UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-55-A

Date: 20 March 2019

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Olufemi Elias**

Judgement of: **20 March 2019**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC REDACTED

JUDGEMENT

The Office of the Prosecutor:

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

Counsel for Mr. Radovan Karadžić:

Mr. Peter Robinson
Ms. Kate Gibson

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seized of appeals of Mr. Radovan Karadžić ("Karadžić") and the Office of the Prosecutor of the Mechanism ("Prosecution") against the Judgement in the case of *Prosecutor v. Radovan Karadžić*, which was issued on 24 March 2016 by the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Trial Chamber" and "ICTY", respectively).

I. INTRODUCTION

A. Background

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

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

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

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

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

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

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

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

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

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

B. The Appeals

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

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

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

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

II. STANDARDS OF APPELLATE REVIEW

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

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

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

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

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

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

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

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

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

15. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[35] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[36] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[37] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[38]

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

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

confirmed on appeal.[40] The Appeals Chamber will not review the entire trial record *de novo*; rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[41]

17. When considering alleged errors of fact, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[42] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[43] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has caused a miscarriage of justice.[44] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[45]

18. The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.[46] The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[47] Nevertheless, considering that, at trial, it is the Prosecution that bears the burden of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal

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

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

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

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

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

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

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

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

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

19. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[51] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[52]

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

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

III. THE APPEAL OF RADOVAN KARADŽIĆ

A. Fairness of the Trial Proceedings

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

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

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

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

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

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

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

25. The Appeals Chamber notes that Karadžić did not raise his arguments about the alleged breach of his right to represent himself during trial or seek reconsideration or certification to appeal the impugned decision.[67] In this respect it recalls that, if a party raises no objection to a particular issue before a trial chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to raise the issue on appeal.[68] However, in view of the fundamental importance of the right to self-representation, the Appeals Chamber holds that it would not be appropriate to apply the waiver doctrine to Karadžić's allegation of error and will consider the matter.[69]

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

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

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

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

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

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[71] *See, e.g.*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 ("*Mladić* Decision of 22 October 2013"), para. 12; *Ndahimana* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 18. *See also* Article 21 of the ICTY Statute.

[72] *Prlić et al.* Appeal Judgement, para. 26; *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.

[73] Article 21(4)(d) of the ICTY Statute; *Šešelj* Appeal Judgement, para. 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010, para. 27; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), paras. 11-13.

[74] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to be Present at Trial, 5 October 2007 ("*Karemera et al.* Decision of 5 October 2007"), para. 11, *referring to Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Decision of 30 October 2006"), para. 14. *See also Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Decision on Assignment of Standby Counsel for the Appeal Hearing, 11 October 2017, p. 2; *Milošević* Decision of 1 November 2004, paras. 17, 18. *Cf. Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003 ("*Limaj et al.* Decision of 31 October 2003"), para. 13.

[75] T. 27 January 2014 p. 45934.

[76] T. 27 January 2014 p. 45935.

[77] T. 27 January 2014 p. 45935.

[78] T. 27 January 2014 p. 45935.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[99] *Karemera et al.* Decision of 5 October 2007, para. 11, *referring to Zigiranyirazo* Decision of 30 October 2006, para. 14. *See also Milošević* Decision of 1 November 2004, paras. 17, 18. *Cf. Limaj et al.* Decision of 31 October 2003, para. 13.
[100] Sarajevo Site Visit Decision, para. 9; Srebrenica Site Visit Decision, para. 6. *See also* Sarajevo Site Visit Order, para. 9.
[101] Sarajevo Site Visit Order, para. 6; Sarajevo Site Visit Decision, para. 12.
[102] Sarajevo Site Visit Decision, para. 12. *See also* Sarajevo Site Visit Decision, Annex A.
[103] Srebrenica Site Visit Decision, para. 7.
[104] Sarajevo Site Visit Decision, para. 12; Srebrenica Site Visit Decision, para. 7.
[105] Sarajevo Site Visit Decision, paras. 6, 13; Srebrenica Site Visit Decision, paras. 2, 8; Sarajevo Site Visit Order, paras. 6, 11(ii); Sarajevo Site Visit Minutes, p. 2; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Registry Minutes on Site Visit Conducted Between 5 and 8 June 2012, 13 July 2012 ("Srebrenica Site Visit Minutes"), p. 2. The Appeals Chamber notes that, in requesting the Trial Chamber to reconsider its decision as to his presence at the Sarajevo site visit, Karadžić submitted that, should the Trial Chamber decline to allow him to participate in the visit, his legal associate accompany the Trial Chamber on his behalf, and that, with respect to the second visit, Karadžić requested that he be present or, in the alternative, be represented by his legal advisor. *See* Sarajevo Site Visit Decision, para. 6; Srebrenica Site Visit Decision, para. 2.
[106] *See* Sarajevo Site Visit Decision, para. 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Count 4 (Extermination)

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

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

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

(b) Count 7 (Deportation)

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

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

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

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

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

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

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

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

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

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

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

(c) Count 11 (Hostage-Taking)

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

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

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

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

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

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

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

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

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

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

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[170] Trial Judgement, para. 5944.

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

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

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

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

(d) Conclusion

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

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

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

(a) Scope of the Trial

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

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

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

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

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

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

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

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

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

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

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

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

[193] Prosecution Response Brief, para. 43.

[194] Prosecution Response Brief, para. 44.

[195] Prosecution Response Brief, para. 44.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Disclosure Violations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[253] *Šešelj* Appeal Judgement, para. 41. *Nyiramasuhuko et al.* Appeal Judgement, para. 346 and references cited therein.
[254] *See, e.g., The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 7 ("If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves. The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case.") (internal citations omitted).
[255] *See* Decision on Forty-Seventh Disclosure Motion, paras. 24, 26; Decision on Fifth Suspension of Proceedings Motion, paras. 6, 9; Decision on Fourth Suspension of Proceedings Motion, paras. 8, 12; T. 10 February 2011 pp. 11474-11476; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, paras. 39-41; T. 3 November 2010 pp. 8907, 8908; Decision on Seventeenth Disclosure Motion, paras. 7, 22; T. 13 September 2010 pp. 6593, 6594; Decision on Suspension of Proceedings, para. 8.
[256] *See* Decision on Forty-Seventh Disclosure Motion, paras. 22-24; Decision on Fifth Suspension of Proceedings Motion, para. 9; Decision on Fourth Suspension of Proceedings Motion, paras. 7, 10-13; T. 10 February 2011 pp. 11474, 11475; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, paras. 39-43; T. 3 November 2010 pp. 8907, 8908; Decision on Seventeenth Disclosure Motion, para. 7; T. 13 September 2010 p. 6593; Decision on Suspension of Proceedings, para. 7. *See also* Decision on Seventy-First Disclosure Motion, para. 10.
[257] The Appeals Chamber observes that the Prosecution rejects Karadžić's claim that the Prosecution "did not disclose[] exculpatory evidence before trial" and argues that reference to 78% misleadingly "conflates exculpatory material disclosed under Rule 68(i) and 'relevant material' disclosed under Rule 68(ii)". Prosecution Response Brief, para. 59. The Prosecution further suggests that "[t]he vast majority of Rule 68(i) material was disclosed by the March 2011 deadline for Rule 68 disclosure" imposed on it by the Trial Chamber and more than 18 months prior to the commencement of the Defence case. *See* Prosecution Response Brief, para. 59.

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

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

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

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

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

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[258] *See Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 29; *Blaškić* Appeal Judgement, paras. 263, 267.

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

[260] *See supra* para. 77.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Conclusion

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

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

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

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

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

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

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

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

(a) Presumption of Innocence and Burden of Proof

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

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

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

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

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

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

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

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

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

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

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

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

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

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[313] Karadžić Appeal Brief, paras. 130, 131; T. 23 April 2018 pp. 106-110. In this respect, Karadžić highlights that, in the *Brđanin* and *Krajišnik* cases, for example, arguments were focused on the notion that the military, rather than the civilian authorities, committed crimes, and in the *Galić* case, in which the accused was a military official, arguments were focused on blaming civilian authorities. Karadžić asserts that taking judicial notice of adjudicated facts from these cases is prejudicial to him because he was charged with responsibility for *Republika Srpska's* military and civilian organs. *See* Karadžić Appeal Brief, para. 130; T. 23 April 2018 pp. 107, 108.
[314] Karadžić Appeal Brief, para. 132.
[315] Prosecution Response Brief, paras. 67-70; T. 23 April 2018 pp. 168, 179, 180. *See also* T. 23 April 2018 p. 169; T. 24 April 2018 p. 280.
[316] Karadžić Reply Brief, paras. 39-45.
[317] Decision of 5 June 2009 on First Motion for Judicial Notice, para. 11. *See also* Decision of 14 June 2010 on Fifth Motion for Judicial Notice, para. 15; Decision of 14 June 2010 on Fourth Motion for Judicial Notice, para. 17; Decision of 9 October 2009 on Second Motion for Judicial Notice, para. 17; Decision of 9 July 2009 on Third Motion for Judicial Notice, para. 13.
[318] Decision of 5 June 2009 on First Motion for Judicial Notice, para. 11.
[319] *Mladić* Decision of 12 November 2013, para. 9; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*Dragomir Milošević* Decision of 26 June 2007"), para. 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Rebuttal of Adjudicated Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[377] Karadžić Appeal Brief, para. 151.

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

[379] Karadžić Appeal Brief, para. 154.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Appeals Chamber adopts this interpretation.[395]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[413] Karadžić Appeal Brief, para. 157.

[414] Karadžić Appeal Brief, para. 158.

[415] Karadžić Appeal Brief, para. 162.

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

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

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

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

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

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[417] Prosecution Response Brief, paras. 83, 84.
[418] Prosecution Response Brief, para. 85.
[419] Prosecution Response Brief, para. 87; T. 23 April 2018 pp. 169, 189.
[420] Karadžić Reply Brief, paras. 56-58.
[421] *See Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić et al.* Decision of 23 November 2007"), paras. 41, 43, 52; *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić* Decision of 14 September 2006"), paras. 12, 13.
[422] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, 12 June 2003, para. 14. *See also Prlić et al.* Decision of 23 November 2007, para. 41.
[423] *See, e.g., Prlić et al.* Appeal Judgement, para. 143; *Prlić et al.* Decision of 23 November 2007, para. 8; *Martić* Decision of 14 September 2006, para. 6.
[424] Decision of 6 April 2011, paras. 12, 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[470] Karadžić Appeal Brief, para. 180.

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

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

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

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

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

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

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

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

[475] [REDACTED].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[514] *See Prlić et al.* Appeal Judgement, paras. 143, 151; *Nyiramasuhuko et al.* Appeal Judgement, para. 331; *Prlić et al.* Decision of 1 July 2010, para. 8; *Kanyarukiga* Decision of 23 March 2010, para. 7.

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

[516] Decision of 25 February 2014, para. 7. *See also* Motion of 21 January 2014, Annex B (confidential).

[517] *See, e.g., Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun), 22 February 2013, para. 11; *Tolimir* Decision of 7 September 2011, para. 25. *Cf. Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para. 21. The Appeals Chamber finds that Karadžić's reliance on case law related to a trial chamber's discretion to issue an arrest warrant for a witness who fails to appear and testify is not on point as it concerns a clearly distinguishable situation and fails to demonstrate error. *See* Karadžić Appeal Brief, para. 230.

[518] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Decision on Accused's Request for Review of Registrar's Decision on Indigence Issued on 25 February 2014, 3 December 2014, paras. 5, 57; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision, 11 October 2012 (public with public and confidential and *ex parte* Appendix II) ("Registrar Decision of 11 October 2012"), p. 4.

[519] *See* Directive on the Assignment of Defence Counsel, IT/73/REV. 11, 11 July 2006 ("ICTY Directive on the Assignment of Counsel"), Article 23 (B)(ii). *See also* Registrar Decision of 11 October 2012, p. 4 ("with the exception of [Karadžić's] contribution of €146,501.00, the expenses referred to in [Article] 23 [...] of the [ICTY Directive on the Assignment of Counsel], as applicable to a self-represented accused and in accordance with the Remuneration Scheme, shall be borne by the Tribunal").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[540] *Karemera et al.* Decision of 29 May 2009, para. 15; *Popović et al.* Decision of 30 January 2008, para. 22; *Nyiramasuhuko* Decision of 4 October 2004, para. 7.
[541] Decision of 3 October 2012, para. 15.
[542] Decision of 3 October 2012, paras. 15, 16.
[543] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008 (confidential) ("*Popović et al.* Decision of 18 August 2008"), para. 44.
[544] *See Lukić and Lukić* Appeal Judgement, n. 1633, *referring to, inter alia, Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 7; *Popović et al.* Decision of 18 August 2008, paras. 30, 31. *See also, e.g., Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Redacted Version of "Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*", Filed Confidentially on 18 December 2008, 19 February 2009, para. 32; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Two Witnesses Pursuant to Rule 92 *quater*, 24 April 2008, para. 6; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8.
[545] *Prlić et al.* Decision of 12 January 2009, para. 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[629] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543, 1 November 2012 ("Decision of 1 November 2012"), paras. 13, 15.

[630] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW402, 8 January 2013 ("Decision of 8 January 2013"), paras. 7, 8.

[631] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW392, 14 February 2013 ("Decision of 14 February 2013"), paras. 7, 8.

[632] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motions for Rule 70 Conditions Relating to KDZ240 and KDZ314, 15 December 2009 (confidential) ("Decision of 15 December 2009"), paras. 34, 42. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Motion to Vary Protective Measures or to Exclude Testimony of Witness KDZ240, 31 August 2009 (confidential), para. 22.

[633] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Revoke Protective Measures for KDZ240, 28 June 2011 (confidential) ("Decision of 28 June 2011"), para. 33; T. 4 July 2011 p. 15948 (closed session) ("Oral Decision of 4 July 2011").

[634] T. 4 July 2011 pp. 15957-16047 (closed session); T. 5 July 2011 pp. 16049-16154 (closed session); T. 6 July 2011 pp. 16156-16228 (closed session).

[635] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Second Motion for Rule 70 Conditions for French Witnesses, 15 April 2010 (confidential) ("Decision of 15 April 2010"), para. 15.

[636] T. 28 June 2010 pp. 4169, 4170 and 4171, 4172 (private session), 4172-4174 and 4174-4177 (private session), 4177-4179 and 4179-4182 (private session), 4182, 4183 and 4183-4187 (private session), 4187-4189 and 4189-4193, 4203, 4204 (private session), 4204, 4205 and 4206, 4207 (private session), 4207, 4208 and 4208-4212 (private session), 4212, 4213 and 4214 (private session), 4214-4221 and 4221-4224 (private session), 4224-4231 and 4231-4235 (private session), 4235-4238 and 4238-4242 (private session), 4242-4245 and 4245-4248 (private session), 4248-4254; T. 29 June 2010 pp. 4255-4264 and 4264, 4265 (private session), 4265-4267 and 4267-4270 (private session), 4270-4275 and 4275-4277 (private session), 4277-4287 and 4287, 4288 (private session), 4288-4290 and 4290-4292 (private session),

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

(a) Denial of Protective Measures to Prospective Defence Witnesses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Conclusion

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

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

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

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

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

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

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

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

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

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

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

274. The Prosecution responds that the Trial Chamber correctly applied the law in declining Karadžić's requests to subpoena the four prospective witnesses.[707] It contends that the Trial Chamber properly considered whether the evidence could be obtained by other means and correctly determined that it could.[708] The Prosecution further submits that Karadžić fails to demonstrate that the testimony of the four proposed witnesses would have altered the Trial Chamber's findings or otherwise impacted the verdict.[709]

275. Karadžić replies that the Trial Chamber's emphasis on whether the relevant information could be obtained by other means led it to ignore considerations such as the directness and credibility of the prospective evidence as well as the proposed witnesses' unique roles and positions, which constitutes a legal error.[710] He further highlights how the prospective evidence of Tomašević, Forca, Milanković, and Tomović directly contradicts inculpatory findings of the Trial Chamber and submits that the absence of their evidence rendered his trial unfair.[711]

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[702] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 315-318, *referring to Halilović* Decision of 21 June 2004, paras. 6, 7, 10, 15, *Krstić* Decision of 1 July 2003, paras. 10, 11.
[703] Karadžić Appeal Brief, paras. 316, 318, *referring to Halilović* Decision of 21 June 2004, para. 10, *Krstić* Decision of 1 July 2003, para. 11. *See also* Karadžić Reply Brief, paras. 87, 88.
[704] Karadžić Appeal Brief, paras. 323-326. *See also* Karadžić Reply Brief, paras. 86, 89-91, 93. Karadžić further contends that the Trial Chamber failed to sufficiently consider the credibility of the prospective witnesses' evidence and whether such evidence could corroborate or impeach existing evidence. *See* Karadžić Appeal Brief, paras. 319-322.
[705] Karadžić Appeal Brief, paras. 326-328.
[706] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 306, 311, 314, 328. *See also* Karadžić Reply Brief, paras. 92-94.
[707] Prosecution Response Brief, paras. 175-177.
[708] Prosecution Response Brief, paras. 176-181.
[709] Prosecution Response Brief, paras. 182-184.
[710] Karadžić Reply Brief, paras. 86-89.
[711] Karadžić Reply Brief, paras. 90-94. With respect to Tomović specifically, Karadžić argues that the Trial Chamber's determination that there was no indication that mosques were used for military purposes further demonstrates the prejudice he suffered by the Trial Chamber's denial of his request to subpoena Tomović. *See* Karadžić Reply Brief, para. 93.

276. The Appeals Chamber recalls that decisions on requests for subpoenas relate to the general conduct of the trial and fall within a trial chamber's discretion.[712] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed discernible error resulting in prejudice to that party.[713]

277. Rule 54 of the ICTY Rules provides, *inter alia*, that a trial chamber may issue subpoenas "as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". In interpreting this provision, the Appeals Chamber of the ICTY has stated:

> The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused. As the Appeals Chamber [of the ICTY] has emphasized, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."
>
> In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial." The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.[714]

The Appeals Chamber has adopted this interpretation.[715]

278. The Appeals Chamber finds that the Trial Chamber correctly recalled the applicable law and acted within the bounds of its discretion when considering whether the relevant information was obtainable through other means.[716] As it concerns Tomašević, Karadžić argues that the Trial

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[712] *See, e.g.*, Decision of 29 January 2013, para. 7; *Bizimungu et al.* Decision of 22 May 2008, para. 8; *Halilović* Decision of 21 June 2004, para. 6.

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

[714] *Halilović* Decision of 21 June 2004, paras. 6, 7, *referring to, inter alia, Krstić* Decision of 1 July 2003, paras. 10, 11 (internal references omitted).

[715] *See supra* para. 148.

[716] *See* Tomović Decision of 28 January 2013, paras. 7-10; Milanković Decision of 18 January 2013, paras. 7-10; Forca Decision 18 December 2013, paras. 5-8; Tomašević Decision of 11 December 2013, paras. 5-8. Karadžić's contentions that the Trial Chamber erred in not sufficiently considering the credibility of the prospective witnesses' evidence and whether such evidence could corroborate or impeach existing evidence are without merit. *See* Karadžić Appeal Brief, paras. 319-322. The Appeals Chamber observes that the evidentiary factors relevant to the issuance of subpoenas set out above are illustrative and not exhaustive. *See supra* paras. 148, 277. While it would have been within the Trial Chamber's discretion to consider the credibility of the prospective evidence or its capability to corroborate or impeach other evidence when adjudicating Karadžić's requests, the Trial Chamber was not required to do so. This is particularly

Chamber ignored that he was best placed to testify to his own rationale for releasing the prisoners in question.[717] However, Karadžić disregards the Trial Chamber's consideration that the prospective evidence as to why individuals were released in one case was already reflected in documentation admitted into the record.[718] Karadžić also demonstrates no error in the Trial Chamber's conclusion that information related to the second case was obtainable through other means, in view of evidence already on the record.[719] Therefore, Karadžić has not shown that the Trial Chamber committed a discernible error in denying his request to subpoena Tomašević.

279. With respect to Forca, Karadžić submits that he could have spoken directly as to whether the decisions he rendered were issued because of any policy of Karadžić that tolerated the commission of crimes by Serbs against non-Serbs.[720] As noted above, the Trial Chamber concluded that there was no indication that his evidence would add anything to the evidence on the record which already included, *inter alia*, the decisions issued by Forca.[721] Karadžić does not substantiate how the Trial Chamber erred in reaching this conclusion. Therefore, Karadžić does not demonstrate that the Trial Chamber committed a discernible error in denying his request to subpoena Forca.

280. As regards Milanković, Karadžić argues that the Trial Chamber failed to give adequate weight to his unique position as Battalion Commander when considering that others could have offered comparable evidence concerning the shelling of civilians in Dobrinja.[722] The Appeals Chamber observes that, in the impugned decision, the Trial Chamber held that it was not persuaded that the relevant information was obtainable only through Milanković since there must have been other members of the battalion operating in the area at the relevant time who could provide the information Karadžić sought.[723] The record reflects that Karadžić was able to obtain relevant evidence concerning the events in Dobrinja from Serb military officers who held positions similar to or higher than that of Milanković as well as evidence from personnel from the same brigade who

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the case in the circumstances under consideration where, in support of his requests for the issuance of subpoenas, Karadžić did not elaborate on the credibility of the evidence of the prospective witnesses or its ability to corroborate or impeach evidence on the record.

[717] Karadžić Appeal Brief, para. 323.

[718] Tomašević Decision of 11 December 2013, para. 12.

[719] Tomašević Decision of 11 December 2013, para. 13.

[720] Karadžić Appeal Brief, para. 313. The Appeals Chamber observes that Karadžić argues that Forca issued a total of four decisions that were cited by the Prosecution as evincing a policy of the non-prosecution of crimes against non-Serbs. *See* Karadžić Appeal Brief, para. 313. As Karadžić makes no showing that he referred to two of the four decisions when requesting to subpoena Forca at trial, the Appeals Chamber will not consider this aspect of his submissions for the first time on appeal.

[721] Forca Decision of 18 December 2013, paras. 11, 12.

[722] Karadžić Appeal Brief, paras. 325, 326. *See also* Karadžić Appeal Brief, paras. 307-309.

[723] Milanković Decision of 18 January 2013, para. 14.

were responsible for artilleries.[724] Karadžić has therefore not demonstrated that the Trial Chamber committed a discernible error in rejecting his request to subpoena Milanković.

281. With respect to Tomović, Karadžić emphasizes on appeal that, as Commander of the First Battalion in Foča, he was uniquely placed to provide evidence about the reasons for the events at issue in Foča, which, for example, lower ranking members of his battalion could not do.[725] The Appeals Chamber notes that in support of his request to subpoena Tomović, Karadžić did not argue that Tomović's prospective evidence was unique due to his position, but that he was the "only witness [...] Karadžić ha[d] identified who [could] testify to the military events in Fo[č]a and particularly the shooting from the [Aladža] mosque."[726] In denying Karadžić's request, the Trial Chamber noted that the record reflected that Tomović's battalion had around 520 soldiers and that Karadžić did not explain why Tomović was the only witness he could identify despite the large size of the battalion.[727] Furthermore, the record reflects that Karadžić was able to present evidence about the events in Foča, including evidence that Bosnian Muslims were fighting from mosques and using them to store weapons and for training.[728] Karadžić therefore fails to demonstrate that the Trial Chamber committed a discernible error in denying his request to subpoena Tomović.

282. Having not demonstrated any discernible error in the Trial Chamber's decisions denying the requested subpoenas for the four prospective witnesses, the Appeals Chamber also dismisses Karadžić's allegation that the decisions violated his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him under Article 21(4)(e) of the ICTY Statute.[729] Based on the foregoing, the Appeals Chamber dismisses Ground 19 of Karadžić's appeal.

[724] *See* Exhibit D2341, paras. 7, 20, 21; Exhibit D2412, paras. 3, 6, 27; Exhibit D2479, paras. 26, 27; Exhibit D2562, paras. 1, 110, 111; Exhibit D2633, paras. 14, 15, 22, 23-30; Exhibit D2774, paras. 129-134; T. 22 October 2012 pp. 29152-29156; T. 28 January 2013 pp. 32711-32715; T. 18 April 2013 pp. 37367-37393, 37441-37443.
[725] Karadžić Appeal Brief, para. 324.
[726] Tomović Motion of 17 December 2012, para. 6. *See also* Karadžić Reply Brief, para. 93.
[727] Tomović Decision of 28 January 2013, para. 14.
[728] *See* Trial Judgement, paras. 927, 932.
[729] Karadžić Appeal Brief, paras. 326-328.

16. Alleged Errors in Refusing to Compel Ratko Mladić to Testify (Ground 20)

283. When Mladić declined to testify as a defence witness for Karadžić, Karadžić requested the Trial Chamber to issue a subpoena to compel him to testify.[730] The Trial Chamber granted Karadžić's request as he had sufficiently demonstrated that there was a good chance that Mladić would be able to give information which would materially assist his case and that specific aspects of Mladić's expected evidence could not be obtained through other means.[731] In particular, the Trial Chamber considered that Mladić, as the highest ranking officer in the VRS, was uniquely positioned to give evidence regarding the information he passed to Karadžić concerning many of the events alleged in the Indictment.[732] The Trial Chamber added that it remained within its discretion whether to compel a witness to answer particular questions and that, in exercising this discretion, it would be cognizant of the fact that Mladić's trial before the ICTY was pending and would ensure that his rights in that respect were safeguarded.[733] The Trial Chamber subsequently denied Mladić's request for leave to appeal this decision.[734]

284. When Mladić appeared to testify, the Trial Chamber denied his counsel's objections to his prospective testimony founded on health concerns and his right to remain silent since the indictment in his own case was "almost identical" to the indictment against Karadžić.[735] The Trial Chamber observed that both issues had been sufficiently dealt with when considering whether to subpoena Mladić and that there had been no subsequent developments.[736] When invited to make a solemn declaration before testifying, Mladić initially refused to do so.[737] Once he took the oath, the Trial Chamber informed him that, pursuant to Rule 90(E) of the ICTY Rules, he could object to answering any question if he believed that his answer might incriminate him.[738] However, the Trial Chamber noted that it could nonetheless compel him to answer, in which case the Tribunal would ensure that his compelled testimony would not be used in any case against him for any offence, except for the offence of giving false testimony.[739] Subsequently, and in response to the questions

[730] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Ratko Mladić, 11 December 2013 ("Decision on Motion to Subpoena Ratko Mladić"), paras. 1, 2.
[731] Decision on Motion to Subpoena Ratko Mladić, paras. 20, 22, 27.
[732] Decision on Motion to Subpoena Ratko Mladić, paras. 20, 22.
[733] Decision on Motion to Subpoena Ratko Mladić, para. 23 ("In exercising this discretion, [the Trial Chamber] will be cognizant of the fact that Mladić is currently on trial, and will ensure that his rights are safeguarded.").
[734] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Mladić Request for Certification to Appeal Subpoena Decision, 23 December 2013, paras. 4, 13, 14. The Trial Chamber also denied the Prosecution's and Mladić's motions for reconsideration of this decision. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Urgent Motions for Reconsideration of Decision Denying Mladić Request for Certification to Appeal Subpoena Decision, 22 January 2014, paras. 5, 6, 22, 23.
[735] T. 28 January 2014 pp. 46041-46044.
[736] T. 28 January 2014 pp. 46043, 46044.
[737] T. 28 January 2014 pp. 46044-46046.
[738] T. 28 January 2014 pp. 46048, 46049.
[739] T. 28 January 2014 pp. 46048, 46049.

posed by Karadžić, Mladić repeated that he could not testify due to his health condition and invoked his right to remain silent.[740] The Trial Chamber decided not to compel Mladić to answer the questions in light of Mladić's right against self-incrimination as an accused whose trial was pending before the ICTY.[741]

285. Karadžić submits that the Trial Chamber erred by its "blanket" refusal to compel Mladić to testify in Karadžić's trial.[742] In his view, compelling Mladić to testify would not violate Mladić's right not to incriminate himself because his answers could not be used against him either directly or indirectly.[743] In addition, he argues that, had the appropriate guarantees been provided against the use of Mladić's evidence in his own case, Karadžić's need for Mladić's "critical" exculpatory evidence outweighed any interest Mladić may have had in declining to answer.[744] In particular, he argues that Mladić could speak to important issues concerning Karadžić's responsibility, including whether Karadžić was informed about the killings of prisoners from Srebrenica, whether the shelling and sniping of Sarajevo was directed at civilians and was part of a campaign of terror, and whether there was an agreement to expel Bosnian Muslims and Bosnian Croats residing in Serb-controlled areas.[745] Karadžić requests the Appeals Chamber to order a new trial at which Mladić's evidence could be heard.[746]

286. The Prosecution responds that Karadžić fails to show abuse of the Trial Chamber's discretion in refusing to compel Mladić to answer self-incriminating questions.[747] In particular, the Trial Chamber correctly balanced the competing interests at stake, namely the concrete risks to Mladić's fundamental right not to incriminate himself and the potential advantage of Mladić's testimony for Karadžić's case.[748] The Prosecution also argues that, even if Karadžić would obtain the denials sought from Mladić, this evidence would be duplicative of that given by other members of the relevant joint criminal enterprises and senior Bosnian Serb officials, which was found not credible in light of the overwhelming evidence to the contrary.[749]

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[740] T. 28 January 2014 pp. 46050-46054.
[741] *See* T. 28 January 2014 pp. 46051-46054.
[742] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 330, 344; T. 23 April 2018 pp. 113, 114, 116. *See also* Karadžić Appeal Brief, paras. 329-345; T. 23 April 2018 pp. 113-118; T. 24 April 2018 pp. 244, 245.
[743] Karadžić Appeal Brief, paras. 336, 340.
[744] Karadžić Appeal Brief, paras. 336, 340, 344; T. 23 April 2018 pp. 113-116.
[745] Karadžić Appeal Brief, paras. 341-345, *referring to* Trial Judgement, paras. 3437, 3439, 3440, 3447, 3464, 3465, 4891, 4928, 5805-5814, 5818-5821. *See also* T. 23 April 2018 p. 116.
[746] Karadžić Appeal Brief, para. 345; T. 23 April 2018 p. 118.
[747] Prosecution Response Brief, paras. 185-201. *See also* T. 23 April 2018 pp. 180-183.
[748] Prosecution Response Brief, paras. 185, 188-193. *See also* T. 23 April 2018 pp. 180-183.
[749] Prosecution Response Brief, paras. 197, 199, 201; T. 23 April 2018 p. 182. The Prosecution also argues that, had Karadžić considered Mladić's testimony so crucial, he could have sought to introduce it as additional evidence on appeal, given the significantly reduced risk of Mladić incriminating himself after the evidentiary phase of his case had ended and even less risk after Mladić was convicted. *See* T. 23 April 2018 pp. 182, 183.

287. Karadžić replies that the Prosecution exaggerates the difficulties in guaranteeing Mladić's rights in his own trial and fails to provide a reasonable justification for the Trial Chamber's decision not to compel Mladić to testify.[750] He also argues that the Prosecution underestimates the potential importance of Mladić's direct evidence for challenging the Trial Chamber's findings that: (i) Mladić had informed him about the Srebrenica events on 13 July 1995; (ii) Mladić presented a plan to shell Sarajevo indiscriminately during a meeting between 20 and 28 May 1992; and (iii) together with Mladić, Karadžić formulated a plan to expel Bosnian Muslims and Croats to form a homogenous Serb state.[751]

288. The Appeals Chamber recalls that Article 21(4)(g) of the ICTY Statute guarantees the fundamental right of an accused not to be compelled to testify against himself in the determination of any charge against him. Rule 90(E) of the ICTY Rules provides that a witness may object to making any statement which might tend to incriminate him and that a chamber may compel the witness to answer the question, in which case testimony compelled in this way will not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. The ICTY Appeals Chamber has held that compelling an accused to testify in proceedings which do not involve the determination of the charges against him under Rule 90(E) of the ICTY Rules is not in itself inconsistent with the right not to incriminate oneself given the absolute prohibition on direct or indirect use of self-incriminating statements so compelled in the proceedings against him.[752] Compelling a witness to answer a question which may incriminate him in such circumstances remains within a trial chamber's discretion.[753] This discretion, however, must be exercised consistently with Articles 20(1) and 21 of the ICTY Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[754]

289. The Appeals Chamber notes that, in deciding not to compel Mladić to answer the questions posed by Karadžić, the Trial Chamber had to balance Karadžić's right to obtain the attendance and examination of witnesses on his behalf with Mladić's right not to incriminate himself. Both of these rights are guaranteed by the ICTY Statute but neither is absolute and both may be subject to limitations.[755] Karadžić requested Mladić to confirm whether Mladić had informed him about the execution of prisoners from Srebrenica, whether they had agreed that the citizens of Sarajevo would

[750] Karadžić Reply Brief, paras. 96, 100; T. 23 April 2018 p. 115. *See also* T. 24 April 2018 p. 244.
[751] Karadžić Reply Brief, para. 97, *referring to* Trial Judgement, paras. 3266-3273, 4023, 4721, 5769, 5804. *See also* T. 24 April 2018 pp. 244, 245.
[752] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("Decision of 13 November 2013"), paras. 43, 45.
[753] *Cf. Ntagerura et al.* Appeal Judgement, para. 253.
[754] *See, e.g.*, Mladić Decision of 22 October 2013, para. 12; *Ndahimana* Appeal Judgement, para. 14.
[755] *See* Article 21(4) of the ICTY Statute; Decision of 13 November 2013, para. 36; *Furundžija* Appeal Judgement, para. 75.

be subjected to terror by shelling or sniping, what were the reasons for the shelling or sniping of Sarajevo, and whether there was an agreement between them to expel Bosnian Muslims and Bosnian Croats residing in Serb-controlled areas.[756] Answers to these questions would have been directly relevant to the charges against Mladić in his ongoing proceedings before the ICTY.[757] Notwithstanding the Trial Chamber's discretion to compel Mladić to testify in view of the safeguards afforded under Rule 90(E) of the ICTY Rules, the Appeals Chamber finds that in these circumstances the Trial Chamber did not err in declining to compel him to answer Karadžić's potentially incriminating questions.

290. Moreover, the Appeals Chamber finds that Karadžić does not show that, in safeguarding Mladić's right against self-incrimination, the Trial Chamber violated Karadžić's right to obtain the attendance and examination of witnesses on his behalf. The Appeals Chamber notes that the Trial Chamber facilitated Karadžić's request to obtain Mladić's attendance and examination. In particular, the Trial Chamber granted Karadžić's request to subpoena Mladić and, once Mladić appeared, it dismissed his objections over testifying and instructed him that he was to answer Karadžić's questions.[758] The Trial Chamber also warned Mladić that wilful refusal to comply with the terms of the subpoena could constitute contempt.[759] Nevertheless, in response to each of Karadžić's questions, Mladić repeatedly refused to testify.[760]

291. The Appeals Chamber also finds that Karadžić's speculative submission that Mladić would have provided "critical" exculpatory evidence fails to show error. Specifically, three out of the four substantive questions posed by Karadžić sought to elicit general denials of the existence and criminal purpose of the joint criminal enterprises charged in the Indictment.[761] However, the Trial Chamber observed in its decision to subpoena Mladić that such evidence would be duplicative of other evidence on the record, including evidence from other alleged members of the relevant joint criminal enterprises, and did not in itself warrant the issuance of a subpoena.[762] Karadžić's remaining substantive question sought to elicit evidence as to whether Mladić had informed him of the fate of prisoners from Srebrenica.[763] In this respect, the Appeals Chamber notes that the Trial

[756] T. 28 January 2014 pp. 46051-46054.
[757] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011.
[758] T. 28 January 2014 pp. 46044, 46045, 46051.
[759] T. 28 January 2014 pp. 46045, 46046.
[760] T. 28 January 2014 pp. 46050-46054.
[761] *See* T. 28 January 2014 pp. 46052-46054. The Appeals Chamber notes that Karadžić indicated that he only had six questions to put to Mladić, the first concerned the non-substantive issue of the positions Mladić held in his military career and one question was voluntarily withdrawn as moot. *See* T. 28 January 2014 pp. 46050, 46053, 46054.
[762] Decision on Motion to Subpoena Ratko Mladić, para. 21, n. 41, *referring to* evidence of Witnesses Milan Martić, Vojislav Šešelj, Vladislav Jovanović, Milorad Dodik, Momir Bulatović, Milenko Inđić, Ljubomir Borovčanin, Momčilo Krajišnik, John Zametica, Vujadin Popović, and Milenko Živanović.
[763] T. 28 January 2014 p. 46051.

Chamber had already heard evidence from other Bosnian Serb officials and military personnel, including high-ranking VRS officers, who denied passing such information to Karadžić.[764] Notwithstanding, in its judgement the Trial Chamber preferred to rely instead on ample evidence on the trial record demonstrating that Karadžić was informed about and had agreed to the executions of the detainees from Srebrenica.[765] In these circumstances, Mladić's expected evidence on this matter could not be considered critical.

292. In light of the above, the Appeals Chamber finds that Karadžić fails to show error in the Trial Chamber's decision not to compel Mladić to answer his questions. Consequently, the Appeals Chamber dismisses Ground 20 of Karadžić's appeal.

[764] The Trial Chamber heard the evidence of: (i) Witness Petar Salapura who stated that he never informed Karadžić either verbally or in writing that prisoners from Srebrenica were executed (T. 24 June 2013 pp. 40305, 40306); (ii) Witness Milenko Karišik who stated that he never reported to Karadžić about any unlawful killings or executions in Srebrenica after its fall (T. 2 July 2013 p. 40692); (iii) Witness John Zametica who stated that the civilian authorities and the Bosnian Serb Presidency knew nothing about the massacre in Srebrenica after the completion of the military operation there (T. 29 October 2013 p. 42483); (iv) Witness Tomislav Kovač who stated that he had no information as to whether Karadžić was informed of executions of prisoners of war and had not seen any written report containing information about the executions in Srebrenica that was sent to Karadžić (T. 4 November 2013 p. 42851); (v) Momčilo Krajišnik who stated that at a meeting on 14 July 1995 with Karadžić and Miroslav Deronjić no one spoke about any negative aspect of what happened in Srebrenica (T. 12 November 2013 pp. 43352, 43353); and (vi) Witness Zdravko Tolimir who denied informing Karadžić of the Srebrenica executions (T. 12 December 2013 pp. 45063, 45064).
[765] Trial Judgement, paras. 5756-5797.

17. Alleged Errors in Refusing to Assign Counsel to a Prospective Defence Witness (Ground 21)

293. On 16 January 2014, the Trial Chamber dismissed a request from Predrag Banović, a prospective Defence witness, to be assigned counsel for the purposes of his testimony in Karadžić's case.[766] The Trial Chamber considered that Banović, who was not a suspect, an accused, or a person detained under the authority of the ICTY, was not entitled to counsel under the ICTY Directive on the Assignment of Defence Counsel.[767] The Trial Chamber also found that there were no exceptional circumstances warranting the assignment of counsel to Banović for the purposes of his testimony in the proceedings against Karadžić.[768]

294. Karadžić then sought the admission of a statement by Banović pursuant to Rule 92 *bis* of the ICTY Rules, stating that the witness had refused to testify after being informed that the Trial Chamber would not assign counsel to assist him during his testimony.[769] The Trial Chamber denied Karadžić's request, noting that Banović had refused to testify because of his concerns about his right against self-incrimination and considered that the same concerns would equally apply should his evidence be received in writing.[770] The Trial Chamber was therefore not satisfied that Banović would agree to certify the contents of his statement and found that Karadžić had made no attempt to prove the contrary.[771]

295. Karadžić argues that the Trial Chamber erred in refusing to assign counsel to Banović.[772] He submits that Banović faced the risk of incriminating himself in his testimony, which could have been used against him to revoke his plea agreement with the Prosecution or in national proceedings.[773] Karadžić maintains that the Trial Chamber's reasoning was flawed because in denying the request it relied on the ICTY Directive on the Assignment of Counsel, violating the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[774] Karadžić argues that he was prejudiced by the Trial Chamber's decision, which deprived him of Banović's evidence

[766] T. 16 January 2014 pp. 45428, 45429.
[767] T. 16 January 2014 pp. 45428, 45429, *referring to* ICTY Directive on the Assignment of Counsel, Article 5 ("Without prejudice to the right of a suspect or an accused to conduct his own defence: (i) a suspect who is to be questioned by the Prosecutor during an investigation; (ii) an accused upon whom personal service of the indictment has been effected; and (iii) any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis*; shall have the right to be assisted by counsel.").
[768] T. 16 January 2014 p. 45429.
[769] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Testimony of Predrag Banovi[ć] Pursuant to Rule 92[ ]*bis*, 11 February 2014, paras. 1, 2; Decision of 18 March 2014, para. 67.
[770] Decision of 18 March 2014, paras. 68, 69(f).
[771] Decision of 18 March 2014, para. 68.
[772] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 348, 350; Karadžić Reply Brief, para. 102.
[773] Karadžić Appeal Brief, para. 350; Karadžić Reply Brief, para. 101.
[774] Karadžić Appeal Brief, para. 348, *referring to* UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Doc A/Res/67/187, 28 March 2013, Guideline 8, para. 51. *See also* Karadžić Reply Brief, para. 102. Karadžić also relies on jurisprudence from the ICC and legislation from Germany and the United States. *See* Karadžić Appeal Brief, para. 349.

and led to adverse findings on issues about which Banović would have testified.[775] He submits that the Appeals Chamber should order a new trial in which Banović can be assigned counsel and testify.[776]

296. The Prosecution responds that, through his inaction, Karadžić waived his right to appeal the Trial Chamber's decision not to assign counsel to Banović as he did not file any motion on this matter or exhaust all available remedies to secure Banović's appearance.[777] In addition, the Prosecution argues that Karadžić shows no error in the decision and that the Trial Chamber was not required to assign counsel to Banović.[778] Finally, the Prosecution contends that Karadžić fails to demonstrate that Banović's testimony would have had any impact on the Trial Judgement.[779]

297. Karadžić replies that he did not waive his right to raise this matter on appeal as he was not required to re-submit Banović's request and that he did not have to subpoena Banović.[780]

298. The Appeals Chamber recalls that, in the absence of special circumstances, if a party raises no objection to a particular issue before the trial chamber when it could have reasonably done so, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[781] The Appeals Chamber notes that Karadžić did not challenge the impugned decision at trial and did not present to the Trial Chamber any of the detailed factual or legal submissions he makes on appeal. In addition, he fails to demonstrate any special circumstance warranting consideration of his submissions for the first time on appeal. The Appeals Chamber therefore finds that Karadžić has waived his right to raise this issue on appeal.

299. Consequently, the Appeals Chamber dismisses Ground 21 of Karadžić's appeal.

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[775] Karadžić Appeal Brief, para. 350.
[776] Karadžić Appeal Brief, para. 351.
[777] Prosecution Response Brief, para. 202; T. 23 April 2018 p. 167.
[778] Prosecution Response Brief, para. 203.
[779] Prosecution Response Brief, para. 205.
[780] Karadžić Reply Brief, paras. 103, 104.
[781] *See, e.g., Prlić et al.* Appeal Judgement, para. 165; *Nyiramasuhuko et al.* Appeal Judgement, paras. 63, 1060, n. 157; *Popović et al.* Appeal Judgement, para. 176; *Bagosora and Nsengiyumva* Appeal Judgement, para. 31. *See also Orić* Decision of 17 February 2016, para. 14.

18. Alleged Errors in Failing to Exclude the Testimony of War Correspondents (Ground 23)

300. On 20 May 2009 and 17 May 2010, the Trial Chamber denied two motions from Karadžić to exclude the testimony of war correspondents, finding that the testimonial privilege enjoyed by war correspondents is a matter that they personally may choose to exercise or not.[782]

301. Karadžić submits that the Trial Chamber erred in denying his motions to exclude the testimony of five retired war correspondents.[783] He argues that a qualified privilege for war correspondents exists at the ICTY pursuant to which a war correspondent may not be compelled to testify unless the party calling him or her demonstrates that the correspondent will give evidence that is important to the core issues of the case and which cannot be reasonably obtained by other means.[784] Karadžić contends that the news organization, rather than the journalist, holds the war correspondent privilege as the organization owns the information and controls its disclosure.[785] Karadžić further contends that the principles of employment and agency law as well as the corporate attorney-client privilege support the proposition that, as a journalist, a war correspondent does not have the authority to waive the privilege of confidentiality when the waiver implicates the news organization.[786] Karadžić claims that news organizations and not individual war correspondents are best placed to determine when to waive their privilege so as not to jeopardize their mandate and ability to operate in war zones, which, he argues, is the case for the International Committee of the Red Cross ("ICRC") whose employees cannot be compelled to testify absent a waiver from the organization.[787] Karadžić submits that the Trial Chamber "heavily relied" on the evidence of war correspondents in making certain findings concerning his participation in joint criminal enterprises,[788] and he requests that the Appeals Chamber order a new trial, at which their testimony would be excluded in the absence of a valid waiver of privilege.[789]

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[782] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Exclude Testimony of Aernout Van Lynden, 17 May 2010 ("Decision of 17 May 2010"), paras. 1, 4, 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion to Exclude Testimony of War Correspondents, 20 May 2009 ("Decision of 20 May 2009"), paras. 3, 4. The Appeals Chamber notes that Karadžić also raised objections to hearing the testimony of war correspondents on several occasions during the trial proceedings. *See* T. 13 December 2010 pp. 9749, 9750; T. 13 January 2011 p. 10067; T. 9 November 2011 p. 21033; T. 21 February 2012 pp. 24909, 24910.

[783] Karadžić Appeal Brief, paras. 384, 393; T. 23 April 2018 pp. 118, 119, 133, 134. *See also* T. 23 April 2018 pp. 125-127.

[784] Karadžić Appeal Brief, para. 385, *referring to Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin* Decision of 11 December 2002"), para. 50. *See also* Karadžić Reply Brief, paras. 107, 108.

[785] Karadžić Appeal Brief, paras. 386, 387. *See* T. 23 April 2018 pp. 118, 119. *See also* T. 23 April 2018 pp. 133, 134.

[786] Karadžić Appeal Brief, paras. 388, 389. *See also* Karadžić Reply Brief, para. 110.

[787] Karadžić Appeal Brief, paras. 390-392; T. 23 April 2018 pp. 118, 119. Karadžić submits that war correspondents, like ICRC employees, would be endangered through the perception that they can be forced to become witnesses against their interviewees. *See* Karadžić Appeal Brief, para. 392. *See also* Karadžić Reply Brief, paras. 108, 109.

[788] Specifically, Karadžić submits that the Trial Chamber relied on the evidence of war correspondents in finding the existence of the Sarajevo JCE and his intent to terrorize civilians in Sarajevo, and that he had the intent to expel

302. The Prosecution responds that the Trial Chamber correctly rejected Karadžić's claim that the news organization, rather than the journalist, holds the war correspondent privilege in accordance with the *Brđanin* Decision of 11 December 2002, from which Karadžić has not demonstrated cogent reasons to depart.[790] The Prosecution contends that Karadžić merely repeats his submissions at trial in this respect and that his remaining arguments, relying on inapposite case law, ignore the rationale underpinning the war correspondent privilege and are otherwise irrelevant.[791] The Prosecution contends that even if the Trial Chamber erred in its finding regarding the war correspondent privilege, Karadžić has failed to demonstrate any prejudice or present any information that the news organizations may have asserted this privilege or had any concerns about their journalists testifying before the ICTY.[792]

303. Karadžić replies that the *Brđanin* Decision of 11 December 2002 only involved the assertion of the war correspondent privilege, not its waiver, and that the Appeals Chamber never made a determination on whether war correspondents were free to testify without a waiver from their respective news organization.[793] He further contends that the Prosecution had the opportunity during the trial to seek waivers from the relevant news organizations when each war correspondent appeared in court but failed to do so.[794]

304. The Appeals Chamber recalls that trial chambers enjoy broad discretion in the conduct of proceedings before them, including in deciding on matters relating to the admission or presentation of evidence.[795] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[796]

305. The Appeals Chamber observes that, under this ground of appeal, Karadžić largely repeats the arguments he raised before the Trial Chamber.[797] The Appeals Chamber recalls that a party

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Bosnian Muslims and Croats as part of the Overarching JCE. *See* Karadžić Appeal Brief, para. 394; Karadžić Reply Brief, para. 112.

[789] Karadžić Appeal Brief, para. 394.

[790] Prosecution Response Brief, paras. 213-216; T. 23 April 2018 pp. 168, 183, 184.

[791] Prosecution Response Brief, paras. 215-219. The Prosecution submits that Karadžić's claim with respect to the ICRC privilege fails to acknowledge that the Appeals Chamber has held that while the ICRC, as an organization, holds an absolute privilege against the compelled testimony of its employees, war correspondents are free to testify voluntarily. *See* Prosecution Response Brief, para. 217.

[792] Prosecution Response Brief, para. 220. *See also* T. 23 April 2018 p. 169.

[793] *See* Karadžić Reply Brief, paras. 106, 107. Karadžić asserts that the fact the ICRC has an absolute privilege has no bearing on the issue of waiver of qualified privilege. *See* Karadžić Reply Brief, para. 108.

[794] Karadžić Reply Brief, para. 111.

[795] *See, e.g., Prlić et al.* Appeal Judgement, paras. 26, 143, 151; *Popović et al.* Appeal Judgement, paras. 74, 297; *Karemera and Ngirumpatse* Appeal Judgement, para. 27; *Šainović et al.* Appeal Judgement, paras. 152, 161.

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

[797] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Exclude Testimony of Aernout Van Lynden, 14 May 2010 ("Motion of 14 May 2010"), paras. 11-15; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Exclude Testimony of War Correspondents, 18 May 2009, paras. 2, 4, 9-18.

cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[798] The Appeals Chamber notes that the Trial Chamber already considered and dismissed Karadžić's argument that the testimonial privilege granted to war correspondents can only be waived by his or her employer news organization.[799] The Trial Chamber held that the settled jurisprudence of the ICTY allows war correspondents to waive their privilege if they choose to do so.[800] The Trial Chamber also rejected Karadžić's analogy between war correspondents and ICRC employees as unsupported and inconsistent with the ICTY's practice to hear war correspondents who are willing to give evidence.[801]

306. The Appeals Chamber notes that Karadžić's arguments before the Trial Chamber and on appeal ignore the fact that none of the news organizations for which the war correspondents worked sought to assert any qualified privilege and Karadžić has no standing to assert it on their behalf. On appeal Karadžić points to no binding authority or relevant jurisprudence in support of his contention that the Trial Chamber erred in denying his request to exclude the testimony of war correspondents.[802] Karadžić's argument that a qualified privilege for war correspondents is recognized in ICTY jurisprudence such that a war correspondent may not be compelled to testify unless a certain test is met is not on point as the correspondents in question were not being compelled to testify. Consequently, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber erred in rejecting his arguments or that it committed a discernible error.

307. For the foregoing reasons, the Appeals Chamber dismisses Ground 23 of Karadžić's appeal.

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[798] *See Šešelj* Appeal Judgement, paras. 17, 28; *Prlić et al.* Appeal Judgement, para. 128; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27.

[799] *See* Decision of 17 May 2010, paras. 2, 4, 5; Motion of 14 May 2010, paras. 11-14. *See also* Decision of 20 May 2009, para. 3.

[800] Decision of 17 May 2010, paras. 4, 5; Decision of 20 May 2009, para. 3, *referring to Brđanin* Decision of 11 December 2002.

[801] Decision of 17 May 2010, para. 5.

[802] The Appeals Chamber recalls that numerous war correspondents provided evidence before the ICTY. For example, Mr. Aernout van Lynden, who was the subject of the Decision of 17 May 2010, testified in the *Perišić*, *Martić*, *Mrkšić et al.*, *Slobodan Milošević*, and *Galić* cases before the ICTY. *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, T. 3 October 2008 pp. 460, 482, T. 6 October 2008 pp. 533, 553; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, T. 2 June 2006 pp. 4990, 4991; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, T. 23 January 2006 pp. 3075-3077, 3082, 3118, 3119, T. 24 January 2006 pp. 3160, 3161; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 15 September 2003 pp. 26693, 26694; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, T. 23 January 2002 p. 2085, T. 24 January 2002, pp. 2210, 2213, 2215. Other examples of war correspondents who testified before the ICTY include Morten Hvaal who testified in the *Perišić* case, Martin Bell who testified in the *Dragomir Milošević* case, Sead Omeragić who testified in the *Slobodan Milošević* case, Edward Vulliamy who testified in the *Stakić* case, and Jeremy Bowen who testified in the *Naletilić and Martinović* case. *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, T. 1 December 2008 pp. 2227, 2230, 2231; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, T. 26 April 2007 p. 5235; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 16 October 2003 pp. 27678, 27690; *Prosecutor v.*

Milomir Stakić, Case No. IT-97-24-T, T. 16 September 2002 pp. 7899, 7902; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, T. 15 November 2001 pp. 5770, 5772.

19. Alleged Error in Failing to Recognise Parliamentary Privilege (Ground 24)

308. On 7 November 2013, the Trial Chamber dismissed Karadžić's request to preclude the Prosecution from questioning Momčilo Krajišnik about any statements he made in sessions of parliament on the basis that he had failed to demonstrate that immunities and privileges that may be accorded to parliamentary statements in domestic jurisdictions apply in international criminal proceedings.[803]

309. Karadžić submits that the Trial Chamber erred in finding that the parliamentary privilege did not apply to statements made by him during Bosnian and *Republika Srpska* parliamentary assembly sessions in his trial.[804] As a result of this error, Karadžić argues that he was prejudiced as the Trial Chamber relied on such statements to make adverse findings against him.[805] He therefore requests that the Appeals Chamber order a new trial, in which statements made before parliament may not be used against him.[806]

310. The Prosecution responds that Karadžić has failed to demonstrate that the Oral Decision of 7 November 2013, which only addressed the issue of whether Krajišnik could be cross-examined on statements he made during assembly sessions, had any impact on the Trial Judgement.[807] The Prosecution further contends that Karadžić has waived any claim of privilege over his assembly statements since he did not appeal the Oral Decision of 7 November 2013 or claim that assembly records and statements, including his own, could not be admitted at trial and that there are no special circumstances warranting appellate intervention given that throughout the entire trial Karadžić benefited from expert legal advice.[808]

311. Karadžić replies that he has not waived the argument that the parliamentary privilege should apply to statements made by him before parliamentary assembly sessions and that, in any event, the Appeals Chamber should exercise its discretion to address it particularly given that, at trial, he was

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[803] *See* T. 7 November 2013 p. 43150 ("Oral Decision of 7 November 2013").
[804] Karadžić Notice of Appeal, p. 10; Karadžić Appeal Brief, paras. 395, 402; T. 23 April 2018 pp. 120-122; T. 24 April 2018 pp. 245, 246. Karadžić states that, under the doctrine of parliamentary privilege, statements made in parliament by a member of parliament or a person appearing before it cannot be used against that person in civil or criminal actions and submits that the proceedings of a legislative body "are absolutely privileged and words spoken in the course of a proceedings in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution". *See* Karadžić Appeal Brief, paras. 396, 399.
[805] Karadžić Appeal Brief, paras. 395, 402, 405. Karadžić argues that those statements "permeated" the Trial Chamber's findings on the existence of the Overarching JCE and his responsibility, as well as its finding that he had genocidal intent in relation to Srebrenica. Karadžić Appeal Brief, paras. 403, 404.
[806] Karadžić Appeal Brief, para. 405.
[807] Prosecution Response Brief, paras. 221, 222. *See also* T. 23 April 2018 p. 169.
[808] Prosecution Response Brief, para. 221; T. 23 April 2018 pp. 167, 168, 184, 185; T. 24 April 2018 p. 279.

a self-represented accused.[809] He further disputes the Prosecution's contention that the parliamentary privilege does not apply to him.[810]

312. The Appeals Chamber recalls that, as a general principle, a party should not be permitted to refrain from objecting to a matter which was apparent during the course of the trial, only to raise it in the event of an adverse finding.[811] Further, it is settled jurisprudence that, if a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[812]

313. While Karadžić contests the Trial Chamber's holding regarding parliamentary privilege, he only refers to the Oral Decision of 7 November 2013, which only addressed the testimony of Krajišnik.[813] Karadžić, however, does not refer to any objection he made during his trial concerning the use of statements made by him in various parliamentary assembly sessions. This omission is glaring, particularly in view of the fact that, even prior to trial, the Prosecution indicated its intention to rely on his statements in parliamentary assembly sessions to prove that he was a member of the Overarching JCE.[814] Moreover, Karadžić's submissions before the Trial Chamber acknowledged that an accused may have to object to the introduction in his own trial of his statements made during parliamentary assembly sessions.[815]

314. Karadžić's submissions on appeal also appear at odds with the position he took concerning the use of statements made during parliamentary assembly sessions at trial. Specifically, Karadžić stated that "[w]e have no objection whatsoever to the admission of all the transcripts of all the [parliamentary assembly] sessions, regardless of whether they were public sessions or secret sessions, or, rather, ones closed to the public. Everything the Serbs did, we have no objection [...]".[816] Furthermore, Karadžić cited to transcripts and minutes of parliamentary assembly sessions and tendered such transcripts and minutes for admission during the trial, many of which contained

[809] Karadžić Reply Brief, paras. 113-116, 119; T. 24 April 2018 pp. 240, 245, 246.
[810] Karadžić Reply Brief, paras. 117, 118; T. 24 April 2018 pp. 245, 246.
[811] *Musema* Appeal Judgement, para. 127.
[812] *See, e.g., Prlić et al.* Appeal Judgement, para. 165; *Nyiramasuhuko et al.* Appeal Judgement, paras. 63, 1060, n. 157; *Popović et al.* Appeal Judgement, para. 176; *Bagosora and Nsengiyumva* Appeal Judgement, para. 31. *See also Orić* Decision of 17 February 2016, para. 14.
[813] *See* Karadžić Appeal Brief, para. 395, n. 539.
[814] Prosecution Pre-Trial Brief, paras. 77-87. *See also* Prosecution Pre-Trial Brief, paras. 23, 26, 34, 42, 90, 92, 100, 104, 108, 123, 139-141, 151, 167, 187, 268. The Appeals Chamber notes that "Assembly" in the Prosecution Pre-Trial Brief refers to the "Assembly of the Serbian People of Bosnia-Herzegovina (*later* National Assembly of *Republika Srpska*)". *See* Prosecution Pre-Trial Brief, Appendix F, p. 2.
[815] *See* T. 6 November 2013 p. 43095.
[816] *See* T. 27 April 2010 p. 1712.

his own statements made during such sessions.[817] Moreover, Karadžić relied on such statements at trial and has continued to rely on them on appeal.[818]

315. In light of the above, the Appeals Chamber finds that Karadžić has waived his right to appeal this issue and has not demonstrated the existence of special circumstances that would warrant the consideration of this argument for the first time on appeal.

316. For the foregoing reasons, the Appeals Chamber dismisses Ground 24 of Karadžić's appeal.

[817] T. 15 April 2010 pp. 1245-1247; T. 27 April 2010 pp. 1712-1736; T. 10 June 2010 pp. 3661-3665; T. 15 July 2010 pp. 5202-5213; T. 20 August 2010 p. 6072; T. 30 June 2011 pp. 15742-15744; T. 24 April 2012 pp. 27927-27930. *See also* Exhibits D27, D82, D83, D84, D85, D86, D87, D88, D89, D90, D92, D115, D304, D456.
[818] Karadžić Final Trial Brief, paras. 67, 83, 85, 89, 269, 280; Karadžić Appeal Brief, paras. 474-476, 501-503, *referring to* Exhibits P961, P1403, D90.

20. Alleged Error in Excluding Defence Evidence on the Basis of the *Tu Quoque* Principle (Ground 25)

317. On 28 November 2012, the Trial Chamber considered the Prosecution's request to exclude parts of the proposed Rule 92 *ter* statement of Branislav Dukić, tendered by Karadžić, and decided to exclude the statement in its entirety.[819] The Trial Chamber noted that Dukić's statement concerned almost entirely crimes committed against Serbs and was not relevant to the charges in the Indictment while Dukić's references to the positions and military activity of the ABiH and the Bosnian Croat forces in and around Sarajevo were minimal and general in nature and, as such, did not warrant admission.[820] On 30 November 2012, the Trial Chamber considered that parts of the statement of Defence Witness Goran Sikiraš tendered by Karadžić, concerned crimes committed against Bosnian Serbs in Vogošća that were not relevant to the charges in the Indictment and reminded Karadžić that it would not admit "detailed *tu quoque* evidence under the guise of relevance".[821] The Trial Chamber admitted the remainder of the statement noting that it was "of some relevance to the background to the take-over of Vogošća".[822] Similarly, on 24 January 2013, 12 February 2013, and 31 May 2013, the Trial Chamber found that parts of the tendered statements of Defence Witnesses Milan Mandić, Vidomir Banduka, and Nenad Kecmanović related to crimes targeting Bosnian Serbs and, as such, were irrelevant to the charges in the Indictment and thus inadmissible.[823] The Trial Chamber admitted the remainder of these statements.[824]

318. Karadžić submits that the Trial Chamber erred in excluding relevant evidence on the incorrect basis that he was relying on *tu quoque* evidence.[825] Specifically, he maintains that the evidence was tendered to establish the existence of legitimate military targets in civilian areas, the aim of protecting Serb areas around Sarajevo, and that crimes committed at the local level were acts of revenge rather than organized crimes committed at the direction of members of the relevant joint criminal enterprise.[826] He argues that the Trial Chamber's error led to a number of adverse findings,

[819] T. 28 November 2012 pp. 30518, 30519.
[820] T. 28 November 2012 pp. 30518, 30519.
[821] T. 30 November 2012 pp. 30687, 30688.
[822] T. 30 November 2012 p. 30688.
[823] T. 24 January 2013 p. 32696; T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[824] T. 31 January 2013 pp. 33058, 33059; T. 12 February 2013 p. 33488, T. 31 May 2013 p. 39084.
[825] *See* Karadžić Notice of Appeal, pp. 10, 11; Karadžić Appeal Brief, paras. 406-424; Karadžić Reply Brief, paras. 120-122. Karadžić submits that the *tu quoque* principle is not a legitimate defence. *See* Karadžić Appeal Brief, para. 407, *referring to Kunarac et al.* Appeal Judgement, para. 87 ("when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.") (internal citations omitted).
[826] Karadžić Appeal Brief, para. 422; Karadžić Reply Brief, para. 121.

including that the Bosnian Serbs engaged in indiscriminate attacks on civilian objects in Sarajevo and intended to inflict terror on the civilian population, as well as to his convictions under Counts 3 through 10 of the Indictment.[827] He contends that the Appeals Chamber should order a re-trial in which the excluded evidence can be considered.[828]

319. The Prosecution responds that the Trial Chamber correctly denied admission of the proposed *tu quoque* evidence and that Karadžić failed to demonstrate a legitimate purpose for its admission.[829] The Prosecution submits that Karadžić fails to show abuse of the Trial Chamber's discretion in excluding the entirety of Dukić's evidence on the basis that his non-*tu quoque* evidence was vague, general, and thus of low probative value.[830] The Prosecution also argues that Karadžić fails to establish prejudice as he has not shown how the allegations of crimes against Serbs described in the excluded material were necessary to make his defence arguments given that they were duplicative of other evidence on the trial record that was duly considered by the Trial Chamber.[831]

320. Karadžić replies that the Prosecution's submission that the excluded statements duplicated other evidence ignores the importance of corroboration and undermines the Prosecution's "central

[827] Karadžić Appeal Brief, para. 423; Karadžić Reply Brief, para. 121. Karadžić maintains that, having excluded Dukić's evidence showing that the VRS was firing at military targets, the ABiH had turned buildings dedicated to civilian purposes in Sarajevo into artillery and sniping strongholds, and the ABiH in Sarajevo had heavy artillery weapons at its disposal, the Trial Chamber found that the Serbs continuously targeted civilians in Sarajevo and used disproportionate and indiscriminate fire, Sarajevo hospitals were not used for military purposes by the ABiH, ABiH locations were far from the site of a Scheduled Incident in the Indictment, and the majority of the ABiH's arsenal in Sarajevo consisted of small arms and mortars with small quantities of artillery weapons. *See* Karadžić Appeal Brief, paras. 409-411. He also maintains that, having excluded portions of Witness Sikiraš's evidence concerning the May 1992 attacks launched by Bosnian Muslims on Serbs in the Velešići area of Sarajevo, the Trial Chamber found that in May 1992 Mladić had ordered indiscriminate and disproportionate shelling of Muslim civilians in Velešići because no Serbs were there, and that the goal of the blockade of Sarajevo was to pressure the Muslim authorities and civilians. *See* Karadžić Appeal Brief, para. 412; Karadžić Reply Brief, para. 121. Karadžić also submits that the excluded evidence of Witnesses Kecmanović, Mandić, and Banduka corroborated other evidence showing that one of the main goals of the VRS in Sarajevo was to defend and protect Serb civilians and territories from ABiH attacks rather than terrorise the Muslim population in Sarajevo. *See* Karadžić Appeal Brief, paras. 413-416.

[828] Karadžić Appeal Brief, para. 424.

[829] *See* Prosecution Response Brief, paras. 224-236.

[830] Prosecution Response Brief, paras. 226, 229.

[831] Prosecution Response Brief, para. 227. Specifically, the Prosecution submits that the Trial Chamber relied on evidence on the trial record and noted in the Trial Judgement that the ABiH operated from civilian locations, including a hospital and a school referred to by Dukić in his proposed statement, and that Dukić's unsubstantiated assertions on types of ABiH weaponry were duplicative of evidence referred to in the Trial Judgement on this matter. *See* Prosecution Response Brief, paras. 230-232. The Prosecution also submits that Karadžić fails to explain how Witness Sikiraš's claim, which was similar to other evidence that was before the Trial Chamber, could have impacted the Trial Chamber's interpretation of Mladić's comment made during Scheduled Incident G.1 in which he ordered the shelling of Velešići and added that "there is not much Serb population [in Velešići]". *See* Prosecution Response Brief, para. 234. As to Witnesses Kecmanović, Mandić, and Banduka, the Prosecution maintains that the Trial Chamber admitted other evidence suggesting that the ABiH in Sarajevo aimed to protect and defend Serb territories around Sarajevo from ABiH attack, that Serbs in Sarajevo were being detained and mistreated, and evidence regarding Bosnian Muslim crimes in Hadžići, and that Karadžić fails to demonstrate how the excluded evidence would have altered the Trial Chamber's analysis. *See* Prosecution Response Brief, paras. 235, 236.

argument" as, in his view, the admission of similar evidence indicates its relevance to substantive issues in the proceedings.[832]

321. The Appeals Chamber recalls that, pursuant to Rule 89(C) of the ICTY Rules, trial chambers have discretion to admit relevant evidence that has probative value.[833] The admissibility of evidence related to crimes committed by adversaries depends on the purpose for which it is adduced and whether it tends to refute allegations made in the indictment, while it is for the defence to clarify to the trial chamber the purpose of tendering such evidence.[834] In determining the admissibility of evidence, trial chambers enjoy considerable discretion and the Appeals Chamber must accord deference to their decisions in this respect.[835] The Appeals Chamber's examination of challenges concerning a trial chamber's refusal to admit material into evidence is limited to establishing whether the trial chamber abused its discretion by committing a discernible error.[836]

322. The Appeals Chamber notes that the Trial Chamber thoroughly reviewed the proposed evidence and found that Karadžić had failed to demonstrate how the parts concerning crimes committed against Serbs related to an issue at trial.[837] Specifically, the Trial Chamber considered that the proposed evidence of Dukić included detailed descriptions of crimes committed against him and other Serbs, which were not relevant to the charges in the Indictment.[838] The Trial Chamber dismissed Karadžić's submission that Witness Sikiraš's evidence concerning crimes committed against Bosnian Serbs in Vogošća showed that Bosnian Serbs did not make unprovoked attacks there but participated "in a civil war in which each side attacked the other".[839] It found that the crimes on which Karadžić sought to rely were not relevant to the charges in the Indictment but admitted the parts of the witness's statement relating to the "take-over of Vogošća".[840] The Trial Chamber also found that two paragraphs in the proposed statement by Witness Mandić related to crimes targeting Bosnian Serbs and found these inadmissible as irrelevant.[841] In the same vein, the Trial Chamber found parts of Witness Banduka's and Witness Kecmanović's proposed statements

[832] Karadžić Reply Brief, para. 122.
[833] *Tolimir* Appeal Judgement, para. 564; *Kupreškić et al.* Appeal Judgement, para. 31.
[834] *See, e.g.*, *Kunarac et al.* Appeal Judgement, para. 88, n. 104. *Cf. Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak Defence Motion for Admission of Documentary Evidence, 1 April 2010 (originally filed in French, English translation filed on 23 April 2010), para. 80; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Defence Motion for Clarification of the Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination Pursuant to Rule 90 (H) of the Rules, 28 January 2004 (originally filed in French, English translation filed on 4 February 2004), p. 4; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999, p. 5.
[835] *Prlić et al.* Appeal Judgement, paras. 143, 151; *Šainović et al.* Appeal Judgement, paras. 152, 161.
[836] *Šainović et al.* Appeal Judgement, paras. 152, 161, *referring to Prlić et al.* Decision of 12 January 2009, para. 5.
[837] T. 28 November 2012 pp. 30518, 30519; T. 30 November 2012 pp. 30687, 30688; T. 24 January 2013 p. 32696; T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[838] T. 28 November 2012 p. 30518.
[839] T. 30 November 2012 pp. 30687, 30688. *See also* T. 30 November 2012 p. 30689.
[840] T. 30 November 2012 pp. 30687, 30688; Exhibit D2540, pp. 1-3.

that referred to detention facilities established by Bosnian Muslim authorities and the mistreatment of Serbs not relevant to the Indictment and, as such, inadmissible.[842] Having reviewed the proposed evidence, the Appeals Chamber is not convinced by Karadžić's submissions that the excluded parts "establish the existence of legitimate military targets", "the goal of protecting Serb areas", or that "crimes committed at the local level were acts of revenge".[843] Considering that it is for the party tendering material to show the indicia of relevance required for it to be admissible under Rule 89(C) of the ICTY Rules,[844] the Appeals Chamber finds that Karadžić fails to demonstrate discernible error on the part of the Trial Chamber in denying admission.

323. In addition, the Appeals Chamber notes that, contrary to Karadžić's submission, the scant references to material issues in Dukić's evidence were not excluded on *tu quoque* grounds but for their low probative value.[845] In particular, the Trial Chamber considered that his references to the positions and military activity of the ABiH and the Bosnian Croat forces in and around Sarajevo were not only minimal but also general in nature and were thus insufficient in and of themselves to warrant admission.[846] Having reviewed the references in question and considering that the criteria for admission of evidence set out in Rule 89(C) of the Rules are cumulative, that the tendering party bears the burden of showing that these are met, and the deference accorded to trial chambers on matters related to the admissibility of evidence,[847] the Appeals Chamber finds that Karadžić fails to demonstrate discernible error on the part of the Trial Chamber. The Appeals Chamber therefore finds that Karadžić fails to show that the Trial Chamber abused its discretion in concluding that the proposed evidence was not sufficiently relevant or probative to merit admission.

324. Based on the foregoing, the Appeals Chamber dismisses Ground 25 of Karadžić's appeal.

[841] T. 24 January 2013 p. 32696.
[842] T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[843] Karadžić Appeal Brief, para. 422.
[844] *Šainović et al.* Appeal Judgement, para. 162, *referring to Prlić et al.* Decision of 12 January 2009, para. 17.
[845] *See* T. 28 November 2012 pp. 30518, 30519.
[846] T. 28 November 2012 pp. 30518, 30519.
[847] *Prlić et al.* Appeal Judgement, para. 143; *Šainović et al.* Appeal Judgement, para. 163, *referring to Prlić et al.* Decision of 12 January 2009, para. 17.

21. Alleged Errors Concerning the Testimony of Radivoje Miletić (Ground 26)

325. On 9 May 2013, the Trial Chamber granted Karadžić's request to subpoena General Radivoje Miletić, the former VRS Chief of Administration, to testify.[848] The Trial Chamber considered that the issues upon which Miletić would provide evidence pertained to Karadžić's "responsibility for crimes committed pursuant to the alleged joint criminal enterprise to eliminate the Bosnian Muslims of Srebrenica [...] and his *mens rea* for the crime of genocide charged in Count 2 and for other crimes charged in Counts 3 to 8 of the Indictment" and, therefore, would "materially assist [Karadžić] with respect to those clearly identified issues relevant to his case."[849] The Trial Chamber further found that, by virtue of Miletić's former position, he was "uniquely situated" to give evidence about the specific identified issues and, given the scope of his anticipated evidence, it was "not obtainable through other means."[850] On 4 February 2014, Miletić requested that his testimony be postponed, stating that it would not be possible for him to testify due to health reasons,[851] and the Trial Chamber, *proprio motu*, vacated the subpoena after considering the impact on Miletić's health if he were to testify.[852]

326. On 18 February 2015, several months after the completion of closing arguments, Karadžić requested leave to re-open the Defence case to call Miletić.[853] On 3 March 2015, the Trial Chamber denied the request considering that there was "nothing before the Chamber which would suggest that Miletić's health condition [had] improved to such an extent that the medical issues which were the basis for vacating the subpoena, [were] no longer a concern."[854] The Trial Chamber also noted that "the decision whether or not to re-open a case at [a] very advanced stage of proceedings involves a very different assessment from the initial decision to subpoena a witness."[855]

327. Subsequently, on 14 April 2015, Karadžić renewed his request, submitting that Miletić's medical issues were no longer a concern[856] and that the probative value of his evidence outweighed

[848] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Radivoje Miletić, 9 May 2013 ("Decision on Miletić's Subpoena"), paras. 1, 2, 17.
[849] Decision on Miletić's Subpoena, para. 13.
[850] Decision on Miletić's Subpoena, para. 14.
[851] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Request of Radivoje Miletić to Postpone His Court Appearance, 7 February 2014 (confidential), paras. 3, 7.
[852] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request by Radivoje Miletić to Postpone Date of Testimony, 13 February 2014 (confidential), paras. 11, 13.
[853] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Sixth Motion to Re-Open Defence Case: General Mileti[ć]'s Testimony, 18 February 2015 (confidential) ("Motion of 18 February 2015"), para. 1.
[854] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixth Motion to Re-open Defence Case, 3 March 2015 (confidential) ("Decision of 3 March 2015"), paras. 13, 15.
[855] Decision of 3 March 2015, para. 14.
[856] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Re-Open Defence Case No. Six *bis*: General Mileti[ć] Testimony, 14 April 2015 (confidential) ("Motion of 14 April 2015"), paras. 1, 18, 21.

the impact that might result from any delay.[857] The Trial Chamber denied the renewed request, finding that the case was at an advanced stage, that there was "lack of detail" on the content of Miletić's proposed evidence, and that, in any case, nothing suggests that the evidence would have such probative value, in light of other evidence on the record.[858]

328. Karadžić submits that, by refusing to re-open the case and hear Miletić's evidence, the Trial Chamber abused its discretion and violated his right to a fair trial and that a new trial should be ordered where the evidence can be heard.[859] In particular, he contends that the Trial Chamber's emphasis on the late "stage of the deliberations" as a basis for rejecting the request resulted in an erroneous assessment.[860] He further contends that the Trial Chamber erred in its assessment of the probative value of the evidence.[861] He argues that Miletić's evidence was directly relevant to Karadžić's alleged knowledge of, agreement to, and participation in the joint criminal enterprise to kill Bosnian Muslim men as well as to Karadžić's intent to eliminate the Bosnian Muslims of Srebrenica.[862]

329. The Prosecution responds that the Trial Chamber's denial of Karadžić's request to re-open his case was a proper and reasonable exercise of its discretion[863] and that Karadžić has failed to show how Miletić's testimony would have impacted the Trial Judgement.[864] In particular, the Prosecution contends that the Trial Chamber properly assessed the probative value of Miletić's

[857] Motion of 14 April 2015, para. 20.
[858] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixth *Bis* Motion to Re-Open Defence Case, 7 May 2015 ("Decision of 7 May 2015"), paras. 15-17.
[859] Karadžić Appeal Brief, paras. 426, 445, 446; T. 23 April 2018 pp. 116-118. *See also* Karadžić Notice of Appeal, p. 11.
[860] Karadžić Appeal Brief, para. 437. In support of this argument, Karadžić suggests that the Trial Chamber failed to assess whether a party would be prejudiced, rather than whether the Trial Chamber itself would be inconvenienced, and argues that any delay resulting from hearing Miletić's evidence would have been "*de minimis*". Karadžić Appeal Brief, para. 437. Karadžić further argues that a survey of cases where proceedings were re-opened and resulted in similar or greater delays than that anticipated in his case reflects that the Trial Chamber's refusal to re-open the Defence case is contrary to precedent and demonstrates an abuse of its discretion. *See* Karadžić Appeal Brief, paras. 439-443.
[861] Karadžić Appeal Brief, paras. 428, 436.
[862] Karadžić Appeal Brief, paras. 430-436. *See also* Karadžić Reply Brief, paras. 124, 126, 128; T. 23 April 2018 pp. 116-118. Karadžić suggests that the Trial Chamber made "about-faces" in finding that Miletić's evidence lacked sufficient probative value to justify re-opening the case as it contradicted its earlier findings on the potential significance of the evidence in question, as set forth in the Decision on Miletić's Subpoena. Karadžić Appeal Brief, paras. 428, 429, 430, 432. In this respect, Karadžić observes that, when issuing the subpoena, the Trial Chamber found that "Mileti[ć] is uniquely situated to give evidence regarding the Accused's knowledge of and/or involvement in the alleged execution of prisoners from Srebrenica", yet, in denying the request to re-open the Defence case, found that "there was nothing to suggest that Mileti[ć]'s evidence would be so probative with respect to the issues of President Karadžić's *mens rea* for genocide and forcible transfer so as to warrant re-opening the defence case." Karadžić Appeal Brief, para. 429, *referring to* Decision on Miletić's Subpoena, para. 14; Decision of 7 May 2015, para. 16. *See also* Karadžić Reply Brief, paras. 124, 126, 128.
[863] Prosecution Response Brief, para. 237.
[864] *See* Prosecution Response Brief, paras. 237-244; T. 23 April 2018 pp. 185-188. The Prosecution submits that the fact that other trial chambers re-opened cases in different circumstances does not show that the Trial Chamber abused its discretion because, unlike in this case, in the other cases the trial chambers found the probative value of the proposed evidence to be sufficient to warrant re-opening despite any possible delays. *See* Prosecution Response Brief, para. 240.

evidence in light of other evidence already on the record.[865] The Prosecution also submits that Karadžić has not shown how Miletić's proposed evidence, which the Trial Chamber found lacking in probative value on the very issues for which Karadžić sought his testimony, could have impacted the Trial Judgement.[866] In this respect, it contends that Karadžić's submissions concerning the potential probative value of Miletić's evidence are contradicted by Miletić's Rule 65 *ter* Summary, which suggested minimal contact with Karadžić,[867] and that specific aspects of Miletić's proposed evidence are cumulative of evidence from other VRS officers which the Trial Chamber rejected.[868]

330. The Appeals Chamber recalls that matters related to the management of trial proceedings, including the decision to re-open a party's case, fall within the discretion of the trial chamber.[869] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[870]

331. In support of this ground of appeal, Karadžić highlights findings in the Trial Judgement and argues that Miletić's evidence was "directly relevant" to such findings.[871] In particular, Karadžić identifies three specific factual findings in the Trial Judgement as "crucial" to the Trial Chamber's ultimate determination of Karadžić's individual criminal responsibility for crimes committed in Srebrenica.[872] As discussed below, irrespective of whether the Trial Chamber erred in declining to re-open the Defence case to hear Miletić, the Appeals Chamber concludes that Karadžić has not demonstrated that Miletić's evidence could have impacted the Trial Chamber's findings with respect to Karadžić's individual criminal responsibility for the crimes in Srebrenica.

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[865] Prosecution Response Brief, para. 238. The Prosecution also suggests that Karadžić's submission that the Trial Chamber acted inconsistently in first issuing a subpoena for Miletić and then denying Karadžić's re-opening request ignores the fact that the decisions were made at markedly different stages of proceedings with the latter coming after the Trial Chamber had heard other Defence witnesses on similar topics and after it had already admitted some of the exhibits associated with Miletić. Prosecution Response Brief, para. 238.

[866] Prosecution Response Brief, para. 241. *See also* T. 23 April 2018 pp. 185-188.

[867] Prosecution Response Brief, para. 242, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Supplemental Rule 65 *ter* Summary and List of Exhibits for General Radivoje Mileti[ć], 18 June 2013 ("Miletić Rule 65 *ter* Summary"), p. 2. *See also* T. 23 April 2018 pp. 185-188.

[868] Prosecution Response Brief, paras. 243, 244. The Prosecution further argues that, in his own response to Karadžić's subpoena request, Miletić downplayed his knowledge and authority, claiming: (i) he was outside the "narrow command circle"; (ii) his knowledge of directives was limited to "technical aspects"; and (iii) he lacked first-hand knowledge of the July 1995 events in Srebrenica. Prosecution Response Brief, para. 241. The Prosecution also suggests that Miletić's conviction for his involvement in forcibly transferring Srebrenica Muslims and the finding that he told others to withhold relevant information from the ICTY limit the credibility of his proposed evidence. Prosecution Response Brief, para. 241.

[869] *See Prlić et al.* Appeal Judgement, paras. 26, 119; *Šainović et al.* Appeal Judgement, para. 29; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Re-open the Prosecution Case, 1 July 2010, para. 5; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008, para. 3.

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

[871] *See* Karadžić Appeal Brief, paras. 430-436.

[872] *See* Karadžić Appeal Brief, paras. 430-436, *referring to* Trial Judgement, paras. 5805, 5830, 5799.

332. Karadžić refers to the Trial Chamber's finding that he acquired knowledge of the VRS's plan to kill the prisoners from Srebrenica sometime before his conversation with Miroslav Deronjić on 13 July 1995, during which he manifested his agreement with the plan to kill the prisoners and ordered that they be transferred to Zvornik.[873] Karadžić suggests that Miletić was prepared to testify that: (i) "he never informed President Karad[ž]i[ć], either in writing or orally, that prisoners from Srebrenica would be, were being, or had been executed";[874] (ii) he "never saw any reference to killing prisoners from Srebrenica in any written VRS reports";[875] (iii) "never knew of any plan to kill prisoners from Srebrenica";[876] (iv) [REDACTED];[877] and (v) "based upon his knowledge of President Karad[ž]i[ć], he could not imagine that he would ever favour or condone the execution of prisoners".[878] This evidence, Karadžić asserts, was directly relevant to the Trial Chamber's findings of Karadžić's "knowledge of and agreement to the JCE to kill the men."[879]

333. The Appeals Chamber observes that the Trial Chamber found that Karadžić "adopted and embraced" the plan to kill Bosnian Muslim men and boys in Srebrenica during the intercepted conversation with Deronjić on the evening of 13 July 1995, when he issued what the Trial Chamber found to be a coded direction to transfer detainees to Zvornik where they would be executed.[880] It found that this conversation, along with various subsequent acts – including disseminating false information to the media, publicly congratulating units involved in the killing operation in Zvornik, and failing to initiate investigations or prosecutions of the direct perpetrators of the crimes committed in Bratunac and Zvornik – demonstrated Karadžić's agreement to the expansion of the objective of the joint criminal enterprise to encompass the killing of Bosnian Muslim males.[881]

334. The Appeals Chamber notes that Karadžić does not claim that Miletić could have testified as to the content of the relevant phone call or about Karadžić's subsequent acts upon which the Trial Chamber relied to infer his agreement to the killing of Bosnian Muslim males. While Karadžić asserts that [REDACTED], the Appeals Chamber notes that Karadžić has not explained how Miletić's [REDACTED] could have affected the Trial Chamber's consideration of the evidence of the intercepted conversation with Deronjić on the evening of 13 July 1995.

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[873] Karadžić Appeal Brief, para. 430, *referring to* Trial Judgement, para. 5805.
[874] Karadžić Appeal Brief, para. 431, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena: General Radivoje Mileti[ć], 2 April 2013, para. 7.
[875] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 2.
[876] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 2.
[877] Karadžić Appeal Brief, para. 431, *referring to* [REDACTED].
[878] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 3.
[879] Karadžić Appeal Brief, para. 432.
[880] Trial Judgement, paras. 5805, 5811.
[881] *See* Trial Judgement, paras. 5811-5814.

335. The Appeals Chamber also observes that, while the Trial Chamber could only make a positive determination about Karadžić's agreement to the expanded objective of the joint criminal enterprise encompassing the killing of Bosnian Muslim men and boys as of the conversation with Deronjić on the evening of 13 July 1995, it determined that Karadžić must have known about the plan to kill prior to the conversation.[882] In inferring both his prior knowledge and "contemporaneous" knowledge of the progress of the killings that followed the conversation with Deronjić, the Trial Chamber found that Karadžić was receiving relevant information from multiple channels.[883]

336. The Appeals Chamber therefore finds that Karadžić has not demonstrated that Miletić's proposed evidence about his own lack of knowledge of the killings or the fact that he himself did not inform Karadžić could have impacted the relevant findings of the Trial Chamber. Similarly, given that the Trial Chamber acknowledged that it did not receive evidence that written reports which reached Karadžić mentioned killings of Bosnian Muslim prisoners,[884] the Appeals Chamber finds that Karadžić has not demonstrated that Miletić's proposed evidence regarding lack of references to killings in written VRS reports could have affected the relevant conclusions. Finally, in light of the other and more concrete evidence relied upon by the Trial Chamber to make findings that Karadžić had knowledge of and agreed to the expanded purpose of the joint criminal enterprise, the Appeals Chamber finds that Karadžić has not demonstrated that Miletić's proposed evidence that "he could not imagine that [Karadžić] would ever favour or condone the execution of prisoners" could have impacted any of the relevant findings.

337. Karadžić also refers to what he describes as the Trial Chamber's finding that "Karad[ž]i[ć] opposed opening a corridor to allow the men from the column which had left Srebrenica to pass to Bosnian Muslim territory, and that this demonstrated that President Karadžić shared the intent to destroy the group."[885] He argues that Miletić "was privy to President Karad[ž]i[ć]'s inquiries to the VRS Main Staff about the corridor on 16 July" and "never received any information or impression

[882] Trial Judgement, para. 5811.
[883] *See* Trial Judgement, paras. 5801-5812, 5830.
[884] Trial Judgement, para. 5801. The Trial Chamber noted, however, that, beginning on 12 July 1995, the daily combat reports described the transport of the Bosnian Muslim population, the existence of the movement of the column attempting the reach Tuzla, as well as Bosnian Serb forces' attempts to block the progress of the column, and on 13 and 14 July 1995, the reports described capture and surrender of large numbers of men from the column and continuing efforts to block the progress of the column. It also noted Popović's direction to Jokić not to make a record of killings. *See* Trial Judgement, para. 5801.
[885] Karadžić Appeal Brief, para. 433, *referring to* Trial Judgement, para. 5830. *See also* Karadžić Reply Brief, para. 127.

that President Karad[ž]i[ć] wanted the corridor closed",[886] and therefore that his testimony could "have refuted the key element used to establish President Karad[ž]i[ć]'s genocidal intent."[887]

338. The Appeals Chamber observes that the closure of the corridor was not the "key element" relied upon by the Trial Chamber to infer that Karadžić shared "the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed."[888] The Trial Chamber relied upon a number of elements, including Karadžić's awareness that thousands of Bosnian Muslim men, constituting a very significant percentage of the Bosnian Muslim males from Srebrenica, were held by Serb forces in the Srebrenica area, and further, that despite Karadžić's contemporaneous knowledge of the killings, he agreed to and did not intervene to halt or hinder the killing aspect of the plan to eliminate between 13 and 17 July 1995; rather, he ordered that the detainees be moved to Zvornik where they were killed.[889] While the Trial Chamber did rely upon the fact that Milenko Karišik was promptly sent to investigate Vinko Pandurević's decision to open the corridor and the corridor was closed within a day,[890] in this respect, it also had regard to later actions of Karadžić in relation to the column and the corridor, noting that "although [Karadžić] touted the opening of the corridor when speaking to the international press, in a closed session of the Bosnian Serb Assembly held weeks later, [he] expressed regret that the Bosnian Muslim males had managed to pass through Bosnian Serb lines."[891] The Appeals Chamber therefore finds that Karadžić has not demonstrated that Miletić's proposed evidence could have impacted the relevant Trial Chamber findings.

339. Finally, Karadžić refers to what he describes as the Trial Chamber's finding that "by signing [the Directive for Further Operations No. 7 ("Directive 7")], and reducing the humanitarian aid that reached Srebrenica, President Karad[ž]i[ć] demonstrated his intent that the Bosnian Muslims be forcibly transferred from Srebrenica."[892] He argues that "General Mileti[ć] was the person in the VRS Main Staff responsible for issues relating to humanitarian aid and who drafted Directive 7" and, according to him, "there was no plan to reduce humanitarian aid to the enclave resulting from Directive 7 or any other order of President Karad[ž]i[ć]'s, and neither President Karad[ž]i[ć] nor the

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[886] Karadžić Appeal Brief, para. 434, *referring to* Miletić Rule 65 *ter* Summary, p. 3[REDACTED]. *See also* Karadžić Reply Brief, para. 128.
[887] Karadžić Appeal Brief, para. 434. The Appeals Chamber notes that Karadžić adds, in reply, that: "General Miletić played a significant role in monitoring the column and the corridor. He denied a request to open the corridor, and later ordered an investigation into its opening. As such General Miletić was in a unique position to exonerate Karad[ž]i[ć] on the issues relating to President Karadžić's role in the corridor and his alleged intent to destroy Srebrenica's Muslims, and could have done so if allowed to testify." Karadžić Reply Brief, para. 128 (internal references omitted).
[888] Trial Judgement, para. 5830.
[889] Trial Judgement, paras. 5829, 5830.
[890] Trial Judgement, para. 5830.
[891] Trial Judgement, para. 5830. The Appeals Chamber notes that Karadžić's precise words were "in the end several thousand fighters did manage to get through" and that "[we] were not able to encircle the enemy and destroy them." *See* Trial Judgement, para. 5474, *referring to* Exhibit P1412, p. 17.
[892] Karadžić Appeal Brief, para. 435, *referring to* Trial Judgement, para. 5799.

VRS Main Staff ever gave any orders to reduce humanitarian aid to Srebrenica after March 1995."[893]

340. The Appeals Chamber observes that the paragraph of the Trial Judgement cited by Karadžić makes no mention of Karadžić's "intent that the Bosnian Muslims be forcibly transferred from Srebrenica" and contains no finding that such intent was demonstrated by Karadžić "signing Directive 7, and reducing the humanitarian aid that reached Srebrenica."[894] Rather, the paragraph in question addresses actions taken by Karadžić, which, in the Trial Chamber's view, established that he was a "directing force" in the events leading up to the take-over of Srebrenica.[895]

341. With respect to its analysis of and findings in relation to Directive 7 and its implementation, the Trial Chamber noted the reference in Directive 7 to "creat[ing] an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa"[896] and, further, that this language was repeated in the "Order for Defence and Active Combat Operations, Operative No. 7", issued several days after Directive 7 was disseminated to the various VRS corps on or around 18 March 1995.[897] The Trial Chamber considered and rejected the evidence of several VRS officers that this was never "implemented in practice," because, among other reasons, it was contradicted by other evidence showing that Directive 7 was implemented on the ground.[898]

342. The Trial Chamber then made a number of findings relating to the restrictions on humanitarian convoys imposed by Bosnian Serb forces and the denial of access to a number of areas, which had occurred in practice,[899] and concluded that this aspect of Directive 7 was indeed implemented.[900] The Trial Chamber further found that the humanitarian situation deteriorated in Srebrenica following the issuance of Directive 7.[901] In making these findings, the Trial Chamber relied on evidence from multiple sources, including humanitarian agencies and their representatives,

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[893] Karadžić Appeal Brief, para. 435, *referring to* Miletić Rule 65 *ter* Summary, p. 2; [REDACTED].
[894] *See* Trial Judgement, para. 5799.
[895] *See* Trial Judgement, para. 5799. In this context, the Trial Chamber referred to its findings that Karadžić implemented Directive 7 by restricting access to Srebrenica and that this restriction allowed him to maintain control over goods and personnel entering the enclave during the months and weeks leading to its take-over. Trial Judgement, para. 5799, *referring to* Trial Judgement, paras. 5756-5759.
[896] Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 10.
[897] Trial Judgement, para. 4981, *referring to* Exhibit P3040, pp. 5, 6.
[898] Trial Judgement para. 4982. *See also* Trial Judgement, paras. 5004-5035. The Trial Chamber also noted that Directive 7 stipulated that relevant State and military organs responsible for work with UNPROFOR and humanitarian organizations should "through the planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population." Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 14.
[899] *See* Trial Judgement, paras. 4989-4991.
[900] Trial Judgement, para. 4991.
[901] *See* Trial Judgement, paras. 4989-4992.

as well as the VRS and individual VRS officers.[902] The Appeals Chamber is therefore not persuaded that Miletić's evidence could have impacted the relevant Trial Chamber findings.

343. In light of the foregoing, the Appeals Chamber finds that Karadžić has not demonstrated that the Trial Chamber's decision to deny his request to re-open the case to hear Miletić could have impacted any of the relevant Trial Chamber findings. Therefore, Karadžić has not demonstrated that the Trial Chamber's decision resulted in prejudice to him.

344. Based on the foregoing, the Appeals Chamber dismisses Ground 26 of Karadžić's appeal.

[902] *See, e.g.*, Trial Judgement, paras. 4989, 4991, 4992 and references cited therein.

22. Alleged Violation of the Right to an Impartial Tribunal (Ground 27)

345. [REDACTED] and his written statement was admitted into evidence.[903] [REDACTED] gave evidence related to events [REDACTED].[904] In convicting Karadžić of Counts 3 through 8 of the Indictment, the Trial Chamber relied in part on [REDACTED] evidence, along with other evidence, in connection with its findings on [REDACTED],[905] [REDACTED],[906] [REDACTED],[907] and [REDACTED],[908] [REDACTED],[909] and [REDACTED].[910]

346. [REDACTED].[911] At the time, [REDACTED],[912] who later became a judge of the Trial Chamber in this case.[913] [REDACTED] was not present during [REDACTED] testimony.[914] The Trial Judgement does not indicate whether [REDACTED] recused himself from deliberating on [REDACTED] evidence. Although Karadžić was aware of [REDACTED], he did not raise the issue before the Trial Chamber.[915]

347. Karadžić submits that the Trial Chamber erred in failing to provide him with a fair and impartial trial and in finding him guilty on Counts 3 through 8 of the Indictment on the basis of the evidence of [REDACTED].[916] According to Karadžić, [REDACTED].[917]

348. Karadžić also submits that the Trial Chamber violated Rule 15(A) of the ICTY Rules for failing to recuse [REDACTED] from the deliberations [REDACTED].[918] In this respect, Karadžić argues that in the course [REDACTED].[919] As a result, Karadžić asserts that a properly informed observer would have reasonably apprehended bias and that his right to an impartial tribunal was consequently violated.[920] In support, Karadžić refers to national legislation on the disqualification

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[903] [REDACTED].
[904] [REDACTED].
[905] [REDACTED].
[906] [REDACTED].
[907] [REDACTED].
[908] [REDACTED].
[909] [REDACTED].
[910] [REDACTED].
[911] [REDACTED].
[912] [REDACTED].
[913] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Regarding Composition of a Bench of the Trial Chamber, 4 September 2009, p. 2.
[914] *See* [REDACTED].
[915] Karadžić Appeal Brief, n. 633; Karadžić Reply Brief, para. 133. [REDACTED].
[916] *See* Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 447-460.
[917] Karadžić Appeal Brief, paras. 451, 459.
[918] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 450, 458.
[919] Karadžić Appeal Brief, paras. 449, 451, 457.
[920] *See* Karadžić Appeal Brief, paras. 450-452.

of a judge and to jurisprudence concerning withdrawal in order to avoid the apprehension of bias.[921] Karadžić submits that [REDACTED] should have withdrawn from the deliberations concerning [REDACTED] evidence and allowed the reserve judge to take his place.[922] According to Karadžić, [REDACTED] participation in deliberations on [REDACTED] evidence violated his right to an impartial tribunal.[923]

349. The Prosecution responds that before trial Karadžić had been informed about [REDACTED] and that this information might be relevant to his right to challenge the composition of the bench.[924] Upon receiving this information, Karadžić stated that he was considering how to respond.[925] The Prosecution contends that his failure to raise this issue at trial was a tactical choice which is highlighted by the fact that he sought disqualification of another judge and even the entire bench, but that he had never raised the issue of [REDACTED].[926] The Prosecution further argues that Karadžić waived his right to raise this issue since he failed to raise it at the appropriate time, which was during the trial.[927]

350. The Prosecution also submits that [REDACTED] is not one that would have affected his impartiality within the meaning of Rule 15(A) of the ICTY Rules.[928] According to the Prosecution, a reasonable observer would not apprehend bias since they would conclude that [REDACTED] was able to examine the evidence in "an unprejudiced and impartial manner".[929] In addition, the Prosecution asserts that a reasonable observer would have been aware that [REDACTED] ended long before the trial started and that [REDACTED] did not reflect his personal opinions.[930]

351. In reply, Karadžić maintains that he has not waived his right to raise the issue on appeal and that it has been the practice of the Appeals Chamber to treat the issue of bias as a special circumstance that would justify consideration of the merits on appeal.[931] Karadžić maintains that [REDACTED] did not disqualify him from the entire case but that he should not have participated

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[921] Karadžić Appeal Brief, paras. 454-456 *referring to* 28 U.S.C. 455(a), (b)(2), *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), *United States v. Ferguson and Joseph*, 550 F. Supp. 1256, 1260 (1982), *Hadler v. Union Bank and Trust Co. of Greensburg*, 765 F. Supp. 976, 979 (1991), *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988), *Fried v. National Australia Bank* [2000] FCA 787.
[922] Karadžić Appeal Brief, para. 458.
[923] Karadžić Appeal Brief, para. 458.
[924] Prosecution Response Brief, paras. 245, 246.
[925] Prosecution Response Brief, para. 246.
[926] Prosecution Response Brief, para. 246; T. 23 April 2018 p. 167.
[927] Prosecution Response Brief, paras. 246, 247; T. 23 April 2018 p. 167.
[928] Prosecution Response Brief, para. 249.
[929] Prosecution Response Brief, paras. 248, 249.
[930] Prosecution Response Brief, para. 249.
[931] Karadžić Reply Brief, para. 132, *referring to Šainović et al.* Appeal Judgement, para. 182.

in the deliberations on the evidence [REDACTED].[932] Karadžić further replies that this error is not rendered harmless since the two remaining judges deliberated on the evidence and it is unknown to what extent [REDACTED] contributed to the deliberations.[933]

352. The right of an accused to be tried before an independent and impartial tribunal is an integral component of the fundamental right to a fair trial.[934] Impartiality is a required quality for a judge at the Tribunal, and a judge may not sit in any case in which he has, or has had, any association which might affect his impartiality.[935] The Appeals Chamber observes that, as a general rule, a judge should not only be subjectively free from bias but also that nothing surrounding the circumstances would objectively give rise to an appearance of bias.[936]

353. Rule 15 of the ICTY Rules prescribes a specific procedure for challenging the participation of a judge in a case on the grounds of bias. The Appeals Chamber recalls, however, that a presumption of impartiality attaches to judges of the Tribunal which cannot be easily rebutted.[937] Where allegations of bias are raised on appeal, there is a high threshold to reach in order to rebut the presumption of impartiality and it is for the appealing party alleging bias to set forth substantiated and detailed arguments in support of demonstrating the alleged bias.[938]

354. The Appeals Chamber observes that, shortly after the assignment of [REDACTED] to the case, the Trial Chamber provided Karadžić with specific information concerning [REDACTED], which highlighted the relevance of this information to a potential challenge to the composition of the bench.[939] After receiving this information, Karadžić stated in a submission that he would respond to this information after the Trial Chamber decided on the scope of the case.[940] Ultimately, Karadžić did not pursue this matter at trial. The Appeals Chamber finds that Karadžić's inaction at

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[932] Karadžić Reply Brief, paras. 133, 134.
[933] Karadžić Reply Brief, para. 136.
[934] *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 11 and references cited therein; *Furundžija* Appeal Judgement, para. 177.
[935] Article 13 of the ICTY Statute; Rule 15(A) of the ICTY Rules. The requirement of impartiality is also explicitly stated in Rule 14(A) of the ICTY Rules, pursuant to which, upon taking up duties, a Judge solemnly declares to perform his duties and exercise his powers "impartially and conscientiously".
[936] *Renzaho* Appeal Judgement, para. 21; *Rutaganda* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 189; *Čelebići* Appeal Judgement, para. 682.
[937] *See, e.g., Renzaho* Appeal Judgement, para. 21; *Nahimana et al.* Appeal Judgement, para. 48; *Rutaganda* Appeal Judgement, para. 42.
[938] *Renzaho* Appeal Judgement, para. 23, *referring to The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009, para. 10, *Karera* Appeal Judgement, para. 254, *Nahimana et al.* Appeal Judgement, paras. 47-90, *Ntagerura et al.* Appeal Judgement, para. 135, *Rutaganda* Appeal Judgement, para. 43, *Furundžija* Appeal Judgement, paras. 196, 197.
[939] [REDACTED].
[940] *See Prosecutor v. Radovan Karadžić*, Case No IT-95-05/18-PT, Response to Prosecution's Second Rule 73 *bis* Submission, 30 September 2009, n. 3.

trial in the face of his awareness of [REDACTED], which was specifically brought to his attention by the Trial Chamber, demonstrates that he did not object to [REDACTED] participation in his case at trial on the basis of an alleged apprehension of bias and could result in the possible waiver of this argument on appeal. Notwithstanding, in view of the fundamental importance of an impartial tribunal, the Appeals Chamber holds that it would not be appropriate to apply the waiver doctrine to Karadžić's allegation of error and will consider the matter.[941]

355. The Appeals Chamber considers that a fair-minded observer with sufficient knowledge of the specific circumstances would not apprehend bias. An informed observer would know that, [REDACTED].[942] [REDACTED] More importantly, an informed observer would know that the ICTY was established to hear a number of cases related to the same overall conflict and that ICTY judges will be faced with oral and material evidence relating to the same facts which, as highly qualified professional judges, will not affect their impartiality.[943] Moreover, as a trial chamber judge, [REDACTED] had the obligation to withdraw from the case if he considered that [REDACTED] might have affected his impartiality in the present case given his access to confidential information [REDACTED].[944] [REDACTED], however, did not withdraw. In the absence of evidence to the contrary, it is assumed that, by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.[945]

356. In any event, the Appeals Chamber recalls that where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[946] Having not demonstrated circumstances giving rise to an objective appearance of bias, the Appeals Chamber further observes that Karadžić's submissions on appeal in no way demonstrate prejudice as a result of [REDACTED] participation in his proceedings. Karadžić provides no references to the assessment of [REDACTED] evidence in the Trial Judgement to support the suggestion that the Trial Chamber's deliberations were impermissibly influenced by information [REDACTED].

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[941] *Cf. Nahimana et al.* Decision of 5 March 2007, para. 15, *referring to Niyitegeka* Appeal Judgement, para. 200.
[942] [REDACTED].
[943] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, para. 15.
[944] *See* Rule 15(A) of the ICTY Rules.
[945] *Karera* Appeal Judgement, para. 378, *referring to Nahimana et al.* Appeal Judgement, para. 78.
[946] *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.

357. For the foregoing reasons, the Appeals Chamber finds that Karadžić does not demonstrate that [REDACTED] participation in this case deprived him of his right to an impartial tribunal. The Appeals Chamber dismisses Ground 27 of Karadžić's appeal.

B. Municipalities

1. Alleged Errors in Finding the Existence of a Common Plan of the Overarching JCE (Ground 28)

358. The Trial Chamber concluded that between October 1991 and 30 November 1995, the Overarching JCE existed with a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in Bosnia and Herzegovina through the crimes of deportation, inhumane acts (forcible transfer), persecution (forcible transfer and deportation), and persecution through the underlying acts of unlawful detention and the imposition and maintenance of restrictive and discriminatory measures as crimes against humanity.[947] It found that by virtue of the functions and positions held by Karadžić and through the impact of his acts and omissions, he significantly contributed to the Overarching JCE.[948]

359. In particular, the Trial Chamber found that, between 1990 and 1991, Karadžić and the Bosnian Serb leadership had a political objective to preserve Yugoslavia and to prevent the separation or independence of Bosnia and Herzegovina.[949] The Trial Chamber further found that, from October 1991, after it was clear that Bosnia and Herzegovina was pursuing the path of independence, the focus of Karadžić and the Bosnian Serb leadership "shifted" to the establishment of a Bosnian Serb state with the creation of parallel governmental structures followed by the physical take-over of territories.[950]

360. In this context, the Trial Chamber considered that through the issuance of Variant A/B Instructions[951] and Strategic Goals,[952] Karadžić and the Bosnian Serb leadership advocated and

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[947] Trial Judgement, paras. 3447, 3462, 3466, 3505, 3524, 3525. Specifically, the scope of the Prosecution's case concerned the Bosnian municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Višegrad, Sokolac, Vlasenica, Zvornik, Banja Luka, Bosanski Novi, Ključ, Prijedor, Sanski Most, Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća ("Overarching JCE Municipalities"). *See* Trial Judgement, para. 592.
[948] Trial Judgement, paras. 3467-3505, 3524.
[949] Trial Judgement, paras. 2651, 3435.
[950] Trial Judgement, paras. 2941-2944, 3435.
[951] The Trial Chamber found that the Variant A/B Instructions were issued by the SDS Main Board and distributed by Karadžić in December 1991 with the stated purpose to "carry out the results of the plebiscite at which the Serbian people in Bosnia and Herzegovina decide to live in a single state" and to "increase mobility and readiness for the defence of the interests of the Serbian people". The instructions were a means of creating Serb authority in both Variant A (Serb-majority) and Variant B (Serb-minority) municipalities and the first level of their implementation required, *inter alia*: (i) SDS municipal boards to "establish immediately Crisis Staffs of the Serbian People in the municipality"; (ii) the proclamation of an assembly of the Serbian people to be composed of Serbian representatives in the municipal assembly and presidents of SDS local boards; and (iii) an estimate of the number of active and reserve police, Territorial Defence units, and civilian protection units and to bring these units "to full manpower" and take necessary action for their engagement depending on developments. The second level of the implementation of the Variant A/B Instructions called for, *inter alia*, convening a session of the Serb municipal assembly, establishing a municipal executive board and municipal state or government organs, mobilising and re-subordinating all Serb police forces in co-ordination with the JNA command and staff, and ensuring the implementation of the order for mobilisation of the JNA. *See* Trial Judgement, paras. 2992, 2993, 2995-2999. The Trial Chamber found that the instructions formed the basis on

planned a "territorial reorganisation" to allow Bosnian Serbs to control a large part of the Bosnian territory[953] and which created the basis for the structures through which their criminal purpose could be achieved.[954] The Trial Chamber found that ethnic separation and the creation of a largely ethnically homogenous territorial entity were some of the core aspects of the Strategic Goals and that Karadžić and the Bosnian Serb leadership planned the military implementation of these goals through the take-over of territory and the forcible movement of the non-Serb population.[955]

361. The Trial Chamber further found that the Serb forces and the Bosnian Serb Political and Governmental Organs forcibly displaced Bosnian Muslims and Bosnian Croats from their residences to other locations in Bosnia and Herzegovina or other countries,[956] which resulted in the change of the ethnic composition of the Overarching JCE Municipalities.[957] In light of the systematic and organized pattern of crimes which were committed in each of the Overarching JCE Municipalities over a short period of time, the Trial Chamber concluded that these crimes were committed in a coordinated manner.[958]

362. Karadžić submits that the Trial Chamber erred in concluding that he was a member of a joint criminal enterprise since the record allowed another inference: that he was part of a "joint political enterprise" the aim of which was "political autonomy, not physical separation through forced displacements".[959] In support of this contention, Karadžić challenges the assessment of evidence in relation to the Overarching JCE and submits that the Trial Chamber erred: (i) by adopting a selective approach in the assessment of the evidence; (ii) in its assessment of his statements; and (iii) in finding that there was a systematic expulsion of non-Serbs from *Republika Srpska*.[960]

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which Bosnian Serb Crisis Staffs, Bosnian Serb municipal assemblies, and other parallel political and military structures were established at the municipal level. *See* Trial Judgement, paras. 3075, 3077. The Trial Chamber further found that the structures and organs created pursuant to the Variant A/B Instructions, particularly the Crisis Staff, had a central role in the Bosnian Serb take-over in the municipalities and maintaining Bosnian Serb authority once the take-over was concluded. *See* Trial Judgement, para. 3437, *referring to* Trial Judgement, paras. 3072-3096.

[952] The Trial Chamber recalled that on 12 May 1992, during the 16th session of the Bosnian Serb Assembly, Karadžić presented and the Bosnian Serb Assembly adopted the Strategic Goals which were: (i) separation from the other two national communities and the separation of states; (ii) creation of a corridor between Semberija and Krajina; (iii) creation of a corridor in the Drina Valley; (iv) creation of a border on the Una and Nereveta Rivers; (v) division of the city of Sarajevo into Serbian and Muslim parts; and (vi) access of SerBiH to the sea. *See* Trial Judgement, para. 2857.

[953] Trial Judgement, paras. 3435, 3437-3439, *referring to* Trial Judgement, paras. 2839-2856.

[954] Trial Judgement, para. 3439.

[955] Trial Judgement, para. 3439, *referring to* Trial Judgement paras. 2895-2903.

[956] Trial Judgement, paras. 3442, 3443.

[957] Trial Judgement, para. 3442.

[958] Trial Judgement, paras. 3441-3446.

[959] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 461-521.

[960] Karadžić Appeal Brief, paras. 461-521.

363. The Appeals Chamber will address Karadžić's allegations in turn. Before doing so, the Appeals Chamber recalls that trial chambers have a broad discretion in weighing evidence[961] and are best placed to assess the credibility of a witness and the reliability of the evidence adduced.[962] In the context of the deference accorded to a trier of fact with respect to the assessment of evidence, it is within a trial chamber's discretion, *inter alia*, to: (i) evaluate any inconsistencies that may arise within or among witnesses' testimonies and consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence;[963] (ii) decide, in the circumstances of each case, whether corroboration of evidence is necessary or to rely on uncorroborated, but otherwise credible, witness testimony;[964] and (iii) accept a witness's testimony, notwithstanding inconsistencies between the said testimony and the witness's previous statements, as it is for the trial chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.[965]

(a) Alleged Selective Approach in the Assessment of Evidence

364. In the section of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber found that Karadžić and the Bosnian Serb leadership advocated and worked toward "a territorial re-organisation which would allow the Bosnian Serb leadership to claim control and ownership of a large percentage of the territory in [Bosnia and Herzegovina]."[966] It also found that, from November 1991, Karadžić and the Bosnian Serb leadership "spoke against Bosnian Muslims being allowed to stay in Bosnian Serb claimed territory and emphasised the importance of taking control of power and the creation of separate municipalities and municipal structures."[967] In reaching these conclusions, the Trial Chamber relied on, *inter alia*, a number of speeches and statements made by Karadžić and members of the Bosnian Serb leadership reflecting their intent to separate Bosnian Muslims and Bosnian Croats from the Bosnian Serb claimed territories.[968]

365. In addition, in the section of the Trial Judgement titled "Investigation and prosecution of crimes committed against non-Serbs", the Trial Chamber concluded that there was a "systemic

[961] *Ngirabatware* Appeal Judgement, para. 69; *Šainović et al.* Appeal Judgement, para. 490.
[962] *Popović et al.* Appeal Judgement, para. 513; *Šainović et al.* Appeal Judgement, para. 464. *See also Lukić and Lukić* Appeal Judgement, para. 296.
[963] *Popović et al.* Appeal Judgement, para. 1228; *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Nzabonimana* Appeal Judgement, para. 319.
[964] *Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, paras. 125, 138; *Ntawukulilyayo* Appeal Judgement, para. 21; *Dragomir Milošević* Appeal Judgement, para. 215.
[965] *Lukić and Lukić* Appeal Judgement, para. 234; *Hategekimana* Appeal Judgement, para. 190; *Kajelijeli* Appeal Judgement, para. 96.
[966] Trial Judgement, para. 2839. *See also* Trial Judgement, paras. 2851, 2855, 3435.
[967] Trial Judgement, para. 2840.
[968] Trial Judgement, paras. 2716-2773.

failure" on the part of the Serb authorities to investigate and prosecute criminal offences committed against non-Serbs in the Overarching JCE Municipalities relying, *inter alia*, on evidence from Prosecution Witnesses Branko Đjerić and Milorad Davidović.[969] According to the Trial Chamber, the inadequate level of investigation and prosecution of such crimes was consistent with Karadžić's position that such matters could be delayed during the conflict.[970]

366. Karadžić submits that in finding that he advocated the separation of the Bosnian Muslim and Bosnian Serb population and the creation of a Bosnian Serb state, the Trial Chamber adopted a selective approach to interpreting the relevant evidence, isolating "phrases or passages and ascrib[ing] a sinister meaning to them."[971] He submits that the Trial Chamber's "systematically selective reliance on fragments of evidence" undermines its factual findings and the credibility of its overall inference that there was a common criminal plan.[972]

367. In this regard, he argues that whereas the Trial Chamber relied on his statement during the Bosnian Serb Assembly in July 1994 that Krajina would "take [the] appearance of a rotten apple" if their enemy was still there and that the primary strategic aim was "to get rid of the enemies in our house, the Croats and Muslims, and not to be in the same state with them any more",[973] other evidence referred to by the Trial Chamber shows that these statements "cannot reasonably be understood as being directed towards civilians".[974] Specifically, Karadžić points to his order in July 1994 that municipal authorities in Prijedor should ensure the protection of non-Serbs.[975] In his view, this evidence gives rise to the reasonable inference that, in speaking about "rotten apples", Karadžić was referring to combatants, rather than civilians.[976]

368. Karadžić also argues that while the Trial Chamber relied on a speech given during a Bosnian Serb Assembly in November 1994, where he referred to having "created new realities" to infer the Serb right to claim new territories,[977] another portion of the same exhibit reflects that he further stated that "we must create a state using all means above all those permitted and allowed, of course, with respect for human rights and international conventions [...] we have to respect the humanitarian law and we have to respect all the conventions."[978]

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[969] Trial Judgement, para. 3425. *See also* Trial Judgement, paras. 3411-3424.
[970] Trial Judgement, para. 3425. *See also* Trial Judgement, para. 3413.
[971] Karadžić Appeal Brief, paras. 469-480, 484.
[972] Karadžić Appeal Brief, para. 479. *See also* Karadžić Appeal Brief, paras. 469, 470.
[973] Karadžić Appeal Brief, para. 471, *referring to* Trial Judgement, paras. 2765, 2770.
[974] Karadžić Appeal Brief, paras. 471, 472.
[975] Karadžić Appeal Brief, para. 472, *referring to* Trial Judgement, para. 3403, Exhibit D4213.
[976] Karadžić Appeal Brief, para. 473.
[977] Karadžić Appeal Brief, para. 474, *referring to* Trial Judgement, paras. 2772, 3070.
[978] Karadžić Appeal Brief, para. 474, *referring to* Exhibit P1403, pp. 156, 159.

369. Likewise, Karadžić highlights that the Trial Chamber relied on evidence from the 31 March 1995 Supreme Command meeting where he spoke about "turning a blind eye to private agencies and arrangements through which Bosnian Muslims left for western Europe because in those situations 'no one can accuse us', whereas if a state institution was involved they would be accused of 'ethnic cleansing'" to support its conclusion that he advocated the inability to co-exist between Bosnian Serbs and non-Serbs.[979] In relying on that comment, Karadžić suggests that the Trial Chamber failed to give sufficient weight to another statement during the same meeting, wherein Momčilo Krajišnik said that "[o]ur policy is such as President Karadžić said [...] not to ethnically cleanse them."[980]

370. Karadžić further argues that the Trial Chamber relied on two of his statements recorded in Ratko Mladić's diary in May 1992 where he said "then we clear the Posavina of Croats" and in June 1992 where he said that "the birth of a state and the creation of borders does not occur without war".[981] However, according to Karadžić, the Trial Judgement does not refer to other statements from the same meetings recorded in Mladić's diary in June 1992 where he said "we must not put the pressure to have people displaced" and that he told Mladić that he was going to sign an agreement to allow refugees to return to their homes,[982] which he later did.[983] In light of these considerations, Karadžić contends that the Trial Chamber erred in finding that the statements recorded in Mladić's diary in May and June 1992 were in "stark contrast" with his interview on 20 July 1990 where he said that "the Serbs and the Muslims will always live in a common state, and they know [...] how to live together",[984] since, when viewed as a whole, these statements constitute corroborative evidence demonstrating that he never sought the creation of a homogeneous entity.[985]

371. Similarly, Karadžić contends that in concluding that Nikola Koljević, Vice President of *Republika Srpska*, called for the expulsion of Bosnian Muslims, the Trial Chamber did not consider a statement from Koljević during a Presidential Meeting in July 1992 where he proposed to build a law-abiding rather than an ethnically clean state.[986]

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[979] Karadžić Appeal Brief, para. 475, *referring to* Trial Judgement, paras. 2773, 2840, 2841, 2851, 2855.
[980] Karadžić Appeal Brief, para. 476, *referring to* Exhibit P3149, p. 66.
[981] Karadžić Appeal Brief, para. 477, *referring to* Trial Judgement, paras. 2733, 2875.
[982] Karadžić Appeal Brief, para. 477, *referring to* Exhibit P1478, pp. 98, 358, 359.
[983] Karadžić Appeal Brief, para. 477, *referring to* Exhibit P1479, p. 17.
[984] Karadžić Appeal Brief, para. 478, *referring to* Trial Judgement, paras. 2734-2737.
[985] Karadžić Appeal Brief, para. 478.
[986] *See* Karadžić Appeal Brief, para. 483, *referring to* Trial Judgement, para. 2721, Exhibit P1478, pp. 313, 314.

372. Karadžić lastly submits that the Trial Chamber adopted a similar piecemeal approach in assessing the evidence of Witnesses Đjerić and Davidović to conclude that Karadžić blocked efforts to prosecute war criminals and failed to address exculpatory evidence in their testimonies.[987]

373. The Prosecution responds that Karadžić misrepresents or ignores relevant findings and evidence and fails to demonstrate any error in the Trial Chamber's conclusion that he and the rest of the Bosnian Serb leadership advocated the separation of the population and the creation of a Bosnian Serb state.[988]

374. In reply, Karadžić maintains that the Trial Chamber selectively assessed the evidence and contends that the Prosecution misrepresents relevant evidence.[989]

375. The Appeals Chamber observes that in the section of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber addressed in detail a large amount of evidence, including speeches, statements, and conversations by Karadžić and the rest of the Bosnian Serb leadership explicitly referring to: (i) the inability of Bosnian Serbs to live or co-exist with Bosnian Muslims or Bosnian Croats; (ii) their intent to create ethnically pure or homogeneous areas, and (iii) the necessity to separate the population.[990]

376. Against this background, Karadžić takes issue with the assessment of five statements claiming that the Trial Chamber selectively relied on evidence consistent with the inference of guilt and points to other evidence which, in his view, is not consistent with this inference.[991] The Appeals Chamber finds that Karadžić's reference to other evidence on the record, which, in his view, is inconsistent with the Trial Chamber's conclusion, reflects mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. In this regard, the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[992]

377. Moreover, in light of the Trial Chamber's detailed analysis of the large amount of evidence in support of its conclusion that Karadžić advocated the creation of a Bosnian Serb state and the separation of the population, including evidence related to Karadžić's statements expressly

[987] *See* Karadžić Appeal Brief, paras. 480-482.
[988] Prosecution Response Brief, paras. 261-271. *See also* Prosecution Response Brief, paras. 255-260.
[989] Karadžić Reply Brief, paras. 137-145.
[990] *See, e.g.*, Trial Judgement, paras. 2716-2729, 2732, 2733, 2739, 2745, 2746, 2749, 2752, 2754-2757, 2770, 2772, 2773.
[991] Karadžić Appeal Brief, paras. 471-477, 483.
[992] *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

advocating such separation,[993] the Appeals Chamber fails to see how Karadžić's allegations of errors concerning a limited number of his statements could demonstrate that the Trial Chamber "systematically" adopted a selective approach to the evidence in its entire analysis concerning the common criminal plan. Furthermore, Karadžić does not provide any explanation as to how his contentions concerning the Trial Chamber's assessment of these five statements would necessarily disturb its overall conclusion that Karadžić advocated the separation between Bosnian Serbs, Bosnian Muslims, and Bosnian Croats.

378. Likewise, with respect to Karadžić's argument that the Trial Chamber selectively relied on the evidence of Witnesses Đjerić and Davidović when concluding that Karadžić failed to investigate and prosecute criminal offences committed against non-Serbs, the Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[994] Furthermore, Karadžić does not demonstrate how these allegations of errors could impact the Trial Chamber's overall finding that there was a systemic failure to investigate and prosecute criminal offences committed against non-Serbs in the municipalities during the conflict, which was based on considerable corroborating evidence,[995] and the Trial Chamber's conclusion concerning the common criminal purpose of the Overarching JCE.

379. Accordingly, Karadžić fails to show under this ground of appeal that the Trial Chamber adopted a selective approach to the assessment of evidence.

(b) Assessment of Karadžić's Statements

380. In assessing Karadžić's statements in relation to the Overarching JCE, the Trial Chamber found that while Karadžić envisaged the use of force and violence to take over power, he was cautious about the way this would be portrayed at the international level,[996] and observed a disjuncture in Karadžić's speeches and utterances depending on the different audiences addressed as well as a disjuncture between many such speeches and utterances and the reality on the ground.[997]

381. Karadžić argues that the Trial Chamber erred in the assessment of his statements, particularly, in finding that: (i) there was a disjuncture in his statements; (ii) the statements in the Bosnian Serb Assembly sessions were often for public consumption; and (iii) he was duplicitous in

[993] *See, e.g.*, Trial Judgement, paras. 2716-2720, 2723-2726, 2732, 2733, 2739, 2745, 2746, 2749, 2752, 2754-2757, 2770, 2772, 2773. *See also generally* Trial Judgement, paras. 2716-2773.
[994] *Lukić and Lukić* Appeal Judgement, para. 234; *Hategekimana* Appeal Judgement, para. 190; *Kajelijeli* Appeal Judgement, para. 96.
[995] *See* Trial Judgement, para. 3425. *See also* Trial Judgement, paras. 3411-3424.
[996] Trial Judgement, paras. 2715, 3084.

his dealings with the international community.[998] The Appeals Chamber will consider these allegations of error in turn.

(i) Disjuncture in Karadžić's Statements

382. In the section of the Trial Judgement titled "Reaction to proposed independence of [Bosnia and Herzegovina]", the Trial Chamber found that from October 1991, Karadžić's focus shifted from opposing the secession of Bosnia and Herzegovina to the creation of a Bosnian Serb state as an ethnically based entity.[999] The Trial Chamber also found that there was a "disjuncture between what [Karadžić] said in private conversations or before a Bosnian Serb audience and the tone he took in international negotiations where he was more conciliatory, spoke against the conflict, and claimed that the Serbs were the victims of propaganda."[1000]

383. In the part of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber concluded that Karadžić and the Bosnian Serb leadership advocated and worked towards a territorial re-organization which would allow the Bosnian Serbs to claim control of a large part of the territory of Bosnia and Herzegovina.[1001] In support of this conclusion, the Trial Chamber found that, while in international settings and press conferences Karadžić spoke in favour of the interest of the minorities and denied the suggestion that people would be forced from their homes, Karadžić was informed of the displacement of non-Serbs from the municipalities which were taken-over and the drastic demographic changes resulting in the Serbs becoming the majority in these municipalities, and acknowledged that in undertaking the military operations, the Bosnian Muslim population had been concentrated in small areas.[1002] According to the Trial Chamber, this demonstrated the difference between Karadžić's public statements and the reality on the ground of which he was fully aware.[1003] The Trial Chamber also noted Karadžić's statements concerning the right of refugees to return and found that such statements demonstrated that he was conscious "of making public statements which were in accordance with international expectations and obligations, but which were at odds with the reality on the ground."[1004] In addition, the Trial Chamber also found that there was "a clear disjuncture"

[997] Trial Judgement, paras. 2715, 2847, 2849, 2852, 2853, 3085, 3094, 3095.
[998] Karadžić Appeal Brief, paras. 485-511.
[999] Trial Judgement, paras. 2711, 2712. *See also* Trial Judgement, paras. 2707-2710, 2713-2715.
[1000] Trial Judgement, para. 2715.
[1001] Trial Judgement, para. 2839. *See also* Trial Judgement, paras. 2840-2856.
[1002] Trial Judgement, para. 2847.
[1003] Trial Judgement, para. 2847.
[1004] Trial Judgement, para. 2852.

between Karadžić's public announcements made to international representatives and his speeches and policy advocating ethnic separation and the creation of an ethnically homogeneous state.[1005]

384. In the section of the Trial Judgement titled "Variant A/B Instructions and take-over of power", the Trial Chamber found that Karadžić played a leading role in the distribution and promotion of such instructions, which reflected his objectives from December 1991 onwards.[1006] In this regard, the Trial Chamber found that, in the context of the implementation of the Variant A/B Instructions, while Karadžić was making public statements about the protection of minorities, Bosnian Muslims continued to be subjected to forcible displacement.[1007] On this basis, the Trial Chamber concluded that there was "a disjuncture between [Karadžić]'s public statements and his private discourse in this regard".[1008] Likewise, the Trial Chamber further reiterated that Karadžić's statements and decisions concerning the protection of the rights of minorities "were often for the consumption of international public opinion" and were disingenuous, having regard to the reality on the ground in the Overarching JCE Municipalities.[1009]

385. Karadžić submits that the Trial Chamber erroneously found that a number of his speeches, conversations, and statements were disingenuous on the basis that there was a disjuncture between his public statements and his private discourse as such disjuncture is not supported by the record.[1010] According to Karadžić, the Trial Chamber was not able to point to "a pattern of exculpatory statements made in public, and inculpatory statements made in private" and that its "own findings point away from such a trend."[1011] In support of this contention, Karadžić argues that while, on the one hand, the Trial Chamber referred to statements that he made in private and in confidential orders which indicate that he never favoured a homogeneous entity,[1012] on the other, it "ascribed a criminal meaning" to various statements, speeches, interviews, and assembly meetings which instead were rendered in public.[1013]

[1005] Trial Judgement, para. 2853.
[1006] Trial Judgement, paras. 3073, 3074. *See also* Trial Judgement, paras. 3072, 3075-3096.
[1007] Trial Judgement, paras. 3083-3085.
[1008] Trial Judgement, para. 3085.
[1009] Trial Judgement, paras. 3094, 3095.
[1010] Karadžić Appeal Brief, paras. 485-511. *See* Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2635, 2636, 2638, 2640, 2641, 2646, 2681, 2696, 2700, 2703, 2719, 2723, 2734, 2735, 2737, 2738, 2740, 2741, 2743, 2744, 2749, 2763, 2768, 2774, 2789, 2795, 2796, 3023, 3028, 3031, 3051, 3052, 3054, 3055, 3057, 3062, 3063, 3094, 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403, 3405, 3409, 3419. *See also* Karadžić Appeal Brief, paras. 465-467.
[1011] Karadžić Appeal Brief, para. 488.
[1012] Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, paras. 2743, 2749, 2763, 2774, 3351, 3383, 3387, 3389, 3392, 3395, 3400, 3402, 3403, 3405, 3409, 3418, 3419.
[1013] Karadžić Appeal Brief, para. 489. Karadžić additionally contends that the Trial Chamber failed "to provide a quantitative analysis, or even a reasoned opinion, to support the finding that [his] public statements were commendable, while private statements reflected a common criminal plan." *See* Karadžić Appeal Brief, para. 490.

386. In addition, Karadžić contends that the Trial Chamber failed to consider evidence showing that his "private discourse revealed the same sentiments as those expressed in public".[1014] In his view, "the Trial Chamber was not entitled to make a finding that [he] spoke differently in public and private" without considering this evidence.[1015]

387. The Prosecution responds that the Trial Chamber correctly assessed Karadžić's statements and that he misrepresents the Trial Judgement, ignores relevant findings, and provides his own interpretation of the evidence without demonstrating an error in the Trial Chamber's reasoning.[1016] Specifically, the Prosecution argues that Karadžić challenges only one aspect of the Trial Chamber's reasoning, as the Trial Chamber ultimately found that his statements were disingenuous on the basis of the reality on the ground and in light of his knowledge of the crimes.[1017]

388. In his reply, Karadžić clarifies that it is not his argument that the Trial Chamber ignored his exculpatory statements, but rather that it "wrongly discount[ed] them due to a disjuncture which did not exist".[1018] In addition, he argues that the "disjuncture finding was not limited to the take-over of power" but was repeated throughout the Trial Judgement.[1019]

389. As a preliminary matter, the Appeals Chamber observes that Karadžić refers to 65 statements and orders that were assessed and rejected by the Trial Chamber in different portions of the Trial Judgement related to the Overarching JCE, namely in the sections titled "Reaction to proposed independence of [Bosnia and Herzegovina]",[1020] "Advocating separation of population and creation of a Bosnian Serb state",[1021] "Variant A/B Instructions and the take-over of power",[1022] and "Accused's knowledge of crimes and measures he took to prevent and punish them".[1023] Karadžić's contention appears to rest on the assumption that the Trial Chamber concluded that these

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[1014] Karadžić Appeal Brief, paras. 491-497, *referring to* Exhibits D3149, p. 7, D3162, p. 7, D3571, pp. 2-5, D4517, pp. 3, 4.
[1015] Karadžić Appeal Brief, para. 498.
[1016] Prosecution Response Brief, paras. 272-276. *See also* Prosecution Response Brief, paras. 255-260.
[1017] Prosecution Response Brief, para. 275, *referring to, inter alia*, Trial Judgement, paras. 3085, 3095.
[1018] Karadžić Reply Brief, para. 146.
[1019] Karadžić Reply Brief, para. 147. *See also* Karadžić Reply Brief, paras. 148-152.
[1020] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2681, 2696, 2700, 2703.
[1021] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2719, 2723, 2734, 2735, 2737, 2738, 2740, 2741, 2743, 2744, 2749, 2763, 2768, 2774, 2789, 2795, 2796.
[1022] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3023, 3028, 3031, 3051, 3052, 3054, 3055, 3057, 3062, 3063, 3094.
[1023] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403 3405, 3409, 3419. The Appeals Chamber notes that Karadžić refers to some statements reflected in the section "Unity of the Serb people and promotion of Serb interests" which predate the establishment of the Overarching JCE. *See* Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2635, 2636, 2638, 2640, 2641, 2646. In the absence of any explanation on the relevance of these statements in relation to his responsibility, the Appeals Chamber declines to consider Karadžić's allegation of error concerning the Trial Chamber's assessment of these statements.

65 utterances were disingenuous on the basis of a disjuncture between *all* his public statements and *all* his private conversations.[1024] However, after a careful review of the Trial Judgement, the Appeals Chamber is not convinced that the Trial Chamber's assessment of the statements or orders is based on such a conclusion.

390. For instance, with respect to the statements addressed in the section titled "Reaction to proposed independence of [Bosnia and Herzegovina]", the Trial Chamber found that there was a disjuncture between Karadžić's public statements during international negotiations, on the one hand, and what he said during private conversations and his statements pronounced before a Serb audience, on the other.[1025] Accordingly, contrary to Karadžić's arguments, the Trial Chamber did not find that there was a net discrepancy between all of Karadžić's public and private statements *per se*. Rather, it concluded that the disjuncture arose when comparing Karadžić's statements pronounced during international negotiations with those he made to Serbian audiences, in public or private settings.

391. Likewise, in the section titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber did not reject the statements referred to by Karadžić on the basis that there was a disjuncture between his public statements and his private discourse, but rather because such utterances: (i) were made in a different environment and period when the Bosnian Serb leadership aimed at the unity of Yugoslavia; (ii) were in contrast with the reality on the ground of which he was fully aware; and (iii) contradicted other public speeches and policy which advocated ethnic separation and the creation of an ethnically homogeneous state.[1026]

392. With respect to the section titled "Variant A/B instructions and take-over of power", the Appeals Chamber notes that the Trial Chamber stated that there was a disjuncture between Karadžić's public statements and his private discourse concerning the protection of minorities.[1027] However, this finding principally concerned one statement from Karadžić that, while he was prepared "to let everything go to [...] hell and that we take the express way", he also spoke about the necessity of taking a tactful approach to achieve the Bosnian Serb leadership's goals given the importance of not appearing as the aggressors to the international community.[1028] The Trial Judgement reflects that Karadžić's statements in favour of the minorities were found to be

[1024] Karadžić Appeal Brief, para. 486; Karadžić Reply Brief, para. 147.
[1025] Trial Judgement, para. 2715.
[1026] Trial Judgement, paras. 2736, 2739, 2745, 2752, 2753, 2789, 2847, 2852, 2853.
[1027] Trial Judgement, para. 3085.
[1028] Trial Judgement, para. 3084, *referring to* Trial Judgement, paras. 3023, 3024. The Appeals Chamber further notes that, in its conclusions concerning Karadžić's contribution to the Overarching JCE, the Trial Chamber clarified the impugned finding limiting the disjuncture to Karadžić's public statements to the *international observers* and his private discourse. *See* Trial Judgement, para. 3484 (emphasis added).

disingenuous because they were in contrast with the situation on the ground where Bosnian Muslims were forced out of the municipalities of Bosnia and Herzegovina taken over by Bosnian Serbs.[1029]

393. With respect to Karadžić's orders to improve the conditions of the non-Serb civilians and to punish crimes committed against them,[1030] the Trial Chamber repeatedly found that these instructions were deliberately ineffective, "otiose", and "minimal".[1031]

394. In light of these considerations, the Appeals Chamber finds that Karadžić's claim that the Trial Chamber erred in rejecting his statements in light of the fact that there was a disjuncture between all his public and private statements is based on a misrepresentation of the Trial Judgement. On the contrary, a review of the Trial Judgement shows that the Trial Chamber found these statements to be disingenuous on a different basis, namely that such utterances were: (i) inconsistent with those pronounced before a Serbian audience or during private conversations;[1032] (ii) at odds with the reality on the ground and the crimes committed by Bosnian Serbs against the Bosnian Muslims and Bosnian Croats of which Karadžić was fully aware;[1033] or (iii) deliberately ineffective, "otiose", and "minimal".[1034] Accordingly, Karadžić's contention that the Trial Chamber failed to point to a pattern of "exculpatory statements made in public, and inculpatory statements made in private" fails to show an error in the Trial Chamber's assessment of his statements.[1035]

395. The Appeals Chamber turns to Karadžić's contention that the Trial Chamber failed to consider four pieces of evidence from his private conversations to show that his "private discourse revealed the same sentiments as those expressed in public".[1036] The Appeals Chamber observes that

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[1029] Trial Judgement, paras. 3085, 3094, 3095.
[1030] Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403 3405, 3409, 3419. *See also* Karadžić Appeal Brief, para. 489.
[1031] Trial Judgement, paras. 3399, 3403, 3410, 3413, 3420-3425, 3494-3496.
[1032] Trial Judgement, paras. 2715, 2853.
[1033] Trial Judgement, paras. 2847, 2853, 3094, 3095.
[1034] Trial Judgement, paras. 3399, 3403, 3410, 3413, 3420-3425, 3494-3496.
[1035] Karadžić Appeal Brief, para. 488. To the extent that Karadžić submits that some of the exculpatory statements assessed by the Trial Chamber were in fact pronounced in a private setting (Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, paras. 2743, 2749, 2763), the Appeals Chamber observes that Karadžić refers instead to statements pronounced during sessions of the Bosnian Serb Government and that the Trial Chamber found that such statements were issued as a means to ease the international political pressure concerning the treatment of non-Serbs in Bosnian Serb controlled territory and did not translate into the improvement of the situation. *See* Trial Judgement, paras. 2763, 2850, 2852. Karadžić also points to a conversation between him and Nikola Koljević in December 1991, to which the Trial Chamber referred in the section titled "Advocating separation of population and creation of a Bosnian Serb state", where he said that "we have no aims. We don't want to take what belongs to someone else; we just don't want them to take ours." *See* Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, para. 2774. The Appeals Chamber finds that, by merely referring to an excerpt of this conversation, Karadžić fails to show that this evidence contradicts the Trial Chamber's finding that he advocated physical separation or that it supports his contention that he never favoured the creation of a homogeneous entity. *See* Trial Judgement, paras. 2841-2856. Accordingly, he fails to show any error in the Trial Chamber's assessment of this evidence.
[1035] *See* Trial Judgement, para. 3095.
[1036] Karadžić Appeal Brief, paras. 491-497.

two pieces of this evidence are intercepted conversations pre-dating the existence of the Overarching JCE,[1037] or concerning a municipality not encompassed by the common criminal purpose.[1038] Accordingly, the Appeals Chamber finds that Karadžić fails to show that this evidence was of sufficient relevance to the Trial Chamber's finding that his statements were disingenuous in the context of the implementation of the Overarching JCE that it could have materially impacted the Trial Chamber's conclusion concerning the existence of the Overarching JCE and his responsibility for the relevant crimes.

396. Karadžić also relies on excerpts from an intercepted conversation on 26 October 1991 where he stated that the rights of Muslims and Serbs will be regulated based on reciprocity,[1039] and excerpts from another conversation where he stated that "Muslim civilians may stay where they are or go where they want" and that "civilians can stay and have no need to flee".[1040] While this evidence is not expressly discussed in the Trial Judgement, the Appeals Chamber recalls that a trial chamber need not refer to the testimony of every witness or every piece of evidence on the trial record.[1041] It is to be presumed that a trial chamber evaluated all the evidence presented to it, as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence.[1042] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[1043] If a trial chamber did not refer to specific evidence it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual finding.[1044] Based on the totality of the evidence, and particularly in light of the vast number of intercepted conversations considered by the Trial Chamber where Karadžić warned and threatened the Bosnian Muslims against the independence of Bosnia and Herzegovina, advocated the creation of a Serbian state in Bosnia and Herzegovina, and maintained that the different nationalities could not live together,[1045] the Appeals Chamber is not convinced that the Trial Chamber failed to consider relevant evidence in this regard,

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[1037] Karadžić Appeal Brief, para. 493, *referring to* Exhibit D3149, p. 7. The Appeals Chamber observes that this exhibit reflects an intercepted conversation which occurred on 23 July 1991, where Karadžić stated that, in regions where the Serbs were the majority, Muslims should be told not to be afraid as no one had anything against them. *See* Exhibit D3149, pp. 1, 7.

[1038] Karadžić Appeal Brief, para. 494, *referring to* Exhibit D3162, p. 7. The Appeals Chamber observes that this evidence reflects a conversation between Karadžić and Božidar Vucurević concerning the Bosnian Muslim community in the municipality of Trebinje. *See* Exhibit D3162, pp. 1, 7.

[1039] Karadžić Appeal Brief, para. 492, *referring to* Exhibit D4517, pp. 3, 4.

[1040] Karadžić Appeal Brief, para. 495, *referring to* Exhibit D3571, pp. 2-5.

[1041] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127.

[1042] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, n. 2527; *Kanyarukiga* Appeal Judgement, para. 127.

[1043] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100.

[1044] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 1410.

but rather that it considered that this evidence did not prevent it from reaching the conclusion that Karadžić's public statements were disingenuous.

397. Based on these considerations, the Appeals Chamber finds that Karadžić has failed to demonstrate any error in the Trial Chamber's assessment of his statements.

(ii) Statements During the Bosnian Serb Assembly Sessions

398. In discussing Karadžić's role in relation to the implementation of the Variant A/B Instructions, the Trial Chamber concluded that it would exercise caution in assessing the statements made during the Bosnian Serb Assembly sessions since "what was said at these sessions was often for public consumption and included rhetoric".[1046]

399. Karadžić submits that the Trial Chamber made inconsistent findings with respect to the nature of the Bosnian Serb Assembly sessions.[1047] He argues that while in certain parts of the Trial Judgement, the Trial Chamber found that "the Bosnian Serb Assembly was the forum for the official dissemination of instructions to which there was a high level of adherence",[1048] when confronted with statements he made in the assembly advocating peace and the equal treatment for Muslims, Croatians, and citizens of other religions and nationalities,[1049] it concluded that this assembly was the forum where he disseminated statements for public consumption.[1050] Karadžić submits that, as a result, the Trial Chamber erroneously disregarded exculpatory statements he made in the Bosnian Serb Assembly.[1051]

400. The Prosecution responds that Karadžić fails to show that the Trial Chamber entered contradictory findings on the nature of the statements made before the Bosnian Serb Assembly.[1052]

401. As a preliminary matter, the Appeals Chamber observes that, in alleging that the Trial Chamber disregarded his exculpatory statements, Karadžić refers to excerpts of exhibits which were discussed in detail by the Trial Chamber.[1053] The Appeals Chamber therefore finds that the Trial

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[1045] *See* Trial Judgement, paras. 2677-2680, 2683, 2686, 2693, 2708, 2719, 2730, 2739, 3023.
[1046] Trial Judgement, para. 3056. *See also* Trial Judgement, para. 3095.
[1047] Karadžić Appeal Brief, paras. 499-505. *See also* Karadžić Reply Brief, paras. 153-155.
[1048] Karadžić Appeal Brief, para. 505. *See also* Karadžić Appeal Brief, paras. 499, 500, *referring to* Trial Judgement, paras. 2944, 2946-2948, 2951.
[1049] Karadžić Appeal Brief, paras. 501-503, *referring to* Exhibits D90, pp. 45, 46, P961, p. 17, Trial Judgement, paras. 2696, 3054, 3055, 3334, 3356.
[1050] Karadžić Appeal Brief, paras. 504, 505, *referring to* Trial Judgement, para. 3056.
[1051] Karadžić Appeal Brief, paras. 499, 505.
[1052] Prosecution Response Brief, paras. 277-283.
[1053] *See* Trial Judgement, paras. 3052 (*referring to* Exhibit P961, pp. 16, 17), 3054 (*referring to* Exhibit D90, pp. 45, 46). *See also* Trial Judgement, paras. 3051, 3060, 3061, *referring to* Exhibits D90, P961.

Chamber has considered this evidence and will focus its analysis on whether the Trial Chamber's assessment of his statements was unreasonable.

402. The Appeals Chamber notes that Karadžić refers to a section of the Trial Judgement concerning his authority over the Bosnian Serb Assembly and governmental structures where the Trial Chamber found, *inter alia*, that the Bosnian Serb Assembly was the means through which Karadžić and the Bosnian Serb leadership sanctioned and disseminated their ideology and objectives and communicated instructions to municipal representatives.[1054] In this regard, the Appeals Chamber considers that the fact that the Trial Chamber found that this organ was used to disseminate instructions concerning the creation of a Serb entity in Bosnia and Herzegovina is not necessarily in contradiction with the conclusion that some of the public statements made in that context were made for public consumption.[1055]

403. Moreover, a review of the passage of the Trial Judgement to which Karadžić points in support of his argument reveals that the record supports the Trial Chamber's conclusion that "what was said at these sessions was often for public consumption and included rhetoric".[1056] In particular, in reaching this conclusion, the Trial Chamber relied on Krajišnik's statement during a session of the Bosnian Serb Assembly, that "I have discussed [the creation of a unified Serb state] openly, even though this is being recorded and even though the journalists might write it down".[1057] In addition, the Trial Chamber considered that, when asking Mladić to brief the Bosnian Serb Assembly on the military situation and their intentions, Karadžić told him to report "what can be said at a place like this".[1058] Based on these considerations and recalling the broad discretion afforded to the Trial Chamber in assessing the evidence on the record,[1059] the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude as it did.

404. Accordingly, the Appeals Chamber finds that Karadžić does not show that the Trial Chamber made an inconsistent finding in concluding that what was said at the Bosnian Serb Assembly sessions was often for public consumption and included rhetoric.

405. In light of the foregoing, Karadžić has failed to show that the Trial Chamber committed an error.

[1054] Karadžić Appeal Brief, para. 499, *referring to* Trial Judgement, para. 2944.
[1055] Trial Judgement, paras. 3056, 3095.
[1056] Trial Judgement, para. 3056.
[1057] Trial Judgement, para. 3056, *referring to* Exhibit P1357, p. 18.
[1058] Trial Judgement, para. 3056, *referring to* Exhibit D456, pp. 17, 18.
[1059] *Šainović et al.* Appeal Judgement, para. 490.

(iii) Duplicity in Dealing with the International Community

406. In its analysis concerning Karadžić's efforts in advocating the separation of the population and the creation of a Bosnian Serb state as well as his role in the issuance and the implementation of the Variant A/B instructions, the Trial Chamber found that Karadžić made statements in favour of the interests of minorities, denying forcible displacement, and that the Bosnian Serbs were not creating "an ethnically clean State".[1060] However, the Trial Chamber found that these statements were often for the "consumption of the international public opinion" and that there was a discrepancy between Karadžić's statements in international settings and the reality on the ground.[1061]

407. Karadžić submits that the Trial Chamber erred in concluding that he was duplicitous in dealing with the international community.[1062] He contends that the Trial Chamber relied on the uncorroborated evidence of Prosecution Witness David Harland, a UN official, who testified that Karadžić told the witness that "his aim was to redistribute the population so that the Serbs would control a single continuous block of territory and that large numbers of Muslims had to be removed", although such statement was not reflected in the witness's reports on Karadžić's meetings.[1063] Likewise, Karadžić avers that the Trial Chamber relied on the uncorroborated testimony of Prosecution Witness Hussein Ali Abdel-Razek, a UN official, who testified that Karadžić and other leaders of *Republika Srpska* stated in January 1993 that ethnic cleansing was necessary, although such statement did not appear in the witness's contemporaneous reports.[1064] Karadžić contends that, if he had made such statements and Witnesses Harland and Abdel-Razek did not report them, they failed in their duty to report "this alarming information to their superiors within the United Nations, so that immediate action could have been taken".[1065] Karadžić submits that if he had had the intent to ethnically cleanse Bosnian Muslims and Bosnian Croats, it was unlikely that he would have disclosed this to the two witnesses.[1066] He adds that, in any event, the Trial Chamber made contradictory findings by concluding that he was disingenuous with the "international interlocutors" while also confessing his true intentions to these witnesses.[1067]

[1060] Trial Judgement, paras. 2743, 2847, 2849, 3094, 3095.
[1061] Trial Judgement, paras. 2847, 2849, 3095.
[1062] Karadžić Appeal Brief, paras. 506-510.
[1063] Karadžić Appeal Brief, para. 506, *referring to* Trial Judgement, para. 2726.
[1064] Karadžić Appeal Brief, para. 507, *referring to* Trial Judgement, para. 2757.
[1065] *See* Karadžić Appeal Brief, para. 508.
[1066] Karadžić Appeal Brief, para. 509.
[1067] Karadžić Appeal Brief, para. 510.

408. The Prosecution responds that Karadžić fails to show that the Trial Chamber erred in finding that he was duplicitous in his dealings with the international community.[1068]

409. Karadžić replies that the Prosecution fails to address his contention of error on the part of the Trial Chamber, namely, that its findings that he was candid with international representatives and that he created a "false narrative" at meetings with them are inconsistent.[1069]

410. The Appeals Chamber turns to Karadžić's argument that the Trial Chamber erroneously relied on the evidence of Witnesses Harland and Abdel-Razek in finding that he was duplicitous in dealing with the international community. As a preliminary matter, the Appeals Chamber observes that Karadžić makes unclear assertions that the Trial Chamber relied on Witness Harland's and Witness Abdel-Razek's evidence concerning their conversation with him although they did not mention such statements in their reports, failing their professional duty by not reporting "this alarming information" to their superiors.[1070] To the extent that Karadžić claims that Witness Harland's and Witness Abdel-Razek's evidence was unreliable based on these circumstances, he does not explain how the fact that Witness Harland and Witness Abdel-Razek did not mention Karadžić's statements in their reports demonstrates an error in the Trial Chamber's assessment of their evidence.[1071] Karadžić merely disagrees with the Trial Chamber's assessment of the evidence without showing an error warranting appellate intervention.[1072]

411. Furthermore, Karadžić's allegation that the Trial Chamber made contradictory findings in concluding that he was disingenuous with the "international interlocutors" while also confessing his true intentions to Witnesses Harland and Abdel-Razek, reflects a misinterpretation of the Trial Judgement. The Appeals Chamber recalls that in finding discrepancies between Karadžić's statements in international settings and the reality on the ground, the Trial Chamber was referring to his public speeches, statements, and announcements before an international audience, rather than to

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[1068] Prosecution Response Brief, paras. 284-286. The Prosecution also argues that Karadžić's assertion that Witnesses Harland and Abdel-Razek failed to report their conversation with him fails to appreciate that they already knew that Karadžić and the Bosnian Serb Leadership were conducting an ethnic cleansing campaign as reflected in their repeated protest. *See* Prosecution Response Brief, para. 286.

[1069] Karadžić Reply Brief, para. 158. Karadžić also contends that the Prosecution's argument that Witnesses Harland and Abdel-Razek did not report their conversation with him because they already knew that Karadžić was conducting an ethnic cleansing campaign is not reasonable and "goes against the most basic principles of human rights monitoring and reporting." *See* Karadžić Reply Brief, para. 157.

[1070] Karadžić Appeal Brief, paras. 506-508.

[1071] *Cf. Ngirabatware* Appeal Judgement, para. 69; *Popović et al.* Appeal Judgement, para. 513; *Šainović et al.* Appeal Judgement, para. 464; *Lukić and Lukić* Appeal Judgement, para. 296; *Nahimana et al.* Appeal Judgement, para. 949.

[1072] To the extent that Karadžić argues that the Trial Chamber erred in relying on the evidence of Witnesses Harland and Abdel-Razek because of the lack of corroboration, the Appeals Chamber finds this argument without merit as a trial chamber has the discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony. *See Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, para. 138; *Ntawukulilyayo* Appeal Judgement, para. 21; *Dragomir Milošević* Appeal Judgement, para. 215.

his private discussions with members of the international community.[1073] In this regard, Witness Harland's and Witness Abdel-Razek's evidence concerns statements which occurred in private settings or closed meetings.[1074] The Appeals Chamber further observes that, consistent with the evidence of Witnesses Harland and Abdel-Razek, the Trial Chamber indeed acknowledged that in discussions with international representatives, Karadžić made it clear that he advocated the separation of people and believed that co-existence with the Bosnian Muslims and Bosnian Croats was not possible.[1075] Therefore, the Appeals Chamber finds that the evidence of Witnesses Harland and Abdel-Razek concerning their private discussions with Karadžić does not necessarily contradict the Trial Chamber's finding that Karadžić's statements favouring the interests of minorities and denying forcible displacement and the creation of "an ethnically clean State"[1076] were for the consumption of the international *public* opinion.[1077]

412. Accordingly, Karadžić has failed to show that the Trial Chamber committed any error in this regard.

(iv) Conclusion

413. For the foregoing reasons, the Appeals Chamber dismisses Karadžić's allegations of error concerning the Trial Chamber's assessment of his statements.

(c) Systematic Displacement of Minorities

414. The Trial Chamber found that there was an organized and systematic pattern of crimes committed in the area of the Overarching JCE Municipalities by the Serb forces and the Bosnian Serb Political and Governmental Organs against Bosnian Muslims and Bosnian Croats who were forcibly displaced to other locations or third countries.[1078] The Trial Chamber found no merit in Karadžić's argument that, in the majority of municipalities of *Republika Srpska*, non-Serbs were protected.[1079] Specifically, the Trial Chamber found that the municipalities where the crimes were committed, "and in relation to which the [Trial] Chamber was tasked with entering findings", were

[1073] Trial Judgement, paras. 2847, 2849, 3095.
[1074] *See* Exhibit P1258, pp. 6, 7. Notably, the Trial Chamber found that in private meetings, Karadžić was open and "candid about [...] their territorial objectives even at the cost of lives and the displacement of thousands of people." *See* Trial Judgement, para. 2900.
[1075] Trial Judgement, paras. 2746, 2752, 2757, 2841.
[1076] Trial Judgement, paras. 2847, 2849, 3094, 3095.
[1077] Trial Judgement, paras. 2847, 2849, 3095.
[1078] Trial Judgement, paras. 3439-3447.
[1079] Trial Judgement, para. 3446, *referring to* Karadžić Final Trial Brief, paras. 966-972, 979.

of strategic importance to Karadžić and the Bosnian Serb leadership and formed part of Bosnian Serb claimed territory.[1080]

415. Karadžić submits that the Trial Chamber erred in concluding that there was a common plan in light of the systematic and organized manner in which the crimes were committed in the Overarching JCE Municipalities.[1081] He contends that displacement occurred in a minority of municipalities which is incompatible with the Trial Chamber's finding that the displacement of Bosnian Muslims and Bosnian Croats was systematic and organized.[1082] However, he recalls, the Trial Chamber dismissed his argument that the majority of municipalities were free from any apparent implementation of the plan on the basis that the "twenty municipalities in which these crimes were committed [...] were of strategic importance."[1083] Karadžić argues that the Trial Chamber erred in considering that all 20 municipalities were of strategic importance to him and the Bosnian Serb leadership since it had only found that three of the municipalities were of such importance.[1084] According to Karadžić, a reasonable trier of fact could not have discarded the reasonable inference that since non-Serbs were not expelled from the majority of the municipalities across Bosnia and Herzegovina, there was no policy to create a homogeneous entity from which non-Serbs would be expelled.[1085]

416. The Prosecution responds that the Trial Chamber reasonably found that the Serb forces as well as the Bosnian Serb Political and Governmental Organs engaged in a systematic and organized pattern of crimes, which resulted in the removal of the Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities.[1086] In particular, it contends that the Trial Chamber's conclusion that the Overarching JCE Municipalities were of strategic importance is reflected in various findings in the Trial Judgement and supported by the evidence on the record.[1087]

417. Karadžić replies that the Prosecution fails to refer to findings showing that all the Overarching JCE Municipalities were of strategic importance.[1088]

[1080] Trial Judgement, para. 3446. The Trial Chamber also concluded that even if there were no crimes committed in other municipalities not covered by the Indictment, it would not impact the Trial Chamber's finding that the crimes were committed in a systematic and organized manner in the Overarching JCE Municipalities. *See* Trial Judgement, para. 3446.
[1081] Karadžić Appeal Brief, para. 518.
[1082] Karadžić Appeal Brief, paras. 512, 513.
[1083] Karadžić Appeal Brief, para. 514.
[1084] Karadžić Appeal Brief, paras. 514-516.
[1085] Karadžić Appeal Brief, paras. 512, 518.
[1086] Prosecution Response Brief, para. 287. *See also* Prosecution Response Brief, paras. 255-260, 288, 289.
[1087] Prosecution Response Brief, para. 289.
[1088] Karadžić Reply Brief, paras. 159, 160. *See also* Karadžić Reply Brief, paras. 161, 162.

418. Contrary to Karadžić's contention, a review of the Trial Judgement reflects that the Trial Chamber found that most of the Overarching JCE Municipalities were strategically important.[1089]

419. In any case, the Appeals Chamber finds that the fact that crimes might not have occurred in municipalities other than the Overarching JCE Municipalities does not show an error in the Trial Chamber's conclusion with respect to the manner in which these crimes were committed in the Overarching JCE Municipalities. The Appeals Chamber recalls that the Trial Chamber based its finding that the relevant crimes were committed in a systematic manner on the considerations that crimes were committed throughout the Overarching JCE Municipalities in a similar and organized manner, in the context of planned and co-ordinated operations, in a short period of time, and resulted in "drastic changes to the ethnic composition of the towns".[1090] In particular, it observed that in many cases following the attacks or take-over by Serb forces, Bosnian Muslims and Bosnian Croats were given a limited amount of time to leave their homes before being transported out of the Overarching JCE Municipalities, while in other cases they were first unlawfully detained and later expelled.[1091] In addition, the Trial Chamber considered that, in a similar pattern, Serb forces and Bosnian Serb Political and Governmental Organs were involved in the systematic forced movement of Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities through the creation of an environment of fear caused by the various crimes committed against non-Serbs or through physical force, threat of force, and coercion.[1092]

420. Based on the similar manner and the short time in which crimes were committed, the Trial Chamber concluded that they were the result "of well planned and coordinated operations which involved the military take-over of Municipalities and the expulsion of non-Serbs".[1093] In light of these findings, the Appeals Chamber finds that Karadžić has failed to show that it was unreasonable for the Trial Chamber to find that there was an organized and systematic pattern of crimes committed by Serb forces and Bosnian Serb Political and Governmental Organs against Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities.

[1089] With the exception of Sokolac, Bosanski Novi, and Novo Sarajevo, the Trial Chamber discussed the strategic importance of the remaining Overarching JCE Municipalities. *See* Trial Judgement, paras. 599, 600 (concerning Bijeljina), 1099 (concerning Vlasenica), 2067 (concerning Hadžići), 2120 (concerning Ilidža), 2169, 2170 (concerning Novi Grad), 2292, 2293, 2295 (concerning Pale), 2356, 2357 (concerning Vogošća), 2800, 2802 (concerning Brčko, Foča, Prijedor and Sanski Most), 2806 (concerning Vlasenica and Bijeljina), 2807 (concerning Brčko), 2816 (concerning Bratunac, Rogatica, Srebrenica, Višegrad, Vlasenica and Zvornik), 2892 (concerning Bratunac, Rogatica, Prijedor, Vlasenica, Ključ, and Sanski Most).
[1090] Trial Judgement, paras. 3441-3445.
[1091] Trial Judgement, para. 3442.
[1092] Trial Judgement, para. 3443.
[1093] Trial Judgement, paras. 3444, 3445.

(d) Conclusion

421. Based on the foregoing, the Appeals Chamber dismisses Ground 28 of Karadžić's appeal.

2. Alleged Error Concerning Liability for Crimes in the Overarching JCE Municipalities under the Third Form of Joint Criminal Enterprise (Ground 29)

422. The Trial Chamber found that Karadžić was a member of and participated in the Overarching JCE, the common purpose of which was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in the Overarching JCE Municipalities through the commission of deportation, inhumane acts (forcible transfer), and persecution through forcible transfer, deportation, unlawful detention, and the imposition and maintenance of restrictive and discriminatory measures.[1094] The Trial Chamber found that Karadžić shared the intent to commit the crimes falling within the scope of the common plan with other members of the Overarching JCE and that, through his position in the Bosnian Serb leadership and "involvement throughout the Municipalities", he contributed to the execution of the common plan from October 1991 until at least 30 November 1995.[1095] The Trial Chamber was not persuaded that there was sufficient evidence to demonstrate that other acts of persecution as charged in Count 3 of the Indictment or the crimes of extermination and murder charged in Counts 4, 5, and 6 of the Indictment that related to the Overarching JCE were included in the common plan or were intended by Karadžić.[1096]

423. Based on the nature of the common plan and the manner in which it was carried out, the Trial Chamber found that Karadžić could foresee that Serb forces might commit "violent and property-related crimes" against non-Serbs during and after the take-overs in the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1097] The Trial Chamber also found that the evidence of Karadžić's knowledge of violent criminal activity in the Overarching JCE Municipalities, including killings of non-Serb civilians and the forced displacement of thousands of Bosnian Muslims through the policy of harassment and discrimination by Bosnian Serbs, as well as his awareness of the violent criminal behaviour of armed groups, which resulted in rapes, thefts, killings, looting, and inhumane conditions in many detention centers, demonstrated that he was well aware of the nature of the environment in which the forcible displacement of non-Serbs occurred

[1094] Trial Judgement, paras. 1, 3462-3466, 3512.
[1095] Trial Judgement, paras. 3452, 3462, 3463, 3465. Specifically, the Trial Chamber found that Karadžić contributed to the commission of these crimes by promoting an ideology of ethnic separation, using rhetoric that amplified historical ethnic grievances and promoting propaganda to that effect, establishing the institutions used to carry out the objective of the common plan, and creating a climate of impunity for criminal acts committed against non-Serbs. *See* Trial Judgement, para. 3514.
[1096] Trial Judgement, para. 3466. *See also* Trial Judgement, para. 5. While such crimes were shown to have resulted from the campaign to forcibly remove the non-Serb population from the Overarching JCE Municipalities, the Trial Chamber considered that the evidence allowed for the reasonable inference that Karadžić did not intend them to be committed but did not care enough to stop pursuing the common plan. *See* Trial Judgement, para. 3466.
[1097] Trial Judgement, para. 3515.

and that paramilitaries, volunteers, and other irregular armed groups were being used to further the common purpose.[1098]

424. The Trial Chamber considered that Karadžić's "continued participation" in the Overarching JCE demonstrated that he acted in furtherance of the common plan "with the awareness of the possibility" that the other crimes might be committed either by members of the Overarching JCE or Serb forces who were used by him or other members to carry out the common plan, and that he "willingly took that risk".[1099] Such other crimes consisted of persecution through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, the establishment and perpetuation of inhumane living conditions in detention facilities as cruel or inhumane treatment, killings, forced labour at the frontline, the use of non-Serbs as human shields, the appropriation or plunder of property, the wanton destruction of private property including cultural and sacred sites, killings on a large scale, and extermination.[1100] On this basis, the Trial Chamber convicted Karadžić of crimes listed in Counts 3 to 6 of the Indictment under the third form of joint criminal enterprise.[1101]

425. Karadžić submits that there are cogent reasons for the Appeals Chamber to depart from the controlling *mens rea* standard upon which the Trial Chamber relied in convicting him of persecution, murder, and extermination under the third form of joint criminal enterprise.[1102] Specifically, he argues that the Appeals Chamber should depart from the *mens rea* standard of "awareness of the *possibility* that [such] crimes *might* be committed", given the recent reversal by the Supreme Court of the United Kingdom of the analogous standard in the case of *R v. Jogee*; *Ruddock v. The Queen* ("*Jogee*")[1103] and find that the correct *mens rea* standard for liability under the third form of joint criminal enterprise is "knowledge of the probability or substantial likelihood" that the crimes will be committed.[1104] Karadžić maintains that review of the *mens rea* standard applied by the ICTY is warranted given the finding of the Supreme Court of the United Kingdom that the standard that had been applied in England and Wales was erroneous and that the correct *mens rea* standard is the same as that applied to aiding, abetting, and instigating.[1105] He contends

[1098] Trial Judgement, paras. 3516-3518.
[1099] Trial Judgement, para. 3522.
[1100] Trial Judgement, para. 3521.
[1101] Trial Judgement, paras. 3522-3524, 6002-6005.
[1102] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 522-548.
[1103] *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7.
[1104] Karadžić Appeal Brief, paras. 523-548. In particular, Karadžić submits that his conviction under the third form of joint criminal enterprise erroneously conflates foresight with authorisation, which is what the Supreme Court of the United Kingdom described as the "wrong turn" in common law case law. He submits that *Jogee* corrected this error by setting the required *mens rea* as knowledge of the "probability or substantial likelihood" that the crimes will be committed. *See* Karadžić Appeal Brief, paras. 523, 530-532, 534, 535.
[1105] Karadžić Appeal Brief, paras. 523, 524, 529, 539.

that because the English law of complicity was considered authoritative in post-World War II cases and the ICTY Appeals Chamber relied upon it when defining the standard for liability under the third form of joint criminal enterprise in *Tadić*, in the wake of *Jogee* this standard is no longer "underpinned" by national law and the Appeals Chamber should depart from it.[1106] In addition, Karadžić contends that revision of the existing ICTY standard for liability under the third form of joint criminal enterprise is merited because it is "the most controversial" aspect of the ICTY's legal legacy, which has not been followed by the ECCC, ICC, SCSL, or STL and has been criticized in dissenting and extrajudicial opinions by ICTY Judges as well as in academic literature.[1107] He argues that his convictions related to the Overarching JCE Municipalities under the third form of joint criminal enterprise for Counts 3 to 6 of the Indictment should therefore be reversed.[1108]

426. The Prosecution responds that Karadžić fails to demonstrate cogent reasons for departing from well-settled appellate jurisprudence establishing and consistently reaffirming the standard required for the third form of joint criminal enterprise liability.[1109] It also asserts that Karadžić "fundamentally misconstrues" the relevance of English case law to the development of ICTY jurisprudence on the third form of joint criminal enterprise and ignores appellate case law distinguishing joint criminal enterprise liability from "aiding and abetting".[1110] In addition, the Prosecution argues that the change in English law under *Jogee*, which is neither binding on the Mechanism nor of persuasive authority, confirms the lack of consistency on common purpose liability across major domestic legal systems, particularly given that other common law jurisdictions have declined to follow *Jogee*.[1111] It also contends that the ECCC, SCSL, and STL decisions, academic opinions, and differences in the common purpose provisions of the ICC Statute relied upon by Karadžić are not binding on the Mechanism and have been found insufficient to justify a departure from ICTY jurisprudence.[1112] The Prosecution also submits that Karadžić seeks a reversal of his convictions without showing that the findings in this case would not satisfy a probability or substantial likelihood standard.[1113] In its submission, the Trial Chamber's findings

[1106] Karadžić Appeal Brief, paras. 524, 527-531, 540-548. Karadžić further argues that statutory versions of the third form of joint criminal enterprise liability in various common law jurisdictions including Canada, New Zealand, and parts of Australia, also require knowledge that the crime was "a *probable* consequence" of carrying out the common purpose. *See* Karadžić Appeal Brief, para. 547.
[1107] Karadžić Appeal Brief, paras. 541, 542, 546-548.
[1108] Karadžić Appeal Brief, p. 147. para. 548.
[1109] Prosecution Response Brief, paras. 290, 291, 293-297.
[1110] Prosecution Response Brief, paras. 291, 293, 296-299.
[1111] Prosecution Response Brief, paras. 293, 295, *referring to, inter alia*, the judgement of the High Court of Australia in *Miller v. The Queen*; *Smith v. The Queen*; *Presley v. The Director of Public Prosecutions* [2016] HCA 30 and of the Hong Kong Court of Final Appeal in *HKSAR v. Chan Kam-Shing* [2016] HKCFA 87.
[1112] Prosecution Response Brief, para. 298. The Prosecution also submits that the dissenting views of two ICTY judges to which Karadžić refers in his appeal brief pertain to the application of the third form of joint criminal enterprise to the evidence and not the standard itself. *See* Prosecution Response Brief, para. 299.
[1113] Prosecution Response Brief, para. 292.

show not only that the higher standard would be met, but also that Karadžić shared the intent for the crimes he was convicted of under the third form of joint criminal enterprise.[1114]

427. Karadžić replies that the Prosecution ignores that the ICTY principles on the third form of joint criminal enterprise "are grounded in English law", particularly the concepts of joint enterprise, furtherance of a common criminal design, and the foreseeability standard.[1115] According to Karadžić, in developing the applicable principles, the ICTY Appeals Chamber expressly relied on the leading English case of *R v. Powell*,[1116] which was reversed by *Jogee*.[1117] He further submits that the reluctance of other international tribunals to apply the principles related to the third form of joint criminal enterprise provides additional reasons to re-examine its scope in light of *Jogee*.[1118]

428. On 25 September 2017, the Appeals Chamber accepted *amicus curiae* observations on the relevance of *Jogee* to applicable jurisprudence on the *mens rea* of the third form of joint criminal enterprise.[1119] On 25 October 2017, the Prosecution filed its response to the *amicus curiae* observations.[1120] Karadžić filed no response.[1121]

429. The *amici* submit that, although not binding, *Jogee* is persuasive authority as it highlights that the ICTY Appeals Chamber in *Tadić* overlooked the possibility that foresight should be treated as an evidential factor rather than a legal element.[1122] This distinction led the Supreme Court of the United Kingdom to correct a misstatement of law that had permeated the common law for over thirty years in treating foresight as a sufficient legal requirement of *mens rea* when assessing an accused's responsibility for extended crimes perpetrated outside the execution of a common criminal purpose.[1123] The Supreme Court of the United Kingdom found that, instead, foresight should be treated as evidence of intent and that, in truth, the English common law never recognized an "extended" common purpose doctrine.[1124] In the *amici*'s submission, the fact that the ICTY Appeals Chamber in *Tadić* appears not to have recognized this distinction suggests that its formulation of *mens rea* elements was pronounced *per incuriam* or otherwise on the basis of an incorrect legal principle as the consideration of foreseeability as a legal element is neither evident

[1114] Prosecution Response Brief, para. 292, *referring to* Prosecution Appeal Brief, paras. 21-24.
[1115] Karadžić Reply Brief, para. 163.
[1116] *R v. Powell and Daniels*; *R v. English* [1999] 1 AC 1.
[1117] Karadžić Reply Brief, para. 164, *referring to* the Separate Opinion of Judge Shahabuddeen in *Krajišnik* Appeal Judgement, para. 33.
[1118] Karadžić Reply Brief, para. 165.
[1119] Decision on a Request for Leave to Make Submissions as *Amicus Curiae*, 25 September 2017, p. 2.
[1120] Prosecution Response to *Amicus Curiae* Submissions of 24 August 2017, 25 October 2017.
[1121] *See* T. 10 October 2017 p. 10 (indicating that Karadžić did not wish to file a response).
[1122] Request for Leave to Make Submissions as *Amicus Curiae*, 24 August 2017, Annex ("*Amicus Curiae* Submissions on *Jogee*"), paras. 2-5, 15-29, 31-35.
[1123] *Amicus Curiae* Submissions on *Jogee*, paras. 8, 12-14, 33.
[1124] *Amicus Curiae* Submissions on *Jogee*, paras. 12, 14.

in, nor evidenced by, the sources of customary international law upon which it relied or its analysis of these sources.[1125] This "inadvertent shortcoming" in *Tadić* gives rise to compelling reasons to review it and determine whether foreseeability exists as a legal element distinguishing the third category of common purpose liability in customary international law, or alternatively, whether foresight should be treated only as a factual consideration relevant to proof of intent, as was the case in *Jogee*.[1126] In their submission, although common law and customary international law doctrines of joint liability are not the same, this does not detract from the significance of the distinction recognized in *Jogee*, which points to errors of history and logic relevant to both jurisdictions.[1127]

430. The *amici* also submit that Karadžić's submission that the principles of the third form of joint criminal enterprise are grounded in English law is an overstatement but that this, however, does not detract from the importance of *Jogee* to the law of the *ad hoc* tribunals.[1128] *Jogee*'s relevance lies in its assessment of underlying principles of complicity and accessorial liability and the similar characteristics of the cases it considered as the sources of customary international law cited in support of *Tadić*'s formulation of the *mens rea* for the third form of joint criminal enterprise.[1129] In their submission, it is the reliance in *Tadić* on domestic jurisprudence to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems that now gives impetus to revisit the distinction between the legal element and factual consideration recognized in *Jogee* and overlooked in *Tadić*.[1130] Lastly, the *amici* add that following *Jogee* would not result in convictions being overturned as evidence relied upon to infer foresight may likewise be indicative of the requisite intent.[1131]

431. The Prosecution responds that the Appeals Chamber should either give the *Amicus Curiae* Submissions on *Jogee* no weight or exercise its discretion to reject them.[1132] In particular, it submits

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[1125] *Amicus Curiae* Submissions on *Jogee*, paras. 34, 35. The *amici* observe that since there is no support for treating foreseeability as a legal element rather than factual consideration in the discussion in *Tadić* of relevant authorities, the *Tadić* approach represents unnecessary judicial creativity and a legal development that could not have been predicted, which as such, contravenes the principle of *nullum crimen sine lege*. *See Amicus Curiae* Submissions on *Jogee*, para. 35.
[1126] *Amicus Curiae* Submissions on *Jogee*, paras. 3, 8, 38.
[1127] *Amicus Curiae* Submissions on *Jogee*, para. 6. In particular, the *amici* observe that convicting an accused on the basis of his intent to commit a crime within the scope of a common purpose plus the foreseeability of an extended crime creates a lower subjective threshold applicable to the accused for the extended crime than to the principal perpetrator of the extended crime. *See Amicus Curiae* Submissions on *Jogee*, para. 35.
[1128] *Amicus Curiae* Submissions on *Jogee*, para. 30.
[1129] *Amicus Curiae* Submissions on *Jogee*, para. 7.
[1130] *Amicus Curiae* Submissions on *Jogee*, para. 31.
[1131] *Amicus Curiae* Submissions on *Jogee*, para. 37.
[1132] Prosecution Response to *Amicus Curiae* Submissions of 24 August 2017, 25 October 2017 ("Prosecution Response to *Amicus Curiae* Submissions"), paras. 1, 9-11, *referring to, inter alia*, Information Concerning the Submission of *Amicus Curiae* Briefs, Doc. No. IT/122/Rev.1, 16 February 2015, para. 9 (b) (suggesting that this provision in the ICTY

that the brief provides no cogent reasons to depart from well-established jurisprudence, fails to show that the *Tadić* Appeal Judgement, in which the relevant *mens rea* standard was first articulated, was wrongly decided, and argues that the parallels sought to be drawn between the third form of joint criminal enterprise and English accessorial liability are inapt as these concepts address different types of liability with different legal elements operating within different legal systems.[1133] The Prosecution also argues that the *Amicus Curiae* Submissions on *Jogee* fail to show that the ICTY Appeals Chamber misinterpreted the relevance of foresight in the cases it relied upon and the discussion of a handful of the cases considered in *Tadić* – based only on the extracts of those cases as reproduced in the *Tadić* Appeal Judgement – does not show that the *mens rea* of the third form of joint criminal enterprise was pronounced *per incuriam* or constitute a cogent reason to depart from established jurisprudence.[1134]

432. In examining whether liability for the crimes falling outside the scope of the Overarching JCE could be imposed on Karadžić pursuant to the third form of joint criminal enterprise liability, the Trial Chamber noted that it had to determine whether it was reasonably foreseeable to him that any of these crimes "might be committed" if he acted in furtherance of the common plan and that "he willingly took that risk".[1135] In this respect, the Trial Chamber recalled that the assessment of what was reasonably foreseeable to Karadžić had to be made on the basis of his individual knowledge and that it had to be established that "the possibility of any of these crimes being committed was sufficiently substantial as to be foreseeable to [him]".[1136]

433. The Appeals Chamber notes that this statement of the relevant applicable law is consistent with settled appellate case law of the ICTY.[1137] For liability under the third form of joint criminal enterprise, it is required that an accused had the intent to commit the crimes that form part of the common purpose of the joint criminal enterprise and to participate in a common plan aimed at their commission, as well as that it was foreseeable to him or her that a crime falling outside the common purpose might be perpetrated by any other member of the joint criminal enterprise, or one or more of the persons used by the accused or other members of the joint criminal enterprise to further the common purpose, and that the accused willingly took the risk that the crime might occur by joining

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is persuasive authority for the proposition that the Appeals Chamber retains the authority to "reject" the *amici* submissions).

[1133] Prosecution Response to *Amicus Curiae* Submissions, 25 October 2017, para. 2.

[1134] Prosecution Response to *Amicus Curiae* Submissions, 25 October 2017, paras. 2, 6.

[1135] Trial Judgement, para. 3513.

[1136] Trial Judgement, para. 3513.

[1137] *See, e.g., Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 ("*Karadžić* Decision on JCE III Foreseeability"), paras. 15, 16, 18.

or continuing to participate in the enterprise.[1138] The Appeals Chamber recalls that the ICTY Appeals Chamber has consistently declined to apply a standard requiring foreseeability that the crime falling outside the common criminal purpose would "probably" be committed for liability under the third form of joint criminal enterprise to attach but recognized instead that the possibility that a crime could be committed must be sufficiently substantial.[1139] The Appeals Chamber also reiterates that, although not bound by decisions of the ICTY and the ICTR Appeals Chambers, in the interests of legal certainty, it should follow such previous decisions and depart from them only for cogent reasons in the interests of justice.[1140] This would be the case where the previous decision was decided on the basis of a wrong legal principle or was given *per incuriam*, that is, it was wrongly decided, usually because the judges were not well-informed about the applicable law.[1141]

434. The Appeals Chamber observes that it is not bound by the findings of other courts – domestic, international, or hybrid – or by the extrajudicial writings, separate or dissenting opinions of its Judges, or by views expressed in academic literature.[1142] On review of the judgement in *Jogee*, the Appeals Chamber does not find any cogent reason for departing from the Appeals Chamber's well-established jurisprudence. The Supreme Court of the United Kingdom and Judicial Committee of the Privy Council in *Jogee* changed the *mens rea* applicable in England and Wales and the jurisdictions bound by the jurisprudence of the Privy Council for accessorial liability resulting from participation in a joint enterprise.[1143] However, the form of individual criminal responsibility under the third type of joint criminal enterprise is "commission", resulting in liability

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[1138] *Stanišić and Župljanin* Appeal Judgement, para. 958; *Karemera and Ngirumpatse* Appeal Judgement, para. 634; *Šainović et al.* Appeal Judgement, para. 1557; *Ntakirutimana* Appeal Judgement, para. 467.

[1139] *Prlić et al.* Appeal Judgement, para. 3022; *Popović et al.* Appeal Judgement, para. 1432; *Šainović et al.* Appeal Judgement, paras. 1061, 1272, 1525, 1557, 1558; *Karadžić* Decision on JCE III Foreseeability, para. 18. The ICTR Appeals Chamber has held that the ICTY jurisprudence on the third form of joint criminal enterprise should be applied to the interpretation of the principles on individual criminal responsibility under the ICTR Statute. *See Ntakirutimana* Appeal Judgement, para. 468. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 634.

[1140] *See supra* paras. 13, 119.

[1141] *Stanišić and Župljanin* Appeal Judgement, para. 968.

[1142] *Stanišić and Župljanin* Appeal Judgement, paras. 598, 974, 975; *Popović et al.* Appeal Judgement, paras. 1437-1443, 1674; *Đorđević* Appeal Judgement, paras. 33, 38, 39, 50-53, 83; *Čelebići* Appeal Judgement, para. 24.

[1143] This joint case involved two separate appellants who had been convicted of murder on the basis of "parasitic accessory liability", after a co-defendant had killed the victim. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3. In the case of Jogee, he had been vocally encouraging the principal who subsequently stabbed the victim to death. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, para. 102. The judge directed the jury that Jogee was guilty of murder if he took part in the attack by encouraging the principal and realised that it was possible that his co-defendant might use the knife with intent to cause serious harm. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3, 104. In the case of Ruddock, liability was based on his participation in a robbery during which the principal cut the victim's throat. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 108, 109. The judge directed the jury that the prosecution had to prove a common intention to commit the robbery which included a situation in which Ruddock knew that there was a possibility that the principal might intend to kill the victim. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3, 114. The Supreme Court unanimously set the appellants' convictions aside and corrected the common law on "parasitic accessory liability" by holding that the proper mental element for establishing such liability is intent to assist or encourage and that foresight is simply evidence of such intent. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 79, 83, 87, 89, 90, 98, 99.

as a perpetrator, not as an accessory.[1144] In this sense, *Jogee* is not directly on point. The Appeals Chamber also notes that, in considering whether to find Karadžić liable, *inter alia*, as an accessory for the crimes in the Overarching JCE Municipalities, the Trial Chamber found that, on the basis of the evidence before it, the most accurate and appropriate characterisation of his liability was "commission" through joint criminal enterprise.[1145]

435. In addition, the Appeals Chamber does not find persuasive arguments that the shift in the law of England and Wales on this point warrants reconsideration and possible reversal of established appellate jurisprudence of the ICTY. Although the common law notion of liability due to participation in a joint enterprise may have been influential in the development of ICTY case law, Karadžić's argument that the relevant principles in ICTY jurisprudence were derived from English law is not accurate. The ICTY Appeals Chamber in the *Tadić* case extensively examined a series of post-World War II cases from various domestic jurisdictions concerning war crimes and concluded that the relevant *actus reus* and *mens rea* for liability under the three forms of joint criminal enterprise were firmly established in customary international law.[1146] With regard to the *mens rea* standard for the third form of joint criminal enterprise, it found that customary international law required that: (i) the accused could foresee that the crime not agreed upon in the common plan "might be perpetrated" by one or other members of the group; and (ii) the accused willingly took that risk.[1147] It also clarified that, what was required was intent to pursue the common plan in addition to "foresight that those crimes outside the criminal common purpose were likely to be committed".[1148] Thus, while the ICTY Appeals Chamber in *Tadić* considered domestic case law in determining customary international law,[1149] contrary to Karadžić's claim, it found that the relevant principles were derived from customary international law, not the law of England and Wales.[1150] A shift in the law of England and Wales and the jurisdictions bound by the Privy Council on this point therefore does not *per se* warrant the reversal of established appellate jurisprudence.

436. The ICTY Appeals Chamber in *Tadić* also assessed whether domestic legislation or case law could be relied upon as a source of international principles or rules under the doctrine of general principles of law recognized by the major legal systems of the world.[1151] Its survey led it to conclude that, although the common purpose doctrine "was rooted in the national law of many

[1144] *Šainović et al.* Appeal Judgement, para. 1260; *Krajišnik* Appeal Judgement, para. 662; *Kvočka et al.* Appeal Judgement, paras. 79, 80; *Vasiljević* Appeal Judgement, para. 102.
[1145] Trial Judgement, para. 3525.
[1146] *Tadić* Appeal Judgement, paras. 194-226.
[1147] *Tadić* Appeal Judgement, para. 228.
[1148] *Tadić* Appeal Judgement, para. 229.
[1149] *Tadić* Appeal Judgement, paras. 194-226.
[1150] *See also Tadić* Appeal Judgement, paras. 225, 226.
[1151] *Tadić* Appeal Judgement, para. 225.

States", major domestic jurisdictions did not adopt a common approach with regard to the third form of joint criminal enterprise and that therefore "national legislation and case law cannot be relied upon as a source of international principles or rules" in this context.[1152] The shift in the law in *Jogee*, which has not been followed in other common law jurisdictions,[1153] confirms rather than undermines the conclusion in *Tadić* that different approaches at a domestic level reflect that domestic case law, in such circumstances, cannot be relied upon as a source of international principles.[1154] The Appeals Chamber finds that the shift in *Jogee* does not provide a sufficient basis to revisit *Tadić* or the relevant *mens rea* standard as applied in established case law.

437. In light of the foregoing, the Appeals Chamber finds that the submissions of Karadžić and the *amici* fail to show that the shift in the law in *Jogee* constitutes a cogent reason warranting departure from the consistent jurisprudence on the *mens rea* element of the third category of joint criminal enterprise. Consequently, the Appeals Chamber dismisses Ground 29 of Karadžić's appeal.

[1152] *Tadić* Appeal Judgement, para. 225.

[1153] *See HKSAR v. Chan Kam-Shing* [2016] HKCFA 87, paras. 32, 33, 40, 58, 60, 62, 71, 98; *Miller v. The Queen, Smith v. The Queen, Presley v. The Director of Public Prosecutions* [2016] HCA 30, para. 43.

[1154] *Tadić* Appeal Judgement, para. 225 ("in the area under discussion [concerning the third form of joint criminal enterprise], national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above survey shows that this is not the case.").

3. Alleged Error in Convicting Karadžić of Conduct Not Charged in the Indictment (Ground 30)

438. The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of persecution as a crime against humanity by forcible transfer, based on the forcible displacement of a large number of Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities from their homes to other locations, both within the national boundaries of Bosnia and Herzegovina, as well as to Serbia, Croatia, or Montenegro.[1155] In this regard, the Trial Chamber found that, in many cases, Bosnian Muslims and Bosnian Croats had been forced to leave following the attack or take-over of their villages or towns by Serb forces, and that, in some cases, Bosnian Muslims and Bosnian Croats had been arrested and detained in detention facilities before being transported out of the Overarching JCE Municipalities.[1156] The Trial Chamber considered that, while the transfers of some detainees out of detention facilities were described as "exchanges", they predominantly concerned unlawfully detained civilians and therefore it found that they amounted to forced displacement.[1157]

439. Karadžić submits that the Trial Chamber erred by convicting him of persecution by forcible transfer of detained persons who were the subject of prisoner exchanges as such conduct was not charged in the Indictment, which only charged him with persecution by forcible transfer or deportation of Bosnian Muslims and Bosnian Croats from their homes.[1158] He contends that the Appeals Chamber should vacate his conviction for persecution that was based on prisoner exchanges and reduce his sentence accordingly.[1159]

440. The Prosecution responds that Karadžić was not convicted of an uncharged crime as the interim detention of some individuals before their displacement from the Overarching JCE Municipalities did not negate that they were originally removed from their homes, as charged, and that, as demonstrated by the Trial Chamber's findings, interim detention was part of the process of displacing people from their homes.[1160]

[1155] Trial Judgement, paras. 2465-2481, 2519-2521, 6002.
[1156] Trial Judgement, para. 2470.
[1157] Trial Judgement, para. 2470.
[1158] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 549, 550; Karadžić Reply Brief, paras. 166-168. Karadžić also submits that "[t]he [I]ndictment distinguished and separated crimes committed against persons in their homes (Schedule A) and crimes committed against persons in detention (Schedule B) [and that t]herefore, paragraph 60(f), with its language 'from their homes' did not include persons in detention". *See* Karadžić Appeal Brief, para. 551; Karadžić Reply Brief, para. 168.
[1159] Karadžić Appeal Brief, para. 552.
[1160] Prosecution Response Brief, paras. 300-303.

441. The Appeals Chamber recalls that a trial chamber can only convict an accused of crimes that are charged in the indictment.[1161] The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable him or her to prepare a meaningful defence.[1162] An indictment need not have the degree of specificity of the evidence underpinning it; the degree of specificity required depends on the nature and scale of the alleged criminal conduct, including the proximity of the accused to the relevant events.[1163]

442. The Appeals Chamber observes that the Indictment charged Karadžić with "forcible transfer or deportation of Bosnian Muslims and Bosnian Croats from their homes within the Municipalities and from Srebrenica."[1164] Although it did not specify that the victims of forcible transfer or deportation included persons who had been detained and/or exchanged, the Indictment nonetheless charged that persecution as a crime against humanity was committed against Bosnian Muslims and Bosnian Croats in 21 geographical areas of Bosnia and Herzegovina claimed as Bosnian Serb territory over a period of more than three years.[1165] The Indictment further provided that, during and after the attacks and take-over of towns and villages in the Overarching JCE Municipalities and Srebrenica, Serb forces and Bosnian Serb political organs carried out persecutory acts against Bosnian Muslims and Bosnian Croats, including arbitrary arrests and detention, and established and controlled detention facilities where Bosnian Muslims and Bosnian Croats were detained.[1166] In this respect, the Indictment specified that these acts caused some Bosnian Muslims and Bosnian Croats to flee the municipalities in fear while others were physically driven out.[1167] Considering the nature of the charge, the sheer scale of the alleged crimes, and Karadžić's high-ranking position and alleged responsibility as a member of a joint criminal enterprise sharing the intent to commit such persecutory acts, the Appeals Chamber finds that the interim detention of some victims of forcible transfer before their expulsion from the Overarching JCE Municipalities was not a material fact that had to be pleaded in the Indictment.[1168]

[1161] *Ngirabatware* Appeal Judgement, para. 116; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Kupreškić et al.* Appeal Judgement, para. 113.
[1162] *Ngirabatware* Appeal Judgement, para. 32; *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al.* Appeal Judgement, paras. 213, 225, 262.
[1163] *Ngirabatware* Appeal Judgement, para. 32; *Šainović et al.* Appeal Judgement, paras. 225, 233; *Kvočka et al.* Appeal Judgement, para. 65; *Rutaganda* Appeal Judgement, para. 302.
[1164] Indictment, para. 60(f).
[1165] Indictment, paras. 48, 51, 52.
[1166] Indictment, paras. 52-54.
[1167] Indictment, para. 55.
[1168] The Appeals Chamber notes that, contrary to Karadžić's submissions, the Indictment did not make an overall distinction between crimes committed against persons in their homes and crimes committed against persons in detention. This distinction was only made with regard to killing incidents listed in Schedules A and B of the Indictment. *See* Indictment, RP. 26298 ("Schedule A, Killings Not Related to Detention Facilities"), 26294 ("Schedule B, Killings Related to Detention Facilities").

443. In any event, the Appeals Chamber is satisfied that, well in advance of the commencement of the trial, the Prosecution gave Karadžić notice of its allegation that the forcibly removed persons referred to in the Indictment included persons held in detention facilities or persons who were "exchanged". The Prosecution Pre-Trial Brief specified that the Bosnian Serb government had organized the expulsion of non-Serb civilians from Serb-claimed territories at the highest level of both the military and civilian structures, *inter alia*, by establishing a Central Exchange Commission that operated as a vehicle for the removals.[1169] The Prosecution's list of witnesses, which included a summary of anticipated evidence, explicitly provided that Prosecution witnesses would testify that civilians were arrested, transferred to detention centers, and later "exchanged" or transferred outside Serb claimed territories.[1170]

444. Furthermore, when opening its case, the Prosecution explicitly stated that:

> [witnesses] will describe [...] how their municipalities were forcibly taken over by Serb forces [...] how they were arrested or rounded up with other non-Serbs and sent to camps [...]; how they were transferred from camp to camp in the network of detention facilities and camps that spanned the municipalities; how they were eventually exchanged, a euphemism for their expulsion from Bosnian Serb-controlled territory after signing documents relinquishing their property to the Bosnian Serb State.[1171]

The Prosecution also noted that its case was that "the establishment of the exchange system [...] completed and perfected the process of removing [Bosnian Muslim and Bosnian Croat civilians] from the territories and ethnic purification".[1172]

445. Based on the foregoing, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred by convicting him of conduct that was not charged in the Indictment. Therefore, the Appeals Chamber dismisses Ground 30 of Karadžić's appeal.

[1169] Prosecution Rule 65 *ter* Submissions, Appendix I, Prosecution's Final Pre-Trial Brief (public with partly confidential appendices), paras. 94-97, 114, 115, 144-147; Prosecution Rule 65 *ter* Submissions Attachment Detailing Events in the Municipalities (confidential), [REDACTED].
[1170] Prosecution Rule 65 *ter* Submissions, Appendix II, Witness List (confidential), [REDACTED].
[1171] T. 27 October 2009 pp. 523, 524.
[1172] T. 27 October 2009 pp. 581, 582.

4. Alleged Errors Concerning Untested Evidence and Adjudicated Facts (Ground 31)

446. The Trial Chamber concluded that Karadžić significantly contributed to the furtherance of the common purpose of the Overarching JCE and shared the intent to expel Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities.[1173] In the context of Karadžić's participation in the Overarching JCE, the Trial Chamber found that he was responsible for the crimes alleged as Scheduled Incidents in the Indictment[1174] related to the take-over of 20 municipalities located in Eastern Bosnia,[1175] the Autonomous Region of Krajina ("ARK"),[1176] and the Sarajevo area.[1177] As a result of these findings, the Trial Chamber found Karadžić responsible, pursuant to Article 7(1) of the ICTY Statute, for persecution, extermination, murder, deportation, and inhumane acts (forcible transfer) as crimes against humanity as well as murder as a violation of the laws or customs of war.[1178]

447. The Trial Chamber further found that Karadžić significantly contributed to the furtherance of the common purpose of the Srebrenica JCE and shared the intent to eliminate Bosnian Muslims in Srebrenica.[1179] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination and other inhumane acts (forcible transfer) as

[1173] Trial Judgement, paras. 3434-3524, 5996.
[1174] Trial Judgement, paras. 6002-6007.
[1175] Trial Judgement, paras. 596-1365. With respect to Eastern Bosnia, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Sokolac, Višegrad, Vlasenica, and Zvornik. *See* Trial Judgement, paras. 617-679 (with respect to the crimes committed in the municipality of Bijeljina), 733-791 (with respect to the crimes committed in the municipality of Bratunac), 799-833 (with respect to the crimes committed in the municipality of Brčko), 862-934 (with respect to the crimes committed in the municipality of Foča), 981-1040 (with respect to the crimes committed in the municipality of Rogatica), 1055-1074 (with respect to the crimes committed in the municipality of Sokolac), 1080-1093 (with respect to the crimes committed in the municipality of Višegrad), 1135-1222 (with respect to the crimes committed in the municipality of Vlasenica), 1254-1274, 1296-1365 (with respect to the crimes committed in the municipality of Zvornik).
[1176] Trial Judgement, paras. 1366-2061. With respect to the ARK, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Banja Luka, Bosanski Novi, Ključ, Prijedor, and Sanski Most. *See* Trial Judgement, paras. 1375-1430 (with respect to the crimes committed in the municipality of Banja Luka), 1451-1483 (with respect to the crimes committed in the municipality of Bosanski Novi), 1513-1568 (with respect to the crimes committed in the municipality of Ključ), 1617-1637, 1641-1657, 1664-1715, 1720-1735, 1739-1913 (with respect to the crimes committed in the municipality of Prijedor), 1952-1978, 1980-2035 (with respect to the crimes committed in the municipality of Sanski Most).
[1177] Trial Judgement, paras. 2062-2438. With respect to the Sarajevo Area, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća. *See* Trial Judgement, paras. 2095-2115 (with respect to the crimes committed in the municipality of Hadžići), 2136-2165 (with respect to the crimes committed in the municipality of Ilidža), 2189-2237 (with respect to the crimes committed in the municipality of Novi Grad), 2274-2288 (with respect to the crimes committed in the municipality of Novo Sarajevo), 2316-2352 (with respect to the crimes committed in the municipality of Pale), 2392-2438 (with respect to the crimes committed in the municipality of Vogošća).
[1178] Trial Judgement, paras. 3524, 5996, 6002-6007, 6022-6024, n. 20574.
[1179] Trial Judgement, paras. 5998, 6001-6007.

crimes against humanity and murder as a violation of the laws or customs of war for the crimes committed by Bosnian Serb forces in the execution of the Srebrenica JCE.[1180]

448. Karadžić submits that, in finding him responsible for the crimes related to 36 Scheduled Incidents that allegedly occurred in the context of the Overarching JCE and the Srebrenica JCE, the Trial Chamber violated his right to examine or have examined the evidence against him under Article 21(4) of the ICTY Statute.[1181] Specifically, he submits that, in reaching findings in support of these convictions, the Trial Chamber impermissibly relied solely or in a decisive manner on untested evidence in the form of adjudicated facts and/or evidence admitted pursuant to Rule 92 *bis* and *quater* of the ICTY Rules ("Rule 92 *bis* and *quater* evidence" or, separately, "Rule 92 *bis* evidence" and "Rule 92 *quater* evidence").[1182] The Appeals Chamber will consider these contentions in turn.

449. The Appeals Chamber recalls that under Article 21(4)(e) of the ICTY Statute an accused has the right to examine, or have examined, the witnesses against him. In relation to challenges to a trial chamber's reliance on evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules when the defendants did not have an opportunity to cross-examine the witness, the Appeals Chamber of the ICTY stated:

> [A] conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration".[1183]

The Appeals Chamber adopts this statement of the law.

(a) Alleged Errors Concerning Adjudicated Facts

450. Karadžić submits that the Trial Chamber erred in convicting him for Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 based solely or in a decisive manner upon adjudicated facts and for convicting him in relation to Scheduled Incidents A.7.1, A.7.2, A.10.5,

[1180] Trial Judgement, paras. 5998, 6002-6005. Although the Trial Chamber found that Karadžić could be convicted of murder as a crime against humanity, it observed that convictions for this offense and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574. The Trial Chamber did not hold Karadžić responsible under Article 7(1) of the ICTY Statute for the killings and related acts of persecution of the Srebrenica JCE which occurred prior to his agreement on 13 July 1995. Rather, it entered a conviction under Article 7(3) of the ICTY Statute for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war for these events. *See* Trial Judgement, paras. 5831, 5833, 5848, 5850, 5998, 6002-6005.
[1181] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 553-569; T. 23 April 2018 pp. 112, 113.
[1182] Karadžić Appeal Brief, paras. 553-569; T. 23 April 2018 pp. 112, 113.

A.10.7, A.10.8, A.12.1, A.12.2, B.15.1, C.15.1, C.20.6, C.22.3, C.23.1, C.27.4, D.20, and E.1.1 based solely or decisively on a combination of adjudicated facts and untested Rule 92 *bis* and *quater* evidence.[1184] In his view, adjudicated facts, like Rule 92 *bis* and *quater* evidence, are untested evidence and cannot be relied upon solely or decisively when entering a conviction.[1185] Similarly, Karadžić argues that a finding based on a combination of adjudicated facts and Rule 92 *bis* and *quater* evidence must also be considered to be based upon untested evidence and, therefore, must require corroboration.[1186]

451. The Prosecution disputes Karadžić's argument that adjudicated facts are untested evidence and that they require corroboration before being relied upon in support of a conviction.[1187] It further argues that Karadžić's contention that the Trial Chamber erred in relying on adjudicated facts in combination with Rule 92 *bis* and *quater* evidence is similarly baseless and should be rejected.[1188]

452. The Appeals Chamber finds no merit in Karadžić's contention that the Trial Chamber erred in convicting him for Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 by relying solely or in a decisive manner upon adjudicated facts. Karadžić presents no argument suggesting that the Trial Chamber violated the well-established principle that adjudicated facts should not be admitted, and by extension, relied upon, if they concern the acts, conduct, or mental state of the accused. Furthermore, Karadžić fails to appreciate that adjudicated facts, within the meaning of Rule 94(B) of the ICTY Rules, are presumptions and are not equivalent to untested evidence requiring sufficient corroboration to be relied upon in support of conviction.[1189] Specifically, the Appeals Chamber recalls the jurisprudence of the ICTY Appeals Chamber that "by taking judicial notice of an adjudicated fact, a [trial] [c]hamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial,

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[1183] *Popović et al.* Appeal Judgement, para. 96 (internal references omitted). *See also Prlić et al.* Appeal Judgement, para. 137; *Martić* Appeal Judgement, para. 192, n. 486.
[1184] Karadžić Appeal Brief, paras. 555, 556; T. 24 April 2018 p. 247.
[1185] Karadžić Appeal Brief, paras. 557, 558; Karadžić Reply Brief, paras. 169, 170. To establish that adjudicated facts should be subject to the same limitations as untested evidence, Karadžić emphasizes that adjudicated facts, like Rule 92 *bis* evidence, cannot go to the acts and conduct of the accused and that the means of challenging adjudicated facts and untested evidence is the same. Karadžić Appeal Brief, para. 557; Karadžić Reply Brief, paras. 169, 170. Viewed in this light, Karadžić argues that adjudicated facts are the equivalent of untested evidence and that they therefore require sufficient corroboration before being relied upon in support of findings in support of conviction. Karadžić Appeal Brief, paras. 557, 558; Karadžić Reply Brief, paras. 169, 170.
[1186] Karadžić Appeal Brief, paras. 559, 560.
[1187] Prosecution Response Brief, paras. 305, 306. *See also* T. 23 April 2018 p. 188.
[1188] Prosecution Response Brief, para. 306.
[1189] In this respect, Karadžić's contentions that adjudicated facts can be equated to untested evidence, such as that admitted pursuant to Rule 92 *bis* of the ICTY Rules, on the basis that neither may go towards the acts, omissions, and mental state of the accused and that the means of challenging both is the same are not persuasive. Adjudicated facts under Rule 94(B) of the ICTY Rules are rebuttable presumptions that can only be accepted where, *inter alia*, they have been tested and established in another trial proceeding whereas the reliability and credibility requirements for admission of untested evidence pursuant to Rules 89(C) and 92 *bis* of the ICTY Rules are far less onerous. *Compare, mutatis mutandis, Bagosora et al.* Decision of 29 October 2010, para. 11 *with Nizeyimana* Decision of 8 March 2011, para. 7.

but which, subject to that presumption, may be challenged at that trial."[1190] Requiring corroboration of adjudicated facts after their admission would undermine the judicial economy function served by taking judicial notice of adjudicated facts,[1191] as judicial notice under Rule 94(B) of the ICTY Rules relieves the Prosecution of the initial burden of producing evidence on such facts.[1192] Moreover, adjudicated facts may relate to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible.[1193] In this context, trial chambers, after having reviewed the record as a whole, may rely on adjudicated facts to establish the underlying crime base when making findings in support of convictions.[1194]

453. Based on these considerations, Karadžić's blanket argument that the Trial Chamber erred by relying solely or in a decisive manner on adjudicated facts in relation to Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 fails to demonstrate error on the part of the Trial Chamber. The Appeals Chamber similarly finds no error in respect of Karadžić's cursory argument that the Trial Chamber impermissibly relied upon a combination of adjudicated facts and Rule 92 *bis* and *quater* evidence with respect to Scheduled Incidents A.7.1, A.7.2, A.10.5, A.10.7, A.10.8, A.12.1, A.12.2, B.15.1, C.15.1, C.20.6, C.22.3, C.23.1, C.27.4, D.20, and E.1.1.

(b) Alleged Errors Concerning Rule 92 *bis* Evidence

454. Karadžić submits that the Trial Chamber impermissibly relied solely or in a decisive manner on untested Rule 92 *bis* evidence in entering convictions related to Scheduled Incidents A.10.2, A.10.3, A.10.4, A.10.6, A.14.2, B.1.1, B.13.1, B.13.3, B.20.4, C.20.5, C.20.7, C.22.5, C.27.3, C.27.5, and E.11.1.[1195] In support of this contention, Karadžić relies on the *Đorđević* Appeal Judgement which, in his view, reflects that any factual finding used in support of a conviction cannot rest solely or decisively on untested evidence.[1196] Moreover, he argues that the Appeals

[1190] *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 11, *quoting Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4. *Cf. Bagosora et al.*, Decision of 29 October 2010, para. 7; *Karemera et al.* Decision of 16 June 2006, para. 42. *See also Lukić and Lukić* Appeal Judgement, para. 261.
[1191] *See, mutatis mutandis, Karemera et al.* Decision of 16 June 2006, para. 39 ("Taking judicial notice of adjudicated facts under Rule 94(B) [of the ICTR Rules] is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial."). *See also Setako* Appeal Judgement, para. 200.
[1192] *See, mutatis mutandis, Karemera et al.* Decision of 16 June 2006, para. 42.
[1193] *See Mladić* Decision of 12 November 2013, para. 85.
[1194] In this regard, the Appeals Chamber observes that this is supported by the practice of trial chambers, which in a number of cases relied on adjudicated facts as the sole basis to establish findings concerning crime base incidents. *See, e.g., Stanišić and Župljanin* Trial Judgement, paras. 663, 664, 690; *Krajišnik* Trial Judgement, paras. 632-636; *Perišić* Trial Judgement, paras. 468-472.
[1195] Karadžić Appeal Brief, para. 554; T. 24 April 2018 p. 247. *See also* Karadžić Reply Brief, para. 171.
[1196] Karadžić Appeal Brief, para. 562.

Chamber of the ICTY erroneously departed from this principle when concluding in the *Popović et al.* Appeal Judgement that a trial chamber could rely solely or decisively on untested evidence with respect to a single incident insofar as the conviction on the relevant count was not based on that incident alone.[1197]

455. The Prosecution responds that Karadžić erroneously contends that the findings related to the Scheduled Incidents he identified are based solely or decisively on Rule 92 *bis* evidence since they are supported by adjudicated facts, corroborated by other evidence and findings demonstrating a corroborative pattern of conduct, and/or corroborated by other, non-Rule 92 *bis* evidence.[1198] Moreover, relying on the *Popović et al.* Appeal Judgement, the Prosecution contends that the counts upon which Karadžić has been convicted would stand even if the findings related to the identified Scheduled Incidents were overturned and, in this context, rejects the proposition that any of his convictions are based solely or decisively on untested evidence.[1199] The Prosecution also argues that Karadžić's disagreement with the *Popović et al.* Appeal Judgement does not show the existence of cogent reasons to depart from the principles established in it.[1200]

456. Karadžić replies that the Trial Chamber did not refer to corroborative evidence highlighted by the Prosecution and, therefore, made findings based on untested evidence.[1201] He further contends that corroborating evidence that the Prosecution relies on relates to general patterns of conduct and does not sufficiently corroborate whether a particular Scheduled Incident occurred or who the perpetrators were or if there is any link to the accused.[1202]

457. The Appeals Chamber observes that Karadžić and the Prosecution appear to interpret the *Popović et al.* Appeal Judgement to suggest that findings in support of a conviction may be based solely or decisively on untested Rule 92 *bis* evidence so long as they are not the only findings in support of a count or counts for which a defendant is convicted. In presenting such interpretation, however, both parties ignore that the *Popović et al.* Appeal Judgement, consistent with the approach

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[1197] Karadžić Appeal Brief, paras. 563, 564, *referring to Popović et al.* Appeal Judgement, paras. 103, 104, *Stakić* Appeal Judgement, paras. 201, 202. *See also* Karadžić Appeal Brief, paras. 565-568.
[1198] Prosecution Response Brief, paras. 304, 309-311. *See also* T. 23 April 2018 p. 189 (identifying Scheduled Incident A.14.2 as an example where the Trial Chamber relied on a variety of evidence to corroborate the relevant Rule 92 *bis* evidence when making findings in support of conviction), T. 24 April 2018 p. 280 (arguing that the Defence "inflates" the number of findings allegedly based solely on untested evidence).
[1199] Prosecution Response Brief, paras. 304, 307, 308; T. 23 April 2018 p. 189. *See also* T. 23 April 2018 pp. 189, 190 (arguing that the *Đorđević* Appeal Judgement stands for the proposition that where untested evidence is corroborated by findings demonstrating a similar pattern of conduct, the relevant chamber's findings on that incident cannot be said to rest solely or decisively on untested evidence).
[1200] Prosecution Response Brief, para. 307, n. 1172.
[1201] Karadžić Reply Brief, para. 171.
[1202] Karadžić Reply Brief, para. 171; T. 24 April 2018 p. 247. *See also* T. 24 April 2018 pp. 247, 248 (highlighting that, with respect to Scheduled Incident A.14.2, all 55 references in that section of the Trial Judgement refer to the relevant Rule 92 *bis* evidence with only four footnotes citing to "a variety of other evidence").

taken in the *Đorđević* Appeal Judgement, reflects that evidence demonstrating a consistent pattern of conduct can provide sufficient corroboration in support of convictions based on evidence admitted pursuant to Rule 92 *bis* or 92 *quater* of the ICTY Rules.[1203] Consequently, the Appeals Chamber dismisses Karadžić's submission that the *Popović et al.* Appeal Judgement departs from previous ICTY jurisprudence in relation to the prohibition against the use of untested evidence as the sole or decisive basis in support of a conviction.

458. The Appeals Chamber turns to Karadžić's contentions that the Trial Chamber impermissibly made several findings in support of his convictions based solely or decisively on untested evidence. The Appeals Chamber recalls that the principle that no conviction can rest solely or decisively on untested evidence without sufficient corroboration stems from the fundamental right of the accused to examine, or have examined, the witnesses against him, which is enshrined in Article 21(4)(e) of the ICTY Statute.[1204] As Karadžić alleges a violation of his fair trial rights, he must demonstrate that such a violation occurred and show that it caused prejudice amounting to an error of law invalidating the trial judgement.[1205]

459. Turning to whether the Trial Chamber violated Karadžić's right under Article 21(4)(e) of the ICTY Statute in reaching findings related to Scheduled Incidents A.10.2, A.10.3, A.10.4, A.10.6, A.14.2, B.1.1, B.13.3, C.20.5, C.20.7, and C.27.3, the Appeals Chamber observes that the Trial Chamber expressly considered adjudicated facts and/or evidence other than Rule 92 *bis* and *quater* in reaching its conclusions when first making findings on these Scheduled Incidents.[1206] Karadžić's

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[1203] *See Popović et al.* Appeal Judgement, para. 104 ("The Appeals Chamber concludes that Popović has failed to show an error in the Trial Chamber's finding that the Kravica Supermarket killings were analogous to the other 'opportunistic' killings. The Appeals Chamber further observes that evidence that demonstrates a pattern of conduct may be used as corroborative evidence. The Appeals Chamber recalls that this conclusion finds support in Rule 93(A) of the Rules, which allows for the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice. Accordingly, the Appeals Chamber finds that Popović and Beara have failed to identify an error by the Trial Chamber in relation to the admitted evidence of PW-116."); *Đorđević* Appeal Judgement, paras. 807 ("The Appeals Chamber considers Morina's evidence [which was admitted under Rule 92 *quater* of the ICTY Rules] – that Serbian forces set fire to the interior of the mosque in Landovica/Landovicë causing substantial destruction to its structure and minaret by use of an explosive device – to be a critical element of the Prosecution case and a vital link in demonstrating Đorđević's responsibility for the destruction of the mosque committed by Serbian forces."), 808 ("The Appeals Chamber notes, however, that the Trial Chamber found a consistent pattern of attack by the Serbian forces entering towns and villages on foot, beginning on 24 March 1999, and setting houses on fire and looting valuables. Particularly, it found that '[t]he same pattern continued in the following days, on 26 March 1999 in Landovica/Landovicë.' The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds this pattern of attack by the Serbian forces to be corroborative of Morina's account in the admitted statement and transcript that the Serbian forces set fire to the interior of the mosque in Landovica/Landovicë. The Appeals Chamber therefore considers, Judge Tuzmukhamedov dissenting, that the Trial Chamber's conclusion is not based solely or in a decisive manner on Morina's 92 *quater* evidence, as other evidence supports Đorđević's conviction for the crime of persecutions through the destruction of the mosque in Landovica/Landovicë.") (internal citations omitted).

[1204] *See Đorđević* Appeal Judgement, para. 807; *Prlić et al.* Decision of 23 November 2007, para. 59.

[1205] *Šainović et al.* Appeal Judgement, para. 29; *Nyiramasuhuko et al.* Appeal Judgement, para. 346.

[1206] Specifically, the Appeals Chamber notes that with respect to Scheduled Incident A.10.2, concerning the killing of at least six Bosnian Muslims in the areas of Hambarine and Ljubija between 23 May and 1 July 1992 (Trial Judgement, paras. 1664-1677) the Trial Chamber also relied on adjudicated facts and forensic evidence. *See* Trial Judgement, paras.

general argument fails to demonstrate that the relevant findings were not independently supported by adjudicated facts and/or sufficiently corroborated by non-Rule 92 *bis* or *quater* evidence. Accordingly, the Appeals Chamber dismisses Karadžić's contention in this respect.

460. As concerns Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the relevant findings are based solely or decisively on untested Rule 92 *bis* or *quater* evidence. With respect to Scheduled Incident C.27.5, the Trial Chamber found that, from the end of May 1992, Bosnian Muslims detained at the Drinjača cultural center in Zvornik were subjected to threats, severe beatings, and were stabbed by

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1666 (*referring to* Adjudicated Facts 1034, 1036, 1060, 1061, 1286), 1667 (*referring to* Adjudicated Facts 1035, 1038, 1062, 1294), 1668 (*referring to* Adjudicated Facts 1034, 1061), 1669 (*referring to* Adjudicated Facts 1036, 1281, 1294), 1670 (*referring to* Adjudicated Fact 1061, Exhibits P4853, P646 (confidential)), 1675 (*referring to* Exhibit P646 (confidential)), 1676 (*referring to* Exhibits P4853, P4892, P646 (confidential)). With respect to Scheduled Incident A.10.3, where the Trial Chamber found that at least nine Bosnian Muslim men and women were killed by Serb forces in the village of Kamičani on or about 26 May 1992 (Trial Judgement, paras. 1641-1649), it also relied on adjudicated facts, [REDACTED], and evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1643, 1644 (*referring to* Adjudicated Facts 1034, 1063, 1288, [REDACTED]), 1646 ([REDACTED]), 1647 ([REDACTED]), 1648 ([REDACTED]). With respect to Scheduled Incident A.10.4, concerning the killing of at least eight Bosnian Muslim men by Serb forces in the village of Jaskići on or about 14 June 1992 (Trial Judgement, paras. 1650-1657), the Trial Chamber also relied on an adjudicated fact and forensic evidence. *See* Trial Judgement, para. 1656 (*referring to* Adjudicated Fact 1064, Exhibits P4853, P646 (confidential)). With respect to Scheduled Incident A.10.6, concerning the killing of at least 300 non-Serbs, including civilians, by Serb forces in the village of Bišćani and in the surrounding hamlets of Hegići, Mrkalji, Ravine, Duratovići, Kadići, Lagići, and Čemernica on or about 20 July 1992 (Trial Judgement, paras. 1693-1715), the Trial Chamber also relied upon adjudicated facts, forensic evidence, and evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1694 (*referring to* Adjudicated Fact 1073), 1696 (*referring to* Adjudicated Fact 1074, Exhibit P646 (confidential)), 1698 (*referring to* Exhibit P4853), 1701 (*referring to* Adjudicated Fact 1075), 1703 (*referring to* Adjudicated Facts 1076, 1077), 1705 (*referring to* Exhibit P646 (confidential)), 1706 (*referring to* Adjudicated Fact 1289), 1712 (*referring to* Adjudicated Fact 1071), 1713 (*referring to* [REDACTED]), 1714 (*referring to* Exhibits P4853, P4892, P6689, P6690). With respect to Scheduled Incident A.14.2, concerning the killing of approximately 45 Bosnian Muslim civilians near Paklenik in Sokolac municipality by Serb forces on 15 June 1992 (Trial Judgement, paras. 1080-1093), the Trial Chamber also relied on written statements of Defence witnesses and forensic evidence. *See* Trial Judgement, paras. 1084 (*referring to* Exhibit P5508), 1087 (*referring to* Exhibits P4902, P3291), 1088 (*referring to* Exhibits D3206, D3175), 1090-1092 (*referring to* Exhibits P4106, P4853, P4902). With respect to Scheduled Incident B.1.1, concerning the killing of six Bosnian Muslim men in Manjača (Trial Judgement, paras. 1411-1415), the Appeals Chambers notes that the Trial Chamber also relied on adjudicated facts and other evidence, including forensic evidence. *See* Trial Judgement, paras. 1412 (*referring to* Adjudicated Fact 583), 1413 (*referring to* Adjudicated Fact 584, Exhibits P6556, P3519, P3520), 1414 (*referring to* Exhibit P4853). With respect to Scheduled Incident B.13.3, concerning the killing of three detainees while performing forced labor at Kula Prison between 23 July and 24 November 1992 (Trial Judgement, paras. 2156-2158), the Appeals Chambers notes that the Trial Chamber also relied on an adjudicated fact and other evidence, including forensic evidence. *See* Trial Judgement, para. 2157 (*referring to* Adjudicated Fact 2640, Exhibits P4853, P4886). With respect to Scheduled Incident C.20.5, concerning the detention and mistreatments of Bosnian Muslims detained at Miška Glava Dom in the village of Miška Glava, Prijedor Municipality, by Serb forces from around 21 July to 25 July 1992 (Trial Judgement, paras. 1853-1861), the Trial Chamber also relied on adjudicated facts. *See* Trial Judgement, paras. 1854 (*referring to* Adjudicated Facts 1102, 1257, 1258), 1855 (*referring to* Adjudicated Fact 1259), 1858 (*referring to* Adjudicated Facts 1258, 1259, 1260). With respect to Scheduled Incident C.20.7, concerning the detention and mistreatment of non-Serb civilians in Prijedor barracks by Serb forces in June 1992 (Trial Judgement, paras. 1878-1885), the Trial Chamber also relied on adjudicated facts and on evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1879 (*referring to* Adjudicated Facts 1102, 1264, [REDACTED]), 1882 ([REDACTED]). With respect to Scheduled Incident C.27.3, concerning the detention and mistreatment of Bosnian Muslims at the Alhos factory in April 1992 (Trial Judgement, paras. 1316-1320), the Trial Chamber also relied on adjudicated facts. *See* Trial Judgement, paras. 1317 (*referring to* Adjudicated Fact 2757), 1319 (*referring to* Adjudicated Fact 2758).

Serb forces.[1207] In relation to this incident, the Trial Chamber found Karadžić responsible for persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute.[1208] The Appeals Chamber, Judges Joensen and de Prada dissenting, observes that the Trial Chamber's findings concerning the mistreatment of the Bosnian Muslim detainees are supported entirely by a transcript of the testimony of KDZ072 in the *Šešelj* case,[1209] which the Trial Chamber admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1210]

461. The Prosecution argues that this evidence is further corroborated by the evidence of other witnesses and forensic evidence and that the relevant findings are also supported by an adjudicated fact.[1211] However, the Appeals Chamber observes that the Prosecution refers to evidence and an adjudicated fact relied on by the Trial Chamber in relation to Scheduled Incident B.20.1 concerning the killing of approximately 88 of the detainees at Drinjača cultural center which occurred following their mistreatment.[1212] While the killing of the detainees at Drinjača cultural center appears to have occurred soon after the event detailed in Scheduled Incident C.27.5, none of the evidence or the adjudicated fact referred to by the Prosecution directly corroborates the untested evidence of KDZ072 that the detainees were subjected to threats, severe beatings, and were stabbed by Serb forces.[1213]

462. The Prosecution, referring to the Trial Chamber's conclusions in relation to other Scheduled Incidents and legal findings, also argues that this Scheduled Incident is corroborated by "a pattern of similar conduct".[1214] Having reviewed the Scheduled Incidents referred to by the Prosecution, the Appeals Chamber considers that nothing contained in the Trial Chamber's analysis of them

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[1207] Trial Judgement, paras. 1329-1333. Specifically, the Trial Chamber found that on 30 May 1992 around 300 Muslim men, women, and children were detained at the Drinjača cultural center. *See* Trial Judgement, para. 1330. It also found that these detainees were guarded by Bosnian Serb soldiers and that, *inter alia*, the women and children were subsequently separated from the men. *See* Trial Judgement, para. 1331. Further, the Trial Chamber concluded that between 25 and 30 detainees in the Drinjača cultural center were beaten, mistreated, and verbally abused by a group of men wearing camouflage uniforms. *See* Trial Judgement, para. 1332.

[1208] Trial Judgement, paras. 2486, 2493, 2498, 2512-2518, 2522, 2529, 2530, 3505, 3512-3520, 6022.

[1209] *See* Trial Judgement, para. 1332, nn. 4611-4614, *referring to* Exhibit P425. With the exception of the photograph of the exterior of Drinjača cultural center reflected in Exhibit P99, the Trial Chamber's findings concerning the detention of the Bosnian Muslims, their numbers, and the separation of men from the women and children are based principally on Exhibit P425. *See* Trial Judgement, paras. 1330-1332.

[1210] Decision of 10 November 2009, para. 47(b).

[1211] *See* Prosecution Response Brief, para. 310, nn. 1196 ([REDACTED], P6405, pp. 6, 7), 1197 (*referring to* Adjudicated Fact 2762).

[1212] Trial Judgement, paras. 1336, 1337, nn. 4622, 4623, *referring to* Exhibits [REDACTED] P6405 (Marinko Vasilić's interview dated 21 October 2002), Adjudicated Fact 2762.

[1213] Specifically, the Appeals Chamber observes that the relevant excerpts of [REDACTED] and Exhibit P6405 only concern the execution and the collection of the corpses of the detainees at the Drinjača cultural center. *See* [REDACTED]; Exhibit P6405, pp. 6, 7. Similarly, Adjudicated Fact 2762 reflects the killing of ten detainees at Drinjača cultural center by the White Eagles. *See* Trial Judgement, para. 1336. *See* Decision of 14 June 2010 on Fourth Motion for Judicial Notice, para. 98; Appendix A, RP. 36244, item 2761.

[1214] *See* Prosecution Response Brief, paras. 309, 310, nn. 1199 (*referring to* Trial Judgement, paras. 1295-1353), 1200 (*referring to* Trial Judgement, paras. 2485, 2522, 2523, 3443-3445).

suggests that it relied upon this evidence or these findings as a corroborative pattern of conduct in relation to Scheduled Incident C.27.5.[1215] As concerns the legal findings, the Appeals Chamber observes that the legal findings on persecution as a crime against humanity[1216] refer to Scheduled Incident C.27.5 cumulatively with other Scheduled Incidents when describing the conditions of mistreatment of the detainees in detention centers in the Overarching JCE Municipalities.[1217] In the view of the Appeals Chamber, Judges Joensen and de Prada dissenting, this, however, does not demonstrate that the Trial Chamber relied on these incidents, alongside Scheduled Incident C.27.5, as a corroborative pattern of conduct in order to make findings beyond reasonable doubt in relation to Scheduled Incident C.27.5. Rather, the legal findings section recounts the previous findings concerning the various Scheduled Incidents for the purpose of determining whether they satisfy the requirements for this crime.[1218] In marked contrast to the *Popović et al.* and the *Đorđević* cases,[1219] the Appeals Chamber considers, Judges Joensen and de Prada dissenting, that the Trial Judgement does not provide any indication that the Trial Chamber relied on the findings or the underlying evidence as a pattern of similar conduct to corroborate the findings in relation to Scheduled Incident C.27.5, which are otherwise based on untested evidence.[1220] Consequently, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively upon the untested Rule 92 *bis* evidence in support of Karadžić's conviction based on Scheduled Incident C.27.5.[1221]

463. As to Scheduled Incident B.20.4, the Trial Chamber found that at least two men were killed at the Ekonomija Farm by Serb forces in May 1992 and found Karadžić responsible for murder as a crime against humanity (Count 5), murder as a violation of the laws or customs of war (Count 6), and persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute

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[1215] Trial Judgement, paras. 1329-1333. *See also* Trial Judgement, paras. 1295, 1301 (Scheduled Incidents B20.2, C.27.1), 1302-1307 (Scheduled Incident C.27.2), 1308-1311 (Scheduled Incident B.20.3), 1312-1315 (Scheduled Incident A.16.3), 1316-1320 (Scheduled Incident C.27.3), 1321-1328 (Scheduled Incident C.27.4), 1347-1349 (Scheduled Incident B.20.4), 1350-1353 (Scheduled Incident C.27.7).

[1216] *See* Trial Judgement, paras. 2482-2570.

[1217] *See, e.g.*, Trial Judgement, paras. 2486, 2491.

[1218] The references to Scheduled Incident C.27.5 in the legal findings section of the Trial Judgement reflect the Trial Chamber recalling findings it had already made in relation to each Scheduled Incident and provides no indication that it relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident C.27.5. *See* Trial Judgement, paras. 2485, 2486.

[1219] The *Popović et al.* Trial Judgement and the *Đorđević* Trial Judgement provide clear indication that the findings that were made based on untested evidence were corroborated by circumstantial evidence demonstrating a pattern of conduct. *See Popović et al.* Trial Judgement, para. 448 ("However, it should be noted that the circumstances described by PW-116 are analogous to those in other locations where 'opportunistic' killings have been found to have occurred."); *Đorđević* Trial Judgement, para. 2027.

[1220] Trial Judgement, paras. 1329-1333.

[1221] The Prosecution also highlights that, in his final trial brief, Karadžić conceded that these crimes occurred. *See* Prosecution Response Brief, para. 310, n. 1195, [REDACTED]. The Appeals Chamber does not consider Karadžić's submissions in his final trial brief as corroboration of untested evidence upon which the Trial Chamber relied.

for this incident.[1222] The Appeals Chamber, Judges Joensen and de Prada dissenting, observes that the Trial Chamber's findings concerning this Scheduled Incident rest entirely on the witness statement of Jusuf Avdispahić,[1223] admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1224] The Prosecution argues that the conviction underpinning Scheduled Incident B.20.4 also rests on an adjudicated fact and "a pattern of similar conduct".[1225] However, the Appeals Chamber observes that the Prosecution refers to an adjudicated fact referred to by the Trial Chamber in its findings about Scheduled Incident C.27.6 concerning different criminal conduct that occurred at the Ekonomija Farm, which the Trial Chamber distinguished from Scheduled Incident B.20.4.[1226]

464. Similarly, the Prosecution's reference to findings related to other Scheduled Incidents and legal findings to suggest that the event was corroborated by "a pattern of similar conduct" fails to demonstrate that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident B.20.4. Nothing contained in the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon the evidence or findings within them as a corroborative pattern of conduct in relation to Scheduled Incident B.20.4.[1227] The Appeals Chamber observes that the legal findings concerning murder as a violation of the laws or customs of war and as a crime against humanity[1228] refer to Scheduled Incident B.20.4 cumulatively with other scheduled incidents in analysing the intent of the perpetrators[1229] and the status of the victims.[1230] However, for the reasons articulated above, the Appeals Chamber, Judges Joensen and de Prada dissenting, is not persuaded that this cumulative review of findings related to various Scheduled Incidents reflects that the Trial Chamber relied upon a similar pattern of conduct as corroboration of its findings beyond reasonable doubt in relation to Scheduled Incident B.20.4.[1231] Accordingly, the

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[1222] Trial Judgement, paras. 1347-1349, 2451, 2455, 2456, 2482-2484, 3505, 3512-3520, 6022.
[1223] Trial Judgement, paras. 1347-1349, *referring to* Exhibit P70, pp. 16, 17.
[1224] Decision of 10 November 2009, para. 47(d). Jusuf Avdispahić's evidence was first admitted under his pseudonym KDZ533 but was later made public. Decision of 9 February 2010, paras. 5, 44(3).
[1225] Prosecution Response Brief, paras. 309, 310, nn. 1202 (*referring to* Adjudicated Fact 2765, Trial Judgement, para. 1341), 1203 (*referring to* Karadžić Final Trial Brief, para. 1456, Trial Judgement, n. 4637), 1204 (*referring to* Trial Judgement, paras. 1296-1301, 1308-1311, 1334-1338, 1347-1349), 1205 (*referring to* Trial Judgement, paras. 2447, 2522, 2523, 3443-3445).
[1226] *See* Trial Judgement, paras. 1339-1346, n. 4658.
[1227] Trial Judgement, paras. 1347-1349. *See also* Trial Judgement, paras. 1296-1301 (Scheduled Incidents B.20.2, C.27.1), 1308-1311 (Scheduled Incident B.20.3), 1334-1338 (Scheduled Incident B.20.1), 1347-1349 (Scheduled Incident B.20.4).
[1228] *See* Trial Judgement, paras. 2446-2456.
[1229] Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.10.1, B.12.1, B.15.1, B.15.4, B.15.5, B.16.2, B.18.1, B.18.3, B.20.1, B.20.2, B.20.3, B.20.4 ("the [Trial] Chamber found that the victims (i) were shot by Serb Forces during their detention").
[1230] Trial Judgement, para. 2454, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.8.1, B.10.1, B.12.1, B.12.2, B.15.1-B.15.6, A.10.8, B.16.1, B.16.2, B.18.1-B.18.3, B.20.1, B.20.4, B.1.1-B.1.4, B.13.1 ("others were killed after being detained by Serb Forces in scheduled detention facilities").
[1231] The references to Scheduled Incident B.20.4 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication

Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively upon the untested Rule 92 *bis* evidence in support of Karadžić's convictions based on Scheduled Incident B.20.4.[1232]

465. As to Scheduled Incident B.13.1, the Trial Chamber found that, on or about 7 May 1992, Zlatan Salčinović and another detainee were beaten to death at Kula Prison by Serb forces and concluded that Karadžić was responsible for murder as a crime against humanity (Count 5), murder as a violation of the laws or customs of war (Count 6), and persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute for this incident.[1233] The Appeals Chamber observes that in reaching this finding the Trial Chamber principally relied on the witness statement of Mirsad Smajš,[1234] admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1235] The Appeals Chamber, Judges Joensen and de Prada dissenting, further observes that, while forensic evidence corroborates the witness statement of Mirsad Smajš with respect to the killing of Zlatan Salčinović,[1236] the killing of the other detainee is based entirely on untested evidence.[1237]

466. The Prosecution argues that the findings underpinning Scheduled Incident B.13.1 are supported by other evidence and an adjudicated fact.[1238] However, the Appeals Chamber observes that the Prosecution refers to evidence pertaining to the general conditions of detention and treatment of detainees at Kula Prison,[1239] which was used in support of separate findings related to Scheduled Incident C.18.2 and concerns separate criminal conduct at Kula Prison.[1240] Furthermore, while the Prosecution also refers to the forensic evidence corroborating the death of Zlatan

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that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident B.20.4. *See* Trial Judgement, paras. 2448, 2451.

[1232] Furthermore, while the Prosecution suggests that Karadžić conceded the facts underpinning this incident in his final trial brief, the Appeals Chamber observes that such concession was limited to the crimes concerning Scheduled Incident C.27.6 rather than Scheduled Incident B.20.4. *See* Trial Judgement, nn. 4637, 4658, 4659.

[1233] Trial Judgement, paras. 2153-2155, 2447, 2451, 2455, 2456, 2482-2484, 3505, 3512-3524, 6022-6024.

[1234] Trial Judgement, paras. 2153-2155, *referring to* Exhibit P43, pp. 2, 3.

[1235] Decision of 15 October 2009, para. 32(a).

[1236] Trial Judgement, para. 2154, *referring to* Exhibit P4853, p. 89.

[1237] Trial Judgement, paras. 2153-2155.

[1238] Prosecution Response Brief, paras. 309, 310, nn. 1252 (*referring to* Witness Hajrudin Karić, T. 23 June 2011 p. 15307, Witness KDZ239, T. 15 September 2011 p. 18922, Trial Judgement, para. 2148, nn. 7328, 7329), 1253 (*referring to* Trial Judgement, para. 2146), 1254 (*referring to* Adjudicated Fact 2636, Trial Judgement, para. 2147), 1255 (*referring to* Trial Judgement, paras. 2141, 2147-2149).

[1239] The Appeals Chamber observes that the testimony of Witnesses Hajrudin Karić and KDZ239, who were subject to cross-examination, only identify that the detainees were subject to forced labor, including burying dead bodies, and that several prisoners who were deployed to work were killed. *See* T. 23 June 2011 p. 15307, T. 15 September 2011 p. 18922, T. 16 September 2011 p. 19004. The Appeals Chamber observes further that the relevant excerpts of Exhibit P1126 concern the inadequate conditions of accommodation, food, hygiene, and health of the detainees. *See* Exhibit P1126, pp. 1, 2. Adjudicated Fact 2636 refers to the fact that, in Kula Prison, detainees were regularly beaten. *See* Trial Judgement, para. 2147; Decision of 14 June 2010 on Fourth Motion for Judicial Notice, Appendix A, RP. 36259.

[1240] *Compare* Trial Judgement, paras. 2153-2155 *with* Trial Judgement, paras. 2136-2152.

Salčinović,[1241] the Appeals Chamber considers, Judges Joensen and de Prada dissenting, that this evidence does not corroborate the witness statement of Mirsad Smajš with respect to the killing of the second detainee.

467. Turning to the Prosecution's arguments that the Trial Chamber's conclusions in relation to Scheduled Incidents and legal findings demonstrate "a pattern of similar conduct",[1242] the Appeals Chamber finds that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident B.13.1.[1243] The Appeals Chamber observes that, in discussing its legal findings concerning murder as a violation of the laws or customs of war and as a crime against humanity,[1244] the Trial Chamber referred to Scheduled Incident B.13.1 cumulatively with other Scheduled Incidents when asserting that it "found that the victims [...] died as a result of severe beatings by Serb Forces during their detention".[1245] The Appeals Chamber, Judges Joensen and de Prada dissenting, reiterates that this passage of the Trial Judgement reflects the Trial Chamber's reference to its previous factual findings reached beyond reasonable doubt in the context of each Scheduled Incident and does not indicate that the Trial Chamber relied on a similar pattern of conduct in corroboration of the evidence underpinning Scheduled Incident B.13.1.[1246] Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively on untested evidence in support of Karadžić's convictions based on the killing of the second detainee in relation to Scheduled Incident B.13.1.

468. As concerns Scheduled Incident C.22.5, the Trial Chamber found that Faik Biščević and two other Muslim men detained at the Magarice military facility on or about 27 May 1992 were beaten and subjected to mistreatment by Serb forces.[1247] In relation to this incident, the Trial Chamber found Karadžić responsible for persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute.[1248] In reaching these findings, the Trial Chamber relied on

[1241] *See* Prosecution Response Brief, para. 310, n. 1256, *referring to* Exhibit P4853.
[1242] *See* Prosecution Response Brief, paras. 309, 310, nn. 1257 (*referring to* Trial Judgement, paras. 2153-2158), 1258 (*referring to* Trial Judgement, paras. 2447, 2522, 2523, 3443-3445).
[1243] Trial Judgement, paras. 2153-2155 (Scheduled Incident B.13.1), 2156-2158 (Scheduled Incident B.13.3).
[1244] *See* Trial Judgement, paras. 2446-2456.
[1245] Trial Judgement, para. 2451.
[1246] The references to Scheduled Incident B.13.1 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident B.13.1. *See* Trial Judgement, paras. 2447, 2451.
[1247] Trial Judgement, paras. 2019-2024.
[1248] Trial Judgement, paras. 2485, 2491, 2498, 2507, 2512-2518, 2522, 2529, 2530, 2542, 3505, 3512-3524, 6022.

transcripts of Faik Biščević's testimony from the *Brđanin* and *Krajišnik* cases,[1249] which the Trial Chamber admitted without cross-examination under Rule 92 *quater* of the ICTY Rules.[1250]

469. According to the Prosecution, the untested evidence of Faik Biščević is further corroborated by Adjudicated Fact 2546 and evidence subject to cross-examination.[1251] However, the Appeals Chamber observes that the adjudicated fact and the evidence referred to by the Prosecution only concern the detention and the mistreatment of Faik Biščević.[1252] There is no evidence that corroborates the Trial Chamber's conclusions as they concern the mistreatment of the other two Muslim men.[1253]

470. The Prosecution further refers to findings concerning other Scheduled Incidents and the Trial Chamber's legal findings to suggest that a corroborative "pattern of similar conduct" supports this finding.[1254] The Appeals Chamber considers that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident C.22.5.[1255] The Appeals Chamber observes that, in discussing its legal findings on persecution as a crime against humanity,[1256] the Trial Chamber referred to Scheduled Incident C.22.5 cumulatively with other Scheduled Incidents when describing the conditions of mistreatment of the detainees in detention centers of the Overarching JCE.[1257] However, for the reasons stated above, the Appeals Chamber, Judges Joensen and de Prada dissenting, reiterates that these passages merely reference previous factual findings reached beyond reasonable doubt in the context of each Scheduled Incident and do not indicate that the Trial Chamber relied upon a similar pattern of conduct as corroborating the evidence underpinning Scheduled Incident C.22.5.[1258] Accordingly, the Appeals Chamber finds, Judges Joensen and de

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[1249] Trial Judgement, paras. 2020 (*referring to* Exhibits P135, P122), 2021 (*referring to* Exhibit P135), 2022, 2023 (*referring to* Exhibits P135, P122).
[1250] *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 90(ii).
[1251] Prosecution Response Brief, para. 310, nn. 1247 (*referring to* Adjudicated Fact 2546, Trial Judgement, para. 2022), 1248 (*referring to* Exhibit P3395 (under seal), Trial Judgement, para. 2021).
[1252] Trial Judgement, paras. 2021, 2022. *See also* Exhibit P3395 (under seal); Decision of 14 June 2010 on Fourth Motion for Judicial Notice, Appendix A, RP. 36268.
[1253] Trial Judgement, para. 2022.
[1254] Prosecution Response Brief, paras. 309, 310, nn. 1249 (*referring to* Trial Judgement, paras. 1979-2024), 1250, (*referring to* Trial Judgement, paras. 2485, 2522, 2523, 3443-3445).
[1255] Trial Judgement, paras. 1979-1991 (Scheduled Incident C.22.1), 1992-1998 (Scheduled Incident C.22.2), 1999-2018 (Scheduled Incident B.17.1), 2019-2024 (Scheduled Incident C.22.5).
[1256] *See* Trial Judgement, paras. 2482-2570.
[1257] *See, e.g.*, Trial Judgement, paras. 2491, 2507, 2522, 2542.
[1258] The references to Scheduled Incident C.22.5 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident C.22.5. *See* Trial Judgement, paras. 2507, 2522.

Prada dissenting, that the Trial Chamber impermissibly relied solely and decisively on untested evidence in support of Karadžić's conviction based on Scheduled Incident C.22.5.

471. As to Scheduled Incident E.11.1, the Trial Chamber found that, following the fall of Srebrenica, members of the Bosnian Serb forces killed two Bosnian Muslim men near the town of Snagovo.[1259] The Trial Chamber convicted Karadžić, in part, for genocide (Count 2), extermination as a crime against humanity (count 4), and murder as a violation of the laws or customs of war (Count 6), pursuant to Article 7(1) of the ICTY Statute based upon this incident.[1260] The Appeals Chamber observes that in reaching this finding the Trial Chamber relied on the transcripts of the testimony of Witness KDZ365 in the *Popović et al.* case,[1261] which the Trial Chamber admitted under Rule 92 *bis* of the ICTY Rules without cross-examination.[1262]

472. The Prosecution argues that this evidence is further corroborated by other documentary evidence and by "a pattern of similar conduct".[1263] In this regard, the Appeals Chamber observes that the evidence referred to by the Prosecution only supports the untested evidence as it relates to the surrender of a group of Muslim men and that a group of police officers joined the Bosnian Serb forces; however, the evidence does not corroborate Witness KDZ365's evidence concerning the subsequent killing of two Bosnian Muslim men.[1264]

473. As to the Prosecution's contention that conclusions related to other Scheduled Incidents and contained in the legal findings demonstrate a "pattern of similar conduct" that corroborates Scheduled Incident E.11.1,[1265] the Appeals Chamber considers that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident E.11.1. As concerns the relevant legal findings, the Appeals Chamber observes that findings on murder and extermination as a crime against humanity and murder as a violation of the laws or customs of war[1266] refer to Scheduled Incident E.11.1 cumulatively with other Scheduled Incidents when describing the circumstances of the killings of Bosnian Muslim males.[1267] However, for the reasons explained above, the Appeals

[1259] Trial Judgement, paras. 5477-5481.
[1260] Trial Judgement, paras. 5607-5621, 5655-5673, 5744, 5831, 6022-6024, n. 20574. The Trial Chamber did not convict Karadžić for murder as a crime against humanity based on this event as it would be impermissibly cumulative of his conviction for extermination as a crime against humanity on this same basis. Trial Judgement, para. 6024, n. 20574.
[1261] Trial Judgement, paras. 5478-5480, *referring to* Exhibits P325 (under seal), P326 (under seal).
[1262] Delayed Disclosure Decision of 21 December 2009, para. 32(a).
[1263] *See* Prosecution Response Brief, paras. 309, 310, nn. 1268 (*referring to* Exhibit P4949), 1269 (*referring to* Trial Judgement, para. 5744).
[1264] *See* Exhibit P4949. *See also* Trial Judgement, para. 5480, n. 18724.
[1265] *See* Prosecution Response Brief, para. 310, n. 1269, *referring to* Trial Judgement, para. 5744.
[1266] *See* Trial Judgement, paras. 5607-5612.
[1267] *See, e.g.*, Trial Judgement, paras. 5609, 5610, 5615. The Prosecution's reference to paragraph 5744 of the Trial Judgement does not reflect that the Trial Chamber considered various findings to establish a corroborative pattern of

Chamber, Judges Joensen and de Prada dissenting, does not consider that the references to previous factual findings demonstrate that the Trial Chamber relied on evidence or findings of a similar pattern of conduct as corroboration for the evidence underpinning Scheduled Incident E.11.1.[1268] Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively on untested evidence in support of Karadžić's convictions based on Scheduled Incident E.11.1.

474. Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that Karadžić has established that the Trial Chamber violated his fundamental right to examine, or have examined, the witnesses against him under Article 21(4)(e) of the ICTY Statute by convicting him after having impermissibly relied solely or decisively on untested evidence in reaching findings in relation to Scheduled Incidents C.27.5, B.20.4, and E.11.1 as well as Scheduled Incident B.13.1 with respect to the killing of one detainee in Kula prison and Scheduled Incident C.22.5 in relation to the mistreatment of two Muslim men at the Magarice military facility. The Appeals Chamber finds that such violations prevented Karadžić from testing evidence related to these specific events which the Trial Chamber relied upon in convicting him. This has resulted in material prejudice invalidating the judgement to the extent that his convictions are based upon these findings. The Appeals Chamber, Judges Joensen and de Prada dissenting, considers that the only appropriate remedy is to set aside, in part, Karadžić's convictions to the extent they rely on these findings. The impact, if any, such errors may have had on Karadžić's sentence will be evaluated below.

(c) Conclusion

475. Based on the foregoing, the Appeals Chamber, Judges Joensen and de Prada dissenting, grants Ground 31 of Karadžić's appeal, in part, and reverses his convictions to the extent they rely on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1. The Appeals Chamber will examine the impact, if any, of this finding on Karadžić's sentence below.[1269] The Appeals Chamber dismisses the remainder of Ground 31 of Karadžić's appeal.

conduct in relation to Scheduled Incident E.11.1 as this paragraph simply recalls previous findings reached beyond reasonable doubt.

[1268] The references to Scheduled Incident E.11.1 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident E.11.1. *See* Trial Judgement, paras. 5607, 5609.

[1269] *See infra* Section V.D.

C. Sarajevo

1. Alleged Errors Relating to Findings of Indiscriminate or Disproportionate Shelling Attacks of Sarajevo (Ground 33)

476. The Trial Chamber found that the Sarajevo JCE, the primary purpose of which was to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the Sarajevo-Romanija Corps ("SRK"), came into existence in late May 1992 and continued to be implemented until October 1995.[1270] The Trial Chamber determined that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror among the civilian population of Sarajevo, and significantly contributed to the execution of the common plan.[1271] The Trial Chamber also concluded that Karadžić, together with the other members of the Sarajevo JCE, had the intent to commit murder, terror, and unlawful attacks against civilians.[1272] Pursuant to Article 7(1) of the ICTY Statute, the Trial Chamber convicted Karadžić of murder as a crime against humanity (Count 5) as well as murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war (Counts 6, 9, and 10, respectively).[1273]

477. In convicting Karadžić of crimes arising from the shelling of Sarajevo, the Trial Chamber relied, in part, on its findings that the shelling from 28 to 29 May 1992 and from 5 to 8 June 1992, described, respectively, as Scheduled Incidents G.1 and G.2 in the Indictment, was "indiscriminate" and "disproportionate".[1274] The Trial Chamber determined that Scheduled Incidents G.1 and G.2 occurred "in a purely urban setting where large concentrations of civilians and civilian buildings were closely intermingled with a number of military targets" and that the SRK shelling "targeted entire civilian neighbourhoods of Sarajevo, without differentiating between civilian and military targets".[1275] In addition, the Trial Chamber concluded that, "even if initially launched in response to Bosnian Muslim attacks originating from specific locations in Sarajevo, [...] the shellings by the SRK [in Scheduled Incidents G.1 and G.2] were carried out in a disproportionate manner."[1276]

478. In light of these findings, the Trial Chamber inferred that Scheduled Incidents G.1 and G.2, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, were attacks "directed against civilians".[1277] This inference led the Trial Chamber to further conclude that Scheduled Incidents G.1 and G.2, along with other scheduled shelling and

[1270] Trial Judgement, paras. 4649, 4676.
[1271] Trial Judgement, para. 4891.
[1272] Trial Judgement, para. 4928.
[1273] Trial Judgement, paras. 4937-4939.
[1274] Trial Judgement, paras. 4053-4055.
[1275] Trial Judgement, para. 4053.
[1276] Trial Judgement, para. 4053.

sniping incidents, constituted the crime of unlawful attacks on civilians as a violation of the laws or customs of war and the crime of terror.[1278] In addition, the Trial Chamber determined that Scheduled Incident G.2, along with other scheduled shelling and sniping incidents, constituted murder as a crime against humanity and as a violation of the laws or customs of war.[1279]

479. Karadžić submits that, particularly as it relates to Scheduled Incidents G.1 and G.2, the Trial Chamber erred in its application of the principles of the law of armed conflict in finding that the shelling in Sarajevo was "indiscriminate" and "disproportionate".[1280] The Appeals Chamber addresses Karadžić's arguments in turn.

(a) Principle of Distinction

480. As recalled above, the Trial Chamber found that the shelling referred to in Scheduled Incidents G.1 and G.2 was indiscriminate.[1281] The Trial Chamber relied on this determination, in part, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, to infer that these attacks were "directed against civilians",[1282] and, on this basis, convicted Karadžić under Counts 5, 6, 9, and 10 of the Indictment for his participation in the Sarajevo JCE.[1283]

481. Karadžić submits that the Trial Chamber erred in its application of the principle of distinction in its analysis of the attacks referred to in Scheduled Incidents G.1 and G.2.[1284] He

[1277] Trial Judgement, para. 4623.
[1278] Trial Judgement, paras. 4628, 4635.
[1279] Trial Judgement, paras. 4612, 4618, n. 15512.
[1280] Karadžić Appeal Brief, paras. 570, 571, 574, 575, 583-585, 588, 589, 592, 595, 597, 598. *See also* Karadžić Notice of Appeal, pp. 2, 12. Karadžić also contends that the Trial Chamber's errors led it to the mistaken conclusion that there was a campaign to terrorize civilians in Sarajevo and that Karadžić shared the intent of this campaign. *See* Karadžić Appeal Brief, paras. 575, 598. Consequently, he argues that the Appeals Chamber should reverse his convictions under Counts 5, 6, 9, and 10 for crimes in Sarajevo. Karadžić Appeal Brief, para. 600.
[1281] Trial Judgement, paras. 4053-4055.
[1282] Trial Judgement, para. 4623.
[1283] Trial Judgement, paras. 4612, 4616, 4628, 4632, 4635, 4937-4939, n. 15512.
[1284] Although Karadžić also alleges that the Trial Chamber erred in finding that "the overall shelling campaign was indiscriminate", the Appeals Chamber observes that Karadžić only seeks to substantiate his arguments concerning the misapplication of the law of distinction in relation to Scheduled Incidents G.1 and G.2. *See* Karadžić Appeal Brief, paras. 570, 575, 578, 581, nn. 804, 815. Notably, the Trial Chamber also found that Scheduled Incidents G.4 and G.10 through G.15 were indiscriminate attacks. *See* Trial Judgement, paras. 4616, 4626, n. 15527. In finding them indiscriminate, the Trial Chamber relied, in part, on the fact that the weapons used in these attacks – modified air bombs – were "inherently inaccurate" and "not capable of targeting specific targets" and therefore "indiscriminate" by their very nature. Trial Judgement, paras. 4379, 4616, n. 15527. This type of attack is expressly prohibited under the laws or customs of war. Specifically, it amounts to the type of attack contemplated in Article 51(4)(b) of Additional Protocol I as an example of indiscriminate attack, that is, an attack which "employ[s] a method or means of combat which cannot be directed at a specific military objective". Karadžić does not allege error in the Trial Chamber's findings that the modified air bombs were an inherently "indiscriminate" weapon. The Appeals Chamber also observes that Scheduled Incident G.4 was found to be an example of indiscriminate fire. *See* Trial Judgement, para. 4087, n. 15527. The only argument Karadžić raises that implicates this incident is evidence about the presence of ABiH mobile mortars, which he refers to in support of a more general argument that the Prosecution failed to disprove that these were not the legitimate military objects being targeted at the time. *See* Karadžić Appeal Brief, paras. 580, 582, n. 822.

contends that, in light of universal State practice and the "very nature of *jus in bello*", the Trial Chamber was required to assess the existence of legitimate military objectives from the perspective of a reasonable military commander contemplating the attack.[1285] Instead, he submits, the Trial Chamber erroneously relied on the impressions of "observers and victims" in finding the shelling to be indiscriminate.[1286]

482. Karadžić also submits that the Prosecution was required to disprove that shells landing far from stationary military targets were not aimed at opportunistic mobile targets before the Trial Chamber could find that the shelling was indiscriminate.[1287] In view of Defence evidence concerning SRK reconnaissance operations in Sarajevo, evidence that the ABiH used mobile mortars and were moving throughout Sarajevo, and evidence that the SRK targeted the ABiH's mobile artillery, Karadžić argues that no reasonable trier of fact could have excluded the possibility that the SRK observed and fired on mobile military targets.[1288] With respect to Scheduled Incidents G.1 and G.2 specifically, he emphasizes evidence that ABiH forces were conducting combat operations throughout Sarajevo during the relevant periods and contends that the Trial Chamber erroneously found the attacks to be indiscriminate.[1289]

483. The Prosecution responds that, with respect to the alleged errors in the application of the principle of distinction, the Trial Chamber reasonably rejected Karadžić's claims that the SRK only targeted military objectives.[1290] It submits that Karadžić confuses the lens through which a trial chamber must assess the existence of a military objective with the types of evidence upon which a

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However, this brief argument fails to demonstrate error in the Trial Chamber's conclusion that the attack in Scheduled Incident G.4 was indiscriminate on the basis, in part, that, "even if the presence and the number of ABiH soldiers were known to the SRK units in advance, it must have been obvious to those launching the attack that large numbers of civilians would inevitably gather at the event given: (i) that the event involved a football match, that is, a purely civilian activity; (ii) the time of the event, that is, daytime and during a period of cease-fire; and (iii) the location of the event, that is, the middle of a residential area, surrounded by residential apartment blocks" and its finding that "the SRK's decision to fire two mortar shells at such an event, those shells being designed to suppress activity over a wide area, shows in turn that the SRK units in question did not take any precautionary measures in accordance with the laws of war". Trial Judgement, para. 4087.

[1285] Karadžić Appeal Brief, paras. 571-573, 575.

[1286] Karadžić Appeal Brief, paras. 571, 575. In this respect, Karadžić submits that the Trial Chamber erroneously relied on evidence from John Wilson, Pyers Tucker, Martin Bell, and victims to prove that attacks occurred in purely residential areas and far from military targets, such as barracks, police stations, or factories. Karadžić Appeal Brief, para. 574.

[1287] Karadžić Appeal Brief, paras. 576, 577, 582.

[1288] Karadžić Appeal Brief, paras. 579, 580.

[1289] Karadžić Appeal Brief, paras. 575, 581. Karadžić also suggests that the circumstances of the present case are comparable to those in the *Gotovina* case in which the ICTY Appeals Chamber found that the relevant trial chamber erred by failing to adequately explain how it was able to exclude the possibility of "targets of opportunity". Karadžić Appeal Brief, paras. 577, 578, *referring to Gotovina and Markač* Appeal Judgement, para. 63. *See also* T. 23 April 2018 p. 161 (arguing that ABiH forces abused civilian locations such as "neighborhoods", "UN Hospitals" and schools" by firing from them).

[1290] Prosecution Response Brief, paras. 315, 317. *See also* T. 23 April 2018 p. 221 (arguing that the Trial Chamber considered evidence that the ABiH forces provoked responses from the SRK and reasonably inferred from the indiscriminate or disproportionate nature of the attack that it was directed against the civilian population).

trial chamber may properly rely in making this assessment.[1291] It contends that Karadžić shows no error in the Trial Chamber's "military objective" analysis for Scheduled Incidents G.1 and G.2.[1292] The Prosecution also submits that the Trial Chamber reasonably found that the SRK shelling campaign targeted civilians and civilian areas, not ABiH mobile mortars.[1293] In this respect, the Prosecution suggests that Karadžić ignores the Trial Chamber's findings that the SRK forces shelled areas of Sarajevo other than those where the ABiH operated during Scheduled Incidents G.1 and G.2.[1294]

484. Karadžić replies that the victims and observers upon whose evidence the Trial Chamber relied were not in a position to know the anticipated military advantage from the attacks.[1295] He further submits that the Prosecution failed to exclude the possibility that mobile mortars could have been employed in areas other than those where the ABiH was known to operate during Scheduled Incidents G.1 and G.2.[1296]

485. The Appeals Chamber observes that, with respect to Scheduled Incidents G.1 and G.2, the Trial Chamber noted that military action launched in response to military attacks by the opposing party should be "directed at military targets".[1297] The Trial Chamber found, however, that the SRK shelling "targeted entire civilian neighbourhoods of Sarajevo, without differentiating between civilian and military targets".[1298] Consequently, the Trial Chamber determined the shelling to be "indiscriminate".[1299]

486. The Appeals Chamber recalls that the ICTY was bound to apply rules of international humanitarian law which are beyond any doubt part of customary international law.[1300] The Appeals Chamber further recalls that there is an absolute prohibition on the targeting of civilians in

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[1291] Prosecution Response Brief, para. 315.
[1292] Prosecution Response Brief, para. 316, *referring to* Trial Judgement, para. 4053.
[1293] Prosecution Response Brief, paras. 320, 321. The Prosecution adds that Karadžić's reliance on the *Gotovina and Markač* Appeal Judgement is misplaced. *See* Prosecution Response Brief, para. 321.
[1294] Prosecution Response Brief, para. 320. The Prosecution also submits that Karadžić has not referred to any evidence that the shelling was aimed only at ABiH mobile mortars, that mobile mortars were observed, or that the SRK ordered the targeting of opportunistic mobile targets. *See* Prosecution Response Brief, para. 320.
[1295] Karadžić Reply Brief, para. 173. Karadžić emphasizes that both observers and witnesses acknowledged in their evidence that they were unaware of ABiH military positions and/or that the ABiH used civilian objects for military purposes. *See* Karadžić Reply Brief, paras. 174, 175.
[1296] Karadžić Reply Brief, para. 177. Karadžić emphasizes that "the holding of [the *Gotovina and Markač* Appeal Judgement is that] [w]here the Prosecution fails to prove that 'outlying impacts' landing 'far from military targets' were not aimed at mobile mortars known to be employed by the enemy, its evidence is insufficient". *See* Karadžić Reply Brief, para. 177.
[1297] Trial Judgement, para. 4053.
[1298] Trial Judgement, para. 4053.
[1299] Trial Judgement, paras. 4053-4055.
[1300] *Kordić and Čerkez* Appeal Judgement, para. 44; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 143, *referring to* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704, 3 May 1993, para. 34.

customary international law.[1301] However, while the Appeals Chamber of the ICTY has held that an indiscriminate attack may qualify as an attack directed against civilians or give rise to the inference that an attack was directed against civilians,[1302] the legal test underpinning the principle of distinction as applied in the law of armed conflict has not been articulated by the Appeals Chambers of the ICTY or the ICTR.[1303]

487. The Appeals Chamber observes that the principle of distinction is encapsulated in Additional Protocol I, and that key provisions of Additional Protocol I, including Articles 51 and 52, reflect customary international law.[1304] The Appeals Chamber further observes that Additional Protocol I has been relied upon to interpret provisions of the ICTY Statute.[1305] The Appeals Chamber therefore considers that, in this instance, the principle of distinction should be interpreted and applied in accordance with the relevant provisions of Additional Protocol I.

488. The Appeals Chamber observes that Article 51(4) of Additional Protocol I prohibits indiscriminate attacks, that is to say, attacks which are of a nature to strike military objectives and civilians or civilian objects without distinction.[1306] Thus, in accordance with the fundamental principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked.[1307] The widely accepted definition of "military objectives" is set forth in Article 52(2) of Additional Protocol I as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[1308]

489. The Appeals Chamber considers that, whether a "military advantage" could have been achieved from an attack requires an assessment of whether it was reasonable to believe, in the circumstances of the person(s) contemplating the attack, including the information available to the

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[1301] *Blaškić* Appeal Judgement, para. 109.
[1302] *Dragomir Milošević* Appeal Judgement, para. 66; *Strugar* Appeal Judgement, para. 275.
[1303] The Appeals Chamber observes that, although the ICTY Appeals Chamber recently determined that a trial chamber erred in finding an attack to be indiscriminate, its analysis sets forth the legal framework applied to indiscriminate attacks only in passing and only as it relates to indiscriminate attacks based on the type of weaponry used. *See Prlić et al.* Appeal Judgement, para. 434.
[1304] *See Galić* Appeal Judgement, para. 87, *referring to Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002, para. 9; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal, 11 March 2005, para. 28. *See also Kordić and Čerkez* Appeal Judgement, para. 59, *referring to Blaškić* Appeal Judgement, para. 157.
[1305] *See, e.g., Kordić and Čerkez* Appeal Judgement, paras. 47, 48, 50, 53, 54, 58, 59, 62-65; *Blaškić* Appeal Judgement, paras. 69, 110, 111, 113, 145, 147, 151, 157, 632, 639, 652.
[1306] Articles 51(4) and (5) of Additional Protocol I provide examples as to what types of attacks are to be considered as indiscriminate.
[1307] *See* Article 52(2) of Additional Protocol I. *See also Galić* Trial Judgement, para. 51.
[1308] *See* Article 52(2) of Additional Protocol I. *Cf. Strugar* Appeal Judgement, para. 330.

latter, that the object was being used to make an effective contribution to military action.[1309] The relevant question is whether the attacker(s) could have reasonably believed that the target was a legitimate military objective, and a useful standard by which to assess the reasonableness of such belief is that of a "reasonable commander" in the position of the attacker(s).[1310]

490. Bearing in mind the applicable law, the Appeals Chamber turns to determine whether it was reasonable for the Trial Chamber to have concluded beyond reasonable doubt that the shelling referred to in Scheduled Incidents G.1 and G.2 was indiscriminate.

491. The Appeals Chamber observes that, in summarising the relevant evidence related to Scheduled Incidents G.1 and G.2, the Trial Chamber recalled threats issued by Mladić in May 1992, suggesting that Sarajevo would be subject to an attack of an indiscriminate nature should ABiH forces attack SRK positions in Sarajevo.[1311] In this respect, the Trial Chamber credited evidence [REDACTED].[1312] [REDACTED].[1313]

492. The Trial Chamber further recalled evidence of the orders Mladić issued in relation to the attacks alleged in Scheduled Incidents G.1 and G.2, which, in the Appeals Chamber's view, include clear intent to fire shells without regard for the principles of distinction and protection of civilian objects and the civilian population.[1314] For example, in relation to Scheduled Incident G.1, Mladić ordered an SRK artillery officer, to fire at the railway station and to "scatter them around".[1315]

493. In relation to Scheduled Incident G.1, the Trial Chamber noted evidence from General John Wilson, the then Chief Military Observer of the UN Protection Force ("UNPROFOR"), that the shelling on 28 May 1992 was widespread, and scattered around the city, but at the same time was

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[1309] *Cf. Galić* Trial Judgement, para. 51. *See also Boškoski and Tarčulovski* Trial Judgement, para. 356; *Strugar* Trial Judgement, para. 295. The Appeals Chamber observes that the ICRC commentary on Article 52 of Additional Protocol I highlights the lack of precise definitions offered and suggests that the text "largely relies on the judgment of soldiers who will have to apply these provisions." ICRC Commentary on Additional Protocol I, para. 2037.

[1310] *Cf. Dragomir Milošević* Appeal Judgement, para. 60.

[1311] Trial Judgement, paras. 4022 ("On 19 May 1992, Lieutenant-Colonel Janković of the JNA reported to Mladić that the ABiH was threatening the barracks and the JNA personnel inside; Mladić responded that if Jovan Divjak, a Serb General in the ABiH, attacked the Maršal Tito Barracks, Divjak 'would sentence first himself and then [the] entire Sarajevo to death.'"), 4023 (noting that during a meeting sometime between 20 and 28 May 1992 "Mladić proposed to use 'all the equipment and arms' available to 'massively bombard Sarajevo'"), 4024 ("On 25 May 1992, Mladić informed an unidentified JNA officer that '[i]f a single bullet is fired [...] at Jusuf Džonlić barracks or Maršal Tito Barracks, or if a single soldier is wounded either at the front or in the barracks' he would 'retaliate against the town'. He further stated: 'Sarajevo will shake, more shells will fall on per second than in the entire war so far. [...] You can endure more than they can. It is not my intention to destroy the town and kill innocent people. [...] They should pull out the civilians, and if they want to fight we'll fight. It would be better to fight in the mountains than in the town, though.'"). *See also* Trial Judgement, para. 4000, nn. 13253, 13264.

[1312] [REDACTED]

[1313] [REDACTED]

[1314] For orders issued in relation to Scheduled Incident G.1, *see* Trial Judgement, paras. 4028, 4034, 4035. For orders issued by Mladić in relation to Scheduled Incident G.2, *see* Trial Judgement, para. 4041.

[1315] Trial Judgement, para. 4035, *referring to* Exhibit P1511.

focused on the center of the city and not related to any conflict on the confrontation line, and was an example of "indiscriminately directed fire" at the city, whereby there was no military value in the targets that were selected.[1316] Similarly, with respect to Scheduled Incident G.2, the Trial Chamber accepted the [REDACTED] observations that due to the nature of the weaponry employed by the SRK and Sarajevo's dense urban environment, "'[e]verything was being hit', including housing and accommodation buildings."[1317]

494. With respect to both scheduled incidents, the Trial Chamber recalled evidence of shells striking civilian objects such as houses and the state hospital as well as individual civilians, resulting in damage to civilian property as well as injuries and deaths.[1318] In several instances, the Trial Chamber noted that these locations were not near ABiH military installations, confrontations lines, and/or ABiH forces.[1319]

495. The Trial Chamber also recalled evidence of opposition to the attacks related to Scheduled Incident G.1 expressed by various Serb officials in the context of cease-fire negotiations.[1320] This included evidence from John Wilson that JNA commanders had sought to dissociate themselves from the shelling and had expressed their disapproval, and explained that Mladić was acting independently of the JNA.[1321] The Trial Chamber also noted that Slobodan Milošević had stated to UNPROFOR representatives, in response to an appeal from the UN Secretary-General to end the shelling related to Scheduled Incident G.1, that he disagreed with Mladić's actions and that he had been trying to contact Karadžić to use his influence to stop the "bloody, criminal" bombardment.[1322] Similarly, the Trial Chamber also noted evidence of Karadžić's agreement with UNPROFOR representatives that he would see Mladić in person to stop the bombardment.[1323]

496. As reflected above, contrary to Karadžić's suggestion, the Trial Chamber did not limit itself to the evidence of military observers and victims. Indeed, the Trial Chamber relied upon the evidence of [REDACTED] including, in particular, [REDACTED], in reaching its conclusion that the shelling was indiscriminate. In any event, the applicable legal test, used to determine whether an attack was appropriately directed at a military objective, does not render the evidence of military

[1316] Trial Judgement, para. 4029.
[1317] Trial Judgement, para. 4048.
[1318] For damage to civilian property and civilian injuries caused from shelling related to Scheduled Incident G.1, *see* Trial Judgement, paras. 4029-4033. For damage to civilian property and civilian injuries and deaths caused from shelling related to Scheduled Incident G.2, *see* Trial Judgement, paras. 4040, 4042-4046, 4049.
[1319] Trial Judgement, paras. 4029-4032, 4042-4046.
[1320] Trial Judgement, paras. 4034, 4036, 4037.
[1321] Trial Judgement, para. 4034.
[1322] Trial Judgement, para. 4036.

observers and victims irrelevant. The Trial Chamber was entitled to rely on such evidence in determining whether the attacker(s) reasonably could have believed that the targets were legitimate military objectives. The Appeals Chamber considers that Karadžić has not shown that the Trial Chamber's determinations that the attacks related to Scheduled Incidents G.1 and G.2 were indiscriminate were erroneous.

497. With regard to Karadžić's contention that the Prosecution was required to disprove that shells landing far from stationary military targets were not aimed at ABiH mobile targets, the Appeals Chamber notes that the evidence of ABiH mobile mortar activity cited by Karadžić is largely general in nature, rather than temporally and geographically specific to the scope of Scheduled Incidents G.1 and G.2.[1324] In addition, Karadžić's references to evidence that ABiH combat operations were ongoing during the attacks related to Scheduled Incidents G.1 and G.2 are mostly general in nature rather than related to the ABiH's use of mobile mortars specifically.[1325] Further, this evidence only demonstrates overlap between some, not all, of the various areas of Sarajevo, including civilian neighbourhoods, that the Trial Chamber found were shelled indiscriminately resulting in damage to civilian objects and civilian casualties, and the areas of ABiH combat activities.[1326]

498. The Appeals Chamber also observes that, in its discussion of the general nature of the shelling campaign, the Trial Chamber explicitly considered the ABiH's use of mobile mortars in civilian areas and considered the practice to be "illegal".[1327] Notwithstanding, it credited evidence from David Fraser of UNPROFOR that it would have been impossible for the SRK to locate the ABiH mobile mortar,[1328] and determined that there was a "low probability of the SRK response actually hitting and destroying the mobile mortar in question".[1329] It therefore concluded that the SRK units should have refrained from firing back if the mobile mortar was intermingled with

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[1323] Trial Judgement, para. 4037. According to Witness Wilson, Karadžić further stated that the Serb forces were inexperienced and self-organized and therefore tended to "over-react" to attacks by the "Green Berets". *See* Trial Judgement, para. 4037.

[1324] *See* Karadžić Appeal Brief, para. 580, *referring to* Trial Judgement, paras. 3986, 4067, 4501, 4535. The Appeals Chamber also notes that notwithstanding specific Prosecution evidence of a number of incidents of fire on ostensibly civilian objects, such as houses and apartment buildings, resulting in both civilian casualties and the destruction of civilian objects, Karadžić did not argue in his final trial brief in relation to Scheduled Incidents G.1 and G.2 that the intended targets of attack were mobile mortars. Further, he did not argue, more generally, that these objects were otherwise legitimate military objects or in the vicinity of legitimate military objects other than through very general assertions. *See* Karadžić Final Trial Brief, paras. 1980-2001.

[1325] *See* Karadžić Appeal Brief, para. 581, *referring to* Exhibits D232, P998, D577, P2239.

[1326] *See* Karadžić Appeal Brief, paras. 580, 581, *referring to* T. 12 November 2012 p. 30056, Exhibits D232, P998, D577, P2239. *See also* Trial Judgement, paras. 4054, 4055. *Cf.* Trial Judgement, paras. 4028-4033, 4035, 4040-4046, 4049, 4053-4055.

[1327] *See, e.g.*, Trial Judgement, para. 4501.

[1328] Trial Judgement, para. 3990.

[1329] Trial Judgement, para. 4501.

civilians.[1330] The Trial Chamber also found that the nature of the SRK responses to alleged ABiH fire from mobile mortars indicated that the "aim was retaliation rather than that of neutralising the mortar in question".[1331]

499. In addition, the Trial Chamber noted the evidence of Francis Roy Thomas who testified that due to their limited range of fire, ABiH mortars located "too far into the city" could not reach the SRK positions, and therefore reasoned that any SRK fire deep into the city could not have been targeting mobile mortars.[1332] Further, and in relation to Scheduled Incident G.1 specifically, the Trial Chamber rejected the evidence of a Defence witness that ABiH forces fired mortars from positions in and around the State Hospital in May 1992, which was shelled during this attack.[1333]

500. In view of the above, the Appeals Chamber finds that Karadžić has not shown that the Trial Chamber's determination that the attacks related to Scheduled Incidents G.1 and G.2 were indiscriminate was erroneous due to an alleged failure to exclude the reasonable possibility that the attacks were aimed at the engagement of mobile mortars.[1334] To the contrary, the Trial Chamber's findings reflect that the SRK shelling targeted military objectives and civilian objects and the civilian population without distinction, notwithstanding the possibility that ABiH mobile positions may have been intermingled in civilian areas of Sarajevo.[1335] Karadžić's contentions on appeal do not undermine the reasonableness of this conclusion.

501. In light of the foregoing, the Appeals Chamber finds that Karadžić does not demonstrate any error in the Trial Chamber's conclusions that Scheduled Incidents G.1 and G.2 were indiscriminate attacks.

[1330] Trial Judgement, para. 4501 ("As for the use of mobile mortars by the ABiH from civilian areas, the [Trial] Chamber accepts that this practice caused difficulties to the SRK units and that it was illegal. However, the legality or otherwise of ABiH firing practices is only relevant to the allegations made in this case if they go to one of the main allegations in this case, such as showing that the SRK observed the principles of distinction during the conflict in Sarajevo. In that respect, the [Trial] Chamber agrees with Fraser that given the low probability of the SRK response actually hitting and destroying the mobile mortar in question, the SRK units should have refrained from firing back if the mobile mortar was intermingled with civilians.") (internal citation omitted).
[1331] Trial Judgement, para. 4501.
[1332] Trial Judgement, n. 13180.
[1333] Trial Judgement, n. 13403.
[1334] The Appeals Chamber considers that the circumstances of the present case are distinct from those of the *Gotovina* case, in which the ICTY Appeals Chamber found that the trial chamber had erred in failing to adequately explain how it was able to exclude the possibility of "targets of opportunity". *See Gotovina and Markač* Appeal Judgement, para. 63. *Cf.* Karadžić Appeal Brief, paras. 577, 578, *referring to Gotovina and Markač* Appeal Judgement, para. 63. In the *Gotovina* case, the Appeals Chamber emphasized that there was evidence that targets of opportunity were moving throughout the town of Knin and, further, that Croatian Army artillery had successfully hit one such target. *Gotovina and Markač* Appeal Judgement, para. 63. In the present case, as detailed above, there was an absence of evidence indicating that mobile mortars were active in all areas subjected to artillery fire in Scheduled Incidents G.1 and G.2 as well as considerable evidence that ABiH mobile mortars within Sarajevo could not be targeted with distinction from the civilian objects and civilians with which they were intermingled.
[1335] Trial Judgement, para. 4053.

(b) Principle of Proportionality

502. As recalled above, the Trial Chamber found that the shelling related to Scheduled Incidents G.1 and G.2 was disproportionate.[1336] The Trial Chamber relied on this determination, in part, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, to infer that these were attacks "directed against civilians",[1337] and, on this basis, entered convictions under Counts 5, 6, 9, and 10 of the Indictment for Karadžić's participation in the Sarajevo JCE.[1338]

503. Karadžić contends that, in finding the attacks in Scheduled Incidents G.1 and G.2 were disproportionate,[1339] the Trial Chamber failed to consider whether the military commanders launched the attacks with "the knowledge" that they would cause "excessive" collateral damage.[1340] Furthermore, Karadžić submits that the Trial Chamber erroneously evaluated whether incidental loss of life or injury to civilians and damage to civilian objects was "extensive" instead of applying the appropriate balancing test of assessing whether such injury and/or damage was "clearly excessive in relation to the concrete and direct overall military advantage".[1341] Specifically, he contends that the Trial Chamber omitted consideration of the importance of protecting JNA soldiers who were attacked in their barracks, the importance of defending Bosnian Serb positions in Hadžići, at Sarajevo airport, and the Jewish Cemetery, and the importance of preventing ABiH forces from de-blocking Sarajevo from the north and the west.[1342] He further argues that, in finding the attacks disproportionate, the Trial Chamber erroneously relied on the superior firepower of the SRK and Mladić's statement that "Sarajevo will shake with more shells fired than in the entire war so far" when, in fact, the attacks related to Scheduled Incidents G.1 and G.2 resulted in a limited number of casualties.[1343]

[1336] Trial Judgement, paras. 4053-4055.
[1337] Trial Judgement, para. 4623.
[1338] Trial Judgement, paras. 4612, 4616, 4628, 4632, 4937-4939, n.15512.
[1339] Similar to his submissions related to the principle of distinction, Karadžić generally argues that the Trial Chamber misapplied the principle of proportionality but only seeks to substantiate his contention through reference to the Trial Chamber's consideration of Scheduled Incidents G.1 and G.2. *See* Karadžić Appeal Brief, paras. 587, 588, 591, 596.
[1340] Karadžić Appeal Brief, paras. 592, 595, 597. Karadžić emphasizes that the ICRC Commentary on the Additional Protocols, domestic jurisprudence, State practice, and academic commentary reflect that the "knowledge element" is a question of "common sense and good faith", with military commanders being granted a "fairly broad margin of judgement". Karadžić Appeal Brief, para. 593.
[1341] Karadžić Appeal Brief, paras. 570, 583-587, 594, *referring to, inter alia*, Article 8(2)(b)(iv) of the Rome Statute, Article 51(5)(b) of Additional Protocol I. Karadžić emphasizes that injury to civilians may be "exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance". Karadžić Appeal Brief, para. 586.
[1342] Karadžić Appeal Brief, para. 588.
[1343] Karadžić Appeal Brief, paras. 589-591. Karadžić contrasts the number of casualties proven in relation to Scheduled Incidents G.1 and G.2 to the larger number resulting from the NATO bombing of Belgrade, which the ICTY's Office of the Prosecutor determined to be proportionate. Karadžić Appeal Brief, para. 591.

504. The Prosecution responds that Karadžić mischaracterizes the Trial Chamber's findings, arguing that it did not base its proportionality findings solely on the extent of the damage[1344] or the superiority of the SRK's heavy weaponry.[1345] Likewise, it disputes that the Trial Chamber failed to consider the SRK's tactical concerns.[1346] The Prosecution also suggests that the disproportionate nature of certain attacks was simply one of the factors relied upon by the Trial Chamber to infer that the SRK shelling was "directed against civilians".[1347] It further contends that it is "inherent in the [Trial] Chamber's conclusions" that, to the extent the perpetrators had any military objectives in mind, "they knew their attack would result in excessive civilian harm".[1348] Finally, the Prosecution submits that Karadžić's challenges to the Trial Chamber's proportionality findings would have no impact on his convictions as Scheduled Incidents G.1 and G.2 were also reasonably found to be indiscriminate attacks, which is a sufficient basis to infer that these attacks were directed against civilians.[1349]

505. Karadžić replies that the Trial Chamber applied the wrong test for the assessment of proportionality, arguing that the SRK's superior firepower and the fact that civilian structures were "extensively" damaged is not determinative and that the relevant question was whether the collateral damage was excessive in relation to the military advantage anticipated.[1350]

506. As noted above, the Trial Chamber inferred that Scheduled Incidents G.1 and G.2, along with all other incidents of indiscriminate and disproportionate shelling and sniping, amounted to attacks "directed against civilians".[1351] The Trial Chamber relied on this inference to establish the relevant *mens rea* and/or *actus reus* requirements for the crimes of murder, unlawful attack on civilians, and terror.[1352] However, the Appeals Chamber recalls that "the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population".[1353] Considering that the Appeals Chamber has affirmed the Trial Chamber's conclusions that the shelling related to Scheduled Incidents G.1 and G.2 was indiscriminate, an

[1344] Prosecution Response Brief, para. 326.
[1345] Prosecution Response Brief, paras. 326, 327.
[1346] Prosecution Response Brief, para. 328.
[1347] Prosecution Response Brief, para. 325.
[1348] Prosecution Response Brief, para. 324.
[1349] Prosecution Response Brief, paras. 329, 330.
[1350] Karadžić Reply Brief, para. 178.
[1351] Trial Judgement, para. 4623.
[1352] With respect to the crimes of unlawful attacks on civilians and terror as violations of the laws or customs of war, findings that the attacks were directed against civilians were used to establish the *actus reus* for each crime. *See* Trial Judgement, paras. 450, 459, 460, 4628, 4632. With respect to murder as a crime against humanity and as a violation of the laws or customs of war, the Trial Chamber observed that the scheduled incidents collectively reflected that civilians were either deliberately targeted or were the victims of indiscriminate and/or disproportionate attack and that the only reasonable inference to be drawn from the circumstances and the manner in which the victims were killed was that the perpetrators had the intent to kill. Trial Judgement, para. 4616. *See also* Trial Judgement, paras. 4612, 4614, n. 15512.
[1353] *Dragomir Milošević* Appeal Judgement, para. 66; *Strugar* Appeal Judgement, para. 275.

additional finding that the attacks were disproportionate is not necessary to sustain the Trial Chamber's inference that the attacks were "directed against civilians".

507. In addition, any error invalidating the conclusions that the attacks related to Scheduled Incidents G.1 and G.2 were disproportionate would not impact the Trial Chamber's findings that the Sarajevo JCE involved a campaign to terrorise civilians and the findings on Karadžić's participation in the Sarajevo JCE. The Trial Chamber's findings reflect that "disproportionate" attacks were simply one of several types of illegitimate attacks, and the Trial Chamber's conclusions on the Sarajevo JCE's intent to terrorise the civilian population would be sustained on the basis of all the shelling attacks found to be indiscriminate as well as the shelling and sniping attacks found to have been deliberate attacks on civilians.[1354] In finding that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror, and significantly contributed to the joint criminal enterprise, the Trial Chamber relied on factors entirely independent of the "disproportionate" nature of any particular attack.[1355] Finding that attacks related to Scheduled Incidents G.1 and G.2 were disproportionate is not necessary to sustain these findings.

508. In light of the above, the Appeals Chamber finds that it need not assess whether the Trial Chamber erred in finding that the shelling related to Scheduled Incidents G.1 and G.2 was disproportionate as any error in this respect would have no impact on the verdict and would not result in a miscarriage of justice.

(c) Conclusion

509. For the foregoing reasons, the Appeals Chamber dismisses Ground 33 of Karadžić's appeal.

[1354] *See* Trial Judgement, paras. 4497 ("throughout the conflict the SRK units engaged in deliberate, disproportionate, and indiscriminate shelling"), 4600 ("the SRK conducted a campaign of shelling and sniping of the city, including of its civilian population, with the intention to, *inter alia*, terrorise the civilian population of Sarajevo"). The Appeals Chamber further observes that, in determining that the campaign of shelling and sniping was conducted with the intention to terrorise the civilian population, the Trial Chamber emphasized: (i) the SRK's use of modified air bombs, which it had determined to be "indiscriminate" by their very nature; and (ii) sniping incidents, which it determined "by their very nature could have been nothing but deliberate attacks on civilians". Trial Judgement, paras. 4597, 4600.

[1355] *See* Trial Judgement, para. 4891. Factors relied upon were: (i) Karadžić's continuous support of Mladić who was central to the implementation of the Sarajevo JCE; (ii) Karadžić's involvement in military matters at the planning and operational levels; (iii) Karadžić's knowledge of attacks on civilians in Sarajevo and of indiscriminate or disproportionate SRK fire; (iv) Karadžić's failure to prevent the shelling and sniping or punish those responsible; (v) Karadžić's support for and promotion of SRK commanders involved in the shelling and sniping; and (vi) Karadžić's modulation of the campaign in accordance with political goals. *See* Trial Judgement, para. 4891.

2. Alleged Errors in Finding that the VRS Shelled Markale Market on 5 February 1994 (Ground 34)

510. The Trial Chamber found by majority, Judge Baird dissenting, that the SRK fired the 120 millimetre mortar shell that hit the "Markale" open-air market frequented by civilians in Sarajevo on 5 February 1994 causing the death of at least 67 people and injuring over 140.[1356] Its conclusion on the origin of fire was based on the following findings: (i) the shell came from above ground level and was fired from a north to north-easterly direction with an azimuth of 18 degrees, plus or minus five degrees;[1357] (ii) the shell's angle of descent was in the range between 55 and 65 degrees;[1358] (iii) the shell was fired on a charge higher than charge two;[1359] (iv) the angle of descent measured at the scene was not compatible with the higher angle of descent ABiH forces would have had to use to hit the market and such steeper angle would have placed the launching crew at significant risk;[1360] and (v) the shell was fired from the SRK side of the confrontation line in the area of Mrkovići, which was north to north-east of Markale and where the SRK kept 120 millimetre mortars.[1361] The Trial Chamber also accepted evidence that: (i) the ABiH had no mortars in the area it controlled within the determined direction of fire and concluded that it would have been nearly impossible to have used mobile mortars to fire at the market without being seen;[1362] (ii) the SRK had used mortar fire on other urban parts of Sarajevo just before the shelling of the market on 5 February 1994;[1363] and (iii) the upper echelons of Bosnian Serb leadership were trying to ensure control over the undisciplined firing by SRK forces into Sarajevo around the time of the incident.[1364]

511. The Trial Chamber's finding on the shell's angle of descent relied on the calculations of Prosecution Witnesses Berko Zečević and John Hamill who had investigated the scene and whose estimates "overlap[ped] to a great extent" and were "in line" with the angle determined by Defence Witness Zorica Subotić.[1365]

512. Karadžić submits that the Trial Chamber erred by calculating the shell's angle of descent on the basis of measurements taken after the crater was disturbed and, in doing so, unreasonably

[1356] Trial Judgement, paras. 4243, 4253.
[1357] Trial Judgement, para. 4245.
[1358] Trial Judgement, para. 4247.
[1359] Trial Judgement, para. 4248.
[1360] Trial Judgement, para. 4248.
[1361] Trial Judgement, para. 4249.
[1362] Trial Judgement, para. 4249.
[1363] Trial Judgement, paras. 4249, 4250.
[1364] Trial Judgement, para. 4250.
[1365] Trial Judgement, paras. 4181, 4188, 4190, 4247, 4248.

disregarded "a plethora of evidence" that the measurements were unreliable.[1366] In his view, the Trial Chamber unreasonably disregarded the findings of a UN expert investigation team, including the evidence of Witness Sahasair Khan, who was a member of the team, as well as the evidence of Prosecution Witness Richard Higgs, and the evidence of Defence Witnesses Derek Allsop and John Russell who concluded that there was no way to determine which side had fired the mortar.[1367] Karadžić also submits that the Trial Chamber unreasonably relied on the evidence of Witness Zečević who, as a former ABiH employee, "presumably" aimed to establish that the Bosnian Serbs were responsible for the shelling, who acknowledged that he had not used a "standard" method of measurement, and whom the Trial Chamber found mistaken in relation to another matter within his area of expertise concerning fuel air bombs.[1368] Karadžić argues that, given the error in calculating the angle of descent that could not be calculated, the Trial Chamber's finding that the Bosnian Serbs had fired the shell that landed on Markale market is unsafe and must be reversed.[1369]

513. The Prosecution responds that the Trial Chamber reasonably found that the SRK had fired the shell that struck Markale market and that its findings were supported by a comprehensive analysis of the technical evidence.[1370] In particular, the Prosecution contends that the Trial Chamber reasonably relied on the evidence of experts in crater analysis who agreed that a range for the angle of descent could be established and whose independent findings strongly overlapped and posits that Karadžić misconstrues the relevant evidence.[1371] The Prosecution also submits that the Trial Chamber reasonably relied on the evidence of Witness Zečević given his expertise and methodology and the fact that his calculations were corroborated by other evidence.[1372] The Prosecution also maintains that the Trial Chamber reasonably rejected contrary evidence.[1373]

514. The Appeals Chamber will first consider Karadžić's argument that the Trial Chamber erred by calculating the shell's angle of descent on the basis of measurements taken after the crater had

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[1366] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 601, 602, 606, 608-611, 621; Karadžić Reply Brief, paras. 180-184; T. 24 April 2018 p. 264.
[1367] Karadžić Appeal Brief, paras. 602, 605, 609, 615, 619, 620; T. 23 April 2018 p. 161.
[1368] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 606, 607, 615, *referring to* Trial Judgement, paras. 4413, 4437, 4452, 4473, 4491; T. 23 April 2018 p. 161, T. 24 April 2018 p. 264. *See also* T. 23 April 2018 p. 155.
[1369] Karadžić Appeal Brief, paras. 618-622; Karadžić Reply Brief, paras. 180-184; T. 24 April 2018 p. 264. *See also* T. 24 April 2018 pp. 264, 265 (contending that, on 5 February 1994, the stalls of the Markale market were empty and reports did not reflect that a single sales person was killed, raising the question as to why 500 people were there).
[1370] Prosecution Response Brief, paras. 331, 332, 340; T. 23 April 2018 p. 228. *See also* T. 23 April 2018 pp. 234, 235 (arguing that the findings in relation to this incident are further supported by the circumstantial evidence relied upon by the Trial Chamber).
[1371] Prosecution Response Brief, paras. 332, 335-340; T. 23 April 2018 pp. 232-234.
[1372] Prosecution Response Brief, paras. 331, 335, 338-340; T. 23 April 2018 pp. 228-234.
[1373] Prosecution Response Brief, paras. 341-343; T. 23 April 2018 pp. 220, 233, 235. The Prosecution also submits that Judge Baird's dissenting opinion on this point misinterprets the relevant findings by UN investigators who were unable to prove which party had fired the shell because they could not establish the number of charges used and not because, as Karadžić claims, it was impossible to calculate the angle of descent. *See* Prosecution Response Brief, para. 344, *referring to* Trial Judgement, Judge Baird's Dissenting Opinion, paras. 6081-6119.

been disturbed. In this respect, the Appeals Chamber notes that the Trial Chamber considered the evidence suggesting that measurements and estimates of the angle of descent were unreliable due to the crater having been disturbed and that it thoroughly explained its decision to nonetheless rely on the evidence of Witnesses Zečević and Hamill, whose estimates in its view overlapped to a great extent and were corroborated by the evidence of Witness Subotić.[1374] The Trial Chamber relied in particular upon the evidence of Witness Hamill, who stated that the fuse tunnel in Markale was sufficiently intact to take measurements and estimate the angle of descent.[1375] The Trial Chamber also took note of Witness Hamill's clarification that the UN team had used various methods to establish the direction of fire and that there was a remarkable consistency across their findings despite the fact that the investigators had proceeded independently and used different methods.[1376] The Trial Chamber found it significant that all but one of the estimated angle ranges on the trial record overlapped and that the one exception was the slightly higher angle calculated by Witness Russell, who had limited experience in crater analysis, had made his estimate quickly on the day of the incident and, when testifying, could not remember having taken any measurements.[1377]

515. The Appeals Chamber notes that Karadžić suggests that Witness Hamill concluded that it was impossible to determine where the mortar round was fired from because the crater had been disturbed in the days that elapsed between the impact and the analysis.[1378] However, the Appeals Chamber observes that Karadžić's submission is based on a selective reading of Witness Hamill's evidence. When Karadžić put to the witness that, because of the passage of time between the impact and the investigation, it was impossible to determine the origin of the mortar, Witness Hamill responded categorically that, to the contrary, as he had stated in his report, it was "very" possible to determine the "specific" direction from which the round originated without any ambiguity.[1379]

[1374] Trial Judgement, para. 4247.

[1375] Trial Judgement, para. 4194, *referring to, inter alia*, Exhibit P1994, p. 137 ("it was my view [...] on examining the fuse tunnel that it was inherently – it was pretty well intact. It wasn't completely intact, but it was intact enough that I could make an estimate of the angle of incidence as being between 950 and 1.100 mils. That is within less than 10 degrees. A colleague of [...] mine put it to between 1.000 and 1.100 mils. I would say that the fuse tunnel was fairly intact.").

[1376] Trial Judgement, para. 4194.

[1377] Trial Judgement, para. 4247, *referring to, inter alia*, the evidence of Witness Russell. The Appeals Chamber also notes that in considering Witness Russell's evidence and, in particular, his conclusion that "it was not possible to determine which side had fired the round as the minimum/maximum range straddled the confrontation line", the Trial Chamber noted that when put to him that firing tables for 120 millimeter shells indicated that the angle of descent remains the same regardless of the distance from which the shell is fired on different charges, Witness Russell accepted that, had he known this, he would have likely come to a different conclusion about the distance from which the shell was fired. *See* Trial Judgement, para. 4186, *referring to* T. 30 October 2012 pp. 29397-29400.

[1378] Karadžić Appeal Brief, para. 609.

[1379] T. 13 December 2010 p. 9693. As Witness Hamill had clarified in his report, "[i]t [was] not possible to state where the round was fired from, as it could have been fired at any one of a number of different charges, giving a different range. It was therefore not the difficulty with estimating more accurately the angle of descent that prevented a definitive conclusion as to the origin of fire but rather the lack of information on the charge used to fire the mortar, which was an essential element for calculating the distance the mortar had traveled before hitting the ground at the site of the incident." *See* Exhibit P1441, p. 25; Trial Judgement, para. 4194, *referring to* Exhibit P1994, pp. 132-133 ("[b]ecause

Karadžić also misrepresents the evidence of another member of the UN investigating team, Witness Khan, who acknowledged the difficulty in calculating accurately the angle of descent due to interferences at the scene by various investigators but stated that, nonetheless, his calculation of the direction to the firing position was "fairly accurate", because the approximate angle of descent was calculated on the basis of the approximate location of the shell's fins found in the crater.[1380] The Appeals Chamber observes that Karadžić's submission that another UN expert, Verdy, "did not attempt to measure the angle of descent because the previous team had disturbed the crater"[1381] is misleading as the said expert had provided an estimated angle of descent.[1382] In any event, the Trial Chamber did not rely on Verdy's calculations, having found flaws in his method.[1383]

516. As to Karadžić's contention that Witness Higgs concluded that there was no way to validly determine the origin of fire,[1384] the Appeals Chamber observes that Karadžić misconstrues his evidence. Witness Higgs testified that his team worked out the angle of descent from the minimum angle necessary for the mortar to clear the nearby buildings and land in the market and then calculated the six possible locations from which the mortar could have been fired using the six charges that could have been used.[1385] Having visited the six locations, Witness Higgs concluded that the mortar must have been fired using the two higher charges from farther behind the confrontation line in the village of Mrkovići which was supported by the mortar's tail fins being embedded in the crater at Markale and by the evidence of a bystander.[1386] The Appeals Chamber notes therefore that, contrary to Karadžić's submission, Witness Higgs concluded that the mortar was "possibly fired" from the SRK-controlled area of Mrkovići.[1387] In addition, the Appeals Chamber notes that, although the Trial Chamber found Witness Higgs reliable and credible, it nonetheless considered that his evidence was of limited value as the majority of his testimony was based on interpretation of reports compiled by investigation teams, appraising their methodology

of the fact that it is impossible to determine, absolutely impossible to determine, the number of additional increments to the primary charge, then it is not possible with any sort of validity to say where the round was fired. However, what one can do if one has a good fuse tunnel and measures the incident angle, by consulting the range tables, one can work out six areas, in the case of a bomb like this which had six possibilities of different charges. If a mortar bomb had seven possibilities, for example, if it had seven charges, then there would be seven possible areas from which it could have been launched, all of them along the same line and all of them comprising effectively an oval area along that line"); T. 13 December 2010 p. 9694 ("it is simply not possible to determine the distance that the round has been fired from").

[1380] *Compare* Exhibit P1441, p. 23 *with* Karadžić Appeal Brief, para. 609 *and* Karadžić Reply Brief, para. 182.

[1381] Karadžić Appeal Brief, para. 604.

[1382] Exhibit P1441, p. 16.

[1383] Trial Judgement, para. 4246.

[1384] Karadžić Appeal Brief, para. 613 ("[h]e concluded that as there was no accurate angle of descent recorded, there was no way to validly determine which side had fired the mortar"), *referring to* T. 19 August 2010 p. 5983.

[1385] Trial Judgement, para. 4212, n. 14105, *referring to, inter alia*, T. 19 August 2010 pp. 5983, 6027.

[1386] Trial Judgement, para. 4212, n. 14101, *referring to, inter alia*, T. 19 August 2010 p. 6027, Exhibit P1437, p. 11.

[1387] Trial Judgement, para. 4212, n. 14102, *referring to* T. 19 August 2010 pp. 6026–6028.

and conclusions.[1388] Hence, in finding that the fire originated from Mrkovići, it relied upon Witness Higgs's evidence when corroborated by other witnesses.[1389]

517. As to Karadžić's submissions related to Witness Allsop who testified that the information available on site did not allow for an accurate calculation of the range from which the mortar was fired,[1390] the Appeals Chamber notes that the Trial Chamber duly considered his evidence and observed that, in light of his observations, it could not be certain that the speed of the shell as determined by Witness Zečević was absolutely accurate.[1391] However, it was satisfied that the wide margin of error allowed by Witness Zečević took into account all the possible factors referred to by Witness Allsop as capable of having a significant impact on the accuracy of the relevant calculation.[1392]

518. In light of the foregoing, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber made unreasonable findings in its assessment of the relevant evidence or erred in accepting the expert evidence suggesting that the angle of descent could be reliably estimated despite the interference with the crater at the scene of the incident.

519. With respect to Karadžić's submission that the Trial Chamber unreasonably relied on Witness Zečević's evidence as to the angle of descent, the Appeals Chamber notes that the Trial Chamber relied on Witness Zečević's evidence having found him credible, in possession of extensive technical expertise, and given that his evidence was corroborated by two other expert witnesses.[1393] Specifically, the Trial Chamber observed that Witness Zečević's estimates were corroborated by those of Witness Hamill, which with their margins of error overlapped to a great extent, as well as the estimates by Witness Subotić, which were determined on the basis of the fragment traces on the scene.[1394] The Trial Chamber also found significant the fact that Witness Zečević's estimate "contained the largest margin of error" compared to the other investigators.[1395]

520. The Appeals Chamber considers unsubstantiated Karadžić's cursory submission that Witness Zečević's evidence was tainted by his motive to demonstrate that the mortar was fired from

[1388] Trial Judgement, para. 4012.
[1389] *See* Trial Judgement, paras. 4012, 4248.
[1390] Trial Judgement, para. 4219.
[1391] Trial Judgement, para. 4248.
[1392] Trial Judgement, para. 4248.
[1393] Trial Judgement, para. 4247. The Trial Chamber noted that "Zečević is a mechanical engineer with years of experience in the weapons industry, including testing of weapons". *See* Trial Judgement, para. 4247, n. 14231.
[1394] Trial Judgement, para. 4247. *See also* Trial Judgement, para. 4216 ("[Witness Subotić] using another method, namely the density of the lateral beam of the fragment markings or splinter patterns on the asphalt, she calculated the angle of descent at between 64.6 and 70.32 degrees, that is, still within the range estimated by Zečević.").
[1395] Trial Judgement, para. 4247.

Bosnian Serb-held territory.[1396] As to Karadžić's contention that Witness Zečević "acknowledged" that he had not used a common method of measuring the angle of descent,[1397] the Appeals Chamber notes that, in order to calculate the angle of descent, Witness Zečević measured the depth of the penetration of the shell's stabiliser by returning the stabiliser to the scene and inserting it into the crater.[1398] Contrary to Karadžić's submission, the witness testified that, since the investigation, this method had become "standard" and was widely adopted in assessing operations in urban zones.[1399] In addition, the Trial Chamber considered the evidence of Defence Witness Steven Joudry, a trained artillery officer and instructor in gunnery and field techniques for crater analysis, who testified that re-inserting the stabiliser for the purposes of crater analysis was an "acceptable" and "reasonable way to come up with an estimate".[1400] Finally, with respect to Karadžić's argument that Witness Zečević was found to have erred in relation to another matter within his expertise related to fuel air bombs,[1401] the Appeals Chamber notes that the fact that the Trial Chamber preferred to rely on the testimony of other ballistic experts for the purposes of a different incident does not demonstrate that the Trial Chamber erred in relying on Witness Zečević's ballistic expertise or in its assessment of the probative value of his evidence on the angle of descent for the purposes of the Markale incident. In light of the above, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber's reliance on Witness Zečević's calculation of the angle of descent was unreasonable.

521. The Appeals Chamber finds that Karadžić has failed to demonstrate any error on the part of the Trial Chamber in its assessment of evidence and finding that SRK forces had fired the shell that landed on Markale market on 5 February 1994. Based on the foregoing, the Appeals Chamber dismisses Ground 34 of Karadžić's appeal.

[1396] Karadžić Appeal Brief, para. 606, *referring to* T. 22 February 2011 p. 12158. The Appeals Chamber notes that, in the transcript page Karadžić seeks to rely upon, the witness merely states: "I volunteered for this work, because I believed that the statements given on the previous day were not correct, and that it was, according to them, impossible to determine the origin of fire. So therefore I attempted, with my colleagues, to provide some additional information. The investigating judge who was on the spot authorised me and my colleagues to proceed with preparing this analysis".
[1397] Karadžić Appeal Brief, para. 607, *referring to* T. 24 February 2011 p. 12340.
[1398] Trial Judgement, para. 4181.
[1399] T. 24 February 2011 pp. 12339, 12340.
[1400] Trial Judgement, para. 4196; T. 30 October 2012 pp. 29344, 29345.
[1401] Karadžić Appeal Brief, para. 615, *referring to* Trial Judgement, paras. 4413, 4437, 4452, 4473, 4491.

3. Alleged Errors in Finding that Karadžić Shared the Common Purpose to Terrorize the Civilian Population of Sarajevo (Grounds 36 and 37)

522. As recalled above, the Trial Chamber found that the Sarajevo JCE, the primary purpose of which was to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the SRK, came into existence in late May 1992 and continued to be implemented until October 1995.[1402] The Trial Chamber determined that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror among the civilian population of Sarajevo, and significantly contributed to the execution of the common plan.[1403] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of murder as a crime against humanity as well as murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war.[1404]

523. In concluding that Karadžić shared the common purpose of and significantly contributed to the Sarajevo JCE, the Trial Chamber relied on evidence and findings on: (i) his continuous support for Mladić, who was central in the implementation of the Sarajevo JCE; (ii) his direct involvement in the military matters in and around Sarajevo at the planning and operational levels; (iii) his knowledge of the attacks on civilians in Sarajevo and of indiscriminate or disproportionate SRK fire, together with his persistent denials and deflections of any SRK responsibility; (iv) his failure to prevent the shelling and sniping of civilians and to punish those responsible, despite being at the apex of control over the VRS and the SRK; (v) his support for and promotion of SRK commanders and units while aware of their involvement in the campaign of sniping and shelling of civilians; and (vi) his modulation of that campaign in accordance with his political goals.[1405]

524. Karadžić submits that, in finding that he shared the common purpose of the Sarajevo JCE, the Trial Chamber erred: (i) by relying on a meeting which never occurred; (ii) by disregarding evidence of his orders prohibiting the targeting of civilians; and (iii) in assessing his knowledge of the attacks on civilians.[1406] The Appeals Chamber will address his contentions in turn.

(a) Alleged Errors in Relation to the Late May 1992 Meeting

525. In discussing the shelling of Sarajevo city on 28 and 29 May 1992 as alleged in Scheduled Incident G.1 of the Indictment, the Trial Chamber relied on the evidence of [REDACTED] and found that Karadžić and the Bosnian Serb leadership attended a meeting which occurred sometime

[1402] Trial Judgement, paras. 4649, 4676.
[1403] Trial Judgement, para. 4891.
[1404] Trial Judgement, paras. 4937-4939.
[1405] Trial Judgement, para. 4891.

between 20 and 28 May 1992, "most probably in the last week of May", where Mladić outlined his plans to use "all the equipment and arms" available to "massively bombard Sarajevo".[1407] The Trial Chamber found that, [REDACTED], Karadžić and other members of the Bosnian Serb leadership remained silent.[1408] The Trial Chamber relied, in part, on this meeting in concluding that Karadžić supported Mladić and the SRK in the implementation of the Sarajevo JCE.[1409]

526. Karadžić submits that this meeting never occurred and [REDACTED].[1410] He further contends that the Trial Chamber's findings as to the date of this meeting are contradicted by evidence and by the Trial Chamber's acknowledgement that Karadžić was in Lisbon when this meeting was determined to have occurred.[1411] He further argues that the Trial Chamber ignored relevant evidence in that the meeting was not recorded in Mladić's diary, which contains "fastidious recording of meetings", and that this omission raises further reasonable doubt as to its occurrence.[1412] In sum, Karadžić submits that the Trial Chamber's conclusions regarding the meeting are "manifestly unsafe" and impact the Trial Chamber's finding that the common plan of the Sarajevo JCE materialized in late May 1992.[1413]

527. The Prosecution responds that the Trial Chamber correctly assessed the evidence and, in particular, argues that the evidence and findings of the Trial Chamber reflect that the meeting could have occurred on 20 May 1992.[1414] It contends that the meeting was neither the heart of the Sarajevo JCE nor marked the point when the common plan was implemented as the common plan materialized with the events of Scheduled Incident G.1 and Karadžić's agreement with it was demonstrated by his conduct before and after the meeting as described in the Trial Chamber's relevant unchallenged findings.[1415]

[1406] Karadžić Notice of Appeal, p. 13; Karadžić Appeal Brief, paras. 623-659.
[1407] Trial Judgement, paras. 4023, 4721.
[1408] Trial Judgement, paras. 4023, 4721.
[1409] Trial Judgement, paras. 4721, 4736. *See also* Trial Judgement, paras. 4718-4739.
[1410] Karadžić Appeal Brief, paras. 623-627, 631. In this respect, Karadžić further submits that the Trial Chamber's [REDACTED] further undermines the Trial Chamber's reliance on [REDACTED]. *See* Karadžić Appeal Brief, para. 627.
[1411] Karadžić Appeal Brief, paras. 628, 629.
[1412] Karadžić Appeal Brief, para. 630.
[1413] Karadžić Appeal Brief, para. 631.
[1414] Prosecution Response Brief, paras. 365-367, 369. The Prosecution further asserts that Karadžić's departure to Lisbon could have happened after 20 May 1992, as he was still in the region in the evening of 20 May 1992 when he signed the decree on general mobilization and since the evidence relied on by the Trial Chamber only stated that it was Colm Doyle, rather than Karadžić, who left for Lisbon on that day. It contends that any factual error on Karadžić's departure date could not be appealed as this did not result in a miscarriage of justice. *See* Prosecution Response Brief, para. 368; T. 23 April 2018 p. 223.
[1415] Prosecution Response Brief, paras. 363, 364, 370; T. 23 April 2018 pp. 223-225.

528. Karadžić replies that the Prosecution's suggestion that the meeting could have occurred on 20 May 1992 contradicts its position at trial and is unsupported by evidence.[1416] He further contends that the Trial Chamber's findings in relation to the meeting do not only impact its conclusion on Scheduled Incident G.1, but also on his contribution to the Sarajevo JCE and his support for Mladić and the SRK.[1417]

529. Turning to Karadžić's contention that the Trial Chamber failed to exercise sufficient caution when relying on the [REDACTED], Karadžić refers to a statement given voluntarily by the witness to the Prosecution, reflecting that he was cautioned by a representative of the Prosecution that, based on information in its possession, he may be [REDACTED].[1418] However, the Appeals Chamber does not consider that this general, precautionary admonition demonstrates that [REDACTED] was an accomplice witness with motives to implicate Karadžić.[1419] Notably, neither Karadžić's cross-examination of the witness nor his closing submissions reflect that the Trial Chamber should have treated this witness's evidence with caution due to any motivation to implicate Karadžić on the basis of any actual or potential criminal proceedings against the witness in relation to the events about which he testified.[1420]

530. The Appeals Chamber recalls that a trial chamber has broad discretion in weighing evidence,[1421] is best placed to assess the credibility of a witness and the reliability of the evidence,[1422] and may decide, in the circumstances of each case, whether corroboration of evidence is necessary or to rely on uncorroborated, but otherwise credible, witness testimony.[1423] The Trial

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[1416] Karadžić Reply Brief, paras. 185, 186. In particular, Karadžić points to evidence from Mladić's diary that he noted meetings with [REDACTED] but made no notation concerning a meeting on 20 May 1992 and submits that the diary further indicated that Plavšić, who the Trial Chamber found attended the meeting, should be "pulled out of Sarajevo" on 20 May 1992, and therefore could not have been present at the meeting on this date. *See* Karadžić Reply Brief, para. 186, [REDACTED]. *See also* Karadžić Appeal Brief, para. 628. During the appeal hearing, Karadžić argued that, on 19 May 1992, he "had to travel by car to Belgrade" and that on 20 May 1992 he "was to fly to Lisbon and stay there until [27 May 1992]" and then "remain in Belgrade until [30 May 1992]." T. 24 April 2018 pp. 267, 268.

[1417] Karadžić Reply Brief, para. 187; T. 24 April 208 pp. 267, 268.

[1418] *See* Karadžić Appeal Brief, para. 626 [REDACTED].

[1419] *See Munyakazi* Appeal Judgement, para. 93 ("The Appeals Chamber has stated that the ordinary meaning of the term 'accomplice' is 'an association in guilt, a partner in crime'. The caution associated with accomplice testimony is most appropriate where a witness 'is charged with the same criminal acts as the accused'.") (internal references omitted).

[1420] *See, e.g.*, Karadžić Final Trial Brief, paras. 1642, 1688, 1703, 1853-1855, 1919, 1952, 1955, 1968, 1974, 1976, 1992, 1997, 2311; T. 8 September 2010 pp. 6339-6432 (closed session); T. 10 September 2010 pp. 6435-6548 (closed session); T. 13 September 2010 pp. 6551-6620, 6667-6670 (closed session). *See also* Karadžić Closing Arguments, T. 2 October 2014 pp. 47954, 47995-47997 (private session).

[1421] *Šainović et al.* Appeal Judgement, para. 490.

[1422] *Prlić et al.* Appeal Judgement, paras. 200, 708; *Stanišić and Župljanin* Appeal Judgement, para. 654; *Nyiramasuhuko et al.* Appeal Judgement, para. 1830; *Popović et al.* Appeal Judgement, para. 513; *Ngirabatware* Appeal Judgement, para. 69; *Šainović et al.* Appeal Judgement, para. 464.

[1423] *Prlić et al.* Appeal Judgement, para. 201; *Nyiramasuhuko et al.* Appeal Judgement, paras. 874, 949, 1340; *Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, paras. 125, 138; *Ntawukulilyayo* Appeal Judgement, para. 21.

Chamber stated that, in cases where it relied on the testimony of a single Prosecution witness on a material fact, it examined the evidence of the witness with the utmost caution before accepting it as a sufficient basis for a finding of guilt.[1424] In this respect, apart from disagreeing with the Trial Chamber's assessment of [REDACTED], Karadžić has not demonstrated that such evidence was not credible or that the Trial Chamber erred in relying on it.[1425]

531. With respect to the date of the meeting, the Trial Chamber considered that [REDACTED].[1426] The Trial Chamber nevertheless found that the meeting took place "some time between 20 to 28 May 1992, most probably in the last week of May" on the basis that: (i) [REDACTED].[1427]

532. The Appeals Chamber notes that the Trial Chamber also found that, "[o]n 20 May 1992, [Karadžić] travelled to Lisbon for about a week to attend the peace negotiations there".[1428] The Trial Chamber's findings also reflect that Karadžić was in Lisbon on 27 May 1992.[1429] The Appeals Chamber considers that, on their face, these findings could contradict the conclusion that Karadžić attended the meeting which occurred between 20 and 28 May 1992 and "most probably in the last week of May".[1430] The Appeals Chamber observes that the Trial Chamber's conclusion that Karadžić departed for Lisbon on 20 May 1992 is not supported by the evidence it relied upon to make that finding.[1431] To the contrary, the Appeals Chamber notes that other findings of the Trial Chamber, and the evidence it relied upon to make them reflect that Karadžić was in the Sarajevo area on 20 May 1992.[1432] Furthermore, and contrary to Karadžić's suggestion, evidence that Mladić had noted in his diary on 20 May 1992 that Plavšić and her family should be pulled out of Sarajevo[1433] is not inconsistent with the Trial Chamber's conclusion that this meeting took place as the meeting could have occurred on 20 May 1992 while Karadžić was in the Sarajevo area. In this

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[1424] Trial Judgement, para. 12.
[1425] The Appeals Chamber recalls its conclusion that Karadžić has not demonstrated any prejudice due to the Trial Chamber's failure to admit a statement provided by [REDACTED]. *See supra* Section III.A.4(b). Karadžić does not demonstrate how this undermines the reasonableness of the Trial Chamber's reliance on [REDACTED].
[1426] Trial Judgement, para. 4023, n. 13366, *referring to, inter alia* [REDACTED].
[1427] Trial Judgement, para. 4023, n. 13366. *See also* Trial Judgement, n. 13478 [REDACTED].
[1428] Trial Judgement, para. 4026, n. 13380.
[1429] Trial Judgement, para. 4026.
[1430] Trial Judgement, para. 4023.
[1431] Trial Judgement, para. 4026, n. 13380, *referring to, inter alia*, Exhibit P918, pp. 25299, 25300 (testimony of Colm Doyle reflecting that he travelled to Lisbon on 20 May 1992 without specifying that Karadžić travelled to Lisbon that day).
[1432] *See, e.g.*, Trial Judgement, paras. 3145, *referring to, inter alia*, Exhibit P3919 (concerning a decision issued by the Presidency of the Serbian Republic of Bosnia and Herzegovina signed by Karadžić on 20 May 1992 and stamped "Sarajevo"), 3162, 4765, *referring to* Exhibit P2645 (concerning an order of 20 May 1992 signed by Karadžić and stamped "Sarajevo"). *See also* Trial Judgement, para. 253, *referring to, inter alia*, Exhibit P2617, p. 1 (concerning decisions taken by the Presidency of the Serbian Republic of Bosnia and Herzegovina on 20 May 1992).
[1433] [REDACTED]

regard, the Trial Chamber's findings are not contradictory and the record demonstrates that it was reasonable to conclude that Karadžić participated in this meeting, which occurred "some time between 20 and 28 May 1992, most probably in the last week of May".[1434]

533. Turning to Karadžić's contention that the Trial Chamber ignored relevant evidence that this meeting was not recorded in Mladić's diary, the Appeals Chamber recalls that it is not necessary for a trial chamber to refer to every piece of evidence on the trial record as long as there is no indication that it completely disregarded any particular piece of evidence.[1435] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[1436] If a trial chamber did not refer to specific evidence, it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual finding.[1437] The Appeals Chamber observes that the Trial Chamber extensively considered the contents of Mladić's diary[1438] and it is not persuaded that the Trial Chamber ignored this evidence when assessing the occurrence of this meeting.[1439] Moreover, the Appeals Chamber is not persuaded that the absence of any entry as it relates to this meeting contradicts or undermines the reasonableness of the Trial Chamber's conclusions that it occurred.

534. For the foregoing reasons, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber committed any error in relying on [REDACTED] and finding that Karadžić and the Bosnian Serb leadership attended a meeting which occurred between 20 and 28 May 1992 and "most probably in the last week of May".

535. In any event, for the following reasons the Appeals Chamber considers that Karadžić's suggestion that any error as it relates to the late May 1992 meeting would invalidate the verdict as it relates to the Sarajevo JCE is unpersuasive.[1440] The Trial Chamber found that the plan of sniping

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[1434] Trial Judgement, para. 4023.

[1435] *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 3100; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.

[1436] *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864; *Kvočka et al.* Appeal Judgement, para. 23.

[1437] *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 1410; *Kvočka et al.* Appeal Judgement, para. 23.

[1438] *See, e.g.*, Trial Judgement, paras. 4021, 4026, 4027, 4034, 4035. *See also* Trial Judgement, paras. 4041, 4506, 4548, 4568, 4661, 4665, 4666, 4670, 4673, 4683, 4724, 4727-4730, 4764, 4776, 4780-4784, 4791, 4794-4796, 4800-4804, 4813, 4819, 4823, 4827, 4837, 4871, 4873, 4876, 4906, 4907, 4909, 4910, 4912, 4923, 4927, 4936.

[1439] The Appeals Chamber is not persuaded that notations in Mladić's diary as it relates to [REDACTED] necessarily support the conclusion that the absence of any notation of a meeting with Karadžić on 20 May 1992 is an indication that it did not occur. [REDACTED].

[1440] *See* Karadžić Appeal Brief, para. 631. Karadžić submits that this meeting is "at the heart" of the Sarajevo JCE and that the common plan could not have materialised without it. Karadžić Appeal Brief, para. 631. In reply, Karadžić further argues that the Trial Chamber also relied upon the late May 1992 meeting in support of Karadžić's contributions to the Sarajevo JCE and his support for Mladić and the SRK. Karadžić Reply Brief, para. 187, *referring to* Trial Judgement, paras. 4023, 4721.

and shelling the city materialised in late May 1992 with Scheduled Incident G.1[1441] and this conclusion is not dependent upon Karadžić's participation in the late May 1992 meeting.[1442] Moreover, the Trial Chamber found that, prior to the late May 1992 meeting, Karadžić supported Mladić and his plan of shelling and sniping Sarajevo when he voted for him as the Commander of the VRS on 12 May 1992 during the 16th Session of the Bosnian Serb Assembly, after Mladić presented to him and the Bosnian Serb leadership his Sarajevo strategy, including the besieging and targeting of the city with a large number of heavy weapons.[1443] Furthermore, the Trial Chamber relied on other factors that were critical to finding Karadžić's agreement and contributions to the Sarajevo JCE that would remain undisturbed irrespective of the Trial Chamber's conclusions as to his participation in the late May 1992 meeting.[1444]

(b) Alleged Errors in Disregarding Evidence Prohibiting the Targeting of Civilians

536. In finding that Karadžić had the intent to commit murder, terror, and unlawful attacks on civilians in Sarajevo, the Trial Chamber relied, in part, on Karadžić's statements, orders, conversations, and activities.[1445] The Trial Chamber acknowledged that Karadžić occasionally issued orders for Bosnian Serb forces to stop the shelling and sniping in the city and to respect the laws of war.[1446] However, it found that Karadžić made no "genuine" effort to protect civilians from the attacks and only issued orders when pressured by the international community, under threat by NATO, or to "achieve his political goals".[1447] The Trial Chamber considered that, in light of the length of the siege of Sarajevo and of the SRK's campaign of sniping and shelling, such orders "were few and far between" and had no practical effect on the situation on the ground as they were never followed up by proper investigation and/or punishment for those who disobeyed them.[1448]

[1441] Trial Judgement, paras. 4649, 4892.
[1442] *See* Trial Judgement, paras. 4018, 4027-4035.
[1443] Trial Judgement, para. 4735. *See also* Trial Judgement, paras. 3984, 4661, 4719.
[1444] For example, the Trial Chamber relied on numerous events demonstrating Karadžić's support for Mladić's implementation of the Sarajevo JCE after the late May 1992 meeting. Specifically, the Trial Chamber found that Karadžić indirectly acknowledged the intensified campaign against Sarajevo when he defended Mladić's actions in a meeting with Morillon, Mackenzie, and Koljević on 30 May 1992. Trial Judgement, paras. 4037, 4723, 4736. Furthermore, the Trial Chamber also relied on Karadžić's acceptance of military directives signed by Mladić, a number of meetings where he and Mladić discussed their plans for Sarajevo, and on Mladić's promotion by Karadžić to the rank of a Colonel General on 28 June 1994 despite the objections of the international community to Mladić's and the SRK's actions in Sarajevo. Trial Judgement, paras. 4724, 4727-4729, 4731, 4736. The Trial Chamber found that aside from Mladić, Karadžić also showed support for other SRK officers who were members of the Sarajevo JCE such as Stanislav Galić and Dragomir Milošević by promoting them and also relied on findings as to the authority Karadžić exercised over the SRK since May 1992. Trial Judgement, paras. 4707, 4708, 4711, 4718, 4719, 4732, 4733, 4738, 4752, 4891. The Trial Chamber's conclusions as they pertain to the common plan and Karadžić's contributions to it further demonstrate that Karadžić's liability through his participation in the Sarajevo JCE is dependent upon numerous acts and omissions over the course of years. *See* Trial Judgement, paras. 4676, 4891.
[1445] Trial Judgement, para. 4928.
[1446] Trial Judgement, para. 4934. *See also* Trial Judgement, para. 4927, *referring to, inter alia,* Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv.
[1447] Trial Judgement, paras. 4927, 4934. *See also* Trial Judgement, para. 4866.
[1448] Trial Judgement, para. 4934.

According to the Trial Chamber, the fact that Karadžić did not exercise his extensive influence more regularly and rigorously indicated that the cessation of attacks on civilians was not in his interest.[1449] The Trial Chamber concluded that these orders did not undermine its finding that Karadžić possessed the requisite intent to commit murder, terror, and unlawful attacks on civilians.[1450]

537. Karadžić submits that no reasonable trier of fact could have found that he possessed the intent to commit murder, terror, and unlawful attacks on civilians in Sarajevo, in light of the numerous orders he issued that reflected his dedication to protecting civilians.[1451] Karadžić argues that his orders to protect civilians were found credible by the Trial Chamber when making adverse findings as to his level of control, knowledge of crimes, and ability to modulate shelling.[1452] However, he submits that the Trial Chamber erroneously disregarded them when assessing his intent and erred in finding that his orders were: (i) not "genuine"; (ii) motivated by "political goals"; and (iii) "few and far between" and that he failed to exert his influence "more regularly and rigorously".[1453] He argues that these conclusions are incompatible with the Trial Chamber's own findings as well as the record and demonstrate the unreasonableness of the Trial Chamber's evaluation of his intent.[1454]

538. The Prosecution responds that the Trial Chamber reasonably found that Karadžić's orders to protect civilians were not genuine, were politically motivated, and were too few and far in between.[1455]

539. Karadžić replies that the Prosecution fails to provide evidence that he ordered, approved, or favoured indiscriminate or disproportionate shelling or targeting of civilians.[1456]

[1449] Trial Judgement, para. 4934.
[1450] Trial Judgement, para. 4934.
[1451] Karadžić Appeal Brief, paras. 633, 634, 640.
[1452] Karadžić Appeal Brief, para. 636.
[1453] Karadžić Appeal Brief, paras. 635, 636, 638, 639.
[1454] Karadžić Appeal Brief, paras. 635-640. Karadžić argues that the genuineness of his orders to not target civilians is corroborated by private conversations admitted into the record repeating such instructions as well as the absence of any private conversations to the contrary. *See* Karadžić Appeal Brief, paras. 635, 639. He submits that it was inapposite for the Trial Chamber to consider his alleged "political goals" as these do not demonstrate that he wanted civilians to be targeted. *See* Karadžić Appeal Brief, para. 638. As regards the question whether his orders were "few and far between" or the finding that he did not exercise his influence "more regularly or rigorously", Karadžić argues that, in light of the Trial Chamber's reasoning that the chain of command between Karadžić and the SRK operated as intended and that the control system within the SRK and the Main Staff through to Karadžić functioned well, there would have been no need to re-issue orders or repeat to them to change "their weight or vigor". *See* Karadžić Appeal Brief, para. 637.
[1455] Prosecution Response Brief, paras. 357-362; T. 23 April 2018 pp. 225-227. *See also* T. 23 April 2018 p. 226 (emphasizing that, because the campaign targeting civilians in Sarajevo continued for over three years, Karadžić, as the Supreme Commander of the VRS, intended it to continue and that general instructions to protect civilians, on most occasions, were "mere lip service").
[1456] Karadžić Reply Brief, para. 191. He further contends that one of the orders was issued before there was international pressure concerning shelling. *See* Karadžić Reply Brief, para. 192, *referring to, inter alia*, Exhibit D232.

540. The Appeals Chamber recalls that, in determining Karadžić's intent with regard to the crimes of murder, terror, and unlawful attacks on civilians in relation to the Sarajevo JCE, the Trial Chamber assessed numerous statements and orders given by Karadžić and others, including those instructing Serb forces in Sarajevo not to target civilians or to respect the laws of war.[1457] The Trial Chamber noted and discussed in detail nearly all of the orders to which Karadžić refers.[1458] The Trial Chamber also found one of these orders to be of low probative value,[1459] and expressly considered other orders to which he refers in discussing the context of a cease-fire or the Scheduled Incidents concerning the sniping and shelling in Sarajevo.[1460] Karadžić therefore does not demonstrate that the Trial Chamber failed to assess this evidence.

541. The Appeals Chamber observes that the Trial Chamber did not expressly assess a directive contained in Exhibit D4618 to which Karadžić refers on appeal. However, the Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence on the trial record and that it is to be presumed that it evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[1461] In this respect, the Appeals Chamber notes that this exhibit, which concerns an order requiring all SRK units to cease fire and seek leave to open fire was issued as an implementation of an agreement between Karadžić and UNICEF, and consequently, is cumulative of other evidence discussed by the Trial Chamber that concerned orders issued either in the context of Karadžić engaging in the process of negotiating with foreign diplomats or agreeing to cease-fires.[1462] In light of the above, Karadžić does not demonstrate that the Trial Chamber erred by disregarding the orders to which he refers on appeal.

[1457] Trial Judgement, paras. 4927, 4928, 4934, *referring to, inter alia,* Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv. *See generally* Trial Judgement, paras. 4764-4798, 4869-4884.

[1458] Karadžić Appeal Brief, paras. 633-636, Annex N.

[1459] The Trial Chamber found that Exhibit D314 had low probative value as the document was undated and contained no stamp. *See* Trial Judgement, para. 4779, n. 16064. *See also* Trial Judgement, para. 4927, n. 16619.

[1460] *See* Trial Judgement, paras. 338 (*referring to, inter alia,* Exhibit D4564), 4834 (*referring to, inter alia,* Exhibit D700), 4873 (*referring to* Exhibit P2661). Karadžić also submits that the Trial Chamber failed to consider Exhibit D4836, which he mistakenly describes as the "SRK order implementing the Agreement of Complete Cessation of Hostilities with Bosnian Muslims" dated 3 January 1995. *See* Karadžić Appeal Brief, para. 633, Annex N, RP. 1673. To the extent that Karadžić is in fact referring to Exhibit D2786 (order from the Main Staff of the Army of *Republika Srpska* on the "implementation of the agreement on complete cessation of hostilities against the Muslim side" dated 1 January 1995), this evidence was similarly considered by the Trial Chamber in the context of a cease-fire agreement. *See* Trial Judgement, para. 410.

[1461] *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, paras. 187, 2937, 3039; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.

[1462] *See* Trial Judgement, n. 16620. *See also* Trial Judgement, paras. 410, 3606, 4783, 4859, 4872. Karadžić further argues that the Trial Chamber failed to consider that Exhibit D232, a military directive dated 6 June 1992 that included an admonishment that "maltreating of civilian unarmed population is strictly forbidden and prisoners must be treated pursuant to the Geneva Conventions", was issued before international pressure concerning the shelling was applied and failed to explain why, in this context, such a directive was not genuine. *See* Karadžić Reply Brief, para. 192. The Appeals Chamber notes that Karadžić points to this exhibit for the first time in his reply and could dismiss these arguments on this basis. In any event, his assertion that the direction was issued before the beginning of the siege on Sarajevo and before international pressure was placed on him is belied by the record relied upon by the Trial Chamber,

542. Turning to Karadžić's contentions that the Trial Chamber erred in determining that his orders were "not genuine", were "politically motivated" and "few and far between", and that he did not exercise his influence more "rigorously and regularly", the Appeals Chamber recalls that in so finding, the Trial Chamber considered statements and orders made by Karadžić, including private conversations to halt firing upon Sarajevo to which he refers on appeal.[1463] The Trial Chamber ultimately concluded that such statements and orders did not indicate that Karadžić disapproved of the sniping and shelling of Sarajevo, but rather that they were made at times when such conduct was inconvenient to him.[1464] With respect to, specifically, his private conversations to halt firing upon Sarajevo, the Trial Chamber concluded that such statements were made during times where he was being pressured by the international community or threatened with air strikes.[1465] The Trial Chamber also considered additional evidence of private conversations that led the Trial Chamber to determine that Karadžić "was duplicitous in his dealings with the international community" in relation to the attacks on Sarajevo.[1466] The Appeals Chamber considers that Karadžić simply offers an alternative interpretation of the record and the Trial Judgement without demonstrating the unreasonableness of the Trial Chamber's conclusion that his orders were "not genuine".

543. Similarly, the Appeals Chamber finds no merit in Karadžić's assertion that his political motivation was irrelevant in assessing his intent. The context in which Karadžić issued orders prohibiting the targeting of civilians in Sarajevo is directly relevant to whether his actions reflected a genuine concern for their safety. In this respect, the Trial Chamber reasonably found that Karadžić issued such orders while negotiating with foreign diplomats or when he had agreed to cease-fires,[1467] or when he was being pressured by the international community or threatened with air strikes, such as in the aftermath of the SRK's capture of Mt. Igman in 1993 and the first Markale incident in February 1994.[1468] Likewise, the Trial Chamber reasonably concluded that orders prohibiting the targeting of civilians did not indicate that Karadžić disapproved of the shelling and sniping of Sarajevo, but rather that they were conducted at times inconvenient to him.[1469] In this context, it was reasonable to determine that the relevant orders were "politically motivated" and to

which reflects discussions with international actors to end the siege on Sarajevo started as early as 30 May 1992. *See, e.g.*, Trial Judgement, paras. 4036, 4037. Accordingly, this argument is dismissed.

[1463] Karadžić Appeal Brief, paras. 635, 638, 639, *referring to, inter alia*, Trial Judgement, paras. 4785, 4792, 4874, 4927, Exhibits D4510, P4802; Trial Judgement, para. 4927, *referring to, inter alia*, Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv. nn. 16220, 16221.

[1464] Trial Judgement, para. 4927.

[1465] Trial Judgement, para. 4927, n. 16621 *referring to, inter alia*, Exhibits D4510, P4802.

[1466] *See, e.g.*, Trial Judgement, paras. 4905, 4931 (referring to evidence that Karadžić issued private orders to continue firing on Sarajevo after bringing bombing to a halt).

[1467] Trial Judgement, para. 4927, n. 16620, *referring to, inter alia*, Exhibits D4512, P836, D4507, D4508, D4610.

[1468] Trial Judgement, para. 4927, n. 16621, *referring to, inter alia*, Exhibits P1483, P4802, P4804, P846, D4510, D3521.

[1469] Trial Judgement, para. 4927.

consider this conclusion when assessing Karadžić's intent in relation to the crimes committed through the Sarajevo JCE.

544. Finally, the Appeals Chamber does not consider that the Trial Chamber's conclusions that Karadžić's orders were "few and far between" and that he did not exercise his influence more "regularly and rigorously" are incompatible with other findings that the chain of command between Karadžić and the SRK operated as intended and that the control system within the SRK and the Main Staff to Karadžić functioned well.[1470] Karadžić has not, for example, demonstrated the unreasonableness of the Trial Chamber's conclusions as to the length of the siege of Sarajevo, or the fact that his orders to stop the sniping and shelling in Sarajevo and to respect the laws of war had no practical effect on the situation on the ground as they were never followed up by proper investigation and/or punishment for those who disobeyed them.[1471]

545. In light of the above, Karadžić fails to demonstrate the unreasonableness of the Trial Chamber's assessment of his orders in determining his intent to commit murder, torture, and unlawful attacks on civilians in relation to the Sarajevo JCE.

(c) Alleged Errors in Assessing Karadžić's Knowledge of Attacks Against Civilians

546. The Trial Chamber found that Karadžić knew or had reason to know that the SRK was sniping and shelling the civilian population or launching indiscriminate and/or disproportionate attacks on Sarajevo.[1472] The Trial Chamber relied on evidence from representatives of the international community and some Defence witnesses that Karadžić regularly received information about the sniping and shelling incidents throughout the conflict.[1473] The Trial Chamber found that Karadžić was fully aware of the international community's statements about the situation in Sarajevo, the plight of civilians, and violations of international humanitarian law, as he attended meetings in which Security Council resolutions were discussed.[1474] The Trial Chamber further found that Karadžić was cognizant of numerous media reports regarding the situation in the city and had interactions with journalists who repeatedly brought to his attention instances of shelling and sniping of civilians.[1475]

[1470] *See* Trial Judgement, paras. 4764, 4862.
[1471] Trial Judgement, para. 4934.
[1472] Trial Judgement, paras. 4861, 4863, 4865, 4866.
[1473] Trial Judgement, paras. 4861, 4863, 4864. *See also* Trial Judgement, paras. 4813-4847.
[1474] Trial Judgement, para. 4861.
[1475] Trial Judgement, para. 4861. *See also* Trial Judgement, paras. 4848-4850.

547. Karadžić submits that the Trial Chamber erred in assessing his knowledge by focusing on information he received, rather than information he "reasonably believed".[1476] He contends that the Trial Chamber relied "heavily" on news reports and information from the international community, whom Karadžić, at the relevant time, considered biased against the Bosnian Serb leadership, and failed to give adequate weight to evidence from military sources within the VRS and the SRK, whom he "trusted far more than the international observers", that Bosnian Serb forces were acting lawfully.[1477] Karadžić contends that, even if the Trial Chamber correctly concluded that the VRS witnesses who "were willing to travel to The Hague 20 years later, take the solemn oath and testify that they only fired [...] at military objectives" were lying, it is reasonable to conclude that this was the information they provided to Karadžić.[1478] Karadžić further submits that the Trial Chamber failed to adequately consider information he received from his own sources with respect to Scheduled Incidents G.4, G.7, G.8, and F.11 reflecting the lawfulness of the conduct of the VRS.[1479]

548. The Prosecution responds that, in light of the information that Karadžić received and evidence demonstrating his awareness, including documents from within the SRK/VRS, the Trial Chamber reasonably found that he knew that the SRK was shelling and sniping civilians.[1480]

549. In reply, Karadžić maintains that the Trial Chamber failed to consider the totality of the information he received.[1481] He submits that while some sources within the Bosnian Serb structures occasionally informed him on the targeting of civilians, these were isolated incidents and the evidence does not necessarily demonstrate that civilians were deliberately targeted.[1482] He further contends that he expressly disapproved attacks which he believed were disproportionate.[1483]

550. The Appeals Chamber notes that, in inferring Karadžić's knowledge about the sniping and shelling of the civilian population or the launching of indiscriminate and/or disproportionate attacks on Sarajevo, the Trial Chamber relied on Prosecution and Defence evidence and did not solely rely on evidence from international representatives and media reports.[1484] In particular, the Trial Chamber considered evidence from sources within the Serbian and Bosnian Serb civilian and military structures, including contemporaneous documentation, demonstrating Karadžić's

[1476] Karadžić Appeal Brief, paras. 641-659.
[1477] Karadžić Appeal Brief, paras. 642-650.
[1478] Karadžić Appeal Brief, para. 650.
[1479] Karadžić Appeal Brief, paras. 654-659, *referring to, inter alia*, Exhibits D1515, D340, P867, T. 5 March 2012 pp. 25735, 25736, T. 28 January 2013 pp. 32711, 32712.
[1480] Prosecution Response Brief, paras. 350-356. *See also* T. 23 April 2018 pp. 221, 222 (highlighting findings of the Trial Chamber supporting that Karadžić's conduct "clearly shows that he shared the common purpose of the Sarajevo JCE and that he intended to spread terror among the civilian population through the campaign of shelling and sniping").
[1481] Karadžić Reply Brief, paras. 188, 190.
[1482] Karadžić Reply Brief, para. 189.
[1483] Karadžić Reply Brief, para. 189.
[1484] Trial Judgement, para. 4861. *See, e.g.*, Trial Judgement, paras. 4813, 4817, 4820, 4821, 4823, 4825, 4827, 4846.

knowledge of the nature of the attacks on Sarajevo, including attacks on civilian populations.[1485] The Trial Chamber considered that its conclusion that he knew of the SRK's firing practices in Sarajevo was confirmed by the fact that Karadžić himself at times raised concerns and attempted to limit disproportionate attacks on the city.[1486] The Trial Chamber further considered, and rejected, Karadžić's arguments that some of the international representatives were biased and that their evidence was unreliable.[1487] The Trial Chamber also considered, and accepted, Karadžić's argument that the media was "somewhat unfavorable" to the Bosnian Serb side when reporting on the situation in Sarajevo.[1488] A review of the Trial Judgement therefore reveals that the Trial Chamber thoroughly considered Karadžić's position that he distrusted information he received from international representatives and the media.

551. Given the totality of the evidence considered by the Trial Chamber, the Appeals Chamber finds unpersuasive Karadžić's argument that the Trial Chamber erred by focusing on information he received, rather than information he "reasonably believed".

[1485] *See, e.g.*, Trial Judgement paras. 4051 ("[A]fter a detailed discussion during a meeting of the Bosnian Serb Presidency, attended by the Accused, Plavšić, Krajišnik, Koljević, Đerić and Mladić, it was concluded that 'the heavy artillery fire on the city [should] be halted'."), 4817 (where John Zametica, Karadžić's advisor on international relations, testified that Karadžić told him that Bosnian Serb sniping and shelling was "stupid", unnecessary, and did not give any military advantage to the Serbs and where Vladislav Jovanović, Foreign Minister of Serbia at the time, questioned Karadžić several times about why Sarajevo was kept under siege for so long and subjected to "all those snipers and misfortunes" and stated that Karadžić denied that the Bosnian Serbs had a policy of shelling Sarajevo and responded that the incidents were sporadic and caused by "a few frustrated individuals", or that the "Bosnian Muslims were responsible because they wanted to draw international attention".), 4820, 4823 ("On 8 September 1992, at a meeting between, *inter alios*, the Accused, Mladić and General Simonović, Simonović stated that the blockade of Sarajevo was justified but mass-scale use of artillery against cities was damaging, and recommended that the Bosnian Serbs should prevent the bombardment of cities."), 4825 ("On 9 December 1992, members of the SDC, including, *inter alios*, Slobodan Milošević, [Momir] Bulatović, and Dobrica Ćosić, met to discuss the war in BiH. At the meeting, Ćosić noted that the Serbian leadership had advised the Accused on numerous occasions that the shelling of Sarajevo was detrimental to the political position of the Bosnian Serbs. Bulatović testified that, although the Accused had fully agreed on every occasion, he was unable to solve the problem."), 4827 ("Galić testified that sometime during 1993 the Accused met with the SRK command and expressed concern about the disproportionate use of artillery. According to Galić, at these top-level meetings where the Accused was present, the topic of proportionality was always discussed. Galić noted that the Accused did not have to inform him that the disproportionate use of artillery by the SRK had caused civilian casualties, because 'everybody saw that, there was a war going on and that fire came from both sides'."), 4837 ("On 15 March 1994, at a meeting between, *inter alios*, the Accused, Mladić, and Slobodan Milošević in Belgrade, the Accused complained that '[o]ur idiots are firing on Sarajevo' and described the army as acting like a 'pampered prima donna'."), 4841 ("In early November 1994, during the 46th Bosnian Serb Assembly session, the Accused himself recounted the 'hard time' he had when 'that pointless shelling of Sarajevo was going on' and explained that people told him that sometimes soldiers get drunk and fire a number of shells into Sarajevo 'without aim and purpose'."), 4842 (referring to the SRK combat report of 7 April 1995, informing Karadžić of that attack on Famo and that "the enemy was adequately responded to whereby an [air bomb] was launched on the centre of Hrasnica"), 4846 ("[...] the Accused, Mladić, Plavšić, Krajišnik, Tolimir, and Gvero, among others, met with Slobodan Milošević, Bulatović, and Perišić, to discuss the upcoming peace conference. During this meeting, Milošević encouraged the Bosnian Serb leadership to criticize the shelling and the killing of innocent civilians in Sarajevo 'in a more severe way'."), 4861.

[1486] Trial Judgement, para. 4861. *See also* Trial Judgement, paras. 4827, 4837, 4841.

[1487] Trial Judgement, paras. 4887-4890.

[1488] Trial Judgement, para. 4564.

552. With respect to Karadžić's contention that the Trial Chamber failed to adequately consider information he received from his own sources in relation to specific Scheduled Incidents, the Appeals Chamber recalls that in discussing the Scheduled Incidents, the Trial Chamber considered and rejected evidence: (i) concerning Scheduled Incident G.7, that the SRK combat report of 4 February 1994 and Colonel Kosovac's inquiries on behalf of the SRK Command concluded that the SRK had not opened fire in Dobrinja;[1489] (ii) concerning Scheduled Incident G.4, that the combat report for 1 June 1993 stated that the SRK did not open fire on that day;[1490] (iii) concerning Scheduled Incident G.8, that the SRK internal investigation concluded that the explosion at the Markale marketplace was not caused by a shell but rather by an explosive device detonated at ground level;[1491] and (iv) concerning Scheduled Incident F.11, that Mladić claimed that the incident was staged by "the Muslim side".[1492]

553. While the Trial Chamber did not explicitly discuss this evidence in its relevant legal findings, it did discuss it in detail in the parts of the Trial Judgement concerning the specific Scheduled Incidents.[1493] The Appeals Chamber is therefore not convinced that the Trial Chamber failed to consider relevant evidence in this respect. Furthermore, as Karadžić only generally argues that the Trial Chamber failed to "adequately" assess this evidence,[1494] he fails to demonstrate that the Trial Chamber's evaluation of it was unreasonable.[1495]

554. Consequently, Karadžić does not demonstrate that the Trial Chamber committed any error in determining his knowledge of the attacks against civilians.

[1489] Trial Judgement, paras. 4156, 4157, 4164, *referring to, inter alia*, Exhibit D1515, T. 28 January 2013 pp. 32711, 32712. *See also* Trial Judgement, para. 4799, n. 16164.
[1490] Trial Judgement, paras. 4078, 4085, *referring to, inter alia*, Exhibit D340.
[1491] Trial Judgement, para. 4206, *referring to, inter alia*, T. 5 March 2012 pp. 25735, 25736. *See also* Trial Judgement, paras. 4592, 4598, 4602, 4605.
[1492] Trial Judgement, para. 3690, *referring to, inter alia*, Exhibit P867. *See also* Trial Judgement, para. 4686.
[1493] *See* Trial Judgement, paras. 3690, 4078, 4156, 4157, 4206.
[1494] *See* Karadžić Appeal Brief, paras. 654, 655, 657, 658.
[1495] *See, e.g., Šainović et al.* Appeal Judgement, para. 490.

(d) Conclusion

555. Based on the foregoing, the Appeals Chamber dismisses Grounds 36 and 37 of Karadžić's appeal.

D. Srebrenica

1. Alleged Errors in Finding that Karadžić Shared the Common Purpose of Forcibly Removing Bosnian Muslims from Srebrenica (Grounds 38 and 39)

556. As recalled above, the Trial Chamber found that the Srebrenica JCE was established as Srebrenica fell on 11 July 1995, with a common plan to eliminate the Bosnian Muslims in Srebrenica – first through forcible removal of Bosnian Muslim women, children, and elderly men and later through the killing of the men and boys.[1496] The Trial Chamber further found that Karadžić shared the common purpose of the Srebrenica JCE, significantly contributed to the implementation of the common plan, and had the intent to commit the crimes carried out by the Serb forces following the fall of Srebrenica.[1497] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination, and inhumane acts (forcible transfer) as crimes against humanity, as well as murder as a violation of the laws or customs of war.[1498]

557. Karadžić submits that the Trial Chamber erred in finding that he shared the common purpose of eliminating the Bosnian Muslims in Srebrenica through forcible removal on the basis of: (i) Directive 7 issued by Karadžić on 8 March 1995; (ii) restriction of humanitarian aid; (iii) three orders he issued on 11 July 1995; and (iv) facts establishing forcible transfer.[1499] The Appeals Chamber will address these contentions in turn.

(a) The Issuance of Directive 7

558. The Trial Chamber found that, on 8 March 1995, Karadžić issued Directive 7,[1500] a strictly confidential directive that contained a passage ordering the Drina Corps to "create an unbearable

[1496] Trial Judgement, paras. 5726, 5755, 5849.
[1497] Trial Judgement, paras. 5814, 5821, 5822.
[1498] Trial Judgement, para. 5849. The Trial Chamber did not hold Karadžić responsible under Article 7(1) of the ICTY Statute for the killings and related acts of persecution of the Srebrenica JCE which occurred prior to his agreement on 13 July 1995. Rather, it entered a conviction under Article 7(3) of the ICTY Statute for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war for these events. *See* Trial Judgement, paras. 5831, 5833, 5848, 5850, 5998, 6002-6005. Although finding that Karadžić could be convicted for murder as a crime against humanity, the Trial Chamber observed that convictions for this offence and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity for incidents related to the Srebrenica JCE. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574.
[1499] Karadžić Notice of Appeal, pp. 13, 14; Karadžić Appeal Brief, paras. 660-686. *See also* T. 23 April 2018 pp. 116, 117.
[1500] Directive 7 addressed the military and political situation following the Agreement on Complete Cessation of Hostilities, allocating tasks to the various corps of the VRS after describing the anticipated objectives of the Bosnian Muslim and Bosnian Croat forces, and tasking the Drina Corps with "complet[ing] physical separation of Srebrenica from Žepa [...] as soon as possible, preventing even communication between individuals in the two enclaves". *See* Trial Judgement, paras. 4979-4981.

situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[1501] The Trial Chamber found that this passage indicated an intent to force the Bosnian Muslim population to leave Srebrenica and Žepa.[1502] It further found that at least by the time Directive 7 was issued, Karadžić and Mladić had devised a long-term strategy aimed at the eventual forcible removal of Bosnian Muslims from Srebrenica through the deliberate restriction of humanitarian aid as well as the targeting of the enclave by the Bosnian Serb forces.[1503]

559. Karadžić submits that the Trial Chamber erred in finding that he had the intent to remove the Bosnian Muslim population of Srebrenica by failing to consider his submission and supporting evidence that he signed Directive 7 without reading or being aware of the above-quoted passage.[1504] Karadžić contends that there is no evidence that he was aware of this passage and that during the trial, he presented evidence establishing that Directive 7 was prepared and stamped by the VRS, rather than his staff, and that he frequently signed documents without reading them.[1505] He argues that by failing to refer to his submission that he was unaware of the passage in the directive, the Trial Chamber failed to consider directly relevant evidence and provide a reasoned opinion.[1506]

560. The Prosecution responds that the Trial Chamber reasonably concluded that Karadžić shared the common purpose of eliminating the Bosnian Muslims in Srebrenica by forcible removal and that Directive 7 reflected his intent.[1507] The Prosecution contends that, apart from providing an alternative interpretation of isolated pieces of evidence, Karadžić fails to demonstrate any error.[1508]

561. Karadžić replies that the Prosecution failed to address his arguments on the Trial Chamber's error and contends that the instruction to make life unbearable for the inhabitants of Srebrenica was not one of the "main ingredients" of Directive 7.[1509]

562. The Appeals Chamber recalls that, while the Trial Chamber did not explicitly address Karadžić's contention that he had signed Directive 7 without reading the passage ordering the Drina Corps to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa", it was not under an obligation to justify its findings in

[1501] Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 10.
[1502] Trial Judgement, para. 5681.
[1503] Trial Judgement, para. 5684.
[1504] Karadžić Appeal Brief, paras. 662, 663, 666, 667.
[1505] Karadžić Appeal Brief, para. 662, *referring to* Karadžić Final Trial Brief, para. 3310, T. 4 July 2011 pp. 16042, 16043, T. 6 July 2011 p. 16203 (closed session), T. 8 February 2012 p. 24338, Exhibits D3682, D3695.
[1506] Karadžić Appeal Brief, paras. 663, 666. Karadžić further contends that the trial chamber in the *Popović et al.* case considered a report signed by Pandurević to be insufficient to conclude that he "possessed the necessary criminal intent to carry out the common purpose". *See* Karadžić Appeal Brief, para. 665, *referring to Popović et al.* Trial Judgement, para. 2003.
[1507] Prosecution Response Brief, paras. 371-378. *See also* T. 23 April 2018 pp. 186, 187.
[1508] Prosecution Response Brief, para. 372. *See also* Prosecution Response Brief, paras. 371, 373-378.

relation to every submission made during the trial or to refer to the testimony of every witness or every piece of evidence on the trial record as long as there is no indication that it completely disregarded any particular piece of evidence.[1510] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[1511] If a trial chamber did not refer to specific evidence, it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual finding.[1512]

563. The Appeals Chamber notes that some of the evidence to which Karadžić points concerns his signing of documents, without referring to Directive 7.[1513] With respect to the evidence of Witnesses Bogdan Subotić and Gordan Milinić, the Appeals Chamber notes that Witness Subotić stated that "[Karadžić] would never knowingly put his signature under that disputable text of Directive number 7"[1514] and that Witness Milinić stated that Directive 7 did not go through the presidential procedure and archive, that neither Karadžić nor his Military Offices participated in drafting it, that the document did not bear his protocol numbers, and that Karadžić may have been tricked into signing it.[1515] While the Trial Chamber did not specifically discuss this evidence when assessing the implications of Directive 7 and Karadžić's role in issuing it, the Trial Chamber considered the evidence of these witnesses in other parts of the Trial Judgement.[1516] Recalling that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant

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[1509] Karadžić Reply Brief, paras. 197-199.
[1510] *Prlić et al.* Appeal Judgement, paras. 187, 329; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 3100; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.
[1511] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100.
[1512] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 1410.
[1513] *See* Karadžić Appeal Brief, para. 662, *referring to* T. 4 July 2011 pp. 16042, 16043 (closed session) ([REDACTED]), [REDACTED], T. 8 February 2012 p. 24338 (where Witness Mira Mihajlović confirmed that Karadžić frequently signed "shorter" documents without reading them), Exhibit D3682, para. 22 (concerning Witness Gordan Milinić, stating that Karadžić used to sign documents without reading them).
[1514] Exhibit D3695, para. 233.
[1515] Exhibit D3682, paras. 21, 22.
[1516] With respect to T. 4 July 2011 (closed session), *see* Trial Judgement, nn. 4333, 4687, 10794, 10799, 16717, 16727, 16728, 16732. With respect to T. 6 July 2011 (closed session), *see* Trial Judgement, nn. 4704, 15317, 16222, 16252. With respect to T. 8 February 2012, *see* Trial Judgement, nn. 16325, 19618. With respect to Exhibit D3682, *see* Trial Judgement, nn. 703, 10056, 10086, 10151, 10873, 14085, 14086, 16374, 20656. With respect to Exhibit D3695, *see* Trial Judgement, nn. 624, 746, 954, 1049, 4467, 4468, 8847, 9330, 9371, 9841, 9842, 9844, 9869, 9878, 9921, 9925, 9966, 10035, 10042, 10043, 10053, 10054, 10058, 10106, 10112, 10128, 10132, 10133, 10134, 10145, 10224, 10225, 10238, 10244, 10247, 10250, 10367, 10368, 10430, 10607, 10684, 10730, 10731, 10812, 10827, 10900, 10931, 10937, 15292, 15302, 15323, 15326, 15929, 15991, 16016, 16607, 16608, 19616. The Trial Chamber considered the evidence of Gordan Milinić unreliable in certain regards as it was "marked by contradictions, bias, and indicators that he lacked candour". *See* Trial Judgement, nn. 10056, 10873, *referring to* Exhibit D3682. With regard to Bogdan Subotić's evidence, the Trial Chamber similarly found his evidence unreliable in certain regards as it was "marked by evasiveness, contradictions, and indicators of partisanship and bias". *See* Trial Judgement, nn. 9869, 9878, 9921, 10607, 10827, *referring to* Exhibit D3695. *See also* Trial Judgement, nn. 10244, 10931, 19616.

evidence as long as there is no indication that it completely disregarded any particular piece of evidence,[1517] the Appeals Chamber is not convinced that this evidence was not considered. Furthermore, the Trial Chamber extensively discussed the procedures and methods of, as well as Karadžić's role in, the drafting of the seven main VRS military directives issued between June 1992 and March 1995 in pursuance of the Strategic Goals, including Directive 7.[1518] The Trial Chamber found that the directives constituted "the highest level of political-military direction" for the conduct of the war, were "acts of command used by the highest echelons of command", and regulated the actions of the military forces by assigning tasks and setting guidelines governing the division of responsibilities between the army, police, and civilian protection.[1519] The Trial Chamber found that before signing the directives, upon receiving the proposed text from the Main Staff, Karadžić would provide guidelines, and revisions would be made in accordance with his instructions.[1520] The Trial Chamber found that Karadžić examined and approved all seven directives and considered, in particular, evidence that Karadžić told the Bosnian Serb Assembly in October 1995 that he "examined" and "approved" all of the directives.[1521] Furthermore, the Trial Chamber considered evidence that Karadžić stated that the attacks in Srebrenica and Žepa were based on "his Order No. 7" and that the objective of the operations was "to raise the temperature to the boiling point".[1522]

564. In light of the evidence considered by the Trial Chamber and discussed above, particularly on the importance of Directive 7 as "the highest level of political-military direction", Karadžić's role in the drafting process of the seven directives, including Directive 7, Karadžić's personal acknowledgment of the directive as his own, and his admission that he examined and approved it, the Appeals Chamber finds that the Trial Chamber did not err by failing to consider relevant evidence or to provide a reasoned opinion.[1523] Karadžić therefore fails to demonstrate that the Trial Chamber erred in relying upon the passage in Directive 7 ordering the Drina Corps to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of

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[1517] *Prlić* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Stanišić and Župljanin* Appeal Judgement, para. 138.
[1518] *See* Trial Judgement, paras. 3152-3156.
[1519] *See* Trial Judgement, para. 3153.
[1520] *See* Trial Judgement, para. 3155, *referring to, inter alia*, T. 29 February 2012 p. 25495 (concerning the drafting of Directive 7), Exhibits P4444, p. 11992 (concerning the methodology of drafting directives), P1415, p. 84, P3149, p. 24 (where during the 14th session of Supreme Command of the Armed Forces of *Republika Srpska* on 31 March 1995, Karadžić stated "I think that every document of the Main Staff should be verified by the Supreme commander", to which Mladić replied "[...] every directive went through here for examination, we did every analysis in your presence").
[1521] Trial Judgement, para. 3155, *referring to, inter alia*, Exhibit P1415, p. 84.
[1522] Trial Judgement, n. 19623, *referring to, inter alia*, T. 7 March 2012 pp. 25938, 25939, Exhibit P4515, RP. 1075398.
[1523] The Appeals Chamber finds Karadžić reliance on a determination in the *Popović et al.* case that a report signed by Pandurević was insufficient to establish the necessary criminal intent unpersuasive. Karadžić fails to demonstrate the pertinence of this conclusion, which is based on a separate record and distinct circumstances, or how it reflects error in the Trial Chamber's reasoning.

Srebrenica and Žepa" in establishing Karadžić's intent to force the Bosnian Muslim population to leave Srebrenica and Žepa.

(b) Restriction of Humanitarian Aid

565. The Trial Chamber found that to accomplish the goals of the physical separation of Srebrenica from Žepa and to "create an unbearable situation of total insecurity with no hope of further survival or life for [their] inhabitants", Directive 7 ordered "relevant State and military organs responsible for work with UNPROFOR and humanitarian organisations" to:

> through the planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion.[1524]

The Trial Chamber found that Karadžić implemented this order by restricting access to Srebrenica and limiting the amount of humanitarian aid and UNPROFOR re-supply convoys reaching the enclave.[1525] The Trial Chamber further found that, six days after the issuance of Directive 7, Karadžić issued a decision forming a State Committee for Co-operation with the UN and International Humanitarian Organisations ("State Committee"), which would be in charge of the approval of humanitarian convoys following prior consultations with him.[1526] Furthermore, the Trial Chamber noted that following the issuance of Directive 7, humanitarian aid deliveries fell considerably, the conditions in Srebrenica deteriorated to "disastrous levels", and, by the end of June 1995, some residents had died of starvation.[1527] According to the Trial Chamber, the restriction of access to Srebrenica, which was implemented by Mladić, allowed Karadžić to maintain control over goods and personnel entering Srebrenica during the period leading to its take-over.[1528] The Trial Chamber concluded, partly based on these considerations, that, by the time Directive 7 was issued, Karadžić and Mladić had devised a long-term strategy aimed at the eventual forcible removal of the Bosnian Muslims from Srebrenica through, *inter alia*, the deliberate restriction of humanitarian aid,[1529] and that Karadžić shared the common purpose of and significantly contributed to the Srebrenica JCE.[1530]

[1524] Trial Judgement, paras. 4980, 5681, *referring to* Exhibit P838, p. 14.
[1525] Trial Judgement, paras. 4989, 4991, 5756, 5799, 5817.
[1526] Trial Judgement, paras. 5756, 5757, 5799, *referring to* Exhibit P4543. The Trial Chamber noted that the State Committee was responsible for approving the passage of humanitarian aid convoys and the VRS was responsible for the UNPROFOR re-supply convoys and that Karadžić controlled the policy of restriction which was implemented by Mladić. *See* Trial Judgement, para. 5757.
[1527] Trial Judgement, paras. 4989-4992, 5758.
[1528] Trial Judgement, paras. 5756-5758, 5799, 5817.
[1529] Trial Judgement, paras. 5684, 5800.
[1530] Trial Judgement, paras. 5814, 5821. *See also* Trial Judgement, paras. 5756-5758, 5799, 5817.

566. Karadžić submits that the Trial Chamber erred in finding that the State Committee gave him control over convoys heading to Srebrenica and that he used that control to restrict humanitarian aid to the enclave.[1531] He contends that the Trial Chamber ignored evidence that the State Committee was created to ease restrictions in response to complaints from the international community.[1532] Karadžić further contends that the Trial Chamber's finding that there was a policy to reduce the supply of humanitarian aid following the issuance of Directive 7 in March 1995 is unsupported by the evidence.[1533] Karadžić submits that the Trial Chamber's conclusion that he restricted humanitarian aid to Srebrenica was not the only reasonable inference available from the evidence, proposing another possible inference that the obstructions to the convoys were caused by lower level soldiers without his or the State Committee's knowledge.[1534]

567. The Prosecution responds that the Trial Chamber reasonably concluded that Karadžić controlled the implementation of Directive 7 by reducing humanitarian aid deliveries to Srebrenica.[1535]

568. Karadžić replies that the Prosecution's arguments are unsupported, based on incorrect statistics, and otherwise unpersuasive.[1536]

569. With respect to Karadžić's submission that the Trial Chamber ignored evidence that the State Committee was created to "ease restrictions" in the delivery of humanitarian aid, the Appeals Chamber observes that the two exhibits to which Karadžić refers in support do not reflect this contention.[1537] Instead, they contain the correspondence in early March 1995 between Karadžić and Yasushi Akashi, UNPROFOR Special Representative of the UN Secretary-General, in which, *inter alia*, Akashi complained about the barring of medical convoys entering the enclaves and to which Karadžić responded that Akashi "greatly exaggerate[d]" the difficulties concerning the matter and

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[1531] Karadžić Appeal Brief, paras. 668-676. *See also* T. 24 April 2018 p. 272.
[1532] Karadžić Appeal Brief, para. 669, *referring to* Exhibits P2244, P2245. Karadžić claims that this evidence aligns with his policy to allow humanitarian convoys to pass without obstruction and is further corroborated by: (i) the State Committee's aim to improve cooperation with the UN and international humanitarian organisations; (ii) the fact that those appointed to the committee were civilians with humanitarian experience; and (iii) his letter to Mladić about the non-observance of a State Committee order for unimpeded passage of a UNHCR convoy, ordering immediate execution of such order and submission of a report explaining the delay. *See* Karadžić Appeal Brief, paras. 669-671, *referring to* Exhibits P4543, D3876.
[1533] Karadžić Appeal Brief, para. 673. Karadžić asserts that, to the contrary, the number of humanitarian convoys for Srebrenica increased after the issuance of Directive 7, that 93% of humanitarian aid was delivered to Srebrenica, and that, in April 1995, the UN reported convoy access to Srebrenica was unhindered and that the humanitarian situation in the enclave was satisfactory. *See* Karadžić Appeal Brief, para. 673. Karadžić adds that considering the State Committee's function to approve convoys, the Trial Chamber's finding that not all approved convoys arrived in Srebrenica is inconsistent with the finding that he used his control over the State Committee to restrict humanitarian aid. *See* Karadžić Appeal Brief, para. 674.
[1534] Karadžić Appeal Brief, paras. 675, 676.
[1535] Prosecution Response Brief, paras. 371, 379-383.
[1536] Karadžić Reply Brief, para. 200.
[1537] Karadžić Appeal Brief, para. 669, *referring to* Exhibits P2244, P2245.

that "where problems genuinely exist" they would "strive to eliminate them".[1538] Nowhere in these exhibits was any mention made of the State Committee.

570. In any event, the Appeals Chamber notes that the Trial Chamber did consider these exhibits in the Trial Judgement,[1539] as well as other evidence to which Karadžić refers, namely, his decision creating the State Committee[1540] and the letter he sent to Mladić concerning the non-observance of the State Committee's order for unimpeded passage of a UNHCR convoy.[1541] In light of these considerations, the Appeals Chamber finds that Karadžić has not demonstrated that the Trial Chamber disregarded relevant evidence.

571. The Appeals Chamber now turns to Karadžić's contention that the Trial Chamber's finding that there was a policy to reduce the supply of humanitarian aid following the issuance of Directive 7 in March 1995 was unsupported by evidence. The Appeals Chamber recalls that in reaching this conclusion, the Trial Chamber considered evidence showing that following the issuance of Directive 7, humanitarian aid deliveries decreased considerably, the conditions in Srebrenica deteriorated to "disastrous levels", and by the end of June 1995, some residents had died of starvation.[1542] The Trial Chamber further considered Karadžić's submission that there was no appreciable difference between the amounts of humanitarian aid delivered before and after the issuance of Directive 7 as well as most of the evidence which Karadžić claims demonstrates that the number of convoys for Srebrenica increased after the issuance of Directive 7.[1543] The Trial Chamber found, in light of the testimony of Witness Momir Nikolić, who stated that he received frequent requests that the amount of goods in UNHCR convoys "be halved",[1544] and considering a

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[1538] *See* Exhibit P2245, p. 1. *See also* Exhibit P2244.
[1539] Trial Judgement, nn. 16811, 16847, 16848, 16492, 16574, 16575, 16811.
[1540] *See* Trial Judgement, para. 5757, *referring to* Exhibit P4543. *See also* Trial Judgement, paras. 173, 3256.
[1541] Trial Judgement, para. 3117, n. 10077 *referring to, inter alia*, Exhibit D3876. Karadžić's claims that "those appointed to the committee were civilians with humanitarian experience", is unsubstantiated and therefore dismissed without further consideration. *See* Karadžić Appeal Brief, para. 670, *referring to* Exhibit P4543, p. 3 (which is the decision on forming the State Committee as published in the Official Gazette of Republika Srpska that merely lists the appointed members of the committee).
[1542] Trial Judgement, paras. 4989-4992, 5758 and references cited therein. The Trial Chamber noted that following the issuance of Directive 7, the supply of fuel, electricity, and water in Srebrenica was limited or non-existent, that sanitation was dire and medical care insufficient, and that in early June 1995, the only food present in the enclave was what the residents were able to raise for themselves as humanitarian aid deliveries fell to 29.7% of targeted levels. *See* Trial Judgement, paras. 4989, 4991, *referring to, inter alia*, Exhibit P2443, p. 6. *See also* Exhibit P2443, p. 2 (where UNPROFOR reported on 6 July 1995 that while UNHCR convoys had unhindered access to Srebrenica until June 1995, access to the enclave became "sporadic" from then on, leading to an "increasingly difficult food situation", in which, for the month of June 1995, only some 30% of the targeted amount of food deliveries for Srebrenica was met).
[1543] Trial Judgement, para. 4991, n. 16836, *referring to, inter alia*, Exhibits D2067, D2068, D2069, D2070, D2072, D2073, D2075, D2076, D2077, D2116, D2117, D2119, D2120, D3932, D3957, P4452. The Appeals Chamber further observes that the Trial Chamber considered Exhibits P4190 and P831 in finding that the humanitarian situation worsened after the issuance of Directive 7. *See* Trial Judgement, para. 4989, nn. 16825, 16826.
[1544] The Trial Chamber noted that Momir Nikolić was the Chief of the Security and Intelligence Organ from November 1992 until the end of the conflict, reported to the Drina Corps Intelligence and Security Organ, and acted as liaison officer to UNMOs, UNPROFOR, and other international organizations in the Srebrenica area in 1995. *See* Trial Judgement, para. 197.

large amount of documentary evidence and witness testimony attesting to the deprivation visible in the enclave at the time, that even if such convoys were ostensibly authorized on paper, this did not mean that they ultimately arrived in Srebrenica.[1545] On this basis, recalling that the language of Directive 7 "specifically called on the Bosnian Serb Political and Governmental Organs and Bosnian Serb Forces to '*unobtrusively* [...] reduce and limit the supply of material resources to the Muslim population'", the Trial Chamber found that Directive 7 was implemented.[1546] In light of the evidence considered by the Trial Chamber in concluding that Directive 7 was implemented through the reduction of the amount of humanitarian aid reaching Srebrenica, Karadžić has failed to demonstrate that the Trial Chamber's conclusion was unsupported or otherwise unreasonable.[1547]

572. With respect to Karadžić's contention that no reasonable trial chamber could have excluded the possibility that the obstructions to the convoys were caused by lower level soldiers without his or the State Committee's knowledge, Karadžić proposes an alternative conclusion without substantiating his argument or pointing to any basis for this conclusion in the trial record.

573. For the foregoing reasons, Karadžić has failed to demonstrate that the Trial Chamber erred in finding that Karadžić implemented Directive 7 by restricting access to humanitarian aid in Srebrenica.

(c) 11 July 1995 Orders

574. In finding that Karadžić shared the common purpose to eliminate the Bosnian Muslims in Srebrenica through forcible removal, and that he significantly contributed to the implementation of this common plan, the Trial Chamber considered, *inter alia*, three orders pertaining to the situation in Srebrenica issued by Karadžić immediately after the fall of the enclave on 11 July 1995. These were: (i) an order appointing Deronjić as civilian commissioner for Srebrenica ("Order Appointing Deronjić as Civilian Commissioner"), tasked to establish "the functions of the appointed municipal authority organs and ensure conditions for their efficient functioning" and the functioning of a Bosnian Serb Public Security Station ("SJB");[1548] (ii) an order to the *Republika Srpska* Ministry of Internal Affairs to form an SJB in "Serb Srebrenica" ("Order to Form an SJB in Srebrenica");[1549] and (iii) an order stating that, from then on, only the State Committee would give approval for humanitarian convoys following prior consultations with Karadžić ("Order on Approval of

[1545] Trial Judgement, para. 4991.
[1546] Trial Judgement, para. 4991, *referring to* Exhibit P838, p. 14.
[1547] Furthermore, in light of these considerations, the Appeals Chamber dismisses Karadžić's cursory contention – that the finding that not all convoys arrived in Srebrenica is inconsistent with the finding that he controlled the State Committee – as it is without merit and fails to identify any error.
[1548] *See* Trial Judgement, para. 5693, *referring to* Exhibit D2055. *See also* Trial Judgement, paras. 5761, 5817.
[1549] *See* Trial Judgement, paras. 226, 5693, 5761, *referring to* Exhibit P2994. *See also* Trial Judgement, para. 5817.

Humanitarian Convoys").[1550] The Trial Chamber found that the establishment of Bosnian Serb structures in Srebrenica, through the Order Appointing Deronjić as Civilian Commissioner and the Order to Form an SJB in Srebrenica, indicated that the removal of the enclave's Bosnian Muslim population was intended to be permanent.[1551] The Trial Chamber further found that the Order on Approval of Humanitarian Convoys allowed for increased oversight and control over humanitarian convoys and the restriction of their passage, and had the practical effect of limiting international access to the enclave.[1552]

575. Karadžić submits that, in finding that these orders demonstrated his intent that the Bosnian Muslims be permanently removed from Srebrenica, the Trial Chamber "failed to adopt a reasonable inference consistent with innocence".[1553] He contends that the Order Appointing Deronjić as Civilian Commissioner envisaged that Bosnian Muslims would remain in Srebrenica, as it instructed Deronjić to ensure that all citizens who participated in combat against the VRS be treated as prisoners of war and that the civilian population could freely choose where they would live.[1554] With respect to the Order to Form an SJB in Srebrenica, Karadžić asserts that the Trial Chamber failed to give a reasoned opinion in finding that it indicated an intent that the removal of the Bosnian Muslims was designed to be permanent.[1555] He further submits that the Trial Chamber's conclusion that the Order on Approval of Humanitarian Convoys had the effect of limiting international access to Srebrenica is not the only inference that could be drawn from the evidence, as another possible conclusion would have been that the order was aimed to improve the passage of convoys.[1556]

576. The Prosecution responds that the Trial Chamber reasonably relied on these orders in support of its finding that Karadžić shared the intent to permanently remove the Bosnian Muslim population from Srebrenica and that Karadžić proposes alternative interpretations of individual exhibits without showing any error.[1557]

577. The Appeals Chamber notes that the Trial Chamber did not solely rely on the Order Appointing Deronjić as Civilian Commissioner and the Order to Form an SJB in concluding that the establishment of Bosnian Serb structures in Srebrenica was intended for the permanent removal

[1550] Trial Judgement, paras. 5761, 5817, *referring to* Exhibit P5183.
[1551] Trial Judgement, para. 5694. *See also* Trial Judgement, paras. 5761, 5800, 5810, 5817.
[1552] Trial Judgement, para. 5817.
[1553] Karadžić Appeal Brief, paras. 677-686. *See also* Karadžić Reply Brief, para. 201.
[1554] Karadžić Appeal Brief, paras. 678, 679.
[1555] Karadžić Appeal Brief, para. 680.
[1556] *See* Karadžić Appeal Brief, paras. 681-686.
[1557] Prosecution Response Brief, paras. 384-387.

of the Bosnian Muslim population.[1558] Rather, the Trial Chamber's conclusion was based on the totality of the evidence, particularly in light of the Bosnian Serb rhetoric advocating the separation of the population along ethnic lines and asserting an inability to co-exist.[1559] Apart from offering alternative interpretations of two orders, Karadžić does not demonstrate the unreasonableness of the Trial Chamber's conclusion.

578. The Appeals Chamber turns to Karadžić's contention that the Trial Chamber erred in finding that the Order on Approval of Humanitarian Convoys had the effect of limiting international access to Srebrenica, as another possible inference would have been that the order was aimed to improve the passage of convoys. The Appeals Chamber recalls that it has upheld the Trial Chamber's finding that Karadžić implemented Directive 7 by restricting access to humanitarian convoys in Srebrenica during the period leading to its take-over through, *inter alia*, establishing the State Committee, and has rejected Karadžić's arguments on appeal that the Trial Chamber failed to consider that the State Committee was created to "ease restrictions" in the delivery of humanitarian aid.[1560] The Appeals Chamber observes that the Trial Chamber found that the Order on Approval of Humanitarian Convoys was "carried out as instructed", and that during this period the ICRC was unable to access Srebrenica.[1561] The Appeals Chamber finds that apart from repeating his argument already made at trial[1562] and disagreeing with the Trial Chamber's conclusion, Karadžić fails to demonstrate that the Trial Chamber's assessment of the Order on Approval of Humanitarian Convoys was unreasonable.

579. Karadžić has therefore failed to demonstrate the Trial Chamber erred in relying on the three orders he issued on 11 July 1995 in finding that he shared the common purpose to eliminate the Bosnian Muslims in Srebrenica through forcible removal.

(d) Facts Establishing Forcible Transfer

580. In assessing the crimes of deportation and inhumane acts (forcible transfer) as crimes against humanity, the Trial Chamber found, based on the totality of the evidence, that the circumstances arising from the imposition of restrictions on humanitarian aid pursuant to Directive 7, the attack on Srebrenica, as well as the atmosphere in Potočari, all of which resulted from the acts of Bosnian Serb forces, created a coercive environment in which the Bosnian Muslims had no

[1558] Trial Judgement, paras. 5693, 5694.
[1559] *See* Trial Judgement, paras. 5693, 5694, *referring to* Trial Judgement, Section IV.A.3.i.
[1560] *See supra* paras. 565-573.
[1561] Trial Judgement, paras. 5787, 5817.
[1562] Karadžić Appeal Brief, para. 683, *referring to* T. 2 October 2014 p. 47941.

viable alternative but to leave the enclave in order to stay alive.[1563] Furthermore, in finding that the Serb forces intended the forcible removal, the Trial Chamber considered, *inter alia*, Mladić's statement during a telephone conversation that "we'll evacuate them all—those who want to and those who don't want to".[1564]

581. Karadžić submits that he was not aware of any of the "*indicia* relied upon by the Trial Chamber" in finding that the transfer of Bosnian Muslims was forcible.[1565] He contends that he did not receive any reports concerning "undu[e]" restriction of humanitarian aid, the shelling of civilians in Srebrenica, or the coercive atmosphere in Potočari.[1566] He further argues that he was not privy to the conversation in which Mladić made the above-mentioned statement.[1567] Karadžić adds that in an interview with the newspaper *El País* on 13 July 1995, he stated that "Muslims were free to stay or go".[1568]

582. The Prosecution responds that Karadžić misunderstands the law, that the Trial Chamber properly based its conclusion that he shared the intent for forcible removal on the totality of the evidence, and that his knowledge did not depend on Mladić's above-mentioned statement.[1569] In addition, the Prosecution asserts that Karadžić's interview with *El País* supports rather than undermines his knowledge of the conditions resulting in forcible removal.[1570]

583. Karadžić replies that the Prosecution's references to his interview with *El País* are selective and taken out of context.[1571]

584. The Appeals Chamber recalls that the *mens rea* required for liability under the first category of joint criminal enterprise is that the accused shares the intent with the other participants to carry out the crimes forming part of the common purpose.[1572] The Appeals Chamber observes that the Trial Chamber concluded, based on evidence concerning Karadžić's conduct, including his interview with *El País*,[1573] that he knew about the concrete plan to eliminate Bosnian Muslims in

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[1563] Trial Judgement, para. 5633.
[1564] Trial Judgement, paras. 5637-5640.
[1565] Karadžić Appeal Brief, para. 688.
[1566] Karadžić Appeal Brief, paras. 687, 688.
[1567] Karadžić Appeal Brief, paras. 687, 688.
[1568] Karadžić Appeal Brief, para. 688.
[1569] Prosecution Response Brief, para. 390. The Prosecution contends that, in any event, Karadžić played a leading role in creating coercive conditions, and that he received constant reports regarding the situation on the ground. *See* Prosecution Response Brief, para. 390.
[1570] Prosecution Response Brief, para. 391.
[1571] Karadžić Reply Brief, para. 202.
[1572] *See Prlić et al.* Appeal Judgement, para. 1755; *Stanišić and Župljanin* Appeal Judgement, para. 915; *Popović et al.* Appeal Judgement, para. 1369; *Đorđević* Appeal Judgement, para. 468; *Munyakazi* Appeal Judgement, para. 160; *Brđanin* Appeal Judgement, para. 365.
[1573] *See* Trial Judgement, para. 5774. In particular, the Trial Chamber noted that during the interview, Karadžić stated that "very few Muslims can stay in Srebrenica because they are now beginning to realise that Srebrenica belongs to the

Srebrenica through forcible removal, shared the common purpose of the Srebrenica JCE, significantly contributed to the implementation of the common plan, and had the intent to commit the crimes carried out by the Serb forces following the fall of Srebrenica.[1574] Karadžić's alternative interpretation and selective reliance on the evidence fail to show that the Trial Chamber's conclusion was unreasonable.

585. Furthermore, the Appeals Chamber recalls that, while it was necessary for the Trial Chamber to find that Karadžić shared the intent to forcibly displace the population, the Trial Chamber was not required to establish that he intended the specific acts of coercion causing the forcible removal of Bosnian Muslims.[1575] Karadžić's contention that he was not aware of the circumstances which the Trial Chamber found created "a coercive environment in which the Bosnian Muslims had no other viable alternative but to leave the enclave in order to stay alive", does not therefore demonstrate error on the part of the Trial Chamber.

586. Based on these considerations, the Appeals Chamber finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he shared the intent to forcibly transfer the Bosnian Muslims from Srebrenica.

(e) Conclusion

587. Based on the foregoing, the Appeals Chamber dismisses Grounds 38 and 39 of Karadžić's appeal.

Serbian State", but that whoever wanted to stay in Srebrenica could do so, that the enclaves should disappear and that he was willing to put an end to the war "by political or military methods". *See* Trial Judgement, para. 5774, *referring to* Exhibit P2564, pp. 1-4.

[1574] Trial Judgement, paras. 5810, 5814, 5821-5831. *See also* Trial Judgement, paras. 5756-5813.

[1575] *Cf. Stanišić and Župljanin* Appeal Judgement, para. 917.

2. Alleged Errors in Finding that Karadžić Shared the Common Purpose of Eliminating the Bosnian Muslims of Srebrenica (Ground 40)

588. The Trial Chamber found that the Srebrenica JCE shared a common plan to eliminate the Bosnian Muslims in Srebrenica first through the forcible removal of Bosnian Muslims and later through the killing of Bosnian Muslim men and boys.[1576] The Trial Chamber found that Karadžić shared the common purpose of eliminating the Bosnian Muslims in Srebrenica with the other members of the joint criminal enterprise, including its expanded common purpose of killing Bosnian Muslim men and boys.[1577] It did so relying on Karadžić's knowledge of and participation in the plan of eliminating the Bosnian Muslims in Srebrenica by forcibly removing the women, children, and elderly men as of the evening of 11 July 1995, his subsequent agreement to the expansion of the plan to encompass the killing of the able-bodied men and boys on 13 July 1995, and his subsequent actions following the executions.[1578] The Trial Chamber also determined that Karadžić significantly contributed to the joint criminal enterprise.[1579] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination and other inhumane acts (forcible transfer) as crimes against humanity, and murder as a violation of the laws or customs of war for the crimes committed by Bosnian Serb forces in the execution of the Srebrenica JCE.[1580]

589. Karadžić contends that the Trial Chamber erred in finding that he shared the Srebrenica JCE's expanded common purpose of the killing of able-bodied Bosnian Muslim men and boys.[1581] Specifically, he argues that the Trial Chamber erred by: (i) inferring that he ordered prisoners to be transferred to Zvornik where they were later killed in view of other reasonable inferences;[1582] (ii) inferring that he possessed contemporaneous knowledge of killings occurring in Srebrenica in view of the absence of any direct evidence supporting this conclusion and in light of evidence

[1576] Trial Judgement, paras. 5849, 5998.
[1577] Trial Judgement, paras. 5814, 5998.
[1578] Trial Judgement, para. 5814.
[1579] Trial Judgement, paras. 5821, 5998.
[1580] Trial Judgement, paras. 5833, 5837, 5848, 5850, 5998, 6002-6005. Although finding that Karadžić could be convicted for murder as a crime against humanity, the Trial Chamber observed that convictions for this offense and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity for incidents related to the Srebrenica JCE. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574. Furthermore, as the Trial Chamber had only been able to determine that Karadžić agreed to the expanded common purpose as of his conversation with Deronjić on the evening of 13 July 1995, the Trial Chamber found that it could not hold Karadžić responsible through his participation in the joint criminal enterprise for crimes committed prior to that time. *See* Trial Judgement, para. 5831. Instead, it found him responsible for such crimes as a superior pursuant to Article 7(3) of the ICTY Statute. *See* Trial Judgement, paras. 5847, 5848, 5850, 5998.
[1581] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 690-745; Reply Brief, paras. 203-220; T. 23 April 2018 pp. 127-131, 134-139, T. 24 April 2018 pp. 249-261.
[1582] Karadžić Appeal Brief, paras. 693-727.

contradicting it;[1583] and (iii) relying on his actions subsequent to the executions in Srebrenica as a basis for establishing his intent.[1584] Karadžić asserts that the Trial Chamber's errors warrant reversals of his convictions for genocide as well as murder and extermination as crimes against humanity through his participation in the Srebrenica JCE.[1585] The Appeals Chamber will address these arguments in turn.

(a) Findings on Order to Transfer the Detainees to Zvornik Where They Were Executed

590. The Trial Chamber found that Karadžić "adopted and embraced" the expansion of the purpose of the joint criminal enterprise to entail the killing of Bosnian Muslim men and boys in Srebrenica, based in part, on an intercepted conversation with Miroslav Deronjić on the evening of 13 July 1995 in which Deronjić informed him that the Bosnian Serb forces had "about two thousand" Bosnian Muslim males in custody and expected that number to increase overnight.[1586] The Trial Chamber interpreted Karadžić's reference to the detainees as "goods" which had to be placed "inside the warehouses before twelve tomorrow" and further instruction "not in the warehouses over there, but somewhere else" as a coded direction to transfer the detainees to Zvornik, where they were executed.[1587] The Trial Chamber also found that the use of code by Karadžić and Deronjić demonstrated "malign intent" and that the intercepted conversation, in addition to Karadžić's "subsequent act", proved beyond reasonable doubt Karadžić's agreement to the expansion of the common purpose to include the killing of Bosnian Muslim males.[1588]

591. In concluding that Karadžić's conversation with Deronjić demonstrated that he ordered the detainees' transfer to Zvornik where they were executed,[1589] the Trial Chamber relied on the following evidence: (i) the intercept of a telephone conversation that took place on 13 July 1995 between Karadžić and Deronjić through an intermediary;[1590] (ii) the testimony of Witness KDZ126 who recorded this conversation;[1591] (iii) the fact that, in his final trial brief, Karadžić acknowledged that this telephone conversation took place, that Deronjić informed him of the large number of detainees in Bratunac,[1592] and did not dispute that the term "goods" referred to those detainees;[1593]

[1583] Karadžić Appeal Brief, paras. 728-740; T. 24 April 2018 pp. 251-257.
[1584] Karadžić Appeal Brief, paras. 728, 741-744; T. 23 April 2018 pp. 136-138. *See also* T. 24 April 2018 pp. 255-257.
[1585] Karadžić Appeal Brief, para. 745; T. 23 April 2018 p. 139; T. 24 April 2018 p. 259.
[1586] Trial Judgement, paras. 5772, 5805, 5811, 5814, 5829, 5830. The Appeals Chamber notes that, while the Trial Chamber could only make a positive determination about Karadžić's agreement to the expanded objective as of the conversation with Deronjić on the evening of 13 July 1995, it determined that Karadžić must have known about the plan to kill prior to the conversation. *See* Trial Judgement, paras. 5801-5809.
[1587] Trial Judgement, paras. 5710, 5772, 5805, 5811, 5818, 5830.
[1588] Trial Judgement, paras. 5805, 5814.
[1589] Trial Judgement, paras. 5311, 5312, 5710, 5712, 5772, 5773, 5805, 5818, 5830.
[1590] Trial Judgement, para. 5772, *referring to, inter alia*, Exhibit P6692, p. 1. *See also* Trial Judgement, para. 5311.
[1591] Trial Judgement, para. 5772, *referring to, inter alia*, T. 15 March 2012 pp. 26400-26403. *See also* Trial Judgement, para. 5311.
[1592] Trial Judgement, nn. 18019, 19396, *referring to, inter alia*, Karadžić Final Trial Brief, paras. 3025, 3026.

(iv) the testimony of Witness Momir Nikolić, who testified that later on the same day he heard Deronjić telling Beara that he had received instructions from Karadžić to transfer the detainees to Zvornik and that, by that stage, their understanding was that the detainees would be executed there;[1594] (v) the testimony of Witness Srbislav Davidović who had urged Deronjić to "use [his] connections" with Karadžić in order to have the buses with detainees moved from Bratunac;[1595] (vi) the testimony of Witness Milenko Katanić who stated that he believed that Karadžić had helped Deronjić to persuade Beara to send the prisoners to a location outside Bratunac;[1596] (vii) the testimony of Witness Borovčanin that, before speaking to Karadžić, Deronjić had complained to Beara about the detainees' presence in Bratunac;[1597] and (viii) the evidence of Witness KDZ320 that, on the following day during a briefing with VRS officers and municipal authorities, Beara stated that the VRS had to "get rid of" the detainees held in various locations in the Zvornik municipality and that he expected assistance from the municipality and instructed that his order originated from "two Presidents".[1598]

592. Karadžić submits that the Trial Chamber's finding that he shared the common purpose of eliminating the Bosnian Muslims in Srebrenica through the execution of able-bodied men and boys is unsafe.[1599] In this respect, he contends that the Trial Chamber erred by: (i) relying on the "uncorroborated hearsay testimony" of Prosecution Witness Momir Nikolić, a "plea-bargaining accomplice" to find that he ordered the prisoners transferred to Zvornik and that he shared the intent to kill;[1600] (ii) inferring that he ordered the prisoners transferred to Zvornik to be killed, which was not the only reasonably available inference on the evidence, and ignoring "a wealth" of evidence suggesting that he intended the detainees' transfer to the Batković camp;[1601] and (iii) inferring that

[1593] Trial Judgement, n. 19399, *referring to* Karadžić Final Trial Brief, paras. 3025-3027.
[1594] Trial Judgement, paras. 5312, 5805, n. 18024.
[1595] Trial Judgement, paras. 5709, 5710, 5773, n. 18024, *referring to, inter alia*, T. 9 February 2012 pp. 24415, 24416, 24452, 24453.
[1596] Trial Judgement, para. 5312, n. 18024, *referring to, inter alia*, T. 10 February 2012 p. 24496, Exhibit P4374, paras. 91-93. *See also* Trial Judgement, n. 19398.
[1597] Trial Judgement, paras. 5710, 5773, n. 19393, *referring to, inter alia*, Exhibit D3659.
[1598] Trial Judgement, paras. 5715, 5818, n. 19740.
[1599] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 690-745; Karadžić Reply Brief, paras. 203-220; T. 23 April 2018 pp. 127-131, 134-139; T. 24 April 2018 pp. 249-261. The Appeals Chamber notes that, in his notice of appeal, Karadžić refers to, *inter alia*, paragraphs 5818-5821, 5823, and 5824 of the Trial Judgement. *See* Karadžić Notice of Appeal, n. 46. These paragraphs contain findings on, *inter alia*, Karadžić's contribution to the Srebrenica JCE (*see* Trial Judgement, paras. 5818-5821) and Karadžić's intent for the crimes of inhumane acts (forcible transfer) and persecution (*see* Trial Judgement, paras. 5823, 5824). As Karadžić does not present or develop any challenge to these findings in his appeal brief, the Appeals Chamber will not consider this matter any further.
[1600] Karadžić Appeal Brief, paras. 697-703, 712-719, 724-725; Karadžić Reply Brief, paras. 207-209, 211; T. 23 April 2018 pp. 129-131, 134-136, 138, 139; T. 24 April 2018 pp. 258, 259.
[1601] Karadžić Appeal Brief, paras. 695-696, 704-711, 719, 720; Karadžić Reply Brief, paras. 204, 212, 213; T. 23 April 2018 pp. 129-131. In particular, Karadžić highlights academic papers suggesting that the Trial Chamber did not apply the requisite standard of proof when making findings on Karadžić's intent based on the 13 July 1995 conversation between him and Deronjić. Karadžić Appeal Brief, paras. 733, 734, 771; T. 24 April 2018 pp. 249, 250.

the use of code in his conversation with Deronjić demonstrated malign intent, which was not the only reasonable inference available from the evidence.[1602]

593. The Prosecution responds that the Trial Chamber's conclusion that Karadžić ordered the transfer of prisoners to Zvornik during the intercepted conversation with Deronjić is supported by: (i) the totality of the evidence; (ii) the terms used in that conversation; (iii) the fact that the prisoners were moved to Zvornik by Karadžić's subordinates who confirmed that they were following Karadžić's orders; (iv) Karadžić's continuous receipt of information and active oversight of the killing operation; and (v) Witness Momir Nikolić's evidence, which it contends finds considerable corroboration.[1603] The Prosecution also submits that the alternative version of events suggested by Karadžić rests on the suggestion that his subordinates engaged in a massive and elaborate conspiracy to prevent him from learning the fate of the prisoners which is implausible and contradicted by extensive evidence.[1604]

594. Karadžić replies that the Prosecution fails to demonstrate that it was unreasonable to infer that he had intended transferring the prisoners to Batković[1605] and that the use of code was to enable discussing the location of prisoners on unsecured lines.[1606]

595. The Appeals Chamber considers that, contrary to Karadžić's suggestion that the Trial Chamber "relied on [Witness] Momir Nikolić's uncorroborated testimony when making the crucial finding that [he] shared the intent to kill",[1607] the impugned finding does not rest solely on the uncorroborated evidence of Witness Momir Nikolić.

596. Nonetheless, the Trial Chamber's finding that Karadžić ordered the detainees' transfer to Zvornik relies substantially on the evidence of Witness Momir Nikolić.[1608] Witness Momir Nikolić testified that, having driven Beara to Bratunac to attend a meeting with Deronjić and Vasić on 13

[1602] Karadžić Appeal Brief, paras. 721-724; Karadžić Reply Brief, para. 206; T. 23 April 2018 p. 135.
[1603] Prosecution Response Brief, paras. 392-410; T. 23 April 2018 pp. 206-218.
[1604] Prosecution Response Brief, para. 397; T. 23 April 2018 pp. 217, 218. *See also* Prosecution Response Brief, paras. 412-419.
[1605] Karadžić Reply Brief, para. 212.
[1606] Karadžić Reply Brief, para. 206. [REDACTED] *See* Karadžić Reply Brief, para. 210. *See also* Karadžić Appeal Brief, para. 703. The Appeals Chamber notes that Vasić's testimony in the *Perišić* case was not admitted at trial and recalls that Karadžić has failed to satisfy the requirements for admitting Vasić's testimony in the *Perišić* case as additional evidence on appeal. *See* Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, paras. 6, 17, 19. Furthermore, [REDACTED].
[1607] Karadžić Appeal Brief, para. 713. *See also* Karadžić Appeal Brief, paras. 698, 719, 725, 726; T. 23 April 2018 pp. 129-131, 134-136.
[1608] Trial Judgement, paras. 5312, 5712, 5808, n. 18022. The Appeals Chamber notes that the Trial Chamber also relied on the evidence of Witnesses Katanić and Srbislav Davidović as it concerns the meeting between Deronjić and Beara in the early hours of 14 July 1995; however, having reviewed the excerpts relied upon by the Trial Chamber, none reflects direct knowledge of the meeting or the contents of its conversation. *See* Trial Judgement, nn. 18022, 18024, *referring*

July 1995, he waited in the reception area next to Deronjić's office from where he could follow the entire meeting at which it was openly agreed that the detainees were to be executed and Beara and Deronjić argued about where to kill the detainees.[1609] Witness Momir Nikolić also heard Deronjić stating that he had received instructions from Karadžić that all the Bosnian Muslim men being detained in Bratunac should be transferred to Zvornik,[1610] and that, eventually, Beara and Deronjić agreed to transfer the detainees to the area of responsibility of the Zvornik Brigade.[1611] The Trial Chamber noted Karadžić's challenge to Witness Momir Nikolić's evidence about this meeting as unreliable and unacceptable without corroboration.[1612] However, having assessed Witness Momir Nikolić's evidence, the Trial Chamber was satisfied of "the truthfulness and reliability of his account of the meeting".[1613]

597. The Appeals Chamber observes that the Trial Chamber noted that it had approached Witness Momir Nikolić's evidence with "the utmost caution" given that he was himself convicted of crimes arising from events charged in the Indictment and that it was alive to the possibility that he may have motive to implicate Karadžić.[1614] The Trial Chamber recalled that Witness Momir Nikolić testified before it, allowing it to observe his demeanour on direct and cross-examination, and that his evidence was weighed against the totality of the evidence.[1615] It noted the possible motives of Witness Momir Nikolić to lie and thoroughly considered a previous occasion when the witness told the Prosecution an "avowed lie" in one of his interviews.[1616] In this respect, it considered that the witness admitted that he did not speak the truth at the first available opportunity, and, having examined his explanation, was satisfied that, although unfortunate, this was not the result of any oblique motive to mislead but was rather caused by his wish to ensure the success of his plea agreement with the Prosecution.[1617] The Trial Chamber also considered the fact that the witness

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to, inter alia, T. 9 February 2012 pp. 24415, 24416, 24452, 24453, T. 10 February 2012 p. 24496, Exhibit P4374, paras. 91-93.

[1609] Trial Judgement, para. 5312, n. 18022.

[1610] Trial Judgement, para. 5312. *See also* T. 14 February 2012 p. 24679 ("[Deronjić] said, I have received instructions from President Karadžić according to which the prisoners in Bratunac should be transferred to Zvornik, and Deronjić then said that he did not want anyone killed in Bratunac. He said he had enough problems as it was and he didn't want this. That's what I heard [...].").

[1611] Trial Judgement, para. 5312.

[1612] Trial Judgement, n. 18022.

[1613] Trial Judgement, n. 18022.

[1614] Trial Judgement, paras. 16, 17, 5056. In this respect, the Trial Chamber recalled that accomplice evidence is not *per se* unreliable, especially where it can be thoroughly cross-examined, and that therefore reliance upon such evidence is not a legal error. *See* Trial Judgement, para. 16, *referring to Krajišnik* Appeal Judgement, para. 146. The Trial Chamber also noted that it was bound to carefully consider the totality of the circumstances in which such evidence was tendered and explain its reasons for accepting the evidence of a witness who may have had motives or incentives to implicate the accused. *See* Trial Judgement, para. 16, *referring to Krajišnik* Appeal Judgement, para. 146.

[1615] Trial Judgement, para. 17.

[1616] Trial Judgement, paras. 5057, 5058.

[1617] Trial Judgement, para. 5058.

falsely identified himself in a photograph which had been shown to him.[1618] Nonetheless, it found that these incidents did not affect Witness Momir Nikolić's credibility, nor did they justify rejection of his evidence.[1619] In this respect, the Trial Chamber noted that the witness remained otherwise consistent throughout his various statements and testimonies.[1620]

598. The Appeals Chamber also notes that the Trial Chamber considered and rejected Karadžić's challenge to Witness Momir Nikolić's credibility.[1621] In this respect, the Appeals Chamber recalls that a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1622] Karadžić fails to demonstrate such error in the assessment of Witness Momir Nikolić's credibility. The Appeals Chamber also notes that Karadžić had ample opportunity to thoroughly cross-examine Witness Momir Nikolić.[1623] As to Karadžić's submission that Witness Momir Nikolić's evidence should be rejected as uncorroborated hearsay, the Appeals Chamber recalls that trial chambers have the discretion to rely on hearsay evidence.[1624] In these circumstances, the Appeals Chamber finds that Karadžić fails to show that it was unreasonable for the Trial Chamber to rely on Witness Momir Nikolić's evidence.

599. The Appeals Chamber now turns to Karadžić's argument that the Trial Chamber erred in inferring that he had ordered the detainees to be transferred to Zvornik instead of the Batković camp where, in his submission, they would be detained.[1625] The Appeals Chamber recalls that where a fact on which a conviction relies is established on the basis of an inference, that inference must be the only reasonable one available on the evidence.[1626]

600. The Appeals Chamber has considered the factors and evidence relied upon by Karadžić in support of his suggested alternative inference that he had directed the detainees' transfer to

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[1618] Trial Judgement, para. 5059.
[1619] Trial Judgement, para. 5060.
[1620] Trial Judgement, para. 5060.
[1621] Trial Judgement, n. 18022, *referring to* Karadžić Final Trial Brief, paras. 3039, 3040.
[1622] *Šešelj* Appeal Judgement, para. 17; *Prlić et al.* Appeal Judgement, paras. 25, 772, 1601; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12.
[1623] Trial Judgement, para. 17. *See also* T. 14 February 2012 pp. 24695-24727; T. 15 February 2012 pp. 24728-24813; T. 16 February 2017 pp. 24816-24896.
[1624] *Prlić et al.* Appeal Judgement, para. 1601; *Popović et al.* Appeal Judgement, para. 1307, *referring to Kalimanzira* Appeal Judgement, para. 96, *Karera* Appeal Judgement, para. 39. *See also Munyakazi* Appeal Judgement, para. 77.
[1625] *See* Karadžić Appeal Brief, paras. 695, 696, 704-711, 719, 720; Karadžić Reply Brief, paras. 204, 212, 213; T. 23 April 2018 p. 129.
[1626] *Prlić et al.* Appeal Judgement, para. 1709; *Nyiramasuhuko et al.* Appeal Judgement, paras. 650, 1509; *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Stakić* Appeal Judgement, para. 219. *See also Muhimana* Appeal Judgement, para. 49.

Batković,[1627] but observes that Karadžić effectively reiterates his disagreement with the Trial Chamber's evaluation of the relevant evidence without demonstrating error in its conclusion that the only reasonable inference on the evidence was that his order was for the detainees to be transferred to Zvornik. Considering the Trial Chamber's findings on Karadžić's active oversight of the killing operation,[1628] the implementation of the plan by his subordinates,[1629] the role of his close associates on the ground,[1630] the fact that he maintained regular contact with them throughout the implementation of the killing operation,[1631] and the fact that the detainees were transferred to Zvornik where they were executed,[1632] the Appeals Chamber finds that the Trial Chamber committed no error in concluding that the only reasonable inference from the totality of the evidence was that Karadžić had ordered the detainees to be transferred to Zvornik.

601. The Appeals Chamber now turns to Karadžić's argument that the Trial Chamber erred in inferring "malign intent" from the use of code in his conversation with Deronjić.[1633] The Appeals Chamber notes that, contrary to Karadžić's suggestion, the Trial Chamber did not draw the inference of malign intent from the use of code alone, but rather considered that the "use of code to refer to the detainees, as well as the direction to move them toward Zvornik, demonstrate[d] the malign intent behind the conversation."[1634] The Appeals Chamber has already found that Karadžić failed to demonstrate error in the Trial Chamber's conclusion that he ordered the detainees transferred to Zvornik. It also notes that the alternative inference suggested by Karadžić, namely that "the use of code on unsecured lines when referring to the location of prisoners was [...] so that the enemy would not know where the prisoners were being held and mount a rescue operation",[1635] does not explain why code would have been used for the detainees' destination if, as Karadžić submits,[1636] it was widely expected that the transfer would be to Batković. Rather, the use of code was consistent with the Trial Chamber's finding on the VRS direction to conceal the killing aspect of the plan by not making a record of the activities involving the killings or speak about it on the

[1627] Karadžić has argued in this respect that: (i) Batković was the usual place for taking detainees and that Deronjić would have understood his words "somewhere else" as referring to Batković (*see* Karadžić Appeal Brief, para. 696, 711); (ii) there were plans and preparations in place to transfer the detainees to Batković before 13 July 1995 (*see* Karadžić Appeal Brief, paras. 705, 707, *referring to* Exhibits D2197, D4124); (iii) Mladić informed the detainees that they would be given food and water and that afterwards they would decide whether to send them to Krajina, Fikret Abdić, or the Batković camp (*see* Karadžić Appeal Brief, para. 706); (iv) several witnesses testified that they had expected the detainees to be transferred to Batković (*see* Karadžić Appeal Brief, paras. 700, 708, 709); and (v) Defence Witness Radovan Radinović concluded that Karadžić was referring to Batković in his conversation with Deronjić as it was well known that the prisoners would be taken there (*see* Karadžić Appeal Brief, para. 710).
[1628] Trial Judgement, paras. 5760-5762, 5766, 5767, 5772, 5773, 5777, 5779, 5780, 5783, 5801-5804, 5806-5812, 5820.
[1629] Trial Judgement, paras. 5736, 5737, 5743, 5801-5805, 5809, 5820.
[1630] Trial Judgement, paras. 5761, 5763, 5779, 5780, 5805, 5806, 5808.
[1631] Trial Judgement, paras. 5780, 5781-5783, 5820.
[1632] Trial Judgement, paras. 5805, 5818.
[1633] Karadžić Appeal Brief, paras. 721-724; T. 23 April 2018 p. 135.
[1634] Trial Judgement, para. 5805.
[1635] Karadžić Appeal Brief, para. 721.

radio, reinforcing the reasonableness of the Trial Chamber's inference of malign intent.[1637] The Appeals Chamber therefore finds that Karadžić fails to demonstrate error on the part of the Trial Chamber in this respect.

(b) Contemporaneous Knowledge of the Killings

602. The Trial Chamber considered that Karadžić's shared intent for the Srebrenica JCE's expanded common purpose was reaffirmed by the fact that, from the moment he directed Deronjić to move the detainees to Zvornik, he was "actively involved in overseeing the implementation of the plan to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys."[1638] It found that, after his conversation with Deronjić, Karadžić continued to seek and was provided with information about developments on the ground from multiple sources.[1639]

603. Karadžić submits that the Trial Chamber erred in inferring that he had contemporaneous knowledge of the Srebrenica killings.[1640] Specifically, he argues that, for each of the findings that he was informed of the killings, the Trial Chamber "solely" relied on a series of inferences and ignored evidence that he had no knowledge of the killings and that the perpetrators had concealed the killings from him.[1641] Karadžić contends that, in the absence of any direct evidence or by ignoring evidence suggesting the contrary, the Trial Chamber erroneously inferred that Deronjić had informed Karadžić of the Kravica warehouse killings when they met on the afternoon of 14 July 1995 in Pale,[1642] and erroneously inferred that Kovač and Bajagić had informed him about the Srebrenica killings when their testimony reflected the opposite.[1643]

[1636] Karadžić Appeal Brief, paras. 696, 700, 703-711.
[1637] Trial Judgement, paras. 5734, 5801, n. 19426. *See also* Trial Judgement, para. 5184.
[1638] Trial Judgement, para. 5811.
[1639] Trial Judgement, paras. 5806-5809.
[1640] Karadžić Appeal Brief, paras. 729, 740; T. 24 April 2018 pp. 250, 251, 254, 255.
[1641] Karadžić Appeal Brief, paras. 729-732, 735-741; T. 24 April 2018 pp. 250-257. *See also* Karadžić Appeal Brief, paras. 731, 732, 739, 740, where Karadžić refers to: (i) his unsworn statement in which he denied knowledge of killings after the fall of Srebrenica (T. 16 October 2012 p. 28878); (ii) the lack of any direct evidence that Deronjić informed Karadžić about the Kravica warehouse killings during their meeting on 14 July 1995 and the evidence of Witnesses Katanić and Krajišnik who testified that during their meeting immediately following Karadžić's meeting with Deronjić there was no mention of killing men from Srebrenica (Exhibit D3561, para. 8; T. 12 November 2013 p. 43352); (iii) the evidence of 28 witnesses, including his staff, and high-ranking officials in the army, police, security services and assembly, who testified that Karadžić was not informed of the Srebrenica executions (T. 2 October 2014 p. 47949; Karadžić Final Trial Brief, paras. 3016-3149); and (iv) the intercepted conversation of 1 August 1995 in which Beara alludes to the fact that Karadžić might make an agreement for the inspection of exchange of prisoners, and expressed concern that they did not have any to exchange (Exhibits [REDACTED], P6696).
[1642] Karadžić Appeal Brief, para. 730; T. 24 April 2018 pp. 252-255.
[1643] Karadžić Appeal Brief, paras. 735, 736, *referring to* Exhibits D3960, para. 129, D3853, para. 36D; Karadžić Reply Brief, para. 216; T. 24 April 2018 p. 252 (also referring to evidence from Witness Karišik denying that he was aware of or informed Karadžić of executions during a meeting on 16 July 1995).

604. The Prosecution responds that there was considerable evidence demonstrating Karadžić's contemporaneous knowledge of the ongoing killing operation[1644] and that Karadžić demonstrates no error in the Trial Chamber's assessment and conclusions in this respect.[1645]

605. Karadžić replies that the evidence showing that he may have learned of the Kravica warehouse incident "after-the-fact" does not support the Trial Chamber's finding that he contemporaneously shared the expanded common purpose to kill Bosnian Muslim men and boys.[1646] He further replies that the Prosecution fails to identify any written report received by him that refers to the killings.[1647]

606. The Appeals Chamber notes that the Trial Chamber found that Karadžić sought, and was provided with, information through multiple channels on the progress of the killing plan over the course of 14 and 15 July 1995,[1648] and that he had "contemporaneous knowledge" of the ongoing killing operation.[1649] It found, in particular, that: (i) during a meeting on the morning of 14 July 1995, Karadžić and Deronjić discussed the killings at the Kravica warehouse and the implementation of Karadžić's order to transport the detainees from Bratunac to Zvornik;[1650] (ii) Kovač shared his knowledge and observations of the killing operations on 13 and 14 July 1995 in a meeting with Karadžić on the evening of 14 July 1995;[1651] and (iii) Bajagić reported to Karadžić on events in Srebrenica on 13 and 14 July 1995, during a meeting in the early hours of 15 July 1995.[1652]

607. The Trial Chamber also noted that, although it had not received evidence demonstrating that written reports that reached Karadžić mentioned killings of Bosnian Muslim detainees, it was "inconceivable" that the relevant information would have been withheld from him by his subordinates.[1653] It relied in this respect on its findings that: (i) whereas the daily combat reports as of 12 July 1995 described the transport of the Bosnian Muslim population, and the capture and surrender of large numbers of Bosnian Muslim men, subsequent reports made no mention of detainees; (ii) Popović had directed that no record be made of activities related to the killing aspect

[1644] Prosecution Response Brief, paras. 425-436; T. 23 April 2018 pp. 204-208, 213, 214, 216.
[1645] Prosecution Response Brief, para. 425. The Prosecution also submits that inferences are typical in relation to intent and knowledge, indications of which are rarely overt. *See* Prosecution Response Brief, para. 425, *referring to* Trial Judgement, para. 5825.
[1646] Karadžić Reply Brief, para. 214; T. 23 April 2018 p. 138.
[1647] Karadžić Reply Brief, para. 216; T. 24 April 2018 p. 251. *See also* T. 23 April 2018 p. 139.
[1648] Trial Judgement, paras. 5806-5809, 5820.
[1649] Trial Judgement, paras. 5812, 5820, 5823, 5829, 5830.
[1650] Trial Judgement, paras. 5807, 5808.
[1651] Trial Judgement, paras. 5781, 5806.
[1652] Trial Judgement, paras. 5783, 5809.
[1653] Trial Judgement, paras. 5801, 5802.

of the plan;[1654] (iii) Karadžić had a demonstrated interest in the unfolding events in Srebrenica; and (iv) the communication capacities between Karadžić and the VRS, MUP, and DB functioned properly.[1655]

608. The Trial Chamber also noted that it had no direct evidence on the meeting between Karadžić and Deronjić on 14 July 1995.[1656] Nevertheless, it found that during the meeting, Karadžić and Deronjić discussed the killings at the Kravica warehouse and the implementation of Karadžić's order to transport the detainees to Zvornik on the basis of the following: (i) Deronjić had been aware of the Kravica warehouse killings since the evening of 13 July 1995, and had participated in the efforts to bury the bodies of those killed;[1657] (ii) Karadžić and Deronjić had spoken on the evening of 13 July 1995 and Karadžić had ordered the detainees transferred to Zvornik;[1658] (iii) Karadžić and Deronjić had frequent communications, either by telephone or in person, during the Srebrenica operation;[1659] (iv) Deronjić's duties as civilian commissioner of Srebrenica required him to report the Kravica warehouse killings to Karadžić;[1660] and (v) Deronjić informed Witness Ljubislav Simić that he had informed Karadžić of the Kravica warehouse killings the day after the incident.[1661]

609. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Deronjić had informed Karadžić of the Kravica warehouse killings at their meeting on 14 July 1995, particularly in light of its findings that Deronjić was appointed by Karadžić and reported directly to him and that Witness Simić provided specific evidence that Deronjić told him that he had informed Karadžić of the Kravica warehouse killings the day after they occurred.[1662] The Appeals Chamber therefore sees no error in the Trial Chamber's finding that the only reasonable inference

[1654] Trial Judgement, para. 5801.
[1655] Trial Judgement, para. 5802.
[1656] Trial Judgement, para. 5808.
[1657] Trial Judgement, para. 5808, n. 19748, *referring to* Trial Judgement, para. 5240 ("Borovčanin discussed with Miroslav Deronjić the incident at the Kravica Warehouse, including the fact that a number of detainees had been killed"), and the evidence of Witnesses Milenko Katanić, Jovan Nikolić, and Ljubislav Simić.
[1658] Trial Judgement, para. 5808, *referring to* Trial Judgement, para. 5772.
[1659] Trial Judgement, para. 5808, *referring to* the evidence of Witnesses Katanić and Ristić.
[1660] Trial Judgement, para. 5808, *referring to* the evidence of Witnesses Katanić and Simić.
[1661] Trial Judgement, para. 5808, *referring to* the evidence of Witness Simić. The Appeals Chamber notes that Karadžić argues that Witness Simić did not know whether Deronjić had reported to Karadžić on the Kravica warehouse incident or what Deronjić had told Karadžić about it. *See* Karadzic Reply Brief, para. 237. Having reviewed the evidence of Witness Simić, the Appeals Chamber notes that Karadžić fails to demonstrate error in the Trial Chamber's reliance on Witness Simić's evidence in this respect, particularly given Witness Simić's evidence that he had "found out that [Deronjić] had informed [Karadžić] about what had happened" (*see* T. 16 April 2013 p. 37293), he had heard from Deronjić that Deronjić had informed Karadžić of the incident at the Kravica warehouse and "supposed" therefore that Deronjic had indeed informed Karadžić about it (*see* T. 16 April 2013 p. 37307), and his confirmation that "[he] assumed with quite a bit of certainty that Miroslav Deronjić had heard of – about what had happened at Kravica and that it was his duty to inform [Karadžić]. [...] However, when [he] spoke about it with [Deronjić], [he couldn't] recall at which point in time this was, [he] asked him, 'Did you send word? Did you spread information?' [Deronjić] said that he did" (*see* T. 16 April 2013 p. 37308).

from the evidence was that on 14 July 1995 Karadžić and Deronjić discussed the Kravica warehouse killings and the implementation of Karadžić's order of 13 July 1995.

610. With respect to the meeting Karadžić held with Witness Kovač on 14 July 1995, the Trial Chamber noted that Witness Kovač denied reporting to Karadžić on Srebrenica but found this evidence not credible.[1663] The Trial Chamber concluded that "the only reasonable inference" was that Kovač "shared the knowledge and observations he had gathered during his trip with [Karadžić]" when they met on 14 July 1995.[1664] In this respect, it relied on: (i) reports sent to Kovač on 12 and 13 July 1995 regarding the Srebrenica operation; (ii) the fact that Kovač and Karadžić had met on 13 July 1995; (iii) Kovač's presence in the Bratunac and Zvornik areas, as well as in Srebrenica on 13 and 14 July 1995; and (iv) the encounters he had with Mladić, Vasić, and Borovčanin.[1665]

611. Similarly, the Trial Chamber noted that Witness Bajagić had denied having any knowledge of the events in Srebrenica and informing Karadžić about them on 15 July 1995 but found his testimony "full of inconsistencies and contradictions" and considered it clearly established that he had "substantive knowledge" of events in Srebrenica prior to his meeting with Karadžić.[1666] It found, in particular, that he had seen detainees held at the Nova Kasaba football field and was prevented from taking photos of them and that he was informed of the Kravica warehouse killings after the fact.[1667] The Trial Chamber also noted the fact that Karadžić had "invited Bajagić to Pale", as well as "the extremely late hour of their meeting" and determined that the "only reasonable inference" was that Bajagić had reported to Karadžić the events in Srebrenica he had witnessed on 13 and 14 July 1995.[1668]

612. Regarding the inferences that Kovač and Bajagić had informed Karadžić of the events in Srebrenica, the Appeals Chamber sees no error in the Trial Chamber's credibility assessment of

[1662] *See* Trial Judgement, para. 5808.
[1663] Trial Judgement, paras. 5781, 5782. The Trial Chamber also noted "numerous internal inconsistencies" within Witness Kovač's testimony as well as with prior statements given under oath, and his "evasiveness and even intermittent combativeness [...] throughout his testimony", and concluded that these arose from his efforts to minimize his own involvement in the events in Srebrenica. *See* Trial Judgement, para. 5766. In addition, the Trial Chamber found that Witness Kovač's own suggestion that he had issued an order for the police to cease communication with the VRS security organ so as not to be involved with any of their activities as "proof" of the contrary, and further, that his knowledge of the killing plan was supported by his warning to Borovčanin that MUP units in the field "should distance themselves from anything other than combat tasks." *See* Trial Judgement, para. 5782.
[1664] Trial Judgement, para. 5781.
[1665] Trial Judgement, para. 5781.
[1666] Trial Judgement, para. 5783. The Trial Chamber recalled that Witness Bajagić acknowledged that, on 13 July 1995, he had seen captured Bosnian Muslim men sitting at the Nova Kasaba football field, had been prevented from taking photos of them, and had met with Mladić, Salapura, and Kovač that same day. *See* Trial Judgement, para. 5783, n. 19647. It also recalled that Witness Bajagić conceded that he had heard about the Kravica warehouse killings while present at the Drina Corps Command in Vlasenica on 14 July 1995. *See* Trial Judgement, para. 5783.
[1667] Trial Judgement, para. 5783.

these witnesses and rejection of the part of their testimony in which they denied informing Karadžić.[1669] The Appeals Chamber finds no error in the Trial Chamber's conclusion that the only reasonable inference was that they had informed Karadžić.

613. The Appeals Chamber finds that Karadžić has failed to demonstrate error in the Trial Chamber's finding that he had contemporaneous knowledge of the killings and events on the ground in Srebrenica.

(c) The "Subsequent Acts"

614. In concluding that Karadžić shared the expanded common purpose of the Srebrenica JCE to kill Bosnian Muslim men and boys, the Trial Chamber noted that Karadžić, together with Mladić, embarked on an effort to disseminate false information about the fate of the Bosnian Muslim males and that Karadžić denied international organizations access to Srebrenica and the Bratunac and Zvornik areas.[1670] Given Karadžić's knowledge of the ongoing killing operation, the Trial Chamber found that the only reasonable inference was that Karadžić intended to shield the true actions of the Bosnian Serb forces from international attention and intervention.[1671] The Trial Chamber also observed that, from the point he ordered the detainees' transfer to Zvornik until the spring of 1996, Karadžić took no action to initiate investigations or prosecutions of the direct perpetrators of the crimes committed following the fall of Srebrenica and, by contrast, he praised the units of the Bosnian Serb forces involved in the killing operation in Zvornik and even referred to Mladić as a "legend".[1672]

615. Karadžić submits that the Trial Chamber's findings on his subsequent acts, that is disseminating false information, denying access to international organizations, and failing to prosecute, suffer from legal and factual errors.[1673] Specifically, he maintains that, without finding that he had instructed the detainees' transfer to Zvornik, the finding that the subsequent acts of disseminating "false information", denying international organizations access to the area, and failing to prosecute those responsible are baseless and cannot support the conclusion that he shared the intent of the expanded Srebrenica JCE.[1674]

616. The Prosecution responds that Karadžić fails to counter the finding that his failure to initiate investigations or prosecutions of the crimes demonstrates his intent, that he disregards relevant

[1668] Trial Judgement, para. 5783.
[1669] *See* Trial Judgement, paras. 5766, 5781-5783.
[1670] Trial Judgement, para. 5812.
[1671] Trial Judgement, para. 5812.
[1672] Trial Judgement, para. 5813.
[1673] Karadžić Appeal Brief, paras. 726-729, 741-744; T. 23 April 2018 pp. 136-138.

findings showing his involvement in the implementation of the killing operation and his dissemination of falsehoods to misdirect the international community, and that the Trial Chamber reasonably concluded that his efforts to deny international organizations access to the "missing" prisoners support its findings on his intent.[1675]

617. Karadžić replies that his subsequent acts are consistent with his position that he did not order the killing of the prisoners.[1676]

618. The Appeals Chamber notes that the Trial Chamber found that Karadžić and Mladić "embarked on an effort to disseminate false information about the fate of the Bosnian Muslim males as well as the conditions under which the remainder of the Bosnian Muslim population was transferred to Potočari."[1677] In this respect, the Trial Chamber found that, on 17 July 1995, Karadžić claimed in an interview with David Frost that civilians in Srebrenica had wanted to leave on their own and offered as proof a statement produced by Bosnian Serb representatives and signed by Nesib Mandžić, a Bosnian Muslim who had agreed to act as spokesperson for the Bosnian Muslim population, and Robert Franken, an officer of DutchBat.[1678] The Trial Chamber found that the 17 July 1995 statement could not be considered demonstrative of the population's genuine choice to leave the enclave given the prevailing circumstances in Potočari and in light of Witness Franken's testimony that the statement was "nonsense", "false", and that he had only signed it to ensure the evacuation of DutchBat.[1679] The Trial Chamber concluded that, given Karadžić's "nearly-contemporaneous knowledge of the ongoing killing operation, the only reasonable inference is that by disseminating false information, [he] intended to shield the true actions of the Bosnian Serb forces from international attention and intervention."[1680]

619. The Appeals Chamber recalls that it has already found that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he ordered prisoners to be transferred to Zvornik and that he had contemporaneous knowledge of the killings and events on the ground in Srebrenica. The Appeals Chamber considers that Karadžić's cursory and undeveloped submission that the Trial Chamber erred as he had "stated what he truly believed"[1681] fails to demonstrate error

[1674] Karadžić Appeal Brief, paras. 726-729, 741, 742; T. 23 April 2018 pp. 137, 138.
[1675] Prosecution Response Brief, paras. 437-443.
[1676] Karadžić Reply Brief, para. 217. Karadžić also submits that the Prosecution fails to explain why he would have sought to publicly take credit for the Srebrenica operation if he was aware that prisoners had been executed and that, had he known prisoners had been executed, it would have been "foolish and counterintuitive" to claim in his 17 July 1995 interview with David Frost that people he knew to be dead would soon be reaching "Muslim territory". *See* Karadžić Reply Brief, paras. 217, 218; T. 24 April 2018 pp. 256, 257.
[1677] Trial Judgement, para. 5812, *referring to* Trial Judgement, paras. 5786, 5787.
[1678] Trial Judgement, paras. 5042, 5043, 5128, 5129, 5786.
[1679] Trial Judgement, para. 5631.
[1680] Trial Judgement, para. 5812.
[1681] Karadžić Appeal Brief, para. 741.

in the Trial Chamber's finding that, by disseminating false information, he intended to shield the true actions of the Bosnian Serb forces from international attention and intervention.

620. As to Karadžić's challenge to the Trial Chamber's finding that he had denied international organizations access to Srebrenica and the Bratunac and Zvornik areas,[1682] the Appeals Chamber notes that the Trial Chamber found that Karadžić had received but did not reply to the request for access of UN staff to areas under Karadžić's control, which was made to him directly on 24 July 1995 by the Special Rapporteur of the Commission on Human Rights.[1683] In support of its finding, the Trial Chamber relied on the Special Rapporteur's letter,[1684] the Report of the UN Secretary General of 30 August 1995, which noted the letter and the fact that there was no response,[1685] and the intercept of a conversation between Karadžić and Danijela Sremac on 25 July 1995, which records that Sremac had discussed with Karadžić on 24 July 1995 the "attacks" by the Special Rapporteur to the media concerning the humanitarian situation in Srebrenica.[1686] The Appeals Chamber finds reasonable the Trial Chamber's conclusion that Karadžić was aware of the Special Rapporteur's request and that he did not allow international organizations access to the area at the relevant time. The Trial Chamber's finding in this respect is supported by its earlier findings that Karadžić had a keen interest in and actively monitored the international media's coverage of the events in Srebrenica and that it was inconceivable that his subordinates would not communicate to him relevant information reaching his office.[1687] Karadžić's submission that the Trial Chamber's finding is "untrue" because access to international organizations was granted in late July 1995[1688] does not demonstrate error. In any event, the fact that the ICRC was allowed to access the Batković camp in late July 1995 was expressly considered by the Trial Chamber, which noted that by that time the ICRC could only locate 164 detainees from Srebrenica.[1689]

621. The Appeals Chamber now turns to consider Karadžić's challenge to the Trial Chamber's finding that Karadžić took no action to initiate investigations or prosecutions of the direct perpetrators of the crimes committed following the fall of Srebrenica and instead congratulated the units of the Bosnian Serb forces involved in the killing operation.[1690] Specifically, it determined that neither his 23 March 1996 order, nor his 1 April 1996 order – which purported to establish formal

[1682] Trial Judgement, para. 5812, *referring to* Trial Judgement, para. 5788.
[1683] Trial Judgement, paras. 5812, 5788.
[1684] Trial Judgement, para. 5788, *referring to, inter alia*, Exhibit P6396.
[1685] Exhibit P5177, para. 38.
[1686] Trial Judgement, n. 19670, *referring to, inter alia*, Exhibit D4509, p. 3.
[1687] Trial Judgement, paras. 5801, 5802, 5812.
[1688] Karadžić Appeal Brief, paras. 743, 744; T. 23 April 2018 pp. 136, 137.
[1689] Trial Judgement, para. 5788.
[1690] Trial Judgement, para. 5813.

investigations of the Srebrenica events and accompanying violations[1691] – actually resulted in *bona fide* investigations or prosecutions.[1692] It also referred to a press release issued on 20 July 1995 by Karadžić's press office congratulating the VRS Main Staff, the Drina Corps Command, and the "staff of the Police Armed Forces" on the "brilliant victory in Srebrenica and Žepa" as well as Karadžić's praise of Mladić as a "legend".[1693] The Appeals Chamber notes that Karadžić fails to point to any alleged error of the Trial Chamber in this respect and, consequently, dismisses this challenge.

622. The Appeals Chamber finds therefore that Karadžić fails to show error in the Trial Chamber's finding on his "subsequent acts" or in the Trial Chamber's reliance on them to support its finding that he shared the expanded criminal purpose of the Srebrenica JCE.

(d) Conclusion

623. For the above reasons, the Appeals Chamber finds that Karadžić fails to demonstrate error in the Trial Chamber's finding that he agreed to the expansion of the common purpose to entail the killing of Bosnian Muslim men and boys of Srebrenica. Based on the foregoing, the Appeals Chamber dismisses Ground 40 of Karadžić's appeal.

[1691] Trial Judgement, paras. 5794, 5795.
[1692] Trial Judgement, para. 5813.
[1693] Trial Judgement, paras. 5789, 5813.

3. Alleged Errors in Finding the *Mens Rea* for Genocide (Ground 41)

624. The Trial Chamber found that the Srebrenica JCE shared a common plan to eliminate the Bosnian Muslims in Srebrenica, first through forcible removal and later through the killing of the men and boys.[1694] The Trial Chamber further found that Karadžić significantly contributed to this plan and shared with the other members of the Srebrenica JCE the intent for the crimes within its scope, including genocide.[1695] The Trial Chamber based its finding regarding Karadžić's intent on its conclusion that the only reasonable inference available on the evidence was that Karadžić shared with Mladić, Beara, and Popović the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed, which amounted to the intent to destroy the Bosnian Muslims in Srebrenica.[1696]

625. In reaching conclusions as to Karadžić's genocidal intent with respect to the Srebrenica JCE, the Trial Chamber relied, in part, on its findings that: (i) Karadžić was informed by Deronjić that the Bosnian Serb forces had "about two thousand" Bosnian Muslim males in custody and expected that number to increase";[1697] (ii) Karadžić must have learned from Kovač – either during their conversation on 13 July 1995 or during their subsequent meeting on 14 July 1995 – that most of the able-bodied Bosnian Muslim men had not gone to the UN Compound with their families but had fled through the woods;[1698] (iii) Karadžić received daily combat reports from the Main Staff, which after reporting on the capture and surrender between 12 and 14 July 1995 of large numbers of Bosnian Muslim males who had fled in a column, made no further mention of detainees;[1699] (iv) Karadžić knew that the thousands of Bosnian Muslim male detainees being held by the Bosnian Serb forces in the Srebrenica area constituted a very significant percentage of the Bosnian Muslim males from Srebrenica;[1700] (v) Karadžić agreed with and did not intervene to halt or hinder the killing aspect of the plan to eliminate the detainees between 13 and 17 July 1995 but ordered instead their transfer to Zvornik, where they were killed;[1701] (vi) once Karadžić was informed of the opening of a corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karišik was promptly sent to investigate and the corridor was closed within a day;[1702] and (vii) when speaking in a closed session of the Bosnian Serb Assembly weeks later, Karadžić expressed regret that Bosnian Muslim males had managed to pass through Bosnian

[1694] Trial Judgement, para. 5849.
[1695] Trial Judgement, paras. 5830, 5831, 5849, 5851.
[1696] Trial Judgement, para. 5830.
[1697] Trial Judgement, para. 5829.
[1698] Trial Judgement, para. 5829.
[1699] Trial Judgement, para. 5829.
[1700] Trial Judgement, para. 5829.
[1701] Trial Judgement, para. 5830.
[1702] Trial Judgement, para. 5830.

Serb lines.[1703] The Trial Chamber found that Karadžić's agreement to allow the local staff of UNPROFOR, which included Bosnian Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.[1704]

626. Karadžić submits that the Trial Chamber erred in inferring his genocidal intent due to its "mistaken" evaluation of the evidence and erroneous inferences that were not the only reasonable conclusions based on the evidence.[1705] Specifically, Karadžić contends that the Trial Chamber erroneously discounted his order that local Bosnian Muslims who worked with the UN be allowed to depart with UN personnel, reflecting that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed.[1706] Karadžić further argues that the Trial Chamber erred in finding that he sent Karišik to investigate and close the corridor near Zvornik that opened on 16 July 1995 to facilitate Bosnian Muslims to pass freely into Bosnian-Muslim territory.[1707] He submits that the relevant evidence suggested that the corridor would be open for 24 hours and that the VRS extended it for two more hours after Karišik's visit, undermining the conclusion that Karišik was sent to close it.[1708] Karadžić also contends that the Trial Chamber erroneously interpreted and relied upon his remarks before the Bosnian Serb Assembly on 6 August 1995 stating that "in the end several thousands fighters did manage to get through [...] we were not able to encircle the enemy and destroy them".[1709] He argues that these remarks were made in the context of criticizing the army for conduct after the fall of Srebrenica and, particularly, directing resources to Žepa and being unable to defeat the column militarily.[1710] Finally, Karadžić submits that, the Trial Chamber erroneously equated knowledge about the executions in Srebrenica and lack of action to prevent them with finding that he possessed genocidal intent and argues that his genocide conviction must be reversed.[1711]

627. In response, the Prosecution submits that Karadžić fails to show that his order of 17 July 1995 to spare UNPROFOR's local staff undermines the Trial Chamber's finding that he had

[1703] Trial Judgement, para. 5830.
[1704] Trial Judgement, n. 19811.
[1705] Karadžić Notice of Appeal, p. 41, *referring to* Trial Judgement, paras. 5829, 5830, 5849, 6001; Karadžić Appeal Brief, paras. 746-749, 765, 766, 772; T. 23 April 2018 p. 139.
[1706] Karadžić Appeal Brief, paras. 750-752; T. 24 April 2018 p. 257.
[1707] Karadžić Appeal Brief, paras. 753-757, 764. *See also* T. 23 April 2018 p. 117.
[1708] Karadžić Appeal Brief, paras. 754-757.
[1709] Karadžić Appeal Brief, paras. 758-765.
[1710] Karadžić Appeal Brief, paras. 761, 762. Karadžić maintains that, even assuming that he had opposed opening the corridor [REDACTED], that would have been a military decision and not evidence of an intent to destroy Bosnian Muslims as such and points to the fact that neither Miletić nor Krstić were found to have genocidal intent. Karadžić Appeal Brief, para. 763, *referring to, inter alia, Krstić* Appeal Judgement, para. 134.
[1711] Karadžić Appeal Brief, paras. 746, 767-772, *referring to, inter alia, Krstić* Appeal Judgement, paras. 104, 111, 121, 129, *Popović et al.* Trial Judgement, para. 1414, *Popović et al.* Appeal Judgement, para. 503; T. 23 April 2018 pp. 138, 139; T. 24 April 2018 pp. 254, 255. In arguing that the record is insufficient to establish genocidal intent, Karadžić

genocidal intent.[1712] It also argues that, contrary to Karadžić's submission, the Trial Chamber reasonably found that he did not order the corridor to remain open when informed by Karišik that Muslims were leaving through it and reasonably relied on his regret at the escape of some Muslims as expressed before the Bosnian Serb Assembly in August 1995.[1713] The Prosecution further submits that the Trial Chamber's finding that Karadžić had the intent to destroy Srebrenica's Muslims was based on corroborated evidence.[1714] In particular, the Prosecution contends that Karadžić's multifarious contributions to the implementation of the plan to eliminate Srebrenica's Muslims from his position as President and Supreme Commander of the forces that perpetrated the genocide were reasonably found significant and that Karadžić was the sole person with the power to prevent the Bosnian Serb forces from moving the Bosnian Muslim males to Zvornik to be killed.[1715] The Prosecution also argues that the Trial Chamber's finding that Karadžić shared genocidal intent was based not only on his knowledge of the operation to eliminate Srebrenica's Muslims, but also on his shared intent for the expansion of the joint criminal enterprise to include the killing operation and his contribution to the crimes, including his order for the prisoners' transfer to Zvornik.[1716]

628. Karadžić replies that the Trial Chamber magnified its error concerning his order for the prisoners' transfer to Zvornik by disregarding his actions that saved UN local staff in Srebrenica from execution and finding that he had genocidal intent based on an inference that he had ordered or favoured closing a corridor for safe passage.[1717] He also argues that the Prosecution fails to refute his argument that the Trial Chamber erred in relying on his comments at the Bosnian Serb Assembly session on 6 August 1995 as he was referring to VRS military tactics and not the killing of civilians, which is evident from reading his remarks in full.[1718]

629. The Appeals Chamber notes that Karadžić's first submission challenges the Trial Chamber's conclusion that his agreement to allow the local staff of UNPROFOR, which included Bosnian

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further contends that the record fails to support a finding of aiding and abetting genocide. *See* Karadžić Appeal Brief, paras. 772-781.

[1712] Prosecution Response Brief, para. 451; T. 23 April 2018 p. 211.

[1713] Prosecution Response Brief, paras. 452, 453. *See also* T. 23 April 2018 pp. 208, 209. The Prosecution also submits that Karadžić's argument that Karišik's enquiries and the closing of the corridor were not connected is flawed as the Trial Chamber reasonably considered that Karadžić was informed by Karišik about the opening of the corridor, as shown by an intercepted conversation and a report, and regretted the escape of Muslims through it while the corridor was closed shortly thereafter. *See* Prosecution Response Brief, para. 453, *referring to, inter alia,* Trial Judgement, para. 5472. The Prosecution also submits that Karadžić fails to explain how any hypothetical military motive for "opposing the opening of the corridor" could undermine the Trial Chamber's conclusions concerning his genocidal intent. *See* Prosecution Response Brief, para. 454.

[1714] Prosecution Response Brief, paras. 446, 448, 449, 454. *See also* T. 23 April 2018 pp. 211, 218.

[1715] Prosecution Response Brief, paras. 447, 457, 462. *See also* T. 23 April 2018 pp. 203, 204, 211.

[1716] Prosecution Response Brief, paras. 450, 459. *See also* T. 23 April 2018 pp. 212-217.

[1717] Karadžić Reply Brief, paras. 221, 222, 232. Karadžić also argues that the Prosecution misconstrues his position as he never denied knowing about the opening of the corridor but rather denied that he was opposed to opening the corridor and favoured or ordered closing it. *See* Karadžić Reply Brief, paras. 223, 224.

[1718] Karadžić Reply Brief, para. 225.

Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.[1719] The Trial Chamber noted in this respect that the reason proffered by the Bosnian Serb forces for separating and taking custody of Bosnian Muslim males in Potočari, namely that they were to be screened for involvement in war crimes, would not have applied to the local staff of UNPROFOR.[1720] Karadžić maintains that his decision allowing such local staff to leave demonstrates that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed.[1721] In this respect, the Appeals Chamber reiterates that evidence of limited and selective assistance to a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide.[1722] Moreover, the Appeals Chamber considers reasonable the Trial Chamber's view that the pretext of screening for war crimes would not have applied to UNPROFOR staff. Consequently, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred in finding that allowing the local UNPROFOR staff to leave the UN compound did not raise doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.

630. Turning to Karadžić's submission that the Trial Chamber erred in finding that he wanted to close the corridor near Zvornik that opened on 16 July 1995 to facilitate Bosnian Muslims to pass freely into Bosnian-Muslim territory, the Appeals Chamber notes that Karadžić misrepresents the Trial Chamber's assessment and findings. Contrary to his submission, the Trial Chamber did not infer that Karadžić had wanted the corridor closed from the fact that he was in contact with Karišik about the corridor.[1723] As one element of its finding that Karadžić shared the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed, the Trial Chamber noted that, once Pandurević had opened the corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karišik was "promptly sent" to investigate and the corridor was closed within a day.[1724] In this respect, the Trial Chamber found that, shortly after Pandurević had notified the Drina Corps command that a corridor had been opened to allow civilians to pass through, an officer from the Main Staff, who stated that he was calling from "the boss [...] the main head of state", told the Zvornik Brigade duty officer to have Pandurević inform the Main Staff immediately about what had been done.[1725] It also found that, on the same date, Karišik was dispatched to Zvornik and informed Karadžić that Pandurević had arranged for the opening of the

[1719] Karadžić Appeal Brief, paras. 750-752, *referring to, inter alia*, Trial Judgement, n. 19811; Karadžić Reply Brief, para. 222.
[1720] Trial Judgement, n. 19811.
[1721] Karadžić Appeal Brief, paras. 750-752; Karadžić Reply Brief, para. 222.
[1722] *Muhimana* Appeal Judgement, para. 32. *See also Rutaganda* Appeal Judgement, para. 537.
[1723] *See* Karadžić Appeal Brief, paras. 754-756.
[1724] Trial Judgement, para. 5830, *referring to* Trial Judgement, paras. 5470-5472, 5784.
[1725] Trial Judgement, para. 5784.

corridor and that the same evening and the following day reinforcements were sent to the area and the Main Staff sent three colonels to investigate Pandurević's decision to open the corridor.[1726] Having reviewed the Trial Chamber's findings, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred in its assessment of the evidence or drew unreasonable inferences warranting appellate intervention.

631. As to Karadžić's argument that the Trial Chamber misinterpreted his remarks before the Bosnian Serb Assembly on 6 August 1995, the Appeals Chamber notes that the Trial Chamber drew support for its finding that Karadžić shared the intent for every Bosnian Muslim male from Srebrenica to be killed from his expressed regret about the fact that some Bosnian Muslim males had managed to pass through Bosnian Serb lines.[1727] The Appeals Chamber finds that Karadžić merely provides an alternative interpretation of the evidence but fails to demonstrate that the Trial Chamber's interpretation of his statement or its reliance on it in establishing his intent was unreasonable.

632. Finally, contrary to Karadžić's claim, the Trial Chamber did not solely rely on his knowledge of executions and inaction to prevent them in finding that he had genocidal intent. The Trial Chamber's finding as to Karadžić's genocidal intent rests on Karadžić's knowledge of the executions as well as his agreement to implement the plan. This is demonstrated by his order for the detainees to be moved to Zvornik where they were killed and by his failure to intervene to halt or hinder the killings between the evening of 13 July and 17 July 1995.[1728]

633. In light of the foregoing, the Appeals Chamber finds that Karadžić has failed to demonstrate error in the Trial Chamber's finding on his *mens rea* for genocide.[1729] The Appeals Chamber dismisses Ground 41 of Karadžić's appeal.

[1726] Trial Judgement, para. 5784.
[1727] Trial Judgement, para. 5830.
[1728] Trial Judgement, paras. 5829, 5830.
[1729] As Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he possessed genocidal intent with respect to the Srebrenica JCE, the Appeals Chamber will not examine his submissions concerning his possible liability for "aiding and abetting" this crime.

4. Alleged Errors in Finding Karadžić Responsible as a Superior for Certain Killings (Grounds 42 and 43)

634. The Trial Chamber convicted Karadžić under Article 7(3) of the ICTY Statute for failing to take necessary and reasonable measures to punish the commission of the crimes of persecution and extermination as crimes against humanity, as well as murder as a violation of the laws or customs of war committed by his subordinates in the aftermath of the fall of the Srebrenica enclave.[1730] The Trial Chamber found that these crimes, which had occurred prior to Karadžić's agreement to the expansion of the means of eliminating the Bosnian Muslims in Srebrenica, included: (i) the killing of ten Bosnian Muslim men in Potočari on 13 July 1995;[1731] (ii) the killing of 15 Bosnian Muslim men on the bank of the Jadar River on 13 July 1995;[1732] (iii) the killing of 10 to 15 Bosnian Muslim men at Sandići Meadow on 13 July 1995;[1733] (iv) the killing of 755 to 1,016 Bosnian Muslim men at the Kravica warehouse on 13 and 14 July 1995;[1734] and (v) the killing of at least 50 Bosnian Muslim men in Bratunac town between 12 and 14 July 1995 and the killing of a man outside the Vuk Karadžić School in Bratunac on 13 July 1995.[1735] The Trial Chamber found that these killings were committed by forces subordinated to the VRS and operating under the command of Krstić, who was a direct subordinate of VRS Commander Mladić, who in turn was Karadžić's direct subordinate.[1736] It also found that Karadžić had *de jure* authority over the VRS in July 1995, which he exercised in fact, and that he also had the material ability to punish the perpetrators of the killings that occurred prior to the point at which he agreed to the killing aspect of the Srebrenica JCE on 13 July 1995.[1737]

635. The Trial Chamber was satisfied that Karadžić knew of the large-scale Kravica warehouse killings by the day after they were committed and that this had put him on notice that members of

[1730] Trial Judgement, paras. 5830, 5833, 5837, 5839-5848, 5850, 6002-6005. Although the Trial Chamber found that Karadžić could bear responsibility pursuant to Article 7(3) of the ICTY Statute in relation to genocide committed by his subordinates, it did not convict him on this basis as it had already convicted him of genocide under Article 7(1) of the ICTY Statute for his participation in the Srebrenica JCE. *See* Trial Judgement, paras. 5850, 6001. Furthermore, the Trial Chamber declined to convict Karadžić of murder as a crime against humanity under Article 7(3) of the ICTY Statute having determined that such a conviction would be impermissibly cumulative as he was also convicted for extermination as a crime against humanity on the same basis. *See* Trial Judgement, paras. 5607-5621, 5851, 6022-6024, n. 20574.
[1731] Trial Judgement, para. 5837, *referring to* Sections IV.C.1.d.v.A, IV.C.1.d.v.B. *See also* Trial Judgement, para. 5120.
[1732] Trial Judgement, para. 5837, *referring to* Section IV.C.1.e.iv.A.
[1733] Trial Judgement, para. 5837, *referring to* Section IV.C.1.e.iv.D.
[1734] Trial Judgement, paras. 5286, 5837, *referring to* Section IV.C.1.e.iv.C, para. 5233.
[1735] Trial Judgement, para. 5837. *See also* Trial Judgement, Section IV.C.1.e.v.B.
[1736] Trial Judgement, paras. 5839, 5840. The Appeals Chamber notes that Krstić was prosecuted at trial on the basis that Drina Corps troops, who were subordinate to him, carried out executions of Bosnian Muslims at Potočari, Jadar River, and Kravica Warehouse, and that these allegations were not proven beyond reasonable doubt. *See, e.g., Krstić* Trial Judgement, paras. 155, 200, 215, 623. Furthermore, the Appeals Chamber of the ICTY reversed findings that members of the Bratunac Brigade from the Drina Corps executed detainees at Branjevo Military Farm and the Pilica Cultural Dom on 16 July 1995. *Krstić* Appeal Judgement, para. 70. *See also Krstić* Appeal Judgement, para. 77.

the Bosnian Serb forces had killed hundreds of Bosnian Muslim detainees who had been in their custody following the fall of the Srebrenica enclave.[1738] On this basis, it found that Karadžić possessed sufficiently alarming information to justify further inquiry into whether other unlawful acts had been committed.[1739] It therefore found that Karadžić knew that crimes had been committed in the aftermath of the fall of Srebrenica and had reason to know that other crimes had also been committed.[1740]

636. The Trial Chamber also found that, once Karadžić became aware of the large-scale killings which had just occurred, not only did he take no steps to remove the perpetrators from service, but he joined in the killing aspect of the plan to eliminate.[1741] It therefore concluded that, in light of all the evidence, Karadžić had failed to punish his subordinates for the killings which had occurred prior to the point at which he joined the Srebrenica JCE on the evening of 13 July 1995.[1742]

637. Karadžić submits that the Trial Chamber erred in finding that he knew of the killings that occurred on 13 July 1995 and by convicting him as a superior in connection with them.[1743] Specifically, he submits that neither Deronjić nor Witness Kovač had informed him of the Kravica warehouse killings, their scale or criminal nature, or that no investigation would follow, and that the Trial Chamber failed to provide a reasoned opinion on the nature of the information conveyed by Deronjić to Karadžić and erred in excluding the reasonable inference that the relevant incident was not described by either Deronjić or Kovač in a way that could trigger Karadžić's obligation to punish the perpetrators.[1744] He also maintains that the Trial Chamber made no finding to the effect that Karadžić or Deronjić were aware of the other killing incidents and that therefore Karadžić cannot be held responsible for failing to punish the perpetrators for crimes he did not know about.[1745] Karadžić also argues that the Trial Chamber erred by inferring that, in his position as President, he knew or had reason to know of the crimes committed by his subordinates on 13 July

[1737] Trial Judgement, paras. 5841, 5842.
[1738] Trial Judgement, para. 5843.
[1739] Trial Judgement, para. 5843.
[1740] Trial Judgement, para. 5848.
[1741] Trial Judgement, para. 5845.
[1742] Trial Judgement, para. 5847.
[1743] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 782-798.
[1744] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 786, 789-794; Karadžić Reply Brief, para. 236. *See also* T. 24 April 2018 pp. 252, 253. Karadžić relies in support of his submission that the information may have been presented to him in a way that was not sufficiently alarming on evidence that, in his view suggests that: (i) Witness Ljubisav Simić did not know what Deronjić had told Karadžić about the incident, or even if Deronjić had spoken to Karadžić in Pale (*referring to* T. 16 April 2013 p. 37310); (ii) Witness Kovač had not seen any bodies when passing the Kravica warehouse (*referring to* T. 1 November 2013 pp. 42778, 42779); and (iii) the incident at the Kravica warehouse was seen at the time as a spontaneous response to an escape attempt by the prisoners (*referring to* T. 9 February 2012 p. 24413, T. 10 February 2012, p. 24506, Exhibits D3115, para. 40, D3126, para. 59, D3398, para. 79). *See* Karadžić Reply Brief, para. 237.

1995, when, in fact, his position would have made it less likely for him to have received information related to these crimes.[1746]

638. The Prosecution responds that the Trial Chamber correctly convicted Karadžić under Article 7(3) of the ICTY Statute in connection with killings committed prior to his adoption of the expanded plan to kill the Bosnian Muslim males and that the finding that he had sufficient notice of the killings at the relevant time was adequately explained, supported by the evidential record, and reasonable in light of Karadžić's involvement in the broader killing operation and events in Srebrenica.[1747] The Prosecution also submits that the Trial Chamber correctly applied the *mens rea* standard for liability under Article 7(3) of the ICTY Statute, given the Trial Chamber's finding that Karadžić's knowledge of the killing of hundreds of Bosnian Muslims at the Kravica warehouse by his subordinates was sufficiently alarming to justify inquiring into the possibility of other crimes.[1748]

639. In addition, the Prosecution argues that the Trial Chamber did not presume Karadžić's knowledge on the basis of his position as President but determined he had sufficient knowledge based on information he received about the killing operation.[1749] In its view, Karadžić's suggestion that special rules should apply to presidents ignores the *mens rea* requirements of Article 7(3) of the ICTY Statute, which apply regardless of an accused's position.[1750]

640. With regard to Karadžić's submission that the Trial Chamber erred in finding that he knew of the killings that occurred on 13 July 1995,[1751] the Appeals Chamber notes that Karadžić misrepresents the Trial Chamber's impugned finding. In particular, the Trial Chamber found that Karadžić knew about the Kravica warehouse killings and had reason to know that other killings had also been committed.[1752] Contrary to Karadžić's submission,[1753] the Trial Chamber was not required to find that Karadžić knew about the other killings that occurred on 13 July 1995. Its finding that he

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[1745] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, para. 795; Karadžić Reply Brief, paras. 233-235, *referring to Bizimungu* Appeal Judgement, paras. 146, 252; *Ndindiliyimana et al.* Appeal Judgement, para. 396; *Orić* Appeal Judgement, paras. 59-60.

[1746] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 787, 788, 797, *referring to The United States of America v. Wilhelm von Leeb et al.*, US Military Tribunal Nuremberg, Trial Judgement, 27 October 1948 ("the *High Command* case"). Specifically, Karadžić argues that special caution is warranted when applying the principles of superior responsibility to a president and relies on the *High Command* case to argue that "[a] high commander cannot keep completely informed of the details of military operations of subordinates", "[h]e has the right to assume that details entrusted to responsible subordinates will be legally executed", and there "must be a personal neglect amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence." *See* Karadžić Appeal Brief, para. 787.

[1747] Prosecution Response Brief, paras. 463-465, 468-474. *See also* T. 23 April 2018 pp. 203-218.

[1748] Prosecution Response Brief, paras. 466, 467, 469.

[1749] Prosecution Response Brief, para. 467.

[1750] Prosecution Response Brief, para. 467.

[1751] Karadžić Appeal Brief, paras. 782, 783, 785, 795. *See also* Karadžić Reply Brief, para. 233.

[1752] Trial Judgement, paras. 5843, 5848.

possessed information putting him on notice of other possible killings by his subordinates sufficed to show that he had reason to know about them and for finding him responsible for them as a superior.[1754]

641. The Trial Chamber concluded that Karadžić knew of the large-scale Kravica warehouse killings by the day after they were committed by relying on its finding that he became aware of the expansion of the plan to eliminate to include the killing of Bosnian Muslim men and boys of Srebrenica sometime before the evening of 13 July 1995 and that he was specifically informed about the Kravica warehouse killings by Deronjić at least by the time they met on 14 July 1995.[1755] The Appeals Chamber has already dismissed Karadžić's submission that the Trial Chamber erred in finding that Deronjić had informed Karadžić of the Kravica warehouse killings at their meeting on 14 July 1995.[1756] It has also rejected his submission that the Trial Chamber erred in finding that Witness Kovač had informed him of the relevant events in Srebrenica.[1757] In claiming that he was not informed of the scale or criminal nature of the killings and had no reason to know about them, Karadžić merely disagrees with the Trial Chamber's findings and evaluation of the relevant evidence without demonstrating error.

642. The Appeals Chamber also dismisses Karadžić suggestion that the Trial Chamber failed to provide a reasoned opinion with respect to these findings. The Trial Chamber described the underlying factual findings and evidence on the record on which it relied to conclude that Karadžić had discussed the killings at the Kravica warehouse with Deronjić.[1758] In addition, Karadžić's claim that the Trial Chamber should have entertained the inference that the incident was not described to him in a way triggering his obligation to investigate and punish the perpetrators is neither persuasive nor reasonable on the basis of the record. In particular, his suggestion cannot be reconciled with the Trial Chamber's finding that it was "inconceivable", given the evidence demonstrating his interest in the unfolding events in Srebrenica, as well as on the proper functioning of the communication capacities between the various forces under his control, that information on the killing aspect of the plan would have been withheld from him by members of his

[1753] Karadžić Appeal Brief, para. 795.
[1754] Trial Judgement, para. 5843. *See Čelebići* Appeal Judgement, paras. 238 ("[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'"), 241 ("a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates"). *See also Prlić et al.* Appeal Judgement, para. 3174; *Blaškić* Appeal Judgement, para. 62; *Bagilishema* Appeal Judgement, para. 42.
[1755] Trial Judgement, para. 5843, *referring to* Trial Judgement, paras. 5808, 5811.
[1756] *See supra* paras. 602-609.
[1757] *See supra* paras. 610, 612.
[1758] *See* Trial Judgement, para. 5808 and references cited therein.

staff.[1759] Karadžić also fails to refer to any reliable evidence supporting the scenario that his subordinates omitted reporting to him the large-scale nature of the killings at the warehouse.[1760] As noted above, the Appeals Chamber finds that the Trial Chamber correctly determined that the receipt of information about the killing of 755 to 1,016 Bosnian Muslim men detained by forces under his control at the Kravica warehouse sufficed to trigger his obligation to investigate this and other related crimes in Srebrenica and punish the perpetrators.

643. Karadžić's contention that the Trial Chamber presumed he knew of crimes simply because he was "President" is also unpersuasive.[1761] The Trial Chamber assessed the specific circumstances and, as noted above, found that Karadžić knew of the large-scale killings that took place at the Kravica warehouse and reasonably determined that he had reason to know of other killings perpetrated by his subordinates.[1762] Karadžić fails to demonstrate any error in this respect.

644. In light of the above, the Appeals Chamber finds that Karadžić fails to demonstrate any error in the Trial Chamber's assessment of his *mens rea* for the purposes of finding him responsible as a superior in connection with the killings that occurred prior to Karadžić's agreement to the expansion of the means of eliminating the Bosnian Muslims in Srebrenica on 13 July 1995. Based on the foregoing, the Appeals Chamber dismisses Grounds 42 and 43 of Karadžić's appeal.

[1759] Trial Judgement, para. 5802.

[1760] Karadžić's reliance on Witness Kovač's denial of informing Karadžić about the killings (*see* Karadžić Appeal Brief, paras. 792, 793; T. 24 April 2018 p. 252) is unpersuasive given the Trial Chamber's findings on this witness's credibility. *See supra* paras. 610, 612.

[1761] The Appeals Chamber finds that the *High Command* case, on which Karadžić relies for the purpose of suggesting it was less likely that he would have been informed about crimes committed by his subordinates, is inapposite in view of the record the Trial Chamber relied upon to establish that he was, in fact, aware of the Kravica warehouse killings.

[1762] Trial Judgement, paras. 5801, 5802, 5804-5808, 5843. *See also* Trial Judgement, para. 585, *referring to Krnojelac* Appeal Judgement, para. 156, *Čelebići* Appeal Judgement, para. 239.

E. Hostage-Taking

1. Alleged Errors in Convicting Karadžić for Hostage-Taking (Grounds 44 and 45)

645. The Trial Chamber found that, between 25 May and 18 June 1995, the Hostages JCE existed with the common purpose of taking UNPROFOR and UNMO personnel ("UN Personnel") hostage in order to compel NATO to abstain from conducting air strikes against Bosnian Serb targets.[1763] It found that members of the Hostages JCE, which included Karadžić, Mladić, Krajišnik, and Manojlo Milovanović, implemented the common purpose themselves or by using members of the Bosnian Serb forces of the VRS and the MUP to act in furtherance of the common purpose.[1764] Specifically, the Trial Chamber found that, on 25 and 26 May 1995, following the NATO air strikes on Bosnian Serb military targets, the Bosnian Serb forces detained over 200 UN Personnel, took them to various locations including those of military significance, and threatened to harm, kill, or continue to detain them unless NATO ceased air strikes.[1765] The Trial Chamber further found that these threats were communicated to the detained UN Personnel as well as to UNPROFOR and UNMO headquarters.[1766] The Trial Chamber concluded that Karadžić significantly contributed to the Hostages JCE as "the driving force" and "active participant" in every aspect of the events and that he shared the common purpose and intent of the crime of hostage-taking along with other members of the Hostages JCE.[1767] The Trial Chamber convicted Karadžić under Count 11 of the Indictment for the crime of hostage-taking as a violation of the laws or customs of war, pursuant to his participation in the Hostages JCE.[1768]

646. Karadžić submits that the Trial Chamber erred in finding that he shared the common purpose and intent to commit hostage-taking as: (i) there was no evidence that he issued or approved threats to kill or injure the UN Personnel; and (ii) the UN Personnel were lawfully detained.[1769] The Appeals Chamber addresses these contentions in turn.

(a) Threats to Kill or Injure UN Personnel

647. In assessing whether Karadžić shared the common purpose of the Hostages JCE, the Trial Chamber found that Karadžić's own statements, acts, and conduct amounted to threats to injure, kill, or continue the detention of the UN Personnel and that the only reasonable inference based on the evidence was that he intended to detain the UN Personnel and issue threats while they were

[1763] Trial Judgement, paras. 5937, 5962.
[1764] Trial Judgement, para. 5962.
[1765] Trial Judgement, paras. 5937, 5941, 5944, 5945, 5951.
[1766] Trial Judgement, paras. 5937, 5944, 5946, 5961, 5970.
[1767] Trial Judgement, paras. 5973, 5992.
[1768] Trial Judgement, paras. 5951, 5993, 6010.

detained in order to stop further NATO air strikes.[1770] The Trial Chamber also found that Karadžić knew and approved the threats made by Mladić, Jovan Zametica, and others.[1771]

648. Karadžić submits that the Trial Chamber's finding that he intended to issue threats to injure or kill the UN Personnel was unsupported by evidence.[1772] He contends that the Trial Chamber failed to provide a reasoned opinion or give sufficient weight to the evidence that he ordered the VRS to treat the UN Personnel with "military respect".[1773] He further argues that the Trial Chamber erroneously characterized his acts, statements, and orders as "threats" despite the absence of "the communication of intention to harm".[1774] Karadžić asserts that the Trial Chamber erred in finding that he intended to issue threats on the basis of his statement that "any attempt to liberate [the UN Personnel] would be a slaughter", ignoring the reasonable inference that the statement refers to "casualties that would be taken by forces that might be sent to liberate them".[1775] He also submits that there is no evidence that he knew or approved threats made by Mladić or other VRS members.[1776]

649. The Prosecution responds that Karadžić's arguments ignore relevant evidence, findings, and legal authorities and fail to demonstrate that the Trial Chamber erred in concluding that he threatened to injure and kill the UN Personnel.[1777]

650. Karadžić replies that no express or implied threats of death or injury could be attributed to him.[1778]

651. The Appeals Chamber recalls that the Trial Chamber did not rely on threats issued by Karadžić when establishing the *actus reus* of the crime of hostage-taking.[1779] However, in assessing whether Karadžić shared the common purpose of the Hostages JCE, the Trial Chamber concluded

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[1769] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805-826.
[1770] Trial Judgement, paras. 5969-5973. *See also* Trial Judgement, paras. 5964-5968.
[1771] Trial Judgement, paras. 5961, 5970-5972.
[1772] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805-813. *See also* Karadžić Reply Brief, paras. 242-249, 253.
[1773] Karadžić Appeal Brief, paras. 806, 807.
[1774] Karadžić Appeal Brief, paras. 808-811, *referring to* The Oxford English Dictionary J. A. Simpson, E. S. C. Weiner, (Oxford University Press, 1989), Black's Law Dictionary 1480 (6th ed. 1990), State of California, Penal Code, Section 422, Criminal Code of Canada (R.S.C. 1985, c. C-46 as Amended), Section 264(1), Indian Evidence Act, 1872, (Act No. 1 of 1872), Chapter II, Section 24. Specifically, Karadžić contends that the order that the UN Personnel be placed at potential NATO targets does not constitute a threat. *See* Karadžić Appeal Brief, paras. 808, 811. *See also* Karadžić Reply Brief, paras. 244, 245.
[1775] Karadžić Appeal Brief, para. 812. Karadžić contends that the Trial Chamber misquoted him as he stated: "any attempt to liberate them **by force** would end in catastrophe. It would be a slaughter." *See* Karadžić Reply Brief, paras. 246-248.
[1776] Karadžić Appeal Brief, para. 813. *See also* Karadžić Reply Brief, para. 249.
[1777] Prosecution Response Brief, paras. 480-486.
[1778] Karadžić Reply Brief, paras. 242-250, 253.
[1779] *See supra* para. 62.

that Karadžić issued and intended to issue threats against the UN Personnel on the basis, *inter alia*, that Karadžić: (i) stated in a television interview that any attempt to liberate the UN Personnel would "end in catastrophe" and that it "would be a slaughter";[1780] (ii) in the same interview, threatened to escalate the Bosnian Serb response if the UN ordered more NATO air strikes;[1781] (iii) warned UNPROFOR that he would treat UN soldiers "as enemies" if NATO conducted air strikes;[1782] (iv) ordered Milovanović to activate the decision ordering the VRS to "arrest everything foreign in RS territory" and to treat military personnel as prisoners of war and "hold them as hostages";[1783] and (v) approved Milovanović's order to place detained UN Personnel at strategic locations of potential targets of the air strikes.[1784] In discussing the last point, the Trial Chamber referred to its detailed discussion about the content of this order, expressly quoting the instruction that the detainees were to be treated with military respect.[1785] Despite the evidence that Karadžić approved the order which contained this instruction, in light of the other factors taken into account by the Trial Chamber, the Appeals Chamber finds that Karadžić does not demonstrate that the Trial Chamber erred in concluding that he issued and intended to issue threats to injure, kill, or continue to detain the UN Personnel when assessing whether he shared the common purpose of the Hostages JCE. Specifically, Karadžić does not demonstrate that the Trial Chamber failed to give sufficient weight to the evidence that he approved the order to place detained UN Personnel at strategic locations of potential targets of the air strikes which contained the instruction that the UN Personnel were to be "treated properly with military respect" or that it did not provide a reasoned opinion.

652. The Appeals Chamber further considers unpersuasive Karadžić's argument that the Trial Chamber erred in concluding that he intended not only to detain UN Personnel, but also to issue threats to injure or kill them when it had heard no evidence of such threats or of any "communication of intention to harm". The Appeals Chamber recalls that the Trial Chamber concluded that Bosnian Serb forces detained UN Personnel following the NATO air strikes and relied upon Karadžić's approval of the order that UN Personnel be placed at potential targets, his statements that they should be held as hostages and that any attempt to liberate them "would be a slaughter", and his threats to escalate the Bosnian Serb response and treat UN Personnel as enemies if the UN ordered more NATO air strikes.[1786] The Appeals Chamber finds that Karadžić does not demonstrate that the Trial Chamber erred in concluding that his acts, statements, and orders were sufficient to demonstrate that he shared the common purpose of the Hostages JCE.

[1780] Trial Judgement, para. 5967.
[1781] Trial Judgement, para. 5967.
[1782] Trial Judgement, paras. 5964, 5965.
[1783] Trial Judgement, para. 5965.
[1784] Trial Judgement, para. 5966.
[1785] Trial Judgement, para. 5966, *referring to* Trial Judgement, para. 5860, Exhibit P2137.
[1786] Trial Judgement, paras. 5937, 5941, 5944, 5945, 5951, 5964-5967.

653. The Appeals Chamber turns to Karadžić's contention that there was no evidence supporting the Trial Chamber's finding that he knew or approved threats made by Mladić or other VRS members.[1787] The Trial Chamber found that Mladić, Zametica, and Krajišnik, who were Karadžić's "close subordinates", issued threats, made public statements, and showed videos of the UN Personnel being threatened, detained, and handcuffed in locations of potential NATO air strikes.[1788] The Trial Chamber concluded that given their relationship, the only reasonable inference is that Karadžić knew and approved these threats.[1789] In this respect, the Appeals Chamber recalls that the Trial Chamber found that: (i) Karadžić had the authority to control Mladić as the commander of the VRS, Karadžić and Mladić had a "superior and subordinate relationship within the chain of command", and Karadžić had *de jure* control over Mladić which was exercised "in fact" throughout the conflict;[1790] (ii) Krajišnik was considered Karadžić's "closest associate", shared a position of leadership with Karadžić in "The Presidency" of the Serbian Republic of Bosnia and Herzegovina, and communicated frequently with Karadžić who often sought his advice during negotiations;[1791] and (iii) Zametica was Karadžić's political and personal advisor who was privy to "everything that was important" in the Presidency and communicated with the international community on behalf of Karadžić.[1792] In view of these findings, the Appeals Chamber concludes that Karadžić does not demonstrate that the Trial Chamber erred in finding that, on the basis of Karadžić's relationship with Mladić, Zametica, and Krajišnik, the only reasonable inference is that he knew of and approved these threats. This conclusion is further supported by the Trial Chamber's finding that the threats were communicated in public.[1793]

654. Therefore, the Appeals Chamber finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he shared the common purpose of the Hostages JCE and intended for threats to be issued against the UN Personnel in order to stop further NATO air strikes.

(b) Detention of UN Personnel

655. The Trial Chamber rejected Karadžić's argument that the UN Personnel were not protected under Common Article 3 because they were persons taking active part in the hostilities.[1794] It found that the UN Personnel were not persons taking active part in the hostilities as the UN and its peacekeeping forces were not a party to the conflict and that NATO's involvement in the conflict

[1787] Karadžić Appeal Brief, para. 813.
[1788] Trial Judgement, paras. 5961, 5970, 5972.
[1789] Trial Judgement, para. 5972.
[1790] Trial Judgement, paras. 3116, 3130, 3141, 3266-3268. *See also* Trial Judgement, paras. 5957, 5972, 5976, 5986, 5991.
[1791] Trial Judgement, paras. 3240-3245. *See also* Trial Judgement, paras. 5984, 5985.
[1792] Trial Judgement, paras. 4817, 4924, 5911, 5971.
[1793] Trial Judgement, paras. 5961, 5970.

did not change their status.[1795] The Trial Chamber further found that, even if the UN Personnel had been combatants prior to their detention, they were rendered *hors de combat* by virtue of their detention.[1796] Accordingly, it concluded that the UN Personnel were entitled to the protections under Common Article 3 which includes the prohibition against hostage-taking.[1797]

656. Karadžić submits that the Trial Chamber erred in law in not finding that unlawful detention is an element of hostage-taking.[1798] He argues that when involving a threat of continued detention, the crime of hostage-taking presupposes the detention to be unlawful,[1799] and that the Trial Chamber erred in convicting him of hostage-taking on this basis since the UN Personnel were lawfully detained as prisoners of war.[1800] He contends that their detention was lawful as UN peacekeepers are not at all times *hors de combat* and that the NATO air strikes rendered the UN Personnel combatants or otherwise persons taking direct part in hostilities.[1801]

657. The Prosecution responds that the UN Personnel were unlawfully detained and that, in any event, unlawful detention is not an element of hostage-taking.[1802] The Prosecution argues that irrespective of the status of the UN Personnel, their detention was unlawful in light of the purpose of or their treatment in detention.[1803] It contends that Karadžić ignores or misinterprets relevant authorities and fails to demonstrate any error.[1804]

658. Karadžić replies that the Prosecution essentially agrees that a threat for continued detention, rather than the detention itself, must be unlawful.[1805] He further opposes the contention that the lawfulness of detention depended on the treatment of detainees.[1806]

[1794] Trial Judgement, paras. 5942, 5943.
[1795] Trial Judgement, para. 5943.
[1796] Trial Judgement, para. 5943.
[1797] Trial Judgement, para. 5943.
[1798] *See* Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 820-825.
[1799] Karadžić Appeal Brief, paras. 820-825, *referring to, inter alia*, Decision of 28 April 2009, para. 65, International Committee of the Red Cross, Commentary on Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 75 UNTS 287 (1958), The 1949 Geneva Conventions: A Commentary (Andrew Clapham, Paola Gaeta, and Marco Sassoli, eds., Oxford University Press, 2015), pp. 309-311, Article 191(1) of the Criminal Code of the Federation of Bosnia and Herzegovina, 2003, Bosnia and Herzegovina Official Gazette 3/03 with amendments to the Law as published in "Official Gazette of BiH" no. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15.
[1800] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805, 814, 820, 822, 825. *See also* Karadžić Reply Brief, paras. 250-253.
[1801] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 815-820.
[1802] Prosecution Response Brief, paras. 487-490.
[1803] Prosecution Response Brief, paras. 489, 490. The Prosecution points to the Trial Chamber's findings that the UN Personnel were used as human shields and were subjected to death threats, physical abuse, and poor detention conditions. *See* Prosecution Response Brief, para. 489, *referring to* Trial Judgement, paras. 5857, 5860, 5872, 5874-5877, 5880, 5881, 5890, 5893-5896, 5899, 5905, 5909, 5910, 5914-5921, 5961, 5971, 5979, 5981.
[1804] Prosecution Response Brief, para. 487.
[1805] Karadžić Reply Brief, para. 251.
[1806] Karadžić Reply Brief, para. 252.

659. The Appeals Chamber recalls the absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention.[1807] In this respect, the ICTY Appeals Chamber had previously dismissed Karadžić's submission that the UN Personnel were not entitled to protection under Common Article 3.[1808] In the Decision of 11 December 2012, the ICTY Appeals Chamber explained that "[t]he fact that detainees are considered *hors de combat* does not render their detention unlawful in itself. Rather, their *hors de combat* status triggers Common Article 3's protections, including the prohibition on their use as hostages."[1809] Therefore, whether the detention of the UN Personnel was lawful or not would have no bearing on the applicability of the prohibition on hostage-taking under Common Article 3. Consequently, the Appeals Chamber dismisses Karadžić's argument that the Trial Chamber erred in not considering unlawful detention to be an element of hostage-taking. In light of these considerations, the Appeals Chamber finds it unnecessary to address Karadžić's remaining contentions.

660. The Appeals Chamber therefore finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that the prohibition on hostage-taking applies to the UN Personnel in this case.

661. In light of the foregoing, the Appeals Chamber dismisses Grounds 44 and 45 of Karadžić's appeal.

[1807] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012 ("Decision of 11 December 2012"), paras. 16, 21; Decision of 9 July 2009, para. 22.

[1808] *See* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21. Common Article 3 provides, in relevant parts:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex birth or wealth or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) [...]
> (b) taking of hostages; [...]

[1809] Decision of 11 December 2012, para. 20.

IV. THE APPEAL OF THE PROSECUTION

A. Alleged Errors in Defining the Scope of the Common Purpose of the Overarching JCE (Ground 1)

662. The Trial Chamber found that, between October 1991 and 30 November 1995, Karadžić and other members of the Bosnian Serb leadership participated in the Overarching JCE, the aim of which was to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory and create an ethnically pure and contiguous Bosnian Serb state, through the crimes of deportation, inhumane acts (forcible transfer), and persecution through the underlying acts of forcible transfer, deportation, unlawful detention, and the imposition and maintenance of restrictive and discriminatory measures.[1810] The Trial Chamber also found that Karadžić and the other members of the Overarching JCE shared the intent for each of these crimes.[1811] The Trial Chamber thus convicted Karadžić pursuant to Article 7(1) of the ICTY Statute on the basis of the first form of joint criminal enterprise liability for each of these crimes.[1812]

663. With respect to other proven acts of persecution charged in Count 3 of the Indictment,[1813] as well as the crimes of murder and extermination as charged in Counts 4, 5, and 6 of the Indictment, the Trial Chamber found the evidence insufficient to demonstrate as the only reasonable inference that these crimes were included in the common plan or intended by Karadžić ("Excluded Crimes").[1814] Specifically, the Trial Chamber found that another reasonable inference available on the evidence was that, while Karadžić did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.[1815] However, in light of "the nature of the common plan and the manner in which it was carried out" as well as the information available to Karadžić prior to and during the execution of the common plan, the Trial Chamber concluded that Karadžić could foresee that the Serb forces might commit these crimes during and after the take-overs in the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1816] It determined that Karadžić's continued participation in the Overarching JCE until 1995 demonstrated that he acted in

[1810] Trial Judgement, paras. 3447, 3452, 3462-3466.
[1811] Trial Judgement, paras. 3447, 3452, 3462-3466.
[1812] Trial Judgement, para. 3524.
[1813] These include persecution through killings, cruel and/or inhumane treatment (through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, and the establishment and perpetuation of inhumane living conditions in detention facilities), forced labour at the frontline, the use of non-Serbs as human shields, the appropriation or plunder of property, and the wanton destruction of private property, including cultural and sacred sites. Trial Judgement, paras. 3512, 3521.
[1814] Trial Judgement, paras. 3466, 3512, 3521.
[1815] Trial Judgement, para. 3466.
[1816] Trial Judgement, paras. 3515, 3520, 3522.

furtherance of the common plan with the awareness of the possibility that the Excluded Crimes might be committed either by other members of the joint criminal enterprise or Serb forces who were used by him or other members, and that he willingly took that risk.[1817] It thus convicted Karadžić pursuant to Article 7(1) of the ICTY Statute on the basis of the third form of joint criminal enterprise liability for each of the Excluded Crimes.[1818]

664. The Prosecution submits that the Trial Chamber erred in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE and therefore erroneously found Karadžić liable for the Excluded Crimes pursuant to the third category, rather than the first category of joint criminal enterprise, which further led to "a flawed genocidal intent analysis".[1819] The Prosecution requests that the Excluded Crimes be reclassified as crimes committed pursuant to the first form of joint criminal enterprise, that Karadžić's genocidal intent under Count 1 of the Indictment be re-evaluated in this light and a conviction be entered in this respect, and that Karadžić's sentence be increased to reflect both the reclassification of his conviction under the first form of joint criminal enterprise and the Count 1 conviction.[1820]

665. Specifically, the Prosecution submits that the Trial Chamber: (i) erred in law by concluding that the other reasonable inference foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes;[1821] or (ii) erred in fact as its findings on Karadžić's and other members' of the joint criminal enterprise policies, objectives, knowledge, and conduct as well as on the implementation of the common purpose lead to the only reasonable conclusion that the Excluded Crimes formed part of the common purpose and that Karadžić shared the intent for them.[1822] The Appeals Chamber will address these contentions in turn.

1. Alleged Error in Law

666. The Prosecution submits that the Trial Chamber erred by concluding that another reasonable inference to a finding that Karadžić intended the Excluded Crimes was that he "did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Municipalities."[1823] The Prosecution asserts that the Trial Chamber adopted this conclusion despite noting that it had considered that Karadžić had received information about the commission of the

[1817] Trial Judgement, para. 3522.
[1818] Trial Judgement, paras. 3521, 3524.
[1819] Prosecution Notice of Appeal, paras. 3, 4; Prosecution Appeal Brief, paras. 4, 14, 47. *See also* T. 24 April 2018 pp. 281-286.
[1820] Prosecution Notice of Appeal, para. 8; Prosecution Appeal Brief, paras. 45, 46, 48. *See also* Prosecution Reply Brief, para. 16.
[1821] Prosecution Appeal Brief, paras. 12, 16.
[1822] Prosecution Appeal Brief, paras. 13, 19, 20.
[1823] Prosecution Appeal Brief, paras. 12, 15-17; T. 24 April 2018 pp. 284, 285.

Excluded Crimes by the Serb forces throughout the conflict and that he continued to act in furtherance of the common plan.[1824] The Prosecution contends that this alternative inference is consistent with shared intent and the Trial Chamber erred by concluding that it foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes.[1825] The Prosecution argues that the Trial Chamber failed to assess whether Karadžić's willingness to pursue the common purpose with the knowledge that it entailed the commission of the Excluded Crimes reflected his shared intent.[1826]

667. Karadžić responds that the Prosecution fails to show that the Trial Chamber committed a legal error in identifying another reasonable inference.[1827] He submits that the Trial Chamber applied the correct legal standard and did not foreclose the possibility of shared intent for the Excluded Crimes, rather, it considered whether he had intended the Excluded Crimes and concluded that, in light of all the evidence, a finding of intent was not the only reasonable one available.[1828] Karadžić adds that the Trial Chamber's finding that he "did not care enough to stop pursuing the common plan" does not equate to being "willing to pursue the common purpose" as ambivalence or passive acquiescence is not the same as willingness.[1829] He also argues that the Prosecution's submission that foreseeability and inaction amount to intent undermines the intent requirement for liability under the first form of joint criminal enterprise and would result in a finding of intent for every foreseeable crime.[1830]

668. The Prosecution replies that the Trial Chamber did not find that Karadžić was "ambivalent" about or passively acquiesced to the Excluded Crimes, but rather that he did not care enough about them.[1831] It contends that Karadžić ignores the Trial Chamber's findings about his active and persistent contributions to the joint criminal enterprise that demonstrate his "volition" in respect of these crimes.[1832]

669. The Trial Chamber observed that, when the Prosecution relied upon proof of a certain fact, such as the state of mind of the accused by inference, it considered whether that inference was the only reasonable inference that could have been made based on the evidence and that, where that

[1824] Prosecution Appeal Brief, para. 15; T. 24 April 2018 p. 284.
[1825] Prosecution Appeal Brief, paras. 12, 16; T. 24 April 2018 pp. 284, 285.
[1826] Prosecution Appeal Brief, para. 17; Prosecution Reply Brief, para. 7.
[1827] Karadžić Response Brief, paras. 15-28. *See also* T. 24 April 2018 pp. 296-298.
[1828] Karadžić Response Brief, paras. 16, 17, 26, 27, *referring to* Trial Judgement, para. 3466. *See also* Karadžić Response Brief, paras. 23-25; T. 24 April 2018 p. 297.
[1829] Karadžić Response Brief, paras. 18-21, 28. Karadžić further submits that the Trial Chamber performed the assessment the Prosecution claims that it failed to do and concluded that the evidence reflected ambivalence and not intent towards the means of achieving the agreed plans. *See* Karadžić Response Brief, paras. 24, 25.
[1830] Karadžić Response Brief, para. 22.
[1831] Prosecution Reply Brief, paras. 5, 6, 13; T. 24 April 2018 pp. 284, 285.
[1832] Prosecution Reply Brief, paras. 6, 7, 13, 14. *See also* T. 24 April 2018 pp. 281-285.

inference was not the only reasonable one, it found that the Prosecution had not proved its case.[1833] The Appeals Chamber finds that the Trial Chamber correctly set out the applicable law.[1834]

670. With respect to the Excluded Crimes, the Trial Chamber identified what, in its view, constituted another reasonable inference available on the evidence.[1835] In so concluding, the Trial Chamber noted that it had considered not only the evidence of Karadžić's intent for the crimes he was convicted of pursuant to the first form of joint criminal enterprise liability, but also evidence showing that Karadžić had received information about the perpetration of crimes committed by Serb forces against non-Serbs throughout the conflict, including certain Excluded Crimes, and continued to act in furtherance of the common plan. For instance, the Trial Chamber considered that Serb forces had killed approximately 45 non-Serb civilians in Bijeljina in April 1992 and approximately 200 non-Serb detainees at Korićanske Stijene in August 1992.[1836] In the Trial Chamber's view, these findings were consistent with the inference that "while [Karadžić] did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Municipalities".[1837] It therefore concluded that, while the Excluded Crimes resulted from the campaign to forcibly remove the non-Serb population from the Overarching JCE Municipalities, these crimes were not intended as part of the common plan.[1838]

671. Thus, contrary to the Prosecution's submission, the Trial Chamber did examine whether Karadžić intended the Excluded Crimes based on his knowledge of them and continued participation in the joint criminal enterprise but found that its findings and underlying evidence were consistent with intent pursuant to the third form of joint criminal enterprise, namely the willingness to pursue the common purpose with the understanding that the Excluded Crimes might be committed during and after the take-overs of the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1839] In this respect, the Trial Chamber found that the Excluded Crimes "resulted from the campaign to forcibly remove the non-Serb population from the Municipalities" but that they were not "an intended part of the common plan".[1840] Rather, "[b]ased on the nature of the common plan and the manner in which it was carried out", it was "foreseeable to [Karadžić] that Serb Forces might commit violent and property-related crimes against non-Serbs during and after the take-overs in the Municipalities and the campaign to forcibly remove non-

[1833] Trial Judgement, para. 10, *referring to Vasiljević* Appeal Judgement, para. 120.
[1834] *See also Šainović et al.* Appeal Judgement, para. 995; *Rukundo* Appeal Judgement, para. 235.
[1835] Trial Judgement, para. 3466.
[1836] Trial Judgement, para. 3466.
[1837] Trial Judgement, para. 3466.
[1838] Trial Judgement, para. 3466.
[1839] Trial Judgement, paras. 3466, 3515.

Serbs."[1841] Viewed in this context, the Appeals Chamber is not persuaded by the Prosecution's argument that the Trial Chamber failed to consider that Karadžić could possess the *mens rea* for the Excluded Crimes based on his knowledge of them and his continued participation in the Overarching JCE. To the contrary, the Trial Chamber was not convinced based on the totality of the evidence that these circumstances demonstrated that his intent for the Excluded Crimes was the only reasonable inference.[1842]

672. The Appeals Chamber recalls that, while an accused's knowledge of particular crimes combined with continued participation in the execution of the common plan from which those crimes result may be a basis to infer that he or she shared the requisite intent for the crimes in question, this does not necessarily compel such a conclusion.[1843] Whether intent can be inferred depends on all the circumstances of the case.[1844] Further, where intent is inferred from circumstantial evidence, it must be the only reasonable inference available on the evidence.[1845]

673. Based on the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution fails to demonstrate that the Trial Chamber committed a legal error in assessing whether Karadžić possessed the requisite intent for the Excluded Crimes.

2. Alleged Error of Fact

674. The Prosecution submits that the Trial Chamber erred in fact by finding that the Excluded Crimes were "merely" foreseeable consequences of the implementation of the common plan, and that based on its findings on Karadžić's and other joint criminal enterprise members' policies, objectives, knowledge, and conduct as well as on the implementation of the common purpose, the only reasonable conclusion is that the Excluded Crimes formed part of the common purpose and Karadžić shared the intent for them.[1846] The Prosecution relies in particular on the Trial Chamber's

[1840] Trial Judgement, para. 3466.
[1841] Trial Judgement, para. 3515.
[1842] In its reply, the Prosecution suggests that the Trial Chamber failed to discuss clearly relevant factors, including that Karadžić was the foremost official in *Republika Srpska*, played a leading role in the joint criminal enterprise over many years and received information about the commission of the Excluded Crimes while actively facilitating their commission as a demonstration that it erred in finding that he did not possess the intent for the Excluded Crimes. Prosecution Reply Brief, para. 7. However, the Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement. *See Stakić* Appeal Judgement, para. 47.
[1843] *See, e.g.*, *Popović et al.* Appeal Judgement, para. 1369; *Karemera and Ngirumpatse* Appeal Judgement, para. 632; *Krajišnik* Appeal Judgement, para. 202; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273. *See also Stanišić and Simatović* Appeal Judgement, para. 81; *Đorđević* Appeal Judgement, para. 512; *Krajišnik* Appeal Judgement, para. 697; *Kvočka et al.* Appeal Judgement, para. 243.
[1844] *See, e.g.*, *Kvočka et al.* Appeal Judgement, para. 243. *See also Popović et al.* Appeal Judgement, para. 1369; *Krajišnik* Appeal Judgement, paras. 202, 697; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273.
[1845] *See, e.g.*, *Šainović et al.* Appeal Judgement, para. 995; *Rukundo* Appeal Judgement, para. 235; *Kvočka et al.* Appeal Judgement, para. 237; *Vasiljević* Appeal Judgement, para. 120.
[1846] *See* Prosecution Appeal Brief, paras. 13, 18-46; T. 24 April 2018 pp. 281, 306.

findings that: (i) before the outbreak of the conflict, Karadžić threatened Bosnian Muslims with the "bloodbath" and mass destruction that his forces later wrought through the mass and systematic commission of the Excluded Crimes;[1847] (ii) Karadžić and the Bosnian Serb leadership were prepared to use force and violence against Bosnian Muslims and Bosnian Croats to achieve their permanent removal and knew that violence would be necessary to achieve it;[1848] (iii) Karadžić played the most important role in preparing the structures used to violently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-targeted areas;[1849] (iv) the Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organized pattern of crimes involving, in part, the Excluded Crimes of murder, cruel treatment, sexual violence, and wanton destruction;[1850] (v) the Excluded Crimes formed part of the *actus reus* of forcible transfer and deportation and extreme violence was employed from the outset to displace non-Serbs;[1851] (vi) Karadžić was informed of the crimes committed by the Bosnian Serb forces in implementing the common purpose but did not use his authority to put an end to them and instead pursued a policy of non-punishment and rewarding the perpetrators;[1852] and (vii) Karadžić continued to pursue the common purpose for over three years without altering his policies.[1853]

675. Karadžić responds that the Prosecution's submissions rest on the incorrect assumption that the Trial Chamber found that he knew that the Excluded Crimes were a necessary or an integral component of the joint criminal enterprise.[1854] He also argues that the findings that the members of the joint criminal enterprise were "prepared to use force and violence" to achieve their objective, or knew that "a potential conflict would be extremely violent" do not equate to a finding that Karadžić knew that the Excluded Crimes were necessary to achieve the common objective, or that he possessed the intent for those crimes.[1855] In addition, Karadžić maintains that the fact the Excluded Crimes were systematic, organized, or even at the "core" of the forcible transfer and deportation

[1847] Prosecution Appeal Brief, paras. 10, 19, 21-24, 46; T. 24 April 2018 pp. 282, 306.
[1848] Prosecution Appeal Brief, paras. 10, 19, 21-24, 44, 45; T. 24 April 2018 pp. 282, 283, 285. *See also* Prosecution Reply Brief, para. 10.
[1849] Prosecution Appeal Brief, paras. 25, 26; T. 24 April 2018 p. 282.
[1850] Prosecution Appeal Brief, paras. 10, 19, 27-32, 45, 46; T. 24 April 2018, pp. 281, 283.
[1851] Prosecution Appeal Brief, paras. 10, 30-32, 45. *See also* Prosecution Reply Brief, para. 12.
[1852] Prosecution Appeal Brief, paras. 10, 19, 33-42, 45. The Prosecution adds that Karadžić's denials and deflections to reports related to the Excluded Crimes and his disingenuous portrayal of the reality on the ground "encouraged" the commission of the Excluded Crimes. Prosecution Appeal Brief, paras. 38-42; Prosecution Reply Brief, para. 13; T. 24 April 2018 pp. 283, 284, 306-308, 310.
[1853] Prosecution Appeal Brief, paras. 10, 43. *See also* Prosecution Reply Brief, para. 14; T. 24 April 2018 pp. 283, 284, 306.
[1854] Karadžić Response Brief, para. 33; T. 24 April 2018 pp. 296, 297.
[1855] Karadžić Response Brief, paras. 35, 38, 40-42. Karadžić adds that in order to establish liability under the first form of joint criminal enterprise, the Prosecution must show that, in October 1991, each of the members of the joint criminal enterprise intended to commit each of the Excluded Crimes and that the Trial Chamber's findings do not support such a conclusion. Karadžić Response Brief, paras. 40-43; T. 24 April 2018 pp. 296-299.

does not mean that the joint criminal enterprise members intended them,[1856] and that the Trial Chamber was well aware of the Excluded Crimes, the scope and the manner in which they were carried out, as well as his reaction to information concerning them but was not convinced that their inclusion in the common plan was the only reasonable inference available.[1857]

676. The Prosecution replies that the Excluded Crimes were part of the joint criminal enterprise from its inception and, to demonstrate this, it relies on the Trial Chamber's findings concerning both the period before and after the criminal campaign began to show the existence of shared intent by October 1991.[1858] The Prosecution further contends that, rather than merely being concurrent with the common purpose, the Excluded Crimes were integral to it and, in fact, caused the displacement.[1859] It submits that it "defies logic" to conclude that Karadžić intended to forcibly displace the non-Serbs but did not intend that the acts constituting the "force" integral to their displacement would be committed.[1860] The Prosecution also argues that it does not rely on a specific finding of the Trial Chamber that Karadžić knew that the Excluded Crimes were necessary to achieve the common purpose, but rather on the fact that this conclusion flows from the combined effect of several findings, which demonstrate his threats of violence against non-Serbs civilians, his central role in pursuing an ethnically homogenous state, his knowledge that implementing this goal "would" result in violence, and his preparedness to use force and violence against non-Serbs to achieve it.[1861]

677. The Appeals Chamber observes that the Prosecution does not allege error in any of the Trial Chamber's underlying factual findings upon which its ultimate conclusion rests, that there was insufficient evidence to establish that the Excluded Crimes were included in the common purpose of the joint criminal enterprise and that Karadžić intended these crimes. Similarly, the Prosecution does not allege any failure to consider relevant evidence or suggest that insufficient weight was attributed to certain evidence with respect to either of those findings or to its ultimate conclusion. Rather, the Prosecution alleges that the relevant underlying findings compelled the conclusion that the Excluded Crimes were part of the common purpose and that Karadžić and the other members of

[1856] Karadžić Response Brief, paras. 44-46.
[1857] Karadžić Response Brief, paras. 47-49. Furthermore, Karadžić argues that even an unwavering and long-term commitment to a common plan does not establish intent for crimes that fell outside of it and the Prosecution fails to point to a finding on agreement by joint criminal enterprise members to expand it in the way the Prosecution suggests. Karadžić Response Brief, paras. 50, 51; T. 24 April 2018 pp. 297, 298. Karadžić also contends that the errors alleged by the Prosecution have no impact on the Trial Chamber's analysis of his genocidal intent. Karadžić Response Brief, paras. 59, 60.
[1858] Prosecution Reply Brief, para. 4.
[1859] Prosecution Reply Brief, para. 12.
[1860] Prosecution Reply Brief, para. 12.
[1861] Prosecution Reply Brief, para. 10. *See also* T. 24 April 2018 pp. 281-286.

the joint criminal enterprise intended these crimes and submits that the Trial Chamber failed to draw the only reasonably available conclusion from its factual findings.[1862]

678. The Appeals Chamber recalls that it will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[1863] Furthermore, the Prosecution must show that, when account is taken of errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated.[1864] The Appeals Chamber will thus consider whether the Trial Chamber's factual findings to which the Prosecution refers demonstrate error in the Trial Chamber's conclusion that the Excluded Crimes were only "foreseeable" to Karadžić and the other members of the joint criminal enterprise and whether, in light of this alleged error, the only reasonable conclusion that the Excluded Crimes were part of the common purpose and that Karadžić and the other members of the joint criminal enterprise intended these crimes.

(a) Threats of Violence and Destruction, Knowledge that the Objective Required Violence and Continued Pursuit of the Objective, and Central Role in Preparing Structures for Violent Removal

679. The Appeals Chamber turns to the Trial Chamber's findings concerning various inflammatory speeches made by Karadžić and other members of the joint criminal enterprise in the lead-up to and during the conflict, which the Prosecution claims manifest the shared intent for the Excluded Crimes "even before the conflict broke out".[1865] The Appeals Chamber observes, that, within the context of assessing whether the threats and warnings delivered by Karadžić and other members of the joint criminal enterprise could be construed as evidence of intent to destroy the Bosnian Muslims or Bosnian Coats, the Trial Chamber referred to speeches and statements in which they spoke about the "disappearance", "annihilation", "vanish[ing]", "elimination", and "extinction" of the Bosnian Muslims and it did so "in the full context in which they were delivered and not in isolation."[1866] With respect to the "early speeches", the Trial Chamber found that these "were delivered mainly as a warning that Bosnian Muslims should not pursue a path to independence which was contrary to Bosnian Serb interests, and as a threat that if they did so there would be war which would lead to severe bloodshed."[1867] It also found that some of Karadžić's

[1862] *See, e.g.*, Prosecution Appeal Brief, paras. 13, 19, 20, 32, 45; Prosecution Reply Brief, paras. 8, 10-13.
[1863] *Šešelj* Appeal Judgement, paras. 103, 118; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g.*, *Prlić et al.* Appeal Judgement, para. 21; *Stanišić and Župljanin* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[1864] *Šešelj* Appeal Judgement, para. 16. *See also, e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21.
[1865] *See, e.g.*, Prosecution Appeal Brief, paras. 10, 19, 21-23, 44. *See also* T. 24 April 2018 pp. 282, 306.
[1866] Trial Judgement, para. 2599. *See also* Trial Judgement, paras. 2600-2605.
[1867] Trial Judgement, para. 2599.

statements "reflected how angry he was about the proposed moves towards the independence of [Bosnia and Herzegovina], which would lead to violence if Bosnian Serb demands were not met."[1868] The Trial Chamber further found that when Karadžić and the Bosnian Serb leadership issued the threats, "they envisaged that any attempt to circumvent the interests of the Bosnian Serbs would result in chaos and extreme violence" and concluded that the record showed that the Bosnian Serbs "were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives".[1869] In analyzing whether the threats could be construed as evidence of intent to destroy the Bosnian Muslims or Bosnian Croats, however, the Trial Chamber concluded that, in light of the totality of the evidence, this was not the only reasonable inference available.[1870]

680. The Appeals Chamber considers that this analysis highlights the Trial Chamber's careful consideration of statements relevant to the Prosecution's position that the Trial Chamber's findings demonstrate that Karadžić and the other members of the joint criminal enterprise possessed the intent to perpetrate the Excluded Crimes. The Appeals Chamber is not persuaded that the Trial Chamber ignored the import of these statements or others highlighted by the Prosecution[1871] when assessing whether Karadžić possessed the requisite intent for the Excluded Crimes[1872] or that the Trial Chamber's findings regarding the statements compel the conclusions that the Excluded Crimes formed part of the common purpose and that Karadžić and the other members shared the intent for these crimes.

681. The Appeals Chamber similarly finds that the Trial Chamber's findings – that Karadžić knew that a "potential" conflict would be violent, that the Bosnian Serbs were "prepared" to use "force" and "violence", and that Karadžić and the Bosnian Serb leadership were aware that the objective would result in "violence" – fall short of what is required to compel the conclusion that, at the time of the inception of the joint criminal enterprise, its members embraced the common purpose of achieving that objective through particular forms of unlawful violence, including specific crimes, such as, murder, extermination, torture, cruel or inhuman treatment, and wanton destruction and plunder, or that they shared the intent for each of these crimes.

682. Furthermore, the findings referred to by the Prosecution on Karadžić's "important" role in laying the groundwork for the joint criminal enterprise and continued pursuit of its objective from

[1868] Trial Judgement, para. 2599.
[1869] Trial Judgement, para. 2599.
[1870] Trial Judgement, paras. 2599-2605.
[1871] *See, e.g.*, Trial Judgement, paras. 2670-2672, 2675, 2677-2680, 2692, 2700, 2707, 2719, 2823, 2846, 3475, 3485, 3486. *See also* Trial Judgement, paras. 2663, 2664, 2706, 2728, 2766, 2789, 2798, 2870, 3272, 3273.

which the Excluded Crimes were excluded,[1873] do not lead to the inevitable conclusion that specific Excluded Crimes formed part of that common purpose and that the members of the joint criminal enterprise shared the intent for those crimes. Indeed, the Prosecution highlights the Trial Chamber's findings as to Karadžić's role in the formulation, distribution, and activation of the Variant A/B Instructions and the Strategic Goals in support of this argument but ignores the Trial Chamber's analysis that nothing in the Variant A/B Instructions or Strategic Goals "called for the commission of crimes *per se*."[1874] In this context, the Prosecution has not shown that Karadžić's role in laying the groundwork for the joint criminal enterprise in this manner compelled the Trial Chamber to conclude as the only reasonable inference that he and the other members of the joint criminal enterprise possessed the intent for the Excluded Crimes that were eventually committed. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber erred in its analysis of this matter.

(b) Findings Concerning Systematic Commission of Excluded Crimes and the *Actus Reus* of Deportation and Forcible Transfer

683. The Appeals Chamber turns to the Prosecution's reliance on the Trial Chamber's finding that the Excluded Crimes formed part of the *actus reus* of forcible transfer and deportation,[1875] and the submission that it "defies logic" to conclude that Karadžić intended to forcibly displace the non-Serbs but did not intend the commission of acts constituting the "force" integral to their displacement.[1876] In particular, the Prosecution highlights findings that many non-Serbs fled out of fear caused by "ongoing violence and various crimes committed against non-Serbs including, *inter alia*, killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments" and that many fled after attacks against their villages and homes by Serb forces.[1877] However, in this respect, the Appeals Chamber notes that the Trial Chamber's findings reflect that forcible displacement of non-Serbs supporting the *actus reus* of the crimes of forcible transfer and deportation was effected through crimes *within* the scope of the common purpose – *i.e.* unlawful detention and discriminatory measures.[1878] It also found that, in some cases, Bosnian Muslims and Bosnian Croats were first arrested and detained in detention facilities before being transferred out of the Overarching JCE Municipalities and that so-called prisoner "exchanges" amounted to forced

[1872] The Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement. *See Stakić* Appeal Judgement, para. 47.
[1873] Prosecution Appeal Brief, paras. 25, 26; T. 24 April 2018 p. 282.
[1874] Trial Judgement, para. 3439.
[1875] Prosecution Appeal Brief, paras. 10, 30-32, 45. *See also* Prosecution Reply Brief, para. 12.
[1876] Prosecution Reply Brief, para. 12.
[1877] *See* Trial Judgement, paras. 2468, 2470, 2475.

displacement.[1879] It further found that Karadžić and the Bosnian Serb leadership "shared the intent to unlawfully detain Bosnian Muslims and Bosnian Croats as one of the means through which they could achieve their objective of ethnic separation".[1880]

684. The Appeals Chamber does not accept the Prosecution's submission that there is an inherent lack of logic in the Trial Chamber's findings and that the Excluded Crimes were necessarily included in the common purpose of the joint criminal enterprise and that Karadžić and the other members shared the intent for those crimes. As acknowledged by the Prosecution, crimes that form part of the *actus reus* of deportation and forcible transfer need not themselves all fall within a common purpose encompassing these crimes.[1881] In this respect, the Appeals Chamber recalls that it is not required that members of a joint criminal enterprise agree upon a particular form through which the forcible displacement is to be effectuated or that its members intend specific acts of coercion causing such displacement, so long as it is established that they intended to forcibly displace the victims.[1882]

685. With respect to the Prosecution's reference to the findings that Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organized pattern of crimes involving murder, cruel treatment, sexual violence, and wanton destruction and its position that these crimes were at the core of the expulsion operations,[1883] the Appeals Chamber observes that the relevant Trial Chamber findings concern crimes committed during the take-over operations in the period from April to October 1992 and afterwards. The Appeals Chamber further observes that the Trial Chamber's findings reflect express consideration of the violent conduct when assessing the common plan of the joint criminal enterprise and its scope.[1884] It further considered Karadžić's knowledge of such violence and his continued participation in the joint criminal enterprise.[1885] In the view of the Appeals Chamber, the fact that the Excluded Crimes were committed systematically in the course of well-planned operations, and, along with the intended crimes and the general "ongoing violence", created an environment of fear in which Bosnian Muslims and Bosnian Croats were forced to flee, might support the conclusion that such crimes formed part of the common purpose of the joint criminal enterprise and that the members shared the intent for each of these crimes. However, as noted above, the Trial Chamber considered this possibility and the Appeals Chamber is not persuaded that it acted unreasonably in determining that

[1878] *See* Trial Judgement, para. 3465.
[1879] Trial Judgement, para. 2470.
[1880] Trial Judgement, para. 3465.
[1881] Prosecution Appeal Brief, n. 75.
[1882] *Stanišić and Župljanin* Appeal Judgement, para. 917.
[1883] Prosecution Appeal Brief, paras. 10, 19, 27-32, 45, 46; T. 24 April 2018 pp. 281, 283.
[1884] *See, e.g.*, Trial Judgement, paras. 3443, 3466.

such findings do not compel the conclusion that Karadžić and the other members of the joint criminal enterprise shared the intent for the Excluded Crimes specifically.

686. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber erred in this respect.

(c) Findings Concerning Knowledge of Excluded Crimes and the Continued Pursuit of the Common Purpose

687. The Appeals Chamber turns to the Trial Chamber's findings referred to by the Prosecution that Karadžić was informed of the crimes committed by the Bosnian Serb forces but did not use his authority to put an end to them and instead continued to pursue the common purpose for years and adopted a policy of non-punishment and rewarding the perpetrators.[1886] Having reviewed the findings in the Trial Judgement referred to by the Prosecution, the Appeals Chamber is not persuaded that the Trial Chamber ignored these findings when assessing Karadžić's intent with respect to the Excluded Crimes. The Trial Chamber explicitly considered the fact that Karadžić had received information about crimes, including the Excluded Crimes, committed against non-Serbs during the take-over operations but continued to act in pursuit of the common purpose, and concluded that a reasonable inference available on the evidence was that "while [Karadžić] did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan".[1887] The Trial Chamber further concluded that there was a systematic failure to investigate criminal offences committed against non-Serbs in the Overarching JCE Municipalities during the conflict, reflecting Karadžić's position that such matters could be delayed during the conflict.[1888] The Trial Chamber also found that Karadžić rewarded and promoted subordinates, who he knew committed crimes, and that this indicated that Karadžić "was indifferent to whether [the perpetrators] participated in criminal activity directed at non-Serbs during the conflict as long as the core objectives of the Bosnian Serbs were fulfilled".[1889]

688. The Prosecution contends that, by rewarding and promoting the perpetrators, Karadžić was expressing his support for, rather than indifference to, the fulfilment of the objectives of the common purpose through the Excluded Crimes.[1890] While this may be the case, the Appeals Chamber is not persuaded that no reasonable trier of fact could reach the conclusion that Karadžić's

[1885] Trial Judgement, paras. 3466, 3515.
[1886] Prosecution Appeal Brief, paras. 10, 19, 33-43, 45; Prosecution Reply Brief, paras. 13, 14; T. 24 April 2018 p. 283.
[1887] Trial Judgement, para. 3466.
[1888] Trial Judgement, para. 3425.
[1889] Trial Judgement, para. 3433.
[1890] Prosecution Appeal Brief, para. 40, *referring to, inter alia*, Trial Judgement, para. 3433.

acts and omissions might instead, as the Trial Chamber concluded, reflect his commitment to the crimes falling within the common purpose and his indifference towards the Excluded Crimes. The Appeals Chamber also recalls that, although knowledge of crimes in combination with failure to intervene to prevent them may be a basis for inferring intent, it does not compel such a conclusion.[1891]

689. With respect to the Prosecution's contention that Karadžić's failure to adequately prevent or punish crimes and his disingenuous portrayal of the reality on the ground "encouraged" the commission of the Excluded Crimes,[1892] the Prosecution acknowledges that a pertinent finding concerning Karadžić's failure to prevent crimes or punish perpetrators that it relies upon in support of this contention, concerns crimes found to fall within the scope of the joint criminal enterprise.[1893] The Prosecution asserts that the "predicate findings on Karadžić's false denials and disingenuous statements apply equally to [the Excluded] Crimes".[1894] Even if this were the case, however, in the view of the Appeals Chamber, the inaction or action as found by the Trial Chamber which might have encouraged or facilitated crimes does not necessarily equate to, or compel a finding of, intent for those crimes. It further does not compel a finding that other members of the joint criminal enterprise shared that intent. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber committed any error in this respect.

(d) Cumulative Effect

690. Having concluded, Judge de Prada dissenting, that none of the individual categories of findings relied upon by the Prosecution leads to the conclusion that the only reasonable inference was that the Excluded Crimes formed part of the common purpose and that the members of the joint criminal enterprise shared the intent for those crimes, the Appeals Chamber now turns to consider whether these findings do so cumulatively.

691. The Appeals Chamber considers that the Trial Chamber's factual findings demonstrate that: (i) Karadžić and other joint criminal enterprise members issued various threats of violence and destruction in the lead up to and during the conflict, some of which contained highly inflammatory language; (ii) Karadžić and other joint criminal enterprise members were aware that a "potential" conflict would be violent, were "prepared" to use "force" and "violence" to achieve the objective of ethnic separation, and knew that achieving the objective would result in violence; (iii) both crimes

[1891] *Popović et al.* Appeal Judgement, para. 1385; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273.
[1892] Prosecution Appeal Brief, paras. 38-42; T. 24 April 2018 pp. 283, 284.
[1893] *See* Prosecution Appeal Brief, para. 41. *See* Trial Judgement, para. 3501 ("[Karadžić's] failure to take adequate steps to prevent and punish criminal activity committed against non-Serbs in the Municipalities had the effect of encouraging and facilitating the JCE I Crimes.").

falling under the common purpose as well as the Excluded Crimes were committed systematically in the course of well-planned and coordinated operations, and the Excluded Crimes contributed to the deportation and forcible transfer and formed part of the *actus reus* of those crimes; (iv) Karadžić, along with several other members of the joint criminal enterprise, was informed from April 1992 onwards that the Excluded Crimes were being committed and portrayed a disingenuous reality of what was occurring or issued false denials as well as failed to act to prevent crimes or punish the perpetrators of them, and, in some cases, rewarded and promoted the perpetrators, and further, through his acts and omissions in this respect, encouraged and/or facilitated their commission; and (v) Karadžić, despite knowledge of the commission of the Excluded Crimes, continued to act in furtherance of the objective.[1895]

692. A reasonable trier of fact could find that these factual findings, considered cumulatively, support the conclusion that some or all of the Excluded Crimes formed part of the common purpose, and that Karadžić and some or all of the joint criminal enterprise members shared the intent to commit these crimes. The Appeals Chamber, Judge de Prada dissenting, finds, however, that the Trial Chamber did not err in finding that these factual findings do not compel this as the only reasonable conclusion.

3. Conclusion

693. In light of the Appeals Chamber's finding, Judge de Prada dissenting, that the Trial Chamber did not commit any error in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE, the Appeals Chamber finds it unnecessary to consider the Prosecution's argument that the erroneous conclusion on the scope of the common purpose led to a flawed genocidal intent analysis. For the foregoing reasons, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 1 of the Prosecution's appeal.

[1894] Prosecution Appeal Brief, para. 41, *referring* to Trial Judgement, para. 3504.
[1895] *See, e.g.*, Trial Judgement, paras. 2468-2470, 2599-2605, 2708, 2846, 3333-3336, 3341-3345, 3363, 3367, 3368, 3375, 3410, 3428-3432, 3443-3446, 3466, 3504, 3516-3518.

B. Alleged Errors in Not Finding that Bosnian Muslims and Bosnian Croats Were Subjected to Destructive Conditions of Life under Article 4(2)(c) of the ICTY Statute (Ground 2)

694. The Trial Chamber assessed the *actus reus* of genocide within the meaning of Articles 4(2)(a) through 4(2)(c) of the ICTY Statute with respect to the municipalities referred to in Count 1 of the Indictment ("Count 1 Municipalities").[1896] The Trial Chamber recalled that, when the same acts are charged under Articles 4(2)(b) and 4(2)(c) of the ICTY Statute, it was limited to considering conditions calculated to bring about physical destruction under Article 4(2)(c) of the ICTY Statute only when it had not found such conduct to amount to "causing serious bodily or mental harm" under Article 4(2)(b) of the ICTY Statute.[1897] Consequently, the Trial Chamber stated that it would "limit its assessment" to acts including "the imposition of inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities" which it had not considered in respect of Article 4(2)(b) of the ICTY Statute.[1898]

695. The Trial Chamber then found that, in all of the Count 1 Municipalities, Bosnian Muslim and Bosnian Croat detainees were held in terrible conditions, including severe over-crowding, stifling heat paired with lack of ventilation, inadequate or non-existent medical care, insufficient access to food and water, and poor hygienic conditions.[1899] Some detainees were forced to perform labour in dangerous conditions.[1900] The Trial Chamber further found that a number of detainees died as a result of these detention conditions and that others suffered lasting physical and psychological damage.[1901] Nevertheless, the Trial Chamber concluded that, "[w]hile the conditions in the detention facilities in the Count 1 Municipalities were dreadful and had serious effects on the detainees", the evidence did not demonstrate that the conditions "ultimately sought the physical destruction of the Bosnian Muslims and Bosnian Croats".[1902]

696. The Prosecution submits that the Trial Chamber erred in law by failing to provide a reasoned opinion and/or by improperly compartmentalizing its analysis of the evidence in determining that the elements of Article 4(2)(c) of the ICTY Statute had not been established.[1903] Alternatively, it contends that the Trial Chamber erred in fact by unreasonably concluding that the

[1896] Trial Judgement, paras. 2578-2587. The Count 1 Municipalities are: Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica, and Zvornik. *See* Indictment, para. 38; Trial Judgement, para. 2571.
[1897] Trial Judgement, paras. 546, 2583, *referring to Brđanin* Trial Judgement, para. 905.
[1898] Trial Judgement, para. 2583, *referring to* Indictment, para. 40(c).
[1899] Trial Judgement, para. 2584 and references cited therein.
[1900] Trial Judgement, para. 2585 and references cited therein.
[1901] Trial Judgement, paras. 2580, 2584 and references cited therein.
[1902] Trial Judgement, para. 2587.
[1903] Prosecution Notice of Appeal, paras. 9, 12, 13; Prosecution Appeal Brief, paras. 51-69. *See also* Prosecution Reply Brief, para. 17.

elements of Article 4(2)(c) of the ICTY Statute had not been satisfied with respect to specific detention facilities within the Count 1 Municipalities.[1904] The Prosecution requests that the Appeals Chamber correct these errors by conducting its own analysis under Article 4(2)(c) of the ICTY Statute and finding that both the *actus reus* and *mens rea* of this form of genocide have been met in relation to the Count 1 Municipalities.[1905] The Appeals Chamber will address these arguments in turn.

1. Failure to Provide a Reasoned Opinion and/or Erroneously Compartmentalized Analysis

697. The Prosecution argues that the Trial Chamber erred in law by failing to provide a factual or legal basis for its conclusion that the evidence did not demonstrate that the conditions of detention in the Count 1 Municipalities ultimately sought the physical destruction of Bosnian Muslims and Bosnian Croats.[1906] It contends that the Trial Chamber ignored evidence directly supporting this conclusion and failed to consider illustrative factors demonstrating the objective probability that the conditions deliberately sought the destruction of these ethnic groups.[1907] The Prosecution concludes that these omissions amount to a failure to provide a reasoned opinion.[1908]

698. The Prosecution further contends that the Trial Chamber erroneously compartmentalized its assessment of whether the detention conditions sought the destruction of Bosnian Muslims and Bosnian Croats as meant under Article 4(2)(c) of the ICTY Statute by excluding from its consideration acts of killing or acts causing serious bodily or mental harm within the meaning of Articles 4(2)(a) and 4(2)(b) of the ICTY Statute, respectively, as well as other relevant evidence.[1909] In so doing, the Prosecution submits that the Trial Chamber failed to consider relevant context, including that: (i) detention conditions were rendered more destructive by the particular vulnerability of detainees and their exposure to the commission of other genocidal acts;[1910] and (ii)

[1904] Prosecution Notice of Appeal, paras. 9, 14; Prosecution Appeal Brief, paras. 51, 70-76. *See also* Prosecution Reply Brief, paras. 20, 22, 24-27.
[1905] Prosecution Appeal Brief, para. 57. The Prosecution further contends that, in failing to find that the elements under Article 4(2)(c) of the ICTY Statute had been established, the Trial Chamber's subsequent *mens rea* analysis failed to capture the destructive impact that mass incarceration in deplorable conditions had on the targeted communities in the Count 1 Municipalities. *See* Prosecution Appeal Brief, para. 50. It argues that, in light of the errors alleged in this ground of appeal, the Appeals Chamber should accordingly re-evaluate the genocidal intent with respect to Count 1. Prosecution Appeal Brief, para. 77; Prosecution Reply Brief, para. 27.
[1906] Prosecution Appeal Brief, paras. 51-53. *See also* Prosecution Appeal Brief, para. 50.
[1907] Prosecution Appeal Brief, paras. 54-56.
[1908] Prosecution Appeal Brief, para. 57.
[1909] Prosecution Appeal Brief, para. 58. The Prosecution contends that the Trial Chamber's compartmentalized assessment of Article 4(2)(c) of the ICTY Statute is contrary to the holistic assessment of evidence as required by ICTY jurisprudence. Prosecution Appeal Brief, para. 58, n. 220, *referring to Tolimir* Appeal Judgement, paras. 206, 210, 211, *Halilović* Appeal Judgement, para. 128.
[1910] Prosecution Appeal Brief, paras. 60-66.

such systematic, deadly violence demonstrates that the inhumane conditions suffered by all detainees were aimed at their ultimate physical destruction.[1911]

699. In response, Karadžić agrees that the Trial Chamber failed to provide a reasoned opinion in finding that the evidence did not demonstrate that the conditions of detention ultimately sought the physical destruction of Bosnian Muslims and Bosnian Croats under Article 4(2)(c) of the ICTY Statute.[1912] He further submits that, as argued by the Prosecution, murder and conduct resulting in serious mental and bodily harm may be considered as context when determining whether the evidence establishes "whether conditions of life were calculated to destroy the group" pursuant to Article 4(2)(c) of the ICTY Statute.[1913] However, he disputes the Prosecution's position that the record establishes beyond reasonable doubt that the elements of Article 4(2)(c) of the ICTY Statute are satisfied.[1914]

700. The Appeals Chamber recalls that a trial chamber is required to provide a reasoned opinion under Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.[1915] Consequently, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused.[1916] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1917]

701. The Appeals Chamber finds no merit in the parties' position that the Trial Chamber failed in its obligation to provide a reasoned opinion in concluding that the record did not establish the elements for genocide under Article 4(2)(c) of the ICTY Statute. The Trial Chamber set forth the governing law with respect to this form of genocide and considered, in particular, whether the conduct satisfied the *actus reus* requirements in order to assess Karadžić's responsibility for it.[1918] Furthermore, the Trial Chamber found, after a comprehensive review of the relevant evidence, that the *mens rea* for any form of genocide in relation to the Count 1 Municipalities had not been established.[1919] This comprehensive assessment stands in stark contrast to several instances where

[1911] Prosecution Appeal Brief, paras. 61, 65-68.
[1912] Karadžić Response Brief, paras. 61, 63.
[1913] Karadžić Response Brief, para. 64.
[1914] Karadžić Response Brief, paras. 62, 78-95.
[1915] *Prlić et al.* Appeal Judgement, paras. 187, 990, 1778, 3099; *Stanišić and Župljanin* Appeal Judgement, para. 137; *Hadžihasanović and Kubura* Appeal Judgement, para. 13. *See, mutatis mutandis, Nyiramasuhuko et al.* Appeal Judgement, paras. 729, 1954; *Ndindiliyimana et al.* Appeal Judgement, para. 293 and references cited therein.
[1916] *Prlić et al.* Appeal Judgement, para. 3099, n. 423; *Stanišić and Župljanin* Appeal Judgement, para. 137; *Ndindiliyimana et al.* Appeal Judgement, para. 293; *Kordić and Čerkez* Appeal Judgement, para. 383.
[1917] *Ndindiliyimana et al.* Appeal Judgement, para. 293 and references cited therein. *See also Prlić et al.* Appeal Judgement, para. 1778.
[1918] *See* Trial Judgement, paras. 546-555, 2583-2587.
[1919] *See* Trial Judgement, paras. 2588-2625. *See also infra* Section IV.C.1.

the Appeals Chambers of the ICTY and ICTR have found failures to provide a reasoned opinion in reaching legal conclusions as to guilt or innocence.[1920]

702. The Appeals Chamber recalls that, in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1921] In this respect, the Appeals Chamber observes that the Prosecution does not point to relevant evidence that the Trial Chamber did not consider in the Trial Judgement. Rather, the Prosecution's argument suggests that the entirety of the Trial Chamber's analysis as to whether the elements of Article 4(2)(c) of the ICTY Statute had been established is set forth in paragraphs 2583 through 2587 of the Trial Judgement. Such reading of the Trial Judgement departs from the well-established principles that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence.[1922] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[1923] Viewed in this light, the Prosecution's extensive references in its appeal brief to findings made and evidence referred to elsewhere in the Trial Judgement undermine its position that the Trial Chamber disregarded relevant evidence or findings in concluding that the elements required under Article 4(2)(c) of the ICTY Statute had not been established in respect of the Count 1 Municipalities.[1924] Therefore, this contention is dismissed.

703. Similarly, the Appeals Chamber considers that the Prosecution misreads the Trial Judgement when arguing that the Trial Chamber erroneously compartmentalized its analysis with respect to Article 4(2)(c) of the ICTY Statute. The Prosecution takes issue with the statement in

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[1920] The Appeals Chambers of the ICTY and the ICTR have found failures to provide a reasoned opinion in instances where, for example, the Trial Chamber failed to: (i) make legal findings with respect to the relevant crimes for which a defendant was convicted (*see, e.g.*, *Prlić et al.* Appeal Judgement, paras. 1778, 1779, 1789, 2019, 2020; *Bizimungu* Appeal Judgement, paras. 17-32); (ii) make *mens rea* and/or *actus reus* findings with respect to modes of liability upon which defendants were convicted or acquitted (*see, e.g.*, *Ndindiliyimana et al.* Appeal Judgement, paras. 291-293, 316; *Stanišić and Župljanin* Appeal Judgement, paras. 139, 140; *Stanišić and Simatović* Appeal Judgement, paras. 79, 80); and (iii) make explicit factual findings upon which convictions were entered (*see, e.g.*, *Prlić et al.* Appeal Judgement, paras. 3113, 3114; *Kordić and Čerkez* Appeal Judgement, paras. 384, 385).

[1921] *Šešelj* Appeal Judgement, para. 49; *Prlić et al.* Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.

[1922] *Šešelj* Appeal Judgement, paras. 62, 101, 126; *Prlić et al.* Appeal Judgement, paras. 187, 329, 453, 628, 771; *Nyiramasuhuko et al.* Appeal Judgement, paras. 105, 1308.

[1923] *Prlić et al.* Appeal Judgement, paras. 187, 2937, 3039; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308.

[1924] The Appeals Chamber observes that the Prosecution principally faults the Trial Chamber for the brevity of its analysis and reliance on limited cross-references to other sections of the Trial Judgement without elaborating on prior evidence or findings contained in the Trial Judgement that it argues were critical to assessing whether conditions sought the physical destruction of Bosnian Muslims and Bosnian Croats. *See* Prosecution Appeal Brief, paras. 54, 55. For the reasons stated above, the Appeals Chamber is not persuaded by this argument.

paragraph 2583 of the Trial Judgement that the Trial Chamber would "limit its assessment" to acts that had not been established under Article 4(2)(b) of the ICTY Statute. However, the obvious interpretation of this statement is that the Trial Chamber would not include conduct falling within the ambit of Article 4(2)(b) of the ICTY Statute *as a basis for conviction* under Article 4(2)(c) of the ICTY Statute as well.[1925] While the Prosecution argues that the Trial Chamber was required to "identify 'all the legal implications of the evidence presented'",[1926] the approach adopted by the Trial Chamber is consistent with binding jurisprudence on the issue.[1927]

704. The Prosecution also fails to demonstrate that the Trial Chamber failed to sufficiently consider the particular vulnerability of the detainees and how killings and/or conduct resulting in serious bodily and mental harm had an exacerbating effect on the remaining detainees, eliminating any doubt that their conditions of life were deliberately calculated to lead to their destruction. Notably, the Trial Chamber's approach to assessing evidence that could support the elements of genocide charged in relation to the Count 1 Municipalities reflected a holistic approach to the record.[1928] The Appeals Chamber is not persuaded that the Trial Chamber ignored the evidence or findings the Prosecution points to and considers that the Trial Chamber appropriately examined the circumstances of the detainees as well as the conditions and conduct that fell outside the ambit of Articles 4(2)(a) and 4(2)(b) of the ICTY Statute[1929] and determined that it was not satisfied that such conduct was deliberately inflicted to bring about the destruction of the Bosnian Muslims and Bosnian Croats.[1930]

705. In light of the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution does not show that the Trial Chamber failed to provide a reasoned opinion or erroneously compartmentalized its assessment when evaluating the elements under Article 4(2)(c) of the ICTY Statute.

[1925] *See* Trial Judgement, para. 2583, *referring to Brdanin* Trial Judgement, para. 905.
[1926] Prosecution Appeal Brief, para. 58.
[1927] *Cf. Tolimir* Appeal Judgement, para. 228 ("Notably, killings, which are explicitly mentioned as a separate genocidal act under Article 4(2)(a) of the [ICTY] Statute, may not be considered as a method of inflicting upon the protected group conditions of life calculated to bring about its destruction under Article 4(2)(c) of the [ICTY] Statute."). Indeed, the Appeals Chamber observes that, when the same set of facts establish the offence of deliberately imposing conditions of life calculated to bring about a group's destruction under Article 4(2)(c) of the ICTY Statute but result in killing or serious bodily or mental harm as required by Articles 4(2)(a) and 4(2)(b) of the ICTY Statute, then the latter two articles are the appropriate basis for liability. *Cf. Brdanin* Trial Judgement, n. 2255.
[1928] *See, e.g.*, Trial Judgement, paras. 2592, 2616-2622, 2626. *See also, e.g.*, Trial Judgement, paras. 2482, 2483, 2486-2518, 2522-2538 (recalling and assessing factual findings underpinning criminal conduct in detention facilities in relation to persecution as a crime against humanity).
[1929] Trial Judgement, paras. 2584, 2585.
[1930] Trial Judgement, para. 2587.

2. Error in Concluding that the Elements of Article 4(2)(c) of the ICTY Statute were not Established

706. The Prosecution argues that the Trial Chamber erred in fact when determining that the elements required under Article 4(2)(c) of the ICTY Statute had not been established with respect to certain detention facilities in the Count 1 Municipalities.[1931] The Prosecution stresses that genocide under Article 4(2)(c) of the ICTY Statute may be established based on the deliberate imposition of conditions that have the objective probability of leading to a group's destruction, such as:

> subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[1932]

It submits that the totality of the evidence and findings in relation to the detention facilities charged under Scheduled Detention Facilities C.20.2, C.10.1, and C.25.3, are emblematic of the genocidal conditions, and compel the conclusion that the elements of Article 4(2)(c) of the ICTY Statute were established.[1933] The Prosecution further points to other evidence and findings to demonstrate the lack of proper food and water, insufficient sanitation conditions, severe over-crowding, inadequate shelter, lack of medical care and supplies, and forced labor in certain detention facilities, that it claims also compel the same conclusion.[1934]

707. Karadžić, focusing on the relatively high survival rate of detainees and submitting that most detainees who died at detention facilities died as a consequence of killings or beatings rather than detention conditions,[1935] disputes that the evidence and findings demonstrate as the only reasonable conclusion that conditions calculated to bring about the physical destruction of the relevant groups were deliberately imposed in relation to the relevant detention facilities in the Count 1 Municipalities.[1936]

708. The Prosecution replies that Karadžić ignores findings and evidence demonstrating the severity of detention conditions and inaccurately minimizes the number of victims subjected to

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[1931] Prosecution Appeal Brief, paras. 51, 70, n. 196.
[1932] Prosecution Appeal Brief, para. 73, *quoting Tolimir* Appeal Judgement, para. 225. The Prosecution emphasizes that immediate physical destruction is not required under Article 4(2)(c) of the ICTY Statute and that the sufficiency requirement may be satisfied where the conduct is directed at a collection of the "group members". Prosecution Appeal Brief, paras. 71, 72. *See also* Prosecution Reply Brief, paras. 17-19.
[1933] Prosecution Appeal Brief, paras. 74, 76 and references cited therein.
[1934] Prosecution Appeal Brief, paras. 75, 76 and references cited therein.
[1935] Karadžić Response Brief, paras. 78, 80, 82, 84, 86, 94.
[1936] Karadžić Response Brief, paras. 77-94. Karadžić further argues that the elements of Article 4(2)(c) of the ICTY Statute cannot be satisfied by targeting members of the group rather than the group as a whole. *See* Karadžić Response Brief, paras. 66-76.

them.[1937] It further argues that the fact that many detainees died from beatings and killings supports rather than contradicts the inference that detention conditions were aimed at their destruction.[1938]

709. The Appeals Chamber observes that the Prosecution does not challenge the Trial Chamber's articulation of the relevant legal principles or suggest that the Trial Judgement, when read as a whole, omits consideration of relevant evidence. Rather, the Prosecution posits an alternative interpretation that the record eliminates any doubt that the only reasonable conclusion is that the elements of Article 4(2)(c) of the ICTY Statute were satisfied with respect to certain detention facilities within the Count 1 Municipalities. The Appeals Chamber does not agree. The Trial Judgement reflects the Trial Chamber's extensive assessment of both the discriminatory and the destructive conditions in which the relevant detention facilities were operated.[1939] While the Prosecution argues that the Trial Chamber ignored these factors, the Appeals Chamber observes that the Trial Chamber found that the conditions demonstrated discriminatory intent and were sufficient to establish persecution, in part, on the basis of cruel and inhumane treatment.[1940] However, the persecutory and severe mistreatment demonstrated by the evidence and reflected in the Trial Chamber's findings did not compel it to find, as the only reasonable inference, the existence of the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Bosnian Muslim and Bosnian Croat groups as such. In this regard, and as discussed in greater detail below, the Trial Chamber, when considering the *mens rea* for genocide with respect to the Count 1 Municipalities, reasonably considered the number of Bosnian Muslims and Bosnian Croats who survived and found that it was not satisfied that the Prosecution had established the requisite genocidal intent with respect to other conduct falling within Articles 4(2)(a) and 4(2)(b) of the ICTY Statute.[1941] Such a conclusion would apply with equal force in relation to conduct falling within Article 4(2)(c) of the ICTY Statute, and the Prosecution has not demonstrated that this is in error.

710. Based on the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution has not demonstrated that the Trial Chamber erred in its assessment of the record in not finding the elements of Article 4(2)(c) of the ICTY Statute proven beyond reasonable doubt.

[1937] Prosecution Reply Brief, paras. 17, 20, 22, 24-27. The Prosecution also replies that Karadžić misinterprets Article 4(2)(c) of the ICTY Statute in suggesting that it requires the infliction of destructive conditions on a group as a whole rather than on members of a group. *See* Prosecution Reply Brief, paras. 17-19.
[1938] Prosecution Reply Brief, para. 22.
[1939] As noted previously, the Appeals Chamber observes that the Trial Chamber considered, *inter alia*: (i) severe overcrowding; (ii) stifling heat paired with lack of ventilation; (iii) inadequate or non-existent medical care; (iv) insufficient access to food and water; (v) poor hygienic conditions; (vi) forced labour in dangerous conditions; and (vii) lasting physical and psychological damage on detainees. *See, e.g.*, Trial Judgement, paras. 2584, 2585 and references cited therein.
[1940] *See, e.g.*, Trial Judgement, paras. 2507-2514, 2518.
[1941] *See infra* Section IV.C.1(b).

3. Conclusion

711. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 2 of the Prosecution's appeal.

C. Alleged Errors in Failing to Find Genocidal Intent (Ground 3)

712. The Trial Chamber was not satisfied beyond reasonable doubt that acts under Article 4(2) of the ICTY Statute in relation to the Overarching JCE were committed with genocidal intent.[1942] Specifically, it was not convinced that the only reasonable inference to be drawn from the evidence was that the named members of the Overarching JCE, including Karadžić, other Bosnian Serbs not named as alleged members, or physical perpetrators "possessed such intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities".[1943] Karadžić was found not guilty of genocide in relation to Count 1 of the Indictment.[1944]

713. The Prosecution submits that the Trial Chamber erred in law and in fact when it failed to find that Karadžić and other members of the Overarching JCE possessed genocidal intent as charged under Count 1.[1945] The Prosecution argues that the Trial Chamber erred in assessing the pattern of crimes[1946] as well as the specific statements and conduct of Karadžić and other members of the Overarching JCE.[1947] The Prosecution requests that the Appeals Chamber find that Karadžić and other members of the Overarching JCE possessed genocidal intent and convict Karadžić of genocide under Count 1.[1948]

1. Alleged Errors Regarding the Pattern of Crimes

714. The Trial Chamber reviewed the pattern of crimes committed in each of the Count 1 Municipalities and found that the evidence did not establish, as the only reasonable inference, the existence of the intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in these municipalities.[1949] Rather, it considered that another reasonable inference was the intent to "ensure the removal" of the targeted groups from the Count 1 Municipalities.[1950]

715. In particular, in paragraph 2624 of the Trial Judgement, the Trial Chamber found that:

> The total number of Bosnian Muslims and Bosnian Croats displaced – especially when examined in light of the portion of the groups of Bosnian Muslims and Bosnian Croats allegedly targeted for destruction in the Count 1 Municipalities through the commission of the acts under Article 4(2) of the [ICTY] Statute identified above as well as the fact that Serb Forces exercised control over these territories – does not satisfy the Chamber that the only reasonable inference is that there existed an intent to destroy the Bosnian Muslim and/or the Bosnian Croat groups in the Count 1

[1942] Trial Judgement, para. 2626. *See also* Trial Judgement, paras. 2588-2625.
[1943] Trial Judgement, para. 2626. *See also* Trial Judgement, paras. 2571, 2588-2625.
[1944] Trial Judgement, paras. 2626, 6071.
[1945] Prosecution Notice of Appeal, paras. 16-23; Prosecution Appeal Brief, paras. 6, 78-147; T. 24 April 2018 pp. 281, 286.
[1946] Prosecution Appeal Brief, paras. 6, 78-83, 85, 87-139; T. 24 April 2018 pp. 281, 286.
[1947] Prosecution Appeal Brief, paras. 84, 85, 126, 140-146.
[1948] Prosecution Appeal Brief, paras. 6, 82, 83, 86, 88, 94, 102, 103, 114, 124-126, 139, 146, 147.
[1949] Trial Judgement, paras. 2624-2626. *See also* Trial Judgement, paras. 2589, 2614-2623.
[1950] Trial Judgement, para. 2624.

> Municipalities as such. Rather, the Chamber considers that a reasonable inference to be drawn from the pattern described above is that the intent behind those crimes was to ensure the removal of members of the Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities.[1951]

716. The Prosecution submits that the Trial Chamber committed legal and factual errors in its assessment of the pattern of crimes. Specifically, it contends that the Trial Chamber: (i) erroneously concluded that the objective of permanent removal precluded a finding of genocidal intent;[1952] (ii) applied an erroneous legal standard for genocidal intent;[1953] and (iii) erred in failing to assess genocidal intent with respect to Prijedor Municipality specifically.[1954] The Appeals Chamber will address these arguments in turn.

(a) Objective of Permanent Removal and Genocidal Intent

717. The Prosecution submits that, in finding that permanent removal was the "intent behind" crimes committed in the Count 1 Municipalities against Bosnian Muslims and Bosnian Croats, the Trial Chamber erroneously presumed that such a conclusion was inconsistent with a finding of genocidal intent.[1955] The Prosecution argues that the Trial Chamber failed to consider that the objective of permanent removal can be accomplished through genocide and, thereby, did not sufficiently assess whether Karadžić and the Overarching JCE members possessed genocidal intent and used acts of genocide to achieve the joint criminal enterprise's objective of permanent removal.[1956] The Prosecution further argues that, read in context, the Trial Chamber's analysis, and use of the phrase "intent behind" the crimes at paragraph 2624 of the Trial Judgement, conflate the removal objective of the Overarching JCE with the intent for the underlying acts of genocide that were used to carry out the removal operation.[1957]

718. Karadžić responds that the Trial Chamber: (i) never found that the objective of permanent removal precluded genocidal intent and acknowledged that genocidal intent was charged as a means of achieving permanent removal; (ii) did not conflate the Overarching JCE's objective of permanent

[1951] Trial Judgement, para. 2624.
[1952] Prosecution Appeal Brief, paras. 6, 78-81, 85, 94-102.
[1953] Prosecution Appeal Brief, paras. 6, 80, 82, 83, 85, 103-125. *See also* T. 24 April 2018 pp. 286-290.
[1954] Prosecution Appeal Brief, paras. 85, 87-93, 127-139. *See also* T. 24 April 2018 pp. 290-293.
[1955] Prosecution Appeal Brief, paras. 6, 78, 81, 85, 94, 95, 98-102; T. 24 April 2018 pp. 293, 294.
[1956] Prosecution Appeal Brief, paras. 85, 94, 102. The Prosecution argues that it repeatedly submitted before the Trial Chamber that the Overarching JCE's objective of permanent removal was achieved through acts of genocide. *See* Prosecution Appeal Brief, paras. 95, 97. It also argues that the Trial Chamber erroneously made a theoretical distinction between "redistribution" and "physical destruction" of the targeted population. *See* Prosecution Appeal Brief, para. 100; Prosecution Reply Brief, para. 37. *See also* T. 24 April 2018 p. 293.
[1957] Prosecution Appeal Brief, paras. 94, 96, 98, 99, *referring to* Trial Judgement, paras. 2623-2625, 3447, 3463. *See also* Prosecution Reply Brief, paras. 35-37, 39; T. 24 April 2018 pp. 293, 294.

removal with genocidal intent; and (iii) correctly found that the evidence presented did not establish genocidal intent in respect of the Count 1 Municipalities.[1958]

719. Turning to the contention that the Trial Chamber presumed the intent for permanent removal to be inconsistent with genocidal intent, the Appeals Chamber observes that the Prosecution fails to provide any citation to support this proposition and the Appeals Chamber does not find it in the Trial Judgement. Rather, the Trial Judgement reflects that, while the record established beyond reasonable doubt a shared intent for the removal of Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities,[1959] the record did not support, as the only reasonable inference, the finding of genocidal intent with respect to the crimes committed in the Count 1 Municipalities.[1960]

720. Likewise, there is no merit to the submission that the Trial Chamber failed to consider that the objective of permanent removal can be achieved through acts of genocide, thereby failing to sufficiently consider the existence of genocidal intent. The Trial Chamber expressly noted the Prosecution's position that genocide was one of the "means" used to permanently remove Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities.[1961] It also recalled the Prosecution's contention that the "alleged persecutory campaign included or escalated to include conduct that manifested an intent to destroy, in part, the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such".[1962] Furthermore, the Trial Chamber examined the conduct of Karadžić, members and non-members of the Overarching JCE, and physical perpetrators to discern whether genocidal intent could be inferred in relation to crimes committed within the Count 1 Municipalities.[1963] The Trial Chamber also considered various crimes that demonstrated "a clear pattern of widespread intimidation, violence, [and] killings [...] targeted at the Bosnian Muslims and Bosnian Croats".[1964] It expressly acknowledged that certain Bosnian Muslims and Bosnian Croats were targeted through the commission of acts that would fall under Article 4(2) of the ICTY Statute.[1965]

721. While the Trial Chamber's analysis in paragraph 2624 of the Trial Judgement, to which the Prosecution points in its submission, does not expressly reiterate each of these considerations, the Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or

[1958] Karadžić Response Brief, paras. 116-133, *referring to* Trial Judgement, paras. 592, 2596, 2605, 2624, 2625.
[1959] *See, e.g.*, Trial Judgement, paras. 2625, 2898.
[1960] *See, e.g.*, Trial Judgement, paras. 2624-2626.
[1961] Trial Judgement, para. 592.
[1962] Trial Judgement, para. 2571, *referring to* Indictment, paras. 36, 38, Prosecution Final Trial Brief, para. 570.
[1963] Trial Judgement, paras. 2595-2613.
[1964] Trial Judgement, para. 2623. *See also* Trial Judgement, paras. 2614-2622.
[1965] Trial Judgement, para. 2624.

unnecessarily repeat considerations reflected elsewhere in the trial judgement.[1966] Viewed in this context, the Prosecution's contention ignores the Trial Chamber's extensive assessment of evidence, which the Prosecution argues would suggest that the objective of permanent removal could be achieved through acts of genocide.

722. The Prosecution's argument that the Trial Chamber erroneously conflated the Overarching JCE's objective of permanent removal with its evaluation of genocidal intent is also unpersuasive. The Prosecution's position fails to sufficiently take into account that the Trial Chamber observed that the *mens rea* for genocide is distinguished from motive and that the existence of motive does not exclude the possession of genocidal intent.[1967] Moreover, the Prosecution's argument that the Trial Chamber's use of the phrase "intent behind"[1968] conflates the notions of "motive" and "intent"[1969] discounts the plain meaning of the phrase as well as the context and purpose for which it was used – to express that the *mens rea* of genocide had not been established.[1970] Likewise, the Appeals Chamber is not persuaded by the Prosecution's argument that parallels in the language used by the Trial Chamber when assessing the *mens rea* for genocide and the objective of the Overarching JCE demonstrate that it conflated the two concepts.[1971] The findings in the Trial Judgement reflect that the Trial Chamber distinguished its analysis concerning the *mens rea* for genocide from the "objectives" of the Bosnian Serb leadership.[1972]

723. In light of the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution fails to demonstrate that the Trial Chamber erroneously concluded that the objective of permanent removal precluded a finding of genocidal intent.

(b) Alleged Incorrect Legal Standard for Genocidal Intent

724. The Prosecution submits that the Trial Chamber erroneously applied a "narrow" definition of genocidal intent, as it focused only on evidence resulting in immediate physical destruction and ignored conduct that targets the long-term existence of the groups and that supports an inference of genocidal intent.[1973] Specifically, it challenges the Trial Chamber's comparison between the larger number of Bosnian Muslims and Bosnian Croats displaced from the Count 1 Municipalities against

[1966] *Stakić* Appeal Judgement, para. 47.
[1967] Trial Judgement, para. 554.
[1968] Trial Judgement, para. 2624.
[1969] *See* Prosecution Appeal Brief, para. 99.
[1970] *See* Trial Judgement, para. 2624.
[1971] *See* Prosecution Appeal Brief, para. 99, *comparing* Trial Judgement, paras. 2624, 2625 *with* Trial Judgement, paras. 3447, 3463.
[1972] Trial Judgement, para. 2625, nn. 8802, 8803, *referring to* Trial Judgement, Section IV.A.3.a.i, para. 2898.
[1973] Prosecution Appeal Brief, paras. 6, 80, 82, 83, 85, 103, 114-125. *See also* Prosecution Appeal Brief, paras. 104-113; Prosecution Reply Brief, para. 41; T. 24 April 2018 pp. 286, 287, 290.

the fewer number of genocidal acts committed against them.[1974] According to the Prosecution, this approach led the Trial Chamber to ignore that large-scale displacements committed alongside the relatively fewer acts of genocide: (i) support (rather than negate) a finding of genocidal intent; and (ii) augment the destructive impact of the underlying acts of genocide.[1975]

725. The Prosecution further contends that the Trial Chamber's "simplistic numerical" approach led it to ignore several other factors demonstrating the existence of genocidal intent, including: (i) the violent and traumatic circumstances in which displacements were effected; (ii) the unlawful and destructive conditions in which displaced persons were detained; and (iii) the destruction of cultural and religious property that accompanied the attacks.[1976] It further submits that the Trial Chamber failed to account for the destructive impact the displacements had on the long-term ability of the targeted Bosnian Muslims and Bosnian Croats to survive as "separate and distinct" entities.[1977]

726. Karadžić responds that the Trial Chamber did not limit its focus to immediate physical destruction and submits that the Trial Chamber considered other culpable acts such as forcible displacement, conditions of detention, destruction of religious and cultural property, sexual violence, and the targeting of leaders when concluding that the record did not support a finding of genocidal intent.[1978]

727. The Appeals Chamber observes that the Prosecution's arguments principally take issue with paragraph 2624 of the Trial Judgement, as quoted above. The Appeals Chamber recalls that the intent to destroy a group as such is circumscribed by the "area of the perpetrators' activity and

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[1974] Prosecution Appeal Brief, paras. 115, 116, *referring to* Trial Judgement, paras. 2624, 2625. *See also* Prosecution Reply Brief, paras. 45-48; T. 24 April 2018 pp. 286, 287.
[1975] Prosecution Appeal Brief, paras. 115, 117, 118.
[1976] Prosecution Appeal Brief, paras. 117-121. *See also* Prosecution Reply Brief, para. 54. The Prosecution contends that the scale of killings or genocidal acts is a relevant factor in inferring genocidal intent, however, a "narrow" focus on this factor to the exclusion of others is an error. T. 24 April 2018 p. 287.
[1977] Prosecution Appeal Brief, paras. 80, 85, 114, 117, 122-124; Prosecution Reply Brief, paras. 46, 48, 49. The Prosecution emphasizes that the intent to physically and biologically destroy a targeted group does not require intent to destroy every member of the group or part, rather the intent to destroy the continued physical existence of group members as a community. In this respect, conduct that inflicts no physical harm on group members can contribute to the physical destruction of the community where surviving group members can no longer function as members of or reconstitute themselves as a community. *See* Prosecution Reply Brief, para. 41; T. 24 April 2018 pp. 286-290. The Prosecution argues that the manner in which Serb forces effected the mass expulsion of Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities exemplifies that it was used as a means to ensure the physical destruction of the community, thereby reflecting genocidal intent. *See* Prosecution Appeal Brief, para. 128. *See also* T. 24 April 2014 pp. 290-293. It contends that the Trial Chamber, however, divided victims into two categories – direct victims of genocidal acts versus victims of forcible displacements – and only focused on immediate victims who were, for example, killed or faced sexual violence. *See* Prosecution Appeal Brief, paras. 122, 123. The Prosecution argues that this misguided approach to genocidal intent affected the Trial Chamber's assessment of the statements and conduct of Karadžić and other members of the joint criminal enterprise. *See* Prosecution Appeal Brief, para. 125. This contention is evaluated below. *See infra* Section IV.C.2.
[1978] Karadžić Response Brief, paras. 134, 135, 151-160.

control" and the "extent of [the perpetrators'] reach".[1979] Absent direct evidence of genocidal intent, the "scale of the atrocities committed" is one of several factors relevant to determining genocidal intent[1980] and the fact that more members of a targeted group could have been, for example, killed, but were not, may indicate a lack of the *dolus specialis* required to prove such intent.[1981]

728. Against this background, the Appeals Chamber is not persuaded that the Trial Chamber placed undue emphasis on evidence reflecting immediate physical destruction when assessing genocidal intent with respect to the pattern of crimes in the Count 1 Municipalities. The Trial Chamber recalled that conduct not constituting acts of genocide may be considered when assessing genocidal intent.[1982] Furthermore, when assessing the *mens rea* for genocide, the Trial Chamber extensively detailed criminal conduct committed against Bosnian Muslims and Bosnian Croats that resulted in both immediate physical destruction as well as the remaining conduct which the Prosecution argues would have impacted the long-term survival of the targeted groups.[1983] The Appeals Chamber finds that the Trial Chamber acted within the bounds of the law and its discretion when contrasting the number of Bosnian Muslims and Bosnian Croats displaced versus those who were victims of conduct falling within Article 4(2) of the ICTY Statute in assessing whether genocidal intent had been established.[1984]

729. Furthermore, the Appeals Chamber notes that the paragraphs preceding the conclusion in paragraph 2624 of the Trial Judgement reflect the Trial Chamber's extensive consideration of the violent circumstances in which displacements occurred, the unlawful and destructive conditions in which displaced persons were detained, and the destruction of cultural and religious property that accompanied the attacks that resulted in displacements.[1985] It further considered acts of sexual violence, targeted killings, and other conduct that could have an impact on the long-term survival of the Bosnian Muslims and Bosnian Croats as such.[1986] In this context, the Appeals Chamber finds that the Prosecution simply offers an alternative interpretation of the record without demonstrating

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[1979] *See Krstić* Appeal Judgement, para. 13.
[1980] *See Tolimir* Appeal Judgement, para. 246; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Judgement, 11 July 2013, para. 80.
[1981] *See Stakić* Appeal Judgement, para. 42.
[1982] *See* Trial Judgement, para. 553 ("The Genocide Convention and customary international law prohibit only the physical and biological destruction of a group, not attacks on cultural or religious property or symbols of the group. However, while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group. Forcible transfer alone would not suffice to demonstrate the intent to 'destroy' a group but it is a relevant consideration as part of the Chamber's overall factual assessment.") (internal references omitted).
[1983] *See* Trial Judgement, paras. 2614-2622. The Appeals Chamber finds unpersuasive the Prosecution's arguments that the Trial Chamber failed to sufficiently account for findings made previously in the Trial Judgement.
[1984] *Cf. Stakić* Appeal Judgement, paras. 41, 42.
[1985] *See* Trial Judgement, paras. 2616-2622 and references cited therein.
[1986] *See* Trial Judgement, paras. 2616-2622 and references cited therein.

that, under the circumstances, the Trial Chamber was compelled to find, as the only reasonable inference, the existence of genocidal intent.

730. In light of the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses the Prosecution's arguments that the Trial Chamber applied an incorrect definition of genocidal intent and erred in concluding that genocidal intent had not been established based on the crimes committed in the Count 1 Municipalities.

(c) Alleged Errors Concerning Genocidal Intent in Relation to Prijedor Municipality

731. The Prosecution submits that, after finding that genocidal intent was not established for all of the Count 1 Municipalities on a cumulative basis, the Trial Chamber, in light of the Prosecution submissions throughout the proceedings, erred by not determining whether genocidal intent was established with respect to crimes committed in Prijedor Municipality individually.[1987] Alternatively, the Prosecution argues that, if the Trial Judgement is read as "containing an implicit negative conclusion regarding genocidal intent in individual Count 1 Municipalities", the Trial Chamber erred by failing to provide a reasoned opinion.[1988] The Prosecution further submits that the Trial Chamber erred in its analysis of the relevant evidence and findings in concluding that genocidal intent had not been established.[1989]

732. Karadžić responds that the Prosecution's case at trial was that the crimes committed in all of the Count 1 Municipalities on a cumulative basis – not Prijedor Municipality individually – amounted to genocide.[1990] He further submits that the Trial Chamber fully considered evidence relevant to the assessment of genocidal intent in relation to Prijedor Municipality and that evaluating the record with respect to this municipality individually would not have resulted in a

[1987] Prosecution Appeal Brief, paras. 85, 87-92, 129-139. *See also* Prosecution Reply Brief, paras. 28, 33.
[1988] Prosecution Appeal Brief, paras. 85, 93. *See also* Prosecution Reply Brief, para. 31. The Prosecution argues in passing that the Trial Chamber also failed in its obligation to provide a reasoned opinion in not reaching genocidal intent conclusions for each of the other Count 1 Municipalities in addition to Prijedor. *See* Prosecution Appeal Brief, para. 93; Prosecution Reply Brief, para. 31.
[1989] Prosecution Appeal Brief, paras. 129-139. *See also* Prosecution Reply Brief, para. 58. The Appeals Chamber observes that the Prosecution also argues that the conduct in the other Count 1 Municipalities further supports a finding of genocidal intent. *See* Prosecution Appeal Brief, para. 129, nn. 474, 476, 485, 492, 493, 503, 505, 508, 509, 512, 513, 515, 518-520, 526, 527. However, it contends that the events in Prijedor Municipality reflect the clearest example of genocidal intent particularly in light of three unique factors: (i) the vast scale of genocidal acts in relation to the detention of over 30,000 Muslims and Croats across Omarska, Keraterm, and Trnopolje camps; (ii) the rape, abuse, mistreatment, and deplorable detention conditions subjected to women, children, and the elderly in Trnopolje causing terrible fear and mental trauma; and (iii) the targeting of prominent group members of the Prijedor Muslim community who were singled out for execution, torture, and abuse. T. 24 April 2018 pp. 290-293, 295, 296, *referring to* Trial Judgement, paras. 1587, 1596, 1740, 1744, 1749, 1753, 1766, 1793, 1830, 1831, 1851.
[1990] Karadžić Response Brief, paras. 98-101, 104, 106, 111. In this respect, Karadžić suggests that the Trial Chamber recalled and assessed the Prosecution's submissions as they were presented with respect to Prijedor Municipality. Karadžić Response Brief, paras. 98, 99. Karadžić further contends that there is no authority for the proposition that a trial chamber is required to isolate all of the different municipalities in the indictment and make a "genocidal evaluation indictment by indictment". T. 24 April 2018 p. 301.

different outcome.[1991] Karadžić concludes that the Trial Chamber did not fail to provide a reasoned opinion.[1992]

733. The Appeals Chamber finds no error in the Trial Chamber's assessment of genocidal intent on the basis of all Count 1 Municipalities without providing a separate conclusion for Prijedor Municipality.[1993] The phrasing employed in the Indictment[1994] as well as the Prosecution's pre-trial[1995] and closing submissions[1996] did not require the Trial Chamber to articulate a separate *mens rea* finding for Prijedor Municipality. The Trial Chamber assessed the events in Prijedor Municipality in the same manner in which the Prosecution emphasized its importance – as a "core example" of the genocidal nature of crimes committed throughout the Count 1 Municipalities.[1997] As noted above, the Trial Chamber concluded that genocidal intent had not been established in respect of the Count 1 Municipalities. Consequently, the Prosecution's arguments regarding the failure to adjudicate and to provide a reasoned opinion are dismissed.[1998]

734. Turning to the Prosecution's contention that the Trial Chamber erred in assessing genocidal intent in relation to Prijedor Municipality,[1999] the Appeals Chamber observes that the Trial

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[1991] Karadžić Response Brief, paras. 98, 100-102, 107-115.
[1992] Karadžić Response Brief, para. 114.
[1993] The Prosecution's references to the *Stanišić and Simatović* Appeal Judgement for a basis of arguing that the Trial Chamber was compelled to make *mens rea* findings on genocide for Prijedor Municipality specifically are unpersuasive. In the *Stanišić and Simatović* Appeal Judgement, the Appeals Chamber of the ICTY faulted the Trial Chamber for not making requisite findings on elements of responsibility with respect to the relevant joint criminal enterprise, which were crucial to assessing the defendants' *mens rea* with respect to that mode of liability. *Stanišić and Simatović* Appeal Judgement, paras. 86-88. In the present case, the Trial Chamber made the findings on all the elements of responsibility with respect to the Overarching JCE and did not omit consideration of the relevant elements of genocide. *See, e.g.*, Trial Judgement, paras. 2571-2626 (genocide), 2627-3525 (Overarching JCE).
[1994] *See* Indictment, paras. 36-40.
[1995] *See* Prosecution Pre-Trial Brief, para. 27.
[1996] Prosecution Final Trial Brief, paras. 573, 587, 588.
[1997] *Compare* Trial Judgement, para. 2589 ("For the Prosecution, the pattern of crimes in the Count 1 Municipalities, taking Prijedor as the core example, demonstrates the intent to destroy the very existence of the Bosnian Croat and Bosnian Muslim communities in the Count 1 Municipalities and to prevent their ability to reconstitute themselves.") (internal references omitted) *with* Prosecution Final Trial Brief, paras. 583 ("While the same general pattern of crimes occurred in all of the municipalities charged in Count 1, it is instructive to focus on one to illustrate how far removed from 'mere' forcible transfer this was and how clearly the underlying crimes reflect Karadžić's intent to destroy the group in part. In Prijedor, [...]."), 591 ("Applying the substantiality factors to just one of the Count 1 specified municipalities, the numeric size of the Bosnian Muslim population in Prijedor in 1991 was nearly 25 percent larger that the Bosnian Muslim population in Srebrenica at the time of the 1995 genocide [...]."); T. 29 September 2014 pp. 47567 (Mr. Tieger: "I outline the story of some of the masses of victims of the overarching JCE, particularly Dr. Sadikovic, but whole communities, distinct and separate parts of the Bosnian Muslim and Bosnian Croat community, were also victims; for example, Prijedor"), 47579 (Mr. Tieger: "Let me just return to Prijedor, focus on that by way of example [...].").
[1998] For the reasons articulated above, the Appeals Chamber further dismisses the Prosecution's contention that the Trial Chamber failed to provide a reasoned opinion in not making specific genocidal intent findings with respect to each of the Count 1 Municipalities other than Prijedor.
[1999] The Appeals Chamber is mindful that the Prosecution's arguments are raised under Sub-Ground 3(D) of its appeal brief wherein it contends that Karadžić and the other joint criminal enterprise members possessed genocidal intent based on the pattern of crimes committed and in view of the statements and conduct of the joint criminal enterprise members. *See* Prosecution Appeal Brief, paras. 126-146. The Appeals Chamber has considered the arguments holistically notwithstanding the organization of its analysis.

Chamber, *inter alia*, considered: (i) the establishment of Serb institutions in 1991 and 1992; (ii) the prevalence of propaganda against Bosnian Muslims and Bosnian Croats; (iii) the takeover by Serb forces on 30 April 1992 and its immediate aftermath of events against non-Serbs; (iv) the attack and destruction of predominantly Muslim villages; (v) the killings and detention of Bosnian Muslims and Bosnian Croats, where detainees were subjected to frequent and severe beatings, rape, sexual violence, or death; (vi) the destruction of mosques and Catholic churches by Serb forces; (vii) the expulsion of non-Serbs from the municipalities; and (viii) that, by 1995, the population of Prijedor Municipality was approximately 92 percent Bosnian Serb, five percent Bosnian Muslim, and one percent Bosnian Croat.[2000] The Trial Chamber assessed these findings along with the similar pattern of crimes arising from the various other Count 1 Municipalities and concluded that it was not satisfied that there was genocidal intent to destroy parts of the Bosnian Muslim and/or Bosnian Croat groups in these municipalities.[2001]

735. The Appeals Chamber notes that the majority of the Prosecution's submissions under this ground of appeal rely upon the Trial Chamber's factual findings regarding atrocities committed against Bosnian Muslims and Bosnian Croats in Prijedor Municipality. The Prosecution does not challenge the Trial Chamber's assessment of evidence underlying these factual conclusions, but rather presents an alternative interpretation of the record. The Appeals Chamber is not persuaded that the Trial Chamber ignored the relevant evidence or the impact of its findings or that it was compelled to find, as the only reasonable conclusion, that genocidal intent existed with respect to the underlying crimes committed in Prijedor Municipality.[2002]

736. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses the Prosecution's submissions that the Trial Chamber erred in its assessment of genocidal intent with respect to Prijedor Municipality.

(d) Conclusion

737. The Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution has failed to demonstrate any error in the Trial Chamber's assessment of the pattern of crimes in relation to the Count 1 Municipalities.

[2000] Trial Judgement, para. 2620, *referring to* Trial Judgement, paras. 1578-1582, 1592, 1593, 1596-1603, 1618, 1619, 1621, 1628, 1631, 1637, 1638, 1647, 1657, 1666, 1669, 1677, 1681, 1682, 1684, 1692, 1700-1703, 1715, 1717, 1735, 1738, 1747, 1774, 1778, 1781, 1803, 1815, 1832, 1847, 1861, 1871, 1877, 1885, 1896, 1897, 1902, 1913. Elsewhere in the Trial Judgement, the Trial Chamber noted that in 1991, 43.9 percent of the population in Prijedor were Bosnian Muslims, 42.3 percent were Bosnian Serbs, and 5.6 percent were Bosnian Croats. *See* Trial Judgement, para. 1574.
[2001] Trial Judgement, paras. 2624, 2625.
[2002] This same analysis applies with equal force to the Prosecution's contentions that the conduct in other Count 1 Municipalities demonstrates genocidal intent in view of the holistic consideration of the circumstances prevalent in the municipalities aside from Prijedor. *See, e.g.*, Trial Judgement, paras. 2616-2619, 2621, 2622.

2. Alleged Errors in Assessing Conduct and Statements

738. The Trial Chamber assessed the statements and conduct of Karadžić and other members of the Overarching JCE and determined that it was not satisfied that this evidence, even when considered in the context of the pattern of crimes, allowed it to conclude that the only reasonable inference was that these individuals had the intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities as such.[2003]

739. The Prosecution submits that the Trial Chamber's "narrow" conception of genocidal intent affected its assessment of statements made by Karadžić and other joint criminal enterprise members.[2004] The Prosecution further challenges the Trial Chamber's assessment of: (i) Karadžić's "constant references" to historical grievances and genocide against Serbs in World War II[2005] and his statements that "repeatedly foreshadowed" the destruction of the Bosnian Muslim and Bosnian Croat groups;[2006] (ii) statements made by Overarching JCE members such as Mladić, Šešelj, and Plavšić that echoed Karadžić's sentiments and reflected shared genocidal intent;[2007] and (iii) statements made by Mladić and Plavšić in Prijedor and Karadžić's promotion of Simo Drljača, who oversaw camps and commanded those responsible for genocidal acts in the municipality.[2008] According to the Prosecution, the Trial Chamber failed to assess the statements' "true destructive impact", which affirms the inference of a shared genocidal intent among the members of the Overarching JCE.[2009]

740. Karadžić responds that the Trial Chamber properly considered the conduct and statements of Karadžić and other members of the Overarching JCE, and was well within its discretion to find that genocidal intent was not established.[2010] He further responds that these statements were assessed in

[2003] Trial Judgement, para. 2605. *See also* Trial Judgement, paras. 2595-2604, 2634-2903.
[2004] Prosecution Appeal Brief, para. 125. The Prosecution contends that the Trial Chamber considered this evidence in the context of the pattern of crimes, and found that statements about disappearance, elimination, annihilation, or "possible extinction" of Bosnian Muslims "did not support a conclusion" that joint criminal enterprise members possessed the intent to "physically destroy" these groups. *See* Prosecution Appeal Brief, para. 125, *referring to, inter alia*, Trial Judgement, paras. 2599, 2601, 2605. It submits, however, that a "holistic consideration" of the statements and conduct of joint criminal enterprise members responsible for the pattern of crimes, viewed against the proper legal framework, leads to the only reasonable conclusion that Karadžić and other joint criminal enterprise members possessed and shared genocidal intent. *See* Prosecution Appeal Brief, paras. 125, 126, 140-146.
[2005] Prosecution Appeal Brief, para. 141.
[2006] Prosecution Appeal Brief, para. 142. *See also* Prosecution Reply Brief, para. 66.
[2007] Prosecution Appeal Brief, para. 143.
[2008] Prosecution Appeal Brief, para. 144. *See also* Prosecution Reply Brief, para. 68.
[2009] Prosecution Appeal Brief paras. 145, 146; T. 24 April 2018 pp. 308-310. The Prosecution submits that, in addition to these statements, Karadžić used his "unparalleled" power and authority over the perpetrators to encourage the commission of crimes by deflecting outside scrutiny, continuing to incite ethnic hatred, deliberately failing to curb the rampant criminality until international exposure, as well as rewarding and promoting Prijedor police officials who he knew had been involved in crimes. *See* T. 24 April 2018 pp. 309, 310.
[2010] Karadžić Response Brief, paras. 190-200.

other ICTY cases, all of which found no genocidal intent with respect to crimes committed in the Count 1 Municipalities.[2011]

741. The Appeals Chamber has rejected, Judge de Prada dissenting, the Prosecution's contention that the Trial Chamber applied a "narrow" conception of genocidal intent in its assessment of the pattern of crimes.[2012] Consequently, it also rejects the contention that, on this basis, the Trial Chamber applied an erroneous interpretation of the law when assessing the statements and conduct of Karadžić and other members of the Overarching JCE.

742. Turning to the specific challenges, the Appeals Chamber observes that the Trial Chamber explicitly considered statements and conduct addressed in the Prosecution's submissions. In this regard, the Trial Chamber noted that Karadžić and the Bosnian Serb leadership repeatedly denigrated Bosnian Muslims and Bosnian Croats and portrayed them as historic enemies, all of which exacerbated ethnic tensions in Bosnia and Herzegovina.[2013] In the Trial Chamber's view, these statements had the effect of "furthering the objective of ethnic separation", rather than revealing an intent to "physically destroy" a part of the Bosnian Muslim and/or Bosnian Croat groups.[2014] The Trial Chamber equally considered highly inflammatory public speeches by Karadžić calling for the "disappearance", "annihilation", "vanish[ing]", "elimination", and "extinction" of Bosnian Muslims.[2015] Having assessed these statements "in the full context in which they were delivered and not in isolation",[2016] the Trial Chamber found that they were delivered "mainly as a warning that Bosnian Muslims should not pursue a path to independence" and "that if they did do so there would be war which would lead to severe bloodshed".[2017] The Trial Chamber stated that it was not satisfied that these statements demonstrated that Karadžić intended to physically destroy a part of the Bosnian Muslim and/or the Bosnian Croat groups as such.[2018]

[2011] Karadžić Response Brief, paras. 192-194. *See also* T. 24 April 2018 pp. 301-305.
[2012] *See supra* Section IV.C.1(b).
[2013] Trial Judgement, para. 2596.
[2014] Trial Judgement, para. 2598.
[2015] Trial Judgement, para. 2599. The statements expressly considered by the Trial Chamber included Karadžić's speeches in October 1991 to the Assembly of the Socialist Republic of Bosnia and Herzegovina and in July 1992 to the Bosnian Serb Assembly. *See* Trial Judgement, paras. 2600, 2601, *referring to* Trial Judgement, para. 2675 (where Karadžić spoke about a "highway of hell" and issued threats of war if the Bosnian Serb interests were ignored and the Bosnian Muslims pursued independence for Bosnia and Herzegovina), Exhibit D92, p. 86 (where Karadžić stated that the conflict had been roused to eliminate Bosnian Muslims, and went on to say that "we have to save the Serb people in their ethnic and also historical territories", that in "the state that we are building, we have to ensure that [Bosnian Muslims and Bosnian Croats] have all the rights we have, under the condition that they are not hostile and that they leave the weapons").
[2016] Trial Judgement, para. 2599, *referring to* Trial Judgement, paras. 2675, 2766, 2789, 2810, 2864, 2870, 3272, 3273.
[2017] Trial Judgement, para. 2599.
[2018] Trial Judgement, paras. 2599-2601. The Appeals Chamber notes the Prosecution's submissions that, in private telephone conversations in late 1991, Karadžić warned that Bosnian Muslims would, *inter alia*, "disappear from the face of the earth" and "be annihilated" if they persisted in pursuing independence. *See* Prosecution Appeal Brief, para. 142, nn. 546-549. While the Trial Chamber's assessment of genocidal intent in paragraphs 2599 and 2600 of the Trial

743. In the same vein, the Trial Chamber evaluated statements made by Šešelj, Mladić, and Plavšić, including those that the Prosecution has cited.[2019] It considered that, despite the highly inflammatory language, given the context in which the statements were made, the evidence did not lead to the conclusion that the only reasonable inference was the intent to physically destroy, but rather to separate and move Bosnian Muslims and/or Bosnian Croats out of Bosnian Serb claimed territory.[2020]

744. The Appeals Chamber notes that the Trial Chamber, when assessing genocidal intent, did not discuss statements made by Mladić and Plavšić in Prijedor.[2021] Nevertheless, recalling the presumption that the Trial Chamber has evaluated all the evidence presented to it,[2022] and reading the Trial Judgement as a whole,[2023] the Appeals Chamber observes that this evidence was addressed elsewhere in the Trial Judgement.[2024] Finally, regarding the promotion of Drljača, who established the Omarska camp in Prijedor, the Trial Chamber also did not discuss this evidence in its assessment of genocidal intent. However, this evidence was considered elsewhere in the Trial Judgement, where the Trial Chamber found that Karadžić knowingly rewarded or promoted subordinates who had committed crimes, thus demonstrating his indifference to criminal activity directed at non-Serbs during the conflict "as long as the core objectives of the Bosnian Serbs were fulfilled".[2025] The Appeals Chamber is therefore not convinced that the Trial Chamber ignored this evidence or that it was compelled to conclude that genocidal intent was the only reasonable inference based on the conduct of Karadžić and the other members of the Overarching JCE as well as the pattern of crimes committed in Prijedor Municipality.

745. Aside from arguing that the statements and conduct demonstrate the "true destructive impact of the pattern of crimes on the targeted communities" and affirm Karadžić's genocidal intent,[2026] the Prosecution fails to demonstrate how the Trial Chamber's assessment was erroneous or unreasonable. Evidence demonstrating ethnic bias, however reprehensible, does not necessarily

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Judgement did not explicitly discuss this evidence, the Trial Judgement reflects that it was considered by the Trial Chamber in reaching its conclusions with respect to genocidal intent. *See* Trial Judgement, paras. 2595, 2677, 2678, 2680.

[2019] *See* Prosecution Appeal Brief, para. 143, nn. 550-557 *and* Trial Judgement, paras. 2602-2604, 2657, 2662-2664, 2669, 2706, 2727, 2771, 2798, 2832, 3329.

[2020] Trial Judgement, paras. 2602, 2603.

[2021] *See* Prosecution Appeal Brief, para. 144, *referring to* Exhibit P1360.

[2022] *See, e.g.*, *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 163; *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75; *Kvočka et al.* Appeal Judgement, para. 23.

[2023] *Šešelj* Appeal Judgement, para. 62; *Prlić et al.* Appeal Judgement, paras. 329, 453. *Cf. Nyiramasuhuko et al.* Appeal Judgement, paras. 643, 1523, 1927, 2106, 2901.

[2024] *See* Trial Judgement, nn. 200, 9024, 9334.

[2025] Trial Judgement, paras. 3432, 3433.

[2026] Prosecution Appeal Brief, paras. 125, 140, 145.

prove genocidal intent.[2027] Utterances that fall short of expressly calling for a group's physical destruction might constitute evidence of genocidal intent but a perpetrator's statements must be understood and assessed in their proper context.[2028] The Trial Judgement reflects the Trial Chamber's adherence to this approach. In light of the above, the Appeals Chamber, Judge de Prada dissenting, cannot conclude that the statements and conduct to which the Prosecution refers required a reasonable trier of fact to infer as the only reasonable inference that the conduct and statements of Karadžić and other Overarching JCE members reflected an intent to destroy the Bosnian Muslim and the Bosnian Croat groups as such in the Count 1 Municipalities.

3. Conclusion

746. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 3 of the Prosecution's appeal.

[2027] *See Stakić* Appeal Judgement, para. 52.
[2028] *Stakić* Appeal Judgement, para. 52.

V. SENTENCING APPEALS

A. Introduction

747. The Trial Chamber sentenced Karadžić to a single sentence of 40 years' imprisonment for his convictions for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war.[2029] In determining the sentence, the Trial Chamber considered the gravity of Karadžić's offences, aggravating and mitigating circumstances, sentences in related cases at the ICTY, general practice of sentences in the former Yugoslavia, as well as credit for the time that Karadžić had already spent in detention.[2030]

748. Pursuant to Article 24 of the ICTY Statute and Rule 101(B) of the ICTY Rules, trial chambers must take into account the following factors in sentencing: (i) the gravity of the offence or totality of the culpable conduct; (ii) the individual circumstances of the convicted person; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; and (iv) aggravating and mitigating circumstances.[2031]

749. The Appeals Chamber recalls that appeals against the sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[2032] Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime.[2033] As a general rule, the Appeals Chamber will not revise a sentence unless the trial chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[2034] It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence.[2035] To show that the trial chamber committed a discernible error in exercising its discretion, an appellant must demonstrate

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[2029] Trial Judgement, paras. 6070-6072.
[2030] *See* Trial Judgement, paras. 6045-6070.
[2031] *Prlić et al.* Appeal Judgement, para. 3203; *Stanišić and Župljanin* Appeal Judgement, para. 1099; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1960. *See also Šešelj* Appeal Judgement, para. 179.
[2032] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961; *Kupreškić et al.* Appeal Judgement, para. 408.
[2033] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1961; *Ngirabatware* Appeal Judgement, para. 255.
[2034] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961; *Ngirabatware* Appeal Judgement, para. 255.
[2035] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.

that the trial chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion.[2036]

750. Both Karadžić[2037] and the Prosecution[2038] have appealed against the 40-year sentence imposed by the Trial Chamber. The Appeals Chamber will address their appeals as well as the impact of its findings on Karadžić's sentence.

B. Karadžić's Sentencing Appeal (Grounds 47-50)

751. Karadžić submits that the Trial Chamber erred in declining to find several mitigating circumstances.[2039] Specifically, he argues that the Trial Chamber erroneously found his motive to enter into an agreement with an American official, Richard Holbrooke ("Holbrooke Agreement"), irrelevant and therefore failed to consider that his prosecution before the ICTY was a breach of this agreement and consequently a violation of his rights.[2040] Karadžić further submits that the Trial Chamber erred in finding that the Prosecution's disclosure violations did not constitute a mitigating circumstance, and that the violations did not prejudice him, particularly because the violations prompted the Trial Chamber to order 14 weeks of trial suspension which unduly delayed his proceedings.[2041] Finally, Karadžić submits that the Trial Chamber failed to find his lack of preparation for war, difficulties in exercising command, and good conduct during the war as mitigating circumstances.[2042]

752. The Prosecution responds that Karadžić's self-serving motive to resign from public life is incompatible with mitigation and that he fails to substantiate that any right was violated by the

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[2036] *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1962; *Ngirabatware* Appeal Judgement, para. 255.
[2037] *See* Karadžić Notice of Appeal, pp. 15, 16; Karadžić Appeal Brief, paras. 846-856; Karadžić Reply Brief, paras. 256, 257.
[2038] *See* Prosecution Notice of Appeal, paras. 24, 25; Prosecution Appeal Brief, paras. 7, 148-180; Prosecution Reply Brief, paras. 69-75.
[2039] *See* Karadžić Notice of Appeal, pp. 15, 16; Karadžić Appeal Brief, paras. 846-856; Karadžić Reply Brief, paras. 256, 257.
[2040] Karadžić Appeal Brief, paras. 846, 848. In reply, Karadžić points to domestic jurisprudence to support his contention that a right was violated in the breach of an agreement not to prosecute. Karadžić Reply Brief, para. 257, n. 507, *referring to Santobello v. New York*, 404 U.S. 257, 262 (1971).
[2041] Karadžić Appeal Brief, paras. 849, 850. In reply, Karadžić submits that the delay, resulting from the Prosecution's disclosure violations, was in no way his fault. Karadžić Reply Brief, para. 257. While recognizing the delay as relatively short, he submits that the Trial Chamber failed to recognize it as a mitigating circumstance. Karadžić Reply Brief, para. 257.
[2042] Karadžić Appeal Brief, paras. 851, 853-855. *See also* Karadžić Reply Brief, para. 256. Karadžić argues that these factors have been recognized as mitigating circumstances in other cases. Karadžić Appeal Brief, para. 855, nn. 1168, 1169.

purported breach of the alleged non-prosecution element of the Holbrooke Agreement.[2043] It further submits that Karadžić does not show any abuse of discretion when the Trial Chamber rejected arguments that Karadžić suffered prejudice from the Prosecution's disclosure violations or that the trial was unduly delayed.[2044] As for Karadžić's contentions about his lack of preparation for war, difficulties in exercising command, and good conduct during the war, the Prosecution responds that the Trial Chamber considered relevant evidence in support and appropriately concluded that these factors were not mitigating in light of the extreme gravity of Karadžić's crimes, the central role he played in their commission, and his authority over Bosnian Serb forces as well as Bosnian Serb political and governmental organs.[2045]

753. The Appeals Chamber recalls that a trial chamber is required to consider any mitigating circumstance when determining the appropriate sentence, but it enjoys considerable discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to the factors identified.[2046] The existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.[2047]

754. Turning to Karadžić's submissions regarding the purported violation of the non-prosecution agreement, the Appeals Chamber observes that the Trial Chamber considered the Holbrooke Agreement[2048] and Karadžić's reliance on it for two purposes: (i) to demonstrate his good character and conduct after the conflict; and (ii) to receive a remedy for the violation of his rights resulting from his prosecution at the ICTY in alleged breach of this agreement.[2049] The Trial Chamber concluded that Karadžić's decision to step down from public office in July 1996 had a "positive influence on the establishment of peace and stability" in Bosnia and Herzegovina and the region and found this to be a mitigating factor.[2050] The Trial Chamber also examined evidence that Karadžić verbally agreed to step down from public office in order to not be prosecuted by the

[2043] Prosecution Response Brief, para. 494.
[2044] Prosecution Response Brief, paras. 495, 496. The Prosecution further submits that a remedy for supposed prejudice resulting from disclosure violations should not automatically result in a reduction of sentence, particularly in view of the extreme gravity of Karadžić's crimes and individual circumstances. Prosecution Response Brief, para. 497.
[2045] Prosecution Response Brief, para. 498.
[2046] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 1130; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265.
[2047] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265 and references cited therein.
[2048] Trial Judgement, paras. 6053-6057.
[2049] Trial Judgement, para. 6053, n. 20648, *referring to* Karadžić Final Trial Brief, paras. 3379-3406. *See* Karadžić Final Trial Brief, paras. 3400-3406.
[2050] Trial Judgement, para. 6057.

ICTY[2051] but considered his reasons for resigning irrelevant to determining mitigating factors in sentencing.[2052]

755. The Appeals Chamber finds no error in this approach. The Appeals Chamber recalls that the ICTY Appeals Chamber issued a decision on 12 October 2009 finding that, even if the Holbrooke Agreement provided that Karadžić would not be prosecuted before the ICTY, "it would not limit the jurisdiction of the [ICTY], it would not otherwise be binding on the [ICTY] and it would not trigger the doctrine of abuse of process".[2053] The Appeals Chamber of the ICTY considered that a fundamental aim of international criminal tribunals is to end impunity by ensuring that serious violations of international humanitarian law are prosecuted and punished.[2054] Consequently, it held that individuals accused of such crimes "can have no legitimate expectation of immunity from prosecution" and that Karadžić's "expectations of impunity do not constitute an exception to this rule".[2055] Accordingly, the Trial Chamber correctly did not take into account any purported non-prosecution agreement when assessing the mitigating factors. The Appeals Chamber finds that Karadžić does not demonstrate any error on the part of the Trial Chamber in this respect.

756. As to Karadžić's contention that the Trial Chamber failed to consider the Prosecution's disclosure violations in mitigation, the Trial Chamber found that the number of such violations did not constitute a mitigating circumstance and that the Prosecution's disclosure practices had no bearing on the appropriate sentence.[2056] The Trial Chamber further recalled that Karadžić did not suffer any prejudice from the disclosure violations and that it had taken measures to protect his fair trial rights.[2057]

757. The Appeals Chamber recalls that it has previously dismissed Karadžić's appeal concerning the Trial Chamber's findings in relation to disclosure violations and prejudice, including alleged undue delay resulting from the Prosecution's disclosure practices.[2058] In particular, the Appeals

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[2051] *See* Trial Judgement, para. 6056.
[2052] Trial Judgement, para. 6057.
[2053] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009 ("Decision of 12 October 2009"), para. 54.
[2054] Decision of 12 October 2009, para. 52.
[2055] Decision of 12 October 2009, para. 52.
[2056] Trial Judgement, para. 6063.
[2057] Trial Judgement, para. 6063.
[2058] *See supra* Section III.A.4(b). The Appeals Chamber also notes that Karadžić relies on ICTR jurisprudence to argue that all violations, regardless of the degree of prejudice, require an appropriate remedy. *See* Karadžić Appeal Brief, para. 849, n. 1156, *referring to Rwamakuba* Decision of 13 September 2007, para. 24, *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000 (originally filed in French, English translation filed on 6 July 2001), para. 125. The Appeals Chamber is of the view that Karadžić misconstrues the jurisprudence. The nature and form of an effective remedy should be proportional to the gravity of the harm that is suffered. Furthermore, in situations where a violation has not materially prejudiced an accused, recognition of the violation may suffice as an effective remedy. *See Nyiramasuhuko et al.* Appeal Judgement, para. 42. In any event, the Appeals Chamber notes that the Trial Chamber found no prejudice in relation to the Prosecution's disclosure violations, and in view of the remedies

Chamber has found that the Trial Chamber's orders to suspend proceedings in view of the Prosecution's disclosure practices did not result in undue delay as such suspensions expressly sought to strike a balance between Karadžić's rights to be tried without undue delay and to have adequate time and facilities to prepare his defence.[2059] In light of the foregoing and mindful of the broad discretion trial chambers enjoy in determining what constitutes a mitigating circumstance, the Appeals Chamber finds that Karadžić demonstrates no error in the Trial Chamber's refusal to consider the Prosecution's disclosure violations in mitigation.

758. As to the Trial Chamber's alleged failure to consider Karadžić's lack of preparation and control during the war, the Appeals Chamber observes that the Trial Chamber explicitly noted his submissions but concluded that it did not consider his alleged lack of training and preparation for war to be mitigating in light of its findings on his authority over Bosnian Serb forces and relevant political and governmental organs.[2060] Karadžić's contention that he was a "psychiatrist and poet, with no military training"[2061] ignores the Trial Chamber's extensive findings of his authority over Bosnian Serb forces[2062] and his central involvement in four joint criminal enterprises.[2063] Given the broad discretion trial chambers enjoy in determining what constitutes a mitigating circumstance, Karadžić does not demonstrate that the Trial Chamber erred in not giving weight to his contentions of lack of preparation and control during the war in mitigation of his sentence.

759. As to Karadžić's submissions relating to his good conduct during the war, the Appeals Chamber recalls that this may be a relevant factor in sentencing,[2064] but that good character or conduct of a convicted person often carries little weight in the determination of the sentence.[2065] The Appeals Chamber observes that the Trial Chamber noted Karadžić's submission on this point, recalled the relevant jurisprudence, and found that, given the gravity of his crimes and his central involvement in them, it did not "consider his conduct during the war to be mitigating in any way".[2066] The Appeals Chamber also recalls the Trial Chamber's findings that Karadžić's participation was integral to crimes committed in furtherance of four joint criminal enterprises, as well as a finding, in one instance, that his "contribution was so instrumental that, without his

provided by the Trial Chamber to pre-empt the occurrence of any such prejudice, the cases Karadžić refers to are distinguishable from the circumstances of his case.

[2059] *See supra* Section III.A.4(b).

[2060] Trial Judgement, paras. 6053, 6064.

[2061] Karadžić Appeal Brief, para. 855; Karadžić Final Trial Brief, para. 3417.

[2062] *See, e.g.*, Trial Judgement, paras. 3157, 3160, 3167, 3168, 3177, 4891, 5848, 5850.

[2063] *See, e.g.*, Trial Judgement, paras. 3505, 3524, 4891, 4937-4939, 5831, 5849, 5992, 5993, 5996-6010, 6046-6050.

[2064] *See, e.g.*, *Šainović et al.* Appeal Judgement, para. 1821; *Ntabakuze* Appeal Judgement, para. 296; *Krajišnik* Appeal Judgement, para. 816.

[2065] *See Ntabakuze* Appeal Judgement, para. 296 and references cited therein.

[2066] Trial Judgement, paras. 6036, 6053, 6064.

support, the SRK's attacks on civilians could not have in fact occurred".[2067] In light of the above, Karadžić has failed to demonstrate that the Trial Chamber erred in not giving weight to his submission of good conduct during the war in mitigation of his sentence.

760. Based on the foregoing, the Appeals Chamber dismisses Grounds 47 to 50 of Karadžić's appeal in their entirety.

C. Prosecution's Sentencing Appeal (Ground 4)

761. The Prosecution submits that the Trial Chamber abused its discretion by imposing a sentence of 40 years' imprisonment and seeks to have Karadžić's sentence increased to life imprisonment.[2068] It argues that the 40-year sentence does not reflect the Trial Chamber's own findings and analysis on the gravity of Karadžić's crimes and his responsibility for the largest and gravest set of crimes ever attributed to a single person at the ICTY.[2069] The Prosecution contends that, *inter alia*, the Trial Chamber failed to acknowledge the Prosecution's recommendation of a life sentence[2070] and that sentencing practice in comparable and "related cases" demonstrates that the Trial Chamber committed a discernible error in imposing a 40-year sentence.[2071] The Prosecution further submits that the Trial Chamber erred in its assessment of aggravating[2072] and mitigating factors.[2073]

762. Karadžić responds that the Trial Chamber was under no compulsion to impose a mandatory life sentence,[2074] and that comparing sentences of other cases is of limited assistance.[2075] Karadžić

[2067] *See* Trial Judgement, para. 4891. *See also, e.g.*, Trial Judgement, paras. 3505, 3524, 4937-4939, 5831, 5849, 5992, 5993, 5996-6010, 6046-6050.
[2068] *See* Prosecution Notice of Appeal, paras. 24, 25; Prosecution Appeal Brief, paras. 7, 148-180; Prosecution Reply Brief, paras. 69-75. *See also* T. 24 April 2018 p. 295.
[2069] *See* Prosecution Appeal Brief, paras. 7, 148-151, 153, 155-172. *See also* T. 24 April 2018 p. 295. The Prosecution submits that the Trial Chamber failed to give sufficient weight to its own findings regarding the extreme gravity of Karadžić's crimes and his "essential" or "instrumental" role in any one of the three main joint criminal enterprises, of which he was found to have been a member. *See* Prosecution Appeal Brief, paras. 7, 149, 155, 158, 159, 168. *See also* T. 24 April 2018 p. 295.
[2070] Prosecution Appeal Brief, paras. 169, 171.
[2071] Prosecution Appeal Brief, paras. 149, 164-166, 172; Prosecution Reply Brief, para. 71.
[2072] *See* Prosecution Appeal Brief, paras. 152, 173-175.
[2073] *See* Prosecution Appeal Brief, paras. 7, 152, 159, 176-179. *See also* T. 24 April 2018 pp. 310, 311. The Prosecution argues that the Trial Chamber erred in crediting Karadžić's decision to resign in 1996 from public office as a mitigating circumstance and in failing to consider his reasons for doing so. *See* Prosecution Appeal Brief, para. 178. *See also* T. 24 April 2018 pp. 310, 311. In this regard, the Prosecution contends that Karadžić's self-serving motive to gain immunity from criminal prosecution does not show good character or an intention to make amends for wrongful conduct. *See* Prosecution Appeal Brief, paras. 178, 179. *See also* Prosecution Reply Brief, para. 75.
[2074] Karadžić Response Brief, para. 210.
[2075] Karadžić Response Brief, paras. 215, 216. *See also* Karadžić Response Brief, paras. 217, 218.

further submits that the Prosecution fails to demonstrate an error in the Trial Chamber's assessment of aggravating and mitigating factors.[2076]

763. After setting out the jurisprudence on sentencing[2077] and considering the relevant sentencing factors,[2078] the Trial Chamber concluded that a 40-year sentence was warranted, "in particular given the scope and scale of the serious crimes for which [Karadžić] was found responsible and his central involvement in the commission of these crimes".[2079]

764. In assessing the gravity of Karadžić's offences, the Trial Chamber considered them to be "among the most egregious of crimes in international criminal law [including] extermination as a crime against humanity and genocide".[2080] The Trial Chamber recalled its findings that, between October 1991 and 30 November 1995, Karadžić participated in the Overarching JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina.[2081] For crimes committed in relation to the Overarching JCE, the Trial Chamber convicted Karadžić of persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity (under the first form of joint criminal enterprise), as well as of persecution, extermination, and murder as crimes against humanity and murder as a violation of the laws or customs of war (under the third form of joint criminal enterprise).[2082] The Trial Chamber also recalled that, between April 1992 and October 1995, Karadžić participated in the Sarajevo JCE to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling.[2083] In relation to this joint criminal enterprise, Karadžić was convicted of murder as a crime against humanity, as well as of murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war (under the first form of

[2076] *See* Karadžić Response Brief, paras. 221-229. With respect to mitigating factors, Karadžić responds that there is no dispute with the Trial Chamber's finding that his resignation in 1996 had a positive influence on the establishment of peace and stability in Bosnia and Herzegovina and the region. In his view, the establishment of peace and security, being one of the broader goals of international criminal justice, should be encouraged, and it was appropriate to attribute weight to his resignation as a mitigating factor. *See* Karadžić Response Brief, paras. 227-229; T. 24 April 2018 p. 300.
[2077] *See* Trial Judgement, paras. 6025-6044.
[2078] *See* Trial Judgement, paras. 6045-6069.
[2079] Trial Judgement, para. 6070.
[2080] Trial Judgement, paras. 6046-6050.
[2081] Trial Judgement, para. 6047. *See also* Trial Judgement, paras. 3447, 3462, 3463, 3464, 3505, 3511, 3512, 3524, 5996, 6002-6007.
[2082] Trial Judgement, paras. 3521, 3524, 5996, 6002-6007, 6022, 6047. The Trial Chamber noted that the crimes of extermination and murder as crimes against humanity are impermissibly cumulative, and therefore only entered convictions for extermination as a crime against humanity for specific "overlapping" incidents related to the Overarching JCE. *See* Trial Judgement, paras. 6023, 6024, n. 20574. The Appeals Chamber recalls that it, Judge Joensen dissenting, has granted, in part, Ground 31 of Karadžić's appeal, regarding certain crimes committed in connection with the Overarching JCE. *See supra* paras. 474, 475. The Appeals Chamber will consider the impact of this in a later section. *See infra* Section V.D.
[2083] Trial Judgement, para. 6048. *See also* Trial Judgement, paras. 4644, 4647-4649, 4676, 4678, 4707, 4708, 4891, 4892, 4932, 4936-4939, 5997.

joint criminal enterprise).[2084] The Trial Chamber further recalled that, in 1995, Karadžić participated in the Srebrenica JCE to eliminate Bosnian Muslims in Srebrenica,[2085] and was convicted of genocide, persecution, extermination, and other inhumane acts (forcible transfer) as crimes against humanity, as well as of murder as a violation of the laws or customs of war (under the first form of joint criminal enterprise).[2086] In relation to this joint criminal enterprise, the Trial Chamber also convicted Karadžić as a superior of persecution and extermination as crimes against humanity, as well as of murder as a violation of the laws or customs of war.[2087] Finally, the Trial Chamber recalled its finding that, between 25 May and June 1995, Karadžić participated in the Hostages JCE with the purpose of taking UN Personnel hostage to compel NATO to abstain from conducting air strikes against Bosnian Serb targets.[2088] In relation to this joint criminal enterprise, the Trial Chamber convicted Karadžić of the crime of taking hostages as a violation of the laws or customs of war (under the first form of joint criminal enterprise).[2089]

765. In assessing the degree and form of Karadžić's participation, the Trial Chamber explicitly noted Karadžić's "central role" and contribution to the joint criminal enterprises, specifically noting that: (i) in the Overarching JCE, as the *Republika Srpska* President and Supreme Commander of its army, Karadžić was "at the apex of power and played an integral role" by promoting ethnic separation and hatred, establishing institutions to carry out objectives of the common plan, and creating a climate of impunity; (ii) in the Sarajevo JCE, Karadžić's contribution was "so instrumental that without his support the SRK attacks on civilians could not have in fact occurred"; and (iii) that in the Srebrenica JCE, Karadžić, as the "sole person" in *Republika Srpska* with the power to prevent Bosnian Serb forces from moving Bosnian Muslim males to Zvornik to be killed, ordered their transfer, and therefore "agreed to and enabled the implementation of a systematic, organized, and large scale murder operation".[2090]

[2084] Trial Judgement, paras. 4939, 5997, 6004, 6005, 6008, 6009.
[2085] Trial Judgement, para. 6049. *See also* Trial Judgement, paras. 5724, 5731, 5736, 5737, 5739-5745, 5810, 5811, 5814, 5821, 5822, 5831, 5849, 5998.
[2086] Trial Judgement, para. 6049. *See* Trial Judgement, paras. 5849, 5998, 6001-6005, 6007. With respect to the Srebrenica JCE, the Trial Chamber noted that murder and extermination as crimes against humanity are "impermissibly cumulative" and did not enter convictions for murder as a crime against humanity as these incidents were "subsumed" under extermination as a crime against humanity. *See* Trial Judgement, paras. 6023, 6024, n. 20574. *See also* Trial Judgement, paras. 5607-5621. The Appeals Chamber recalls that it, Judge Joensen dissenting, has granted, in part, Ground 31 of Karadžić's appeal, regarding certain crimes committed in connection with the Srebrenica JCE. *See supra* paras. 474, 475.
[2087] Trial Judgement, paras. 5837, 5848, 5850, 5998, 6002-6005. With respect to the Srebrenica JCE, the Trial Chamber noted that murder and extermination as crimes against humanity are impermissibly cumulative and did not enter convictions for murder as a crime against humanity as these incidents were subsumed under extermination as a crime against humanity. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574.
[2088] Trial Judgement, para. 6050. *See also* Trial Judgement, paras. 5962, 5973, 5992, 5993, 5999.
[2089] Trial Judgement, paras. 5993, 6010.
[2090] Trial Judgement, paras. 6046-6049.

766. The Appeals Chamber understands that the Prosecution does not challenge the Trial Chamber's factual determinations regarding the gravity of crimes, but rather contends that the sentence it imposed on Karadžić was "manifestly inadequate" and unreasonable given the "unprecedented gravity" of his crimes.[2091] Taking into account the Trial Chamber's conclusions reflecting the magnitude of Karadžić's crimes, the Appeals Chamber is in agreement with the Prosecution's position. While fully cognizant of the Trial Chamber's discretion in sentencing, the Appeals Chamber considers that the 40-year sentence inadequately reflects the extraordinary gravity of Karadžić's crimes as well as his central and instrumental participation in four joint criminal enterprises, which spanned more than four years and covered a large number of municipalities in Bosnia and Herzegovina.

767. The incongruence between the gravity of Karadžić's crimes and his 40-year sentence is apparent when Karadžić's crimes and punishment are compared to the life sentences imposed on Tolimir, Beara, Popović, and Galić for their responsibility in only a fraction of Karadžić's crimes. The Appeals Chamber notes that the Trial Chamber did not explicitly consider these cases in its determination of Karadžić's sentence.[2092] The Appeals Chamber recalls that trial chambers are under no obligation to expressly compare the case of one accused to that of another.[2093] Moreover, it is settled jurisprudence that any given case may contain a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual.[2094] However, a "disparity between sentences rendered in similar cases may be considered 'capricious or excessive', hence warranting the intervention of the Appeals Chamber, 'if it is out of *reasonable* proportion with a line of sentences passed in similar circumstances for the same offences'".[2095]

768. The Appeals Chamber notes that Tolimir, the Assistant Commander and Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the VRS and direct subordinate of Mladić, was convicted of genocide, conspiracy to commit genocide, extermination, persecution, and other inhumane acts (forcible transfer) as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in joint criminal enterprises to forcibly remove and

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[2091] *See* Prosecution Appeal Brief, paras. 7, 148-172, 180; Prosecution Reply Brief, paras. 69-72. *See also* T. 24 April 2018 p. 295.

[2092] The Appeals Chamber notes that the Trial Chamber only explicitly considered the sentences imposed on Biljana Plavšić (11 years) and Momčilo Krajišnik (20 years) that were argued by the Defence at trial. *See* Trial Judgement, paras. 6066, 6067.

[2093] *See Prlić et al.* Appeal Judgement, para. 3340; *Kupreškić et al.* Appeal Judgement, para. 443.

[2094] *See, e.g., Prlić et al.* Appeal Judgement, para. 3341; *Nyiramasuhuko et al.* Appeal Judgement, para. 3400; *Ntabakuze* Appeal Judgement, para. 298. A trial chamber's primary responsibility is to tailor the penalty to fit the individual circumstances of the accused. *See, e.g., Prlić et al.* Appeal Judgement, para. 3341; *Nyiramasuhuko et al.* Appeal Judgement, paras. 3400, 3453, 3512; *Popović et al.* Appeal Judgement, para. 2093; *Ntabakuze* Appeal Judgement, para. 298.

[2095] *See Prlić et al.* Appeal Judgement, para. 3340; *Đorđević* Appeal Judgement, para. 949 and references cited therein.

murder Bosnian Muslims in Srebrenica and Žepa in 1995.[2096] The Trial Chamber of the ICTY sentenced Tolimir to life imprisonment.[2097] On appeal, despite the partial reversal of his convictions, the Appeals Chamber of the ICTY affirmed his remaining convictions, including genocide, and upheld Tolimir's sentence of life imprisonment.[2098]

769. Tolimir's subordinate,[2099] Beara, the Chief of the VRS Main Staff's Administration for Security, was convicted of genocide, extermination and persecution as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in the joint criminal enterprise to murder able-bodied Bosnian Muslim men from Srebrenica in July 1995.[2100] The Trial Chamber of the ICTY considered Beara as the "driving force behind the murder enterprise and a central figure in the organisation and execution of the genocide" in Srebrenica, and found that "the only appropriate sentence for him [was] life imprisonment".[2101] On appeal, despite partially reversing his convictions with respect to the killing of six Bosnian Muslims near Trnovo, the Appeals Chamber of the ICTY affirmed the remainder of Beara's convictions, including genocide, and upheld his sentence of life imprisonment.[2102]

770. Beara's subordinate,[2103] Popović, the Chief of Security of the VRS Drina Corps, was also convicted of genocide, extermination and persecution as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in the joint criminal enterprise to murder able-bodied Bosnian Muslim men from Srebrenica in July 1995.[2104] The Trial Chamber of the ICTY, considering that Popović played a key role in the organization and execution of the genocide in Srebrenica and that he participated "vigorously in almost every step of the murder operation", found that the "only appropriate sentence" was life imprisonment.[2105] The

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[2096] *See Tolimir* Trial Judgement, paras. 1, 2, 82, 83, 1040, 1071, 1093-1095, 1128, 1129, 1144, 1154, 1216, 1224, 1225, 1227, 1239. *See also Tolimir* Appeal Judgement, paras. 2, 5, 649.
[2097] *See Tolimir* Trial Judgement, para. 1242.
[2098] *See Tolimir* Appeal Judgement, paras. 634, 648, 649. According to the Appeals Chamber of the ICTY, "[i]n light of these genocide convictions alone, the Appeals Chamber considers that Tolimir's responsibility does not warrant a revision of his sentence". *Tolimir* Appeal Judgement, para. 648.
[2099] *See Popović et al.* Trial Judgement, paras. 1090, 1202. *See also Tolimir* Appeal Judgement, para. 648; *Tolimir* Trial Judgement, para. 1127.
[2100] *See Popović et al.* Trial Judgement, paras. 1072, 1202-1206, 1302, 2105, p. 833. *See also Popović et al.* Appeal Judgement, paras. 3, 4, 2117.
[2101] *See Popović et al.* Trial Judgement, paras. 1314, 2164, p. 833; *Popović et al.* Appeal Judgement, paras. 1967, 1972. *See also Popović et al.* Trial Judgement, paras. 2148-2152 (discussing the gravity of the crimes committed in Srebrenica in July 1995).
[2102] *See Popović et al.* Appeal Judgement, paras. 2111, 2117. The Appeals Chamber of the ICTY also granted the Prosecution's appeal and entered a conviction for conspiracy to commit genocide, which was not entered by the Trial Chamber of the ICTY on the basis of the principle of cumulative convictions. *See Popović et al.* Appeal Judgement, paras. 555, 557, 2111, 2117; *Popović et al.* Trial Judgement, p. 833.
[2103] *See Popović et al.* Trial Judgement, paras. 1090, 1205.
[2104] *See Popović et al.* Trial Judgement, paras. 1072, 1090, 1168, p. 832. *See also Popović et al.* Appeal Judgement, paras. 3, 4.
[2105] *See Popović et al.* Trial Judgement, para. 2157, p. 832.

Appeals Chamber of the ICTY partially reversed Popović's convictions with respect to the killing of six Bosnian Muslims near Trnovo, but affirmed the remainder of his convictions, including genocide, and upheld his sentence of life imprisonment.[2106]

771. Galić, the *de jure* SRK Commander, whose superiors were Mladić and Karadžić, was found guilty of acts of violence, the primary purpose of which was to spread terror among the civilian population, a violation of the laws or customs of war, as well as of murder and other inhumane acts as crimes against humanity for having "directly participated" in the commission of crimes by ordering the campaign of sniping and shelling civilians in Sarajevo between 10 September 1992 and 10 August 1994.[2107] The Trial Chamber of the ICTY sentenced Galić to 20 years' imprisonment.[2108] The Appeals Chamber of the ICTY upheld all of Galić's convictions but quashed his sentence of 20 years and imposed a sentence of life imprisonment.[2109] In doing so, the Appeals Chamber of the ICTY considered that the Trial Chamber of the ICTY abused its discretion as the 20-year sentence fell outside the range of available sentences and "underestimated the gravity of Galić's criminal conduct".[2110]

772. In the present case, the Appeals Chamber observes the Trial Chamber's findings that Galić was a named member of the Sarajevo JCE,[2111] and that Tolimir,[2112] Beara,[2113] and Popović[2114] either supported or were named members of the Srebrenica JCE. Additionally, as noted above, these individuals were high-ranking members of the VRS or the SRK, which were under Karadžić's "authority" as the President of *Republika Srpska* and Supreme Commander of its forces.[2115] The fact that Tolimir, Beara, Popović, and Galić were each sentenced to life imprisonment for participating in only one of the four joint criminal enterprises involved in this case, and the fact that

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[2106] *See Popović et al.* Appeal Judgement, paras. 2110, 2117. The Appeals Chamber of the ICTY also granted the Prosecution's appeal and entered a conviction for conspiracy to commit genocide, which was not entered by the Trial Chamber of the ICTY on the basis of the principle of cumulative convictions. *See Popović et al.* Appeal Judgement, paras. 546, 557, 2110, 2117. *See also Popović et al.* Trial Judgement, p. 832.
[2107] *See Galić* Trial Judgement, paras. 3, 606, 750-752, 769. *See also Galić* Appeal Judgement, paras. 2-4, 454.
[2108] *See Galić* Trial Judgement, para. 769.
[2109] *See Galić* Appeal Judgement, p. 185.
[2110] *See Galić* Appeal Judgement, paras. 454-456.
[2111] *See* Trial Judgement, paras. 4680, 4707, 4708, 4892, 4932, 5997.
[2112] In finding that the common plan to eliminate Bosnian Muslims in Srebrenica was formed and executed in conditions designed to ensure its secrecy to the greatest extent possible, the Trial Chamber considered "Tolimir's proposal to remove the detainees from locations where they could be sighted". *See* Trial Judgement, para. 5734. The Trial Chamber also considered that Karadžić was constantly kept abreast of developments on the ground, and this was achieved particularly through briefings by high-ranking officers, including Tolimir, who was already on the ground near Srebrenica. *See* Trial Judgement, para. 5801.
[2113] The Trial Chamber found that Beara was a member of the Srebrenica JCE. *See* Trial Judgement, paras. 5737, 5830, 5998.
[2114] The Trial Chamber found that Popović was a member of the Srebrenica JCE. *See* Trial Judgement, paras. 5733, 5737, 5830, 5998.
[2115] *See, e.g.*, Trial Judgement, paras. 4885, 4891, 4938, 5821, 6047, 6052.

they were subordinated to Karadžić, further demonstrates that the 40-year sentence imposed on Karadžić was inadequate.

773. Given the above, the Appeals Chamber considers that the sentence of 40 years imposed on Karadžić by the Trial Chamber underestimates the extraordinary gravity of Karadžić's responsibility and his integral participation in "the most egregious of crimes" that were committed throughout the entire period of the conflict in Bosnia and Herzegovina and were noted for their "sheer scale" and "systematic cruelty".[2116] In the circumstances of this case, the sentence the Trial Chamber imposed was so unreasonable and plainly unjust that the Appeals Chamber can only infer that the Trial Chamber failed to properly exercise its discretion.

774. The Appeals Chamber finds, Judges de Prada and Rosa dissenting, that the Trial Chamber committed a discernible error and abused its discretion in imposing a sentence of only 40 years of imprisonment. The Appeals Chamber, Judges de Prada and Rosa dissenting, therefore grants Ground 4 of the Prosecution's appeal.[2117] The impact of this finding is addressed below.

D. Impact of the Appeals Chamber's Findings on Sentence

775. The Appeals Chamber recalls that it has granted, in part, Judges Joensen and de Prada dissenting, Ground 31 of Karadžić's appeal and has accordingly reversed his convictions related to the Overarching JCE to the extent that they are based on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1.[2118] Notwithstanding, the Appeals Chamber has dismissed all other aspects of Karadžić's appeal and has affirmed his remaining convictions for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war, in relation to his participation in the Overarching JCE, the Sarajevo JCE, the Srebrenica JCE, and the Hostages JCE.[2119] The Appeals Chamber further recalls that it has granted, Judges de Prada and Rosa dissenting, Ground 4 of the Prosecution's appeal.[2120]

776. The Appeals Chamber considers that the overturned convictions, related to Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1, are *de minimis* in nature compared to the extraordinary gravity of the crimes for which Karadžić remains convicted. In light

[2116] *See* Trial Judgement, para. 6046.
[2117] In light of the foregoing, the Appeals Chamber finds it unnecessary to address the remainder of the Prosecution's sentencing submissions.
[2118] *See supra* paras. 460, 462, 464, 467, 470, 473-475.
[2119] *See supra* paras. 30, 42, 64, 108, 133, 153, 166, 186, 192, 202, 214, 224, 241, 268, 282, 292, 299, 307, 316, 324, 344, 357, 421, 437, 445, 475, 509, 521, 555, 587, 623, 633, 644, 661.

of Karadžić's position at the apex of power in *Republika Srpska* and its military, his instrumental and integral participation in the four joint criminal enterprises, the scale and systematic cruelty of the crimes committed, the large number of victims, the continued impact of these crimes on victims who have survived, as well as the relevant mitigating and aggravating factors, the Appeals Chamber, Judges de Prada and Rosa dissenting, finds that the only appropriate sentence in the circumstances of this case is imprisonment for the remainder of Karadžić's life.

[2120] *See supra* para. 774.

VI. DISPOSITION

777. For the foregoing reasons, **THE APPEALS CHAMBER,**

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 23 and 24 April 2018;

SITTING in open session;

GRANTS, Judges Joensen and de Prada dissenting, Karadžić's Thirty-First Ground of Appeal, in part, and **REVERSES**, Judges Joensen and de Prada dissenting, Karadžić's convictions to the extent that they rely on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1;

DISMISSES Karadžić's appeal in all other respects;

AFFIRMS Karadžić's remaining convictions, pursuant to Article 1 of the Statute and Articles 7(1) and 7(3) of the ICTY Statute, for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war, in relation to his participation in the Overarching JCE, the Sarajevo JCE, the Srebrenica JCE, and the Hostages JCE;

GRANTS, Judges de Prada and Rosa dissenting, the Prosecution's Fourth Ground of Appeal;

DISMISSES, Judge de Prada dissenting, the Prosecution's appeal in all other respects;

SETS ASIDE, Judges de Prada and Rosa dissenting, the sentence of 40 years of imprisonment and **IMPOSES**, Judges de Prada and Rosa dissenting, a sentence of life imprisonment, subject to credit being given under Rules 125(C) and 131 of the Rules for the period Karadžić has already spent in detention since his arrest on 21 July 2008;

RULES that this Judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules;

ORDERS that, in accordance with Rules 127(C) and 131 of the Rules, Karadžić shall remain in the custody of the Mechanism pending the finalization of the arrangements for his transfer to the State where his sentence will be served.

Done in English and French, the English text being authoritative.

Judge Vagn Joensen, Presiding

Judge William H. Sekule

Judge José Ricardo de Prada Solaesa

Judge Graciela Susana Gatti Santana

Judge Ivo Nelson de Caires Batista Rosa

Judge Vagn Joensen appends partially dissenting and separate concurring opinions.

Judge José Ricardo de Prada Solaesa appends a partially dissenting opinion.

Done this 20th day of March 2019 at The Hague, the Netherlands.

[Seal of the Mechanism]

VII. PARTIALLY DISSENTING AND SEPARATE CONCURRING OPINIONS OF JUDGE JOENSEN

778. I respectfully disagree with the Majority's conclusion concerning Ground 31 of Karadžić's appeal. Moreover, I attach to this Judgement a separate opinion setting out my position with regard to the finding in relation to one of the evidentiary elements in Ground 40 of Karadžić's appeal.

A. Partially Dissenting Opinion on Ground 31

779. In this Judgement, the Majority finds that the Trial Chamber impermissibly relied solely or in a decisive manner on untested Rule 92 *bis* or *quater* evidence in entering convictions related to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1.[2121] The Majority therefore granted Ground 31 of Karadžić's appeal, in part, and reversed his convictions to the extent that they relied on these Scheduled Incidents.[2122] While I agree with the Majority that the untested evidence has been significant in relation to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1,[2123] for the reasons set forth below, I respectfully disagree with the conclusion of the Majority concerning Ground 31 of Karadžić's appeal.

780. At the outset, I recall that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement, and that trial judgements must be read as a whole when evaluating the findings contained in them.[2124] The Appeals Chamber itself explicitly relied on this principle in the Appeal Judgement regarding other grounds of appeal.[2125] The Appeals Chamber also confirmed the presumption that a trial chamber has evaluated all of the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence and, in certain instances, did so in the context of evidence "not expressly discussed in the Trial Judgement".[2126] In particular, when providing its analysis of Grounds 2 and 3 of the appeal of the Prosecution, the Appeals Chamber correctly viewed it as sufficient if evidence was considered elsewhere in the Trial Judgement, relying on the

[2121] *See* Appeal Judgement, paras. 460-462, 464, 467, 470, 473-475.
[2122] *See* Appeal Judgement, paras. 475, 775, 777.
[2123] *See* Appeal Judgement, paras. 460-473.
[2124] *See* Appeal Judgement, paras. 563, 702, 721, 744, nn. 1842, 1872, *referring to, inter alia, Šešelj* Appeal Judgement, para. 62; *Prlić et al.* Appeal Judgement, paras. 329, 453; *Stakić* Appeal Judgement, para. 47.
[2125] *See* Appeal Judgement, paras. 363, 563, 702.
[2126] *See* Appeal Judgement, paras. 396, 533, 541, 562, 563, 702, 744, *referring to, inter alia, Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Nyiramasuhuko et al.* Appeal Judgement, paras. 163, 1308; *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75; *Kvočka et al.* Appeal Judgement, para. 23.

aforementioned principle that trial judgements must be read as a whole.[2127] I respectfully contend that there is no reason to deviate from these principles in relation to Ground 31 of Karadžić's appeal.

781. Considering the above, it is my view that, although the Trial Chamber did not explicitly state in its individual analysis on the relevant Scheduled Incidents that it relied upon other evidence or findings as corroborative of the untested evidence, this approach does not necessarily mean that the Trial Chamber considered the evidence concerning particular Scheduled Incidents in isolation. More specifically, when read as a whole, it is evident that the Trial Chamber did not rely solely or decisively on untested evidence in convicting Karadžić on the basis of the Scheduled Incidents in question. Instead, the Trial Chamber referred to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1 cumulatively with other Scheduled Incidents when considering whether the elements of the relevant crimes had been established.[2128] For instance, with respect to Karadžić's conviction for persecution as a crime against humanity, the Trial Chamber relied on Scheduled Incidents C.27.5 and C.22.5 cumulatively with other Scheduled Incidents when describing the crimes and the conditions of detention to which the Bosnian Muslim and Bosnian Croat detainees were subjected.[2129] As to Karadžić's convictions for murder as a crime against humanity and as a

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[2127] *See* Appeal Judgement, paras. 702 ("Such reading of the Trial Judgement departs from the well-established principles that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning. Viewed in this light, the Prosecution's extensive references in its appeal brief to findings made and evidence referred to elsewhere in the Trial Judgement undermine its position that the Trial Chamber disregarded relevant evidence or findings in concluding that the elements required under Article 4(2)(c) of the ICTY Statute had not been established in respect of the Count 1 Municipalities. Therefore, this contention is dismissed."), 744 ("The Appeals Chamber notes that the Trial Chamber, when assessing genocidal intent, did not discuss statements made by Mladić and Plavšić in Prijedor. Nevertheless, recalling the presumption that the Trial Chamber has evaluated all the evidence presented to it, and reading the Trial Judgement as a whole, the Appeals Chamber observes that this evidence was addressed elsewhere in the Trial Judgement. [...] The Appeals Chamber is therefore not convinced that the Trial Chamber ignored this evidence."). The Appeal Judgement further reflects instances where the Appeals Chamber made findings based on the "totality of the evidence". *See* Appeal Judgement, paras. 396, 551, 577.

[2128] Trial Judgement, paras. 2448, 2451, 2454, 2486, 2491, 2493, 2507, 2514, 2522, 2542, 5609, 5610, 5615.

[2129] The Trial Chamber referred to Scheduled Incident C.27.5 along with other Scheduled Incidents in support of its findings that some detainees were cut and stabbed. *See* Trial Judgement, para. 2486, *referring to* Scheduled Incidents C.1.2, C.6.1, C.6.2, C.10.1, C.20.2, C.20.4, C.21.2, C.25.1, C.27.1, C.27.4, C.27.5. The Trial Chamber relied on Scheduled Incidents C.27.5 and C.22.5 when it found that: (i) detainees were punched, kicked, and beaten often severely with whatever device could be found, including chains, batons, bats, clubs, rifle butts, machine guns, heavy wooden sticks, iron tubes, steel rods, wooden planks, poles, thick plastic pipes, cables, rubber hoses, stakes, chair legs, and brass knuckles (Trial Judgement, para. 2491, *referring to* Scheduled Incidents C.2.1, C.6.1, C.6.2, C.7.2, C.10.1, C.11.2, C.15.1, C.15.2, C.20.2, C.20.3, C.21.3, C.25.1-C.25.3, C.26.1, C.26.3, C.27.2, C.27.4-C.27.7); and (ii) detainees were also subject to verbal and mental abuse, intimidation, and threats, including threats that they would be killed (Trial Judgement, para. 2493, *referring to* Scheduled Incidents C.4.1, C.6.1, C.6.2, C.7.2, C.10.1, C.10.2, C.10.5-C.15.2, C.15.3, C.19.2, C.20.1, C.20.2, C.20.4, C.21.1, C.21.3, C.25.2, C.25.3, C.26.3, C.27.1, C.27.4-C.27.6). The Trial Chamber referred to Scheduled Incident C.22.5 along with other Scheduled Incidents in support of its findings that: (i) conditions of detention were characterised by insufficient or restricted access to water (Trial Judgement, para. 2507, *referring to* Scheduled Incidents C.1.2, C.4.1, C.11.1, C.17.1, C.18.1, C.20.2, C.20.4, C.20.5, C.22.1, C.22.2, C.22.5, C.21.3, C.25.3); (ii) a large number of Bosnian Muslim and Bosnian Croat civilians were detained by members of Serb Forces and Bosnian Serb Political and Governmental Organs in detention facilities in Sanski Most (Trial Judgement,

violation of the laws or customs of war, the Trial Chamber relied on Scheduled Incidents B.20.4 and B.13.1 alongside other Scheduled Incidents *vis-à-vis* its findings concerning the intent of the perpetrators[2130] and the status of the victims.[2131] Moreover, the Trial Chamber referred to Scheduled Incident E.11.1 together with other similar events in its legal findings on murder and extermination as crimes against humanity and murder as a violation of the laws or customs of war, when describing the circumstances of the killings of Bosnian Muslim males.[2132]

782. Viewed in this context, it is clear that the Trial Chamber's assessment of the evidence and its legal conclusions did not follow from evaluation of the evidence underpinning the findings in relation to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1 in isolation. In my view, considering the Trial Judgement as a whole, as the Appeals Chamber has done in relation to other Grounds of appeal, the record offers sufficient corroboration, based on a pattern of similar conduct, in relation to these events.[2133] In addition, I respectfully consider that the Majority read the relevant

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para. 2522, *referring to* Scheduled Incidents C.22.1-C.22.5); and (iii) Bosnian Muslims had their money, identification documents, jewellery, and valuables taken away from them on arrival at detention facilities (Trial Judgement, para. 2542, *referring to* Scheduled Incidents C.1.2, C.6.1, C.7.2, C.10.1, C.15.2, C15.3, C.20.2, C.20.5, C.21.1, C.22.5, C.25.2, C.25.3, C.26.3, C.27.2, C.27.6).

[2130] The Trial Chamber referred to Scheduled Incident B.20.4 in finding that in the detention facilities the victims were shot by Serb Forces during their detention. *See* Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.10.1, B.12.1, B.15.1, B.15.4, B.15.5, B.16.2, B.18.1, B.18.3, B.20.1, B.20.2, B.20.3, B.20.4. The Trial Chamber referred to Scheduled Incident B.13.1 in finding that the victims died as a result of severe beatings by Serb Forces during their detention. *See* Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.1.4, B.2.1, B.4.1, B.8.1, B.12.1, B.12.1, B.13.1, B.15.2, B.15.5, B.18.1.

[2131] The Trial Chamber referred to Scheduled Incidents B.13.1 and B.20.4 in finding that the victims "were killed after being detained by Serb Forces in scheduled detention facilities". Trial Judgement, para. 2454, *referring to* Scheduled Incidents A.10.8, B.1.1-B.1.4, B.2.1, B.4.1, B.5.1, B.8.1, B.10.1, B.12.1, B.12.2, B.13.1, B.15.1-B.15.6, B.16.1, B.16.2, B.18.1-B.18.3, B.20.1-B.20.4.

[2132] *See* Trial Judgement, paras. 5609 (*referring to* Scheduled Incidents E.1.1, E.3.1, E.4.1, E.5.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.1, E.9.2, E.10.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3), 5610 (*referring to* Scheduled Incidents E.4.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3), 5615 (*referring to* Scheduled Incidents E.1.1, E.3.1, E.4.1, E.5.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.1, E.9.2, E.10.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3.).

[2133] For instance, the Trial Chamber found in Scheduled Incidents C.27.5 and C.22.5 that Bosnian Serb Forces mistreated Bosnian Muslims and Bosnian Croats detained in detention centres, subjecting them to threats, severe beatings, and stabbing them. Trial Judgement, paras. 1329-1333, 2019-2024. The Trial Chamber's findings of other Scheduled Incidents reveal that, in similar circumstances, Bosnian Muslim and Bosnian Croat detainees held in detention centres across the Overarching JCE Municipalities were subjected to comparable mistreatment and harsh conditions by Bosnian Serb forces, which stabbed or beat them. *See* Trial Judgement, paras. 2486-2492, 3443-3445. *See also* Trial Judgement, paras. 769-780 (Scheduled Incident C.6.2), 889-903 (Scheduled Incident C.10.1), 998-1001 (Scheduled Incident C.21.2), 1009-1021 (Scheduled Incident C.21.3), 1160-1167 (Scheduled Incident C.25.1). Moreover, in relation to Scheduled Incidents B.20.4 and B.13.1, the Trial Chamber found that, in detention centres, detainees were shot during their detention or died as a result of severe beatings by Serb Forces, respectively. *See* Trial Judgement, paras. 1347-1349, 2153-2155. These findings are corroborated by evidence underpinning the findings reached in relation to other Scheduled Incidents concerning the Overarching JCE Municipalities, where detainees in other detention centres, including civilians and combatants *hors de combat*, were found to have been shot by Serb Forces or died as a result of the beatings. *See* Trial Judgement, paras. 2446-2448, 2451, 3443-3445. *See also* Trial Judgement, paras. 658-661 (Scheduled Incident B.2.1), 769-780 (Scheduled Incident B.4.1), 812-823 (Scheduled Incident B.5.1), 1168-1170 (Scheduled Incident B.18.3), 1202-1207 (Scheduled Incident B.18.1) 1523-1529 (Scheduled Incident B.10.1), 1757-1768 (Scheduled Incident B.15.2), 1779-1781 (Scheduled Incident B.15.4), 1806-1815 (Scheduled Incident B.15.1), 1824-1829 (Scheduled Incident B.15.5). As to Scheduled Incident E.11.1, the Trial Chamber found that, following the fall of Srebrenica, members of the Bosnian Serb Forces shot and killed two Bosnian Muslim men near the town of Snagovo on 14 July 1995. Trial Judgement, paras. 5477-5481. The Trial Chamber's

evidence, that the Trial Chamber relied upon, in a selective manner, and I cannot agree that the witness's account that two persons were murdered is not corroborated by the forensics confirming the death of one of these persons.[2134]

783. For the foregoing reasons, I do not agree with the Majority's conclusion that it has been demonstrated that Karadžić's convictions on the basis of Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1, or any of the other Scheduled Incidents identified in this ground of appeal, rely solely or decisively on untested evidence.

B. Separate Concurring Opinion on Ground 40

784. Based on a thorough analysis of a large number of evidentiary elements, the Trial Judgement found beyond reasonable doubt that Karadžić agreed to the expansion of the purpose of the Srebrenica JCE to include the killing of able-bodied Muslim boys and men of Srebrenica, and that, through his acts and omissions, he significantly contributed to the expanded purpose.[2135] The Appeals Chamber has found no errors in these findings.[2136]

785. The Appeals Chamber determined that the Trial Chamber committed no error in concluding that the only reasonable inference from the totality of the evidence was that Karadžić had ordered the detainees to be transferred to Zvornik.[2137] While otherwise agreeing with the analysis on this matter, I would like to set out my views with regard to the finding in relation to one of its evidentiary elements, namely the intercepted phone call between Karadžić and Deronjić on 13 July 1995 at around 8:10 p.m.[2138]

786. The transcript of the intercepted phone call shows that Karadžić, using coded words for detainees and Bratunac, instructed Deronjić that the detainees who were being held in Bratunac be moved "somewhere else".[2139] The Trial Chamber found that, during the intercepted call, Karadžić "conveyed to Deronjić the direction that the detainees should be transferred to Zvornik".[2140] The

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findings of other Scheduled Incidents show that in similar circumstances, Muslim men were shot by Bosnian Serb forces, in the area around Srebrenica and during the same time period. *See* Trial Judgement, paras. 5609, 5610, 5615, 5744. *See also* Trial Judgement, paras. 5146-5154 (Scheduled Incident E.5.1), 5223-5239 (Scheduled Incident E.3.1), 5287-5291 (Scheduled Incident E.4.1), 5482-5490 (Scheduled Incident E.12.1).

[2134] The Trial Chamber based its findings regarding Scheduled Incident B.13.1 on the witness statement of Mirsad Smajš (Trial Judgement, paras. 2153-2155, *referring to* Exhibit P43, pp. 2, 3). As the forensic evidence regarding Scheduled Incident B.13.1 supports the death of Zlatan Salčinović (Trial Judgement, para. 2154, *referring to* Exhibit P4853, p. 89), the witness statement of Mirsad Smajš, describing a single and consistent process and not two different incidents, is corroborated.

[2135] Trial Judgement, paras. 5814, 5830, 5831, 5849, 5850, 5851, 5998.

[2136] Appeal Judgement, paras. 573, 586, 587, 598, 600, 601, 609, 612, 613, 619-623.

[2137] Appeal Judgement, para. 600.

[2138] Trial Judgement, paras. 5710, 5772, 5805, 5811, 5814, 5829, 5830. *See also* Appeal Judgement, para. 600.

[2139] Trial Judgement, para. 5772, *referring to, inter alia*, Exhibit P6692.

[2140] Trial Judgement, para. 5773.

Trial Chamber based this finding on Prosecution Witness Momir Nikolić's evidence that he heard Deronjić say at a subsequent meeting with Beara and others that Karadžić had instructed him that all detainees should be transferred to Zvornik.[2141]

787. I find that a reasonable trier of fact could not exclude as an alternative reasonable inference of the evidence that Deronjić, at the meeting with Beara, had invoked Karadžić's authority to promote his own preference for Zvornik as the most suitable execution site and that Karadžić approved this transfer at a subsequent stage, for instance, during his meeting with Deronjić the following morning.[2142]

788. This alternative inference is in accordance with the Trial Chamber's conclusion that "[t]he Chamber is thus satisfied that the Accused's order to move [...] Bosnian Muslim males of Srebrenica enabled their transfer to Zvornik, where they were ultimately killed."[2143]

789. The said modification, in my opinion, does not affect the Appeals Chamber's conclusion that the Trial Chamber did not err in finding that Karadžić had agreed and significantly contributed to the Srebrenica JCE.

Done in English and French, the English version being authoritative.

Done this 20th day of March 2019,
At The Hague,
The Netherlands

Judge Vagn Joensen

[Seal of the Mechanism]

[2141] Trial Judgement, para. 5712.
[2142] Trial Judgement, paras. 5807, 5808.
[2143] Trial Judgement, para. 5818.

VIII. PARTIALLY DISSENTING OPINION OF JUDGE DE PRADA

790. I respectfully disagree with the Majority's conclusion concerning Grounds 1, 2, 3, and 4 of the Prosecution's appeal. Moreover, I attach to this Judgement a separate dissenting opinion setting out my position in this regard. In my opinion, the Appeals Chamber should have granted Grounds 1, 2, and 3 and dismissed Ground 4 of the Prosecution's appeal.

A. Dissenting Opinion on Grounds 1, 2, and 3 of the Prosecution's Appeal

1. Common Aspects on General Evidentiary Principles

791. Regarding the "General Evidentiary Principles" contained in paragraphs 8 to 10 of the Trial Judgement and specifically the evidentiary assessment and the standard of proof applicable, I would like to make the following considerations.

792. In first instance, taking as premise that one of the principal functions and basic principles of any criminal trial is to find out the truth about a crime or crimes, always within a framework of strict procedural safeguards, it is of paramount importance to examine the different mechanisms that establish the rules of evidence and procedure that would be appropriate to ascertain a "judicial truth" as the overriding aim of the criminal justice system.[2144] Among them, we can find the following: the rules of admission or exclusion of evidence, the standard of proof, the benefit of the doubt, the presumption of innocence, the burden of proof, etc.

793. Concerning the standard of proof for the trier of facts, the lack of a single universal standard of proof common to all legal systems and jurisdictions, has to be addressed. We typically distinguish between the standard applicable to common law and civil law systems. In the first case, there is traditionally the standard of "Beyond Reasonable Doubt" ("BRD"), which permeated with different names (*e.g. in dubio pro reo*) and nuances in a great part of the civil law systems, in their pursuit for the highest objective standard of proof to substitute the subjectivism inherent to moral certainty.

794. Nevertheless, the BRD standard does not satisfy all desired expectations of clarity, determination, and objectivity. It generates many interpretative doubts even regarding basic terms that constitute the core of the concept's descriptive definition.[2145]

[2144] We should take into consideration that truth gains a special relevance in criminal proceedings related to transitional contexts, as it is the present case, in which the victims' rights to truth, justice reparation, and non-repetition prevail.
[2145] *See* T. Mulrine, *Reasonable Doubt: How in the World Is It Defined?*, American University International Law Review (1997), at 12(1); L. Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology (Cambridge

795. In this respect, it is of paramount relevance to carefully differentiate the use of BRD by juries from that of professional judges, of whom legal knowledge and professional practice is expected and who should implicitly have, at least in theory, better, more sophisticated, systematic, and complete skills of evidence analysis.[2146]

796. The legal obligation of professional judges to provide a reasoned opinion acts as a complementary guarantee in this matter. This also implies, apart from making public his general line of reasoning, the possibility of a vertical control of his opinions (evidentiary findings) on appeal.

797. Neither the ICTY Statute, the Statute of the Mechanism, nor the Rules of Procedure and Evidence of both tribunals establish with clarity what is the standard of proof applicable for a trier of facts, limiting themselves to establish general principles that should serve all judges as a guideline. In contrast to the ICC Statute,[2147] the only reference contained in the ICTY Statute is that of Articles 19 and 21(3), which provide that "the accused shall be presumed innocent until proven guilty according to the provisions of the Statute". Rules 89(B) of the ICTY Rules and 105(B) of the Rules of the Mechanism establish that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Only Rule 87(A) of the ICTY Rules and Rule 104(A) of the Rules of the Mechanism contain a reference to the standard of proof of BRD: "A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt".

798. Notwithstanding, the relevance of BRD as the standard of proof applicable to trier of facts is well established in the jurisprudence of both the ICTR and the ICTY.

799. Of special relevance are the characteristics and high professional requirements that according to the Statutes of the ICTY, ICTR, and Mechanism judges must comply and taken into account in the composition of trial and appeal chambers.[2148]

University Press, 2006); L. Laudan, *Por qué un estándar de prueba subjetivo y ambiguo no es un estándar*, DOXA, Cuadernos de Filosofía del Derecho 28 (2005); J. Igartua Salaverría, *Prolongaciones a partir de Laudan*, DOXA, Cuadernos de Filosofía del Derrecho 28 (2005); M. Taruffo, *Tres observaciones sobre "Por qué un estándar de prueba subjetivo y ambiguo no es un estándar", de Larry Laudan*, DOXA, Cuadernos de Filosofía del Derecho 28 (2005).

[2146] Michelle Taruffo, La rueba de los Hechos (Editorial Trotta, 2002).

[2147] ICC Statute, Article 66 (Presumption of innocence) ("1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.").

[2148] Article 9 (Qualification of Judges) of the Statute of the Mechanism provides:

800. In addition, Article 23(2) of ICTY Statute and Article 21(2) of the Statute of the Mechanism impose the requirement upon Judges to provide a written reasoned opinion of their judgements.[2149] This is also required under Rules 98 *ter*(C)(5) and 117(B) of the ICTY Rules and Rules 122(C) and 144(B) of the Rules of the Mechanism.

801. This implies the legal obligation for trial and appeals chambers to express in writing their legal grounds as well as factual arguments and especially those related to the evidentiary assessment on which they base their Judgements.

802. For this reason, according to my opinion, there is no doubt on the design of the accused's guarantees contained in both Statutes: the accused enjoys the benefit of the presumption of innocence at all time during the process, the burden of proof lies on the Prosecution, only legally valid evidence is admissible, and BRD is the standard of proof applicable for trier of facts.

803. This model, however, is characterized by the fact that the BRD standard has to be applied by professional judges, and although this does not modify its general meaning, judges have to comply with a high level of specialization and sophistication in their evidentiary assessment as well as keep record of the reasoning of their decision in the Judgement.

804. In addition to these general considerations, there are several important evidentiary issues which occur in practice regarding the BRD application to concrete cases.

805. The BRD standard is not exactly equivalent to the non-existence of an alternate inference that could be accepted as reasonable, but rather that the outcome of the evidentiary analysis that has been reached is beyond a reasonable doubt.

806. This implies that the opinion of a professional judge cannot be circumscribed to a mere fragmented, superficial, or limited evidentiary assessment; nor can he, in order to establish his criterion, simply conform to a mere observation of the existence of a mere inference or alternative hypothesis that could be reasonable in abstract. In my opinion, his analysis should cover, and thus should be expressed in the reasons, if this possible (and reasonable) alternative inference has the

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1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.

2. In the composition of the Trial and Appeals Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

[2149] P.A. Ibañez, *Sobre prueba y motivación*, Revista de la Asociación de Ciencias Penales, 25 (2008), at pp. 20-40.

real power to generate in the judge a reasonable doubt in a manner that he would not be able to express a judgement of certainty in his reasoning.

807. Thus, according to my view, the test of on the assessment of evidence conducted by the Trial Chamber and expressed in paragraph 10 of the Trial Judgement[2150] does not seem useful:

> When the Prosecution relied upon proof of a certain fact such as, for example, the state of mind of an Accused by inference, the Chamber considered whether that inference was the only reasonable inference that could have been made based on that evidence. Where that inference was not the only reasonable inference, it found that the Prosecution had not proved its case.

808. In my opinion, this represents a simplistic analysis of evidence that does not satisfy the reasonableness standard corresponding to professional judges, who have the obligation to justify why a concrete possible alternative inference can cause a reasonable doubt. A court decision would only be legitimate when the alternative inference is recognised as a veritable reasonable doubt, being this one: well-reasoned, responding to an evident reasonableness standard, and allowing the mechanisms for its control. On the other hand, control (procedural and extra-procedural) would only be possible if the reasoning is published, thus being impossible to exert any control of any non-written reasoning (that remains in the minds of the judge).

809. The criteria established in paragraph 10 of the Trial Judgement is the standard of proof applied by the Trial and Appeals Chambers regarding the mental state of Karadžić. Therefore, in my opinion, the Trial and Appeals Chambers erred when they found evidence insufficient to demonstrate, with respect to other proven acts of persecution charged in Count 3 of the Indictment, as well as to the crimes of murder and extermination as charged in Counts 4, 5, and 6 of the Indictment or "Excluded Crimes", that these crimes were included in the common plan or intended by Karadžić.

2. Ground 1 of the Prosecution's Appeal

810. In this Judgement, the Majority has found that the Trial Chamber did not commit any error in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE. The Majority has also found unnecessary to consider the Prosecution's argument that the erroneous conclusion on the scope of the common purpose led to a flawed genocidal intent analysis, dismissing Ground 1 of the Prosecution's appeal.

811. In my opinion, the Trial Chamber erred when it found insufficient evidence to demonstrate that the Excluded Crimes were included in the common plan or intended by Karadžić.[2151]

[2150] Trial Judgement, para. 10, *referring to Vasiljević* Appeal Judgement, para. 120.

812. The Trial Chamber found insufficient evidence to demonstrate that this is the only reasonable inference and that another reasonable available inference that could be drawn from the evidence was that, while Karadžić did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.[2152]

813. In my view, this argumentation of the evidence assessment is clearly insufficient as it does not satisfy the required reasonableness standard. Paragraphs 3466, 3512, and 3521 of the Trial Judgement on which the Trial Chamber based its reasoning and which the Majority[2153] adopts in this Judgement, do not contain any explanation that justifies a true reasonable doubt. Apparently, they limited themselves to affirm the existence of an alternative inference, which is not the same as a reasonable doubt, but, in my opinion, they did not sufficiently analyse if this alternative inference is truly contradictory or incompatible[2154] with the inference that appears as the most likely finding - principal hypothesis or conclusion- resulting from a holistic evidentiary analysis, or if it can be undermined by other concurrent alternative inferences that support the principal conclusion. An alternative inference can either generate a true reasonable doubt or not depending on the circumstances and the strength of the principal conclusion, given the force of all existing relevant evidence.

814. The possibility of establishing with less evidential effort an alternative inference that would allow to establish the criminal liability under the third form of joint criminal enterprise ("JCE III"), does not allow us to renounce or verify if after a complete and thoughtful evidence analysis we can establish a principal inference, that could also be of the first form of joint criminal enterprise ("JCE I), and would resist any reasonable doubt. The precise determination of the criminal liability is critical in the reasoning standard. It allows to complete the necessary legal analysis to ascertain the fulfillment of the elements and requirements of the applicable crimes. In the present case, concerning two separate mental elements of the crime of genocide (Count 1 of the Indictment), the Excluded Crimes gain a singular relevance.

815. Following the legal categories established in the jurisprudence after the *Tadić* Appeal Judgement regarding the interpretation of Article 7(1) of the ICTY Statute, the matter is centered in whether a first scenario occurs which involves a conspiracy where all members – Karadžić included

[2151] On the ambiguous meaning of the concept of intent as an element of *mens rea* and on the existence of a common initial plan and its evolution and successive adaptation as the most plausible logical proposal, *see infra* paras. 835, 836.
[2152] Trial Judgement, para. 3466.
[2153] Appeal Judgement, para. 669. *See supra* n. 2147.
[2154] The Prosecution contends that this alternative inference is consistent with shared intent and the Trial Chamber erred by concluding that it foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes.

– carry the intent to commit the crimes, although the criminal action is only executed by one or more members of the conspiracy; or if instead a second scenario takes place where the participant – Karadžić – is committed to the goals of a joint criminal enterprise and becomes liable for the foreseeable criminal acts of other participants even if the criminal acts in question were not part of the agreement.

816. The problem arises precisely in particularly complex situations in which it is difficult to identify conditions, in addition to the difficulties derived from the evidence analysis. I refer, beyond the common purpose, explicit and easily identifiable, to other less public aspects of which it is accompanied, upon which an agreement also exists. We can differentiate among these purposes, those which are perfectly foreseeable, being the necessary consequences of the means used, as well as those which are purely foreseeable. On the other hand, it has to be taken into account that an initial common purpose can be modified, and an escalation in the use of violence and thus in its consequences can take place, conducing to the renewal of the agreement on the new situation of existing violence.[2155] It is also of great importance the distinction between top, mid, and low-level perpetrators as well as between principal and secondary forms of participation.

817. Since this is not the place to give a solution to all the possible situations that may arise, I will limit my arguments to some factual legal explanations for my reasons to consider that the exclusion of these crimes from the common purpose, or at least from their consideration, as part of liability under JCE I, was incorrect. In first instance, I would like to point out some of the Trial Chamber's findings that I consider especially relevant in the analysis of the situation:

(i) The position of Karadžić, at the apex of Bosnian Serb civilian and military power. Karadžić through his position played an essential role in four interconnected joint criminal enterprises involving crimes committed throughout Bosnia and Herzegovina ("BiH") over the entire conflict.[2156]

[2155] *Krajišnik* Trial Judgement, para. 1118 ("The Chamber finds that, whereas in the early stages of the Bosnian-Serb campaign the common objective of the JCE was discriminatory deportation and forced transfer, soon thereafter it became clear to the members of the JCE, including the Accused, that the implementation of the common objective involved, as a matter of fact, the commission of an expanded set of crimes. These crimes came to redefine the criminal means of the JCE's common objective during the course of the indictment period. In accordance with the reasoning set out earlier in this section, acceptance of this greater range of criminal means, coupled with persistence in implementation, signalled an intention to pursue the common objective through those new means. As this is an evidentiary matter, the Chamber's conclusion does not exclude the possibility that the 'original' crimes of the common objective were not limited to deportation and forced transfer. To speak of an increase in criminal means is only to say that the evidence confirms that at the given point in time indicated by the evidence the accepted means were what they were.").

[2156] *See, e.g.*, Trial Judgement, paras. 2, 3447, 3462-3464, 3493 ("The Chamber found that during the time period relevant to the Indictment, the Accused was the highest authority in the VRS chain of command. Prior to its establishment, the Accused had *de jure* authority over the [Territorial Defence] and took steps to create a hierarchical

(ii) In the latter half of 1991, before the outbreak of the conflict, Karadžić, in several conversations and public speeches threatened Muslims with the very types of crimes that the Trial Chamber excluded from the common purpose.[2157]

(iii) Karadžić and the Bosnian Serb leadership's objective was to create an ethnically pure Bosnian Serb state as well as contiguous Serb areas and they were prepared to use force and violence against non-Serbs to achieve their permanent removal objective and knew that violence would be necessary to achieve it.[2158] The Trial Chamber also found that the Karadžić and the Bosnian Serb leadership were aware and put on notice that the objective of ethnic separation would result in violence given the extent to which the population in BiH was intermixed and yet still proceeded to pursue this objective.[2159]

(iv) Karadžić, following up on his threats, formulated and promoted a policy of ethnic separation[2160] and "not only did the [he] formulate and promote these policies, the [Trial] Chamber [found] that he was adamant that he would not allow anything to stop the Bosnian Serbs from achieving their objectives".[2161]

(v) Karadžić developed an ideology "loaded with Serb nationalism" and "the importance of creating an ethnically homogeneous Serb state",[2162] "promot[ing] the idea that the Bosnian Serbs could not live together with the Bosnian Muslims and Bosnian Croats and formed the foundation for the separation of the three people and the creation of a Serb state",[2163] creating an amplified narrative of the historic grievances for the Serb people,[2164] generating "fear and hatred of Bosnian Muslims and Bosnian Croats", and "exacerbating ethnic

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command and control structure, which included some municipal Crisis Staffs over which he had authority. According to the Bosnian Serb Constitution and the Law on the Army, as Supreme Commander, the Accused had the authority to, *inter alia*: (i) appoint, promote, and dismiss VRS officers in accordance with the law; (ii) appoint and dismiss presidents, judges, and assistant judges of military courts and military prosecutors; (iii) issue regulations prescribing internal order and relations in the military service; and (iv) issue regulations on military training and discipline. The Chamber also found that the Accused had de jure authority over the MUP, which he exercised in fact. The Chamber finds that in light of his position of authority over the VRS, [Territorial Defence], Crisis Staffs, and MUP [...]."), 3505, 3511, 3512, 3524, 3840, 4809, 4891, 4937-4939, 5849, 5850, 5992, 5993, 5996-5999, 6001-6010, 6022, 6046, 6071, 6502.

[2157] *See, e.g.*, Trial Judgement, paras. 2675- 2680, 2707, 2708, 2710-2712, 2716.

[2158] Trial Judgement, paras. 2599 ("The record shows that the Bosnian Serbs were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives and assert their historic territorial claims."), 2846 ("The Chamber also finds that the Accused and Bosnian Serb leadership were aware and put on notice that the objective of ethnic separation would result in violence given the extent to which the population in BiH was intermixed and yet still proceeded to pursue this objective.").

[2159] Trial Judgement, para. 2846.

[2160] Trial Judgement, paras. 2841, 3476.

[2161] Trial Judgement, para. 3467.

[2162] Trial Judgement, para. 3475.

[2163] Trial Judgement, para. 3485.

[2164] Trial Judgement, paras. 2596, 2598, 2599.

divisions and tensions in BiH".[2165] The Trial Chamber found that these speeches and statements went beyond mere rhetoric and formed a core element in the policies and plans developed by the Karadžić and the Bosnian Serb leadership.[2166] In another paragraph, the Trial Chamber emphasized: "While the Accused publicly claimed that he had no influence over the issue of war, it was clear that he envisaged that in a war, there would be bloodshed and all the communities would flee towards their 'fully homogeneous' areas. In contrast to public statements where the Accused foreshadowed what could happen, [...] the Accused was not simply foreshadowing what he thought could happen, he was outlining the pattern which was actually put into practice.".[2167]

(vi) In implementing the common purpose, Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organised pattern of crimes involving the Excluded Crimes of murder, cruel treatment, sexual violence and wanton destruction,[2168] throughout the Overarching JCE Municipalities.[2169] The purpose was not only the permanent removal of Bosnian Muslims and Bosnian Croats to create an ethnically pure Bosnian Serb state. Other purposes were established, such as, the discrimination against Bosnian Muslims and Bosnian Croats on the basis of their identity.[2170]

(vii) Karadžić "played the most important role" in preparing the structure used for the implementation of the common purpose.[2171]

(viii) The same Excluded Crimes formed part of the *actus reus* of the JCE I Crimes[2172] of forcible transfer and deportation. The Trial Chamber established that the Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities were forcibly displaced. For this

[2165] Trial Judgement, paras. 2590, 2660, 2661.
[2166] Trial Judgement, para. 3487.
[2167] Trial Judgement, para. 2846.
[2168] Trial Judgement, paras. 622, 624, 1250-1258, 1269, 1298-1301, 1307, 1311, 1315, 1318-1320, 1324-1328, 1332-1333, 1335-1338, 1341-1346, 1349, 1351-1353.
[2169] *See* Trial Judgement, paras. 670-672, 728-732, 738-749, 784, 785, 1039, 1128-1151, 1219, 1456-1462, 1464-1466, 1912, 2039, 2469, 2470, 2478, nn. 2166, 8335, 8339.
[2170] Trial Judgement, para. 3465 ("With respect to these underlying acts of persecution, the Chamber also finds that the Accused and the Overarching JCE members shared the specific intent to discriminate against the Bosnian Muslims and Bosnian Croats on the basis of their identity.").
[2171] *See, e.g.*, Trial Judgement, paras. 2895, 3437 ("the Accused issued the Variant A/B Instructions in December 1991 to ensure preparations at the municipal level for the establishment of an ethnically homogeneous separate state. The Chamber found above that these instructions were central in terms of furthering the objectives of the Accused and the Bosnian Serb leadership from December 1991 onwards. The Chamber found that the structures and organs created pursuant to the Variant A/B Instructions—first and foremost the Crisis Staffs—played a central role in preparing for, and carrying out, the Bosnian Serb take-overs in the Municipalities and in maintaining Bosnian Serb authority and power after the take-overs were completed."), 3439, 3475, 3483.
[2172] According to the Trial Chamber, the scope of the Overarching JCE includes the crimes of deportation, inhumane acts (forcible transfer), persecution (forcible transfer and deportation), and persecution through the underlying acts of

purpose, it took into account the surrounding circumstances in the Overarching JCE Municipalities "and found that the Bosnian Muslims and Bosnian Croats were displaced as a result of physical force, threat of force, or coercion. Others fled out of fear. This fear was caused by ongoing violence and various crimes committed against non-Serbs including *inter alia*, killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments."[2173] The Excluded Crimes were not random, unplanned or isolated. Rather, they formed part of a "systematic and organised pattern of crimes" committed in the Overarching JCE Municipalities.[2174]

(ix) Karadžić was perfectly aware from the first moment as he was promptly, repeatedly and well informed, that Serb forces were using Excluded Crimes to implement the common purpose.[2175]

(x) Notwithstanding, Karadžić did not use his immense authority to put a stop to these crimes,[2176] and instead, he encouraged them by pursuing a policy of non-punishment for

unlawful detention and the imposition and maintenance of restrictive and discriminatory measures ("JCE I Crimes"). *See* Trial Judgement, para. 3466.

[2173] Trial Judgement, para. 2468.

[2174] Trial Judgement, para. 3445.

[2175] Trial Judgement, paras. 3515 ("Based on the nature of the common plan and the manner in which it was carried out, the Chamber considers that it was foreseeable to the Accused that Serb Forces might commit violent and property-related crimes against non-Serbs during and after the take-overs in the Municipalities and the campaign to forcibly remove non-Serbs."), 3516 ("The Chamber considers that in light of his knowledge of crimes committed in the Municipalities, the Accused was aware of the environment of extreme fear in which non-Serbs were forced to leave and of other acts of violence committed by Serb Forces against non-Serbs during the campaign of forcible displacement."), 3363 ("Based on the evidence set forth above, the Chamber finds that the Accused was promptly and well informed of the forced displacement of non-Serb civilians from the Municipalities by Serb Forces from as early as April 1992. He continued to learn of such displacements throughout the conflict. In addition, he learned of other types of criminal activity committed against the non-Serb population by Serb Forces, including killings, rapes, and property related offences, from the beginning of April 1992 onwards.").

[2176] Trial Judgement, para. 3410 ("The Chamber considers that while the Accused and his subordinates issued orders during the conflict regarding respect for international humanitarian law, the rampant criminal acts being committed against non-Serbs in the Municipalities continued. The Accused continued to learn about the commission of serious crimes committed by Serb Forces against non-Serbs throughout the conflict and yet he continued to issue the same type of generic orders. He made no efforts to ensure that these orders were implemented on the ground so as to generate a positive effect on the prevention of crime. The Chamber therefore finds that these orders are not reflective of genuine efforts to prevent such crimes."), 3501("The Chamber considers that the Accused's failure to exercise his authority to adequately prevent or punish crimes committed against non-Serbs signalled to Serb Forces and Bosnian Serb Political and Governmental Organs that criminal acts committed against non-Serbs were tolerated throughout the period of the Overarching JCE. In light of this, his failure to take adequate steps to prevent and punish criminal activity committed against non-Serbs in the Municipalities had the effect of encouraging and facilitating the JCE I Crimes. The Chamber further finds that the Accused's failure to prevent and punish crimes committed by Serb Forces against non-Serbs and his tolerance for such crimes demonstrate a failure on his part to take adequate steps to ensure that Serb Forces and Bosnian Serb Political and Governmental Organs would act to protect Bosnian Muslims and Bosnian Croats residing in areas under their control.").

JCE I Crimes and Excluded Crimes[2177] alike and rewarded perpetrators.[2178] Furthermore, he publicly denied the serious situation.[2179]

(xi) Karadžić continued to pursue the common purpose for over three years without altering his policies.[2180]

818. The above findings bring to light a scenario of extreme violence, among them the Excluded Crimes, against Bosnian Muslim and Bosnian Croat victims, in a general policy of permanent removal of these populations in order to obtain the ethnic homogeneity of certain territories under Bosnian Serb control. This took place over a long period of time, during which Karadžić was promptly informed of these crimes. However, despite his position as the highest political and military authority, not only did he omitted to exert his authority to prevent or avoid the Excluded Crimes, he even concealed and encouraged them by pursuing a policy of non-punishment and rewarding the perpetrators.

819. From an evidentiary assessment point of view, it seems reasonable to conclude, for being a quite wide inference, that it is not proven beyond a reasonable doubt that the Excluded Crimes were deliberately planned in the initial common purpose that Karadžić shared with other members of the Overarching JCE and who decided or planned (intended) those crimes, as members of the initial intent. However, it does not seem reasonable at all, and is even incongruent with the obtained findings, to establish as an alternative inference an inference in which the only participation generating criminal liability that can be ascribed to Karadžić is that he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.

820. This analysis does not take into consideration certain facts of extraordinary relevance that were previously expressed and consequently legally assessed. This is not a situation of mere

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[2177] Trial Judgement, para, 3415 ("In relation to crimes committed by Bosnian Serbs against non-Serbs, authorities either failed to investigate or actively prevented investigations or prosecutions.").
[2178] Trial Judgement, paras. 3428, 3432.
[2179] Trial Judgement, paras. 3503 ("The Chamber found the many different ways in which the Accused, having been informed of crimes in the Municipalities, provided misleading information to representatives of international organisations, the public, and to the media in relation to these crimes. He covered up, for instance, the severity of the conditions in detention facilities, and he deflated criticism expressed by internationals in relation to claims of 'ethnic cleansing' by claiming that non-Serbs were leaving 'out of fear'. The Chamber found a clear disjuncture between the manner in which the Accused defended the actions of the Bosnian Serbs in international settings and press conferences and the reality on the ground, of which he was fully aware. In statements and speeches, the Accused created a narrative for an international audience in which the Bosnian Serbs would not be blamed for the movement of the non-Serb population."), 3356 ("On 2 April 1993, the Accused was present at the Bosnian Serb Assembly when it was reported that Foča was completely under Bosnian Serb control. At the same session, he acknowledged that 'we could not swear that there are no crimes' and that Serbs who committed crimes should be tried. However, the Accused claimed that he had only heard of 18 allegations of rape, but the propaganda had turned this into 18,000 cases of rape."), 3378, 3379.
[2180] Trial Judgement, para. 3487.

passivity before the Excluded Crimes, as merely foreseeable events. The findings of the Trial Chamber show other conclusions: the Excluded Crimes were not committed in a single isolated occasion, but during a determined lapse of time, in a framework of gradual escalation of violence until it became systematic and generalized, and as part of a wide plan that comported other crimes of extraordinary violence and similar characteristics carried out as means to the consecution of the end of ethnic cleansing of the territories under Bosnian Serb control. Karadžić and other members of the joint criminal enterprise had, from the beginning, knowledge of all of this. Despite Karadžić's position at the apex of power, knowing that these crimes were being committed, he instead encouraged them, publicly denied them, and rewarded the perpetrators.

821. It does not seem reasonable to affirm the existence of a sole agreement regarding a common purpose and that it remained unchanged over time, that it absolutely closed and excluded the perpetration of certain crimes as a means to achieve the implementation of the established plan. The most plausible hypothesis is that during the development of the events, different decisions were taken before new and changing situations occur, motivated by the development of war and the results of the implementation of the initial plan, adapting to the common purpose in connection with the means to be used.[2181]

822. On the other hand, we should recall the position of Karadžić, at the highest level of the structure – understood in an organizational way and as means to the implementation of the ethnic cleansing policies – and with all the power to approve or reject any act of his subordinates and all the information at his disposal. We are not in a scenario of mere passivity and voluntary assumption of a foreseeable risk of excesses in the execution of the common purpose; but in a complex form of criminal engagement, although not physical or direct, but through the control of the persons and involving events within the context of an executive structure; a situation that exceeds mere secondary criminal participation and reaches the essential contribution threshold of co-perpetration.

823. All this would imply that the most appropriate solution would be to consider that this is a case of liability under JCE I,[2182] and not JCE III.

824. In any case, from a factual point of view (and not of liability), it allows us to establish, as an alternative inference to that adopted by the Trial Chamber, stronger and more consistent with the rest of the evidence, that Karadžić was aware of and consented to the perpetration by his

[2181] *See supra* n. 2155.
[2182] I share the argument of the Trial Chamber in the *Stakić* case stating: "The Trial Chamber notes with special reference to the *mens rea* of joint criminal enterprise, that Article 7(1) lists modes of liability only. These cannot change or replace elements of crimes defined in the Statute. In particular, the *mens rea* elements required for an offence listed

subordinates of the Excluded Crimes, which *actus reus* in occasions extended over the course of several months.

3. Ground 2 of the Prosecution's Appeal

825. I can neither agree with the solution adopted by the majority of the Appeals Chamber regarding Ground 2 of the Prosecution's Appeal. In my opinion, a defect lies in the legal reasoning derived from the mixture or incorrect separation of factual and legal aspects in the moment of undertaking the analysis of the factual assumptions of the case, prior to the application of the legal norm. This analysis should take place in two different stages. First, regarding facts; second, regarding the applicable law.

826. With respect to the first stage, Article 4(2)(c) of the ICTY Statute clearly contains a factual description:

> deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

This describes an action from a naturalistic point of view. The form to determine or establish if this action or human conduct actually took place has to be undertaken according to the existing evidence. It is not a legal concept as such and therefore cannot to be subject to legal approximations but rather to rules and standards of evidentiary assessment exclusively.

827. The second stage, corresponds to the legal assessment, this means, which law is applicable to the factual description previously established. At this stage, the first thing that has to be cleared out is whether sections (a), (b), (c), (d), and (e) of Article 4(2) of the ICTY Statute constitute different criminal subtypes or correspond to a plural description of different modalities of the offence commission. From my point of view, each section does not constitute a different crime, rather, different forms or conduct of the *actus reus* of the crime of genocide, that can be represented in a sole form, concurrent or combined. I consider that, there is no legal reason to consider that a concrete event or fact cannot be from a legal point of view included in one or more sections of Article 4(2) of the ICTY Statute, thus being the only possible limitation of ontological nature in case we face two events physically incompatible. This limitation does not take place in the present case in which the same authorities who imposed deplorable conditions in the detention facilities in the Count 1 Municipalities were simultaneously killing, raping, and abusing detainees, as a factual reality.

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in the Statute cannot be altered." *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 437.

828. On the other hand, in my view, the evidentiary assessment contained in paragraph 2587 of the Trial Judgement is not adjusted to the minimum reasonableness standard. The detailed description of the terrible conditions in which Bosnian Muslims and Bosnian Croats were held,[2183] and which are summarised in paragraphs 2584[2184] and 2585[2185] of the Trial Judgement, should be taken into account together with the findings that establish that the same authorities who imposed deplorable conditions in the detention facilities in the Count 1 Municipalities were simultaneously killing, raping, and abusing detainees or enabling these other genocidal acts in the very same facilities. These findings all together reveal an objective situation of extreme gravity which could only lead to a sole reasonable conclusion: there were conditions of life calculated to bring about physical destruction in whole or in part and they were deliberately inflicted.

829. For all the above mentioned, my dissenting opinion is that thousands of Bosnian Muslims and Bosnian Croats, whom the Trial Chamber categorised as merely displaced, were in fact subjected to conditions of life aimed at their physical destruction.

4. Ground 3 of the Prosecution's Appeal

830. I can neither share the position of the Majority regarding the Prosecution's ground of appeal on Count 1 Municipalities, confirming the lack of genocidal intent already noted by the Trial Chamber regarding the acts under Article 4(2) of the ICTY Statute. In my opinion, the legal arguments provided regarding the *mens rea* for the crime of genocide are not correct, neither is the evidentiary assessment undertaken as it does not correspond with the required reasonableness standard.

831. Regarding the genocidal *mens rea*, the Trial Chamber stated in paragraph 549 of the Trial Judgement:

> The *mens rea* required for the crime of genocide –"intent to destroy, in whole or in part, a national, ethnical, racial or religious group" as defined in Article 4 of the Statute– has been referred to variously as, for instance, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent. Genocide requires not only proof of intent to commit the alleged acts of genocide, but also proof of the specific intent to destroy the protected group, in whole or in part.

[2183] *See* Trial Judgement, Section IV.A.1, paras. 2507-2509.

[2184] Trial Judgement, para. 2584 ("In all of the Count 1 Municipalities, the Chamber found that Bosnian Muslim and Bosnian Croat detainees were held in terrible conditions. For the purpose of Article 4(2)(c), the Chamber recalls its findings that the detainees faced severe over-crowding in the detention facilities. This combined with stifling heat and lack of ventilation led to unbearable conditions for the detainees and some died. In these detention facilities, medical care was non-existent or inadequate, at best. Access to water and food was insufficient, which led to severe weight loss, malnutrition, and at times, starvation. Hygienic conditions were poor and the lack of access to washing facilities led to dysentery, lice, and skin diseases spreading throughout the facilities.").

[2185] Trial Judgement, para. 2585 ("Further, in Foča, Ključ, and Vlasenica, the Chamber found that a number of Bosnian Muslim and Bosnian Croat detainees were forced to perform labour at the frontline. They were put in dangerous situations, were afraid for their lives and of being beaten if they refused to work.").

> Therefore, when genocide is charged through the framework of JCE I, the accused needs to share genocidal intent with other members of the JCE.

832. Further, when the Trial Chamber referred to the proof of the *mens rea* of genocide, it reiterated this position and established as evidentiary standard the following:

> The chamber will examine below whether it can be satisfied beyond reasonable doubt that there was intent to destroy a part of the Bosnian Muslim and/or Bosnian Croat groups, namely the Bosnian Muslims and Bosnian Croats in the Count 1 Municipalities.[2186]

833. Under these premises, the Trial Chamber assessed evidence of genocidal intent: (i) of Karadžić and named alleged Overarching JCE members; (ii) of Bosnian Serbs not names as alleged members of the Overarching JCE; (iii) of the physical perpetrators; and (v) through the pattern of crimes. Lastly, in paragraph 2626 of the Trial Judgement, the Trial Chamber concluded:

> Having reviewed all of the evidence on record, for the purpose of Count 1, the Chamber is not satisfied beyond reasonable doubt that the acts under Article 4(2) identified above as Count 1 Municipalities were committed with genocidal intent. Further, it is not convinced that the only reasonable inference to be drawn from the evidence is that named members of the alleged Overarching JCE, or physical perpetrators possessed such intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities as such.

834. In my opinion, the Trial Chamber did not express an opinion sustained by true arguments but rather by mere subjective appreciations, referred to a purpose-based understanding of the concept of intent, a psychological fact that characterizes with especial intensity the crime of genocide. Psychological facts are practically impossible to be proven by direct evidence and can only be supported by indirect evidence, by means of inferences. This is the reason why they should be accompanied with a minimum reasonableness standard to justify the decision and render it in some way verifiable.

835. The legal definition of genocide establishes the *mens rea* requisite of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". The first question at stake is to determine the meaning of this element or requirement of "intent to destroy, in whole or in part, a national ethnical, racial or religious group" in the definition of the "Crime of Genocide" contained in Article 4(2) of the ICTY Statute and Article 2 of the UN Genocide Convention of 1948. Is it a specific "intent" or (direct) purpose – purpose-based concept – that operates as *dolus specialis* of the person committing genocide, which is the position sustained by the Trial Chamber and the majority of the Appeals Chamber, and the position traditionally maintained in the jurisprudence of both the ICTY and ICTR? Or if, on the contrary, it operates as an assignable end to the diverse acts –means – in which the commission of the crime of genocide can be unfolded according to the definition contained in Article 4(2) of the ICTY Statute, without a specific *mens rea* other than the

[2186] Trial Judgement, para. 1594.

ordinary, even with the possibility of *dolus eventualis*, as a cognitive element of *mens rea* – knowledge-based concept – regarding the end of genocidal acts, aimed to destroy in whole or in part, a national, ethnical or religious group.

836. Scholars have highlighted the conceptual ambiguity and the practical problems inherent to the concept of "intent", especially regarding the crime of genocide, proposing alternative approaches to those adopted by the jurisprudence of international tribunals.[2187] Nothing in the ICTY or ICTR Statutes or the Genocide Convention explicitly provides for a distinct genocidal intent standard. The origins and drafting of the Genocide Convention show the ambiguity of the treaty's intent provision.[2188]

837. In my opinion, a definition of the crime of genocide – which intends the protection of human groups – almost completely articulated on the basis of the intention or particular purpose of the person committing the act, in the sense that it should be specific and exclusively focused on the intent to destroy the group as such, makes no sense. Rather, it should have more objective bases, addressing: (i) the "genocidal acts", the core of which should conform with the most characteristic defining elements of genocide, namely, as means to intend the end of, "to destroy, in whole or in part", a group; and (ii) the effective contribution of the perpetrator to the collective destruction of a protected group.

838. I do not intend to dwell on the reasons, of criminal politics among others, that according to my view could have influenced the development of an extraordinarily narrow concept of genocide, filling it with impossible requirements that make the concept almost inapplicable, losing all its sense and legal value for the correct protection of criminal attacks against human groups, thus gaining a mere symbolic character. There is nothing to gain in the spread conception of genocide as the crime amongst crimes. In my opinion, when addressing the gravest crimes against human rights, we cannot establish graduations but apply the law differentiating distinct situations, qualitatively different. The concept of the crime of genocide makes sense when understood as extreme criminal acts of discrimination against human groups, which can go as far as their physical destruction, but also includes all acts tending to this finality.

[2187] A. K. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, Columbia Law Review (1999), at pp. 2259-2294; O. Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, Leiden Journal of International Law, 14(2) (2001), at pp. 399-408; H. Vest, *A Structure-Based Concept of Genocidal Intent*, Journal of International Criminal Justice, 5(4) (2007), at pp. 781-797; C. Kress, *The Darfur Report and Genocidal Intent*, Journal of International Criminal Justice 3(3) (2005), at pp. 562-578; K. Ambos, *What Does 'Intent to Destroy' in Genocide Mean?*, International Review of the Red Cross, 91(876) (2009), at pp. 833-858; A. Gil Gil, *Derecho penal internacional*, Madrid: Editorial Tecnos: Madrid (1999), at pp. 231-258.

[2188] A. K. Greenawalt, *Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation*, Columbia Law Review (1999), at pp. 2270-2279.

839. In my view, both perspectives – purpose-based and knowledge-based– make sense and can be reconciled in their application to the present case. I have already mentioned important aspects regarding the general framework of the case, in which a context of extraordinary violence takes places and extraordinary criminal means of special gravity were used with the intention of obtaining a concrete result of ethnic cleansing for the consecution of an ethnically pure territory. These collective actions took place inside a war structure, with both military and paramilitary intervention, and where Karadžić held a special position at the apex of this structure as a political and military leader. I have tried to explain – with the purpose of evaluating his criminal liability both in psychological and material terms – the relationship between Karadžić and the events, that in my opinion resulted from the Trial Chamber findings, drawing specific conclusions that enhance the real control of the Karadžić over the events.

840. In the presence of certain situations of extreme complexity, with many elements and unmanageable shades from an evidentiary point of view, the dilemmas regarding the "intent to destroy" are of practical evidentiary order rather than legal. There are many possible situations and they do not admit a unitary solution. The questions to answer are the following: what is the required standard to consider the intent "to destroy in whole or in part" as proved, when is there enough evidence regarding the perpetration of the genocidal acts constitutive of the *actus reus*, and which acts are objectively attributable to the accused when he did not perpetrate them directly? What are the elements that have to be taken into account in this assessment? Is the BRD criterion useful when applied to a concept of intent exclusively purpose-based? How do judges have to understand the BRD criterion in these scenarios? Is it possible to objectify intent through some kind of indicators[2189] serving as guides to assess genocide scenarios?

841. To give an answer to the above questions –that the Trial Chamber did not ask– is not an easy task. From my point of view, the Trial Chamber limited itself to a formal approach to the evidentiary problems which is unsatisfactory. It did not make a deep analysis of the characteristic

[2189] According the Office of the UN Special Adviser on the Prevention of Genocide, among the issues that have to be analysed and taken into account to establish genocidal intent are: Statements amounting to hate speech by those involved in a genocidal campaign; In a large-scale armed conflict, widespread and systematic nature of acts; intensity and scale of acts and invariability of killing methods used against the same protected group; types of weapons employed (in particular weapons prohibited under international law) and the extent of bodily injury caused; In a non-conflict situation, widespread and/or systematic discriminatory and targeted practices culminating in gross violations of human rights of protected groups, such as extrajudicial killings, torture and displacement; The specific means used to achieve "ethnic cleansing" which may underscore that the perpetration of the acts is designed to reach the foundations of the group or what is considered as such by the perpetrator group; The nature of the atrocities, *e.g.*, dismemberment of those already killed that reveal a level of dehumanization of the group or euphoria at having total control over another human being, or the systematic rape of women which may be intended to transmit a new ethnic identity to the child or to cause humiliation and terror in order to fragment the group; The destruction of or attacks on cultural and religious property and symbols of the targeted group that may be designed to annihilate the historic presence of the group or groups; Targeted elimination of community leaders and/or men and/or women of a particular age group (the "future generation" or a military-age group); Other practices designed to complete the exclusion of targeted group from social/political life.

elements and peculiarities related to the present case. Many of the alluded indicators used as evidence of an intent "to destroy in whole or in part" exist in the present case and appear as proven in the findings of the Trial Judgement, particularly in paragraphs 2595 to 2624 and 2634 to 2903. Paragraphs 2634 to 2903 of the Trial Judgement deserve a special mention in their reference to "Evidence of genocidal intent through the pattern of crimes".

842. However, these findings are not sufficiently considered by the Trial Chamber, giving arguments that in my opinion do not meet the due reasonableness standard.[2190] It is paradigmatic that paragraph 2624 of the Trial Judgement establishes the evidentiary test on the basis of a purely quantitative criterion, which I cannot share.

843. In my view, another result could have been achieved from a correct assessment of the ensemble of the evidence together with more objective and pragmatic criteria regarding the requirements of intent "to destroy in whole or in part". For example, taking into account the presence of the alluded genocidal indicators and the certainty of knowledge on the part of the accused that his acts or omissions were contributing to the collective destruction of a group.

B. Dissenting Opinion on Ground 4 of the Prosecution's Appeal

844. I also express my respectful disagreement with the Appeals Chamber's finding that the Trial Chamber committed a discernible error and abused its discretion in imposing a sentence of only 40 years of imprisonment, therefore granting Ground 4 of the Prosecution's appeal and imposing a sentence of life imprisonment.

845. The Prosecution submits that the 40-year sentence does not reflect the Trial Chamber's own findings and analysis on the gravity of Karadžić's crimes and his responsibility for the largest and gravest set of crimes ever attributed to a single person at the ICTY.

846. In my opinion, the sentence should have remained as 40 years of imprisonment, a penalty which reflects in a sufficient measure the extreme gravity of the events, for the following reasons.

847. A penalty cannot rely on the principles of retribution and deterrence at the expense of other important sentencing factors, including: rehabilitation, reintegration into society, proportionality, and consistency.

848. A penalty, in any form or duration, cannot lose its humanity. This is what sets the difference between a legally civilised response and tribal vengeance. A sentence of 40 years of imprisonment

[2190] *See* Trial Judgement, paras. 2599-2606, 2610, 2612-2614, 2624.

is a penalty of a very large duration if compared with the extension of the human life and represents the absolute limit of what should be considered as acceptable confinement.

849. If we trespass a certain threshold, the quantity of the penalty ceases from being representative of the moral or legal gravity of a crime and gains a new significance. Neither can we talk of proportionality when the gravity of the crimes committed is of a very large scale and magnitude that no one can imagine a correlative penalty.

850. Life imprisonment or imprisonment for the remainder of the convicted person's life, without any possible redemption, makes the penalty acquire different qualitative characteristics to a mere deprivation of liberty, transforming it metaphysically. It deprives, in a definitive way, a human being from a right consubstantial with human nature, making life lose any sense and thus equating it with a death sentence. Life imprisonment only makes sense as a substitute of death penalty, a penalty that is fortunately proscribed from the rank of possible penalties that can be imposed on a subject.

851. Losing the freedom horizon undermines the humanity of penalties in any sense and reduces it to the realm of inhuman and degrading. The European Court of Human Rights ("ECtHR")[2191] has ruled on this matter on multiple occasions, considering life imprisonment sentences (for the remainder of the convicted person's life) in breach of Article 3 of the ECHR.

[2191] *Vinter and Others v. the United Kingdom* [GC], ECtHR, Nos. 66069/09, 130/10 and 3896/10, Judgment, 9 July 2013, paras. 119-122 ("[...] [I]n the context of a life sentence, Article 3 [of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment] must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. However, the [European] Court [of Human Rights] would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing [...], it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, [...] the comparative and international law materials before [the Court] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter [...] It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention. [...] Furthermore, [...] [a] whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."). *See Öcalan v. Turkey (no. 2)*, ECtHR, Nos. 24069/03, 197/04, 6201/06 and 10464/07, Judgment, 18 March 2014 (The Court held that there had been a violation of Article 3 of the Convention as regards the applicant's sentence to life imprisonment without any possibility of conditional release, finding that, in the absence of any review mechanism, the life prison sentence imposed on the applicant constituted an irreducible sentence that amounted to inhuman treatment). *See also Matiošaitis and Others v. Lithuania*, ECtHR, Nos. 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, Judgment, 23 May 2017; *T.P. and A.T. v. Hungary*, ECtHR, Nos. 37871/14 and 73986/14, Judgment, 4 October 2016; *Murray v. the Netherlands*, ECtHR, No. 10511/10, Judgment, 26 April 2016; *László Magyar v. Hungary*, ECtHR, No. 73593/10, Judgment, 20 May 2014.

852. Lastly, although it has been widely established in the ICTY jurisprudence, I have serious doubts on the fulfillment of the principle of *nulla poena sine lege* of the prison penalty for the remainder of the convicted person's life and thus, if it would be a possible penalty. Article 24 of the ICTY Statute clearly establishes that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment" and the provision contained in Rule 101 (B) of the ICTY Rules on imprisonment for the remainder of the convicted person's life, would be in my opinion an *ultra vires* ("beyond the powers") disposition since we are facing a penalty that exceeds qualitatively from the mere penalty of imprisonment, which is of a limited time, and without its provision in the "national law provision". We should remember that Article 38 of Socialist Federal Republic of Yugoslavia Criminal Code explicitly excluded life imprisonment even as a substitute to death penalty. On the other hand, the ICTY Rules do not contain any provision establishing the possibility of its revision after a certain time, something that is not sufficiently guaranteed if it is not determined in each Judgement.[2192] This situation is quite different from the explicit provision of life imprisonment and the possibility, as set by the ICC Statute, of conditional release (Articles 77 and 110 (3)-(5) of the ICC Statute).

853. For the foregoing reasons, I do not agree with the Majority's conclusion concerning Grounds 1, 2, 3, and 4 of the Prosecution's appeal.

Done in English and French, the English version being authoritative.

Done this 20th day of March 2019,
At The Hague,
The Netherlands

Judge José Ricardo de Prada Solaesa

[Seal of the Mechanism]

[2192] *Stakić* Trial Judgement, paras. 437, 890, Disposition.

IX. ANNEX A – PROCEDURAL HISTORY

854. The main aspects of the appeal proceedings are summarized below.

A. Composition of the Appeals Chamber

855. On 20 April 2016, the President of the Mechanism ordered that the Bench in the present case be composed of Judge Theodor Meron (Presiding), Judge William H. Sekule, Judge Vagn Joensen, Judge José Ricardo de Prada Solaesa, and Judge Graciela Susana Gatti Santana.[2193] On 21 April 2016, the Judge Meron assigned himself as the Pre-Appeal Judge in this case.[2194] On 27 September 2018, Judge Meron withdrew from this case[2195] and, in his capacity as President of the Mechanism, assigned Judge Ivo Nelson de Caires Batista Rosa to replace him on the Bench in this case.[2196]

B. Karadžić's and the Prosecution's Appeals

856. Following the Pre-Appeal Judge's decisions granting Karadžić and the Prosecution an extension of 90 days to file their notices of appeal,[2197] Karadžić and the Prosecution filed their respective notices of appeal on 22 July 2016.[2198]

857. On 9 August 2016, the Pre-Appeal Judge granted Karadžić and the Prosecution an extension of 60 days for filing their appeal briefs and an extension of 45 days for filing their response briefs.[2199] On 8 September 2016, the Pre-Appeal Judge granted Karadžić's motion for an extension of the word limit for his appeal brief and authorized him to file a brief not exceeding 75,000 words, granting the Prosecution an equivalent extension of the word limit for its response brief.[2200] On 15 September 2016, the Pre-Appeal Judge denied the Prosecution's motion for a further extension of time for the parties to file their respective response briefs.[2201]

[2193] Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016, p. 2.
[2194] Order Assigning a Pre-Appeal Judge, 21 April 2016, p. 1.
[2195] Decision, 27 September 2018, p. 3.
[2196] Order Replacing a Judge in a Case Before the Appeals Chamber, 27 September 2018, p. 1.
[2197] Decision on Motion for Extension of Time to File Notice of Appeal, 21 April 2016, p. 2; Decision on a Motion for a Further Extension of Time to File a Notice of Appeal, 15 June 2016, pp. 3, 4.
[2198] Radovan Karad[ž]i[ć]'s Notice of Appeal, 22 July 2016 (public with confidential annex); Prosecution's Notice of Appeal, 22 July 2016.
[2199] Decision on a Joint Motion for Extension of Time to File Appeal and Response Briefs, 9 August 2016, pp. 2, 3.
[2200] Decision on a Motion for an Extension of a Word Limit, 8 September 2016, p. 3.
[2201] Decision on the Prosecution's Motion for an Extension of Time to File the Response Briefs, 15 September 2016, pp. 1, 2.

858. Karadžić and the Prosecution filed their appeal briefs on 5 December 2016.[2202]

859. On 9 January 2017, the Appeals Chamber granted an additional extension of 15 days for filing the parties' response briefs.[2203] Karadžić and the Prosecution filed their response briefs on 15 March 2017.[2204]

860. On 21 March 2017, the Pre-Appeal Judge granted, in part, Karadžić's motion for an extension of time and word limit, authorizing him to file a brief not exceeding 22,500 words and allowing the parties a seven day extension to file their reply briefs.[2205] On 6 April 2017, Karadžić and the Prosecution filed their briefs in reply.[2206]

C. Decisions Pursuant to Rule 142 of the Rules

861. Karadžić filed motions requesting the admission of additional evidence on appeal on 24 April 2017 and 7 May 2018, respectively.[2207] On 2 March 2018, the Appeals Chamber denied Karadžić's first motion for admission of additional evidence on appeal.[2208] On 18 July 2018, the Appeals Chamber denied Karadžić's second motion for admission of additional evidence on appeal.[2209]

D. Status Conferences

862. In accordance with Rule 69 of the Rules, Status Conferences were held on 15 November 2016,[2210] 6 March 2017,[2211] 23 June 2017,[2212] 10 October 2017,[2213] 30 January 2018,[2214] 25 April 2018,[2215] 15 August 2018,[2216] and 11 December 2018.[2217]

[2202] Radovan Karad[ž]i[ć]'s Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 23 December 2016); Prosecution Appeal Brief, 5 December 2016 (confidential ; public redacted version filed on 11 January 2017).
[2203] Decision on the Renewed Prosecution Motion for an Extension of Time to File the Response Briefs, 9 January 2017, p. 3.
[2204] Radovan Karad[ž]i[ć]'s Response Brief, 15 March 2017 (confidential; public redacted version filed on 15 March 2017); Prosecution Response Brief, 15 March 2017 (confidential; revised public redacted version filed on 16 May 2017).
[2205] Decision on a Motion for Extension of Time and Word Limit for Reply Brief, 21 March 2017.
[2206] Radovan Karad[ž]i[ć]'s Reply Brief, 6 April 2017 (confidential; public redacted version filed on 19 April 2017); Prosecution Reply Brief, 6 April 2017 (confidential; public redacted version filed on 16 May 2017).
[2207] Motion to Admit Additional Evidence, 24 April 2017; Second Motion to Admit Additional Evidence, 7 May 2018.
[2208] Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, paras. 1, 19.
[2209] Decision on Second Motion to Admit Additional Evidence on Appeal, 18 July 2018, pp. 2, 5. The Appeals Chamber denied Karadžić's request to reconsider each of these decisions on 13 February 2019. Decision on a Motion for Reconsideration, 13 February 2019, p. 6.
[2210] T. 15 November 2016 pp. 1-15.
[2211] T. 6 March 2017 pp. 16-31.
[2212] T. 23 June 2017 pp. 32-47.
[2213] T. 10 October 2017 pp. 48-66.
[2214] T. 30 January 2018 pp. 67-83.
[2215] T. 25 April 2018 pp. 317-322.

E. Hearing of the Appeals

863. The Appeals Chamber heard the parties' oral arguments at the appeal hearing held in The Hague, The Netherlands on 23 and 24 April 2018.[2218]

[2216] T. 15 August 2018 pp. 323-330.
[2217] T. 11 December 2018 pp. 331-339.
[2218] T. 23 April 2018 pp. 84-236; T. 24 April 2018 pp. 237-316.

X. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

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BIZIMUNGU, Casimir, *et al.*

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D. Defined Terms and Abbreviations

ABiH

Army of the Republic of Bosnia and Herzegovina (*Armija Bosne i Hercegovine*)

Additional Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Appeals Chamber

Appeals Chamber of the Mechanism

ARK

Autonomous Region of Krajina (*Autonomna Regija Krajina*)

Assembly

Assembly of the Serbian People of Bosnia-Herzegovina (*later* National Assembly of *Republika Srpska*)

Bosnian Serb Political and Governmental Organs

Political and governmental organs as defined in paragraph 12 of the Indictment, namely: "members of SDS and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions"

Common Article 3

Common Article 3 of the Geneva Conventions of 1949

Count 1 Municipalities

Municipalities referred to in paragraph 38 of the Indictment, namely: Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica, and Zvornik

DB

State Security Service of *Republika Srpska*

Defence

Defence Team of Radovan Karadžić

Directive 7

The Directive for Further Operations No. 7 issued by Radovan Karadžić on 8 March 1995

DutchBat

Dutch Battalion of UNPROFOR

ECCC

Extraordinary Chambers in the Courts of Cambodia

ECHR

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

Eight Witnesses

Eight witnesses whose prior statements and/or testimony had been admitted into evidence as part of the Rule 92 *bis* Material and who were subject of Karadžić's request to issue subpoenas compelling them to submit to interviews with the Defence which was denied by the Trial Chamber on 21 March 2011

First Amended Indictment

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Amended Indictment, 24 May 2000

Five Rule 70 Witnesses

Prosecution Witnesses KDZ182, KDZ185, KDZ196, KDZ304, and KDZ450 who on 15 April 2010 were granted leave to testify under certain conditions, including the use of pseudonyms as well as image and voice distortion

Hostages JCE

Joint criminal enterprise that existed between 25 May and 18 June 1995 with the common purpose of taking UN Personnel hostage in order to compel NATO to abstain from conducting air strikes against Bosnian Serb targets

ICC

International Criminal Court

ICCPR

International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976

ICRC

International Committee of the Red Cross

ICRC Commentary on Additional Protocol I

International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTR Rules

ICTR Rules of Procedure and Evidence

ICTR Statute

Statute of the ICTR

ICTY or Tribunal

International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

ICTY Directive on the Assignment of Counsel

ICTY Directive on the Assignment of Defence Counsel, Revision 11, 11 July 2006, No. 1/94, (IT/73/REV. 11)

Prosecution Final Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Prosecution's Submission on Final Trial Brief, 29 August 2014 (confidential with confidential appendices)

Prosecution Interim Pre-Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Prosecution's Submission of Interim Pre-Trial Brief, 8 April 2009 (public with partly confidential appendices)

Prosecution Pre-Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Prosecution's Submission Pursuant to Rule 65 *ter* (E)(i)-(iii), 18 May 2009 (public with partly confidential appendices), Appendix I, Prosecution's Final Trial Brief (public with partly confidential appendices)

ICTY Rules

ICTY Rules of Procedure and Evidence

ICTY Statute

Statute of the ICTY

Indictment

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009

JCE

Joint criminal enterprise

JNA

Yugoslav People's Army (*Jugoslavenska Narodna Armija*)

Karadžić

Mr. Radovan Karadžić

Karadžić Appeal Brief

Radovan Karad[ž]i[ć]'s Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 23 December 2016)

Karadžić Final Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Defence Final Trial Brief, 29 August 2014 (confidential; public redacted version filed on 24 September 2014)

Karadžić Notice of Appeal

Radovan Karad[ž]i[ć]'s Notice of Appeal, 22 July 2016 (public with confidential annex)

Karadžić Reply Brief

Radovan Karad[ž]i[ć]'s Reply Brief, 6 April 2017 (confidential; public redacted version filed on 19 April 2017)

Karadžić Response Brief

Radovan Karad[ž]i[ć]'s Response Brief, 15 March 2017 (confidential; public redacted version filed on 15 March 2017)

Mechanism

International Residual Mechanism for Criminal Tribunals

Municipalities 92 *bis* Statements

Unsigned statements of eight prospective Defence witnesses who initially appeared on Karadžić's witness list and whose evidence concerned the Municipalities component of his case and who are the subject of motions filed by Karadžić which was denied by the Trial Chamber on 18 March 2014

MUP

Ministry of Internal Affairs (*Ministarstvo Unutrašnjih Poslova*) of *Republika Srpska*

n. (nn.)

footnote (footnotes)

NATO

North Atlantic Treaty Organization

Order Appointing Deronjić as Civilian Commissioner

Order issued by Karadžić on 11 July 1995 appointing Miroslav Deronjić as civilian commissioner for Srebrenica

Order on Approval of Humanitarian Convoys

Order issued by Karadžić on 11 July 1995 that approval of humanitarian convoys will be given exclusively by the State Committee following prior consultations with Karadžić

Order to Form an SJB in Srebrenica

Order issued by Karadžić on 11 July 1995 to the *Republika Srpska* Ministry of Internal Affairs to form a Public Security Station in "Serb Srebrenica"

Overarching JCE

Joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina between October 1991 and November 1995

Overarching JCE Municipalities

Bosnia and Herzegovina municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Višegrad, Sokolac, Vlasenica, Zvornik, Banja Luka, Bosanski Novi, Ključ, Prijedor, Sanski Most, Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća

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Prosecution

Office of the Prosecutor of the ICTY or the Mechanism

Prosecution Appeal Brief

Prosecution Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 11 January 2017)

Prosecution Notice of Appeal

Prosecution's Notice of Appeal, 22 July 2016

Prosecution Reply Brief

Prosecution Reply Brief, 6 April 2017 (confidential; public redacted version filed on 16 May 2017)

Prosecution Response Brief

Prosecution Response Brief, 15 March 2017 (confidential; public redacted version filed on 16 May 2017)

Registry

Office of the Registrar of the ICTY or the Mechanism

***Republika Srpska* or RS**

Serbian Republic of Bosnia and Herzegovina from 12 August 1992

Rome Statute

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002

RP.

Registry Pagination

Rule 92 *bis* and *quater* Evidence or Rule 92 *bis* Evidence and Rule 92 *quater* Evidence

Evidence admitted pursuant to Rule 92 *bis* and/or Rule 92 *quater* of the ICTY Rules

Rules

Rules of Procedure and Evidence of the Mechanism

Sarajevo 92 *bis* Statements

Four witness statements under Rule 92 *bis* of the ICTY Rules related to the Sarajevo component of the case of which Karadžić sought admission on 1 October 2013

Sarajevo JCE

Joint criminal enterprise with the primary purpose of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the SRK between late May 1992 and October 1995

SCSL

Special Court for Sierra Leone

SDC

Supreme Defence Council *(Vrhovni Savet Odbrane)*

SDS

Serbian Democratic Party (*Srpska Demokratska Stranka*) in Bosnia and Herzegovina

Security Council Resolution 1966

UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010

SerBiH

Serbian Republic of Bosnia and Herzegovina, renamed *Republika Srpska* on 12 August 1992

SJB

Public Security Station (local level) (*Stanica Javne Bezbjednosti*)

Srebrenica JCE

Joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica in 1995

SRK

Sarajevo-Romanija Corps of the VRS *(Sarajevo Romanija Korpus)*

State Committee

State Committee for Co-Operation with the UN and international humanitarian organisations in charge of the approval of humanitarian convoys

Statute

Statute of the Mechanism

Strategic Goals

A list of six goals presented by Karadžić and adopted by the Bosnian Serb Assembly during its 16th session, the Strategic Goals which included: (i) separation from the other two national communities and the separation of states; (ii) creation of the corridor between Semberija and Krajina; (iii) creation of the corridor in the Drina Valley; (iv) creation of a border on the Una and Nereveta Rivers; (v) division of the city of Sarajevo into Serbian and Muslim parts; and (vi) access of SerBiH to the sea

STL

Special Tribunal for Lebanon

T.

Transcript from hearings at trial or appeal in the present case, all references are to the official English transcript, unless otherwise indicated

Trial Chamber

Trial Chamber of the ICTY seized of the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T

Trial Judgement

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Judgement, 24 March 2016 (confidential; public redacted version filed on 24 March 2016)

UN

United Nations

UNHCR

United Nations High Commissioner for Refugees

UNICEF

United Nations Children's Fund

UNMO

United Nations Military Observers

UN Personnel

United Nations Protection Force and United Nations Military Observers

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Doc. A/Res/67/187, 28 March 2013

UNPROFOR

United Nations Protection Force

Variant A/B Instructions

Document issued by the Main Board of the SDS on 19 December 1991 entitled "Instructions for the Organization and Operation of Organs of the Serbian People in Bosnia and Herzegovina in Emergency Conditions"

VRS

Army of *Republika Srpska* (*Vojska Republike Srpske*)

Žepinić Interview

Witness Vitomir Žepinić's interview with the Prosecution in September 1996