UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-02-61-A

Date: 20 July 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **20 July 2005**

PROSECUTOR

v.

MIROSLAV DERONJIĆ

JUDGEMENT ON SENTENCING APPEAL

Counsel for the Prosecution:

Mr. Mark J. McKeon
Ms. Barbara Goy

Counsel for the Appellant:

Mr. Slobodan Cvijetić
Mr. Slobodan Zečević

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seised of an appeal from the Sentencing Judgement rendered by Trial Chamber II on 30 March 2004 in the case *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S ("Sentencing Judgement").

2. The events giving rise to this appeal took place in the village of Glogova, in the Bratunac Municipality in eastern Bosnia and Herzegovina in May 1992. The population of Glogova was almost entirely Muslim.[1] Miroslav Deronjić ("Appellant") was then President of the Bratunac Crisis Staff and a member of the Serbian Democratic Party of Bosnia and Herzegovina.[2] In the evening of 8 May 1992, he ordered an attack on the village of Glogova as part of his participation in a joint criminal enterprise, the objective of which was the permanent removal, by force or other means, of Bosnian Muslim inhabitants from the village of Glogova through the commission of the crime of persecutions.[3] On 9 May 1992, the attack on Glogova commenced, the village was burned down in part and the Bosnian Muslim residents were forcibly displaced. As a result of this attack, 64 Muslim civilians from the village were killed; Bosnian Muslim homes, private property, and the mosque were destroyed; and a substantial part of Glogova was razed.[4]

3. A first indictment against the Appellant was issued on 3 July 2002 and was amended twice.[5] On 29 September 2003, the parties entered a Plea Agreement,[6] based on the Second Amended Indictment,[7] and a separate factual basis ("Factual Basis").[8] The last amendment to the initial indictment was accepted by the Trial Chamber at the Plea Hearing held on 30 September 2003.[9] The Appellant pleaded guilty to the single charge of persecutions in the Second Amended Indictment at the Plea Hearing.[10] However, the Trial Chamber identified several discrepancies between the Second Amended Indictment and the Factual Basis.[11] In order to reconcile the

[1] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004 ("Sentencing Judgement"), para. 51.
[2] *Ibid*., para. 48.
[3] *Ibid.,* para. 126.
[4] *Ibid*., para. 44.
[5] *Ibid.*, para. 14.
[6] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Plea Agreement, signed on 29 September 2003, filed on 30 September 2003 ("Plea Agreement").
[7] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Second Amended Indictment, signed on 29 September 2003, filed on 30 September 2003 ("Second Amended Indictment").
[8] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Factual Basis, signed on 29 September 2003, filed on 30 September 2003 ("Factual Basis").
[9] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Plea Hearing, 30 September 2003 ("Plea Hearing"), T. 47.
[10] *Ibid*., T. 83.
[11] Sentencing Judgement, para. 28.

discrepancies and establish a sufficient factual basis for the crime, the Trial Chamber invited the parties to provide further clarification and relied, *inter alia,* on the subsequent testimony given by the Appellant on 27 January 2004 ("Appellant's Testimony").[12] During the Sentencing Hearing, which commenced on 27 January 2004 and concluded on 28 January 2004, the Trial Chamber entered a finding of guilt in relation to the charge of persecutions as described in the Second Amended Indictment.[13] After the Sentencing Hearing, the Trial Chamber revisited the Appellant's Testimony, compared it with the Second Amended Indictment and the Factual Basis and found further substantial, material discrepancies.[14] In order to clarify the discrepancies and verify that the Appellant's guilty plea could still fulfill the prerequisites of Rule 62*bis* of the Rules of Procedure and Evidence ("Rules"), the Trial Chamber ordered a continuation of the sentencing hearing to be held on 5 March 2004.[15] During the Continued Sentencing Hearing, the Trial Chamber found that the parties resolved all remaining discrepancies, thereby eliminating the possibility that the guilty plea could be construed as failing to fulfill the prerequisites of Rule 62*bis* of the Rules.[16]

4. The Trial Chamber entered a single conviction against the Appellant for the crime of persecutions, a Crime against Humanity under Article 5(h) of the International Tribunal's Statute ("Statute").[17] The Appellant was held individually criminally responsible pursuant to Article 7(1) of the Statute for his substantial participation as a co-perpetrator in a joint criminal enterprise.[18] The acts underlying the Appellant's conviction were as follows: ordering the attack on the village of Glogova, the killing of Bosnian Muslim civilians in Glogova, the forcible displacement of Bosnian Muslim civilians of Glogova from the Municipality of Bratunac, the destruction of an institution dedicated to religion (the mosque in Glogova), and the destruction of Muslim civilian property in Glogova.[19] The Appellant was sentenced to 10 years of imprisonment, Judge Schomburg dissenting, with credit for time already served in detention.

5. The Appellant filed his Notice of Appeal on 28 April 2004[20] and his brief on appeal on 22 July 2004.[21] The Prosecution filed its Confidential Response Brief on 31 August 2004[22] and the

[12] Referred to in the Sentencing Judgement as "Deronjić Testimony", Sentencing Judgement, para. 29.
[13] Sentencing Judgement, para. 29; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Hearing, 27 and 28 January 2004 ("Sentencing Hearing"), T. 177-178.
[14] Sentencing Judgement, para. 35.
[15] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Hearing, 05 March 2004 ("Continued Sentencing Hearing"), *see* Sentencing Judgement, para. 36.
[16] Sentencing Judgement, para. 39.
[17] Sentencing Hearing, T. 177-178.
[18] Sentencing Judgement, para. 125.
[19] Second Amended Indictment, paras 29-39.
[20] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Miroslav Deronjić's Notice of Appeal, 28 April 2004 ("Notice of Appeal").
[21] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, 22 July 2004 ("Appellant's Brief").

Appellant filed his Brief in Reply on 15 September 2004.[23] The hearing on appeal took place on 17 June 2005.[24]

[22] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Prosecution's Response Brief, filed confidentially on 31 August 2004 ("Respondent's Brief"). The Respondent's Brief was made public by the Prosecution's "Notice of Lifting of Confidential Status of 'Prosecution's Response Brief' of 31 August 2004", 30 May 2005.
[23] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appellant's Brief in Reply, 15 September 2004 ("Brief in Reply").
[24] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appeal Hearing, 17 June 2005 ("Appeal Hearing").

II. STANDARD OF REVIEW

6. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber that amount to an obligation to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct, the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.[25]

7. Appeals against sentencing judgements, as appeals against trial judgements, are appeals *stricto sensu*; they are of a "corrective nature" and are not trials *de novo*.[26] This is clear from the terms of Article 25 of the Statute, which provides that the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice.[27] These criteria have been frequently referred to and are well established in the jurisprudence of the Appeals Chamber of the International Tribunal,[28] and the International Criminal Tribunal for Rwanda (ICTR).[29]

8. Trial Chambers are vested with broad discretion, although not unlimited, in determining an appropriate sentence, due to their obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime.[30] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[31] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[32] For instance, a Trial Chamber's decision may be disturbed on appeal if the Appellant shows that the Trial Chamber abused its discretion either by taking into account what it ought not to have or by failing to take into

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[25] *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv).
[26] *Kupreškić et al.* Appeal Judgement, para. 408.
[27] *Mucić et al.* Judgement on Sentence Appeal, para. 11. *See* also *Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8.
[28] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, paras 434-435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras 35-48; *Vasiljević* Appeal Judgement, paras 4-12, *Kvočka et al.* Appeal Judgement, para.14.
[29] *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.
[30] *Čelebići* Appeal Judgement, para. 717.
[31] *Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Kupreškić et al.* Appeal Judgement, para. 408; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680.
[32] *Čelebići* Appeal Judgement, para. 725.

account what it ought to have taken into account in the weighing process involved in the exercise of its discretion.[33]

[33] *Ibid.*, para. 780. *See* also *Kupreškić et al.* Appeal Judgement, para. 457.

III. FIRST GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER WRONGFULLY EXPANDED, AMENDED, AND MODIFIED THE FACTS CONTAINED IN THE SECOND AMENDED INDICTMENT AND THE FACTUAL BASIS

9. In his first ground of appeal, the Appellant contends that the Trial Chamber erred in law and in fact and abused its discretion in reaching conclusions and findings which are based upon evidence not specifically contained in the Second Amended Indictment, the Plea Agreement or the Factual Basis; he refers to all these documents as the "Plea agreement package" ("Plea Agreement Package").[34] In support of this contention, the Appellant draws the attention of the Appeals Chamber to various paragraphs of the Sentencing Judgement, which he claims are contradictory or contain errors of law or fact.[35]

10. The Prosecution argues that "the Appellant wrongly assessed the role played by the agreed Factual Basis in this process",[36] and that the Trial Chamber did not err in considering evidence not contained in the Factual Basis.[37] The Prosecution addresses those paragraphs from the Sentencing Judgement relied upon by the Appellant in support of his arguments and concludes that the first ground of appeal should be dismissed because he failed to demonstrate an error on the part of the Trial Chamber.[38]

11. The Appeals Chamber will first turn to the issue of the Plea Agreement Package and subsequently consider each error alleged by the Appellant.

A. The "Plea Agreement Package"

12. The Appellant submits that the Trial Chamber erred in considering evidence not contained in the Plea Agreement Package, thereby expanding, amending, and modifying the facts contained in the Factual Basis, despite the fact that the Sentencing Judgement acknowledges that the Trial Chamber was limited to the legal and/or factual assessment contained in, or annexed to, the Plea Agreement and that it was solely seised of the events that occurred in Glogova on 9 May 1992.[39] The Appellant asserts that the Trial Chamber wrongly concluded that "the Factual Basis is to be

[34] Appellant's Brief, para. 18.
[35] *Ibid*., paras 22-70 referring to Sentencing Judgement, paras 2,71, 76, 78, 98, 100, 101, 113, 125, 186, 194, 195, 201, 202, 207, 209, 222, 252, and 271.
[36] Respondent's Brief, para. 4.3.
[37] *Ibid*., para. 4.11.
[38] *Ibid*., paras 4.12-4.44. The Appeals Chamber notes that the Prosecution did not respond to the Appellant's submissions concerning the alleged errors of fact made by the Trial Chamber in paras 2, 100, 101, and 113 of the Sentencing Judgement.
[39] Appellant's Brief, paras 18, 19, 21.

regarded as a mere support to the guilty plea"[40] since the Factual Basis forms the basis of the Sentencing Judgement.[41]

13. The Prosecution responds that there is "nothing in Rule *62bis* to support the conclusion that parties may, by agreement, limit the Trial Chamber to considering only the written 'factual basis' in meeting its obligations under Rule 62*bis*(iv)."[42] If that were the case, and the Trial Chamber had only been able to rely on the written Factual Basis, the Prosecution argues that the Trial Chamber would not have been able to accept the guilty plea.[43] In addition, the Prosecution states that, in meeting its obligations under Rule 62*bis* of the Rules, the Trial Chamber may look to other "independent indicia" for determining if there is a sufficient factual basis or to other ways of demonstrating a "lack of any material disagreement between the parties about the facts of the case."[44] The Prosecution further submits that, at the Sentencing Hearing, the Appellant acknowledged that the Factual Basis is only meant to support the guilty plea, a proposition he now disputes.[45] In addition, the Prosecution submits that the Trial Chamber was entitled to use evidence outside the Plea Agreement Package in determining the Appellant's sentence since, pursuant to Rule 100 of the Rules, the parties can submit "any relevant information" to the Trial Chamber that may assist in the determination of sentence.[46]

14. The Appellant replies that since the finding of guilt against him was entered on 30 September 2003, during the Plea Hearing, "the Trial Chamber was at that point already satisfied that 'there [was] sufficient factual basis for the crime and [his] participation in it'".[47] Furthermore, the Appellant argues that "according to Rule 62*bis*(iv), in case of a 'lack of any material disagreement between the parties about the facts of the case' there is no additional requirement to substantiate 'the facts of the case' by other means.'"[48] During the Appeal Hearing, the Appellant argued that "there must be objective identity between the judgement and the indictment, both with respect to the factual description of a crime and with respect to the legal qualification of an act for which the accused is charged."[49]

15. With regard to the Appellant's allegation that the Trial Chamber erred by going beyond the Plea Agreement Package, the Appeals Chamber recalls that the Appellant pleaded guilty on 30

[40] *Ibid*., para. 33 citing Sentencing Judgement, para. 47.
[41] *Ibid*.
[42] Respondent's Brief, para. 4.6; AT. 23.
[43] Respondent's Brief, para. 4.8 *ad finem*.
[44] *Ibid*., para. 4.8 (footnotes omitted).
[45] *Ibid*., para. 4.7 referring to Appellant's Testimony, T. 135.
[46] *Ibid*., paras 4.9. *See* also AT. 23-24.
[47] Brief in Reply, para. 22.
[48] *Ibid*., para. 18.
[49] AT. 15.

September 2003, at the Plea Hearing; however, the Trial Chamber identified several discrepancies between the Second Amended Indictment and the agreed Factual Basis and invited the parties to provide further clarification. The Trial Chamber did not enter a finding of guilt until 28 January 2004 at the Sentencing Hearing, after having had the benefit of reviewing other evidence admitted on 16 January 2004 and hearing the Appellant's Testimony on 27 January 2004. Subsequent to the Sentencing Hearing, the Trial Chamber found further substantial material discrepancies and ordered a continuation of the sentencing hearing on 5 March 2004 in order to assure itself that the guilty plea still met the requirements of Rule 62*bis* of the Rules. During the Continued Sentencing Hearing, the Trial Chamber admitted transcripts of the Appellant's testimony in other cases into evidence and found that the parties had resolved all remaining material discrepancies such that the Trial Chamber could be satisfied that there existed a sufficient factual basis for the guilty plea under Rule 62*bis* of the Rules.[50]

16. The Appeals Chamber first finds that it is clear from the procedural history that, contrary to the Appellant's claim, the Trial Chamber did not find the existence of a sufficient factual basis for his guilty plea on 30 September 2003 on the basis of the Plea Agreement Package alone. The Trial Chamber only entered a finding of guilt on 28 January 2004 after hearing the Appellant's Testimony and reviewing the additional evidence. Second, although the Appellant is correct that there was no material disagreement between the Appellant and the Prosecution regarding the facts of the case as represented in the Factual Basis, the Trial Chamber itself identified the existence of substantial material discrepancies. Rule 62*bis*(iv) of the Rules stipulates that the Trial Chamber may satisfy itself as to a sufficient factual basis for a guilty plea on the basis of a "lack of material disagreement between the parties about the facts of the case", *i.e.*, the agreed Factual Basis in this case, *or* on the basis of "independent indicia." Because the Trial Chamber found discrepancies with the Factual Basis, it was appropriate and indeed necessary under the plain language of Rule 62*bis*(iv) of the Rules for the Trial Chamber to look beyond the Plea Agreement Package to other evidence as "independent indicia" in order to satisfy itself that there was a sufficient factual basis for the guilty plea.

17. With regard to the Appellant's claim that the Trial Chamber erred by concluding that the Factual Basis is a "mere support" to the guilty plea, the Appeals Chamber considers that this statement was taken out of context by the Appellant. This statement was made following the Trial Chamber's discussion concerning the situation where there are discrepancies between the Factual Basis and the Second Amended Indictment and which should take precedence over the other with regard to the guilty plea:

[50] *See supra* para. 3.

> [A]s it was clarified during the Sentencing Hearing, wherever there are any discrepancies between the Indictment and the Factual Basis, it shall be the Indictment itself that is controlling, and forms the fundament in the present case. Accordingly, the Factual Basis is to be regarded as a mere support to the guilty plea.[51]

The Trial Chamber made it clear that the agreed Factual Basis is to be treated as mere support for the guilty plea *specifically in the case where it is discrepant with the Indictment,* such that the Indictment shall be regarded as controlling. The Appeals Chamber considers that this approach was correct. Furthermore, the Appeals Chamber notes that the Appellant conceded as much in his Brief in Reply when he stated that:

> the [i]ndictment is controlling the case in [p]lea [a]greement cases as the Indictment is the Document to which the accused pleads guilty. However, the Factual Basis indeed, provides the facts of the case, and a sufficient factual basis for the crime and in this sense supports the Indictment in reaching the ultimate goal of establishing whether there is a "lack of any material disagreements between the parties about the facts."[52]

18. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not err in going beyond the Plea Agreement Package in order to establish a sufficient factual basis for the guilty plea or in stating that the Factual Basis is mere support for the guilty plea vis-à-vis the Second Amended Indictment.

19. As pointed out by the Prosecution, during the Continued Sentencing Hearing, the Trial Chamber observed that "it would be using [the evidence submitted by the parties] in part to be determining the sentence."[53] The Appeals Chamber agrees with the Prosecution that the Appellant was aware at the Sentencing Hearing and at the Continued Sentencing Hearing that he could object to the Trial Chamber's considering evidence that in his view went beyond the Plea Agreement Package, but failed to do so and, as a result, waived his right to do so on appeal.[54] The Appeals Chamber further agrees with the Prosecution that the Trial Chamber did not err in determining the Appellant's sentence by considering all relevant information it had before it, including the evidence submitted by the Appellant himself. Accordingly, this part of the Appellant's first ground of appeal is dismissed.

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[51] Sentencing Judgement, para. 47 (footnote omitted).
[52] Brief in Reply, para. 20. *See also* Defence Counsel's comments during the Appeal Hearing: "In our brief, we already pointed out that the Trial Chamber erred because with respect to certain facts and the level of responsibility of the accused it went beyond the [P]lea [A]greement [P]ackage, comprised of the [S]econd [A]mended [I]ndictment, [P]lea [A]greement, and [F]actual [B]asis, which support the previous two documents." AT. 14.
[53] AT. 24-25; the Prosecution referred to the Continued Sentencing Hearing, T. 250, Judge Schomburg: "In addition to that, also based on the new evidence, these facts have to be discussed. The underlying facts have to be discussed not only in the light of the prerequisites of Rule 62*bis* but they might also be relevant as factors for determining an appropriate sentencing." *See also* Respondent's Brief, para. 4.11.
[54] AT. 24. *See Dragan Nikolić* Judgement on Sentencing Appeal, para. 107.

B. Alleged Errors of Law and Fact

20. The Appeals Chamber turns now to the specific errors of law and fact alleged by the Appellant under his first ground of appeal. In the Appellant's Brief, entire paragraphs of the Sentencing Judgement and the Appellant's Testimony are reproduced and compared in an attempt to show how the Trial Chamber erred in reaching certain findings of fact.[55] The Prosecution submits that the Appellant focuses in support of the alleged errors only on the evidence cited in the Sentencing Judgement and relies on alleged "misreadings" by the Trial Chamber of the Appellant's Testimony.[56] It further adds that it is clear that the Trial Chamber correctly interpreted the Appellant's Testimony, if the latter is read in light of other statements made by him and available to the Trial Chamber,[57] as well as in the light of the Factual Basis itself.[58] In reply, the Appellant submits that since the evidence cited in the Sentencing Judgement is that upon which the Trial Chamber relied in imposing a sentence and supports its reasoning, it must be the focus of the appeal.[59]

21. The Appeals Chamber recalls that, in general, a Trial Chamber is not obliged to refer to every piece of evidence in the trial record in its judgement nor to every submission made during the trial.[60] If the evidence cited does not directly support the facts on which the Trial Chamber's challenged finding is based, the determination as to whether the Trial Chamber made an error must be considered on a case-by-case basis and in light of all the evidence before it. The Appeals Chamber will turn to address each alleged error and consider whether the Trial Chamber went beyond the scope of the Plea Agreement, the Factual Basis, the Second Amended Indictment as well as the other evidence it had before it, in reaching its findings.

1. Alleged error of fact concerning the arrival of the volunteers and their involvement in the use of force

22. The Appellant alleges that the Trial Chamber's finding that he "had *accepted* the arrival of the 'volunteers' as well as their involvement in the use of force"[61] is erroneous.[62] In support of his

[55] *See* Appellant's Brief, paras 22-71.
[56] Respondent's Brief, para. 4.12.
[57] Including 17 interviews given by the Appellant to the Prosecution (admitted by the Trial Chamber into evidence, *see* Sentencing Judgement, para. 33, footnote 67) and testimony given by the Appellant in four other cases (admitted by the Trial Chamber into evidence, *see* Sentencing Judgement, para. 30, footnote 57 and footnote 62).
[58] Respondent's Brief, paras. 4.12-4.13.
[59] Brief in Reply, para. 25.
[60] *Čelebiči* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, paras 39, 458; *Kordić and Čerkez* Appeal Judgement, para. 382; *Kvočka et al.* Appeal Judgement, para. 23, 677.
[61] Sentencing Judgement, para. 71 referring to Appellant's Testimony, T. 141 (emphasis added by the Appellant, para. 22 of the Appellant's Brief).
[62] Appellant's Brief, paras 22-23.

allegation, he reproduces the relevant part of the Appellant's Testimony upon which, he submits, the challenged finding is based:

> JUDGE SCHOMBURG: What was the role you played in this meeting in your own capacity? Did you act on the same footing together with your colleague, Mr. Zekic, or were there any other persons leading the takeover? Who is finally responsible? And I recall, and I have to give you the hint that you already pleaded guilty to this point. But we have to clarify what was your relationship to the volunteers. You accepted the arrival of the volunteers and their involvement in the use of force, as you just a few minutes ago told us. Is it correct?
>
> A: Yes, Your Honour. I attended this meeting. I was summoned to that meeting. I stayed there for a very brief time because I had been invited by the Muslim representatives who asked me to come to the public security station, and they said they wanted to talk to me. I have stated exactly what they asked me; that is, the representatives of the Bosnian Muslims. They asked me for guarantees that these volunteers would not do anything to them. I responded that I had never seen them before, I didn't know them, and I was unable to provide any guarantees to the Muslim representatives. They asked me if they could leave Bratunac, and they asked me to help them leave safely.[63]

23. The Appellant argues that the explanation he provided after answering the Presiding Judge's question in the affirmative does not justify the conclusion reached by the Trial Chamber. He claims that the said question consisted of "many sub-questions posed at the same time" so that his answer in the affirmative "must be considered within the context of the totality of the exchange between [him] and the Judge."[64]

24. The Prosecution submits that shortly before giving his answer ("Yes, Your Honour"[65]), the Appellant stated that he had found out about the volunteers taking part in the use of force to implement the objectives.[66] It further adds that the criminal activities of the "volunteers" were known to the Bosnian Serb leadership in Bratunac, including the Appellant, and that he nevertheless co-ordinated the attack on Glogova in which he knew that the "volunteers" would participate and that executions were foreseeable.[67]

25. The Appeals Chamber considers that the brief portion of the transcript cited by the Appellant was not the sole evidence supporting the Trial Chamber's finding concerning the Appellant's involvement in the use of force. Even if, taken in isolation, that piece of the Appellant's Testimony might be considered ambiguous, in the full context of the Sentencing Hearing it is clear that the Appellant unmistakably accepted responsibility for the volunteers' involvement in the use of force. Paragraph 13 of the Factual Basis of the Second Amended Indictment – to which the Appellant pled guilty in full – states that "Miroslav Deronjić subscribed unequivocally to the […] use of force to remove non Serbs from Serb designated territories." During the Sentencing Hearing,

[63] *Ibid*., para. 22 referring to Appellant's Testimony, T. 141–142.
[64] *Ibid*., para. 23.
[65] Appellant's Testimony, T. 141.
[66] Respondent's Brief, paras 4.14-4.15.

Judge Schomburg questioned the Appellant on the meaning that the Appellant understood the phrase "use of force" in this paragraph to encompass. In relevant part, their exchange proceeded as follows:

> [Appellant] As far as paragraph 13 is concerned, it states "and later, to the use of force." I understand that to mean what is contained in the factual basis, or in my interview, that on the 5th of May I unequivocally found out that the use of force is also one of the methods in order to implement these objectives, and that is how I acted regarding the events in Glogova.
>
> JUDGE SCHOMBURG: And what were these means of use of force? Could you elaborate a little bit more on this because there's a huge range how you can use -- make use of force, with making use of weapons including -- or whatever. I don't want to anticipate your answer. So please, if you could tell us a little bit more what the term "use of force" includes.
>
> A. The term "use of force" *includes violent transfer of population* -- of the population from those territories *and includes conduct -- the conduct of the volunteer units* which are already arrived in the area, and the conduct of the Yugoslav People's Army in those events, and the conduct of the crisis staffs and individuals on the Serb side during that period. So the term "use of force" in my opinion is used in this sense and in this context.
>
> JUDGE SCHOMBURG: So it includes the conduct of the volunteer units which are already -- had arrived in the area, and the JNA. Correct?
>
> A. Correct, Your Honour.
>
> JUDGE SCHOMBURG: Would it include the killing of people?
>
> A. Yes, Your Honour. That's correct. Members of the Muslim ethnic group were killed in that period.[68]

Subsequent questioning further detailed the way in which the Appellant became aware of, and accepted, the involvement of the paramilitary "volunteer" groups.[69]

26. The portion of the Appellant's Testimony excerpted in paragraph 22 above must be taken in the context of this continuing discussion concerning the Appellant's relationship to the "volunteers."[70] In light of his previous statement, the Appellant's response "Yes Your Honour" was reasonably interpreted by the Trial Chamber as a response to the most recent question he had been asked by the Presiding Judge, that is, as an affirmation that the Appellant had "accepted the arrival of the volunteers and their involvement in the use of force".[71] Taken together the Appellant's Testimony clearly supports the Trial Chamber's findings.

27. In light of the foregoing, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed an error in finding that he accepted the arrival of the

[67] *Ibid.*, para. 4.16.
[68] Appellant's Testimony, T. 136-137 (emphasis added).
[69] *Ibid.,* T. 138-140.
[70] *See* Appellant's Testimony, T.141 lines 16-21.
[71] *Ibid.,* lines 21-24.

volunteers and their involvement in the use of force. Therefore, the Appeals Chamber dismisses this part of the Appellant's first ground of appeal.

2. Alleged error of fact concerning the Appellant's participation in the disarmament of the village of Glogova

28. The Appellant alleges that the Trial Chamber erred in fact when reaching the following finding in paragraph 78 of the Sentencing Judgement:[72]

> The Accused joined this mission to disarm the population of Glogova by not only accepting it, but also by *participating in it*.[73]

This conclusion was reached after the Appellant's Testimony that, after having responded that he had not ordered the disarmament of Glogova, he explained that Mr. Reljić of the JNA ordered it.[74] The portions of the Appellant's Testimony referred to in the said paragraph and relied upon by the Appellant in support of his allegation read as follows:

> And at [Mr. Reljić's] orders, there had been disarming of the village of Pocus [phoen], and I had participated in this as a soldier since I had been mobilised by the Territorial Defence. At one of the crisis staff meetings in this period, Mr. Reljić, the captain of this unit, brought a decision to the crisis staff on the disarming of Muslims, and he asked us to confirm it, which we did.[75]
>
> […]
>
> JUDGE SCHOMBURG: So in other words, you joined this mission to disarm the population of Glogova. You not only accepted it, but also endorsed it in your capacity, in all your capacities you had at this point in time in Glogova. Is this a correct assessment?
>
> A. Your Honour, I think that the decision to approve this operation was reached later when the disarming of the Glogova village was completed. If you're thinking of my personal position at that point in time, I was there nearby when the operation was being carried out. I took part in it personally, and I did not oppose the action.[76]

29. The Appellant submits that his answer in this portion of his testimony obviously refers only to the disarming operation conducted in the Municipality of Bratunac as a whole and not Glogova village specifically and that "there is no evidence whatsoever" that he participated in the disarmament of Glogova; thus, no reasonable trier of fact could have reached such a conclusion.[77] The Prosecution acknowledges that the Factual Basis supports the Appellant's argument that the

[72] Appellant's Brief, para. 25.
[73] Sentencing Judgement, para. 78 referring to Appellant's Testimony, T. 143, 158. Emphasis as added by Appellant, *see* Appellant's Brief, para. 25.
[74] Appellant's Testimony, T. 142.
[75] *Ibid.*, T. 143.
[76] *Ibid.*, T. 158.
[77] Appellant's Brief, para. 26.

disarmament of Glogova was "*physically conducted* by others", but argues that the disarming operation in Glogova was conducted under the Appellant's control and with his knowledge.[78]

30. The Appeals Chamber notes that paragraph 78 of the Sentencing Judgement reads in its entirety as follows:

> As President of the Bratunac Crisis Staff, Miroslav Deronjić was aware of and agreed to the plan to disarm the population of Glogova. As it was clarified during the Sentencing Hearing, the Accused did not order the disarmament of Glogova by the end of April/beginning of May 1992. The decision on the disarming of the Muslims in the villages of the Municipality of Bratunac as such was taken by Reljić after the JNA had arrived in Bratunac. During this period, Reljić brought this decision to the Crisis Staff at one of its meetings and asked its members to confirm his action. Miroslav Deronjić, as the President of the Crisis Staff, and the Crisis Staff accepted it and gave their confirmation. However, the decision by the Crisis Staff to approve this operation was only reached later when the disarming of the Glogova village was completed. In that sense he "authorised" the disarmament. The Accused joined this mission to disarm the population of Glogova by not only accepting it, but also by participating in it.[79]

31. In the paragraph cited above, the Trial Chamber provided a detailed account of (1) the context within which the decision to disarm the villages of the Municipality of Bratunac, which included Glogova, was taken and carried out by the JNA following an agreed plan known by the Appellant; and (2) the Appellant's involvement in this plan through his acceptance and approval of the disarmament, in his capacity as President of the Bratunac Crisis Staff. The Trial Chamber's account is based on the Appellant's Testimony as well as the Second Amended Indictment to which the Appellant pleaded guilty.[80] The Trial Chamber entered a finding of guilt in relation to the charge of persecutions based on all allegations contained in the Second Amended Indictment.[81] The Appellant was alleged to have *participated* as a co-perpetrator in a joint criminal enterprise, *inter alia,* as follows:

> (a) Between the end of April and early May of 1992, Miroslav DERONJIĆ, exercising *de facto* and *de jure* control as President of the Bratunac Crisis Staff over the TO and *de facto* control over the Bratunac police forces authorised the TO and Bratunac police forces to disarm the Bosnian Muslim population in Glogova. On at least three occasions during that period, Bratunac police forces and the TO, working in concert with members of the JNA, went through Glogova and secured weapons from the Bosnian Muslim population. [82]

32. In support of the assertion that "there is no evidence whatsoever that [he] in fact participated in [the] disarming of Glogova",[83] the Appellant focuses on pages 143 and 158 of the Appellant's Testimony transcript, which were cited by the Trial Chamber, in footnote 173 of the Sentencing Judgement, in support of this finding. The Appeals Chamber acknowledges that, indeed, page 143

[78] Respondent's Brief, para. 4.18 referring to Factual Basis, paras 18, 19 and Second Amended Indictment, paras 8 (b), (c) and (d).
[79] Sentencing Judgement, para. 78 (footnotes omitted).
[80] *Ibid., see* footnotes 166-173.
[81] Sentencing Hearing, T. 177 lines 23-25 to T. 178 lines 1-3.
[82] Second Amended Indictment, para. 8; *see also* Factual Basis, para. 18.

of the transcript of the Appellant's Testimony does not indicate whether the Appellant participated, physically or in any other way, in the disarmament of the village of Glogova. However, the Appeals Chamber observes that on page 158 of the Appellant's Testimony transcript, when asked whether he not only accepted the disarmament of Glogova but also endorsed it in his capacity as the President of the Bratunac Crisis Staff, the Appellant replied that he "was there nearby when the operation was being carried out", that he "took part in it personally", and that he "did not oppose the action".[84]

33. In light of the foregoing, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed an error. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that the Appellant "joined this mission to disarm the population of Glogova by not only accepting it, but also by participating in it";[85] this finding is in line with the Second Amended Indictment, the Factual Basis and the Appellant's Testimony.

34. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

3. Alleged error of fact concerning whether the joint criminal enterprise the Appellant participated in was well organised for months

35. The Appellant claims that the Trial Chamber erred in concluding that he participated "in a joint criminal enterprise, *well organised for months.*"[86] The Appeals Chamber finds, however, that the Appellant has not demonstrated that he was prejudiced by this passing comment of the Trial Chamber, and therefore finds that it need not consider the parties' arguments concerning the length of time during which the joint criminal enterprise had in fact been organised. The Appellant was only convicted for those crimes for which he was charged and to which he pled guilty, and he does not claim that his sentence was increased as a result of the Trial Chamber's observation concerning the duration of the joint criminal enterprise. The Appeals Chamber finds that the phrase "well organised for several months" was merely descriptive of the joint criminal enterprise, providing background information regarding the context of the Appellant's conviction. It did not expand the temporal scope of the criminal conduct for which the Appellant was held individually responsible. The Appeals Chamber therefore finds that the Appellant has not alleged a factual error that has occasioned a miscarriage of justice, and dismisses this part of his first ground of appeal.

[83] Appellant's Brief, para. 26.
[84] Appellant's Testimony, T. 158.
[85] Sentencing Judgement, para. 78.
[86] Appellant's Brief, para. 27 (emphasis added by Appellant) citing Sentencing Judgement, para. 25.

4. Alleged error of fact concerning whether the crime of persecution was "long-planned"

36. Additionally, the Appellant alleges that the Trial Chamber erred in fact in concluding that "[o]ne culmination of his criminal conduct was the commission of the *long-planned* crime of [p]ersecutions on 9 May 1992 in Glogova,"[87] and submits that the conclusions in paragraphs 125 and 271 of the Sentencing Judgement are contradictory.[88]

37. The Appeals Chamber considers that the Trial Chamber did not err in finding that the crime of persecutions for which the Appellant was convicted, was long-planned. As stated in the Second Amended Indictment, the Appellant participated in a joint criminal enterprise, the objective of which was, the permanent removal, by force or other means, of Bosnian Muslim inhabitants from the village of Glogova in the Municipality of Bratunac. The joint criminal enterprise was in existence for a time period that included the period from the end of April 1992 to 9 May 1992. [89] However, the broader plan to remove Muslim villagers from the Bratunac Municipality generally – an area that includes Glogova – had been in place as early as December 1991, as the Factual Basis and the Appellant's testimony before the Trial Chamber made clear.[90]

38. Moreover, as discussed above,[91] the temporal scope of the Appellant's criminal responsibility for substantial participation in the joint criminal enterprise was clearly recognized by the Trial Chamber as limited to the charges for crimes committed solely on 9 May 1992 as set out in the Second Amended Indictment to which the Appellant pleaded guilty. The Appellant has not demonstrated that the description of his crime as "long planned" affected his sentence or materially affected the judgement in any way, such that even if the description were in error, this would not amount to a miscarriage of justice.

39. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

5. Alleged errors of law concerning the Appellant's *mens rea*

40. The Appellant asserts that the Trial Chamber erred in law and in fact[92] in paragraphs 98 and 186 of the Sentencing Judgement in finding that his *mens rea* was "of a higher level than the one agreed upon by the parties"[93] with regard to the murders of civilians as a result of the attack on

[87] *Ibid.*, para. 69 citing Sentencing Judgement, para. 271 (emphasis added by the Appellant).
[88] Appellant's Brief, para. 28.
[89] Second Amended Indictment, paras 3, 5.
[90] *See* Factual Basis, paras 8-11; Sentencing Judgement, paras 57-63.
[91] *See supra* para. 35.
[92] Appellant's Brief, paras 35, 39.
[93] *Ibid.,* para. 36.

Glogova pursuant to the Appellant's order,[94] thus "going clearly beyond the contents of the 'Plea [A]greement [P]ackage' as the basis for the Sentencing Judgement."[95] He argues that this error "strongly influenced" the Trial Chamber's decision on his sentence.[96]

41. The Prosecution agrees with the Appellant that the Trial Chamber made findings "that would fulfil a higher standard of *mens rea* than is required for [the third form of joint criminal enterprise] under the [International] Tribunal's jurisprudence."[97] However, it argues that the said finding is based on a reasonable conclusion of the Trial Chamber,[98] and that "[i]n any case, the Appellant failed to demonstrate that the finding of the higher *mens rea* influenced the Trial Chamber regarding the sentence imposed."[99]

42. The Appeals Chamber recalls that the Appellant pleaded guilty to the crime of persecutions under Article 5(h) of the Statute and was held individually criminally responsible under Article 7(1) of the Statute not for *ordering* crimes prohibited under Articles 2-5 of the Statute, but for participating as a co-perpetrator in a joint criminal enterprise. Indeed, the parties agreed to delete from the Second Amended Indictment the charge that he had ordered the underlying events constituting persecutions.[100] It was agreed that this deletion concerned the use of the word "order" only in its strict legal sense and not in the descriptive part of the Second Amended Indictment and the Factual Basis.[101] Therefore, with regard to the attack on Glogova as one of the underlying acts of persecutions committed as part of a joint criminal enterprise, the Appellant was found individually responsible because he substantially participated in that act as a co-perpetrator by ordering the attack, which resulted in the execution of 64 Bosnian Muslim civilians.

43. This distinction is important in terms of determining the requisite *mens rea* for holding the Appellant accountable for crimes occurring as a result of his acts under the jurisprudence of the Appeals Chamber. The requisite *mens rea* for responsibility for crimes committed as a result of one's acts or omissions under the extended form of joint criminal enterprise is twofold:

> First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common

[94] *Ibid*., paras 36-38.
[95] *Ibid*., para. 39.
[96] *Ibid*. *See also* AT. 16, where Defence Counsel submitted that "[t]his act of the Trial Chamber is prejudicial to the acused because by wrongly interpreting certain facts, especially the form of *mens rea* of the accused, the Trial Chamber increased his level of responsibility, which eventually had an impact on the severity of the sentence." *See also* AT. 39: "This results in the – in the interpretation or in the view that his crimes were much graver that what he pleaded to, which in the end resulted in a much more severe sentence."
[97] Respondent's Brief, para. 4.38.
[98] *Ibid*., para. 4.39.
[99] *Ibid*., para. 4.43.
[100] Sentencing Judgement, para. 33.
[101] *Ibid.*

> criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.[102]

44. In this case, the Appeals Chamber notes that the Appellant clearly pleaded guilty to the *mens rea* required for crimes committed as a result of one's participation in a joint criminal enterprise under the third form of joint criminal enterprise. In paragraph four of the Second Amended Indictment, it is stated that "[t]he crimes enumerated in paragraphs 31-34 [the killings at Glogova] as described in the charge of persecutions were the natural and foreseeable consequences of the execution of the joint criminal enterprise and Miroslav Deronjić was aware that these crimes were possible consequences of the execution of the joint criminal enterprise." Similarly paragraph 42 of the Factual Basis, states that:

> Miroslav Deronjić did not physically commit any of the murders of the […] civilians identified in Schedule A. However at the time he ordered the attack, given the purpose and objective of the attack, the existing political climate, and the units that were to participate in, it was foreseeable to him and he was prepared to take the risk, that innocent Muslim residents of Glogova could be murdered as it was a consequence that was natural and foreseeable.

(a) Paragraph 98 of the Sentencing Judgement

45. The Appeals Chamber first turns to the alleged error of law in paragraph 98 of the Sentencing Judgement, which reads as follows:

> Miroslav Deronjić did not physically commit any of the murders of the 64 civilians identified in Section XII. However, at the time he ordered the attack, given the purpose and objective of the attack, the existing political climate, his previous experiences in other municipalities, and the units that were to participate in it, these murders were foreseeable to him, he took them into account, he was prepared to take the risk and he accepted that unarmed innocent Muslim residents of the undefended village of Glogova *would* be murdered.[103]

46. The Appellant submits that the Trial Chamber found his *mens rea* to be different (or, in his words "higher") from the one agreed upon by the parties. In support of his submission he refers to the sources cited in the Sentencing Judgement in the paragraph in question, that is, the Appellant's Testimony where he acknowledged that he had accepted that the killings "might happen",[104] and the Factual Basis, which states that "it was foreseeable to him and he was prepared to take the risk, that innocent Muslim residents of Glogova *could* be murdered as it was a consequence that was natural and foreseeable."[105] He argues that "the Trial Chamber, by using the word '*would*', indicate[s] the

[102] *Kvočka et al.* Appeal Judgement, para. 83 (footnote omitted).
[103] Sentencing Judgement, para. 98 (footnotes omitted; emphasis added).
[104] Appellant's Testimony, T. 156-157; "Judge Schomburg: […] However, may I also, with respect to these 65 killings, and you will recall that we heard the names of these 65 dead persons, that this murder of 65 Bosnian Muslims was a foreseeable result of the attack, and you took into account and accepted that this might happen? A. Yes, Your Honour. I state that that is so and that the way that is put is correct."
[105] Factual Basis, para. 42 (emphasis added).

very high probability that murder will in fact take place."[106] Finally, the Appellant submits that the impugned finding strongly influenced the Trial Chamber's decision regarding the sentence imposed.[107]

47. The Prosecution responds that "the finding of this level of *mens rea* is based on a reasonable conclusion of the Trial Chamber on the basis of the Appellant's [T]estimony."[108] In this context, the Prosecution refers to statements made during the Appellant's Testimony and concludes that "it is reasonable to assume that he was aware of the substantial likelihood that killings could also occur".[109] The Prosecution further argues that the Appellant, in answering affirmatively to the question of whether he accepted that the killings "might happen",[110] agreed at least to this level of *mens rea*.[111] The Prosecution appears to suggest that this finding had no impact on the sentence since paragraph 98 of the Sentencing Judgement "is not even part of the section determining the sentence."[112] The Appellant replies that the Trial Chamber did not interpret the established facts in a reasonable way.[113]

48. The Appeals Chamber emphasises that it is not seised of an appeal against conviction. During the Continued Sentencing Hearing the Trial Chamber sought clarification concerning the Appellant's *mens rea* in particular in relation to the killings. The parties assured the Trial Chamber that the Appellant would stand by his guilty plea and that for both parties there was nothing equivocal in the Appellant's statements.[114] In that respect the Defence submitted:

> However, our client pleaded guilty for the -- […] murder of 64 innocent civilians […] Searching for a formula which would be adequate to the state of his mind, his *mens rea*, you, Your Honours, have a coordinated, balanced position of the parties, the Prosecution and the Defence. It is formulated in paragraph 42 of the Factual Basis.[115]

49. The Appeals Chamber acknowledges that the word "would" as used in the statement in question is not present either in paragraph 42 of the Factual Basis, or in the portion of the Appellant's Testimony referred to in paragraph 98 of the Sentencing Judgement, where he acknowledged that he had accepted that the killings "might happen" and were a foreseeable result of the attack. It is difficult to ascertain whether the word "would" utilised in the statement challenged by the Appellant constitutes a typographical error or represents the Trial Chamber's

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[106] Appellant's Brief, para. 36 (emphasis by the Appellant).
[107] *Ibid*., para. 39.
[108] Respondent's Brief, para. 4.39.
[109] *Ibid*., para. 4.41.
[110] Appellant's Testimony, T. 156-157.
[111] Respondent's Brief, para. 4.40.
[112] *Ibid.*, para. 4.43.
[113] AT. 39.
[114] Sentencing Judgement, para. 39 referring to Continued Sentencing Hearing, T. 316.
[115] Continued Sentencing Hearing, T. 306.

misinterpretation of the Appellant's answer during his exchange with the Trial Chamber. However, the Appeals Chamber does not find that the statement in question amounts to a legal finding with "the intention […] to raise the level of *mens rea* of the Appellant."[116] The Appellant's mode of liability as well as the factual basis supporting the elements of the crime of persecutions as set out in the Second Amended Indictment, the Plea Agreement and the Factual Basis, were accepted by the Trial Chamber as sufficient to enter a finding of guilt.[117] Thus, the Trial Chamber had already reached a determination as to the requisite *mens rea* for crimes resulting from participation in a joint criminal enterprise as agreed to by the parties in support of a finding of the Appellant's guilt before the statement in question was pronounced.

50. In any event, the Appeals Chamber finds that the statement in question was not considered in aggravation of the sentence. The Appeals Chamber observes that paragraph 98 of the Sentencing Judgement is not included in the section titled "Facts Related to the Individual Conduct of the Accused",[118] but in the section titled "Facts", in the subsection "Acts of Persecutions", under the subheading named "Killings of Bosnian Muslim Civilians in Glogova". Paragraph 98 of the Sentencing Judgement expressly refers to section XII of the Sentencing Judgement, which contains the list of 64 identified civilians murdered on 9 May 1992. The Appeals Chamber further observes that the Trial Chamber in its consideration of the "Gravity of the Offence and Aggravating Circumstances"[119] mirrors its finding in paragraph 98 that the Appellant did not physically commit the murders but this time merely notes that "[h]owever, the Accused accepted his individual criminal responsibility for the death of these 64 human beings",[120] thus leaving aside its previous statement that the Appellant accepted that the killings would take place. The Appeals Chamber finds that, therefore, it is clear that the statement in question in paragraph 98 of the Sentencing Judgement did not influence the Trial Chamber's decision with respect to the Appellant's sentence. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

(b) Paragraph 186 of the Sentencing Judgement

51. The Appellant alleges that there is an error of law[121] contained in paragraph 186 of the Sentencing Judgement, which reads as follows:

> As a result of the persecutory acts to which the Accused pleaded guilty, 64 identified Bosnian Muslim civilians were killed. In addition, an unspecified number of Bosnian Muslim civilians

[116] Appellant's Brief, 38.
[117] Sentencing Hearing, T. 177-178.
[118] Sentencing Judgement, Section IX.
[119] *Ibid*., Section IX.A.
[120] *Ibid*., para. 206.
[121] Appellant's Brief, para. 35.

> were forcibly displaced and deprived of their property. The Accused was aware of the *substantial likelihood* that such crimes could occur as an accepted result of his criminal conduct.[122]

He submits that "the intention of the Trial Chamber to raise the level of *mens rea* of the Appellant is even more evident and extreme in paragraph 186 of the Sentencing Judgement" and that the said paragraph is "contrary to the provisions of the Second Amended Indictment and the Factual Basis".[123]

52. The Appeals Chamber acknowledges that in this statement, the Trial Chamber appears to have found that the Appellant had a different *mens rea* than it was required to find as to the killings which resulted from the Appellant's participation in the joint criminal enterprise.[124] Nevertheless the Appeals Chamber finds that the Trial Chamber was entitled to conclude as it did. Having entered a conviction against the Appellant for committing the crime of persecutions which resulted in the killings of Bosnian Muslim civilians, it was reasonable to conclude that he was aware of the substantial likelihood that killings could take place. The Appellant had subscribed to the use of force to remove non-Serbs from Serb designated territory,[125] and "on the 5th of May [he] unequivocally found out that the use of force [was] also one of the methods in order to implement these objectives".[126] Moreover, he knew that "the term 'use of force' include[d] violent transfer of population",[127] that it included the killing of people,[128] and that the implementation of the objectives by way of "use of force" had already occurred in neighbouring municipalities.[129]

53. In addition, as submitted by the Prosecution,[130] the Appeals Chamber considers that, in any case, the Appellant has failed to demonstrate how the challenged statement in paragraph 186 of the Sentencing Judgement influenced the Trial Chamber's decision regarding the sentence imposed. This finding was not considered in aggravation; rather, the large number of civilians killed was considered.[131]

54. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

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[122] Sentencing Judgement, para. 186 (emphasis added by the Appellant in Appellant's Brief, para. 38).
[123] Appellant's Brief, para. 38.
[124] *See Kvočka et al.* Appeal Judgement, para. 83 (footnote omitted).
[125] Factual Basis, para. 13.
[126] Appellant's Testimony, T. 136.
[127] *Ibid*., T. 137.
[128] *Ibid*., T. 137: "JUDGE SCHOMBURG: Would it include the use of arms, the use of a tank? A. Correct, Your Honour. JUDGE SCHOMBURG: Would it include the killing of people? A. Yes, Your Honour. That's correct. Members of the Muslim ethnic group were killed in that period."
[129] *Ibid*., T. 134, 138.
[130] Respondent's Brief, para. 4.43.
[131] Sentencing Judgement, para. 222(i).

6. Alleged errors of fact concerning the Appellant's criminal responsibility beyond the scope of the Second Amended Indictment

55. The Appellant alleges that paragraphs 2, 100, 101, and 113 of the Sentencing Judgement contain errors of fact[132] since they go beyond the Plea Agreement Package and are an attempt to picture him as a vicious man.[133] He further submits that paragraphs 100, 101 and 107 through 112 insinuate his criminal responsibility for additional crimes not covered by the Second Amended Indictment.[134] He concludes that "these issues obviously influenced the Trial Chamber's Decision. At the same time they constitute a miscarriage of justice."[135] The Prosecution does not address these allegations in its response.

56. The Appeals Chamber turns to consider each of the paragraphs of the Sentencing Judgement referred to by the Appellant under this ground of appeal, which he alleges contain insinuations by the Trial Chamber amounting to findings concerning his criminal responsibility for additional crimes not covered by the Second Amended Indictment. The challenged paragraphs are reproduced and the statements which allegedly contain errors of fact have been italicised.

(a) Paragraph two of the Sentencing Judgement

> Miroslav Deronjić […]was indicted by the Tribunal on 3 July 2002. *The Trial Chamber wishes to emphasize that it is seized only with Miroslav Deronjić's individual criminal responsibility for Persecutions committed on 9 May 1992 and only in the village of Glogova in the Municipality of Bratunac in Eastern Bosnia, based on the Second Amended Indictment of 30 September 2003.*[136]

57. Despite the fact that the Appellant specifically alleges that the paragraph above contains an error of fact,[137] no arguments were advanced to substantiate his allegation. Consequently, the Appeals Chamber considers that no further discussion with respect to this paragraph is necessary.

(b) Paragraphs 107 through 112, and 113 of the Sentencing Judgement

58. Even though paragraphs 107 through 112 of the Sentencing Judgement are not specifically referred to by the Appellant as containing an error of fact in this part of his first ground of appeal, in a different part of his brief he states that references made in these paragraphs are "a misdirection and an error made by the Trial Chamber" and insinuate the Appellant's criminal responsibility for additional crimes not charged in the Second Amended Indictment.[138] Thus, the Appellant alleges

[132] Appellant's Brief, para. 40.
[133] *Ibid*., para. 48.
[134] *Ibid*., para. 44.
[135] *Ibid*., para. 45.
[136] Sentencing Judgement, para. 2 (emphasis added).
[137] Appellant's Brief, para. 40.
[138] *Ibid*., para. 44.

that the Trial Chamber's statement in paragraph 113 to the contrary is also in error.[139] The Appeals Chamber notes that paragraphs 107 through 112 are contained within a section of the Sentencing Judgement titled "Events Following the Attack on Glogova." They recount events which took place from 10 May 1992 onwards and the Trial Chamber explicitly held in section V of its Sentencing Judgement that the references dealing with the Appellant's conduct "*after* the events in Glogova on 9 May 1992, are to be considered only as additional background information."[140] As a result, the Appeals Chamber finds that the Appellant's allegations that the Trial Chamber erred in paragraphs 107 through 112 and 113 by making improper insinuations as to his criminal responsibility are without merit.

(c) Paragraph 101 of the Sentencing Judgement

> As it was stated by the Accused during the Sentencing Hearing, he passed through the village of Glogova and noticed a large number of people gathered in the centre of Glogova. He also observed the buses, the presence of the army and the Bratunac police. However, according to his testimony, he did not notice anything that would indicate that things were happening beyond what they had agreed beforehand at the Crisis Staff meeting, i.e. *that all residents of Glogova without exception should be collected together and taken off in the direction of Kladanj.*[141]

59. It appears that the Appellant challenges this statement to the effect that the Trial Chamber found him criminally responsible for an agreement made at the Crisis Staff meeting held prior to 9 May 1992.[142] The Appeals Chamber considers that the challenged statement has been taken out of context. A proper reading of paragraph 101 of the Sentencing Judgement shows that the Trial Chamber made no such finding; rather, the Trial Chamber merely reiterates background facts that are included in the Factual Basis.[143] The Appeals Chamber finds that the Appellant's allegations concerning paragraph 101 are unfounded. The Appellant has failed to show that the Trial Chamber committed an error of fact therein.

(d) Paragraph 100 of the Sentencing Judgement

> On 9 May 1992, during and immediately after the attack on Glogova, and in fulfilment of the operational objective of the plan to permanently displace Bosnian Muslims from the Municipality of Bratunac, members of the attacking forces forced the Bosnian Muslim civilians from their homes and forcibly displaced them from the village of Glogova to other parts of the Republic of Bosnia and Herzegovina. Specifically, the women and children who *survived* the attack were placed on buses and forcibly displaced to Muslim held territory outside the Municipality of

[139] *Ibid*., para. 40.
[140] Sentencing Judgement, para. 46.
[141] *Ibid*., para. 101 (footnote omitted, emphasis added).
[142] Appellant's Brief, para. 42 citing Sentencing Judgement, para. 101
[143] Factual Basis, para. 29: "At this session of the Crisis Staff, Miroslav Deronjić made introductory remarks that included an announcement that the operation against Glogova would be carried out the following day. […] He said that that if there was no resistance from the Muslim residents of Glogova, all the Muslim residents should be brought to the centre of town *and transported by bus and truck out of the Bratunac municipality to Kladanj.* […] Following the introductory remarks by Miroslav Deronjić, and a discussion about the Glogova plan, the Bratunac Crisis Staff *adopted the plan*" (emphasis added).

> Bratunac. *Neither the Indictment nor the Factual Basis specify [sic] what happened to the villagers on and after their transport. This question remains especially important because several names of villagers originating from Glogova can be found on the list of survivors that were taken from the hangar in Bratunac to Pale. The Trial Chamber also does not know what the fate of these persons was.*[144]

60. The Appellant appears to suggest that the Trial Chamber "insinuates" that he is criminally responsible for what happened to the villagers when they were transported to other parts of Bosnia Herzegovina and for their fate afterwards.[145] He takes issue with paragraph 272 of the Sentencing Judgement,[146] in which the Trial Chamber noted that "[t]he 400 civilians [detained in the hangar] were transferred during the night of 12 and 13 May 1992 from Bratunac to Pale, the headquarters of the Bosnian Serb leadership at the time, and their fate remains unclear until the present day."[147] The Appeals Chamber finds that in merely referring to the unclear fate of the forcibly displaced villagers in paragraphs 100 and 272, the Trial Chamber made no finding concerning the Appellant's criminal responsibility.

61. Additionally, the Appellant submits that the Trial Chamber "did not take into account" relevant paragraphs of the Second Amended Indictment and the Factual Basis, which "with sufficient particularity addres[s] the question posed by the Trial Chamber as to the fate of the residents of Glogova."[148] The relevant paragraph of the Second Amended Indictment referred to by the Appellant in support of his argument states that: "[t]he attacking forces forced the Bosnian Muslim civilians from their homes and forcibly displaced them from the village of Glogova to other parts of the Republic of Bosnia Herzegovina."[149] The Appeals Chamber notes that reference to this paragraph of the Second Amended Indictment is made in paragraph 100 of the Sentencing Judgement, thus the Appellant's claim that the Trial Chamber did not take it into account is erroneous. The Appeals Chamber considers that this part of the Second Amended Indictment, contrary to what the Appellant argues, in no way explains the fate of the displaced villagers. The paragraph of the Factual Basis which the Appellant claims was not "taken into account" by the Trial Chamber states that "[h]e said that that if there was no resistance from the Muslim residents of Glogova, all the Muslim residents should be brought to the centre of town and transported by bus and truck out of the Bratunac municipality to Kladanj."[150] The Appeals Chamber considers that this part of the Factual Basis merely refers to the plan the Crisis Staff adopted but does not shed light on the actual fate of the civilians, and notes that paragraph 29 of the Factual Basis was specifically

[144] Sentencing Judgement, para. 100 (footnotes omitted, emphasis added).
[145] *See* Appellant's Brief, para. 43.
[146] *Ibid.,* para. 42.
[147] Sentencing Judgement, para. 272 (footnote omitted).
[148] Appellant's Brief, para. 47.
[149] Second Amended Indictment, para. 26.
[150] Factual Basis, para. 29.

referred to in paragraph 272 of the Sentencing Judgement,[151] thus the Appellant's claim that it was not taken into account by the Trial Chamber is erroneous.

62. Finally, the Appellant submits that "[i]n all fairness the Trial Chamber should have shown more consistenc[y] and recognized the positive role the [A]ppellant played in the events after Glogova on May 9, 1992."[152] Since the Appellant fails to substantiate in what way he believes he played a positive role in the events after the attack on Glogova or the Trial Chamber's failure to take that role into account and merely refers in a footnote to his arguments in support of his fourth ground of appeal,[153] the Appeals Chamber will not consider this argument under the present ground of appeal.

63. For the foregoing reasons this part of the Appellant's first ground of appeal is dismissed.

7. Alleged error of law and fact concerning the finding that the Appellant abused his authority and political power

64. The Appellant claims that the Trial Chamber erred in law and in fact in concluding that he abused his authority and political power as President of the Crisis Staff and the Municipal Board to commit the crimes he is charged with.[154] He argues that the Trial Chamber erred in considering his superior position as an aggravating factor as it clearly goes beyond the limits imposed by the Plea Agreement Package,[155] since, in his view, neither the Second Amended Indictment nor the Factual Basis alleges an abuse of power or authority.[156] Moreover, he submits that the Trial Chamber did not give reasons for this finding and that "the allegation of 'abuse of political power and authority' by the Appellant, indeed stands without any substance or evidence."[157]

65. The Prosecution agrees with the Appellant that the Trial Chamber did not cite any evidence in support of its conclusion[158] but submits that the Trial Chamber did not have to do so at this point in the Sentencing Judgement since it was merely stating the conclusion it reached from the facts presented earlier.[159] The Prosecution argues that it is undisputed from the Plea Agreement Package that the Appellant held a high political rank and that he ordered the attack in the exercise of the

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[151] *See* Sentencing Judgement, para. 272 footnote 526.
[152] Appellant's Brief, para. 48.
[153] *Ibid*., footnote 21 referring to Appellant's Brief, paras 110-114.
[154] *Ibid*., para. 49 citing paras 194 and 195 of the Sentencing Judgement.
[155] *Ibid*., para. 50; *see also* para. 55.
[156] *Ibid*., para. 51.
[157] *Ibid*., para. 52. The Appeals Chamber notes that the Appellant advances the same argument under his third ground of appeal where he asserts that this aggravating factor was "not substantiated by any of the evidence" and "the findings go beyond the Plea Agreement Package, as in detail explained [in the first ground of appeal]." *Ibid*., para. 103.
[158] Respondent's Brief, para. 4.26.
[159] *Ibid*., para. 4.27.

power given to him by that office, and therefore submits that it was proper for the Trial Chamber to conclude that "he used his position of authority as a tool for committing the crime."[160]

66. The Appeals Chamber observes that the Trial Chamber did not cite to any evidence or the Factual Basis when it found that the Appellant had abused his authority. However, the Trial Chamber did not, as alleged by the Appellant, substitute the reasoning for such a finding by simply recalling portions of other judgements in the International Tribunal's case law. Rather, the Trial Chamber properly relied on principles developed by the case law of the International Tribunal.

67. The Appeals Chamber recalls that a Trial Chamber has the discretion to find that the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute may be taken into account as an aggravating circumstance.[161] As the Trial Chamber correctly recognised, a high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence.[162] In the *Kambanda* case, for example, the Appeals Chamber concluded that the Trial Chamber had committed no error in considering as an aggravating factor the fact that Jean Kambanda had abused his position of authority and the trust of the civilian population, since he, as Prime Minister, was responsible for maintaining peace and security, and yet instigated, aided and abetted the massacre of civilians.[163] In the *Aleksovski* case, the Appeals Chamber maintained that the appellant's "superior responsibility as a warden seriously aggravated the [a]ppellant's offences, [and that] instead of preventing it, he involved himself in violence against those whom he should have been protecting".[164] The Appeals Chamber notes that the Appellant does not dispute that the abuse of authority can be considered in aggravation of a sentence. Rather his claim is that his alleged abuse of power cannot be considered in this case because there is no evidence of such abuse.[165]

68. The Appeals Chamber finds that the Trial Chamber's finding that the Appellant held a high political rank and abused his position of power and authority is a conclusion the Trial Chamber reached relying upon the facts considered and recounted earlier in the Sentencing Judgement. These facts are not disputed by the Appellant. It was open to the Trial Chamber to weigh all the evidence that was presented to it. The Appeals Chamber recalls that a Trial Chamber is not required to

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[160] *Ibid*.
[161] *Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745; *Kupreškić et al.* Appeal Judgement, para. 451; *Krstić* Trial Judgement, para. 708; *Galić* Trial Judgement, para. 765.
[162] *Krstić* Trial Judgement, para. 709; *see also Kayishema and Ruzindana* Appeal Judgement, paras 358-359.
[163] *See Kambanda* Appeal Judgement, paras 118-119, 126.
[164] *Aleksovski* Appeal Judgement, para. 183, quoted at para. 357 of the *Kayishema and Ruzindana* Appeal Judgement.
[165] Appellant's Brief, paras 51-52.

articulate in its judgement every step of its reasoning in reaching particular findings.[166] The fact that no evidence was cited in paragraphs 194 and 195 of the Sentencing Judgement does not mean that the conclusion reached by the Trial Chamber is unsubstantiated. A Trial Chamber is not obliged to refer to every piece of evidence on the record in its judgement.[167]

69. The Appeals Chamber notes that section IX of the Sentencing Judgement concerns the gravity of the offences and the aggravating circumstances. Relying upon the Second Amended Indictment, the Appellant's Testimony and the Sentencing Hearing, section IX of the Sentencing Judgement provides a detailed account of (1) the positions of authority held by the Appellant; (2) his awareness of the Bosnian Serb leadership's objective to establish a Serbian state; (3) the way in which as the highest-ranking Bosnian Serb official in the Municipality of Bratunac he subscribed to the policy of creating Serb-ethnic territories within Bosnia and to the policy of using force to remove Muslims from the territory; and (4) how, to achieve this objective, military, police, and paramilitary forces from within Bosnia - some of which were under his authority, *i.e.*, the Territorial Defence and the Bratunac police forces - were utilised.[168] The Appeals Chamber finds that all of this evidence enabled the Trial Chamber to conclude that the Appellant's political power and authority as the President of the Bratunac Crisis Staff and the Municipality Board vested him with a particular responsibility towards the population of Bratunac, and that he abused his power and authority.[169]

8. Alleged error of law and fact concerning whether the Appellant personally planned the attack on Glogova and had a leading position in the operation

(a) Alleged "reference" to command responsibility

The Appellant challenges the following conclusion reached by the Trial Chamber:

> It has been endorsed by the Appeals Chamber in *Kupreškić et al*. that a commander's participation in the attack that he himself ordered and planned can aggravate his criminal liability.[170]

70. The Appellant submits that the Trial Chamber erred in law as its "[r]eference to command responsibility, can only be understood as an allegation of the command responsibility of the Appellant, although he was not charged under Article 7(3) [of the Statute] [in the] Second Amended

[166] *Čelebići* Appeal Judgement, para. 481.
[167] *Kupreškić et al.* Appeal Judgement, para. 39.
[168] Sentencing Judgement, paras 188-193.
[169] *Ibid.*, paras 194-195.
[170] *Ibid*., para. 202 (footnote omitted).

Indictment and he pleaded guilty on the basis of Article 7(1) [of the Statute] only."[171] The Prosecution does not address this submission in its response.

71. The Appeals Chamber notes that paragraph 202 of the Sentencing Judgement does not refer to the Appellant's command responsibility. The reference to the *Kupreškić* Appeal Judgement in the Sentencing Judgement cannot be construed as a finding of the Trial Chamber concerning the Appellant's superior responsibility pursuant to Article 7(3) of the Statute.

72. As a result, this part of the Appellant's first ground of appeal is dismissed.

(b) Appellant's "leading position in the operation", paragraph 201 of the Sentencing Judgement

73. The Appellant submits that the Trial Chamber's finding to the effect that he had a "leading position in the operation"[172] is in error and is in contradiction with the Trial Chamber's statement that "[he] coordinated and monitored the attack on the village of Glogova."[173] He asserts that he had a "relatively low position"[174] because the unit assigned to him for the attack, was commanded by someone else[175] and he was not competent to give orders to the JNA unit involved.[176] The Prosecution does not address this submission in its response.

74. Even if the Appellant was not technically competent to issue "orders" to the JNA unit, the Appeals Chamber recalls that the Appellant used his *de facto* and *de jure* control over the Territorial Defence and his *de facto* power over the police in the Municipality of Bratunac to order the attack on the village of Glogova and to forcibly displace the Bosnian Muslim residents.[177]

75. Furthermore, the Appeals Chamber finds that the finding of the Trial Chamber that the Appellant had a leading position in the operation is not in contradiction with the Trial Chamber's statement that he "coordinated and monitored the attack on the village of Glogova."[178] In fact, the Appeals Chamber considers that coordinating and monitoring an attack can be seen as illustrating a leading position in an operation.

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[171] Appellant's Brief, para. 58.
[172] Sentencing Judgement, para. 201.
[173] *Ibid*., para. 203 citing Appellant's Testimony, T. 159-160.
[174] Appellant's Brief, para. 61.
[175] *Ibid.*, citing Appellant's Testimony, T. 150: "I joined a unit of the Territorial Defence which was lined up in front of the municipal building. The unit was commanded by Mr. Miloje Bozic. He was unfortunately killed. I joined that unit because that was a TO unit to which I am assigned to."
[176] *Ibid.*, citing Appellant's Testimony, T. 146: "But during these meetings, he [Mr. Reljić] always said that I was not competent to give orders to his unit and that he would contact his command and consult them."
[177] Sentencing Judgement, para. 199.
[178] *Ibid*., para. 203.

76. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in concluding that the Appellant had a leading position in the operation.

(c) Whether the Appellant "personally planned", paragraph 202 of the Sentencing Judgement

77. The Appellant further submits that the Trial Chamber erred in concluding that he "personally planned" the attack on the village of Glogova and in considering this as an aggravating factor[179] because "no evidence was produced to substantiate" this conclusion.[180]

78. The Prosecution responds that the Trial Chamber's conclusion that the Appellant personally planned the attack is "supported by ample evidence."[181] Relying upon an interview between the Appellant and the Prosecution, the latter asserts, *inter alia,* that during the interview, the Appellant spoke of *his* plan to "militarily neutralise Glogova". [182]

79. The Appeals Chamber notes that the Trial Chamber actually stated in this part of the Sentencing Judgement that the Appellant "personally planned […] *in* the attack" [183] on Glogova and that this was an aggravating factor, not that he planned the attack itself. Thus, the Appeals Chamber need not consider the Prosecution's reference to the Appellant's interview statement with regard to the planning *of* the attack as evidence in that regard.[184] The Appeals Chamber finds that it is clear from the facts considered in the Sentencing Judgement at paragraphs 203 and 204 with regard to the execution of the attack on 9 May 1992, that the Trial Chamber correctly concluded that the Appellant's personal involvement in the attack on Glogova included planning during the attack.

80. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

9. Alleged errors of fact concerning the vulnerability of the inhabitants of Glogova

81. The following portions of the Sentencing Judgement have been challenged by the Appellant. The statements which allegedly contain errors of fact have been italicised.

> 76. On or about 27 April 1992, the aforementioned group returned to Glogova in order to collect weapons. Milutin Milošević, Chief of the Serb SUP, told the villagers that Glogova would not be attacked because they had turned over their weapons. *The fact that Milutin Milošević added that he was speaking on behalf of Miroslav Deronjić is not disputed by the Accused. Moreover, the*

[179] Appellant's Brief, para. 59.
[180] *Ibid*., para. 57, *see also* paras 59-60.
[181] Respondent's Brief, para. 4.29.
[182] *Ibid.,* para. 4.29 referring to Appellant's Interview, 9 July 2003, pp. 921, 916, 913, 903-02, Exh. DS-7/11. In support of its assertion the Prosecution refers additionally to other parts of this interview.
[183] Sentencing Judgement, para. 202 (emphasis added).
[184] Respondent's Brief, para. 4.29.

> *Accused accepted and agreed to all of those aforementioned actions.* From then on, Glogova was to be regarded as a disarmed and undefended village.[185]
>
> […]
>
> 207. The Trial Chamber in Banović accepted that "the position of inferiority and the vulnerability of the victims as well as the context in which the offences were committed are relevant factors in assessing the gravity of the offence." *The Trial Chamber recognises that the inhabitants of Glogova were subjected to a position of special vulnerability*.[186]
>
> […]
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> 209. Moreover, at the end of April 1992, the villagers of Glogova had been told that they would not be attacked because they had turned over their weapons. This statement was made by Milutin Milošević, Chief of the Serb SUP, who declared that he was speaking on behalf of Miroslav Deronjić. *The Accused was not present during that statement, but he agreed with it and accepted the actions of Mr. Milošević. The given assertion created the false feeling of safety to the Muslim population and made them stay in Glogova. Without this presentation, in fact amounting to an ambush, in all likelihood far more of them might have fled in time. The Trial Chamber finds that this has to be considered in aggravation of the sentence*.[187]

(a) Paragraph 207 of the Sentencing Judgement

82. The Appellant submits that the Trial Chamber erred in finding that "the inhabitants of Glogova were subjected to a position of *special* vulnerability"[188] because there was no evidence before the Trial Chamber to support this conclusion.[189]

83. The Prosecution responds that the Trial Chamber based its conclusion on the fact that the villagers had been deliberately disarmed, rendering them vulnerable and defenceless,[190] and argues that they were given assurances that created a false feeling of safety without which far more of them might have fled in time.[191] It further submits that these factors are referred to in the Second Amended Indictment and the Factual Basis.[192]

84. The Appeals Chamber notes that in establishing that the inhabitants of Glogova were in a position of special vulnerability, the Trial Chamber relied upon several facts, such as the fact that the village had been disarmed prior to the attack and the unarmed population offered no resistance against the attacking forces[193] and the fact that the villagers had been told by a purported

[185] Sentencing Judgment, para. 76 (footnotes omitted, emphasis added).
[186] *Ibid.*, para. 207 (footnote omitted, emphasis added).
[187] *Ibid.*, para. 209 (footnote omitted, emphasis added).
[188] Appellant's Brief, para. 62 quoting Sentencing Judgement, para. 207 (emphasis added by Appellant).
[189] *Ibid.*, para. 63.
[190] Respondent's Brief, para. 4.35.
[191] *Ibid.*
[192] *Ibid.*, para 4.36 referring to Second Amended Indictment, paras 8 (a)–(e) and Factual Basis, paras 18 and 19.
[193] Sentencing Judgement, para. 208.

representative of the Appellant that they would not be attacked if they handed in their weapons, a statement with which the Appellant agreed and accepted.[194]

85. The Appeals Chamber observes that evidence of the fact that the civilians were disarmed was included in the Factual Basis and the Second Amended Indictment.[195] Moreover, the Second Amended Indictment states that the Appellant knew that the villagers had been disarmed[196] and that the village was undefended.[197] The Trial Chamber was aware of the fact that the villagers of Glogova had been told by Milutin Milošević, Chief of the Bratunac Police, that they would not be attacked.[198] Therefore, the Appeals Chamber finds that the Trial Chamber did not "supersede the Plea Agreement Package" as alleged by the Appellant. It did not go beyond the evidence it had before it when it "recognise[d] that the inhabitants of Glogova were subjected to a position of special vulnerability".[199]

86. The Appeals Chamber finds that the Appellant has failed to demonstrate any error of fact on the part of the Trial Chamber in paragraph 207 of the Sentencing Judgement.

(b) Paragraphs 76 and 209 of Sentencing Judgement

87. The Appellant further submits that the Trial Chamber erred when it concluded that he "accepted and agreed to" the actions of Milutin Milošević, who told the villagers that they would not be attacked because they had turned over their weapons. He argues that the Trial Chamber went beyond the Plea Agreement Package and erred in concluding that he accepted that Mr. Milošević was working under his instructions or with his knowledge.[200] He submits that this conclusion cannot be inferred from the portion of his testimony cited in paragraph 209 of the Sentencing Judgement.[201]

88. The Prosecution submits that the Appellant erroneously interprets the Trial Chamber's language,[202] since the Trial Chamber did not conclude that Milutin Milošević was working under the Appellant's instructions or with his knowledge.[203]

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[194] *Ibid.*, para. 209.
[195] Second Amended Indictment, para. 22; Factual Basis, para. 18.
[196] Second Amended Indictment, paras 22, 25.
[197] *Ibid.*, para. 25.
[198] *Ibid.*, para. 27; Factual Basis, para. 19.
[199] Sentencing Judgement, para. 207.
[200] Appellant's Brief, para. 66.
[201] *Ibid.*, para. 67.
[202] Respondent's Brief, para. 4.31.
[203] *Ibid*.

89. The Appeals Chamber notes that the Trial Chamber did not, as alleged by the Appellant, conclude that he instructed Milutin Milošević or that he knew about the statement made by the latter allegedly on his behalf. The Trial Chamber limited itself to concluding that Milutin Milošević supposedly made the statement on behalf of the Appellant and that the latter "agreed with it and accepted the actions of Mr. Milošević."[204] In this context, the Appeals Chamber notes that the Appellant only cites part of the relevant discussion that took place during his testimony before the Trial Chamber,[205] and recalls the last part which was not mentioned in the Appellant's Brief:

> JUDGE SCHOMBURG: So you were absolutely in agreement [with] what Milošević has said. Correct? A. I've already answered that question. I accepted all of those actions, and I agreed with them.[206]

The Appeals Chamber finds that the Trial Chamber did not err when it concluded that "[t]he Accused was not present during that statement, but he agreed with it and accepted the actions of Mr. Milošević."[207] Such a conclusion mirrors the Appellant's own admission.

90. The Appeals Chamber finds that the Appellant has failed to demonstrate any error of fact on the part of the Trial Chamber in paragraphs 76 and 209 of the Sentencing Judgement.

91. Referring in a footnote to other arguments advanced in his brief concerning his third ground of appeal, the Appellant finally submits that "[a]s this erroneous conclusion was considered as an aggravating factor it clearly did in fact strongly influenced [*sic*] [the] Trial Chamber's decision in regard to [the] sentence imposed on the Appellant."[208] No arguments are offered by the Appellant to substantiate this allegation in this part of his brief. The Appeals Chamber notes that the arguments referred to by the Appellant in the footnote concern whether the special vulnerability of victims can constitute an aggravating circumstance; however, this is a question of law which will be considered in the discussion on the Appellant's third ground of appeal below.

92. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

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[204] Sentencing Judgement, para. 209 citing Appellant's Testimony, T. 159. *See also* Sentencing Judgement, para. 76.
[205] Appellant's Brief, para. 66.
[206] Appellant's Testimony, T. 159.
[207] Sentencing Judgement, para. 209.
[208] Appellant's Brief, para. 68 (footnote omitted).

IV. SECOND GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED IN FINDING THE PRINCIPLE OF *LEX MITIOR* NOT APPLICABLE

93. The Appellant asserts that the principle of *lex mitior* is applicable in his case and submits that the Trial Chamber erred in law and in fact in concluding that "the Tribunal, having primacy *vis-à-vis* national jurisdictions in the former Yugoslavia, is not bound to apply a more lenient penalty – if any – under these jurisdictions."[209] The Appellant argues that the principle of *lex mitior* is contained in numerous legal systems,[210] that "[it] should be observed as […] fundamental, applicable in all jurisdictions",[211] that it constitutes part of international customary law,[212] and that therefore "it must necessarily be applied in relation to other concurrent jurisdictions."[213] During the Appeal Hearing, the Defense argued that "the manner in which the Trial Chamber interprets this principle […] is not a proper one".[214]

94. The Prosecution submits that the Appeals Chamber does not have to consider the issue of the general applicability of the principle of *lex mitior* with regard to national jurisdictions since "this principle has no practical implication in this case and therefore its non-application can not have had an impact on the verdict."[215]

95. The Appeals Chamber notes that the issue concerning the applicability of the principle of *lex mitior* has been squarely decided in the *Dragan Nikolić* Sentencing Appeal Judgement.[216] Therefore, the Appeals Chamber will not consider the parties' submissions regarding the practical implication of the application of this principle.[217]

96. The principle of *lex mitior* is understood to mean that the more lenient law has to be applied if the laws relevant to the offence have been amended. The Appeals Chamber reiterates its finding that this principle applies to the Statute of the International Tribunal, and therefore, if ever there is a

[209] *Ibid.*, paras 73, 75, 88 referring to Sentencing Judgement, para. 170.
[210] *Ibid.*, paras 80-85 citing Article 24 (2) of the ICC Statute, as well as provisions from the criminal codes of former Yugoslavia, Germany, France, and Switzerland. Furthermore, the Appellant submits that the principle of *lex mitior* is derived from the principle *nullum crimen sine lege* and "as such contained in legal systems all over the world".
[211] *Ibid*., para. 85; AT. 16.
[212] AT. 16, 39.
[213] Appellant's Brief, para. 86.
[214] AT. 39.
[215] Respondent's Brief, para. 4.46; see *also* para. 4.47: "However, there is no need for the Appeals Chamber to examine this conclusion in the present case because even if it were in error, the Appellant has not shown that it could have affected the sentence."
[216] During the Appeal Hearing, the Prosecution referred to the *Dragan Nikolić* Judgement on Sentencing Appeal in support of its arguments. AT. 27. The Prosecution also relied upon the *Blaškić* Appeal Judgement, footnote 1433.
[217] Respondent's Brief, paras 4.48–4.54; Brief in Reply, paras 31–34.

change in the Statute regarding sentencing powers, the International Tribunal would have to apply the version of the Statute resulting in the less severe penalty.[218]

97. With respect to the applicability of the principle of *lex mitior* to the relationship between the law of the International Tribunal and the law relevant for the national courts of the former Yugoslavia, the Appeals Chamber notes that this issue is not a question of jurisdiction. Rather, the issue is whether differing national criminal laws are relevant and applicable to the law governing the sentencing consideration of the International Tribunal.[219] The Appeals Chamber further notes that the answer is to be found in the principle of *lex mitior* itself and, to this end, reiterates its finding in the *Dragan Nikolić* Sentencing Appeal Judgement:

> It is an inherent element of [the] principle [of *lex mitior*] that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[220]

98. As the International Tribunal is not bound by the law or sentencing practice of the former Yugoslavia,[221] the principle of *lex mitior* is not applicable in relation to those laws.

99. For the foregoing reasons, the Appellant's second ground of appeal is dismissed.

[218] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 85.
[219] *Ibid.*, para. 80.
[220] *Ibid.*, para. 81.
[221] *Tadić* Judgement in Sentencing Appeals, para. 21; *see also Krstić* Appeal Judgement, para. 260; *Blaškić* Appeal Judgement, para. 682.

V. THIRD GROUND OF APPEAL: AGGRAVATING CIRCUMSTANCES

100. The Appellant contends under his third ground of appeal that the Trial Chamber erred in law and in fact in its assessment of the aggravating factors.[222] He argues that the factors accepted by the Trial Chamber as aggravating circumstances are either already subsumed in the offence of persecutions to which he pleaded guilty or cannot be considered as aggravating circumstances because they are illustrative of the context of that crime. The Prosecution responds that the Appellant's Brief goes beyond the Notice of Appeal and submits that the present ground of appeal should be dismissed "on this basis alone".[223] In the alternative, the Prosecution argues that the Trial Chamber "did not err with regard to the manner in which it considered these aggravating factors."[224] The Appeals Chamber will, as a preliminary issue, address the Prosecution's contention that the Appellant's Brief goes beyond the Notice of Appeal. It will then address each alleged error.

A. Preliminary issue

101. As the Prosecution points out, the Appellant's contentions concerning the Trial Chamber's supposed double-counting of aggravating factors were not specifically set forth in his Notice of Appeal, [225] nor has the Appellant sought to amend the Notice of Appeal to provide for them. The Appellant contends that he should nonetheless be permitted to advance the arguments because, at the time he filed his Notice of Appeal, he had not yet been given a translation of the Sentencing Judgement in Bosnian/Croatian/Serbian.[226] The Appellant accordingly included in the Notice of Appeal a proviso, on which he now relies, stating that he reserved "the right to raise any and all errors of law or fact that may become apparent subsequent to the full review and analysis of the entire records of the proceedings, and subsequent to [him] being given a copy of the Sentencing Judgment in his own language."[227]

102. The Appeals Chamber does not find the Appellant's argument persuasive. He never sought "variation of the grounds of appeal" pursuant to Rule 108 of the Rules, a procedure he was required to follow if, upon further review, the initial Notice of Appeal proved inadequate. This procedural

[222] Appellant's Brief, para. 90 referring to paras 207, 209 and 210 to 222 of the Sentencing Judgement. *See also* Appellant's Brief, para. 108.
[223] Respondent's Brief, para. 4.56.
[224] *Ibid.*
[225] *Ibid.,* para. 4.58. *See also* Notice of Appeal, para. 2 and Appellant's Brief, paras 90-109.
[226] The Appellant had filed a request for an extension of time to file the Notice of Appeal on this basis, but the Appeals Chamber did not act on the request before the expiration of the thirty-day time limit. The Appeals Chamber notes that typically, delays in the translation of a Trial Chamber's judgement into an appellant's language do not provide grounds for an extension of the deadline for a notice of appeal, as long as the judgement is available in a language spoken by the appellant's counsel. *See e.g., Prosecutor v. Radoslav Brdanin,* Case No.IT-99-36-A, Decision on Motion for Extension of Time, 4 October 2004, p. 2.
[227] Notice of Appeal, para. 2; *see also* para. 3 and Brief in Reply, para. 40.

requirement was not obviated by the Appellant's proviso, nor by the inclusion of the relevant arguments in his Appeal Brief. Nonetheless, the Appeals Chamber finds that under the circumstances of the case, the Prosecution was not materially prejudiced by the failure to seek a variation of the Notice of Appeal pursuant to Rule 108 of the Rules, and that therefore, pursuant to Rule 5 of the Rules, relief in the form of a refusal to hear the Appellant's arguments is not required. As the Appellant argues and the Prosecution does not dispute in its Respondent's Brief – he had raised the issue of the Trial Chamber's alleged double-counting of aggravating circumstances during the Defence's closing statement before the Trial Chamber at the sentencing stage.[228] Moreover, the Notice of Appeal did request revision of the Trial Chamber's findings on aggravating circumstances, contending that the Trial Chamber had erred both in law and in fact, although it provided only the reason that the Trial Chamber had failed to consider the "totality of the evidence."[229]

103. These facts, taken in combination with the Appellant's proviso in the Notice of Appeal concerning his right to raise additional errors and the Appellant's subsequent development of his arguments in his Appeal Brief,[230] provided the Prosecution with adequate notice of the Appellant's arguments, and the Prosecution did respond to the Appellant's arguments in its brief.[231] The Appeals Chamber considers that in light of this lack of material prejudice and the potential importance of the arguments in question, if successful, for the sentence of the Appellant, the Appellant should be permitted to raise them in spite of his violation of Rule 108 of the Rules. The Appeals Chamber will therefore consider the Appellant's arguments concerning the Trial Chamber's treatment of aggravating factors, notwithstanding the Appellant's failure to comply with the Rules.

B. Alleged Errors

1. Impermissible double counting of factors in aggravation of the sentence

104. As stated above, the Appellant submits that the Trial Chamber erred in law and in fact in paragraph 222 of the Sentencing Judgement, which lists the aggravating factors taken into account, because these factors are either subsumed in the overall gravity of the offence for which he was convicted, or are incorporated as constitutive elements of the crime.[232] He relies upon the *Plavšić* and *Obrenović* cases, in which the Trial Chambers found that some of the aggravating

[228] *See* Appellant's Brief, para. 99 referring to Sentencing Hearing, T. 230.
[229] Notice of Appeal, para. 6.
[230] *See* Appellant's Brief, paras 94-107.
[231] *See* Respondent's Brief, paras 4.60-4.92.
[232] *See* Appellant's Brief, paras 90-108.

circumstances were subsumed in the overall gravity of the offence.[233] In other words, the Appellant alleges that the Trial Chamber impermissibly considered the factors in aggravation of his sentence twice.

105. The Prosecution argues that the reference to the findings in the *Plavšić* and *Obrenović* cases "only suggests that some factors could generally be considered as aggravating factors *or* be taken into account in ascertaining the gravity of the offence."[234] The Prosecution submits that "[t]he general principle contained in these cases is that double counting of factors is impermissible",[235] and it contends that the point is to make sure that each circumstance is only considered in aggravation *once*.[236] The Prosecution argues that the Trial Chamber recognised this principle and that "[t]herefore, one may conclude that the five factors which the Trial Chamber identified in Paragraph 222 as aggravating factors it did not also consider when assessing the gravity of the offence."[237] In reply, the Appellant submits that the Prosecution's assertion is erroneous because the Sentencing Judgement itself considers the gravity of the offence and the aggravating circumstances together under the same heading. [238] He asserts that the Trial Chamber did not address the distinction between the gravity of the offence and the aggravating circumstances. Moreover, in his view, the Trial Chamber did not at all address the gravity of the offence.[239] The Appellant concludes that the Trial Chamber did in fact consider the aggravating circumstances twice.[240]

106. The Appeals Chamber considers that factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa.*[241] The Appeals Chamber acknowledges that, indeed, the Trial Chamber did not address the distinction between the gravity of the offence and the aggravating circumstances, and did not expressly state in its Sentencing Judgement the principle that a factor may only be taken into account once in sentencing.[242] The Appeals Chamber notes that, as correctly pointed out by the Appellant, section IX. A. of the Sentencing Judgement, titled "Gravity of the Offence and Aggravating Circumstances", addresses the gravity of the offence together with the

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[233] *Ibid.*, para. 94.
[234] Respondent's Brief, para. 4.63 referring to *Plavšić* Sentencing Judgement, para. 58 and *Češić* Sentencing Judgement, para. 53.
[235] *Ibid.*, para. 4.64 referring to *Krnojelac* Trial Judgement, para. 517. AT. 29.
[236] *Ibid.*, para. 4.64; *see also* AT. 30.
[237] *Ibid.*, para. 4.65; *see also* AT. 30.
[238] Brief in Reply, para. 42.
[239] *Ibid.*
[240] *Ibid.*
[241] *See Krnojelac* Trial Judgement, para. 517; *Plavšić* Sentencing Judgement, para. 58; *Banović* Sentencing Judgement, para. 53; *Obrenović* Sentencing Judgement, para. 101; Češić Sentencing Judgement, para. 53.
[242] The Prosecution argues that the Trial Chamber recognized the principle of impermissible double-counting in footnote 289 of the Sentencing Judgement. Respondent's Brief, para. 4.65; AT. 30. The Appeals Chamber notes however, that the footnote in question, a reference to the *Stakić* Trial Judgement, concerns the principle that an element of the crime cannot be considered as an aggravating factor.

factors considered in aggravation. This is unfortunate, but it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting by taking into account matters relevant to the gravity of the offence as additional aggravating circumstances as well. The Appeals Chamber notes that in section IX. A. of the Sentencing Judgement, the Trial Chamber provides a detailed description of the circumstances surrounding the commission of the crime of persecutions, as well as the Appellant's role before and during the attack on Glogova,[243] and lists all the aggravating factors taken into account.[244] The Appeals Chamber considers that those factors not listed in paragraph 222 of the Sentencing Judgement but contained in paragraphs 186-220 were considered by the Trial Chamber within the context of the gravity of the offence, except where otherwise stated by the Trial Chamber.[245]

107. In the conclusion of section IX. A. of the Sentencing Judgement, the Trial Chamber stated that it had taken into consideration "the gravity of the crime and all the accepted aggravating circumstances".[246] This statement refers to prior paragraph 222 which states that "[the Trial Chamber] accepts the following factors as aggravating". In this respect, the Appeals Chamber notes that, for instance, the Trial Chamber did not include its consideration of the long-term effects of the attack on the victims in its list of aggravating circumstances.[247] Rather, the Trial Chamber found this element to be "a relevant factor in determining the gravity of the crime."[248] Therefore, the Appeals Chamber considers that the Sentencing Judgement clearly shows that the Trial Chamber indeed distinguished between aggravating circumstances on the one hand and the gravity of the offence on the other, albeit considering them under the same heading. The Trial Chamber was cognisant of the fact that double-counting for sentencing purposes is impermissible. With respect to the alleged errors concerning each specific aggravating factor, the Appellant must demonstrate that the Trial Chamber impermissibly double-counted the factor in question and considered it within the context of the gravity of the offence as well.

2. The large number of victims

108. The Appellant alleges under this part of his third ground of appeal that the Trial Chamber's conclusion that "[t]he large number of civilians who were killed, subjected to the risk of being killed, forcibly displaced, and deprived of their property" amounts to an aggravating factor[249] is

[243] *See* Sentencing Judgement, paras 186-220.
[244] *Ibid.*, para. 222.
[245] *See* for instance *ibid*., para. 202.
[246] *Ibid.*, para. 223.
[247] *Ibid.*, paras 210–218, sub-paragraph (g) in the Trial Chamber's discussion on the gravity of the offence and aggravating circumstances.
[248] *Ibid.*, para. 210.
[249] Sentencing Judgement, para. 222(i).

erroneous as such circumstance is already "subsumed in the overall gravity of the offence to which [he] pleaded guilty, and […] incorporated as [a] constitutive element of the crime in the Second Amended Indictment and [in the] Factual Basis."[250] The Prosecution responds that the fact that there was a large number of victims is not an element of the crime of persecution as "a single discriminatory act against an individual could constitute persecution".[251] It argues that the fact that crimes against humanity must be related to a widespread or systematic attack "does not signify that a single act by a perpetrator cannot constitute a crime against humanity, if committed within the appropriate context and with the requisite knowledge".[252] The Prosecution acknowledges that the requirement of a widespread and systematic attack refers to the large-scale nature and the number of the targeted persons, but submits that it is not required that the person accused of a crime against humanity be individually responsible for the large number of victims.[253] The Prosecution submits that it is clear from paragraph 222 of the Sentencing Judgement that the Trial Chamber considered the large number of victims as an aggravating circumstance and not when it determined the gravity of the crime.[254]

109. The Appeals Chamber first recalls that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population;[255] however, this requirement only applies to the attack and not to the individual acts of the accused.[256] The acts of the accused need only be a part of the attack and, all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.[257] With regard to the crime of persecutions, the Appeals Chamber further recalls that this crime is defined as "an act or omission which: 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*)."[258]

110. With regard to the allegation that the large number of victims is subsumed in the overall gravity of the offence, the Appellant submits that the Trial Chamber did not address the distinction

[250] Appellant's Brief, para. 101.
[251] Respondent's Brief, para. 4.69 (footnote omitted). *See also* AT. 30.
[252] *Ibid*., para. 4.70. *See also* AT. 30.
[253] AT. 30-31.
[254] AT. 31; Respondent's Brief, para. 4.71.
[255] *Blaškić* Appeal Judgement, para. 98.
[256] *Ibid*., para. 101 referring to *Kunarac et al.* Appeal Judgement, para. 96.
[257] *Ibid*.
[258] *Ibid.*, para. 131 referring to *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.

between the aggravating circumstances and the gravity of the offence.[259] However, the Appeals Chamber notes that the Appellant does not point to any specific finding in the Sentencing Judgement that makes it clear that the Trial Chamber additionally took into account the large number of victims as part of the gravity of the crime. The Appeals Chamber therefore finds that the Appellant has failed to demonstrate that the Trial Chamber took this into account twice as part of the gravity of the offence and as an aggravating factor.

111. For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

3. The meticulously planned attack on Glogova

112. The Trial Chamber concluded, at paragraph 222(ii) of the Sentencing Judgement, that the following was an aggravating circumstance:

> The Accused launched a meticulously planned attack on Glogova in order to facilitate the scheme of creating Serb-ethnic territories by forcefully displacing Bosnian Muslim population from the entire Municipality of Bratunac that was designed by the Bosnian Serb leadership already in 1991.

The Appellant alleges that paragraph 222(ii) of the Sentencing Judgement contains an error of law as this circumstance cannot be considered as aggravating since it is "in substance [the] context of [the] crime to which [he] pleaded guilty", as expressed at paragraph 14 of the Second Amended Indictment and at paragraphs 7, 8 and 13 of the Factual Basis.[260] The Prosecution responds that it is "precisely in 'the context of a crime' where the Trial Chamber should have been looking for aggravating factors'"[261] and that "[o]nly those circumstances directly related to the commission of the offence charged may be seen as aggravating".[262] Further, the Prosecution argues that the Appellant provides no authority or reasoning in support of his proposition that the mere fact that the context of planning is mentioned in the Factual Basis prevents the Trial Chamber from taking it into account as an aggravating circumstance.[263]

113. The Appellant seems to allege that the Trial Chamber erred in considering as an aggravating factor his very participation in the attack. He argues that the Trial Chamber erred in considering the fact that he "launched a meticulously planned attack on Glogova"[264] in aggravation of his sentence

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[259] Brief in Reply, para. 42.
[260] Appellant's Brief, para. 102. The Appeals Chamber notes that the Appellant does not allege in this part of his third ground of appeal that the meticulous planning of the attack on Glogova, considered by the Trial Chamber as an aggravating circumstance, is also a factor subsumed in the overall gravity of the offence or a constitutive element of the crime of persecution. Therefore the Appeals Chamber will not address the arguments put forward by the Prosecution in this regard, *See* Respondent's Brief, para. 4.75; AT. 31-32.
[261] Respondent's Brief, para. 4.73.
[262] *Ibid*. referring to *Kunarac et al.* Trial Judgement, para. 850.
[263] *Ibid.*, para. 4.74.
[264] Sentencing Judgement, para. 222(ii).

because this fact concerns the context of the crime to which he pleaded guilty, as described in the Factual Basis and the Second Amended Indictment.[265] The Appeals Chamber disagrees with this proposition. The Appeals Chamber finds that the Trial Chamber was entitled to rely upon facts related to the context of the crime as provided for in the Factual Basis and the Second Amended Indictment to set out the basis on which it intended to impose its sentence, based on its overriding obligation to individualise a penalty to fit the circumstances of the accused and the gravity of the crime.[266] The Appeals Chamber finds that the Trial Chamber did not err in considering the fact that the Appellant launched a meticulously planned attack on Glogova as an aggravating circumstance.

114. For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

4. The Appellant's abuse of authority

115. The Appellant alleges under this part of his third ground of appeal that the fact that he "abused his capacity as President of the Crisis Staff of the Municipality of Bratunac when he ordered the attack of the village of Glogova",[267] which was considered by the Trial Chamber as an aggravating circumstance, was "not substantiated by any of the evidence lead during proceedings".[268] He contends that this finding goes "beyond the Plea Agreement [P]ackage".[269]

116. The Appeals Chamber notes that the Appellant does not argue that it was unreasonable for the Trial Chamber to find that an abuse of authority can constitute an aggravating circumstance. It further notes that the Appellant does not provide any new argument in support of his allegation that the Trial Chamber's finding is not substantiated by any evidence, but merely refers to the arguments he already put forward under his first ground of appeal. The Appeals Chamber has already found that the evidence before the Trial Chamber enabled it to conclude that the Appellant's political power and authority as the President of the Bratunac Crisis Staff and the Municipality Board vested him with a particular responsibility towards the population of Bratunac, and that he abused this power and authority.[270]

117. For the foregoing reason, this part of the Appellant's third ground of appeal is dismissed.

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[265] *See* Appellant's Brief, para. 102.
[266] *Čelebići* Appeal Judgement, para. 717.
[267] Sentencing Judgement, para. 222(iii).
[268] Appellant's Brief, para. 103.
[269] *Ibid.*, referring to the arguments he put forward under his first ground of appeal (Appellant's Brief, paras 49-55). The Prosecution's arguments in response are addressed in the first ground of appeal. *See supra* para. 65.
[270] *See supra* paras 68-69 referring, *inter alia*, to paras 194 and 195 of the Sentencing Judgement.

5. The additional torching of houses

118. The Appellant contends that the Trial Chamber erred in considering as an aggravating circumstance the fact that he "ordered additional torching of houses immediately after the attack [on Glogova]",[271] as this is "a constitutive element" of the crime charged as described at paragraphs 36 and 37 of the Second Amended Indictment and as this is "subsumed in the overall gravity of [the] offence."[272] The Prosecution contends that while the paragraphs of the Second Amended Indictment referred to by the Appellant allege the destruction of property in the village of Glogova as one of the underlying acts of persecution, the Appellant was not charged for ordering but for committing this destruction.[273] The Prosecution argues that if a person is involved in the commission of a crime through more than one mode of liability, this can be considered as an aggravating factor.[274] In this context, it submits that the ordering of additional torching can be seen as "another increase in the personal involvement of the accused more than just a contribution to the joint criminal enterprise, and therefore it was not a necessary element of the offence."[275] Finally, the Prosecution adds that the Trial Chamber took this factor into account as an aggravating factor and not as part of the gravity of the crime.[276]

119. The paragraphs of the Second Amended Indictment referred to by the Appellant read as follows:

> During the 9 May 1992 attack on Glogova, the attacking forces systematically set fire to the mosque, and to Bosnian Muslim homes, warehouses, businesses, personal property, fields and haystacks.[277]
>
> Miroslav DERONJIĆ was present during the attack on Glogova while members of the attacking forces wantonly destroyed Bosnian Muslim homes, businesses, and personal property. A substantial part of Glogova was razed to the ground. Miroslav DERONJIĆ is individually criminally responsible under Article 7(1) for committing and ordering the destruction of Bosnian Muslim property described in paragraphs 36 and 37.[278]

120. The above mentioned paragraphs of the Second Amended Indictment describe the "Destruction of Property in the Village of Glogova" as part of the underlying acts of the crime of persecution for which the Appellant was convicted. It is clear from a plain reading of the above paragraphs that the destruction of Bosnian Muslim property, including setting fire to Bosnian Muslim homes, warehouses, businesses, personal property, fields and haystacks, was systematically

[271] Sentencing Judgement, para. 222(iv).
[272] Appellant's Brief, para. 104.
[273] Respondent's Brief, paras 4.79-4.81.
[274] *Ibid.,* para. 4.82.
[275] AT. 32.
[276] Respondent's Brief, paras 4.83; AT. 32.
[277] Second Amended Indictment, para. 36.
[278] *Ibid*., para. 37.

committed *during* the 9 May 1992 attack on Glogova,[279] whereas the "additional torching of houses" ordered by the Appellant occurred "immediately after the attack."[280] Therefore, the Appeals Chamber considers that the Trial Chamber was entitled to consider these additional events as an aggravating circumstance, and the Appellant's argument in that respect is dismissed.

121. With regard to the Appellant's allegation that the additional torching of houses is subsumed in the overall gravity of the offence, the Appeals Chamber notes that the Appellant does not make specific submissions in that respect, that is, he does not point to any specific finding in the Sentencing Judgement in which the Trial Chamber did so. Therefore, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber took into account the additional torching of the houses, twice, as part of the gravity of the offence and as an additional aggravating factor.

122. For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

6. The exacerbated vulnerability and defencelessness of the victims

123. The Trial Chamber concluded at paragraph 222(v) of the Sentencing Judgement that the following facts amounted to an aggravating circumstance:

> The Accused accepted a statement given by Milutin Milošević on his behalf that deceivingly suggested safety to the Muslim population of Glogova prior to the attack. This exacerbated the vulnerability and defencelessness of the victims, who had been disarmed well before the attack, had offered no resistance and were not informed about their fate.[281]

The Appellant alleges that the Trial Chamber erred in law as this cannot be considered in aggravation of a sentence, since an aggravating factor must be directly related to the commission of the offence charged and to the offender himself.[282] In the alternative, he alleges that the fact that the village of Glogova was completely disarmed "is subsumed in the overall gravity of the offence",[283] that he already pleaded guilty to it,[284] and that he confirmed this during his testimony before the Trial Chamber.[285] The Prosecution responds that the Trial Chamber did not err when considering the vulnerability and defencelessness of victims as an aggravating factor as it determined the special vulnerability of the victims mainly on the fact that, in addition to being disarmed before the attack,

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[279] *Ibid*., para. 36.
[280] Sentencing Judgement, para. 222(iv).
[281] *Ibid.*, para. 222(v).
[282] Appellant's Brief, paras 105 and 106, referring to *Kunarac et al.* Trial Judgement, para. 850.
[283] *Ibid.*, paras 97 and 107.
[284] *Ibid.*, para. 96 quoting para. 8(e) of the Second Amended Indictment which reads: "Miroslav Deronjić was aware on 8 May 1992 that he was ordering the attack on an unarmed civilian village."
[285] *Ibid*., quoting the following part of the Appellant's Testimony, T. 143: "one might say that in early May, Glogova had already been disarmed completely".

they had been promised safety.[286] According to the Prosecution, this factor does not constitute an element of the crime nor was it subsumed by the Trial Chamber in the gravity of the offence.[287] The Appeals Chamber will address the arguments of the parties with respect to these two issues in turn.

a. Appellant's first argument

124. In support of his first argument, the Apellant cites the *Kunarac et al.* Trial Judgement:

> Only those circumstances directly related to the commission of the offence charged *and* to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation.[288]

Although it is not clearly explained, the implication of the Appellant's argument is that the vulnerability of the victims can never be taken into account in aggravation because, while this factor relates to the nature of the offence, it is not "directly related […] to the offender himself".[289] The Appeals Chamber rejects this argument. The statement by the *Kunarac et al.* Trial Chamber that aggravating circumstances must relate "to the offender himself" is not to be taken as a rule that such circumstances must specifically pertain to the offender's personal characteristics. Rather, it simply reflects the general principle of individual responsibility that underlies criminal law: a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, individuals are not held responsible – either for the purposes of conviction or sentencing – for the unforeseeable acts of others involved in carrying out a plan. Holding an individual responsible for taking advantage of the vulnerability of his victims, on the other hand, falls well within this notion of individual responsibility. Here, not only was the Appellant aware of his victims' defencelessness and took advantage of it, but he exacerbated it through Milutin Milošević's statements making false promises of safety on his behalf, which he accepted.[290] There is no question that this factor "relates to the offender himself". The Appeals Chamber notes that it has often affirmed the use of aggravating factors related to victim characteristics such as age, and to the number of victims and the length of time over which a crime is committed,[291] all features of the crime of which an accused is aware or could be expected to foresee and for which it is fair to hold him responsible.

[286] Respondent's Brief, para. 4.86.
[287] *Ibid.*, paras 4.88-4.90; AT. 32-33.
[288] *Kunarac et al.* Trial Judgement, para. 850 (emphasis added).
[289] Appellant's Brief, para. 106.
[290] Sentencing Judgement, para. 209 referring to Appellant's Testimony, T.159.
[291] *See* for example *Kunarac et al.* Appeal Judgement, para. 356; *Kordić and Čerkez* Appeal Judgement, para. 1088; *Semanza* Appeal Judgement, para. 338.

125. Moreover, the fact that the statement that deceivingly suggested safety to the inhabitants of Glogova was not made by the Appellant himself but was made by Milutin Milošević on his behalf is irrelevant as he agreed with it and accepted it.[292] The Appeals Chamber therefore finds that the Trial Chamber could reasonably consider the situation in which the victims found themselves as an aggravating circumstance and the argument of the Appellant under the present part of his third ground of appeal is dismissed.

b. Appellant's second argument

126. The Appellant's second argument is that the Trial Chamber erred in law as this circumstance is already "subsumed in the overall gravity of the offence."[293] Nevertheless, he does not make any submission with regard to the issue of the gravity of the offence but rather refers to the finding of the Trial Chamber in the *Jokić* case that "[…] the vulnerability of the victims cannot be considered as an aggravating circumstance in the instant case as it has already been taken into account as part of the definition of the crimes."[294] The Appeals Chamber will thus determine whether the special vulnerability and defencelessness of the victims was impermissibly taken into account twice, as an element of the crime and as an aggravating circumstance.

127. While it is correct to say that the civilian status of the population against which the attack is directed is an element of crimes against humanity[295] and that therefore such status cannot be taken into account as an aggravating circumstance,[296] the Appeals Chamber notes that the issue before it is not whether the intrinsic vulnerability of civilians can be taken into account but rather whether there are additional elements amounting to particular circumstances showing that the victims were subjected to a special vulnerability.[297] In the present case, not only had the civilians been disarmed and denied any warning about their fate, but moreover had been deceived by a statement on the Appellant's behalf into believing they were safe. These facts are not inherent in the population's civilian status.

128. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber could reasonably come to the conclusion that it was not only their status as civilians which rendered the

[292] Sentencing Judgement, para. 209, referring to Appellant's Testimony, T. 159.
[293] Appellant's Brief, para. 107.
[294] *Ibid.*, quoting para. 65 of the *Jokić* Sentencing Judgement.
[295] *Blaškić* Appeal Judgement, para. 107: "The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity."
[296] *See Blaškić* Appeal Judgement, para. 693: "where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing." *See also Vasiljević* Appeal Judgement, paras 172-173.

victims especially vulnerable and accepts the finding of the Trial Chamber that the exacerbated vulnerability and defencelessness of the victims was an aggravating circumstance. As a result, this part of the Appellant's third ground of appeal is dismissed.

[297] *Mrda* Sentencing Judgement, para. 46 referring to *Banović* Sentencing Judgement, para. 50, and *Dragan Nikolić* Sentencing Judgement, para.184.

VI. FOURTH GROUND OF APPEAL: MITIGATING FACTORS

A. Preliminary issue

129. The Appeals Chamber notes with concern that the Appellant's Brief impermissibly goes beyond the scope of his Notice of Appeal. In his Notice of Appeal, he contends that "[t]he Trial Chamber erred in law and in fact and abused its discretion in concluding that the facts on character and behaviour can not be seen as mitigating factors" and refers to paragraphs 268 to 275 of the Sentencing Judgement.[298] In his Appellant's Brief, however, referring to paragraphs 135 and 224 to 276 of the Sentencing Judgement, the Appellant expands his fourth ground of appeal from one specific mitigating factor – that is his character and behaviour – to the entire section on mitigating circumstances of the Sentencing Judgement.[299] He additionally alleges, for example, that the Trial Chamber did not address his personal and family circumstances as a mitigating factor,[300] and submits that the Trial Chamber erred in relying only on deterrence and retribution, and not on rehabilitation, citing hereby paragraph 280 of the Sentencing Judgement.[301]

130. As discussed previously, if the Appellant wished to vary the grounds of appeal from those stated in his Notice of Appeal, he was obligated to make an appropriate motion pursuant to Rule 108 of the Rules.[302] However, under the circumstances of the case and having regard to the fact that the Prosecution addressed all the issues raised by the Appellant in its response, the Appeals Chamber decides to exercise its discretion and address on the merits the Appellant's arguments as advanced in his Appellant's Brief.

B. The truthfulness of the Appellant's submissions

131. The Appellant submits that the reference by the Trial Chamber at paragraph 135 of the Sentencing Judgement to the "negative side effects of the guilty plea" shows that it expressed concerns as to the truthfulness of his admissions.[303] In his view, such alleged concerns "did in fact strongly influence […] the decision of the Trial Chamber in respect of the sentence imposed."[304] The Prosecution responds that paragraph 135 of the Sentencing Judgement does not allude to the truthfulness of the Appellant's statements but "deals in general terms […] with the limitation of

[298] Notice of Appeal, para. 7.
[299] Appellant's Brief, para. 110: "The relevant portions of the Judgement where the Trial Chamber erred in law and in fact and abused its discretion in deciding on mitigating circumstances are paragraphs 135 and 224 through 276."
[300] *Ibid.*, paras 128-134.
[301] *Ibid.*, para. 116 and footnote 40.
[302] *See supra* para. 102.
[303] Appellant's Brief, para. 111.
[304] *Ibid.*

confessions in plea agreements".[305] It argues that the paragraph does not discuss any possible untruthfulness by the Appellant and that there is therefore no basis for the Appellant's contention that the Trial Chamber was influenced in this regard when rendering the sentence.[306]

132. The Appeals Chamber notes at the outset that it cannot be inferred from paragraph 135 of the Sentencing Judgement that the Trial Chamber challenged the truthfulness of the Appellant's statements. This paragraph is included in the *chapeau* of the section of the Sentencing Judgement addressing the law applicable to sentencing and contains no reference to the Appellant's case. The Appeals Chamber notes that the Appellant does not make any reference to the Sentencing Judgement in support of his argument that the Trial Chamber challenged his statements as untrue. As a result, the Appeals Chamber finds that the Appellant's argument is without merit.

133. With regard to the Appellant's further submission under this part of his fourth ground of appeal that he provided the Prosecution with significant information about his criminal behaviour,[307] the Appeals Chamber finds that this not only goes beyond the scope of his Notice of Appeal, but also does not support in any respect his allegation that the Trial Chamber challenged the truthfulness of his statements.

134. For the foregoing reason, the present part of the Appellant's fourth ground of appeal is dismissed.

C. Rehabilitation as a sentencing principle

135. The Appellant argues that in determining his sentence, the Trial Chamber only focused on deterrence and retribution and "avoided to award due prominence to the process of rehabilitation as one of [the] important factors in determining the sentence."[308] He refers to the Sentencing Judgement in the *Obrenović* case, in which the Trial Chamber held that "Dragan Obrenović's affirmative steps toward rehabilitation are a factor in mitigation of sentence",[309] and to Judge Mumba's Separate Opinion appended to the Sentencing Judgement in the present case.[310] The Prosecution responds that the Trial Chamber did in fact consider rehabilitation as one of the principles for sentencing by reference to the *Čelebići* Appeal Judgement and thereby fulfilled its obligation to consider such a factor in determining the sentence.[311] It argues that to give the principle of rehabilitation only a "tertiary importance" is consistent with the *Čelebići* Appeal

[305] Respondent's Brief, para. 4.96. *See also* AT. 35.
[306] *Ibid*.
[307] Appellant's Brief, para. 112.
[308] *Ibid.*, paras 116-117.
[309] *Obrenović* Sentencing Judgement, para. 146.
[310] Appellant's Brief, paras 114-115.

Judgement.[312] In addition, the Prosecution submits that the Trial Chamber admitted into evidence and considered a report from an expert in psychology on the Appellant's socialisation.[313]

136. The Appeals Chamber notes that in support of his allegation the Appellant refers to paragraph 280 of the Sentencing Judgement,[314] which states that in determining the sentence, the Trial Chamber took into account the gravity of the crimes, aggravating and mitigating circumstances, and the "aforementioned goals of sentencing".[315] These "aforementioned goals of sentencing" can be found in the section of the Sentencing Judgement in which the Trial Chamber discussed the principles and purposes of sentencing.[316] By reference to the *Čelebići* Appeal Judgement, the Trial Chamber correctly referred to deterrence and retribution as the main purposes of sentencing and correctly considered rehabilitation as a relevant factor that should not be given undue weight.[317] In the *Čelebići* Appeal Judgement, the Appeals Chamber addressed in detail, *inter alia,* the issue of the fundamental principles to be taken into consideration when imposing a sentence at the International Tribunal. The Appeals Chamber recalls its previous finding with respect to the role of rehabilitation as a purpose for sentencing within the context of the International Tribunal:

> The cases which come before the [International] Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is "serious violations of international humanitarian law". Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the [International] Tribunal. On the contrary, the Appeals Chamber (and Trial Chambers of both the [International] Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight. Given the findings which were made as to Mucić's culpability, the Appeals Chamber finds no error in the fact that the Trial Chamber does not specifically refer to rehabilitation in sentencing Mucić nor in its general statement cited above.[318]

137. The Appeals Chamber finds no cogent reasons to depart from its finding in the *Čelebići* Appeal Judgement.[319] The Trial Chamber in the instant case did consider rehabilitation as a

[311] Respondent's Brief, para. 4.99 referring to paragraph 143 of the Sentencing Judgement; AT. 34.
[312] AT. 34.
[313] AT. 36.
[314] Appellant's Brief, para 116, footnote 40.
[315] Sentencing Judgement, para. 280.
[316] *Ibid.*, paras 142-150.
[317] *Ibid.*, paras 142-143.
[318] *Čelebići* Appeal Judgement, para. 806.
[319] See *Aleksovski* Appeal Judgement, paras 108-109.

sentencing principle as well as the Defence's submissions in that respect.[320] The fact that it decided not to give undue weight to such a factor was within its discretion.

138. For the foregoing reasons, this part of the Appellant's fourth ground of appeal is dismissed.

D. The Appellant's character and behaviour

139. The Appellant submits that the Trial Chamber "erred and misdirected itself by not recognizing the facts regarding character and behaviour as mitigating."[321] He then refers to some facts that, in his view, show that his character and behaviour amounted to exceptional circumstances which should have been considered as mitigating.[322] The Prosecution argues that the Trial Chamber did consider evidence of the Appellant's good character, but rather concluded that, when balanced against facts that showed the Appellant in a negative light, such evidence could be seen neither as mitigating nor as aggravating.[323] The Prosecution concludes that the Appellant failed to show a discernible error of the Trial Chamber.[324]

1. The Trial Chamber's reference to events in Bratunac after 9 May 1992

140. The Appellant submits that the Trial Chamber referred to events that took place in Bratunac after 9 May 1992, the day of the attack, to come to the conclusion that his character and behaviour do not constitute mitigating factors.[325] In this respect he invokes paragraphs 40 to 46 of his Appellant's Brief,[326] in which he alleges that the Trial Chamber insinuates his criminal responsibility for additional crimes not covered by the Second Amended Indictment,[327] which in turn "obviously influenced the Trial Chamber's decision."[328]

141. The Appeals Chamber notes that the Trial Chamber indeed referred to events that took place after 9 May 1992 in its discussion on the character and behaviour of the Appellant.[329] As stated above in the discussion on the first ground of appeal,[330] the Trial Chamber correctly established the

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[320] Sentencing Judgement, para. 270: "The Defence submits that '[t]he overall behaviour of Mr. Deronjić since 1997 to this day, indicates that the rehabilitation process is well underway' and '[i]f additional conditions are provided ... this process will be speeded up ... bearing in mind the positive character features of the accused.' The Defence further asserts that the same standard as applied in the *Obrenović* case, i.e. 'affirmative steps toward rehabilitation are a factor in mitigation of sentence', should be applicable to Miroslav Deronjić, 'bearing in mind his genuine remorse expressed on numerous occasions during his contacts with OTP Investigators' " (footnotes omitted).
[321] Appellant's Brief, para. 125.
[322] *Ibid.*, paras 121-124.
[323] Respondent's Brief, para. 4.101 referring to Sentencing Judgement, para. 275. *See also* AT. 36.
[324] *Ibid.*, para. 4.104.
[325] Appellant's Brief, para. 120.
[326] *Ibid.*
[327] *Ibid.*, paras 43-44.
[328] *Ibid.*, para. 45.
[329] Sentencing Judgement, para. 272.
[330] *See supra* paras 58-62.

facts and the Appellant failed to demonstrate that the Trial Chamber inferred the Appellant's criminal responsibility for additional crimes not covered in the Second Amended Indictment, namely, for the events that occurred in Bratunac after 9 May 1992. With respect to the Appellant's present ground of appeal, the Appeals Chamber finds that the Trial Chamber did not err when it referred to the events which took place after the day of the attack on the village of Glogova. When assessing an accused's character and behaviour, a Trial Chamber is not limited to consider only facts which took place on the day the offence itself occurred. To correctly assess the character and behaviour of an accused as a mitigating circumstance, a Trial Chamber may take into account any facts established in this regard on a balance of probabilities. This part of the Appellant's fourth ground of appeal is therefore dismissed.

2. The "exceptional circumstances" the Trial Chamber should have taken into account

142. The Appellant relies upon the finding in the *Babić* Sentencing Judgement to the effect that in "exceptional circumstances" the prior good character of an accused, may be taken into account in mitigation of the sentence,[331] and asserts that there are facts in this case which "should be considered as circumstances which, having regard to the time and the overall situation when they occurred, rise to the level of being exceptional."[332] The facts he refers to are those considered by the Trial Chamber at paragraph 272 of the Sentencing Judgement, which reads in its relevant part:

> the Trial Chamber notes that, according to his own testimony, Miroslav Deronjić, on one hand, immediately took steps to prevent further violent criminal behaviour of the "volunteers" in Bratunac by issuing a decision at the Bratunac Crisis Staff on 13 May 1993, which ordered the expulsion of "volunteers" from Bratunac. On the other hand, the night prior to that decision, Miroslav Deronjić took part in the transfer of 400 civilians, who were detained in the hangar and were meant to be forcibly displaced out of Bratunac pursuant to the plan adopted at the Crisis Staff meeting on 8 May 1992.[333]

In other words, the Appellant does not contend that the Trial Chamber failed to take into account elements that it should have taken into account, but rather argues that the Trial Chamber should have qualified the elements before it as "exceptional".[334] The only new argument the Appellant puts forward is that "the very reason, for urgent evacuation of the people from [the] hangar and the expulsion of the volunteers, was to save the lives of the people incarcerated in the [h]angar, as no other means for the protection of these people in Bratunac [were] available to him at the time."[335]

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[331] *Babić* Sentencing Judgement, para. 91: "The Trial Chamber is of the view that the prior good character of a convicted person (understood against a common standard of behaviour) does not as such count in mitigation, although in exceptional circumstances, for which there is no evidence in this case, it may."
[332] Appellant's Brief, para. 121.
[333] Sentencing Judgement, para. 272.
[334] Appellant's Brief, para. 121.
[335] *Ibid.*, para. 122.

143. The Appeals Chamber notes that the Appellant does not refer to any evidence to support his assertion that "no other means for the protection of these people"[336] were available to him. He only refers to paragraphs 109 to 111 of the Sentencing Judgement,[337] which contain no evidence that could substantiate such an assertion. Indeed, paragraph 109 of the Sentencing Judgment states that: "[t]he day after a meeting in Pale, the Accused was informed that these people who were separated at the hangar were abused by the 'volunteers' and some local citizens."[338] Moreover, the Appeals Chamber considers that the Appellant has failed to show that the Trial Chamber had evidence before it which supports his assertion that the transfer was done in order to "save the lives of the people incarcerated in the hangar".[339] In fact, the Trial Chamber noted at paragraph 111 of the Sentencing Judgement that "[t]he fate of these people remains unclear"[340] and later ascertained that this transfer was not a demonstration of the good character of the Appellant, but rather a part of the plan to expel Bosnian Muslims from the area.[341] The Appellant himself acknowledges that the transfer was done in furtherance of the plan.[342] Accordingly, the Appeals Chamber finds that the Trial Chamber was entitled as it did to balance the fact that the Appellant expelled the volunteers, against the fact that he transferred the people in the hangar pursuant to the plan to forcibly displace them, and could reasonably conclude that the facts concerning the Appellant's character and behaviour "can be seen neither as mitigation [*sic*] nor as aggravating factors".[343]

144. For the foregoing reasons, this part of the Appellant's fourth ground of appeal is dismissed.

3. Additional Arguments in the Brief in Reply

145. The Appeals Chamber lastly turns to the additional argument put forward by the Appellant that "all four grounds of appeal should be the subject of review and consideration of the Appeals Chamber in their totality, as they are in some respects closely related".[344] Instead of replying to the Prosecution's arguments in response addressing his character and behaviour, the Appellant alleges errors on the part of the Trial Chamber with regard to his *mens rea*. The Appeals Chamber has already addressed the Appellant's arguments individually and will, under the present ground of

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[336] *Ibid.*
[337] *Ibid.*, footnote 42.
[338] Sentencing Judgement, para. 109 (footnotes omitted).
[339] Appellant's Brief, para. 122 referring to Sentencing Judgement, paras 109-111.
[340] Sentencing Judgement, para. 110.
[341] *Ibid.*, para. 272: "[i]ndeed, the Accused pleaded guilty to the fact that at the Crisis Staff meeting on 8 May 1992, chaired by him, the Accused stated himself that 'if everything went well with the Glogova operation, the operation to permanently remove Bosnian Muslims would continue in the following days in the town of Bratunac and the communities of Voljavica and Suha', and that this decision was adopted."
[342] Appellant's Brief, para. 122: "To avoid any misunderstanding, the Appellant does not oppose that the transfer of these people has been part of the plan."
[343] Sentencing Judgement, para. 275.
[344] Brief in Reply, para. 45.

appeal, neither discuss his grounds of appeal "in their totality", nor the arguments raised by the Appellant with regard to his *mens rea*, as they were raised for the first time in the Appellant's Brief in Reply and do not constitute replies to the Prosecution's Respondent's Brief.[345]

146. In light of the foregoing, this part of the Appellant's fourth ground of appeal is dismissed.

E. The personal and family circumstances of the Appellant

147. The Appellant asserts that the Trial Chamber did not address "at all the personal and family circumstances of the Appellant as a mitigating [circumstance]" despite the fact that he "offered substantial reasoning and presented material evidence […] underlining that [his] personal and family circumstances are truly exceptional".[346] He relies upon the statement contained in his Sentencing Brief to the effect that "[he] lost his wife during the war, and that he has four children, three of whom are minors."[347] He then draws the attention of the Appeals Chamber to the *Babić* Sentencing Judgement, in which the Trial Chamber took into account in mitigation, within its assessment of the family and personal situation of the accused, the fact that "Babić incurred substantial security risks for himself and his loved ones",[348] and asserts that he also "brought himself and his family in a very difficult and extremely risky situation in respect to safety issues".[349] The Prosecution responds that the Appellant's family circumstances were "specifically described in the [Sentencing] Judgement"[350] and that the Trial Chamber noted that the family and social situation of an accused is a recognized mitigating circumstance.[351] Further, the Prosecution argues that the Trial Chamber did consider his family situation and gave him credit for it when considering the value of his co-operation.[352]

148. The Appeals Chamber notes that in section IX. B. 6 of the Sentencing Judgement, concerning the Appellant's character, behaviour and possibility of rehabilitation, under the heading titled "Submissions of the Parties", the Trial Chamber indeed referred expressly to the Appellant's submission that "[he] is a family man, being a father of four children, three of whom are minors".[353] Even though the Trial Chamber did not address the Appellant's family situation in the part titled

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[345] *See* Practice Direction on Formal Requirement on Appeals from Judgement (IT/201), 7 March 2002, Article 6, which states that a Brief in Reply is "limited to arguments in reply to the Respondent's Brief". *See also Prosecutor v Stanislav Galić,* Case No. IT-98-29-A, Decision on Prosecutor's motion to strike new argument alleging errors by Trial Chamber raised for the first time in Appellant's Reply Brief, 28 January 2005.
[346] Appellant's Brief, para. 128.
[347] *Ibid.*, para. 129 referring to *Prosecutor v. Miroslav Deronjić*, Case No.: IT-02-61-S, Miroslav Deronjić's Sentencing Brief, 18 December 2003 ("Sentencing Brief"), paras 79-81.
[348] *Babić* Sentencing Judgement, para. 88.
[349] Appellant's Brief, para. 131.
[350] Respondent's Brief, para. 4.106 referring to Sentencing Judgement, para. 268.
[351] *Ibid.* referring to Sentencing Judgement, para. 156. *See also* AT. 35.
[352] AT. 36-37.

"Discussion" within the same section of the Sentencing Judgement, the Appeals Chamber recalls that the express reference to the written submissions is *prima facie* evidence that they were taken into account.[354] The Appellant therefore failed to demonstrate that these factors were in fact not taken into account by the Trial Chamber.

149. With regard to the Appellant's further submission regarding the consequences of his plea of guilt for him and his family, and more specifically the fact that his wife and children are in a witness protection program, the Appeals Chamber observes that although this fact was submitted by the Appellant in his Sentencing Brief,[355] the Trial Chamber did not expressly make reference to it when recounting the parties' submissions regarding the Appellant's character and behaviour.[356] However, footnote 516 to paragraph 268 of the Sentencing Judgement makes reference to the Sentencing Hearing at page 237, the last lines of which read: "Mr. Deronjić, therefore has four children, three of whom are minors. His wife and children are in a witness protection".[357] As correctly pointed out by the Prosecution,[358] the Trial Chamber noted, in the context of the Appellant's substantial co-operation with the International Tribunal, that the Appellant had provided information "under substantial risk for his own safety and the safety of his family."[359] That the Trial Chamber in the *Babić* case made a specific finding – within the context of its consideration of the family circumstances of the accused as a mitigating circumstance – that "Babić incurred substantial security risks for himself and his loved ones",[360] is of limited assistance to the Appellant's case since it was within the Trial Chamber's discretion in the present case to take the Appellant's family situation into account within the context of his cooperation with the International Tribunal.[361] What matters is, that the Trial Chamber fulfilled, as it did, its obligation pursuant to Rule 101(B)(ii) of the Rules to take into account any mitigating circumstances.[362] Further, the Appeals Chamber stresses that the Trial Chamber gave "particular importance" to both the Appellant's guilty plea and his substantial co-operation.[363] The Appellant has failed to show that

[353] Sentencing Judgement, para. 268.
[354] *Kupreškić et al.* Appeal Judgement, para. 430.
[355] Sentencing Brief, para. 81.
[356] *See* Sentencing Judgement, para. 268, footnote 516, referring only to paragraphs 78 and 80 of the Sentencing Brief, not to paragraph 81 of the Sentencing Brief.
[357] Sentencing Hearing, T.237 lines 24-25. The first line on page 238 continues: "programme as a direct consequence of his cooperation and guilty plea."
[358] Respondent's Brief, para. 4.107.
[359] Sentencing Judgement, para. 243 referring to Sentencing Brief, para. 68.
[360] *Babić* Sentencing Judgement, para. 88.
[361] "In conclusion, taking all above mentioned factors into account, the Trial Chamber accepts the submissions of both Parties that the co-operation by the Accused was substantial and therefore regards it as a mitigating factor in determining the Accused's sentence". Sentencing Judgement, para. 245.
[362] *Musema* Appeal Judgement, para. 395.
[363] Sentencing Judgement, para. 276.

the Trial Chamber committed an error which occasioned a miscarriage of justice in considering the mitigating factors.[364]

150. The Appeals Chamber turns now to the Appellant's last submission to the effect that, "his personal and his family's exile from [their] place of birth" and the "physical discontinuity with the rest of his family"[365] constitute another punishment that he will suffer and which he requests the Appeals Chamber to consider.[366] The Appeals Chamber notes that this issue was not raised at the sentencing stage and that there is therefore no evidence on the basis of which the Appeals Chamber can consider this submission. The Trial Chamber therefore committed no error by not considering this fact in its assessment of the mitigating factors. In addition, the Appeals Chamber emphasises that an appellant cannot expect the Appeals Chamber to consider on appeal evidence of mitigating circumstances which was available but not introduced in the first instance.[367]

151. For the foregoing reasons**,** this part of the Appellant's fourth ground of appeal is dismissed.

[364] *Serushago* Sentencing Appeal Judgement, para. 22.
[365] Appellant's Brief, para. 134.
[366] *Ibid.*
[367] "As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised." *Kvočka et al.* Appeal Judgement, para. 674. *See also Kupreškić et al.* Appeal Judgement, para. 414.

VII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the oral arguments they presented at the hearing of 17 June 2005;

SITTING in open session;

DISMISSES unanimously all the grounds of appeal filed by the Appellant;

AFFIRMS unanimously the sentence of 10 years' imprisonment as imposed by the Trial Chamber;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

Done in English and French, the English text being authoritative.

_____	_____	_____
Judge Theodor Meron Presiding	Judge Fausto Pocar	Judge Mohamed Shahabuddeen
_____	_____	
Judge Mehmet Güney	Judge Inés Mónica Weinberg de Roca	

Dated this twentieth day of July 2005

At The Hague,
The Netherlands.

[Seal of the International Tribunal]

VIII. GLOSSARY OF TERMS

A. List of Cited Court Decisions

1. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004 ("*Babić* Sentencing Judgement")

BANOVIĆ
Prosecutor v. Predrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Decision on Motion for Extension of Time, 4 October 2004, p. 2.

"ČELEBIĆI" (A)
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

"ČELEBIĆI" (B)
Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgement on Sentence Appeal")

ČEŠIĆ
Prosecutor v. Ranko Češić, Case No. IT-95-10/1, Sentencing Judgement, 11 March 2004 ("*Češić* Sentencing Judgement")

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement")

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement")

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement")

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

MRĐA
Prosecutor v. Darko Mrđa, Case No. IT-02-59-S, Sentencing Judgement, 31 March 2004 ("*Mrđa* Sentencing Judgement")

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-02-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement")

Prosecutor v. Dragan Nikolić, Case No. IT-94-02-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

OBRENOVIĆ
Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement")

PLAVŠIĆ
Prosecutor v. Biljana Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003 ("*Plavšić* Sentencing Judgement")

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

D. TADIĆ
Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals")

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

KAMBANDA
Jean Kambanda v Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement")

MUSEMA
Alfred Musema v. Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

SEMANZA
Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

SERUSHAGO
Omar Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement [Appeal against Sentence], 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

B. List of Abbreviations

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

Appeal Hearing	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appeal Hearing, 17 June 2005
Appellant's Brief	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, 22 July 2004
Appellant's Testimony	Testimony given by the Appellant during the Sentencing Hearing on 27 January 2004
AT.	Transcript page from the appeal hearing in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
Brief in Reply	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Appellant's Brief in Reply, 15 September 2004
Continued Sentencing Hearing	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Hearing, 05 March 2004
Defence	Counsel for the Appellant
Factual Basis	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Factual Basis, signed on 29 September 2003, filed on 30 September 2003
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Notice of Appeal	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Miroslav Deronjić's Notice of Appeal, 28 April 2004
Plea Agreement	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Plea Agreement, signed on 29 September 2003, filed on 30 September 2003

Plea Agreement Package	The Second Amended Indictment, the Plea Agreement and the Factual Basis of the present case
Plea Hearing	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Plea Hearing, 30 September 2003
Prosecution	Office of the Prosecutor
Respondent's Brief	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Prosecution's Response Brief, filed confidentially on 31 August 2004, made public on 30 May 2005
Rules	Rules of Procedure and Evidence of the International Tribunal
Second Amended Indictment	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Second Amended Indictment, signed on 29 September 2003, filed on 30 September 2003
Sentencing Brief	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Miroslav Deronjić's Sentencing Brief, 18 December 2003
Sentencing Hearing	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Hearing, 27 and 28 January 2004
Sentencing Judgement	*Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.