

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-05-88-T**

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle

**Registrar:** Mr John Hocking

**Date Filed:** 23 April 2010

**THE PROSECUTOR  
v.  
VUJADIN POPOVIC  
LJUBISA BEARA  
DRAGO NIKOLIC  
LJUBOMIR BOROVCANIN  
RADIVOJE MILETIC  
MILAN GVERO  
VINKO PANDUREVIC**

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**LJUBOMIR BOROVCANIN'S PUBLIC AND CORRECTED  
FINAL TRIAL BRIEF**

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**LJUBOMIR BOROVCANIN'S PUBLIC AND CORRECTED  
FINAL TRIAL BRIEF**

1. The Borovcanin Defence herewith files, as Annex A, a public and corrected version of its Final Trial Brief as filed on 30 July 2009. Redactions have been made to conceal the identity of protected witnesses, and non-material corrections have been made to the text.

Word count: 53.

Respectfully submitted.

This 23<sup>rd</sup> day of April 2010

A handwritten signature in black ink, appearing to read "Chris Gosnell and Tatjana Cmeric", written over a horizontal line.

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# **Ljubomir Borovcanin's Final Trial Brief**

30 July 2009

Public and Corrected Version filed 23 April 2010

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## I Introduction

1. The Prosecution got it wrong charging Ljubomir Borovcanin. The Indictment paints a picture of a man who coldly passed by a mass execution in which his own men were engaged in a frenzy of killing, and who presided over a brutal expulsion of civilians from Potocari.

2. The evidence tells a different story. Two distinct killing events happened at the Kravica Warehouse on 13 July. The first, at around 5.30 pm, was a sudden and unexpected event, probably precipitated by Muslim prisoners trying to seize the weapons of Serb soldiers. Shootings in reaction to this event lasted between 15 and 30 minutes, then stopped. By the time Borovcanin passed the Warehouse in his car, the escape attempt had been suppressed and the prisoners were back under control. This can be inferred from the Petrovic video, which shows that the doors on the right-side of the Warehouse, just behind the pile of bodies, are visibly closed, and soldiers are walking casually in various directions away from the door.

3. The massacre at Kravica Warehouse happened three hours later, around nightfall. This was the testimony of Muslim survivor PW-111, whose testimony is circumstantially corroborated by Mevludin Oric and by other evidence. The Prosecution failed to adduce any credible evidence connecting Borovcanin or his subordinates to this event. On the contrary, the Prosecution even failed to present credible evidence that Borovcanin's men were involved in the *first* shooting event. Two of Borovcanin's men were present at the beginning of that event, but one was dead and the other on his way to hospital by the time Borovcanin passed the scene.

4. The presence of other members of the Special Police at the Warehouse cannot be inferred merely because they were spread at various locations along the road. Bratunac Brigade soldiers were also in the area in numbers and, indeed, credible evidence adduced in this case shows that many of them were present inside the Warehouse compound during the killings. One witness specifically affirmed that no special police, apart from the two mentioned above, were inside the compound at the time of the first shooting event. Muslim survivor PW-111 said that the men guarding him at the Warehouse were not the same as those who had been guarding him earlier in the day at Sandici Meadow.

5. The Prosecution relies exclusively on circumstantial and hearsay evidence to support its allegations that Borovcanin's men were present at the Warehouse. The circumstantial evidence falls woefully short of being convincing beyond a reasonable doubt, in light of the presence of other units in the area at the time. The presence of two Special Police members does not suffice to show that the remainder of the unit was there, in light of the indications that they were not present. The disturbing aspect of the Prosecution's strategy in this case is that it deliberately chose not to call available eyewitnesses who could have identified the Serb units present that day. The hearsay evidence is weak, based on the manifestly erroneous inference amongst certain people in Bratunac that the unit which committed the massacre later that night must have been the same unit from which the soldier had been killed there earlier that day.

6. The allegations concerning forcible transfer are specious. Borovcanin was not present there supervising the evacuation process: he left on the 12<sup>th</sup> before the evacuations started, returning on the 13<sup>th</sup> only at the very end of the process. He did allow, having been so ordered by Mladic, his men to be placed under the command and control of VRS officers who were supervising and directing the evacuation process. In the circumstances that presented themselves to Borovcanin on the morning of 12 July – who had only arrived in the area the day before and had had no previous involvement in relations with the Srebrenica enclave – this was a lawful and reasonable course of action.

7. This brief is divided into nine sections, organized around the two primary allegations in the indictment against Borovcanin, namely, that he was part of two joint criminal enterprises – one to commit mass murder, the other forcible transfer. Of particular importance are sections V(c), (d) and (e), which discuss, respectively, the evidence of (i) *what* happened at Kravica Warehouse; (ii) *who* was involved; and (iii) the relationship of Borovcanin to those events in respect of each mode of criminal liability alleged against him. Sections IV (b), (c) and (d) address: (i) the motivation that led Muslim civilians to wish to flee the Srebrenica enclave by the afternoon of 11 July; (ii) the lawfulness of Borovcanin's actions in allowing his men to participate in searching the terrain at the northern end of the Srebrenica enclave on the morning of 12 July; and (iii) the lawfulness and reasonableness of allowing his men to assist with an evacuation.

## II Prologue: Operations Against the Srebrenica Enclave and Borovcanin's Arrival

8. Borovcanin had no involvement in the conception or planning of operations against the Srebrenica enclave in 1995. He left his position as *komandir* in the Bratunac police station in February 1994, taking up duties as the Deputy Commander of the Special Police Brigade, based in Bijeljina. He was seriously wounded in November 1994, only returning to service three to four months later, serving on the Majevisa and Sarajevo fronts through the first half of 1995. Borovcanin was in Trnovo during the first ten days of July, more than 200 kilometres by road from Srebrenica.

9. Unbeknownst to him, planning was underway at the highest levels to exert additional pressure on the Srebrenica enclave. Borovcanin was never informed of the existence of Directives 7 and 7.1, nor was he privy to any of the Drina Corps planning documents in the lead-up to launching Krivaja-95.<sup>1</sup> Operations commenced against the Srebrenica enclave on the morning of 6 July 1995, apparently with the immediate intention of reducing the size of the Srebrenica enclave and cutting off its supply routes with Zepa.<sup>2</sup> Local MUP units appear to have been "patrolling" in support of the operation and then, on 10 July, the Drina Corps requested that the VRS Main Staff "send us reinforcements up to the strength of one battalion."<sup>3</sup> That same day, Order 64/95 was issued, designating Borovcanin as the commander of specific MUP units to assist in crushing "the enemy offensive being carried out from the safe area of Srebrenica," and requiring him to assemble his units by noon the next day in Bratunac.

10. Borovcanin left Trnovo on 10 July and went to Jahorina where he met with the commander of the Special Police Brigade, Goran Saric.<sup>4</sup> Borovcanin arrived around noon the

<sup>1</sup> P5 (Directive 7, 17 March 1995); 5D361 (Directive 7/1, 31 March 1995); P107/4D377/1D382/4D378 (Drina Corps Order for Active Combat Operations "Krivaja-95", 2 July 1995).

<sup>2</sup> Butler 19777:3-7.

<sup>3</sup> 4D336 (Drina Corps Regular Combat Report, 10 July), p. 1.

<sup>4</sup> P2852 (Borovcanin OTP Interview), p. 26. Borovcanin did not, however, visit the MUP training facility at Mount Jahorina on this occasion. PW-160 testified that Borovcanin "came to Jahorina" without specifying that they met at the training facility, rather than at the headquarters of the Jahorina Special Police Detachment some kilometres away in Jahorina town. PW-160 8573:9-13. PW-100 testified, however, that the senior MUP policeman whom he saw at the training centre on 10 July "was introduced to us as the highest-ranking officer" of MUP forces (*i.e.*,

next day in Bratunac and found that none of his units had yet arrived.<sup>5</sup> He travelled from Bratunac to the Pribicevac IKM, seeking orders from the person expressly named in Order 64/95 as the VRS officer to whom he should report: General Krstic. He instead found himself speaking to General Mladic by military field telephone, who ordered him to take his units and head in the direction of Milacevici.<sup>6</sup> Borovcanin arrived back in Bratunac around 4 p.m. to again find that his units had not arrived in sufficient number or quality to be deployed to the field.<sup>7</sup> Borovcanin ultimately did not deploy any of his units that evening, sending them to where they were to be billeted for the night, mainly in Bjelovac.

11. At about the same time that Borovcanin arrived back in Bratunac, between 4 p.m. and 5 p.m., General Mladic was walking down the main street of Srebrenica Town, VRS forces having entered the town from the south. The Muslim population had already fled, with most civilians crowding in and around the UNPROFOR compound in Potocari, and most military-aged men heading into the forests preparing for the break-through to Tuzla. Borovcanin's only concrete action that evening of 11 July, after being chastised by General Mladic in Bratunac at around 7 p.m. for having failed to deploy his units, was to go to Zuti Most to reconnoitre the terrain in anticipation of deploying his units the next day.<sup>8</sup>

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Goran Saric). PW-100 14869:15-16. The matter is of relatively minor importance, but the best view of the evidence is that Borovcanin met Saric in Jahorina, and that Saric is the "highest-ranking officer" whom PW-100 sees at the training facility that day. Even though ranks were not introduced in the MUP until later, this description corresponds with Saric's position.

<sup>5</sup> P2852 (Borovcanin OTP Interview), p. 26.

<sup>6</sup> P2852 (Borovcanin OTP Interview), p. 35.

<sup>7</sup> P2852 (Borovcanin OTP Interview), pp. 44-45.

<sup>8</sup> P2852 (Borovcanin OTP Interview), pp. 45-46.

### III The Legislative Framework of the RS Armed Forces, Order 64/95 and the Consequences of Mr Borovcanin's Resubordination to the VRS in July 1995

#### (i) Legislative framework

12. The structure and organization of the Republika Srpska Armed Forces as it existed in July 1995 are prescribed in a variety of statutory instruments defining, *inter alia*, principles of command and control, and command relationships between their component parts.<sup>9</sup> Further elaboration on command relationships in the Republika Srpska Army is provided in the Decision on Establishment of the Supreme Command of the Republika Srpska Army.<sup>10</sup>

13. The modalities for engaging MUP forces in combat activities in July 1995 were governed by an interlocking framework of legislation, discussed extensively in the Ristivojevic and Bajagic expert reports, to which the Chamber is referred if in need of fuller explanation.<sup>11</sup> Of primary

<sup>9</sup> The provisions of main importance are: the Constitution of the Serb Republic of Bosnia-Herzegovina, 16 March 1992, Chapter VII – National Defence (4D168) and amendments thereto (4D180, 4D182, 4D194); the Law on National Defence, 23 March 1992 (4D171) and amendments thereto (4D177 and 4D181); the Law on Defence, 1 June 1992 (4D181); the Law on Implementation of Law on Defence During Imminent Threat of War or State of War, 29 November 1994 (4D413); Decision on Establishing the Army of the Serb Republic of Bosnia-Herzegovina, 12 May 1992 (4D526/5D754); Law on the Army, 1 June 1992 (4D372) and amendments thereto 4D186, 4D205, 4D413, 4D114; Law on Implementation of the Law on Internal Affairs During Immediate Threat of War or State of War, 28 November 1994 (4D413); Interim Provisions on Service in the Army of Republika Srpska, 18 August 1992 (7DP417); and the Decision on Establishment of the Supreme Command of the Republika Srpska Army (4D143/5D755), 30 November 1992. Article 1 creates the institution of the Supreme Command for synchronization, coordination and a more efficient system of commanding the Republika Srpska Army. The general structure of the VRS is to be found in 4DP2508, which identifies the number of VPs and locations. This list of VRS units, organized by Corps, provides information on base locations of various units. Contextually relevant to the structure of the VRS and chain of command in July 1995. Should this type of commentary (found in many footnotes throughout) be removed?

<sup>10</sup> [4D143/5D755 (Decision on Establishing the Supreme Command of Republika Srpska, 30 November 1992). According to Article 1 of the Decision, Supreme Command is established for synchronization, coordination and a more efficient system of commanding the Republika Srpska Army. For the VRS structure, *see* 4DP2508 (List of VRS Corps, units and peacetime VP, providing number of VPs and locations. This list of VRS units, organized by Corps, provides information on base locations of various units.) This repeats what is stated in footnote 9. Contextually relevant to discussions concerning the structure of the VRS and its chain of command as it existed in July 1995. Also shows respective VP numbers – important to see who recipients of certain documents were during the relevant time period – Drina Corps units at p. 8)

<sup>11</sup> 4D503 (Ristivojevic Expert Report); 4D499 (Bajagic Expert Report). The provisions govern the establishment of both the VRS and the MUP, both of which deemed to be the constituent components of the "RS Armed Forces." The provisions of main importance are: the Constitution of the Serb Republic of Bosnia-Herzegovina, 16 March 1992, Chapter VII – National Defence (4D168) and amendments thereto (4D180, 4D182, 4D194); the Law on

importance amongst these was the Law on Internal Affairs During an Imminent Threat of War or State of War (“1/94 Law on the Interior”), which directly addressed the conditions for engaging police units in combat, and the chain of command while so engaged.<sup>12</sup> Article 13 prescribes the modalities for engagement:

Police units shall participate in combat operations pursuant to an order issued by the commander-in-chief of the Armed Forces and the Minister of the Interior. The Minister of the Interior shall control police units through the Ministry of Police Forces Command Staff.

Article 14 prescribes the consequences for the duration of that engagement:

Police units assigned to combat operations by an order of the commander-in-chief of the Armed Forces shall be resubordinated to the commander of the unit in whose zone of responsibility they are performing combat tasks.<sup>13</sup>

14. . As a practical matter, requests to the commander-in-chief of the Armed Forces (i.e. the President)<sup>14</sup> were to be channeled through the VRS Main Staff, which had direct institutional

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National Defence, 23 March 1992 (4D171) and amendments thereto (4D177 and 4D181); the Law on Defence, 1 June 1992 (4D181); the Law on Implementation of Law on Defence During Imminent Threat of War or State of War, 29 November 1994 (4D413); Decision on establishing the Army of the Serb Republic of Bosnia-Herzegovina, 12 May 1992 (4D526/5D754); Law on the Army, 1 June 1992 (4D372) and amendments thereto 4D186, 4D205, 4D413, 4D114; 4D413 (Law on Implementation of the Law on Internal Affairs During Immediate Threat of War or State of War, Official Gazette No. 1/94, 29 November 1994); Interim Provisions on Service in the Army of Republika Srpska, 18 August 1992 (7DP417); and the Decision on Establishment of the Supreme Command of the Republika Srpska Army (4D143/5D755), 30 November 1992. Article 1 creates the institution of the Supreme Command for synchronization, coordination and a more efficient system of commanding the Republika Srpska Army. The general structure of the VRS is to be found in 4DP2508, which identifies the number of VPs and locations. This list of VRS units, organized by Corps, provides information on base locations of various units. Contextually relevant to the structure of the VRS and chain of command in July 1995.

<sup>12</sup> An imminent threat of war had been declared throughout the Republika Srpska in April 1992, thus satisfying the condition for the application of the law: 4D527 (RS Presidency Decision Declaring an Imminent Threat of War, 15 April 1992). A further Presidential order for full combat readiness and further mobilization and reinforcement of units was issued in June 1995. (4DP1/4DP726/5D1341/5D1342, 16 June 1995) to which Prosecution Richard Butler refers as his basis for believing that an imminent threat of war was in effect in July 1995: 19601:24-19602:9 (“Q. And in the period of July 1995, had an imminent state of war been declared? A. Yes, sir. In fact, an imminent state – an imminent threat of state of war was declared back in June of 1995”).

<sup>13</sup> 4DP725/P422, Articles 13, 14; Ristivojevic B 27897:4-8, 27987:1-24; P684 (Butler Expert Report), pp. 30-31; PW-160 8667:14-8668:14.

<sup>14</sup> 4D372 (Law on the Army), Art. 174, para. 1.

channels to the President through the Supreme Command.<sup>15</sup> A typical example of this mechanism in operation from start to finish was the engagement of MUP units in the area of Konjevic Polje starting in March 1995 and continuing through at least July. The VRS Main Staff sent a request to the President<sup>16</sup> which resulted in a Presidential Order to the Minister of the Interior to station MUP units to take control and maintain security in that area.<sup>17</sup> The Minister of the Interior apparently issued such an order, reporting back to the President that the 2nd Zvornik PJP Company had been assigned to Konjevic Polje.<sup>18</sup> MUP units were still in Konjevic Polje on "mission" pursuant to this order in July 1995.<sup>19</sup> Other examples of this procedure being followed abound, although in many cases the order from the President to the Minister of the Interior would be given orally, and the order from the Minister of the Interior to the subordinated units would be given in writing.<sup>20</sup>

<sup>15</sup> 4D143/5D755 (Decision on Establishing the Supreme Command of Republika Srpska, 30 November 1992). This body consisted of the political leadership of the Republic, including the President, the President of the National Assembly, the Prime Minister, the Minister of Defence and the Minister of the Interior. The Commander of the Main Staff and his assistants were to report to and attend meetings of the Supreme Command. According to Article 1 of the Decision, the Supreme Command was established for synchronization, coordination and a more efficient system of commanding the Republika Srpska Army. The VRS and MUP forces are defined as the constituent components of the "RS Armed Forces." 4DP725/P422 (1/94 Law on the Interior), Article 2; P684 (Butler VRS Brigade Command Responsibility Report), p. 30; Butler 19601:20-23, 19658:18-19659:8; 4D92 (diagram showing the structure of the RS Armed Forces); P2862 (Borovcanin sketch of chains of VRS and MUP chains of command); 4D461 (diagram - line of control/direction and command in the RS Armed Forces), discussed by Bajagic M at 26724:25-26727:2.

<sup>16</sup> 4DP31/P898 (VRS Main Staff (Intelligence and Security Sector), 19 March 1995). Bajagic conforms this at 26766:11-13 ("Obviously, it is proposed to use MUP units and it goes from the Main Staff to the president of the Republic, and it defines the proposed tasks for the MUP units.")

<sup>17</sup> 4DP6/P899 (Republika Srpska Presidential Order, 21 March 1995).

<sup>18</sup> 4DP7/P900 (Republika Srpska Ministry of the Interior Information, 23 March 1995).

<sup>19</sup> 4D314 (Zvornik CJB Order, 3 July 1995) ("Order... the 6<sup>th</sup> Company and Support Platoon of the PJP Unit of this centre on 4 July 1995 [to] relieve the 5<sup>th</sup> Company which is on a mission in Konjevic Polje"); P1102 (Intercept between X and Major Obrenovic, 12 July 1995, 0740 hours) (indicating that the police forces should receive orders through the commander of the engineering battalion (referring to the 5<sup>th</sup> Engineering Battalion); the Prosecution asserts that this exchange demonstrates that these police forces were resubordinated to the Army and under its overall command).

<sup>20</sup> See, e.g., 5D1238 (Drina Corps letter, signed Krstic, 20 May 1995) (seeking authorization from RS MUP for MUP units to close off the Srebrenica and Zepa enclaves; 5D1320 (RS Ministry of Interior letter, 11 June 1995) (showing that the President could issue order for resubordination orally, that this is directed to the MUP Police Forces Staff, and that the MUP forces will be engaged as requested by the B-de Commander); 4D463 (RS MUP Cabinet of the Minister - Dispatch by Deputy Minister, 17 June 1995) (VRS requesting that PJP forces be subordinated to it for the purposes of a specific operation, and the Deputy Minister's approval of such engagement which is to be regulated in cooperation with the Police Forces Staff); 4D397 (RS MUP Police Forces Staff at Pale - Order by Staff Commander,

15. The VRS sometimes skirted the channels prescribed by Articles 13 and 14 of the 1/94 Law on the Interior by making informal requests for the engagement of MUP forces directly to municipal police stations (SJBs) or regional police centres (CJBs).<sup>21</sup> The President reacted to this practice by issuing an order on 22 April 1995 insisting that VRS requests for subordination of MUP forces comply with the formalities prescribed by the 1/94 Law on the Interior and that they be articulated with greater precision,<sup>22</sup> reflecting that informal or vague requests had been one of a number of sources of discord between the two organs.<sup>23</sup> General Milovanovic, Chief of Staff of the Main Staff at the time, circulated this presidential order in its entirety to the Corps commands on 23 April 1995.<sup>24</sup> MUP units could be deployed in combat in case of emergency notwithstanding the absence of formal compliance with the 1/94 Law on the Interior, although the issuance of the order evidently reflects that such cases were to be exceptional.<sup>25</sup>

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24 June 1995) (PJP forces deployed in combat through an order issued by Tomislav Kovac in his capacity as Staff Commander of the MUP police forces command staff); 4D62 (Order by the Bijeljina CJB, 14 July 1995) (Police Forces Staff initiates the process of deployment by sending an order to the CJB, which then issues an order dispatching the relevant unit to the field).

<sup>21</sup> 4D356 (Banja Luka CJB, Dispatch, 14 August 1995) (reporting that a VRS unit had apparently made a request directly to a police station for the mobilization of PJP forces; this memo from the relevant CJB reports to the Minister that the request was refused, and the VRS unit was told to channel its request properly through the Minister and the Police Forces Staff.)

<sup>22</sup> P8 (Presidential Order, 22 April 1995); 4D503 (Ristivojevic Expert Report), p. 8; Ristivojevic B 27915:8-27916:1; P684 (Butler VRS Brigade Command Responsibility Report), p. 31.

<sup>23</sup> Butler 20286:1-16 ("I believe – and, again, if it's not in my report, it's because the information wasn't available at the time, but I talked about it as an exhibit certainly in the Blagojevic case. I don't know if we've discussed it in this case - the fact that the relationship between the army and the MUP was acrimonious, because soldiers would frequently desert from their military units and try to sign on with MUP units in part because the MUP was paying their soldiers in cash and not other forms of either credit or script; and that particularly from an army perspective, the MUP was not returning those soldiers back to the military units, and that was having a significant impact on the VRS. Q. When you're discussing that the relationship between the army and the MUP was acrimonious and that it had a significant impact on the VRS, isn't it true that the period of time you're discussing, sir, is the period of March, April, May, June, and July 1995, among other periods? A. Yes, sir. In fact, through July 1995, there are references where particularly General Mladic was not a fan of the MUP.").

<sup>24</sup> 4D261. See also, 4D245 (Dispatch by MUP Minister, 25 March 1995) reaffirming provisions of the 1/94 Law on the Interior.

<sup>25</sup> 4D215 (MUP Order 10/8-937/94, 12 September 1994); Bajagic M 26765:10-16 ("Q. Can we just look at the next page of this document [4D215], the second paragraph. What powers are given to the chief of the public security centre? A. The chief of the public security centre may allow the use of PJP at the level of his open centre, if so required by the circumstances, and if the situation and the timing does not allow any consultation with the minister. That means in situations that qualify as emergency").

16. Articles 13 and 14 of the 1/94 Law on the Interior were not applicable when MUP units were engaged in the field in non-combat tasks, such as manning road checkpoints. MUP units would, as would be expected, communicate their positions with the VRS and otherwise cooperate in performing such functions, but would not be subordinated to the VRS in the performance of those tasks.<sup>26</sup>

**(ii) Order 64/95 Resubordinated Borovcanin and His Units to the VRS**

17. Order 64/95 is a textbook example of formal resubordination of MUP units in accordance with the requirements of the 1/94 Law on the Interior,<sup>27</sup> for several reasons: (1) the order recites in its first line that it is made pursuant to an order of the Supreme Commander of the RS Armed Forces, in compliance with Article 13; (2) the order is made by Tomislav Kovac, the Deputy Minister of the Interior, in his capacity as "Staff Commander", as specifically prescribed by Article 13; (3) a member of the Ministry of the Interior was designated as the direct commander of the units to be resubordinated, as required by Article 14; (4) Borovcanin is ordered to report to General Krstic, who was the competent VRS commander in the zone of engagement (as prescribed by Article 14); and (5) the combat task is defined to the extent practicable, in compliance with the Presidential Order that had been issued on 22 April 1995.

The order reads:

"Republika Srpska /RS/  
Ministry of the Interior  
Office of the Minister

No: 64/95

<sup>26</sup> P148 (Drina Corps Intel Report, 12 July 1995), p. 2; Butler 19856:18-19857:9 ("Q. This last paragraph: "The commands of the Bratunac, Zvornik and Milici Brigades, in cooperation with the SJBs in their respective areas of responsibility, shall regulate traffic during the night on the Bratunac-Milici-Vlasenica" and then "Konjevic Polje-Vlasenica roads. This term "cooperation," does this use of cooperation have anything to do with the definition of or the word "cooperation" as you spoke about it a day or two ago when you were going through the JNA rules? A. No, sir. In this context, there's not a linkage that they're saying that these local municipal MUP forces are going to be under a form of command of the military for this. This is simply along the lines of, "You need to cooperate with your public safety and security people to ensure that during the evening hours," you know, "the police," you know, "exercise their function and close these roads in part to protect the civilian population, the Bosnian Serb population," so they don't run into a potential combat zone. So I don't look at this, in this context with the local SJBs, as a formal relationship existing between them").

<sup>27</sup> Ristivojevic B 27901:23- 27903:11; 4D503 (Ristivojevic Expert Report), pp. 7-8.

Date: 10 July 1995

To:

- Commander of the Special Police Brigade
- Staff the Trnovo Police Forces Command
- Staff the Vogosca Police Forces Command
- Staff the Bijeljina Police Forces Command
- Zvornik CJB /Public Security Center/
- Sarajevo CJB
- Jahorina Police Training Camp

Pursuant to the Order of the Supreme Commander of the Republika Srpska Armed Forces, and in order to crush the enemy offensive being carried out from the safe area of Srebrenica,

I HEREBY ORDER

1. Detach a part of RS MUP forces that are taking part in combat operations on the Sarajevo front and send them sometime tomorrow, 11 July 1995, as an independent unit to the Srebrenica sector.
2. The unit shall consist of the 2nd Special Police Detachment from Sekovici, the 1st company of the PJP of the Zvornik CJB, a mixed company of joint RSK, Serbian and RS MUP forces and a company from the training camp on Jahorina.
3. I designate Ljubisa Borovcanin, Deputy Commander of the Special Police Brigade as commander of the MUP units.
4. During the night withdraw the company of joint RSK, Serbian and RS MUP forces from the Trnovo battlefield. Assemble units by 1200 hours on 11 July 1995, in front of the SJB in Bratunac except for the 2nd Special Police Detachment, which shall proceed towards its destination on 11 July 1995 in the afternoon.
5. On his arrival at his destination the unit commander is obliged to make contact with the Corps Chief of Staff, General Krstic.

Staff Commander  
Tomislav Kovac<sup>28</sup>

18. No one on the ground on 12 and 13 July had any doubt that Borovcanin's MUP units were formally resubordinated to the VRS. The person from the VRS who had the most direct contact with one of the units designated under Order 64/95, Momir Nikolic, testified that his understanding was that they were resubordinated to the VRS. Nikolic testified specifically about his understanding of Order 64/95:

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<sup>28</sup> 4D337. P57 and P94 are slightly different versions of the same order.

Q. ... Mr. McCloskey is asking you about this order ... your answer in response to the query from Mr. McCloskey about the meaning of this document, you said, and I quote: "This means to me that the police forces under the command of Mr. Borovcanin, that they are coming into the area of responsibility of the Bratunac, that they are gonna be tasked with General Krstic, and they are being put under his command." Then Mr. McCloskey asks you: "Okay. Why can't this mean they are just working together as partners with General Krstic and the army? A. [But] they usually work together, but it's logical that the commander of the operation is General Krstic, and it's logical that the police units are being put under the command of the military units in the field. Q. Based on what? A. It's defined by law. Q. So it's more than just logical. It has a legal requirement. A. Yes. There is a law that defines these relations." Now, sir, do you stand by what you answered Mr. McCloskey during that interview? A. Yes, I do.<sup>29</sup>

Richard Butler came to the same conclusion:

...this [Order 64/95] is an excellent example of just how that law was manifested in the practical reality on the ground when it came to these situations.<sup>30</sup>

19. The origins of the request provide further support, if any is needed, to show that the VRS sought formal resubordination of these units in support of Krivaja-95. Major General Zivanovic asks the Main Staff for MUP reinforcements on 8 July because of possible enemy attacks in the north-west of the enclave,<sup>31</sup> followed on 10 July by a more urgent request to the Main Staff from Major General Krstic, who asks for reinforcements up to the strength of one battalion.<sup>32</sup> Both requests are addressed to the Main Staff of the VRS through which requests for resubordination of MUP units were to be channeled; the likely inference is that the Main Staff acted on those requests by making a request to the President.<sup>33</sup>

20. The order was circulated to all those concerned, notably (1) Commander of the SPB; (2) the Trnovo Police Forces Command Staff, where Borovcanin was then located; (3) the Zvornik

<sup>29</sup> Nikolic M 33272:24-33273:22.

<sup>30</sup> Butler 19663:4-19664:3.

<sup>31</sup> 4D327 (Drina Corps Daily Combat Report, 8 July 1995), p. 2.

<sup>32</sup> 4D336/6D23/7D474 (Drina Corps Interim Combat Report, 10 July 1995), p. 1.

<sup>33</sup> 5D1322 (Diary of presidential appointments, 1995) (10 July entry shows Karadzic meeting with Milenko Karisik, member of the RS MUP Police Forces Staff (see 4D140), and later in the evening with the Minister of the Interior Zivko Rakic, implying that the authorization for deployment was issued orally). 5D1320 (Ministry of Interior document, 11 June 1995) (confirming that RS President frequently issued oral orders to Minister for engagement of MUP forces on request from the VRS Main Staff).

CJB (from which 1<sup>st</sup> PJP Company would be engaged),<sup>34</sup> and (4) the Jahorina Training Camp (where the deserters' unit was being trained).

### **(iii) VRS Rules and Regulations Applied to the MUP Units While Resubordinated**

21. Resubordination pursuant to the legislative regime prescribed by the 1/94 Law on the Interior incorporated MUP units into the fabric of the VRS command, control and reporting structure for the duration of the resubordination. For example, whereas MUP forces were strictly regulated as to the circumstances in which they were entitled to discharge a firearm, Articles 15 and 16 of the law entitled MUP units to use firearms in the same way as the VRS.<sup>35</sup> Correspondingly, resubordinated MUP forces were obliged to follow the VRS rules of warfare,<sup>36</sup> and were subject to prosecution before military courts for crimes committed while resubordinated.<sup>37</sup> Responsibility for criminal investigation into alleged breaches of international humanitarian law or other VRS regulations by MUP members fell within the jurisdiction of the VRS and its structures.<sup>38</sup> It follows that suspected crimes by MUP members should ordinarily be reported, directly or indirectly, to the appropriate authority within the VRS for further investigation and prosecution.<sup>39</sup> In short, resubordination meant that the MUP unit was, for the

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<sup>34</sup> BCS version of the 64/95 Order under the exhibit number P94 (received by the Zvornik CJB) contains a handwritten annotation in the right-hand corner, stating that the Order was sent to all SJBs and police stations. The signature below the annotation shows that it was made and signed by Mane Djuric, Deputy Chief of the Zvornik CJB.

<sup>35</sup> 4DP725/P422 (the 1/94 Law on the Interior), Article 15 ("There shall be no evaluation of the legality and procedural correctness of the use of firearms and means of coercion in combat operations."); Article 16 ("In combat operations, members of police units shall have the right to use all the weapons and equipment used by the units of the Army of Republika Srpska."); 4D503 (Ristivojevic Expert Report), pp. 5-6.

<sup>36</sup> 4D503 (Ristivojevic Expert Report), pp. 18-26.

<sup>37</sup> 4D503 (Ristivojevic Expert Report), pp. 27-29. 4D396 (Minister of Interior, 19 June 1995) explains that when VRS courts martial are trying alleged violation by resubordinated MUP members, "the trial chamber must include at least one member (judge) from the command of the MUP unit to which the employee being tried belongs".

<sup>38</sup> 4D503 (Ristivojevic Expert Report), pp. 27-29.

<sup>39</sup> 4D503 (Ristivojevic Expert Report), p. 29. Ristivojevic does not exclude the possibility of reporting through other channels (i.e. MUP channels). His opinion, however, is that the normal channel of reporting crimes during resubordination is through the VRS chain of command to whom the MUP commander is subordinated.

duration of the engagement, subject to VRS command, regulations and jurisdiction in all respects.<sup>40</sup>

22. Subordinated MUP units could not be disbanded during their resubordination to the VRS and were to retain their normal MUP commanders, who would take orders from the appropriate VRS commander.<sup>41</sup> Nothing prevented individual MUP units, however, from being deployed separately; thus, individual companies from the same CJB could be separated and deployed for different tasks as directed by the VRS commander.

23. MUP units were entitled to rely on the VRS for all logistical support in the areas to which they were sent.<sup>42</sup> The units resubordinated by virtue of Order 64/95 were, for example, accommodated in Bratunac Brigade facilities for the duration of their assignment and received food and other logistical support.<sup>43</sup> Other documents show that the VRS was often required to give MUP units artillery support as and when necessary.<sup>44</sup>

<sup>40</sup> 4D503 (Ristivojevic Expert Report), pp. 5-6. The normal rules of policing in peacetime were inapplicable during periods of MUP resubordination to the VRS: Ristivojevic 27900:8-19 ("Q. In a situation when a unit of the MUP was resubordinated to the commander of the VRS in whose area of responsibility it's carrying out combat tasks, do the rights and authorities of members of the MUP that they normally have change in any way? A. Yes. Under the Law on Internal Affairs, authorised official -- authorised officials of the ministry are those who directly carry out tasks related to public safety and state security. The law on the application of the Law on Internal Affairs in wartime conditions, in the state of war, makes it possible for police units to carry out combat operations, which means that they no longer carry out tasks of public security and state security. Therefore, they no longer have the status granted to authorised officials under the Law on Internal affairs").

<sup>41</sup> 4DP725/P422 (the 1/94 Law on the Interior), Article 14, para. 2 ("Police units shall be under the direct command of a commander who is a member of the Ministry of the Interior. During the time they are resubordinated to the Army of Republika Srpska, they shall retain their organization and may not be split up or separated").

<sup>42</sup> 4D503 (Ristivojevic Expert Report), p. 5.

<sup>43</sup> Djuric M 10907:9-16 ("since the special unit did not have some services that the army of Republika Srpska had, and I'm speaking about the logistics, we didn't have our own kitchen or that component. When we would come out to the field, we would eat in the military kitchens and so on"); 4D87 (Request for Food Provisions for a MUP Unit Monitoring the Srebrenica and Bratunac Areas, 15 July 1995); Filipovic N 26992:23-24 (1<sup>st</sup> PJP Company billeted at a school in Bjelovac, east of Bratunac); Pepic M 13544:16-17; Celic P 13464:4-5 (2<sup>nd</sup> SD billeted in Bjelovac). The Bjelovac school is mentioned in several Bratunac Brigade documents as one of its facilities: see e.g., 4D290 (Bratunac Brigade Report, 16 June 1995) (reporting about a reserve unit that "currently numbers 36 conscripts and is located at the school in Bjelovac"); 4D289 (Bratunac Brigade Order, 16 June 1995), point 9 ("Parts of 'R' Battalion which are being put into action at 0700 hours on 17 June 1995 shall spend the night at the school in Bjelovac").

<sup>44</sup> 4D271 (MUP Police Directorate, Information on Participation of Police in combat activities for the period January-March 1995), p. 3; 4D270 (MUP Police Forces Staff, letter 13 May 1995), p. 3 (VRS should be providing for the logistic support to MUP units, in particular artillery).

24. While resubordinated, MUP units were severed from the MUP command structure. MUP commanders could, of course, report on their tasks and whereabouts,<sup>45</sup> but insofar as the combat task for which they are resubordinated is concerned, they were not entitled to receive orders from anyone other than the competent VRS commander. The legislative structure therefore reflected the well-established principle of the singleness or unity of command, which was itself a well-established VRS doctrine applicable to any forces resubordinated to it.<sup>46</sup>

25. Resubordinated MUP members had no command authority or function over even the lowliest VRS soldier. Richard Butler acknowledged that, at least by 1995, MUP units were never superior to VRS units:

Q ... When you were working on this case and as you were preparing your expert analysis, did you ever come across a situation in which a MUP unit would be superior to a military unit? A. No, sir, I don't believe that I have; certainly not in 1995. 1992 was a much more chaotic circumstance, and it may have occurred then.<sup>47</sup>

**(iv) The Units described in Order 64/95 and Functional Designations Within the MUP**

26. The Special Police Brigade ("SPB") was, in command terms, a centralized unit of the MUP designed for specialised police duties and, in times of war, combat tasks.<sup>48</sup> The Brigade

<sup>45</sup> See, e.g., P3789 (MUP Special Police Brigade document No. 284/95, type-signed Ljubisa Borovcanin, dated 13 July 1995).

<sup>46</sup> Butler 20773:6-16 ("Q. ...During the course of your testimony in the Blagojevic case, and for the benefit of others, it's page 4272 on Monday, the 10th of November, 2003, you said the following, and I quote: ""In essence, unity of command is the general military philosophy that only one individual can be in command of one unit or of one series of units. You cannot have a function where you have multiple commanders in one unit. I think historically that approach has been found not to work effectively on the battlefield." Is that still your position? A. Yes, sir. I mean, that is -- that is the principle that's embodied in the RS laws and in the regulations that we've talked about.")

<sup>47</sup> Butler 20458:8-12.

<sup>48</sup> 4D499 (Bajagic Expert Report), pp. 35-39; 4D452 (Diagram - Structure of Special Police (Milicija) Brigade); 4D453 (Diagram - Structure of Special Police Brigade pursuant to the Rules K/B-1081/94); 4D454 (Diagram - Structure of the Special Police Brigade in July 1995, pursuant to document titled Observations, No. 01/1-100/95 of 20 February 1995). See generally, 4D499 (Bajagic Expert Report); Bajagic M 26657:9-26902:15.

headquarters was in Bijeljina,<sup>49</sup> with its nine detachments headquartered at various locations, but not tied to any particular zones of responsibility.<sup>50</sup> The 2nd Sekovici Detachment (2<sup>nd</sup> SD) of the SPB, which was headquartered in Sekovici, consisted of three platoons and a logistics platoon.<sup>51</sup> In July 1995, Rado Cuturic (nicknamed "Oficir") commanded the detachment having replaced Milos Stupar in mid-June.<sup>52</sup> In total, the detachment had between 40 and 80 men.<sup>53</sup>

27. Separate Police (sometimes translated as "special police") units ("PJPs") consisted of regular policemen who could be called away from their regular duties and organized into units for combat (in accordance with the procedures described above) or complex police tasks.<sup>54</sup> These units were organized at the level of the regional Public Security Centres ("CJB"s) and were drawn from policemen serving at its constituent local SJBs and police stations.<sup>55</sup> The Zvornik CJB

<sup>49</sup> Djuric M 10793:3-13; P2852 (Borovcanin OTP Interview), p. 10.

<sup>50</sup> 4D499 (Bajagic Expert Report), p. 39; PW-160 8570:9-10; P2852 (Borovcanin OTP Interview), pp. 10-12; Djuric M 10798:6-13; Djuric M 10906-7.

<sup>51</sup> Celic P 13458:7-9, 13459:19-24; Pepic M 13538:16-18, 13540:5-10.

<sup>52</sup> Celic P 13458:13-24; Pepic M 13538:22-13539:10.

<sup>53</sup> Celic P 13459:25-13460:5 ("Q. And in July of 1995, in total, how many infantry soldiers did those three platoons add up to, just approximately, if you can give the Court an idea? A. Infantry? In July? Q. Yes. A. Three platoons, adding up to around 40 men"); Celic P 13494:18 ("A platoon had 20 to 25 members"); Pepic M 13581:20-13582:3 ("Q. To the best of your recollection how many members of the Sekovici Detachment approximately arrived in the Bratunac area on that occasion? A. I don't know the exact number but there were ... three infantry platoons, as far as I can remember, but as far as the strength of the troops is concerned, I don't remember. Q. Would you agree with me that a police platoon within a detachment has about 30 men? A. Well, more or less, sometimes there were fewer men. Between 20 and 30 men, though").

<sup>54</sup> 4D499 (Bajagic Expert Report), pp. 42-46; Mr Borovcanin discusses the difference between the SPB and PJP at pp. 19-20 of P2852 (Borovcanin OTP Interview); P2863 (Document created by Mr Borovcanin in his February 2002 interview – Zvornik Special Police Unit Staffing - 1st Company); 4D456 (Diagram - Structure of CJB Zvornik (Diagram No. 6 of the Bajagic Expert Report)); 4D463 (RS MUP Dispatch by Deputy Minister, 17 June 1995) shows a typical VRS request for the combat engagement of PJP units. 4DP725/P422 (the 1/94 Law on the Interior). Article 12 refers to PJP units: "In addition to special police units, the Minister of the Interior shall set up separate police units [PJP] for the execution of combat tasks." 4D213 (RS MUP - Order by MUP Minister, 12 September 1994 (explaining organization and use of PJP units); 4D214 (Diagrams attached to the Order by MUP Minister, dated 12 September 1994) (organization of the Zvornik CJB PJP Companies). Pursuant to this Order, four PJP Brigades were established: Banja Luka; Prijedor and Doboj; Bijeljina and Zvornik; Sarajevo, Srebrenica and Trebinje. The Order also specifies the manner of control of these police units, with consent for their use to be given by the Minister of the Interior or his Deputy, and refers to plans of use of the PJP. Item 4 of this Order states that PJP members, when not engaged in combat actions, shall discharge regular duties and tasks at their base police stations, that is, Public Security Centres. See also, 4D215 (RS MUP - Instruction on Establishing and Using PJPs, 12 September 1994).

<sup>55</sup> 4D499 (Bajagic Expert Report), p. 41.

had six PJP companies.<sup>56</sup> PJP companies seldom operated at establishment strength. The 1<sup>st</sup> Zvornik PJP Company deployed in July 1995 with a strength of about 60 men, organized into three platoons.<sup>57</sup>

28. The Jahorina training centre, officially called the "Internal Affairs Personnel Education Centre" was a MUP facility, not part of the Special Police Brigade.<sup>58</sup> The centre's normal function was to train policemen from and for any MUP police service.<sup>59</sup> The centre also came to train deserters who had been arrested and brought there.<sup>60</sup> Dusko Jevic directed the training of the deserters at Jahorina,<sup>61</sup> and was later assisted by Mendeljev Djuric who arrived there at the end of June.<sup>62</sup> The deserters were organized into two companies, the 1<sup>st</sup> Company commanded by Djuric. Although each company nominally had 100 men, Djuric testified that he deployed to Bratunac on 11 July with 70 men, and that ten deserted on the night of 12 to 13 July.<sup>63</sup> The

<sup>56</sup> Stanojevic D 12903:20-12904:2; Zaric Z 26945:1-5.

<sup>57</sup> Zaric Z 26949:17-21 ("Q. ...there were between 50 and 60 PJP officers [in the 1<sup>st</sup> PJP Company] present at that time? A. Some 50 policemen, three platoons; between 50 and 60, that would be right"); Stanojevic D 12904:8-10 ("Q. Could you please tell us, in July 1995, to the best of your knowledge, how many people were there in the 1<sup>st</sup> PJP Company? A. Well, maybe about 60 people").

<sup>58</sup> 4D499 (Bajagic Expert Report), p. 43; 4D212 (Law on Internal Affairs, revised text), pp. 16-17. Nor was the Mount Jahorina training facility linked in any way, nor should it be confused with, the 1<sup>st</sup> Jahorina Special Police Detachment, located a few kilometres away in Jahorina Town. 4D450 (Diagram - Structure of RS MUP at the Seat, July 1995 (Diagram No. 1c of the Bajagic Expert Report - shows where the Personnel Education Center fits in) with 4D454 (Diagram - Structure of the Special Police Brigade in July 1995, pursuant to document titled Observations, No. 01/1-100/95 of 20 February 1995 (Diagram No. 4 of the Bajagic Expert Report)), 4D455 (Diagram - Structure of Special Police Detachment as in July 1995, pursuant to the Rules strictly confidential No. 1081/94 (Diagram No. 5 of the Bajagic Expert Report)) and 4D247/1D1316 (Order by MUP Minister, 30 March 1995 re 1<sup>st</sup> Jahorina Special Police Detachment).

<sup>59</sup> 4D499 (Bajagic Expert Report), p. 46.

<sup>60</sup> 4D499 (Bajagic Expert Report), p. 48; Djuric M 10794:23-10795:6; PW-160 8571:12-18; PW-100 14787:17-14788:25; 4D119/4D300 (RS MUP, Cabinet of the Minister - Memorandum to RS President by Deputy MUP Minister, 23 June 1995 (showing that the Jahorina training Center is an RS MUP facility, and is not part of the SPB). 4DP1/4DP726/SD1341/SD1342 (RS Presidential Decree 01-1118/95, 16 June 1995).

<sup>61</sup> PW-160 8567:20-8568:10; PW-100 14789:18-21.

<sup>62</sup> Djuric M 10792:67-10794:3, 10795:22-10796:6; 4D499 (Bajagic Expert Report), p. 48.

<sup>63</sup> Djuric M 10854:5-24 ("I said '70', and a full company should be many more. One part of them left with me, but the unit had never been fully reinforced, according to establishment.... two of them escaped before we reached our destination. In fact, they had asked for my permission to go and visit their families, but they never -- they never returned. They simply cheated me... Another 10 or so escaped. The base where we were located was next to the

deserters had received minimal training at the moment of their deployment to Bratunac.<sup>64</sup> The only connection between the Special Police Brigade and the MUP training centre at Jahorina, was that some of its instructors happened to be SPB members. The deserters did not become members of the SPB merely because they had been trained briefly by members of the SPB at the facility,<sup>65</sup> on the contrary, their training was minimal and many of them were sent to serve in the VRS, rather than the MUP.<sup>66</sup>

29. MUP policemen had functional designations, but no ranks, in July 1995. These ranks were introduced later, either in August (according to Butler) or October (according to Bajagic).<sup>67</sup> Momir Nikolic referred in his testimony to Borovcanin as "Colonel", but admitted that he was unsure whether the designation was correct.<sup>68</sup> In any event, these were MUP ranks, with no status or correlation as VRS ranks.

30. Police force staffs were set up to facilitate managing the increasingly complex and lengthy tasks for which police units were being engaged. A Ministerial police forces staff was

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Drina River, and Serbia is on the other side. They had ample opportunity to leave; the proximity of the river made it only easier. That's what I suppose. I did not investigate, but I suppose they crossed the river and left").

<sup>64</sup> PW-100 14797:19-14798:3; Stojcinovic M 27602:13-20, 27606:10-27607:16; Djuric M 10795:22-10796:6.

<sup>65</sup> 4D499 (Bajagic Expert Report), paras. 163-165 and 167; Djuric M 10844:24-10847:2; Stojcinovic M 27612:7-19.

<sup>66</sup> 4D499 (Bajagic Expert Report), paras. 163-165 and 167.

<sup>67</sup> Bajagic M 26821:7-11 ("Q. ... When were the ranks finally confirmed in the Ministry of the Interior of Republika Srpska? A. The timing was rather slow. In the end, the ranks were regulated as late as October 1995. Butler 20499:24-20500:16 ("Q. In the course of your examination-in-chief, you first said that Mr. Borovcanin, in July 1995, was colonel, and then you corrected yourself and you referred to him as "Mr. Borovcanin". Do you have any reason to correct yourself? Do you have any information about his rank in the police in July 1995, whether there were any ranks in the police at the time? Why did you correct yourself, on what basis? A. I see your point exactly. In -- I think it might have been in either late August or early September of 1995, the MUP established a formal rank system to give it some kind of correspondence with military ranks, and at that point in time Borovcanin was given the rank of -- I believe he was colonel. Now, before that, they did not have a formal rank system and he's always referred to as "Mr." My understanding, of course, in talking to individuals in the post-war environment about this, they always refer to him by the military rank, but of course I'm aware that prior to that August declaration, which established a formalised ranking structure, he didn't hold that as a rank. So I apologise for any confusion that I -- I caused by alternatively referring to him one way or another"). See generally, 4D499 (Bajagic Expert Report), pp. 80-84.

<sup>68</sup> Nikolic M 32913:11-14 ("You referred to Mr. Borovcanin as Colonel Borovcanin. Is that how you knew him at the time, by that rank? A. As far as I know, I think he was a colonel with the police, but, however, I am not absolutely sure").

hierarchically superior<sup>69</sup> to regional (CJB) police forces staffs<sup>70</sup>. The Zvornik CJB, for example, had an operational police forces staff no later than March 1995.<sup>71</sup> These staffs did not usurp or disrupt the VRS's command function in respect of MUP units resubordinated to the VRS, but they did facilitate more effective command and control *within* the units when so engaged.<sup>72</sup> Further, these police force staffs issued orders to police units in respect of complex tasks when not resubordinated to the VRS. Thus, these staffs had a role both when MUP units were resubordinated, and when they were not resubordinated – but they in no way broke the relationship of resubordination between the units and the designated VRS commander.<sup>73</sup>

**(v) Two Independent MUP Chains of Command: Borovcanin and Vasic**

31. The units under Borovcanin's command are specified in Order 64/95. The Indictment expressly indicates that references to "MUP units" not specifically mentioned as being under his command are not to be understood as being under his command.<sup>74</sup> Who, then, was in command, both formally and practically, of these other units in July 1995?

<sup>69</sup> 4D144 (Ministry of the Interior, Rules on the Internal Organisation of the MUP, Number: 10-012-3029, 1 April 1994), Article 57 ("In the event a state of war is declared, a Staff under the control of the Minister shall be established. The Staff referred to in the previous paragraph shall comprise the Minister, the Deputy Minister, the Chiefs of the Public and State Security Departments, the Commander of the Special Police Brigade, the Brigade Command and the Commander of Special Police Units. The police forces referred to in paragraph 1 of this Article shall be understood to mean members of the Special Police Brigade and members of the active and reserve police force.")

<sup>70</sup> 4D138 (Order by RS Minister of Interior Zivko Rakic 10/P-393/94 re Joint Police Staffs, 31 October 1994) (ordering all CJBs and CRDBs to set up joint staffs to control all police forces in their respective areas).

<sup>71</sup> 4D244/4D387 (RS MUP Public Security Service Zvornik – Report No. 01-16-02/1-72/95 by Chief of CJB Zvornik re meeting of the Police Forces Staff, dated 21 March 1995).

<sup>72</sup> See, e.g., 4D387 (RS MUP, Zvornik CJB, 21 March 1995); 2) 4D333 (RS MUP, Zvornik CJB, 9 July 1995); 4D334 and 4D335 (RS MUP, Zvornik CJB, 10 July 1995); 4) 4D339 (RS MUP, Zvornik CJB, 12 July 1995); 5) 4D270 (RS MUP, MUP Police Forces Command Staff, Bijeljina, Number: 01/1-71/95, of 13 May 1995); 6) 4DP66 (Zvornik CJB, Number: 01-6-02/1-243/95, of 1 August 1995).

<sup>73</sup> 4DP725 or P422 (the 1/94 Law on the Interior), Article 14; 5D1320 (RS Ministry of Interior letter, 11 June 1995) (showing that the President could issue order for resubordination orally, that this is directed to the MUP Police Forces Staff, and that the MUP forces will be engaged as requested by the B-de Commander); 4D463 (RS MUP Cabinet of the Minister - Dispatch by Deputy Minister, 17 June 1995) (VRS requesting that PJP forces be subordinated to it for the purposes of a specific operation, and the Deputy Minister's approval of such engagement which is to be regulated in cooperation with the Police Forces Staff)

<sup>74</sup> Indictment, para. 18.

32. Dragomir Vasic, the Chief of the Zvornik CJB, was the commander of all MUP forces in and around Srebrenica not engaged in combat. He was also, as a practical matter, heavily involved in liaising and controlling the Zvornik CJB units that were deployed in combat and, therefore, were resubordinated to the VRS.

33. Vasic's pivotal role is reflected in (i) his presence during the Hotel Fontana meeting on 12 July;<sup>75</sup> and (ii) his voluminous and detailed reporting up the MUP chain of reporting. Vasic was the Chief of the Zvornik CJB and the commander of its Police Forces Staff.<sup>76</sup> Srebrenica fell within the Zvornik CJB area and he reported to the RS Police Forces Staff in Pale, headed by the Deputy Minister of the Interior, Tomislav Kovac,<sup>77</sup> on all matters relating to regular police work as well as reporting on the Zvornik CJB units engaged in combat.<sup>78</sup>

34. Borovcanin did not fall under Vasic's jurisdiction. He was directly answerable to the VRS commander to whom he was resubordinated in accordance with Order 64/95 for the duration of the combat task. The fact that Vasic included references to the activities of the 1<sup>st</sup> Zvornik PJP Company in his reports to Deputy Minister Kovac in no way alters its resubordination to the VRS; it was only natural and normal that Vasic should advise the Ministry of the activities of one

<sup>75</sup> P2047 (Trial Video) 1:44:00-1:52:20; PW-162 9203:21-9204:1 ("Dragomir Vasic was also there, he was the head of the public security station in Zvornik, and as I said, there was Miroslav Deronjic, Ljubisa Simic [REDACTED] [REDACTED] So that was the attendance at the meeting. The meeting was conducted by General Mladic."); Simic Lj 27207:7-13 ("Q. Sir, I'd like to now just conclude with two very brief topics, and the first topic is to rewind to the meeting at the Hotel Fontana at 10.00 a.m. You've testified that there was a gentleman from the MUP named Mr. Vasic at that meeting. Was there anyone else from the MUP present at that meeting, as best you can recall? A. I recall quite clearly that there was nobody else from the MUP there. There was just him."); Nikolic M 33304:5-15.

<sup>76</sup> 4D645 (CJB Zvornik, Dispatch No. 01-16-02/1-7/94, 29 April 1994); See also, 4D456 (Diagram - Structure of CJB Zvornik); 4D244 or 4D387 (RS MUP CJB Zvornik - Report on Police Forces Staff Meeting, 21 March 1995); 4D333 (CJB Zvornik - Dispatch by the Police Staff Commander, No. 12-6-08-487/95, dated 9 July 1995); 4D334 or 4D335 (CJB Zvornik - Dispatch by the Police Staff Commander, No. 12-6/08-491/95, dated 10 July 1995).

<sup>77</sup> 4D140 (RS Ministry of Interior, Information by the Deputy Minister Tomislav Kovac on the establishment of the Pale Police Forces Staff, 19 June 1995, laying out the composition of the Staff).

<sup>78</sup> 4D138 (Order by RS Minister of Interior Zivko RAKIC 10/P-393/94 re Joint Police Staffs, 31 October 1994); Neskovic D 27447:3-10 ("Q. Okay. Going back to this police staff in Zvornik that was in Bratunac in July of 1995, what was the role of Dragomir Vasic at that time in connection with the Bratunac police station? Do you know what his duties and obligations were at that time? I know you mentioned to look at the political situation, but can you be more concrete for us? A. He was a -- the superior to all of us, to my commander, to my chief, and to all the other officers in position who participated on that").

of the units of the Zvornik CJB, even when resubordinated to the VRS under Order 64/95. Vasic's extensive reporting shows that he received information from many sources, and reported on the activities of both military and police units.<sup>79</sup>

35. Conversely, Vasic had no obligation to report to Borovcanin. Butler testified:

Q. So in order to do away with any dilemma, did you see any telegram sent from Vasic that had been sent directly to Mr. Borovcanin? A. They would not have been addressed to him, given he didn't have the material ability or lack of a command post to receive them. Like I said, I don't believe any of the documents that are attributed to Vasic, you know, specifically list him as an addressee. Q. Thank you very much. That is what I had wanted to ask you. Also, you don't have any examples to the contrary; namely, that Mr. Borovcanin submitted some kind of reports to Vasic. You didn't come across any such documents, Borovcanin sending documents to Vasic, or, rather, reports to Vasic, sorry? A. No, sir. I mean, I don't -- I'm not aware of any documents which reflect Colonel Borovcanin reporting in a formal text manner or anything to Mr. Vasic. Q. So between the two of them, there is no relationship based on subordination and a superior position, not in any sense? A. In the context of the events and the resubordination, you know, certainly during the period of 12, 13 and 14 July, and even on 15, when they move up to Zvornik, there is not a document that I'm aware of where Colonel Borovcanin is subordinated to Dragan Vasic, or vice versa, for that matter. Only those units that were already previously designated from the CSB, which would be Vasic's people, to the command of Colonel Borovcanin, those are the only documents I'm aware of.<sup>80</sup>

Dragan Neskovic testified that Mr Borovcanin, in his role as commander of the three resubordinated units pursuant to Order 64/95, could not issue orders to other MUP units outside of his immediate command:

Q. ... In the light of -- in the line of command, could Mr. Borovcanin issue orders to you or to someone else in the Bratunac police station? A. No. Q. If Mr. Borovcanin, for example, asked for assistance of some kind, for example, if he wanted to phone from the premises or to send a telegram or something like that, would you have done that for him? A. Well, look. Assistance is one thing. An order is another thing. We would have probably helped him if that is what was at stake...<sup>81</sup>

<sup>79</sup> See, e.g., 4D323 (CJB Zvornik Dispatch, 7 July 1995 (reporting progress of VRS forces and their losses); 4D333 (CJB Zvornik - Dispatch by Police Staff Commander, No. 12-6-08-487/95, 9 July 1995), 4D334 and 4D335 (CJB Zvornik - Dispatch by Staff Commander, No. 12-6/08-491/95, 10 July 1995); P4486 (CJB Zvornik document 19 July 1995, type-signed Vasic) (MUP forces taking part in search of the terrain and reporting VRS casualties).

<sup>80</sup> Butler 20473:10-20474:7.

<sup>81</sup> Neskovic D 27437:20-27438:4.

36. Vasic would be the default MUP commander (subject to VRS resubordination) of MUP units sent into the jurisdiction of the Zvornik CJB. For example, when a Special Police Brigade detachment and a MUP dogs unit was sent to Konjevic Polje, "the Police Forces Staff of the Zvornik CJB is to control all the MUP forces in executing a combat task on the Vlasenica-Zvornik axis, cutting off the road and the possible passage of Muslim units from Srebrenica."<sup>82</sup>

37. Vasic set up a "crisis staff" in Bratunac no later than 11 July.<sup>83</sup> He reported extensively from that location to the MUP police forces staff on a whole range of issues during this time period, including the activities of the Zvornik CJB units based on Konjevic Polje.<sup>84</sup> Mane Djuric, the Deputy Chief of the Zvornik CJB (not to be confused with Mendeljev, a.k.a. "Mane" Djuric) was apparently actively engaged in liaising with the VRS as to how those units should be used on 12 July.<sup>85</sup> Vasic and Djuric would have been in close contact concerning the activities of those

<sup>82</sup> 4D247 (RS MUP, Office of the Minister, 30 March 1995) (when various disparate MUP units were ordered to be sent to Konjevic Polje (including a dogs unit), control over these units is specifically conferred on the Zvornik CJB police forces staff).

<sup>83</sup> Simic S 27533:2-5 ("Q. And Mr. Vasic was present at the Bratunac police station during the 11th, the 12th, the 13th when you were a duty officer, right? A. He was present at that time during those days because at the time the Crisis Staff had its headquarters in our police station."); Neskovic D 27445:25-27446:5 ("Q. And what I need to know from you if you remember, do you know if Dragomir Vasic was in Bratunac in July 1995 to the best of your recollection? A. During the dates that we were talking about, Dragomir Vasic was in Bratunac. His -- he shared his office with Josipovic, or Josipovic gave him the use of his office"); Butler 19813:24-19814:5 ("JUDGE AGIUS: Do you wish Mr. McCloskey to repeat the question, Mr. Butler, or are you in a position to give us an answer? He did start the question: "To your knowledge of the investigation, was he, on July 12th, 1995 ..." THE WITNESS: Yes, sir. I think he was in Bratunac. I believe the investigation has established that").

<sup>84</sup> See, e.g., P59, P3109, P60, P62, and P886. VASIC dispatches which he sent from Bratunac are all in sequential order P59 (CJB Zvornik Dispatch No. 277/95, 12 July 1995); P3040 (Zvornik CJB dispatch No. 278/95, 12 July 1995); P3109 (CJB Zvornik Report No. 280/95, 12 July 1995); P60 (CJB Zvornik Report No. 281/95, 12 July 1995); P62 (CJB Zvornik Report No. 282/95, 13 July 1995); P886 (CJB Zvornik Report No. 283/95, 13 July 1995). And Borovcanin dispatch P3789 (MUP Special Police Brigade document No. 284/95, type-signed Ljubisa Borovcanin, 13 July 1995) follows the sequence of VASIC's dispatch numbers. This reporting reflects the relationship of subordination between the Zvornik CJB police forces staff and MUP's central police forces staff, and shows the dispatches must have been sent from Bratunac.

<sup>85</sup> P1102 (Intercept between X and Major Obrenovic, 12 July 1995, 0740 hours) ("Listen, please tell him that I called, that Mane, Laco's [i.e. Vaso's or Vasic's] deputy, will call him, that the police in Konjevic Polje have been told to [do] the same as the Engineering Battalion are doing, and that he can give orders to them through the commander of the Engineering Battalion"); P1103 (intercept 0748 hours between a General and unknown, but clearly referring to previous intercept) ("General, I spoke with Mane ... One of his companies is up there next to our man with the bulldozers, over there in /?Konjevic Polje/ and has the task of doing whatever he does. So you can give orders what to do through the commander"); PW-168 15987:3-15 ("The duty operations officer must have said "Vaso's deputy. Q. Okay. Vaso, what does "Vaso" mean, if that's the correct word? A. That's the nickname or maybe a shortened form of Vasic. Vasic was the Chief of MUP, so this referred to Mane Djuric, who was his deputy and who was in

forces, and were communicating and ensuring the execution of VRS orders during that time period.

38. A War Presidency was established in the Municipality of Srebrenica-Skelani and introduction of a War Presidency on 14 July 1995.<sup>86</sup> A 1994 Presidential decision governed the competencies of war presidencies in general,<sup>87</sup> requiring them to cooperate with the commands of military units in the territory of the municipality on all issues pertinent to the defence, armed forces and life of the population. Such war presidencies, however, had no jurisdiction over police units and were not allowed to engage by some separate channel of authority, much less usurp the command of the VRS over a resubordinated MUP unit prescribed in accordance with the 1/94 Law on the Interior.<sup>88</sup>

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Zvornik at the time. Q. Okay. And when it says, "He can give orders to them through the commander," who do you think the "he" is referring to? A. As I have explained, this pertained to our commander. He told me then that he would resolve it with them up there. Since it wasn't in our area, we didn't deal with it. Q. And the "them," who is that again, just so it's clear? A. Civilian police.. Pandurevic V 31877:12-31878:1 ("Q. Do you know anything about Vasic's man, Mane Djuric, and what he was doing with a bulldozer man on the 12th of July, 1995? A. Mr. Ostojic, I really have to clarify this. You have interpreted this as if it's the first time you've seen this conversation. Mane didn't do anything with bulldozers. This participant told the general that there's a company of Mane's in Konjevic Polje up there with that man of ours with the bulldozers. So it's the engineering battalion from the Drina Corps. No one operated bulldozers.... you know that they are talking about Mane.")

<sup>86</sup> 4DP425 or P716 (RS Presidential Order No. 1372/95, declaring a "State of War and forming a War Presidency for the Srebrenica-Skelani Municipality" dated 14 July 1995. Relevant to the general mobilization and for the introduction of the War Presidency with extended powers; relevant to the measures taken and potential investigation into the events. Representative of VRS is also a member of the War Presidency). This Decision states that on the date of its issuance, the 1992 Decision on proclamation of an imminent threat of war (4D527) ceases to produce legal effects). 4D379 or P3141 (RS Presidential Decision No. 01-1371/95 on the Appointment of the War Presidency of the Srebrenica-Skelani Municipality, dated 14 July 1995).

<sup>87</sup> 4D218 (RS Official Gazette No. 28/94 - Decision on establishing municipal war presidencies during a state of war, 11 November 1994). Point 4 of the Decision reads as follows: "In carrying out its duties, the War Presidency shall continuously and directly cooperate with commands of the units on the territory of the Municipality, with an obligation to inform each other and to synchronize work on all of the issues pertinent to the defence, armed forces and life of the population."

<sup>88</sup> See, 4D354 (RS MUP Cabinet of the Minister - Dispatch by Deputy MUP Minister, No. K/P-1/464/95, 2 August 1995). More generally on this issue, see 4D503 (Ristivojevic Expert Report), paras. 3.23 to 3.28.

#### **IV a Borovcanin Had No Involvement in the Conditions that Led the Mass Departure of the Muslim Population from Srebrenica and He Was Powerless to Prevent That Exodus Once it Had Begun**

##### **(i) Introduction**

39. The mass departure of civilians and combatants from the Srebrenica enclave was induced by three factors: (i) poor living conditions that worsened from March through July 1995; (ii) fierce combat in and around Srebrenica Town starting on 6 July, culminating in the sudden fall of the town on 11 July; and (iii) the generalized fear of Serbs arising from years of a bitter civil war defined by ethnic and religious tensions. By the late afternoon of 11 July, all Muslim civilians and combatants were on the move, desperately seeking to leave the Srebrenica enclave *en masse*.

40. Borovcanin did not contribute to the factors that caused the Muslim population to leave the enclave. He had had no involvement in relations with the Srebrenica enclave since leaving Bratunac in February 1994, and did not participate in the attack that precipitated its fall. He arrived in Bratunac at mid-day on 11 July and his only substantive action that day, in the absence of his units, was to reconnoitre the area around Zuti Most that evening. By that time, the column of Muslim men was already beginning its trek to the north-west; the civilians were already crowded in unsustainable conditions around the Dutchbat compound, expecting to be transported away; and Karremans was, on their behalf, requesting their wholesale evacuation.

41. This does not imply that the evacuation was necessarily voluntary. Improper coercion may or may not have been exerted in the days or months preceding the afternoon of 11 July. This coercion, assuming that it did take place, would not have been apparent to Borovcanin on 11 or 12 July – or at least not so apparent as to require him to infer that a criminal forcible transfer was underway. Even if Borovcanin could somehow have surmised that improper coercion had been exerted, the population's undoubted determination to leave the enclave was a *fait accompli*. He had no capacity to turn back the clock and change the civilian population's intense collective desire to leave, which had crystallized on the afternoon of 11 July. His only viable course of action by that stage was to alleviate the humanitarian consequences of what had already happened. Karremans had far more knowledge than Borovcanin of the circumstances leading up to the morning of 12 July, yet it would be equally absurd to allege that

the commander of Dutchbat is guilty of forcible transfer because he allowed his men to assist with an evacuation necessitated by humanitarian considerations.

**(ii) Prelude: Conditions Inside the Enclave Were Worsening, Increasing Pressure Amongst the Civilian Population to Leave the Enclave**

42. The Indictment alleges that from March through July, “the VRS deliberately restricted humanitarian aid and relief supplies to the Muslim inhabitants of Srebrenica and Zepa as part of the organized effort to make life impossible for the Muslims and remove them.”<sup>89</sup> Sniping and shelling is also alleged to have taken place for the same purpose.<sup>90</sup> The Chamber has found as adjudicated facts that “fewer and fewer supply convoys were making it through to the Srebrenica enclave” in early 1995 and that “the already meager resources of the civilian population dwindled further.”<sup>91</sup> Even going back to 1992, “hygienic conditions throughout the Srebrenica enclave were appalling”,<sup>92</sup> with little electricity, poor water supplies, and limited food.<sup>93</sup> According to Ahmo Hasic:

It was very difficult because the humanitarian aid came sometimes. Sometimes they would let them pass from Bratunac and sometimes they would stop them or they would keep a couple of trucks for themselves, keep what they wanted, and then leave the rest

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<sup>89</sup> Indictment, para. 51.

<sup>90</sup> Indictment, para. 52.

<sup>91</sup> Prosecution Adjudicated Fact 48 (“The Bosnian Serbs deliberately tried to limit access to the enclave by international aid convoys. Dutchbat personnel were prevented from returning to the enclave by Bosnian Serb forces, and equipment and ammunition were also prevented from getting in”); Fact 52 (“By early 1995, fewer and fewer supply convoys were making it through to the Srebrenica enclave”); Fact 53 (“The already meager resources of the civilian population dwindled further, and even the UN forces started running dangerously low on food, medicine, fuel, and ammunition”); Fact 62 (“[Directive 7] specified that the VRS was to ‘create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves’”); Fact 63 (“Blocking aid convoys was a part of the plan”); Fact 64 (“By mid-1995, the humanitarian situation of the Bosnian Muslim civilians and military personnel in the enclave was catastrophic.”)

<sup>92</sup> Popovic Adjudicated Fact 23.

<sup>93</sup> Popovic Adjudicated Fact 23 (“total absence of running water”); 1D20 (UNMO Report, 26 July), para. 9 (morale amongst civilians was low, caused “in the short-term because of the fighting/shelling, or in the long-term with food short”); P3240 (92bis statement of Amer Malagic), p. 2 (“we received a letter from [a relative in Srebrenica] via the International Red Cross. He wrote that things were very difficult for him there”); 4D302 (28th Div Command, Intel. Dept. Report, 29 June 1995) (“the principle motive for the departure of civilians and soldiers from Srebrenica is the lack of food, footwear and clothing.”).

to go to Srebrenica. This happened in Bratunac. Life was very difficult, especially towards the end. There was a shortage of food.<sup>94</sup>

By mid-1995, "the humanitarian situation of the Bosnian Muslim civilians and military personnel in the enclave was catastrophic."<sup>95</sup>

43. The BiH authorities – in particular, the Army – had forbidden civilians and combatants alike from leaving the Srebrenica enclave for some time leading up to July 1995.<sup>96</sup> In May 1995, the 28<sup>th</sup> Division Command, implementing an order of the 2<sup>nd</sup> Corps, apparently adopted more robust measures to enforce this prohibition, reflecting its importance to the ABiH:

Acting pursuant to order strictly confidential no. 08-147 of the 2<sup>nd</sup> Corps Command, dated 9 September 1994, with a view to taking measures to prevent all persons from leaving the Srebrenica and Zepa demilitarized zones without authorizations, I hereby ORDER the command of all units of the 28<sup>th</sup> Division must take all measure to prevent Army members and civilians from leaving the demilitarized zones of Srebrenica and Zepa.... To this end, you are required to gather intelligence data on individuals and groups preparing for such departures and take appropriate measures in order to prevent them from leaving.... Once the movement of army members is controlled, unsupervised movement of civilians will stop, as they will not be able to leave the area without armed escort.<sup>97</sup>

Many subsequent orders reflect the ABiH's preoccupation with keeping civilians inside the enclave; one of those reports describes "prevent[ing] people from leaving the areas of Srebrenica and Zepa" as "one of the most important tasks, if not the most important".<sup>98</sup>

<sup>94</sup> Hasic A 1173:19-24; P493 (UNMO Report, 8 July), p. 1 ("The food stock in the UNHCR warehouse is almost zero. There is not even sufficient stock to run the social kitchens to provide one meal a day for most of the vulnerable. Estimated private stock on the average may last for not more than a couple of days providing for one or at most two meals a day per person.").

<sup>95</sup> Prosecution Adjudicated Fact 64.

<sup>96</sup> 4D195 (2<sup>nd</sup> Corps Command, Intel Dept Dispatch, 16 April 1993), para. 5 (prohibiting population from leaving with UNHCR).

<sup>97</sup> 5D244 (28<sup>th</sup> Division Order, 27 May 1995), pp. 1-2.

<sup>98</sup> 4D301 (2nd Corps to 28<sup>th</sup> Division, 28 June 1995) ("Take all steps to prevent people from leaving the areas of Srebrenica and Zepa, which, for you at this moment, is one of the most important tasks, if not the most important"); 4D505 (28<sup>th</sup> Division Security Dept to 2<sup>nd</sup> Corps Security Dept, 18 April 1995, p. 2 ("In the forthcoming spring period, /?it is to be expected/ that due to three years of isolation, tension and the desire to link up with families, there will be mass departures for Macedonia, Tuzla and Kladanj. The most senior leadership should be informed of this in order for adequate measures to be taken to prevent it"); 4D302 (28<sup>th</sup> Division Intel Section to 2<sup>nd</sup> Corps, 29 June 1995) (complaining about the "willful departure" of members of the ABiH from their units and from Srebrenica); 4D306 (28<sup>th</sup> Division to 2<sup>nd</sup> Corps Morale Dept, 30 June 1995), p. 2 ("The main problems still have to do with the departure of the population and fighters from Srebrenica to Tuzla.... So far, none of the /hungry?/ people

44. Keeping civilians in the enclave was connected to the strategic military value of the Srebrenica enclave. The same reports that insist on the need to keep civilians inside the enclave also describe the importance of the enclave as a means of tying down large numbers of Serb forces to “distract[] the aggressor from the Sarajevo front.”<sup>99</sup> The Prosecution has repeatedly acknowledged that this is “a historical and well-known fact.”<sup>100</sup> The departure of civilians, including “men of military-age”, would have deprived the Army of its manpower,<sup>101</sup> not to

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have left the free territory. If that part of the population were to start leaving, which possibility cannot be ruled out, that would result in total chaos”; 5D5 (Video transcript video of Naser Oric, 24 May 1994), forbidding departure of military conscripts (*i.e.*, all able-bodied men) from leaving the enclave without permission; 4D11 (“Analysis and Chronology of Events in Srebrenica,” apparently an ABiH document created in late-July 1995), p. 3 (“At the end of June, instances of civilians and soldiers crossing from Srebrenica to Zepa increased. In order to prevent this happening, an order was issued to the 2<sup>nd</sup> Corps on 27 June 1995 to take measures to prevent such occurrences”). See also 5D224 (28<sup>th</sup> Div Command order, 25 May 1995); 1D1100/5D235 (28<sup>th</sup> Div Command report, 17 June 1995); 4D134 (28<sup>th</sup> Div Command report, 23 June 1995), p. 2.

<sup>99</sup> 4D306 (28<sup>th</sup> Division to 2<sup>nd</sup> Corps Morale Department, 30 June 1995), p. 1 (“our side carried out planned combat operations of a diversionary character with the aim of distracting the aggressor from the Sarajevo front”); 4D301 (ABiH 2nd Corps Command to 28th Division, 28 June 1995)(offering congratulations on “the successful combat actions, whereby you significantly contributed to carrying out a more successful operation to lift the Sarajevo blockade and inflicted heavy losses on the aggressor forces”); 4D326 (ABiH 2nd Corps Command, note from Deputy Commander for Morale), p. 1 (“The soldiers of the 28<sup>th</sup> Ground Army Divisions located in Srebrenica and Zepa, although completely encircled ... decided to contribute as much as possible to the fight against the aggressor .... An additional reason for the activities of the members of the 28<sup>th</sup> Division was to prevent enemy forces from sending additional troops to the Sarajevo theatre of operations from the area around Srebrenica and Zepa by causing losses, primarily the loss of man-power, which will force the aggressor to tie up troops in the wide area of Srebrenica and Zepa.”)

<sup>100</sup> Butler 20061:14-17 (“The documents that I came across in large part substantiate the fact that the Bosnian Muslim forces of the 28th Division and of the Zepa enclave were engaged in raids outside those areas **for the purpose of tying down VRS forces.**” (emphasis added)); 2192:2-5 (Mr McCloskey: ... Again, it’s been a historical fact that they were sending out raids to tie down Serb forces from going to the Sarajevo front. This is a historical and well-known fact”); Prosecution Opening Statement 395:24-396:3 (“By the time we get to July 1995, we actually see a Muslim document establishing the policy for the BiH army to attack the Serbs out of the enclave in order to tie down the Serbs from going to the Sarajevo front, which in 1995 was the major front for the Serbs, and that’s precisely what the BiH was doing”); 3874:7-13 (“Mr McCloskey: ... In fact, we have provided the documents that showed that it was policy to attack and tie down the Muslim forces to be -- or tie down the Serb forces to prevent them from going to the Sarajevo front where the real battles in 1995 were going on. This is all part of our case, for this continuing area. And now I’m taking up too much time, so I will be quiet. But this is the position of the Prosecution”); P686 (Butler narrative), p. 14 (explaining that “maintaining a defensive perimeter around the Muslim enclave at Srebrenica alone required the resources of two infantry brigades, and on separate infantry battalion”); *Popovic et al.* (Case No. IT-05-88-T), Popovic Adjudicated Fact 22 (“For the Bosnian Serbs, these Bosnian Muslim raids were of great concern, not least because they **tyed down a considerable amount of their armed forces, making them unavailable for combat activity elsewhere.**” (emphasis added))

<sup>101</sup> 5D5 (Video transcript video of Naser Oric, 24 May 1994), forbidding departure of military conscripts (*i.e.*, all able-bodied men) from leaving the enclave without permission; 4D475 (8<sup>th</sup> OG plan for combat operations, signed

mention the justification for the enclave being designated a “safe area” from which the ABiH could conduct operations with relative impunity.<sup>102</sup>

45. The vast majority of the population cooped up in the Srebrenica enclave in July 1995 had not resided there before the war. The United Nations estimated that between 75% to 90% of the 40,000 people inside the enclave by July 1995 were refugees (or more accurately, “internally displaced persons”) who had fled there from territories that had previously fallen into Serb hands:

80% to 90% of the population of Srebrenica (total pop is 40,000) are displaced persons who fled fighting earlier in the war, thus they do not have long-standing ties to homes and property in the enclave, and will probably be interested in leaving for Tuzla.<sup>103</sup>

A UNHCR staffer in Srebrenica reported on 11 July that “virtually everyone in the enclave wishes to leave.”<sup>104</sup>

### (iii) The Nature of the Attack on Srebrenica

46. The Serb attack starting on 6 July induced widespread fear and even terror amongst the Muslim civilian population. This does not make the attack unlawful, however. Article 52 of Additional Protocol I provides that:

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by Naser Oric to Hadzihasanovic, 15 November 1994), p. 4 (“Troop morale is exceptionally high and if this important operation is abandoned in the forthcoming period, no one will be able to stop the departure of troops to the Tuzla area.”)

<sup>102</sup> 1D727 (Sec. Council Res. 819, 16 April 1993), Operative Clauses 6-11; Butler 20095:25-20096:11 (“the political justification that was used by the ABiH leadership that the presence of the civilian population there, you know, their primary motivator was in fact, because of that civilian population, that the United Nations -- UN protection forces would be deployed there to, in fact, create a buffer between the two forces. If -- your hypothetical would make sense if there were in fact no international forces providing that role, and then it could very well be looked at as that type of a calculated decision. But you have that third international party in there, so in this context I believe that, you know, the ABiH government wanted the population to remain in there in order to continue the justification for having the UN maintain those safe areas, yes, sir.”)

<sup>103</sup> 5D40 (Akashi memo to Annan, 11 July 1995), p. 2; 1D20 (UNMO Report, 26 July), para. 7 (“The population of Srebrenica was made up of 75% refugees. As a result they were not committed to the defence of the area...”); P493 (UNMO Report, 8 July), p. 1 (Total population – 42,000, Eighty-five (85%) percent of who are refugees or displaced persons”); 1D1139 (BiH Report, 10 January 1994), p. 4 (estimating that 35,087 inhabitants (*i.e.*, about 80% of the population) were displaced, compared to 9,372 citizens of Srebrenica municipality).

<sup>104</sup> 5D40 (Akashi memo to Annan, 11 July 1995), p. 2.

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>105</sup>

Attacks on objects located in urban areas that make an effective contribution to military action are not prohibited; on the contrary, urban warfare is a common feature of many modern counter-insurgency campaigns, including the use of artillery and bombs in urban areas.<sup>106</sup> The party targeting such facilities must, of course, apply the generally-applicable principles of distinction and proportionality.<sup>107</sup> An advisory committee to the ICTY Prosecutor described the applicable law as follows:

In brief, in combat military commanders are required: a) to direct their operations against military objectives, and b) when directing their operations against military objectives, to ensure that the losses to the civilian population and the damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated.<sup>108</sup>

The emotional distress that could be caused by an attack is never mentioned as a relevant consideration to the legality of such attacks. Attacks on urban areas would simply be impermissible if that were the case.

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<sup>105</sup> API, Art. 52.

<sup>106</sup> See, e.g., OTP Final Report on NATO Bombing Campaign, paras. 54-56, 71-89 (describing a significant number of large-scale attacks in urban areas, some of which were erroneously targeted, but concluding that there was no credible basis to believe that any violations of the law of armed conflict had been committed).

<sup>107</sup> Galic TJ, para. 58 ("Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.... In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack"); OTP Final Report on NATO Bombing Campaign, para. 48 ("It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.")

<sup>108</sup> OTP Final Report on NATO Bombing Campaign, para. 28.

47. The Srebrenica enclave was heavily fortified and armed by July 1995, as is discussed more generally in Section VII(i). The ABiH deliberately placed important military facilities in the heart of Srebrenica Town. These facilities, according to ABiH documents, included:

- the headquarters of the 28<sup>th</sup> Division, at the Hunting Lodge (*Lovac*),<sup>109</sup>
- a working space and depot at the "Town Command" in Srebrenica;<sup>110</sup>
- the headquarters of the 282<sup>nd</sup> Brigade, located in the Hotel Domavija;<sup>111</sup>
- the headquarters of the 283<sup>rd</sup> Brigade, located in the building owned by Kamen DP, Srebrenica;<sup>112</sup>
- the headquarters of the 284<sup>th</sup> Brigade, located in the "Radnik GP", the building in the very centre of Srebrenica after the traffic circle;<sup>113</sup> and
- the communications facility located on the top floor of the PTT building, used by the 28<sup>th</sup> Division to communicate with the 2<sup>nd</sup> Corps in Tuzla and other units,<sup>114</sup> and which was also used as a *de facto* headquarters of the 28<sup>th</sup> Division, including on 11 July itself.<sup>115</sup>

<sup>109</sup> 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 1 (listing the command of the 8<sup>th</sup> OG (the predecessor of the 28<sup>th</sup> Division) as being in the "Lovac feature, Stari Grad, Srebrenica", consisting of a space 275 square metres); shown on 4D653, p. 14 (see pp. 25-26 of the original). See also 4D8 (BiH State Security Report, 28 August 1995), p. 5 ("the division command was in the old town sector and the hunting lodge"); Pandurevic V 31993:20-21 ("We knew that the Hotel Domavija, the post office and the hunter's lodge were used for military purposes."); Pandurevic V 31995:3-6 ("At the time, I understood that to be a hunter's lodge but since they say Lovac here, I suppose it's the same building where the command of the 8th OG was, whereas in July 1995 that was actually the 28th Division.")

<sup>110</sup> 4D135 (Min. of Defence office, Srebrenica, 22 February 1995), p. 1 (listing this depot as being in the "Old Headquarters of the Territorial Defence, Srebrenica", consisting of 198 square metres; shown on 4D653, p. 11 (see pp. 19-20 of the original). Boering 2178:23-2179:4 ("Q. Did you know that the headquarters of the 28th Division was stationed at Srebrenica? A. Yes. That was the headquarters. Q. Can you tell me in which building this headquarters was? A. I think I drove past it once. It was a bit at the edge, in the outskirts of the enclave, in an area with mountains but I'm sure it wasn't in the centre.")

<sup>111</sup> 4D135 (Min. of Defence office, Srebrenica, 22 February 1995), p. 2 (listing the command of the 282<sup>nd</sup> Brigade as being in the Hotel Domavija, and consisting of 427 square metres), shown on 4D653, p. 13 (see pp. 23-24 of the original); Pandurevic V 31993:20-22 ("We knew that the Hotel Domavija, the post office and the hunter's lodge were used for military purposes.")

<sup>112</sup> 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 2 (listing the command of the 283<sup>rd</sup> Brigade as being in Kamen DP, and consisting of 165 square metres), shown on 4D653, p. 10 (see pp. 17-18 of the original).

<sup>113</sup> 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 2 (listing the command of the 284<sup>th</sup> Battalion as being in the "Radnik Construction Company, Srebrenica" and consisting of 187 square metres), shown on 4D653, p. 8 (see pp. 13-14 of the original).

<sup>114</sup> Kingori 19417:18-21 ("As far as I know, the building that we were living in, that is, the PTT building, as I said earlier, could have constituted a military target because of its strategic position, and also it's housing the communication equipment."); Kingori 19474:7-12 ("Q. Sir, I understand what you're telling us, but I would like to

The PTT building in Srebrenica Town was a legitimate – even vital – military target for the VRS.<sup>116</sup> Disrupting communications between the 28<sup>th</sup> Division and the 2<sup>nd</sup> Corps would have been crucial for a variety of reasons. Communication facilities, whether civilian or military, are an appropriate military target when used for military purposes, as is extensively discussed in the OTP's public reasons for declining to investigate the NATO bombing of the Belgrade TV facility in 1999, resulting in 16 civilian deaths.<sup>117</sup> These locations are shown on Annexes A and B.

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know if you or one of your colleagues, while you were there, did you ever inform your superiors about that. A. Yeah, there is a report somewhere concerning that. The same building that we were in is the one that was holding the communication equipments of the BSA – of the BiH. There is a report on that.”); Kingori 19472:14-16 (“All I know is that 28<sup>th</sup> Division, which was later changed to 8<sup>th</sup> OG, they had a command net at our building; that is, PTT”); Boering 2030:1-3 (“I didn't say it was intended as a headquarters. I said that it could be used as a place to establish connections and to contact Tuzla from there”; Boering 2179:9-17 (“Q. Is it true that the last landing of the post was being used by the intelligence of the 28th Division? The top floor? A. I once saw a meeting there, as far as I can recall, but at other times I never went to the top. There was a discussion with UNMO, that it could not and should not be the headquarters. I have that somewhere in my mind. But I wasn't present at all the discussions. Q. Is it true that the members of the 28th Division were using the PTT building for their communications with the 2nd Corps in Tuzla? A. I assume so, that they also used it for their communication.”); 4D263 (28<sup>th</sup> Division Command report re. communications assets, 25 April 1995); 5D1349 (Karremans protesting to ABiH about artillery placed near the PTT building, 3 April 1995).

<sup>115</sup> The UNPROFOR British forward air controllers go to the PTT building to receive targeting information from Becirovic, demonstrating that it was a well-known headquarters for the 28<sup>th</sup> Division: 4D2 (Becirovic Statement to 2<sup>nd</sup> Corps Mil. Security Dept, 11 August 1995), p. 12 (“Some time after 0600 hours, two British officers came to me in the Post Office building, and asked me to give them targets”); 4D8 (BiH State Security Report, 28 August 1995), p. 4 (UNPROFOR forward air controllers meet the commander of the 28<sup>th</sup> Division on the morning of 11 July and ask him for targets – somehow they know to go to the PTT building for this meeting); Boering 2029:8-13 (“Q. Is that also as you understood it the building that was used as the quasi-headquarters of the 28th Division at that time, or one of the buildings? A. It was used as headquarters but not the headquarters of 28<sup>th</sup> Division. Occasionally meetings were convened there, but it was used primarily for using the connections with Tuzla.”)

<sup>116</sup> The VRS knew about these targets: Pandurevic V 31993:20-22 (“We knew that the Hotel Domavija, the post office and the hunter's lodge were used for military purposes”); P1500 (“Deployment of our Enemy and UNPROFOR Forces in the Srebrenica and Zepa Enclaves”); P1504 (VRS map with ABiH targets); P2884 (Drina Corps map showing ABiH artillery positions and headquarters); P2885 (Drina Corps map); P107/4D377/1D382/4D378 (Drina Corps Command Order, Krivaja-95, 2 July 1995).

<sup>117</sup> Final Report on NATO Bombing Campaign, para. 75 (“The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as military objectives (para. 39 above). The list prepared by Major General Rogers included broadcasting and television stations if they meet the military objective criteria (para. 38 above). As indicated in paras. 72 and 73 above, the attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosevic in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.”)

48. Some shells launched or shots fired during the attack on Srebrenica between 6 and 11 July 1995 probably went astray. This is not the test of legality, however. Mistaken targeting – even mistakes caused by negligence – are not unlawful. Only intentional targeting of civilians or indiscriminate targeting is prohibited.<sup>118</sup> Many Muslim witnesses, understandably, gave testimony asserting that they had been directly targeted by Serb shells or mortars. The evidence by international observers with military experience suggests otherwise. Kingori considered the number of civilian casualties to be “surprisingly low.”<sup>119</sup> On 8 July, which Kingori described as “the heaviest, in terms of shelling”, an UNPROFOR sitrep identifies only a “total of four civilian killed and seventeen wounded.”<sup>120</sup> Seriously wounded would not have escaped the attention of UN observers considering that they would have been treated at the MSF hospital in Srebrenica. Furthermore, the only two locations mentioned as having been shelled on 8 July were both military targets: the PTT building (housing the communications centre), and “a hotel”, which was probably the very same Hotel Domavija that housed the headquarters of the 282<sup>nd</sup> Brigade.<sup>121</sup> Late on 11 July, UNMO counted the total number of seriously wounded as having

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<sup>118</sup> Final Report on NATO Bombing Campaign, para. 28 (“The *mens rea* for the offence is intention or recklessness, not simple negligence.”)

<sup>119</sup> Kingori 19176:15-21 (re. 6 July: “during this first day of shelling, the casualties, we had several- just a few, actually - who had shrapnel injuries, that is, to the head, some to the whole body, their legs, and all that; but, surprisingly, the number was not high. It was not high. I cannot remember how many, but there were a few. We took a few to hospital. Actually, it was surprisingly low. Despite the heavy shelling, the number of casualties were very low, in fact.”); Kingori 19182:1-5 (re. 7 July: “And on the marketplace, at least they were getting -- they were getting the market, but luckily there was nobody in that market. So there were no many casualties, as such, **but at least they had some targets they were targeting**. Regarding also the roads, the roads - maybe I don't know for what particular reason - but at least they were targeting the roads”) (emphasis added); P492 (UNMO report, 7 July), p. 1 (injuries were low enough that the UNMO reports the injury of only 2 men as a result of three shells falling in Srebrenica Town; the report also clearly mentions that the shells were aimed at specific targets: “More shells have been landing in the same spot or around and we suspect they are [firing] from a tk [tank] positioned at Company Hill. A lot of damage on buildings has been caused in that area despite low cas figure”); P493 (UNMO report, 8 July)

<sup>120</sup> P494 (UNPROFOR Sector N-E Sitrep, 8 July 2043 hours), p. 2.

<sup>121</sup> P495 (UNMO Report, 8 July), p. 1. Incidentally, Kingori and Boering both testified that they considered the PTT building as a legitimate military target for the Serb army, and yet for some reason the UNMO post remained there inside that legitimate military target: Kingori 19417:18-21 (“As far as I know, the building that we were living in, that is, the PTT building, as I said earlier, could have constituted a military target because of its strategic position, and also it's housing the communication equipment”); Boering 2179:12-15 (“I once saw a meeting there, as far as I can recall, but at other times I never went to the top. There was a discussion with UNMO, that it could not and should not be the headquarters.”)

“grown now to 50” – which could have included some ABiH combatants lawfully wounded in battle.<sup>122</sup>

49. These numbers are extremely low, even to the mind of a layman untrained in military matters. The VRS was facing what was believed to be a determined insurgency of several thousand fighters, with military facilities honeycombed into a town in a narrow valley, teeming with up to 40,000 inhabitants. ABiH fighters had put up a strong resistance to the south of the town particularly on 10 July, launching a strong counter-offensive.<sup>123</sup> ABiH forces did not refrain from firing mortars from the middle of the town itself.<sup>124</sup> Dutchbat witnesses testified that the ABiH deliberately attempted to use the civilian population as a shield, forcing them to remain in Srebrenica Town on 10 July even when many of them wanted to flee to Potocari.<sup>125</sup> The topography also exposed Serb forces to a potential ambush if they had not managed to root out

<sup>122</sup> P510 (UNMO report, 11 July), p. 4 (“The number of severely wounded has grown now to 50”).

<sup>123</sup> 4D11 (“Analysis and Chronology of Events in Srebrenica,” apparently an ABiH document created in late-July 1995), p. 4 (“On 10 July 1995, our forces regrouped their troops and equipment and thereby succeeded in stopping the aggressor’s progress from the Zeleni Jadar axis towards the town in its immediate vicinity. Our forces continued to regroup in order to repulse the aggressor forces from town. The [Main Staff of the ABiH] insisted that the 2<sup>nd</sup> [Corps] and the 28<sup>th</sup> Division] implement the order of 9 July 1995”), pp. 3-4 (“On 9 July 1995, the 2<sup>nd</sup> [Corps] and 81<sup>st</sup> (sic) [Division] were given the following orders aimed at taking measures to protect Srebrenica: - to organize defence with all forces and equipment in the demilitarized zone and prevent incursions into the territory by the aggressor; to monitor the conduct of UNPROFOR and undertake measures; to take weapons from UNPROFOR; for the forces of the 24<sup>th</sup> (sic) [Division] to undertake offensive b/d on the axes towards Srebrenica”, etc.); 4D336/6D23/7D474 (Drina Corps Combat Report, 10 July 1995), p. 1 (“At 0430 hours, the enemy carried out a powerful counter-attack along the Srebrenica-Bojna-Zeleni Jadar axis.... Our losses: six soldiers killed and 10 wounded”); Pandurevic V 30861:24-30862:6 (“A. On the 10th of July in the morning before dawn, there was a counter-attack launched by the forces of the 28th Division. They followed the general direction of Bojna-Rajna-Zeleni Jadar and the auxiliary direction Rajna-Pusmulici-Zivko Brdo. Those forces managed to push the forces of the tactical group, and they actually pushed us back almost to our starting positions, to the Tri Sise feature and the northern slopes of the Biljeg feature which means that we lost all the positions that we had taken the day before.”)

<sup>124</sup> 4D14; P2047 (Trial Video), 5:40-6:19; Pandurevic V 31993:25-31994:2 (“Yes, we were exposed to mortar fire directly from the town; however, at the time I didn’t know their exact positions because it was impossible to spot them from the posts or the positions where I was.”)

<sup>125</sup> Koster 3059:14-17 (“Q. Do you recall them telling you that that evening, the Muslim population would not come to Potocari and if they tried to do so, they would prevent them? A. Yes. I remember that.”); Franken 2550:17-22 (“Q. So you would agree with the proposition that the movement of – the stream of refugees from B Company down to Potocari was the result of an initiative taken by Captain Groen. A. Partially, because there has been a movement before on the initiative of the people itself. It was then stopped by the 28<sup>th</sup> Division.”); Franken 2583:16-20 (“Q. Do you know that at one point members of the 28<sup>th</sup> Division stopped the column of refugees on the road and asked them to return to the town of Srebrenica? A. Yes, but that’s also another occasion. That happened on the night or the evening of the 10<sup>th</sup>.”)

ABiH forces before entering the town itself.<sup>126</sup> Would NATO forces fighting an insurgent force of several thousand men in a narrow valley in Afghanistan, hiding amongst the civilian population, have been able to take a town like this with as few civilian casualties as were caused by the VRS in Srebrenica? The low casualty number, rather than suggesting indiscriminate firing, suggests that considerable restraint was exercised.

50. The quantitative approach is a legitimate basis on which to draw inferences about the nature of the targeting. The Prosecution applied a quantitative analysis in deciding that no further investigation was warranted into the NATO bombing campaign against mostly urban areas in Serbia in 1999, despite casualty figures estimated at 495 civilians killed and 820 wounded.<sup>127</sup> Kingori himself and the UNMO reports anecdotally confirm that Serb shells were aimed at the legitimate military targets dispersed around the centre of Srebrenica, and were not

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<sup>126</sup> Pandurevic V 30867:13-19 ("I was somewhat surprised by the further actions of the 28th Division in the wake of the counter-attack carried out by the VRS. The 28th Division forces did not try at all to reorganise their defence positions in front of the town itself; although, they had an excellent opportunity to do so in view of the layout of the terrain around the city or the town of Srebrenica. Had they done that, then it would have been very much difficult for the VRS to enter the town"); Pandurevic V 30875:6-14 ("It is common knowledge that Srebrenica is a town which is completely surrounded by what soldiers call strong topographic features which are convenient for defence. At one point, I thought that the 28<sup>th</sup> Division was putting up weak resistance on the afternoon of the 10th and the morning of the 11th. Therefore, their aim was to try and pull in our forces into the ground and -- into the town, and then launch an attack on our forces from the surrounding features. For that purpose, I deemed these features to be very important to our control before entering the town itself.")

<sup>127</sup> Final Report on NATO Bombing Campaign, para. 53, 90.

fired at random.<sup>128</sup> A Muslim document confirms that Serb infantry was directing fire on the "Hunting Lodge" headquarters of the 28<sup>th</sup> Division, not just shooting randomly.<sup>129</sup>

**(iv) Tipping-Point: The Departure of Muslim Combatants and Civilians from the Srebrenica Enclave, 11 July**

51. The imminent fall of Srebrenica was a cataclysmic event for the residents of the enclave. They had come to view it as an internationally protected sanctuary against the Serb forces. The attack followed years of tenacious ethno-religious civil warfare, in which civilians on both sides had been brutally murdered.<sup>130</sup> A regrettable but psychologically comprehensible pattern of population displacement had become well-established by 1995, with populations ebbing and flowing with the ebb and flow of the military lines. The words of one commentator, despite his evident biases, ring true:

I'm simply stating a fact that has been a regular feature of warfare in that part of the world for a very long time, that if, for instance, the Croat troops come into the area of Neretva valley, the Serbs from Mostar will run away to Trebinje or Nevesinje, or when the Muslims overrun parts of central Bosnia, the Croats will be the ones who sometimes even using Serbian territory will escape to Croatia proper, and needless to say that the Muslims when the Serbian army advances will feel more comfortable going to Tuzla or Zenica than staying put. It is, I would say, more of a descriptive factual statement than analytical let alone value judgement.<sup>131</sup>

<sup>128</sup> Kingori 19182:3-4 ("but at least they had some targets they were targeting"); P492 (UNMO report, 7 July), p. 1 (shells were aimed at specific targets: "More shells have been landing in the same spot or around and we suspect they are [firing] from a tk [tank] positioned at Company Hill. A lot of damage on buildings has been caused in that area despite low cas figure"). Kingori asserted that on 8 July fire was aimed at the marketplace, but then belied this claim by admitting that Muslim civilians were selling their wares in the marketplace, belying his own opinion as to what was being targeted: Kingori 19197:8-20 ("So we went out there and got these from the people themselves, those who were selling and those who were buying, and that is what we used to compile this report. Q. You mentioned that the market was one of the areas that appeared to you to be targeted, so why were there still people available for you to even interview? A. Let me tell you, in every situation, there would always be people somewhere there. Even during the tsunami, there were still people selling and buying. So you ask me that, sometimes I cannot even understand myself, but they were there. You find they are there. You told them not to be there, but they would still be somewhere. And we got them and they give us their prices; and also, as I say, there were some shops nearby, small, small shops, which were selling these commodities.")

<sup>129</sup> 4D8 (BiH State Security Report, 28 August 1995), p. 5 ("On the last day, 11 July 1995, it was impossible to approach this building because it was under constant fire from the Chetniks.")

<sup>130</sup> See e.g. 3DP460, P3838.

<sup>131</sup> Trifkovic S 25264:12-21.

52. No matter how gingerly the VRS had proceeded in taking over the Srebrenica enclave, the likely result would have been the mass exodus of civilians. The takeover of the enclave, in the face of ABiH opposition, could not be accomplished gingerly. The VRS finally pushed into Srebrenica town after six days of, at times, fierce combat. Shells were fired at the military targets in Srebrenica Town and civilians probably died as a consequence of these attacks. The result was widespread panic and fear that crystallized into an exodus as soon as it became apparent that Serb forces would seize control of the enclave.<sup>132</sup>

53. The combined effect of the fall of the enclave and shelling impelled the mass departure of the Muslim population of Srebrenica on 11 July. No Muslim seriously considered the possibility of remaining behind in a Serb-controlled Srebrenica. As previously mentioned, a UNHCR observer in Srebrenica reported on 11 July that "virtually everyone in the enclave wishes to leave."<sup>133</sup> Numerous Muslim witness described their departure as a natural and obvious consequence of the fall of Srebrenica and of the shelling:

I felt the need to leave because there had been so much hatred in Srebrenica during the war, and because of that hatred, it was obvious that people had become fearful. I wanted someone to offer me some kind of protection because I was wounded ... Q. Why wouldn't you just stay in your house and let them advance around you? A. Well, this would have been very difficult. I would have been dead, because everybody who remained ended up dead.<sup>134</sup>

...

We were afraid because of everything that had been happening from the beginning of the war, and all the shelling in Srebrenica. It was quite evident they wanted to kill us all. Evidently that was their goal. That's what I meant. When I said from the very beginning of the war, in view of everything we had gone through, the shelling four days before, the attacks, we assumed what would happen to us if we went to Potocari. We knew not just me but all the others knew.<sup>135</sup>

...

Q. Can you briefly describe the circumstances why you decided you had to leave your home and your family had to leave their home. A. Well, I saw that the situation was a chaotic one, a terrible one, and there was [no] other way out. We could only expect death down there because we had no protection from UNPROFOR, and we decided to take to the woods. Q. Is that because the Serb army had taken over Srebrenica on the

<sup>132</sup> P467 (FBIS Report, 17 July 1995), p. 1 ("the Muslim authorities demanded that the evacuation be carried out for fear of the Serbs returning to their houses in Srebrenica.")

<sup>133</sup> 5D40 (Akashi memo to Annan, 11 July 1995), p. 2.

<sup>134</sup> P2210 (PW-118 92ter statement), pp. 1247-1248.

<sup>135</sup> PW-127 3509:17-24.

11<sup>th</sup>? A. Yes, it had already taken over half the town, from the hill of Bojna. And there was no reason to wait any longer, there was no possibility for safety.<sup>136</sup>

....

The shells chased us out. That's why we wanted to go. If we hadn't left, we would have been killed there. The shells were killing everyone. They weren't looking to see if it was a child, a woman or a man. A shell would just kill indiscriminately. That's why we had to leave.<sup>137</sup>

...

There was such a huge panic among women, children, and men, that everything was chaotic. We didn't know who went or fled where. The artillery and shelling attacks were intense. Shells were landing on us, on people, so we had to leave Srebrenica as soon as possible.<sup>138</sup>

...

Had [the enclave] not [ ] fallen to Serb forces, we wouldn't have gone away. Q. Now, did you leave that area on that day because you were ordered to leave that area, or for other reasons? A. Because Srebrenica was a protected enclave, and then they said that the Serb forces entered Srebrenica and as soon as the town fell, the villages fell as well. So we agreed to withdraw from that area.<sup>139</sup>

...

A. That morning, early, when I got up, I saw people moving in large numbers towards Potocari, carrying their belongings, suitcases, bags. They were carrying things and helping each other. And I and my brother were watching this, and my brother says, "What are we going to do, sister? Are we going to go and join them as well?" And I said I was not too keen because I thought that Srebrenica was not supposed to fall. It was a protected area, demilitarised area. It wouldn't fall... I did not have a watch but I believe it was around 11.00, when I got out of the house and all over Bojna I could see the Serb soldiers approaching, and I could see some people hiding and I could hear shots and the noise of fire all around my fence. And even before Srebrenica fell, there was shelling for days, and even after Srebrenica fell, the shells never stopped falling around Srebrenica and in Srebrenica. Q. And, Witness, why were these people leaving Srebrenica? A. Because they realised that we would all be killed. They saw people being killed. They could hear fire and the DutchBat members kept telling them to go to Potocari. And people were moving together with the DutchBat soldiers. And after them, I saw the Serb soldiers and all over Bojna I could see armed people and I'm sure that those were Serb soldiers approaching the town.<sup>140</sup>

...

In view of the fact that the Chetniks had already penetrated Zaboljina, a suburb of Srebrenica, the previous night, the people broke into all the warehouses in town, and carried off all the food supplies, moving in panic towards Potocari... I noticed that UNPROFOR soldiers were directing the inhabitants to Potocari.<sup>141</sup>

<sup>136</sup> P2272 (PW-112 92ter statement), p. 3239.

<sup>137</sup> Hasic A 1175:13-17; P3230 (Hafizovic 92bis statement), pp. 1-2 ("As the Serbian forces were intensely shelling the Srebrenica safe area, the people decided to get out... I... went to the UNPROFOR base in Potocari, where a large number of people had gathered, looking for safety").

<sup>138</sup> PW-111 6972:17-20.

<sup>139</sup> PW-156 7081:18-22.

<sup>140</sup> PW-126 3598:10-3599:9.

<sup>141</sup> 4D2 (Becirovic Statement to 2<sup>nd</sup> Corps Mil. Sec. Dept, 11 August 1995), p.12.

54. The military and civilian authorities inside Srebrenica worked together to coordinate the evacuation of the population. A decision was taken that military-age men should head towards Muslim territory over the hills to the northwest, and that women, children and elderly men should go to the UNPROFOR based in Potocari, in anticipation of an evacuation.<sup>142</sup> These were inter-related decisions: the departure of military-aged men meant, as a corollary, that the families of these men would wish to follow them. The civilian and military authorities worked together to ensure that everyone knew about the evacuation, and the alternate routes that were to be taken. PW-120, PW-169, PW-113 and PW-116, amongst others, described the role of the BiH authorities – in particular, the predominant role of the Army – in spreading word about the evacuation:

The command of the army ordered the able-bodied men to go through the woods; and those who were weak, they were supposed to go to Potocari.<sup>143</sup>

...

In the early evening, perhaps about two hours before night fall, we saw this column from other villages, people walking, and then people called out to me from the other fields around, they said, "Let's go home, Srebrenica has fallen." So I got home and at home I found my neighbours at this particular point, and with packed bags and they said, "What are you waiting for? Do you see that everybody is on the move?" *And they said somebody came from the civilian protection, and they said that the old and infirm should go to the UNPROFOR base at Potocari; whereas military-age men should go through the forest. So I, together with my family, left.*<sup>144</sup>

....

[REDACTED]

145

<sup>142</sup> Prosecution Adjudicated Fact 245 ("As the situation in Potocari escalated towards crisis on the evening of 11 July 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH, and attempt a breakthrough towards Bosnian Muslim-held territory in the north").

<sup>143</sup> P2220 (PW-120 92bis statement), p. 2734-5.

<sup>144</sup> PW-169 17304:8-17 (emphasis added).

[REDACTED] See also P3241 (92bis statement of Salih Mehmedovic), pp. 1-2 ("It was decided that the women, children and old men would gather at the UNPROFOR base in Potocari and be transferred in an organised fashion from there to the Tuzla area [REDACTED]

[REDACTED]; P3235 (92bis statement of Sera Ibisevic), p. 2 ("The military leadership in

55. The Army had planned for this eventuality, having reconnoitered a route for the column in June.<sup>146</sup> The military-aged men started to assemble at Susnjari and Jaglici during the afternoon of 11 July<sup>147</sup> and its lead elements departed at around 10 p.m. that evening.<sup>148</sup> Many civilians had left Srebrenica for Potocari by late-morning of 11 July,<sup>149</sup> with the last group following in the afternoon in advance of Serb troops.<sup>150</sup> By the time General Mladic ambles down the main street

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Srebrenica told mothers with children to head for the UNPROFOR base in Potocari, and grown men to try to break through the woods to free territory.”); PW-111 7079:18-21 (“We were told that there would be a gathering at Jaglici, and I went to Jaglici with my wife and two daughters. We came to a point where we had to separate. The elderly, civilian, and women were going to Potocari, and we were going to the woods”) PW-113 3357:14-3358:3 (“we heard from people that there was this order or that the command of the B and H army ordered that. Nobody else could have done that, for the able-bodied men to go towards Tuzla through the woods and the civilians should go to Potocari. It wasn't anything strict... Somebody ordered that, or perhaps it was the B and H army. I don't remember details. There were many people. This is my answer.”)

<sup>146</sup> See e.g., 1D1009 (28th Division Order, 14 June 1995) and 4D322 (ABiH 28th Division Command Official note, No. 13-05-105, 7 July 1995). Kingori also suggests that this is the likely conclusion, given that in retrospect, the first option that he describes was the manner of the column's departure: 1D20 (UNMO Report, 26 July), para. 11 (“There therefore seem to be 2 possibilities: (a) ABiH were planning to withdraw long before the situation necessitated it. This is supported by the seemingly poor resistance put up by the ABiH. (b) The break-out was not planned but rather carried out by small groups resulting in fighting/ambushes in the W and NW as troops from the E side tried to get through.”)

<sup>147</sup> P2272 (PW-112 92bis statement) pp. 6-7 (“Q. When you set off -- what time did you set off from Susnjari? A. Well, from a field in front of a house, I left there at around noon, between 12.00 and 1.00, towards the Bojna hill. Q. Was that on the evening of the 11th, or was it noon on the 12th? A. It was in the evening of the 12th -- no, I'm sorry. It was between the 11th and 12th. We started out on the 11th, at about 2.30, and in the evening arrived at Susnjari at about 10.00. We had a consultation there. So that at about 12.00, midnight, that is to say, we started out. The night between the 11th and 12th”); Oric M 871:25; P2220 (PW-120 92bis statement), p. 2735 (“Q. Now, can you remember approximately what time you left Jaglici on the 11<sup>th</sup> of July? A. In the evening of the 11<sup>th</sup> of July, around 10.00 p.m.”)

<sup>148</sup> Oric M 870:22-872:15. Prosecution Adjudicated Fact 246 (“At around 22:00 on the evening of 11 July, the “division command”, together with the Bosnian Muslim municipal authorities of Srebrenica, made the decision to form the column”); Oric M 872:10-15 (“And sometime in the evening, around 10.00 maybe, or even later, I don't know, I did not look at the watch, a decision was made to head towards Tuzla... The de-mining units immediately set off towards Tuzla to clear the terrain from landmines, and after them the other units started walking single file after them, and that's -- that's what went on for some time”).

<sup>149</sup> PW-126 3598:19-21 (“The people had already left, most of them left Srebrenica... It was around 11.00...”), 3599:17-19 (“Q. And, Witness, around what time did you and your brother arrive in Potocari? Do you recall? A. We left around 11.00, and we moved slowly”), 3599:25-3600:2 (“Q. And can you tell around what time you arrived in Potocari? How long did it take you to get to Potocari from Srebrenica? A. It may have been about half past 12 or 1.00 in the afternoon”).

<sup>150</sup> 4D8 (ABiH Report on the Fall of Srebrenica, 28 August 1995), p. 4 (“At about 1500 hours on 11 July 1995, almost the entire civilian population of the town and surrounding villages set off in the direction of the main UNPROFOR military base in Potocari.”); Prosecution Adjudicated Fact 105 (“By 10 July some 30,000 refugees from the

of Srebrenica Town, at around 4:30 p.m. on 11 July,<sup>151</sup> the entire Muslim population has fled: the men into the forests in preparation for their break-through attempt; and the women, children and infirm to the UNPROFOR base in Potocari.<sup>152</sup>

56. The collective expectation and desire of the civilians crammed in and around the UNPROFOR base in Potocari on the evening of 11 July was that they should be evacuated as soon as possible. As early as 9 July, the municipal authorities of Srebrenica were asking for authorization from the central authorities to negotiate for the safe-passage of the civilian population:

Our military command is dissolving and the members of the 28<sup>th</sup> Division of the Ground Forces are no longer able to do anything to prevent aggressor forces from entering the town. Chaos and panic prevail and the civilian authorities are left with the last unpopular step to save the population and /?It is stressed that/ a meeting at the level of the state and military organs of the R BH with the Serbian aggressor side with the aim of finding a possibility to open a corridor for the population to move to the nearest free territory of the R BH under the control of international factors must be urgently arranged /as printed/. WE NEED AN URGENT REPLY, AT THE LATEST BY 2400 HOURS.<sup>153</sup>

Officials from the BiH reassured PW-169 and other Muslim civilians as they arrived in Potocari that transportation would be arriving soon to take them away: "They said transportation would

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surrounding area had gathered around the UN Base in Srebrenica town and at the UNPROFOR Headquarters in Potocari"); Fact 108 ("Thousands of residents, desperate for protection, crowded around the UNPROFOR Bravo Company compound in Srebrenica, eventually forcing their way inside"); Fact 110 ("Following the shelling of Bravo Company and with the encouragement of the DutchBat troops, Bosnian Muslim residents from Srebrenica began to move north towards Potocari"); Fact 120 ("Faced with the reality that Srebrenica had fallen under the control of Bosnian Serb forces, thousands of Bosnian Muslim residents from Srebrenica fled to Potocari seeking protection within the UN compound"); Fact 122 ("By the end of 11 July, an estimated 20,000 to 25,000 Bosnian Muslims were gathered in Potocari. Several thousand had pressed inside the UN compound itself, while the rest were spread throughout neighbouring factories and fields").

<sup>151</sup> P2375 (Intercept between GVERO and Karadzic, dated 11 July 1995, at 16:45 hrs. Gvero informs KARADZIC that Serb flag is on the Serb Orthodox church in Srebrenica); P2047 (Trial Video), 27:42-33:13.

<sup>152</sup> UNMO reports on the situation in the enclave provide a timeline for the civilian evacuation. A report apparently sent at 4:20 p.m. on 11 July already assesses the number of refugees at the UNPROFOR compound in Potocari at 20,000 and growing steadily (P507). A 7.10 p.m. UNMO report describing the state of the refugee population in Potocari, omits to mention that civilians were still arriving. It may be inferred, therefore, that the entire group of refugees had all arrived before this time (P509).

<sup>153</sup> 4DP9 (Report from the session of the Srebrenica Municipality Presidency, 9 July at 1900 hours, to Izetbegovic and Delic).

be there, but they didn't say where. They said that those of us who were not able bodied, fit for the army, would go on from Potocari somewhere."<sup>154</sup>

57. Karremans reflects and conveys this same understanding during the first Hotel Fontana meeting, at around 8 pm on 11 July, saying to Mladic:

I had a talk with General Nikolai two hours ago, and also with the national authorities about the request on behalf of the population. It's a request because I'm not in a position to demand anything. We... the Command in Sarajevo has said that the enclave has been lost and I've been ordered by BH Command to take care of all the refugees. And are now approximately 10,000 women and children within the compound of Potocari, and *the request of the BH Command is to... let's say, to negotiate or ask for the withdrawal of the battalion and withdrawal of those refugees*, and if there are possibilities to assist that withdrawal. *There are some women who are able to speak English*, and what I've heard from all the soldiers who are now working to ... let's say, ease the pain for the population.... *A lot of people, a lot of persons, women said: "We are waiting for the buses and can we leave the enclave?"* Because they are sick, they are tired, they are very scared... I think that most of them would like to go to Tuzla, been there once 3 months ago.<sup>155</sup>

Karremans' request for the evacuation of the civilians in Potocari is unequivocal,<sup>156</sup> and based on two sources: the BiH government, and his own direct understanding what the Muslim civilians in Potocari were telling his soldiers. They were telling his soldiers, on the evening of the 11th: "We are waiting for the buses."<sup>157</sup>

<sup>154</sup> PW-169 17368:8-20 ("I understand that, and that's why I wanted to remove this ambiguity. But what I want to ask you is do you remember -- did they tell you then when you said the civilian population should go to Potocari, did they tell you then that you would be transported from there to Tuzla, Kladanj, et cetera? A. They said transportation would be there, but they didn't say where. They said that those of us who were not able bodied, fit for the army, would go on from Potocari somewhere. Q. Let us clarify. That piece of information that you would go to Tuzla with somebody who would organise the transport, that's something you were told in the afternoon of the 11th of July. Could it have been between the -- between 6.00 and 7.00 p.m.? A. Yes. Yes.")

<sup>155</sup> P2047 (Trial Video), 00:43:46 to 00:52:35; P2048 (Srebrenica Trial Video Transcript), pp. 19-22. (emphasis added)

<sup>156</sup> Prosecution Adjudicated Fact 170 ("Colonel Karremans sought assurances that DutchBat and the Bosnian Muslim populations would be allowed to withdraw from the area, and General Mladic stated that the Bosnian Muslim civilian population was not the target of his actions.")

<sup>157</sup> This perception, again, corresponds to that of the UNHCR source, who said "virtually everyone in the enclave wishes to leave" (5D40 (Akashi memo to Annan, 11 July 1995), p. 2.)

**(v) Implications: Any Assistance Provided by Borovcanin, Directly or Indirectly, to the Evacuation Process Does Not Constitute Forcible Transfer**

58. Borovcanin is charged with participating in a joint criminal enterprise to commit forcible transfer of the Muslim population of Srebrenica by (i) militarily disabling UN forces on the morning of 12 July; and (ii) allowing his men to assist with the evacuation process in Potocari.<sup>158</sup>

59. The *actus reus* of forcible transfer is the forcible removal of a person from a place where they are lawfully present, using “expulsion or other coercive acts” not otherwise justified under international law.<sup>159</sup> The ICC elements of crimes explains that “coercive acts” are not limited to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>160</sup> The *mens rea* must logically include the intent to coerce or to forcibly expel the victim, although most statements of *mens rea* in the jurisprudence focus on more esoteric conditions for the crime, such as the lawfulness of the victim’s presence and the intended duration of the transfer.

60. The Prosecution has not demonstrated that Borovcanin’s actions on 12 July were animated by an intention to coerce the civilian population out of the enclave. The evidence described above shows that the Muslim civilians were collectively desperate to leave the enclave by the evening of 11 July. The BiH authorities expected and wanted their evacuation. UNPROFOR had communicated this desire to the VRS in no uncertain terms on the evening of 11 July. Borovcanin, in turn, was told that this was the collective wish of the population and that he should allow his men to assist in the evacuation. Borovcanin’s role in leaving behind one of his units to assist with the evacuation is not probative of any intention to coerce the civilian population out of the enclave; it is simply probative of an intention to respond to an urgent humanitarian need based on the stated wishes of the civilian population itself.

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<sup>158</sup> Indictment, paras. 49, 62, 81; Prosecution Pre-trial Brief, para. 198.

<sup>159</sup> *Prosecutor v Milan Milutinovic et al.* (Case No. IT-05-87-T), Trial Judgement, 26 February 2009, para. 164 (“Milutinovic TJ”); ICC Elements of Crimes, p. 7.

<sup>160</sup> ICC Elements of Crimes, fn. 12.

61. Improper coercion may or may not have been exerted against the population of Srebrenica over the previous months (strangling supplies) or days (during the military attack). Someone responsible for those acts, if they were committed with the requisite intent, may be guilty of forcible transfer. The key point in respect of Borovcanin and his subordinates is that (i) they in no way participated in creating the coercive conditions; (ii) the desire of the civilian population to leave was fully-formed by the time they arrived on the scene; (iii) that desire had been communicated on behalf of the BiH authorities and the Muslim civilians through the presumably reliable auspices of UNPROFOR; (iv) neither Borovcanin nor his subordinates had any capacity to alter that desire; (v) whether improper coercion had taken place over the previous months or days would have required Borovcanin or his subordinates to make subtle evaluations of the extent to which humanitarian supplies had been constricted or the nature of artillery targeting which they simply did not have enough information to assess; and (vi) their only real option was to alleviate the manifestly unsustainable conditions for those civilians by assisting with the evacuation, just as the UNPROFOR troops were doing.

62. A candid view of the situation in Potocari was provided by one Muslim witness:

Q. Can you describe the situation inside the compound [on the evening of 11 July]? A. In a nutshell, it was horrible. Very many people in a tight space. It was crowded. Children were crying. Needless to say, they needed to go to the lavatory. There was little food ....  
 Q. And on the morning, the next morning of July 12<sup>th</sup>, what happened? A. The next morning dawned and those scenes were almost the same, except that panic was mounting amongst the people there. And later on that morning I saw Serb soldiers in the same hall in which we were. Q. Do you know what caused the panic to mount that morning? A. *The mere presence of the Serb soldiers, even though I must point out that those Serb soldiers behaved very decently.*<sup>161</sup>

63. The Prosecution has not shown that Borovcanin was animated by any intent other than to assist an evacuation that appeared voluntary – or at the very least, absolutely necessary in light of the intense desire of Muslim civilians to leave. The question can usefully be inverted: what would Borovcanin have done differently if he was *not* animated by the intent to commit forcible transfer? And what would Borovcanin be charged with before this Tribunal if he had attempted to force the civilians back to their houses against their wishes?

<sup>161</sup> P2210 (PW-118 92bis statement), pp. 1250-1251 (emphasis added).

64. The next two sections will discuss each of the two actions alleged against Borovcanin in respect of forcible transfer: his role in taking military control of Potocari (Section IV(b)); and (ii) leaving his men behind to assist with the evacuation (Section IV(c)).

**(vi) The Impact of Alleged Coercion by General Mladic at the Hotel Fontana Meetings**

65. General Mladic's conduct during the two Hotel Fontana meetings of 11 July could be interpreted as coercive. The significance of his behaviour is minimal, however, first and foremost because there is no evidence that Borovcanin ever learned of this behaviour. He was not present during any of the Hotel Fontana meetings on 11 and 12 July and would not, therefore, have been in a position to assess whether Mladic's conduct was indicative of a broader forcible transfer plan.

66. Further, Mladic's conduct is not particularly significant in light of the chain of events described above. Colonel Karremans arrived at the first Hotel Fontana meeting already intending to convey the messages from UNPROFOR, the BiH authorities and the civilians themselves that they wished to be evacuated. Mladic's grandstanding<sup>162</sup> had no impact on this request. Mladic's dramatic tone with Nesib Mandzic on the second meeting has nothing to do with inducing the civilians to leave. Mladic is prying Mandzic for information about the 28<sup>th</sup> Division, hoping to intimidate them into surrendering. This was not directed at inducing anyone to leave the Srebrenica enclave – which was the very subject-matter of the meeting that they were all attending.

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<sup>162</sup> P2047 (Trial Video), 36:51-43:46, 53:18-56:19; P2048 (Trial Video Transcript), pp. 14-19, 22-30.

## **IV b Borovcanin's Role in Securing the Terrain Around Potocari on 12 July Was Not Unlawful or Improper, Nor Does It Show Involvement in a Forcible Transfer JCE**

### **(i) Prosecution Allegations**

67. The Indictment alleges that Borovcanin was part of a joint criminal enterprise to force the Muslim population out of Srebrenica and that he contributed to the JCE by:

Disabling the UN force militarily: (i) he commanded MUP forces ... on 12 July 1995 who forcibly entered the UN enclave at Potocari, and along with VRS forces, took military control of Potocari and the Dutchbat base there; (ii) he was present in Potocari on 12 and 13 July commanding MUP forces ... who assisted the VRS in disarming Dutchbat troops in and around Potocari.<sup>163</sup>

68. The Prosecution repeatedly conceded that "there were plenty of legitimate reasons for this attack" against the Srebrenica enclave,<sup>164</sup> of which the advance on Potocari was merely the final stage. The Prosecution nevertheless tried to hedge its bets by implying that some participants in this justified military operation were animated by the criminal intent to forcibly transfer the civilian population. The legal implications of this "dual-intent" theory are discussed later; for present purposes, what is significant is that the Prosecution never identified any allegations *other than* Borovcanin's mere participation in the attack on Potocari to demonstrate his alleged criminal intent. The Prosecution has not alleged, nor has it presented, any material fact extrinsic to the attack itself to show that Borovcanin was in on this alleged JCE.

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<sup>163</sup> Indictment, para. 81(a).

<sup>164</sup> 23167:3-8 (MR. McCLOSKEY: Just to reiterate, the Prosecution agrees there were plenty of good and legitimate reasons for the VRS to attack Srebrenica in July 1995 and that there were also some that, as you know, were part of the Prosecution's case were not and that a mixed motive situation is what we have here. I do not disagree that there were plenty of legitimate reasons for this attack"); 3873:24-3874:6 ("MR. McCLOSKEY: The position is that Muslims did attack outside the enclave and that this did provide military justification for the Serb troops to attack Srebrenica. However, it has been our position that the attack on Srebrenica had a dual motive: One was military and it had some legitimacy; two was to take out the Muslim population from the enclave, which is a crime against humanity. And that when there are two motives, one legitimate and one illegitimate, our charges are based on the illegitimate one"); Prosecution Opening Statement 396:3-7 ("So there was some justification to go into Srebrenica by the Serb army and take out this threat. We'll look at that a little bit later. However, when we look at it in the overall objective, the motive to move out the civilian population, it's a two-part plan, one that may have some legitimacy, and the other that absolutely does not"); 3874:2-6 ("One was military and it had some legitimacy; two was to take out the Muslim population from the enclave, which is a crime against humanity. And that when there are two motives, one legitimate and one illegitimate, our charges are based on the illegitimate one.")

## (ii) Overview

69. The military conquest of the Srebrenica enclave was lawful under IHL. Borovcanin executed a combat task on the morning of 12 July that was directly related to this lawful purpose: sending his forces through northern approaches of the enclave around Potocari to ensure that no Muslim forces were present and that the territory was secure. His units had no engagements or exchanges of fire with either Muslim forces or with UNPROFOR forces. Serb forces had every right by the morning of 12 July to treat UNPROFOR soldiers as combatants and to require that they surrender and disarm.

## (iii) Discussion

70. Borovcanin went to the area of Zuti Most at around 10 pm on the night of 11 July in order to reconnoitre the area, in preparation to execute Mladic's orders for the deployment of his forces.<sup>165</sup> Some of his units had by then finally arrived in Bratunac but were not yet deployed.<sup>166</sup> Borovcanin spent about half an hour at Zuti Most,<sup>167</sup> during which time he encountered Momir Nikolic who described their discussion:

<sup>165</sup> P2852 (Borovcanin OTP Interview), p. 32 ("The officer passed General Mladic's order to start to go from Bratunac of course with the police forces towards Zuti Most and then the village of Milacevici.") Borovcanin receives this order some time after 3 pm at Pribicevac and then returns to Bratunac, where he waits for his forces to arrive. He was still waiting for his forces to arrive, in particular the 2<sup>nd</sup> Sekovici Detachment, when Mladic reiterated this task to Borovcanin at around 7 p.m.: "And I entered, I got into the hall and I saw General Mladic, he was having dinner with officers. I don't remember who was there. And before I could speak to him, when there was still a few metres distance he asked me whether I had fulfilled my task. PM: Ok, about what time was this that you went to the Hotel Fontana? LjB: Around 7 p.m. And as I told him again that I don't have these forces at my disposal so that I could do it, he angrily ordered me to leave." (P2852 (Borovcanin OTP Interview), p. 46).

<sup>166</sup> The first of his three units to arrive is the poorly-trained and non-combat worthy Deserters' unit, which arrives late in the afternoon. PW-100 14802:14 ("I would say it was late afternoon"); Djuric M 10854:4 ("It was late in the afternoon"). The unit is immediately sent to several kilometers east of Bratunac; Djuric M 10799:16-22 ("The local policemen took us up river along the Drina to a populated place.... There was a school there. When we got there, there were many beds piled up there. I assume that somebody had stayed there before, and there was a kind of -- we made a kind of makeshift camp there using the beds in that school. It was five or six kilometres away from Bratunac, from what I can recall now.") The 1<sup>st</sup> PJP Company arrived next, assembling in Bratunac between 6 and 8 pm. Zaric Z 26914:2-3 ("We arrived sometime in the evening or late in the afternoon. After 7.00 in the evening, or maybe even 8.00."); Filipovic N 26991:24 ("We arrived in Bratunac, I think, between 6.00 and 7.00 p.m."). The 1<sup>st</sup> PJP Company is billeted that night in a building in Bratunac. Zaric Z 26916:18-20 ("I don't know whether it was a sports facility or a school facility, but in any case, that's where I spent the night together the other members of my platoon"); Filipovic N 26992:23-24 ("That evening we were billeted in a school, in a gym of that school. Commander Pantic told us to stick together, not to wander away.") The 2<sup>nd</sup> Sekovici Detachment ("2<sup>nd</sup> SD") arrived after midnight on the night of 11 to 12 July, and were also billeted in Bjelovac. Pepic M 13544:16-17; Celic P 13464:4-5.

I arrived there some ten or 15 minutes later, Mr. Borovcanin asked me or, rather, we talked about where were the positions, the targets of Muslim units that could be seen from Zuti Most. This was supposed to include the targets on the left-hand side of the road and the right-hand side of the road in the direction of Bratunac and Srebrenica. To be specific, on the left-hand side it was the village of Likari and the positions and fortified positions there. On the right-hand side of the road, it had to do with the village of Budak where also there were fortified Muslim forces. There were bunkers, fortified buildings, et cetera. The basic reason why Mr. Borovcanin asked me to tell me about that was that I was the chief of the security intelligence organ at the Bratunac Brigade, and I had information where certain fortifications were.<sup>168</sup>

This discussion probably occurred shortly before the second Hotel Fontana meeting at 10 p.m., because Nikolic "left in a hurry and actually immediately after that convoy [which included UNPROFOR vehicles]."<sup>169</sup>

71. This discussion illustrates Borovcanin's intent as well as the information available to him. His role is to secure the northern approaches of the Srebrenica enclave by ensuring that no ABiH forces are there. Nikolic tells him that Muslim forces are potentially present in the area and gives precise information about their likely positions. His information was accurate. The 280<sup>th</sup> Brigade of the ABiH had long been known to be present in and around Potocari.<sup>170</sup> Budak was widely known to be a headquarters.<sup>171</sup> VRS maps showed that a headquarters of the 280<sup>th</sup>

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Some members of the 1<sup>st</sup> PJP Company may have spent the night behind the line of separation around Zuti Most (P2853 (Borovcanin OTP Interview), p. 6); 4D510/P92 (Borovcanin Report, 5 Sept 1995) p. 2 ("the envisaged police forces had still not arrived in the area or could not be used. In the meantime, one MUP Company from the Training Center on Jahorina arrived in Bratunac (Bjelovac)". The Bjelovac school is mentioned in several Bratunac Brigade documents as one of its facilities: see e.g. 4D290, 4D298, 4D292 and 4D396.

<sup>167</sup> P2853 (Borovcanin OTP Interview), p. 5.

<sup>168</sup> Nikolic M 32912:13-32913:1. See also P2852 (Borovcanin OTP Interview), p. 51 ("I had the previous order to enter with my troops into that area, so I went there and I wanted to check the situation there ... whether there were any conditions to bring in or take in the troops.")

<sup>169</sup> P2852 (Borovcanin OTP Interview), p. 52.

<sup>170</sup> 4D478 (ABiH 8<sup>th</sup> OG Srebrenica Command - Document titled "Significant Dates of the Units"), p. 1; 4D475 (8<sup>th</sup> OG Command, 15 November 1994), point 7 (referring to Budak as part of the ABiH 280<sup>th</sup> Brigade Defence line; 4D478 (ABiH 8 OG Srebrenica Command - Document titled "Significant Dates of the Units", 20 February 1995), p. 1; 6DIC29 (Photo marked by PW-114 and T. 3172-75 re Muslim fighters with mortar on 11 July in Potocari) 5D50 (BIH 2<sup>nd</sup> Corps - 8<sup>th</sup> OG - a schematic of the structure as at 9 July 1994 - unit in Potocari).

<sup>171</sup> Boering 2180:10-17 ("Q. You said a while ago that there was near Potocari a place. When you say close to Potocari, are you thinking of the bases of UNPROFOR near Potocari? A. No. There was a small village just to the north, the north-west of the enclave, when looking at Potocari itself. There was a small village. Somewhere there. I've never been there, I know there was a brigadier commandant who was there, but I don't really know how he

Brigade was located there, and this information was repeated during the commander's reconnaissance in early July 1995.<sup>172</sup> The ABiH had trenches on the Budak side of the Road,<sup>173</sup> and the VRS expected significant resistance there.<sup>174</sup> ABiH documents confirm that the 280<sup>th</sup> Brigade also had several facilities in and around Potocari, including a house right next to the Dutchbat base.<sup>175</sup>

72. The first tangible action by Borovcanin<sup>176</sup> and his men comes early on the morning of 12 July. The three units under his command move southwards past Zuti Most through the terrain

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operated from that base"). Budak is northwest of Potocari, as confirmed by Pandurevic: And would you agree with me that, although unfortunately the ICTY logo is blocking out the compass direction, at least on my screen, that in fact this image is pointing directly north. Would you agree with me that Budak is north-west of the DutchBat base in Potocari? A. Yes." (31987:14-19)

<sup>172</sup> P1504 (Drina Corps map, 1995); P2884 (Drina Corps map); Pandurevic V 31986:2-5 ("Yes, as far as I can remember, Colonel Blagojevic pointed to the deployment of the forces on the map and those forces came from the north, from the direction of Bratunac. The command of that brigade was indeed in Potocari but I can't remember the exact location"); P2884.

<sup>173</sup> PW-114 3157: 15-17 ("There were a couple of houses and then it was in the middle of nowhere, in the forest mostly, and then up to the hills were green grass fields, that's all, and some bunkers, Muslim bunkers. That's all"); Filipovic N 26996:20-21 ("we encountered some trenches and connecting trenches.")

<sup>174</sup> P107/4D377/1D382/4D378 (Drina Corps Order for Active Combat Operations, Kirvaja-95, 2 July), p. 1 ("the 280<sup>th</sup> Brigade is blocking the Potocari-Srebrenica axis ... Its Command post is in the village of Budak. It has especially strongly fortified, and will resolutely defence, Zonik, the Industrial zone in Potocari, the area of Likar village and Gradac /trig point 527/.")

<sup>175</sup> 4D210 (BiH Armed Forces Supreme Command Staff - Order re organizational changes, 1 January 1994) p. 1 ("set up the 280<sup>th</sup> Light Eastern Bosnia Brigade with headquarters in Potocari ... [the] Brigade will consist of the Potocari Brigade units formed until now, the Solocusa and Bajramovici Companies of the Independent Srebrenica Battalion and the sabotage and reconnaissance platoon"); 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 1 (listing four family houses in Potocari used for command and other purposes, including the house of "Meho Hrvacic"); 4D653 (cadastre of various properties in Srebrenica) pp. 7-8 (showing a listing for "Meho Hrvacic"); 4D683 (video of location identified on 4D653 as the Hrvacic house, showing proximity to Dutchbat base); Pandurevic V 31990:10-12 ("I remember that that command was relatively close to the separation line, maybe midway between the UNPROFOR base and the front-line itself."); Rutten 4956, 5188:17-5189:18, 1D1C57 (Rutten identifying house in Potocari where Muslim military leaders were meeting February-June 1995)

<sup>176</sup> Momir Nikolic testified that on the night of 11 July Borovcanin ordered a tank to fire on the fortified ABiH positions that he (Nikolic) had identified. The Defence denies that this ever happened, and Nikolic's uncorroborated testimony is an insufficient basis on which to make such a finding. Circumstantial evidence shows that tank-fire was being directed against these targets long before Borovcanin arrived. Kingori testified that the tank-fire from Zuti Most started at 1845 hours, more than 3 hours before Borovcanin's arrival (Kingori 19240-19241; P510 (UNMO Report)). The Defence saw no need to challenge or refute this testimony because, even if true, it is no probative of any wrongdoing or criminal intent. Nikolic emphasized that the fire was directed against military targets that he, Nikolic, had himself identified and that he believed at the time were manned by Muslim soldiers. Nikolic M 32913:4-10 ("I did indicate to him the positions I knew about, and the information that I had concerning the

on either side of the road, and along the road itself. The two more experienced units (the 2<sup>nd</sup> SD and the 1<sup>st</sup> PJP Company) were deployed on the west (Budak and Milacevici) side of the road,<sup>177</sup> reflecting where the Muslim forces were expected to be concentrated.<sup>178</sup> The orders were to search the terrain for any hostile forces and, if necessary, engage them.<sup>179</sup> They were specifically

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enclave. Mr. Ljubisa Borovcanin then subsequently engaged the targets using a T-55 tank. I also need to add that at that time when Mr. Borovcanin was firing at those positions, I subsequently learned and had information that on the 11th in the afternoon, at those positions there were no longer any Muslim forces left"); Nikolic M 32985:24 – 32986:16 ("Yes, Your Honours, but I would like to be perfectly clear. Yesterday, I said that from the area of the Yellow Bridge, Mr. Borovcanin was firing at the targets located to the right and to the left of the Bratunac-Potocari road. I also said that on the right-hand side and the left-hand side in Likari and Budak were military targets, such as fortifications where previously members of the Muslims forces from Srebrenica had been deployed ... the targets engaged by Mr. Borovcanin were given to him by me, the coordinates were given to by me because I was an intelligence officer and I knew how these facilities were deployed. That is what I said yesterday and I stand by it.") Even Kingori does not suggest that the Dutchbat compound was being targeted (P510, p. 5; Kingori 19240); Koster 3102:21-23 ("During the night, from 11 to the 12th of July, if that is what you mean, in so far as I know, there were no mortar, grenade, shootings in the direct vicinity of the shelter"); 1D36/P512 (UNMO report, 12 July 95), p. 4 (no shelling during the night of 11-12 July).

<sup>177</sup> Pepic M 13545:14-16 ("Well, if you look from Zuti Most in the direction of Potocari, it would be to the right. There was a hill of some sort up there and there were some villages there too"); Celic P 13465:1-5 ("In the morning of the 12th of July, maybe around 8.00 or 9.00 in the morning, we set out from Bratunac in the direction of Srebrenica. We arrived at the Yellow Bridge where the road forks off towards the right. This is where we turned right towards a place which I believe is called Budak. That's where we were deployed and stayed there for a while"); Zaric Z 26918:1-2 ("We moved in depth on the right-hand side from the road"); Filipovic N 26995:25:26996:1 ("We headed to the area to the right of Zuti Most in single file, and we were accompanied by this deminer"); PW-160 8580:19 - 8581:1 (Deserters on left side of road); PIC73 (photo marked by PW-160); PIC98 (photo marked by Mendeljev Djuric); Stanojevic D 12875:2, 12905:1-4 ("Q.... that would be to the right? A. Yes. Q. To search the terrain in the direction of the village of Gornji Potocari; is that correct? A. Yes")

<sup>178</sup> Borovcanin says in his interview that "Milacevici" was mentioned by name as the direction in which he should deploy his forces on the afternoon of 11 July. This tallies with evidence showing that, by then, VRS intelligence had its first indications that at least some Muslim forces were heading in that direction: see 4D692 (Intelligence report signed by Momir Nikolic, 11 July, 1350 hours), p. 1 ("Muslims are pulling out of Srebrenica towards Potocari, heading to Suceška, Milacevici, Pale"). 4D693 is a hand-written and incomplete order, said to originate from the "Drina Corps Command, Pribicevac IKM", with the ERN number immediately following that of 4D692. This draft order was directed to "The Command of the Milici Light Infantry Brigade", but item two says: "Bratunac brigade towards Milacevici." This order was probably written at just about the very moment that Borovcanin was speaking with Mladic on the telephone at Pribicevac, explaining how and why Milacevici was mentioned in particular.

<sup>179</sup> Pepic M 13545:11-12 ("we were supposed to set out and clear the terrain, comb the terrain"); Celic P 13466:4-5 ("This is where we were deployed in a line, and if needed, we were supposed to scour the terrain"); Zaric Z 26917:24-26918:1 ("We received our complete instruction. At that moment we were told that we were supposed to scour the terrain right to the Bratunac-Srebrenica Road"); Filipovic N 26997:3-6 ("If we were to encounter any armed groups, if they offered resistance, then we were to deal with it in a military way; and if we encountered civilians, we were not to touch them.")

instructed not to target UNPROFOR forces, and did not do so.<sup>180</sup> The units moved through the terrain without confronting any Muslim forces<sup>181</sup> and eventually moved back to the main Road, most of them congregating just north of Potocari itself.<sup>182</sup> The 2<sup>nd</sup> SD and the 1<sup>st</sup> PJP Company were then bused back to Bratunac,<sup>183</sup> leaving the Deserters behind in Potocari along with numerous other VRS and civilian police units, including elements of: the Bratunac Brigade military police; 65<sup>th</sup> Protection Regiment military police; Drina Corps military police; the 2<sup>nd</sup> and 3<sup>rd</sup> Battalions of the Bratunac Brigade; "civilian police with German shepherd dogs"; the 10<sup>th</sup> Sabotage Detachment of the Main Staff; the Drina Wolves; and a unit from the Eastern Bosnia Corps.<sup>184</sup>

73. The Indictment alleges that Borovcanin's forces furthered the forcible transfer JCE by "disabling the UN forces militarily". This allegation is legally misguided and factually false.

<sup>180</sup> Zaric Z 26918:12-19 ("Did any of the commanders tell you anything about the checkpoint of the United Nations or anything with that regard, could you please explain? A. The morning was foggy and we could not see that checkpoint in front of us. But then the company commander told us that there was an UNPROFOR checkpoint and that we should pay special attention to it, that we should be mindful of it, that we should avoid any possible conflicts with them or any sort of communication with them, for that matter"); Djuric M 10856:16-20 (Q. When you received your assignment from Jevic, were you told that members of your unit should attack the UNPROFOR observation post at Zuti Most or to attack the United Nations base at Potocari? A. No.)

<sup>181</sup> Filipovic N 26996:24-25 ("In fact, we did not encounter any armed groups.")

<sup>182</sup> Celic P 13497:1-4 ("Q... that point where you descended on to the road, how far was it from the place where you saw the majority of the civilian population gathered? A. Maybe 600, maybe 700 metres."); Stanojevic D 12877:6-12 ("When I got there to the cordon, we stayed there for awhile, for a short while, until General Mladic arrived .... So we left that area around the cordon. We went behind a house into an orchard. And that's where we stayed"); Zaric Z (4DIC227, 4DIC228, 4DIC230); Djuric M (PIC98); PW-160 (PIC73) Celic P (4DIC136); Pepic M (4DIC139).

<sup>183</sup> Zaric Z 26929:1-26930:5 ("Q. As you descended on the road, did any of the commanders, and I'm referring to the 1<sup>st</sup> Company, accompany you, was anybody with you? A. Commander Pantic was next to the bus that was waiting for us there. He waited for us there on the asphalt road .... We used the same bus to go to the public security station in Bratunac."); Filipovic N 26998:23-25 ("So the bus came to pick you up and you went away, Could you please tell us, where did you go? A. When the bus arrived, we boarded the bus and we went to Bratunac."); Celic P 13467:18-20 ("We left that position and went down to the road. After a certain while we withdrew from that area and we arrived in the direction of Bratunac."); Stanojevic D 12879:11-12 ("Our bus came to pick us up. We all got into the bus and drove away to Bratunac.")

<sup>184</sup> C1 (Momir Nikolic 92<sup>ter</sup> statement), para. 6; Stanojevic D 12877:2-3 (sees Bratunac Brigade soldiers); P1936 (Compilation exhibit containing photos and identifications of Bosnian Serbs, pp. 36-59); P1937 (photo book), pp. 37-62); Erdemovic D 10976:3-10977:14; Trisic D 27165:19-27167:14 (Drina Wolves, Corps military police and Bratunac Brigade soldiers); PW-100 14810:25-14811:2 (Drina Wolves); Janjic M 17927:21-17928:5 (Bratunac Brigade soldiers and military police); Janjic M 17928:13-15 (municipal policeman).

74. UNPROFOR had, no later than 9 July when Franken issued his "seriously meant green order", become a combatant force within the meaning of international humanitarian law. The fundamental principle of IHL is that when the shooting starts, both sides are entitled to shoot at each other subject to reciprocal rules, regardless of who instigated the shooting. Both sides are then equally subject to the obligations and privileges of combatant-status under IHL. IHL does not give more latitude to one side or the other based on the alleged merits or demerits of the original use of force. Serb forces, which had been bombed and shot at for three days by a force that had aligned itself with their enemy, were completely entitled to demand the surrender of Dutchbat forces. This includes requiring them to disarm, seizing all their weapons and equipment, and taking them into physical custody. The requirements of surrender and the application of IHL to UNPROFOR forces are discussed more fully in Section VII (ii).

75. The allegation is also factually false because the Prosecution has failed to show that Borovcanin's forces engaged in any misconduct whatsoever towards UNPROFOR forces. Serb forces moving towards Potocari interacted with UNPROFOR forces peacefully and appropriately. Major Franken made this very clear despite the Prosecution's attempt to put words in his mouth about the nature of the Serb advance on Potocari:

Q. There was an infantry attack that commenced at some point that morning. Could you just briefly describe what you observed with respect to that? A. Yeah. That advance was a demonstration of a basically trained unit, men in line supported by a main battle tank and coming alongside the road from northern direction in the direction of Potocari. So from the area of OP Papa general Bratunac. Well dressed, I mean in proper uniforms. All the same uniforms. There was obviously a communication between the tank crew and the infantry outside. So more or less a demo, a demonstration of a normal army.<sup>185</sup>

...

Q. -- was that an attack or a show of force? A. No -- but that's -- probably, then, I have to explain the military word "attack." When you advance in a deployed formation towards a certain place, that is called an attack formation. If you mean by an attack that they came forward firing, et cetera, et cetera, that is incorrect. They came, deployed in an attack formation, from the area Papa in the direction of the compound Potocari. That's the way you have to read "attack" here.<sup>186</sup>

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<sup>185</sup> Franken 2489:19 -2490:3.

<sup>186</sup> Franken 2614:14-20.

Major Franken went on to explain that Serb forces skirted UN checkpoint OP Papa as they approached Potocari,<sup>187</sup> and the evidence shows that OP Papa was still manned by UNPROFOR on 13 or 14 July.<sup>188</sup> The only Dutch witness who complained about having been detained by force was Lt. Rutten, testifying that he had had a gun put to his head when he refused to hand over his weapon and his communications set.<sup>189</sup> No evidence was heard as to the unit affiliation of the soldier who did this which was, in any event, an entirely lawful incident to Rutten's combatant status.

76. The Prosecution has alleged that houses were looted and set on fire as Serb forces approached Potocari from Bratunac, implying that this has some connection to the forcible transfer.<sup>190</sup> The evidence does not suggest that the fires were of such intensity or scope to suggest any such malign purpose. Video footage does show that some haystacks were set alight; but haystacks were frequently set alight during the Bosnian war for legitimate military purposes, such as to (i) signal the position of one's own forces to other nearby units that are supposed to move in formation; or (ii) deprive the enemy of an effective place of concealment.<sup>191</sup> Further, any houses or buildings that were found to have been serving a military purpose – and

<sup>187</sup> Franken 2588:23-2599:1 ("Q. Once the members of the Dutch Battalion hoisted a white flag, these troops skirted the check-point and continued moving towards Potocari. Is that correct? A. Correct"). See also PW-100 14873:12-16 ("Q. Passing by [OP Papa] did there occur any hostilities between your unit and the Dutch soldiers manning that post? ... Any kind of hostility whatsoever? A. Not to my knowledge"); Djuric M 10858:8-17 ("Q. You and members of your unit did not open fire at the Papa OP when you entered the zone? A. No. Q. And they didn't open fire at you? A. No, no, they didn't.")

<sup>188</sup> Franken 2589:2-5 ("Q. Help us, please, and tell us: How long did the members of the Dutch Battalion stay in the Papa observation point near the Yellow Bridge? A. I'm just thinking. Papa was withdrawn on the 13th or the 14th. I don't know exactly"); Boering 2155:17-19. Rutten 2896:11-13 ("Q. On the 12th, were there DutchBat members at OP Papa still there at the time? A. I don't recall that but it's possible."); Kingori 19459:4-16 ("I think that was the last OP to be -- for the Dutch-Bat to evacuate"); 1D20 (UNMO Report, 26 July 1995), para. 10.

<sup>189</sup> P2178 (Rutten 92ter statement), p. 2122.

<sup>190</sup> Prosecution Pre-trial Brief, para. 148. This paragraph is found in a section entitled "Operation to Forcibly Remove the Muslim Population of Srebrenica", but does not explain the logical connection between the flight of civilians and the burning haystacks, which occurred after all the military-aged men had left the enclave, and the women, children and infirm had already crowded into the UNPROFOR based waiting for evacuation.

<sup>191</sup> Trivic M 11931:4-7 ("Q. When you were passing by, did you see any burning haystacks? Was that used to mark your positions? A. Yes. That was a standard procedure, given the lie of the land. That was almost the only way to see the lines reached by the units"); P4309 (Trivic Diary), p. 19 ("The adjacent units are not keeping up; the plateau was marked by burning hay").

documents show that there were at least four such buildings in the immediate vicinity of Potocari, and more in Budak – could also have been lawfully destroyed.<sup>192</sup>

77. Even assuming that one or more fires were unlawful, the Prosecution has not shown that they were on a sufficient scale to indicate anything more than random acts of indiscipline, rather than being demonstrative of the particular intent to coerce the civilian population into leaving the enclave. One Muslim witness in Potocari who had seen fires before she arrived in Potocari denied, for example, that dwellings were being set alight: “they were not torching valuable and important things, but some unimportant things.”<sup>193</sup> The video footage does not suggest that fires were widespread, and none are visible near the civilian population in Potocari. Petty vandalism, though regrettable, cannot be equated with the intent of coercing the civilian population to leave. Finally, no evidence was adduced that these acts of pyromania were committed by any of Borovcanin’s subordinates. Numerous units were roaming around Potocari and its environs on 12 July. Men from the Deserters’ unit reported to Djuric that they saw fires that had already been lit as they walked through the terrain, which confirmed Djuric’s understanding that VRS forces had already passed through the area.<sup>194</sup>

78. Nothing extrinsic to the “attack” on 12 July suggests that Borovcanin’s participation had the intent to commit forcible transfer by advancing his forces into the northern end of the Srebrenica enclave. Borovcanin had had no involvement in relations with the enclave. He had never seen Directive Number 7. He had never seen Directive Number 7/1. He had never seen the preparatory or combat orders for Krivaja-95. He was not present during any of the three Hotel Fontana meetings to see Mladic’s behaviour. He was not present on 6, 7, 8, 9, 10, or most of 11 July when unlawful targeting allegedly took place against Srebrenica town. There is no evidence that he saw any unlawful targeting on 11 July. He was not close to General Mladic and

<sup>192</sup> 4D135 (Ministry of Defence office, Srebrenica, 22 February 1995), p. 1 (listing four family houses in Potocari used for command and other purposes of the 280<sup>th</sup> Brigade).

<sup>193</sup> PW-126 3601:4-8.

<sup>194</sup> Djuric M 10806:6-15 (“A. Mr. Jevic suggested to me that that area -- he assumed that the area was clear, in the sense that the Army of Republika Srpska had passed there, that there were probably no other formations there, and that this was just a routine matter to go through it just to make sure that somebody wasn't remaining behind or had been left behind.... I remember then that one of the unit members told me that there was something up there that could be seen, that there was some houses that were burned there, that you could still see the smoke.”)

had no meetings with him aside from a brief and unfriendly encounter on the evening of 11 July. He was entitled to rely on what he was told: enemy forces were still potentially in the area and had to be engaged militarily. This information was not manifestly false; indeed, it was a legitimate concern. There was nothing unlawful, much less criminal, in participating in the operation under these circumstances.

#### **IV c Borovcanin's Role in Allowing the Deserters' Unit to Assist the Evacuation Does Not Demonstrate Any Intent to Commit Forcible Transfer**

##### **(i) Prosecution Allegations**

79. The Indictment alleges that Borovcanin was part of a joint criminal enterprise to forcibly transfer Muslim civilians and detainees from Potocari (81(b)(i) and (ii)) and Muslim combatants from the column (81(b)(iii)) by "controlling the movement of the Muslim population out of the enclave":

81(b)(i) on 12 and 13 July, he commanded MUP forces, listed above in paragraph 18, on 12 July 1995 who assisted the VRS in organizing the transportation on buses and trucks of Muslim women and children .... He was present in Potocari on 12 and 13 July and commanded MUP forces there, listed above in paragraph 18, who assisted the VRS in securing and controlling the Muslim population. As a commander, he had responsibility for the handling of all of these Bosnian Muslim women and children and to ensure their safety and welfare. He failed to do so;

(ii) on 12 and 13 July, he was present in Potocari and commanded MUP forces there, listed above in paragraph 18, who assisted the VRS in detaining and transporting Muslim men from Potocari to detention centres outside the enclave ....

(iii) on 13 July he was present along the Bratunac-Konjevic Polje Road and commanded MUP forces there, listed above in paragraph 18m who assisted the VRS in capturing, detaining, transporting to detention sites outside of the enclave, thousands of able-bodied men and boys from Srebrenica.<sup>195</sup>

80. The Prosecution asserts that "Serb soldiers and police horribly abused, murdered and terrorized the Muslim population in Potocari" and "terrorized the Muslims into leaving Srebrenica and then Potocari. They left with no real option to stay in the Srebrenica area."<sup>196</sup> Borovcanin is said to be present in Potocari "where troops under his command are present and assisting in the separation of the women and children and present when the brutality of Potocari is occurring ... Mr Borovcanin is active on the ground, in command [in] Potocari on both

<sup>195</sup> Indictment, para. 81(b).

<sup>196</sup> Prosecution Pre-trial Brief, para. 159.

days, 12<sup>th</sup> and 13<sup>th</sup>, in the middle of this horrendous crime scene of deportation and abuses of the public.”<sup>197</sup>

**(ii) Overview**

81. Borovcanin left Potocari before the evacuation process began on 12 July and did not return until around 3:30 pm on 13 July, when the last convoy of buses was leaving. Borovcanin ordered the Deserters’ unit to remain in Potocari to assist with the evacuation process on Mladic’s direct orders, having been told that the evacuation had been agreed with the Muslim authorities and UNPROFOR. The Deserters’ unit, commanded by Dusko Jevic, was under the effective command and control of Lt. Col. Radoslav Jankovic and/or Momir Nikolic for the duration of their participation in the evacuation process in Potocari, both of whom had been directly charged by General Mladic with responsibility for this task. The involvement of the Main Staff and the Security Organ was a natural and necessary consequence of the sheer scale and importance of the operation, in which many units and disparate resources were involved. Borovcanin had no role or responsibility as to the *manner* in which the Deserters contributed to the evacuation process, having been ordered by Mladic to take the bulk of his forces to fight the column along the Bratunac-Konjevic Polje Road.

82. The allegation that Borovcanin was responsible for forcibly transferring the column of Muslim combatants out of the Srebrenica enclave is logically, factually and legally nonsensical. The column’s departure from the enclave was a military decision taken by the ABiH on 11 July. Borovcanin had had no role in fighting the ABiH before that decision was taken. Borovcanin’s only role in respect of prisoners detained from the column was to hand them over to the Security Organ and military police of the Bratunac Brigade “at the very earliest opportunity.”<sup>198</sup> Borovcanin had no role, and none of his men had any role, in deciding where those prisoners should be detained or subsequently sent on 14 July.

<sup>197</sup> Prosecution Opening Statement 487:22-488:8.

<sup>198</sup> Butler 19637:17-22 (“according to the JNA regulations and the VRS instructions pertaining to those, the general procedure was that at the very earliest opportunity, these prisoners were to be turned over to the military police to ensure that they could be properly safeguarded and handled through the battlefield to the point where they were turned over to the individuals responsible for their -- for their detention on a longer period of level.”)

**(iii) Discussion**

**1. Borovcanin Was Not Present In Potocari During the Evacuation Process**

83. The major factual premise of the Prosecution's allegations against Borovcanin is that he was present in Potocari during the evacuation process, and the minor premise is that the Deserters' unit was under his command. Both of these factual premises are wrong.

84. The evidence shows that Borovcanin was present in Potocari until early afternoon on 12 July. General Mladic then ordered him to leave the Deserters' unit in Potocari, and to deploy his two combat-worthy units to fight the ABiH column that was, by then, known to be heading over the hills to the north-west.<sup>199</sup> Borovcanin accordingly left Potocari and went to Bratunac,<sup>200</sup> issuing instructions for the 2<sup>nd</sup> Sekovici Detachment and the 1<sup>st</sup> PJP Company to withdraw from Potocari.<sup>201</sup> All the witnesses from the 1<sup>st</sup> PJP Company and the 2<sup>nd</sup> SD confirmed that they left Potocari just before the beginning of the evacuation process; that they assembled in Bratunac; and were then deployed to a stretch of the Bratunac-Konjevic Polje Road.<sup>202</sup> No witnesses

<sup>199</sup> P2853 (Borovcanin OTP Interview), p. 24 ("AG: When and where did Mladic tell you to do this? LjB: Between Potocari and Zuti Most. I'm not really sure, but I think about 13:30, so 1.30 in the afternoon"); 4D510 (Borovcanin "Report on the Combat Engagement of the Special Police Brigade and other Police Forces in Operation Srebrenica '95 in the Period from 11 July to 21 July 1995, dated 5 September 1995, p. 3: "I received an order from General Mladic to send half of my men and the available technical equipment to that axis so as to block the area and fight the aforementioned formation.") This order was a logical response to VRS intelligence confirming the scale of the ABiH column moving through the gap between existing positions, and the need to block it; thus, Mladic's order. See e.g. P1100 (12 July 0656 hours intercept between unidentified interlocutors describing the movement of Muslim men in groups of 100 from Jaglici towards Pobudje; one of the interlocutors asks "maybe we should see or you could see if the MUP can set up some ambushes and so on"); P1106 (12 July, 1156 hours intercept between Zlatar [Drina Corps Command] and Badem [Bratunac Brigade Command] expressing urgent concern about a gap [poorly translated into English as "/useless?/"]) between VRS positions through which the Muslim column appears to be moving. This second exchange would have been shortly before Mladic issued his order to Borovcanin).

<sup>200</sup> P2853 (Borovcanin OTP Interview), p. 27 ("At about what time did you leave the area of Potocari, around the DutchBat Compound? LjB: Maybe 13:30. So, 1:30 in the afternoon.")

<sup>201</sup> P2853 (Borovcanin OTP Interview), p. 24 ("I went to gather my units, my forces, and I planned to go towards Zvornik. I was told do so by General Mladic who had information that larger number of armed Muslims soldiers were going in that direction"); Celic P 13467:16-21 ("We left that position and went down to the road. After a certain while we withdrew from that area and we arrived in the direction of Bratunac and from there, we went towards Konjevic Polje"); Pepic M 13548:25-13549:5 ("Q. And at some point I take it you withdrew from that area; is that correct? A. Yes. Q. And what did you do next? A. We went down to the vicinity of Zuti Most and we got into your vehicles and we were sent off in the direction of Bratunac"); Zaric Z 26930:1-5; Filipovic N 26998:23-25.

<sup>202</sup> Celic P 13467:16-2; Pepic M 13549:6-22; Zaric Z 26930:6-12; Filipovic N 26999:5-10; P3789 (Borovcanin dispatch, 13 July: "As we had received information that all able-bodied Muslims from Srebrenica had set out on a breakthrough toward Konjevic Polje and further towards Tuzla, I urgently dispatched our forces, with the support of

contradicted that this was the timing of these units' departure, and the Prosecution never challenged any of these witnesses as to the timing of the departure of the 1<sup>st</sup> PJP Company and the 2<sup>nd</sup> SD.

85. Not a single witness testified that Borovcanin was present during the evacuation of civilians from Potocari on 12 July. Several explicitly confirmed that he was not there. PW-160 indicated that Borovcanin [REDACTED], and made no mention of Borovcanin's further presence in Potocari that day.<sup>203</sup> Mendeljev Djuric, who was directly involved in the evacuation process, explicitly denied seeing Borovcanin there.<sup>204</sup> The Prosecution conspicuously avoided asking Momir Nikolic whether Mr Borovcanin was present during the evacuation – a glaring omission in light of the many questions about the command relationship between Borovcanin and Dusko Jevic (the Deserters' commander).<sup>205</sup> Dragoslav Trisic spent about an hour-and-a-half in Potocari on 12 July, arriving "at midday approximately, around noon".<sup>206</sup> He saw Momir Nikolic busy giving instructions to police and soldiers, but did

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hardware, to seal off the Kravica-Konjevic Polje road, where they spent the night.") Stanojevic D 12879:15-12880:4 (Stanojevic, a member of the 1<sup>st</sup> PJP Company, saw "vehicles coming, making a U-turn, setting themselves up to receive passengers. There was a crowd.... Q. Did you see any Muslims boarding those buses that you saw on the road, parked on the road? A. No, sir. Before we left, there were perhaps two or three vehicles parked there. At that time nobody was boarding the buses and nobody did until we departed. After that, I suppose some transports started"); Celic P 13500:8-11 ("You personally did not see the moment when the transport of the civilians from Potocari started in the directions of Tuzla while you were in Potocari, that is? A. No, I didn't."); Zanic Z ("Q. And let me ask you this, while you were on the road, could you possibly see the arrival of a certain number of lorries and buses who were approaching the DutchBat base in Potocari? A. Yes, we encountered a few empty buses headed towards Srebrenica, towards the base. Q. Did you have an occasion to see that the buses transported refugees from Potocari? A. I did not have an occasion to see that. I saw a somewhat smaller convoy later in the afternoon"); Filipovic N 26998:13-17; P2853 (Borovcanin OTP Interview), p.23 ("Q. Did you see the arrival of the buses and trucks? LJB: Yes. Q. And what is your understanding of the reason for them arriving in Potocari? LJB: They were part of, you know, realization of some previously made agreement and I was not aware of the complete content of that agreement. Q. Did you see people starting to board those vehicles? A. Not on that occasion").

<sup>203</sup> PW-160 8587:9-13 [REDACTED]

[REDACTED] The phrase "as soon as the buses started arriving" shows that the task was given before the buses arrived.

<sup>204</sup> Djuric M 10861:20-24 ("Q. On the 12<sup>th</sup>, also you did not have contacts with Ljubomir Borovcanin; is that correct? A. No. Q. And you did not see him at all on the 12<sup>th</sup> in Potocari? A. As far as I remember, no, I didn't see him.")

<sup>205</sup> See Nikolic M 32925:19-32930:21.

<sup>206</sup> Trisic D 27067:25.

not see Borovcanin at all.<sup>207</sup> Ljubisav Simic, who was distributing food and water in Potocari on 12 July starting at about 1 or 2 p.m., testified that he did not see Mr Borovcanin.<sup>208</sup>

86. The recently-admitted Potocari video provides further corroboration that Borovcanin left before the beginning of the evacuation process. Mr Borovcanin is seen handing out cigarettes or candy to Muslim women and children not long after a time-stamp that says "11.14."<sup>209</sup> The video then shows the situation in Potocari becoming gradually more chaotic and noisy as time goes by. Judging by the daylight and the noise, a significant period elapses between the time that Borovcanin is seen distributing candy and the arrival of the bread-truck.<sup>210</sup> This sequence is followed by a wide-angle shot of the same bread-truck, from which bread is being distributed further up the road closer to the main group of refugees at the Dutchbat compound, with the time-stamp "13.13."<sup>211</sup> The buses and trucks for the evacuation are still not visible on the road in front of the Dutchbat compound.

87. Borovcanin's vehicle is last seen on the Potocari video at 20:24-21:00, well before the distribution of bread. A driver is in the car, which is pointed towards Bratunac, apparently with the engine running.<sup>212</sup> The car is not visible on any subsequent footage of the area where the car had been, providing further circumstantial proof that he had left the area.<sup>213</sup>

88. The Prosecution has never been very clear as to whether it alleges that Mr Borovcanin was present in Potocari on 12 July during the evacuation process. Borovcanin is alleged to have

<sup>207</sup> Trisic D 27073:20-27074:7 ("Q. What did you see Momir Nikolic doing on that day in Potocari, on the 12<sup>th</sup> of July that is? A. Well, he was there with a large group of soldiers; and as far as I could tell, he was giving tasks to the police officers, what they were supposed to do, what they were supposed to secure, how they were supposed to go about their – performing the tasks that were ahead of them... I saw him in communication with other soldiers"); Trisic D 27069:12-14 ("On the 12<sup>th</sup> of July, when you were in Potocari, did you see Mr Borovcanin there as well? A. No. I did not see him in Potocari on that occasion.")

<sup>208</sup> Simic Lj 27203:19-21; Simic Lj 27207:16-18 ("I saw Mr Borovcanin only on TV, and from the TV footage, I was able to realize that he had been there, but I personally had not seen him.")

<sup>209</sup> P4536 (Potocari video), 10:17.

<sup>210</sup> P4536 (Potocari video), 30:13.

<sup>211</sup> P4536 (Potocari video), 30:39.

<sup>212</sup> P2853 (Borovcanin OTP Interview) p. 138 (confirming that he was driving a grey sedan); P4536 (Potocari video).

<sup>213</sup> P4536 (Potocari video), in particular at 21:57-22:05.

been present in Potocari on 12 and 13 July, and this is true; what is vague, however, is whether the Prosecution maintains that Borovcanin was present on 12 July during the evacuation process when all these alleged crimes are being committed. The presence of an accused person at an alleged crime scene is a material fact that ought to be pleaded with particularity. The failure to have done so constitutes a material defect in the Indictment. The ambiguity arises from various vague and contradictory pronouncements at various stages of this trial. On the specific issue of the departure from Potocari, the Pre-trial Brief says only that the order to re-deploy the two MUP units along the Bratunac-Konjevic Polje Road came "towards the end of the day on 12 July".<sup>214</sup> A footnote refers to a dispatch authored by Dragomir Vasic, but the dispatch says nothing to support this claim. The report, whenever on 12 July it may have been written, says that the 2<sup>nd</sup> Sekovici Detachment and 1<sup>st</sup> PJP Company "are blocking this section" of the Road – meaning that they are already deployed – without giving any indication as to how much earlier they arrived there, much less when they had left Potocari.<sup>215</sup> The Prosecution's failure to offer specific pleadings on this issue constitutes a material defect in the indictment, as well as lack of evidential foundation for its case.

89. Borovcanin does not return to Potocari until mid-afternoon on 13 July, accompanied by the Studio B journalist, Zoran Petrovic.<sup>216</sup> Refugees walk along a road lined with buses. A Serbian soldier on one of the buses is heard saying "Yes, this is the last group".<sup>217</sup> Later shots confirm that this is the tail-end of the evacuation, with few civilians remaining in the area.<sup>218</sup> UNPROFOR soldiers, previously overwhelmed trying to assist or regulate the evacuation, appear no longer to be occupied with those tasks and can be seen milling about.<sup>219</sup> Van Duijn confirms that the evacuation was essentially over by this time:

Q. And at some point during that day, do you remember an incident involving a water truck? A. Basically after the -- the big group of refugees was already gone, so there was no huge concentration of people anymore, so the task of the UN soldiers was

<sup>214</sup> Prosecution Pre-trial Brief, para. 203.

<sup>215</sup> P60 (Zvornik CJB No. 281/95, 12 July).

<sup>216</sup> Petrovic Z 18764:12-22.

<sup>217</sup> P2047 (Trial Video), 2:30:16.

<sup>218</sup> P2047 (Trial Video), 2:29:00-2:29:15.

<sup>219</sup> P2047 (Trial Video), 2:27:00-2:28:30.

**becoming less. And we were just helping the sick and the wounded and helping them to either go to the Red Cross or to go to the buses.** One of my soldiers came up and told me that the water truck that we had placed to -- near to the -- the place where we had the injured and the wounded people assembled to be treated by -- in any which way we could by our medical staff, that the Serb forces wanted to take away that water truck. That's when I decided to go over there to explain that the water truck was not for the UN, although it was a white UN-marked water truck, but that it was basically a water truck that was there for the sick and the wounded.<sup>220</sup>

A time-stamp indicates that the footage is shot at 15:26 hours on 13 July.<sup>221</sup>

90. The Prosecution erroneously alleges in its Pre-trial Brief that this visit was in "the early afternoon of 13 July," citing the Petrovic video images as its source.<sup>222</sup> This may seem like a minor factual error, but it would be naïve not to view this as part of a pattern of minor mis-statements designed, cumulatively, to create an entirely false impression. For example, the Prosecution also falsely asserted that the evacuation process was underway while Borovcanin was handing out candy or cigarettes on 12 July:

**But this [the distribution of candy] is clearly a propaganda stunt, showing that he is part of a propaganda operation. And there in Potocari, where troops under his command are present and assisting in the separation of the women and children and present when the brutality of Potocari is occurring.**<sup>223</sup>

The Prosecution knows full well, and the evidence confirms, that the distribution of candy occurred at least two hours before the beginning of the evacuation. Having pushed forward his departure from Potocari on the 12<sup>th</sup>, and pulled back his arrival time on the 13<sup>th</sup>, the Prosecution then concludes: "Mr Borovcanin is active on the ground, in command on Potocari both days, 12<sup>th</sup> and 13<sup>th</sup>, in the middle of this horrendous crime scene of deportation and abuses of the public."<sup>224</sup>

91. This is plain wrong. No evidence has been adduced that Mr Borovcanin was in Potocari between the start of the evacuation process on 12 July, and his visit on 13 July when the

<sup>220</sup> Van Duijn 2301:10-23 (emphasis added).

<sup>221</sup> P2047 (Trial Video), 2:26:20.

<sup>222</sup> Prosecution Pre-trial Brief, para. 205.

<sup>223</sup> Prosecution Opening Statement 487:21-25. (emphasis added)

<sup>224</sup> Prosecution Opening Statement, 488:6-8.

evacuation was drawing to a close. On the contrary, the evidence distinctly shows that he was *not* there during this time.

**2. The Deserters Were Under the Effective Command and Control of Radoslav Jankovic and Momir Nikolic In Respect of their Actions In Support of the Evacuation Process in Potocari**

92. Borovcanin did not exercise *de facto* or *de jure* control over the manner in which the 45 or so deserters assisted the evacuation from Potocari on 12 and 13 July. Radoslav Jankovic, Momir Nikolic and/or others within the Security and Intelligence organ, acting on the instructions of General Mladic, directed and supervised the work of the Deserters unit and other units to accomplish the evacuation of the population and the detention of military-aged men. Borovcanin tasked his units to participate in this operation, but did not exercise any supervision or control over the manner in which they executed the operation, which had been conferred on the Security Organ by General Mladic.

93. Momir Nikolic testified that soldiers from no less than nine different Army and police units were present in Potocari on 12 July: the Drina Corps military police; the Drina Wolves; the 10<sup>th</sup> Sabotage Detachment; the military police of the 65<sup>th</sup> Protection Regiment; the 2<sup>nd</sup> Battalion of the Bratunac Brigade; the 3<sup>rd</sup> Battalion of the Bratunac Brigade; the Bratunac Brigade military police; civilian police; and Dusko Jevic's unit.<sup>225</sup> The variety of units present in Potocari is confirmed on the video-tapes from Potocari that day.

94. The activities of these various units – to say nothing of the massive logistical enterprise ordered by the VRS and the Ministry of Defence<sup>226</sup> – required over-arching coordination to

<sup>225</sup> C1 (Momir Nikolic 92ter statement), s. 6, para. 1; Nikolic M 32896:22-32897:4; 32991:2-8; A tenth unit is briefly mentioned during Momir Nikolic's testimony as being a MUP unit with German shepherd dogs commanded by someone named "Maletic." Nikolic M 32987:7-14. Neither the Indictment nor the pre-trial brief alleged that this unit was under Borovcanin's command, and no evidence was heard suggesting or implying that this unit was under Borovcanin's command.

<sup>226</sup> See, e.g., P110 (Drina Corps Order, 12 July, 0835 hours, referring to a previous request by the Drina Corps command "to the Ministry of Defence of Republika Srpska demanding that the Ministry of Defence's offices in Sarajevo and Zvornik obtain, by 12 July 1995, all the buses available from state and private owners", and explaining that the individual brigades shall "help the municipal offices of the Ministry of Defence to procure the buses rapidly and direct them to Bratunac"); P2899 (Main Staff request to Ministry of Defence offices for buses to be sent to Bratunac); P2900 (Zvornik Ministry of Defence order, 12 July, to subsidiary offices ordering mobilization of all buses); P1109 (Intercepted conversation between General Krstic and Colonel Krsmanovic, Head of Drina Corps

function effectively. High-level officers were present on the spot proportionate with the extent and variety of resources deployed: at a minimum, General Mladic, General Krstic, Lt. Colonel Popovic, Colonel Acamovic (the Drina Corps logistics officer),<sup>227</sup> Lt Col Svetozar Kosoric, the Drina Corps intelligence officer, and Lt. Colonel Radoslav Jankovic, from the Main Staff intelligence department, were all present in Potocari that day.

95. Radoslav Jankovic and Momir Nikolic directed and supervised the mechanics of the evacuation process, pursuant to the direct orders of Mladic who was personally present for some time while the evacuation was ongoing on 12 July.<sup>228</sup> This included issuing all necessary instructions and orders to the Deserters' unit, which worked together with numerous VRS (not to mention Dutchbat) personnel to make the evacuation happen. Momir Nikolic acknowledged in his plea agreement that

For most of the day of 12 July, I was in Potocari co-ordinating and working with Dusko Jevic, a commander of the MUP Special Police Force, and the following other military and MUP units.... Working in conjunction with these units I coordinated and supervised the transportation of the women and children to Kladanj and the separation and detention of able-bodied Muslim men.<sup>229</sup>

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Transportation Services, 12 July 1995, 1210 hours, in which Krstic "wants the buses to start moving right away"); P1113 (intercept between Mladic and unknown interlocutor, 12 July, 1250 hours, in which Mladic asks whether the buses and trucks have left).

<sup>227</sup> Kingori testified to the presence of Acamovic and perceived that he had been assigned a significant role by Mladic: P515 (UNMO Report, 13 July), para. 7 ("Col Acamovic is the special representative of General Mladic who is taking care of the operation from now on"); Kingori 19275:4-7 ("he introduced himself as someone who was being appointed by General Mladic to take over all the operations inside the enclave now from General Mladic. He was like a special representative of the general."). Franken also has contact with Colonel Acamovic who introduced himself as "a G4 officer and responsible for the evacuation of the civilians and asked for support and specifically transport and diesel...." (Franken 2492:21-25).

<sup>228</sup> Kingori 19249:12-19250:4 (Mladic personally takes Kingori to see the conditions in which prisoners are being held in the White House, which must be some time after the beginning of the evacuation); van Duijn 2280:5-15 (although van Duijn does not clearly say that he see Mladic after the beginning of the evacuation); Nikolic M 33269:7-10 ("And do you confirm that indeed Lieutenant-Colonel Jankovic was physically present in Potocari on the 12<sup>th</sup> of July while the evacuation was under way? A. Yes.")

<sup>229</sup> C1 (Momir Nikolic 92ter statement), s.6, para. 1; Trisic D 27168:7-15 ("Q. ... you testified yesterday that you saw Momir Nikolic coordinating various units, including his contacts with the Drina Corps military police; you specifically said that yesterday. So my question to you is: Is providing security for the Muslims the type of activity that Momir Nikolic was coordinating, this coordination among units of the Bratunac Brigade and the Drina Corps military police? A. Yes, that's the way I saw it. That's the way I understood it.")

Nikolic backed away from the word "co-ordination" in his supplemental statement, denying that he had any command authority over units in Potocari.<sup>230</sup> Nikolic named Radoslav Jankovic as the officer with that authority, granted by Mladic and the Main Staff:

Q. [Quoting from Momir Nikolic's previous testimony] "Colonel Jankovic was the one who established contacts, who took over all the affairs pertaining to security and intelligence that have to be performed by the Bratunac Brigade. Colonel Jankovic performed these activities on behalf of the Bratunac Brigade, presumably upon the order of the Main Staff. So there was nothing to communicate to him as he was the one in charge. **He was the boss and the person in charge of everything.**" Now, first of all I want to ask you, sir, do you stand by that statement? A. Yes.<sup>231</sup>

....

Q. ... you were asked in this passage about Colonel Jankovic's authority over the evacuation of refugees, the basis for his authority, and you were asked specifically whether Jankovic could give you orders, and here's what you said in response, and this is at line 23 of transcript page 1920 [of Nikolic's prior testimony]: "As I understood the rules and in view of the position held by Colonel Jankovic - so I'm answering your first question first - his arrival to the Bratunac Brigade and his visit to my office and his contacts and presence there created the conviction that **he was a man from the Main Staff who can give me orders as to what I should do when it comes to the prisoners, the refugees, because generally speaking and as a rule, I knew and was aware even before receiving the order that concern for the refugees and the prisoners, their Assembly, their securing and transportation, was within the competence of the intelligence and security organ.**" Now, of course taking into account what you've said in your further statement of facts, I just want to ask you whether you would confirm this statement that you made in *Blagojevic*. A. Yes, I can confirm this statement, and **that was the impression I gained at the time, without any doubt.** My position today of the role and the relations that prevailed at the time does not differ from what it was then.<sup>232</sup>

96. Mladic undoubtedly took a direct hand in the beginning of the evacuation process on 12 July, as he is often seen to do on the various videos.<sup>233</sup> Any subsequent orders issued by Jankovic and Nikolic would evidently have been viewed as an extension of Mladic's orders. The

<sup>230</sup> C2 (Momir Nikolic further 92ter statement), p. 2.

<sup>231</sup> Nikolic M 33268:22-33269:6. (emphasis added)

<sup>232</sup> Nikolic M 33271:11-33272:7. (emphasis added)

<sup>233</sup> P4537 (Boksanica video) 14:30-27:35 (showing Mladic directing buses). Mladic's authority and direct involvement was confirmed by Momir Nikolic 32928:8-17 ("All forces that were engaged in the Srebrenica operation, and the operation of forcible transfer from Potocari, were commanded and controlled by the Chief of Staff General Krstic and the commander of the Drina Corps. Of course, once General Mladic was in the field in the area of Bratunac, then, of course, it was well known that it was General Mladic who made decisions, ordered through his subordinate officers, those being commanders of the corps, brigades, and all other units that took part in Operation Srebrenica. That is, in short, how I understand the chain of command and control of the units engaged in Operation Srebrenica and during the transport operation.")

Deserters' unit (consisting of about 40 to 45 men in Potocari on 12 July)<sup>234</sup> was just one unit amongst many whose actions in pursuit of the evacuation had to be co-ordinated through the supervision of an over-arching authority. Jevic would obviously have followed any orders issued by Jankovic and Nikolic because (i) Mladic was present supervising the whole operation at the beginning, conferring his authority on their actions; (ii) [REDACTED] [REDACTED];<sup>235</sup> and probably also specifically mentioned that Momir Nikolic would be the one giving instructions in respect of that task;<sup>236</sup> and (iii) because Radoslav Jankovic, as a Lt. Colonel from the Main Staff, had more than ample authority to issue orders to Dusko Jevic. As Momir Nikolic commented, "I think that Colonel Jankovic could tell Mr. Jevic or to suggest to him what to do and how to do it, and I think it's only natural. This kind of cooperation and this kind of relationship is only natural."<sup>237</sup> The idea that Borovcanin, who was not even present in Potocari during the evacuation, might have been issuing orders in parallel to the Mladic-Jankovic-Nikolic *de facto* line of command is highly implausible; the suggestion that Jevic must have taken orders from Borovcanin during the evacuation process is downright ludicrous.

97. Momir Nikolic has, of course, minimized his own role in and authority over the evacuation process, re-characterizing his "co-ordination" of various units as mere assistance. This re-characterization is motivated by evident self-interest for a reduction in sentence, and is belied by the evidence of international witnesses in Potocari. For example, Lt. van Duijn testified that his impression was that Nikolic was exercising command over, or supervising, Dusko Jevic:

<sup>234</sup> Djuric M 10800:1-3 ("A. I don't remember the exact number of men. I didn't have any kind of diary or any documents that would help to refresh my memory. I think it was around 70, 70 men."); Djuric M 10857:14-19 ("Q. Of those 70-odd people, as you said, how many left with you? Or to rephrase it, how many stayed at the school where you were billeted? A. I really couldn't give you the numbers, because I don't remember. Perhaps about 40, 45 people were with me, let's say that, but I really cannot recall the numbers. Forgive me, but it's been a long time since then.")

<sup>235</sup> P3789 (Borovcanin dispatch, 13 July 1995), p. 1 ("A part of the MUP forces was involved in the organization of the evacuation of civilians from Srebrenica to Kladanj"); [REDACTED]

<sup>236</sup> P2853 (Borovcanin OTP Interview), p. 24 ("So, he asked me to leave part of my forces there in order to regulate traffic. So, Dusko Jevic stayed and he, so he was there and the people from the training centre, because they were not members of the police. And they were not trained for combat. And that unit stayed under the command of the Bratunac Brigade until the end of the operation.")

<sup>237</sup> Nikolic M 33274:21-24.

At some point [morning of 12 July before start of evac] I saw Stalin visiting the area, together with a well-known figure for us as Major Nikolic. Major Nikolic was a figure that was the whole period we were present there and even before our time was a well-known character. And I saw Major Nikolic together with Stalin, in which -- from which I drew the conclusion that Nikolic was the superior of Stalin. Nikolic more or less made some sort of an inspection visit with Stalin next to him. Nikolic walked in the centre of the road, Stalin alongside him, which seemed to me in gestures that he was explaining to Nikolic what was happening and what was going on and how they organised things. So that was the visit of Nikolic and Stalin.<sup>238</sup>

Kingori testified that he saw Momir Nikolic with a list in Potocari and that he was checking the men in Potocari against the list.<sup>239</sup> Momir Nikolic, having long-served as the security and intelligence officer in the Brigade most closely situated to Srebrenica, was uniquely qualified to identify individuals from among the Muslim population in Potocari and, therefore, was likely to have been directly involved in the process of separating, detaining and questioning prisoners. He frankly admitted that "concern for the refugees and the prisoners, their Assembly, their securing and transportation, was within the competence of the intelligence and security organ,"<sup>240</sup> although in the same breath insisted that Radoslav Jankovic had assumed these responsibilities in respect of the Bratunac Brigade. The better view is that Momir Nikolic's original plea agreement should be accorded its plain meaning: Momir Nikolic, as the officer on the ground with responsibility for executing the evacuation process, supervised and instructed Jevic and his men as to how the evacuation and separation process should be carried out. This is not to minimize Jankovic's role in supervising the evacuation process that day. He was present on the ground on both 12 and 13 July directly involved in counting the civilians being evacuated,

<sup>238</sup> Van Duijn 2279:13-21; van Duijn 2328:8-19 ("Q. And are you in a position to confirm that Major Nikolic was indeed a key player in the events which took place on the 12th and 13th of July, 1995? A. I don't know if he was a key player. I can only say what I have seen during those two days and of course the days before, and that was that Major Nikolic was also on site and was into contact with people that I had seen at the site and know that they had a key role in the events on those two days, meaning Mane and Stalin. Q. And it was your understanding talking about these two individuals, that Major Nikolic was the superior to Stalin who in turn was the superior to Mane? A. Yes, that's correct.").

<sup>239</sup> Kingori 19454:19-25 ("When the evacuation began from the base, you saw Major Nikolic there; is that correct? A. That's true, Major Nikolic was there. Q. He had a list in his hands with certain names. He said that those people, in his belief, were war criminals, according to the information the Bratunac Brigade had at the time? A. Yeah, he had a list. He had a list that he was checking through."); Kingori 19455:23-25 ("What I know -- what I knew about was that Major Nikolic was coming through with a list and checking from amongst the men who were there, who corresponded with the name and whatever he had in his list.")

<sup>240</sup> Nikolic M 33271:22-25.

restricting the movements of Dutchbat officers, and authorizing the delivery of international aid supplies.<sup>241</sup>

98. [REDACTED]

99. Borovcanin's lack of command function over the Deserters' unit on 12 or 13 July was illustrated during Momir Nikolic's testimony before the Chamber. Nikolic knew that Borovcanin was a Special Police Brigade commander, but he was not even able to spontaneously recall that Borovcanin had any command function over Jevic. On the contrary, he asserted that Dragomir

<sup>241</sup> Franken 2530:4-8 ("it was made clear to me by Colonel Jankovic that the signing of this document would be not an absolute condition but would favour the procedure with the evacuation of the wounded in Bratunac and out of our compound"); Franken 2531:5-12 ("When the delegation of ICRC came in, the lady in charge was pretty mad because one of her trucks was stopped at the Serb border. *It was a truck with emergency supplies. And she protested towards Colonel Jankovic about that. He smiled. He took a mobile phone, had a very short conversation, and said, "The truck is coming."* Q. And what, if anything, did you say to him? A. Well, that I was surprised that the Bosnian Serb officer was able to command Serb border troops, and he didn't react. He just smiled" (emphasis added)); Franken 2531:15-21 (I want to turn your attention, sir, to the 21st of July, the day that DutchBat ultimately withdrew from the base. Up until that time, from, let's say, the 13th of July, did you have freedom of movement to leave the base? A. No, we were not. We were supposed to stay in our compound. Q. And did anyone in particular communicate that to you? A. Yes. Colonel Jankovic made that clear"); P2963 (Janjic 92ter testimony), p. 9767-68) (Jankovic orders him to count the buses and number of civilians being evacuated on 12 July); Nikolic M 33270:4-25 ("With Colonel Jankovic's arrival, and this is something that I testified about before, he himself came to my office and said that he had orders from the Main Staff that in view of the seriousness of the situation and in view of what was to follow in the subsequent several days, that he would be taking over the duties that I discharged since I was only a Captain and a reserve officer at that. And among other things, he told me that all the subsequent contacts with DutchBat personnel and representatives of the international forces in Srebrenica would now come under his competence and that he would be the one to personally decide on these matters, schedule meetings, and everything else. Indeed this is how things happened."); Boering 2145:4-6 ("Q. When you say, "To carry out or implement Mladic's plans," what plans exactly do you have in mind? A. I mean the transport of refugees."); Janjic M 17929:19-20 ("The transportation of people continued on the 12th until about dusk and Colonel Jankovic was present in the area the entire day.")

<sup>242</sup> [REDACTED]

Vasic should have been Jevic's superior in Potocari on 12 and 13 July.<sup>243</sup> This was not based on any specific recollection, but was purely based on what he considered to be a logical inference. Even after leading questions to induce a response about Borovcanin, Nikolic was still unable to identify Borovcanin as Jevic's superior, again asserting that Vasic would have been Jevic's superior.<sup>244</sup> The Prosecution on the following day of Nikolic's testimony read out an extract of Nikolic's previous testimony from another case, finally inducing Nikolic to acknowledge that Borovcanin would have been Jevic's superior; but this again was based on logical inference rather than any recollection, based on the fact that Jevic was a member of the Special Police Brigade, of which Borovcanin was a senior commander.<sup>245</sup> This demonstrates that Momir Nikolic had no present recollection of Borovcanin having interacted with Jevic in Potocari, much less of giving him any orders. His testimony as to who might be Jevic's commander was not based on any direct observation of Jevic being given orders by anyone within the MUP structure.

<sup>243</sup> Nikolic M 32927:1-32928:2 ("A. I'll try to the extent possible for me to explain what you are asking. According to the things I know, in Potocari there were certain units of the special forces, the special forces brigade, of the MUP. What I know is that the commander of the forces from the special MUP brigade was Mr. Borovcanin. In addition to the special MUP brigade units in Potocari, there was also the police of the so-called -- well, they were called PJPs. PJP units had their own commanders. They had their own "komandir" and "komandant" who was in command of all those PJP forces. As regards any other units in Potocari at the time, the battalion of the Bratunac Brigade had its own commander who was in direct command and control of the battalion pursuant to the brigade commander's orders. Then there were units from the Main Staff that were directly subordinated to their own respective commanders from the areas they had arrived from. There were parts of the 65th Protection Regiment that were subordinated to the commander of the regiment, i.e., the commander who was present in Potocari. As for all other units from the Zvornik and other brigades, they had their commanders. They were directly answerable to the commander of the unit engaged pursuant to brigade commander's orders. In principal, that is what I can tell you about it. What I think is this: Control over all MUP units, I may be wrong in saying this, but this is what I think, control over the units of the special MUP brigade as well as the PJP units and the police units from the public security station in Bratunac, as well as all other police forces engaged in Potocari and in its environs, in my belief were under direct command -- sorry, control of the chief of the centre, Mr. Dragomir Vasic.")

<sup>244</sup> Nikolic M 32929:22-32930:16 ("Q. How did Mr. Borovcanin and Mr. Jevic fit into this command structure as you understood it with Mr. Vasic? A. It is difficult for me to answer that how Mr. Borovcanin fit within the command structure. It is my view that it was standard structure prescribed by -- under law that was in place. I see no other logical explanation. In my view, the chief of centre, if I compare it to the army, what is within the remit of the security centre would correspond to the territory, perhaps not all of it but more or less the same territory under control of the corps commander. All forces within the area of the corps commander are subordinated to that corps commander. He is the boss and he is answerable for the actions of his subordinates. I apply the same logic to the MUP. If there is a chief centre [as interpreted] in Bratunac and there were commanders of the brigade special forces of the MUP that were introduced in the area, as well as PJP units, which were at the level of the centre in terms of staffing, then the security stations and all of their forces, if we take all that into account, it is my conclusion that that relationship was the one that would be logical and valid within the framework of the MUP forces present. I cannot arrive at any other conclusion, and that is all I can tell you about it.")

<sup>245</sup> Nikolic M 32982:9-32985:2.

100. [REDACTED]

[REDACTED]<sup>246</sup> Djuric affirmatively denied receiving any orders from Borovcanin concerning the evacuation process.<sup>247</sup> Any such orders would have been surprising, because Borovcanin was not there, and [REDACTED]

[REDACTED]

[REDACTED]<sup>248</sup> [REDACTED]

[REDACTED]<sup>249</sup> Desisting from issuing orders concerning the modalities of the evacuation process was not a failure of command: it simply reflected a division of responsibility in compliance with Mladic's order. The Deserters' unit was understood as temporarily deployed to deal with the evacuation, and under the command of whomever was charged with running the evacuation. The Security Organ was the organ responsible for such issues, and its senior officers were there on the ground supervising the process.<sup>250</sup> Borovcanin was perfectly justified to allow Jevic and his unit to temporarily receive orders from an appropriately designated commander, based on the order of General Mladic, and to expect that those commanders would exercise appropriate supervision over the manner of discharging their functions.

<sup>246</sup> [REDACTED]

<sup>247</sup> Djuric M 10861:20-10862:9 ("On the 12th, also you did not have contacts with Ljubomir Borovcanin; is that correct? A. No. Q. And you did not see him at all on the 12th in Potocari? A. As far as I can remember, no, I didn't see him. Q. Since my question was put in a negative form and in order to understand the response properly, I asked you: "You did not have contacts with Ljubomir Borovcanin; is that correct?" And you said, "No." So we don't want it to be understood that you did have contact. A. No, I didn't have any contacts with Mr. Ljubomir Borovcanin. Q. Thank you very much. Now it's clear. Just one more question, because I can see that we're coming quite close to the break. On the 12th, you didn't have radio communications with Ljubomir Borovcanin; is that correct? A. Yes, I had no contact with him.")

<sup>248</sup> [REDACTED]

<sup>249</sup> [REDACTED]

<sup>250</sup> Borovcanin's understanding was that Momir Nikolic was the one directing the operation, and to whom Jevic would temporarily receive his orders for that purpose: P2853 (Borovcanin OTP Interview), p. 24 ("And that unit stayed under command of the Bratunac Brigade until the end of the operation"); P2853 (Borovcanin OTP Interview), p. 25 ("PM: What did Nikolic tell you? LjB: He told me that part of personnel will remain under command of the Bratunac Brigade").

101. The Prosecution may argue that Borovcanin's command function is demonstrated by his intervention in respect of the water tank in Potocari. Borovcanin's trip to Potocari on 13 July appears to have been induced by pure happenstance. A manager of a Bratunac-based transport company came to the police station and complained directly to Borovcanin about Jevic having commandeered a bus.<sup>251</sup> A second obvious motive would have been to show Petrovic, the journalist, what was going on there. The fact that he would spontaneously intervene in respect of a relatively minor matter hardly shows that Borovcanin exercised command and control over a massive-scale evacuation process that was, effectively, already over.

102. The legal consequences of this situation are threefold: (i) Borovcanin was not exercising effective control for the period that the Deserters' unit was placed, as ordered by Mladic, under the *de facto* command and control of Momir Nikolic and/or Radoslav Jankovic; (ii) that even if the Chamber were to find that Borovcanin exercised some form of residual command, he was not exercising effective control in respect of the *manner* in which the Deserters' unit discharged its tasks in Potocari; (iii) that Borovcanin's real or imputed knowledge must be assessed in light of his actual command function, as ordered by Mladic, which did not extend to the specific details of the evacuation process, including the manner of detention; and (iv) that the reasonableness of any measures to prevent or punish any alleged criminal conduct must be assessed in accordance with Borovcanin's actual command function.

**3. Borovcanin's Compliance With Mladic's Order to Leave the Deserters' Unit In Potocari to Assist with the Evacuation Process Is Not Indicative of Any Criminal Intent or That He Was a Participant in a JCE**

103. Pursuant to Order 64/95, Borovcanin was under General Mladic's authority and resubordinated to VRS and General Krstic for the practical duration of the Krivaja-95 operation. Borovcanin was accordingly obliged to comply with his orders. International criminal law requires subordinates to disobey superior orders that direct, or involve, the commission of a criminal act. Subordinates are not, however, required to request an adjournment of operations

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<sup>251</sup> P2853 (Borovcanin OTP Interview), p. 85 ("my concrete reason for going to Potocari was the bus that I mentioned, because the manager of a transport company appeared in the police station and he wanted me to intervene, because the unit under the command of Dusko Jevic took his bus"); Djuric M 10872:1-3 ("Borovcanin insisted that the bus be returned to Bratunac Municipality and that the bus should be theirs").

to inquire into all the facts of an operation to ensure that no crimes have been, or may in future be, committed in the course of an operation. The nature of information and decision-making in a combat context is imperfect, as was well-articulated by Richard Butler:

There's a -- there's a saying, particularly in my military with respect to combat information, that the first report is wrong, the second report is only half right, you don't know which part of the report is, in fact, correct. It isn't until the third or fourth report that you start to get a clear picture of what is actually happening in a particular battle or a particular situation.<sup>252</sup>

104. International criminal law recognizes this. Article 33 of the ICC Statute enunciates customary international law in respect of the standard of knowledge required before a subordinate is compelled to disobey a presumptively lawful order:

**Superior orders and prescription of law**

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.<sup>253</sup>

105. Borovcanin had no grounds to believe that the order he received from Mladic to allow some of his men to be used for the evacuation process was unlawful, much less any manifest indication that it was. Borovcanin's understanding that morning was:

And according to the information I got, but don't ask me now from whom I got it because everybody knew that, we heard that the deal was made. It was a kind of three-

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<sup>252</sup> Butler 19805:18-24.

<sup>253</sup> ICC Statute, Article 33. *Erdemovic* AJ, Separate Opinion of Judge Cassese, para. 15 ("In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order."); *Eichmann*, p. 256. "The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying 'Prohibited!'. Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the order or of the acts ordered to be done, unlawfulness appearing on the fact of the order itself, the clearly criminal character of the order or of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt – that is the measure of 'manifest unlawfulness' required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts."

partite deal between the civil, military structures of the Republika Srpska and the Muslims, that it was their wish to leave in an organized way that area of Srebrenica.<sup>254</sup>

106. The evidence discussed in section IV(a) shows that Borovcanin's understanding was correct: the civilians were desperate to leave, and the BiH authorities and UNPROFOR had expressly requested their evacuation. This does not necessarily mean that prior acts of coercion had not induced that desire; but Borovcanin had insufficient information to evaluate whether any coercion had previously been exerted. A credible argument can be made even today, in light of all the facts, that the mass exodus of the civilian population was induced by lawful shelling, albeit shelling that would have been terrifying to a group of 40,000 people whom the ABiH was refusing to allow to leave Srebrenica Town, despite the presence of a number of important military targets in the town.<sup>255</sup>

107. Even assuming that there was some information that coercion had previously been exerted, Borovcanin had no reasonable choice but to assist with the evacuation. 20,000 civilians were crammed into unsustainable conditions at the UNPROFOR compound, some under a hot sun, with inadequate sanitation, water or food. The Serb authorities and UNPROFOR did provide food and water to this huge number of people, but the resources were simply not available to properly accommodate that number of people in Potocari.<sup>256</sup> Franken testified:

Q. And you would agree, would you not, that this evacuation was necessary for the welfare of the refugees? A. Yes. Q. Yes, and if it had to be done, it had to be done quickly. A. That's correct as well.<sup>257</sup>

Van Duijn offered a similar opinion to justify his own actions:

<sup>254</sup> P2852 (Borovcanin OTP Interview), p. 65-66.

<sup>255</sup> See, Section III(b).

<sup>256</sup> Egbers 2719:10-15 ("Well, it was very, very hot. We had no water to give to the people. There were thousands of people gathering around the UN base. We tried to get as much of them inside the headquarters, and then even outside the headquarters there has to be a temporary UN base line where they could rest for a while. It was a very, very panic situation at that time."); Boering 1940:7-11 ("As far as what Dutchbat could do for so many people, very little. Our supplies were limited too. At a certain point we assessed how much we had. We figured out that this would last only a few days until we could no longer provide for ourselves and the people, perhaps two or three days.")

<sup>257</sup> Franken 2561:16-20; Franken 2511:17-18 ("Q. How rapidly, sir, was that humanitarian situation deteriorating? A. Very rapidly because we already had death by dehydration..."); Cvoric D 22159:6-16 ("... many who died simply from lack of water and from sheer heat.")

I started with the transportation because it was clear to me that the refugees could not stay there – **in fact, the refugees were even eager to leave** the – the place where they had been there, the factory sites ... and it was clear that they really had to leave there quickly.<sup>258</sup>

108. The eagerness of the Muslim civilians to leave Potocari translated into a “stampede” during the evacuation process, with a real danger of people “tramp[ing] each other”.

Q. Can it be said that, on the 12th of July, when the buses arrived, the people, the population, really were in a hurry to get on board the buses? A. That is correct.<sup>259</sup>

...

Did you see this stampede of the refugees as they were rushing towards the buses? A. Yes, I saw that.<sup>260</sup>

...

Q. So if I understood it properly, based on your testimony in other cases, it seems that there was a stampede by the refugees which happened shortly before you arrived, where people crushed each other in an attempt to come to the front, so I assume that that was probably the reason why you set up this human chain. Is this correct? A. I also heard about some sort of a stampede but it was clear to me that we needed to form that human chain in order to prevent people to crush each other or if they would fall down that someone, the other people would stand on them. So that was the reason why we organised it that way.<sup>261</sup>

...

And I would give orders to the UN soldiers to let people through, and letting them through in small groups so they *would not trample each other* and we could help those families to stay together and not getting hurt in another way *because of the crowd that was -- that was tremendous*.<sup>262</sup>

...

Q. At any rate, at a certain point, there was a commotion among the refugees, and some witnesses labelled that situation as a human stampede. My question to you is whether you remember such an occurrence? A. Yes. I remember that.<sup>263</sup>

...

Q. Does that mean that at one point, the refugees, everybody, wanted to go towards the buses? A. That's correct.<sup>264</sup>

<sup>258</sup> Van Duijn 2300:7-14 (referring to transports taking place on 13 July). See also: Boering 1974:20-22 (“I had the idea attempts were being made for finding a solution to provide for the evacuation of the refugees. This was a positive aspect in my feelings.”)

<sup>259</sup> Franken 2651:20-23.

<sup>260</sup> Koster 3089:12-14.

<sup>261</sup> Van Duijn 2343:2-10.

<sup>262</sup> Van Duijn 2286:8-12 (emphasis added).

<sup>263</sup> Rutten 4888:19-22.

<sup>264</sup> Groenewegen 2980:24-2981:1.

109. Force may have been used against the civilians during the evacuation process from time to time, but there is no evidence that the purpose of this force was to induce civilians to leave. Force seems to have been used in the context of crowd control or fitting as many people as possible into each bus.<sup>265</sup> Van Duijn testified that force may have been used, but acknowledged that "I have no information if that was to force them into buses or otherwise."<sup>266</sup> Indeed, UNPROFOR and Serb forces had to use some force just to restrain the crowd, and they cooperated in doing so.<sup>267</sup> It seems strange that force would have been required to force people to leave in light of the testimony of international witnesses that Muslim civilians were eager to leave Potocari.

110. Borovcanin's knowledge that men of military-age might be detained as part of the evacuation process in no way alters the legality of allowing the Deserters' unit to participate in the operation. As discussed more fully in Section VII(iii), ample grounds existed under international humanitarian law to authorize the detention of military-aged men in Potocari. The

<sup>265</sup> Franken 2651:24-2652:3 ("Q. Can it also be said that, to your knowledge, nobody was forced to get into buses? A. Not in that stage, at the beginning. There was, later on, some force used by Bosnian Serb soldiers to get a hell of a lot of people in a bus, which we reacted on by preparing busloads, so to say.")

<sup>266</sup> Van Duijn 2381:1-10 ("Q. And is it also correct to say that the people would rush towards the cars -- the buses, sorry, when they arrived? A. The Muslim people were also eager to leave, yes. Q. And none of them were forced to board the buses, were they? A. I have no information about that, no. Other than the reports of some kicking or abusing of people that wanted to board the buses, but I have no information if that was to force them into the buses or otherwise. Q. At any rate, you did not see any one case of a person saying they didn't want to go and they would have been forced to get into the bus? A. No. I did not see that, no.")

<sup>267</sup> PW-126 3640:6-9 ("Q. Madam, when it came to moving towards the buses, did you notice any problems between the DutchBat soldiers and the Serb soldiers? A. I did not notice any problems among them at all. I mean, that they had problems with each other."); PW-169 17377:18-25 ("They were just looking, watching, and they were holding hands"); van Duijn 2342:22-2344:3 ("I also heard about some sort of a stampede but it was clear to me that we needed to form that human chain in order to prevent people to crush each other or if they would fall down that someone, the other people would stand on them. So that was the reason why we organised it that way"); van Duijn 2274:5-12 ("When I came up there, there was just a sort of a human chain of UN soldiers made to try to keep the refugees calm, and there was a lot of panicking and scared refugees present at that time there ... the situation was like I described before, chaotic, a lot of people were frightened, screaming and cramped together"); Djuric M 10806:23-10810:7 ("But then we encountered other problems, and these problems were when one or two vehicles would arrive, regardless of what kind of vehicles they were, buses, trucks or some other type of vehicles, then there was a problem how to stop and how to control them from all leaving at the same time, because it wasn't possible. There wasn't enough vehicles. Then the Dutch soldiers, together with some of my men, tried, in a way, to calm them down, to control them, and at some point we were forming police cordons, we were holding hands and trying to kind of direct that crowd of people who were all practically trying to get on to one bus. That's more or less what happened.")

Indictment and the pre-trial brief noticeably avoid alleging that the detention of military-aged men was unlawful or improper, alleging instead that the *manner* of detention was improper.

111. The reaction of the Muslim population to the detention of military-aged men may explain why force had to be used from time to time.<sup>268</sup> As heart-wrenching as these scenes must have been, the hard truth is that Serb forces were legally authorized to use force to detain Muslim men, and to maintain order while that process was underway. The use of reasonable force to accomplish this task would have been lawful. Leaving behind the Deserters' unit knowing that this process might be undertaken was not unlawful, and does not indicate that Borovcanin had any criminal intent to forcibly transfer the Muslim population.

**4. Borovcanin Is Not Responsible for Forcible Transfer of the Detainees from the Column Taken into Custody on 13 July and Sent to Zvornik from Bratunac on 14 July**

112. Indictment paragraph 81(b)(iii) distinctly alleges that Borovcanin is responsible for forcibly transferring prisoners who surrendered to his forces along the Road on 13 July. It says that Borovcanin's subordinates "assisted the VRS in capturing, detaining and transporting to detention sites outside the enclave thousands of able-bodied Muslim men and boys from Srebrenica."

113. The ABiH column set out from Jaglici and Susnjari on the night of 11 July and was in the process of trying to fight their way to Tuzla. The notion that these combatants could only be detained inside the Srebrenica enclave, or else be the victims of forcible transfer, is manifestly absurd.

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<sup>268</sup> Van Duijn 2291:17-2292:2 ("Q. And how did the refugees react to being separated, sir? A. Of course this was a terrible course of events when you have families that want to be together and are placed in a position where nothing is certain.... So this was a terrible situation when in that period of time also families were separated from each other, and men were being singled out by Serb forces and families literally tried to keep hold of each other and were forced by Serb soldiers to let go of each other and have the men separated and brought to that first location on the lawn"); Groenewegen 2969:2-13 ("Q. ...Did this occur once the women and the children had been separated from the men? In other words, was that the main reason why some of the refugees, and I mean women, did not want to leave without the male members of their families? A. That's correct. Q. Could you please tell us whether you and other UN troops, i.e., your officers, did something in that situation, in a situation where a certain number of refugees would not get on the buses without the male members of their families? Was anything done and, if so, what was done? A. When such situations occurred, we intervened by getting in between them, but because of the confusion and the language barrier, we were not able to be effective in that respect.")

114. Neither Borovcanin nor any of his men had the slightest say as to where the detainees from the column were to be detained. The men from the column, as is more fully discussed in the next section, were in the custody of Borovcanin's men along the Road only briefly. Richard Butler, the Prosecution's own expert, testified that:

according to the JNA regulations and the VRS instructions pertaining to those, the general procedure was that at the very earliest opportunity, these prisoners were to be turned over to the military police to ensure that they could be properly safeguarded and handled through the battlefield to the point where they were turned over to the individuals responsible for their -- for their detention on a longer period of level.<sup>269</sup>

This is exactly what happened in reality on 13 July along the Road, as is explored more fully in the next section.<sup>270</sup>

115. Neither Borovcanin nor any of his units participated in any way, shape or form in the convoy of Muslim prisoners taken from Bratunac to Zvornik on 14 July – and the Prosecution has not alleged otherwise. Even assuming that the prisoners can be properly described as having been “forcibly transferred”, Borovcanin had no involvement at all in these events.

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<sup>269</sup> Butler 19637:17-22.

<sup>270</sup> See section IV(f).

## **IV d Borovcanin Bears No Superior Responsibility for Forcible Transfer**

### **(i) Prosecution Allegations**

116. The Indictment alleges that Borovcanin is responsible as a superior for the acts of subordinates, as enumerated, in respect of forcible transfer, at paragraphs 60-64 and 81 of the Indictment.<sup>271</sup> Those paragraphs in relevant part allege that:

- Alleged subordinates terrorized the Bosnian Muslim refugee population in and around Potocari;<sup>272</sup>
- Alleged subordinates worked together with elements of the Bratunac Brigade and other VRS units in moving the Srebrenica population out of the enclave;<sup>273</sup>
- Alleged subordinates separated able-bodied men from the crowd in Potocari;<sup>274</sup>
- Alleged subordinates detained Bosnian Muslim fighters from the column who were ultimately forcibly transferred to Zvornik;<sup>275</sup>
- Alleged subordinates confiscated and destroyed personal property in Potocari and along the Road.<sup>276</sup>

### **(ii) Overview**

117. The evidence shows that the Deserters' unit was not under Borovcanin's command and control while performing tasks in Potocari on 12 and 13 July. The present submissions are made out of an abundance of caution, should the Chamber determine otherwise.

118. The evidence does not show that the participation of the Deserters' unit in the evacuation of civilians and detention of military-aged men was anything other than lawful.

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<sup>271</sup> Indictment paras. 93, 95.

<sup>272</sup> Indictment, para. 60.

<sup>273</sup> Indictment, para. 61.

<sup>274</sup> Indictment, para. 62.

<sup>275</sup> Indictment para. 63.

<sup>276</sup> Indictment para. 64.

Those soldiers were no more able than Borovcanin to make an assessment as to whether any coercion had taken place in the previous months or days that had induced the wish of Muslim civilians to leave the enclave by the morning of 12 July. Even if they did have an indication that coercion had been used, they had no realistic choice but to assist the evacuation in light of the agreement with UNPROFOR, the request by the BiH authorities, and the evident desire of the civilians themselves to leave the enclave from which the men had already fled. Separating men from the civilians and detaining them was lawful, as is more fully explained in Section VII(iii). Force was permissible to perform that lawful task.

119. Even assuming that there may have been certain excesses in the use of force against Muslim civilians in Potocari on 12 July, Borovcanin is not responsible as a superior. First, the Prosecution has failed to establish which of the many units in Potocari were responsible for the most severe incidents of violence in Potocari on 12 and 13 July. The evidence does not establish that the Deserters' unit was involved in these events. Second, the Prosecution has failed to establish that the intent behind any acts of violence was to force the civilians to leave Potocari; indeed, that seems unlikely considering that the civilians were already determined to leave. Third, even assuming that some members of the Deserters' unit may have been involved in some excesses, the unit was not under Borovcanin's command and control while it participated in the evacuation operation from Potocari. The Deserters' unit, along with the many other units contributing to that process, was under the effective command and control of Radoslav Jankovic (of the Main Staff) and Momir Nikolic (of the Bratunac Brigade), both of whom were acting on the orders of the Commander of the Main Staff, General Mladic. Responsibility for preventing and subsequently punishing any criminal acts by that unit, or its commanders Jevic and Djuric, rested with the VRS officers who exercised command authority over that operation.

### **(iii) Discussion**

120. Superior responsibility can arise, as a matter of law, from any mode of criminal responsibility for which the subordinate is responsible under Article 7(1) of the Statute – *i.e.*, committing, planning, instigating, ordering or aiding and abetting.<sup>277</sup> Just as in the case of the accused own direct responsibility, the subordinate's alleged mode of responsibility must be

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<sup>277</sup> *Nahimana AJ*, para. 486.

adequately identified in the Indictment. An Indictment is not sufficiently pleaded by making broad reference to all the forms of liability under Article 7(1) and then picking and choosing whichever seems most appropriate as the trial proceeds.<sup>278</sup> Here, the Indictment makes no effort at all to categorize the alleged mode of liability of Borovcanin's subordinates. This is simply omitted.

121. The indictment does describe the conduct of Borovcanin's alleged subordinates, saying that they "terrorized", "worked together with" the VRS, "separated" the men, and "confiscated and destroyed" personal documents. The indictment also says that Borovcanin's alleged subordinates "participated" in the implementation of the forcible transfer JCE.<sup>279</sup> These descriptions correspond to "committing" under Article 7(1); no description is given that corresponds or gives notice of any charge of "aiding and abetting." The Indictment, incidentally, also does not charge Borovcanin with "aiding and abetting" forcible transfer. The present brief therefore responds to the allegations as pleaded: that Borovcanin's subordinates are alleged in various specific ways to have "committed" the crime of forcible transfer.

122. This allegation is not proven. Borovcanin's subordinates were no more able than Borovcanin to determine whether coercion had been directed against the civilians who, on 12 July, were crowded in and around the UNPROFOR compound eagerly waiting to be evacuated. The same arguments expressed above are equally applicable to Borovcanin's subordinates. Their participation in assisting the evacuation of Muslim civilians from Potocari was therefore lawful, in the absence of any indication that what they had been ordered to do was manifestly unlawful.

123. Assisting in the process of detaining military-aged men was also not unlawful, for all the reasons expressed above and as is discussed further in Section VII. The situation in Potocari was

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<sup>278</sup> *Kvočka* AJ, para. 42; *Ntagerura* AJ, para. 24 ("it is insufficient for an indictment to merely make broad reference to Article 6(1) of the Statute"); *Blaskić* AJ, para. 215 ("[T]he alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that 'the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.' The nature of the alleged responsibility of an accused should be unambiguous in an indictment.") .

<sup>279</sup> Indictment, para. 98.

evidently chaotic, the crowd was desperate to board the buses, and there were some instances of perfectly understandable resistance to the separations.<sup>280</sup> All of these circumstances could have justified various levels of force in order to carry out the lawful detentions.

124. Excesses may have taken place, but nonetheless the international witnesses who were present on the scene saw relatively little mistreatment, given the circumstances, and none that can be distinctly attributable to the intent to force the Muslims out of the area.<sup>281</sup>

125. Numerous units were present in Potocari on 12 and 13 July participating in the evacuation process. Momir Nikolic identified the large number of units involved. The Prosecution has not established that any of the acts of abuse and mistreatment described by some Muslim witnesses was committed by anyone from the Deserters' unit, rather than members of the other units involved.

126. All of these diverse units were under the command of those who had been given responsibility for the evacuation process by General Mladic himself: Lt. Colonel Jankovic and Captain Momir Nikolic. They were the ones who had *de facto* command and control over all the units participating in the evacuation process. Lt. Colonel Jankovic had more than adequate authority, based on Mladic's orders and presence, to issue orders to any unit involved in the

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<sup>280</sup> Van Duijn 2291:17-2292:2 ("Q. And how did the refugees react to being separated, sir? A. Of course this was a terrible course of events when you have families that want to be together and are placed in a position where nothing is certain.... So this was a terrible situation when in that period of time also families were separated from each other, and men were being singled out by Serb forces and families literally tried to keep hold of each other and were forced by Serb soldiers to let go of each other and have the men separated and brought to that first location on the lawn.")

<sup>281</sup> Van Duijn 2381:5-7 ("Other than the reports of some kicking or abusing of people that wanted to board the buses, but I have no information if that was to force them into the buses or otherwise."); van Duijn 2290:24-2291:16 ("Later on during the day I got reports that women and children and the people that wanted to board the buses were kicked or beaten by Serb soldiers to -- to get them into the buses, and that they were mistreated when they came near to the buses, which was a little bit more north of my location. So I could not see it myself, but I heard the report from soldiers that were there in that area. Q. And did you observe any incidents yourself of that nature? A. On my location there were a few incidents where basically the area Mane and myself had agreed upon were crossed by Serb soldiers that entered in the middle of the area where only UN soldiers were. And one incident was very clear where a Serb soldier dressed in a black overall took hold of the throat of a young boy and tried to get him out of the -- of the group of people he was standing in waiting to get through to the buses. And at that point I intervened with Mane and convinced him that he had to get his personnel away from that area because that basically was what we agreed upon, that you had the group of Muslim refugees, then the UN soldiers, and behind myself the Serb soldiers, and not the Serb soldiers in the middle of the refugees.")

evacuation process, including detaining military-aged men. Jankovic and Momir Nikolic exercised de facto command and control over the Deserters' unit at the time. They had the power to issue orders to prevent any mistreatment that may have occurred, or to correct any abuse that was taking place. Further, MUP units, while re-subordinated to the VRS, were placed under the jurisdiction of military justice and could have subsequently been called before military courts for prosecution and punishment.<sup>282</sup> There would have been no obstacle whatsoever to Momir Nikolic or Radoslav Jankovic reporting alleged criminal conduct by Deserters' unit members to the appropriate prosecuting authorities within the VRS for prosecution. They were obviously best-placed to observe such conduct; assess whether it required further investigation; and then report the misconduct, if necessary.

127. Finally, the Deserters' unit were poorly trained and had never served under Borovcanin's command.<sup>283</sup> Many of them had only days before been hauled off the streets of Belgrade where they had hoped to escape military service in Bosnia.<sup>284</sup> They were not influenced by any "spirit of command" derived from Borovcanin's leadership.

128. The unity of command principle, combined with the practical realities on the ground on 12 and 13 July, show that Borovcanin was not in command and control of the Deserters' unit for the duration of their involvement in the evacuation process in Potocari. This does not detract from his formal command of the unit, or that the unit could come back under his command and control after the completion of the assignment given to them by Mladic. Borovcanin cannot be criminally responsible as a superior after he had been ordered to leave his unit under someone

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<sup>282</sup> See section III(a).

<sup>283</sup> Stojcinovic M 27607:6-8 ("...their training was really short, maybe not even a month, and then they would be sent off into battle. Our comment was that they started resembling soldiers"); Stojcinovic M 27609:7-11 ("Q. What I wanted to ask you is whether you saw Ljubomir Borovcanin at any point in time when this unit of deserters was setting off? A. No"); 4D499 (Bajagic expert report), para. 167: "In the period of one month (or little less than that) they could not acquire sufficient knowledge and skills to be treated as regular military conscripts, let alone certain aspects of specialized training for discharging simple and more complex tasks in a zone of combat activities."); Stojcinovic M 27578:20-23 ("Q. One more thing I would like to ask you. According to your best recollection, did Mr. Borovcanin have a position? Did he have a function to perform at the training centre? A. No, not at the training centre.")

<sup>284</sup> PW-100 14787:17-22 ("In June 1995, around midnight or just after the midnight two police officers came into the unit where I was living with my wife and took me away for so-called questioning where I had been taken care of and took to district police station where myself and lots of the other people like myself had been taken without any connection with the Bosnia and Herzegovina had been taken up from Serbia to be sent back to Bosnia.")

else's *de facto* command and control for the completion of a specific task. He had no reason to believe that the Security Organ, in the persons of Momir Nikolic and Jankovic, would not exercise appropriate command and control over the Deserters' unit, including ensuring that they did not engage in any criminal behavior in front of their eyes. Borovcanin cannot be, and should not be, responsible as a superior for their deficient supervision (if any) over the unit that was placed under their command and control by Mladic.

## **V a The Killings at Kravica Warehouse**

### **(i) Introduction**

129. This section addresses the alleged responsibility of Borovcanin in a joint criminal enterprise to commit mass murder, primarily through his alleged support for the killings at the Kravica Warehouse on 13 July. Part (b) of this section describes the tactical context at the time of the events; part (c) describes what happened at the Kravica Warehouse on 13 July, as best can be determined from the evidence; part (d) assesses who the protagonists in those events were; and part (e) analyzes the potential criminal responsibility of Borovcanin in respect of each of the four modes of liability alleged against him for those events. The discussion of each mode requires some repetition of the facts, although this is necessary in order to directly and distinctly address each of the distinct, yet overlapping, modes of liability alleged in the Indictment.

## V b The Tactical Setting: The Movement of the Column and the Deployment of Serb Forces in the Area, 12-13 July

130. The Prosecution has conceded that the entire Bosnian Muslim column streaming out of the Srebrenica enclave starting on the evening of 11 July was a legitimate military target.<sup>285</sup> The evidence amply supports this concession.<sup>286</sup> The column numbered some 10 to 15000 people,<sup>287</sup> of whom at least one third were armed.<sup>288</sup>

<sup>285</sup> 3382:6-16 (MR. McCLOSKEY: Well, I can tell you, yes, it was a military column. You don't see any war crimes being charged on the attack of this column. And the head of this column was a military column and it did a hell of an attack on 16 July and many Serb soldiers were killed. That's been part of the case from the beginning. It's in the indictment. It's in Mr. Butler's report. It's been fundamental to -- even what the witnesses are saying, like this witness. So -- JUDGE AGIUS: Yes, but the witness was in the back of the column. MR. McCLOSKEY: But that's not -- we've been very clear on that. That's -- that's part of our case. So I don't have any problem agreeing to any of that.")

<sup>286</sup> Butler 20244:19-20246:8 ("As a result of the mixed character of the column, with a mixture of military units and personnel and civilians, I believe I've been fairly consistent by saying that, you know, regardless of the civilian presence, that, you know, at face value, it would qualify as a legitimate military target....And just so I'm clear, so when you say "legitimate" in your report, especially or specifically when you reference "legitimate military combat engagements," you're really saying "lawful military combat engagements," are you not? A. I say "legitimate military combat engagements" because the column represents a military target")

<sup>287</sup> P2207 (PW-117 92ter statement), p. 3017 ("ten to fifteen thousand"); P2272 (PW-112 92ter statement), p. 3240 ("There were about 12.000 to 15.000"); 4D8 (BiH State Security Report, 28 August 1995), p. 7 ("some estimate put the number in the column at 10,000 to 15,000 people, including approximately 6,000 armed soldiers.... The formation put the 284<sup>th</sup> Brigade at the head of the column because it had the best knowledge of the terrain, and it was follow by the 280<sup>th</sup> Brigade with the acting commander within it, while the Mountain Battalion brought up the rear of the column"); Oric M 872:20-23 ("There was a total of maybe 15.000 men, children. There were quite a few women who went with us. I can't say that they were all of military age. I don't -- I only know that there was a total of some 15.000 people, ranging in age between 14 and 70."); PW-110 646:3-5 ("We thought that there may have well been over 15,000 people, even 20,000, maybe.") P2288 (PW-139 92ter statement), para. 3 ("the column comprised of between approximately 17000 and 18000 people"); PW-110 645:24 to 646:1 (Q. And how many men was that, approximately? A. According to an estimate, there must have been at least 15.000 men).

<sup>288</sup> P2204 (PW-116 92ter statement), p. 2944 ("about one third had weapons in that group."); P2272 (PW-112 92ter statement), p. 3240 ("about a third, I'd say, with hunting rifles, not very strong weaponry; hunting rifles and other types. But a third of them, I would say.") Oric M 874:6-15 ("Q. And was the entire column armed or were certain sections of the column armed, sir? A. Only in parts of the column. There were some men in the brigades that carried arms. Every brigade had a few men carrying arms. Q. And when you refer to arms, sir, you're referring to military weapons as opposed to, say, hunting weapons? A. Well, as for the hunting weapons, there were quite a few of those because people had those from before the war. Those who had hunted before the war carried those arms. And there were also other types of weapons, other types of more serious weapons."); 4D2 (Statement of Ramiz Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 14 ("in my estimate there were between 10,000 and 15,000 people. I had around 6,000 troops."); See also Prosecution Adjudicated Fact 256.

131. The column started moving at around 10 p.m. on 11 July,<sup>289</sup> with a group of de-miners in the lead, heading northwest towards Tuzla. The column was strung out, with the rear elements not leaving Susnjari until daybreak.<sup>290</sup>

132. The VRS first became aware of the assembly of men in the area of Milacevici on the afternoon of the 11 July.<sup>291</sup> Two VRS interlocutors make reference to the movement of the column at 6.03 am on 12 July,<sup>292</sup> and another intercept at 6.56 a.m. shows that someone on the VRS side had been exchanging fire with the column between Jaglici and Ravni Buljim as early as 3 a.m. on 12 July.<sup>293</sup> Many units were already deployed along or around the column's path, as it moved through the area on 12 and 13 July, including the following:

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<sup>289</sup> P2207 (PW-117 92ter statement), p. 3017 ("it must have been dark already"); P2220 (PW-120 92ter statement), p. 2735 ("In the evening of the 11<sup>th</sup> of July, around 10.00 p.m., and this is where we lined up. This is where we assembled in Susnjari, and then we went in the direction of Jaglici, Pobudze, and Cerska, on onwards towards Tuzla."); P2288 (PW-139 92ter statement), para. 3 ("the column began to trek towards free territory at midnight on the 11<sup>th</sup> July .... As the column was so big, it took some time before the rear started the trek. My portion of the column began to trek at about 02:00 the following morning (12<sup>th</sup> July 1995)"; Prosecution Adjudicated Fact 246 ("At around 22:00 on the evening of 11 July, the "division command", together with the Bosnian Muslim municipal authorities of Srebrenica, made the decision to form the column"); Oric M 872:6-12 ("Q. Sir, you stated a moment ago that the command from Srebrenica also arrived at Susnjari. Was there a decision that was made at some point regarding what was going to happen next? A. How shall I put it? We discussed as to what should be done, where we should go, whether to go towards Zepa or Tuzla. And sometime in the evening, around 10.00 maybe, or even later, I don't know, I did not look at the watch, a decision was made to head towards Tuzla.")

<sup>290</sup> P2211 (PW-119 92ter statement), p. 3189 ("a kind of column was formed. Those are narrow paths so we knew we had to form lines. And we headed towards the woods, in the direction of Tuzla .... It was the 12<sup>th</sup>, at about 2.00 or 3.00 in the morning when I set off from that place.") Prosecution Adjudicated Fact 245 ("As the situation in Potocari escalated towards crisis on the evening of 11 July 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH, and attempt a breakthrough towards Bosnian Muslim-held territory in the north"); Oric 875:13-21 ("Q. Do you recall approximately what time of day you left Susnjari? A. The de-miners set out during the night, and the column followed. Throughout the night people were leaving, and I believe that I left sometime in the morning. I don't know how late it may have been, but it was already a day. Maybe around 9.00. I -- I was amongst the last. Not the last but amongst the last of those who left the area. Q. And this would have been the morning of 12 July; is that correct, sir? A. Yes.")

<sup>291</sup> 4D692 (Intelligence report signed by Momir Nikolic, 11 July, 1350 hours), p. 1 ("Muslims are pulling out of Srebrenica towards Potocari, heading to Sucevka, Milacevici, Pale").

<sup>292</sup> P1099, p. 1.

<sup>293</sup> P1100, p. 1. Butler's view, however, is that the VRS was not yet aware of the strength of this column (Butler 19816:7-9).

- The Milici Brigade, holding positions to the west of the column's path, in particular at Brezanci,<sup>294</sup> which engaged with the column on several occasions on 12 and 13 July;<sup>295</sup>
- The 4<sup>th</sup> Battalion of the Bratunac Brigade (also known as the 8<sup>th</sup> Battalion of the Zvornik Brigade) with a headquarters just east of Kravica at Kajici;<sup>296</sup> the unit had contact with the column on the morning of 12 July, and then a major clash in the afternoon;<sup>297</sup> the 4<sup>th</sup> was equipped with a Praga by the afternoon of 12 July, deployed at or from Brezanci;<sup>298</sup>
- The 65<sup>th</sup> Protection Regiment, deployed in or around Nova Kasaba, where the lead elements of the column passed on 12 July, and which took many prisoners on 13 July;<sup>299</sup>

<sup>294</sup> 4DP1504 (Plan of Deployment of Drina Corps Forces to Prevent Enemy Forces from the Enclaves (Zepa and Srebrenica) to Pass Towards Kladanj-Tuzla) (showing that the 1<sup>st</sup> Battalion of the Milici Brigade is deployed at Brezanci); 4D141 (Map of showing positions of various RS and ABiH units on 12 July); 4D142 Map showing positions of various RS and ABiH units marked by Defence on 13 July); PW-168 17154:15-21.

<sup>295</sup> 4D694 (1st Milici Lpbr, Organ for Intelligence and Security Affairs, Report str.conf. no. 06/11, 12 July 1995) (report concerning captured Muslim POW); 4D695 (Report from Milici SJB, 12 July) (stating that they had been informed of the presence of Muslim fighters in the area of Pobudje and that the Milici Brigade had "insisted that our units get involved in the search of the terrain.")

<sup>296</sup> Butler 20485:7-9 (referring to the markings on 4D141: "The positions of the headquarters of the 4th Battalion and the 1<sup>st</sup> Battalion correspond to locations that I know them to be. Yes, those are their headquarters locations"); 4D141 (Map of showing positions of various RS and ABiH units on 12 July); 3DP274 (The History of the Bratunac Brigade), p. 18 ("the 4<sup>th</sup> Infantry Battalion (Workers' Battalion) controlled the area in front of its positions from Lupoglav to Ravni Buljim and in depth from Mratinjsko Brdo to Sandici").

<sup>297</sup> P377 (Zvornik Brigade Duty Officer's logbook, entry for 12 July), p. 2 (of the partial translation) ("8<sup>th</sup> pb 1350 hours. Bokcin Potok (between 8<sup>th</sup> pb and men from Milici) between 3,000-4,000 Muslims are blocked – one was captured alive and the Turks have four or five dead. Radika requested assistance in manpower to stop the Turks – we are sending a Praga – bring it from Brezanci.")

<sup>298</sup> P377 (Zvornik Brigade Duty Officer's logbook), p. 2 of the partial translation ("Radika requested assistance in manpower to stop the Turks. We are sending Praga -- introduce it from Brezanci, Mane, SUP to his men on the ground. Give him Radika's phone number"). Pandurevic V 30890:3-6 ("Captain 1st Class Radika Petrovic was a commander of a battalion. It says here the 8th Infantry Battalion. That was how it was designated while it was part of the Zvornik Brigade but at the time it was the 4<sup>th</sup> Battalion of the Bratunac Brigade"). PW-168 17149:1-19 ("Q. Can we again look at P00322? A moment ago we saw the same document. It's a daily combat report from the Zvornik Brigade, 12th July 1995. And on page 1, in paragraph 2, in the fourth bullet point, we read, "We have sent one Praga together or complete with a crew to the area of the 8th PB in Kajici." Do you see that? A. Yes. Q. Would you agree with me that it's a Praga that was sent towards Brezanci village? A. Yes.")

<sup>299</sup> 4DP1504 (Plan of Deployment of Drina Corps Forces to Prevent Enemy Forces from the Enclaves (Zepa and Srebrenica) to Pass Towards Kladanj-Tuzla); 4D141 (Map of showing positions of various RS and ABiH units on 12 July); Subotic B 24971:10-12 (and more generally).

this unit is evidently not static, as elements of this unit are reported to be searching the terrain around Kamenica (near Sandici Meadow) on 12 July;<sup>300</sup>

- The 5<sup>th</sup> Engineering Battalion, based in or near Konjevic Polje;<sup>301</sup>
- MUP forces based in or near Konjevic Polje consisting of a variety of units, including the 2<sup>nd</sup> Zvornik PJP Company,<sup>302</sup> the 5<sup>th</sup> Zvornik PJP Company,<sup>303</sup> the 6<sup>th</sup> Zvornik PJP Company (52 men),<sup>304</sup> a squad of Bratunac SJB municipal police;<sup>305</sup> and (from 13 July) the 2<sup>nd</sup> Deserters' Company;<sup>306</sup> MUP forces had been continuously present at Konjevic Polje since March 1995 when the VRS Main Staff requested their deployment to "prevent the

<sup>300</sup> P1121 (Intercept 12 July, 1640 hours between Obrenovic and unknown interlocutor), p. 2 (O: The second group from the Protection regiment... Kamenica ... They have two dogs with them, the retrievers.")

<sup>301</sup> 4DP1504 (Plan of Deployment of Drina Corps Forces to Prevent Enemy Forces from the Enclaves (Zepa and Srebrenica) to Pass Towards Kladanj-Tuzla); 4D141 (Map of showing positions of various RS and ABiH units on 12 July); 1D379 (Overview of number of troops in the Drina Corps in July 1995) (5<sup>th</sup> Engineering Battalion had 134 men).

<sup>302</sup> Butler 20484:2-8 ("Q. Can you just confirm for us that the 2nd PJP Company on the 12th retreated from Konjevic Polje and went to Srebrenica, where they were tasked with establishing the police force? A. I believe, if I recall the particular document in question, two platoons were withdrawn and sent to Srebrenica and one platoon remained in Konjevic Polje"); P3040 (Vasic Dispatch, 12 July), para. 5 (confirming that one company was left behind at Konjevic Polje).

<sup>303</sup> P60 (Vasic dispatch, 12 July) (mentioning the involvement of the 5<sup>th</sup> Zvornik PJP Company along the Road); Butler 19844:15-19845:3 ("The section that [Vasic is] referring to in this context is the section of the column that we generally understand to be transiting that area at the time. They're blocking, within the contents of the section, those particular areas of the enclave that those MUP forces are garrisoning. They've been set up along that road, along that northern perimeter.")

<sup>304</sup> 4D121 (Daily bulletin of Zvornik CJB, 11/12 July 1995), p. 2 ("and the 52-strong 6<sup>th</sup> Company of the CJB is in the Konjevic Polje and Han Pogled sectors"); 4D344 (Daily bulletin of Zvornik CJB, 19 July 1995), p. 2. (the 6<sup>th</sup> Company was still there on 19 July, "engaged in ambush operations in the Konjevic Polje sector").

<sup>305</sup> Nikolic M 33283:19-33284:6 ("Q... And can you confirm that the notation [on Exhibit P1504] there next to that flag indicates that elements of the 5th Engineering Battalion were located at that spot and elements of civilian police as well? A. What I can see on the map, an engineering unit was in Konjevic Polje. It says here the 5th Engineers Battalion. I know which unit it was. And also, there were MUP forces there -- or, rather, MUP units. That is as far as I know. It was not any particular MUP unit. It was a squad, although a squad is a unit, but they were manning this check-point which was held by the MUP. Excuse me. Just one more thing. And this squad, as far as I know, at that time was part of the Bratunac Public Security Station, the chief of which Mr. Miodrag [Josipovic].") PW-161:9526:17-22 ("Q. In Konjevic Polje you saw a check-point of the civilian police; is that correct? A. Yes, it is. Q. Those were policemen wearing blue, classical police uniforms from Bratunac? A. Yes.")

<sup>306</sup> Djuric M 10823:9-18; 4D141 (Map of showing positions of various RS and ABiH units on 12 July), showing 2<sup>nd</sup> Jahorina Company along a stretch of the Road.

announced movement of the Muslim brigade from Srebrenica”;<sup>307</sup> Borovcanin was not in command of any of these units before or during July 1995,<sup>308</sup> an interlocutor tells Obrenovic on the morning of 12 July that these MUP forces have been told to do “the same as the Engineering Battalion” and that orders can be issued to them “through the commander of the Engineering Battalion”; Mane Djuric, the Deputy Commander of the Zvornik CJB, is implied to be the commander of these units;<sup>309</sup> orders were, in fact,

<sup>307</sup> 4DP31/P898 (Letter from Tolimir, Assistant Commander for Security and Intel, to RS President, 19 March 1995), p. 2 (“enemy reconnaissance and sabotage groups are illegally passing through the uninhabited parts of the RS territory ... we propose that RS MUP units take control of the uninhabited parts of the territory behind the front line in Birac and Podrinje, and the Milici-Konjevic Polje-Zvornik and the Milici-Konjevic Polje-Bratunac roads ... Please inform the [Main Staff of the] VRS about the measures that RS MUP will take in order to establish a security and control system in this part of the territory”); 4D314 (Zvornik CJB Order, 3 July 1995) (“Order... the 6<sup>th</sup> Company and Support Platoon of the PJP Unit of this centre on 4 July 1995 [to] relieve the 5<sup>th</sup> Company which is on a mission in Konjevic polje”); 4DP1504 (Plan of Deployment of Drina Corps Forces to Prevent Enemy Forces from the Enclaves (Zepa and Srebrenica) to Pass Towards Kladanj-Tuzla) (shows MUP company located at Konjevic Polje); 5D1331 (Letter from Milovanovic to RS President, proposing that the MUP forces “through ambushes and patrols, ensure the control of the territory in depth along the Srebrenica-Han Pogled-Kladanj axes, which would, together with our intensified security and alertness along the line of contact, block this axis and prevent the announced movement of the Muslim brigade from Srebrenica”); 4D323 (Zvornik CJB Dispatch, Vasic, 7 July 1995) (showing engagement of police units); see Section III concerning deployment of MUP units in Konjevic Polje.

<sup>308</sup> The Prosecution has never suggested otherwise. See e.g., Butler 19832:5-14 (“I apologise. It’s the 1st Company the PJP that’s under that [Order 64/95]. So, in this context, the special police detachment from Sekovici is not the same as the 2nd Police Company from Zvornik SJB. So in that context, I misspoke. The 2nd Company [of the Zvornik PJP] is not designated as being directly under the command of Colonel Borovcanin. MR. McCLOSKEY: Thank you. Perhaps we could take a break, Your Honour. I mean, for me to have to go through that to get a piece of exculpatory information for Borovcanin is beyond me.”)

<sup>309</sup> P1102 (Intercept between X and Major Obrenovic dated 12 July 1995 at 07:40 hrs) (“?: Where is your commander? O: As far as I know, he’s here. X: He’s not answering. Listen, please tell him that I called, that Mane Laco’s deputy will call him, that the police in Konjevic Polje have been told to [do] the same as the Engineering Battalion are doing, and that he can give orders to them through the commander of the Engineering Battalion”); Pandurevic V 30890:8-9 (“I believe this is Mane Djuric, deputy chief of the public security centre in Zvornik”). Incidentally, Mane Djuric is not to be confused with Mendeljev (a.k.a. “Mane”) Djuric, Dusko Jevic’s deputy. The Prosecution own interpretation is that the exchange between Obrenovic and his interlocutor, including the reference to passing orders through the commander of the 5<sup>th</sup> Engineering Battalion, shows that the police forces in Konjevic Polje “were resubordinated to the Army and under its overall command (Prosecution’s Submission in Support of the Admissibility of Intercept Evidence, with Confidential Annexes, 1 May 2007 (Annex I, p. 8)). An intercept recorded 8 minutes after P1102 shows that at least one company was present in Konjevic Polje on the morning of 12 July: P1103 (Intercept of 0748 hours: “General, I spoke with Mane. G: Good. X: ... One of his companies is up there next to our man with the bulldozers, over there in /?Konjevic Polje/ and has the task of doing whatever he does.”) Mane was apparently expected to make contact with the 4<sup>th</sup> Battalion on 12 July after the clash with the Muslim column in the early afternoon of 12 July. According to the Zvornik Duty Officer’s logbook entry the commander of the 4<sup>th</sup> Battalion “requested assistance in manpower to stop the Turks. – we are sending a Praga – introduce it from Brezanci *MANE – SUP /Secretariat of the Interior/ -- to his men on the ground – give him Radika’s phone number”* (P377 (Zvornik Brigade Duty Officer’s logbook, entry for 12 July), p. 2 of the partial translation).

subsequently issued to the MUP forces at Konjevic Polje through the VRS;<sup>310</sup> these forces were not static, setting up an ambush along the Road south of Konjevic Polje on 12 July at Hrcici and moving south some distance down the Road on the evening of the 13<sup>th</sup>;<sup>311</sup>

- A Zvornik Brigade military police detachment was apparently sent to Konjevic Polje on the orders of the Drina Corps on 12 July;<sup>312</sup>
- Bratunac Brigade battalions, which pursued the column from the direction of Potocari, searching the terrain in its wake ("the main forces of the Bratunac Brigade continue to search the terrain in the direction of Ravni Buljim-Zvijezda-Siljato Brdo. Some of the forces are engaged in crushing enemy forces which have retreated to the aforementioned area");<sup>313</sup>
- Bratunac Brigade elements, including from the 3<sup>rd</sup> Battalion, the military police, and the Worker's battalion, who were along the Road itself, as discussed in detail in section V(d).

133. Despite this variety of VRS and MUP forces in the path of the column, Dragomir Vasic complains in a dispatch on 13 July that "we have no cooperation or assistance from the VRS /Army of Republika Srpska/ in sealing off and destroying the large number of enemy soldiers, so that a lot of problems can be expected until the operation is completed, because the MUP is working alone in this operation and both the area and the number of Muslim soldiers are large."<sup>314</sup> He repeats this sentiment in a later dispatch, saying: "Killing of about 8,000 Muslim

<sup>310</sup> P1104 (12 July intercept, 0843 hours, between Ognjenovic, Drina Corps Staff Officer, and a general at Zlatar (Drina Corps Command in Vlasenica) ("G: OK, right. And has the Commander ordered /them/ down in Konjevic Polje what's to be done? O: He ordered them, he ordered those guys down at Palma /code-name/ Zvornik Command) what to do and so forth. Both the MUP /Ministry of the Interior/ and these guys... G: Good, to the MUP in Konjevic Polje and Zvornik. OK, bye.")

<sup>311</sup> P1121 (Intercept 12 July, 1640 hours between Obrenovic and unknown interlocutor), p. 2.

<sup>312</sup> P322 (Zvornik Brigade Regular Combat Report, 12 July 1995, about 1700 hours), p. 1 ("One Military police detachment was sent to Konjevic Polje pursuant to your order.")

<sup>313</sup> 4DP245/P869 (Bratunac Brigade report, 13 July), para. 2. The 3<sup>rd</sup> and 4<sup>th</sup> Battalions and the Worker's units are still engaged searching the terrain on 18 July, showing their continuous presence in that area: ("our units of the 3<sup>rd</sup> pb /infantry battalion/, the 4<sup>th</sup> pb and people mobilized for compulsory labour are searching the terrain in the area of Pobude, Hrcici and Konjevic Polje.")

<sup>314</sup> P62 (CJB Zvornik Report, type-signed Vasic, 13 July).

soldiers whom we blocked in the woods near Konjevic Polje. Fighting is going on. This job is being done solely by MUP units.”<sup>315</sup>

134. It has been suggested in the course of the trial that Vasic’s words of exasperation in these two documents should be taken as a literal reflection of the facts on the ground on 13 July and, further, that it displays a murderous intent. Both of these suggestions are erroneous.

135. Richard Butler, the Prosecution’s military expert, interpreted “killing” in light of the evident context of ongoing combat with the column:

Q. Well, it says "killing of about 8.000." Do you -- have you ever thought that had any dark meaning? A. No, sir. In this context, I take that that all General -- or all Mr. Vasic is referring to is the fact that, you know, engagement and liquidation in a strictly military context.<sup>316</sup>

136. Butler is correct that the evidence does not show that any Army unit was headquartered or stationed along the Road between the 5<sup>th</sup> Engineering Battalion in Konjevic Polje and the positions of the 4<sup>th</sup> Battalion in Kajici. This statement is subject to three important qualifications, however. First, as discussed more fully in the next section, there was a strong VRS presence along that stretch of road on 13 July. Soldiers from at least three different Bratunac Brigade units were present at the Kravica Warehouse itself on 13 July, a strong indication that other members of their units were also in the area.<sup>317</sup> Second, the column was surrounded on three sides by VRS forces, as recognized by PW-168 on the maps that he reviewed in court.<sup>318</sup> The combat with the column, which the Prosecution in any event concedes was a lawful military target, was not conducted by the MUP alone, as claimed by Vasic in his dispatches. Vasic, for whatever reason, was apparently exaggerating the situation to his superiors.<sup>319</sup> Third, not all the

<sup>315</sup> P886 (CJB Zvornik Report, type-signed Vasic, 13 July).

<sup>316</sup> Butler 19870:10-14.

<sup>317</sup> See section V(d).

<sup>318</sup> 4D141; 4D142; 4DIC 185; 4D97.

<sup>319</sup> Pandurevic V 31976:9-15 (referring to P886) (“A. I cannot fathom as to what was driving Vasic when he was compiling this report and whether he faithfully conveyed the orders given by Mladic. However, judging by how it looks, I very much doubt that this could be Vasic’s doing solely. Q. What, writing this short report or engaging in the tasks that were assigned? A. To carry out the tasks mentioned in this report.”); Pandurevic V 31976:22-31977:7 (referring to P62) (“A. Yes, I see apparently there was no coordination between the MUP and the army, or this is

MUP forces were under Borovcanin's command. The 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Zvornik PJP Companies and the 2<sup>nd</sup> Deserters' Unit were subject to a different chain of command, and were not subordinated to Borovcanin under Order 64/95. The Prosecution has never suggested otherwise, underlining in paragraph 18 of the Indictment that only those MUP units specifically named are claimed to have been under his command.

137. This is the tactical framework for the events of 12 and 13 July along the Road, which are now addressed in more detail.

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how Vasic perceived it. These are his words and his observations. Q. You knew the man; you probably still know the man. You wanted to appoint him the commander or assistant commander for morale, legal and religious services of the 6th Battalion. Do you know of any reason why he would lie when he would make such a report like this, as you sit here? A. I have no reason to think that he lied or any reason to believe that everything was 100 per cent accurate. I wanted to appoint him to this position for morale and legal and religious matters because he had a university degree which was quite a rarity at the time.")

## V c The Events at Kravica Warehouse on 13 July

### (i) Introduction

138. This section reviews the evidence concerning the sequence of events at Kravica Warehouse on the afternoon and evening of 13 July 1995. The focus of this section is describing *what* happens; the following section of the brief will address *who* participated in those events.

139. The best view of the evidence, taken in its totality, shows that:

- 1) A first episode of shooting and killing happens on the right-hand side of the Warehouse sometime in the late afternoon, probably between 5 pm and 6 pm, but in any event while it is still light (PW-111, PW-156 and Djukanovic);
- 2) This first episode was triggered by some unexpected or sudden event, probably a break-out attempt by some of the prisoners (PW-111, Pepic, injuries sustained by Cuturic and Dragicevic (a.k.a. "Krlle");
- 3) The shooting lasts for between 15 and 30 minutes, perhaps not continuously, and then stops (PW-111, Djukanovic);
- 4) The bodies of a certain number of Muslim prisoners are piled in front of the Kravica Warehouse, and subsequently covered with hay (Djukanovic, Pepic, Trial Video, PW-156)
- 5) As dusk falls, detainees continue to be escorted to the Kravica Warehouse compound, and are then loaded onto a bus and taken to Bratunac by bus (Oric);
- 6) As darkness falls at around 9 pm, but in any event after Muslim prisoner Mevludin Oric passes by the Kravica Warehouse, the systematic massacre begins, continuing late into the night (PW-111, PW-156, Vasovic P, Jovanovic M).

### (ii) The Sequence of Events on 13 July

140. Sometime during the afternoon of 13 July, shortly after General Mladic's mid-afternoon visit, prisoners at the Sandici Meadow started to be taken to Kravica Warehouse.<sup>320</sup> The first

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<sup>320</sup> PW-156 7112:8-9 ("After Mladic's departure, we stayed less than half an hour, and then we set out [from Sandici Meadow towards KW]"); PW-156 7090:14-17 ("Then [Mladic] left. Then after some 15 to 20 minutes, the man who was in civilian uniform said that we were to be searched..."); PW-111 6977:25-6978:3 ("About what time of day did

group of prisoners was taken in two buses,<sup>321</sup> followed by other groups on foot.<sup>322</sup> Witness PW-111, who was one of the first prisoners to arrive at the Warehouse, recalled that the process of prisoners entering the premises continued for an hour-and-a-half to two hours.<sup>323</sup>

141. Witness PW-111 explains that at some point in time while it was still light,<sup>324</sup> "I saw that the Serb soldiers became agitated and angry":<sup>325</sup>

then there was this shooting outside and I heard screams and moans. I don't know where it was taking place. It was outside. The shooting was so intense we could hear shells landing all around.... To this day I don't know who initiated that shooting and what was going on. After all of that calmed down, they ordered two Muslims from the warehouse to go out to bring in their wounded soldier. They went out, they didn't stay out long, perhaps a couple of minutes, and then they came back.<sup>326</sup>

Witness PW-111, who was in the room on the left-hand side of the Warehouse as seen from the Road, said that he could see Serb soldiers "firing in front, here in front of the entrance ... They

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Mladic come by...? I'm not quite sure, but somewhere at midday. It could have been in the afternoon. Im not quite sure.")

<sup>321</sup> PW-111 6978:17-23 ("Q. Can you explain how it came that you finally left that location that day? A. We were ordered, two buses arrived, and they awaited us on the asphalt road. They made a selection. They didn't get everybody at the same time. This officer came, the one who stood in front of us with a knife, and he said, 'You, you, you, come out. Go down to the asphalt road and get on buses.'"); PW-111 6989:19-21 ("I was among the first one to enter [the Kravica Warehouse] and then after me a lot of other people came in, or rather, came in running, so that the section where I was completely full.").

<sup>322</sup> PW-156, who was in the marching column, sees buses already present at the Kravica Warehouse when he arrives there on foot – presumably the same buses that had transported PW-111: "We came in front of the warehouse. There was a bus parked in front of the warehouse...." (PW-156 7094:21-22). Celic sees a column of men consisting of 600-800 men passing by on the road from Sandici towards Kravica Warehouse (Celic P 13477:11-22).

<sup>323</sup> PW-111 6990:2-6 ("Q. How long did this process of new -- of new people -- I guess Muslim men, I take it, how long did this process of new Muslims coming into the warehouse last, if you can give us a rough estimate? A. Well, roughly -- I don't know exactly, but in my view, perhaps, hour and a half to two hours.")

<sup>324</sup> PW-111 7061:5-6 ("it happened when you could still see, and it wasn't quite dark, but it was getting dark"); PW-111:7060:8-9 ("Q. This happened while it was still day; is that correct? A. Yes.")

<sup>325</sup> PW-111 6992:15-16 ("Then everything calmed down and after a certain period of time I saw that the Serb soldiers became agitated and angry.")

<sup>326</sup> PW-111 6993:6-20. PW-111 repeats this detail about the wounded Muslim being brought into his section of the Warehouse again: "Q. And you had said one of your -- your guards had made a comment to you about, 'Look what's happening,' something to that effect. When in this time period did this guard make this comment to the group? A. He said it when they brought the wounded person." (PW-111 6996:18-21).

were firing in that direction there, to the right.”<sup>327</sup> This implies that the soldiers may have been shooting towards the room on the right-hand side of the Warehouse, where the other detainees were located.<sup>328</sup> The orientation of the left- and right- hand side of the Warehouse are shown on Annex C.

142. PW-111 described the reaction of the Serb soldiers in front of his section of the Warehouse:

Q. Did they appear like they reacted to this firing in some way, in any sort of panic or in any other way? A. I noticed that they were also *frightened*, the soldiers. They were in a *big panic* as well. I noticed that they were so *agitated* you couldn't really tell who was going where. And all of this was going on in front.<sup>329</sup>

The shooting went on for half-an-hour,<sup>330</sup> then stopped.<sup>331</sup> At the end of the shooting, two men from PW-111's side of the Warehouse were sent outside to retrieve one or more wounded Muslim soldiers.<sup>332</sup>

<sup>327</sup> PW-111 6997:8-11 (“I could see them firing in front, here in front of this entrance. I could see that from inside, how they were firing from automatic rifles. They were firing in that direction there, to the right.”)

<sup>328</sup> PW-156 7094:23-24 (“I passed the first entrance, and I came to the second entrance. And that's where I went in, through the second entrance door.”)

<sup>329</sup> PW-111 6998:16-20 (“Q. Did they appear like they reacted to this firing in some way, in any sort of panic or in any other way? A. I noticed that they were also frightened, the soldiers. They were in a big panic as well. I noticed that they were so agitated you couldn't really tell who was going where. And all of this was going on in front.”)

<sup>330</sup> PW-111 6995:11-12 (“The shooting began after they became angry, and the shooting went on for about half an hour, perhaps.”) Djukanovic testified that the shooting lasted fifteen minutes (“Q. Approximately, best that you can remember, how long did that shooting last? A. Well, maybe ten, 15 minutes, but not throughout, not all the time.” - Djukanovic M 11768:13-15).

<sup>331</sup> PW-111 6999:4-6 (“After the shooting everything became quiet, we were quite afraid, we were in a panic, we didn't know what was going on outside. Then things quieted down.”)

<sup>332</sup> PW-111 6993:17-23 (“After all of that calmed down, they ordered two Muslims from the warehouse to go out to bring in their wounded soldier. They went out, they didn't stay out long, perhaps a couple of minutes, and then they came back. And I didn't hear anybody asking them anything, whether they had brought in anybody or anything. They just came in calmly and they sat, but not near me. They were to my left. So I couldn't hear whether they said anything about what was going on”; PW-111 6996:18-6997:4 (“Q. And you had said one of your -- your guards had made a comment to you about, "Look what's happening," something to that effect. When in this time period did this guard make this comment to the group? A. He said it when they brought the wounded person. Those two men, Muslims, who were ordered to go out and bring in their wounded, that's what they told them. They didn't stay long; they returned inside. They started to shout at us, things quieted down a bit, but even though later there was also some more shooting from automatic weapons, they told them, "Well, look, we let you pass

143. Sometime later, after it had become dark,<sup>333</sup> a group of Serb soldiers approached PW-111's side of the Warehouse, pointed their weapons, and started shooting.<sup>334</sup> Except for some brief lulls, the killing continued all night, with automatic rifle-fire and grenades.<sup>335</sup>

144. Witness PW-156, the other Warehouse survivor, gives a different account of the sequence of events. He says that the shooting began immediately after his arrival there on foot no later than 5 pm, continuing uninterrupted for several hours until nightfall.<sup>336</sup>

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through peacefully. We opened a corridor for you, for you to go quietly and peacefully to Tuzla and you don't want to do that. They are attacking us. Look at what they're doing to us.' That's all that I heard.")

<sup>333</sup> PW-111 7061:5-9 ("The first one was -- it happened when you could still see, and it wasn't quite dark, but it was getting dark and then half an hour later, I don't know 100 per cent I said that, roughly, I mean I didn't have a watch to measure the time in the panic and the fear. It was getting dark. They opened fire at us. The first two soldiers.") The witness was subsequently questioned about his time estimate of "roughly" half an hour, and gave the following response: "This [the first outbreak of shooting] happened while it was still day; is that correct? A. Yes. Q. The episode in which the soldier that you described came with the glasses, the long hair and the beard and who fired at you, happened when it was already dark, when it was already getting dark. Is that correct? .... A. The first one was -- it happened when you could still see, and it wasn't quite dark, but it was getting dark and then half an hour later, I don't know 100 per cent I said that, roughly, I mean I didn't have a watch to measure the time in the panic and the fear. It was getting dark. They opened fire at us. The first two soldiers. Q. I understand you really well, but I just wanted to clarify that. Of course you didn't look at the watch and all of that is all right. But you concluded that it was around 8.30 or 9.00 on the basis of the fact that it was beginning to get dark, and since it was mid-July when the days are pretty long, you decided on the basis of that that was the time that this thing was taking place in? A. Yes, that is correct." (7060:8-7061:16). The witness's time estimate of the interval should be given less reliability than the more tangible perception that "it was already getting dark."

<sup>334</sup> PW-111 6999:6-15 ("After some time they came inside and two of them, the one with the black glasses and long, shoulder-length, curly hair, black hair, and the other one who had a blue UN helmet, and he was also wearing a bullet-proof vest and a camouflage shirt. They were the first to open fire at us. Behind them more soldiers came in, five to 10 of them, but these two were in front, they were the first. I've already described them. And the two of them, the first two, opened fire at us. So I could see when the first one opened fire, the one in the black glasses. At the same time, the one in the blue helmet opened fire too.")

<sup>335</sup> PW-111 7000:20-16 ("And then during the night there were several such breaks. I continued to lie down. They would make a break, rest, then come in again and shoot. However they -- however long they wanted to. Then when they stopped they would just then throw in a series of hand-grenades inside through the windows...."); PW-111 7000:23 ("It went on all night, this firing.")

<sup>336</sup> PW-156 7123:15-23 ("And then he shot a burst of fire into him and this is when the shooting started and I just bent my head down and the shooting continued all the way to the night. Q. I want to ask you how long in your estimate that lasted when you say until the night? A. **As we entered the warehouse, and I didn't tell you what time it was when I entered, it was in the afternoon, perhaps 3.00, 4.00 p.m., perhaps even 5.00.** And they were shooting until it became dark. When it became dark, the shooting ceased.") – emphasis added.

145. Witness PW-156's account concerning the duration of this first killing event is incompatible with that of PW-111. PW-111 was one of the first people to arrive at the Warehouse, and certainly arrived before PW-156. PW-156's testimony that a four-hour massacre started at 5 pm directly clashes with PW-111's testimony.

146. PW-111's testimony should be preferred to that of PW-156 for five reasons. First, PW-111's testimony was generally more detailed than that of PW-156.<sup>337</sup> PW-156 described the outbreak of the shooting cursorily, and generally appeared to be re-telling his story as if by rote, probably because of the combined effect of lasting trauma and frequent repetition. Second, PW-111's account is consistent with the other witness in the immediate vicinity, Djukanovic, who heard intensive shooting that lasted 10 to 15 minutes, and then stopped.<sup>338</sup> Third, PW-156 was directly in the line of fire when the first shooting incident occurred, whereas PW-111 was not. The event was so intense and traumatic that there is a much greater likelihood that PW-156's memories or perceptions of this phase of events are faulty.<sup>339</sup> Fourth, PW-156's memory of his arrival at the Warehouse is flawed. Numerous videos, photos and testimony affirm that there was an iron fence separating the compound from the Road.<sup>340</sup> Any large column of men under guard would have had to walk in through the driveway beyond the Warehouse, entering

<sup>337</sup> For example, as described above, Witness PW-111 was able to offer a myriad of details about what was happening at the Warehouse during the lead-up to the first shooting event, as well as the events immediately preceding the first and second shooting events. In contrast, Witness-156 provides only a cursory description of the moment when the firing commences, and tended to repeat the same description, as if learned by rote: Compare 7095:7-12, with 7123:12-17. The Defence does not imply that PW-156 fabricated his experiences, but rather that trauma, combined perhaps with frequent repetition of the story, has given rise to a recollection that does not accord with the true timing or sequence of events.

<sup>338</sup> Djukanovic M 11768:13-19 ("Q. All right. Approximately, best that you can remember, how long did that shooting last? A. Well, maybe ten, 15 minutes, but not throughout, not all the time. Q. Besides the shooting, what else did you hear? Did you hear any other loud noises? A. I heard noises, explosions, but that was already towards dusk but I didn't go anywhere near.").

<sup>339</sup> *E.g.*, PW-111 7097:20-21 ("It was as if someone had thrown me out of an airplane.")

<sup>340</sup> P1575 (OTP video of Kravica Warehouse), 2:54; 4D76 (Video shot in January 1996), 00:22; P2103 (Ruez book of photos), p. 107; (PW-161 9525:7-10; PW-156 7119:4-16 (confirming that the pen-markings on P2435 accurately reflect his route into the compound, showing a direct route from the Road into the Compound in front of the right-side of the Warehouse). P2987 (interactive video of Kravica Warehouse) (best view of the fence is offered by choosing the point-of-view directly in front of the right-hand side of the Warehouse and panning towards the Road. The fence is in a slight depression between the Road and the Compound, explaining why it cannot be distinctly seen on the Petrovic video of the Kravica Warehouse, which is panned above the fence. The Prosecution has never asserted, much less called any evidence to suggest, that this fence was added after July 1995. The state of disrepair of the Warehouse itself in 1996 and 1997 renders such a possibility far-fetched).

a gate on the far side of the compound as seen from Sandici.<sup>341</sup> Instead, PW-156 described matter-of-factly walking straight into the compound from the Road directly in front of the Warehouse.<sup>342</sup> When confronted with the existence of an iron fence separating the compound from the Road, PW-156 flatly denied that it was there.<sup>343</sup> PW-156's failure to remember his route into the Warehouse compound, not to mention his outright denial of the existence of a fence that he would have had to traverse if his recollection were correct, raises serious questions about the reliability of his memory. Fifth, and perhaps most crucially, PW-156's account is irreconcilable with the testimony of a Muslim witness who passed in front of the Kravica Warehouse on 13 July: Mevludin Oric.

147. Oric was traveling towards Bratunac on a bus that stopped in front of the Kravica Warehouse at dusk: "It was dusk. Lights were just being turned on."<sup>344</sup> He had a window-seat on the right-hand side of the bus.<sup>345</sup> Oric looked out the window to his right and saw a group of 400 to 500 Muslim prisoners sitting in front of the Warehouse, under guard.<sup>346</sup> The prisoners

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<sup>341</sup> Even assuming that there was a hole somewhere in the fence, this would not likely have been an appropriate route for a large column of men. In any event, PW-156 makes no mention of going through a gap in the fence; he simply denies its existence entirely.

<sup>342</sup> PW-156 7094:20-21 ("We were passing by. We came in front of the Warehouse"; P1563 (photo of Kravica Warehouse), PIC67 (as marked by PW-156); P1565 (photo of Kravica Warehouse), PIC66 (as marked by PW-156).

<sup>343</sup> PW-156 7119:14-16 ("I see where the line has been drawn and I see the entrance as well that is marked with the pen.... Yes, that is where we turned from the asphalt road to the warehouse.... The fence wasn't there then. When I was going to the Warehouse, the fence wasn't there then"); 7127:20-21 ("I didn't see a single fence between the asphalt road and the warehouse. When I arrived I didn't see any fence.")

<sup>344</sup> Oric M 1061:20-21; 890:12-13; Oric 897:25-898:8 ("Q. Did you make any stops on the way? A. We stopped in Kravica.... Q. Now, you described a meadow in Kravica. Was that meadow located near any structure in particular that you recall, sir? A. There is a facility like a warehouse, and the prisoners were sitting next to it.")

<sup>345</sup> Oric M 891:1-10 ("Q. And was there anything special about that back seat, sir? A. They were somewhat higher than the rest of the seats, so you had a good view of the entire interior of the bus. And the window is almost at the level of the seats, and you had a good view outside the bus if you were sitting on those seats, because they are elevated, higher than the rest of the seats on the bus. Q. And were you seated on the right-hand side or the left-hand side of the bus, sir? A. On the right-hand side, next to the window. Actually, I was the first on the right-hand side, right next to the window.")

<sup>346</sup> Oric M 898:9-23 ("Q. Can you estimate for the Trial Chamber approximately how many prisoners you observed in this meadow. A. As far as I could see from the bus, according to my assessment, 400 to 500 people.... There were soldiers around the bus -- around the buses, guarding them. There were soldiers around. Q. Were there soldiers located in the meadow as well, guarding those prisoners? A. Yes, there were."); Oric M 1061:20-23.

were loaded onto the buses until filled to capacity, before proceeding to Bratunac.<sup>347</sup> Oric did not see any bodies in front of the Warehouse, was unable to tell whether more detainees were inside the Warehouse, and did not recall hearing any shooting.<sup>348</sup> Oric did not testify that the detainees boarding the buses said anything particular or noteworthy or mention that they were agitated.

148. The Trial Video confirms that the first shootings happened while it was still light.<sup>349</sup> Bratunac Health Clinic records provide further specificity, noting that the first Serb soldier was admitted at 1740.<sup>350</sup> How, then, could 500 Muslim prisoners subsequently have been sitting peacefully in front of the Warehouse, waiting to be bused to Bratunac, if a massacre had been taking place for several hours starting between 5 and 6 pm? And how is it conceivably possible that several hundred Muslim prisoners would have been brought to an active execution site while an execution was underway involving gunfire and grenades?

149. PW-111's testimony, on the other hand, fits perfectly into the account given by Oric. The first shooting incident ended after a limited period. Relative calm was restored. Prisoners then arrived in front of the Warehouse on foot, out-of-sight of PW-111. Only then did Oric arrive. Oric did not see the bodies in front of the Warehouse because, as another witness testified and as the Prosecution argues, they had been covered with hay.<sup>351</sup> After the detainees were taken

<sup>347</sup> Oric M 898:15-16 ("There was my bus and another bus, and the prisoners were placed on the bus, and the bus was full with people"); Oric M 907:25-908:1 ("When they filled the two buses, we headed towards Bratunac.").

<sup>348</sup> Oric M 1062:4-13 ("Q. Did you see any Muslims in the warehouse? Your answer was: 'No.' 'Q. Did you see any bodies around the area anywhere? And you said: 'No, I didn't.' Do you still stick by the answers that you gave to Mr. McCloskey at that time? A. No. There were two buses, and that's the mistake that I spotted. There were only two buses. Q. Save for this remark, would the rest of your answers be correct? A. I suppose so, yes. Q. And let me just ask you this: When you were there on that evening, on the 13th of July, in Kravica, did you hear shots? A. I can't remember.").

<sup>349</sup> P2047 (Trial Video), 2:56:48.

<sup>350</sup> 4DP1892 (Bratunac Clinic patient log), BCS p. 31.

<sup>351</sup> Pepic M 13573:2-18 ("I noticed on the wall of the cooperative there were visible traces of bullets, and outside the cooperative there was a pile of hay.... Q. ...why does the hay stand out in your mind? A. Well, when I was going from Sandici towards Kravica, I hadn't noticed it. I hadn't noticed that hay piled up."); 495:4-5 (Prosecution Opening: "they throw hay over the bodies so they can't be seen from the road"); PW-156 7106:14-18 ("Q. You indicated also that while you were in the warehouse you heard that there was an order to cover the bodies with hay. What I want to ask you about that is, do you remember what day that occurred? A. It was on the 13<sup>th</sup> in the evening.")

away on buses, the full-blown massacre commenced sometime around night-fall. PW-111 and PW-156 both testified that once the massacre started, it continued for many hours.<sup>352</sup>

150. This sequence of events is consistent with what is visible from the critical portion of the Petrovic video. As the camera pans along the front of the Warehouse from right to left (west to east), bodies can be seen immediately in front of the right-hand doorway on the right-hand side of the Warehouse.<sup>353</sup> The bodies are distinctively piled up in front of the doorway, as if the killings were concentrated in that spot. The entrance behind those bodies is blocked, apparently by shut doors.<sup>354</sup> The two white marks in the middle of the door appear to be handles; they cannot be windows as is demonstrated by Prosecution photos at P2103, page 117, which shows how the windows at the back of the Warehouse (which is only 10 metres deep) appear as seen through that entrance, as compared with the still of the closed door on the Petrovic video.<sup>355</sup> This photo is reproduced as Annex D.

151. One reasonably possible scenario suggested by this excerpt of video is that a certain number of prisoners emerged from the entry on the right-hand side of the Warehouse; were shot in front of the entrance where they emerged; and that the doors were then shut after the break-out attempt had been suppressed, locking the remaining prisoners inside.

152. This description conflicts, of course, with the testimony of PW-156. Aside from the reasons mentioned above to prefer Witness PW-111's account to that of PW-156, there is another anomaly that bears directly on the reliability of his testimony. PW-156 says that he entered the Warehouse through a small door to the left of the large door on the right-side of the Warehouse. Hence, the Prosecution may argue that a large-scale killing was underway at the moment of the Petrovic video footage through the small door.

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<sup>352</sup> PW-111 7000:23 ("It went on all night, this firing."); PW-156 7123:18-23 (Q. I want to ask you how long in your estimate that lasted when you say until the night? A. **As we entered the warehouse, and I didn't tell you what time it was when I entered, it was in the afternoon, perhaps 3.00, 4.00 p.m., perhaps even 5.00.** And they were shooting until it became dark. When it became dark, the shooting ceased.") (emphasis added)

<sup>353</sup> The right-hand room of the Kravica Warehouse has two entrances: a smaller door on the left, and a wider door on the right.

<sup>354</sup> P2047 (Trial Video), 2:56:25-2:56:40.

<sup>355</sup> P2103 (Ruez collection of photos), pp. 113, 115.

153. This claim is, however, negated by Prosecution investigators' testimony and sketches (see Annex E) showing that the small door led only to a self-contained "guard-house", measuring 4 by 3.6 metres.<sup>356</sup> The Prosecution's own estimate is that this room could have held no more than 41 persons.<sup>357</sup> It is therefore impossible that a large-scale massacre was being committed through that small door.

154. PW-156, despite his firm assertions, may be wrong about which door he used that day. Indeed, PW-156's description of the room could be read to imply that he was in a large room.<sup>358</sup> But if this is true, then his testimony about the continuity of the first killing event is mistaken because the doors to that room are shut on the Petrovic video. In other words, whichever of the two interpretations of PW-156 is adopted is directly contradicted by Prosecution evidence and by the Petrovic video footage.

155. The vast majority of bullet-marks can be seen around the door to the smaller room.<sup>359</sup> Given the size of the room, this suggests that the escape attempt may have occurred before all the prisoners had entered the Warehouse, and that the location of the bullet-marks is explained by Serb soldiers shooting at prisoners who were on their way into the Warehouse, but had not yet entered.

156. The precise details of the first-shooting event are simply not clear, except for the following facts:

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<sup>356</sup> P4529 (Sketch of Kravica Warehouse), p. 3 (showing the "guard-house" to be 3 by 4.6 metres); Ruez JR 1448:2-7 (referring to this smaller room as the "guard house").

<sup>357</sup> According to the Prosecution's own estimations, this small room had a maximum capacity of 41 persons (the room is 13.8 metres square, and according to the Prosecution's liberal calculations, three prisoners could be fit into each square metre, yielding a result of 41 prisoners) (P4531 – photos purporting to show that three average-sized persons can be fit into a square metre of space).

<sup>358</sup> PW-156 7125:3-5 ("When I entered, [another prisoner whom PW-156 knew] was sitting near the centre of the warehouse and it was so full up until the spot where he was that sitting that you couldn't throw a needle or anything that small without hitting somebody.")

<sup>359</sup> P678 (Report by US Naval Criminal Investigation Service, September 1996), pp. 29, 34.

- The door to the large-room on the right-side of the Warehouse is shut tight on the Petrovic video;
- The small door to its left, which is not visible on the Petrovic video, leads to a small room containing no more than 41 prisoners;
- Most of the bullet-marks are around the small door, suggesting that prisoners had tried to escape at around this location while still outside the Warehouse;
- Serb soldiers on the Petrovic video can be seen walking around the compound in different directions and in a casual manner.

The reasonably possible – indeed, very likely – inference to be drawn is that the escape attempt has been suppressed by this moment, and that the prisoners are back under control at the time the Petrovic video is shot.

157. This scenario fits with PW-111, Djukanovic and Oric, all of whom provide direct or indirect evidence that the first shooting incident was of limited duration, followed by a period of restored calm. The timing of the video roughly accords with the period of restored calm. Circumstantial evidence suggests that the Petrovic Video was probably shot 15 to 30 minutes after the beginning of the shooting, based on the sequence and timing of events that led Petrovic to be there;<sup>360</sup> and because the amount of light visible on the video shows that it was still late afternoon, which is when the shooting broke out.

158. The number of dead as a result of the first killing incident is difficult to estimate with certainty. The bodies in front of the Warehouse pictured on the Petrovic video were certainly killed during this shooting, apparently shot as they emerged from the entrance. Some people may have been killed just inside the entrance during this shooting incident, but the vast majority of prisoners would still have been alive. The few minutes<sup>361</sup> during which this shooting occurred

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<sup>360</sup> Borovcanin states that as soon as he received a radio call from Stupar, he turned his car around and headed back towards the Kravica Warehouse. Assuming that Borovcanin was no more than 11.5 kilometres (although probably less than that) away from the Kravica Warehouse, and that Stupar made his call soon after the outbreak of shooting, then the video would likely not have been filmed more than 30 minutes after the outbreak of shooting. The interval was probably less.

<sup>361</sup> The half-hour time period, aside from being supported by the sequence of events leading up to Petrovic filming in front of the Warehouse, is also generally supported by Djukanovic and PW-111, who estimated that the shooting lasted between 10 and 15 minutes, and half an hour, respectively.

was obviously not enough time to massacre everyone in the right-hand side of the Warehouse. As the Prosecution has submitted,<sup>362</sup> and as confirmed by PW-111 and PW-156, once it began the massacre took many hours of shooting and throwing grenades to kill everyone. Furthermore, PW-111 testified that someone from his side of the Warehouse was sent out to bring in one or more of the wounded prisoners – hardly a gesture compatible with a full-blown pre-planned massacre.<sup>363</sup> The likelihood is that few people inside the Warehouse were killed during this first shooting incident, and that the dead are those who can be seen on the Petrovic video.

### (iii) Conclusion

159. The totality of the evidence shows that a limited number of prisoners were killed in the first shooting incident in front of the right-hand side of the Warehouse. This event probably lasted between 15 and 30 minutes. Calm was restored and the prisoners in the right-hand side of the Warehouse were locked in. The bodies of those killed in front of the entrance were covered with hay. More detainees were brought to the Warehouse and eventually boarded the convoy of buses in which Oric was being transported. Soon thereafter, as night fell, all the occupants of both sides of the Warehouse were massacred over the course of many hours, using gunfire and grenades.

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<sup>362</sup> Prosecution Opening Statement 494:2-4 ("And it took hours – you can imagine how long it takes to kill 500 people jammed in two sides of a warehouse, and they'll describe it for you. It took hours"); 433:23-24 ("And the killing lasted for hours and hours.")

<sup>363</sup> PW-111 6993:17-23 ("After all of that calmed down, they ordered two Muslims from the warehouse to go out to bring in their wounded soldier. They went out, they didn't stay out long, perhaps a couple of minutes, and then they came back. And I didn't hear anybody asking them anything, whether they had brought in anybody or anything. They just came in calmly and they sat, but not near me. They were to my left. So I couldn't hear whether they said anything about what was going on"; PW-111 6996:18-6997:4 ("Q. And you had said one of your -- your guards had made a comment to you about, "Look what's happening," something to that effect. When in this time period did this guard make this comment to the group? A. He said it when they brought the wounded person. Those two men, Muslims, who were ordered to go out and bring in their wounded, that's what they told them. They didn't stay long; they returned inside. They started to shout at us, things quieted down a bit, but even though later there was also some more shooting from automatic weapons, they told them, 'Well, look, we let you pass through peacefully. We opened a corridor for you, for you to go quietly and peacefully to Tuzla and you don't want to do that. They are attacking us. Look at what they're doing to us.' That's all that I heard.")

## V d Who Committed the Crimes at Kravica

### (i) Introduction

160. Schedule 1 of the Indictment alleges that twelve members of the 2<sup>nd</sup> SD, identified by name, participated in the execution of over 1,000 Bosnian Muslim men at the Kravica Warehouse. The Defence does not dispute that two of the named members of the 2<sup>nd</sup> SD, Rado Cuturic (a.k.a. Oficir) and Krsto Dragicevic (a.k.a. Krle), were present at the Kravica Warehouse when the *first* shooting incident occurred late in the afternoon of 13 July. Dragicevic was dead and Cuturic was on his way back to Bratunac by the time Mr Borovcanin passed by the Warehouse on 13 July. The Prosecution will likely argue that the presence of Cuturic and Dragicevic, combined with the presence of the 2<sup>nd</sup> SD along the Road on 13 July, provides circumstantial evidence that other members of the 2<sup>nd</sup> SD were at the Warehouse, and that they were killing the prisoners.<sup>364</sup> The Prosecution relies exclusively on circumstantial evidence for this contention, having deliberately chosen during its case not to call eyewitnesses who could have identified the participants. This astonishing failure ought to be considered by the Chamber in weighing whether the presence of other members of the 2<sup>nd</sup> SD can be safely inferred to the exclusion of all other reasonable possibilities.

161. The totality of circumstantial evidence demonstrates that this is not a safe inference. Six areas are of particular relevance. First, numerous other soldiers were present along the Bratunac-Konjevic Polje Road that day and participated in the detention of prisoners. Second, Momir Nikolic assumed primary responsibility, in accordance with his well-understood duties, for the detention *and movement* of prisoners along the Bratunac-Konjevic Polje Road. Third, no evidence supports the proposition that anyone from the 2<sup>nd</sup> SD escorted prisoners from Sandici to the Kravica Warehouse, much less that members of the unit were assigned to guard them inside the Warehouse compound. Fourth, the presence of two members of the 2<sup>nd</sup> SD at the Warehouse when the first shooting incident started cannot reliably lead to the inference that other members of the unit were there four hours later, in light of the number and variety of other soldiers who were present inside the compound. Fifth, Momir Nikolic was present at or near the Kravica Warehouse at the very time the Kravica massacre commenced, and confessed

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<sup>364</sup> The Defence can only guess as to the Prosecution position because neither the Indictment, Pre-trial Brief, nor Opening Statement explain the basis for the names of perpetrators identified in Schedule 1 of the Indictment.

to having ordered the massacre. Sixth, one of the survivors specifically testified that the soldiers at the Warehouse were not the same as those who had been guarding them at Sandici Meadow.

162. The snippets of hearsay information concerning the presence of 2<sup>nd</sup> SD members at the Kravica Warehouse are unreliable and should be accorded no weight. The death of one member of the 2<sup>nd</sup> SD at the Warehouse, and the injury of another, became widely known. When word later spread that a massacre had taken place there, people apparently concluded that these two events must have been interconnected, presuming that the unit to which these two belonged were also responsible for the killings. The fact that a rumour is repeated many times, based on the same faulty foundations, makes it no more reliable. Tellingly, only a single witness who came before the Chamber was able to identify the source of his information.

**(ii) The Prosecution Called None of the Available Eyewitnesses Who Could Have Identified Participants in the Kravica Warehouse Killings**

163. The eyewitness evidence as to the identity of the killers at the Warehouse on 13 July can be quickly reviewed: there is none. This is not because it was unavailable. The Prosecution made a conscious decision not to call eyewitnesses who could have provided testimony concerning the identity of soldiers at the Warehouse at various times on 13 July. The Chamber specifically knows about two such eyewitnesses whom the Prosecution speciously claimed were “unavailable”.<sup>365</sup> Others were also available and were known to the Prosecution throughout its case.<sup>366</sup>

164. The Prosecution’s deliberate strategy of not calling direct eyewitnesses should not be lightly excused. The question is: Why would the Prosecution do this? What tactical advantage did they hope to gain? What aspect of the testimony might prove inconvenient or exculpatory

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<sup>365</sup> The Prosecution claimed in its confidential re-opening motion dated 23 January 2009 that two of these witnesses had been legally “unavailable” throughout the Prosecution case. The Defence hereby relies on its Response to that motion, dated 9 February 2009, which shows not only that that claim is incorrect, but also that it is so manifestly and obviously incorrect that the Prosecution must be deemed to have made a conscious choice not to call these witnesses.

<sup>366</sup> The possibility that a witness might have a strong bias or lie in order to protect their own interests, incidentally, was no obstacle to the Prosecution calling many other former Serb soldiers in respect of other events.

so as to outweigh the potential incriminating value of the testimony? Is it safe to draw inferences based on the circumstantial evidence knowing that the Prosecution deliberately chose not to present eyewitness evidence?<sup>367</sup>

165. The Chamber should exercise particular caution, in this context, in assessing whether the Prosecution's account of events really is the only reasonable one available, to the exclusion of all other reasonable possibilities.<sup>368</sup> An ICTR Trial Chamber, for example, rejected uncorroborated eyewitness evidence on the basis that, *inter alia*, the Prosecution had deliberately not called other available witnesses: "The present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness's testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content."<sup>369</sup> That reasoning should apply with even greater force where the Prosecution chose not to bring *any* of the direct eyewitnesses who could have testified about the crucial identification issues surrounding the Kravica Warehouse.

### (iii) Circumstantial Evidence

#### 1. A Variety of Soldiers and Units Were Present Along the Bratunac-Konjevic Polje Road Throughout 13 July

166. The circumstantial evidence as to who is guarding prisoners at the Kravica Warehouse in the early evening hours of 13 July begins with the assortment of forces present along the Road that day. The 2<sup>nd</sup> SD and the 1<sup>st</sup> PJP Company had been deployed along the road since the previous afternoon, tasked with securing the road and blocking and fighting the ABiH column that was moving north. The Prosecution concedes that the column was a legitimate military

<sup>367</sup> The Defence, of course, bears no burden of proof and, hence, can be subject to no adverse inferences for deciding not to call such evidence.

<sup>368</sup> *Celibici* Appeal Judgement, para. 458; *Karera*, Appeal Judgement, para. 34 ("If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn").

<sup>369</sup> *The Prosecutor v. Mpambara* (ICTR-01-65-T), Judgement, 11 September 2006, para. 124.

target.<sup>370</sup> This task necessarily encompassed securing the road and regulating traffic thereon. A further necessary incident of that combat function was taking ABiH fighters into detention at the point of surrender and securing them until they could be handed over to the unit responsible for prisoners of war. As previously discussed, responsibility for prisoners of war, both as a matter of military regulations and well-understood practice, was vested in the Security Organ and military police of the unit in whose area of responsibility the fighter has surrendered.<sup>371</sup> Custody of prisoners was to be handed over from the frontline unit to the security organ "at the very earliest opportunity."<sup>372</sup> Regulations and practices are, of course, not always followed; but this division of authority provides a default framework for understanding the evidence about which units were present at various locations along the Bratunac-Konjevic Polje Road that day, and why they were there.

167. The force subordinated to Mr Borovcanin along the Bratunac-Konjevic Polje Road on 13 July consisted of about 150 men: 120 men evenly divided between the 2<sup>nd</sup> SD<sup>373</sup> and the 1<sup>st</sup> PJP

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<sup>370</sup> 3382:1-16 ("MR. KRGOVIC: [Interpretation] Your Honour, if the Prosecution accepts that this was a military column, we will drop up the line of questioning regarding that topic. JUDGE AGIUS: Yes, Mr. McCloskey. I find it difficult to anticipate your answer. MR. McCLOSKEY: Well, I can tell you, yes, it was a military column. You don't see any war crimes being charged on the attack of this column. And the head of this column was a military column and it did a hell of an attack on 16 July and many Serb soldiers were killed. That's been part of the case from the beginning. It's in the indictment. It's in Mr. Butler's report. It's been fundamental to -- even what the witnesses are saying, like this witness. So -- JUDGE AGIUS: Yes, but the witness was in the back of the column. MR. McCLOSKEY: But that's not -- we've been very clear on that. That's -- that's part of our case. So I don't have any problem agreeing to any of that.").

<sup>371</sup> See *e.g.*, Butler 19637:13-22 ("Q. In a brigade, who would normally deal with detention issues, prisoner of war issues, as they are captured? A. The front line units, the battalions and companies, generally would be the units to actually capture the prisoner in the first instance. However, according to the JNA regulations and the VRS instructions pertaining to those, the general procedure was that at the very earliest opportunity, these prisoners were to be turned over to the military police to ensure that they could be properly safeguarded and handled through the battlefield to the point where they were turned over to the individuals responsible for their -- for their detention on a longer period of level.")

<sup>372</sup> Butler 19637:18-19.

<sup>373</sup> Pepic M 13581:20-13582:3 ("Q. To the best of your recollection how many members of the Sekovici Detachment approximately arrived in the Bratunac area on that occasion? A. I don't know the exact number but there were ... three infantry platoons, as far as I can remember, but as far as the strength of the troops is concerned, I don't remember. Q. Would you agree with me that a police platoon within a detachment has about 30 men? A. Well, more or less, sometimes there were fewer men. Between 20 and 30 men, though."); Celic P 13494:18 ("A platoon had 20 to 25 members", and the Detachment had three platoons).

Company,<sup>374</sup> and probably no more than half of the Deserters unit which, by 13 July, was down to sixty men.<sup>375</sup> Their task was to secure the road and block the Bosnian Muslim column that was expected to pass through that area.<sup>376</sup> These men were spread out along the road in groups of two or three.<sup>377</sup> Celic, a member of the 2<sup>nd</sup> Platoon of the 2<sup>nd</sup> SD who was deployed about 600 metres from the Kravica Warehouse, testified that he and his platoon was the MUP unit closest to the Warehouse on 13 July.<sup>378</sup> Annex F graphically displays the testimony of various witnesses concerning the order and general location of the subordinated units along the road.

168. Soldiers from Army units were present along the Road that day. Witness PW-110 surrendered along the Road to soldiers whose uniforms he distinctly recalled as having "white patches with four Ss, and it said 'Army of Republika Srpska'. There were no special emblems or anything of the sort. It was just plainly written 'Army of Republika Srpska.'"<sup>379</sup> Dobrisav Stanojevic, without being prompted, indicated spontaneously that he saw Army troops present along the Road near Sandici Meadow when he arrived there on 13 July.<sup>380</sup> Mevludin Oric

<sup>374</sup> Zaric Z 26949:17-21 ("Can you confirm what you told the Prosecutor's office in Sarajevo that there were between 50 and 60 PJP officers [in the 1<sup>st</sup> PJP Company] present at that time? A. Some 50 policemen, three platoons; between 50 and 60, that would be right"); Stanojevic D 12904:8-10 ("Q. Could you please tell us, in July 1995, to the best of your knowledge, how many people were there in the 1<sup>st</sup> PJP Company? A. Well, maybe about 60 people");

<sup>375</sup> Mendeljev Djuric testified that by the 13<sup>th</sup> of July, after about ten of his men had deserted overnight, the 1<sup>st</sup> Company of the Deserters' unit was down to a complement of sixty men (Djuric M 10854:5-24); see also Stojcinovic M 27611:2-4 ("But some, since they were near Drina, near the river Drina had the opportunity of deserting again"). Some of these men were assigned to Potocari on 13 July, while others, including PW-100, were sent to the Konjevic Polje Road. Assuming that their numbers were evenly divided, about thirty Deserters were deployed along the Road on 13 July. The entire 1<sup>st</sup> Company of the Deserters, as based in Jahorina, had "perhaps about a hundred men" (Stojcinovic M 27608:11-12).

<sup>376</sup> Butler 19867:6-8 ("We were just told to stay there and secure the road, and probably, and we didn't even need to be told that, there were Serb villages behind our backs and we were supposed to guard them" (Stanojevic D 12881:3-5); "The MUP forces, the various companies of the Ministry of the Interior, were given the responsibility to essentially guard the road from roughly Kravica north to Konjevic Polje...");

<sup>377</sup> P2047 (Trial Video) 2:46:25.

<sup>378</sup> Celic P 13471:19-25 ("Q. And which 2nd Sekovici Detachment platoon was deployed closest to that warehouse, sir? A. I described the location where I was. The men from my platoon who were to the left of me were next, the 1st Platoon was to the right. I really don't know where the Skelani platoon was. But then the 2nd Platoon must have been the closest to my location, and those colleagues from the same platoon.")

<sup>379</sup> PW-110 803:6-9.

<sup>380</sup> Stanojevic D: 12880:15-20 ("Q. And then what happened, sir? A. We stopped at a place called Sandici. There were some army troops there and members of the Special Police Brigade who told us that they were occasionally

identified the person to whom he surrendered along the Road as a neighbour from before the war, possibly suggestive that the person was in the Bratunac Brigade.<sup>381</sup> PW-138, who has absolutely no motive to lie about this issue given his own position as a member of the Bratunac Brigade, also testified that he saw VRS soldiers in the area.<sup>382</sup>

169. This testimony is corroborated by circumstantial, intercept and documentary evidence.<sup>383</sup> The Bratunac Brigade had a surplus of men available nearby: (i) the regular battalions of the Brigade were, by 13 July, no longer tied down to positions around Srebrenica; (ii) the 4<sup>th</sup> Battalion was headquartered just east of Kravica along the Road;<sup>384</sup> (iii) the “main forces of the Bratunac Brigade” were searching the terrain bordering the west side of the Road on 13 July,<sup>385</sup> and (iv) Commander Blagojevic had mobilized all men liable for military service on 10 July.<sup>386</sup> The Indictment itself, as well as other evidence discussed below, confirms that active and Worker’s Battalion Bratunac Brigade soldiers were present at the Kravica Warehouse itself

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being fired at from the nearby woods, and somebody then ordered, I suppose it was Pantic, that we get out of the bus and deploy along the road.”); Stanojevic D 12917:18-20 (“Yes. I think there were some Republika Srpska army troops. I didn’t recognise the soldiers and they didn’t wear the same kind of insignia that the police wore or the Special Police Brigade wore”)

<sup>381</sup> Oric M 886:20-22 (“A. I recognised one, and he recognised me as well. That was a neighbour of mine from Studenac. I didn’t know his name. I believe that his family name was either Gligic or Simic. He recognised me when we stood up and he asked me where I had served the JNA. I told him I was in Gnjilane. Then he cursed me, and then he told me to move on.”)

<sup>382</sup> PW-138 3820:3-7 (“...and there even came an army – a soldier of the Republika Srpska army, and he nagged one of the [Dutchbat] soldiers because he wanted to swap weapons with them. As I observed them from a distance, I told him to leave the man alone, although at that point the Dutch soldier had even agreed to swapping weapons with him.”)

<sup>383</sup> Egbers V 2755:10-12 (“There were hundreds of soldiers on the road all the way to Konjevic Polje and to Milici, and more. There were more soldiers than the day before.”)

<sup>384</sup> Section V(b), para. 132.

<sup>385</sup> P869 (Bratunac Brigade Daily Combat Report, 13 July, signed Blagojevic), paras. 1-2 (“During a search of the wider area of villages of Milacevici and Babuljica, our forces did not meet any resistance.... The main forces of the Bratunac Brigade continue to search the terrain in the ordered direction of Ravni Buljim-Zvijezda-Siljato Brdo. Some of the forces are engaged in crushing enemy forces which have retreated to the aforementioned area.”)

<sup>386</sup> 4D651 (Bratunac Brigade Order, 10 July 1995), para. 1: “Carry out full mobilization of all military conscripts engaged in work obligation by 18:00 hours on 10 July 1995”; Nikolic M 33285:17-19 (“All the able-bodied men who were engaged in work obligation were mobilized, and now I can see that it was pursuant to this order that the mobilization I knew of was carried out”).

that day,<sup>387</sup> providing circumstantial evidence that they were present more generally along the Road. Lt. Col. Krsmanovic, Drina Corps Assistant Commander for Transportation is heard on an intercept at 2100 hours on 13 July saying that there is "a Bratunac checkpoint" at Sandici village.<sup>388</sup> *The History of the Bratunac Brigade*, describing the Brigade activities on 12 July (there is no separate entry for 13 July), states:

One section of the Brigade members was engaged in holding the current line of defence, another participated in securing a road corridor for the transportation of Muslims from Potocari and Srebrenica to the Kladanj and Tuzla areas.<sup>389</sup>

170. Soldiers from various units were also seen at the Sandici Meadow, as is conceded in the Prosecution pre-trial brief.<sup>390</sup> PW-111, a Muslim survivor, testified about the arrival of a distinctively dressed group of soldiers: "They had different types of uniforms. They had black uniforms with black pants, black T-shirts, boots, I didn't see any insignia on them."<sup>391</sup> Another

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<sup>387</sup> Indictment, Schedule 1 (identifying the presence of a member of the 3<sup>rd</sup> Battalion of the Bratunac Brigade; Momir Nikolic identifies a member of the Bratunac Brigade Military Police and two members of the 2<sup>nd</sup> Battalion as having participated in the executions (C1 (Momir Nikolic 92ter Statement), pp.5-6); Milos Djukanovic also admitted being present at the Warehouse during the killings (11750, 11762:13-19), and was (despite his denials) the commander of the 2<sup>nd</sup> Squad of the 1<sup>st</sup> Company of the Workers' ("R") Battalion (4D107, p.1).

<sup>388</sup> P1152 (13 July, 2100 hours, intercept Krsmanovic and Viskovic) "K: [t]here are 700 people in Sandici village... V: You go there. Anyway, that's a Bratunac checkpoint. Have that loaded and brought here because I don't have any communication with the checkpoint from here.") It is the Prosecution's position that this is a reference to the 700 Muslims who were detained at the Sandici meadow at the time of this conversation. This could also be a reference to a checkpoint manned by municipal police, who were also spotted along the Road that day wearing the blue uniforms customarily worn by municipal policemen when not in their PJP formations. Jevdjevic M 29545:25-29546:10 (referring to the night of 11 July: "I did notice two or three – three smaller groups at various locations, groups of people wearing blue uniforms. Q. Blue uniforms were worn by MUP members, were they not? A. Yes"); Bircakovic M 11085:16-19 (Q. The Prosecutor did not ask you anything about the security guards but in your interview you did speak about them, and you said that those were civilian policemen in blue uniforms; is that correct? A. Yes."); PW-142 6446:18-20 ("Escorted by civilian police in blue uniforms, prisoners started coming off the bus and we escorted them into the gym"); PW-161 9526:20-22 ("Q. Those were policemen wearing blue, classical police uniforms from Bratunac? A. Yes."); Simanic M 14721:12-14 ("Q. When you say "the same," do you mean that they were all wearing blue uniforms? A. Yes, blue uniforms, that was it"); PW-174 32735:11-12 ("the blue uniforms were used by civilian police"); PW-170 17908:16 ("the police wore blue camouflage uniforms.") PW-110 771:14-15 ("I only don't know whether there was any civilian police there, because they normally had blue uniforms or camouflage uniforms."); Jankovic Z 27345:13-17 ("we had blue uniforms. We, the traffic policemen, had white sleeve covers and white hats on top of that.")

<sup>389</sup> 3DP274, p. 33.

<sup>390</sup> Prosecution Pre-trial Brief, para. 59.

Muslim survivor also noticed a changing of the guard, although he may have been misinformed about their exact identity:

At one point when you arrived at that meadow, was there a changeover of some sort? A. Yes.... The person who told us that there would be a changeover, he told us that those new people would be Arkan's men. The guy had a black bandanna and said, "These men are Arkan's men." They had new camouflage uniforms. I didn't see their insignia.... They had new uniforms on. Q.... The fact that those were Arkan's men, you heard that from the soldiers who had guarded you before, and based on that, you drew your conclusion? A. Yes, yes. He is the one who said that. If he hadn't said that, we would not have known anything. He's the one who said that, on his own. Q. And when you surrendered on the road and when you arrived in the meadow, how much later after that was there this changeover? A. Not long. Not more than an hour. And those Arkan's men, as they called them, they stayed until the very end. They were there even when I left.<sup>392</sup>

PW-160 saw Deserters at the Sandici Meadow when he arrived there on 13 July, but "there were also some army soldiers."<sup>393</sup>

## 2. Momir Nikolic Along the Road

171. The most significant presence along the Road that morning, as far as securing and transferring prisoners of war, was General Mladic and Momir Nikolic. Nikolic testified that the well-understood plan on 13 July (following-on from the plan in place on 12 July) was that all the prisoners would be bused to Bratunac and held there:

Q. When – when did you first make the decision unilaterally to transfer Bosnian Muslims who were detained in Konjevic Polje to Bratunac? A. First of all, I want to say that that was not done unilaterally. On the 12th already, the places where those detained were supposed to be kept were known. On the 12th, in the afternoon, by that time there had already been some detainees at the Vuk Karadzic school. As the security intelligence organ, I was, among other things, to a certain extent – since I wasn't alone in that, but I'm talking about my responsibility – I was tasked with transferring those detainees to the place where a number of Muslim men had already been kept.<sup>394</sup>

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<sup>391</sup> PW-111 6976:8-9. PW-110 was escorted onto a lorry by "a Serbian soldier with a black cap, and he told us that he would get on with the driver." (PW-110 663:10-11). As the Trial Video shows, and as confirmed by testimony, no one amongst the forces subordinated to Mr Borovcanin ever wore a black uniform.

<sup>392</sup> PW-110 804:11 – 805:11.

<sup>393</sup> PW-160 8586:15; 3DP274 (The History of the Bratunac Brigade), p. 18 ("the 4<sup>th</sup> Infantry Battalion (Workers' Battalion) controlled the area in front of its positions from Lupoglav to Ravni Buljim and in depth from Mratinjsko Brdo to Sandici").

<sup>394</sup> Nikolic M 33167:3-12.

...

It was a well-known thing, Sir. Everyone knew where detainees should be sent to, at least as the AOR of the Bratunac Brigade is concerned.<sup>395</sup>

172. This plan was implemented on 13 July, and directly supervised and coordinated by General Mladic and Nikolic himself. Bojan Subotic, a member the military police battalion of the 65<sup>th</sup> Protection Regiment, saw General Mladic arrive at a football field near Nova Kasaba where prisoners were being held around 5 pm.<sup>396</sup> After telling the prisoners that they would be exchanged, Mladic told Subotic "to secure the taking of the prisoners to Bratunac and that lorries and buses would be arriving in about an hour, hour and a half and he would be the one to provide their transportation for the prisoners from Bratunac."<sup>397</sup> A convoy of about fifteen buses and trucks subsequently arrived on their return journey from Kladanj, and the convoy departed for Bratunac at around 7 p.m.<sup>398</sup> Mevludin Oric and PW-110 were transported from Konjevic Polje and Sandici Meadow, respectively, to Bratunac at around nightfall.<sup>399</sup> PW-113 testified that he left Sandici Meadow at dusk in a covered lorry, arriving in Bratunac after dark.<sup>400</sup> Other witnesses testified that buses full of prisoners continued to arrive in Bratunac after dark.<sup>401</sup> The plan to transfer all prisoners to Bratunac, even from as far away as Nova

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<sup>395</sup> Nikolic M 33169:1-3.

<sup>396</sup> Subotic B 24984:5-7, 24985:17-18. Also P2207, 92bis statement of PW-117, p. 3024. Mladic probably came to Nova Kasaba from Sandici Meadow on this same trip.

<sup>397</sup> Subotic B 24987:5-8.

<sup>398</sup> Subotic B 24990:6-16.

<sup>399</sup> Oric M 890:11-13; PW-110 663:5-16 ("When they wanted to transport us from there, the lorries and the buses that transported the women and the children and returned empty, a command was issued, the first line run to the vehicles and load them, the second line, and then all the way up to my line. And then I stood up. I ran down the hill. They told us to get on the lorry. I got into the trailer behind the lorry - it had high sides - and I saw a Serbian soldier with a black cap, and he told us that he would get on with the driver. And as a vehicle was full, it would leave. And as soon as it was dark, we were driving up the hill and we saw vehicles moving by us. We didn't know who they were, what vehicles those were. And when we arrived in Bratunac, one driver who was there told us: Those are Vihor's garages on the left-hand side.")

<sup>400</sup> PW-113 3369:20-24 ("Q. How late was it when you set out towards Bratunac? A. I don't know exactly, but it was sometime in the afternoon, maybe five or 6.00 in the afternoon, at dusk. I believe that it was already dark when we arrived there. I don't know how long it took us to get to Bratunac.")

<sup>401</sup> Nikolic M 32941:12-15 ("The point was the status and the fate of the prisoners who were in Bratunac and who, on that night of the 13<sup>th</sup>, were still arriving in buses and trucks from the direction of Konjevic Polje").

Kasaba, was, accordingly, still being coordinated and implemented late on the 13<sup>th</sup> of July when the scale of surrendering prisoners was fully known.<sup>402</sup>

173. Direct and circumstantial evidence shows that Momir Nikolic played a key role in supervising the detention and transfer of prisoners from the Bratunac-Konjevic Polje Road to Bratunac on 13 July. Nikolic, by his own admission, was present along the Road for much of the day, including at about the time of the critical events at Kravica Warehouse. He made three separate trips, by his own account, up the Road on 13 July: (i) the first trip around noon, remaining there for about an hour, during which time he spoke with Mladic in Konjevic Polje;<sup>403</sup> (ii) a second trip in a UN APC lasting most of the afternoon;<sup>404</sup> (iii) a third trip on his way to Zvornik, going past the Kravica Warehouse around 8.30 p.m. and again around midnight on his return journey.<sup>405</sup>

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<sup>402</sup> intercepts show that the transfer of the prisoners was being discussed and coordinated on the late afternoon and evening of 13 July: P1143 (Intercept between two unknown interlocutors, 13 July, 1730 hours): "Is it possible to send about ten buses from Bijeljina? Y: Well, tell them right away to come, there're about 6,000 of them now. X. Of military age? Y: Shut up, don't repeat. X: Ok, then I'll send them? Y: Yeah, send them. I have three points; fuck it. There's the one where you and I were, there there's the one up there where the checkpoints at the intersection is and there's one halfway between the checkpoint and the loading place"; P1152 (Intercept between Krsmanovic and Viskovic, 13 July, 2100 hours): "K: ... There are 700 people in Sandici village. V. Yes. K: That's in your direction from the intersection. The buses need to stop there, load 10 pieces and bring them here to me. V: Listen. K: Yes? V: You go there... Have that loaded and brought here because I don't have any communication with the checkpoint from here.")

<sup>403</sup> C1 (Momir Nikolic 92ter Statement), p. 4 ("I arrived in Konjevic Polje at about 12:30 hrs. that day... I was at Konjevic Polje for approximately 45 minutes before General Mladic arrived"); Nikolic M 32933:7-9 ("I encountered General Mladic in Konjevic Polje on the 13<sup>th</sup> of July. After 12.30 or so, the time may have been half an hour prior or later, but it was within that period that General Mladic came.")

<sup>404</sup> Nikolic M 33163:24-33164:3 ("Q. And then -- and then you came back [from Konjevic Polje] to the Bratunac headquarters, brigade, and then after a little period of time you went back to Konjevic Polje with Mirko Jankovic and with Mile Petrovic in an APC; is that correct? A. Yes, it is."); Nikolic M 33171:2-10 ("Q. Now, sir, just quickly, if I can ask you before the break, do you remember approximately or specifically, if you do, what time you returned to the Bratunac headquarters after your second trip to Konjevic Polje with the APC where you shared with us the story of being with Mirko Jankovic or -- yeah, Mirko Jankovic and Mile Petrovic? A. I went back in the afternoon. What I remember best would be that that took place between 5.00, 5.30, 5.45, and 6.00 p.m. Please don't hold me to it because it was long ago. Let's say between 5.00 and 6.00 on the afternoon.")

<sup>405</sup> Nikolic M 33219:12-16 ("Q... can we establish as a fact ... that at around 2030 hours after the alleged meeting in Bratunac with Colonel Beara, you set off to the Zvornik Brigade? A. Yes."); 33220:14-20 ("I travelled from Bratunac via Kravica, Konjevic Polje, and Drinjaca.... It was July, so it was not night-time. It was 8.00 or 8.30 in the evening. So that's -- I would call that early evening or dusk."); 33258:2-5 (returns to Bratunac from Zvornik after 2300 hours).

174. Nikolic claims that he stayed in Konjevic Polje throughout the afternoon, except for briefly accompanying Mladic to Sandici Meadow. He did admit, at least, that as he drove in the Dutch APC between these two locations, one of his Bratunac Brigade military policemen, Mile Petrovic, sat atop the vehicle calling through a megaphone for prisoners to surrender.<sup>406</sup> [REDACTED]

they made one return trip about 3 kilometres back down the road from Konjevic Polje, but not as far as Sandici Meadow in the APC.<sup>407</sup>

175. A quite different picture is painted by other witnesses, whose testimony shows that Nikolic and Jankovic were moving continuously back and forth between Sandici and Konjevic Polje, the two locations where prisoners were concentrated. Muslim survivors testified that from the forest above the Road:

you could hear Serbs calling over loudspeakers for us to surrender. I saw an UNPROFOR personnel carrier with blue helmets on them, so we immediately recognised that this was the UNPROFOR. At one point, when they were calling out to us, they said, "Come down, don't be afraid. UNPROFOR is here to make it possible for you to be escorted to Tuzla." ... I think they gave us two ultimatums, one was at 12.00 and then the second one at 2.00 was when we decided to go down and surrender, because the personnel carrier *was constantly going up and down there*, to let people know that it was UNPROFOR, to impress that upon people better.<sup>408</sup>

...

Q. And from that vantage point were you able to see the Bratunac-Konjevic Polje portion of that paved road? A. We were able to see the road. We also saw the tanks and Pragas firing at us, and the UNPROFOR carrier. We were able to see it.... They were calling through a loudspeaker.<sup>409</sup>

<sup>406</sup> C1 (Momir Nikolic 92ter Statement), p. 5 ("Mile Petrovic sat on top of the APC with a megaphone calling for the Muslims to surrender. It was clear that some were already surrendering at that stage.") PW-138 denied that Petrovic was doing so, but this denial should be discounted in light of PW-138's obvious self-interest that one of his direct subordinates not be directly involved in calling prisoners down to the Road. 3896:21-23. Momir Nikolic's account is corroborated, if any corroboration is needed, by an entry of the Bratunac Brigade military police logbook a few days later confirming that the military police possessed and used megaphones to call for prisoners to surrender: "Due to the large numbers of those to be apprehended, we had to resort to using a megaphone to hail them." (P220, 23/24 July and 22 August entry).

<sup>407</sup> [REDACTED]

<sup>408</sup> PW-127 3516:5-22 (emphasis added). There was reportedly a second UN APC along the Road at that time driven by Serb forces, but PW-138 testified that it drove off in the direction of Milici (PW-138 3821:22-24).

<sup>409</sup> Oric M 884:19-885:4.

176. Momir Nikolic was present at Sandici Meadow that afternoon more than once. He was there at "mid-day" when PW-170 arrived, and was still there when PW-170 left some twenty minutes later.<sup>410</sup> Muslim prisoners – in particular Witness PW-111 – also noticed the presence of the white UNPROFOR APC at the Sandici Meadow shortly after Mladic appeared and gave his speech to the detainees there.<sup>411</sup> This was also about the same time that PW-111 was taken in a bus to Kravica Warehouse.<sup>412</sup>

177. Nikolic admitted that he conveyed "information" to units in Konjevic Polje that "transport should be organized and the detained taken to Bratunac."<sup>413</sup> This was the squad of Bratunac SJB policemen stationed at Konjevic Polje (not subordinated to Mr Borovcanin) who were said to be guarding a certain number of prisoners.<sup>414</sup> This unit of municipal policemen was obviously in no position to provide buses and trucks to transport prisoners to Bratunac, nor would such an effort have made any sense considering that dozens of trucks and buses were passing empty along that same road. The prisoners – whether at Nova Kasaba, Konjevic Polje, or Sandici Meadow – were obviously to be transported to Bratunac in the very same vehicles that had travelled in the other direction with the refugees from Potocari. Nikolic knew of this plan from General Mladic and liaised with the units along the Road to ensure that the plan was known and carried out.

178. The evidence concerning Momir Nikolic's activities along the Road meshes with his responsibilities as the Security Organ of the Bratunac Brigade, in whose area of responsibility

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<sup>410</sup> PW-170 17890:6 ("mid-day"); 17892:7-11 ("Q. Did he stay there after you left? A. I believe he did. Q. And he was there when you arrived? He had arrived there before you; is that right? A. I believe he did.")

<sup>411</sup> PW-111 6978:7 ("I saw the UN APCs which were there near us."); PW-110 804:7-10. See also P2853 (Borovcanin OTP Interview), p. 60 ("Captain Nikolic was present.")

<sup>412</sup> PW-156, who was in the column on foot, says that he left Sandici about half-an-hour after Mladic's arrival (PW-156 7112:8-9), and PW-111 left before PW-156 in the bus (PW-111 6989:19-21). Hence, PW-111 must have been bused to Kravica Warehouse shortly after Mladic's departure, which is precisely the time that he sees the UN APC there.

<sup>413</sup> Nikolic M 33170:7-9 ("It was simply an information as to what to do with the captured, and this was the normal way of communicating."); Nikolic M 33169:8-9 ("I told the members of the MUP there that transport should be organized and the detained taken to Bratunac.")

<sup>414</sup> See Section V(b), para. 132.

these prisoners were surrendering.<sup>415</sup> Nikolic himself acknowledged that detaining and transporting prisoners of war fell within the jurisdiction of the Security Organ:

generally speaking and as a rule, I knew and was aware even before receiving the order that concern for the refugees and the prisoners, their Assembly, their securing and transportation, was within the competence of the intelligence and security organ.<sup>416</sup>

Prosecution expert Richard Butler explained that prisoners detained by combat units at or near the front-line were to be turned over to the military police "at the very earliest opportunity."<sup>417</sup>

179. Nikolic confirmed that his job as the Security Organ of the Bratunac Brigade included "designat[ing] locations for gathering and detaining and securing prisoners" within his area of responsibility.<sup>418</sup> The Drina Corps and Bratunac Brigade orders for active combat operations against the Srebrenica enclave, dated 2 and 5 July respectively, reflect this function, conferring

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<sup>415</sup> A military "area of responsibility" (or "zone of responsibility") is not an iron-clad jurisdictional border; instead, it defines which units are responsible for combat operations in that area or zone and, therefore, which units should be present in that area. Pandurevic V 30712:8-12; Butler 19671:6-15 ("Much of it traces back to the fact that most of the brigades of the VRS, not only within the Drina Corps but in other areas of the country as well, were initially organized and supported with respect to soldiers from that area, funding from that area, by the individual municipalities. So what happened as the army matures was that these particular brigades, not only were they given the names of particular municipalities, but when you look at the VRS map graphics, you'll note that they have designated areas or zones of responsibilities that, more often than not, correspond with the geographical boundaries of the various municipalities.") The responsibilities arising from those activities and that presence are prescribed by applicable VRS regulations. Numerous documents and maps show that the Bratunac Brigade area of responsibility (or "zone of responsibility") encompassed the Road, Sandici Meadow and the Kravica Warehouse, e.g.: 7D441 (Drina Corps order, 30 November 1992, defining Brigade areas of responsibility); 3DP460 (extract from "The Situation in BiH Before the War and the History of Bratunac Brigade, 1 February 1995, pp. 6-7, showing that a "crisis staff" was formed in Kravica in April 1992, followed by their integration into the Bratunac Brigade under the command of Lt. Col. Marko Lukic, who became "commander of the Kravica area of defence"); 7DP2109.

<sup>416</sup> 33271:16-25.

<sup>417</sup> Butler 19637:13-22 ("Q. In a brigade, who would normally deal with detention issues, prisoner of war issues, as they are captured? A. The front line units, the battalions and companies, generally would be the units to actually capture the prisoner in the first instance. However, according to the JNA regulations and the VRS instructions pertaining to those, the general procedure was that *at the very earliest opportunity*, these prisoners were to be turned over to the military police to ensure that they could be properly safeguarded and handled through the battlefield to the point where they were turned over to the individuals responsible for their -- for their detention on a longer period of level.")

<sup>418</sup> "I said that my [Momir Nikolic's] task was to designate locations for gathering and detaining and securing prisoners.' ... I think it is regulated by the rules of service of the security organ." (Nikolic M 33076:4-33077:1). Whether Nikolic properly identified the exact source of the obligation is irrelevant; what is important is that he explained his perception at the time that he was, indeed, under an obligation to "designate locations for gathering and detaining and securing prisoners".

on their respective Security Organs responsibility for designating “the areas for gathering and securing prisoners of war and war booty.”<sup>419</sup> Nikolic, despite his denials,<sup>420</sup> did make the hand-written annotations on the Drina Corps order specifying where prisoners were to be detained.<sup>421</sup> His denial in this regard is puzzling considering that he acknowledged his general responsibility for doing precisely what is reflected in the annotations. Nikolic’s role also derives from his professional management function in respect of the military police. Applicable military police regulations prescribe that the military police are to:

25.f. Take part in directing the movements of refugees and uncover any members of enemy units who have infiltrated the refugees;

...

25.h. Take part in providing security for prisoners of war in camps for prisoners of war.<sup>422</sup>

These responsibilities explain why the top three security organ and military police officials from the Bratunac Brigade – Momir Nikolic, Mirko Jankovic and Mile Petrovic – were all present along the Road moving between Sandici Meadow and Konjevic Polje on the afternoon of 13 July.

<sup>419</sup> P107, Drina Corps Order for active combat operations, 2 July 1995, p. 7 (“Security organs and military police will indicate the areas for gathering and securing prisoners of war and war booty.”) The Bratunac Brigade version of the Drina Corps order (4D378, p. 5) shows that sentence crossed-out, accompanied by the hand-written marginalia: “The sector for collecting war prisoners and war booty is the Pribicevac sector.” The hand-written notation evidently reflects a decision to designate the Pribicevac sector as the place for assembling prisoners of war. The Bratunac Brigade order for active combat operations reflects that notation: P3025, Bratunac Brigade Order for active combat operations, 5 July 1995, p. 5 (“Prisoners of war and war booty will be collected in the Pribicevac sector.”)

<sup>420</sup> Nikolic M 33079:22-33080:2 (“A. Let me see the handwriting. Yes. Mr. Zivanovic, let me be clear, if I did not see this order, and I did not since it was unavailable to me ... I'd like to see the last page to see the distribution list. I am positive that I was not on the list. Therefore it is certain that I did not change it and I did not have the right to do that.”)

<sup>421</sup> Trisic D 27054:9-19 (“A. Yes. As you can see where it says infantry weapons ammunition, in the brackets it says “four units in assault.” It’s my handwriting. I made these corrections in my own order or for my own order. Q. And the other members of the command, did they proceed in the same way as you did, namely, enter some more specific information into the order? A. Yes. As you can see, the other senior officers made corrections on this order as well. Q. And can you tell us exactly what you were able to notice in the document? A. Well, from what I can see on page 5, Security Captain Nikolic entered a correction or added the sector for the assembly of prisoners of war should be in the Pribicevac sector as well as war booty. Q. And did you recognise Captain Nikolic’s handwriting? A. Yes, I recognised his handwriting. I can see that it’s characteristic. As far as some letters are concerned, I recognise it. And also, we worked together before the war.” 3D583 (Gogic handwriting analysis affirming that the marginal notes were written by Momir Nikolic).

<sup>422</sup> P707 (Service Regulations of the SFRY Military Police), p. 15.

180. The Security Organ's responsibilities in no way relieve, of course, the obligation on combat units to treat prisoners of war that they provisionally detain at or near the frontline in accordance with the Geneva Conventions. The Defence is not asserting that these regulations, and Momir Nikolic's active fulfillment thereof, precludes the involvement of members of the 2<sup>nd</sup> SD in temporarily guarding prisoners at the point of surrender. These regulations, rather, provide added circumstantial evidence for the argument below that: (i) the Security Organ (*i.e.*, Momir Nikolic) was *likely* responsible for the decision to move the prisoners from Sandici Meadow to the Kravica Warehouse; and (ii) that Momir Nikolic would *likely* have relied on military police or Bratunac Brigade soldiers to guard the prisoners, particularly once they arrived at Kravica Warehouse and during the escort.

**3. No Evidence, Direct or Indirect, Shows That Anyone from the 2<sup>nd</sup> Sekovici Detachment Escorted the Prisoners from Sandici Meadow to Kravica Warehouse, or Guarded Them Once They Arrived There**

181. No direct evidence shows which of the several units present at Sandici Meadow on 13 July, if any, escorted prisoners to Kravica Warehouse. PW-111, who was on one of the buses, "didn't see which soldiers they were, whether they were from the meadow or some other soldiers."<sup>423</sup> The man who organized the marching column was, according to PW-156, wearing a "civilian uniform", had a "German shepherd",<sup>424</sup> and "had some kind of black grease painted on his face .... I could see what his eyes were like and his teeth."<sup>425</sup> The witness pointedly distinguished the dog handler's attire ("civilian uniform") from all the other guards at Sandici Meadow who were wearing "multi-coloured uniforms".<sup>426</sup>

182. The Prosecution has, at various moments throughout the trial, attempted to prove that dog units were attached to the forces subordinated to Mr Borovcanin. The Defence cannot

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<sup>423</sup> PW-111 7056:15-17 ("There were a couple of them escorting, but I didn't see which soldiers they were, whether they were from the meadow or some other soldiers.")

<sup>424</sup> PW-156 7088:16, 7090:16-17, 7090:24-25.

<sup>425</sup> PW-156 7113:1-2.

<sup>426</sup> PW-156 7089:22-23 ("All of them were in multi-coloured uniforms. They were young, had regular crew-cuts, and were properly shaved. It was the regular army."); PW-156 7114:10-12 ("As far as I know, we [the detainees at Sandici Meadow] were the only ones in civilian uniforms, and the one who formed a column. I did not see any of their soldiers in civilian uniforms.")

exclude the possibility (but does not accept as proven) that one or more tracking dogs from the Zvornik CJB *may* have accompanied members of 1<sup>st</sup> PJP unit at some point on 13 July. Zarko Zaric denied that dogs were brought from the Zvornik CJB with the 1<sup>st</sup> PJP Company on 12 July,<sup>427</sup> but the Defence does not exclude that they may have come after 12 July. The issue is beside the point, however, for three reasons. First, other dog units were in the area as well. The Military Police Battalion of the 65<sup>th</sup> Protection Regiment, for example, had tracking dogs.<sup>428</sup> 65<sup>th</sup> Protection regiment soldiers were spotted in Potocari on 12 July,<sup>429</sup> and its headquarters was located in Nova Kasaba, a relatively short drive from Sandici Meadow.<sup>430</sup> Dogs from the 65<sup>th</sup> Protection Regiment are mentioned as being in Kamenica, not far from Sandici Meadow, late on the afternoon of 12 July.<sup>431</sup> Soldiers in black uniforms with dogs were also seen guarding Muslim prisoners in Bratunac on the morning of 14 July.<sup>432</sup> Second, Witness PW-156's insistence that the person with the dog was not dressed in military camouflage raises doubts as to whether the dog-handler was, in fact, from the 1<sup>st</sup> PJP Company. Members of the 1<sup>st</sup> PJP were all in uniform, attired in camouflage or solid green/grey uniforms. Third, even assuming that this individual with the dog was a member of the 1<sup>st</sup> PJP Company, it is not significantly probative that elements of the 2<sup>nd</sup> SD would also have been involved in the escort. If the leader of the escort was chosen because he had a dog, then this raises no inference that the 2<sup>nd</sup> SD was involved in the escort, because they had no dogs. The soldiers who followed in support of the dog-handler could just as likely have come from any unit. Further, the Prosecution has never alleged that anyone from the 1<sup>st</sup> PJP Company was involved in the guarding at Kravica Warehouse.

<sup>427</sup> Zaric Z 26961:9-12 ("Well, since in our company [the 1<sup>st</sup> PJP Company] we did not have people trained to handle dogs, apart from myself and my colleague, but he was not there, the dogs were not used. They were not present there [during the search of the terrain on 12 July west of Potocari]. I'm sure about that.")

<sup>428</sup> Savcic M 15237:12-15 ("The 3rd and 4th Companies of the Military Police were primarily to secure the command post, that is, a classical guard duty, patrol duty, use of specially-trained dogs, in military police patrols, et cetera.")

<sup>429</sup> Nikolic M 32927:15, 32987:2.

<sup>430</sup> Savcic 15236:20-22 ("The command of the battalion and the battalion itself, beginning with the second half of 1993, was stationed in Nova Kasaba on the Milici-Konjevic Polje-Zvornik road.")

<sup>431</sup> P1121 (Intercept 12 July, 1640 hours between Obrenovic and unknown interlocutor), p. 2.

<sup>432</sup> "They were wearing black overalls with black bandannas. Some of them were leading hound dogs, German shepherds, on a leash. They were rather rowdy and arrogant. They shouted at the people inside the trucks." P2963 (Mile Janjic 92<sup>ter</sup> testimony), p. 9814.

183. The circumstantial evidence strongly indicates that Momir Nikolic would have been the one to order the removal of the detainees from the Meadow to the Warehouse. First, it fell within his statutory obligations as the Security Organ of the Bratunac Brigade. The evidence concerning his actions throughout the afternoon shows that he was discharging this responsibility. Second, the only person in authority who would have had sufficient local knowledge to select the Kravica Warehouse as an appropriate detention site was Momir Nikolic. He had designated the detention sites used in Bratunac;<sup>433</sup> it is only logical and natural that he would also have designated the site a few kilometers away in Kravica, with which he was certainly familiar.<sup>434</sup> He, better than anyone else, would have known of the potential for overcrowding at the detention facilities and would, therefore, have a motive for designating an alternative detention site, particularly given the substantial number of prisoners involved. Third, the evidence suggests that he was present at Sandici Meadow just before the prisoners started to be transferred from there.<sup>435</sup> Fourth, he is the only person who would have had the authority and knowledge to be in a position to order deviations from the plan to send all prisoners to Bratunac by bus. Indeed, General Mladic was probably with him at Sandici Meadow shortly before the first group of prisoners was sent from Sandici to the Warehouse, providing ample explanation of the authority to deviate from the basic transportation plan.<sup>436</sup> By that time, the potential for overcrowding in Bratunac would have been apparent. Fifth, Momir Nikolic was continuously present in that area all afternoon, whereas Mr Borovcanin was in Bratunac and Potocari for most of that time. This offers yet a further corroboration that Momir Nikolic, rather

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<sup>433</sup> Nikolic M 32918:18-32919:1 ("In light of the circumstances and the situation that these men were going to be separated, I said that the only area in Bratunac where it is possible to detain these Muslims after they had been separated were the facilities in Bratunac, i.e., Vuk Karadzic elementary school, the hangar, and some facilities situated in that part of the town. All those who were separated in Potocari were, indeed, transported and detained in the Vuk Karadzic elementary school, in the old school in Bratunac, in the hangar, and other facilities located in this district of the town. This is what happened.")

<sup>434</sup> Nikolic had lived in Bratunac all his life and, on other occasion, had been assigned tasks that required his intimate knowledge of the terrain around Kravica: 5D1046 (Drina Corps Order, 3 January 1995) (indicating that Momir Nikolic supervising search of terrain by Red Berets); 5D1047 (Bratunac Brigade Order, 4 January 1995)(same event).

<sup>435</sup> PW-156, who was in the column on foot, says that he left Sandici about half-an-hour after Mladic's arrival (PW-156 7112:8-9). PW-111 left before PW-156 in a bus (PW-111 6989:19-21). It follows that PW-111 must have been bused to Kravica Warehouse shortly after Mladic's departure, which is about the time that he seems to see the UN APC there .

<sup>436</sup> The trial video footage of the area near Sandici Meadow shows "16:12", which is the same moment that Borovcanin saw Mladic there. P2047 (Trial Video); P2853 (Borovcanin OTP Interview), pp. 84-85.

than Borovcanin, was responsible for making the decision to move prisoners to Kravica Warehouse and issuing the orders to make that happen.

184. The Prosecution may concede all this and yet argue that Nikolic ordered members of the 2<sup>nd</sup> SD, with or without the consent or knowledge of Borovcanin, to take the prisoners from Sandici Meadow to the Kravica Warehouse, and guard them. The confirmed presence of two members of the 2<sup>nd</sup> SD at the Kravica Warehouse, so the argument would go, provides sufficient circumstantial evidence of this.

185. This is faulty reasoning. Even based on the limited evidence heard by the Chamber, many more Bratunac Brigade soldiers were present at the Warehouse than just the two from the 2<sup>nd</sup> SD. Two members of the 1<sup>st</sup> Battalion, Ilija Nikolic and Milovan Matic are said to have participated in the shooting at the Warehouse on 13 July.<sup>437</sup> Nikola Popovic, a member of the Bratunac Brigade Military Police platoon, is identified by Momir Nikolic as having participated.<sup>438</sup> Miroslav Stanojevic, alleged in the Indictment to have been one of the physical perpetrators of the killings, was in the Intervention "Red Beret" Platoon of the 3<sup>rd</sup> Battalion.<sup>439</sup> A document indicates that he was "wounded while taking captured Muslims into custody."<sup>440</sup> That document identifies two witnesses to his wounding, Rade Petrovic and Ivan Simic.<sup>441</sup> Both of these individuals are listed as members of the Rapid Reaction Company of the Bratunac Brigade, subsequently known as "the Red Berets."<sup>442</sup> Milos Djukanovic, who admitted that he was

<sup>437</sup> Schedule 1 of the Indictment lists Milovan Matic as having been present, but erroneously categorizes him as a "civilian". Momir Nikolic, who also alleges that Matic was a participant, identifies him as a member of the 1<sup>st</sup> Battalion (C1 (Momir Nikolic 92ter Statement), pp. 5-6). His name also appears on 4D569, a Bratunac Brigade list of squad commanders.

<sup>438</sup> C1 (Momir Nikolic 92ter Statement), p. 5.

<sup>439</sup> Indictment, schedule 1; 4D571, p. 0627-4936 (listing Stojanovic as a member of the Red Beret unit); 4DP1892 (Bratunac Clinic Patient Logbook, 13 July) (Stanojevic listed as being in the "Red Beret" unit); 4D558 (list of members of the rapid reaction unit (later the "Red Berets"), 14 May 1994 (listing Stanojevic). The Prosecution claims that on 15 July General Krstic suggests to Colonel Beara that he ask Blagojevic to send him his "Red Berets" for assistance with an unspecified task in the Zvornik area: P1178 (15 July intercept); Butler 19990:1-2.

<sup>440</sup> 4D488 (Bratunac Brigade record of wounding, 8 Aug 1995), p.2.

<sup>441</sup> 4D488 (Bratunac Brigade record of wounding, 8 Aug 1995), p.2 (1<sup>st</sup> Witness: Ivan Simic; 2<sup>nd</sup> Witness: Rade Petrovic.)

<sup>442</sup> 5D558 ("List of combatants," 14 May 1994), BCS, p. 1 (listing at number 22 "Petrovic Sreten Rade"; listing at 32: "Simic Tomislav Ivan"). The Prosecution asserted during the cross-examination of a witness, who confirmed that



authority to issue orders within his area of competence to Bratunac Brigade soldiers<sup>446</sup> and, as a Captain and head of the Security Organ, his instructions, as a practical matter, would have to be obeyed by any Bratunac Brigade soldier.

187. Military policemen from the 65<sup>th</sup> Protection Regiment would also have been a reasonably possible choice to assist with guarding and escorting prisoners. Circumstantial evidence suggests that they were also present along the Road. Two companies of the Military Police were based at nearby Nova Kasaba.<sup>447</sup> Some of them had been in Potocari the day before. A voice on the Trial Video at 2:40:58 (which pictures scenes from the Road west of Sandici Meadow) can be heard over a Motorola referring to "Lucic", possibly a reference to Aleksandar Lucic the Deputy Commander of that Military Police Battalion.<sup>448</sup> That surname is rare, not appearing on the lists of active duty policemen of the 2<sup>nd</sup> SD, or the Bratunac Brigade in June and July 1995.<sup>449</sup> The direct involvement of military policemen escorting and guarding prisoners, particularly late in the afternoon, is also confirmed by Mevludin Oric, who testified that his bus from Konjevic Polje to Bratunac was guarded by three military policemen wearing a "VP" patch – *vojna policija* ("military police").<sup>450</sup>

188. In contrast, the 2<sup>nd</sup> SD and the 1<sup>st</sup> PJP Company were not a plausible choice to assist in this task. First, they were part of a separate structure, albeit subordinated to the VRS at that moment. Second, that separate structure was already carrying out a defined task: to secure the

<sup>446</sup> Nikolic acknowledged his *de facto* and *de jure* capacity to issue orders to both the military police and regular soldiers in the Brigade when describing these units in Potocari on 12 July: "The only unit that I could have ordered or prevented from doing something was the unit of the military police of the Bratunac Brigade that was engaged together in the area where Dusko Jevic operated. Of course, members of the 2<sup>nd</sup> infantry battalion, that is, members of my brigade, the 2<sup>nd</sup> battalion and elements of the 3<sup>rd</sup> battalion that happened to be there, were also the ones that I could have prevented and that was my duty from doing any abuse or crimes" (Nikolic M 32991:2-8).

<sup>447</sup> Butler 19867:6-10 ("The MUP forces, the various companies of the Ministry of the Interior, were given the responsibility to essentially guard the road from roughly Kravica north to Konjevic Polje, then turn left a little bit towards Milici, where they would pick up with the military police of the 65th Protection Regiment"); Subotic B 27971 *et seq.*

<sup>448</sup> Savcic M 15236:15-17.

<sup>449</sup> "Lucic" is not, for example, a surname to be found on the lists of soldiers of the Bratunac Brigade: 4D569, 4D571 and 4D572.

<sup>450</sup> Oric M 891:22-892:2 ("Q. And how do you know that these men were military policemen, sir? A. Because they had patches on their arms. Q. And what did these patches say that you recall? A. VP. Q. And what does that stand for, sir? A. Military police")

road and fight the column. That task was very much still ongoing while the prisoners were being transferred from Sandici to Kravica Warehouse began.<sup>451</sup> One indication of the continuing need for the subordinated police units to remain in position discharging this task is the continuing flow of Muslim detainees who were surrendering and being detained at the Sandici Meadow through the late afternoon and early evening of 13 July.<sup>452</sup>

189. The Prosecution may attempt to argue that Rado Cuturic's role in closing the Road to traffic shows that the 2<sup>nd</sup> SD was involved in escorting and guarding the prisoners at the Warehouse.<sup>453</sup> The task of Mr Borovcanin's units, in addition to blocking and fighting the column, was to ensure security along the Bratunac-Konjevic Polje Road. Cuturic's role in closing the road flowed directly from this responsibility. Of course he would have coordinated with Momir Nikolic or others about the need to close traffic for the purpose of marching a column of detainees down the Road. But this does not show that members of the 2<sup>nd</sup> SD would have been tasked with physically escorting those men to the Warehouse, much less guarding them once they arrived. Cuturic's role in closing the road makes it no more and no less likely that members of the 2<sup>nd</sup> SD were the escorts; whoever the escorts were, it would have been Cuturic's responsibility to stop traffic for security reasons.

#### **4. The Presence of Two Members of a Unit at a Location Is Not Strongly Probative that Other Members of the Unit Were Present**

190. One witness offered an explanation as to why Dragicevic went to the Kravica Warehouse on 13 July:

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<sup>451</sup> P2047 (Trial Video), 2:40 onwards.

<sup>452</sup> P1152 (13 July intercept, 2100 hours) (indicating that there are still "700 people in Sandici village" to be picked up by bus). PW-117 saw a group of prisoners being guarded at the Sandici Meadow on the same bus journey when he sees bodies in front of the Kravica Warehouse (*i.e.* early evening, at the earliest) (P2208, PW-117 92*bis* statement, p. 3025).

<sup>453</sup> Pepic M 13556:16-25 ("Now, did Mr. Cuturic, on this occasion, give you any further instructions, you personally? A. Yes. To me personally. Q. And what did he order you to do? A. To come with him in his car, and after that he transferred me to the place called yellow bridge near Kravica, he gave me his Motorola and told me that he would let me know when those Muslims who had surrendered set off so that I can stop the convoy of buses carrying Muslim civilians, women, children, so that the Muslims who had surrendered could pass unhindered from Sandici towards the agricultural cooperative in Kravica.")

Q. My question was whether after these events, you had heard of such a reason for which Krsto went down there, so I'm not asking you about that evening, I'm asking you about whether you heard about this later. A. I can't provide you with a precise answer but there was some relative of his that was killed and it's probably for that reason.<sup>454</sup>

191. The Defence does not expect the Chamber to place great weight on this statement, given its hearsay nature. But the statement need not be given great weight in order to be accepted as a reasonably possible explanation. Indeed, the Chamber heard similar stories throughout the trial – from Muslim and Serb witness alike – of Serb soldiers making inquiries about the fate of relatives or friends who may have disappeared during the war.<sup>455</sup> Cuturic may have accompanied him for any number of plausible reasons, including sheer curiosity or to ensure that his subordinate did not engage in any abusive or improper behaviour.<sup>456</sup> Finally, it may have been a simple matter of transportation: Cuturic had a vehicle and may have agreed to drive Dragicevic to the location to which the prisoners had been taken.

192. The Prosecution may counter that Dragicevic would have had access to any prisoners whom he wished to question at the Sandici Meadow; thus, there would have been no reason to go to Kravica Warehouse for that purpose. In the absence of evidence one way or the other, these scenarios about what may reasonably have happened become increasingly speculative. Dragicevic could very easily have been stationed somewhere on the Road other than Sandici Meadow, only returning after they had left. The Defence bears no burden in respect of such suppositions. The need for such speculative inquiries arises from the Prosecution's own failure to call direct evidence that could have addressed these issues more reliably and directly.

193. The evidence is ambiguous as to whether anyone from the 2<sup>nd</sup> SD was located on the Road near the Warehouse at the time of the first shooting incident. The distance between

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<sup>454</sup> Pepic M 13600:23-13601:2.

<sup>455</sup> Neskovic D 27430:17-22 ("Q. Did somebody ask you to go there? Did you ask any officers' approval or any of your superiors' approval? A. Nobody ordered me to go there. I just informed the deputy commander, Branimir Tesic. He also wanted to join me because allegedly he had a relative there, and he wanted to see whether he would be able to locate him in that large group of people.")

<sup>456</sup> This was a genuine concern: "Q. Is it fair to say that the Serb authorities were afraid that Serb civilians who lived around Potocari, around Srebrenica and Bratunac, and who may have lost some family, some relatives, would come in July 1995 to Potocari to attack Muslim civilians? A. That's possible, that's possible" (PW-160: 8719:20-24).

Sandici Meadow and Kravica Warehouse is about 1.2 kilometres.<sup>457</sup> Pepic testified that Cuturic picked him up in his car along the Road about 1 kilometre west of the Kravica Warehouse, (although Celic who was also a member of the 2<sup>nd</sup> platoon and would have been nearby testified that the distance was closer to 600 metres).<sup>458</sup> Cuturic then drove Pepic to a point 700 metres east of the Warehouse, instructing him to stop traffic when so instructed by Motorola in order to allow the column of detainees to walk down the Road to the Warehouse. The fact that Cuturic would use his car to transport Pepic to this location indirectly shows that Pepic was probably one of the last members of the unit along the Road towards the Warehouse. This confirms Celic's impression as well. Based on this testimony, it seems unlikely that members of the 2<sup>nd</sup> SD were deployed much closer to the Warehouse than Celic's position, but it cannot be excluded as a possibility.

194. Djukanovic, on the other hand, said that he saw groups of people whom he tentatively<sup>459</sup> identified as "specials" on the road on 13 July: "Q. Did you see specials the next day [13 July], and if so, where? A. Well, the soldiers were walking around Kravica on the asphalt road, in groups of two or three. I didn't see any larger groups."<sup>460</sup> Djukanovic's identification of these people as "specials" is tainted by an evident bias to deny his own involvement in the killings, and to shift blame away from his colleagues in the Bratunac Brigade Workers' Battalion and "Red Berets". Djukanovic flatly denied that he was a squad commander in the Battalion, despite

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<sup>457</sup> Markovic J 27720:3-8.

<sup>458</sup> Pepic M 13596:23-13597:1, 13570:13-14; Celic P 13471:15.

<sup>459</sup> The witness himself had no personal knowledge of the origins of the unit, explaining "A. Well, I heard them referred to as specials or specialists. Q. And who did you -- who referred to them as specials or specialists, these armed men from outside the area? A. Well, mostly those who don't even know what a specialist is. How would I put it? I didn't know what they were myself. I just heard that name when people referred to them, and that's what I'm repeating." (Djukanovic 11751:9-14). Prosecution then cleverly repeated back to the witness the expression "specials" throughout his examination, without any further verification of their identity. Strangely, the witness says that one of these "specials" told him that he was "from Vukovar"; no one from the 2<sup>nd</sup> SD of the Special Police Brigade was from Vukovar.

<sup>460</sup> Djukanovic M 11766:10-12.

being shown documents to this effect.<sup>461</sup> When shown evidence that a member of the Red Berets, Miroslav Stanojevic, had been injured at the Kravica Warehouse on 13 July, Djukanovic incredibly asserted that he had never heard of the "Red Berets" platoon of the Bratunac Brigade.<sup>462</sup> Numerous witnesses over the course of the trial easily identified the Red Berets unit as a part of the Bratunac Brigade.<sup>463</sup> Djukanovic's renunciation of both units is no coincidence, and seems to be a transparent cover-up.

195. Djukanovic did, despite his bias, offer a kernel of probably accurate information: that only two "Specials" were inside the Warehouse compound when the first shooting incident broke out. A substantial portion of Djukanovic's testimony is, unfortunately, marred by ambiguity as to whether he is describing the 12<sup>th</sup> or 13<sup>th</sup> of July.<sup>464</sup> A lengthy extract of the crucial testimony is quoted here in the interests of clarity:

<sup>461</sup> 4D107 (List of conscripts and reserve officers in "R" (Worker's) Battalion, 10 July 1995) (shows Milos Djukanovic as the Commander of the 2<sup>nd</sup> Squad, 1<sup>st</sup> Platoon, 1<sup>st</sup> Company of the Workers' Battalion). The witness's year of birth shown on the document, 1940, was confirmed elsewhere during his testimony (Djukanovic M 11747:17). Nevertheless, Djukanovic stated that he "was not aware of that" (11776:23) and that "I was never a commander to anybody" (11777:2).

<sup>462</sup> Djukanovic M 11790:12-20 ("Q. Very well. Let's finish with this. Are you familiar with this Red Beret unit? A. No, no. Q. Did you ever hear that on the strength of the Bratunac Brigade there was a Red Beret unit? A. I only heard that that existed in Belgrade and that they still exist in Belgrade, the Red Berets and in our local midst I never saw them, I never understood anything about them. But I didn't go there that much to know.")

<sup>463</sup> "Q. Did any component of the Bratunac Brigade take part in the combat operations on Srebrenica? A. Yes, it did. Q. Which one, if any? A. The red beret platoon. I know that they were along the axis including checkpoint ... 789" (Gavric M 26495:16-21); "At the beginning of the conflict we [the Red Berets] were part of the Bircani unit, which had its headquarters in Bratunac, and later on towards the end of 1992 we came under the military post [in] Bratunac" (Simic S 27485:7-10); the unit was apparently sufficiently well-known that Krstic, according to the Prosecution, casually refers to the "Red Berets" unit in a telephone conversation without his alleged interlocutor, Beara, who expresses no doubts about the identity of the unit (P1179a) ("Check with Blagojevic, take his Red Berets"); "Q. Now, I would like to ask for a clarification, the Red Berets platoon is mentioned here. What was that? What was that platoon in the Bratunac Brigade? A. That was a platoon, a unit for interventions. We refer to it as an intervention platoon, and we also call it the Red Berets" (Trisic D 27086:24-27087:3); "Q. Do you know that in 1995 the Bratunac Brigade had an intervention unit that was referred to as the Red Berets? A. Yes, I know that." (PW-161 9532:8-11); "A. The Red Beret [unit] is an intervention platoon that's subordinate to the 3rd Infantry Battalion of the Bratunac Light Infantry Brigade." (Butler 19990:1-2).

<sup>464</sup> One example of this confusion is a passage where Djukanovic asserts that one night, while on his way to check on some cows, he was ordered by "two very nervous special units members" to guard the Warehouse between midnight and 6 am one night. The witness was not, however, referring to the night of the shooting in this passage, but the night before. Prosecution counsel recognized this confusion during the questioning and attempted to steer the witness back to the correct night by citing a prior statement: "Q. It then continues to discuss how they forced you to guard the prisoners that night. Does that help you remember whether it was the night of the 12th to the 13th? A. I believe that this was on the night between the 13th and the 14th. One day after the day of St. Peter. I really can't remember. It was 12 years ago and it's very hard for me to remember all that. Q. Okay. Let me just

Q. Now, you've talked about on Petrovdan, 12th of July, the people you saw and the specials. ***I wanted you to tell me about the next day.*** Did you see specials the next day, and if so, where? A. Well, the soldiers were walking around Kravica on the asphalt road, in groups of two or three. I didn't see any larger groups. Q. And did you see whether any more -- did you personally observe any more Muslims surrendering to the warehouse that day or being brought to the warehouse that day? A. I did not see any. I saw only one group outside the hangar here. I didn't see if any more of them arrived because I didn't stand around all the time to see the comings and goings. Q. Now, you talked about bringing some water to the prisoners because the one special asked you to. Do you recall whether you said anything to him when you gave him that bucket of water? A. When he ordered me to go and get that bucket of water, whatever you want to call it, I did that, and he was standing there with his rifle on his shoulder, and I told him, "Watch out. Somebody might snatch it away from you or kill you." And he said, "No. These people here are quiet." I went into the barn, stayed there for about five minutes and heard two short bursts of fire. I got out and then somebody told me, I don't know exactly who, somebody told me ***this special got killed, and one of the others got wounded,*** and I said, "That's impossible." ... Q. What did you say after somebody told you that the special you brought the water to had been killed? A. I said when they told me this special was killed, I said, "I had told him that would happen and he didn't believe me." Q. Thank you. After those two bursts of fire, what did you hear next? Did you hear any more gunfire? A. Well, while I was at the barn, I heard -- I don't know how long it lasted. I heard a bit more shooting behind the hangar, but there was nothing around the barn where I was but what happened over there I don't know. I heard shooting. Q. You heard shooting around the hangar? A. From the front part of the road. Q. All right. Approximately, best that you can remember, how long did that shooting last? A. Well, maybe ten, 15 minutes, but not throughout, not all the time.... Q. after this shooting and explosions, did you see anybody who had been hurt or killed around the Kravica warehouse? A. Yes. When I went to get a bucket of water for us, I saw on the opposite side between the bus and the hangar, I saw a couple of dead bodies in a pile.... Q. And how many specials, if any, did you see in that area, the area around the warehouse, at the time that you saw the pile of dead bodies? A. ***Two or three, were here on the asphalt road. I don't know if there were any more further up.*** There was a bus standing outside the hangar.<sup>465</sup>

On cross-examination, counsel picked-up on "the two specials" whom the witness had seen inside the Warehouse compound. The crucial exchange is as follows:

Q. In practical terms, sir, you saw the two specials, as you called them, who were in your vicinity? A. Yes. Q. And you say that you see maybe two or three more? A. ***Yes, on the***

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refresh you with one other part of your statement. This is on page 55 of your testimony in the state court. At line 12 in the English. "From the 12th to the 13th, that means in the night of Petrovdan to the next day, that was most probably when these people forced to us keep guard." I'll ask you again if you recall that it was the night of Petrovdan into the next morning? A. I've just told you that I cannot give you a guarantee as to what night it was, whether it was 12th to the 13th or the 13th to the 14th. I really can't be 100 per cent sure of that. I don't remember" (Djukanovic M 11762:1-15).

<sup>465</sup> Djukanovic M 11766:8-11771:15.

*road towards Konjevic Polje. Q. You personally did not see any other specials? A. No, I didn't see anybody.*<sup>466</sup>

Djukanovic displayed an evident bias against the "specials" in order to minimize the role of his own friends and comrades; yet here he is confirming that none of these "specials" were inside the Kravica Warehouse compound after the initial shooting event. The testimony has sufficient credibility – not only in spite of, but because of, his biases – to raise yet further doubts about whether anyone other than Cuturic and Dragicevic from the 2<sup>nd</sup> SD was inside the compound when the shooting broke out. The only other "specials" in the area are the two who are on the asphalt Road, not inside the Warehouse compound.

#### **5. Momir Nikolic Was Present at Kravica Warehouse at the Time of the Massacre and Confessed to Having Ordered It**

196. Momir Nikolic testified that he travelled along the Road to Bratunac at around 5 or 6 p.m. in his UNPROFOR APC; that he passed by again in his car at around 8:30 p.m.; and then again at around midnight. In other words, Momir Nikolic passed by when the first killings broke out; passed by when, according to Witness PW-111, the full-blown massacre commenced; and he passed by late that night while the massacre was in full swing.

197. The evidence suggests that Nikolic did more than just pass by. According to the elder Muslim survivor: "When we were approaching Kravica, there was an UNPROFOR APC on the right-hand side. Some soldiers were standing around there."<sup>467</sup> Entering the Warehouse to check on the prisoners for whom he was responsible would have been a logical and normal activity for Nikolic in light of his statutory functions and his previous activities throughout the day.

198. In April or May 2003, Momir Nikolic confessed that he had ordered executions at the Kravica Warehouse. No transcript of this confession during an interview with the OTP exists. This confession is memorialized only in a "Declaration", signed by Momir Nikolic whose purpose is to retract this confession as a falsehood. The Declaration states that:

<sup>466</sup> Djukanovic M 11786:13-19 (emphasis added).

<sup>467</sup> PW-156 7094:18-20.

I initially falsely stated to the Prosecution that I had ordered executions at the Sandici and the Kravica warehouse on 13 July 1995, when in fact I had not issued any such orders.... I made the false statements because I wrongly and inappropriately believed at the time that they would assist me in obtaining a plea agreement.<sup>468</sup>

During his testimony before the Chamber, Nikolic further elaborated that:

Quite simply, I was very keen to reach that agreement because I had no other way out. And slightly frustrated and agitated when Mr. McCloskey asked me, did you take part in that, I just said yes, yes, I did. I ordered the killing of those people. That's what happened. Immediately thereafter, I asked the talks to be suspended. I met with my Defence lawyers, I told them what I had done, what mistake I made, that it was because of the state of mind that I was in, and I asked my lawyers to tell them that I wished to apologise to the OTP that I told them untruth, that what I said was false, and that I wanted to apologise to them. We broke for a day and then the next day we met again with the OTP. I apologized to Mr. McCloskey and his team for telling them something that was not true, and I reiterated my statement and I'm saying it again today here that I had nothing to do with that event. After that, Mr. McCloskey and his team told me that it would be necessary for the sake of truth to draft an annex to the agreement in which everything that happened would be described. I said that I was ready to sign it because I made -- had made a mistake by saying something that was not true, and then I was prepared to bear any consequences of that act. And this is how it ended.<sup>469</sup>

199. Nikolic had been in custody for a year before he made this confession. He was in possession of all the Prosecution material concerning the case. He demonstrated during his testimony before the Chamber that he is a man who would have carefully reviewed this material.<sup>470</sup> He would have known full well the scale of the crime to which he was confessing. Falsely confessing to such a massive crime in order to secure a better deal for himself makes no sense. A more likely explanation is that Nikolic cracked under the pressure of sustained questioning from the OTP and blurted out the truth: that he was present during the massacre at Kravica Warehouse and ordered the killings. Incidentally, the Prosecution in this case declared on record that "Nikolic made a statement about why he turned his -- changed his statement about the Kravica warehouse and he had an explanation for that *which we do not find as credible*."<sup>471</sup> The only possible interpretation of this statement is that the OTP believes that,

<sup>468</sup> P4485 (Tab B to the 'Joint Motion for Consideration of Plea Agreement Between Momir Nikolic and the Office of the Prosecutor', Declaration of Momir Nikolic.)

<sup>469</sup> Nikolic M 33091:15-33092:10.

<sup>470</sup> Nikolic M 32897:24-32898:7, 33157:22-33158:3.

<sup>471</sup> 17401:1-6.

indeed, Nikolic *did* order those killings – a startling assertion in light of the charges against Borovcanin in respect of Kravica Warehouse. Despite this, the Prosecution asked Nikolic no questions on this topic during his testimony.

200. The confession is supported by the overwhelming circumstantial evidence that Momir Nikolic was there at the time; that he had designated the Kravica Warehouse as a detention site and ordered their transfer there; that he had taken custody of the prisoners in accordance with his responsibilities under VRS regulations; and that men from the Bratunac Brigade were there and to whom he could issue orders. The confession merely provides an additional piece of circumstantial evidence as to the soldiers who were most likely present at Kravica Warehouse when the first killings happened, and who was responsible for initiating those killings.

201. Nikolic supervised the removal of bodies from the Kravica Warehouse on 14 July. This, in itself, does not necessarily indicate his involvement in the killings the night before. Lying about it does. [REDACTED]

[REDACTED]<sup>472</sup> Deronjic and the two Army officers were discussing what to do with the bodies, suggested that they could be taken to the bauxite mine in Rupovo Brdo, and

[REDACTED]<sup>473</sup> [REDACTED]

[REDACTED] Deronjic told [REDACTED], that the bodies from the Warehouse were to be buried in Glogova, and that he should “send some men to that site and to hand them over to Momir Nikolic.”<sup>474</sup> The next morning, Nikolic told the civilian protection workers that they were to go to Kravica, and a column of vehicles was escorted there by the Bratunac Brigade military police.<sup>475</sup> Momir Nikolic was personally present; along with the

<sup>472</sup> P2960 (PW-170 92ter testimony), p. 7873.

<sup>473</sup> P2960, (PW-170 92ter testimony), p. 7873-7874.

<sup>474</sup> P2960, (PW-170 92ter testimony), p. 7877.

<sup>475</sup> 4D608, ([REDACTED] 92bis testimony), p. 7321-7322 (“Momir Nikolic was there on behalf of the military police. He had other policemen around him. Q. And you said he was there. So are you saying it was him who gave you the order to go to Kravica? A. Not me personally, but there were several of us there, [REDACTED]. We were all there together, and he explained that we had to go to Kravica [REDACTED]”)

military police, during the loading of bodies into trucks and issued orders concerning how it should be carried out.<sup>476</sup>

202. Nikolic testified that he only found out about the removal of bodies from Kravica Warehouse [REDACTED] sometime after the war.<sup>477</sup> That claim, aside from conflicting with the vivid recollections of two eyewitnesses, is incongruous with Nikolic's admitted involvement in the reburial of bodies from the Glogova gravesite in September and October 1995.<sup>478</sup> How could Momir Nikolic have known about the killings at Kravica Warehouse and known about the Glogova gravesite without asking anyone how they had been removed from the former to the latter location? Only one reasonable conclusion can be inferred from Nikolic's denial that he was involved in the removal of bodies from the Kravica Warehouse on 14 July: he was trying to cover-up what he subjectively perceived to be a vital indication of his own guilt.

203. Nikolic's culpability, and more specifically his confession of having *ordered* the killings ought to raise doubt in the Chamber's mind as to who was directing the killings, and which units were most likely to be used as a result. Nikolic's involvement – and specifically the claim that he *ordered* the killings – reinforces the other circumstantial and direct evidence that Bratunac Brigade elements were the ones doing the guarding at the Warehouse, and they were the ones who committed the massacre that night. The notion that the 2<sup>nd</sup> SD must have been involved because they were the only unit in the area is plain wrong. Quite the contrary: another unit was in the area and, by that stage, had the prisoners in its custody and control. The requested inference that the 2<sup>nd</sup> SD must also have participated in the killings because of the brief presence of two of its members more than three hours earlier is unsustainable.

<sup>476</sup> [REDACTED]

[REDACTED] 4D608, 92bis testimony of [REDACTED] pp. 7328-7329 [REDACTED] A. I received an order from Momir Nikolic to replace a colleague of mine who couldn't do it any longer").

<sup>477</sup> Nikolic M 33137:13-25. See, also C1 (Momir Nikolic 92ter Statement), p. 6.

<sup>478</sup> C1 (Momir Nikolic 92ter Statement), p.7.

**6. The Young Muslim Survivor Testified that the Killers Were Not the Same Soldiers Who Had Been Guarding Him at Sandici Meadow**

204. One rare piece of direct eyewitness testimony sheds light on the identity of the killers at the Kravica Warehouse. Witness PW-111 got a good look at the guards at Sandici Meadow, describing them in some detail.<sup>479</sup> After the first shooting incident at Kravica Warehouse later that afternoon, PW-111 testified that there was a pause.<sup>480</sup> The second sequence of shooting was led by two soldiers in particular:

After some time they came inside and two of them, the one with the black glasses and long, shoulder-length, curly hair, black hair, and the other one who had a blue UN helmet, and he was also wearing a bullet-proof and a camouflage shirt. They were the first to open fire at us. Behind them more soldiers came in, five to 10 of them, but these two were in front, they were the first.<sup>481</sup>

205. PW-111 was asked about the soldiers at the Kravica Warehouse. He confirmed, notwithstanding that they were wearing the same attire, that they were not the same soldiers who had been at the Sandici Meadow:

Now, witness, I would like to read another part of your evidence from the south location. Page 104 of the transcript. When asked by one of the Defence counsel you said, "[In English] [Previous translation continues] ... soldiers, Serb soldiers would appear, would follow you, and you said that you did not recognise in the hangar the Serb soldiers who you saw in Sandici." And your answer was, "I did not recognise them." Then there was another question by the counsel from the southern location: "Did their uniforms or other insignia differ from the ones of persons who had the same uniforms in Sandici?" And your answer was, "They had the same uniforms, multi-coloured uniforms." And then finally counsel asks you, "Yes, but these were other soldiers." And your answer was, "Yes, they were other soldiers." [Interpretation] Therefore, the soldiers who opened fire on you, the one with the beard and long hair, was not the soldier who was in Sandici, that was your answer, correct? A. Yes.<sup>482</sup>

206. The Prosecution may attempt to draw a connection between the blue helmet mentioned by the witness and the fact that Mr Borovcanin is seen earlier in the afternoon speaking to a soldier in a blue helmet. Dozens of blue UN helmets had been taken by Serb forces on 12 and 13

<sup>479</sup> PW-111 6973:25-6974:14.

<sup>480</sup> PW-111 6999:4-6; 7059:25-7061:16.

<sup>481</sup> PW-111 6999:6-10.

<sup>482</sup> PW-111 7065:6-21.

July, and many different Serb soldiers were seen wearing these helmets.<sup>483</sup> Significantly, soldiers wearing blue helmets were seen on Momir Nikolic's UN APC.<sup>484</sup> Too many blue helmets were available to too many people on 13 July to draw any connection between PW-111's description of the soldier who opened fire at him and the man seen talking to Mr Borovcanin. The combination of black uniforms and blue helmets is visible in at least two photos that are in evidence.<sup>485</sup>

**(iv) The Hearsay Evidence Concerning the Presence of Special Police at the Kravica Warehouse Is Manifestly Unreliable**

207. A few witnesses testified that they heard from other people that the Special Police were present at the Kravica Warehouse and perpetrated killings there. Much of this evidence has no probative value whatsoever because it is based on (i) speculation; or (ii) an anonymous source. The only exception to this is the hearsay testimony of PW-168 which, for reasons discussed below, should be accorded very low probative value.

208. Miladin Jovanovic implied that he had heard that the prisoners at Kravica Warehouse were guarded by policemen from the 3<sup>rd</sup> "Skelani" platoon of the 2<sup>nd</sup> Sekovici Detachment. Jovanovic explained exactly how he came to this conclusion:

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<sup>483</sup> Erdemovic D 10957:9-15 ("A. The person who is closer to the UN armoured vehicle, it's my assumption, but I saw the photograph and I know that it is Cico [a member of the 10<sup>th</sup> Sabotage Detachment], and the other one is also a signalsman who served with the Vlasenica platoon, but I cannot remember his name, nor even his nickname. JUDGE AGIUS: Let's try to clarify this. The guy who is wearing what appears to be a blue helmet, who -- is that Cico? THE WITNESS: [Interpretation] Yes.); Ruez JR 1778:4-7 ("A. I took part in two search and seizure operations. The first one was in the summer of 1996. It was a search and seizure in a container at the Bratunac Brigade headquarters in which we seized a certain number of blue helmets that had been taken from the Dutch Battalion at that time"); Egbers testified that he was stripped of his blue helmet at some point on 13 July (2721:6-13) and then implies that he saw Serb soldiers wearing those helmets around Nova Kasaba on 13 and 14 July: "So when it was safe for us to drive, when nobody should steal the vehicles the UN used, when there were no Bosnian Serbs in blue, with blue helmets in white APCs on the road, it would have been safe for us to go back but we didn't have any choice" (2854:17-21); P271 (Bratunac Brigade Security Organ Report, 17 August 1995) (showing that Bratunac Brigade security organ was dealing with handling and distributing the equipment seized from UNPROFOR).

<sup>484</sup> "I saw an UNPROFOR personnel carrier with blue helmets on them, so we immediately recognised that this was the UNPROFOR" (PW-127 3516:5-7).

<sup>485</sup> P1978 (photo of member of 10th Sabotage Detachment ("Cico") next to a soldier who appears to be wearing a black uniform); P1980 (members of the 10th Sabotage Detachment wearing black uniforms with UN helmets and equipment on the ground).

I do know that these people were guarded by a group from Skelani, *because the man, the soldier, who was killed was from Skelani*. So, this is just a logical piece of information, that a group of soldiers from Skelani guarded those people, *because this man who was killed was from Skelani*.<sup>486</sup>

Jovanovic thus concluded, without any further information, that he *knew* who was guarding (and then subsequently killed) the prisoners at Kravica based purely on the unit affiliation of the two casualties. For all the reasons described above, this is not a safe presumption. Nevertheless, this erroneous chain of logic may have spread widely in Bratunac.

209. Indeed, the evidence shows how easily this rumour spread. The records of the Bratunac health clinic specifically identify Kravica as the place where Dragicevic and Cuturic were injured, and their unit affiliation.<sup>487</sup> This was no secret in the town of Bratunac. Dragan Neskovic, who apparently had no special information about the events at Kravica, gave the following account:

Q. Can you tell me whether you heard anything about events in the Kravica agricultural cooperative on the 13<sup>th</sup> of July, 1995? Did you hear anything about such events? If so, when? From whom? What did you hear about it? A. Yes, but I can't tell you from whom I heard about this because the rumor spread after the funeral when we had this lunch [on 14 July]. Those who were present spoke to each other, and they said that in Kravica -- or, rather, a group of Muslims or Bosniaks had surrendered in Kravica, and they were being detained in buildings that belonged to the Oka, to this agricultural association. They then tried to break out of the building, apparently. They killed a policeman, took his rifle. They wounded another policeman, and on that occasion there was a clash. A fight broke out, and a certain number of Muslims were killed. That's what I heard.<sup>488</sup>

Although Neskovic does not explicitly state that the people doing the killing were from the same unit as the injured policeman, the overpowering implication is that an average person in Bratunac could easily draw the conclusion that the unit with the two casualties at Kravica Warehouse was the same the unit that did the killing. That conclusion would, of course, be

<sup>486</sup> Jovanovic M 24233:5-8 (emphasis added).

<sup>487</sup> 4DP1892.

<sup>488</sup> Neskovic D 27440:3-15. See also Simic S 27515:5-20 ("I heard about an incident in that agricultural cooperative ... At one point in time, some of them attempted to escape from the building, and they managed to take the rifle from a policeman. I heard that that policeman died, but I don't know which police station he was from.... Q. Was this something that was discussed in Bratunac? A. Well, yes. There were rumours, stories that circulated among the population, among the citizens at the time; and on the 14<sup>th</sup>, I hear about this when I attend the funeral. They discussed the death of our colleague and this event in Oka. A number of Muslims were killed on that occasion.")

faulty, for all the reasons expressed above. The frequent repetition of the same rumour could easily lend it an air of reliability which is entirely false.

210. These rumours even had an impact on other witnesses' testimony as to their source of information. Miladin Jovanovic, Perica Vasovic and Jovan Nikolic went to the Kravica Warehouse together on the night of 13 July. Nikolic and Vasovic got out of the car and were confronted by a person in "black overalls" who pointed his rifle at Nikolic and tried to force him to remain there, while shots echoed from the front of the Warehouse.<sup>489</sup> Vasovic testified that the soldier in black overalls never identified his unit, and made no request for any messages to be passed on requesting any rotation of troops. Jovanovic on the other hand, palpably displaying the impact of rumours, asserted in a previous statement that while the three returned in the car to Bratunac, Nikolic told him that "this group was guarded by special police from Skelani and ... that one of the members of the special unit was strangled by Muslim prisoners that day and that members of the special unit were asking their command to send a rotation."<sup>490</sup> Vasovic's testimony shows that Jovanovic was mistaken about the source of his information, not to mention the clearly erroneous reference to strangulation. When confronted with his prior statement, Jovanovic testified: "I know that I had this information in my head, but I don't know – I can't determine the timeline as to where and when I got specific pieces of information ... I cannot stand by that statement, because I am no longer certain whether I heard that on that night or at some other time."<sup>491</sup> Hearsay information which is tainted by an evident indication of unreliability should, if submitted, be given no weight at all. The Chamber should not mistake credulous repetition with corroboration.

211. PW-100 asserts that he was told by an unidentified colleague in the Deserters' unit that prisoners at the Kravica Warehouse were "executed there" and that this was perpetrated by members of the "regular special police force."<sup>492</sup> This testimony is unreliable for several reasons. Witness PW-100 is not a reliable witness in general. The witness had a strong motive to lie,

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<sup>489</sup> Vasovic P 24251:19-29; 24257:4-16.

<sup>490</sup> Jovanovic M 24230:2-6.

<sup>491</sup> Jovanovic M 24230:13-24231:3.

<sup>492</sup> PW-100 14835:6-25.

obviously feeling resentful towards his former superiors<sup>493</sup> and now dependent on the goodwill of the OTP for his current immigration status in a Western country, which he desperately wants to maintain.<sup>494</sup> The witness previously lied to gain refugee status, claiming on a signed UNHCR application form that he had been “threatened of death” if he were ever to testify about what he knew. He retracted that claim before the Chamber.<sup>495</sup> The precariousness of his refugee status translates into undue feelings of indebtedness towards the OTP. The witness himself believes that the OTP had supported his refugee claim because “I was one of them.”<sup>496</sup> These pressures translated into highly unreliable, probably fabricated, testimony about the executions at Sandici Meadow. This testimony is discussed more fully in a later section. If the witness was willing to lie about Sandici, then he would certainly have no qualms about fabricating untestable hearsay evidence about Kravica Warehouse.

212. The specific nature of the hearsay source also renders it unreliable. The Prosecution neglected to ask the identity of the witness’s source.<sup>497</sup> The Appeals Chamber has reversed

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<sup>493</sup> “A. In June 1995, around midnight or just after the midnight two police officers came into the unit where I was living with my wife and took me away for so-called questioning where I had been taken care of and took to district police station where myself and lots of the other people like myself had been taken without any connection with the Bosnia and Herzegovina had been taken up from Serbia to be sent back to Bosnia.” (PW-100 14787:14-22); “Q. Were you free to leave this -- this area or this facility? A. No.” (14790:5-6); “Q. And were you and your fellow recruits treated any differently by the superior officers at this Jahorina facility than the regular special police brigade members were treated? A. Definitely, yes. We have been mistrusted, been called deserters, and were not allowed, actually, to move any further. We could not enter these other two facilities. We would only be able to enter the facility where we have been in.” (PW-100 14798:15-21)

<sup>494</sup> Witness PW-100 admitted that he was highly motivated to leave the territory of the former Yugoslavia when he gave his first statements mentioning the alleged massacre at Sandici meadow: 14891-92 (“Q. And all the wiser from your previous experience, when you were arrested in the FRY and brought back to the Republika Srpska, your mind was made up that you were not safe in the Federal Republic of Yugoslavia and that they could easily take you back again; is that correct? A. Yes, that is correct. ... Q. And since you had an FRY passport, that that short stay in Macedonia you would normally have had to go back to the FRY; is that correct? A. Normally, if you think so, yes, but I was determined rather to go to Greece.”)

<sup>495</sup> PW-100 14848:25-14849:15.

<sup>496</sup> The Office of the Prosecutor, according to the witness, assisted in securing the witness’s relocation to a third country as a result of his testimony: PW-100 14897:6-8 (“Q. The cooperation with the Tribunal, or rather, the OTP of the Hague Tribunal, did it help you to obtain an immigration visa? A. I would say so, yes. I was one of them.”).

<sup>497</sup> PW-100 14835:2-25.

factual findings where the hearsay source is anonymous or unknown.<sup>498</sup> Without knowing the identity of the source, the information is conveniently immunized from investigation and scrutiny. Further, no detail of the hearsay information is subject to independent corroboration. The hearsay source allegedly claimed that he was “in one of the escorts with the smaller vehicle of some of the prisoners....”<sup>499</sup> Not a single witness gave any description that, for example, confirms that smaller vehicles were used to either (i) transport or (ii) escort the prisoners. The hearsay evidence is thus devoid of detail that would allow the Chamber to assess its reliability. PW-100 does not even confirm that his source personally *witnessed* the killings.

213. This last deficiency points to a more fundamental problem. General hearsay testimony may be probative in respect of some general factual issues. But hearsay testimony of a general nature is not very helpful in respect of highly specific questions. Two specific factual issues are in dispute: (i) whether anyone from the 2<sup>nd</sup> SD was inside the Compound doing any of the guarding on 13 July; (ii) whether anyone from that unit other than the two casualties were present there; and, if so, (iii) whether any of those people participated in the shooting. Relying on PW-100’s hearsay evidence is like using a pipe-wrench to fix a watch. That might be necessary if a pipe-wrench is the only tool available; but the OTP had many potential – and at least two actual – direct witnesses whom it could have called as eyewitnesses who could have addressed these issues. In the context, reliance on PW-100 is inappropriate.

214. The only hearsay evidence that has any potential value is that of PW-168. The witness testified that he had a conversation on 15 July with a 2<sup>nd</sup> SD policeman named Milos Stupar:

He asked me if I knew an officer, maybe he mentioned the name. I don't remember if it was Djukic or Djuric. I don't recollect the name but anyway he asked me if I knew an officer, and it was a nickname of one of his senior officers from his unit. I told him that I didn't know this person. It was a person who had completed military training and then had gone to the MUP. And he told us that that officer was killed, and he was killed either when he was guarding or escorting the prisoners in Kravica, and that one of the prisoners grabbed his rifle and used it to kill him. And then, as he described it, there was incident whereby the police men and the soldiers who had been there opened fire on the prisoners and killed them.<sup>500</sup>

<sup>498</sup> *Ndindabahizi AJ*, para. 115 (“The finding that Mr Nors was killed shortly after the Appellant’s visit was thus based only on vague and unverifiable hearsay. While hearsay evidence is not per se inadmissible, it is well established that a Trial Chamber must be cautious in considering such evidence.”)

<sup>499</sup> PW-100 14835:7-8.

<sup>500</sup> PW-168 15877:14-24.

215. The source of this hearsay testimony does seem to have direct knowledge of the events described. He was in the area when prisoners were taken from Sandici Meadow to Kravica Warehouse and he was in the vicinity of the Kravica Warehouse soon after the first shooting incident broke out.<sup>501</sup>

216. The unreliability of PW-168's testimony arises not from the source, but from the strong possibility that PW-168 misunderstood or mis-remembered what he was told. PW-168's testimony is plainly wrong in respect of certain important details. First, "Djuric" was neither injured nor killed at Kravica Warehouse. For some reason PW-168 distinctly recalled the name "Djuric" or "Djukic" as the person who was killed. The confusion may arise either because he misunderstood the true identity of the person nicknamed "Oficir", or because he misunderstood what Stupar told him about the identity of the person who was injured.<sup>502</sup> Second, PW-168 also mistakenly testified that this officer was killed by prisoners. The evidence shows, on the contrary, that "Oficir" was only injured in this incident.

217. The identity of who was doing the actual "guarding or escorting" of the prisoners is no less of a detail than the two distinct mistakes just mentioned. The essential aspect of the story is that someone from the Special Police was killed during an escape attempt by prisoners near Kravica. PW-168 got the essence of the story correct. The question of who escorted the prisoners from Sandici to Kravica Warehouse is nothing more than a minor detail that PW-168 could easily have misunderstood. Indeed, it is all too likely that this information is simply a product of PW-168's own inference – *i.e.*, he inferred that the guarding was being done by the Special Police because someone from the Special Police was injured during the escape-attempt. Again, it's obvious that Stupar would not have sat down for ten minutes and explained every detail about who ordered and supervised the removal of the prisoners from Sandici, who actually escorted them to the Kravica Warehouse, and who guarded them there. The story about who did the shooting is subject to exactly the same unreliability and false inferences. PW-168 may simply have inferred that members of the Special Police did the killing because one of their own had been shot at the scene. Indeed, consider the final phrase of PW-168's testimony:

<sup>501</sup> See section V(e) on Stupar's radio call to Borovcanin and what he told him.

<sup>502</sup> "Oficir" was the nickname of Rado Cuturic, the policeman injured at the Warehouse. Mendeljev Djuric's nickname was "Mane", and he had no connection with the events at the Warehouse.

“there was incident whereby the police men *and* the soldiers who had been there opened fire on the prisoners and killed them.” PW-168 introduces for the first time his recollection that he was told that “soldiers” were also there, and that they participated in the shooting. PW-168 could easily have misremembered or misunderstood precisely what he was told by Stupar. Imagine, for example, that Stupar had told him that soldiers, rather than police, had done the shooting. Would this detail have been sufficiently important or vivid for PW-168 to remember? Would this detail have stood as important, even though it cuts against the grain of the story? The answer is obvious, particularly in the context in which PW-168 would have heard the story. PW-168 heard this story at a moment of crisis, when the Muslim column was moving [REDACTED] and they had to decide quickly how to respond. Stupar’s stories were not the focus of his attention.

218. The Defence did not cross-examine PW-168 on this testimony. The absence of cross-examination does not make the testimony any stronger, however. The weaknesses in this hearsay testimony are evident without cross-examination. The failure to cross-examine a witness can arise from many circumstances, including a simple oversight.

219. Hearsay evidence ought to be treated with caution because it cannot be directly tested and confronted. It can thus possess an apparent reliability that far exceeds what it deserves. The testimony of PW-168 is one of those rare circumstances of hearsay testimony whose errors can be clearly identified. Two important details are demonstrably wrong. The identity of the unit doing the guarding and escorting, and then the subsequent shootings, are also details that he could also have gotten wrong – either because he misunderstood Stupar or drew his own inferences. These issues are, of course, not details in this trial; but to PW-168, in comparison to the gist of the story he was hearing, they could have been details to which he did not pay scrupulous attention.

220. This single item of hearsay evidence, in light of its evident deficiencies, is simply not significantly probative of the crucial factual issues. The evidence shows that Bratunac Brigade soldiers were present in numbers at the Kravica Warehouse at the time of the shootings. PW-168’s hearsay evidence simply does not have the fine-grained reliability to support the contention that members of the Special Police also participated in the shooting. PW-168’s hearsay evidence hardly addresses the uncertainties raised – not resolved – by the

circumstantial evidence concerning the killings. Reliance on this one item of evidence, given the central importance of the issue, is like using the filament of a spider's web to hang a piano.

**(v) Conclusion**

221. The Appeals Chamber has held that "guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence.... If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn".<sup>503</sup> No evidence precludes the reasonable possibility that all the soldiers inside the compound at the time of the shooting, except for Cuturic and Dragicevic, were from the Bratunac Brigade. The Prosecution case rests on a bare supposition, unsupported by evidence, that other 2<sup>nd</sup> SD policemen were there. The only direct evidence in this regard is provided by Djukanovic, who categorically stated that there were no other "specials" inside the compound at that time. Only PW-168's hearsay testimony conceivably suggests otherwise; but PW-168 could easily have misunderstood or misconstrued what he was told by Stupar, just as he misunderstood who had been injured.

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<sup>503</sup> *Karera AJ*, para. 34.

## V e Criminal Responsibility of Mr Borovcanin for the Events at Kravica Warehouse

### (i) Introduction

222. The Prosecution alleges that Mr Borovcanin is criminally responsible for the killings at the Kravica Warehouse in four ways:

- As a participant in a Joint Criminal Enterprise to murder all of the Bosnian Muslim men of Srebrenica, including at Kravica Warehouse, by participating in the capture and/or detention of men at Potocari and along the Road “with full knowledge” that they would be executed;<sup>504</sup>
- By “instigating” and “aiding and abetting” the perpetrators at the Kravica Warehouse;<sup>505</sup>
- As a superior for the criminal acts of subordinates, including at Kravica Warehouse, under Article 7(3) of the Statute;<sup>506</sup>
- Failing to discharge a legal duty to protect the prisoners at Kravica Warehouse, alleged to arise from the fact that they were within his “custody and/or control”, thus invoking the form of liability defined by the *Blaskic* Appeals Chamber (“*Blaskic* omission liability”).<sup>507</sup>

<sup>504</sup> Indictment, para. 43. The pre-trial Brief also states that Mr Borovcanin is “responsible for planning and directing the ... execution of Muslim prisoners along” the Road (para. 194). The Indictment does not, however, charge “planning and directing” as independent and separate forms of commission under 7(1). Rather, as is made clear in paragraph 27 of the Indictment, “planning and directing” are forms of participation in the JCE: “The above-named security officers relied upon ... Ljubomir Borovcanin and others for the men, materials, *directions and orders* to carry out the JCE to murder able-bodied Muslim men.” The Indictment nowhere alleges that Borovcanin actually engaged in any “planning” of the murders, alleging only that he acted “[in furtherance of the plan.” Indictment, para. 43(a).

<sup>505</sup> Indictment, para. 92. The Indictment also suggests that Borovcanin “assisted” the perpetrators of the Kravica massacre, but this is not a recognized form of criminal participation, and appears to be no more than a rhetorical flourish. In a similar vein, paragraph 92 of the Indictment states that Borovcanin’s presence at the Warehouse “served as encouragement and incitement to the physical perpetrators.” The Defence does not understand (and will not accept) that the use of the word “incitement” is meant to charge Mr Borovcanin with “incitement” as a separate head of liability for genocide under Article 4(3)(c) of the Statute. This understanding is confirmed by the absence of any reference to Article 4(3)(c) of the Statute anywhere in the Indictment or Pre-trial Brief.

<sup>506</sup> Indictment, para. 93; Prosecution Pre-trial Brief, para. 215.

<sup>507</sup> Indictment para. 43(iv) (“as Commander of MUP forces in the area, listed in paragraph 18, [Borovcanin] had responsibility for all the Bosnian Muslim prisoners within his custody and/or control and to ensure their safety and welfare”); Indictment, para. 92 (“Borovcanin had custody and/or control over all the over 1,000 Muslim prisoners

223. The JCE to commit mass murder in which Mr Borovcanin is alleged to have been a participant came into existence, according to the Indictment, "in the evening hours of 11 July",<sup>508</sup> and encompasses sixteen killing events starting at 11 am on 13 July and continuing through the end of July.<sup>509</sup> Mr Borovcanin is said to have (i) contributed to this JCE (*actus reus*) by various actions on 12 and 13 July before the Kravica incident; and (ii) that his criminal intent (*mens rea*) in committing these actions can be inferred based on what he would have seen prior to the Kravica event.<sup>510</sup>

224. The other three forms of criminal liability, on the other hand, are alleged to arise directly out of the Mr Borovcanin's conduct in relation to the Kravica Warehouse incident.

225. To minimize repetitive discussions of the same facts, this section is organized into three parts: the first part discusses the legal requirements of each of these forms of liability as relevant to the facts of this case; the second part describes Mr Borovcanin's knowledge and behaviour prior to the outbreak of shootings at the Kravica Warehouse; the third part reviews the evidence concerning Mr Borovcanin's knowledge and behaviour in respect of the Kravica Warehouse incident itself, and examines all four forms of responsibility in relation thereto.

## (ii) Legal Elements of Forms of Alleged Criminal Participation

### 1. Joint Criminal Enterprise

226. A joint criminal enterprises arises when a plurality of persons share a common plan, design or purpose which amounts to, or involves, the commission of a crime. No explicit agreement is required; it can materialize extemporaneously, provided that all the participants

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held in the Kravica Warehouse on the afternoon/evening of 13 July." Prosecution Pre-trial Brief, para. 214: "Borovcanin had a duty to protect the prisoners within his control from individuals who were endangering them."

<sup>508</sup> Indictment, para. 27 ("In the evening hours of 11 July and on the morning of 12 July 1995, at the same time the plan to forcibly transport the Muslim population from Potocari was developed, Ratko Mladic and others developed a plan to murder the hundreds of able-bodied men identified from the crowd of Muslims in Potocari.")

<sup>509</sup> Indictment, para. 30 ("The large-scale and systematic murder of Muslim men from Srebrenica began on the morning of 13 July at approximately 1100 hours and continued through July 1995 as set forth in specific detail below....")

<sup>510</sup> Indictment, para. 28.

share the common criminal intent.<sup>511</sup> As with any other crime, it may be proven by circumstantial evidence.

227. JCE is a method of committing a crime in association with others. The mental element that must be proven for commission through a basic- or systemic-JCE is, thus, the same as for a lone perpetrator: direct intent to commit the crime.<sup>512</sup> The difference between JCE and direct perpetration is that *any* action intended to contribute to the common criminal purpose, no matter how minor, can suffice for the *actus reus*: “it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.”<sup>513</sup> Even inaction may constitute the *actus reus* of contribution to a JCE.<sup>514</sup>

228. The *actus reus* of the crime, however minor it may be, must be committed with direct intent to accomplish the crime. The Appeals Chamber has recognized, in light of the extremely low *actus reus* threshold, that the direct intent must be “the only reasonable inference on the evidence.”<sup>515</sup> The extent of the accused’s contribution is therefore highly relevant to assessing whether the stringent *mens rea* standard is satisfied:

in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the

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<sup>511</sup> *Brdjanin* AJ, para 364; *Vasiljevic* AJ, paras 100-101; *Kvočka* AJ para. 110; *Milutinovic* TJ para. 109.

<sup>512</sup> *Brdjanin* AJ, para. 365 (“Where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime and intend to participate in the common plan aimed at its commission. For second category joint criminal enterprise liability, the accused must be shown to have personal knowledge of an organized criminal system and intent to further the criminal purpose of the system”); *Vasiljevic* AJ, para. 101 (“...what is required is the intent to perpetrate a certain crime (this being the shared intent of the part of all co-perpetrators)”);

<sup>513</sup> *Tadic* AJ, para. 229.

<sup>514</sup> *Kvočka* AJ, para. 187 (“...the accused’s participation in carrying out the joint criminal enterprise is likely to engage his responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose”); *Milutinovic* TJ, para. 103.

<sup>515</sup> *Brdjanin* AJ, para. 429 (“as explained above, the accused must possess the requisite intent. Moreover, the Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence.”)

significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.<sup>516</sup>

The Chamber's vigilance in this regard is particularly important in the present case where the Prosecution concedes that a lawful military operation was underway in and around Srebrenica from 11 to 13 July.<sup>517</sup> The Prosecution must show that the only reasonable inference is that Mr Borovcanin's actions were intended to accomplish the criminal purpose, rather than intended to accomplish the objectives of the lawful military operation. The difficulty, of course, is that the Prosecution has in its pleadings and allegations often failed to make any such distinction, despite admitting that there was a lawful military operation underway.

229. The Prosecution must do more than show that Mr Borovcanin was interacting with, taking orders from, or providing support to, others who may have possessed a criminal intent in respect of some of their actions. The Indictment repeatedly alleges that Borovcanin provided support to members of the JCE without, however, showing that this support was given for the criminal purpose rather than in furtherance of the legitimate military purpose, which the Prosecution concedes also existed. "JCE is not an open-ended concept that permits convictions based on guilt by association".<sup>518</sup> The evidence must show beyond any reasonable doubt that Mr Borovcanin's actions and interactions were taken with the intent to further mass murder, and not the intent to further the lawful military operation.

## 2. Aiding and Abetting and Instigation

230. "Aiding and abetting" is a form of accomplice liability. This form of participation requires that an accused provide practical assistance, encouragement or moral support to a perpetrator

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<sup>516</sup> *Kvočka* AJ, para. 97;

<sup>517</sup> Concerning the enclave: see Section IVb, para. 68. Concerning the ABiH column: "MR. McCLOSKEY: Well, I can tell you, yes, it was a military column. You don't see any war crimes being charged on the attack of this column. And the head of this column was a military column and it did a hell of an attack on 16 July and many Serb soldiers were killed. That's been part of the case from the beginning. It's in the indictment. It's in Mr. Butler's report. It's been fundamental to -- even what the witnesses are saying, like this witness. So -- JUDGE AGIUS: Yes, but the witness was in the back of the column. MR. McCLOSKEY: But that's not -- we've been very clear on that. That's -- that's part of our case. So I don't have any problem agreeing to any of that." (3382:6-16)

<sup>518</sup> *Brdjanin* AJ, para. 428.

that has a “substantial effect upon the perpetration of the crime”.<sup>519</sup> The aider and abettor must know that his or her acts will assist the principal perpetrator in committing the crime.<sup>520</sup> Further, the support must be specifically directed to assist, encourage or lend moral support to the perpetrator in the commission of the crime,<sup>521</sup> and the principal perpetrator must be aware of the support.<sup>522</sup>

231. Instigation is prompting another person to commit a crime, where that prompting substantially contributes to that person committing the crime.<sup>523</sup> The prompting must be intentional, and must be made with knowledge that the act prompted is itself a crime, or at a minimum, with awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.<sup>524</sup>

### 3. Superior Responsibility

232. Superior responsibility under Article 7(3) of the Statute arises where three conditions exist:

- The perpetrator is a subordinate of the accused, in the sense of being a person over whom the accused can exercise “effective control”;

<sup>519</sup> *Blagojevic* AJ, para. 127; *Vasiljevic* AJ, para. 102; *Krstic* AJ, para. 137; *Limaj* TJ, para. 516.

<sup>520</sup> *Krnjelac* AJ, para. 51; *Vasiljevic* AJ, para. 102. The Appeals Chamber in *Blagojevic* AJ, para. 221, categorically rejected OTP arguments that the *mens rea* for aiding and abetting can be satisfied based merely on “awareness of a probability that a crime will be committed”, and strongly reiterated the formulation that: “The aider and abettor must also be aware of the ‘essential elements’ of the crime committed by the principal offender, including the state of mind of the principal offender.”

<sup>521</sup> *Blagojevic* AJ, para. 127 (“an aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime”); *Vasiljevic* AJ, para. 102 (“acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.)”). The requirement that the acts be “specifically directed” appears usually to fall within the rubric of *actus reus*, rather than *mens rea*.

<sup>522</sup> *Brdjanin* AJ, para. 277 (“It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.”)

<sup>523</sup> *Ndindabahizi* AJ, para. 117 (“Instigating means prompting another person to commit an offence”); *Nahimana et al.* AJ, para. 480 (“it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime”).

<sup>524</sup> *Nahimana* AJ, para. 480.

- The accused knew or had reason to know that the crime was about to be, was being, or had been committed by a subordinate, or had sufficiently alarming information that should have caused him to discover that;
- The accused failed to take reasonable and necessary measures to prevent the subordinates from committing the crime, and/or to punish them for those crimes.<sup>525</sup>

233. The notion of “effective control” is not identical to, but “almost invariably” follows the contours of the concept of subordination, whether formal or informal:

[T]he accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists. The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to ‘prevent and punish’ crimes under his jurisdiction but this would not as such make him a superior ... vis-à-vis any perpetrator within that jurisdiction.<sup>526</sup>

More specific aspects of superior responsibility will be discussed as necessary below.

#### 4. Intentionally Failing to Protect Prisoners in One’s Custody (“*Blaskic* Omission Liability”)

234. The *Blaskic* Appeals Chamber recognized a form of criminal liability for failing to discharge certain obligations to prisoners of war prescribed by the Geneva Conventions and Additional Protocol I.<sup>527</sup> The Chamber held:

Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (*i.e.* under the doctrine of command responsibility). There is a further

<sup>525</sup> *Halilovic* AJ, para. 59.

<sup>526</sup> *Halilovic* AJ, para. 59 (emphasis added).

<sup>527</sup> See in particular *Blaskic* AJ, footnote 1385, referring to obligations in respect of prisoners arising from Article 86(1) of Additional Protocol I, Article 16 of Geneva Convention I, and Articles 55 and 56 of Geneva Convention IV. The Appeals Chamber, in effect, derived that these obligations on Parties to the conflict imposed obligations on individual commanders, and that any failure to discharge those obligations could, further, give rise to criminal liability.

exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates. **Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.** The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's **intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.**<sup>528</sup>

235. The Appeals Chamber concluded that Blaskic knew that prisoners in the custody of his own subordinates were being used as human shields around his headquarters.<sup>529</sup> The Appeals Chamber rejected the Trial Chamber's imposition of liability for ordering, but imposed a different form of liability under Article 7(1):

The Appellant was under a duty, imposed upon him by the laws or customs of war, to care for the protected persons put in danger, and to intervene and alleviate that danger. He did not. The consequential breach of his duty, leaving the protected persons exposed to danger of which he was aware, **constituted an intentional omission on the part of the Appellant... in the absence of proof that he positively ordered the use of human shields,** the Appellant's criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: **there was an omission to care for protected persons which was deliberate and not accidental, caused serious mental harm, and constituted a serious attack on human dignity.** The Appellant is accordingly guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields.<sup>530</sup>

236. The use of the terms "intentional omission", "willful failure", and "deliberate" – combined with the rejection of "ordering" liability – suggests that the *Blaskic* Appeals Chamber conceived of this form of liability as "committing" under Article 7(1) of the Statute. The *mens rea* standard, accordingly, is direct intent. That is to say, an accused must be found to have failed to act with the intent for commission. Subsequent cases have specifically adhered to this

<sup>528</sup> *Blaskic* AJ, paras. 663-64.

<sup>529</sup> *Blaskic* AJ, paras. 666-67.

<sup>530</sup> *Blaskic* AJ, para. 670.

view<sup>531</sup> and in this very case the Prosecution characterized this form of liability “commission by omission.”<sup>532</sup>

237. The Appeals Chamber recently held in *Mrksic* that failure to fulfill the obligation to safeguard prisoners in one’s custody, prescribed by the Geneva Conventions, can also be described as “aiding and abetting by omission”.<sup>533</sup> The Defence respectfully submits that this extends the notion of “aiding and abetting by omission” beyond its proper bounds, and stems from a confusion of two distinct forms of omission.<sup>534</sup>

238. The divergent approaches in the *Blaskic* and *Mrksic* Appeals Judgements need not be explored in further detail here, for two reasons. First, neither standard is applicable unless the prisoners are in the accused’s custody.<sup>535</sup> As discussed below, the Prosecution has not shown that the prisoners were in the custody of Mr Borovcanin or any of his subordinates when the shootings at Kravica Warehouse happened. Some prisoners may, through his subordinates, have been in his custody earlier in the day along the Road and at Sandici Meadow. The evidence is insufficient to show that any of those prisoners were still in the custody of any of his subordinates at Kravica Warehouse. On the contrary, the evidence suggests that Bratunac Brigade Security Organ designated the Kravica Warehouse as a detention site; supervised the transfer of the men from Sandici Meadow to Kravica Warehouse; and was guarding them at the Kravica Warehouse using elements of the Bratunac Brigade.

239. The second reason that the *Mrksic* standard is inapplicable is that the Prosecution has unmistakably pleaded *Blaskic* liability in respect of the duty to protect prisoners. The Indictment alleges that Borovcanin is criminally responsible because of his “willful failure to discharge his legal duty”.<sup>536</sup> The omission is therefore charged as being intentional. The Prosecution pre-trial

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<sup>531</sup> *Ntagerura* AJ, para. 333 (“the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur”).

<sup>532</sup> Prosecution Pre-trial Brief, paras. 212-213.

<sup>533</sup> *Mrksic* AJ, para. 49.

<sup>534</sup> See e.g. *Mpambara* TJ, paras. 21-27.

<sup>535</sup> *Mrksic* AJ, para. 73; *Blaskic* AJ, para. 663 (“a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one’s subordinates.”)

<sup>536</sup> Indictment para. 92.

brief confirms this understanding, characterizing the form of liability alleged as “commission by omission”, which is precisely the form of liability recognized in *Blaskic*.<sup>537</sup>

**(iii) Criminal Responsibility Before Kravica: Alleged Involvement in, and Furtherance of, the Killing JCE on 12 and 13 July Before the Events At Kravica Warehouse**

**1. Prosecution Allegations**

240. The Indictment alleges that Mr Borovcanin entered into an agreement with others “to kill the able-bodied Muslim men from Srebrenica that were captured or surrendered after the fall of Srebrenica.”<sup>538</sup> This plot allegedly began “in the evening hours of 11 July and on the morning of 12 July” when “Ratko Mladic developed a plan to murder the hundreds of able-bodied men identified from the crown of Muslims in Potocari.”<sup>539</sup> The Prosecution does not say where, when, or how Mr Borovcanin supposedly learned of this agreement, or that he expressly entered into this agreement with anyone. Paragraphs 43(a)(i) and 43(a)(ii) of the Indictment nevertheless distinctly allege that Mr Borovcanin had “full knowledge of the plan to summarily execute” Muslim prisoners on 12 July and on 13 July before the incident at Kravica Warehouse.

241. The Prosecution offers three grounds on which Mr Borovcanin’s knowledge can supposedly be inferred: (1) Muslim prisoners were “frequently beaten by their captors”; (2) personal property and identification documents were confiscated or destroyed; and (3) food, water and medical treatment were not provided.<sup>540</sup> The Defence views these three grounds to be the only properly pleaded basis for the allegation that Mr Borovcanin had “full knowledge” of the murder plan before the Kravica incident on 13 July.<sup>541</sup> The Prosecution seems to be alleging that, notwithstanding the absence of an express agreement by Mr Borovcanin to join the JCE, he

<sup>537</sup> The Pre-trial Brief confirms this understanding, asserting that liability arises from “commission by omission” (para. 213) and that Borovcanin “willfully failed to discharge” his alleged duty (para. 212).

<sup>538</sup> Indictment para. 34.

<sup>539</sup> Indictment para. 27.

<sup>540</sup> Prosecution Pre-trial Brief, paras. 200-202.

<sup>541</sup> The arguments in the present section sometimes go beyond the material facts pleaded by the Prosecution. This should not be taken as a waiver of any right to object on grounds of lack of notice, where appropriate.

tacitly joined the JCE some time on 12 or 13 July through his continued support for military operations "with full knowledge that" prisoners detained as a result of that operation were going to be executed.

242. Four distinct factual elements must be proven to show that Mr Borovcanin was a participant in the JCE: (a) the beatings, stealing and lack of food and water actually occurred; (b) Mr Borovcanin was aware of them at the time; (c) Mr Borovcanin understood that these events were, in fact, indicative of a murder plot; and (d) that he continued to participate in military operations with the intent to further this murder plot.

243. The present section specifically addresses the Prosecution's allegations in Indictment paragraphs 43(a)(i) and 43(a)(ii), that is, the period preceding the events at Kravica Warehouse. The next section will address Indictment paragraphs 43(a)(iii), 92 and 93, all of which are specifically directed at Mr Borovcanin's behavior at, or in relation to, the events at Kravica Warehouse.

## **2. Overview**

244. Mr Borovcanin was not part of any JCE or other plot to commit mass murder. The evidence does not show that Mr Borovcanin observed or learned of any abuse whose severity would have indicated to him that the prisoners were going to be killed. Incidents of violence may have occurred in Potocari on 12 July or 13 July, but eyewitness accounts suggest that it was sporadic and surreptitious. Several Muslim and Dutchbat witnesses attested that there was no physical abuse of detainees at the White House whatsoever. Nothing suggests that Mr Borovcanin had any greater knowledge about abuses than these credible eyewitnesses. The evidence of other violence prior to the Kravica incident on 13 July does not show that Borovcanin knew of it or, even if he did, that the scale or nature of these incidents were indicative of a mass murder plot.

245. The confiscation of personal belongings and identification cards does not indicate – and would not have suggested to Mr Borovcanin at the time – that prisoners were going to be killed. Several Muslim witnesses testified that they deliberately discarded identification documents prior to being detained. Forcing detainees to shed their personal belongings was not a

manifestly unreasonable security measure in the circumstances, and it certainly would not have indicated the existence of a murderous plot. Theft of money or other personal effects, to the extent that it occurred, would have been indicative of nothing more than petty criminality and avarice, not a murder plot.

246. Significant efforts were made by Serb forces to provide food, water and medical care to Muslim prisoners during their detention on 12 and 13 July. Even assuming that lapses did occur, they were not on such a scale as to indicate that the prisoners were subsequently to be massacred.

**3. Borovcanin Was Unaware of Any of the Alleged Acts of Violence Against Detainees Before the Kravica Incident; Even If He Had Become Aware of Those Alleged Acts, They Were Not Indicative of Any Plan to Murder All the Muslim Detainees**

247. The Prosecution alleges that "Muslim prisoners held in Potocari and Bratunac were frequently beaten by their captors. All of this treatment provided strong indications that the Serb forces intended to kill the able-bodied Muslim men."<sup>542</sup> This is the first basis on which the Prosecution alleges that Mr Borovcanin had "full knowledge that the Muslim men would be executed."<sup>543</sup>

248. As discussed in section IV, Mr Borovcanin left Potocari in the early afternoon on 12 July and then returned on 13 July at around 3:30 pm for about half-an-hour. The question that arises is whether he learned – or can be taken to have learned beyond any reasonable doubt – of violence against detainees that would have indicated to him the existence of a plan to kill them. The target of this inquiry is Mr Borovcanin's state of mind at the time.

249. The Prosecution has significantly not argued that the detention of the men in Potocari was, *per se*, indicative of any murder plan. The detention of military-aged men in Potocari on 12 and 13 July was, as fully discussed elsewhere, lawful under international humanitarian law.<sup>544</sup> The focus of the Prosecution case is the alleged mistreatment, not the detention itself.

<sup>542</sup> Prosecution Pre-trial Brief, para. 202.

<sup>543</sup> Indictment, para. 43(a)(i) and 43(a)(ii).

<sup>544</sup> See Section VII(iii).

250. Mr Borovcanin had left Potocari before the evacuations began and, hence, before the separations began.<sup>545</sup> He had no opportunity to observe conditions in the "White House" on 12 July, or to see anything else related to the manner in which separations were carried out.

251. Even if he had been there to observe the separation and detention process, nothing would have indicated a plan to murder all those men. The "White House" was no house of horrors. Dutchbat soldiers and UNMOs entered the White House on numerous occasions on 12 and 13 July, and two Dutchbat soldiers were continuously posted in front of the building.<sup>546</sup> Kingori may have been the first international to enter the White House, having been present in Potocari from before the beginning of the evacuation.<sup>547</sup> Mladic personally took him into the White House so that he could see the conditions.<sup>548</sup> Major Kingori's foremost complaint was that the house was over-crowded: the detainees were "huddled in one particular building" and "making noises, you know, shouting – not shouting, as such – but you could see they were murmuring to show that they were dissatisfied and all that."<sup>549</sup> Kingori can be heard making exactly the same observation at about 3:30 pm the next day: "This is no good. Im talking about the overcrowding in that place, where all the men are being taken, it's too crowded. They are

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<sup>545</sup> Van Duijn and Boering explain that men were separated at the moment of attempting to board the buses: Boering 2015:6-7 ("I could also see moments where people were not allowed into the buses and had to step aside and were subsequently led off"); van Duijn 2286:18-21 ("So we always let the men – families together, so also the men together with their families. And at first this was also executed. Later on, I noticed that the men were singled out and they were no longer kept with their families.")

<sup>546</sup> 12 July: Kingori and Boering (Kingori 19250:6; Boering 2012:20-2013:1; Boering 2079:1). 13 July: Kingori, van Duijn, Egbers, Rutten, and Major de Haan (van Duijn 2303; Egbers 2750:1-2750:18; Egbers 2902:1-4 (visiting both floors of the house and speaking to prisoners there); P2178 (Rutten 92<sup>ter</sup> statement), p. 2128 ("Q. Did you go to the White House? A. Yes, several times"); Rutten 4895:23-24 ("Major de Haan was at a certain point there, but were not constantly observing the 'White House'") Franken 2499:3-5 ("I sent down patrols of my own men over there in course of the afternoon. They were blocked by -- by far outnumbering Serb forces which did not allow them to go to the 'White House.'"); Rutten 4863:7-13 ("Now were those two Dutch soldiers from the 108<sup>th</sup> -- A. Company Q. -- company, thank you. 108<sup>th</sup> company, were they also still at the White House when you returned on the 13<sup>th</sup> of July 1995, for a second time? A. Yeah, they were still at the 'White House' and not any more inside the house, because they had given a message that they had to wait outside"); Rutten 4895:12-15; Rutten 4900:25.

<sup>547</sup> P2047 (Trial Video), 1:58:10; P4536 (Potocari video), 19:24; Kingori 19454:16-17 ("By the time the evacuation started from inside the base I was, I was around there.")

<sup>548</sup> Kingori 19249:12-19250:4.

<sup>549</sup> Kingori 19250:7-10.

sitting on each other, it's no good."<sup>550</sup> Kingori does not say that any violence or beatings are taking place there, nor did he say that during his testimony before the Chamber – he complains only of over-crowding. Overcrowding can hardly be deemed a basis for anyone to believe that those men were later going to be killed – and none of the international observers inferred any such thing at the time.

252. Egbers visits both floors of the White House on 13 July, finding the men frightened but not mentioning any signs of physical abuse, nor mentioning having been told of such abuse by the men themselves.<sup>551</sup> Rutten entered the White House "several times" and the only form of physical abuse or discomfort that he mentions is "a Muslim man hanging at the staircase with one arm," apparently with one or both feet off the ground.<sup>552</sup> He specifically recalled that he "did not hear any screaming or any sound indicating maltreatment,"<sup>553</sup> and affirmed that he saw no blood or other signs of violence.<sup>554</sup> Van Duijn went into the White House at what must have been about the same moment that Borovcanin is seen on the trial video talking to Kingori on the road in front of the White House. Van Duijn found it "basically packed with men" who looked "scared and frightened, weakened, and very quiet."<sup>555</sup> He makes no mention of any physical abuse or violence. Ahmo Hasic, a Muslim detainee in the White House testified:

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<sup>550</sup> P2047 (Trial Video) 2:28:35.

<sup>551</sup> Egbers 2750:7-18; Egbers 2884:20-24 ("Q. Now, in between the two convoys that you escorted to Kladanj, you went into the "White House" and I just want to confirm that when you went into this "White House" you saw people who were scared but you did not see any ill treatment taking place in the "White House"? A. That's correct"); Egbers 2902:1-4.

<sup>552</sup> P2178 (Rutten 92ter statement), p.2134; Rutten 4859:17-19 ("my first view in the entrance of the house, and that's already clearly stated, was that there was someone hanging a few centimetres with his feet from -- on a staircase.") The record is simply not clear as to exactly what physical position this detainee was in at the time.

<sup>553</sup> Rutten 4858:20-21.

<sup>554</sup> P2178 (Rutten 92ter testimony), p. 2185 ("Judge Wald: When you visited the White House on the various times, did you ever see any signs in there of violence, torture, in the sense of – we've heard in other locations of blood, tissue, anything like that? A. No, we couldn't see any. We tried to avoid that more or less by placing some UN soldiers around.")

<sup>555</sup> Van Duijn 2303:19-2304:1. The probable coincidence of the visit of Borovcanin and van Duijn can be inferred from the conversation near the water tank. Kingori is heard complaining to van Duijn about the over-crowding of prisoners. One of the very next shots on the video shows Kingori and Mr Borovcanin in front of the White House. A logical inference is that Borovcanin, Kingori and van Duijn went to the White House at more or less the same time, after the issue of the water tank had been resolved. P2047 (Trial Video), 2:27:05-2:29:05, 2:29:22.

Q. If I understand you correctly, there was no mistreatment at the house in Potocari. It started happening in Bratunac only? A. No. I didn't see anything like that at the house. There was just that one man who was looking, who was requesting money and this one man who gave it to him. There was no harassment there.<sup>556</sup>

253. Between one and three incidents of serious violence may have taken place in Potocari some time on 12 or 13 July. The most serious of these is the killing of nine individuals that apparently happened on the morning of 13 July, about 80 to 100 metres away from the White House in "a real bushed area ... just behind a house."<sup>557</sup> The only indication of the timing of this killing is provided by Rutten, who says that the wounds were still fresh when saw the bodies.<sup>558</sup> Rutten was unable to remember precisely when he discovered the bodies. "Several hours" after discovering the bodies, he went to the White House and saw that it was still full of prisoners.<sup>559</sup> The Trial Video shows that the White House had been evacuated of all (or at least most) of its prisoners by the time the last convoy of refugees is departing Potocari.<sup>560</sup> Assuming that the last convoy departed Potocari before 6 p.m.,<sup>561</sup> and accounting for some interval of time between Rutten's second visit to the "White House" and the transfer of prisoners from there,<sup>562</sup> the likely inference is that these nine individuals were killed, at the latest, in the early afternoon of 13 July. This would have been before Mr Borovcanin's return to Potocari that day, which was at around 3.30 pm.

254. A second killing incident allegedly happened some time on 13 July while there was still a large crowd of refugees pressing forward towards the buses.<sup>563</sup> The killing was observed at a

<sup>556</sup> Hasic A 1253:3-7. See also PW-169 17311:8-20 (describing verbal threats but no physical abuse).

<sup>557</sup> P2178, p. 2139.

<sup>558</sup> P2178 (Rutten 92ter statement), p. 2140 ("The blood was still running. There were no flies on them. It was very warm that day. So you could easily say that it hadn't been long ago that they were shot.")

<sup>559</sup> Rutten 4862:20.

<sup>560</sup> P2047 (Trial Video) 2:32:12, 2:33:03. The "White House" can be identified from the distinctive brown horizontal slats on its balcony. The previously-crowded balcony (Trial Video P2047, 2:30:43), is shown in this shot to be empty. See also P2289 for general direction of White House from Dutchbat base [REDACTED]

<sup>561</sup> P516 (UNMO Sitrep 13 July).

<sup>562</sup> Rutten 4864:3-4869:1 (Rutten explains that he asked a Serb representative to see to it that the men in the White House were transported elsewhere, and that this was eventually done after an unspecified interval).

<sup>563</sup> P2196 (Groenewegen 92ter statement), pp. 23-24 (the witness says that he sees this incident while he is part of a cordon trying to marshall the refugees towards the buses).

distance of some 30 metres by a Dutch soldier who formed part of a cordon around the refugees in Potocari.<sup>564</sup> No other Dutch soldiers testified about this killing, implying that it was not widely witnessed. Kingori believes that he observed this same event, and said that it happened behind a building in order to hide what was going on from general view.<sup>565</sup> This killing occurred, according to Groenewegen, while the evacuation was in full swing – which means that it occurred before Mr Borovcanin returned to Potocari on 13 July as the evacuation was dwindling.

255. A third alleged killing is potentially identified by Boering who testified that after the commencement of the evacuation on 12 July he saw Mladic's bodyguard's escort a Muslim man behind the White House, and then heard shots.<sup>566</sup> This is not corroborated by any other witness or forensic evidence. In any event, this event would have occurred after Mr Borovcanin left Potocari on 12 July.

256. The evidence shows that Mr Borovcanin was not in Potocari when any of these three incidents occurred. The Prosecution may nevertheless argue that the Chamber should draw the inference that Mr Borovcanin was told about these incidents, [REDACTED]

[REDACTED]

[REDACTED] <sup>567</sup> [REDACTED]

[REDACTED] <sup>568</sup> [REDACTED]

[REDACTED]

<sup>564</sup> P2196 (Groenewegen 92ter statement), p. 24.

<sup>565</sup> P2196 (Groenewegen 92ter statement), p. 23. Kingori claims that he was also nearby when this incident occurred and saw a Muslim man "being taken behind" a building. Kingori 19267:6-24.

<sup>566</sup> Boering 2013:2-9.

<sup>567</sup> [REDACTED]

<sup>568</sup> [REDACTED]

[REDACTED] There was an office there. That's where we met after the 12th in the morning. Q. And other than giving you the order to continue the transportation the next day, did Mr. Borovcanin give you any specific orders with respect to the units along the road? A. As far as I recall, I don't think so. I simply don't remember.")

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257. The Prosecution is, in effect, just speculating that [REDACTED] reported these events. Three factors show that this speculation, aside from being inadequate as a matter of proof, is also probably wrong. First, two of the three incidents occurred on 13 July, not 12 July. Thus, [REDACTED] could not have reported them [REDACTED] on the evening of 12 July or the morning of 13 July before he went to Potocari. The single incident that reportedly occurred on 12 July was based on the sole testimony of Boering. The lack of corroboration should cause the Chamber to doubt whether this event actually occurred, in light of the large number of witnesses who would have been nearby at that time. Second, the situation in Potocari on 12 and 13 July was chaotic, with many different units present.<sup>571</sup> The surreptitious nature of the killings, particularly the nine bodies some distance away from the White House, raises significant doubt as to whether [REDACTED] would have become aware of them. Third, [REDACTED]

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[REDACTED] who hit a civilian. I don't like to see anybody hitting anyone else. That I don't want others to do unto me, I don't do unto them"; [REDACTED]

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<sup>571</sup> C1 (Momir Nikolic 92ter Statement), para. 6; PW-160 8592:17-19 ("Well, there were many members of the army and police there. There were many contacts. I don't know the names of people, but there was a huge number of members, both of police and the army there"); PW-160 8676:20-23 ("As far as I know, there was a huge flux of units, movement of people in both directions. I could not register the units, groups, individuals who came there. This is my impression of the goings on at the time"); [REDACTED] but I am sure that there were many units, I know that I was with a part of my unit at Potocari. For the rest, I really don't know, believe me. There were many units there, as I said"); P4536 (Potocari Video) 22:05-20; 23:41-44; 30:40-34:20.

[REDACTED] 572 [REDACTED]

[REDACTED] 573 [REDACTED]

[REDACTED]

[REDACTED] 574 [REDACTED]

[REDACTED]:

At some point I saw Stalin visiting the area, together with a well-known figure for us as Major Nikolic. Major Nikolic was a figure that was the whole period we were present there and even before our time was a well-known character. And I saw Major Nikolic together with Stalin, in which -- from which I drew the conclusion that Nikolic was the superior of Stalin. Nikolic more or less made some sort of an inspection visit with Stalin next to him. Nikolic walked in the centre of the road, Stalin alongside him, which seemed to me in gestures that he was explaining to Nikolic what was happening and what was going on and how they organised things. So that was the visit of Nikolic and Stalin.<sup>575</sup>

[REDACTED] Nikolic explained the reason for these contacts in his Statement of Facts, saying that he "coordinated and supervised"

572 [REDACTED]

[REDACTED]: Did you see at any time on the 12th of July, Muslim men being separated from their families? A. I didn't, sir. Q. And did you receive any reports of that happening on the 12th of July? A. I didn't, sir. However, I saw the column, and I could see that they had been separated. They were in the column, but separated. They boarded the buses and trucks separate from others.")

573 [REDACTED] ("Q. Do you recall seeing any Muslim men directed towards or placed in any detention centres located around the UN base on the 13th of July, sir? A. No, sir. Q. And do you recall receiving any reports of that happening on the 13th of July? A. No, sir.")

574 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

575 Van Duijn 2279:13-22, 2328:8-19.

576 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] C1 (Momir Nikolic 92ter Statement), para. 9 ("My first task of the day

the process of evacuation and separation, and that he “directed” the forces performing those tasks.<sup>577</sup>

258. [REDACTED]

259. Even if all of these unsubstantiated suppositions concerning reporting to Mr Borovcanin could be accepted on faith, the nature of the events was not sufficient to indicate that a mass murder plan was afoot. The Indictment itself does not allege that the nine men were killed as part of the alleged JCE. Instead, it alleges that these were “opportunistic killings” – that is, a foreseeable, but not an *intended*, consequence of the two alleged JCEs.<sup>578</sup> The Prosecution cannot logically claim on the one hand that these killings were opportunistic, and then turn around and argue in its Pre-trial Brief that Mr Borovcanin should have deduced that a murder plan was underway because of those killings. The view in the Indictment is the correct one. If Mr Borovcanin had come to learn of those killings (which he did not) he would have been entitled to the same view as that present in the Indictment: that these acts of brutality had been committed by elements outside of the military operation, acting opportunistically, not that the entire military operation was pursuing a criminal purpose.

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(13<sup>th</sup> July) was to go to Potocari and check on the progress of the transportation and separation of the Muslim men and other tasks. I established that all was going well. I directed the work of the forces present in Potocari.”)

<sup>577</sup> C1 (Momir Nikolic 92<sup>ter</sup> Statement), paras. 6 (“Working in conjunction with these units, I coordinated and supervised the transportation of the women and children to Kladanj and the separation and detention of able-bodied men”), 9 (“I directed the work of the forces present in Potocari.”) The effective control of the Radoslav Jankovic and/or Momir Nikolic over the Deserters’ unit is more fully discussed in Section IV(c) of the Brief.

<sup>578</sup> Indictment, para. 31.1; [REDACTED]

260. The Prosecution also invokes the violence at the hangar in Bratunac on the night of 12 July as evidence that Mr Borovcanin knew about the murder plan.<sup>579</sup> There is no evidence that Mr Borovcanin became aware of this violence. None of his subordinates assisted in this detention, and the Prosecution has never alleged otherwise. The violence was not notorious or widely audible in Bratunac. The main witness to this event testified that physical beatings took place and that only one gunshot was fired throughout the night.<sup>580</sup> The scale and circumstances of the violence do not suggest that Mr Borovcanin would have become aware of it.

261. The Prosecution may attempt to argue (although this has not been articulated in any pleadings) that violence at the Sandici Meadow on the afternoon of 13 July would have indicated the existence of the alleged murder plan. Conflicting evidence was heard about whether detainees were abused or killed at Sandici Meadow. PW-110 saw no violence directed against prisoners at Sandici Meadow on 13 July.<sup>581</sup> PW-111 says that a soldier wearing a "black uniform[] with black pants, black T-shirts, boots, I didn't see any insignia on them" shot and killed one of the prisoners in the chest.<sup>582</sup> PW-156 also apparently saw this shooting incident.<sup>583</sup> One witness also asserted, without any corroboration, that beatings were taking place in a house near the Meadow.<sup>584</sup> The Prosecution may argue that the Chamber should infer that this incident occurred before Mr Borovcanin's passage by the Sandici Meadow, and that it would have been reported to him.

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<sup>579</sup> Prosecution Pre-trial Brief, para. 202 ("During this time, the Muslim prisoners held in Potocari and Bratunac were frequently beaten by their captors.") See, PW-169 17319:16-17321:10.

<sup>580</sup> PW-169 17321:9-10 ("Q. And overnight, did you hear any shooting at all that night? A. There was just one shot. They shot Hamed Efendic. There were no more shots.")

<sup>581</sup> PW-110 660:15-17 ("While you were on that meadow, was there any kind of physical abuse of the prisoners by the soldiers? A. No.")

<sup>582</sup> PW-111 6976:8-9.

<sup>583</sup> PW-156 7088:18-25 ("And then the soldiers who were around us provided cigarettes to those who smoked. They didn't beat us. There was a man in front of me in the third row. I didn't know him. The children brought water. He asked for water. And then a Serb soldier kicked him in the head, and then another one hit him on the side of the head. He started bleeding and then one grabbed him by the tie, the other one grabbed him by his legs, and they moved him some six to seven metres away and shot a burst of fire into him. We left the meadow and his body remained lying there.")

<sup>584</sup> PW-127 3534:5-11.

262. Neither inference is justified. The timing of these incidents – either the shooting or the beatings – is not specified. They could have occurred before Mr Borovcanin was at the Meadow, or after he was there. As the Petrovic video suggests, Borovcanin's stop at the Sandici Meadow in the afternoon of 13 July is relatively brief in comparison with the time he spends monitoring combat activities along the Bratunac-Konjevic Polje Road beyond Sandici Meadow towards Konjevic Polje.<sup>585</sup> The Prosecution has nowhere alleged or suggested that Mr Borovcanin witnessed this incident, nor has it asserted that this incident occurred before his passage by the Meadow. Furthermore, even if these events occurred before passing by the Meadow, it cannot be taken for granted that they were reported to him. The Serb forces present, including any subordinates of Mr Borovcanin, may have refrained from doing so from fear of reprisal, guilt, or a misplaced sense of solidarity with the perpetrators. The reasonable possibility that the incidents were not reported must also be viewed in light of the various units present at the Sandici Meadow at that time. PW-111 testified that the man who committed the killing, and the men who were guarding him at the time, were dressed in all-black uniforms.<sup>586</sup> His attire is incompatible with any of the units subordinated to Mr Borovcanin. It cannot be assumed beyond a reasonable doubt that the killing of a prisoner in the custody of another unit, by a member of another unit, in the circumstance where Momir Nikolic had overall responsibility for securing prisoners, would have been reported to Mr Borovcanin even though some of his men were present there.<sup>587</sup>

<sup>585</sup> P2047 (Trial Video) 2:37:48-2:40:30.

<sup>586</sup> PW-111 6976:6-9; 7054:6-7055:7 ("Did I understand correctly, there was a group of soldiers that was there when you surrendered, and this group was guarding you. There was another group of soldiers who came at one point in black uniforms and it is your position more or less that these soldiers who guarded you first treated you properly, whereas these other soldiers in black uniforms were people who were arrogant and who, according to your testimony, killed one of the prisoners. Is that correct? A. Yes, it is. Q. And your conclusion was that these were two different units; is that correct? A. How should I know what unit that was and who the people in black uniforms were? Those who were guarding us, nobody touched us, they didn't beat us, they spoke to us normally, they knew some people from Skelani, there were some Serbian soldiers who knew these other people who came in this other column. Ahmo and his brother Dzemo who were walking at the front of the column, they took them aside to the tank, they talked to them. They said, "Where are you neighbours?" So I concluded that they knew each other from Skelani. Q. My question was if, according to your understanding, these were two different units, one in black uniforms and the other one in the camouflage uniforms, that was my question. A. Yes, yes. Q. Thank you. The killing of one of the prisoners at the meadow which you described yesterday in your testimony was carried out by a member of the unit that had the black uniforms; is that correct? A. Yes.")

<sup>587</sup> The nature of the charges against Mr Borovcanin does not require the Defence to take a position on whether the prisoners at Sandici Meadow were in Mr Borovcanin's "custody", in the legal sense of that term. Some prisoners at Sandici Meadow may well have been in the custody of Mr Borovcanin's subordinates at certain times. Equally, not all prisoners can be assumed to have been in the custody of subordinates throughout the afternoon in light of the

263. Even assuming that the killing and the beatings had been reported to Mr Borovcanin, he could not reasonably have drawn the inference that a mass murder plot was being implemented. Nothing would have suggested that this killing and beating was anything more, to use the Prosecution's own formulation, than "opportunistic" – *i.e.*, isolated acts of brutality that transgressed the purposes of the military operation, rather than being its purpose and object.

**4. The Confiscation of Identification Cards and Personal Property Was Not Indicative of a Plan to Murder to Detainees**

264. The Prosecution alleges that:

During the separation process, members of the MUP and VRS confiscated and destroyed personal property and effects belonging to the Bosnian male prisoners, including their identification documents and valuable. This confiscation and destruction of personal property and effects occurred in Potocari, at various points of capture and collection of men from the column along the Bratunac-Konjevic Polje Road-Milici road, and at various execution sites.... All of this treatment provided strong indications that the Serb forces intended to kill the able-bodied Muslim men.<sup>588</sup>

The Prosecution cites, in particular, an exchange between van Duijn and a MUP policeman in Potocari where the latter allegedly says "Well, don't make such a fuss out of it. They just don't need their passports any more."<sup>589</sup>

265. Many Muslim men, according to Mevludin Oric, intentionally discarded their identification documents:

When we were captured everything was taken away from us. Mind you, I did not have anything on my body. I don't know about the others. Nobody had anything major. Maybe some had a pack of cigarettes and a lighter. That was all we had. Most people had thrown their documents even before that.<sup>590</sup>

PW-111, who also surrendered on 13 July explained:

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different units guarding prisoners there, including elements of the Bratunac Brigade, combined with Momir Nikolic's supervisory role.

<sup>588</sup> Prosecution Pre-trial Brief, paras. 200 and 202.

<sup>589</sup> Prosecution Pre-trial Brief, para. 201.

<sup>590</sup> Oric M 890:2-6.

Q. Witness, when you went on the break-through from Jaglici, I found this bit of information in your evidence in Sarajevo. You had on you your passport and your ID card, correct? A. I did have my passport. I don't remember having my ID. Q. But at any rate, you discarded the ID that you had, whichever one of the two you had, while you were in the forest, correct? A. Yes..... Q. Can you explain to us why you discarded your documents if you were prepared to give your full name anyway? A. To tell you the truth, I don't know. I threw my ID away in order not to have anything on me. I didn't want to have any document on me.<sup>591</sup>

A Prosecution investigator articulated the motivation of Muslim men to discard identification papers:

Sir, with respect to these identification cards, isn't it true that you in your investigation or you as the investigator in charge of this team have concluded "most of the soldiers were getting rid of any element which could identify them as combatants", correct? A. Yes, correct. Q. From whom did you learn that information? A. Same situation than in many instances. We discussed its general assessment coming from the interviews conducted with all the people who went through these events. Q. So it's fair to say that these military men or this military column, they were not stripped of their personal identification cards, they in fact are the ones who threw away those belongings in order not to be identified, correct? A. This is a totally correct.<sup>592</sup>

Many if not all of the documents strewn inside and outside the White House may well have been discarded for the same reason.<sup>593</sup>

266. Forcing the detainees to throw away their identification documents – even assuming that to have been the case – would not reasonably indicate that they were about to be murdered. A more obvious inference would have been that the prisoners were to be indiscriminately interned without any serious effort to distinguish detainable persons from non-detainable persons. Keeping as many people in detention as possible would strengthen the Serb position in any future prisoner exchange negotiations. Lt. van Duijn draws exactly this inference when he is allegedly told by Mendeljev Djuric, through the translator Miki, that the prisoners didn't need their passports:

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<sup>591</sup> PW-111 7041:23-7042:21.

<sup>592</sup> Ruez 1726:19-1727:7.

<sup>593</sup> Boering 2012:20-22 ("There were some passports in a corner, or other identity cards"); van Duijn 2303:20-22 ("the whole front lawn, which is empty now on the screen, but was then packed with a mixture of personal belongings, photographs, and also, as I saw then, passports from the men that were sitting inside the house").

Basically he – he grinned at me and he told me that the men didn't need the passports anymore, which at that point made clear to me that there was a very dark future ahead for the men in the house – and in fact for the men that had been singled out the day before. At that stage, I thought about the images I had seen before – before going on mission, images from 1991, 1991/1992 of the camps that were in Bosnia during the war.<sup>594</sup>

267. The Prosecution attempts to give Djuric's words a sinister meaning, implying that the phrase "they didn't need their passports anymore" suggests that he knew the prisoners were to be killed. This claim is unsustainable. The notion that Djuric, if he did possess this knowledge, would have informed a Dutchbat officer of the killing plan defies common sense. Second, the translation provided by Miki is open to doubt. Miki demonstrates his sub-optimal grasp of English on the Potocari video, where he twice translates the English words "four thousand" into the BCS as "four hundred."<sup>595</sup> His translation in the opposite direction, from BCS into English, would likely have been even worse. Djuric's words may have been different than what Miki translated to van Duijn, or the full meaning may not have been conveyed, because Miki was incapable of finding the right English words. For example, Djuric might have made an off-colour joke, such as: "They don't need their passports, they're not going to another country."

268. The confiscation of rucksacks, money or other personal items could not have reasonably been understood to mean that the prisoners were all going to be killed. Separating the prisoners from access to concealed weapons would have been an obvious reason to force them to leave their baggage in front of the White House. Franken observed small-calibre ammunition exploding inside rucksacks that were burned on the night of 13 July.<sup>596</sup> Incidentally, the first prisoners at the White House on 12 July were allowed to keep their personal belongings.<sup>597</sup> Serb

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<sup>594</sup> Van Duijn 2304:16-22.

<sup>595</sup> P4536 (Potocari video) 7:04-10, p. 3.

<sup>596</sup> Franken 2578:16-22 ("Q. And furthermore, insofar as the baggage that was left lying around the 'White House' was burned, which we heard about yesterday, a consider[able] number of small arms ammunition exploded. That was your report to the debriefing. A. Yes. Q. Do you agree with that? A. Yes.")

<sup>597</sup> PW-169 17315:3-10 (referring to 12 July in Potocari: "During the period of time that you were separated from your family up until the point that you were taken to the bus, did you have your belongings with you? A. No, I didn't. I had nothing. Q. Now, were the belongings of the other people that were separated from their families taken away from them up until that point? A. No. They had their things with them, whoever had what with them, but nothing was taken away.")

forces apparently only started to oblige the prisoners to leave behind their rucksacks when the number of prisoners became overwhelming.

269. Muslim witnesses testified that Serb forces stole money from them on various occasions on 12 and 13 July. Some of these reports are probably true. Stealing from these vulnerable people, needless to say, violated domestic law, the Geneva Conventions and the precepts of common decency. But petty larceny is hardly indicative that the victim is later going to be killed – much less that a plan is unfolding to kill the Muslim prisoners *en masse*. The much more obvious and likely explanation is that individual Serb soldiers were motivated by greed, and capitalized on the disadvantaged situation of prisoners within their control to steal from them. Not the slightest evidence shows that Mr Borovcanin became aware of these incidents, much less that he condoned or encouraged them in any way. Even if he had learned that such thefts had taken place, this would not have suggested to him that mass murder was imminent.

#### **5. Efforts Were Made to Provide Food, Water and Medical Care to the Prisoners**

270. The Prosecution alleges at paragraph 64 of the Indictment that prisoners in Potocari and Bratunac “were not provided with food or medical treatment, nor with any meaningful rations of water during their days in detention pending execution.”

271. The Prosecution has adduced no evidence suggesting that any of the Muslim detainees in Potocari on 12 or 13 July required medical treatment. Conversely, medical treatment was provided to some injured prisoners taken into custody on 13 July along the Bratunac-Konjevic Polje-Milici Road.<sup>598</sup> Any lapses in the provision of medical treatment must be viewed in light of the overall chaotic situation, including the lack of medical resources and transportation.

272. Significant efforts were made to provide food and, in particular, water to Muslim detainees on 12 and 13 July. The detainees at Sandici Meadow were provided with water, including a large cistern brought from Bratunac specifically for that purpose.<sup>599</sup> Other detainees

<sup>598</sup> Subotic B 24981:4-8 (“Once I came back with the wounded some 10 minutes later, an ambulance team arrived, I think from the Milici hospital. They approached the prisoners and provided medical assistance, and I think two of those soldiers who had been seriously wounded were taken to the military hospital.”)

<sup>599</sup> PW-110 660:4-8 (“Q. Were you - and by ‘you’ I mean the prisoners collectively -- provided with any water? A. Everyone was given water, but I don't know if they had received enough because we just couldn't get enough water

there were permitted to retrieve and fill up water containers from a nearby stream or spring.<sup>600</sup> PW-169, a Muslim survivor, says that he was provided with water at the Vuk Karadzic school on 12 and 13 July.<sup>601</sup>

273. Water was provided to the detainees in the Kravica Warehouse before the first shooting incident occurred there on 13 July.<sup>602</sup> Prisoners secured inside the Warehouse did not need to be given water to keep them pacified. Distributing water in this context suggests that there was no pre-existing plan to execute the prisoners there.

#### 6. Was the Murder Plan Otherwise "Obvious"?

274. Momir Nikolic testified that on 13 July General Mladic made an arm gesture to him in Konjevic Polje indicating that all the Muslim men in detention were going to be killed. Nikolic then offered the following observation:

Well, it was a confirmation of what was going on in Potocari on the 12th. In other words, all the men who had been separated were already detained, so it was crystal clear only people who didn't want to understand that couldn't understand what the fate of those separated men would be and what the intention behind the separation was. According to what Mr. Mladic and in the way in which he reacted made it clear that there would be

with the thirst that there was.");

Yes.... At any rate, they informed me that there was a group of prisoners at Sandici, that they were being gathered there, and that they were sitting there for a long time. It was a warm day, and water had to be provided to them. What's more, he also told me that food supplies would be sent to them later on."); PW-127 3547:21-3548:2; PW-161 9533:12-20; PW-156 7088:13-14 ("They twice brought in a water truck, which sprayed us, because it was very hot"); PW-111:7047:14-20 ("Q... In the Krstic case you spoke about this water truck arriving, and spraying water on you three times. Do you remember this incident with the water truck? A. Yes, of course.")

<sup>600</sup> PW-127 3534:13-16 ("A. I went back to the meadow. They told me to distribute the water, give everybody a little water, and that's what I did. I remember I had those two canisters and I distributed the water and then I went back to get some more water.")

<sup>601</sup> PW-169 17326:17-21 ("Q. And during the time that you were there from the 12<sup>th</sup> into the 13<sup>th</sup>, the afternoon of the 13<sup>th</sup>, were you provided with any food or water? A. Water, yes. From the morning. I told you. We had enough water in water bottles, plastic ones, up to five litres. There was enough water.")

<sup>602</sup> PW-111 7057:25-7058:10 ("Q. After that event, some time passes, you are still inside, some people bring water, but nothing significant happens other than some soldiers coming, asking about their own. They asked two of your colleagues, prisoners, there you showed on the wall where they were interrogated but they didn't beat them, they didn't mistreat them and then they are returned to you. Is that the sequence of events? Is that correct the way I have just told it right now? A. Well, people didn't bring water, but Serb soldiers brought water. Q. Perhaps I was not precise enough, but thank you for that correction. A. Yes, yes, that's correct."); Djukanovic M 11766:22-11767:4.

no difference in the fate between those captured in Konjevic Polje and those who were already detained on the 12th and separated and that the same fate awaits them as that of those who had been separated and detained in Potocari. This is what I had in mind and that's what I said then and that's what I'm saying now. Q. Just so we are completely clear, what is that fate, sir? A. Well, their fate was that they would be put in detention and later executed. That was the fate awaiting the men who had been captured on that road.<sup>603</sup>

275. Momir Nikolic did not need to rely on inference, of course. He knew the intended fate of the prisoners before the detentions began. He alleges that Lt Colonel Popovic, Head of the Security Organ of the Drina Corps, and Lt. Col. Kosoric, Head of Intelligence of the Drina Corps, told him on the morning of 12 July that all the prisoners were going to be killed.<sup>604</sup>

276. Nikolic is accordingly a poor witness to describe what was or was not obvious on the morning of 12 July. Nikolic himself acknowledged that before being told of the killing plan he had not anticipated that the Muslim prisoners in Potocari were going to be killed.<sup>605</sup> He then kept the plan secret, not mentioning it to anyone on 12 and 13 July:

JUDGE PROST: ... Now, you then spend, according to your statement of facts, much of the day on the 12th at Potocari assisting in that separation process and working with others in dealing with the movement of people and the separations. You describe in particular working with Dusko Jevic, did you discuss with him that day the fact that the men, the able-bodied men being separated were to be killed? A. Well, no. Not in the sense that we discussed it directly. In my statement, and in my previous testimony, I said that I was in contact with Dusko Jevic being the only officer I had contact with. At a certain point in time I assisted with what the problem was at the moment, and it had to do with the buses and the transport of people. It was Dusko Jevic who was tasked with that. Therefore, I did not discuss any murders with Dusko Jevic.... JUDGE PROST: At the same time on the same day you speak about working with others in what was going on in Potocari, military and MUP units, Drina Corps military police, you've listed a number of individuals in section 6 of your original statement. On the 12th, did you have any discussions with any of those individuals about the fact that these men were to be killed? A. No, no. Not on that day in front of the Fontana or at Potocari. I did not have any contact with or talk to any other participants in the operation of the transportation of people from Potocari. JUDGE PROST: So you're saying that neither on the 12th nor on the 13th during the course of that activity at Potocari, on neither day did you have any discussion with anyone about the fact that these men were going to be separated and

<sup>603</sup> Nikolic M 32935:8-22.

<sup>604</sup> C1 (Momir Nikolic 92ter Statement), p. 2.

<sup>605</sup> Nikolic M 32921:10-16 ("Q. And it is also correct, is it not, that as you told the RS [sic] Commission in answers to their question, this is at paragraph 26, you first realised that the Muslim men would be killed when you spoke to Popovic during this conversation; that's correct too, isn't it? A. Yes, that's correct. That's when it dawned on me for the first time, and I think I was right in understanding the situation like that.")

killed? A. No. I never testified to that effect, and I never mentioned it in my statement. I never said that I discussed the murder of those people with anyone in Potocari.<sup>606</sup>

277. Prosecution expert Richard Butler supports the view that the killing plan was not obvious on 12 July. Dragomir Vasic was present at both crucial meetings in Bratunac on the morning of 12 July: the first at 8 a.m. when Mladic instructs various people concerning the evacuation process, including taking military-aged men in Potocari into custody;<sup>607</sup> the second at around 10 a.m. attended by Muslim and UNPROFOR representatives.<sup>608</sup> Vasic wrote a report after these two meetings which includes the observation that “[a]fter the inspection, able-bodied men may be allowed to go in order to have the others from the woods to surrender, since our command urged them to do so.”<sup>609</sup> Butler’s view was that Vasic had no knowledge of the killing plan when he wrote this passage, and that he genuinely believed that those men would be released as an inducement for the column of the 28<sup>th</sup> Division to surrender.<sup>610</sup> If the killing plan was not obvious to Vasic, who had been privy to the two main meetings held by General Mladic, then how could it have been obvious to someone who had been out in the field and not involved in any of these meetings?

278. The international observers did not think it was obvious either. Van Duijn’s worst-case scenario expectation was that the prisoners would be held in poor conditions in detention camps.<sup>611</sup> Prisoner exchanges were routine in the conflict leading up to July 1995.<sup>612</sup> Kingori was

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<sup>606</sup> Nikolic M 32904:15-32905:24.

<sup>607</sup> Butler 19814:20-22; 4D59, 12 July dispatch from Dragomir Vasic (describing meeting held by Mladic and Krstic at which tasks were assigned).

<sup>608</sup> Butler 19822:13-19; see also 4D606 (92<sup>ter</sup> statement of Ljubisav Simic), pp. 7605-7611.

<sup>609</sup> P3040 (12 July dispatch from Vasic to RS MUP), p. 1.

<sup>610</sup> Butler 19824:5-11 (“Now, if that is the case - that’s the Prosecution’s position - what does this comment by Vasic indicate, his knowledge of any potential decision by the VRS? A. I think it’s fair to conclude at this juncture that Dragomir Vasic has not been informed of what the ultimate plan is. Q. Is that reasonable to believe in the circumstances, in your view? A. Yes, sir, I believe it is.”)

<sup>611</sup> Van Duijn 2304:16-22.

<sup>612</sup> Simic N 28694:8-28694:12 (“We had extremely good cooperation with the 2nd corps of the B and H army; and we would quickly exchange these people for our fighters who are captured on the other side or for our men who happened to be in prison; for example, in Tuzla, who were detained for some political reasons. That was how it was done”); Simic N 28711:19-28712:4 (“And my final answer to your question is that they were exchanged for soldiers captured at Lisaca, and not Vlasic. It was one of the peaks at Majevisa where they were surrounded, and they

told, probably by Zlatan Celanovic, that this was the reason for the detention of military-aged men in Potocari, and he accepted this explanation as reasonable.<sup>613</sup> A decision to kill these prisoners stands out as a violent and extreme aberration from the norms that had been generally followed by Serb forces in respect of detained combatants.

279. The notion that the murder plan would have been obvious from the facts observable in Potocari and Bratunac on 12 and 13 July was definitively rejected by the Appeals Chamber in *Blagojevic*:

The Appeals Chamber notes that genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same group. Thus, the Appeals Chamber accepts that the forcible transfer operation, the separations, and the mistreatment and murders in Bratunac town are relevant considerations in assessing whether the principal perpetrators had genocidal intent. However, the Appeals Chamber is not convinced by the Trial Chamber's reasoning that the forcible transfer operation alone or coupled with the murders and mistreatment in Bratunac town would suffice to demonstrate the principal perpetrators' intent to "destroy" the protected group. The *Krstic* Appeal Judgement clearly held that "forcible transfer does not constitute in and of itself a genocidal act", and it is simply a relevant consideration as part of the overall factual assessment. Similarly, the Appeals Chamber notes that "opportunistic killings" by their very nature provide a very limited basis for inferring genocidal intent. Rather, as the Appeals Chamber determined in the *Krstic* Appeal Judgement, these culpable acts simply assist in placing the mass killings in their proper context. Consequently, no reasonable trier of fact could find beyond a reasonable doubt that, without knowledge of the mass killings, Blagojevic's awareness of the other facts

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couldn't break out; and through the mediation of the Red Cross, they surrendered and they were exchanged. I needed a certain number of prisoners of war because I didn't have a sufficient number for the exchange. Q. And, General, your recollection is that that exchange occurred very soon after those prisoners were taken to Batkovic, a matter of days; is that correct? A. I can't tell you with precision, but I think it was soon. We needed the men and that is why we intervened."); Mitrovic Lj 23620:14-23622:15; Cvijetinovic M 25839:25-25840:21; PW-168 16024:13-21; 7D454; 2D520; 2D521; 4D482.

<sup>613</sup> Kingori 19282:25-19283:20 ("Do you see the section that reports that the BSA have confirmed that they are holding a quantity of males in Bratunac and Srebrenica, they have declared that the civilian males will be released soon and the ABiH males will be held for the purpose of POWs." Do you recall seeing that, Colonel? A. Yes, Your Honour I do. Q. Do you recall receiving this information, and if you do, who did you receive it from? A. Your Honour, this information came in two -- came in twofold. That is, first and foremost, I was told by the -- by the legal officer or the officer who introduced himself as the legal officer that the reason -- you know, when I asked him why they were holding men separately from the women, he told me that they were doing that so that men can be transported separately. Later on, when I insisted, he said they are taking the men separately so that if they find there's some soldiers therein, they would -- they would be able to exchange them with their own prisoners of war who were held by the other side, that is, by the Muslims. So he told me that exactly the main reason why they are holding them. And for sure, to them -- to him it made sense, in that if they have men they can hold as prisoners of war and the others have theirs, they can just swap over.")

related to the forcible transfer operation shows that he had knowledge of the principal perpetrators' genocidal intent.<sup>614</sup>

280. This reasoning is directly applicable to the case against Mr Borovcanin, which is based exclusively on inferences that he should have drawn based on his alleged knowledge of mistreatment of prisoners. The claim is factually false, as well as logically specious. The Chamber should expressly and unambiguously reject the suggested inference that Mr Borovcanin knew of any killing plan based on events leading up to the Kravica Warehouse killings that broke out late in the afternoon of 13 July.

#### **7. Positive Indications that Mr Borovcanin Did Not Have Knowledge of the Killing Plan Prior to the Kravica Warehouse Killings**

281. The circumstantial evidence affirmatively suggests that Mr Borovcanin would not have been informed about any plan to commit mass murder. He attended none of the key meetings at which plans for the detainees could have been discussed. He was not at Mladic's meeting with UNPROFOR representatives at around 8 pm on 11 July at Hotel Fontana;<sup>615</sup> he was not at the Hotel Fontana meeting later that night when Mladic spoke sharply to the UNPROFOR and Muslim representatives;<sup>616</sup> he was not at the meeting at 8 a.m. on 12 July at the Bratunac Brigade with top commanders and municipal officials;<sup>617</sup> he was not at the Hotel Fontana meeting later that morning, again with UNPROFOR and Muslim representatives, where details of the evacuation were agreed upon;<sup>618</sup> he was not present at the meeting, held either on the evening of 11 July according to the Defence or 12 July according to the Prosecution, between General Mladic and other top commanders;<sup>619</sup> and he was not at the meeting at the SDS Offices

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<sup>614</sup> *Blagojevic AJ*, para. 123.

<sup>615</sup> P2047 (Trial Video) 36:48-76:07.

<sup>616</sup> P2047 (Trial Video) 1:16:08-1:41:31.

<sup>617</sup> 4D59 (12 July dispatch from Dragomir Vasic (describing meeting held by Mladic and Krstic at which tasks were assigned); 4D606 (Ljubisav Simic 92ter statement), p. 7605-7608 (describing tasks assigned to municipal officials by Mladic).

<sup>618</sup> 4D606 (Ljubisav Simic 92ter statement), p. 7608; P2047 (Trial Video) 1:42:44-1:52:20.

<sup>619</sup> Pandurevic V 30883:19-30885:18; Jevdjevic M 29607:10-20; 7D1092 (Bajagic Z 92ter statement); Bajagic Z 32479:25-32480:11); Trivic M 11841:6-9; Nikolic M 32992:22-32993:19.

where Deronjic argues with Beara about the fate of the prisoners.<sup>620</sup> The Prosecution, in fairness, has never alleged otherwise.

282. Borovcanin can in no sense be described as a trusted confidante of General Mladic. No evidence suggests that they had previously collaborated closely or were for any other reason closely affiliated. The evidence shows, on the contrary, that Mladic was mistrustful and contemptuous towards the MUP forces. On the morning of 12 July before the evacuation from Potocari had begun, Mladic spoke derisively to MUP officers:

At one point General Mladic showed up with his escort - I don't know what time it was - and he said, he asked in a taunting manner, it was a really ugly way of asking us, a rude manner. This is what I've already stated. He asked, "You police [redacted] [expletive deleted], which one of you dares come with me to this mass of people?" So this was the way he talked to us.<sup>621</sup>

This aggressive tone apparently reflected a long-simmering tension between Mladic and the Ministry of Interior forces which he perceived as being aligned with the President in a power struggle against him.<sup>622</sup>

<sup>620</sup> Nikolic M 32939:9-32940:6.

<sup>621</sup> PW-160 8581:12-17.

<sup>622</sup> Butler 20286:3-16 ("I don't know if we've discussed it in this case - the fact that the relationship between the army and the MUP was acrimonious, because soldiers would frequently desert from their military units and try to sign on with MUP units in part because the MUP was paying their soldiers in cash and not other forms of either credit or script; and that particularly from an army perspective, the MUP was not returning those soldiers back to the military units, and that was having a significant impact on the VRS. Q. When you're discussing that the relationship between the army and the MUP was acrimonious and that it had a significant impact on the VRS, isn't it true that the period of time you're discussing, sir, is the period of March, April, May, June, and July 1995, among other periods? A. Yes, sir. In fact, through July 1995, there are references where particularly General Mladic was not a fan of the MUP.") Simanic M (deputy commander of the 5<sup>th</sup> Engineering Battalion) 14705:22-14706:18 ("Q. Yesterday you mentioned that there was antagonism between the police MUP and the army. Do you remember that? A. Yes. Q. And, sir, would you describe that antagonism as being in existence in July of 1995? A. I believe so, I believe it existed." ... "Q. Do you remember, Mr. Witness, that you also qualified that antagonism and identified it as being strong antagonism between the army and the MUP; do you remember that? A. I said there was antagonism between the army and the MUP because the MUP men were better equipped, they had better uniforms, whereas the army did not have such good equipment, and this was the major cause of this antagonism between the two"); Mitrovic M 25058:24-25059:6 ("A. First of all, I have to tell you that towards the end of 1994 and the beginning of 1995 was a very difficult period. During that period, there was a lot of antagonism between MUP members and the military members, and that antagonism had been created by the then-politics of the SDS. Because of this antagonism and conflicts, the normal flow of information had been interrupted between the intelligence and security organs and the MUP organs.")

283. Borovcanin had two face-to-face encounters with Mladic in this time period: the first on the evening of 11 July, the other on the morning of 12 July. As discussed in a previous section, Borovcanin received an order from Mladic on the afternoon of 11 July at the Pribicevac IKM to send his forces in the direction of Milacevici. Borovcanin explained that his forces had not yet arrived. At around 7 pm, Borovcanin was summoned by Mladic to the Hotel Fontana where he was having dinner with fellow officers. A brief and apparently testy exchange followed: "before I could speak to him, when there was still a few metres distance he asked me whether I had fulfilled my task.... And as I told him again that I don't have these forces at my disposal so that I could do it, he angrily ordered me to leave."<sup>623</sup> Borovcanin then left Bratunac and reconnoitered the area of Zuti Most, returning to Bratunac without seeing Mladic later evening. An order was passed on to him ordering him to strengthen the line at Zuti Most in the morning.

284. The next morning at around 10 am, Borovcanin had his second face-to-face encounter with Mladic. In front of a large crowd of people, Mladic

criticized me and told me that we had done nothing, that we had accomplished nothing. And he told me that we were Tomo Kovac's ... vultures... And I understood that this as a kind of result of a certain misunderstanding that they had beforehand. And I told him, Mr General, I think that these are problems that you should solve somewhere else and that people should not listen to this.... He immediately demanded part of the people to stay in order to secure the traffic and at least half of them to go urgently to Zvornik because of the information that a large number of armed people and armed groups from Srebrenica were moving through Cerska, Crni Vrh to Zvornik and that the city of Zvornik was in danger....<sup>624</sup>

Dobrisav Stanojevic may have witnessed part of this event, saying that he saw Mladic "shouting at Mr. Ljubisa Borovcanin saying, 'What do you need the police here for? We have the army. Get them out of here.' So we left that area around the cordon."<sup>625</sup>

285. These exchanges are not jocular banter. Mladic evidently disliked the MUP forces, as confirmed by Butler, and appears to have disliked Borovcanin by extension, even though they had had no previous association. Regardless of the reasons, these exchanges demonstrate that Mladic would not have confided to him a secret plan to wipe out the Muslim men of Potocari.

<sup>623</sup> P2852 (Borovcanin OTP Interview), pp. 45-46.

<sup>624</sup> P2852 (Borovcanin OTP Interview), p. 70.

<sup>625</sup> Stanojevic D 12877:9-11.

286. None of the actions taken by Mr Borovcanin on 12 or 13 July leading up to the Kravica Warehouse massacre deviated from his combat task: to block and fight the column of the 28<sup>th</sup> Division and to secure the Road over which the column was expected to pass. The main force of his units – namely the 1<sup>st</sup> PJP Company and the 2<sup>nd</sup> Sekovici Detachment were both sent in the direction of Budak to the northwest of Potocari precisely because this is where any elements of the column were expected to be at that time.<sup>626</sup> When it was discovered that the column was heading northwest over the mountain and, thus, would be traversing the road, Borovcanin was ordered to secure the road, and to redeploy his units accordingly.<sup>627</sup> The column was expected to be a robust combat force and clearly did have the capacity to fight effectively, particularly in that terrain. Borovcanin continued with that combat task on 13 July, and was obliged to temporarily take prisoners into his custody who were surrendering. Engaging in legitimate combat with the Muslim column was the sole purpose animating Borovcanin's actions throughout the 12<sup>th</sup> and 13<sup>th</sup> of July. None of his orders, actions or statements can be characterized as deviating from that purpose.

#### **(iv) Criminal Responsibility of Mr Borovcanin For the Kravica Shootings**

##### **1. Introduction**

287. The Prosecution alleges that Borovcanin is criminally responsible for the killings at Kravica Warehouse in four ways: JCE, aiding and abetting (including instigation), superior responsibility, and commission by omission. These forms of liability are inter-related. The Prosecution will probably argue that Borovcanin's alleged failure to discharge his obligations under the last two forms of liability proves that he intended or otherwise supported and encouraged the crimes. The present section therefore begins with a discussion of the allegations that are general to all four forms of criminal responsibility alleged. The evidence is then

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<sup>626</sup> See section IV(b).

<sup>627</sup> P1106 (12 July Intercept, 1156 hrs, between Drina Corps Command at Vlasenica ("Zlata") and the Duty Officer of the Bratunac Brigade ("Badem"). The duty officer provides a report of the movement of the column to the Drina Corps (reports the column in moving towards K. Polje and that there is an empty (ET erroneously reads useless) space between the Bratunac and the Milici Bde. The duty officer also refers to General Krstic as being up in his office (in Bratunac). Intercept provides reasons for Mladic's decision to send LjB and part of his forces to be deployed along the road); see, section IV(c) for circumstances of Mladic's order to Borovcanin, not long after noon on 12 July, to redeploy his units.

examined to establish the facts that have been proven beyond a reasonable doubt. Each of the four forms of liability is then each discussed in turn, moving in sequence from the specific to the general: superior responsibility; commission by omission; aiding and abetting; and JCE.

## 2. Prosecution Allegations

288. The Indictment alleges that on 13 July, subordinates of Borovcanin "captured hundreds of Muslim men from Srebrenica and placed them in a large warehouse in the village of Kravica and guarded them there." These forces then "summarily executed over 1,000 Bosnian Muslim men" at the warehouse. Borovcanin was "personally present at the warehouse when hundreds of Muslim prisoners were in the process of being summarily executed by those forces." Borovcanin is not alleged to have participated in covering up these killings, which is said to have been supervised by Ljubisa Beara and Vujadin Popovic the next day.<sup>628</sup> A different paragraph of the Indictment argues in the alternative that the victims were "executed by or in the presence of" his subordinates.<sup>629</sup> The Pre-trial Brief more specifically alleges that Borovcanin's subordinates "took part in the massacre, machine-gunning prisoners inside the warehouse, throwing hand-grenades into the warehouse and blocking means of escape."<sup>630</sup>

289. Borovcanin is alleged to have assisted the perpetrators by omission:

[Borovcanin did] nothing to prevent those executions and did nothing to affect first aid or any other medical treatment of any of the surviving Muslims at the Warehouse, thereby encouraging his men and other to continue to kill Muslim prisoners and let Muslim prisoners die from their wounds.<sup>631</sup>

290. Borovcanin's brief presence near the Kravica Warehouse, combined with inaction, is the alleged basis for inferring the elements required for all four forms of criminal liability alleged. Two of the crimes require Borovcanin's intent to be inferred from the knowledge and omission, whereas two require knowledge that others are committing crimes. The relationship between the inaction (*actus reus*) and the *mens rea* of the four crimes can be summarized as follows:

<sup>628</sup> Indictment para. 30.4.

<sup>629</sup> Indictment para. 43(a)(iii).

<sup>630</sup> Prosecution Pre-trial Brief, para. 206.

<sup>631</sup> Indictment para. 43(a)(iii). See also paragraph 30.4 for a more detailed description of the event.

- (a) Inaction with knowledge, actual or constructive, that his subordinates were going to, or already had, committed crimes (superior responsibility);
- (b) Knowledge that someone is committing a crime, with inaction that is “directed to assist, encourage or lend moral support to the perpetration of a crime” and that has “a substantial effect upon the perpetration of the crime” (aiding and abetting);
- (c) Inaction with intent not to fulfill a duty to act that is mandated by a rule of international criminal law (commission by omission);
- (d) Inaction with the intent of furthering the crimes (JCE).

### 3. Overview

291. The Prosecution has failed to prove beyond a reasonable doubt that Borovcanin’s subordinates committed any killings at Kravica Warehouse, or that they were present inside the compound when he passed the Warehouse. The evidence establishes only that two members of the 2<sup>nd</sup> Sekovici Detachment – Cuturic and Dragicevic – were present at the beginning of the first killing event; that the shooting was initiated by an attempt by prisoners to overpower their guards; and that Cuturic and Dragicevic were killed or injured almost immediately. The evidence has not established that any of Borovcanin’s other subordinates were inside the Warehouse compound during the shooting, much less that they participated in it.

292. The evidence does not establish that the killings were ongoing at the moment Borovcanin passed by the Warehouse. PW-111 and Djukanovic both testified that the first shooting incident was over after a relatively short period. The video shows that the door behind the pile of bodies is closed, implying that control over the prisoners had been restored at the moment that Borovcanin drives by along the Road. The sound of four gunshots on the crucial excerpt of the Petrovic video is not a sufficient basis, in the context of frequent sporadic firing in the area, to infer that those shots were fired inside the Warehouse compound. Borovcanin was told – and it was reasonable for him to have believed – that (i) the killing incident was caused by a break-out attempt; (ii) that, therefore, the killings may have been justified; and (iii) that, in any event, none of his men had participated. He then ordered the most senior Special Policeman on the spot to keep his men away from the Compound, arranged for the removal of his subordinates from the Road as soon as possible, and immediately headed back to Bratunac to speak to the one living eyewitness to the killing who was his subordinate: Rado Cuturic.

293. Borovcanin is not guilty of any crime for these actions. Borovcanin had no duty in international criminal law to intervene to prevent or punish past, present or future crimes that non-subordinates – in particular, VRS troops – had committed or might commit in the future. The Prosecution’s theory that the Borovcanin’s units had a *de facto* military “zone of responsibility” arising from the presence of his units in the area defies common sense. The subordinated forces were charged with responsibility for combat against the column and, related thereto, ensuring the security of the Road along the stretch where they were deployed. This combat task did not mean that the subordinated units had a military “zone of responsibility” in which all acts are imputable to the commander of the force. Borovcanin had no authority over VRS troops. He could not issue orders to them. Intervening with force in those circumstances would have been potentially dangerous and was not required as a matter of law.

294. Borovcanin did later learn of the massacre that had taken place at the Kravica Warehouse, certainly by the morning of 14 July when it was the talk of the town in Bratunac. Borovcanin was with the Deputy Minister of the Interior Tomislav Kovac throughout much of 14 July and the Prosecution has not shown that he did not discuss what he knew about the events with Kovac. Borovcanin’s first major decision after learning of the massacre was on the morning of 15 July. In a meeting with military commanders at the Zvornik Brigade headquarters, Borovcanin openly advocated allowing the remainder of the Muslim column to pass through to Tuzla without being engaged and, hence, without taking any prisoners.<sup>632</sup> Borovcanin was no blood-thirsty executioner of helpless prisoners.

#### **4. Evidence of General Relevance to All Forms of Criminal Responsibility Alleged against Mr Borovcanin**

##### *4.1 The Credibility of the Borovcanin Interview*

295. This section, unlike previous sections, will require the Chamber to assess the credibility of Borovcanin’s interview with the Office of the Prosecutor. These interviews should be

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<sup>632</sup> Pandurevic 30963:1-7 (“Q. Did anybody at the meeting suggest any other course of action, other than strengthening the lines and cutting off the forces of the 28<sup>th</sup> Division? A. There were other suggestions. I think that Mr. Borovcanin put forward a suggestion that the forces of the 28th Division should be allowed to pass through, that the area should be opened up immediately for their free passage.”); Pandurevic 31486:24-25 (“Q. And during that meeting, you testified at page 30963 that Borovcanin suggested to open the line; is that correct? A. Yes.”)

accepted as credible and generally reliable for a number of reasons. First and foremost, Borovcanin demonstrated his candour, particularly in matters of his own conduct, by providing the key piece of evidence that has been used against him in this trial: the Petrovic footage of the front of the Kravica Warehouse on 13 July. The Prosecution did not have this footage at the time.<sup>633</sup> Borovcanin had absolutely no obligation to provide this footage and could easily have denied possessing it without arousing any suspicions. Instead, he acknowledged possessing video material and brought the tape to the interview.<sup>634</sup> The central piece of evidence against Borovcanin was provided by Borovcanin himself. Further, he frankly admitted, without cavil or evasion, that he saw bodies in front of the Kravica Warehouse when he passed by along the Road.

296. Second, Borovcanin responded to all questions without knowing what information the Prosecution had in its possession. He had no advance disclosure, unlike some witnesses or former accused who studied the Prosecution case-file before sitting down to be interviewed.<sup>635</sup> He was, therefore, unable to craft lies or half-truths knowing what the Prosecution would be able to contradict. The Prosecution interview lasted three days, conducted by Mr McCloskey himself and a senior investigator. Mr McCloskey is an adept interviewer, and aggressively challenged Borovcanin with contentious assertions (many of which later turn out to be false) or negative insinuations.<sup>636</sup> Despite these circumstances, the accuracy and truthfulness has been largely vindicated by subsequent evidence. His movements from place to place on the key days has never been contradicted or even contested by the Office of the Prosecutor throughout this trial. On the contrary, the evidence confirms the accuracy of what he said about his movements

<sup>633</sup> Mr McCloskey 1456:8 ("Mr. Borovcanin provided that to us"); Mr McCloskey 489:20-22 ("And then Serbian state security got in and that [video] had not been seen for many years until Mr Borovcanin in his interviews provided us with that.")

<sup>634</sup> P2853 (Borovcanin OTP Interview), pp. 113, 118.

<sup>635</sup> [REDACTED] Nikolic M 32897:24-32898:7, 33157:22-33158:3.

<sup>636</sup> For example, Mr McCloskey alleges at one point without any basis that Borovcanin was coordinating his story with General Zivanovic. P2852 (Borovcanin OTP Interview), p. 57-58 ("I've been talking to General Zivanovic and I see you have too. But, please take it into consideration when you are answering question the truth as it was that night.... Understand, we've been investigating this for over five years. And certain military commands and situations are very clear to us. You don't need to defend General Zivanovic, he's doing very well on his own. But again, you just tell us what you think and if that's what you think, that's fine.... LJB: Im telling you what kind of impression I got. And I would also like to tell you, sir, apart from that, that I've never seen General Zivanovic after that and that we do not have any good relations.")

and the movement of his units. Borovcanin also forthrightly and accurately named his own subordinates and the names of other senior officers who were present during the key events.<sup>637</sup>

297. The interview, conducted seven years after the events, does contain some minor factual errors. These errors do not appear to have been self-serving and concern details that are unrelated to any potential culpability. Borovcanin may have inaccurately recalled, for example, that he personally took Cuturic back to Bratunac from the Kravica Warehouse, rather than someone else doing so.<sup>638</sup> The mistake is, however, immaterial and is neither incriminating nor exculpatory. The records of the Bratunac Health Clinic confirm, as do other witnesses, that Cuturic was indeed injured, that he was at the Bratunac Health Clinic at the time described by Borovcanin, and that Borovcanin went to see him immediately after he was brought in.<sup>639</sup> The interviews were conducted seven years after the events – long enough for minor details to have been forgotten or muddled – but this does not detract from the overall credibility and reliability of the interview in respect of key issues.

298. The interview is entitled to significant weight because (i) Borovcanin demonstrated his willingness to make candid admissions concerning his own actions and involvement in events; (ii) identified other participants in the events, including his own subordinates; (iii) the descriptions in the statement are generally consistent with the evidence heard during the trial, particularly in relation to Borovcanin's own movements during the key period, which has never been gainsaid; and (iv) the circumstances of the interview were such that the Prosecutor had ample opportunity to elicit lies or inaccuracies.

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<sup>637</sup> See e.g. P2852 (Borovcanin OTP Interview), pp. 76,77 (Beara), P2853 (Borovcanin OTP Interview) pp. 13-14 (Popovic); P2852 (Borovcanin OTP Interview), pp. 45, 57, 48 and P2853 (Borovcanin OTP Interview), pp. 9, 14, 28, 39, 40, 57, 72 (naming MUP subordinates).

<sup>638</sup> P2853 (Borovcanin OTP Interview), p.65.

<sup>639</sup> 4DP1892 (Bratunac Clinic patient log), BCS p. 31; PW-161 9363:25-9364:10 ("A. Yes. I'm just not sure. I think that Miroslav Deronjic was there, Srbislav Davidovic, the policeman with the bandaged hand. Maybe somebody else was there, but I don't remember. There were several of us, not just the two of us. Q. Where was this? A. At the restaurant Jasen. Q. Did you hear the circumstances around the incident where the person burned his hands grabbing a rifle held by a Muslim? A. I heard about that. That a Muslim grabbed a rifle from a policeman and killed him, shot a burst of fire at him. So the other policeman grabbed the barrel of the rifle and burned his hand."); Celic P 13506:22-23 ("His hand was dressed. I don't know which one. I don't know whether it was his left or his right hand"); Pepic M 1356:11-12 ("He said he had burnt himself because he got hold of the barrel of a rifle, as far as I can remember"); PW-161 9363:18-19 ("[Borovcanin] was just waiting for this young man with the bandaged hand.")

#### 4.2 Mr Borovcanin's Knowledge and Actions on 13 July

299. Borovcanin begins the 13<sup>th</sup> of July at 7 a.m. by travelling along the Bratunac-Konjevic Polje Road. He spends about an hour and a half along the Road, and learns that several policemen had been wounded that morning in an attack.<sup>640</sup> Intense firing can still be heard in the hills, although not at that moment directed at the road.<sup>641</sup> Borovcanin returns to Bratunac, receives an intravenous infusion for an ongoing medical problem at the medical clinic,<sup>642</sup> and then goes to the Bratunac police station. He learns from a member of the 1<sup>st</sup> PJP Company who had returned from the Road that a military unit under the command of Milan Lukic had arrived around Sandici Meadow<sup>643</sup> -- indirectly corroborated by Muslim witnesses who saw the arrival of additional units at Sandici<sup>644</sup> -- and that prisoners had started to surrender and were being collected there.<sup>645</sup> Borovcanin then met Zoran Petrovic, the journalist. They travel together to Potocari at around 3.30 p.m., where Mr Borovcanin deals with the water-truck issue.<sup>646</sup> Petrovic, Borovcanin and his driver then drive back through Bratunac on their way up to the Konjevic Polje Road. The trial video provides a good indication of the itinerary. After a stop at Sandici Meadow, Borovcanin travels further towards Konjevic Polje and spends most of his time driving up and down that stretch of road where active combat action is underway.

<sup>640</sup> Zaric Z 26934:5-7; Filipovic N 27001:18-27002:3; 4DP3113 (CJB Zvornik Bulletin, 14 July 1995), p.2.

<sup>641</sup> P2853 (Borovcanin OTP Interview), pp. 40-41.

<sup>642</sup> 4D644 (Dr Petar Loncarevic 92bis Statement).

<sup>643</sup> P2853 (Borovcanin OTP Interview), p. 43.

<sup>644</sup> PW-111 6979:6-9 ("Another soldier from another group came. A group arrived, and I didn't know who they were. They had different types of uniforms. They had black uniforms with black pants, black T-shirts, boots, I didn't see any insignia on them."); 7054:10-14 (these soldiers who guarded you first treated you properly, whereas these other soldiers in black uniforms were people who were arrogant and who, according to your testimony, killed one of the prisoners. Is that correct? A. Yes, it is."); 7054:25-7055:3 ("Q. My question was if, according to your understanding, these were two different units, one in black uniforms and the other one in the camouflage uniforms, that was my question. A. Yes, yes.").

<sup>645</sup> P2853 (Borovcanin OTP Interview), p. 43 ("And then someone arrived to the police station from the field, from this first company and I was informed that [an] unknown military unit appeared in that area. So, they did know this unit personally and they presumed that was units from a side and that officer or man, last name Lukic, was leading that unit"); ("So he informed me that a well equipped unit arrived and they settled in Sandici area and that in the meantime, Muslims started to surrender and they were gathered at one location in Sandici.")

<sup>646</sup> Petrovic Z 18847:4-6; 18850:17-18851:11; P2853 (Borovcanin OTP Interview), p. 126

300. Borovcanin's units, as discussed in a previous section, were tasked with securing the road and blocking the Bosnian column.<sup>647</sup> Borovcanin spoke to his commanders as he travelled up the Road and learned about ongoing operations. Muslim prisoners were in the custody of Borovcanin's subordinates from time-to-time where they surrendered along the Road<sup>648</sup> and, to some extent, at the Sandici Meadow. The custody of prisoners at the Sandici Meadow is ambiguous because Borovcanin's subordinates were not the only ones guarding prisoners there: VRS or other military units arrive during the afternoon to guard prisoners.<sup>649</sup> Furthermore, Momir Nikolic himself, the man with designated responsibility for dealing with prisoners of war in the Bratunac Brigade's zone of responsibility, was present on the spot and evidently giving directions about what should be done with the prisoners.<sup>650</sup> The best view of the evidence is that custody of the prisoners at the Meadow was mixed during the early part of the afternoon, depending on who was actually doing the guarding from time-to-time; once Nikolic issues orders to VRS soldiers to move the prisoners, or to others about the detention of those left behind, custody of the prisoners passed exclusively to the Bratunac Brigade.

301. Borovcanin sees the first part of a speech given by General Mladic at the Sandici Meadow. Mladic told the prisoners that "the evacuation was in progress and he also informed them that they were waiting for buses to take them to their families in Kladanj and Tuzla. And

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<sup>647</sup> Butler 19867:6-8 ("The MUP forces, the various companies of the Ministry of the Interior, were given the responsibility to essentially guard the road from roughly Kravica north to Konjevic Polje"); P686 (Butler Narrative), para. 6.19; P60 (Vasic Dispatch, 12 July) ("Sekovici Special Detachment and the 1<sup>st</sup> Company of the PJP of the Zvornik CJB ... are blocking this section with the goal of destroying these forces"); Pepic M 13549:9-11 ("And what were you are told that you would be doing in this place called Sandici. A. We were to secure the road from Bratunac to Konjevic Polje.")

<sup>648</sup> Borovcanin acknowledges this: P2853 (Borovcanin OTP Interview), p. 54 ("I cannot exclude the possibility that they surrendered to the police officers as well"), 57 ("Borovcanin's commanders] were complaining about the increase of numbers, increasing numbers of those who surrendered."); Trial Video, 2:47:59, 2:50:20-2:52:57. ("I cannot exclude the possibility that they surrendered to the police officers as well.")

<sup>649</sup> See, section V(d); Prosecution Pre-trial Brief, para. 59; PW-111 6976:7-9; PW-110 663:9-11; PW-110 804:11-805:11; PW-160 8586:15.

<sup>650</sup> See, section V(d).

my impression was that he was sincere when he said that, and that that was really the case, that they were waiting for buses to arrive."<sup>651</sup>

302. Borovcanin leaves Sandici without waiting for Mladic to finish his speech and continues north along the Road towards Konjevic Polje.<sup>652</sup> As his car is moving northwards, he orders Cuturic over the Motorola to stop traffic "behind your back."<sup>653</sup> The Prosecution may attempt to argue that this order is related to the movement of prisoners from Sandici Meadow to the Kravica Warehouse.<sup>654</sup> This may or may not be the case. Borovcanin was not likely motivated by the movement of prisoners from Sandici Meadow because he was in a moving car north-west of Sandici when he issued the order. He was not present to see the departure of prisoners, or to have been told by Momir Nikolic that their departure was imminent. The Trial Video offers a more obvious explanation: immediately prior to the order, two armoured vehicles can be seen on the Road firing large-calibre shells intensively for several minutes at targets in the woods.<sup>655</sup> No buses or other traffic pass in either direction throughout this sequence. The traffic stoppage may simply have been necessitated by the intense firing from the armoured vehicles. However, even if Borovcanin did give the order to stop traffic for the purpose of allowing the passage of

<sup>651</sup> P2853 (Borovcanin OTP Interview), pp. 58-59. The content of this speech is corroborated by Muslim witnesses .... PW-111 6977:10-14 ("Later on Ratko Mladic came with his entourage. All of them were well-dressed in new uniforms. He addressed us, saying that there was no need for us to be afraid, to worry, that we would be sent to wherever we wanted to go, that we would not be harmed, that we would be sent to our families"); PW-156 7089:23-7090:9 ("The first thing he said is, "Do you know me?" Some people said yes, we do, some people kept quiet. I didn't know anything. I just kept quiet. All I thought was my fate. His first words were, "Naser has deserted you. He fled to Tuzla. It's not a good idea to fight with Serbia [as interpreted]. We have almost evacuated your families. They are accommodated in Tuzla, Kladanj, and another place. Most likely, within a day or two, you will follow and all of you will be able to find your families. Nobody will beat you, nobody will provoke you. We will provide food to you. It's very hot here where you are. We will find cooler accommodation for you.")

<sup>652</sup> P2853 (Borovcanin OTP Interview), p. 62 ("I left. I went towards Zvornik before Mladic finished making his speech and I thought that the problem was dealt [with] when it comes to, in relation to the police and I went to Zvornik. And journalist Petrovic was with me.")

<sup>653</sup> P2047 (Trial Video) 2:45:50.

<sup>654</sup> Pepic testified that Cuturic took him to the Yellow Bridge in Kravica Village to stop traffic for the specific purpose of allowing the prisoners to walk from Sandici Meadow to the Kravica Warehouse: Pepic M 13556-16:25 ("he transferred me to the place called yellow bridge near Kravica, he gave me his Motorola and told me that he would let me know when those Muslims who had surrendered set off so that I can stop the convoy of buses carrying Muslim civilians, women, children, so that the Muslims who had surrendered could pass unhindered from Sandici towards the agricultural cooperative in Kravica"); Pepic M 13559:12-25.

<sup>655</sup> P2047 (Trial video) 2:40:39-2:45:30.

the prisoners, this does not imply that his men were escorting the column. Closing the road to traffic, for whatever reason and at whomever's request, fell directly within the purview of his units' task: to secure the Road and fight the column as it attempted to cross the Road.

303. The Trial Video shows some dead bodies near the Road as Borovcanin drives north. The cause of these casualties is unknown. The Road itself had been the site of violent armed conflict between Muslim and Serb forces earlier that day. Several Serb combatants were seriously injured in clashes that morning, and at least one was killed.<sup>656</sup> Muslim combatants were also likely killed in these same clashes.<sup>657</sup> Further, Bosnian fighters had on at least one occasion attempted to kill Serb soldiers when surrendering.<sup>658</sup> These bodies along what had up until very recently – and indeed still was – an active frontline, cannot be presumed to have been unlawful killings. The Prosecution, incidentally, has nowhere charged or alleged that any of these killings were unlawful.

<sup>656</sup> Zaric Z 26934:5-7 (who is stationed somewhere near Sandici Meadow along the Road: "At a certain point, after a short lull, I felt an explosion, after which I felt I was hit in the leg. And then it was followed by bursts of gunfire in front of us and my colleagues returned fire."); Filipovic N 27001:18-27002:3 ("Between 3.00 or 4.00, there was firing, the Muslim forces attacked our positions, there were several explosions, and I was wounded on that occasion.... Q. how long did the attack last? A. For about 10 minutes, not more than that."); Celic P 13472:6-10 ("A. I heard, I don't know from whom, that one member of the 1st Company of the police had gotten killed up there near Sandici. Q. And did you hear how that police officer had been killed? A. Well, rumour had it that a grenade had been thrown and the man got killed"); 4DP3113 (CJB Zvornik Bulletin, 14 July 1995), p.2.

<sup>657</sup> P2288 (PW-139 92ter statement), para. 6 ("the same night, 12<sup>th</sup> July 1995 at about midnight, we were shelled ... We decided to go to Sandici and attempt to cross the asphalt road there. There was a clearing just before the road and it was decided to cross the road at this point. We came under fire and were being shelled. The people continued to move forward in an attempt to cross the road, even though they were being killed. I estimate that about 200 people were killed in this incident. This was then on the 13<sup>th</sup> of July.")

<sup>658</sup> Pandurevic V 31126:15-23 ("When you talk in that couple of sentences about unexpected moves and an animal instinct for survival, did you have any particular incidents in mind? A. I believe that I received this type of information from Mijo Dragutinovic who spent some time covering the grounds before we drafted this report, and there were -- there was a case when enemy soldiers were taken prisoners. One soldier activated a hand-grenade and one of our soldiers was either killed or seriously injured. In any case, I know that on that occasion one of our soldiers lost an eye"); PW-168 15906:6-11 ("in that period, after we had had more losses and there was an occasion when some of the soldiers from the 28th Division handed themselves over, and then they would activate a bomb and several of our soldiers were killed, and were wounded, and after that the commander ordered that nothing should be risked.")

304. At some moment Borovcanin hears the sound of shooting and detonations over his Motorola, and hears Stupar saying: "Something terrible is going on."<sup>659</sup> Borovcanin orders his driver to turn the car around and head back down the road, believing that his forces have been attacked somewhere along the Road. Borovcanin arrives at Sandici Meadow, where he had last seen Stupar, but does not see him there. He drives on towards Bratunac. In Borovcanin's own words:

So, I passed Sandici where we parted. As nothing was going on in that area, I continued. So, I continued down the road and I reached the building of the agricultural association of some kind in Kravica. And I saw police officers that were previously placed along the road. I saw them gathered there. I saw Lukic's unit. They were all together as well and I saw a large number of bodies, of people that were killed in the yard belonging to that Zadruga. It was not clear to me what happened, so I asked Stupar what happened. So, briefly he informed me that a military unit brought this large number of prisoners from Sandici to that place. So, as they were entering the ... yard one Muslim tried to grab someone's gun and as the Muslim grabbed the gun, he killed the police officer. And then Cuturic ... grabbed the barrel of the gun held by that Muslim .... And the shooting started after that. The military unit that brought those Muslims there started shooting and then, you know, mass killings occurred. And then I asked Stupar what was the role of the police [in] all that. And he said that the police officers did not participate in the shooting. I placed Cuturic, who was injured, in the car. I took him to the health center in Bratunac and then he received medical assistance.

...

So, in front of [the Warehouse] I saw a large number of people who were killed, were lying down... several dozens.

...

And I asked Stupar whether any of [the] police officers participated in that. And he said that no police officers participated in that.

...

AG: Before leaving, do you give any instructions, any orders to your troops, your units that are still on that road? LJB: I didn't tell them anything special except I told them to remain on the road and I told them that I would ask for them to be removed from that position as soon as possible.<sup>660</sup>

305. Borovcanin does not say that he saw any police officers inside the Warehouse compound. The police officers are gathered along the road; whereas Borovcanin specifies that

<sup>659</sup> P2853 (Borovcanin OTP Interview), p. 63 ("So, when someone turned on his Motorola I was able to hear shooting and detonations. I tried to reach some of my Commanders that were there, because I wanted to know what was going on. I believed that the police that were on the road got attacked by someone.... I asked [Stupar] what was going on, what's the problem, but he just, I couldn't get a concrete answer from him, he just kept saying 'Oh, don't ask, don't ask. Something terrible is going on.' And he wanted me to come back.")

<sup>660</sup> P2853 (Borovcanin OTP Interview), pp. 64-65, 66, 68, 73.

he sees Lukic's unit "at the warehouse" itself.<sup>661</sup> This description is corroborated, incidentally, by Djukanovic who, immediately after the shooting, sees "specials" only along the road, not inside the Warehouse compound.<sup>662</sup> A Muslim witness, as mentioned above, noticed the arrival of a group of men in black uniforms at the Sandici Meadow,<sup>663</sup> and affirmed that the guards at the Warehouse were different from the ones who had been guarding him most of the day at Sandici Meadow.<sup>664</sup>

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<sup>661</sup> P2853 (Borovcanin OTP Interview), p. 65.

<sup>662</sup> Djukanovic M 11751:5-14 ("Q. Okay. I'm not asking you their names or if you knew them, but who were these armed men standing guard who were not from your area? What was the name of their unit? How were they referred to by the people in the village? A. Well, I heard them referred to as specials or specialists. Q. And who did you -- who referred to them as specials or specialists, these armed men from outside the area? A. Well, mostly those who don't even know what a specialist is. How would I put it? I didn't know what they were myself. I just heard that name when people referred to them, and that's what I'm repeating"); Djukanovic M 11771:11-15 ("Q. And how many specials, if any, did you see in that area, the area around the warehouse, at the time that you saw the pile of dead bodies? A. Two or three, were here on the asphalt road. I don't know if there were any more further up. There was a bus standing outside the hangar.")

<sup>663</sup> PW-111 6979:6-10 ("They had black uniforms with black pants, black T-shirts, boots, I didn't see any insignia on them.")

<sup>664</sup> PW-111 7054:8-14 ("There was another group of soldiers who came at one point in black uniforms and it is your position more or less that these soldiers who guarded you first treated you properly, whereas these other soldiers in black uniforms were people who were arrogant and who, according to your testimony, killed one of the prisoners. Is that correct? A. Yes, it is."); PW-111 7054:25-7055:3 ("Q. My question was if, according to your understanding, these were two different units, one in black uniforms and the other one in the camouflage uniforms, that was my question. A. Yes, yes."); PW-111 7065:6-21 ("Q. Now, witness, I would like to read another part of your evidence from the south location. Page 104 of the transcript. When asked by one of the Defence counsel you said, '[In English] [Previous translation continues] ... soldiers, Serb soldiers would appear, would follow you, and you said that you did not recognise in the hangar the Serb soldiers who you saw in Sandici.' And your answer was, 'I did not recognise them.' Then there was another question by the counsel from the southern location: 'Did their uniforms or other insignia differ from the ones of persons who had the same uniforms in Sandici?' And your answer was, 'They had the same uniforms, multi-coloured uniforms.' And then finally counsel asks you, 'Yes, but these were other soldiers.' And your answer was, 'Yes, they were other soldiers.' [Interpretation] Therefore, the soldiers who opened fire on you, the one with the beard and long hair, was not the soldier who was in Sandici, that was your answer, correct? A. Yes.")

306. Borovcanin stays briefly, orders Stupar to keep his men on the Road, and then leaves for Bratunac.<sup>665</sup> Pepic and Celic both testified that soon thereafter, buses arrived and drove their units to Konjevic Polje, where they spent the night.<sup>666</sup>

*4.3 The Evidence Does not Prove Beyond a Reasonable Doubt That Killings Were Ongoing While Borovcanin was in the Vicinity of the Warehouse*

307. The evidence does not show that anyone was being killed at Kravica Warehouse when Borovcanin passed by. Four gun-shots are audible on the Trial Video as Borovcanin's car passes the Warehouse. The Prosecution has asserted that it is obvious that these shots emanated from the Warehouse. This is not a safe presumption. PW-156 testified that he could hear gunfire (primarily from Serb guns aiming towards the forest) when he entered the Warehouse which, by his account, was immediately before the shooting started.<sup>667</sup> That gunfire may well have continued after the shooting at the Kravica Warehouse had subsided. The Chamber should guard against a layman's over-confidence that the direction of the shots is obvious. As Boering explained: "Potocari was in a valley and sometimes it was difficult even for a professional soldier to determine the direction of fire."<sup>668</sup> The Kravica Warehouse is in an even narrower valley, in which the likelihood of echo effect is, if anything, more acute than at Potocari, compounded by the poor sound quality of the tape that gives no real sense of direction or distance.

308. More importantly, the Petrovic Video shows that the first shootings at the Warehouse were over by the time Borovcanin passes by in his car. The main door to the room on the right-hand side of the Warehouse is shut by the time Borovcanin passes by the room.<sup>669</sup> The escape

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<sup>665</sup> P2853 (Borovcanin OTP Interview), p. 66 ("I was standing on the road and that's what I saw, because I was on the road. I never went down"); p. 73 ("I told him to remain on the road and I told them that I would ask for them to be removed from that position as soon as possible.")

<sup>666</sup> Celic P 13480:12-13; Pepic M 13567:11-25.

<sup>667</sup> PW-156 7123:1-7 ("Now I would like to ask you this, Witness: As you were walking towards the warehouse, and as you were entering the warehouse, in the nearby hills and around the warehouse, did you hear any shooting? A. Yes. We could hear the shooting while we sat there around the hills, and then there was the tank that I told you on the left. It fired towards the forest. They were telling him that people from Srebrenica were in the forest, so he fired at the forest.")

<sup>668</sup> Boering 2208: 7-8.

<sup>669</sup> See discussion in V a.

attempt has apparently been suppressed, with the dead bodies piled immediately in front of the closed Warehouse door from which they had presumably emerged. One soldier can be seen walking away from the entrance, and another is strolling rather casually across the front of the compound with what appears to be his rifle slung over his shoulder.<sup>670</sup> This is not consistent with the panicked reaction of the Serb soldiers described by PW-111 while the shooting incident was happening.<sup>671</sup> The closed door on the right-side of the Warehouse and the casual demeanor of these soldiers in the immediate vicinity of that door shows that the first killing incident was over by the time Borovcanin arrived at the Warehouse.

309. Two witnesses support the view that the first killing incident lasted for a relatively short period of time, as previously discussed: PW-111 and Djukanovic. For the reasons that have already been discussed at length, the better view of the evidence is that PW-111 and Djukanovic are correct, and that PW-156 is mistaken.

#### *4.4 The First Killings at Kravica Warehouse Were Unplanned and Triggered by an Escape Attempt*

310. As discussed in the previous section, there were two distinct killings events at Kravica Warehouse. The evidence supports the view that the first killing event was unplanned and, more particularly, that it was triggered by an escape attempt. The hearsay evidence of a number of different Serb witnesses;<sup>672</sup> Cuturic's burnt hands and Dragicevic's death (not to mention the

<sup>670</sup> P2047 (Trial Video), 2:56:25, 2:56:43.

<sup>671</sup> PW-111 6998:18-20 ("I noticed that they were also frightened, the soldiers. They were in a big panic as well. I noticed that they were so agitated you couldn't really tell who was going where. And all of this was going on in front.")

<sup>672</sup> This hearsay evidence is of relatively high reliability because (i) it is based on one eyewitness (Cuturic) and one person who spoke to that eyewitness immediately after the event occurred (Stupar); and (ii) the hearsay witnesses spoke to their sources immediately after the events in question. Celic P 13481:19-23 ("From what I heard, one person, somebody among the prisoners, snatched the rifle from the deceased and killed him. And then he also tried to kill the officer. However, the officer grabbed the rifle barrel and he was holding on to that barrel while the bullet was being fired from the rifle." Celic does not say precisely who told him this, but he heard it from another policeman in Konjevic Polje on the night of the 13<sup>th</sup> of July, probably from Cuturic himself.) PW-161 9363 8-10 (reporting what Borovcanin told him in the early evening on 13 July: "Well, we talked about the death of a policeman from a special unit, about a young man who was a member of the Special Police Unit, who had burned his hands as he was seizing a barrel from a Muslim man"); PW-161 9364:8-14 ("That a Muslim grabbed a rifle from a policeman and killed him, shot a burst of fire at him. So the other policeman grabbed the barrel of the rifle and burned his hand. Q. And who told you that story? A. I heard that from that young man [i.e., Cuturic] that evening.") P2853 (Borovcanin OTP Interview), p. 64 (the source of Borovcanin's information, reported by PW-161, was

injury to a Bratunac Brigade soldier); the provision of water to prisoners immediately before the killings;<sup>673</sup> the sudden and chaotic radio-call from Stupar;<sup>674</sup> the pile of dead bodies immediately in front of the closed doors to the right-hand side of the Warehouse;<sup>675</sup> and the fact that the prisoners on the left-side of the Warehouse were permitted to help those who had been injured on the right-side of the Warehouse<sup>676</sup> all provide mutually reinforcing evidence that this is what happened. The only scenario consistent with this circumstantial evidence, drawn from diverse points of view, is that the first killing event was a reaction to an escape-attempt, not the beginning of a pre-planned mass execution. The Prosecution offered no evidence to contradict this inference, despite contemptuously dismissing the testimony of Serb witnesses as "the Serb version."<sup>677</sup> Even if the Chamber were to dismiss all of the consistent testimony from Serb

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apparently Milos Stupar, although he would undoubtedly also have heard the story from Cuturic himself: "so I asked Stupar what happened. So, briefly he informed me that a military unit brought this large number of persons from Sandici to that place. So, as they were entering the ... yard one Muslim tried to grab someone's gun and as the Muslim grabbed the gun, he killed the police officer. And then Cuturic ... grabbed the barrel of the gun held by the Muslim."; 4D606 (Ljubisav Simic 92ter statement), p. 32-33 ("And the story I heard was that a policeman who was guarding those people in Oka and I don't know how they came to be there, whether they were brought or they have come on their own, that that policeman was killed and then shooting ensued.") Djukanovic's testimony is direct evidence that the shootings were not pre-planned, and broke out suddenly: Djukanovic M 11766:19-11768:19.

<sup>673</sup> PW-111 7058:8-10 ("Serb soldiers brought water"); Djukanovic M 11766:19-25.

<sup>674</sup> P2853 (Borovcanin OTP Interview), p. 63; Pepic M 13561:3-6 ("I heard our commander, Mr Oficir, calling out names and informing someone that something had happened. He said that the hairpin had happened, that something had happened, that someone had been wounded or someone had been killed. Q. And sir, when you refer to hair pin, what does that mean? A. It means that someone, in this case the officer, the commander, is informing someone, a superior officer, about the fact that someone was wounded or killed.")

<sup>675</sup> P2047 (Trial Video) 2:56:25-2:56:40.

<sup>676</sup> PW-111 6993:17-20 ("After all of that calmed down, they ordered two Muslims from the warehouse to go out to bring in their wounded soldier. They went out, they didn't stay out long, perhaps a couple of minutes, and then they came back"); PW-111 6996:21-23 ("Those two men, Muslims, who were ordered to go out and bring in their wounded, that's what they told them. They didn't stay long; they returned inside.")

<sup>677</sup> Prosecution Opening Statement, 493:9-21 ("Well, that's the Serb version; it is not the reasonable version. The reasonable version is this: The Serbs decided it was time to kill the people at the warehouse, as they had decided to kill the people at the Jadar River, the Cerska Valley, Nova Kasaba. They put buses in front of the area so that it couldn't be seen from the road so well. They stopped the traffic of the women and children. They got the last man inside the warehouse. They opened fire, and as they opened fire, a Muslim, in a last-ditch effort to save himself, came out of the crowd and took a weapon and fired it, killing a Serb soldier. One of Borovcanin's men did get killed and a Bratunac Brigade Red Beret did get wounded at Kravica. We see the medical records. So this incident with the burned hands took place, we're confident that it did, but not the way that the Serbs say it did. That -- the Serb version is not reasonable.")

witnesses, the other circumstantial evidence is more than sufficient to show that the first killing event was instigated by an escape attempt, and was not the beginning of a massacre.

311. The Prosecution's only argument for disbelieving this evidence is, in effect, its own case-theory. It argues that all of the killings mentioned in paragraph 30 of the indictment were all part of a plan, of which the Kravica killings were but one instance.<sup>678</sup> Hence, the broader pattern of killings proves that the killings at Kravica Warehouse, including this first shooting incident, were pre-planned. This argument might be persuasive in respect of the alleged executions that occurred on 14 or 15 July in the Zvornik area, but the argument is not persuasive in respect of the Kravica Warehouse killings. First, no pattern existed as of 5 pm on 13 July. The only two killing events alleged to have occurred before Kravica are at Jadar River, involving 16 victims, and Cerska, involving 150 victims. The Prosecution recently disclosed evidence indicating that the Cerska event may not have happened on 13 July, but was comprised of several smaller events over a period of days.<sup>679</sup> This so-called pattern is an insufficient basis on which to infer that the killings at Kravica Warehouse were but one instance of a larger pattern. Indeed, the Kravica Warehouse killings do not fit the pattern that subsequently emerged. The killing plan, according to Momir Nikolic, was to transport and hold the prisoners in Bratunac until an appropriate execution site was designated.<sup>680</sup> This plan was still in effect well into the evening of 13 July, with buses taking prisoners back to Bratunac.<sup>681</sup> The killing sites had apparently not yet been determined on the evening of 13 July, with Deronjic and Beara allegedly arguing about whether executions should occur in Bratunac.<sup>682</sup> The decision was taken some time that night to

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<sup>678</sup> Prosecution Opening Statement 493:10-12.

<sup>679</sup> Janc D 33663:18-33664:2 ("I know for some of the bodies -- or for some of the people who are found during this search of the terrain, that the bodies were found in Cerska grave. So from the document you showed me from the 17th when you were -- which is talking about the underage children, we have a statement from, I think, two of those kids, and one of them has named four individuals which were captured in area of Bornica [phoen] around 17 of July, and then their bodies showed up in Cerska grave. So some of them -- for some of them which were captured during these days during the search of terrain, we know where did they end up but not for all of them.")

<sup>680</sup> C1 (Momir Nikolic 92ter Statement), para. 4.

<sup>681</sup> Oric M 890:11-13; PW-113 3369:20-24; Nikolic M 32941:12-15; P1152 (Intercept between Krsmanovic and Viskovic, 13 July, 2100 hours); see section V(e).

<sup>682</sup> C1 (Momir Nikolic 92ter Statement), para. 10; Nikolic M 32941 ("Miroslav Deronjic, as far as I could hear, asked for all these prisoners to be taken away from Bratunac and that no executions take place or abuses take place in Bratunac").

execute the prisoners in the Zvornik area, to which they were all bused the next morning. The prisoners were then executed in groups in locations hidden from the eyes of passing convoys of civilians and, potentially, UNPROFOR observers. The Kravica Warehouse was a poor location for a pre-planned mass execution, right next to a major road along which UNPROFOR personnel and large numbers of civilians were still travelling. Further, unlike almost all the execution sites in Zvornik, no ligatures were found amongst the remains of those allegedly killed at the Warehouse.<sup>683</sup>

312. The killings at Kravica Warehouse were not pre-planned. The circumstantial and hearsay evidence convincingly establishes that the first shooting incident was unplanned, and probably triggered by an attempt by some prisoners to escape by seizing guns from Serb soldiers.

*4.5 At Least Some of the Initial Killings at the Kravica Warehouse Were Legally Justified on the Ground of Self-Defence*

313. An escape attempt involving prisoners seizing weapons from Serb soldiers means that at least some of the initial killings at Kravica Warehouse were likely legally justified as self-defence. This does not prove, of course, that all the first killings were so justified: Serb forces may have over-reacted to the initial incident, crossing the line at some point from killings justified by self-defence to vengeful killings. The evidence provides little assistance as to when this line was crossed. How many killings may have been justified as self-defence? One? Two? Five? A dozen?

314. The Chamber heard no direct evidence about the first killings at the Kravica Warehouse that could shed light on this question. PW-156's account is evidently incomplete or inaccurate on this question, as demonstrated by several factors: (i) PW-156's account of the duration of the initial shooting incident was incorrect, as demonstrated by the testimony of PW-111 and Oric, as well as Djukanovic; (ii) PW-156 made no mention of the initial trigger for the shootings; (iii) he described no events – whether before or after the start of the shooting – that account for the well-established death of one Serb soldier and injuries to two others; and (iv) the inaccuracies of memory or perception are understandable given that PW-156 may have been in the line of fire during the initial shootings, not to mention the extraordinarily traumatic experiences that he

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<sup>683</sup> Prosecution Adjudicated Facts 326 – 337.

subsequently suffered.<sup>684</sup> Discounting PW-156's testimony as inaccurate and incomplete, the question therefore remains: how many of the initial killings were legally justified on the grounds of self-defence?

315. The burden rests on the Prosecution in respect of all elements of its case, including the absence of lawful justification for a killing. Once the evidence establishes a *prima facie* basis to believe that some of the killings charged in the indictment may have been justified on the grounds of self-defence, the Prosecution bears the burden of proving that that justification is inapplicable. Where the question falls to be determined by circumstantial evidence, the Prosecution must show that none of the reasonably possible scenarios allow for the possibility that the killings were justified on the ground of self-defence.

316. A reasonably possible and plausible scenario, entirely consistent with the best view of the evidence, is as follows: two or three Muslim prisoners entering the right-side of the Warehouse decide to try to escape by seizing a rifle from a Serb soldier. During the scuffle, Dragicevic is killed and Cuturic burns his hands trying to wrest the rifle away from one of the prisoners. The prisoners panic and a vicious cycle ensues: prisoners, impelled by terror, rush out of the Warehouse door trying to escape or overwhelm the Serb soldiers; the Serb forces, massively outnumbered and fearing that they will be overwhelmed, respond with furious gunfire killing anyone who emerges from the entrance of the Warehouse or who is still standing outside, for example, in front of the smaller door where many bullet-marks are to be seen. The rest of the prisoners retreat as far into the Warehouse as possible to avoid the bullets. When control is restored, Serb soldiers shut the doors to the room, leaving a pile of bodies immediately in front of the Warehouse entrance. PW-156's testimony is the only evidence inconsistent with this scenario, and his testimony is contradicted by the other Muslim survivor, PW-111, whose testimony is clearly more credible.

317. The Indictment and pre-trial brief simply fail to recognize that the killings at Kravica Warehouse occurred in two phases, separated by a significant interval. The Indictment does not describe or address the very different scale and cause of these two events. The issue is simply not addressed. This extraordinary failure raises serious fair trial concerns, that may not have

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<sup>684</sup> See, section V(c).

been evident when preliminary objections were made to the Indictment. The Defence is now forced to respond to a much wider range of circumstances and possible Prosecution theories than would be the case if the Indictment had properly pleaded the material facts on which it relies. It is material that: (i) there were two killing events; (ii) separated by an interval of over 3 hours; (iii) probably by different people; (iv) initiated in different circumstances by different people.

318. The Defence therefore objects to paragraph 30.4 of the Indictment as pleaded for vagueness in relation to the evidence as presented.<sup>685</sup> The Chamber should dismiss the paragraph from its consideration to the extent that any prejudice may arise from this vague pleading. The Defence has no choice at this stage, however, but to present its arguments in response to the paragraph based on all potential interpretations that may be presented by the Prosecution. This is done without prejudice to its objection as to lack of notice.

#### *4.6 Borovcanin's Point of View*

319. All four forms of criminal responsibility alleged against Borovcanin depend on inferences about his knowledge and state of mind, combined with his alleged inaction. Setting the scene during the critical moments in front of the Warehouse on the afternoon of 13 July is crucial to understanding the range of reasonably possible inferences as to his state of knowledge.

320. The Special Police were present along the Road for most of the day on 13 July and, as previously discussed, this may or may not have included the stretch of Road running in front of the Kravica Warehouse. On balance, the evidence suggests that it is unlikely that any Special Police were stationed along the Road directly in front of the Warehouse when the prisoners were brought there.

321. The Kravica Warehouse compound consists of four large buildings, surrounded by an iron fence.<sup>686</sup> The compound can be accessed from the Road only by a driveway that runs along the eastern perimeter of the compound. After about 30 metres, this driveway turns right into a

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<sup>685</sup> Simba TJ paras. 10-40 (excluding consideration of some allegations in the Indictment where they were "defective in relation to the evidence presented at trial")

<sup>686</sup> P1575 (Video of Kravica Warehouse compound), 2:54; P2987 (interactive video).

gate.<sup>687</sup> This driveway meets the Road, based on OTP measurements and photographs, about 44 metres from the closest edge of the building where the killings occurred.<sup>688</sup> The distance between this junction and the door to the right-hand side of the Warehouse where the bodies were piled is about 99 metres.<sup>689</sup> Foliage runs along this fence in summertime. The view from the junction 50 or 100 metres away to the Warehouse appears to be substantially obscured by this foliage.<sup>690</sup>

## 5. Forms of Criminal Responsibility Alleged

### 5.1 Superior Responsibility under Article 7(3)

#### 5.1.1 Prosecution Allegations

322. The Indictment alleges that Borovcanin is

criminally responsible as Commander[] for the acts of [his] subordinates pursuant to Article 7(3) of the Statute .... The criminal acts of the subordinates of Ljubomir Borovcanin for which he is responsible are described in paragraphs 30.4, 30.4.1 [and] 43.<sup>691</sup>

Paragraph 30.4 alleges that

<sup>687</sup> Jovanovic M 24220:14-24221:1 ("If we look at this aerial photo and your markings on it, we can see that on the way from Bratunac, you turned left and then right, and that is where the entrance into the farming compound at Kravica is located; is that correct? A. Yes. Q. And let me ask you this: If you take a car and if you want to enter the compound of the Kravica farming cooperative, is this the only way to do it? Is there some other side gate through which you can take your car in? A. No, there's no such thing. This is the only way you can enter the compound by car. Q. Around the entire compound, there is a fence, isn't there? A. Yes, there is an iron fence which fences the compound off.")

<sup>688</sup> P4529 is a sketch prepared by a Prosecution investigator showing the length of the Warehouse to be 60.3 metres. The building is 11 centimetres long on OTP overhead photographs of the Warehouse (P1563) making each centimetre about 5.5 metres in reality. The edge of the building is 8 centimetres from the junction, making it about 44 metres in reality.

<sup>689</sup> The distance is 18 centimetres on P1563, making it 99 metres based on the measurements given in P4529.

<sup>690</sup> P2987 (interactive video).

<sup>691</sup> Indictment, para. 93. The wording has been excerpted as relevant to Borovcanin's superior responsibility in respect of the killings, omitting references to Pandurevic and to superior responsibility for the alleged forcible transfer.

On 13 July 1995, MUP Special Police Forces under the command and control of Ljubomir Borovcanin, including elements of the 2<sup>nd</sup> Sekovici Detachment of the RS Special Police, elements of the 1<sup>st</sup> PJP Company of the Zvornik Municipality Police and a unit of RS police officers from the Jahorina Training Facility, captured hundreds of Muslim men from Srebrenica and placed them in a large warehouse in the village of Kravica and guarded them there. In the early evening hours, VRS and/or MUP Special Police Forces under the command and control of Ljubomir Borovcanin, including elements of the 2<sup>nd</sup> Sekovici Detachment ... and others, summarily executed over 1,000 Bosnian Muslim men detained at the large warehouse in the village of Kravica. He was personally present at the warehouse when hundreds of Muslim prisoners were in the process of being summarily executed by those forces. The MUP officers and/or soldiers used automatic weapons, hand grenades, and other weaponry to kill the Bosnian Muslims inside the warehouse.

Paragraph 43 alleges in relevant part that:

on 13 July 1995, [Borovcanin] was personally present at the Kravica Warehouse when hundred of Muslim prisoners were in the process of being summarily executed by or in the presence of troops under his command and control, including members of the Skelani Platoon of the 2<sup>nd</sup> Sekovici Detachment .... He did nothing to prevent those executions and did nothing to effect first aid or any medical treatment of the remaining surviving Muslims....

323. Paragraph 30.4 and 43 both allege in the alternative that either Borovcanin's subordinates "summarily executed" prisoners or they were merely *present* when the executions happened.<sup>692</sup> Additionally, paragraph 30.4 could, if read in isolation, be construed as implying that Borovcanin had command and control over certain VRS troops: "VRS *and/or* MUP Special Police Forces under the command and control of Ljubomir Borovcanin, including elements of the 2<sup>nd</sup> Sekovici Detachment ... and others... summarily executed over 1000 men." The Defence would object to any construction of this sentence as implying that Borovcanin had command and control over VRS forces. Other sections of the Indictment make clear that only specific MUP units were under Borovcanin's command and control. Thus, paragraph 18 states: "MUP units acting under the command and control of Ljubomir Borovcanin are explicitly identified as doing so in the paragraphs below." Indeed, the Chamber required this wording in its ruling on challenges to the form of the Indictment before the beginning of the trial.<sup>693</sup> Accordingly,

<sup>692</sup> Indictment para. 43(a)(iii).

<sup>693</sup> *Popovic et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006, paras. 83-84 ("The Trial Chamber does not find these allegations sufficient to plead Ljubomir Borovcanin's effective control over these MUP troops performing the alleged acts from 12 to 17 July 1995. For harmonization purposes, the Trial Chamber orders the Prosecution to plead expressly Ljubomir Borovcanin's command and control over the respective MUP troops through the relevant time.... The Trial Chamber directs the Prosecution to clarify in the

Borovcanin is not charged with superior responsibility for anyone other than the specific MUP units identified by name in the Indictment and the Defence will object on the grounds of lack of notice to any charge that Borovcanin is criminally responsible as a superior for the acts of any VRS soldier. This is not charged in the Indictment.

324. The phrase "in the presence of" in paragraph 43 is ambiguous. The Prosecution does not distinctly indicate whether "presence" is meant to be restricted to those inside the Warehouse compound, or whether it extends to anyone who may have been on the Road in front of the compound. The Defence assumes that the term "presence" is intended to encompass both possibilities and that the conduct of subordinates for which Borovcanin is charged includes presence on the Road in front of the Warehouse.

#### **5.1.2 Overview**

325. The evidence does not show beyond a reasonable doubt that any of Borovcanin's subordinates killed anyone at the Kravica Warehouse. The evidence does not even show that any of his subordinates, except for Dragicevic and Cuturic, were inside the Warehouse compound at any time. Neither Dragicevic nor Cuturic were capable of committing crimes by the time Borovcanin arrived, one having been killed, the other injured. The subordinates who were on the road outside of the Kravica Warehouse were not committing any crime while he was there, nor is there any evidence showing that they previously or subsequently committed crimes for which Borovcanin could be held responsible as a superior based either on a failure to prevent or a failure to punish.

#### **5.1.3 Discussion**

326. The evidence concerning what happened at the Kravica Warehouse and who perpetrated the killings inside there has been extensively discussed in sections V(c) and V(d), respectively. The Prosecution has failed to prove beyond a reasonable doubt that any of

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respective paragraphs whether the MUP forces were acting under Ljubomir Borovcanin's command and control. The Trial Chamber further holds that the subordinates for whose conduct Ljubomir Borovcanin is alleged to have been responsible are sufficiently identified as MUP forces...."). The "note" to paragraph 18 appears to have emanated from this instruction from the Chamber.

Borovcanin's subordinates perpetrated any killings at the Kravica Warehouse, for the following reasons: (i) absence of any direct evidence as to the identity or unit affiliation of the killers; (ii) failure to call direct evidence that was available, thus intentionally relying on circumstantial and hearsay evidence; (iii) PW-111's testimony that the people guarding him – and who later committed the execution – at the Warehouse were different from those at Sandici Meadow; (iv) abundant evidence, direct and circumstantial, that many Army soldiers were present at the Warehouse during the shootings; (v) circumstantial evidence of Momir Nikolic's likely presence at the Warehouse at the time of the first killing incident in the afternoon and the subsequent massacre at nightfall, suggesting his involvement and supervision of events during those critical time periods; (vi) Djukanovic's testimony that only two "specials" were inside the Warehouse compound when the first shooting incident occurred, and that the only "specials" he saw after the first shooting incident were on the Road in front of the Warehouse; and (vii) the hearsay evidence concerning the involvement of Special Police in the killings is demonstrably based on erroneous speculation (Vasovic) or unnamed sources (PW-100) and should be accorded no weight at all. The totality of the evidence does more than raise a reasonable doubt: it strongly suggests that no Special Police committed killings inside the Kravica Warehouse on the afternoon or evening of 13 July, and that the crimes were, in fact, committed by elements of the Bratunac Brigade or others. Borovcanin cannot be held responsible as a superior in the absence of crimes by subordinates.

327. Assuming for the sake of argument, against all the evidence, that this is wrong, and that a subordinate did wander into the Warehouse compound, Borovcanin would still not be criminally responsible as a superior for failing to prevent the commission of crimes by subordinates during the first killing incident. Borovcanin had no advance notice whatsoever that the first shooting incident was going to take place. Not a shred of evidence suggests otherwise. The Prosecution's theory that the Kravica killings were the implementation of the overarching killing plan is speculation – and poor speculation at that. The circumstances – water being given to prisoners immediately beforehand; the specific nature of Cuturic's injury; the consistent hearsay evidence about the escape-attempt from various sources PW-111's testimony about the panicked reaction of the Serb soldiers guarding him and its limited duration; the evidence about the radio-calls from Cuturic and Stupar; and PW-111's testimony that injured Muslims were allowed to be brought to the other side of the Warehouse – all strongly suggest that the killing event was not pre-planned. Borovcanin would not have brought a journalist armed with a

video-camera, much less allowed him to film the scene, if he had any advance notice or information suggesting that killings on any scale were about to be perpetrated. Borovcanin cannot be held responsible for failing to prevent this first killing event, which was over by the time he passed the Kravica Warehouse.

328. Borovcanin stops at the junction of the Road and the driveway into the Warehouse compound. He asks Stupar what happened, and whether any Special Police were involved. Stupar says no.<sup>694</sup> Borovcanin orders Stupar to keep any Special Police on the Road, and tells him that they will shortly be removed from the area: *"I told them to remain on the road and I told them that I would ask for them to be removed from that position as soon as possible."*<sup>695</sup> He then goes to the Bratunac Clinic to speak to Cuturic, presumably in order to find out what happened. Borovcanin was not asked during the interview what he was told by Cuturic; PW-161 indicates, however, that he saw Cuturic in Bratunac soon after he was released from the clinic, and that Cuturic said *"that a Muslim grabbed a rifle from a policeman and killed him, shot a burst of fire at him. So the other policeman [Cuturic himself] grabbed the barrel of the rifle and burned his hand."*<sup>696</sup> No evidence suggests that Cuturic would have said anything different to Borovcanin.

329. That information, combined with what he already knew, would have confirmed the reasonable understanding that none of his subordinates had committed crimes in relation to the first shooting incident. The inquiries made by Borovcanin were *"reasonable and necessary"* in the circumstances in order to evaluate whether any of his subordinates had committed any crime during the first shooting incident. The inquiries were sufficient to conclude that none of his subordinates had committed any crimes during the first shooting incident.

<sup>694</sup> P2853 (Borovcanin OTP Interview), pp. 64-65 (*"The military unit that brought those Muslims there, they started shooting and then, you know, mass killings occurred. And then I asked Stupar what was the role of the police and all that. And he said that police officers did not participate in the shooting"*); p. 68 (*"And before that I talked to Stupar who was there. He there he was on the road. And I asked Stupar whether any police officers participated in that. And he said that no police officers participated in that."*)

<sup>695</sup> P2853 (Borovcanin OTP Interview), p. 73 (emphasis added).

<sup>696</sup> PW-161 9364:8-10. PW-161 testified that Cuturic, with bandaged hands, joined Borovcanin, himself and others at the Jasen restaurant: PW-161 9533:6-10 (*"A. I can't recognise him in the photo, but a lad wearing a black T-shirt, a handsome lad of medium build and height, with his hands wrapped up was sitting with us and we had been waiting for him. It says here that he was admitted at 1740 hours, and he joined us at the Jasen restaurant an hour or so later."*).

330. The situation does not change even accepting the hypothesis that the killings were ongoing when Borovcanin passes along the Road. No evidence shows that any of Borovcanin's subordinates were inside the Warehouse compound at that moment, as has been previously discussed in detail.<sup>697</sup> Borovcanin had no duty as a superior to make any inquiries into what was going on in the Warehouse unless his men were present there. Stupar told him that his men were not inside the Warehouse compound, and Borovcanin ordered him to keep it that way.<sup>698</sup> Borovcanin's reliance on Stupar's information and his expectation that his order would be carried out were reasonable in the circumstances: the compound was separated from the Road by an iron fence; Stupar was stationed at the only entrance; and Stupar was presumptively Borovcanin's most senior subordinate. Thus, even assuming that the killings were ongoing, Borovcanin took necessary and reasonable measures to ensure that none of his men would join in. The Prosecution has not proven that these measures were ineffective, or that Borovcanin's subordinates actually did subsequently join in the killing.

331. Petrovic testified that he and Borovcanin did not stop at the junction to the Kravica Warehouse compound.<sup>699</sup> This is not correct. Borovcanin did stop the vehicle and did have the conversation reported in his interview with the OTP. Petrovic has either forgotten having stopped or may have been motivated (as he displayed at various points in his testimony) by a misguided desire to separate Borovcanin from the event at Kravica Warehouse. In any case, whether they did or did not stop has no bearing on the absence of evidence showing that any of his subordinates were inside the compound. Borovcanin had no legal duty or cause to stop and investigate unless his subordinates were there at that time.

332. A separate but inter-related issue is whether Borovcanin bears superior responsibility for failing to prevent the alleged crimes of subordinates during the bloody massacre at the Kravica

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<sup>697</sup> Section V(e).

<sup>698</sup> P2853 (Borovcanin OTP Interview), p. 73 (emphasis added).

<sup>699</sup> Petrovic Z 18802:7-13 (Q. Now, we see that drive-by shot. Did you -- did the car stop? Did Mr. Borovcanin tell the car to pull over and stop or did you continue? A. I don't recall anything of the sort. The footage that you have was made while the car was moving. So there's not even any indication of -- it's a short sequence that was shot by chance. I was sitting on the right seat, and I had my camera at the ready, just as any soldier would have his rifle at the ready.); Petrovic Z 18804:3-5 (Q. Okay. A. So that's what I was able to see as we were driving past in the vehicle and, no, we did not stop.)

Warehouse that started at nightfall. Even less evidence links any of Borovcanin's subordinates to this event, as compared to the earlier event. Unlike the shootings in the late afternoon, the Prosecution adduced no evidence showing that any of Borovcanin's subordinates were anywhere near the Kravica Warehouse at nightfall. On the contrary, the evidence shows that the 2<sup>nd</sup> SD was removed from the Road sometime after the first shooting event and taken to spend the night in Konjevic Polje. Pepic testified that he and other colleagues along the Road were picked up by the Detachment bus some time after the first shooting incident had stopped and taken to spend the night in Konjevic Polje.<sup>700</sup> Celic and Pepic both put the time of their withdrawal as between 8 and 9 pm on 13 July, and neither of them mentioned the resumption of shooting as they were being picked up and bused northwards.<sup>701</sup> PW-161 also confirms that on the evening of 13 July he saw buses traveling quickly along the Road toward Konjevic Polje and was told by a municipal policeman at a checkpoint that they were carrying Special Police units that were being re-deployed.<sup>702</sup> The presence of Dragicevic and Cuturic at 5 pm, both of whom were gone within minutes, has no probative value as proof that anyone from the Special Police was inside the compound more than three hours later.

333. Celic testified that he did not see the 3<sup>rd</sup> "Skelani" Platoon of the 2<sup>nd</sup> Sekovici Detachment in Konjevic Polje on the night of 13 July. He speculates that this platoon may have gone to their home base in Skelani, implying that this was because one of their number, Dragicevic, had been killed.<sup>703</sup> Other witnesses explained that it was customary for the members

<sup>700</sup> Pepic M 13572:20-13573:3; 13600:1-5.

<sup>701</sup> Pepic M 13572:25-13573:3; Pepic M 13600:1-5; Celic P 13505:4-7.

<sup>702</sup> PW-161 9363:11-16 ("I said to him, "I heard that the vehicles who travelled from Bratunac to Konjevic Polje were the vehicles of the special unit, which drove so fast by me that I had to stop, and a policeman, a civilian policeman told me that Zvornik was about to fall and that the special unit because supposed to go there to defend Zvornik."); PW-161 9527:19-9528:6 ("Q. On your way back from Konjevic Polje and Sandici, you saw a column of vehicles by this special police. I am quoting from transcripts on Friday, and this column was moving very fast past you so that you had to stop? A. Yes. Q. A civilian policeman told you that Zvornik was about to fall, and that this special unit of the police was sent to defend Zvornik? A. Yes, but before that I asked the policeman who those men were and why they were in such a haste and then he said that the -- Zvornik was about to fall and the special police had been sent to defend Zvornik. Q. Will you agree with me that this was in the early evening hours of that day? A. Yes, as I was returning. This was at dusk.")

<sup>703</sup> Celic P 13480:20-25 ("The 3rd Skelani Platoon, I'm not sure about that unit. It is possible that they withdrew in the direction of Skelani. Later on, I heard a story that a member of the detachment from Skelani had gotten killed in that area where all these civilians were killed, and that one of the officers was wounded, that his arm was burned. So it is quite possible that they were not taken to Konjevic Polje.")

of a unit to gather in the home village of the deceased comrade to observe funeral rituals when conditions permitted.<sup>704</sup> Celic's failure to affirm the presence of the 3<sup>rd</sup> Platoon in Konjevic Polje does not prove their presence at the Warehouse. The Skelani Platoon consisted of no more than 20 to 25 men in July 1995; some or all of his unit may have been present in Konjevic Pole without Celic knowing about it, or some or all of them may have returned to Skelani for the funeral.<sup>705</sup> The Prosecution adduced no positive evidence of their presence at the Warehouse other than Miladin Jovanovic's fallacious inference that the Skelani Platoon was involved because the policeman who was killed in the late afternoon, Dragicevic, was from that unit.<sup>706</sup> Jovanovic specifically denied that he was told that the Skelani platoon was involved in this event when he was there that evening. This denial is corroborated by Perica Vasovic who testified that he and Jovan Nikolic – the ones who told Jovanovic what they saw inside the Warehouse compound that night – entered the Kravica Warehouse and saw a soldier wearing a solid black uniform, who did not identify himself.<sup>707</sup> The evidence, accordingly, does not establish that any of Borovcanin's subordinates were present during the massacre at the Kravica Warehouse on the night of 13 July.

334. Even assuming, in the absence of any evidence, that one or more of Borovcanin's subordinates somehow did manage to participate in the night-time massacre, the Prosecution has not proven that the elements for imposing superior responsibility are present. For a superior to be criminally responsible for failing to prevent a crime, he must have known or had reason to know that the crime was about to be committed, and then failed to take reasonable and necessary measures to prevent that crime. Borovcanin is not criminally responsible as a

<sup>704</sup> Neskovic D 27435:9-27439:13; Simic S 27513:20-27514:10; Dragutinovic M 12886:15-22.

<sup>705</sup> Celic P 13494:14-18 ("JUDGE AGIUS: All right. So let's clear this up. We are told, Mr. Celic, that you did mention - use the word "detachment" but the question you need to answer is how many approximately were in the platoon, in the Skelani Platoon. THE WITNESS: [Interpretation] A platoon had 20 to 25 members.")

<sup>706</sup> Jovanovic M 24233:5-8 ("I do know that these people were guarded by a group from Skelani, because the man, the soldier, who was killed was from Skelani. So, this is just a logical piece of information, that a group of soldiers from Skelani guarded those people, because this man who was killed was from Skelani.")

<sup>707</sup> Vasovic P 24252:10-24253:2 ("Q. Mr. Vasovic, do you remember that in your testimony in that case, when the prosecutor, Mr. Ipaj [phoen] asked you about this, you also stated that the soldier who stepped in front of you wore a black uniform. This is what I was able to hear from the audiotape of the proceedings. You said it was a uniform, black overall. Do you remember that? A. Yes. Q. And you were also asked questions about the defence counsel, Ozren Kajaksic [phoen], and you also told her that it was a single-colour black uniform; do you recall that? A. Yes.... Q. Did this soldier perhaps say what unit he belonged to? A. No. This was not discussed at all.")

superior because (i) he had no reason to know that a massacre was going to be committed at Kravica Warehouse at nightfall, or (ii) that any of his men would participate in that massacre; and (iii) he took reasonable and necessary preventative measures to ensure that his men would not have anything to do with guarding the prisoners at the Kravica Warehouse.

335. As far as Borovcanin would have been able to tell when he passed the Warehouse late on the afternoon of 13 July, the first shooting event at the Kravica Warehouse appeared to have been an exceptional event: a break-out attempt by Muslim prisoners. The exceptional situation had been brought under control by the time he arrived. The prisoners in the right-hand side of the Warehouse were locked in. There was no reason to think at that moment that any further killings would take place.

336. The Prosecution may assert (i) that killings were still ongoing and that Borovcanin should have inferred that they would continue and that his subordinates might join; or (ii) that Borovcanin should have been alerted to the possibility of further killings by the large number of bodies in front of the Warehouse, which could have indicated that the soldiers used force beyond what was required by self-defence. Assuming that these hypotheses are correct, Borovcanin nevertheless did take steps to prevent his men from being involved. First, he ordered Stupar to keep his men on the Road: *"I told them to remain on the road and I told them that I would ask for them to be removed from that position as soon as possible."*<sup>708</sup> Stupar was presumptively the most senior member of the Special Police on the spot; it was entirely reasonable and appropriate to delegate this responsibility to him in light of Borovcanin's immediate need to speak with Cuturic, who by then was on his way to Bratunac, and who was the only living person from the Special Police who had been present during the shooting incident.

337. Second, Borovcanin did take steps to ensure that his men were withdrawn from the area. Borovcanin had, in fact, already made that request upon hearing earlier in the afternoon that a VRS unit had appeared along the same stretch of the Road as his men. Borovcanin apparently did not like the idea of his units deployed in the same area as a VRS unit performing the same task: "I asked [Momir] Nikolic that his unit should either, because it was a military unit,

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<sup>708</sup> P2853 (Borovcanin OTP Interview), p. 73 (emphasis added).

either it would take responsibility for that area, or they should leave that area.”<sup>709</sup> Borovcanin followed up on this because, as described by Celic and Pepic, 2<sup>nd</sup> SD buses arrived along the road before nightfall and picked up Borovcanin’s men, taking them to Konjevic Polje.<sup>710</sup> These two actions – ordering Stupar to keep the Special Police away from the Warehouse, and then re-deploying his men – were reasonable and appropriate steps to ensure that his subordinates would not commit any crimes that might subsequently be committed at the Warehouse. In short, the Prosecution has not shown that Borovcanin could (i) have reasonably anticipated that crimes were subsequently going to take place at the Warehouse based on what he saw; (ii) that his own men would participate in those crimes; or (iii) in the alternative, that his orders to Stupar and for the removal of his men from the Road were inadequate steps to ensure that his men could not participate in any potential crimes that might subsequently occur there.

338. The Prosecution has also failed to show that Borovcanin failed in his duty to retrospectively punish his subordinates for crimes that they allegedly committed. The Prosecution’s failure to show that any of his subordinates did, in fact, commit any such crimes has already been discussed – and this is the primary argument relied upon by the Defence. Over and above that, however, superior responsibility also requires the Prosecution to show that Borovcanin knew or had reason to know that such crimes had been committed by his subordinates, that is: (i) what information he would have received; and (ii) how he received it. At a minimum, the Prosecution must show that Borovcanin received “sufficiently alarming”<sup>711</sup> information to require him to further investigate whether his men may have been involved.

339. The Prosecution has failed to show that Borovcanin was informed later that evening that his men were involved in any crimes at Kravica Warehouse. PW-161 testified that he told Borovcanin at around 9 pm on 13 July in Bratunac that earlier that evening he had seen a man in a green camouflage uniform inside the Warehouse compound ordering five men to lie on the

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<sup>709</sup> P2853 (Borovcanin OTP Interview), p. 47-48 (“I asked Nikolic that we leave that area and that the army take it over because Army showed up there”). See also pp. 43, 48-49, 53, 54, 65.

<sup>710</sup> Celic P 13480:10-20, 13505:4-7; Pepic M 13567:11-15, 13600:1-5.

<sup>711</sup> The “sufficiently alarming” standard has been enunciated in several Appeals Judgements: *Krnjelac* AJ, paras. 171-72; *Hadzihasanovic* AJ, para. 170, 261 (“A superior will be deemed to have had reason to know when, given the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry.”)

ground, and then shooting them in the back.<sup>712</sup> Given PW-161's description of his movements, this must have occurred very soon after the first shooting incident.<sup>713</sup> This information would certainly have been alarming; but it would not have alarmed or alerted Borovcanin to the possibility that the executioner was his own subordinate. On the contrary, PW-161 specifically informed him during the same conversation that he had seen his subordinates being transported away from the Road, as he had ordered.<sup>714</sup> The reasonable inference to have drawn from this information was that his orders had been carried out and that his men had been removed from the scene where PW-161 saw the execution of the five prisoners.

340. Information would have been circulating by word of mouth late on the evening of 13 July and, certainly, by the morning of 14 July that a massacre had taken place at Kravica Warehouse. The news of the full-scale killings was being spread by word-of-mouth by, in particular, Perica Vasovic, Jovan Nikolic, Miladin Jovanovic, and unnamed soldiers. This information would not have reasonably alerted Borovcanin to the possibility that his men were involved in the killings. Assume, for example, that Miladin Jovanovic had said to Borovcanin in Bratunac: "I heard that Special Police were involved in the massacre because a Special Police officer was killed there at around 6 p.m." Borovcanin had direct knowledge of the circumstances of Dragicevic's death that would justifiably have allowed him to dismiss this rumour as based on an erroneous inference. He knew that Cuturic was injured long before the massacre began, and that there was no inter-relationship between these two events; he knew that he had ordered Stupar to keep the Special Police away from the Warehouse; and he had information that the Special Police had left the area soon after the first shooting.

<sup>712</sup> PW-161 9362:25-9363:4 (PW-161 indicates that this conversation occurs immediately before being summoned to a meeting with Beara "after 9.00 pm, maybe even later"); PW-161 9543:21-23 ("You went there about 9.00? A. The Jasen restaurant.")

<sup>713</sup> PW-161 9360:3-18 ("When I was passing through Kravica, near the agricultural, or the farmers' cooperative building, I saw a killing. Where a man in a green camouflage uniform was taking five men with him, and he ordered them to lie on their stomachs and then he shot them in the back. Q. And where were you when you saw this happen? A. On the road, just across from the farmers' cooperative building.... Q. Okay. So you stopped your vehicle, and what else did you see after you stopped your vehicle? A. I saw the killings, and then to the right of where the killing took place I saw a pile of dead bodies.") The sequences of PW-161's movements shows that this late afternoon or very early evening.

<sup>714</sup> PW-161 9527:24-9528:6.

341. Stupar has not been shown to have possessed or passed on to Borovcanin any information that could have suggested that the Special Police were involved in the massacre at the Warehouse. Stupar's words, as reported by PW-168, appear to be referring to the first killing incident, and not the subsequent massacre. There is no evidence to suggest that Borovcanin had any subsequent contact with PW-100 so as to hear his story about alleged crimes reported to him by one of his colleagues "one or two days down the track."<sup>715</sup> By that time, Borovcanin was already in Baljkovica and had no further contact with the Deserters' unit. The Prosecution has accordingly failed to demonstrate by direct or indirect evidence that Borovcanin obtained any *post facto* information sufficiently alarming to suggest that his own men had had any role to play in the mass execution at Kravica Warehouse.

342. One last potential argument must be addressed in respect of superior responsibility. The Prosecution may attempt to argue that Borovcanin's subordinates are somehow criminally responsible merely because of their presence along the Road. The Prosecution may argue, for example, that those subordinates were "approving bystanders" who thereby aided and abetted the perpetrators, or that, by failing to intervene, they were guilty of "commission by omission". These two theories of liability will be discussed in respect of Borovcanin in the next two sections, and the potential liability of his subordinates for those two modes of responsibility will also be addressed there.

343. In conclusion, the Prosecution has failed to show that Borovcanin bears superior responsibility for either the first shooting event or the subsequent massacre. The primary and most obvious reason is that none of Borovcanin's subordinates participated in either event. Even assuming the contrary, however, the conditions for imposing superior responsibility have not been proven beyond a reasonable doubt. Borovcanin could not have reasonably predicted that the first shooting incident or the subsequent massacre would take place, and he took reasonable measures to ensure that his men had no involvement at the Kravica Warehouse. This analysis is not substantially changed on the assumption that the killings were ongoing when he passed by the Warehouse: none of his men was in the compound when he passed along the Road and he took reasonable steps to ensure that his men stayed away from the area.

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<sup>715</sup> PW-100 14835:5.

## 5.2 Aiding and Abetting and Instigation

### 5.2.1 Prosecution Allegations

344. The Indictment alleges that Borovcanin's presence combined with his failure to intercede at the Kravica Warehouse "instigated, assisted and aided and abetted the physical perpetrators of the killings, that his presence served as encouragement and incitement to the physical perpetrators of the Kravica executions who continued to kill prisoners during and after Ljubomir Borovcanin's presence at the site of the executions."<sup>716</sup>

345. The paragraph articulates the well-established form of aiding and abetting liability known as "tacit approval and encouragement" through presence at the scene of a crime.<sup>717</sup> ICT jurisprudence on this form of liability was helpfully summarized in *Mpambara*:

Such presence could "bestow[] legitimacy on, or provide[] encouragement to, the actual perpetrator", particularly when the accused is in a position of some authority over the attacker. Liability is not automatic, even for a person of high office, and must be proven by showing that the accused's inaction had an encouraging or approving effect on the perpetrators; that the effect was substantial; and that the accused knew of this effect and of the perpetrator's criminal intention, albeit without necessarily sharing the perpetrators' criminal intent. Of course, by choosing to be present, the accused is taking a positive step which may contribute to the crime. Properly understood, criminal responsibility is derived not from the omission alone, but from the omission combined with the choice to be present.<sup>718</sup>

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<sup>716</sup> Indictment para. 92(a).

<sup>717</sup> *Oric* AJ, para. 42 ("the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement"); *Kayishema and Ruzindana* AJ, para. 201 (holding that an accused may "incur individual responsibility provided he is aware of the possible effect of his presence (albeit passive) on the commission of the crime. In the case at bar, the Trial Chamber held that the Accused's failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority"); *Aleksovski* TJ, para. 87 ("By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting under Article 7(1) in the physical and mental abuse which detainees were subjected to.")

<sup>718</sup> *Mpambara* TJ, para. 22. See also: *Bisengimana* TJ, para. 34; *Blaskic* TJ, para. 284 ("In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commandant, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime"); *Ndindabahizi* TJ, para. 457 ("It is not the position of authority itself that is important, but rather the encouraging effect that a person holding the office may lend to events"); *Semanza*, Judgement (TC), para. 386 ("Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances"); *Blaskic* TJ, para. 284.

As described by the *Limaj* Trial Chamber:

While each case turns on its own facts, mere presence at the scene of a crime will not usually constitute aiding or abetting. However, where the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, that may be sufficient. In a particular case encouragement may be established by an evident sympathetic or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense.<sup>719</sup>

This form of aiding and abetting requires that the presence have a causative impact on the perpetrator, and that the causative impact be substantial.<sup>720</sup>

346. Instigation has already been defined as prompting another person to commit a crime, where that prompting substantially contributes to that person committing the crime.<sup>721</sup> The Prosecution has not alleged that Borovcanin engaged in verbal or non-verbal communication with anyone encouraging them to commit a crime. The Prosecution relies on the same material facts of “tacit encouragement” to support its claim of instigation.

347. The Prosecution does not allege, and has adduced no evidence suggesting, that Borovcanin:

- Ordered anyone to commit any crimes at Kravica Warehouse;
- Entered the Kravica Warehouse compound at any time;
- Engaged in any positive action or communication, verbal or non-verbal, to encourage the commission of any crimes at Kravica Warehouse.

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<sup>719</sup> *Limaj* TJ, para. 517.

<sup>720</sup> The Appeals Chamber in *Ndindabahizi* discussed at length a trial chamber’s finding of aiding and abetting by verbal encouragement. In that discussion, the Appeals Chamber ultimately rejected the trial chamber’s findings of aiding and abetting, in part, because “people were killed at the roadblock even before the Appellant’s visit, that is, without his contribution” (para. 116). While not determinative, this reasoning shows that the Appeals Chamber considers it necessary to closely scrutinize the actual causative impact of an accused’s actions on the principal perpetrators.

<sup>721</sup> *Ndindabahizi* AJ, para. 117 (“Instigating means prompting another person to commit an offence”); *Nahimana et al.* AJ, para. 480 (“it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime”).

The allegation, rather, is that Borovcanin encouraged the crimes by his mere presence, combined with inaction.

348. “Willful failure to discharge his legal duty”<sup>722</sup> and “aiding and abetting by omission”<sup>723</sup> are distinct forms of potential liability that will be discussed in the next section. This section addresses only the allegation that Borovcanin is guilty of aiding and abetting and/or instigating by tacitly encouraging the crimes of the perpetrators by his presence combined with inaction.

### 5.2.2 Overview

349. Borovcanin relies primarily on the factual account described in previous sections to deny that any crimes were ongoing at the moment of his passage along the Road in front of the Warehouse. If any crimes were being committed at that moment, the evidence does not show that any of Borovcanin’s subordinates participated or were even inside the compound by the time he passed by on the Road. Even less evidence connects Borovcanin’s subordinates with the subsequent massacre that night. Those arguments will not be repeated here, although they are equally applicable to this allegation of aiding and abetting and instigation.

350. The charge of aiding and abetting, and instigation, are also unsubstantiated because the Prosecution has made no showing that Borovcanin’s presence had a substantial effect on the

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<sup>722</sup> Indictment, para. 92(b); *Ntagerura* AJ, para. 338 (“In the view of the Appeals Chamber, criminal responsibility for an omission, which leads to a conviction as the principal perpetrator of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime. In the Notice of Appeal, the Prosecution’s arguments are exclusively related to the issue of criminal responsibility for an omission. The issue of Bagambiki’s responsibility for aiding and abetting the crimes by his tacit approval is raised only in the Appeal Brief, without the Prosecution having first sought leave to vary its grounds of appeal. Accordingly, the Appeals Chamber declines to address this issue further.”)

<sup>723</sup> *Oric* AJ, paras 42-43 (distinguishing aiding and abetting by tacit approval and aiding and abetting by omission); *Simic* AJ, para. 273 (“An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission. In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement”); *Brdjanin* AJ, para. 273 (“This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission”); *Mrksic* AJ, para. 146, fn. 520 (“The Appeals Chamber would like to emphasize for the sake of clarity that the Blaskic Appeals Chamber did not convict Tihomir Blaskic for aiding and abetting by omission the inhuman treatment of detainees.”)

perpetration of any crime. No one inside the compound knew that Borovcanin was there. The only Special Policeman who had any idea he was there was Stupar, whom he met at the junction of the driveway into the compound. Rather than encouraging him tacitly or otherwise, Borovcanin actively charged him with ensuring that none of his men entered the compound. The Army soldiers inside the compound would not have been substantially influenced even if they had known that Borovcanin was there. He was not their superior. He was not even part of the Army.

### 5.2.3 Discussion

351. Previous caselaw has affirmed that presence at the scene of the crime is a necessary, but not sufficient, condition for imposing liability for tacit encouragement:

Criminal responsibility as an “approving spectator” does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.<sup>724</sup>

The presence *per se* is not the essential ingredient; what is required is that the presence sends a signal of approval that has a substantial effect on the perpetrator in favour of committing the crime. A condition of liability is that the perpetrator be aware of the approval,<sup>725</sup> and that it have a significant encouraging effect.

352. The Prosecution has not shown that anyone in the compound perceived Borovcanin’s presence along the Road. Stupar is the only one he saw as he passed by. Rather than encouraging him to participate in any crime, he specifically instructed him to ensure that no Special Police entered the Warehouse and arranged for their removal. No evidence has been

<sup>724</sup> *Semanza* TJ, para. 386. See also *Muvunyi* AJ, para. 80 (“In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused’s conduct amounted to official sanction of the crime and thus substantially contributed to it”); *Oric* AJ, para. 42 (“the Appeals Chamber notes that in cases where this theory has been applied, the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement”); *Simic* AJ, para. 273; *Bagilishema* TJ, paras. 34, 36; *Mpambara* TJ, para. 23; *Bagosora*, 98bis decision, para. 26 (allowing charges against the accused for aiding and abetting to proceed on the basis that at least one perpetrator knew the accused was nearby).

<sup>725</sup> *Brdjanin* AJ, para. 277 (“It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.”)

heard suggesting that anyone else saw him there. He stopped, in fact, about 100 metres away from the entrance to the right-side of the Warehouse, with the line of sight probably obstructed by summer foliage.<sup>726</sup> The Prosecution has never suggested that the soldier on the Petrovic video gesturing to the camera was signaling to Borovcanin personally. His gesture was likely for the benefit of the camera.<sup>727</sup> The allegation of “tacit encouragement” fails for lack of proof that any perpetrator perceived Borovcanin’s presence.

353. Even assuming that someone did know Borovcanin was there, no showing has been made who that might have been, or whether that person would have felt that their criminal conduct was legitimized or encouraged by Borovcanin’s presence. The nature of the required effect was described by the *Krnojelac* Trial Chamber: “Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender”.<sup>728</sup>

354. Borovcanin was not an Army officer. He was a member of the MUP, with no capacity or authority to issue orders to even the lowliest soldiers. There is no evidence that any of the soldiers in the Warehouse compound would have known who Borovcanin was even if they had seen him. Nor could his brief presence have been understood as “tacit approval”. Borovcanin did not remain there watching, with his arms folded. He left quickly, heading to Bratunac to speak to his one subordinate who had seen what happened. This does not come close to the types of situation that have been recognized in previous cases where accused persons possessed significant authority over the perpetrators and demonstrated by consistent inaction that they approved the crimes that were being committed.<sup>729</sup> Further, many cases have remarked that the inaction is usually intertwined with a series of previous actions that,

<sup>726</sup> P2987 (interactive video of Kravica Warehouse) shows that the junction of the Road and the driveway to the Warehouse compound, where Borovcanin stopped, is not visible from the front of the Warehouse with summer foliage.

<sup>727</sup> P2047 (Trial Video) 2:56:45.

<sup>728</sup> *Krnojelac* TJ, para. 89 (emphasis added).

<sup>729</sup> *Aleksovski* TJ para. 87 (superior guilty of “tacit encouragement” by being present during two days of strip searches conducted by his subordinates); *Krnojelac* TJ, para. 171 (finding prison warden guilty of aiding and abetting for failing over a period of months to improve conditions knowing that the prisoners were being mistreated by guards.)

together, evince tacit approval.<sup>730</sup> Borovcanin took no prior actions that could translate his brief stop in front of the Warehouse into an indication of tacit approval for any crimes that may have been committed there.

355. The Prosecution has not proven that Borovcanin's presence combined with inaction had any effect on the commission of crimes, much less was a "substantial contribution."<sup>731</sup> There is no indication that Borovcanin's presence contributed significantly to the alleged continued commission of crimes, or to the commission of crimes at a later time that night. The notion that someone has substantially contributed to a crime by failing to prevent it is an abuse of language and common sense. That reasoning only applies where the person who fails to take action has taken a series of positive actions in the past that have encouraged the crime, or made it likely.<sup>732</sup> If the "substantial contribution" standard is not given meaning, then individuals could easily find themselves subject to a general duty to prevent the crimes of others, or else face criminal punishment based on the "tacit encouragement" theory. Several cases have underlined that even a superior is not automatically liable for inaction in the face of subordinates' criminal conduct. Indeed, no case before the ICTY or ICTR has ever found someone guilty of aiding and abetting by way of tacit encouragement unless that person exercised military or political authority over the perpetrator that either constituted, or was very similar to, a relationship of superior and subordinate. No such relationship has been shown to have existed between Borovcanin and anyone present committing crimes at the Kravica Warehouse.

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<sup>730</sup> *Muvunyi AJ*, para. 80 ("it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused's conduct amounted to official sanction of the crime and thus substantially contributed to it.") Recently, the ICJ commented that "complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators." *Bosnia v. Serbia*, para. 432.

<sup>731</sup> *Muvunyi AJ*, para. 80.

<sup>732</sup> *Simic AJ*, para. 273 ("This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission. In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement. The Trial Chamber in *Kayishema* and *Ruzindana* held that 'individual responsibility pursuant to Article 6(1) [that is, individual criminal responsibility under 7(1) of the Tribunal's Statute] is based, in this instance, not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.' In such cases the combination of a position of authority and physical presence on the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.")

356. The Prosecution's charge of instigation fails for the same reasons. Inaction cannot be instigation absent circumstances that distinctly prove that the inaction had a "prompting" effect which, in turn, substantially contributed to the crime. Failure to prevent cannot be equated with "prompting."

*5.3 Intentionally Failing to Protect Prisoners in One's Custody ("Blaskic Omission Liability")*

**5.3.1 Prosecution Allegations**

357. The Indictment alleges that Borovcanin's

presence at or near the Kravica Warehouse ... together with his failure to intercede in order to protect prisoners there ... (b) constituted a willful failure to discharge his legal duty, resulting in liability under Article 7(1) as an omission, in that Ljubomir Borovcanin had custody and/or control over all the over 1,000 prisoners held in the Kravica Warehouse on the afternoon/evening of 13 July. He had a legal duty to protect those prisoners from his own troops and others, including at least one member one member of the Bratunac Brigade Red Berets. Despite his ability to do so, Ljubomir Borovcanin failed to protect all the prisoners within his control who were held at the Kravica Warehouse.<sup>733</sup>

358. The Pre-trial brief further specifies that Borovcanin's custody or control of prisoners arises from the fact that his units are said to have been "controlling the area" around the Warehouse: "In controlling the area, he had the power to take measures to protect the approximately 1000 Muslim prisoners held at the warehouse. He had a duty to protect from harm the Bosnian Muslim prisoners detained inside the warehouse, and had the power to tale measures to do so."<sup>734</sup>

359. The criminal participation alleged in the Indictment, as previously discussed, corresponds precisely to the form of liability defined in the *Blaskic* Appeals Judgement, also known (and properly identified in the Prosecution pre-trial brief) as "commission by omission."<sup>735</sup>

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<sup>733</sup> Indictment, para. 92.

<sup>734</sup> Prosecution Pre-trial Brief, para. 214 ("In controlling the area, he had the power to take measures to protect the approximately 1000 Muslims (sic) prisoners held at the warehouse.")

<sup>735</sup> Prosecution Pre-trial Brief, para. 212.

### 5.3.2 Overview

360. The Prosecution has failed to show that any prisoners were in the custody of Borovcanin's units at the time that any potential crimes were committed against them. The prisoners at the Kravica Warehouse were in the custody of the Bratunac Brigade, in particular under the active supervision of the duly mandated Security Officer, Momir Nikolic. The presence of some of Borovcanin's subordinates nearby during the first killing event at the Warehouse does not mean that the prisoners were in their custody or control. In the absence of such custody, the duty to act recognized in *Blaskic* does not arise.

361. Even assuming against the evidence, common sense, and logic that the prisoners were in the custody of Borovcanin's subordinates, the Defence reiterates the arguments above that the Prosecution has not shown beyond a reasonable doubt that Borovcanin or any of his subordinates witnessed any crimes taking place at the Kravica Warehouse. The initial killings, based on information given to Borovcanin at the time, were potentially justified on the grounds of self-defence. The Prosecution, further, has not shown that any killings were ongoing when Borovcanin passed by the Warehouse, or that any of his subordinates witnessed the massacre that occurred later that evening. Hence, the Prosecution has not proven the factual predicate of the charges beyond a reasonable doubt.

362. The Defence reserves the right to object to any Prosecution attempt to inappropriately transform the allegations against Borovcanin from "commission by omission" to "aiding and abetting by omission." The Indictment unambiguously charges Borovcanin with "willful failure to discharge his legal duty", thus requiring an intentional non-fulfillment of a legally imposed duty. This is a residual argument because no positive duty to act arises in the absence of custody of the prisoners, regardless of whether liability is characterized as "commission by omission" or "aiding and abetting by omission." As the Prosecution has failed to establish that Borovcanin's units had custody of the prisoners, neither form of liability is satisfied.

### 5.3.3 Discussion

363. *Blaskic* omission liability, regardless of how its precise elements have been interpreted, always requires that the prisoners be in the custody of the person who is obligated to protect

them.<sup>736</sup> Neither Borovcanin nor any of his men had “custody and/or control over all the over 1,000 prisoners held in the Kravica Warehouse on the afternoon/evening of 13 July.” The factual predicate for this allegation is, therefore, lacking.

364. The Prosecution nowhere defines “custody and/or control” in its pleadings. The definition can be inferred from the language used in *Mrksic* and *Blaskic*. In *Mrksic*, the Security Officer of a particular unit was held to have custody over the prisoners of war whose evacuation and detention he was supervising,<sup>737</sup> although it also carefully examined whether the limitations on his authority might circumscribe the scope of that duty.<sup>738</sup> The prisoners to whom Blaskic owed a duty were detained by his subordinates; 247 of them were used as human shields near his headquarters, apparently with his knowledge.<sup>739</sup> These cases apply a non-technical definition of “custody”, which according to the Oxford English Dictionary is “The keeping of the officers of justice (for some presumed offence against the law); confinement, imprisonment, durance.”

365. The evidence concerning who had custody of the Muslim prisoners at various times on the afternoon of 13 July has already been analyzed in detail. Borovcanin’s units did take prisoners into custody where they surrendered along the Road, and did participate in guarding them at the Sandici Meadow for at least some period. At some point during the afternoon, the

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<sup>736</sup> The Defence maintains that *Mrksic* applied a form of omission liability (aiding and abetting) that is different from *Blaskic* omission liability (commission by omission). Regardless of which form of liability is involved, however, custody of the prisoner is a prerequisite for the duty to act: “The Appeals Chamber thus finds that Geneva Convention III invests all agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of their position as agents of the Detaining Power.... The Appeals Chamber finds that all state agents who find themselves with the custody of prisoners of war owe them a duty of protection regardless of whether the investment of responsibility was made through explicit delegation such as through legislative enactment or a superior order, or as a result of the state agent finding himself with de facto custody over prisoners of war such as where a prisoner of war surrenders to that agent.” (*Mrksic* AJ, para. 73). *Blaskic* AJ, para. 663 (“a legal duty is imposed, *inter alia* as a commander, to care for the persons *under the control of one’s subordinates*”)(emphasis added).

<sup>737</sup> *Mrksic* AJ, para. 89 (“Hence, the Trial Chamber further found that Slijivancanin was exercising the power and authority conferred on him by Mrksic to conduct the evacuation of the hospital and as such he was exercising de jure authority with respect to the relevant JNA military police forces of OG South.”).

<sup>738</sup> *Mrksic* AJ, para. 90 (“In light of the foregoing, it is clear that given the limitations on Slijivancanin’s authority over the military police of the 80 mtbr of the JNA, his ability to act in order to fulfill his continuing duty to protect the prisoners of war pursuant to the law and customs of war might have been limited as well.”)

<sup>739</sup> *Blaskic* AJ, paras. 665-666.

prisoners were escorted under guard from the Meadow to the Warehouse.<sup>740</sup> The question of significance is who was guarding the prisoners at the Kravica Warehouse when the first shooting incident occurred late on the afternoon of 13 July, and subsequently.

366. The Prosecution did not call direct evidence to establish which unit or units were performing that function. The direct evidence does show that two members of the Special Police were present inside the Warehouse compound when the shooting began late on the afternoon of 13 July. No evidence shows that any other members of the Special Police were there; on the contrary, Djukanovic testified that no "specials" were inside the compound immediately after the shooting. Furthermore, PW-111 affirmed that the guards at the Warehouse were different from the ones who had been guarding them at the Sandici Meadow. The evidence credibly shows, on the other hand, that at least eight Bratunac Brigade soldiers were present inside the Kravica Warehouse compound at the time of the first shooting incident.<sup>741</sup> And oddly, the Prosecution thought that the suggestion that Milan Lukic's men were involved<sup>742</sup> sufficiently credible to mention in its Opening Statement, but then called no evidence supporting its assertion that "on the 13th of July the men from the Visegrad Brigade's bus had broken down and hadn't made it yet."<sup>743</sup>

367. The broader context of statutory responsibilities and activities throughout the afternoon of 13 July is probative of who was doing the guarding at Kravica Warehouse. The Security Officer of the Bratunac Brigade, Momir Nikolic, was present along the Road most of the afternoon of 13 July, moving back and forth between Konjevic Polje and Sandici Meadow, the two main provisional detention sites for prisoners. The Security Organ of the Bratunac Brigade, working in conjunction with the military police, had responsibility pursuant to VRS regulation to secure prisoners within its area of responsibility. The Bratunac Brigade area of responsibility included the Road, Sandici Meadow and the Kravica Warehouse.<sup>744</sup> The implication that Momir Nikolic

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<sup>740</sup> Section V(c).

<sup>741</sup> Section V(d).

<sup>742</sup> P2853 (Borovcanin OTP Interview) p. 43, 47, 48, 54 (in the area of Sandici Meadow), 64-65 (inside the Kravica Warehouse compound).

<sup>743</sup> Prosecution Opening Statement 492:14-15.

<sup>744</sup> Section V(d).

was active along the Road to discharge that responsibility is supported by the direct evidence that he was also calling prisoners down from the woods and coordinating the movement of prisoners from the assembly points along the Road back to detention facilities in Bratunac.<sup>745</sup> This was all consistent with Nikolic's and the military police's duty, according to Richard Butler, to take custody of prisoners from frontline combat units "at the very earliest opportunity."<sup>746</sup>

368. Momir Nikolic is the only person who combined local knowledge and the requisite authority to designate Kravica Warehouse as a detention facility. This combination, along with the evidence of where he was and what he was doing on 13 July, strongly suggests that he was the one who decided upon and supervised the movement of prisoners from Sandici Meadow to the Kravica Warehouse. It is also likely, as has been previously discussed, that he used Bratunac Brigade soldiers to this end.<sup>747</sup> The evidence does not show that any Special Police or other policemen subordinated to Borovcanin participated in the escort of prisoners from Sandici Meadow, much less that any unit was substantially involved in performing that task.

369. The totality of the evidence thus suggests that the Bratunac Brigade or other military forces, acting on the instructions of Momir Nikolic, assumed physical control and custody of the Muslim prisoners at around the time they were escorted from Sandici Meadow to Kravica Warehouse, and that they continued to exercise that custody and control at the Kravica Warehouse itself. To summarize, the combination of evidence includes:

- Momir Nikolic's presence along the Road most of the afternoon of 13 July;
- Momir Nikolic's statutory responsibility in respect of prisoners of war within his Brigade's zone of responsibility;
- Momir Nikolic's direct involvement in coordinating the transport of prisoners from the provisional detention sites to secure facilities in Bratunac pursuant to Mladic's instructions;

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<sup>745</sup> Section V(d).

<sup>746</sup> Butler 19637:17-22 ("according to the JNA regulations and the VRS instructions pertaining to those, the general procedure was that at the very earliest opportunity, these prisoners were to be turned over to the military police to ensure that they could be properly safeguarded and handled through the battlefield to the point where they were turned over to the individuals responsible for their -- for their detention on a longer period of level.")

<sup>747</sup> Section V(d).

- Momir Nikolic's local knowledge, which made him the person most likely to designate the Kravica Warehouse as a detention facility;
- Momir Nikolic's authority and knowledge to order that prisoners be taken somewhere other than the facilities in Bratunac;
- the absence of evidence that any subordinated MUP policemen participated in the escort of prisoners from the Sandici Meadow to Kravica Warehouse;
- the positive evidence that the guards at the Kravica Warehouse were not the same as the guards at Sandici Meadow (PW-111);
- the positive evidence that only two Special Police were inside the Kravica Warehouse compound when the first shooting broke out (Djukanovic);
- the positive evidence that at least eight members of the Bratunac Brigade, including squad commanders and possibly Momir Nikolic himself, were present at Kravica Warehouse when the first shooting incident occurred, strongly suggesting that far more Bratunac Brigade soldiers were present at that time;
- the specific mandate and combat task of the subordinated police forces to secure the Road and fight the column, which would have implied responsibility only to provisionally detain prisoners at the point of surrender and then hand them over to the competent Security Organ at the earliest reasonable opportunity;
- the departure of the subordinated MUP forces from the area while the prisoners were still in detention at the Kravica Warehouse, strongly suggesting that other units were exercising custody and control over the prisoners there;
- the direct evidence that subordinated police units were not present in the Warehouse compound after the first shooting incident.

370. The Prosecution offers a strange definition of "custody and/or control" in its pre-trial brief, which is not found or implied in the Indictment. The Prosecution seems to argue that Borovcanin had control over the prisoners at Kravica Warehouse because: "In controlling the area, he had the power to take measures to protect the approximately 1000 Muslim prisoners held at the warehouse."<sup>748</sup> The argument appears to be that because Borovcanin's forces "controlled the area" near the area where the prisoners were held, it follows that they had custody or control over the prisoners.

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<sup>748</sup> Prosecution Pre-trial Brief, para. 214.

371. The definition of “custody” employed by the Prosecution is unprecedented, and deviates from common understandings of the meaning of the word. The idea that the presence of Borovcanin’s policemen in the vicinity of the prisoners translates into their “custody or control” over them is nonsensical, particularly in the circumstances of this case. Borovcanin’s forces were temporarily present in the area for a defined purpose: to control the road and fight the ABiH column. This was a combat task *vis à vis* the ABiH. The subordinated MUP units were not tasked to control all activities in the area. On the contrary, this area fell within the zone of responsibility of the Bratunac Brigade. The activities of Momir Nikolic and Bratunac Brigade soldiers in respect of the prisoners shows that the normal functions of the Brigade within that area of responsibility were being fully exercised. The idea that Borovcanin’s forces should be deemed to have custody or control over any prisoners held in the area, notwithstanding the fact that the prisoners were actually in someone else’s custody and control of another unit, is an absurdity. It would mean that that all military units operating in an area have joint custody of all prisoners held in that area, regardless of the unit holding them. Commanders would be placed in the impossible position of having obligations under the Geneva Conventions for prisoners in the custody of other units, but without any authority or wherewithal to ensure that those obligations were discharged. In Iraq or Afghanistan, for example, combat units in the area of a prison would be deemed to have “custody and/or control” over the prisoners in the prison located near the area of their deployment, even if a specialized security unit was specifically tasked with running the prison. This approach is not consistent with basic principles of international humanitarian law, and would effectively destroy the concept of unity of command and its corollary, command responsibility.

372. The Prosecution definition of “custody” may not really be about custody at all. Rather, it is a poorly-disguised attempt to define an unprecedented and sweeping positive duty to act. In effect, the Prosecution seems to be arguing that Borovcanin had a positive duty of action based purely on his alleged capacity to intervene. Thus, his alleged ability to intervene to prevent crimes committed by non-subordinates is asserted to be a sufficient condition for imposing criminal liability.

373. This approach is unprecedented in the annals of international criminal law. No such wholesale duty of action has ever been recognized, and would run directly contrary to the

careful and cautious approach to positive duties of action in ICT jurisprudence. In *Blaskic*, the Appeals Chamber affirmed that “criminal responsibility generally requires the commission of a positive act.”<sup>749</sup> One exception is superior responsibility under Article 7(3) of the Statute, which imposes a positive duty on commanders to act to prevent crimes committed by their subordinates under certain circumstances.<sup>750</sup> The duty thus arises from the special relationship of control between the perpetrator and the commander. A second exception was defined in *Blaskic*, derived directly from specific obligations in the Geneva Conventions:

There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one’s subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.<sup>751</sup>

This exception is anchored on the specific relationship of custodianship between the commander and the victim, requiring that the former protect the latter.

374. The Appeals Chamber subsequently set out a four-part test for the imposition of this form of liability, citing a Trial Chamber judgement without disapproval:

(a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.<sup>752</sup>

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<sup>749</sup> *Blaskic* AJ, para. 663.

<sup>750</sup> *Blaskic* AJ, para. 663 (a positive action “is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility.”)

<sup>751</sup> *Blaskic* AJ, para. 663.

<sup>752</sup> *Ntagerura* AJ, para. 333. The Appeals Chamber has never directly decided that whether a positive duty to act can arise in international criminal law on the basis of (i) a domestic criminal obligation; or (ii) a non-criminal obligation, whether domestic or international. The Defence strongly asserts that any positive duty to act giving rise to criminal responsibility must be based on a duty arising under international criminal law. No Appeals Chamber judgement upholding a conviction on this basis has even been based on anything other than an obligation arising under the Geneva Conventions: *Mrksic* AJ, paras. 150-151 (finding that Slijivancanin’s duty to protect prisoners within his custody was derived directly from obligations arising under Article 13 of Geneva Convention III); *Blaskic*, para. 663, fn. 1385 (finding *Blaskic*’s duty to protect prisoners within his custody was derived from various provisions of Geneva Conventions III and IV, and Additional Protocol I).

The only “duty to act mandated by a rule of criminal law” that has ever been recognized in an ICT judgement is the obligation, recognized in *Blaskic* and *Mrksic*, to protect and safeguard prisoners in one’s custody from the criminal acts of third parties.<sup>753</sup> The *Tadic* Appeals Chamber expressed the exceptional nature of the imposition of positive duties of action in criminal law:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).<sup>754</sup>

This statement should not be misunderstood as limiting a court’s ability to examine the full range of accused’s conduct to determine whether the *mens rea* and *actus reus* of particular forms of liability have been proven. Specific conduct can relatively easily be characterized as an action or omission based purely on linguistic formulation. Some recent judgements have, thus, gone out of their way to emphasize that omissions can also be evaluated as part of the analysis of the evidence to determine whether an accused committed a crime. These two currents of thought are in no way incompatible, and should not be conflated: on the one hand, the full range of an accused’s conduct is relevant to determining whether he or she actually “committed” a crime; on the other, the imposition of positive duties to act in international criminal law is exceptional.<sup>755</sup>

375. The Prosecution has simply not identified the basis for establishing a sweeping new exception to the principle that criminal law is about prohibiting harmful conduct, not legislating

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<sup>753</sup> *Blaskic* AJ, para. 663; *Mrksic* AJ, paras. 150-151. In *Ntagerura*, the Trial Chamber rejected an alleged duty to act based on domestic law: “any omission of this legal duty under Rwandan law, even if proven, does not result in criminal liability under Article 6(1) of the Statute.” *Ntagerura* TJ, para. 660. The Appeals Chamber did not disturb this finding, albeit without entirely ruling out whether domestic law could ever give rise to positive duty to act, failure of which would give rise to criminal liability in international criminal law. *Ntagerura* AJ, para. 335.

<sup>754</sup> *Tadic* AJ, para. 186.

<sup>755</sup> *Mpambara* TJ, paras. 21-27 (defining three distinct uses to which evidence of “omissions” could be put to determine criminal liability.) The ICJ recently cautioned against confusing omission and commission when considering complicity: *Bosnia v. Serbia*, para. 432. The *Mrksic* Appeals Chamber (in discussing a form of liability that has not been pleaded in this case) recently implied that such a duty could arise from Article 21 of the SFRY Regulations. The translation and interpretation of this provision may not be correct. The ICRC’s view of this provision is that it simply gives rise to regular superior responsibility. ICRC Commentary, p. 3745. In any event, this provision applies only to superior officers within the VRS, and could not be applied to a subordinated MUP commander who (a) did not have a rank; (b) had no command authority whatsoever in respect of VRS soldiers.

broad and open-ended duties of intervention. The Prosecution appears to be alleging in the pre-trial brief that the mere fact that Borovcanin has units in the area, even if they do not have actual custody of the prisoners, means that he has a duty to use those forces to prevent the commission of a crime by third parties against the prisoners.

376. The Chamber should reject this argument. First, no such broad duty has ever been recognized in international criminal law. Even the most broad understanding of "aiding and abetting by omission" recognized in *Mrksic* (which has not been pleaded, as such, in this case) required that the accused have custody over the victims.<sup>756</sup> Borovcanin had no such custody. Second, the Prosecution has not pleaded this supposed duty properly. Such an important allegation must be included in the Indictment and cannot be inserted into the pre-trial brief alone. The allegation is so vaguely formulated that the Defence had no realistic opportunity to defend against it. What is the content of the duty? Does Borovcanin have a duty of inquiry similar to that imposed under Article 7(3)? Is Borovcanin supposed to call his nearby forces away from their tasks and take the VRS soldiers into custody at gunpoint? Was he supposed to go into the compound and ask them nicely what was going on? The Defence even now has little idea of the Prosecution's actual position, and is largely speculating as to the position that might be taken.

377. Third, failure to intervene in a crime cannot be equated with commission of a crime. Some countries do impose statutory obligations on citizens to intervene pursuant to "Good Samaritan" statutes if they see a crime being committed. A bystander's failure to fulfill that statutory duty makes them guilty of breaching the statute, not guilty of committing the crime. Most national systems impose very low sentences for breaches of these statutes. A person does not become an accomplice, much less a co-perpetrator, because they fail to intervene unless there is a specific relationship between an accused and the perpetrator.

378. The Prosecution has cited no basis known to international criminal law remotely equivalent to a Good Samaritan statute as part of its pleadings. Charges of which an accused

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<sup>756</sup> *Mrksic* AJ, paras. 150-151.

does not have fair notice cannot be a basis of conviction.<sup>757</sup> At a minimum, the Prosecution was obliged in its pleading to identify the nature and source of the legal duty allegedly incumbent upon the accused.<sup>758</sup> No such indication has been offered in the pleadings. More seriously, the Prosecution has not shown that failure to prevent the crime (even assuming that such a duty exists) makes Borovcanin guilty of the crime.

379. The factual basis for this alleged form of responsibility is also lacking, for three reasons. The first factual deficiency is that Borovcanin was not necessarily witnessing a crime as he passed by along the Road in front of the Warehouse on 13 July. The circumstantial evidence previously discussed shows that some or all of the killings during the first shooting incident were probably legally justified as self-defence. Borovcanin was told at the time that the killings had been precipitated by an escape attempt.

380. Second, a very real and reasonable possibility exists that the killings had ceased by the time Borovcanin passes the compound. Borovcanin had no reason to know that a horrific massacre would subsequently be committed at the Kravica Warehouse later that night. The suppression of an escape attempt, even assuming that the Serb forces over-reacted, would have not have suggested that a mass slaughter would be committed later than night.

381. Third, the Prosecution has not established that Borovcanin could have intervened without significant risk to himself or his men. Borovcanin was not a VRS officer. He had no VRS rank, and was not even a member of the VRS. The circumstances inside the Warehouse compound were, at the least, murky. The VRS forces may not have been acting entirely

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<sup>757</sup> *Kvočka* AJ, para. 29 ("If an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous. When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.")

<sup>758</sup> *Mpambara* TJ, para. 32 ("Neither the Indictment nor the Pre-Trial Brief identify the source of the legal duty on the accused, nor is the scope of the legal duty described in any way. This is an essential element for charging an accused with a failure to prevent or punish. An accused must at least know the scope of his obligations to be in a position to dispute his alleged default.") The Prosecution allegations provide no guidance as to the content of this particular duty, rendering it vague. What is the content of this duty? How is it triggered? Does mere suspicion of a crime trigger the duty of intervention? Or does it require actual knowledge of a crime? Does it include a duty to inquire, similar to superior responsibility?

unlawfully during the first shooting incident. If they were acting unlawfully, and an unknown person had walked into the compound, there is a real possibility that they would have reacted negatively. Indeed, Perica Vasovic testified that he and Jovan Nikolic were physically threatened when they went to the Kravica Warehouse later that night.<sup>759</sup> The Defence does not have the burden of proof to show how those soldiers inside the Kravica Warehouse would have reacted; it is for the Prosecution to show that Borovcanin could have intervened, and that he could have done so without risking his own life and limb. No such showing has been made. On the contrary, Borovcanin's position outside of the VRS chain of command would likely have made him a figure of suspicion or possibly even contempt, as was demonstrated by General Mladic himself on 12 July in Potocari.

382. This context is highly relevant to the inferences that can reasonably be drawn about Borovcanin's intent, which is discussed in the next section.

#### *5.4 Joint Criminal Enterprise*

##### **5.4.1 Prosecution Allegations**

383. Paragraph 43(a)(iii) of the Indictment alleges that:

Ljubomir Borovcanin, acting individually or in concert with other members of the Joint Criminal Enterprise ... committed acts ... [i]n furtherance of the plan to capture, detain, transport, summarily execute and bury the able-bodied men from Srebrenica and with full knowledge of the plan to summarily execute such men: ... iii. On 13 July 1995, he was personally present at the Kravica Warehouse when hundreds of Muslim prisoners were in the process of being summarily executed by or in the presence of troops under his command or control, including members of the Skelani Platoon of the 2<sup>nd</sup> Sekovici Detachment of the RS Special Police. He did nothing to prevent these executions and did nothing to affect first aid or any medical treatment of any of the remaining surviving Muslims at the warehouse, thereby encouraging his men and others to continue to kill Muslim prisoners and let wounded prisoners die from their wounds.<sup>760</sup>

##### **5.4.2 Overview**

384. The allegation is factually false. Borovcanin was not present at Kravica Warehouse watching hundreds of prisoners being summarily executed. No showing has been made that any

<sup>759</sup> Section V(d).

<sup>760</sup> Indictment, para. 43.

of his subordinates were inside the Kravica Warehouse compound during his brief stop there, much less that any of them were summarily executing anyone.

385. The failure to intervene to prevent killings is not probative of any criminal intent because (i) no showing has been made that killings were ongoing when Borovcanin passed the Warehouse; (ii) no showing has been made, assuming that such killings were ongoing, that any of them were unlawful; and (iii) the failure to prevent other persons, in particular non-subordinates, from committing crimes cannot be equated with an intent that those crimes be committed. Borovcanin took positive steps that are inconsistent with the alleged intent: he ordered Stupar to keep his men out of the Warehouse compound, and he quickly arranged for his men to be withdrawn from the Road. The first major decision made by Borovcanin after learning of the large-scale massacre at the Kravica Warehouse on the night of 13 July was to advocate, on the morning of 15 July in Zvornik, that the Muslim column should be allowed to pass through the Serb lines without engaging them in combat. This is inconsistent with an intention to further the purposes of a JCE to kill all the Bosnian Muslim men of Srebrenica.

#### 5.4.3 Discussion

386. The evidence does not show, as has been discussed in detail, that Borovcanin was a participant in, or had any awareness of, a joint criminal enterprise to kill the Bosnian Muslim men of Srebrenica from events on 12 July or on 13 July leading up to the Kravica Warehouse killings. The issue addressed in this section is whether the evidence of what Borovcanin knew and did on the afternoon and evening of 13 July shows that he spontaneously and implicitly joined in the JCE at that time.

387. The evidence concerning the events at Kravica Warehouse on the afternoon of 13 July has been exhaustively analyzed. Two distinct killing events occurred on 13 July: the initial shootings arising from the probable escape-attempt when Muslim prisoners probably tried to seize weapons from their Serb guards; and the sustained massacre that occurred at around nightfall. The evidence shows that (i) the first killing event was on a relatively small scale; (ii) a reasonable possibility and leaves open the reasonable possibility that: (i) those killings were over by the time Borovcanin passes in front of the Warehouse; and/or (ii) that some or all of the

killings were justified as self-defence. These are reasonable possibilities that have not been excluded by the evidence.

388. The evidence has not established beyond a reasonable possibility that any of Borovcanin's subordinates were present in the Warehouse compound when Borovcanin passes by, or at any later time that evening. The hearsay evidence is evidently flawed or of very low probative value, and the circumstantial evidence is non-existent, in light of the presence of other forces in the area, in particular soldiers from the Bratunac Brigade.

389. The Prosecution has argued that an alleged intercepted conversation between Borovcanin and Krstic at 2040 hours on 13 July is highly probative of Borovcanin's criminal intent.<sup>761</sup> The Defence cannot state with certainty whether this conversation is actually the conversation between Borovcanin and Krstic that did occur that evening.<sup>762</sup> Mr McCloskey in his opening statement asserted that this conversation shows that Borovcanin is a cold-blooded mass murderer: "And Borovcanin, who has just killed a thousand men, has been part of the killing of a thousand men, is having a nice chat and everything is fine."<sup>763</sup>

390. This was a reckless and false allegation, as the evidence heard by this Chamber now shows. The systematic massacre at Kravica Warehouse had not even begun by 2040 hours. Mevludin Oric's bus stopped at the Warehouse at around this very moment – "[i]t was dusk. Lights were just being turned on" – to take on passengers, without him seeing any signs of a massacre.<sup>764</sup> PW-111 says that the sustained killings only began around nightfall,<sup>765</sup> which must, in any event, have been after Oric's bus had left the Kravica Warehouse. Borovcanin's failure to register alarm is not because he is a cold-blooded killer, but because he had no idea that a mass

<sup>761</sup> P993a; Prosecution Opening Statement, 495:8-496:16.

<sup>762</sup> P2853 (Borovcanin OTP Interview), p. 76-78 (Borovcanin acknowledges that he had a telephone conversation on the evening of 13 July with Krstic, but is not certain whether P993a actually is a record of that conversation).

<sup>763</sup> Prosecution Opening Statement, 496:11-14.

<sup>764</sup> Oric M 1061:20-21; 890:12-13; Oric M 897:25-898:8 ("Q. Did you make any stops on the way? A. We stopped in Kravica.... Q. Now, you described a meadow in Kravica. Was that meadow located near any structure in particular that you recall, sir? A. There is a facility like a warehouse, and the prisoners were sitting next to it.")

<sup>765</sup> PW-111 6999:14-20 ("At the same time, the one in the blue helmet opened fire too. At that moment I immediately lay down on the ground. I saw they would kill us all.... It was already dark. Night had already fallen."); 7061:8-9 ("It was getting dark. They opened fire at us. The first two soldiers.")

slaughter was about to take place at the Kravica Warehouse. Borovcanin had seen only the consequences of the first killing event, which he understood as having been precipitated by a break-out attempt, not evidence of a full-scale massacre.

391. The Prosecution also asserts the Borovcanin's alleged failure to prevent non-subordinates from committing crimes at the Kravica Warehouse shows his murderous intent. This reasoning is misguided. Non-intervention does not show criminal intent, absent some specific circumstances showing that to be the case. The Prosecution has not foreclosed the very reasonable possibility that Borovcanin was (i) uncertain as to whether a crime had taken place; (ii) suspected that a crime had taken place, but considered that he had no authority to intervene; and/or (iii) reasonably considered that intervention could give rise to an armed confrontation. The mere fact of non-intervention is not equivalent to "non-intervention with intent."

392. Furthermore, if Borovcanin's non-intervention in respect of non-subordinates reflected a criminal intent, then one would expect his positive actions to also reflect that intent. That is not the case, however. Borovcanin took three steps directly contrary to the alleged objectives of the JCE. First, he ordered Stupar to keep the police out of the Warehouse compound. Second, he quickly arranged for the withdrawal of his subordinated units from the area around Kravica Warehouse. Third, the very first major command decision that he took after learning of the Kravica Warehouse killings was to advocate on the morning of 15 July at the Zvornik Brigade headquarters that the Muslim column be allowed to pass through to Tuzla without being attacked. If Borovcanin had been a member of a JCE, bent on slaughtering the Bosnian Muslim men of Srebrenica, he would not have taken this position on the morning of 15 July.

393. Finally, Borovcanin's conduct during his interviews with the Office of the Prosecutor emphatically shows an innocent state of mind. Borovcanin candidly admitted his whereabouts throughout the key days, in particular on 11, 12 and 13 July. He gave the Prosecution the missing video-tape with the crucial footage of Kravica Warehouse that had been erased from the Petrovic tape. He frankly admitted having seen bodies lying in front of the Warehouse at that moment. These are not the reactions of a man who was a member of a joint criminal enterprise to kill those people. These are the actions of a man who was willing to speak openly

and forthrightly about the events that he witnessed, provided that he was not importuned with false and groundless allegations.

**(v) Conclusion**

394. Borovcanin is not individually criminally responsible for any crimes committed at Kravica Warehouse on 13 July. The factual allegations brought by the Prosecution are not supported beyond a reasonable doubt by the evidence heard by the Chamber. The Prosecution has failed to establish that Borovcanin's subordinates participated in any crimes at the Warehouse; failed to show that Borovcanin provided any support whatsoever to any possible perpetrators of crimes during the first killing event; failed to show that Borovcanin had any duty to intervene at the Warehouse; and failed to show that Borovcanin's alleged "failure" to act was animated by criminal intent.

395. The evidence positively shows a very reasonable and real possibility that none of Borovcanin's subordinates were inside the Warehouse by the time Borovcanin arrived there; that those first killings were triggered by Muslim prisoners grabbing weapons and killing one Serb and injuring two others, including the commander of one of Borovcanin's three subordinated units, Rade Cuturic; that panic ensued and that many or all of the killings may have been legally justified as self-defence; that the killings were over by the time Borovcanin arrives at the Warehouse, having heard frantic radio calls over the Motorola; that Borovcanin ordered the most senior person below Cuturic to ensure that no subordinated MUP forces entered the Warehouse compound; that he then arranged quickly for the subordinated units to be removed from the area, which occurred soon after; and that the very first major command decision taken by Borovcanin after he had heard about the massacre at Kravica Warehouse was to advocate letting the Bosnian Muslim column to pass through to Tuzla without combat.

396. The evidence heard by the Chamber does more than raise a reasonable doubt. It suggests that Borovcanin was forced through the military chain of command into an association with men who ultimately colluded in a vicious criminal enterprise. Borovcanin had no knowledge of that criminal enterprise; had no intent to support that criminal enterprise; took steps to prevent his men from being embroiled in what he may have suspected were criminal acts; and then, when he became aware of the possible criminal enterprise, refrained from

actions that might have supported such a plan. On the contrary, Borovcanin advocated the safe passage of men on 15 July whom the Prosecution alleges he wanted to kill.

397. The Prosecution has not proven its case. Borovcanin should be acquitted of all four forms of criminal responsibility alleged in respect of the killing of the Bosnian Muslim men of Srebrenica, as charged in the Indictment.

## VI Other Crimes Alleged

### (i) Sandici Meadow

#### 1. Prosecution Allegations

398. Paragraph 30.4.1 of the Indictment alleges:

By dark [at Sandici Meadow on 13 July], there were approximately 10-15 prisoners remaining at the meadow. A deputy platoon commander from the Jahorina Training Facility of the Special Police Brigade, under the command and control of Ljubomir Borovcanin, issued an order to "eliminate" the remaining prisoners who were subsequently summarily executed by members of a unit of RS police officers from the Jahorina Training Facility in an area near Sandici.

399. Paragraph 30.4.1, in conjunction with paragraph 95, alleges only superior responsibility for this event. The Indictment is vague, however, as to whether this event is also intended to be part of the alleged murder JCE, much less which acts or omissions of Borovcanin satisfy the *actus reus* or *mens rea* of the crime. Nominally, paragraph 30.4.1 does fall into a section of the Indictment called "The Joint Criminal Enterprise to Murder the Able-Bodied Muslim Men"; but paragraph 43 of the indictment, which is supposed to describe "the role and actions of the accused in furtherance of the JCE" gives no description of Borovcanin's role in this event. The Defence does not know on what material facts the Prosecution may rely to explain Borovcanin's alleged 7(1) responsibility for the killings at Sandici Meadow.<sup>766</sup> The Defence accordingly interprets paragraph 30.4.1 as properly charging only superior responsibility and rejects that the paragraph properly charges Borovcanin with having committed this act, whether directly or by way of a JCE.<sup>767</sup> If any such arguments are made by the Prosecution, the Defence objects on the ground of lack of notice.

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<sup>766</sup> The allegation of "*Blaskić* omission liability" is limited to Kravica Warehouse, and does not extend to Sandici Meadow. See para. 92 of the Indictment.

<sup>767</sup> The necessity of distinct pleading in this regard is well-established in the Chamber's jurisprudence: *Blaskić* AJ, para. 215 ("[T]he alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that 'the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.' The nature of the alleged responsibility of an accused should be unambiguous in an indictment."); *Noletić* AJ, para. 23-96 (quashing convictions based on allegations that were not supported by sufficient pleading of material facts).

## 2. Overview

400. Insufficient evidence was heard to establish that this event even occurred or that the Deserters' unit was involved. The sole testimony concerning this event was that of Witness PW-100. This testimony is insufficient because: (i) the Deserters' unit did not have a platoon commander corresponding to the name of the person who, according to PW-100, allegedly gave the execution order, thus raising doubts as to PW-100's veracity or reliability; (ii) the testimony is uncorroborated and, therefore, must be treated with caution; and (iii) PW-100 has a distinct motive to lie, based on his strong desire to maintain his immigration status. Even assuming that this event did occur and that members of the Deserters' unit was involved, no evidence was heard suggesting that Borovcanin had any advance notice or information that would have suggested that this crime was going to be committed, and no evidence was heard suggesting that he later learned of any information that would have put him on notice of the need to conduct further investigations.

## 3. Discussion

401. PW-100 testified that in July 1995 he was a member of the 1<sup>st</sup> Company of the Jahorina recruits. He and other Jahorina recruits were guarding ten to fifteen Muslim prisoners on the Sandici Meadow late in the afternoon or early in the evening of 13 July, the rest having been bussed away.<sup>768</sup> PW-100 says that "very very late in the afternoon, early early evening" he approached a deputy platoon commander, whom he identified as "Aleksa", and asked when the next bus would arrive.<sup>769</sup> Aleksa allegedly responded that no more buses would be coming and that the remaining prisoners should be shot.<sup>770</sup> PW-100 testified that he was shocked:

We just could not believe what we heard, because we believed that all these people and all these prisoners [are] going to be shipped and exchanged in Tuzla for the Serbs that actually have been living in Tuzla and that some sort of agreement has been reached between the

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<sup>768</sup> PW-100 14830:10-12.

<sup>769</sup> PW-100 14830:11-15 ("And very, very late in the afternoon, early, early evening, there was 10 to 15 people left, and we have asked the question when the next bus is going to come to pick these people up, and it was told to us that there won't be any more buses and that we need to get rid of them, shoot them"); PW-100 14883:25-14884:2 ("Q. You went up to him to ask him what was going to happen and whether any more buses would be arriving; isn't that right? A. That is correct, yes.")

<sup>770</sup> PW-100 14830:14-15 (saying they will be shot); 14830:24-14831:3 (saying it was 'Aleksa').

governments of Bosnia and Herzegovina and Republika Srpska to exchange them, all for all.<sup>771</sup>

PW-100 claims that he and two other Jahorina recruits refused the order. Two of the others, however, “collected [a] few other guys who volunteered to go and do the dirty job”.<sup>772</sup> One of the two Jahorina recruits who allegedly committed the killings was nick-named “Crnogorac”, a name for someone originating from Montenegro.<sup>773</sup>

402. Witness PW-100’s testimony is uncorroborated. No other witness provided any direct – or even hearsay – testimony about this event. The absence of such corroboration is startling. PW-100 testified that at least four other Jahorina trainees witnessed this event, along with soldiers from other units.<sup>774</sup> The unit affiliation of these individuals would have made them easier to track down. Even taking into account the reluctance of witnesses to get involved in ICTY proceedings, it is simply incredible that no witness could be found to provide even general confirmation that this event occurred – much less to provide at least hearsay confirmation that it occurred.

403. The Prosecution did not even try to indirectly corroborate PW-100’s story by adducing evidence that the Deserters’ unit had a Deputy Platoon leader named “Aleksa”. The Deserters’ company had only four platoons, and by 13 July its strength was down to about sixty men.<sup>775</sup> The Prosecution did not even ask PW-160 or Mendeljev Djuric whether anyone by that name was a Deputy Platoon leader in their unit.

404. Corroboration is, of course, not a legal requirement for proof of a material fact. Nonetheless, the failure to present corroborative evidence in this case raises reasonable doubt.

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<sup>771</sup> PW-100 14830:18-23.

<sup>772</sup> PW-100 14833:2-4.

<sup>773</sup> PW-100 14833:11-12.

<sup>774</sup> PW-100 14833:1-4 (“At that point in time it was four or five of us. Three of us did refuse that order and two of us from Jahorina compound went up and they have collected [a] few other guys who volunteered to go and do the dirty job”), PW-100 14885:7-8.

<sup>775</sup> Djuric M 10800:1-3 (“I don’t remember the exact number of men. I didn’t have any kind of diary or any documents that would help to refresh my memory. I think it was around 70, 70 men); Djuric M 10854:5-24 (explaining that ten more deserted on the night of 12 July).

The Prosecution should not be permitted to call only a single witness to an event without a compelling justification for doing so – such as the absence of any other witnesses to the event or with important details surrounding the event.<sup>776</sup> Neither is the case here. The Prosecution could reasonably have adduced direct and indirect evidence in corroboration, but did not do so.

405. PW-100's general credibility has already been discussed in Section V(e). The witness has a strong motivation to lie, dependent as he is on the goodwill of the Office of the Prosecutor to maintain his immigration status in a foreign country.<sup>777</sup> The overweening need to assist the OTP was manifested in his perception that "I was one of them".<sup>778</sup>

406. No physical or forensic evidence has been presented confirming that 10-15 individuals were executed on the Sandici Meadow on or around 13 July. The Prosecution made a half-hearted attempt during the re-direct examination of Witness PW-100 to link a shallow grave near the Sandici Meadow to these executions.<sup>779</sup> That connection is specious. Several of the victims identified in the shallow grave near Sandici meadow were seen alive after 13 July, at locations far from Sandici Meadow.<sup>780</sup> This suggests that the victims in that grave were brought

<sup>776</sup> See e.g. *Mpambara* TJ, para. 124.

<sup>777</sup> PW-100 14890:24-14891:4 ("Q. And all the wiser from your previous experience, when you were arrested in the FRY and brought back to the Republika Srpska, your mind was made up that you were not safe in the Federal Republic of Yugoslavia and that they could easily take you back again; is that correct? A. Yes, that is correct.") 14892:18-14893:1 ("Q. With the documents which you had, with the documents with which you entered [REDACTED] you were able to stay [REDACTED] for only a short time; you could not stay there permanently, is that correct? A. Yes. Q. [REDACTED]

[REDACTED] PW-100 14897:6-8 ("Q. The cooperation with the Tribunal, or rather, the OTP of the Hague Tribunal, did it help you to obtain an immigration visa? A. I would say so, yes. I was one of them.").

<sup>778</sup> PW-100 14897:8.

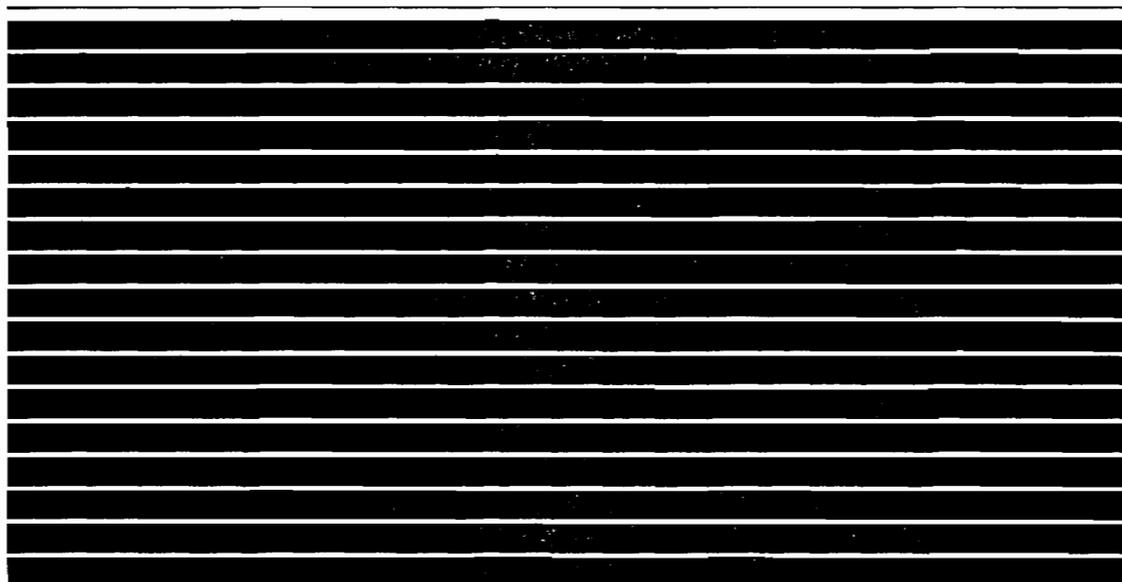
<sup>779</sup> PW-100 14907:17-21.

<sup>780</sup> [REDACTED] Manning D 19116:17-19118:21 ("Q. Mr. Manning, I would like to draw our attention to the last column, where you see it says: "Gravesite: Sandici." Can you find that? The column before that one states the date and place of disappearance, and then it says: "The 17th of July, 1995, Jaglici-Srebrenica." Have you found that? A. I've found the record. I think it's ICMP protocol number 4280/04 a third of the way up the page on the right. Is that the reference? Q. Let's look at this together. That's protocol number 4280/4 [as interpreted] gravesite Sandici, and the date of disappearance is stated as the 17th of July, 1995, Jaglici-Srebrenica." Do you see that? A. Yes, I see that.... As I understand the process, the relatives or close friends would report the person missing and provide information as to where they were last seen alive and when"); P3159a [REDACTED]

[REDACTED] Tableau E 21065:16-21068:8 [REDACTED]

from another location at another time, for example, during the search and *asanacija* operations underway in the area after 13 July.<sup>781</sup>

407. PW-100's story is also contradicted by reliable evidence that prisoners were still being held at, and transported from, Sandici well into the evening of 13 July, despite his claim that this event occurred "very, very late in the afternoon, early, early evening."<sup>782</sup> Mevludin Oric and PW-110 were transported from Konjevic Polje and Sandici Meadow, respectively, to Bratunac at around nightfall.<sup>783</sup> Sandici was no exception to this continuing operation. PW-113 testified that he left



Dunjic D 27823:10-27825:13.

<sup>781</sup> See e.g. 4D83/4DP251/P922 (Bratunac Brigade Order, Blagojevic, 14 July 1995) (orders search of the terrain including the Bratunac-Konjevic Polje Road, and the terrain, including Sandici area); 4DP63/4DP913 (Zvornik CJB Dispatch, Vasic, 15 July 1995), para. 2 (MUP forces deployed along the Kravica – K. Polje – Kasaba road blocking the terrain and engaging in combat with residual Muslim forces in the area and referring to significant losses being inflicted upon the enemy); 4DP255 (Bratunac Brigade Report, 16 July 1995.); P1185 (Intercept dated 16 or 17 July 1995, at 10:48 hours, between unknown participants. It states that clearing of the terrain in the Kravica area and the road has not been done and the order is that Civilian protection and work obligation should be engaged and that not even a shred of clothing should remain).

<sup>782</sup> PW-100 14830:12-13.

<sup>783</sup> Oric M 890:11-13; PW-110 663:5-16 ("When they wanted to transport us from there, the lorries and the buses that transported the women and the children and returned empty, a command was issued, the first line run to the vehicles and load them, the second line, and then all the way up to my line. And then I stood up. I ran down the hill. They told us to get on the lorry. I got into the trailer behind the lorry - it had high sides - and I saw a Serbian soldier with a black cap, and he told us that he would get on with the driver. And as a vehicle was full, it would leave. And as soon as it was dark, we were driving up the hill and we saw vehicles moving by us. We didn't know who they were, what vehicles those were. And when we arrived in Bratunac, one driver who was there told us: Those are Vihor's garages on the left-hand side.")

Sandici Meadow at dusk in a covered lorry, arriving in Bratunac after dark.<sup>784</sup> Intercept evidence shows that there was a specific request to pick up 700 prisoners at "Sandici Village" at 2100 hours.<sup>785</sup> PW-100 is, accordingly, not telling the truth when says that the buses had stopped operating, and that only a few prisoners were left on the Sandici Meadow, "very, very late in the afternoon, early, early evening."

408. Even assuming that the event as described by PW-100 did take place, the conditions for finding Borovcanin responsible as a superior have not been established. Responsibility under Article 7(3) requires that an accused know, or have reason to know, that his subordinates are committing, or are about to commit, crimes.<sup>786</sup> The essence of this form of responsibility is that the accused has an opportunity to prevent the commission of a crime by a subordinate, which he fails to take. That opportunity can present itself either in the form of direct knowledge that a crime is about to be committed, or information that would put him on notice that he should inquire further.<sup>787</sup>

409. The Prosecution offered no evidence that Borovcanin had any advance warning or contemporaneous knowledge of the alleged killings on Sandici Meadow. Witness PW-100 testified that "Aleksa" issued the order to kill the 10-15 Muslims without seeking approval from anyone on his Motorola radio.<sup>788</sup> The witness admitted that he could not exclude the possibility

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<sup>784</sup> PW-113 3369:20-24 ("Q. How late was it when you set out towards Bratunac? A. I don't know exactly, but it was sometime in the afternoon, maybe five or 6.00 in the afternoon, at dusk. I believe that it was already dark when we arrived there. I don't know how long it took us to get to Bratunac.")

<sup>785</sup> P1152 (Intercept between Krsmanovic and Viskovic, 13 July, 2100 hours) ("K: Viskovic, here's the precise information. There are 700 people in Sandici village. V. Yes. K: That's in your direction from the intersection. The buses need to stop there, load 10 pieces and bring them here to me. V: Listen. K: Yes? V: You go there. Anyway, that's a Bratunac checkpoint. Have that loaded and brought here because I don't have any communication with the checkpoint from here.")

<sup>786</sup> *Strugar AJ*, para. 297.

<sup>787</sup> *Strugar AJ*, paras. 298, 301, 306.

<sup>788</sup> PW-100 14883:24-14884:12 ("Q. You went up to him to ask him what was going to happen and whether any more buses would be arriving; isn't that right? A. That is correct, yes. Q. And then Aleksa, as an answer to your question in actual fact, said that you should kill the prisoners; is that right? A. That is correct, yes. Q. You did not hear Aleksa informing anyone about the fact that the prisoners had remained in the meadow without anybody coming to pick them up; you didn't personally hear that or say that, did you? A. No, I did not. Q. You also did not hear anybody say to Aleksa that those prisoners should be killed; that's right, isn't it? A. To my knowledge, yes, that's right.")

that “Aleksa” issued this order on his own initiative.<sup>789</sup> The circumstantial evidence does not show, as the only reasonable conclusion the Borovcanin knew, or should have known, that 10 to 15 prisoners were going to be killed at Sandici Meadow on the late afternoon of 13 July. Mr Borovcanin did see prisoners being detained on the Sandici Meadow during the day and, by all appearances, they were being systematically bused to Bratunac for detention. Borovcanin had no basis to believe anything other than that all the prisoners would be bused to secure locations. By the time this event is alleged to have occurred, Borovcanin was already in Bratunac, far out of Motorola range to be in touch with anyone at Sandici Meadow.

410. The Prosecution has adduced no evidence to suggest that Borovcanin subsequently became aware of information that would have reasonably suggested to him that 10 to 15 people had been killed at Sandici Meadow, which is an essential ingredient for imposing liability for failure to punish under Article 7(3).

**(ii) Blanket Objection to Counts 3 to 6 and 8 for Vagueness**

411. Counts 3 to 6 and 8 of the Indictment are partly defective as not pleaded with sufficient particularity. The deficiency is that these counts do not indicate which modes of liability under Article 7(1) are being alleged. These counts say only that each of the crimes alleged is “punishable under Article[] ... 7(1).”<sup>790</sup> That boilerplate language does no more than state a point of law, without particularizing whether the accused are alleged to have planned, instigated, ordered, aided and abetted, or committed in any of its various and sundry forms (JCE, direct commission, *Gacumbitsi* supervision, *Blaskic* omission) that have been recognized in the jurisprudence of the Tribunal. The Appeals Chamber has recognized that this manner of pleading is not fair, and that the forms of responsibility must be specifically enumerated, along with the material facts in support:

The alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that ‘the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the

<sup>789</sup> PW-100 14884:18-21 (“Q. While we’re on the subject of common sense, you cannot exclude the possibility that Aleksa perhaps decided this himself on the spur of the moment, without anybody having given him an order? A. No, I cannot exclude that, no.”)

<sup>790</sup> Indictment, paras. 45, 47, 48, 84.

indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.<sup>791</sup> The nature of the alleged responsibility of an accused should be unambiguous in an indictment.<sup>791</sup>

412. The Indictment as a whole does give notice of JCE, superior responsibility, and the specific allegations in relation to Kravica Warehouse of aiding and abetting, instigation, and *Blaskic* omission liability. The Defence reads the language of Counts 3 to 6 and 8 as merely incorporating these properly articulated forms of responsibility. All other forms of liability are objected to on the basis that they are not specifically alleged and no material facts in support have been pleaded.

413. This means, most significantly, that the Indictment does not charge aiding and abetting except in respect of the Kravica Warehouse events. Thus, aiding and abetting is not charged in respect of any crimes committed in Potocari, including forcible transfer and the other forms of persecution.

### **(iii) Persecution: Destruction of Personal Property (Count 6)**

414. Not all discriminatory acts constitute persecution as a crime against humanity. An essential requirement is that the alleged conduct is “of gravity equal to the crimes listed in Article 5 of the Statute”<sup>792</sup>, i.e. murder, extermination, enslavement, deportation, imprisonment, torture and rape. The Prosecution now wishes to add “destruction of personal property and effects”.

415. The Trial Chamber in *Kupreskic* recognized that destruction of housing, if widespread, could reach the required threshold of severity:

To some extent this [whether or not destruction of property constitutes an act of persecution] may depend on the type of property involved: in the passage from Flick cited above the Tribunal held that the compulsory taking of industrial property could not be said to affect the life and liberty of oppressed peoples and therefore did not constitute persecution. There may be certain types of property whose destruction may

<sup>791</sup> *Blaskic* AJ, para. 215; *Naletilic* AJ, paras. 23-96 (quashing convictions based on allegations that were not supported by sufficient pleading of material facts).

<sup>792</sup> *Blaskic* AJ, para. 135.

not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is *the burning of someone's car* (unless the car constitutes an indispensable and vital asset to the owner). However, the case at hand concerns the *comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population*. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the *burning of a residential property* may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.<sup>793</sup>

416. The *Blagojevic* Trial Chamber specifically rejected the argument that the destruction of personal effects constituted persecution:

in relation to the destruction of the personal belongings such as clothes and wallets, the Trial Chamber does not find that those personal belongings constituted indispensable assets to their owners. *The Trial Chamber therefore does not find that the burning of those personal belongings had a severe enough impact on the victims to reach the threshold of equal gravity as the acts listed in Article 5 of the Statute.*<sup>794</sup>

417. In any event, the Prosecution has not shown that Muslim prisoners were deprived of their rucksacks with discriminatory intent. Forcing Muslim prisoners to leave behind their rucksacks was a rough and ready method to ensure that they were deprived of any potential weapons while in detention. The Serb forces may simply not have had sufficient time or resources to search every bag. Confiscation in that circumstance was reasonable and lawful. To the extent that Borovcanin observed such events, this would not have been indicative of the commission of a crime against humanity.

418. The destruction of the rucksacks happened separately from their confiscation. The Prosecution has not adduced any evidence as to who decided to destroy these rucksacks. No evidence was heard suggesting that Borovcanin had any involvement in this decision, or that his subordinates had any role whatsoever in this burning process. Neither Borovcanin nor any of his subordinates bear any criminal responsibility in respect of the alleged crime of Persecution as a crime against humanity by way of "destruction of personal property."

<sup>793</sup> *Kupreskic* TJ para. 631, emphasis added, footnotes omitted.

<sup>794</sup> *Blagojevic* TJ para. 620.

419. For these reasons, as well as on the grounds of Notice expressed in the next section, an acquittal should be entered in respect of this charge.

**(iv) Persecution: "Terrorising of Bosnian Muslim Civilians in Srebrenica and at Potocari" (Count 6)**

420. The Prosecution asserts that Borovcanin is guilty of "terrorization" as a form of persecution as a crime against humanity, relying on a potpourri of actions by Serb forces in and around Srebrenica and Potocari, going back to March 1995.<sup>795</sup>

421. This allegation is inadequately and vaguely pleaded. Every single paragraph mentioned in the forcible transfer and murder JCE's are incorporated by reference into this allegation. No specificity is provided as to what material facts the Prosecution is relying on in order to say that Borovcanin or his subordinates are guilty of "terrorization." The Prosecution has not even specified which forms of Article 7(1) of responsibility are alleged, a practice that has been specific rejected by the Appeals Chamber in Blaskic and other judgements. The Chamber should simply declare the entirety of Count 6 to have been improperly pleaded and enter an acquittal on this basis alone.

422. The full range of actions that are incorporated by reference in respect of the charge of "terrorization" have all been addressed in Sections IV and V. The Defence relies on all those arguments to respond to the charge of "terrorization."

423. The *Galic* Appeals Chamber recognized that a crime of "terrorization" does exist as a violation of the laws and customs of war. No reason exists to believe that its definition is or should be any different as form of persecution as a crime against humanity. The *Galic* Appeals Chamber relied on the definition terrorization provided in API and APII:

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<sup>795</sup> Indictment, para. 48(c); Prosecution Pre-trial Brief, para. 422 ("Such conditions may include selective acts of beating, torture, rape and murder, as well as verbal abuse, threats and intimidation; shelling and shooting in and around the population centre; separation of family members; deprivation of the population's basic needs such as food, water and medical treatment; burning of homes and other property around the population centre.")

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.<sup>796</sup>

424. This provision makes three points clear: (i) "terrorization" must be committed as part of an "attack"; (ii) fear and terror caused by attacks against legitimate military targets is in no way prohibited; and (iii) an attack on a civilian target can be terrorization, provided that "spreading terror" is the attack's "primary purpose".<sup>797</sup>

425. The Prosecution has itself admitted that the attack on the Srebrenica enclave was legally justifiable. No showing has been made that any Serb fire was intentionally targeted at civilians, much less that such targeting was committed with the "primary purpose" of spreading terror. The incidents of violence in Potocari were not of sufficient scale to have the hallmark of terrorization, as has been discussed in section IV. Finally, there is no basis for alleging that Borovcanin committed any action with the primary purpose of inducing fear in the civilian population, or that he had any indication that any of his subordinates committed any acts with this specific intent.

## (v) Genocide (Count 1)

### 1. Introduction

426. Killing thousands of unarmed prisoners of war is a crime under international criminal law, in several ways. Each unlawful killing is a murder. When the number of murders or attempted murders during a single killing event reaches a certain threshold, objectively assessed, then mass murder becomes extermination, which "is the act of [unlawful] killing on a large scale."<sup>798</sup> Murder, including mass murder, when committed on racial, religious or political grounds, would also be persecution as a crime against humanity.<sup>799</sup>

<sup>796</sup> Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II; *Galic* AJ, para. 87.

<sup>797</sup> *Galic* AJ, para. 104 ("The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims.")

<sup>798</sup> *Stakic* AJ para. 259; *Ntakirutimana* AJ para. 516. The crime is also committed for "subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death", implying that mass death may not actually be required as a result.

<sup>799</sup> *Krajisnik* TJ, para. 794; *Kupreskic* TJ, para. 636.

427. Genocide is not extermination plus persecution – *i.e.* mass murder (based on an objectively assessed threshold of severity) committed out of ethnic hatred (based on the subjective intent to kill because of ethnicity). The drafters of the Genocide Convention chose a different approach: they lowered the objective threshold of severity required by extermination and they raised the specificity of the subjective intent of persecution. The objective element of genocide can be satisfied relatively easily. A person can commit genocide merely upon a showing of “serious ... mental harm to members of the group”. Genocide, based on the objective criterion, can therefore be committed without anyone being killed. The exceptional nature of genocide depends, rather, on the requirement that the perpetrator intend by his actions to “to destroy, in whole or in part, a national, ethnical or religious group, as such.” As an ICTY Chamber has put it, the *mens rea* of the crime is invested with “a ‘surplus’ of intent.”<sup>800</sup> The *mens rea* standard, in the absence of restrictive objective criteria, does all of the work in keeping genocide within its proper bounds.

428. The next three sections examine three considerations that this Chamber ought to consider in defining and, more importantly, applying that specific intent requirement. First, genocide does not sit at the apex of a hierarchy of crimes of ascending seriousness. The *mens rea* of genocide should not be stretched in order to achieve that purpose. Second, the Genocide Convention imposes a duty on all States to prevent genocide, even when committed in other States. The *mens rea* of the crime of genocide should be interpreted so as to accord with the purposes of, and consequences for State responsibility prescribed by, the Genocide Convention. Third, recent authoritative pronouncements by the United Nations and the ICC on the relationship between forcible displacement and genocide raise serious doubts about the correctness of the *Krstic* Appeals Chamber’s reliance on alleged crimes of forcible transfer to inform its analysis of genocidal intent. This Chamber, with a better factual record than was available in that case, ought to revisit those findings and depart from its conclusions.

## **2. Genocide Does Not Express a Higher Level of Moral Condemnation than Extermination and Should Not Be Imposed for that Purpose**

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<sup>800</sup> *Stakic* TJ, para. 520 (“Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterised and distinguished by a “surplus” of intent.”)

429. The massacre of several thousand men, animated at least in part by ethnic hostility, over a period of two to three days deserves the highest moral condemnation. The crime of extermination more than adequately expresses that moral outrage.

430. Genocide should not, as the Appeals Chamber has held, be viewed as the "the crime of crimes": "there is no hierarchy of crimes under the Statute, and [] all of the crimes specified therein are 'serious violations of international humanitarian law', capable of attracting the same sentence."<sup>801</sup> Indeed, extermination condemns directly what genocide condemns indirectly: mass murder. Mass murder is the essence of the crime of extermination, whereas mass murder is merely evidence of the specific intent required for genocide.

431. The absence of genocide as a crime at Nuremberg was no obstacle to the conviction, and severest punishment, of the Nazi perpetrators of the Holocaust against European Jews. "Extermination" did articulate, to the imperfect extent that any legal classification could, the essence of the evil that had been done by the Nazis to the Jews. In finding Hans Frank, the Nazi governor of occupied Poland, guilty of extermination and other crimes, the International Military Tribunal held:

The persecution of the Jews was immediately begun in the General government. The area originally contained from 2,500,000 to 3,500,000 Jews. They were forged into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated. On 16th December, 1941, Frank told the Cabinet of the Governor General: "We must annihilate the Jews wherever we find them and wherever it is possible, in order to maintain there the structure of Reich as a whole." By 25th January, 1944, Frank estimated that there were only 103,000 Jews left ... Frank was a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave labourers of over a million Poles; and in a programme involving the murder of at least three million Jews.<sup>802</sup>

<sup>801</sup> *Kayishema* AJ, para. 367; *Semanza* TC, para. 555 ("in assessing the gravity of the offence, the Chamber ought to go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime.") See also UN Commission of Inquiry on Darfur, para. 506 ("It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma.")

<sup>802</sup> *Frank* Judgement, Trial of the Major War Criminals Before the Military Tribunal, Nuremberg ("Blue Series") pp. 297-298

Indeed, the Prosecutor at Nuremberg used the term “genocide” as a subspecies of extermination:

[The Defendants] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.<sup>803</sup>

The status of “genocide” as an adjective to describe a form of extermination shows their common moral foundations. Frank, along with ten co-defendants, was executed by hanging for extermination, persecution and other crimes against humanity.

432. The interrelationship between extermination and genocide is confirmed by the indictment of Adolf Eichmann. Eichmann was charged with crimes against the Jewish people, a crime in Israeli law modeled on the Genocide Convention, and with Crimes Against Humanity. The word “genocide” is not used in the Indictment, even in respect of the crimes against the Jewish people. Eichmann’s conduct is described throughout as “extermination ... with the intention of destroying the Jewish People.” The opening paragraph of the indictment alleges

The Accused, during the period from 1939 to 1945, together with others, caused the deaths of millions of Jews as the persons who were responsible for the implementation of the plan of the Nazis for the physical extermination of the Jews, a plan known by its title ‘The Final Solution of the Jewish Question.’<sup>804</sup>

The Israeli Attorney-General, in charging the most heinous mass murderer ever brought to justice, the ring-leader of the most violent and vicious campaign of anti-Semitism the world has ever seen, did not feel the need to use the word “genocide”, and was content to use the word “extermination” with intent to destroy the Jewish people.

433. A simple hypothetical illustrates why investing genocide with a higher level of moral culpability or gravity than extermination is dangerous and misguided. A cataclysmic terrorist attack by Al Qaeda specifically designed to cause mass casualties amongst civilians in a major

<sup>803</sup> Nuremberg Military Tribunals: Indictments, Case No. 1-12, Counts One Through Four, pp. 5-12 and Appendices A, B and C.

<sup>804</sup> *Attorney General for the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, 12 December 1961, 36 (1968) ILR 5

multicultural Western city would seldom, if ever, satisfy the *mens rea* requirements of genocide. The scale of the killing, no matter how massive, could not alter the fact that the purpose of such an attack was to inflict terror in order to force the target to, for example, withdraw from Afghanistan. Once the killing had reached a certain numerical threshold, that killing would be extermination as crime against humanity. Conversely, the destruction of the habitat of a small indigenous group in the Amazon could constitute genocide, if the perpetrator destroyed that habitat knowing that the group would not likely adapt to any other environment and would physically perish as a result. These acts would be genocide, and might also be extermination, depending on the number of individuals killed. The point is that genocide has a specific purpose: to protect groups defined by certain characteristics from intentional targeting for physical destruction, even by indirect means such as “imposing measures intended to prevent births within the group”, forcible transferring children of the group”, and “causing serious ... mental harm to member of the group.”<sup>805</sup> These acts are reprehensible when committed for any purpose, and are arguably more reprehensible when committed to destroy the group; it cannot be said, however, that these acts, even when committed with genocidal intent, are always worse than the perpetration of a mass killing. If the number of victims in the former case is in the hundreds of thousands, and the number of victims in the latter is in the hundreds, most would agree that the former even is far more grave and abhorrent, notwithstanding the absence of destruction of a national, ethnical, racial or religious group.

434. A conservative estimate is that many tens of thousands of civilians have been killed in the Darfur conflict. Nevertheless, the United Nations Commission of Inquiry on Darfur found that the requirements for genocide were lacking. The Commission underlined, however:

Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide.* This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.<sup>806</sup>

The findings of the United Nations Commission do not diminish the seriousness or gravity of the offences that have taken place in Darfur. Indeed, by fetishizing genocide as “the crime of

<sup>805</sup> Genocide Convention, Article 2(b), 2(d), and 2(e).

<sup>806</sup> UN Commission of Inquiry on Darfur, paras. 522, 642.

crimes” there is a potential danger that victims in other conflicts may, perhaps quite correctly, feel that the definition of the crime has been politicized. This damages the cause of international justice.

435. Straining to apply genocide to a mass killing event to express moral outrage is, therefore, misguided. Extermination and persecution as crimes against humanity directly condemn what happened after Srebrenica: a mass killing event stoked by ethnic hatred.

**3. The Crime of Genocide Must Be Defined and Applied at the ICTY In Accordance With the Purposes and Consequences – Both Retrospective and Prospective – of the Genocide Convention**

436. Genocide is a crime, but it has more than just penal consequences for individuals. States are obligated under the Genocide Convention to prevent this crime, even when committed on the territory of another State. The Chambers of this Tribunal, when applying and interpreting genocide’s “surplus of intent,” should be constrained and guided by this broader context. In particular, the obligation of States to prevent crimes in the territory of other States implies that the genocidal intent can only be deemed to have arisen after some pattern of conduct. The notion of genocidal intent coming into existence abruptly in the mind of one or a small number of perpetrators, and then disappearing, is incompatible with the conception embodied in the Genocide Convention.

437. “Genocide” was declared an international crime by a United Nations General Assembly resolution in 1946, and codified by the 1948 “Convention on the Prevention and Punishment of the Crime of Genocide.” When the Security Council inserted *verbatim* the words of the Genocide Convention into the Statutes of the ICTR and ICTY, not a single international judicial opinion had interpreted its meaning. The principles underlying the Convention are a matter of customary international law, but the contours of the crime are defined in the Convention.<sup>807</sup>

438. A narrow textual reading of the definition of the *mens rea* leaves open a range of potential interpretations, some of which are manifestly unreasonable in light of the purposes of

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<sup>807</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports 1951, p. 15, 23 (“the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”)

the Convention. The *mens rea* for genocide requires the commission of any of the prohibited acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” This definition leaves open at least three questions. First, what is meant by the word “destroy”; second, what is meant by the words “in part”; and third, to what extent is the perpetrator’s subjective, personal intent subject to objective, external factors?

439. The first question has now been settled by a series of consistent judicial pronouncements of the ICTY and ICTR, based largely on the *travaux préparatoires* surrounding the Genocide Convention. The intent to “destroy” means intent to cause “physical or biological destruction”,<sup>808</sup> and is not satisfied by the intent to cause cultural dissolution or geographic dispersal.<sup>809</sup> Forcible displacement of a population may, depending on the circumstances, be probative of the distinct intent to cause biological destruction. The manner of forcible displacement of Armenians in Turkey is cited as an example of forcible displacement executed in a manner so as to cause physical destruction of the group.<sup>810</sup> Forcing Tutsis into flight from their homes offered an opportunity to Hutu executioners controlling roadblocks.

440. The second question has now also been answered by the consistent caselaw of the ICTR and ICTY: the intent must be the destruction of, at a minimum, a “substantial part” of the group.<sup>811</sup> The substantiality element is nowhere to be found in the text of the Genocide

<sup>808</sup> *Krstic* AJ, para. 25 (“The Genocide Convention, and customary international law in general, prohibit[s] only the physical or biological destruction of a human group”); *Krstic* TJ, para. 580; *Semanza* TJ, para. 315 (“The drafters of the Genocide Convention, from which the Tribunal’s Statute borrows the definition of genocide verbatim, unequivocally chose to restrict the meaning of “destroy” to encompass only acts that amount to physical or biological genocide.”)

<sup>809</sup> *Stakic* TJ, para. 519 (“A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, ‘[t]his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction’. In this context the Chamber recalls that a proposal by Syria in the Sixth Committee to include “[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” as a separate sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions”(citations omitted); *Bosnia v. Serbia*, para. 190 (“the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, no is such destruction an automatic consequence of the displacement.”)

<sup>810</sup> Schabas, p. 192-93.

<sup>811</sup> *Krstic* AJ, para. 8 (“It is well established that where a conviction for genocide relies on the intent to destroy a protective group ‘in part,’ the part must be a substantial part of that group”), para. 12 (“the intent requirement of

Convention, but Chambers of the ICTY and ICTR have invoked a purposive reading of the Genocide Convention to add this substantiality requirement. Thus, the *Krstic* Appeals Chamber explained that “the aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.”<sup>812</sup>

441. The third question posed above remains largely unanswered, and raises a constellation of issues about how exactly finders of fact are supposed to assess whether the specific intent requirement is satisfied. The issue in the present case is not really about inquiring into the actual subjective intent that could nourish a finding of genocide; the issue, rather, is whether the intention to kill several thousand Bosnian Muslim men, in all the circumstances, constitutes an intention to biologically destroy a substantial part of the ethnic group defined as “Bosnian Muslims.”

442. The Chamber should expressly embrace this objective dimension of the search for genocidal intent. Some judicial pronouncements have given primacy to the subjective approach, implying for example that an individual acting alone could commit genocide. The *Jelisić* Trial Chamber suggested, *obiter*, that “a lone individual seeking to destroy a group as such” could commit genocide, although “it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system”.<sup>813</sup> This reasoning presumes that the accused will resist the genocide allegation. A more fundamental problem arises if a delusional megalomaniac openly declares that he wants to kill “all Bosnian Muslims,” and backs up that declared intention by promptly executing all fifty Muslim prisoners under his control in a prison camp. Is this genocide?

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genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group”; *Jelisić* TJ, para. 82 (“the intention to destroy must target at least a *substantial* part of the group”); *Semanza* TJ, para. 316 (“The intention to destroy must be, at least, to destroy a substantial part of the group”); *Bagilishema* TJ, para. 64 (“Although the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group”); *Bagosora* TJ, para. 2115 (“the perpetrator must act with the intent to destroy at least a substantial part of the group.”) .

<sup>812</sup> *Krstic* AJ, para. 8.

<sup>813</sup> *Jelisić* TJ, paras. 100-101.

443. A literal reading of the Genocide Convention does not exclude this possibility, even with the added gloss that the perpetrator must intend the *physical* destruction of at least a *substantial part* of the ethnic group in order to commit genocide. Most people would recognize intuitively, despite the heinousness of the act, that these killings should not constitute genocide.<sup>814</sup> But why is this so?

444. Finding genocide in such a case would undermine the Genocide Convention. The Genocide Convention, according to the ICJ, imposes an obligation on States to “to employ all means reasonably available to them, so as to prevent genocide as far as possible,”<sup>815</sup> even when the crime is being committed in another State. A finding of genocide therefore has direct consequences for State relations and, potentially, even has a direct impact on the sovereignty of the State in which genocide is committed.

445. The concrete measures that must be taken to prevent genocide in another State depends on the facts, including the State’s

capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.<sup>816</sup>

Further, the obligation arises as soon as it becomes aware of the existence of the genocidal intent:

A State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.<sup>817</sup>

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<sup>814</sup> *Mpambara TJ*, para. 5, fn. 7 (“The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.”)

<sup>815</sup> *Bosnia v. Serbia*, para. 430.

<sup>816</sup> *Bosnia v. Serbia*, para. 430.

<sup>817</sup> *Bosnia v. Serbia*, para. 431.

446. The language adopted by the ICJ to describe the obligation of States to prevent genocide clearly contemplates that the genocidal intent is ongoing and durable – *i.e.* that it has some temporal scope. Two paradigmatic cases of genocide, the Holocaust against European Jews and the killing of Tutsis in Rwanda, both had this quality. The duty to intervene is triggered as soon as the genocidal intent becomes known. The logic of this duty to prevent is that a person who intends to destroy a group, or even a substantial part of a group, is likely to keep attacking the group until all its members are physically destroyed. This prospect of future or ongoing harm triggers the duty to prevent, and constitutes the unique aspect of genocide as an international crime. The Genocide Convention thus implies that genocide is a crime of some temporal scope and cannot, or at least cannot typically, be committed in a short time-frame.

447. This temporal dimension is explicitly recognized by the ICC Elements of Crimes, adopted in 2002, which requires that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”<sup>818</sup> An ICC Chamber recently articulated the connection between this “pattern of similar conduct” and the requirement that the perpetrator intend the destruction of a substantial part of the targeted ethnic group:

The conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the group. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm ... is only triggered when the threat against the existence of the targeted group, or a part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.<sup>819</sup>

This is a helpful contribution for understanding the *mens rea* for genocide because: (i) it acknowledges expressly that the threat to the group must be objectively substantiated, not based on the subjective intentions of the perpetrator; and (ii) it requires that there be a manifest pattern of destructive conduct unless the single act itself brought about the total or partial destruction of the group. These requirements mesh with the broader obligations in the

<sup>818</sup> ICC Elements of Crimes, pp. 2-3; *Prosecutor v. al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad al-Bashir, 4 March 2009, para.13, p.7

<sup>819</sup> *Prosecutor v. al Bashir*, 4 March 2009, paras. 123-24.

Genocide Convention that States have a duty to prevent genocide. The ICC elements of crimes, considering the process of its adoption, should be treated by the ICTY as a highly persuasive pronouncement of the proper approach to the *mens rea* of genocide.

448. Requiring a manifest pattern of similar conduct precludes the possibility of an individual or a rogue group committing acts that would, in the context of an armed conflict, effectively criminalize the activities of the party of which they are members. The Genocide Convention, as a practical matter, requires all States to cut off aid to a Party which is even *reasonably suspected* of acts of genocide.<sup>820</sup> It cannot be the case that isolated heinous acts perpetrated by one side triggers the Genocide Convention, requiring States – at the very least – to cut off and sanctioned that party or risk liability under the Genocide Convention. The duty to isolate a party to a conflict should only arise when it is reasonable to infer that the party is tolerating or condoning the criminal behavior. This requirement helps explain why rogue elements that conceal their activities should not be deemed to have committed genocide, notwithstanding the evil of their actions, or their subjective intentions.

449. Without applying a “manifest pattern” requirement, the 1968 My Lai massacre could be deemed a “reasonably suspected” act of genocide. US Forces there, commanded by a Captain, massacred about 500 victims. General William Westmoreland, before all the facts emerged, congratulated the unit on an “outstanding job.” The killings almost certainly involved an element of ethnic bigotry and the operation was carried out in the context of widespread mandatory civilian relocations. The Russian Secret Police executed over 20,000 Poles at Katyn Forest during World War II, after they had been held for some time in detention. The massacre was probably undergirded by an element of anti-Polish sentiment.

450. Both of these massacres were, undoubtedly, extermination plus persecution *i.e.* mass killings carried out, at least in part, on the basis of ethnic discrimination. The more difficult question is whether these crimes constituted “genocide”, thus triggering the obligation of States to prevent it by, at the least, cutting off all support to the responsible protagonist responsible. To draw a direct connection between the function and specific intent of genocide: were the

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<sup>820</sup> *Bosnia v. Serbia*, para. 431 (“...or reasonably suspected of harbouring specific intent, it is under a duty to make such use of these means as the circumstances permit.”)

intentions of the perpetrators such that those acts can be imputed in some sense to the State on behalf of which they were acting, triggering a duty on other States to sanction that State?

451. A sensible understanding of the relevance of the Genocide Convention to My Lai and Katyn is that the State should be punished and isolated once it becomes apparent that the killing event is part of an ongoing and prospective plan to keep killing the targeted group which the State organizes, condones or tolerates. The prospective consequences of the acts is what, in most cases, would justify international concern and involvement. Thus, prevention would have been mandated in respect of Nazi Germany once the future consequences of the present intentions became evident, in order to prevent the cataclysmic consequences to come. The same reasoning applies to Rwanda, where the intention to commit genocide would have been apparently almost immediately given the ferocity and indiscriminate nature of killings even on 7, 8 and 9 April in Kigali and Gisenyi. This does not preclude the possibility of a truly massive single event, with no prospect of further implementation, constituting genocide. Here again, the ICC's formulation is salient: a "manifest pattern" of acts is required, or the act is itself of "such a nature so as to itself effect, the total or partial destruction of the group."<sup>821</sup> This translates into what is either described as a "very important consideration" to, or as an "element" of, any finding of genocidal intent: a policy or plan on behalf of the party whose adherents have committed the alleged genocide.

452. The circumstances of the Srebrenica massacre do not satisfy the manifest pattern requirement. The Prosecution alleges that the genocidal intent came into being about 40 hours before the plan started to be implemented. The plan was apparently a tightly guarded secret up until the very moment that it was put into execution, involving a relatively tight circle of executioners. The executions were then carried out over an extremely short period of time. The killings were not followed by further massacres.

453. Nor were the killings of "such a nature so as to itself effect, the total or partial destruction of the group." The killing of several thousand individual suspected Muslim combatants, though an abhorrent act of extermination plus persecution, did not constitute a "partial destruction of the group." The United States has defined "substantial part" as "a group of such numerical

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<sup>821</sup> *Prosecutor v. Bashir*, 4 March 2009, paras. 123.

significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”<sup>822</sup> This intent is negated, very simply, by the release of at least twenty thousand Muslim civilians. The *Krstic* Appeals Chamber tried to explain this away, arguing that “This decision not to kill the women or children may be explained by the Bosnian Serbs’ sensitivity to public opinion.” This does not explain, however, the absence of clandestine killings of civilians, as and when the opportunity arose as it must have done from time to time during those two days. No evidence suggests that this occurred. The *Krstic* Appeals Chamber’s attempt to weave the forcible transfer of civilians into genocidal intent has, furthermore, been cast in doubt, as is discussed further below.

#### **4. The Chamber Now Has a Fuller Perspective on the Circumstances Surrounding the Evacuation of Civilians, Which Should Not be Relied Upon As an Indicator of Genocidal Intent**

454. The United Nations Commission of Inquiry on Darfur found that the forcible displacement of civilians was probative of forcible displacement, but was a counter-indication of genocidal intent:

Another element that tends to show the Sudanese Government’s lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government .... [this conduct] is not indicative of any intent to annihilate the group.<sup>823</sup>

455. Section IV above shows that by 6 pm of 11 July, civilians and military-aged men alike are either on their way out of the enclave, or desperate to leave. This is *before* the creation of the genocidal plan alleged by the Prosecution. Any acts of coercion leading to the forcible transfer were committed *before* the genocidal intent was formed. The idea that the forcible transfer is somehow probative of genocidal intent is simply illogical. The genocidal intent did not exist

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<sup>822</sup> 18 USC 1093(8) (2000).

<sup>823</sup> Report of the Commission of Inquiry on Darfur, para. 515. Luban, p. 14 (“the comparison of the Darfur Report with *Krstic* suggests that the UN Commission was more faithful than the ICTY to Lemkin’s uncompromised conception of genocide: the Commission was unwilling to concede that a selective attack amounts to an assault on a group as such ... the comparison of Srebrenica with Darfur shows that the modified conception of genocide, restricted to individual locales, has converged with the crime against humanity of extermination to the point where the two are almost interchangeable. Remarkably similar facts lead to a conviction for complicity in genocide in *Krstic*, but to the conclusion that crimes against humanity, not genocide, are being committed in Darfur.”)

while the acts of coercion were being committed and once it did exist (accepting for argument's sake the Prosecution's assertions) the civilians could not have been stopped from leaving. No logical interconnection can be made between any alleged genocidal intent and the alleged forcible transfer of the civilian population.

## 5. Conclusion

456. The massacres following the conquest of Srebrenica should be called by their proper name: extermination. This is no insult to the memory of those killed, and no lessening of the moral culpability of the executioners. The specific intent of genocide must, however, be interpreted in accordance with the larger purposes of the Genocide Convention, and the consequences for State behavior. Characterizing the Srebrenica massacres as genocide risks lowering the threshold in an unwarranted manner, triggering irrevocable international obligations based on the severe crimes of a few persons over a short period of time. Genocide should be reserved for clear-cut cases in order to uphold the integrity and meaning of the duty on States to prevent the crime. Deploying it more broadly risks undermining its critical, unique, and exceptional function.

### (vi) Conspiracy to Commit Genocide

457. Conspiracy to commit genocide is "an agreement between two or more persons to commit the crime of genocide." The *actus reus* of the crime is the existence of an agreement between individuals to commit genocide; the *mens rea* is the intent to enter into such an agreement.<sup>824</sup> Evidence of concerted or coordinated action may be probative of the existence of such an agreement, but the existence of the criminal agreement must be the only reasonable inference for the apparently concerted or coordinated action.<sup>825</sup>

458. For all the reasons discussed above in Section V, the evidence can support no finding that Borovcanin ever entered into any agreement with anyone to commit genocide. His actions

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<sup>824</sup> *Nahimana* AJ, para. 894; *Bagosora* TJ, para. 2087.

<sup>825</sup> *Nahimana* AJ, para. 896.

were coordinated with others in accordance with the needs of a lawful military operation. Nothing in his actions or behaviour shows that he was part of a criminal conspiracy at any time.

**(vii) “Opportunistic Killings”**

459. Borovcanin was not part of any JCE at all, thus precluding liability under JCE III. The charge is, in any event, improperly made and unfounded.

460. The Indictment alleges that various killings were a “natural and foreseeable consequence of the Joint Criminal Enterprise to forcibly transfer the population of Srebrenica.”<sup>826</sup> The Prosecution has pleaded no material facts in support of this allegation, merely providing details of the killings themselves. The Defence has not notice of what information should have placed Borovcanin on notice that killings were a “natural and foreseeable consequence” of the displacement. This is the essence of JCE III, and yet no material facts germane to this allegation are pleaded. The charge should be dismissed on this basis alone.

461. Nothing in the circumstances surrounding the evacuation of the civilian population of Srebrenica would have indicated that executions were a natural and foreseeable consequence. Indeed, all of the executions took place surreptitiously or were unconnected with the evacuation itself. These acts constituted a departure from all the accepted norms and *usual* practices of the armed forces of the Republika Srpska. Revenge killings were a foreseeable possibility in respect of any military operation carried out during the war in Bosnia. War crimes are, in fact, a foreseeable possibility in virtually any military campaign, no matter how disciplined or well-trained those forces might be. This type of general foreseeability should not satisfy JCE III, lest relatively minor criminal infractions lead to liability for criminal acts of a totally different order of culpability. Further, the killings arose not as a result of the forcible transfer itself, but from the detention of the military-aged men. If these men had been forcibly transferred, they would not have been killed.

462. The Borovcanin Defence reserves the right to rely on and adopt any all arguments presented by other parties in respect of this allegation.

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<sup>826</sup> Indictment, para. 31.

**(viii) Forcible Transfer from Zepa**

463. The Prosecution alleges that Borovcanin was part of a JCE whose purpose was to “force the Muslim population out of the Srebrenica and Zepa enclaves.”<sup>827</sup>

464. Borovcanin was nowhere near Zepa while the alleged acts of coercion were allegedly being exerted against its inhabitants. There is no evidence – much less any allegation – that Borovcanin knew of any plans to remove the population of Zepa; that he knew of the actions constituting the acts of coercion against its population; or that he otherwise contributed to the removal of that population in any way at all. The pleading is manifestly deficient because the evidence is non-existent. The Borovcanin Defence reserves the right to rely on and adopt any all arguments presented by other parties in respect of this allegation.

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<sup>827</sup> Indictment, para. 49.

## VII International Humanitarian Law Issues

### (i) The Conquest of the Srebrenica Enclave Was Not Unlawful

465. The Indictment alleges at paragraph 81 that Borovcanin “commanded MUP forces ... on 12 July 1995 who forcibly entered the UN enclave at Potocari and along with VRS forces, took military control of Potocari and the Dutchbat base there.” This paragraph is found in a section entitled: “Role and Actions of the Accused ... in furtherance of the [JCE] to forcibly transfer and deport the Srebrenica and Zepa civilian population.”

466. The Prosecution repeatedly conceded, however, that “there were plenty of legitimate reasons for this attack.”<sup>828</sup> Evidence probative of justifications for the attack on the enclave was objected to by the Prosecution, and these objections were often sustained by the Chamber on the basis of the concession.<sup>829</sup> The allegation combined with the concession leaves the Defence in a quandary: does the Prosecution maintain its allegation that Borovcanin participated in one phase of the conquest of Srebrenica with criminal intent? Or does it concede that Borovcanin was simply pursuing the objectives of a lawful attack?

467. No material fact is pleaded in support of Borovcanin’s alleged criminal intent *other than* his participation in the attack. The concession that the attack on Srebrenica was itself lawful thus eliminates the sole basis on which the Prosecution has asserted that Borovcanin possessed a criminal intent. The Prosecution is bound by its pleadings and by this concession that mere participation in the attack cannot be taken as evidence of any criminal intent.

468. The Defence does not trust the Prosecution to live up to its concession or to remain within the pleadings. Accordingly, this section discusses the lawfulness of the attack on the enclave as a matter of humanitarian law as applied to the evidence.

<sup>828</sup> 23167:3-8. See fuller citation to Prosecution concessions, section IVb, para 68.

<sup>829</sup> 2171:7-9 (“Mr. McCloskey: ... It’s been gone over and over and over again. I would just at this point object to the continuing part of non-contested facts that have been dealt with repeatedly.”) 2192:6-7 (“Mr. McCloskey: ... I don’t see how it really ties into this witness. It’s not contested”); 3874:2-5; 15306:21-15307:3; 29486:7-8 (“Mr. McCloskey: ... These questions are more time consuming than they are probative.”)

469. International humanitarian law is the *lex specialis* that governs the lawfulness of operations in armed conflict.<sup>830</sup> This is the evident remit of all the treaties and instruments that have been promulgated over the last century, including those negotiated after the emergence of crimes against humanity as a distinct body of law. The edifice of international humanitarian law would be destroyed if military campaigns conducted within the limits prescribed by the law of armed conflict could be deemed unlawful, for example, because of foreseeable population displacements. No ICTY or ICTR case has ever suggested otherwise.<sup>831</sup>

470. The Defence does not contend that a commander would be immunized from criminal liability if he or she conducted a military campaign within the bounds of IHL, but was nevertheless animated by the intent to commit a crime against humanity. The evidence of the criminal intent could not, however, be inferred from the violent actions falling within what is permitted by IHL. The entire premise of IHL is that certain acts of organized violence are lawful. A world without war would be better; but in a world with war, law can at least attenuate its severest consequences by imposing generally-accepted limitations on that violence. IHL has carefully calibrated those limitations, understanding that the efficacy of those protections depends precisely on their general acceptance in the international community. Accordingly, the Prosecution's "dual-purpose" concept – one lawful, the other unlawful – must be rejected unless there is some distinct evidence *other than* the attack itself showing that someone participating in an otherwise lawful military operation was somehow motivated by a criminal intent. The mere fact that a foreseeable consequence of a lawful military operation is human suffering, including mass population displacement, is not probative of intent to commit a crime against humanity. Civilian casualties and mass displacement is a foreseeable consequence of any war, particularly those against counter-insurgencies in which combatants mingle with civilian populations. The commanders of the operation against Fallujah are not guilty of a crime merely because they knew that a foreseeable, if not probable result, was massive population displacement during the years of operations against insurgents in that city.

<sup>830</sup> *Targeted killings Case*, para. 18.

<sup>831</sup> The Defence is not arguing that international humanitarian law is *lex specialis* of crimes against humanity in any and all circumstances. IHL has certain well-known gaps, but the scope of combat operations is not one of those gaps. Liability under Article 5 of the ICTY Statute has been imposed to the mistreatment of prisoners. But those cases (a) had nothing to do with the permissible scope of combat operations; and more importantly, (b) there was no incompatibility between the content of IHL and crimes against humanity. The abuse was equally prohibited under both bodies of law. *Martić*, paras. 303-313. See also *Gotovina et al*, paras. 24-28.

471. The attack on the Srebrenica enclave, including its complete takeover, was permissible under International Humanitarian Law. Parties to a conflict may agree on “demilitarized zones” pursuant to Article 60 of Additional Protocol I, which are to be immune from attack. The VRS and ABiH entered into such an agreement on 8 May 1993, specifically reciting Article 60, and making reference to Security Council Resolution 824 (re-confirming Resolution 819) which had declared Srebrenica a “safe area”.<sup>832</sup> The agreement required that “Every military or paramilitary unit will have either to withdraw from the demilitarized zone or submit/hand over their weapons ... to UNPROFOR.”<sup>833</sup>

472. The ABiH was never serious about this agreement or its predecessor, signed three weeks earlier. ABiH General Sefer Halilovic emphasized in an internal communication: “The disarmament of our troops is out of the question – not a single soldier, much less a whole unit.”<sup>834</sup> The farcical nature of the handover of weapons to UNPROFOR was described by a commander of the 28<sup>th</sup> Division: “We barely managed to secure some older weapons in disrepair to handover to UNPROFOR while the troops hid the rest at their homes.”<sup>835</sup> A huge number of ABiH documents confirm that the ABiH was organized,<sup>836</sup> armed,<sup>837</sup> and engaged in combat operations<sup>838</sup> from the enclave from 1992 through 1995.

<sup>832</sup> SD502 (“Agreement on the Demilitarization of Srebrenica and Zepa”, 8 May 1993), p. 1 (Article 2).

<sup>833</sup> SD502 (“Agreement on the Demilitarization of Srebrenica and Zepa”, 8 May 1993), p. 2 (Article 3).

<sup>834</sup> 4D198 (BiH Armed Forces Supreme Command Staff - Information re results of the negotiations on demilitarization of Srebrenica, 20 April 1993), p. 1.

<sup>835</sup> 4D2 (Statement of Ramiz Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 5. See also 4D490 (Oslobodjenje Daily - *Private conversation with Naser Oric* - Part 1, 23 August 1996), p. 2 (“When the order on demilitarization came, the Commander told be to deliver only those weapons which were out of order and useless and heavy guns, because we could not hide them. So I did. We kept defence lines and our weapons”); 4D491 ((Oslobodjenje Daily - *Private conversation with Naser Oric* - Part 1, 23 August 1996), p. 2 (“Naser got the order to deliver the weapons that were out of order and useless, and he proceeded so. We kept 3 – 4000 [thousand] rifles, let alone Zepa brigade. Let’s make a rough estimate. There were 3500 well armed men, mobilized. We kept most of heavy weapons, while those delivered to the UNPROFOR were accessible as well.”); 4D234 (ABiH 8 OG Srebrenica Command - Report, January 1995) (UNPROFOR was told that the low number of weapons was due to the departure of large numbers of fighters to Tuzla with their personal weapons).

<sup>836</sup> See e.g. 4D210 (BiH Armed Forces Supreme Command Staff - Order re organizational changes, 1 January 1994) pp. 1-3 (describing the formation of the 8<sup>th</sup> Operations Group with 5 brigades and a “Mountain Battalion”; commands of the 8<sup>th</sup> OG and three of the brigades are located in the town of Srebrenica itself); 4D211 (ABiH 2nd Corps Command Report, 2 February 1994) (describes actions taken in response to 4D210 and explains specifically that units are at 92% of prescribed manning levels, and 53% of prescribed levels of armament); 4D135 (BiH Ministry

473. By July 1995, the 28<sup>th</sup> Division consisted of six brigades, a battalion, and a "town command".<sup>839</sup> These units had specialized professional organization as well, including documents showing active reporting along security and intelligence, operations and training,

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of Defence, Srebrenica Department - List of Premises in Srebrenica used by Armed Forces of BiH, 22 February 1995), pp. 1-3 (describing location of military headquarters and facilities, most situated in businesses or private homes). Careful records were kept of officers and commanders: see e.g. Exhibits 1D1020-1D1026.

<sup>837</sup> 4D491 ((Oslobodjenje Daily - *Private conversation with Naser Oric* - Part 1, 23 August 1996), p. 2 ("However, from April 93, that is during a period of 2 years, they received 450,000 bullets of small calibre, 12 rockets, one rocket system and some RPGs from the Main Staff and the Corps Command in Tuzla"). 5D265 (Army General Staff Report, signed Hadzihasanovic, 28 May 1996) (describing weapons, ammunition and other supplies delivered to Srebrenica enclave in 1993 and 1994); 4D5D12/6D67 (ABiH General Staff, Order by Hadzihasanovic, 27 April 1995 (military uniforms, bullets and other materiel sent to both Srebrenica and Zepa army);

<sup>838</sup> 5D548 (Order from Halilovic to Oric, 8 June 1993) ("deploy reconnaissance patrols as deep as possible behind enemy lines, and based on their report and your own assessment, take action (operations) against the enemy"); 4D224 (ABiH 8 OG Srebrenica Command - Weekly Intelligence Report, 12 January 1995) p. 1 ("The enemy unsuccessfully tried to seize trig. point 820 Ravi Buljim and our forces have captured the positions ... The Command of the 8<sup>th</sup> OG Srebrenica has taken all measures and raised combat readiness to the highest level... The Military Police of the 280<sup>th</sup> [Brigade] and the Srebrenica Independent Mountain Battalion have been engaged in combat operations."); Prosecution Adjudicated Fact 46 ("Reconnaissance and sabotage activities were carried out by the 28<sup>th</sup> Division of the Army of Bosnia and Herzegovina ("ABiH") on a regular basis against the VRS forces in the area"); Fact 50 ("Bosnian Muslim helicopters flew in violation of the no-fly zone; the ABiH opened fire towards Bosnian Serb lines and moved through the 'safe area'; the 28<sup>th</sup> Division was continuously arming itself"); Prosecution Adjudicated Fact 67 ("A raiding party of Bosniacs attacked the nearby village of Visnjica, in the early morning of 26 June 1995. Although it was a relatively low-intensity attack, some houses were burned and several people were killed"); Popovic Adjudicated Fact 22 ("For the Bosnian Serbs, these Bosnian Muslim raids were of great concern, not least because they *tyed down a considerable amount of their armed forces, making them unavailable for combat activity elsewhere.*"); 4D475 (ABiH 8 OG Srebrenica Command - Basic concept for execution of tasks, an Opinion, dated 15 November 1994), pp. 1-4 (Oric giving his opinion on what appears to be a large-scale attack on various VRS and Serb civilian targets); 5D106 (Document Army ABiH no.04-20/95, 3 April 1995. This proposal by the Command of the 28<sup>th</sup> Division list army members proposed for different war decorations for their participation in a number of military actions against Serbs (various weapons were seized too), as well as in assisting with smuggling the armaments into the enclave etc.) 1D1007 (28<sup>th</sup> Division Command, Order for Reconnaissance and Sabotage actions, 5 June 1995); 1D1009 (28<sup>th</sup> Division Command, Order to prepare for reconnaissance and sabotage actions, 14 June 1995); 5D227 (ABiH 285<sup>th</sup> IBLbr Zepa - Regular Report by Avdo Palic, 28 June 1995) (describing some 9 diversion and sabotage groups being created and engaged in order to inflict as many losses to the enemy as possible (p. 1); and a number of sabotage actions being carried out, the result of which is some 40 Chetnics killed and large quantities of weapons, materiel and equipment seized).

<sup>839</sup> 4D225 (Order from General Staff to 2nd Corps, 12 January 1995) (8<sup>th</sup> OG reorganized into the 28<sup>th</sup> Division, comprised now of six brigades, a battalion, and a unit called the "Srebrenica Town Command" and the "Zepa Town Command" with Zepa Bde renamed as "285<sup>th</sup> Bde"; "the manpower, vehicle and livestock levels of all the units referred to in item I of this order should be brought up to 110% of those given in the units provisional wartime establishment. The replenishment of mobile brigade should be given priority in terms of numbers and quality of men") 4D263 (28<sup>th</sup> Division Command report on communications equipment); 4D73 (28<sup>th</sup> Division command report on personnel issues).

communication, and artillery functions.<sup>840</sup> Even allowing for a bureaucratic fetish for producing paper, these documents bespeak a surprisingly high-level of organization and resources. A reliable estimate based on several different Muslim sources is that about 6000 men were under arms in the Srebrenica enclave in July 1995.<sup>841</sup> Hunting rifles may have been the staple weapon, but the 28<sup>th</sup> Division also possessed better rifles, sniper rifles and machine-guns; hand grenades; Zolja RPGs; RPG-7's; regular RPG's; 107 mm rockets; 60- and 82-millimetre mortars; and 82 and 120 mm rounds.<sup>842</sup> Quantities of bullets, shells, rockets and grenades were distributed regularly, including from a large shipment received in June 1995.<sup>843</sup> The arsenal apparently included anti-armour weapons with a range of up to 3 kilometres and night-vision capability.<sup>844</sup> Rasim Delic lamented in 1996: "What can be said about the resistance, when despite so many anti-armour weapons, not a single tank was destroyed?"<sup>845</sup>

<sup>840</sup> 4D220 (Annual Report on 8 OG Anti-aircraft Defence Artillery and Rocket Units, to 2<sup>nd</sup> Corps, 28 December 1994); 4D224 (ABiH 8 OG Srebrenica Command - Weekly Intelligence Report, 12 January 1995)

<sup>841</sup> 4D2 (Statement of Ramiz Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 14 ("I had around 6,000 troops, without counting the troops from Zepa"). At one point, Mevludin Oric implies that the number was much higher (1093:3-13) ("Q. Does that statement reflect the truth? A. There were 14,000 of them, but not armed. They existed. There were 40,000 -- 14,000 of them, but they were not all involved. They were not armed. Q. So what you're saying is that there were 14,000 soldiers, but they were not all armed. Is that exact? Is that correct? A. Yes. Most of them didn't. Q. At any rate, we can draw the conclusion that in July, 1995, there were soldiers in the city of Srebrenica; is that correct? A. There were able-bodied men. There were around 14,000 able-bodied men.")

<sup>842</sup> 1D464 (Army General Staff to the President, Strictly Confidential, 13 July 1995, giving an inventory of armaments within the Srebrenica and Zepa enclaves); 4D11 ("Analysis and Chronology of Events in Srebrenica," apparently an ABiH document created in late-July 1995), pp. 3, 10, 11 (providing an inventory of the weapons and ammunition delivered to the Srebrenica enclave); 4D264 (28th Division Command - Report on Received Materiel, 27 April 1995) (confirming receipt of recent shipment of weapons, including: 50,000 7.62 mm bullets; 40 82 mm shells; 70 60 mm shells; 16 RPG-7 launchers; further requests include "a PM-84 machine gun return mechanism, a spring and a trigger mechanism"); 4D269 (285<sup>th</sup> Brigade to 28<sup>th</sup> Division Command confirming receipt of weapons and other supplies, including "nitroglycerine rifles" and ammunition);

<sup>843</sup> 1D1010 (28<sup>th</sup> Div Operations and Training Section, 2 June 1995) (reporting distribution of weapons and ammunition to various units, including thousands of rounds of 7.62 mm bullets, hand grenades, 82 mm mortar shells, M57 rocket-launcher shells, 60 mm hand-held rocket-launchers and shells)

<sup>844</sup> 1D1120 (Command of 2<sup>nd</sup> Corps to Command of 28<sup>th</sup> Division, 6 July 1995); 4D11 ("Analysis and Chronology of Events in Srebrenica," apparently an ABiH document created in late-July 1995), p. 10 (reporting possession of 12 missiles for this weapon).

<sup>845</sup> 4D5 (Report by General Rasim Delic to the BiH Assembly re reasons for the fall of Srebrenica, 30 July 1996), p. 6.

474. The ABiH continued to execute and plan operations against Serb forces and civilians from April through June 1995, with the "aim of distracting the aggressor from the Sarajevo front."<sup>846</sup>

475. UNPROFOR's attempts to enforce the demilitarization were evaded or treated with undisguised contempt.<sup>847</sup> The ABiH did not even bother with the pretence of moving major headquarters out of the centre of Srebrenica Town itself, which was indisputably within the perimeter of the demilitarized zone.<sup>848</sup> The UN placed the ABiH on notice of these violations, reacting in part to forceful complaints by the Serb side that these violations were ongoing.<sup>849</sup>

476. The agreement between the VRS and ABiH prohibited these activities, calling for the demilitarization of the Srebrenica area. The core ingredients of any demilitarized zone, according to Article 60 (3) of API are four-fold: "(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated; (b) no hostile use shall be made of fixed military installations or establishments; (c) no acts of hostility shall be committed by the authorities or by the population; and (d) any activity linked to the military effort must have ceased." Sub-section 7 provides that in the event of "a material breach of the provisions of

<sup>846</sup> 4D306 (28th Division Command report, 30 June 1995) ("our side carried out planned combat operations of a diversionary character with the aim of distracting the aggressor from the Sarajevo front"); 4D262 (28th Division Request for Materiel, 24 April 1995) (request for substantial quantity of weaponry and ammunition for the "forthcoming combat operations"); 4D2 (Statement of Ramiz Bécirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 11 (describing an attack that "killed some 60 Chetniks while one group entered the village of Visnjica and torched several houses").

<sup>847</sup> 4D234 (ABiH 8 OG Report, January 1995); 4D222 (ABiH 8 OG Srebrenica Command - Interim Report, 11 January 1995), p. 1 ("an incident" occurred with UNPROFOR, which had "blocked the building of the 281<sup>st</sup> Brigade Command. Weapons were relocated through the engagement of civilians, so the incident ended without problems").

<sup>848</sup> Prosecution Adjudicated Fact 35 ("However, there was discord about the precise boundaries of the territory subject to the agreement, specifically, whether the agreement covered only the urban area of Srebrenica.") The alleged "discord" was not genuine. The agreement itself, though not defining the exact perimeter of the demilitarized zone, says that it extends to "the areas of Srebrenica and Zepa" and that "the demilitarized areas will include the area within the current lines of conflict." The lines of conflict were obvious not on the perimeter of Srebrenica town. The notion of "discord" implies a good faith disagreement, which is clearly not sustainable based on the wording of the demilitarization agreement. 5D502 ("Agreement on the Demilitarization of Srebrenica and Zepa", 8 May 1993), p. 1 (Article 1).

<sup>849</sup> 4D19 (Memorandum by General Ridderstad, Commander of the North-East Sector addressed to General Delic, 29 January 1995); 5D1349 (Letter of protest sent by Karremans to Osman Suljic, 3 April 1995) (protesting use of weapons inside the enclave, including emplacement of artillery near the PTT building); 4D128 (Letter from Nicolai to Rasim Delic, 26 June 1995), p. 2.

paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone.”<sup>850</sup> The former demilitarized zone then reverts to the default protections of the international law applicable in armed conflict, applicable to any territory.

477. The ABiH materially breached the demilitarization agreement from the beginning. They never even attempted to comply with its terms. This was a notorious fact. Butler acknowledges in his report that in early 1995 the VRS was under growing military and strategic pressure that was making the continued war of attrition unsustainable.<sup>851</sup> The VRS was legally justified in launching an attack against the military targets in the enclave in order to root out these activities. This in no way detracts, of course, from the VRS’s omnipresent obligation to conduct its operations within the proper bounds of IHL. The Prosecution even concedes that the original objective of Krivaja-95 was purely military, designed only to cut-off the smuggling routes into the Srebrenica enclave by which ABiH forces were militarily supplied.<sup>852</sup>

478. VRS forces discovered mid-way through the attack that ABiH defences were weaker than expected, and decided to pursue their advantage. This too was entirely lawful and reasonable. The VRS had every right to attempt to fully defeat and destroy all armed forces in the enclave having discovered that the ABiH was vulnerable. No sensible military force in the world would have done otherwise. Again, this in no way detracts from the omnipresent obligation to pursue those objectives by lawful means.

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<sup>850</sup> API, Article 60(7).

<sup>851</sup> P686 (Srebrenica Narrative), p. 14 (“As the beginning of 1995 took hold, political and military leaders in Republika Srpska (hereinafter “RS”) began what could only be described as a candid look into their future. It is clear that as early as March 1995, the realization had been made that the RS had to either militarily end the conflict or set the stages for a negotiated settlement favourable to them by the end of the year.”)

<sup>852</sup> Prosecution Opening Statement 398:6-16 (Mr. McCLOSKEY: “... while in the direction of Srebrenica and Zepa enclaves complete physical separation of Srebrenica from Zepa should be carried out as soon as possible, preventing even communication between individuals in the two enclaves.” Well, this is military. Zepa and the Srebrenica enclaves were militarily supporting each other. Items were being flown in in secret helicopter missions from the BiH army and creating havoc within the ranks of the villages outside the enclaves and causing the VRS to tie down hundreds of troops around those enclaves away from the Sarajevo front, which was a crucial front. So this part of it is military and is legitimate.”) 417:7-8 (Mr. McCLOSKEY: Now, as we’ve said before, separate the enclaves is a legitimate military concern...).

479. Resolutions 819 and 824 do not alter the situation.<sup>853</sup> These Resolutions were arguably superceded by the more stringent requirements of the demilitarization agreement entered into on 8 May 1993. The Prosecution has conceded that the attack was lawful without distinguishing between public international law and international criminal law obligations. Even assuming, despite this concession, that these Resolutions continued to have independent effect as a matter of public international law, they created no criminal prohibition against attacks on the enclaves. The Security Council has no power to change the well-established rules of armed conflict, codified in Article 60 of API. The character of the resolutions is essentially political. A French *note verbale* accompanying Resolution 819 stated: “[t]he general aim of the scheme should be to stop territorial gains by the Serbian forces in Bosnia Herzegovina and to achieve a negotiated settlement by the parties concerned.”<sup>854</sup> The obligations in the resolutions are directed at the level of state responsibility for embarking on hostilities, not individual responsibility within those hostilities. The Security Council is not declaring *jus in bello*.<sup>855</sup> For example, when the Security Council declares a “no-fly zone”, individuals who fly a plane in violation of the zone are not committing a criminal act. On the contrary, their conduct is privileged under the law of armed conflict, just as would be any UN-sponsored combatant who then tries to enforce the no-fly zone by shooting down that pilot. Neither of them is placed outside of the remit of IHL because of the Security Council resolution. Third, even if these two interpretations are wrong, no one could reliably have stated in July 1995 that the Security Council resolution created any obligations outside of the realm of state responsibility. The concept of a “safe area” had never been previously used in any United Nations Resolution and was unknown to IHL. The Resolutions could reasonably have been understood, as many academic commentators said, as directed towards states and/or parties to a conflict, not

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<sup>853</sup> 1D727/P484 (Resolution 819); P2743 (Resolution 824).

<sup>854</sup> S/25800, para 3.

<sup>855</sup> Lavoyer, p. 272: “These zones had more in common with *ius ad bellum* than with *ius in bello*.” Sassoli and Bouvier, pp. 215-216: “Those zones under the *ius in bello* have to be distinguished from the safe areas, humanitarian corridors, or safe havens recently created under Chapter VII of the UN Charter, i.e., *ius ad bellum*, to avoid certain areas and the war victims found there from falling under enemy control.” Simon, pp. 67-68: “Genauso weichen UN-Schutzzonen in ihrer Errichtung durch Dritte und der Möglichkeit der gewaltsamen Sicherung von der konsensualen Konstruktion der Schutzzonen des humanitären Völkerrechts ab. Deswegen werden UN-Schutzzonen auch dem Bereich des *ius ad bellum*, dem Recht zum Krieg, und nicht dem *ius in bello*, dem humanitärem Völkerrecht, zugeordnet.”

individuals.<sup>856</sup> Applying its provisions as a matter of individual criminal responsibility, based on some theory of instantly-crystallized IHL obligations, would obliterate the principle of *nullum crimen sine lege*.

### Conclusion

480. The initial attack and the complete conquest of the Srebrenica enclave was lawful under international humanitarian law. Serb forces were entitled to respond to the ABiH's persistent and widespread violation of the demilitarized status of the Srebrenica enclave by launching a military offensive. The obvious and predominant purpose of the attack was to eliminate the ABiH from the Srebrenica enclave. Any commander or participant in any stage of the attack on the enclave was entitled to presume that these evident purposes were the real purposes of the attack. Mr Borovcanin's limited role, and the limited role of his men, in taking over the Srebrenica enclave was entirely justified and lawful on this basis.

### (ii) UNPROFOR Soldiers Were Combatants No Later Than 9 July 1995

481. Paragraph 81 of the Indictment alleges that Borovcanin and his subordinates were responsible for "disabling UN forces militarily"; taking control of the Dutchbat base in Potocari; and "disarming Dutchbat troops in and around Potocari."<sup>857</sup> The factual circumstances surrounding these events have been previously discussed. This section argues that, in any event, these actions were in no way unlawful, much less criminal.

482. United Nations forces can be combatants under IHL. A UN force whose original mandate prescribes a neutral peacekeeping role may, by its actions, become a party to the armed conflict. A peacekeeping force that engages in significant hostile acts against a party to a conflict – regardless of the circumstances initiating the hostile acts – becomes a party to the conflict, and the relations between combatants on both sides fall to be regulated by IHL. Dutchbat forces became combatants no later than 9 July, when the "seriously meant green order" was issued by Deputy Commander Franken, followed by a series of hostile acts in furtherance of that order. From that moment on, Dutchbat soldiers became lawfully subject to attack until rendered *hors*

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<sup>856</sup> See Roberts.

<sup>857</sup> Indictment, para. 81(a).

*de combat* by surrendering. As an incident of surrender, Dutchbat forces could be required, by force if necessary, to lay down their weapons and their equipment could lawfully be seized and used as war booty.

### General Legal Framework for Peacekeepers

483. Peacekeepers have no fixed status under IHL: they may be either civilians or combatants depending on their mandate and actual conduct. United Nations documents explicitly recognize that UN forces may act as combatants. The Secretary General has recognized that UN forces are subject to IHL “when in situations of armed conflict they are actively engaged therein as combatants.”<sup>858</sup> Intentionally attacking peacekeepers is a war crime under the ICC Statute “as long as they are entitled to the protection given to civilians.”<sup>859</sup> This implies that peacekeepers are not always entitled to that status.<sup>860</sup> The United Nations, just like any other organized entity, has the factual capacity to become a party to an armed conflict.<sup>861</sup> Armed conflict exists as a question of fact, not of law.<sup>862</sup> Accordingly, if a peacekeeping force becomes a party to an armed conflict, IHL applies and its military members become combatants.<sup>863</sup> To imply otherwise, according to one commentator, would be “so absurd and disingenuous as to not pass what Professor Franck has referred to as the ‘laughter test’.”<sup>864</sup>

<sup>858</sup> UN Secretary General’s Bulletin, para. 1.1. Similarly, the 1994 UN Safety Convention excludes from its scope all “enforcement action under Chapter VII ... in which any of the personnel are engaged as combatants ... and to which the law of international armed conflict applies.” Convention on the Safety of the United Nations and Associated Personnel, Article 2 (2). See also Kindred at p. 260: “While the UN has not defined the term ‘combatant’, its meaning may reflect the practice under the Geneva Conventions concerning humanitarian law.” The relevant provisions are therefore Article 4 (A) Geneva Convention III, and Article 43 Additional Protocol. See the SG’s bulletin, para. 1.2; If the peacekeepers are present in a situation of internal armed conflict without being actively engaged therein, they are protected as “persons taking no active part in the hostilities” (article 3.1 Geneva Conventions). Cf. Greenwood (1996-1997), at p. 191.

<sup>859</sup> Rome Statute, Article 8 (2)(b)(iii). On the scope of this provision see: Cottier, at p. 191f.

<sup>860</sup> See Greenwood (1996-1997), at p. 189; Tittmore, at pp. 110-111; Shraga, at p. 74.

<sup>861</sup> See Glick, at p. 73 *et seq.* See Saura, at p. 500; Seyersted, at p. 201. See Glick, at p. 74; Shraga and Zacklin, at p. 47.

<sup>862</sup> See Glick, at p. 75.

<sup>863</sup> See Greenwood (1996-1997), at p. 189; Bowett, at p. 499 *et seq.*; UK Ministry of Defence Manual, at p. 376.

<sup>864</sup> Glick, at p. 76. See also Bothe and Dörschel, at p. 500.

484. Determining the status of UN forces has become more complicated over the last twenty years, as their roles have become more varied.<sup>865</sup> The mandates of some missions are ambiguous as to whether the forces are intended to be combatants, but leaving open that possibility depending on how events unfold on the ground.<sup>866</sup> The UN “peacekeeping” mission in Bosnia was one such mission. The force was mandated under Chapter VII of the Charter, and authorized to use force to defend the territorial integrity of the “safe areas”.<sup>867</sup> This opened the door to a potential combat role in order to defend those safe areas.

485. The application of IHL does not depend on which party initiated the conflict, or the legitimacy of its initiation.<sup>868</sup> IHL applies reciprocally to both sides, regardless of whether the peacekeeping force went beyond its mandate, and regardless of whether the original attack on the peacekeepers was lawful under either IHL or public international law.<sup>869</sup> The preamble to the First Additional Protocol of 1977 emphasizes that IHL must be applied “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”<sup>870</sup> The vitality of IHL depends on this principle.<sup>871</sup> As Judge Christopher Greenwood has observed:

To depart from that principle [of equal application of IHL to all parties to the conflict] would be likely to undermine respect for the law. As Sir Hersch Lauterpacht, who was initially skeptical about the application of the principle of equality in the United Nations

<sup>865</sup> See Murphy, at p. 166; Shraga and Zacklin, at p. 40. See Shraga, at p. 65 *et seq.* See Murphy, at p. 168 *et seq.*; Shraga and Zacklin, at p. 40.

<sup>866</sup> See Greenwood (1996-1997), at p. 198; Shraga, at p. 76; Shraga and Zacklin, at pp. 46-47. See Bothe and Dörschel, at p. 502

<sup>867</sup> United Nations Security Council Resolution 836 (1993).

<sup>868</sup> See UK Ministry of Defence Manual, at p. 34, 376. NATO Bombing Decision, para. 34 (“As a matter of practice, which we consider to be in accord with the most widely accepted and reputable legal opinion, we in the OTP have deliberately refrained from assessing *jus ad bellum* issues in our work and focused exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of the *jus in bello*.”) See Saura, at p. 494

<sup>869</sup> See Bothe and Dörschel, at p. 501; Murphy, at p. 168.

<sup>870</sup> Additional Protocol I, 5<sup>th</sup> sentence of the preamble.

<sup>871</sup> Reciprocity is a core principle of IHL. IHL is indifferent as regards the legality of the original use of force, it does not matter who brought the conflict into existence. It is a “cardinal principle that combat forces are treated equally” (Murphy, at p. 176). Thus, all that counts is that an armed conflict factually exists.

Charter era, put it more than forty years ago, “[i]t is impossible to visualize a conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.” ... If any attack on UN personnel by any means whatsoever is a crime for which an ordinary soldier can be prosecuted in any country in the world, then it is difficult to see what inducement there is for such persons to comply with the requirements of the 1949 Geneva Conventions, the law on weaponry, or any of the other principles of the law of armed conflict.<sup>872</sup>

What matters alone is whether the threshold of an armed conflict has been reached, with the “peacekeepers” acting as combatants.<sup>873</sup> Once an armed conflict exists, IHL overrules other international rules related to the legality of the use of force.

486. Isolated exchanges of fire, particularly in self-defence, do not suffice.<sup>874</sup> A single “peacekeeper” defending himself or herself does not convert a peacekeeping force into a party to an armed conflict. Systematic and organized engagement – particularly in order to accomplish mission goals rather than for self-defence – crosses the necessary threshold.<sup>875</sup> Once the UN force becomes a party to the conflict, it does so as a whole. This means that not only the units actually engaged in hostilities become combatants but *all* members of the force that fall under the IHL definition of combatant.<sup>876</sup>

### Consequences of Combatant Status

487. Once “peacekeepers” have become combatants under IHL they keep this status until the conflict ceases or their status otherwise changes. Combatants are legitimate military targets. They may be fired upon until they are rendered *hors de combat*.<sup>877</sup> Soldiers are deemed *hors de combat* if they fall into the hands of the adverse party, express the intention to surrender or are incapable of defending themselves. A soldier who wishes to surrender must “lay[] down his

<sup>872</sup> Greenwood (1996-1997), at pp. 205-6 (footnotes omitted).

<sup>873</sup> See Tittmore, at p. 108; Shraga and Zacklin, at p. 47.

<sup>874</sup> Cf. Greenwood (1996-1997), at pp. 201-202. See also Greenwood (2008), at p. 48.

<sup>875</sup> Personal self-defence does not change the individual peacekeepers status (cf. Cottier, at p. 195). However, even acts of personal self-defence may, if they reach a certain scale, render the peacekeeping force a party to an armed conflict (cf. Frostad, at p. 324; Cottier, at p. 195).

<sup>876</sup> See Frostad, at p. 318.

<sup>877</sup> Regulation 23 (c) of the 1907 Hague Regulations, Article 41 Additional Protocol I.

arms and raise[] his hands. Another way is to cease fire, wave a white flag and emerge from a shelter with hands raised... If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons."<sup>878</sup> The intention to surrender must be clear to the attacking forces. The attacking forces are required to cease fire on combatants only once the intention to surrender is indicated in an "absolutely clear manner."<sup>879</sup> Once *hors de combat*, they may be detained as prisoners of war, and all of their weapons and equipment may be seized and used, except for that absolutely necessary for the personal safety of the prisoner.<sup>880</sup>

### **UNPROFOR Became a Party to the Conflict No Later Than 9 July 1995**

488. UNPROFOR became a party to an armed conflict no later than the morning of 9 July when Major Rutten, Deputy Commander of the Dutchbat forces in Srebrenica, ordered his forces to "establish a defence in the southern border of Srebrenica".<sup>881</sup> Rutten explained a notation on this order before the Chamber:

And the note is: "This is a seriously meant green order." That means -- in fact, we had a difference between blue operations, meaning operations within the context of the UN, and blue is referring to the colour of our equipment, blue helmets, et cetera. And the green order was specifically given to tell him that he could use immediately all his means without the restrictions of the UN to execute his order. In fact, it meant you have to proceed now as a normal army, not a UN army. That's what I meant and to make very clear to him.<sup>882</sup>

489. This order followed a period of increasing tension between Serb and UN forces. The first active hostilities between the Bosnian Serbs and UNPROFOR personnel took place on 3 June 1995 when Serb forces attacked OP Echo with rifle and tank fire, damaging the outpost and forcing the withdrawal of UN forces from that position.<sup>883</sup> When the attack on the enclave itself

<sup>878</sup> ICRC Interpretative Guidance, at pp. 486-487.

<sup>879</sup> *Ibid.*

<sup>880</sup> See Kindred, at pp. 263-264; Frostad, at p. 322.

<sup>881</sup> Rutten 2464:22-23; P2263 (Order from Franken to Groen, 9 July 1995).

<sup>882</sup> Rutten 2464:25-2465:7; P2263.

<sup>883</sup> Franken 2452:15-2453:7; see, also, P534 (Dutch Ministry of Defence, Debriefing on Srebrenica, 4 October 1995), p. 24; P495 (UNMO Report, 8 July), p. 1.

started on 6 July, UN forces were ordered to hold and defend their positions, even though they were taking fire from Serb forces who were not necessarily directly targeting them. The order was to hold and defend positions, not merely to return fire in self-defence. This order must also be seen in the context of explicit coordination between UN and ABiH forces as to their relative positions and their reaction to any VRS attack.<sup>884</sup> OP Foxtrot was finally overrun by Serb forces on 8 July.<sup>885</sup>

490. OPs Mike and Uniform were fired at on 9 July.<sup>886</sup> APCs at OP Bravo-1 were apparently fired on by Serb forces, damaging equipment and injuring one Dutch soldier.<sup>887</sup> This fire may at first have been aimed at a nearby ABiH artillery position, but an UNPROFOR soldier testified that he believed that at least some of the fire was aimed directly at his position.<sup>888</sup>

491. UNPROFOR higher command ordered Dutchbat to defend the town of Srebrenica with all military means on 9 July.<sup>889</sup> Franken responded to this order by conveying the "seriously meant green order" to his forces in the southern end of the enclave, where fighting was ongoing.<sup>890</sup> Dutchbat forces took up blocking positions on 9, 10 and 11 July against the VRS.<sup>891</sup> UNPROFOR

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<sup>884</sup> Franken 2458:8-10.

<sup>885</sup> Franken 2460:1-7; see, also, P534 (Dutch Ministry of Defence, Debriefing on Srebrenica, 4 October 1995), p. 24-25.

<sup>886</sup> Franken 2461:11-19; see, also P534 (Dutch Ministry of Defence, Debriefing on Srebrenica, 4 October 1995), p. 25-26; P498 ((UNMO Report, 9 July), p. 1 (for OP K and OP E)

<sup>887</sup> Egbers 2715:24-2716:1

<sup>888</sup> Egbers 2909:10-2910:13.

<sup>889</sup> Franken 2462:10-20.

<sup>890</sup> Franken 2464:25-2465:7.

<sup>891</sup> Egbers 2938:20-2939:3 ("The following day, you were required to go back to B 1 at 7.00 in the morning; that's right, isn't it? A. That's possible. I don't know the date and the times. Q. Well, there was a very specific purpose to your going to B 1 on the 10th of July? A. That is, yes. Q. There was air strike expected at 700 hours precisely? A. That's correct. Q. And you went there with forward air controllers to call in that air strike? A. That's correct."); Egbers 2716:11-16 ("Okay. And while you were at Bravo 1 or near that location, were you aware that close-air support was being summoned? A. That's what my commander told me. He told me, 'You have to have a forward air controller in your position because your position is that good that it can have a clear view on the south of the enclave. And there will be a NATO strike from the F-16s,' or even a gunship is mentioned.") Franken 2471:14-19 ("Q. How many blocking positions were there and what names were they assigned? A. There were originally planned four blocking positions. They were called Bravo 1 up to Bravo 4, and there was one planned position for my forward air controllers, which means that is a team that is able to lead planes on -- attacking planes on a target.");

soldiers came under fire and some were injured while holding these blocking positions.<sup>892</sup> Dutch forces fired back, as was confirmed by van Duijn and Franken.<sup>893</sup>

492. The blocking positions were a lethal threat to the Serb forces not only because of the infantry fire that could be directed on them, but also because these positions were known to be part of an attempt to bomb their static (*i.e.* blocked) positions from the air.<sup>894</sup> UNPROFOR threatened the VRS on the night of 10 July with massive air strikes if they did not withdraw.<sup>895</sup> Dutchbat commanders met with 28<sup>th</sup> Division commanders that same night, informing them that massive airstrikes would commence in the morning:

the UNPROFOR commander informed us that the Chetniks had been give[n] an ultimatum to which they had to respond by 0600 hours, according to which the Chetniks were required to withdraw to the positions they held before having taken the UNPROFOR observation post at Zeleni Jadar, and that if they were to refuse ... strong air strikes with around 100 aircraft participating would ensue. The zone from Zeleni Jadar to

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van Duijn 2264:3-7 ("On the 9th I got the assignment to go with the rest of my platoon because two of my groups were already positioned on the OPs Romeo and Quebec, but with the rest of my platoon and with the quick-reaction force to go and help the Bravo Company setting up the blocking positions south of Srebrenica town in order to stop the advancing of the Serb forces.")

<sup>892</sup> Franken 2472:22-2473:5; van Duijn 2266:7-23.

<sup>893</sup> Van Duijn 2376:11-16 ("Q. I will be more specific. Did you not at a given point in time shoot directly at the Serbian forces? A. At a certain period, I gave my gunner the order to first shoot overhead if he saw forces coming over the hill, and after that, there was the intent to first shoot overhead and later on if they would not stop, shoot directly. And my gunner did that, he shot.") Franken 2479:21-23 ("That's correct. The situation was that we had an attack on the 10th. The evening of the attack we fired upon the Serb army. They withdrew.")

<sup>894</sup> Franken 2549:24-2550:1 ("But within the procedures of air support, we know the killing zone. Killing zone is an area where you try to amass your enemy and be sure that there are none of your own troops in the area."); Egbers 2716:11-16 ("Okay. And while you were at Bravo 1 or near that location, were you aware that close-air support was being summoned? A. That's what my commander told me. He told me, 'You have to have a forward air controller in your position because your position is that good that it can have a clear view on the south of the enclave. And there will be a NATO strike from the F-16s,' or even a gunship is mentioned.")

<sup>895</sup> Nicolai 18474:8-13 ("Well, at that point, it became crystal clear that the VRS was attacking the enclave. It was not immediately clear where they would stop, but they had penetrated far enough for them to have almost reached -- have reached the city of Srebrenica. So it was high time to stop the attack in its tracks and that's why we threatened to use air-strikes."); Nicolai 18484:12-13 ("As far as I know, in this case I warned both parties that air support had been requested."); Franken 2549:16-23 ("Q. And they were described by your superior, Colonel Karremans, to the representatives of the BiH as massive air-strikes. Is that -- A. Yeah, that's correct, in the night of the 10th to the 11th, yes.")

the new position of our units would be considered a dead zone, within which everything that moved would be fired upon.<sup>896</sup>

493. Two British SAS air controllers arrived at the PTT building at about 0600 hours on 11 July and asked the commander of the 28<sup>th</sup> Division for locations of Serb targets for the air strike.<sup>897</sup> The assistant commander for intelligence of the 28<sup>th</sup> Division guided the two air controllers into the field for that purpose.<sup>898</sup> The UNMOs also provided grid references to NATO for air strikes on Serb artillery positions, thus abrogating their status as observers.<sup>899</sup> The provision of tactical intelligence, especially the identification and marking of targets, is itself a hostile act under IHL and constitutes direct participation in hostilities.<sup>900</sup>

494. The potential for massive air strikes was no empty threat. F-16 and A-10 aircraft from NATO were apparently circling the area on 11 July.<sup>901</sup> Air strikes were conducted during the day

<sup>896</sup> 4D2 (Statement of Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 12; See also, 5D56 (NIOD report Srebrenica, describing last meeting between Karremans and the Opstina of 10 to 11 July 1995).

<sup>897</sup> 4D2 (Statement of Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995) p. 12 ("Some time after 0600 hours, two British officers came to me in the Post Office building, and asked me to give them the targets for the air strikes since the Chetniks had failed to respond to the ultimatum.")

<sup>898</sup> 4D8 (BiH State Security Report, 28 August 1995), p. 4 ([UNPROFOR informs commanders of the 28<sup>th</sup> Division on the night of 10 July that an ultimatum is being issued to the VRS to halt the advance and that "[i]f they rejected the ultimatum or failed to respond to it, heavy air strikes would follow, involving about 100 aircraft. The zone from Zeleni Jadar to our units' new position would be considered a dead zone, where anything that moved would be targeted. After this announcement, and consultations with the members of the division command gathered there and some of the brigade commanders, a decision was taken to postpone the planned counterattack in order not to be exposed to the aerial attack. The decision was changed for the units to remain on the lines achieved in order to prevent any further advance by the aggressor and for the units to move to clear the ground after the aerial operations. A little after 6 o'clock in the morning, two British officers came to the post office building, where the commander of the 28<sup>th</sup> [Division] was. They requested targets for the aircraft since the Chetniks had not responded to the ultimatum. Ekrrem Salihovic, assistant for intelligence, who is now at the division command in Tuzla, was assigned to take these officers into the field. They were able to see the targets in the banned zone."); Egbers 2938-2940.

<sup>899</sup> Kingori 19236, 19244.

<sup>900</sup> ICRC Interpretative Guidance, at p. 55; Targeted Killings Case, at para. 35.

<sup>901</sup> Fortin 18261:11-18262:3 ("Q. And do you recall with any specificity what actual planes were stopped and who in Sarajevo actually gave the order to stop them? A. Well, the BH command gave the order and the acting commander at the time was General Gobillard. He may have acted through the Chief of Staff of BH command, who was General Nicolai. I know that two Dutch F-16s had engaged; two Americans F-16s followed, but I'm not sure that they were-- they dropped anything; and A-10s were -- two A-10s were next to come and they were stopped. Q. And, just briefly, what type of capabilities does an A-10 have, and do they have anything in particular that's relevant to close air

by F-16 aircraft, destroying a Serb tank, albeit at a much lower level of intensity than had been threatened.<sup>902</sup> The air strikes were apparently called off because of a VRS threat to kill Dutch soldiers in their custody. This would, of course, constitute a violation of IHL. The reason for suspending of the air strikes does not, however, lessen the lethal danger to the VRS forces posed by the UN blocking positions on 9, 10 and 11 July.

495. This sequence of events shows that UNPROFOR had become a party to an armed conflict with the Bosnian Serbs as of 9 July, when the "seriously meant green order" was issued. The order converted Dutchbat from a UN "peacekeeping" role into a party to the conflict hostile to the VRS. Direct fire on the Serb forces, combined with the well-understood tactical manoeuvre of establishing blocking positions to facilitate air strikes, are the most concrete indications that UNPROFOR had, by then, become a party to the conflict. UNPROFOR soldiers became combatants as a result of their hostile acts against Serb forces.

**Dutchbat Soldiers Were Lawful Targets Until Placed Hors de Combat, and Thereafter Could Lawfully be Detained As Prisoners of War**

496. A combatant who surrenders is rendered *hors de combat* and henceforth is entitled to be treated as a prisoner of war. The local UNPROFOR commander ordered on 12 July that his troops lay down their weapons, or place them beyond use.<sup>903</sup> The Dutch soldiers at OP Papa hoisted a white flag, thereby effectively surrendering to the advancing Serbs.<sup>904</sup> Serb forces subsequently went around the OP and the soldiers stationed there returned to base a few days

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support? A. The A-10s are the best aircraft for that kind of air task. They are slower. Their pilots do basically only that, fire on ground support. So they are better trained, and they have a big cannon which is much more accurate. Accuracy, in the case of close air support, is important because the limiting definitions of that type of action usually mean they are being employed in close support to our -- or in close proximity to our own troops. So accuracy is important.")

<sup>902</sup> Franken 2485; Kingori 19236; Egbers 2716. Egbers 2717; 2801:3-20 ("Do you recall, sir, when the F-16 bombed Serb military in Srebrenica or around that area? A. I can recall that. Q. And what date was that? A. That was on the last day that I was there. Q. And what day -- A. At Bravo 1. I don't have all -- it was on the fourth day, so it was 8, 9, 10, 11th. July 11th. Q. It was on July 11. After the -- strike that. Do you know how many tanks, if any, those F-16s that shot at the Serb military, how many tanks they took out, if any? A. I only know that there was one tank who was between us and the town of Srebrenica, and that it didn't move, it didn't fire at us after the attack.")

<sup>903</sup> Van Duijn 2272.

<sup>904</sup> Franken 2588:16-2589:11; 1D20 (UNMO report, 26 July 1995), para. 10 (OP Papa remains in place).

later.<sup>905</sup> There is no indication that any UNPROFOR soldier was attacked after he or she had surrendered. All surrendered UNPROFOR soldiers were lawfully subject to detention on any terms that may have been dictated by the VRS within the parameters prescribed by the Geneva Conventions for the treatment of prisoners. The mere fact that many UNPROFOR soldiers were not detained or disarmed does not diminish the right to do so.

497. Some Dutch soldiers apparently declined to voluntarily disarm. Lt. Rutten ordered some of the soldiers under his command on 12 July not to give up their weapons when so requested by Serb forces and, at some point, he was himself detained by Serb forces.<sup>906</sup> Rutten and his men were lawfully subject to detention under IHL. Indeed, Rutten's acts of resistance made it entirely appropriate and proper that he be disarmed and placed under arrest.

#### End of the armed conflict

498. According to Article 3 (b) of the First Additional Protocol "the application of the [Geneva] Conventions and of this Protocol shall cease, in the territory of the parties to the conflict, on the general close of military operations [...]."<sup>907</sup> 'Military operations' means the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.<sup>908</sup> The general close of military operations is not the same as a mere factual cessation of hostilities. The ICRC Commentary on the matter makes this clear when it states that "[t]he general close of military operations may occur after the "cessation of active hostilities" referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations."<sup>909</sup> The cessation of hostilities appears as a necessary, but not sufficient, condition for the general close of military operations.<sup>910</sup> The moment of the general close of

<sup>905</sup> Franken 2588:16-2589:11.

<sup>906</sup> P2178 (Rutten 92ter statement), pp. 2121-2122.

<sup>907</sup> See also Ministry of Defence, at p. 33.

<sup>908</sup> See Commentary API, at p. 67.

<sup>909</sup> *Ibid.*, at p. 68.

<sup>910</sup> *Ibid.*, at p. 67 *et seq.*: "The general close of military operations is the same expression as that used in Article 6 of the fourth Convention, which, according to the commentary thereon, may be deemed in principle to be at the time of a general armistice, capitulation or just when the occupation of the whole territory of a Party is completed, accompanied by the effective cessation of all hostilities, without the necessity of a legal instrument of any kind."

military operations is tied, at least "in principle", to the conclusion of an armistice, a capitulation or *debellatio*.<sup>911</sup> Peacekeepers would therefore cease to be combatants and regain their protection as civilians only if the armed conflict between the peacekeeping force and the adversary has factually and permanently come to an end.

499. This was no earlier than the Dutchbat withdrawal from Srebrenica on 21 July. UNPROFOR never communicated a close of military operations or capitulation to the VRS. Accordingly, the conflict only came to an end, at the earliest, with the departure of UNPROFOR from the Srebrenica enclave.

#### **Supported by perception of the parties**

500. The conclusions set out above are supported by the subjective perceptions of the parties themselves. Major Franken expressed his belief that as of 9 July Dutchbat was engaged, as a normal army, in an armed confrontation with the Serb forces.<sup>912</sup> Franken expected that the active engagement would be responded to by the Serb forces with the use of force.<sup>913</sup> Second, when describing the status of those members of Dutchbat that had been taken prisoners at their various OPs by the advancing Serb force during or prior to the 11th, he refers to them as "POWs".<sup>914</sup> Major Franken must therefore have considered his men to be normal combatants under IHL.

501. The combatant status of UNPROFOR forces was certainly clear by 9 July, but may have actually come in to being much earlier. UNPROFOR and the 28<sup>th</sup> Division of the ABiH cooperated closely in the months preceding the VRS attack on the enclave, with the objective of preparing a coordinated defence of the enclave against Serb forces.<sup>915</sup> This coordination is, to say the least,

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<sup>911</sup> Dinstein, at p. 146: *Debellatio* is "a situation in which one of the belligerents is utterly defeated, to the point of its total disintegration as a sovereign nation."

<sup>912</sup> Franken 2565, 2606.

<sup>913</sup> Franken 2607:6-9.

<sup>914</sup> Franken 2479:18.

<sup>915</sup> 4D20 (Order from Oric to Becirovic, 31 May 1995): Oric orders Becirovic to ask "the Dutch battalion to give you back the ammunition and infantry weapons that we handed over. Thus, we shall know for sure if they are our true allies." Franken confirmed in his testimony (Franken 2539:3-4) that the weapon collection point would be open to the ABiH as soon as the real attack on Srebrenica occurs.

incongruous with UNPROFOR's ostensible mandate of enforcing the demilitarization agreement. As of mid-June, UNPROFOR no longer attempted to enforce the DMZ agreement and disarm fighters in the enclave, rather allowing "Muslim fighters to walk around with Kalashnikovs."<sup>916</sup> This behaviour is irreconcilable with that of an impartial peacekeeping force and may have created a justified impression on the Serb side that UNPROFOR had become a party to the conflict, or would likely do so once operations against the enclave commenced.<sup>917</sup>

### **Conclusion**

502. UNPROFOR forces in Srebrenica were combatants no later than 9 July 1995. They were lawfully subject to attack until they clearly and unmistakably surrendered. Upon surrender, they were lawfully subject to detention and their weapons and equipment could be seized. Any Dutchbat soldiers who resisted, such as Lt. Rutten, were subject to any necessary force as was required to detain them. In the event, most Dutchbat soldiers explicitly surrendered or indicated that they would take no hostile acts, and Serb forces made no attempt to detain these individuals. This does not diminish the entitlement of Serb forces under international humanitarian law to detain and disarm each and every UNPROFOR soldier in Potocari. The same is probably true of the UNMOs, who had violated their observer status by providing targeting information to NATO.

### **(iii) The Detention of Military-Aged Men, Including The Separation from the Crowd in Potocari, Was Lawful and Appropriate**

#### **Introduction**

503. The Indictment does not allege that the detention of military-aged men in Potocari was unlawful, but implies that Borovcanin had "full knowledge" that all men taken into detention were going to be killed. The present section addresses the potential argument that the detentions were somehow unusual or improper, so as to be probative of some criminal intent in anyone who may have observed it.

<sup>916</sup> Boering 2116:18-20.

<sup>917</sup> P686 (Revised Srebrenica Military Narrative), 0113-4323, para. 3.5.

504. Serb forces were entitled to detain the military-aged Muslim men in Potocari, on the reasonable suspicion that each and every one of them fell into one or more of the following three well-recognized categories of IHL:

- Direct participants in hostilities (combatants and civilians directly participating in hostilities);
- Civilians who could be temporarily interned for security reasons under Article 78 of GC IV, in light of active combat by BiH forces in the immediate vicinity;
- Combatants or civilians suspected of war crimes.

#### **Detention of Direct Participants in Hostilities**

505. Direct participants in hostilities fall into two categories: combatants or civilians directly participating in hostilities. The former are full-fledged members of an organized armed force, such as the ABiH.<sup>918</sup> A captured combatant is a prisoner of war and is subject to specific protections.<sup>919</sup> Combatants who violate certain rules of IHL are deemed “unlawful” or “unprivileged” combatants, and may forfeit their prisoner of war status and may be lawfully detained and prosecuted under Article 44(4) API.<sup>920</sup> A direct participant in hostilities is a person who, though not part of the armed forces, engages in hostile acts against the armed forces of a party. Hostile acts are acts which, by their nature and purpose, are intended to inflict harm to the personnel and equipment of the armed forces.<sup>921</sup> Though such a person does not lose their civilian status under IHL, he or she may be targeted as a combatant for the duration of their

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<sup>918</sup> API, Article 43 states that “Members of the armed forces to a conflict...are combatants”. GCIII Article 4 further sets out categories of persons entitled to prisoner of war status, who are thus also combatants. The status of combatant is dependent upon the formal membership of a person to the armed forces of a party. Combatants include inter alia: (i) Members of armed forces, including members of militias or volunteer corps; (ii) Members of other militias and groups belonging to a party to the conflict so long as commanded by a superior, displaying a distinctive sign, carrying arms openly, and acting in accordance with the laws and customs of war; (iii) Persons belonging or formerly belonging to the armed forces of the occupied country.)

<sup>919</sup> API, Article 44(1)

<sup>920</sup> API, Article 44(3)

<sup>921</sup> Commentary API Art.51(3), para. 1942. *Tadic* judgement, para. 616; *Targeted killings* Case, para. 39.

Cf. also U.S. Naval Handbook, para. 11.3: “Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behaviour, location and attire, and other information available at the time.”

hostile activities.<sup>922</sup> The civilian regains his civilian status when his or her hostile acts cease, but may subsequently be prosecuted for those acts under national law. Their hostile acts are not privileged in the way that the acts of a combatant are privileged.

#### **Detention of Civilians on Security Grounds Pursuant to Article 78 of GC IV**

506. Civilians not participating directly in hostilities may also be detained in times of armed conflict where “the Occupying power considers it necessary, for imperative reasons of security.”<sup>923</sup> Whether the security situation makes internment “absolutely necessary” is left largely within the discretion of the detaining party.<sup>924</sup> As the *Kordic* Trial Chamber observed, “it is, to a large extent, up to the Party exercising this right to determine the activities that are prejudicial to the external or internal security of the State”.<sup>925</sup>

507. The Commentary to GCIV confirms this view, describing “absolute necessity” as requiring only that “the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.”<sup>926</sup> That

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<sup>922</sup> API, Article 51(3) states that such protections are lost “...for such time as they take a direct part in hostilities”.

<sup>923</sup> Cf. Commentary API, Art. 75(3), para. 3064; “Art. 78 If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. The liberal use of the word “internment” in the Geneva Conventions can be confusing. Note that “internment” in the sense of GCIII Art. 4(B)1 and other provisions of GCIII refers to POW regime, and not to the “internment” analyzed here. The two terms can be used interchangeably. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power”; “Art. 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.” See, also GCIV, Art. 27(4) allowing parties to an armed conflict to take “such measures of control and security as may be necessary as a result of the war.”

<sup>924</sup> “It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.” Commentary GC IV, Art. 42, p. 257

<sup>925</sup> *Kordic* judgment, para. 254.

<sup>926</sup> Commentary GCIV, at p. 258: “Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances (...) On the other hand, the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to

phrase is followed by a footnote directly applicable to the circumstances of the military-aged men in Srebrenica on 12 and 13 July, in light of the ongoing armed clashes with the ABiH column on 12 and 13 July:

The fact that a man is of military age should not necessarily be considered as justifying the application of these measures, *unless there is a danger of him being able to join the enemy armed forces.*<sup>927</sup>

The Commentary thus implies that the danger of a man of military age joining the enemy armed forces can, in itself, justify internment.

### **Suspected of war criminals**

508. Persons suspected of having committed war crimes are lawfully detainable, regardless of their status as civilian or combatant. Indeed, States are required by IHL to prosecute such persons.<sup>928</sup>

### **The Detention of Military-Aged Men in Potocari Was Amply Justified on One or More Grounds Authorized Under International Humanitarian Law**

509. Serb forces had solid grounds to believe that at least some of the military-aged men in Potocari on 12 July were members of the ABiH (and thus, combatants). This belief was justified on several grounds, including:

- The extent of military activities emanating from the Srebrenica enclave in the period leading up to its defeat;
- the organization of the ABiH within the enclave;

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such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security (Footnote 1). The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded."

<sup>927</sup> Commentary GCIV, *ibid.*

<sup>928</sup> GCIII, Art. 129. The Commentary to GCIII (at p. 623) defines this obligation as applying on a State's own territory. It seems logical, however, that it applies also to a State acting as occupying power.

- mandatory conscription of men of military-age into the ABiH;
- and the notorious fact that combatants often wore civilian clothing.

510. The surprising extent of the ABiH's organization and armament within the Srebrenica enclave was discussed at length in section VI(a). Members of the ABiH were, *ipso facto*, combatants. The units there were organized into a conventional military structure with distinct units, commanders, ranks, headquarters, and effective command and control. Some units did occasionally refuse orders or showed a lack of discipline, but this does not alter the overall picture that the ABiH was well-established in the Srebrenica enclave and organized and directed hostile acts against Serb forces across the confrontation line. Further, the ABiH in the Srebrenica enclave was clearly subordinated to, supported by, and integrated within the 2<sup>nd</sup> Corps and the Main Staff of the ABiH on a national level.

511. Able-bodied men were subject to compulsory service in the ABiH.<sup>929</sup> The Ministry of Defence had district offices inside Srebrenica that kept registration records of boys born as late as 1979 (*i.e.* as young as 15 years old in July 1995) for military training and service.<sup>930</sup> After one re-organization of units inside the Srebrenica enclave, the General Staff ordered the 2<sup>nd</sup> Corps to turn to Ministry of Defence district offices to satisfy its manpower requirements.<sup>931</sup> The age of conscription, incidentally, was not much younger for Serb adolescents who were liable for

<sup>929</sup> 3D313 (Decision Declaring the State of War and Decision on General Mobilization, 20 June 1992); 1D502 (Decision of the RBiH Presidency on Mobilization, 4 April 1992).

<sup>930</sup> 4D254 (BiH MOD Srebrenica Municipal Secretariat of Defense - Report on Number of conscripts registered", 18 April 1995) (this "report on the number of registered military conscripts born in 1978 and 1979" indicates the registration, as of 31 March 1995, of 159 born in 1979, and 211 born in 1978"); 4D255 (BiH MOD Municipal Secretariat of Srebrenica - Report on the number of Conscripts, 18 April 1995. This is a "report on the number of registered military conscripts born in 1978 and 1979" from Zvornik municipality. The number given is 29. Indicative of the systematic induction of adolescents as young as 15 years old into the BiH Army, as well as the systematic conscription of the civilian population of Srebrenica); 4D258 (BiH MOD Dept in Bratunac Municipality - List of Conscripts for recruitment in the year of 1995, 19 April 1995) (listing numbers of conscripts from various years of birth, including those as young as 17).

<sup>931</sup> 4D225 (Order from General Staff to 2nd Corps, 12 January 1995), p. 5 ("All units should be filled by transferring conscripts from the units that are being disbanded or reformed, from armed contingents that have more personnel to those that have fewer. The transferred conscripts should take their personal weapons with them. If, after the completion of the organizational changes ... there is a shortage of men to fill the units, requests for personnel should be addressed to the relevant district (cantonal) or municipal bodies of the Defence Ministry).

service starting at 17 and for combat at 18.<sup>932</sup> The presumptive authority of the Army over able-bodied men was reflected in the testimony of many witnesses. PW-120, who denied that he was in the Army, testified that the "command of the army ordered the able-bodied men to go through the woods; and those who were weak were supposed to go to Potocari."<sup>933</sup> PW-110, who spontaneously used the phrase "able-bodied man" on numerous occasions throughout his testimony,<sup>934</sup> recognized that any able-bodied man under 60 years of age was liable to be called up for service, but that the scarcity of weapons practically limited the number who were.<sup>935</sup>

512. Reliable evidence shows that the ABiH had at least 6000 fighters within the enclave.<sup>936</sup> A good number may not have been constantly under arms, possessing a weapon only when on duty.<sup>937</sup> A part-time soldier is still a combatant for the purposes of IHL, particularly when the person is subject to a well-understood chain of command and perceives himself to be a member of the army.<sup>938</sup>

<sup>932</sup> 4D115 (Decree Implementing Law on the Army During an Imminent Threat of War of State of War), Article 5 ("Conscription during an imminent threat of war or a state of war shall include all citizens who are fit for work: men from 17 to 60 and women from 17 to 55"), Article 8 (liable for combat service "when they turn 18").

<sup>933</sup> P2220 (PW-120 92*bis* statement), p. 2734-2735); PW-113 3357:18-21 ("we heard from people that there was this order or that the command of the B and H army ordered that. Nobody else could have done that, for the able-bodied men to go towards Tuzla through the woods and the civilians should go to Potocari.")

<sup>934</sup> The phrase is, in fact, used frequently by many Serb and Muslim witnesses without any apparent doubt as to the obvious military implications: Torlak H 9802:3; Torlak H 9815:9.

<sup>935</sup> PW-110 822:19-823:3 ("Q. But you were an able-bodied man and could join the army. A. I was an able-bodied man, of course, because in our context any man below 60 years of age was an able-bodied man. Q. And at any point in time you could have been called up by a military unit? A. No. I could not have been called up even though I was able-bodied, because they simply didn't have any weapons. What could they have called me up for, simply to get killed. Had there been enough weapons to go round, of course I would have been called up.")

<sup>936</sup> 4D2 (Statement of Ramiz Becirovic to the ABiH 2<sup>nd</sup> Corps Military Security Department, 11 August 1995), p. 14 ("I had around 6,000 troops."). Even Franken, from whom the ABiH was trying to hide its activities and armaments, perceived that the ABiH had "had about 4, 4500 small arms and some mortars, and what you could see of it that they were mostly – most of the time walking around in, yeah, parts of uniforms, never dress up completely. That changed somewhere in May. Then we saw suddenly that they were new combat suits worn by the BiH." (Franken 2438:11-15)

<sup>937</sup> PW-111 7033:20-7034:1 ("Q. When I was reading your prior statements I found information that you personally were not armed, that you had never been issued a weapon, but only when you went to the line were you then able to take a rifle from another soldier who was already there and when you -- your shift was completed, then you would give your rifle to another soldier. Is that correct? A. Yes.")

<sup>938</sup> PW-111 was one of these part-time soldiers, and yet he clearly perceived himself to be a member of the ABiH and subject to military discipline and chain of command: PW-111 7034:23-7035:8 ("Q. And the commander of the

513. The absence of a military uniform would not have reliably indicated that a person was a non-combatant. Many ABiH soldiers had no proper military uniforms.<sup>939</sup> ABiH soldiers feared admitting to Serb soldiers that they were combatants.<sup>940</sup> Armed Muslim fighters in civilian clothing were active in combat in the days leading up to 12 July.<sup>941</sup> They were even spotted in and around Potocari on 11 and 13 July.<sup>942</sup> Many international witnesses perceived that the military-aged men were being held as POWs and did not consider it surprising or improper.<sup>943</sup>

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282nd Brigade was Ibro Dudic who had the rank of major at the time. Is that correct? A. I don't know about his rank. Dudic Ibro was my commander however, yes. Q. Just a couple more things about this. Your membership of the 282nd Brigade, I just wanted to clarify something about that. Were you just a regular soldier or did you have any kind of command function? Well, starting from being a regular soldier, then we have other ranks, privates and so on, lance corporal, so could you please tell us what your rank was? A. No, I was just a regular soldier.")

<sup>939</sup> PW-156 7140:6-10 ("Q. Witness, once again, I have to repeat my question. Is it correct that you were wearing civilian clothes when you left to Jaglici? A. Civilian clothing. I didn't have any military clothing. Maybe 10 per cent just had the military uniforms. Because we were almost all of us in civilian clothes, only a small number wore military uniforms."); Oric M 1058:22-25 ("At that time - and we're talking about July 1995 - did the 28th Division have enough uniforms for all the soldiers on its strength? A. No.") Oric M 875:22-876:4 ("Q. Now, were you armed? A. Yes. I had two grenades. Q. And what were you -- what kind of clothes were you wearing, sir? A. Civilian clothes. Q. And do you recall with any more detail what types of clothes you were wearing? What did you have on? A. A pair of jeans, a shirt, a jacket. Simple civilian clothes, nothing more.") Egbers 2862:2-24 and Koster 3058-59.

<sup>940</sup> PW-111 7038:24-7039:8 ("Do you stand by what you said, that they had thrown away their weapons in the woods before they surrendered? A. Yes, of course. Q. And the reason why they threw away their weapons was that they did not want Serb soldiers to find out that soldiers of the B and H army were involved. Is that correct? A. Yes. Q. And of course they wanted to present themselves as civilians when they were surrendering? A. Most probably, yes. Even though they knew that people had weapons. Not all, but some did.")

<sup>941</sup> Egbers 2790-2798 experienced two attacks upon his troops by Muslim fighters in civilian clothes: on July 8<sup>th</sup>, a hand-grenade attack by approx. 10 Muslim fighters, wearing Ukraine uniforms or civilian clothes and armed with RPG-7, machine-guns and AK-47. On July 9<sup>th</sup>, while supporting other vehicles in Srebrenica, 50-60 Muslim fighters shot at Dutchbat with AK-47s, resulting in a light injury to one of the Dutchbat soldiers. They were armed with RPG-7, machine-guns and AK-47, and with an artillery piece that Egbers identifies as a Mike 48 (2792:22-25).

<sup>942</sup> Rutten P2178 (92<sup>ter</sup> Statement), p. 2117 ("We had during the night [of 11-12 July at the Dutchbat base in Potocari] a man in a wheelbarrow came in. I knew the man because he was in the BiH army. Now he was in civilian clothes, wounded at his leg, he had a shot through his leg"); Rutten 4831:3-5 ("Q. So it would be right to characterize him as a soldier who had put on civilian clothing? A. Yes."); Rutten 4828:3-14 ("Q. In those three days, that is the 10th, 11th, and 12th of July, did you see any resistance at all from Muslim soldiers or irregulars or indeed any form of resistance whatsoever? A. Not on that spot. Not on the spot of Potocari. Q. Where did you see some resistance? A. Not actual resistance, but during my journey, as you asked before, in the evening of the 13th, to Srebrenica, I -- on the road to Srebrenica, I saw a group of Bosnian soldiers, Muslim soldiers, who were hiding in a house. I stopped there and asked them whether they -- what they did over there because it was quite dangerous to be around there. And I suggested to them that they get the hell out of there because they could be getting in a problem.")

<sup>943</sup> Van Duijn 2287:11-13 ("Basically it was a clear explanation, and it is something armed forces do when they are in a conflict together and you make prisoners of war. And the explanation at that time was credible."); Franken

514. Detaining the military-aged men who were civilians – assuming that there were some – was justified “for imperative reasons of security” as authorized by Article 78 of GC IV.<sup>944</sup> An armed ABiH military column was still active in the immediate vicinity of Potocari, engaging in combat with Serb forces. A real possibility existed that the ABiH would have conscripted every military-aged man dropped off in Kladanj and immediately sent them to the Tuzla front where the 2<sup>nd</sup> Corps was fighting to join up with the column of the 28<sup>th</sup> Division. This prospect is precisely the basis of detention recognized in Footnote 1 of the ICRC Commentary.

515. This danger was enhanced in light of (a) the practice of conscription of all able-bodied men; (b) widespread military activity and training amongst this group; and (c) the proximity of active combat between the ABiH and VRS.

516. Doubts arise, in the light of absence of evidence, as to which of these categories were applicable to any particular person. State practice allows group detention in cases where such doubts arise. The United States Field Manual FM3-19.40 instructs soldiers to gather all detainable persons in “Division Collecting Points” where they will be only subsequently “segregated”, a separation occurring between EPW (POWs) and CI (civilian internees).<sup>945</sup> In the *Coard* case, before the Inter-American Human Rights Commission, the United States invoked various legal bases for detentions carried out in Grenada, stating that it is not necessary to

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2499:10-12 (“I again said that to Colonel Jankovic, who said that they were POWs, and if there was a -- too rude action he would take action to prevent that.”); Egbers 2886:18-2887:13; Kingori 19256:17-20 (“So they were taken towards the buses one by one, like they are prisoners of war, one by one, one following each other, with no space in between, and soldiers everywhere.”); Kingori 19283.

<sup>944</sup> State practice shows how such latitude has been translated into a standard of reasonableness to be applied on the ground. UK High Court of Justice interprets Art. 78 as allowing “to intern *those suspected of conduct creating a serious threat to security (...)*”: *Al-Jedda*, at para. 93. The Israeli “Emergency powers law” allows the Ministry of Defence to detain a person during a “state of emergency” when the Minister has “has *reasonable cause to believe* that reasons of State security or public security require that a particular person be detained.” (Section 2(a), emphasis added) The Israeli “Incarceration of Illegal Combatants Law” establishes the presumption that “(...) a person who is a member of a force that carries out hostilities against the State of Israel or who took part in the hostilities of such a force, whether directly or indirectly, shall be regarded as someone whose release will harm state security (...)” (Section 7). Under Section 9 of the Sri Lankan Prevention of Terrorism (Temporary Provisions) Act 1979, the Minister in charge of the Act may order detention where he has “*reason to believe or suspect* that any person is connected with or concerned in any unlawful activity” (emphasis added).

<sup>945</sup> U.S. Field Manual, Sections 3-21, 3-22.

distinguish between the various categories, since the factual consequences are the same.<sup>946</sup> The Commission implicitly accepts this reasoning.<sup>947</sup>

517. Serb authorities genuinely suspected the presence of persons within the enclave having committed war crimes, and were searching for such individuals.<sup>948</sup> Furthermore, Boering testified regarding reports of possible war crimes being committed by ABiH troops in the enclave, thus increasing the credibility of the Serb claims.<sup>949</sup>

### Conclusion

518. Serb forces were entitled to detain all military-aged men in Potocari on the reasonable suspicion that they were: (i) combatants; (ii) civilians who could be conscripted for immediate service to assist the column in breaking through to ABiH territory around Tuzla; (iii) civilians who had engaged in non-privileged acts of violence; or (iv) war criminals.

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<sup>946</sup> *Coard*, paras. 46-48

<sup>947</sup> *Coard*, para. 50

<sup>948</sup> 4D15 (List of War Criminals known to 1st Light Infantry Brigade who committed war crimes in Bratunac, Srebrenica, Milici, Vlasenica, and Skelani Municipalities, believed to be in Srebrenica). This is the Bratunac Bde List dated 12 July 1995.

<sup>949</sup> Boering 2146:22-24.

## VIII Crime Victims versus Deaths in Combat, by Suicide and other Means; Improper Reliance on Forensic Evidence

### (i) Introduction

519. The Indictment charges that over 7000 Bosnian Muslim men and boys from the Srebrenica enclave were summarily executed as part of the alleged killing plan.<sup>950</sup> The evidence shows, however, that many individuals whose remains have been included in this number – in the thousands – were killed in combat engagements that the Prosecution itself concedes were lawful. The Prosecution's failure to address adequately the number of lawful deaths raises significant issues in relation to the number of deaths that can properly be categorized beyond a reasonable doubt as being attributable to executions.

520. The Prosecution has similarly attempted to rely on the number of sets of remains in the Glogova and Ravnice gravesites as being probative of the number of victims executed at the Kravica Warehouse on 13 July. Many of the individuals in these gravesites, as the Prosecution concedes in principle, were killed, lawfully or unlawfully, at other locations and buried in there. The Prosecution has never satisfactorily determined the number of such individuals, thus casting significant doubt on the probative value of relying on the aggregate number of sets of remains in Glogova and Ravnice as an indicator of the number of victims at Kravica Warehouse.

### (ii) Discussion

521. The Prosecution concedes, as previously discussed, that the whole ABiH column was a legitimate military target. Deaths arising from combat with the column, therefore, cannot properly be categorized as unlawful.<sup>951</sup>

522. The Trial Chamber has heard extensive evidence of combat between the column and the RS Armed Forces in the days following the fall of Srebrenica,<sup>952</sup> and of substantial Muslim

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<sup>950</sup> Indictment paras. 28, 29 and 37. See also Prosecution Pre-Trial Brief, para. 47.

<sup>951</sup> See section IV(b). At no time has the Prosecution suggested that some engagements with the column were lawful while other were unlawful.

<sup>952</sup> See also Prosecution Adjudicated Facts 260 and 279.

casualties as a result. Richard Butler estimated the number of combat-related deaths over the period of 12 to 18 July 1995 at between 1000 and 2000, based on a partial review of the evidence in this case.<sup>953</sup> An UNPROFOR report of 17 July suggests a figure of "up to 3000".<sup>954</sup> Bosnian Muslim witnesses described heavy losses inflicted on the column during combat engagements with Serb forces cumulatively numbering in the thousands.<sup>955</sup> Bosnian Serb witnesses confirmed many casualties.<sup>956</sup> Casualties were also suffered as the column stumbled on mine-fields.<sup>957</sup> Some were killed by errant targeting from artillery fired from the ABiH 2<sup>nd</sup> Corps.<sup>958</sup> Several witnesses, including Muslims, described suicides<sup>959</sup> and internecine clashes<sup>960</sup> within the column itself.

<sup>953</sup> Butler 20251:1-14.

<sup>954</sup> 1D374 (United Nations Protection Force - Srebrenica/Tuzla Update), p. 2 ("Up to three thousand were killed on the way, mostly by mines and BSA engagements... Some committed suicide").

<sup>955</sup> P2288 (PW-139 92bis Statement), p. 3 ("between 500 and 1,000 were killed in this ambush"); 2D669 (Statement of ██████████, p. 5 ("We did not count the bodies we saw but I would estimate that there were about two to three thousand bodies"); P2280 (PW-113 92bis Testimony), p.6 ("I saw 300 to 500 dead people"); PW-139 3729:9-3730:5 ("Q. And, sir, when you say that lots or many of people were killed at that ambush at Kamenica, in your statement, I recall that you said between 500 to a 1000. Is that still your testimony today? A. From what I can recall, of what happened, I believe that it is around that figure..."); PW-106 3957:19-3958:5 ("... In any case, we were told to go back because information was received that the back of the column had been cut off and that there were a lot of dead and wounded..."); PW-111 7009:18-7010:15 ("...There were a lot of dead people, hundreds of dead people killed by shells, automatic weapons..."); Oric M 876:25-877:15 ("... I believe that over a hundred people were killed in that place...").

<sup>956</sup> Gavric M 26491:12-15 ("Q. You say there were so many of them. Can you give us an estimate of how many bodies were lying there in the field that you saw? A. It is the part that I covered, I saw several hundred dead people for sure"); Stanojevic O 13654:14-18 ("... However, when we found out, when Rajko found out, that the troops from Srebrenica emerged on the confrontation line at Baljkovica and many of them got killed there..."); Sladojevic B 14373:24-14374:1 ("A. I found Colonel Stankovic there. Vinko Pandurevic reported to him and Trkulja. He briefed them. And I concluded that the first wave had gone through fighting, and that there had been enormous casualties"); Pandurevic V 31860:2-14 ("A. I agree with you that there were quite a lot of people who were killed when breaking through from Srebrenica to Tuzla...");

<sup>957</sup> Gavric M 26495:4-5 ("They also said that many people stepped on land mines").

<sup>958</sup> Sladojevic B 14375:15-17 ("A. ... I concluded that the Muslim artillery had not been precise in its targeting and that they had inflicted major losses on their own forces, because there was unprotected manpower out in the open"); Pandurevic V 31029:9-11 ("The forces of the 28th Division were deployed as shown in the map closer to Baljkovica, and as a result of the artillery fire from the 2nd Corps, they suffered so-called friendly-fire losses");

<sup>959</sup> PW-113 3342:7-17; P2203 ██████████ 92bis Statement), p. 6: (12 suicides); PW-110 797:23-798:5 ("... On the day we decided to surrender, two people committed suicide..."); Van Dujn 2299:15-18 ("... there was a man that had hung himself during the night..."); Franken 2511:22-2512:1 ("... One of my officers reported that somebody hanged himself in one of the factory buildings..."); Koster 3025:19-21, 3069:9-3070:17; Jankovic Z 27378:4-10 ("Q. Did you have an occasion to hear or see some situations when people committed suicide or when there was an

523. Prosecution investigator Dusan Janc conceded that many deaths had been lawful, but admitted that the Prosecution had made no attempt to determine the number of lawful deaths, despite acknowledging.<sup>961</sup> He admitted that his report improperly included amongst its aggregate number of "victims" those who died from legitimate combat engagements, injuries sustained from land-mines and self-inflicted injuries.<sup>962</sup> Janc nevertheless believed that he was competent to downplay Richard Butler's estimate of 1000 to 2000 combat-related deaths, asserting that the number is closer to 1000 relying on the identifications of some 648 surface remains.<sup>963</sup>

524. The total number of lawful killings in combat cannot be equated with the number of surface remains. Extensive *asanacija* efforts were undertaken following combat with the column in order to remove surface remains from where they had been killed.<sup>964</sup> Credible evidence

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internal showdown among the people moving the column? A. I personally witnessed only one such case, and I heard from my guards that there had been a number of such situations where people had killed each other. There were even such situations that a father shot a son or a brother shot at a brother, and I said on occasion to see on the 15th when a soldier had activated a hand grenade which killed him and another man and wounded four or five other men"); Gavric M 26490:21-26491:15 ("... Many of them had killed themselves by activating grenades. Some of them killed themselves with their weapons. Some of them took out their belts and hanged themselves from trees..."); Subotic B 24980:6-13 ("... I realized that some of them had killed themselves. Some people hanged themselves..."); Jevdjevic M 23848:9-23849:3 ("... committed suicide with bombs. And we could conclude that judging by the wounds that they had inflicted upon themselves with those grenades....")

<sup>960</sup> Subotic B 24978:24-24979:3 ("... They said that their commanders were killing those who wanted to surrender"); Jevdjevic M 23848:9-23849:3 ("... we could establish that they had killed each other..."); Gavric M 26494:25-26495:3 ("They said that at certain points some would get depressed and such a person would simply take out his rifle and spent all of his ammunition before being killed, spraying bullets and killing everyone near").

<sup>961</sup> Janc D 3599:20-33600:11.

<sup>962</sup> Janc D 33626:15-23.

<sup>963</sup> Janc D 33594:15-33595:13.

<sup>964</sup> PW-161 9556:5017 ("Q. During the days that we're talking about, around the Kravica murder and afterward, did you or anyone else you know go back into those woods to retrieve Muslim bodies out of those woods? A. Well, the employees of the public utilities company and the civilian protection gathered bodies. There were even lorries that couldn't access certain areas, but as to whether they were in Ravni Buljim, I don't know, but they did bring them in from the woods"); P3016 (Drina Corps Command Order No. 18-146/95, cleaning up of battlefield, signed by Lazar Acamovic); P220 (Bratunac Brigade Military Police Daily Log), p. 18: the entry for 19 July 1995 shows that patrols of military police provided security for utility company personnel in Glogova; 4D598 (VRS Main Staff Order No. 03/4-1731 to SO Bratunac), p. 1: orders the *asanacija* of the region.

shows that these remains were then removed to larger gravesites, including Glogova.<sup>965</sup> Further, the figure of 648 is incompatible with the direct evidence that the number of combat deaths was, in fact, far higher.

525. The Prosecution has admitted that it had made no effort to ascertain with any reasonable degree of certainty the number of combat deaths. There is a zero-sum relationship between the number of combat deaths and the number of unlawful killings. Admitting that the number of combat deaths is unascertained is an admission that the number of unlawful killings is also unascertained beyond a reasonable doubt at least within a certain margin. The real question for the Trial Chamber is how to assess the magnitude of the grey area that the Prosecution has acknowledged exists. The high range of Butler's reasonably possible estimate – 2000 – was probably based on partial information. Can the Chamber genuinely exclude beyond a reasonable doubt that 3000 or 4000 individuals may have been killed during the five or six days of clashes between the column and the Serb forces attack it along its route?

526. The Prosecution has been similarly cavalier in its reliance on the number of sets of remains in the Glogova and Ravnice gravesites as being probative of the number of victims killed at the Kravica Warehouse. Janc asserted in his initial report that 1319 deaths could be associated with executions at Kravica Warehouse on 13 July.<sup>966</sup> A corrigendum corrected that assertion, explaining that many of the sets of remains in the Glogova grave came from elsewhere, including up to 80 bodies having been relocated from the Vuk Karadzic school in Bratunac, 6 to 7 bodies relocated from Potocari, and 10 to 15 bodies from Konjevic Polje.<sup>967</sup> If the Prosecution acknowledges that sets of remains from locations as disparate as Potocari, Bratunac and Konjevic Polje were being buried at Glogova, then what about all of the sets of remains of those killed during the fierce clashes at, for example, Kamenica just west of the Road, where there were undoubtedly many casualties?

<sup>965</sup> See, e.g., PW-161 9538:18-9539:1 (“Q. And in these graves in Glogova... bodies found when searching the territory and the area of Radno Buljek [sic], Kamenica, Pobudje, these bodies were also buried there... A. All of them had been taken and... to those graves and buried in those graves in Glogova”), 9556:5-17.

<sup>966</sup> P4490 (Janc Report), Annex A, p. 36.

<sup>967</sup> P4492 (Janc Report Corrigendum), referencing the evidence of PW-161, PW-170 and Djukanovic M.

527. The link with a further grave site is tenuous. Only the presence of allegedly similar pieces of concrete, plaster and polystyrene foam link the Ravnice grave sites with the warehouse,<sup>968</sup> which Janc admitted may be the product of cross-contamination by the use of machinery at both locations.<sup>969</sup> Both Prosecution and Defence forensic witnesses have pointed out that some of the remains found in the Glogova graves show signs of injuries caused by explosions,<sup>970</sup> whereas none of the Ravnice bodies show such signs.<sup>971</sup> Any link between the warehouse and the Ravnice grave site is weak at best, and is certainly no basis on which to draw conclusions as to the total number killed in Kravica.

528. The Borovcanin Defence reserves the right to rely on and adopt any all arguments presented by other parties in respect of forensic evidence.

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<sup>968</sup> P4490 (Janc Report), Annex A, pp. 7-8.

<sup>969</sup> Janc D 33652:7-10.

<sup>970</sup> P598 (Clark 2001 Report), p. 19; P2446 (Clark 2003 Report), p. 16.

<sup>971</sup> P598 (Clark 2001 Report), p. 26; P2446 (Clark 2003 Report), pp. 8, 11 and 16; 1D1070 (Dunjic Report), p. 120.

## IX Character of Mr Borovcanin and Sentencing

529. The Defence is required by the procedures of the Tribunal to make submissions on sentencing prior to the Chamber's determination on the merits. The evidence falls far short of proving beyond a reasonable doubt that Borovcanin is guilty of any crime at all, including superior responsibility for any crime. The present section is nonetheless submitted out an abundance of caution.

530. The Chamber ought to assess the reality of Mr Borovcanin's circumstances in July 1995 in order to assess the "gravity" of the offences with which he is charged, pursuant to Article 24(2) of the Statute. He had fewer than 200 men under his command during operations on 12 and 13 July 1995. The Indictment itself does not allege that he contributed to any of the decision-making that led to the evacuation of civilians from Potocari, or to murder any prisoners. The essence of the Indictment is that he allowed his forces to be used to support the evacuation and that he did not intervene to prevent killings.

531. If the Chamber somehow finds guilt for forcible transfer, the sentence should reflect Borovcanin's minimal role. He had no say in the decision to evacuate the prisoners and no realistic capacity to prevent it, given the desperate desire of the Muslim civilians themselves that had formed by the time he arrives on the scene. Very legitimate reasons seemed to exist at the time to allow his troops to participate in the operation that, with or without his cooperation, would have been conducted by the VRS and UNPROFOR.

532. Failure to intercede in a crime cannot be simplistically equated with commission of the crime, even when the crime is murder. Borovcanin did not order or direct the killings at Kravica Warehouse, and the Prosecution has never alleged that he did. The most serious allegation against him is that he was "personally present at the warehouse when hundreds of Muslim prisoners were in the process of being summarily executed by [his] forces."<sup>972</sup> This allegation is factually incorrect, for the reasons described in Section V of the brief. The evidence shows that the full-scale massacre at Kravica Warehouse happened long after he had passed by the Warehouse, just after the break-out attempt had been suppressed. The Chamber, should it find Borovcanin in any way criminally responsible in relation to this first event, ought to assess his

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<sup>972</sup> Indictment, para. 30.4.

culpability in relation to the scale and circumstances surrounding that first event – namely, that it happened suddenly and was not pre-planned. Borovcanin was nowhere near the Warehouse when the massacre started later that night.

533. Superior responsibility usually only attracts a significant sentence when the commander's negligence is extreme and manifested over a period of time. The events of 13 July happened abruptly and were over quickly. If the Chamber somehow concludes that Borovcanin had an ability to prevent any criminal acts committed by subordinates, then the Chamber ought to take a realistic view of those who were directing those events. Borovcanin had no capacity to countermand or stop operations being directed by VRS officers at the most senior levels. Borovcanin also had a limited practical capacity to launch an investigation into alleged crimes following Srebrenica in light of the determined opposition of the senior leadership in the Army.<sup>973</sup> Indeed, as a member of the police, Borovcanin had no authority or jurisdiction to conduct inquiries that would have been a necessary part of any investigation into alleged misdeeds of his own men.<sup>974</sup>

534. Borovcanin's superior responsibility should be limited to his subordinates. Culpability for an omission in relation to anyone else's actions, if the Chamber finds that this possibility exists as a matter of law, should be substantially diminished. Sentences arising from national statutes imposing such liability are generally extremely low,<sup>975</sup> demonstrating a much lower level of culpability for such inaction.

535. Borovcanin is a good, honourable man. Serbs and westerners are separated by a cultural and linguistic gulf, and yet Brigadier General David L Grange (ret.), who worked with Borovcanin in the difficult process of implementing the Dayton Accords in Bosnia, concluded:

<sup>973</sup> P548 (Order by RS President to VRS Main Staff and MUP to establish a mixed commission to investigate 2 corpses found in Pilica, 23 March 1996), p. 5 (a hand-written notation page 5 of this Order indicates that "after the fax was sent, no answer /response/ was received from the Main Staff").

<sup>974</sup> 4D503 (Ristivojevic Expert Report), para. 3.11 (explaining that the jurisdiction of military courts extends to any crimes in which the perpetrators consist of civilians and military personnel; this approach is entirely logical insofar as neither Borovcanin nor any other police official would have had the authority or jurisdiction to ask any questions to any member of the VRS who were involved in the same events).

<sup>975</sup> See *e.g.*, German Criminal Code (*Strafgesetzbuch*), section 49 (prescribing a maximum sentence of three years for failure to prevent the most serious crimes); Cadoppi, pp. 108-109.

By the end of my time in Bosnia, I felt that we had established a certain mutual trust and respect, and I wish I had had more time to work with him.... I knew that he had a warrior's sense of honour, and we respected that in one another.<sup>976</sup>

Borovcanin, according to Grange, made significant efforts to assist SFOR during three incidents in 1997. He took evident personal risks to defuse these situations, demonstrating that he cared about ensuring that the Dayton process – including the return of Muslim civilians to their homes – could move forward without provoking reprisals and extremism.<sup>977</sup>

536. The civil war in Bosnia was an ethno-religious conflict that engendered searing mistrust and animosity. Resentments over alleged atrocities and territorial rivalry were strongly entrenched in 1995. Nevertheless, Borovcanin never used derogatory ethnic slurs in any of his reports,<sup>978</sup> nor did the Chamber hear any evidence that he ever used such terms.

537. Borovcanin's good character, both professionally and personally, was affirmed by a range of witnesses from different walks of life. These tributes were sometimes unsolicited, including from individuals with whom Borovcanin did not have strong ties of friendship:<sup>979</sup>

I can also say that when one is choosing one's friends, one naturally chooses a person with many moral and human qualities and virtues. Ljubomir Borovcanin was always an

<sup>976</sup> 4D556 (Brig. General David L. Grange 92bis statement), para. 12.

<sup>977</sup> 4D556 (Brig. General David L. Grange 92bis statement), paras. 7-9 ("Acts of violence by civilians against SFOR forces, often involving Molotov cocktails, were increasing at a place called Doboje in September 1997. The local police chief was not fully committed to ensuring that such attacks were prevented. I asked for General Borovcanin's assistance and he and I made a joint radio address appealing for calm. Following this intervention, I recall that attacks diminished or ceased and I believe that this was because of follow-up efforts by General Borovcanin.... SFOR undertook an operation to seize the television transmitters in Bosnia to give the Banja Luka faction access to the airwaves. The Pale government reacted by sending mobs of protesters to riot near one particular tower, at Udrigovo, hoping to force a withdrawal of SFOR troops. I immediately called General Borovcanin and he and I, with others, flew to the site by helicopter. My perception was that he was not in a position to simply order the rioters to disperse. He worked through the night, speaking on the telephone with representatives of the Pale faction and negotiating with people at the site to defuse the situation. An agreement was eventually reached in which airtime would be shared between the two Bosnian Serb factions. Some of the rioters at Udrigovo appeared to be particularly radical. General Borovcanin definitely prevented the rioters from trying to break through the concertina wire enclosing the transmitter. I would have had no choice but to fire on these rioters, and General Borovcanin prevented this from happening. After speaking with the rioters, he succeeded in ensuring that they dispersed.")

<sup>978</sup> P3789, P3792, P56/P3793, P3794, 4D509, 4D510, and 4D511 (reports authored by Borovcanin).

<sup>979</sup> E.g., Nikolic M 33202:15-20.

example to his subordinates and to his colleagues, and at the height of battle he is a man who makes swift and right decisions which decide the outcome of the battle.<sup>980</sup>

...

I see Borovcanin as an honest man, good policeman, exceptionally educated man. Having such character traits, he was well respected in the place where he lived and worked. I could even say that he was very popular, which in my mind is not typical for a policeman.<sup>981</sup>

...

He was a good man and a strict superior. That means he was kind to people, and he was friendly and helped people whenever he could, when we were at ease, and in combat we had to follow the rules strictly. He insisted on that and people appreciated it.<sup>982</sup>

...

I think he is a man who is exceptionally talented, well educated, dignified, a man without vices.<sup>983</sup>

538. Borovcanin's interview with the Office of the Prosecution offers the Chamber an added window into his character. The interview has in almost every significant respect been confirmed by the evidence heard by this Chamber. Some errors are to be found, as is to be expected seven years after the events, particularly in the absence of any documents to refresh his memory. In respect of his own movements and the presence of other individuals, Borovcanin was candid and accurate. He disclosed the existence of the video-tape, and provided a copy, of the video-tape that is the linchpin of the accusations against him.

539. Borovcanin was seriously wounded by a trip-wire mine in November 1994, only returning to active service in early March 1995. He was still suffering from the effects of this injury in July, and received intravenous infusions on several occasions on 12 and 13 July.<sup>984</sup> The

<sup>980</sup> Savcic M 15299:10-15.

<sup>981</sup> PW-162 7318:10-15.

<sup>982</sup> Celic P 13512:15-21.

<sup>983</sup> Stojcinovic M 27624:6-8.

<sup>984</sup> 4D644 (Loncarevic 92bis Statement), p. 4 (Bratunac health clinic doctor confirms that "Borovcanin came a few times to the Bratunac Health Centre in order to receive infusion. He was rather exhausted, so very much that at one point he was unable to come to the Health Centre and I then went to his apartment in order to give him the infusion"); P2853 (Borovcanin OTP Interview), p. 42 (on afternoon of 13 July: "I advised them not to move from that position, to stay there and I returned back to Bratunac. I stayed in hospital for about half an hour. I was receiving the infusion and after that I went back to the police station... I stayed for a long long period in Sarajevo area and I

Chamber ought to take this into consideration in assessing measures or actions that Borovcanin could or should have taken during this period, and any culpability that might arise therefrom.

540. Borovcanin, in short, is a good citizen. The conduct alleged against him, when examined concretely, does not reach a high level of culpability when all the circumstances are considered. The Chamber will undoubtedly be motivated in the present case to impose sentences to reflect the gravity of the crimes and their consequences. This does not mean, however, that anyone connected to these crimes, howsoever remotely, ought to receive an equal sentence. Borovcanin's actual conduct, his actual state of mind, and his practical capacity to have behaved differently, should be weighed by the Chamber in assessing his sentence. The most accurate reflection of his culpability, however, would be an acquittal.

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was exhausted and I was wounded, that's why I received that"), p. 84 (night of 13 July: "I spent that night in my apartment. In the meantime, I went to the hospital again for another infusion 4D634 (hospital discharge letter, 9 November 1994, describing "blast injuries to the abdomen and lower extremities"); Stojcinovic M 27624:22-24 ("He was very seriously wounded, and so I was surprised that three or four months later he had managed to recover and return to carry out his task").

ANNEX A 4D670, Annotated with Selected Known Targets in Srebrenica Town



Headquarters of the 284<sup>th</sup> Brigade, "Radnik GP"; 4D653 p.13-14

Working space and depot at the "Town Command" in Srebrenica; 4D653, pp.19-20; 198 square metres

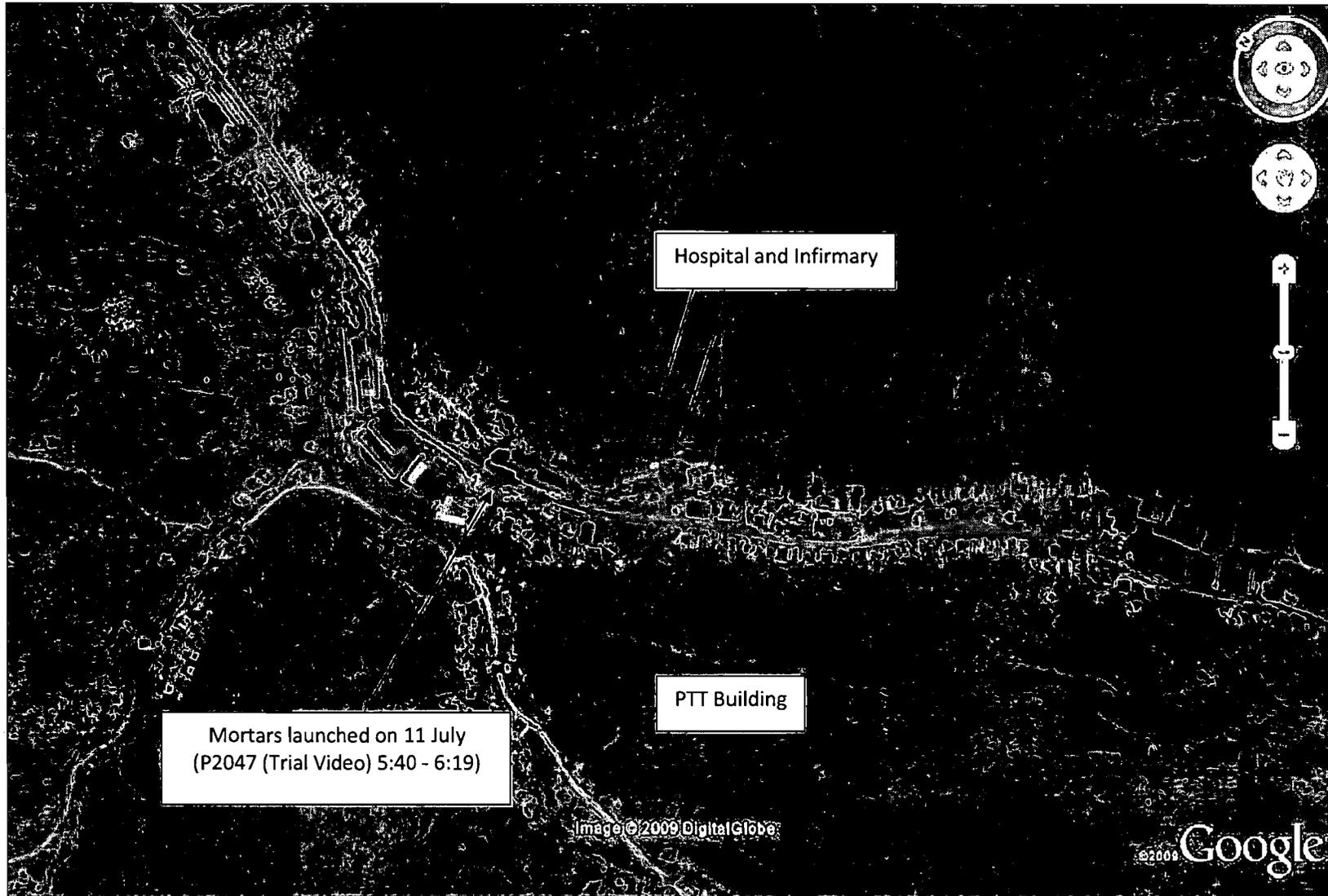
Headquarters of the 283<sup>rd</sup> Brigade, located in the building owned by Kamen DP; 4D653 pp.17-18

Headquarters of the 282<sup>nd</sup> Brigade, located in the Hotel Domavija; 4D653; pp.23-24; 427 square metres

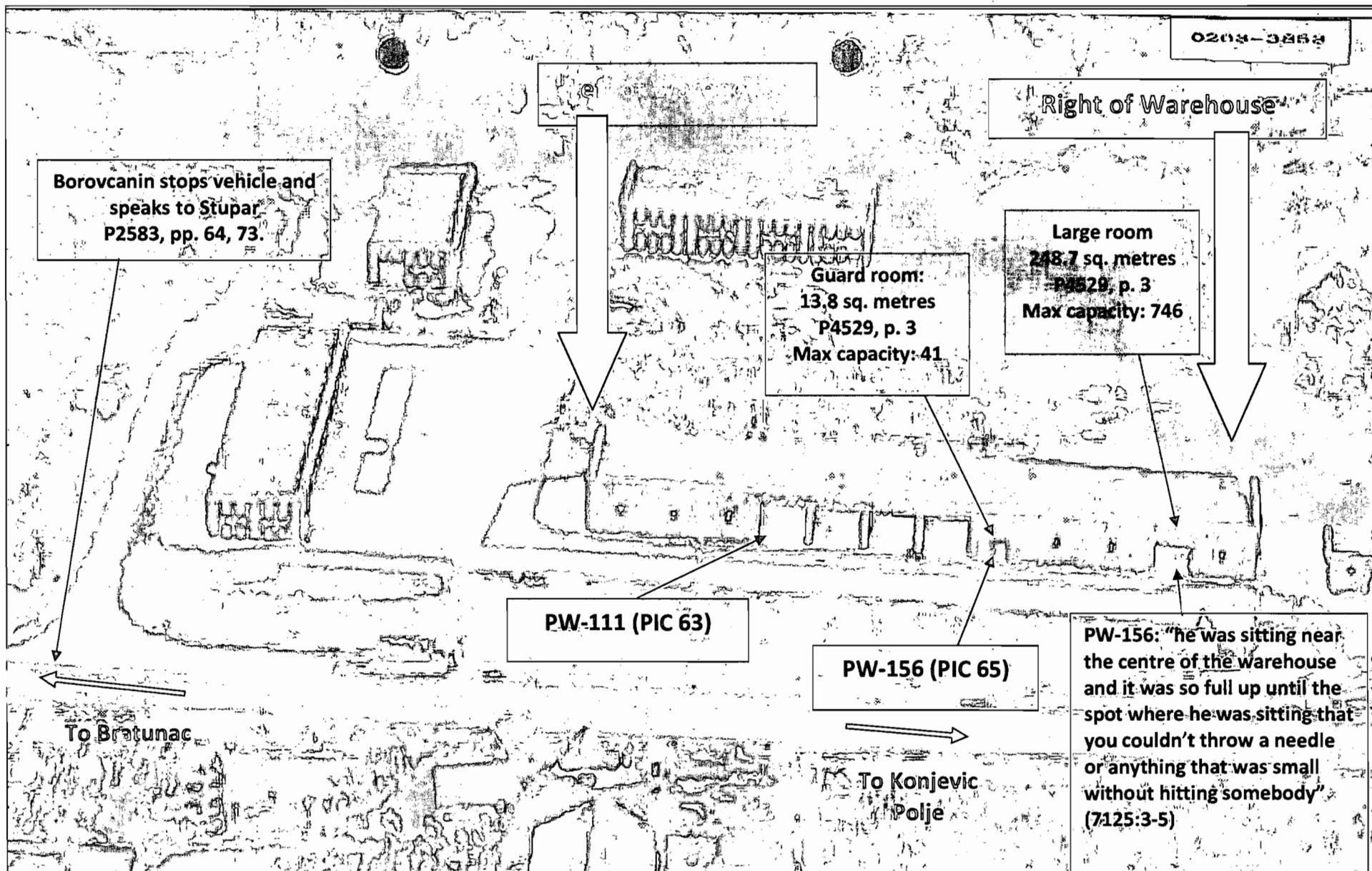
Headquarters of the 28<sup>th</sup> Division, at the Hunting Lodge; in the Lovac feature, Stari Grad, Srebrenica; 275 square metres. 4D653 p.25-26.

ANNEX B 4D673, with Added Annotations

20. Google Earth Image: SREBRENICA TOWN ZOOMED NORTH



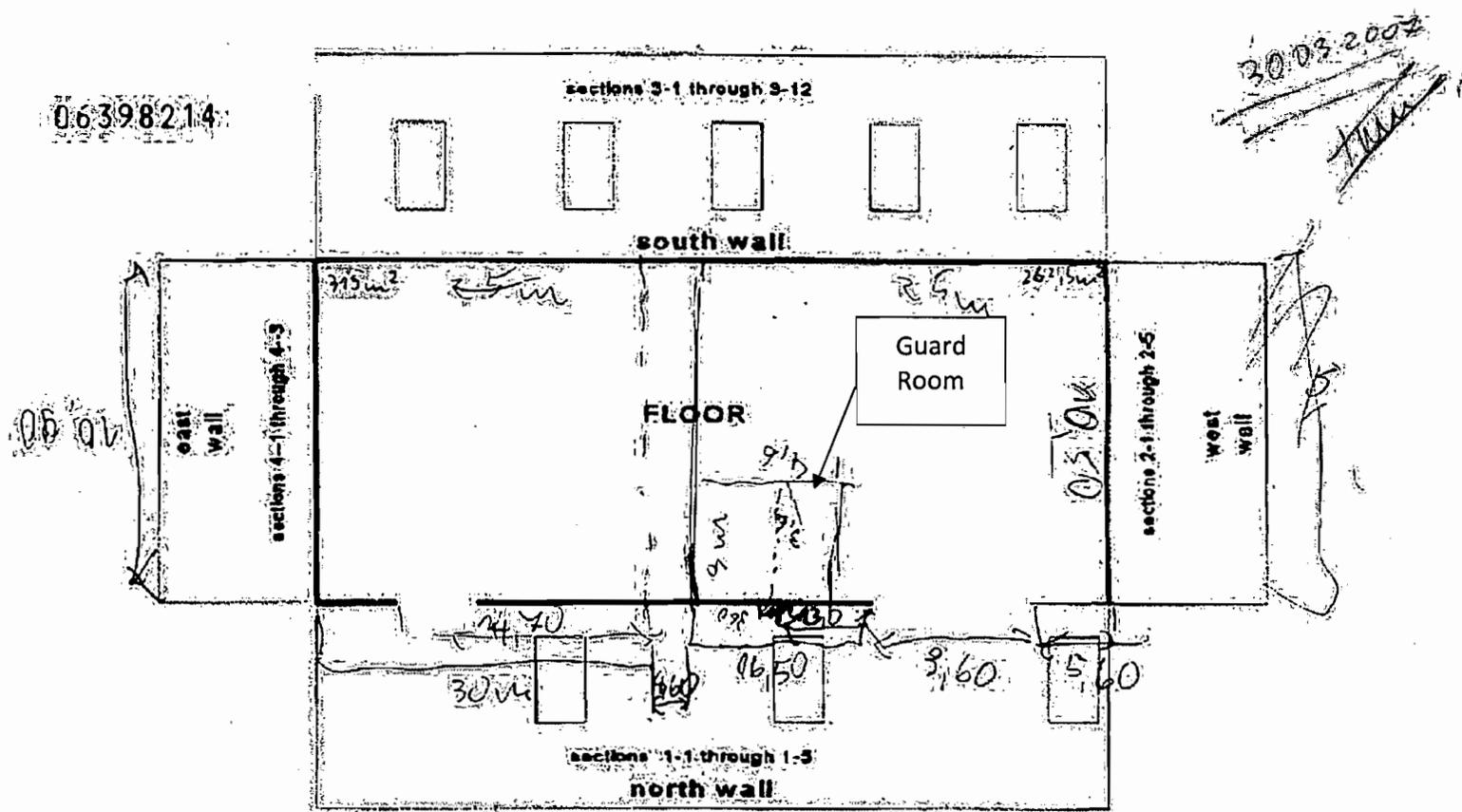
ANNEX C P1563, Kravica Warehouse, with Added Annotations



ANNEX D P2103, p. 117, with Added Annotations



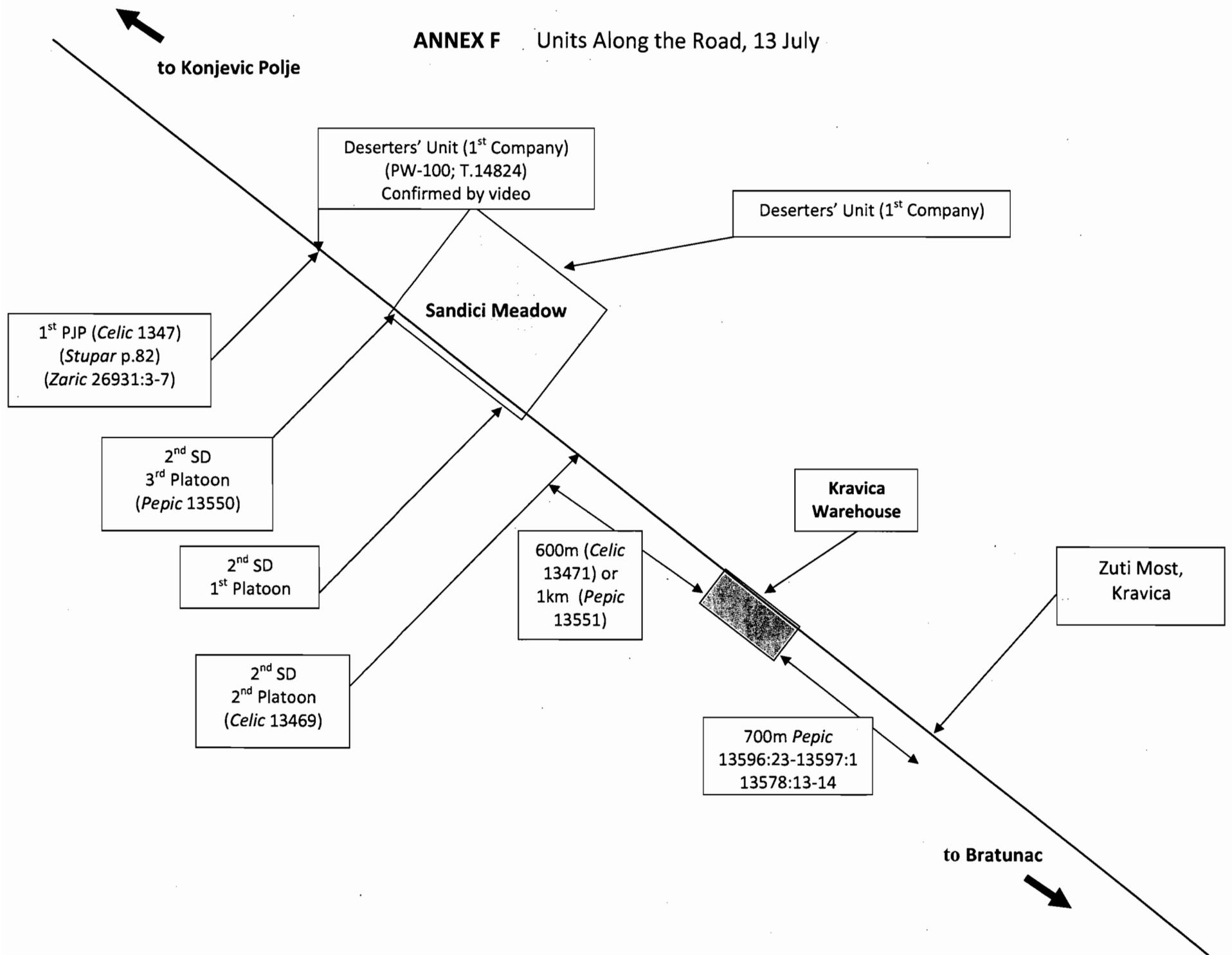
ANNEX E P4529, p. 3, with Annotation for "Guard Room"



KRAVICA WAREHOUSE  
GREBENICA  
INVESTIGATION

LOCATION: KRAVICA  
BOSNIA  
DATE: 30 SEPT 1998  
NOT TO SCALE  
WALL SECTIONS ON SKETCH

**ANNEX F Units Along the Road, 13 July**



## LIST OF LEGAL SOURCES

## CONVENTIONS AND DOCUMENTS

<b>Additional Protocol I (API)</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 UNTS 3
<b>Commentary (GC III)</b>	Pictet (ed.) Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, (1960)
<b>Commentary (GC IV)</b>	Pictet (ed.) Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War, (1958)
<b>Commentary (API)</b>	International Committee of the Red Cross, <i>Commentary on the Additional Protocols of 8 June 1977</i> , (1987)
<b>Convention on Safety of UN Personnel</b>	Convention on the Safety of the United Nations and Associated Personnel, 34 ILM 482
<b>Geneva Convention III</b>	Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949, 75 UNTS 135
<b>Geneva Convention IV</b>	Geneva Convention Relative to the Protection of Civilian Persons in Times of War, of 12 August 1949
<b>Geneva Conventions</b>	Geneva Conventions I through IV, of 12 August 1949
<b>Hague Regulations</b>	Regulations Respecting the Laws and Customs of War on Land annexed to 1907 Hague Convention (IV)
<b>ICRC Interpretative Guidance</b>	International Committee of the Red Cross, <i>Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law</i> , 2009
<b>1999 UN SG's Bulletin</b>	'Observance by United Nations forces of international humanitarian law', 6 August 1999, UN Doc. SG/SGB/1999/13
<b>UK Ministry of Defence Manual</b>	United Kingdom Ministry of Defence, <i>The Manual of the Law of Armed Conflict</i> , 2004

**US Naval Handbook** U.S. Navy/Marine Corps/Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M, MCWP P5800.7

**US Field Manual** United States Field Manual FM3-19.40: Military Police Internment/Resettlement Operations, 1 August 2001

## CASE LAW

**Al-Jedda Judgement** *R (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence* (2005), UK High Court of Justice, [2005] H.R.L.R. 39

**Coard Judgement** *Coard et al. v. United States*, Inter-American Human Rights Commission, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999

**Gotovina Decision on Jurisdiction** *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007

**Mpambara** *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Trial Judgement, 11 September 2006

**NATO Bombing Decision** Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia

**Targeted killings Case** *The Public Committee Against Torture in Israel v. the Government of Israel*, Supreme Court of Israel, HCJ 769/02, 14 December 2006

## NATIONAL LEGISLATION

**Germany** German Criminal Code (*Strafgesetzbuch*), 13 November 1998, Federal Law Gazette I, p. 945; p. 3322

**Israel** "Emergency powers law" (5939-1979)

"Incarceration of Illegal Combatants Law" (5762-2002)

**Sri Lanka** Prevention of Terrorism (Temporary Provisions) Act 1979

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## GLOSSARY

28 <sup>th</sup> Division	28 <sup>th</sup> Division of the ABiH located in Srebrenica (later renamed 8 <sup>th</sup> OG)
22 <sup>nd</sup> Corps Mil. Sec. Dept	2 <sup>nd</sup> Corps Military Security Department of the ABiH
8 <sup>th</sup> OG	Eight Operational Group of the ABiH located in Srebrenica
ABiH	Army of the Republic of Bosnia and Herzegovina
AJ	Appeals Chamber Judgement
AOR	area/zone of responsibility
APC	Armoured Personnel Carrier
Bde	Brigade
BiH	Bosnia and Herzegovina
BiH FCMP	Bosnia and Herzegovina Federal Commission on Missing Persons
Borovcanin	The Accused Ljubomir Borovcanin
Bratunac Ipbr	Bratunac Light Infantry Brigade
CJB	Public Security Centre
CRDB	State Security Department Centre
CSB	Security Services Centre
Dept.	Department
Div	Division
DK	Drina Corps
DutchBat	The Dutch Battalion of UNPROFOR troops stationed in Srebrenica in July 1995
FBIS	Foreign Broadcast Information Service

FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICMP	International Commission on Missing Persons
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IKM	Forward Command Post
Indictment	IT-05-88, <i>Prosecutor v. Popovic et al</i> , Second Consolidated Amended Indictment, 4 August 2006
Intel.	Intelligence
JCE	Joint Criminal Enterprise
JNA	Yugoslav People's Army
Lpbr	Light Infantry Brigade
MSF	Médecins Sans Frontières
MUP	Republika Srpska Ministry of the Interior
NATO	North Atlantic Treaty Organization
OTP/Prosecution	Office of the Prosecutor
OTP Pre-Trial Brief	IT-05-88, <i>Prosecutor v. Popovic et al</i> , Prosecution Pre-Trial Brief, 28 April 2006
OTP Adjudicated Facts	IT-05-88, <i>Prosecutor v. Popovic et al</i> , Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006
para.	Paragraph

paras.	Paragraphs
PJP	RS MUP Separate Police Unit
Popovic Adjudicated	IT-05-88, <i>Prosecutor v. Popovic et al</i> , Decision on Popovic's Motion for Judicial Notice of Adjudicated Facts, 2 June 2008
Road	Asphalt road between Bratunac and Konjevic Polje
RS	Republika Srpska
Rules	Rules of the Procedure and Evidence of the ICTY
SPB	RS MUP Special Police Brigade
SD	Sekovici Detachment of the Special Police Brigade
SFRY	Socialist Federal Republic of Yugoslavia
Sitrep	Situation Report
SJB	Public Security Station
SOP	RS MUP Special Police Detachment
Statute	Statute of the ICTY
SUP	Secretariat of the Interior
TJ	Trial Chamber Judgement
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMO	United Nations Military Observer
UNPROFOR	United Nations Protection Forces
VJ	Army of the Federal Republic of Yugoslavia
Vol	Volume

VP	Military Post
VRS	Army of Republika Srpska
Zvornik pbr	Zvornik Infantry Brigade