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# JUDGEMENT SUMMARY

*(Exclusively for the use of the media. Not an official document)*

APPEALS CHAMBER

The Hague, 30 January 2015

## Appeal Judgement Summary for Popović et al.

*Please find below the summary of the Judgement read out today by Judge Patrick Robinson.*

The Appeals Chamber convenes today, in accordance with the scheduling order issued on 17 November 2014 and pursuant to Rule 117(D) of the Tribunal's Rules of Procedure and Evidence, to deliver its Judgement in the case of Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, and Vinko Pandurević.

At the outset, I would like to inform the parties that Judge Fausto Pocar is unable to sit during this hearing. Hence, this hearing will take place pursuant to Rule 15*bis*(A) of the Rules of Procedure and Evidence.

Following the practice of the Tribunal, I will not read out the text of the Judgement, except for the disposition, but instead will summarise the essential issues on appeal and the central findings of the Appeals Chamber. This oral summary does not constitute any part of the official and authoritative Judgement of the Appeals Chamber, which will be distributed in writing to the parties at the close of this hearing. In view of the length of this summary, a break or two will be taken during this reading.

### **BACKGROUND OF THE CASE**

The events giving rise to this case took place in July 1995, in and around Srebrenica and Žepa in the Podrinje region, Eastern Bosnia and Herzegovina. The Trial Chamber found that these events followed an intense military assault by the Bosnian Serb Forces, or "BSF", on the United Nations-protected areas of Srebrenica and Žepa in July 1995. Bosnian Muslims fled Srebrenica to the nearby town of Potočari, where the women, children, and the elderly were loaded onto packed buses and transported away from their homes in Eastern Bosnia. Thousands of males were detained in horrific conditions and subsequently summarily executed. In Žepa, a series of military attacks also led to the removal of the entire Bosnian Muslim population by transport or by flight.

The Trial Chamber found that a joint criminal enterprise existed to murder the able-bodied Bosnian Muslim men from Srebrenica in July 1995, or "JCE to Murder", and that a joint criminal enterprise existed to forcibly remove the Bosnian Muslim population from Srebrenica and Žepa in 1995, or JCE to Forcibly Remove.

During the relevant time period, Mr. Popović was Chief of Security of the Army of the Republika Srpska, or "VRS", Drina Corps; Mr. Beara was the Chief of the VRS Main Staff's Administration for Security; Mr. Nikolić was the Chief of Security in the 1st Light Infantry Zvornik Brigade of the Drina Corps; Mr. Miletić was the Chief of the Main Staff's Administration for Operations and Training; and Mr. Pandurević was the Commander of the Zvornik Brigade. The Trial Chamber determined that Messrs. Popović, Beara, and Nikolić were participants in the JCE to Murder, and that Mr. Miletić was a participant in the JCE to Forcibly Remove.

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The Trial Chamber convicted Mr. Popović and Mr. Beara of committing - through the JCE to Murder - genocide, murder as a violation of the laws or customs of war as well as extermination, and persecution as crimes against humanity. Mr. Popović and Mr. Beara were both sentenced to life imprisonment.

With respect to Mr. Nikolić, the Trial Chamber convicted him of committing - through the JCE to Murder - extermination and persecution as crimes against humanity; and murder as a violation of the laws or customs of war. He was also convicted of aiding and abetting genocide. Mr. Nikolić was sentenced to 35 years of imprisonment.

The Trial Chamber convicted Mr. Miletić of committing - through the JCE to Forcibly Remove -murder, persecution, and forcible transfer as crimes against humanity. Mr. Miletić was sentenced to 19 years of imprisonment.

With respect to Mr. Pandurević, the Trial Chamber convicted him of aiding and abetting murder as a violation of the law or customs of war as well as murder, persecution, and forcible transfer as crimes against humanity. He was also convicted of murder as a crime against humanity and as a violation of the law or customs of war pursuant to command responsibility. Mr. Pandurević was sentenced to 13 years of imprisonment.

## **THE APPEALS**

Following the rendering of the Trial Judgement on 10 June 2010, the Prosecution, Messrs. Popović, Beara, Nikolić, Miletić, and Pandurević appealed the Trial Judgement. The Appeals Chamber heard the oral submissions of the parties from 2 to 6 December 2013.

I shall now turn to the contentions of the Appellants and the Prosecution.

### **Alleged Errors Concerning the Indictment**

Messrs. Popović and Miletić advance arguments contending that the Trial Chamber erred in law by convicting them either on the basis of crimes not charged in the Indictment or on the basis of allegations not clearly pleaded in the Indictment. The Appeals Chamber finds that Messrs. Popović and Miletić have failed to demonstrate that the Trial Chamber erred. The Trial Chamber found Mr. Pandurević guilty of having aided and abetted the murder of the ten wounded Bosnian Muslim prisoners from the Milići Hospital, or “Milići Prisoners”, by omission through a failure to discharge a legal duty. Mr. Pandurević argues that, as the Prosecution neither pleaded nor gave any indication throughout the trial that he was charged with aiding and abetting by omission through a failure to discharge a legal duty, the Trial Chamber erred in convicting him for this crime. The Appeals Chamber, Judge Niang dissenting, recalls that the Indictment must be read as a whole and finds, Judge Niang dissenting, that it contains allegations that provided notice to Mr. Pandurević of the material facts underlying the charge that he aided and abetted the murder of the Milići Prisoners by omission. The Appeals Chamber, Judge Niang dissenting, therefore dismisses the relevant part of Mr. Pandurević’s appeal.

### **Alleged Errors Relating to the Admissibility and Weight of the Evidence**

Messrs. Popović, Beara, Nikolić, and Miletić present several challenges to the admission of evidence by the Trial Chamber as well as its assessment or weighing of evidence. Specifically, they challenge the Trial Chamber’s decisions not to admit certain evidence, admission of statements made pursuant to Rule 92quater of the Rules, use of untested and uncorroborated evidence, and admission of intercepts and other documentary evidence. The Appeals Chamber finds no error in the Trial Chamber’s exercise of its broad discretion, and dismisses all challenges considered in this section of the Appeal Judgement.

### **Alleged Errors Concerning Witness Credibility**

Messrs. Popović, Beara, Nikolić, and Miletić present challenges concerning the overall credibility of witnesses who testified in this case. In particular, they challenge the Trial Chamber’s assessment of the credibility of Witnesses PW-168, Momir Nikolić, PW-101, and

Srećko Aćimović. Having considered the parties' submissions, the Appeals Chamber finds that the Appellants have not shown that the Trial Chamber erred and dismisses all challenges regarding the overall credibility of witnesses.

#### **Alleged Errors in Relation to the Evidence Regarding the Number of Deceased**

Mr. Popović contends that the Trial Chamber erred in its findings on the number of persons executed at specific execution sites. Messrs. Popović, Beara, and Nikolić all challenge the Trial Chamber's findings on the total number of persons executed based on forensic and demographic evidence. The Appeals Chamber dismisses all challenges to the total number of deceased.

#### **Other Evidentiary Matters**

On the issue of alibi, Mr. Popović submits that the Trial Chamber erred in its consideration of his alibis for the evening of 14 July 1995 and 23 July 1995. Specifically, he argues that the Trial Chamber failed to consider all the evidence on the record in rejecting his alibi that he was at the Forward Command Post in Krivače on 14 July 1995 and therefore could not have participated in the killings at Orahovac. Likewise, he argues that the Trial Chamber erred in dismissing his alibi for 23 July 1995 by disregarding evidence that he was in a meeting at the time of the killings in Bišina. The Appeals Chamber finds that Mr. Popović has not shown that the Trial Chamber disregarded evidence concerning his alibis or demonstrated that any error by the Trial Chamber resulted in a miscarriage of justice, and therefore, dismisses his arguments.

Mr. Beara also contests the Trial Chamber's consideration of his alibi for 13 and 14 July 1995 and its finding that he was actively engaged in murder operations in Bratunac and Zvornik. He argues that the Trial Chamber erroneously assessed and disregarded the Defence evidence, and inappropriately shifted the burden of proof to the Defence by requiring it to prove his alibi beyond reasonable doubt. After considering Mr. Beara's arguments, the Appeals Chamber dismisses all of his challenges.

Messrs. Nikolić and Beara also present challenges to the Trial Chamber's assessment of expert evidence; Mr. Nikolić argues that the Trial Chamber disregarded the evidence of a military expert, while Mr. Beara disputes the Trial Chamber's approach to identification evidence. Further, Mr. Miletić contests the Trial Chamber's reliance on intercept evidence and contends that it arrived at erroneous conclusions. Having considered the parties' submissions, the Appeals Chamber finds that the Appellants have not shown that the Trial Chamber erred and dismisses all challenges regarding expert evidence, identification evidence, and intercept evidence.

I now turn to the Appellants' and the Prosecution's challenges to the Trial Chamber's findings on the crimes perpetrated against the Bosnian Muslims of Eastern Bosnia.

#### **Crimes**

##### **Genocide**

The Trial Chamber concluded that members of the BSF committed genocide against the Muslims of Eastern Bosnia, which constituted a substantial component of Bosnian Muslims as a group. The Trial Chamber was satisfied beyond reasonable doubt that Messrs. Popović and Beara committed genocide through their participation in the JCE to Murder with genocidal intent. The Trial Chamber found that Mr. Nikolić did not have genocidal intent but it concluded that he aided and abetted genocide.

Mr. Beara argues that the Trial Chamber erred in finding that the targeted group of Bosnian Muslims was a substantial part of the entire group. He contends in particular that the Trial Chamber ignored the numeric size of the targeted group, wrongly assessed the strategic importance of the Srebrenica enclave, and widened the scope of the targeted group as defined by the Indictment. The Appeals Chamber dismisses all of Mr. Beara's challenges and finds that he fails to show an error on the part of the Trial Chamber.

Mr. Nikolić argues that the Trial Chamber erred in failing to identify State policy as an essential element of genocide. The Appeals Chamber finds that the question of whether the existence of State policy is required for genocide has already been considered by the Tribunal, and as a policy is not a legal requirement, then it follows that State policy is not a legal requirement of genocide. The Appeals Chamber also finds that Mr. Nikolić has not established the existence of cogent reasons to depart from this jurisprudence or that the Trial Chamber erred.

Messrs. Popović, Beara, and Nikolić also challenge, to varying degrees, the Trial Chamber's findings on the genocidal intent of the BSF. Notably, Mr. Nikolić argues that the acts of killing and infliction of serious bodily and mental harm against the Muslims of Eastern Bosnia were not perpetrated with genocidal intent by submitting that the Trial Chamber failed to consider that no genocidal acts were perpetrated against the Bosnian Muslims of Žepa, that the column of 10,000 Bosnian Muslims was allowed to pass through the defence lines of the Zvornik Brigade, and that numerous prisoner exchanges occurred in mid-to-late July 1995. Nikolić also argues that the Trial Chamber ignored significant recent precedents establishing that the killing of a group of men while forcibly transferring the remainder of the population does not evince genocidal intent. The Appeals Chamber considers that the Trial Chamber found that the Muslims of Eastern Bosnia, including the inhabitants of Žepa, were found to be victims of the genocidal enterprise and it can discern no error in the Trial Chamber's consideration of the opening of the corridor to allow the column to pass through or the exchange of prisoners. The Appeals Chamber also considers that there was no obligation on the Trial Chamber to explicitly consider the authorities relied upon by Mr. Nikolić and that he fails to show an error. In sum, the Appeals Chamber dismisses the Appellant's arguments concerning the genocidal intent of the BSF.

I now turn to the challenges to the Appellants' liability for genocide.

Mr. Popović disputes the Trial Chamber's finding that he possessed genocidal intent and, inter alia, argues that it disregarded evidence as well as analysed his use of a derogatory term out of context. Mr. Beara argues that the Trial Chamber erred in finding that he had genocidal intent as it reached its conclusion on his knowledge of the murder operation solely on the basis of his position in the VRS, erroneously drew inferences from certain exhibits and evidence, and failed to take into account the legitimate military aims of attacks on the Srebrenica enclave. Mr. Beara also argues that the Trial Chamber erred in convicting him for genocide after acquitting him of forcible transfer as genocidal intent in the present case can only be inferred from the combined intent to murder the Bosnian Muslim men and forcibly transfer the women, children, and the elderly. Having considered the arguments made by Messrs. Popović and Beara, as well as the Prosecution, the Appeals Chamber finds that the Appellants have not shown an error by the Trial Chamber and dismisses their arguments.

The Prosecution presents various challenges to the Trial Chamber's finding that Mr. Nikolić lacked genocidal intent. It argues that the Trial Chamber failed to apply nine accepted factors for inferring genocidal intent, relied on irrelevant factual and legal considerations, and erred in fact as no reasonable trial chamber could have concluded that Mr. Nikolić lacked genocidal intent. The Appeals Chamber finds that, although the Trial Chamber did enter contradictory findings regarding Mr. Nikolić's involvement in the movement of prisoners from Bratunac to Zvornik and whether he was directly implicated in the killings at the Branjevo Military Farm, these contradictory findings do not occasion a miscarriage of justice, in light of the Trial Chamber's overall reasoning. Further, the Appeals Chamber considers that the Trial Chamber erred in considering, as a factor negating genocidal intent, the fact that the Milići Prisoners remained alive when in Mr. Nikolić's custody, because of the lack of evidence or findings on his role in the matter. This error, however, does not occasion a miscarriage of justice, considering the wide range of evidence the Trial Chamber relied on to conclude on Mr. Nikolić's *mens rea*. The Appeals Chamber is not convinced by the remainder of the Prosecution's arguments and, Judge Niang dissenting, dismisses its challenges regarding Mr. Nikolić's *mens rea* for genocide.

## Conspiracy to Commit Genocide

I will now address the Parties' submissions regarding conspiracy to commit genocide. The Trial Chamber found Messrs. Popović and Beara criminally responsible for conspiracy to commit genocide but declined to enter convictions against them, concluding that the full criminality of the Accused is accounted for by a conviction for genocide.

The Prosecution submits that the Trial Chamber erred in law. As conspiracy to commit genocide and genocide are distinct crimes, the Appeals Chamber, Judge Niang dissenting, finds that it was necessary to enter convictions against Messrs. Popović and Beara for conspiracy to commit genocide in order to reflect their full culpability. By failing to do so, the Trial Chamber erred in law. Furthermore, the Appeals Chamber discerns no error in the Trial Chamber's underlying factual findings and dismisses Messrs. Popović's and Beara's arguments to the contrary.

The Appeals Chamber, Judge Niang dissenting, therefore grants the Prosecution's ground of appeal 6 and, Judge Pocar dissenting, enters convictions against Messrs. Popović and Beara for conspiracy to commit genocide.

## Crimes Against Humanity

I now turn to the Parties' submissions regarding crimes against humanity. The Trial Chamber found beyond reasonable doubt that there was a widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa, commencing with the issuance of Directive 7. The Trial Chamber found that the attack included the following components: the strangulation of the enclaves through restrictions on humanitarian supplies; the gradual weakening and disabling of the United Nations Protection Force, or "UNPROFOR"; and a military assault on the enclaves culminating in the removal of thousands of people from Srebrenica and Žepa. In addition, the Trial Chamber found that the military assault, on its own, constituted a widespread and systematic attack against a civilian population. Messrs. Beara, Nikolić, and Miletić were found responsible for certain crimes against humanity and present challenges to the related findings of the Trial Chamber.

Mr. Beara's main contentions are that the Trial Chamber erred in finding that: (1) the actions taken against the military-aged Bosnian Muslim men in Potočari and the column of Bosnian Muslim men fleeing towards Tuzla formed part of a widespread and systematic attack against a civilian population; (2) he satisfied the knowledge requirement for commission of a crime against humanity; (3) he possessed the *mens rea* for extermination; and (4) he had the specific discriminatory intent required for the crime of persecution. After considering the submissions made, the Appeals Chamber finds that Mr. Beara has failed to demonstrate that the Trial Chamber erred and dismisses his contentions in their entirety.

Mr. Nikolić challenges the Trial Chamber's factual finding that his acts were clearly tied to the widespread and systematic attack on Srebrenica and that he knew that this was the case. He also argues that the Trial Chamber erred in concluding that he had the requisite *mens rea* for persecution. Having considered the Parties' arguments, the Appeals Chamber, Judge Niang dissenting in part, finds that Mr. Nikolić has failed to demonstrate that the Trial Chamber erred and therefore dismisses his arguments.

I now turn to the challenges presented by Mr. Miletić. The Appeals Chamber finds that he has failed to demonstrate that the Trial Chamber erred in linking Directive 7 to the attacks on the Srebrenica and Žepa enclaves; in finding that all VRS military activity around the enclaves constituted an attack on the civilian population without distinguishing legitimate military actions; and in finding that a plan to restrict humanitarian aid and the re-supply of UNPROFOR constituted part of the attack on the civilian population and that his acts were part of this plan. The Appeals Chamber also finds no merit in Mr. Miletić's arguments that the Trial Chamber erred in finding that he knew of the widespread and

systematic attack against the civilian population and that he knew that his actions comprised part of that attack.

Regarding Mr. Miletić's challenges to the Trial Chamber's findings on persecution, the Appeals Chamber first dismisses his submissions that the Trial Chamber erred in concluding that he had discriminatory intent, that the JCE to Forcibly Remove was partly implemented by acts of cruel and inhumane treatment, and that he intended these acts. Mr. Miletić also alleged errors in relation to the underlying act of terrorising civilians. He submits that the Trial Chamber failed to establish that he had the specific intent required for persecution through terrorising civilians as it had to establish the intent to commit the underlying act and the intent to discriminate. The Appeals Chamber first notes that a trial chamber does not need to establish the elements of the underlying acts, including the *mens rea*; all that is required is establishing that the underlying act was deliberately carried out with discriminatory intent. Mr. Miletić has failed to show that the Trial Chamber erred in establishing his discriminatory intent for persecution through terrorising civilians, that he played a role in disseminating terror, and that he intended to do so. Mr. Miletić made further submissions disputing the Trial Chamber's consideration of shelling and sniping directed at the civilian population of Srebrenica in the months preceding the fall of the enclave as part of the *actus reus* of terrorising civilians. The Appeals Chamber considers, inter alia, that the Trial Chamber established - with sufficient specificity - the numerous incidents of shelling and sniping of the civilian population of Srebrenica in the months preceding the attack on the enclave and that these incidents of shelling and sniping were of sufficient gravity to constitute an underlying act of persecution. The Appeals Chamber therefore dismisses Mr. Miletić's challenges to the Trial Chamber's findings on the underlying act of terrorising civilians.

Mr. Miletić also disputes the Trial Chamber's findings on forcible transfer as a crime against humanity. The Appeals Chamber finds that Mr. Miletić has failed to demonstrate that the Trial Chamber erred in finding that the actions directed against the civilian component of the column constituted a crime against humanity. The Trial Chamber found that able-bodied Bosnian Muslim men fled Žepa and crossed the Drina River into Serbia. The Trial Chamber concluded that this movement across the Drina River amounted to forcible transfer and had the required nexus with the widespread and systematic attack on the civilian population. The Appeals Chamber notes that the Trial Chamber made no finding that the men who crossed the Drina River included any civilians, and considers that - in light of the facts of the case - no reasonable trier of fact could have reached, as the only reasonable inference, the conclusion that the nexus requirement for crimes against humanity had been established. The Appeals Chamber finds that the Trial Chamber erred in this regard and grants Mr. Miletić's appeal in relevant part. Mr. Miletić's convictions for persecution and forcible transfer as crimes against humanity in relation to the men who crossed the Drina River are therefore reversed and the impact of this reversal, if any, will be addressed below.

I will now address Mr. Beara's challenges regarding murder as a violation of the laws or customs of war.

#### War Crimes

Mr. Beara submits that the Trial Chamber erred in finding him guilty of murder of Bosnian Muslim men from Potočari and members of the column of men heading for Tuzla. Notably, he argues that the Trial Chamber erred by listing persons as victims who were in fact taking an active part in hostilities at the time they were killed. The Trial Chamber was satisfied that since the Bosnian Muslim men from the column or who had been separated from their families at Potočari had been killed after their surrender or capture and during the period of their detention, they were not taking an active part in hostilities at the time the crimes were committed. The Appeals Chamber finds that Mr. Beara has not shown that the Trial Chamber erred and dismisses his arguments. The Appeals Chamber also dismisses Mr. Beara's arguments that he did not know that the victims were not taking an active part

in hostilities when the murders were committed and that he did not possess the required *mens rea*.

I will now address the individual criminal responsibility of the Appellants.

### **Individual Criminal Responsibility**

#### **Joint Criminal Enterprise to Murder**

The Trial Chamber found that the plan to murder Bosnian Muslim men already existed on 12 July 1995 and that the separation of the Bosnian Muslim men that started later that day marked the commencement of the implementation of the plan to murder. The Trial Chamber also found that the plan to murder subsequently expanded to include the males captured from the column on 13 July 1995. Messrs. Popović, Beara, and Nikolić presented various challenges to these and related findings on the existence and implementation of the plan to murder. The Appeals Chamber dismisses all of the Appellant's arguments concerning this aspect of the Trial Judgement. In particular, the Appeals Chamber rejects the submissions of Messrs. Popović and Beara concerning the Trial Chamber's reliance on Witness Momir Nikolić's evidence, alleged errors by the Trial Chamber concerning the separation process, and the Trial Chamber's consideration of the detention conditions in Potočari as further evidence of the plan to murder. Messrs. Popović, Beara, and Nikolić all dispute the Trial Chamber's findings regarding the extent and the expansion of the plan to murder. Having examined the submissions of the Parties, the Appeals Chamber finds that the Appellants have failed to show that no reasonable trier of fact could have concluded as the Trial Chamber did and dismisses their arguments accordingly.

The Trial Chamber found that the BSF killed several thousand Bosnian Muslim men in locations across the Bratunac and Zvornik areas. The Trial Chamber also concluded that it did not have evidence in respect of each killing site to determine whether the physical perpetrators of these killings were themselves members of the JCE but considered whether each killing formed part of the common purpose, even when the crimes were committed by persons outside the JCE or by unknown members of the JCE. Mr. Beara challenges the findings regarding the scope of the JCE to Murder. The Appeals Chamber dismisses Mr. Beara's contentions that the killings at the Kravica Warehouse and Cerska Valley were not committed in furtherance of the JCE to Murder. Regarding the killings at the Jadar River, the Appeals Chamber finds that the Trial Chamber erred in fact by finding that the Bratunac Brigade was involved in these killings and thus the link between the killings and the JCE to Murder is no longer readily apparent from the reasoning of the Trial Chamber. This error however does not result in a miscarriage of justice as the Appeals Chamber is satisfied that, in light of the close cooperation of the VRS and MUP forces in the lead up to the killings at the Jadar River and in the implementation of the common purpose of the murder plan, a reasonable trier of fact could have found a link to at least one member of the JCE.

Mr. Beara also argues that the killings of six men at Trnovo were not a part of the common purpose of the JCE to Murder as the Scorpions Unit, who perpetrated the crime, was not a member of the JCE or linked to a member. Mr. Popović presents a similar challenge. The Appeals Chamber first observes that the Trial Chamber did not address the question of whether the members of the Scorpions Unit were members of the JCE and its findings do not allow for such a conclusion. Further, after considering the findings of the Trial Chamber and the arguments presented, the Appeals Chamber, Judge Niang dissenting, is not satisfied that a reasonable trier of fact could have established a link between the Scorpions Unit and a member of the JCE to Murder thereby holding the JCE members responsible for the Trnovo killings. The Appeals Chamber, Judge Niang dissenting, therefore grants Messrs. Beara's and Popović's appeal in this regard, and reverses their convictions for genocide; extermination and persecution as crimes against humanity; and murder as a violation of the laws or customs of war, to the extent they concern the Trnovo killings. For the same reasons, the Appeals Chamber, Judge Niang dissenting, also, *proprio motu*, reverses Mr. Nikolić's convictions for genocide; extermination and persecution as crimes

against humanity; and murder as a violation of the laws or customs of war, to the extent they concern the Trnovo killings. I will address the impact of these reversals, if any, below.

I will now turn to the Appellants' contentions pertaining to *mens rea*. The Trial Chamber found that Messrs. Popović, Beara, and Nikolić shared the intent to carry out the common purpose of the JCE to Murder. The Appeals Chamber dismisses the submissions of Messrs. Popović and Nikolić, inter alia, concerning the Trial Chamber's assessment of, and reliance on, evidence from PW-168 and Momir Nikolić. The Appeals Chamber also finds no merit in Mr. Nikolić's contentions that the Trial Chamber erred in finding that he knew of the common purpose of the JCE to Murder and shared the intent to carry out this purpose. After considering Mr. Beara's submissions concerning the alleged errors by the Trial Chamber in finding that he was aware of and implicated in the murder operation by the morning of 12 July 1995 as well as in finding that he knew of the common purpose of the JCE and shared the intent to carry out this common purpose, the Appeals Chamber finds that Mr. Beara has failed to show that the Trial Chamber erred in this regard.

The Trial Chamber also found that Messrs. Popović, Beara, and Nikolić each made a significant contribution to the JCE to Murder. Regarding Mr. Popović, the Trial Chamber concluded that he figured prominently in various aspects of the implementation of the plan to murder. Mr. Popović contends, inter alia, that the Trial Chamber erred in finding that he had a co-ordinating role in the murder operation. Specifically, he also challenges the Trial Chamber's findings that he was the "lieutenant colonel" who directed the executions that took place at Orahovac on 14 July 1995 and co-ordinated logistics for the killings that took place at the Branjevo Military Farm and the Pilica Cultural Centre on 16 July 1995. After considering the arguments presented, the Appeals Chamber, Judge Robinson dissenting in part, finds that Mr. Popović has failed to show an error by the Trial Chamber. He also challenges the Trial Chamber's findings on his presence and conduct in Ročević on 15 July 1995, in particular, its reliance on the testimony of Witness Srećko Aćimović. The Appeals Chamber finds that Mr. Popović has failed to show any Trial Chamber's error in this respect that would result in a miscarriage of justice or would invalidate the Trial Judgement. Mr. Popović also presents challenges to the Trial Chamber's findings concerning his role in the murder of the Milići Prisoners. Although the Trial Chamber erred in counting Redžo Mustafić who was killed on 15 July 1995 as one of the Milići Prisoners, the Appeals Chamber considers that this has no impact on Mr. Popović's conviction or sentence. Likewise, the Trial Chamber erred in considering that Mr. Popović "killed or facilitated the killing of" the Milići Prisoners as this phrase suggests an alternative conduct, however, as the Trial Chamber did not in fact rely on the alternative conclusion that Mr. Popović "killed" the Milići Prisoners, the error does not invalidate its judgement. In sum, Mr. Popović has failed to demonstrate an error by the Trial Chamber in relation to his contributions to the JCE to Murder that would impact his convictions or sentence.

Mr. Beara also disputes the Trial Chamber's findings underlying its conclusion that he made significant contributions to the common purpose of the JCE to Murder. Specifically, he contends that the Trial Chamber erred in finding that he had a key role in orchestrating the murder operation including his presence in Pribićevec and Bratunac on 11 July 1995, Potočari on 12 July 1995, Orahovac on 14 July 1995 as well as his conduct in Bratunac on 13 July 1995. Mr. Beara further contests the Trial Chamber's reliance on evidence it considered in finding that he was implicated in identifying locations, securing personnel and equipment, and overseeing the execution of the murder plan at individual killing sites. He also challenges the finding that he interacted and met with other participants in the murder operation as well as that he was omnipresent in the Zvornik area. Having examined the arguments presented, the Appeals Chamber finds that Mr. Beara has failed to demonstrate that the Trial Chamber erred in making its findings and dismisses all of his contentions regarding his contributions to the JCE to Murder.

The Trial Chamber found that Mr. Nikolić was involved behind the scenes of, and at, various detention and execution sites in the Zvornik area. His culpable acts included securing personnel to guard and execute prisoners as well as giving directions at one of the



killing sites. Mr. Nikolić challenges several specific findings of the Trial Chamber with regard to his contribution to the JCE to Murder. In particular, he contends that the Trial Chamber erred in finding that he sought to persuade soldiers to participate in the killings at Orahovac, by concluding that he ordered that prisoners at the Kula School be secured, and in relying on Witness Ćimović's evidence to establish his involvement in the crimes committed at Kozluk. However, Mr. Nikolić has failed to show an error that would result in a miscarriage of justice, and the Appeals Chamber dismisses his grounds of appeal as far as they concern his contributions to the JCE to Murder.

The Prosecution also appealed some of the Trial Chamber's findings as they relate to Mr. Pandurević and his membership in the JCE to Murder. The Trial Chamber concluded that Mr. Pandurević was not a participant in the JCE to Murder as he lacked the intent to carry out the common purpose of the JCE to Murder and did not significantly contribute to it. The Appeals Chamber first dismisses the Prosecution's contention that the Trial Chamber failed to provide a reasoned opinion. Regarding Mr. Pandurević's intent, the Appeals Chamber finds that the Trial Chamber erred in finding that Mr. Pandurević did not know that his subordinates were committing or aiding and abetting crimes in the murder operation until 16 July 1995. Nevertheless, the Appeals Chamber finds that although he: (1) knew about his subordinates' assistance in the murder operation as of noon on 15 July 1995 and failed to intervene; and (2) knew about Mr. Popović's planned arrival on 23 July 1995 to Zvornik and its probable consequences for the Milići Prisoners held in the Zvornik Brigade's custody and did nothing to prevent Mr. Popović from sealing their fate, this knowledge does not in itself compel the conclusion that he shared the intent of the JCE to Murder. The Appeals Chamber notes particularly in this respect the key role played by the VRS Main Staff and the Security Branch - regarding the assistance rendered to the murder operation by his subordinates on 15 and 16 July 1995 - and the difficult military situation the Zvornik Brigade faced when Mr. Pandurević resumed active operational command on 15 July 1995, requiring his immediate attention. Further, regardless of Mr. Pandurević's motivation for opening the corridor for the column, which was in contradiction to orders of his superiors, or for transferring 140-150 prisoners to the Batković detention centre, his actions saved thousands of Bosnian Muslim lives in the Zvornik area. The Appeals Chamber therefore finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Mr. Pandurević was not a participant in the JCE to Murder.

The Trial Chamber found that Mr. Beara was liable pursuant to the third category of joint criminal enterprise for the "opportunistic" killings that occurred in Bratunac, Potočari, the Petkovci School, and at the Kravica Supermarket. Mr. Beara contests the Trial Chamber's underlying findings - and in particular, the linking of the perpetrators of the "opportunistic" killings to a member of the JCE to Murder. The Appeals Chamber observes that when entering the initial findings on the "opportunistic" killings, the Trial Chamber did not always specify whether the principal perpetrators were VRS or MUP forces - frequently they were attributed to the BSF. The Appeals Chamber considers that the unreferenced subsequent finding that these killings were committed by the VRS is erroneous. The Appeals Chamber recalls that, although the Trial Chamber found that the BSF consisted of two components, the VRS and the MUP forces, the Trial Chamber's findings could be construed as allowing the principal perpetrators of these crimes to come exclusively from the MUP. The Appeals Chamber considers that it was incumbent upon the Trial Chamber to clearly set out how it established the link between the JCE members, who were all VRS members, and the principal perpetrators. The Appeals Chamber considers that the Trial Chamber's failure to further elaborate on this link constitutes a failure to give a reasoned opinion.

The Appeals Chamber finds that, based on the Trial Chamber's findings, the only reasonable conclusion is that the BSF members who were involved in the "opportunistic" killings of these Bosnian Muslim men were working in close co-operation with the VRS units whose ultimate superior was Ratko Mladić and in some instances were working with either Mr. Beara or Mr. Popović. The Appeals Chamber further finds that the only reasonable inference from the Trial Chamber's findings is that Mladić was also a member of the JCE to Murder. The Appeals Chamber is satisfied that a reasonable trier of fact could have found a

link between the perpetrators of these “opportunistic” killings and Messrs. Mladić, Beara, or Popović, who were all members of the JCE to Murder. The Appeals Chamber thus considers that the Trial Chamber’s failure to provide a reasoned opinion establishing these links did not invalidate the Trial Judgement.

Mr. Beara also presents several challenges to the Trial Chamber’s findings in relation to the *mens rea* requirements for JCE III and asserts that the Trial Chamber erred in finding that it was foreseeable to him that the “opportunistic” killings would occur and that he willingly took that risk. He also argues that the Trial Chamber erroneously found that it was foreseeable to him that the “opportunistic” killings would be carried out with persecutory intent, and by finding that a specific intent crime can be committed through JCE III. After considering the arguments presented, the Appeals Chamber dismisses Mr. Beara’s arguments in their entirety.

I will now address Mr. Miletić’s challenges to the Trial Chamber’s findings concerning the JCE to Forcibly Remove.

#### Joint Criminal Enterprise to Forcibly Remove

Mr. Miletić first contends that the Trial Chamber erred in assessing his role within the VRS Main Staff in 1995, including whether he acted as a “co-ordinator” and whether he advised Ratko Mladić. The Appeals Chamber has considered Mr. Miletić’s contentions, but finds that he fails to demonstrate an error by the Trial Chamber in this regard. Mr. Miletić then alleges that the Trial Chamber erred in its consideration of his membership in the JCE to Forcibly Remove. He argues that the Trial Chamber equated his membership in the VRS with membership in the JCE and failed to consider relevant evidence. The Appeals Chamber is not convinced by the arguments presented and dismisses them.

The Trial Chamber found that Directive 7 tasked the Drina Corps with an illegal plan for an attack on the civilian population involving the creation of “an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa” and that the JCE to Forcibly Remove came into existence, at the latest, with the issuance of Directive 7. The Trial Chamber found that Mr. Miletić made a significant contribution to the common criminal purpose of the JCE to Forcibly Remove through his involvement in the drafting of Directives 7 and 7/1 and by restricting humanitarian aid and UNPROFOR re-supply as well as through his role, in the exercise of his functions, in monitoring and co-ordinating work and information for the VRS Main Staff. Mr. Miletić argues that the Trial Chamber made erroneous findings concerning his central role in the drafting of Directive 7, his knowledge of the final version of its contents, and by concluding that Directive 7/1 was a continuation of Directive 7. The Appeals Chamber considers Mr. Miletić’s arguments unpersuasive and finds that he has failed to demonstrate an error by the Trial Chamber.

Mr. Miletić challenges the Trial Chamber’s findings concerning his role in the approval and notification procedure for humanitarian aid convoys. The Appeals Chamber observes that the Trial Chamber did not find that Mr. Miletić played a role specifically in the approval procedure for humanitarian aid convoys and he fails to show that the Trial Chamber erred in considering his role in the notification procedure. Mr. Miletić also argues that the Trial Chamber committed errors concerning his involvement in the approval and notification procedure for UNPROFOR convoys as well as by finding that he knowingly implemented the instructions of Directive 7 through his involvement in convoy restrictions. After considering the arguments presented, the Appeals Chamber finds that Mr. Miletić has failed to show an error and dismisses all of his contentions.

Another submission presented by Mr. Miletić concerns whether the Trial Chamber overestimated the importance of the Main Staff’s reporting function and his role in it, and he challenges various underlying findings. Mr. Miletić, however, has failed to show any error by the Trial Chamber that has occasioned a miscarriage of justice.

Regarding his knowledge of, and role in, the attack on Srebrenica, Mr. Miletić submits that the Trial Chamber erred. He contends, inter alia, that the Trial Chamber erroneously found that he: skilfully and efficiently used his unique position of knowledge to inform and advise others concerning the removal of the Bosnian Muslim population out of Srebrenica; and monitored the movement of the column. The Appeals Chamber has considered all of Mr. Miletić's arguments and finds that he fails to show an error by the Trial Chamber.

Regarding Žepa, Mr. Miletić challenges the Trial Chamber's conclusion that he contributed to the JCE to Forcibly Remove through his role as an information source, his involvement in monitoring and co-ordinating from the Main Staff, as well as his role in issuing instructions to units in the field. The Appeals Chamber dismisses the arguments presented by Mr. Miletić. The Appeals Chamber also dismisses Mr. Miletić's contention that the Trial Chamber erred in failing to consider evidence indicating that his acts were part of his normal and legitimate responsibilities.

Mr. Miletić further argues that the Trial Chamber erred in law and fact when it found that he shared the requisite *mens rea* as a participant in the JCE to Forcibly Remove. His arguments pertain to the Trial Chamber's application of the legal standard governing the establishment of *mens rea* for JCE I; its conclusions concerning the scope of his knowledge, including his knowledge of the criminal plan to forcibly remove Bosnian Muslims from the enclaves; and its conclusion that his acts, found to contribute to the common purpose, were carried out in relation to the JCE to Forcibly Remove. The Appeals Chamber finds that the Trial Chamber applied the correct legal standard and dismisses Mr. Miletić's challenges thereto. Furthermore, the Appeals Chamber finds that Mr. Miletić has failed to demonstrate that a reasonable trier of fact could not have found that his knowledge included "a wide and substantive knowledge of the strategies and goals of RS" as well as "full knowledge of the situation in Srebrenica and Žepa", and that he was aware of the plan for the JCE to Forcibly Remove as set out in Directive 7. His arguments on the scope of his knowledge are therefore dismissed. The Appeals Chamber also considers that Mr. Miletić has failed to demonstrate an error in the Trial Chamber's findings concerning his continuous participation in the furtherance of the common purpose of the JCE to Forcibly Remove, and dismisses all his challenges to the Trial Chamber's conclusion on his *mens rea*.

The Trial Chamber found that the BSF committed "opportunistic" killings in Potočari which were foreseeable consequences of the JCE to Forcibly Remove. It found that these "opportunistic" killings were foreseeable to Mr. Miletić, that he took the risk that such killings might occur, and found him responsible for them under JCE III. First, the Appeals Chamber dismisses Mr. Miletić's contention that JCE III did not exist in customary international law prior to the events described in the Indictment. Mr. Miletić also contends that the Trial Chamber erred in finding that members of the VRS committed the "opportunistic" killings in Potočari. The Appeals Chamber finds that, in light of the Trial Chamber's findings that the BSF committed these killings and that both the VRS and the MUP forces were operating in Potočari, a reasonable trier of fact could not have later concluded that the VRS committed the killings in Potočari. In so doing, the Trial Chamber committed an error of fact. Considering that Mr. Miletić can only be held liable for the "opportunistic" killings in Potočari if the perpetrators can be linked to one or more members of the JCE to Forcibly Remove, the Appeals Chamber concludes that irrespective of whether the direct perpetrators of the "opportunistic" killings in Potočari were members of the VRS, the MUP forces, or a combination thereof, a reasonable trier of fact could have concluded that a link was established between them and Mladić, a member of the JCE to Forcibly Remove. Thus, the Trial Chamber's error did not occasion a miscarriage of justice. The Appeals Chamber also finds that Mr. Miletić has failed to demonstrate that a reasonable trier of fact could not have found that the "opportunistic" killings in Potočari were a natural and foreseeable consequence of the JCE to Forcibly Remove, that his knowledge was sufficient for him to be in a position to foresee that the "opportunistic" killings might occur, and that he willingly took the risk that they might occur. His appeal in relation to these issues is dismissed. Also dismissed is Mr. Miletić's contention that the Trial Chamber

erred in finding that he could foresee that the “opportunistic” killings in Potočari might be committed with discriminatory intent and that he willingly took that risk.

The Prosecution also alleges that the Trial Chamber erred. In assessing Mr. Miletić’s individual responsibility, the Trial Chamber found that he was liable under JCE III for murder as a crime against humanity for the “opportunistic” killings in Potočari. At the same time, the Trial Chamber, without providing any further reason, held that “in the circumstances of ‘opportunistic’ killings arising from a JCE to Forcibly Remove - encompassing forcible transfer as other inhumane acts constituting a crime against humanity - his criminal responsibility is for murder as a crime against humanity and not as a war crime”. The Appeals Chamber considers that the Trial Chamber’s scant reasoning as to why it acquitted Mr. Miletić for war crimes committed in Potočari indicates that the Trial Chamber erroneously required that the category of the JCE III crime must match that of the JCE I crime. The Appeals Chamber therefore finds that the Trial Chamber erred in law. After considering the Trial Chamber’s findings on Mr. Miletić’s conduct and knowledge, the Appeals Chamber finds that when the correct legal standard is applied, no reasonable trier of fact could have found that Mr. Miletić was not responsible for murder as a war crime for the “opportunistic” killings in Potočari. The Appeals Chamber therefore grants the Prosecution’s ground of appeal 9 and, Judge Pocar dissenting, enters a new conviction against Mr. Miletić under JCE III for murder as a violation of the laws or customs of war for the Potočari “opportunistic” killings.

I will now turn to the Parties’ contentions concerning the mode of liability of aiding and abetting.

#### Aiding and Abetting

The Trial Chamber convicted Mr. Nikolić for aiding and abetting genocide through his participation in the JCE to Murder. The Trial Chamber also convicted Mr. Pandurević of aiding and abetting by omission murder as a crime against humanity and as a violation of the laws or customs of war for the death of the Milići Prisoners, and for aiding and abetting the crimes against humanity of forcible transfer and persecution through forcible transfer. It acquitted Mr. Pandurević of the remaining charges related to aiding and abetting. Messrs. Pandurević and Nikolić as well as the Prosecution present challenges to the Trial Chamber’s findings related to aiding and abetting.

Mr. Nikolić argues that the Trial Chamber erred in finding that he knew that the killing operation was being carried out with genocidal intent. Having considered the arguments, the Appeals Chamber concludes that Mr. Nikolić has failed to demonstrate that the Trial Chamber erred.

Mr. Pandurević argues that the Trial Chamber erred in finding that he must have realised that if he failed to take action, he would be assisting Mr. Popović to carry out the murders of the Milići Prisoners. He further submits that the Trial Chamber erred in finding that his alleged inaction substantially contributed to their murders as he had no realistic courses of action that would have made the crime substantially less likely. Mr. Pandurević also argues that the Trial Chamber applied the wrong *mens rea* standard of aiding and abetting. In relation to the forcible transfer charge, Mr. Pandurević submits that the Trial Chamber erred in not evaluating whether his actions were specifically directed to assist the forcible transfer. The Appeals Chamber, Judge Niang dissenting in part, finds that Mr. Pandurević has failed to establish any factual or legal error, recalling in particular that “specific direction” is not an element of aiding and abetting liability under customary international law. The Appeals Chamber, Judge Niang dissenting in part, therefore dismisses all of these arguments.

The Prosecution argues that the Trial Chamber erred in failing to find that Mr. Pandurević, after he resumed active operational command of the Zvornik Brigade at noon on 15 July 1995, became an aider and abettor to the extermination, murder, and persecution committed in the Zvornik area through the participation of his subordinates.

The Prosecution submits in this regard that the Trial Chamber failed to provide a reasoned opinion, a contention which the Appeals Chamber dismisses. The Appeals Chamber further dismisses as unsubstantiated the Prosecution's argument that Mr. Pandurević aided and abetted the cruel and inhumane treatment of Bosnian Muslim detainees. However, the Appeals Chamber finds that the Trial Chamber erred in finding that there is no evidence of any acts or omissions on Mr. Pandurević's part that would constitute aiding and abetting of the crimes committed within the JCE to Murder. Examining therefore whether all reasonable doubt of Mr. Pandurević's guilt has been eliminated, the Appeals Chamber, Judge Niang dissenting, finds that the Prosecution has shown this to be the case.

Accordingly, the Appeals Chamber, Judge Niang dissenting, grants in part the Prosecution's appeal and reverses Mr. Pandurević's acquittal for extermination as a crime against humanity as well as his acquittals for having aided and abetted murder as a violation of the laws or customs of war and persecution as a crime against humanity through murder. The Appeals Chamber, Judge Pocar dissenting, further enters new convictions against Mr. Pandurević for these crimes. Finally, in light of the new convictions, the Appeals Chamber sets aside Mr. Pandurević's murder convictions under command responsibility for the same crimes committed by his subordinates.

The Prosecution further argues that the Trial Chamber erred in acquitting Mr. Pandurević of aiding and abetting persecution through the murder of the Milići Prisoners. Applying the correct law to the factual findings of the Trial Chamber, the Appeals Chamber, Judge Niang dissenting, concludes that the Trial Chamber erred in failing to convict Mr. Pandurević of aiding and abetting persecution through murder as a crime against humanity in relation to the Milići Prisoners. The Appeals Chamber, Judge Niang dissenting, therefore grants the Prosecution's appeal and reverses Mr. Pandurević's acquittal for aiding and abetting persecution as a crime against humanity through the murder of the Milići Prisoners. Finally, the Appeals Chamber, Judge Pocar dissenting, enters a new conviction against Mr. Pandurević in this regard. The impact of these findings, if any, will be addressed below.

#### Ordering and Planning

Messrs. Beara and Miletić appeal the Trial Chamber's findings on their respective responsibilities for ordering and planning. However, as the Trial Chamber considered that their conduct was most appropriately described as commission of the crimes and entered convictions on this basis, the questions of whether Mr. Beara planned and ordered the crimes, and whether Mr. Miletić planned forcible transfer and persecution do not affect the verdicts, their convictions, or sentences, the Appeals Chamber will not address the merits of their challenges.

I turn now to the challenges presented to command responsibility.

#### Command Responsibility

The Trial Chamber found that Mr. Pandurević, as the commander of the Zvornik Brigade, remained in control of the brigade throughout the relevant period in July 1995, even when he was physically absent from 4 to 15 July 1995. The Trial Chamber, however, found that he only received notice of the criminal acts of his subordinates when he returned to the Zvornik Brigade headquarters around noon on 15 July 1995.

The Trial Chamber convicted Mr. Pandurević of murder as a crime against humanity and as a violation of the laws or customs of war for failing to take necessary and reasonable measures to prevent his subordinates from committing crimes. Mr. Pandurević was acquitted under command responsibility for, inter alia, persecution through cruel and inhumane treatment as a crime against humanity, and murder as a crime against humanity and as a violation of the laws or customs of war, for failing to punish his subordinates for crimes they committed.

Mr. Pandurević and the Prosecution both challenge the Trial Chamber's findings on his liability based on command responsibility. With regard to his absence from the Zvornik

Brigade headquarters from 4 to 15 July 1995, Mr. Pandurević alleges that the Trial Chamber erred in two ways. First, by applying an unduly formalistic standard when concluding that he had the material ability to exercise control over the Zvornik Brigade. Second, by finding that he had effective control of the Zvornik Brigade, when in fact he was tasked with another assignment, his deputy was running the affairs of the brigade, and he did not receive information from the brigade or issue orders to it. The Appeals Chamber, Judge Niang dissenting, finds that Mr. Pandurević has not demonstrated any error in the Trial Chamber's interpretation and application of the standard of effective control. The Appeals Chamber, Judge Niang dissenting, further finds that the Trial Chamber did not err in concluding that the evidence demonstrated that Mr. Pandurević maintained the ability to exercise control over both his deputy and the rest of the Zvornik Brigade during his period of absence.

Finally, Mr. Pandurević argues that his command authority over the Zvornik Brigade had been interrupted by Messrs. Beara and Popović who were issuing directions to his subordinates on the orders of Ratko Mladić. Recalling in particular that the exercise of effective control by one commander does not necessarily exclude effective control being exercised by a different commander and that Mr. Pandurević was legally obliged to ensure that international humanitarian law was applied even when faced with manifestly unlawful orders issued by his superiors, the Appeals Chamber, Judge Niang dissenting, finds that the Trial Chamber did not err in finding that Mr. Pandurević exercised effective control over the men who were performing tasks at the direction of Messrs. Beara and Popović. The Appeals Chamber, Judge Niang dissenting, thus dismisses all of Mr. Pandurević's arguments related to command responsibility.

The Prosecution argues that the Trial Chamber erred by failing to adjudicate or provide a reasoned opinion regarding Mr. Pandurević's command responsibility for failing to prevent the Zvornik Brigade members' participation, from noon on 15 July through 16 July 1995, in persecution through cruel and inhumane treatment, and requests the Appeals Chamber to convict Mr. Pandurević for these crimes. The Appeals Chamber finds that the Trial Chamber failed to enter any specific findings and therefore failed to give a reasoned opinion on this issue and will therefore review the relevant factual findings of the Trial Chamber and when necessary the evidence in the trial record. Having done so, the Appeals Chamber, Judge Niang dissenting, finds beyond a reasonable doubt that Mr. Pandurević failed to take the necessary and reasonable measures to prevent his subordinates from participating in persecution through cruel and inhumane treatment from noon on 15 July to 16 July 1995, as required to discharge his duty as a commander. Thus, the Appeals Chamber, Judge Niang dissenting, grants the Prosecution's appeal in this regard, reverses Mr. Pandurević's acquittal, and, Judge Pocar dissenting, enters a new conviction against Mr. Pandurević.

The Trial Chamber found that the Prosecution did not prove beyond reasonable doubt that Mr. Pandurević failed to take the necessary and reasonable measures to punish his subordinates as required of a commander. The Prosecution argues that the Trial Chamber erred in its application of the "necessary and reasonable measures to punish" standard, which, if correctly applied, would result in convicting Mr. Pandurević for failing to punish the crimes committed by his subordinates from 13 to 17 July 1995. The Appeals Chamber finds that the Trial Chamber's finding rests on two implicit legal findings. The first is that a measure that would ordinarily be considered necessary and reasonable - such as reporting crimes committed by a superior's subordinates to a competent authority or up the chain of command - may in certain circumstances be unreasonable if the evidence indicates that such a competent authority may be subject to interference by the persons or bodies responsible for ordering or planning the crimes. However, international law requires commanders to take some action to punish their subordinates for committing crimes, even in these circumstances. The Appeals Chamber therefore finds that the Trial Chamber erred in this regard. The second implicit legal finding is that measures that would normally not be sufficient to fulfil the duty to punish might in certain circumstances be considered as the only necessary and reasonable measures available. The Appeals Chamber recalls that a superior's duty to punish the perpetrators of a crime includes, if the superior has no power

to sanction, an obligation to report them to the competent authorities, which would only suffice to fulfil the duty to punish if such a report is likely to trigger an investigation or initiate disciplinary or criminal proceedings. The Appeals Chamber finds that the Trial Chamber erred by failing to consider if the measures Mr. Pandurević took were in fact capable of contributing to an investigation or punishment of those who committed the crimes.

Having identified two implicit errors of law in the Trial Chamber's reasoning, the Appeals Chamber, Judge Niang dissenting, finds that Mr. Pandurević failed to take the necessary and reasonable measures to punish his subordinates as required to discharge his duty as a commander. Specifically, the Appeals Chamber finds that these measures included reporting the crimes of his subordinates: (1) directly to the Military Prosecutor; (2) to Mr. Pandurević's higher ranking officer, Radislav Krstić; and (3) to the MUP so that they could investigate or pass it on to the competent authority. The Appeals Chamber, Judge Niang dissenting, therefore grants in part the Prosecution's appeal in this respect and finds Mr. Pandurević responsible as a superior for the crimes of his subordinates between 13 and 16 July 1995.

However, as the Appeals Chamber, Judge Niang dissenting, has found Mr. Pandurević responsible for aiding and abetting extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution through murder as a crime against humanity, for the killing of Bosnian Muslim prisoners from noon on 15 July to 16 July 1995, and the Appeals Chamber has consequently entered new convictions against Mr. Pandurević for these crimes, it will not enter a conviction based on command responsibility for the same crimes. The Appeals Chamber, Judge Pocar dissenting, therefore enters new convictions against Mr. Pandurević for failing to punish the crimes perpetrated by his subordinates between 13 July 1995 and noon on 15 July 1995, for extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity through murder. The Appeals Chamber, Judge Pocar dissenting, further enters a new conviction against Mr. Pandurević for failure to punish persecution as a crime against humanity through cruel and inhumane treatment as perpetrated by his subordinates from 13 July to 16 July 1995. The impact of these findings, if any, will be addressed below.

That concludes the summary of the Appeals Chamber's findings regarding the individual criminal responsibility of the Appellants. I will now address a few miscellaneous grounds of appeal.

#### Miscellaneous Grounds of Appeal

Mr. Miletić contends that the Trial Chamber violated his right to a fair trial by not issuing a decision on a motion he filed, and that it also violated his right to obtain a public judgement as it only made a redacted version of the Trial Judgement available to the public. The Appeals Chamber finds that although the Trial Chamber erred in not clearly deciding the motion, Mr. Miletić has not demonstrated that the Trial Chamber violated his right to a fair trial or his right to obtain a public judgement and dismisses his relevant grounds of appeal.

I shall now turn to the contentions of the Appellants and Prosecution regarding sentencing.

#### Sentencing

The Appellants and the Prosecution presented various challenges to the factors considered by the Trial Chamber in the exercise of its sentencing discretion, alleging errors concerning the sentencing goals, the gravity of crimes and involvement of the Appellants, aggravating circumstances, mitigating factors, and the sentencing practice in the former Yugoslavia as well as to the sentences given by the Tribunal in similar cases. Having considered the Parties' arguments carefully, the Appeals Chamber finds that the Trial Chamber failed to properly exercise its discretion in its discussion on Mr. Nikolić's sentence

when arriving at the conclusion that there is some evidence that Mr. Nikolić was disturbed by what he was asked to do. However, the Appeals Chamber considers that this error did not result in a miscarriage of justice. Furthermore, the Appeals Chamber finds merit in Mr. Miletić's submission that the Trial Chamber erred in law by considering his use of his authority within the VRS Main Staff as an aggravating circumstance, thus effectively double-counting it, as it was already considered in the findings on the gravity of his crimes.

Consequently, it is unnecessary to consider whether the Trial Chamber erred in concluding that Mr. Miletić abused his authority. Mr. Miletić's relevant ground of appeal is therefore granted, in part. I will address the impact of this error, if any, below. The Appeals Chamber dismisses all other grounds of appeal raised by the Appellants and the Prosecution relating to sentencing.

I now turn to the impact of the Appeals Chamber's findings on sentencing. In this context, the Appeals Chamber recalls in addition to its findings on Mr. Miletić's appeal against sentencing, it has reversed certain convictions in relation to each Appellant. The Appeals Chamber has also entered convictions in relation to Messrs. Popović, Beara, Miletić, and Pandurević. The Appeals Chamber considers that, in light of the circumstances of this case, as well as the gravity of the crimes for which each Appellant is responsible, the sentences for Messrs. Popović, Beara, Nikolić, and Pandurević are not impacted, while a limited reduction is warranted in relation to Mr. Miletić.

#### **DISPOSITION**

I will now read out the full operative text of the Appeals Chamber's disposition.

**PURSUANT TO** Article 25 of the Statute and Rules 117 and 118 of the Rules;  
**NOTING** the respective written submissions of the parties and the arguments they presented at the appeal hearing on 2-6 December 2013;  
**SITTING** in open session;

Mr. Popović, will you please stand.

#### **WITH RESPECT TO VUJADIN POPOVIĆ,**

**GRANTS**, Judge Niang dissenting, Popović's appeal regarding the killing of six Bosnian Muslim men near Trnovo and **REVERSES** his convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing near Trnovo;

**DISMISSES**, Judge Robinson dissenting in part, Popović's appeal in all other respects;

**AFFIRMS** the remainder of Popović's convictions under Counts 1, 3, 5, and 6;

**GRANTS**, Judge Niang dissenting, in part the Prosecution's ground of appeal 6 and **ENTERS**, Judge Pocar dissenting, a conviction against Popović for conspiracy to commit genocide (Count 2);

**AFFIRMS** Popović's sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

Mr. Popović, you may be seated.

Mr. Beara, will you please stand.

#### **WITH RESPECT TO LJUBIŠA BEARA,**



**GRANTS**, Judge Niang dissenting, in part Beara's ground of appeal 17 and **REVERSES** his convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing of six Bosnian Muslim men near Trnovo;

**DISMISSES** Beara's appeal in all other respects;

**AFFIRMS** the remainder of Beara's convictions under Counts 1, 3, 5, and 6;

**GRANTS**, Judge Niang dissenting, in part the Prosecution's ground of appeal 6 and **ENTERS**, Judge Pocar dissenting, a conviction against Beara for conspiracy to commit genocide (Count 2);

**AFFIRMS** Beara's sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

Mr. Beara, you may be seated.

Mr. Nikolić, will you please stand.

**WITH RESPECT TO DRAGO NIKOLIĆ,**

**DISMISSES** Nikolić's appeal in its entirety;

**REVERSES**, *proprio motu*, Judge Niang dissenting, Nikolić's convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing of six Bosnian Muslim men near Trnovo;

**AFFIRMS** the remainder of Nikolić's convictions under Counts 1, 3, 5, and 6;

**DISMISSES**, Judge Niang dissenting in part, the Prosecution's appeal concerning Nikolić in its entirety;

**AFFIRMS**, Judge Niang dissenting, Nikolić's sentence of 35 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

Mr. Nikolić, you may be seated.

Mr. Miletić, will you please stand.

**WITH RESPECT TO RADIVOJE MILETIĆ,**

**GRANTS** Miletić's sub-ground of appeal 6.2 and **REVERSES** his convictions for persecution and inhumane acts (forcible transfer) as crimes against humanity in connection with the forcible transfer of the men who crossed the Drina River (Count 6 in part and Count 7 in part);

**GRANTS** in part Miletić's ground of appeal 24 concerning sentencing;

**DISMISSES** Miletić's appeal in all other respects;

**AFFIRMS** the remainder of Miletić's convictions under Counts 4, 6, and 7;

**GRANTS** the Prosecution's ground of appeal 9 and **ENTERS**, Judge Pocar dissenting, a conviction against Miletić for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari (Count 5 in part);

**SETS ASIDE** Miletić's sentence of 19 years of imprisonment and **IMPOSES** a sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

Mr. Miletić, you may be seated.

Mr. Pandurević, will you please stand.

**WITH RESPECT TO VINKO PANDUREVIĆ,**

**DISMISSES**, Judge Niang dissenting in part, Pandurević's appeal in its entirety;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 1(b) in part and **ENTERS**, Judge Pocar dissenting, new convictions against Pandurević for aiding and abetting extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution through murder as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners at the Ročević School, the Kula School, Kozluk, the Pilica Cultural Centre, and the Branjevo Military Farm;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 1(c) and **ENTERS**, Judge Pocar dissenting, a conviction against Pandurević for aiding and abetting persecution through murder as a crime against humanity (Count 6 in part) in relation to the Milići Prisoners;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 2(d) and **ENTERS**, Judge Pocar dissenting, a conviction against Pandurević under Article 7(3) of the Statute for persecution through cruel and inhumane treatment as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners at the Ročević and Kula Schools;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 2(e) and **ENTERS**, Judge Pocar dissenting, convictions against Pandurević under Article 7(3) of the Statute for extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution through murder as well as through cruel and inhumane treatment as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners who were detained at the Grbavci, Ročević, and Kula Schools, transported to Orahovac and Kozluk, and killed at Orahovac;

As a result, **SETS ASIDE** Pandurević's conviction under Article 7(3) for murder as a crime against humanity (Count 4 in part) and murder as a violation of the laws or customs of war (Count 5 in part) for crimes committed by his subordinates at Kozluk and the Branjevo Military Farm from noon on 15 July to 16 July 1995;

**DISMISSES** the Prosecution's appeal concerning Pandurević in all other respects;

**AFFIRMS** the remainder of Pandurević's convictions under Counts 4, 5, 6, and 7;

**AFFIRMS** Pandurević's sentence of 13 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention.

Mr. Pandurević, you may be seated.

**RULES** that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

**ORDERS**, Judge Niang dissenting in part, that, in accordance with Rules 103(C) and 107 of the Rules, the Appellants are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

Judge Patrick Robinson appends a partially dissenting opinion.

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Mandiaye Niang appends separate and dissenting opinions.

Madam Registrar, would you please distribute copies of the judgement to the parties.

Before concluding, I would take this brief opportunity to thank all of those who have contributed to the efficient conduct of this case, and thank them for their constructive efforts.

This hearing of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stands adjourned.

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