THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88-A

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Andrésia Vaz** **Judge Khalida Rachid Khan**
Registrar:	**Mr John Hocking**
Date Filed:	**19 February 2013**

THE PROSECUTOR

v.

VUJADIN POPOVIC
LJUBISA BEARA
DRAGO NIKOLIC
RADIVOJE MILETIC
MILAN GVERO
VINKO PANDUREVIC

PUBLIC

PUBLIC REDACTED VERSION OF APPEAL BRIEF ON BEHALF OF MILAN GVERO AGAINST THE TRIAL JUDGEMENT OF 10 JUNE 2010

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PUBLIC REDACTED VERSION OF APPEAL BRIEF ON BEHALF OF MILAN GVERO AGAINST THE TRIAL JUDGEMENT OF 10 JUNE 2010

I. INTRODUCTION

A. Procedural Background

1. This *Appeal Brief* is being filed by Defence Counsel[1] representing General Milan Gvero pursuant to Article 25 of the Statute, Rules 107 and 111 of the Rules, paragraphs 4, 13 and 14 of the Practice Direction (IT/201) of 7 March 2002, paragraph 1 of the Practice Direction (IT/184/Rev.2), of 16 September 2005, and the Appeals Chamber's Decision of 13 December 2012.[2]

2. On 10 June 2010, a Judgement was delivered by the Trial Chamber in *Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, and Vinko Pandurevic*. Milan Gvero was found guilty of Count 6 – Persecution, a crime against humanity, charged pursuant to Articles 5(h) and 7(1) of the Statute, through forcible transfer, cruel and inhumane treatment, and terrorising civilians; and of Count 7 – Inhumane acts (forcible transfer), a crime against humanity, charged pursuant to Articles 5(i) and 7(1) of the Statute;[3] he was also acquitted of Count 4 – Murder, a crime against humanity, punishable under Articles 5(a) and 7(1) of the Statute; Count 5 – Murder, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of

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[1] Milan Gvero has had virtually no input into this Brief. As set out in the concurrently filed *Confidential and Ex Parte* "Urgent Submission of Counsel to accompany the Appeal Brief filed on Milan Gvero's behalf concerning his Medical Condition" he was taken seriously ill on 3 February 2013. He has therefore not seen or had read to him any of the text of this document. His counsel have nonetheless taken the decision to file this Brief but request the Appeals Chamber keep in the forefront of their minds Milan Gvero's inability to contribute in any meaningful way to it.

[2] *See*, *Prosecutor v. Popovic et al.* (IT-05-88-A), Decision on Milan Gvero's Motion to Rescind in Part or for an Extension of Time to File Various Briefs, 13 December 2012, p. 3 (confidentiality lifted by the Appeals Chamber's Order of 16 January 2013).

[3] Judgement, paras. 1825, 1826, 1833, 1836 / pp. 679-682, 835-836.

the Statute; and Count 8 – Deportation, a crime against humanity, punishable under Articles 5(d) and 7(1) of the Statute.[4] He received a single sentence of 5 years of imprisonment.[5]

3. The proceedings in Milan Gvero's case were suspended for in excess of two years, following serious complications in his health in August 2010.[6] Milan Gvero was eventually declared fit to participate in the appellate proceedings, which accordingly resumed in November 2012.[7]

4. On 8 September 2010, the Prosecution filed its Notice of Appeal,[8] setting out two grounds of appeal against the Judgement. On 17 December 2012, the Defence filed its Notice of Appeal,[9] setting out nine grounds of appeal against the Judgement.

5. Pursuant to Rule 111(A) of the Rules and Articles 7-10 of the Practice Direction (IT/201) of 7 March 2002, the Defence will also file a Book of Authorities containing a separate compilation of the non-ICTY and non-ICTR authorities relied upon.

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4 Judgement, paras. 1827, 1831 / pp. 680-681, 836.

5 Judgement, p. 836.

6 *Prosecutor v. Popovic et al.* (IT-05-88-A), Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 13 December 2010, p. 10.

7 *Prosecutor v. Popovic et al.* (IT-05-88-A), Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 30 November 2012, pp. 12-13 (public redacted version issued on 16 January 2013).

8 *Prosecutor v. Popovic et al.* (IT-05-88-A), Prosecution Notice of Appeal ("Prosecution Notice"), 8 September 2010, pp. 11-12.

9 *Prosecutor v. Popovic et al.* (IT-05-88-A), *Confidential* Defence Notice of Appeal on Behalf of Milan Gvero, 17 December 2012 ("Defence Notice").

B. General Overview

6. This appeal concerns the Judgement involving events taking place prior to, during and after the attack on the Srebrenica and the Zepa enclaves in the summer of 1995.

7. The First Ground relates to the lawfulness of the shelling on 10 and 11 July 1995 and its actual aim, indicating Trial Chamber's errors in both law and fact that render Milan Gvero's conviction unsustainable.

8. The Second Ground discusses flaws and deficiencies in the Trial Chamber's reasoning and findings on the opportunistic killings in Potocari, including the foreseeability thereof generally to anyone, even with the fullest knowledge of the plan.

9. The Third Ground addresses vagueness, ambiguity and other deficiencies of the Indictment and legal errors on the part of the Chamber concerning persecution and other inhumane acts (forcible transfer) as crimes against humanity in relation to the civilian component of the column of Bosnian Muslim men attempting to escape from Srebrenica and the Bosnian Muslim able-bodied men who swam from Zepa across the Drina River to Serbia.

10. The Fourth Ground concerns the Chamber's erroneous interpretation of and approach to Gvero's 11 July 1995 telephone conversation with General Nicolai.

11. The Fifth Ground deals with the Chamber's failure to require the Prosecution to prove beyond a reasonable doubt that Gvero spoke to Radovan Karadzic during two telephone conversations on 11 July 1995.

12. The Sixth Ground addresses errors in the Chamber's reasoning and findings concerning the drafting of Directive 7 and Milan Gvero's knowledge and contribution to it.

13. The Seventh Ground deals with errors in the Chamber's reasoning and findings regarding the Article 5 knowledge requirement on Milan Gvero's part that his acts formed part of an illegal attack.

14. The Eighth Ground challenges the Chamber's findings on Milan Gvero's participation in and contribution to the JCE to Forcibly Remove.

15. The Ninth Ground concerns the impermissibly cumulative convictions for Count 6 (persecution through forcible transfer) and Count 7 (other inhumane acts, forcible transfer) of the Indictment.

16. Each of these errors has invalidated the Judgement and/or occasioned a miscarriage of justice. The Appeals Chamber is therefore invited to correct the errors, quash the convictions and enter a judgement of acquittal or, in the alternative, reduce Milan Gvero's sentence accordingly.

II. GROUNDS OF APPEAL

A. FIRST GROUND: *The Trial Chamber Erred in Law and in Fact by Finding that the Shelling on 10 and 11 July 1995 Amounted to the Terrorising of Civilians*

17. The Trial Chamber erred in law and in fact in finding that the principal aim of the shelling of targets in and around Srebrenica on 10 and 11 July 1995 was to terrorise the civilian population,[10] thus constituting an underlying act of persecution.[11] No reasonable trier of fact could have found that Bosnian Serb Forces fired indiscriminately, or that they expressly targeted Bosnian Muslim civilians as they fled from their homes along the road from Srebrenica to Potocari.[12] The error of fact arises from (i) disregarding abundant and credible evidence of legitimate military targets in proximity to where the shells were landing; (ii) the Chamber disregarding its own finding that the attack on the enclave was justified by legitimate military aims; and/or (iii) applying an erroneous legal standard of unlawful targeting.

18. The nature of the errors is not always clear, as the Trial Chamber also erred by failing to fully state its reasons, as required by Article 23 of the Statute and Rule 98*ter*(C) of the Rules, on material matters. The factual errors occasion a miscarriage of justice and the postulated legal error invalidates the Judgement.

[10] Judgement, para. 980 / pp. 380-381.

[11] Judgement, para. 998 / p. 386.

[12] Judgement, para. 996 / p. 385.

i. **Sub-ground 1(A):** *The Trial Chamber Erred in Law by Failing to Apply a Correct Legal Standard and to Fully State Its Reasons*

19. The Prosecution conceded, and the Trial Chamber acknowledged,[13] that the attack against Srebrenica was, in principle, justified by a legitimate and lawful military objective: to demilitarize the enclave and prevent the Bosnian forces from constantly attacking and tying down large numbers of Serbian forces. This legitimate purpose was recognized from the outset of the trial.[14]

20. The Trial Chamber nevertheless found that the attack on the Srebrenica enclave was unlawful on two grounds: (i) some individuals may have been (simultaneously) motivated by the unlawful purpose of forcing the civilian population out of the enclave; and (ii) the means adopted in the attack was disproportionate to the lawful military objective. Thus, the Chamber posited that:

> "It is however not necessary for the Trial Chamber to speculate as to what military action on the part of the VRS may have been justified in relation to the enclaves in fulfilment of these legitimate military aims. Whatever those measures might have been, the full scale, indiscriminate and disproportionate attack levelled by the VRS against these United Nations protected civilian enclaves, was not amongst them."[15]

21. It is well-recognised that attacks on civilian population, as such, are impermissible. Both Additional Protocol I and Additional Protocol II state:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[16]

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[13] Judgement, para. 774 / pp. 319-320.

[14] Prosecution Opening Statement, T. 388, 395-396 (21 August 2006); Butler, R., T. 20579 (28 January 2008); Mr McCloskey, T. 23167 (2 July 2008); Prosecution FTB, para. 279.

[15] Judgement, para. 775 / p. 320 [footnote omitted].

[16] Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. *See*, also, *Galic* AJ, para. 87.

22. Article 52 of Additional Protocol I provides that:

> "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[17]

23. Attacks against military targets – which by definition means that civilians are not the "object of attack" – are lawful, even where a foreseeable by-product of those attacks is the infliction of great fear, or even terror, amongst the civilian population.[18] Attacks on facilities located in urban areas that make an effective contribution to military action are not prohibited; on the contrary, they can even involve the use of artillery and bombs.[19] The foreseeable emotional distress that may be caused by an attack is never mentioned as a relevant consideration to the legality of such attacks.

24. The party targeting facilities in urban environments must, as in any other environment, adhere to the principles of proportionality and distinction.[20] An

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[17] Additional Protocol I, Article 52.

[18] *See*, also, *Galic* AJ, para. 104.

[19] *See*, *e.g.*, Final Report on NATO Bombing Campaign, paras. 54-56, 71-89 (describing a significant number of large-scale attacks in urban areas, some of which were erroneously targeted, but concluding that there was no credible basis to believe that any violations of the law of armed conflict had been committed).

[20] *Galic* TJ, para. 58 ("Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated [....] In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack"); Final Report on NATO Bombing Campaign, para. 48 ("It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.").

advisory committee to the ICTY Prosecutor described the applicable law as follows:

> "In brief, in combat military commanders are required: a) to direct their operations against military objectives, and b) when directing their operations against military objectives, to ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated."[21]

25. No reasonable trier of fact could have found that any Serb fire was intentionally targeted at civilians, much less that this was the only policy, and still less that such targeting was committed with the "primary purpose" of spreading terror.

26. The Chamber made no specific findings – indeed, as discussed more specifically below, there is virtually no reference whatsoever to the abundant evidence of the many lawful targets present in Srebrenica that may have been the "object of attack" of Serb fire. Since the Trial Chamber found that the illegality of the attack consisted in the means employed in the attack, it was incumbent on the Trial Chamber to explain how it found that the attacks were disproportionate or indiscriminate in such a way as to be probative that the primary purpose was terrorisation. A distinction should have been made between a legal military operation during which certain crimes might have occurred without the commander ordering their commission, and unlawful military action which, ordered by the commander, itself constitutes a crime.[22]

27. By failing to provide a reasoned opinion on a material matter and differentiate in this case between a legitimate military action and an unlawful attack on the civilian population and by holding that all military actions around the enclaves constituted an attack on the civilian population, the Chamber acted in breach of

[21] Final Report on NATO Bombing Campaign, para. 28.

[22] *Blaskic* AJ, para. 427.

Article 23 of the Statute[23] and Rule 98*ter*(C) of the Rules, and committed an error of law, rendering the Judgement invalid.

28. The Chamber failed to assess the legitimacy of the objectives of military activities around the enclaves and was therefore unable to adequately assess and pronounce itself on the actions of Milan Gvero carried out within the context of his regular and legitimate duties. Instead, the Chamber routinely qualified them as an attack on the civilian population.[24]

29. In addition, the Chamber's conclusions did not meet the requirements of a reasoned opinion. It reached a conclusion without providing a reasoned opinion as required by the Statute and Rules[25] and in violation of fair trial protections.[26]

30. The Appeals Chamber should, therefore, apply the correct legal standard to the evidence contained in the trial record.[27]

ii. **Sub-ground 1(B):** *The Trial Chamber Erred in Fact in Findings Related to the Shelling on 10 and 11 July 1995*

31. The Trial Chamber erred in fact in finding, in the absence of proof beyond a reasonable doubt, that Serb Forces targeted civilians or fired indiscriminately

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[23] It follows from Article 23 of the Statute that Trial Chamber's duty is to provide a reasoned opinion. In the *Furundzija* Case, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute (*see*, *Furundzija* AJ, para. 69; *see,* also, *Kupreskic et al.* AJ, para. 32).

[24] *See*, Judgement, para. 770 / p. 318.

[25] *See*, Article 23(2) of the Statute; Rule 98ter(C) of the Rules.

[26] This requirement serves as a fair trial protection ensuring that: (1) appeal rights can be exercised, and (2) the Appeals Chamber can understand and review a trial chamber's findings and its evaluation of the evidence. *Haradinaj et al.* AJ, para. 128; *Krajisnik* AJ, para. 139. *See*, also, Article 20(1) of the Statute.

[27] *Blaskic* AJ, para. 24(d).

during the takeover of the Srebrenica enclave.[28] The Chamber heard no, or virtually no, direct evidence to support such a finding, relying instead on circumstantial evidence. When such evidence is relied on:

> "It is not sufficient that [the finding of guilt] is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[29]

a. *Shelling of the Enclave was not Unlawful or Indiscriminate*

32. The circumstantial evidence did not exclude the reasonable possibility that Serb Forces, in respect of any given shooting or artillery attack, were targeting one or more of the numerous military targets present in the Srebrenica enclave, including nestled in Srebrenica Town itself. The Chamber itself acknowledged, and the Prosecution conceded, that the enclave was never disarmed.[30] This was a breach of the demilitarization agreement and a source of constant complaint by Serb Forces.[31] The evidence showed, and the Prosecution never significantly disputed, that there were some 7,000 Bosnian Muslim fighters in the enclave, some well-armed and organized into specific units of the ABiH, whereas others were fighting without proper uniforms and shared rifles. These forces often carried out attacks outside the enclave for the express purpose of tying down as many Serb Forces as possible so as to keep them away from other fronts.[32]

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[28] Judgement, paras. 770, 996 / pp. 318, 385.

[29] *Delalic et al.* AJ, para. 458. *See*, also, *Tolimir* TJ, Dissenting and Separate Concurring Opinions of Judge Prisca Matimba Nyambe, ftnt. 7.

[30] *See*, T. 2171 (25 September 2006). *See,* also, Nicolai C., T. 18559 (30 November 2007); Smith R., T. 17642-17643 (7 November 2007).

[31] Smith R., T. 17647 (7 November 2007); Ex. 5D502 (Agreement on the demilitarization of Srebrenica and Zepa between VRS and ABiH, 8 May 1993).

[32] PW-168, T. 15815 (26 October 2007) (closed session); Lazic, M., T. 21731 (4 June 2008); Nikolic M., T. 33010 (22 April 2009), 33063 (23 April 2009); *See,* also, PW-168, T. 16243 (11 October 2007). Likewise, the 285th Eastern Bosnia Light Infantry Brigade, or the 1st Zepa Brigade, was directly subordinated to the 28th Division from Srebrenica (*see*, Ex. 6D75 – Instruction from Command of the 28th Division Army of the Republic of BH to Command of the 285th IBLbr Zepa Salih Hasanovic signed

33. The ABiH deliberately placed important military facilities in the heart of Srebrenica Town. These facilities, according to ABiH documents, included: 1) the headquarters of the 28th Division, at the Hunting Lodge (Lovac);[33] 2) a working space and depot at the "Town Command" in Srebrenica;[34] 3) the headquarters of the 282nd Brigade, located in the Hotel Domavija;[35] 4) the headquarters of the 283rd Brigade, located in the building owned by Kamen DP, Srebrenica;[36] 5) the headquarters of the 284th Brigade, located in the "Radnik GP", the building in the very centre of Srebrenica after the traffic circle;[37] and 6) the communications facility located on the top floor of the PTT building, used by the 28th Division to communicate with the 2nd Corps in Tuzla and other units,[38] and which was also used as a *de facto* headquarters of the 28th Division, including on 11 July itself.[39]

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by Nedzad Bektic, 2 June 1995; Butler R., T. 16777 (16 January 2008) and Ex. P2764 – VRS Main Staff Command Responsibility Report, 9 June 2006, at 4.0), and very active in the Zepa enclave (Vojinovic, M., T. 23694-23696 (21 July 2008)).

[33] Ex. 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 1, shown on Ex. 4D653 (Official Land Register for Various Locations - Srebrenica and Potocari), p. 14 (see pp. 25-26 of the original). *See*, also, Ex. 4D8 (BiH State Security Report, 28 August 1995), p. 5; Pandurevic V., T. 31993, 31995 (23 February 2009).

[34] Ex. 4D135, p. 1, shown on Ex. 4D653 (Official Land Register for Various Locations - Srebrenica and Potocari), p. 11 (see pp. 19-20 of the original); Boering P., T. 2178-2179 (26 September 2006) ("Q. Did you know that the headquarters of the 28th Division was stationed at Srebrenica? A. Yes. That was the headquarters. Q. Can you tell me in which building this headquarters was? A. I think I drove past it once. It was a bit at the edge, in the outskirts of the enclave, in an area with mountains but I'm sure it wasn't in the centre.").

[35] Ex. 4D135, p. 2, shown on Ex. 4D653 (Official Land Register for Various Locations - Srebrenica and Potocari), p. 13 (see pp. 23-24 of the original); Pandurevic V., T. 31993.

[36] Ex. 4D135, p. 2, shown on Ex. 4D653 (Official Land Register for Various Locations - Srebrenica and Potocari), p. 10 (see pp. 17-18 of the original).

[37] Ex. 4D135, p. 2, shown on Ex. 4D653 (Official Land Register for Various Locations - Srebrenica and Potocari), p. 8 (see pp. 13-14 of the original).

[38] Kingori J., T. 19417 (11 January 2008) ("As far as I know, the building that we were living in, that is, the PTT building, as I said earlier, could have constituted a military target because of its strategic position, and also it's housing the communication equipment."); Kingori J., T. 19474:7-12 (11 January

34. The PTT building in Srebrenica Town was a legitimate military target for the VRS.[40] Communication facilities, whether civilian or military, are an appropriate military target when used for military purposes. This is extensively discussed in the Prosecutor's public reasons for declining to investigate the NATO bombing of the Belgrade TV facility in 1999, resulting in 16 civilian deaths.[41]

35. Further evidence of using the civilian population as shields is the policy adopted by the ABiH of prohibiting civilians from leaving the Srebrenica enclave,[42] and then adopting vigorous measures to implement the prohibition.[43]

2008); Kingori J., T. 19472 (11 January 2008) ("All I know is that 28th Division, which was later changed to 8th OG, they had a command net at our building; that is, PTT"); Boering P., T. 2030 (22 September 2006) ("I didn't say it was intended as a headquarters. I said that it could be used as a place to establish connections and to contact Tuzla from there"; Boering P., T. 2179:9-17 (26 September 2006); Ex. 4D263 (28th Division Command report re. communications assets, 25 April 1995); Ex. 5D1349 (Karremans protesting to ABiH about artillery placed near the PTT building, 3 April 1995).

[39] The UNPROFOR British forward air controllers go to the PTT building to receive targeting information from Becirovic, demonstrating that it was a well-known headquarters for the 28th Division: Ex. 4D2 (Becirovic Statement to 2nd Corps Mil. Security Department, 11 August 1995), p. 12; Ex. 4D8 (BiH State Security Report, 28 August 1995), p. 4; Boering P., T. 2029 (22 September 2006).

[40] The VRS knew about these targets: Pandurevic V., T. 31993 (23 February 2009) ("We knew that the Hotel Domavija, the post office and the hunter's lodge were used for military purposes"); Ex. P1500 (Map titled "Deployment of our Enemy and UNPROFOR Forces in the Srebrenica and Zepa Enclaves"); Ex. 4DP1504 (VRS map with ABiH targets); Ex. P2884 (Drina Corps map showing ABiH artillery positions and headquarters); Ex. P2885 (Drina Corps map); Exs. P107 / 1D382 / 4D377 / 4D378 (Drina Corps Command Order, Krivaja-95, 2 July 1995).

[41] Final Report on NATO Bombing Campaign, para. 75.

[42] Ex. 4D195 (ABiH 2nd Corps Command Intelligence Department, Dispatch, 16 April 1993), para. 5.

[43] Exs. 5D5 (Transcript of a video recording, Naser Oric Order, 24 May 1994); 4D505 (ABiH 28th Division Command Security Department - Overview of security situation, No. 13-05-29, 18 April 1995); 5D224 (Document from the 285th Iblbr Zepa Army of the Republic of BH to the General Staff of the Army, 25 May 1995); 5D244 (Order from the Command of the 28th Division to the Command of the 285th Iblbr Zepa, 27 May 1995); 1D1100/5D235 (Order from Command of the 28th Division Army of the Republic of BH to the Command of the 285th Iblbr Zepa, 17 June 1995); 4D306 (RBIH Army Command of the 28th Division – Weekly morale report addressed to the Command of the 2nd Corps,

36. The law of war does not prohibit erroneous targeting, even as a result of negligence. Only intentional targeting of civilians or indiscriminate targeting is prohibited.[44] No reasonable trial chamber could have found based on the circumstantial evidence that the only reasonable conclusion was that the targets of the Serb Forces were not legitimate, or that they were only targeting civilians.

37. The number of legitimate military targets, combined with the active defence of the enclave by Bosnian Muslim forces, justified the use by Serb Forces of small arms of fire, mortars and, during selected phases of the operation, artillery. The ABiH fighters had put up strong resistance to the south of the town particularly on 10 July, launching a strong counter-offensive.[45] ABiH forces did not refrain from firing mortars from the middle of the town itself.[46] DutchBat witnesses testified that the ABiH deliberately attempted to use the civilian population as a shield during the attack, forcing them to remain in Srebrenica Town on 10 July even when many of them wanted to flee to Potocari.[47]

Morale Department in Tuzla, 20 June 1995); 4D134 (Monthly Report from ABiH 28th Division, 23 June 1995), p. 2; 4D301 (RBiH Army Command of the 2nd Corps - Congratulation to 28th Division and 285th Brigade, Commands on successful sabotage combat activities, 28 June 1995); 4D302 (ABiH 28th Division Command, Intelligence Department – Information re ABiH General Staff Document No. 1/825-564, 29 June 1995); 4D11 (Analysis and chronology of events in Srebrenica, late July 1995), p. 3.

[44] Final Report on NATO Bombing Campaign, para. 28 ("The *mens rea* for the offence is intention or recklessness, not simple negligence.").

[45] Ex. 4D11 (ABiH mid-1995document titled "Analysis and Chronology of Events in Srebrenica"), pp. 3-4; Exs. 4D336 / 6D23 / 7D474 (Drina Corps Combat Report, 10 July 1995), p. 1.

[46] Ex. 4D14 / P2047 (Srebrenica Trial Video), 5:40-6:19; Pandurevic V., T. 31993-31994 (23 February 2009).

[47] Koster E., T. 3059 (26 October 2006) ("Q. Do you recall them telling you that that evening, the Muslim population would not come to Potocari and if they tried to do so, they would prevent them? A. Yes. I remember that."); Franken R., T. 2550 (17 October 2006) ("Q. So you would agree with the proposition that the movement of – the stream of refugees from B Company down to Potocari was the result of an initiative taken by Captain Groen. A. Partially, because there has been a movement before on the initiative of the people itself. It was then stopped by the 28th Division."; Franken R., T. 2583 (17

38. On 10 July, there was intense shelling of Srebrenica town with more than 160 or 200 detonations, and DutchBat could count about 32 VRS active artillery or mortar positions.[48] Of these 160 to 200 shells, the Trial Chamber placed heavy reliance on two of these shells, which landed near the hospital and killed six civilians.[49] The ABiH was still present in Srebrenica town but they started leaving the enclave that night.[50] The Trial Chamber conducted no serious analysis of the possibility that these shells landed where they did because of a mistake or negligence, and there is no analysis at all – as there was in the *Gotovina* case, for example – of the allowable margin of error before an inference could be drawn about the nature of the targeting.

39. A statistical approach is not impermissible in such cases to determine whether there is a pattern of indiscriminate firing or targeting of civilians. In this case, however, not only does the statistical approach now show that such was the case, it actually shows that targeting was *not* indiscriminate. The clearest indication of this is the extremely low casualty figure for the attack. UNMO reported late on 11 July (towards the end of the attack) that the total number of seriously wounded had "grown now to 50".[51] In an enclave of 40,000 with military targets throughout the urban area, this can only be viewed as a very low number, reflecting that targeting was, for the most part, undertaken very carefully. UNMO observer

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October 2006) ("Q. Do you know that at one point members of the 28th Division stopped the column of refugees on the road and asked them to return to the town of Srebrenica? A. Yes, but that's also another occasion. That happened on the night or the evening of the 10th.").

48 Judgement, para. 255 / p. 101.

49 Judgement, para. 255 / p. 101.

50 Judgement, para. 255 / p. 101.

51 Ex. P510 (UNMO Report, 11 July 1995), p. 4 ("The number of severely wounded has grown now to 50").

Joseph Kingori[52] considered the number of civilian casualties to be "surprisingly low."[53]

40. Kingori himself and other UNMO reports confirm that Serb shells were aimed at the legitimate military targets dispersed around the centre of Srebrenica, and were not fired at random.[54] A Bosnian Muslim document confirms that Serb infantry was directing fire on the "Hunting Lodge" headquarters of the 28th Division, not just shooting randomly.[55] A small number of errant shells do not demonstrate according to the circumstantial standard of proof either that those shells in particular, or shelling in general, was indiscriminate or targeted against civilians.

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[52] *See*, *e.g.*, Judgement, ftnts. 774, 776, 778 / pp. 319-321.

[53] Kingori J., T. 19176:15-21 (13 December 2007); T. 19182:1-5 (13 December 2007); *See*, also, Ex. P492 (UNMO Report, 7 July 1995), p. 1; Ex. P493 (UNMO Report, 8 July 1995).

[54] Kingori J., T. 19182 (13 December 2007) ("but at least they had some targets they were targeting"); Ex. P492 (UNMO report, 7 July 1995), p. 1 (shells were aimed at specific targets: "More shells have been landing in the same spot or around and we suspect they are [firing] from a tk [tank] positioned at Company Hill. A lot of damage on buildings has been caused in that area despite low cas figure"). Kingori asserted that on 8 July fire was aimed at the marketplace, but then belied this claim by admitting that Muslim civilians were selling their wares in the marketplace, belying his own opinion as to what was being targeted; Kingori J., T. 19197 (13 December 2007) ("So we went out there and got these from the people themselves, those who were selling and those who were buying, and that is what we used to compile this report. Q. You mentioned that the market was one of the areas that appeared to you to be targeted, so why were there still people available for you to even interview? A. Let me tell you, in every situation, there would always be people somewhere there. Even during the tsunami, there were still people selling and buying. So you ask me that, sometimes I cannot even understand myself, but they were there. You find they are there. You told them not to be there, but they would still be somewhere. And we got them and they give us their prices; and also, as I say, there were some shops nearby, small, small shops, which were selling these commodities.").

[55] Ex. 4D8 (BiH State Security Report, 28 August 1995), p. 5 ("On the last day, 11 July 1995, it was impossible to approach this building because it was under constant fire from the Chetniks.").

b. *Shelling of Bosnian Muslims on the Way to Potocari*

41. The Majority, Judge Kwon dissenting,[56] found that "the shelling followed [the Bosnian Muslims] on the journey to Potocari"[57], and that "the population was shelled and shot at as it left and proceeded along the road from Srebrenica town to Potocari".[58] No reasonable trial chamber could have reached this finding.[59]

42. The Majority had no evidential basis to exclude the reasonable possibility that the Bosnian Serb forces were targeting the ABiH positions both within the Srebrenica town and along the path of the column of Bosnian Muslims heading to Potocari.

43. No reliable evidence was presented that shells landed among the Bosnian Muslims moving from Srebrenica town to Potocari or that the people were targeted or shot at from a close range. The Chamber's reliance on the testimony of civilians in the column[60] was not treated with due caution. Of course they would have believed that they were targeted, both because they were in harm's way and because they were civilians untrained in military matters. The Chamber ought to have viewed civilian evidence with caution, just as the *Gotovina* Appeals Chamber considered the *Gotovina* Trial Chamber correct to have done so in similar circumstances.[61]

44. The possibility that any observations made by the witnesses at the relevant time may have been affected by terror or stress should have been taken into account by the Trial Chamber. While these circumstances do not necessarily mean that such

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[56] *See*, Kwon Separate Opinion, Judgement, ftnt. 849 (disagreeing with the finding that Bosnian Muslims were targeted intentionally).

[57] *See*, Judgement, para. 257 / p. 102.

[58] *See*, Judgement, para. 265 / ftnt. 848 / pp. 105-106.,

[59] *See*, Kwon Separate Opinion, Judgement, ftnt. 849 / p. 105.

[60] Judgement, ftnt. 848 / p. 105.

[61] *Gotovina* AJ, para. 79.

evidence is not reliable, the Trial Chamber has to weigh it with particular scrutiny.[62]

45. Factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber ought to consider such factors as it assesses and weighs the evidence.[63] The Chamber in this case failed to do so.

46. Had the Trial Chamber properly weighed on the Prosecution Adjudicated Fact 121, *i.e.*, assessed its weight by taking into consideration the totality of the trial record and, most particularly, the evidence submitted by the non-moving party to rebut the adjudicated fact,[64] it would become clear that other inferences too remained open on the evidence.

47. Likewise, Momir Nikolic's evidence[65] relied upon by the Chamber[66] also reveals that the Bratunac Brigade 2nd Battalion members allegedly targeting the Muslim civilians told Nikolic that they had in fact thought they were shooting at the members of the BiH Army; and that Nikolic's assessment is that the nature of the column moving towards Potocari could clearly be seen from the positions of the

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62 *Kamara et al.* TJ (SCSL-04-16-T), para. 111.

63 *Kupreskic et al.* AJ, para. 31.

64 Judgement, para. 71 / pp. 21-22, citing *Prosecutor v. Krajisnik* (IT-00-39-T), Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 17; *Prosecutor v. Prlic et al.* (IT-04-74-PT), Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006, para. 11 ("Adjudicated facts that are judicially noticed by way of Rule 94(B) of the Rules remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them, which will require their consideration together with 7all of the evidence brought at trial.").

65 Nikolic M., T. 32977-32978 (22 April 2009).

66 *See*, Judgement, para. 265 / ftnt. 848 / pp. 105-106.

2nd Battalion. In any event, Nikolic's uncorroborated presentation of events, as well as his overall account should be treated with great caution, in the light of his plea agreement[67] and declaration admitting to making false statements to the Prosecutor[68], as well as his status at the time of his testimony both in this and earlier ICTY cases.[69]

48. Most of the proffered evidence does not support the Chamber's finding that Bosnian Muslims were not "shelled and shot at" as intentional targets but, rather, indicates that shells fell nearby or around the road. Franken testified that "if [the Bosnian Serb Forces] wanted to kill everybody in that column, they could have done so".[70] Also, the Prosecution witness and a DutchBat member testified that nobody was killed when grenades fell 100 meters from the column and that the injured people who were on his APC came from the hospital, and were not picked up along the road.[71]

49. In order for an attack to be perceived as an attack against the civilian population, the civilian population must be its primary target.[72] In determining whether this is the case, one must consider, *inter alia*, the means and methods employed during the attack, the status of the victims, their number, the discriminatory nature of the attack and the nature of the crimes committed during it.[73]

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[67] *See*, Ex. P4527 (Annex A to the Joint Motion for consideration of Plea Agreement Between Momir Nikolic and the Office of the Prosecutor, dated 6 May 2003 and Amended Plea Agreement dated 7 May 2003).

[68] *See*, Ex. P4485 (TAB B to the "Joint motion for consideration of plea agreement between Momir Nikolic and the Office of the Prosecutor": Declaration of Momir Nikolic, of 6 May 2003).

[69] Also, generally on the credibility of and weight to be given to the so-called "accomplice evidence" and witnesses who entered into a plea agreement, and particularly on Momir Nikolic, *see* also, *Tolimir* TJ, Dissenting and Separate Concurring Opinions of Judge Prisca Matimba Nyambe, paras. 5-13.

[70] Franken R., T. 2611 (17 October 2006).

[71] Egbers V., T. 2882-2883 (20 October 2006).

[72] *Kordic and Cerkez* AJ, para. 96; *Blaskic* AJ, para. 106; *Kunarac et al.* AJ, para. 91.

[73] *Kordic and Cerkez* AJ, para. 96; *Blaskic* AJ, para. 106; *Kunarac et al.* AJ, para. 91.

50. When the criminal responsibility of members of the armed forces is at issue, the burden of proof as to whether a facility is actually used for civilian purposes rests on the Prosecution.[74] In another case, having observed that Muslim forces were present in private houses,[75] the Appeals Chamber held that "no reasonable trier of fact could have concluded that civilian objects were unlawfully targeted"[76] and that "no reasonable Trial Chamber could have concluded that destruction not justified by military necessity occurred [...]"[77] As discussed above, many pieces of evidence and testimony in the present case show that the greater part of the ABiH forces present in Srebrenica were based in otherwise civilian facilities and mixed with civilian population.

51. These factual errors constitute an essential element on the basis of which Gvero was found to have significantly contributed to the JCE to Forcibly Remove[78] and ultimately criminally responsible for the commission of the forcible transfer of the Bosnian Muslims from Srebrenica and Zepa. The errors have occasioned a miscarriage of justice. On the evidence adduced at trial, no reasonable trial chamber would have concluded beyond reasonable doubt that the VRS shelling of the enclave was indiscriminate and the Bosnian Muslims were fired at whilst on the road from Srebrenica to Potocari. The Appeals Chamber should, therefore, overturn the Trial Chamber's finding and substitute it with its own findings.

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[74] *Kordic and Cerkez* AJ, para. 53.

[75] *Kordic and Cerkez* AJ, para. 455.

[76] *Kordic and Cerkez* AJ, para. 456.

[77] *Kordic and Cerkez* AJ, para. 466.

[78] Judgement, para. 1820 / p. 678.

B. SECOND GROUND: *The Trial Chamber Erred in Law and in Fact in Relation to the Opportunistic Killings in Potocari*[79]

52. The majority found that the killings in Potocari – and *only* those killings – were a natural and foreseeable consequence of the JCE to Forcibly Remove the Bosnian Muslim populations from the enclaves.[80] The Chamber also found that the Potocari killings were committed by Bosnian Serb Forces,[81] with discriminatory intent,[82] and as a part of a widespread and systematic attack directed against the civilian population.[83]

53. The Trial Chamber correctly found, given Gvero's particular knowledge of the alleged JCE as set out at paragraph 1803 of the Judgement that he would not have foreseen the possibility, much less undertaken the risk, that the crimes perpetrated in Potocari were a natural and foreseeable consequence of the JCE. A separate and different issue, however, is whether anyone with even the fullest knowledge of the plan could have had that foresight. No reasonable trial chamber could have made that finding. This error is not only factual, but arises from a legally erroneous evaluation of foreseeability based not on the criminal purpose itself, but to the evolving execution of that plan. Applying JCE III in this manner was legally wrong.

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[79] To the extent that contents of Sub-grounds 2(A) and 2(B) have been amended, the Defence hereby seeks leave to vary its Second Ground of appeal, pursuant to Article 21 of the Statute and Rule 108 of the Rules. This amendment results from an oversight recently spotted. No possible prejudice to the Prosecution can arise.

[80] Judgement, para. 1088 / pp. 415-416.

[81] Judgement, para. 359 / p. 143.

[82] Judgement, para. 991 / pp. 383-384.

[83] Judgement, paras. 760-761, 794.2, 796, 1828-1829 / pp. 314-315, 325, 327, 680.

i. **Sub-grounds 2(A) and 2(B):** *The Trial Chamber Erred in Law and in Fact by Finding that the Opportunistic Killings in Potocari were a Natural and Foreseeable Consequence of the JCE to Forcibly Remove*

54. The Chamber gives little, if any, explanation of its finding that "in the circumstances of this forced movement of an entire population, numbering in the thousands, it was foreseeable that 'opportunistic' killings would occur."[84] It is clear, however, that the Chamber erroneously considered not only the criminal purpose, but also the nature of its execution. Thus, in the very next sentence after its conclusion the Chamber stated: "This is particularly the case where the movement was accompanied by acts of cruel and inhumane treatment and terrorization."[85]

55. This latter comment reveals that the Chamber did not assess foreseeability with reference to the criminal plan itself; it instead assessed foreseeability with reference to how the plan actually unfolded. Thus, the Chamber relied upon its interpretation of events on 12 and 13 July to determine foreseeability, rather than focusing on the plan itself. This was a clear legal error invalidating the judgement. The Chamber's methodology would, in practice, mean that JCE III could be assessed not with regard to the criminal plan and the accused's knowledge thereof, but based on some objective foreseeability based on events as they may retrospectively become known.

56. Foreseeability does not involve an analysis of how the enterprise actually unfolded in execution from moment to moment, but rather an assessment of what the plan would necessarily entail, as viewed *ex ante*. This is particularly significant for Gvero, who had no knowledge as to how the operation was

[84] Judgement, para. 1088 / pp. 415-416.

[85] Judgement, para. 1088 / pp. 415-416.

developing.[86] The issue, therefore, is whether participants in the plan would know from the outset that the execution of that plan might foreseeably involve the commission of crimes by other members of the JCE. The Chamber failed to apply this test to the evidence before it.

57. The finding is also incongruous in light of the Trial Chamber's recognition that a separate JCE to commit murder came into existence on the morning of 12 July, of which Gvero was not charged, let alone found to play any part therein.[87] In accordance with this plan, able-bodied men from Srebrenica who were captured or surrendered from the column were detained at various locations with the specific aim to execute them at a later stage. The Chamber never explains why the deaths in Potocari – and those deaths alone – were categorized as JCE III in respect of forcible transfer, whereas all other deaths were attributable to the JCE to Murder.

58. As for the men in Potocari, the Chamber found that they were separated from the women and children, detained in the White House and later brought to various detention locations in Bratunac.[88] The Chamber then found that the separation and detention of men in Potocari were not part of the forcible transfer JCE but were, instead, part of the murder JCE.[89] Given that the separation of the victims in Potocari was in no way foreseeable as part of their forcible transfer, and that they were instead separated pursuant to the murder JCE, the Chamber's attribution of their murder to the forcible transfer JCE is particularly illogical.[90] These opportunistic killings, despite having occurred in proximity to the location where buses were transporting people out of the enclave, cannot be considered as a

[86] *See*, Judgement, para. 1830 / pp. 680-681 ("However, it has not been demonstrated that Gvero was involved in any of the logistical aspects of the forcible transfer operation, neither that he was present in Potocari to see the conditions there.").

[87] *See,* Judgement, paras. 1051-1054 / pp. 402-404.

[88] *See,* Judgement, paras. 319–323, 325–331, 338–340, 399 / pp. 129-136, 160-161.

[89] *See,* Judgement, para. 1050 / p. 402.

[90] *See,* Judgement, paras. 319–323, 325–331, 338–340, 399 / pp. 129-136, 160-161.

natural and foreseeable consequence of the plan to forcibly remove the Bosnian Muslims from the enclaves.[91] [92]

59. The circumstances surrounding the killings in Potocari are virtually unknown. The situation in Potocari was chaotic,[93] as illustrated by the video footage in evidence.[94] Tens of thousands of Muslim civilians were there, perhaps thousands of Serb forces, and many hundreds of DutchBat. No one knows the identity of the killers, why they were killed, exactly when, or how those individuals may have been connected – if at all – with the execution of the forcible transfer JCE.

60. The Chamber's legal error is compounded by a failure to explain precisely how or why it could conclude that these relatively few killings fell within JCE III, but no others did.

[91] *See*, also, Judgement, Dissenting and Separate Opinions of Judge Kwon, para. 24; *Tolimir* TJ, para. 1138 (The Chamber has found that the crime of forcible transfer did not encompass the removal of the men from Potocari or the transportation of the men who were captured from the column.).

[92] *See*, also, Gvero Closing Arguments, T. 34734 (11 September 2009) ("The indictment alleges that the killings were a natural and foreseeable consequence of the JCE to forcibly transfer the population of Srebrenica. The Prosecution has pleaded no material fact in support of this allegation, merely providing details of the killings, themselves. The Defence, we contend, has had no indication of what information should have placed our client and his lawyers on notice that killings were a "natural and foreseeable consequence" of the displacements. On this basis alone, Counts 4 and 5 should be dismissed, as the material facts essential to this allegation have simply not been pleaded.").

[93] *See, e.g.*, van Duijn L., T. 2274 (27 September 2006) ("When I came up there, there was just a sort of a human chain of UN soldiers made to try to keep the refugees calm, and there was a lot of panicking and scared refugees present at that time there... the situation was like I described before, chaotic, a lot of people were frightened, screaming and cramped together"); Egbers V., T. 2719 (19 October 2006) ("It was a very, very panic situation at that time."); Ex. P2210 [redacted] pp. 1250-1251.

[94] Ex. P4536 (Potocari Video, 12 July 1995).

ii. **Sub-ground 2(C):** *The Trial Chamber Erred in Fact by Finding that There was Sufficient Evidence that Nine Men in Potocari were Killed by the Bosnian Serb Forces*

61. The Chamber made an error of fact by failing to require the Prosecution to prove beyond a reasonable doubt that the bodies of the nine Bosnian Muslim men found near the UN Compound in Potocari were a result of a killing carried out by the Bosnian Serb Forces. In reaching this finding, the Trial Chamber relied on insufficient and unreliable evidence, when other inferences were reasonably open to it. The error occasioned a miscarriage of justice.

62. After noting that "Bosnian Serb Forces" consisted of both the VRS and the MUP forces[95], the Chamber held:

> "Having considered all the evidence before it, the Trial Chamber finds that nine Bosnian Muslim men were killed by Bosnian Serb Forces in a field near a stream, at about 500 metres distance from the DutchBat compound, on 13 July 1995."[96]

63. Although the Chamber refers to "all the evidence before it", nothing in the evidence adduced at trial indicates that any of the Bosnian Serb Forces committed the killings in question, much less so that they were committed by the VRS, as stated several times throughout the Judgement.[97]

64. The Defence submission is further supported by the recent finding of the Trial Chamber in *Tolimir* "that there is not sufficient reliable evidence before the Chamber to link the killing of the nine men in Potocari beyond reasonable doubt to the Bosnian Serb Forces."[98]

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[95] Judgement, para. 102 / p. 34.

[96] Judgement, para. 359 / p. 143.

[97] *See*, Judgement, paras. 1082, 1727, 1735, 1830 / pp. 414, 643, 645, 680-681.

[98] *Tolimir* TJ, para. 308; and Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, paras. 1-3.

65. On the evidence adduced at trial, no reasonable trial chamber would have concluded beyond reasonable doubt that the nine men in Potocari were killed by the Bosnian Serb Forces or the VRS. The Chamber failed to state the basis for either of the conclusions and it erroneously attributed the Potocari individual killings firstly to the Bosnian Serb Forces and then specifically to the VRS. In the absence of any proof thereof, the Chamber made a clear error of fact.

iii. **Sub-ground 2(D):** *The Trial Chamber Erred in Fact on the Origin of the Bodies of the Nine Men in Potocari*

66. The Chamber erred in fact by failing to require the Prosecution to prove beyond a reasonable doubt that the nine men, whose bodies were found near the UN Compound in Potocari, were Bosnian Muslim men who had surrendered or had been captured from the column of men retreating from the Srebrenica enclave or had been separated at Potocari.[99] The Trial Chamber reached this finding on the basis of pure speculation when other inferences were reasonably open on the evidence. The error occasioned a miscarriage of justice.

67. No evidence was presented concerning identification of the perpetrators of the Potocari killings or where the nine dead men came from (*i.e.*, whether they were separated in Potocari from the group of Bosnian Muslims who arrived from Srebrenica; or if they were a part of the column of Bosnian Muslim men heading towards the BiH-held territory; or some other group of men altogether) and whether, prior to being killed, they had or had not been detained in various houses in Potocari, the White House included.[100]

[99] Judgement, paras. 795, 1081 / pp. 327, 413-414.

[100] *See*, Judgement, paras. 354-359 / pp. 141-143.

68. For instance, the fact that the bodies were in civilian clothes[101] does not exclude the possibility that those were ABiH members or combatants. The Chamber heard evidence from Bosnian Muslims and DutchBat members alike that many ABiH soldiers had no proper military uniforms.[102] In fact, armed Muslim fighters in civilian clothing were active in combat in the days leading up to 12 July.[103] What is more, they were observed in and around Potocari on 11 and 13 July 1995.[104]

69. The failure by the Prosecution to proffer other evidence on the origin of the nine bodies, the Chamber's failure to require it to do so and, hence, the absence of the Trial Chamber's conclusion as to the origin of the nine bodies near the UN Compound in Potocari, brought about a clear error of fact.

C. THIRD GROUND: *The Trial Chamber Erred in Law by Convicting Milan Gvero for Acts of Forcible Transfer not Properly Pleaded in the Indictment*

70. The Trial Chamber erred in law by convicting Milan Gvero for acts pleaded with insufficient particularity in the Indictment. The defective nature of the Indictment

[101] Judgement, para. 355 / ftnt. 1206 / p. 142.

[102] Oric M., T. 1058 (30 August 2006) ("At that time - and we're talking about July 1995 - did the 28th Division have enough uniforms for all the soldiers on its strength? A. No."); Oric M. T. 875-876 (28 August 2006) ("Q. Now, were you armed? A. Yes. I had two grenades. Q. And what were you -- what kind of clothes were you wearing, sir? A. Civilian clothes. Q. And do you recall with any more detail what types of clothes you were wearing? What did you have on? A. A pair of jeans, a shirt, a jacket. Simple civilian clothes, nothing more."); PW-156, T. 7140 (8 February 2007) ("Q. [...] Is it correct that you were wearing civilian clothes when you left to Jaglici? A. Civilian clothing. I didn't have any military clothing. Maybe 10 per cent just had the military uniforms. Because we were almost all of us in civilian clothes, only a small number wore military uniforms."); *See*, also, Egbers V., T. 2862 (20 October 2006) and Koster E., T. 3058-3059 (26 October 2006).

[103] Egbers V., T. 2790-2798 (19 October 2006).

[104] Rutten J., Ex. P2178 (92*ter* Statement: Transcript of testimony in Case No. IT-98-33-T, 5 April 2000), p. 2117; Rutten J., T. 4828 (30 November 2006); Rutten J., T. 4831 (30 November 2006) ("Q. So it would be right to characterize him as a soldier who had put on civilian clothing? A. Yes.").

in relation to these acts was not subsequently cured by the Prosecution providing Gvero with timely, clear and consistent information compensating for the failure of the Indictment to give proper notice of the charges.

71. The Accused is entitled to a fair and public hearing[105] and to "minimum guarantees" in the determination of charges against him.[106] One such guarantee, set out in the Statute at 21(4)(a), is that the Accused "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". The Accused is similarly afforded protection under 21(4)(b) of the Statute in that he is minimally permitted to "have adequate time and facilities for the preparation of his defence".

72. The Prosecution is required to plead the material facts underpinning the charges in the Indictment.[107] Whether an Indictment is considered to have been pleaded with sufficient particularity is dependent on whether its content is sufficient to inform an Accused of the charges against him such that he is able to prepare his defence.[108]

73. A defective Indictment may be cured if the Prosecutor gives the Accused timely, clear and consistent information compensating for a failure to give proper notice.[109] But this method is not without its limitations and ought not to lead to a transformation of the Prosecution case beyond correction of mistakes in a vague

[105] Art. 21(2) of the Statute.

[106] Art. 21(4) of the Statute.

[107] *Martic* AJ, para. 162; *Simic* AJ, para. 20; *Naletilic and Martinovic* AJ, para. 23; *Stakic* AJ, para. 116; *Kvocka et al.* AJ, para. 27; *Kordic and Cerkez* AJ, para. 135; *Kupreskic et al.* AJ, para. 88; *Muvunyi* AJ, para. 18; *Seromba* AJ, para. 27; *Simba* AJ, para. 63; *Muhimana* AJ, paras. 76 and 195; *Gacumbitsi* AJ, para. 49.

[108] *Simic* AJ, para. 20; *Stakic* AJ, para. 116; *Kupreskic et al.* AJ, para. 88.

[109] *Martic* AJ, para. 163; *Simic* AJ, para. 23; *Naletilic and Martinovic* AJ, para. 26; *Kvocka et al.* AJ, paras. 33-34; *Kupreskic et al.* AJ, para. 114; *Nahimana* AJ, para. 325.

and unspecific Indictment.[110] Mere neglect to plead specific facts cannot be rectified by this method.[111] The appropriate course where substantive alterations are proposed is to amend the Indictment pursuant to Rule 50 of the Rules. No Accused may be found guilty of crimes not alleged in the Indictment.[112]

74. The Indictment in the present case fails to set out with sufficient particularity acts of persecution and forcible transfer in relation both to the civilian component of the column of Bosnian Muslim men attempting to escape from Srebrenica, and the able-bodied men from Zepa who swam across the Drina River to Serbia. It is thus defective in nature. It was neither amended pursuant to Rule 50 to include both of these groups, nor can the defect be said to be cured. The Prosecution failed to accord to the Accused the minimum guarantee of prompt and detailed information about the two groups' inclusion in the charges. The Trial Chamber's Judgement – Judge Kwon dissenting – had the effect of widening the scope of the Indictment in circumstances that were prejudicial to the manner in which Gvero was able to defend the allegations made against him.

i. **Sub-ground 3(A):** *The Trial Chamber Erred by Convicting Gvero for Persecution and Other Inhumane Acts (Forcible Transfer) in Relation to the Civilian Component of the Column of Bosnian Muslim Men Attempting to Escape From Srebrenica*

75. The Trial Chamber erred in law by convicting Gvero for persecution and other inhumane acts (forcible transfer) as crimes against humanity in relation to underlying acts that were not properly pleaded in the Indictment, namely the forcible transfer of the civilian component of the column of Bosnian Muslim men attempting to escape from Srebrenica. The error of law invalidates the decision.

[110] *Muvunyi* AJ, para. 20.

[111] *Muvunyi* AJ, para. 20; *Ntagerura et al.* AJ, para. 32.

[112] *Naletilic and Martinovic* AJ, para. 26; *Kvocka et al.* AJ, para. 33.

76. The majority of the Trial Chamber found that paragraph 56 of the Indictment and paragraph 145 of the Prosecution Pre-Trial Brief formed sufficient basis to make the following finding:

> "The Prosecution alleges that forcible transfer was committed in Srebrenica through (a) the forced busing of the Bosnian Muslim women, children and the elderly from Potocari to ABiH-territory, (b) the forced flight of the column of Bosnian Muslim men who attempted to escape to ABiH-held territory, and (c) the forced busing of the Bosnian Muslim men separated at Potocari, or who were captured or surrendered from the column up to Zvornik where they were ultimately executed."[113]

77. The paragraphs relied upon by the Chamber, however, relate to events happening in the region surrounding Srebrenica on 10 to 11 July 1995 and cannot be said to relate to men in the column as victims of the forcible transfer. They may be contrasted with paragraph 48 of the Indictment which purports to be an exhaustive list of the means by which persecution was carried out. As noted by Judge Kwon in his dissent,[114] the Prosecutor omits to name this group of men in Paragraph 48(e) of the Indictment:

> "the forcible transfer of Bosnian Muslims from Srebrenica and Zepa by the means of forced busing of the women and children to Bosnian Muslim-controlled territory and the forced busing of the men, separated at Potocari or having surrendered from the column, up to the Zvornik area, where they were ultimately executed, and the deportation of the Bosnian Muslim men from Zepa who were forced to flee from their homes in Zepa to Serbia."[115]

78. Although the column is mentioned in the introductory section to the charge alleging forcible transfer,[116] the Prosecutor similarly omits mention of the civilian group at paragraphs 61 to 64 of the Indictment. In other words, again as Judge Kwon recognises in his Opinion,[117] at both sections of the Indictment dealing with the specific allegation of forcible transfer, the movement of the men in the column is notably absent.

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[113] Judgement, para. 914 / p. 361.

[114] Judgement, Dissenting and Separate Opinions of Judge Kwon, para. 7.

[115] Indictment, para. 48(e).

[116] Indictment, para. 56.

[117] Judgement, Dissenting and Separate Opinions of Judge Kwon, para. 7.

79. The Prosecution Pre-Trial Brief states clearly that the victims of forcible transfer were limited to the women, children and elderly:

> "...all the Accused participated, with others, in JCE whose objective and common purpose was to (1) forcible transfer and deport the Bosnian Muslim women and children and elderly from the Srebrenica and Zepa enclaves"[118]

80. During the course of the trial, the Prosecution repeatedly stated that the civilian component of the column were not victims of forcible transfer. In his preliminary statement, the Prosecutor made no mention of the group,[119] stating instead that the Serbs did not want this column to leave Serb-controlled territory.[120]

81. To take but one example of the Prosecutor's stated position, in an exchange between counsel for Borovcanin and the Prosecutor on 7 February 2007, the following was said:

> "LAZAREVIC: However, whether this was a military column from the very beginning and whether it was a legitimate military target, if this is something that the Prosecution is ready to stipulate, then we are very close to get this – this agreed
>
> JUDGE AGIUS: Yes. Do you wish to comment on that Mr. McCloskey?
>
> McCLOSKEY: [...] I can point out, it is not a subject matter of the indictment, and I think that's pretty clear."[121]

82. The Prosecutor's approach appeared only to change by the time of its Final Trial Brief[122] and during its closing arguments in response to a question by Judge Prost.[123] To do so represented a *volte-face* made at the end of the trial after all the evidence in the case had been heard. It was wholly untimely and cannot be

[118] Prosecution PTB, para. 27.

[119] T. 373-446 (21 August 2006); T. 457-534 (22 August 2006).

[120] T. 527 (22 August 2006).

[121] T. 7041 (7 February 2007).

[122] Prosecution FTB, para. 2909.

[123] Prosecution Closing Arguments, T. 34262 (4 September 2009).

said to have cured the Indictment which the Prosecution could have sought leave to amend at any point pursuant to Rule 50 of the Rules.

ii. **Sub-ground 3(B):** *The Trial Chamber Erred in Convicting Gvero for Persecution and Other Inhumane Acts (Forcible Transfer) in Relation to the Able-Bodied Men from Zepa who Swam Across the Drina River to Serbia*

83. The Trial Chamber erred in law by convicting Gvero for persecution and other inhumane acts (forcible transfer) as crimes against humanity in relation to the underlying acts that were not properly pleaded in the Indictment, namely the forcible transfer of the Bosnian Muslim able-bodied men who swam from Zepa across the Drina River to Serbia. The error of law invalidates the Judgement.

84. At paragraph 953 of the Judgement, the majority of the Trial Chamber found that paragraphs 84 and, by reference, 71 of the Indictment formed sufficient basis to make the following finding:

> "It is clear that under paragraph 84 the Indictment charges the Accused with the crime of deportation in relation to the Bosnian Muslim able-bodied men who fled to Serbia and this allegation has been addressed by all the Accused. However, in the view of the Trial Chamber, by majority, Judge Kwon dissenting, it is also clear that alternatively the Prosecution has alleged that the same factual circumstances constitute forcible transfer as an inhumane act. This factual allegation can be found in paragraph 71 of the Indictment [...] the Indictment thus alleges that the able-bodied men who swam across the Drina River to Serbia were victims of the crimes of forcible transfer and deportation under Counts 7 and 8, respectively."[124]

85. Paragraph 71 of the Indictment, however, refers to the flight of Bosnian Muslim men across the Drina River to Serbia out of fear "they would be harmed or killed if they surrendered to the VRS".[125] This is a mere description of the events in Zepa which do not specifically underlie the charge of forcible transfer.

[124] Prosecution PTB, para. 27.

[125] Indictment, para. 71, which reads "[t]he transportation of the women and children of Zepa began on 25 July 1995. On or about the same day, hundreds of able-bodied Muslim men began to flee across the Drina River to Serbia where many of them were registered by the International Committee for the Red

86. In common with the civilian component of the column discussed above at Ground 3(a), recourse may be had to paragraph 48(e) of the Indictment, which draws a clear distinction between the forcible transfer of the women and children and deportation of the men:

> "the forcible transfer of Bosnian Muslims from [...] Zepa by the means of forced busing of the women and children to Bosnian Muslim-controlled territory [...] and the deportation of the Bosnian Muslim men from Zepa who were forced to flee from their homes in Zepa to Serbia."[126]

87. The Prosecution's Final Trial Brief delineates the same distinction in abundantly clear terms:

> "[...] the women, children and elderly Muslims from the Zepa enclave were forcibly displaced to other areas within Bosnia. These crimes should be classified as forcible transfer.
>
> The Bosnian Muslim men who swam from Zepa across the Drina River into Serbia were forcibly displaced across a national border. As a result, these crimes constitute deportation."[127]

88. There is thus no allegation contained within the Indictment, and there was no attempt by the Prosecution either to amend or otherwise cure the Indictment to include the Bosnian Muslim men who swam across the Drina River into Serbia in the charge of forcible transfer. Instead, the group was unambiguously omitted from the charge of forcible transfer. To have included the group in convicting Milan Gvero of the charge, the Judgement had the effect of widening the scope of the Indictment in circumstances that were prejudicial to the manner in which Gvero was able to defend allegations made against him.

89. The inclusion of both the civilian component of the column, and the men who swam across the River Drina to Serbia are errors of law that invalidate the

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Cross (ICRC) and eventually released. The Muslim men fled to Serbia because they feared they would be harmed or killed if they surrendered to the VRS."

[126] Indictment, para. 48(e).

[127] Prosecution FTB, paras. 2909-2910.

judgement. No reasonable trial chamber would have interpreted the Indictment to have included the two groups. The Appeals Chambers should, therefore, overturn the Trial Chamber's findings and substitute them with a finding that neither group was charged under Counts 6 and 7.

D. FOURTH GROUND: *The Trial Chamber Erred in Law and in Fact in Finding that Gvero had Threatened Cornelis Nicolai*

90. The Trial Chamber erred in law and fact by adopting a wholly unreasonable approach to the evidence when it found that Gvero had threatened UNPROFOR members and the civilian population gathered in Potocari during his telephone conversation with Cornelis Nicolai of 11 July 1995.[128]

i. **Sub-ground 4(A):** *The Trial Chamber Erred in Law in Finding that Gvero had Threatened Cornelis Nicolai*

91. The Trial Chamber erred in law in relying upon inculpatory statements from Cornelis Nicolai's testimony while disregarding exculpatory statements without any explanation. The error of law invalidates the decision.

92. In reaching the conclusion that Gvero's comments were "intended as and constituted a threat",[129] the Trial Chamber relied on a preliminary finding that "Nicolai interpreted and understood this to be a threat".[130]

[128] Judgement, paras. 1770, 1816-1818 / pp. 659-660, 676-677. *See*, also, Ex. P2906 (Notes of a telephone conversation between Nicolai and Gvero, 11 July 1995 at 16:15 hours); Ex. P2374a [redacted].

[129] Judgement, para. 1816 / pp. 676-677.

[130] Judgement, para. 1816 / pp. 676-677.

93. During cross-examination, however, Nicolai conceded that: (i) there was no explicit threat by Gvero to shell the compound;[131] (ii) he had assumed that Gvero's statement that Nicolai would be responsible for the consequences of not discontinuing the air support were referring to an earlier VRS threat to shell the compound;[132] and (iii) he did not know what was in Gvero's mind.[133]

94. Although the Judgement indicates that the evidence was evaluated in the way that "best favours a fair determination of the case and that is consistent with the spirit of the Statute and the general principles of law, including the principle of *in dubio pro reo*,"[134] the Chamber clearly failed to follow these principles here.

95. By not providing a reasoned opinion as to why it did not give due regard to other portions of General Nicolai's testimony, the Chamber acted in breach of Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[135] Had the Chamber properly examined and assessed the testimony of General Nicolai, as required by the evidentiary principles, the Chamber would not have made the impugned findings, which rendered the decision invalid.

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[131] Nicolai C., T. 18513-18515 (29 November 2007).

[132] Nicolai C., T. 18510-18511 (29 November 2007). Two threats were issued prior to the Gvero-Nicolai telephone conversation that led directly to the cessation of air support. *See*, Gvero FTB, paras. 284-291 / pp. 204-207.

[133] Nicolai C., T. 18556 (30 November 2007).

[134] Judgement, para. 8 / p. 3.

[135] It follows from Article 23 of the Statute that Trial Chamber's duty is to provide a reasoned opinion. In the *Furundzija* Case, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute (*see, Furundzija* AJ, para. 69; *see,* also, *Kupreskic et al.* AJ, para. 32).

ii. **Sub-ground 4(B):** *The Trial Chamber Erred in Fact in Finding that Milan Gvero had Threatened Cornelis Nicolai*

96. The Trial Chamber erred in fact in finding on the available evidence that Gvero threatened Cornelis Nicolai.

97. There is no other intercepted telephone conversation where Gvero is alleged to have issued a single threat to anyone. Gvero never intended or attempted or actually threaten any UNPROFOR member. Quite the contrary, his actions were representative of nothing but respect towards UNPROFOR personnel.[136]

98. The Chamber failed to take into account Gvero's *de facto* position and lack of authority.[137] Prosecution witness Milovanovic[138] testified that Gvero did not have responsibility for VRS liaisons with UNPROFOR. In fact, the evidence adduced points to several other individuals who were in charge of contact with international organisations.[139] Butler testified that he could not see that anyone below Mladic would personally feel that they had the authority to make such a threat.[140] Hence, it is obvious that Gvero had no power to make any decisions and that he most certainly was in no position to issue any threats.

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[136] *See, e.g.*, Ex. 6D207 (VRS Main Staff, Warning on treatment of UNPROFOR personnel in the Srebrenica enclave, to the Drina Corps Command and IKM, 11 July 1995).

[137] In fact, it was precisely a segment of a telephone conversation between Gvero and Nicolai that, according to the Prosecution witness Skrbic, shows that Gvero "*de facto* has no power" (*See*, Skrbic P., T. 15638 (19 September 2007), referring to Ex. P2906 (Notes of a telephone conversation between Nicolai and Gvero, 11 July 1995 at 16:15 hours); *See*, also, Gvero FTB, paras. 20-27 / pp. 100-102.

[138] Milovanovic M., T. 12248 (29 May 2007) (Q. And in particular, it was not his responsibility to liaise with the UNPROFOR on a permanent basis? A. No.").

[139] Gvero FTB, para. 5 / pp. 88-89; paras. 31-40 / pp. 104-110; para. 304 / p. 213; paras. 386-396 / pp. 257-261; *See*, also, Ex. 6D147 (Instruction about contacts with international organizations issued by the Republic of Srpska President of the Republic Sarajevo and sent to the Supreme headquarters of the Army of Republic of Srpska, 5 December 1994).

[140] Butler R., T. 19801-19802 (16 January 2008).

99. Testimony of witnesses associated with the parties to the armed conflict in BiH should be approached with great caution. The Chamber, however, failed to address the issue of UNPROFOR's general partiality and specifically that of General Nicolai.[141] As noted by Judge Nyambe, "caution should also be extended to the evidence of some witnesses from outside BiH who, as a result of traumatic experiences or for other reasons, were not wholly objective in their testimony."[142]

100. The Chamber found that Gvero's aim during the telephone conversation was to stop the NATO bombing[143] and went on to imply that he was in fact attempting to remove the last significant obstacle to the completion of the plan to take over the Srebrenica enclave and forcibly remove its inhabitants.[144] In fact, the Chamber started from an erroneous premise that Gvero "knew of the plan to take-over the Srebrenica enclave and to forcibly remove the civilian population".[145]

101. The Chamber should not have concluded that Gvero lies in the conversation with Nicolai when he claims the ABiH was attacking UNPROFOR positions.[146] Ample evidence shows that, at the time, this was the situation as Gvero knew it to be.[147] This is supported by other witnesses' testimony.[148] Likewise, the

[141] *See*, Gvero FTB, Gvero's alleged participation in the JCE: Indictment's paragraph 76(b)(i), paras. 230-234 / pp. 179-181.

[142] *See*, also, *Tolimir* TJ, Dissenting and Separate Concurring Opinions of Judge Prisca Matimba Nyambe, para. 15.

[143] Judgement, para. 1816 / pp. 676-677.

[144] Judgement, para. 1816 / pp. 676-677.

[145] Judgement, para. 1815 / p. 676. This error will be discussed as a part of the Eighth Ground *infra*.

[146] Judgement, para. 1770 / p. 659-660.

[147] *See, e.g.*, Exs. 6D22 (Document from the Drina Corps IKM No. 08/95, 9 July 95) and 6D23 (Document from the Drina Corps Command, 10 July 1995). *See, also*, Gvero FTB, pp. 123-124; 6D328 (Report on the UNPROFOR situation in the Srebrenica enclave, sent by the Command of the Drina Corps in Pribicevac Forward Command Post, signed by General Radislav Krstic, 10 July 1995).

[148] Gvero FTB, ftnt. 833.

Chamber should not have concluded that Gvero lies when he states that he could not have done anything to stop the fighting, because neither UNPROFOR nor the civilian population in Srebrenica is being attacked by the VRS.[149]

102. The Chamber ought to have explored other inferences that were reasonably open on the evidence, *i.e.*, that Nicolai may have mistaken this telephone conversation with another incident; or that Nicolai misconceived Gvero's call and the intention behind his comments. Instead, the Chamber used the above mutually reinforcing arguments to conclude that Gvero played an important role in supporting the VRS' military action and that by disseminating false information and issuing a serious threat, he significantly contributed to the JCE to Forcibly Remove.[150]

103. These factual errors constitute one of the essential elements on the basis of which Gvero was found to have significantly contributed to the JCE to Forcibly Remove[151] and ultimately found criminally responsible for the commission of the forcible transfer of the Bosnian Muslims from Srebrenica and Zepa. The evaluation of evidence adduced at trial was erroneous and has occasioned a miscarriage of justice. On the evidence adduced at trial, no reasonable trial chamber would have concluded beyond reasonable doubt that Gvero was threatening a UN officer. The Appeals Chamber should, therefore, overturn the Trial Chamber's finding and substitute it with its own findings.

[149] Gvero FTB, paras. 239-243 / pp. 184-187.

[150] Judgement, para. 1820 / p. 678.

[151] Judgement, para. 1820 / p. 678.

E. FIFTH GROUND: *The Trial Chamber Erred in Fact in Finding that Milan Gvero Conversed with Radovan Karadzic*

104. The majority erred in fact in failing to require the Prosecution to prove beyond a reasonable doubt that Milan Gvero spoke to Radovan Karadzic during two conversations[152] that took place during the afternoon of 11 July 1995.

105. The Defence hereby recalls the 'reasonable doubt' standard discussed in greater detail in paragraph 31 *supra*.

106. The conversations in question are only audible in part, in that only Gvero can be heard talking.[153] In addition, the name "Karadzic" was never mentioned during these conversations.[154]

107. The majority found that the conversations do not evidence a friendly exchange but rather a respectful one,[155] despite the fact that the mood of the conversations, which the Chamber had the opportunity to hear during PW-145's testimony,[156] seemed quite relaxed and some laughter was heard at one point.[157]

108. The majority lightly dismisses evidence of the strained[158] and deteriorating[159] relationship between Gvero and Karadzic throughout the war. In this connection,

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[152] Exs. P1096a [redacted] and P2375a [redacted].

[153] Judgement, para. 1772 / p. 660; *See*, also, Kwon Separate Opinion, Judgement, ftnt. 5337 / p. 661.

[154] PW-145, T. 7239-7240 (9 February 2007); Exs. P1096a and P2375a; *See, also*, Gvero FTB, paras. 266-276; Kwon Separate Opinion, Judgement, ftnt. 5337 / p. 661.

[155] Judgement, para. 1775 / p. 661.

[156] PW-145, T. 7263-7264 (19 February 2007).

[157] *See*, also, Kwon Separate Opinion, Judgement, ftnt. 5337 / p. 661.

[158] *See*, Gvero FTB, paras. 127-137 / pp. 69-76; para. 3 / p. 86.

[159] Judgement, para. 1757 / p. 654; *See*, also, Gvero FTB, paras. 260-265 / pp. 193-196.

the Chamber relies on Gvero's letter of 18 July 1995,[160] and disregards a letter from December 1994, where Karadzic is saying to Gvero that his behaviour is a confirmation that he has "no respect whatsoever for the institution of the President of the Republic and Supreme Commander".[161] The respect, similar to that purportedly expressed in conversations of 11 July, is inferred from a document which in fact seems to be showing more disrespect on Gvero's part towards Karadzic.[162]

109. The Chamber failed to reconcile the account of one witness with that of another, credible witness. It relied on speculative testimony of PW-145,[163] over the reliable testimony of General Skrbic,[164] who was much closer to General Gvero than the ABiH-engaged intercept operator and, thus, in a much better position to attest to Gvero's relationship with Karadzic and his attitude when talking to him.

110. When it comes to identification evidence, it is well established that a trial chamber has a duty to be particularly scrupulous in providing a reasoned opinion.[165] In particular, the chamber must "carefully articulate the factors relied

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[160] Judgement, para. 1775 / p. 661, referring to para. 1797 / pp. 670-671, and Ex. P2757 (Letter to the President of the RS, signed by Gvero, of 18 July 1995).

[161] Ex. 6D137 (Letter from President of RS to Gen. Gvero, No. 01-2480-2/94, signed by Karadzic, 18 December 1994).

[162] *See*, Ex. P2757 (Letter to the President of the RS, signed by Gvero, 18 July 1995) (Gvero's words "I have carried out all the activities mentioned in your document as ordered by my immediate superior"—the Commander of the Main Staff" can be interpreted as another corroboration of Karadzic's December 1994 position that Gvero has "no respect whatsoever for the institution of the President of the Republic and Supreme Commander").

[163] PW-145, T. 7239-7241 (9 February 2007), who stated that he concluded that Gvero was addressing Karadzic based on the tone of his language and the fact that he said "President".

[164] Skrbic P., T. 15565–15566 (18 September 2007), who testified that "this friendly exchange and the relationship full of respect between the collocutors would not reflect the relationship that General Gvero and President Karadzic [had] in July [of 1995]"; *See*, also, Kwon Separate Opinion, Judgement, ftnt. 5337 / p. 661.

[165] *Kupreskic et al.* AJ, para. 39.

upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence."[166]

111. The Trial Chamber acknowledged that identification evidence is predisposed to error and that, in order for a witness testimony to be sufficient to establish a positive identification, the identification must be of such quality to be able to persuade the Chamber that it is objectively reliable.[167]

112. The Trial Chamber lists a number of factors it has taken into consideration in assessing identification evidence. [168] Although all relating to identification of an accused (the circumstances in which each witness claimed to have observed the accused in question; the length of the observation; the familiarity of the witness with the accused prior to the identification; and the description given by the witness of his or her identification of the accused), they can be applied, at least to an important extent to this particular case of alleged aural identification. Once that exercise is performed, it becomes apparent that testimony of PW-145 or other related testimony of other intercept operators[169] is not a valid basis from which proof can be inferred beyond reasonable doubt.

113. Identification [of a person] must be proved by the Prosecution beyond reasonable doubt.[170] The presented evidence was insufficient to support the conclusion that Gvero was talking to Karadzic. The Prosecution should have been required to proffer other evidence to that end, for instance, how frequently, if at all, Gvero reported to Karadzic; or another intercepted telephone

[166] *Haradinaj et al.* AJ, para. 152, citing *Kupreskic et al.* AJ, para. 39.

[167] Judgement, para. 55 / p. 16, citing *Kunarac et al.* TJ, para. 561; *Vasiljevic* TJ, para. 16.

[168] Judgement, para. 55 / p. 16, citing *Vasiljevic* TJ, para. 16.

[169] *See, e.g.*, PW-128, T. 6142-6143 and 6147-6148 (22 January 2007); and PW-146, T. 6202 (23 January 2007).

[170] Judgement, para. 54 / p. 16.

conversation between the two.[171] In the absence of any such evidence the Prosecution failed to prove beyond a reasonable doubt that Milan Gvero spoke to Radovan Karadzic in the afternoon of 11 July 1995.

114. The Chamber reached this finding on the basis of speculation when other inferences were reasonably open on the evidence. The Chamber's findings, and the evidence upon which those findings were based, do not exclude the reasonable possibility that Gvero was conversing with the RS Assembly speaker Momcilo Krajisnik, or a member of the RS Presidency Nikola Koljevic.[172]

115. The fact that Gvero addresses his collocutor as "president" indicates that he is conversing with someone at the higher level of state authority. It, however, does not automatically support the Chamber's finding with regard to Gvero's participation in the JCE to Forcibly Remove since neither of the two alternative collocutors is specifically alleged to have been a member of either of the two JCEs alleged in the Indictment.[173]

116. This factual error constitutes one of the essential elements on the basis of which Gvero was found to have significantly contributed to the JCE to Forcibly Remove.[174] The evaluation of evidence adduced at trial was erroneous and has occasioned a miscarriage of justice. On the evidence adduced at trial, no reasonable trial chamber would have concluded beyond reasonable doubt that Milan Gvero was conversing with Radovan Karadzic. The Appeals Chamber

[171] There are thousands of pages with hundreds of intercepted telephone conversations admitted into evidence and yet, not a single conversation between Gvero and Karadzic, other than alleged two of 11 July 1995.

[172] PW-145, T. 7241-7244 (9 February 2007); Skrbic, P., T. 15565 (18 September 2007); Ex. 6D43 (Intercept at 12,41 hours between Milan Gvero and Momcilo Krajisnik, of 28 April 1995); Ex. 6D21 (Document dated 14 October 1994, handover to the International Tribunal, including intercept). *See*, also, Gvero FTB, paras. 263-264, and Kwon Separate Opinion, Judgement, ftnt. 5337.

[173] Indictment, Attachment A.

[174] Judgement, paras. 1819-1820, 1822 / pp. 677-679.

should, therefore, overturn the Trial Chamber's finding and substitute it with its own findings.

F. SIXTH GROUND: *The Trial Chamber Erred in Law and in Fact in Its Findings Regarding Directive 7*

117. The Trial Chamber erred in law and in fact in its findings regarding Directive 7. These errors invalidated the Judgement and occasioned a miscarriage of justice, respectively.

i. **Sub-ground 6(A):** *The Trial Chamber Erred in Law and in Fact in Finding that Directive 7 was Drafted in Accordance with the Full or Complete Method*

118. The Trial Chamber erred in law in finding that Directive 7 was drafted in accordance with the full or complete method[175] on the basis of insufficient reasoning. Despite its holding that there was conflicting evidence on the methods of drafting of the Directive, the Chamber failed to provide particularised reasons as to why it accepted evidence indicating that Directive 7 was drafted according to the full method, while disregarding the evidence indicating that it was not drafted by this method. Furthermore, in analysing the evidence concerning the method of drafting, no reasons are advanced as to why certain witnesses, such as Skrbic, were considered unreliable on this issue but reliable on other issues.[176]

119. The method by which Directive 7 was drafted or General Gvero's involvement in its drafting were never even hinted at by the Prosecution in either the Indictment, the Prosecution Pre-Trial Brief, their opening statement or at any point during the three-year trial in this case. It was alleged for the first time in

[175] Judgement, paras. 1649, 1760 / pp. 617, 655-656.

[176] *See, e.g.*, Judgement, para. 1748 / p. 649.

the Prosecution Final Brief,[177] and, even then, so as to say that Gvero "would have participated" in the drafting. This assertion was based on the testimony of a witness[178] who in cross-examination clarified that he in fact was not aware which method had been used in drafting of this particular Directive.[179]

120. In fact, in addition to several other high ranking military officers, the few witnesses who testified about the purported "full" or "complete" method of decision making and document drafting process within the VRS[180] all admitted, , to making only theoretical comments and to never once in their extensive military careers taking part in the drafting of any directive,[181] or to have drafted directives either by themselves and/or by applying a different drafting method.[182]

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[177] Prosecution FTB, para. 1765.

[178] Lazic M. (assistant chief for operations and training at the VRS Main Staff), T. 21763 (4 June 2008).

[179] Lazic M., T. 21808 (5 June 2008) (Q. You have no direct knowledge of how the directive number 7 was drafted at the Supreme Command? A. I don't. I wasn't there.")

[180] Milovanovic M., T. 12275 (30 May 2007); Lazic M., T. 21763 (4 June 2008); Obradovic Lj., T. 28304 (17 November 2008), T. 28472–28473 (19 November 2008); Kosovac S., T. 30051, 30056 (13 January 2009).

[181] Milovanovic M., T. 12199 (29 May 2007) (the VRS Chief of Staff testifying to not participating in the drafting of Directive 7 and to be unfamiliar with it at the time); Assistant Commander for Personnel and Mobilisation Petar Skrbic testified he never saw Directive 7 until shown by the Prosecution in 2005, let alone participated in its drafting, and, by way of his position back in 1995, he would have had to be involved, had the "full" method been applied: Skrbic P., T. 15517–15518 (17 September 2007); Obradovic Lj., T. 28466 (19 November 2008) (A. I was not present. I didn't take part in the drafting of Directive 7 or Directive 7/1), T. 28473 (19 November 2008) (clarifying that, when discussing the full method, he was not talking about Directive 7, but about methodology in general terms); Miljanovic R. (Assistant Commander for Logistics), T. 28928; 28957 (27 November 2008) (confirming that he had not heard of or seen Directive 7 and Directive 7.1, or participated in their drafting); Kosovac S., T. 30257 (16 January 2009) (confirming that noting in Directive 7 indicated what method was used in the drafting thereof).

[182] Milovanovic M., T. 12195 (29 May 2007) (confirming that he personally drafted Directive 4); Lazic M., T. 21829 (5 June 2008) (Lazic clearly denies that the full method was applied with Directive 4. He testifies that Directive 4, drafted at the time he was working in the VRS Main Staff, was written by the Chief of Staff himself and that he was not acquainted it at the time); Masal D., T. 29068-29069 (1

121. Witness Milovanovic testified that written documents issued by the Main Staff and relating to combat activities were drafted by the Administration for Operations and Training.[183] With respect to the actual manner in which the directives were prepared, he explained that when the guidelines were given by the Supreme Command (as was the case with Directive 7), it was not necessary for the drafter to consult the assistant commanders.[184] Hence, it is clear that the so-called "full" method was abandoned in such situations.

122. The Chamber, however, only noted the existence of contradictory evidence regarding this issue,[185] and went on to conclude that Miletic drafted Directive 7 following the full method.[186] There is nothing in the Judgement indicating the basis for this conclusion, other than a blanket reference by the Chamber to "analysis of all evidence before it".[187]

123. There is no explanation by the Chamber as to why it decided to assign weight to selected portions of a limited number of witnesses it heard during the trial,[188] or why it failed to either take into account some important parts of the testimony of those same and some other witnesses,[189] or the only document that comes close to portraying the manner in which directives were prepared, *i.e.*, how the information were collected and guidelines issued.[190]

December 2008) (the VRS Main Staff operations officer describing how he drafted Directive 9 by using the abridged method).

[183] Milovanovic M., T. 12275 (30 May 2007). *See,* also, Judgement, para. 1644 / p. 614.

[184] Milovanovic M., T. 12275 (30 May 2007).

[185] Judgement, para. 1649 / p. 617, ftnt. 5051.

[186] Judgement, para. 1649 / p. 617.

[187] Judgement, para. 1649 / p. 617.

[188] Judgement, para. 1649 / p. 617.

[189] *See, supra,* ftnts. 181, 182.

[190] Ex. 6D311 (Proposal for the directive to the RS President on special measures in the IBK zone of responsibility to Adviser to the RS President Major General Subotic, signed by Major General Novica

124. The Chamber erred in law by reaching conclusions without providing a reasoned opinion on the material matter, as required by the Statute and Rules[191] and in violation of fair trial protections.[192] If the Trial Chamber had properly scrutinised the evidence relating to Directive 7, as the exercise of giving reasons would have required them to do, the Chamber would not have relied, or would not have relied to the same extent, on this evidence in convicting Milan Gvero. The error of law invalidates the decision.

125. Further, while the Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted, whenever such an approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber committed an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice.[193]

126. The standard of appellate review of findings based on circumstantial evidence reads:

> "Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the [reasonable doubt] standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such instances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not

Simic, 24 March 1995); *See*, also, Exs. 6D313 (Further statement of witness Djorde Djukic, 5 February 1996) and 6D315 (Further statement of witness Djorde Djukic).

[191] *See*, Article 23(2) of the Statute; Rule 98ter(C) of the Rules.

[192] This requirement serves as an essential fair trial protection ensuring that: (1) appeal rights can be exercised, and (2) the Appeals Chamber can understand and review a trial chamber's findings and its evaluation of the evidence. *Haradinaj et al.* AJ, para. 128; *Krajisnik* AJ, para. 139. *See*, also, Article 20(1) of the Statute.

[193] *Gotovina* AJ, para. 50, citing *Kayishema and Ruzindana* AJ, para. 119. *See,* also, *Aleksovski* AJ, para. 63.

> proven. If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber will vacate the Trial Chamber's factual inference and reverse any conviction that is dependent on it."[194]

127. The unexplained conclusion, therefore, merits a review on a correctness standard. No reasonable trier of fact would have concluded beyond reasonable doubt that Directive 7 was drafted in accordance with the full or complete method. Other conclusions were clearly available on the evidence adduced. The factual errors committed herein constitute an essential element on the basis of which the Chamber found that Gvero knew of the plan to forcibly remove the populations from Srebrenica and Zepa from its inception;[195] that he meets the knowledge requirement for crimes against humanity under Article 5 of the Statute,[196] and is ultimately guilty of inhumane acts (forcible transfer) as a crime against humanity punishable under Article 5(i) of the Statute.[197] The errors have occasioned a miscarriage of justice. The Appeals Chamber should, therefore, overturn the Trial Chamber's finding.

ii. **Sub-ground 6(B):** *The Trial Chamber Erred in Law in Finding that Milan Gvero Provided Input Into and was Well Aware of Directive 7 and Its Content*

128. The Trial Chamber erred in law in finding that Milan Gvero provided input into and was well aware of Directive 7 and its content.

129. The Chamber held:

> "Whether or not the command organs of the Main Staff provided the actual words of Directive 7, the Trial Chamber is satisfied they provided substantive input."[198]

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[194] *Stakic* AJ, para. 219; *Ntagerura et al.* AJ, para. 306.

[195] Judgement, paras. 1802-1803 / pp. 671-672.

[196] Judgement, para. 1824 / p. 679.

[197] Judgement, para. 1826 / p. 680.

[198] Judgement, para. 1649 / p. 617.

> "**It has not been established that Gvero, or his Sector, provided the actual text for parts of Directive 7**. However the Trial Chamber is satisfied that, with his background knowledge of the strategies since 1992 and through the full-method according to which Directive 7 was drafted, Gvero provided input in relation to his area of responsibility.[199] On the totality of the evidence, the Trial Chamber is satisfied that the only reasonable inference is that Gvero was well aware of Directive 7 and its content. In reaching this conclusion, the Trial Chamber has taken into consideration the importance of Directive 7, being a main policy document, and Gvero's previous knowledge of and involvement in the strategies of RS. Further, as the Assistant Commander for Morale, Gvero was responsible for implementing the objectives set out in Directive 7 in relation to "Moral and Psychological Support".[200]

130. The Chamber has again used mutually reinforcing arguments to infer existence of knowledge on Gvero's part concerning Directive 7 and input therein relating to his area of responsibility. The Defence has already pointed out the Chamber's errors concerning purported application of the so-called full method in the drafting of Directive 7,[201] and it hereby incorporates and includes by reference those arguments, as well as arguments refuting the Chamber's conclusions on Gvero's familiarity with and involvement in the RS strategies.[202]

131. Despite finding that "[i]t has not been established that Gvero, or his Sector, provided the actual text for parts of Directive 7,"[203] and noting the opinion of the military expert witness that parts of the Directive's text pertinent to the Sector for Morale, Legal and Religious Affairs couldn't have been written by this Sector,[204] the Chamber opined that the only reasonable inference was that Gvero was well aware of Directive 7 and its content.

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[199] Judgement, para. 1802 / pp. 671-672, referring to Judgement paras. 1758–1760 and 116 / pp. 654-656, 40 [emphasis added].

[200] Judgement, para. 1802 / pp. 671-672, referring to Judgement paras. 1760 and 116 / pp. 656, 40.

[201] *See*, Sub-ground 6(A), *supra*.

[202] *See*, Sub-grounds 7(A) and 8(A)-8(C), *infra*.

[203] Judgement, para. 1802 / pp. 671-672.

[204] Kosovac S., T. 30377–30379 (20 January 2009) (testifying that section of Directive 7 dealing with morale and psychological support for combat operations was not attributable to the Main Staff Sector

132. There is nothing in the "totality of the evidence" or Gvero's alleged previous knowledge of and involvement in the strategies of RS, or indeed in his tasks or those of his Sector within the Main Staff, which would suggest that he did in any way provide any kind of input in preparation of the Directive's section dealing with Morale. Nor is there any direct evidence to suggest that Gvero was aware of part or all of the contents of this Directive.

133. Quite the contrary, the Chamber heard evidence from two witnesses that, apart from the heading of the particular section 6.1, no other portions of that section or of Directive 7 as a whole fall within the purview of the organ for morale; as well as that the said section could not have been written by a qualified and trained military person[205] that must have comprised the Main Staff Sector for Morale.

134. The Chamber further heard evidence from several witnesses, who at the relevant time were high-ranking Main Staff officers, who testified to having not seen or been familiar with Directive 7 at the time of its creation.[206]

135. Moreover, the Chamber heard a witness explain how documents marked as "state secret" (as was the case with Directives 4 and 7) would remain unknown to everyone but those directly involved in their drafting.[207]

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for Morale, but rather to the commander and government or the government of Republika Srpska); *See*, also, Ex. P5 (RS Supreme Command Directive 7, 8 March 1995), p. 14.

[205] *See*, Skrbic P., T. 15549 (18 September 2007); Kosovac S., T. 30243-30246 (16 January 2009).

[206] *See, e.g.*, the VRS Chief of Staff Milovanovic M., T. 12199 (29 May 2007); Assistant Commander for Personnel Skrbic P., T. 15517–15518 (17 September 2007); Miljanovic R. (Assistant Commander for Logistics), T. 28928; 28957 (27 November 2008).

[207] Masal D., T. 29055 (1 December 2008); *See*, also, *ibid.* (explaining how all those involved in the writing of a directive must sign it to confirm their participation in the drafting or to indicate the authorship; how they were bound by a confidentiality clause to keep the contents of such documents to themselves; and how nobody else could be informed about the contents of such documents); Obradovic Lj., T. 28343 (17 November 2008) (explaining that Directive 7 was kept in a special safe box).

136. The Chamber disregarded relevant evidence and its own findings.[208] It acted unreasonably and in direct violation of the *in dubio pro reo* principle,[209] when it chose to exclude or ignore other inferences available on the evidence, and then reached a conclusion in the absence of a proper reasoning.

137. This error constitutes a failure by the Trial Chamber to provide a sufficiently reasoned Judgement, as required by Article 23 of the Statute and Rule 98*ter*(C) of the Rules, on material matters. If the Chamber had properly scrutinised the evidence relating to Directive 7 and Gvero's powers and responsibilities, as the exercise of giving reasons would have forced the Chamber to do, the Chamber would not have reached the conclusion that Gvero provided input in and was well-aware of the contents of Directive 7. The error of law invalidated the decision.

G. SEVENTH GROUND: *The Chamber Erred in Law and in Fact in Finding that Milan Gvero Possessed the Knowledge Requirement for a Crime Under Article 5 of the Statute*

138. The Trial Chamber erred in fact and in law in its findings regarding the knowledge requirement for a crime under Article 5. These errors occasioned a miscarriage of justice and invalidated the Judgement, respectively.

[208] *Kvocka* et al. AJ, para. 23 (quoted in *Haradinaj et al.* AJ, para. 129).

[209] Under this principle, if there is any ambiguity or doubt as to the guilt of the Accused, any determination must be in favour of the accused. Where the Chamber suspects that the guilt of an Accused may have been proved on the balance of probabilities rather than beyond reasonable doubt it must acquit. *Blagojevic and Jokic* TJ, para. 18. *See,* also, *Halilovic* AJ, para. 109.

i. **Sub-ground 7(A):** *The Trial Chamber Erred in Fact in Finding that Milan Gvero Possessed the Knowledge Requirement for a Crime Under Article 5 of the Statute*

139. The Trial Chamber erred in fact in finding that Milan Gvero possessed knowledge of Directive 7 in the absence of proof beyond a reasonable doubt. On this basis the Trial Chamber erroneously found that Gvero knew that his acts formed part of the widespread and systematic attack against the civilian population. No reasonable trial chamber would have made this finding on the evidence. The error occasioned a miscarriage of justice.[210]

140. The Trial Chamber relied upon its finding that Gvero had knowledge of Directive 7 to impute to him knowledge of the widespread and systematic attack against the civilian population.[211] In so doing, they convicted him of crimes against humanity under Article 5 of the Statute. The factual finding that he knew of Directive 7 was not established to the criminal standard of proof. In the alternative, the Trial Chamber failed to apply the adopted standard in addressing the knowledge requirement that his acts formed part of an illegal attack.

141. The Trial Chamber rightly recognises that it could not be sure that the Gvero, or his Sector, provided the actual text for parts of Directive 7.[212] The Chamber instead relies upon "his background knowledge of the strategies since 1992 and through the full-method according to which Directive 7 was drafted"[213] to find that Gvero had knowledge of the Directive. The full-method is described by the Trial Chamber in the following terms:

> "Most directives were drafted using the so-called "full" or "complete" method, involving the work of all of the command organs in the Main Staff. Each

[210] This section is somewhat repetitive of issues surrounding Directive 7 dealt with in the Sixth Ground above. They are included here for the purposes of exposition.

[211] Judgement, para. 1824 / p. 679.

[212] Judgement, para. 1802 / pp. 671-672.

[213] Judgement, para. 1802 / pp. 671-672.

> command organ would provide the elements pertaining to its own respective sector. The Administration for Operations and Training merged all these elements, as approved by the VRS Main Staff Commander, and incorporated them in a single directive"[214]

142. The "background knowledge" referred to by the Trial Chamber appears to be a 2 September 1992 meeting at Bijeljina, where "strategic objectives of the war were put forth",[215] a military and political seminar held in Zvornik a few days after the issuance of Directive 4,[216] and a briefing on the combat readiness held at the beginning of 1995.[217] The Trial Chamber concludes that "by participating in the combat readiness briefing, Gvero gained a wide and substantive knowledge of the strategies and goals of the political leadership of RS".[218]

143. To have imputed to Gvero knowledge of the strategic goals as a result of his involvement in just a few meetings dating over a number of years, was to have found knowledge where the evidence of such knowledge was scant at best and fell short of being established beyond doubt.

144. By way of example, the Trial Chamber relies upon Novica Simic's account of the 2 September 1992 meeting. But his evidence is unequivocal on the purpose and content of the meeting: he was clear that the primary purpose of the meeting was not the discussion of the strategic objectives which were only mentioned in passing, rather it concerned the conflict between the paramilitary troops and the army in Bijeljina.[219]

145. Similarly, the Trial Chamber relies upon the seminar in Zvornik. But in the contents of the order for preparation of the military/political consultation in

[214] Judgement, para. 1646 / pp. 614-615.

[215] Judgement, para. 1758 / pp. 654-655.

[216] Judgement, para. 1758 / pp. 654-655.

[217] Judgement, para. 1759 / p. 655.

[218] Judgement, para. 1759 / p. 655.

[219] Simic N., T. 28649-28651 (21 November 2008).

Zvornik, Directive 4 is not mentioned.[220] The witness Dragica Masal explained that the Directives were confidential state secrets whose contents were only known to those directly involved in the drafting.[221] It is highly unlikely, therefore, that the contents would have been discussed at that large-scale meeting. Vinko Pandurevic, under cross-examination by the Prosecutor, stated that Directive 4 was not discussed at the meeting at all.[222]

146. The Trial Chamber found that as the Assistant Commander for Morale, Gvero was responsible for implementing the objectives set out in Directive 7 in relation to "Moral and Psychological Support".[223] However, Petar Skrbic and Slobodan Kosovac both testified that apart from the heading, no part of Directive 7 fell under the remit of the organ for morale, nor was it written by a qualified or trained military individual.[224]

147. The Trial Chamber erred in finding that Gvero had knowledge of Directive 7 by relying on his "background knowledge". Indeed, the only two witnesses who, by the full-method of drafting, ought to have had actual knowledge of the directive were Petar Skrbic and Ratko Miljanovic. Both denied seeing it or participating in its drafting.[225]

[220] Exs. P4221 (VRS Main Staff Order to Drina Corps Command, signed by Mladic, 20 November 1992); and P4222 (Timetable for a Military and Political Seminar in the Drina Corps for 23 November 1992, approved by Mladic, signed by Milovanovic).

[221] Masal D., T. 29055 (1 December 2008).

[222] Pandurevic V., T. 32075 (25 February 2009).

[223] Judgement, para. 1802 / p. .

[224] Skrbic P., T. 15549 (18 September 2007); Kosovac S., T. 30243-30246 (16 January 2009).

[225] Skrbic P., T. 15517-15518 (17 September 2007); Miljanovic R., T. 28957 (27 November 2008).

ii. **Sub-ground 7(B):** *The Trial Chamber Erred in Law in Finding that Milan Gvero Possessed the Knowledge Requirement for a Crime Under Article 5 of the Statute*

148. Alternatively, the Chamber erred in law in finding that Gvero possessed the knowledge requirement for a crime under Article 5 of the Statute. The Trial Chamber failed to apply the adopted standard in addressing the knowledge requirement on the part of an accused that his acts formed part of an illegal attack. The error of law invalidates the decision.

149. Relying on Gvero's knowledge of Directive 7, on "Gvero's acts and conduct... clearly tied to the attacks on Srebrenica and Zepa", and "his overview of the forcible transfer operation from its inception", the Trial Chamber found that Gvero met the knowledge requirement for crimes against humanity under Article 5 of the Statute.[226] The Trial Chamber set out the legal basis for the knowledge requirement, stating:

> "Gvero is responsible for a crime against humanity under Article 5 of the Statute if his acts were part of the widespread and systematic attack against the civilian population and if at the time, he knew of that attack and that his crimes comprised a part thereof"[227]

150. It is accepted that this is an accurate statement of the law. However, the Trial Chamber erred in failing to apply the adopted standard in addressing the knowledge requirement, such a standard being the criminal standard: knowledge established beyond a reasonable doubt that Gvero knew both of the attack, and that his crimes comprised a part of the attack.

151. Issues pertaining to Directive 7 are discussed immediately above at sub-ground 7(a). In the context of this ground of appeal, the Appeal Chamber is respectfully invited to the view taken by the *Krajisnik* Trial Chamber, that none of the

[226] Judgement, para. 1824 / p. 679.

[227] Judgement, para. 1823 / p. 679.

strategic goals are unlawful in character, nor do they contain anything incriminating within them.[228] Mere awareness of Directive 7, or of the strategic goals contained in it, thus fall short of establishing at law the knowledge requirement beyond doubt.

152. In respect of Gvero's conduct tied to the attacks on Srebrenica and Zepa, the Trial Chamber found that he was "provided with crucial information and was involved at critical junctures".[229] However, having found that he was aware of the strategic objectives, much of the Trial Chamber's reasoning is based upon provision to him of information. For example, a telegram sent on 9 July 1995 which was sent to Gvero at the IKM.[230] But the Trial Chamber acknowledges that they could not be sure that he received it. The Trial Chamber acknowledges too that a 13 July 1995 type-signed Gvero calling for the capture of men from the column is not directly relevant to the forcible transfer operation.[231]

153. The Trial Chamber erred in law in failing to apply assiduously the criminal standard of proof to the various elements on which it sought to make findings as to Gvero's knowledge for the purposes of crimes against humanity.

[228] *Krajisnik* TJ, para. 995. Discussed at *Krajisnik* AJ, para. 579.

[229] Judgement, para. 1805 / p. 672.

[230] Judgement, para. 1806 / p. 673.

[231] Judgement, para. 1807 / p. 673.

H. EIGHTH GROUND: *The Trial Chamber Erred in Law and in Fact in Its Findings as to the Joint Criminal Enterprise*

i. Sub-grounds 8(a) and 8(b): *The Trial Chamber Erred in Law and in Fact Regarding the JCE*

154. The Trial Chamber erred in law in convicting Gvero by using the JCE as a mode of liability when the material facts evidencing his knowledge of the JCE's common purpose (his knowledge of the Six Strategic Goals and Directive 4) were not properly pleaded in the Indictment, the Prosecution's Pre-Trial Brief or the Opening Statement. These material facts were wrongly employed by the Trial Chamber to find that Gvero had the intent to further the common purpose of the JCE.[232] By convicting Gvero based upon a defective pleading of one element of the JCE mode of liability, the Chamber violated his right to a fair trial in that he was not informed promptly and in detail of the nature and cause of each of the charges against him, as required by Article 21(4)(a) of the Statute. The error of law invalidates the Judgement.

155. The Chamber dismissed the Defence objection to the defects in the Prosecution's pleading of the material facts regarding Six Strategic Goals and Directive 4 which purportedly evidence Gvero's knowledge of the common purpose of the JCE to Forcibly Remove,[233] by holding that the existence of the Strategic Goals and Directive 4 constitutes evidence that need not be pleaded in the Indictment;[234] that reference to the pre-1995 events in paragraphs 19–23 of the Indictment as evidence relevant for background and context to the charges sufficiently puts the accused on notice;[235] and that evidence from time periods

[232] Judgement, paras. 1801, 1822, 2203 / pp. 671, 679, 823.

[233] Gvero Closing Arguments, T. 34702-34703 (11 September 2009).

[234] Judgement, para. 1746 / p. 648.

[235] Judgement, para. 1608 / p. 601.

prior to the crimes alleged in the Indictment can be used to infer the knowledge and intent of an accused.[236]

156. In making this determination, the Chamber concentrates on the Prosecution's obligation to state the material facts underpinning the charges in the Indictment.[237] It however, fails to address the decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment, *i.e.*, the nature of the alleged criminal conduct charged.[238]

157. As noted in *Kupreskic*:

> "In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[239] There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment."[240]

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[236] Judgement, para. 1609 / p. 601.

[237] Judgement, para. 1745 / p. 648.

[238] *Bagosora and Nsengiyumva* AJ, para. 132, citing *Kamuhanda* AJ, para. 17; *Ntakirutimana* AJ, para. 25; *Kupreskic et al.* AJ, para. 89; *Nahimana et al.* AJ, para. 324; *Ntagerura et al.* AJ, para. 23. *See*, also, *Stakic* AJ, para. 116; *Kupreskic et al.* AJ, para. 88 (stating that "the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence").

[239] *Prosecutor* v. *Krnojelac* (IT-97-25-PT), Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 23.

[240] *Kupreskic et al.* AJ, para. 92.

158. The Defence recognises that background information may serve to "understand or contextualise later events."[241] The decisive reliance on these events shows, however, that they were not relied on as either "background" or "context", and should not have been so treated for pleading purposes.

159. Also, the Defence hereby incorporates and includes by reference the arguments put forward in paragraphs 71-73 *supra*.

160. The Prosecution failed to put Gvero on sufficient notice concerning the Six Strategic Goals and Directive 4. This constitutes error of law which invalidated the decision.

a. Gvero Lacked Intent to Further the JCE

161. The Trial Chamber further erred in law by applying an incorrect legal test to determine Milan Gvero's intent by reaching an inference which, on the evidence, was not the only reasonable one open to it. Had the proper legal test been applied it would have resulted in the conclusion that Gvero lacked the requisite intent to further the JCE. The error of law invalidates the decision.

162. The JCE should not be regarded as an open-ended concept which permits conviction based on guilt by association.[242] For instance, the fact that an accused had contacts with members of the JCE does not constitute a sufficient basis for finding that he himself belonged to the JCE.

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[241] *See*, *Prosecutor v. Ratko Mladic* (IT-09-92-PT), Decision in Relation to Prosecution's Rule 92 *ter* Motion for Witness RM-114, 16 August 2012, para. 7; Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphonse Orie and for A Stay of Proceedings, Public Redacted Annex (Internal Memorandum – Report by Presiding Judge Alphonse Orie Pursuant to Rule 15(B), 14 May 2012), 15 May 2012, para. 46, ftnt. 76.

[242] *Brdjanin* AJ, para. 428; *See*, also, *Sesay et al.* AJ (SCSL-04-15-A), para. 318, and Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, para. 44.

163. *Mens rea* is the foundational element of a crime, indispensable for finding an accused guilty and it must be established beyond a reasonable doubt.[243] Furthermore, an accused can only be found to possess the necessary intent if that is the only reasonable inference to be drawn from the adduced evidence.[244] Although it is difficult to prove intent, it would be contrary to essential principles of law to seek to confound this challenge by expanding the concept of *mens rea*. The Tribunal held that:

> "The expansion of *mens rea* is an easy but dangerous approach. [...] Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal".[245]

164. The *mens rea* requirement for the first category JCE liability requires showing that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed.[246] Common purpose liability is predicated on the understanding that all participants share the same criminal intent and are thus liable for the crimes that occur through the realisation of the common design or purpose.

165. There is no evidence to show that Gvero had played any part in the formulation or adoption of the Six Strategic Goals. In fact, there is no evidence that he was even present when the Six Strategic Goals were passed in May of 1992.[247] The Six Strategic Goals should not have been considered in determining whether Milan Gvero had knowledge of or shared the *mens rea* for the alleged common

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[243] *Limaj et al.* AJ, para. 21; *Halilovic* AJ, para. 125; *Blagojevic and Jokic* AJ, para. 226; *Ntagerura et al.* AJ, para. 174; *Brdjanin* AJ, para. 429. *See*, also, *Krstic* TJ, paras. 519-532.

[244] *Brdjanin* AJ, para. 429.

[245] *Kordic and Cerkez* TJ, para. 219.

[246] *Tadic* AJ, para. 228.

[247] Judgement, para. 1758 / pp. 654-655.

criminal plan in relation to Srebrenica and Zepa. As the Trial Chamber in *Krajisnik* explained:

> "It would be incorrect to place these goals on a pedestal, as the Prosecution does, for in the final analysis they are anodyne statements, serving as official state policy and even qualifying for publication in the Bosnian-Serb Republic's *Official Gazette*. If one is inclined to find in them insidious hidden meanings, it is because of the context and the events that followed. An anachronistic reading of the May goals is not only inadvisable, it misses the point, just as an anachronistic reading of the December Instructions misses the point. The instructions and the goals lacked substance and utility, but they did symbolize a new central authority at a time when the old order had disintegrated. The extent to which they found currency among Bosnian Serbs is an indication of the degree of acceptance of that new authority."[248]

166. Even if one is to consider these Goals as pertinent to the 1995 events around Srebrenica and Zepa, the fact that Gvero attended and briefly spoke at a meeting in Bijeljina in September 1992 cannot be taken as an indication of his actual familiarity with the six strategic objectives. Both the testimony of General Simic[249] and the relevant entries in his diary[250] clearly show 1) that the reason for this meeting was related to a local problem; 2) that the then Speaker of the RS Assembly Momcilo Krajisnik was the one to refer to the strategic goals by simply listing them, rather than elaborating on them in any greater detail; and 3) that Gvero's address at the meeting was very brief and entirely unrelated to the goals in question.

167. Further, Directive 4 should not have had any bearing on Gvero's purported knowledge of or the shared *mens rea* for the alleged common criminal plan in relation to Srebrenica and Zepa. As correctly noted by the Trial Chamber, there is no evidence concerning Gvero's involvement in its issuance.[251] What is more, the Chief of Staff Milovanovic testified that he personally drafted this

[248] *Krajisnik* TJ, para. 995. This finding was subsequently approved on appeal: *Krajisnik* AJ, para. 579.

[249] Simic N., T. 28649–28654 (21 November 2008).

[250] Ex. P3927 (War diary of Novica Simic January 1992 to January 1993), p. 35.

[251] Judgement, para. 1758 / pp. 654-655.

Directive.[252] Lazic explained that, at the time when Directive 4 was created, he was not familiar with it at all,[253] and that one could only learn from the Chief of Staff what some parts of the directives contained.[254] Military expert witness Kosovac clarified the lack of correlation among directives in general, and particularly between Directive 4 and Directive 7.[255]

168. The Chamber infers Gvero's knowledge on Directive 4 from his presence at a military and political seminar held in Zvornik on 23 November 1992, a few days after Directive 4 was issued and during which some of the tasks for the Drina Corps were discussed.[256] However, when one analyses the evidence[257] on which the Chamber relies to substantiate this inference and the contention that "some of the tasks for the Drina Corps ***pursuant to this Directive*** were discussed",[258] it becomes obvious by an examination of any of the proffered documents or by scrutinising the testimony of Pandurevic that Directive 4 was not referred to in

[252] Milovanovic M., T. 12195 (29 May 2007).

[253] Lazic M., T. 21829 (5 June 2008).

[254] Lazic M., T. 21827 (5 June 2008).

[255] Kosovac S., T. 29967-29968 (12 January 2009) ("No directive, at least as far as military theory goes, links up with any other directive. Each directive is self-sufficient. It contains a job. It's completed or not. If not, then it's completed in a different way, depending on the causes, obviously. If you look at the situation on the ground, the situation that prevailed at the time, directive number 4, directive number 7 - I mean 1995 – one realises there is nothing like that. There are two entirely different situations on the ground. If you look at the situation that prevailed in the armed forces, these are entirely different situations. If you look at the objectives that were set, these are two entirely different objectives. There would be no logic in the linking up of these two directives in any sense at all.").

[256] Judgement, para. 1758 / pp. 654-655.

[257] Ex. P4402 (Extract of notebook seized by NATO forces during a search of residences of the family of Radovan Karadzic on 25-26 May 2005), p. 1; Ex. P4221 (VRS Main Staff Order to Drina Corps Command, signed by Mladic, 20 November 1992); Ex. P4222 (Timetable for a Military and Political Seminar in the Drina Corps for 23 November 1992, approved by Mladic, signed by Milovanovic) (stating that the "situation, results, further tasks and capabilities" of the Drina Corps in the areas of, *inter alia*, Visegrad, Gorazde, Bratunac and Zvornik were discussed at the seminar); Pandurevic V., T. 32073–32080 (25 February 2009).

[258] Judgement, para. 1758 / pp. 654-655.

or linked to this seminar. The co-accused Pandurevic who took part in the seminar[259] stated he did not remember Directive 4 being mentioned at that seminar.[260] He was not even sure if General Gvero was present at the seminar[261] which, in Pandurevic's opinion, was more about the newly formed Drina Corps and its functioning than anything else.[262] That, in combination with the fact that Gvero was not listed as one of the speakers at the seminar[263] suggests his rather inferior role at that gathering. Indeed, nothing in the evidence suggest that Directive 4 was discussed or that, by attending the meeting, Gvero would have familiarised himself with the contents of the Directive, let alone learn of "the plans of the RS leadership, aimed at the creation of a separate State for the Serbian people in BiH,"[264] or the VRS tasks "to defeat the Bosnian Muslim forces and to remove the civilian population from the Srebrenica and Zepa enclaves".[265]

169. Likewise, Gvero's participation in the January 1995 Briefing on Combat Readiness should not have been regarded as a way of Gvero's gaining a wide and substantive knowledge of the strategies and goals of the political leadership of the RS.[266] There is no conclusive evidence that Gvero was present throughout the Briefing, or that Gvero was actually present during the discussions on "future political and military goals and strategies of conducting the war and peace

[259] Pandurevic V., T. 32073 (25 February 2009).

[260] Pandurevic V., T. 32075 (25 February 2009). The Defence observes that, despite the fact that the Prosecution claimed both Pandurevic and Gvero would have acquired knowledge of Directive 4 through participation in the seminar (*see,* Prosecution FTB, para 61), the Trial Chamber made no such finding in Pandurevic's case or, for that matter, attached any importance whatsoever to Pandurevic's presence at the seminar when it assessed his responsibility under the JCE doctrine.

[261] Pandurevic V., T. 32079-32080 (25 February 2009).

[262] Pandurevic V., T. 32074, 32076 (25 February 2009).

[263] Ex. P4222 (Timetable for a Military and Political Seminar in the Drina Corps for 23 November 1992, approved by Mladic, signed by Milovanovic).

[264] Judgement, para. 1801 / p. 671.

[265] Judgement, para. 1801 / p. 671.

[266] Judgement, para. 1759 / p. 655.

negotiations" or the political and military priorities of the RS, or the "already adopted strategic goals", or "the most important tasks [of the VRS] in 1995."[267]

170. There was no proper basis in the trial record upon which the Trial Chamber could draw an inference that Gvero satisfies the JCE membership requirement in that he possessed the requisite intent to further the common purpose to forcibly remove the Bosnian Muslims from the enclaves. The Chamber's errors therefore invalidate the decision.

171. The absence of the requisite *mens rea* is sufficient for a reversal of Gvero's convictions under JCE liability,[268] and the Appeals Chamber should quash the convictions and enter a judgement of acquittal.

172. The Chamber's findings that Milan Gvero had the requisite intent to commit crimes of persecution and forcible transfer as part of a JCE to Forcibly Remove also constitute factual errors which have occasioned a miscarriage of justice.

173. The crime of persecution consists of:

> "[a]n act or omission that: (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[269]

174. As the Trial Chamber correctly held, in addition to the chapeau requirements of knowledge of a widespread or systematic attack against a civilian population, the *mens rea* for persecutions consists of the intent to commit the underlying act and

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[267] Judgement, para. 1759 / p. 655, citing Ex. 5D967 (Schedule briefing on Combat Readiness in 1994, 29 and 30 January 1995, signed by Mladic).

[268] *See*, also, *Sesay et al.* AJ (SCSL-04-15-A), Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, para. 29.

[269] *Stakic* AJ, para. 327, citing *Kordic and Cerkez* AJ, para. 101; *Blaskic* AJ, para. 131; *Vasiljevic* AJ, para. 113; *Krnojelac* AJ, para. 185.

the intent to discriminate on political, racial or religious grounds.[270] The discriminatory intent requirement amounts to a "*dolus specialis.*"

175. However, as discussed above, the evidence admitted at trial simply does not add up to it. In addition, Gvero's poor relationship with the RS policy makers,[271] his traditional military education, as well as his role and responsibilities prior to, during and post the relevant time period clearly show his lack of persecutory intent or any intent whatsoever to engage in a common plan to forcibly remove Muslim population.[272]

176. The factual errors constitute an essential element on the basis of which Gvero was found to have significantly contributed to the JCE to Forcibly Remove[273] and ultimately criminally responsible for the commission of the forcible transfer of the Bosnian Muslims from Srebrenica and Zepa. The errors have occasioned a miscarriage of justice. On the evidence adduced at trial, no reasonable trial chamber would have reached these conclusions beyond reasonable doubt. The Appeals Chamber should, therefore, overturn the Trial Chamber's findings and substitute it with its own findings.

ii. **Sub-ground 8(C):** *The Trial Chamber Erred in Law Regarding Milan Gvero's Participation in the JCE*

177. The Trial Chamber erred in law by failing to provide adequate reasoning for convicting Milan Gvero as a JCE member.[274] The evidence against the Gvero, taken at its highest and making all assumptions in favour of the Prosecution, showed that Gvero's acts were not such as to amount to participation in the JCE.

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[270] Judgement, para. 968 / p. 378.

[271] Judgement, para. 1757 / p. 654; *See,* also, Gvero FTB, paras. 126-149 / pp. 69-84.

[272] Judgement, paras. 1802-1803, 1822 / pp. 671-672, 679.

[273] Judgement, para. 1820 / p. 678.

[274] Judgement, para. 1822 / p. 679.

In particular, the Chamber failed to provide reasons for its findings as to Gvero's "detailed knowledge of the strategic aim to remove the Bosnian Muslim population from the enclaves",[275] in the absence of which Gvero's acts cannot be said to be in furtherance of the common purpose of the JCE. The error of law invalidates the decision.

178. As noted by the Chamber, the centerpiece of the Prosecution's case against Gvero is his commission of crimes through participation in the JCE to Forcibly Remove.[276]

179. Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal. Moreover, the evaluation of the evidence was erroneous. The Appeals Chamber is, therefore, called upon to overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Gvero had participated in the criminal conduct.[277]

180. The Chamber's conclusions did not meet the requirements of a reasoned opinion. It reached a conclusion without providing a reasoned opinion as required by the Statute and Rules[278] and in violation of fair trial protections.[279]

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[275] Judgement, paras. 1822, 2203 / pp. 679, 823.

[276] Judgement, para. 1800 / p. 671.

[277] *See*, *Kupreskic et al.* AJ, para. 41, citing *Tadic* AJ, para. 64; *Aleksovski* AJ, para. 63; and *Delalic et al.* AJ, para. 491.

[278] *See*, Article 23(2) of the Statute; Rule 98ter(C) of the Rules.

[279] This requirement serves as a fair trial protection ensuring that: (1) appeal rights can be exercised, and (2) the Appeals Chamber can understand and review a trial chamber's findings and its evaluation of the evidence. *Haradinaj et al.* AJ, para. 128; *Krajisnik* AJ, para. 139. *See*, also, Article 20(1) of the Statute.

iii. **Sub-ground 8(D):** *The Trial Chamber Erred in Fact Regarding Milan Gvero's Participation in the JCE*

181. The Trial Chamber erred in fact by finding that Milan Gvero had participated in the JCE. The evidence purportedly addressing the nature of Gvero's alleged assistance was insufficient to establish participation for the purposes of JCE. In particular, Gvero's alleged efforts "to delay and block international protective intervention"[280] by "disseminating false information and issuing a serious threat",[281] when considered in light of his total lack of contribution to the Zepa campaign, were insufficient to amount to a significant contribution to the common purpose of the JCE. The error occasioned a miscarriage of justice.

182. The Chamber ought to characterise the contribution of an accused in the common plan, an element necessary to establish the *actus reus* of JCE liability. Not every type of conduct amounts to a significant enough contribution to the crime for it to create criminal liability for the accused regarding the crime in question. Although the contribution need not be necessary or substantial,[282] it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[283]

183. The Defence has already addressed some of the findings concerning blockage of international intervention, dissemination of false information and issuance of a serious threat.[284] Those arguments are hereby repeated and included by reference.

[280] Judgement, paras. 1822, 2203 / pp. 679, 823.

[281] Judgement, paras. 1812, 1820 / pp. 676, 678.

[282] *Gotovina* AJ, para. 89; *Brdjanin* AJ, para. 430; *Kvocka et al.* AJ, para. 97-98; *Krajisnik* AJ, para. 215; *See,* also, Judgement, para. 1027 / p. 395.

[283] *Krajisnik* AJ, para. 215; *Brdjanin* AJ, paras. 430, citing *Kvocka et al.* AJ, para. 97; *See,* also, Judgement, para. 1027 / p. 395.

[284] *See*, arguments under Fourth Ground, *supra.*

184. The Chamber assigned disproportionate weight to Gvero's role and responsibilities in VRS operations.[285] As an example of the important part Gvero played, the Chamber refers to his presence at the IKM Pribicevac on 9 July 1995,[286] in the face of quite divergent testimony from the Prosecution military expert[287] and in the absence of any other testimony to support its contention. The Chamber does not address Butler's statement which offers another reasonable, non-criminal reason for Gvero's presence at the IKM.

185. The Chamber offered no reasons for its finding that "as the Assistant Commander for Morale, Gvero had an important role to play in VRS' operations: the *Krivaja-95* and the Zepa operations were no exception;"[288] Further, no evidence was proffered that Gvero was acquainted with "major developments in the campaign"[289] The fact that Gvero was one of the addressees of Tolimir's telegram detailing Karadzic's order concerning further military activities around Srebrenica[290] does not prove that Gvero was receiving "key documents and was generally informed as to the progress of the military action."[291] In reality, there is sufficient and reliable evidence to show that Gvero

[285] Judgement, para. 1805 / p. 672.

[286] Judgement, para. 1805 / p. 672.

[287] Butler R., T. 19795 (16 January 2008) ("Q. Does General Gvero's presence at the forward command post have any significance for you in your overall analysis? A. No, sir, other than it's just a -- again a reflection of the practice where, in critical operations, that often officers of the Main Staff will be present at these command posts to help oversee the operations and be there as a person who can potentially de-conflict any problems between the corps and the Main Staff [...]"); T. 19800 (16 January 2008) (A. [...] "We know, from other documents and other information, that General Mladic shows up at the IKM personally on the 10th. With General Mladic on the scene, there's no reason for General Gvero to be there as the Main Staff representative. General Mladic can obviously do that better than anyone else.").

[288] Judgement, para. 1806 / p. 673.

[289] Judgement, para. 1806 / p. 673.

[290] Ex. P33 (VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995).

[291] Judgement, para. 1806 / p. 673.

never received that telegram.[292] Yet, the Chamber failed to make that determination and unreasonably left the possibility open.[293]

186. In addition, it is submitted that, starting from an incorrect premise that Gvero "knew of the plan to take-over the Srebrenica enclave and to forcibly remove the civilian population, and the action which had been taken to implement it,"[294] his press statement of 10 July 1995[295] was "unquestionably a misleading press release".[296] The Chamber went on to conclude that "[t]he only reasonable inference as to the goal behind this *communiqué* is that it was intended to mislead, in particular the international authorities concerned with protecting the enclave, with a view to delaying any action on their part which might thwart the VRS' military efforts."[297]

187. Yet, the Chamber failed to consider other reasonable inferences that were open to it on the evidence, *i.e.*, that Gvero was not attempting to deceive or mislead anyone, but that it was simply the information at Gvero's disposal at the time,[298] that he was only doing his job;[299] and that quite a bit of the information

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[292] Ex. P33 was received [at the IKM] when Gvero had already left Pribicevac. Momcilovic B., T. 14132-14133 (22 August 2007); Trisic and PW-162 stayed at Pribicevac for between one and two hours, after which they left together; Gvero left at the same time in a separate vehicle. Trisic D., T. 27117-27118 (21 October 2008); *See,* also, PW-162 "Gvero remained at Pribicevac for approximately an hour". The witness and General Gvero stayed at Pribicevac for approximately one hour, after which they returned to and reached Bratunac together. General Gvero told him that he was in a hurry to reach Vlasenica. PW-162, T. 9333-9334 (23 March 2007).

[293] Judgement, para. 1806 / p. 673.

[294] Judgement, para. 1815 / p. 676.

[295] Ex. P2753 ('Srebrenica – The Muslim War Trump Card', statement by Gvero, 10 July 1995).

[296] Judgement, para. 1815 / p. 676.

[297] Judgement, para. 1815 / p. 676.

[298] *See*, also, Fourth Ground *supra*, paras. 100-102; and Gvero FTB, paras. 153-166 / pp. 141-147; paras. 184, 189 / pp. 157, 160.

[299] Skrbic P., T. 15627 (19 September 2007).

contained in the press statement proved to be true.[300] Similarly, despite the Chamber's conclusion that with his statement Gvero was aiming to mislead, in particular the international authorities concerned with protecting the enclave, there is no evidence that any of the UNPROFOR or DutchBat members present in Bosnia actually became aware of this statement at the time. Quite the contrary, it was obvious that General Nicolai was seeing it for the first time at trial.[301]

188. The Chamber further erred in finding that Gvero's Warning on Treatment of UNPROFOR Personnel[302] "was designed to ensure that no further actions were taken in relation to UNPROFOR that might provoke a response and interfere with efforts to end the NATO air strikes."[303] This was so given Gvero's previous conduct towards, *inter alia*, members of international organisations,[304] as well as the comment by the Prosecution's military analyst Richard Butler that this document represents "a fair example of a good military idea that was overcome by events."[305] Butler does not suggest that there is anything clandestine or criminal in this document. Again, Gvero is acting well within the scope of his professional duties and the cited characterisation of the Warning document by the Trial Chamber is erroneous and unsubstantiated.

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[300] Gvero FTB, paras. 153-166 / pp. 141-147; paras. 184, 189 / pp. 157, 160. The Prosecution acknowledged it too. Prosecution Opening Statement, T. 466-467 (22 August 2006)).

[301] Nicolai C., T. 18484-18485 (29 November 2007).

[302] Ex. 6D207 (VRS Main Staff, Warning on treatment of UNPROFOR personnel in the Srebrenica enclave, to the Drina Corps Command and IKM, of 11 July 1995).

[303] Judgement, para. 1817 / p. 677.

[304] Ex. 6D129 (VRS Main Staff document regarding prevention of reprisal and treatment of journalists and representatives of international organisations, 20 June 1992). *See*, also, Gvero FTB, para. 297 / p. 209.

[305] Butler R., T. 19801 (16 January 2008); 20722 (30 January 2008).

189. It is of note and importance that Gvero was not present at any of the three Fontana Hotel meetings. In addition he was not present at any important meeting prior to the Zepa operation.[306] The Chamber correctly concluded that, despite some knowledge on the Zepa developments, "there is no evidence before the Trial Chamber of any actions on [Gvero's] part which contributed directly to it."[307]

190. Overall, links that possibly tie Gvero to a common plan or the group of people designated as the JCE members are far more weak and implausible than those distancing him from any contribution, let alone a significant contribution, to the JCE to Forcibly Remove.

191. Same as with the lack of the requisite *mens rea*, the reversal of Gvero's convictions under JCE liability is also mandated in the absence of Gvero's significant contribution to the crimes within the JCE for which he was found responsible.[308]

[306] *E.g.*, Gvero was not present at a meeting in Bratunac. *See*, Trivic M., T. 11837-11842 (21 May 2007); Jevdjevic M., T. 29607-29609 (12 December 2008); Pandurevic V., T. 30882-30899 (30 January 2009).

[307] Judgement, para. 1821 / p. 678.

[308] *Krajisnik* AJ, para. 706; *Tadic* AJ, para. 227(iii).

I. NINETH GROUND: *The Trial Chamber Erred in Law by Convicting Milan Gvero on an Impermissibly Cumulative Basis*

192. The Trial Chamber erred in convicting Milan Gvero of crimes against humanity on an impermissibly cumulative basis. The error of law invalidates the decision.

193. The Trial Chamber convicted Milan Gvero of both Count 6, 'persecution through forcible transfer' and Count 7, 'other inhumane acts (forcible transfer)'.[309] The Judgement then goes on to discuss cumulative convictions generally.[310] As part of that discussion, the Chamber finds that:

> "A conviction for persecution, a crime against humanity pursuant to Article 5(h) of the Statute, and another crime under Article 5 of the Statute, on the basis of the same acts, is not impermissibly cumulative. Therefore, cumulative convictions for persecution as a crime against humanity (Count 6) on the one hand [...] and forcible transfer as other inhumane acts (Count 7), on the other hand, are permissible."[311]

194. The Defence contends that the Chamber erred in convicting Gvero on both Counts. The Chamber wrongly considered that the acts underlying persecution through forcible transfer were not impermissibly cumulative of other inhumane acts.

195. It is recognized that the Tribunal's case law has developed following the *Celibici* test[312] to permit cumulative convictions if each statutory provision involved contains a materially distinct element not contained in the other. However, in the application of this test, particularly to *intra*-Article 5 convictions, various Appeals Chambers have taken markedly divergent approaches. Although cumulative convictions have been found to be permissible in the *Krajinsik*,

[309] Judgement, para. 2109 / p. 791.

[310] Judgement, paras. 2111-2127 / pp. 794-799.

[311] Judgement, para. 27 / p. 8.

[312] *Kordic and Cerkez* AJ, para. 1033; *Krstic* AJ, para. 218; *Delalic et al.* AJ, para. 412.

Jelisic, *Kupreskic*, *Kunarac*, and *Musema* cases, they have been found to be impermissibly cumulative in the *Krnojelac*, *Vasiljevic*, and *Krstic* cases. In many cases on appeal permitting cumulative convictions, they have been the subject of dissenting opinion. The law is thus far from settled.

196. As a starting point, and as Appeal Chambers have indicated with reference to the *Delalic et al.* test, care must be exercised in its application since cumulative convictions create a risk of prejudice to an accused.[313] It is recognised, however, that the jurisprudence has developed such that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[314]

197. In this regard the various dissenting opinions of Judge Güney in the *Kordic* and *Naletilic* cases are of significance. In his partly dissenting opinion in the *Nahimana* case, making reference to his earlier opinions, Judge Güney sets out his opposition to cumulative convictions in *intra*-Article 5 charges. His approach is that the crime of persecution is correctly seen as "an empty hull, a sort of residual category designed to cover any type of underlying act".[315] Thus:

> "where a Chamber has to consider the issue of cumulative convictions entered in respect of the same facts for persecution and for other crimes against humanity, it cannot – if it wishes to give an account of the accused's criminal conduct in as complete and fair a manner as possible – merely compare the constituent elements of the cries in question, but must also consider the acts underlying the crime of persecution, without which there is no crime"[316]

[313] *Kunarac* AJ, para. 169, referring to *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 1248 (1996).

[314] *Kunarac et al.* AJ, para. 169 (citing the Partial Dissenting Opinion of Judge Shahabuddeen in the *Jelisic* AJ, para. 34).

[315] *Nahimana* AJ, Partly Dissenting Opinion of Judge Güney, para. 2.

[316] *Nahimana* AJ, Partly Dissenting Opinion of Judge Güney, para. 3.

198. As noted by both Judge Schomburg and Judge Güney in the *Kordic* case, "it should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case".[317] The conflicting approaches taken by different Appeals Chambers, and those proffered in dissenting opinions, are irreconcilable with a consistent manner of dealing with *intra*-Article 5 cumulative convictions. The most appropriate disposal where there is inconsistent authority is to favour an accused. That is the approach that should be adopted in this case.

199. It is clear that Gvero was convicted by the Trial Chamber of the same acts of forcible transfer under both Count 6 and Count 7.[318] To have done so was to convict on an impermissibly cumulative basis. This error of law invalidates the decision and Milan Gvero's conviction on Count 6 or, alternatively, on Count 7 of the Indictment should be quashed.

[317] *Kordic and Cerkez* AJ, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 13.

[318] Judgement, para. 2109 / p. 791.

III. OVERALL RELIEF SOUGHT

200. The Defence submits that the Appeals Chamber should:

(i) allow the appeal, grant the appeal grounds and quash Gvero's convictions; and

(ii) enter a verdict of acquittal or, in the alternative, reduce the sentence of 5 years of imprisonment passed upon Milan Gvero.

Word count: 24,281.

Respectfully submitted.

This 15th Day of February 2013

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Counsel for Milan Gvero

Public

ANNEX A
TO APPEAL BRIEF ON BEHALF OF MILAN GVERO

GLOSSARY OF TERMS AND ABBREVIATIONS

TERM	ENGLISH	Bosnian/Croatian/Serbian
ABiH	Army of the Republic of Bosnia and Herzegovina	Armija Republike Bosne i Hercegovine
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), 8 June 1977	
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II), 8 June 1977.	
AJ	Appeal Judgment	
BiH	Bosnia and Herzegovina	Bosna i Hercegovina
DutchBat	Dutch Battalion under the command of the UNPROFOR	
Ex., Exs.	exhibit, exhibits	
ftnt., ftnts.	footnote, footnotes	
ICRC	International Committee of Red Cross	Medjunarodni komitet Crvenog Krsta
ICTR	International Criminal Tribunal for Rwanda	Medjunarodni krivicni Tribunal za Ruandu
ICTY / Tribunal	International Criminal Tribunal for the Former Yugoslavia	Medjunarodni krivicni Tribunal za bivsu Jugoslaviju

IKM	Forward Command Post	Istureno komandno mesto
JCE	Joint Criminal Enterprise	Udruzeni zlocinacki poduhvat
MUP	Ministry of Interior	Ministarstvo unutrasnjih poslova
NATO	The North Atlantic Treaty Organization	Organizacija Severnoatlantskog saveza
para., paras.	paragraph, paragraphs	
p., pp.	page, pages	
Practice Direction (IT/201)	Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002	
Practice Direction (IT/184/Rev.2)	Pracctice Direction on the Length of Briefs and Motions (IT/184/Rev.2), 16 September 2005	
RS	Republika Srpska	Republika Srpska
Rules	Rules of Procedure and Evidence of the Tribunal	Pravilnik o postupku i dokazima Tribunala
SCSL	Special Court for Sierra Leone	
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia	Statut Medjunarodnog krivicnog Tribunala za bivsu Jugoslaviju
T.	trial transcript	

TJ	Trial Judgment	
VRS	Republika Srpska Army	Vojska Republike Srpske
UNPROFOR	United Nation Protection Force	

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ANNEX B
TO APPEAL BRIEF ON BEHALF OF MILAN GVERO

TABLE OF AUTHORITIES

ABBREVIATION USED	FULL CITATION
Chamber	Trial Chamber in *Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T)
Gvero FTB	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Gvero Defence Final Trial Brief, 30 July 2009
Indictment	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Indictment, 4 August 2006
Judgement	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Judgment, 10 June 2010, with Dissenting and Separate Opinions of Judge Kwon and Separate Opinion of Judge Prost
Prosecution Adjudicated Fact	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, with Annex, 26 September 2006
Prosecution Brief	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Prosecution Appeal Brief, 17 February 2013
Prosecution FTB	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Prosecution Final Trial Brief, 30 July 2009
Prosecution PTB	*Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic* (IT-05-88-T), Prosecution Pre-Trial Brief, 28 April 2006

OTHER ICTY AUTHORITIES	
ABBREVIATION USED	**FULL CITATION**
Aleksovski AJ	*Prosecutor v. Zlatko Aleksovski* (IT-95-14/1-A), Appeals Chamber, Judgement, 24 March 2000
Blaskic AJ	*Prosecutor v. Tihomir Blaskic* (IT-95-14-A), Appeals Chamber, Judgement, 29 July 2004
Blagojevic and Jokic AJ	*Prosecutor v. Vidoje Blagojevic & Dragan Jokic* (IT-02-60-A), Appeals Chamber, Judgement, 9 May 2007
Blagojevic and Jokic TJ	*Prosecutor v. Vidoje Blagojevic & Dragan Jokic* (IT-02-60-T), Trial Chamber, Judgement, 17 January 2005
Brdjanin AJ	*Prosecutor v. Radoslav Brdjanin* (IT-99-36-A), Appeals Chamber, Judgement, 3 April 2007
Delalic et al. AJ	*Prosecutor v. Delalic et al.* (IT-96-21-A), Appeals Chamber, Judgement, 20 February 2001
Delalic et al. TJ	*Prosecutor v. Delalic et al.* (IT-96-21-T), Trial Chamber, Judgement, 16 November 1998
Final Report on NATO Bombing Campaign	Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 2000

Furundzija AJ	*Prosecutor v. Anto Furundzija* (IT-95-17/1-A), Appeals Chamber, Judgement, 21 July 2000
Galic TJ	*Prosecutor v. Stanislav Galic* (IT-98-29-T), Trial Chamber, Judgement and Opinion, 5 December 2003
Galic AJ	*Prosecutor v. Stanislav Galic* (IT-98-29-A), Appeals Chamber, Judgement, 30 November 2006
Gotovina AJ	*Prosecutor v. Ante Gotovina and Mladen Markac* (IT-06-90-A), Appeals Chamber, Judgement, 16 November 2012
Halilovic AJ	*Prosecutor v. Sefer Halilovic* (IT-01-48-A), Appeals Chamber, Judgement, 16 October 2007
Haradinaj AJ	*Prosecutor v. Ramush Haradinaj, Idriz Bala and Lahi Brahimaj* (IT-04-84-A), Appeals Chamber, Judgement, 19 July 2010
Kordic and Cerkez AJ	*Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-A), Appeals Chamber, Judgement, 17 December 2004
Kordic and Cerkez TJ	*Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-T), Trial Chamber, Judgement, 26 February 2001
Krajisnik AJ	*Prosecutor v. Momcilo Krajisnik* (IT-00-39-A), Appeals Chamber, Judgement, 17 March 2009
Krajisnik TJ	*Prosecutor v. Momcilo Krajisnik* (IT-00-39-T), Trial Chamber, Judgement, 27 September 2006

Krnojelac AJ	*Prosecutor v. Milorad Krnojelac* (IT-97-25-A), Appeals Chamber, Judgement, 17 September 2003
Krstic AJ	*Prosecutor v. Radislav Krstic* (IT-98-33-A), Appeals Chamber, Judgement, 19 April 2004
Krstic TJ	*Prosecutor v. Radislav Krstic* (IT-98-33-A), Appeals Chamber, Judgement, 2 August 2001
Kunarac et al. AJ	*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (IT-96-23 & IT-96-23/1-A), Appeals Chamber, Judgement, 12 June 2002
Kunarac et al. TJ	*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (IT-96-23 & IT-96-23/1-A), Appeals Chamber, Judgement, 22 February 2001
Kupreskic et al. AJ	*Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vladimir Santic* (IT-95-16-A), Appeals Chamber, Judgement, 23 October 2001
Kvocka et al. AJ	*Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac* (IT-98-30/1-A), Appelas Chamber, Judgement, 28 February 2005
Limaj et al. AJ	*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu* (IT-03-66-A), Appeals Chamber, Judgement, 27 September 2007
Martic AJ	*Prosecutor v. Milan Martic* (IT-95-11-A), Appeals Chamber, Judgement, 8 October 2008
Naletilic and Martinovic AJ	*Prosecutor v. Mladen Naletilic and Vinko Martinovic* (IT-98-34- A) Appeals Chamber, Judgement, 3 May 2006

Simic AJ	*Prosecutor v. Blagoje Simic* (IT-95-9-A), Appeals Chamber, Judgement, 28 November 2006
Stakic AJ	*Prosecutor v. Milomir Stakic* (IT-97-24-A), Appeals Chamber, Judgement, 22 March 2006
Tadic AJ	*Prosecutor v. Dusko Tadic* (IT-94-1-A), Appeals Chamber, Judgement, 15 July 1999
Tolimir TJ	*Prosecutor v. Zdravko Tolimir* (IT-05-88/2-T), Trial Chamber, Judgement, 12 December 2012
Vasiljevic AJ	*Prosecutor v. Mitar Vasiljevic* (IT-98-32-A), Appeals Chamber, Judgement, 25 February 2004
Vasiljevic TJ	Prosecutor v. Mitar Vasiljevic (IT-98-32-T), Trial Chamber, Judgement, 29 November 2002

ICTR AUTHORITIES	
ABBREVIATION USED	**FULL CITATION**
Bagosora and Nsengiyumva AJ	*Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva* (ICTR-98-41-A), Appeals Chamber, Judgement, 14 December 2011

Gacumbitsi AJ	*Prosecutor v. Sylvestre Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, Judgement, 7 July 2006
Kamuhanda AJ	*Prosecutor v. Jean de Dieu Kamuhanda* (ICTR-99-54A-A), Appeals Chamber, Judgement, 19 September 2005
Kayishema and Ruzindana AJ	*Prosecutor v. Clément Kayishema & Obed Ruzindana* (ICTR-95-1-A), Appeals Chamber, Judgement (Reasons), 1 June 2001
Muvunyi AJ	*Prosecutor v. Tharcisse Muvunyi* (ICTR-2000-55A-A), Appeals Chamber, Judgement and Sentence, 29 August 2008
Muhimana AJ	*Prosecutor v. Mikaeli Muhimana* (ICTR-95-1B-A), Appeals Chamber, Judgement, 21 May 2007
Nahimana AJ	*Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (ICTR-99-52-A), Appeals Chamber, Judgement, 28 November 2007
Ntagerura et al. AJ	*Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe* (ICTR-99-46-A), Appeals Chamber, Judgement and Sentence, 7 July 2006
Ntakirutimana AJ	*Prosecutor v Ntakirutimana & Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, Judgement, 13 December 2004
Seromba AJ	*Prosecutor v. Athanase Seromba* (ICTR-2001-66-T), Appepals Chamber, Judgement, 12 March 2008
Simba AJ	*Prosecutor v. Aloys Simba* (ICTR-01-76-A), Appeals Chamber, Judgement, 27 November 2007

IHL AUTHORITIES	
ABBREVIATION USED	**FULL CITATION**
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
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

SCSL AUTHORITIES	
ABBREVIATION USED	**FULL CITATION**
Kamara et al. TJ	*Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-T), Trial Chamber, Judgment, 20 June 2007
Sesay et al. AJ	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-A), Appeals Chamber, Judgement, 26 October 2009

Public Redacted

ANNEX C
TO APPEAL BRIEF ON BEHALF OF MILAN GVERO

EXIBITS CITED OR REFERRED TO IN THE BRIEF

Exhibit No.	DESCRIPTION
1D382 (4D377, 4D378, P107)	Drina Corps Command Order, Krivaja-95, 2 July 1995
1D1100 (5D235)	Order from Command of the 28th Division Army of the Republic of BH to the Command of the 285th Iblbr Zepa, 17 June 1995
4D2	Becirovic Statement to 2nd Corps Mil. Security Department, 11 August 1995
4D8	BiH State Security Report, 28 August 1995
4D14 (P2047)	Srebrenica Trial video
4D11	Analysis and chronology of events in Srebrenica, late July 1995
4D134	Monthly Report from ABiH 28th Division, 23 June 1995
4D135	Ministry of Defence office, Srebrenica, 22 February 1995
4D195	ABiH 2nd Corps Command Intelligence Department, Dispatch, 16 April 1993
4D263	28th Division Command report re. communications assets, 25 April 1995
4D301	RBiH Army Command of the 2nd Corps - Congratulation to 28th Division and 285th Brigade, Commands on successful sabotage combat activities, 28 June 1995
4D302	(ABiH 28th Division Command, Intelligence Department – Information re ABiH General Staff Document No. 1/825-564, 29 June 1995
4D306	RBIH Army Command of the 28th Division – Weekly morale report addressed to the Command of the 2nd Corps, Morale Department in Tuzla, 20 June 1995
4D336 (6D23, 7D474)	Drina Corps Combat Report, 10 July 1995

4D505	ABiH 28th Division Command Security Department - Overview of security situation, No. 13-05-29, 18 April 1995
4D653	Official Land Register for Various Locations – Srebrenica and Potocari
4DP1504	VRS map with ABiH targets
5D5	Transcript of a video recording, Naser Oric Order, 24 May 1994
5D224	Document from the 285th Iblbr Zepa Army of the Republic of BH to the General Staff of the Army, 25 May 1995
5D244	Order from the Command of the 28th Division to the Command of the 285th Iblbr Zepa, 27 May 1995
5D502	Agreement on the demilitarization of Srebrenica and Zepa between VRS and ABiH, 8 May 1993
5D967	Schedule briefing on Combat Readiness in 1994, 29 and 30 January 1995, signed by Mladic
5D1349	Karremans protesting to ABiH about artillery placed near the PTT building, 3 April 1995
6D21	Document dated 14 October 1994, handover to the International Tribunal, including intercept
6D22	Document of the Drina Corps IKM No. 08/95, 9 July 1995
6D23	Document from the Drina Corps Command, 10 July 1995
6D43	Intercept at 12,41 hours between Milan Gvero and Momcilo Krajisnik, of 28 April 1995
6D75	Instruction from Command of the 28th Division Army of the Republic of BH to Command of the 285th IBLbr Zepa Salih Hasanovic signed by Nedzad Bektic, 2 June 1995
6D129	VRS Main Staff document regarding prevention of reprisal and treatment of journalists and representatives of international organisations, 20 June 1992
6D137	Letter from President of RS to Gen. Gvero, No. 01-2480-2/94, signed by Karadzic, 18 December 1994

6D147	Instruction about contacts with international organizations issued by the Republic of Srpska President of the Republic Sarajevo and sent to the Supreme headquarters of the Army of Republic of Srpska, 5 December 1994
6D207	VRS Main Staff, Warning on treatment of UNPROFOR personnel in the Srebrenica enclave, to the Drina Corps Command and IKM, of 11 July 1995
6D311	Proposal for the directive to the RS President on special measures in the IBK zone of responsibility to Adviser to the RS President Major General Subotic, signed by Major General Novica Simic, 24 March 1995
6D313	Further statement of witness Djorde Djukic, 5 February 1996
6D315	Further statement of witness Djorde Djukic
6D328	Report on the UNPROFOR situation in the Srebrenica enclave, sent by the Command of the Drina Corps in Pribicevac Forward Command Post, signed by General Radislav Krstic, 10 July 1995
P5	RS Supreme Command Directive 7, 8 March 1995
P33	VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995
P492	UNMO Report, 7 July 1995
P493	UNMO Report, 8 July 1995
P510	UNMO Report, 11 July 1995
P1096a	[redacted]
P1500	Map titled "Deployment of our Enemy and UNPROFOR Forces in the Srebrenica and Zepa Enclaves"
P2178	92*ter* Statement: Transcript of testimony in Case No. IT-98-33-T, 5 April 2000
P2210	[redacted]
P2374a	[redacted]

P2375a	[redacted]
P2753	'Srebrenica – The Muslim War Trump Card', statement by Gvero, 10 July 1995
P2757	Letter to the President of the RS, signed by Gvero, of 18 July 1995
P2764	VRS Main Staff Command Responsibility Report, 9 June 2006, at 4.0), and very active in the Zepa enclave
P2884	Drina Corps map showing ABiH artillery positions and headquarters
P2885	Drina Corps map
P2906	Notes of a telephone conversation between Nicolai and Gvero, 11 July 1995 at 16:15 hours
P3927	War diary of Novica Simic January 1992 to January 1993
P4221	VRS Main Staff Order to Drina Corps Command, signed by Mladic, 20 November 1992
P4222	Timetable for a Military and Political Seminar in the Drina Corps for 23 November 1992, approved by Mladic, signed by Milovanovic
P4402	Extract of notebook seized by NATO forces during a search of residences of the family of Radovan Karadzic on 25-26 May 2005
P4485	TAB B to the "Joint motion for consideration of plea agreement between Momir Nikolic and the Office of the Prosecutor": Declaration of Momir Nikolic, of 6 May 2003
P4527	Annex A to the Joint Motion for consideration of Plea Agreement Between Momir Nikolic and the Office of the Prosecutor, dated 6 May 2003 and Amended Plea Agreement dated 7 May 2003
P4536	Potocari Video, 12 July 1995)