UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-05-88/2-A
		Date:	8 April 2015
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge William H. Sekule
Judge Patrick Robinson
Judge Mehmet Güney
Judge Jean-Claude Antonetti

Registrar: **Mr. John Hocking**

Judgement: **8 April 2015**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer QC
Mr. Kyle Wood
Mr. Todd Schneider
Ms. Lada Šoljan
Mr. Nema Milaninia

Mr. Zdravko Tolimir, *pro se*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal by Zdravko Tolimir ("Tolimir") against the judgement rendered by Trial Chamber II of the Tribunal ("Trial Chamber") on 12 December 2012 in the case of *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. The underlying events giving rise to this case occurred in the Srebrenica and Žepa enclaves, in Eastern Bosnia, between 1992 and 1995.[2] During the relevant time, Tolimir was an Assistant Commander and the Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Srpska ("VRS").[3]

3. Tolimir was charged with eight counts pursuant to Articles 3, 4, and 5 of the Statute of the Tribunal ("Statute"): Genocide (Count 1), Conspiracy to Commit Genocide (Count 2), Extermination (Count 3), Murder (Count 4 and Count 5), Persecutions (Count 6), Inhumane Acts through Forcible Transfer (Count 7), and Deportation (Count 8) pursuant to Article 7(1) of the Statute[4] through his participation in two distinct joint criminal enterprises:[5] a joint criminal enterprise ("JCE") to murder thousands of able-bodied Bosnian Muslim men and boys captured from Srebrenica between 11 July 1995 and 1 November 1995 ("JCE to Murder"),[6] and a JCE to force the Bosnian Muslim population out of the Srebrenica and Žepa enclaves from about 8 March 1995 through to the end of August 1995 ("JCE to Forcibly Remove").[7]

4. The Indictment alleged that following the fall of the Srebrenica enclave on 11 July 1995, members of the VRS and Republika Srpska Ministry of Interior ("MUP") (collectively, "Bosnian Serb Forces") transported thousands of Bosnian Muslim women, children and elderly who had gathered in Potočari to the territory held by the Army of Bosnia and Herzegovina ("ABiH").[8] It alleged that following a VRS attack on Žepa in July 1995, the Bosnian Muslim civilian population

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Trial Judgement, para. 1.
[3] Trial Judgement, paras 2, 83.
[4] Indictment, paras 10-69.
[5] Indictment, paras 10-69.
[6] Indictment, paras 10, 18-23, 25, 27.
[7] Indictment, paras 35-46, 67.
[8] Indictment, paras 40-47.

was transported out of Žepa to ABiH-held territory.[9] The Indictment further alleged that in the morning of 13 July 1995, a large-scale and systematic murder operation against the Bosnian Muslim men from Srebrenica began and continued through July and August 1995 in the Bratunac and Zvornik areas.[10] It further alleged that from 1 August through 1 November 1995, members of the Bosnian Serb Forces participated in an organised and comprehensive effort to conceal the killings in these areas.[11]

5. The Trial Chamber found that the two JCEs alleged in the Indictment were established beyond reasonable doubt. It found that Tolimir significantly contributed to the achievement of the common plans and shared the intent of the JCEs' members.[12] The Trial Chamber declared Tolimir guilty pursuant to Article 7(1) of the Statute of genocide, conspiracy to commit genocide, extermination, persecutions, and inhumane acts through forcible transfer as crimes against humanity,[13] as well as murder as a violation of the laws or customs of war.[14] He was sentenced to life imprisonment.[15]

B. The Appeal

6. Tolimir submits 25 grounds of appeal challenging his convictions and sentence.[16] He requests that the Appeals Chamber overturn his convictions in their entirety, or, in the alternative, to significantly reduce his sentence.[17] The Prosecution responds that Tolimir's appeal should be dismissed in its entirety.[18] The Prosecution did not lodge an appeal.

7. The Appeals Chamber heard oral submissions regarding this appeal on 12 November 2014.

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[9] Indictment, paras 51-57.
[10] Indictment, paras 21, 21.1-21.16.
[11] Indictment, para. 23.
[12] Trial Judgement, paras 1040, 1071, 1093-1095, 1129.
[13] Trial Judgement, para. 1239. Tolimir was found guilty under the first and the third form of JCE liability. *See* Trial Judgement, paras 1093-1095, 1129, 1144, 1154.
[14] The Trial Chamber by majority found Tolimir guilty of murder both as a violation of the laws or customs of war and as a crime against humanity pursuant to Articles 3 and 5(a) of the Statute, but in accordance of the principles of cumulative convictions did not enter a conviction for murder as a crime against humanity. *See* Trial Judgement, paras 1187, 1204, 1240.
[15] Trial Judgement, para. 1242.
[16] Notice of Appeal, para. 338; Appeal Brief, paras 6-519.
[17] Notice of Appeal, paras 337-338; Appeal Brief, para. 519.
[18] Response Brief, para. 351.

II. STANDARD OF REVIEW

8. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute. The scope of appellate review is restricted to errors of law having the potential to invalidate the trial chamber's decision, and errors of fact that have occasioned a miscarriage of justice.[19] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[20]

9. A party alleging an error of law must provide arguments in support of that assertion, and an explanation as to how the alleged error invalidates the decision.[21] An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that basis.[22] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[23] Where an appellant alleges an error of law on the basis of a lack of a reasoned opinion, the appellant must identify the specific issues, factual findings, or arguments which the trial chamber is alleged to have omitted, and must explain why this omission invalidates the decision.[24]

10. The Appeals Chamber reviews the trial chamber's findings of law to determine whether or not they are correct.[25] Where the Appeals Chamber identifies an error of law in the trial judgement arising from the application of an erroneous legal standard, the Appeals Chamber will articulate the proper legal standard and review the relevant factual findings of the trial chamber accordingly.[26] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is convinced beyond reasonable doubt as to the factual finding challenged by the appellant, before that

[19] *Popović et al.* Appeal Judgement, para. 16; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19.
[20] *Popović et al.* Appeal Judgement, para. 16; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19.
[21] *Popović et al.* Appeal Judgement, para. 17; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20.
[22] *Popović et al.* Appeal Judgement, para. 17; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20.
[23] *Popović et al.* Appeal Judgement, para. 17; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20.
[24] *Popović et al.* Appeal Judgement, para. 17; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20.
[25] *Popović et al.* Appeal Judgement, para. 18; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21.
[26] *Popović et al.* Appeal Judgement, para. 18; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21.

finding is confirmed on appeal.[27] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the judgement or in a related footnote, and evidence contained in the trial record and referred to by the parties.[28]

11. Regarding alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.[29] The Appeals Chamber will only substitute its own findings for those of the trial chamber in instances where no reasonable trier of fact could have reached the original decision.[30] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[31] Furthermore, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a trial chamber's decision.[32]

12. In determining the reasonableness of a trial chamber's findings, the Appeals Chamber will not lightly disturb the trial chamber's findings of fact.[33] The Appeals Chamber recalls, as a general principle, that:

> […], the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[34]

13. In order for the Appeals Chamber to assess the arguments presented, a party must present its case clearly, logically, and exhaustively.[35] The appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which

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[27] *Popović et al.* Appeal Judgement, para. 18; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21.
[28] *Popović et al.* Appeal Judgement, para. 18; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21.
[29] *Popović et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22.
[30] *Popović et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, paras 16, 18; *Šainović et al.* Appeal Judgement, paras 22, 24.
[31] *Popović et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22.
[32] *Popović et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22.
[33] *Popović et al.* Appeal Judgement, para. 20; *Đorđević* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 23.
[34] *Kupreškić et al.* Appeal Judgement, para. 30. *See also Đorđević* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 23; *Boškoski and Tarčulovski* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[35] *Šainović et al.* Appeal Judgement, para. 26; *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 16; *Martić* Appeal Judgement, para. 14.

challenges are being made.[36] Furthermore, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[37] Moreover, arguments lacking the potential to result in the revision or reversal of the impugned decision may be immediately dismissed by the Appeals Chamber without consideration on the merits.[38] The Appeals Chamber has the inherent discretion to select which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[39]

14. The Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which need not be considered on the merits.[40] In particular, the Appeals Chamber will dismiss without detailed analysis: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the trial chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the trial record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, or failure to articulate errors; (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[41]

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[36] *Popović et al.* Appeal Judgement, para. 22; Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, paras 1(c)(iii)-(iv), 4(b)(i)-(ii). *See also Đordević* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 26.

[37] *Đordević* Appeal Judgement, paras 19-20; *Šainović et al.* Appeal Judgement, paras 26-27. *See Ngirabatware* Appeal Judgement, para. 12.

[38] *Popović et al.* Appeal Judgement, para. 22; *Đordević* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 26. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 16.

[39] *Popović et al.* Appeal Judgement, para. 18; *D. Milošević* Appeal Judgement, para. 16, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 17, *Krajišnik* Appeal Judgement, para. 16, *Martić* Appeal Judgement, para. 14, *Strugar* Appeal Judgement, para. 16. *See Ndahimana* Appeal Judgement, para. 12; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12.

[40] *Đordević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Strugar* Appeal Judgement, paras 17-24 *(citing*, *inter alia*, *Brđanin* Appeal Judgement, paras 17-31).

[41] *Popović et al.* Appeal Judgement, paras 22-23; *Đordević* Appeal Judgement, paras 19-20; *Šainović et al.* Appeal Judgement, paras 26-27. *See also Krajišnik* Appeal Judgement, paras 17-27.

15. Finally, where the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but challenges the trial chamber's factual findings in terms of its assessment of evidence, the Appeals Chamber will either analyse those alleged factual errors to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal to which the facts relate.[42]

[42] *Popović et al.* Appeal Judgement, para. 18; *Đorđević* Appeal Judgement, para. 21; *D. Milošević* Appeal Judgement, para. 18. *See also Strugar* Appeal Judgement, paras 252, 269.

III. PRELIMINARY MATTERS

A. Judicial notice of adjudicated facts (Ground of Appeal 1)

16. In its Adjudicated Facts Decision, the Trial Chamber found that 523 of the proposed 604 facts submitted by the Prosecution ("Proposed Facts") were suitable for judicial notice ("Adjudicated Facts", or alternatively, "Facts").[43] It considered that these Adjudicated Facts would further the interests of justice without prejudicing Tolimir's fair trial rights.[44]

17. Tolimir submits that the Trial Chamber erred in law by judicially noticing the Adjudicated Facts from the trial and appeal judgements in the *Krstić* and *Blagojević and Jokić* cases proposed by the Prosecution for judicial notice.[45] He asserts that most of the Adjudicated Facts significantly affected the outcome of the trial, that the Trial Chamber erred in its assessment of those Facts, and that these errors invalidate the Trial Judgement.[46] Tolimir raises three challenges to the Trial Chamber's findings: first, he submits that the Trial Chamber erred by taking judicial notice of the Adjudicated Facts instead of making its own findings on the same evidence supporting the Adjudicated Facts;[47] second, he contends that the Trial Chamber erred by taking judicial notice of Adjudicated Facts that went to the core of the case,[48] despite its expressed indication that it would not do so;[49] and third, he challenges the Trial Chamber's use of sub-headings in the Annex to the Adjudicated Facts Decision, which, in his submission, may have prejudiced the outcome of the trial proceedings.[50] To correct these errors, Tolimir requests that the Appeals Chamber formulate the correct legal standard and review all the Trial Chamber's findings based on the Adjudicated Facts, or alternatively order a retrial.[51]

18. The Prosecution responds that Tolimir's submissions should be dismissed as he fails to show an error in the Trial Chamber's findings, repeats his arguments made at trial, and fails to show how any error would invalidate any of his convictions.[52]

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43 Adjudicated Facts Decision, paras 36-37.
44 Adjudicated Facts Decision, para. 37.
45 Appeal Brief, para. 6. The Appeals Chamber understands Tolimir to refer to the Adjudicated Facts Decision in which the Trial Chamber took judicial notice of 523 of the proposed 604 adjudicated facts from the trial and appeal judgements in the *Krstić* case and the *Blagojević and Jokić* case. *See also* Notice of Appeal, para. 7.
46 Appeal Brief, paras 6, 21. *See also* Notice of Appeal, para. 7.
47 *See* Appeal Brief, paras 13-20; Reply Brief, paras 4, 7-12.
48 *See* Adjudicated Facts Decision, paras 32-33.
49 *See* Appeal Brief, paras 7, 9-11; Reply Brief, paras 3-6.
50 Appeal Brief, paras 8-9.
51 Appeal Brief, para. 21.
52 Response Brief, para. 13.

1. The Trial Chamber's reliance on additional evidence

(a) Submissions

19. Tolimir submits that as the underlying purpose of taking judicial notice of adjudicated facts is to avoid the repetitious presentation of evidence concerning facts already proven in other completed Tribunal cases, the Trial Chamber was obliged to either instruct the Prosecution to reduce the amount of evidence presented in its Rule 65*ter* list, or prohibit the Prosecution from producing evidence on the issues to which the Adjudicated Facts related.[53]

20. Tolimir further submits that by judicially noticing the Adjudicated Facts the Trial Chamber created a presumption of their accuracy. He claims that "a decision on judicial notice of a fact loses its meaning if the moving party present evidence about the fact in issue".[54] Tolimir contends that the Trial Chamber made numerous factual findings in which Adjudicated Facts have been supported or amplified by other evidence. He argues that whenever evidence is presented to a trial chamber, the trial chamber should refrain from relying on the adjudicated facts and should make its own factual findings.[55]

21. In response, the Prosecution submits that the judicial economy attained through judicial notice of adjudicated facts does not prevent the Trial Chamber from considering other relevant evidence when making a factual finding.[56] The Prosecution also contends that additional evidence in support of judicially noticed adjudicated facts is necessary in anticipation of possible attempts by the accused to rebut the presumption of accuracy attaching to judicially noticed facts.[57] It further contends that adjudicated facts do not *per se* provide a complete record of events and must therefore be supplemented with further evidence.[58] The Prosecution asserts that the Trial Chamber "proceeded with appropriate caution" where doubtful as to the accuracy of an Adjudicated Fact.[59]

22. Tolimir replies, *inter alia*, that contrary to the Prosecution's submissions, he argued that taking judicial notice of adjudicated facts does not prohibit a trial chamber from considering other evidence, but instead obliges a trial chamber to prohibit the Prosecution from presenting repetitive evidence on the same issue.[60] He submits that the Trial Chamber's decision to take judicial notice of

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53 Appeal Brief, paras 13, 19.
54 Appeal Brief, paras 14-16, *citing* Trial Judgement, para. 76.
55 Appeal Brief, paras 16, 18. *See also* Reply Brief, para. 12.
56 Response Brief, para. 12.
57 Response Brief, para. 12. *See* Response Brief, para. 10, *citing* Adjudicated Facts Decision, para. 9, which quotes *Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 42. The Prosecution also cites *Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 49.
58 Response Brief, para. 12.
59 Response Brief, para. 10, *citing* Trial Judgement, nn. 1438, 1640.
60 Reply Brief, para. 4.

the Adjudicated Facts did not achieve judicial economy as "voluminous material on which those facts were based" was also admitted into evidence.[61]

(b) Analysis

23. Rule 94(B) of the Rules aims to achieve judicial economy by "avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated"[62] while "ensuring the right of the accused to a fair, public, and expeditious trial".[63] Thus, while judicial economy is a desirable objective in the administration of justice it must nonetheless be balanced against other important considerations in ensuring the fairness of trials and compliance of the proceedings with the Rules of the Tribunal. The admission or exclusion of evidence is one such important consideration.

24. The Appeals Chamber recalls that pursuant to Rule 89(C) of the Rules "[a] Chamber may admit any relevant evidence which it deems to have probative value", and that:

> Deference is afforded to the Trial Chamber's discretion in these decisions because they "draw[…] on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.[64]

Furthermore, the Appeals Chamber recalls that judicial notice under Rule 94(B) of the Rules "does not shift the ultimate burden of proof, which remains with the Prosecution" rather it operates "only to relieve the Prosecution of its initial burden to produce evidence on the point".[65] It is open to a party wishing to contest the judicially noticed adjudicated facts to present evidence in rebuttal of the presumption of accuracy attaching thereto.[66]

25. Accordingly, a party relying on an adjudicated fact does not *have* to produce further evidence in proof of that fact, however, it *may* nonetheless seek to do so. Whether such additional evidence is in fact admitted will ultimately depend upon a trial chamber's discretionary powers. The Appeals Chamber sees no error in the Trial Chamber's decision to admit evidence relevant to facts established in the Adjudicated Facts. Tolimir's arguments in this regard are therefore dismissed.

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[61] Reply Brief, para. 8.
[62] *Karemera* Adjudicated Facts Appeal Decision of 29 May 2009, para. 20. *See also Mladić* Adjudicated Facts Appeal Decision, para. 24, *citing Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 39.
[63] *Mladić* Adjudicated Facts Appeal Decision, para. 24, *citing Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 39.
[64] *Tolimir* Appeal Decision of 27 January 2006, para. 4. *See also Simba* Appeal Judgement, para. 19.
[65] *Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 42.
[66] *Nikolić* Adjudicated Facts Appeal Decision, para. 11. *See also D. Milošević* Adjudicated Facts Appeal Decision, para. 16; *Slobodan Milošević* Adjudicated Facts Appeal Decision, p. 4.

26. The Appeals Chamber recalls that it is firmly established that a trial chamber must independently assess the totality of the evidence before it, notwithstanding its decision to take judicial notice of adjudicated facts.[67] Accordingly, there is no merit to Tolimir's submission that reliance on an adjudicated fact, which "is based on the same evidence as in the current proceedings", *per se* divests a trial chamber of its main role of independently assessing evidence.[68] Furthermore, considering that a trial chamber possesses the discretion to determine the evidence on which it will ultimately rely and the weight to be assigned thereto,[69] the Appeals Chamber finds no basis for Tolimir's contention that where a trial chamber is presented with evidence upon which an adjudicated fact is based or evidence in excess of that evidence, the trial chamber should ignore the adjudicated fact of which it has taken judicial notice, and restrict itself to the evidence on the record in the case before it.[70] Moreover, Tolimir fails to identify any specific failure on the part of the Trial Chamber to independently assess the totality of the evidence in the case and arrive at its own conclusions. In this respect, the Appeals Chamber notes that the Trial Chamber specifically stated that it "assessed the weight of the Adjudicated Facts, taking into consideration the totality of evidence".[71] Tolimir's arguments discussed above are thus dismissed.

2. Judicial notice of facts going to the core of the case

(a) Submissions

27. Tolimir states that the Trial Chamber took judicial notice of a number of Adjudicated Facts that went to the core of the case,[72] despite its indication in the Adjudicated Facts Decision that it would not serve the interests of justice to do so.[73] He also asserts that the Adjudicated Facts Decision fails to explain the criteria used to determine which Adjudicated Facts went to the core of the case.[74]

28. Tolimir further submits that, although these Adjudicated Facts clearly go to the core of the case, the Trial Chamber denied his Request for Certification to Appeal the Adjudicated Facts Decision on the bases that it is unnecessary for an accused to rebut each fact presented in the

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[67] *See Lukić and Lukić* Appeal Judgement, para. 261. *See also Karemera* Adjudicated Facts Decision of 29 May 2009, para. 21.
[68] *See* Appeal Brief, para. 17; Reply Brief, para. 9.
[69] *See Čelebići* Appeal Judgement, para. 330. *See also Nyiramasuhuko and Ntahobali.* Appeal Decision, para. 15.
[70] *See* Appeal Brief, paras 16-17; Reply Brief, paras 6, 9, 12.
[71] Trial Judgement, para. 77.
[72] Appeal Brief, paras 7, 10. *See also* Reply Brief, para. 4. The Adjudicated Facts which Tolimir specifically claims go to the core of the case are: Adjudicated Facts 18, 53, 61-62, 156-190, 201-203, 205-206, 208-209, 434-435, 439, 441-442, 444, 460, 464, 470, 491-492, 523, 540-541, 553, 581-604. *See* Appeal Brief, para. 10. The Appeals Chamber understands Tolimir's reference to Adjudicated Facts 581-558 in paragraph 10 of his Appeal Brief to refer to Adjudicated Facts 581-585.
[73] Appeal Brief, para. 7. *See also* Reply Brief, para. 5.
[74] Appeal Brief, para. 9. *See also* Reply Brief, para. 6.

Prosecution's case to mount a fully adequate defence, and that the Adjudicated Facts Decision did not involve an issue that would significantly affect the outcome of the trial.[75] Tolimir argues by way of example, that the Adjudicated Fact which states that refugees in Potočari "did not have a genuine choice of whether to remain in the Srebrenica enclave" is critical to the determination of forcible transfer as a crime against humanity.[76] Tolimir contends that, although the Trial Chamber did not regard these Adjudicated Facts as ones that would have significantly affected the outcome of the trial, "it was duty bound to treat them as such, or disregard them during the estimation of evidence".[77]

29. The Prosecution submits in response that the Trial Chamber properly defined and applied the law concerning judicial notice of adjudicated facts.[78] The Prosecution contends that the Trial Chamber exercised its discretion in deciding not to judicially notice Proposed Facts which it determined went to the core of the case, and that in referring to the core of the case the Trial Chamber did not create an additional admissibility requirement for judicial notice of adjudicated facts, but rather "balanced the interests of justice between the expediency of admitting adjudicated facts and the rights of the accused".[79]

(b) Analysis

30. The Trial Chamber declined to take judicial notice of a number of Proposed Facts, despite finding that they satisfied the criteria for judicial notice under Rule 94(B) of the Rules as defined in the jurisprudence of the Tribunal, finding that it served the interests of justice to deny their admission.[80] Specifically, the Trial Chamber reasoned that "the volume and type of evidence", which Tolimir intended to produce in order to rebut the presumption of accuracy attaching to these particular Proposed Facts, risked placing such a significant burden on him as to potentially

[75] Appeal Brief, para. 11, *citing* Decision on Request for Certification to Appeal Adjudicated Facts Decision, p. 3.
[76] Appeal Brief, para. 12.
[77] Appeal Brief, para. 13.
[78] Response Brief, para. 9, *citing* Adjudicated Facts Decision, paras 7-8, 11-30.
[79] Response Brief, para. 9, *citing* Adjudicated Facts Decision, paras 32-33, 36.
[80] Adjudicated Facts Decision, paras 32-33. The Appeals Chamber recalls that the decision to take judicial notice of adjudicated facts from other Tribunal proceedings pursuant to Rule 94(B) of the Rules is discretionary. *See Mladić* Adjudicated Facts Appeal Decision, para. 9; *Nikolić* Adjudicated Facts Appeal Decision, para. 11; *Slobodan Milošević* Adjudicated Facts Appeal Decision, p. 3. *See also Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 41. The Appeals Chamber further recalls that, in exercising this discretion trial chambers must first determine whether an adjudicated fact proposed for judicial notice satisfies the admissibility criteria; and secondly, consider whether judicial notice should be withheld, notwithstanding that all the admissibility criteria are met, on the basis that it would serve the interests of justice. *See Mladić* Adjudicated Facts Appeal Decision, para. 25; *D. Milošević* Adjudicated Facts Appeal Decision, paras 13, 22; *Nikolić* Adjudicated Facts Appeal Decision, para. 11; *Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, paras 50, 53, 55. *See also Popović et al.* Adjudicated Facts Trial Decision of 2 June 2008, para. 6; *D. Milošević* Adjudicated Facts Trial Decision, paras 27-28; *Delić* Adjudicated Facts Trial Decision, paras 10-11.

jeopardise his right to a fair trial.[81] This was considered to have been particularly the case regarding Proposed Facts going to the core of the case.[82]

31. The Appeals Chamber considers that the Trial Chamber did in fact explain the criteria used to determine the Proposed Facts that went to the core of the case:

> In the view of the Trial Chamber, a proposed fact may go to the core of the case for a number of reasons. For example, a proposed fact may relate to a specific allegation against the Accused, or may pertain to an objective of the joint criminal enterprise alleged by the Prosecution. A proposed fact might also relate to the acts and conduct of persons for whose criminal conduct the Accused is allegedly responsible. […] [S]uch proposed facts are not inadmissible, yet the Trial Chamber retains its discretion to withhold judicial notice when it considers that such facts go to the core of the case and that taking judicial notice of them would not serve the interests of justice. Similarly, the Trial Chamber considers that a proposed adjudicated fact that relates to a highly contested issue may also go to the core of the case. In each instance where a proposed fact goes to the core of the case, the Trial Chamber considers that it would not serve the interests of justice to take judicial notice of it.[83]

Applying these criteria, the Trial Chamber identified the particular Proposed Facts that went to the core of the case, and categorised them according to the criteria pursuant to which they were found to do so.[84] Furthermore, the Appeals Chamber also finds that in light of: (i) its elaboration of the applicable law regarding Rule 94(B) of the Rules;[85] (ii) its extensive consideration of the admissibility criteria for judicial notice relative to the Proposed Facts;[86] and (iii) its detailed discussion of its discretionary decision to exclude certain Proposed Facts where appropriate,[87] the Trial Chamber fulfilled its duty to provide a reasoned opinion on this particular issue. Tolimir's submissions in this regard are therefore dismissed.

32. Before specifically addressing whether the Trial Chamber erroneously took judicial notice of Adjudicated Facts going to the core of the case,[88] the Appeals Chamber notes that it is unclear whether Tolimir's submissions on this issue relate to all 523 Adjudicated Facts or are restricted exclusively to the 85 Adjudicated Facts which Tolimir specifically identifies ("85 Facts").[89] Thus, *ex abundanti cautela*, the Appeals Chamber will consider Tolimir's challenge with regard to all 523 Adjudicated Facts. In this context, the Appeals Chamber notes that 225 of the 523 Adjudicated Facts were not in fact relied on in the Trial Judgement despite having been judicially noticed by the Trial Chamber ("225 Unused Facts").[90] Thus, considering that the 225 Unused Facts did not

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81 Adjudicated Facts Decision, para. 32.
82 Adjudicated Facts Decision, para. 32.
83 Adjudicated Facts Decision, para. 33 (internal citations omitted).
84 *See* Adjudicated Facts Decision, para. 33, nn. 72-75.
85 *See* Adjudicated Facts Decision, paras 5-10.
86 *See* Adjudicated Facts Decision, paras 11-30, 35.
87 *See* Adjudicated Facts Decision, paras 31-34, 36-37.
88 Appeal Brief, paras 7, 9-12. *See* Reply Brief, paras 4-6.
89 *See* Adjudicated Facts 18, 53, 61-62, 159-190, 201-203, 205-206, 208-209, 434-435, 439, 441-442, 444, 460, 464, 470, 491-492, 523, 540-541, 553, 581-604. *See also* Appeal Brief, para. 10.
90 *See* Adjudicated Facts Decision, Annex, pp. 17-53.

ultimately impact upon any of the findings made in the Trial Judgement, the Appeals Chamber regards further consideration of them unnecessary. Accordingly, the Appeals Chamber will consider the 298 of the 523 Adjudicated Facts that were actually used in the Trial Judgement ("298 Facts").[91]

33. The Appeals Chamber will now address whether the Trial Chamber erred in exercising its discretion under Rule 94(B) of the Rules, with specific regard to its mode of determining the Proposed Facts, which went to the core of the case. The Trial Chamber defined the Proposed Facts relevant to the core of the case against Tolimir as those which concern: (i) a specific allegation against Tolimir; (ii) an objective of the joint criminal enterprise alleged by the Prosecution; (iii) the acts and conduct of persons for whose criminal conduct Tolimir was alleged to have been responsible; or (iv) a highly contested issue.[92] The Appeals Chamber finds no error in these criteria. These criteria patently address issues pertinent to the very heart of the case against Tolimir. The Trial Chamber thus properly used its discretion in identifying the criteria of those Proposed Facts related to the core of the case.

34. Having reviewed the 298 Facts, the Appeals Chamber finds that 297 of them do not meet any of the criteria constitutive of the definition articulated by the Trial Chamber of the Proposed Facts going to the core of the case ("297 Facts"), as listed above.[93] The Appeals Chamber therefore finds no error in the Trial Chamber's analysis of the 297 Facts.

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[91] As a final preliminary consideration, the Appeals Chamber observes that, in stating that the Adjudicated Facts "significantly affected the outcome of the trial", Tolimir draws upon the language of Rule 73(B) of the Rules, which provides in relevant part that a trial chamber may grant certification to appeal an interlocutory decision "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial". Considering that, in the matter presently before the Appeals Chamber, Tolimir does not challenge the Trial Chamber's Decision Denying the Request for Certification to Appeal the Adjudicated Facts Decision, Rule 73(B) of the Rules is irrelevant to the Appeals Chamber's current assessment of whether the Trial Chamber erred in the Adjudicated Facts Decision.

[92] *See* Adjudicated Facts Decision, para. 33.

[93] *See* Adjudicated Facts Decision, para. 33 (internal citations omitted). The 297 Facts concern: (i) general geographical, historical, and demographic details about the former Yugoslavia, the six Republics comprising it, and the town of Srebrenica (Adjudicated Facts 1-3, 5-8, 16, 18-25); (ii) the history, structure, and organisation of the VRS and its sub-units (Adjudicated Facts 131-136, 138-141, 143-145, 148-150); (iii) the designation of Srebrenica as a "safe area" by the United Nations Security Council (Adjudicated Facts 26, 29-41, 43-47); (iv) the food, fuel, medical, and ammunition supplies available in Srebrenica (Adjudicated Facts 49, 52-54, 56, 58-59); (v) the influx of Bosnian Serb Forces into the area surrounding Srebrenica (Adjudicated Facts 49, 52-54, 56, 58-59); (vi) the operational experiences of DutchBat soldiers in Srebrenica during the Indictment period; and details concerning the plan of the Bosnian Serbs to attack Srebrenica with reference to Bosnian Serb officials for whose criminal conduct Tolimir was not alleged to have been responsible, including Karadžić and Mladić (Adjudicated Facts 60-61, 64, 66, 68-69, 71-72, 75-78, 84-85, 90-92, 95-98, 100-105, 108-111, 113, 115); (vii) the Hotel Fontana Meetings, specifically, the dates and times during which they were held; the names and ranks of the attendees and those absent without mentioning the acts and conduct of persons for whose criminal conduct Tolimir was alleged to have been responsible; the provision of buses to transport Bosnian Muslim refugees out of Srebrenica, a fact which, although generally relevant to the JCE to Forcibly Transfer, did not speak specifically to the *objective* of the JCE to Forcibly Transfer (Adjudicated Facts 156-162, 164, 168-170, 172-174, 176-180, 182-183, 185, 188-189); (viii) the numerical composition and movement of the column of Bosnian Muslim men; the artillery attack on the column by Bosnian Serb Forces; and the eventual fate of the men comprising the column (Adjudicated Facts 117-120, 124-126, 526, 532-533, 540-542, 545-547, 556-558); (ix) narrative details regarding the experience of the group of Bosnian

35. The Appeals Chamber finds, however, that one of the 298 Facts does clearly relate to "an objective of the joint criminal enterprise alleged by the Prosecution,"[94] and thus goes to the core of the case pursuant to the definition provided by the Trial Chamber ("Adjudicated Fact 62"). The Adjudicated Fact 62 concerns the objectives of Directive 7,[95] which in turn relate to the objective of the JCE to Forcibly Remove.[96] The Appeals Chamber therefore finds that the Trial Chamber erred in relation to Adjudicated Fact 62, and finds that contrary to the Trial Chamber's finding, this fact goes to the core of the case.

36. The Appeals Chamber will now consider the impact of the Trial Chamber's error.[97] The Appeals Chamber notes that although the Trial Chamber relied upon the Adjudicated Fact 62 in support of certain findings, these findings were also based on additional, independent evidence that mirrors virtually *verbatim* the contents of the Adjudicated Fact 62.[98] Thus, considering that the Adjudicated Fact 62 did not constitute the sole basis of the findings in support of which they were cited, the Appeals Chamber finds that the Trial Chamber's decision to take judicial notice of it did not occasion a miscarriage of justice. Accordingly, the Appeals Chamber dismisses Tolimir's arguments under this part of his Ground of Appeal 1.

Muslims refugees from Srebrenica gathered at Potočari, specifically, the numerical and gender composition of the group; the availability of food, water, and medical supplies and the conditions endured during the Bosnian Muslim civilians' time in Potočari; the military units responsible for organising the buses out of Potočari to Kladanj, and the role played by DutchBat in escorting the convoy of buses; the events surrounding the boarding of the buses and the journey to Kladanj; the separation of the Bosnian Muslim men from the women and children; the detention of the Bosnian Muslim men at the White House, and confiscation of their identification documents and personal belongings; and the subsequent transportation of the Bosnian Muslim men detained at the White House to detention sites in Bratunac and Zvornik and its consequences (Adjudicated Facts 433-439, 441-444, 446-447, 450-452, 454, 459, 461-464, 467-471, 473, 475-479, 483, 487, 490-502, 504, 506, 508-510, 512, 514-515, 519-522, 559-560, 565-568, 570-571, 573, 575, 577); (x) narrative details regarding the killings and number of victims killed in the Bratunac and Zvornik areas (Adjudicated Facts 214-226, 230, 232, 234-244, 247-250, 252-253, 270-271, 274-275, 280-281, 285, 292, 319, 321-322, 334, 342-344, 348); (xi) dates, burial sites, and forensics information appurtenant to the reburial operation (Adjudicated Facts 350-352, 355, 357, 372, 374, 377, 379, 381-382, 390-393, 395-396, 400, 426-430); (xii) the social and psychological impact of the crimes on the Bosnian Muslim community from Srebrenica (Adjudicated Facts 589-592, 594); and (xiii) the format and technical details involved in recording intercepted communications, and the means employed by the Prosecution to authenticate them (Adjudicated Facts 596, 598-599, 601-602, 604). *See* Adjudicated Facts Decision, Annex, pp. 17-53.

94 *See* Adjudicated Facts Decision, para. 33 (internal citations omitted).

95 *See* Adjudicated Fact 62.

96 Adjudicated Fact 62, with reference to Directive 7, states: "The directive specified that the VRS was to 'create an unbearable situation of total insecurity with no further hope of further survival or life for the inhabitants of both enclaves'".

97 *See supra*, para. 11.

98 Thus, the content of Adjudicated Fact 62, which addresses Directive 7, is mirrored in Prosecution Exhibit 1214 (Republika Srpska Command Directive 7, 8 March 1995), p. 10. *See* Trial Judgement, para. 188, n. 682; para. 1015, n. 3998; para. 1078, n. 4229.

3. The Trial Chamber's use of sub-headings

(a) Submissions

37. Tolimir submits that the headings under which the Adjudicated Facts were grouped in the Annex to the Adjudicated Facts Decision significantly impacted the conclusions which the Trial Chamber subsequently made in the Trial Judgement.[99] In this regard, he states that by the start of the trial the Trial Chamber already had a predetermined qualification of groups of facts.[100]

38. The Prosecution responds that nothing in the Adjudicated Facts Decision or the Trial Judgement indicates that the Trial Chamber had predetermined the facts of the case, and that Tolimir's submissions should be dismissed.[101]

(b) Analysis

39. The Appeals Chamber finds no merit in Tolimir's suggestion that the use of subject headings to organise the Proposed Facts in the Annex to the Adjudicated Facts Decision is *per se* indicative that the Trial Chamber formed predetermined conclusions concerning the ultimate outcome of the trial proceedings.[102] The impugned headings merely reflect the subject-matter of the specific groups of Proposed Facts to which they relate and simply served to organise the index of 604 Proposed Facts according to content in order to facilitate ease of reference. Accordingly, this submission fails.

4. Conclusion

40. In light of the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 1 in its entirety.

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[99] Appeal Brief, para. 8. Tolimir states by way of example that: Adjudicated Facts 433-558 were listed under the heading "Operation to Forcibly Remove the Bosnian Muslim Population of Srebrenica", Adjudicated Facts 557-559 were grouped under the heading "Opportunistic Killings Which Were a Foreseeable Consequence of the Forcible Removal of the Bosnian Muslim Population from Srebrenica", Adjudicated Facts 578-585 were listed under "Widespread Knowledge of the Crimes", and Adjudicated Facts 586-594 were classified under the heading "The Impact of the Crimes on the Bosnian Muslim Community of Srebrenica". He also includes the use of such subheadings as "Violence and Terror in Potočari", "Forcible Transfer of the Women, Children and Elderly", and "Separation of the Men". *See* Appeal Brief, para. 8, *citing* Adjudicated Facts Decision, Annex.

[100] Appeal Brief, para. 9.

[101] Response Brief, para. 11, *citing Lukić and Lukić* Appeal Judgement, para. 15(i).

[102] *See* Appeal Brief, paras 8-9.

B. Evaluation of evidence

1. Intercepted communications (Ground of Appeal 2)

41. The Trial Chamber admitted into evidence the records of a large number of intercepted communications ("Intercepts"), which were produced by the Bosnian Muslim side, and found that, as a whole, the Intercepts had a high degree of validity in relation to the conversations they purported to record.[103] In reaching this conclusion the Trial Chamber relied, *inter alia*, on the *viva voce* testimony of 17 intercept operators, two of their supervisors, and former Prosecution analyst Stefanie Frease regarding the procedures followed in producing the Intercepts,[104] and her evidence about the independent corroboration of the Intercepts by documents obtained from other sources.[105] The Trial Chamber also made reference to several adjudicated facts to support its findings.[106]

(a) Submissions

42. Tolimir submits that in reaching its conclusions on the Intercepts the Trial Chamber made a number of errors, which invalidate the Trial Judgement.[107] First, he argues that the Trial Chamber erred in law in taking judicial notice of Adjudicated Facts 595-604, which "significantly affected" its reasoning on the authenticity and reliability of the intercepts and its assessment of the evidence was guided by the "presumptions" created by this judicial notice.[108] He submits that it was unacceptable to take judicial notice of facts concerning the reliability of documents, which at the time of taking judicial notice had not been admitted into evidence, or of facts that concern the Prosecution's investigation.[109]

43. Second, Tolimir submits that the Trial Chamber failed to provide a reasoned opinion in respect of the intercepts.[110] He argues that the Trial Chamber failed to consider his arguments and evidence on the record challenging the presumption of authenticity and reliability of the intercepts.[111] In particular, he submits that the Trial Chamber erred by failing to consider or to even mention Defence Exhibit 48, an appendix to a report by the Netherlands Institute for War Documentation, which, in his submission, demonstrates that the ABiH and BH MUP had neither real time intelligence nor the capacity at the two surveillance sites to record intercepted

[103] Trial Judgement, paras 63, 66.
[104] Trial Judgement, paras 63-64.
[105] Trial Judgement, para. 65.
[106] Trial Judgement, nn. 164-166.
[107] Appeal Brief, paras 22, 30.
[108] Appeal Brief, paras 22, 29; Reply Brief, para. 19.
[109] Appeal Brief, para. 29.
[110] Appeal Brief, para. 23.
[111] Appeal Brief, paras 23-24, 26.

communications of the VRS creating reasonable doubt as to their authenticity.[112] Moreover, according to Tolimir, the lack of evidence that the ABiH ever acted upon information contained in the large number of intercepts from July 1995 strongly indicates that the intercepts are not ABiH or BH MUP intercepts "but intercepts from some other service".[113]

44. Third, Tolimir argues that the Trial Chamber failed to exercise caution when assessing the evidence of Frease, on whom he avers the Trial Chamber "particularly relied", despite: (i) her association with the Prosecution; (ii) the hearsay nature of her knowledge; and (iii) the fact that her analysis was limited to the internal consistency of information.[114] Fourth, according to Tolimir, the fact that some intercepts were corroborated by other sources is not a cogent reason to treat all the admitted intercepts as reliable.[115]

45. Finally, in relation to an intercepted conversation between himself and UNPROFOR General Nicolai, Tolimir asserts that the Trial Chamber failed to consider that the ABiH intercept in Prosecution Exhibit 311 was incomplete and, thus, less reliable than other documentary evidence.[116] He argues that this exhibit can be misunderstood despite corroboration from other sources due to inaccuracy and other defects.[117]

46. With respect to Tolimir's challenges to the judicial notice of adjudicated facts and to the reliability of Frease's evidence, the Prosecution refers to its responses to Grounds of Appeal 1 and 4, respectively, which are considered elsewhere in this Judgement.[118]

47. Turning to the argument that the Trial Chamber failed to provide a reasoned opinion, the Prosecution responds that the Trial Chamber carefully assessed the evidence relating to the procedures followed in producing the intercepts and properly weighed the evidence of the relevant witnesses.[119] It submits that Tolimir fails to show that the Trial Chamber's assessment of the reliability of the intercepts was unreasonable in light of the entirety of the evidence and that he

[112] Appeal Brief, paras 24, 26, 28, *citing* Defence Exhibit 48 ("Intelligence and the war in Bosnia 1992-1995: The role of the intelligence and security services", appendix to the report "Srebrenica, a 'safe' area. Reconstruction, background, consequences and analyses of the fall of a Safe Area (11 July 1995)" by the Netherlands Institute for War Documentation); Reply Brief, paras 14-15, 18.
[113] Appeal Brief, para. 28, *citing* Defence Exhibit 48 ("Intelligence and the war in Bosnia 1992-1995: The role of the intelligence and security services", appendix to the report "Srebrenica, a 'safe' area. Reconstruction, background, consequences and analyses of the fall of a Safe Area (11 July 1995)" by the Netherlands Institute for War Documentation), p. 47 (e-court).
[114] Appeal Brief, para. 25.
[115] Appeal Brief, para. 27.
[116] Appeal Brief, para. 27.
[117] Reply Brief, para. 17.
[118] Response, para. 17. *See supra*, paras 18, 21, 29 (Prosecution's submissions regarding Ground of Appeal 1); *infra*, para. 74 (Prosecution's submissions concerning Ground of Appeal 4).
[119] Response Brief, para. 14.

repeats his arguments at trial.[120] The Prosecution further submits that Tolimir challenges the Trial Chamber's alleged failure to rely on Defence Exhibit 48 without showing how his arguments would invalidate any of his convictions.[121] The Prosecution argues that, in any event, the Trial Chamber was not required to refer to every piece of evidence on the record in making its findings.[122]

48. The Prosecution points out that the Trial Chamber considered the methods used to record the intercepts to be reliable and independently corroborated by various sources.[123] It maintains that Tolimir fails to indicate which of the intercepts were not corroborated and why the lack of corroboration would render them unreliable.[124] It further asserts that Tolimir does not explain how the Trial Chamber's alleged failure to find Prosecution Exhibit 311 less reliable would have had any impact on the verdict since there are two other exhibits evidencing the same conversation.[125]

(b) Analysis

49. In the Adjudicated Facts Decision,[126] the Trial Chamber took judicial notice of facts related to how the intercepts were produced[127] and of facts concerning the Prosecution's analysis of the intercepts.[128]

50. Turning first to the argument that the Trial Chamber erred in law by taking judicial notice of Adjudicated Facts 595-604, the Appeals Chamber notes that the Trial Chamber's primary evidentiary sources for its finding that the intercepts were reliable were, on the one hand, the evidence of 17 intercept operators, their two supervisors and former Prosecution analyst Frease and, on the other hand, evidence received from other sources which corroborated the intercepts.[129] The Trial Chamber cited some of the Adjudicated Facts by way of further reference consistent with evidence from these primary sources.[130] There is nothing in the Trial Chamber's findings that suggests that Adjudicated Facts 595-604 had any kind of significant impact on its assessment of the authenticity and reliability of the intercepts. In fact, the Trial Chamber had explicitly acknowledged in its prior decision that, while Adjudicated Facts 600-603 "go to the validity of the methods used by the Prosecution in relation to the intercept material […] they by no means fully establish the

[120] Response Brief, para. 14.
[121] Response Brief, paras 14-15.
[122] Response Brief, para. 15.
[123] Response Brief, para. 16.
[124] Response Brief, para. 16.
[125] Response Brief, para. 16, *citing* Prosecution Exhibits 699 (Croatian intercept dated 9 July 1995 at 17:55 hours between "General Micoliai [*sic*]" of UNPROFOR and "General Tolimir"), 700 (audiotape of Prosecution Exhibit 311).
[126] Adjudicated Facts Decision, para. 37, Annex, p. 53.
[127] Adjudicated Facts 595-599, 604.
[128] Adjudicated Facts 600-603.
[129] Trial Judgement, paras 63-65.

reliability of such material".[131] Accordingly, the Appeals Chamber is not satisfied that Tolimir has established an error on the part of the Trial Chamber.

51. Tolimir also submits that it is not legally acceptable to take judicial notice of facts that concern the reliability of documents, which at the time of taking judicial notice have not been admitted into evidence.[132] As noted earlier, the Trial Chamber considered the Proposed Facts pursuant to the conditions set out in the law and jurisprudence pursuant to Rule 94(B) of the Rules.[133] There is no admissibility requirement to the effect that documentary or other evidence to which a proposed fact relates must be admitted into evidence prior to a Trial Chamber taking judicial notice of the proposed fact.[134] Nor, as also noted earlier, is a trial chamber required, in determining whether to take judicial notice, to examine the particular items of evidence from the previous case that constituted the basis for the findings reflected in the proposed adjudicated facts.[135] The Appeals Chamber therefore rejects Tolimir's contention that the Trial Chamber committed an error in this respect.

52. Beyond submitting that it is unacceptable, Tolimir does not substantiate why a trial chamber is not permitted to take judicial notice of facts that concern the Prosecution's investigation. The Appeals Chamber recalls that there is no exception among the admissibility requirements concerning such Proposed Facts. Furthermore, even if a proposed fact meets the admissibility requirements, a trial chamber may still, in the exercise of its discretion, refrain from taking judicial notice of it, if doing so would not serve the interests of justice.[136] In fact, the Trial Chamber withheld judicial notice of a number of proposed facts on this basis.[137] For this reason, the Appeals Chamber considers that Tolimir's submission in this respect is without merit.

53. With respect to the argument that the Trial Chamber failed to provide a reasoned opinion in respect of the intercepts, the Appeals Chamber recalls that pursuant to Article 23 of the Statute and Rule 98*ter*(C) of the Rules, every accused is guaranteed the right to a reasoned opinion.[138] However, a trial chamber is not obliged to justify its findings in relation to every submission made during trial.[139] A trial chamber has discretion in deciding which legal arguments to address, and is

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[130] In the footnotes to section II.B.2(c) of the Trial Judgement, the only references to Adjudicated Facts are in "*See also*" references in footnotes 164, 165, and 166.
[131] Decision on Request for Certification to Appeal Adjudicated Facts Decision, 23 February 2010, p. 2.
[132] Appeal Brief, para. 29. *See supra*, para. 42.
[133] Adjudicated Facts Decision, paras 11-34. *See supra*, para. 31.
[134] *See supra*, paras 23-25.
[135] *See supra*, para. 25.
[136] *See Karemera* Adjudicated Facts Appeal Decision of 16 June 2006, para. 41; *Krajišnik* Adjudicated Facts Trial Decision, para. 12. *See also Slobodan Milošević* Adjudicated Facts Appeal Decision, pp. 3-4.
[137] Adjudicated Facts Decision, paras 31-34.
[138] *Lukić and Lukić* Appeal Judgement, para. 60; *Krajišnik* Appeal Judgement, para. 139.
[139] *Kvočka et al.* Appeal Judgement, para. 23. *See Popović et al.* Appeal Judgement, para. 305.

only required to make factual findings which are essential to the determination of guilt on a particular count.[140] In making factual findings, a trial chamber is entitled to rely on the evidence it finds most convincing[141] and is not obliged to refer to every witness testimony or evidence on the record as long as there is no indication that a trial chamber completely disregarded evidence which is clearly relevant.[142] However, a trial chamber's failure to explicitly refer to specific evidence on the record will often not amount to an error of law, especially where there is significant contrary evidence on the record.[143]

54. In this case, the Trial Chamber considered the evidence of several witnesses involved in the interception of communications and the production of the intercepts. It also examined corroborating evidence from other sources and Frease's evidence and analysis of the intercepts.[144] The Appeals Chamber thus finds no basis for Tolimir's general assertion that the Trial Chamber failed to provide a reasoned opinion concerning the intercepts.

55. Concerning Tolimir's specific submission that the Trial Chamber did not consider his arguments and evidence challenging the presumption of authenticity and reliability of the intercepts, the Appeals Chamber notes that Tolimir extensively cross-examined several witnesses called by the Prosecution in respect of the intercepts concerning their authenticity and reliability.[145] As noted above, trial chambers have discretion with respect to which legal arguments and facts to address in the judgement. Apart from the evidence discussed below, Tolimir fails to identify any particular piece of evidence that the Trial Chamber allegedly disregarded in analysing the reliability of the intercepts.[146] The Trial Chamber therefore did not err by not specifically addressing Tolimir's arguments and evidence challenging the presumption of authenticity and reliability of the intercepts.

56. With regard to Tolimir's argument that the Trial Chamber failed to consider Defence Exhibit 48, the Appeals Chamber recalls that it is not necessary for the Trial Chamber to refer to every piece of evidence on the record and it is presumed that it evaluated all evidence presented before it.[147] In any event, the Appeals Chamber observes that, while this report states that the ABiH

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[140] *Kvočka et al.* Appeal Judgement, para. 23, *citing Čelebići* Appeal Judgement, para. 498, *Kupreškić et al.* Appeal Judgement, para. 39, *Kordić and Čerkez* Appeal Judgement, para. 382.
[141] *Perišić* Appeal Judgement, para. 92; *Kvočka et al.* Appeal Judgement, para. 23.
[142] *Popović et al.* Appeal Judgement, paras 306, 340; *Đorđević* Appeal Judgement, para. 864, n. 2527.
[143] *Perišić* Appeal Judgement, para. 95. *See, e.g.*, *Kvočka et al*. Appeal Judgement, paras 23, 483-484, 487, 582-583. *See also Simba* Appeal Judgement, paras 143, 152, 155.
[144] Trial Judgement, para. 63.
[145] *See, e.g.,* T. 8 June 2010 pp. 2474-2506; T. 10 June 2010 pp. 2628-2630; T. 10 June 2010 pp. 2667-2670; T. 15 June 2010 pp. 2777-2780; T. 22 June 2010 pp. 2987-2989; T. 22 June 2010 pp. 3030-3031; T. 12 July 2010 pp. 3831-3839; T. 24 August 2010 pp. 4328-4334; T. 28 May 2010 pp. 2127-2140; T. 1 June 2010 pp. 2331-2333, 2336-2340, 2343-2348.
[146] Appeal Brief, paras 23-24, *citing* Defence Final Trial Brief, paras 107-135 (the Appeals Chamber understands Tolimir to have intended to cite paragraphs 127-135).
[147] *Popović et al.* Appeal Judgement, paras 306, 340; *Kvočka et al.* Appeal Judgement, para. 23.

did not have real-time signal or communication intelligence due to shortage of personnel and inadequate equipment,[148] this does not undermine the reliability or authenticity of the intercepts in view of the fact that the ABiH was evidently capable of intercepting VRS communications. Concerning Tolimir's submission that the lack of evidence that the ABiH acted on information from the intercepts indicates that they are "from some other service", the Appeals Chamber notes that the report concluded that "the Bosnian Muslims did not have enough personnel, interception equipment, crypto analysts, analysis capabilities or even an adequate internal communication network to get the collected [communications intelligence] to the right destination quickly and efficiently" and that it is "more likely that [they] knew nothing about what actually happened until days, weeks or months after the executions".[149] However, Tolimir's suggestion that the intercepts emanated from another source is pure speculation. For these reasons, the Appeals Chamber holds that the Trial Chamber did not err by not specifically referring to Defence Exhibit 48 in making its findings on the intercepts.

57. The Appeals Chamber notes that Tolimir repeats the argument of his Defence Final Trial Brief that the Trial Chamber failed to exercise caution in assessing the reliability of Frease's evidence.[150] The Appeals Chamber notes that the Trial Chamber considered certain witnesses' status, including that of Frease, as current or former Prosecution investigators, and held that this did not render their testimony and reports unreliable.[151] The Trial Chamber further held that in determining what weight was to be given to each witness, it took into account several factors, including "their expertise and knowledge of the investigation that they have been involved in, as well as other relevant evidence".[152] As further discussed under Ground of Appeal 4, the Appeals Chamber finds no error in the Trial Chamber's approach.[153]

58. The Appeals Chamber also observes that the Trial Chamber heard independent corroboration of the hearsay evidence of Frease through *viva voce* evidence of 17 intercept operators and two of their supervisors.[154] The Trial Chamber also took into account Frease's own evidence that further independent corroboration of the intercepts was provided by documents captured from the VRS, notes taken by UN officials, telephone books obtained in the RS, aerial images, Croatian intercepts, and UNPROFOR reports.[155] Furthermore, the Trial Chamber

[148] Defence Exhibit 48 ("Intelligence and the war in Bosnia 1992-1995: The role of the intelligence and security services", appendix to the report "Srebrenica, a 'safe' area. Reconstruction, background, consequences and analyses of the fall of a Safe Area (11 July 1995)" by the Netherlands Institute for War Documentation), pp. 289-301.
[149] Defence Exhibit 48, pp. 311-312.
[150] Defence Final Trial Brief, para. 130; Appeal Brief, para. 25.
[151] Trial Judgement, para. 38.
[152] Trial Judgement, para. 38.
[153] *See infra*, paras 76-79.
[154] Trial Judgement, para. 63.
[155] Trial Judgement, para. 65.

specifically considered that Frease acknowledged the theoretical possibility that intercepts from the ABiH may have been tampered with before they came into the Prosecution's possession[156] and also noted a reasonable conclusion by Frease concerning the differing time stamps on three intercepts concerning the conversation between Tolimir and General Nicolai.[157] Thus, in evaluating the authenticity and reliability of the intercepts, the Trial Chamber carefully and cautiously considered Frease's evidence and conclusions and determined that her testimony was reliable.[158] For these reasons, Tolimir's argument fails.[159]

59. With respect to the argument that the corroboration of some intercepts did not render all the intercepts reliable, the Appeals Chamber notes that the Trial Chamber made its findings on the reliability of the intercepts based on a range of factors. These included the procedures employed in producing the intercepts and the methods used to promote reliability, including instructions issued to and practices followed by the intercept operators.[160] As noted above, the Trial Chamber also considered that some of the intercepts were independently corroborated by other sources.[161] Since nothing prohibits a trial chamber from relying on uncorroborated evidence,[162] and given that the Trial Chamber assessed the reliability of the intercepts on a number of bases, the Appeals Chamber finds no error in the Trial Chamber's approach of assessing the reliability of all the intercepts.

60. In terms of the reliability of Prosecution Exhibit 311, an intercept of a conversation between Tolimir and General Nicolai, the Appeals Chamber observes that the Trial Chamber referred to two other exhibits concerning the same conversation – a Croatian intercept and a report made by UNPROFOR – and noted that there are "certain points present in each of the three records of the content of conversation".[163] Indeed, as the Trial Chamber found, the three pieces of evidence correspond in several respects, including date and time stamps, Tolimir's statement that UNPROFOR personnel held by the VRS would not be endangered and would be permitted to return to Potočari, and that a helicopter flight would be arranged to allow UNPROFOR to collect the body of a fallen UNPROFOR member from the stadium in Zvornik.[164] Contrary to Tolimir's submission,

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[156] Trial Judgement, para. 66.
[157] Trial Judgement, para. 65.
[158] Trial Judgement, para. 38.
[159] The Appeals Chamber has considered Tolimir's specific arguments regarding the objectivity of Prosecution witnesses and addressed them elsewhere. *See infra*, paras 76-79.
[160] Trial Judgement, paras 63-64.
[161] Trial Judgement, para. 65.
[162] *Popović et al.* Appeal Judgement, paras 1009, 1258; *D. Milošević* Appeal Judgement, para. 215; *Aleksovski* Appeal Judgement, para. 63.
[163] Trial Judgement, para. 65 and n. 169, *citing* Prosecution Exhibits 680 (UNPROFOR notes of a telephone conversation at 5:50 p.m. between Nicolai and Tolimir) and 699 (Croatian intercept dated 9 July 1995 at 1755 hours between "General Micoliai [*sic*]" of UNPROFOR and "General Tolimir").
[164] Prosecution Exhibit 311 is dated 9 July 1995 and provides that the conversation began at 18:15 hours. Prosecution Exhibit 680 is also dated 9 July 1995 and is time stamped 17:50 hours. Prosecution Exhibit 699 is likewise dated 9 July 1995 and is time stamped 17:55 hours. Prosecution Exhibits 311 (at p. 2) and 680 (at p. 1) both refer to

the Trial Chamber did not commit any error in holding that such corroborating information reinforces the reliability of Prosecution Exhibit 311. The Appeals Chamber dismisses Tolimir's challenges in this respect.

(c) Conclusion

61. For the reasons set out above, the Appeals Chamber dismisses Ground of Appeal 2 in its entirety.[165]

2. Expert evidence of Richard Butler (Ground of Appeal 3)

62. The Trial Chamber accepted Prosecution Witness Richard Butler as an expert witness and admitted into evidence his reports as expert reports ("Expert Reports"). The Trial Chamber stated that it would evaluate Butler's evidence with caution, given his former association with the Prosecution, and specified that his evidence would be analysed in light of the entire body of evidence.[166]

(a) Submissions

63. Tolimir submits that the Trial Chamber erred in law by accepting Butler as an expert witness, which invalidated the judgement.[167] Specifically, Tolimir contends that the Prosecution failed to disclose the Expert Reports, as required under Rule 94*bis* of the Rules.[168] According to Tolimir, disclosure of expert reports pursuant to Rule 94*bis* of the Rules is mandatory and the Prosecution's failure to submit the Expert Reports according to this procedure deprived him of the opportunity to challenge Butler's reports as expert reports, as provided for under Rule 94*bis*(B) of the Rules.[169] Tolimir further asserts that Butler's long-standing association with the Prosecution should have led the Trial Chamber to characterise Butler as an OTP investigator submitting his personal opinions, rather than an expert witness, who possesses specialised knowledge.[170] Tolimir also contends that Butler lacks the requisite expertise to provide an expert opinion on matters

Tolimir's statement that UNPROFOR members would not be threatened. Prosecution Exhibits 311 (at p. 3), 680 (at p. 1) and 699 (at p. 1) refer to the helicopter transport of the fallen UNPROFOR member.

[165] Judge Antonetti appends a separate opinion.

[166] Trial Judgement, para. 41. *See also* Trial Judgement, paras 38-40.

[167] Appeal Brief, paras 31, 43. *See also* Notice of Appeal, para. 16. Tolimir also argues that the Trial Chamber's reliance on Butler's evidence resulted in errors that occasioned a miscarriage of justice. *See* Appeal Brief, para. 42. As Tolimir fails to identify the relevant findings or pinpoint any evidence in support of his claim, the Appeals Chamber summarily dismisses his argument in this regard.

[168] Appeal Brief, paras 32-33. *See also* Reply Brief, para. 20.

[169] Appeal Brief, paras 33-35, 41.

[170] Appeal Brief, paras 37-38. *See also* Reply Brief, para. 23.

related to the military structures and strategic organs of the VRS.[171] Tolimir requests the Appeals Chamber to reverse the Trial Chamber's characterisation of Butler as an expert, and to review his evidence and the Expert Reports as if Butler were an OTP investigator.[172]

64. The Prosecution responds that it disclosed the Expert Reports to Tolimir in March and September 1998, and that Tolimir received notice of the Prosecution's intention to call Butler as an expert witness by virtue of its Rule 65*ter* list and its opening statements. The Prosecution further asserts that Tolimir waived the right to challenge any failure to comply with Rule 94*bis* of the Rules given that he did not raise any concerns prior to, or during, Butler's testimony. Moreover, the Prosecution contends that Tolimir fails to demonstrate that he suffered prejudice as a result of the alleged Rule 94*bis* violation.[173] It further submits that Tolimir does not show that the Trial Chamber erred in considering Butler as an independent expert with the qualifications necessary to be considered an expert witness.[174] Finally, the Prosecution avers that Tolimir merely repeats arguments he presented at trial without showing any error on the part of the Trial Chamber or any impact on his convictions.[175]

(b) Analysis

(i) Alleged violation of Rule 94*bis* of the Rules

65. The Trial Chamber admitted into evidence Butler's Expert Reports based on the fact that Tolimir: (i) was on notice that the Prosecution intended to call Butler as an expert witness and to tender his reports as expert reports; and (ii) did not object to the admission of the Expert Reports into evidence and "implicitly accepted" that Butler was an expert during his cross-examination.[176]

66. Rule 94*bis*(A) of the Rules imposes upon a party the obligation to disclose expert reports of a witness they intend to call prior to the testimony of the witness.[177] The Prosecution submits, and Tolimir does not contest, that it disclosed the Expert Reports to Tolimir in March and September 2008.[178] The Prosecution Rule 65*ter* List, filed in October 2008, indicated that Butler would be called as an expert and that the Prosecution "intend[ed] to submit these reports with the

[171] Appeal Brief, paras 39-40. Tolimir also argues that he did raise concerns about Butler's status as an expert witness during the trial proceedings, and the Trial Chamber should have accordingly decided upon Butler's status as an expert before allowing him to testify. Reply Brief, paras 21-22.
[172] Appeal Brief, para. 43.
[173] Response Brief, para. 18. The Appeals Chamber understands the reference to "1998" in the Response Brief to be a typographical error and should read "2008".
[174] Response Brief, paras 19-20.
[175] Response Brief, para. 21.
[176] Trial Judgement, n. 97.
[177] Rule 94*bis*(A) of the Rules provides that "[t]he full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge".
[178] Response Brief, para. 18.

Trial Chamber pursuant to Rule 94*bis*(A) of the Tribunal's Rules of Procedure and Evidence".[179] However, the Prosecution did not disclose the Expert Reports *pursuant to Rule 94bis(A) of the Rules* by filing a Rule 94*bis* disclosure notification. Given the absence of disclosure of the Expert Reports pursuant to Rule 94*bis*(A) of the Rules through a filing, Tolimir was deprived of a formal disclosure notification which would have given him the opportunity to object to the expert status of the reports before Butler's testimony.[180] In these circumstances, the Trial Chamber erred by considering that the Prosecution's notice of its intention to call Butler as an expert witness and to tender his reports as expert reports in its Rule 65*ter* list sufficed.

67. With regard to the Trial Chamber's consideration that Tolimir failed to object to the admission of the Expert Reports *during* the trial and "implicitly accepted" that Butler was an expert during his cross-examination,[181] the Appeals Chamber notes that when the Trial Chamber requested the parties' positions on the status of Butler, Tolimir stated:

> I believe that he is an investigator who works for the OTP and is instructed by the Office of the Prosecutor, in terms of the method of work and the materials that he used. However, I don't have a problem with the OTP giving him whatever status they want to give him.[182]

In the view of the Appeals Chamber, Tolimir did not accept the Expert Reports or that Butler was an expert. Tolimir expressed his view that Butler should be considered by the Trial Chamber as an OTP investigator.[183] Tolimir's remark that the Prosecution could give Butler "whatever status they want to give him" must be interpreted in this context. Contrary to the Prosecution's submission, what is implicit in this remark is not an acceptance of Butler's expert status, but the recognition that it is the Trial Chamber that determines Butler's status. The fact that Tolimir referred to Butler as an expert during his cross-examination and that the Trial Chamber referred to Butler as an expert without objection from Tolimir carries little weight in the absence of a reasoned decision by the Trial Chamber during the trial on the status of Butler. The Trial Chamber therefore erred in considering that Tolimir implicitly accepted, and failed to object to, Butler's expert status during the trial.

68. However, the Appeals Chamber considers, that although the Trial Chamber erred by classifying Butler's reports as expert reports, this error caused no prejudice to Tolimir or had any impact upon his convictions. Tolimir had notice of the Prosecution's intention to call Butler as an expert witness following the filing of the Prosecution's Rule 65*ter* List in October 2008 and cross-

[179] Prosecution Notice of Filing of 65*ter* Witness List, Witness Summaries and Exhibit List, 15 October 2008, Appendix B (confidential) ("Prosecution 65*ter* List"), p. 5. *See* Prosecution 65*ter* List, p. 4.
[180] Rule 94*bis*(B) of the Rules.
[181] Trial Judgement, n. 97.
[182] T. 23 June 2011 pp. 15966-15967.
[183] *See also* Defence Final Trial Brief, paras 178, 184-185.

examined Butler extensively on the relevant issues.[184] Moreover, the Trial Chamber explicitly stated that, while it deemed Butler to be an expert witness, it also relied on other witnesses in analysing issues such as the command structure of the VRS.[185] The Trial Chamber further specified that it evaluated Butler's evidence with caution and that his evidence was analysed in light of the entire body of evidence adduced.[186] Accordingly, Tolimir has not demonstrated that he suffered prejudice or that the Trial Chamber's error invalidated the verdict.

(ii) Butler's status as an expert witness

69. The Appeals Chamber is not persuaded by Tolimir's submissions that the Trial Chamber erred by regarding Butler as an expert witness or the manner in which it evaluated his evidence. With regard to Tolimir's challenge to the Trial Chamber's acceptance of Butler as an expert witness given his former association with the Prosecution, the Appeals Chamber recalls that the mere fact that an expert witness is employed or paid by a party does not disqualify him or her from testifying as an expert witness.[187] It further recalls that "concerns relating to the Witness' independence and impartiality […] are a matter of weight, not admissibility".[188] It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be regarded as an expert witness. The party alleging bias on the part of an expert witness may demonstrate such bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply. Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.[189] In the present case, the Trial Chamber emphasised that it exercised particular caution with regard to Butler's evidence in view of his former association with the Prosecution and stated that his testimony would be "analysed in the light of the entire body of evidence adduced".[190] Tolimir fails to identify any findings or other support for his assertion that the "most crucial Majority findings are based on Butler's opinions without showing any caution concerning his association with the Prosecution".[191] This argument is dismissed.

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[184] Trial Judgement, n. 97. *See also Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, paras 21, 31. Consequently, Tolimir was afforded the opportunity to challenge the admissibility of Butler's reports and alleged lack of impartiality or bias.

[185] Trial Judgement, para. 41. Consistent with this approach, the Trial Chamber placed limited reliance on the Expert Reports in making findings in the Trial Judgement. *See* Trial Judgement, nn. 215, 217, 232-233, 353, 394, 2348.

[186] Trial Judgement, para. 41.

[187] *Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, para. 20, *citing Nahimana et al.* Appeal Judgement, para. 282, *Brdanin* Decision on Expert Witness Ewan Brown, p. 2.

[188] *Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, para. 21. *See also Nahimana et al.* Appeal Judgement, para. 199.

[189] *Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, para. 20, *citing Nahimana et al.* Appeal Judgement, para. 199.

[190] Trial Judgement, para. 41.

[191] Appeal Brief, para. 40.

70. As to Tolimir's contention that Butler lacked the qualifications and experience necessary to provide an expert opinion on the military structures and strategic organs of the VRS, the Appeals Chamber notes that the Trial Chamber accepted Butler's experience in military intelligence based on Butler's testimony and the information contained in his *curriculum vitae*, which detailed his technical qualifications and experience of over 13 years in the intelligence branch of the army of the United States of America.[192] Tolimir's contention that Butler has "no expert qualifications necessary to provide reliable opinions" on relevant matters thus fails. The Appeals Chamber further considers Tolimir's argument about Butler's lack of working experience with the VRS to be without merit since firsthand knowledge or experience is not required for qualifying as an expert.[193] Moreover, in weighing Butler's evidence, the Trial Chamber considered the "professional competence of the expert, the methodologies used by the expert and the reliability of the findings made in light of these factors and other evidence accepted".[194] Accordingly, Tolimir fails to demonstrate an error on the part of the Trial Chamber.

(c) Conclusion

71. In light of the above, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 3.

3. Prosecution investigators (Ground of Appeal 4)

72. The Trial Chamber considered that the status of Prosecution Witnesses Dušan Janc, Jean-René Ruez, Dean Manning, Erin Gallagher, Tomasz Blaszczyk, and Stefanie Frease ("Prosecution Investigators") as current or former Prosecution investigators alone did not render their testimonies and reports unreliable.[195]

(a) Submissions

73. Tolimir submits that the Trial Chamber erred in law by failing to apply the appropriate caution, as set forth in the *Martić* Trial Judgement, in assessing the evidence of the Prosecution Investigators.[196] Tolimir contends that while the Trial Chamber expressed "certain concerns" about relying on this evidence, it relied heavily on the evidence of the Prosecution Investigators

[192] Trial Judgement, para. 41 and n. 99.
[193] *Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, para. 29.
[194] Trial Judgement, para. 39.
[195] Trial Judgement, para. 38.
[196] Appeal Brief, paras 44, 46-48, 51-52, *citing Martić* Trial Judgement, para. 35. The Appeals Chamber notes that Tolimir includes a reference to Butler in his list of Prosecution investigators under this Ground of Appeal. *See* Appeal Brief, paras 44, 49. The Appeals Chamber has addressed Tolimir's submissions regarding the Trial Chamber's assessment of Butler's evidence above. *See supra*, paras 65-71.

(particularly Frease, Janc, and Blaszczyk) for key aspects of the Trial Judgement.[197] Tolimir argues that no weight should be attached to the opinions of the Prosecution Investigators given that they are "obliged to protect the interests of the Prosecution, and to coordinate their activities with those of the Prosecution" and are "not allowed to speak in public without certain permission which also contains instructions about what the investigator is entitled to talk about".[198] Tolimir requests that the Appeals Chamber formulate the correct legal standard for the evaluation of evidence provided by Prosecution Investigators and to review the Trial Judgement applying that standard.[199]

74. The Prosecution responds that the Trial Chamber correctly found that the ties between it and the Prosecution Investigators did not render the latter's evidence unreliable.[200] It argues that, Tolimir's arguments should be summarily dismissed given that he merely repeats arguments raised at trial without showing an error.[201] The Prosecution contends that a witness's association with a party to the proceedings does not render their testimony inadmissible but may impact the weight of this evidence.[202] It submits that Tolimir fails to demonstrate that the Prosecution Investigators lacked independence, lied under oath, or that the Prosecution tampered with their testimonies.[203] It avers that the *Martić* Trial Judgement, in which the Trial Chamber attached no weight to parts of the testimony of a former Prosecution analyst, is distinguishable from the present case, since the Prosecution in that case acknowledged that the analyst lacked expertise.[204]

75. Tolimir replies that the Prosecution fails to offer any cogent reason to depart from the holding in the *Martić* Trial Judgement.[205] He submits that as in the *Martić* case, the Prosecution Investigators testified about issues outside the scope of their expertise and knowledge.[206]

(b) Analysis

76. The Appeals Chamber is not persuaded by Tolimir's submission that the Trial Chamber applied an incorrect standard when assessing the Prosecution Investigators' evidence. At the outset, the Appeals Chamber recalls that "concerns relating to [a] Witness' independence and impartiality […] are a matter of weight, not admissibility".[207] It is well-established that trial chambers exercise broad discretion to consider all relevant factors in determining the weight to attach to the evidence

[197] Appeal Brief, para. 45. *See also* Appeal Brief, para. 51; Reply Brief, para. 24.
[198] Appeal Brief, para. 50. *See also* Appeal Brief, para. 51; Reply Brief, para. 24.
[199] Appeal Brief, para. 52.
[200] Response Brief, para. 22.
[201] Response Brief, paras 22-23.
[202] Response Brief, para. 23.
[203] Response Brief, paras 23-24.
[204] Response Brief, para. 24.
[205] Reply Brief, para. 25.
[206] Reply Brief, para. 26.

of any witness.[208] The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion or fact; or (iii) so unfair or unreasonable as to constitute an abuse of discretion.[209]

77. The Trial Chamber stated that the status of the witnesses as current or former Prosecution investigators alone does not render their testimony and reports unreliable.[210] Nevertheless, the Trial Chamber stated that it exercised caution in evaluating their evidence in light of their association with the Prosecution.[211] Tolimir fails to demonstrate how the *Martić* Trial Judgement supports his argument that the Trial Chamber erred in this regard. In the *Martić* case, the Trial Chamber did not attach weight to the "views, conclusions and analyses" of a former Prosecution analyst that went beyond his expertise or personal knowledge.[212] The *Martić* Trial Chamber did not discuss the analyst's association with the Prosecution.[213] Accordingly, the Appeals Chamber finds no error in the Trial Chamber's approach.

78. The Appeals Chamber is similarly unconvinced that the Trial Chamber failed to assess the Prosecution Investigators' evidence pursuant to the correct standard. The Trial Chamber took into account the following factors in determining the weight to be given to the evidence of the Prosecution Investigators: (i) their expertise and knowledge of the investigation they were involved in; (ii) other relevant evidence; (iii) the fact that they were not eyewitnesses or direct observers of the events charged in the Indictment; and (iv) their association with a party to the proceedings.[214] The Appeals Chamber is satisfied that the consideration of such factors in the assessment of the weight to be attached to the evidence of the Prosecution Investigators is within the Trial Chamber's discretion.

79. Moreover, the Appeals Chamber considers that the Trial Chamber acted within its discretion in its assessment of the Prosecution Investigators' evidence. Tolimir fails to identify where the Trial Chamber allegedly relied heavily on the Prosecution Investigators' evidence for key findings in the Trial Judgement. A review of the Trial Judgement reveals that the Trial Chamber only relied on the Prosecution Investigators' evidence where it was corroborated by other evidence on the record,

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[207] *Popović et al.* Appeal Judgement, para. 131. *See also Popović et al.* Decision on the Status of Richard Butler as an Expert Witness, para. 21; *Nahimana et al.* Appeal Judgement, para. 199.
[208] *Đordević* Appeal Judgement, para. 781; *Šainović et al.* Appeal Judgement, para. 152. *See also Bikindi* Appeal Judgement, para. 116; *Nahimana et al.* Appeal Judgement, para. 194.
[209] *Popović et al.* Appeal Judgement, para. 131; *Lukić and Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.
[210] Trial Judgement, para. 38.
[211] Trial Judgement, para. 38.
[212] *Martić* Trial Judgement, para. 35.
[213] *Martić* Trial Judgement, para. 35.

unless it pertained specifically to the Prosecution investigation or to an uncontested fact.[215] The Appeals Chamber also rejects as unsubstantiated Tolimir's arguments that the Prosecution Investigators lacked sufficient independence to provide reliable evidence or that their evidence fell outside the scope of their personal knowledge or expertise. Furthermore, the Appeals Chamber finds that Tolimir attempts to re-litigate issues that he unsuccessfully raised at trial,[216] without demonstrating any error on the part of the Trial Chamber.

(c) Conclusion

80. In light of the above, the Appeals Chamber dismisses Ground of Appeal 4.[217]

[214] Trial Judgement, para. 38.
[215] *See, e.g.*, Trial Judgement, paras 63, 65, 70, 347, 350, 363, 367, 370, 373, 435, 437, 454, 457-458, 478-479, 504, 506, 561, 564, 938-939, 941-947. *See also* Trial Judgement, nn. 119, 186-187, 189-190, 192, 195-196, 199-200, 327, 344, 386-387, 405, 407, 411, 481, 515, 517, 832, 899, 916, 939, 1184, 1203-1204, 1208-1209, 1248, 1343-1344, 1372, 1390, 1416, 1418, 1435, 1437, 1439, 1444, 1446, 1461-1462, 1467, 1540, 1545, 1549-1552, 1557, 1560, 1573-1574, 1578, 1588, 1661-1666, 1682, 1778-1779, 1804-1805, 1807-1809, 1840, 1865-1866, 1885, 1943, 1977, 1986, 1991, 1996, 2000, 2012, 2099, 2120, 2146, 2171, 2174-2175, 2178, 2193, 2197, 2202-2204, 2225, 2229-2230, 2234-2235, 2245-2246, 2572, 3204.
[216] *See* Defence Final Trial Brief, paras 177-183.
[217] Judge Antonetti appends a separate opinion.

IV. NUMBER OF THOSE KILLED IN THE EVENTS IN SREBRENICA IN JULY 1995 AND THEIR AFTERMATH (GROUND OF APPEAL 9)

A. Background

81. The Trial Chamber found that at least 5,749 Bosnian Muslims were unlawfully killed by the Bosnian Serb Forces following the fall of Srebrenica.[218] To determine this figure, the Trial Chamber calculated the number of Bosnian Muslims killed by the Bosnian Serb Forces: (i) at the specific crime sites listed in paragraphs 21.1-22.4 of the Indictment (4,970);[219] and (ii) in circumstances not specified in the Indictment (830),[220] excluding from the calculation 51 victims to avoid double-counting.[221]

82. Tolimir makes a number of challenges to the Trial Chamber's calculation of the number of persons unlawfully killed by Bosnian Serb Forces after the fall of Srebrenica.[222] First, he asserts that the Trial Chamber erred in law in calculating the number of persons unlawfully killed in circumstances other than the incidents specified in the Indictment.[223] Second, he submits that the Trial Chamber committed methodological errors in appraising the evidence in calculating the total number of those killed.[224] Third, he avers that the Trial Chamber erred in calculating the number of victims in four specific incidents included in the Indictment.[225]

83. The Prosecution responds that Tolimir's challenges should be summarily dismissed since he ignores the Trial Chamber's relevant factual findings, focuses on individual pieces of evidence without showing why the conviction should not stand on the remaining evidence, and repeats arguments made at trial while failing to identify any error by the Trial Chamber.[226]

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[218] Trial Judgement, para. 596.
[219] The Appeals Chamber notes that the Trial Chamber did not include in its calculation of the number of victims listed in the Indictment the three Žepa leaders, whose murders were charged under paragraph 23.1 of the Indictment (*see* Trial Judgement, paras 568, 570). However, it included these killings in its findings on the total number of persons murdered. *See* Trial Judgement, paras 721, 727.
[220] Trial Judgement, paras 566-596.
[221] Trial Judgement, paras 566, 570, 591, 595-596.
[222] Appeal Brief, paras 89-142. *See also* Trial Judgement, paras 566-597.
[223] Appeal Brief, paras 89-91.
[224] Appeal Brief, paras 103-142.
[225] Appeal Brief, paras 92-102.
[226] Response Brief, para. 54.

B. Discussion

1. Calculation of the total number of persons killed in incidents not specified in the Indictment

(a) Submissions

84. Tolimir submits that the Trial Chamber erred since its findings should have been limited to the victims of the incidents specified in the Indictment.[227] He argues that "incidents" not specified in the Indictment were not the subject of proof and that the Trial Chamber did not establish the circumstances of the death of persons linked to those incidents.[228] Consequently, he avers that the Trial Chamber's calculation cannot serve as a basis for findings on the gravity of the crime or whether a certain crime – genocide or extermination – has been committed.[229] In the alternative, Tolimir submits that the Trial Chamber erred in relying on that number in relation to its legal findings.[230] Tolimir argues that the Trial Chamber's erroneous finding had a significant impact on its findings on all counts of the Indictment, and particularly on its assessment of the gravity of the crime and thus in determining his sentence.[231] He requests that the Appeals Chamber articulate the correct legal standard and review the Trial Chamber's findings in relation to Counts 1-7.[232]

85. The Prosecution responds that the Trial Chamber's conclusion that 5,749 Bosnian Muslims were unlawfully killed by Bosnian Serb Forces was covered by the Indictment, which alleged that "over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave" were summarily executed as a result of the JCE to Murder.[233] The Prosecution submits that the Trial Chamber referred to the 5,749 Bosnian Muslim victims solely in the context of genocidal acts and intent and in evaluating the gravity of the offence.[234] The Prosecution argues that Tolimir fails to show any impact upon the judgement and that his argument should be summarily dismissed.[235]

(b) Analysis

86. The Appeals Chamber will first consider whether Tolimir's submission that the Trial Chamber erred in law by calculating the number of persons unlawfully killed in circumstances not specified in paragraphs 21.1 to 22.4 of the Indictment should be summarily dismissed, as requested by the Prosecution. The Appeals Chamber notes that the Trial Chamber referred to the 5,749

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[227] Appeal Brief, paras 90-91, *citing* Indictment, paras 21.1-21.4. The Appeals Chamber understands Tolimir to have intended to refer to paragraphs 21.4-22.4. *See* Reply Brief, para. 42.
[228] Appeal Brief, para. 91. *See* Reply Brief, para. 42.
[229] Appeal Brief, para. 91.
[230] Appeal Brief, para. 91.
[231] Appeal Brief, para. 89.
[232] Appeal Brief, para. 91.
[233] Response Brief, para. 55, *citing* Indictment, para. 28.
[234] Response Brief, para. 56.

victims in relation to the charge of genocide in finding that: (i) members of the protected group were killed;[236] (ii) the Bosnian Serb Forces deliberately inflicted conditions of life that were calculated to bring about the protected group's destruction;[237] and (iii) there was an intent to destroy the protected group.[238] The Trial Chamber also referred to the 5,749 victims when assessing the gravity of the offence in sentencing Tolimir.[239] As an alleged error in the Trial Chamber's calculation of persons unlawfully killed could have impacted the Trial Chamber's findings on genocide and sentencing, the Appeals Chamber will consider Tolimir's submission on the merits.

87. The Appeals Chamber recalls that in reaching its judgement, a trial chamber can only convict an accused of crimes which are charged in the indictment.[240] The Appeals Chamber has consistently held that, in accordance with the Statute of the Tribunal and the ICTR Statute, the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment.[241] Material facts not pleaded in the indictment cannot serve as a legitimate foundation for a conviction against the accused.[242]

88. In the present case, the charges and the material facts supporting the charges are pleaded in the Indictment with a reasonably high degree of specificity. The Indictment alleged that the plan to murder the able-bodied Bosnian Muslim men from Srebrenica encompassed "over 1,000" men who were separated from their friends and families at Potočari and taken to Bratunac, and "over 6,000" men who surrendered to or were captured by Bosnian Serb Forces stationed along the road between Bratunac, Konjević Polje, and Milići.[243] It alleged that the systematic murder of these men from Srebrenica began on 13 July 1995 "as set forth in specific detail" in paragraphs 21.1 to 22.4, *i.e.* in the circumstances of the specified incidents listed therein.[244] Similarly, the Indictment alleged that four specific incidents of opportunistic killings and the killing of three named Bosnian Muslim leaders from Žepa were natural and foreseeable consequences of the JCEs alleged in the Indictment.[245] Under Count 2, charging the facts and agreement identified in the JCE to Murder as

[235] Response Brief, para. 56.
[236] Trial Judgement, paras 751-752.
[237] Trial Judgement, para. 766.
[238] Trial Judgement, paras 770, 773.
[239] Trial Judgement, para. 1217.
[240] *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33.
[241] *Đordević* Appeal Judgement, para. 574; *Martić* Appeal Judgement, para. 162; *Muvunyi* Appeal Judgement, para. 18. *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88. The Appeals Chamber recalls that the count or charge is the legal characterisation of the material facts which support that count or charge. *Muvunyi* Appeal Judgement, para. 19.
[242] *Kupreškić et al.* Appeal Judgement, para. 320. *See also Kupreškić et al.* Appeal Judgement, paras 312-319; *Martić* Appeal Judgement, paras 162-164.
[243] Indictment, paras 19-20.
[244] Indictment, para. 21.
[245] Indictment, paras 22, 22.1-22.4, 23.1. The Indictment alleges, in particular, that the opportunistic killings specified in paragraph 22 were the natural and foreseeable consequence of the JCE to Forcibly Remove and the JCE to

the underlying acts of conspiracy to commit genocide,[246] the Indictment alleged that the implementation of the JCE resulted in the summary execution of "over 7,000" Bosnian Muslim men and boys from the Srebrenica enclave.[247]

89. It is clear from these provisions that the incidents charged in the Indictment are not mere examples of criminal conduct for which Tolimir is alleged to be responsible but an exhaustive list of specific allegations charged against him in the Indictment. Tolimir was not charged with crimes arising from incidents not specified in the Indictment. It is also clear that the Prosecution's allegation of the total number of those persons unlawfully killed by Bosnian Serb Forces (over 7,000) related solely to the victims of the incidents specified in paragraphs 21.1 to 22.4 and 23.1 of the Indictment. Moreover, the evidence led by the Prosecution was focused on the incidents specified in the Indictment.

90. The Trial Chamber therefore erred by making findings that 779 persons[248] were unlawfully killed by Bosnian Serb Forces in circumstances not specified in the Indictment and by relying on this higher figure in support of its conclusions on Tolimir's convictions.

91. The Appeals Chamber is not, however, convinced that this error of law invalidates the Trial Judgement. Tolimir fails to show why his convictions should not stand on the basis of the Trial Chamber's finding that at least 4,970 individuals were unlawfully killed in the specific circumstances detailed in the Indictment. The Trial Chamber emphasised that the figure of 4,970 is a conservative calculation of the number of people killed in the circumstances specified in the Indictment, with the actual number of victims likely to be markedly higher.[249] With regard to its findings in relation to the charge of genocide, the Trial Chamber also recalled its finding that at least 4,970 Bosnian Muslim men were killed by Bosnian Serb Forces in circumstances specified in the Indictment.[250] Tolimir has provided no indication that this figure alone would not have enabled the Trial Chamber to make its findings on the protected group element or that the forcible transfer and killing operations were deliberately inflicted in order to lead to the physical destruction of the

Murder and that the killings of the three Žepa leaders were the natural and foreseeable consequence of the JCE to Forcibly Remove. Indictment, paras 22, 23.1.

[246] Indictment, para. 25. *See also* Indictment, para. 27.

[247] Indictment, para. 28. *See also* Indictment, para. 9.

[248] The Appeals Chamber recalls that the Trial Chamber found that at least 5,749 Bosnian Muslims were unlawfully killed by the Bosnian Serb Forces following the fall of Srebrenica by calculating the number of Bosnian Muslims killed by the Bosnian Serb Forces at the specific crime sites listed in paragraphs 21.1-22.4 of the Indictment (4,970) and in circumstances not specified in the Indictment (830). The Trial Chamber excluded from the calculation 51 victims to avoid double-counting, thus finding that 779 individuals were killed by Bosnian Serb Forces in circumstances other than specified in the Indictment. *See supra*, para. 81.

[249] Trial Judgement, para. 571.

[250] Trial Judgement, para. 751.

Bosnian Muslim population in the area.[251] Similarly, with respect to the Trial Chamber's reference to the 5,749 victims in assessing the gravity of the offence in sentencing Tolimir, the Appeals Chamber considers that the Trial Chamber's general assessment that those who were killed were victims of a "massive and cruel murder operation" remains fully supported by the conservatively calculated 4,970 minimum figure.[252] Moreover, all the Trial Chamber's specific examples illustrating the horrific nature of the mass executions that informed its assessment of the gravity of the offence derived from incidents specified in the Indictment.[253] Tolimir's argument is therefore dismissed.

2. Methodology used by the Trial Chamber in evaluating the total number of those killed

92. Tolimir submits that the Trial Chamber erred in fact in its findings on the total number and identification of the Srebrenica-related missing and killed and in its findings concerning the number of Bosnian Muslim males who died as a result of combat, suicide, and other causes.[254] First, he argues that the Trial Chamber erroneously arrived at its figures by making a "presumption" that all the victims identified from Srebrenica-related mass graves were unlawfully killed by Bosnian Serb Forces.[255] Second, he challenges the way the Trial Chamber evaluated demographic and DNA evidence.[256]

93. The Prosecution responds that Tolimir focuses on isolated aspects of the Trial Chamber's consideration of the evidence while ignoring its detailed analysis and that he merely asserts that the Trial Chamber failed to interpret the evidence in a particular manner.[257]

(a) Alleged errors in finding that persons identified from the Srebrenica-related graves were unlawfully killed

94. Tolimir argues that the Trial Chamber's finding that only a minority of the deaths of the Srebrenica-related missing can be attributed to combat, suicide, and other causes is "unrealistic" and based on the presumption that all those persons buried in mass graves are victims of summary execution.[258] He challenges the Trial Chamber's finding that in cases of inconsistencies between DNA identification and court declarations regarding the death of the same person, the DNA is more reliable, arguing that DNA data provides no information about the date and circumstances of death

[251] Trial Judgement, para. 766.
[252] Trial Judgement, para. 1217.
[253] Trial Judgement, para. 1217.
[254] Appeal Brief, paras 103, 119.
[255] Appeal Brief, paras 103-125.
[256] Appeal Brief, paras 126-140.
[257] Response Brief, para. 61.
[258] Appeal Brief, paras 104, 107-108, 119, 125. *See also* Reply Brief, paras 45, 48.

but only identification.[259] In his view, in assessing the number of those unlawfully killed by Bosnian Serb Forces, the Trial Chamber was obliged to estimate the total number of those persons who were killed as a result of combat, suicide, and infighting among the members in the column.[260] Tolimir points to evidence which, he avers, indicates that approximately 3,000 persons were killed in combat or from causes other than murder.[261] He submits that the Trial Chamber failed to provide reasons as to why estimates by individual members of the column of the number of persons killed by military action were not reliable.[262] In support of his argument that Srebrenica-related graves do not contain only victims of execution, Tolimir points to two court declarations concerning persons killed in combat whose remains were found in mass graves,[263] ABiH records showing that 140 persons identified in Srebrenica-related graves died in circumstances unrelated to the Indictment,[264] and information provided by the Dutch Government pertaining to a mass grave containing the bodies of at least seven persons not summarily executed.[265] Finally, he states that there is little evidence of burial and reburial operations, which, in his view, indicates that not only victims of executions were buried in Srebrenica-related mass graves.[266]

95. The Prosecution responds that the Trial Chamber carefully assessed the substance and reliability of DNA, forensic, and demographic evidence, witness testimonies and documentary evidence on the mass executions, burials, and reburials.[267] It submits that Tolimir fails to consider the absence of combat activities inside the Zvornik Brigade area, and the fact that the Trial Chamber did not include among the Srebrenica victims unlawfully killed individuals who were identified from surface remains along the route taken by the column of Bosnian Muslim men.[268] The Prosecution further contends that Tolimir ignores the Trial Chamber's explicit consideration and rejection of the two court declarations and the ABiH records.[269] It also asserts that Tolimir ignores the considerable evidence of and factual findings regarding the reburial operations.[270] Lastly, the Prosecution submits that the Trial Chamber was not required to consider Defence

[259] Appeal Brief, paras 109-111. Tolimir also argues that the Trial Chamber should have considered additional factors in its assessment of the evidence, such as the data on the Srebrenica population and alleged shortcomings in the presentation of DNA analysis results. Appeal Brief, para. 107.
[260] Appeal Brief, paras 105-106. Tolimir argues that there is ample evidence that the ABiH suffered large numbers of casualties during the breakthrough operation that would account for their deaths. Reply Brief, para. 49.
[261] Appeal Brief, paras 120-123.
[262] Appeal Brief, para. 121, *citing* Trial Judgement, para. 593. Tolimir adds that some of the mass graves are located on the line of the column movement. Appeal Brief, para. 105.
[263] Appeal Brief, paras 112-113, 115, *citing* Defence Exhibit 316 (Lukavac Lower Court Decision dated 20 June 1997), Defence Exhibit 317 (Kladanj Municipal Court Decision dated 31 March 2000), T. 11 March 2010 p. 518. *See also* Appeal Brief, paras 109-110, 114.
[264] Appeal Brief, paras 117-118.
[265] Appeal Brief, para. 124, *citing* Defence Exhibit 320 (Dutch news article dated 21 June 2011).
[266] Appeal Brief, para. 116.
[267] Response Brief, para. 62.
[268] Response Brief, para. 63.
[269] Response Brief, para. 64.
[270] Response Brief, para. 65.

Exhibit 320 because it does not concern a Srebrenica-related grave containing victims of executions.[271]

96. Tolimir replies that he "clearly demonstrated" that the Srebrenica-related mass graves contained victims of persons buried prior to the relevant events.[272] He further argues that the Trial Chamber should have considered Defence Exhibit 320 since it indicates that the persons mentioned in this report were probably reported missing and that there are matters related to the Srebrenica events that have not yet been fully investigated.[273]

97. The Appeals Chamber recalls that the Trial Chamber erred by making a finding that 779 victims were killed by Bosnian Serb Forces in circumstances not specified in the Indictment.[274] In light of this Appeals Chamber's finding, Tolimir's arguments as to the methodology used by the Trial Chamber in reaching the higher number of 5,749 are moot. The Appeals Chamber will assess those arguments related to the methodology employed by the Trial Chamber in calculating the 4,970 victims of incidents specified in the Indictment.[275]

98. The Trial Chamber reached its finding that 4,970 individuals were unlawfully killed by Bosnian Serb Forces in the incidents specified in the Indictment[276] by analysing a combination of evidence comprising witness testimony as to the circumstances of the killings, forensic evidence, and demographic data.[277] With regard to some incidents, the Trial Chamber reached its findings based on eyewitness accounts alone.[278] The Appeals Chamber finds no support for Tolimir's allegation that, in finding that 4,970 Bosnian Muslims were unlawfully killed, the Trial Chamber employed a presumption that all those persons identified in the mass graves were summarily executed.

99. Insofar as Tolimir suggests that the victims in the mass graves located near the movement of the column were those of ABiH soldiers killed in combat, this argument is rejected. The Appeals Chamber reiterates that in reaching its findings on the incidents in the Indictment, the Trial Chamber did not exclusively rely on the fact that individual victims were recovered from mass

[271] Response Brief, paras 65-66.
[272] Reply Brief, para. 45.
[273] Reply Brief, para. 47. *See* Reply Brief, para. 49.
[274] *See supra*, para. 90.
[275] *See* Appeal Brief, para. 104. The Appeals Chamber notes that Tolimir challenges the lower number of 4,970 victims as well as the higher number of 5,749 victims. The Appeals Chamber further notes that in another section of this Judgement it has granted Tolimir's Ground of Appeal 20, *see infra*, paras 434-435. Tolimir's arguments regarding the methodology used by the Trial Chamber in evaluating the total number of those killed, insofar as they relate to the killings of the six Bosnian Muslim men near Trnovo, are therefore moot.
[276] Trial Judgement, paras 566, 570.
[277] Trial Judgement, paras 49-62, 344, 350-351, 367-376, 397-401, 435-439, 454-458, 478-481, 504-508, 525, 532, 537, 541, 545-546, 550, 569.
[278] Trial Judgement, paras 309, 313-314, 345-348, 381, 396-397, 487-488.

graves, but based its findings on a range of evidence.[279] The Appeals Chamber furthermore notes that in concluding that only a minority of deaths of the Srebrenica-related missing could be attributed to combat, suicide and other causes, the Trial Chamber explicitly considered the evidence referred to by Tolimir that, in his submission, supported a finding that up to 3,000 Bosnian Muslims died as a result of these causes.[280] Contrary to Tolimir's submission, the Trial Chamber explained its reasons for not relying on this evidence – in its view, the assessments made in the immediate aftermath of the fall of Srebrenica were based on patchy information and rough estimates.[281] Tolimir fails to show that no reasonable trial chamber could have relied on the demographic and forensic evidence, together with the large amount of testimony related to specific incidents, in order to make findings on how the victims were killed.[282]

100. The Appeals Chamber further dismisses Tolimir's argument that the Trial Chamber should have estimated the number of people killed as a result of combat, infighting in the column, or suicide. The Trial Chamber was under no obligation to make such a finding in assessing the counts under the Indictment. As previously discussed, the Trial Chamber made detailed findings on the number of people unlawfully killed in each incident charged in the Indictment and then made a calculation of the overall number of victims on the basis of these findings.[283] In view of the cautious and conservative approach of the Trial Chamber in making findings on the number of victims for each incident, there was no reason for the Trial Chamber to make additional findings on the number of people who died in other circumstances. Nor would such a finding have impacted the Trial Chamber's finding on the overall number of people who were unlawfully killed in the circumstances specified in the Indictment.

101. The Appeals Chamber notes that the Trial Chamber explicitly considered and rejected the two court declarations concerning persons killed in combat whose remains were found in mass graves.[284] In this context, having evaluated Prosecution Witness demographer Ewa Tabeau's explanation as to the reliability of the court declarations *vis-à-vis* the ICMP data, the Trial Chamber reasonably concluded that in cases of inconsistencies between DNA-based identification of Srebrenica-related missing and court declarations regarding the same persons, the DNA-based identification is more reliable.[285]

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[279] *See supra*, para. 98.
[280] Trial Judgement, paras 592-594.
[281] Trial Judgement, para. 593.
[282] Trial Judgement, para. 594.
[283] *See supra*, para. 98.
[284] Trial Judgement, para. 60 and n. 151.
[285] Trial Judgement, para. 60.

102. Similarly, the Trial Chamber explicitly considered and rejected the ABiH records as conclusive proof that 220 individuals associated with the ABiH had died prior to July 1995, 140 of whom were identified by the ICMP in Srebrenica-related graves.[286] It specified that following clarification by the Bosnian authorities and findings by the ICMP "most of the 220 cases were indeed Srebrenica-related" and that the scale of any inconsistency is "small".[287]

103. With regard to Defence Exhibit 320, a report of the Dutch Government on a mass grave found in Srebrenica, the Appeals Chamber notes that the report neither confirms nor denies that the seven Bosnian Muslim victims were summarily executed and hence does not support Tolimir's argument that not each and every grave connected with Srebrenica contains the remains of those who were summarily executed. In any event, Tolimir fails to demonstrate that the Trial Chamber erred by not explicitly considering this evidence in evaluating the number of individuals killed in the incidents specified in the Indictment.

104. Since Tolimir does not substantiate his assertion that there is scant evidence of the reburial operation,[288] this argument is summarily dismissed.

(b) Demographic and DNA-based evidence to identify and establish the number of Srebrenica-related missing and killed

105. Tolimir challenges the reliability of the demographic and DNA-based evidence used by the Trial Chamber to establish the number of Srebrenica-related missing and of those who were killed in the aftermath of the fall of Srebrenica.[289] The Appeals Chamber will address Tolimir's arguments insofar as they relate to the Trial Chamber's use of demographic and DNA-based evidence in its findings on the number of victims of incidents specified in the Indictment.[290]

106. First, Tolimir submits that the Trial Chamber erred in rejecting his argument at trial that the estimate of 7,000 victims is untenable "if the number of people about whom the WHO had information in the area of the Tuzla-Podrinje Canton on 29 July – 34,341 – is subtracted from the number of those in Srebrenica in January 1995 – 37,555 people".[291] According to Tolimir, the

[286] Trial Judgement, para. 61.
[287] Trial Judgement, para. 61.
[288] *See* Appeal Brief, para. 116.
[289] Appeal Brief, paras 126-140.
[290] *See supra*, para. 98 and n. 277 for those findings which were, *inter alia,* based on demographic and forensic evidence.
[291] Appeal Brief, para. 126, *citing*, *inter alia*, Prosecution Exhibit 2873 (Tuzla WHO field office report of 29 July 1995), Defence Exhibit 117 (Civilian Protection Staff of Srebrenica Municipality report of 11 January 1995), and, in error, Trial Judgement, paras 574-757. The Appeals Chamber understands Tolimir to have intended to cite Trial Judgement, paras 574-575. *See* Appeal Brief, para. 127. *See also* Appeal Brief, para. 131.

WHO figures are reliable, notwithstanding the fact that they are approximations.[292] He further avers that the Trial Chamber erroneously concluded that the value of the Srebrenica Municipality Civilian Protection Staff figures (Defence Exhibit 117) was limited.[293]

107. Second, Tolimir submits that the Trial Chamber erred in finding the DNA-based identification evidence of the ICMP reliable, referring to the Trial Chamber's finding that the number of those killed has largely been derived from DNA identification.[294] He contends that there is no evidence that the ICMP employed traditional forensic scientist reviews and related evidence to ensure that the match is valid and that, consequently, the ICMP data cannot be regarded as reliable.[295] Tolimir submits that the Trial Chamber erroneously relied on Thomas Parsons's statement that "concordance of DNA and non-DNA data was […] one of the pillars of the ICMP identification process" despite no evidentiary support that such concordance was in fact established by the ICMP.[296] He further avers that DNA data was presented without relevant supporting material, in particular, the reports provide no information as to time, cause, and manner of death.[297] In his view, the ICMP data is not reliable with regard to the date and place of disappearance because the ICMP simply included two nominal dates in relation to the date of disappearance and that no reasonable trial chamber would have relied on such information.[298] He further submits that the Trial Chamber also erred in failing to request the documents required to assess the reliability of the expert report.[299] He points out that electroencephalograms,[300] which are necessary to verify the accuracy of a DNA report, were only available in relation to a small percentage of cases, namely those relating to the mass gravesite at Bišina.[301] As to Parsons's explanation that relatives had concerns about providing genetic information to individuals considered to be complicit in the death of family members, he argues that such information could have been provided to the Prosecution, Trial Chamber, or defence counsel.[302] Tolimir also contends that the ICMP reports do not meet the

[292] Appeal Brief, para. 127, *citing* Prosecution Exhibit 2873 (Tuzla WHO field office report of 29 July 1995).
[293] Appeal Brief, paras 128-129.
[294] Appeal Brief, paras 132-139.
[295] Appeal Brief, para. 135.
[296] Appeal Brief, para. 134, *citing* Trial Judgement, n. 144.
[297] Appeal Brief, paras 134, 137.
[298] Appeal Brief, para. 135, *citing*, Prosecution Exhibits 136 (Decision from the RS General Staff assigning a Commission for the handing over of the Drina Corps archives, signed by General Đukić, dated 8 December 2004) and 137 (Travel authorisation issued by the RS Ministry of Defence, dated 8 December 2004). The Appeals Chamber understands Tolimir to have intended to cite Prosecution Exhibit 1936 (transcript of Thomas Parsons in the *Prosecutor v. Popović et al.* case dated 1 February 2008 and 29 April 2009), p. 20875 and Prosecution Exhibit 1937 (Curriculum Vitae of Thomas J. Parsons, Ph.D.). In this context, Tolimir further submits that Prosecution expert witness Parsons himself testified that the ICMP lacked a comprehensive investigative programme that would seek to reconcile the various lists or definitively investigate missing person reports from family members.
[299] Appeal Brief, para. 136.
[300] Electroencephalograms are "the raw data by which an analyst derives the DNA profile" (Prosecution Exhibit 1936 (transcript of Prosecution expert witness Parsons in the *Prosecutor v. Popović et al.* case dated 1 February 2008), p. 20910).
[301] Appeal Brief, para. 137.
[302] Appeal Brief, para. 136, *citing* T. 25 February 2012 p. 10445.

minimum standards of reliability for expert reports because they fail to provide clear references and accessible sources.[303]

108. Third, Tolimir submits that the ICMP and ICRC lists cannot be considered completely reliable because: (i) individuals were reported missing by family members and friends; and (ii) there is no reliable evidence as to how the lists were updated or their accuracy ensured.[304] In support of his submission, he points to the evidence of Witness Ramiz Bećirović, Commander of the 28th Division of the ABiH, that individuals named as killed were present with him in the Drč sector.[305] He also refers to a report by Svetlana Radovanović, which, in his submission, casts doubt on the reliability of the demographic data.[306]

109. The Prosecution responds that Tolimir's arguments are simply a repetition of unsuccessful trial arguments and ignore the Trial Chamber's other relevant findings.[307] It argues that Tolimir merely asserts that the Trial Chamber must have failed to consider relevant evidence without showing that no reasonable trial chamber could have reached the same conclusion.[308]

110. The Prosecution responds further that the Trial Chamber duly considered Tolimir's arguments and gave a reasoned opinion in dismissing them.[309] The Prosecution avers that Tolimir fails to consider the Trial Chamber's findings that the ICRC "applies a very selective method when accepting reports on the missing", and that "the reports generated by the ICMP on the basis of the DNA analysis can be fully relied upon".[310]

111. The Appeals Chamber notes that the Trial Chamber rejected Tolimir's argument based on the WHO figures on a number of bases.[311] Apart from his argument about how approximate the WHO figures may be, Tolimir fails to address why the Trial Chamber's other reasons for rejecting this argument – in particular, the limited value of the data due to the absence of data on individuals and the fact that Tolimir's approach ignores the significant amount of evidence related to the killings and forensic analysis – amount to an error. Tolimir further fails to substantiate his allegations that there is "evidence that until January throughout July, some people left Srebrenica"

[303] Appeal Brief, paras 138-139, *citing Stanišić and Simatović* Rule 94*bis* Decision, para. 9.
[304] Appeal Brief, para. 140.
[305] Appeal Brief, para. 140, *citing* Defence Exhibit 1 (statement of Ramiz Becirović dated 11 August 1995), p. 15.
[306] Appeal Brief, para. 133.
[307] Response Brief, para. 72.
[308] Response Brief, para. 72.
[309] Response Brief, para. 67. *See also* Response Brief, para. 72 and n. 261, listing a number of submissions from the Appeal Brief and corresponding arguments from Tolimir's Final Trial Brief.
[310] Response Brief, para. 71, *citing* Trial Judgement, paras 51, 57 (internal citations omitted).
[311] Trial Judgement, para. 574. In particular, the Trial Chamber pointed to the fact that the data concerns a time six months prior to the fall of the enclave; the difficult conditions existing at that time; and the absence of data on specific individuals.

and that no additional refugees arrived in the enclave.[312] The Appeals Chamber observes that Defence Exhibit 117 containing data on a number of municipalities[313] is not comparable to the definition of "Srebrenica-related missing" employed by the Trial Chamber.[314] Tolimir thus fails to demonstrate how Defence Exhibit 117 could undermine the credibility of the data relied upon by the Trial Chamber. In view of the above, the Appeals Chamber dismisses this argument.

112. The Appeals Chamber further notes that Tolimir already raised the argument at trial that the DNA matches as reported by the ICMP cannot be used as the sole method to establish the facts because DNA-led identification needs to be supplemented by traditional anthropological methods.[315] The Trial Chamber considered and dismissed this argument on the grounds that: (i) it rested on an administrative practice; and (ii) Parsons testified that concordance of DNA and non-DNA data was an important part of the ICMP identification process.[316] The Appeals Chamber further observes that the numbers of Srebrenica-related missing identified by DNA analysis were used exclusively by the Trial Chamber to determine the numbers of persons recovered from gravesites, and not to establish the cause of death of these persons.[317] The Trial Chamber made specific reference to the definition for place and date of disappearance used by the ICMP.[318] Since the date of disappearance and the date of death are separate from the question of whether a person's remains were located in a specific gravesite, and since the DNA methodology was used by the Trial Chamber exclusively to determine that a person's remains were found in a specific gravesite, the Appeals Chamber finds that the arguments advanced by Tolimir are irrelevant to the reliability of the DNA identification methodology as such. Tolimir fails to demonstrate an error on the part of the Trial Chamber in rejecting his arguments at trial and these arguments are therefore dismissed.

113. With respect to Tolimir's third argument, the Appeals Chamber understands Tolimir to challenge the credibility of the 2009 Integrated Report, prepared by Helge Brunborg and Ewa Tabeau,[319] and the 2009 List of Missing.[320] The Appeals Chamber notes that the 2009 Integrated Report does not exclusively rely on the ICMP data, but rather combines DNA analysis with demographic data, which, as the Trial Chamber noted, corroborate each other.[321] The Trial Chamber

[312] Appeal Brief, para. 129.
[313] Defence Exhibit 117 (Srebrenica Municipality Civilian Protection Staff figures), Table 1. This data relates to Srebrenica, Bratunac, Vlasenica, Zvornik, Han Pijesak, Višegrad, and Rogatica municipalities.
[314] Trial Judgement, para. 51, n. 120, *citing* Prosecution Exhibit 1776 (2009 Integrated Report), Annex 2. The Trial Chamber considered data related to Srebrenica, Bratunac, Vlasenica, Zvornik, Han Pijesak, Rogatica Bijeljina, Kalesija, Kladanj, Šekovići as well as Bajina Bašta, Ljubovija, and Valjevo.
[315] Tolimir's Final Trial Brief, paras 229-233. *See also* Tolimir's Final Trial Brief, paras 271, 274.
[316] Trial Judgement, n. 144.
[317] Trial Judgement, para. 58.
[318] Trial Judgement, n. 120.
[319] Prosecution Exhibit 1776 (2009 Integrated Report).
[320] Prosecution Exhibit 1777 (2009 List of Missing). *See* Trial Judgement, para. 50.
[321] Trial Judgement, para. 58, *citing* T. 16 March 2011 p. 11406.

comprehensively described and analysed the various lists of demographic data used by Brunborg and Tabeau for establishing lists of the Srebrenica-related missing.[322] The Appeals Chamber notes that, while the ICRC list was extensively relied on,[323] neither the ICMP data nor any other source was used by Brunborg and Tabeau as an exclusive source.[324] The Trial Chamber specifically noted that the two demographers did not use lists of the missing maintained by the parties to the conflict in order to ensure neutrality.[325] The Appeals Chamber further notes that the 2009 Integrated Report took into account ABiH army records to identify individuals on the OTP list of Srebrenica-related missing and dead who possibly might have died in combat situations, but noted that the ABiH records did not provide information on the cause of death.[326] Further, in assessing the accuracy of the lists of Srebrenica-related missing, the Trial Chamber explicitly noted demographer Helge Brunborg's explanation as to the inconsistencies pointed out by Svetlana Radovanović, although her report, as Tolimir concedes,[327] was never tendered into evidence.[328] As noted above, the ICMP data was used only to establish the number of so-called "Srebrenica-related identified" persons, that is, persons who were reported missing and whose remains were subsequently exhumed and identified through DNA analysis.[329]

114. The Appeals Chamber further notes the Trial Chamber's finding that the demographic profile of the Srebrenica-related missing that resulted from Brunborg and Tabeau's work corresponded with what is independently known of those people who were separated at Potočari or captured from the column.[330] The Trial Chamber found, on the basis of eyewitness accounts, that individuals were killed by Bosnian Serb Forces.[331] These accounts include estimates on the number of people killed.[332] Bećirović's statement that "when they started naming the persons who had been seen to be killed, I saw that these persons had been with us in the Drč sector, so I could not accept all this information as accurate" describes the information he was receiving while he was still in the

[322] Trial Judgement, paras 51-52.
[323] Trial Judgement, para. 51, *citing* T. 16 March 2011 p. 11407, T. 17 March 2011 p. 11447. *See also* Prosecution Exhibit 1776 (2009 Integrated Report), p. 2, which clarifies that the ICRC list in question is the 2008 ICRC list.
[324] Trial Judgement, para. 51, *citing* Prosecution Exhibit 1776 (2009 Integrated Report), pp. 1-2.
[325] Trial Judgement, para. 52.
[326] Prosecution Exhibit 1776 (2009 Integrated Report), Annex 3, p. 36.
[327] Appeal Brief, para. 133.
[328] Trial Judgement, para. 54. *See also* T. 9 February 2011 pp. 9647-9652.
[329] *See supra*, para. 112. *See also* T. 16 March 2011 p. 11406; Prosecution Exhibit 1776 (2009 Integrated Report), Annex 2, p. 34.
[330] Trial Judgement, para. 53.
[331] *See* Trial Judgement, paras 309, 346, 396-397, 449, 474.
[332] *See* Trial Judgement, para. 376, *citing* eyewitnesses Predrag Čelić's assessment that the column of prisoners who went by foot from Sandići Meadow to Kravica Warehouse numbered between approximately 600 and 800 (Prosecution Exhibit 1633 (Transcript of testimony of Predrag Čelić in the *Prosecutor v. Popović et al.* case, dated 28 June 2007), p. 13477) and PW-006's statement that two busloads also arrived there (Prosecution Exhibit 2797, (Transcript of testimony of PW-006 in the *Prosecutor v. Popović et al.* case, dated 6 February 2007), pp. 6978-6981). *See also infra*, paras 119-122.

column.[333] At most, this evidence indicates that the information Bećirović was receiving at the time was not reliable as to the identity of persons from the column who had been killed. However, it does not undermine the credibility of the OTP lists. The Appeals Chamber therefore finds that it was reasonable for the Trial Chamber to find the lists maintained by the OTP of Srebrenica-related missing with integrated DNA identifications reliable. Consequently, Tolimir's arguments are dismissed.

3. The Trial Chamber's findings on four incidents specified in the Indictment

115. Tolimir submits that the Trial Chamber erred in fact in calculating the number of Bosnian Muslims killed at four incidents specified in the Indictment, namely the killings at the Branjevo Military Farm, the killings at Pilica Cultural Centre, the 10 Bosnian Muslim men taken from the Milići Hospital ("10 Milići Prisoners"), and the four Bosnian Muslim men who survived the events at the Branjevo Military Farm.[334]

116. The Prosecution responds that Tolimir's challenges should be summarily dismissed since Tolimir is merely offering his own interpretation of the evidence and fails to show any error by the Trial Chamber.[335]

(a) Branjevo Military Farm

117. Tolimir argues that the Trial Chamber improperly weighed evidence and failed to consider all its factual findings in concluding that 1,000 to 1,500 Bosnian Muslims at the Branjevo Military Farm were shot and killed.[336] Tolimir emphasises Prosecution Witness Dražen Erdemović's testimony that he did not count the buses but only estimated their number.[337] Tolimir also argues that the Trial Chamber erred in relying on Prosecution Witness PW-073's estimate considering "the circumstances in which [PW-073] was trapped".[338] Tolimir further submits that even the lower estimate of 1,000 individuals is unrealistic given Erdemović's description of the manner in which the executions were conducted and the time frame in which they occurred, because the finding suggests an impossible rate of killings.[339]

[333] Defence Exhibit 1 (statement of Ramiz Bećirović dated 11 August 1995), p. 15.
[334] Appeal Brief, paras 93-102.
[335] Response Brief, para. 57.
[336] Appeal Brief, para. 93, *citing* Trial Judgement, paras 459, 491-500. *See also* Appeal Brief, para. 97.
[337] Appeal Brief, para. 95, *citing* T. 4 May 2007 p. 10983, T. 17 May 2010 p. 1881. *See also* Appeal Brief, para. 94.
[338] Appeal Brief, para. 95, *citing* Prosecution Exhibit 48, p. 1208.
[339] Appeal Brief, para. 96, *citing* Trial Judgement, paras 491-494. *See also* Appeal Brief, para. 94.

118. The Prosecution argues that the Trial Chamber's finding regarding the Branjevo Military Farm incident was not based exclusively on the witness statements challenged by Tolimir, but also on forensic and DNA evidence.[340]

119. The Trial Chamber found that on 16 July 1995 approximately 1,000 to 1,500 Bosnian Muslims were transported by bus to the Branjevo Military Farm where they were shot and killed by members of the 10th Sabotage Detachment and VRS soldiers from Bratunac.[341] Tolimir does not dispute the fact that a mass execution took place at the Branjevo Military Farm on 16 July 1995 but challenges the Trial Chamber's calculation of the number of victims. The Appeals Chamber notes that the Trial Chamber based its findings on how the killing operation unfolded on the corroborative eyewitness accounts of Erdemović, a member of the 10th Sabotage Detachment, and Prosecution Witnesses PW-073 and PW-016 who both survived the incident.[342] Tolimir's argument that Erdemović did not count the number of buses arriving is unpersuasive. As acknowledged by Tolimir, Erdemović provided an estimate of the number of buses, and based on this, an estimate of the number of persons who were killed.[343] Given his proximity to the events at all relevant times, it was reasonable for the Trial Chamber to have considered that Erdemović was well-positioned to do so and, accordingly, to provide a reliable estimate of the number of persons killed.[344]

120. With respect to Tolimir's claim that the Trial Chamber should not have relied on PW-073's estimate that there were between 1,000 and 1,500 victims given that he was trapped, the Appeals Chamber notes PW-073's evidence that: (i) prior to reaching his group's designated execution spot, they "passed through the ranks of the dead, through the lines of dead";[345] (ii) seven columns of people were subsequently executed;[346] and (iii) while concealed in the shrubbery for several hours, he could see the soldiers walking around the dead.[347] Tolimir fails to show that no reasonable trial chamber could have relied upon PW-073's estimate.

121. In regard to the contention that it was not possible for even 1,000 men to be killed in the circumstances described by the Trial Chamber, the Appeals Chamber notes the Trial Chamber's

[340] Response Brief, para. 58.
[341] Trial Judgement, para. 495. *See also* Trial Judgement, paras 491-494.
[342] Trial Judgement, paras 493-495. *See also* Trial Judgement, nn. 2174, 2178, 2181, 2184.
[343] Prosecution Exhibit 215 (Transcript of testimony of Dražen Erdemović in the *Prosecutor v. Popović et al.* case, dated 4 and 7 May 2007), p. 10983.
[344] Erdemović testified that he took part in all the executions. *See* Prosecution Exhibit 215 (Transcript of testimony of Dražen Erdemović in the *Prosecutor v. Popović et al* case dated 4 and 7 May 2007), p. 10972.
[345] Prosecution Exhibit 48 (under seal version of transcript of testimony of PW-073 in the *Prosecutor v. Popović et al.* case, dated 6 and 7 September 2006), p. 1202.
[346] Prosecution Exhibit 48 (under seal version of transcript of testimony of PW-073 in the *Prosecutor v. Popović et al.* case, dated 6 and 7 September 2006), p. 1203.
[347] Prosecution Exhibit 48 (under seal version of transcript of testimony of PW-073 in the *Prosecutor v. Popović et al* case, dated 6 and 7 September 2006), p. 1205.

findings that additional soldiers arrived to assist with executions (amounting to 18 in total)[348] that the soldiers used machine guns followed by single gun shots,[349] and that the executions continued for five to six hours.[350] It is also noted that the timings given by the Trial Chamber were only approximations.[351] Moreover, while the figures provided by Erdemović and PW-073 were estimates, they corroborate each other. In the view of the Appeals Chamber, it was reasonable for the Trial Chamber to conclude, on the basis of the eyewitness testimony, that between 1,000 and 1,500 persons were executed within a time frame of five to six hours.

122. Furthermore, the Trial Chamber found that its calculation of the number of victims of the Branjevo Military Farm incident based on eyewitness testimony was corroborated by forensic evidence, which established that at least 1,656 individuals were killed at the Branjevo Military Farm and Pilica Cultural Centre on 16 July 1995.[352] The Trial Chamber relied on the 1,656 figure in all its subsequent factual and legal findings regarding the number of those killed at the Branjevo Military Farm and Pilica Cultural Centre.[353] Tolimir fails to show any error on the part of the Trial Chamber. His argument is thus dismissed.

(b) Pilica Cultural Centre

123. The Trial Chamber found that on 16 July 1995, Bosnian Serb Forces killed approximately 500 Bosnian Muslim men at the Pilica Cultural Centre.[354] The Appeals Chamber notes that Tolimir offers no support for his allegation that the Trial Chamber erred in making this finding.[355] This argument is therefore summarily dismissed.

(c) Bosnian Muslim men taken from the Milići Hospital

124. Tolimir submits that the Trial Chamber erred in concluding that Bosnian Serb Forces killed the 10 Milići Prisoners and could not have relied on the context of the events taking place in the aftermath of the fall of Srebrenica and on the circumstances of their disappearance to make this finding.[356] He argues that the Trial Chamber based its finding on the "highly unreliable" testimony of Prosecution Witness PW-057 and failed to exercise any caution in assessing his evidence, which

[348] Trial Judgement, para. 494.
[349] Trial Judgement, para. 493.
[350] Trial Judgement, para. 494.
[351] *See* Trial Judgement, para. 494. In particular, the Appeals Chamber notes that the Trial Chamber found that the killing of Bosnian Muslims lasted from "approximately 10:00 a.m. until 3:00 or 4:00 p.m.". Trial Judgement, para. 494.
[352] Trial Judgement, para. 508.
[353] *See* Trial Judgement, paras 568, 570 (overall number of those unlawfully killed), 721 (murder), 727, 729 (extermination), 751-752 (killing members of the group as acts of genocide), 862 (killings as acts of persecution), 1217 (sentencing).
[354] Trial Judgement, paras 496, 500.
[355] Appeal Brief, para. 93.

was based on hearsay.[357] Tolimir also contests the Trial Chamber's reliance upon the most recent list of missing persons, arguing that the list gives no insight into the circumstances of death. He further points out that the remains of these individuals have not been discovered.[358]

125. The Prosecution responds that Tolimir ignores other evidence that the Trial Chamber relied upon in reaching its finding on the 10 Milići Prisoners.[359]

126. The Appeals Chamber recalls that a body need not be recovered in order to establish that a person has been killed and that a victim's death can be inferred circumstantially from all of the evidence presented to the trial chamber.[360] In order to challenge a trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.[361] The Appeals Chamber further recalls that hearsay evidence is in principle admissible,[362] although in assessing its probative value, the surrounding circumstances must be considered.[363]

127. The Trial Chamber found that, at some time after 23 July 1995, members of the Bosnian Serb Forces killed 10 Bosnian Muslims who had been medically treated at the Standard Barracks of the Zvornik Brigade following their transfer from the Milići Hospital.[364] The Trial Chamber based this finding on: (i) evidence that Vujadin Popović came to the Standard Barracks on 23 July 1995 to deal with the captured prisoners; (ii) testimony from PW-057 that, according to Vinko Pandurević, the men were taken away after Popović arrived with an order from Mladić that they should be liquidated;[365] (iii) the evidence of Dr. Zoran Begović, a doctor working in the Zvornik Brigade Medical Centre, that he was informed that the wounded had been taken away early one morning without their medical records or any of the medical staff to escort them contrary to standard practice;[366] and (iv) the fact that the names of all 10 men appear in the most recent list of persons reported as missing or dead after the takeover of Srebrenica.[367]

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[356] Appeal Brief, para. 99, *citing* Trial Judgement, para. 533, Reply Brief, para. 44. *See also* Appeal Brief, para. 100.
[357] Appeal Brief, para. 99, *citing*, *inter alia*, Trial Judgement, para. 531.
[358] Appeal Brief, para. 99, *citing* Trial Judgement, para. 532.
[359] Response Brief, para. 59.
[360] *Kvočka et al.* Appeal Judgement, para. 260.
[361] *Lukić and Lukić* Appeal Judgement, para. 149.
[362] *Lukić and Lukić* Appeal Judgement, para. 303; *Blaškić* Appeal Judgement, para. 656, n. 1374. *See Popović et al.* Appeal Judgement, paras 1276, 1307.
[363] *Popović et al.* Appeal Judgement, para. 1307; *Lukić and Lukić* Appeal Judgement, para. 303; *Haradinaj et al.* Appeal Judgement, paras 85-86. *See also Karera* Appeal Judgement, para. 39.
[364] Trial Judgement, paras 528-529, 533.
[365] Trial Judgement, paras 531, 533.
[366] Trial Judgement, para. 531, *citing* Prosecution Exhibit 1638 (Transcript of Zoran Begović's testimony in the *Prosecutor v. Popović et al.* case, dated 21 March 2007) p. 9135. The Appeals Chamber notes that the transcript was tendered into evidence pursuant to Rule 92*bis*(A) of the Rules and that, therefore, Dr. Begović did not appear as a witness in the trial proceedings and was not subject to cross-examination by Tolimir. However, the Appeals Chamber does not find a reason for the Trial Chamber to have doubted the credibility of Dr. Begović's evidence

128. With respect to the testimony of PW-057, the Appeals Chamber notes that the Trial Chamber specified that it had taken additional care in evaluating PW-057's evidence on the basis of the circumstances in which it was given and in the case as a whole, and had only given weight to it where it had been corroborated or otherwise deemed reliable. In light of this, the Appeals Chamber is satisfied that the Trial Chamber exercised due caution in accepting PW-057's evidence in regard to the incident. Moreover, given the corroborative evidence regarding the fate of the 10 Milići Prisoners as outlined above, the Appeals Chamber considers that a reasonable trier of fact could have reached the conclusion that the only reasonable inference from the evidence was that the 10 Milići Prisoners were killed by Bosnian Serb Forces. Tolimir's argument is dismissed.

(d) Four survivors of the Branjevo Military Farm

129. Tolimir submits that the Trial Chamber erred in finding that Bosnian Serb Forces killed four Bosnian Muslim men who had survived the events at the Branjevo Military Farm.[368] In particular, he contends that the Trial Chamber failed to establish any facts concerning their disappearance and he contests the Trial Chamber's reliance on the "highly unreliable" evidence of PW-057.[369]

130. The Prosecution responds that Tolimir exclusively focuses on the alleged unreliable evidence of PW-057 while ignoring the other evidence considered by the Trial Chamber when making its finding.[370]

131. The Trial Chamber found that four Bosnian Muslims who had survived the events at the Branjevo Military Farm were captured and held in the Detention Unit of the Zvornik Brigade.[371] The Trial Chamber concluded that "in the context of the events following the fall of Srebrenica and in view of the circumstances of their disappearance", members of the Bosnian Serb Forces killed them on or shortly after 26 July 1995.[372] The Trial Chamber based its finding that they were killed while in the custody of the Zvornik Brigade on: (i) the evidence of Nebojša Jeremić, a member of

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regarding the fact that he was informed that the 10 Bosnian Muslim men had been taken away early in the morning. This statement corroborates PW-057's testimony that a duty officer told him that the wounded had been taken away early in the morning. Trial Judgement, para. 531, n. 2367, *citing* Prosecution Exhibit 2279 (Transcript of PW-057's testimony in the *Prosecutor v. Popović et al.* case, dated 24 September 2007), pp. 15915-15916.

[367] Trial Judgement, para. 532, *citing* Prosecution Exhibit 1777 (2009 List of Missing), pp. 29, 33, 66, 68, 92, 113, 115, 177, 182, 202 (page references made to page numbers on eCourt), Prosecution Exhibit 1940.

[368] Appeal Brief, para. 101, *citing*, in error, Trial Judgement, para. 451. The Appeals Chamber understands Tolimir to have intended to cite Trial Judgement, para. 541. *See also* Appeal Brief, para. 102.

[369] Appeal Brief, para. 101, *citing* Trial Judgement, para. 540. Tolimir submits that the context of the events following the fall of Srebrenica and the circumstances of the disappearance of the survivors are not indicative that they were killed by the Bosnian Serb Forces, and that further evidence would be required to establish such a finding. Reply Brief, para. 44.

[370] Response Brief, para. 59.

[371] Trial Judgement, paras 539-541.

[372] Trial Judgement, para. 541.

the Crime Prevention Service of the Zvornik Brigade, who took statements from the four men;[373] (ii) documentary evidence of such statements; (iii) documentary evidence of a judgement handed down to two members of the VRS who were found guilty of not reporting the discovery of the men; and (iv) the evidence of PW-057 of a conversation regarding the four men between Drago Nikolić and Vinko Pandurević.[374] In coming to its finding that the men had been killed, the Trial Chamber also relied on the fact that the names of the four men are included in the most recent list of persons missing or dead after the take-over of Srebrenica.[375]

132. As noted above, the Trial Chamber was appropriately cautious in its reliance on PW-057's testimony.[376] Moreover, PW-057's evidence was corroborated by other relevant evidence as outlined above, which established the circumstances of the men's disappearance. The Appeals Chamber notes that the Trial Chamber carefully evaluated information about the identities of the four Bosnian Muslim men and matched their details with the testimony provided by PW-073, who gave a description of four Bosnian Muslim men who had survived the killings at the Branjevo Military Farm.[377] The fact that the four captives were in fact survivors of the executions at the Branjevo Military Farm is corroborated by PW-057's testimony that Nikolić told the commander of the Zvornik Brigade, Vinko Pandurević, that he had learned that they had escaped from one of the execution sites in Pilica.[378]

133. In the view of the Appeals Chamber, Tolimir has not shown that a reasonable trial chamber could not have found that the only reasonable inference from the evidence was that these four men, survivors of a mass execution of Bosnian Muslim men by Bosnian Serbian Forces, who had found themselves again in the hands of such forces shortly after their escape, and who were never seen again, were subsequently killed by those same forces. Accordingly, Tolimir's challenge is dismissed.

C. Conclusion

134. For the foregoing reasons, the Appeals Chamber dismisses Ground of Appeal 9.[379]

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[373] Trial Judgement, para. 540, *citing* Prosecution Exhibit 1280 (Transcript of testimony of Nebojša Jeremić in the *Prosecutor v. Popović et al.* case, dated 24 and 25 April 2007), p. 10430.
[374] Trial Judgement, para. 540, and accompanying footnotes.
[375] Trial Judgement, para. 541.
[376] *See supra*, para. 128.
[377] Trial Judgement, n. 2396.
[378] Trial Judgement, n. 2399, *citing* Prosecution Exhibit 2279 (Transcript of PW-057's testimony in the *Prosecutor v. Popović et al.* case, dated 27 September 2007), pp. 15916-15917.
[379] Judge Antonetti appends a separate opinion.

V. THE CRIMES

A. Crimes against Humanity

1. Extermination (Ground of Appeal 6)

135. The Trial Chamber convicted Tolimir for having committed extermination as a crime against humanity through his participation in the JCE to Murder.[380] In reaching this conclusion, the Trial Chamber found that there was a widespread and systematic attack by the Bosnian Serb Forces primarily directed against the Bosnian Muslim civilian population of Srebrenica and Žepa during the Indictment period.[381] The single attack was comprised of several interrelated components: the military attacks against both enclaves, the restrictions on humanitarian aid, the removal of women, children, and elderly from the enclaves, and the killing of thousands of Bosnian Muslim males committed in a short period of time, mostly in July 1995.[382] With respect to these killings, the Trial Chamber established that "there was a single deliberate, organised, large-scale operation to murder Bosnian Muslim males",[383] that resulted in at least 4,970 murder victims after the fall of Srebrenica, as well as the death of three prominent Bosnian Muslim leaders from Žepa who were killed "[a]t some point after the middle of August".[384] It found that the murder operation satisfied the *actus reus* of the crime of extermination and was committed with the requisite intent to kill on a massive scale.[385]

(a) Submissions

136. Tolimir challenges his conviction for extermination.[386] Tolimir's principal argument is that the Trial Chamber erred in law by applying an incorrect standard concerning the *mens rea* for extermination as a crime against humanity since, in his submission, the wording of Article 5 of the Statute requires that all crimes against humanity, including extermination, must be "directed against any civilian population" and thus, the victims of extermination must have been targeted on the basis of their civilian status.[387] Tolimir argues that the Trial Chamber moreover erred in finding that the "intended target" of the mass murder operation was civilians.[388] He submits that the target of the murder operation was military-aged men who were considered to be members of the ABiH Army, particularly given the general mobilisation order issued by the ABiH to the men within the

[380] Trial Judgement, paras 1180-1183, 1239.
[381] Trial Judgement, paras 701, 710.
[382] Trial Judgement, paras 701, 710.
[383] Trial Judgement, para. 729.
[384] Trial Judgement, paras 727-729.
[385] Trial Judgement, paras 729, 1180.
[386] Appeal Brief, paras 65-71.
[387] Appeal Brief, paras 65-66. *See also* Reply Brief, para. 31.

Srebrenica enclave a few days before its fall, which in his view, had the effect of stripping the men of their civilian status.[389] He argues that the Trial Chamber found that the murder victims were predominantly males of military age who were either separated at Potočari or captured from a column that was engaged in a typical military operation.[390] On this basis, Tolimir contends that the victims of the mass murder were not civilians or were not targeted because they were civilians or predominantly civilians.[391] For similar reasons, he adds that the Trial Chamber also erred in finding that the alleged murder operation of the Bosnian Muslim men from Srebrenica was in itself or part of a widespread or systematic attack against the civilian population.[392] In this respect, he argues that the Trial Chamber erred "in fact and law" in finding that "Bosnian Muslim males were also targeted with little to no effort by the Bosnian Serb Forces to distinguish between civilians and combatants"[393] when making its finding of an attack against a civilian population.

137. Tolimir further submits that the Trial Chamber erred in finding that the killings of the three Bosnian Muslim leaders from Žepa were part of "a single murder operation", since the three men were killed in a period after the murder operation in Srebrenica.[394] He argues that in the circumstances, these three persons cannot be considered victims of the crime of extermination.[395] Tolimir adds that there was no evidence with regard to these three killing incidents.[396]

138. The Prosecution responds that Tolimir fails to establish any error in the Trial Chamber's findings.[397] It submits that the Trial Chamber correctly found that the attack was primarily directed against the Bosnian Muslim civilian population of Srebrenica and Žepa, and included both the killings and the forcible transfer of thousands.[398] The Prosecution contends that the victims of an attack and of crimes against humanity need not be civilians, but may also be persons *hors de combat*.[399] The Prosecution argues that Article 5 of the Statute only requires that the "attack

[388] Appeal Brief, para. 68.
[389] Appeal Brief, paras 67-68. *See also* Reply Brief, para. 33.
[390] Appeal Brief, para. 67; Reply Brief, paras 32-33.
[391] Appeal Brief, para. 70.
[392] Appeal Brief, paras 67-68. *See also* Appeal Brief, para. 70.
[393] Appeal Brief, para. 67, *citing* Trial Judgement, para. 708.
[394] Appeal Brief, para. 69; Reply Brief, para. 35. Tolimir also argues that it is not established that the killings of the three were committed by the same troops, that on the basis of the evidence no reasonable connection can be established between the killings of the three Žepa leaders and the killings of those from Srebrenica, and that the Trial Chamber provided no reasons for its conclusion that the killings of the three men were part of a single large-scale murder operation. Reply Brief, paras 34-35.
[395] Appeal Brief, para. 69.
[396] Appeal Brief, para. 69; Reply Brief, para. 34.
[397] Response Brief, paras 30, 36.
[398] Response Brief, paras 31-32.
[399] Response Brief, paras 32-33, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 36. *See also* Response Brief, para. 30. The Appeals Chamber notes that the Prosecution asserts in paragraph 32 of its Response Brief that the "victims of *an attack* need not be civilians" (emphasis added), and cites the Trial Judgement which refers to the *Mrkšić and Šljivančanin* and *Martić* Appeal Judgements in its Response Brief, n. 119 ("[s]o long as the crimes are part of a widespread or systematic attack on a civilian population, Article 5 does not require proof that the actual victims were civilians").

overall" be directed against a civilian population and that the underlying acts form part of that attack.[400] It further responds that the Trial Chamber did not find that the murder victims were military-aged persons, but rather that the victims included boys, elderly men and women.[401] It asserts that, contrary to Tolimir's claim, the alleged general mobilisation order did not render the men taken from Potočari or the column "combatants" under customary international law,[402] many of whom were found by the Trial Chamber to be civilians who "had never been engaged in armed combat".[403]

139. The Prosecution further submits that Tolimir has failed to show an error in the Trial Chamber's finding that the killing of the three leaders from Žepa formed part of the crime of extermination.[404] It argues that, according to the Tribunal's jurisprudence, the crime of extermination can arise on "an accumulation of separate and unrelated incidents, meaning on an aggregate basis" and that Tolimir fails to show an error in aggregating these three murders with the other murders committed by the "same troops following the same attack on Srebrenica and Žepa".[405]

140. Tolimir replies that the Trial Chamber did not establish that the murders of the three leaders from Žepa had been committed by the "same troops" as the large-scale murders.[406] He argues that the Trial Chamber failed to provide reasons for finding that these murders were part of the one murder operation.[407]

(b) Analysis

141. With respect to Tolimir's argument that the Trial Chamber erred in law in applying an incorrect standard to establish the *mens rea* of extermination by not requiring that the civilian population was the intended target of mass murder,[408] the Appeals Chamber recalls that, as noted by the Trial Chamber,[409] it is well-established that with regard to the victims of the underlying acts of crimes against humanity, "[t]here is nothing in the text of Article 5 of the Statute, or previous

[400] Response Brief, para. 31 (emphasis in original), *citing* Trial Judgement, para. 699, *citing Kunarac et al.* Appeal Judgement, paras 99-100, *Mrkšić and Šljivančanin* Appeal Judgement, para. 41.
[401] Response Brief, para. 33.
[402] Response Brief, para. 34.
[403] Response Brief, para. 34, *citing* Trial Judgement, para. 708.
[404] Response Brief, para. 35. *See also* Response Brief, paras 30, 36.
[405] Response Brief, para. 35, *citing Brdanin* Trial Judgement, para. 391, *Martić* Trial Judgement, para. 63.
[406] Reply Brief, para. 34.
[407] Reply Brief, para. 35.
[408] Appeal Brief, paras 65-66. *See also* Reply Brief, para. 31.
[409] Trial Judgement, para. 697.

authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians".[410] The Appeals Chamber has more specifically clarified that:

> whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement of Article 5 of the Statute that an attack be directed against a "civilian population" is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be "civilians".[411]

142. Accordingly, while the establishment of the *actus reus* of a crime against humanity requires that the crime occur as part of a widespread or systematic attack directed against a civilian population,[412] the victims of the underlying crime do not have to be civilians. The Appeals Chamber thus rejects Tolimir's argument that the Trial Chamber erred in law by applying an incorrect *mens rea* standard for extermination when not requiring proof of intent to commit mass murder against civilians. It was sufficient for the Trial Chamber to be satisfied in that regard that the *mens rea* for the crime of extermination was established on the basis of evidence of the intent to kill on a massive scale as part of a widespread or systematic attack directed against a civilian population.

143. Insofar as Tolimir argues that the murder of the Bosnian Muslim males from Srebrenica did not constitute, in and of itself, or form part of, a widespread or systematic attack against the civilian population of Srebrenica and Žepa because the victims were ABiH fighters, not civilians, the Appeals Chamber considers that, even if the Trial Chamber had accepted that all the men killed were ABiH fighters[413] killed unlawfully *hors de combat*, according to the Trial Chamber's findings, the vast majority of victims of the overall attack on the civilian population of Srebrenica and Žepa, remained civilians.[414] Thus, even if the Trial Chamber had erred in its finding as to the status of the ABiH soldiers, such an error would have had no impact on its conclusions. The Appeals Chamber recalls that the Trial Chamber found that the killing of the Bosnian Muslim men from Srebrenica comprised just one component of the widespread and systematic attack which was directed primarily at the civilian population of Srebrenica and Žepa. The Trial Chamber found that the attack directed against the civilian population also included the military actions against both enclaves, the

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[410] *Martić* Appeal Judgement, para. 307. *See also Popović et al.* Appeal Judgement, para. 569; *Mrkšić and Šljivančanin* Appeal Judgement, para. 29.

[411] *Popović et al.* Appeal Judgement, para. 569. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 32.

[412] *See Popović et al.* Appeal Judgement, para. 569; *Mrkšić and Šljivančanin* Appeal Judgement, para. 41; *Kunarac et al.* Appeal Judgement, paras 99-100.

[413] Regarding Tolimir's claim that a general mobilisation order by the ABiH in the days before the fall of Srebrenica altered the civilian status of all men in the enclave, the Appeals Chamber notes that the Trial Chamber made no finding as to the existence of such an order (by contrast it did find that "[o]n that first day of the VRS attack against Žepa, 14 July [1995], the War Presidency decided that there should be a "general mobilisation" of the population on the territory of Žepa municipality" (Trial Judgement, para. 613)). In view of its finding that the Trial Chamber reasonably found that killings of the men and boys of Srebrenica formed one component of the widespread and systematic attack on the civilian population, the Appeals Chamber need not review the evidence cited by Tolimir in his submissions in this regard (*see* Appeal Brief, n. 50).

[414] *See infra*, n. 415.

removal of thousands of women, children, and elderly, and the restriction of humanitarian aid.[415] Tolimir fails to show any error in these findings. His arguments are thus rejected.[416]

144. Tolimir also submits that no evidence supports the Trial Chamber's findings concerning the killing of Amir Imamović, Avdo Palić, and Mehmed Hajrić ("three Žepa leaders") by "the same troops". The Appeals Chamber notes, in this regard, the Trial Chamber's finding that forensic evidence points towards the violent death of each of these persons caused by damage to the head or skull, and that they suffered fractures caused by projectiles.[417] The Trial Chamber also found that the three leaders were in continued detention by Bosnian Serb Forces before their death.[418] From these findings, the Trial Chamber inferred that the three Žepa leaders were murdered by the Bosnian Serb Forces.[419] The Appeals Chamber finds no error in this determination.

145. Turning to Tolimir's arguments regarding the Trial Chamber's aggregation of the killing of the three Žepa leaders with the murder operation in Srebrenica, the Appeals Chamber notes the Trial Chamber's findings that the mass killings of the men and boys from Srebrenica occurred between 13 and 16 July 1995 and over several weeks after 16 July 1995.[420] By contrast, the Trial Chamber found that Bosnian Serb Forces took custody of the three Žepa leaders on 27 July 1995

[415] Trial Judgement, paras 701, 710. The Trial Chamber found in particular that by early July 1995, there were an estimated 42,000 persons inside the Srebrenica enclave and approximately 6,500 to 10,000 people in the Žepa enclave with no food, no water, and few medical supplies (Trial Judgement, paras 196-199, 202-204, 242); that some 25,000-30,000 Bosnian Muslims, almost entirely women, children and the elderly were forcibly transferred from Potočari (Trial Judgement, paras 304, 808, 817, 842); and that nearly 4,400 Bosnian Muslim civilians were forcibly transferred from Žepa (Trial Judgement, paras 645-649, 827, 833, 842). In contrast, the Trial Chamber found that the large-scale murder operation after the fall of Srebrenica and the three Žepa leaders in August 1995 involved at least 4,970 Bosnian Muslim male victims. *See* Trial Judgement, paras 571, 727-729. The Appeals Chamber's conclusion that the Trial Chamber did not commit any error in finding a single widespread and systematic attack against the Bosnian Muslim civilians of Srebrenica and Žepa does not negate the distinction in the Indictment and the Trial Judgement between the different interrelated components of that attack, namely the killing operation (that was charged and found to have been executed through the JCE to Murder) and the forcible transfer operations in Srebrenica and Žepa (that were pleaded and found to have been part of the JCE to Forcibly Remove). The distinction between the different components of that attack is important for the purposes of the legal questions in other parts of this Judgement, while the inquiry and conclusions in this section (and the corresponding section of the Trial Judgement) only relate to the *chapeau* requirements of Article 5 of the Statute.

[416] The Appeals Chamber observes that the Trial Chamber considered some members of the group of men killed as persons *hors de combat* when determining the civilian status of the population subjected to a widespread or systematic attack, and in so doing cited jurisprudence that pronounces on the status of victims of underlying acts of crimes against humanity. Trial Judgement, para. 708, n. 3038 and para. 697, n. 2976, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 36, *Martić* Appeal Judgement, para. 307. The Appeals Chamber observes that these considerations of persons *hors de combat* and the reference to the above mentioned case law on victims of the underlying crimes may be misleading when placed in the context of making a finding of an attack against a civilian population concerning the *chapeau* element of Article 5 of the Statute, since it may risk to convey the appearance of an inapposite blending of this finding with the finding of the status of the victims of the underlying crime which amounts to a crime against humanity. For the sake of a clear and unambiguous jurisprudence, the Appeals Chamber would like to underscore that these are, however, two distinct legal elements.

[417] Trial Judgement, para. 680.

[418] Trial Judgement, paras 658-659, 661-666, 677-679.

[419] Trial Judgement, para. 680.

[420] Trial Judgement, para. 728.

(Imamović and Palić)[421] and on 28 July 1995 (Hajrić),[422] and subsequently killed them "after they had held them in detention for many days" at "some point after the middle of August", with their cause of death being "injuries to the head or skull".[423] The remains of the three Žepa leaders were found in a mass grave in Vragolovi, Rogatica, along with six other victims.[424] The Trial Chamber found that the killings of the three Žepa leaders were part of one single organised, large-scale murder operation that commenced on 13 July 1995, constituting the *actus reus* of extermination.[425] The Trial Chamber reasoned that the three men had been targeted because of their leadership positions before the fall of Žepa.[426]

146. With regard to Tolimir's argument that the killing of the three Žepa leaders was not part of the one murder operation involving the mass killings of the men of Srebrenica, the Appeals Chamber recalls that the *actus reus* of the crime of extermination is "the act of killing on a large scale"[427] and the *mens rea* is the intention to kill on a large-scale.[428] It further recalls that the crime of extermination differs from murder in that it requires an element of massiveness, which is not required for murder.[429] The Appeals Chamber has clarified that:

> The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred. Relevant factors include, *inter alia*: the time and place of the killings; the selection of the victims and the manner in which they were targeted; and whether the killings were aimed at the collective group rather than victims in their individual capacity.[430]

147. The *actus reus* of the crime of extermination may be established through an aggregation of separate incidents.[431]It is not required that the killings be on a vast scale in a concentrated location over a short period of time.[432] The ICTR Appeals Chamber has, on the other hand, stated that "[a]s a general matter, the element of killing on a large scale cannot be satisfied by a collective

[421] Trial Judgement, paras 658, 662. *See also* Trial Judgement, paras 664-665.
[422] Trial Judgement, paras 660-661. *See also* Trial Judgement, paras 664-665.
[423] Trial Judgement, paras 680, 728. *See also* Trial Judgement, paras 654-680.
[424] Trial Judgement, paras 680, 1148.
[425] Trial Judgement, paras 728-729.
[426] Trial Judgement, para. 728.
[427] *Stakić* Appeal Judgement, para. 259.
[428] *Popović et al.* Appeal Judgement, para.701 *citing Lukić and Lukić* Appeal Judgement, para. 536; *Stakić* Appeal Judgement, para. 259. The Appeals Chamber observes that Tolimir does not specify whether he challenges the *actus reus* or the *mens rea* of the crime of extermination or both with regard to killing of the three Žepa leaders. Appeal Brief, para. 69; Reply Brief, paras 34-35.
[429] *Lukić and Lukić* Appeal Judgement, para. 536; *Stakić* Appeal Judgement, para. 260; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 516.
[430] *Lukić and Lukić* Appeal Judgement, para. 538 (internal citations omitted).
[431] *Cf. Karemera and Ngirumpatse* Appeal Judgement, paras 661-662.
[432] *Stakić* Appeal Judgement, para. 259, affirming *Stakić* Trial Judgement, para. 640.

consideration of distinct events committed in different locations, in different circumstances, by different perpetrators, and over an extended period of time, *i.e.* a period of two months".[433]

148. The Appeals Chamber notes the Trial Chamber's findings that there were factors shared between the murders of the three Žepa leaders and the mass murders of the Bosnian Muslim men and boys of Srebrenica. These include: (i) the murders occurred in the weeks following the fall of the two enclaves; (ii) the victims were all Bosnian Muslims; (iii) the violence of the killings; (iv) the general identity of the perpetrators of the killings as members of the Bosnian Serb Forces; and (v) the link to the overall goal of the Bosnian Serb Forces of "ridding the enclaves of its Bosnian Muslim population".[434]

149. The Appeals Chamber observes, however, that the Trial Chamber found that the three Žepa leaders were killed in late August and September 1995, therefore after the main attack against the civilian population, which included the military operations against both enclaves, the removal of thousands of civilians from Srebrenica and Žepa, and the killings of the Bosnian Muslim men from Srebrenica which occurred in July 1995.[435] At the time of the killings of the three Žepa leaders, the civilian population had already been transferred from both enclaves to ABiH-held territory.[436] Further, the Appeals Chamber notes that the murder of the three Žepa leaders was charged in the Indictment as – and found by the Trial Chamber to be – a foreseeable consequence of the JCE to Forcibly Remove, not the JCE to Murder.[437] The Appeals Chamber also observes that prior to their murders, the three Žepa leaders were singled out from other Bosnian Muslim male prisoners who were not killed but were ultimately exchanged.[438] Consequently, the Appeals Chamber is not convinced that the killings of the three Žepa leaders was part of the same murder operation that had targeted the Bosnian Muslim men and boys of Srebrenica. Considering, thus, the different context and the circumstances in which those three killings were committed, no reasonable trial chamber could have found that the killings of the three Žepa leaders were part of the Srebrenica murder operation.

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[433] *Karemera and Ngirumpatse* Appeal Judgement, para. 661; *Bagosora and Nsengiyumva* Appeal Judgement, para. 396. The *Bagosora and Nsengiyumva* Appeal Judgement further specifies that in that case, each of the incidents which formed the basis of the appellant's convictions presented distinct features and could not be said to constitute one and the same incident, referring to incidents as described in the sections addressing grounds of appeal 6-10. In the *Karemera and Ngirumpatse* case, the Appeals Chamber nevertheless found it permissible for the trial chamber in that particular case, to connect and aggregate sets of killings in order to meet the large-scale requirement. *Karemera and Ngirumpatse* Appeal Judgement, paras 661-662. The Appeals Chamber referred to sets of "massive killings throughout Rwanda by mid-July 1994". *Karemera and Ngirumpatse* Appeal Judgement, paras 661-662.

[434] Trial Judgement, para. 1150.

[435] Trial Judgement, paras 701.

[436] Trial Judgement, para. 842. *See also* Trial Judgement, paras 817, 826, 832-833.

[437] Trial Judgement, paras 1071, 1144. *See also* Trial Judgement, paras 1150-1151.

[438] Trial Judgement, paras 664-665.

150. In light of the above, the Appeals Chamber finds that, considering the circumstances in the present case, no reasonable trial chamber could have found that the killings of the three Žepa leaders were part of the same attack against the civilian population or of "a single deliberate, organised, large-scale operation to murder Bosnian Muslim males" thereby fulfilling the requirement of "large scale" and constituting extermination.[439] In the view of the Appeals Chamber, those three killings were "isolated acts".[440] This error of fact caused a miscarriage of justice, as Tolimir was erroneously convicted of extermination in respect of the three Žepa leaders. The Appeals Chamber finds that in order to correct the Trial Chamber's error, the conviction under Count 3 of the Indictment must be reversed insofar as it relates to the three Žepa leaders.

(c) Conclusion

151. For the foregoing reasons, the Appeals Chamber upholds Ground of Appeal 6 of Tolimir's Appeal in part, and dismisses the remainder of the ground of appeal.[441] The impact of this finding on Tolimir's sentence, if any, will be discussed in the sentencing part of this Judgement.

2. Inhumane Acts (through forcible transfer) as a crime against humanity (Ground of Appeal 13)

152. The Trial Chamber found that the "busing of approximately 25,000-30,000 Bosnian Muslims out of Potočari on 12 and 13 July 1995 and nearly 4,400 Bosnian Muslims out of Žepa on 25-27 July 1995" constituted the crime of inhumane acts through forcible transfer as a crime against humanity.[442]

(a) Submissions

153. Tolimir submits that the Trial Chamber erred in fact and law in making the above-mentioned finding and requests the Appeals Chamber to overturn his conviction for forcible transfer.[443] Firstly, he submits that the Trial Chamber erred in finding that the transfer of the population was forced since it was the Bosnian Muslim authorities in Sarajevo and Žepa that sought to evacuate the civilian population of Srebrenica and Žepa before the attacks on the two enclaves occurred.[444] In this respect, Tolimir submits that the Trial Chamber failed to consider relevant evidence and made selective references to unreliable witnesses, which led to its erroneous conclusions.[445] Tolimir also claims that, contrary to the Trial Chamber's finding, the evacuation

[439] Trial Judgement, paras 728-729.
[440] *See Kunarac et al.* Appeal Judgement, para. 100.
[441] Judge Antonetti appends a separate opinion.
[442] Trial Judgement, para. 842. *See also* Trial Judgement, paras 817, 833.
[443] Appeal Brief, paras 197, 208.
[444] Appeal Brief, paras 200, 202. *See also* Appeal Brief, para. 199; Reply Brief, para. 61.
[445] Appeal Brief, paras 199-202. *See also* Reply Brief, para. 62.

agreement signed between the VRS and Žepa's War Presidency on 24 July 1995 was valid and voluntary and proved that the transfer of the Bosnian Muslims out of the enclave was agreed upon by all sides.[446]

154. Secondly, Tolimir argues that the Trial Chamber failed to provide a reasoned opinion with regard to its finding that the civilian populations of Srebrenica and Žepa were displaced within a national border.[447] He asserts that since the border between the RS and BiH was a *de jure* or *de facto* border, the transfer of the populations concerned across that border could not constitute the crime of forcible transfer.[448]

155. The Prosecution responds that the Trial Chamber properly convicted Tolimir of forcible transfer. It argues that the Trial Chamber considered and rejected Tolimir's arguments as to the voluntary or "evacuation" nature of the transfer and correctly concluded that the Bosnian Muslims were forced to leave the enclaves as their only hope for survival.[449] The Prosecution further submits that Tolimir ignores evidence relied on by the Trial Chamber, mischaracterises the Trial Chamber's findings, and does not articulate how the Trial Chamber allegedly failed to critically examine evidence.[450]

156. The Prosecution further responds that Tolimir's second argument related to the alleged border between the RS and BiH, should have been raised at trial and, as he had failed to do so, his challenge should be summarily dismissed.[451] The Prosecution claims that the Trial Chamber did not commit any error as the crime of forcible transfer does not appear to require that forcible displacement occurs within national boundaries.[452] The Prosecution further submits that even if such a requirement existed, the Trial Chamber was satisfied that the Srebrenica and Žepa enclaves were in BiH and that the conflict was one between two ethnic groups within Bosnia.[453] Any border could at best be classified as a constantly changing frontline which would not constitute a *de jure* or *de facto* border under customary international law. The Prosecution further submits that even if the

[446] Appeal Brief, paras 317-320.
[447] Appeal Brief, para. 203.
[448] Appeal Brief, paras 204, 207.
[449] Response Brief, para. 109.
[450] Response Brief, paras 110-111, 115.
[451] Response Brief, para. 112.
[452] Response Brief, para. 113. The Prosecution relies on the Appeals Chamber's finding in the *Stakić* case, where it held that "forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries". *Stakić* Appeal Judgement, para. 317. The Prosecution submits that the Appeals Chamber in *Stakić* merely sought to delineate forcible transfer from deportation by adding an additional element to deportation, but without adding an additional element to forcible transfer. Response Brief, para. 113.
[453] Response Brief, para. 114.

boundary between the RS and BiH constituted such a border, the displacement of Bosnian Muslims up to that border would constitute forcible transfer.[454]

157. Tolimir replies that the Prosecution disregards the "whole context" that led to – and, in his view, legally justified – the VRS attack on the enclaves, namely that the ABiH was using the protected status of the enclaves as a shield for its military operations.[455] Furthermore, Tolimir argues that he was under no obligation to raise an argument with regard to the constituent elements of the crime of forcible transfer during his trial as the Prosecution bore the burden of proving all the elements of the alleged crimes.[456] He argues that the Prosecution ignores the fundamental distinction between forcible transfer and deportation, which lies in the location to which the victims are displaced. He also argues that the Prosecution's contention as to the border being a "constantly changing frontline" is unsupported by any evidence.[457]

(b) Analysis

(i) The forcible nature of the population transfer

158. The Appeals Chamber notes that in finding that the population transfers from the Srebrenica and Žepa enclaves were forced, the Trial Chamber cited the well-settled principle of international humanitarian law that "forced displacement is not justified in circumstances where the humanitarian crisis that caused the displacement is itself the result of the accused's unlawful activity".[458] The Trial Chamber reasoned that the transfer of the population from both the Srebrenica and Žepa enclaves was forced because the Bosnian Serb Forces had imposed such living conditions on the civilians of those enclaves so that their only genuine choice was to leave in order to survive.[459] The Appeals Chamber notes in this regard the Trial Chamber's finding that the conditions faced by those seeking shelter in Srebrenica from 11 to 13 July 1995 were catastrophic.[460] The Trial Chamber found that in the months and days leading up to the busing of Srebrenica's civilian population out of the enclave, severe convoy restrictions, terror, and attacks from the Bosnian Serb Forces essentially forced the civilian population to leave the enclave.[461]

159. In reaching this conclusion, the Trial Chamber relied, *inter alia*, on Prosecution Exhibit 990, a letter dated 9 July 1995 from the Presidency of the Srebrenica municipality to General Delić and

[454] Response Brief, para. 114.
[455] Reply Brief, para. 61.
[456] Reply Brief, paras 63-64.
[457] Reply Brief, paras 68-69.
[458] Trial Judgement, para. 810, *citing Krajišnik* Appeal Judgement, para. 208, n. 739; *Stakić* Appeal Judgement, para. 287.
[459] Trial Judgement, para. 809.
[460] Trial Judgement, paras 805-810.

President Izetbegović.[462] The Trial Chamber cited Prosecution Exhibit 990 in support of its finding that following the arrival of the VRS in Srebrenica on 9 July 1995, chaos and panic prevailed and the civilian authorities in Srebrenica were left with "the last unpopular step to save the population", which was to enter into negotiations with the VRS to open a corridor for the population to leave to the nearest free territory.[463] To the extent that Tolimir challenges the Trial Chamber's evaluation of this exhibit, the Appeals Chamber recalls that it will not interfere with a trial chamber's assessment of the probative value of a piece of evidence or a testimony, absent arguments establishing an error by the trial chamber.[464] Tolimir merely disagrees with the Trial Chamber's assessment of the exhibit and fails to show any error on the part of the Trial Chamber.[465]

160. Tolimir further argues that the Trial Chamber failed to examine Defence Exhibit 538, a letter dated 28 August 1995 from the 2nd Corps Command of the ABiH to its General Staff, which describes the context surrounding the negotiations to remove the population from Srebrenica. According to Tolimir, the exhibit clearly shows that it was the BiH authorities who requested the Bosnian Serbs to authorise the evacuation of the population. Defence Exhibit 538 states that immediately prior to the negotiations with the VRS side about the evacuation of civilians, Nesib Mandžić, a Bosnian Muslim participant in these negotiations, "was informed by the commander of the Dutch Battalion and his deputy […] that the Chetnik General Mladić had threatened to kill the captured Dutch soldiers immediately […], and that he would issue orders to open fire on the refugees along with the destruction of the UNPROFOR military base in Potočari".[466] Following this, "[i]t was suggested to the Chetniks that they authorise the safe evacuation of the civilians, escorted by UNPROFOR, to free territory".[467]

161. The Appeals Chamber observes that the Trial Chamber did not cite Defence Exhibit 538 in the Trial Judgement and recalls that a trial chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence".[468] Such disregard is shown

[461] Trial Judgement, paras 806-810.
[462] Trial Judgement, para. 805, *citing*, *inter alia*, Trial Judgement, para. 223.
[463] Trial Judgement, para. 223, n. 857.
[464] *See supra*, para. 11.
[465] *Đordević* Appeal Judgement, para. 20.
[466] Defence Exhibit 538 (Unsigned letter to the General Staff of the BiH Army, dated 28 August 1995), p. 5.
[467] Defence Exhibit 538 (Unsigned letter to the General Staff of the BiH Army, dated 28 August 1995), p. 5.
[468] *Popović et al.* Appeal Judgement, paras 306, 340; *Đordević* Appeal Judgement, para. 864, n. 2527; *Limaj* Appeal Judgement, para. 86, *citing Kvočka et al.* Appeal Judgement, para. 23.

"when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[469]

162. Defence Exhibit 538 shows that the BiH authorities requested the VRS to authorise and facilitate the transfer of civilians out of Srebrenica. However, it also shows that such proposals were only made after reports of General Mladić's threats to destroy the UNPROFOR base in Potočari and to attack the civilian refugees had reached the representatives of the Bosnian Muslims in Potočari and the BiH authorities in Sarajevo. Viewed as a whole, Defence Exhibit 538 does not lend credence to Tolimir's allegation that the BiH authorities initiated the transfer of the refugees out of Potočari. The Appeals Chamber is satisfied that the Trial Chamber reasonably found that the BiH authorities requested the Bosnian Serb Forces' authorisation for the transfer because they were concerned for the safety of the Bosnian Muslim refugees in Potočari. Defence Exhibit 538 therefore does not undermine, but in fact supports, the Trial Chamber's finding that the civilian population of Srebrenica was forced out of the enclave as a consequence of the living conditions imposed upon them and the threats against their safety by the VRS. Tolimir has failed to show that the Trial Chamber erred in this regard.

163. With regard to Tolimir's argument that the Trial Chamber failed to consider in its entirety Defence Exhibit 174, a coded UNPROFOR cable sent by the Special Representative to the UN Secretary-General, Yasushi Akashi, to UN Secretary-General Kofi Annan on 11 July 1995,[470] the Appeals Chamber notes that the Trial Chamber explicitly considered Tolimir's argument that Defence Exhibit 174 demonstrated that: (i) the population wanted to leave the Srebrenica enclave; and (ii) that their evacuation was facilitated by UNPROFOR rather than the VRS.[471] According to the Trial Chamber, Defence Exhibit 174 indicates that UNPROFOR sought the VRS' authorisation of the departure of the civilians from Srebrenica in order to avoid a continuing humanitarian catastrophe.[472] In the same context, and contrary to Tolimir's argument, the Trial Chamber also cited Prosecution Exhibit 1008, a transcript of a video recording of a meeting between Bosnian Serb leaders and Srebrenica Bosnian Muslim representatives at Hotel Fontana.[473] The Trial Chamber found that Tolimir's argument was not supported by either of the said exhibits, reasoning that if the displacement is the result of a humanitarian crisis caused by the accused's activities, such

[469] *Popović et al.* Appeal Judgement, paras 306, 340; *Đorđević* Appeal Judgement, para. 864, n. 2527; *Limaj* Appeal Judgement, para. 86; *Kvočka et al.* Appeal Judgement, para. 92.
[470] Appeal Brief, para. 199.
[471] Trial Judgement, para. 810.
[472] Trial Judgement, para. 810.
[473] Trial Judgement, para. 810, n. 3317.

displacement is forced.[474] Tolimir fails to show that the Trial Chamber's assessment of these exhibits was erroneous or one that no reasonable trier of fact could have made.

164. As to Tolimir's contention that the Trial Chamber erred in fact by relying selectively and uncritically on the evidence of unreliable witnesses, such as Prosecution Witness and UNMO officer Joseph Kingori,[475] in finding that the movements of the Bosnian Muslim civilians in Srebrenica were "a reaction to an already-existing problem caused by the [Bosnian Serb Forces]",[476] the Appeals Chamber notes that the Trial Chamber placed considerable reliance on the evidence of Joseph Kingori throughout the Trial Judgement.[477] It is well-established that trial chambers exercise broad discretion in determining the weight to attach to the evidence of any witness.[478] The Appeals Chamber also observes that Tolimir fails to point to any evidence that would undermine the Trial Chamber's reliance on this witness. In the view of the Appeals Chamber, Tolimir fails to show that the Trial Chamber abused its discretion by relying on Kingori's evidence.

165. Regarding Tolimir's challenge to the Trial Chamber's finding that during a meeting at Hotel Fontana, Mladić threatened to shell the UN compound in Potočari if NATO strikes against the VRS continued, the Appeals Chamber notes that the finding was based on the direct evidence of Prosecution Witness Evert Rave who attended the meeting, as well as two UNMO reports describing the meeting.[479] The Appeals Chamber is not persuaded by Tolimir's argument that Prosecution Exhibit 1008, a transcript of the video recording of the meeting, does not evidence such a warning.[480] The Appeals Chamber notes that – contrary to Tolimir's contention – a threat of this type is recorded in Prosecution Exhibit 1008, where the transcript states that Mladić said to Colonel Karremans: "But if you keep on bombing, they [the Dutch soldiers] won't be hosts for a long time […] We know how to bomb too".[481] In the Appeals Chamber's view, a reasonable trier of fact could have concluded that this evidences a threat to shell the UN compound. It is this threat that is reported in the two UNMO reports cited as support by the Trial Chamber.[482] Tolimir also fails to

[474] Trial Judgement, para. 810.
[475] Appeal Brief, para. 201.
[476] Trial Judgement, para. 810, *citing* T. 16 September 2010 pp. 5533-5534.
[477] *See* Trial Judgement, paras 180, 197, 210, 219-220, nn. 642, 649-650, 723, 784, 830, 837.
[478] *Popović et al.* Appeal Judgement, para. 131; *Đorđević* Appeal Judgement, para. 781; *Šainović et al.* Appeal Judgement, para. 152.
[479] Trial Judgement, para. 247, nn. 980, 981, *citing* Prosecution Exhibits 678 (UNMO report dated 11 July 1995) and 608 (fax sent by Karremans to UNPROFOR on 12 July 1995). The Appeals Chamber notes that Tolimir claims that this finding is based on Prosecution Exhibit 1436, which he describes as a DutchBat report. However, Prosecution Exhibit 1436 is a Drina Corps Command request dated 19 July 1995. The Appeals Chamber understands Tolimir to be challenging the reliability of Prosecution Exhibits 678 and 608.
[480] Appeal Brief, para. 201.
[481] Prosecution Exhibit 1008, p. 21.
[482] Trial Judgement, para. 247, nn. 980-981, *citing* Prosecution Exhibit 678, Prosecution Exhibit 608.

address the testimony of Rave that Mladić's threats were made off-camera.[483] Tolimir's arguments are thus dismissed.

166. As to Tolimir's contention that the Trial Chamber ignored Defence Exhibit 192, a purported interview of General Rupert Smith dated January 2000, which, in his view, suggests that UNPROFOR commanders sometimes submitted false reports,[484] the Appeals Chamber notes that the Trial Chamber did not address or cite Defence Exhibit 192 in the Trial Judgement. In this instance, the Appeals Chamber is of the view that Defence Exhibit 192 was not clearly relevant to the issue of whether Mladić made a threat to attack the UN compound in Potočari, as Smith denied having made that statement.[485] Tolimir fails to show that the Trial Chamber abused its discretion in the assessment of the evidence. His argument in this regard is dismissed.

167. Turning to Tolimir's argument that the Trial Chamber failed to sufficiently take into account Defence Exhibits 54, 55, 60, and 363, which, according to him, show that the authorities in Žepa sought to evacuate the civilian population on their own volition both before and during the attack by the VRS,[486] the Appeals Chamber notes that the Trial Chamber expressly considered these exhibits in its analysis. In particular, the Trial Chamber examined Defence Exhibit 54, a letter from BiH President Alija Izetbegović to the President of Žepa, Mehmed Hajrić, dated 19 July 1995, in light of Tolimir's submission "that the 'evacuation' of the Bosnian Muslim population was 'planned secretly by the BH Federation leadership' and was 'kept secret in order to accuse the VRS of attacking the civilian population and driving them out'".[487] The Trial Chamber found that: (i) prior to the meeting held on 19 July 1995 the "War Presidency had agreed internally to try to make arrangements with the VRS for the 'evacuation of the civilian population'" from Žepa;[488] and (ii) another letter from Izetbegović to ABiH Commander Rasim Delić on 18 July 1995 contained instructions for a contingency plan for the retreat from Žepa.[489] The Trial Chamber found that the fact that "the BiH authorities were discussing a possible evacuation scenario for the Bosnian

[483] Trial Judgement, n. 981.
[484] Appeal Brief, para. 201, *citing* Defence Exhibit 192 (Interview with General Rupert Smith dated 12 January 2000).
[485] T. 24 March 2011 pp. 11816-11818.
[486] Appeal Brief, para. 202, *citing* Defence Exhibits 363 (Draft Plan for the Evacuation of the Population of Žepa), 54 (letter from Alija Izetbegović to the President of Žepa, Mehmed Hajrić, 19 July 1995), 60 (Cover Letter Attached to the Draft Plan for the Evacuation of the Population from Žepa), 55 (Military Narrative Entitled "The Fall of Žepa"), paras 108-110). The Appeals Chamber notes that Defence Exhibit 60 is identical to the first page of Defence Exhibit 363.
[487] Trial Judgement, para. 1036.
[488] Trial Judgement, para. 617, n. 2668. *See also* Trial Judgement, para. 829, n. 3378.
[489] Trial Judgement, para. 617, n. 2668 (*citing* Defence Exhibit 106 (Letter from Alija Izetbegović to ABiH Commander Rasim Delić dated 18 July 1995)); Trial Judgement, para. 1036, *citing* Defence Exhibit 106.

Muslim population at this time was the direct result of VRS restrictions on the enclave […] and VRS military activities which terrorised the civilian population".[490]

168. Moreover, the Trial Chamber expressly considered Defence Exhibit 363, the draft plan for the evacuation of the population of Žepa (which also encompasses Defence Exhibit 60, the covering letter to the plan)[491] and found that it was not incompatible with its conclusion that the departure of the population out of Žepa was the consequence of the VRS's actions and thus not voluntary.[492] The Appeals Chamber is also satisfied that the Trial Chamber duly considered Defence Exhibit 55, the Military Narrative by Viktor Bezruchenko entitled "The Fall of Žepa", including the excerpts cited by Tolimir, in making findings about the appeal of the Žepa Bosnian Muslims to the BiH government to agree to a POW exchange.[493] In the view of the Appeals Chamber, it was within the discretion of the Trial Chamber to determine that this evidence was not incompatible with its findings about the forcible nature of the population displacement. Similarly, the 24 July 1995 evacuation agreement does not demonstrate, as Tolimir suggests, that the population transfer was voluntary, considering the VRS's actions leading up to it.

169. In light of the above, the Appeals Chamber dismisses Tolimir's arguments regarding the Trial Chamber's findings on the forcible nature of the transfer of the civilian populations out of the Srebrenica and Žepa enclaves.

(ii) Transfer within national boundaries

170. With regard to Tolimir's argument concerning the legal requirement of the crime of forcible transfer, the Appeals Chamber notes the Prosecution's submission that this argument should be summarily dismissed.[494] The Appeals Chamber recalls that a party is under an obligation to formally raise before the Trial Chamber, at the pre-trial stage or during trial, any issues that require resolution, and that failure to do so would amount to a waiver of the right to bring the issue as a valid ground of appeal unless special circumstances are present.[495] If Tolimir wanted to argue that the RS had a separate border, and that therefore the notion of forcible transfer applying to displacements beyond national borders was a legal issue in the case, he had an obligation to raise this at trial.[496] The Appeals Chamber considers that the argument may warrant dismissal. However, the Appeals Chamber considers that the fact that Tolimir was self-represented at trial is a special

[490] Trial Judgement, para. 1036.
[491] Trial Judgement, para. 1037, n. 4092.
[492] Trial Judgement, para. 1037.
[493] *See* Trial Judgement, para. 638.
[494] *See* Response Brief, para. 112, *citing*, *inter alia*, *Naletilić and Martinović* Appeal Judgement, para. 21.
[495] *Naletilić and Martinović* Appeal Judgement, para. 21.
[496] *Naletilić and Martinović* Appeal Judgement, para. 21.

circumstance justifying the consideration of an issue raised for the first time on appeal[497] and thus will address the merits of the challenge.

171. Having considered the Trial Chamber's findings regarding the locations from and to where civilians were displaced as a whole,[498] the Appeals Chamber is satisfied that the Trial Chamber was convinced beyond a reasonable doubt that the civilians were forcibly displaced to other areas of BiH, for example, Kladanj, which in the Trial Chamber's view did not constitute an area across a *de jure* or *de facto* border.[499] Although the Trial Chamber did not make an express finding that the civilian populations of Srebrenica and Žepa were displaced within national boundaries, it is clear that the Trial Chamber found that the civilian populations were transferred to areas within the national boundaries of BiH.

172. As support for his argument that locations within the RS were across a *de facto* or *de jure* border from BiH, Tolimir refers to evidence suggesting that the RS had its own constitution, makes general statements about the RS's independent character without any references to evidence in support, and relies on Rule 2 of the Rules, which defines "State" as "a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not".

173. The Appeals Chamber has previously held that displacement of civilian populations across constantly changing frontlines does not constitute the crime of deportation under customary international law, but may still amount to forcible transfer.[500] Evidence of the RS having a constitution is irrelevant to the issue of whether there was a *de facto* border between BiH and the RS. Further, Tolimir's reference to Rule 2 of the Rules is irrelevant to determining the substantive customary international law on forcible transfer. The Appeals Chamber finds that Tolimir has failed to show that the Trial Chamber committed a legal error when it implicitly found that the civilian population of Srebrenica and Žepa did not cross a *de facto* border. In light of the above, Tolimir's arguments fail.

(iii) Conclusion

174. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 13.

[497] *See Krajišnik* Appeal Judgement, para. 651; *Krajišnik* Decision of 28 February 2008, para. 6; *Slobodan Milošević* Decision of 20 January 2004, para. 19.
[498] *See* Trial Judgement, paras 827-828.
[499] Trial Judgement, paras 817, 826, 832.
[500] *See Stakić* Appeal Judgement, paras 302-303, 321.

B. Genocide

175. The Trial Chamber found that the acts of killing, causing serious bodily or mental harm, and deliberately inflicting on a protected group conditions of life calculated to bring about its physical destruction were perpetrated against the Bosnian Muslim populations of Srebrenica and Žepa with the specific intent to destroy part of the Bosnian Muslim population.[501]

176. Tolimir makes a number of challenges to the Trial Chamber's findings establishing the elements of the crime of genocide. First, he submits that the Trial Chamber erred in law in finding that the Muslims of Eastern BiH qualified as part of a protected group under Article 4 of the Statute (Ground of Appeal 8). Second, he argues that the Trial Chamber erred in law and fact in its analysis of the *actus reus* of genocide by: (i) misinterpreting serious mental harm as an underlying genocidal act and applying that erroneous interpretation to the facts of the case (Grounds of Appeal 7 in part and 10 in part); and (ii) misinterpreting the term "physical destruction" under Article 4(2)(c) of the Statute (Ground of Appeal 10 in part). Third, Tolimir submits that the Trial Chamber erred in law in its analysis of the *mens rea* required for genocide (Grounds of Appeal 7 in part, 11 and 12).

177. In this section of the Judgement, the Appeals Chamber will address Tolimir's challenges to the Trial Chamber's findings on each element of the crime of genocide in turn.

1. Definition of the protected group (Ground of Appeal 8)

178. The Trial Chamber found that the "Bosnian Muslims" constituted a protected group within the meaning of Article 4 of the Statute,[502] noting that the identification of the Bosnian Muslims as a protected group "has been settled by the Appeals Chamber" and there was no need for the Trial Chamber "to revisit" it.[503] It further found that "the Bosnian Muslim population of Eastern Bosnia and in particular, the enclaves of Srebrenica, Žepa and Goražde" constituted a substantial part of the protected group.[504]

(a) Submissions

179. Tolimir submits that the Trial Chamber erred in law by failing to provide a reasoned opinion as to why the Bosnian Muslims qualified as a protected group under Article 4 of the Statute and why the Bosnian Muslims of Eastern BiH were a substantial part of that group.[505] Tolimir asserts

[501] Trial Judgement, paras 750-782.
[502] Trial Judgement, para. 750. *See also* Trial Judgement, paras 774-775.
[503] Trial Judgement, para. 750, *citing Krstić* Appeal Judgement, paras 6, 15, *Blagojević and Jokić* Trial Judgement, para. 667, *Popović et al.* Trial Judgement, para. 840.
[504] Trial Judgement, paras 774-775.
[505] *See* Notice of Appeal, para. 39; Appeal Brief, paras 83-85, 87-88. *See also* Reply Brief, para. 40.

that, instead of entering its own findings on these critical issues, the Trial Chamber improperly relied on findings made in other cases without taking judicial notice of those findings.[506] He argues that findings made in other cases have no binding force except between the parties to those cases.[507] According to Tolimir, the identification of the protected group under Article 4 of the Statute is a factual – not legal – issue that must be established in each case on the basis of evidence before the trial chamber adjudicating the case.[508] Tolimir submits that the Trial Chamber's error invalidates the Trial Judgement, since one of the core elements of the crime of genocide and conspiracy to genocide in this case – the identification of the protected group – has not been established on the evidence in the trial record.[509]

180. The Prosecution responds that Tolimir's challenge to these findings warrants summary dismissal as Tolimir, at no point, contested at trial or on appeal that the Bosnian Muslims qualify as a protected group under Article 4 of the Statute or that the Bosnian Muslims of Eastern BiH constitute a substantial part of that group.[510] The Prosecution further submits that the Trial Chamber's identification of the Bosnian Muslims as an ethnic group was well-grounded in findings in other parts of the Trial Judgement about the "multi-ethnic" character of BiH and the ethnic nature of the conflict in the country – findings based on the evidence as well as some adjudicated facts.[511] Similarly, the Prosecution argues that the Trial Chamber's conclusion that the Muslims of Eastern BiH constituted a substantial part of the protected group is sufficiently supported by numerous findings about the strategic importance of the enclaves of Eastern BiH in terms of the Bosnian Serb leadership achieving its goal of removing the Muslim population in the area.[512] Finally, the Prosecution submits that the qualification of Bosnian Muslims as a protected group is a fact of common knowledge, which is not required to be judicially noticed by trial chambers pursuant to Rule 94(A) of the Rules, and that such facts can be judicially noticed at the judgement stage.[513]

181. Tolimir replies that the Prosecution's arguments are contradicted by the express wording of the relevant portion of the Trial Judgement.[514] He further argues that the parts of the Trial Judgement quoted by the Prosecution do not sufficiently explain why Serb and Muslim populations in Eastern BiH were distinct ethnic groups, as required by the Trial Chamber.[515]

[506] Appeal Brief, paras 83, 85. *See also* Reply Brief, para. 39.
[507] Appeal Brief, paras 83-86. *See also* Reply Brief, para. 39.
[508] Appeal Brief, paras 83, 85-87.
[509] Appeal Brief, para. 88.
[510] Response Brief, para. 46.
[511] Response Brief, paras 47, 49.
[512] Response Brief, paras 48-49.
[513] Response Brief, para. 50.
[514] Reply Brief, paras 38-39.
[515] Reply Brief, para. 40.

(b) Analysis

182. Article 4 of the Statute, which mirrors the Genocide Convention, defines genocide as a number of specified acts committed with the intent to destroy, in whole or in part, "a national, ethnical, racial or religious group, as such".[516] The identification of one of these protected groups as the victim of the proscribed acts is thus one of the required components of establishing the crime of genocide.[517]

183. At the outset, the Appeals Chamber notes that Tolimir never contested, either before or during trial the definition of the protected group with regard to the Article 4 charges in the Indictment.[518] It was this definition that the Trial Chamber ultimately adopted – not the definition of the protected group accepted by trial chambers in other cases involving charges of genocide.[519] The Appeals Chamber recalls that "absent special circumstances, a party cannot remain silent on a matter at trial only to raise it for the first time on appeal".[520] The Appeals Chamber thus has the discretion to dismiss Tolimir's challenges to the definition of the protected group.

184. Nevertheless, the Appeals Chamber considers that the fact that Tolimir was self-represented at trial, coupled with the seriousness of the convictions challenged under this Ground of Appeal, is a special circumstance justifying the consideration of an issue raised for the first time on appeal.[521] In addition, the Appeals Chamber finds that it is in the interests of justice to consider whether the Trial Chamber committed any error in defining the protected group for purposes of its analysis of the crime of genocide under Article 4 of the Statute. The Appeals Chamber will therefore examine Tolimir's arguments on the merits.

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[516] *See* Genocide Convention, Art. II. The acts listed under Article II of the Genocide Convention and in Article 4 of the Statute are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

[517] *See* Genocide Convention, Art. II; *Bosnia Genocide* Judgment, para. 191. *See also* Trial Judgement, para. 735.

[518] *See* Defence Pre-Trial Brief, *passim*; Defence Final Trial Brief, *passim.* On appeal, Tolimir does not deny his failure to challenge that definition at trial. *See* Reply Brief, paras 39-40.

[519] *See* Trial Judgement, paras 730, 750, 775.

[520] *Haradinaj et al.* Appeal Judgement, para. 112. *See also Naletilić and Martinović* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 868; *Čelebići* Appeal Judgement, para. 640; *Furundžija* Appeal Judgement, para. 174; *Aleksovski* Appeal Judgement, para. 51; *Tadić* Appeal Judgement, para. 55. *Cf. Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 32 ("the appeal's process is not meant to offer the parties a remedy to their previous failings at trial.").

[521] *See Krajišnik* Appeal Judgement, para. 651 ("the Appeals Chamber notes that Krajišnik is self-represented […] Furthermore, the question of whether or not JCE exists goes to very heart of the case against him. Hence, the Appeals Chamber finds that in the circumstances of this case, it is in the interests of justice to consider this ground of appeal as validly filed"); *Krajišnik* Decision of 28 February 2008, para. 6 ("the Appeals Chamber has recognized the existence of heightened concerns regarding the basic fairness of proceedings when a defendant has chosen to self-represent"); *Slobodan Milošević* Decision of 20 January 2004, para. 19 ("[w]here an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair.").

185. The Appeals Chamber is satisfied that the Trial Chamber made its own findings on the protected group requirement for the crime of genocide and only relied on the definition of the protected group in past genocide cases in further support of, and not as a substitute for, those findings.[522] Tolimir misunderstands the reliance placed by the Trial Chamber on prior trial and appeal judgements. Nothing in the Statute, the Rules, or the prior jurisprudence of the Tribunal prevented the Trial Chamber from referring to the reasoning in other cases involving similar facts and applying it by analogy in the case before it, in order to reinforce its identification of the protected group and what may constitute a substantial part of the protected group in this case. Furthermore, the Trial Chamber did not take judicial notice of the definitions of the protected group in those cases.[523] Instead, in making its findings on this element of the crime, the Trial Chamber explicitly referred to the definition of the protected group contained in the Indictment and reiterated in the Prosecution's Final Trial Brief,[524] which Tolimir had not contested at trial.[525] It then made a series of findings about the underlying genocidal acts committed in this case and concluded that all of these acts had been perpetrated against members of the protected group, *i.e.*, the Muslims of Eastern BiH,[526] and referred to other cases involving similar facts as authorities in support of the proposition that the Bosnian Muslims could constitute "a national, ethnical, racial or religious group", as that term is used in Article 4 of the Statute. That proposition, in the Trial Chamber's view, was "settled by the Appeals Chamber".[527] The Appeals Chamber does not find that the Trial Chamber committed an error "by adopting the analytical legal framework used by the Appeals Chamber".[528] The Appeals Chamber is thus satisfied that the Trial Chamber provided a reasoned opinion in this regard and properly established this element of the crime of genocide.

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[522] *See* Trial Judgement, para. 750.

[523] Rule 94(A) of the Rules allows a trial chamber to take judicial notice of "facts of common knowledge". The Trial Chamber did not pronounce itself on whether it considered the identification of Bosnian Muslims as a protected group under Article 4 of the Statute as a fact of common knowledge, stating only that this issue is "settled by the Appeals Chamber". *See* Trial Judgement, para. 750. The Appeals Chamber does not interpret that statement as taking judicial notice under Rule 94(A) of the Rules and, thus, does not find it necessary to determine whether the protected group definition could be properly the subject of judicial notice under that rule, as the Prosecution argues. *See* Response Brief, para. 50. Rule 94(B) of the Rules allows a trial chamber to take judicial notice of "adjudicated facts […] from other proceedings of the Tribunal relating to matters at issue in the current proceedings", but only "[a]t the request of a party or *proprio motu* […] after hearing the parties" on this issue. The Trial Chamber never notified the parties of its intention to take judicial notice of the protected group definition in other cases and, thus, did not resort to Rule 94(B) of the Rules.

[524] *See* Trial Judgement, para. 750 (adopting the Prosecution's definition of "the targeted group that is the subject of the charges in the Indictment as the 'Muslim population of Eastern Bosnia', as constituting 'part' of the Bosnian Muslim people" (*citing* Indictment, paras 10, 24, and Prosecution Final Brief, para. 197)). *See also* Trial Judgement, para. 730.

[525] *See supra*, para. 183.

[526] *See* Trial Judgement, paras 751-752 (killing), 753-759 (causing serious bodily or mental harm to members of the group), 760-766 (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part).

[527] Trial Judgement, para. 750.

[528] *Popović et al.* Appeal Judgement, para. 421 (rejecting similar challenges brought by the defendants in that case against trial conclusions regarding the definition of the protected group).

186. Likewise, the Trial Chamber's analysis of the "substantiality" requirement was properly reasoned. The Trial Chamber based its finding that the Bosnian Muslim population of Eastern BiH constituted a substantial part of the protected group (*i.e.*, the Bosnian Muslims)[529] on the definition of the substantial part of the protected group in the Indictment.[530] In reaching its conclusion on this point, the Trial Chamber referred to and applied by analogy the reasoning given in the *Popović et al.* Trial Judgement and the *Krstić* Appeal Judgement as to why the Bosnian Muslim population of Srebrenica, although a small percentage of the overall Muslim population of BiH, amounted to a substantial part of that group. The Trial Chamber stated, in this regard, that:[531]

> [t]he Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership because (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims.[532]

187. The Trial Chamber in this case did not take judicial notice of the relevant findings in the *Popović et al.* Trial Judgement or the *Krstić* Appeal Judgement, nor did it adopt them as directly applicable findings. Instead, the Trial Chamber quoted the *Popović et al.* Trial Judgement and explained why its (and the *Krstić* Appeal Judgement's) reasoning – which, as the Trial Chamber acknowledged, concerned the Srebrenica enclave – would also apply by analogy to the facts of the *Tolimir* case. The Trial Chamber specified that:

> While the Appeals Chamber made this finding [in the *Krstić* case] specifically with regard to the Bosnian Muslims of Srebrenica, the reasoning equally applies to the broader population specified in the Indictment, namely "the Bosnian Muslim population of Eastern Bosnia and in particular, the enclaves of Srebrenica, Žepa and Goražde".[533]

In determining, thus, that the Bosnian Muslim population of Eastern BiH was a substantial part of the entire Bosnian Muslim population, the Trial Chamber held that the reasoning in other relevant cases equally applied to the circumstances of this case, namely the definition of the protected group pleaded in the Indictment (which Tolimir did not contest).[534]

188. As in the *Popović et al.* case – where similar challenges were rejected on appeal[535] – the Appeals Chamber does not find that the Trial Chamber's analysis of the substantiality requirement

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[529] *See* Trial Judgement, paras 774-775.
[530] *See* Trial Judgement, para. 775, *citing* Indictment, para. 10. *See also* Trial Judgement, para. 730.
[531] *See* Trial Judgement, para. 774, *citing Popović et al.* Trial Judgement, para. 865 (which summarised the relevant findings of the *Krstić* Appeal Judgement).
[532] Trial Judgement, para. 774, *citing Popović et al.* Trial Judgement, para. 865 (which referred to *Krstić* Appeal Judgement, paras 15-16).
[533] Trial Judgement, para. 775, *citing* Indictment, para. 10.
[534] Trial Judgement, para. 775.
[535] *Popović et al.* Appeal Judgement, para. 421.

was based exclusively on other cases without proper reasoning and without regard to the evidence in this case. Tolimir does not demonstrate that the Trial Chamber failed to provide a reasoned opinion in this regard or to establish a requisite element of the crime of genocide.

(c) Conclusion

189. For the foregoing reasons, the Appeals Chamber dismisses Ground of Appeal 8.[536]

2. *Actus reus* of genocide

190. The Trial Chamber held that the following acts of genocide were perpetrated against the Bosnian Muslim population of Eastern BiH pursuant to Article 4(2) of the Statute: (i) the killing of at least 5,749 Bosnian Muslim men from Srebrenica and the three Žepa leaders;[537] (ii) the infliction of serious bodily or mental harm on the Bosnian Muslim men from Srebrenica who were detained and then led to places of execution,[538] the Bosnian Muslim women, children, and elderly from Srebrenica who were forcibly transferred to ABiH-held territory,[539] and the Bosnian Muslim population forcibly transferred from Žepa;[540] and (iii) the deliberate infliction on the Bosnian Muslim population of Eastern BiH of conditions of life calculated to bring about its destruction as a group through the combined effect of the forcible transfer and killing operations.[541]

191. Tolimir submits that the Trial Chamber erred in law and fact in its findings on the acts of: (i) inflicting serious bodily or mental harm; and (ii) deliberately inflicting conditions of life calculated to bring about the protected group's destruction (Grounds of Appeal 7 in part and 10).[542] The Appeals Chamber will address these challenges in turn.

(a) Causing serious bodily or mental harm to members of the group (Grounds of Appeal 7 in part and 10 in part)

192. As noted above, the Trial Chamber found that Bosnian Serb Forces inflicted serious bodily or mental harm, as defined in Article 4(2)(b) of the Statute, on three groups of Bosnian Muslims:

[536] Judge Antonetti appends a separate opinion.
[537] Trial Judgement, paras 751-752.
[538] Trial Judgement, paras 754-755. *See also* Trial Judgement, para. 240, and authorities cited therein.
[539] Trial Judgement, paras 756-757.
[540] Trial Judgement, paras 758-759.
[541] Trial Judgement, paras 764-766. The Appeals Chamber notes that paragraph 1239 of the Trial Judgement does not include an explicit reference to a conviction for genocide under Article 4(2)(b) or Article4(2)(c) of the Statute. However, in light of the Trial Chamber's unequivocal findings in paragraphs 755, 759, and 766 of the Trial Judgement the Appeals Chamber considers this omission to be a mere oversight.
[542] Appeal Brief, paras 72-81, 143-165.

(i) the Bosnian Muslim males from Srebrenica separated from their families in Potočari and those men from the column detained in terrible conditions prior to their execution or attempted execution, who, as the Trial Chamber held, "would have become aware at one stage or another of the real possibility that they would ultimately meet their death at the hands of Bosnian Serb Forces who were detaining them"[543] and who consequently suffered as a result of "these horrific confrontations with death";[544]

(ii) the women, children, and elderly separated from the male members of their families in Potočari and forcibly transferred to ABiH-held parts of BiH, who suffered "profound psychological" trauma;[545] and

(iii) the Bosnian Muslim population forcibly transferred out of Žepa between 25 and 27 July 1995 in circumstances that caused the infliction of serious mental harm, in particular, the preceding intense VRS attacks on the surrounding villages, the fleeing of the population to the mountains, the pressuring of the "emotionally distressed population" to return to the enclave, Tolimir's menacing display of his weapon as he walked through the crowd and Mladić's statements to Bosnian Muslims leaving Žepa that he was giving them their lives as a gift.[546]

(i) Submissions

193. Tolimir submits that the Trial Chamber erred in law and fact in finding that the above-mentioned groups suffered "serious bodily or mental harm", as that term is used in Article 4(2)(b) of the Statute.[547] He argues that the Trial Chamber's definition of the harm required to meet the threshold of Article 4(2)(b) is "too general and imprecise".[548] In his view "serious mental harm" must involve permanent impairment to mental faculties that is sufficiently serious so as to contribute or tend to contribute to the destruction of the group.[549] Tolimir argues that the Trial Chamber adopted and applied a much broader definition of mental harm, contained in the first draft of the Genocide Convention, than that eventually adopted in the Genocide Convention.[550]

194. Tolimir contends that the suffering of the Bosnian Muslim men who were detained by the Bosnian Serb Forces in the days and hours prior to their death did not amount to serious mental

[543] Trial Judgement, para. 754.
[544] Trial Judgement, para. 755.
[545] Trial Judgement, para. 756. *See also* Trial Judgement, para. 757.
[546] Trial Judgement, para. 758.
[547] Appeal Brief, paras 76, 143, 148, 151.
[548] Appeal Brief, para. 73, *citing* Trial Judgement, para. 738.
[549] Appeal Brief, para. 144.

harm since it cannot be reasonably concluded that that specific harm was inflicted in order to destroy a group as such or contributed or tended to contribute to the destruction of the group as such (this was achieved by the separate act of killing).[551] Tolimir adds that if the *actus reus* of genocide consists of killing members of the protected group, any mental harm suffered by the victims immediately before their death does not constitute a separate act of genocide.[552] Tolimir further argues that the survivors of the killings did not experience serious mental harm within the meaning of Article 4 of the Statute since the survivors suffered the circumstances of their escapes as individuals and thus such harm did not contribute or tend to contribute to the destruction of the Bosnian Muslims as a group.[553]

195. Tolimir submits that the Trial Chamber also erred in finding that the women, children, and elderly forcibly transferred from Srebrenica and the Bosnian Muslims transferred out of Žepa suffered serious mental harm amounting to genocide.[554] He argues that population transfers cannot be underlying acts of genocide unless members of the protected group are transferred in a manner leading to their deaths or to locations such as concentration camps or ghettos where they are exposed to conditions of life that lead to their physical destruction.[555] In this case, Tolimir contends, the Bosnian Muslim populations were transferred to safe Muslim-held territory, where they were not subjected to conditions of life leading to their death.[556] Tolimir further argues that the Trial Chamber failed to support its finding that the suffering of the Bosnian Muslim civilians transported from Srebrenica to Kladanj amounted to serious mental harm since that harm did not permanently impair their mental faculties or contribute or tend to contribute to the destruction of the Bosnian Muslims as a group.[557] Tolimir adds that, in considering whether serious mental harm had been done, the Trial Chamber erroneously took into account irrelevant factors such as the group's post-transfer quality of life and their inability to return to their former homes.[558]

196. Tolimir finally argues that the Trial Chamber erred in law and fact in finding that the harm inflicted upon Žepa's Bosnian Muslims constituted serious bodily or mental harm.[559] He points to the absence of any evidence in support of the Trial Chamber's conclusion.[560] Tolimir specifically submits that the Trial Chamber erred in fact in finding that he brandished his weapon in the air

[550] In this respect, Tolimir points to the views expressed by the United States of America when ratifying the Genocide Convention. *See* Appeal Brief, paras 73-74, 77; Reply Brief, para. 36.
[551] Appeal Brief, paras 143-145.
[552] Appeal Brief, paras 144-145.
[553] Appeal Brief, paras 146-147.
[554] *See* Appeal Brief, paras 148-159.
[555] Appeal Brief, para. 75. *See also* Notice of Appeal, para. 36.
[556] Appeal Brief, para. 76.
[557] Appeal Brief, para. 149.
[558] Appeal Brief, para. 150, *citing* Trial Judgement, para. 757.
[559] Notice of Appeal, paras 58-59; Appeal Brief, paras 151-152.
[560] Appeal Brief, para. 152.

while supervising the transfer operation in Žepa.[561] He argues that in making this finding, the Trial Chamber relied upon unreliable testimony and disregarded other evidence allegedly showing that he was, in fact, unarmed during the operation and specifically ordered that no harm be done to the people.[562] Tolimir contends that the Trial Chamber analysed Mladić's statements to the Bosnian Muslim civilians on board the buses in Žepa out of context and that in any case such statements could not be reasonably construed as having caused or as having the potential to cause serious mental harm to Žepa's Bosnian Muslim population.[563] According to Tolimir, Mladić actually ordered that the Žepa evacuees not be mistreated.[564] Finally, Tolimir contends that the Trial Chamber erred in finding that the Žepa population suffered serious mental harm in part because they were aware of the killings of Srebrenica's male population; according to Tolimir, no one in Žepa, including the UN and himself, had received any information about those killings, and rumours in that regard could not have reasonably been taken into consideration.[565]

197. The Prosecution responds that the Trial Chamber reasonably concluded that the Bosnian Serb Forces caused serious bodily or mental harm to the protected group.[566] It argues that since Tolimir fails to substantiate his arguments, they should be summarily dismissed.[567]

198. With regard to the Bosnian Muslim men who were detained prior to their murder by the Bosnian Serb Forces, the Prosecution argues that there is nothing to prevent a chamber from treating the harm suffered prior to murder as a separate *actus reus* of genocide and that it is proper to establish genocide under both Article 4(2)(a) and (b) of the Statute, since this establishes the full extent of the defendant's culpable conduct and is a relevant consideration in sentencing.[568]

199. As to the Bosnian Muslims who were separated from their male family members and then forcibly transferred from Potočari, the Prosecution argues that the Trial Chamber correctly assessed their suffering as amounting to serious mental harm.[569] The Prosecution argues that there are no limits as to the kind of act that may give rise to serious bodily or mental harm to members of the protected group.[570] It contends that, so long as the harm arising from an act of expulsion amounts to serious bodily or mental harm, there is no requirement that the protected group be transferred in a manner or to a specific location, such as concentration camps, where the conditions of life would

[561] Appeal Brief, para. 153.
[562] Appeal Brief, para. 153, *citing* Defence Exhibit 217 (Transcript of interview with Zoran Čarkić, dated 22 February 2011), pp. 13-14. *See also* Reply Brief, para. 53.
[563] Appeal Brief, paras 154-156.
[564] Appeal Brief, para. 158. *See also* Reply Brief, para. 54.
[565] Reply Brief, para. 55.
[566] Response Brief, para. 75.
[567] Response Brief, para. 43.
[568] Response Brief, para. 76.
[569] Response Brief, para. 77.

lead to the group's destruction.[571] Referring to ICTY trial jurisprudence, the Prosecution submits that deportation can cause "grave and long-term disadvantage to a person's ability to lead a normal and constructive life, which has been accepted as tending towards the group's destruction".[572] The Prosecution submits that the Trial Chamber did not base its finding on the harm suffered by those displaced from Potočari only on the forcible transfer *per se*, but on a consideration of "all acts of intimidation and violence" against these Bosnian Muslim civilians, including the attacks on Srebrenica by the Bosnian Serb Forces, the conditions in and around the UN compound in Potočari, the mistreatment at the compound, the "abduction" of their male relatives, and the overall "profound psychological trauma caused from the loss of their homes, their loved ones, and the very experience of having their lives uprooted through force and violence".[573]

200. The Prosecution further contends that the Trial Chamber properly conducted the "same holistic analysis" of the suffering of the Žepa population in reaching the conclusion that serious mental harm was inflicted upon them. According to the Prosecution, Tolimir fails to explain why no reasonable trial chamber could have relied upon the evidence of an eyewitness found to be credible by the Trial Chamber in concluding that Tolimir brandished his weapon to coerce Žepa's population onto the vehicles.[574] It also asserts that the Trial Chamber was entitled to give weight to Mladić's statements to Žepa's Bosnian Muslims during the evacuation and evaluate them in light of the circumstances in which they were made, including his statements to other Bosnian Muslims.[575]

(ii) Analysis

a. Definition of "serious mental harm" under Article 4 of the Statute

201. Article 4(2)(b) of the Statute provides that genocide can be committed by "causing serious bodily or mental harm to members of the [protected] group" with intent to destroy, in whole or in part, the group as such.[576] "Serious bodily or mental harm" is not defined in the Statute. Drawing on the case law of the ICTY and the ICTR, the Trial Chamber held that serious bodily or mental harm:

> must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go "beyond temporary

[570] Response Brief, para. 39.
[571] Response Brief, para. 39.
[572] Response Brief, para. 39.
[573] Response Brief, para. 77.
[574] Response Brief, para. 80.
[575] Response Brief, para. 81.
[576] The same language is used in Article II(b) of the Genocide Convention.

> unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".[577]

The Trial Chamber also stated that the determination of the seriousness of the harm in question "must be made on a case-by-case basis".[578]

202. The Appeals Chamber recalls that it has not directly addressed what constitutes serious mental harm as an act of genocide. Nonetheless, it is satisfied that the definition of serious mental harm adopted in the Trial Judgement is consistent with the case law of the ICTY and the ICTR and aligns with the letter and spirit of the Genocide Convention. The Appeals Chamber rejects Tolimir's contention that the Trial Chamber based its understanding of "serious mental harm" on the Draft Genocide Convention. The Trial Chamber placed no reliance on this document in defining serious mental harm. The Trial Chamber cited the Draft Genocide Convention only as additional support for its further finding that forcible transfer may be an underlying act causing serious bodily or mental harm "in particular if the forcible transfer operation was conducted under such circumstances as to lead to the death of all or part of the displaced population".[579]

203. As correctly stated by the Trial Chamber, serious mental harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group.[580] The ICTR Appeals Chamber in the *Seromba* case has held in this regard that:

> serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat". Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings. To support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.[581]

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[577] Trial Judgement, para. 738, *citing Krajišnik* Trial Judgement, para. 862; *Seromba* Appeal Judgement, para. 46; *Gatete* Trial Judgement, para. 584, *Brđanin* Trial Judgement, para. 690; *Stakić* Trial Judgement, para. 516; *Akayesu* Trial Judgement, paras 502–504; *Kayishema and Ruzindana* Trial Judgement, para. 108; *Bagosora et al.* Trial Judgement, para. 2117; *Krstić* Trial Judgement, para. 513; *Blagojević and Jokić* Trial Judgement, para. 645.

[578] Trial Judgement, para. 738.

[579] Trial Judgement, para. 739 and n. 3107.

[580] Trial Judgement, para. 738, and authorities cited therein. *See also* ICJ *Croatia v. Serbia* Judgment, para. 157 ("in light of the [Genocide] Convention's object and purpose, the ordinary meaning of 'serious' is that the bodily or mental harm referred to in subparagraph (b) of that Article must be such as to contribute to the physical or biological destruction of the group, in whole or in part."). The Appeals Chamber notes that, significantly, under Article IX of the Genocide Convention, the International Court of Justice ("ICJ") is the competent organ to resolve disputes relating to the interpretation of that Convention. It is also the principal judicial organ of the United Nations and the community of nations at large. *See* Charter of the United Nations, Art. 92.

[581] *Seromba* Appeal Judgement, para. 46 (internal citations omitted). *See also Krajišnik* Trial Judgement, paras 862-863 ("'failure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities' will not amount to the *actus reus* of genocide if the deprivation is not so severe as to contribute to the destruction of the group, or tend to do so. Living conditions, which may be inadequate by any number of standards, may nevertheless be adequate for the survival of the group"); International Criminal Court, Elements of Crimes (2011), Art. 6(b), n. 3 (specifying that an act of serious bodily or mental harm "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment".).

Contrary to Tolimir's argument, serious mental harm must be lasting[582] but need not be permanent and irremediable.[583] Tolimir fails to show that these articulations of serious mental harm are "too general and imprecise".[584]

204. The Appeals Chamber is also not persuaded that the United States of America's "understanding" of serious mental harm as "the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques", expressed in its instrument of accession to the Genocide Convention,[585] is correct under customary international law, as Tolimir argues.[586] Tolimir does not point to any other State party to the Genocide Convention subscribing to such a restrictive reading of serious mental harm as an act of genocide,[587] nor does he explain why the Appeals Chamber should not be guided by the case law of the ICTY, the ICTR, and the ICJ on the matter.[588] Tolimir's challenges to the Trial Chamber's definition of serious mental harm as a genocidal act fail.[589]

205. The Appeals Chamber will now review the Trial Chamber's assessment of the seriousness of the mental harm suffered by each category of Bosnian Muslims detained by the VRS or affected by their operations in Srebrenica and Žepa. In doing so, the Appeals Chamber is following the analysis of the Trial Chamber, which also separately assessed the harm inflicted on each of those categories of Bosnian Muslim civilians to determine whether their suffering meets the threshold of "serious mental harm" under Article 4(2)(b) of the Statute.[590]

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[582] Judge Sekule dissents on the Majority's interpretation of the jurisprudence in that "harm must be lasting" for reasons set out in his partly dissenting opinion appended to the present Judgement.

[583] *See* Trial Judgement, para. 738; *Blagojević and Jokić* Trial Judgement, paras 645-646; *Brdanin* Trial Judgement, para. 690; *Stakić* Trial Judgement, para. 516; *Krstić* Trial Judgement, para. 513 (holding that serious mental harm "must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation" and result "in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life."); *Bagosora et al.* Trial Judgement, para. 2117; *Kayishema and Ruzindana* Trial Judgement, para. 108; *Akayesu* Trial Judgement, paras 502–504. *See also Bosnia Genocide* Judgment, para. 300 (quoting with approval *Stakić* Trial Judgement in this regard).

[584] *See* Appeal Brief, para. 73.

[585] *See* Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045, 18 U.S.C. §1091(a)(3) (1988), *also available at* 28 I.L.M. 754 (1989).

[586] *See* Appeal Brief, paras 73-74, 77; Reply Brief, para. 36.

[587] The Appeals Chamber notes that views of a single signatory on the meaning of a particular term used in a treaty only bind that State for the purpose of domestic implementing legislation and do not necessarily suggest a universal consensus on this issue. Even if the United States of America had submitted an official reservation as to the use of the term "mental harm" in Article II of the Genocide Convention – which it did not – such a reservation would not have modified the Convention for other signatories in that respect. *See* VCLT, Art. 21(2) ("The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.").

[588] The Appeals Chamber notes that the United States of America's interpretation of serious mental harm in its instrument of accession to the Genocide Convention was expressly considered and rejected in the *Krstić* Trial Judgement. *See Krstić* Trial Judgement, para. 510.

[589] Tolimir's specific arguments as to why forcible transfer may not amount to serious mental harm (Appeal Brief, paras 75-76, 148-151) are addressed below at paragraphs 208-212.

[590] Trial Judgement, paras 753-759.

b. Bosnian Muslim men detained prior to execution

206. With regard to Tolimir's argument that the mental harm suffered by those Bosnian Muslim men who were subsequently killed cannot be considered a separate act of genocide, the Appeals Chamber notes that "threats of death" and knowledge of impending death have been accepted as amounting to serious mental harm under Article 4 of the Statute.[591] The Appeals Chamber further observes that there is nothing in the Statute or the Genocide Convention that prevents a trial chamber from considering the harm suffered by a victim prior to death as a separate *actus reus* of genocide. Moreover, it recalls that a trial chamber has the duty to identify all the legal implications of the evidence presented.[592] Tolimir thus fails to demonstrate any error in the Trial Chamber's finding that the suffering endured by the Bosnian Muslim men prior to being killed constituted serious mental harm as a separate genocidal act.[593]

207. The Appeals Chamber also rejects Tolimir's argument that the survivors of the killings did not suffer serious mental harm because the harm they experienced was individualised. The Appeals Chamber notes the Trial Chamber's findings that these survivors had "horrific confrontations with death [that] have had a long-lasting impact" on their ability to lead "a normal and constructive life".[594] It is clear from these findings that the harm suffered by these survivors was the direct consequence of intentional acts perpetrated upon them not as individuals, but as Muslims of Eastern BiH.[595] The Appeals Chamber notes that there is ICTY and other international jurisprudence for the proposition that survivors of killing operations may suffer serious mental harm amounting to an act of genocide.[596] The Appeals Chamber finds no error in the Trial Chamber's conclusion that the mental harm suffered by the survivors of the killings qualified as an act of genocide under Article 4 of the Statute. The Appeals Chamber thus dismisses Tolimir's arguments.

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[591] *See Popović et al.* Trial Judgement, paras 812, 844; *Blagojević and Jokić* Trial Judgement, para. 649; *Brdanin* Trial Judgement, para. 690; *Krstić* Trial Judgement, para. 543. *See also Bosnia Genocide* Judgment, paras 290-291 (accepting that the experience of those Bosnian Muslim men from Srebrenica who were about to be executed amounted to serious mental harm and was "fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or mental harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre").

[592] *Krnojelac* Appeal Judgement, para. 172; *Rutaganda* Appeal Judgement, para. 580.

[593] Trial Judgement, paras 754-755.

[594] Trial Judgement, para. 755.

[595] This does not confuse attempted murder with the infliction of serious mental harm, as Tolimir contends. *See* Appeal Brief, para. 147. The crime of attempted murder addresses the legal consequences of the attempt to kill as a threat to the physical integrity of a human being, without consideration of its impact on the psychological health of the victim. The focus of the Trial Chamber's analysis under Article 4(2)(b) of the Statute, however, was precisely the impact of the killing operation and its surrounding circumstances on the mental condition of the Bosnian Muslim men who were subjected to that operation, including those who did not survive it. *See* Trial Judgement, paras 753-755. The Appeals Chamber also notes that the Trial Chamber properly found that the mental harm suffered by the men who survived arose not only from their being subjected to the killing operation itself, but also from having subsequently experienced the horrific circumstances of their escapes. Trial Judgement, para. 755.

[596] *See Popović et al.* Trial Judgement, para. 845; *Blagojević and Jokić* Trial Judgement, para. 647; *Krstić* Trial Judgement, para. 514; *Bosnia Genocide* Judgment, paras 290-291.

c. Bosnian Muslim women, children, and elderly forcibly transferred from Srebrenica

208. The Appeals Chamber first turns to Tolimir's argument that the Trial Chamber erred in law by considering the forcible transfer of the Bosnian Muslim populations out of Srebrenica and Žepa as an act causing serious mental harm. The Trial Chamber held that:

> [w]hile forcible transfer does not constitute a genocidal act by itself, it can, in certain circumstances, be an underlying act causing serious bodily or mental harm – in particular if the forcible transfer operation was conducted under such circumstances as to lead to the death of all or part of the displaced population.[597]

209. This holding is consistent with the Tribunal's precedent. The Appeals Chamber recalls that while "forcible transfer does not in and of itself constitute a genocidal act […] it is […] a relevant consideration as part of the overall factual assessment"[598] and "could be an additional means by which to ensure the physical destruction" of the protected group.[599] Nothing in the Tribunal's jurisprudence or in the Genocide Convention provides that a forcible transfer operation may only support a finding of genocide if the displaced population is transferred to concentration camps or places of execution. Tolimir cites no authority suggesting the existence of such a requirement. A forcible transfer operation may still "ensure the physical destruction" of the protected group[600] by causing serious mental harm or leading to conditions of life calculated to bring about the group's physical destruction, even if the group members are not transferred to places of execution. In past cases before the Tribunal, various trial chambers have recognised that forced displacement may – depending on the circumstances of the case – inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.[601]

210. Tolimir's challenge to the Trial Chamber's ultimate conclusion that the suffering of the women, children, and elderly forcibly transferred from Srebrenica resulted in serious mental harm is also without merit. The Trial Chamber assessed the seriousness of the harm caused to the displaced Bosnian Muslims by considering the painful separation process from their male family members at Potočari, the fear and uncertainty as to their fate and that of their detained male relatives, and the appalling conditions of the journey to Muslim-held territory by bus and on foot.[602] The Trial Chamber also considered the continuation of their profound trauma, as well as the financial and

[597] Trial Judgement, para. 739 (internal citations omitted).
[598] *Blagojević and Jokić* Appeal Judgement, para. 123. *See also Krstić* Appeal Judgement, para. 33.
[599] *Krstić* Appeal Judgement, para. 31.
[600] *Krstić* Appeal Judgement, para. 31.
[601] *See Blagojević and Jokić* Trial Judgement, para. 646 and n. 2071; *Krstić* Trial Judgement, paras 513, 518; *Krajišnik* Trial Judgement, para. 862.
[602] Trial Judgement, para. 756.

emotional difficulties they faced in their "drastically changed" lives following the forced transfer.[603] It is clear from these findings that the Trial Chamber did not find that the forcible transfer was *per se* an act of genocide, as Tolimir suggests.[604] Rather, the Trial Chamber evaluated all the relevant acts perpetrated against the Bosnian Muslim women, children, and elderly arising from the forcible transfer operation and the separation from and killings of their male relatives in determining whether their suffering amounted to serious mental harm. Tolimir fails to show that this holistic assessment of factors and evidence in order to assess the harm caused to the group as a result of the forcible transfer operation was an error.

211. Further, the Appeals Chamber is not persuaded that the Trial Chamber was not entitled to take into account the inability and fears of the group to return to their former homes, or the post-transfer quality of their life in making such an assessment. The Trial Chamber did not view each of those factors in isolation, nor did it hold that the inability of the surviving Bosnian Muslims to return to their place or their post-transfer living conditions amounted to serious mental harm *per se*; it holistically evaluated the suffering inflicted upon the women, children, and elderly of Srebrenica as a result of the Bosnian Serb Forces' operations. Tolimir does not offer any reason why the post-transfer suffering of the surviving Bosnian Muslims should not be considered in evaluating whether serious mental harm was inflicted. The Appeals Chamber notes that these factors are particularly relevant to considering whether the harm caused grave and long-term disadvantage to the ability of members of the protected group to lead a normal and constructive life.[605]

212. Contrary to Tolimir's contention,[606] the Trial Chamber did make findings satisfying the requirement that the harm suffered be of such a nature that it tends to contribute to the destruction of the protected group as such. The Appeals Chamber notes in this regard the Trial Chamber's findings that the lives of the displaced population "drastically changed", while some women have been "so profoundly traumatized that they prefer to die".[607] As noted above, serious mental harm need not result from acts causing permanent or irremediable mental impairment. It suffices that the harmful conduct caused grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life[608] so as to threaten the physical destruction of the group in whole or in part.[609] The Appeals Chamber is satisfied that the Trial Chamber provided sufficient reasoning for its conclusion that the suffering of the women, children, and elderly forcibly

[603] Trial Judgement, paras 756-757.
[604] *See* Appeal Brief, para. 149.
[605] *See supra*, para. 201.
[606] *See* Appeal Brief, para. 149.
[607] Trial Judgement, para. 757 (also quoting the testimony of a Bosnian Muslim woman, stating that "I live but actually my life does not exist, or we can say my life goes on but I do not exist").
[608] *See supra*, para. 201.
[609] *Seromba* Appeal Judgement, para. 46.

transferred from Srebrenica amounted to serious mental harm under Article 4 of the Statute. Tolimir's arguments are therefore dismissed.

d. Bosnian Muslim population forcibly transferred from Žepa

213. The Trial Chamber assessed the plight of the Bosnian Muslims forcibly transferred from Žepa separately from the suffering of the Bosnian Muslims of Srebrenica and acknowledged that the displacement of the Žepa population took place under "slightly different circumstances" from the transfer of the women, children, and elderly from Srebrenica, despite the existence of "some important similarities".[610] Unlike the Srebrenica transfer operation, the Trial Chamber made no findings that in Žepa, families were separated by force or that mass executions occurred.[611] The Trial Chamber held that Žepa's Bosnian Muslims suffered serious mental harm as a result of: (i) the intense VRS attacks on surrounding villages immediately prior to the forcible transfer operation; (ii) the pressure exerted by the VRS on the population that fled to the mountains to return to the enclave; (iii) the news about the murders of the men from Srebrenica beginning to spread; and (iv) the circumstances of the forcible transfer, particularly, Tolimir walking through the crowd directing activities and brandishing a weapon in the air and Mladić entering numerous buses and telling the Bosnian Muslims that he was giving them their lives as a gift.[612] The Appeals Chamber notes the Trial Chamber's reliance on evidence that during the evacuation, "there was an atmosphere of fear and intimidation in the enclave".[613] The Trial Chamber found that:

> The Bosnian Muslims were afraid and tired, many of them having lost track of family members who had fled to the mountains or the forests in the days preceding the start of the transportation. [Tolimir], who appeared to be directing the VRS as they boarded Bosnian Muslim civilians onto the buses, was observed waving his pistol up at the sky, knowing "very well what he was doing". In addition, the VRS was using megaphones from a surrounding hill to broadcast messages to the Bosnian Muslims. In one instance, Esma Palić recalls them calling out "People of Žepa, this is Ratko Mladić talking to you. […] You cannot stay in Žepa. Take white flags and start walking toward Brezova Ravan, where there are buses waiting for you." Moreover, information about the events following the fall of the Srebrenica enclave was beginning to circulate amongst some of the civilians, although people did not yet know the enormity of what had taken place. [614]

214. The Appeals Chamber is not persuaded by Tolimir's challenge to the Trial Chamber's finding that he brandished a weapon in the air during the evacuation of Bosnian Muslims from Žepa. The Trial Chamber based this finding on the eyewitness testimony of Prosecution Witness David Wood, the UNPROFOR major of the Joint Observers, whom the Trial Chamber found to be

[610] Trial Judgement, para. 758.
[611] The killings of the three Žepa leaders by the Bosnian Serb Forces will be evaluated separately below. In any case, those three killings do not qualify as "massive".
[612] Trial Judgement, para. 758. The Appeals Chamber notes that the Trial Judgement mistakenly refers to paragraph 673 of the Trial Judgement for its findings in this regard, whereas this incident is discussed in paragraph 643 of the Trial Judgement.
[613] Trial Judgement, para. 643.
[614] Trial Judgement, para. 643.

credible.[615] Tolimir disagrees with the Trial Chamber's assessment of the credibility of the witness, but fails to show that reliance on this evidence was unreasonable. Neither is the Appeals Chamber persuaded that the Trial Chamber erred in taking into account Mladić's statement to the departing population that their lives were given to them as a gift. In the view of the Appeals Chamber, a reasonable trial chamber could find that these words imparted a threat of violence designed to intimidate those in the buses, particularly given the circumstances in which they were spoken. As to Tolimir's contention that the Trial Chamber erred by considering "rumours" about the Srebrenica mass killings having reached Žepa before the transfer began,[616] the Appeals Chamber notes that the Trial Chamber based its finding in this regard on the testimony of three witnesses on the ground who each testified to the general expectation at the time of the forcible transfer operation in Žepa that able-bodied Bosnian Muslim men who were captured by the VRS would be killed.[617] Tolimir merely disagrees with the Trial Chamber's evidentiary assessments and fails to show that no reasonable fact finder could have reached them.

215. On the other hand, the Appeals Chamber recalls that serious mental harm results only from acts causing grave and long-term disadvantage to the ability of members of the protected group to lead a normal and constructive life[618] and threatening the physical destruction of the group as such.[619] The Appeals Chamber, Judges Sekule and Güney dissenting, notes, however, that, unlike the Bosnian Muslims forcibly transferred from Srebrenica, the Trial Chamber made no findings and cited no evidence as to the lasting impact of the forcible transfer operation on Žepa's population in terms of causing a grave and long-term disadvantage to their ability to lead a normal and constructive life.[620] Even though the emotional pain and distress inflicted upon Žepa's Bosnian Muslims was irrefutably grave, no evidence of any long-term psychological trauma was cited in the Trial Judgement.[621]

216. In reaching its conclusion as to the seriousness of the mental harm inflicted on Srebrenica's displaced population, the Trial Chamber relied principally on the painful process of the violent, coercive separation from their male family members, the subsequent uncertainty of what happened to their male relatives, and the continuing "emotional distress caused by the loss of their loved ones" following the transfer, all of which prevented the recovery of the displaced population and

[615] Trial Judgement, para. 643.
[616] *See supra*, para. 196.
[617] *See* Trial Judgement, n. 2903, *citing* T. 15 February 2011 pp. 9886–9887, T. 2 September 2010 p. 4821, T. 22 March 2011 p. 11597.
[618] *See supra*, paras 203-204, 209.
[619] *Seromba* Appeal Judgement, para. 46.
[620] Trial Judgement, para. 758. *Cf.* Trial Judgement, para. 757.
[621] *See* Trial Judgement, para. 758.

their ability to lead normal lives.[622] By contrast, in the case of the Žepa population, the Trial Chamber based its assessment on the pressure exerted by the VRS on the Bosnian Muslim population to leave the enclave, the news of the murders of the Bosnian Muslim men from Potočari starting to spread, and the threatening conduct of Tolimir and Mladić during the operation.[623] While the circumstances of the forcible transfer must have been frightening for Žepa's population, serious mental harm must be "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".[624] The Appeals Chamber further recalls that acts falling under Article 4(2)(b) of the Statute require proof of a result, *i.e.*, that serious mental harm was inflicted.[625]

217. The Trial Chamber did not find that Žepa's Bosnian Muslim population suffered a mass violent separation of families and the ongoing trauma of having lost their family members, like the Bosnian Muslims from Srebrenica,[626] and failed to point to any evidence on the record establishing that the mental harm suffered by that group tended to contribute to the destruction of the Muslims of Eastern BiH as such.[627] Even if all the factors considered by the Trial Chamber were established, in the absence of findings or references to evidence of any long-term consequences of the forcible transfer operation on the Žepa population and the Bosnian Muslim population of Eastern BiH in general and of a link between the circumstances of the transfer operation in Žepa and the physical destruction of the protected group as a whole, no reasonable trial chamber could have found that the Bosnian Muslims forcibly transferred from Žepa suffered serious mental harm within the meaning of Article 4(2)(b) of the Statute. The Appeals Chamber, Judges Sekule and Güney dissenting, thus reverses the Trial Chamber's findings in this regard and Tolimir's remaining arguments are rendered moot and need not be addressed.

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[622] Trial Judgement, paras 756-757.
[623] Trial Judgement, para. 758.
[624] *Seromba* Appeal Judgement, para. 46.
[625] Trial Judgement, para. 737; *Brdanin* Trial Judgement, para. 688; *Stakić* Trial Judgement, para. 514. *See also Popović et al.* Trial Judgement, para. 811.
[626] The Appeals Chamber acknowledges the Trial Chamber's finding that, "[i]n the period leading up to the fall of the Žepa enclave, the population of Žepa, including the able-bodied men and some wounded, had fled to the surrounding mountains". *See* Trial Judgement, para. 639. The Trial Chamber also found that, even though Žepa's Muslim civilians "started returning to the centre of Žepa in order to be evacuated" once news about the 24 July 1995 evacuation agreement began to spread (Trial Judgement, para. 639), "[m]ost of the able-bodied men, including members of the ABiH, remained in the mountains at this time". Trial Judgement, n. 2737, and authorities cited therein. In analysing whether the genocidal act of Article 4(2)(b) of the Statute had been committed, however, the Trial Chamber did not list the *de facto* separation of families in Žepa among the factors causing serious mental harm to the Bosnian Muslims of Žepa (Trial Judgement, para. 758), even though it did hold that serious mental harm was caused as a result of, *inter alia*, the forced, violent separation of Srebrenica's Muslim families in Potočari, which resulted in the detention of men and boys from Srebrenica and their subsequent murders by the Bosnian Serb Forces. *See* Trial Judgement, para. 756.
[627] *Cf. Seromba* Appeal Judgement, para. 48 ("the Appeals Chamber cannot equate nebulous invocations of 'weakening' and 'anxiety' with the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture.").

218. This conclusion, of course, does not amount to a conclusion that the Bosnian Muslims of Žepa were not the victims of genocide. The Appeals Chamber emphasises that the only question addressed here is whether the Trial Chamber erred in finding that the forcible transfer operation in Žepa – which the Trial Chamber distinguished from the transfer operation in Srebrenica and analysed separately *vis-à-vis* the *actus reus* of Article 4(2)(b) of the Statute – inflicted on the transferred Muslim population serious mental harm, as that term is used in Article 4(2)(b) of the Statute and the Genocide Convention. This question does not involve the definition of the protected group. In this sense, the Appeals Chamber recalls its earlier conclusion that the Trial Chamber did not err in holding that the Bosnian Muslims of Žepa are, along with the Muslims of Srebrenica and Eastern BiH in general, members of the protected group.[628] By virtue of being "within the targeted part of the protected group", the Bosnian Muslims of Žepa were among the ultimate victims of the genocidal enterprise against the Muslims of Eastern BiH.[629]

219. Accordingly, the Appeals Chamber, Judges Sekule and Güney dissenting, grants Ground of Appeal 10 in part and reverses Tolimir's conviction for genocide through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute, to the extent that this conviction was based on the Bosnian Serb operations in Žepa.

(iii) Conclusion

220. For the foregoing reasons, the Appeals Chamber dismisses Grounds of Appeal 7 in part (with respect to serious mental harm as the *actus reus* of genocide) and 10 in part (with respect to serious mental harm as the *actus reus* of genocide *vis-à-vis* the Bosnian Muslim men from Srebrenica who were detained and executed, those who survived the executions, and the women, children, and elderly forcibly transferred from Srebrenica).[630]

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[628] *See supra*, paras 185-188. It is this group that is the victim of the crime of genocide – and each underlying act meeting the threshold of Article 4 of the Statute and committed with genocidal intent – and not the individual members of the group. *See* Trial Judgement, para. 747, *citing Akayesu* Trial Judgement, para. 521.

[629] *See also Popović et al.* Appeal Judgement, para. 458. The Appeals Chamber refers, in this respect, to its relevant findings in the *Popović et al.* case, which involved facts and charges almost identical to the present case. The *Popović et al.* Appeal Judgement affirmed that "the Muslims of Eastern Bosnia including the inhabitants of Žepa were found to be victims of the genocidal enterprise" (*Popović et al.* Appeal Judgement, para. 458), even though the *Popović et al.* Trial Chamber had confined its analysis of genocidal acts falling under Article 4(2)(b) of the Statute "to an analysis of the serious bodily and mental harm caused by the killing operation" of the Bosnian Muslim men and boys from Srebrenica. *Popović et al.* Trial Judgement, para. 843. *See also Popović et al.* Trial Judgement, paras 844-847. In the *Popović et al.* case, the Appeals Chamber did not address the Trial Chamber's holding that the Bosnian Muslim of Žepa were victims of genocide, even though serious bodily or mental harm had only been caused by the killing operation of the Bosnian Muslim men and boys from Srebrenica, not the forcible transfer operations in either Srebrenica or Žepa and this issue was not challenged on appeal. In the view of the Appeals Chamber, the same distinction between victims of genocide (which include all members of the protected group) and direct targets of each act that constitutes the *actus reus* of genocide applies to the present case.

[630] Judge Antonetti appends a separate opinion in this regard.

221. The Appeals Chamber, Judges Sekule and Güney dissenting, grants Ground of Appeal 10 in part with respect to serious mental harm as the *actus reus* of genocide *vis-à-vis* the Bosnian Muslims forcibly transferred from Žepa and reverses Tolimir's conviction for genocide through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute, to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa.[631]

(b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction (Ground of Appeal 10 in part)

222. The Trial Chamber found that the "combined effect" of the "forcible transfer operations of the women and children of the protected group" and the killing of at least 5,749 Bosnian Muslim men from this same group "had a devastating effect on the physical survival of the Bosnian Muslim population of Eastern BiH" and that "these operations were aimed at destroying this Bosnian Muslim community and preventing reconstitution of the group in this area".[632] In reaching this conclusion, the Trial Chamber also considered that following the fall of the enclaves the mosques in Srebrenica and Žepa were destroyed.[633] The Trial Chamber held that the only reasonable inference to draw from the evidence was that the conditions resulting from the combined effect of the killing and forcible transfer operations were "deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH".[634]

(i) Submissions

223. Tolimir submits that the Trial Chamber erred in fact and law[635] in making the above-mentioned findings due to an incorrect understanding of the term "physical and biological destruction", erroneous factual findings, a failure to consider relevant evidence, selective analysis of facts, and failure to provide a reasoned opinion.[636] Tolimir argues that the Trial Chamber erred in finding that the conditions of life deliberately imposed as a result of the killing and forcible transfer operations aimed at "destroying this Bosnian Muslim community [of Eastern BiH] and preventing

[631] Judge Antonetti appends a separate opinion in this regard.
[632] Trial Judgement, para. 766.
[633] Trial Judgement, para. 766.
[634] Trial Judgement, para. 766.
[635] The Appeals Chamber notes that while Tolimir alleges only an "error in fact" in paragraph 160 of the Appeal Brief and paragraph 61 of his Notice of Appeal, his arguments refer to alleged errors of both law and fact. Further, in paragraph 166 of his Appeal Brief and paragraph 63 of his Notice of Appeal, he argues that the alleged errors "invalidate the Judgement and caused a miscarriage of justice". The Appeal Chamber therefore will consider his arguments as alleging both errors of fact and law.
[636] Appeal Brief, paras 160-161. The Appeals Chamber understands Tolimir's reference to paragraph 66 of the Trial Judgement to be a reference to paragraph 766 of the Trial Judgement. *See also* Notice of Appeal, para. 61.

the reconstitution of the group *in this area*".[637] In Tolimir's view, the purpose of Article 4 of the Statute is to protect the survival of certain groups as such, not the survival of a group in a particular area.[638] Tolimir also avers that separate findings should have been made for the populations of Srebrenica and Žepa, although he contends that there is no evidence that either group were subjected to conditions of life meeting the threshold of Article 4(2)(c) of the Statute.[639] He points to the fact that both groups were transferred to Muslim-held territory where they were not subjected to living conditions calculated to bring about their physical destruction.[640] Tolimir argues in this respect that the "whole population or its respective part" must be subjected to the destructive living conditions.[641] Finally, Tolimir adds that it is impermissible to rely on facts constitutive of other genocidal acts to establish an act under Article 4(2)(c) of the Statute.[642]

224. The Prosecution responds that the Trial Chamber correctly found that the forcible transfer and killing operations were deliberately inflicted and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH.[643] It argues that the Trial Chamber's finding was consistent with the Appeals Chamber's holding in the *Krstić* Appeal Judgement that the transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating the possibility that "the Muslim community *in the area* could reconstitute itself".[644] The Prosecution further asserts that the Trial Chamber was not obliged to treat the populations in Srebrenica and Žepa separately when assessing the combined effect of the Bosnian Serb Forces' operations *vis-à-vis* the Muslims of Eastern BiH, since the Prosecution's case was whether this group as a whole – not each enclave separately – was the victim of genocide.[645] The Prosecution points out that Article 4(2)(c) of the Statute does not require proof of a result, *i.e.*, of the physical destruction of the protected group.[646] It also avers that the Trial Chamber was permitted to consider the same underlying acts of forcible transfer and killings as constituting multiple acts of genocide.[647] The Prosecution requests the summary dismissal of Tolimir's other, unsubstantiated, arguments.[648]

[637] Trial Judgement, para. 766 (emphasis added).
[638] Appeal Brief, para. 163. *See also* Appeal Brief, para. 76.
[639] Appeal Brief, para. 164.
[640] Appeal Brief, para. 164.
[641] Appeal Brief, para. 165.
[642] Appeal Brief, para. 165.
[643] Response Brief, para. 83.
[644] Response Brief, para. 84, *citing Krstić* Appeal Judgement, para. 31 (emphasis in Response Brief).
[645] Response Brief, para. 85, *citing* Trial Judgement, paras 760, 766.
[646] Response Brief, para. 85.
[647] Response Brief, para. 86.
[648] Response Brief, para. 87.

(ii) Analysis

225. Article 4(2)(c) of the Statute provides that genocide can be committed by "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".[649] This provision has been analysed and interpreted by a number of trial chambers of the ICTY and the ICTR. The Trial Chamber in this case correctly summarised this jurisprudence as:

> The underlying acts covered by Article 4(2)(c) are methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts punishable under Article 4(2)(c) include, *inter alia,* subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[650]

> Unlike Articles 4(2)(a) and (b), Article 4(2)(c) does not require proof of a result such as the ultimate physical destruction of the group in whole or in part. However, Article 4(2)(c) applies only to acts calculated to cause a group's physical or biological destruction deliberately and, as such, these acts must be clearly distinguished from those acts designed to bring about the mere dissolution of the group. Such acts, which have been referred to as "cultural genocide", were excluded from the Genocide Convention. For example, the forcible transfer of a group or part of a group does not, by itself, constitute a genocidal act, although it can be an additional means by which to ensure the physical destruction of a group.[651]

226. The Appeals Chamber has not previously been called upon to address the issue of what acts qualify as the *actus reus* of genocide under Article 4(2)(c) of the Statute. However, it is satisfied that the legal principles stated by the Trial Chamber are consistent with the existing case law of the ICTY and the ICTR, as well as the letter and spirit of the Genocide Convention. The Appeals Chamber recalls, in this respect the relevant findings of the ICJ in the recent *Croatia v. Serbia* case. Citing ICTY jurisprudence, the ICJ held that:

> [d]eliberate infliction on the [protected] group of conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II(c) of the Convention, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group. Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion.[652]

The Appeals Chamber recalls that it is not bound by the legal determinations reached by trial chambers of this Tribunal or by the ICJ.[653] The Appeals Chamber notes, however, that the ICJ is the principal organ of the United Nations and the competent organ to resolve disputes relating to the

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[649] The same language is used in Article II(c) of the Genocide Convention.
[650] Trial Judgement, para. 740, *citing Akayesu* Trial Judgement, paras 505-506, *Brdanin* Trial Judgement, para. 691, *Stakić* Trial Judgement, paras 517–518, *Musema* Trial Judgement, para. 157, *Rutaganda* Trial Judgement, para. 52, *Kayishema and Ruzindana* Trial Judgement, paras 115–116, *Popović et al.* Trial Judgement, para. 814.
[651] Trial Judgement, para. 741, and authorities cited therein.
[652] ICJ *Croatia v. Serbia* Judgment, para. 161, *citing Brdanin* Trial Judgement, para. 691, *Stakić* Trial Judgement, paras 517–518.
[653] *Karadžić* Rule 98*bis* Appeal Judgement, para. 94.

interpretation of the Genocide Convention.[654] The Appeals Chamber further notes that the ICJ's interpretation of Article II(c) of the Genocide Convention cited above was based on ICTY trial jurisprudence and is consistent with it. The Appeals Chamber is therefore satisfied that the jurisprudence set out by the Trial Chamber accurately reflects the applicable law.

227. Bearing the above principles in mind, the Appeals Chamber turns to the Trial Chamber's interpretation and application of Article 4(2)(c) of the Statute in this case. The Appeals Chamber recalls that the Trial Chamber considered the "combined effect" of: (i) the "forcible transfer operations" in relation to Srebrenica's Muslim women, children, and elderly from Potočari and Žepa's Muslim population; and (ii) the killing of at least 5,749 Bosnian Muslim men from Srebrenica to conclude that "these operations were aimed at destroying this Bosnian Muslim community and preventing reconstitution of the group in this area" (*i.e.* Eastern BiH).[655] In the view of the Appeals Chamber, the Trial Chamber's consideration of the killing operation under Article 4(2)(c) of the Statute was an error, as it contravened the very case law cited by the Trial Chamber. The Appeals Chamber recalls that Article 4(2)(c) of the Statute covers "methods of destruction *that do not immediately kill* the members of the group, but ultimately seek their physical destruction".[656] It is clear from the Tribunal's case law, explicitly relied upon by the ICJ, that killings may not be considered, under Article 4(2)(c) of the Statute, as acts resulting in the deliberate infliction of conditions of life calculated to bring about the protected group's physical destruction.

228. The Appeals Chamber recalls that the different categories of genocidal acts proscribed in Article 4(2) of the Statute correspond to and aim to capture different methods of physical destruction of a protected group: subparagraphs (a) and (b) of Article 4(2) of the Statute proscribe acts causing a specific result, which must be established by the evidence, *i.e.*, killings and serious bodily or mental harm respectively;[657] on the other hand, subparagraph (c) of the same Article purports to capture those methods of destruction that do not immediately kill the members of the group, but which, ultimately, seek their physical destruction.[658] The chambers of the Tribunal and the ICJ have listed several acts as examples of such methods of destruction that could potentially meet the threshold of Article 4(2)(c) of the Statute and Article II(c) of the Genocide Convention, including deprivation of food, medical care, shelter or clothing, lack of hygiene, systematic expulsion from homes, or subjecting members of the group to excessive work or physical exertion.[659] Notably, killings, which are explicitly mentioned as a separate genocidal act under

[654] *See* Charter of the United Nations, Art. 92; Genocide Convention, Art. IX. *See also supra*, n. 580.
[655] Trial Judgement, para. 766.
[656] Trial Judgement, para. 740 (emphasis added).
[657] Trial Judgement, para. 737, and authorities cited therein.
[658] Trial Judgement, para. 741, *citing Brdanin* Trial Judgement, paras 691, 905, *Stakić* Trial Judgement, para. 517.
[659] *See* Trial Judgement, para. 740 (referring to "subjecting the group to a subsistence diet; failing to provide adequate

Article 4(2)(a) of the Statute, may not be considered as a method of inflicting upon the protected group conditions of life calculated to bring about its destruction under Article 4(2)(c) of the Statute.

229. The Appeals Chamber, therefore, finds merit in Tolimir's contention that the Trial Chamber was legally barred from considering the combined effect of the killing and the forcible transfer operations under Article 4(2)(c) of the Statute. The Appeals Chamber recognises that in the Indictment, this *actus reus* of genocide was alleged to have been perpetrated through "the forcible transfer of the women and children from Srebrenica and Žepa, the separation of the men in Potočari and the execution of the men from Srebrenica", all of which operations were to be considered together.[660] Such combined consideration, however, was contrary to the legal principles governing the application of Article 4(2)(c) of the Statute, which limit the scope of the provision to "methods of physical destruction, other than killing".[661]

230. Another error committed by the Trial Chamber in its application of Article 4(2)(c) of the Statute was its consideration of the destruction of mosques in Srebrenica and Žepa as an additional act through which the Bosnian Serb Forces inflicted on the protected group conditions of life calculated to bring about its destruction.[662] As the Trial Chamber itself acknowledged, acts amounting to "cultural genocide" are excluded from the scope of the Genocide Convention.[663] Notably, the ICJ also held that "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group".[664] The Trial Chamber, therefore, committed a legal error in considering the destruction of mosques in Srebrenica and Žepa under Article 4(2)(c) of the Statute.

231. In light of the legal errors identified above, the Appeals Chamber will proceed with examining the factual findings of the Trial Chamber and the evidence on the record in order to determine whether the forcible transfer operations of the Muslim populations of Srebrenica and Žepa, excluding the killings of Srebrenica's males and the destruction of mosques in the enclaves,

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medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion."). *See also Karadžić* Rule 98*bis* Appeal Judgement, para. 47 (referring to cruel and inhumane treatment, inhumane living conditions, and forced labour); ICJ *Croatia v. Serbia* Judgment, para. 161 (referring to "deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion").

660 Indictment, para. 24.

661 ICJ *Croatia v. Serbia* Judgment, para. 161.

662 Trial Judgement, para. 766. The Appeals Chamber notes that Tolimir does not challenge this finding. However, considering that the issue is of general significance to the jurisprudence of the Tribunal, in the exercise of its discretion, the Appeals Chamber has decided to consider the issue *proprio motu*.

663 Trial Judgement, para. 741, and authorities cited therein.

664 *Bosnia Genocide* Judgment, para. 344. *See also* ICJ *Croatia v. Serbia* Judgment, paras 386-390 (affirming that the destruction of cultural property cannot qualify as an act of genocide under any of the categories of Article II of the Genocide Convention, even if such acts may be taken into account to establish genocidal intent).

were conducted under such circumstances so as to impose on the protected group conditions of life meeting the threshold of Article 4(2)(c) of the Statute.[665] In this regard, the Appeals Chamber recalls its holding in the *Krstić* case that a forcible transfer operation does not amount to physical destruction as such and the displacement of a protected group, either in whole or in part, does not constitute a genocidal act *per se*.[666] The Appeals Chamber also finds helpful the ICJ's holding that:

> deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. […] [T]his is not to say that acts described as 'ethnic cleansing' may never constitute genocide, […] provided such action[s] [are] carried out […] with a view to the destruction of the group, as distinct from its removal from the region. […] in other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such.[667]

232. The issue before the Appeals Chamber is whether the forcible transfer operations of the Muslim populations of Srebrenica and Žepa took place under such circumstances calculated to cause the physical extinction of the Muslims of Eastern BiH as a whole, and the "circumstances in which the forced displacements were carried out are critical in this regard".[668]

233. After carefully examining the relevant evidence, the Appeals Chamber is not convinced that the forcible transfer operations in Srebrenica and Žepa, viewed separately from the killings of Srebrenica's male population, were conducted under circumstances calculated to result in the total or partial physical destruction of the protected group, *i.e.* the Muslims of Eastern BiH. There is no doubt that the Bosnian Muslims who were forced to abandon their houses and belongings in Srebrenica and Žepa and then endured a painful process of separation from their ancestral land and transferred to other parts of BiH were traumatised as a result of the transfer and have since faced harsh realities in their new lives, both financially and psychologically.[669] The record, however, is devoid of any evidence that the forcible transfers, if they are analysed – as they must – separately from the killing operation and the destruction of mosques in Srebrenica and Žepa, were "carried out […] with a view to the destruction of the group, as distinct from its removal from the region" at issue (*i.e.*, the enclaves of Srebrenica and Žepa).[670] Although the Appeals Chamber is satisfied that

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[665] *See supra*, para. 10.
[666] *See Krstić* Appeal Judgement, para. 33.
[667] ICJ *Croatia v. Serbia* Judgment, para. 162, *quoting Bosnia Genocide* Judgment, para. 190 (internal quotation marks omitted).
[668] ICJ *Croatia v. Serbia* Judgment, para. 163.
[669] Trial Judgement, paras 757, 766, and authorities cited therein.
[670] ICJ *Croatia v. Serbia* Judgment, para. 162, *quoting Bosnia Genocide* Judgment, para. 190 (internal quotation marks omitted). *See also supra*, para. 231. In that sense, the Trial Chamber's statement, in paragraph 766 of the Trial Judgement, that the forcible transfer and killing operations met the threshold of Article 4(2)(c) of the Statute because they resulted in conditions of life aimed at "destroying this Bosnian Muslim community and preventing the reconstitution of the group *in this area*" (emphasis added) reflects an erroneous understanding of the term "physical destruction" as used in this provision. *See also* Appeal Brief, para. 164. As the *Bosnia Genocide* Judgement makes clear (*see Bosnia Genocide* Judgment, para. 190), the destruction of a protected group's ability to reconstitute itself

there was a deliberate plan to expel the Bosnian Muslim women, children, and elderly from Srebrenica and the entire Muslim population from Žepa, it has not been established beyond reasonable doubt that such a policy of removal, implemented through the JCE to Forcibly Remove, was aimed at causing the physical destruction, *i.e.*, the slow death, of these populations.[671] It bears noting, in this regard, that the Trial Chamber found that despite the distress caused by the transfer process, these populations were ultimately transferred to ABiH-held territory where they were safe and no longer ran any risk of physical extinction.[672] The *actus reus* of Article 4(2)(c) of the Statute "covers methods of physical destruction, other than killing, whereby the perpetrator ultimately *seeks the death* of the members of the group".[673] There is no evidence on the record that the forcible transfer operations were carried out in such a way so as to lead to the ultimate death of the displaced Bosnian Muslims.

234. The Appeals Chamber recalls again that the forced displacement of a population "does not constitute in and of itself a genocidal act"[674] and that acts meeting the threshold of Article 4(2)(c) of the Statute typically relate to the deliberate withholding or taking away of the basic necessities of life over an extended period of time.[675] No such acts were alleged or found to have been committed against the Muslim populations forcibly transferred out of the enclaves of Srebrenica and Žepa. The Appeals Chamber also notes that in the *Popović et al.* case – the only other case before the Tribunal involving the Bosnian Serb operations in both Srebrenica and Žepa – the Trial Chamber held that the forcible transfer of the women, children, and elderly from Srebrenica and Žepa, viewed in isolation from the killings in Srebrenica, did not fall within the ambit of Article 4(2)(c) of the Statute.[676] The *Popović et al.* Trial Chamber specifically rejected the notion that "the destruction of the social structure of the community and the inability of those who were forcibly transferred to reconstruct their lives […] are the kinds of conditions intended to be prohibited by Article 4(2)(c) of the Statute".[677] Even though it is not binding, that holding, in the view of the Appeals Chamber,

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in a particular area is not synonymous with the physical or biological destruction of the group as such, which, in essence, means "the death of the members of the group". *See* ICJ *Croatia v. Serbia* Judgment, para. 161.

[671] *See also* ICJ *Croatia v. Serbia* Judgment, paras 376 (rejecting the claim that the "expulsions and forced displacements of Croats in the SAO Krajina" qualified as genocidal acts), 480 (holding that "even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina" and even if "there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been shown that such a policy was aimed at causing the physical destruction of the population in question").

[672] *See* Trial Judgement, paras 263-284, 645.

[673] ICJ *Croatia v. Serbia* Judgment, para. 161, *citing Brdanin* Trial Judgement, para. 691, *Stakić* Trial Judgement, paras 517–518 (emphasis added).

[674] *See Krstić* Appeal Judgement, para. 33.

[675] *See* Trial Judgement, para. 740, and authorities cited therein. *See also Karadžić* Rule 98*bis* Appeal Judgement, paras 34, 37, 47; ICJ *Croatia v. Serbia* Judgment, para. 161.

[676] *Popović et al.* Trial Judgement, paras 849, 854. The Appeals Chamber notes that these holdings in the *Popović et al.* Trial Judgement were not challenged on appeal.

[677] *Popović et al.* Trial Judgement, para. 854. *See also Krstić* Appeal Judgement, paras 31, 33 (relying on the forcible transfer operation in Srebrenica as additional evidence of genocidal intent, but not as a separate genocidal act); *Stakić* Trial Judgement, para. 519 and nn. 1097-1098.

is persuasive in the present case. The Appeals Chamber thus concludes that the forcible transfer operations did not deliberately subject the protected group to conditions of life calculated to destroy it physically.[678]

235. The Appeals Chamber's conclusion that the forcible transfer operations involving Muslim civilians from Srebrenica and Žepa did not amount to genocidal acts under Article 4(2)(c) of the Statute, along with its previous conclusion that the displaced Muslim population of Žepa did not suffer serious mental harm within the meaning of Article 4(2)(b) of the Statute,[679] mean that the Bosnian Serb operations in Žepa did not constitute the *actus reus* of genocide under any of the provisions of Article 4 of the Statute. In other words, the Appeals Chamber holds that the forcible transfer operation involving the Muslim population of Žepa did not amount to genocide and, thus, the only genocidal acts committed through the JCE to Forcibly Remove was the serious mental harm resulting from the forcible transfer operation of Srebrenica's women, children, and elderly from Potočari.[680] The Appeals Chamber, thus, overturns Tolimir's conviction for genocide to the extent it was based on the forcible transfer operation in Žepa.

236. This holding does not mean that the Muslim civilians of Žepa were not the victims of genocide. As clarified above, and consistent with the Appeals Chamber's recent case law, all members of the protected group as defined by the Trial Chamber – *i.e.*, "the Bosnian Muslim population of Eastern Bosnia and in particular, of the enclaves of Srebrenica, Žepa and Goražde"[681] – were the victims of the genocidal acts of Article 4(2)(a) and 4(2)(b) of the Statute (killings and acts causing serious mental harm), by virtue of being "within the targeted part of the protected group".[682] In this and the previous subsections, the Appeals Chamber only finds that the displaced Bosnian Muslims of Žepa were not the direct victims of the specific genocidal act defined in Article 4(2)(b) and Article 4(2)(c) of the Statute – acts causing serious mental harm and acts deliberately inflicting conditions of life calculated to bring about the protected group's physical destruction in whole or in part. The Appeals Chamber's conclusions do not diminish the status of Žepa's Muslim populations as victims of the genocide committed against the entire protected group by means of (i) the killings of Srebrenica's male population (which qualifies as a genocidal act under both Article

[678] The Appeals Chamber notes that nothing precludes consideration of the same operations as evidence of genocidal intent. *See Krstić* Appeal Judgement, para. 33. *See also* ICJ *Croatia v. Serbia* Judgment, paras 162-163, 478; *Bosnia Genocide* Judgment, para. 190.
[679] *See supra*, paras 219, 221.
[680] *See supra*, paras 208-212.
[681] Trial Judgement, para. 775, *citing* Indictment, para. 10.
[682] *Popović et al.* Appeal Judgement, para. 458. *See also supra*, para. 218.

4(2)(a) and 4(2)(b) of the Statute) and (ii) the forcible transfer operation of Srebrenica's women, children, and elderly (which qualifies as a genocidal act under Article 4(2)(b) of the Statute).[683]

(iii) Conclusion

237. Accordingly, the Appeals Chamber grants Ground of Appeal 10 in part, to the extent that it challenges the Trial Chamber's findings under Article 4(2)(c) of the Statute, and reverses Tolimir's conviction for genocide under Article 4(2)(c) of the Statute.[684]

3. *Mens rea* of genocide

238. Tolimir submits that the Trial Chamber erred in law and fact in finding that "the Bosnian Serb Forces who committed the underlying acts set out in Article 4(2)(a)-(c)" had genocidal intent.[685] He also contends that the Trial Chamber erred in finding that the targeted killings of three Žepa leaders were committed with genocidal intent and relying on those killings as further evidence of genocidal intent.[686] Tolimir's challenges will be addressed in turn.

(a) The genocidal intent of the perpetrators (Grounds of Appeal 7, in part, and 11)

239. The Trial Chamber found that the "Bosnian Serb Forces who committed the underlying acts set out in Article 4(2)(a)-(c) intended the physical destruction of the Bosnian Muslim population of Eastern BiH".[687] In reaching this conclusion, the Trial Chamber evaluated the relevant evidence as a whole, taking guidance from the *Stakić* Appeal Judgement which held that "rather than considering separately whether there was intent to destroy the groups through each of the enumerated acts of Article 4 of the Statute, consideration should be given to all the evidence, taken together".[688] Consistent with this approach, the Trial Chamber considered the following to be evidence of genocidal intent: the circumstances under which the separation of Bosnian Muslim men from their families in Potočari occurred on 12 and 13 July 1995; the opportunistic killing of one Bosnian Muslim man in Potočari on 13 July 1995;[689] the capture of thousands of Bosnian Muslim men from the column on the same day; the collection and burning of the identification documents of those men taken from Potočari; the "inhumane conditions" of the detention of the men;[690] the scope and nature of the killing of the Bosnian Muslim men from Srebrenica, as well as the efficient and

[683] *See supra*, paras 208-212.
[684] Judge Antonetti appends a separate opinion.
[685] Notice of Appeal, paras 64-66; Appeal Brief, paras 167-181, *citing* Trial Judgement, para. 773. *See* Appeal Brief, paras 78-80.
[686] Appeal Brief, paras 182-196.
[687] Trial Judgement, para. 773.
[688] Trial Judgement, para. 772, *citing Stakić* Appeal Judgement, para. 55.
[689] Trial Judgement, para. 769.
[690] Trial Judgement, para. 769.

orderly manner in which this took place and the involvement of "several layers of leadership […] in the organization and coordination of the killing operation".[691] The Trial Chamber also inferred genocidal intent from the fact that a proposal to open a corridor to let the column move to ABiH-held territory was opposed until the Bosnian Serb Forces "were forced to accept that it was costing them too much manpower to engage in combat with the armed members of the column".[692] It further took into account the close temporal and geographical proximity and the coordinated execution of the underlying genocidal acts.[693]

240. In addition, the Trial Chamber considered that:

> the pattern of verbal abuse on account of affiliation with the Islamic faith inflicted by Bosnian Serb Forces on the Bosnian Muslims gathered in Potočari and the Bosnian Muslim men during their detention in Bratunac and Zvornik and up until they were killed; the persistent capture of the Bosnian Muslim men from the column; the almost simultaneous implementation of the operations to kill the men from Srebrenica and the forcible transfer of the Bosnian Muslim women, children and elderly out of Potočari […]; the forcible transfer of the Bosnian Muslim population from Žepa and the murder of three of its most prominent leaders […]; and the deliberate destruction of the mosques of Srebrenica and Žepa and the homes of Bosnian Muslims […], following the fall of the respective enclaves.[694]

(i) Submissions

241. Tolimir submits that the Trial Chamber erred in fact and law in finding that the Bosnian Serb Forces committed the underlying acts under Article 4(2)(a)-(c) with genocidal intent.[695] First, Tolimir submits that genocidal intent has to be established for each and every act constituting the *actus reus* of genocide. He argues that the Trial Chamber erred by inferring genocidal intent for all the underlying acts from the evidence viewed as a whole.[696] Second, Tolimir contends that the Trial Chamber erroneously inferred genocidal intent merely from the acts constituting the *actus reus* of genocide and their consequences.[697] Third, Tolimir argues that the following factors taken into account by the Trial Chamber do not support an inference of genocidal intent, namely:[698] (i) opportunistic killings, which by their nature can only provide a very limited basis for inferring genocidal intent;[699] (ii) the capture by the Bosnian Serb Forces of thousands of Bosnian Muslim men from the column, which Tolimir claims was a lawful military operation to capture enemy soldiers;[700] (iii) the destruction of the detainees' identification documents;[701] (iv) the inhumane

[691] Trial Judgement, paras 770-771, 773.
[692] Trial Judgement, para. 769.
[693] Trial Judgement, para. 772.
[694] Trial Judgement, para. 773.
[695] Appeal Brief, para. 167. *See also* Notice of Appeal, para. 64.
[696] Appeal Brief, para. 179.
[697] Appeal Brief, para. 168.
[698] Appeal Brief, paras 169-179.
[699] Appeal Brief, para. 170.
[700] Appeal Brief, paras 171, 174.
[701] Appeal Brief, para. 172.

conditions of the detention of Bosnian Muslim men from Srebrenica;[702] (v) the VRS's initial opposition to the proposal to open a corridor for the column to pass and the systematic targeting of the column, which Tolimir argues was lawful as it aimed at the "[d]estruction of enemy forces engaged in [a] military operation";[703] (vi) the large number of Bosnian Muslims killed, which, in his view, cannot *per se* be considered as proof of genocidal intent;[704] (vii) the involvement of "several layers of leadership" in the killing operations, which Tolimir argues is not supported by the evidence on the record;[705] (viii) the burial and reburial of murdered Bosnian Muslims, which Tolimir contends only revealed the perpetrators' intent "to conceal murders";[706] and (ix) the suffering of the Bosnian Muslims separated from their families in Potočari, detained, and killed, those who survived the killings, and those transferred from Potočari and Žepa, along with the "combined effect" of the forcible removal and killing operations.[707]

242. Tolimir additionally argues that the Trial Chamber erred in law by considering that evidence of intent to forcibly remove may also constitute evidence of the intent to destroy a group as such when considered in connection with "other culpable acts systematically directed against the same group".[708] He contends that this reasoning raises the question of whether the group subjected to "other culpable acts" is the protected group under Article 4 of the Statute and whether such "other culpable acts" must also amount to genocidal acts under that Article.[709] Tolimir avers that genocidal intent must be established specifically in regard to the group forcibly transferred and cannot be inferred from measures imposed on another part of the group (*e.g.*, murder), considered together with the forcible transfer. For this reason, in Tolimir's view, forcible transfer could only evidence genocidal intent if the group was transferred to a location where they are exposed to conditions of life capable of bringing about their physical destruction, such as enslavement, starvation, or detention in concentration camps.[710]

243. Finally, Tolimir submits that, in inferring genocidal intent *vis-à-vis* the Žepa operations, the Trial Chamber did not accord due weight to two exhibits that allegedly contradict the inference of genocidal intent.[711] Tolimir refers, in that respect, to: (i) Defence Exhibit 217, Tolimir's alleged instruction to Zoran Čarkić, during the Žepa evacuation process, that "nothing should happen to the

[702] Appeal Brief, para. 173.
[703] Appeal Brief, para. 174.
[704] Appeal Brief, para. 175.
[705] Appeal Brief, para. 177.
[706] Appeal Brief, para. 176.
[707] Appeal Brief, para. 178.
[708] Appeal Brief, para. 78, *citing* Trial Judgement, para. 748.
[709] Appeal Brief, para. 79.
[710] Appeal Brief, para. 80.
[711] Appeal Brief, para. 180; Reply Brief, para. 56.

people";[712] and (ii) Prosecution Exhibit 2427, Mladić's alleged explicit order that "nothing must be taken from the [Muslim people] whom [the VRS] evacuated from Žepa and that they must not be maltreated".[713]

244. The Prosecution responds that Tolimir fails to show that the Trial Chamber's findings were unreasonable. It argues that Tolimir does not challenge most of the factual findings relied on by the Trial Chamber and instead "attacks individual strands of evidence" from which the Trial Chamber inferred genocidal intent, while ignoring the fact that Trial Chamber's conclusion was "drawn from the totality of the circumstances taken together".[714] With regard to Tolimir's arguments as to the factors considered by the Trial Chamber, the Prosecution responds that: (i) opportunistic killings can indicate genocidal intent, as Tolimir acknowledges, and the Trial Chamber did so "to a minimal extent", relying on a single killing on 13 July 1995;[715] (ii) the Bosnian Muslim men captured from the column were detained in inhumane conditions alongside those men separated from their families at Potočari and were not engaging in combat when killed, thus their capture and execution reasonably supported the finding of genocidal intent;[716] (iii) the decision of Zvornik Brigade Commander Vinko Pandurević to open a corridor for the column in light of the combat situation does not undermine the inference of genocidal intent since genocide does not require proof that the perpetrator chose the "most efficient method" to achieve the objective of destroying the targeted group;[717] and (iv) the Trial Chamber properly considered the victims' suffering and the combined effect of the forcible transfer and murder operations along with other evidence, in assessing whether the Bosnian Serb Forces acted with genocidal intent.[718] The Prosecution adds that the Appeals Chamber should summarily dismiss Tolimir's remaining unsubstantiated arguments.[719]

245. Pointing to the Appeals Chamber's holding in *Krstić* that forcible displacement can evidence genocidal intent,[720] the Prosecution further argues that conduct not amounting to a genocidal act can be used to infer genocidal intent, such as forcible transfer or acts systematically targeting a particular group.[721] Finally, the Prosecution asserts that Tolimir's arguments regarding genocidal intent *vis-à-vis* the Žepa operations should be dismissed.[722] According to the Prosecution,

[712] Appeal Brief, para. 180, *quoting* Defence Exhibit 217 (Transcript of interview with Zoran Čarkić), p. 14.
[713] Appeal Brief, para. 180, *quoting* Prosecution Exhibit 2427 (VRS Main Staff Intelligence and Security Sector Report with attachments, sent to the Military Police Battalion of the 65th Motorised Protection Regiment, signed by Naval Captain Ljubiša Beara, dated 25 August 1995).
[714] Response Brief, para. 88.
[715] Response Brief, para. 90.
[716] Response Brief, para. 91.
[717] Response Brief, para. 92.
[718] Response Brief, para. 94.
[719] Response Brief, paras 93, 96.
[720] Response Brief, para. 42, *citing Krstić* Appeal Judgement, para. 31.
[721] Response Brief, para. 42.
[722] Response Brief, para. 95.

the evidence on which Tolimir relies in support of his argument does not undermine the Trial Chamber's analysis, in view of Mladić's and Tolimir's substantial involvement in the forcible transfer of Žepa's population.[723]

(ii) Analysis

246. The Appeals Chamber recalls that "[a]s a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part".[724] However, "by its nature, genocidal intent is not usually susceptible to direct proof".[725] As correctly stated by the Trial Chamber, "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy".[726]

247. The Appeals Chamber notes that the Trial Chamber made findings concerning the existence of genocidal intent in this case after assessing "all of this evidence, taken together", an approach that, according to the Trial Chamber, "is in line with the fluid concept of intent".[727] The Trial Chamber thus considered a variety of factors as a whole – including, but not limited to, the circumstances under which the actions constituting the *actus reus* of genocide were carried out – and concluded that the acts of Article 4(2)(a)-(c) of the Statute were perpetrated with the *dolus specialis* required for genocide.[728] This holistic approach is consistent with the Tribunal's jurisprudence. As the Appeals Chamber has recently stated:

> in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.[729]

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[723] Response Brief, para. 95.

[724] *Krstić* Appeal Judgement, para. 20. *See also* Statute, Art. 4 (reiterating *verbatim* the *mens rea* standard of Art. II of the Genocide Convention); Trial Judgement, para. 744. Interpreting the Genocide Convention, the ICJ has stated: "It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Art. II [of the Genocide Convention] must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group". *Bosnia Genocide* Judgment, para. 187.

[725] *Karadžić* Rule 98*bis* Appeal Judgement, para. 80, and authorities referenced therein.

[726] Trial Judgement, para. 745. *See also Karadžić* Rule 98*bis* Appeal Judgement, para. 80, and authorities referenced therein.

[727] Trial Judgement, para. 772.

[728] Trial Judgement, paras 769-773.

[729] *Karadžić* Rule 98*bis* Appeal Judgement, para. 56, and authorities referenced therein. *See also* ICJ *Croatia v. Serbia* Judgment, para. 419 (stating that the ICJ would examine "the context in which the acts constituting the *actus reus* of

Tolimir himself acknowledges that "it is a good approach to consider whether 'all of the evidence, taken together, demonstrated a genocidal mental state'".[730] Since Tolimir fails to show any reason why the Trial Chamber's holistic analysis of the relevant evidence was erroneous or why the Appeals Chamber should depart from its settled case law in that regard, his arguments as to the approach adopted by the Trial Chamber are rejected.

248. The Appeals Chamber also finds no merit in Tolimir's challenges to the Trial Chamber's reliance on various factors to infer genocidal intent. First, the Appeals Chamber observes that Tolimir does not substantiate his arguments as to why the Trial Chamber erred in inferring genocidal intent by considering the following factors: the destruction by Bosnian Serb Forces of the identification documents of the Bosnian Muslim men from Srebrenica who were detained for the purpose of being executed, the inhumane conditions of detention of those men, the large number of Bosnian Muslim men killed, and the burial and reburial of the victims killed.[731] These unsupported assertions are summarily dismissed.[732]

249. The Appeals Chamber also dismisses Tolimir's argument regarding the Trial Chamber's reliance on opportunistic killings as an indicator of genocidal intent. As Tolimir acknowledges, opportunistic killings may be used to infer such intent on a limited basis – by placing the mass killings in their proper context.[733] This is exactly what the Trial Chamber did, relying on the opportunistic killing of one Bosnian Muslim man on 13 July 1995 as a part of its consideration of the circumstances under which the separation of the men at Potočari occurred on 12 and 13 July 1995 and the capture of thousands of Bosnian Muslim men from the column on the same day, *i.e.* 13 July 1995, which it found to be "telling of the intent of the Bosnian Serb Forces".[734] The Appeals Chamber finds no error in this analysis.

250. Tolimir further contends that the Trial Chamber improperly inferred genocidal intent from the capture and execution of the Bosnian Muslim men from the column since, in his view, the Bosnian Serb Forces were merely targeting "enemy military forces engaged in military

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genocide within the meaning of subparagraphs (a) and (b) of [Article II of] the Convention were committed, in order to determine the aim pursued by the authors of those acts").

730 Appeal Brief, para. 179, *quoting Stakić* Appeal Judgement, para. 55.

731 Appeal Brief, paras 172-173, 175-176. Tolimir asserts that the burial and reburial of the bodies of killed Bosnian Muslims merely indicates "the intention to conceal murders", not an intention to commit genocide, but does not explain why acts revealing an "intention to conceal murders" cannot be probative, in combination with other factors, of genocidal intent. *See* Appeal Brief, para. 176. He also ignores the Trial Chamber's finding that the pattern of large-scale burials and reburials evidenced the organisation and coordination of the killing operation, from which genocidal intent may be inferred. *See* Trial Judgement, para. 770. As Tolimir acknowledges, the Trial Chamber did not consider this factor alone as conclusive evidence of genocidal intent, but assessed it in combination with the entire evidence as a whole. *See* Appeal Brief, para. 179, *citing* Trial Judgement, paras 769-772.

732 *See Lukić and Lukić* Appeal Judgement, para. 15 (summary dismissal is warranted for "mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error").

733 *Blagojević and Jokić* Appeal Judgement, para. 123.

operation".[735] This contention is groundless. The Trial Judgement contains no finding and Tolimir does not cite to any evidence that the captured members of the column were engaging in combat operations when killed.[736] The Appeals Chamber further notes the Trial Chamber's findings that the column "consisted predominantly of able-bodied men between the ages of 16 and 65" with "a small number of women, children, and elderly", that "[a]n unknown number of the men from the column were armed", and that "[p]eople with weapons were mixed with those who did not have weapons to provide security".[737] These findings do not support Tolimir's argument that all of the men captured from the column were "enemy soldiers involved in military operation".[738] Even if the column heading to Tuzla could be accepted as a "military operation", the Trial Chamber found that the men and boys were killed subsequent to their separation from the column.[739]

251. The Appeals Chamber is not persuaded by Tolimir's argument that the Trial Chamber erred in considering that genocidal intent could be inferred from the VRS opposition to the proposal to open a corridor to allow the column to pass through Bosnian Serb territory.[740] The Trial Chamber found that there was "fierce fighting from the evening of 15 July to the early morning of 16 July" and that following a cease-fire agreement in the wake of a renewed ABiH request for an open corridor on 16 July 1995, "the 28th Division mounted an even fiercer attack".[741] It was only then that Pandurević, acting against orders, agreed to allow "the remainder of the armed column to pass safely through the lines into the ABiH-held territory".[742] Tolimir fails to show that no reasonable trial chamber could have concluded on the basis of these findings that Pandurević's decision to open the corridor was based on his assessment of the situation on the ground and did not negate the existence of an official stance of opposing such a corridor, from which genocidal intent could be inferred.

252. Tolimir also contends that the Trial Chamber erred in relying on the involvement of several layers of leadership in the killing operation as circumstantial evidence of genocidal intent.[743] The Appeals Chamber, however, does not see an error in the Trial Chamber's analysis. The implication of multiple levels of military command in a genocidal operation can evidence the systematic nature of the culpable acts and an organised plan of destruction, which may be relied upon to infer

[734] Trial Judgement, para. 769.
[735] Appeal Brief, para. 174. *See also* Appeal Brief, para. 171.
[736] *See* Trial Judgement, para. 771. *See also* Appeal Brief, paras 171, 174.
[737] Trial Judgement, para. 240.
[738] Appeal Brief, para. 171.
[739] Trial Judgement, paras 708, 771.
[740] *See* Appeal Brief, para. 174.
[741] Trial Judgement, para. 512.
[742] Trial Judgement, paras 513, 516.
[743] Appeal Brief, para. 177.

genocidal intent.[744] Contrary to Tolimir's argument, the Trial Chamber did not only find that "certain individuals" were involved;[745] it found that multiple units and several levels of command of the Bosnian Serb Forces were implicated in the killing operation.[746] Tolimir fails to identify any findings or evidence contradicting or demonstrating an error in these factual findings. The Appeals Chamber, thus, finds no error in the Trial Chamber's consideration of this factor.

253. The Appeals Chamber further rejects Tolimir's argument that the Trial Chamber erred by basing its *mens rea* analysis on the very acts constituting the *actus reus* of genocide, thereby double-counting those acts as indicators of genocidal intent.[747] Tolimir misunderstands the Trial Chamber's analysis. The Trial Chamber did not consider the underlying genocidal acts themselves (*i.e.*, the mass killings, the acts causing serious mental harm or leading to conditions of life designed to bring about the Bosnian Muslims' destruction as a group) as proof of the *dolus specialis*. It only relied on the circumstances under which such acts were committed, as well as the mental state of the perpetrators.[748] The Appeals Chamber recalls that genocidal intent may be inferred from "the general context" of the commission of the underlying genocidal acts, "the perpetration of other culpable acts systematically directed against the same group",[749] or "proof of the mental state with respect to the commission of the underlying act" of genocide.[750] This was the approach followed by the Trial Chamber in this case. The Appeals Chamber finds no error in the Trial Chamber's analysis.

254. The Appeals Chamber rejects, for similar reasons, Tolimir's argument that the Trial Chamber erred in law by holding that evidence of the intent to forcibly remove may also constitute evidence of genocidal intent when considered in connection with other culpable acts systematically directed against the group. The fact that the forcible transfer operation does not constitute, in and of itself, a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of those individuals involved.[751] The Appeals Chamber therefore finds no legal error in the Trial Chamber's holding. For the same reasons, the Appeals Chamber finds no merit in

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[744] *See supra*, para. 246.
[745] Appeal Brief, para. 177.
[746] *See* Trial Judgement, paras 78-79, 81-82, 123-126, 128, 130-131, 141-143, 146-147, 149, 152-153, 219, 226, 236, 262, 265, 1065, 1071.
[747] Appeal Brief, paras 168, 178.
[748] Trial Judgement, para. 772.
[749] *Karadžić* Rule 98*bis* Appeal Judgement, para. 80, and references cited therein. The Appeals Chamber notes that under Ground of Appeal 7, Tolimir argues that those "other culpable acts systematically directed against the same group" must be "the acts that are the actus reus of genocide". Appeal Brief, para. 78. Tolimir cites no authority for this proposition and the Appeals Chamber summarily dismisses it as unsubstantiated. The Appeals Chamber further notes that this argument contradicts Tolimir's position, under Ground of Appeal 10, that acts constituting the *actus reus* of genocide may not be taken into account as indicators of genocidal intent. Appeal Brief, paras 168, 179.
[750] *Krstić* Appeal Judgement, para. 20.
[751] *Krstić* Appeal Judgement, para. 33. *See also* ICJ *Croatia v. Serbia* Judgment, paras 162-163, 478; *Bosnia Genocide* Judgment, para. 190.

Tolimir's related argument that forcible transfer can only be considered as evidence of genocidal intent if the affected members of the group are transferred to a place where they are subjected to conditions leading to their death or destruction. As noted, a trial chamber may rely on the act of forcible transfer as evidence of genocidal intent, regardless of the destination of the transfer.[752] Tolimir's argument is thus dismissed.

255. In view of the Appeals Chamber's prior conclusion that the Trial Chamber erred in finding that the forcible transfer operation of Žepa's Bosnian Muslims satisfied the *actus reus* requirements of Article 4(2)(b) and (c) of the Statute,[753] Tolimir's *mens rea* arguments pertaining to that operation are dismissed as moot.[754]

(iii) Conclusion

256. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Grounds of Appeal 11 and 7, in part (with regard to forcible transfer as an indicator of genocidal intent).

(b) Genocidal intent with regard to the killings of Mehmed Hajrić, Amir Imamović and Avdo Palić (Ground of Appeal 12)

257. The Trial Chamber held that the Bosnian Serb Forces killed three of "the most prominent leaders" of Žepa's Bosnian Muslim community, namely Mehmed Hajrić, Žepa's mayor and president of the War Presidency, Colonel Avdo Palić, commander of the ABiH Žepa Brigade based in Žepa, and Amir Imamović, the head of the Civil Protection Unit, with the intent to destroy the Muslim population of Eastern BiH as such.[755] The Trial Chamber held that these killings were committed with genocidal intent because these three leaders represented the core of Žepa's civilian and military leadership[756] and were deliberately "selected for the impact that their disappearance

[752] *Krstić* Appeal Judgement, para. 33. In support of his argument, Tolimir quotes the judgement of the District Court of Jerusalem in the *Eichmann* case. *See* Appeal Brief, para. 80, n. 58. Tolimir's reliance on that case is, nevertheless, misplaced. The District Court found, in relevant part, that Eichmann had "caused this grave [bodily or mental] harm by means of enslavement, starvation, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps – all this under conditions intended to humiliate the Jews, to deny their rights as human beings, to suppress and torment them by inhuman suffering and torture". *Eichmann* District Court Judgement, para. 199. In holding so, the District Court was determining the means used by Eichmann and others to inflict serious bodily or mental harm on the Jewish people. The District Court did not find that genocidal intent may be inferred from acts of forcible transfer only where the transferred group has been exposed to certain types of conditions, such as enslavement or confinement to a concentration camp.
[753] *See supra*, paras 221, 237.
[754] *See* Appeal Brief, para. 180.
[755] Trial Judgement, paras 778, 782.
[756] Trial Judgement, para. 780.

would have on the survival of" the Bosnian Muslims of Eastern BiH "as such".[757] The Trial Chamber reasoned that the forcible transfer of Žepa's population "immediately prior to" the killing of these leaders supported its finding of genocidal intent as, in order "[t]o ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient – in the case of Žepa – to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders".[758]

(i) Submissions

258. Tolimir submits that the Trial Chamber erred in fact and law in finding that Bosnian Serb Forces killed Palić, Hajrić, and Imamović with the intent to destroy part of the Bosnian Muslim population of Eastern BiH as such.[759] First, Tolimir submits that the Trial Chamber erred in finding that the selective targeting of leading figures of a community can be proof of genocidal intent.[760] Second, Tolimir argues that the Trial Chamber erred in finding that the three Žepa leaders were "key for the survival" of Žepa's Bosnian Muslim community.[761] Tolimir points out in this regard that the members of the War Presidency were appointed, not elected, officials[762] whose presence in the enclave and involvement in combat activities was "illegal under the law of war" and in violation of the Demilitarization Agreement of 8 May 1993 and the COHA of 1994.[763] With regard to Palić, Tolimir adds that the Trial Chamber relied on the "emotional" testimony of Palić's wife and communications "between military personnel of the opposing parties", without critically analysing such evidence, whereas other evidence indicated that Palić was much less respected and influential than found by the Trial Chamber.[764]

259. Third, Tolimir asserts that the Trial Chamber's reasoning was based on the erroneous presumption that the three Žepa leaders were killed with genocidal intent, as shown by its speculation on why another leader (Hamdija Torlak, President of the Executive Board of Žepa, who was also taken into detention) was not killed.[765] Finally, Tolimir argues that the Trial Chamber

[757] Trial Judgement, para. 782. The Trial Chamber specifically found that the three Žepa leaders were "key to the survival of the small community" and their killing was of "symbolic purpose for the survival of the Bosnian Muslims of Eastern BiH". Trial Judgement, para. 780.
[758] Trial Judgement, para. 781.
[759] Notice of Appeal, paras 67-69; Appeal Brief, para. 182.
[760] Appeal Brief, para. 183. Quoting a dissenting opinion in the *Bosnia Genocide* Judgment on Preliminary Objections of the ICJ, Tolimir argues that a division of the protected group into an elite entitled to "special, stronger protection" and less protected, ordinary members is "anachronistic and discriminatory" and lacks a basis in the *travaux préparatoires* of the Genocide Convention. Appeal Brief, para. 183, *quoting* Dissenting Opinion of Judge Kreća, *Bosnia Genocide* Judgment on Preliminary Objections, para. 90.
[761] Appeal Brief, paras 182, 187, 195.
[762] Appeal Brief, para. 184.
[763] Appeal Brief, para. 190.
[764] Appeal Brief, paras 188-189. *See also* Reply Brief, para. 58.
[765] Appeal Brief, para. 191. The Trial Chamber held that Torlak was not targeted because of his prominence in the media as a negotiator on behalf of the Žepa community (Trial Judgement, para. 780), but Tolimir argues that such

erred in finding that the forcible transfer of the Žepa population immediately prior to the killing of the three Žepa leaders is a factor supporting a finding of genocidal intent.[766] He submits that in the absence of any evidence as to the perpetrators, dates, and circumstances of these three killings, no reasonable fact-finder could have concluded beyond reasonable doubt that they were killed with genocidal intent, especially since the killings occurred after the completion of the forcible transfer.[767]

260. The Prosecution responds that Tolimir fails to show an error of fact or law by the Trial Chamber in finding that the Bosnian Serb Forces acted with genocidal intent when they murdered the three Žepa leaders.[768] According to the Prosecution, the Trial Chamber correctly held that targeting the leadership of a protected group can indicate genocidal intent, irrespective of the process of selection of the targeted leaders.[769] The Prosecution also asserts that the Trial Chamber reasonably concluded that Palić was respected and trusted by the Žepa population,[770] relying on the "measured and accurate" testimony of Palić's wife, which was supported by other evidence.[771] In the Prosecution's view, the three leaders' role in the ABiH's breach of Žepa's demilitarised zone status is irrelevant. Furthermore, the Prosecution contends that the fact that other Bosnian Muslim leaders were not targeted does not undermine the Trial Chamber's analysis.[772] According to the Prosecution, the Trial Chamber properly considered the three murders in the context of the surrounding events, including the forcible transfer from Žepa, in determining that the three Žepa leaders were killed with genocidal intent.[773] The Prosecution finally avers that Tolimir fails to show an error in the Trial Chamber's finding that the Bosnian Serb Forces were responsible for these killings.[774]

(ii) Analysis

261. The Appeals Chamber first observes that the Trial Chamber correctly stated that the prominence of the targeted portion of the protected group is a relevant factor in determining

reasoning already presupposes that the concerned individuals were killed with genocidal intent. Appeal Brief, para. 191.

766 Appeal Brief, para. 192.

767 Appeal Brief, paras 185-186, 192-195. Tolimir specifically asserts that the Trial Chamber failed to consider evidence regarding the escape of Hajrić and Imamović from Bosnian Serb custody, as well as evidence concerning possible other reasons for the killings, namely the three Žepa leaders' alleged involvement in crimes against Bosnian Serbs. Appeal Brief, paras 193-194.

768 Response Brief, paras 98-99.

769 Response Brief, para. 100.

770 Response Brief, para. 101.

771 Response Brief, paras 101-103.

772 Response Brief, paras 100, 104-105.

773 Response Brief, para. 106.

774 Response Brief, para. 107.

whether the perpetrator intended to destroy at least a substantial part of the protected group.[775] Indeed, as the Trial Chamber held, "genocidal intent may […] consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such".[776] This holding is consistent with other trial judgements of the Tribunal,[777] as well as the Appeals Chamber's own jurisprudence. The Appeals Chamber recalls, in this respect, that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4" of the Statute.[778]

262. The Commission of Experts Report, on which the Trial Chamber relied as support for its legal analysis *vis-à-vis* the killings of the three Žepa leaders,[779] states, in relevant part:

> [i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. If a group has its leadership exterminated, *and at the same time or in the wake of that,* has a relatively large number of the members of the group killed or subjected to other heinous acts, *for example deported on a large scale or forced to flee*, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.[780]

263. The Appeals Chamber finds no legal error in the Trial Chamber's statement that the selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent.[781] The Appeals Chamber is not persuaded that the commission of genocide through the targeted killings of only the leaders of a group suggests that the leaders of the group are subject to special, stronger protection than the other members of the group, as Tolimir suggests. Recognising that genocide may be committed through the killings of only certain prominent members of the group "selected for the impact that their disappearance would have on the survival of the group as such"[782] aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders. A dissenting opinion in a judgement of

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[775] Trial Judgement, para. 749.
[776] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.
[777] *See Sikirica et al.* Judgement on Motions to Acquit, para. 77; *Jelisić* Trial Judgement, para. 82.
[778] *Krstić* Appeal Judgement, para. 12 (*cited* in Trial Judgement, para. 749).
[779] Trial Judgement, paras 749, 777. The *Jelisić* Trial Judgement also relied on this report as the basis for its holding that genocidal intent may consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. *See Jelisić* Trial Judgement, para. 82.
[780] Commission of Experts Report, para. 94 (emphasis added).
[781] Trial Judgement, paras 749, 777, and authorities cited therein. The Appeals Chamber notes that this statement correctly stated the applicable law, even though, with the exception of the present case, no conviction for genocide has ever been entered by the Tribunal, or other international criminal tribunals, on the basis of the selective targeting of a protected group's leadership. *See*, *e.g.*, *Sikirica et al.* Judgement on Motions to Acquit, paras 84-85; *Jelisić* Trial Judgement, paras 82-83.
[782] Trial Judgement, para. 777, and authorities cited therein.

the ICJ, the sole authority cited by Tolimir,[783] does not bind this Tribunal and is not sufficient to substantiate Tolimir's argument.

264. The Appeals Chamber also fails to see the relevance of the method of selection of the targeted leaders of Žepa in view of the Trial Chamber's findings on the prominent positions these three men occupied in the Žepa community.[784] For a finding of genocide it suffices that the leaders were "selected for the impact that their disappearance would have on the survival of the group as such".[785] Genocide may be committed even if not all leaders of a group are killed – even though targeting "the totality [of the leadership] per se may be a strong indication of genocide regardless of the actual numbers killed".[786]

265. With regard to Tolimir's challenge to the Trial Chamber's conclusion that the three Žepa leaders were killed with genocidal intent, the Appeals Chamber notes the Trial Chamber's finding that all three Žepa leaders were arrested and detained "shortly after the completion of the forcible removal operation in Žepa" at the end of July 1995.[787] The Trial Chamber found that after several days in detention, Hajrić and Imamović were killed sometime in late August 1995, while Palić was killed in early September 1995.[788] The Appeals Chamber recalls that according to the Commission of Experts Report and as the Trial Chamber itself recognised, "[t]he character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group […] at the same time or in the wake of that" attack.[789] As the Trial Chamber found, the selective targeting of a protected group's leadership may amount to genocide only if the leaders are selected because of "the impact that their disappearance would have on the survival of the group as such".[790] The impact of the leaders' disappearance may of course be assessed only *after* the leaders are attacked. Only by considering what happened to the rest of the protected group at the same time or in the wake of the attack on its leadership could "the impact that [the leaders'] disappearance would have on the survival of the group as such" be assessed.[791]

266. The Appeals Chamber is not convinced of the reasonableness of the Trial Chamber's finding regarding the impact of the killings of the three Žepa leaders on the Žepa civilian population. The Trial Chamber cited no evidence in support of its finding that the disappearance of

[783] Appeal Brief, para. 183.
[784] Trial Judgement, paras 599, 778.
[785] Trial Judgement, para. 777, and authorities cited therein.
[786] Commission of Experts Report, para. 94 (*cited* in Trial Judgement, para. 777).
[787] Trial Judgement, para. 778.
[788] Trial Judgement, paras 679-680, 778.
[789] Commission of Experts Report, para. 94. The Trial Chamber also stated that the killings of the three Žepa leaders must not be seen in isolation, but in conjunction with "the fate of the remaining population of Žepa". Trial Judgement, para. 781.
[790] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.

the three Žepa leaders would have an impact on the protected group. The Trial Judgement contains no reference to evidence as to the impact of the disappearance of the three Žepa leaders on the survival of the Bosnian Muslim population from Žepa. The Appeals Chamber notes, in this regard, that, even though the Trial Chamber found, based on forensic evidence, that the three Žepa leaders suffered violent deaths caused by injuries to the head or skull while in the custody of Bosnian Serb Forces and were then buried in a mass grave,[792] there are no findings or references to evidence as to whether the VRS members who detained and murdered the three Žepa leaders intended, for instance, to use their actions in a way that would intimidate and expedite the removal of the Bosnian Muslims of Žepa, prevent their return, or impact their survival as a group in any other way.[793]

267. The Appeals Chamber has already established that the Trial Chamber did not err in finding that the only reasonable inference from the evidence was that the three Žepa leaders suffered a violent death at the hands of their Bosnian Serb captors.[794] However, the Trial Chamber failed to explain how their detention and killings – committed weeks after the entire Žepa population had been forcibly transferred from the enclave – had any impact "on the survival of the group as such".[795] The Trial Chamber accepted in its conclusion that there was such an impact, but it did not consider or analyse whether or how the killings of the three Žepa leaders *after* the Bosnian Muslim civilian population of Žepa had been transferred to safe areas of BiH specifically affected the ability of those removed civilians to survive and reconstitute themselves as a group.[796] A finding that Žepa's Bosnian Muslims lost three of their leaders[797] does not suffice to infer that those civilians were affected by the loss of their leaders in a way that would threaten or tend to contribute to their physical destruction as a group.

268. The Appeals Chamber also notes that the killings of the three Žepa leaders were alleged and found to be natural and foreseeable consequences of the JCE to Forcibly Remove; in other words,

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[791] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.

[792] Trial Judgement, paras 658, 665-666, 677-680. Tolimir does not raise specific challenges to these findings *per se*, but claims that there is no specific proof of who were the perpetrators, dates, and exact circumstances of these three killings. *See* Appeal Brief, para. 185. The Appeals Chamber has already rejected such claims as Tolimir does not explain at all why it was unreasonable for the Trial Chamber to conclude that the three Žepa leaders suffered violent deaths while detained by the Bosnian Serb Forces. *See supra*, paras 152-153.

[793] The Appeals Chamber notes the Trial Chamber's finding that on the morning of 28 July 1995, Mladić told a UN officer that Avdo Palić was dead – even though at that time, Palić was still alive and was only killed after 5 September 1995. Trial Judgement, paras 666, 679. Mladić's misstatement was contradicted by Tolimir, who stated that he could not confirm the information of Palić's death. Trial Judgement, para. 666. These findings do not undermine the Appeals Chamber's conclusion that the Trial Chamber made no findings as to the impact of the disappearance of the three Žepa leaders on the survival of the Bosnia Muslims from Žepa. Mladić's false statement about Palić's death does not amount to an effort to intimidate or threaten the destruction of the Bosnian Muslims from Žepa.

[794] *See supra*, para. 144.

[795] Trial Judgement, para. 782.

[796] Trial Judgement, paras 780-782.

these killings were neither charged nor found to be: (i) connected with the killings of Srebrenica's male population; or (ii) part of the forcible transfer operations involving Srebrenica's women, children and elderly and Žepa's Muslim population, which constituted the common purpose and sole objective of the JCE to Forcibly Remove.[798] These Trial Chamber's findings confirm the tenuous connection between the three killings and the genocidal acts committed against the Muslims of Eastern BiH under the two JCEs and further undermine the notion that the three killings formed part of the same genocidal enterprise.

269. In this context, particularly in light of the fact that the forcible transfer operation of Žepa's Bosnian Muslims had been completed before the three Žepa leaders were detained and killed and in the absence of any findings as to whether or how the loss of these three prominent figures affected the ability of the Bosnian Muslims from Žepa to survive in the post-transfer period, the inference of genocidal intent was not the only reasonable inference that could be drawn from the record. In the view of the Appeals Chamber, the evidence does not allow for the conclusion that the murders of the three Žepa leaders had a significant impact on the physical survival of the group as such so as to amount to genocide. There is, in sum, no sufficient evidentiary support for the finding that Hajrić, Palić, and Imamović were killed "with the specific genocidal intent of destroying part of the Bosnian Muslim population as such".[799] The Trial Chamber, therefore, erred in holding that the record established beyond reasonable doubt that Hajrić, Palić, and Imamović were killed by the Bosnian Serb Forces with the specific intent of destroying part of the Bosnian Muslim population as such and thus that their murders constituted genocide. The Appeals Chamber's conclusion does not preclude, of course, that these killings constituted crimes proscribed under other provisions of the Statute.

(iii) Conclusion

270. Based on the foregoing, the Appeals Chamber grants Ground of Appeal 12 and reverses Tolimir's conviction for genocide for the killings of Hajrić, Palić, and Imamović. Tolimir's remaining arguments are rendered moot and need not be addressed.[800]

4. Conclusion

271. For the foregoing reasons, the Appeals Chamber dismisses, in their entirety, Grounds of Appeal 7, 8, and 11.[801] The Appeals Chamber also dismisses Ground of Appeal 10 in part (with

[797] Trial Judgement, para. 782.
[798] Trial Judgement, paras 776, 1148-1154.
[799] Trial Judgement, para. 782.
[800] Judge Antonetti appends a separate opinion.

respect to serious mental harm as the *actus reus* of genocide for the men from Srebrenica who were executed, those who survived the executions, and the women, children, and elderly forcibly transferred from Srebrenica).[802]

272. The Appeals Chamber grants: (i) Ground of Appeal 10 in part and reverses Tolimir's conviction for genocide through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute, to the extent that this conviction was based on the Bosnian Serb operations in Žepa; (ii) Ground of Appeal 10 in part and reverses Tolimir's conviction for genocide under Article 4(2)(c) of the Statute; and (iii) Ground of Appeal 12 and reverses Tolimir's conviction for genocide for the murders of the three Žepa leaders.[803]

273. The impact, if any, of these reversals on Tolimir's sentence will be discussed in the sentencing part of this Judgement.

[801] Judge Antonetti appends a separate opinion on Grounds of Appeal 7 and 8 and a dissenting opinion on Ground of Appeal 11.
[802] Judge Antonetti appends a separate opinion.
[803] Judge Antonetti appends a separate opinion.

VI. JOINT CRIMINAL ENTERPRISE

A. Preliminary matters

1. JCE as a mode of liability (Ground of Appeal 5)

274. The Trial Chamber found that Tolimir was a member of and participated in the JCE to Forcibly Remove and in the JCE to Murder. For this participation he was convicted pursuant to Article 7(1) of the Statute of genocide (Count 1), conspiracy to commit genocide (Count 2), extermination (Count 3), persecutions (Count 6), and inhumane acts through forcible transfer (Count 7) as crimes against humanity as well as murder (Count 5) as a violation of the laws or customs of war.[804]

(a) Submissions

275. Tolimir submits that the Trial Chamber erred in law in holding that JCE is a mode of liability under customary international law and thus violated the principle of legality.[805] He argues that there is no evidence that this form of liability forms part of customary international law.[806] Tolimir asserts that if JCE had customary law status, it would have been included in the Rome Statute of the ICC or at least have been inferred by chambers of the ICC from provisions of the Rome Statute.[807] He also avers that the Trial Chamber confused perpetration and co-perpetration with other forms of liability related to participation in a crime.[808] In his view, the notion of perpetration must involve the concept of control over the crime as applied in ICC jurisprudence in order to properly distinguish it from participation.[809] Tolimir argues that the application of JCE liability in its third form is the "most problematic" mode of liability since, in his view, it lowers the *mens rea* element for the most serious crimes "below the acceptable level".[810]

276. Tolimir further submits that there was no "clear majority" with respect to the application of JCE liability in this case since one of the judges who formed the majority, Judge Mindua, stated in his separate and concurring opinion that the "classical" modes of individual criminal responsibility pursuant to Article 7 of the Statute "are preferable to that of JCE liability".[811] Tolimir argues that in

[804] Trial Judgement, paras 1095, 1129, 1144, 1154, 1239.
[805] Appeal Brief, paras 53-54, 63. *See also* Reply Brief, paras 27-28.
[806] Appeal Brief, para. 54. *See also* Reply Brief, para. 28.
[807] Appeal Brief, para. 55. *See also* Appeal Brief, para. 63, *citing* Trial Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, para. 4; Reply Brief, paras 27-28.
[808] Appeal Brief, paras 56-57, *citing Lubanga* Decision on Confirmation of Charges, paras 340, 342-367.
[809] Appeal Brief, paras 56-57.
[810] Appeal Brief, para. 58.
[811] Appeal Brief, paras 53, 59-64; Reply Brief, paras 28-30, *citing* Trial Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, para. 6.

view of Judge Mindua's opinion, the Majority was obliged to consider whether there were grounds for a conviction under the other modes of liability.[812] Tolimir requests the Appeals Chamber to quash the Trial Judgement or order a retrial.[813]

277. The Prosecution responds that Tolimir's arguments should be summarily dismissed since he simply repeats his trial arguments without showing any error in the Trial Chamber's approach.[814] It argues that Tolimir fails to demonstrate any cogent reason why the Appeals Chamber should deviate from its jurisprudence on JCE as a form of responsibility – including in its third form – under customary international law at the time of the events in the former Yugoslavia.[815] It avers that Tolimir's references to the Rome Statute and the practice of the ICC concerning co-perpetration are misguided and that the former argument has been rejected by the Appeals Chamber.[816] In its view, no doubt is cast on the customary status of JCE by the fact that ICC chambers refer to "co-perpetration" instead of JCE since the Rome Statute – the primary source of law for the ICC – specifically provides for co-perpetration.[817]

278. The Prosecution further responds that Tolimir is misguided in his reliance on Judge Mindua's separate opinion. It points out that Judge Mindua stated that "JCE liability has been recognised and well developed by the ICTY Appeals Chamber" and found that Tolimir participated in the two JCEs.[818]

279. Tolimir replies that simply because a mode of liability is well established in the jurisprudence of the Tribunal does not make that mode of liability part of customary international law, which may only be created through the *opinio juris* and uniform practice of States.[819] He asserts that the Prosecution ignores Judge Mindua's statement which, in his view, suggests that the Majority either could not find him liable on those other modes of liability or did not consider them.[820]

(b) Analysis

280. The Appeals Chamber notes that the Trial Chamber rejected several challenges raised by Tolimir with regard to JCE as a mode of liability.[821] The Appeals Chamber notes that some of

[812] Appeal Brief, paras 60-61.
[813] Appeal Brief, paras 5, 64.
[814] Response Brief, para. 25.
[815] Response Brief, paras 25-27.
[816] Response Brief, para. 28, *citing Martić* Appeal Judgement, paras 72, 80.
[817] Response Brief, para. 28.
[818] Response Brief, para. 29.
[819] Reply Brief, para. 27.
[820] Reply Brief, para. 29.
[821] Trial Judgement, paras 886-887.

Tolimir's arguments on appeal are broadly similar to those he submitted at trial, but do not amount to a mere repetition. Accordingly, the Appeals Chamber will consider the submissions on the merits.

281. Turning to Tolimir's contention that JCE is not part of customary international law, the Appeals Chamber recalls that it recently reaffirmed its long-standing jurisprudence that joint criminal enterprise, including the third category of joint criminal enterprise, is a form of commission under customary international law.[822] To the extent that Tolimir claims that there are cogent reasons to depart from the jurisprudence of the Tribunal on JCE as it is not established under international customary law,[823] the Appeals Chamber recalls that in so concluding, it did not merely rely on its previous jurisprudence,[824] but carefully re-examined the sources of law relied on by the *Tadić* Appeals Chamber that first made this finding as well as other relevant decisions and judgements.[825] As noted in the *Đorđević* Appeal Judgement, the *Tadić* Appeals Chamber concluded that JCE existed in customary international law based on the "consistency and cogency of case law and the treaties referred to […], as well as their consonance with the general principles on criminal responsibility laid down in the Statute and general international criminal law and in national legislation".[826] Tolimir's argument is rejected.

282. As regards Tolimir's submission that JCE cannot be a mode of liability under customary international law since it was not included in the Rome Statute, and has not been inferred by ICC chambers, the Appeals Chamber notes that according to Article 21(1)(a) and (b) of the Rome Statute, that court primarily applies its statute, rules of procedure and evidence and elements of crimes, and only as a secondary source, treaties and principles and rules of international law. The law on individual criminal responsibility is regulated by Article 25 of the Rome Statute. The Appeals Chamber furthermore notes that the *Tadić* Appeals Chamber considered the Rome Statute in reaching its conclusion that JCE reflected rules of customary international law.[827] In particular, it considered that, while the text adopted in Article 25(3)(d) of the Rome Statute differed to a certain

[822] *Popović et al.* Appeal Judgement, para. 1672; *Đordević* Appeal Judgement, para. 58.
[823] The Appeals Chamber notes that Tolimir, as the moving party, bears the burden to demonstrate cogent reason in the interests of justice for departing from the Appeals Chamber's jurisprudence. *Đordević* Appeal Judgement, para. 24. *See also Popović et al.* Appeal Judgement, para. 1674.
[824] *Tadić* Appeal Judgement, paras 193-226. *See also Krajišnik* Appeal Judgement, para. 659; *Brđanin* Appeal Judgement, paras 363, 431; *Stakić* Appeal Judgement, paras 62, 100-102; *Vasiljević* Appeal Judgement, para. 95; *Krnojelac* Appeal Judgement, para. 29; *Ojdanić* Appeal Decision on Jurisdiction, paras 18, 21, 28-30, 41, 43. For case law on JCE liability in its third form, *see Martić* Appeal Judgement, paras 168-169; *Brđanin* Appeal Judgement, para. 365; *Blaškić* Appeal Judgement, para. 33; *Stakić* Appeal Judgement, paras 65, 86-87, 101, 103-104; *Babić* Sentencing Appeal Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras 79-80, 82-83; *Vasiljević* Appeal Judgement, paras 95-101, 99; *Krnojelac* Appeal Judgement, paras 30-32, 84; *Ojdanić* Appeal Decision on Jurisdiction, para. 33; *Tadić* Appeal Judgement, paras 194-195, 204-220, 224-228.
[825] *Đordević* Appeal Judgement, paras 32-45, 48-53. *See also Popović et al.* Appeal Judgement, para. 1673.
[826] *Đordević* Appeal Judgement, para. 41, *citing Tadić* Appeal Judgement, para. 226. *See also Popović et al.* Appeal Judgement, para. 1673.

extent from the elements required by the case law it examined, it was nonetheless "consistent with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting".[828] As the *Tadić* Appeals Chamber clearly considered the relevant provisions of the Rome Statute in determining that JCE reflects customary international law, Tolimir's argument is without merit.

283. With respect to Tolimir's argument that the Tribunal erred by confusing modes of liability and should have applied the notion of "control over the crime" as adopted by the ICC to distinguish between principal and accomplice liability, the Appeals Chamber notes that the ICC based its analysis on the detailed provisions of the ICC Statute that are not applicable to the Tribunal.[829] The Appeals Chamber recalls its holding in *Đorđević* that:

> the interpretation in the ICC jurisprudence regarding the objective or subjective elements of the mode of liability based on a "common purpose" derived from the ICC Statute does not undermine the Tribunal's analysis on the issue of the existence of the "notion of common purpose" in customary international law.[830]

Accordingly, Tolimir's submission in this regard is rejected.

284. As to Tolimir's argument regarding the third form of JCE, the Appeals Chamber recalls that "the sources of law examined by the *Tadić* Appeal Chamber law are reliable and […] the principles in relation to the third category of joint criminal enterprise set out therein are well-established in both customary international law and the jurisprudence of this Tribunal".[831] Apart from a general and unsupported criticism that this mode of liability is "problematic" and that the mental element is too easily met in view of the seriousness of the crimes, Tolimir offers no cogent reason why the jurisprudence of the Tribunal on this form of JCE should be revisited. The argument is dismissed.

285. Lastly, with regard to Tolimir's argument that there was no clear majority as to the application of JCE liability in his case, the Appeals Chamber notes that Judge Mindua – one of the two judges forming the majority on Tolimir's liability under JCE – in his separate and concurring opinion observed that while JCE liability was not explicitly mentioned in the Statute of the Tribunal

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[827] *Tadić* Appeal Judgement, paras 221-223.
[828] *Tadić* Appeal Judgement, para. 223 and n. 282.
[829] *Bemba* Decision on Charges, paras 350-351, 371; *Katanga and Ngudjolo Chui* Confirmation of Charges Decision, paras 488-489, 494-526, 534, 538-539; *Bemba* Decision on Arrest Warrant, paras 71, 78, 84; *Lubanga* Decision on Confirmation of Charges, paras 322-348, 366-367. For ICC jurisprudence acknowledging that the Tribunal and the ICC operate under different sets of rules, *see Katanga and Ngudjolo Chui* Confirmation of Charges Decision, para. 408; *Lubanga* Decision on Confirmation of Charges, paras 323, 335, 338.
[830] *Đorđević* Appeal Judgement, para. 38. *See also Popović et al.* Appeal Judgement, paras 1670-1671, 1674.
[831] *Đorđević* Appeal Judgement, para. 52. *See also Popović et al.* Appeal Judgement, para. 1672; *Brđanin* Appeal Judgement, para. 365; *Babić* Appeal Sentencing Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras 79-80, 82-83; *Vasiljević* Appeal Judgement, paras 95-101; *Krnojelac* Appeal Judgement, paras 30-32, 84; *Ojdanić* Appeal Decision on Jurisdiction, para. 33; *Martić* Appeal Judgement, paras 168-169; *Blaškić* Appeal Judgement, para. 33;

and was absent from the Rome Statute and not applied at the ICC, it has been "recognised and well developed by the ICTY Appeals Chamber".[832] Judge Mindua expressed that he "fully compl[ies] with the jurisprudence of the Appeals Chamber", which has consistently recognised the customary law status of JCE as a mode of liability.[833] He further stated that "as part of the Majority, I share the view that the Accused participated in the above mentioned JCE to [F]orcibly [R]emove […] as well as the JCE to [M]urder".[834] Accordingly, Tolimir's argument that he expressed doubts about JCE as a mode of liability under customary international law is without merit.

286. As to Tolimir's contention that Judge Mindua's statement that other modes of liability – if proven – were preferable to that of JCE liability obliged the Trial Chamber to consider those other modes of liability, the Appeals Chamber notes that this argument hinges on the view that there was no real majority on the applicability of JCE in the Trial Judgement.[835] As found above, there is no basis in Judge Mindua's separate opinion for the contention that he expressed doubts about JCE liability in customary international law or in this case. Tolimir's argument is dismissed.

(c) Conclusion

287. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 5 in its entirety.

2. VRS principles and Tolimir's position (Ground of Appeal 14)

288. In reaching its conclusions about Tolimir's participation in the JCE to Forcibly Remove and in the JCE to Murder, the Trial Chamber relied, *inter alia*, on: (i) Tolimir's authority as Assistant Commander and Chief of the Sector for Intelligence and Security of the VRS Main Staff;[836] (ii) Tolimir's close association with Mladić;[837] and (iii) the on-the-ground presence of Tolimir's

Stakić Appeal Judgement, paras 65, 86-87, 101, 103-104; *Tadić* Appeal Judgement, paras 194-195, 204-220, 224-228.

[832] Trial Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, para. 4.

[833] Trial Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, para. 5. *See Krajišnik* Appeal Judgement, para. 659; *Brdanin* Appeal Judgement, paras 363, 431; *Stakić* Appeal Judgement, paras 62, 100-102; *Vasiljević* Appeal Judgement, para. 95; *Krnojelac* Appeal Judgement, para. 29; *Ojdanić* Appeal Decision on Jurisdiction, paras 18, 21, 28-30, 41, 43; *Tadić* Appeal Judgement, paras 193-226. In regard to JCE in its third form under customary international law, *see* n. 831.

[834] Trial Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, para. 5.

[835] Appeal Brief, para. 63.

[836] Trial Judgement, paras 1083, 1093, 1098. *See also* Trial Judgement, paras 1112, 1165.

[837] Trial Judgement, paras 1083, 1126, 1165.

subordinates,[838] which, it found, provided him with knowledge about the criminal acts perpetrated by other JCE participants.[839]

(a) Submissions

289. Tolimir argues that the Trial Chamber erred in law and fact in making findings on relevant VRS military principles and on his position as Assistant Commander and Chief of the Sector for Intelligence and Security Affairs, which led to its erroneous conclusions regarding his knowledge of and participation in the two JCEs.[840] He submits that these errors caused a miscarriage of justice and requests that all his convictions be overturned.[841]

290. Tolimir contends that the Trial Chamber erred in finding that he exerted command authority over his subordinates by failing to establish the principle of singleness of command. According to Tolimir, this principle provides that only a commander, not an assistant commander or chief of sector, the position held by him, had the exclusive right to command subordinate units, including subordinate security organs.[842] Tolimir argues that the Trial Chamber introduced a "parallel chain of command" by referring to the "professional line of command" (based on the command structure of the VRS Main Staff) that was inexistent, not part of the evidence, and inconsistent with the principle of singleness of command.[843] Secondly, Tolimir argues that the Trial Chamber erred in finding that he had "control" of subordinate intelligence officers by relying on an inaccurate translation by the CLSS of the words "*rukovodenje i komandovanje"* in BCS to "control" (the function of a commander) instead of, in his submission, "management/direction and command" (the function of an assistant commander).[844] Tolimir also argues that in reaching its conclusions on the meaning of command and control within the VRS the Trial Chamber misinterpreted the evidence of Prosecution Witness Milenko Todorović[845] and failed to consider other relevant evidence on the record,[846] including the applicable JNA and VRS rules and regulations.[847]

[838] Trial Judgement, paras 1093, 1098, 1104, 1107, 1109-1111, 1113.
[839] Trial Judgement, paras 1093, 1104, 1107, 1109, 1112. Tolimir's position in the VRS Main Staff, his duties to ensure the safety of prisoners, and the direct involvement of his subordinates on the ground, were among the factors upon which the Trial Chamber relied to find Tolimir criminally responsible pursuant to the third form of JCE for persecutory acts and certain killings. Trial Judgement, paras 1139-1144, 1150-1154.
[840] Appeal Brief, para. 209. *See also* Appeal Brief, paras 210-211, 241-242; Reply Brief, paras 71-72.
[841] Appeal Brief, paras 209, 242.
[842] Appeal Brief, para. 213. *See also* Appeal Brief, paras 225, 230.
[843] Appeal Brief, paras 223, 229-230. *See also* Appeal Brief, para. 231.
[844] Appeal Brief, paras 212, 214-220. *See also* Reply Brief, para. 74.
[845] Appeal Brief, paras 218-219.
[846] Appeal Brief, paras 220-221, 224.
[847] Appeal Brief, para. 221, *citing* Defence Exhibits 202 (SFRY Regulations on the Responsibilities of the Land Army Corps Command in Peacetime, 1990), 203 (Rules of Service of Security Organs in SFRY Armed Forces, 1984), 248 (Manual of Intelligence Support of the SFRY Armed Forces, 1987), 148 (JNA Brigade Rules, 1984), and Prosecution Exhibit 1297 (Service Regulations of the SFRY Armed Forces Military Police, 1985). *See also* Reply Brief, para. 75.

291. Tolimir asserts that being responsible for the "*rukovođenje*" (*i.e.*, management) of the Sector for Intelligence and Security Affairs, he managed the unit in the sense of providing professional guidance but had no control over all its actions.[848] Tolimir contends that the Trial Chamber disregarded the evidence of Defence Witness Slavko Čulić, who testified that superior security organs did not give orders to security organs at the lower level and that they were their superiors only in terms of professional education.[849] Tolimir emphasises Čulić's evidence that, consistent with this, Tolimir "never wanted to impose himself as an officer from the Main Staff who had the last say".[850] He also submits that the Trial Chamber did not discuss the specific work of the Sector for Intelligence and Security and erred in finding that the sector was involved in acts and events falling outside of its jurisdictional scope.[851]

292. Tolimir additionally challenges the Trial Chamber's factual findings in relation to his information-sharing role,[852] his authority over the 410th Intelligence Centre,[853] and his control over the appointment of security and intelligence officers.[854] He argues that the Trial Chamber erred in fact in finding that he played a central role in the convoy approval process, which it found was instrumental in matters related to POW exchanges.[855] Finally, Tolimir argues that the Trial Chamber erred in its description of his relationship with Mladić,[856] in particular by relying on Prosecution Witness Rupert Smith's evidence that Tolimir and Mladić were "closer to being equals"[857] and by taking out of context Prosecution Witness Manojlo Milovanović's statement that Tolimir was Mladić's "eyes and ears".[858]

293. The Prosecution responds that Tolimir's submissions should be summarily dismissed because they are based on his misunderstanding that the Trial Chamber convicted him solely on the basis of his institutional position as Chief of the VRS Sector for Intelligence and Security Affairs.[859] The Prosecution argues that Tolimir has failed to demonstrate an error in the Trial Chamber's conclusions[860] and to explain how the alleged errors affect the Trial Judgement.[861] It submits that he repeats his trial submissions[862] or seeks to substitute his interpretation of the evidence for that of the

[848] Appeal Brief, para. 222. *See also* Reply Brief, paras 76-78.
[849] Appeal Brief, para. 226.
[850] Appeal Brief, paras 227-228.
[851] Appeal Brief, para. 222.
[852] Appeal Brief, paras 232, 239-240.
[853] Appeal Brief, para. 233.
[854] Appeal Brief, para. 234.
[855] Appeal Brief, para. 235.
[856] Appeal Brief, para. 236.
[857] Appeal Brief, paras 236-237.
[858] Appeal Brief, paras 236, 238.
[859] Response Brief, paras 117-119. *See also* Response Brief, paras 122, 125.
[860] *See* Response Brief, paras 121, 125, 128-129, 131-132, 135-137.
[861] *See* Response Brief, paras 124, 129.
[862] *See* Response Brief, paras 121, 125.

Trial Chamber.[863] More specifically, in response to Tolimir's arguments about the Trial Chamber's alleged errors in the interpretation of the words "*rukovođenje*" and "*komandovanje*", the Prosecution submits that Tolimir has failed to demonstrate that the Trial Chamber unreasonably accepted the long-standing interpretations of these terms by CLSS, and argues that it considered the totality of the evidence when rejecting Tolimir's submission.[864] With respect to Tolimir's arguments about his professional relationship with Mladić, the Prosecution contends that Witness Smith's views were informed by how Mladić himself described his relationship with Tolimir and are consistent with the evidence of Prosecution Witness David Wood.[865]

(b) Analysis

294. The Appeals Chamber finds no merit in Tolimir's argument that the Trial Chamber erred in its findings regarding basic military principles. With respect to Tolimir's contention that the Trial Chamber failed to establish the principle of singleness of command, the Appeals Chamber notes the Trial Chamber's finding that the Bosnian Serb Forces functioned in accordance with the principles of command and control, unity, and subordination.[866] In particular, the Trial Chamber found that under the principle of unity of command, a commander had the exclusive right to command subordinate units[867] and that under the principle of subordination, the subordinate officers were obliged to make sure that the decision issued by the commander was implemented.[868] The Trial Chamber consequently found that only "one commander could exist in a unit, for which he was responsible".[869] Tolimir fails to explain how this finding of the Trial Chamber does not establish the principle of singleness or unity of command. The Appeals Chamber rejects this argument.

295. To the extent that Tolimir suggests that the singleness or unity of command principle would entail that he, as assistant commander, had no control over his subordinate intelligence officers who were directly subordinated in their day-to-day work to the brigade or unit commander, the Appeals Chamber notes that the Trial Chamber established that, at the relevant time, two chains of instructions were functioning with respect to the security organs in the brigades. Pursuant to the regular military chain of command, the security organs were directly subordinated to the commanders of those brigades or units for their day to day work.[870] However, under the professional chain of command, and as assistant commanders, the heads of the VRS Main Staff

[863] *See* Response Brief, para. 128.
[864] Response Brief, para. 121.
[865] Response Brief, paras 133-134.
[866] Trial Judgement, para. 88.
[867] Trial Judgement, para. 90.
[868] Trial Judgement, para. 91.
[869] Trial Judgement, para. 91.
[870] Trial Judgement, paras 109, 111.

sectors and administrations exercised command and control over their assigned sectors, within which the officers were their professional subordinates.[871] The Trial Chamber further found that the Chief of the Sector for Intelligence and Security Affairs directed, coordinated, and supervised the work of subordinate security and intelligence organs with respect to matters associated with security or intelligence.[872] Furthermore, the subordinate security organs were required to keep their superior organs informed of developments and send reports, and the superior security organs monitored the lawfulness of the conduct of the subordinate organs.[873] Tolimir fails to show any error in these findings, or how the principle of singleness of command had the effect of usurping all control exercised by Tolimir over his subordinate units.[874]

296. For the same reason, Tolimir's submission that the Trial Chamber's erroneous understanding of basic military rules resulted in the use of non-existent terms such as "professional command," "professional line of command," "subordinated in relation to professional activities," "professional subordination" and "professional subordinates," which are not part of the evidence[875] is also rejected. Moreover, the Appeals Chamber observes that the terms cited by Tolimir are in fact reflected in the evidence on the record[876] and that military rules and regulations applicable at the relevant time adopt terms consistent with the terms used by the Trial Chamber.[877]

297. With respect to Tolimir's argument that the Trial Chamber erred by accepting the translation of "*rukovođenje i komandovanje*" as "command and control" in English, the Appeals Chamber notes that the Trial Chamber accepted that the term "*komandovanje*" in BCS corresponded to the term "command" in English, and that "*rukovođenje*" corresponded in military terms to "control" but in other contexts could refer to "managing or administering".[878] The Trial

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[871] Trial Judgement, para. 83.
[872] Trial Judgement, para. 104. *See also* Trial Judgement, para. 111 (finding that MP units were professionally controlled by the security organs at "all command levels").
[873] Trial Judgement, para. 108.
[874] *See Popović et al.* Appeal Judgement, para. 1892; *Nizeyimana* Appeal Judgement, paras 201, 346.
[875] *See also* Appeal Brief, para. 223.
[876] *See* T. 18 April 2011 p. 12930 ("My immediate superior was the commander of the unit in whose composition we belonged. […] However, there is a kind of difference between the organs of security and intelligence. There is a professional line of command and control. It's a professional line of command and direction. […]"); T. 29 March 2011 p. 11960 ("[…] because of that reconnaissance tasks [the Reconnaissance Sabotage Detachment] was attached through the professional line to the intelligence administration"); T. 1 June 2010 p. 2353 ("along the professional line […] the unit was subordinated to the intelligence department").
[877] *See* Defence Exhibit 248 (Manual of Intelligence Support of the SFRY Armed Forces, 1987), p. 18, para. 14 ("The intelligence organ of the superior command/staff of the armed forces directs and coordinates the expert work of the intelligence and reconnaissance organs […] in directly subordinate commands […]"); Defence Exhibit 148 (JNA Brigade Rules, 1984), p. 38, para. 118 ("The intelligence organ […] provides expert direction for the intelligence activities of intelligence and security organs of subordinate units"), pp. 38-39, para. 122 ("In terms of expertise [the security organ] directs the work of the intelligence and security organs of subordinate units. […] The security organ provides expert direction for the military police unit […]"); Prosecution Exhibit 1297 (Service Regulations of the SFRY Armed Forces Military Police, 1985), p. 25, para. 80 ("The officer of the security body of the army command […] who leads the military police from the expert standpoint […]").
[878] Trial Judgement, para. 89, n. 249.

Chamber further explained "controlling" as referring to professional or specialised assistance to the commander.[879] The Trial Chamber found that "[a] third term, 'managing', refers to the process of overseeing the implementation of orders issued by a commander", citing as authority Witness Todorović.[880] The Appeals Chamber notes that Todorović was actually explaining the term "*kontrola*" (as distinguished from "*rukovođenje*"). The Trial Chamber thus appears to have interpreted "*kontrola*" as "managing", whereas the evidence suggested that "*rukovođenje*" was the term used to describe management.[881] While the use of the word "managing" by the Trial Chamber to explain the term "*kontrola*" may have caused a degree of confusion between the two terms, Tolimir fails to show how this had any impact on his convictions, nor how the Trial Chamber's understanding of the term "*rukovođenje i komandovanje*" as "command and control" differs in any material way from "management/direction and command" exercised by assistant commanders. The argument is thus rejected.

298. The Appeals Chamber considers that Tolimir's assertion that the Trial Chamber failed to consider military rules and instructions concerning the work of the security and intelligence organs misrepresents the Trial Chamber's findings.[882] Relying, *inter alia*, on the military rules and regulations cited later by Tolimir in his Appeal Brief,[883] the Trial Chamber found that: (i) the security organs[884] and the MP[885] were directly subordinated to the commanders of the Corps or Brigades in which they operated; (ii) Tolimir, as the Chief of the Sector for Intelligence and Security Affairs, directed, coordinated, and supervised the work of the Sector's two administrations, the Security Administration and the Intelligence Administration, as well as subordinate security and intelligence organs, including the MP;[886] and (iii) along the professional chain of command the Intelligence Administration directed the subordinate intelligence organs of the subordinate Corps and Brigades and the 410th Intelligence Centre.[887] Tolimir fails to show that the Trial Chamber's findings were in error or were not based on the military rules and regulations of the VRS.

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[879] Trial Judgement, para. 89, n. 250.
[880] Trial Judgement, para. 89, n. 251, *citing* T. 19 April 2011 pp. 13051-13052.
[881] *See* T. 30 January 2012 pp. 18572-18573.
[882] *See* Appeal Brief, paras 221-222.
[883] *See* Appeal Brief, para. 221.
[884] Trial Judgement, para. 109, n. 340, *citing* Defence Exhibit 203 (Rules of Service of Security Organs in SFRY Armed Forces, 1984). *See also* Trial Judgement, para. 130, n. 419, *citing* Defence Exhibit 148 (JNA Brigade Rules, 1984).
[885] Trial Judgement, para. 133, n. 431, *citing* Prosecution Exhibit 1297 (Service Regulations of the SFRY Armed Forces Military Police, 1985). *See also* Trial Judgement, para. 124, n. 404, *citing* Defence Exhibit 202 (SFRY Regulations on the Responsibilities of the Land Army Corps Command in Peacetime, 1990).
[886] Trial Judgement, para. 104, n. 312, *citing* Defence Exhibits 202 (SFRY Regulations on the Responsibilities of the Land Army Corps Command in Peacetime, 1990) and 203 (Rules of Service of Security Organs in SFRY Armed Forces, 1984). *See also* Trial Judgement, para. 131, n. 424, *citing* Prosecution Exhibit 1297 (Service Regulations of the SFRY Armed Forces Military Police, 1985).
[887] Trial Judgement, para. 118, n. 380, *citing* Defence Exhibit 248 (Manual of Intelligence Support of the SFRY Armed Forces, 1987).

299. With respect to Tolimir's argument that the Trial Chamber disregarded Čulić's evidence regarding the security organs' powers, the commander's exclusive right to command and control, and Tolimir's behaviour,[888] the Appeals Chamber recalls that:

> a [t]rial [c]hamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the [t]rial [c]hamber completely disregarded any particular piece of evidence." Such disregard is shown "when evidence which is clearly relevant […] is not addressed by the [t]rial [c]hamber's reasoning".[889]

Further, an appellant who alleges that a trial chamber failed to consider evidence has to demonstrate that the evidence allegedly disregarded by the trial chamber would have affected the trial judgement.[890]

300. In this case, the Appeals Chamber observes that the Trial Chamber did not specifically acknowledge Čulić's evidence that security organs were subordinated to the commander of the unit in which they operated,[891] that superior security organs were superior to subordinate security organs only in terms of professional education,[892] and that Tolimir did not issue direct orders towards subordinate security and intelligence officers.[893] The Appeals Chamber considers that this evidence is clearly relevant and should have been addressed by the Trial Chamber. The Trial Chamber thus erred in failing to explicitly consider this evidence. The Appeals Chamber recalls, however, that only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a trial chamber's decision.[894] Tolimir fails to demonstrate how the Trial Chamber's failure to specifically address this evidence resulted in an error of fact that occasioned a miscarriage of justice. The Appeals Chamber observes that Čulić's evidence is consistent with the Trial Chamber's finding that security organs were subordinated to the commander of the unit in which they operated.[895] Further, the Trial Chamber made findings on the remaining issues in Čulić's evidence based on the testimony of a number of witnesses and on relevant military regulations.[896] In these circumstances, the Appeals Chamber is not persuaded that the Trial Chamber's failure to

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[888] *See also* Appeal Brief, paras 224-226.
[889] *Popović et al.* Appeal Judgement, para. 375; *Perišić* Appeal Judgement, para. 92 (internal citations omitted). *See also Zigiranyirazo* Appeal Judgement, para. 45 ("[t]here is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. However, this presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.") (internal quotation marks and citations omitted). *See also Nizeyimana* Appeal Judgement, para. 176; *Karemera and Ngirumpatse* Appeal Judgement, para. 648; *Gotovina and Markač* Appeal Judgement, para. 132; *Limaj et al.* Appeal Judgement, para. 86; *Deronjić* Sentencing Appeal Judgement, para. 21; *Kvočka et al.* Appeal Judgement, para. 23.
[890] *Kamuhanda* Appeal Judgement, para. 105.
[891] *See* Appeal Brief, paras 224-225, *citing* T. 15 February 2012 pp. 19278-19279.
[892] *See* Appeal Brief, para. 226, *citing* T. 15 February 2012 pp. 19279-19280.
[893] *See* Appeal Brief, paras 227-228, *citing* T. 15 February 2012 pp. 19280-19281.
[894] *See supra*, para. 11.
[895] Trial Judgement, para. 109. *See also* Trial Judgement, paras 90-91, 131, 138, 146. *Cf.* Appeal Brief, paras 224-225, *citing* T. 15 February 2012 pp. 19278-19279.

explicitly address Čulić's evidence cited by Tolimir resulted in an error of fact that occasioned a miscarriage of justice.

301. The Appeals Chamber also rejects Tolimir's argument that the Trial Chamber did not discuss the substance of the work of the Sector for Intelligence and Security Affairs as unsupported by the Trial Chamber's findings.[897] The Trial Chamber found that the Sector for Intelligence and Security Affairs was tasked with carrying out intelligence and counter-intelligence activities[898] and set out in detail the primary tasks of the security organs[899] and the respective functions of the Security and Intelligence Administrations[900] and the MP.[901]

302. With regard to Tolimir's submission that the Trial Chamber erred in its findings in relation to his powers and the information available to him, the Appeals Chamber notes that, based on the evidence of Prosecution Witness Petar Salapura, the Trial Chamber found that the Sector's two administrations and the subordinate security and intelligence organs were duty-bound to exchange relevant information, and that, "to avoid duplication and the crossing of competencies", Tolimir was the one to "decide who will get what information, what will be referred to whom".[902] Contrary to Tolimir's suggestion, this finding did not concern specific information, but "relevant information" which the two administrations were duty-bound to exchange. The Appeals Chamber rejects Tolimir's claim that the Trial Chamber took Salapura's evidence out of context.[903] Tolimir's argument is therefore dismissed.

303. As to Tolimir's argument that the Trial Chamber erred in relying on Witness Milovanović's statement that Tolimir "always knew more" than his immediate subordinates Salapura and Ljubiša Beara because this statement is inconsistent with the nature of their duties,[904] the Appeals Chamber notes that Salapura and Beara were each responsible for the two administrations that comprised the Sector for Intelligence and Security Affairs.[905] As Chief of this Sector, Tolimir, directed, coordinated, and supervised the work of the two administrations and decided on the distribution of relevant information between the two administrations.[906] In light of this evidence, a reasonable trial chamber could have accepted Milovanović's evidence that Tolimir always knew more than

[896] *See* Trial Judgement, para. 104, n. 312 (findings on the authority of the Chief of the Sector for Intelligence and Security Affairs), para. 109, n. 341 (findings on the subordination of security organs).
[897] *See also* Appeal Brief, para. 222.
[898] Trial Judgement, para. 103.
[899] Trial Judgement, paras 106, 116. *See also* Trial Judgement, paras 132, 146.
[900] Trial Judgement, paras 106-108, 116-118.
[901] Trial Judgement, paras 110-111, 134.
[902] Trial Judgement, para. 104.
[903] Appeal Brief, para. 232.
[904] Appeal Brief, para. 239.
[905] Trial Judgement, para. 103.
[906] Trial Judgement, para. 104.

Salapura and Beara. Tolimir thus fails to demonstrate that the Trial Chamber's reliance on this evidence was in error.

304. With regard to Tolimir's submission that the Trial Chamber erred in relying on Prosecution Witness Mikajlo Mitrović's statement that available information was always presented to Tolimir,[907] the Appeals Chamber observes that Mitrović's statement concerned available information about intelligence or security related matters and included an explanation that such information was required to be presented to Tolimir in order that he (Tolimir) could make counter-intelligence and security assessments.[908] In the view of the Appeals Chamber, Tolimir has failed to demonstrate that the Trial Chamber's reliance on this statement was in error.

305. With respect to Tolimir's challenges to the Trial Chamber's conclusion that Mladić transferred to him certain authority over the 410th Intelligence Centre on the basis that Prosecution Witness Petar Škrbić, on whose evidence the Trial Chamber relied, testified only that he did not "rule out that possibility" and for which there was no other supporting evidence,[909] the Appeals Chamber observes that the Trial Chamber's finding is based not only on the evidence of Škrbić, but also on its earlier findings regarding the Intelligence Administration and the 410th Intelligence Centre.[910] Further, Škrbić's evidence cited by Tolimir concerns the 10th Sabotage Detachment and not the 410th Intelligence Centre.[911] When asked whether he stood by his statement that Mladić had transferred certain authority over the 410th Intelligence Centre to the Sector for Intelligence and Security Affairs, Škrbić confirmed the statement.[912] Accordingly, Tolimir's argument is without merit.

306. Concerning Tolimir's contention that in finding that he controlled the appointment of security and intelligence officers, the Trial Chamber failed to consider that his "real role" in that process was limited to "professional abilities",[913] Tolimir fails to point to specific evidence which the Trial Chamber allegedly failed to consider, identify any factual error, or explain why it was not reasonable for the Trial Chamber to reach this conclusion. Tolimir's argument is therefore dismissed as being without merit.

307. As to Tolimir's challenge to the Trial Chamber's finding that he played a central role in the convoy approval process and was instrumental in matters related to POW exchanges,[914] the Appeals

[907] Appeal Brief, para. 240.
[908] T. 1 June 2011 pp. 14990-14991.
[909] Appeal Brief, para. 233.
[910] Trial Judgement, para. 917, n. 3633.
[911] T. 2 February 2012 pp. 18788-18789.
[912] T. 2 February 2012 pp. 18788-18789.
[913] Appeal Brief, para. 234.
[914] Appeal Brief, para. 235.

Chamber notes that most of his arguments are made by way of cross-reference to other grounds of appeal.[915] For the reasons expressed in other parts of this Judgement dealing with those grounds of appeal, these arguments are dismissed.[916]

308. With respect to Tolimir's argument that the Trial Chamber erred in its description of his relationship with Mladić,[917] in particular by relying on Smith's evidence that he and Mladić were "closer to being equals",[918] the Appeals Chamber notes that the Trial Chamber based its findings about the relationship between Mladić and Tolimir on the evidence of several witnesses, including former VRS officers who described Tolimir as the person Mladić trusted the most and whom Mladić often consulted before taking a decision.[919] The Trial Chamber also took into account the fact that Tolimir often accompanied Mladić to negotiations or meetings.[920] Smith's evidence was based on his direct contact with Mladić and Tolimir,[921] not upon the fact that Tolimir was frequently tasked with negotiations and was considered as "the most skilful diplomat" among the VRS members, as suggested by Tolimir.[922] In this context, a reasonable trial chamber could have relied on the evidence of Smith, a witness it found credible, in describing the relationship between Mladić and Tolimir.

309. As for Tolimir's argument that the Trial Chamber took Milovanović's statement that Tolimir was Mladić's "eyes and ears" out of context,[923] the Appeals Chamber notes that the Trial Chamber relied on the evidence of Milovanović to find that Tolimir's function was to prevent leaks of highly classified information and to "cover up the intentions of the VRS"[924] and that he was the "eyes and ears" of his direct superior, the commander of the VRS Main Staff, Mladić.[925] The Appeals Chamber is not convinced that the Trial Chamber took Milovanović's statement out of context. Milovanović explained at trial that "Tolimir was Mladic's eyes and ears […] this was precisely Tolimir's duty. He was in charge of gathering intelligence. Those would be Mladic's ears. He also prevented any leaks of information from the VRS, meaning he was there to open Mladic's eyes".[926] The Trial Chamber found that Tolimir received daily written reports from each of the sector's two administrations and detailed oral reports from his subordinates.[927] The Appeals

[915] Appeal Brief, para. 235.
[916] *See infra*, paras 356-357.
[917] Appeal Brief, para. 236.
[918] Appeal Brief, para. 237.
[919] Trial Judgement, para. 921, nn. 3647-3648.
[920] Trial Judgement, para. 921, n. 3649.
[921] *See* Trial Judgement, paras 616-617, 650, 965.
[922] *See* Appeal Brief, para. 237.
[923] Appeal Brief, para. 238.
[924] Trial Judgement, para. 915.
[925] Trial Judgement, paras 914-915, 1109, 1165.
[926] T. 17 May 2011 pp. 14247-14248.
[927] Trial Judgement, para. 915.

Chamber considers that the Trial Chamber's consideration of Milovanović's statement was consistent with the context in which it was made regarding Tolimir's role. The Appeals Chamber thus rejects Tolimir's submission.

(c) Conclusion

310. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 14.

B. JCE to Forcibly Remove (Ground of Appeal 15 in part)

311. The Trial Chamber found that at the latest by March 1995 a common plan existed in the Bosnian Serb leadership to forcibly remove the Bosnian Muslim populations from the Srebrenica and Žepa enclaves.[928] It found that the strategic goals of the plan were set out in Directive 7 and were implemented in the ensuing months by means of restrictions on UNPROFOR re-supply and humanitarian aid convoys into the enclaves, as well as military actions against the enclaves.[929]

312. Tolimir submits that the Trial Chamber erred in fact and law in concluding that the JCE to Forcibly Remove existed.[930] Specifically, he argues that the Trial Chamber erred in: (i) finding that the RS leadership adopted objectives in May 1992 which evidenced a policy to 'get rid' of Muslim population of Eastern BiH,[931] while rejecting that the real strategic objective of the RS and VRS was solely to defeat the ABiH in the two enclaves,[932] and thus misinterpreting Directive 7 and its relationship with Directive 7/1 and consequent VRS military orders;[933] (ii) finding that the VRS participated in the restrictions of UNPROFOR and humanitarian aid convoys;[934] (iii) taking into consideration an attack on the Srebrenica enclave through a tunnel in the night of 23-24 June 1995 ("Tunnel Attack") to find that the Bosnian Muslim civilian population in Srebrenica were subjected to sniping and shelling in the months immediately prior to the military attacks on the enclaves;[935] and (iv) finding that the enclaves' status as "safe areas" was inviolable under international law even though they were not fully demilitarised.[936]

[928] Trial Judgement, para. 1040.
[929] Trial Judgement, paras 1038, 1040.
[930] Appeal Brief, paras 245-255.
[931] Appeal Brief, paras 245-256.
[932] Appeal Brief, para. 247.
[933] Appeal Brief, paras 250-255.
[934] Appeal Brief, para. 266.
[935] Appeal Brief, para. 273.
[936] Appeal Brief, paras 283-292, 305-308.

1. The RS's strategic objectives and Directives 7 and 7/1

313. The Trial Chamber found that, as early as 1992, the RS had a policy "aimed at ridding the eastern enclaves of its Bosnian Muslim populations".[937] It based this finding on the adoption by the National Assembly of the strategic objectives in May 1992 ("Six Strategic Objectives"), which included establishing "State borders separating the Serbian people from the other two ethnic communities" and eliminating "the Drina [river] as a border separating Serbian States".[938] These objectives were followed by Directive 4 of November 1992, which ordered the Drina Corps of the VRS to "force [the enemy] to leave the Birač, Žepa and Goražde areas together with the Muslim population" and to "destroy" the able-bodied armed men who refuse to surrender.[939] The Trial Chamber found that this policy was "reaffirmed" by the issuance of Directive 7 of 8 March 1995, which ordered the Drina Corps to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[940] The Trial Chamber further held that Directive 7/1 served as the military translation of the political goals set out in Directive 7.[941]

(a) Submissions

314. Tolimir submits that the evidence, in particular Prosecution Exhibit 2477, the minutes of the 16th Session of the National Assembly, and specifically, the comments made by Mladić ("we do not want a war against the Muslims as a people […] we cannot cleanse […] so that only Serbs would stay […] that would be genocide"[942]), indicate that the Six Strategic Objectives were not adopted at this session, and that deliberations during the session cannot be understood as reflecting any unlawful policy.[943] Tolimir further claims that the Trial Chamber's findings concerning the existence of the JCE to Forcibly Remove were a consequence of its: (i) failure to establish the actual strategic objectives of both the RS and the VRS; (ii) incorrect interpretation of evidence presented by Prosecution Witness Milenko Lazić; and (iii) failure to establish facts that concern the events of 1992-1995 in the Podrinje region.[944] Furthermore, with regard to Directives 7 and 7/1 and the relation between them, Tolimir claims that the Trial Chamber, by relying on the testimony of former Prosecution employee and Prosecution Witness Richard Butler, erred in its interpretation of

[937] Trial Judgement, para. 1010.
[938] Trial Judgement, paras 162-165, 1010.
[939] Trial Judgement, paras 162-165, 1010.
[940] Trial Judgement, para. 1010.
[941] Trial Judgement, para. 1012.
[942] Appeal Brief, para. 245, *quoting* Prosecution Exhibit 2477, pp. 37-39.
[943] Appeal Brief, paras 245-246; Reply Brief, paras 80-81.
[944] Appeal Brief, paras 247-249; Reply Brief, paras 83-84.

the evidence, submitting that the Trial Chamber's finding that "the political goals set out in Directive 7 […] were implemented through military orders" was not reasonable.[945]

315. The Prosecution responds that Tolimir misinterprets or ignores the Trial Chamber's findings in relation to the Six Strategic Objectives, contests a finding which does not constitute a basis for his conviction, and merely repeats unsuccessful arguments presented during trial.[946] With regard to the deliberations during the 16th Session of the National Assembly, the Prosecution submits that the comments expressed by Mladić should be disregarded taking into consideration his own involvement in the JCEs.[947] The Prosecution further submits that Tolimir: (i) does not show how the Trial Chamber erred in "failing to establish real strategic objectives […] formulated in Directive 6"; (ii) simply questions the Trial Chamber's interpretation of evidence presented by Lazić; and (iii) does not show what the relevance of the events of 1992-1995 in the Podrinje region is, and ignores the fact that the Trial Chamber considered those events.[948] The Prosecution argues that with regard to Directives 7 and 7/1, Tolimir merely repeats his arguments from trial and claims that his interpretation of the evidence should be authoritative without showing why the Trial Chamber's interpretation of the evidence was not reasonable.[949] Moreover, according to the Prosecution, the Trial Chamber considered the entirety of the evidence as opposed to basing its findings solely on the opinion of Butler, and Tolimir shows no error in the Trial Chamber's assessment of the credibility of this witness.[950] The Prosecution also submits that Prosecution Exhibit 1202, the order for active combat operations issued by Živanović, constitutes evidence of the military implementation of the directives.[951]

316. Tolimir replies that there is no connection between Directive 7 and the Six Strategic Objectives, and that the strategic objectives were set out in Directive 6.[952] Regarding the relationship between Directives 7 and 7/1, Tolimir replies that the Prosecution's argument is unreasonable taking into account Prosecution Exhibit 2719, a Drina Corps Order dated 20 March 1995, Prosecution Exhibit 1202, a Drina Corps Command Order dated 2 July 1995, both signed by Milenko Živanović, and Prosecution Exhibit 2509, a Drina Corps Daily Combat Report dated 16 May 1995 signed by Radislav Krstić.[953]

[945] Appeal Brief, paras 250-255; Reply Brief, para. 87.
[946] Response Brief, paras 147-148.
[947] Response Brief, para. 149.
[948] Response Brief, paras 150-154.
[949] Response Brief, paras 155, 157.
[950] Response Brief, paras 156, 158-159.
[951] Response Brief, para. 160.
[952] Reply Brief, para. 82.
[953] Reply Brief, para. 86.

(b) Analysis

317. The Appeals Chamber notes that the JCE to Forcibly Remove was not alleged to have started in 1992 and the Trial Chamber did not make such a finding.[954] In that sense, the Trial Chamber's findings in relation to the Six Strategic Objectives do not form a basis of Tolimir's conviction. The Trial Chamber explicitly concluded that the common plan to forcibly remove the Bosnian Muslim populations from the Srebrenica and Žepa enclaves existed "at the latest by early March 1995"[955] and, more specifically, that it was the issuance of Directive 7 in March 1995 that marked the birth of the JCE to Forcibly Remove.[956] By contrast, the Six Strategic Objectives were adopted in May 1992 and reflected a general policy of "ridding the eastern enclaves of [their] Bosnian Muslim populations", which had not materialised into a concrete criminal enterprise until the adoption of Directive 7 in March 1995.[957] Nonetheless, in view of the Trial Chamber's finding that Directive 7 "reaffirmed" an existing policy of ethnic separation, and that "at the latest by early March 1995" a common plan to forcibly remove the Bosnian Muslim population of the two enclaves existed,[958] the Appeals Chamber will consider Tolimir's arguments on the merits.

318. Tolimir's submission that the Six Strategic Objectives were never adopted by the National Assembly was expressly considered and rejected by the Trial Chamber.[959] Tolimir fails to show any error by the Trial Chamber in so doing and his argument in this regard is dismissed. Moreover, the Appeals Chamber is not persuaded by Tolimir's contention that the discussion of the Six Strategic Objectives by the National Assembly did not reflect any unlawful policy and that the Trial Chamber should have taken into account Mladić's statements made during the discussion. In this respect, the Appeals Chamber notes that the Trial Chamber did not find that the Six Strategic Objectives necessarily reflected an unlawful policy or criminal enterprise; it merely relied on this evidence as indicative of the RS's political objective of ethnic separation. Its finding that this objective was implemented through criminal means, *i.e.* forcible transfer, was based on Directive 7 and its implementation.[960]

319. As to Tolimir's claim that the Trial Chamber failed to establish the "real" RS and VRS objectives set out in Directive 6 of 11 November 1993, the Appeals Chamber notes that the Trial Chamber found that Directive 6 "revisits portions of Directive 4, including 'to create objective

[954] Indictment, para. 35; Trial Judgement, para. 1040.
[955] Trial Judgement, para. 1040.
[956] Trial Judgement, paras 1077-1078.
[957] Trial Judgement, para. 1010.
[958] Trial Judgement, paras 1010, 1040.
[959] Trial Judgement, n. 576.
[960] Trial Judgement, paras 1010, 1038, 1040.

conditions for achievement of the [VRS] strategic war goals'".[961] The "real" objectives of Directive 6, therefore, included the objectives previously set out in Directive 4. In any event, Directive 6 was superseded by Directive 7,[962] on which the Trial Chamber relied in coming to the impugned finding. The argument is thus rejected.

320. The Appeals Chamber is similarly not convinced by Tolimir's undeveloped arguments in relation to the Trial Chamber's interpretation of the evidence of Lazić and the evidence in relation to the events in the Podrinje region in 1992-1995. With regard to Lazić's evidence, Tolimir fails to show any error in the Trial Chamber's analysis and merely argues that it should have interpreted it in a particular manner. As to the events in the Podrinje region in 1992-1995, Tolimir fails to show how the evidence he cites is relevant to the impugned finding and could have had an impact on the Trial Chamber's conclusion. These arguments are therefore dismissed.

321. Turning to Tolimir's argument that the Trial Chamber erred in concluding that the goals expressed in Directive 7 were implemented militarily by way of Directive 7/1, the Appeals Chamber notes that Tolimir repeats the same argument he made at trial without showing how the Trial Chamber erred in rejecting it. The Trial Chamber considered that the military orders issued after Directive 7/1 set out tasks pursuant to both Directive 7 *and* 7/1, such as the order for active combat operations issued by Živanović on 2 July 1995, which ordered the task of improving the VRS's tactical position with a view to "creat[ing] conditions for the elimination of the enclaves".[963] In relation to the credibility of Witness Butler, the Appeals Chamber rejects Tolimir's arguments for reasons explained earlier in this Judgement.[964] Tolimir fails to demonstrate that no reasonable trier of fact could have reached the conclusion that Directive 7/1 implemented Directive 7 militarily. His argument is dismissed.

2. The VRS's role in the restriction of humanitarian and UNPROFOR re-supply convoys

322. The Trial Chamber found that, pursuant to the instruction in Directive 7 to "reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population", the VRS engaged in restrictions on convoys delivering humanitarian aid and UNPROFOR re-supply convoys to both enclaves.[965] The Trial Chamber found that, as a result of these restrictions, "by early June 1995, DutchBat had reached a point where it was operationally

[961] Trial Judgement, n. 648, *citing* Defence Exhibit 300 (Republika Srpska Supreme Command Directive 6, dated 11 November 1993), p. 3.
[962] Trial Judgement, n. 289.
[963] Trial Judgement, para. 1012, *citing*, *inter alia*, Prosecution Exhibit 1202 (Drina Corps Command Order 04/156-2, Operations Order No.1 Krivaja-95, signed by Milenko Živanović, dated 2 July 1995), p. 3.
[964] *See supra*, paras 69-70.
[965] Trial Judgement, paras 1013 (*quoting* Prosecution Exhibit 1214 (Republika Srpska Supreme Command Directive 7, dated 8 March 1995), p. 14), 1014, 1038.

no longer able to fulfil its mission" and by early July 1995, "a devastating humanitarian situation engulfed the enclaves", thereby "laying the groundwork for the […] physical removal of the Bosnian Muslim population […] from the enclaves of Srebrenica and Žepa".[966]

(a) Submissions

323. Tolimir submits that the Trial Chamber erred in finding that the VRS participated in the restriction of humanitarian convoys.[967] He argues that the VRS had no authority over humanitarian convoys, as even before 14 May 1995, there were separate processes for the approval of UNPROFOR re-supply and humanitarian aid convoys and it was the State Committee for Cooperation with the UN and International Humanitarian Organisations and the Ministry of Health ("State Committee") that had exclusive authority over the approval of humanitarian convoys.[968] According to Tolimir, the VRS was only charged with preventing the passage of unauthorised convoys, but could not interfere with the approval process itself.[969] In that regard, Tolimir asserts that the Trial Chamber's findings about the involvement of the VRS in the restriction of humanitarian convoys were based on an erroneous assessment of the relevant evidence,[970] such as biased statements of UNPROFOR officials.[971] Tolimir adds that the real cause for the cancellations of convoys were "problems between UNHCR and DutchBat", as evidenced by Prosecution Exhibit 619. He claims that, in any event, the Trial Chamber failed to analyse the actual impact of the restrictions or to consider evidence that sufficient food reached Srebrenica and Žepa during the Indictment period.[972] Finally, according to Tolimir, impeding the passage of prohibited convoys could not contribute to a criminal enterprise, because it is the right of a warring party under international humanitarian law to approve or reject such convoys.[973]

324. Regarding the UNPROFOR re-supply convoys, Tolimir argues that the Trial Chamber failed to consider evidence that convoys were used to supply arms, ammunition, food, and fuel to the ABiH, which was never disarmed by UNPROFOR and was preparing offensives against the VRS.[974] Tolimir also argues that, in any event, restrictions on UNPROFOR re-supply convoys could not affect UNPROFOR's ability to distribute humanitarian aid or cause a humanitarian crisis,

[966] Trial Judgement, paras 204, 1015, 1038.
[967] Appeal Brief, para. 266.
[968] Appeal Brief, paras 261-264; Reply Brief, paras 95-96.
[969] Appeal Brief, para. 264.
[970] Appeal Brief, paras 261-263; Reply Brief, paras 93-95.
[971] Appeal Brief, para. 265; Reply Brief, para. 98.
[972] Appeal Brief, para. 266. *See also* Reply Brief, para. 100.
[973] Appeal Brief, para. 264, *citing* Additional Protocol I, Art. 70.
[974] Appeal Brief, paras 271-272, 294. *See also* Reply Brief, para. 101.

because the provisions sent through the re-supply convoys were only meant for UNPROFOR, not the local population.[975]

325. The Prosecution responds that the Trial Chamber correctly assessed the VRS's role in the restriction of convoys and the impact of the restrictions on UNPROFOR and the civilian population.[976] According to the Prosecution, Tolimir's arguments are simply repeating failed trial arguments or propose a different interpretation of evidence considered by the Trial Chamber, and are contradictory.[977] The Prosecution further points out that, while Additional Protocol I allows a party to a conflict to prescribe technical requirements for the passage of convoys, it also prohibits any interference with humanitarian relief consignments.[978]

326. The Prosecution submits that Tolimir's argument that the Trial Chamber failed to give sufficient credit to Prosecution Exhibit 619 should be summarily dismissed.[979] The Prosecution further argues that, in blaming DutchBat for the delays and cancellations of convoys, Tolimir relies on evidence not supporting that argument, but only showing that on a single occasion a UNHCR employee threatened to discontinue the convoys if the ABiH insisted on extensive checks.[980] Moreover, the Prosecution contends that, contrary to Tolimir's arguments, the evidence amply supported the Trial Chamber's findings that the VRS restrictions on UNPROFOR convoys affected its ability to fulfil its mission and also contributed to harsher living conditions for the local civilian population.[981] The Prosecution argues that the Trial Chamber reasonably chose not to rely on evidence allegedly showing that, as was known by the VRS, DutchBat provided food and other supplies to the ABiH.[982]

327. Tolimir replies that the VRS's hostility against UNPROFOR was justified by pointing to evidence that DutchBat took part in "the combat activities, setting up blocking positions and firing on the VRS".[983] Concerning the alleged provision of food to the ABiH by UNPROFOR, Tolimir replies that this is established by the testimony of Defence Witness Slavko Kralj.[984]

[975] Appeal Brief, para. 270.
[976] Response Brief, paras 174, 176-177.
[977] Response Brief, paras 170, 174, 179, 190.
[978] Response Brief, para. 178.
[979] Response Brief, paras 182-184.
[980] Response Brief, para. 187.
[981] Response Brief, paras 186, 188.
[982] Response Brief, para. 189.
[983] Reply Brief, para. 99.
[984] Reply Brief, para. 101.

(b) Analysis

328. The Appeals Chamber first addresses Tolimir's argument that the VRS lacked the authority to decide on whether to allow humanitarian aid convoys into the enclaves.[985] In the view of the Appeals Chamber, that argument is based on a misreading of the Trial Chamber's conclusions. The Trial Chamber specifically acknowledged the formation of separate processes for the approval of humanitarian and UNPROFOR re-supply convoys in March 1995 and found that the State Committee, not the VRS, was responsible for the approval of humanitarian convoys,[986] yet focused on the VRS's actual role in the passage of humanitarian convoys at checkpoints. The Trial Chamber found that "[d]espite changes in the approval process, the VRS retained control of ensuring safe passage for these convoys and performing checks of the goods transported" and "the final decision for the passage of any convoy remained 'in the hands of the army, Mladić, at check-points".[987] Tolimir fails to point to any evidence demonstrating that such a conclusion was unreasonable or that evidence was "completely disregarded" despite its clear relevance.[988] Contrary to Tolimir's contention, the Trial Chamber considered Defence Exhibit 303, an order by Lieutenant General Manojlo Milovanović to the Corps Command, dated 31 August 1994, that there were to be no movements across the line of separation between VRS- and ABiH-controlled areas without written notice from the VRS Main Staff.[989] The Trial Chamber noted the content of that order and cited it in support of its finding that "the VRS had standing orders to prevent the passage of unauthorised convoys or movements".[990] Tolimir does not show an error in the Trial Chamber's assessment of that exhibit.

329. Likewise, Tolimir's argument that the VRS was entitled under international humanitarian law to prevent the passage of all unauthorised convoys is incorrect.[991] The Appeals Chamber observes that while Article 70 of Additional Protocol I provides that parties to an armed conflict have "the right to prescribe the technical arrangements, including search, under which such passage [of relief consignments] is permitted", it also provides that such parties "shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned"

[985] Appeal Brief, paras 260-261, 264-266.
[986] Trial Judgement, paras 193-194.
[987] Trial Judgement, para. 193, *citing*, *inter alia*, T. 17 May 2011 p. 14213.
[988] As for Defence Exhibits 79 and 307, two orders by the then-President of the Republika Srpska concerning convoys that Tolimir claims the Trial Chamber improperly ignored, these exhibits only concern the official approval procedures for humanitarian and UNPROFOR convoys – which the Trial Chamber acknowledged, finding that the State Committee, not the VRS, was responsible for the approval of humanitarian convoys (Trial Judgement, paras 193-194) – and not to how these procedures were implemented on the field. These exhibits, therefore, did not have to be explicitly considered by the Trial Chamber. The Appeals Chamber does not find an error in that respect.
[989] Trial Judgement, n. 714. *See also* Trial Judgement, n. 697.
[990] Trial Judgement, para. 196.
[991] Appeal Brief, para. 264, *citing* Additional Protocol I, Art. 70.

and must "protect relief consignments and facilitate their rapid distribution".[992] It is true, as the Appeals Chamber has recently held in a case involving very similar facts, that "the applicable international humanitarian law did not oblige the VRS to allow passage of consignments of humanitarian aid for the benefit of the ABiH, or of military equipment under the guise of humanitarian aid" since "[s]uch consignments were deprived of their impartial character".[993] However, Tolimir does not point to any evidence and does not even allege that the unauthorised humanitarian aid convoys were essentially dispatches of military equipment or other aid to the ABiH and were thus not impartial. Tolimir only advances such arguments *vis-à-vis* the UNPROFOR re-supply convoys, which he alleges were used to supply ammunition, weapons, fuel, and even food to the ABiH within the enclaves of Srebrenica and Žepa.[994] The right to refuse the entry of consignments that were "deprived of their impartial character",[995] therefore, did not apply to the humanitarian aid convoys the VRS refused to allow into the enclaves. The only basis on which Tolimir argues the VRS officers and soldiers on the ground were entitled to block the entry of humanitarian convoys was the fact that they were not authorised by the VRS Main Staff, irrespective of the reason for which such authorisation had been denied.[996] Tolimir, in essence, argues that the VRS had limitless discretion in deciding which humanitarian convoys to allow into the enclaves. This is not correct under international humanitarian law. In view of the clear language of Article 70 of Additional Protocol I and in light of the Trial Chamber's findings on the restriction by the VRS of humanitarian convoys into the enclaves, Tolimir fails to show that it was unreasonable for the Trial Chamber to rely on the VRS's role in preventing the passage of the convoys as evidence of the JCE to Forcibly Remove.

330. The Appeals Chamber also dismisses as unsupported Tolimir's submission that the Trial Chamber based its conclusions mainly on the statements of UNPROFOR officials, who Tolimir claims had reason to give dishonest testimony.[997] The Trial Chamber actually based its findings on a range of documentary and witness evidence, including VRS orders and the evidence of VRS officers.[998] Tolimir argues that the Trial Chamber did not properly consider Defence Exhibit 254, Tolimir's report to the Commands of a number of VRS Corps, including the Drina Corps, dated 12 February 1995, but a trial chamber need not refer explicitly to every piece of evidence presented at trial as long as there is no indication that it completely disregarded clearly relevant evidence.[999]

[992] Additional Protocol I, Art. 70(3)(a), 70(3)(c), 70(4).
[993] *Popović et al.* Appeal Judgement, para. 615.
[994] Appeal Brief, para. 271; Reply Brief, para. 101.
[995] *Popović et al.* Appeal Judgement, para. 615.
[996] Appeal Brief, para. 264, *citing* Additional Protocol I, Art. 70.
[997] *See* Appeal Brief, para. 265. The Appeals Chamber understands Tolimir to be referring to paragraph 196 (rather than paragraph 186) of the Trial Judgement.
[998] *See* Trial Judgement, nn. 714-720, and references cited therein.
[999] *Popović et al.* Appeal Judgement, para. 375; *Perišić* Appeal Judgement, para. 92.

Defence Exhibit 254 states that UNPROFOR wished to avoid complying with the Agreement on Principles of Freedom of Movement of 31 January 1995.[1000] The Appeals Chamber is not convinced that this exhibit was relevant to the Trial Chamber's discussion of the VRS's role in the restriction of convoys or proves, as Tolimir alleges, that the UNPROFOR officials gave dishonest testimony. Tolimir's arguments are thus dismissed.

331. As to Tolimir's related argument that the humanitarian convoys were cancelled due to problems between UNHCR and DutchBat, the Appeals Chamber notes that Prosecution Exhibit 619, a report on the fall of Srebrenica prepared by the NIOD Institute for War, Holocaust and Genocide Studies, states that the lack of UNHCR convoys had a negative influence on the morale of the population, and "diminished the state of readiness of the ABiH".[1001] However, Tolimir fails to show that this unsubstantiated assertion, even if accepted, would have any impact on the impugned findings. Moreover, the report indicates that just one UNHCR convoy was cancelled as a result of tension between UNHCR and DutchBat over the latter's procedures for checking.[1002] This does not provide a basis for Tolimir's claim that the VRS did not participate in humanitarian convoy restrictions. The Appeals Chamber thus finds no error by the Trial Chamber in not explicitly considering Prosecution Exhibit 619.

332. The Appeals Chamber is similarly not persuaded by Tolimir's contention that the Trial Chamber should have assessed the needs of the civilian population in Srebrenica against the number of convoys that were rejected in order to assess if these rejections were the reason there was insufficient food. The Trial Chamber found that the enclaves had been dependent on humanitarian aid since the establishment of the safe areas in 1993.[1003] The Trial Chamber relied on extensive documentary and witness evidence in finding that the VRS restrictions on the humanitarian convoys caused a dire humanitarian situation.[1004] Tolimir's argument is dismissed.

333. Tolimir's argument that the restrictions on UNPROFOR re-supply convoys were justified because fuel, food, ammunition, and arms from those convoys were being channelled to the ABiH in Srebrenica also lacks merit.[1005] The Appeals Chamber notes the Trial Chamber's finding that "an embargo on the import of weapons and ammunition was in place due to RS concerns that these items, as well as fuel, were being supplied to the ABiH".[1006] The Trial Chamber also cited evidence

1000 *See* Defence Exhibit 254.
1001 Prosecution Exhibit 619, p. 1.
1002 Prosecution Exhibit 619, p. 5.
1003 Trial Judgement, para. 198.
1004 Trial Judgement, paras 197-204.
1005 Appeal Brief, paras 271-272, 294.
1006 Trial Judgement, n. 744.

that "the ABiH did receive some of these items from convoys in the period of 1993-1995".[1007] Nevertheless, the Trial Chamber concluded that the VRS restrictions on UNPROFOR re-supply convoys did not only aim at precluding the supply of arms, ammunition, and fuel to the ABiH, but was also directly aimed at affecting and severely undermining UNPROFOR's own ability to operate and fulfil its mandate as the guarantor of the enclaves' "safe zone" status and protector of the local civilian population.[1008] The Trial Chamber found that the impairment of UNPROFOR's operational capacity in the enclaves had a direct impact on the local population, who were "aware of the inability of DutchBat to protect them" and "in fear of what was to come".[1009] The Trial Chamber concluded that UNPROFOR's inability to protect the civilians exacerbated the humanitarian crisis in the enclaves and contributed to "the creation of unbearable conditions within the enclaves", which eventually forced the Bosnian Muslims out of the enclaves.[1010]

334. In the Appeals Chamber's view, even if it were accepted that *some* restrictions on UNPROFOR re-supply convoys might have been justified (such as ammunitions and arms),[1011] Tolimir does not point to any evidence that the "categorical […] disapprovals"[1012] by the VRS of DutchBat requests to supply the minimum goods needed in order to adequately fulfil its role were warranted. The Appeals Chamber therefore finds no error in the Trial Chamber's conclusion that restrictions on UNPROFOR re-supply convoys were unjustified and illegal and were evidence of the existence of a criminal scheme to forcibly remove the Bosnian Muslims from the enclaves.

335. Tolimir's assertion that restrictions on UNPROFOR re-supply convoys only affected UNPROFOR and had no impact on the civilians in the enclaves repeats an argument rejected at trial without showing any error in the Trial Chamber's reasoning.[1013] Tolimir further challenges the Trial Chamber's finding that the VRS's convoy restrictions undermined UNPROFOR's ability to assist with the distribution of humanitarian aid, as per its mandate.[1014] These assertions do not show an error in the Trial Judgement. Contrary to Tolimir's contention, the Trial Chamber found that UNPROFOR's mandate was not only to facilitate and assist with the distribution of humanitarian

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1007 Trial Judgement, n. 744 (citing various pieces of evidence to that effect).
1008 Trial Judgement, paras 200-202. The Trial Chamber found, in particular, that the VRS would "categorically deny requests to re-supply ammunition, spare parts for vehicles, and communication radios to DutchBat" and as a result, "[b]y early June 1995, DutchBat had reached a point where it was operationally no longer able to fulfil its mission, execute any actions, or 'respond on forthcoming deteriorating situations'". Trial Judgement, para. 201 (internal citations omitted). *See also* Trial Judgement, para. 202 (regarding Žepa).
1009 Trial Judgement, para. 1015.
1010 Trial Judgement, para. 1079. *See also* Trial Judgement, paras 203-204, 1015.
1011 Trial Judgement, n. 744.
1012 Trial Judgement, para. 201. *See also* Trial Judgement, paras 202, 1015, 1079.
1013 Appeal Brief, para. 268.
1014 Appeal Brief, para. 270. *See also* Trial Judgement, para. 1079.

aid, but also to deter hostile action by the warring parties through their presence, and to demilitarise the enclave.[1015]

336. The VRS restrictions on UNPROFOR re-supply convoys did not only affect its ability to distribute humanitarian aid, as Tolimir suggests; they impaired its ability to operate effectively to fulfil that extensive and demanding mandate. As the Trial Chamber found, "[t]he restrictions of re-supply convoys directly impacted UNPROFOR's ability to carry out its mandate, and as such, contributed to the creation of unbearable conditions within the enclaves".[1016] By preventing UNPROFOR from acting to deter attacks against the safe area and monitor the cease-fire, the VRS restrictions exacerbated the humanitarian crisis in the enclaves and led the civilians to flee.[1017] The Appeals Chamber finds no error in the Trial Chamber's findings in that regard.

3. The Tunnel Attack of 23-24 June 1995

337. The Trial Chamber found that in addition to the restrictions and attacks on UN positions, the VRS steadily increased the shelling and sniping of the Srebrenica enclave in May and June 1995.[1018] In this regard, the Trial Chamber took into account an operation carried out by the VRS in the night of 23-24 June 1995 when members of the 10th Sabotage Detachment together with a unit of the Bratunac Brigade entered the Srebrenica enclave through an old mine tunnel and fired a number of shoulder-launched rocket propelled grenades at buildings in the Vidikovac neighbourhood, resulting in a number of wounded and the death of one woman.[1019]

(a) Submissions

338. Tolimir submits that the Trial Chamber erred in law by taking into account the Tunnel Attack as this incident was not charged in the Indictment.[1020] Furthermore, Tolimir contests the Trial Chamber's findings concerning the purpose of the attack.[1021] Tolimir contends that the purpose of the Tunnel Attack was not to terrorise Srebrenica's civilian population, but to attack legitimate military objectives, as evidenced by Prosecution Exhibit 2200, the operational plan

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[1015] Trial Judgement, para. 166. UNPROFOR was deployed in the protected enclaves in order to ensure respect of the Security Council Resolutions designating the enclaves as "safe areas" and deter violations of the enclaves' status. *See*, *e.g.*, Prosecution Exhibit 2134 (U.N. Security Council Resolution 819, U.N. Doc. S/RES/819, 16 April 1993), para. 4; Prosecution Exhibit 2133 (U.N. Security Council Resolution 836, U.N. Doc. S/RES/836, 4 June 1993), para. 5.

[1016] Trial Judgement, para. 1079.

[1017] *See* Trial Judgement, para. 1015 (finding that Srebrenica's civilians became "aware of the inability of DutchBat to protect them" and were "in fear of what was to come").

[1018] Trial Judgement, para. 1016.

[1019] Trial Judgement, paras 1017-1018.

[1020] Appeal Brief, paras 273-274.

[1021] Appeal Brief, para. 276.

issued on 21 June 1995 by Colonel Petar Salapura, head of the VRS Intelligence Administration, and Salapura's own testimony.[1022]

339. The Prosecution responds that the events of 23-24 June 1995 in Srebrenica are sufficiently charged in paragraph 38 of the Indictment.[1023] Regarding the aim of the Tunnel Attack, the Prosecution contends that the Trial Chamber considered and rejected Tolimir's argument at trial.[1024] The Prosecution further submits that Tolimir mischaracterises the testimony of Salapura, while ignoring other relevant evidence in this regard, *inter alia*, the testimony of Witness Erdemović, which support the Trial Chamber's findings as to the purpose of the attack.[1025]

(b) Analysis

340. The Appeals Chamber finds no merit in Tolimir's submission that the Tunnel Attack was not adequately charged in the Indictment.[1026] The Appeals Chamber notes that the Trial Chamber addressed this issue, finding that, even though the incident was "not specifically mentioned in the Indictment," it was covered by paragraph 38 of the Indictment, which states that "[c]ontinuing in March 1995 through the fall of the enclaves in July 1995, the VRS shelled and sniped various civilian targets in the Srebrenica and Žepa enclaves, as part of the effort to make life for the Muslims in the enclave impossible and remove them".[1027] The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[1028] Since the Tunnel Attack occurred in the early morning hours of 24 June 1995, it was encompassed by the reference, in paragraph 38 of the Indictment, to shelling attacks by the VRS against civilians in the enclaves.[1029] The Appeals Chamber is not convinced that the Tunnel Attack was a material fact that needed to be pleaded with additional specificity in the Indictment.[1030] Tolimir was on notice that evidence of the VRS shelling and sniping various civilian targets in the enclaves prior to the military attacks would be adduced at trial in relation to this charge. The Appeals Chamber therefore dismisses the argument.

[1022] Appeal Brief, paras 276-278; Reply Brief, para. 102.
[1023] Response Brief, para. 192.
[1024] Response Brief, para. 194.
[1025] Response Brief, paras 194-195.
[1026] Appeal Brief, paras 273-274.
[1027] Trial Judgement, para. 1017 and n. 4007; Indictment, para. 38.
[1028] *See*, *e.g.*, *Popović et al.* Appeal Judgement, para. 65; *Đorđević* Appeal Judgement, para. 574; *Šainović et al.* Appeal Judgement, para. 262.
[1029] The Appeals Chamber rejects Tolimir's unsupported assertion that the Tunnel Attack did not constitute shelling or sniping, since the use of a rocket-propelled grenade is clearly a form of shelling. *See* Appeal Brief, para. 274.
[1030] *See Đorđević* Appeal Judgement, para. 574, and authorities cited therein (distinguishing between "counts or charges", "material facts", and other factual allegations in an indictment).

341. The Appeals Chamber is not persuaded by Tolimir's argument that the Trial Chamber erred in finding that one aim of the Tunnel Attack was to terrorise Srebrenica's civilian population. The Appeals Chamber notes the Trial Chamber's finding that the attack "had the dual function of warning the ABiH of the VRS's capabilities to carry out attacks in the enclave, as well as terrorising the civilian population in line with the goal of making life inside the enclave unbearable".[1031] In reaching this conclusion, the Trial Chamber carefully considered all the relevant evidence on the record, including Prosecution Exhibit 2200 and Salapura's testimony.[1032] The Trial Chamber specifically took into account the order in Prosecution Exhibit 2200 to avoid civilian casualties, as well as Salapura's testimony that the purpose of the operation was not to inflict terror on civilians.[1033] Nevertheless, in light of other relevant evidence, such as the testimony of Erdemović, who took part in the attack, that the purpose of that operation was to "'alert the military and the population, the people in Srebrenica'",[1034] and the fact that the attack was carried out in a civilian neighbourhood in a safe area, the Trial Chamber reasoned that "the distinction between combatants and civilians was not a priority".[1035] Tolimir fails to show that no reasonable trial chamber could have made the impugned finding on the basis of the available evidence.

4. The status of the enclaves and the lawfulness of VRS attacks

342. In the context of discussing Tolimir's *mens rea* for crimes against humanity, the Trial Chamber found that, because the UN Security Council designated the enclaves of Srebrenica and Žepa as "safe areas" pursuant to Chapter VII of the UN Charter, the VRS could not lawfully attack the enclaves, even though the ABiH did not honour its demilitarisation commitments under UN Security Council Resolutions and cease-fire agreements with the VRS and irrespective of the fact that military targets may have existed in the enclaves.[1036]

(a) Submissions

343. Tolimir submits that the Trial Chamber erred in fact and law in making the above findings, and, as a result, failed to establish the real reasons for the attacks on Srebrenica and Žepa.[1037] Tolimir argues that the VRS had the right to attack Srebrenica and Žepa under Additional Protocol I because, despite their designation as "safe areas" by the UN Security Council and as "demilitarized zones" under the belligerents' agreement, the ABiH materially breached the enclaves' status by

[1031] Trial Judgement, para. 1021.
[1032] Trial Judgement, paras 1017-1021.
[1033] Trial Judgement, paras 1017, 1020-1021.
[1034] *See* Trial Judgement, para. 1018, *quoting* T. 17 May 2010 pp. 1880–1881.
[1035] Trial Judgement, para. 1021.
[1036] Trial Judgement, para. 704.
[1037] *See generally* Notice of Appeal, para. 104; Appeal Brief, paras 283-292, 305-308.

maintaining a military presence there.[1038] Tolimir claims that the VRS attacks on the enclaves were directed against military targets – not the civilian populations as such, as the Trial Chamber erroneously found.[1039] Tolimir points to evidence of the ABiH's continuous military operations against the VRS from inside the Žepa enclave, as well as evidence that the VRS did not intend to attack the civilian population.[1040] He contends, in particular, that the VRS operations were only undertaken in response to ABiH's attacks and aimed at taking control of the area – a lawful military objective under Geneva Convention IV and Additional Protocol I.[1041]

344. The Prosecution responds that Tolimir's arguments about the lawfulness of the VRS attacks should be dismissed because the Trial Chamber considered and rejected Tolimir's submissions that the VRS operations in the enclaves were only directed against enemy military targets and not civilians, as well as the evidence invoked to support those submissions, and Tolimir fails to show an error in this regard.[1042] It adds that whether the VRS was entitled to attack the two enclaves is irrelevant in this case, since the Trial Chamber convicted Tolimir as a member of a JCE aiming to primarily attack the civilian populations of the enclaves, which thus rendered the VRS attacks unlawful irrespective of the ABiH's military presence in the two safe zones.[1043]

(b) Analysis

345. At the outset, the Appeals Chamber notes that Tolimir raises the above arguments relating to the lawfulness of the VRS attacks under Ground of Appeal 15, which challenges the Trial Chamber's findings on the existence of the JCE to Forcibly Remove and Tolimir's own participation in it. However, in the Appeals Chamber's view, whether the VRS was entitled to attack the two enclaves and whether there were legitimate military targets in the enclaves that the VRS had the right to attack under international law, as Tolimir argues, is irrelevant to the Trial Chamber finding that a JCE to Forcibly Remove existed. That finding was based on evidence of a scheme devised by the Bosnian Serb leadership to forcibly remove the Bosnian Muslim civilian populations from Eastern BiH and, in particular, from the enclaves of Srebrenica and Žepa.[1044] The Trial Chamber relied on the VRS's military operations in the enclaves as evidence of the common

[1038] Appeal Brief, paras 285-287, 289. Tolimir contests, in particular, the Trial Chamber's finding that the designation of Srebrenica and Žepa as "safe areas" remained valid and required the VRS to abstain from offensive operations, even after (and irrespective of whether) the enclaves ceased, *de facto*, to be demilitarised zones due to the ABiH's presence and activities within their boundaries. *See* Appeal Brief, paras 287-291.
[1039] Appeal Brief, paras 292, 305-307; Reply Brief, paras 105, 110.
[1040] Appeal Brief, paras 305-307.
[1041] Appeal Brief, paras 305-307.
[1042] Response Brief, paras 163, 199. The Prosecution also argues that the Trial Chamber's rejection of Tolimir's arguments regarding the targets of the VRS attacks in Žepa was reasonable. Response Brief, para. 217.
[1043] Response Brief, para. 199.
[1044] Trial Judgement, paras 1038-1040 and sections cited therein.

plan and found that these operations were carried out consistent with that plan,[1045] even though it also found that the ABiH had breached the COHA and the agreement regarding the demilitarisation of the enclaves by maintaining a strong military presence therein.[1046] In other words, the Trial Chamber found that, irrespective of the ABiH's military presence in the two safe zones and whether or not the ABiH had violated the COHA and the demilitarisation agreement, the VRS attacks on the enclaves were carried out in implementation of the common criminal plan to remove the Bosnian Muslim civilians from the enclaves.[1047]

346. Furthermore, the Appeals Chamber notes that, as the Trial Chamber correctly held,[1048] under Additional Protocol I, even if an area loses its status as demilitarised zone due to material breaches of that status by one of the warring parties, it "continue[s] to enjoy the protection provided by the other provisions of this Protocol *and the other rules of international law applicable in armed conflict*".[1049] Additional Protocol I prohibits attacks on civilians and indiscriminate attacks in all circumstances.[1050] Thus, even if Srebrenica and Žepa had lost their status as demilitarised zones because of the ABiH's presence and operations within those enclaves, the VRS could not target civilians in the enclaves, either deliberately or as part of an indiscriminate attack against military and civilian objectives alike.[1051] And even if the VRS operations against Srebrenica and Žepa had been directed exclusively at legitimate enemy military targets in the enclaves, as Tolimir argues,[1052] the VRS, once the enclaves were under its control, could not force, directly or indirectly, the local civilian population out of these areas or commit any other prohibited criminal acts against the civilians.[1053]

347. For these reasons, the Appeals Chamber is not satisfied that the issue of whether the VRS attacks on the enclaves were justified and legitimate under international law would have any impact

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[1045] Trial Judgement, para. 1038.
[1046] *See* Trial Judgement, paras 180 ("the demilitarisation [of the enclaves] was never fully realised"), 184-185.
[1047] Trial Judgement, para. 1038. The Trial Chamber specifically held that:

> the UN declarations of "safe areas" were not contingent upon the parties adhering to demilitarisation; the safe areas were made pursuant to Chapter VII of the UN Charter and designated prior to and independent of the subsequent demilitarisation agreements of the VRS and ABiH. That the ABiH did not honour the subsequent cease-fire agreements or that some military targets may have existed in the enclaves could not provide a basis for the VRS to attack what had been designated by the UN as "safe areas". Further, […] the safety of the civilian population […] remained a duty under international law and Article 60(7) of Additional Protocol I.

Trial Judgement, para. 704.
[1048] Trial Judgement, para. 704.
[1049] Additional Protocol I, Art. 60(7) (emphasis added).
[1050] Additional Protocol I, Arts. 48, 51.
[1051] The Appeals Chamber recalls, in this regard, the Trial Chamber's finding that the VRS attacked Srebrenica "indiscriminately, targeting UN facilities and causing several civilian deaths". Trial Judgement, para. 1016.
[1052] Appeal Brief, paras 292, 305-307; Reply Brief, paras 105, 110.
[1053] *See* Additional Protocol I, Art. 75.

on the Trial Chamber's analysis of the existence of the JCE to Forcibly Remove or of Tolimir's participation in it.[1054]

(c) Conclusion

348. Accordingly, the Appeals Chamber dismisses Tolimir's submissions relating to the status of the enclaves and the VRS's obligation to respect that status.

5. Conclusion

349. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Tolimir's arguments in Ground of Appeal 15 related to the existence of the JCE to Forcibly Remove.

C. Tolimir's liability pursuant to the JCE to Forcibly Remove (Ground of Appeal 15 in part)

350. The Trial Chamber found that Tolimir shared with other members of the JCE to Forcibly Remove the intent to rid the enclaves of their Bosnian Muslim population and provided a significant contribution to the implementation of the common plan.[1055] Tolimir challenges the Trial Chamber's findings both as to his contribution and his intent.

1. Tolimir's contribution to the JCE to Forcibly Remove

351. The Trial Chamber concluded that Tolimir significantly contributed to the JCE's common plan to forcibly remove the Bosnian Muslims of Srebrenica and Žepa by: (i) participating in the restrictions of convoys entering the enclaves;[1056] (ii) limiting UNPROFOR's ability to carry out its mandate and facilitating VRS's takeover of the enclaves by "keeping UNPROFOR at bay", and making false representations concerning VRS intentions;[1057] and (iii) his direct involvement in the preparation and implementation of the forcible removal of Žepa's civilian population, an operation of which Tolimir was in charge.[1058] The Trial Chamber also noted that, after the VRS's takeover of Srebrenica on 11 July 1995, Tolimir continued to transmit intelligence information so as to ensure that the VRS consolidated its control over the enclave.[1059]

[1054] In this respect, the Appeals Chamber recalls that the Trial Chamber addressed Tolimir's arguments regarding the lawfulness of the VRS attacks on the enclaves and their actual targets in connection with the *mens rea* requirements for crimes against humanity. Trial Judgement, para. 704.
[1055] Trial Judgement, paras 1093-1095.
[1056] Trial Judgement, paras 1079, 1093.
[1057] Trial Judgement, para. 1084.
[1058] Trial Judgement, paras 1088-1092, 1094.
[1059] Trial Judgement, para. 1086.

352. Tolimir submits that the Trial Chamber erred in fact and law in finding that he significantly contributed to the JCE to Forcibly Remove.[1060] In this regard, he challenges the Trial Chamber's underlying findings regarding his role in the JCE.[1061] The Appeals Chamber addresses these challenges in turn.

(a) Restrictions on convoys

353. The Trial Chamber found that Tolimir contributed to the JCE to Forcibly Remove through his participation in the restriction of convoys into the enclaves.[1062] It found that Tolimir "was closely involved in the process of approving or rejecting UNPROFOR re-supply convoys into the enclaves" and that he "was consulted whenever UNPROFOR submitted a convoy request and was considered the Main Staff's liaison with UNPROFOR".[1063]

(i) Submissions

354. Tolimir submits that, in the absence of any evidence linking him to the approval of humanitarian aid convoys to the enclaves, restrictions on such convoys cannot be counted as his alleged contribution to the JCE to Forcibly Remove.[1064] Concerning the UNPROFOR re-supply convoys, Tolimir argues that the Trial Chamber failed to take into account evidence showing that only Mladić and the Deputy Commander and Chief of the Main Staff, Milovanović, had the authority to issue authorisations for such convoys, while Tolimir's role was only to "provide information" as to the approval of certain items.[1065]

355. The Prosecution responds that the Trial Chamber reasonably found that Tolimir participated in the restriction of convoys into the enclaves based on a range of evidence demonstrating that security officials under his professional control were actively engaged in the

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[1060] Appeal Brief, para. 243.

[1061] Appeal Brief, paras 260, 267, 270, 273, 303. Tolimir also argues that, contrary to the Trial Chamber's findings, his role in the Tunnel Attack cannot be counted as a contribution to the JCE to Forcibly Remove. *See* Appeal Brief, paras 276-279. However, that argument is based on a misreading of the Trial Judgement: the Trial Chamber did not make a "conclusive finding" as to Tolimir's role in the attack and only found that Tolimir "knew that this attack was carried out" and that "it resulted in the wounding of civilians and civilian casualties". Trial Judgement, para. 1083. In other words, the Trial Chamber only considered Tolimir's knowledge of that incident as an indication of his *mens rea vis-à-vis* the JCE to Forcibly Remove, not as an act of contribution to the JCE. *See also* Trial Judgement, para. 1094 ("Taking into consideration his knowledge and his continued participation in the JCE […], the Majority is satisfied beyond reasonable doubt that the Accused shared the intent […] to rid the enclaves of their Bosnian Muslim population."). The Appeals Chamber will, therefore, consider Tolimir's arguments regarding the Tunnel Attack in connection with other challenges to the Trial Chamber's findings on *mens rea*. *See infra*, paras 391-396.

[1062] Trial Judgement, paras 1079, 1093.

[1063] Trial Judgement, para. 1079, *citing* Trial Judgement, paras 194, 920, 922. *See also* Trial Judgement, para. 1093 ("[Tolimir] actively contributed to the aim of limiting UNPROFOR's ability to carry out its mandate.").

[1064] Appeal Brief, para. 262; Reply Brief, para. 95.

[1065] Appeal Brief, para. 269. *See also* Appeal Brief, para. 262.

approval process for humanitarian convoys and that he himself had a prominent role in the approvals of UNPROFOR re-supply convoys.[1066]

(ii) Analysis

356. Tolimir challenges the Trial Chamber's findings regarding his role in the approval process for UNPROFOR convoys.[1067] The Appeals Chamber notes, however, that in reaching these factual conclusions, the Trial Chamber relied upon numerous witnesses and ample documentary evidence demonstrating that Tolimir was intimately involved in the process of approval of UNPROFOR re-supply convoys.[1068] The Trial Chamber cited a number of convoy approval requests that were disapproved by Tolimir himself.[1069] Particularly indicative of Tolimir's role in the approval process is the fact that sometimes his advice would override Mladić's own initial decision on whether to approve a convoy.[1070] The Appeals Chamber therefore dismisses Tolimir's argument that there was no evidence linking him to the approval of humanitarian aid convoys to the enclaves. Tolimir also refers to the testimony of Defence Witness Slavko Kralj in support of his allegations,[1071] yet the Trial Chamber did not ignore, but extensively relied upon the testimony of Kralj to support its findings.[1072] The Appeals Chamber finds no error in that regard. Tolimir further disagrees with the Trial Chamber's assessment of that evidence and requests the Appeals Chamber to re-assess the same evidence and interpret it in a different way. The Appeals Chamber will not revisit the Trial Chamber's evidentiary assessments or unravel such findings, absent a showing that they were erroneous or unreasonable, in the sense that no reasonable fact-finder could have reached those conclusions.[1073] Tolimir fails to show that the Trial Chamber's assessment of the evidence related to his role in the restriction of convoys and its findings were unreasonable or erroneous.[1074]

[1066] Response Brief, paras 173-175, 185.

[1067] Appeal Brief, paras 267, 269. *See* Trial Judgement, para. 1079, *citing* Trial Judgement, paras 194, 920, 922. *See also* Trial Judgement, para. 1093 ("[Tolimir] actively contributed to the aim of limiting UNPROFOR's ability to carry out its mandate.").

[1068] *See* Trial Judgement, para. 194 and nn. 704-708.

[1069] *See* Trial Judgement, para. 194, n. 705.

[1070] *See*, *e.g.*, Trial Judgement, para. 194, n. 705, *citing* T. 25 January 2012 pp. 18423-18424.

[1071] Appeal Brief, para. 269 and nn. 236-237.

[1072] *See*, *e.g.*, Trial Judgement, nn. 696-700, 702-705, 707-708, 710-714.

[1073] *See supra*, para. 10.

[1074] Tolimir also contests that he was involved in the approval of humanitarian aid convoys to the enclaves. Appeal Brief, para. 262; Reply Brief, para. 95. That argument, however, is based on a misreading of the Trial Judgement, which does not contain findings about any role played by Tolimir himself in the restrictions of humanitarian aid convoys. The Trial Chamber only found that Tolimir was involved in the process of approving or rejecting UNPROFOR re-supply convoys, not humanitarian aid convoys, into the enclaves. *See* Trial Judgement, para. 1079, *citing* Trial Judgement, paras 194, 920, 922. *See also* Trial Judgement, para. 1093 ("[Tolimir] actively contributed to the aim of limiting UNPROFOR's ability to carry out its mandate."). The Trial Chamber did find that "security organs under [Tolimir]'s professional control actively engaged in the system of restrictions placed on humanitarian convoys entering the enclaves" (*see* Trial Judgement, para. 1079, *citing* Trial Judgement, paras 195-196), but did not explain whether the involvement of security officers under Tolimir's "professional control" was or could be counted as Tolimir's own contribution to the JCE to Forcibly Remove. At the very least, the Trial

(iii) Conclusion

357. Accordingly, the Appeals Chamber rejects Tolimir's challenges to the Trial Chamber's finding regarding his role in restricting the passage of convoys into the enclaves.

(b) Tolimir's actions with regard to UNPROFOR and enabling the takeover of the enclaves

358. The Trial Chamber found that Tolimir actively contributed to limiting UNPROFOR's ability to safeguard the safe zone status of the enclaves pursuant to its mandate.[1075] The Trial Chamber found that "[i]n the days immediately leading up to the attack on Srebrenica enclave", Tolimir "kept UNPROFOR at bay by denying VRS intentions, stalling communication on UNPROFOR's concerns regarding VRS military activities, and deflecting attention to the ABiH".[1076] It also found that Tolimir's hostility towards the UN generally was evidenced by his proposal that UN peacekeepers taken hostage by the VRS at the end of May 1993 be placed near potential targets of NATO air strikes.[1077] The Trial Chamber further found that following the takeover of the Srebrenica enclave on 11 July 1995, Tolimir "continued to play an active part, dispersing relevant intelligence and security related information with a view to ensuring the VRS maintained its control over the enclave".[1078]

(i) Submissions

359. Tolimir argues that he was never hostile to the UN or took any actions aimed at incapacitating UNPROFOR.[1079] He submits that there is no evidence supporting the Trial Chamber's finding that he proposed that UN hostages be placed near targets of NATO bombings in May 1995, and that the Trial Chamber erred in law by taking this incident into account since it is not in the Indictment.[1080] Tolimir claims that he always insisted on the protection of UNPROFOR, as demonstrated by: (i) Defence Exhibit 41, a letter dated 9 July 1995 signed by Tolimir, which relayed to the Drina Corps Command and Generals Gvero and Krstić orders by Karadžić concerning the Srebrenica operations, including an order to ensure the protection of UNPROFOR members and the civilians; and (ii) Defence Exhibit 85, a report by Tolimir to the Drina Corps

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Judgement is unclear on this point. In any event, the Appeals Chamber does not need to address this issue, since it is satisfied that, even if Tolimir played no role *vis-à-vis* the restrictions of humanitarian aid convoys, his other actions (namely, his actions regarding UNPROFOR, his involvement in the approval of UNPROFOR re-supply convoys, as well as his close involvement in the removal of the Bosnian Muslim civilians out of Žepa, as the most senior VRS officer on site) meet the threshold of a significant contribution to the JCE to Forcibly Remove, consistent with the Trial Chamber's findings. *See infra*, para. 414.

1075 Trial Judgement, paras 1084, 1093.
1076 Trial Judgement, para. 1084.
1077 Trial Judgement, para. 1084.
1078 Trial Judgement, para. 1086.
1079 Appeal Brief, paras 281-282.
1080 Appeal Brief, para. 281.

Command and Krstić, also dated 9 July 1995, providing information about Tolimir's communications with UNPROFOR and containing a similar instruction as to the protection of UNPROFOR and civilians.[1081] According to Tolimir, that evidence, along with the fact that he was "not on the field" and did not participate in the Srebrenica operations, proves at least that he did not intend and was not aware of any attack against UNPROFOR.[1082] Tolimir also asserts that the Trial Chamber erred in finding that he "kept UNPROFOR at bay" through misleading communications, aimed to divert attention to the ABiH, since in his contention he was actually responding to what was happening on the ground, which was that the ABiH were using stolen UNPROFOR armoured personnel carriers.[1083] Finally, he argues that the Trial Chamber erred by considering that his actions in dispersing intelligence and security related information helped to ensure the VRS control over the enclave since these reports relayed the intentions of the Muslim leadership and had no impact on the civilian population.[1084]

360. The Prosecution responds that the Trial Chamber reasonably inferred from Prosecution Exhibit 2140, a report issued by Tolimir's sector and signed on his behalf, that it was his proposal to place the UN hostages in areas of possible NATO air-strikes.[1085] The Prosecution maintains that, in any event, whether Tolimir intended to attack UNPROFOR itself is irrelevant; what matters in its view is that he was aware of the plan to displace the civilians and keep UNPROFOR at bay, disable its operational capacity, and deflect attention from the VRS activities, which significantly contributed to the JCE to Forcibly Remove.[1086] The Prosecution further argues that the Trial Chamber considered both Defence Exhibits 41 and 85 and reasonably concluded on the basis of the evidence as a whole that the order and instruction to protect UNPROFOR in those documents had no bearing upon Tolimir's state of mind *vis-à-vis* the forcible removal.[1087]

361. Tolimir replies that Prosecution Exhibit 2140 cannot serve as a basis for determining his attitude towards the UN, as there is no information about the origin of the document.[1088]

(ii) Analysis

362. The Appeals Chamber notes, at the outset, that the Trial Chamber relied upon Tolimir's proposal regarding the UN peacekeepers as an indication of his "attitude towards the UN

[1081] Appeal Brief, paras 293, 295-296; Reply Brief, para. 107.
[1082] Appeal Brief, para. 297; Reply Brief, para. 107.
[1083] Appeal Brief, paras 282, 294.
[1084] Appeal Brief, para. 298.
[1085] Response Brief, para. 198.
[1086] Response Brief, paras 201-202.
[1087] Response Brief, para. 204.
[1088] Reply Brief, para. 104.

generally",[1089] but did not consider this as a contribution to the JCE to Forcibly Remove. Rather, the Trial Chamber counted Tolimir's actions to keep UNPROFOR at bay in the days leading up to the attack on the Srebrenica enclave as a contribution to the JCE.[1090] Prosecution Exhibit 2140, therefore, is not relevant to the Trial Chamber's findings on Tolimir's participation in the JCE to Forcibly Remove. Any alleged error by the Trial Chamber in the evaluation of this document would thus have no impact on the impugned finding and need not be considered further.

363. Pointing to Defence Exhibits 41 and 85 – which the Trial Chamber considered in its analysis[1091] – Tolimir argues that he never intended to attack the members of UNPROFOR or endanger the lives of UN peacekeepers and was not aware that the attack on Srebrenica was directed against the civilian population or UNPROFOR.[1092] The Appeals Chamber notes that the Trial Chamber considered and rejected this argument at trial.[1093] The Trial Chamber held that Tolimir's reporting of Karadžić's order to ensure the protection of UNPROFOR and civilian population had no bearing on Tolimir's state of mind, given his knowledge of the VRS offensive operations against several UNPROFOR observation posts and the Srebrenica enclave as a whole, including: (i) the shelling of the DutchBat Bravo Company in Srebrenica, where Bosnian Muslim civilians had gathered for protection; (ii) the attack on the road which the column of Bosnian Muslim civilians travelled in an effort to reach the UN compound for shelter; and (iii) the attack on Potočari itself, causing civilian casualties.[1094] Tolimir fails to show any error in the Trial Chamber's reasoning in this regard.

364. Furthermore, the Appeals Chamber observes that whether Tolimir intended to attack UNPROFOR or not is irrelevant to the Trial Chamber's finding that Tolimir contributed to the forcible removal of Srebrenica's Bosnian Muslims by keeping UNPROFOR at bay and sabotaging its operational capacity through restrictions on re-supply convoys. Even if Tolimir did not intend to attack UNPROFOR and harm its members, as he alleges, the Trial Chamber could still reasonably find that he undertook actions aiming at forcing the civilian population out of the enclaves by diminishing UNPROFOR's ability to inhibit the VRS's plans. In that sense, the evidence invoked by Tolimir to disprove his hostility towards the UN is neither apposite to nor incompatible with the Trial Chamber's analysis of his contribution to the JCE to Forcibly Remove.

365. Tolimir's challenges to the Trial Chamber's finding that he kept UNPROFOR at bay through misleading communications and by deflecting attention to the ABiH are also groundless. In

[1089] Trial Judgement, para. 1084.
[1090] Trial Judgement, para. 1084.
[1091] Trial Judgement, paras 224, 226, 928-929, 1085.
[1092] Appeal Brief, paras 293, 295.
[1093] Trial Judgement, para. 1085. *See infra*, paras 517-520.

support of his arguments, Tolimir cites Prosecution Exhibit 1255 – a Drina Corps Command Order signed by Krstić to attack the Žepa enclave, dated 13 July 1995, which notes that the ABiH had stolen armoured personnel carriers from UNPROFOR – as well as the testimony of Prosecution Witness Robert Franken, Deputy Commander of DutchBat, stating that DutchBat did not check the contents of UNHCR convoys carrying humanitarian aid into the enclaves.[1095] The Appeals Chamber does not find Tolimir's argument persuasive. This evidence – even if accepted – is not relevant to and fails to demonstrate any error in the Trial Chamber's finding that Tolimir repeatedly deflected UNPROFOR's attention from the VRS attack on Srebrenica to the ABiH's operations. The Trial Chamber found that when Tolimir received a call from Cornelis Nicolai, UNPROFOR's Chief of Staff, protesting the VRS attack on an observation post on 8 July 1995, he told Nicolai that he was not informed of the problem and instead insisted on UNPROFOR doing something about the ABiH using six UNPROFOR APCs in the Srebrenica area.[1096] Yet, two further UNPROFOR observation posts were surrounded by the VRS later the same day.[1097] As the VRS continued its attack on the enclave on 9 July 1995, Tolimir repeatedly told Nicolai that the conflict was between the VRS and the ABiH.[1098] The Trial Chamber made detailed findings on a series of conversations between Tolimir and members of UNPROFOR, in which Tolimir continually claimed a lack of knowledge of VRS actions or promised that the situation would be de-escalated even while the VRS attack on the civilian population intensified.[1099] Tolimir fails to demonstrate that no reasonable trial chamber could have reached these findings.

366. As to Tolimir's contention that the Trial Chamber erred in finding that he also contributed to the JCE to Forcibly Remove by transmitting intelligence information on 12 July 1995, thereby ensuring the VRS control over the enclave,[1100] the Appeals Chamber notes that the two intelligence reports sent by Tolimir in the wake of Srebrenica's fall to the VRS (Prosecution Exhibit 2203 and Defence Exhibit 64) provided information about the movement of civilians to Potočari and the column out of Srebrenica[1101] and about the "presence of elements of the 28th [ABiH] Division in the area of Cerska and the Zvornik-Šekovići road", and suggested that "the names of all men fit for military service who are being evacuated from the UNPROFOR base in Potočari" be noted down.[1102] The intelligence reports sent by Tolimir were not related to the removal of the civilian

1094 Trial Judgement, para. 1085. *See also* Trial Judgement, paras 220-225, 230, 233, 235.
1095 Appeal Brief, n. 266, *citing* Prosecution Exhibit 1255 (Drina Corps Command Order signed by Krstić to attack the Žepa enclave, dated 13 July 1995), para. 7; T. 6 July 1020, pp. 3456-3459.
1096 Trial Judgement, para. 925.
1097 Trial Judgement, para. 926.
1098 Trial Judgement, para. 927.
1099 Trial Judgement, paras 928-930.
1100 Trial Judgement, para. 1086. *See also* Trial Judgement, paras 932-933.
1101 Trial Judgement, para. 932.
1102 Trial Judgement, para. 933.

population.[1103] In the view of the Appeals Chamber, transmitting those intelligence reports does not therefore, in and of itself, constitute a contribution to the JCE to Forcibly Remove, because this was not an action "directed to the furtherance of the common plan or purpose" of that JCE.[1104] Nevertheless, even without taking into account the transmission of these intelligence reports, the Appeals Chamber is satisfied that Tolimir's other actions *vis-à-vis* UNPROFOR's ability to fulfil its mandate and his close involvement in the Žepa removal operations constitute a significant contribution to the JCE to Forcibly Remove. Accordingly, it considers that the Trial Chamber's error in this regard did not cause a miscarriage of justice.

(iii) Conclusion

367. The Appeals Chamber thus dismisses Tolimir's arguments with regard to his actions towards UNPROFOR and enabling the takeover of Srebrenica.

(c) Tolimir's role in the Žepa operations

368. The Trial Chamber found that Tolimir's involvement in the forcible removal of Žepa's civilian population contributed to the JCE to Forcibly Remove.[1105] The Trial Chamber found that Tolimir's involvement in the Žepa operations consisted of: (i) his "central" role in the negotiations held on 13 July 1995 with Bosnian Muslim representatives concerning the fate of Žepa's civilians;[1106] (ii) proposing ways to optimise the combat operations against Žepa, ensure UNPROFOR's inability to intervene, prevent international condemnation which would lead to the enclave's swift fall;[1107] (iii) proposing ways to accelerate the "surrender of Muslims";[1108] and (iv) being in charge of the operation to remove Žepa's civilian population out of the enclaves, an operation which he helped prepare and supervised personally, as the most senior VRS officer on the ground at the time.[1109]

(i) Submissions

369. Tolimir argues that the Trial Chamber erred in finding that his involvement in the operation in Žepa significantly contributed to the JCE to Forcibly Remove.[1110] He contends that there is no credible evidence that he was "in charge" of the operation to remove the Bosnian

[1103] *See* Trial Judgement, paras 932-933.
[1104] *Tadić* Appeal Judgement, para. 229. *See also* Trial Judgement, para. 894, and authorities cited therein.
[1105] Trial Judgement, paras 1088-1092, 1094.
[1106] Trial Judgement, para. 1094. The Trial Chamber found that Tolimir was one of the two VRS representatives in those discussions. *See also* Trial Judgement, paras 605-610, 1088.
[1107] Trial Judgement, paras 950, 953-956, 1088-1089, 1094.
[1108] Trial Judgement, paras 1090-1091.
[1109] Trial Judgement, paras 977-989, 1092, 1094.
[1110] Appeal Brief, para. 303.

Muslim population from Žepa.[1111] In this regard, Tolimir challenges the Trial Chamber's finding that he was present at the 24 July 1995 meeting in Bokšanica, claiming that the video evidence of the meeting was fabricated.[1112] Tolimir maintains that Mladić was in charge of the Žepa operation as commander and that the intercepted conversation cited by the Trial Chamber is not reliable proof of the contrary.[1113] Tolimir further argues that he did not participate in ensuring UNPROFOR's inability to intervene,[1114] citing evidence which he argues shows that the real threat to UNPROFOR emanated from the ABiH's activities in Žepa, not the VRS.[1115] He adds that his proposal for the VRS to take over Žepa quickly was driven by concerns for military efficiency.[1116] Tolimir contests the Trial Chamber's finding that he contributed to the threatening atmosphere of the forcible displacement operation by carrying a pistol during the evacuation and pointing it up towards the sky.[1117] Tolimir submits that this finding was based on unreliable witness statements, whereas abundant evidence to the contrary, most notably the testimony of Witness Čarkić, demonstrated that Tolimir was unarmed during the evacuation.[1118]

370. The Prosecution responds that Tolimir fails to explain how evidence that the ABiH were disarming UNPROFOR on 16 July 1995 has any affect on the Trial Chamber's finding that Tolimir actively contributed to the efficiency of the VRS takeover of the enclave.[1119] The Prosecution also submits that, in contesting his central role in the Žepa evacuation operation, Tolimir ignores the abundance of available evidence cited by the Trial Chamber, including evidence that Mladić put Tolimir in charge of the population transfer, the testimony of Prosecution Witness Hamdija Torlak, Prosecution Exhibit 2807 (a video recording from Žepa, showing Mladić and other VRS officials travelling through the area dated 13 June 1995), and Prosecution Exhibits 359a and 359b (intercepts of communications taking place on 24 July 1995).[1120] The Prosecution adds that the Trial Chamber's finding regarding Tolimir's contribution to the threatening atmosphere in Žepa by pointing a pistol at the sky was not unreasonable and that Tolimir fails to show any error in the Trial Chamber's reasoning apart from claiming that Witness Wood was not a reliable witness.[1121]

[1111] Appeal Brief, para. 321.
[1112] Appeal Brief, para. 321.
[1113] Appeal Brief, para. 321.
[1114] Appeal Brief, para. 311.
[1115] Appeal Brief, para. 311.
[1116] Appeal Brief, para. 312.
[1117] Appeal Brief, para. 323; Reply Brief, para. 111.
[1118] Appeal Brief, paras 323-324; Reply Brief, para. 111.
[1119] Response Brief, para. 221.
[1120] Response Brief, paras 213-215.
[1121] Response Brief, para. 227.

(ii) Analysis

371. The Appeals Chamber is not persuaded by Tolimir's challenges to the Trial Chamber's conclusion that he was in charge of the operation to remove the Bosnian Muslim population from Žepa. The Trial Chamber found that Tolimir: (i) was present at the 24 July 1995 meeting in Bokšanica, where the agreement for the evacuation of the civilian population was signed;[1122] (ii) was in charge of the operation to remove Žepa's civilians, as the most senior VRS official on the ground after Mladić;[1123] (iii) was explicitly given the command over the VRS operations in Žepa by Mladić himself;[1124] and (iv) carried a pistol during the evacuation process and at some point raised it at shoulder height and pointed to the sky, thus contributing to the threatening atmosphere in Žepa at that time.[1125]

372. The Appeals Chamber, in particular, is not persuaded by Tolimir's challenge to the Trial Chamber's finding that he brandished a weapon in the air during the evacuation of Bosnian Muslims from Žepa. The Trial Chamber based this finding on the eyewitness testimony of Witness Wood, the UNPROFOR major of the Joint Observers, whom the Trial Chamber found to be credible.[1126] Tolimir disagrees with the Trial Chamber's assessment of the credibility of that witness, but fails to show that reliance on this evidence was unreasonable.

373. Regarding the meeting in Bokšanica, Tolimir challenges the authenticity of the video evidence of his presence, but fails to show an error in the Trial Chamber's reliance on that video, along with other evidence, including the eyewitness testimony of Witness Torlak, to conclude that Tolimir was present at the meeting.[1127] Tolimir also fails to substantiate his claim that the intercept cited by the Trial Chamber as affirming his role in organising the transports is unreliable[1128] or that the Trial Chamber erred in finding that he was the most senior VRS official on the ground after Mladić.[1129]

374. Moreover, even if Tolimir's factual challenges were successful, they would have no impact on the Trial Chamber's well-supported finding that Tolimir was closely involved in the

[1122] Trial Judgement, paras 617-618, 977.
[1123] Trial Judgement, para. 1092.
[1124] Trial Judgement, para. 978.
[1125] Trial Judgement, paras 982, 1092.
[1126] Trial Judgement, para. 643.
[1127] *See* Trial Judgement, paras 629-633, and evidence cited therein.
[1128] *See* Appeal Brief, para. 321, *citing* Trial Judgement, para. 978, *citing* Prosecution Exhibit 359a (intercept of 24 July 1995).
[1129] Trial Judgement, para. 1092.

implementation of the plan to remove Žepa's Muslim civilians.[1130] The Trial Chamber found, and Tolimir does not dispute, that he:

> immediately proceeded to carry out a number of activities in preparation for the start of the operation, including the provision of sufficient fuel to ensure the removal could proceed "undisturbed". […]. He directed members of the Bosnian Serb Forces, including Pećanac, while they boarded Bosnian Muslim civilians onto buses. […] He personally escorted the last convoy heading out of Žepa on the evening of 25 July. On 27 July, he was present in Luke near Tišća and actively engaged in the removal of 12 lightly wounded men whom he had allowed to enter a bus in Žepa earlier that day; the men were taken out of the bus and driven to Rasadnik prison near Rogatica.[1131]

The Appeals Chamber is thus satisfied that the Trial Chamber reasonably found that Tolimir "was in charge of the removal of Žepa's civilian population".[1132]

375. The Appeals Chamber, finally, fails to see the relevance of Defence Exhibit 105, a military report by Colonel Avdo Palić dated 16 July 1995, to the Trial Chamber's finding regarding Tolimir's role in "ensuring UNPROFOR's inability to intervene".[1133] Defence Exhibit 105 contains Palić's statement to ABiH officials that the ABiH units in Žepa were "disarming UNPROFOR in accordance with the directive […] received earlier".[1134] Even if this report shows that UNPROFOR was simultaneously facing threats by the ABiH, this fact does not preclude or undermine the finding that Tolimir was also actively limiting UNPROFOR's ability to intervene, which was based, *inter alia*, on "a series of documents issued by the Accused on 14 July alone".[1135] Tolimir's argument is therefore dismissed.

(iii) Conclusion

376. Accordingly, the Appeals Chamber dismisses Tolimir's challenges to the Trial Chamber's findings regarding his close involvement in the Žepa takeover and the displacement of Žepa's population.

(d) Significance of Tolimir's contribution

377. In view of its affirmation of the Trial Chamber's findings on Tolimir's contributions to the JCE to Forcibly Remove discussed above, the Appeals Chamber considers that Tolimir fails to

[1130] Trial Judgement, paras 1092, 1094.
[1131] Trial Judgement, para. 1092.
[1132] Trial Judgement, para. 1094.
[1133] Trial Judgement, para. 1089.
[1134] Defence Exhibit 105 (report by ABiH Colonel Avdo Palić to the ABiH 285th IBlbr, 16 July 1995).
[1135] Trial Judgement, para. 1089. *See also* Trial Judgement, paras 953-955, and evidence cited therein.

demonstrate an error in the Trial Chamber's finding that he significantly contributed to the JCE to Forcibly Remove and thus satisfied the first limb of JCE liability.[1136]

2. Tolimir's intent to further the goals of the JCE to Forcibly Remove

378. The Trial Chamber concluded that Tolimir "shared the intent with other members of the JCE [to Forcibly Remove] to rid the enclaves of their Bosnian Muslim population".[1137] The Trial Chamber inferred Tolimir's intent from: (i) his awareness of the official policy of ethnic segregation formulated by the Bosnian Serb leadership;[1138] (ii) his awareness of military activities undertaken by the VRS with the goal to terrorise Srebrenica's civilians, such as the Tunnel Attack;[1139] (iii) his knowledge of the VRS operations in Potočari, *i.e.*, the removal of Srebrenica's Bosnian Muslims who had gathered there and the separation of the men and the boys from their families;[1140] and (iv) his dedicated involvement in and supervision of the Žepa forcible removal operation, particularly his apparent awareness of the illegality of the operation and his proposal to attack Bosnian Muslim civilians fleeing the enclave.[1141] The Trial Chamber also took into account Tolimir's "continued participation in the JCE throughout its duration from March 1995 to August 1995".[1142]

379. Tolimir submits that the Trial Chamber erred in law and fact in concluding that he intended to further the goals of the JCE to Forcibly Remove.[1143] Tolimir challenges the Trial Chamber's findings as to each of the factors from which the Trial Chamber inferred his intent. The Appeals Chamber considers each of these challenges in turn.

(a) Knowledge of the aim to rid the enclaves of its Bosnian Muslim population

380. The Trial Chamber found that Tolimir was aware of the Bosnian Serb policy of ethnic separation already since 1992, given his knowledge of the Six Strategic Objectives, Operational Directive 4, and Directive 7, all of which reflected the objective to rid the enclaves of their Bosnian Muslim population.[1144]

[1136] *See Gotovina and Markač* Appeal Judgement, paras 89-90; *Krajišnik* Appeal Judgement, paras 215, 696; *Brdanin* Appeal Judgement, para. 430. *See also* Trial Judgement, para. 893, and authorities cited therein.
[1137] Trial Judgement, para. 1094.
[1138] Trial Judgement, paras 1077-1078.
[1139] Trial Judgement, paras 1080-1083.
[1140] Trial Judgement, para. 1087.
[1141] Trial Judgement, paras 1088-1092.
[1142] Trial Judgement, para. 1094.
[1143] Appeal Brief, paras 243-246, 248, 257-259, 272, 276-278, 293-297, 299-302, 312, 322.
[1144] Trial Judgement, paras 1077-1078.

(i) Submissions

381. Tolimir submits that the Trial Chamber erroneously concluded that he was aware of the alleged policy of the Bosnian Serb leadership to rid Srebrenica and Žepa of their Bosnian Muslim population.[1145] In this regard, he submits that the Trial Chamber erred in finding that he was present at the Bosnian Serb Assembly meeting where the Six Strategic Objectives were discussed and contends that even if he were present, this would not be a basis for inferring his intent since the Six Strategic Objectives were never adopted.[1146] Tolimir also submits that the Trial Chamber misinterpreted the testimony of Witness Lazić regarding Operational Directive 4 and how it was understood by the VRS staff, including Tolimir: the witness testified that the main objective of the VRS was to defend the Bosnian Serb population and ethnic separation was a last resort, which, Tolimir submits, did not imply anything illegal.[1147] Tolimir adds that the Trial Chamber failed to consider that testimony in its proper political context at the time, particularly the BiH policies towards Bosnian Serbs.[1148] Tolimir further argues that the evidence does not support the Trial Chamber's finding that he knew and received the full text of Directive 7.[1149] Additionally, according to Tolimir, the Trial Chamber failed to consider evidence of his knowledge of the ABiH's military plans and UNPROFOR's support to the ABiH, which show that his actions were directed strictly against enemy forces in the enclaves, not civilians.[1150] In light of this evidence, Tolimir submits, no reasonable trier of fact could have found that he was aware of the aim to remove the Bosnian Muslim civilian population from the enclaves.[1151]

382. The Prosecution responds that the Trial Chamber's findings concerning Tolimir's presence at the Bosnian Serb assembly meeting where the Six Strategic Objectives were adopted and Tolimir's receipt and knowledge of Directive 7 were adequately supported by the evidence and thus reasonable.[1152] In the Prosecution's view, Tolimir fails to substantiate his claims that he was not present at the assembly meeting and that he never received the text of Directive 7.[1153] As to his challenges to Witness Lazić's testimony, the Prosecution argues that Tolimir merely disagrees with the Trial Chamber's assessment of the witness's testimony and thus his argument should be summarily dismissed.[1154] The Prosecution further maintains that, contrary to Tolimir's assertions, the Trial Chamber did consider evidence relating to abuse of convoys by the ABiH, the ABiH's

[1145] Appeal Brief, paras 244-246, 248.
[1146] Appeal Brief, paras 245-246; Reply Brief, para. 80.
[1147] Appeal Brief, para. 248.
[1148] Appeal Brief, para. 249.
[1149] Appeal Brief, para. 257; Reply Brief, para. 88.
[1150] Appeal Brief, para. 258.
[1151] Appeal Brief, paras 258-259.
[1152] Response Brief, paras 161-162.
[1153] Response Brief, paras 161-162.
[1154] Response Brief, para. 152.

attacks from within the enclaves, UNPROFOR's alleged support to the ABiH, and Tolimir's knowledge of the ABiH's plans, but reasonably decided to place more weight on Directive 7.[1155] It submits that, even if the convoys entering the enclaves were used to support the ABiH's activities, Directive 7 unequivocally stated the Bosnian Serb policy of restricting both UNPROFOR and humanitarian aid convoys.[1156] According to the Prosecution, the Trial Chamber reasonably inferred from that policy – which Tolimir knew – along with the humanitarian crisis caused by the convoy restrictions – in which Tolimir had an active role – that Tolimir shared the intent to forcibly displace Srebrenica's Bosnian Muslim civilians.[1157]

(ii) Analysis

383. Concerning Tolimir's knowledge of the Six Strategic Objectives, the Trial Chamber concluded that on 12 May 1992, Tolimir, along with Karadžić, Mladić, and Milovanović, attended in person "the 16th Session of the National Assembly of the Serbian People in BiH", in which the Six Strategic Objectives were discussed and the decision to create the VRS was taken.[1158] In reaching this conclusion, the Trial Chamber cited two pieces of evidence, namely: (i) Prosecution Exhibit 2477, which contains the minutes of the assembly meeting in question; and (ii) the testimony of Witness Milovanović.[1159] However, that evidence does not support the Trial Chamber's finding that Tolimir attended the assembly meeting. Prosecution Exhibit 2477 does not reflect that Tolimir was present when the Bosnian Serb assembly discussed the Six Strategic Objectives on 12 May 1992; Tolimir's name is not mentioned in the minutes of the assembly meeting.[1160] Milovanović, on the other hand, clearly testified that "[t]he political leadership of the [Republika Srpska] met *for the first time* with the representatives of the Main Staff", *i.e.*, "with Mladic, [Milovanović], and Tolimir," around "the 16th of May, four days following th[e] [Bosnian Serb] assembly session" at which the Six Strategic Objectives were discussed.[1161] Milovanović also testified that even "[o]n that occasion," the military leaders "did not receive those war objectives" (*i.e.*, the Six Strategic Objectives), which they had to infer themselves from the tasks assigned to them between 11 and 12 May 1992.[1162] In the absence of other evidence that Tolimir attended the 12 May 1992 assembly meeting and received the text of the Six Strategic Objectives as formulated

[1155] Response Brief, paras 163-164.
[1156] Response Brief, para. 164.
[1157] Response Brief, para. 164.
[1158] Trial Judgement, paras 162, 1077.
[1159] Trial Judgement, para. 162, *citing* Prosecution Exhibit 2477 (minutes of the 16th session of the assembly of the Serbian people in BH held on 12 May 1992 in Banja Luka (six strategic objectives)), T. 18 May 2011 pp. 14276-14277.
[1160] *See* Prosecution Exhibit 2477 (minutes of the 16th session of the assembly of the Serbian people in BH held on 12 May 1992 in Banja Luka (six strategic objectives)).
[1161] T. 18 May 2011 p. 14276 (emphasis added).
[1162] T. 18 May 2011 p. 14276.

in the assembly meeting, no reasonable fact-finder could have reached the Trial Chamber's conclusions concerning Tolimir's presence at the meeting and knowledge of the Six Strategic Objectives. The Appeals Chamber, therefore, finds that the Trial Chamber erred in fact in this regard and could not rely on Tolimir's knowledge of the Six Strategic Objectives to infer his intent *vis-à-vis* the JCE to Forcibly Remove. The Appeals Chamber will consider the impact of this error in its conclusion to this section.

384. The Appeals Chamber, however, finds no merit in Tolimir's arguments relating to his knowledge of Directive 7. Tolimir disagrees with the Trial Chamber's reliance on Prosecution Witnesses Obradović and Savčić, who both testified that VRS assistant commanders like Tolimir should have seen and been aware of the directive.[1163] The Appeals Chamber recalls that the Trial Chamber is in the best position to weigh the probative value of evidence presented at trial and to assess the credibility of witnesses.[1164] Tolimir's assertion that Directive 7 had the status of a state secret and was only distributed to its intended recipient is unsubstantiated and unsupported by any evidence.[1165] The Appeals Chamber, therefore, dismisses Tolimir's challenges to the Trial Chamber's findings regarding his knowledge of Directive 7.

385. Tolimir also fails to show an error in the Trial Chamber's finding that he was aware of Operational Directive 4 and understood it to also call for operations that would drive the ABiH and Bosnian Muslim civilians out of certain enclaves, including Žepa.[1166] The Appeals Chamber notes that Tolimir does not challenge the Trial Chamber's conclusion regarding his knowledge of the directive, which is primarily based on his membership in the VRS Main Staff in November 1992 when Mladić issued the directive.[1167] Tolimir only challenges the Trial Chamber's reliance on the testimony of Lazić that all the members of the VRS understood Operational Directive 4 to propagate the goal of ethnic separation.[1168] The Appeals Chamber has already dismissed Tolimir's challenge in this regard.[1169] Additionally, the Trial Chamber pointed to other evidence supporting its finding regarding Tolimir's knowledge of Operational Directive 4, namely the fact that he was a member of the Main Staff when Mladić issued the directive.[1170] Tolimir thus fails to show that no reasonable fact-finder could have inferred his knowledge of Operational Directive 4.

1163 Trial Judgement, paras 100, 186, 1078, n. 677.
1164 *See Kupreškić et al.* Appeal Judgement, para. 32; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63.
1165 Appeal Brief, para. 257.
1166 Trial Judgement, para. 1077.
1167 Trial Judgement, para. 1077.
1168 Trial Judgement, para. 1077.
1169 *See supra*, para. 320.
1170 Trial Judgement, para. 1077.

386. Tolimir cites numerous pieces of evidence regarding the political context at the time when Operational Directive 4 was issued, which he submits the Trial Chamber failed to consider in assessing Lazić's testimony and Tolimir's own knowledge of the policy of ethnic separation.[1171] That evidence relates to: (i) attacks by Bosnian Muslims against Serbian villages in 1992-1993, including Kravica and all villages except Bratunac;[1172] (ii) attacks by ABiH against the VRS from inside the designated safe areas;[1173] (iii) attacks by the Croatian Army against the Bosnian Serbian population;[1174] (iv) the formation of the VRS in response to the formation of Bosnian Muslim and Bosnian Croat armies;[1175] and (v) challenges to the evidence of the mass killings of Srebrenica's Bosnian Muslims.[1176]

387. Contrary to Tolimir's arguments, however, most of that evidence was explicitly addressed by the Trial Chamber.[1177] A review of the Trial Judgement shows that the general political context in which the Bosnian Serb policy of ethnic separation was decided was considered by the Trial Chamber. The Trial Chamber took into account the attack by Bosnian Muslim fighters on Kravica and found that, as a result, the VRS launched a counter-offensive.[1178] The Trial Chamber recognized that ABiH soldiers inside Srebrenica carried out attacks outside its borders, targeting VRS-held territory.[1179] The Trial Chamber also acknowledged that in June 1995, the number of ABiH forces within the Srebrenica enclave increased.[1180] Furthermore, as also noted above, the

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1171 Appeal Brief, para. 249, and evidence cited therein.

1172 *See* T. 12 April 2011 p. 12680; T. 14 February 2011 pp. 9807-9808; Defence Exhibit 122 (report of the Secretary-General pursuant to General Assembly resolution 53/35 – the fall of Srebrenica), p. 13; Defence Exhibit 261 (document entitled "Creation and Development of the VRS during the homeland war in BiH in the period from 1992 until 1995", signed by General Manojlo Milovanović), pp. 1-5; T. 19 October 2010, p. 6503. Some of this evidence refers to the Bosnian Muslim attacks against the Bosnian Serbs as ethnic cleansing. *See* Defence Exhibit 122, p. 13; Defence Exhibit 261, p. 4.

1173 *See* T. 14 February 2011 p. 9808; Defence Final Trial Brief, paras 350-353.

1174 *See* Defence Exhibit 234 (selection of pages from the document titled RS, Government, Documentation Center, War Crimes committed against Serbian population and JNA prior to armed conflict in BiH 1991-1995), describing the attacks as genocide against the Serbian population; T. 3 May 2011 pp. 13639-13700; Defence Exhibit 261, pp. 5-6.

1175 *See* Defence Exhibit 261 (document entitled "Creation and Development of the VRS during the homeland war in BiH in the period from 1992 until 1995", signed by General Manojlo Milovanović), pp. 1-5.

1176 *See* Defence Exhibit 365 (foreword and chapter 4 of a book entitled "Srebrenica Massacre: evidence, context, politics"). Tolimir also cites to evidence that some UNPROFOR re-supply convoys included items not permitted to enter the enclaves. *See* Appeal Brief, para. 249, *citing* Defence Exhibit 73 (document on movement by convoys, teams and individuals from UNPROFOR and humanitarian organisations signed by Captain Slavko Novaković). This argument, however, pertains to Tolimir's role with respect to the restrictions of convoys and has been addressed above. *See supra*, paras 333-334.

1177 *See* Trial Judgement, paras 116 (considering Witness Salapura's testimony), 174 (considering Defence Exhibit 160 and the testimonies of Witness Momčilović and Prosecution Witness 063), 197 (considering Defence Exhibit 73), 159-160, 174, 204 (considering Defence Exhibit 122), 79, 81, 92, 123, 162, 913-914 (considering Defence Exhibit 261), 1068 (considering Witness Momir Nikolić's testimony).

1178 Trial Judgement, para. 174.

1179 Trial Judgement, paras 210, 212.

1180 Trial Judgement, para. 210.

Trial Chamber specifically addressed and rejected Tolimir's argument that the VRS attacks against the enclaves were a lawful response to attacks by the ABiH from inside the safe areas.[1181]

388. In any event, the Appeals Chamber fails to see the relevance of this evidence of ethnic tension in BiH at the same time as the Bosnian Serb policy of ethnic separation was developed. The underlying premise of Tolimir's position regarding that evidence is that the Bosnian Serb policy of ethnic separation was justified and legitimate because of the attacks by other ethnic groups in BiH against Bosnian Serbs. The Trial Chamber, however, rejected this position[1182] and the Appeals Chamber sees no error in that conclusion. The fact that Bosnian Muslims and Croats had targeted Bosnian Serb civilians does not render the VRS's operations against Bosnian Muslim civilians legal, nor does it render lawful an official policy by the Bosnian Serb leadership to forcibly remove the Bosnian Muslim civilian population of Srebrenica and Žepa out of these enclaves. As previously explained, military attacks against civilians and indiscriminate attacks are under no circumstances allowed under international humanitarian law.[1183] As a result, Tolimir has not shown an error in the Trial Chamber's evaluation of the evidence relating to his knowledge of Operational Directive 4 and the Bosnian Serb policy of ethnic separation at large.

389. For the same reasons, the Appeals Chamber rejects Tolimir's broader arguments that, in light of evidence concerning the ABiH's military plans, its abuse of convoys entering the enclaves, and UNPROFOR's support to the ABiH, as well as evidence that the VRS's operations (and his own actions) were directed strictly against enemy forces, not civilians, no reasonable trier of fact could have concluded that he was aware of and shared the aim to rid the enclaves of their Muslim population. Tolimir re-asserts arguments considered and rejected by the Trial Chamber.[1184] More fundamentally, Tolimir fails to show the relevance of such evidence.[1185]

(iii) Conclusion

390. For the foregoing reasons, the Appeals Chamber dismisses Tolimir's challenges to the Trial Chamber's conclusions regarding his knowledge of the official Bosnian Serb policy to rid the enclaves in Eastern BiH of their Bosnian Muslim population, a policy reflected in Operational Directive 4 and Directive 7. The Appeals Chamber also rejects Tolimir's submissions that this policy was legitimate under international humanitarian law. In view of these findings, the Trial Chamber's erroneous finding that Tolimir was aware of the Six Strategic Objectives because he attended the Bosnian Serb assembly session at which those objectives were discussed did not cause

[1181] Trial Judgement, para. 706.
[1182] Trial Judgement, para. 706.
[1183] *See supra*, para. 346. *See also* Additional Protocol I, Arts. 48, 51.
[1184] *See* Trial Judgement, paras 706, 1085, 1121.

a miscarriage of justice, as it does not undermine the Trial Chamber's conclusion, premised on other findings, that Tolimir was aware of the official policy of Republika Srpska to remove the Bosnian Muslim population from Eastern BiH.

(b) Knowledge of the Tunnel Attack

391. The Trial Chamber inferred Tolimir's intent to participate in the JCE to Forcibly Remove in part from his knowledge of the Tunnel Attack, discussed earlier in this section.[1186] The Trial Chamber did not enter conclusive findings regarding Tolimir's exact involvement in the planning and implementation of the attack, but concluded that he was fully aware that the attack was carried out and resulted in civilian casualties and implicitly condoned it by falsely accusing the ABiH of spreading misinformation concerning this incident in an intelligence report issued on 25 June 1995.[1187]

(i) Submissions

392. Tolimir argues that the Trial Chamber erred in law in taking the Tunnel Attack into consideration since it is not mentioned in the part of the Indictment setting out his alleged contributions to the JCE.[1188] Furthermore, according to Tolimir, the Trial Chamber erred in finding that he had knowledge of the attack and despite that knowledge, spread misleading information that the attack did not occur.[1189]

393. The Prosecution responds that the Trial Chamber addressed and rejected Tolimir's argument that the Tunnel Attack was not covered by the Indictment and that Tolimir ignores the Trial Chamber's findings in this regard. It further argues that the Trial Chamber's conclusion that Tolimir was aware of the Tunnel Attack and its civilian casualties was reasonable in light of the entirety of the evidence on the record, including Tolimir's position within the VRS.[1190]

1185 *See supra*, para.346.
1186 Trial Judgement, paras 1081-1083. *See supra*, paras 340-341.
1187 Trial Judgement, para. 1083.
1188 Appeal Brief, para. 274.
1189 Appeal Brief, paras 276-278. Tolimir also contends that the Trial Chamber erred in finding that his involvement in the attack was "not passive", but, as noted above, the Trial Chamber did not make a conclusive finding on Tolimir's role in the planning and execution of this operation. *See* Trial Judgement, para. 1083. The Trial Chamber only relied on Tolimir's knowledge of the Tunnel Attack and its civilian casualties. The Appeals Chamber, thus, rejects Tolimir's arguments as to his role in the Tunnel Attack as irrelevant.
1190 Response Brief, paras 195-196.

(ii) Analysis

394. The Appeals Chamber has already dismissed Tolimir's contention that the Tunnel Attack was not covered by the Indictment.[1191] The Appeals Chamber recalls that the specific actions by which Tolimir was accused of contributing to the JCE to Forcibly Remove were pleaded in paragraph 60 of the Indictment, which does not specifically refer to Tolimir assuming an active role in the Tunnel Attack, although it does refer to paragraph 38 of the Indictment, which covered such incidents.[1192] The Appeals Chamber also notes, in this regard, that the Trial Chamber did not find that Tolimir was personally involved in the attack – it only took into account his knowledge of that attack and its civilian casualties.[1193] In light of this, the Appeals Chamber is satisfied that it was unnecessary for the Indictment to contain additional details concerning this incident. Tolimir's contention in this regard is therefore dismissed.

395. The Appeals Chamber is also not persuaded that the Trial Chamber's conclusion regarding Tolimir's knowledge of the Tunnel Attack was unreasonable or erroneous. In support of its finding that Tolimir knew about the attack and its casualties, the Trial Chamber relied on Witness Salapura's testimony that he would have reported to Tolimir following the completion of the attack.[1194] Tolimir does not contest that Salapura would have submitted a report to him about the attack, but points out that Salapura testified that he did not receive reports about any casualties and thus could not have reported any such casualties to Tolimir.[1195] However, Salapura testified that he received information "that a woman […] was killed and a child was wounded".[1196] The Trial Chamber cited to the relevant portions of Salapura's testimony.[1197] In light of that testimony, Tolimir fails to show that no reasonable fact-finder could have concluded that Tolimir knew of the attack and its civilian casualties.

(iii) Conclusion

396. Accordingly, the Appeals Chamber rejects Tolimir's arguments.

(c) Knowledge of the VRS operations in Potočari on 12 and 13 July 1995

397. The Trial Chamber concluded that, even though Tolimir "may not have been physically present in Potočari on 12 and 13 July" 1995, "he was informed of the events on the ground by

1191 *See supra*, para. 340.
1192 Indictment, para. 60.
1193 Trial Judgement, para. 1083.
1194 Trial Judgement, para. 1083, *citing* T. 2 May 2011 p. 13527-13528.
1195 Appeal Brief, para. 278.
1196 T. 2 May 2011 p. 13544.
1197 Trial Judgement, para. 1020, n. 4026.

Radoslav Janković, an intelligence officer of the Main Staff, and through the involvement of subordinate officers of the security and intelligence organs at brigade and corps level including Popović, Keserović, and Momir Nikolić".[1198] The Trial Chamber found that Tolimir was informed in particular that approximately 25,000–30,000 Bosnian Muslim civilians had sought refuge at the UN compound in Potočari and that the men were being separated from their family members. He also knew about the discussions held at the Hotel Fontana on 11 and 12 July 1995 between representatives of the VRS and the Bosnian Muslims of Srebrenica.[1199]

(i) Submissions

398. Tolimir submits that the Trial Chamber erred in finding that he was aware of the VRS operations in Potočari on 12 and 13 July 1995.[1200] Tolimir claims that he was not informed by Radoslav Janković about the July 1995 events in Potočari, as Janković had been re-assigned to the Drina Corps.[1201] Tolimir also denies receiving any information regarding "inappropriate or unlawful treatment of civilian population [sic]" at Potočari from Popović, Keserović, or Momir Nikolić. He claims that he was not in contact with those persons during that time.[1202] Tolimir asserts that the Trial Chamber's contrary findings in this regard were not supported by reliable evidence but based on Tolimir's position in the VRS.[1203] Tolimir further points to the absence of any evidence proving his participation in the Potočari operations, particularly the evacuation of Srebrenica's civilian population, or his knowledge of those events prior to or during the evacuation process.[1204] Tolimir further claims that Popović and Momir Nikolić were not his subordinates.[1205]

399. The Prosecution responds that the Trial Chamber reasonably concluded that Tolimir was informed of the events in Potočari by Janković.[1206] In the Prosecution's view, Tolimir fails to explain how Janković's alleged re-assignment to the Drina Corps deprived him of the authority or affected his ability to report to Tolimir regarding the VRS operations in Potočari, especially in view of other evidence on the record supporting the Trial Chamber's findings.[1207]

[1198] Trial Judgement, para. 1087.
[1199] Trial Judgement, para. 1087.
[1200] Appeal Brief, paras 299-302.
[1201] Appeal Brief, paras 299-300. *See also* Reply Brief, para. 109.
[1202] Appeal Brief, para. 299. *See also* Reply Brief, para. 109.
[1203] Appeal Brief, paras 299-300; Reply Brief, para. 108.
[1204] Appeal Brief, para. 301.
[1205] Appeal Brief, para. 302; Reply Brief, para. 108.
[1206] Response Brief, para. 210.
[1207] Response Brief, paras 209-210.

(ii) Analysis

400. The Appeals Chamber notes that Tolimir does not challenge Janković's role in the VRS operations in Potočari, but only contends that Janković was not his subordinate because he was re-assigned from the VRS Main Staff to the Drina Corps.[1208] However, the Trial Chamber's finding that Janković was Tolimir's subordinate was based not only on evidence of the formal hierarchical structure of the VRS and Tolimir's official position.[1209] It was also based on proof of Janković's compliance with specific orders issued by Tolimir concerning the evacuation of wounded Bosnian Muslims from the Bratunac Hospital.[1210] The Trial Chamber specifically referred to a report prepared by Janković, which reflected the orders received from Tolimir in connection with the evacuation process, and Janković's request to Tolimir for further guidance concerning the evacuation of MSF staff and others. The Trial Chamber also cited evidence of further communications between Janković and Tolimir.[1211] Tolimir fails to show an error in the Trial Chamber's analysis. In light of the evidence, the Appeals Chamber considers that a reasonable fact-finder could have reached the conclusion that a superior-subordinate relationship existed between Tolimir and Janković.

401. Moreover, Janković's re-assignment to the Drina Corps did not preclude him from still being able to transmit information to the Intelligence Sector, headed by Tolimir. Salapura testified that while Janković was re-assigned to the Drina Corps and "was not duty-bound to submit that information to" the Main Staff and the Intelligence Sector, "sometimes he would pass on information to the Intelligence Administration of the Main Staff as well".[1212] Momir Nikolić testified that Janković was sent from the Main Staff to work at Nikolić's office.[1213] He claimed that during his time there he wrote reports under the Bratunac Brigade heading, but that he did not know whether those reports "went both to the Drina Corps command and the Main Staff".[1214] Nikolić additionally testified that Janković "introduced himself as a colonel from the Main Staff and that he was from the intelligence department".[1215] Tolimir thus fails to show how Janković's alleged re-assignment to the Drina Corps affected his professional relationship with Tolimir or prevented him from actually informing Tolimir of the developments at Potočari.

[1208] Appeal Brief, para. 300.
[1209] Appeal Brief, para. 300.
[1210] Trial Judgement, paras 964, 1087.
[1211] Trial Judgement, para. 964, and evidence cited therein.
[1212] T. 3 May 2011 p. 13577.
[1213] T. 6 April 2011 p. 12365.
[1214] T. 6 April 2011 p. 12367.
[1215] T. 6 April 2011 p. 12365.

402. In any event, the Appeals Chamber observes that the Trial Chamber did not conclude that Tolimir was informed about the Potočari events only by Janković. The Trial Chamber relied upon additional evidence, including: (i) Prosecution Exhibit 2203, a report authored by Tolimir himself, confirming his knowledge of the presence of 25,000-30,000 Bosnian Muslim civilians at the UN compound in Potočari;[1216] (ii) Prosecution Exhibit 2518, a telegram sent by Popović to Tolimir, *inter alios*, on 11 July 1995, informing that Bosnian Muslim civilians were moving from Potočari;[1217] and (iii) Prosecution Exhibit 2069, a report sent by Popović on 12 July 1995 to the Main Staff and Sector for Intelligence and Security Affairs, amongst others, stating that "[w]e are separating men from 17-60 years of age and we are not transporting them", and that "the security organs and the DB /the state security/ are working with them".[1218] Regarding the Hotel Fontana discussions in particular, the Trial Chamber relied, in addition to Janković's presence at those meetings, on proof of the efficient reporting system within the VRS, from which the Trial Chamber inferred Tolimir's knowledge of those discussions.[1219] The Trial Chamber finally referred to Tolimir's position as the head of the Intelligence Sector to infer his knowledge of the Potočari events, finding that the presence of tens of thousands of Bosnian Muslim civilians at the UN compound was relevant to his area of responsibility.[1220] This additional evidence cited by the Trial Chamber, which Tolimir does not challenge, suffices to support the conclusion that Tolimir must have received sufficient information about the Potočari operations. In light of that evidence, the Appeals Chamber is satisfied that a reasonable fact-finder could have reached the Trial Chamber's findings regarding Tolimir's knowledge of these events.

403. Tolimir's assertions that Popović and Momir Nikolić were not his subordinates and that he was not present during the transfer from Srebrenica has no bearing upon the Trial Chamber's analysis. The Trial Chamber acknowledged that Tolimir "may not have been physically present at Potočari on 12 and 13 July" 1995, but still concluded that Tolimir was informed of the events on the ground at Potočari.[1221]

(iii) Conclusion

404. Accordingly, the Appeals Chamber rejects Tolimir's challenges to the Trial Chamber's conclusion that he was informed of the VRS operations in Potočari on 12 and 13 July 1995.

[1216] Trial Judgement, para. 1087, n. 4265.
[1217] Trial Judgement, n. 4264. In finding that this telegram conveyed information about the transfer of Bosnian Muslims from Potočari, the Trial Chamber pointed to additional evidence, such as the testimony of UNPROFOR's Richard Butler, corroborating that interpretation of the telegram. *See* Trial Judgement, n. 4264.
[1218] Trial Judgement, n. 4266.
[1219] Trial Judgement, para. 1087.
[1220] Trial Judgement, n. 4267.
[1221] Trial Judgement, para. 1087, n. 4264.

(d) Intent to forcibly remove Žepa's Bosnian Muslims

405. The Trial Chamber also inferred Tolimir's intent regarding the JCE to Forcibly Remove from his "direct and active involvement in the preparation and implementation of the forcible removal of Žepa's civilian population at the end of July" 1995.[1222] In this respect, the Trial Chamber relied on: (i) Tolimir's ultimatum to Žepa's Bosnian Muslims to either evacuate the enclave or face military attacks by the VRS;[1223] (ii) his proposal to Mladić and other VRS officials to capture Žepa within 21 hours so as to avoid condemnation and reaction from the international community;[1224] (iii) his additional proposals, in a report sent to the VRS Main Staff on 21 July 1995, that the VRS use chemical agents against Žepa and that they attack and destroy the Bosnian Muslim civilians who had sought refuge outside the inhabited areas of the Žepa enclave;[1225] and (iv) his continued involvement in exchanges of prisoners of war in August 1995 and thereafter, which, according to the Trial Chamber, attested to his "dedication to the follow up of the forcible removal operation".[1226]

(i) Submissions

406. Tolimir argues that the Trial Chamber erred in finding that he shared the intent to forcibly remove the Bosnian Muslim civilians from Srebrenica and Žepa and was aware that the VRS operations in Žepa were illegal. Specifically, Tolimir challenges the Trial Chamber's finding that he gave an ultimatum to Žepa's Bosnian Muslims representatives to either evacuate the enclave or come under military attack. Tolimir claims that the evidence shows that he threatened to use military force only if the Bosnian Muslims did not surrender their weapons. He claims this was a lawful demand.[1227] Furthermore, Tolimir argues that his proposal to capture Žepa within 21 hours concerned the "efficiency of [the] military operation" and reflected his concerns about the political climate at the time.[1228] Tolimir further asserts that the Trial Chamber erred in interpreting his 21 July 1995 report to the VRS Main Staff as containing a proposal to destroy "groups of Muslim refugees". He claims that the Trial Chamber relied on an erroneous translation of the relevant portion of his report to make this finding.[1229] Finally, Tolimir contends that the Trial Chamber erred

[1222] Trial Judgement, para. 1094.
[1223] Trial Judgement, para. 1088.
[1224] Trial Judgement, paras 1088-1089.
[1225] Trial Judgement, paras 1090-1091.
[1226] Trial Judgement, para. 1092.
[1227] Appeal Brief, paras 309-310; Reply Brief, para. 90.
[1228] Appeal Brief, para. 312.
[1229] Appeal Brief, paras 314-315; Reply Brief, para. 91. Tolimir also argues that this proposal was never implemented and, thus, could not have been counted as a contribution to the JCE to Forcibly Remove. Appeal Brief, para. 316; Reply Brief, para. 91. The Appeals Chamber, however, notes that the Trial Chamber did not consider Tolimir's proposal in that regard as a significant contribution to the JCE, but as an indication of Tolimir's genocidal intent, as well as his intent to forcibly remove Žepa's Bosnian Muslim civilians from the enclave. Trial Judgement, paras

in finding that his involvement in prisoner-related matters in August 1995 and thereafter demonstrated his dedication to the forcible removal operation.[1230] Tolimir claims that his involvement in discussions for the exchange of prisoners of war was not illegal. He further claims that it was not directly related to the displacement operations.[1231]

407. The Prosecution responds that Tolimir's arguments should be dismissed. Concerning Tolimir's ultimatum to the Bosnian Muslim representatives, the Prosecution argues that the Trial Chamber reasonably relied on the testimony of Hamdija Torlak, who was present at the 13 July 1995 discussions and whose testimony is corroborated by other evidence.[1232] Tolimir's contention that the ultimatum was lawful should, in the Prosecution's view, be summarily dismissed.[1233] It further argues that the Trial Chamber's findings concerning Tolimir's proposal to capture Žepa within 21 hours and his involvement in prisoner-of-war-related matters were reasonable.[1234] As to the latter issue, the Prosecution maintains that the legality of the prisoner-related matters is not relevant to Tolimir's JCE liability.[1235] Finally, the Prosecution requests the summary dismissal of Tolimir's argument concerning the supposedly incorrect translation of his proposal to attack Bosnian Muslim civilians. The Prosecution claims that this argument was already considered and rejected by the Trial Chamber.[1236]

(ii) Analysis

408. With respect to the ultimatum given by Tolimir to the representatives of Žepa's Bosnian Muslims on 13 July 1995, the Appeals Chamber notes that the evidence that Tolimir claims to be undermining the Trial Chamber's relevant findings was in fact considered and analysed by the Trial Chamber. The Trial Chamber took into account both Prosecution Exhibit 491, Tolimir's own report about the meeting with Bosnian Muslim representatives at Bokšanica on 13 July 1995, which the Trial Chamber extensively cited in relation to its findings concerning the meeting,[1237] and Prosecution Exhibit 596, a UN memorandum containing an account of the same meeting.[1238] Relying primarily on Torlak's testimony, the Trial Chamber found that "[t]he only alternative presented by the Accused to the 'evacuation' of Žepa was the use of military force against the

1090, 1171. As a result, the fact that Tolimir's proposal was not implemented was of no consequence to the Trial Chamber's analysis and Tolimir's argument to the contrary is rejected as moot.

[1230] Appeal Brief, para. 322.
[1231] Appeal Brief, para. 322.
[1232] Response Brief, para. 165.
[1233] Response Brief, para. 166.
[1234] Response Brief, paras 216, 222.
[1235] Response Brief, para. 216.
[1236] Response Brief, para. 167.
[1237] *See* Trial Judgement, paras 606, 608-609 and nn. 2622, 2624-2626, 2628-2631.
[1238] Trial Judgement, nn. 2621, 2631.

enclave".[1239] That finding, however, was also corroborated by Prosecution Exhibit 491, which stated that the "VRS had indicated that the alternative solution to the commencement of the evacuation at 3:00 p.m. was military force".[1240] The Trial Chamber cited that portion of Prosecution Exhibit 491 in its factual analysis.[1241] Tolimir does not show an error in the Trial Chamber's finding. Citing Prosecution Exhibits 491 and 596, Tolimir argues that the Bosnian Muslims were presented with the choice of either surrendering their arms or facing military force, but in any event had the option to either leave or stay.[1242] Yet Prosecution Exhibit 491, Tolimir's own account of the events, undermines his argument, as it explicitly shows that the VRS essentially demanded the evacuation of the enclave.[1243]

409. The Appeals Chamber acknowledges the Trial Chamber's finding that, during the Bokšanica meeting, Tolimir eventually agreed to some civilians staying in the enclave, as long as they accepted the authority of the RS.[1244] That finding, however, does not alter the fact that, speaking on behalf of the VRS at that meeting, Tolimir expressed a clear preference for the evacuation of the enclave and threatened to use military force if the evacuation would not commence in the afternoon of the same day (13 July 1995).[1245] That statement was a clear indication of Tolimir's state of mind regarding the removal of Žepa's civilian population. The Trial Chamber reasonably cited it along with Tolimir's "central participa[tion]" in the 13 July 1995 negotiations on a whole as proof of his "shared intent" to forcibly displace Žepa's Bosnian Muslim civilians from the enclave.[1246] Whether the VRS officials participating in the meeting were also seeking to disarm the Bosnian Muslims and the legality of the VRS's proposals to the Bosnian Muslim representatives, as well as the extent to which the VRS was willing to accept the presence of some civilians in the enclave, do not undermine the Trial Chamber's analysis of Tolimir's role in the Žepa negotiations.

410. The Appeals Chamber considers Tolimir's challenge to the Trial Chamber's finding that his proposal to capture Žepa within 21 hours so as to avoid international condemnation demonstrated his awareness that the takeover was illegal to be without merit. Tolimir merely

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1239 Trial Judgement, para. 609. *See also* Trial Judgement, para. 1088.
1240 Prosecution Exhibit 491, p. 2.
1241 Trial Judgement, n. 2626, *citing* Prosecution Exhibit 491, p. 2.
1242 Appeal Brief, para. 309.
1243 Prosecution Exhibit 491 (PLPBR report re situation in Žepa enclave, type-signed General Major Zdravko Tolimir, assistant commander, dated 13 July 1995), p. 2.
1244 Trial Judgement, para. 609, *citing*, *inter alia*, Prosecution Exhibit 491. The Trial Chamber noted that Tolimir agreed without any conditions to about ten families staying in Žepa, but in the end they also left the enclave. Trial Judgement, n. 2629.
1245 Trial Judgement, para. 609, *citing*, *inter alia*, Prosecution Exhibit 491 (PLPBR report re situation in Žepa enclave, type-signed General Major Zdravko Tolimir, assistant commander, dated 13 July 1995), p. 2. *See also* Trial Judgement, para. 1088.
1246 Trial Judgement, para. 1094.

disagrees with the Trial Chamber's finding,[1247] but does not demonstrate that no reasonable trier of fact could have so concluded. As the Trial Chamber found, and as the Appeals Chamber has also concluded above, the VRS attack against Žepa was in violation of the rules of international humanitarian law prohibiting attacks on civilians and indiscriminate attacks.[1248] Considering the illegality of the VRS attack against Žepa,[1249] it was not unreasonable for the Trial Chamber to conclude that Tolimir's proposal to Mladić and other officials to expedite Žepa's takeover so as to minimise international reaction revealed Tolimir's knowledge of the illegality of the operation.

411. The Appeals Chamber also rejects Tolimir's argument that the Trial Chamber erred in inferring his intent from his proposal to attack and destroy "groups of Muslim refugees" fleeing from certain locations in the Žepa enclave, contained in Prosecution Exhibit 488.[1250] The Appeals Chamber notes that the Trial Chamber considered the potential errors in the translation of that exhibit (Tolimir's 21 July 1995 report), but concluded that, even if his report referred to a place of refuge and not to groups of Muslim refugees, "the intended victims" of the attacks proposed by Tolimir "included Bosnian Muslim civilians".[1251] It found that Tolimir knew of "the Bosnian Muslim population of Žepa taking shelter outside of inhabited areas".[1252] The Appeals Chamber does not find an error in this conclusion.[1253]

412. Nevertheless, the Appeals Chamber considers that the Trial Chamber erred in finding that Tolimir's continued involvement in the exchange of prisoners of war from Žepa showed his dedication to the follow up of the forcible removal of Žepa's Bosnian Muslim civilians. The prisoner exchanges of which Tolimir was in charge concerned prisoners of war, not civilians,[1254] and was a matter that arose after the completion of the VRS operations in Žepa.[1255] Accordingly, the Appeals Chamber finds that no reasonable trier of fact could have relied on Tolimir's involvement in prisoner-related matters to infer his intent to forcibly remove civilians, as the Trial Chamber did. This finding thus constitutes an error. However, in light of the other evidence reasonably relied on by the Trial Chamber in inferring that Tolimir shared the intent of the JCE to Forcibly Remove, the Appeals Chamber is not satisfied that this error occasioned a miscarriage of justice.

[1247] Appeal Brief, para. 312.
[1248] *See supra*, paras 345-348.
[1249] Trial Judgement, para. 1089 ("there was nothing legitimate about Žepa's takeover").
[1250] Appeal Brief, para. 314, *citing* Trial Judgement, para. 1171.
[1251] Trial Judgement, para. 1091.
[1252] Trial Judgement, para. 1091.
[1253] The Appeals Chamber is also satisfied that, even if Tolimir's proposal to attack Bosnian Muslim refugees (or places of refuge) was never implemented, as Tolimir argues (Appeal Brief, para. 313), it still manifested Tolimir's intent to target civilians and the Trial Chamber's conclusion to that effect remains valid.
[1254] Trial Judgement, paras 1002-1005.
[1255] Trial Judgement, para. 1092.

(iii) Conclusion

413. For the foregoing reasons, the Appeals Chamber rejects Tolimir's challenges to the Trial Chamber's reliance on his "direct and active involvement in the preparation and implementation of the forcible removal of Žepa's civilian population at the end of July" 1995 to infer his intent to participate in the JCE to Forcibly Remove and commit the crimes encompassed within its scope, including genocide and forcible removal as a crime against humanity.[1256]

3. Conclusion

414. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 15 (in part) related to Tolimir's liability pursuant to the JCE to Forcibly Remove.

D. JCE to Murder

1. Existence of a common plan

(a) Killings at the Kravica Warehouse (Ground of Appeal 19)

(i) Submissions

415. Tolimir submits that the Trial Chamber erred in fact and law in finding that the killings at the Kravica Warehouse of 600 to 1,000 Bosnian Muslims on 13-14 July 1995 were committed so as to achieve the common plan of the JCE to Murder.[1257]

416. Tolimir refers to evidence on the record, namely the video footage from the car in which Ljubomir Borovčanin, the commander of the police units in the area, passed by the Kravica Warehouse and asserts that this evidence clearly shows that Borovčanin saw nothing.[1258] He contends that the Trial Chamber's findings demonstrate that the killings were a retaliatory action by Bosnian Serb Forces to an incident in which a prisoner inside the warehouse took a rifle from a police officer guarding the prisoners and shot and killed him and another police officer grabbed the barrel of the rifle and burned his hand ("burnt hand incident").[1259] In Tolimir's submission, the killings were a vastly disproportionate and inappropriate response to this incident, as stated by Judge Nyambe in her dissenting opinion.[1260] He further submits that the other evidence relied on by the Trial Chamber does not support its conclusion that the killings were planned as part of the JCE

[1256] Trial Judgement, para. 1094.
[1257] Appeal Brief, para. 430, *citing* Trial Judgement, para. 1054. *See also* Trial Judgement, para. 376.
[1258] Appeal Brief, para. 431. The Appeals Chamber understands that Tolimir is referring to Prosecution Exhibit 1250 (Studio B Petrović footage, 1995), at 00:18:07 – 00:18:09.
[1259] Appeal Brief, para. 431. *See also* Trial Judgement, paras 358-359, 1054.
[1260] Appeal Brief, para. 431.

to Murder.[1261] He argues that the errors have either invalidated the judgement and/or caused a miscarriage of justice.[1262]

417. The Prosecution responds that the Trial Chamber properly considered the Kravica Warehouse killings as being part of the common plan to murder.[1263] It submits that Tolimir's submissions should be summarily dismissed as he seeks to substitute his evaluation of the evidence for that of the Trial Chamber, while ignoring other relevant factual findings and evidence.[1264] Alternatively, the Prosecution submits that Tolimir fails to show how the Trial Chamber's findings based on the evidence of the execution of the Bosnian Muslim prisoners in the warehouse were ones that no reasonable trial chamber could have reached.[1265] It notes that the Trial Chamber specifically addressed the burnt hand incident and considered, *inter alia*, the full-scale execution of the detained Bosnian Muslim men which followed at the Kravica Warehouse.[1266]

(ii) Analysis

418. The Appeals Chamber notes that, but for one reference to Judge Nyambe's dissenting opinion, Tolimir's submissions are not substantiated by any supporting evidence, authorities, or specific findings, and thus fall short of the standard required for the Appeals Chamber to consider arguments on appeal.[1267] The Appeals Chamber recalls, however, that in appeal proceedings concerning self-represented appellants, it has "heightened concerns regarding the basic fairness of proceedings".[1268] In light of this and given the seriousness of the convictions challenged under this Ground of Appeal, the Appeals Chamber will consider the ground on the merits despite its deficiencies.

419. The Trial Chamber found that "the killings at Kravica Warehouse were executed so as to achieve the common plan, taking into account that the plan itself had already been developed and members of the Bosnian Serb Forces were engaged in the killings".[1269]

420. Tolimir claims that the killing of 600 to 1,000 Bosnian Muslim men at the Kravica Warehouse on 13-14 July 1995 was an isolated retaliatory action on the part of those guarding the

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[1261] Appeal Brief, para. 431.
[1262] Appeal Brief, para. 432. *See also* Appeal Brief, para. 5.
[1263] Response Brief, para. 316.
[1264] Response Brief, para. 317.
[1265] Response Brief, para. 318.
[1266] Response Brief, para. 318.
[1267] *See supra*, paras 13-14. The Appeals Chamber further notes that, while Tolimir claims both an error of fact and an error of law on the part of the Trial Chamber, he fails to articulate an error of law. *See* Appeal Brief, paras 430-432. The Appeals Chamber will therefore consider this ground of appeal only as an allegation of an error of fact.
[1268] *Krajišnik* Decision of 28 February 2008, para. 6, and references cited therein. *See also Krajišnik* Appeal Judgement, para. 651.
[1269] Trial Judgement, para. 1054.

prisoners at the warehouse, not part of a preconceived plan to murder. The Appeals Chamber notes that the Trial Chamber dealt in detail with the burnt hand incident.[1270] The Trial Chamber found that "this incident caused the Bosnian Serb guards to become agitated and angry and led to the shooting of many Bosnian Muslim prisoners in front of the warehouse".[1271] Relying, *inter alia*, on video footage taken from the car in which Borovčanin was travelling, the Trial Chamber found that a pile of approximately 50 bodies was visible in front of the warehouse in the late afternoon of 13 July 1995.[1272]

421. The Appeals Chamber notes that the Trial Chamber found that "[*l*]*ater* that day, the members of Bosnian Serb Forces commenced shooting into the crowded warehouse, which lasted into the night and next morning […] [and] continued until the early evening of 14 July".[1273] It is clear from the Trial Chamber's findings that while the burnt hand incident may have triggered the shooting of a large number of Bosnian Muslim prisoners in its immediate aftermath, the full-scale execution of the prisoners in the warehouse commenced only later. These killings continued for some 24 hours over 13-14 July 1995, with members of the Bosnian Serb Forces periodically entering the warehouse to shoot prisoners and throw grenades, resulting in the death of 600 to 1,000 men.[1274] In view of the methodical way the killings were carried out, their scale and duration, the Appeals Chamber considers that a reasonable trial chamber could have found that such killings were not a retaliatory action but part of a plan to murder.

422. Tolimir argues that the other evidence relied on by the Trial Chamber does not support its conclusion that the killings were part of the common plan of the JCE to Murder. The Appeals Chamber notes that the Trial Chamber's conclusion relied largely on its findings on events that took place prior to the commencement of the shooting in the warehouse. First, the Appeals Chamber notes that in the Trial Chamber's finding, the plan to murder the able-bodied Bosnian Muslim men of Srebrenica, including those from the column, had been formed sometime between 12 and 13 July 1995.[1275] Second, the Trial Chamber found that the prisoners detained at the Sandići Meadow were taken to the Kravica Warehouse both on foot and by bus, arriving between 2:00 p.m. and 5:00 p.m. on 13 July 1995 and were packed inside the warehouse.[1276] Third, the Trial Chamber found that at around 4:30 p.m., before the shooting of the prisoners began, an order was given by

[1270] Trial Judgement, paras 358-359.
[1271] Trial Judgement, para. 359. *See also* Trial Judgement, para. 357.
[1272] Trial Judgement, para. 358, n. 1578, *citing*, *inter alia*, Prosecution Exhibit 1250 (Studio B Petrović footage, 1995), at 00:18:07 – 00:18:09 and Prosecution Exhibit 1251, p. 60 (still-frame of video footage showing the pile of bodies outside the Kravica Warehouse).
[1273] Trial Judgement, para. 1054 (emphasis added). *See also* Trial Judgement, paras 360-362.
[1274] Trial Judgement, paras 360-362, 376.
[1275] Trial Judgement, para. 1047.
[1276] Trial Judgement, paras 354-355.

Borovčanin to stop traffic from passing by Kravica.[1277] The Trial Chamber specifically noted that this order was in line with an order that Mladić had issued earlier the same day "to prevent the giving of information […] particularly on prisoners of war" and similar to a telegram issued by Tolimir at around 2:00 p.m. that day.[1278] The Trial Chamber found that such orders were evidence of "a joint effort to hide the intended fate of Bosnian Muslim males from Srebrenica".[1279]

423. In addition, the Trial Chamber took into consideration evidence that arrangements were made by Ljubiša Beara, Head of the Security Administration and Tolimir's subordinate, and Miroslav Deronjić, Civilian Commissioner for the Serbian Municipality of Srebrenica, for the burial of the prisoners at the Kravica Warehouse in the evening and into the night of 13 July 1995, while the killings were ongoing.[1280] The Trial Chamber found that the purpose of such arrangements was "to conceal the evidence of those killings".[1281] The Appeals Chamber considers that the findings by the Trial Chamber outlined above strongly support its conclusion that the killings at the Kravica Warehouse were planned and implemented in coordination between VRS security and intelligence officers. Tolimir fails to show that no reasonable trial chamber could rely on this evidence to conclude that the Kravica Warehouse killings were part of the common plan of the JCE to Murder.

424. Insofar as Tolimir argues that the Studio B Video, which shows Borovčanin travelling in a car passing the Kravica Warehouse, is evidence that the killings at that location were not part of the plan to murder, the Appeals Chamber is not persuaded. In the section of the video which shows the car passing the Kravica Warehouse in the afternoon of 13 July 1995, a pile of dead bodies is clearly visible outside both sides of the entrance to the building.[1282] The fact that Borovčanin makes no specific comment about the bodies provides no support for the argument that the killings were not part of the common plan of the JCE to Murder. The most telling part of the video in this respect occurs earlier in the chronology of the footage, when it records Borovčanin ordering his subordinate to stop the traffic passing by Kravica.[1283] As found above, the Trial Chamber reasonably relied on evidence of this order – which was given prior to the killings at the Kravica Warehouse – in concluding that the executions were part of the common plan to murder. Tolimir's argument is dismissed.

[1277] Trial Judgement, para. 356.
[1278] Trial Judgement, para. 1055, n. 4158, *citing* Prosecution Exhibit 2420 (VRS Main Staff Order, 13 July 1995). *See* Trial Judgement, paras 934-937. *See also infra*, paras 462-464.
[1279] Trial Judgement, para. 1055.
[1280] Trial Judgement, paras 364, 1055.
[1281] Trial Judgement, para. 1055.
[1282] Prosecution Exhibit 1250 (Studio B Petrović footage, 1995), at 00:18:07 – 00:18:09 and Prosecution Exhibit 1251 (still-frame of video footage showing the pile of bodies outside the Kravica Warehouse), p. 60.
[1283] Prosecution Exhibit 1349 (High quality copy of Petrović's footage), 00:16:32–00:16:54; Prosecution Exhibit 1347 (transcript of the video footage), pp. 10-11.

(iii) Conclusion

425. In light of the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 19.

(b) Killing of six Bosnian Muslims near Trnovo (Ground of Appeal 20)

426. The Trial Chamber found that after the fall of the Srebrenica enclave the Bosnian Serb Forces murdered at least 4,970 Bosnian Muslims.[1284] This number included six Bosnian Muslim males from Srebrenica murdered by the Scorpions Unit at a site near Trnovo.[1285] The Trial Chamber found that the Scorpions Unit was part of the "security apparatus" of the Republic of the Serbian Krajina, and was operating under the direction of the Bosnian Serb Forces at the relevant time.[1286] The Trial Chamber concluded from the "evidence in its totality" including the Trnovo killings and the "highly organised circumstances surrounding the detention and murder of thousands at the hands of Bosnian Serb Forces over a period of several weeks and over a large geographical area", that there was a common plan to murder the Bosnian Muslim males from Srebrenica.[1287]

(i) Submissions

427. Tolimir submits that the Trial Chamber erred in finding that the killing of the six Bosnian Muslims near Trnovo by the Scorpions Unit was part of the JCE to Murder.[1288] Firstly, he avers that the Trial Chamber erred in law by failing to provide a reasoned opinion as to whether those who committed the Trnovo killings were members of the JCE or whether their acts formed part of the JCE to Murder.[1289] Secondly, he argues that there is no evidence that these murders were committed pursuant to the common purpose of the JCE.[1290] In this regard, he emphasises that: (i) the Scorpions Unit was deployed in the area of responsibility of the Sarajevo Romanija Corps, and all other killings were committed in the area of responsibility of the Drina Corps;[1291] (ii) the Scorpions Unit was deployed in Trnovo, "approximately 200 kilometres" away from Srebrenica, before the Srebrenica operation, and did not take part in the operation;[1292] (iii) there is no evidence as to how the six Bosnian Muslims arrived in Trnovo and how they came into the custody of the Scorpions Unit or evidence of any contact between members of the Scorpions Unit and members of the JCE to

1284 Trial Judgement, paras 721, 1065.
1285 Trial Judgement, paras 547-551, 568, 570, 718, 721, 1063. The Appeals Chamber notes that the Trial Chamber found that a number of killings in Zvornik, Bišina, and Trnovo, took place "[l]ater in July and early August". Trial Judgement, para. 1063.
1286 Trial Judgement, paras 547, 551, 1063. *See also* Trial Judgement, n. 2422.
1287 Trial Judgement, paras 1063, 1069-1070.
1288 Appeal Brief, para. 433.
1289 Appeal Brief, paras 434, 436 (*citing* Trial Judgement, paras 1041-1072), 443.
1290 Appeal Brief, paras 438-442.
1291 Appeal Brief, paras 437, 439, 441-442.

Murder;[1293] and (iv) unlike the other murders which were kept secret, the murders at Trnovo were video-recorded, which, in Tolimir's submission, is a strong indication that those who ordered the murders also ordered the video-recording.[1294] Tolimir suggests that the murders in Trnovo were "a terrible criminal act" which members of the Scorpions Unit committed on their own.[1295] He further submits that the fact that the Scorpions Unit was acting under the direction of the Bosnian Serb Forces – a finding he does not dispute – is an insufficient basis to infer that the Scorpions Unit acted in concert with members of the JCE to Murder.[1296]

428. The Prosecution responds that the Trial Chamber reasonably concluded that the killing of the six Bosnian Muslim men and boys from Srebrenica in Trnovo were part of the JCE to Murder.[1297] It argues that Tolimir's arguments warrant summary dismissal, as he mainly repeats trial arguments without demonstrating an error, tries to substitute the Trial Chamber's interpretation of the evidence with his own, and omits to reference relevant findings.[1298]

429. The Prosecution submits that it is irrelevant whether members of the Scorpions Unit were members of the JCE to find that the Trnovo killings committed by them formed part of the criminal purpose of the JCE to Murder.[1299] What matters, in its view, is whether the crime at issue forms part of that common purpose, which is to be determined on a case-by-case basis, taking into account "a variety of factors".[1300] It submits that the Trial Chamber based its finding that the Scorpions Unit was operating under the direction of the Bosnian Serb Forces upon evidence that the Scorpions Unit "was cooperating with VRS and/or RS MUP members of the JCE to Murder during its deployment in Srebrenica in July 1995".[1301] It also points to Trial Chamber findings that: (i) following the largest-known killings, the Bosnian Serb Forces continued to search the terrain for ABiH soldiers and captured and killed smaller groups of Bosnian Muslim men who were fleeing from Srebrenica; (ii) the six victims killed near Trnovo had been reported missing or dead along the route of the column; and (iii) the Scorpions Unit was ordered to provide vehicles and go to Srebrenica to take the victims to different locations to be killed.[1302] The Prosecution argues that it was not surprising that the six men and boys were killed in Trnovo, since this is where the Scorpions Unit had been

[1292] Appeal Brief, paras 435, 439.
[1293] Appeal Brief, para. 438.
[1294] Appeal Brief, para. 440.
[1295] Appeal Brief, para. 442.
[1296] Appeal Brief, paras 437, 441.
[1297] Response Brief, paras 319, 322.
[1298] Response Brief, para. 319.
[1299] Response Brief, para. 320.
[1300] Response Brief, para. 320.
[1301] Response Brief, para. 320.
[1302] Response Brief, para. 321.

deployed when they received the order to withdraw from active hostilities in Trnovo to assist the Bosnian Serb Forces in Srebrenica.[1303]

430. Tolimir replies that, contrary to the Prosecution's assertion, the Trial Chamber did not find that the Scorpions Unit had been deployed to Srebrenica in July 1995.[1304]

(ii) Analysis

a. Alleged failure to provide a reasoned opinion

431. With regard to Tolimir's submission that the Trial Chamber erred by failing to provide a reasoned opinion as to whether the members of the Scorpions Unit were members of the JCE to Murder,[1305] the Appeals Chamber notes that the Trial Chamber found that the JCE to Murder existed among "some members of the leadership of the Bosnian Serb Forces"[1306] and that the common plan to murder was "implemented by countless members of the Bosnian Serb Forces", including "numerous high-ranking VRS officers and their subordinates, and members of the Bosnian Serb MUP".[1307] The Trial Chamber did not establish whether or not the members of the Scorpions Unit were members of the JCE to Murder, and was not obliged to do so, as the principal perpetrator of a crime need not be a member of the JCE. In this regard, the Appeals Chamber recalls that "what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose".[1308] The Appeals Chamber further notes that the Indictment did not allege that members of the Scorpions Unit were members of the JCE to Murder, but participants in the implementation of the JCE.[1309] The question of whether members of the Scorpions Unit were members of the JCE to Murder was not at issue and did not have to be decided by the Trial Chamber. Tolimir's submission is therefore dismissed as irrelevant.

432. Nevertheless, the Appeals Chamber recalls that all members of a joint criminal enterprise are responsible for a crime committed by a non-member of the JCE if it is shown that the crime can be imputed to at least one JCE member, and that this member acted in accordance with the common plan when using the principal perpetrator.[1310] The establishment of such a link between the crime in

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1303 Response Brief, para. 321.
1304 Reply Brief, para. 149.
1305 Appeal Brief, paras 434, 436, 443.
1306 Trial Judgement, para. 1071.
1307 Trial Judgement, paras 1070-1071.
1308 *Brdanin* Appeal Judgement, para. 410. *See also Popović et al.* Appeal Judgement, para. 1065.
1309 Indictment, paras 71-72.
1310 *See Popović et al.* Appeal Judgement, para. 1065; *Đordević* Appeal Judgement, para. 165; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, paras 168, 181; *Brdanin* Appeal Judgement, paras 413, 430.

question and the JCE member is to be assessed on a case-by-case basis.[1311] The Appeals Chamber observes, that the Trial Chamber correctly stated the relevant law in this regard.[1312]

433. The Trial Chamber did not explicitly find that there existed a link between the members of the Scorpions Unit who committed the Trnovo killings and a member of the JCE and that, therefore, the killings formed part of the JCE to Murder in that a JCE member acting in accordance with the common plan used the Scorpions Unit to commit the six murders. The Trial Chamber only alluded to such a finding by concluding on the basis of the "evidence in its totality", including evidence of the Trnovo killings, that a common plan to murder the Bosnian Muslim males from Srebrenica existed.[1313] The only explicit findings specifically pertaining to the Trnovo killings were that: (1) the Scorpions Unit was part of the security apparatus of the Serbian Republic of Krajina[1314] but at the relevant time was operating under the direction of the Bosnian Serb Forces;[1315](2) after the fall of Srebrenica, in later July and early August 1995,[1316] the Scorpions Unit Commander Medić was ordered "through his chain of command" to provide vehicles to go to Srebrenica; and (3) six Bosnian Muslims were collected by bus and subsequently murdered by the Scorpions Unit.[1317] The Appeals Chamber finds that the Trial Chamber's failure to further elaborate on the required link between the perpetrators and a JCE member, *i.e.,* whether or not JCE members used the Scorpions Unit to commit the murders in accordance with the common plan of the JCE to Murder, amounts to a failure to provide a reasoned opinion. In view of the Trial Chamber's error of law, the Appeals Chamber will consider below whether the factual findings in the Trial Judgement on a whole would allow a reasonable trier of fact to establish a link between the Scorpions Unit and a member of the JCE to Murder.

b. Alleged link between the Scorpions Unit and a JCE member

434. In the Appeals Chamber's view, the above mentioned findings, even when viewed together, do not support the conclusion that the Trnovo killings were part of the JCE to Murder. In this

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1311 *See Đorđević* Appeal Judgement, para. 165; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, para. 226; *Martić* Appeal Judgement, para. 169; *Brđanin* Appeal Judgement, para. 413. The Appeals Chamber recalls that to find that a JCE member has used a non-JCE member in accordance with the common purpose, no close cooperation between them needs to be established (*Šainović et al.* Appeal Judgement, para. 1257), or that the JCE member has ordered or instructed the direct perpetrator to commit the crime (*Šainović et al.* Appeal Judgement, paras 1259-1260).

1312 Trial Judgement, para. 890. The Appeals Chamber notes that the Trial Chamber did not explicitly state that the JCE member to whom the crime is imputed must have been acting in accordance with the common plan when utilising the direct perpetrator.

1313 Trial Judgement, paras 1063, 1069.

1314 Trial Judgement, para. 547, n. 2422.

1315 Trial Judgement, paras 547, 1063.

1316 The Appeals Chamber notes that the Trial Chamber found that a number of killings in Zvornik, Bišina, and Trnovo, took place "[l]ater in July and early August". Trial Judgement, para. 1063.

1317 Trial Judgement, para. 548. The Appeals Chamber notes that the Trial Chamber's finding is supported by the testimony of a *viva voce* witness and two corresponding statements.

regard, the Appeals Chamber notes that even though the Trial Chamber found that the Scorpions Unit was acting at the relevant time under the direction of Bosnian Serb Forces, it failed to identify under whose direction or pursuant to whose orders they acted.[1318] The Appeals Chamber recalls that the Trial Chamber did not find that all the members of the Bosnian Serb Forces were also members of the JCE to Murder; indeed, the Trial Chamber found that the JCE to Murder was composed only of "some members of the leadership of the Bosnian Serb Forces […] including numerous high-ranking VRS officers and their subordinates, and members of the Bosnian Serb MUP".[1319] The Trial Chamber did not identify with any specificity any members of the JCE to Murder who were linked to and used the Scorpions Unit for the purpose of committing the Trnovo killings in furtherance of the JCE's common plan. The Trial Chamber found that Medić "received an order through his chain of command to provide vehicles to go to Srebrenica"[1320] but did not identify whether "his chain of command" included members of the JCE to Murder. While the Appeals Chamber notes that the evidence upon which the Trial Chamber relied suggests that the six men were transported from the Srebrenica area to Trnovo by members of the Scorpions Unit where they were subsequently killed,[1321] the Appeals Chamber is not convinced that it was reasonable for the Trial Chamber to infer from these facts that the Scorpions Unit perpetrated the six killings in Trnovo in furtherance of the common plan of the JCE to Murder and were thus used by JCE members. The Appeals Chamber further notes that the geographical location of the killings near Trnovo, approximately 200 kilometres from Srebrenica, outside the area of responsibility of the Drina Corps[1322] is an additional factor tending to suggest that these killings were not committed as part of the JCE to Murder or that the Bosnian Serb Forces under whose direction the Scorpions Unit were acting, were members of the JCE to Murder and used the Scorpions Unit in accordance with the common plan.

1318 The Appeals Chamber notes that the Trial Chamber cited to conflicting evidence in this regard. *See* Trial Judgement, para. 547, nn. 2422, 2424. The Trial Chamber stated that "PW-078 testified that the Commander of the Scorpions Unit received orders from Milovan Milovanović a.k.a. Mrgud, who he described as the Minister of Police of the Serbian Republic of Krajina […] Janc testified that the Scorpions Unit was part of the MUP of the Republic of Serbia. […] A Judgement of the War Crimes Chamber of the Belgrade District Court of 10 April 2007 concerning the events alleged in paragraph 21.16 of the Indictment found that the Scorpions Unit was for a time part of the MUP of the Serbian Republic of Krajina, but operated as part of its Army at the time of its deployment in Trnovo. […] A report dated 1 July 1995 by Ljubiša Borovčanin, Deputy Commander of the RS Special Police Brigade, refers to a combat group that included 'Škorpija/Scorpion/(Serbian MUP)'". Trial Judgement, n. 2422. The Trial Chamber further stated that "PW-078 said at one point that at the time of the deployment of the Scorpions Unit in BiH its Commander was subordinated to someone in the VRS, but later said that he did not know this for a fact and he was unsure of the precise relationship with Bosnian Serb Forces […] A report by Borovčanin implied that the Scorpions Unit was under the control of the RS Ministry of the Interior during its deployment in the Srebrenica operation in July 1995". Trial Judgement, n. 2424.

1319 Trial Judgement, para. 1071.

1320 Trial Judgement, para. 548.

1321 *See* Trial Judgement, paras 548, 550, nn. 2426, 2437, 2439, 2440.

1322 *Cf.* Appeal Brief, paras 437, 439, 441-442.

(iii) Conclusion

435. In light of the above, the Appeals Chamber finds that no reasonable trial chamber could have found that the evidence before the Trial Chamber established a link between members of the JCE to Murder and the Scorpions Unit, which allowed for the conclusion as the only reasonable inference that a member of the JCE used the Scorpions Unit to commit the murders near Trnovo pursuant to the JCE to Murder. It therefore grants Tolimir's Ground of Appeal 20.[1323] The impact of this finding on Tolimir's sentence, if any, will be discussed in the sentencing part of this Judgement.

E. Tolimir's liability pursuant to the JCE to Murder (Ground of Appeal 16)

436. The Trial Chamber found that by the morning of 12 July 1995, a common plan to murder the Bosnian Muslim able-bodied men from the Srebrenica enclave existed.[1324] The Trial Chamber found that this plan was carried out by a plurality of persons, including some members of the leadership of the Bosnian Serb Forces.[1325] The Trial Chamber further found that Tolimir became aware of the common plan by the afternoon of 13 July 1995 at the latest, and from then on actively and significantly contributed to its accomplishment.[1326]

437. The Trial Chamber found that Tolimir contributed to the JCE to Murder through the following acts and omissions:

(i) his transmission of a message to Major Malinić, the commander of the MP Battalion of the 65th Protection Regiment on 13 July 1995 regarding measures to be taken for the accommodation of more than 1,000 Bosnian Muslims captured in the Kasaba area, including measures to remove POWs from the road and detain them indoors or in a protected area;[1327]

(ii) his proposal on 13 July 1995, to the VRS Main Staff and personally to Lieutenant Colonel General Gvero, Chief of the Sector for Morale, Guidance, Religious and Legal Affairs, concerning the accommodation of 800 POWs in the agricultural buildings in Sjemeč, noting that the transfer of the POWs had to be done at night and contact with other POWs had to be avoided;[1328]

[1323] Judge Antonetti appends a separate opinion.
[1324] Trial Judgement, paras 1046, 1069, 1071.
[1325] Trial Judgement, para. 1071.
[1326] Trial Judgement, paras 1104, 1115, 1128-1129.
[1327] Trial Judgement, para. 1103. *See also* Trial Judgement, paras 114, 936-947.
[1328] Trial Judgement, para. 1105. *See also* Trial Judgement, paras 83, 949.

(iii) his instruction, at the earliest on 13 July 1995 to Milenko Todorović, Chief of Security of the Eastern Bosnia Corps, to halt all preparations for the accommodation of an anticipated group of 1,000 to 1,300 ABiH soldiers at the Batković Collection Centre;[1329]

(iv) his active involvement in the forcible transfer of Bosnian Muslims in the Žepa enclave "[w]ith his understanding of the murder operation on the ground";[1330]

(v) his transmission of a warning from Mladić to the Drina Corps Command and its subordinate units in the evening of 14 July 1995 about the presence of an unmanned aircraft;[1331]

(vi) his instruction to Major General Miletić, Chief of the Administration for Operations and Training in the Staff Sector of the VRS Main Staff, in the morning of 16 July 1995 to transmit to Colonel Salapura and other officers the message that it was safer to communicate by telegram through the Drina Corps IKM in Krivače;[1332]

(vii) his authorisation, on 16 July 1995, and supervision on 18 July 1995, of the evacuation of 22 wounded ABiH soldiers and local MSF staff from the Bratunac Health Centre in Srebrenica with a view to concealing the killings that had taken place and diverting international attention from the fate of the detained and killed Bosnian Muslim males from Srebrenica; [1333]

(viii) his direction to Popović in the context of a telephone conversation concerning a missing relative of the latter, to "do his job" on 22 July 1995, the day before Popović supervised the killings of Bosnian Muslim men in Bišina by the 10th Sabotage Detachment;[1334]

(ix) his proposal in a report to Lieutenant Colonel Gvero and Major General Miletić, dated 25 July 1995, that the Republika Srpska's State Commission for Exchange of POWs be advised not to agree to a longer procedure for POW exchanges with the ABiH, since Bosnian Muslims could take advantage of the 24 July 1995 Agreement "which they have already tried to do so by bringing up the issue of the prisoners from Srebrenica";[1335]

[1329] Trial Judgement, para. 1103. *See also* Trial Judgement, paras 554, 951.
[1330] Trial Judgement, para. 1108.
[1331] Trial Judgement, para. 1108.
[1332] Trial Judgement, para. 1109.
[1333] Trial Judgement, para. 1110.
[1334] Trial Judgement, para. 1111.
[1335] Trial Judgement, para. 1113.

(x) his lies, in August and September 1995, to families of captured VRS soldiers and Bosnian Muslims about the reason why the VRS did not have enough Bosnian Muslim prisoners for exchanges with VRS soldiers captured by the ABiH;[1336]

(xi) his proposal in February 1997 not to respond to a request from the Dutch Embassy in Sarajevo for assistance in the identification of 239 persons listed as present at the UN compound in Potočari on 13 July 1995;[1337] and

(xii) his failure to protect Bosnian Muslim prisoners from Srebrenica.[1338]

438. The Trial Chamber inferred Tolimir's intent from his actions, as summarised in the paragraph above,[1339] noting in particular his instruction to Todorović,[1340] his proposal to Gvero,[1341] and his contacts with Salapura and Popović on 16 and 22 July 1995, respectively.[1342] The Trial Chamber also took into account Tolimir's position in the VRS to infer his knowledge, intent, and significant contribution to the plan to murder.[1343]

439. Tolimir challenges the Trial Chamber's findings that he was aware of and intended the common plan to murder the able-bodied Bosnian Muslim men from the Srebrenica enclave. Tolimir also challenges the Trial Chamber's findings that he significantly contributed to such a common plan. The Appeals Chamber will deal with each of Tolimir's arguments in turn.

1. Tolimir's awareness and shared intent of the plan to murder

440. Tolimir makes a number of arguments to support his submission that the Trial Chamber erred in finding that he was aware of and intended the plan to murder. These arguments relate to the Trial Chamber's findings on: (i) his position in the VRS; (ii) his presence in Žepa; (iii) his awareness of the separation of Bosnian Muslim males in Potočari; (iv) his contact with certain persons; (v) Prosecution Exhibit 125, a report regarding the procedure for treatment of POWs of 13 July 1995; (vi) his instructions regarding the prisoners due to arrive at Batković; (vii) his awareness of the killings by the 10th Sabotage Detachment on 16 and 23 July 1995; and (viii) his role in concealing the murder operation.

1336 Trial Judgement, para. 1114.
1337 Trial Judgement, para. 1114. *See also* Prosecution Exhibit 2433 (VRS Main Staff document number 98-83/97, Letter from Zdravko Tolimir to Colonel Savčić, Security Administration of the VRS, 27 February 1997).
1338 Trial Judgement, paras 1118-1128.
1339 Trial Judgement, para. 1115. The Trial Chamber considered Tolimir's omission to fulfil his duty to protect the Bosnian Muslim detainees from Srebrenica only as a significant contribution to the JCE to Murder. Trial Judgement, para. 1128.
1340 Trial Judgement, para. 1103.
1341 Trial Judgement, paras 1105-1106.
1342 Trial Judgement, paras 1109, 1111-1112.
1343 Trial Judgement, para. 1109. *See also* Trial Judgement, para. 1112.

(a) Tolimir's position in the VRS

(i) Submissions

441. Tolimir contends that the Trial Chamber erred in fact when it found that he possessed a high level of knowledge of the scale of the murder operation, supported criminal activities his subordinates were engaging in, and coordinated their work.[1344] Tolimir submits that the Trial Chamber's conclusion is primarily based on his position as assistant commander.[1345] Tolimir challenges the Trial Chamber's finding that given his authority, it is inconceivable that he was kept in the dark about the murders at the relevant sites at the time, and that, instead, he tacitly approved the murders.[1346] Tolimir submits that there is no direct evidence that he had direct knowledge of the murder operation and that only knowledge contemporary with the murder operation may be relied on to establish his liability under JCE.[1347] Tolimir argues further that mere communication with VRS members or his position is not sufficient proof of his knowledge and engagement in the murder operation.[1348] Tolimir states that the Trial Chamber "improperly took the alleged reporting system and general statement that no secrets were kept from [him] as an axiom in evaluation of other evidence".[1349] Tolimir submits that there is no evidence that he received reports concerning Srebrenica and the destiny of the POWs.[1350]

442. The Prosecution responds that the Trial Chamber carefully analysed Tolimir's position, his duties, and his communications with his subordinates.[1351] The Prosecution submits that Tolimir's arguments ignore the Trial Chamber's findings concerning the reporting regime in the VRS as well as the principle of command and control that supports the Trial Chamber's finding on Tolimir's knowledge of the murders.[1352]

(ii) Analysis

443. The Trial Chamber found that:

> the Accused, considered as Mladić's "eyes and ears", possessed a high level of knowledge of the scale of the murder operation, supported the criminal activities his subordinates were engaging in, and coordinated their work. Given that the Accused knew where his subordinates were and was in communication with them while the murder operation was underway, the only reasonable

1344 Appeal Brief, para. 366. *See also* Appeal Brief, paras 329, 333.
1345 Appeal Brief, para. 367. *See also* Appeal Brief, para. 391.
1346 Appeal Brief, para. 370; Reply Brief, para. 115.
1347 Appeal Brief, para. 331.
1348 Appeal Brief, paras 331, 367, 373-374, 392; Reply Brief, paras 114-115.
1349 Reply Brief, para. 118.
1350 Reply Brief, para. 118.
1351 Response Brief, para. 265.
1352 Response Brief, para. 266.

> inference to be drawn in the circumstances is that when the Accused was at the VRS Main Staff Headquarters, he was informed about the ongoing murder operation in the Zvornik area.[1353]
>
> [g]iven his authority, it is inconceivable that the Accused was kept in the dark about the murders in the relevant sites at the time; instead he tacitly approved to make these murders happen.[1354]

444. The Appeals Chamber considers that, while high positions or authority in an organisation may indicate that persons are being informed of and approve of what is occurring, this is not necessarily the case. However, as is clear from the Trial Chamber's reasoning quoted above, as well as the numerous factors considered below, the Trial Chamber did not impute Tolimir's knowledge of, and intent *vis-à-vis*, the plan to murder solely from his authority and position or communications with his subordinates. More specifically, the Trial Chamber found that: (i) in the morning of 16 July 1995 Tolimir spoke with Miletić instructing him to pass on to Salapura and other subordinate officers that it was safer to communicate by telegram through the Drina Corps Command IKM in Krivače; (ii) in the evening of 16 July 1995 Tolimir was at the VRS Main Staff Headquarters at Crna Rijeka, where he met with Mladić, Keserović, Miletić, and Obradović, and told Keserović that Beara was in the zone of responsibility of the Drina Corps; and (iii) on 16 July 1995 the killings at the Branjevo Military Farm by members of the 10th Sabotage Detachment were under way.[1355] Given this evidence, which Tolimir does not contest, it was not unreasonable for the Trial Chamber to conclude, taking into account Tolimir's position in the VRS, that when he was at the VRS Main Staff Headquarters on 16 July 1995 he was informed about the ongoing murder operation in the Zvornik area.

445. The Appeals Chamber notes, however, that in addition to this finding the Trial Chamber made broader findings that Tolimir "possessed a high level of knowledge of the scale of the murder operation, supported the criminal activities his subordinates were engaged in, and coordinated their work".[1356] The Trial Chamber drew this conclusion from Tolimir's position and the fact that his subordinates Beara, Popović, and Drago Nikolić were present throughout the Zvornik area between 14 and 16 July 1995 and were actively involved in the murder operation.[1357] As demonstrated by the range of evidence relied on by the Trial Chamber examined below, the Trial Chamber imputed Tolimir's knowledge and intent from a wide array of factors, including his relationship with Mladić, his knowledge of the activities of his subordinates involved in the murder operation, and his own

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[1353] Trial Judgement, para. 1109. *See also* Trial Judgement, para. 1093 for Tolimir's position: "[b]y virtue of his capacity as Assistant Commander and Chief of the Sector for Intelligence and Security of the Main Staff, and against the backdrop of his close relationship with Mladić, the Accused was a coordinating and directing factor – and indeed, a vital link – in the events leading up to the VRS takeover of both enclaves, and the removal of their respective populations".

[1354] Trial Judgement, para. 1112.

[1355] Trial Judgement, para. 1109.

[1356] Trial Judgement, para. 1109.

[1357] Trial Judgement, para. 1109, *citing* Trial Judgement, paras 405-412, 414-434, 439, 441-452, 458, 460-477, 481-503, 1056, 1058-1066.

actions. In light of the evidence considered by the Trial Chamber as a whole, it was not unreasonable for the Trial Chamber to infer a degree of knowledge and intent from Tolimir's position and role. Tolimir's argument is thus dismissed.

(b) Tolimir's presence in Žepa

(i) Submissions

446. Tolimir contends that the Trial Chamber erred in fact when it found that he possessed a high level of knowledge of the scale of the murder operation in Srebrenica and that it did not pay due regard to his involvement at the relevant time in the Žepa operation.[1358] He submits that his presence in the Žepa area indicates his inability to act in relation to the Srebrenica events.[1359] He contends that he was neither in charge of the Srebrenica operation nor in a position to direct or control armed forces deployed there.[1360]

447. The Prosecution submits that Tolimir's arguments warrant summary dismissal since they are undeveloped, lack detailed references, and have no impact on the Trial Judgement.[1361]

(ii) Analysis

448. The Appeals Chamber notes that the Trial Chamber was fully aware of Tolimir's presence in Žepa at the time of the Srebrenica murder operation.[1362] The Appeals Chamber is unconvinced by Tolimir's argument that physical absence from a crime scene is indicative of an individual's inability to possess knowledge of such crimes or act in relation thereto.[1363] It recalls that a participant in a JCE is not required to be physically present when and where the crime is being committed.[1364] Moreover, the Trial Judgement makes a number of references to exhibits which demonstrate that Tolimir was not exclusively involved in operations in Žepa but also in relation to Srebrenica.[1365] Under these circumstances, the Appeals Chamber dismisses Tolimir's arguments in this respect.

[1358] Appeal Brief, paras 338, 366-367; Reply Brief, para. 117.
[1359] Reply Brief, para. 119.
[1360] Reply Brief, para. 119. *See also* Reply Brief, para. 135.
[1361] Response Brief, para. 241.
[1362] *See* Trial Judgement, paras 605, 934, 953.
[1363] *See Boškoski and Tarčulovski* Appeal Judgement, para. 125.
[1364] *Kvočka et al*. Appeal Judgement, para. 112; *Krnojelac* Appeal Judgement, para. 111.
[1365] *See* Trial Judgement, paras 949, 951, 958.

(c) Separation of Bosnian Muslim males in Potočari

(i) Submissions

449. Tolimir contends that the Trial Chamber erred in fact when it found that he was aware of the separation of the Bosnian Muslim males in Potočari as it based its conclusion on Prosecution Exhibit 2069, a Drina Corps Bratunac report of 12 July 1995 drafted by Vujadin Popović, informing the VRS Main Staff and the Sector for Intelligence and Security Affairs about the separation of males at Potočari.[1366] Tolimir suggests that he was not aware of the document at the time and cites the evidence of Prosecution Witness Pećanac who testified that "Tolimir never had this document in his hands otherwise he would put his initials".[1367]

450. The Prosecution responds, at the outset, that there is no specific finding of the Trial Chamber that Tolimir was aware of the separations.[1368] It concedes, however, that such a finding may be implicit in the Trial Chamber's finding that Tolimir was made aware of the situation that transpired on the ground in Srebrenica.[1369] The Prosecution contends that the Trial Chamber analysed in detail the reporting systems of the intelligence and security administrations and based its finding that Tolimir was aware of the situation on the ground not only on Prosecution Exhibit 2069, but also on Prosecution Exhibit 2527 (a Drina Corps report of 12 July 1995 signed by Pavle Golić), Defence Exhibit 64 (a Drina Corps report of 12 July 1995 signed by Tolimir), and evidence of Tolimir's presence in the VRS Main Staff headquarters on 12 July 1995.[1370] The Prosecution submits that Tolimir merely prefers his own interpretation of the evidence instead of explaining why the conviction should not stand on the basis of the remaining evidence, warranting summary dismissal.[1371]

(ii) Analysis

451. The Appeals Chamber notes the Trial Chamber's finding that on 12 July 1995 Tolimir was informed of "the fact that men were being separated" at the UN compound in Potočari.[1372] The Trial Chamber based this finding on three pieces of evidence considered in combination: (i) Prosecution Exhibit 2069, a Drina Corps Bratunac report of 12 July 1995 stamped as received at 7:34 p.m. drafted by Popović, informing the VRS Main Staff and the Sector for Intelligence and Security

1366 Appeal Brief, para. 334, *citing* Prosecution Exhibit 2069 (Drina Corps report of 12 July 1995).
1367 Appeal Brief, para. 334. The Appeals Chamber understands Tolimir to be referring to T. 16 January 2012 p. 18112.
1368 Response Brief, para. 237, n. 855.
1369 Response Brief, paras 237, 239, n. 855.
1370 Response Brief, paras 238-239, nn. 863, 867.
1371 Response Brief, para. 237.
1372 Trial Judgement, para. 1087.

Affairs that "[w]e are separating men from 17-60 years of age and we are not transporting them […] the security organs and the DB/state security/ are working with them"; (ii) Defence Exhibit 64, Tolimir's report of 12 July 1995 stamped as received at 9:50 p.m. to the Command of the Drina Corps Intelligence Department, which stated that "[i]t is equally important to note down the names of all men fit for military service who are being evacuated from the UNPROFOR base in Potočari"; and (iii) the testimony of Witness Butler that the information conveyed in Prosecution Exhibit 2069 was connected to Defence Exhibit 64.[1373]

452. Contrary to Tolimir's contention that there is no evidence that he ever received or read Prosecution Exhibit 2069, the Appeals Chamber finds that the Trial Chamber reasonably relied on Defence Exhibit 64, which was sent approximately two hours after Prosecution Exhibit 2069 was received, as indicative of Tolimir's knowledge of Prosecution Exhibit 2069. In addition, the Trial Chamber's reliance on Prosecution Exhibit 2069 is generally supported by the Trial Chamber's findings that "available information was always presented to the Accused", that "there were no secrets kept from him", and that "Popović would convey technical information to the Accused to assist in facilitating the overall operation".[1374] The evidence of Witness Pećanac cited by Tolimir is solely based on the absence of a signature on the document and is thus insufficient to outweigh the other evidence reasonably relied upon by the Trial Chamber. In view of this, it was reasonable for the Trial Chamber to rely on Prosecution Exhibit 2069 despite the claim that Tolimir never saw the report. For these reasons, the Appeals Chamber dismisses Tolimir's arguments.

(d) Tolimir's contact with subordinates and awareness of the events on the ground in Srebrenica

(i) Submissions

453. Tolimir contends that the Trial Chamber erred in finding that he was made aware of the situation in Srebrenica as it wrongly interpreted Defence Exhibit 64. He submits that the exhibit does not demonstrate that he kept in touch with "all the relevant personnel and was made aware of the situation in Srebrenica" and that the Trial Chamber unreasonably concluded that his remarks stressing "the importance of arresting the Bosnian Muslims [from] the column and of registering the names of the able bodied Bosnian Muslim men in Potočari" conspicuously resembled Mladić's remark in Potočari that the men would be screened to identify war criminals.[1375] Tolimir argues that the only reasonable conclusion that can be drawn from Defence Exhibit 64 on a whole is that he

[1373] Trial Judgement, n. 4266, *citing* Prosecution Exhibit 2069, p. 2 (Drina Corps report of 12 July 1995); T. 8 July 2011 pp. 16379-16380; and Defence Exhibit 64 (VRS Main Staff Intelligence Report (17/897) to the Intelligence and Security Sections from Tolimir dated 12 July 1995).
[1374] Trial Judgement, para. 915 and n. 3616.
[1375] Appeal Brief, para. 335.

wanted to prevent accusations that the attack on Srebrenica was an attack on the civilian population.[1376]

454. The Prosecution responds that the Trial Chamber's findings in relation to Tolimir's awareness of the situation in Srebrenica were not solely based on Defence Exhibit 64 and refers to another report by Tolimir, Prosecution Exhibit 2203, as well as evidence establishing his presence at the VRS Main Staff headquarters on 12 July 1995. The Prosecution submits that Tolimir's arguments on this point should be summarily dismissed as they amount to nothing more than a claim that the Trial Chamber failed to interpret the evidence in a particular manner.[1377]

(ii) Analysis

455. The Appeals Chamber notes that the Trial Chamber analysed Defence Exhibit 64, as well as other evidence related to events on 12 July 1995, and came to the conclusion that the evidence was "insufficient for the Chamber to conclude that the Accused had knowledge of the plan at this time".[1378] Nonetheless, the Trial Chamber found that this evidence demonstrated that Tolimir kept in touch with the relevant personnel and organs and was made aware of the situation that transpired on the ground in Srebrenica.[1379] The Appeals Chamber notes that the Trial Chamber based its determination of Tolimir's awareness of the situation in Srebrenica not only on Defence Exhibit 64, but also on other evidence, such as Prosecution Exhibit 2203, a report from the Drina Corps Command Intelligence Department signed by Tolimir to the VRS Main Staff, dated 12 July 1995 (stating that civilians had set off to the UNPROFOR base in Potočari, while the able-bodied men had formed a column and were trying to get to Tuzla), Defence Exhibit 296, the OTP interview transcript of Prosecution Witness Mile Mičić dated 17 November 2009 and the testimony of Mičić (stating that in the morning of 12 July 1995, Tolimir went to Bijeljina where he met with the personnel of the Security Organ of the Eastern Bosnia Corps). The Appeals Chamber thus finds that Tolimir has failed to demonstrate that no reasonable trial chamber could have relied on Defence Exhibit 64, in conjunction with the other evidence, to find that Tolimir was in contact with the relevant personnel and organs and was made aware of the situation as it transpired on the ground in Srebrenica.

[1376] Appeal Brief, paras 336-337.
[1377] Response Brief, para. 240.
[1378] Trial Judgement, para. 1101.
[1379] Trial Judgement, para. 1101.

(e) Tolimir's knowledge based on Prosecution Exhibit 125

(i) Submissions

456. Tolimir contends that the Trial Chamber erred in basing its allegedly erroneous finding that he was aware of and intended the common plan of the JCE to Murder on Prosecution Exhibit 125, an order by Lieutenant Colonel Milomir Savčić to the Commander of the Military Police Battalion of the 65th Motorised Protection Regiment, dated 13 July 1995, containing certain measures proposed by Tolimir regarding the procedure for treatment of POWs.[1380] Tolimir claims that the Trial Chamber erred in finding Prosecution Exhibit 125 to be authentic.[1381] In the alternative, Tolimir submits that the Trial Chamber erred in its interpretation of the document concluding that it "demonstrates [his] intent to contribute to the JCE to Murder".[1382]

457. Regarding the authenticity of Prosecution Exhibit 125, Tolimir challenges the Trial Chamber's cautious approach in relying on the evidence of Prosecution Witnesses Savčić and Malinić who claimed not to have received or drafted it, arguing that both witnesses provided reliable statements and did not cover up their involvement in the Srebrenica events.[1383] Further, Tolimir submits that a forward command post of the 65th Protection Regiment, which is mentioned in the document, was non-existent, and that the document does not bear the sender's handwritten signature casting serious doubt on the document's authenticity.[1384] Tolimir also points out that Witness Malinić stated that "he did not act on the orders contained in P125 because he never received that order".[1385] Tolimir further submits that the fact that Mladić issued a similar order "in the evening of the same day" is not proof of Prosecution Exhibit 125's authenticity.[1386]

458. Regarding the interpretation of Prosecution Exhibit 125, Tolimir submits that the document refers to measures commonly applied in all armies of the world and cannot serve as a basis for a reasonable trial chamber to infer knowledge of crimes or contributions to a JCE.[1387] Tolimir also submits that there is no evidence from which the Trial Chamber could have concluded that "Mladić and Gvero were timely informed of [Tolimir's] proposed measures by Ex. P125".[1388] Tolimir contends that the Trial Chamber's conclusion is not the only reasonable one that can be drawn from

[1380] Appeal Brief, para. 339.
[1381] Appeal Brief, para. 339.
[1382] Appeal Brief, para. 339.
[1383] Appeal Brief, para. 340.
[1384] Appeal Brief, paras 341-343.
[1385] Appeal Brief, para. 344.
[1386] Appeal Brief, para. 344; Reply Brief, para. 121.
[1387] Appeal Brief, paras 349-350.
[1388] Appeal Brief, para. 351.

the evidence.[1389] Tolimir argues that putting those prisoners inside certain facilities was aimed at guarding them better, as the VRS was under the threat of NATO bombings.[1390]

459. The Prosecution responds that the Trial Chamber analysed in detail Prosecution Exhibit 125 and other evidence in the context of the events taking place on 13 July 1995.[1391] According to the Prosecution, Tolimir repeats arguments unsuccessfully raised at trial, warranting summary dismissal of this part of the appeal.[1392] In relation to the authenticity of Prosecution Exhibit 125, the Prosecution submits that while Tolimir disagrees with the Trial Chamber's approach to the evidence of Savčić and Malinić, he fails to show any error in its assessment of the witnesses' reliability.[1393]

460. Regarding the interpretation of Prosecution Exhibit 125, the Prosecution states that the Trial Chamber's finding that Tolimir knew of the murder operation on 13 July 1995 and actively became involved in it was not based solely on Prosecution Exhibit 125.[1394] The Prosecution submits that the Trial Chamber considered other evidence indicating that instead of going to the camp in Batković the POWs would be executed. Such evidence includes a similar order from Mladić (Prosecution Exhibit 2420) about the control of information about POWs and Tolimir's response to Todorović that all preparations for the arrival of POWs in Batković should stop. The Trial Chamber also found that prisoners who had been at Nova Kasaba on 13 July 1995 were transported to Bratunac or Kravica and held inside buildings or vehicles, indicating that Tolimir's proposals in this respect had been acted upon.[1395] The Prosecution submits that Tolimir fails to show that no reasonable trial chamber could have reached the Trial Chamber's conclusion.[1396] In relation to Tolimir's remaining arguments, the Prosecution states that they ignore other factual findings, are undeveloped, or have no impact on the Judgement, warranting summary dismissal.[1397]

(ii) Analysis

461. The Appeals Chamber will first address the challenge to the Trial Chamber's finding on the authenticity of Prosecution Exhibit 125. The Appeals Chamber notes that the Trial Chamber extensively discussed this document's authenticity.[1398] The Trial Chamber found that the exhibit was part of the Drina Corps collection and that Prosecution Witness Tomasz Blaszczyk gave a

1389 Reply Brief, para. 121.
1390 AT. 12 November 2014 pp. 57-58.
1391 Response Brief, para. 243.
1392 Response Brief, paras 242, 244, 248.
1393 Response Brief, para. 245.
1394 Response Brief, para. 249.
1395 Response Brief, para. 249.
1396 Response Brief, paras 249, 251.
1397 Response Brief, para. 250.
1398 Trial Judgement, paras 937-947.

thorough account of the document's chain of custody.[1399] The Trial Chamber considered the evidence of Malinić and Savčić in relation to the authenticity of Prosecution Exhibit 125 but rejected it.[1400] All of Tolimir's challenges raised on appeal were addressed by the Trial Chamber in its reasoning.[1401] In relation to the testimony of Savčić and Malinić, Tolimir disagrees with the Trial Chamber's assessments but does not demonstrate any error in the conclusions. Similarly, Tolimir's arguments that Prosecution Exhibit 125 lacks a signature and that, according to Malinić, Tolimir never received the document are not determinative of its authenticity. Furthermore, the Trial Chamber duly considered these submissions in its analysis of the document's authenticity.[1402] Tolimir fails to show that the Trial Chamber disregarded these factors in coming to its conclusion. Furthermore, Tolimir's argument that the forward command post of the 65th Protection Regiment, mentioned in the document, never existed was similarly addressed and considered by the Trial Chamber.[1403] Lastly, Tolimir fails to show that the Trial Chamber unreasonably relied on a similarity between Prosecution Exhibit 125 and an order from Mladić as a factor in determining that Prosecution Exhibit 125 is authentic. Based on the foregoing, the Appeals Chamber finds that Tolimir has failed to demonstrate that no reasonable trial chamber could have found Prosecution Exhibit 125 to be authentic. Tolimir's challenges in this respect are hence dismissed.

462. In relation to the Trial Chamber's interpretation of Prosecution Exhibit 125, Tolimir suggests that there is nothing manifestly illegal about its content. Prosecution Exhibit 125 reads in relevant part:

> Assistant Commander for Security and Intelligence Affairs of the GŠVRS proposes the following measures:
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> […]
>
> 3. Commander of the Military Police Battalion shall take measures to remove war prisoners from the main Milići – Zvornik road, place them somewhere indoors or in an area protected from observation from the ground or the air.

463. The Trial Chamber used Prosecution Exhibit 125, which contains measures proposed by Tolimir to the Commander of the Military Police Battalion of the 65th Motorised Protection Regiment regarding the procedure for treatment of POWs, as a factor in determining Tolimir's state of mind.[1404] The Trial Chamber held in this regard that:

> Viewed in conjunction with the on-going events, the only reasonable inference to be drawn from this evidence is that by the time Savčić sent the Accused's message, the Accused knew of the plan

[1399] Trial Judgement, para. 938.
[1400] Trial Judgement, paras 940, 943-946.
[1401] Trial Judgement, paras 937-947.
[1402] Trial Judgement, paras 940, 942.
[1403] Trial Judgement, para. 941.
[1404] Trial Judgement, para. 1103.

> to murder the Bosnian Muslims prisoners from Srebrenica. Furthermore, this document also demonstrates his intent to contribute to the JCE to Murder at this point of time.[1405]

464. In the view of the Appeals Chamber, it was not unreasonable for the Trial Chamber to conclude that, by ordering a military police commander to move the prisoners indoors where they could not be seen, it was possible to infer Tolimir's intent to contribute to the JCE to Murder by ensuring the prisoners would not be detected. The Appeals Chamber further notes that the Trial Chamber did not base its determination of Tolimir's *mens rea* solely on Prosecution Exhibit 125.[1406] The Trial Chamber interpreted Prosecution Exhibit 125 in connection with other findings and evidence, namely: (i) its finding that on the same day on which Exhibit 125 was sent out, "killings of the Bosnian Muslim males were taking place, including the large-scale killings in Cerska Valley and Kravica Warehouse"[1407]; (ii) Prosecution Exhibit 2420, a VRS Main Staff Order for the prevention of leakage of confidential military information in the area of combat operations signed by Mladić and dated 13 July 1995; (iii) the testimony of Witness Todorović, according to which, on 13 July 1995 or later, Tolimir instructed Todorović to halt preparations for accommodating POWs at the Batković Collection Centre.[1408] Reading Prosecution Exhibit 125 together with other evidence, the Appeals Chamber considers that the Trial Chamber reasonably concluded that Prosecution Exhibit 125 was evidence of Tolimir's awareness of and intent to contribute to the plan to murder. The Appeals Chamber further notes that Prosecution Exhibit 125 can only be interpreted as indicative of Tolimir's intent to contribute to the JCE to Murder if Tolimir's knowledge of the existence of the common plan had been established at the time. To establish Tolimir's knowledge of the existence of the plan to murder the Trial Chamber relied on Milenko Todorović's evidence regarding Tolimir's instructions to halt the preparations for the arrival of a large group of POWs at the Batković Collection Centre. The Appeals Chamber finds that Tolimir has failed to demonstrate any error.

(f) Tolimir's instructions regarding prisoners due to arrive at Batković

(i) Submissions

465. Tolimir contends that the Trial Chamber erred in fact in basing its finding that he knew of the plan to murder on the evidence of Witness Todorović that Tolimir told him on 13 July 1995 to stop all preparations for the arrival of 1,000 to 1,300 ABiH soldiers at Batković.[1409] Tolimir challenges the Trial Chamber's finding that he directed Todorović to prepare the Batković camp for

[1405] Trial Judgement, para. 1103.
[1406] *See infra*, paras 474-475.
[1407] Trial Judgement, para. 1103.
[1408] Trial Judgement, para. 1103.
[1409] Appeal Brief, para. 354.

the arrival of 1,000 to 1,300 POWs on 12 July 1995, as at that time, the VRS did not have that many POWs in custody.[1410] Tolimir further highlights that Todorović himself was unsure when and from whom the instructions to prepare the camp was given.[1411] Tolimir also submits that it would not have been possible for Todorović, who was in Bijeljina, to reach Tolimir, who was in Žepa, by telephone on 13 July 1995.[1412] Tolimir further contends that the Trial Chamber erred in law when it failed to give weight to the evidence of Prosecution Witness Novica Simić, on whose behalf Todorović acted and who did not mention this issue in his testimony.[1413]

466. The Prosecution responds that the Trial Chamber relied on Todorović's evidence, as well as other evidence, when concluding that Tolimir knew of the murder operation by 13 July 1995.[1414] The Prosecution submits that Tolimir fails to show any error in the Trial Chamber's analysis of Todorović's evidence.[1415] It further submits that the exact date of Tolimir's instruction to Todorović to stop preparations does not impact the overall findings about Tolimir's knowledge as this knowledge is already sufficiently demonstrated by other evidence.[1416] In relation to Tolimir's argument that the VRS did not have 1,000 POWs on 12 July 1995, the Prosecution submits that this is an undeveloped challenge that fails to address the evidence considered by the Trial Chamber, in particular with regard to the large numbers of POWs taken by the VRS on 12 July 1995.[1417] It also submits that Tolimir's challenge that Todorović could not reach him by telephone on 13 July 1995 is undeveloped, warranting summary dismissal.[1418] With regard to the evidence of Simić, the Prosecution argues that the Trial Chamber evaluated the evidence as a whole, including the testimony of Prosecution Witness Ljubomir Mitrović who testified that "something bad was happening" when the POWs did not arrive at Batković.[1419]

(ii) Analysis

467. Milenko Todorović testified that in the morning of 12 July 1995 in Bijeljina Tolimir told him to prepare the Batković Collection Centre for the arrival of 1,000 to 1,300 ABiH soldiers over the next few days.[1420] When rumours about the expected arrival of a large number of ABiH soldiers at Batković spread among relatives of VRS soldiers held by the ABiH, the relatives started pressuring the relevant VRS commanders demanding an immediate exchange. As a result, at the

[1410] Appeal Brief, para. 355.
[1411] Appeal Brief, para. 356.
[1412] Appeal Brief, paras 357, 359.
[1413] Appeal Brief, para. 358.
[1414] Response Brief, para. 253.
[1415] Response Brief, para. 254.
[1416] Response Brief, para. 255.
[1417] Response Brief, para. 256.
[1418] Response Brief, para. 257.
[1419] Response Brief, para. 258.

behest of his commander, Todorović called Tolimir to ask when the POWs would be arriving to which Tolimir replied that all preparations should stop.[1421] The Trial Chamber eventually concluded that Todorović's evidence "further supported Tolimir's knowledge of the murder operation".[1422]

468. The Appeals Chamber considers Tolimir's arguments about the number of POWs the VRS may have had on 12 July 1995 and the fact that Todorović may not have been in a position to reach Tolimir by telephone on 13 July 1995 to be mere assertions without a demonstrated evidentiary foundation on the record. As such, the Appeals Chamber will not consider them further.

469. In relation to Tolimir's argument that Todorović himself was unsure who gave him the instruction to prepare Batković camp for the arrival of POWs, the Appeals Chamber considers that a trial chamber is best positioned to evaluate matters pertaining to a witness's credibility.[1423] The Appeals Chamber recalls in that regard that the Trial Chamber specifically considered Todorović's initial uncertainty as to who gave him the initial order to prepare the Batković Collection Centre, but also noted that Todorović "later adopted the answer given during his interview with the Prosecution in 2010, at which point he had stated that he was 'sure' that he received the information from" Tolimir.[1424] Tolimir has not demonstrated that the Trial Chamber's conclusion was erroneous such that no reasonable trial chamber could have come to such a conclusion.

470. In relation to the evidence of Simić, Tolimir contends that the Trial Chamber failed to consider his evidence since he did not refer to any communications between himself, Todorović, and Tolimir regarding the arrival of POWs at Batković. However, the fact that a witness did not mention a certain event does not necessarily imply that it did not take place. In any event, Tolimir fails to demonstrate that the Trial Chamber disregarded Simić's evidence or that Simić's evidence undermines the Trial Chamber's conclusion.

471. Concerning the inference of knowledge of the killings drawn by the Trial Chamber from Witness Todorović's evidence, the Appeals Chamber finds that a reasonable trier of fact could have been satisfied that a reasonable interpretation of Todorović's evidence was that Tolimir cancelled all preparations for the arrival of 1,000 to 1,300 ABiH soldiers at the Batković Collection Centre because he became aware of the mass killings of those men. Given the mass killings that were taking place on 13 and 14 July 1995 the Appeals Chamber is convinced that, in fact, the only

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1420 Trial Judgement, paras 554, 931, 1100.
1421 Trial Judgement, paras 951, 1103. *See also* Trial Judgement, para. 555.
1422 Trial Judgement, para. 1103.
1423 *See Kupreškić et al.* Appeal Judgement, para. 32; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63.
1424 Trial Judgement, n. 3709, *citing* T. 12934-12935 (18 April 2011), Prosecution Exhibit 2183 (Interview with Milenko Todorović conducted in Belgrade, dated 2 February 2010), p. 37.

reasonable explanation as to why the arrival of more than 1,000 POWs was cancelled was that they had been killed or were about to be killed.[1425] Tolimir's direction to Todorović, on 13 July 1995, to halt preparations for the arrival of POWs at Batković is one factor establishing Tolimir's knowledge of the mass killings.

(g) Killings by the 10th Sabotage Detachment on 16 and 23 July 1995

(i) Submissions

472. Tolimir contends that the Trial Chamber erred in fact when it concluded that he was informed about killings by the 10th Sabotage Detachment on 16 July 1995 in Branjevo and on 23 July 1995 in Bišina by Salapura and Popović respectively.[1426] He argues that the 10th Sabotage Detachment was an independent VRS unit directly subordinated to Mladić and that the Trial Chamber erred in its conclusions about that unit's relationship with the Intelligence Administration. Tolimir refers to the evidence of Witness Salapura that his first telephone conversation after his return from Belgrade occurred on 19 July 1995.[1427] Tolimir does not dispute that he spoke to Popović on 22 July 1995 but submits that the Trial Chamber interpreted this intercepted conversation (Prosecution Exhibit 765) selectively and out of context. According to Tolimir, no reasonable trial chamber could establish a connection between this conversation and the Bišina killings the following day.[1428]

473. The Prosecution responds that Tolimir fails to show any error in the Trial Chamber's conclusion.[1429] The Prosecution submits that the Trial Chamber analysed the evidence regarding Tolimir's communications with Salapura and Popović in the context of the entirety of the evidence concerning Tolimir's position as well as the events on the ground.[1430]

(ii) Analysis

474. The Appeals Chamber understands Tolimir's argument about his awareness of killings perpetrated on 16 and 23 July 1995 to be relevant to the question of whether he shared the common purpose of the JCE. In this respect, the Appeals Chamber recalls that a participant in a JCE need not know of each crime committed in order to be criminally liable. It suffices that a JCE member knows that crimes are being committed according to a common plan and knowingly participates in that plan in a way that facilitates the commission of a crime or which allows the criminal enterprise to

[1425] Trial Judgement, para. 1103.
[1426] Appeal Brief, para. 370.
[1427] Appeal Brief, para. 371.
[1428] Appeal Brief, para. 372; Reply Brief, para. 129.
[1429] Response Brief, para. 269.

function effectively or efficiently.[1431] Thus, Tolimir's criminal responsibility does not hinge on whether or not he was aware of the specific killings on 16 and 23 July 1995.

475. In any event, the Trial Chamber duly analysed the evidence related to whether Tolimir was informed of these two killing incidents.[1432] The Trial Chamber established that Tolimir communicated with Salapura through Miletić on 16 July 1995 and that he knew where his subordinates were on that day. Based on this, the Trial Chamber found that the only reasonable inference from the evidence was that Tolimir knew about the killings.[1433] The Appeals Chamber sees no error in such a conclusion. Similarly, the Appeals Chamber sees no error in the Trial Chamber's analysis of the intercepted conversation between Tolimir and Popović on 22 July 1995 (Prosecution Exhibit 765) as it pertains to Tolimir's knowledge. In light of other conclusions by the Appeals Chamber under this Ground of Appeal, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to interpret this exhibit, and especially Tolimir's remark "do your job" to Popović contained therein, as support for establishing Tolimir's awareness of the killings on 23 July 1995. Furthermore, in relation to Tolimir's argument that the Trial Chamber erred in its finding on his relationship with the 10th Sabotage Detachment, the Appeals Chamber recalls that it has upheld the Trial Chamber's finding that as head of the Sector for Intelligence and Security of the VRS Main Staff, Tolimir exercised command and control over his assigned administrations, and the officers working in those administrations were his subordinates with respect to matters associated with security or intelligence.[1434] A reasonable trial chamber could, therefore, have considered, as one factor establishing that Tolimir was kept abreast of all the actions of the 10th Sabotage Detachment, Tolimir's superior position over Salapura, who was in charge of the unit's professional monitoring.[1435]

(h) Concealment of the fate of the murdered Bosnian Muslims

(i) Submissions

476. Tolimir contends that the Trial Chamber erred in fact in finding that in July 1995 he diverted ABiH attention from the missing Bosnian Muslim males from Srebrenica and was involved in concealing their fate.[1436] He submits that this conclusion is based on Prosecution Exhibit 494, a

1430 Response Brief, para. 270.
1431 *Kvočka et al.* Appeal Judgement, para. 276.
1432 Trial Judgement, paras 1109, 1111-1112.
1433 Trial Judgement, para. 1112.
1434 *See supra*, para. 298.
1435 *See* Trial Judgement, paras 121, 917.
1436 Appeal Brief, para. 375. The Trial Chamber also considered this factor in finding that Tolimir significantly contributed to the JCE to Murder. *See* Trial Judgement, para. 1164. However, the Appeals Chamber understands

report dated 25 July 1995 from Tolimir to Gvero and Miletić regarding Žepa, where Tolimir makes proposals regarding POW exchanges and mentions the Bosnian Muslims from Srebrenica.[1437] Tolimir contends that the Trial Chamber's finding is speculative and in any event irrelevant as by that time the murder operation was finished.[1438] Tolimir submits that he was only concerned with the implementation of the 24 July 1995 agreement concerning POW exchanges and that this is clear from the exhibit.[1439] Tolimir further contends that the Trial Chamber failed to consider relevant evidence, in particular Defence Exhibit 217, an interview with Zoran Čarkić, wherein Čarkić states that Tolimir was not in favour of exchanging people from Žepa against those from other areas.[1440] Lastly, Tolimir submits that on 25 July 1995 he was not aware of the fate of the Srebrenica POWs.[1441] Tolimir also submits that Prosecution Exhibit 494 has a translation error which led the Trial Chamber to misinterpret the exhibit.[1442]

477. The Prosecution submits that Tolimir merely argues for a different interpretation of the evidence, without identifying an error in the Trial Chamber's findings.[1443]

(ii) Analysis

478. The Trial Chamber relied on Prosecution Exhibit 494 in support of its finding that Tolimir was aware of the situation on the ground in Srebrenica and tried to conceal the crimes, thereby intending them.[1444] In Prosecution Exhibit 494, Tolimir is recorded as proposing as follows: "Advise State Commission for War Prisoners and SRK commission not to agree to longer procedure considering that Muslims could take advantage of the signed agreement under the pressure from Sarajevo, which they have already tried to do so by bringing up the issue of prisoners from Srebrenica".[1445]

479. The Appeals Chamber considers that even if Tolimir was primarily concerned with the situation in Žepa when drafting the document admitted as Prosecution Exhibit 494, that, in itself, does not mean that he did not use the opportunity to further the common goal by concealing the crimes committed. Especially in light of other findings in relation to his state of mind, Tolimir fails

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Tolimir's arguments to be focused on the Trial Chamber's reliance on this factor in establishing his awareness of and intent *vis-à-vis* the plan to murder.

1437 Appeal Brief, para. 376.
1438 Appeal Brief, para. 376.
1439 Appeal Brief, para. 376.
1440 Appeal Brief, para. 378.
1441 Appeal Brief, para. 379.
1442 Appeal Brief, para. 377. Tolimir suggests that the translation incorrectly refers to the word "advantage" instead of "abuse" when stating that "the Bosnian Muslims could take advantage of the 24 July 1995 agreement under pressure from Sarajevo".
1443 Response Brief, paras 272-273.
1444 Trial Judgement, paras 1113, 1164.
1445 Prosecution Exhibit 494 (report from Tolimir to Gvero and Miletić dated 25 July 1995), p. 1.

to demonstrate that no reasonable trial chamber could have found that he was also concerned with diverting attention from the missing Bosnian Muslim males from Srebrenica. The Appeals Chamber further finds that Tolimir's argument that the Trial Chamber's findings in this regard are irrelevant because the murder operation was finished by 25 July 1995 is misconceived. The Trial Chamber inferred from, *inter alia*, Prosecution Exhibit 494 that Tolimir intended to conceal crimes, which may indicate that he shared the common plan. Concealment of crimes necessarily occurs after the crimes have been committed and may constitute evidence of a shared purpose to commit crimes.[1446] Furthermore, the Trial Chamber found that Tolimir's acts of concealment of the crimes already began during the murder operation.[1447] Bearing this in mind, the Appeals Chamber finds that Tolimir has not shown that no reasonable trial chamber could infer his intent from Prosecution Exhibit 494.

480. In relation to Defence Exhibit 217, Tolimir merely points to Čarkić's opinion evidence about Tolimir's view in relation to POWs, which was based on his impression and interpretations of Tolimir's words during a conversation he had with him. The Appeals Chamber considers that it was reasonable for the Trial Chamber to accord limited weight, if any, to such opinion evidence.

481. The Appeals Chamber notes, however, that the Trial Chamber did not cite or analyse Defence Exhibit 217 at all in the Trial Judgement. The Appeals Chamber also notes that this exhibit contains references to Tolimir's alleged instruction to Zoran Čarkić, during the Žepa evacuation process, that "nothing should happen to the people", as relayed by Čarkić in an interview with a Tribunal investigator.[1448] That evidence, on its face, was relevant to Tolimir's mental state *vis-à-vis* the Žepa Bosnian Muslims, but could also be deemed indicative of his intentions *vis-à-vis* Bosnian Muslim civilians in general. The Appeals Chamber recalls, in this respect, the Trial Chamber extensively relied on Prosecution Exhibit 488 – which contained a proposal by Tolimir to attack and destroy "groups of fleeing Muslim refugees" as a way to expedite the fall of Žepa -- to infer Tolimir's genocidal intent as a whole.[1449] In that sense, the Appeals Chamber is of the opinion that Defence Exhibit 217 should have been considered and analysed by the Trial Chamber in connection with Tolimir's intent *vis-à-vis* the JCE to Murder, as Tolimir argues. Since the Trial Chamber considered Zoran Čarkić's testimony reliable on multiple occasions,[1450] its omission to analyse Čarkić's reference to an instruction by Tolimir that nothing should happen to the civilians was an error, which allows the Appeals Chamber to assess the importance of this exhibit.[1451] In the view of

[1446] *See Đorđević* Appeal Judgement, para. 378.
[1447] Trial Judgement, para. 1164.
[1448] *See* Defence Exhibit 217 (Transcript of interview with Zoran Čarkić), p. 14.
[1449] Prosecution Exhibit 488 (PLPBR report type-signed Gen Maj Zdravko Tolimir, dated 21 July 1995).
[1450] *See*, *e.g.*, Trial Judgement, paras 949, 1105.
[1451] *Perišić* Appeal Judgement, para. 93.

the Appeals Chamber, this exhibit on its face undermines the inference that Tolimir shared the intent of members to the JCE to Murder and intended the killings of Bosnian Muslim detainees from Srebrenica. In that sense, it should have been taken into account by the Trial Chamber in its analysis of Tolimir's *mens rea* and evaluated against the other available evidence on the record that supported the inference of guilt. In light of the other evidence on which the Trial Chamber based its factual findings, however, the Appeals Chamber does not find this error of the Trial Chamber to be of a nature to invalidate the Trial Judgement.

482. The Appeals Chamber also considers that, even if Tolimir's suggested translation of Prosecution Exhibit 494 were more accurate, this would not change the meaning of the document. In any event, the Appeals Chamber considers that this translation matter has no impact on the Trial Chamber's findings.

(i) Conclusion

483. Based on the foregoing, the Appeals Chamber dismisses Tolimir's challenges to the Trial Chamber's finding that Tolimir was aware of and shared the intent of other JCE members to murder the Bosnian Muslim able-bodied men from the Srebrenica enclave.

2. Tolimir's contributions to the plan to murder

484. Tolimir makes a number of arguments in support of his submission that the Trial Chamber erred in finding that he significantly contributed to the plan to murder. These relate to the Trial Chamber's findings on: (i) Defence Exhibit 49, a proposal sent on 13 July 1995 by Tolimir to Gvero on the accommodation of POWs; (ii) the purpose of Tolimir's warning regarding an unmanned aircraft on 14 July 1995; (iii) the aim of Tolimir's instruction of 16 July 1995 to evacuate the wounded and MSF staff from the Bratunac Health Centre; and (iv) Tolimir's duty to protect POWs.

(a) The Trial Chamber's assessment of Defence Exhibit 49

(i) Submissions

485. Tolimir contends that the Trial Chamber erroneously assessed Defence Exhibit 49, a proposal he sent on 13 July 1995 to Gvero regarding the accommodation of POWs from Srebrenica.[1452] First, Tolimir submits that the Trial Chamber erroneously quoted the document's content in relation to qualifying certain buildings in Sjemeč as "agricultural buildings".[1453] Second,

[1452] Appeal Brief, para. 360.
[1453] Appeal Brief, para. 361.

he challenges the Trial Chamber's conclusions that 800 POWs would have been beyond the ability of the Rogatica Brigade, that no one got the task to prepare the buildings for the POWs' arrival, and that there was no farm work to be done.[1454] Tolimir contends that the Trial Chamber disregarded the fact that Defence Exhibit 49 was only a proposal to house POWs in Sjemeč and, as such, there was no need to take any preparatory measures until the proposal was accepted.[1455] Tolimir also submits that the Trial Chamber erred in finding that Defence Exhibit 49 comports with his instructions that preparations of the Batković camp for the arrival of POWs should stop.[1456] Third, Tolimir submits that the Trial Chamber failed to consider the inference from Defence Exhibit 49 that he was not in charge of the treatment of the POWs and had no knowledge about the murder operation.[1457]

486. The Prosecution responds that Tolimir fails to show any error in the Trial Chamber's analysis of Defence Exhibit 49, repeats his arguments made at trial, and that his arguments, in any event, do not impact his conviction.[1458] The Prosecution requests the Appeals Chamber to summarily dismiss this part of Tolimir's appeal.[1459] First, the Prosecution submits that it was reasonable to qualify the buildings in Sjemeč as "agricultural buildings," but that any error in such a qualification is irrelevant and has no impact on the Trial Judgement.[1460] Second, the Prosecution states that Tolimir's argument that Defence Exhibit 49 was a mere proposal ignores evidence about additional forces needed to deal with such a large number of POWs.[1461] Third, the Prosecution submits that the Trial Chamber considered Defence Exhibit 49 in the context of all the evidence and reasonably found that his proposal in this exhibit was similar to Tolimir's previous proposal to keep the prisoners out of view.[1462]

(ii) Analysis

487. The Trial Chamber relied on Defence Exhibit 49 in finding that Tolimir was looking for a way to place the prisoners from Srebrenica out of sight in furtherance of the common plan to murder.[1463] Defence Exhibit 49 states in relevant parts:

> If you are unable to find adequate accommodation for all prisoners of war from Srebrenica, we hereby inform you that space with /unknown word/ has been arranged for 800 prisoners of war in the 1st Podrinje Light Infantry Brigade in Sjemeč.

1454 Appeal Brief, para. 362; AT. 12 November 2014 p. 59.
1455 Appeal Brief, para. 362; AT. 12 November 2014 p. 59.
1456 Appeal Brief, para. 362.
1457 Appeal Brief, para. 363; Reply Brief, para. 127.
1458 Response Brief, paras 259, 261-262.
1459 Response Brief, para. 259.
1460 Response Brief, para. 260.
1461 Response Brief, para. 262.
1462 Response Brief, para. 263.
1463 Trial Judgement, para. 1106. *See also* Trial Judgement, para. 949.

> The [Rogatica Brigade] can guard them with its own forces, and would use them for agricultural work […].
>
> If you send them to this sector, this must be done at night […] It would be best if this is a new group which has not been in contact with the other prisoners of war.[1464]

488. In relation to Tolimir's first argument, the Appeals Chamber considers that any error by the Trial Chamber in qualifying the buildings in Sjemeč as "agricultural buildings" is insignificant and does not impact Tolimir's conviction.[1465] Accordingly, Tolimir's argument is dismissed.

489. With respect to Tolimir's argument that the Trial Chamber erred in concluding that 800 POWs would have been beyond the ability of the Rogatica Brigade and that no one was tasked with preparing the buildings for the POWs' arrival and that there was no farm work to be done, the Appeals Chamber considers that Tolimir does not demonstrate why the Trial Chamber's conclusion was unreasonable. The only argument he puts forward is that the Trial Chamber ignored that Defence Exhibit 49 only represented a proposal by Tolimir and that was the reason why no arrangements for the arrival of the POWs were made. However, the Trial Chamber considered Defence Exhibit 49 in light of Tolimir's other actions on the same day, *i.e.*, 13 July 1995, namely: (i) Tolimir's proposal to the Commander of the Military Police Battalion of the 65th Motorised Protection Regiment, contained in Prosecution Exhibit 125, to remove POWs from the Milići-Zvornik road and out of sight; and (ii) Tolimir's communications with Todorović about POWs due to arrive at the Batković Collection Centre and, particularly, his instruction to stop preparations for the arrival of 1,000 to 1,300 POWs at Batković.[1466] The Appeals Chamber has dismissed Tolimir's challenges to the Trial Chamber's analysis of this evidence above.[1467] In light of those conclusions, the Appeals Chamber considers that Tolimir has failed to demonstrate that no reasonable trial chamber could have found that Defence Exhibit 49 constituted an action of Tolimir which aimed to further and, in fact, furthered the common plan.

490. As to Tolimir's argument that the Trial Chamber failed to consider the possible inference from Defence Exhibit 49 that Tolimir was not in charge of the treatment of the POWs and had no knowledge of the murder operation, the Appeals Chamber notes that the Trial Chamber's interpretation of Defence Exhibit 49 was not based solely on its text. It was also based on other actions taken by Tolimir on the same day, notably his prior proposal to detain the Bosnian Muslim prisoners captured in the Nova Kasaba area indoors and his instruction to stop preparations at the

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1464 Defence Exhibit 49 (message from Tolimir to Gvero, dated 13 July 1995), p. 1.

1465 In any event, the Appeals Chamber notes that the Trial Chamber based its understanding of Defence Exhibit 49 as referring to agricultural buildings on the evidence of Zoran Čarkić, the Chief of the Department for Intelligence and Security Affairs. *See* Trial Judgement, para. 949, n. 3781.

1466 Trial Judgement, para. 1106.

1467 *See supra*, paras 461-463, 468-470.

Batković camp for the arrival of 1,000 to 1,300 prisoners.[1468] Tolimir fails to demonstrate that the Trial Chamber's interpretation of Defence Exhibit 49 – made in light of its other findings on Tolimir's conduct on the same day – was one that no reasonable trial chamber could have made. Tolimir merely presents his preferred interpretation of the exhibit.

(b) Tolimir's warning regarding an unmanned aircraft

(i) Submissions

491. Tolimir contends that the Trial Chamber erred in fact when it concluded that his warnings on 14 July 1995 concerning an unmanned aircraft (Prosecution Exhibit 128) were sent so that "the murder operation would be carried out without being detected".[1469] Tolimir submits that at the time there were preparations ongoing for the Žepa operation and there was a constant threat of NATO bombings. He submits that the only reasonable interpretation of Prosecution Exhibit 128 is that the warning was issued to protect VRS troops.[1470] According to Tolimir, at the very least, the Trial Chamber's finding could not have been made beyond reasonable doubt.[1471]

492. The Prosecution responds that Tolimir merely repeats unsuccessful arguments made at trial without showing any reversible error.[1472]

(ii) Analysis

493. The Trial Chamber inferred from Prosecution Exhibit 128 that Tolimir's warning regarding an unmanned aircraft was sent so as to hide the murder operation.[1473] Prosecution Exhibit 128 states in relevant part:

> There is an unmanned aerial vehicle in our airspace reconnoitring the area and jamming our radio communications. It has been here since 0500 hours and has probably recorded certain features and movements. The following measures therefore need to be taken:
>
> 1. Warn all units and reinforcements in the /?combat area/ that an unmanned aerial vehicle is in our airspace recording features and troop movements.

494. The Appeals Chamber understands Tolimir's argument to be that the Trial Chamber's interpretation of his warning relating to the unmanned aircraft is not a reasonable conclusion, let alone the only reasonable conclusion. The Appeals Chamber will first address whether a reasonable trial chamber could consider Tolimir's warning as a contribution to the murder operation. Bearing

[1468] Trial Judgement, para. 1106.
[1469] Appeal Brief, para. 365.
[1470] Appeal Brief, para. 365.
[1471] Reply Brief, para. 132.
[1472] Response Brief, para. 274.
[1473] Trial Judgement, para. 1108. *See also* Trial Judgement, para. 953.

in mind the Trial Chamber's findings about the crimes committed in Srebrenica and the existence of a JCE to Murder the Bosnian Muslim males – findings which have not been specifically challenged by Tolimir – the Appeals Chamber considers that a reasonable trial chamber could conclude that a reasonable interpretation of the evidence was that his warning was issued so as to ensure in some way the continuation of the murder operation without detection, and was thus a contribution to the operation. The Appeals Chamber recalls that the contribution only needs to be "directed to the furthering of the common plan", which implies that the acts could also have served other purposes.[1474] Accordingly, the Appeals Chamber dismisses Tolimir's argument in this respect.

495. The Appeals Chamber now turns to the question of whether a reasonable trial chamber could find that this was the *only* reasonable interpretation of Tolimir's warning. On the face of Prosecution Exhibit 128 alone, another reasonable interpretation of Tolimir's warning is that he intended to pass on a message about an unmanned aircraft so as to protect VRS troops from any possible attack. However, the Appeals Chamber is cognisant that in order to properly assess Tolimir's mental state (and thereby his intended purpose in sending the message), all evidence of his actions must be considered so as to be able to draw the only reasonable inference.[1475] The Appeals Chamber has upheld other Trial Chamber findings challenged by Tolimir under this Ground of Appeal in relation to his mental state.[1476] In view of those findings, the Appeals Chamber considers that Tolimir has failed to show that no reasonable trial chamber could have found that the only reasonable interpretation of Tolimir's warning was that he issued it so as to ensure the undetected continuation of the murder operation. Accordingly, the Appeals Chamber dismisses Tolimir's arguments in this respect.

(c) Evacuation of 22 wounded Bosnian Muslim prisoners and MSF staff

(i) Submissions

496. Tolimir contends that the Trial Chamber erred in fact when it concluded that he supervised the evacuation of 22 wounded Bosnian Muslim prisoners and local MSF staff in Srebrenica on 18 July 1995 with a view to diverting attention and pressure from the international community about the Bosnian Muslim males from Srebrenica. Tolimir submits that the Trial Chamber's

1474 *See Tadić* Appeal Judgement, para. 229.
1475 *Vasiljević* Appeal Judgement, para. 120.
1476 *See supra*, paras 461-463. *See also* Trial Judgement, paras 1103-1104. The Appeals Chamber notes that Tolimir challenged the authenticity of Prosecution Exhibit 125 and the Trial Chamber's finding that it showed his *mens rea*, but did not challenge the Trial Chamber's finding that his actions as contained in the exhibit indicate his contributions to the JCE to Murder. *See also supra*, para. 487.

conclusion is wholly speculative, not based on evidence, and indicative of the Trial Chamber acting on an assumption of guilt.[1477]

497. The Prosecution responds that Tolimir fails to demonstrate that no reasonable trial chamber could reach such a conclusion and points to supporting evidence cited by the Trial Chamber.[1478]

(ii) Analysis

498. The Trial Chamber concluded that Tolimir's instruction to Janković of 16 July 1995 to evacuate the 22 wounded Bosnian Muslim prisoners and MSF staff from the Bratunac Health Centre – an operation carried out on 18 July 1995 and organised by the ICRC – was aimed at diverting attention from the fate of the Bosnian Muslim males in Srebrenica.[1479] The Trial Chamber specifically found that:

> The only reasonable inference the Majority can draw based on this evidence is that [Tolimir] supervised the evacuation of the wounded and the local MSF staff in Srebrenica with a view to divert attention and pressure from international community about the Bosnian Muslim males from Srebrenica, the majority of whom had been executed by now. This again notably corresponds to his competence—to obscure the VRS's real goals.[1480]

499. The Appeals Chamber understands Tolimir's argument to be that the Trial Chamber's interpretation of his actions *vis-à-vis* the wounded and local MSF staff is not a reasonable conclusion, let alone the only reasonable conclusion to be drawn from this evidence. The Appeals Chamber notes that in support of its conclusion, the Trial Chamber cited the fact that most of the killings of Bosnian Muslim detainees by the VRS had been completed at that time, as well as evidence that rumours had started circulating in the international community about those executions, and that the Drina Corps subordinate intelligence and security organs were preventing entry of international and domestic media into the RS and controlling its movement.[1481] In view of these circumstances, the Appeals Chamber considers that a reasonable trial chamber could find that a reasonable interpretation of Tolimir's actions with regard to the evacuations is that he took them so as to divert attention and pressure from the international community about the Bosnian Muslim males from Srebrenica, thus contributing to the JCE to Murder. However, that interpretation has to be the only reasonable conclusion so as to accord with the standard of making findings beyond a reasonable doubt.[1482] The Appeals Chamber considers that based solely on the evidence about Tolimir's actions with regard to the evacuations, a reasonable trial chamber could find that Tolimir merely intended to assist the wounded and local MSF staff to leave the area of ongoing military

[1477] Appeal Brief, para. 369.
[1478] Response Brief, para. 268.
[1479] Trial Judgement, para. 1110.
[1480] Trial Judgement, para. 1110.
[1481] Trial Judgement, para. 1110.

hostilities. However, as noted above, in order to properly assess Tolimir's intentions, all of his actions must be considered so as to be able to properly draw the only reasonable inference. The Appeals Chamber has upheld a number of other Trial Chamber findings which indicate that Tolimir shared the intent of the JCE to Murder.[1483] In light of these Trial Chamber findings, the Appeals Chamber finds that Tolimir has failed to show that no reasonable trial chamber could find that the only reasonable interpretation of his actions in relation to the evacuation was that he acted so as to divert attention and pressure from the international community about the Bosnian Muslim males from Srebrenica. Contrary to Tolimir's contention, this evidence was only one element the Trial Chamber considered in evaluating all the evidence related to Tolimir's actions at the relevant time and – based on the combination of the different factual findings – it drew an inference of guilt because it was the only reasonable inference that could be drawn from the combination of circumstances.[1484]

(d) Duty to protect POWs

(i) Submissions

500. Tolimir contends that the Trial Chamber erred in fact and law when it found that he failed to exercise his duty to protect the Bosnian Muslim POWs from Srebrenica.[1485] He submits that the Trial Chamber erroneously focused on evidence relating to POW *exchanges*, rather than that relating to the *treatment* of POWs.[1486] Tolimir argues that the responsibility for the proper treatment of the POWs lay with the units detaining them, not with an officer of the Main Staff.[1487] In that regard, Tolimir submits that the Trial Chamber confused state responsibility with individual responsibility, pointing out that the Trial Chamber did not find that he had custody of the POWs from Srebrenica.[1488] He further argues that the evidence shows that he always insisted on the proper treatment of POWs.[1489]

501. Tolimir challenges the Trial Chamber's finding that he willingly assisted in the JCE to Murder by "issuing orders conflicting with the rules".[1490] Tolimir submits that the exhibits relied on by the Trial Chamber to reach this conclusion have no connection to Srebrenica as they relate to Žepa and were in any event not intended to subject POWs to ill-treatment. According to Tolimir,

1482 *See Čelebići* Appeal Judgement, paras 305, 458; *Ntagerura et al.* Appeal Judgement, para. 306.
1483 *See supra*, paras 461-463, 487.
1484 *See* Trial Judgement, paras 922-1006, 1099-1129. *See also Čelebići* Appeal Judgement, para. 458.
1485 Appeal Brief, para. 382.
1486 Appeal Brief, para. 384.
1487 Appeal Brief, paras 384, 396.
1488 Appeal Brief, paras 394-395.
1489 Appeal Brief, para. 384.
1490 Appeal Brief, para. 385.

these exhibits' references to "not registering POWs" must be seen in light of the fact that Serb POWs had also not been registered. He also points out that the proposal not to register the POWs was limited in time until the "cessation of fire".[1491] Tolimir submits that in relation to other POWs he gave clear instructions for their registration.[1492] In addition, Tolimir points to evidence demonstrating that he directed his subordinates to comply with the rules governing the treatment of POWs.[1493]

502. Tolimir challenges the Trial Chamber's finding that because he was tasked with dealing with POW exchanges throughout the conflict, he had a duty to protect these prisoners.[1494] Tolimir submits that the instructions at the time required the first superior organ to monitor professionalism, legality, and correctness of the work. According to Tolimir, these first superior organs were Beara and Salapura, not him.[1495]

503. The Prosecution responds that Tolimir ignores the Trial Chamber's findings regarding his responsibilities and that, as an agent of the detaining power and somebody who was tasked with dealing with POW exchanges, he had a duty to protect the Bosnian Muslim prisoners.[1496] The Prosecution submits that the Trial Chamber's finding that Tolimir issued "orders conflicting with the rules" must be read in context and be understood as finding that Tolimir knew what constituted appropriate treatment of POWs.[1497] In relation to the challenge that Tolimir was not "with custody" of the Srebrenica POWs, the Prosecution submits that Tolimir fails to refer to a specific finding of the Trial Chamber in this respect.[1498] The Prosecution submits that the Trial Chamber reasonably found that Tolimir had the material ability to protect the POWs, given that he could have directed his subordinates to comply with rules and confronted Mladić about the fate of the POWs.[1499] In that respect, the Prosecution submits that Tolimir's argument about his directions to his subordinates prior to the murder operation ignores the weightier evidence considered by the Trial Chamber which showed his illegal directions once the murder operation was under way.[1500]

(ii) Analysis

504. The Appeals Chamber will first analyse whether the Trial Chamber erred in finding that Tolimir had a duty to protect the Srebrenica POWs. The Appeals Chamber recalls that "Geneva

[1491] Appeal Brief, para. 385.
[1492] Appeal Brief, para. 385.
[1493] Appeal Brief, para. 389.
[1494] Appeal Brief, para. 386.
[1495] Appeal Brief, para. 387.
[1496] Response Brief, paras 275, 280. *See also* Response Brief, para. 277.
[1497] Response Brief, para. 278.
[1498] Response Brief, para. 280.
[1499] Response Brief, para. 283.

Convention III invests all agents of a Detaining Power *into whose custody* prisoners of war have come with the obligation to protect them by reason of their position as agents of that Detaining Power".[1501] In order for an individual to be shown to have custody of a POW, the Appeals Chamber considers that a person must be legally vested with responsibility for the care, supervision, and control of the POW.[1502] The Trial Chamber found that Tolimir had a duty to protect the POWs by reason of his being a member of the VRS as well as being "tasked with dealing with POW exchanges throughout the conflict".[1503] In the view of the Appeals Chamber, the function of dealing with POW exchanges does not necessarily entail that Tolimir had custody of the Srebrenica POWs, at least not prior to any planned exchanges. However, the Trial Chamber also found that Tolimir was a member of the VRS Main Staff[1504] and Chief of the Sector for Intelligence and Security Affairs and Assistant Commander, responsible for control and management of that entire sector.[1505] This included the Security Administration, headed by Beara, which was tasked with "interrogating and securing POWs by using the MP".[1506] The Trial Chamber found that the MP "escorted and guarded […] POWs" and "would interrogate POWs".[1507]

505. Tolimir contends that the Srebrenica POWs were in the custody of the units that captured them and that he was not a commander of those units nor responsible for those units. The Trial Chamber found that many VRS members, including the MP, were involved in the detention of the Srebrenica POWs.[1508] Beara – Tolimir's direct subordinate – was integrally involved in the arrangements regarding the prisoners.[1509] The Appeals Chamber notes the Trial Chamber's finding that militarily all VRS members were subordinate exclusively to the commander of the Main Staff and not to all VRS Main Staff members.[1510] Similarly, the MP units attached to the Corps or Brigades were directly subordinated to their respective commanders.[1511] However, it also notes that the MP units were professionally controlled by the security organs at "all command levels".[1512] Furthermore, the Trial Chamber found that the subordinate security organs were required to keep their superior security organs informed of developments and send reports, and that the superior

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1500 Response Brief, para. 284.
1501 *Mrkšić and Šljivančanin* Appeal Judgement, para. 73 (emphasis added).
1502 *Mrkšić and Šljivančanin* Appeal Judgement, para. 71 ("The fundamental principle enshrined in Geneva Convention III […] entails the obligation of each agent *in charge* of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to") (emphasis added).
1503 Trial Judgement, para. 1124.
1504 Trial Judgement, para. 83.
1505 Trial Judgement, para. 914.
1506 Trial Judgement, para. 106.
1507 Trial Judgement, para. 110.
1508 Trial Judgement, sections V. C., V. D.
1509 Trial Judgement, paras 320, 338, 342, 364-366, 402-403, 405, 408, 423, 442.
1510 Trial Judgement, paras 82, 90-91, 93, n. 265.
1511 Trial Judgement, paras 109, 111.
1512 Trial Judgement, para. 111.

security organs monitored the lawfulness of the conduct of the subordinate organs.[1513] The Trial Chamber acknowledged this when discussing Tolimir's material ability to protect the POWs.[1514] Moreover, as Assistant Commander to Mladić, Tolimir was militarily directly subordinate to Mladić and thus superior to all VRS members under this rank.

506. The Appeals Chamber is not persuaded by Tolimir's argument that Defence Exhibit 49, a proposal sent on 13 July 1995 from Tolimir to Gvero regarding the accommodation of POWs from Srebrenica, indicates that he was not responsible for POWs. Defence Exhibit 49 must be interpreted in light of other actions taken by Tolimir on the same day, notably his prior proposal to detain the Bosnian Muslim prisoners captured in the Nova Kasaba area indoors and his instruction to stop preparations at the Batković camp for the arrival of 1,000-1,300 prisoners.[1515] Similarly, Tolimir's contention that the Trial Chamber erred in relying on evidence related to the Žepa POWs when making findings on Tolimir assisting the JCE to Murder misinterprets the Trial Chamber's reasoning. The Trial Chamber referred to such evidence in support of its general finding that both Tolimir and his immediate subordinate Beara were "well cognizant of procedures relating to POWs and what constituted criminal conduct during the conflict" and issued instructions incompatible with those procedures to relevant organs.[1516] The Appeals Chamber is convinced that it was reasonable for the Trial Chamber to consider all these actions – as well as his overall professional responsibility for the actions of the security organs tasked with securing POWs – in concluding that Tolimir had legal custody of the POWs and thus a duty to protect them. Tolimir's submissions are therefore dismissed.

(e) Conclusion

507. In light of the above, the Appeals Chamber dismisses Tolimir's challenges to the Trial Chamber's finding that he significantly contributed to the JCE to Murder.

3. Conclusion

508. Based on the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 16.

[1513] Trial Judgement, para. 108.
[1514] Trial Judgement, para. 1125.
[1515] *See supra*, para. 490.
[1516] Trial Judgement, para. 1123.

F. Tolimir's liability under the third category of JCE

1. Foreseeable Opportunistic Killings and Persecutory Acts (Ground of Appeal 17)

509. The Trial Chamber found Tolimir criminally responsible, pursuant to JCE III, for persecutory acts, including the opportunistic killing of one Bosnian Muslim man in Potočari, as a natural and foreseeable consequence of the JCE to Forcibly Remove.[1517] The Trial Chamber also found Tolimir criminally responsible, pursuant to JCE III, for persecutory acts, including opportunistic killings of Bosnian Muslim men and boys in Bratunac town, in and around the Vuk Karadžić School (limited to the killings that occurred in the night of 13 July 1995 and in the early morning of 14 July 1995), at the Kravica Supermarket and at the Petkovci School, as natural and foreseeable consequences of the JCE to Murder.[1518]

(a) Submissions

510. Tolimir argues that the Trial Chamber erred in fact and law in making the above findings as there was no evidence that he was in possession of information that enabled him to reasonably foresee that opportunistic killings and persecutory acts would be committed.[1519] Tolimir contends that the "mere existence of the JCE" is insufficient for a finding that he foresaw the possibility of the commission of persecutory acts and opportunistic killings outside the scope of the agreed JCE. He claims that foreseeability must be assessed on the basis of the information in possession of the accused at the relevant time[1520] and that the Trial Chamber failed to identify information that was known to him beyond a reasonable doubt.[1521] Tolimir further argues that the Trial Chamber failed to consider evidence of his acts at the time, in particular Defence Exhibits 41 and 85, Tolimir's military reports of 9 July 1995, which he claims are in clear opposition to the Trial Chamber's finding that persecutory acts and opportunistic killings were foreseeable to him and that he willingly took the risk that such crimes would be committed.[1522] With respect to the Trial Chamber's finding that he was aware that the VRS seised control of Potočari early on 12 July 1995, Tolimir submits that this information was a matter of common knowledge.[1523] However, he argues that there is no evidence that he received actual information about the situation in Potočari, Bratunac, or Zvornik or that he was a participant in the events on the ground. In this respect,

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1517 Trial Judgement, para. 1144. *See* Indictment, para. 22.1(b).
1518 Trial Judgement, para. 1144. *See* Indictment, paras 22.2(b)-(d) (concerning opportunistic killings in Bratunac town), 22.3 (concerning killings at the Kravica Supermarket), 22.4 (concerning killings at the Petkovci School).
1519 Appeal Brief, paras 398, 410, where Tolimir refers to the persecutory acts and opportunistic killings charged in paragraphs 22.2(b)-(d), 22.3 and 22.4 of the Indictment. The Appeals Chamber notes that Tolimir occasionally uses the term "feasible" where "foreseeable" is apparently intended.
1520 Appeal Brief, para. 401.
1521 Appeal Brief, paras 407, 410.
1522 Appeal Brief, para. 408.

Tolimir argues that there is no reasonable basis to conclude that the crimes were foreseeable to him as he was involved in the Žepa operation at the time and that there were a number of other high ranking officers of the VRS on the ground in Potočari.[1524]

511. Tolimir further asserts that there is no evidence to suggest he shared the intent to make life unbearable for the Bosnian Muslims in the Srebrenica enclave with a view to their removal. However, in his view, even if such a fact were proven, it would not be sufficient to establish that it would be foreseeable to him that crimes would be committed.[1525] Tolimir further argues that the Trial Chamber failed to provide reasons in support of its finding concerning his awareness of the "ethnic hatred" between Bosnian Muslims and Serbs.[1526] With respect to the Trial Chamber's finding that he used derogatory language, Tolimir submits that the Trial Chamber failed to consider whether terms such as "Turks" and "*balijas*" were used in order to encourage or promote crimes against the Bosnian Muslim population or had such an effect.[1527] In his view, the Trial Chamber also failed to consider other evidence of instances where Tolimir used the term "Muslims" and relied on documents not drafted by him or evidence which described the acts of others.[1528]

512. The Prosecution responds that the Trial Chamber did not rely on the "mere existence of the JCE" to establish foreseeability of the crime, but rather evaluated Tolimir's foreseeability based on his knowledge of the two JCEs and his contribution to their common purpose, as well as the surrounding contextual circumstances.[1529] The Prosecution also argues that the Trial Chamber did not need to find that he had specific knowledge of the killings for them to be foreseeable to him.[1530]

513. As to Tolimir's remaining arguments, including the issue concerning his shared intent, the Prosecution submits that he fails to address the totality of evidence considered by the Trial Chamber to establish foreseeability and to show any error.[1531] The Prosecution asserts that the Trial Chamber reasonably relied on the evidence of Tolimir's use of derogatory terms to determine whether he accepted the risk of crimes outside the common purpose occurring. It argues that Tolimir misunderstands the elements of JCE III in arguing that the Trial Chamber failed to consider whether his use of derogatory language encouraged crimes.[1532] The Prosecution further submits that Tolimir

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[1523] Appeal Brief, para. 402.
[1524] Appeal Brief, paras 402, 409.
[1525] Appeal Brief, para. 403. *See also* Reply Brief, para. 139.
[1526] Appeal Brief, paras 404-405.
[1527] Appeal Brief, para. 406. *See also* Reply Brief, para. 140.
[1528] Appeal Brief, para. 406, *citing* Trial Judgement, n. 4432.
[1529] Response Brief, para. 289.
[1530] Response Brief, para. 289.
[1531] Response Brief, paras 290-291, *citing* Appeal Brief, paras 403-409. In reply, Tolimir argues that he has addressed all the Trial Chamber's findings and referred to arguments under other grounds of appeal when necessary. Reply Brief, para. 138.
[1532] Response Brief, para. 292.

fails to articulate how the Trial Chamber failed to provide a reasoned opinion concerning the ethnic hatred between Bosnian Serbs and Muslims, noting that findings to this effect can be found throughout the Trial Judgement.[1533] With respect to Defence Exhibits 41 and 85, the Prosecution notes that the Trial Chamber did consider them in evaluating Tolimir's acts and conduct for the purpose of establishing his role in the crimes.[1534]

(b) Analysis

514. Tolimir argues that the Trial Chamber erred by failing to base its conclusion about his ability to foresee that crimes occurring outside the scopes of the JCE to Murder and the JCE to Forcibly Remove ("JCEs") would be committed on the actual information available to him at the relevant time. The Appeals Chamber recalls that the *mens rea* standard for JCE III is the possibility that a crime committed outside the agreed common plan is reasonably foreseeable to the accused[1535] and that the accused willingly took the risk that such a crime might occur by continuing to participate in the agreed common plan.[1536] The Appeals Chamber is not persuaded that the Trial Chamber erred in its application of this test. The Trial Chamber first determined that persecutory acts and opportunistic killings were natural and foreseeable consequences of the two JCEs.[1537] It then specifically analysed whether Tolimir knew that these crimes might be perpetrated by a member of the JCEs and willingly accepted the risk that such crimes would be committed by assessing his knowledge of the events on the ground and continued participation in the JCEs.[1538] Such an approach is consistent with the accepted JCE III *mens rea* test.[1539] Tolimir's argument thus fails.

515. With respect to Tolimir's argument that there is no evidence of his intent to make life unbearable for the Bosnian Muslims in the Srebrenica enclave so as to expedite their removal, the Appeals Chamber notes that the Trial Chamber considered a broad range of evidence concerning Tolimir's acts and conduct in concluding that he participated in the JCE to Forcibly Remove and shared the intent with other members of the JCE to effectuate the forcible removal.[1540] The Appeals Chamber further notes the Trial Chamber's assessment that, by March 1995 through to the fall of the Srebrenica and Žepa enclaves, Tolimir participated in the restrictions of convoys entering the

[1533] Response Brief, para. 293.
[1534] Response Brief, para. 293.
[1535] *Šainović et al.* Appeal Judgement, para. 1081; *Karadžić* JCE III Decision, paras 15, 18.
[1536] *Šainović et al.* Appeal Judgement, para. 1078; *Kvočka et al.* Appeal Judgement, para. 83, *citing Tadić* Appeal Judgement, paras 204, 220, 228, *Vasiljević* Appeal Judgement, para. 99.
[1537] Trial Judgement, paras 1136-1138.
[1538] Trial Judgement, paras 1139-1143.
[1539] *See Popović et al.* Appeal Judgement, paras 1431-1432, 1701; *Kvočka et al.* Appeal Judgement, para. 83; *Blaškić* Appeal Judgement, para. 33; *Tadić* Appeal Judgement, para. 228.
[1540] *See* Trial Judgement, paras 1076-1095.

enclaves,[1541] actively contributed to the aim of limiting UNPROFOR's ability to carry out its mandate and facilitated the VRS's takeover of the enclaves by keeping UNPROFOR at bay and making false claims concerning the VRS intentions.[1542] In addition, it found that on 9 July 1995, on the eve of a further advance on Srebrenica, Tolimir passed on Karadžić's instruction to the Drina Corps and Gvero and Krstić, personally, to take over the town of Srebrenica itself.[1543] Other evidence considered by the Trial Chamber indicated that Tolimir received information from his subordinates about the VRS actions in Srebrenica in the days following its takeover.[1544] In light of this evidence, the Appeals Chamber finds that a reasonable trial chamber could have concluded that Tolimir fully shared the intent to make life unbearable for Bosnian Muslims with a view to removing them from the two enclaves. With respect to Tolimir's submission that his sharing such intent would not in itself be sufficient for him to foresee that other crimes might be committed, the Appeals Chamber notes that the Trial Chamber did not base its finding in this respect only on Tolimir's shared intent, but on a wide range of evidence, discussed below.[1545] Accordingly, this argument is dismissed.

516. For reasons explained elsewhere in this Judgement, the Appeals Chamber dismisses Tolimir's argument that there is no evidence that he received information about the situation in Potočari, Bratunac, or Zvornik.[1546] Similarly, the Appeals Chamber dismisses Tolimir's argument that the Trial Chamber failed to identify information that was known to him beyond a reasonable doubt. Given his knowledge about the situation in Potočari, Bratunac, or Zvornik, his agreement to participate in the JCE to Murder on 13 July 1995 and his continued participation in the JCE to Murder and the JCE to Forcibly Remove, it is immaterial whether Tolimir was a direct participant in the events on the ground in those locations.

1541 Trial Judgement, para. 1079, where the Trial Chamber refers to Tolimir's direct involvement in the request process concerning UNPROFOR convoys to the enclaves and was considered as the VRS Main Staff's liaison with UNPROFOR. *See further* Trial Judgement, para. 194, referring to evidence of Tolimir having particular insight into convoy requests by virtue of being on the Central Joint Commission (which discussed what types of goods, and which quantities, could be shipped) and of Tolimir expressing disapproval concerning several requests. *See also* Trial Judgement, paras 920, 922.

1542 Trial Judgement, para. 1084, where the Trial Chamber refers to evidence of Tolimir, in contact with UNPROFOR, denying VRS intentions, stalling communications on UNPROFOR concerns regarding VRS military activities and deflecting attention to the ABiH. *See also* Trial Judgement, paras 925-930 concerning evidence of Tolimir's actions in this respect on 8-12 July 1995.

1543 Trial Judgement, para. 1084, where the Trial Chamber refers to evidence of Tolimir on 9 July 1995 falsely stating to UNPROFOR's General Janvier that the VRS would do "everything […] to calm down the situation and to find a reasonable solution" just before forwarding to the Drina Corps and Gvero and Krstić, personally, an urgent telegram (Defence Exhibit 41, *see infra*, para. 518) stating that Karadžić had agreed that operations would continue to take over Srebrenica. *See also* Trial Judgement, para. 929.

1544 Trial Judgement, paras 1088-1092. *See also* Trial Judgement, paras 607 (referring to evidence of Tolimir stating at a meeting in Bokšanica that Srebrenica had fallen, that it was Žepa's turn, and that he offered the population to "get on the buses and leave"), 953-955 (referring to several telegrams issued by Tolimir on 14 July 1995, the date when the VRS attack on the Žepa enclave began, in order to organise the attack).

1545 *See infra*, para. 520.

1546 *See supra*, paras 400-404, 451.

517. Tolimir further submits that the Trial Chamber failed to consider evidence of his acts at the time, in particular Defence Exhibits 41 and 85, Tolimir's military reports of 9 July 1995 to Gvero and Krstić personally, with a copy sent to Karadžić as President of Republika Srpska, and the Drina Corps Command, respectively.[1547] He argues that these reports stand in opposition to the Trial Chamber's finding concerning the foreseeability of the persecutory acts and opportunistic killings.[1548] Defence Exhibit 85 is a report of 9 July 1995 time-marked 20:25 from Tolimir to, *inter alia*, Krstić personally and the VRS Main Staff. In the report, Tolimir cites a message from UNPROFOR General Nicolai expressing that UNPROFOR considers the proximity of VRS units one kilometre from the town of Srebrenica as "an attack on a safe area" and that UNPROFOR will be compelled to defend the safe area with all means at their disposal. Tolimir reports that he replied to Nicolai that he was verifying the information about the situation in Srebrenica and that UNPROFOR forces were safe. Tolimir also requested that battlefield situation reports be sent to him every hour so that he could communicate with UNPROFOR, noting that this would "enable you to continue to work according to plan". Tolimir further stated that particular attention should be paid to protecting members of UNPROFOR and the civilian population. He signs off by congratulating the recipients on their "results".[1549] Defence Exhibit 41 is a military report of 9 July 1995 time-marked 23:50 hours from Tolimir to Gvero and Krstić personally, with a copy sent to Karadžić as President of Republika Srpska. Tolimir refers to Karadžić being satisfied with the results of combat operations around Srebrenica stating that he has agreed that operations should continue to take over Srebrenica, disarm "Muslim terrorist gangs" and complete the demilitarisation of the Srebrenica enclave. In addition to his report, Tolimir conveyed Karadžić's order to all units that "full protection" be ensured to UNPROFOR members and the Muslim civilian population during coming operations, including a specific instruction to treat civilians and prisoners of war in accordance with the Geneva Conventions of 1949.[1550]

518. The Appeals Chamber notes that while the Trial Chamber did not refer to Defence Exhibits 41 and 85 when analysing Tolimir's JCE III *mens rea*, it did, however, consider both of these exhibits in its assessment of Tolimir's acts on 9 July 1995.[1551] In particular, the Trial Chamber noted the statements in both Defence Exhibits 41 and 85 that UNPROFOR members and the

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1547 *See supra*, para. 510. *See also* Appeal Brief, para. 408.
1548 *See supra*, para. 510. *See also* Appeal Brief, para. 408.
1549 Defence Exhibit 85 (military report of the Drina Corps Command, Intelligence and Security Department, No. 17/884, from Major-General Zdravko Tolimir to Drina Corps Command, General Krstić personally, copied to Tolimir for information, 9 July 1995).
1550 Defence Exhibit 41 (military report of the Main Staff of the VRS, No. 12/46-501/95, from Major-General Zdravko Tolimir to Drina Corps IKM, Generals Gvero and Krstić personally, copied to President of the Republika Srpska, for information, 9 July 1995).
1551 Trial Judgement, paras 928-929.

civilian population were to be protected.[1552] Moreover, the Trial Chamber specifically discussed Defence Exhibit 41 in the context of its findings on Tolimir's participation in the JCE to Forcibly Remove.[1553] The Trial Chamber also considered Tolimir's argument, made at trial, that the statement in Defence Exhibit 41 about the need to protect the civilian population supported his position that he could not be "attributed the intent necessary for an attack on the civilian population".[1554] In assessing Defence Exhibit 41 the Trial Chamber noted that although Tolimir reported Karadžić's order to Gvero and Krstić that "all combat units participating in combat operations around Srebrenica [were to] offer maximum protection and safety to all UNPROFOR members and the civilian population,"[1555] other evidence on the record demonstrated that this order was not followed. The Trial Chamber found that on the day the order was forwarded the VRS attacked several UNPROFOR observation posts; in the days following the VRS launched a full attack on the Srebrenica enclave, including shelling the DutchBat Bravo Company in Srebrenica, where Bosnian Muslim civilians had gathered for protection; the VRS also attacked the road on which the column of Bosnian Muslim civilians were travelling in an effort to reach the UN compound for shelter. Further, the VRS attacked Potočari itself, causing civilian casualties.[1556] The Trial Chamber concluded that Tolimir's reporting of Karadžić's order to ensure the protection of UNPROFOR and civilian population could have no bearing on Tolimir's state of mind given his knowledge of the actual events on the ground.[1557] Tolimir's assertion that the Trial Chamber failed to consider Defence Exhibits 41 and 85 is, therefore, without merit.

519. To the extent that Tolimir argues that the Trial Chamber erred in law by not *explicitly* referring to Defence Exhibits 41 and 85 in its discussion of whether persecutory acts and opportunistic killings were foreseeable to him, the Appeals Chamber recalls that a trial chamber, in making factual findings, is entitled to rely on the evidence it finds most convincing.[1558] A trial chamber is not obliged to refer to every witness testimony or evidence on the record as long as there is no indication that it completely disregarded evidence which is clearly relevant.[1559] Furthermore, a trial chamber's failure to refer explicitly to specific evidence on the record will not amount to an error of law, where there is significant contrary evidence on the record.[1560]

[1552] Trial Judgement, paras 928-929.
[1553] Trial Judgement, para. 1085.
[1554] Trial Judgement, para. 1085, *citing* Tolimir's Closing Arguments, T. 22 August 2012 p. 19497.
[1555] Trial Judgement, para. 1085.
[1556] Trial Judgement, para. 1085. *See also* Trial Judgement, paras 220-225, 230, 233, 235.
[1557] Trial Judgement, para. 1085.
[1558] *Perišić* Appeal Judgement, para. 92; *Kvočka et al.* Appeal Judgement, para. 23.
[1559] *Popović et al.* Appeal Judgement, paras 306, 340; *Đorđević* Appeal Judgement, para. 864, n. 2527; *Perišić* Appeal Judgement, para. 92; *Limaj et al.* Appeal Judgement, para. 86. *See also supra*, para. 53.
[1560] *Perišić* Appeal Judgement, para. 95. *See Kvočka et al.* Appeal Judgement, paras 23, 483-484, 487, 582-583. *See also Simba* Appeal Judgement, paras 143, 152, 155. *See further supra*, para. 53.

520. In the present case, the Trial Chamber based its analysis of whether Tolimir could foresee that persecutory acts and opportunistic killings could be committed as a consequence the JCE to Forcibly Remove, and willingly took that risk, on a significant body of evidence, including: (i) the highly volatile situation on the ground as a result of the build-up of ethnic tensions since the start of the war in Bosnia in 1992; (ii) the "triumphant and euphoric frenzy" among the Bosnian Serb Forces following the capture of Srebrenica; (iii) the goal set out in Directive 7 to ethnically separate the Serbs from the Muslims; (iv) Tolimir's knowledge that 25,000-30,000 Bosnian Muslim civilians were gathered at the UN compound as a result of the attack against Srebrenica; (v) Tolimir's knowledge that VRS forces had seised control of Potočari on 12 July 1995 and that the UN compound was overrun with Bosnian Serb Forces; and (vi) Tolimir's awareness of the ethnic hatred between Bosnian Muslims and Serbs.[1561] Furthermore, based on Tolimir's agreement with the plan to murder and his active involvement in the JCE to Murder from the afternoon of 13 July 1995, the Trial Chamber found that the killings at the Vuk Karadžić School, which occurred during the night of 13 July 1995 and the morning of 14 July 1995 were foreseeable to him.[1562] Likewise, the Trial Chamber found that the killings in Bratunac town, at the Kravica Supermarket and the Petkovci School, which the Trial Chamber found were committed after Tolimir joined the JCE to Murder, were foreseeable to Tolimir.[1563] In light of the considerable amount of evidence underlying these findings, the Appeals Chamber finds no basis for Tolimir's assertion that the Trial Chamber erred in law by not explicitly referring to Defence Exhibits 41 and 85 in the context of making the relevant findings with respect to Tolimir's *mens rea* under JCE III.

521. Concerning Tolimir's argument that the Trial Chamber erred in law by failing to provide a reasoned opinion as to the alleged ethnic hatred between Bosnian Muslims and Serbs, the Appeals Chamber notes that the Trial Chamber considered evidence on this issue on several occasions,[1564] including instances where Tolimir himself had made derogatory remarks concerning Bosnian Muslims,[1565] and found – in the relevant section of the Trial Judgement – that "the ethnic tensions that had built up from the start of the war in Bosnia in 1992 had resulted in a highly volatile situation on the ground".[1566] Tolimir's submission in this respect is therefore dismissed as without merit.

522. As to Tolimir's related argument that the Trial Chamber failed to consider whether terms such as "Turks" and "*balijas*" were used to encourage or promote crimes or had such effects, the

[1561] Trial Judgement, paras 1136, 1140.
[1562] Trial Judgement, paras 1104, 1137, 1142. *See* Indictment, para. 22.2(d).
[1563] Trial Judgement, para. 1143. *See* Indictment, paras 22.2(b)-(c), 22.3, 22.4.
[1564] Trial Judgement, paras 257, 275, 312-313, 320, 362, 378, 522, 675, 790, 971, 1023, 1044-1045, 1136, 1168-1169.
[1565] Trial Judgement, paras 971, 1168 and n. 4432.
[1566] Trial Judgement, para. 1136.

Appeals Chamber recalls that in determining JCE III liability, the Trial Chamber was required to consider whether the possibility of crimes was sufficiently substantial to have been foreseeable to Tolimir.[1567] Contrary to Tolimir's argument, the Trial Chamber was not required to consider whether the use of such terms was intended to encourage or promote crimes or had that effect. In considering the foreseeability of an act being committed with the required special intent for the crime of persecution, "the general attitude of the alleged perpetrator as demonstrated by his behaviour" is a relevant factor to determining the *mens rea* of the accused.[1568] The use of derogatory language in relation to a particular group is one aspect of an accused's behaviour that may be taken into account, together with other evidence, to determine the existence of discriminatory intent.[1569] Hence, Tolimir's knowledge of the use of such language by Bosnian Serb Forces, including his own usage and that of his immediate subordinates, was relevant to the Trial Chamber's consideration – amongst other evidence – of whether Tolimir could foresee that persecutory acts outside the common purpose might be committed. The Appeals Chamber also notes that the Trial Chamber was aware of the evidence showing instances where Tolimir used the term "Muslims" instead.[1570] Moreover, such evidence has no impact on the above-stated conclusion. The fact that Tolimir may have also used the term "Muslims" is insufficient to demonstrate that the use of derogatory terms to refer to Muslims was not indicative of discriminatory intent against the Bosnian Muslim population. This argument is, therefore, dismissed.

(c) Conclusion

523. In light of the foregoing, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 17.

1567 *See supra*, para. 514.

1568 *Kvočka et al.* Appeal Judgement, para. 460.

1569 *See Kvočka et al.* Appeal Judgement, para. 461 (finding that the Trial Chamber correctly found that the use of the word "*balijas*" by the accused Zoran Žigić towards Muslim detainees in the Omarska, Keraterm and Trnopolje camps supported its conclusion that he had discriminatory intent in maltreating the detainees). *Cf. Popović et al.* Appeal Judgement, para. 713. *See also Naletilić and Martinović* Appeal Judgement, para. 138 (finding that the Trial Chamber did not disregard the evidence that the accused addressed the victims in derogatory terms), which suggests that disregarding such evidence would have constituted an error by the Trial Chamber. The Appeals Chamber in that case nonetheless upheld the finding of the Trial Chamber that the evidence of discriminatory intent was insufficient (*see Naletilić and Martinović* Appeal Judgement, para. 140).

1570 Trial Judgement, n. 868 (*citing* Defence Exhibit 41, Report dated 9 July 1995, from Tolimir to Karadžić, Gvero and Krstić, concerning agreement for continuation of operations for the takeover of Srebrenica), paras 950 (*citing* Prosecution Exhibit 123, Report, dated 13 July 1995, from Tolimir to, *inter alia*, Mladić and the VRS Main Staff Sector for Intelligence and Security, concerning the situation in the Žepa enclave), 997 (*citing* Prosecution Exhibit 122, Report, dated 29 July 1995, from Tolimir to, *inter alia*, Krstić and Pećanac, concerning negotiations with the ABiH regarding a ceasefire in Žepa).

2. Whether the killings of the three Žepa leaders were reasonably foreseeable to Tolimir (Ground of Appeal 18)

524. The Trial Chamber, by majority, found Tolimir criminally responsible, pursuant to JCE III, for the killing of the three Žepa leaders – Avdo Palić, Amir Imamović and Mehmed Hajrić.[1571] The Trial Chamber found that it was reasonably foreseeable to Tolimir that these three men might be killed by Bosnian Serb Forces in the implementation of the JCE to Forcibly Remove as it relates to Žepa.[1572] The Trial Chamber found that as Tolimir had the duty to ensure the safety of prisoners it "could not have escaped his attention" that his subordinates in the security organs were involved in the mistreatment of prisoners and the killings that occurred during the JCE to Murder. Accordingly, it was satisfied that the possibility that the three Žepa leaders would be killed was sufficiently substantial so as to be reasonably foreseeable to Tolimir.[1573] It further found that as a member of the JCE to Forcibly Remove since its inception in March 1995, Tolimir willingly accepted the risk that these killings could occur by participating in the JCE to Forcibly Remove with the awareness that these crimes were a possible consequence of its implementation.[1574]

(a) Submissions

525. Tolimir submits that the Trial Chamber erred in making the above findings.[1575] He argues that the Trial Chamber erred in concluding that the killings were committed as a consequence of the implementation of the JCE to Forcibly Remove because they were committed outside the time frame of the JCE as charged in the Indictment and after the implementation of the JCE was concluded, with the completion of the population transfer to Kladanj.[1576] Tolimir also avers that the mere fact that the three men were prominent figures in the Žepa Muslim community does not support the Trial Chamber's finding that their killings were foreseeable, that Tolimir willingly took the risk that they might be killed, or that they were killed because of their respective positions.[1577] Tolimir adds that the Trial Chamber erred in relying on Žepa Imam Ramiz Dumanjić's testimony that he feared for his life should the VRS find out that he was an imam as a basis for the above conclusion.[1578]

[1571] Trial Judgement, para. 1154. The Trial Chamber found that the killings of the three Žepa leaders constituted genocide under Count 1, murder as a war crime under Count 5, and persecution as a crime against humanity under Count 6, for which Tolimir was found responsible pursuant to JCE III. Trial Judgement, paras 1173, 1185, 1191.
[1572] Trial Judgement, paras 1150-1151.
[1573] Trial Judgement, para. 1151.
[1574] Trial Judgement, paras 1151, 1154.
[1575] Appeal Brief, paras 412-413. Tolimir does not specify if he is alleging an error of fact or law.
[1576] Appeal Brief, paras 414, 425; Reply Brief, para. 141.
[1577] Appeal Brief, para. 416.
[1578] Appeal Brief, para. 417.

526. Tolimir further contends that the Trial Chamber erred in fact in finding that the security organs of the VRS were under his "professional command".[1579] He avers that the mere involvement of security organs in relation to the three men does not reasonably support the finding that those killings were foreseeable to him.[1580] Tolimir further argues that the Trial Chamber based its findings on the erroneous conclusion that he had a duty to "ensure [the] safety of these prisoners", submitting that he had no specific duty to monitor or control their treatment or the treatment of POWs generally and notes instances referred to by the Trial Chamber where "[w]hen Tolimir was in contact with POWs" he had given clear instructions concerning their treatment in accordance with international humanitarian law.[1581] Tolimir adds that the Trial Chamber mistakenly equated involvement in exchanges of POWs (in which he was involved) with responsibility for their treatment, when it was the particular units in whose custody they were that were responsible for the prisoners' treatment.[1582] In this context, Tolimir submits that the Trial Chamber failed to consider Prosecution Exhibit 2609/2610, a Main Staff Order of 13 January 1995 signed by Mladić.[1583]

527. Tolimir also submits that the Trial Chamber erred in concluding that the fact that an ICRC team visited the Rasadnik Prison and registered Imamović and Hajrić had no bearing on his ability to foresee that these men could be killed, and failed to explain why this would not support the contention that he did not willingly take the risk that the men might be killed.[1584] Tolimir also argues that the Trial Chamber did not properly consider the circumstances surrounding the disappearances and deaths of Imamović and Hajrić, submitting that there is no evidence about the perpetrators or when, why or how they were killed.[1585] Tolimir further submits that the Trial Chamber failed to consider evidence that in his view supports the conclusion that Imamović and Hajrić escaped from the Rasadnik Prison.[1586]

528. In addition, Tolimir argues that the Trial Chamber erred by basing its finding that Palić's killing was foreseeable to him on their alleged personal dealings with each other, Beara's involvement in Palić's transfer to a military prison on 10 August 1995, and on Palić being taken from that prison by Pećanac on 4 or 5 September 1995.[1587] Tolimir claims that the Trial Chamber erred in finding that Pećanac was his subordinate and in rejecting his argument that he was at the

[1579] Appeal Brief, para. 418.
[1580] Appeal Brief, para. 418.
[1581] Appeal Brief, para. 419, *citing* Prosecution Exhibit 1434 (report sent by the Command of the 1st Podringje Light Infantry Brigade/Organ for BOP/Security and Intelligence to the VRS Main Staff Sector For Intelligence and Security Administration, 30 July 1995), p. 5 and other evidence referred to in paragraph 1122 of the Trial Judgement. *See also* Appeal Brief, para. 420.
[1582] Appeal Brief, para. 419.
[1583] Appeal Brief, para. 419, *citing* Prosecution Exhibit 2610 (Main Staff Order of 13 January 1995), para. 7.
[1584] Appeal Brief, para. 420, *citing* Trial Judgement, para. 1152.
[1585] Appeal Brief, para. 421.
[1586] Appeal Brief, para. 421.
[1587] Appeal Brief, para. 423.

Grahovo and Glamoč front from 30 July 1995.[1588] Furthermore, he argues that the Trial Chamber failed to provide reasons as to why the alleged contact between himself and Palić was relevant for the determination of his foreseeability.[1589] Tolimir additionally submits that the Trial Chamber failed to consider evidence that contradicts its finding that the killings were foreseeable to him or to note that there was no evidence that he received information about Palić after 30 July 1995.[1590] Furthermore, since Tolimir was told that Palić had "better accommodation", he submits that the only reasonable conclusion was that he believed Palić was alive and in a safe place.[1591]

529. The Prosecution responds that the Trial Chamber reasonably found that the killings of the three Žepa leaders were foreseeable to Tolimir because he knew that sending Bosnian Serb Forces from the Srebrenica area, where murders had already occurred, to Žepa meant that similar killings might also occur, and because Tolimir and his subordinates were involved in the seizure and detention of the three men.[1592] The Prosecution submits that Tolimir's challenges should be rejected since they fail to address the Trial Chamber's findings, merely cite favourable evidence without addressing contrary findings by the Trial Chamber, mischaracterise the Trial Chamber's findings, and repeat unsuccessful trial arguments without showing an error.[1593]

530. The Prosecution argues that Hajrić and Imamović were both removed from the Rasadnik Prison in mid-August 1995 and never seen alive again, implying that the Trial Chamber found that they were murdered in August 1995, which coincides with the JCE time period.[1594] In its view, the fact that Palić's murder on or after 5 September 1995 falls outside the time frame of the JCE does not undermine Tolimir's conviction because Bosnian Serb Forces targeted him during the implementation of the JCE to Forcibly Remove.[1595] The Prosecution further submits that Tolimir failed to prevent Bosnian Serb Forces from murdering Palić during the implementation of the JCE to Forcibly Remove although such an occurrence was foreseeable to him, and thereby willingly accepted the risks associated with the JCE's implementation.[1596] The Prosecution contends that considering the killings in Srebrenica, and Tolimir's awareness of these events, it was reasonable for the Trial Chamber to find that it was foreseeable to Tolimir that similar killings were likely to occur during the subsequent transfer operation in Žepa, especially as several units from Srebrenica

[1588] Appeal Brief, paras 423, 426. *See also* Appeal Brief, para. 419.
[1589] Appeal Brief, paras 423-424.
[1590] Appeal Brief, paras 425 (the Appeals Chamber understands Tolimir's reference to Prosecution Exhibit 434 to be a reference to Prosecution Exhibit 1434 (report sent by the Command of the 1st Podringje Light Infantry Brigade/Organ for BOP/Security and Intelligence to the VRS Main Staff Sector For Intelligence and Security Administration, 30 July 1995 - and Čarkić's evidence), 427. *See also* Appeal Brief, para. 428.
[1591] Appeal Brief, paras 425, 428; Reply Brief, para. 143.
[1592] Response Brief, para. 295.
[1593] Response Brief, para. 296.
[1594] Response Brief, para. 297. *See* Trial Judgement, para. 1148.
[1595] Response Brief, para. 298.
[1596] Response Brief, paras 297, 299.

were directly involved in the Žepa operation.[1597] The Prosecution argues that Tolimir misunderstands the Trial Chamber's findings regarding his duty to protect prisoners. In its view, the Trial Chamber found, in light of Tolimir's responsibilities regarding POWs, that he was aware of the crimes of murder and mistreatment committed by Bosnian Serb Forces in Srebrenica, which, in turn, meant that further killings in Žepa were foreseeable to Tolimir.[1598] In this context, it submits that Prosecution Exhibit 2609/2610, of which the Trial Chamber was aware, further demonstrates Tolimir's authority with respect to POWs.[1599] The Prosecution adds that the murder of the three Žepa leaders was a natural and foreseeable consequence in part due to their prominent positions.[1600]

531. The Prosecution further responds that the ICRC's involvement with Hajrić and Imamović at the Rasadnik Prison does not undermine the Trial Chamber's finding that their deaths were foreseeable to Tolimir since Tolimir ignores that the two prisoners were beaten and mistreated around the time of an ICRC visit and that the ICRC representatives were lied to regarding their alleged escape.[1601] Moreover, the Prosecution contends that the active involvement of Tolimir and his subordinates in the capture and detention of the three Žepa leaders further reaffirms the Trial Chamber's findings that their deaths were reasonably foreseeable to him.[1602] The Prosecution argues that Tolimir's instructions to protect POWs were disregarded in practice.[1603] The Prosecution avers that the information available to Tolimir by 30 July 1995 was sufficient on its own to make the killings of these men foreseeable to him and that the Trial Chamber reasonably rejected Tolimir's submission that his absence from the Žepa region after this date precluded responsibility for these murders pursuant to JCE III.[1604]

532. Tolimir replies that the Prosecution's submission that the Žepa killings were likely to occur as units from Srebrenica were involved in the Žepa operation is erroneous and speculative. He claims that, at the time of the murders, those units were no longer present in the Žepa area.[1605]

(b) Analysis

533. With regard to Tolimir's submission that the killings of the three Žepa leaders were committed outside the time frame of the JCE to Forcibly Remove, the Appeals Chamber notes that the Indictment charged Tolimir with knowingly participating as a member in the JCE to Forcibly

[1597] Response Brief, paras 301-302.
[1598] Response Brief, paras 303-304.
[1599] Response Brief, para. 303.
[1600] Response Brief, para. 305.
[1601] Response Brief, para. 307. *See also* Response Brief, para. 308.
[1602] Response Brief, paras 309-310, 312-313.
[1603] Response Brief, para. 311.
[1604] Response Brief, paras 313-314. *See also* Response Brief, para. 302.
[1605] Reply Brief, para. 146.

Remove the Muslim populations of Srebrenica and Žepa "from about 8 March 1995 through the end of August".[1606] The Trial Chamber found that the actual transportation of Žepa's Muslim population out of the enclave started on 25 July 1995 and lasted until 27 July 1995 and that by 2 August 1995, the village of Žepa was empty.[1607] The Trial Chamber found that "it was foreseeable that these killings might be committed by Bosnian Serb Forces in the completion of the JCE to forcibly remove the Bosnian Muslim population from Žepa".[1608] The Appeals Chamber finds no error in the Trial Chamber's approach. It recalls that under the third category of JCE an accused may incur liability for crimes which were not part of the common plan if it was foreseeable that the extended crimes might be committed by one or more of the persons used by him or by another JCE member in order to carry out the *actus reus* of the crimes forming part of the common plan.[1609]

534. The Trial Chamber found that the circumstances of the arrest, detention, and murder of the three Žepa leaders demonstrated that the killings were done by Bosnian Serb Forces in carrying out the common criminal purpose of the JCE to Forcibly Remove.[1610] The three men were arrested shortly after the completion of the forcible removal operation in Žepa at the end of July 1995. Imamović was taken off a bus that was part of the last convoy of civilians and wounded leaving Žepa on 27 July 1995 and brought to the UNPROFOR compound at OP2 and arrested by VRS soldiers.[1611] Palić was arrested in the UNPROFOR compound by two VRS soldiers after the final convoy left.[1612] Hajrić was also part of last convoy of civilians and wounded leaving Žepa and was arrested by the VRS shortly after a meeting on 28 July 1995 during which UNPROFOR Military Commander of the Sarajevo Sector Hervé Gobilliard[1613] dismissed Tolimir's offer to give the UN the opportunity to send vehicles to gather the remaining Bosnian Muslim civilians and military members who were in the mountains.[1614] Hajrić and Imamović were removed from the Rasadnik Prison in mid-August 1995 and never returned.[1615] On 5 September 1995, Pećanac collected Palić from the Mlin Military Prison and took him to Han Pijesak, the location of the Main Staff's rear command post.[1616] The bodies of these three men were discovered in a grave containing nine

[1606] Indictment, para. 35.
[1607] Trial Judgement, paras 640, 676.
[1608] Trial Judgement, para. 1150.
[1609] *Popović et al*. Appeal Judgement, paras 1431-1432, 1701; *Đordević* Appeal Judgement, para. 906; *Šainović et al.* Appeal Judgement, para. 1078. *See* Trial Judgement, para. 896, *citing, inter alia, Brđanin* Appeal Judgement, para. 411; *Kvočka et al.* Appeal Judgement, para. 83; *Tadić* Appeal Judgement, paras 204, 220, 228.
[1610] Trial Judgement, paras 654-680.
[1611] Trial Judgement, paras 654, 658, 1148.
[1612] Trial Judgement, paras 660-662, 1148.
[1613] *See* Trial Judgement, para. 168.
[1614] Trial Judgement, paras 654, 660-662, 1148.
[1615] Trial Judgement, paras 665, 1148.
[1616] Trial Judgement, paras 679, 1148, 1153.

bodies, in Vragolovi, Rogatica; their autopsy reports revealed that they each suffered a violent death caused by injuries to the head and skull.[1617]

535. Although these findings establish that the three men were killed after the forcible removal operation was completed, the Appeals Chamber finds no error in the Trial Chamber's conclusion that it was foreseeable that the killings of the three Žepa leaders, following their continued detention by the VRS, might be committed in the implementation of the JCE to Forcibly Remove. The Trial Chamber correctly considered the circumstances of their arrest and detention, discussed in the above paragraph, in concluding that it was foreseeable that the killings of the three Žepa leaders might be committed by Bosnian Serb Forces in the completion of the JCE to Forcibly Remove the Bosnian Muslim population from Žepa. Tolimir fails to show any error in this regard.

536. To the extent that Tolimir contends that the Trial Chamber erred in finding him criminally responsible for crimes that occurred outside the time frame of the JCE to Forcibly Remove as charged, the Appeals Chamber notes that the Indictment gave an approximate time frame for the duration of the JCE to Forcibly Remove ("from *about* 8 March 1995 through the end of August"),[1618] and clearly intended to include the foreseeable targeted killings in this time frame while not specifying approximate dates of these alleged killings.[1619] The Appeals Chamber notes that the amended version of the Prosecution's Pre-Trial Brief of 16 February 2010 included evidence on Palić's handover from the Vanekov Mlin prison on 5 September 1995, thereby giving more precision on the approximate date of the alleged killing in this regard.[1620] In view of the approximate time frame of the JCE to Forcibly Remove provided in the Indictment, the fact that Palić's killing was found by the Trial Chamber to have occurred within a week of that indicated time frame, and that Tolimir received timely notice that Palić's killing was alleged to have been committed on or around 5 September 1995, the Appeals Chamber finds no error in the Trial Chamber's finding.

537. As to Tolimir's submission that the mere fact that the three Žepa leaders were prominent figures in the Žepa Muslim community does not support the Trial Chamber's finding that their killings were foreseeable, the Appeals Chamber notes that the Trial Chamber considered the prominence of the men in the Žepa Muslim community, in combination with other factual findings, in concluding that their killings were foreseeable. The Trial Chamber relied, *inter alia*, on: (i) a VRS intelligence report dated 28 May 1995, authored by Pećanac, Tolimir's subordinate, expressing concern with the appointment of Hajrić, identified as an imam, as President of the War

[1617] Trial Judgement, paras 680, 1148, 1152.
[1618] Indictment, para. 35 (emphasis added).
[1619] *See* Indictment, paras 23.1, 35, 61.

Presidency, and noting that "the hard-line fundamentalist faction has since recently come to power in Žepa";[1621] and (ii) Dumanjić's testimony that, as an imam, he feared being killed while leaving Žepa as he had heard of the murder of other imams by the Bosnian Serb Forces during the war.[1622] The Appeals Chamber considers that it was reasonable for the Trial Chamber to rely on Dumanjić's testimony since it was relevant to determining whether the killing of the three Žepa leaders was foreseeable.[1623] The fact that Dumanjić was not killed by Bosnian Serb Forces when he left Žepa by bus does not undermine the relevance and credibility of his testimony. Contrary to Tolimir's suggestion that Mladić knew Dumanjić was an imam when he entered the bus but did not kill him and that the VRS had information on all the religious, political and military leaders of Žepa.[1624] Dumanjić's testimony does not support the contention that Mladić knew Dumanjić was an imam when he entered the bus,[1625] and Tolimir does not advance any other evidence to support his assertions. Tolimir's argument that the "[a]lleged personal fear of evacuated person cannot serve as a basis" for the Trial Chamber's finding misrepresents the Trial Chamber's use of Dumanjić's evidence.[1626] The Trial Chamber did not directly rely on the subjective fear of Dumanjić but, as mentioned above, on objective elements supported by Dumanjić's testimony. Moreover, the Trial Chamber relied on many other factors to determine Tolimir's foreseeability as discussed below.[1627] The Appeals Chamber therefore dismisses Tolimir's submissions.

538. The Appeals Chamber also dismisses Tolimir's submission that the Trial Chamber erred in fact in concluding that the security organs of the VRS were under his "professional command" for reasons expressed elsewhere in this Judgement.[1628] In addition, Tolimir's argument that the Trial Chamber erred by concluding that Tolimir had a duty to ensure the safety of these prisoners and to monitor or control their treatment or the treatment of POWs generally has also been dismissed for reasons explained previously in this Judgement.[1629] Tolimir's sub-argument that the Trial Chamber failed to consider Prosecution Exhibit 2609/2610 which states that Tolimir, as Chief of the VRS Intelligence and Security Sector, will regulate the competencies and preparation of persons who come in contact with UNPROFOR or "the enemy" has no relevance to the issue and does not impact on the Trial Chamber's finding.

1620 Prosecution Amended Pre-Trial Brief, para. 4.
1621 Trial Judgement, para. 1150.
1622 Trial Judgement, para. 1150.
1623 *See* T. 29 September 2011 p. 17940.
1624 Appeal Brief, para. 417.
1625 T. 29 September 2011 p. 17940.
1626 *See* Appeal Brief, para. 417.
1627 *See infra*, paras 540-541, 544-548.
1628 *See supra*, para. 298.
1629 *See supra*, paras 504-506.

539. Neither is the Appeals Chamber persuaded by Tolimir's related argument that when he was in contact with POWs, he gave instructions to ensure their correct treatment. The Trial Chamber found that Tolimir gave conflicting instructions concerning the humane treatment of prisoners to relevant organs and there was no evidence of Tolimir attempting to ensure that the rules governing the treatment of POWs were respected.[1630] In light of the Trial Chamber's findings on the active involvement of Tolimir's subordinates in the mistreatment of detained prisoners,[1631] his knowledge of his subordinates' activities in light of his duties to ensure the safety of these prisoners,[1632] coupled with his conflicting instructions on the treatment of prisoners and his failure to ensure that the rules governing the treatment of POWs were respected, the Appeals Chamber is not satisfied that the Trial Chamber erred in concluding that it was reasonably foreseeable to Tolimir that the three Žepa leaders might be killed.

540. Regarding Tolimir's contention that the mere involvement of security organs in relation to the three Žepa leaders is insufficient for the conclusion that those killings were foreseeable to Tolimir,[1633] the Appeals Chamber notes that in making this determination, the Trial Chamber took into consideration a range of evidence, including, *inter alia*, Tolimir's proposal that the VRS move quickly to capture Žepa, given their successes in Srebrenica,[1634] and his knowledge that the "security organs under his professional command took an active part in the mistreatment of detained prisoners and the killings that occurred during the JCE to Murder".[1635] The Trial Chamber considered that, in the light of Tolimir's duties "under the applicable laws and regulations, to ensure the safety of these prisoners, the activities of his subordinates could not have escaped his attention".[1636] The Appeals Chamber considers that, in view of these findings, a reasonable trial chamber could have taken into consideration the involvement of the security organs under Tolimir's professional command in the three Žepa leaders' detention in determining whether their killings were foreseeable to him.

541. With respect to Tolimir's submission that the Trial Chamber erred in concluding that the fact that an ICRC team visited the Rasadnik Prison and registered Hajrić and Imamović on 30 July 1995, of which he was informed, had no bearing on Tolimir's foreseeability that these men could be killed, the Appeals Chamber notes the Trial Chamber's related finding that both prisoners were physically beaten and mistreated while held in the "infamous room" of the Rasadnik Prison following their transfer to this facility at the end of July 1995. It further found that in subsequent

1630 Trial Judgement, paras 1123, 1126.
1631 Trial Judgement, para. 1151.
1632 Trial Judgement, para. 1151.
1633 Appeal Brief, para. 418.
1634 Trial Judgement, para. 1151.
1635 Trial Judgement, para. 1151.

visits on 21 August 1995 and 23 October 1995 respectively, the ICRC delegates were denied access to private interviews with the detainees and told that they had "escaped", while other evidence showed that Hajrić and Imamović could not have escaped and that they had been removed from the prison by VRS forces in mid-August 1995.[1637] In light of these findings, as well as the Trial Chamber's findings on Tolimir's knowledge of the activities of his subordinates in the mistreatment of the prisoners, the Appeals Chamber considers that a reasonable trial chamber could find that the ICRC visits had no bearing on Tolimir's foreseeability that the three Žepa leaders might be killed. It also rejects Tolimir's argument that the Trial Chamber failed to explain why it considered that the ICRC registration would have no impact on Tolimir's foreseeability that these men might be killed. In the Appeals Chamber's view, it is sufficiently clear from the Trial Chamber's related findings on the ICRC visits to the Rasadnik Prison that the ICRC visit and registration of Hajrić and Imamović had no dissuasive effect on the Bosnian Serb Forces from committing crimes against the two men either immediately before or after the visit and therefore did not support the contention that Tolimir did not willingly take the risk that the men might be killed.

542. The Appeals Chamber summarily dismisses Tolimir's claim that, at the time of the alleged murders of the three Žepa leaders, the units that had been active in Srebrenica were no longer present in the Žepa area since he advances no evidence in support.[1638]

543. With regard to Tolimir's contention that the Trial Chamber did not properly elaborate on the circumstances surrounding the disappearance and killings of Imamović and Hajrić, and failed to consider contemporaneous evidence suggesting they had escaped from the prison, the Appeals Chamber reiterates that a trial chamber, in making factual findings, is entitled to rely on the evidence it finds most convincing.[1639] A trial chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, as long as there is no indication that the trial chamber completely disregarded evidence which is clearly relevant.[1640] There is no indication that the Trial Chamber disregarded either Prosecution Exhibit 2818, an intercepted communication dated 22 October 1995, or Prosecution Exhibit 2253, an ICRC report dated 9 November 1995 indicating that ICRC delegates had been informed, during their second visit to the Rasadnik Prison on 23 October 1995, that three detained men escaped since the last ICRC visit. The Trial Chamber addressed the evidence regarding the alleged escape of Imamović and Hajrić from the Rasadnik

1636 Trial Judgement, para. 1151.
1637 Trial Judgement, para. 1152.
1638 Reply Brief, para. 146. *See Krajišnik* Appeal Judgement, para. 26; *Martić* Appeal Judgement, para. 20; *Galić* Appeal Judgement, para. 297.
1639 *Perišić* Appeal Judgement, para. 92; *Kvočka et al.* Appeal Judgement, para. 23.
1640 *See Popović et al.* Appeal Judgement, paras 306, 340; *Đordević* Appeal Judgement, para. 864, n. 2527; *Perišić* Appeal Judgement, para. 92; *Limaj et al.* Appeal Judgement, para. 86. *See also supra*, para. 53.

Prison, and specifically cited Prosecution Exhibit 2253.[1641] Although the Trial Chamber did not specifically cite Prosecution Exhibit 2818, which appears to be relevant to the matter, the Appeals Chamber notes that this intercepted conversation would in fact strongly support the Trial Chamber's conclusion that the story given to the ICRC that Imamović and Hajrić had escaped was fabricated.[1642] Therefore, even if the Trial Chamber erred by not specifically considering this evidence, it would have no impact on the impugned finding.

544. The Appeals Chamber notes that, contrary to Tolimir's assertion, the Trial Chamber did not rely only on Prosecution Witness Meho Džebo's testimony to conclude that Imamović and Hajrić did not escape but were killed by the Bosnian Serb Forces.[1643] The Trial Chamber also relied on its previous findings that: (i) Imamović and Hajrić were removed from the Rasadnik Prison by the VRS around mid-August 1995; (ii) their bodies were found in a mass grave on 12 November 2001 in Vragolovi, Rogatica; and (iii) their autopsies revealed they suffered a violent death, caused by injuries to the head and skull.[1644] The Appeals Chamber notes that Tolimir's argument that Džebo's testimony was misinterpreted addresses the Prosecution's use of his testimony in its Response Brief,[1645] not the Trial Chamber's usage, which correctly noted Džebo's testimony that the three Žepa leaders could not have escaped.[1646] Defence Exhibit 187, a report from the command of the 1st Podrinje Light Infantry Brigade about the NATO bombing on 30 August 1995, is irrelevant since Imamović and Hajrić were removed from the Rasadnik Prison by mid-August 1995 and never returned. The Appeals Chamber dismisses Tolimir's submission.

545. With regard to Tolimir's argument that the Trial Chamber failed to consider evidence that indicated that Palić's killing was not foreseeable, namely, evidence that Palić was detained in a safe location distinct from Rasadnik Prison, and had been given a "special status" and a code name and enjoyed protection and maximum security,[1647] the Appeals Chamber notes that the Trial Chamber specifically considered and accepted this evidence in an earlier part of the Trial Judgement.[1648] The Trial Chamber analysed Tolimir's ability to foresee Palić's murder in view of other evidence that indicated that Tolimir's direct subordinates, Beara and Pećanac, were involved in moving Palić to Mlin Military prison on 10 August 1995, and two weeks later to Han Pijesak, the location of the Main Staff's rear command post, "for the needs of the unit/organization Intelligence Sector of the

1641 *See* Trial Judgement, para. 1152 and n. 4453.
1642 *See* Prosecution Exhibit 2818, pp. 1-2.
1643 *See* Appeal Brief, para. 421.
1644 Trial Judgement, para. 1152.
1645 *See* Reply Brief, para. 147.
1646 Trial Judgement, para. 1152.
1647 *See* Appeal Brief, para. 425, *citing* Prosecution Exhibit 1434 (report sent by the Command of the 1st Podringje Light Infantry Brigade/Organ for BOP/Security and Intelligence to the VRS Main Staff Sector For Intelligence and Security Administration, 30 July 1995), p. 3.
1648 *See* Trial Judgement, para. 677, nn. 2915-2917.

VRS Main Staff".[1649] In view of this evidence directly implicating the Intelligence Sector in Palić's detention, together with the other evidence relied on by the Trial Chamber examined above, the Appeals Chamber considers that a reasonable trial chamber could have found that Palić's killing was foreseeable to Tolimir, in spite of the fact that Palić had been given a code name and was detained at different locations from the other detainees. The argument is thus rejected.

546. The Appeals Chamber also rejects Tolimir's related argument that the Trial Chamber erred in relying on Beara and Pećanac's involvement in Palić's transfers. In the Appeals Chamber's view this evidence demonstrates that Tolimir's subordinates were implicated in Palić's detention and last known movements and is therefore directly relevant to Tolimir's foreseeability. For similar reasons, the Appeals Chamber also rejects Tolimir's contention that the Trial Chamber failed to note that there is no evidence that Tolimir received information about Palić after 30 July 1995[1650] since, in light of all the Trial Chamber's findings considered above, a lack of evidence in this regard does not undermine the Trial Chamber's conclusion.

547. The Appeals Chamber also dismisses Tolimir's submission that the Trial Chamber erred by relying on his personal dealings with Palić. The Appeals Chamber considers that, in combination with the other relevant circumstances established by the Trial Chamber considered above, it was reasonable for the Trial Chamber to rely on its findings related to Tolimir's personal dealings with Palić which showed that Tolimir knew of Palić's particular prominence among the Muslim leaders of Žepa, had countered rumours (first expressed by Mladić) that Palić was dead, and had issued orders related to Palić's treatment while detained,[1651] in assessing whether Palić's death was foreseeable to Tolimir. The Appeals Chamber also finds that it is sufficiently clear from the Trial Chamber's findings on a whole why the alleged dealings between Tolimir and Palić were relevant for the determination of his foreseeability.[1652] The Appeals Chamber therefore dismisses Tolimir's submission that the Trial Chamber failed to provide a reasoned opinion on the matter.

548. The Appeals Chamber finds no merit in Tolimir's submission that the Trial Chamber erred in concluding that Pećanac was Tolimir's subordinate. The Trial Chamber found that Pećanac: (i) in July 1995 worked for the VRS Main Staff Intelligence Administration;[1653] (ii) was present in Žepa in this period serving as a security guard for Mladić and supporting the implementation of the

[1649] Trial Judgement, para. 1153, *citing* Prosecution Exhibit 2182 (Bijeljina Garrison Command Prison document no. 553/94, receipt of prisoner of war, Avdo Palić, signed by Dragomir Pećanac, 5 September 1995).
[1650] *See* Appeal Brief, para. 427.
[1651] *See* Trial Judgement, para. 1153, *citing* Trial Judgement, paras 646, 666, 672, 985, 990, 993, 999.
[1652] Appeal Brief, paras 423-424.
[1653] Trial Judgement, paras 115, 642. *See also* T. 12 January 2012 pp. 18042-18044 (private session), 18060-18061 (private session).

forcible removal operation by personally accompanying Bosnian Muslims to the buses;[1654] (iii) assisted Tolimir in the direction of the transport operation in Žepa;[1655] and (iv) reported information he collected about the forcible removal operation to Tolimir.[1656] The Appeals Chamber also notes that on 5 September 1995, Pećanac signed a receipt indicating that he was transferring Palić for the needs of the Intelligence Sector of VRS Main Staff, headed by Tolimir.[1657] Tolimir's submission is dismissed.

549. The Appeals Chamber is also not persuaded by Tolimir's argument that the Trial Chamber erred in rejecting his argument that he was at the Grahovo and Glamoč front from 30 July 1995 onwards.[1658] The Trial Chamber did not actually reject this factual claim, but found that Tolimir's physical absence from the Rogatica area was irrelevant to determining whether the murders of Palić, Hajrić, and Imamović were foreseeable to him.[1659] The Appeals Chamber recalls that the physical presence of the accused in the area of commission of the crimes is not required to establish responsibility under JCE III.[1660] The Appeals Chamber thus dismisses Tolimir's submission.

(c) Conclusion

550. For the above-mentioned reasons, the Appeals Chamber dismisses by majority, Judge Antonetti dissenting, Ground of Appeal 18.

G. Tolimir's responsibility in relation to counts

1. Genocidal intent (Ground of Appeal 21)

551. The Trial Chamber found that the only reasonable inference that could be drawn from the totality of evidence was that Tolimir possessed genocidal intent[1661] and held him criminally responsible for committing the crime of genocide through his participation in the JCE to Murder and the JCE to Forcibly Remove.[1662]

1654 Trial Judgement, para. 642.
1655 Trial Judgement, paras 986, 1092.
1656 Trial Judgement, paras 672, 995.
1657 Prosecution Exhibit 2182 (Bijeljina Garrison Command Prison document no. 553/94, receipt of prisoner of war, Avdo Palić, signed by Dragomir Pećanac, 5 September 1995).
1658 *See* Appeal Brief, para. 423. *See also* Appeal Brief, para. 419.
1659 Trial Judgement, para. 1154.
1660 *Šainović et al.* Appeal Judgement, paras 1078, 1081; *Karadžić* JCE III Decision, paras 15, 18; *Kvočka et al.* Appeal Judgement, para. 83, *citing Vasiljević* Appeal Judgement, para. 99, *Tadić* Appeal Judgement, paras 204, 220, 228.
1661 Trial Judgement, para. 1172.
1662 Trial Judgement, para. 1172.

(a) Submissions

552. Tolimir submits that the Trial Chamber erred in law by relying on Tribunal jurisprudence that because the genocidal intent is rarely overt, intent may be inferred from the totality of evidence.[1663] He argues that the fact that genocidal intent is rarely overt may be a theoretical conclusion based on the analysis of several tribunals' practices but it cannot be a starting point in determining his *mens rea*.[1664]

553. Tolimir contends that the Trial Chamber erred in fact and in law in finding that he possessed the requisite knowledge that the murder operations were being carried out with genocidal intent.[1665] He avers that the Trial Chamber erred by relying on his education, experience as an officer, his position in the VRS, his capabilities regarding his duties, and the responsibilities stemming from his professional position, as factors in its determination of his genocidal intent.[1666] Tolimir submits that the Trial Chamber erred in law in considering his connection to, and relationship with, Mladić.[1667] He argues that there was no evidence that he was informed about the fate of the POWs in Srebrenica or that he was in contact with Mladić from 14 to 17 July 1995.[1668] Tolimir further submits that the Trial Chamber erred in its assessment of his *mens rea* by taking into account several factual findings that overstep the temporal boundaries of the alleged genocide, as specified in the Indictment, including: (i) the implementation of Directive 7; (ii) the restriction of convoys; (iii) his contribution to the aim of limiting UNPROFOR's ability to carry out its mandate; and (iv) the facilitation of the takeover of the enclaves.[1669] He claims that the Trial Chamber failed to provide adequate reasoning as to why, and how, those factors demonstrate genocidal intent.[1670] Tolimir also argues that the Trial Chamber erred in inferring his genocidal intent through acts he carried out after the murder operation. He claims that this evidence does not support a finding of genocidal intent or an intention to conceal the alleged crimes.[1671]

554. Tolimir further claims that the Trial Chamber erred in fact in relying on Prosecution Exhibit 488, a report signed by Tolimir concerning the situation in Žepa dated 21 July 1995, in which he proposed to Miletić that "we could force Muslims to surrender sooner if we destroyed groups of Muslim refugees fleeing from the direction of Stublić, Radava, and Brloška Planina" and that the "best way to destroy them would be by using chemical weapons or aerosol grenades or

1663 Notice of Appeal, para. 156; Appeal Brief, para. 446.
1664 Appeal Brief, para. 446.
1665 Notice of Appeal, para. 158.
1666 Notice of Appeal, para. 156; Appeal Brief, para. 452.
1667 Notice of Appeal, para. 157.
1668 Appeal Brief, para. 449.
1669 Appeal Brief, para. 447.
1670 Appeal Brief, para. 447.
1671 Appeal Brief, para. 451.

bombs".[1672] Tolimir argues that Prosecution Exhibit 488 only demonstrates his determination to achieve a legitimate military goal, namely to speed up the surrender of the ABiH Žepa Brigade, and not to destroy the population of Žepa.[1673] In this regard, Tolimir submits that the English translation of Prosecution Exhibit 488 is erroneous as his proposal was not to destroy groups of fleeing members of the Muslim population but "to destroy empty locations for which it had been established that potentially they represented places where Muslim populations could arrive at".[1674] Tolimir argues further that, in any event, the locations mentioned in Prosecution Exhibit 488 were out of range of the VRS.[1675]

555. Finally, Tolimir argues that the Trial Chamber erred in finding that he encouraged the use of derogative terms so as to provoke ethnic hatred amongst members of the Bosnian Serb Forces and fostered an attitude that the Bosnian Muslims were human beings of a lesser value, referring to Defence Exhibits 41 and 145 and Prosecution Exhibits 122 and 123 in which he used the term "Muslims".[1676] In his view, the use of derogatory terms by some VRS members cannot be used as a basis for inferring genocidal intent with respect to him.[1677] Furthermore, Tolimir submits that the use of derogatory terms cannot be used at all as a basis for inferring genocidal intent as there is evidence establishing that derogatory terms were constantly used during the war.[1678] In this context, he refers to the testimony of Witness Čulić who testified that the use of derogatory terms, while considered politically incorrect today, was a common phenomenon during the war.[1679]

556. The Prosecution responds that the Trial Chamber reasonably concluded that Tolimir possessed genocidal intent.[1680] The Prosecution submits that Tolimir's submissions fail to address the totality of the evidence underpinning his genocide conviction and to specify why no reasonable trial chamber could have drawn an inference of genocidal intent from the totality of the evidence relied upon.[1681] The Prosecution contends that Tolimir's submission that his position in the VRS and his participation in the JCE to Murder and the JCE to Forcibly Remove do not establish his responsibility for genocide, should be summarily dismissed for lack of argumentation.[1682] The Prosecution argues that the Trial Chamber reasonably found that Tolimir was aware of his fellow JCE members' genocidal intent and that, contrary to his argument, there were numerous pieces of

[1672] AT. 12 November 2014 pp. 68-71. *See also* Notice of Appeal, para. 160; Appeal Brief, para. 450.
[1673] AT. 12 November 2014 pp. 68-71.
[1674] AT. 12 November 2014 p. 69. *See also* Appeal Brief, para. 314 in relation to the Ground of Appeal 15.
[1675] AT. 12 November 2014 p. 69, *citing* Prosecution Witness Milomir Savčić's testimony. *See also* Appeal Brief, para. 314 in relation to the Ground of Appeal 15.
[1676] Notice of Appeal, para. 159; Appeal Brief, para. 454.
[1677] Appeal Brief, para. 454.
[1678] Appeal Brief, para. 454.
[1679] T. 15 February 2012 pp. 19317-19318.
[1680] Response Brief, paras 323-324.
[1681] Response Brief, para. 325.
[1682] Response Brief, para. 330.

evidence demonstrating his awareness of the fate of the Srebrenica prisoners, and that he was in direct contact with Mladić between 14-17 July 1995.[1683]

557. With regard to Prosecution Exhibit 488, the Prosecution responds that the Trial Chamber reasonably found that it "manifests the Accused's determination to destroy the Bosnian Muslim population"[1684] relying on the context of the events at the time.[1685] With regard to Tolimir's argument related to the English translation, the Prosecution contends that the Trial Chamber properly relied on the official CLSS version of the document which translated the relevant phrase as "group of refugees".[1686] It argues further that the Trial Chamber reasonably found that even if Tolimir's translation of "place of refuge" would be accepted, it would still find that the intended targets were Bosnian Muslim civilians, as Prosecution Witnesses Obradović and Savčić confirmed in their testimonies that Tolimir's proposal was aimed at fleeing civilians.[1687] It submits that the only relevant fact is that Tolimir was willing to make such a radical proposal, and not whether the proposal to destroy the refugees could be implemented.[1688]

558. The Prosecution further responds that the Trial Chamber appropriately took into consideration evidence from outside the Indictment period for Count One (Genocide) when assessing Tolimir's *mens rea*.[1689] It submits that the Trial Chamber reasonably relied on evidence that Tolimir used, and actively encouraged the use of, derogatory and dehumanising terms for, and towards, Bosnian Muslims in establishing his intent.[1690]

559. Tolimir replies that the Prosecution fails to take into consideration the fact that he challenged both JCE findings under various grounds of appeal and therefore submits that if the Appeals Chamber concludes that he was not a participant in the JCEs, then his conviction for genocide must be overturned.[1691] He further states that genocidal intent is *dolus specialis* and intent drawn from the implementation of Directive 7 is irrelevant for the purpose of indicating genocidal intent.[1692] Tolimir adds that the selective use of derogatory terms during periods of the war other than the Srebrenica and Žepa operations should not have been considered in determining his genocidal intent.[1693]

[1683] Response Brief, paras 323, 327-328.
[1684] AT. 12 November 2014 p. 102, *citing* Trial Judgement, para. 1171.
[1685] AT. 12 November 2014 p. 102, *citing* Trial Judgement, para. 1171. *See also* AT. 12 November 2014 pp. 105-106.
[1686] AT. 12 November 2014 p. 103.
[1687] AT. 12 November 2014 p. 103, *citing* Trial Judgement, para. 1091 and n. 4290.
[1688] AT. 12 November 2014 p. 104.
[1689] Response Brief, paras 326, 328.
[1690] Response Brief, paras 323, 329.
[1691] Reply Brief, para. 154.
[1692] Reply Brief, para. 151.
[1693] Reply Brief, para. 153.

(b) Analysis

560. The Trial Chamber concluded that the only reasonable inference based on the totality of evidence was that Tolimir possessed genocidal intent. In reaching this conclusion it took into account "the Accused's education, his experience as an officer, his general capabilities especially with respect to his duties and responsibilities stemming from his specific professional position,"[1694] together with:

> the facts that in his position as Chief of the Sector for Intelligence and Security Affairs the Accused had knowledge of the large-scale criminal operations on the ground, that he knew of the genocidal intentions of the JCE members, that he actively contributed to the JCEs to Forcibly Remove and to Murder, that the Accused freely used derogatory and dehumanising language, and that the Accused proposed to destroy groups of fleeing refugees […].[1695]

561. The Appeals Chamber finds no merit in the submission that the Trial Chamber erred in law by drawing an inference of Tolimir's genocidal intent from the totality of evidence.[1696] The Trial Chamber correctly held that an accused's genocidal intent can be inferred from a number of relevant facts and circumstances, provided that that inference is the only reasonable inference available on the evidence.[1697] Tolimir's challenges to the relevance of the specific facts considered by the Trial Chamber are considered below.

562. With regard to Tolimir's argument that the Trial Chamber erred by taking into account his education, experience as an officer, and general capabilities with respect to his duties and responsibilities in inferring his genocidal intent, the Appeals Chamber notes that the Trial Chamber inferred Tolimir's genocidal intent from his knowledge of the large-scale criminal operations by reason of his position as Chief of the Sector for Intelligence and Security Affairs together with his contribution to the JCEs.[1698] In the view of the Appeals Chamber, it is clear from this analysis that the Trial Chamber did not draw a conclusion of genocidal intent solely on the basis of Tolimir's education, experience or position. Rather, the Trial Chamber considered Tolimir's education, experience, and position at the relevant time in terms of how these factors related to his knowledge of relevant events and his specific contribution to the JCEs.[1699] The Appeals Chamber finds that such factors were thus legally and factually relevant to assessing genocidal intent.

1694 Trial Judgement, para. 1161.
1695 Trial Judgement, para. 1172.
1696 Trial Judgement, paras 745, 1161, 1172.
1697 Trial Judgement, paras 745, 1161. *See Lukić and Lukić* Appeal Judgement, para. 149; *Jelisić* Appeal Judgement, paras 47-48; *Munyakazi* Appeal Judgement, para. 142; *Gacumbitsi* Appeal Judgement, paras 40-41; *Kayishema and Ruzindana* Appeal Judgement, para. 159.
1698 Trial Judgement, paras 1163-1166, 1172.
1699 Trial Judgement, paras 1163-1166, 1170-1172.

563. As to Tolimir's submission that the Trial Chamber erred by emphasising his close relationship with Mladić in inferring his genocidal intent, the Appeals Chamber considers that this finding formed part of the relevant facts and circumstances from which genocidal intent could be inferred.[1700] Insofar as Tolimir argues that this factor was irrelevant since he was not informed about the murder of the detained men and boys from Srebrenica and had no contact with Mladić from 14 to 17 July 1995, the Appeals Chamber recalls that it has dismissed Tolimir's challenges to these factual findings elsewhere in this Judgement.[1701]

564. In respect of Tolimir's submission that the Trial Chamber erred by considering evidence from outside the time period for the alleged genocide in the Indictment (11 July-1 November 1995) to infer his intent, the Appeals Chamber notes that the Trial Chamber relied, *inter alia*, on Tolimir's active contribution to the JCE to Forcibly Remove from March 1995 to infer his genocidal intent.[1702] Specifically, the Trial Chamber considered: (i) Tolimir's active involvement in the implementation of Directive 7 from March to July 1995; (ii) his participation in the restriction of aid convoys; and (iii) his contribution to limiting UNPROFOR's ability to carry out its mandate.[1703] The Appeals Chamber recalls that the inquiry is whether at the moment of the commission of the criminal act the accused possessed the necessary intent.[1704] As noted above, in order to infer such intent, the Trial Chamber may consider any relevant facts and circumstances.[1705] The Appeals Chamber recalls that, as a general principle, it is not an error of law to rely on evidence originating from outside the time period of the Indictment.[1706] The Trial Chamber pursuant to Rule 89(C) of the Rules has the discretion to admit any "relevant evidence which it deems to have probative value".[1707] The question before the Appeals Chamber is whether the Trial Chamber abused its discretion by finding that evidence outside the scope of the Indictment had probative value to the crimes charged therein.

565. The Appeals Chamber notes the Trial Chamber's finding that Tolimir's actions from March 1995 were directed towards implementing Directive 7, which aimed to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa," which ultimately led to the forcible removal of approximately 30,000 to 35,000 Bosnian Muslims from Srebrenica and Žepa during the Indictment period (constituting the crime of genocide

1700 *See* Trial Judgement, paras 1039, 1044, 1048, 1053, 1055.
1701 *See supra*, para. 455.
1702 Trial Judgement, para. 1172.
1703 Trial Judgement, para. 1163.
1704 *Munyakazi* Appeal Judgement, para. 142; *Simba* Appeal Judgement, para. 266.
1705 *See supra*, para. 561.
1706 *Stakić* Appeal Judgement, para. 122.
1707 *Stakić* Appeal Judgement, para. 122; *Kupreškić et al.* Appeal Judgement, para. 31, *citing* Rule 89(C) and (D) of the Rules.

through inflicting serious bodily or mental harm).[1708] In the view of the Appeals Chamber, Tolimir's related actions in the months preceding the Indictment period are clearly relevant and probative to the inquiry into his genocidal intent. In this context, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion by relying on Tolimir's actions prior to the Indictment period to establish his *mens rea* for the crimes committed during that period.[1709]

566. The Appeals Chamber finds no merit in Tolimir's submission that the Trial Chamber failed to provide a reasoned opinion as to why the above-mentioned facts indicated genocidal intent. It notes that, having recapitulated its findings on Tolimir's participation in the JCEs, the Trial Chamber noted that Tolimir was aware of the forcible removal of approximately 25,000 to 30,000 Bosnian Muslims on 12-13 July 1995 and had knowledge from 13 July 1995 that the murder operation was being carried out with genocidal intent.[1710] It further noted that Tolimir actively covered up the "common purpose, despite his extensive knowledge of the situation on the ground and of his obligations towards POWs".[1711] The Trial Chamber found that Tolimir's genocidal intent could be inferred from his contribution to the JCEs – including through the above-mentioned contributions – combined with his knowledge of the crimes committed, as part of the totality of the evidence.[1712] The Appeals Chamber finds no error in this approach and dismisses this argument.

567. Tolimir further submits that the Trial Chamber erred in inferring his genocidal intent through acts he carried out after the murder operations – specifically – that the Trial Chamber should not have relied on Prosecution Exhibit 2433, a letter dated 27 February 1997 from Tolimir to Colonel Milomir Savčić in the Security Administration of the VRS.[1713] In this letter, Tolimir proposed not to respond to an *aide mémoire* sent by the Dutch embassy in Sarajevo to the President of Republika Srpska on 18 February 1997 ("*Aide Mémoire*") – attached to the 27 February 1997 letter - asking for information about the fate of 242 persons listed in the *Aide Mémoire* as being evacuated by Bosnian Serb Forces from Potočari on 13 July 1995.[1714] Tolimir refers to the testimony of Savčić and PW-071 to support his interpretation of Prosecution Exhibit 2433 and to challenge the credibility of the list of 242 persons included in this exhibit.[1715] The Appeals Chamber notes that, in inferring his genocidal intent, the Trial Chamber considered, *inter alia*, that Tolimir

[1708] Trial Judgement, paras 756, 759, 1163.
[1709] *See Đorđević* Appeal Judgement, para. 297; *Šainović et al.* Appeal Judgement, paras 1019, 1470.
[1710] Trial Judgement, paras 1163, 1166.
[1711] Trial Judgement, para. 1164.
[1712] Trial Judgement, para. 1172.
[1713] Appeal Brief, paras 450-451. The Appeals Chamber notes that while Tolimir avers that the Trial Chamber erred in relying on two documents, he only develops arguments in relation to Prosecution Exhibit 2433 (VRS Main Staff document number 98-83/97, Letter from Zdravko Tolimir to Colonel Savčić, Security Administration of the VRS, 27 February 1997).
[1714] Prosecution Exhibit 2433.
[1715] Appeal Brief, para. 451.

"was determined to obscure the murders of an unspeakably massive scale committed by members of the Bosnian Serb Forces even after the end of war".[1716] Tolimir argues that no reasonable trier of fact could infer genocidal intent or an intention to conceal crimes from Prosecution Exhibit 2433 since it merely expressed that he could not provide information about the 242 persons on the list included in this exhibit. In this context, Tolimir reiterates in his Appeal Brief the reasons he gave in the 22 February 1997 letter to not respond to the Dutch embassy's request, *i.e.*, that: (i) the 242 persons on this list had never been registered as refugees; (ii) no list had been compiled by UNPROFOR or the ICRC of such persons; and (iii) this list was unreliable as it was based on Ibro Nuhanović's memory and could have included people who had "been evacuated in an organized manner or had gone missing prior to the evacuation during combat operations".[1717] In the view of the Appeals Chamber, Tolimir seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[1718] He offers no support for his interpretation of the letter save for the express wording of the letter itself, which the Trial Chamber viewed as an effort to obscure the murders,[1719] and the testimony of Savčić, who claimed to have no knowledge or recollection of the letter.[1720]

568. The reasons given by Tolimir in the 22 February 1997 letter and repeated in his Appeal Brief to not respond to the Dutch embassy's request for information supports the Trial Chamber's interpretation that the 22 February 1997 letter was intended to conceal the crimes. With regard to Tolimir's suggestion that the list was compiled from Nuhanović's memory,[1721] the Appeals Chamber notes that the evidence referred to by Tolimir in this respect actually supports the Trial Chamber's finding – and the statement in the *Aide Mémoire* attached to the 22 February 1997 letter – that the list was contemporaneously compiled at the compound in Potočari on 13 July 1995 of the men detained in the compound who agreed to have their names recorded.[1722] Tolimir fails to show that the Trial Chamber's evaluation of the 22 February 1997 letter was erroneous.

569. Insofar as Tolimir suggests that *ex post facto* evidence cannot support an inference of genocidal intent, the Appeals Chamber reiterates that, as a general principle, it is not an error of law to rely on material originating from outside the time period of the Indictment, so long as it has

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[1716] Trial Judgement, para. 1166, *citing* Trial Judgement, para. 1114, which relies on Prosecution Exhibit 2433 (VRS Main Staff document number 98-83/97, Letter from Zdravko Tolimir to Colonel Savčić, Security Administration of the VRS, 27 February 1997).

[1717] Appeal Brief, para. 451, *citing* Prosecution Exhibit 2433, pp. 2-3.

[1718] *See Krajišnik* Appeal Judgement, para. 27.

[1719] Trial Judgement, paras 1114, 1166.

[1720] Appeal Brief, n. 408, *citing* T. 22 June 2011 pp. 15867-15871.

[1721] Appeal Brief, n. 408, *citing* T. 30 September 2010 pp. 6091-6093 (closed session).

[1722] *See* Trial Judgement, para. 288, *citing*, *inter alia*, Prosecution Exhibit 600 (hand-written list of names of men detained in Potočari on 12 July 1995). This list of names is identical to the list attached to the Dutch *Aide Mémoire*, in Prosecution Exhibit 2433. *See* Prosecution Exhibit 2433, p. 5, *Aide Mémoire*, para. 1 and Appendix A.

probative value.[1723] In the present case, the Trial Chamber found that Tolimir's participation in the concealment of the crime of genocide *began during the Indictment period* and *continued* in 1997 with the issuance of the 22 February 1997 letter.[1724] Specifically, the Trial Chamber found that Tolimir: on 13 July 1995, issued instructions on how to ensure that the Bosnian Muslim prisoners were kept out of sight;[1725] on 14 July 1995, conveyed Mladić's order to the Drina Corps Command about the presence of an unmanned aircraft so that "the murder operation would be carried out without being detected";[1726] on 16 July 1995, instructed Miletić to inform subordinate units that it was safer to communicate by telegram through the Drina Corps IKM;[1727] on 18 July 1995, supervised the evacuation of the wounded and the local MSF staff in Srebrenica in order to divert the attention of the international community from the missing Bosnian Muslim males from Srebrenica;[1728] on 25 July 1995, issued a report addressed to Gvero and Miletić proposing that the State Commission for the Exchange of POWs be advised not to agree to a longer procedure for POW exchanges with the ABiH in order to divert pressure from the ABiH with respect to the missing Bosnian Muslim males from Srebrenica;[1729] in September 1995 – while the reburial operation was taking place – issued a report advising that the VRS could not conduct POW exchanges with the ABiH because of the small number of enemy soldiers captured;[1730] and in 1997 issued the 22 February 1997 letter, discussed above. The Appeals Chamber has already upheld these findings.[1731] All of Tolimir's actions to conceal the crimes that were part of the common plan of the JCE to Murder, therefore even if the 22 February 1997 letter was *ex post facto* in time, constructively it was contemporaneous with the murder operation. The Appeals Chamber therefore finds that the Trial Chamber did not abuse its discretion by relying on the 22 February 1997 letter as additional evidence in support of its finding that Tolimir possessed genocidal intent.

570. The Appeals Chamber summarily dismisses Tolimir's submission that the Trial Chamber erred in finding that he possessed the requisite knowledge that the murder operation was being carried out with genocidal intent as Tolimir fails to indicate any evidence or findings in support or to develop his argument.[1732]

571. Concerning Tolimir's submission that the English translation of Prosecution Exhibit 488 is erroneous, the Appeals Chamber recalls that it has already dismissed Tolimir's arguments that his

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[1723] *See supra*, para. 564.
[1724] Trial Judgement, paras 1114, 1164, 1166.
[1725] Trial Judgement, paras 1105-1106.
[1726] Trial Judgement, para. 1108.
[1727] Trial Judgement, para. 1109.
[1728] Trial Judgement, para. 1110.
[1729] Trial Judgement, para. 1113.
[1730] Trial Judgement, para. 1114.
[1731] *See supra*, paras 475, 478-479, 487-490, 493-495,498-499.
[1732] *Krajišnik* Appeal Judgement, para. 26; *Martić* Appeal Judgement, para. 20; *Galić* Appeal Judgement, para. 297.

proposal aimed at destroying "empty locations", and not populations, in order to achieve a legitimate military goal.[1733] The Appeals Chamber further dismisses Tolimir's argument that in any event the locations mentioned in Prosecution Exhibit 488 were out of the range of the VRS as it is irrelevant whether or not his proposal could be implemented for the purpose of establishing his *mens rea*.

572. The Trial Chamber found that Prosecution Exhibit 488 was "relevant as a demonstration of the Accused's state of mind during the forcible removal of the civilian population in Žepa and his full knowledge of the predicament of this vulnerable population," and evidenced "his fervent and tactical intention to remove the Bosnian Muslim population from the Žepa enclave, as part of contributing to the JCE to Forcibly Remove".[1734] The Trial Chamber concluded that "the only reasonable inference to be drawn by the Majority is that this document manifests the Accused's determination to destroy the Bosnian Muslim population".[1735] The Appeals Chamber notes that in reaching this conclusion the Trial Chamber took into consideration not only the meaning of the document but also the context of the events at the time, namely that: (i) the Bosnian Muslim population had been forcibly moved out of Potočari, resulting in serious bodily or mental harm; (ii) Tolimir was deeply involved in covering up the murder operation that was carried out with genocidal intent; and (iii) he was deeply involved in preparing the forced movement of the Bosnian Muslim population of Žepa.[1736] In light of the above, the Appeals Chamber considers that a reasonable trier of fact could have reached the conclusion that Tolimir's determination to destroy the Bosnian Muslim population of Eastern Bosnia was the only reasonable inference that could be drawn.[1737]

573. Finally, with regard to Tolimir's contention that the Trial Chamber erred in inferring his genocidal intent from his use of derogative terms in reference to Bosnian Muslims, the Appeals Chamber notes that the Trial Chamber, having found that Tolimir used "derogatory and

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1733 *See supra*, para. 411.
1734 Trial Judgement, para. 1171.
1735 Trial Judgement, para. 1171. *See also* Trial Judgement, para. 1172.
1736 Trial Judgement, para. 1171.
1737 The conclusion in this paragraph that the Trial Chamber did not err in inferring Tolimir's genocidal intent from Prosecution Exhibit 488 does not, of course, undermine the Appeals Chamber's prior conclusion that the forcible transfer of Žepa's population did not constitute genocide. The Appeals Chamber recalls, in this regard, its prior conclusion, Judges Sekule and Güney dissenting, that genocide had been committed only through: (1) the killings of Srebrenica's male population; and (2) the forcible transfer of Srebrenica's women, children, and elderly from Potočari, which resulted in the infliction of serious mental harm. It is only with regard to these two operations that the Appeals Chamber reviews the Trial Chamber's findings on Tolimir's genocidal intent. The Appeals Chamber recalls also that it has affirmed Tolimir's participation in both the JCE to Murder and the JCE to Forcibly Remove. The inquiry regarding Tolimir's genocidal intent, thus, does not concern the operations in Žepa, but the acts that have been found to meet the threshold for genocide. The fact that, in inferring Tolimir's genocidal intent, the Trial Chamber relied upon a document concerning the Bosnian Serb operations in Žepa does not mean that genocide occurred in Žepa. The Appeals Chamber has already concluded, Judges Sekule and Güney dissenting, that the

dehumanising terms, such as 'Turks' or 'Balijas' to refer to Bosnian Muslims"[1738] in VRS communications, concluded that he "encouraged the use of derogatory terms so as to provoke ethnic hatred among members of the Bosnian Serb Forces and an attitude that Bosnian Muslims were human beings of a lesser value, with a view to eradicate this particular group of the population from the Eastern BiH".[1739]

574. The Appeals Chamber recalls that the weight to be assigned to the use of derogatory language in relation to a particular group in establishing genocidal intent will depend on the circumstances of the case.[1740] The evidence referred to by the Trial Chamber of such usage, apart from that of Tolimir, emanated from direct perpetrators of the genocide or members of the JCE to Murder.[1741] The Appeals Chamber notes that Tolimir refers to Čulić's testimony that certain derogatory terms were constantly used by members of the VRS during the war to argue that the Trial Chamber erred in attaching probative weight to it.[1742] However, the Appeals Chamber is satisfied that regardless of whether or not the term was widely used by members of the VRS it was reasonable for the Trial Chamber to attach probative weight to Tolimir's use of the term when considered in conjunction with all the other evidence relied upon to establish genocidal intent. In this respect, the Appeals Chamber notes the evidence of Prosecution Expert Witness Richard Butler that the use of derogatory terms is generally unacceptable in military practice and the use of such terms by a high ranking military officer would send a message to subordinates that such behaviour was tolerated.[1743]

575. With regard to Tolimir's contention that the Trial Chamber erred in finding that he personally used derogatory terms in reference to Bosnian Muslims during the relevant period of the war, the Appeals Chamber notes that the Trial Chamber relied on: (i) Prosecution Exhibit 2485, an order approving POW exchanges; (ii) Prosecution Exhibit 2274, a telegram related to POW exchanges; and (iii) Prosecution Exhibits 371a, 2156 and 2468 intercepted communications, in which Tolimir used derogatory terms such as "*balijas*" or "Turks" to refer to Bosnian Muslims.[1744] The Appeals Chamber also notes that the Trial Chamber was aware of the evidence showing instances where Tolimir used the term "Muslims" instead.[1745] The fact that Tolimir did not

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forcible removal of Žepa's population did not meet the threshold of the *actus reus* of genocide. *See supra*, paras 232-235.

1738 Trial Judgement, para. 1168.

1739 Trial Judgement, para. 1169.

1740 *See Krstić* Appeal Judgement, para. 130. *Cf. Popović et al*. Appeal Judgement, paras 470, 506.

1741 *See* Trial Judgement, paras 312, 362, 378, 522, 549, 1168.

1742 Appeal Brief, para. 454.

1743 Trial Judgement, para. 1169.

1744 Trial Judgement, para. 1168.

1745 Trial Judgement, n. 868 (*citing* Defence Exhibit 41, Report dated 9 July 1995, from Tolimir to Karadžić, Gvero and Krstić, concerning agreement for continuation of operations for the takeover of Srebrenica), paras 950 (*citing* Prosecution Exhibit 123 (Report, dated 13 July 1995, from Tolimir to, *inter alia*, Mladić and the VRS Main Staff

exclusively use derogatory terms to refer to Bosnian Muslims is not sufficient to undermine the Trial Chamber's finding that he did frequently use such terms.[1746] The Appeals Chamber finds no merit in Tolimir's submission.

576. Concerning Tolimir's submission that the use of derogatory terms by other VRS members cannot be used to infer his own genocidal intent, the Appeals Chamber notes that the Trial Chamber took into account the use of such terms by Tolimir's immediate subordinates, together with the testimony of Butler and the aforementioned evidence of Tolimir's own usage, to conclude that Tolimir encouraged the use of derogatory terms so as to provoke ethnic hatred among members of the Bosnian Serb Forces, and an attitude that the Bosnian Muslims were human beings of a lesser value with a view to eradicating this particular group of the population from Eastern BiH.[1747] The Appeals Chamber recalls that where proof of state of mind is based on inference, it must be the only reasonable inference available on the evidence.[1748] This test is even more stringently applied when inferring genocidal intent.[1749] The Appeals Chamber is satisfied that a reasonable trier of fact could have considered Tolimir's and his immediate subordinates' usage of such derogatory language in combination with the other relevant circumstances established by the Trial Chamber considered above, to find that the only reasonable inference from the evidence on a whole is that Tolimir harboured genocidal intent.

(c) Conclusion

577. For the above-mentioned reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 21.

2. Conspiracy to commit genocide (Ground of Appeal 22)

578. The Trial Chamber convicted Tolimir for genocide and conspiracy to commit genocide under Article 4(3)(a) and (b) of the Statute.[1750] It found that an agreement between two or more persons to commit genocide existed in the plan to murder the able-bodied Bosnian Muslim males from Srebrenica with the specific intent to destroy the Bosnian Muslims of Eastern BiH.[1751] The Trial Chamber inferred from the evidence that Tolimir had agreed to commit genocide and thus

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Sector for Intelligence and Security, concerning the situation in the Žepa enclave)), 997 (*citing* Prosecution Exhibit 122 (Report, dated 29 July 1995, from Tolimir to, *inter alia*, Krstić and Pećanac, concerning negotiations with the ABiH regarding a ceasefire in Žepa)).

1746 Trial Judgement, para. 1168.
1747 Trial Judgement, paras 1168-1169.
1748 *Vasiljević* Appeal Judgement, para. 120.
1749 *Krstić* Appeal Judgement, para. 37.
1750 Trial Judgement, paras 1172-1173, 1175-1176.
1751 Trial Judgement, paras 789, 791, 1175-1176.

found him criminally responsible for conspiracy to commit genocide on the basis that he had significantly contributed to the JCE to Murder with genocidal intent.[1752]

(a) Submissions

579. Tolimir challenges his conviction for conspiracy to commit genocide as erroneous both in fact and law.[1753] Tolimir contends that the Trial Chamber mistakenly equated responsibility for genocide with conspiracy to commit genocide.[1754] He argues that the Trial Chamber regarded conspiracy as the collaborative aspect of the crime of genocide, which in his view means that conspiracy to commit genocide cannot be considered as a separate crime if the principal crime, genocide, had been committed.[1755] Tolimir adds that the Trial Chamber relied on its findings on genocide as the sole basis for its findings on the charge of conspiracy to commit genocide.[1756] On the *actus reus*, Tolimir contends that the Trial Chamber failed to consider whether the murder operation alone constituted genocide or whether the plan to commit genocide existed at an earlier point in time.[1757] Furthermore, Tolimir argues that the Trial Chamber failed to provide a reasoned opinion by not making an explicit finding that he entered the alleged agreement to commit genocide.[1758] Finally, he argues that there is no evidence that he had any communication – let alone entered into an agreement – with the alleged members of the JCE to Murder.[1759]

580. Regarding the *mens rea*, Tolimir contends that, even though the conspiracy charge only encompassed "the agreement to kill the able-bodied men from Srebrenica",[1760] the Trial Chamber inferred his genocidal intent from a wider factual basis.[1761] Finally, Tolimir submits that, if conspiracy to commit genocide is considered as a separate crime, the Trial Chamber erred by failing to state which mode of liability under Article 7(1) of the Statute forms the basis of his conviction for this crime.[1762] In Tolimir's view, conspiracy to commit genocide should only be considered as a mode of liability, and is indistinguishable from JCE as a mode of liability.[1763] In his submission, the Trial Chamber was obliged to acquit him on the conspiracy charge because the two convictions are impermissibly cumulative.

[1752] Trial Judgement, paras 1176, 1206.
[1753] Appeal Brief, paras 456-457.
[1754] Appeal Brief, para. 460.
[1755] Appeal Brief, paras 460-461.
[1756] Appeal Brief, para. 462.
[1757] Appeal Brief, para. 458.
[1758] Appeal Brief, paras 459-460.
[1759] Appeal Brief, para. 465.
[1760] Appeal Brief, para. 458, *citing* Trial Judgement, para. 789.
[1761] Appeal Brief, para. 458, *citing* Trial Judgement, para. 1158.
[1762] Appeal Brief, paras 459, 463.
[1763] Appeal Brief, paras 464-465. *See also* Reply Brief, para. 155.

581. The Prosecution responds that the Trial Chamber correctly convicted Tolimir for both conspiracy to commit genocide and genocide, as it addressed the requisite elements of the crimes, finding that Tolimir was party to an agreement to commit genocide and had genocidal intent.[1764] It argues that Tolimir ignores the *Gatete* Appeal Judgement, where the ICTR Appeals Chamber determined that convictions for both conspiracy to commit genocide and genocide were possible.[1765] The Prosecution further asserts that since the *actus reus* of conspiracy is the act of entering into an agreement to commit genocide, the Trial Chamber was not required to provide any further explanation as to the mode of liability.[1766] The Prosecution adds that Tolimir fails to show any factual errors, noting the Trial Chamber's findings that the scale and nature of the murder operation sufficed to demonstrate the crime of genocide and that the genocidal plan and intent stemmed from July 1995.[1767] It further notes that the Trial Chamber found that Tolimir did communicate with other JCE members about the murder operation (*e.g.* instructing Popović to "just do [his] job" after which Popović supervised the murder of 39 Bosnian Muslim men in Bišina).[1768]

(b) Analysis

582. The Appeals Chamber recalls that genocide and conspiracy to commit genocide are distinct crimes under Article 4 of the Statute.[1769] While the *mens rea* for the two crimes is identical – *i.e.*, "the intent to destroy in whole or in part a national, ethnical, racial or religious group as such"[1770] – the *actus reus* is different. The crime of genocide requires the commission of one of the enumerated acts in Article 4(2) of the Statute, while the crime of conspiracy to commit genocide requires the act of entering into an agreement to commit genocide.[1771] As the Trial Chamber correctly found, conspiracy is an inchoate crime and thus does not require proof of commission of the underlying crime of genocide, as the agreement itself is the essence of the crime.[1772]

583. Regarding Tolimir's argument that the Trial Chamber erred by relying on its findings on genocide to establish his responsibility for the crime of conspiracy to commit genocide, the Appeals

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[1764] Response Brief, para. 332. *See also* Response Brief, para. 333.
[1765] Response Brief, paras 332-333.
[1766] Response Brief, para. 334.
[1767] Response Brief, para. 335.
[1768] Response Brief, para. 335, *citing* Trial Judgement, paras 769-773, 790-791, 976, 1109, 1111. In reply, Tolimir submits that no reasonable trial chamber could interpret his conversation with Popović as evidence of an instruction to supervise murder operations. Reply Brief, para. 156.
[1769] *Popović et al.* Appeal Judgement, paras 537-538; *Karemera and Ngirumpatse* Appeal Judgement, para. 710; *Gatete* Appeal Judgement, para. 260.
[1770] Trial Judgement, para. 787, *citing Nahimana et al.* Appeal Judgement, para. 894.
[1771] *Karemera and Ngirumpatse* Appeal Judgement, para. 710; *Gatete* Appeal Judgement, para. 260. *See Nahimana et al.* Appeal Judgement, para. 894; *Seromba* Appeal Judgement, para. 218; *Ntagerura et al.* Appeal Judgement, para. 92.
[1772] *See Karemera and Ngirumpatse* Appeal Judgement, para. 711. *See also* Trial Judgement, para. 786, *citing Popović et al.* Trial Judgement, para. 868, *Niyitegeka* Trial Judgement, para. 423, *Musema* Trial Judgement, para. 193, *Nahimana et al.* Appeal Judgement, para. 720.

Chamber notes that the Trial Chamber relied on its findings on genocide as well as on findings related to his liability pursuant to the JCE to Murder.[1773] The Appeals Chamber can identify no error in the Trial Chamber's approach. The Appeals Chamber recalls that to establish the *actus reus* of conspiracy to commit genocide where direct evidence of an agreement to commit genocide is lacking, an agreement to commit genocide may be inferred from the conduct of the conspirators or the concerted or coordinated action of a group of individuals, so long as it is the only reasonable inference to be drawn from the totality of the evidence.[1774] The Trial Chamber was therefore entitled to consider all the relevant facts and circumstances, including any factual findings made in the context of determining whether genocide had been committed.[1775] The Appeals Chamber therefore dismisses Tolimir's submission.

584. To the extent that Tolimir contends that the Trial Chamber erred in fact in finding that the agreement to commit genocide existed, the Appeals Chamber first notes that, contrary to Tolimir's assertion, the Trial Chamber did find that the mass murder of Srebrenica's Bosnian Muslim men constituted genocide in and of itself.[1776] Second, it notes that the Trial Chamber made a clear finding that the plan to murder had materialised by the morning of 12 July 1995, prior to the start of the mass killings.[1777] Third, the Appeals Chamber notes that, in the absence of direct evidence, the Trial Chamber relied on circumstantial evidence to establish the existence of an agreement between two or more persons to kill the able-bodied Bosnian Muslim men from Srebrenica with the intent to destroy them.[1778] The Trial Chamber pointed to "the level of coordination amongst various layers of the VRS leadership from the very beginning of the implementation of the plan to murder […] indicating that those involved in the [murder] operation were acting in accordance with an agreed course of action".[1779] Tolimir fails to show that no reasonable fact-finder could have reached this conclusion because of the existence of other reasonable inferences.[1780] The Appeals Chamber therefore dismisses Tolimir's argument.

585. The Appeals Chamber finds Tolimir's submission that the Trial Chamber failed to provide a reasoned opinion by not making an explicit finding on his entering into the agreement to be without merit. The Trial Chamber inferred Tolimir's entering into an agreement "at the latest by the afternoon of 13 July", when he had knowledge of the murder operation and was significantly

[1773] *See* Trial Judgement, para. 1176.
[1774] *Popović et al.* Appeal Judgement, para. 544; *Nahimana et al.* Appeal Judgement, paras 896-897; *Seromba* Appeal Judgement, para. 221.
[1775] *Nahimana et al.* Appeal Judgement, para. 896.
[1776] *See* Trial Judgement, paras 750-751, 769-771.
[1777] Trial Judgement, paras 1046, 1048-1049, 1054.
[1778] Trial Judgement, paras 790-791.
[1779] Trial Judgement, paras 790-791 and the evidence cited and analysed therein.
[1780] *See Nahimana et al.* Appeal Judgement, para. 896.

contributing to it.[1781] As acknowledged by Tolimir,[1782] the Trial Chamber recalled the inference it made in this regard later in the Trial Judgement, when it noted that – on the basis of its finding that Tolimir significantly contributed to the JCE to Murder with genocidal intent – it "has inferred that the Accused acceded to an agreement to commit genocide".[1783] The Trial Chamber thus fulfilled its obligation to provide a reasoned opinion on the *actus reus* of conspiracy to commit genocide to establish Tolimir's responsibility.

586. As regards Tolimir's submission that the Trial Chamber erred by inferring his genocidal intent with regard to the crime of conspiracy to commit genocide on a wider factual basis than merely the agreement to kill the able-bodied men from Srebrenica, the Appeals Chamber recalls that – as correctly noted by the Trial Chamber – the *mens rea* for the two crimes of genocide and conspiracy to commit genocide is the same and that genocidal intent may be inferred from the totality of evidence.[1784] The Appeals Chamber therefore finds that the Trial Chamber did not err in relying on its findings as to the *mens rea* for the crime of genocide to establish the *mens rea* required for the conspiracy to commit genocide.[1785]

587. In relation to Tolimir's argument that he should not have been convicted under Article 4(3)(b) of the Statute because there is no finding or evidence on the record that he had any communications with any of the alleged members of the JCE to Murder, the Appeals Chamber notes that the Trial Chamber did not specifically rely upon its prior findings on Tolimir's communications with the alleged members of the JCE to Murder to establish his entering the conspiracy to genocide.[1786] Nor was the Trial Chamber required to do so: as explained above, if direct evidence of entering into an agreement is lacking, the *actus reus* of the crime of conspiracy under Article 4(3)(b) of the Statute may be established on the basis of the totality of the evidence on the record, as long as it is the only reasonable inference to be drawn from such evidence.[1787]

588. As to Tolimir's contention that the Trial Chamber failed to state the mode of liability under which he was convicted for conspiracy to commit genocide, the Appeals Chamber considers that while the Trial Chamber did not explicitly discuss the mode of liability for conspiracy to commit genocide, it is sufficiently clear from the Trial Judgement that the Trial Chamber convicted Tolimir

[1781] Trial Judgement, para. 1176.
[1782] *See* Appeal Brief, para. 460.
[1783] Trial Judgement, para. 1206.
[1784] Trial Judgement, paras 745, 1161. *See Stakić* Appeal Judgement, para. 55.
[1785] Trial Judgement, para. 1176.
[1786] *See* Trial Judgement, para. 1176.
[1787] *See supra*, para. 583.

for *committing* the crime of conspiracy to commit genocide by having "acceded to an agreement to commit genocide".[1788]

589. As regards Tolimir's argument that the Trial Chamber mistakenly equated responsibility for genocide with conspiracy to commit genocide, the Appeals Chamber considers that Tolimir misinterprets the statement in the Trial Judgement that "[t]he rationale for criminalising conspiracy to commit genocide involves not only preventing the commission of the substantive offence, but also punishing the collaborative aspect of the crime".[1789] Contrary to Tolimir's contention, the Trial Chamber did not suggest that conspiracy to commit genocide is one element of the crime of genocide but explained why the two crimes are materially distinct and thus why convictions may be entered for both crimes.[1790] The Appeals Chamber finds no error in the Trial Chamber's reasoning and rejects Tolimir's argument. The Trial Chamber made distinct findings about each crime, articulating separate reasoning for each conviction on both the *actus reus* and the *mens rea*.[1791]

590. Finally, the Appeals Chamber finds no merit in Tolimir's related argument that conspiracy to commit genocide under Article 4(3)(b) of the Statute is essentially a mode of liability identical to JCE, rendering convictions under both modes of liability impermissibly cumulative. The Appeals Chamber recalls that under the Statute of the Tribunal, conspiracy to commit genocide is not a mode of liability but an inchoate crime, constituted as soon as there is an agreement among the conspirators "to act for the purpose of committing genocide".[1792] By contrast, JCE is a form of "committing" under Article 7(1) of the Statute – a form of liability that requires the actual commission of the crime.[1793]

(c) Conclusion

591. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 22.

[1788] Trial Judgement, paras 1176, 1206.
[1789] Trial Judgement, para. 1207.
[1790] Trial Judgement, para. 1207 (emphasis added).
[1791] *See* Trial Judgement, paras 750-782 (genocide), 788-791 (conspiracy to commit genocide).
[1792] *Nahimana et al.* Appeal Judgement, para. 896.
[1793] *See Tadić* Appeal Judgement, para. 227.

3. *Mens rea* requirements of crimes against humanity (Ground of Appeal 23)

592. The Trial Chamber found that Tolimir knew that there was an attack directed against the Bosnian Muslim civilian populations of the Srebrenica and Žepa enclaves, and that his acts formed part of this attack.[1794]

(a) Submissions

593. Tolimir submits that the Trial Chamber erred in fact in finding that he had knowledge that the attack on the Srebrenica and Žepa enclaves was an attack against a civilian population, and that his acts formed part of the attack.[1795] Tolimir reiterates his challenges to the Trial Chamber's findings as submitted under Ground of Appeal 15, specifically that the Trial Chamber: (i) misinterpreted Directive 7, in particular when it erroneously assumed that "every" subsequent act was in implementation of this directive; and (ii) disregarded the explicit wording of a number of documents issued after Directive 7, some of them issued by Tolimir, which ordered VRS officers to treat civilians and POWs in accordance with the Geneva Conventions.[1796]

594. The Prosecution responds that Tolimir merely repeats arguments made under Grounds of Appeal 15-17.[1797] It argues that for the reasons it advances in relation to these grounds, Tolimir's submissions under Ground of Appeal 23 should also be dismissed.[1798]

(b) Analysis

595. The Appeals Chamber notes that the Trial Chamber based its findings of Tolimir's knowledge of the attack and that his acts formed part of this attack on its previous findings that: (i) the Sector for Intelligence and Security, headed by Tolimir, contributed to the drafting of Directive 7, which marked the start of the forcible removal of the Bosnian Muslim population from the two enclaves; (ii) Tolimir was consequently aware that there was a plan to create conditions to ethnically cleanse the enclaves of their Bosnian Muslim civilian population; and (iii) Tolimir had knowledge of Operation Krivaja, that aimed "to 'split apart the enclaves of Srebrenica and Žepa and

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1794 Trial Judgement, paras 1178-1179.
1795 Appeal Brief, paras 467, 469.
1796 Appeal Brief, para. 468, *citing* Prosecution Exhibit 1202 (Operation Krivaja 95 Order), p. 7, Prosecution Exhibit 1225 (Stupčanica 95 Order), Defence Exhibit 41 (report from Tolimir to *inter alia* VRS main staff dated 9 July 1995, 2025 hours), Defence Exhibit 85 (report from Tolimir to Gvero and Krstić dated 9 July 1995, 2350 hours). *See also* Appeal Brief, para. 305.
1797 Response Brief, para. 337.
1798 Response Brief, paras 337-338, *citing* Response Brief, paras 155-162 (concerning Directive 7 and ensuing orders submitted in relation to Ground of Appeal 15), 200-205, 293 (concerning Defence Exhibits 41 and 85 submitted in relation to Grounds of Appeal 15 and 17). The Appeals Chamber notes that the Prosecution does not make any reference to specific paragraphs in its Response Brief in relation to submissions made under Ground of Appeal 16.

to reduce them to their urban areas', *pursuant* to Directives 7 and 7/1".[1799] The Appeals Chamber notes that in arriving at its conclusion that Directive 7 marked the beginning of the forcible removal operation, the Trial Chamber considered and rejected Tolimir's argument that Directive 7/1 replaced Directive 7.[1800] The Appeals Chamber has also dismissed Tolimir's argument on appeal that the Trial Chamber erred in its interpretation of Directive 7 and subsequent military orders[1801] elsewhere in this Judgement.[1802] Consequently, the Appeals Chamber dismisses Tolimir's arguments in this respect in relation to his *mens rea* concerning crimes against humanity.

596. With regard to Tolimir's argument that the Trial Chamber disregarded a number of documents he and other VRS officers issued after Directive 7 ordering the correct treatment of civilians and POWs, namely, Prosecution Exhibits 1202 (Operation Krivaja 95 Order) and 1225 (Drina Corps Command Order from Krstić to attack the Žepa enclave dated 13 July 1995), and Defence Exhibits 41 and 85 (reports from Tolimir dated 9 July 1995, marked 2025 hours and 2350 hours, respectively),[1803] the Appeals Chamber notes that the Trial Chamber, when making its finding on Tolimir's *mens rea* concerning crimes against humanity, did not explicitly discuss these orders in the mentioned documents.[1804] With respect to Prosecution Exhibit 1202, there is no indication that the Trial Chamber disregarded this document. In finding that Tolimir knew of the aim of Operation Krivaja to split apart and reduce the two enclaves pursuant to Directives 7 and 7/1, the Trial Chamber cited previous findings in which the order in Prosecution Exhibit 1202 to treat POWs and civilians lawfully under the Geneva Conventions was explicitly considered.[1805] Furthermore, even if Prosecution Exhibit 1202 ordered members of the Drina Corps to abide by the Geneva Conventions as regards the treatment of civilians and POWs, Tolimir fails to demonstrate that no reasonable trier of fact could have concluded, on the basis of all the evidence cited by the

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[1799] Trial Judgement, paras 1078, 1178, *citing* Prosecution Exhibit 1202 ("Operation Krijava 95" Drina Corps Command order of 2 July 1995) (emphasis added).

[1800] Trial Judgement, paras 1010, 1012, 1078.

[1801] Appeal Brief, paras 250-255, 327.

[1802] *See supra*, paras 317-321.

[1803] *See* Prosecution Exhibit 1202, p. 7 ("In dealing with prisoners of war and the civilian population behave in every way in accordance with the Geneva Conventions"); Prosecution Exhibit 1225, p. 4 ("The civilian Muslim population and UNPROFOR are not targets of our operations. Collect them together and keep them under guard, but crush and destroy armed Muslim groups"); Defence Exhibit 41 ("The President of the Republika Srpska ordered that in the follow-up combat operations full protection be ensured to UNPROFOR members and the Muslim civilian population and that they be guaranteed safety in the event of their cross-over to the territory of Republika Srpska./ In accordance with the order of the President of Republika Srpska, you must issue an order to all combat units participating in combat operations around Srebrenica to offer maximum protection and safety to all UNPROFOR members and the civilian Muslim population. You must order subordinate units to refrain from destroying civilian targets unless forced to do so because of strong enemy resistance. Ban the torching of residential buildings and treat the civilian population and war prisoners in accordance with the Geneva Conventions of 12 August 1949"); Defence Exhibit 85 ("Pay particular attention to protecting members of UNPROFOR and the civilian population").

[1804] Trial Judgement, paras 1177-1179.

[1805] Trial Judgement, para. 1178, n. 4517, *citing* Trial Judgement, para. 217, which refers to Prosecution Exhibit 1202, p. 7.

Trial Chamber, that he knew that the attack on Srebrenica and Žepa was directed against a civilian population, and that his acts were tied to the attack. As a result, there was no need for the Trial Chamber to expressly discuss this part of the order in Prosecution Exhibit 1202.

597. The Appeals Chamber notes that, while the Trial Chamber did not explicitly refer to the mentioned orders in Prosecution Exhibit 1225 or Defence Exhibits 41 and 85 when analysing Tolimir's *mens rea* concerning crimes against humanity,[1806] it did, however, consider the orders in these documents in relation to other findings in the Trial Judgement.[1807] With regard to Prosecution Exhibit 1225, an order from Krstić to attack the Žepa enclave dated 13 July 1995, the Trial Chamber expressly considered the order that "[t]he civilian Muslim population and UNPROFOR are not targets of our operations" but reasoned that "the mere inclusion of this language in Krstić's [order] does not convince the Majority, in and of itself, that the VRS operation against Žepa was only aimed at the ABiH".[1808] In view of clear evidence to the contrary, the Trial Chamber reasonably dismissed Tolimir's argument that the target of the attack on Žepa was not the civilian population.[1809] It took into account, *inter alia*, the fact that by late June 1995, the VRS had attacked most of the UNPROFOR OPs around Žepa, that sporadic shelling and firing had been directed against the centre of Žepa town the week before Krstić's order and that this order also referred to the objective of "liberating" and "eliminating" the enclaves, reflecting the aim to take over the safe area by force – thereby targeting the civilian population.[1810] In view of these findings, as well as the Trial Chamber's findings on how the attack culminated in the forcible transfer of the Bosnian Muslim population of Žepa, the Appeals Chamber considers that a reasonable trial chamber could find that the "mere inclusion" of the order in Prosecution Exhibit 1225 was not sufficient to demonstrate that the aim of the attack was solely to target the ABiH. Tolimir's argument is thus dismissed. Similarly, as discussed under Grounds of Appeal 15 and 17, the Appeals Chamber notes that the Trial Chamber expressly considered the language contained in Defence Exhibits 41 and 85, but reasonably held that these orders could have no bearing on Tolimir's state of mind in view of his knowledge of actual events on the ground.[1811] For these reasons, the Appeals Chamber considers that Tolimir fails to demonstrate that the Trial Chamber erred by not explicitly discussing Prosecution Exhibit 1225 and Defence Exhibits 41 and 85 in relation to his *mens rea* for crimes against humanity, or that such a discussion would have impacted the impugned finding.

[1806] Trial Judgement, paras 1178-1179.
[1807] *See, e.g,* Trial Judgement, para. 224, n. 863 (for Defence Exhibit 85); Trial Judgement, para. 226, n. 868, para. 1085, n. 4257 (for Defence Exhibit 41); Trial Judgement, para. 612, n. 2639, paras 1028-1029 (for Prosecution Exhibit 1225).
[1808] Trial Judgement, para. 1028.
[1809] Trial Judgement, paras 1028-1029.
[1810] Trial Judgement, para. 1029.
[1811] *See supra*, paras 363, 517-520.

(c) Conclusion

598. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Ground of Appeal 23.

VII. CUMULATIVE CONVICTIONS (GROUND OF APPEAL 24)

599. Tolimir submits that the Trial Chamber erred in law by relying on the test articulated in the *Čelebići* Appeal Judgement ("*Čelebići* test") in determining whether he could be convicted cumulatively and in finding that convictions for the following pairs of offences are permissibly cumulative: (i) *intra*-Article 5 cumulative convictions (persecution and murder,[1812] and forcible transfer as an act of persecution and forcible transfer as an inhumane act);[1813] (ii) genocide and extermination as a crime against humanity;[1814] (iii) genocide and murder as a crime against humanity or as a violation of the laws or customs of war;[1815] and (iv) genocide and conspiracy to commit genocide.[1816]

A. Law on cumulative convictions

1. Submissions

600. Tolimir argues that the Trial Chamber erred by relying on the *Čelebići* test claiming that it is not a complete test.[1817] He contends that the *Čelebići* test "is inappropriately narrow for the determination of combinations of crimes" pursuant to Articles 3, 4, and 5 of the Statute.[1818] Tolimir claims that it is necessary to establish not only whether elements of crimes overlap, but also to compare elements that do not.[1819] In support of his arguments, Tolimir refers to domestic law[1820] and also relies on the dissenting opinions in the *Čelebići* Appeal Judgement on the entering of cumulative convictions.[1821]

2. Analysis

601. The *Čelebići* test is as follows:

> […] reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

1812 Appeal Brief, paras 471-472. *See also* Notice of Appeal, para. 166.
1813 Appeal Brief, paras 471-472. *See also* Notice of Appeal, para. 167.
1814 Appeal Brief, paras 473-476. *See also* Notice of Appeal, para. 168.
1815 Appeal Brief, paras 473-476. *See also* Notice of Appeal, para. 168.
1816 Appeal Brief, paras 477-489. *See also* Notice of Appeal, para. 168.
1817 Reply Brief, paras 158-160.
1818 Reply Brief, para. 158, *citing Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 29.
1819 Reply Brief, para. 160.
1820 Reply Brief, para. 159, *citing* Judge S. R. Joseph.
1821 Appeal Brief, para. 471.

> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additionally materially distinct element, then a conviction should be entered only under that provision.[1822]

602. The *Čelebići* test is well-established in the jurisprudence of the Tribunal and has been reaffirmed in numerous judgements.[1823] In the interests of certainty and predictability, the Appeals Chamber will follow its previous decisions, and will only depart from them for cogent reasons in the interests of justice.[1824] It is for the party submitting that the Appeals Chamber should depart from a previous decision to demonstrate that there are cogent reasons in the interests of justice that justify such departure.[1825] The Appeals Chamber is not satisfied that Tolimir's arguments establish cogent reasons for the Appeals Chamber to depart from the settled jurisprudence of the Tribunal on this issue.

B. Application of the law on cumulative convictions

1. Persecution and murder (crimes against humanity) and forcible transfer as an act of persecution and forcible transfer as an inhumane act (crimes against humanity)

(a) Submissions

603. With respect to the permissibility of *intra*-Article 5 cumulative convictions,[1826] Tolimir submits that the Joint Dissenting Opinion of Judges Schomburg and Güney in the *Kordić and Čerkez* Appeal Judgement articulated the correct legal standard under international criminal law.[1827]

604. The Prosecution responds that *intra*-Article 5 cumulative convictions are permitted under well-settled precedent.[1828] Specifically, the Prosecution maintains that the Trial Chamber correctly entered cumulative convictions for persecution as a crime against humanity and murder as a crime against humanity because both have a materially distinct element not contained in the other.[1829] The

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[1822] *Čelebići* Appeal Judgement, paras 412-413. *See also Gatete* Appeal Judgement, para. 259; *Krajišnik* Appeal Judgement, para. 386; *Ntagerura et al.* Appeal Judgement, para. 425; *Stakić* Appeal Judgement, paras 355-357; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 542; *Musema* Appeal Judgement, paras 360-361.

[1823] *See Gatete* Appeal Judgement, para. 259; *Krajišnik* Appeal Judgement, para. 386; *Ntagerura et al.* Appeal Judgement, para. 425; *Stakić* Appeal Judgement, paras 355-357; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 425; *Musema* Appeal Judgement, paras 360-361.

[1824] *Aleksovski* Appeal Judgement, paras 107, 109.

[1825] *Đordević* Appeal Judgement, para. 24, and references cited therein.

[1826] Specifically: (i) persecution as a crime against humanity under Article 5(h) of the Statute and extermination under Article 5(b) of the Statute; and (ii) forcible transfer as an other inhumane act under Article 5(i) of the Statute and forcible transfer as an act of persecution under Article 5(h) of the Statute. Appeal Brief, paras 471-472.

[1827] Appeal Brief, para. 471. Tolimir cites to "Joint DO of Judge Schomburg and Judge Güney, para. 4-7", which the Appeals Chamber understands to be the Joint Dissenting Opinion of Judge Schomburg and Judge Güney in the *Kordić and Čerkez* Appeal Judgement.

[1828] Response Brief, para. 339.

[1829] Response Brief, para. 339.

Prosecution asserts that the same principle applies to a conviction for forcible transfer as an "other inhumane act" and forcible transfer as an act of persecution.[1830]

(b) Analysis

605. The Appeals Chamber notes that the Trial Chamber declined to convict Tolimir for murder as a crime against humanity, on the basis that it would have been impermissibly cumulative with the conviction entered for extermination.[1831] Accordingly, as Tolimir was not convicted of murder as a crime against humanity,[1832] this limb of Ground of Appeal 24 is dismissed.

606. The Appeals Chamber notes that the Trial Chamber's finding of the validity of cumulative convictions for forcible transfer as an act of persecution and as an "other inhumane act" is consistent with the Tribunal's and the ICTR's jurisprudence.[1833] Tolimir's reliance on a joint dissenting opinion in the *Kordić and Čerkez* Appeal Judgement[1834] does not establish cogent reasons for the Appeals Chamber to depart from its well-settled jurisprudence. In light of the above, this limb of Ground of Appeal 24 is dismissed.

2. Genocide and extermination as a crime against humanity

607. The Trial Chamber found it "permissible to enter convictions for genocide under Article 4(3)(a) as well as a conviction for any crime under Article 5".[1835] It reasoned that whereas genocide "requires the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group […] a conviction for crimes against humanity under Article 5 requires a finding of a widespread or systematic attack against any civilian population".[1836]

(a) Submissions

608. In relation to genocide and extermination, Tolimir contends that although both crimes possess distinct elements, these distinctions are of such a nature as to make entering cumulative convictions impermissible.[1837] In this context, Tolimir asserts that genocide is an aggravated form of crimes against humanity. He claims that the only reason the framers of the Genocide Convention did not describe genocide as a form of crime against humanity was to avoid any doubt that genocide

1830 Response Brief, para. 339.
1831 Trial Judgement, para. 1204.
1832 Trial Judgement, paras 1204, 1240.
1833 *See Nahimana et al.* Appeal Judgement, paras 1026-1027; *Naletilić and Martinović* Appeal Judgement, paras 587-591; *Stakić* Appeal Judgement, paras 355-367; *Kordić and Čerkez* Appeal Judgement, paras 386-391, 1040, 1042.
1834 *See supra*, para. 603; Appeal Brief, para. 471.
1835 Trial Judgement, para. 1205.
1836 Trial Judgement, para. 1205.
1837 Appeal Brief, para. 474.

could be committed both in times of peace and war.[1838] In this context, Tolimir submits that: (i) the *mens rea* and *actus reus* of genocide require that the underlying acts of genocide be directed against the civilian population;[1839] (ii) "to establish genocide, it is necessary to establish systematic or widespread nature of the punishable acts";[1840] and (iii) "genocidal intent, by its very nature, even [if] not by definition, always encompasses civilians".[1841] With regard to the *mens rea* of genocide and crimes against humanity, Tolimir submits that the specific intent required for genocide "is much more serious" than that required for crimes against humanity, and that both forms of intent are "materially distinct in a way that entering cumulative convictions is impermissible".[1842]

609. The Prosecution responds that a conviction for genocide may be cumulated with murder or extermination as crimes against humanity which is permitted under the *Čelebići* test.[1843]

(b) Analysis

610. The permissibility of cumulative convictions for the crimes of genocide and extermination is well established in the jurisprudence of the Appeals Chamber on the basis that each crime contains a materially distinct element not contained in the other consistent with the *Čelebići* test.[1844] Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group which is not required by extermination as a crime against humanity. Extermination requires proof that the crime was committed as part of a widespread or systematic attack against a civilian population, an element not required by genocide. The Appeals Chamber finds no merit in Tolimir's submission that the civilian component in each renders cumulative convictions impermissible.[1845] Consequently, the Appeals Chamber upholds the Trial Chamber's finding in this respect and dismisses this prong of Ground of Appeal 24.

3. Genocide and murder as a crime against humanity or as a war crime

611. The Trial Chamber found it "permissible to enter convictions for genocide under Article 4(3)(a) as well as a conviction for any crime under Article 5 or a conviction for murder under Article 3".[1846] It reasoned that whereas genocide "requires the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group […] a conviction for crimes against humanity

[1838] Appeal Brief, para. 474.
[1839] Appeal Brief, para. 475.
[1840] Appeal Brief, para. 475.
[1841] Appeal Brief, para. 476.
[1842] Appeal Brief, para. 476.
[1843] Response Brief, para. 340.
[1844] *See Musema* Appeal Judgement, paras 366-367; *Nahimana et al.* Appeal Judgement, paras 1029-1030; *Ntagerura et al.* Appeal Judgement, para. 426; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 543; *Semanza* Appeal Judgement, para. 318. *See also Krstić* Appeal Judgement, paras 222-223, 225-227.
[1845] Appeal Brief, paras 475-476.

under Article 5 requires a finding of a widespread or systematic attack against any civilian population […] and a conviction under Article 3 requires proof of a close link between the acts of the accused and the armed conflict".[1847]

(a) Submissions

612. In relation to genocide and murder as a war crime, Tolimir submits that the Trial Chamber erred in law in permitting cumulative convictions for genocide and murder as a violation of the laws or customs of war.[1848]

613. The Prosecution contends that, as for genocide and crimes against humanity, murder as a violation of the laws or customs of war contains a distinct element not contained in the crime of genocide, namely the existence of a nexus between the acts of the accused and the armed conflict.[1849]

(b) Analysis

614. The Trial Chamber did not convict Tolimir for murder as a crime against humanity as it would have been impermissibly cumulative with the conviction entered for extermination.[1850] Therefore, as Tolimir has not been convicted of this crime, his challenge is dismissed.

615. However, the Trial Chamber did convict Tolimir for murder as a violation of the laws or customs of war under Article 3 of the Statute.[1851] The Appeals Chamber will therefore address whether the Trial Chamber erred in law in entering cumulative convictions for genocide and murder as a violation of the laws or customs of war.

616. The Appeals Chamber notes that there is no appellate jurisprudence which addresses the specific cumulative convictions for genocide and murder as a violation of the laws or customs of war. However, the ICTR Appeals Chamber has upheld cumulative convictions for war crimes, as a broad category, and genocide based on the materially distinct elements of genocide and war crimes.[1852] Relevantly, genocide requires proof of specific intent while war crimes require proof of the existence of a nexus between the alleged crimes and the armed conflict.[1853]

1846 Trial Judgement, para. 1205.
1847 Trial Judgement, para. 1205.
1848 Appeal Brief, para. 473. *See also* Notice of Appeal, para. 168, *citing* Trial Judgement, para. 1205.
1849 Response Brief, para. 340.
1850 Trial Judgement, para. 1204.
1851 Trial Judgement, para. 1239.
1852 *See Semanza* Appeal Judgement, para. 368; *Rutaganda* Appeal Judgement, para. 583.
1853 *Semanza* Appeal Judgement, para. 368; *Rutaganda* Appeal Judgement, para. 583.

617. The Appeals Chamber finds no error in the Trial Chamber's finding which is consistent with the *Čelebići* test. Accordingly, the Appeals Chamber finds that the Trial Chamber committed no error by entering convictions for both genocide and murder as a violation of the laws or customs of war as both contain a materially distinct element not contained in the other. Therefore, this limb of Ground of Appeal 24 is dismissed.

4. Genocide and conspiracy to commit genocide

618. Regarding the convictions entered for genocide and conspiracy to commit genocide, the Trial Chamber stated as follows:

> Turning to the propriety of entering convictions for both genocide and conspiracy to commit genocide, the Majority observes that although the evidence supporting both convictions is largely the same, the Majority has found that the Accused significantly contributed to the JCE to murder, and that he did so with genocidal intent. On this basis, the Majority has inferred that the Accused acceded to an agreement to commit genocide. While the Majority's finding that the Accused committed acts enumerated under Article 4(2) of the Statute sustains the genocide conviction, it is the finding that the Accused entered into an agreement to commit genocide that underlies the conviction for conspiracy. It is thus clear that the two convictions are not based upon the same underlying conduct, and that the *Čelebići* test does not govern this question.[1854]

(a) Submissions

619. Tolimir contends that entering cumulative convictions for both conspiracy to commit genocide and genocide on the basis of participation in a JCE is unnecessary and impermissibly cumulative as it confuses the two different modes of liability.[1855] He submits that Article 4 of the Statute adopts *verbatim* Article III of the Genocide Convention, which delimits punishable acts of genocide by defining "all applicable modes of liability" for genocide, namely commission, conspiracy, incitement, attempt, and complicity.[1856] Tolimir thereby asserts that Article 7(1) of the Statute does not apply to conspiracy to commit genocide.[1857] In this context, Tolimir notes that convictions under conspiracy and the underlying offence are not possible in civil law countries.[1858]

620. The Prosecution maintains that the Trial Chamber followed the case law of the *Gatete* Appeals Chamber and correctly entered cumulative convictions for both genocide and conspiracy to commit genocide.[1859] In this regard, the Prosecution submits that Tolimir does not advance any

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1854 Trial Judgement, para. 1206 (internal citations omitted).
1855 Appeal Brief, paras 484-486.
1856 The Appeals Chamber notes that Tolimir erroneously included "instigation" when referring to Article 4 of the Statute. It understands him to mean "incitement" and "attempt" as listed in that article. *See* Appeal Brief, para. 479.
1857 Appeal Brief, para. 480.
1858 Appeal Brief, para. 487.
1859 Response Brief, para. 342.

cogent reason why the Appeals Chamber should depart from its jurisprudence and that his arguments should be dismissed.[1860]

(b) Analysis

621. Genocide and conspiracy to commit genocide are distinct crimes under Articles 4(3)(a) and 4(3)(b) of the Statute.[1861] The Appeals Chamber has found that it is permissible to enter convictions for both genocide and conspiracy to commit genocide.[1862] Tolimir fails to raise any cogent reasons to depart from the jurisprudence establishing that conspiracy to commit genocide is a crime and not a mode of liability. As stated in the Trial Judgement, while the finding that Tolimir committed acts enumerated under Article 4(2) of the Statute sustains the genocide conviction, it is the finding that Tolimir entered into an agreement to commit genocide that underlies the conviction for conspiracy to commit genocide.[1863] The Appeals Chamber therefore considers that the Trial Chamber committed no error when finding that the two convictions are not based upon the same underlying acts, rendering the *Čelebići* test inapplicable.[1864]

622. The Appeals Chamber now turns to address Tolimir's contention that the Trial Chamber erred in entering convictions for both genocide and conspiracy to commit genocide. As genocide and conspiracy to commit genocide are distinct crimes not based on the same underlying conduct, the Appeals Chamber considers that the Trial Chamber correctly entered convictions for both crimes, in order to hold Tolimir responsible for the totality of his criminal conduct.[1865] The remainder of Tolimir's submissions do not impact his conviction and the Appeals Chamber refrains from addressing them further. This limb of Ground of Appeal 24 is therefore dismissed.

C. Conclusion

623. In light of the foregoing, the Appeals Chamber dismisses Ground of Appeal 24 in its entirety.

1860 Response Brief, para. 343.
1861 *Popović et al.* Appeal Judgement, paras 537-538; *Gatete* Appeal Judgement, para. 260.
1862 *Popović et al.* Appeal Judgement, para. 538; *Karemera and Ngirumpatse* Appeal Judgement, para. 713; *Gatete* Appeal Judgement, paras 262-264.
1863 Trial Judgement, para. 1206.
1864 Trial Judgement, para. 1206.
1865 *See Popović et al.* Appeal Judgement, para. 538.

VIII. SENTENCING (GROUND OF APPEAL 25)

624. The Trial Chamber convicted Tolimir for the crimes of genocide, conspiracy to commit genocide, extermination, murder, persecutions, and forcible transfer pursuant to Article 7(1) of the Statute and sentenced him to life imprisonment.[1866] In determining the sentence, the Trial Chamber considered various factors,[1867] including: (i) the gravity of the offences, in view of the sheer scale of crimes, Tolimir's convictions for genocide and persecutions, the large-scale brutality used by the VRS, and the impact of the crimes on the victims;[1868] (ii) aggravating circumstances,[1869] including Tolimir's high rank that he abused to contribute to and cover up the crimes[1870] and his active involvement in the implementation of the criminal objectives of the JCEs;[1871] (iii) various mitigating circumstances, which the Trial Chamber considered *proprio motu* and to which it accorded little or no weight;[1872] (iv) the general practice of sentencing in the courts of the former Yugoslavia;[1873] (v) the terms of sentencing to imprisonment in similar cases before the Tribunal;[1874] and (v) credit for the time spent in custody.[1875] The Trial Chamber was careful not to double-count factors relevant to the gravity of the crime as aggravating circumstances.[1876]

625. Tolimir has appealed the sentence imposed on him on the basis that it is manifestly excessive and disproportionate.[1877]

A. Standard of appellate review on sentencing

626. Pursuant to Article 24 of the Statute and Rule 101(B) of the Rules, a trial chamber must consider the following factors in determining the appropriate sentence: the gravity of the offence; the individual circumstances of the convicted person; the general practice regarding sentences in the courts of the former Yugoslavia; and any aggravating and/or mitigating circumstances. A trial chamber is vested with broad discretion in determining an appropriate sentence reflecting the circumstances of the particular accused and the gravity of the crime.[1878]

1866 Trial Judgement, paras 1239-1240, 1242.
1867 Trial Judgement, paras 1212-1214.
1868 Trial Judgement, paras 1215-1218.
1869 Trial Judgement, paras 1219-1227, 1229, 1231.
1870 Trial Judgement, paras 1224-1225.
1871 Trial Judgement, paras 1224, 1227.
1872 Trial Judgement, paras 1228-1231.
1873 Trial Judgement, paras 1232-1235.
1874 Trial Judgement, para. 1236.
1875 Trial Judgement, para. 1237.
1876 Trial Judgement, paras 1215, 1222.
1877 Appeal Brief, paras 491, 517.
1878 *Popović et al.* Appeal Judgement, para. 1961; *Đorđević* Appeal Judgement, para. 931; *Šainović et al.* Appeal Judgement, paras 1797-1798; *Boškoski and Tarčulovski* Appeal Judgement, paras 203-204; *D. Milošević* Appeal Judgement, para. 297; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Strugar* Appeal Judgement, para.

627. An appeal against sentence is an appeal *stricto sensu*, *i.e.* it is corrective in nature and is not a trial *de novo*.[1879] The Appeals Chamber will not revise a sentence unless the trial chamber has committed a "discernible error" in exercising its discretion or failed to follow the applicable law.[1880] It is for the party challenging the sentence to demonstrate that the trial chamber ventured outside its discretionary framework imposing the sentence.[1881] In doing so, a challenging party must show that the trial chamber: gave weight to extraneous or irrelevant considerations; failed to give sufficient weight to relevant considerations; made a clear error as to the facts upon which it exercised its discretion; or, made a decision that was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber failed to properly exercise its discretion.[1882]

B. Gravity of the crimes

1. Submissions

628. Tolimir submits that when the Trial Chamber contemplated the gravity of the crimes as a factor to determine the appropriate sentence, it erred by failing to consider the gravity of his alleged criminal behaviour and only addressed the gravity of the crimes for which he was convicted.[1883] In Tolimir's view, the Trial Chamber thus failed to "individualise" the sentence by not tailoring it to his alleged criminal behaviour.[1884] He asserts that the Trial Chamber relied on erroneous factual and legal findings as challenged under his other Grounds of Appeal when it determined the gravity of the crime.[1885]

629. Tolimir argues that the Trial Chamber's finding that "the extreme magnitude and scale of crimes committed could only have been achieved by an organised, interconnected military structure working in unison" is speculative and probably based on the erroneous evidence given by Witness Butler.[1886] He submits that, on the contrary, VRS officers were trained to abide by the laws of war

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336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Blagojević and Jokić* Appeal Judgement, paras 137, 321; *Blaškić* Appeal Judgement, para. 680.

1879 *Popović et al.* Appeal Judgement, para. 1961; *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Strugar* Appeal Judgement, para. 336; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Haradinaj et al.* Appeal Judgement, para. 321.

1880 *Popović et al.* Appeal Judgement, para. 1961; *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Haradinaj et al.* Appeal Judgement, para. 321.

1881 *Popović et al.* Appeal Judgement, para. 1961; *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Haradinaj et al.* Appeal Judgement, para. 321.

1882 *Popović et al.* Appeal Judgement, para. 1962; *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1799; *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Haradinaj et al.* Appeal Judgement, paras 321-322; *D. Milošević* Appeal Judgement, para. 297.

1883 Appeal Brief, paras 492-493.

1884 Appeal Brief, para. 493.

1885 Appeal Brief, paras 497, 517.

1886 Appeal Brief, para. 495, *citing* Trial Judgement, para. 1216, T. 8 July 2011 pp. 16371-16372.

and obliged to reject an unlawful order.[1887] In Tolimir's submission, the Trial Chamber could have only considered crimes as set out in the Indictment, and accordingly, with regard to the JCE to Murder, it only could have considered the crimes as described in paragraphs 21.1-21.4 of the Indictment.[1888]

630. Tolimir further submits that the Trial Chamber's findings on the impact of the crimes on the victims as a factor determining the gravity of the crime were erroneous.[1889] In particular, he takes issue with the Trial Chamber's reliance on adjudicated facts and the evidence of Witness Ibrahimefendić.[1890] In Tolimir's view, this evidence predominantly consists of selective and untested hearsay about events, such as the separation of children at Potočari and that younger persons were part of the column.[1891] He further argues that the impact on the victims that Ibrahimefendić describes is not specifically concerned with the events relating to the fall of Srebrenica but with "overall personal experiences", is based on a limited number of victims' reports, and does not differ from the general experience of persons who lived through times of war.[1892] Tolimir emphasises that Ibrahimefendić did not testify as an expert witness.[1893] He also contends that the Trial Chamber erroneously took into account the impact of the precarious economic situation in BiH in assessing the impact of the crimes on the victims.[1894] Tolimir asserts that the Trial Chamber's findings that "the events have left a society to disappear [*sic*]" and lose its leadership are unsupported by evidence.[1895] He adds that the Trial Chamber did not distinguish between the victims of the murder operation and those who fell in combat.[1896]

631. The Prosecution responds that the Trial Chamber correctly considered the gravity of Tolimir's behaviour,[1897] and considered facts concerning the nature and extent of Tolimir's involvement in the crimes only when determining the gravity of the crimes, or as an aggravating factor, but not in combination.[1898] It submits that Tolimir fails to show that the Trial Chamber erroneously considered crimes not charged in the Indictment or factual findings that Tolimir challenged under other grounds of appeal.[1899]

[1887] Appeal Brief, para. 495.
[1888] Appeal Brief, para. 496.
[1889] Appeal Brief, para. 498. *See also* Appeal Brief, para. 505.
[1890] Appeal Brief, paras 498-501, *citing* Trial Judgement, paras 1217-1218, T. 17 February 2011 pp. 10088-10090.
[1891] Appeal Brief, paras 499-501, *citing* T. 17 February 2011 pp. 10088-10091.
[1892] Appeal Brief, paras 499-501.
[1893] Appeal Brief, paras 499-500.
[1894] Appeal Brief, paras 502-503, *citing* Trial Judgement, para. 1218.
[1895] Appeal Brief, para. 504, *citing* Trial Judgement, para. 1218.
[1896] Appeal Brief, para. 504.
[1897] Response Brief, para. 346, *citing* Trial Judgement, paras 1224-1227.
[1898] Response Brief, paras 346, 348, *citing* Appeal Brief, para. 494, Trial Judgement, para. 1215, n. 4593, *D. Milošević* Appeal Judgement, para. 307.
[1899] Response Brief, para. 346, *citing* Appeal Brief, paras 496-497.

632. Further, the Prosecution submits that the Trial Chamber correctly relied on adjudicated facts, Rule 92*bis* statements, and evidence given by Witness Ibrahimefendić when considering the impact of the crimes on the victims.[1900] The Prosecution avers that Tolimir's contention that the Trial Chamber confused the impact of the crimes with the impact of the economic situation on the victims is unsupported. The Prosecution further submits that the Trial Chamber's findings on the loss of identity of the Bosnian Muslim population and on the impact of the crimes on the victims were supported by evidence.[1901]

2. Analysis

633. The Appeals Chamber first turns to Tolimir's argument that in assessing the gravity of the crime, the Trial Chamber failed to consider his criminal behaviour and only considered the gravity of the underlying crimes, and thus failed to "individualise" the sentence. The Appeals Chamber notes that the Trial Chamber correctly stated the Tribunal's jurisprudence that to assess the gravity of the offence, it must consider the inherent seriousness of the crime as well as the totality of the criminal conduct of the convicted person in light of the particular circumstances of the case, as well as the form and degree of participation of the convicted person.[1902] The Appeals Chamber notes that the Trial Chamber did not, however, analyse Tolimir's own criminal conduct when determining the gravity of the offence.[1903] Instead, it considered Tolimir's own role and participation in the crimes when assessing aggravating circumstances. The Trial Chamber took this approach in view of the sentencing principle that the same factor should not be considered both in assessing the gravity of the crime and as an aggravating circumstance.[1904] When assessing aggravating circumstances, the Trial Chamber considered: (i) Tolimir's abuse of his high rank and central position in the VRS Main Staff to contribute to the forcible removal operation and to cover up the crimes of murder;[1905] (ii) his contact with his subordinates, who informed him about the events on the ground and whose criminal activities he directed; (iii) his active involvement in the VRS's implementation of the aims of Directive 7 to create unbearable living conditions for the populations of Srebrenica and Žepa;[1906] and (iv) his active and direct involvement in the implementation of the common criminal goals of the JCE to Forcibly Remove and the JCE to Murder by intentionally forming plans and issuing

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1900 Response Brief, para. 347.
1901 Response Brief, para. 347, *citing* Appeal Brief, paras 504-505, Trial Judgement, nn. 4601-4607. The Prosecution notes that Tolimir himself concedes that the impact of the crimes on the victims is "very serious". Response Brief, para. 347, *citing* Appeal Brief, para. 501.
1902 Trial Judgement, para. 1215.
1903 Trial Judgement, paras 1216-1218.
1904 Trial Judgement, para. 1215, n. 4593, paras 1223-1227.
1905 The Trial Chamber included in its consideration the issuing of orders by Tolimir to his subordinates to conceal Bosnian Muslim men and boys at the Nova Kasaba football field from sight. Trial Judgement, paras 1224-1225.
1906 Trial Judgement, para. 1224.

orders to further these goals.[1907] It is clear from these factors that the Trial Chamber individualised the sentence by taking into account Tolimir's specific criminal conduct in light of the circumstances of the case, although some of these considerations are more appropriately addressed under the gravity of offences. Tolimir thus fails to show an error in the Trial Chamber's approach. Accordingly, Tolimir's argument is dismissed.

634. As to Tolimir's argument that when determining the gravity of the crimes the Trial Chamber relied on erroneous factual and legal findings as challenged under Tolimir's other grounds of appeal, the Appeals Chamber recalls that it has overturned the following Trial Chamber's findings:

- Tolimir's convictions for genocide, extermination as crime against humanity, and murder as a violation of the laws or customs of war, to the extent that they concern the killings specified in paragraph 21.16 of the Indictment (six Bosnian Muslim men near Trnovo);[1908]

- Tolimir's convictions for genocide and extermination as a crime against humanity, to the extent that they concern the killings specified in paragraph 23.1 of the Indictment (three Žepa leaders);[1909]

- Tolimir's conviction for genocide through causing serious bodily or mental harm under Article 4(2)(b) of the Statute to the extent it concerns Bosnian Muslims transferred from Žepa (Indictment, para. 10, lit. b);[1910] and

- Tolimir's conviction for genocide through inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern BiH, under Article 4(2)(c) of the Statute through the aggregation of the forcible transfer of the women and children from Srebrenica and Žepa, the separation of men in Potočari, and the execution of the men from Srebrenica (Indictment, para. 24).[1911]

The impact of these reversals are considered at the end of this section.

635. With regard to Tolimir's argument that the Trial Chamber could have only considered crimes charged in the Indictment, and accordingly, with regard to the charged crimes related to the JCE to Murder, it only could have considered the crimes as described in paragraphs 21.1 to 21.4 of the Indictment, the Appeals Chamber fails to see why the Trial Chamber should have only considered the crimes in the cited paragraphs of the Indictment for that purpose and not the killings

[1907] Trial Judgement, para. 1227.
[1908] *See supra,* para. 434.
[1909] *See supra,* paras 148-149, 269.
[1910] *See supra,* para. 220.

in the following paragraphs of the Indictment for which it has established Tolimir's criminal responsibility.[1912] Tolimir's submissions in this regard are therefore dismissed. The Appeals Chamber also dismisses Tolimir's unsupported submission that the Trial Chamber's finding that "the extreme magnitude and scale of crimes committed could only have been achieved by an organised, interconnected military structure working in unison" was speculative and presumably based on the evidence of Witness Butler. The Appeals Chamber has already rejected Tolimir's argument in this respect.[1913] Moreover, since Tolimir disputes only that the magnitude of the crimes necessarily required the use of an organised military structure, not that the crimes were of an extreme magnitude, even if his argument were accepted, it would not impact the Trial Chamber's finding on the gravity of the crimes, and may therefore be summarily dismissed.[1914]

636. Regarding Tolimir's challenges to the Trial Chamber's findings on the impact of the crimes on the victims, the Appeals Chamber rejects his assertion that the evidence of Ibrahimefendić in this regard is not specifically concerned with the events relating to the fall of Srebrenica, but with "overall personal experiences". On the contrary, all portions of Ibrahimefendić's evidence cited in the Trial Judgement concern victims that survived the Srebrenica massacre.[1915] Whether the impact of the crimes on the Srebrenica victims does or does not differ from the impact of war on persons in general, including their impoverished economic condition, is irrelevant. The Appeals Chamber likewise rejects Tolimir's contention that Ibrahimefendić's evidence was selective and based on a limited number of victims' reports only. Her evidence was "based on [her] personal experience from [her] practice", and her contacts with or treatment of "140 women and several hundred children".[1916] The fact that Ibrahimefendić did not testify as an expert witness does not undermine the credibility of her evidence. Furthermore, the Appeals Chamber notes that the Trial Chamber

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1911 *See supra,* para. 236.

1912 The Appeals Chamber notes that it has overturned the Trial Chamber's findings concerning Tolimir's responsibility for the Trnovo killings set out in the paragraph 21.16 of the Indictment.

1913 *See supra*, para. 252.

1914 *See supra*, para. 13.

1915 Trial Judgement, para. 1218, *citing, inter alia,* T. 17 February 2011 pp. 10078-10089, Prosecution Exhibit 1817 (Transcript of testimony from *Prosecutor v. Krstić*, Case No. IT-98-33-T, dated 27 July 2000), pp. 5815-5824, 5830, 5832-5834, 5838, 5841. *See, e.g.,* T. 17 February 2011 pp. 10078 ("these women and children of Srebrenica"), 10079 ("these women and children"), 10080 ("these women and children", "original traumatic event that happened 15 years ago"), 10082 ("July 1995 events"), 10083 ("families from Srebrenica"), 10084 ("those children of Srebrenica"), 10085-10087 (continued), 10088-10089 (relating back to "these women and children"); Prosecution Exhibit 1817 (Transcript of testimony from *Prosecutor v. Krstić*, Case No. IT-98-33-T, dated 27 July 2000), pp. 5815 ("Srebrenica survivor community"), 5816 ("five years after the event"), 5817 ("victims of Srebrenica"), 5818 ("Srebrenica women victims"), 5819 ("children survivors of Srebrenica"), 5820 (on children survivors, continued, "in July 1995"), 5821 ("five years have passed since the events in Srebrenica"), 5822 ("children from Srebrenica"), 5823 ("children from the Srebrenica victim community"), 5824 ("children of Srebrenica", "Srebrenica events"), 5830 ("families from Srebrenica"), 5832 (relating back to pp. 5823-5824 on lack of role models, "children from Srebrenica"), 5833 (continued), 5834 ("detainees in Srebrenica"), 5838 ("140 women from Srebrenica and the several hundred children"), 5841 ("Srebrenica syndrome").

1916 T. 17 February 2011 p. 10086; Prosecution Exhibit 1817 (Transcript of testimony from *Prosecutor v. Krstić*, Case No. IT-98-33-T, dated 27 July 2000), pp. 5822, 5838.

relied on her observations of the medical, psychological, and physical condition of Srebrenica victims in order to consider the impact of the crimes on the victims,[1917] not to make factual findings on the events in question. The fact that Ibrahimefendić's evidence includes untested hearsay on these events is therefore irrelevant. Moreover, the Appeals Chamber notes that in addition to Ibrahimefendić's evidence, the Trial Chamber also based its finding on the impact of the crimes on the victims on several other witness statements.[1918]

637. With regard to Tolimir's allegation that the Trial Chamber wrongfully relied on adjudicated facts when determining the impact of the crimes on the victims, the Appeals Chamber recalls that it has rejected Tolimir's challenges to the Trial Chamber's use of adjudicated facts.[1919] Furthermore, as noted above, the Trial Chamber also based its finding on the impact of the crimes on the victims on several witness statements in addition to adjudicated facts. Tolimir also has not demonstrated any error by the Trial Chamber in relying on adjudicated facts that remained unchallenged.[1920] Additionally, and contrary to Tolimir's claim, the Trial Chamber did not find that the events have left "a society to disappear", but that the events have left "a society in despair".[1921] The Appeals Chamber notes that there is ample evidence cited in the Trial Judgement in support of the finding that as a result of the events the Bosnian Muslim community of Eastern Bosnia lost, in only a few days, its leadership, identity, and three generations of Bosnian Muslim men.[1922] The Appeals Chamber also fails to see any merit in Tolimir's argument that the Trial Chamber erred in not distinguishing between victims of the "murder operation" and those who fell in combat when determining the impact of the crimes on the victims. It is clear from the Trial Chamber's reasoning that it only took into consideration the impact of the "massive and cruel murder operation" that resulted in the killing of at least 5,749 Bosnian Muslim males from Srebrenica on the surviving women and children.[1923]

1917 Trial Judgement, para. 1218.

1918 Trial Judgement, para. 1218, *citing* Prosecution Exhibit 1521 (Rule 92*bis* statement of Rahima Malkić dated 17 June 2000), Prosecution Exhibit 1522 (Rule 92*bis* statement of Hanifa Hafizović dated 16 June 2000), Prosecution Exhibit 1524 (Rule 92*bis* statement of Samila Salčinović dated 18 June 2000), Prosecution Exhibit 1525 (Rule 92*bis* statement of Mejra Mešanović dated 19 June 2000), Prosecution Exhibit 1526 (Rule 92*bis* statement of Šehra Ibišević dated 21 June 2000), Prosecution Exhibit 1527 (Rule 92*bis* statement of Šifa Hafizović dated 16 June 2000), Prosecution Exhibit 1529 (Rule 92*bis* statement of Mirsada Gabeljić dated 18 June 2000), Prosecution Exhibit 2743 (Rule 92*bis* statement of Behara Krdžić dated 16 June 2000).

1919 *See supra*, para. 40.

1920 *See* Trial Judgement, para. 1218, *citing* Adjudicated Facts 589-592, 594.

1921 Trial Judgement, para. 1218.

1922 Trial Judgement, para. 1218, n. 4601, c*iting*, *inter alia*, T. 17 February 2011 pp. 10082-10083, Prosecution Exhibit 1817 (Transcript of testimony from *Prosecutor v. Krstić*, Case No. IT-98-33-T, dated 27 July 2000), p. 5815 ("[e]ven boys were separated from the women in Potočari […] over the age of ten, for example"), Prosecution Exhibit 2743 (Rule 92*bis* statement of Behara Krdžić dated 16 June 2000), p. 3.

1923 *See* Trial Judgement, paras 1217-1218. *See also supra*, n. 1915.

C. Aggravating and mitigating circumstances

1. Submissions

638. Tolimir avers that the Trial Chamber erroneously considered certain factors as aggravating.[1924] He asserts that the Trial Chamber's finding that he was in contact with his subordinates on the ground, was privy to and directed their criminal activity is not supported by evidence.[1925] Tolimir also argues that the Trial Chamber erred in finding: (i) that he used his position to cover up crimes committed by the other JCE members and thus contributed to the JCE to Murder, in particular by his instruction to hide Bosnian Muslim males detained at the Nova Kasaba football field from sight; (ii) that he abused his authority; (iii) that he played a pivotal role in the two JCEs by devising plans and issuing instructions that were intended to further the JCEs' goals; and (iv) that his actions and omissions were deliberate.[1926] He submits, in this regard, that there is no evidence on the record that he made plans or issued orders "concerning crimes alleged in the Indictment".[1927] He further avers that the Trial Chamber failed to consider evidence that he continuously insisted on the proper treatment of prisoners of war.[1928] He also submits that his position was already considered by the Trial Chamber as a main element to constitute his criminal responsibility.[1929] Furthermore, he avers that the Trial Chamber mistakenly considered "the nature and the extent of this alleged involvement in commission of crimes" as an aggravating factor.[1930]

639. Tolimir submits that the Trial Chamber erred in not identifying mitigating circumstances from the trial record *proprio motu*,[1931] such as: (i) his actions aiming at preventing crimes in July 1995 and insisting that the laws of war be observed;[1932] (ii) his post-conflict conduct, in particular his participation in the negotiations and the subsequent implementation of the Dayton agreement;[1933] (iii) his good behaviour in the UNDU despite the disturbance of his night sleep for a considerable period of time;[1934] (iv) his prompt preparation for trial;[1935] (v) his display of

[1924] Appeal Brief, paras 494, 506.
[1925] Appeal Brief, para. 506, *citing* Trial Judgement, para. 1224.
[1926] Appeal Brief, paras 506, 508-509, *citing* Trial Judgement, paras 1116-1127 (the Appeals Chamber understands Tolimir to be referring to paragraph 1227), 1128, 1224-1225.
[1927] Appeal Brief, para. 509.
[1928] Appeal Brief, paras 507, 511, *citing* T. 1 February 2012 pp. 18699-18700.
[1929] Appeal Brief, para. 509.
[1930] Appeal Brief, para. 494.
[1931] Appeal Brief, para. 510, *citing* Trial Judgement, para. 1231.
[1932] Appeal Brief, para. 511, *citing* Defence Exhibit 64 (Drina Corps Command Intelligence Report dated 12 July 1995), Defence Exhibit 69 (Drina Corps Command dated 8 July 1995).
[1933] Appeal Brief, para. 512, *citing* T. 25 January 2012 pp. 18407-18411, Defence Exhibit 223 (VRS Main Staff Security & Intelligence report re Peace negotiations from Dayton, signed by Tolimir, dated 25 November 1995), Defence Exhibit 224 (Sector for Security and Intelligence Affairs, VRS Main Staff report signed by Tolimir, dated 6 December 1995), T. 18 May 2011 p. 14263, Trial Judgement n. 3641.
[1934] Appeal Brief, paras 513-514.
[1935] Appeal Brief, para. 514.

compassion for the victims during trial;[1936] (vi) his good character;[1937] (vii) his ill-health;[1938] and (viii) the circumstances of his arrest and lack of legal support after his arrest.[1939]

640. The Prosecution responds that the Trial Chamber correctly considered aggravating factors and argues that Tolimir merely asserts that the facts on which the Trial Chamber based its findings of aggravating factors were wrong, without supporting his argument or showing that the alleged errors occasioned a miscarriage of justice.[1940] The Prosecution further responds that the Trial Chamber did not err in according little or no weight to several mitigating circumstances, which it considered *proprio motu*, as Tolimir failed to make submissions in this regard at trial.[1941] The Prosecution submits that the mitigating circumstances which Tolimir advances at this stage should be rejected, as he did not raise them at trial.[1942]

641. Tolimir replies that he was not obliged to advance mitigating factors at trial in light of his right to remain silent.[1943] He avers that to the contrary, it was the Trial Chamber's duty to consider mitigating factors *proprio motu*, in particular those mentioned in paragraph 1228 of the Trial Judgement.[1944]

2. Analysis

642. With respect to Tolimir's argument that the Trial Chamber relied on erroneous factual findings when determining aggravating circumstances, the Appeals Chamber notes that it confirmed the following findings elsewhere in this Judgement: (i) that he was in contact with his subordinates on the ground and was privy to their criminal activity;[1945] (ii) that he used his position to cover up crimes of other JCE members and thus contributed to the JCE to Murder in particular by his instruction to hide Bosnian Muslim males detained at the Nova Kasaba football field from sight;[1946] (iii) that he abused his authority;[1947] (iv) that he played a pivotal role in the two JCEs by devising

1936 Appeal Brief, para. 515.
1937 Appeal Brief, para. 516.
1938 Notice of Appeal, para. 174.
1939 Notice of Appeal, para. 175.
1940 Response Brief, paras 345, 348, *citing* Response Brief, Grounds of Appeal 14-16.
1941 Response Brief, para. 349, *citing* Appeal Brief, paras 507, 510-516, Trial Judgement, para. 1230.
1942 Response Brief, para. 349, *citing Muhimana* Appeal Judgement, para. 231, *citing Kamuhanda* Appeal Judgement, para. 354, *Kvočka et al.* Appeal Judgement, para. 674.
1943 Reply Brief, para. 161.
1944 Reply Brief, para. 161.
1945 *See supra*, paras 455, 475.
1946 *See supra*, paras 461-464, 478-483.
1947 *See supra*, paras 478-482, 504-506.

plans and issuing instructions that were intended to further the JCEs' goals;[1948] and (v) that his actions and omissions were deliberate.[1949]

643. To the extent that Tolimir argues that the Trial Chamber impermissibly double-counted his position in the VRS, both as an element of his criminal responsibility, and as an aggravating factor, the Appeals Chamber notes that when the Trial Chamber determined Tolimir's criminal responsibility in terms of his participation in the JCE to Murder, it considered his position, and also his failure to protect Bosnian Muslim prisoners, which was a duty arising from his functions.[1950] When determining Tolimir's sentence, the Trial Chamber recalled its earlier findings on Tolimir's position and his intentional failure to comply with his duty to protect the prisoners. The Trial Chamber considered both this failure and Tolimir's attempts to conceal the murders as an abuse of his position which it found to be an aggravating factor.[1951] The Appeals Chamber recalls that a position of superiority and the abuse of such position are distinct issues, and that only the latter qualifies as an aggravating factor in sentencing.[1952] Since the Trial Chamber considered Tolimir's abuse of his power, rather than his position of authority, as an aggravating factor, the Appeals Chamber sees no error in this regard and dismisses this sub-ground of Ground of Appeal 25.

644. As to Tolimir's argument that it was the Trial Chamber's duty to consider mitigating circumstances *proprio motu,* the Appeals Chamber notes that the Trial Chamber did in fact consider *proprio motu* various circumstances in mitigation. In this regard, it considered: (i) Tolimir's good behaviour in detention and during trial proceedings; (ii) his advanced age; and (iii) his ill-health in particular during pre-trial phase. The Trial Chamber decided, however, to accord little to no weight to these factors which it held were not so exceptional as to merit mitigation, particularly in light of the gravity of the crimes.[1953] The Appeals Chamber recalls that a trial chamber enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.[1954] The Appeals Chamber further recalls that Rule 86(C) of the Rules provides that sentencing submissions shall be addressed during closing arguments. Rule 85(A)(vi) of the Rules provides that a trial chamber will consider any relevant information that may assist it in determining an appropriate sentence.[1955] Appeal proceedings are

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1948 *See supra*, paras 356, 364-366, 374, 377, 464, 471, 475.
1949 *See supra*, paras 390, 483.
1950 *See, e.g.,* Trial Judgement, paras 1098, 1104, 1109, 1112, 1114, 1117, 1121, 1123-1124, 1127-1128. In particular, the Trial Chamber considered his duty arising from his position as a legal requirement for criminal liability by omission. Trial Judgement, paras 1117-1128.
1951 Trial Judgement, para. 1225.
1952 *Đordević* Appeal Judgement, para. 939; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Stakić* Appeal Judgement, para. 411; *Babić* Appeal Sentencing Judgement, para. 80.
1953 Trial Judgement, paras 1230-1231.
1954 *Đordević* Appeal Judgement, para. 944; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Brdanin* Appeal Judgement, para. 500; *Blaškić* Appeal Judgement, para. 685.
1955 Rule 85(A)(vi) of the Rules.

not the appropriate forum to raise such matters for the first time.[1956] Therefore, it was incumbent on Tolimir to identify mitigating circumstances on the trial record in his final brief or during closing arguments.[1957] Tolimir's arguments in this regard are therefore dismissed.

D. Alleged errors in the Trial Chamber's exercise of its discretion

1. Submissions

645. Tolimir submits that the Trial Chamber erred in the exercise of its discretion when it sentenced him to life imprisonment, since this sentence is manifestly excessive and disproportionate.[1958] Tolimir avers that the Trial Chamber erred in law in imposing a sentence that could not be imposed in his domestic system.[1959] Tolimir requests the Appeals Chamber – should he not be fully acquitted as requested under other grounds of appeal – to significantly reduce the sentence imposed by the Trial Chamber.[1960]

646. The Prosecution responds that Tolimir fails to show any error by the Trial Chamber and contends that a life sentence is the only appropriate sentence for a person who was convicted for having been "actively and directly involved" in an enterprise involving genocide, extermination, murder, and persecutions of thousands of persons.[1961]

2. Analysis

647. With respect to Tolimir's submission that the Trial Chamber erred in law in imposing a sentence that could not be imposed in his domestic system, the Appeals Chamber recalls that while a trial chamber must consider the general practice of sentencing in the courts of the former Yugoslavia, it is not bound by this practice.[1962] Tolimir's argument in this regard is therefore dismissed. In light of all the above considerations in this chapter, and taking into account the impact of the Appeals Chamber's findings on Tolimir's sentence, as set out below, the Appeals Chamber finds that Tolimir has failed to show that the Trial Chamber erred in the exercise of its discretion by imposing a manifestly excessive sentence and dismisses Ground of Appeal 25.

1956 *See Đordević* Appeal Judgement, para. 945. *See also Kvočka et al.* Appeal Judgement, para. 674.
1957 *See Đordević* Appeal Judgement, paras 945-946. *See also Bikindi* Appeal Judgement, para. 165.
1958 Appeal Brief, paras 491, 517.
1959 Notice of Appeal, para. 176.
1960 Appeal Brief, para. 518.
1961 Response Brief, paras 344, 350. The Prosecution also submits that a life sentence has been imposed in related Srebrenica cases before the Tribunal, and thus is not out of line with the sentences in similar cases. Response Brief, para. 344, *citing Popović et al.* Trial Judgement, Disposition, where life sentences were imposed on Vujadin Popović and Ljubiša Beara.
1962 Statute, Art. 24(1); Rule 101(B)(iii) of the Rules. *See Popović et al.* Appeal Judgement, n. 5667; *Đordević* Appeal Judgement, para. 955; *Boškoski and Tarčulovski* Appeal Judgement, para. 212; *Blaškić* Appeal Judgement, para. 681.

E. Impact of the Appeals Chamber's findings on Tolimir's sentence

648. The Appeals Chamber recalls that it has reversed several of Tolimir's convictions, as set out above.[1963] In particular, the Appeals Chamber recalls that it has reversed his convictions for genocide through causing serious bodily or mental harm to the Bosnian Muslim population of Žepa and through inflicting on the Bosnian Muslims from Eastern BiH conditions of life calculated to bring about their physical destruction. The Appeals Chamber has also reversed Tolimir's convictions for genocide, extermination as a crime against humanity, and murder as a violation of the laws or customs of war to the extent that they concern the killings of the six Bosnian Muslim men near Trnovo as well as his convictions for genocide and extermination as a crime against humanity to the extent they concern the killings of the three Žepa leaders.[1964] The Appeals Chamber notes, on the other hand, that Tolimir's remaining convictions, in particular those for genocide committed through the killings of the men from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica are sustained. In light of these genocide convictions alone, the Appeals Chamber considers that Tolimir's responsibility does not warrant a revision of his sentence. In these circumstances, the Appeals Chamber affirms Tolimir's sentence of life imprisonment.

[1963] *See supra,* para. 633.
[1964] *See supra*, para. 634.

IX. DISPOSITION

649. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 12 November 2014;

SITTING in open session;

GRANTS IN PART Ground of Appeal 6 and **REVERSES** Tolimir's conviction for extermination as a crime against humanity, to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS IN PART, Judge Sekule and Judge Güney dissenting, Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide committed through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa;

GRANTS IN PART Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide through inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern BiH under Article 4(2)(c) of the Statute;

GRANTS Ground of Appeal 12 and **REVERSES** Tolimir's conviction for genocide (Count 1) to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS Ground of Appeal 20 and **REVERSES** Tolimir's conviction for genocide (Count 1), extermination as a crime against humanity (Count 3), and murder as a violation of the laws or customs of war (Count 5) to the extent they concern the killings of six Bosnian Muslim men near Trnovo specified in paragraph 21.16 of the Indictment;

DISMISSES, Judge Antonetti dissenting, Grounds of Appeal 1, 3, 5, 7, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, and 25;

DISMISSES Tolimir's remaining grounds of appeal;

AFFIRMS the remainder of Tolimir's convictions under Counts 1, 2, 3, 5, 6, and 7;

AFFIRMS Tolimir's sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

RULES that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

ORDERS that in accordance with Rules 103(C) and 107 of the Rules, Tolimir is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he will serve his sentence.

Done in English and French, the English text being authoritative.

Judge Theodor Meron, Presiding	Judge William H. Sekule

Judge Patrick Robinson	Judge Mehmet Güney	Judge Jean-Claude Antonetti

Judge William H. Sekule appends a partly dissenting opinion.

Judge Mehmet Güney appends a partly dissenting opinion.

Judge Jean-Claude Antonetti appends a separate and partly dissenting opinion.

Dated this eighth day of April 2015,

At The Hague, The Netherlands.

[Seal of the Tribunal]

X. PARTLY DISSENTING OPINION OF JUDGE SEKULE

1. For the reasons set out below, I respectfully disagree with the analysis and the conclusions drawn by the Majority in the present Appeal Judgement with respect to Tolimir's Grounds of Appeal 7 and 10 in so far as they relate to the *actus reus* of genocide of causing serious bodily or mental harm within the meaning of Article 4(2)(b) of the Statute to the Bosnian Muslim population forcibly transferred from Žepa.[1]

2. The Majority reversed the Trial Chamber's findings in this respect as it found that, unlike in the case of the Bosnian Muslims forcibly transferred from Srebrenica, the Trial Chamber made no findings and cited no evidence as to the long lasting impact of the forcible transfer operation on Žepa's population in terms of causing grave and long-term disadvantage to their ability to lead a normal and constructive life.[2] It found that, "[e]ven though the emotional pain and distress inflicted upon Žepa's Bosnian Muslims was irrefutably grave, no evidence of any long-term psychological trauma was cited in the Trial Judgement."[3]

3. The Majority's findings are effectively based on three elements with which I cannot agree. First, the Majority compares the harm suffered by the Žepa population with the harm suffered by the Srebrenica population. Second, the Majority, in my view, incorrectly interprets the guiding jurisprudence and effectively adds a new requirement to the definition of serious mental harm, namely that such harm "must be lasting".[4] Third, the Majority finds that the Trial Chamber failed to make findings as to the lasting impact of the forcible transfer operation on the Žepa population.

4. The Majority largely based its findings on the distinguishing characteristics of the forcible transfer operations carried out in the Srebrenica enclave on 12 and 13 July 1995, and the forcible transfer of the Žepa population carried out from 25 to 27 July 1995. In doing so, it ultimately compared the harm suffered by the Srebrenica population with the harm suffered by the Žepa population. As a result of this comparison, it found that the harm inflicted upon the Žepa population did not rise to the same level as that endured by the women, children and elderly forcibly removed from the Srebrenica enclave.[5] I not only find such comparison misplaced, but also consider it to be erroneous in law in view of the relevant jurisprudence of the ICTR and the ICTY in this regard.

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[1] *See* Appeal Judgement, paras. 213-219. I specifically cannot agree with the legal analysis, the interpretation of the Trial Chamber's findings, the interpretation of the evidence, and the conclusions drawn therefrom as set out in paragraphs 213 to 219 of the Appeal Judgement.
[2] Appeal Judgement, para. 215.
[3] Appeal Judgement, para. 215.
[4] Appeal Judgement, para. 203.
[5] *See* Appeal Judgment, para. 216. The Majority finds that "[i]n reaching its conclusion as to the seriousness of the mental harm inflicted on Srebrenica's displaced population, the Trial Chamber relied principally on the painful process

5. The guiding jurisprudence on Article 4(2)(b) of the Statute[6] clearly sets out that whether an act constitutes "serious bodily or mental harm" within the meaning of Article 4(2)(b) of the Statute must be assessed on a case-by-case basis, with due regard for the particular circumstances of the case.[7] It follows that the circumstances of the forcible transfer of the Žepa population did not have to be identical or even similar to those surrounding the Srebrenica forcible transfer; rather, the question is whether they amounted to acts within the meaning of Article 4(2)(b) of the Statute in their own right.

6. In my view, the circumstances of the forcible transfer of women, children, and the elderly of Žepa – as revealed by the evidence cited by the Trial Chamber[8] – were in themselves sufficient to meet the requirements of Article 4(2)(b) of the Statute. In this regard, I particularly recall the Trial Chamber's findings that, following a period of intense VRS attacks on surrounding villages near Žepa,[9] the population fled to the mountains to seek refuge.[10] The VRS used loudspeakers pressuring them to return to the enclave.[11] Many able-bodied men stayed behind out of fear for their lives,[12] while most of the population returned to Žepa.[13] When, on 24 July 1995, the VRS broke through the main defence lines approximately 500 to 600 metres from the centre of Žepa,[14] the population was scared and on the brink of panic.[15] The same day, the VRS coerced the Žepa War Presidency into signing the 24 July 1995 Agreement for the "evacuation" of the population.[16] Following the signing, Mladić put Tolimir in charge of the organisation of their transport.[17] Thereafter, on 25 July 1995, the VRS commenced the bussing out of the Žepa population from the enclave.[18] The

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of the violent, coercive separation from their male family members, the subsequent uncertainty of what happened to their male relatives, and the continuing 'emotional distress caused by the loss of their loved ones' following the transfer, all of which prevented the recovery of the displaced population and their ability to lead normal lives. **By contrast**, in the case of the Žepa population, the Trial Chamber based its assessment on the pressure exerted by the VRS […] the news of the murders […] and the threatening conduct of Tolimir and Mladić". *See idem.* Emphasis added. Internal references omitted. *See also ibid.*, para. 217, "The Trial Chamber did not find that Žepa's Bosnian Muslim population suffered a mass violent separation of families and the ongoing trauma of having lost their family members, **like the Bosnian Muslims from Srebrenica**". Emphasis added.

[6] I note that Article 4(2)(b) of the ICTY Statute is identical to Article 2(2)(b) of the ICTR Statute.

[7] *Blagojević and Jokić* Trial Judgement, para. 646; *Kajelijeli* Trial Judgement, para. 815; *Krstić* Trial Judgement, para. 513; *Kayishema and Ruzindana* Trial Judgement, paras 108, 110, 113.

[8] Trial Judgement, paras 640, 641, 645, 647. *See also ibid.*, para. 758.

[9] Trial Judgement, paras 600, 612, 614, 625, 758.

[10] Trial Judgement, paras 614, 625, 639, 758.

[11] Trial Judgement, paras 621, 643, 758.

[12] Trial Judgement, para. 618, 674, 758.

[13] Trial Judgement, para. 758.

[14] Trial Judgement, para. 628.

[15] Trial Judgement, para. 628.

[16] Trial Judgement, para. 629. The Trial Chamber, *inter alia*, relied on the evidence of Hamdija Torlak who stated that acting in fear and under duress, he considered that the title "Agreement" was a euphemism since the Bosnian Muslims had in fact capitulated and were in no position to lay down any conditions from their side. He testified that he would have signed anything as long as it ensured that the "evacuation" would commence. *See ibid.*, *referring to* Hamdija Torlak, T. 4375-4378 (24 August 2010), T. 4382, 4396-4397 (25 August 2010).

[17] Trial Judgement, para. 632.

[18] Trial Judgement, para. 640, *referring to* Đoko Razdoljac, T. 8285-8286 (30 November 2010); Exhibit. P01435, pp.1-2; Thomas Dibb, Exhibit P00741, PT. 16286 (15 October 2007); Hamdija Torlak, T. 4411 (25 August 2010);

Trial Chamber further cited evidence according to which, by 26 July 1995, the people of Žepa had become more aware of what had happened in Srebrenica and were terrorised, petrified, and in an agitated state.[19] It found that Tolimir not only organised,[20] but also directed the VRS as they made the Bosnian Muslim civilians board the buses,[21] and walked through the crowd brandishing his weapon in the air.[22] General Ratko Mladić entered numerous buses and addressed those who were about to be bused out of Žepa by telling them that he was giving them their lives as a gift.[23] The Trial Chamber, by majority, found that it was against this backdrop that it evaluated, and found, that serious mental harm was inflicted upon the Bosnian Muslims who were forcibly transferred out of Žepa between 25 and 27 July 1995.[24] It is my view that the Trial Chamber did not commit a discernible error in arriving at this conclusion.

7. I recall that, while "serious mental harm" within the meaning of Article 4(2)(b) of the Statute is, as such, not defined in the Statute,[25] ICTR and ICTY jurisprudence clarifies that serious mental harm within the meaning of Article 4(2)(b) of the Statute must be more than minor or temporary impairment of mental faculties, such as the infliction of strong fear or terror, intimidation, or threat.[26] It need not be permanent or irremediable.[27] I note that in *Akayesu*, it was held that "[f]or the purposes of interpreting Article 2(2)(b) of the [ICTR] Statute, the Chamber takes serious bodily or mental harm, *without limiting itself thereto*, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution."[28] Moreover, both the ICTR and the

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Ex. D00055, p. 28. The Trial Chamber further found that the transportation of the Žepa population started on the same day that Tolimir had ordered fuel for "undisturbed work", namely 25 July 1995. *See ibid*., *referring to* Exhibit P00568a; Exhibit P00568b (confidential); Hamdija Torlak, T. 4391-4392 (25 August 2010), T. 4766 (1 September 2010); Esma Palić, T. 13312 (27 April 2010); Rupert Smith, Exhibit P02086, PT. 17552 (6 November 2007); Exhibit 02798, 00:36:39-00:38:17.

[19] Trial Judgement, para. 647. The Trial Chamber, *inter alia* relied on the evidence of Edward Joseph who stated that the women he spoke to were absolutely terrorised and petrified and their concern was if they remained in that town, their survival was something subject to serious question. *See idem., referring to* Edward Jospeh, Ex. P01949, PT. 14184 (23 August 2010).

[20] Trial Judgement, para. 632.

[21] Trial Judgement, paras. 643, 758.

[22] Trial Judgement, para. 758.

[23] Trial Judgement, para. 758. The Trial Chamber referred to video footage depicting General Ratko Mladić entering the buses full of people on their way out of Žepa in Bokšanica. Mladić introduced himself and told the people that they were being transported to Kladanj. In several buses he told the Bosnian Muslim civilians that he was giving them their life as a gift. In one bus, after asking whether there were any able-bodied men on it, he said "[y]ou just proceed and join your people, but rest assured that we are going to find you there as well". *See* Trial Judgement, para. 648, *referring to* Exhibit P02798, Disc 4, 00:55:06-00:55:19, p. 137; Ramiz Dumanjić, T. 17939, 17943 (29 September 2011).

[24] Trial Judgement, para. 758.

[25] *Seromba* Appeal Judgement, para 46. *See also Blagojević and Jokić* Trial Judgement, para. 645; *Gatete* Trial Judgement, para. 584; *Semanza* Trial Judgement, para. 320.

[26] *Kajelijeli* Trial Judgement, para. 815; *See also Ntagerura* Trial Judgement, para. 664; *Semanza* Trial Judgement, para. 320.

[27] *Ntagerura* Trial Judgement, para. 664; *Kayishema and Ruzindana* Trial Judgement, para. 108; *Akayesu* Trial Judgement, para. 502.

[28] *Akayesu* Trial Judgement, para. 504. Emphasis added. The *Akayesu* Trial Judgement has been consistently cited in this respect in subsequent ICTR and ICTY cases. *See e.g. Brdanin* Trial Judgement, para. 690; *Krstić* Trial Judgement, para. 513; *Kayishema and Ruzindana* Trial Judgement, para. 108.

ICTY have specified that serious mental harm may include threats of death[29] as well as deportation.[30]

8. As set out above, I cannot agree with the Majority when it finds that "serious mental harm must be lasting".[31] It appears to me that this is a new requirement which is not as such supported by the jurisprudence.

9. In my view, the definition of serious mental harm does not centre around the question of the duration of the harm, but the nature of the harm that is inflicted and whether it is such as to instill strong fear, terror, intimidation or threat, as set out in the applicable authorities.[32]

10. It is for these reasons that I find that the Trial Chamber did not err when it considered the forcible transfer of the Žepa population against the backdrop of what preceded it and in the context of what accompanied it in order to assess the nature of the harm that was meted out to the population during this forcible transfer operation. I find no error in assessing the pressure that was brought to bear on the population of Žepa and the conduct and threats of the VRS – and in particular Tolimir and Mladić – in their proper context. Recalling the evidence the Trial Chamber cited in relation to what preceeded the transfer, it appears that at the point the population was made to board the buses, it was effectively at the VRS's mercy. I have no doubt that Mladić's words imparted threats of death in these circumstances. Effectively, the population appears to have been given to understand that they were lucky to leave alive, but that their luck could change at any point. Sight must also not be lost of the fact that the VRS, and particularly Tolimir – who was brandishing his weapon in the air – was overseeing and carrying out the operation, as found by the Trial Chamber.[33]

11. The Majority further finds that the Trial Chamber erred in not making findings and referring to evidence of "any long-term consequences of the forcible transfer operation on the Žepa population and the Bosnian Muslim population of Eastern BiH in general and of a link between the circumstances of the transfer operation in Žepa and the physical destruction of the protected group as a whole".[34] It is my view that the Majority ascribes undue prominence to *proof* of long-term

[29] *Stakić* Trial Judgement, para. 516; *Kajelijeli* Trial Judgement, para. 815; *Kayishema and Ruzindana* Trial Judgement, paras 108, 110.
[30] *Blagojević and Jokić* Trial Judgement, para. 646; *Krstić* Trial Judgement, para. 513.
[31] *See* Appeals Judgement, para. 203.
[32] *See Seromba* Appeal Judgement, para. 46. *See also Blagojević and Jokić*, Trial Judgement, para. 646; *Krstić* Trial Judgement, para. 513. *Rutaganda* Trial Judgement, para. 51; *Musema* Trial Judgement, para. 156, *Bagilishema* Trial Judgement para. 59; *Gacumbitsi* Trial Judgement, para. 291, *Kajelijeli* Trial Judgemenr, para. 815; *Eichmann* District Court Judgment, p. 340.
[33] Trial Judgement, paras. 643, 758
[34] *See*, Appeal Judgement, para. 217. In this respect, I note that the Trial Chamber referred to the evidence of Esma Palić who stated that "people lived in Žepa for generations, and such families never dreamt of leaving. They were the

disadvantage so as to effectively negate the qualification of any harm as serious mental harm in the absence of such proof. In this regard, I recall the *Krstić* Trial Judgement where the *Akayesu* holding was cited so as to emphasise the main feature of serious mental harm, namely that it be more than the minor or temporary impairment of mental faculties.[35] The essence of "grave and long-term disadvantage" is that it is a classification that aids to distinguish serious mental harm from the minor and temporary impairment; it is not an additional requirement to which it is, in my view, elevated by the Majority in making the abovementioned finding.

12. It is for these reasons that I cannot join the Majority in its finding that the Trial Chamber erred when it found that the suffering of the population that was forcibly transferred from Žepa rose to the level of serious bodily or mental harm, within the meaning of Article 4(2)(b) of the Statute.

13. Consequently, I would have affirmed Tolimir's conviction for genocide pursuant to Article 4(2)(b) of the Statute with respect to the forcible transfer of the civilian population from the Žepa enclave.

Done in English and French, the English text being authoritative.

Done this eighth day of April 2015,
At The Hague,
The Netherlands.

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Judge William H. Sekule

true indigenous population of Žepa who never pondered leaving their property. However, they had to leave. They never managed to adapt to the new social circumstances". *See* Trial Judgement, para. 647, *referring to* Esma Palić, T. 13319 (27 April 2011).

[35] *Krstić,* Trial Judgement, para. 510.

XI. PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In this Judgement, the Appeals Chamber, by majority, reverses Tolimir's convictions for committing genocide through causing serious mental harm to the Bosnian Muslim population of Eastern BiH, pursuant to Article 4(2)(b) of the Statute to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa.[1] I respectfully dissent from this conclusion. In my view, the Majority's analysis fails to properly give deference to the Trial Chamber's factual analysis while also being contradictory in certain aspects.[2]

1. Causing serious or mental harm to members of the group (Grounds of Appeal 7 in part and 10 in part)

2. The Majority considers that, contrary to the circumstances of the Bosnian Muslim population of Srebrenica, the Trial Chamber did not find that Žepa's Bosnian Muslim population suffered a mass violent separation of families and the ongoing trauma of having loss their family members.[3] The Majority also notes the purported lack of finding and evidence showing the lasting impact of the forcible transfer operation of Žepa on the Žepa's population.[4] Consequently, it concludes that no reasonable trier of fact could have found that the Bosnian Muslims forcibly transferred from Žepa suffered serious mental harm within the meaning of Article 4(2)(b) of the Statute.[5] However, in the same breath, the Majority finds that the same Bosnian Muslim population transferred from Žepa were victims of genocide due to their suffering of serious mental harm within the meaning of Article 4(2)(b) of the Statute as members of the protected group against which the genocidal acts of Srebrenica were perpetrated.[6] I cannot agree with this reasoning as I find it fundamentally contradictory and disrespectful of the standard on appeal.

i. The *single* attack and the Žepa Operation

3. The Trial Chamber identified the protected group as the Bosnian Muslim population of Eastern Bosnia, including, in particular, the populations of Srebrenica, Žepa and Goradže.[7] The Trial Chamber also found that the overall attack against the population was composed of the

[1] Appeal Judgement, paras 217, 219.
[2] The Majority includes only Judges Meron and Robinson, as Judge Antonetti reaches the same conclusion but according to a different analysis.
[3] Appeal Judgement, paras 216-217.
[4] Appeal Judgement, paras 215, 217.
[5] Appeal Judgement, para. 217.
[6] Appeal Judgement, para. 218. *See also* Trial Judgement, paras 201-212.
[7] Trial Judgement, paras 774-775. This finding was confirmed on appeal, *see* Appeal Judgement, paras 188-189.

military actions against both enclaves, the removal of thousands of women, children and elderly of Srebrenica and Žepa and the restriction of humanitarian aid.[8] It is manifest that the Trial Chamber saw the Žepa operation as part of the same attack against the population.

4. The Majority sees it differently. It disjoints and isolates the Žepa operation from the rest of the attack on the basis of "the absence" of a "link between the circumstances of the transfer in Žepa and the physical destruction of the protected group as a whole."[9] I agree that, viewed separately, reasonable trier of fact could not have found that the forcible displacement of the civilians out of Žepa was capable of inflicting serious mental and bodily harm to the level required by Article 4(2)(b) of the Statute. However, this was not the reasoning of the Trial Chamber or the charge as set in the Indictment.[10] The Majority does not explain the reasons why the Trial Chamber erred in viewing the *single* attack as one operation in the context of the assessment pursuant to Article 4(2)(b) of the Statute, while, and most surprisingly, the Appeals Chamber upheld the same finding that the *single* attack against he civilian population was encompassed of *interrelated* components, that included the forcible displacement of both Srebrenica and Žepa with regard to other crimes, such as crimes against humanity.[11]

(ii) Reasonableness' of the Trial Chamber's findings

5. As it was recalled in the Appeal Judgement, trial chambers benefit from a considerable margin of discretion with regard to factual findings.[12] It is also in this context that I believe that the reasoning of the Majority is irregular and fails to respect the standard of appeal.

6. I note in particular that the Trial Chamber considered the differences in the forcible transfer operations conducted in Srebrenica and Žepa. It expressly acknowledged that the forcible displacement in Žepa took place under "slightly different circumstances", but emphasized the "important similarities".[13] The Trial Chamber reached its conclusion against the following backdrop: (i) the Bosnian Muslim population transferred out of Žepa were members of the protected group;[14] (ii) the Žepa forcible displacement operation was part of the single attack directed against the civilian population;[15] (iii) as members of the protected group, the Žepa displaced population was victim of the mass-scale murder operation and other underlying genocidal

[8] Trial Judgement, paras 701, 710. This finding was confirmed on appeal, *see* Appeal Judgement para. 143.
[9] Appeal Judgement, para. 217.
[10] Indictment, para. 10 b). Trial Judgement, paras 758-759.
[11] Appeal Judgement, para. 143.
[12] Appeal Judgement, para. 11, 12.
[13] Trial Judgement, para. 758.
[14] Trial Judgement, para. 750.
[15] Trial Judgement, para. 701, 710.

acts perpetrated in Srebrenica;[16] (iii) the genocidal intent of Tolimir in relation to the protected group;[17] and (iv) direct evidence of the lasting suffering of the Žepa Bosnian Muslim civilian population following the events.[18] In my view, a reasonable trier of fact could have found that, within the overall attack against the Eastern Bosnian Muslims, the forcible transfer of the Žepa population, who were already victims of the genocidal acts committed in Srebrenica, contributed to their suffering from serious bodily and mental harm within the meaning of Article 4(2)(b) of the Statute. I would have consequently affirmed Tolimir's conviction for genocide pursuant to Article 4(2)(b) of the Statute, including the forcible transfer of the civilian population out of the Žepa enclave.

Done in English and French, the English text being authoritative.

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Judge Mehmet Güney

Done this eighth day of April 2015 at The Hague, The Netherlands.

[16] Trial Judgement, para. 750. This finding was confirmed on appeal, *see* Appeal Judgement, para. 189.
[17] Trial Chamber, para. 773, 1173. These findings were upheld on appeals, *see* Appeal Judgement, para. I note in particular that, in its latest judgement on this issue, the ICJ was reluctant to declare the forcible displacements genocidal acts. However, the perpetrators were not found to have had the genocidal intent with regard to the protected group, *see* ICJ Judgement, para. 440.
[18] *See* Trial Judgement, para. 758, n. 3176, *citing* Teufika Ibrahimefendić, T. 10081 (17 February 2011), testifying about the suffering of a woman and her daughter from Žepa; Trial Judgement, para. 647, *citing* Esma Palić, T. 13319 (27 April 2011), testifying that "they were the true indigenous population of Žepa who never pondered leaving their property. However, they had to leave. They never managed to adapt to the new social circumstances, but they had to leave."

XII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE ANTONETTI

XIII. ANNEX A: PROCEDURAL HISTORY

1. Trial Chamber II rendered the Trial Judgement in this case on 12 December 2012. The main aspects of the appeal proceedings are summarised below.

A. Notice of Appeal and Briefs

2. On 21 December 2012, Tolimir filed a motion for extension of time for the filing of his notice of appeal,[1] which was granted by the Pre-Appeal Judge on 3 January 2013.[2] Tolimir filed his notice of appeal on 11 March 2013.[3] On 2 May 2013, Tolimir filed a motion for extension of time for the filing of his appellant's brief and leave to exceed the word limit[4] which was granted in part on 17 May 2013, permitting his appellant's brief to contain 40,000 words instead of 30,000 and to be filed no later than 21 June 2013.[5] On 17 June 2013, the Pre-Appeal Judge granted a further request from Tolimir[6] and allowed him to file his appellant's brief no later than 28 June 2013.[7] Tolimir filed his appellant's brief on 28 June 2013.[8] As his appellant's brief did not contain arguments in support of a number of grounds of appeal and as at the status conference on 5 July 2013, Tolimir indicated that he maintained these grounds, the Pre-Appeal Judge authorised the filing of a supplemental appellant's brief no later than 19 July 2013.[9] Tolimir filed a supplemental appeal brief on 19 July 2013.[10]

3. On 9 July 2013, the Pre-Appeal Judge granted in part a motion by Tolimir for a time-limit to file a motion to amend his notice of appeal and his appellant's brief upon the receipt of the BCS translation of the Trial Judgement,[11] and ordered that any motion seeking variation of the notice of appeal based upon the BCS translation of the Trial Judgement be filed no later than 6 August 2013.[12] On 6 August 2013, Tolimir filed a motion to vary his grounds of appeal and his appellant's brief[13] which the Prosecution opposed.[14] On 4 September 2013, the Appeals Chamber granted the motion and ordered Tolimir to file an amended notice of appeal within five days of its

1 Motion for an Extension of Time to File Notice of Appeal, 21 December 2012.
2 Decision on Zdravko Tolimir's Motion for an Extension of Time to File a Notice of Appeal, 3 January 2013.
3 Notice of Appeal of Zdravko Tolimir, 11 March 2013.
4 Motion for Setting a Time Limit for Filing an Appellant's Brief and for an Extension of Word Limits, 2 May 2013.
5 Decision on Motion for Setting a Time Limit for Filing an Appellant's [*sic*] Brief and for an Extension of Word Limit, 17 May 2013.
6 Request for an Extension of Time Limit for Filing an Appellant Brief, 13 June 2013.
7 Decision on Tolimir's Request for Extension of Time for Filing an Appellant's Brief, 17 June 2013.
8 Zdravko Tolimir's Appeal Brief, 28 June 2013 (confidential).
9 Status Conference, 5 July 2013 p. 8.
10 Supplemental Appeal Brief, 19 July 2013 (confidential).
11 Status Conference, 5 July 2013 pp. 4-5.
12 Decision on Tolimir's request for a time-limit to amend his Notice of Appeal and his Appeal Brief, 9 July 2013.
13 Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief, 6 August 2013.

decision, and a consolidated appeal brief within 20 days.[15] By the same decision, the Appeals Chamber ordered the Prosecution to file its response brief within 21 days of the filing of Tolimir's consolidated appeal brief and Tolimir to file a reply brief if any within 15 days of the filing of the response brief.[16] Tolimir filed his amended notice of appeal on 9 September 2013[17] and a consolidated appeal brief on 24 September 2013.[18] The Prosecution filed its response brief on 16 October 2013.[19] On 25 October 2013, Tolimir filed a motion for extension of time for the filing of his reply brief.[20] At the status conference of 28 October 2013, the Pre-Appeal Judge orally granted the motion in part and authorised Tolimir to file a reply brief not later than 7 November 2013. The Pre-Appeal Judge also authorised Tolimir to file a motion to amend his reply brief on the basis of the BCS translation of the Prosecution's Response Brief within ten days of receipt of the BCS translation.[21] On 18 February 2014, Tolimir filed a motion for extension of time for the filing of an amended version of his reply brief,[22] which the Prosecution did not oppose.[23] On 20 February 2014, the Pre-Appeal Judge granted the motion and ordered Tolimir to file an amended version of his reply brief no later than 27 February 2014.[24] On 27 February 2014, Tolimir filed his amended reply brief.[25] On 3 March 2014, Tolimir filed his public redacted version of the consolidated appeal brief.[26] On 5 March 2014, the Pre-Appeal Judge granted the Prosecution's motion seeking an extension of 14 days from 27 March 2014 or from the filing of Tolimir's public redacted consolidated appeal brief (whichever was earlier),[27] ordered the Prosecution to file a public redacted response brief no later than 17 March 2014, and affirmed the time limit of 27 March for Tolimir to file a public redacted version of the amended brief in reply.[28] On 10 March 2014, the Prosecution filed its public redacted version of the response brief.[29] On 14

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14 Prosecution's Response to Tolimir's Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief, 15 August 2013.
15 Decision on Tolimir's Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief, 4 September 2013 ("Decision of 4 September 2013").
16 Decision of 4 September 2013, p. 10.
17 Amended Notice of Appeal, 9 September 2013.
18 Consolidated Appeal Brief, 24 September 2013 (confidential).
19 Prosecution Response Brief, 16 October 2013 (confidential).
20 Request for an extention [*sic*] of time limit for filing a brief in reply, 25 October 2013.
21 Status Conference, 28 October 2013 pp. 4-5.
22 Motion for Extension of Time Limit for Filling Amendments to the Brief in Reply, 18 February 2014.
23 Prosecution's Response to Tolimir's Motion for Extension of Time Limit for Filing Amendments to the Brief in Reply, 19 February 2014.
24 Decision on Tolimir's Motion for Extension of Time for Filing Amendments to the Brief in Reply, 20 February 2014.
25 Amended Brief in Reply, 27 February 2014 (confidential).
26 Public Redacted Version of the Consolidated Appeal Brief, 3 March 2014.
27 Motion for Extension of Time, 27 February 2014.
28 Decision on Prosecution's Motion for Extension of Time, 5 March 2014.
29 Public Redacted Version of Prosecution Response Brief, 10 March 2014.

March 2014, Tolimir requested the Registry to lift the confidentiality of the amended brief in reply filed on 27 February 2014.[30]

B. Composition of the Appeals Chamber

4. On 27 December 2012, the President of the Tribunal, Judge Theodor Meron, assigned the following judges to hear the appeal: Judge Theodor Meron, Judge Carmel Agius, Judge Liu Daqun, Judge Khalida Rachid Khan, and Judge Bakhtiyar Tuzmukhamedov.[31] On the same date, 27 December 2012, Judge Theodor Meron appointed himself as the Pre-Appeal Judge.[32] On 4 January 2013, the President of the Tribunal appointed Judge Mehmet Güney to replace Judge Carmel Agius.[33] On 21 January 2014, the President of the Tribunal appointed Judge Jean-Claude Antonetti to replace Judge Bakhtiyar Tuzmukhamedov.[34] On 10 March 2014, the President of the Tribunal appointed Judge Patrick Robinson to replace Judge Liu Daqun.[35] On 22 September 2014, the President of the Tribunal appointed Judge William H. Sekule to replace Judge Khalida Rachid Khan.[36]

C. Self-representation and role of legal advisor

5. Tolimir elected to represent himself on appeal pursuant to Rules 45(F) and 107 of the Rules with the assistance of Mr. Aleksandar Gajić as his legal advisor.[37]

6. On 3 July 2013, Tolimir filed a motion requesting that his legal advisor, Mr. Aleksandar Gajić, be allowed to be present in the courtroom during status conferences and be granted a right of audience before the Appeals Chamber at such status conferences.[38] At the status conference held on 5 July 2013, the Pre-Appeal Judge issued an oral decision granting Mr. Gajić rights of audience limited to addressing legal or administrative issues during status conferences. By the same decision the Pre-Appeal Judge directed Tolimir, should he wish that Mr. Gajić be granted rights of audience in the appeal proceedings beyond addressing the Pre-Appeal Judge at status conferences, to submit

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30 Request to the Registry to Lift Confidentiality of the Amended Brief in Reply Filed on 27 February 2014, 14 March 2014.
31 Order Assigning Judges to a Case before the Appeals Chamber, 27 December 2012.
32 Order Designating a Pre-Appeal Judge, 27 December 2012.
33 Order Replacing a Judge in a Case before the Appeals Chamber, 4 January 2013.
34 Order Replacing a Judge in a Case before the Appeals Chamber, 21 January 2014.
35 Order Replacing a Judge in a Case before the Appeals Chamber, 10 March 2014.
36 Order Replacing a Judge in a Case before the Appeals Chamber, 22 September 2014.
37 The Appeals Chamber was informed by the Office of the Registrar ("Registry") that Tolimir indicated to the Registry by letter dated 10 January 2013 that he would continue to represent himself on appeal with the assistance of Mr. Gajjć as his legal advisor. The Registry acknowledged Tolimir's choice to be self-represented on appeal by letter dated 18 January 2013. The Appeals Chamber accepted Tolimir's Notice of Appeal filed by himself on 11 March 2013.

a written request to the full bench of the Appeals Chamber.[39] On 23 May 2014, Tolimir filed a request to the bench of the Appeals Chamber to grant rights of audience to Mr. Gajić at the appeal hearing.[40] On 28 May 2014, the Prosecution responded that it did not oppose Tolimir's request, provided that such rights were limited to presenting arguments about legal issues.[41] On 20 June 2014, the Appeals Chamber granted the request and authorised Mr. Gajić to make oral submissions at the appeal hearing.[42]

D. Status Conferences

7. In accordance with Rule 65*bis*(B) of the Rules, status conferences were held on 5 July 2013, 28 October 2013, 25 February 2014, 24 June 2014, 22 October 2014, and 11 February 2015.

E. Appeal Hearing

8. On 15 October 2014, the Appeals Chamber issued a scheduling order for the appeal hearing in this case.[43] On 31 October 2014, the Appeals Chamber issued an addendum inviting the parties to address several specific issues in relation to their written submissions.[44] The appeal hearing was held on 12 November 2014.

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38 Zdravko Tolimir's request to grant Mr. Aleksandar Gajić a right to be present in the courtroom during status conferences and to grant him a right of audience before the Appeals Chamber at Status Conferences, 3 July 2013 (confidential).
39 Status Conference, 5 July 2013 pp. 3-4.
40 Request to the Bench of the Appeals Chamber to grant a right of audience to Mr. Aleksandar Gajić, 23 May 2014.
41 Prosecution's response to Tolimir's request for right of audience for Mr. Aleksandar Gajić, 28 May 2014.
42 Decision on Tolimir's request to grant a right of audience to Mr. Aleksandar Gajić, 20 June 2014.
43 Scheduling Order for Appeal Hearing, 15 October 2014.
44 *Addendum* to the Scheduling Order for Appeal Hearing, 31 October 2014.

XIV. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Sentencing Appeal Judgement")

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement")

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement")

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement")

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ("*Brđanin* Decision on Expert Witness Ewan Brown")

ČELEBIĆI

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

DELIĆ

Prosecutor v. Rasim Delić, Case No. IT-04-83-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts, 9 July 2007 ("*Delić* Adjudicated Facts Trial Decision")

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Sentencing Appeal Judgement")

ĐORĐEVIĆ

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement")

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GOTOVINA AND MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement")

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement")

HARADINAJ *ET AL.*

Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement").

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement")

KARADŽIĆ

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR98bis.1, Judgement, 11 July 2013 ("*Karadžić* Rule 98*bis* Appeal Judgement")

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 ("*Karadžić* JCE III Decision")

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney, 17 December 2004 ("Joint Dissenting Opinion of Judge Schomburg and Judge Güney")

KRAJIŠNIK

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Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008 ("*Krajišnik* Decision of 28 February 2008")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions For Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Adjudicated Facts Trial Decision")

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

Prosecutor v. Radislav Krstić, Case No, IT-98-30-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

KUPREŠKIĆ *ET AL.*

Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KUNARAC *ET AL.*

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KVOČKA *ET AL.*

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

LIMAJ *ET AL.*

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

LUKIĆ AND LUKIĆ

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement")

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement")

Prosecutor v. Milan Martić, Case No. IT-95-11-T, Judgement, 12 June 2007 ("*Martić* Trial Judgement")

DRAGOMIR MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*D. Milošević* Appeal Judgement")

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*D. Milošević* Adjudicated Facts Appeal Decision")

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff, 10 April 2007 ("*D. Milošević* Adjudicated Facts Trial Decision")

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POPOVIĆ *ET AL.*

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Prosecutor v. Vujadin Popović et al., Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović et al.* Decision on the Status of Richard Butler as an Expert Witness")

ŠAINOVIĆ *ET AL.*

Prosecutor v. Nikola Šainović et al., Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović et al.* Appeal Judgement")

SIKIRICA *ET AL.*

Prosecutor v. Duško Sikirica et al. Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 ("Judgement on Motions to Acquit")

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Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

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STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement")

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement 15 July 1999 ("*Tadić* Appeal Judgement")

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TOLIMIR

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Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-PT, Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 February 2010 ("Decision on Request for Certification to Appeal Adjudicated Facts Decision")

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Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-PT, Zdravko Tolimir's Submission with a Pre-Trial Brief Pursuant to Rule 65 ter (F) and Notification of the Defence of Alibi in Respect of Some Charges, 28 October 2009 (English translation), 30 September 2009 ("Defence Pre-Trial Brief") (BCS original)

TOLIMIR *ET AL.*

Prosecutor v. Zdravko Tolimir et al., Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Tolimir* Appeal Decision of 27 January 2006")

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement")

BIKINDI

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* Appeal Judgement")

BAGOSORA AND NSENGIYUMVA

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement")

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement")

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KAREMERA AND NGIRUMPASTE

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The Prosecutor v. Éduoard Karemera et al., Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera* Adjudicated Facts Appeal Decision of 29 Decisions of 29 May 2009")

The Prosecutor v. Éduoard Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Adjudicated Facts Appeal Decision of 16 June 2006")

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement")

KAYISHEMA AND RUZINDANA

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The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement")

MUNYAKAZI

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 ("*Munyakazi* Appeal Judgement")

MUSEMA

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The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement")

NAHIMANA *ET AL.*

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (English translation filed 16 May 2008) ("*Nahimana et al.* Appeal Judgement")

NIYITEGEKA

The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgement")

NIZEYIMANA

Ildéphonse Nizeyimana v. The Prosecutor, Case No. ICTR-00-55C-A, Judgement, 29 September 2014 ("*Nizeyimana* Appeal Judgement")

NTAGERURA *ET AL.*

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Judgement, 7 July 2006 (English translation filed 29 March 2007) ("*Ntagerura et al.* Appeal Judgement")

NTAKIRUTIMANA AND NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana and Ntakirutimana* Appeal Judgement")

NTAWUKULILYAYO

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NYIRAMASUHUKO AND NTAHOBALI

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RUTAGANDA

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SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

SEROMBA

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SIMBA

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ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement")

3. The Mechanism for International Criminal Tribunals

NGIRABATWARE

Augustin Ngirabatware v. The Prosecutor, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgement")

4. International Court of Justice

CROATIA

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgement, 3 February 2015 (ICJ *Croatia v. Serbia* Judgement)

BOSNIA GENOCIDE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 2007 I.C.J. Rep. 43 (*Bosnia Genocide* Judgment)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections), Judgement of 11 July 1996 ("Bosnian Genocide Judgment on Preliminary Objections")

5. International Criminal Court

BEMBA

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009 ("*Bemba* Decision on Charges")

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KATANGA AND NGUDJOLO CHUI

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LUBANGA DYILO

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Pre-Trial Chamber Decision on the Confirmation of Charges, 29 January 2007 ("*Lubanga* Decision on Confirmation of Charges")

6. Decisions of national courts

EICHMANN

The Attorney General v. Adolph Eichmann, District Court of Jerusalem, Judgment of 12 December 1961, 36 ILR 18 ("*Eichmann* District Court Judgment")

B. Other Sources

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (entered into force on 12 January 1951) ("Genocide Convention")

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1979) ("Additional Protocol I")

Charter of the United Nations ("UN Charter")

C. List of Defined Terms and Abbreviations

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular shall include the plural.

ABiH	Army of Bosnia and Herzegovina
Tolimir	Zdravko Tolimir
Appeal Brief	*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Consolidated Appeal Brief, 24 September 2013 (confidential)(public redacted version filed on 3 March 2014)
Appeal Hearing	Oral submissions in the present case
Appeals Chamber	Appeals Chamber of the Tribunal
AT.	Appeal Hearing Transcript
Art.	Article
BCS	The Bosnian-Croatian-Serbian language

BiH or Bosnia	*Bosna i Hercegovina* – Bosnia and Herzegovina
Bosnian Serb Forces	Members of VRS and RS Ministry of Interior [MUP]
Cf.	Compare with
COHA	Agreement on Complete Cessation of Hostilities
CLSS	Conference and Language Services Section
Command order	Non-Administrative Orders
Commission of Experts Report	Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, U.N. Doc. S/1994/674, 27 May 1994
Croatia	Republic of Croatia
Defence Exhibit	Defence Exhibits in the present case (where Defence exhibits are originally in BCS, all citations herein refer to the English translation as admitted at trial)
DutchBat	Dutch Battalion of UNPROFOR
ICC	International Criminal Court
ICMP	International Commission on Missing Persons
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, and Rwandan Citizens Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
IKM	Forward Command Post
Indictment	*The Prosecutor of the Tribunal v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Third Amended Indictment, 4 November 2009
JCE	Joint Criminal Enterprise
JCE III	Joint Criminal Enterprise III
JCE to Forcibly Remove	Joint Criminal Enterprise to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves, as defined in paragraph 3 of the Trial Judgement

JCE to Murder	Joint Criminal Enterprise to murder the able-bodied men from the Srebrenica enclave, as defined in paragraph 3 of the Trial Judgement
JNA	Yugoslav People's Army (Army of the Socialist Federal Republic of Yugoslavia)
Ratko Mladić	Commander of the VRS Main Staff
MP	Military Police
MUP	*Ministarstvo Unustrasnjih Poslova* - Ministry of the Interior in Republika Srpska
MSF	*Médecins Sans Frontičres* - Doctors Without Borders
n. (nn.)	Footnote(s)
National Assembly	National Assembly of the Serbian People in BiH
NATO	North Atlantic Treaty Organization
Notice of Appeal	*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Amended Notice of Appeal, 9 September 2013
OTP	Office of the Prosecutor
p. (pp.)	Page(s)
para. (paras)	Paragraph(s)
POW(s)	Prisoner[s] of War
Prosecution	Office of the Prosecutor
Prosecution Exhibit	Prosecution Exhibits in the present case (where Prosecution exhibits are originally in BCS, all citations herein refer to the English translation as admitted at trial)
Reply Brief	*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Amended Brief in Reply, 27 February 2014
Response Brief	*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Prosecution Response Brief, 16 October 2013 (confidential) (public redacted version filed on 10 March 2014)
Rogatica Brigade	1st Podrinje Light Infantry Brigade
RS	*Republika Srpska* – Bosnian- Serb Republic
Rules	Rules of Procedure and Evidence of the Tribunal

SFRY	Socialist Federal Republic of Yugoslavia
Standard Barracks	Zvornik Brigade Headquarters
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 [1993]
T.	Trial Hearing Transcript
Trial Chamber	Trial Chamber II of the Tribunal
Trial Judgement	*Prosecutor v. Zdravko Tolimir,* Case No. IT-05-88/2-T, Judgement, 12 December 2012
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
UN	United Nations
UNDU	United Nations Detention Unit
UNHCR	United Nations High Commissioner for Refugees
UNMO	United Nations Military Observer
UNPROFOR	United Nations Protection Force in BiH
VCLT	Vienna Convention on the Law of Treaties,1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)
VRS	*Vojska Republike Srpske* – Army of the Republika Srpska
WHO	World Health Organization
ABiH Žepa Brigade	285th Eastern Bosnian Light Brigade of the ABiH
Zvornik Brigade	1st Zvornik Infantry Brigade
28th Division	28th Division of the Army of Bosnia and Herzegovina

NATIONS UNIES

	Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991	Affaire n°:	IT-05-88/2-A
		Date:	8 avril 2015
		Original:	Français

LA CHAMBRE D'APPEL

Composée comme suit: **Juge Theodor Meron, Président**
Juge William H. Sekule
Juge Patrick Robinson
Juge Mehmet Güney
Juge Jean-Claude Antonetti

Assistée de: **M. John Hocking, Greffier**

Rendue le: **8 avril 2015**

PROCUREUR

c/

ZDRAVKO TOLIMIR

PUBLIC

OPINIONS SÉPARÉE ET PARTIELLEMENT DISSIDENTE DU JUGE JEAN-CLAUDE ANTONETTI

Bureau du Procureur:

M. Peter Kremer
M. Kyle Wood
M. Todd Schneider
Mme Lada Šoljan
M. Nema Milaninia

M. Zdravko Tolimir, *pro se*

SOMMAIRE

I. Avant-propos

Au moment de délibérer dans une affaire de cette importance, en raison du nombre de victimes[1], le juge ne peut s'extraire mentalement de la souffrance endurée par les victimes et les familles, la peur éprouvée par les victimes elles mêmes au moment de leur exécution et la nécessité de ne pas commettre d'erreur quant à l'appréciation des faits et les conclusions qui doivent en être tirées. Ceci implique donc de la part du juge, au niveau de la Chambre d'appel, un **investissement total** dans l'appréciation des moyens soulevés et des éléments de preuve qui ont conduit, dans le cas d'espèce, deux juges de la Chambre de première instance à dire qu'il était **coupable** et à un autre juge de dire qu'il était **innocent.**

[1] Il est très difficile de donner un chiffre précis sauf à indiquer une fourchette allant de 4000 personnes (estimation basse) à 7000 (estimation haute).

II. Observations générales

1. La prise de parole du Général Tolimir

Dans le cadre de la présente procédure d'appel, la parole a été donnée pendant dix minutes au Général Zdravko Tolimir (« l'Accusé ») lui permettant ainsi d'indiquer aux cinq juges de la Chambre d'appel sa position finale concernant sa responsabilité pénale[2]. En règle générale, les accusés ont deux attitudes : soit ils rappellent qu'ils sont totalement innocents, soit ils demandent une atténuation de la peine. L'Accusé ne s'est absolument pas placé dans cette situation car il a seulement mis en avant l'action de l'OTAN[3]. Si un juge doit attacher une importance à ces propos finaux (c'est ce qu'il fait en général), dans le cas d'espèce, la justification qui semble apparaître serait que les crimes ont été commis en raison de l'action de l'OTAN. A supposer exacts les propos tenus par cet accusé, force est de constater que pour autant il ne peut être exonéré de sa responsabilité pénale.

2. La composition de la Chambre d'appel

A la suite du jugement, le Président du Tribunal avait désigné le 27 septembre 2012 les Juges Agius, Liu, Khan et Tuzmukhamedov dans le cadre de la Chambre d'appel. Toutefois, quelques jours plus tard, le Juge Agius avait été remplacé par le Juge Güney, puis moi-même j'ai été nommé le 21 janvier 2014 en remplacement du juge Tuzmukhamedov. Le 10 mars 2014, le Président a remplacé le Juge Liu par le Juge Robinson et le 22 septembre 2014, le Juge Sekule a été désigné pour remplacer le Juge Khan. Comme on peut le voir, à l'exception du Juge Meron, tous les juges initialement désignés ont été remplacés. On ne peut que s'interroger sur ce *malstrom* de remplacement de juges sans que l'on en comprenne les raisons.

3. La date de l'arrêt

Compte tenu de l'importance de cet arrêt, je considère qu'il été nécessaire d'accorder **un délai** de réflexion et d'étude raisonnable entre l'arrêt rendu par la Chambre d'appel ***Popović et al.***[4] et celui rendu par la Chambre d'appel dont je fais partie. A cet égard, je tiens à relever que les faits visés dans les deux affaires sont identiques puisqu'à l'origine, l'Accusé figurait dans l'acte d'accusation

[2] Audience d'appel, 12 novembre 2014, CRF., pp. 143-148.
[3] *Ibid.*, voir notamment CRF., pp. 146-147.
[4] Cet arrêt qui fait 792 pages en comptant les annexes devait entraîner au moins un mois de délai avant la délibération finale.

Popović et al.[5] De plus, deux juges de la Chambre d'appel *Popović et al.* ont également juges dans **la Chambre d'appel *Tolimir*[6].**

Toutefois, malgré mes demandes répétées de report de la date du rendu de l'arrêt, le Président de la Chambre et mes autres collègues ont maintenu la date mentionnée initialement convenue devant le **Conseil de Sécurité**. J'ai pris acte de la volonté majoritaire de rendre l'arrêt à la date annoncée mais j'estime qu'il n'y avait aucune urgence, d'autant plus, que l'Accusé n'avait pas formé de **demande de mise en liberté** pendant la phase d'appel. De même, l'importance de **l'arrêt *Popović et al.,*** rendu le 30 janvier 2015 aurait mérité, de mon point de vue, un examen attentif sans précipitation.

4. La durée du délibéré

Suite au jugement rendu le 12 décembre 2012, l'Accusé a fait appel du jugement le 11 mars 2013[7]. Depuis, le dépôt des premières écritures de l'appelant en date du 28 juin 2013[8], les juges qui avaient été nommés pour cette affaire étaient censés commencer à délibérer. Toutefois, les diverses modifications dans la composition de la Chambre d'appel, pour des raisons inconnues de moi, ont eu des répercussions sur le bon déroulement de la procédure.

Ayant été nommé seulement le **21 janvier 2014** dans cette affaire et ne bénéficiant pas initialement d'une assistance juridique au même titre que les autres juges de la Chambre d'appel, j'ai été obligé de commencer à travailler **seul** tout le dossier, jusqu'à l'octroi d'une assistance juridique à partir du **1er septembre 2014**. Par ailleurs, ce n'est que le **23 octobre 2014** que j'ai pu rencontrer deux membres de l'équipe juridique de la Chambre d'appel qui sont venus me voir du fait que j'avais fait part d'une opinion sur une question accessoire. Le premier *draft* préparatoire, comportant **272 pages** et 680 paragraphes m'a été adressé le **8 octobre 2014**. A ce moment, j'ai pu constater qu'il avait fallu à l'équipe juridique quasiment **22 mois** pour préparer ce premier document de travail intitulé *Preparatory Document*. Je considère que cette durée est excessive pour la préparation du premier document et qu'elle a eu des conséquences négatives sur la durée du délibéré. Je tiens cependant à souligner que l'équipe de juristes n'est pas **responsable** de cette durée.

[5] Voir, *Le Procureur c. Zdravko Tolimir et al.*, Deuxième Acte d'accusation modifié consolidé, 15 novembre 2006.
[6] Les Juges **Robinson** et **Sekule** ont été membres de la Chambre d'appel dans les affaires *Popović et al*. et *Tolimir*.
[7] Voir Notice d'appel, 11 mars 2013.
[8] Voir Mémoire d'appel, 28 juin 2013.

Force est de constater, qu'il y a eu pendant **22 mois** un très long laps de temps qui a permis à une équipe de juristes de préparer un document alors qu'en comparaison, les juges quant à eux n'ont eu que **quelques semaines** pour délibérer[9]. Certes, on pourra dire que la Chambre d'appel a pris son temps puisque l'arrêt est rendu quasiment plus de **deux ans et demi** après le jugement, or les juges n'ont eu en réalité que très peu de temps pour délibérer, faisant des prodiges, en absence du temps supplémentaire malgré mes demandes répétées.

D'ailleurs, il m'apparaît anormal de constater que la première composition de la Chambre d'appel, à l'exception de son Président, a complètement été changée. Je tiens à relever ce point pour que l'on comprenne que la durée des procédures et la durée des délibérations pourraient être réduites avec la nomination d'une **Chambre définitive et stable** dès le départ c'est-à-dire dès l'envoi du document contenant les moyens d'appel. J'estime que le **Conseil de Sécurité** devrait demander à une mission d'audit d'examiner avec attention cette question afin de trouver des réponses adéquates allant dans le sens de la **rapidité des procès**. Il a déjà eu l'occasion de recourir dans le passé à une telle mission concernant le fonctionnement du Cour spéciale pour le Sierra Leone[10].

5. La jonction souhaitable des affaires *Popović et al.* et *Tolimir*

S'il y avait eu un acte d'accusation **unique**, nous aurions eu comme éléments de preuve **les mêmes témoins et/ou experts**. Certes, il aurait été plus utile pour la **manifestation de la vérité** d'avoir les mêmes personnes sur le banc des accusés afin d'avoir une **vision complète** et exacte de la chaîne de commandement politique et militaire. Malheureusement, ceci n'a pas été possible et nous avons eu des procès multiples avec la technique dite des « faits constatés » qui a permis de prendre en compte des faits jugés par d'autres Chambres qui ont été finalement intégrés dans l'affaire jugée.

De mon point de vue, l'Accusé aurait dû normalement être jugé avec les autres accusés de l'affaire ***Popović et al***. Ceci n'ayant pas été le cas, la conséquence en a été que **deux jugements** sont intervenus les 10 juin 2010 et 12 décembre 2012 et que la Chambre d'appel a rendu **deux arrêts** avec quelques mois d'intervalle : dans l'affaire *Popović et al*, l'Arrêt a été rendu le 30 janvier 2015 et dans l'affaire *Tolimir*, celui-ci est intervenu le 8 avril 2015. A cet égard, force est de constater que l'accusation, à l'origine, avait à juste raison inclus l'Accusé dans l'acte d'accusation *Popović et*

[9] Je tiens à remercier mon assistante, **Flor de Maria Palaco Caballero**, qui m'a aidé à préparer cette opinion séparée et partiellement dissidente dans un délai record.
[10] Voir, *Rapport sur la Cour spéciale pour le Sierra Leone* réalisé par Antonio Cassese, expert indépendant, 12 décembre 2006.

al., mais pour des raisons liées à son arrestation tardive, deux actes d'acte d'accusation ont été introduits**.**

En effet, l'Accusé n'ayant pas été arrêté et le procès *Popović et al*. ayant commencé, la Chambre en charge de cette affaire avait demandé à l'Accusation d'enlever le nom de l'Accusé de la liste des co-accusés dans cette affaire[11]. Ultérieurement, l'Accusation, après l'arrestation de l'intéressé, avait demandé la **jonction** de cette affaire avec l'affaire *Popović et al.*[12], mais les juges de la Chambre *Popović et al.* avaient alors rejeté cette demande[13].

En ce qui me concerne, il me paraît évident, pour l'intérêt de la justice, que l'Accusé aurait dû être jugé en même temps que ses subordonnés. De même, il aurait dû être jugé en même temps que son supérieur hiérarchique, le Général **Ratko Mladić**. Si le concept de **bonne administration de la justice** et du **souci de recherche de la vérité** avaient prévalu, normalement, les Chambres saisies auraient dû interrompre leurs travaux et faire en sorte qu'**une jonction** de ces affaires soit opérée de telle façon que nous aurions pu avoir en même temps sur le même banc des accusés, **Radovan Karadžić, Ratko Mladić, Goran Hadžić, Zdravko Tolimir** etc… Si cela avait été possible et effectif, il paraît évident que la responsabilité individuelle de chacun des accusés aurait été mieux sériée et ainsi **tous** les éléments de preuve auraient pu être examinés à l'aune de chacune des défenses. Techniquement, ce n'était pas impossible, il suffisait simplement aux Chambres déjà saisies et en cours de procès d'arrêter la procédure dans **l'intérêt de la justice** et de transmettre le dossier aux juges de l'affaire **Radovan Karadžić** pour jonction.

6. L'opinion dissidente de la Juge Nyambe

La Juge **Nyambe** dans une opinion remarquable constituée de 46 pages[14] s'est prononcée de manière ferme pour l'acquittement. En l'espèce, elle a considéré qu'il n'y avait pas d'**entreprise criminelle commune** et que les conditions de l'intention génocidaire n'étaient pas remplies à l'égard de l'Accusé[15].

J'estime que la démarche de la Juge **Nyambe** est un exemple à suivre et qu'avant toute conclusion, il faut revenir aux éléments de preuve pour déterminer l'existence du plan commun allégué, la

[11] *Le Procureur c. Popović, Beara, Nikolić, Tolimir, Miletić, Gvero et Pandurević*, IT-05-88-PT, Ordonnance orale, CRF., pp. 311-312, 13 juillet 2006.
[12] *The Prosecutor v. Popović et al*., IT-05-88-T, "Motion for joinder", 6 June 2007
[13] *The Prosecutor v. Popović et al*., IT-05-88-T, "Decision on Motion for joinder", 7 July 2007.
[14] Voir l'opinion de la Juge Prisca Nyambe jointe au jugement.

connaissance de l'Accusé de ce plan afin de cerner le mieux possible sa responsabilité pénale. Je m'inscris dans cette démarche et c'est la raison pour laquelle je me suis dans un premier temps polarisé sur la **question de la procédure** afin d'indiquer de manière extrêmement précise qu'il n'y a pas eu de **procès équitable** pour l'Accusé. En effet, ses droits ont été violés par le fait d'une part, qu'il y a eu une admission de faits jugés inconséquents[16] sans que l'Accusé ait pu interjeter appel du fait du refus opposé par la Chambre de première instance[17] et d'autre part, une partie des charges est basée presque exclusivement sur les dires et constatations du témoin de l'Accusation, **Richard Butler**, qualifié de « témoin expert »[18]. Compte tenu de ces circonstances, je ne pouvais que conclure qu'à l'annulation du témoignage de **Richard Butler**.

7. La requalification juridique des faits

Les juges des Chambres sont saisis de l'existence de crimes prévus et réprimés par les articles 2, 3, 4 et 5 du Statut. Dans le cadre des actes d'accusation délivrés, l'Accusation a qualifié ces crimes soit d'infractions graves aux Convention de Genève, soit de violations aux lois et coutumes de la guerre, soit de génocide, soit de crimes contre l'humanité ; étant précisé que parfois un même fait peut avoir plusieurs qualifications. A l'origine, la question de la qualification juridique des faits par les juges s'est posée et, force est de constater, que les juges n'ont pas voulu entrer dans cette voie en raison de la jurisprudence et des pratiques inhérentes au Tribunal. Cette approche a été de mon point de vue **catastrophique** car le rôle du juge est limité par le champ juridique proposé par l'Accusation et ce, au détriment de la recherche de la vérité.

Concernant plus particulièrement la situation de l'Accusé, il n'est pas sans intérêt de constater que l'Acte d'accusation dressé à son encontre ne lui impute pas la forme de responsabilité basée sur l'article 7.3[19] (responsabilité du supérieur hiérarchique). Ceci aurait pu se concevoir dans la mesure où ses subordonnés comme **Beara** ont participé aux crimes (arrêt *Popović et al*). De même, l'organigramme permettait de rattacher le 10ème détachement à **Dražen Erdemović** sous l'autorité de l'Accusé. Alors j'estime que le fait de s'être totalement lié aux qualifications de l'Accusation aboutit dans un certain nombre de cas au principe du « tout ou rien » alors même que la vérité peut se trouver « au milieu »...

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[15] Opinion de la Juge Prisca Nyambe, pp. 41-45.
[16] J'aurai l'occasion de revenir plus en détails sur cette question lors de l'analyse effectuée du **moyen d'appel n°1** soulevé par l'appelant.
[17] *The Prosecutor v. Tolimir*, IT-05-88-2-PT, "Decision on request for certification of decision on Prosecution motion for judicial notice of adjudicated facts", 23 February 2010.
[18] J'aurai l'occasion de revenir plus en détails sur cette question lors de l'analyse effectuée du **moyen d'appel n°3** soulevé par l'appelant.

8. Le procès équitable et les arrêts *Blagojević* et *Krstić*

Dans le jugement rendu par la Chambre de première instance ***Tolimir,*** il a été fait mention à plusieurs reprises à **l'affaire *Blagojević*** avec référence au jugement et à l'arrêt. Concernant cette affaire, ma position est identique à celle que le Juge **Mohamed Shahabuddeen** avait exprimé dans son opinion dissidente jointe à l'Arrêt[20] à savoir que **Vidoje Blagojević** n'avait pas eu de procès équitable en raison de conflit avec l'avocat qui lui avait été commis d'office et qu'ainsi dans ses écritures **Vidoje Blagojević** avait demandé la tenue d'un nouveau procès ou à défaut d'être acquitté[21]. En ce qui me concerne, je partage entièrement ce point de vue.

De même, au regard de l'Arrêt ***Krstić,*** il avait été soulevé en moyen d'appel le fait qu'il y avait eu violation du Règlement de procédure et de preuve en ce qui concerne l'obligation faite à l'Accusation en application de l'article 68 de transmettre **en temps utile** à l'accusé les éléments de preuve[22]. La Chambre d'appel *Krstić,* consciente de ce problème, a donné partiellement raison à l'appelant en reconnaissant l'erreur mais elle n'en a pas tiré toute la conclusion qui s'imposait et qui devait être l'annulation du jugement et la reprise d'un nouveau procès[23].

9. Les événements de Srebrenica en 1993

Il me paraît nécessaire de mettre l'accent de manière synthétique sur le contexte ayant entraîné le déroulement des évènements. Dans le jugement *Tolimir*, les juges de la Chambre de première instance ont, au chapitre IV du jugement, intitulé *Les évènements ayant précédé les attaques contre Srebrenica et Žepa*[24] évoquée de manière extrêmement succincte un ensemble d'évènements qui auraient mérité à mon sens un plus grand développement. A mon niveau, je ne peux que regretter cette façon de procéder et je me contenterai sur la base du **Rapport du Secrétaire général de l'ONU en date du 15 novembre 1999**[25], de relater les évènements qui se sont produits aux alentours des années 1993. En effet, pour la bonne compréhension des faits, il m'apparaît utile de

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[19] Dans le cadre du deuxième acte d'accusation modifié en date du 15 novembre 2006 (IT-05-88-PT), seuls les Accusés Pandurević et Borovčanin sont poursuivis au titre de l'article 7.3 du Statut, l'Accusé étant retenu au titre de l'article 7.1.
[20] Voir l'opinion dissidente du Juge Shahabuddeen jointe à l'Arrêt du 9 mai 2007, pp. 155-159.
[21] Le Juge Shahabuddeen dans son opinion dissidente va indiquer que, « Vidoje Blagojević, faute d'avoir pu donner sa version des faits, n'a pas eu un procès équitable et que, vu l'ensemble des circonstances, il y a lieu de renvoyer l'affaire pour qu'elle soit rejugée », p. 155, §1.
[22] Arrêt *Krstić,* p. 85-86.
[23] Arrêt *Krstić,* p. 85-86.
[24] Jugement *Tolimir,* par. 159 et ss.

rappeler ces événements antérieurs, dont l'accusation n'en a quasiment pas parlé, ce qui me paraît être une hérésie.

Dans son rapport de 1999, le **Secrétaire général de l'ONU** a tenu à évoquer ces évènements. Il apparaît, ainsi, que le **6 mai 1992** les musulmans avaient commencé à lutter pour enlever aux serbes le contrôle de **Srebrenica**[26]. Lors d'une embuscade le 8 mai 1992, un dirigeant serbe avait été tué et peu après les serbes avaient commencé à évacuer la ville ou à en être chassés[27]. Le 9 mai, les bosniens avaient pris le contrôle de la ville par des groupes de combats dont le plus puissant d'entre eux était placé sous le commandement de **Naser Orić**[28]. Sous la direction de **ce dernier**, au cours d'une période de plusieurs mois, l'enclave bosniaque qui avait **Srebrenica** pour centre avait été progressivement élargie aux zones environnantes. Comme le dit le **Secrétaire général de l'ONU**, les bosniens ont élargi les territoires en utilisant des techniques de « nettoyage ethnique », en mettant le feu à des résidences et en terrorisant la population civile[29]. En septembre 1993, les forces bosniaques de Srebrenica forcèrent la position avec celle de Žepa[30]. Ainsi, la zone de Srebrenica avait atteint sa plus grande superficie en janvier 1993 avec environ 900 km2[31]. Le 7 janvier 1993, les forces bosniaques avaient attaqué le village de **Kravica (**habité par les serbes), lors de cette attaque, **40 civils** serbes avaient été tués[32]. Comme l'indique le Secrétaire général de l'ONU, les forces serbes ont mené une contre offensive et au fur et à mesure qu'elles avançaient, elles se sont livrées elles aussi à des exactions[33]. En raison de cette contre-attaque, **50 000 à 60 000** bosniens se sont retirés dans une zone montagneuse ayant la ville de Srebrenica pour centre[34]. Dans ces conditions, **Žepa** et **Srebrenica** ont été séparés par un étroit corridor tenu par les serbes[35].

La situation étant préoccupante, le commandant de la FORPRONU en Bosnie Herzégovine, s'est rendu sur place où il a constaté que la ville était assiégée et que le **surpeuplement** représentait un grave problème. La population locale ayant empêché le commandant de la FORPRONU de s'en aller, celui-ci prenant la parole en publique à Srebrenica affirmait alors que la population était sous la protection des soldats de l'ONU et qu'il ne les abandonnerait pas[36]. Suite à cette déclaration du

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[25] Voir pièce D00122. La référence à ce document incontestable est mentionnée dans le mémoire final de la défense. Compte tenu de l'importance de cette pièce, j'aborderai certains aspects dans une **annexe** spécialement dédiée.
[26] D00122, par. 34.
[27] *Ibid*.
[28] *Ibid*.
[29] D00122, par. 35.
[30] D00122, par. 36.
[31] *Ibid*.
[32] D00122, par. 37.
[33] *Ibid*.
[34] *Ibid*.
[35] D00122, par. 37. Voir également, la carte figurant à la pièce P00104.
[36] D00122, par. 38.

Général Morillon, le HCR avait réussi à faire passer plusieurs convois humanitaires et à évacuer des personnes pour **Tuzla.** Ainsi, un premier convoi a eu lieu le **19 mars 1993** puis un second le **28 mars**, un troisième le **31 mars** puis un autre le **8 avril** et un dernier convoi le 13 avril. Au total, plus de **8000 à 9000 personnes ont été transportées à Tuzla**[37]. Il y a lieu de noter que ces « transferts » n'ont pas été reprochés à l'Accusé. A bien suivre l'Accusation, on pourrait se demander pourquoi ceux de 1993 ont pu être considérés comme licites à l'inverse de ceux de 1995…

Au même titre, il m'apparaît important de me référer au processus de paix engagé par la Communauté internationale à travers la mise en place de la conférence internationale sur l'ex-Yougoslavie et notamment du plan Vance Owen[38]. Le 2 septembre 1993, le **Plan Vance Owen** comportait trois parties : un ensemble de principes constitutionnels, des dispositions militaires, une carte délimitant dix provinces[39]. Les objections des dirigeants serbes sur le plan avaient porté sur la province 5 qui aurait eu une majorité bosniaque ; étant précisé que cette province 5 englobait les enclaves de **Srebrenica et Žepa**[40]. De même, lorsque ce plan de paix avait été proposé, l'armée des serbes de Bosnie contrôlait 70% du territoire alors même que le plan **Vance Owen** ne leur aurait octroyé que **43%** du territoire ce qui les aurait obligés à abandonner une partie de leur territoire revendiqué comme étant serbe. Le plan avait été adopté par la Croatie. Cependant, **Radovan Karadžić**, à la suite de pressions multiples, avait signé au nom des serbes cet accord lors d'une réunion à Athènes le 2 mai 1993, or sa signature avait été apposée à la condition que l'Assemblée nationale de la Republika Srpska l'approuve, ce qui n'a pas été le cas puisque lors de la session plénière tenue à Pale les 4 et 5 mai 1993, le plan avait été rejeté.

Il m'apparaît également utile pour la bonne compréhension de dire que **Srebrenica** se trouvait dans une vallée de la Bosnie orientale à proximité de la Serbie et dans le cadre du recensement de 1991 elle comptait **37 000 habitants** dont les ¾ étaient bosniaques et le ¼ étaient serbes.

[37] D00122, par. 40.
[38] D00122, par. 29-32.
[39] D00122, par. 31.
[40] D00122, par. 31.

10. Les témoins Momir Nikolić et Dražen Erdemović

a. Momir Nikolic

Momir Nikolić avait plaidé coupable du Chef 5 de son Acte d'accusation concernant les persécutions, crime contre l'humanité sanctionné par l'article 5 h) du Statut[41].

En retour, l'Accusation avait enlevé de l'Acte d'accusation, les Chefs relatifs au génocide, complicité de génocide et extermination[42].

L'intéressé avait été déclaré coupable du Chef 5 et dans le cadre du plaidoyer de culpabilité, l'Accusation et la Défense avaient recommandé à la Chambre de prononcer pour la Défense une sanction de 10 ans et pour l'Accusation de 15 à 20 ans[43]. La Chambre de première instance avait décidé que la peine serait de 27 ans[44]. Dans ces conditions, Momir Nikolić a fait appel de la décision[45].

Le fait qu'un accord de plaidoyer ne soit pas suivi par les juges pose un problème car si la peine rendue est supérieure à ce qu'attend la défense, voire l'Accusation (comme c'est le cas ici), il y aura inévitablement un nouveau contentieux devant la Chambre d'appel car l'accusé, à juste titre, peut s'être senti floué. Sur ce plan, pour rendre crédible ce type d'accord de culpabilité il m'apparaît essentiel que les juges ne dépassent pas les maximum des demandes proposés par les parties. En effet, si les juges s'accordent à confirmer la demande de l'Accusé, celui-ci ne fera pas appel et témoignera plus facilement par la suite car il aura le sentiment que justice lui a été rendu. De même, L'Accusation ne doit pas non plus trop s'éloigner du chiffrage de la défense sous peine de faire capoter tout le processus qu'il a mis en œuvre dans l'intérêt de la justice et des victimes.

De mon point de vue, la condamnation à 27 ans pour un seul Chef d'accusation n'allait que susciter des problèmes. Je ne vais pas entrer dans un commentaire des moyens d'appel qui ont été soumis à la Chambre d'appel. En revanche, je tiens à mettre en exergue le passage de l'Arrêt par lequel Chambre d'appel note que l'appelant avait menti à l'Accusation quand il avait confessé des crimes

[41] Plaidoyer de culpabilité de Dražen Erdemović en date du 31 mai 1996 du chef de crime contre l'humanité, prévu à l'article 5 a) du Statut.
[42] Acte d'accusation conjoint modifié, 27 mai 2002.
[43] *The Prosecutor v. Vidoje Blagojević et al*., IT-02-60-PT, "Joint motion for consideration of amended Plea agreement between Momir Nikolić and the office ot the Prosecutor", 7 May 2003.
[44] Jugement *Nikolić*, 2 décembre 2003.
[45] Notice d'appel *Nikolić*, 30 décembre 2003.

qu'il n'avait pas commis[46]. Cette phrase jette la **suspicion intégrale** sur tout ce qu'a pu dire ou dira par la suite **Momir Nikolić**. Pourquoi s'est-il auto-accusé de crimes non commis, voulait-il faire plaisir à l'Accusation en l'échange d'une bienveillance ? Le fait même qu'un accusé ayant plaidé coupable reconnaisse qu'une partie de son comportement était empreint de fausseté ne peut que jeter un doute sur tout ce qu'il a pu dire. Dans ces conditions, j'avais demandé en cours de délibéré à mes collègues la réouverture des débats afin de reprendre intégralement les auditions de **Momir Nikolić** car une partie du jugement est fondée à l'encontre de l'Accusé Tolimir sur des propos de celui-ci. Malheureusement, ma demande n'a pas été suivie par la majorité des juges de la Chambre d'appel.

b. Dražen Erdemović

Dans l'acte d'accusation, il est indiqué que des milliers de civils qui s'étaient rendus à Srebrenica s'étaient enfui à Potočari[47]. A ce stade, j'essaye de trouver une cohérence avec la thèse de l'accusation disant qu'il y a eu transfert forcé alors même que dans cet acte d'accusation, il est indiqué que les civils se sont enfuis. De même, l'Accusation indique qu'entre le 11 et 13 juillet personnel militaire bosno- serbe a sommairement exécuté un nombre inconnu de musulmans bosniaques à Potočari et à Srebrenica[48]. D'après les éléments de preuve, je n'ai pas trouvé trace de ceci. Dans la suite de l'Acte d'accusation, il est indiqué que **Dražen Erdemović** était informé que des bus venant de Srebrenica rempli de civils devaient arriver[49]. Ces bus étant remplis d'hommes âgés de 17 à 60 ans. Les éléments de preuve établissent que ces hommes étaient soit des soldats, soit des hommes en âge de combattre et dans ces conditions, il me paraît difficile de les qualifier de civils.

A l'issue de sa comparution initiale, la Chambre de première instance a ordonné un examen psychiatrique et psychologique[50]. Il est donc apparu la nécessité de se poser des questions sur un désordre mental pouvant exister au niveau de l'accusé. Entre temps, l'Accusé qui coopérait avec les membres du Bureau du Procureur avait témoigné lors d'une audience tenue en application de l'article 61 du Règlement dans une affaire *Le Procureur c/ Karadžić et Mladić (IT-95-5- R61 et IT-95-18 -R61)*[51]. Lors de ce témoignage, il a indiqué que le 16 juillet 1995, des bus étaient arrivés

[46] Arrêt *Nikolić*, 8 mars 2006, par. 107.
[47] Voir Acte d'accusation initial, 22 mai 1996, par. 3.
[48] Acte d'accusation initial, par. 4.
[49] Acte d'accusation initial, par. 10.
[50] Audience de mise en état, 24 juin 1996.
[51] Voir conférence de mise en état du 4 juillet 1996 reprise dans le Jugement *Erdemović* portant condamnation, 29 novembre 1996, par. 6.

venant de Srebrenica contenant des civils bosniaques âgés de 17 à 60 ans[52]. L'intéressé ayant fait appel[53], son avocat avait indiqué entre autres moyen d'appel, qu'il n'avait pas le choix moral devant exécuté l'ordre donné par son supérieur militaire et qu'il avait ainsi perdu le contrôle de son comportement. L'appelant indique également que la Chambre avait commis une erreur de fait causant un déni de justice en disant qu'aucune conclusion quant à l'état psychologique de l'accusé au moment de crime ne peut être tirée »[54]. L'appelant a estimé qu'il revenait à une commission d'experts de se prononcer.

En application de l'article 115 du Règlement, l'appelant demandait la désignation d'un comité d'experts composé de psychiatres et de psychologues afin de fournir un nouveau rapport de l'état de santé de l'intéressé au moment des évènements[55]. Malgré de mon point de vue le bien fondé de cette demande, la Chambre d'appel a rejeté cette requête estimant que l'intérêt de la justice ne requérait pas la présentation de documents supplémentaires et que si l'appelant pensait que les éléments de preuve appuieraient son argumentation, elle aurait dû la soumettre à la Chambre de première instance[56].

Néanmoins, par quatre voix contre une, la Chambre d'appel estimait que l'affaire devait être renvoyée devant une Chambre de première instance autre que celle qui a prononcée la sanction de l'appelant[57]. Dans ces conditions, la Chambre de première instance nouvellement composée entendait le 14 janvier 1998 un nouveau plaidoyer de l'Accusé lequel plaidait coupable de violation des lois ou coutumes de la guerre au sens de l'article 3 du Statut, l'Accusation ayant retiré le chef alternatif de crime contre l'humanité[58]. Dans le cadre de ce plaidoyer de culpabilité, la Chambre retenait les paragraphes 8 à 12 de l'Acte d'accusation initial mentionnant l'arrivée de bus remplis de civils bosniaques[59]. Il convient de noter que lors de l'audience du 5 juillet 1996, la question lui avait été posée du sort réservé à ces civils, la réponse a été de les exécuter[60]. La Chambre de première instance relevait que le 20 novembre 1996, il avait dit que Brano leur avait dit : « maintenant des autobus vont arriver avec des civils de Srebrenica, des hommes »[61]. Il a insisté en insistant que c'étaient des civils »[62]. Il apparaît donc que la conclusion de **Dražen Erdemović** sur le

[52] Audience du 16 juillet 1995 (non accessible).
[53] Notice d'appel, 3 décembre 1996.
[54] Arrêt *Erdemović*, 7 octobre 1997, par. 12 d)
[55] Arrêt *Erdemović*, par. 15.
[56] Arrêt *Erdemović*, par. 15.
[57] Arrêt *Erdemović*, « Dispositif »
[58] Audience du 14 janvier 1998.
[59] Audience du 14 janvier 1998.
[60] *Le Procureur c/ Karadžić et Mladić (IT-95-5- R61 et IT-95-18 -R61)*, Audience du 5 juillet 1996.
[61] Jugement *Erdemović*, 5 mars 1998, par. 14.
[62] Jugement *Erdemović*, par. 14.

statut juridique des personnes qui allaient être tuées et étaient des civils alors que nous savons parfaitement que bien souvent les combattants étaient habillés en civil…

Ce qui m'apparaît extrêmement important c'est que nous avons la preuve que ce témoin capital pour un ensemble d'affaire avait des problèmes de nature psychologique et psychiatrique. Il apparaît également dans le jugement du 5 mars 1998 que les juges qui avaient fait foi de ce plaidoyer de culpabilité avaient successivement servi dans plusieurs armés (JNA, ABIH, HVO et VRS[63]).

La Chambre d'appel qui avait été saisie du jugement rendu par la Chambre de première instance le 29 novembre 1996 ayant condamné **Dražen Erdemović** à 10 ans après que celui-ci ait plaidé coupable du chef de crime contre l'humanité pour sa participation aux meurtres d'environs 1200 civils non armés à la ferme de Vranjevo près de la ville de Piliča le 16 juillet 1995 après la chute de Srebrenica[64]. A ce stade, je dois noter une incohérence d'analyse effectuée par la Chambre d'appel qui parle de 1200 civils musulmans non armés. En eux-mêmes ces termes sont antinomiques, un civil par définition est non armé. Le fait d'indiquer « civils musulmans non armés » évoque la possibilité que ces musulmans avaient un statut de militaire et qu'au moment de leur arrestation ils n'avaient pas d'arme. L'acte d'accusation dressé à l'encontre de **Dražen Erdemović** indique que des milliers de civils bosniaques musulmans qui étaient présents à Srebrenica s'étaient enfuis à la base de l'ONU à Potočari[65]. Cette affirmation est contraire à divers éléments de preuve qui tendent à prouver que ces hommes étaient soit des militaires de l'ABiH ou des hommes en âge de combattre.

Par ailleurs, des éléments de preuve dénotent qu'ils ne s'étaient pas enfuis mais qu'ils avaient eu ordre de se rendre à Potočari ce qui est tout autre chose. Dans la suite de l'acte d'accusation, il a été indiqué qu'un deuxième groupe d'hommes femmes et enfants avaient fui Srebrenica[66]. Ce paragraphe laisse penser à des civils ce qui n'était pas le cas. Le 31 mai 1996, l'accusé plaidait coupable en disant qu'il n'avait pas le choix de le faire et s'il avait refusé de le faire il aurait été tué en même temps que les autres[67]. A l'époque, la Chambre de première instance avait ordonné un examen psychiatrique et psychologique lequel concluait qu'il subissait un désordre syndrome post traumatique. Elle ordonnait la suspension de l'audience et demandait un deuxième rapport ; celui-ci

[63] Jugement *Erdemović*, par. 16.
[64] Jugement *Erdemović*, 29 novembre 1996.
[65] Acte d'accusation initial, par. 3.
[66] Acte d'accusation initial, par. 6
[67] Plaidoyer de culpabilité de Dražen Erdemović en date du 31 mai 1996 du chef de crime contre l'humanité, prévu à l'article 5 a) du Statut.

indiquait qu'il était apte à en juger[68]. Etant précisé qu'entre temps celui-ci avait coopéré avec le Bureau du Procureur et avait témoigné en application de l'article 61 dans l'affaire *Le Procureur c/ Karadžić et Mladić (IT-95-5- R61 et IT-95-18 -R61).* De mon point de vue se posait la question de savoir si au moment de son témoignage, il était en état mental de le faire en toute sérénité…

Ayant de sérieux doutes, comme d'ailleurs la **Juge Nyambe** sur les témoignages concernant les plaidoyers de culpabilité, j'ai pris connaissance des rapports des experts sur son état de santé mental. Je constate que le rapport avait été remis le 24 juin 1996 et que celui-ci en raison de la sévérité de son stress post-traumatique combiné avec un comportement suicidaire ne lui permettait pas de participer au jugement et qu'il était demandé un second examen par une commission médicale dans un laps de temps de **six à neuf mois**. Comment se fait il alors que l'intéressé ait pu témoigner le **19 novembre 1996** c'est-à-dire moins de six mois avant le second rapport médical ?[69]

A aucun moment il n'est mentionné dans l'Arrêt des éléments précis sur sa situation mentale. Dans ce rapport, il est mentionné que **Dražen Erdemović** a un entretien avec les experts et il relate qu'on l'avait obligé à tirer sur les musulmans et que s'il avait refusé d'obéir on lui aurait tiré dessus et également sur sa famille.

Selon lui, les meurtres (« butchering ») avaient duré de 5 à 6 heures et qu'après il s'était rendu dans un café pour boire avec d'autres soldats. Quand soudainement un de ses compagnons à l'aide de son arme lui tira dessus ainsi que sur deux autres soldats, il était gravement blessé dont deux au ventre et une à la jambe. Il était conduit à l'hôpital pour subir une opération puis une autre opération[70]. Comment se fait-il que ce fait extrêmement important ait été occulté par tout le monde à ce jour. Que s'est il passé dans ce café ? Est-ce que compte tenu du refus opposé par **Dražen Erdemović** à participer à une exécution, un de ses compagnons n'aurait-il pas eu l'ordre d'exécuter les réfractaires ? car il apparaît que le comportement de ce soldat dans ce café est totalement incompréhensible, ceci aurait mérité pour le moins que des questions soient posées à **Dražen Erdemović**. En effet, il faut évaluer l'impact de cet évènement sur l'état psychologique de **Dražen Erdemović**. S'il pouvait à juste titre penser qu'on a voulu le faire taire, il n'en pouvait qu'en vouloir à ses supérieurs hiérarchique donc tout ce qu'il peut dire sur la chaine de commandement est entaché d'irrégularités ? L'autre hypothèse qui peut venir est celle de penser que **Dražen Erdemović** a effectivement refusé de tirer et n'a pas participé aux tirs et pour cette raison il aurait été puni sur instruction de la chaine de commandement où un soldat pouvant être manipulé par ses

[68] Rapport d'experts en date du 27 juin 1996.
[69] Témoignage dans l'affaire *Le Procureur c/ Karadžić et Mladić (IT-95-5- R61 et IT-95-18 -R61)*, 19 novembre 1996.

supérieurs serait venu l'exécuter dans ce café mais dans cette hypothèse, **Dražen Erdemović** se serait alors faussement accusé. En ce qui me concerne, je suis sidéré de constater avec quelle légèreté on a pu traiter ce témoin.

Conscient du rôle de celui-ci j'ai demandé en vain à mes collègues de la Chambre d'appel de faire venir ce témoin pour que je puisse de manière professionnelle lui poser les questions appropriées. Malheureusement, je n'ai pas été suivi dans cette démarche pourtant nécessaire de mon point de vue.

[70] *Ibid*.

III. Questions préliminaires et autres

1. Constat judiciaire de faits jugés (moyen d'appel n°1)

a. Les griefs principaux soulevés par l'appelant

L'appelant, dans le cadre de son moyen d'appel n°1, soutient que la Chambre de première instance a commis une erreur en procédant à l'admission de **523** faits jugés dans d'autres affaires[71], la plupart d'entre eux ayant eu un impact significatif sur le procès par l'emploi qui en a été fait[72]. Tout en rappelant le droit applicable en la matière, l'appelant indique que les faits qui ont été admis par la Chambre touchent directement au fond de l'affaire du fait qu'ils ont été utilisés par l'Accusation dans sa requête en application de l'article 94 B) du Règlement contenant des éléments juridiques cruciaux[73].

A cet égard, l'appelant va soulever deux griefs principaux : le premier concernant le plan par titres adopté par l'Accusation dans sa requête en admission[74] et le second touchant à certains faits admis en relation directe avec le fond de l'affaire[75].

i. Le plan par titres élaboré par l'Accusation contenant des conclusions factuelles cruciales

Sur ce point, il est exact que l'Accusation dans le cadre de sa demande d'admission a établi **un plan** par titres regroupant les faits admis. A titre d'exemple, l'appelant relève que les faits admis 433 à 538 ont été présentés sous le titre « Opération de transfert forcé de la population bosniaque musulmane de Srebrenica » avec l'ajout de sous-titres concernant la violence et terreur à Potočari, le transfert forcé des femmes, enfants et personnes âgées, la séparation des hommes[76]. Pour l'appelant, cette manière de procéder consiste en une qualification prédéterminée des groupes de faits ; étant précisé que l'Accusation dans sa requête n'indique aucunement au sein de ces éléments ceux qui touchent directement au fond de l'affaire[77].

Dans sa demande présentée en application de l'article 94 B) du Règlement, l'Accusation va adopter un plan en suivant dans un premier temps la chronologie des évènements qui ont eu lieu au mois de

[71] Voir, Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de faits admis en vertu de l'article 94 B) du Règlement, 17 décembre 2009. Le Procureur, dans sa requête, va solliciter l'admission de 604 faits jugés en application de l'article 94 (B) du Règlement de procédure et de preuve dans les affaires *Krstić* (première instance et appel) et *Blagojević* et *Jokić* (première instance et appel)
[72] Mémoire d'appel, par. 6.
[73] Mémoire d'appel., par. 7.
[74] Mémoire d'appel, par. 8.
[75] Mémoire d'appel, par. 10.
[76] Mémoire d'appel, par. 8.
[77] Mémoire d'appel, par.9.

juillet 1995 et à « l'opération de meurtre sur les hommes bosniaques musulmans de Srebrenica »[78]. Les sites d'exécution décrits concernent les meurtres commis à l'entrepôt Kravica le 13 juillet[79], les meurtres commis à Sandici, le 13 juillet[80], les meurtres commis à l'école Luke près de Tisca[81], le mouvement de prisonniers de Bratunac vers la zone de Zvornik[82], les meurtres commis à Orahovac[83], les meurtres commis à l'école Petkovci[84] et les meurtres commis au barrage Petkovci[85]. Par ailleurs, dans l'affaire *Tolimir*, l'Accusation va choisir de mettre en évidence les différents charniers : Glogova 1 et 2[86], Lazete 1 et 2[87], Barrage de Petkovci et Liplje[88], Kuzluk[89], la ferme de Branjevo[90].

A côté de ces éléments objectifs liés aux crimes commis, l'Accusation, dans la suite de son plan, va mettre l'accent sur des aspects plus subjectifs comme le transfert forcé de la population musulmane de Srebrenica[91] et les meurtres opportunistes comme conséquence prévisible du transfert forcé de la population bosniaque musulmane de Srebrenica[92].

Sur la question du **transfert forcé** de la population musulmane de Srebrenica, le plan retenu par l'Accusation est le suivant :

Violence et terreur à Potočari
Organisation des bus
Le transfert forcé des femmes, enfants et personnes âgées
La séparation des hommes
La maison blanche
La présence des officiers du corps de la Drina à Potočari les 12 et 13 juillet 1995
La colonne des hommes bosniaques musulmans

Sur les **meurtres opportunistes** comme conséquence prévisible du transfert forcé de la population bosniaque musulmane, le plan est le suivant :

Potočari
Bratunac

[78] Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de faits admis en vertu de l'article 94 B) du Règlement (« Décision sur les faits admis »), pp. 29-43, faits admis 195-432.
[79] Décision sur les faits admis, p. 31, faits admis 225-235.
[80] Décision sur les faits admis, p. 31-32, faits admis 236-242.
[81] Décision sur les faits admis, p. 32, faits admis 243-253.
[82] Décision sur les faits admis, p. 33, faits admis 265-268.
[83] Décision sur les faits admis, pp. 33-35, faits admis 269-292.
[84] Décision sur les faits admis, p. 35, faits admis 293-297.
[85] Décision sur les faits admis, p. 35-36, faits admis 298-307.
[86] Décision sur les faits admis, p. 40, faits admis 374-389.
[87] Décision sur les faits admis, pp. 41, 390-401.
[88] Décision sur les faits admis, pp. 41-42, faits admis 402-411.
[89] Décision sur les faits admis, p. 42, faits admis, 412-425.
[90] Décision sur les faits admis, p. 43, fait admis, 426-432.
[91] Décision sur les faits admis, pp. 43-50, faits admis 433-558.
[92] Décision sur les faits admis, pp. 50-53, faits admis 559-604.

L'école Grbavci à Orahovac
L'école Kula près de Pilica
Faits supplémentaires pertinents
Connaissance généralisée des crimes
L'impact des crimes sur la communauté bosniaque musulmane de Srebrenica
La pertinence des communications-intercepte

Pour l'appelant, la démarche du Procureur consistant en l'usage de titres regroupant des faits jugés a conditionné la Chambre dès le départ du procès à suivre une qualification prédéterminée. Sur cette base, l'appelant va soutenir qu'une grande partie de ces faits jugés ont une **relation directe** avec le fond de l'affaire et que de ce fait, ils auraient dû être écartés par la Chambre de première instance dans le cadre de sa décision d'admission. En ce qui me concerne, je partage entièrement ce point de vue. La Chambre de première instance aurait dû écarter les faits jugés qui sont en relation directe avec les faits reprochés à l'Accusé et sur lesquels je vais revenir en détails dans la suite des développements sur ce moyen d'appel.

ii. L'admission de faits jugés en relation directe avec le fond de l'affaire

Sur le second point, l'appelant va énumérer les faits jugés qui auraient un lien direct avec le fond de l'affaire en les regroupant[93]. Il est intéressant de constater que dans le cadre de cette analyse, l'appelant va notamment citer certains faits jugés relatifs aux directives 4, 7 et 7/1 ainsi qu'aux trois réunions ayant eu lieu à l'hôtel Fontana, éléments centraux sur lesquels s'articule l'Acte d'accusation du Procureur[94]. Ces faits jugés ayant fait l'objet d'une admission par la Chambre de première instance sont les suivants : **18, 53, 61-62, 156-190, 201, 202, 203, 205, 206, 208, 209, 434, 435, 439, 441-442, 444, 460, 464, 470, 491, 492, 523, 540, 541, 553, 558, 586-604**[95]. Il est indéniable que parmi ces faits, une partie significative d'entre eux ont un lien plus ou moins direct avec le fond de l'affaire et la responsabilité de l'Accusé. Sur ce plan, l'appelant allègue le fait qu'à travers cette pratique des faits admis, la Chambre de première instance crée une présomption d'authenticité[96]. En effet, en admettant des conclusions sur la base de faits jugés dans d'autres affaires, la Chambre *Tolimir* va les prendre en compte sans qu'elle ait eu accès à l'ensemble des éléments de preuve ayant permis d'aboutir à de telles conclusions[97].

[93] Mémoire d'appel, par. 10-21.
[94] Acte d'accusation, 28 août 2006. Les principaux éléments sont mentionnés dans la partie consacrée à « l'entreprise criminelle commune visant à chasser la population musulmane de Srebrenica et de Žepa », par. 36-46.
[95] Acte d'accusation, par. 10.
[96] Acte d'accusation, par. 14.
[97] Acte d'accusation, par. 14.

Or, comme le relève à juste titre l'appelant dans son moyen d'appel n°1, il revient à la Chambre de première instance de juger de la **valeur probante** des éléments de preuve versés au dossier afin de faire sienne ou de se départir des conclusions factuelles auxquelles sont parvenues d'autres Chambres dans d'autres affaire connexes[98]. Si cette pratique consiste à réduire le besoin de recourir à des témoignages répétitifs et éléments de preuve dans les affaires successives[99], il n'en demeure pas moins qu'une telle démarche reviendrait purement et simplement pour l'appelant à nier le rôle premier d'une Chambre de première instance[100]. En effet, son rôle est de statuer de manière indépendante sur des conclusions factuelles à partir d'éléments de preuve portés au dossier et non de procéder à des constatations sur la base de simples présomptions particulièrement concernant des éléments cruciaux de l'affaire[101].

Néanmoins, il convient de constater que les faits liés notamment aux directives 4, 7 et 7/1 ont été admis alors même qu'ils sont **au cœur** de la démonstration de l'Accusation de la culpabilité de l'Accusé. Ces faits jugés par d'autres Chambres n'auraient jamais dû être admis par la Chambre de première instance chargée de jugée cette affaire.

b. Le pouvoir discrétionnaire de la Chambre de première instance en matière d'admission de faits jugés dans d'autres affaires

La lecture combinée des articles 89 C) et 94 B) du Règlement de procédure et de preuve par la Chambre d'appel fait apparaître le fait que « [l]a Chambre peut recevoir tout élément de preuve pertinent qu'elle estime avoir valeur probante ». Dans ce cadre, en application de l'article 94 B), « [u]ne Chambre de première instance peut, d'office ou à la demande d'une partie, et après audition des parties, décider de dresser le constat judiciaire de faits jugés ou de l'authenticité de moyens de preuve documentaires admis lors d'autres affaires portées devant le Tribunal et en rapport avec l'instance ». Sur ce point, la jurisprudence de la Chambre d'appel consacre la faculté discrétionnaire des juges de la Chambre afin de déterminer le poids à donner aux éléments de preuve et à leur valeur probante[102]. Sur cette base, la Chambre d'appel rappelle qu'il est fermement établi qu'une Chambre de première instance doit analyser la totalité des éléments de preuve présentés nonobstant sa décision concernant l'admission de faits jugés[103].

[98] Acte d'accusation, par. 13.
[99] Acte d'accusation, par. 13.
[100] Acte d'accusation, par. 17.
[101] Acte d'accusation, par. 17.
[102] Arrêt *Tolimir*, par. 25.
[103] Arrêt *Tolimir*, par. 26.

Cette position constante de la Chambre d'appel en la matière avait été affirmée par la Chambre de première instance dans le cadre de son jugement dans **l'affaire *Tolimir***. En effet, dans sa décision, elle indique que l'effet juridique du constat judiciaire d'un fait jugé dans une affaire est que « la Chambre part, à bon droit, de la présomption que ce fait est exact, que celui-ci ne devra donc plus être établi au procès mais que, dans la mesure où il s'agit là d'une présomption, il pourra être contesté au procès »[104]. Elle va ajouter que si cette pratique a pour conséquence « de dégager l'Accusation de sa charge initiale consistant à produire des éléments de preuve sur le point considéré, [il n'en demeure pas moins que] la Défense est habilitée à remettre ce point en question par la suite en versant au dossier des preuves contraires crédibles et fiables »[105].

Dans la suite de son développement, la Chambre indique que lorsque la Chambre dresse le constat judiciaire d'un fait proposé par l'Accusation, **la charge de la production de la preuve** est renversée et revient à l'Accusé, alors que la charge de convaincre, c'est-à-dire la culpabilité au-delà de tout doute raisonnable, incombe toujours à l'Accusation[106]. Dans la mesure où ces faits admis dégagent l'Accusation de sa charge initiale, il est pour le moins incorrect de dire qu'il lui incombe toujours de convaincre au niveau de la culpabilité. En réalité, la pratique qui se dégage des faits admis introduit de manière perceptible un balancier en défaveur de l'Accusé, celui-ci devant apporter la preuve contraire. Ce déséquilibre est manifeste, comme le relève à juste titre la Chambre, concluant que la charge de la production de la preuve est renversée et revient à l'Accusé.

A cet égard, la Chambre de première instance, au paragraphe 76 du jugement, indique que la charge de la preuve est renversée et revient à l'Accusé. A ma connaissance, il n'y a aucune juridiction nationale ou internationale qui met à la charge de l'accusé de prouver son innocence. C'est à l'Accusation de prouver sa culpabilité. Cette position est d'autant plus étonnante que l'accusé peut **garder le silence**, ce droit lui est reconnu par le Règlement de procédure et de preuve. Ce renversement de la charge de la preuve fait donc de l'accusé un présumé coupable et ce contrairement à l'article 21 4) g du Statut qui dispose que l'accusé n'a pas à être forcé à témoigner ou d'avouer qu'il est coupable.

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[104] Jugement *Tolimir*, par. 76. La Chambre de première instance va se fonder sur, *Le Procureur c/ Milošević*, affaire no IT-02-54-AR73.5, Décision relative à l'appel interlocutoire interjeté par l'Accusation contre la Décision relative à la requête visant à faire dresser constat judiciaire de faits [jugés] dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance, 28 octobre 2003, p. 4.

[105] Jugement *Tolimir*, par. 76. Sur ce point, la Chambre de première instance va se référer aux décisions suivantes : *Le Procureur c/ Prlić*, IT-04-74-PT, Décision relative à la requête aux fins de dresser le constat judiciaire de faits [jugés] dans d'autres affaires en application de l'article 94 B) du règlement, 14 mars 2006, par. 10 ; *Le Procureur c/ Krajišnik*, IT-00-39-T, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits [jugés] et de l'admission de déclarations écrites en application de l'article 92 *bis*, 28 février 2003, par. 16 et 17.

Afin de parer à d'éventuelles critiques quant au rôle des parties dans la procédure, la Chambre sur la base des principes susmentionnés, va apprécier le poids des faits jugés, en tenant compte de l'ensemble des éléments de preuve admis[107]. Dans son jugement, la Chambre de première instance dans **l'affaire Tolimir** indique qu'elle a fait de nombreuses constatations dans lesquelles des faits jugés ont été confirmés ou renforcés par d'autres éléments de preuve versés au dossier[108]. S'il est exact que dans son jugement, les références aux faits jugés sont la plupart du temps corroborées par d'autres éléments de preuve, il n'en demeure pas moins que ces faits jugés ont été versés à la procédure sans que les juges dans cette affaire n'aient eu à leur disposition les éléments dont disposaient les juges de l'époque. A cet égard, l'Accusé va avancer l'argument selon lequel : « lorsque sont présentés devant a Chambre des éléments de preuve, voire un nombre d'élément de preuve plus élevé que dans l'affaire dont sont issus les faits dont elle a dressé le constat judiciaire, elle devrait s'abstenir de s'appuyer sur des faits jugés »[109]. Cet argument avait été rejeté par la Chambre en disant que le poids des faits jugés est apprécié à la lumière de l'ensemble des éléments de preuve du dossier[110].

Sur ce plan, je ne peux que souscrire au point de vue de l'appelant. Pour ma part, je conteste le fait qu'il y ait dans les faits un renversement de la charge de la preuve. En effet, ce n'est pas parce que la Chambre de première instance a admis un fait jugé, que l'Accusation est dispensée de son obligation. A suivre ce raisonnement, le procès serait alors terminé dès le début puisque tous les éléments susceptibles d'établir la culpabilité de l'Accusé auraient été admis et qu'ainsi, c'est à la défense de prouver son innocence. Il y a là un réel problème.

c. La position majoritaire de la Chambre d'appel sur le moyen n°1

La Chambre d'appel, à la majorité, relève que la Chambre de première n'a pas commis d'erreur en retenant différents critères permettant d'appréhender les éléments ayant un lien direct avec le fond de l'affaire[111]. En l'espèce, la Chambre d'appel, ayant procédé à la révision de tous les faits jugés admis dans cette affaire, n'a retenu que le fait n°62 comme étant le seul susceptible d'avoir un lien direct sur l'affaire[112]. En ce sens, elle va considérer que cette conclusion du fait n°62 a été corroborée par d'autres éléments additionnels et indépendants qui reprennent *verbatim* le contenu

[106] Jugement *Tolimir*, par. 76.
[107] Jugement *Tolimir*, par. 77.
[108] Jugement *Tolimir*, par. 77.
[109] Jugement *Tolimir*, par. 77, cité en référence au Mémoire en clôture de l'Accusé, par. 211.
[110] Jugement *Tolimir*, par. 77.
[111] Arrêt *Tolimir*, par. 30.
[112] Arrêt *Tolimir*, par. 35.

du fait en question[113]. De ce fait, elle va conclure que ce fait n°62 ne constituait pas la base unique des conclusions de la Chambre de première instance et qu'ainsi cette admission n'occasionne pas une erreur judiciaire[114].

Je ne partage pas ce point de vue car pour moi si ce fait est important il y avait d'autres faits jugés admis ayant **un lien direct** avec l'affaire[115]. La décision prise par la Chambre *Tolimir* le 17 décembre 2009 sur la requête de l'Accusation permet, comme l'indique le jugement, de constater que la Chambre a dressé le constat judiciaire de **523 faits jugés.** L'esprit de l'article 94 B) est d'admettre des faits jugés afin de gagner du temps mais avec l'accord de tous. Si une partie n'est pas d'accord, elle doit pouvoir demander à la Chambre d'appel de statuer surtout si des conséquences importantes peuvent en être tirées sur la culpabilité de l'accusé.

Bien que la Chambre de première instance ait pris le soin d'indiquer au paragraphe 33 de sa décision que des faits concernant l'entreprise criminelle commune (« ECC ») et le comportement criminel de l'accusé ne doivent pas être admis, il n'en demeure pas moins qu'un certain nombre de faits concernant ces deux sujets l'ont finalement été. Je suis donc contraint à entrer dans le détail pour montrer l'erreur commise par la Chambre de première instance. Mon analyse reposera sur la présentation de deux tableaux : un premier concernant les faits demandés en admission par l'Accusation qui n'ont pas été admis et un second concernant les faits admis qui peuvent être considérés comme étant des faits à charge contre l'accusé.

[113] Arrêt *Tolimir*, par. 36.
[114] Arrêt *Tolimir*, par. 36.
[115] J'analyse l'ensemble de ces faits dans le tableau concernant les **faits admis.**

FAITS NON ADMIS	
NUMERO DE FAIT	**OBSERVATIONS CONCERNANT LA NON ADMISSION**
42	Ce fait indique que les soldats de l'ABiH n'avaient pas d'armes lourdes et qu'ils étaient mal entraînés. Ce fait est à mettre en parallèle avec les nombreuses actions menées par l'ABiH à l'extérieur des enclaves qui mettent à mal le constat.
50 51 55 57	Ces faits constatent que les forces serbes tiraient sur les convois humanitaires. Il aurait été intéressant d'admettre ces faits pour permettre à l'accusé d'indiquer que les tirs étaient nécessaires du fait de transport d'armes à destination de l'ABiH dans l'enclave.
79 80 81 82 83	De manière incohérente, les faits 79 à 83 relatifs au plan Krivaja 95 n'ont pas été admis alors même que les faits précédents (76 à 78) qui se réfèrent au même plan l'ont été quant à eux.
106	Ce fait en lien avec le pilonnage de la colonne de réfugiés n'a pas été admis alors même que la question se pose de savoir s'il y a eu des victimes entre Srebrenica et Potočari.
112	Ce fait concerne les actes allégués commis par les membres du 10ème détachement de sabotage.
114	Ce fait indique que le Chef du 10ème détachement de sabotage, Mico Pelemiš, était présent dans le centre de Srebrenica le 11 juillet 1995.
121	Ce fait donne une estimation chiffrée de la colonne 10 000 à 15 000 constituée principalement d'hommes et composée de civils et de militaires.
122	Ce fait donne un aperçu de la composition de la 28ème division de l'ABiH à Srebrenica constituée de 1000 à 4000 soldats. Le chiffre de 4000 peut avoir une importance pour la colonne ou pour le moins sa composition.
254 264	Ces faits donnent des détails sur les exécutions. Je ne vois pas bien pourquoi ils n'ont pas été retenus.
323 à 341	Ces faits concernant les exécutions à la ferme de Branjevo n'ont pas été admis alors qu'ils donnent des précisions importantes.
527 529 531 539	L'importance de la question de la colonne aurait mérité l'admission de ces faits.

FAITS ADMIS[116]		
SUJET	**NUMERO DE FAIT**	**OBSERVATIONS CONCERNANT L'ADMISSION**
1992-1993 Conflit à Srebrenica	16 (BJJ)	Ce fait qui est relatif à la décision sur les objectifs stratégiques du peuple serbe touche directement à l'ECC reprochée à l'accusé.
	18 (BJJ)	Ce fait qui est relatif à la Directive 4 s'inscrit également dans le même esprit où l'Accusation allègue que cette directive 4 s'inscrivait dans le plan de l'ECC.
L'attaque et la chute de l'enclave de Srebrenica	60 (KJ, BJJ)	Ce fait référence à la directive émise par Radovan Karadžić concernant la stratégie à long terme de la VRS dans l'enclave. Cette directive fait partie intégrante de la démonstration de l'Accusation sur l'existence de l'ECC comprenant l'Accusé en sa qualité de membre.
	61 (KA, BJJ)	Ce fait n'est que la déclinaison du fait 60.
	62 (KA, KJ, BJJ)	Ce fait n'est lui aussi que la précision contenue dans la directive 7 sur la création d'une *« situation de totale insécurité sans espoir de survie ou de vie future pour les habitants de l'enclave »*. C'est le fait le plus accablant à l'encontre des membres de l'ECC et la phrase mentionnée « entre guillemets » aurait dû inciter la Chambre de première instance à plus de prudence afin de permettre l'Accusé de la contester et non de lui imposer la charge de la preuve. En quelque sorte, à mon humble avis, le procès était terminé dès l'admission de ce fait n°62. La majorité de la Chambre d'appel, qui a compris l'importance capitale de ce fait, va développer son argumentation aux paragraphe 33 et 34 de l'Arrêt en reconnaissance que celui-ci entre dans le champ de l'ECC alléguée et que la Chambre de première instance a fait une erreur. Toutefois, elle va dire que ce fait n'est pas la seule base des conclusions de la Chambre de première instance rejetant ainsi l'argument de l'Accusé. Je ne partage pas ce point de vue, j'observe au passage qu'elle aurait pu faire le même constat pour les faits 60 et 61 ce qu'elle a omis de faire. Le fait 62 est mentionné à diverses reprises et notamment au paragraphe 35 du présent Arrêt comme étant le cœur du cas « the core of the case » !
	66 (KA, BJJ)	Ce fait concerne également la même question puisqu'il s'agit de la directive 7.1 qui fait partie de la thèse centrale de l'Accusation sur l'ECC. De mon point de vue, ce fait n'aurait jamais dû être admis. Si la charge de la preuve incombait à l'Accusé, il aurait alors fallu que celui-ci fasse venir le Général Mladić à l'audience pour que celui-ci explique le but de cette directive et sa cohérence avec la directive 7 de Radovan Karadžić qui aurait aussi dû être citée. Mais alors, n'y aurait il pas eu un problème puisqu'en droit procédural au terme de l'article 90 E) du Règlement de procédure et de preuve, « un témoin peut refuser de faire toute déclaration qui risquerait de l'incriminer » ? Allant plus loin, on aboutirait à une situation ubuesque puisque le même article dispose que la Chambre pourrait obliger le témoin à répondre mais que ce témoignage ne pourrait être utilisé par la suite comme élément de preuve…Au moment de prendre une décision de cette nature en application de l'article 94 B), la Chambre de première instance doit se poser de nombreuses questions et notamment celles touchant aux autres accusés poursuivis pour les mêmes faits sous peine d'une part de porter atteinte aux droits de la défense et d'autre part, d'entrer dans une zone procédurale ne pouvant déboucher que sur une impasse.

[116] Les faits admis sont référencés comme suit selon les affaires :
KJ : Jugement de la Chambre de première instance Krstić
KA : Arrêt de la Chambre d'appel Krstić
BJJ : Jugement de la Chambre de première instance Blagojević et Jokić
BJA : Arrêt de la Chambre d'appel Blagojević et Jokić
Pour l'analyse je vais reprendre le plan qui avait été proposé par l'Accusation

	97 (KJ, BJJ)	Ce fait est problématique car il indique que le Président Karadžić avait délivré un nouvel ordre autorisant la VRS à capturer la ville de Srebrenica. Cette mention soulève plusieurs problèmes : **S'agit-il d'un ordre écrit ou oral ?** **Cet ordre a-t-il bien été donné et confirmé par Radovan Karadžić ?** **Quelles raisons ont entraîné un changement d'ordre en pleine opération militaire lourde en moyen logistique ?** **Y a-t-il une relation de cause à effet avec l'action ou l'inaction de l'OTAN ?** Cette liste de questions n'est pas exhaustive et l'on peut alors constater qu'une telle admission ne pouvait que placer l'Accusé dans une situation extrêmement compliquée au niveau de la charge de la preuve.
	98 (KJ)	Le fait indique que cet ordre a été donné personnellement au Général Krstić. Ce fait soulève aussi des questions fondamentales : **Si l'ordre a été reçu par le Général Krstić le 9 juillet 1995, à quel titre a t-il reçu cet ordre ?** Il semble qu'il ait pris le commandement *de facto* du Corps de la Drina le 13 juillet 1995. Ceci a été mentionné au paragraphe 45 de l'Arrêt Krstić. Il apparaît donc que le 9 juillet 1995, il n'est pas commandant du Corps de la Drina. Le fait 113 (KJ) confirme que la Commandant du Corps de la Drina est le Général Zivanović. Dès lors comment se fait-il que le Président Karadžić commandant de l'armée saute plusieurs échelons hiérarchiques dont le Général Mladić pour une action militaire capitale ? **Si effectivement cet ordre a été reçu par le Général Krstić, comment a-t-il interprété cet ordre ?** **N'y avait-il pas des chaines de commandement parallèles ?** Ceci a été la thèse du Général Krstić exposée au paragraphe 48 de l'Arrêt le concernant. Cette vision n'a pas été admise par la Chambre d'appel. A cet égard, il y a lieu de noter que si effectivement, le Général Krstić a reçu un ordre directement de Radovan Karadžić le 9 juillet 1995, cela signifie qu'il y avait au moins deux chaînes de commandement : Karadžić ⟶ Krstić Mladić ⟶ Beara ⟶ Popović ⟶ Dragan Nikolić Avant d'admettre ce fait, la Chambre de première instance aurait pu se poser la question de l'existence de différentes chaines de commandement. Une troisième chaîne de commandement peut être mise à jour : **Milosevic ⟶ Simatović ⟶ Ministère de l'intérieur (MUP)** Cette troisième chaine de commandement peut s'expliquer dans le cadre de l'Acte d'accusation contre Slobodan Milosevic (avec Srebrenica)[117].
La colonne des hommes musulmans	120 (KJ)	Ce fait mentionne la présence de civils et de soldats qui étaient mixés (« mixed with soldiers »), en soulevant la question de la nature exacte de cette colonne (militaire, mixte, civile). Par l'admission de ce fait, la Chambre de première instance impose à l'Accusé de prouver que la colonne était militaire malgré la présence de quelques civils. Cette question devait être évoquée par

[117] *Le Procureur c. Slobodan Milosevic*, Affaire IT-02-54-T, Acte d'accusation initial, 22 novembre 2001, par. 31.

		l'Accusation dans le procès *Tolimir* et non réglée par l'admission de ce fait n°120.
Les unités temporaires dans des zones du Corps de la Drina	143 (KJ)	Ce fait est curieusement admis alors que le titre de ce chapitre concerne les unités temporaires. Est-ce donc à dire que le 10ème détachement de sabotage a été resubordonné au Corps de la Drina ? C'est ce que laisse supposer le mot « also » de la phrase précisant qu'il était directement subordonné à l'Etat major principal. Ceci n'est pas sans importance car au moment où Dražen Erdemović exécute des prisonniers quelle est sa chaine de commandement ? Corps de la Drina ou Etat major ? Cette question entraîne évidemment le lien avec l'Accusé et sa responsabilité pénale. Il en résulte donc que ce fait n'aurait pas dû être admis.
Première rencontre à l'Hôtel Fontana	164 (BJJ)	Ce fait relate les propos à charge tenus par le Général Mladić « You can all leave, all stay, or all die here » a des conséquences directes pour l'Accusé à divers titres et notamment pour sa participation à l'ECC de meurtres.
Seconde réunion à l'Hôtel Fontana	176 (KJ, BJJ)	Le sens donné par l'Accusation aux propos du Général Mladić aurait dû inciter la Chambre de première instance à ne pas admettre ce fait. Le fait 176 (KJ, BJJ) est dans le même esprit car la phrase « survive, stay or disappear » est quasi identique à celle mentionnée au fait 164.
Meurtre des hommes musulmans	208 (KA, BJJ)	Ce fait relate que 7000 à 8000 musulmans ont été systématiquement tués. Comment rattacher ce fait aux conclusions de la Chambre de première instance qui a évalué après un travail important le nombre réel de tués à 5749 au paragraphe 596 de son jugement ? La prudence aurait dû entraîner la Chambre de première instance à ne pas admettre ce fait.
Violence et terreur à Potočari	439 (KJ, BJJ)	Ce fait évoque la campagne de terreur subie par les réfugiés musulmans lors de l'arrivée des forces serbes à Potočari. Il est indiqué qu'il y avait eu pillages, destructions de maisons, viols et meurtres. Ce fait qui s'analyse comme des crimes établis à charge de l'Accusé auraient dû ne pas être admis. En l'espèce, le renversement de la charge de la preuve oblige l'accusé à prouver que certains crimes mentionnés ne lui sont pas reprochés (viols notamment).
Transfert forcé	459 (BJA)	Ce fait indique que les femmes, enfants et personnes âgées ont été transférées de Potočari à Kladanj. Dans la mesure où le transfert forcé a été contesté par l'accusé dans le mémoire préalable, il convenait d'être prudent d'autant que le fait 468 mentionne que les soldats du bataillon néerlandais accompagnaient le premier convoi de réfugiés.

En conclusion, je considère que la Chambre de première instance *Tolimir* dans sa décision sur les faits jugés a commis une erreur en admettant un ensemble de faits admis ayant un lien direct avec le fond de l'affaire et en rejetant d'autres faits qui auraient mérité d'être admis. Si l'admission de faits jugés dans d'autres affaires en application de l'article 94 *bis* du Règlement de procédure et de preuve permet une forme d'économie judiciaire, il n'en demeure pas moins que des questions se posent concernant le droit à un procès équitable de l'Accusé. Il est significatif de constater que la Chambre de première instance dans son jugement n'a consacré que deux paragraphes (76 et 77) à cette question qui est pour moi une question majeure du procès.

Je suis donc à l'admission du moyen d'appel n°1 et la conséquence pour moi est évidente : annulation partielle du jugement de première instance. Dans le cas d'espèce, l'Accusé n'a pas eu de procès équitable car il y a eu une violation grave à ses droits par l'obligation du renversement de la charge de la preuve alors même qu'il est présumé innocent.

2. La manque de fiabilité des écoutes téléphoniques (Moyen d'appel n°2)

L'appelant dans ses écritures a soulevé au moyen d'appel n°2 le manque de fiabilité des écoutes qui ont été admises par la Chambre de première instance[118]. La contestation permanente devant ce tribunal des écoutes téléphoniques opérées par une des parties au conflit (ABiH) n'a jamais eu de succès car la totalité des Chambres ont rejeté ces moyens de contestation. Il est évident que le contenu d'une écoute peut donner lieu à des multiples interprétations surtout si l'on n'a pas l'ensemble de l'écoute ni le contexte. De même, parfois il n'y a pas la **bande son**, les juges n'ayant à leur disposition qu'une transcription en anglais des propos tenus dans une autre langue. Néanmoins, j'estime que ces écoutes téléphoniques peuvent être admises comme élément de preuve et qu'elles peuvent servir également à la Défense dans sa démonstration de contestation de la position de l'accusation.

Il apparaît ainsi qu'une vigilance particulière doit être néanmoins apportée par les juges dans l'exploitation du contenu des écoutes. Les juges doivent également avoir à l'esprit le fait qu'il puisse y avoir aussi eu des falsifications au niveau de la bande son ou des erreurs de traduction. Malgré ces inconvénients, il est toujours possible pour une Défense de faire venir à la barre ceux qui ont tenu les propos afin qu'ils s'en expliquent sur le sens et le contenu. L'Accusé avait donc la possibilité technique de contester le contenu des écoutes qui avaient été réalisées par la venue de témoins ou d'experts.

De ce fait, je souscris totalement au rejet du moyen d'appel n°2[119]. J'estime cependant nécessaire de faire une **opinion séparée** sur le sujet car il apparaît que les écoutes réalisées pendant les conflits ayant eu lieu sur le territoire de l'ex-Yougoslavie ont pris énormément d'importance au niveau des éléments de preuve à charge à l'encontre des accusés.

[118] Mémoire d'appel, pp. 8-9.
[119] Arrêt *Tolimir*, par. 61.

3. Le Rapport Butler (Moyen d'appel n°3)

La Chambre de première instance a évoqué dans son jugement la contestation faite par la défense sur le **poids** à accorder aux éléments de preuve présentés par **Richard Butler**[120]. Ce n'est qu'à la note de bas de page 97 du jugement que la Chambre de première instance évacue la question de la qualité d'expert de **Richard Butler** en disant d'une part, que les rapports établis par Richard Butler avaient été admis sans que l'Accusé ne s'y oppose et que d'autre part, durant le contre-interrogatoire de ce témoin, l'Accusé semblait avoir implicitement accepté sa qualité d'expert.

Ceci n'a pas été la position de la Défense comme elle l'a rappelée dans son mémoire en clôture[121] et comme elle l'a rappelée dans ses écritures concernant son moyen d'appel n°3[122]. Il est indéniable que la procédure applicable à l'**article 94 *bis*** du Règlement n'a pas été respectée et qu'ainsi, la Défense n'a pas été à même à réfuter la qualité d'expert par des écritures et s'est trouvée dans une position telle, qu'elle avait à l'audience soit un témoin expert, soit un « témoin enquêteur ».

Sur un plan général, la procédure *common law* suivie par le TPIY n'a pas facilité l'indépendance et l'impartialité des rapports d'experts car en fait le témoin expert est cité par une partie et payé par elle. Contrairement à ce qu'à pu affirmer à maintes reprises la Chambre d'appel sur l'impartialité de ces témoins experts, je suis d'avis que ceux-ci ne sont pas des témoins experts à proprement parler mais plutôt des **« experts, témoins de l'Accusation ».** Ces problèmes auraient pu facilement être évités si, à la demande des parties, la Chambre saisie avait désigné de manière **indépendante** et **impartiale** un expert. Ce n'est malheureusement pas la procédure qui a été suivie d'où des contestations continues en la matière.

a. La situation du témoin Richard Butler et sa qualité d'expert

Le témoin **Richard Butler** a témoigné dans l'affaire ***Tolimir*** du jeudi 7 juillet au mercredi 31 août 2011[123]. Il apparaît qu'à l'examen du *transcript* que celui-ci avait déjà témoigné dans quatre autres affaires (Krstić, Blagojević et Jokić, Popović *et al.* et Perisić)[124]. Ce qui est particulièrement intéressant concernant ce témoin c'est le fait qu'il avait été mis à la disposition du Bureau du Procureur par le gouvernement des **Etats-Unis d'Amérique** comme **analyste** et qu'il avait par la

[120] Jugement *Tolimir*, par. 41.
[121] Mémoire en clôture de la Défense, par. 185-188.
[122] Mémoire d'appel, par. 31-43.
[123] Audiences du 7 juillet au 31 août 2011, CRF, pp. 16269 à 17488.
[124] Audience du 7 juillet 2011, CRF, p. 16274.

suite était engagé comme fonctionnaire des Nations Unies[125]. Par la suite, retournant aux Etats-Unis en qualité d'agent de renseignements, il avait participé à l'affaire **Marko Boskić** qui était membre du 10ème détachement de sabotage du fait qu'il était entré illégalement aux Etats-Unis et que pour les crimes commis[126]. Celui-ci avait été jugé en Bosnie Herzégovine devant la Cour d'Etat devant laquelle Richard Butler avait déjà témoigné. Il résulte donc de l'ensemble de ces données, que **Richard Butler** ne peut être considéré comme un témoin-expert mais bien comme un membre du Bureau du Procureur qui témoigne uniquement à charge.

A cet égard, pour en être convaincu, il suffit de se pencher sur la question qui lui est posée à la page **16329** :

> **Q.** Vous nous dites que le contre-renseignement consiste à protéger les secrets d'une armée. A partir de ce moment-là, très brièvement, est-ce que vous pouvez nous dire quel est le rôle joué -- ou quel a-t-il été, du général Tolimir -- ou plutôt, à quel niveau se situe le général Tolimir au sein de cette hiérarchie du contre-renseignement ?
> **R.** Il est l'assistant du commandant chargé du renseignement et de la sécurité de l'état-major de la VRS, donc il se situe au sommet de cette pyramide au sein de l'armée de la Republika Srpska.
> **Q.** Le général Milovanovic et le général Mladić, est-ce qu'ils comptaient sur lui entièrement pour cela ?
> **R.** Absolument.
> **Q.** Alors, les plans relatifs aux opérations militaires, le fait de les protéger face à l'ennemi, est-ce que cela faisait partie normalement du travail du général Tolimir ?
> **R.** Oui.
> **Q.** Et par rapport aux opérations visées dans l'acte d'accusation en l'espèce, donc l'opération consistant à abattre des milliers d'hommes valides, de les placer en détention, les transporter aux sites d'exécution, donc les exécuter, les enterrer et les ré-enterrer, est-ce que cela ferait partie des secrets militaires de ce type-là ?
> **R.** Si l'on cherche à empêcher toute divulgation de sa participation à ces actes, votre service chargé du renseignement et de la sécurité va jouer un rôle très important en ce sens-là, va se soucier d'empêcher toute divulgation. Donc, là encore, compte tenu du fait qu'il est à la tête -- ou plutôt, compte tenu du fait qu'il est l'assistant du commandant chargé du renseignement et de la sécurité au niveau de l'état-major principal de l'armée, le général Tolimir, effectivement, est celui vers qui convergent ces activités.

Lors de cette très longue audition, il lui a été présenté des documents qui ont été admis par la Chambre. Dans le cadre de la présentation de ces documents, six documents numérotés **P02470** à **P02475** lui ont été présentés du fait que c'est lui qui les avait rédigé et ces documents ont été admis. Il convient de noter les titres de ces documents essentiels :

- **P02470:** Rapport intitulé **"**VRS Corps Command Responsibility Report with supporting documents", 5 avril 2000

[125] P02469 (Curriculum vitae de Richard J. Butler).
[126] Audience du 7 juillet 2001, CRF, pp. 16272-16273.

- **P02471**: Rapport intitulé “Srebrenica Military Narrative – Operation “Krivaja 95 with supporting documents ”, 15 mai 2000
- **P02472**: Rapport intitulé “VRS Brigade Command Responsibility Report with supporting documents ”, 31octobre 2002
- **P02473**: Rapport intitulé “Srebrenica Military Narrative (Revised) – Operation “Krivaja 95” with supporting documents”, 1er novembre 2002
- **P02474**: Rapport intitulé “Chapter 8 Analytical Addendum to Srebrenica Military Narrative (Revised) with supporting documents”, 2003
- **P02475**: Report intitulé "VRS Main Staff Command Responsibility Report", 9 juin 2006.

Ces documents ont principalement servi dans l’affaire Krstić[127]**.** De ce fait, on ne peut pas dire qu’il y ait eu un rapport établi spécifiquement pour l’affaire Tolimir. Ainsi, l’Accusation, en se fondant sur des rapports produits dans d’autres affaires, a, par l’introduction de ces six documents, comblé la non existence d’un rapport au sens de l’article 94 *bis* du Règlement. Ces six documents qui sont à la base des travaux de Richard Butler auraient dû être transmis officiellement à l’Accusé avant l’audience du 7 juillet 2011 sur le fondement de l’article 94 *bis* du Règlement.

b. Appréciation de certaines références du rapport Butler contenues dans le jugement

A la lumière des constatations précédentes, la question qui se pose est celle de savoir si le témoignage de cet expert accompagné des rapports qu’il a rédigés n’ont pas porté un préjudice à l’Accusé ? Il est symptomatique de constater que sur les **630 pages** de jugement, nous trouvons à **261 reprises** le nom de **Richard Butler**. Ainsi, ce témoin expert a, de mon point de vue, joué un **rôle capital** car c’est le témoin qui a été cité le plus souvent.

Afin d’avoir une vue exhaustive de l’impact des documents rédigés par **Richard Butler** et ses dires à l’audience, j’ai rédigé **le tableau figurant en annexe** qui répertorie en quatre colonnes les paragraphes du jugement où le nom de **Richard Butler** est mentionné, les notes de bas de pages où son nom apparaît, les documents se rapportant à ses dires, les numéros des faits jugés se rapportant à ses affirmations et enfin j’ai estimé nécessaire de reproduire *in extenso* les phrases contenues dans le jugement concernant son témoignage[128]. Comme on peut le voir, il apparaît notamment aux notes de bas page 4251, 4496 et 4498 des éléments totalement à charge à partir de propos tenus par **Richard Butler** et pris en compte par la Chambre de première instance. Ceci témoigne amplement

[127] Différentes mentions faites au témoignage et rapports de Richard Butler figurent dans le jugement de première instance Krstić en date du 2 août 2001.

de l'importance des propos tenus qui ont été pris en compte par la majorité de la Chambre dans l'appréciation de la responsabilité pénale de l'Accusé.

A la note de bas de page 576 renvoyant au paragraphe 163 du jugement, la Chambre estime que bien que les objectifs stratégiques n'aient pas été officiellement adoptés le **12 mai 1992**, les objectifs visés par les dirigeants de la Republika Srpska étaient connus ; aucune opposition à ces objectifs ne figure dans les procès-verbaux. Qui plus est, ces objectifs ont été utilisés pour formuler des directives de la VRS[129]. Le fait que la Chambre de première instance se fonde sur la réunion du 12 mai 1992 pour dire qu'il y a eu six objectifs et que les directives stratégiques ont été prises dans le cadre de ces objectifs en s'appuyant sur ce qu'a pu dire **Richard Butler**, permet à la majorité de faire le lien entre un discours politique tenu par **Radovan Karadžić** le 12 mai 1992 et les évènements qui sont survenus à Srebrenica et à Žepa plus d'un an après. La Chambre de première instance, pour faire « la passerelle », évoque les directives opérationnelles au paragraphe 164. J'estime pour ma part que ces directives opérationnelles n'avaient qu'un but purement militaire et qu'ainsi, la référence par ces notes de bas de page a eu un impact sur l'appréciation de la responsabilité pénale de l'Accusé.

A la note de bas de page 637 renvoyant au paragraphe 177 du jugement, il est indiqué que selon **Richard Butler**, un ordre de combat de l'état-major principal daté du 1er mai 1993 pour la « libération de Žepa et de Goražde » illustre le plan de la VRS de « déplacer et réduire le nombre de civils et de militaires musulmans de Žepa et de Goražde », qui s'attendait à ce que ces zones soient déclarées zones de sécurité juste après Srebrenica[130]. La conclusion à laquelle parvient la majorité de la Chambre de première instance est tirée du point de vue de **Richard Butler.**

De même, **à la note de bas de page 648 renvoyant au paragraphe 180 du jugement,** en s'appuyant sur les dires de **Richard Butler** tenus lors de l'audience du 20 juillet 2011, la Chambre de première instance va dire que la directive opérationnelle n°6 a été rédigée par Miletić et prise par Karadžić le 11 novembre 1993. Elle revisite certains passages de la directive n°4, notamment pour ce qui est de « créer les conditions concrètes devant permettre à la VRS d'atteindre ses objectifs de guerre stratégiques ».[131]. Cette prise en compte par la majorité de la Chambre découle **directement** des propos de **Richard Butler.**

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[128] Le tableau peut être consulté à **l'annexe 1.** de cette opinion.
[129] Jugement *Tolimir*, par. 164, note de bas de page 576.
[130] Jugement *Tolimir*, par. 177, note de bas de page 637.
[131] Jugement *Tolimir*, par. 180, note d e bas de page 648.

A la note de bas de page 676 renvoyant au paragraphe 186 du jugement, il est indiqué que **Butler** a déclaré que, contrairement à la directive n°4, la directive n°7 avait été diffusée au nom de Karadžić, car en 1995, les organes politiques avaient endossé un rôle plus important dans la direction de l'effort de guerre.[132]. Cette note de bas de page renvoie au paragraphe 186 du jugement consacré à la directive n°7 qui pour moi est une directive de nature militaire à objectif militaire et non civil.

A la note de bas de page 691 renvoyant au paragraphe 191 du jugement, la majorité de la Chambre de première instance indique que selon **Richard Butler**, la directive 7/1 ne reprend pas le libellé de la directive 7 (concernant la création d'une situation invivable dans l'enclave), car « certaines missions plus vastes ne se prêtent pas aux ordres militaires ».[133]. La majorité, en s'appuyant sur la position de **Richard Butler,** en tire la conclusion que la directive 7/1 était plus technique que la directive 7 de Radovan Karadžić. Ceci sous-entend que la directive 7 avait un objectif civil, ce qui n'est pas le cas de la directive 7/1.

En ce qui concerne les paragraphes 1080 et suivants sous le chapitre *Actions militaires visant à terroriser la population civile à Srebrenica*, la Chambre, à la majorité, accepte le témoignage de **Richard Butler** selon lequel la référence faite par l'Accusé à une campagne de « désinformation » menée par l'ABiH au sujet du sabotage par la VRS d'installations civiles constituait en soi de la désinformation. **Richard Butler** a déclaré que les fausses informations fournies par l'Accusé visaient à influencer l'opinion des destinataires du rapport, c'est-à-dire, entre autres, l'état-major principal, mais aussi les autorités civiles, le Ministère de l'intérieur, les commandants de corps d'armée, et même le bureau de la sécurité de l'armée fédérale à Belgrade[134]. La majorité en tire donc la conclusion en se fondant sur les dires de **Richard Butler** que l'Accusé a mené une campagne de désinformation à l'égard de ses propres autorités militaires et civiles.

Au paragraphe 1069 du jugement, la Chambre indique que Butler a affirmé que l'emploi d'un terme péjoratif comme **« Turcs »** ne constitue généralement pas une pratique acceptable au sein de l'armée. La majorité estime que l'Accusé a encouragé l'emploi de termes péjoratifs dans le but d'inciter les membres des forces serbes de Bosnie à la haine ethnique et à considérer les Musulmans de Bosnie comme des êtres inférieurs, en vue de l'éradication de ce groupe précis de la Bosnie orientale[135]. Comme on peut le voir, ce paragraphe concerne la responsabilité pénale de l'Accusé du

[132] Jugement *Tolimir*, par. 186, note de bas de page 676.
[133] Jugement *Tolimir*, par. 191, note de bas de page 691.
[134] Jugement *Tolimir*, par. 1083, note de bas de page 4251.
[135] Jugement *Tolimir*, par. 1169, note de bas de page 4496.

Chef 1 : génocide. En conséquence, partant des propos de Richard Butler, la majorité en tire donc une conclusion.

En conclusion, je peux faire le constat que sur les **4652** notes de bas de pages du jugement, **85** font explicitement référence au rapport de **Richard Butler** ou à ses dires et qu'ainsi **46** documents sont mis en corrélation avec la position de Butler avec par ailleurs une référence à **13** faits admis. Dans ces conditions, il apparaît donc que le témoignage de **Richard Butler** et ses rapports ont eu un effet important voire décisif sur l'appréciation de la responsabilité pénale de Zdravko Tolimir alors même que sa qualité d'expert n'a pas suivi les règles extrêmement strictes de l'article 94 bis du Règlement. Pour moi, il y a eu **violation du procès équitable** car la défense n'a pas été en mesure de contester en temps utile la **qualité d'expert de Richard Butler** ainsi que le contenu des rapports établis. **Pour cette raison, le moyen d'appel n° 3 aurait dû être admis et le jugement invalidé en partie**.

4. Les enquêteurs du Bureau du Procureur (Moyen d'appel n°4)

L'appelant soutient dans ses écritures que la Chambre de première instance a fait une erreur dans l'évaluation des témoignages des enquêteurs du Bureau du Procureur notamment Dusan Janc, Richard Butler, Jean-René Ruez, Dean Manning, Erin Gallagher, Tomasz Blaszczyk et Stefanie Freese[136]. Sur cette question, la Chambre de première instance au paragraphe 23 du jugement a rappelé que l'Accusation avait présenté 183 témoignages et que 126 avaient déposé à l'audience ainsi que 12 témoins experts. La Chambre de première instance souligne au paragraphe 38 du jugement que l'accusé avait accordé une attention particulière « aux enquêteurs » du Bureau du Procureur en précisant que leurs rapports ne pouvaient à eux seuls établir les faits.

Les juges de la Chambre de première instance ont pris le soin d'indiquer que pour déterminer le crédit à apporter à leurs témoignages, la Chambre a tenu compte de leurs compétences et de leurs connaissances. Je ne peux que partager le point de vue de la Chambre de première instance. Toutefois, il convient d'observer au TPIY qu'au travers des affaires, ce sont presque toujours les mêmes témoins qui reviennent déposer comme **Jean-René Ruez** par exemple, ancien enquêteur du Bureau du Procureur.

Bien que ces témoins ne fussent pas présents sur les lieux lors de la commission des crimes, ils viennent néanmoins apporter aux juges un éclairage tiré de leur travail d'enquête. Pour ces raisons, j'estime que le nombre élevé des enquêteurs ayant témoigné n'a pas entraîné un préjudice pour l'Accusé et que dans ces conditions, je suis comme les autres juges de la Chambre d'appel au rejet de ce moyen tel que développé aux paragraphes 74 à 78 du présent arrêt.

[136] Mémoire d'appel, par. 44-52.

5. Le nombre des tués (Moyen d'appel n°9)

a. L'expert Ewa Tabeau

Cet expert a témoigné au sein des différents procès et ses multiples dépositions font de cet expert une personne qui jouit d'une grande autorité. Cet expert a déposé dans l'affaire Popović *et al.* le 5 février 2008[137] et elle a été employée par le Tribunal dès le début de l'année 2000 en qualité de chef de projet pour le service démographique. Il s'agit donc d'une employée du Bureau du Procureur. Elle a rédigé un rapport intitulé « Les personnes portées disparues de Srebrenica ». Ce rapport a été mis à jour le 16 novembre 2005[138]. Sans entrer dans la méthodologie suivie par Mme Tabeau, il convient de noter qu'au fil du temps, il y a eu des réajustements des données statistiques. Je constate que les registres de l'ABiH n'ont pas été utilisés pour le rapport de 2005 et que le rapport mis à jour en 2007 comporte 7692 personnes de Srebrenica portés disparues ou décédées. Cet expert est l'auteur de nombreux rapports pour le TPIY depuis l'année 2000[139].

Ce qui me paraît essentiel dans le travail effectué par cet expert réside dans le **tableau 8** de la page 19 du document P1776 où il est indiqué que pour les **7692** personnes disparues et tuées il y a **68** femmes dont **10** avaient plus de **80 ans** et seulement **deux** âgées de moins de dix ans. Nous n'avons pas de connaissance autre sur les disparitions ou décès de ces 68 femmes. Dans le tableau concernant les hommes, il est intéressant de noter que des structures d'âges ont été constituées. Pour les quatre premières structures d'âge allant de 5 à 10 ans, 10 à 14 ans et 15 à 19 ans, nous avons comme chiffres 0, 20 et 893[140]. Correspondant les hommes âgés ceux de 70 ans et plus, nous constatons qu'il y en a 118 âgés de 70 à 80 ans et 13 de 80 à 90 ans.

Il apparaît que d'autres listes ont été constituées tant par le Bureau du Procureur que par le CICR[141]. On peut faire le constat que ces listes ne contiennent pas les mêmes éléments chiffrés et qu'ainsi, il y a certaines variations qui peuvent se comprendre compte tenu du nombre important de victimes. Cependant, mon attention a été appelée sur le document **D00165** qui est une étude faite par Milivoje Ivanisević qui indique que des personnes dont les noms ont été recensés comme victimes du massacre de Srebrenica sont décédées soit avant, soit après et dans d'autres lieux. C'est ainsi qu'il a

[137] *Le Procureur c. Popović et al*, IT-05-88-T, Audience du 5 février 2008, CRF, p. 21030 et ss.
[138] P01776.
[139] *Le Procureur c. Tolimir*, IT-05-88-2-T, Audience du 16 mars 2011, CRF, p. 11397.
[140] Ce qui me semble important c'est que le chiffre de 893 peut correspondre aux personnes qualifiées dans les documents d' « hommes en âge de combattre ».
[141] Voir notamment le rapport établi par le C.I.C.R., P01780.

mis à jour l'existence d'une liste comprenant 87 personnes. Ce document présente une fiabilité certaine puisqu'il a été établi à partir de décisions judiciaires précisant les dates et lieux de décès.

Indépendamment des incertitudes liées à certaines personnes, il en résulte néanmoins des rapports de Mme Tabeau que plusieurs milliers de personnes ont disparu ou ont été tuées dans le cadre des évènements liés à Srebrenica.

b. Le calcul des victimes répertoriées

L'appelant allègue aux paragraphes 89 à 142 de ses écritures d'appel du 28 février 2014 que la Chambre de première instance a fait une erreur dans le calcul du nombre de tués.

A titre d'exemple, il cite le paragraphe 45 du jugement où il est indiqué que 1000 à 1500 musulmans ont été tués à la ferme militaire de Branjevo et 500 au Centre culturel de Piliča. La Chambre de première instance a pris le soin de faire un chapitre intitulé « Calcul du nombre total de musulmans de Bosnie tués après la chute de Srebrenica »[142]. La Chambre de première instance va calculer notamment le nombre de musulmans de Bosnie qui ont été tués sur les sites spécifiques mentionnés dans l'acte d'accusation[143] et le nombre de tués en dehors d'opérations de combats dans des circonstances non précisées par l'acte d'accusation[144].

Elle précise qu'elle ne prendra pas en compte dans ses calculs les musulmans morts aux combats ni ceux sui se sont suicidés ou ont été tués lors d'affrontements avec d'autres musulmans[145]. La demande est donc rigoureuse à la condition que chaque tué puisse être rangé de manière précise dans sa catégorie. A partir de ces calculs, la Chambre de première instance a conclu qu'au moins 4970 musulmans ont été tués[146]. Le tableau n°1[147] permet d'avoir un récapitulatif précis. Ce tableau permet d'isoler cinq lieux ayant donné lieu à un nombre important de morts :

- Entrepôt de Kravica (600)
- Ecole de Grbavci à Oharovac (830)
- Petkovci (809)
- Kozluk (761)

[142] Jugement *Tolimir*, p. 314. La méthodologie de la Chambre est expliquée au paragraphe 566 du jugement.
[143] Jugement *Tolimir.*, par. 568-571.
[144] *Jugement Tolimir*, par. 595-597.
[145] Jugement *Tolimir*, par. 592-594.
[146] Jugement *Tolimir*, voir tableau n°1, p. 314.
[147] Jugement *Tolimir*, voir tableau n°1, p. 314.

- Ferme militaire de Branjevo et centre culturel de Piliča (1656)

La Chambre de première instance est moins convaincante dans son analyse au paragraphe 574 où elle rejette l'argumentation de l'accusé concernant le chiffre de 7000 personnes qui ne serait pas défendable. La Chambre de première instance dans son analyse va également prendre en compte un rapport de synthèse plus récent établi en 2009[148]. Selon ce rapport, le chiffre réel de personnes disparues et décédées serait de 7905. La Chambre de première instance va ensuite se pencher sur les 1683 victimes de Srebrenica identifiées dont il est question dans le rapport de **Dusan Janc** d'avril 2010[149]. Sur ces 1683 victimes, la Chambre de première instance indique que 734 auraient été tuées en dehors des opérations de combats. Au paragraphe 591 du jugement, la Chambre de première instance affirme que sur les 1683 victimes de Srebrenica, les forces serbes en ont tué 830 en dehors des opérations de combats.

Finalement, la Chambre dans son tableau n°2 récapitulatif[150] va ajouter au nombre de 4970, les 734 victimes retrouvées à Glogova 1et 2 et dans des fosses secondaires et les 96 victimes retrouvées dans d'autres sites pour aboutir au chiffre de 5749 victimes.

Ce chiffre paraît acceptable et je ne vois pas comment l'Accusé pourrait contester ce chiffre même si comme l'indique la note de bas de page 2589, la Juge Nyambe émet quelques réserves. En ce qui me concerne, le noyau dur de ces calculs est constitué par les victimes répertoriées sur les sites de **Krahovac, Orahovac, Petkovic et Branjevo**, ce qui fait plusieurs milliers de victimes.

Comme les autres juges de la Chambre d'appel, je suis au rejet du moyen n°9 tout en soulignant que « l'expert » Ewa Tabeau est membre du Bureau du Procureur et que ses chiffres prêtent parfois à discussion notant au passage qu'elle avait décidé de retenir la structure d'âge dans son tableau de 15 à 19 ans alors même qu'elle sait qu'à partir de 16 ans, l'individu est considéré comme étant en âge de combattre.

[148] Jugement *Tolimir*, par. 576. Ce rapport a été admis sous la cote P01776.
[149] Jugement *Tolimir*, par. 586 et ss.

IV. Les crimes

[150] *Ibid.*, p. 330.

A. CRIME CONTRE L'HUMANITE

1. Extermination (Moyen d'appel n°6)

Si je partage la conclusion de la Chambre d'appel sur ce moyen aboutissant à l'acquittement partiel de l'Accusé concernant le crime d'extermination[151], en revanche, je diffère en ce qui concerne le raisonnement suivi[152]. A cet égard, la Chambre d'appel dans son développement, va juger que la position décrite s'inscrit dans le cadre d'une jurisprudence bien établie concernant le standard juridique applicable en matière de crime contre l'humanité[153]. Selon la majorité de la Chambre, alors que l'existence d'un crime contre l'humanité suppose que le crime soit commis dans le cadre d'une attaque systématique et généralisée contre la population, ces victimes n'ont pas à être des civils[154].

Les jugement et arrêts rendus par le TPIY me permettent de remettre en cause l'analyse linéaire faite par la Chambre d'appel du standard juridique applicable en matière de crime contre l'humanité au sens de l'article 5 du Statut. Ainsi, la lecture comparée de différents jugements et arrêts rendus ainsi que des travaux de la Commission préparatoire au Statut de Rome tendent à remettre en cause le raisonnement développé par la Chambre d'appel en l'espèce.

a. La définition de la notion de « civil » au sens du droit international humanitaire

Il convient d'indiquer tout d'abord que l'article 5 du Statut ne donne pas de définition précise du crime d'extermination se contentant de le faire figurer parmi la catégorie des « crimes contre l'humanité ». Si le crime d'extermination figure dans cette liste, il convient de noter que plusieurs Chambres ont, successivement, eu l'occasion de se pencher sur les contours à donner de cette notion en procédant à une analyse de la disposition. Il convient de noter, comme le relèvera à juste titre la Chambre de première instance dans l'affaire *Mrkšić*, qu'en la matière « la jurisprudence a évolué au fil des ans »[155]. Sur le terme de « civil » contenu à l'article 5 du Statut, elle va indiquer que celui-ci n'a été « défini que dans le contexte des conditions générales d'application de cet article c'est-à-dire dans le cadre de l'exigence d'une attaque dirigée contre une population

[151] Arrêt *Tolimir*, par. 151.
[152] Arrêt *Tolimir*, par. 141. A l'appui de son propos, elle va aux jugements de première instance dans les affaires *Martić* et *Mrkšić* et *Šljivančanin*. Arrêt *Tolimir*, par. 139, notamment la note de bas de page 404.
[153] Arrêt *Tolimir*, par. 141.
[154] Arrêt *Tolimir*, par. 141.
[155] Jugement *Mrkšić*, par. 449.

civile »[156]. Elle va indiquer que cette question a été abordée dans plusieurs affaires où la notion de « civil » devait être prise au sens large en englobant les individus qui avaient pu se livrer, à un moment donné, à des actes de résistance, ainsi que des personnes hors de combat à l'époque des faits[157].

Par la suite, la jurisprudence a connu une évolution lors de l'arrêt rendu par la Chambre d'appel dans l'Arrêt *Blaskić* en 2004[158]. Alors que dans le cadre des jugements antérieurs, les juges s'étaient fondés sur la situation concrète de la victime au moment, la Chambre d'appel dans l'Arrêt *Blaskić* va s'intéresser à la **qualité de civil au titre de l'article 50 al. 1 du Protocole additionnel I**[159]. Sur ce fondement, les juges de la Chambre ont estimé que « ni les membres des forces armées, ni les membres des milices et des corps volontaires faisant partie de ces forces armées non plus que les groupes de résistance organisés ne pouvaient se prévaloir de la qualité de civils »[160]. En outre, ils ont ajouté que la spécificité du crime contre l'humanité tenait tant à la qualité de civil de la victime qu'à son ampleur et à son organisation[161]. Cette approche tend donc à réduire l'étendue de la notion de « civil » en se conformant au droit international humanitaire. Cette approche va être confirmée par la Chambre d'appel dans l'arrêt ***Galić***, cette dernière concluant « qu'il ne serait pas forcément juste de dire qu'une personne hors de combat est un civil en droit international humanitaire »[162].

Dans la présente affaire, la Chambre d'appel se base notamment sur l'arrêt ***Martić*** pour étayer son développement. Toutefois, il n'est pas intérêt de relever que cette chambre avait considéré le fait que l'article 5 du Statut définissait les crimes contre l'humanité de façon plus étroite que ne l'exige le droit international coutumier en exigeant « qu'ils soient liés à un conflit armé et donc qu'une distinction soit faite entre les combattants et les non-combattants au sens du droit international humanitaire »[163]. A cet égard, l'article 50 1) du Procotole additionnel I donne une définition précise de la notion de « population civile ». Dans le cadre du commentaire de cet article, le Comité international de la Croix-Rouge va indiquer, au §1915, que sont donc exclus du statut de civil, selon l'article 4, lettre A, de la IIIe Convention:

[156] Jugement *Mrkšić*, par. 449.
[157] Jugement *Mrkšić*, par. 450. Le jugement renvoie également au jugement *Tadić*, par. 641 et 643 ainsi qu'au jugement *Blaškić*, par. 214
[158] *Arrêt Blaškić*, par. 113 et 114.
[159] *Arrêt Blaškić*, par. 113 et 114.
[160] *Arrêt Blaškić*, par. 113 et 114.
[161] *Arrêt Blaškić*, par. 113 et 114.
[162] *Arrêt Galić*, par. 144.
[163] *Jugement Martić*, par. 56.

«1) les membres des forces armées d'une Partie au conflit, de même que les membres des milices et des corps de volontaires faisant partie de ces forces armées; 2) les membres des autres milices et les membres des autres corps de volontaires, y compris ceux des mouvements de résistance organisés, appartenant à une Partie au conflit et agissant en dehors ou à l'intérieur de leur propre territoire, même si ce territoire est occupé, pourvu que ces milices ou corps de volontaires, y compris ces mouvements de résistance organisés, remplissent les conditions suivantes:

a) d'avoir à leur tête une personne responsable pour ses subordonnés;
b) d'avoir un signe distinctif fixe et reconnaissable à distance;
c) de porter ouvertement les armes;
d) de se conformer, dans leurs opérations, aux lois et coutumes de la guerre

A la lumière de ces précédents, le raisonnement suivi par la Chambre d'appel dans l'affaire ***Tolimir*** me semble hautement critiquable dans la mesure où comme le rappelle la Chambre de première instance dans l'affaire ***Martić***, « considérer comme des civils tous ceux qui ne prenaient pas une part active au combat lorsque les crimes ont été commis, y compris les personnes mises hors de combat, brouillerait abusivement cette distinction »[164]. Il semble à cet égard, qu'elle ait choisi de faire une application de l'article 3 commun aux Convention de Genève qui opère une distinction entre les personnes participant directement aux hostilités et celles qui n'y participent pas, y compris les membres de forces armées qui ont déposé les armes.

Si, effectivement, l'article 3 commun constitue le droit applicable dans le cadre d'un conflit armé non international, il n'en demeure pas moins que la définition précise et stricte donnée par l'article 50 1) du Protocole additionnel applicable dans le cadre d'un conflit armé international devait s'appliquer à la situation présente. En effet, comme l'indique le jugement ***Mrkšić***, « il serait absurde que la Chambre d'appel ait tiré des textes susmentionnés la définition en droit coutumier des expressions « civils » et « population civile » aux fins de l'article 5 du Statut sans avoir l'intention de l'appliquer ensuite pour autant aux conflits armés tant internationaux qu'internes »[165]. Tout en rejoignant les conclusions de la Chambre ***Mrkšić***, pour moi cet article a vocation à s'appliquer à **tous types de conflits armés**. En conséquence, je ne partage par le raisonnement développé par la Chambre d'appel concernant la définition large de la notion de population civile.

[164] *Jugement Martić*, par. 56.
[165] Jugement *Mrkšić*, par. 456

b. Le standard juridique applicable aux crimes contre l'humanité au sens du droit international coutumier

Pour comprendre la nécessité d'une approche stricte de la notion de « civil », il convient de se pencher sur le Statut des juridictions précédant notre juridiction pour comprendre que les crimes contre l'humanité dès l'origine ont été entendus comme des crimes contre des civils, comme le montre l'expression « contre toutes populations civiles » à l'article 6 c) du Statut de Nuremberg[166]. Ceci accrédite plus encore l'idée que les crimes contre l'humanité sont commis à l'encontre de civils et non de combattants. L'argument avancée par l'exigence d'une attaque généralisée ou systématique n'a de justification que dans la mesure où la population civile est visée et donc doit être analysée non pas comme une condition *sine qua non* mais comme une condition minimale pour éviter que la juridiction ne soit saisie de violations de droits de l'homme graves mais isolées[167].

Une telle approche a été suivie par la Commission préparatoire à l'établissement du Statut de la Cour pénale internationale qui à l'article 7 1) b) de son projet concernant les éléments des crimes a envisagé l'extermination en tant que crime contre l'humanité. A l'alinéa 3 de cet article, il est indiqué que le *mens rea* du crime d'extermination réside dans le contexte d'un **massacre de membres d'une population civile**[168].

A la lumière des dispositions coutumières et de l'évolution jurisprudentielle opérée depuis l'arrêt ***Tadić***, il est erroné de dire que cette « jurisprudence est bien établie » selon les termes de la majorité de la Chambre d'appel. Il semble au contraire que les conclusions reprises par la majorité s'écarte d'une jurisprudence qui a le mérité de reprendre les termes du **Statut de Nuremberg** et qui s'inscrit dans le cadre des réflexions préparatoires au **Statut de Rome**. Il est inconséquent de procéder à une interprétation large de l'article 5 du Statut au risque de commettre des erreurs. Une analyse rigoureuse du droit applicable de l'article 5 du Statut laisse apparaître une contradiction importante avec les conclusions auxquelles a abouti la majorité.

Par ailleurs, il est important d'observer, que le refus de considérer les atrocités commises contre des combattants hors de combat comme des crimes contre l'humanité n'a pas pour conséquence de les laisser impunies. Si elles ont été commises dans le cadre d'un conflit armé, elles sont susceptibles de recevoir la qualification de **crimes de guerre**, comme c'est le plus souvent le cas au TPIY[169].

[166] Jugement *Mrkšić*, par. 458.
[167] Jugement *Mrkšić*, par. 458..
[168] Voir le *Projet de la Commission préparatoire au Statut de Rome*.
[169] Jugement *Mrkšić*, par. 460.

c. Analyse des éléments constitutifs du crime d'extermination

Nonobstant le fait pour la majorité de la Chambre d'appel d'avoir commis une erreur de droit en faisant une application erronée de l'article 5, il s'agissait encore pour elle de caractériser **l'attaque généralisée ou systématique visant une population civile**. Selon les conclusions de la Chambre de première instance, les meurtres des hommes de **Srebrenica** étaient seulement un volet de l'attaque systématique et généralisée dirigée premièrement contre la population civile, incluant également les actions militaires contre les deux enclaves, l'expulsion de milliers de femmes, enfants et personnes âgées et les restrictions de l'aide humanitaire[170].

Sur la notion d' « attaque », la jurisprudence de ce Tribunal a retenu plusieurs conditions générales devant être remplis et notamment : il doit y avoir une attaque ; l'attaque doit être généralisée ou systématique ; l'attaque doit être dirigée contre une population civile ; les actes de l'auteur doivent s'inscrire dans le cadre de cette attaque[171]. Une « attaque » au sens de l'article 5 du Statut s'entend d'un type de comportement entraînant des actes de violence[172]. Elle ne se limite pas au recours à la force armée et comprend également tous mauvais traitements infligés à la population civile. L'attaque ne doit pas nécessairement s'inscrire dans le cadre d'un conflit armé[173]. En outre, l'attaque doit être généralisée ou systématique, cette condition étant disjonctive et non cumulative. L'adjectif « généralisé » renvoie au fait que l'attaque a été menée sur une grande échelle et au nombre de victimes qu'elle a faites, tandis que l'adjectif « systématique » dénote le caractère organisé des actes de violence et la répétition délibérée et l'improbabilité de leur caractère fortuit[174].

Il est intéressant de se reporter aux paragraphes 103 et 105 de l'arrêt ***Kunarac*** concernant l'élément moral exigé en ce qui concerne l'attaque. C'est donc l'attaque qui doit être dirigée contre cette population et non les actes de l'accusé. Pour caractériser l'attaque comme étant un crime d'extermination la population civile dit être la cible principale de l'attaque. Selon la jurisprudence de ce tribunal, Plusieurs éléments sont à prendre en compte pour aboutir à cette conclusion : L'attaque doit être dirigée contre une population civile quelle qu'elle soit. Comme l'a dit la Chambre d'appel, « dans le cas d'un crime contre l'humanité, la population civile doit être la cible principale de l'attaque». Pour déterminer si tel était le cas, il faut prendre en compte, entre autres, les moyens et méthodes utilisés au cours de l'attaque, le statut des victimes, leur nombre, le

[170] Jugement *Tolimir*, par. 701 et 710. A ce stade, j'écarte pour ma part le transfert forcé qui fera l'objet d'une analyse plus détaillée dans mon opinion dissidente traitant du moyen n°13.
[171] Arrêt *Kunarac* et consorts, par. 85.
[172] Arrêt *Kunarac* et consorts, par. 86. Voir également Jugement *Vasiljević*, par. 29 et 30 ; Jugement *Naletilić*, par. 233.
[173] Arrêt *Kunarac* et consorts, par. 86.
[174] Arrêt *Blaškić*, par. 101.

caractère discriminatoire de l'attaque, la nature des crimes commis pendant celle-ci, la résistance alors opposée aux assaillants, et dans quelle mesure les forces[175].

A bien suivre la jurisprudence, l'expression « population civile » doit être prise au sens large et s'entendre d'une population majoritairement civile. Il est à noter qu'à cet égard, le critère retenu par la jurisprudence est vague et laisse planer des incertitudes concernant la présence effective de civils en comparaison avec les combattants présents. Selon ce principe, « une population peut être qualifiée de civile même si elle comprendre en son sein des non civils à condition qu'elle soit majoritairement civile »[176]. La présence de membres de groupe de résistance armée et d'anciens combattants ayant déposé les armes ne remet pas en cause le caractère civil de la population. Si je peux partager cette approche en ce qui concerne la présence d'une **majorité de civils**, l'application qui en a été faite en l'espèce par la Chambre d'appel m'apparaît erronée.

En effet, l'accusation n'a pas été en mesure d'apporter, au-delà de tout doute raisonnable, la preuve que les 4970 hommes tués étaient majoritairement des civils et non des combattants. Les différents rapports et éléments de preuve présentés ne permettent pas d'établir clairement la différence entre civils et combattants. Sans remettre en cause les crimes de masse perpétrés dans le cadre de ces évènements, pouvant constituer l'*actus reus* du crime d'extermination, **les éléments de preuve ne permettant pas au-delà de tout doute raisonnable de conclure que cette population visée était composée majoritairement de civils**. A cet égard, le statut des victimes, le caractère discriminatoire de l'attaque, la résistance opposée aux assaillants s'inscrivent de mon point de vue dans le cadre de crimes de guerre punissables au titre de l'article 3 du Statut. Pour cette raison, je diffère de la position majoritaire au niveau de la caractérisation du *mens rea* propre au crime d'extermination envisagé en tant que crime contre l'humanité. Je considère que ce moyen d'appel n°6 devait être admis dans son intégralité.

d. Conclusion

En conclusion, je suis favorable à l'acquittement partiel de l'Accusé sur ce moyen d'appel n°6[177]. Toutefois, je diffère en ce qui concerne le raisonnement suivi par la Chambre d'appel

[175] Arrêt *Kunarac*, par. 96.
[176] Arrêt *Blaškić*, par. 113.
[177] Arrêt *Tolimir*, par. 151

2. Transfert forcé (Moyen d'appel n°13)

La Chambre d'appel tient à rappeler que la Chambre de première n'a pas à se référer au témoignage de chaque témoin, ni à chaque élément de preuve du dossier d'instruction et ceci « tant qu'il n'y aurait aucune indication que la Chambre de première instance aurait complètement ignoré toute pièce particulière de la preuve»[178]. Elle établi sur cette base que les preuves présentées par la Défense n'entraient pas en contradiction avec la nature forcée du déplacement de la population[179]. Toutefois, une analyse détaillée des pièces du dossier fait ressortir des éléments qui méritent d'être pris en compte. Pour les raisons que je vais étayer ci-après, je suis **en désaccord** avec la conclusion de la majorité car les éléments de preuve ne me permettent pas d'établir, au delà de tout doute raisonnable, le **caractère forcé et illicite du déplacement.**

Le caractère forcé du déplacement se matérialise, par **l'absence de choix** véritable pour les personnes déplacées[180], et par l'intention de **déplacer de force** une population à l'intérieur des frontières nationales[181]. Le droit international reconnaît des circonstances où les déplacements forcés seraient légalement justifiés en période de conflit. Ainsi, l'article 49 de la IVe Convention de Genève et l'article 17 1) du Protocole additionnel II autorisent, dans des conditions spécifiques, le déplacement forcé si la sécurité de la population ou d'impérieuses raisons militaires l'exigent[182].

Il découle des éléments de preuve qui vont être analysés ci-après que non seulement **les civils** avaient la volonté forte de quitter les enclaves de leur propre choix, mais que l'intention de déplacer ces populations provenait des dirigeants de l'ABiH en accord avec la FORPRONU et le bataillon néerlandais et cela, avec le consentement explicite de l'ONU.

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[178] Arrêt *Tolimir*, par.161.
[179] Arrêt *Tolimir*, par.162.
[180] Arrêt *Stakić*, par. 279 ; Arrêt *Krnojelac*, par. 229 et 233 ; Jugement *Krajišnik*, par. 724 ; Jugement *Blagojević*, par. 596 ; Jugement *Brđanin*, par. 543. Voir aussi Jugement *Simić*, par. 126 ; Jugement *Krstić*, par. 147.
[181] Arrêt *Stakić*, par. 317. Voir aussi Jugement *Popović et al.*, par. 904 ; Jugement *Milutinović*, tome 1, par. 164 ; Jugement *Martić*, par. 111.
[182] En ce qui concerne les « impérieuses raisons militaires », le Commentaire de la IV Convention de Genève précise : Si donc la région est menacée par les effets des opérations militaires ou risque d'être l'objet de bombardements intenses, la Puissance occupante a le droit et, sous réserve des dispositions de l'[article] 5 [Dérogations], le devoir de l'évacuer partiellement ou totalement, en plaçant les habitants dans des lieux de refuge. Il en est de même lorsque la présence de personnes protégées dans une région déterminée entrave les opérations militaires. Toutefois, pour que l'évacuation soit admise dans ces cas, il faut qu'un intérêt supérieur militaire l'exige absolument ; sans cette nécessité impérieuse, l'évacuation perdrait son caractère légitime. Voir, le Commentaire de la IVe Convention de Genève, p. 302. En outre, le Commentaire du Protocole additionnel II précise que les « raisons militaires impératives […] comme motif de dérogation à une règle, exige[nt] toujours une appréciation minutieuse des circonstances », en référence à l'article 49 de la IVe Convention de Genève. Voir *supra*, note de bas de page 3280. Le Commentaire ajoute que, dans tous les cas, « l'appréciation de la situation doit se faire d'une façon particulièrement soigneuse et l'adjectif "impératif" restreint à leur minimum les cas où un déplacement peut être ordonné ». Commentaire du Protocole additionnel II, p. 1495.Voir aussi, Arrêt *Stakić*, par. 284 et 285 ; Jugement *Popović et al.*, par. 901 à 903; Jugement *Milutinović*, tome 1, par. 166 ; Jugement *Blagojević*, par. 597.

a. Le déplacement forcé de la population musulmane de Srebrenica et de Potočari

Il est important de relever que malgré la courte distance qui sépare la ville de Srebrenica de la ville de Potočari (5,7 km de distance environ) les événements qui se sont produits à ces deux endroits auraient du être bien différenciés. A cet égard, bien que le destin de ces deux villes soit lié par la mobilisation de la population de Srebrenica vers Potočari, il aurait été plus judicieux sur le plan de la rigueur de décrire tout d'abord les événements de **Srebrenica** pour ensuite se concentrer sur la ville de **Potočari.**

Les éléments de preuve montrent que malgré l'existence d'un **élément commun** quant au souhait de la population de vouloir quitter ces lieux, il y a bien des différences quant à l'intention du déplacement de la population. Alors que dans la **ville de Srebrenica** le déplacement de la population s'est matérialisé par l'intention des autorités de la République de Bosnie-Herzégovine de vouloir faire partir la population avec l'aide des hommes du bataillon néerlandais[183] , dans la ville de Potočari, le déplacement de la population est une initiative des autorités onusiennes de la FORPRONU.

La **Juge Nyambe**, dans son opinion dissidente, relève à juste titre la portée de la pièce à conviction **D00538**. Cette pièce qui est une lettre datée du **28 août 1995 du 2ème Corps d'armée de l'ABiH** à son état-major général, décrit le contexte entourant les négociations et relate la chute de Srebrenica, en indiquant que l'évacuation des civils a été évoquée dans le contexte d'opérations militaires et qu'elle a **été proposée à la VRS et non le contraire**[184]. Ce rapport ne fait état d'aucun déplacement forcé de la population en tant que cible des forces serbes de Bosnie, mais il explique que la population avait reçu l'ordre de partir, avant même d'arriver à Potočari[185]. A ce titre, la pièce **P00990**, apporte des éléments qui viennent corroborer la portée de la pièces D00538, en montrant que, dès le 9 juillet 1995, les autorités de la **municipalité de Srebrenica** avaient manifestement l'intention de faire partir la population de l'enclave dans la mesure où elles avaient prié **Alija Izetbegović,** Président de la BiH, et Delić de conclure d'urgence un accord avec la VRS afin d'ouvrir un couloir à cette fin[186].

[183] Des éléments de preuve montrent que l'ONU a initié le déplacement des Musulmans de Bosnie de Srebrenica vers Potočari. Vincentius Egbers, pièce P01142, CR *Popović et al.*, p. 2879 (20 octobre 2006) ; Evert Rave, CR, p. 6858 (27 octobre 2010) ; Evert Rave, pièce P01004, CR *Krstić*, p. 923 (21 mars 2010) ; Mirsada Malagić, CR, p. 10021 (16 février 2011) (où le témoin affirme que même si les Musulmans de Bosnie ne comprenaient pas ce que disaient les soldats du DutchBat, ces derniers ont pu les guider à Potočari grâce à des gestes) ; Johannes Rutten, pièce P02629, CR *Popović et al.*, p. 4883 (30 novembre 2006).
[184] Pièce D00538, p. 4.
[185] Pièce D00538, p. 6.
[186] Pièce P00990 ; Ratko Škrbić, CR, p. 18944 à 18947 (7 février 2012). Voir également, la pièce P00023.

Ces éléments de preuve ne me permettent pas d'aboutir au même raisonnement que la majorité de la Chambre d'appel qui sous-estime la portée de la pièce **D00538**. En effet, en considérant que la Chambre de première instance n'est pas obligée de se référer à chaque élément de preuve[187], la Chambre d'appel va procéder à une interprétation très orientée de la pièce D00538[188]. A cet égard, je me dois de rappeler la jurisprudence du tribunal en matière de procédure d'appel qui considère qu'*« une analyse insuffisante par une Chambre de première instance des éléments de preuve versés au dossier peut constituer, dans certaines circonstances, un défaut de motivation »*[189]. D'ailleurs, un défaut de motivation *« est une erreur de droit qui exige l'examen de novo par la Chambre d'appel des éléments de preuve »*[190].

Concernant les restrictions des **convois humanitaires**, il ressort des plaidoiries de l'accusé que des distinctions avaient été faites entre les convois du **HCR** qui contenaient des vivres pour la population civile de Srebrenica et les convois de la **FORPRONU** qui transportaient du matériel pour cette dernière[191]. **Il découle des éléments de preuve que les convois du HCR ne faisaient pas l'objet de restrictions** ; la pièce D00538, atteste du fait que la ville comptait plusieurs entrepôts de nourriture et que la veille de la prise de Srebrenica, les gens étaient entrés par effraction « dans tous les entrepôts de la ville et avaient rassemblé toutes les réserves »[192]. Par ailleurs, d'après les éléments de preuve, dès juillet 1995, **l'ABiH** non seulement avait mis en place de nombreux postes de contrôle pour pouvoir bloquer et inspecter elle-même les convois[193], mais prenait de la nourriture et d'autres matériels acheminés par des convois d'aide humanitaire[194].

Sur les conditions catastrophiques auxquelles les personnes à la recherche d'un refuge ont fait face du 11 au 13 juillet 1995 à la base de l'ONU à Potočari, il ressort des témoignages, que dès 1993, les civils cherchaient vivement à quitter l'enclave, en utilisant les convois de ravitaillement de l'ONU pour sortir de la zone[195]. Au §206 du jugement, il est précisé également que le souhait de la population de partir

[187] Arrêt *Tolimir*, par.161.
[188] Arrêt *Tolimir*, par.162.
[189] Arrêt *Zigiranyirazo*, par. 44 à 46 ; Arrêt *Muvunyi*, par. 144 et 147, note de bas de page 321, renvoyant à l'Arrêt *Simba*, par. 143 (où il est dit que, dans le contexte de l'espèce, le fait que la Chambre de première instance ait négligé d'expliquer le traitement qu'elle avait réservé à un témoignage constitue une erreur de droit).
[190] Arrêt *Kalimanzira*, par. 195 à 201 ; Arrêt *Zigiranyirazo*, par. 44 à 46 ; Arrêt *Simba*, par. 142 et 143. ; Arrêt *Limaj*, par. 86 ; Arrêt *Kalimanzira*, par. 99 et 100 ; Arrêt *Muvunyi*, par. 144 et 147, note de bas de page 321.
[191] Plaidoirie de l'Accusé, CR, p. 19469 et 19470 (22 août 2012)
[192] Pièce D00538, p. 4.
[193] Cornelis Nicolaï, CR, p. 4095 à 4097 (18 août 2010).
[194] Pièce D00080 ; Richard Butler, CR, p. 17214 (24 août 2011) ; Slavko Kralj, CR, p. 18292 à 18295 et 18299 (23 janvier 2012).
[195] PW-022, pièce P00097, CR *Popović et al.*, p. 3934 (15 novembre 2006). PW-022 a déclaré, s'agissant du transport, que certains hauts responsables ou leur famille étaient prioritaires et que beaucoup de personnes ordinaires n'avaient donc pas pu monter dans les camions du HCR et qu'il y avait un processus de sélection pour décider qui pouvait ou non

s'est renforcé les mois suivants en raison des combats intenses entre les parties belligérantes, et de la crainte de frappes aériennes de l'OTAN. Les affrontements entre les parties et la présence de 30 000 à 50 000 réfugiés vivant dans des conditions de vie périlleuses ne pouvaient avoir d'autre conséquence, que celle du souhait de la population civile de partir et d'être évacuée[196]. Il convient de citer également la pièce **D00324** où Leendert Van Duijn (officier du bataillon néerlandais), vient conforter cette affirmation en se référant devant le Parlement néerlandais aux conditions de vie à Potočari comme étant insupportables et ne permettant pas de rester plus longtemps à cet endroit[197].

Quant aux pourparlers concernant le transport de la population hors Potočari, il est important de relever que l'enregistrement contenu à la pièce P02798 montre que ces négociations ont débuté à l'initiative de la **FORPRONU et non de la VRS**, et ceci après des discussions avec des responsables à Sarajevo[198]. En réponse à la demande du **Colonel Karremans**, qui estimait qu'il devait appuyer le souhait exprimé par les Musulmans de Bosnie d'être transportés en toute sécurité hors de l'enclave avec l'assistance de la VRS, le **Général Mladić** avait pris l'initiative d'organiser de nouveaux pourparlers à **l'hôtel Fontana**, en présence de représentants des civils musulmans de Bosnie[199]. Lors de ces réunions, contrairement à ce qui a été dit dans le jugement[200], rien dans ces enregistrements ne laisse apparaître une forme d'intimidation et autoritarisme de la part du Général Mladić à l'égard des participants, en revanche il se montre accueillant et courtois[201]. **La vision de la bande vidéo à laquelle j'ai procédé est particulièrement éclairante quant à l'ambiance et au contenu des discussions.**

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prendre place dans un camion. PW-022, pièce P00096 (confidentiel), CR *Popović et al.*, p. 4040 et 4041 (huis clos partiel) (16 novembre 2006) ; PW-022, CR, p. 1107 à 1110 (14 avril 2010). Voir aussi la déposition d'un témoin qui a dit que sa soeur était déjà partie en 1993 dans un convoi organisé. Salih Mehemedović, pièce P01531 (15 juin 2000), p. 3.

[196] PW-063 a déclaré qu'il n'avait « jamais entendu dire que quelqu'un voulait rester dans la région, que ce soit à Srebrenica ou à Bratunac». Voir, PW-063, CR, p. 6522 (19 octobre 2010). Il avait l'impression que ceux qui se trouvaient à Potočari voulaient en partir pour rejoindre Tuzla au plus vite. Voir, PW-063, pièce P00867, CR *Popović et al.*, p. 9316 (23 mars 2007). Voir aussi Mirsada Malagić, CR, p. 10033 (16 février 2011) (« tout le monde voulait quitter Potočari »).

[197] Pièce D00324, p.17.

[198] Pièce P02798, disque 1, 00 h 42 mn 55 s, p. 17.

[199] Pièce P02798, disque 1, 01 h 00 mn 24 s à 01 h 01 mn 40 s, p. 26.

[200] Le jugement s'est concentrée sur le témoignage d'Evert Rave et d'autres participants à la réunion, pour qui les cris d'un cochon que l'on égorgeait était une menace ; Voir Evert Rave, CR, p. 6753, 6756 et 6757 (26 octobre 2010). Voir aussi PW-071, CR, p. 6077 (huis clos) (30 septembre 2010). Toutefois, les éléments de preuve permettent raisonnablement de tirer une autre conclusion. Voir à ce titre la pièce D00037, dans laquelle il est clairement indiqué que l'« [a]utorisation d'égorger et de livrer [un cochon] pour les besoins des soldats de l'ONU cantonnés à l'hôtel de Bratunac a été accordée».

[201] Il offre aux personnes présentes des cigarettes (Pièce P02798, disque 1, 00 h 46 mn 46 s à 00 h 46 mn 52 s, p. 18) ; de la bière et des sandwichs pour le déjeuner (Pièce P02798, disque 1, 01 h 08 mn 22 s à 01 h 09 mn 30 s, p. 31 et 32). Comme il n'y avait pas de bière, les soldats ont eu plus tard du vin blanc mélangé à de l'eau minérale (Pièce P02798, disque 1, 01 h 08 mn 22 s à 01 h 09 mn 30 s, p. 32). Il a continué d'avoir ce type de comportement durant la troisième réunion à l'hôtel Fontana, proposant sa voiture à Čamila Omamović pour qu'elle soit évacuée en toute sécurité, avec sa fille, sa petite-fille et sa mère, comme elle le demandait (Pièce P02798, disque 3, 00 h 12 mn 57 s à 00 h 13 mn 12 s, p. 51.) Il a ensuite eu la même attitude à l'égard des Musulmans de Bosnie présents aux réunions ultérieures tenues à

Concernant le transport de civils musulmans de Bosnie, il est important de relever que non seulement l'ONU était au courant de l'évacuation mais qu'au moins les officiers les plus hauts gradés de la FORPRONU et du bataillon néerlandais étaient informés des accords relatifs au transport des civils de Potočari. Les pièces **D00174**[202] et la pièce **P00608**[203], sont deux télégrammes chiffrés du 11 et du 12 juillet 1995 envoyés par **Akashi** à **Kofi Annan**, à l'époque Secrétaire général adjoint, se référant au plan de la FORPRONU visant à évacuer les réfugiés de Srebrenica[204]. Par ailleurs, dans son témoignage, l'officier **Franken** précise qu'un **accord écrit** avait été conclu entre le **Général Mladić** et le **général Rupert Smith concernant l'évacuation**[205], mais du fait que l'ONU n'était pas en mesure de se charger elle-même de l'évacuation, **elle avait accepté que la VRS le fasse**[206]. D'ailleurs, les pièces P01008[207], D00036[208] et P02798[209] contenant les transcripts vidéo des réunions de négociations entamés par les membres du bataillon néerlandais, entre les autorités locales de musulmans de Bosnie et les autorités de la VRS, démontre clairement l'initiative prise par le bataillon néerlandais en vue de parvenir à **un accord de cessez-le-feu immédiat afin de protéger la population civile**[210]. Pour les raisons exposées ci-dessus, je suis donc en total désaccord avec l'interprétation faite par la chambre d'appel de ces pièces, et je rejoins sur ce point le constat de la Juge Nyambe qui considère que *« l'évacuation a été discutée par tous les responsables concernés, à savoir par Akashi et Annan s'agissant de l'ONU, par les dirigeants de la BiH à Sarajevo, et sur le terrain par la FORPRONU et dans ce cas le DutchBat"*[211].

Toutefois, si dans le cadre de cette évacuation, certains membres de la VRS et du MUP ont pu déclencher la panique, d'autres membres ont été déployés autour des civils pour les protéger[212]. A Potočari, Franken avait reçu l'ordre de coopérer afin que l'évacuation se « fasse dans les conditions les plus humaines et légales qui soient »[213]. Les témoignages font état du souhait de la population civile de vouloir partir de **leur plein gré** afin d'être transportée dans des territoires plus sécurisés

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Bokšanica, offrant par exemple une veste à Hamdija Torlak, qui était frigorifié (Pièce P02798, disque 4, 00 h 25 mn 08 s à 00 h 25 mn 50 s, p. 118 et 119).
[202] Pièce D00174, p.2.
[203] Pièce P00608, p.5.
[204] Voir plaidoirie de l'Accusé, CR, p. 19508 à 19512 (22 août 2012).
[205] Robert Franken, pièce P00597, CR *Popović et al.*, p. 2553 et 2554 (17 octobre 2006).
[206] Robert Franken, pièce P00597, CR *Popović et al.*, p. 2560 (17 octobre 2006).
[207] Pièce P01008, p. 19-22 et 26-27.
[208] Pièces D00036
[209] Pièce P02798, disque 4, 00 h 35 mn 48 s à 00 h 36 mn 39.
[210] A cet égard la pièce D00174, se réfère à la communication du 11 juillet 1995 où l'on lit que le DutchBat devait «[e]ntamer des négociations locales avec les forces [de la VRS] pour conclure un accord de cessez-le-feu immédiat » et « [p]rendre toutes les mesures raisonnables pour protéger les réfugiés et les civils [dont il avait] la responsabilité ». Voir également, la Pièce P01463, p. 2 ; la plaidoirie de l'Accusé, CR, p. 19509 à 19511 (22 août 2012).
[211] Voir, Opinion dissidente de la Juge Nyambe, p.21,par. 43.
[212] Mendeljev Đurić, pièce P01620, CR *Popović et al.*, p. 10807 et 10808 (2 mai 2007).
[213] Robert Franken, pièce P00597, CR *Popović et al.*, p. 2680, 2682 et 2683 (18 octobre 2006). Voir aussi Eelco Koster, pièce P01483, CR *Popović et al.*, p. 3094 et 3095 (26 octobre 2006).

contrôlés par l'ABiH[214], ne voulant y retourner qu'après la cessation des hostilités[215]. Il découle de l'analyse des éléments de preuve, que ni l'intention, ni le caractère forcé du déplacement en tant qu'éléments constitutifs du transfert forcé ne sont présents dans le cadre des événements qui se sont produits successivement à Srebrenica et à Potočari.

b. Le déplacement forcé de la population musulmane de Žepa

La pièce **D00144**[216] met en évidence le souhait de la population civile de vouloir partir de leur propre gré dès le début de l'année 1995. En effet, cette volonté de partir s'est manifestée comme conséquence des combats constants entre la VRS et l'ABiH et s'est traduit par des départs massifs de nombreux civils qui voulaient quitter l'enclave sans demander l'approbation des autorités locales[217]. D'après, la récit militaire sur la chute de Žepa contenu à la pièce **D00055**, Palić se trouvait confronté à une pléthore de départs du fait qu'il devait arrêter entre **300 et 400** personnes par jour pour empêcher des départs illégaux[218]. L'ABiH considérait d'ailleurs ces départs volontaires comme étant un sérieux problème, car aucune des mesures prises par les autorités militaires et civiles ne permettait de dissuader les gens de partir[219]. A cet égard, **Hamdija Torlak** précise qu'il été tout à fait naturel que les gens aient voulu partir cas ils étaient assiégés dans des conditions très difficiles[220].

Face à des telles conditions, la **présidence de guerre de Žepa** était consciente de la nécessité d'une mesure de protection afin de mettre fin à cette situation[221]. En effet, les différents échanges entre les autorités de l'ABiH laissent ressortir que les dirigeants de Žepa cherchaient à élaborer **un plan d'évacuation de la population civile**. Cette intention est d'ailleurs confirmée par la pièce **P00127** qui est un rapport de **Živanović** destiné au commandement du corps de la Drina, daté du **13 juillet 1993** dans lequel il précise que les dirigeant de Žepa étaient prêts à procéder à l'évacuation mais que les dirigeants à Sarajevo pesaient de façon négative sur cette démarche[222]. Les pièces D00106[223], D00060[224] et D00054[225], sont des lettres d'échangées entre les dirigeants politiques de

[214] PW-017, pièce P02883, CR *Krstić*, p. 1255 et 1256 (24 mars 2000) ; Mirsada Malagić, CR, p. 10036 (16 février 2011). Voir aussi Paul Groenewegen, pièce P00098, CR *Blagojević*, p. 1025 (10 juillet 2003).
[215] Mevlinda Bektić, pièce P01534 (16 juin 2000), p. 5 ; Šifa Hafizović, pièce P01527 (16 juin 2000), p. 4 ; Nura Efendić, pièce P01528 (21 juin 2000), p. 5.
[216] Pièce D00144 p.1-2. Ratko Škrbić, CR, p. 18843 à 18845 (6 février 2012).
[217] Pièce D00144 p.1
[218] Pièce D00055, par.11 et 12.
[219] Pièce D00144 p.1
[220] Hamdija Torlak, CR, p. 4607 (30 août 2010). D00099, p.1.
[221] Hamdija Torlak, CR, p. 4375 (24 août 2010).
[222] Pièce P00127, p. 1.
[223] Pièce D00106, Lettre du 18 juillet 1995, du Président de Zepa Mehmed Hajrić au Président de la BiH Alija Izetbegović.

la BiH qui attestent de cette volonté d'encadrer des négociations avec la VRS. En effet, la pièce D00060 fait état du fait que les dirigeants politiques de la BiH avaient préparé un plan **pour le retrait** de la population civile de Žepa, tout en coordonnant des opérations pour s'engager davantage dans des combats avec la VRS[226].

La pièce **D00636** qui est un projet de plan d'évacuation de Žepa signé par **Bećir Heljić, Rašid Kulovac et Sejdalija Sućeska**, soumis à **Alija Izetbegović**, vient amplement conforter ces échanges. Cette pièce à conviction qui comprend une lettre d'accompagnement signée par **Bećir Sadović**, envoyée au général **Delić** le 18 juillet 1995 fait ressortir 4 points importants. Au point 1) **Sadović** propose à **Delić** que la **FORPRONU** évacue les femmes, les enfants et les personnes âgées de Žepa, aux points 2) et 3) figurent, entre autres, les efforts qui sont déployés afin que d'autres bénévoles aident l'ABiH puis au point 4) il est précisé qu'un plan d'évacuation de la population a été élaboré dans le cas où «les points 1 et 2 ci-dessus échouent ». A cet égard, la **FORPRONU** a reconnu, dans un rapport du **26 juillet 1995**, que les civils n'avaient pas été contraints de partir, mais l'avaient décidé dans le cadre de l'évacuation totale de l'enclave qui n'a pas été accompagnée de violence physique ou de l'emploi de la force[227]. Il paraît dans ces conditions fort étonnant qu'une autre conclusion ait pu être prise…

En effet, les éléments de preuve montrent que la population souhaitait vivement être transportés hors de **Žepa** et que le plan d'évacuation de la population civile de **Žepa** était une initiative de la part des dirigeants politiques de l'ABiH. Il ressort de cette analyse, que l'évacuation de la population civile avait été programmée par les dirigeants politiques de l'ABiH **avant même** que la dernière attaque militaire ne soit lancée contre **Žepa**. Sur cette base, l'argument selon lequel « le déplacement forcé ne peut se justifier lorsque la crise humanitaire à l'origine du déplacement est elle-même due aux activités illicites de l'accusé[228] n'est pas d'application dans le cas d'espèce. A partir de cette démonstration, **aucun élément** ne permet pas de conclure, au delà de tout doute raisonnable, que le scénario d'évacuation de la population musulmane de Bosnie était le résultat direct des restrictions et des activités armées de la VRS[229].

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[224] Pièce D00060, Lettre du 18 juillet 1995, du Président de la BiH Alija Izetbegović au Général Rasim Delić
[225] Pièce D00054, Lettre du 19 juillet 1995, du Président de la BiH Alija Izetbegović au Président de Zepa Mehmed Hajrić.
[226] Pièce D00060.
[227] Pièce D00175
[228] Voir, par. 800-810 du Jugement. Voir aussi, Arrêt *Krajišnik*, par. 308, note de bas de page 739 ; Arrêt *Stakić*, par. 287 ; Jugement *Popović et al.*, par. 903.
[229] Voir, par.1036 du jugement.

Il s'agissait, en réalité, d'une mesure d'évacuation entreprise à l'initiative de l'ABiH dont le but était préventif : celui de protéger la population civile. A cet égard, si l'article 49 de la IV Convention de Genève et l'article 17 1) du Protocole additionnel II autorisent, dans des conditions spécifiques, le déplacement forcé si la sécurité de la population ou d'impérieuses raisons militaires l'exigent, ces deux textes ne sont pas d'application dans le cas d'espèce. En effet, les mesures prises par les dirigeants de la ABiH ne rentrent pas dans le champ d'application de ses articles du fait que ces dirigeants n'agissaient pas en tant que puissance occupante, mais en tant que dirigeants du territoire en conflit et de ce fait, ils avaient toute la légitimité de vouloir faire évacuer leur population.

A la lumière de ce qui précède, aucun des éléments constitutifs du transfert force n'est présent dans le cas d'espèce, ni l'intention, ni le caractère forcé du déplacement. Il est important de relever que l'évacuation de la population de **Žepa** s'est faite de **manière volontaire**, elle est partie du souhait de la population de vouloir quitter l'enclave. Cette volonté s'est matérialisée à travers des négociations entamées par les dirigeants de l'ABiH qui ont préparé un plan d'évacuation afin de déplacer la population civile.

Dans ces conditions, je ne peux que faire droit au moyen d'appel n°13 qui est particulièrement fondé par les éléments de preuves.

c. Le statut juridique des membres de la colonne

Pour les événements qui se sont produits suite à la chute de Srebrenica, l'Accusation retient **le déplacement de la colonne** comme étant un acte constitutif du **transfert forcé**[230]. Or, la réalité des faits amène à une conclusion tout autre. Ainsi, au delà des aspects purement formels qui auraient voulu une plus grande rigueur dans le respect des règles de procédure[231], il s'agit de savoir quel est le statut exact des membres de la colonne afin de pouvoir déterminer le droit applicable.

En l'espèce, nous avons, selon les déclarations des témoins, une colonne de plusieurs milliers d'individus entre **10 000** et **15 000** personnes[232] composée en premier lieu des démineurs à statut militaire qui ouvraient le chemin, suivis des membres de la 28ème division et des différentes sections allant sur plusieurs kilomètres et ayant comme destination finale la ville de Tuzla[233]. Il s'agit d'une colonne mixte composée des membres de l'armée divisée en brigades et des « civils » avec et sans armes[234]. Pour les brigades, il y avait une partie qui ne portait pas d'armes et une autre partie qui était armée[235], certains étaient habillés en civil d'autres portaient un uniforme[236]. Il y avait également dans la composition de la colonne des hommes en âge de porter des armes, un **nombre réduit de femmes**[237] et des **enfants** ainsi que certains membres du corps médical des hôpitaux[238]. Dans chaque section de la colonne il y avait des militaires qui encadraient le déplacement de la colonne et indiquaient le chemin à suivre[239]. La présence des civils semble s'expliquer par la peur qui régnait dans le groupe des personnes qui se trouvaient à Srebrenica, qui ont préféré s'enfuir avec les troupes de l'ABiH et suivre la même direction que la colonne, avant de devenir prisonniers des forces serbes et être soumis à des mauvais traitements, voir à la mort[240]. Lors de l'avancée de la colonne, certaines sections ont été coupées d'autres ont subi plusieurs embuscades entraînant des morts en grand nombre du côté de l'ABiH et quelques morts du côté de la VRS[241]. Les victimes de l'ABiH ont été enterrées dans des fosses communes, primaires ou secondaires. Seulement une expertise médico-légale des corps des victimes pourrait déterminer si ces personnes ont été tuées dans le cadre d'une explosion ou d'une exécution sommaire.

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[230] Voir, par. 818-822 du jugement.
[231] Dans le jugement *Popović et al.*, le Juge Kwon se réfère à juste titre aux vices de procédure résultant de la détermination juridique de la colonne en tant qu'élément constitutif du transfert forcé.
[232] Jugement, par.269.
[233] Mevludin Orić, pièce P00069, CRF *Popović et al.*, p. 873 (28 août 2006) et p.1078 (30 août 2006).
[234] CRF *Popović et al.*, p.1050 (30 août 2006).
[235] CRF *Popović et al.*, p. 874 (28 août 2006).
[236] CRF *Popović et al.*, p.1059 (30 août 2006).
[237] PW-116, CRF *Krstić*, p.2944 (14 avril 2000).
[238] PW-106, CRF, *Popović et al.*, p. 4019, 4026 et 4027 (huis clos partiel) (16 novembre 2006)
[239] PW-127, CRF, *Popović et al.*, p. 3574 (huis clos partiel) (3 novembre 2006)
[240] PW-116, CRF *Krstić*, p.2995 (14 avril 2000).
[241] Il y a eu également des pertes du côté de la VRS, mais ses pertes ont été minimes.

La question qui se pose est celle de savoir quel est le statut juridique de ces victimes ? Au regard du droit international humanitaire, les combattants, y compris les membres des groupes armés, ne jouissent de la protection offerte par l'article 3 *commun* aux quatre conventions de Genève qu'à condition d'avoir déposé les armes ou être mis hors de combats. Dans le cas d'espèce, il n'y avait pas eu reddition d'armes, au contraire, un bon nombre de membres des forces armés de la 28ème division étaient bien équipés avec des armements militaires. En ce sens, au regard du **droit international humanitaire**, ces membres, y compris ceux qui étaient habillés en civil et qui ne portaient pas d'armes ou ne participaient pas aux combats, sont des **parties belligérantes** considérées comme des cibles militaires légitimes durant tout le conflit.

En effet, cette approche a été relevé par le CICR dans le commentaire du Protocole I selon lequel : *« Tous les membres des forces armées sont des combattants et seuls les membres des forces armées sont des combattants. Ainsi devrait aussi disparaître une certaine notion de « quasi-combattants » que l'on a parfois tenté d'accréditer sur la base d'activités en relation plus ou moins directe avec l'effort de guerre. Ainsi également disparaît toute notion de statut à temps partiel, mi-civil mi-militaire, guerrier de nuit et paisible citoyen de jour"*[242]. La Chambre d'appel du TPIY, dans son arrêt ***Blaškić*** du 29 juillet 2004, a soutenu cette approche en corrigeant le jugement de la Chambre de première instance, en précisant que « *la situation concrète de la victime au moment des faits ne suffit pas toujours à déterminer sa qualité. Si la victime est effectivement membre d'un groupe armé, le fait qu'elle ne soit pas armée ou au combat lorsque les crimes sont perpétrés ne lui confère pas la qualité de civil »*[243]. Cette décision rejoint, d'ailleurs, la position du CICR dans le sens où *« Le Protocole (…) n'admet pas que* [l]*e combattant ait le statut de combattant lorsqu'il est en action et le statut de civil dans l'intervalle. Il ne reconnaît pas de combattants «à la carte». En échange, il met tous les combattants sur un pied d'égalité juridique, ce qui correspond à une vieille revendication, comme on l'a vu »*[244].

Il reste à savoir quel est le statut réel des civils présents dans cette colonne ? En ce qui concerne la participation des civils aux hostilités, il y a encore plusieurs lacunes juridiques. Si l'article 3 commun aux quatre conventions de Genève et les articles 51 § 3 du Protocole I et 13 par. 3 du Protocole II prévoient que leur participation directe suspend leur protection contre les dangers résultant des opérations militaires[245], il reste à savoir quel sont les critères déterminant une telle

[242] Voir, Commentaire de l'article 43 par. 2 du Protocole additionnel I, p.521, par. 1677.
[243] Arrêt *Blaškić*, par.114.
[244] Voir, Commentaire de l'article 43 par. 2 du Protocole Additionnel I, p.521-522, par. 1678.
[245] D'après le CICR toute personne civile que par sa participation directe entreprenant des actes de guerre que par leur nature ou leur but destinent à frapper concrètement le personnel et le matériel des forcés adverses perdent le bénéfice de

participation. Selon les recommandations du CICR, pour qu'il y ait participation directe il faut la réunion de **trois éléments cumulatifs** : un certains seuil de nuisance susceptible de résulter de l'acte, un rapport de causalité directe entre l'acte et les effets nuisibles attendus et un lien de belligérance entre l'acte et la conduite des hostilités par les parties au conflit[246].

De ce fait, les civils qui participent directement aux hostilités sans appartenir aux forces armées et groupes armés perdent leur protection contre les attaques uniquement pendant la durée de leur participation[247]. Autrement dit, les civils qui participent directement aux hostilités ne cessent pas de faire partie de la population civile, mais leur protection contre les attaques directes est provisoirement interrompue[248]. A cet égard, il est important de distinguer la notion restrictive de **« participation directe »** d'une autre expression voisine **« la participation active »** qui inclurait tous les actes hostiles directs et indirects commis à l'encontre d'une des parties belligérantes[249]. Ainsi lorsqu'il s'agit de distinguer les combattants des non combattants, c'est-à-dire les cibles militaires légitimes des cibles protégées contre des attaques, seule l'expression **participation directe** doit être retenue afin de ne pas considérer des innocents comme des objectifs militaires légitimes[250]. Les chambres du TPIY sont favorables à une protection extensive de ce principe en protégeant toute personne qui ne participerait pas ou plus au moment de la commission du comportement reproché. Dans le jugement *Halilović*, la Chambre reprend *« le critère de la situation*

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leur protection et son considérés comme des cibles militaires donc légitimes. Voir, Commentaire de l'article 51, par. 3 du Protocole I, p.633, par. 1944. Dans le même sens, jugement *Blaškić*, par.180 ; jugement *Galić*, par.48.

[246] *Guide interprétative sur la notion de participation directe aux hostilités en droit international humanitaire, op.cit.*, p.48. Le CICR, dans son guide interprétatif considère comme faisant partie intégrante des actes de participation directe les mesures préparatoires nécessaires à l'exécution d'un acte spécifique aux hostilités, de même que les actes de déploiement vers le lieu de destination et le retour du lieu d'exécution. *Ibid.*, pp.68-71. Auparavant, certains délégués à la Conférence diplomatique de 1974 ont exprimé l'idée que la participation directe aux hostilités couvrirait « les préparatifs du combat et le retour au combat ». Voir Actes de la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés, Genève, 1974-1977, XIV, p.340. Voir dans le même sens le Rapport de la Commission interaméricaine des droits de l'homme sur la situation des droits de l'homme en Colombie, Third Report on Human Rights in Colombia, Doc. OEA/Ser.L/V/II.102, 26 February 1999. Chap.IV, par. 54-55.

[247] Cette participation directe des civils aux hostilités a été interprétée par certains jugements de première instance du TPIR et du TPIY comme reflétant une analogie entre le statut de combattant et de civil. Toutefois, cette position a été rejetée par la chambre d'appel du TPIR dans l'affaire *Akayesu* et par les jugements TPIY dans les affaires *Blagojević & Jokić et Strugar,* qui se sont montrées favorables pour une approche plus large et différenciée de la notion des personnes civiles ne participant pas directement aux hostilités.

[248] Voir en ce sens, *Guide interprétative sur la notion de participation directe aux hostilités en droit international humanitaire, op.cit.,* p.73.

[249] Cette expression plus large se trouve dans certains rapports de réunions d'experts organisées par le CICR. Voir par exemple le Rapport présentée par le CICR lors de la XXIème Conférence internationale de la Croix-rouge, Genève, mai 1969, pp.81 et s.41.

[250] Le statut de la CPI à l'article 8 par. 2 (e) qualifie le crime de guerre dans les conflits armés non internationaux comme « le fait de diriger intentionnellement des attaques contre la population civile en tant que telle ou contre des personnes civiles qui ne participent pas directement aux hostilités ». De ce fait, il se tourne vers une interprétation restrictive de la participation aux hostilités n'incluant pas les personnes civiles participant indirectement au conflit. Dans l'affaire *Thomas Lubanga Dylo* concernant la livraison de denrée alimentaire à une base aérienne la CPI considère que les activités manifestement sans lien avec le conflit ne doivent être considérées comme des actes d'hostilités

particulière » de la victime au moment ou le crime aurait été commis pour déterminer si elle avait droit ou non à la protection offerte par l'article 3 *commun*[251]. L'arrêt question est à examiner au cas par cas, à la lumière des circonstances personnelles de la victime à l'époque des faits[252].

Aujourd'hui, ce qu'on appelle les **non-combattants** et qui étaient autrefois plus ou moins des spectateurs du drame, jouent maintenant, un rôle qui n'est guère moins important que celui des combattants. Ceci se manifeste notamment lors des interventions de mouvements de résistance ou d'autodéfense[253], dont les structures sont constituées en dehors de tout contrôle d'une armée classique et la participation des civils à la résistance devient une réalité difficile à gérer du fait du caractère différé de certaine de ses opérations. Cette mutation des acteurs des conflits armés non internationaux contemporains a pour conséquence de rendre plus difficile la distinction entre **civils** et **combattants** dans la mesure où les personnes civiles qui participent à ce type de conflit ne portent ni uniformes, ni autres signes distinctifs pouvant permettre leur distinction. D'ailleurs, la présence simultanée des membres des forces armés avec la population civile peut rendre certaines situations plus complexes. A cet égard, l'article 50 par. 3 du Protocole I prévoit que la présence au sein de la population civile des membres des forces armées ou des personnes isolées ne répondant pas à la définition de personne civile, ne prive pas cette population de sa qualité et de son immunité contre les attaques[254].

Dans le cas d'espèce, les éléments de preuve ne permettent pas de déterminer quel était le degré de participation des victimes civiles. Si, au regard des témoignages, la **participation directe** de certains civils armés pourrait être mise en cause du fait de leur intervention au sein de combats, de la nuisance des armes qu'ils portaient et du lien directe avec les belligérants présents dans la colonne[255], il reste à savoir quelle est la situation des civils qui étaient présents dans la colonne mais qui ne portaient pas d'armes. Peuvent-ils être considérés comme ayant une participation directe aux

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directes. Voir, CPI, Chambre préliminaire I, décision du 29 janvier 2007, *Thomas Lubanga Dylo*, ICC-01/04-01/06, par.262.

[251] Quant au résultat immédiat des opérations militaires, Jean MIRIMANOFF-CHILIKINE, considère qu'il convient de relativiser la question de l'immédiateté du résultat de l'acte de participation *« car il y a des circonstances ou le résultat dommageable de l'acte de participation est différé »*.

[252] Arrêt *Strugar*, par. 178.

[253] Par exemple, la deuxième guerre du Golfe (2003) qui a aboutit à l'occupation du territoire Irakien par les troupes américaines, à connu l'apparition des mouvements de résistance armée contre cette occupation. Le plus célèbre est « l'armée du Mehdi » de Moqtadar Al-Sadr basé à Sadr City situé au Nord-Est de Bagdad. Avant l'occupation américaine le conflit s'était déroulé entre l'armée régulière Irakienne et les troupes de la coalition anglo-américaine. En l'espèce, il était important de séparer le conflit interétatique des hostilités liées à l'occupation du territoire.

[254] Jugement, *Kupreskic et consorts*, par. 513.

[255] Cela étant, le civil qui prend part au combat, isolément ou en groupe, devient par là même une cible licite, mais seulement pour le temps où il participe aux hostilités, Arrêt *D. Milošević*, par. 57 ; Arrêt *Strugar*, par.174 et par.179.

hostilités du fait de sa seule présence à côte de forces armés?[256] Peuvent-ils être considérés comme des cibles légitimes et leur mort pourrait être elle le résultat des dommages collatéraux ?

Au regard du DIH, la protection de la population civile doit en tout temps faire l'objet du principe de distinction entre civils et combattants. De ce fait, les opérations ne doivent être dirigées que contre des objectifs militaires[257], en accord avec le principe de précaution[258] et cela afin d'éviter des pertes ou des dommages qui seraient excessifs par rapport à l'avantage militaire attendu[259] . L'interdiction de diriger des attaques contre la population civile est un principe fondamental du droit international coutumier ; des victimes civils ne peuvent être considérées comme légitimes que si elles sont *accidentelles* aux opérations militaires et à condition que le nombre de ces victimes ne soit pas disproportionné par rapport à l'avantage militaire concret et direct attendu de l'attaque[260].

Dans cette situation particulière, nous sommes *a priori* en présence de milliers des morts du côté de l'ABiH et des dizaines de mort de la part de la VRS, de ce fait le **degré de proportionnalité** semble être dépassé au mépris du principe de précaution. Toutefois, les divers degrés de participation de civils aux hostilités posent un certain nombre de problèmes d'ordre pratique, dont l'un des principaux est celui du doute quant à l'identité de l'adversaire. Ainsi, lorsque les combats ont lieu la nuit, dans une forêt ou face à des mauvaises conditions climatiques, les forces armées sont confrontées à de sérieuses difficultés afin de garantir le respect du principe de distinction entre civils et combattants. Dans la présente affaire, la difficulté, pour les forces de la VRS, consistait à établir de manière fiable une distinction entre trois catégories de personnes : les membres de forces armées de l'ABiH, les civils participant directement aux hostilités, de manière spontanée, sporadique ou non organisée et les civils qui pouvaient, ou non, apporter leur soutien à l'adversaire mais qui, au moment considéré, ne participent pas **directement** aux hostilités. Face à une telle situation, le DIH considère que lorsqu'il existe de doute sur la qualité d'une personne, celle-ci dot être considérée comme civile. Le CICR dans ses commentaires de l'article 50 du Protocole I précise que s' *« il s'agit de personnes qui n'ont pas pratiqué d'actes d'hostilité, mais dont la qualité paraît*

[256] Dans l'Arrêt *Strugar*, la Chambre d'appel considère à titre d'exemple, comme étant une participation indirecte aux hostilités le fait de prendre part à l'effort de guerre ou à l'effort militaire pour le compte de l'un des belligérants, de lui vendre des biens, d'exprimer sa sympathie pour sa cause, de ne pas empêcher son incursion, d'accompagner ses forces et de lui fournir des vivres, de recueillir pour lui des renseignements militaires et de les lui transmettre, de transporter à son intention des armes et des munitions et des ravitaillements, et de donner un avis d'expert sur la formation de son personnel militaire, son entraînement ou l'entretien correct des armes. Arrêt *Strugar*, par. 177.
[257] Article 48 du Protocole I et de l'article 13 par. 2 du Protocole II ; Arrêt *Galić*, par. 190 ; Arrêt *D. Milošević*, par. 53 ; Arrêt *Galić*, par.190 ; Arrêt *Kordic et Cerkez*, par. 54.
[258] Protocole additionnel I, article 57.
[259] Protocole additionnel I, article 51, par. 5 b).
[260] Arrêt *Boškoski et Tarčulovski*, par. 46 ; Arrêt *D. Milošević*, par.53 ; Arrêt *Galić*, par.190 ; Arrêt *Strugar*, par.179.

douteuse, en raison des circonstances. Il faudra les considérer, jusqu'à plus ample informé, comme civiles et s'abstenir donc de les attaquer».

Selon cette approche, en agissant de manière indifférente aux conséquences de l'attaque[261], les forces de la VRS n'ont pas pris les mesures nécessaires afin d'éviter que des personnes protégés soient prise pour de cibles militaire, toutefois, les preuves ne permettent pas d'établir de manière concluante le statut des victimes. Il résulte ainsi qu'à partir des éléments de preuve, **il est impossible d'établir au delà de tout doute raisonnable l'identité et les circonstances exactes de meurtre de personnes décédées dans la colonne suites aux attaques des forces serbes**[262]. De ce fait, la responsabilité de l'Accusé pour les meurtres commis à l'encontre des **civils,** ne participant pas directement aux hostilités, ne peut pas être engagée au regard de l'article 3 du Statut qui qualifie ces crimes comme étant des crimes de guerre.

J'estime qu'il aurait fallu être plus rigoureux sur cette question en distinguant parmi les tués, les personnes qui sont décédées lors des combats (militaires et civils ayant une participation active) des civils qui ont été victimes des exécutions sommaires. A partir de cette liste, il fallait pour chaque victime déterminer les circonstances exactes de leur décès.

La Chambre de première instance dans son jugement, aux paragraphes 689 et suivants, rappelle le droit applicable en la matière des paragraphes 689 à 697. Si je suis entièrement d'accord avec son analyse juridique, en revanche je constate une contradiction aveuglante concernant **les personnes hors de combat**. La Chambre de première instance indique au paragraphe 695 du jugement, en se fondant sur les arrêts ***Martić et Galić***, que ces personnes ne sont pas considérées comme des civils[263], alors même qu'au paragraphe 697 en se référant aux arrêts ***Mrkšić et Martić*** la Chambre d'appel a conclu qu'*« en vertu de l'article 5 du Statut, une personne hors de combat peut donc être victime d'un acte constituant un crime contre l'humanité, dès lors que toutes les autres conditions requises sont remplies, notamment que l'acte en question s'inscrit dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile, quelle qu'elle soit »*[264].

[261] Arrêt *Strugar*, par. 270 se référant au Commentaire des Protocoles additionnels, Protocole additionnel I, par. 3474, où l'intention est définie de la manière suivante : « [L]'auteur doit avoir agi avec conscience et volonté, c'est-à-dire en se représentant son acte et ses résultats et en les voulant ("intention criminelle" ou "dol pénal") ; cela englobe la notion de "dol éventuel", soit l'attitude d'un auteur qui, sans être certain de la survenance du résultat, l'accepte au cas où il se produirait ; n'est pas couverte, en revanche, l'imprudence ou l'imprévoyance, c'est-à-dire le cas où l'auteur agit sans se rendre compte de son acte ou de ses conséquences. »
[262] Arrêt *Kvočka et al*., par. 260 se référant au Jugement *Krnojelac*, par. 326-327 et au Jugement *Tadić*, par. 240.
[263] Arrêt *Martić* par.302 et Arrêt *Galić* par.144.
[264] Arrêts *Mrkšić* par.36, Arrêt *Martić* par. 313.

Cette contradiction mérite à mon sens un éclaircissement sur la protection offerte à la « population civile ». En effet, si la protection accordée par l'article 3 commun aux quatre conventions de Genève vaut en principe en toute période et au regard de toute personne combattant ou civile sans discrimination, les combattants y compris les membres des groupes armés ne jouissent de cette protection qu'à condition d'avoir déposé les armes ou être mis hors de combats. Pour toutes les personnes n'ayant pas le statut de combattant c'est le critère de la **« participation directe** » qui est applicable ». De ce fait, les hommes en age de combattre ayant une participation directe aux hostilités n'étaient pas susceptible de bénéficier d'une telle protection durant toute la période de sa participation[265].

La Chambre de première instance dans ses conclusions aux paragraphes 701 et suivants, à la majorité, la Juge Nyambe étant dissidente, a abouti à la conclusion selon laquelle l'attaque était généralisée et qu'elle visait la population civile en se fondant sur la directive n°7 qui visait, selon elle, expressément les populations civiles protégées. De ce fait, comme elle l'a indiqué au paragraphe 710, la Chambre de première instance concluait que c'était une attaque principalement dirigée contre les populations musulmanes des enclaves de Srebrenica et de Žepa. Je ne partage absolument pas cette conclusion car l'examen des directives 7 et 7.1 qui rappelle que la population doit être protégée ne visait pas la population civile mais s'inscrivait dans le cadre d'une opération militaire légitime qui avait plusieurs buts : faire cesser les attaques de l'ABiH à partir des enclaves ; créer entre les deux enclaves un corridor contrôlé par la VRS ; aboutir à la reconnaissance de la Communauté internationale d'une discontinuité territoriale de la Republika Srpska sans enclaves.

Certes, il était bien évident que la capture militaire des deux enclaves devait avoir une conséquence à l'égard de la population civile mais comme en témoignent les documents, les réunions à l'hôtel Fontana conduites par le **général Mladić**, les populations civiles avaient le choix de rester ou de partir. Au-delà de cet aspect, j'estime par ailleurs, que les populations civiles de ces deux enclaves n'avaient en tête que le but de quitter ces enclaves car pour les uns ils voulaient regagner soit leur localité d'origine soit, aller vers les zones contrôlés par l'armée de Bosnie, voire, comme on a pu le voir pour l'enclave de Žepa, aller en Serbie. **En conclusion, il n'y a pas eu de transfert forcé et le moyen de l'appelant devait être admis**.

[265] Dans le cadre des documents admis, il est mentionné par les forces en présence (ABiH ou VRS) les termes les hommes en âge de porter des armes âgés de 18 à 60 ans. En examinant les éléments de preuve avec soin, j'ai pu constater que certains d'entre eux étaient mêlés à l'effectif militaire (D00055). Toutefois, nous ne connaissons pas le nombre exact d'entre eux qui se sont intégrés dans la colonne qui fuyait **Srebrenica** et qui avait été constituée par la 28ème brigade de l'ABiH.

B. GENOCIDE

Concernant le **génocide,** je ne peux pas souscrire à la thèse de l'Accusation qui, comme toute accusation, est censée être unique et lorsqu'elle s'exprime dans une affaire, sa voix se répercute également de façon automatique dans les autres affaires[266].

Ainsi, sur ce plan, le Substitut du procureur, **M. Nice,** avait dit le 12 février 2002 dans le procès de **Slobodan Milošević** que, « le génocide était la naturelle et future conséquence de l'entreprise criminelle commune de transfert forcé des non serbes de leur territoire sous contrôle »[267]. Sur cette affirmation, il convient de noter comme je le démontrerai ultérieurement, que l'Accusation fait un amalgame entre le transfert forcé (résultant d'une ECC) et le génocide.

En réalité, le point de vue de l'Accusation rappelé dans toutes les affaires du TPIY est à nuancer au cas par cas et élément de preuve par élément de preuve. Je suis conduit à me ranger à l'idée qu'il y a eu un « génocide » mais pas celui déterminé par les propos approximatifs de l'Accusation qui ne tient pas compte du statut réel des personnes appartenant au groupe protégé des musulmans rassemblés à Srebrenica. En effet, plusieurs composantes de ce groupe ont été tués de manière quasi systématique et ce, en plusieurs endroits, dans un laps de temps de quelques jours et sous les yeux de la Communauté internationale[268].

[266] Voir l'Acte d'accusation établit dans l'affaire *Tolimir* en date du 28 août 2006 et la partie consacrée au Chef n°1 : *Génocide*, pp. 4-17.
[267] *Le Procureur c. Slobodan Milošević*, affaire n°IT-02-54-T, Audience du 12 février 2002, CRA., p. 92 (le texte original se lit comme suit : « (…) genocide was the natural and foreseeable consequence of the joint criminal enterprise forcibly and permanently to remove non-Serbs from the territory under control ».
[268] Représente par l'UNPROFOR, le HCR, les ONG et les médias (CNN notamment) ainsi que des membres des unités militaires qui avaient toutes, en théorie, comme Chef militaire le Général Mladić et comme Commandant suprême Radovan Karadžić.

1. La notion de groupe protégé (Moyen d'appel n° 8)

L'article 4 du Statut du TPIY donne une définition du **crime de génocide** similaire à celle donnée par l'article III de la Convention sur le génocide consistant en un certain nombre d'actes visés commis dans l'intention de détruire, en tout ou en partie, un groupe «nationale, ethnique, raciale ou religieuse, comme tel »[269]. De ce fait, **l'identification des victimes** appartenant au groupe protégé est une des composantes nécessaires permettant de caractériser le crime de génocide.

Il est important de constater que lorsque la **Convention sur le génocide** protège le groupe en partie, elle protège en réalité, le groupe dans son intégralité. De ce fait, reconnaître qu'une fraction d'un groupe est distincte sur la base de sa localisation géographique diminuerait l'efficacité de la protection dont bénéficie le groupe dans son ensemble. Comme l'a souligné la Chambre de première instance du TPIR dans plusieurs affaires, «la victime du crime de génocide est le groupe lui-même et non seulement l'individu »[270].

En ce sens, les preuves présentées au procès indiquent très clairement que les plus hautes autorités politiques et les forces serbes de Bosnie opérant à **Srebrenica** en juillet 1995 considéraient les Musulmans de Bosnie comme un groupe national tout entier. En effet, aucune caractéristique nationale, ethnique, raciale ou religieuse ou aucun critère de localisation géographique ne permet de distinguer les Musulmans de Bosnie habitant à Srebrenica lors de l'offensive de 1995 des « autres » Musulmans de Bosnie. Sur ce point, je suis **en désaccord** avec la conclusion de la chambre de première instance dans l'affaire *Krstić* qui considère que : «*l'intention de détruire un groupe, fût-ce en partie, implique la volonté de détruire une fraction distincte du groupe, et non une multitude d'individus isolés appartenant au groupe*»[271]. En réalité, cette interprétation va bien au delà de la signification stricte du groupe protégé contenue à l'article 2 de la Convention sur le génocide. Par ailleurs, il serait malaisé de suivre un tel raisonnement dans la mesure où dans ce cas les Musulmans de Bosnie vivant à Srebrenica constitueraient une fraction distincte par rapport aux Musulmans de Bosnie dans leur ensemble. Or, au regard de la Convention, un groupe national, ethnique ou religieux n'est pas une entité composée de fractions distinctes mais une **entité distincte en soi.**

En revanche, j'adhère au raisonnement de la chambre de première instance *Krstić* quant au fait que la population musulmane de Bosnie-Herzégovine de l'Est constituait une partie substantielle du

[269] Voir, article 2 de la Convention sur le génocide, et article 4 du Statut du Tribunal.
[270] Jugement *Akayesu*, par. 521. Voir aussi Arrêt *Niyitegeka*, par. 53.

groupe protégé[272]. A cet égard, il est important de relever qu'au titre de l'article II de la Convention sur le génocide, la partie visée doit être suffisamment importante pour que sa disparition ait des effets sur le groupe tout entier[273]. La **Cour internationale de justice (« CIJ »)** relève d'ailleurs qu'il est largement admis qu'il puisse être conclu à l'existence d'un génocide lorsque l'intention est de détruire le groupe au sein d'une zone géographique précise[274]. Sur ce point, je rejoins le raisonnement de la Chambre de première instance quant au fait que l' *«enclave de Srebrenica était d'une immense importance stratégique»*[275]. De ce fait, malgré le nombre relatif de personnes musulmanes présentes dans cette zone géographique par rapport à l'ensemble de la population musulmane de Bosnie, il n'en demeure pas moins que cette partie pouvait être considérée comme représentative d'une partie substantielle du groupe à l'intérieur de cette zone.

En effet, concernant l'importance numérique de la fraction visée, aucun nombre minimal de victimes n'est requis[276], la partie du groupe visée doit être «suffisamment importante pour que l'ensemble du groupe soit affecté» [277]. Toutefois, même si le nombre de personnes visées, considéré dans l'absolu, est pertinent pour déterminer si la partie du groupe est substantielle, il n'est pas déterminant» [278]. A cet égard, la Chambre de première instance, dans l'affaire ***Jelisić,*** a conclu, à juste titre, que l'intention génocidaire pouvait consister à vouloir l'extermination d'un nombre très élevé de membres du groupe, et elle peut aussi consister à rechercher la destruction d'un nombre plus limité de personnes, celles-ci étant sélectionnées en raison de l'impact qu'aurait leur disparition sur la survie du groupe comme tel[279].

Force est de constater que dans le cas d'espèce, la chambre de première instance a procédé à une sorte de sous -division du groupe protégé des musulmans de Bosnie[280]. En effet, la chambre a jugé que l'intention de détruire les hommes en âge de porter les armes à l'intérieur du groupe signifiait une intention de détruire une partie substantielle de ce groupe, du point de vue non seulement *quantitatif*[281], mais également *qualitatif*[282]. Cette sous division de la partie du groupe en sous-

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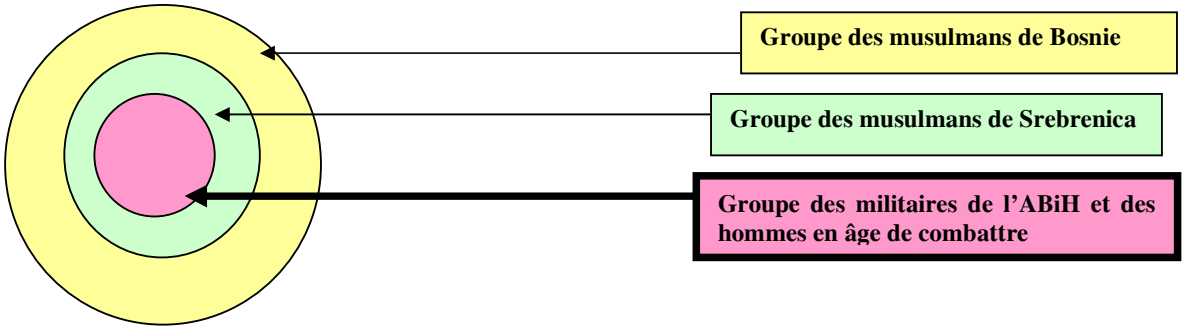
[271] Jugement *Krstić* par. 559, cité dans l'Arrêt *Krstić* par. 6-15.
[272] Jugement par. 749. Voir aussi, Arrêt *Krstić* par.12.
[273] Jugement, par.749, Arrêt *Krstić*, par. 8.
[274] La Cour internationale de justice dans son arrêt du 26 février 2007 s'était prononcée dans ce sens au § 193.
[275] Jugement par.775. Voir également Jugement *Popović et al*, par. 865, cité dans l'Arrêt *Krstić* par.15-16.
[276] Jugement *Semanza*, par. 316 ; Jugement *Kajelijeli*, par. 809.
[277] Arrêt *Krstić*, par. 8.
[278] Arrêt *Krstić*, par.12
[279] Arrêt *Krstić*, par. 8.
[280] La Chambre de première instance au paragraphe 750 du jugement évoque la question du « groupe protégé » en indiquant à la note de bas de page 3141 que des jugements ont été rendus sur la question (arrêts *Krstić*, jugement *Blagojević*, jugement *Popović et al.*). La question de savoir si les musulmans de Bosnie centrale constituent une partie substantielle du **groupe protégé** est examinée aux paragraphes 774 et 775 du jugement.
[281] Jugement, *Krstić*, par. 594.
[282] Jugement, *Krstić*, par. 595.

groupes semble être fondée sur un triple critère, à savoir le sexe des victimes (uniquement des hommes), leur âge (seulement ou principalement ceux en âge de porter les armes) et leur origine géographique (Srebrenica et ses environs)[283]. D'ailleurs, une telle sous division ne reviendrait pas à vouloir « *détruire une partie substantielle d'une partie substantielle du groupe*»[284], recouvrant ainsi seulement les hommes musulmans de Srebrenica en âge de combattre et physiquement capables de le faire. Ce qui voudrait dire, qu'il y aurait alors un **« sous-groupe »** constitué par les militaires de l'ABiH et les hommes en âge de combattre. Le schéma suivant permet d'avoir une vue exacte du groupe protégé concerné :



J'estime que cette question devait être replacée dans un cadre beaucoup plus large, regroupant les différentes localités de la Bosnie-Herzégovine, dont **Srebrenica**. Ceci aurait permis à un juge raisonnable de considérer **la totalité** des victimes dont le témoignage a servi à la constitution de tous les actes d'accusation afin de bien déterminer cette notion de « groupe protégé ». S'il y a avait eu comme à Nuremberg **un seul procès** réunissant Slobodan Milosevic, Radovan Karadžić, Ratko Mladić, Zdravko Tolimir et les autres accusés, la juridiction qui aurait été saisie l'aurait été de l'ensemble des victimes. Malheureusement, le « saucissonnage » des affaires n'a pas permis d'avoir **cette vision d'ensemble** : la limitation de cette question aux enclaves de **Srebrenica** et de **Žepa** a fait naître des controverses qui se retrouvent amplement dans les écritures de l'appelant.

Dans ses écritures, l'Accusé soutient, sur la base de l'article 23 du Statut, que la Chambre de première instance a commis une erreur de droit en omettant de fournir un **avis motivé** sur les critères de détermination du groupe protégé[285], il considère d'ailleurs qu'au regard de l'article 4 du Statut, la Chambre aurait dû établir les éléments sur lesquels elle s'est fondée pour déterminer que les Musulmans de Bosnie de l'Est étaient des groupes ethniques distincts et elle aurait dû également

[283] G. Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, 2005, p. 222.
[284] C. Tournaye, "Genocidal Intent before the ICTY", *International and Comparative Law Quarterly*, Vol. 52, April 2003, p. 459.

bien déterminer les motifs qui lui ont permis de conclure au fait que la population musulmane de Bosnie-Herzégovine de l'Est était considérée comme étant une partie substantielle du groupe[286]. L'appelant affirme que la Chambre de première instance a mal interprété les constatations faites dans d'autres affaires, sans prendre connaissance des éléments de preuve les corroborant[287]. Selon l'appelant, l'identification du groupe protégé en vertu de l'article 4 du Statut est un fait qui doit être établi au cas par cas sur la base des éléments de preuve présentés dans l'affaire[288].

A cet égard, bien que je ne partage pas le point de vue de la chambre de première instance quant à ses conclusions et à son raisonnement sur la notion de « groupe distinct »[289], je considère toutefois, au même titre que la **Chambre d'appel**[290], que **rien** dans le Statut, le Règlement ou la jurisprudence antérieure du Tribunal n'empêche la Chambre de première instance de se référer aux constatations faites dans d'autres affaires impliquant des faits similaires en vue de renforcer ses conclusions concernant l'identification du groupe protégé et ce qui peut constituer une partie substantielle du groupe protégé dans ce cas[291].

Pour ses raisons, je considère que l'appelant ne démontre pas que la Chambre de première instance ait omis de fournir un **avis motivé** à ce sujet ou pour établir un élément nécessaire du crime de génocide. En conclusion, et malgré mes réserves, j'estime que le moyen n°8 doit être rejeté[292].

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[285] Voir, Notice d'appel, par. 39-40 ; Mémoire d'appel, paras 83-85, 87-88.
[286] Voir Notice d'appel, par. 39; Mémoire d'appel, par. 83-85, 87-88. Voir notice d'appel, par. 40.
[287] Mémoire d'appel, par. 83, 85. Voir Notice d'appel, par. 39.
[288] Mémoire d'appel, par. 83, 85-87.
[289] La Chambre *Tolimir* va appliquer le raisonnement suivi à la population plus large visée dans l'acte d'accusation à savoir la population musulmane de la Bosnie orientale notamment des enclaves de Srebrenica, de Zepa et Goradze. A cet égard, je tiens néanmoins à préciser que le nombre de disparus ou tués constatés par la Chambre *Tolimir* de 5749 rapporté à la population totale musulmane de la Bosnie Herzégovine est relativement **faible** mais que rapporté à la population de la municipalité de Srebrenica 5749/35000 est très important.
[290] Arrêt *Tolimir*, par. 185.
[291] Voir en ce sens, Jugement, par. 750 (adopting the Prosecution's definition of "the targeted group that is the subject of the charges in the Indictment as the 'Muslim population of Eastern Bosnia', as constituting 'part' of the Bosnian Muslim people" (Cité dans l'acte d'accusation, par. 10 et 24, et Mémoire final, par. 197). Voir aussi, Jugement, par. 730.
[292] Arrêt *Tolimir*, par. 188-189.

2. L'Atteinte grave à l'intégrité physique ou mentale de membres du groupe (Moyens d'appel n°7 et n°10)

L'article 4 2) b) du Statut reprend la définition de l'article II de la Convention sur le génocide en établissant comme **acte sous-jacent** tout **acte** ou **omission intentionnel** qui porte une atteinte grave à l'intégrité physique ou mentale de membres du groupe visé. Bien que l'« atteinte grave à l'intégrité physique ou mentale » ne soit pas définie dans le Statut du tribunal, cette expression peut s'entendre selon plusieurs jugements comme actes de torture, de traitements inhumains ou dégradants, de violences sexuelles, y compris les viols, de violences, de menaces de mort, et d'actes portant atteinte à la santé ou se traduisant par une défiguration ou des blessures graves infligées à des membres du groupe[293], étant précisé que cette énumération n'est pas exhaustive.

A cet égard, il est établi, que ces atteintes doivent comporter à la fois les « actes en question » et « l'intention spécifique (*dolus specialis)*» de commettre ses actes dans le but de détruire, en tout ou en partie le groupe protégé. Ce qui veut dire, qu'il ne suffit pas que ces actes aient été commis au regard des membres du groupe en raison de leur appartenance, mais il faut encore que ces actes soient accomplis dans **l'intention de détruire**, en tout ou en partie, le groupe comme tel[294]. Cette question s'est posée notamment dans **l'affaire *Krstić*** où la chambre de première instance s'est déclarée «convaincue (…) que les meurtres et les atteintes graves à l'intégrité physique ou mentale [avaient] été perpétrés avec l'intention de tuer tous les hommes musulmans de Bosnie présents à Srebrenica qui étaient en âge de porter les armes» [295].

Il aurait été hautement souhaitable que la chambre de première instance et la chambre d'appel fassent une distinction lors de leur analyse, entre les hommes musulmans de Bosnie qui ont été tués de ceux qui ont survécus. En effet, l'atteinte à l'intégrité physique ou mentale de ces hommes ne devrait pas être abordée de la même manière dans les deux cas. En faisant une assimilation systématique des souffrances endurées par les hommes avant d'être tués avec celles de survivants, la Chambre de première instance considère le préjudice subi par les victimes avant leur décès comme un ***actus reus*** séparée de génocide, ce qui à mon sens manque de cohérence. Pour faire cette distinction, encore aurait-il fallu que les Chambres prennent leur temps et examinent la situation des victimes **cas par cas.**

[293] Jugement *Brđanin*, par. 690. Voir aussi Jugement *Blagojević*, par. 645 ; Jugement *Gatete*, par. 584.
[294] Voir sur ce point, CIJ, *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro*, arrêt 2007, par. 187.

Rien dans le Statut du TPIY ni dans la Convention sur le génocide n'empêche une chambre de première instance de considérer **le préjudice** subi par la victime avant son décès comme un *actus reus* séparé de génocide[296], ce silence, loin de venir conforter le point de vue de la chambre, répond en réalité à un souci de cohérence. Sur ce point, il important de mettre en valeur le fait que l'interprétation de la Convention sur le génocide doit s'effectuer de bonne foi à la lumière de l'objet et du but de cet instrument[297]. Si, comme l'affirme la Chambre d'appel, l'analyse de la Chambre de première instance répond à un devoir d'identifier toutes les implications juridiques de la preuve présentée[298], il aurait été souhaitable que cette analyse trouve toute sa pertinence.

Si l'on suit le raisonnement de la chambre d'appel : les personnes qui ont été tuées, ont été **en même temps** victimes d'une atteinte grave à leur intégrité physique et mentale dans les moments précédents leur mort. Ces souffrances, que je ne mets pas en cause, ne font pas à mon point vue ressortir une quelque forme de séparation dans l'*actus reus* du crime génocide, elles mettent en réalité en évidence la gravité du crime commis au sens de l'article 4, 2 a) qui se réfère aux actes de meurtre des membres du groupe et elles font ressortir également la commission d'autres crimes, par des actes de torture. Au-delà de mon propre positionnement, si on veut suivre le raisonnement de la chambre d'appel, il faudrait encore s'accorder avec la jurisprudence du tribunal qui demande d'apporter la preuve que les actes commis ont produit un tel résultat[299]. Ceci me semble encore plus compliqué sauf à vouloir déduire les conséquences et les effets de ces actes vis-à-vis des personnes décédées…

Si j'ai des fortes réserves à considérer les souffrances endurées par les victimes dans les moments précédents à leur mort, comme étant un *actus reus* séparé du génocide, en revanche, il ne fait aucun doute pour moi que les souffrances des survivants, qui ont échappé à une mort imminente doivent être prise en compte séparément. En effet, ces personnes qui ont été victimes des souffrances extrêmes dans le secteur de Potočari et dans les lieux de détention de Bratunac et de Zvornik[300], ont souffert d'une atteinte grave à leur intégrité physique et mentale, avec des conséquences durables dans leur vie[301]. Sur cet aspect, je considère que ces actes rentrent dans le cadre des actes sous-jacents de génocide. En effet, ces atteintes ont pu être menées avec **l'intention spécifique** de

[295] Jugement *Krstić*, par. 546.
[296] Arrêt *Tolimir*, par. 206.
[297] Voir en ce sens, l'article 38 de la Convention de Vienne sur le droit des traités. Voir également, CIJ, Avis consultatif du 28 mai 1951, p.23.
[298] Arrêt par 205 ; Arrêt, *Knojelac*, par. 172; Arrêt, *Rutaganda* par. 580.
[299] Jugement *Brđanin*, par. 688 ; Jugement *Stakić*, par. 514. Voir aussi Jugement *Popović et al.*, par. 811.
[300] Jugement *Tolimir*, par. 864.
[301] Jugement *Tolimir*, par.755.

contribuer à la destruction du groupe ou d'une partie de celui-ci. Les souffrances subies par ces personnes les ont empêchées de mener une vie normale et fructueuse[302].

En ce qui concerne les femmes, les enfants et les personnes âgées séparées des membres masculins de leur famille et « transférés » de **Srebrenica** vers **Tuzla**, il convient d'analyser la situation de manière différenciée afin de bien déterminer l'atteinte physique et mentale dont ils auraient pu être victimes. Lors de l'analyse du moyen n°6, j'ai eu l'occasion de développer cet aspect en précisant que les éléments de preuve ne permettaient pas de caractériser ces actes comme relevant du **transfert forcé.** De mon point de vue, ni l'intention, ni le caractère forcé du déplacement ne sont présents dans le cadre des événements qui se sont produits successivement à **Srebrenica** et à **Potočari.**

Toutefois, bien que je ne sois pas d'accord avec la qualification faite par la majorité du déplacement volontaire de ces personnes, je suis d'avis que la séparation des membres masculins de leur famille a dû certainement causé des souffrances et une détresse émotionnelle importante pour ces personnes. A cet égard, je considère que les souffrances subies par ces hommes, femmes, personnes âgées et enfants dues à la séparation ont pu avoir des répercussions non négligeables sur leur qualité de vie, du fait même qu'ils n'ont pas été en mesure d'assimiler ce qui s'était passé durant cette période[303]. Nonobstant, à la différence de la Chambre de première instance et de la Chambre d'appel, je considère que ces souffrances, qui constituent certes des atteintes graves à l'intégrité de ces personnes, ne sont pas constitutives des actes sous-jacents du crime de génocide. En effet, les éléments de preuve ne permettent pas d'établir de manière concluante, au delà de tout doute raisonnable, que ces atteintes ont été commises avec l'intention spécifique *(dolus specialis)* de détruire le groupe protégé, en tout ou en partie[304].

Au regard de la situation de Žepa, si je ne partage pas le raisonnement de la chambre d'appel, en raison de l'absence d'éléments constitutifs du transfert forcé, en revanche, je considère au même titre que cette dernière que le déplacement de la population de cette localité s'était réalisé dans des circonstances qui ne relèvent pas d'un préjudice mental du fait qu'aucune preuve d'un traumatisme psychologique à long terme a été évoqué dans le jugement de première instance[305].

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[302] Arrêt *Tolimir*, par. 207; Jugement *Tolimir*, par.755.
[303] Jugement *Tolimir*, par.757.
[304] De mon point de vue, ces atteintes auraient pu être qualifiées au sens de l'article 5 du Statut qui sanctionne les actes inhumains dans le cadre des crimes contre l'humanité.
[305] Arrêt *Tolimir*, par. 221. En effet, la Chambre de première instance ne fait état d'aucune preuve établissant un quelconque préjudice moral subi par ce groupe qui pourrait être considéré comme une forme de contribution à la destruction des Musulmans de Bosnie-Herzégovine de l'Est en tant que telle. Je tiens à dire par ailleurs que je ne partage pas le raisonnement développé par la Chambre d'appel au §217 concernant la constitution du groupe protégé.

3. La soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique (Moyen d'appel n°10 en partie)

En ce qui concerne les actes contenus à l'article 4 par. 2 c) du Statut consistant à soumettre les intéressés à des conditions d'existence devant entraîner leur destruction physique totale ou partielle, ces actes doivent avoir été accomplis de manière «intentionnelle », par la soumission du groupe à des conditions «devant» entraîner sa destruction, et «délibérés », par des mesures bien précises.

Afin de démontrer l'existence des tels actes, la Chambre de première instance a estimé que **la seule conclusion raisonnable** à tirer de la preuve, est que les conditions résultant de **l'effet combiné** des opérations de mise à mort et de transfert forcé des femmes et enfant ont été délibérément infligées, et calculées pour conduire à la destruction physique de la population musulmane de Bosnie de l'Est Bosnie-Herzégovine "[306].Si l'article 4 par. 2 e) du Statut prévoit que le transfert forcé d'enfants du groupe à un autre groupe est susceptible de constituer un acte sous-jacent de génocide tant qu'il soit commis avec l'intention de détruire en tout ou en partie un groupe comme tel, il faut encore que ces actes relèvent d'un **caractère forcé** et qu'il ne s'agisse pas d'un déplacement volontaire de la population. D'ailleurs, l'article 4 §2 se réfère uniquement au transfert forcé d'enfants et ne considère pas le transfert forcé des femmes ni des personnes âgées comme étant des actes sous-jacents de génocide[307].

En l'espèce, il apparaît que la Chambre de première instance afin de déterminer la destruction physique de la population musulmane de Bosnie de l'Est Bosnie-Herzégovine se réfère au transfert forcé de manière globale au regard des femmes, enfants et personnes âgées, en abordant la question de manière combinée avec les actes de meurtre. A cet égard, il est important de préciser que, contrairement aux actes de meurtre, les actes de transfert forcé s'accompagnent non pas d'une réelle destruction, mais d'un grave dommage physique ou mental pour certains avec un effet différé dans le temps.

Bien que la Chambre de première instance va suivre de prime bord l'interprétation stricte de la Chambre d'appel dans l'affaire ***Blagojević***, elle va nuancer son appréciation en tenant compte en même temps de l'approche plus étendue que la chambre de première instance avait tenu dans cette

[306] Jugement *Tolimir*, par. 766.
[307] Il m'apparaît que si les rédacteurs de cette article auraient voulu faire une distinction, ils auraient ajouté à l'article 4 §2 c) les mots « femmes » et « personnes âgées » ; ce qu'il n'a pas fait.

affaire[308]. De ce fait, elle aborde la question **de manière contrastée**, car elle réaffirme dans un premier temps que le déplacement d'une population n'équivaut pas à sa destruction et que le transfert forcé en lui-même n'est pas un acte génocidaire[309], tout en se montrant favorable à «une notion élargie de l'étendu de la destruction» applicable aux «actes qui ne sont pas susceptible de causer la mort»[310]. Cette interprétation, qui va **au-delà** même de l'interprétation de destruction au regard de la Convention sur le génocide, va permettre à la chambre de première instance d'interpréter le terme «destruction» contenu dans la définition du génocide, comme étant susceptible de couvrir des actes de transfert forcé de population»[311].

La Chambre d'appel, quant à elle, va écarter de son analyse les meurtres d'au moins **5 749 hommes musulmans de Bosnie** au même titre que la destruction des maisons et des mosquées musulmanes de Bosnie après la chute des deux enclaves, pour concentrer son attention sur les **actes de transfert forcé** comme étant les seuls éléments susceptibles de caractériser les conditions de l'article 4 par. 2 c)[312]. D'après la Chambre d'appel, même si les perturbations causées par les opérations de transfert forcé et l'incapacité de la communauté déplacée à se reconstituer dans une région ne répondent pas aux exigences de l'article 4 (2) en soi, ils peuvent néanmoins être pris en compte pour déterminer si ces actes ont été commis avec l'intention d'assurer la destruction physique de cette communauté[313].

En dehors de mon positionnement concernant l'absence de transfert forcé de la population, j'estime qu'en essayant d'établir **un lien juridique** entre **deux actes** de nature différente ayant des conséquences nettement distinctes, la majorité de la Chambre d'appel a fait une appréciation erronée des actes constitutifs de génocide et cela afin de déterminer l'intention de destruction physique du groupe en tant que tel. **En effet, la preuve du transfert forcé ne peut pas, à elle seule, servir de base pour déduire l'intention génocidaire, du fait que selon la conclusion tirée de la jurisprudence du propre Tribunal, le transfert forcé *«ne constitue pas en soi un acte génocidaire»***[314]. Au regard de la **Convention sur le génocide,** les éléments factuels permettant de déduire l'intention génocidaire devraient, en principe, consister en des **actes matériels** susceptibles de produire des effets génocidaires et doivent être clairement distingués des actes visant la simple

[308] Jugement *Tolimir*, par. 764-765.
[309] Jugement *Tolimir*, par. 765. Voir en ce sens, Arrêt *Blagojević´*, par. 123 ; Arrêt *Krstić*, par. 33 ;CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 190.
[310] Jugement *Tolimir*, par. 765. Voir en ce sens, Jugement, *Blagojević*, par. 662.
[311] Jugement *Tolimir*, par. 766. Voir en ce sens, Jugement, *Blagojević*, par. 665.
[312] Arrêt *Tolimir* par.227, Jugement *Tolimir*, par. 766. Voir en ce sens, Jugement, *Popović et al.* par.854.
[313] Arrêt *Tolimir* par.233. Jugement *Tolimir*, par. 766. Voir en ce sens, Jugement, *Popović et al.* par.854.
[314] Jugement, *Stakić*, par. 519 ; Arrêt. *Krstić´*, par. 33 ; Arrêt *Blagojević*, par. 123

dissolution du groupe[315]. Ainsi, les **actes matériels qui n'ont pas de tels effets, comme les actes de transfert forcé ne peuvent venir que dans une certaine mesure corroborer l'intention génocidaire mais ne doivent en aucun cas servir à prouver son existence.** Un tel raisonnement reviendrait donc à placer les actes de transfert forcé **au même niveau** que les actes sous-jacents de génocide contenus à l'article 4 2) du Statut et à l'article II de la Convention sur le génocide.

A ce titre, il est important de rappeler que si la CIJ considère que les actes de déportation ou de déplacement de membres appartenant à un groupe peuvent être qualifiés comme étant des actes relevant de l'article II c) de la Convention sur le génocide, elle précise toutefois, qu'une telle action doit être menée avec l'intention spécifique *(dolus specialis)* nécessaire, c'est-à-dire avec l'intention de détruire le groupe, et non pas seulement de l'expulser de la région[316]. A mon sens, il paraît difficile de parvenir à une explication logique des faits qui sont à la base de cette analyse. En effet, si l'intention de l'état major de la VRS était celle d'arriver à la destruction du groupe en tant que tel, il est difficile de comprendre pourquoi il aurait ordonné le déplacement de femmes, d'enfants et de personnes âgées qui se trouvaient à l'intérieur de la zone de contrôle des Serbes de Bosnie, vers d'autres régions de la Bosnie sous contrôle musulman[317]. En agissant ainsi, les membres de la VRS n'allaient-ils pas à l'encontre de leur intention de destruction du groupe en tant que tel, du fait même qu'ils mettaient cette population à l'abri de l'armée serbe ?

A cet égard, il est important de relever que s'il existe la possibilité que des actes de «nettoyage ethnique» puissent se produire en même temps que des actes prohibés par l'article II de la Convention sur le génocide, ces actes ne peuvent servir qu'à déceler l'existence d'une intention spécifique *(dolus specialis)* se trouvant à l'origine des actes en question[318]. La jurisprudence du Tribunal s'est exprimée sur la question en considérant qu'il faut faire une claire distinction entre la destruction physique et la simple dissolution d'un groupe du fait que l'expulsion d'un groupe ou d'une partie d'un groupe ne saurait à elle seule constituer un génocide[319].

Il apparaît donc évident, que la **combinaison** des actes de meurtre et de transfert forcé n'est pas une appréciation cohérente permettant d'aboutir à l'intention de détruire les Musulmans de Bosnie à

[315] Jugement *Brđanin*, par. 692 et 694 ; Jugement *Krstić*, par. 580 ; Jugement *Stakić*, par. 519. Voir aussi, CIJ *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 344.
[316] CIJ *Croatie c. Serbie*, arrêt 2015, par.162 ; CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 190. Voir aussi, Jugement, *Blagojević*, par. 666.
[317] Notice d'appel, par.164.
[318] Voir à cet égard, CIJ *Croatie c. Serbie*, arrêt 2015, par.162 ; CIJ *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 190.
[319] Jugement *Brđanin*, par. 692 et 694 ; Jugement *Krstić*, par. 580 ; Jugement *Stakić*, par. 519. Voir aussi, CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 344.

Srebrenica en tant que tels. Il me semble exagéré de vouloir se fonder uniquement sur le déplacement de femmes, d'enfants et de personnes âgées dans des zones sûres afin d'établir une intention de destruction quelconque surtout si l'on tient bien compte du contexte dans lequel ce transfert s'est réalisé.

D'ailleurs, en considérant l'effet combiné des différentes catégories d'actes génocidaires proscrits à l'article 4 (2) du Statut comme étant susceptibles de constituer l'*actus reus* de génocide[320], la Chambre de première instance a commis **une erreur de droit**. En effet, selon ce qui a été précisé par la Chambre d'appel, les actes sous-jacents contenus à l'article 4 (2) (a) et (b) ne peuvent pas être combinés afin de caractériser des conditions contenues à l'alinéa (c) du même article, car il existe une nette distinction dans la caractérisation desdits actes[321]. En effet, les alinéas (a) et (b) de l'article 4 (2) du Statut proscrivent des actes causant un résultat spécifique et les actes compris à l'alinéa (c) du même article sont censés utiliser des méthodes de destruction qui ne tuent pas immédiatement les membres du groupe. De toute évidence, cette nette distinction aurait du être prise en compte par la Chambre de première instance dans son appréciation.

A la différence des actes de destruction à long terme, comme c'est le cas des actes de soumission de la population à des conditions d'existence devant entraîner sa destruction physique totale ou partielle, les actes de meurtre visent à entraîner une **destruction rapide** voire **immédiate** des membres du groupe entraînant une mort inéluctable. Il en résulte ainsi, que **l'élément temporel** marque une différence capitale entre ces deux actes car il est à l'origine des conditions de destructions distinctes[322]. Je rejoins sur ce point le raisonnement de la Chambre d'appel quant à une analyse séparée des éléments de preuve permettant de caractériser chaque acte sous-jacent[323] et ceci afin d'éviter toute forme d'incohérence ou d'erreur d'appréciation qui irait à l'encontre des principes régissant l'application de cet article.

Si je maintiens mon positionnement personnel quant à l'analyse des fait et sur l'absence d'éléments caractérisant l'existence d'un transfert forcé quelconque, je suis toutefois en accord avec la conclusion de la Chambre d'appel qui considère **que la population musulmane de Žepa n'a pas été victime directe des actes qui auraient entraîné sa destruction physique au sens de l'article**

[320] Jugement *Tolimir*, par.765-766.
[321] Arrêt *Tolimir*, par.228-229. Jugement *Tolimir* par.741.
[322] Voir à cet égard, Jugement *Kayishema et Ruzindana* par. 548.
[323] Arrêt *Tolimir*, par. 228-229.

4, §2 c)[324]. Je considère à cet égard, que les faits qui se sont déroulés à Srebrenica et Žepa, ont des caractéristiques et des conséquences amplement distinctes qui auraient mérité une analyse séparée.

4. L'intention génocidaire des auteurs (Moyen d'appel n°7 en partie et Moyen d'appel n°11)

Il aurait été souhaitable afin d'arriver à une analyse plus cohérente des éléments constitutifs du génocide que la Chambre d'appel fasse un examen bien précis du *mens rea* par rapport à l'*actus reus*. Si dans la pratique, l'articulation des actes de génocide peut contribuer à la déduction de l'intention génocidaire, il faut encore que les éléments constitutifs d'un tel acte soient bien établis. En abordant la question de la notion du **groupe protégé** dans une partie préliminaire au lieu de la traiter dans la partie correspondante au *mens rea*, la majorité de la Chambre d'appel prive cette partie de toute sa substance. En effet, dans la partie du *mens rea*, la chambre d'appel aurait dû examiner **l'intention de détruire le groupe protégé** comme tel, afin de pouvoir déterminer si les actes appréhendés dans le cadre du génocide avaient été commis avec cette intention spécifique *dolus specialis*.

Comme je l'ai précisé auparavant, je suis en désaccord avec la majorité tant en ce qui concerne l'existence même du transfert forcé qu'au niveau de l'analyse de ces actes comme une forme de preuve de l'intention génocidaire. Le transfert forcé *« ne constitue pas en soit un acte génocidaire »*[325], en réalité, il ne peut servir qu'à corroborer l'intention génocidaire une fois qu'elle a été établie préalablement. Toutefois, pour venir corroborer cette intention spécifique, encore faut-il que les actes de transfert forcé s'effectuent dans des conditions telles qu'ils entraînent la destruction physique du groupe en tant que tel[326]. D'ailleurs, des actes susceptibles d'entraîner une telle destruction, ne se produisent que dans le cas où le transfert forcé est la conséquence directe de la commission des actes susceptibles de constituer en soit des actes de génocide[327]. C'est le cas par exemple lorsque les membres du groupe protégé sont transférés à un endroit où ils sont exposés à des conditions de vie susceptibles de conduire à leur destruction physique, comme l'esclavage, la famine ou lorsqu'ils sont objet d'une détention dans des camps de concentration. Dans le cas d'espèce, les éléments de preuve du dossier ne me permettent pas de conclure au-delà de tout doute

[324] Arrêt *Tolimir*, par. 236.
[325] Jugement, *Stakić*, par. 519 ; Arrêt. *Krstić´*, par. 33 ; Arrêt *Blagojević´*, par. 123. Voir aussi, CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 344.
[326] Voir en ce sens, CIJ, *Croatie c. Serbie*, arrêt 2015, par. 376.
[327] *Ibid.*

raisonnable à l'existence d'un transfert forcé, comme ***seule déduction raisonnable au vu des éléments de preuve***[328]**.**

En ce qui concerne la preuve de l'intention génocidaire, si par sa nature une telle intention n'est généralement pas limitée à une preuve directe[329] et elle peut être déduite d'un certain nombre de faits et de circonstances bien précises, il faut tenir compte également de la **ligne de conduite** dans laquelle s'inscrit cette **intention spécifique**. A cet égard, au même titre que la jurisprudence du Tribunal, je considère que pour déterminer une telle intention, il faut démontrer que la **seule déduction raisonnable** qui puisse être faite de la ligne de conduite est celle de l'intention de détruire, en tout ou en partie, le groupe protégé[330]. Afin de bien déterminer l'ampleur des atrocités commises, il aurait été souhaitable que la majorité de la Chambre d'appel mette en évidence **tant** le contexte général dans lequel se sont produits de tels actes, **que** le ciblage systématique des victimes en raison de leur appartenance à un groupe particulier ainsi que la récurrence d'actes destructifs et discriminatoires. Une telle analyse aurait permis de mieux comprendre la logique de destruction dans laquelle s'inscrivent les meurtres, les enterrements, les réensevelissement, les actes inhumains de détention et la destruction des documents d'identification, afin de pouvoir identifier ces actions comme facteurs révélateurs de l'intention génocidaire[331].

Si certains des actes susmentionnés rentrent dans le cadre de l'intention génocidaire, il y a d'autres faits qui ne relèvent pas d'un tel contexte. A cet égard, je me suis exprimé dans la partie concernant le transfert forcé sur le sort des hommes de la colonne, en expliquant que ce grand nombre de meurtres, que je ne remets pas en cause, ne rentrent pas dans la catégorie des actes de génocide. En effet, compte tenu de la spécificité et des circonstances propres à la composition de cette colonne, les meurtres imputés découlent en grande partie d'opérations militaires et dans certains cas, ils pourraient être rattachés à des crimes de guerre et éventuellement à des crimes contre l'humanité si la présence d'une composante essentiellement civile était constatée et établie de manière irréfutable dans la colonne.

En ce qui concerne l'analyse fait par la Chambre d'appel du meurtre opportuniste d'un homme musulman de Bosnie à **Potočari**, force est de constater que si l'examen de l'intention génocidaire peut se faire à la lumière *« d'autres actes répréhensibles systématiquement dirigés contre le même*

[328] Jugement *Tolimir*, par.745, Voir aussi, CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 373 ; CIJ, *Croatie c. Serbie*, arrêt 2015, par.148.
[329] *Karadžić* Rule 98*bis*, arrêt, par. 80.
[330] Jugement *Tolimir*, par. 745, Voir aussi, CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 373 ; CIJ, *Croatie c. Serbie*, arrêt 2015, par. 440.
[331] Arrêt *Tolimir*, par. 248.

groupe »[332], il faut en même temps tenir compte de la portée des éléments de preuve. A cet égard, la Chambre d'appel aurait du garder à l'esprit le fait que les *«"meurtres opportunistes", de par leur nature même, ne suffisent pas à établir l'intention génocidaire»*[333], ne se référant à cette preuve que d'une manière incidente sans en faire le point central de son développement. D'ailleurs, dans le cadre de l'analyse de la responsabilité de l'accusé, la chambre de première instance avait considéré qu'elle ne pouvait pas *« déterminer de manière irréfutable que ce meurtre a été perpétré après que l'Accusé est devenu membre de l'entreprise criminelle commune relative aux exécutions »*[334].

Quant à l'évaluation de la preuve, si la chambre d'appel relève à juste titre qu'un examen de tous les éléments pris dans son ensemble est susceptible d'apporter la preuve de l'intention génocidaire spécifique[335], en revanche, elle se détache de **l'élément central** qui permet d'arriver à une telle conclusion. A cet égard, la majorité de la Chambre d'appel, aurait du mettre en valeur le fait qu'une telle approche est possible **à condition** que la conclusion qui en découle soit *«la seule qui soit raisonnable au vu des éléments de preuve»*[336]. En effet, l'analyse de l'ensemble des éléments doit permettre de déduire que les actes commis étaient animés de l'intention spécifique requise.

Pour ces raisons, je considère que la majorité de la Chambre d'appel a commis une **erreur de droit** en considérant que l'opération de transfert forcé des Musulmans de Žepa satisfait aux exigences de l'*actus reus* de l'article 4 (2) (b) et (c) du Statut[337]. Ainsi, comme je l'ai indiqué auparavant, les actes qui se sont produits dans ces deux localités ne relèvent pas du transfert forcé. Plus précisément, en ce qui concerne les actes qui ont eu lieu dans la localité de Žepa, je considère qu'ils ne relèvent ni de l'*actus reus*, ni du *mes rea* en tant qu'éléments constitutifs du génocide. Afin d'éviter une mauvaise interprétation des faits, il aurait été souhaitable que la majorité de la Chambre d'appel s'attache à faire une analyse cohérente des faits en établissant une nette distinction dans l'analyse des actes qui se sont produits à **Srebrenica** et à **Žepa**.

[332] Jugement *Tolimir*, par. 748, Arrêt *Krstić*, par. 33.
[333] Arrêt *Blagojević*, par. 123.
[334] Jugement par.1141. N'y aurait-il pas eu hiatus entre la théorie de la forme 3 de l'ECC et l'intention génocidaire ? La théorie de la forme 3 de l'ECC dégagée par la jurisprudence Tadic fait reposer sur des individus des conséquences qu'ils auraient dû prévoir au moment de l'élaboration de leur plan, ceci signifie donc que ces « meurtres opportunistes » ne figuraient as dans le plan initial. Dès lors, s'ils n'y figuraient pas, il n'y avait donc pas d'intention génocidaire au départ ? A vouloir manier des concepts sans réflexion approfondie, on aboutit à des incohérences.
[335] Arrêt *Tolimir*, par. 247. Jugement *Tolimir*, par.775, Arrêt *Stakić*, par. 55. Voir aussi Jugement *Popović et al.*, par. 820.
[336] Jugement, §745, Voir aussi, CIJ, *Bosnie-Herzégovine c. Serbie et Monténégro*, arrêt 2007, par. 373 ; CIJ, *Croatie c. Serbie*, arrêt 2015, par. 440.
[337] Arrêt *Tolimir*, par. 254.

5. L'intention génocidaire concernant les meurtres de Mehmed Hajrić, Amir Imamović et Avdo Palić (Moyen d'appel n°12)

Dans le cadre de l'examen de l'intention génocidaire, la chambre de première instance a considéré que les personnes responsables des meurtres de **Mehmed Hajrić, Avdo Palić** et **Amir Imamović** ont pris ces derniers pour cibles parce qu'ils étaient des personnalités de premier plan dans l'enclave de Žepa[338]. Elle considère que ces meurtres ne devraient pas être considérés isolément, du fait que ces trois dirigeants ont été délibérément « sélectionnés pour l'impact que leur disparition pourrait avoir sur la survie du groupe en tant que telle »[339].

En ce qui me concerne, si je suis d'accord sur le fait que l'intention génocidaire peut se matérialiser tant par l'extermination d'un nombre suffisamment important de membres du groupe[340], que par la destruction d'un nombre plus limité de personnes[341], je tiens toutefois à relever, que c'est le caractère substantiel de la partie sélectionnée[342], l'élément central, qui permet de déterminer l'impact qu'aurait de telles disparitions sur la survie du groupe comme tel[343]. En effet, afin de pouvoir déterminer un tel impact, ces disparitions doivent être évaluées dans le contexte du devenir du reste du groupe[344], et sur la base d'une analyse des éléments de preuve « au cas par cas »[345].

En affirmant que les meurtres de **Hajrić, Palić** et **Imamović** étaient probablement liés aux postes occupés par ces trois dirigeants, la chambre de première instance ne tient pas compte l'ensemble des faits qui attestent que les forces serbes de Bosnie n'ont pas tué tous les dirigeants politiques et militaires. Comme l'a précisé la Juge Nyambe dans son opinion dissidente, *« Hamdija Torlak, président du comité exécutif de Žepa, a été emprisonné avec Hajrić et Imamović, mais il n'a pas été tué, et il a finalement été échangé avec les prisonniers restants en janvier 1996*[346]. D'ailleurs, les éléments de preuve ne permettent pas d'établir de manière certaine le déroulement exact des faits. A cet égard, les conclusions de la Chambre de première instance ne reposent que sur des témoignages qui sont, dans certains cas, contradictoires et dans d'autres cas, fondés sur de simples rumeurs[347].

[338] Jugement *Tolimir*, par.779.
[339] Jugement *Tolimir*, par.780-782.
[340] Arrêt *Krstić*, par. 8.
[341] Jugement *Semanza*, par. 316 ; Jugement *Kajelijeli*, par. 809.
[342] Arrêt *Krstić*, par. 32.
[343] Arrêt *Krstić*, par. 12.
[344] Jugement *Jelisić*, par. 82.
[345] Arrêt *Krstić*, par. 14.
[346] Opinion dissidente Juge Nyambe, par.81, Jugement, par. 665.
[347] Jugement *Tolimir*, par. 679.

En réalité, **aucun** des éléments de preuve dont nous disposons ne permet de déterminer les circonstances réelles de ces meurtres.

En considérant que les forces serbes de Bosnie qui ont tué les trois dirigeants étaient animées de l'intention génocidaire spécifique de détruire une partie de la population musulmane de Bosnie en tant que telle, la Chambre de première instance se tourne vers une analyse biaisée des faits. En effet, elle ne tiendra compte ni de l'absence de preuve quant à l'intention de l'Accusé de prendre ces hommes pour cible en raison de leurs fonctions de dirigeant, ni de l'absence d'éléments certains permettant de déterminer les circonstances exactes qui entourent ces trois meurtres. Force est de constater, qu'en l'absence d'éléments matériels et intentionnels tangibles permettant de déterminer l'origine de ces meurtres, la Chambre de première instance se tourne davantage vers de simples présomptions.

En effet, elle ne donne pas d'éléments précis permettant de mettre en évidence l'impact de la disparition des trois dirigeants musulmans de Žepa sur la survie du groupe protégé en tant que tel. A cet égard, s'il est sans conteste, au regard des preuves médico-légales, que les trois dirigeants de Žepa ont souffert d'une mort violente causée par des blessures à la tête[348], il n'a pas été établi de quelle manière l'impact de ces meurtres aurait constitué une forme d'intimidation qui contribuait à l'élimination des Musulmans de Bosnie de Žepa.

Étant donné que les preuves ne permettent pas d'établir au delà de tout doute raisonnable que les meurtres de **Hajrić, Palić** et **Imamović** étaient inspirés par une **intention génocidaire** spécifique, je ne peux conclure, sur la base des éléments de preuve disponibles, que ces trois hommes ont été sélectionnés et tués en raison de l'impact qu'aurait eu leur disparition sur la survie du groupe comme tel. Pour ces raisons, bien que je ne partage pas le raisonnement de la chambre d'appel, je suis d'accord sur le fait que les conséquences de tels actes ne sont pas constitutives d'actes de génocide[349].

[348] Jugement *Tolimir*, par.749.
[349] Arrêt *Tolimir*, par. 270.

V. La responsabilité

A. L'ECC

Dans le cadre de son moyen d'appel n°5, l'appelant soutient que la Chambre de première instance a commis une **erreur de droit** en concluant que l'entreprise criminelle commune était une forme de responsabilité au sens du droit international coutumier[350]. A l'appui de son grief, l'appelant allègue plusieurs arguments tenant à l'existence même du concept d'entreprise criminelle commune mis en lumière par les juges du TPIY depuis l'affaire ***Tadić*** et repris par la suite dans d'autres affaires au sein du TPIY et du TPIR.

Sur la base du principe de légalité[351], l'appelant va indiquer que le TPIY ne devrait pas être autorisé à appliquer l'ECC comme mode de responsabilité car il n'y a aucune preuve tendant à considérer cette forme de responsabilité comme relevant du droit international coutumier. Il indique que si cela avait été le cas, la Cour pénale internationale l'aurait intégré postérieurement lors de l'adoption du Statut de Rome, ce qui n'a pas été fait. En effet, il soutient que dans le Statut de Rome, la perpétration ou coaction ont été élaborées sur la base du concept de « contrôle sur le crime »[352]. La Chambre de première instance aurait ainsi commis une erreur en confondant la perpétration et la coaction des autres formes de responsabilité incluant la participation à la commission d'un crime[353].

L'appelant va également faire état du fait que la Chambre de première instance n'a pas réuni une majorité claire en faveur de la forme de responsabilité de l'ECC dans la présente affaire[354]. En effet, la position de l'un des juges reflétée dans une opinion séparée jointe au jugement serait selon l'appelant « en contradiction »[355] avec la position majoritaire de la Chambre de première instance exprimée au paragraphe 884 du jugement. Ainsi, l'appelant relève que dans son opinion, le juge en question déclare que « la responsabilité découlant de la participation à une entreprise criminelle commune, sous ses trois formes, n'est pas définie expressément dans le Statut du Tribunal ; [qu'] [e]lle est aussi absente du Statut de Rome, en vigueur à la CPI, où elle ne s'applique pas »[356] et qu'il aurait été « préférable de se référer aux formes classiques de responsabilité telles que mentionnées à l'article 7.1 du Statut plutôt qu'à la forme ECC »[357].

[350] Mémoire d'appel, par. 53.
[351] Mémoire d'appel, par. 54.
[352] Mémoire d'appel, par. 56.
[353] Mémoire d'appel, par. 57.
[354] Mémoire d'appel, par. 62.
[355] *Ibid.*
[356] Mémoire d'appel, par. 63.
[357] *Ibid.*

Sur le moyen d'appel n°5, la Chambre d'appel, à la majorité, a rejeté les arguments de l'appelant en se basant notamment sur la jurisprudence ***Tadić*** et celle plus récente issue de l'arrêt ***Dordević***[358]. Elle va juger que l'argument avancé par l'appelant concernant les dispositions pertinentes du **Statut de Rome** était sans fondement[359]. En outre, concernant la forme 3 de l'ECC, qui a fait l'objet d'une critique particulière de la part de l'appelant dans ses écritures d'appel[360], elle va rappeler que les sources du droit international examinées par la Chambre d'appel dans l'arrêt ***Tadić*** sont fiables, [que] les principes en relation avec la troisième catégorie de l'ECC sont bien établis en droit international coutumier et dans la jurisprudence du Tribunal[361].

Je ne partage pas la position majoritaire de la Chambre d'appel sur ce moyen n°5. Si cette question a été abordée dans de nombreuses affaires au sein du TPIY, il n'en demeure pas moins que les développements consacrés à cette question en l'espèce me paraissent insuffisants. Le point essentiel concerne l'existence de l'**ECC** en tant que **forme de responsabilité** admise au sens du droit international coutumier. La Chambre d'appel en l'espèce va se borner à faire application de la jurisprudence constante du TPIY en la matière découlant de l'Arrêt ***Tadić***.

A. La jurisprudence Tadić, genèse de la notion d'entreprise criminelle commune

Afin de mieux comprendre les tenants et aboutissants de ce grief, il convient de se référer à l'arrêt rendu par la Chambre d'appel dans l'affaire **Tadić**. Dans cet arrêt, la Chambre d'appel a envisagé la notion de **« but commun »**[362] au sens de l'article 7.1 du Statut en partant de deux questions essentielles qui étaient de savoir : « i) si les actes commis par une personne peuvent engager la responsabilité pénale d'une autre personne quand elles ont toutes deux participé à l'exécution d'un projet criminel et ii) quel est le degré d'élément moral requis dans ce cas »[363].

A cet égard, la Chambre d'appel, va indiquer que le Statut ne s'est pas contenté de conférer compétence à l'encontre des personnes qui planifient, incitent à commettre, ordonnent, commettent physiquement ou de toute autre manière aident et encouragent à planifier, préparer ou exécuter un crime, (…), il n'exclut pas les cas où plusieurs personnes poursuivant un but commun entreprennent de commettre un acte criminel qui est ensuite exécuté soit de concert par ces personnes, soit par

[358] Arrêt *Tolimir*, par. 280.
[359] Arrêt *Tolimir*, par. 282.
[360] Mémoire d'appel, par. 58. A cet égard, en l'espèce, l'appelant dans son mémoire préalable, souligne que le mode de responsabilité le plus problématique est caractérisé par l'ECC forme 3 tel que développée par le TPIY et particulièrement le critère de l'élément moral touchant les crimes les plus graves qui dans ce cadre est sous-évalué.
[361] Arrêt *Tolimir*, par. 283.
[362] Arrêt *Tadić*, par. 187- 137
[363] Arrêt *Tadić*, par. 187.

quelques membres de ce groupe de personnes »[364]. [Toutefois], le Statut du Tribunal ne spécifie pas les éléments objectifs et subjectifs de cette catégorie de comportements criminels collectifs et pour les identifier, [il s'agit] de se tourner vers le droit international coutumier[365]. A cet égard, elle va préciser que les règles de droit coutumier dans ce domaine se dégagent de différentes sources principalement la jurisprudence et de quelques dispositions juridiques internationales[366].

Dans le cadre de son analyse, la Chambre d'appel va procéder à un examen de plusieurs affaires jugées après la Deuxième guerre mondiale en les regroupant eu trois catégories correspondant aux trois formes d'ECC retenue par la jurisprudence du TPIY[367]. Elle ajoute que s'agissant des éléments objectifs et subjectifs du crime, la jurisprudence montre que cette notion s'applique dans trois catégories distinctes d'affaires[368]. C'est sur la base de ce raisonnement que la Chambre d'appel dans cette affaire va estimer que la notion de dessein commun en tant que forme de responsabilité au titre de **coauteur** était bien établie en droit international coutumier et qu'elle est de plus consacrée, implicitement dans le Statut du Tribunal international[369].

En ce sens, elle va distinguer trois catégories d'affaires :

La **première catégorie** concerne les affaires où tous les participants partagent **la même intention** de commettre un crime, et tous sont responsables, quelle que soit leur rôle et leur position dans la réalisation du plan criminel commun (même s'ils tout simplement votés, dans une assemblée ou dans un groupe, en faveur de la mise en œuvre d'un tel plan). Outre l'intention partagée, le *dolus eventualis* (c'est-à-dire l'insouciance ou l'insouciance consciente) peut également suffire pour considérer tous les participants dans le plan commun pénalement responsables[370].

La **seconde catégorie** a vocation à couvrir les affaires où l'existence d'un plan préalable n'est pas nécessaire. Néanmoins, on peut légitimement considérer que chaque participant dans cette institution pénale (un camp de concentration, par exemple) non seulement est au courant des crimes dans lesquels l'institution ou ses membres se livrent, mais aussi, implicitement ou expressément partage l'intention criminelle de commettre de tels crimes. Cette catégorie vise notamment les

[364] Arrêt *Tadić*, par. 190.
[365] Arrêt *Tadić*, par. 194.
[366] Arrêt *Tadić*, par. 194.
[367] Arrêt *Tadić*, par. 195.
[368] Arrêt *Tadić*, par. 220.
[369] Arrêt *Tadić*, par. 220.
[370] Arrêt *Tadić*, par. 196-201.

personnes ayant contribué d'une manière ou d'une autre d'un commun accord à administrer le camp de manière brutale, toutes ces personnes ayant adhéré à cet état d'esprit[371].

Enfin, la **troisième catégorie** correspond à la forme 3 de l'ECC concernant les affaires dans lesquelles l'un des auteurs commet un acte qui, s'il ne procède pas du but commun, est néanmoins une conséquence naturelle et prévisible de sa mise en œuvre. Deux affaires vont être rappelées : celle des ***lynchages d'Essen*** et celle dite de ***l'île de Borkum***. La Chambre d'appel va rappeler que dans la seconde affaire, les accusés étaient « des rouages d'un objectif commun, dont chacun avait la même importance, chaque rouage jouant le rôle qui lui était assigné. Et le mécanisme du massacre ne pouvait fonctionner sans l'ensemble des rouages[372].

Outre la jurisprudence dont elle va faire état, La Chambre d'appel va relever que la notion de « projet commun » a été retenue dans au moins deux traités internationaux[373] et qu'une notion essentiellement similaire a été consacrée par la suite dans l'article 25 du Statut de la Cour pénale internationale[374]. Bien que relevant le fait qu'à l'époque, ce statut restait un instrument international n'ayant pas force de droit, sa valeur juridique était déjà importante. Du fait de la très large majorité des Etats représentés à la Conférence diplomatique de plénipotentiaires tenue à Rome, cela montre que ce texte reçoit l'appui d'un grand nombre d'Etats et peut être considéré comme l'expression de leur opinion juridique ou ***opinio juris***. Elle va en tirer la conclusion que la notion de responsabilité de **coauteur** dont il est question ici est bien établie en droit international et est distincte de celle de **complicité** relayant son propos à la législation nationale de nombreux Etats[375].

Sur la question posée par la Chambre d'appel ***Tadić*** de savoir si, « à la lumière des principes généraux qui précèdent, il convient de déterminer si la responsabilité pénale pour avoir participé à un but criminel commun relève de l'article 7 1) du Statut »[376], les juges vont répondre positivement en mettant en lumière trois catégories d'entreprise criminelle commune. Il convient de noter que dans son raisonnement, la Chambre d'appel se base sur plusieurs jurisprudences post- Seconde guerre mondiale, sur les travaux précédents l'adoption du **Statut de Rome** ainsi que sur une interprétation du Statut du Tribunal. Il convient de noter qu'à l'origine, bien que certains éléments

[371] Arrêt *Tadić*, par. 202-203.
[372] Arrêt *Tadić*, par. 204-219. Dans cette affaire complexe, les accusés ont été déclarés coupables de meurtre malgré l'absence d'éléments prouvant qu'ils avaient effectivement tué ces personnes. Pour la Chambre d'appel, ce verdict reposait vraisemblablement sur le fait que les accusés, que ce soit du fait de leur statut, de leur rôle ou de leur comportement, étaient en mesure de prévoir que l'agression entraînerait le meurtre des victimes par certains des individus y participant.
[373] Arrêt *Tadić*, par. 221.
[374] Arrêt *Tadić*, par 222-223.
[375] Arrêt *Tadić*, par. 223.

laissent apparaître l'existence juridique de la notion de **« projet commun »,** il n'en demeure pas moins que la Chambre d'appel ne pouvait en tirer la conclusion que la forme de responsabilité de l'entreprise criminelle commune avait une existence au sens du droit international coutumier. Tout au plus, celle-ci pouvait être analysée comme une pratique propre à ce Tribunal qui ne pouvait acquérir une existence coutumière que par une pratique constante et uniforme.

B. L'existence de l'entreprise criminelle commune comme forme de responsabilité au sens du droit international coutumier

1. Les éléments constitutifs consacrant l'existence d'une coutume internationale

D'un point de vue purement juridique, l'appartenance du concept juridique d'ECC au droit international coutumier est déterminée par la réunion de deux éléments que sont : la pratique des Etats ou **élément matériel et l'*opinio juris* ou élément psychologique**[377]. L'appelant, dans le cadre de son moyen d'appel, ne va pas analyser en détail la question de l'appartenance de cette forme de responsabilité au droit international coutumier et se limitera au paragraphe 54 de ses écritures à répondre par la négative[378]. En l'espèce, la Chambre d'appel, à la majorité, n'a pas jugé utile de revenir sur les éléments constitutifs de la coutume en tant que source formelle du droit international préférant se référer aux jugements et arrêts précédemment rendus par le TPIY[379]. Cette question de la validité de cette forme de responsabilité issue de la jurisprudence du TPIY en tant que concept de droit international coutumier a fait l'objet de plusieurs décisions au sein du TPIY et TPIR suite à la mise en cause par certains accusés de la compétence du Tribunal en relation avec l'ECC[380].

A ce stade, il convient de rappeler que le processus coutumier n'est parfait que par la réunion de deux éléments, la pratique effective et l'*opinio juris* des Etats. La réunion de **ces deux éléments** a

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[376] Arrêt *Tadić*, par. 187.
[377] Voir notamment sur ce point, S. Seferiades, « Aperçu sur la coutume juridique internationale », Revue générale de droit international public, 1936, pp. 129-196 ; S. Sur, « La Coutume internationale. Sa vie, son œuvre », Droits, 1986, pp. 111-124.
[378] Mémoire d'appel, par. 54.
[379] Arrêt *Tolimir*, par. 280.
[380] Voir notamment l'appel interlocutoire consécutif à une décision rendue le 11 mai 2004 par la Chambre de première instance saisie du fond dans l'affaire André Rwamakuba. Cet accusé, dans sa requête, avait mis en cause la compétence de la juridiction en relation avec cette forme de responsabilité. A l'appui de ses arguments, l'Accusé soutenait que cette « doctrine » de l'ECC était complètement étrangère au droit international coutumier ainsi qu'au Statut du Tribunal international. Au soutien de cette position, l'intéressé alléguait d'une part, l'insuffisance de la pratique étatique et de l'*opinio juris* permettant d'aboutir à cette conclusion. D'autre part, l'Accusé va énumérer les crimes punissables au terme du Statut du TPIR et notamment le crime de génocide mentionné à l'article 3 de la Convention sur la prévention et la répression du crime de génocide. Retenir une condamnation pour génocide sur la base d'une ECC reviendrait selon lui à **« édulcorer les préjugés relatif au crime de génocide »** et ainsi aboutir à **« une responsabilité criminelle collective ».**

été consacrée par la **Cour internationale de justice** (« CIJ ») affirmant que « la substance du droit international coutumier doit être recherchée en premier lieu dans la pratique effective et l'*opinio juris* des Etats »[381]. Le premier élément s'analyse comme l'accomplissement répété d'actes dénommés « précédents » constitutifs de l'élément matériel qui peut n'être au départ du processus qu'un simple usage[382]. Le second élément, quant à lui, est constitué par le sentiment, la conviction des sujets de droit, que l'accomplissement de tels actes est obligatoire parce que le droit l'exige[383].

Au niveau des sources du droit international, la coutume se distingue du processus conventionnel et une forme de souplesse dans ce mode de formation semble devoir être tolérée. En effet, le processus coutumier correspondrait à un équilibre des forces internationales en présence à un moment donné, à une confrontation des sujets de droit sur un problème international[384]. La formation spontanée de telles règles se réalise par suite d'une prise de conscience juridique de la nécessité sociale. Toutefois, il demeure que l'existence d'une coutume doit répondre à une exigence formelle et je reviendrai donc successivement sur l'analyse des deux éléments de la coutume.

L'élément matériel, tout d'abord, est constitué par des comportements susceptibles de constituer des précédents émanant de sujets de droit international dont font partie les Etats et les juridictions internationales[385]. En outre, ces agissements doivent être opposables à leur auteur, et donc ne pas être viciés. En ce qui concerne, les actes des juridictions internationales, il faut retenir en premier lieu les actes juridictionnels et arbitraux internationaux[386]. Pour que l'on puisse parler d'usage, ces actes doivent être répétés dans le temps. La CIJ sur ce point va retenir l'exigence d'une « pratique internationale constante et uniforme »[387] synonyme d'affermissement de la pratique.

L'élément moral est quant à lui constitué par l'exigence de l'*opinio juris* c'est-à-dire qu'une règle coutumière n'existe que si l'acte pris en considération est motivé par la conscience d'une obligation juridique[388]. A cet égard, la Cour internationale de justice à l'article 38 §1 de son Statut a bien distinguer la coutume des autres sources du droit international en la qualifiant de « pratique

[381] Voir, CIJ, *Plateau continental* (Jamahiriya arabe lybienne/Malte), arrêt 1985, p. 29, par. 27 ; CIJ, *Licéité de la menace et de l'emploi d'armes nucléaires*, avis consultatif 1996, p. 253.
[382] Voir, P. Daillier, M. Forteau, A. Pellet, « Droit international public », 8ème édition, p. 353.
[383] *Ibid.*
[384] R.J. Dupuy, « Coutume sage et coutume sauvage », *Mélanges Rousseau*, 1974, pp. 75-89.
[385] P. Daillier, M. Forteau, A. Pellet, « Droit international public », 8ème édition, p. 355.
[386] Ch. Rousseau, « Droit international public », Vol. I, 1971, pp. 338-339. A cet égard, la Cour internationale de justice, organe judiciaire principal des Nations Unies, n'hésitent pas à citer sa propre jurisprudence comme le fondement de précédents utiles.
[387] CIJ, *Droit d'asile*, Arrêt 1950, p. 277 ; CIJ, *Droit de passage en territoire indien*, Arrêt 1960, p. 40.
[388] P. Daillier, M. Forteau, A. Pellet, « Droit international public », 8ème édition, p. 361.

générale acceptée comme étant le droit »[389]. Elle va faire application de ce principe dans le cadre d'une jurisprudence constante. Traditionnellement, la pratique est à l'origine de l'*opinio juris* en ce sens que c'est la répétition des précédents dans le temps qui fait naître le sentiment de l'obligation[390].

A ce stade, il convient de noter que les éléments constitutifs de l'existence d'une coutume internationale sont à analyser de manière stricte et ne peuvent se concevoir sans la réunion de ces deux éléments. Il semble sur ce point que la Chambre d'appel dans l'affaire *Tadić* ait voulu « accélérer le pas » en ne prenant pas en compte ces conditions strictes qui lui étaient imposées. L'analyse faite dans cet arrêt ne pouvait aboutir à la conclusion selon laquelle l'entreprise criminelle commune avait une existence au sens du droit international coutumier. Il me semble que les arguments avancés par elle ne permettaient pas à l'origine d'aboutir à cette conclusion. Toutefois, la « pratique uniforme et constante » au sein de ce Tribunal au niveau de cette forme de responsabilité a pu faire naître une coutume internationale.

2. La singularité de la notion d'ECC au regard de la notion de coaction retenue dans le Statut de la Cour pénale internationale

Sur la base des éléments constitutifs de l'existence d'une coutume internationale, l'appelant allègue le fait que la théorie de l'entreprise criminelle commune telle qu'elle a été conçue depuis l'Arrêt ***Tadić*** et pratiquée par les TPIY se distingue de la notion de **coaction** envisagée à l'article 25 du Statut de Rome[391]. En effet, la notion de la coaction mentionnée à l'article 25(3) (d) du Statut de Rome, même si elle peut être perçue comme une stricte limitation de la responsabilité pénale individuelle, a l'avantage de « circonscrire » la responsabilité pénale **aux seuls coauteurs** ayant apporté leur contribution en vue de faciliter l'activité criminelle commune ou le dessein criminel du groupe. Elle a le mérite de ne retenir que les coauteurs ou coparticipants ayant facilité l'activité criminelle commune en pleine connaissance de l'intention de chacun des membres du groupe[392]. L'article 25 du Statut de Rome ne retient qu'une responsabilité pénale individuelle des individus en

[389] Texte de l'article 38 du Statut de la CIJ.
[390] C.I.J., *Plateau continental de la Mer du Nord*, Recueil 1969, p. 44.
[391] Mémoire d'appel, p. 14, §55; Voir également, J. D. OHLIN, « *Three conceptual problems with the doctrine of joint criminal enterprise* », p. 89.
[392] Voir par exemple le Mandat d'arrêt délivré à l'encontre de Laurent Gbagbo, p. 10, où il est stipumé: « Il y a une base suffisante pour conclure que les forces pro-Gbagbo qui ont exécuté la politique en question l'ont fait en obéissant de façon quasi automatique aux ordres qu'elles avaient reçus. Enfin, il a été suffisamment prouvé que Laurent Gbagbo a agi avec le degré d'intention et de connaissance requis ».

tenant compte principalement de leurs actes, et non pour leur association à un groupe criminel**,** ce qui me paraît conforme à l'interprétation stricte du droit pénal international[393].

En choisissant de s'écarter de la notion d'entreprise criminelle commune et en retenant une forme de responsabilité correspondant à la définition de la coaction, les Etats membres du **Statut de Rome** ont clairement opter pour une **approche objective** soucieuse d'établir une séparation nette entre les **innocents** et les **coupables** responsables des actes criminels, sans faire référence à l'appartenance au groupe qui donnerait lieu à diverses interprétations du principe de la responsabilité pénale qui implique que l'individu ne soit pénalement poursuivi que pour les actes criminels dont il est l'auteur. Cette prise de distance avec la théorie de l'entreprise criminelle commune par la CPI peut être perçue comme une garantie du principe *nullum crimen sine lege* et du procès équitable[394]. Cet argument va être repris par l'appelant au début de son moyen d'appel n°5 alléguant quant à lui du respect du principe de légalité[395].

Dans son Arrêt, la Chambre d'appel ***Tadić***, pour justifier de l'existence de l'ECC en tant que forme de responsabilité au sens du droit international coutumier va retenir le lien de connexité entre les deux notions retenus par les deux juridictions en tirant la conclusion que la notion de responsabilité de coauteur dont il est question ici est bien établie en droit international et qu'elle est distincte de celle de **complicité** relayant son propos à la législation nationale de nombreux Etats[396]. Or, la théorie de l'entreprise criminelle commune est considérée comme l'une des causes de nombreuses atteintes aux droits de l'accusé, en particulier ceux liés à la présomption d'innocence et au procès équitable[397]. La Chambre d'appel du TPIY a elle-même reconnu que l'entreprise criminelle commune n'est pas *« un concept sans limites qui permet de conclure à la culpabilité de l'accusé en opérant des rapprochements[398] »*.

[393] Voir l'article 25 3) d) du Statut de Rome.
[394] Code de déontologie pour les avocats exerçant devant le TPIY tel que modifié le 29 juin 2006, article 11 ; *Le Procureur c. Haradinaj et consorts*, « Décision relative à la demande d'admission de moyens de preuve supplémentaires, présentée par Lahi Brahimaj en application de l'article 115 du Règlement », 3 mars 2006, par. 10 ; *Le Procureur c. Naletilić et Martinović*, « Décision relative à la requête globale de Naletilić aux fins de présentation de moyens de preuve supplémentaires », 20 octobre 2004, par. 30 ; *Le Procureur c. Kupreškić et consorts*, « Décision relative à l'admission de moyens de preuve supplémentaires suite à l'audience du 30 mars 2001 », 11 avril 2001, par. 12 ; *Le Procureur c. Delalić et consorts*, « Arrêt », 20 février 2001, par. 631 : « L'absence de protestation du conseil indique d'ordinaire que celui-ci a estimé à l'époque que les questions auxquelles le juge ne prêtait pas attention n'étaient pas d'une importance telle pour l'affaire que le procès ne puisse se poursuivre sans que cette question soit soulevée ».
[395] Mémoire d'appel, par. 54.
[396] Arrêt *Tadić*, par. 224 et ss.
[397] Voir notamment J. D. OHLIN, « *Three conceptual problems with the doctrine of joint criminal enterprise* », p. 89
[398] Arrêt *Brđanin*, par. 428.

3. La compatibilité de la coaction avec les formes I et II de l'Entreprise criminelle commune

Au niveau de la jurisprudence des tribunaux ad-hoc, TPIY et TPIR, il est admis que ce mode de responsabilité pénale peut prendre **trois formes différentes**. Au titre de ces trois formes, l'on retrouve : la responsabilité pour un but intentionnel commun, la responsabilité pour la participation à un plan criminel commun institutionnalisé, et la responsabilité pénale accessoire fondée sur la prévoyance et l'acceptation volontaire du risque.

En ce qui concerne les formes 1 et 2 de l'ECC dont l'ancrage jurisprudentiel est bien établi au sein du TPIY et du TPIR, celles-ci sont le produit d'un « jeu académique » visant à créer une nouvelle doctrine en droit pénal international dont les principes fondamentaux figuraient dans des modes de responsabilité pénale établis et reconnus dans diverses juridictions. A cet égard, la **co-action** (« *co-perpetration* ») présente une similitude de principe avec la forme 1 de l'ECC et la forme 2 de l'ECC est semblable à la forme 2. Certains auteurs vont indiquer que le concept de coaction constitue un mode de responsabilité pénale aux contours plus définis que l'ECC et établi et reconnu dans bon nombre de juridictions nationales[399]. La Chambre d'appel dans l'affaire ***Tadić*** va reprendre ces deux catégories d'ECC en les définissant.

Sur les formes I et II de l'ECC, je peux me ranger à la **position théorique** exprimée par beaucoup dont notamment les Juges de la Chambre d'appel *Tadić* mais en « transférant » celle-ci sur la forme de responsabilité énoncée à l'article 7 du Statut **« quiconque a planifié »**. Nonobstant, de mon point de vue, il n'était pas nécessaire de créer cette notion qui, au lieu de mettre à disposition des Juges et des parties un instrument clair et précis, complique énormément la tâche amenant les Juges au fil du temps à des ajustements constants et ce, au détriment de la sécurité juridique.

B. La détermination objective de la responsabilité individuelle d'un Accusé au regard du Statut du TPIY

Dans son arrêt, la Chambre *Tadić* va rappeler que dans le rapport du **Secrétaire général de l'ONU** sur la création du Tribunal international, il est indiqué qu'un « élément important du point de vue de la compétence *ratione personae* du Tribunal international est le principe de **responsabilité pénale individuelle.** [En effet], le Conseil de Sécurité a réaffirmé dans plusieurs résolutions que les

[399] Voir notamment sur ce point, la synthèse réalisée par. P. Wrange, « Joint criminal enterprise and the International Criminal Court : A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint commission in Crime under the Rome Statute ; Can the international Criminal Court apply Joint Criminal Enterprise as a Mode of Liability? », thèse de droit international pénal réalisée à l'Université de Stockholm.

personnes qui commettent de graves violation du droit international humanitaire en ex-Yougoslavie sont individuellement responsables de ces violations »[400]. Dans ce rapport, il était également indiqué que « toutes les personnes qui participent à la planification, à la préparation ou à l'exécution de violations graves du droit international humanitaire dans l'ex-Yougoslavie contribuent à commettre la violation et sont donc individuellement responsables »[401].

Contrairement à ce qu'en disent les Juges de la Chambre *Tadić*, le Statut du TPIY ne recèle pas en lui-même de mon point de vue « un vide » entraînant la nécessité de créer une jurisprudence pour poursuivre certains Accusés. A mon sens, il n'y a pas eu de vide juridique, à aucun moment une telle possibilité n'a pu exister au sein du **Conseil de Sécurité** assisté de juristes éminents en permanence ou éclairé par divers professeurs de droit reconnus et non des moindres... Il faut se rappeler que la **Résolution 827** du Conseil de Sécurité a été prise après moults consultations et de nombreux documents préparatoires émanant des Etats ou de juristes internationaux. Dans ces conditions, il est impossible que tous ces intervenants aient pu commettre une erreur en laissant dans l'obscurité certains auteurs d'infractions. Je pense que la jurisprudence *Tadić* n'était absolument pas nécessaire ; l'article 7.1 du Statut ne souffrant à cet égard d'aucun vice nécessitant un « comblement jurisprudentiel ».

Il suffit simplement de se pencher sur le texte et de prendre en compte l'esprit de l'article 7.1 du Statut qui appréhende parfaitement la commission d'infractions émanant d'un plan concerté. Il y a les planificateurs, ensuite ceux qui vont inciter à commettre en utilisant les médias, il y a ceux qui vont donner les ordres pour faire traduire sur le terrain le plan concerté et il y a ceux qui sont sur le terrain et qui vont exécuter le plan ; ce sont ces derniers qui commettent les crimes sur le terrain prévus aux articles du Statut entrant dans la catégorie très précise des commettants et non celles des planificateurs, incitateurs ou donneurs d'ordres.

De ce fait, il m'apparaît incongru de mettre les **commettants** au même niveau que les **planificateurs** dans le cadre de la thèse de l'ECC « façon *Tadić* ». L'ECC basée sur un projet au dessein commun entre à mon sens dans la catégorie de la planification.

Le droit pénal international postérieur à **Nuremberg**, symbolisé par la création de tribunaux *ad hoc* tels que le TPIY, le TPIR, le Tribunal Spécial pour la Sierra Léone, Tribunal Spécial pour le Liban

[400] Rapport du Secrétaire général établi conformément au paragraphe 2 de la résolution 808 (1993) du Conseil de Sécurité, (S/25704), 3 mai 1993, par. 53 cité dans Arrêt *Tadić*, par. 186.
[401] Rapport du Secrétaire général établi conformément au paragraphe 2 de la résolution 808 (1993) du Conseil de Sécurité, (S/25704), 3 mai 1993, par .54 cité dans Arrêt *Tadić*, par.190.

et la création de la CPI, a imposé l'abandon du mécanisme de déclaration préalable de criminalité de l'organisation. Ce mécanisme était, en effet, fondé en premier lieu sur la qualité **objective** de membre de l'organisation criminelle et pouvait s'apparenter à une responsabilité collective. Aussi, afin d'instaurer une responsabilité pénale individuelle respectant le principe de culpabilité individuelle[402], à l'image du célèbre *dictum* dans le Jugement de Nuremberg *« les crimes contre le droit international sont commis par des hommes et non par d'abstraites entités légales (…) »*[403].

Force est de constater que la jurisprudence *Tadić* et la notion d'ECC qu'elle a créé ont engendré une certaine incertitude juridique liée à l'imprécision de cette notion.

En effet, la Chambre d'appel dans l'affaire *Tadić* et les affaires ultérieures n'a pas défini précisément les conditions objectives qui doivent être remplies pour prouver l'existence d'une ECC. Elle va indiquer qu'une ECC existe lorsque plusieurs personnes partagent un **but commun**, sans pour autant exiger que soient déterminés **l'identité de ces personnes**, **le but précis** qu'elles poursuivent, les **moyens exacts** qu'elles mettent en œuvre pour l'atteindre, le **contexte géographique et temporel**…

Ce problème se retrouve au niveau de la preuve de l'intention s'agissant de la forme 3 de l'ECC. Les conditions subjectives évoquées par la Chambre ne sont pas plus précisément définies que les conditions objectives. En effet, la Chambre considère qu'un accusé peut être déclaré responsable pour un crime autre que celui envisagé dans le projet commun « si, dans les circonstances de l'espèce, i) il était prévisible qu'un tel crime était susceptible d'être commis par l'un ou l'autre des membres du groupe, et ii) l'accusé a délibérément pris ce risque »[404]. La Chambre ne précise pas pour autant ce qu'elle entend par le terme « prévisibilité », et s'il faut apprécier cette prévisibilité de façon objective ou subjective[405].

[402] Voir Article 7 1) du Statut du TPIY, 6 1) du TPIR et Article 25 3) du Statut de Rome.
[403] Voir Jugement Nuremberg.
[404] Arrêt *Tadić*, par. 228.
[405] A titre de comparaison, en droit anglais, la théorie du « but commun » dont les racines remontent au XIVème siècle, permet de déclarer une personne responsable d'un crime commis en raison d'un plan commun, même lorsque cet acte a dépassé le plan, en fonction de certaines conditions qui ont évolué au fil du temps. Selon les premières jurisprudences, le crime lui était imputable s'il constituait la conséquence prévisible du plan commun *selon l'appréciation d'un tiers neutre* (« *objective probable consequences test* »). Depuis la décision du Privy Council dans l'affaire Chan Wing-Sui en

C. Les controverses autour de l'élargissement de cette forme de responsabilité à la forme 3 de l'ECC

1. L'absence de critères suffisants constitutifs de l'élément intentionnel du *mens rea* en tant que *dolus eventualis*

La troisième forme d'ECC introduisant une « responsabilité pénale accessoire fondée sur la prévoyance et l'acceptation volontaire du risque »[406], a fait l'objet d'amples critiques. Il a été noté que la norme de prévisibilité n'est pas fiable. En effet, il n'est pas facile pour un tribunal de déterminer si le comportement criminel d'une personne participant à une ECC, qui se trouve en dehors du plan commun, était prévisible par un autre participant, et si cette autre participant a délibérément pris le risque que le comportement soit effectué.

Selon certains auteurs, la forme 3 de l'ECC ne possède **aucun fondement** dans les Statuts respectifs du TPIY et du TPIR et que le principe *nulla poena sine lege stricta* interdit l'application de la doctrine de l'ECC dans sa troisième forme[407].

Des faiblesses récurrentes apparaissent dans l'analyse de la *mens rea* requise pour la forme 3 de l'ECC dans la jurisprudence. En effet, le deuxième élément constitutif de la *mens rea* propre à la forme 3 de l'ECC, à savoir l'évaluation de l'existence d'un **risque volontaire** pris par un accusé qu'un crime, autre que ceux constitutifs du plan commun, auquel il aurait participé soit susceptible d'être perpétré par un ou plusieurs membres du groupe, est souvent omis de l'analyse dans la jurisprudence à l'exception des arrêts *Blaškić* et *Kordić* dans lesquels la Chambre d'appel a explicitement clarifié que l'acceptation volontaire ou l'approbation de la prise de risque par l'auteur présumé du crime est requise pour remplir le standard de *dolus eventualis*[408].

Il me semble que ce serait à l'Accusation de prouver que le participant a eu connaissance d'un fait *particulier* ou d'une circonstance témoignant la probabilité que l'autre participant peut commettre un crime non concertée. Il incomberait également à l'Accusation de prouver que les circonstances générales de la commission du crime convenu étaient de nature à rendre extrêmement probable,

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1985, le critère d'appréciation est subjectif. Pour plus de précisions, voir C. Barthe, *Joint Criminal Enterprise*, pp. 148 et ss.

[406] C. Barthe, *Joint Criminal Enterprise*, pp. 148 et ss.

[407] W. Schomburg, " *Jurisprudence on JCE – revisiting a never ending history* ", publié le 3 juin 2010 sur le site *Cambodia Tribunal Monitor*, pp. 3 et 4.

[408] *Ibid*., pp. 6 et 7. Sur ce point, il convient de noter que l'auteur ne donne ni de références précises aux deux arrêts cités ni de références à des jugements ou arrêts dans lesquels serait omis ce deuxième élément constitutif de la *mens rea* de la forme 3 de l'ECC.

donc prévisible, que d'autres crimes « accessoires » seront commis. C'est également à l'Accusation de prouver que, en plus de cette connaissance, le participant en cause a sciemment pris le risque que la situation prévisible pourrait se produire. Ceci, à nouveau, pourrait être déduit de toute une gamme de circonstances factuelles.

Selon cette approche, si l'Accusation ne parviendrait pas à prouver tout cela, l'accusation devrait être rejetée. Il serait contraire aux principes d'un **procès équitable** de déplacer la charge de la preuve à la Défense et exiger que cette dernière prouve que l'Accusé ne connaissait pas les faits pertinents, n'ait pas prévu le crime et ait délibérément pris le risque que ce crime serait commis.

Il semble de mon point de vue que la latitude que la notion laisse aux Juges devraient les inciter à procéder avec précaution et avec la plus grande prudence quand ils apprécient les preuves et établissent l'existence à la fois de l'*actus reus* et la *mens rea*. En cas de doute, les Juges devraient opter pour une décision de non-culpabilité ou comme l'indique à juste tire le Juge **Mindua** avoir recours aux formes classiques de responsabilité définies dans le Statut.

2. La pratique des autres tribunaux internationaux : l'exemple des tribunaux cambodgiens

Dans sa Décision Relative aux appels interjetés contre l'Ordonnance des co-Juges d'instruction sur l'Entreprise Criminelle Commune (ECC) datant du 20 Mai 2010, la Chambre Préliminaire d'Appel des Chambres Extraordinaires au sein des Tribunaux Cambodgiens a analysé l'existence en droit international coutumier de la Troisième catégorie de l'ECC. Dans le cadre des appels interjetés, était contesté le fait que cette forme de responsabilité puisse constituer une base solide en droit international coutumier, argument allant à rebours du principe juridique selon lequel une règle de droit international coutumier ne puisse se déterminer que sur la base de la pratique et de l'*opinio juris* constantes et généralisées des États. Selon les appelants son application devant les Chambres extraordinaires au sein des tribunaux cambodgiens (CETC) violerait le principe de légalité[409].

Alors que les Co-procureurs ont répondu à cette argumentation en disant que « nombre de systèmes juridiques avancés reconnaissaient des modes de participation criminelle similaires à la troisième catégorie de la Chambre, la Chambre préliminaire est d'avis que ces affaires ne suffisent pas à établir que cette troisième catégorie relevait d'une pratique et d'une *opinio juris* constantes des États au moment des faits concernés par le dossier n°002 et conclut, pour les motifs mentionnés ci-

après, qu'elle n'était pas reconnue en tant que forme de responsabilité applicable aux violations du droit international humanitaire[410].

En ce qui concerne la jurisprudence, la Chambre s'est référée tour à tour aux affaires sur lesquelles la Chambre d'appel du TPIY s'est fondée dans son Arrêt *Tadić*, à savoir l'affaire de l'*île de Borkum*, celle des *lynchages d'Essen*, et plusieurs autres affaires portées devant des juridictions italiennes après la deuxième guerre mondiale. A la lumière de ces précédents, la Chambre a estimé qu'elle ne saurait considérer ces affaires comme précédents valables pour dresser l'état du droit international coutumier. Selon elle, ces affaires ne relèvent pas de la jurisprudence internationale parce qu'elles étaient jugées sous l'empire du droit interne[411]. Pour les raisons qui précèdent, la Chambre a estimé que les précédents retenus dans l'arrêt *Tadić* et, partant, dans l'Ordonnance contestée, ne constituaient pas une assise suffisamment solide pour conclure à l'existence de l'ECC élargie en droit international coutumier à l'époque des faits intéressant le dossier n°002[412].

Dans une décision ultérieure**,** la Chambre de première instance aura une nouvelle fois l'occasion de se prononcer sur la question suite à une demande de **IENG Sary** déposée le 24 février 2011 visant à obtenir l'annulation pour cause de vices de plusieurs parties de la Décision de renvoi[413].

A titre liminaire, la Chambre de première instance va relever que l'applicabilité de la théorie de la troisième catégorie d'ECC a fait l'objet de longs débats devant les CETC. Cette question a aussi déjà été examinée en appel par la Chambre préliminaire dans le cadre du dossier n°002. Bien que la Chambre de première instance n'ait pas vocation à connaître de recours formés contre des décisions de la Chambre préliminaire, elle a relevé que la demande sur laquelle elle devait se prononcer est en très grande partie similaire à celle dont avait été saisie la Chambre préliminaire. Cette dernière a examiné en détail, dans sa Décision relative à l'ECC, les instruments juridiques en vigueur avant 1975, notamment le **Statut de Nuremberg et la Loi n°10 du Conseil de Contrôle allié**. Tout comme la Chambre de première instance dans le Jugement *DUCH*, elle a considéré que les première et deuxième catégories d'ECC constituaient des modes de participation reconnus en droit international coutumier au cours de la période visée dans la Décision de renvoi. Elle a toutefois

[409] Chambre Préliminaire d'Appel des CETC, Dossier n°002/19-09-2007-CETC-CP/BCJI(CP38) n° D97/15/9, Décision Relative aux appels interjetés contre l'Ordonnance des Co-Juges d'instruction sur l'Entreprise Criminelle Commune (« Décision relative à l'ECC forme III du 20 Mai 2010 »), par. 75.
[410] Décision relative à l'ECC forme III du 20 Mai 2010, par. 77.
[411] *Ibid.*
[412] Décision relative à l'ECC forme III du 20 Mai 2010, par. 83.
[413] Chambre de première instance des CETC, Dossier n°002/19-09-2007/ECCC/TC, Décision relative à l'applicabilité de la théorie de l'ECC devant les CETC, 12 Septembre 2011, par. 2 et 3.

relevé que ces instruments internationaux ne reconnaissaient pas spécifiquement la troisième catégorie d'ECC.

Il convient de noter qu'en l'espèce, les Co-Procureurs fondaient essentiellement leurs poursuites sur la première catégorie d'ECC tout en demandant de retenir également la troisième catégorie d'ECC comme possible mode de participation, mais uniquement dans le cas où, pour certains faits incriminés dans le cadre du dossier n°002, le lien entre ces actes criminels et les accusés ne pourrait pas être établi en appliquant la théorie de la première catégorie d'ECC[414]**.** Il convient de noter que la position de l'Accusation est de considérer la forme III de l'ECC **comme un moyen complémentaire** de poursuivre des accusés si elle n'a pas assez d'éléments pour les faire entrer dans la forme I. Il s'agit donc ni plus, ni moins pour l'Accusation de disposer « d'une panoplie » de formes de responsabilité lui permettant d'agir tout azimut en fonction des éléments de preuve dont elle dispose. Il pourrait être ainsi dit que moins il y a de preuves, plus la forme III de l'ECC doit être utilisée…

Enfin, la Chambre de première instance va répondre à la question savoir si la **troisième catégorie d'ECC** pouvait être retenue comme mode de participation susceptible d'engager la responsabilité pénale des Accusés parce qu'elle faisait partie des « principes généraux de droit reconnus par les nations civilisées » à l'époque de faits incriminés. Elle va tout d'abord noter la conclusion à laquelle la Chambre d'Appel du TPIY était parvenue dans l'arrêt *Tadić*, à savoir qu'une même notion de responsabilité fondée sur l'existence d'un but commun n'avait pas été adoptée par la plupart des systèmes de droit nationaux. Elle a ensuite estimé qu'il n'était pas utile qu'elle détermine si la forme élargie de l'ECC équivalait à un principe général de droit entre1975 et 1979, aux motifs qu'elle n'était en tout état de cause pas convaincue qu'à l'époque, il était suffisamment prévisible pour les Accusés que les crimes débordant le cadre du but commun pourraient engager leur responsabilité en tant que co-auteurs ni que la législation pertinente permettant de les déclarer responsable leur était suffisamment accessible, dès lors que la troisième catégorie d'ECC ne trouvait alors aucun fondement en droit interne cambodgien[415].

[414] Décision relative à l'applicabilité de la théorie de l'ECC devant les CETC, par. 23.
[415] Décision relative à l'applicabilité de la théorie de l'ECC devant les CETC, par. 28.

3. Une forme de responsabilité accessoire aux formes classiques au titre de l'article 7.1 du Statut

L'appelant dans son moyen d'appel n°5 va faire état du fait que pour lui la Chambre de première instance n'a pas formé une **claire majorité** concernant l'application de l'ECC dans la présente affaire. En effet, la position du Juge **Mindua** reflétée dans son opinion séparée jointe au jugement viendrait selon les termes du mémoire d'appel en contradiction avec la position de la Chambre exprimée au paragraphe 884 du jugement. Sur ce point, la lecture de cette opinion fait apparaître le fait que le Juge **Mindua** a déclaré qu'il est « préférable »[416] de se référer aux formes classiques de responsabilité telles que mentionnées à l'article 7.1 du Statut plutôt qu'à la forme ECC tout en ayant indiqué que « la responsabilité découlant de la participation à une entreprise criminelle commune, sous ses trois formes, n'est pas définie expressément dans le Statut du Tribunal. Elle est aussi absente du Statut de Rome, en vigueur à la CPI, où elle ne s'applique pas »[417].

Sur le contenu de l'opinion du Juge **Mindua**, l'appelant indique que tenant compte des circonstances particulières de cette affaire, la majorité était dans l'obligation de s'intéresser de manière plus détaillée aux modes de responsabilité alternatifs puisqu'un juge avait indiqué dans son opinion séparée, que le recours aux modes de responsabilité classiques était préférable à l'entreprise criminelle commune, ces différents modes de responsabilité auraient pu aboutir au sens de l'article 7.1 du Statut des conclusions juridiques différentes. Pour l'appelant cette contradiction liée au contenu de l'opinion d'un des juges équivaut à une **erreur juridique** invalidant le jugement et demande à la Chambre d'appel de casser le jugement et d'ordonner un nouveau procès[418].

La question est d'importance puisque l'un des juges de la Chambre *Tolimir*, le Juge Mindua, a soulevé dans son opinion concordante également le problème en disant que : « j'estime que lorsqu'un Accusé peut être tenu responsable sur la base de formes classiques de responsabilité, il est préférable de recourir à ces formes de responsabilité plutôt que de la responsabilité (…)[419]. Je partage entièrement ce point de vue et dans ce cas, l'Accusation aurait dû, en premier, se consacrer à la détermination de la forme de **responsabilité classique** la plus appropriée et peut être que dans cette hypothèse, la Juge **Nyambe** aurait pu se rallier à une forme de responsabilité classique ; alors même qu'elle a estimé qu'il ne pouvait être reproché à l'Accusé une forme de responsabilité découlant de l'ECC.

[416] Voir l'opinion du Juge Mindua jointe au Jugement *Tolimir*, par. 6
[417] Opinion du Juge Mindua jointe au Jugement *Tolimir*, par. 4.
[418] Mémoire d'appel, §64.
[419] Voir l'opinion du Juge Mindua jointe au Jugement *Tolimir*, par. 6

Au demeurant, sur la base des formes classiques de responsabilité, la responsabilité des Accusés est engagée au titre des articles 7(1) du Statut du TPIY et je ne vois pas la nécessité d'avoir traduit ce mode de responsabilité par le concept d'ECC[420]. Dès lors, le moyen d'appel n°5 m'apparaît devoir être admis et sans pour autant devoir entraîner l'annulation du jugement car la Chambre d'appel a la possibilité en annulant la déclaration de culpabilité basée sur la forme de responsabilité ECC de lui substituer une autre forme de responsabilité plus appropriée qui serait comme je l'expliquerai pas ailleurs dans ce cas, celui de la complicité par aide et encouragement au titre des formes de responsabilité classique issues de l'article 7.1 du Statut.

Dans ce cas de figure, ne partageant pas le point de vue de la Chambre d'appel quant à la forme de responsabilité à appliquer à l'Accusé, je suis **dissident** pour les moyens d'appel **15, 16, 17, 18 et 19** tout en rejoignant la conclusion de la Chambre d'appel au moyen d'appel n°**20**.

Sur le **moyen d'appel n°15** et la question du poids à accorder aux directives 7 et 7/1, une lecture attentive de ces documents me permet de conclure qu'ils avaient une vocation **purement militaire.** En effet, ils ne concernaient pas uniquement **Srebrenica** et **Žepa** mais visaient également d'autres localités. On ne peut donc pas considérer que les Directives n°7 et 7/1 n'avaient que le but spécifique de **Srebrenica** et **Žepa**. L'examen des documents dans leur globalité permet de conclure que **le seul objectif** était de séparer les deux enclaves et d'anéantir les forces armées musulmanes. Cet objectif est donc à mon sens **strictement** militaire[421]. Je suis donc à **l'admission** du moyen d'appel n°15.

Sur le **moyen d'appel n°16**, je constate une fois de plus que lorsqu'on examine en profondeur les déclarations des témoins, des contradictions importantes apparaissent jetant un doute sérieux quant à leur crédibilité. Compte tenu de la « fiabilité » de ces témoignages, la Chambre de première instance ne pouvait pas aboutir aux constats mentionnés dans le jugement[422]. Je ne peux donc que conclure à **l'admission** du moyen d'appel n°16.

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[420] W. Schomburg, "*Jurisprudence on JCE – revisiting a never ending history", op. cit.,* p. 5.

[421] Concernant plus particulièrement l'attaque du *Tunnel* des 23 et 24 juin 1995, il m'apparaît que celui qui pouvait apporter des précisions concernant l'attaque du tunnel c'est Dražen Erdemović. Dans ses déclarations circonstanciées, à aucun moment il n'a indiqué que l'objectif était de terrorisé la population civile et encore moins de tuer ou blesser des civils. Quoiqu'il en soit, nous ne connaissons pas l'identité des personnes qui auraient été tuées dans l'attaque du tunnel. Qui plus est, il semble que l'objectif était le poste de police qui était un objectif militaire et que dans ce cadre, s'il y a pu y avoir des victimes nous ne connaissons pas leur statut civil ou militaire donc on ne peut conclure que l'attaque du tunnel était une attaque visait la population civile et encore moins faire entrer cette attaque dans le cadre d'une ECC.

[422] La Chambre de première instance tire au paragraphe 1110 du jugement la seule déduction du fait que l'Accusé a supervisé l'évacuation des blessés était de détourner l'attention de la Communauté internationale. Une autre déduction pouvait de mon point de vue être faite à savoir qu'il a accompli sa tâche concernant les prisonniers de guerre blessés.

Sur les **moyens d'appel n°17 et 18**, il m'apparaît que compte tenu de la faiblesse des éléments de preuve, l'Accusation a mis à la charge de l'Accusé les meurtres des trois dirigeants de **Žepa** comme conséquences prévisible et naturelle de l'ECC forme 3. Dans la mesure où j'estime que l'ECC forme 3 n'a pas de base légale, je ne peux souscrire au point de vue de la majorité de la Chambre d'appel sur ces moyens. Je suis donc favorable à **l'admission** des **moyens d'appel n°17 et 18.**

Sur le **moyen d'appel n°19** et les meurtres commis à l'entrepôt de Kravica, la Chambre de première instance indique qu'une colonne d'environ **600 à 800** prisonniers est entrée dans l'entrepôt de Kravica entre 15 heures et 17 heures environ[423]. Dans le courant de l'après-midi des tirs nourris se sont fait entendre après qu'un prisonnier musulman se soit emparé d'un fusil d'un membre assurant la garde et en tuant un membre du MUP serbe de Bosnie[424]. Il est donc indéniable que **l'élément déclencheur** a été la révolte d'un des détenus par le tir par arme à feu sur un gardien. La Chambre de première instance indique également que les exécutions se sont poursuivies dans la matinée du 14 juillet[425]. Elle reconnaît donc qu'un certain nombre de tués l'ont été en réaction aux agissements d'un prisonnier musulman. Je ne vois pas dès lors comment il pourrait être soutenu que ces meurtres auraient été planifiés dans le cadre d'un plan commun[426]. Je ne peux donc que conclure à **l'admission** du moyen d'appel n°19.

Concernant le **moyen d'appel n°20** et les meurtres commis à Trnovo, Il est également significatif de constater que **l'unité Scorpions,** dont on ne connaît pas exactement les liens de subordination à la Republika Srpska, a procédé à l'arrestation et à l'exécution **à une date indéterminée**. Dans ces conditions, il me semble impossible d'affirmer, au-delà de tout doute raisonnable, comme l'a fait la Chambre de première instance[427], que ces six victimes faisaient partie des victimes de l'ECC. Dans ces conditions, je ne peux qu'être favorable à la recevabilité du **moyen d'appel n°20.**

[423] Jugement *Tolimir*, par. 355.
[424] Jugement *Tolimir*, par. 359.
[425] Jugement *Tolimir*, par. 362.
[426] Jugement *Tolimir*, par. 1054-1055.
[427] Jugement *Tolimir*, par. 551.

B. LA COMPLICITE

1. Les fonctions de l'accusé en tant que chef du renseignement (Moyen d'appel n°14)

Je tiens tout d'abord à préciser que si je considère que **l'Accusé** dans le cadre de ses fonctions se devait de prendre toutes les mesures nécessaires afin de se soucier du sort des prisonniers de guerre, en revanche, je ne suis pas d'accord sur le fait que ce dernier aurait exercé une fonction du commandement au sein des organes de direction.

Comme l'indique la Chambre de première instance dans son jugement, l'Accusé était chef **du bureau de renseignement et de la sécurité** qui était « l'organe administratif le plus élevé pour les questions liées à l'organisation des organes du renseignement et de la sécurité, de la police militaire, des unités de reconnaissance, notamment électronique, et de sabotage, ainsi qu'à la planification et à l'organisation des mesures de sécurité et de l'appui de renseignement entre autres»[428]. En tant que **chef de ce bureau**, l'Accusé dirigeait, coordonnait et supervisait les travaux des deux sections qui le composaient, ainsi que des organes subordonnés du renseignement et de la sécurité, dont la police militaire[429].

Il est important d'indiquer que concernant les éléments de preuve apportés par l'Accusation, une grande partie est formée par des témoignages qui soulèvent le **rôle important joué** par les organes de sécurité et d'intelligence au sein de l'Etat major de la VRS[430]. Si la majorité de ces témoignages confirment que les informations sur le terrain étaient communiquées par les brigades au service de sécurité et du renseignement, en revanche, ils différent sur le rôle de l'accusé en matière de commandement. En effet, concernant les opérations militaires, les directives, les ordres d'attaque et défense, ils indiquent que celui qui les signait n'était pas le chef de la sécurité et du renseignement, mais le commandant qui, en règle générale, se devait d'être présent. A cet égard, le témoin **Culić**[431],

[428] Jugement *Tolimir*, par. 103.
[429] Jugement *Tolimir*, par. 104.
[430] Les témoins les plus cités sont Milenko Todorović (Audience du 19 avril 2011), Manojlo Milovanović (cité au par. 103 du jugement), Petar Salapura (cité au par. 103 du jugement), Mikajlo Mitrović (Audience du 1er juin 2011) et Petar Skrbić (Audience du 2 février 2012).
[431] Il est à noter que le témoignage du témoin Culić, témoin de la défense**,** n'a pas été pris en compte par la Chambre de première instance dans son jugement.

va confirmer ce fait, en indiquant que « c'était aux commandants de commander, c'était leur droit exclusif, ainsi que de prendre des décisions »[432].

Concernant le rôle de l'accusé dans les évènements du 10 au 12 juillet 1995, la Chambre de première instance, dans son jugement, fait état de deux documents importants qui sont les pièces **D00064**[433] et **P02203**[434]. La véritable question à se poser est de savoir si l'Accusé avait **le contrôle** des organes de renseignement et de sécurité placés auprès des unités combattantes. A cet égard, l'Accusé invoque que Chambre de première instance a commis **une erreur** en précisant qu'il exerçait un commandement sur certains organes[1]. L'Accusé indique également que la Chambre de première instance s'était trompée en traduisant les termes *rukovodenje* (B/C/S) par contrôle alors qu'il fallait traduire ces termes par management[435]. Par ailleurs, l'Accusé conteste avoir eu une autorité sur le 410ème *Intelligence Center*. Il ajoute que la Chambre de première instance s'était trompée sur le rôle qu'il avait dans l'approbation des convois humanitaires et qu'elle s'était également trompée concernant ses relations avec le **Général Mladić**[436]. En effet, concernant la police militaire, la Chambre de première instance indique que : « à tous les niveaux de commandement, les unités de la police militaire étaient placées sous **le contrôle professionnel** des organes de sécurité»[437].

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[432] L'Accusation, lors du contre-interrogatoire de ce témoin, va mettre en lumière deux documents, les pièces D00264 ainsi que la pièce P02880, qui viendraient en contradiction avec ses dires. Le premier document est un ordre du Général Mladić en date du 11 octobre 1995 concernant le commencement d'opérations de combat. A la page 2 dudit document, le nom de l'Accusé y figure, ce dernier « coordonnera les actions la défense de l'axe Mrkonjic Grad- Village de Trijebovo- village de Stricici ». Le second document correspond à une session de l'Assemblée nationale indiquant que la présence des Commandants de l'Etat major, ou d'un représentant de l'Etat major, dans les unités procédant à la mission de libération de Podrinje est un moyen spécifique permettant de donner du poids et de **piloter** les opérations de combat en direction d'un but unique ». A cet égard, l'Accusation va faire mention de différentes visites effectuées par les responsables de la VRS et notamment de l'Accusé sur le front peu avant les évènements de juillet 1995.

[433] L'interprétation du premier document, **D00064**, consiste pour l'Accusation à dire que l'Accusé a ordonné aux organes du renseignement et de la sécurité des commandements « de prendre toutes les mesures nécessaires pour empêcher le retrait des soldats ennemis et pour les capturer ». Le terme « ordonné » n'est pas exact si l'on se réfère au document original. Il est indiqué que « the OBP organs of the Brigade commands will propose to the commanders of the units positioned along the line of withdrawal of elements of the routed 28th Muslim Division from Srebrenica to undertake all measures to prevent the withdrawal of enemy soldiers and to capture them ». S'il est vrai qu'il demande de consigner le nom de tous les hommes aptes à porter les armes qui sont en train d'être évacués de la base de la FORPRONU à Potočari, il justifie ceci par le fait que « The Muslims wish to portray Srebrenica as a demilitarized zone with nothing but a civilian population in it», ce qui n'est pas le cas.

[434] Concernant la pièce **P02203**, la Chambre de première instance indique que l'Accusé a ordonné aux organes de renseignement et de sécurité subordonnés de « proposer des mesures à prendre par les commandements pour empêcher [les percées], comme tendre des embuscades […] pour les arrêter ». La lecture du texte nuance pourtant cette traduction. En effet, il est indiqué que les organes subordonnés devraient proposer [shall propose measures] des mesures à prendre par les commandements afin d'empêcher les musulmans armés d'atteindre illégalement Tuzla et Kladanj comme tendre des embuscades le long des routes dans les but de les arrêter et d'empêcher de possibles « surprises » contre les civils et les unités de combat présentes. L'interprétation retenue par la Chambre de première instance semble se heurter à une lecture précise de l'ordre émis le **12 juillet 1995** par l'Accusé. Dans cette communication, il va indiquer que les commandants de brigade ont la responsabilité d'informer pleinement la station de sécurité présente dans la zone de responsabilité qui lui incombe.

[435] Mémoire d'appel, par. 222 ; Jugement *Tolimir*, par.109, Arrêt *Tolimir*, par. 290.

[436] Mémoire d'appel, par. 222 ; Jugement *Tolimir*, par.109, Arrêt *Tolimir*, par. 290.

[437] Jugement *Tolimir*, par.111.

Sur la question de **contrôle** et de **management**, le témoin de la Défense **Slavko Culić**, commandant la première brigade légère de Sipovo, a précisé d'une part, que c'était **lui** le commandant de toutes les unités y compris des unités de la police militaire et du secteur de sécurité. Pour lui, ce n'est que le **commandant de la brigade** qui avait le droit de commander[438], que tous les ordres émanaient du centre de commandement[439] et que l'Accusé qui s'était rendu à plusieurs reprises dans sa brigade n'avait en aucun cas exercé le commandement de cette brigade. Interrogé sur le rôle exact de l'Accusé, il indiquait que celui-ci avait la **mission de coordination** ainsi qu'en témoignent ses dires : « Monsieur, le Général Tolimir n'a pas dirigé l'opération. Il était présent uniquement comme représentant du commandement pour coordonner le travail dans la mesure où c'était nécessaire sur le champ de bataille et pour coordonner les actions. C'était le commandant de la division et le commandant de corps qui étaient aux commandes »[440]. Interrogé par le **Juge Flügge** sur le mot « coordonner », il entendait par là qu'il était responsable de la coordination et de l'organisation des forces qui s'occupent de la défense[441].

Il est évident que la Chambre de première instance a bien été consciente du problème posé comme en témoigne son analyse développée aux paragraphes 109, 110 et 111 sur les organes de sécurité et la police militaire. La Chambre de première instance a cru devoir résoudre ce problème par la théorie du **« contrôle professionnel ».** De mon point de vue, dans une chaîne de commandement professionnel, le contrôle est effectué par le **supérieur hiérarchique.** En ce sens, les unités de police militaire étant affectés à une brigade, relevaient du contrôle du commandant du chef de la brigade et non pas l'adjoint du commandant de l'Etat major. De même, les organes de sécurité dépendaient directement du commandant de la brigade. Cependant, il convient de noter que l'Etat major pouvait exercer non pas la mission de contrôle et de commandement mais la mission « de management » des effectifs par des affectations, mutations, notations etc…

Le rôle du 65ème régiment de protection défini au paragraphe 112 du jugement est particulièrement éclairant. En tant qu'unité indépendante comme le dit le jugement, le 65ème régiment de protection motorisée était constituée de plusieurs unités dont notamment un bataillon de police militaire. Sa

[438] Témoignage *Culić*, 15 février 2012, CRF., p. 19278
[439] Témoignage *Culić*, 15 février 2012, CRF., p.19279.
[440] Témoignage *Culić*, 15 février 2012, CRF., p. 19292.
[441] Témoignage *Culić*, 15 février 2012, CRF., p. 19293. Dans le cadre du contre-interrogatoire, répondant à la question de savoir si l'Accusé et d'autres commandants spécialistes étaient experts de la mise en œuvre des ordres, le témoin répondait que si ils étaient des experts il n'étaient pas ceux qui mettaient en œuvre les ordres sur le terrain car le système de contrôle était très clair : les ordres étaient appliqués par les commandants. Il apparaît ainsi que de mon point de vue, la Chambre de première instance n'a pas pris les mesures des propos du témoin Culić ni en a tirer les conséquences juridiques.

mission était d'assurer la sécurité du personnel de l'Etat major principal mais était aussi déployé dans le cadre d'activités de combats. Il est évident que dans le cadre d'activités de combats ils dépendaient dans la zone de responsabilité de la brigade de celui-ci. Pour une partie de ses activités hors les opérations de combats, ce 65ème régiment relevait du commandement du **Général Mladić** et par voie de conséquence de l'Accusé pour certaines activités[442].

L'Accusé a également soulevé le fait qu'il n'avait pas eu un transfert d'autorité sur le 410ème *intelligence center*. La Chambre de première instance a indiqué au paragraphe 917 que Mladić lui avait confié certains pouvoirs du 410e centre de renseignement. Cette mention a été faite à partir du témoignage de **Petar Skrbić**[443]. Toutefois, le fait d'avoir certains pouvoirs qui avaient été transférés n'emporte pas pour autant la direction d'une opération militaire car il s'agissait d'une unité de renseignements. Dans ces conditions, il paraît très difficile de relier ce centre de renseignements à l'Accusé puisqu'il dépendait directement de Mladić.

Si je suis d'accord sur le fait que l'Accusé était « les yeux et les oreilles » du Général Mladić, cela ne veut pas pour autant dire qu'il exerçait une forme de commandement direct sur les unités militaires. C'est la raison pour laquelle, je suis à l'admission du moyen d'appel n°14 contrairement à la majorité de la Chambre d'appel[444].

[442] La note de bas de page **362** est particulièrement explicite puisqu'il est indiqué qu'en mai 1995 un ordre avait été donné qu'une compagnie du 65e régiment de protection soit resubordonnée au corps de la Drina afin d'exécuter un plan de combat ordonné par l'état-major principal de la VRS (avec mention de la pièce P2431). De même toujours cette note de bas de page, le témoin Skrbić avait déclaré que le volet professionnel des tâches qui lui étaient confiées comprenait la formation et le déploiement, accomplis sous l'égide de la section de la sécurité (avec mention de la pièce P02473). Ce n'est pas parce que le témoin de l'Accusation Manoljlo Milovanović avait dit que l'Accusé : « always knew more » que pour autant l'Accusé qui devait tout savoir avait la capacité juridique de donner des ordres hors la chaîne de commandement traditionnelle.
[443] Témoignage *Skrbić*, 2 février 2012, CRF., p. 18789
[444] Arrêt *Tolimir*, par. 577.

2. La responsabilité de Tolimir au regard des chefs d'accusation (Moyen d'appel n° 21)

La Chambre de première instance et la majorité de la chambre d'appel ont conclu que **la seule conclusion raisonnable** qui pourrait être tirée de l'ensemble des éléments de preuve, est que l'Accusé avait **une intention génocidaire**. Sur cette base, la responsabilité pénale de l'Accusé est engagée dans le cadre du crime de génocide pour sa participation à l'ECC de meurtre. La majorité de la Chambre d'appel est d'avis que l'accusé avait connaissance de l'opération meurtrière à partir du **13 juillet 1995** sur la base des mesures qu'il aurait transmises à Malinić, par l'intermédiaire de Savčić et cela dans le but de déplacer les Musulmans de Bosnie capturés dans la région de Kasaba[445]. Ces mesures, selon la majorité, ressemblent étonnamment à celles contenues dans l'ordre émis par Mladić le même jour[446], figurent à la pièce **P00125** dont l'authenticité a été fortement contestée. En un mot, l'Accusé conteste les mesures mises en œuvre qu'il n'aurait pas ordonnées.

Je ne suis pas d'accord avec la majorité quant à la **valeur probante** à donner à la pièce **P00125**. Au delà de l'importance des arguments factuels sur l'authenticité de cette pièce qui mettent sérieusement en doute sa valeur probante[447], il ressort de la lecture du document que cette pièce ne comporte pas la signature manuscrite de l'expéditeur et que son contenu associant un **ordre** et une **proposition** apparaît complètement **illogique**, ce qui me conforte dans mon sentiment sur la création d'un **faux document** pour des raisons mystérieuses. Au regard des explications avancées sur l'authenticité de ce document, je considère que le fait que ce document ait été transmis par un télétypiste, réduit sa valeur probante et ne permet pas de conclure qu'il s'agissait d'un **document original** provenant de **Savčić.** En réalité, le fait que le télétypiste ait reconnu avoir apposé sa signature, avec la mention « transmis », confirme simplement qu'il avait bien exécuté son travail et ce n'est qu'en amont qu'il fallait s'intéresser à la **confection intellectuelle** de ce document. Quant au contenu mixte du document combinant à la foi un **ordre** et une **proposition**, je considère qu'aucune des explications avancées par la Chambre de première instance ne permet de répondre aux inquiétudes sur la cohérence du document laissant en revanche de sérieuses doutes quant à son authenticité.

[445] Pièce P00125.
[446] Pièce P02420.
[447] Notamment sur l'absence de confirmation de l'authenticité du classeur *Atlantida* dans lequel ce document a été trouvé, des déclarations de Malinić et Savčić qui n'ont pas de souvenir d'avoir reçu ni rédige ce document, sur la contestation de l'existence du Poste du commandement avancé du 65ème régiment. Voir, Jugement *Tolimir*, par. 936.

En outre, indépendamment des interrogations sur le début de la participation et contribution significative de l'accusé à l'ECC relative aux exécutions, je considère que l'ECC au sens général, ne peut se concevoir que dans le cadre de la **planification** et non de **l'exécution**. Pour cette raison, je ne retiens pas la responsabilité de l'accusé dans le cadre de l'ECC relative aux exécutions mais dans le cadre de la **complicité du génocide**. A cet égard, la question est de savoir si, pour être tenu responsable pour complicité (*aide et encouragement*) sur la base de l'article 7 1), il suffit que l'accusé ait eu connaissance de **l'intention spécifique** de l'auteur principal du génocide, ou s'il se devait également de partager cette intention ? A cet égard, la Chambre d'appel a eu l'occasion d'indiquer, à plusieurs reprises, que tout individu qui aide et encourage à commettre une infraction supposant une **intention spécifique** peut en être tenu responsable s'il le fait en connaissant l'intention qui l'inspire[448]. Ce principe s'applique à l'interdiction par le Statut du génocide, qui constitue également une infraction supposant une intention spécifique. Le Statut et la jurisprudence du Tribunal permettent de déclarer un accusé coupable de **complicité de génocide sur la base de l'article 7 1)** si la preuve est faite qu'il avait **connaissance** de l'intention génocidaire qui animait l'auteur principal[449]. A cet égard, il découle des éléments de preuve que l'accusé avait d'une part connaissance de **l'intention génocidaire** qui animait certains membres de l'état-major principal de la VRS[450] et d'autre part, en tant que responsable du renseignement, il était conscient des conséquences de ses actes dans la perpétration de ces crimes. Pour ces raisons, si la connaissance qu'il avait de cette intention génocidaire ne permet pas à elle seule de conclure qu'il était animé d'une telle intention en tant qu'auteur principal[451], en revanche, elle permet d'établir l'existence d'un **lien de causalité** entre l'absence d'intervention de l'accusé et la commission du crime de génocide[452].

Tout en relèvant le fait que la responsabilité de l'Accusé n'est pas mise en cause au titre de l'article 7 3) du Statut, en tant que supérieur hiérarchique, au regard du comportement de ses subalternes ou

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L'authenticité de ce document, contestée par l'Accusé, a déjà été débattue. La majorité a jugé qu'il était authentique. Voir, Jugement *Tolimir*, par. 937-944.

[448] Arrêt *Krnojelac*, par. 52, Arrêt *Vasiljević*, par. 142 ; Arrêt *Tadić*, par. 229, *Krstić*, arrêt, par.140

[449] Arrêt, *Krstić*, par.140.

[450] Par le fait qu'il ne pouvait ignorer vu sa fonction que des prisonniers de guerre avaient été exécutés.

[451] Arrêt *Krstić*, par.134

[452] De mon point de vue, les éléments de preuve apportés par l'Accusation ne permettent pas de conclure que l'accusé partageait une telle intention génocidaire. Si tel avait été le cas, la preuve aurait dû être rapportée à ce sujet et non pas être déduite à partir d'éléments circonstanciels. En effet, dans l'hypothèse où une exécution en masse aurait été ordonnée par les hauts dirigeants politiques avec des restrictions précises données par Radovan Karadžić au Général Mladić, ce dernier pour des raisons techniques ne se devait pas alors obligatoirement d'informer ses subalternes de l'Etat major dont l'Accusé ? La chronologie des évènements, sa présence à Zepa et son rôle de médiateur à Zepa m'amènent à conclure qu'il ne partageait pas au départ l'intention génocidaire. Cependant, il a eu connaissance par la force des choses que des éléments militaires de l'ABiH avaient été capturés et qu'ils étaient détenus. A ce stade, il se devait d'intervenir en raison de se fonction de sécurité et de renseignement afin d'assurer aux prisonniers la mise en œuvre pleine et entière des Conventions de Genève, ce qu'il n'a pas fait.

organes subordonnés aux moment des faits, il est important de relever que son rôle en tant que chef du renseignement et de la sécurité était d'une importance substantielle, notamment pour les questions relatives à l'échange des prisonniers de guerre[453]. En effet, l'Accusé dirigeait, coordonnait et supervisait les travaux des deux sections qui le composaient, ainsi que des organes subordonnés du renseignement et de la sécurité, de la police militaire[454]. Il était en charge, avec la police militaire, des prisonniers de guerre[455] et il était tenu informé entre autres des travaux et engagements des unités de police militaire des différents corps[456].

D'ailleurs, en qualité de supérieur direct de **Salapura**[457], l'Accusé était tenu au courant des actions menées par le **10e détachement de sabotage**[458]. A l'égard de son adjoint **Petar Salapura,** je ne peux que m'étonner de l'absence de poursuites à son encontre[459], j'estime qu'il aurait dû être appelé par la Chambre d'appel comme témoin supplémentaire[460]. En ce qui concerne le 10e détachement de sabotage, bien qu'il était une unité indépendante de l'état-major principal de la VRS directement subordonnée à Mladić, il relevait toutefois, de la section du renseignement dirigée par **Salapura** dans la mesure où il effectuait de missions de reconnaissance et il été tenu d'informer l'accusé de tout ce que faisait le détachement[461]. Si les agissements de ses subalternes ne le sont pas imputés à l'accusé en tant que supérieur hiérarchique[462], en raison des informations qui lui étaient transmissent, il est fort contestable que l'Accusé ait été tenu dans l'ignorance au sujet des meurtres

[453] Jugement *Tolimir*, par. 104, 106, et 916.
[454] Jugement *Tolimir*, par. 104.
[455] Voir, en ce sens, pièce P02203 ; pièce D00064.
[456] Milenko Todorović, CR, p. 12960 à 12963 (18 avril 2011). L'Accusé accompagnait souvent Koljević à des réunions afin de contribuer à l'élaboration d'accords pour l'échange de prisonniers. Ljubomir Obradović, CR, p. 11930 et 11931 (29 mars 2011).
[457] Jugement, par.115.
[458] Jugement, par.121.La section du renseignement, dirigée par Salapura, contrôlait directement le 10e détachement de Sabotage. Dragomir Pećanac, CR, p. 18134 (16 janvier 2012) ; Ljubomir Obradović, CR, p. 11960 à 11962 (29 mars 2011).
[459] Il était, en effet, le supérieur de Dražen Erdemović qui lui a exécuté des ordres. J'estime que faire de Petar Salapura un simple témoin à charge de l'Accusation dans les procès relatifs aux évènements de Srebrenica, alors qu'il a témoigné pour l'Accusation devant la Cour de Bosnie-Herzégovine (Cas n°S1 1K003372 10 Krl) dans le procès des membres du 10ème détachement de sabotage (Franc Kos et al.), qu'il a été le 23ème témoin de l'Accusation et qu'il a témoigné le 13 mai 2011 (Cf. Annexe B du jugement) est un déni de justice à l'égard des victimes. Il me paraît incompréhensible de constater que l'exécutant simple Dražen Erdemović a été condamné par le TPIY et que son supérieur hiérarchique soit passé entre les mailles du filet. Ceci méritant une explication, j'estime qu'il aurait dû être appelé par la Chambre d'appel comme témoin supplémentaire.
[460] La Chambre d'appel a deux moyens juridiques pour faire venir un témoin :
- L'article 98 du Règlement de procédure et de preuve a pour titre « Pouvoir des Chambres » d'ordonner de leur propre initiative la production de moyens de preuve supplémentaires ».
- L'article 115 du Règlement de procédure et de preuve applicable devant la Chambre d'appel a pour titre « Moyens de preuve supplémentaires ». Si le contenu de l'article évoque le fait qu' « une partie peut demander à pouvoir présenter devant la Chambre d'appel des moyens de preuve supplémentaires », rien n'interdit à la Chambre d'appel au même titre que la Chambre de première instance de faire venir tel ou tel témoin. De mon point de vue, pour l'équité du procès, il fallait entendre : Dražen Erdemović, Momir Nikolić, Milorad Pelemiš et à défaut Frank Kos.
[461] Jugement, par.120, 121 et 917.
[462] A ce titre, la chambre a indiqué que l'Accusé avait eu des communications avec Salapura le 16 juillet et avec *Popović et al*. le 22 juillet. Jugement *Tolimir*, par. 1113.

perpétrés à l'époque des faits. Bien qu'étant en accord avec le fait que la responsabilité de l'accusé puisse être engagée sur la base d'un ensemble de déductions, je considère cependant, que compte tenu de la fonction et du rôle qui lui ont été confiés, il se devait de prendre toutes les mesures nécessaires afin de se soucier du sort des prisonniers de guerre, ce qu'il n'a pas fait.

En sa qualité de commandant adjoint chargé du renseignement et de la sécurité, l'Accusé avait la charge de veiller à la sécurité et au bien-être des prisonniers, obligation qu'il n'a pas accomplie dans son intégralité. D'ailleurs, en tant qu'officier militaire chevronné, l'Accusé était au courant des obligations que lui faisaient les règlements militaires[463] et les règles de droit international[464]. La jurisprudence du Tribunal est bien précise à cet égard en précisant que la IIIe Convention de Genève fait *«à tous les agents de la Puissance détentrice qui ont la garde de prisonniers de guerre l'obligation de protéger ces derniers, en raison du fait qu'ils sont des agents de cette Puissance détentrice»*[465]. En effet, les principes fondamentaux inscrits dans la IIIe Convention de Genève, n'admettent aucune dérogation, voulant ainsi que les prisonniers de guerre soient traités avec humanité et protégés des souffrances physiques et mentales, dès qu'ils sont tombés au pouvoir de l'ennemi et jusqu'à leur libération et leur rapatriement définitifs.

Si la participation directe de l'accusé aux «négociations » sur le transport de civils musulmans de Bosnie et les échanges de prisonniers de guerre musulmans de Bosnie à Žepa laisse apparaître sa connaissance du respect des règles de droit international applicables[466], en revanche certaines de ses

[463] Voir en ce sens, le Règlement relatif à l'application du droit international de la guerre par les forces armées de la République socialiste fédérative de Yougoslavie qui reconnaît que les dispositions qui figurent dans la IVe Convention de Genève de 1949 et les deux Protocoles additionnels de 1977 (exigeant par exemple que les prisonniers de guerre et les civils au pouvoir d'une partie au conflit soient traités avec humanité) sont aussi fondées sur le droit international coutumier relatif à l'application du droit international de la guerre par les forces armées de la République socialiste fédérative de Yougoslavie. . Voir notamment les articles 9-12, 20-22, 207, 253, 210, 212 et 253 contenus dans la Pièce P02482. Le code pénal de la RS, calqué sur celui de la RSFY, traite des crimes contre l'humanité ou des violations du droit international, y compris des crimes de guerre contre les populations civiles et les prisonniers de guerre. Voir pièce P02480 p.1, 3. La Constitution de la RS elle-même proscrit les traitements inhumains et la détention illégale. Pièce P02215, p. 3, articles 14 et 15.

[464] En effet, l'obligation de traiter les prisonniers avec humanité prévue à l'article 13 de la IIIe Convention de Genève est aussi consacrée à l'article 3 commun aux Conventions de Genève qui, dans la mesure où il fait partie du droit international coutumier, s'applique à toutes les parties, que ce soit dans des conflits armés internationaux ou non.

[465] Arrêt *Mrkšić*, par. 70-71 et 73.

[466] En effet, dans le rapport qu'il a envoyé au commandement du corps de la Drina le 9 juillet 1995 et dans lequel, en transmettant les instructions de Karadžić, il a enjoint à Krstić d'ordonner à ses unités de « traiter la population civile et les prisonniers de guerre conformément aux Conventions de Genève du 12 août 1949». Voir Pièce D00041 ; Jugement, par. 929. Dans la même ligne de conduite le 28 juillet, l'Accusé avait déclaré que les hommes musulmans de Bosnie que l'on avait fait descendre des autocars le 27 juillet puis détenus à la prison de Rasadnik seraient enregistrés par le CICR en tant que prisonniers de guerre. Voir, Jugement, par. 992. Le rapport daté du 30 juillet rédigé par Čarkić sur autorisation de l'Accusé montre aussi que, pour ce qui est des prisonniers de guerre détenus à la prison de Rasadnik, toutes les dispositions nécessaires concernant leur traitement avaient été prises conformément aux ordres et instructions de l'Accusé, à savoir notamment que les prisonniers de guerre soient classés par catégorie ; qu'on leur distribue des repas, qu'ils bénéficient de soins médicaux ; qu'ils aient la possibilité de prier et qu'ils soient enregistrés par le CICR. Voir, Pièce P01434, p. 3, Jugement, par. 999. De plus, l'Accusé a envoyé à l'état-major principal de la VRS l'accord de

instructions peuvent être interprétées comme **évasives,** voir **contradictoires** par rapport au strict respect des règles de droit international. En effet, **en août et en septembre 1995**, alors que les familles des soldats de la VRS et des Musulmans de Bosnie capturés faisaient pression, l'accusé n'a pas pu procéder aux échanges de prisonniers de guerre, en alléguant le fait qu'il n'y avait tout simplement pas assez de soldats de l'ABiH capturés[467]. A ce moment précis, l'accusé aurait dû entreprendre toutes les démarches nécessaires afin de déterminer **les causes** qui auraient pu expliquer une telle situation et ne pas se contenter uniquement de soulever l'impossibilité d'échange de prisonniers sur la base du faible nombre de soldats ennemis capturés par ses unités[468]. Le fait qu'à la même période s'est déroulée l'opération de **réensevelissement coordonnée** et **supervisée** par des officiers du renseignement et de la sécurité relevant de l'autorité de l'Accusé, dont **Beara** et ***Popović***, est un élément à prendre en compte quant aux raisons qui auraient pu motiver l'accusé à donner une telle réponse[469]. Un autre événement qui attire mon attention est la proposition de la part de l'accusé de ne pas répondre à une demande formulée par l'Ambassade des Pays-Bas à Sarajevo et de ne pas apporter son aide à l'identification de **239 personnes** figurant sur une liste de personnes présentes à la base de l'ONU à Potočari le 13 juillet 1995[470].

Si les éléments de preuve montrent que l'accusé avait, à plusieurs reprises, entendu respecter les règles de procédures internationales applicables dans le cadre des échanges de prisonniers[471], rien ne peut excuser l'inaction et l'absence de coopération de ce dernier face aux demandes d'information réitérées. En effet, l'Accusé aurait dû obtenir des informations de renseignement et de contre-renseignement auprès des unités et du personnel sur le terrain qui lui étaient subordonnés. Les instructions de **Mladić** relatives à la direction et au commandement des organes de sécurité de la VRS délivrées le 24 octobre 1994 montrent que l'Accusé exerçait un « **contrôle centralisé »** sur leurs activités. Les éléments de preuve montrent que l'Accusé donnait des conseils, des instructions et des ordres à ses subordonnés, qui le tenaient au courant de l'évolution de la situation ce qui ne jette aucun doute sur la capacité matérielle de l'Accusé à protéger les prisonniers musulmans de Bosnie de Srebrenica.

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cessez-le-feu conclu en octobre 1995 qui prévoyait « que tous les civils et les prisonniers de guerre bénéficient d'un traitement humain». Voir, Pièce D00263, p. 3 ; Jugement *Tolimir*, par.1005.

[467] Pièce P02751 ; pièce P02250, p. 2. Voir aussi Jugement, par. 1003 et 1004.

[468] Pièce P02250, p. 4.

[469] Jugement *Tolimir*, par. 558-564, 1064 et 1066.

[470] Voir Pièce P02433. Voir, également, pièce P00122, p.2 ; pièce P02875 (document du bureau du MUP de la BiH chargé de la sûreté de l'État, daté du 3 août 1995, où l'on peut lire qu'une conversation entre deux membres des forces serbes de Bosnie a été interceptée et que l'un des participants transmettait l'ordre du général Tolimir, qu'ils appellent Toša : « N'enregistrez pas les détenus. Parlez-leur le plus possible et gardez-les pour les échanges futurs »).

[471] Le fait qu'il se soit occupé pendant longtemps de l'échange des prisonniers de guerre de 1992 jusqu'à la fin de l'année 1995. Voir, Pièce P02871; pièce P02251 ; pièce P02250.

A cet égard, bien que les éléments de preuve laissent apparaître le fait que l'Accusé ne faisait pas partie du plan de l'ECC, il avait en sa qualité de commandant adjoint chargé du renseignement et de la sécurité, l'obligation absolue de protéger les prisonniers musulmans de Bosnie de **Srebrenica.** Toutefois, malgré la connaissance de la situation sur le terrain et les obligations qui lui incombaient l'Accusé a choisi de ne pas agir, ce qui a pu conduire à la commission de ces crimes. Pour ces raisons, je ne suis pas d'accord avec le raisonnement de la majorité de la Chambre d'appel[472] car je considère qu'il aurait été judicieux et équitable de mettre en cause la responsabilité de l'Accusé en tant que **complice de génocide** (*aider and abettor*)[473] et non en tant qu'**auteur principal du génocide**.

A mon sens, les éléments de preuve se rapportent à un auteur principal d'un génocide doivent être consistants et indiscutables. On ne peut se baser sur des simples suppositions pour établir une telle responsabilité. A ce sujet, j'estime que l'Accusation en se fondant principalement sur des éléments discutables[474] n'a pas été en mesure d'apporter des éléments probants au soutien de sa démonstration[475].

[472] Arrêt *Tolimir*, par. 591.
[473] Voir, Arrêt *Krstić* par.137; Arrêt *Krnojelac*, par. *52 ; Arrêt Vasiljević*, par. 102.
[474] Elle se base notamment sur des expertises de salariés du Bureau du procureur, sur les témoignages en audience des membres du Bureau du Procureur, sur des accords de plaidoyer discutables, sur des témoins émanant de la VRS comme Salapura.
[475] C'est notamment pour cette raison que l'un juge de la Chambre de première instance s'est prononcé pour l'acquittement de l'Accusé.

3. Entente en vue de commettre un génocide (Moyen d'appel n°22)

L'appelant soutient dans ses écritures que la Chambre de première instance a commis une erreur en concluant que l'Accusé avait une intention génocidaire[476]. La Chambre de Première instance et la Chambre d'appel ont conclu à la **majorité**, que l'Accusé était pénalement responsable **d'entente en vue de commettre un génocide** en vertu de l'article 4 (3) (b) du Statut[477]. Selon les conclusions de la Chambre d'appel, la preuve que l'Accusé aurait donné son accord à la commission du crime de génocide se déduit donc de sa contribution significative à l'entreprise criminelle commune de meurtre[478].

Je considère que la responsabilité de l'accusé ne peut être engagée que sur la base de la complicité de génocide. En effet, **la seule connaissance** de **l'intention génocidaire** ne suffit pas en elle-même pour inculper l'accusé au même titre que les membres de l'ECC[479]. Je considère que l'accusé, non seulement ne faisait pas **partie** de l'ECC, mais également qu'aucune **analyse juridique exhaustive et sérieuse** ne pourrait parvenir à la conclusion de l'existence d'une forme d'entente en vue de commettre un génocide **entre l'Accusé** et les **membres de l'ECC**. En effet, à partir des éléments juridiques dont nous disposons, il n'y a **aucune preuve, directe ou indirecte**, qui soit susceptible d'être interprétée comme étant **la seule déduction raisonnable et possible**[480], que l'accusé aurait conclu une forme d'accord avec les membres présumés de l'ECC en y apportant une contribution significative.

En outre, au-delà de mon positionnement personnel et mes divergences quant à la forme de responsabilité applicable à l'accusé, l'analyse juridique de la Chambre d'appel laisse apparaître plusieurs questions qui auraient, de mon point de vue, méritées un raisonnement plus attentif. A cet égard, si la Chambre d'appel, évoque à juste titre, le fait que le ***mens rea*** pour le crime de génocide

[476] Mémoire d'appel, par. 456-466. L'appelant conteste la conclusion de la Chambre de première instance rappelé au paragraphe 1175 du jugement selon lequel le projet de tuer les hommes musulmans de Srebrenica avait déjà été conçu et qu'il existait une résolution d'agir pour laquelle au moins deux personnes se sont accordées en vue de commettre un génocide. Au paragraphe 1176 du jugement, la Chambre de première instance souligne qu'au plus tard dans l'après-midi du 13 juillet 1995, l'accusé avait connaissance de l'opération meurtrière et qu'il avait activement entrepris de la dissimuler dans le cadre de la contribution importante qu'il avait apportée à l'entreprise criminelle commune relative aux exécutions. De même, la Chambre de première instance a indiqué que le fait de n'avoir pas protégé les prisonniers musulmans constituait une **inaction délibérée** en vue de servir l'objectif commun partagé avec les autres membres de l'ECC ce qui a entraîné la commission d'un génocide.
[477] Jugement *Tolimir*, par.172-173, 175-176, Arrêt *Tolimir*, par. 589.
[478] Jugement *Tolimir*, par.1176, 1206. Arrêt *Tolimir*, par. 580.
[479] Arrêt *Krstić*, par.134.
[480] Arrêt *Popović et al. et al.*, par. 544 ; Arrêt *Nahimana et al.* par. 896-897; Arrêt *Seromba* par. 221.

et le crime d'entente en vue de commettre un génocide sont **identiques**[481], elle a plus de difficulté à faire ressortir la différence qui caractérise **l'*actus reus* de ces deux crimes**[482]. En effet, le crime de génocide exige la commission d'un des actes énumérés à l'article 4 (2) du Statut, alors que le crime d'entente en vue de commettre le génocide exige l'acte de conclure **un accord** visant à commettre le génocide[483]. Si en théorie une telle distinction semble aller de soit, dans la pratique les choses semblent plus complexes. En effet dans le but de parvenir à une telle distinction la Chambre d'appel a, sans le vouloir, mélangé ces deux notions en les rendant indiscernables.

En effet, afin d'établir **l'*actus reus*** du crime d'entente en vue de commettre le génocide, la Chambre d'appel s'est fondée non seulement sur les conclusions liées aux actes de génocide mais également sur la responsabilité de l'Accusé dans le cadre de sa participation à l'ECC.[484] Ainsi, en absence de preuves directes, la Chambre d'appel a voulu déduire l'accord en vue de commettre le génocide, à partir du **comportement des membres de l'ECC au moment de la commission des actes de génocide**[485]. Pour y parvenir, elle a procédé à une analyse d'ensemble des faits et des circonstances liées au crime de génocide afin de déduire l'existence du crime d'entente en vue de commettre un génocide[486]. En ce sens, si à défaut de preuve directe d'un accord d'entente en vu de commettre le génocide, la majorité de la Chambre d'appel, était en droit de considérer tous les faits et circonstances pertinentes, y compris les conclusions de fait dans le but de déterminer si un génocide avait été commis[487], elle se devait, toutefois, de tenir compte dans le cadre de son analyse du fait qu'une telle approche aboutissait à incriminer l'accusé **deux fois** pour les mêmes actes.

D'autre part, il ressort du raisonnement de la Chambre de première instance qui a été corroboré par la Chambre d'appel, que l'accord d'entente en vue de commettre le génocide a été déduit à partir du **13 juillet 1995**, date de la connaissance présumée par l'accusé de l'opération meurtrière commune[488]. A suivre ce raisonnement, la Chambre de première instance aurait déduit l'adhésion à l'accord d'entente en vue de commettre lé génocide, à partir de la connaissance par l'accusé de l'intention génocidaire des membres de l'ECC[489]. Ceci voudrait dire que la Chambre de première instance se serait servie des éléments d'analyse qui lui ont permis de déterminer le *mens rea,* pour en déduire à partir des mêmes éléments l'existence de l'*actus reus* du crime d'entente en vue de

[481] Arrêt *Tolimir*, par.586 ; Jugement *Tolimir* par. 787 ; Arrêt *Nahimana et al.* par. 894.
[482] Arrêt *Tolimir*, par.582 et 585.
[483] Arrêt *Nahimana et al.* para. 894; Arrêt *Seromba* para. 218; Arrêt *Ntagerura et al*. para. 92.
[484] Arrêt *Tolimir*, par.583.
[485] Arrêt *Tolimir*, par.583.
[486] Arrêt *Tolimir*, par.583 *;* Jugement *Nahimana et al.* Par. 896.
[487] Arrêt *Popović et al.*, par. 544 ; Arrêt *Nahimana et al.,* par. 896-897; Arrêt *Seromba* par. 221.
[488] Arrêt *Tolimir*, par. 585. Jugement *Tolimir*, par. 460.
[489] Voir Arrêt *Tolimir,* par. 583-585. Jugement *Tolimir,* par. 1206.

commettre lé génocide. En ce qui me concerne, je suis en **total désaccord** avec un tel raisonnement qui de mon point de vue va bien au-delà des présomptions ou autres preuves indirectes servant de limite à l'analyse.

J'attire l'attention sur le fait que **le crime d'entente en vue de commettre le génocide**, est une **infraction formelle** et **préventive** qui mérite une attention particulière notamment dans un contexte dans lequel un accusé est déjà condamné pour des actes de génocide[490]. Si conformément à la jurisprudence, une condamnation pour génocide n'exclue pas un cumul de condamnation avec l'entente en vue de commettre le génocide, du fait que le crime de génocide ne sanctionne pas l'accord en vue de commettre le génocide[491], encore faudrait-il **qu'un tel accord** ait véritablement existé et qu'il puisse être déduit à partir d'une analyse juridique exhaustive.

La Chambre d'appel, revient également sur le fait que l'incrimination de l'entente en vue de commettre le génocide a pour but non seulement de prévenir la commission du crime matériel, mais aussi de **réprimer** la collaboration en vue de commettre ce crime car une telle collaboration représente en soit un danger précis, que le crime matériel ait été commis ou non[492]. Si je ne mets pas en doute le fait qu'une telle conclusion s'inscrit dans le cadre des buts de la Convention sur le génocide[493], en revanche j'ai de fortes réserves sur le danger que pourrait représenter une telle entente, notamment lorsque le crime de génocide a été établi.

A cet égard, je considère que si l'incrimination d'une **infraction formelle**, telle que **l'entente**, a pour objet de prévenir la commission de l'infraction matérielle[494], dès lors que celle-ci est commise, la raison justifiant de punir l'entente préalable est moins impérieuse[495]. Ceci est d'autant plus vrai lorsque la preuve de l'infraction matérielle est l'élément essentiel qui a permis de déduire l'existence d'un accord préalable et qui fonde la déclaration de culpabilité pour entente.

Je me demande d'ailleurs, si en essayant d'intégrer la condamnation d'entente de commettre le génocide dans le cadre de la participation de l'accusé à l'ECC de meurtre, il n'y aurait pas une

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[490] Voir, Don Stuart, *Canadian Criminal Law: A Treatise*, 4e éd., (2001), p. 698 à 700 (dans la mesure où l'entente est une infraction préventive et non achevée, « une fois l'infraction matérielle consommée, rien ne justifie dès lors la répression du crime non achevé »)

[491] Arrêt *Gatete* par. 262.

[492] Arrêt *Tolimir*, par.589, Jugement *Tolimir*, par. 1207, Arrêt *Gatete*, par. 262

[493] Travaux préparatoires de la Convention sur le génocide et au Comité spécial du génocide, Rapport du Comité et projet de convention élaboré par le Comité, Conseil économique et social, E/794, 24 mai 1948, p. 19.

[494] Arrêt *Nahimana*, par. 678 ; Jugement *Kalimanzira*, par. 510 ; Voir aussi documents officiels de l'ONU, A/C.6/SR.85 et A/C.6/SR.84 (travaux préparatoires de la Convention sur le génocide où il est dit que « le but de la Convention est plutôt de prévenir le génocide que de le réprimer »).

[495] Jugement *Popović et al.*, par. 2124.

articulation forcée des éléments d'appréciation ? En d'autres termes, la base pour ces deux condamnations ne serait-elle pas la même c'est-à-dire l'adhésion par l'accusé à un accord en vue de commettre un génocide ? En ce sens, si une déclaration de culpabilité pour crime de génocide ne rend pas une condamnation pour entente de commettre le génocide redondante[496], en revanche, il est essentiel de rappeler, comme il a été fait dans l'affaire *Popović et al.*, que *«le principe fondamental qui sous-tend les préoccupations concernant les déclarations de culpabilité multiples à raison d'un même acte est celui de l'équité envers l'accusé*[497]. Au delà de mon propre positionnement en matière de responsabilité de l'accusé, je considère que la Chambre d'appel, aurait dû d'appliquer **le principe d'équité** dans le cas d'espèce, du fait que la base des deux condamnations se déduit des éléments de connaissance par l'accusé du plan génocidaire. Ainsi, dans les cas où ces actes ont déjà donné lieu à une condamnation pour **génocide**, entrer dans la voie d'une condamnation supplémentaire aurait par conséquence une double condamnation de l'accusé pour les mêmes actes[498].

Pour ces raisons, ne partageant pas le point de vue de la Chambre d'appel[499] car j'estime que la Chambre de première instance a fait une **erreur de droit** et je conclus donc à l'admission du moyen d'appel n°22.

[496] Arrêt Gatete, par. 263. Ceci notamment du fait que l'entente en vue de commettre le génocide est un crime en vertu du Statut, alors que l'entreprise criminelle commune est une forme de la responsabilité pénale

[497] Jugement *Popović et al.*, par. 2123. Voir aussi, Arrêt *Kunarac*, par. 173 (où il est dit que la Chambre d'appel « examinera les déclarations de culpabilité multiples en étant guidée par « les considérations de justice envers les accusés ») ; Arrêt *Čelebići*, par. 412.

[498] Jugement *Musema* par.198. Dans cette affaire la Chambre de première instance s'est tournée vers la définition plus favorable, pour laquelle un accusé ne peut être reconnu coupable de génocide et d'entente pour commettre le génocide sur la base des mêmes faits.

VI. La Peine

[499] Arrêt par.590.

La Peine (Moyen d'appel n°25)

La Chambre d'appel a condamné, à la majorité, l'Accusé, à la **réclusion à perpétuité**. Les faits reprochés à l'Accusé sont particulièrement graves et méritent d'être sanctionnés à hauteur de la responsabilité militaire effective qu'il remplissait au sein de l'Etat major de la VRS.

Sur le plan procédural, j'avais conclu, concernant les moyens 1 et 3, à l'absence de procès équitable mais j'ai estimé cependant que le dossier recelait en lui-même un nombre important d'éléments de preuve qui me permettaient en tant que juge raisonnable de porter une appréciation sur la responsabilité pénale de l'Accusé. C'est la raison pour laquelle j'ai pour certains des moyens soulevés par l'appelant accepter ceux-ci et rejeter d'autres. J'ai tenu aux pages 9 et 10 de mes observations générales d'indiquer qu'il m'était apparu nécessaire de donner aux faits reprochés une **exacte qualification juridique**.

Pour moi, la responsabilité pénale l'Accusé est engagée à deux titres :

- En application de l'article 2 Infractions aux Conventions de Genève de 1949 car au titre du paragraphe A) l'Accusé est responsable d'homicides intentionnels de plusieurs milliers de prisonniers de guerre

- Au titre de l'article 4 2 a), il peut être déclaré **complice d'un génocide** pour les meurtres de membres du groupe des musulmans de Srebrenica

La déclaration de culpabilité fondée sur ces deux articles doit appeler l'octroi d'une **peine maximale** qui en l'espèce ne peut être que la réclusion à vie avec à la clef une **peine incompressible de 30 ans.**

Pourquoi cette peine incompressible de 30 ans ? Le nombre des victimes à Srebrenica est énorme : plusieurs milliers de militaires ou d'hommes en âge de combattre ont été sans procès exécutés en quelques jours et ce, dans le cadre d'un *modus operandi* abominable. Bien que la Chambre *Tolimir* baignait dans l'appréciation d'autres responsabilités comme celle de Krstić, Popović *et al.*, Pandurević, Beara, elle se devait de se centrer **uniquement** sur l'Accusé. L'Accusé ne fait pas partie des simples exécutants du terrain comme le sergent **Dražen Erdemović**, il fait partie de la

catégorie des généraux c'est-à-dire du haut commandement de la Republika Srpska n'ayant au dessus de lui que le **Général Mladić** et Le Président **Radovan Karadžić**. En quelque sorte, si un jour, **Radovan Karadžić** et **Ratko Mladić** étaient condamnés, l'Accusé serait en quelque sorte « le n°3 » et si les intéressés étaient acquittés ou décédaient en cours de procès, l'Accusé pourrait en théorie se retrouver en **position n°1 ou n°2**, c'est donc dire l'importance du rôle de l'Accusé.

Certes, les éléments de preuve rapportés par l'Accusation n'ont pas permis de mon point de vue de l'associer à la planification d'une ECC ou en une qualité d'auteur d'un génocide. En revanche, les éléments de preuve examinés à la lumière de moyens d'appel m'ont permis de conclure à sa culpabilité et à la nécessité d'une peine incompressible de 30 ans de telle façon que compte tenu de son âge il ne puisse jamais se retrouver un jour en liberté. Cette peine incompressible m'est d'autant parue nécessaire que dans le cadre du Mécanisme résiduel il incombera **seul** au Président du Tribunal d'accorder en application de l'article 150 du Règlement de procédure et de preuve, une grâce, une commutation de peine ou une libération anticipée.

Certes, l'article 151 du Règlement de procédure et de preuve du MICT oblige le Président à tenir compte, entre autres, de la gravité de l'infraction commise, du traitement réservé aux condamnés se trouvant dans la même situation, de la volonté de réinsertion sociale dont fait preuve le condamné ainsi que du sérieux et de l'étendue de la coopération fournie au Procureur mais, dans la mesure où c'est un pouvoir énorme qui échoit au Président, il m'apparaît nécessaire « d'encadrer » cette possibilité de grâce et l'encadrement adéquat me paraît être le prononcé d'une peine de réclusion à vie avec une peine incompressible de 30 ans.

De même, dans le dispositif joint en annexe, j'indique clairement que l'Accusé doit effectuer sa peine en Serbie, je ne vois pas à quel titre les frais inhérents à sa longue devraient être pris en charge par un autre Etat, c'est à la Serbie de veiller à la sécurité et aux soins. De plus, comme la période de détention sera très longue je ne tiens pas à sanctionner les membres de sa famille qui ne sont pas responsables des évènements. Sa famille, si elle le souhaite, doit pouvoir le rencontrer dans le cadre des visites auxquelles les accusés ont droit et afin de faciliter les contacts familiaux la meilleure des solutions est qu'il puisse purger sa peine en Serbie.

VII. Conclusion

Après une analyse exhaustive des éléments de preuve admis et l'examen des écritures des parties, je suis en mesure d'indiquer **comment** se sont déroulés les faits ayant conduit à la capture puis à l'exécution de milliers d'hommes (militaires et en âge de combattre) de Srebrenica.

En effet, le point de départ est **exclusivement** l'attaque par les forces serbes des positions du bataillon néerlandais de l'enclave de Srebrenica. La prise de ces positions qui est décrite dans les l'annexe relève la question de savoir **pourquoi** les forces serbes ont attaqué ces position en priorité ?

La réponse n'est pas aisée, alors même qu'elle est à mon sens la clef des évènements, et cela notamment du fait de l'absence d'intérêt de la Chambre de première instance sur la question Il est indéniable qu'un « bras de fer » opposait la Republika Srpska à la Communauté internationale et particulièrement à l'OTAN[500].

Il était alors logique que l'attaque de l'enclave de Srebrenica par les forces serbes allait à nouveau déclencher des bombardements de l'OTAN ; la Communauté internationale ne pouvait rester insensible à une attaque dirigée contre une enclave juridiquement protégée par une Résolution du Conseil de Sécurité. Dans la mesure où les forces serbes étaient **à l'intérieur** de l'enclave de **Srebrenica** et que dans ces conditions, la population musulmane ne pouvait qu'être inquiète des risques de dommages collatéraux en cas de bombardements, celle-ci ne pouvait alors que partir de la zone de combats. C'est d'ailleurs, ce qu'elle a fait en quittant les lieux **spontanément** et en se réfugiant à Potočari siège du quartier général du bataillon néerlandais, lieu mieux protégé normalement en cas de bombardement de l'OTAN.

Dans la confusion suivant l'opération menée contre le bataillon néerlandais, les forces militaires de l'ABiH en profitaient pour fuir l'enclave en emmenant avec elle des hommes en âge de combattre âgés de 16 à 60 ans[501], dont la plupart avaient une participation directe aux hostilités. Force est de constater que quelques femmes en faible nombre se sont également joint, pour des motifs personnels, à cette colonne essentiellement militaire. La Chambre de première instance établissait au-delà de tout doute raisonnable que cette colonne a combattu les forces serbes leur infligeant des pertes ce qui a entraîné un cessez-le –feu temporaire entre les deux parties pour permettre le départ de la colonne dans les meilleures conditions possibles.

[500] En effet, l'autre enclave Goražde avait fait l'objet d'une attaque par les forces serbes le 4 avril 1994 et le 10 avril 1994, l'OTAN avait bombardé les positions serbes autour de Goražde ce qui avait entraîné le 25 avril 1994 la proposition du « Groupe de contact » constitué des Etats-Unis, de la Russie, de la Grande Bretagne et de la France pour élaborer un plan de paix pour la Bosnie-Herzégovine. Les 25 et 26 mai 1995, l'**OTAN** bombardait les positions serbes autour de Pale.

Le prise des positions tenues par le bataillon néerlandais sans réaction de l'OTAN a été indéniablement un succès pour le Général Mladić qui s'en est vanté publiquement comme en témoigne la vidéo P02807 dans laquelle il dit que le journaliste bien connu de la CNN lui avait dit qu'il était un nouveau Général GIAP[502] car la comparaison peut être effectivement faite avec la prise de *Dien Bien Phu* par le Général GIAP après la prise des positions de l'armée française à partir d'un positionnement en hauteur.

Il découle ainsi, que le déroulement des faits ne peut aucunement accréditer la thèse d'une ECC visant le transfert forcé de la population civile. Je considère cette conclusion comme une erreur majeure commise dans l'appréciation des éléments de preuve, car ce projet hypothétique ne correspond en aucune façon aux Directives 7 et 7/1 à la base de cette théorie. La question qui se pose est celle de savoir pourquoi cette opération militaire s'est transformée en massacre des prisonniers de guerre. En ne voulant pas explorer cette voie, le TPIY ne fait pas son devoir de recherche de la manifestation de la vérité.

A cet égard, je me dois d'évoquer **l'attente** des familles des victimes en ce qui concerne la vérité sur ces évènements et la détermination exacte par la justice internationale des responsables de ces évènements tragiques ayant abouti à l'exécution de plusieurs milliers de musulmans de Bosnie-Herzégovine. Le présent dossier ne concernait que l'Accusé qui a été sanctionné par les juges de la Chambre d'appel en raison de sa participation aux faits tels que relatés par le jugement de la Chambre de première instance et confirmés en grande partie par la Chambre d'appel.

Son rôle qui a été définitivement déterminé par cet Arrêt ne permet pas cependant de répondre à la question légitime des familles de victimes qui auraient voulu savoir qui a ordonné ces exécutions de masse ?

La fragmentation des dossiers relatifs à Srebrenica et le contrôle quasi exclusif de la présentation des éléments de preuve par les parties n'ont pas permis à ce jour, me semble t-il, de répondre à cette question essentielle pour les familles des victimes et l'attente de la communauté internationale.

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[501] Qui avaient au titre de la loi nationale le statut de conscrit.

[502] La connaissance de la guerre par le journaliste, Prix Pulitzer en 1966 aurait du l'inciter à une plus grande prudence dans ses propos car le Général GIAP s'il avait effectivement accompli un exploit militaire est également coupable des décès de 7801 prisonniers de guerre et le départ de 3013 prisonniers indochinois capturés sur les lieux.

Un autre point important de cette réflexion, est celui lié à la procédure de type *common law* qui a été suivie dès l'origine des procès par les premiers juges de ce Tribunal mais qui ne permet pas d'approcher pour autant au plus près de la vérité. L'implication des juges dans le déroulement du procès par des questions précises aux témoins et aux parties sur les éléments de preuve est la voie qui aurait dû être suivie. A cet égard, j'ai demandé en vain à mes collègues de faire venir des témoins dont **Karadžić** et **Mladić** dans le cadre de ce procès.

Le fait que le **Statut** reconnaisse à juste titre à l'accusé de ne pas **s'auto-incriminer**, en application de l'article 21, n'interdit pas toutefois aux juges la possibilité de lui demander de témoigner, avec son consentement d,'autant plus qu'il a plaidé **non coupable**. Certains accusés ont compris que c'était leur propre intérêt d'assurer eux-mêmes leur propre défense (c'est ce qu'a fait l'Accusé) ce qui me paraît être une excellent chose, mais je considère toutefois, qu'ils auraient dû compléter leur défense **par leur propre témoignage**. Il est incroyable de constater que l'Accusation et la Défense dans plusieurs affaires fassent venir des témoins qui ont été condamnés ou sont en cours de procès pour qu'ils témoignent sur les faits.

Il m'apparaît également important de relever qu'il manque dans l'enceinte judiciaire la présence et la voix des victimes qui n'ont pas au TPIY de statut sauf celui de témoin soumis à un contre-interrogatoire de l'autre partie. Devant d'autres juridictions internationales les victimes ont un statut qui leur permet de donner leur point de vue, c'est un défaut de fonctionnement que je me dois de relever !

Enfin, il convient aussi de réfléchir à la question de la **protection des témoins**. Est-il vraiment nécessaire que plus de 20 ans après les faits, il y ait la nécessité de protéger les témoins à l'exclusion des victimes de viols (ce qui n'était pas reproché ici à l'Accusé) ? Le poids à accorder au témoignage public d'un témoin est certainement plus important que celui qui est accordé à un témoin qui dépose sans mesures de protection et qui peut parfois avoir tendance, en raison du temps passé, à prendre une certaine liberté par rapport à l'évènement.

La solution est donc claire : il suffirait aux juges de reprendre le contrôle du procès et pour prendre une image aérienne, **« passer du pilotage automatique au pilotage manuel »**, c'est la condition qui permettra d'atteindre la Vérité et de savoir **qui** a décidé de l'exécution de milliers de victimes et **pourquoi**. A ce jour, à partir des éléments de preuve du dossier, je suis incapable d'y répondre.

VIII. Annexes

1. Tableau récapitulatif des références à Richard Butler dans le Jugement *Tolimir*

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2. Rapport du secrétaire général des Nations Unies[503] (Pièce D00122)

a. Retracé historique des événements qui ont conduit à la création des zones de sécurité

[503] Rapport complet comprenant une évaluation des évènements survenus depuis la création de la zone de sécurité de Srebrenica, le 16 avril 1993, en vertu de la résolution 829 (1993) du 16 avril 1993 ainsi que d'autres zones de sécurité, jusqu'à l'adoption de l'Accord de paix par le Conseil de Sécurité, par la Résolution 1031 (1995) du 15 décembre 1995.

Les évènements liés à **Srebrenica** et les crimes imputés au **Général Tolimir** concernent deux enclaves (Srebrenica et Žepa) qui avaient été déclarés **« zones de sécurité »** par le Conseil de Sécurité[504]. La question peut alors se poser de savoir pourquoi une zone dite de sécurité a été attaquée par les forces serbes. Tenter de répondre à cette question revient à examiner en premier lieu les raisons qui ont conduit à la création de la zone de sécurité.

Au début du confit en Bosnie-Herzégovine, des musulmans ont été expulsés de chez eux et certains ont été maltraités et tués par les Serbes[505]. En mai 1992, les bosniens se sont regroupés pour enlever aux Serbes le contrôle de Srebrenica et après la mort de **Goran Zekić**, un dirigeant serbe, les habitants serbes ont commencé à évacuer Srebrenica[506] et la ville a été contrôlée le 9 mai 1992 par les combattants bosniens placés sous le commandement de **Naser Orić**[507].

Sous l'égide de ce dernier, les bosniens ont étendu leur contrôle au cours de combats et, selon les statistiques émanant des deux parties, plus de 1300 serbes auraient été tués par les bosniens[508]. En septembre 1992, les forces de **Srebrenica** faisaient leur jonction avec celles de **Žepa**[509]. Le 7 janvier 1993, les forces bosniennes lançaient une attaque contre le village de **Kravica** tuant 40 civils serbes[510]. En mars 1993, les forces serbes dans une contre-offensive envahissaient les villages de Konjević Polje et de Cerska entraînant la concentration d'une population de 50 000 à 60 000 autour de Srebrenica et, au cours de la contre-offensive, la ville de Žepa a été séparée de Srebrenica par un étroit corridor tenu par les Serbes, cette localité devenant elle aussi une enclave[511]. La situation devenait désespérée à **Srebrenica**, le Commandant de la FORPRONU s'y rendait le 11 mars 1993 pour constater qu'il n'y avait plus d'eau courante, que peu d'électricité, qu'un surpeuplement existait et que des écoles et des bâtiments avaient été vidés pour l'accueil des fuyards. La population locale empêchait le Commandant de la FORPRONU de s'en aller, celui-ci affirmant alors que les personnes présentes étaient sous la protection de l'ONU[512].

Dans les semaines suivantes, le HCR réussissait à faire passer un certain nombre de convois d'aide humanitaire et à évacuer des personnes vulnérables pour Tuzla[513]. Ces évacuations se heurtaient à l'opposition des autorités gouvernementales de Sarajevo qui évoquaient « un nettoyage ethnique ».

[504] Résolution 819 du Conseil de Sécurité, 16 avril 1993.
[505] D00122, par. 33.
[506] *Ibid.*, p. 13, par. 34. Srebrenica qui se trouve dans une vallée de Bosnie orientale comprend en 1991 37 000 habitants dont le quart était serbe.
[507] *Ibid.*
[508] D00122, par. 35.
[509] D00122., par. 36.
[510] D00122, par. 37.
[511] *Ibid.*
[512] D00122., par. 38.
[513] D00122, par. 39.

Un premier convoi du HCR entrait dans la ville le 19 mars 1993 et revenait à Tuzla avec 600 civils[514]. Le 28 mars, il y a eu 1600 personnes qui ont voulu aller à Tuzla entraînant le décès de 6 personnes puis de 7 personnes dans des véhicules bondés. Plusieurs autres personnes sont mortes lors d'un troisième convoi du HCR au cours duquel 3000 femmes et enfants et hommes âgés ont été évacués dans 14 camions[515]. Par la suite, d'autres évacuations ont eu lieu à une échelle limitée malgré l'opposition du gouvernement bosnien. Au total, selon le rapport du Secrétaire général de l'ONU, **8000** à **9000** personnes ont été transportées à Tuzla.

A ce stade, je dois noter que personne n'a été mis en accusation au sujet de ces évacuations qui, manifestement, résultaient de la volonté exclusive des 9000 personnes contre la volonté des dirigeants musulmans.

Selon le Secrétaire général de l'ONU, à mesure que la situation de détériorait, le Conseil de Sécurité intensifiait son activité[516]. Lors de son intervention dans le cadre de la conférence tenue à Londres, le Président du CICR avait déclaré au mois d'août 1992 que les massacres devaient cesser et qu'il fallait offrir un refuge aux 10 000 détenus et il avait demandé aux représentants s'ils étaient prêts à envisager la création de « zones protégées »[517]. L'Autriche, membre non permanent du Conseil de Sécurité, avait exploré cette question bien que l'ensemble des membres permanents du Conseil de Sécurité n'y étaient pas favorables, se contentant dans la Résolution 787 de demander au Secrétaire général d'étudier en consultation avec le HCR, les possibilités et les besoins touchant la promotion de « zones de sécurité » à des fins humanitaires[518].

Plusieurs questions devaient être résolues auparavant :

- ces zones devaient être créées avec l'accord des parties
- ces zones devaient être occupées entièrement par des civils et exemptes de toutes activités militaires
- ces zones devaient être démilitarisées
- elles devaient être protégées par la FORPRONU

[514] D00122, par. 40.
[515] *Ibid.*
[516] D00122, par. 41.
[517] D00122, par. 45.
[518] D00122, par. 47.

Dès le départ, **Lord Owen,** co-président de la conférence internationale sur l'ex-Yougoslavie, déclarait que ces zones étaient mal conçues[519]. Il était relayé par l'autre co-président, **Cyrus Vance**, qui déclarait que ces zones de sécurité encourageaient de nouvelles opérations **de « nettoyage ethnique »**[520]. Il en allait de même pour le Haut Commissariat des Nations Unies, **Mme Ogata**, qui émettait des réticences faisant preuve de lucidité en disant que les parties au conflit pouvaient s'en servir pour promouvoir leurs propres objectifs militaires[521]. Par ailleurs, le Commandant de la FORPRONU estimait qu'elles ne pouvaient être créées que par voie d'accord entre belligérants[522]. La confusion régnant au **Conseil de Sécurité**, celui-ci adoptait néanmoins la **Résolution 819** exigeant que toutes les parties traitent Srebrenica comme une zone de sécurité et la cessation des attaques armées contre Srebrenica par les unités paramilitaires[523]. Informée, la FORPRONU faisait savoir que ce régime ne pourrait être appliqué sans le consentement des parties. La FORPRONU ne restait pas inactive en convaincant les commandants bosniens qu'ils devraient signer un accord prévoyant qu'ils remettraient leurs armes à la FORPRONU et qu'en échange, un cessez-le-feu serait instauré[524].

Le texte de l'accord négocié à **Sarajevo** était signé par les **Généraux Halilović et Mladić** le 18 avril 1993[525]. Des interprétations divergentes vont surgir entre les parties notamment sur le point de savoir s'il s'appliquait uniquement à Srebrenica ou également aux alentours. Dans le cadre de cet accord, le contingent canadien de la FORPRONU était déployé. Toutefois, le **Général Halilović** donnait l'ordre aux bosniens de ne pas remettre d'armes ou munitions utilisables[526]. Le Secrétaire général informait le commandant de le FORPRONU qu'il ne devait pas faire de zèle excessif dans le processus de démilitarisation. Malgré le contexte, la FORPRONU publiait un communiqué intitulé **« la démilitarisation de Srebrenica : un succès »** ![527]

Le Conseil de Sécurité envoyait sur place une mission qui dans un rapport mentionnait le décalage existant entre les Résolutions et la situation sur le terrain[528]. Malgré cela, elle préconisait de désigner **Goražde, Žepa, Tuzla et Sarajevo** comme « zones de sécurité, à titre «d'acte de diplomatie préventive du Conseil de Sécurité »[529]. Sur le terrain, l'accord du 18 avril était suivi

[519] D00122, par. 48.
[520] *Ibid.*
[521] D00122, par. 49.
[522] D00122, par. 51.
[523] D00122, par. 55.
[524] D00122, par. 59.
[525] D00122, par. 60.
[526] D00122, par. 61.

[527] D00122, par. 62.
[528] D00122, par. 64.
[529] *Ibid.*

d'un accord plus détaillé du 8 mai 1993 par des mesures couvrant toute l'enclave de **Srebrenica** et l'enclave adjacente de **Žepa**. Aux termes de cet accord, les forces bosniennes remettraient leurs armes et munitions à la FORPRONU et les armes lourdes et les unités serbes seraient retirées[530]. Il convient de noter que l'Assemblée des Serbes avait rejeté le plan de paix **Vance-Owen** et qu'à la suite, le Conseil de Sécurité avait adopté la résolution 824 déclarant que Sarajevo, Tuzla, Žepa, Goražde et Bihać devaient être traitées comme des **zones de sécurité** et être à l'abri d'attaques armées[531]. Le représentant du Pakistan transmettait au Président du Conseil de Sécurité un mémorandum faisant valoir que le concept de zone de sécurité serait inopérant si la sécurité n'était pas garantie et protégée par la FORPRONU[532]. La France adressait également un mémorandum portant sur les modifications à apporter au mandat de la FORPRONU envisageant la possibilité du recours à la force afin de donner un coup d'arrêt aux conquêtes territoriales des forces serbes[533].

L'Espagne, les Etats-Unis, la France, la Russie et le Royaume-Uni donnaient leur accord à un programme commun d'action qui mentionnait la possibilité de l'aide humanitaire, l'application de sanctions contre les Serbes, l'éventualité de la fermeture des frontières entre la Yougoslavie et la Bosnie-Herzégovine, la maintien de la zone d'exclusion aérienne et la constitution d'un tribunal de crimes de guerre et la « contribution précieuse » que pouvait apporter le concept de zone de sécurité[534].

Le Conseil de Sécurité demandait au Secrétaire général d'élaborer un document de travail sur les zones de sécurité qui était présenté au Conseil de Sécurité le 28 mai 1993. Il était mentionné dans ce document que si la FORPRONU était chargée de faire respecter les zones de sécurité, il était probable qu'elle aurait besoin d'armes telles des pièces d'artillerie et peut être même un appui aérien[535].

La Résolution 836 décidait d'étendre le mandat de la FORPRONU afin de lui permettre dans les zones de sécurité de dissuader les attaques, de contrôler le cessez-le-feu, de favoriser le retrait des unités militaires et paramilitaires et d'occuper quelques points essentiels sur le terrain[536]. Cette Résolution autorisait la force pour se défendre, à prendre des mesures nécessaires en riposte à des bombardements par toute partie, à des incursions armées ou si des obstacles étaient mis à la liberté de circulations de la FORPRONU ou des convois humanitaires. Par ailleurs, les Etats membres

[530] D00122, par. 65.
[531] D00122, par. 66.
[532] D00122, par. 71.
[533] D00122, par. 72.
[534] D00122, par. 75. Voir S/25829.
[535] D00122, par. 77.
[536] D00122, par. 78.

pouvaient prendre, sous l'autorité du Conseil de Sécurité et moyennant une étroite coordination avec le Secrétaire général, toutes mesures nécessaires à l'intérieur et dans les environs des zones de sécurité. Le Secrétaire général convoquait une réunion des coauteurs de la Résolution pour dire qu'il faudrait disposer de **32 000** militaires terrestres supplémentaires cette proposition n'a pas été acceptée[537]. Néanmoins, le Secrétaire général, présentant le premier rapport le 14 juin, estimait à **34 000** le nombre d'hommes nécessaires[538]. En ce qui concerne Srebrenica, il indiquait qu'il n'était pas nécessaire d'accroître les effectifs dans le cadre de « l'option légère »[539]. La Résolution 843 du 18 juin 1993 décidait d'autoriser le déploiement de **7600** hommes dans le cadre de l'option légère[540].

Le rapport du Secrétaire général va identifier les causes menant à **la catastrophe**. Il est indiqué qu'aucun des auteurs de la Résolution 836 n'a offert des troupes supplémentaires[541]. La FORPRONU s'est heurtée au refus des Etats membres d'autoriser le déploiement dans les zones de sécurité de personnel se trouvant déjà sur le théâtre d'opérations[542]. A titre d'exemple, le bataillon canadien devait être remplacé à Srebrenica par le bataillon nordique mais le gouvernement suédois avait refusé ce remplacement. Le régime des zones de sécurité s'est heurté à la crise du Mont Igman du mois d'avril 1993. Il est apparu des divergences de vues entre **l'OTAN et l'ONU au sujet de l'utilisation de la force aérienne**[543]. Les forces serbes se retiraient du Mont Bjelašnica et du Mont Igman[544]. Ce retrait était analysé par le Commandant de la FORPRONU comme suite à la menace de frappes aériennes. Les discussions politiques reprenaient par le retour du Président Itzetbegović à bord du navire britannique l'I*nvincible* où un ensemble de dispositions prévoyait une Union de trois républiques à majorité bosnienne, croate et serbe[545]. La République à majorité bosnienne aurait occupé 30% de la superficie de la Bosnie-Herzégovine, y compris Srebrenica et Žepa. Ce dernier point entraînait l'opposition des Serbes pour des raisons stratégiques. Les Serbes proposaient un échange entre ces enclaves revenant à la République à majorité serbe avec des territoires sous contrôle serbe autour de Sarajevo. La délégation bosnienne de Srebrenica et Žepa était informée les 28 et 29 septembre 1993 par le **Président Itzetbegović** de l'échange et elle faisait part de son opposition[546]. Sous les auspices de l'Union européenne, une version modifiée de ces dispositions a été mise au point dans le cadre d'un plan d'action. Ce plan mentionnait **Srebrenica** et **Žepa** comme

[537] D00122, par. 94.
[538] D00122, par. 96.
[539] D00122, par. 97.
[540] D00122, par. 98.
[541] D00122, par. 103.
[542] D00122, par. 104.
[543] D00122, par. 107.
[544] D00122, par. 114.

[545] D00122, par. 114.
[546] D00122, par. 115.

administrées par la République à majorité bosnienne[547]. Les zones de sécurité faisaient l'objet d'une évaluation par le Secrétaire général dans son rapport à l'Assemblée générale[548]. Celle-ci mentionnait que sur l'effectif de **7600** soldats supplémentaires devaient être déployés dans les zones de sécurité, moins de **3000** étaient arrivés[549]. Il notait que les Serbes de Bosnie ne s'étaient pas conformés aux dispositions des Résolutions 819, 824 et 836. Les Chefs d'Etats de l'OTAN faisaient une déclaration le 11 janvier 1994 affirmant que l'OTAN était prête à lancer des frappes aériennes afin « d'empêcher l'étranglement de Sarajevo et des zones de sécurité »[550].

Les forces serbes ayant lancé une offensive contre la zone de sécurité de **Goražde** en mars 1994, un débat s'était alors engagé sur la manière de réagir[551]. La FORPRONU était hostile à l'emploi de la force pour décourager les serbes. Elle informait le gouvernement de la Bosnie-Herzégovine qu'elle était une force de maintien de la paix. Le Commandant de la FORPRONU adressait une communication écrite au siège de l'ONU pour dire qu'en choisissant d'adopter l'option légère, la Communauté internationale avait admis que les zones de sécurité seraient établies par consentement et non pas par la force[552]. Toutefois, les tirs d'artillerie et de chars se poursuivaient sur la ville, le 10 avril 1994, la FORPRONU demandait le déclenchement d'un appui rapproché de l'OTAN[553].

A la suite du bombardement par trois bombes lâchées par des avions américains, le **Général Mladić** avertissait le FORPRONU que des agents des Nations Unies seraient tués sur les attaques de l'OTAN ne cessaient pas[554]. Le lendemain les serbes recommençaient à bombarder Goražde, ce qui entraînait une nouvelle opération d'appui aérien au terme de laquelle un char et deux véhicules blindés serbes étaient détruits. Les serbes prenaient en otage 150 agents des forces des Nations Unies près de Sarajevo[555]. Un avion de l'OTAN ayant été abattu, le Commandant en chef des forces de l'OTAN informait le Commandant des forces des Nations Unies qu'à cause des risques courus par les appareils, il n'approuverait pas de nouvelles attaques au niveau tactique mais seulement pour des frappes au niveau stratégiques[556]. Le soir même, les serbes avaient accepté un cessez-le-feu et la libération des otages. Le Conseil de Sécurité adoptait le 22 avril 1994 le Résolution 913 exigeant la conclusion d'un accord de cessez-le-feu et le retrait des forces et des armes[557]. Le

[547] D00122, par. 116.
[548] Voir, A/48/847.
[549] D00122, par. 125.
[550] Voir, S/1994/131.
[551] D00122, par. 131 et ss.
[552] D00122, par. 132.
[553] D00122, par. 135.
[554] *Ibid.*
[555] D00122, par. 137.
[556] D00122, par. 138.
[557] D00122, par. 142.

lendemain, un accord était conclu à Belgrade entre le représentant spécial du Secrétaire général et les dirigeants serbes Karadžić, Krajisnik et Mladić[558].

Suite à cette offensive, le Secrétaire général soumettait un nouveau rapport sur la politique des zones de sécurité[559]. Il est intéressant de constater qu'il était indiqué que le concept avait été appliqué à **Srebrenica** et à **Žepa** avec un plus grand degré d'efficacité en raison des accords de démilitarisation. Il convient de noter que le Secrétaire général restait prudent quant à l'utilisation future des frappes aériennes de l'OTAN en mentionnait le risque d'exposer le personnel militaire et civil de l'ONU à des représailles.

Dans ce rapport, il définissait le rôle de la FORPRONU comme celui de protéger les populations civiles des zones de sécurité désignées contre les attaques armées et autres actes d'hostilité par la présence de ces troupes et au besoin par l'emploi de moyens aériens[560]. A ce stade, il convient de conclure que l'exemple de Goražde ne pouvait qu'inciter les forces serbes à retenter l'opération ailleurs (Srebrenica) en sachant que l'appui aérien n'interviendrait pas de façon automatique et que de plus, la Communauté international était divisée sur ce concept de zone de sécurité.

A mon avis, le concept pouvait se révéler conforme aux nécessités liées à la protection des civils mais encore aurait-il fallu imposer aux deux parties la **démilitarisation de Srebrenica** en exigeant le départ complet des forces bosniennes et, en cas de tentative d'intrusion des forces serbes dans l'enclave, il fallait avoir recours immédiatement à la force par l'emploi de l'appui aérien en vue de la destruction des sites militaires participant à l'opération d'intrusion. La mise en œuvre du concept entraînait la nécessité de mettre la FORPRONU hors des enclaves pour éviter les prises d'otages potentielles voire des attaques directes comme on a pu le constater sur les postes d'observation. La démilitarisation de la zone passait également par le retrait forcé de l'**ABiH** des enclaves sous peine elle aussi d'être concernée par les frappes aériennes en cas de refus de retrait.

En résumé, le rapport du Secrétaire général a eu le grand mérite d'apporter à la communauté internationale des informations précieuses sur la création des **zones de sécurité** et ses limites inhérentes.

b. Eléments d'information concernant le rôle du bataillon néerlandais

[558] D00122, par. 143.
[559] Voir, S/1994/555.
[560] D00122, par. 150.

Les éléments d'information contenant le bataillon néerlandais sont tirés du rapport présenté par le Secrétaire général de l'ONU à l'Assemblée générale intitulé **« La Chute de Srebrenica ».** Ce rapport sous réserve de quelques approximations et de plaidoyer « pro domo » me paraît assez fiable concernant le bataillon néerlandais.

Ce bataillon (« Dutchbat 3 ») qui avait remplacé le Dutchbat 2 le 18 janvier 1995 comprenait **780** hommes dont **600** déployés dans la zone de sécurité[561].

Le quartier général se trouvait à **Potočari** à environ 6 à 7 kilomètres de Srebrenica. La Compagnie C avait établi cinq poste d'observation dans le nord de Srebrenica (*Alpha, Novembre, Papa, Québec et Roméo*), la compagnie B dans la ville en avait établi 3 dans le Sud (*Charlie, Echo, Foxtrot*)[562].

Le poste d'observation était peint en blanc avec le drapeau de l'ONU. Chaque poste comprenait sept soldats en moyenne avec un véhicule blindé armé d'une mitrailleuse de calibre 0,5[563]. Le poste était équipé d'une arme anti-char TOW ainsi que des roquettes anti-char AT-4 tirées à l'épaule. A la suite de la crue de janvier, un 9ème poste d'observation (*Mike*) était créé près de Simici. Aux environs du 18 février, en raison de l'élan des forces serbes, le bataillon n'était pas ravitaillé en carburant ce qui entraînait alors la création de trois autres postes (*Delta, Hotel, Kilo*) pour des patrouilles à pied[564]. Face au bataillon néerlandais, les forces serbes disposaient de 1000 à 2000 soldats bien équipés. Elles disposaient de chars, des pièces d'artillerie et de mortiers. La 28ème division de l'ABiH quant à elle, supérieure en nombre, composée 3000 à 4000 soldats, ne disposait pas d'armes lourdes mais de quelques mortiers légers[565]. La FORPRONU essayait de les désarmer sans y parvenir. En sus du bataillon néerlandais, se trouvaient dans l'enclave **trois observateurs militaires des Nations Unies et trois officiers de la Commission mixte**.

En raison de l'action militaire des serbes qui entraînait le chute du **poste *Echo***, le Commandant néerlandais faisait savoir que le bataillon était impuissant et qu'il était l'otage de l'armée des serbes[566]. Il faisait part de ses préoccupations concernant la perte du poste *Echo* qui permettait à l'armée serbe d'atteindre la vallée de **Jadar** dans le Sud de Srebrenica où les 3000 réfugiés du projet suédois pouvaient être expulsés[567]. Il créait deux nouveaux postes (*Sierra* et *Uniform*) à côté du poste *Echo.* Il lançait un appel au nom de la population de l'enclave pour demander à sa

[561] D00122, par. 226.
[562] D00122, par. 227.
[563] D00122, par. 228.
[564] D00122, par. 229.
[565] D00122, par. 230.
[566] D00122, par. 233.
[567] *Ibid.*

hiérarchie et l'ONU de lancer un appel pour qu'il soit mis fin à cette situation. Il récidivait trois semaines plus tard en indiquant que l'armée des serbes n'avait autorisé **aucun soldat** à quitter l'enclave ou à y pénétrer. Il concluait son appel comme suit : « Compte tenu de la politique appliquée par le gouvernement de l'armée des serbes de Bosnie, mon bataillon ne veut plus et ne peut plus se considérer impartial… »[568]. Comme on peut le constater, le bataillon néerlandais était livré à lui-même dans une situation extrêmement difficile. Curieusement, les observateurs militaires des Nations Unies indiquaient que la situation militaire dans la semaine du 25 juin au 2 juillet était moins tendue qu'avant[569]. Ainsi, le 5 juillet dans les alentours de Srebrenica, il n'était enregistré que six altercations. Il apparaît ainsi que les autorités onusiennes n'avaient aucune raison d'être alarmées[570].

Le bataillon néerlandais devait subir le **6 juillet 1995** l'offensive de l'armée des serbes de Bosnie par la chute à 300 mètres du quartier général de 5 roquettes et avait entendu des tirs nourris dans le triangle de la Bardera[571]. **Ramiz Bećirović,** Commandant des forces bosniennes, demandait en vain au Commandant de la FORPRONU de restituer les armes déposées dans le cadre des accords de démilitarisation de 1993[572]. Le poste d'observation ***Foxtrot*** était visé par un char serbe à 12h55[573]. Le Commandant du bataillon informait ses autorités à Tuzla et au Commandant de la FORPRONU à Sarajevo lequel informait le quartier général des forces de paix des Nations Unies à Zagreb en notant que l'information portait sur des tirs « sporadiques »[574].

Sur le terrain, le bataillon néerlandais passait à l'alerte rouge et le mirador de *Foxtrot* était touché par un tir. Le Commandant du bataillon demandait à son supérieur à Tuzla un appui aérien rapproché pour répondre à l'attaque dirigée contre *Foxtrot*[575]. Cette demande était transmise par la voir hiérarchique à Sarajevo. Il convient de noter que le rapport mentionne que les communications entre le Commandant de la FORPRONU en Bosnie-Herzégovine et le bataillon néerlandais étaient assurées pendant la crise par le Chef d'état major de la FORPRONU qui a découragé l'envoi d'un appui aérien, cette évaluation ayant été confirmée par le chef des opérations terrestres et le Commandant de la FORPRONU[576]. Après que d'autres tirs aient eu lieu (*Papa* et *Foxtrot*), le bombardement prenait fin. Il convient de noter que pendant ce temps, **Carl Bildt** s'entretenait avec **Milošević** et le Général **Mladić** le 7 juillet 1995 engageant les serbes à faire preuve de retenu mais

[568] D00122, par. 235.
[569] D00122, par. 236.
[570] D00122, par. 237.
[571] D00122, par. 239.
[572] D00122, par. 240.
[573] D00122, par. 241.
[574] D00122, par. 242.
[575] *Ibid.*
[576] D00122, par. 243.

ignorant manifestement la gravité des évènements[577]. Il était enregistré par le bataillon néerlandais, 287 détonations en provenance des serbes et 21 en provenance de l'ABiH, les victimes était de 4 tués et de 17 blessés[578]. A la fin de la journée, le Commandant du bataillon néerlandais faisait ne évaluation de la situation précisant que l'armée des serbes ne serait pas en mesure de conquérir l'enclave…[579]

Le 8 juillet 1995, le poste Foxtrot faisait à nouveau l'objet de tirs tandis que d'autres obus touchaient le centre de Srebrenica[580]. L'évaluation faite par les autorités à Sarajevo et Zagreb était que les serbes avaient franchi la « ligne Morillon » pour entrer dans l'enclave[581]. L'ordre était donné aux soldats de *Foxtrot* de se retirer pour laisse la place aux soldats serbes[582]. Les soldats néerlandais étaient contraints d'abandonner leurs armes. La suite va être tragique car les soldats de la FORPRONU sans arme vont quitter les lieux à bord de leur véhicule blindé (VAB) pour se retrouver face à trois soldats de l'ABiH qui vont tenter de leur barrer la route et un des soldats de l'ABiH va tirer tuant un soldat néerlandais[583]. Il est facile d'imaginer l'état d'esprit du bataillon néerlandais d'autant plus que des tirs vont obliger le poste d'observation *Uniform* au retrait vers Srebrenica puis Bratunac.

Au même moment, le Secrétaire général de l'ONU tenait une réunion à Genève avec le co-président de la conférence internationale sur l'ex-Yougoslavie et le HCR, le Commandant de la FPNU et le Commandant de la FORPRONU[584]. Au cours de la réunion, il n'a pas été fait état de l'offensive des serbes à Srebrenica….Dans l'après-midi du 9 juillet 1995, les observateurs militaires des Nations Unies faisaient un rapport indiquant que l'offensive de l'armée des serbes se poursuivait jusqu'à ce qu'elle parvienne à ses fins[585]. Le poste d'observation *Uniform* était occupé par les soldats serbes et les soldats néerlandais gagnaient Bratunac. Le chef d'état major du Commandement de la FORPRONU appelait le **Général Tolimir** pour dire que les soldats néerlandais avait été bien traités mais qu'il fallait qu'ils puissent aller à Potočari[586]. Un véhicule VAB dépêché au niveau du centre d'accueil suédois était arrêté et ses soldats étaient désarmés devant regagner à pied le territoire détenu par les serbes[587]. Le Poste *Kilo* était attaqué ainsi que le poste *Mike*. Le poste d'observation Delta était aussi pris et les soldats néerlandais étaient désarmés à leur tour. Il leur était proposé soit

[577] D00122, par. 247.
[578] D00122, par. 248.
[579] D00122, par. 249.
[580] D00122, par. 250.
[581] Le paragraphe 253 décrit dans le détail les tirs opposant les serbes et les musulmans dans le cadre d'une bataille.
[582] D00122, par. 254.
[583] *Ibid.*

[584] D00122, par. 259 et ss.
[585] D00122, par. 263.
[586] D00122, par. 266.

de retourner à Srebrenica ou à Milići. Un ordre était donné par le commandant de la Force au bataillon néerlandais d'établir une position d'arrêt pour empêcher les serbes de gagner la ville par le sud avec une demande écrite d'appui aérien rapproché[588]. Le **Général Tolimir** était informé par téléphone de ces décisions. Toutefois, le commandant du bataillon néerlandais avait changé de position estimant que l'utilisation de l'appui aérien n'était pas réalisable…[589] En exécution de l'ordre, la compagnie B avait commencé à établir la position le 10 juillet par une cinquantaine de soldats avec six véhicules blindés de transport de troupes (VBTT)[590]. Une erreur était faite par le représentant spécial du Secrétaire général de l'ONU qui indiquait que le VBTT avait été touché par un tir de l'ABiH alors que c'était un tir des serbes…Il fait également une autre erreur en disant que la progression des serbes vers la ville avait cessé ajoutant une autre erreur en disant que les tirs de l'armée des serbes avaient cessé.

Il convient de noter que malgré ces erreurs, les serbes de Bosnie n'ont pas tiré sur la position d'arrêt[591]. Voyant des éléments d'infanterie, le commandant de la compagnie ordonnait de lancer des fusées éclairantes et de tirer au dessus des positions serbes sans riposte de ceux-ci. Toutefois, il était ordonné de se replier vers la ville pour ne pas être débordé pendant la nuit[592].

A 19h30, le poste *Lima* était à son tour attaqué[593]. A Zagreb, trois options étaient offertes :

- ne rien faire
- demander un appui aérien
- attendre le matin pour faire appel à l'appui aérien

Le Commandant du bataillon néerlandais faisait alors savoir que la position d'arrêt pouvait tenir bon et qu'il ne jugeait pas utile de demander un **appui aérien**. Le commandant du bataillon néerlandais tenait une réunion avec les dirigeants bosniens de Srebrenica en les informant qu'il avait reçu un ultimatum de capitulation des serbes qu'il avait rejeté et que dès 6h du matin l'OTAN procéderait à une frappe aérienne massive[594]. Le commandant du bataillon néerlandais était informé que les avions de l'OTAN frapperaient 46 cibles identifiées à 6h50[595]. Ne voyant rien venir, il téléphonait au Chef des opérations au secteur nord-ouest qui lui disait qu'il n'y avait pas de trace

[587] D00122, par. 267.
[588] D00122, par. 273.
[589] D00122, par. 274.
[590] D00122, par. 277 (sur le dispositif technique).
[591] D00122, par. 283.
[592] D00122, par. 284.
[593] D00122, par. 285.
[594] Le paragraphe 296 mentionne que de nombreux combattants armés quittaient la ville vers l'Ouest (1000 à 15000 combattants)

d'une demande d'appui aérien rapproché ! L'armée des serbes de Bosnie recommençait à attaquer vers 11h notamment sur les postes *Mike* et *November*[596]. Une nouvelle demande d'appui aérien était formalisée en cas d'attaque contre les postes d'observation des Nations Unies. A 12h10, le personnel du poste *November* devait se replier puis à 2h30, un tir était effectué sur la position d'arrêt B1[597]. Les forces serbes entraient dans la ville sans beaucoup de résistance et le drapeau serbe était dressé sur le toit d'une boulangerie[598]. Vers 14h40, deux appareils de l'OTAN larguaient deux bombes sur des véhicules serbes[599]. Les forces serbes faisaient savoir que si l'OTAN continuait à bombarder, des soldats néerlandais seraient tués ou pris en otages. Le Ministre de la défense néerlandais demandait l'arrêt de l'appui aérien. Sur demande du Commandant des forces, le Commandant par interim a donné l'ordre au bataillon néerlandais d'ouvrir des négociations avec les serbes en vue d'un cessez-le-feu. Les serbes prenaient contact avec le bataillon néerlandais donnant l'ordre au Commandant du bataillon néerlandais de se rendre à l'Hôtel Fontana à Bratunac[600].

Il convient de noter que le contenu de ce paragraphe ne correspond pas à la vidéo prise à l'occasion de la réunion à l'hôtel Fontana. Le Commandant du bataillon néerlandais est retourné à l'hôtel Fontana à 13h30 accompagné du directeur de l'établissement d'enseignement secondaire de Srebrenica qui représentait les réfugiés. Le **Général Mladić** s'engageait à faire appliquer le cessez-le-feu jusqu'à 10 heures le 12 juillet[601]. De retour à son PC, le Commandant du bataillon néerlandais envoyait un rapport en disant que 15 000 personnes étaient dans une situation vulnérable et qu'il ne pouvait les défendre ni trouver des responsables civils ni militaires et que selon lui, il n'existe qu'un seul moyen de s'en sortir : « négocier au niveau le plus élevé »[602].

Au-delà des déclarations des témoins et notamment de ceux du bataillon néerlandais, le rapport du Secrétaire général que l'on peut estimer comme **objectif** témoigne non pas d'un bataillon néerlandais dépassé par les évènements mais d'un bataillon qui a essayé de faire tout son possible avec des moyens limités. Il a subi de plein fouet **deux chocs** : la mort d'un soldat tué par l'ABiH et de multiples attaques de leurs postes d'observation. Le bataillon néerlandais a rempli sa mission en tenant le point d'arrêt jusqu'au bout. Le seul revirement qui manque par d'étonner est la question de l'appui aérien revendiqué au départ puis non souhaité par la suite. Ceci se comprend parfaitement par la chronologie des évènements car d'une situation délicate, le bataillon néerlandais s'est trouvé en position de faiblesse étant désarmé voire ridiculisé. Dans son analyse, la Commandant du

[595] D00122, par. 297.
[596] D00122, par. 302.
[597] D00122, par. 303.
[598] D00122, par. 304.
[599] D00122, par. 305.
[600] D00122, par. 313.
[601] D00122, par. 314.

bataillon néerlandais aurait conclu à juste titre qu'il ne fallait pas in fine des frappes aériennes sous réserve des dommages encore plus grands. **En tout état de cause, la bataillon néerlandais a été placé par la création de cette zone de sécurité dans une position délicate car il n'avait pas les moyens de faire respecter la décision du Conseil de Sécurité et encore moins d'être en capacité de s'opposer aux serbes supérieurs en nombre et en équipements lourds.**

Pour conclure, je dirai que le bataillon néerlandais a eu un **comportement héroïque** ou **pour le moins exemplaire compte tenu de la mission impossible** qui lui avait été assignée dans le cadre d'un théâtre de guerre, peu propice à la médiation. Il m'est apparu nécessaire d'évoquer le rôle du bataillon néerlandais pendant la période du 6 au 12 juillet 1995 pour mieux comprendre les enchaînements qui vont suivre du 12 au 20 juillet qui seront développés par la suite dans ce rapport aux paragraphes 318 à 403. Les limites de l'action du bataillon néerlandais sont donc évidentes mais malgré ces limites, le représentants de la République de Bosnie-Herzégovine qui prenait la parole au Conseil de Sécurité lors du débat en vue de l'adoption de la Résolution 1004 donnait lecture d'une déclaration du **Président Itzetbegović** qui exigeait que l'ONU et l'OTAN rétablissent par la force la zone de sécurité violée de Srebrenica ; cette déclaration était pleinement justifiée mais encore aurait-il fallu que les forces armées de l'ABiH remettent au moment de la création de la zone de sécurité l'intégralité de leur armement ce qu'ils n'avaient pas fait menant par ailleurs à partir des enclaves des attaques militaires contre les forces serbes et les villages serbes ; dans ces conditions, la mission du bataillon néerlandais était dès le départ vouée à **l'échec**.

[602] D00122, par. 315.

3. La participation directe aux hostilités[603]

a. Le concept de civil dans les conflits armés internationaux

Aux fins du principe de distinction dans les conflits armés internationaux, toutes les personnes qui ne sont ni des membres des forces armées d'une partie au conflit ni des participants à une levée en masse sont des personnes civiles, et elles ont donc droit à la protection contre les attaques directes, sauf si elles participent directement aux hostilités et pendant la durée de cette participation.

Selon le Protocole additionnel I, dans les situations de conflit armé international, les personnes civiles sont définies par défaut comme étant toutes les personnes qui ne sont ni des membres des forces armées d'une partie au conflit ni des participants à une levée en masse[604]. Alors que le DIH conventionnel antérieur au Protocole I ne définit pas expressément les civils, la terminologie utilisée dans le Règlement annexé à la quatrième Convention de La Haye et dans les quatre Conventions de Genève suggère néanmoins que les concepts de personnes civiles, de forces armées et de levée en masse s'excluent mutuellement, et que toute personne impliquée dans, ou affectée par, la conduite des hostilités relève de l'une de ces trois catégories.

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[603] *Guide interprétative sur la notion de participation directe aux hostilités en droit international humanitaire,* Nils Melser, conseiller juridique du CICR, octobre, 2010, 88p.

[604] Article 50 §1 du Protocole I. Cette définition des civils reflète le DIH coutumier dans les conflits armés internationaux. Les catégories visées aux articles 4, A §1, §2 et §3 de la Convention de Genève III sont incluses dans la définition générale des forces armées énoncée à l'article 43 § 1 du Protocole I. Voir également Sandoz et al. (éd.), *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949* (Genève : CICR, 1987), par. 1916-1917. [ci-après : *Commentaire Protocoles additionnels*].

b. La participation directe aux hostilités en tant qu'acte spécifique

La notion de participation directe aux hostilités est essentiellement composée de deux éléments, dont le premier est «hostilités » et le second « participation directe »[605]. Le concept d'« hostilités » se réfère au recours (collectif) par les parties au conflit à des méthodes et moyens de nuire à l'ennemi, tandis que la « participation » aux hostilités se réfère à l'implication (individuelle) d'une personne dans ces hostilités[606]. En fonction de la qualité et du degré de cette implication, la participation individuelle aux hostilités peut être décrite comme « directe » ou « indirecte ». La notion de participation directe aux hostilités découle de la formule « qui ne participent pas directement aux hostilités » utilisée à l'article 3 commun aux Conventions de Genève.

La notion de participation directe aux hostilités se réfère à des « actes hostiles » spécifiques commis par des personnes dans le cadre de la conduite des hostilités entre les parties à un conflit armé. Elle doit être interprétée de la même manière dans les situations de conflits armés internationaux et non internationaux. Les termes anglais utilisés dans les traités – *direct* et *active* – indiquent la même qualité et le même degré de participation individuelle aux hostilités.

c. Éléments constitutifs de la participation directe aux hostilités

Pour constituer une participation directe aux hostilités, un acte spécifique doit remplir les critères cumulatifs suivants :

1. L'acte doit être susceptible de nuire aux opérations militaires ou à la capacité militaire d'une partie à un conflit armé, ou alors l'acte doit être de nature à causer des pertes en vies humaines, des blessures et des destructions à des personnes ou à des biens protégés contre les attaques directes (seuil de nuisance),
2. Il doit exister une relation directe de causalité entre l'acte et les effets nuisibles susceptibles de résulter de cet acte ou d'une opération militaire coordonnée dont cet acte fait partie intégrante (causation directe), et ;
3. L'acte doit être spécifiquement destiné à causer directement des effets nuisibles atteignant le seuil requis, à l'avantage d'une partie au conflit et au détriment d'une autre (lien de belligérance)[607].

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[605] *Report Expert on the Notion of Direct Participation in Hostilities,* CICR, 2005, p.17

[606] Voir les articles 51§3 ; article 43§2 et 67§1 e) du Protocole additionnel I et article 13 §3 du Protocole additionnel II.

[607] L'exigence d'un lien de belligérance est conçue de manière plus étroite que l'exigence d'un lien avec le conflit armé développée dans la jurisprudence du TPIY et du TPIR en tant que condition préalable pour la qualification d'un acte en tant que crime de guerre (voir : TPIY, *Le Procureur c / Kunarac et consorts,* Affaire No IT-96-23, Arrêt de la *Chambre d'appel* du 12 juin 2002, par. 58 ; TPIR, *Le Procureur c / R utaganda,* Affaire No TPIR-96–3, Arrêt de la *Chambre d'appel* du 26 mai 2003, par. 570). Alors que l'exigence d'un lien avec le conflit armé se réfère au rapport entre un acte et une situation de conflit armé dans son ensemble, l'exigence du lien de belligérance se réfère au rapport entre un acte et la conduite des hostilités entre les parties à un conflit armé. Durant les réunions d'experts, il a été généralement admis qu'une conduite ne présentant pas un lien suffisant avec les hostilités ne pourrait constituer une participation directe à ces hostilités. Voir *Report DP H 2005*, p. 25 et, plus généralement, *Background Doc. DP H 2004*, pp. 25-26 ;

d. Début et fin de la participation directe aux hostilités

Étant donné que les civils cessent d'être protégés contre les attaques directes « pendant la durée » de leur participation directe aux hostilités, le début et la fin des actes spécifiques constituant une telle participation directe aux hostilités doivent être déterminés avec le plus grand soin[608]. Sans aucun doute, la notion de participation directe aux hostilités inclut la phase immédiate d'exécution d'un acte spécifique répondant aux trois critères retenus – *seuil de nuisance, causation directe* et *lien de belligérance.* Elle peut également inclure les mesures préparatoires à l'exécution d'un tel acte, de même que le déploiement vers son lieu d'exécution et le retour de ce lieu, lorsque ceux-ci constituent une partie intégrante d'un tel acte spécifique ou d'une telle opération.

e. Portée temporelle de la perte de protection

Les civils cessent d'être protégés contre les attaques directes pendant la durée de chaque acte spécifique constituant une participation directe aux hostilités. Une telle suspension de la protection dure exactement aussi longtemps que l'acte constituant une participation directe aux hostilités.

f. Précautions et présomptions dans les situations de doute

Toutes les précautions pratiquement possibles doivent être prises au moment de déterminer si une personne est une personne civile et, en ce cas, si cette personne civile participe directement aux hostilités. En cas de doute, la personne doit être présumée protégée contre les attaques directes.

Avant toute attaque, toutes les précautions pratiquement possibles doivent être prises pour vérifier que les personnes visées constituent des cibles militaires légitimes[609]. Une fois qu'une attaque a commencé, les personnes responsables doivent annuler ou interrompre l'attaque s'il apparaît que la cible n'est pas un objectif militaire légitime[610]. Avant et durant toute attaque, tout ce qui est possible doit être fait pour déterminer si la personne visée est une personne civile et, en ce cas, si elle participe directement aux hostilités.

Dès qu'il apparaît que la personne visée est en droit de bénéficier de la protection accordée aux civils, les personnes responsables doivent s'abstenir de lancer l'attaque, ou l'annuler, ou

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Report DP H 2004, pp. 10, 25 ; *Background Doc. DP H 2005,* WS II-III, p. 8 ; *Report DP H 2005,* pp. 9-10, 22 et ss.., 27, 34

[608] Voir également les débats relatés dans *Report DP H 2006,* pp. 54-63.

[609] Article 57 [2] a) i) du Protocole additionnel I.

[610] Article 57 [2] b) du Protocole Additionnel I.

l'interrompre si elle a déjà été lancée. Cette détermination doit être faite de bonne foi et en tenant compte de tous les éléments d'information qui peuvent être considérés comme raisonnablement disponibles dans cette situation spécifique[611].

Les civils sont généralement protégés contre les attaques directes, sauf s'ils participent directement aux hostilités et pendant toute la durée de cette participation. Afin d'éviter que des civils ayant droit à une protection contre les attaques directes soient pris pour cibles de façon erronée ou arbitraire, il est donc particulièrement important de prendre toutes les précautions pratiquement possibles au moment de déterminer si une personne est un civil et, le cas échéant, si cette personne participe directement aux hostilités. En cas de doute, la personne en question doit être présumée protégée contre les attaques directes.

g. Limitations à l'emploi de la force lors d'une attaque directe

Outre les limitations imposées par le DIH à l'emploi de certains moyens et méthodes de guerre spécifiques, et sous réserve de restrictions additionnelles pouvant être imposées par d'autres branches applicables du droit international, le type et le degré de force admissibles contre des personnes n'ayant pas droit à une protection contre les attaques directes ne doivent pas excéder ce qui est véritablement nécessaire pour atteindre un but militaire légitime dans les circonstances qui prévalent.

Toute opération militaire menée dans une situation de conflit armé doit respecter les dispositions applicables du DIH conventionnel et coutumier régissant la conduite des hostilités[612].

- Parmi ces dispositions figurent, d'une part, les règles découlant de trois principes :

- **Distinction entre civils et combattants,**
- **précaution et**
- **proportionnalité** –

- ils figurent également des interdictions :

- **Refus de quartier et perfidie**
- **La limitation ou l'interdiction de certaines armes**
- **l'interdiction de méthodes et moyens de guerre spécifiques qui sont de nature à causer des maux superflus.**

[611] *Report DP H 2006*, pp.70 et ss.
[612] Voir également *Report DP H 2006*, p. 76, et *Report DP H 2008*, pp. 24, 29 et ss.

En l'absence de réglementation expresse, le type et le degré de force admissibles dans les attaques contre des cibles militaires légitimes devraient être déterminés, avant tout, en se fondant sur deux principes fondamentaux :

- **Nécessité militaire et**
- **Humanité**.

Ces principes sous-tendent et informent tout le cadre normatif du DIH et, par conséquent, délimitent le contexte dans lequel les règles du DIH doivent être interprétées[613]. Les principes de nécessité militaire et d'humanité ni ne dérogent aux dispositions spécifiques du DIH ni ne priment sur elles, mais ils constituent les principes directeurs au regard desquels les droits et les devoirs des belligérants doivent être interprétés, à l'intérieur des paramètres définis par ces dispositions[614].

Aujourd'hui, **le principe de nécessité militaire** est généralement reconnu comme autorisant *«seulement le degré et le type de force, non interdits par ailleurs par le droit des conflits armés, qui sont requis pour atteindre le but légitime du conflit, à savoir la soumission complčte ou partielle de l'ennemi le plus tôt possible avec le coût minimum en vies humaines et en moyens engagés »*[615]. **Le principe d'humanité**, qui « interdit d'infliger des souffrances, des blessures ou des destructions qui ne sont pas véritablement nécessaires pour atteindre des buts militaires légitimes », vient compléter le principe de nécessité militaire dans lequel il est implicitement contenu[616]. Ainsi, en dehors des actions expressément prohibées par le DIH, les actions militaires admissibles sont réduites – sous l'effet conjoint des principes de nécessité militaire et d'humanité – aux actions véritablement nécessaires pour atteindre un but militaire légitime dans les circonstances qui prévalent[617]. Le but

[613] Voir notamment : *Commentaire Protocoles additionnels, op.cit.,* par. 1389.
[614] *Report DP H 2008,* pp. 7-8, 19-20. Voir également la déclaration de Lauterpacht, selon laquelle *« ce n'est pas en se référant à des règles existantes que l'on résout ces problèmes, pour autant qu'ils puissent être résolus, mais en se rapportant à des considérations impératives d'humanité, de sauvegarde de la civilisation et d'inviolabilité de la personne humaine »* (cité dans : *Commentaire Protocoles additionnels, op.cit.,* par. 1394).
[615] Voir par exemple, France : ministère de la Défense, *Manuel de Droit des Conflits Armés* (2001), pp. 86-87 ; Allemagne : ministère fédéral de la Défense, *Règlement sur le service dans les forces armées ZDv 15/2 : Droit international humanitaire dans les conflits armés* (août 1992), par. 130 ; Suisse : Armée suisse, *Les bases légales du comportement à l'engagement, règlement 51.007/IV* (2005), par. 160. Au cours de l'histoire, le concept moderne de « nécessité militaire » a été fortement influencé par la définition figurant à l'article 14 du « Code de Lieber » (États-Unis : *Adjutant General's Office, General Orders N° 100,* 24 avril 1863).
[616] En conséquence, dans la mesure où les deux principes – nécessité militaire et humanité – visent à limiter les pertes en vies humaines, les blessures et les destructions à ce qui est véritablement nécessaire pour réaliser des buts militaires légitimes, ils ne s'opposent pas l'un à l'autre, mais au contraire se renforcent mutuellement. Ce n'est que lorsqu'une action militaire peut raisonnablement être considérée comme nécessaire pour atteindre un but militaire légitime que le principe de nécessité militaire et le principe d'humanité deviennent des éléments à prendre en considération qui s'opposent et entre lesquels un équilibre doit être trouvé, comme prévu dans les dispositions spécifiques du DIH.
[617] Voir *Commentaire Protocoles additionnels, op.cit.,* par. 1395. Voir également l'arrêt de la Cour internationale de Justice (CIJ) selon lequel l'interdiction de l'emploi de méthodes et moyens de guerre spécifiques d'une nature à causer des souffrances inutiles aux combattants constitue un principe intransgressible du droit international coutumier et un principe cardinal du DIH : il est interdit de causer des « souffrances supérieures aux maux inévitables que suppose la réalisation d'objectifs militaires légitimes » (soulignement ajouté). Voir : CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires,* avis consultatif 1996 par. 78.

est plutôt d'éviter les erreurs, l'arbitraire et les abus, en indiquant au commandant militaire les principes directeurs devant guider son choix de méthodes et moyens de guerre spécifiques en fonction de son évaluation de la situation[618]

4. Dispositif découlant de mon positionnement

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 12 November 2015;

SITTING in open session;

GRANTS IN PART, Ground of Appeal 6 and **REVERSES** Tolimir's conviction for extermination as a crime against humanity, to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS IN PART, Judge Sekule and Judge Güney dissenting, Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide committed through causing serious mental harm to the Bosnian Muslim population of Eastern BiH under Article 4(2)(b) of the Statute to the extent that this conviction was based on the forcible transfer of Bosnian Muslims from Žepa;

GRANTS IN PART, Judge Güney dissenting, Ground of Appeal 10 and **REVERSES** Tolimir's conviction for genocide through inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern BiH under Article 4(2)(c) of the Statute;

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[618] Il est admis depuis longtemps que les cas qui ne sont pas expressément réglementés en DIH conventionnel ne devraient pas être, « faute de stipulation écrite, laissés à l'appréciation arbitraire de ceux qui dirigent les armées » (Préambule H II ; Préambule H IV) mais que, pour reprendre les termes de la célèbre clause de Martens, « les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, de lois de l'humanité et des exigences de la conscience publique » (article 1 [2] PA I). D'abord adoptée dans le Préambule de la Convention II de La Haye (1899) et réaffirmée ensuite dans des traités et dans la jurisprudence pendant plus d'un siècle, la clause de Martens continue de servir de rappel constant du fait qu'en situation de conflit armé, une conduite particulière n'est pas nécessairement licite du simple fait qu'elle n'est pas expressément interdite ou réglementée d'une autre manière dans le droit des traités. Voir, par exemple : Préambules H IV R (1907) ; PA II (1977) ; Convention des Nations Unies sur certaines armes classiques (1980) ; articles 63 G I, 62 CG II, 142 CG III, 158 CG IV (1949) ; CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires*, avis consultatif (note 217, ci-dessus), par. 78 ; enfin, TPIY, *Le Procureur c / Kupreskic et consorts*, Affaire No IT-95-16-T-14, Jugement du 14 janvier 2000, par. 525. Pour les débats relatifs à la clause de Martens durant les réunions d'experts, voir *Report DP H 2008*, pp. 22-23.

GRANTS Ground of Appeal 12 and **REVERSES** his conviction for genocide (Count 1) to the extent that it concerns the killings of the three Žepa leaders specified in paragraph 23.1 of the Indictment;

GRANTS Ground of Appeal 20 and **REVERSES** Tolimir's conviction for genocide (Count 1), extermination as a crime against humanity (Count 3), and murder as a violation of the laws or customs of war (Count 5) to the extent they concern the killings of six Bosnian Muslim men near Trnovo specified in paragraph 21.16 of the Indictment;

DISSMISSES, Judge Antonetti dissenting, Grounds of Appeal 1, 3, 5, 7, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, and 25;

DISSMISSES Tolimir's remaining grounds of appeal;

AFFIRMS the remainder of Tolimir's convictions under Counts 1, 2, 3, 5, 6, and 7;

AFFIRMS Tolimir's sentence of life-imprisonment **with a minimum term of 30 years;**

RULES that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

ORDERS that in accordance with Rules 103(C) and 107 of the Rules, Tolimir is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the **Republic of Serbia** where he will serve his sentence.

Fait en anglais et en français, la version en français faisant foi.

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Juge Jean-Claude Antonetti

En date du huit avril 2015
La Haye (Pays-Bas)