

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

Case No. IT-05-88-A

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Date filed: 18 July 2011

THE PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**NOTICE OF RE-FILING OF
PUBLIC REDACTED VERSION OF BRIEF IN REPLY
ON BEHALF OF DRAGO NIKOLIĆ**

The Office of the Prosecutor

Mr. Peter Kremer

Counsel for the Defence

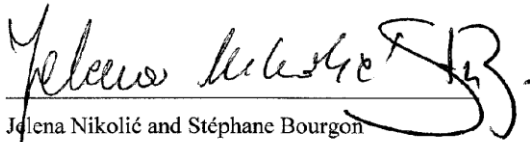
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Mr. Peter Haynes and Mr. Simon Davis, Counsel for Vinko Pandurević

1. On 7 July 2011, the Defence filed the “*Public Redacted Version of Brief in Reply on Behalf of Drago Nikolić*” (the “7 July 2011 Filing”). On 14 July 2011, the Prosecution observed that the 7 July 2011 Filing contains one additional footnote in comparison with the “*Brief in Reply (Modified) on Behalf of Drago Nikolić*”, filed confidentially on 8 May 2011 (the “8 May 2011 Filing”).
2. While the additional footnote in the 7 July 2011 Filing neither alters the contents of the 8 May 2011 Filing nor reveals confidential information, the Defence herewith requests the Registrar to withdraw the 7 July 2011 Filing and files a corrected “*Public Redacted Version of Brief in Reply on Behalf of Drago Nikolić*” out of an abundance of caution and in the spirit of co-operation.

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RESPECTFULLY SUBMITTED ON THIS 18th DAY OF JULY 2011

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INTRODUCTION

1. The Appellant hereby files his Brief in Reply to the Prosecution's Response.
2. The Prosecution Response significantly deviates from the Practice Direction¹ attempting to confuse the issues by failing to respond separately to each individual Ground.
3. The Prosecution Response perfunctorily reiterates findings without addressing the arguments, misapprehends the law and misstates the evidence. It must be disregarded.

GROUND 1

4. The TC discernibly erred in the exercise of its sentencing discretion.² Contrary to the Prosecution's claim, this Ground indeed is a "*stand-alone sentencing appeal*".³ The Appellant repeatedly indicated that this error alone warrants a significant sentence reduction.⁴ Moreover, this Ground adheres to applicable appeal standard.⁵ The Prosecution fails to rebut this Ground.

Ground 1.1

5. Contrary to the Prosecution's assertions,⁶ the TC erred noticeably concerning the form and degree of the Appellant's participation.⁷ The Prosecution's reiteration of its sentencing appeal is irrelevant⁸ and must, in any event, be dismissed.⁹
6. Firstly, the Appellant's contribution was limited in time and extent¹⁰ and the Prosecution fails to rebut this argument.¹¹

¹ Prosecution-Response, para.5, fn.15.

² Nikolić-Appeal, para.5-45.

³ Prosecution-Response, para.12.

⁴ Nikolić-Notice, para.7-9, 95; Nikolić-Appeal, para.4-5, 45.

⁵ Galić-AJ, para.394.

⁶ Prosecution-Response, para.8-16.

⁷ Nikolić-Appeal, para.6-20.

⁸ Prosecution-Response, para.8-9,102-123.

⁹ Nikolić-Response, para.191-261.

7. The Appellant's contribution to the events ended on 15 July¹² and the Prosecution mischaracterises the Judgment in asserting otherwise. Contrary to its claims,¹³ whilst the Appellant was Duty Officer on 15-16 July, the TC clearly found that he did not contribute to the crimes in Roćević/Kozluk and Branjevo/Pilica. The Prosecution's reliance on messages in the Notebook is meritless as the TC did not find that they invoked criminal responsibility.¹⁴ Also, the Prosecution speculates that Popović's admonition to Jokić explains the absence of incriminating entries in the Notebook¹⁵ but the TC did not find that Popović told the same to the Appellant.¹⁶ Significantly, the Prosecution did not appeal these findings¹⁷ and its attempt to bring new allegations on appeal must be rejected. The Prosecution's speculation that the Appellant contributed by omission after 15 July¹⁸ is immaterial as the TC never reached such a finding.¹⁹ Importantly, this claim also ignores that the Appellant was not involved in the crimes after 17 July in Zvornik²⁰ and Žepa.²¹ Also, contrary to the Prosecution's assertion,²² the TC concluded that the Appellant had "*some knowledge*" of the reburial operation but that he did not participate therein.²³
8. Then, the Prosecution ignores that the Appellant: (i) was not involved in the critical events in Srebrenica, Potočari and Bratunac²⁴ and that he acted with a "*sphere of knowledge limited to Zvornik*";²⁵ (ii) was not involved in killings outside Zvornik;²⁶ (iii) was not involved in the crimes in Petkovci;²⁷ (iv) did not appear physically in

¹⁰ Nikolić-Appeal, para.7-16.

¹¹ Prosecution-Response, para.14, 98-123.

¹² Nikolić-Appeal, para.7-8.

¹³ Prosecution-Response, para.120-121.

¹⁴ Judgment, para.1370-1373.

¹⁵ Prosecution-Response, para.121.

¹⁶ Judgment, para.1122, 1370-1373.

¹⁷ Prosecution-Notice, Grounds 7, 8.

¹⁸ Prosecution-Response, para.128.

¹⁹ Judgment, para.1397-1430, 2106.

²⁰ Judgment, para.565-589, 1379-1380.

²¹ Judgment, para.665-738, 1396.

²² Prosecution-Response, para.14.

²³ Judgment, para.1384.

²⁴ Judgment, para.1344-1345.

²⁵ Judgment, para.1393, 1402-1403.

²⁶ Judgment, para.565-589, 1402-1403.

²⁷ Judgment, para.499-501, 1366.

neither Roćević/Kozluk nor Branjevo/Pilica;²⁸ (v) was not directly implicated in the crimes at Branjevo/Pilica;²⁹ (vi) was not involved in the murder of the Branjevo Farm survivors and the Milići Hospital Patients despite his role in their unharmed detention;³⁰ (vii) did not partake in “*arrangements for the burials*”;³¹ (viii) was unconnected to the reburial except for a conversation about fuel in which he also indicated that he was “*out of it*”;³² (ix) was lowly-ranked;³³ and (x) acted with “*little authority of his own*”.³⁴ In context, this evidently evinces a limited contribution to the crimes.

9. Secondly, the Appellant interacted sparsely with Beara and Popović and the Prosecution fails to rebut this argument.³⁵

10. On 14 July, the Appellant was with Beara at the Petkovci crossroads³⁶ but not the Petkovci School³⁷ and, crucially, the TC did not find that the Appellant was involved in the crimes in Petkovci.³⁸ Furthermore, the TC did not find that, after the 14 July message, the Appellant actually met Beara,³⁹ invalidating the Prosecution’s speculative assertion.⁴⁰ The Prosecution’s claims about the messages in the Notebook on 15-16 July⁴¹ are irrelevant as the TC did not find that they related to the crimes⁴² and the Prosecution did not challenge this on appeal. In September, the Appellant spoke to Popović about fuel⁴³ but, in light of Trbić’s leading role in the reburial⁴⁴ and the Appellant’s lack of participation,⁴⁵ this actually confirms the limited extent of interaction.

²⁸ Judgment, para.1409.

²⁹ Judgment, para.1410.

³⁰ Judgment, fn.4521, para.1411.

³¹ Judgment, para.1410.

³² *Idem.*

³³ Judgment, para.1412.

³⁴ *Idem.*

³⁵ Prosecution-Response, para.15, 130-138.

³⁶ Judgment, para.1366.

³⁷ Prosecution-Response, para.119.

³⁸ Judgment, para.493-501, 1366.

³⁹ Judgment, para.1281-1284, 1367-1371.

⁴⁰ Prosecution-Response, para.134.

⁴¹ Prosecution-Response, para.135.

⁴² Judgment, para.1367-1373.

⁴³ Judgment, para.1381.

⁴⁴ Judgment, para.602-605.

⁴⁵ P02391; Judgment, para.1384.

11. Significantly, the Prosecution also ignores important findings. Prior to the evening of 13 July, the Appellant neither contacted Beara nor Popović,⁴⁶ even though they were involved in the events in Srebrenica.⁴⁷ [REDACTED]⁴⁸ ⁴⁹ [REDACTED]⁵⁰ Moreover, Popović did not call the Appellant from Ročević to secure materials,⁵¹ invalidating the Prosecution's claim that he was the "*focal point*".⁵² Also, in the evening of 15 July, Beara and Popović met at Standard⁵³ but the Appellant was not present.⁵⁴ On 16 July, Beara and Popović were involved in Branjevo and Pilica⁵⁵ but did not communicate with the Appellant, despite his continued stint as Duty Officer.⁵⁶ Thus, at the height of the killing operation, such communication was non-existent.⁵⁷ Also on 16 July, Pandurević did not order the Appellant to the IKM to obtain more information about the acts of Beara and Popović.⁵⁸ After 17 July, the Appellant was involved in the unharmed detention of the Muslim prisoners but he did not communicate with Popović in this respect.⁵⁹ Also, no further communication occurred from mid-July to August⁶⁰ despite the continued involvement of Popović.⁶¹
12. Thirdly, the Appellant possessed limited contextual knowledge of the crimes⁶² and the Prosecution fails to rebut this argument.
13. The Prosecution's reiterates the finding that the Appellant was informed of the murder plan on 13 July⁶³ but ignores that he was not involved in the crucial events in Srebrenica, Potočari and Bratunac that established the context and that a

⁴⁶ Judgment, para.1096-1103, 1255-1271, 1344.

⁴⁷ Judgment, para.1096-1103, 1255-1263.

⁴⁸ [REDACTED]

⁴⁹ [REDACTED]

⁵⁰ [REDACTED]

⁵¹ Judgment, para.1119.

⁵² Prosecution-Response, para.120.

⁵³ Judgment, para.1284.

⁵⁴ Judgment, para.1367-1370.

⁵⁵ Judgment, para.1124-1141, 1287.

⁵⁶ Judgment, para.1372-1373.

⁵⁷ Judgment, para.1123, 1281-1284, 1367-1371.

⁵⁸ T.31540.

⁵⁹ Judgment, para.1153-1156.

⁶⁰ Judgment, para.1379-1380.

⁶¹ Judgment, para.1142-1157.

⁶² Nikolić-Appeal, para.10.

⁶³ Prosecution-Response, para.13.

significant part of the plan had already been executed.⁶⁴ Then, the Prosecution repeats that the Appellant acquired more knowledge on 14 July but overlooks that the details of the plan remained undisclosed to him. The sole additional information he learned was that there would be multiple execution sites, without further specification.⁶⁵ Also, the Prosecution rehashes that the Appellant saw part of the crimes in Orahovac, ignoring that he was absent from the execution-sites in Petkovci, Roćević, Kozluk, Branjevo, and Pilica as well as other crime-sites.⁶⁶

14. Fourthly, the Prosecution's claim that the Appellant's lack of involvement in important aspects of the crimes is "*immaterial and unrealistic*"⁶⁷ misses the mark. The Prosecution allegations concerning the Appellant's involvement in the crimes in Srebrenica and Potočari, the killings of the Branjevo Survivors and the Milići Hospital Survivors and the reburial⁶⁸ proved incorrect,⁶⁹ which obviously affects the extent of the Appellant's involvement. It also undercuts the Prosecution's claim that most of the crimes occurred in Zvornik,⁷⁰ as the allegations against the Appellant were broader. Also, the Appellant was in a position to contribute to the crimes in Roćević/Kozluk and Branjevo/Pilica as Duty Officer, to the killings of the Branjevo Survivors and the Milići Hospital Survivors⁷¹ or the reburials but he did not.⁷² The Prosecution's claim that he "*could only do so many things at one time, and he could only be at one place at a time*"⁷³ is baseless. These events occurred at different times and place.
15. Finally, the Prosecution does not even respond to the TC's errors, finding that the Appellant was "*persistent and determined*".⁷⁴ The Prosecution also fails to respond to the TC's error, failing to repair the disparity between the Appellant's limited contribution to the JCE and the overwhelmingly large contributions of others.⁷⁵

⁶⁴ Judgment, para.1344-1345, 1402-1403.

⁶⁵ Nikolić-Appeal, para.10.

⁶⁶ Judgment, para.499-501, 1366, 1369-1372, 1409, 1411.

⁶⁷ Prosecution-Response, para.16.

⁶⁸ Indictment, para.30.14-30.15, 32, 80.

⁶⁹ Judgment, para.1379-1380, 1384, 1395.

⁷⁰ Prosecution-Response, para.126.

⁷¹ Judgment, para.1370-1373, 1379-1380.

⁷² *Idem*.

⁷³ Prosecution-Response, para.16.

⁷⁴ Judgment, para.2171.

⁷⁵ Nikolić-Appeal, para.17-20.

Indeed, the Appellant played a role limited in time, extent and influence⁷⁶ while Beara and Popović were the architects of the operation,⁷⁷ *ubiquitous* in Srebrenica, Potočari, Bratunac and Zvornik.⁷⁸ Sentencing reparation is required.

Grounds 1.2-1.3

16. The Prosecution fails to rebut⁷⁹ that the TC erred in multiple manners in relation to the applicable mitigating factors.⁸⁰
17. Firstly, the TC erred in failing to treat the *complete* absence of specific aggravating factors as a mitigating circumstance.⁸¹ The Prosecution erroneously focuses on the absence of abuse of authority,⁸² whereas the TC also rejected zeal or enthusiasm, leaving no specific aggravating factors applicable to the Appellant.⁸³ *Blaškić* is inapplicable⁸⁴ as the relevant holding excludes the creation of an aggravating factor through the absence of mitigating factors and not *vice versa*.⁸⁵ The Prosecution's claim that the Appellant would nevertheless have abused his authority is contradicted by the finding that the Appellant acted with "*little authority of his own*".⁸⁶ Crucially, the Prosecution ignores that, in the context of an operation marked by abuse of authority, prolonged or systematic involvement and zeal or enthusiasm,⁸⁷ the Appellant displayed no such conduct.⁸⁸
18. Secondly, the TC erred in failing to consider the Appellant's distress as a mitigating circumstance.⁸⁹ The Prosecution reargues its appeal⁹⁰ without answering the Appellant's arguments. Birčaković's testimony⁹¹ clearly indicates the Appellant's

⁷⁶ Judgment, para.1402-1403, 1410-1413.

⁷⁷ Judgment, para.1410.

⁷⁸ Judgment, para.1166-1168, 1299-1301.

⁷⁹ Prosecution-Response, para.17-30.

⁸⁰ Nikolić-Appeal, para.21-31.

⁸¹ Nikolić-Appeal, para.21-24.

⁸² Prosecution-Response, para.19.

⁸³ Judgment, para.2172-2174.

⁸⁴ Prosecution-Response, fn.41.

⁸⁵ *Blaškić-AJ*, para.687.

⁸⁶ Judgment, para.1412.

⁸⁷ Judgment, para.2158-2159, 2165-2166, 2196-2197.

⁸⁸ Judgment, para. 2172-2174.

⁸⁹ Nikolić-Appeal, para.23.

⁹⁰ Prosecution-Response, para.22; Prosecution-Appeal, para.316.

⁹¹ T.11133.

distress, as a display of anger to a driver is incompatible with a zealous participant. Also, the Appellant's limited involvement⁹² fully tallies with his distress.

19. Thirdly, the TC erred in relation to the mitigating circumstance of military ethos.⁹³ The Prosecution's claim that "*military ethos' in genocide cases is misguided*"⁹⁴ is contradicted by the holding in *Krstić* that "*keen sense for the soldiering profession*" can constitute a mitigating circumstance.⁹⁵ The Prosecution rehashes its appeal⁹⁶ but fails to address that the Appellant's military ethos led to his limited contribution as he executed "*specific tasks*"⁹⁷ but did not escalate his contribution.⁹⁸
20. Fourthly, the TC erred in relation to the mitigating circumstance of remorse.⁹⁹ The Prosecution selectively quotes from the Appellant's statement,¹⁰⁰ ignoring that he admitted to "*some measure of moral blameworthiness*",¹⁰¹ stating: "*I understand that I bear some part of the responsibility*".¹⁰² It also overlooks that the Appellant expressed his remorse for everything that happened during the war, including Srebrenica.¹⁰³ This is extremely important as the Appellant was the only one amongst the Co-Accused to admit bearing some responsibility.¹⁰⁴
21. Finally, the Prosecution does not even respond to the TC's errors, failing to treat the Appellant's absence on 16-17 July, during the executions and burials in Branjevo/Pilica, and his limited participation in the commission of the crimes as mitigating circumstances.¹⁰⁵

⁹² Nikolić-Appeal, para.7-16.

⁹³ Nikolić-Appeal, para.30.

⁹⁴ Prosecution-Response, para.25.

⁹⁵ *Krstić-TJ*, para.714.

⁹⁶ Prosecution-Response, para.26; Prosecution-Appeal, para.303-316.

⁹⁷ Judgment, para.1410.

⁹⁸ Nikolić-Appeal, para.26-27.

⁹⁹ Nikolić-Appeal, para.30.

¹⁰⁰ Prosecution-Response, para.28-29.

¹⁰¹ *Strugar-AJ*, para.365.

¹⁰² T.34899.

¹⁰³ T.34897.

¹⁰⁴ Nikolić-Appeal, para.30.

¹⁰⁵ Nikolić-Appeal, para.29-31.

Ground 1.4

22. The Prosecution fails to rebut¹⁰⁶ that the Appellant's sentence of 35 years' imprisonment is "*out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences*".¹⁰⁷
23. While the Prosecution sought to compare the Appellant to individuals convicted at the ICTR,¹⁰⁸ despite the enormous dissimilarities,¹⁰⁹ it artificially seeks to distinguish his situation from those convicted on the basis of identical facts.¹¹⁰ However, the Srebrenica cases invariably involve identical offences of genocide¹¹¹ and forcible transfer¹¹² as well as an indistinguishable crime-basis.¹¹³
24. The Prosecution ignores the obvious comparison between the Appellant and Dragan Jokić. Despite their involvement in identical crimes and highly comparable circumstances,¹¹⁴ the Appellant received a quadruple sentence. In addition, the Prosecution concedes that Krstić was involved in identical crimes and that Krstić occupied a higher rank and position.¹¹⁵ It ignores, that Krstić was also involved in forcible transfer,¹¹⁶ a crime the Appellant was acquitted of¹¹⁷ and that Krstić had the ability to influence the mass-executions¹¹⁸ while the Appellant acted "*with little authority of his own*".¹¹⁹ Moreover, the Prosecution overlooks that the involvement of Obrenović and Momir Nikolić¹²⁰ in the crimes was more extensive and that they enjoyed far more influence than the Appellant.¹²¹

¹⁰⁶ Prosecution-Response, para.31-38.

¹⁰⁷ Jelisić-AJ, para.96.

¹⁰⁸ Prosecution-Appeal, para.319, fn.844.

¹⁰⁹ Nikolić-Response, para.251-255.

¹¹⁰ Prosecution-Response, para.33-34.

¹¹¹ Krstić-TJ, para.594-599; Blagojević-Jokić-TJ, para.671-677.

¹¹² Krstić-TJ, para.532; Blagojević-Jokić-TJ, para.631.

¹¹³ Obrenović-SJ, para.25-37; M.Nikolić-SJ, para.27-42; Krstić-TJ, para.31-94; Blagojević-Jokić-TJ, para.119-390.

¹¹⁴ Nikolić-Appeal, para.33-35.

¹¹⁵ Prosecution-Response, para.35.

¹¹⁶ Krstić-TJ, para.617-618.

¹¹⁷ Judgment, para.1395.

¹¹⁸ Krstić-AJ, para.136.

¹¹⁹ Judgment, para.1412.

¹²⁰ Prosecution-Response, para.37.

¹²¹ Nikolić-Appeal, para.36-40.

GROUND 2

25. Schabas should have testified.¹²² The Prosecution ignores¹²³ the TC's failure to provide a reasoned opinion, warranting appellate intervention.¹²⁴
26. The Prosecution concedes that the Schabas Report contains historical elements. However, the Schabas Report does not concern the elements of a crime as such¹²⁵ but addresses genocide in its wider legal context.¹²⁶ *Nahimana*¹²⁷ is thus inapplicable. These aspects¹²⁸ unequivocally exceed the TC's functions.¹²⁹
27. The Prosecution erroneously addresses other cases. Gow testified to the international character of a conflict,¹³⁰ i.e. an element of a crime.¹³¹ Economides' testimony concerned public international law,¹³² alike the Schabas Report.¹³³ Zwaan dealt with the historical aspects of genocide,¹³⁴ similar to the Schabas Report.¹³⁵
28. Absent expert testimony, the TC's cursory perusal caused prejudice,¹³⁶ Schabas must be called to testify.

GROUND 3

29. Schabas' theory has not been considered. *Jelisić* is not an implicit rejection¹³⁷ as *Jelisić* merely concerns evidentiary matters.¹³⁸ The Prosecution has no response to *Krstić*,¹³⁹ thereby conceding that this case is distinguishable. The ICC approach¹⁴⁰

¹²² Nikolić-Appeal, para.46-54.

¹²³ Prosecution-Response, para.40-43.

¹²⁴ Zigaranyirazo-AJ, para.44-46, 51.

¹²⁵ Nikolić-Appeal, para.46,55; Prosecution-Response, para.41.

¹²⁶ Nikolic-Final-Brief, Annex A, p.6-9.

¹²⁷ Nahimana-AJ, para.293-294.

¹²⁸ ICJ-Genocide-Case, para.403.

¹²⁹ Prosecution-Response, para.41.

¹³⁰ Prosecution-Response, para.42, fn.99.

¹³¹ Prosecution-Response, para.42, fn.99.

¹³² Prosecution-Response, para.42, fn.100.

¹³³ Nikolić-Appeal, para.46-48, 55.

¹³⁴ Prosecution-Response, para.42, fn.101.

¹³⁵ Nikolić-Appeal, para.46-48, 55.

¹³⁶ Nikolić-Appeal, para.53.

¹³⁷ Prosecution-Response, para.44-50.

¹³⁸ Jelisić-AJ, para.48.

¹³⁹ Nikolić-Appeal, para.57; Krstić-AJ, para.223.

fully corresponds to Schabas' theory.¹⁴¹ Moreover, the lone *genocidaire* theory concerns the absence of State policy¹⁴² and not, one sole individual.

30. Moreover, cogent reasons exist.¹⁴³ Contrary to the Prosecution's claims,¹⁴⁴ State and individual responsibility differ as the former concerns State policy while the latter does not¹⁴⁵ and unification will avoid contradictory outcomes.¹⁴⁶ The uniformity of international criminal law is another cogent reason¹⁴⁷ and no error is required here.¹⁴⁸ Also, a decision *per incuriam* is a cogent reason,¹⁴⁹ as conceded by the Prosecution.¹⁵⁰

GROUND 4

31. No genocide was committed. This is not an "*alternative explanation*"¹⁵¹ but a demonstration of an unreasonable disregard of relevant evidence.¹⁵²
32. The Prosecution ignores that, in this case, it alleged that the protected group was the Bosnian Muslims of Srebrenica and Žepa,¹⁵³ whereas in *Krstić*, it alleged that the protected group was the Bosnian Muslims of Srebrenica only.¹⁵⁴
33. Thus, contrary to its claim,¹⁵⁵ the opportunity presented to the perpetrators¹⁵⁶ far exceeded the destruction committed¹⁵⁷ and the lack of crimes indicates an absence of genocidal intent.¹⁵⁸ The Prosecution's citations¹⁵⁹ focus on the crimes against the

¹⁴⁰ ICC-Elements-of-Crimes, Art.6(a).

¹⁴¹ Schabas-Report, p.14-16

¹⁴² Schabas-Report, p.9-16.

¹⁴³ Nikolić-Appeal, para.63-66.

¹⁴⁴ Prosecution-Response, para.52-54.

¹⁴⁵ Schabas-Report, p.23.

¹⁴⁶ Schabas-Report, p.6-9.

¹⁴⁷ Nikolić-Appeal, para.64-65.

¹⁴⁸ Prosecution-Response, para.55-56.

¹⁴⁹ Nikolić-Appeal, para.66.

¹⁵⁰ Prosecution-Response, fn.122.

¹⁵¹ Prosecution-Response, para.60.

¹⁵² Kvočka-AJ, para.23; Boškoski-Tarčulovski-AJ, para.16.

¹⁵³ Prosecution-Closing-Arguments, T.34276; Indictment, para.26,33.

¹⁵⁴ Krstić-AJ, para.15, fn.24.

¹⁵⁵ Prosecution-Response, para.59.

¹⁵⁶ Krstić-AJ, para.13.

¹⁵⁷ Nikolić-Appeal, para.67-77,86.

¹⁵⁸ Stakić-AJ, para.42.

Muslims of Srebrenica, without mention of Žepa.¹⁶⁰ Further, as ignored by the Prosecution, irrespective of the motives behind the passage of the column, evidence establishes that the column could have been attacked.¹⁶¹ Contrary to the Prosecution's assertions,¹⁶² the exchanged prisoners could have been killed.¹⁶³

34. The TC erred in considering the relevant demographic and forensic evidence.¹⁶⁴ Contrary to the Prosecution's claim,¹⁶⁵ the evidence of Radovanović exactly established that the TC erred in this regard as Radovanović specifically considered the evidence it relied upon.¹⁶⁶ The Appellant does not repeat trial arguments but demonstrates the TC's misconstruction of key evidence,¹⁶⁷ warranting appellate intervention.¹⁶⁸ Also, the Prosecution repeats the challenged finding concerning combat casualties¹⁶⁹ but fails to address the TC's disregard of additional evidence.¹⁷⁰
35. Without diminishing the gravity of the crimes,¹⁷¹ and contrary to the Prosecution's misrepresentations,¹⁷² the number must be revised downwards to approximately 3,000.¹⁷³ As ignored by the Prosecution,¹⁷⁴ a reduced extent of actual destruction points to a lack of genocidal intent.¹⁷⁵

GROUND 5

36. The Prosecution misapprehends¹⁷⁶ that absence of genocidal acts denotes lack of genocidal intent.

¹⁵⁹ Prosecution-Response, fn.151-152.

¹⁶⁰ Judgment, para.845-847.

¹⁶¹ Krstić-AJ, para.13.

¹⁶² Prosecution-Response, para.64-65.

¹⁶³ Nikolić-Appeal, para.74-77.

¹⁶⁴ Nikolić-Appeal, para.78-87.

¹⁶⁵ Prosecution-Response, para.71.

¹⁶⁶ Nikolić-Appeal, para.79-82.

¹⁶⁷ Nikolić-Appeal, para.78-85.

¹⁶⁸ Zigiranyirazo-AJ, para.47, 67-73.

¹⁶⁹ Prosecution-Response, para.72.

¹⁷⁰ Nikolić-Appeal, para.83-84.

¹⁷¹ Nikolić-Appeal, para.88.

¹⁷² Prosecution-Response, fn.173, para.75.

¹⁷³ [REDACTED]; Nikolić-Appeal, para.85.

¹⁷⁴ Prosecution-Response, para.70.

¹⁷⁵ Krstić-AJ, para.13, 35; Stakić-AJ, para.42; S.Milošević-Rule-98bis-Decision, para.125-130.

¹⁷⁶ Prosecution-Response, para.78-82.

GROUND 6

37. The Prosecution fails to rebut this Ground.¹⁷⁷ The TC unreasonably found that the Appellant knew of others' genocidal intent.
38. Firstly, contrary to the Prosecution's claim, the Appellant does not argue that he did not know "*every single factor indicating genocidal intent*"¹⁷⁸ but that the TC unreasonably found that he knew of others' genocidal intent.¹⁷⁹ The authority cited by the Prosecution¹⁸⁰ does not support its rejection of the importance of the general context and related conduct since it merely confirms that an aider and abettor need not share genocidal intent.¹⁸¹
39. Most importantly, the Prosecution ignores its four-pronged allegation.¹⁸² Crucially, the Appellant: (i) neither knew of the forcible transfer nor of the opportunistic killings outside Zvornik;¹⁸³ (ii) acquired belated and partial information of the killing operation¹⁸⁴ and (iii) his connection to the reburial was non-existent besides a conversation about fuel.¹⁸⁵ The Appellant thus lacked knowledge of essential components of the genocidal operation. The Prosecution Response highlights the futility of its position, considering that it confuses actions with knowledge and absolves individuals who obviously knew much more of responsibility for genocide.¹⁸⁶
40. Secondly, contrary to the Prosecution's claims, the Appellant did not acquire sufficient knowledge after 13 July to learn of others' genocidal intent. His lack of

¹⁷⁷ Nikolić-Appeal, para.100-119.

¹⁷⁸ Prosecution-Response, para.155.

¹⁷⁹ Nikolić-Appeal, para.100, 117-119.

¹⁸⁰ Prosecution-Response, fn.399.

¹⁸¹ Krstić-AJ, para.140; Ntakirutimana-AJ, para.501.

¹⁸² Indictment, para.30-33.

¹⁸³ Judgment, para.1393.

¹⁸⁴ Judgment, para.1345, 1354; Nikolić-Appeal, Grounds 14, 20.

¹⁸⁵ Judgment, para.1384.

¹⁸⁶ Prosecution-Response, para.159.

knowledge does not concern “*details*”,¹⁸⁷ but relates to ignorance of essential indicators of genocidal intent.¹⁸⁸

41. According to challenged findings,¹⁸⁹ the Appellant learned of an impending crime on 13 July and the Prosecution does not contest¹⁹⁰ that he did not know of others’ genocidal intent on this day.¹⁹¹ However, the fact that he saw prisoners in Orahovac on 13 July or at Vidikovac Hotel on 14 July is irrelevant¹⁹² as it accords with his challenged knowledge of 13 July that prisoners were targeted and not a protected group, as such. Also, the Prosecution mechanically reiterates¹⁹³ the challenged finding that the Appellant spoke with Beara and Popović on 14 July, ignoring that his knowledge of 13 July was not expanded as he only additionally learned of multiple execution locations without further specification.¹⁹⁴ Furthermore, contrary to the Prosecution’s claim,¹⁹⁵ the Appellant interacted sporadically with Beara and Popović thereafter, which prevented him from learning of their genocidal intent.¹⁹⁶
42. In addition, the Prosecution ignores¹⁹⁷ the crucial matter that the Appellant’s involvement was too limited to appraise the full scale and scope of the operation.¹⁹⁸ The Prosecution concedes or ignores¹⁹⁹ that the Appellant was not involved in the inception of the plan,²⁰⁰ that he did not know of the crimes on 13 July,²⁰¹ that he was absent from the execution sites in Petkovci, Roćević/Kozluk and Branjevo/Pilica²⁰² and that he was not involved in crimes after 17 July.²⁰³ Also, contrary to the Prosecution’s claim,²⁰⁴ the Appellant did not witness the full extent

¹⁸⁷ Judgment, para.156-157.

¹⁸⁸ Nikolić-Appeal, para.101-113.

¹⁸⁹ *Supra* footnote 185.

¹⁹⁰ Prosecution-Response, para.156.

¹⁹¹ Judgment, para.1403.

¹⁹² Prosecution-Response, para.141.

¹⁹³ Prosecution-Response, para.156.

¹⁹⁴ Nikolić-Appeal, para.103-105.

¹⁹⁵ Prosecution-Response, para.131-138.

¹⁹⁶ Nikolić-Appeal, para.111-113.

¹⁹⁷ Prosecution-Response, para.98-123, 154-157.

¹⁹⁸ Nikolić-Appeal, para.108-110.

¹⁹⁹ Prosecution-Response, para.98-123, 154-157.

²⁰⁰ Judgment, para.1344-1345.

²⁰¹ Judgement, para.1402-1403.

²⁰² Judgment, para.499-501, 1366-1373, 1409.

²⁰³ Judgment, para.1379-1384.

²⁰⁴ Prosecution-Response, para.105, 141, 156.

of the crimes in Orahovac,²⁰⁵ refuting the claim that he knew of others' genocidal intent.

43. In addition, the Prosecution's claim concerning the presence of some young boys and older men in Orahovac²⁰⁶ does not detract from the fact that the Appellant witnessed almost exclusively military-aged men,²⁰⁷ affirming his state of knowledge that prisoners were targeted and not a protected group, as such. [REDACTED]²⁰⁸ ²⁰⁹ Also, it is irrelevant that PWs can be victims of genocide²¹⁰ as, in combination with his lack of knowledge of the events in Srebrenica,²¹¹ the Appellant's belief that PWs were targeted²¹² negates his knowledge that the complete or partial destruction of a protected group, as such, was intended.
44. Furthermore, the fact that the Appellant referred to the victims as "*prisoners*" confirms that he did not believe that a protected group was targeted.²¹³ Perić and the Appellant specifically spoke of "*prisoners*" and Perić stated that the Appellant told him something similar to the contents of the telegram,²¹⁴ including the exchange. In light of the complete absence of relevant findings, the Prosecution's claim that the TC did not accept the statements of Birčaković and Ristić concerning the exchange is purely speculative.²¹⁵ The TC's failure thus constitutes unreasonable disregard,²¹⁶ belying the Prosecution's claim of re-litigation.
45. The Appellant does not overstate his observations regarding the sparing of Bosnian Muslims.²¹⁷ He witnessed the detention of the Branjevo Survivors and the Milići Hospital patients; he was not involved in their murder²¹⁸ and believed they survived. Also, as he was present, he must have witnessed the remaining detainees

²⁰⁵ Nikolić-Response, para.44, 232; Judgment, para.1362-1364.

²⁰⁶ Prosecution-Response, para.144, 154.

²⁰⁷ Nikolić-Appeal, para.107.

²⁰⁸ [REDACTED]

²⁰⁹ [REDACTED]

²¹⁰ Prosecution-Response, para.146.

²¹¹ Judgment, para.1344-1345, 1402-1403.

²¹² Mrkšić-Šljivančanin-AJ, para.42.

²¹³ Nikolić-Appeal, para.107.

²¹⁴ T.11376.

²¹⁵ Prosecution-Response, para. 147-149.

²¹⁶ Kvočka-AJ, para.23.

²¹⁷ Prosecution-Response, para.158.

²¹⁸ Judgment, para.1379-1380.

as the Brigade's facilities were jam-packed.²¹⁹ This is not a “*handful of survivors*”²²⁰ but a sizeable number of over 50 prisoners,²²¹ denying that the Appellant witnessed a determination to kill all prisoners.²²²

GROUND 7

46. The Prosecution fails²²³ to rebut this Ground.²²⁴
47. The Prosecution misses the point entirely. Its description of the expansion of the common plan – “*from targeting the Bosnian Muslim men separated in Potočari to include the men captured from the column fleeing Srebrenica*” – concedes the point; the men in Potočari and those in the column made up all the men in Srebrenica.
48. Moreover, the TC's description was insufficient in law.²²⁵ It described the events without specification of “*the criminal goal intended and its scope*”²²⁶ on the basis of the allegations that all men from Srebrenica were targeted.²²⁷ Reading the Judgment “*as a whole*” is of no avail²²⁸ as the TC failed to provide additional specifications.²²⁹ In fact, the TC offers differing specifications throughout.
49. Thus, the Prosecution incorrectly claims that the Appellant's lack of knowledge of the common purpose to kill all men from Srebrenica is “*irrelevant*”.²³⁰ The Prosecution concedes that, on 13 July, the Appellant knew of “*a large number*” of victims but not of all men from Srebrenica²³¹ and that the TC found that he was not aware that the operation extended beyond killing prisoners.²³² The Prosecution also

²¹⁹ Judgment, para.592.

²²⁰ Prosecution-Response, para.158.

²²¹ Judgment, para.592, 1379-1380.

²²² Prosecution-Response, para.158; Stakić-AJ, para.42.

²²³ Prosecution-Response, para.83-90.

²²⁴ Nikolić-Appeal, para.120-133.

²²⁵ Prosecution-Response, para.87-88.

²²⁶ Brđanin-AJ, para.430.

²²⁷ Nikolić-Appeal, para.123.

²²⁸ Prosecution-Response, para.88.

²²⁹ Judgment, para.1050-1083.

²³⁰ Prosecution-Response, para.89, fn.234.

²³¹ Nikolić-Appeal, para.126.

²³² Judgment, para.1403.

concedes²³³ that after the meeting on 14 July, he also does not learn about the extent of the common plan.²³⁴

50. Moreover, the Appellant did not know of the prisoners' origin.²³⁵ The fact that the Prosecution notes²³⁶ that the Appellant knew that prisoners were coming from Bratunac confirms that he did not know they came from Srebrenica.²³⁷ It also ignores that, no information about the prisoners' geographical origins was provided to him on 13 July.²³⁸ Also, while he met with Beara and Popović, no finding was reached that they informed the Appellant about the prisoners' origins.²³⁹ Also, the Appellant's observance of some victims has no bearing on his knowledge of their origins and ignores that he did not see the vast majority of the victims.²⁴⁰ Also, the Appellant was not involved in intelligence affairs,²⁴¹ which contradicts that, as Security Officer, he knew of the prisoners' origins.²⁴² The Prosecution fatally ignores that the Appellant was not involved in the events in Srebrenica and Potočari,²⁴³ which highly limited his contextual knowledge.²⁴⁴
51. Moreover, while the Prosecution argues that the Appellant's involvement was not limited,²⁴⁵ it fails to address²⁴⁶ that the Appellant's absence from three execution sites²⁴⁷ and his non-involvement in the remaining crimes after 17 July²⁴⁸ indicates that he did not know of a plan to kill all men from Srebrenica. The Prosecution also ignores that the Appellant witnessed the sparing of Bosnian Muslims.²⁴⁹

²³³ Prosecution-Response, fn.234.

²³⁴ Nikolić-Appeal, para.128.

²³⁵ Nikolić-Appeal, para.125.

²³⁶ Prosecution-Response, para.150.

²³⁷ Nikolić-Appeal, para.125.

²³⁸ Nikolić-Appeal, para.125.

²³⁹ Judgment, para.1357, 1404; Nikolić-Appeal, para.128.

²⁴⁰ Judgment, para.1366-1373, 1409; Nikolić-Appeal, para.129.

²⁴¹ Judgment, para.153-154; M.Nikolić, T.33216-T.33217.

²⁴² Prosecution-Response, para.142.

²⁴³ Judgment, para.1395.

²⁴⁴ Nikolić-Appeal, para.125.

²⁴⁵ Prosecution-Response, para.98-123.

²⁴⁶ Prosecution-Response, para.160-161.

²⁴⁷ Judgment, para.1366-1373, 1409; Nikolić-Appeal, para.129.

²⁴⁸ Judgment, para.1379-1380.

²⁴⁹ *idem*.

52. Finally, the Prosecution's repetition that the Appellant's motive is irrelevant²⁵⁰ is erroneous.²⁵¹ The AC has found that the conclusion that an individual executed orders without sharing the *mens rea* for JCE is not a confusion of intent and motive.²⁵² Here, the TC unreasonably neglected to consider this equally reasonable inference²⁵³ in keeping with the established principle that an inference as to intent must be the only reasonable inference.²⁵⁴

GROUND 8

53. The Prosecution ignores²⁵⁵ that the Appellant was not involved in the events in Srebrenica.²⁵⁶ Its claim that he "*was likely aware*" of forcible transfer ignores the evidence. The Appellant could only have known of the legitimate military aims. Moreover, the Appellant's ignorance of the other alleged components²⁵⁷ underscores his lack of knowledge.²⁵⁸

54. The Prosecution misunderstands that others did possess this contextual knowledge, contrary to the Appellant,²⁵⁹ exemplifying the TC's error.

55. Finally, the Appellant's lack of knowledge, together with his limited involvement²⁶⁰ and his ignorance as to the victims' origins and status,²⁶¹ denies his *mens rea*.²⁶² It is irrelevant that PWs can be victims of crimes against humanity²⁶³ as the Appellant believed that a group of prisoners was targeted.²⁶⁴

²⁵⁰ Prosecution-Response, para.152-153.

²⁵¹ Nikolić-Response, para.101-105.

²⁵² Krnojelac-AJ, para.103.

²⁵³ Nikolić-Appeal, para.130-132.

²⁵⁴ Brđanin-AJ, para.429.

²⁵⁵ Prosecution-Response, para.162-166.

²⁵⁶ Judgment, para.1344, 1395, 1403.

²⁵⁷ Judgment, para.760.

²⁵⁸ Nikolić-Appeal, para.136-137.

²⁵⁹ Nikolić-Appeal, para.143-144.

²⁶⁰ Nikolić-Appeal, Ground 1.1.

²⁶¹ *Supra*, Grounds 6, 7.

²⁶² Nikolić-Appeal, para.138-142.

²⁶³ Prosecution-Response, para.146.

²⁶⁴ Mrkšić-Šljivančanin-AJ, para.42.

GROUND 9

56. The Prosecution's legal claim is inaccurate.²⁶⁵ It is established that “[i]t is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate”,²⁶⁶ dispelling the Prosecution's assertion that these are “synonyms”.
57. It is not “sufficient” that the Appellant knew that the victims were Muslims²⁶⁷ as this evinces awareness of factually discriminatory conduct as opposed to a conscious intent to discriminate.²⁶⁸
58. The TC erroneously inferred persecutory intent from the general context.²⁶⁹ This is confirmed by the Prosecution's citation²⁷⁰ in which the “activities” of the Accused were considered.²⁷¹ This is exactly the TC's error as the victims came pre-selected and the Appellant did not hear the discriminatory remarks, denying a conscious intent to discriminate.

GROUND 10

59. [REDACTED]^{272 273 274 275}
60. [REDACTED]^{276 277 278}
61. [REDACTED]²⁷⁹

²⁶⁵ Prosecution-Response, para.92.

²⁶⁶ Lukić-TJ, para.994, invoking: Stakić-AJ, para.328.

²⁶⁷ Prosecution-Response, para.93.

²⁶⁸ Lukić-TJ, para.994.

²⁶⁹ Nikolić-Appeal, para.152-153.

²⁷⁰ Prosecution-Response, fn.446.

²⁷¹ Kvočka-AJ, para.461.

²⁷² [REDACTED]

²⁷³ [REDACTED]

²⁷⁴ [REDACTED]

²⁷⁵ [REDACTED]

²⁷⁶ [REDACTED]

²⁷⁷ [REDACTED]

²⁷⁸ [REDACTED]

²⁷⁹ [REDACTED]

62. [REDACTED]²⁸⁰

GROUND 13

63. [REDACTED]²⁸¹

64. [REDACTED]

65. [REDACTED]^{282 283 284 285 286 287 288}

66. [REDACTED]²⁸⁹

67. [REDACTED]^{290 291}

68. [REDACTED]

GROUND 14

Introduction

69. [REDACTED]²⁹²

70. [REDACTED]^{293 294}

71. [REDACTED]^{295 296 297 298 299}

²⁸⁰ [REDACTED]

²⁸¹ [REDACTED]

²⁸² [REDACTED]

²⁸³ [REDACTED]

²⁸⁴ [REDACTED]

²⁸⁵ [REDACTED]

²⁸⁶ [REDACTED]

²⁸⁷ [REDACTED]

²⁸⁸ [REDACTED]

²⁸⁹ [REDACTED]

²⁹⁰ [REDACTED]

²⁹¹ [REDACTED]

²⁹² [REDACTED]

²⁹³ [REDACTED]

²⁹⁴ [REDACTED]

72. [REDACTED]^{300 301 302}
73. [REDACTED]^{303 304 305 306 307}
74. [REDACTED]^{308 309}
75. [REDACTED]^{310 311}
76. [REDACTED]^{312 313}
77. [REDACTED]^{314 315 316 317 318}
78. [REDACTED]³¹⁹
79. [REDACTED]

295 [REDACTED]
 296 [REDACTED]
 297 [REDACTED]
 298 [REDACTED]
 299 [REDACTED]
 300 [REDACTED]
 301 [REDACTED]
 302 [REDACTED]
 303 [REDACTED]
 304 [REDACTED]
 305 [REDACTED]
 306 [REDACTED]
 307 [REDACTED]
 308 [REDACTED]
 309 [REDACTED]
 310 [REDACTED]
 311 [REDACTED]
 312 [REDACTED]
 313 [REDACTED]
 314 [REDACTED]
 315 [REDACTED]
 316 [REDACTED]
 317 [REDACTED]
 318 [REDACTED]
 319 [REDACTED]

Ground 14.1

80. [REDACTED]³²⁰

81. [REDACTED]^{321 322 323 324 325 326 327 328}

82. [REDACTED]^{329 330 331 332 333 334 335 336 337 338}

83. [REDACTED]^{339 340}

Ground 14.2

84. [REDACTED]³⁴¹

85. [REDACTED]^{342 343 344}

86. [REDACTED]³⁴⁵

87. [REDACTED]³⁴⁶

³²⁰ [REDACTED]
³²¹ [REDACTED]
³²² [REDACTED]
³²³ [REDACTED]
³²⁴ [REDACTED]
³²⁵ [REDACTED]
³²⁶ [REDACTED]
³²⁷ [REDACTED]
³²⁸ [REDACTED]
³²⁹ [REDACTED]
³³⁰ [REDACTED]
³³¹ [REDACTED]
³³² [REDACTED]
³³³ [REDACTED]
³³⁴ [REDACTED]
³³⁵ [REDACTED]
³³⁶ [REDACTED]
³³⁷ [REDACTED]
³³⁸ [REDACTED]
³³⁹ [REDACTED]
³⁴⁰ [REDACTED]
³⁴¹ [REDACTED]
³⁴² [REDACTED]
³⁴³ [REDACTED]
³⁴⁴ [REDACTED]
³⁴⁵ [REDACTED]

88. [REDACTED]^{347 348}

89. [REDACTED]³⁴⁹.

90. [REDACTED]³⁵⁰

91. [REDACTED]

Ground 14.3

92. [REDACTED]

93. [REDACTED]^{351 352}

94. [REDACTED]^{353 354}

95. [REDACTED]^{355 356 357 358 359 360 361 362 363 364 365 366 367}

96. [REDACTED]^{368 369}

³⁴⁶ [REDACTED]

³⁴⁷ [REDACTED]

³⁴⁸ [REDACTED]

³⁴⁹ [REDACTED]

³⁵⁰ [REDACTED]

³⁵¹ [REDACTED]

³⁵² [REDACTED]

³⁵³ [REDACTED]

³⁵⁴ [REDACTED]

³⁵⁵ [REDACTED]

³⁵⁶ [REDACTED]

³⁵⁷ [REDACTED]

³⁵⁸ [REDACTED]

³⁵⁹ [REDACTED]

³⁶⁰ [REDACTED]

³⁶¹ [REDACTED]

³⁶² [REDACTED]

³⁶³ [REDACTED]

³⁶⁴ [REDACTED]

³⁶⁵ [REDACTED]

³⁶⁶ [REDACTED]

³⁶⁷ [REDACTED]

³⁶⁸ [REDACTED]

97. [REDACTED]^{370 371 372}
98. [REDACTED]^{373 374 375 376}
99. [REDACTED]^{377 378}
100. [REDACTED]^{379 380 381}

GROUND 15

101. [REDACTED]
102. [REDACTED]^{382 383}
103. [REDACTED]^{384 385 386}
104. [REDACTED]^{387 388 389}
105. [REDACTED]^{390 391}

³⁶⁹ [REDACTED]
³⁷⁰ [REDACTED]
³⁷¹ [REDACTED]
³⁷² [REDACTED]
³⁷³ [REDACTED]
³⁷⁴ [REDACTED]
³⁷⁵ [REDACTED]
³⁷⁶ [REDACTED]
³⁷⁷ [REDACTED]
³⁷⁸ [REDACTED]
³⁷⁹ [REDACTED]
³⁸⁰ [REDACTED]
³⁸¹ [REDACTED]
³⁸² [REDACTED]
³⁸³ [REDACTED]
³⁸⁴ [REDACTED]
³⁸⁵ [REDACTED]
³⁸⁶ [REDACTED]
³⁸⁷ [REDACTED]
³⁸⁸ [REDACTED]
³⁸⁹ [REDACTED]
³⁹⁰ [REDACTED]
³⁹¹ [REDACTED]

GROUND 16

106. The Prosecution³⁹² fails to rebut this Ground.³⁹³
107. Firstly, the Prosecution simply eschews the decisive issue; the TC failed to assess Aćimović's concoctions about the manner of receipt in keeping with the AC's test for witness credibility.³⁹⁴ The Prosecution does not even respond to the TC's failure to consider that Aćimović contradicted himself in "*successive statements*" about the manner of receipt and that, on "*cross-examination*",³⁹⁵ he was unable to explain these contradictions.³⁹⁶ Furthermore, the Prosecution ignores that the TC erroneously treated the contradictions between Aćimović's "*testimony and other evidence*"³⁹⁷ concerning the manner of receipt. Also, the Prosecution fails to respond to the TC's failure to assess Aćimović's "*motive to lie*" about the manner of receipt; he sought to conceal the extent of his "*involvement*"³⁹⁸ by referring to mysterious, unverifiable "*coded*" telegrams.³⁹⁹ The Prosecution unpersuasively claims re-litigation,⁴⁰⁰ ignoring the TC's legal error, which led to a conclusion no reasonable TC could have adopted.
108. Secondly, the Prosecution misapprehends⁴⁰¹ that the TC's dismissal during deliberations amounts to an alteration of the allegations, a clear error of law.⁴⁰² The Prosecution concedes that it focused on the manner of receipt throughout⁴⁰³ and the TC should thus have either elucidated this matter or ruled whether the Prosecution proved its allegation, in line with the Appellant's right to be informed. This is further confirmed by the TC's prior characterization of the matter as "*significant*". The Prosecution's claim about differing standards is irrelevant.⁴⁰⁴ The underlying

³⁹² Prosecution-Response, para.238-260.

³⁹³ Nikolić-Appeal, para.263-270.

³⁹⁴ Nahimana-AJ, para.194; Nchamihigo-AJ, para.47.

³⁹⁵ *idem*.

³⁹⁶ Nikolić-Appeal, para.265.

³⁹⁷ Nahimana-AJ, para.194.

³⁹⁸ *idem*.

³⁹⁹ Nikolić-Appeal, para.264.

⁴⁰⁰ Prosecution-Response, para.258.

⁴⁰¹ Prosecution-Response, para.257-260.

⁴⁰² Nikolić-Appeal, para.267.

⁴⁰³ Prosecution-Response, fn.705.

⁴⁰⁴ Prosecution-Response, para.260.

principle is one and the same: this matter was deemed “*significant*” during trial and its dismissal as “*peripheral*” during deliberations on the basis of the identical evidentiary record was contradictory, constituting a factual error.⁴⁰⁵

GROUND 18

109. The Prosecution fails to rebut this Ground.

Introduction

110. The Prosecution unconvincingly claims that the Appellant engages in re-litigation or substitution of evidence evaluation as it concedes⁴⁰⁶ that the argument centres on the TC’s “*wholly erroneous*” assessment of Aćimović’s credibility on the basis of the relevant legal test,⁴⁰⁷ which constitutes a recognized error of fact and law.⁴⁰⁸

111. While the Prosecution simply reproduces the TC’s general comments, it ignores that the TC failed “*to consider several matters going directly to the credibility of*” Aćimović, rendering the TC’s evaluation “*wholly erroneous*”.⁴⁰⁹ Moreover, the TC’s recognition of Aćimović’s lack of credibility ought to have triggered an exhaustive consideration of all credibility criteria,⁴¹⁰ as opposed to unspecified generalities.⁴¹¹

112. Furthermore, the Prosecution overlooks the decisive issue in relation to this argument:⁴¹² despite Aćimović’s strong “*motivation to lie*”, the TC failed to consider that Aćimović’s concoctions about the coded telegrams and phone calls, seeking to fabricate a reason for his presence and crimes at Roćević on 15 July, formed part and parcel of his attempts to minimise his “*involvement*”⁴¹³ in the

⁴⁰⁵ Nikolić-Appeal, para.268-269.

⁴⁰⁶ Prosecution-Response, para.239, 242.

⁴⁰⁷ Nikolić-Appeal, para.273.

⁴⁰⁸ Kupreškić-AJ, para.223-225; Nahimana-AJ, para.194; Nchamihigo-AJ, para.47.

⁴⁰⁹ Kupreškić-AJ, para.223-225.

⁴¹⁰ Nahimana-AJ, para.194; Nchamihigo-AJ, para.47.

⁴¹¹ Judgment, para.506.

⁴¹² Prosecution-Response, para.255, 261.

⁴¹³ Nahimana-AJ, para.194

crimes. Indeed, Aćimović's involvement was far more extensive than the TC found.⁴¹⁴

113. Also, the Prosecution ignores that Aćimović's lies about attempting to contact his superiors establish that Aćimović minimized his involvement to a greater extent than the TC found.⁴¹⁵ The Prosecution's arguments are meritless.⁴¹⁶ Popović's admonition to Jokić is irrelevant as Aćimović's alleged attempts to reach his superiors did not constitute messages about the prisoners.⁴¹⁷ Popović's presence was also immaterial as Aćimović did not answer to him but to Obrenović and Pandurević.⁴¹⁸ [REDACTED]⁴¹⁹ Also, the Prosecution concedes that the TC made no finding about Aćimović's supposed attempt to reach the Brigade on 15 July,⁴²⁰ which actually confirms the TC's failure to consider that Aćimović was dishonest about contacting his superiors to further minimize his involvement.
114. Furthermore, far from constituting re-litigation,⁴²¹ the TC's failure to assess Mitar Lazarević's motivation to lie⁴²² was a breach of its legal obligation. [REDACTED]⁴²³ This is all the more so in light of the severe inconsistencies in their stories.⁴²⁴ Also, far from being irrelevant,⁴²⁵ Aćimović's snub to the Appellant's Counsel demonstrates his "*grudge*"⁴²⁶ against the Nikolic, which the TC failed to assess.
115. Finally, contrary to the Prosecution's claim,⁴²⁷ the TC did not consider Aćimović's continuous modifications to his story and his failure to mention the telegrams and the conversations during his first interview.⁴²⁸ The TC only mentioned assessing "*his demeanour and manner of delivery*", "*his testimony in the context of other*

⁴¹⁴ Nikolić-Appeal, para.277.

⁴¹⁵ Nikolić-Appeal, para.278.

⁴¹⁶ Prosecution-Response, para.255.

⁴¹⁷ Judgment, para.1122; P377, p.126-144.

⁴¹⁸ Judgment, para.150.

⁴¹⁹ [REDACTED]

⁴²⁰ Prosecution-Response, para.255.

⁴²¹ Prosecution-Response, para.245.

⁴²² Nikolić-Appeal, para.284-286.

⁴²³ [REDACTED]

⁴²⁴ Nikolić-Appeal, para.285, 292-293.

⁴²⁵ Prosecution-Response, para.261.

⁴²⁶ Nchamihigo-AJ, para.47.

⁴²⁷ Prosecution-Response, fn.642.

⁴²⁸ Nikolić-Appeal, para.281-283.

evidence” and “*its internal consistency*”.⁴²⁹ This does not include “*contradictions and discrepancies in ... successive statements*” and “*responses during cross-examination*”, which constitute separate limbs of the credibility test.⁴³⁰

Ground 18.1

116. The Prosecution’s claim that other 2Bn members could only testify to their knowledge of the telegrams⁴³¹ is false. Whereas Aćimović stated that 2Bn members decoded the telegrams⁴³² and that he discussed them with his Company Commanders,⁴³³ none of these persons ever heard anything about such telegrams,⁴³⁴ clearly revealing Aćimović’s lies. Also, the Prosecution ignores that the telegrams constituted orders,⁴³⁵ implying that others must have known thereof.
117. Moreover, contrary to the Prosecution’s claim,⁴³⁶ the discrepancies between M.Lazarević and Aćimović invalidate the core of their evidence.⁴³⁷ M.Lazarević asserted that all those present in the 2Bn read the telegram⁴³⁸ but Aćimović claimed to have discussed both telegrams only with Vujo and M.Lazarević.⁴³⁹ Also, Aćimović averred that he consulted the Company Commanders in the field⁴⁴⁰ but M.Lazarević said that they were at the Command to discuss the telegram.⁴⁴¹ The Prosecution ignores that all this is contradicted by other evidence.⁴⁴² This not re-litigation but establishes unreasonable disregard of critical evidence.⁴⁴³
118. Then, the Prosecution misapprehends that it is uncontested that 2Bn members guarded the prisoners and that prisoners were killed:⁴⁴⁴ The preceding events are

⁴²⁹ Judgment, para.506.

⁴³⁰ Nahimana-AJ, para.194; Nchamihigo-AJ, para.47.

⁴³¹ Prosecution-Response, para.253.

⁴³² T.12945-T.12946, [REDACTED]

⁴³³ T.13405-T.13406.

⁴³⁴ T.25836-T.25837; 3D00477, p.2; T.26181; T.32848-T.32849, [REDACTED]

⁴³⁵ T.13124-T.13126; T.25832-T.25834.

⁴³⁶ Prosecution-Response, para.246.

⁴³⁷ Nikolić-Appeal, para.291-293.

⁴³⁸ T.13387, T.13405.

⁴³⁹ T.12943, T.12948-T.12949, T.13405-T.13406.

⁴⁴⁰ T.13405-T.13406.

⁴⁴¹ T.13375-T.13376.

⁴⁴² T.25836-T.25837; 3D00477, p.2; T.26181; T.32848-T.32849, [REDACTED]

⁴⁴³ Kvočka-AJ, para.23.

⁴⁴⁴ Prosecution-Response, para.246-249.

contested.⁴⁴⁵ Aćimović claimed executioners were required⁴⁴⁶ but 2Bn members did not shoot prisoners,⁴⁴⁷ despite the Prosecution's misrepresentations.⁴⁴⁸ Aćimović's provision of logistical support,⁴⁴⁹ as opposed to executioners, establishes that inconsistent events were unreasonably treated as corroboration.⁴⁵⁰

119. Finally, the Prosecution ignores⁴⁵¹ that, whereas other Battalions received non-coded messages about the prisoners' arrival on 14 July,⁴⁵² only Aćimović claimed to have received coded telegrams about killings on 15 July.⁴⁵³ This is not "*one piece of evidence*" but an unreasonable treatment of dissimilar events as corroboration.⁴⁵⁴

Ground 18.2

120. M.Lazarević severely contradicted Aćimović concerning the phone conversations, and his evidence was unreasonably treated as corroboration.⁴⁵⁵ The Prosecution fails to address⁴⁵⁶ that M.Lazarević specifically stated that he has no knowledge of Aćimović having a conversation with Nikolić⁴⁵⁷ even though Aćimović claimed to have discussed this conversation with both Vujo and M.Lazarević.⁴⁵⁸ Also, the Prosecution overlooks that, as M.Lazarević only knew of one conversation,⁴⁵⁹ the second conversation claimed by Aćimović stands uncorroborated.⁴⁶⁰
121. Moreover, as opposed to close interaction,⁴⁶¹ the fact that Popović did not call the Appellant from Roćević when he needed support⁴⁶² confirms their limited

⁴⁴⁵ Nikolić-Appeal, para.294-296.

⁴⁴⁶ T.12944-T.12949.

⁴⁴⁷ T.18064; [REDACTED]; [REDACTED]; [REDACTED], [REDACTED].

⁴⁴⁸ Prosecution-Response, fn.668

⁴⁴⁹ T.18058-T.18060, [REDACTED]; [REDACTED], [REDACTED]; T.18174-T.18178, [REDACTED].

⁴⁵⁰ Nikolić-Appeal, para.296.

⁴⁵¹ Prosecution-Response, para.250-251.

⁴⁵² Judgment, para.527; T.10062, T.10067-T.10068; Judgment, para.479; T.13300-T.13301; Judgment, para.494.

⁴⁵³ T.12944-T.12949.

⁴⁵⁴ Nikolić-Appeal, para.300.

⁴⁵⁵ Nikolić-Appeal, para.302-305.

⁴⁵⁶ Prosecution-Response, para.246, 256.

⁴⁵⁷ T.13388.

⁴⁵⁸ T.12957, T.13123.

⁴⁵⁹ T.13377-T.13378.

⁴⁶⁰ Nikolić-Appeal, para.303; Judgment, para.510.

⁴⁶¹ Prosecution-Response, para.256.

⁴⁶² Judgment, para.1119.

interaction⁴⁶³ and belies the Nikolić's involvement.⁴⁶⁴ Had Nikolić been involved in the manner claimed by Aćimović,⁴⁶⁵ Popović would not have ignored him.⁴⁶⁶ This is not "*speculation*" but a critical inference that was unreasonably ignored.

122. Also, as ignored by the Prosecution, had Aćimović spoken to Nikolić during the night of 14-15 July,⁴⁶⁷ he could not have claimed *not* to have spoken to him in the afternoon of 15 July when he contacted the Duty Officer.⁴⁶⁸ At least by 11h45, Nikolić had assumed his shift as Duty Officer.⁴⁶⁹ This contradiction was unreasonably ignored by the TC.⁴⁷⁰
123. Finally, the Prosecution ignores⁴⁷¹ that, whereas Perić stated that the Appellant did not have the authority to issue an order⁴⁷² and that their conversation was not an instruction to commit crimes,⁴⁷³ Aćimović claimed to have received an explicit illegal order.⁴⁷⁴ These entirely dissimilar events were unreasonably considered as corroboration.⁴⁷⁵

GROUND 19

124. [REDACTED]⁴⁷⁶

125. [REDACTED]⁴⁷⁷

126. [REDACTED]⁴⁷⁸

⁴⁶³ *Supra* Ground 1.1.

⁴⁶⁴ Nikolić-Appeal, para.306-309.

⁴⁶⁵ T.12949-T.12951.

⁴⁶⁶ Judgment, para.1119.

⁴⁶⁷ T.12949-T.12951.

⁴⁶⁸ T.12989-T.12990; T.13140.

⁴⁶⁹ Judgment, fn.4427.

⁴⁷⁰ Nikolić-Appeal, para.310-311.

⁴⁷¹ Prosecution-Response, para.251.

⁴⁷² T.11378.

⁴⁷³ T.11443, T.11469-T.11470.

⁴⁷⁴ T.12949-T.12951

⁴⁷⁵ Nikolić-Appeal, para.313.

⁴⁷⁶ [REDACTED]

⁴⁷⁷ [REDACTED]

⁴⁷⁸ [REDACTED]

127. [REDACTED]⁴⁷⁹
128. [REDACTED]^{480 481 482}
129. [REDACTED]⁴⁸³
130. [REDACTED]^{484 485 486 487 488 489}
131. [REDACTED]⁴⁹⁰
132. [REDACTED]^{491 492 493 494 495 496 497}
133. [REDACTED]⁴⁹⁸
134. [REDACTED]^{499 500 501 502 503 504}
135. [REDACTED]^{505 506 507 508 509 510}

⁴⁷⁹ [REDACTED]
⁴⁸⁰ [REDACTED]
⁴⁸¹ [REDACTED]
⁴⁸² [REDACTED]
⁴⁸³ [REDACTED]
⁴⁸⁴ [REDACTED]
⁴⁸⁵ [REDACTED]
⁴⁸⁶ [REDACTED]
⁴⁸⁷ [REDACTED]
⁴⁸⁸ [REDACTED]
⁴⁸⁹ [REDACTED]
⁴⁹⁰ [REDACTED]
⁴⁹¹ [REDACTED]
⁴⁹² [REDACTED]
⁴⁹³ [REDACTED]
⁴⁹⁴ [REDACTED]
⁴⁹⁵ [REDACTED]
⁴⁹⁶ [REDACTED]
⁴⁹⁷ [REDACTED]
⁴⁹⁸ [REDACTED]
⁴⁹⁹ [REDACTED]
⁵⁰⁰ [REDACTED]
⁵⁰¹ [REDACTED]
⁵⁰² [REDACTED]
⁵⁰³ [REDACTED]
⁵⁰⁴ [REDACTED]
⁵⁰⁵ [REDACTED]
⁵⁰⁶ [REDACTED]

136. [REDACTED]
137. [REDACTED]⁵¹¹
138. [REDACTED]⁵¹²
139. [REDACTED]^{513 514 515}
140. [REDACTED]⁵¹⁶
141. [REDACTED]^{517 518 519 520}
142. [REDACTED]⁵²¹
143. [REDACTED]
144. [REDACTED]^{522 523 524}
145. [REDACTED]^{525 526 527}

⁵⁰⁷ [REDACTED]
⁵⁰⁸ [REDACTED]
⁵⁰⁹ [REDACTED]
⁵¹⁰ [REDACTED]
⁵¹¹ [REDACTED]
⁵¹² [REDACTED]
⁵¹³ [REDACTED]
⁵¹⁴ [REDACTED]
⁵¹⁵ [REDACTED]
⁵¹⁶ [REDACTED]
⁵¹⁷ [REDACTED]
⁵¹⁸ [REDACTED]
⁵¹⁹ [REDACTED]
⁵²⁰ [REDACTED]
⁵²¹ [REDACTED]
⁵²² [REDACTED]
⁵²³ [REDACTED]
⁵²⁴ [REDACTED]
⁵²⁵ [REDACTED]
⁵²⁶ [REDACTED]
⁵²⁷ [REDACTED]

146. [REDACTED]⁵²⁸
147. [REDACTED]^{529 530 531 532}
148. [REDACTED]

GROUND 20

149. The Prosecution fails to rebut this Ground.⁵³³
150. [REDACTED]^{534 535 536 537 538}
151. Secondly, the Prosecution's assertions concerning M.Nikolić's plea-agreement miss the mark. The possibility of employing accomplice testimony as such⁵³⁹ is irrelevant: plea-deals oblige Accused to be truthful;⁵⁴⁰ a plea-deal thus cannot augment their credibility. Nevertheless, whereas the Prosecution mechanically reproduces findings,⁵⁴¹ it ignores the TC's failure to consider that M.Nikolić lied and breached his plea-deal.⁵⁴²
152. Thirdly, far from warranting summary dismissal, the contradictions between M.Nikolić and Janjić, Kostić, Jeremić, Milošević and his prior evidence amount to a failure "*to consider several matters going directly to the credibility of*" M.Nikolić, requiring appellate intervention.⁵⁴³

⁵²⁸ [REDACTED]

⁵²⁹ [REDACTED]

⁵³⁰ [REDACTED]

⁵³¹ [REDACTED]

⁵³² [REDACTED]

⁵³³ Nikolić-Appeal, para.340-352.

⁵³⁴ [REDACTED]

⁵³⁵ [REDACTED]

⁵³⁶ [REDACTED]

⁵³⁷ [REDACTED]

⁵³⁸ [REDACTED]

⁵³⁹ Blagojević-AJ, para.81-82.

⁵⁴⁰ M.Nikolić-Joint-Motion, Annex-A, para.9, 11.

⁵⁴¹ Prosecution-Response, para.295-303.

⁵⁴² Nikolić-Appeal, para.343.

⁵⁴³ Kupreškić-AJ, para.223-225.

153. The Prosecution's speculation as to Janjić's sighting of M.Nikolić⁵⁴⁴ does not alter that their approximations as to time precisely overlap.⁵⁴⁵ Also, Jeremić's unfamiliarity with M.Nikolić is irrelevant. M.Nikolić claimed he was accompanied to the Command Building⁵⁴⁶ but Jeremić testified that he did not accompany any visitor.⁵⁴⁷ Kostić confirmed that Jeremić was alone at the gate for 24 hours,⁵⁴⁸ invalidating the Prosecution's claim that Kostić does not add to Jeremić's evidence. No one else could thus have accompanied M.Nikolić.⁵⁴⁹ These "*contradictions or inconsistencies*"⁵⁵⁰ strike at the core of M.Nikolić's testimony that he visited the Brigade.
154. Then, the Prosecution merely reiterates the TC's findings concerning Milošević⁵⁵¹ but fails to address the essential argument.⁵⁵² The TC erred in rejecting his testimony, by finding that he was not constantly at his post.⁵⁵³ The Notebook demonstrates that, at the time M.Nikolić claimed to have visited,⁵⁵⁴ Milošević was at his post.⁵⁵⁵ This does not indicate "*greater ... responsibility*";⁵⁵⁶ M.Nikolić never stated mentioning anything about the crimes to the Duty Officer.⁵⁵⁷
155. Also, M.Nikolić's testimony *not* entering the IKM is not a minor "*inconsistency*"⁵⁵⁸ but a clear retraction of his testimony in *Blagojević*.⁵⁵⁹ Furthermore, M.Nikolić could not depart from Bratunac to tell the Appellant about the prisoners going to Zvornik before this decision was taken.⁵⁶⁰
156. [REDACTED]^{561 562}

⁵⁴⁴ Prosecution-Response, para.304.

⁵⁴⁵ Nikolić-Appeal, para.345.

⁵⁴⁶ M.Nikolić, T.33223-T.33227.

⁵⁴⁷ Jeremić, T.26090-T.26091; 3D587, para.5.

⁵⁴⁸ Kostić, T.26007.

⁵⁴⁹ Nikolić-Appeal, para.345.

⁵⁵⁰ Nahimana-AJ, para.194.

⁵⁵¹ Prosecution-Response, para.307-308.

⁵⁵² Nikolić-Appeal, para.346.

⁵⁵³ Judgment, fn.4393.

⁵⁵⁴ M.Nikolić, C0001, para.10.

⁵⁵⁵ P377, p.120(ERN-02935738)-p.126(ERN-02935744).

⁵⁵⁶ Prosecution-Response, para.307.

⁵⁵⁷ M.Nikolić, C1, para.10.

⁵⁵⁸ Prosecution-Response, para.310.

⁵⁵⁹ M.Nikolić, T.33251; Blagojević, T.2289.

⁵⁶⁰ C0001, para.6,10; T.32944-T.32945, T.33180.

⁵⁶¹ [REDACTED]

157. [REDACTED]^{563 564 565 566 567}

158. [REDACTED]^{568 569 570 571}

GROUND 21

159. Contrary to the Prosecution's claim,⁵⁷² the Logbook entry is irrelevant as the assessment of Galić's credibility was "*wholly erroneous*".⁵⁷³ This is not re-litigation. Moreover, this error does occasion a miscarriage of justice.⁵⁷⁴

160. The Prosecution downplays the contradictions between Galić's testimony, his statements and other evidence⁵⁷⁵ whereas these contradictions are decisive; they strike at the core of his evidence, *i.e.* the replacement.⁵⁷⁶ [REDACTED]⁵⁷⁷ Moreover, the Prosecution ignores the TC's failure to consider Stojkić.⁵⁷⁸

161. The Prosecution overlooks⁵⁷⁹ the TC's contradictory findings that Nikolić arrived from the IKM on 14 July⁵⁸⁰ despite his prior replacement.⁵⁸¹

⁵⁶² [REDACTED]

⁵⁶³ [REDACTED]

⁵⁶⁴ [REDACTED]

⁵⁶⁵ [REDACTED]

⁵⁶⁶ [REDACTED]

⁵⁶⁷ [REDACTED]

⁵⁶⁸ [REDACTED]

⁵⁶⁹ [REDACTED]

⁵⁷⁰ [REDACTED]

⁵⁷¹ [REDACTED]

⁵⁷² Prosecution-Response, para.319-322.

⁵⁷³ Kupreškić-AJ, para.223-225.

⁵⁷⁴ Nikolić-Appeal, para.353.

⁵⁷⁵ Prosecution-Response, para.323-328.

⁵⁷⁶ Nikolić-Appeal, para.355-359.

⁵⁷⁷ [REDACTED]

⁵⁷⁸ Nikolić-Appeal, para.360.

⁵⁷⁹ Prosecution-Response, para.318-329.

⁵⁸⁰ Judgment, para.472, 1357, fn.1715,4398.

⁵⁸¹ Judgment, para.1349.

GROUND 22

162. [REDACTED]^{582 583 584} His ignorance about important aspects is not re-litigation but unreasonable disregard of the lack of “*plausibility and clarity*”.⁵⁸⁵
163. The Prosecution ignores⁵⁸⁶ that Ivanović’s testimony, that he saw only Jasikovac on 13 July,⁵⁸⁷ was not considered.⁵⁸⁸ Birčaković’s evidence that he did not remember going to Orahovac on 13 July⁵⁸⁹ and that Nikolić came from the IKM on 14 July⁵⁹⁰ was also disregarded.⁵⁹¹ The Prosecution misapprehends that other evidence mischaracterized as corroboration is unrelated to Nikolić.⁵⁹² The TC misconstrued key evidence.⁵⁹³
164. The Prosecution misconstrues Levy,⁵⁹⁴ who specifically states that asking a witness about his certainty concerning his examination-in-chief is not proper re-examination.⁵⁹⁵

GROUND 23

165. Besides reproducing findings,⁵⁹⁶ the Prosecution does not address the relevant arguments.⁵⁹⁷
166. The Prosecution fails to consider the Nikolić Appeal as a whole. The TC’s erroneous inference concerning the 14 July meeting must be read with the TC’s unreasonable finding concerning Nikolić’s knowledge on 13 July.

⁵⁸² [REDACTED]

⁵⁸³ [REDACTED]

⁵⁸⁴ [REDACTED]

⁵⁸⁵ Nahimana-AJ, para.194

⁵⁸⁶ Prosecution-Response, para.338-340.

⁵⁸⁷ T.14540-T.14541.

⁵⁸⁸ Judgment, para.1350.

⁵⁸⁹ T.11052-T.11054.

⁵⁹⁰ T.11013-T.11014

⁵⁹¹ Judgment, para.1350.

⁵⁹² Nikolić-Appeal, para.336.

⁵⁹³ Zigiranyirazo-AJ, para.47, 67, 73.

⁵⁹⁴ Prosecution-Response, para.341.

⁵⁹⁵ Nikolić-Appeal, para.370.

⁵⁹⁶ Prosecution-Response, para.131-133.

⁵⁹⁷ Nikolić-Appeal, para.373-384.

167. Moreover, the Prosecution ignores that⁵⁹⁸ Nikolić was under the impression that prisoners were coming for exchange.⁵⁹⁹
168. Furthermore, the ensuing events do not support the TC's unreasonable inference since Nikolić's involvement was limited and his interaction with Beara/Popović was sporadic.
169. Finally, the Appellant's limited authority does not exclusively relate to genocidal intent⁶⁰⁰ but to the operation.⁶⁰¹ As opposed to arguing the Security Organ's limited role, Nikolić demonstrated his own limited influence.⁶⁰²

GROUND 24

170. Nikolić unequivocally challenges the findings concerning his role in Branjevo/Pilica. Crucially, the Prosecution ignores that the TC unreasonably considered Nikolić's suggestion as a contribution to the crimes in Branjevo/Pilica even though it did not prompt Perić to secure the prisoners at Kula School,⁶⁰³ did not contribute to these crimes as Duty Officer and was absent from Zvornik during the executions and burials.⁶⁰⁴
171. The Prosecution incorrectly claims that the TC was aware that Nikolić had not formally ordered Perić⁶⁰⁵ since TC specifically found that Perić "*classified the instruction from Nikolić as an order*".⁶⁰⁶ However, both the TC⁶⁰⁷ and the Prosecution,⁶⁰⁸ fail to consider that Perić repeatedly denied having receive an order from Nikolić and testified that he went to Kula School pursuant to an agreement

⁵⁹⁸ Prosecution-Response, para.147-149.

⁵⁹⁹ *Supra*, Grounds 6-9.

⁶⁰⁰ Prosecution-Response, fn.328.

⁶⁰¹ Judgment, para.1412.

⁶⁰² *Supra*, Ground 1.1; Nikolić-Appeal, para.382-383.

⁶⁰³ Nikolić-Appeal, para.385-391.

⁶⁰⁴ Judgment, para.1372-1373.

⁶⁰⁵ Prosecution-Response, para.112.

⁶⁰⁶ Judgment, para.1359, fn.4411.

⁶⁰⁷ Judgment, para.1359-1360.

⁶⁰⁸ Prosecution-Response, para.109-114.

with the 1Bn Command.⁶⁰⁹ Whether the 1Bn Commander could assign “*others*” to go there⁶¹⁰ is immaterial; Perić himself, as opposed to others, went to Kula School pursuant to the agreement and was not influenced by Nikolić’s suggestion.⁶¹¹

172. Considering that Nikolić never transmitted any order, the Prosecution wrongly claims that ordering also captures those transmitting the order.⁶¹² Perić classified the telegram that arrived prior to his conversation with Nikolić as an order but their conversation was conducted independently thereof; Perić confirms that the conversation was not related to the telegram.⁶¹³
173. Nikolić possessed neither *de facto* nor *de jure* authority to issue orders⁶¹⁴ which was confirmed by Vuga⁶¹⁵ and not only in respect of the MP.⁶¹⁶ The Prosecution also ignores that the TC⁶¹⁷ and its own expert, excluded the right to command of the Security Organ.⁶¹⁸ The Prosecution’s claim that Nikolić exercised “*de facto*” authority is belied by Perić’s testimony.
174. That Perić did guard prisoners⁶¹⁹ is thus irrelevant as he did not act under the authority of Nikolić.⁶²⁰ The Prosecution ignores⁶²¹ that the conversation between Nikolić and Perić did not concern the guarding of prisoners; Nikolić suggested going to Kula School to “*avoid any problems with the surrounding citizenry*”.⁶²² Nikolić’s lack of authority is confirmed by 1Bn members were not in control of the situation at Kula School.⁶²³

⁶⁰⁹ T.11376-T.11380.

⁶¹⁰ Prosecution-Response, fn.279.

⁶¹¹ T.11379-T.11380.

⁶¹² Prosecution-Response, para.112.

⁶¹³ T.11375-T.11376.

⁶¹⁴ Nikolić-Appeal, para.388-389.

⁶¹⁵ T.23330.

⁶¹⁶ Prosecution-Response, fn.277.

⁶¹⁷ Judgment, para.121.

⁶¹⁸ T.19635-T.19636.

⁶¹⁹ Prosecution-Response, fn.278.

⁶²⁰ Nikolić-Appeal, para.388-389.

⁶²¹ Prosecution-Response, para.109-114.

⁶²² T.11376, T.11378.

⁶²³ T.11383-T.11385, T.11439-T.11440.

175. Finally, the Prosecution misrepresents Perić's statement that he did not interpret the conversation with Nikolić as an instruction to commit crimes.⁶²⁴ Perić testified that their conversation only concerned the avoidance of problems with the local populace,⁶²⁵ excluding criminal activity. Also, in response to the question "*whether you had ever received such information from Drago Nikolic ..., namely that prisoners should be killed*", Perić responded: "[a]bsolutely not".⁶²⁶
176. The TC unreasonably disregarded relevant and critical evidence.⁶²⁷

GROUND 25

177. M.Birčaković could certainly "*see*" and "*recall seeing*"⁶²⁸ the events: he escorted the trucks but testified that Nikolić was not with him.⁶²⁹ The relevant findings⁶³⁰ demonstrate that the evidence of both Stanoje and M.Birčaković was not considered.
178. PW-143's testimony was not "*clear*"⁶³¹ on "*cross-examination*" [REDACTED]⁶³²
179. The TC's disregard of these matters was unreasonable.⁶³³
180. The Prosecution misapprehends Levy, and PW-143's additional alteration of his testimony⁶³⁴ was not proper re-examination.⁶³⁵
181. The TC's error occasioned a miscarriage of justice since the TC's erroneous assessment of the extent of Nikolić's involvement in Orahovac is contested.

⁶²⁴ Prosecution-Response, fn.277.

⁶²⁵ T.11376-T.11378.

⁶²⁶ T.11469-T.11470.

⁶²⁷ Kvočka-AJ, para.23; Zigiranyirazo-AJ, para.47, 67, 73.

⁶²⁸ Prosecution-Response, para.339-341.

⁶²⁹ T.11026-T.11028.

⁶³⁰ Judgment, para.1362, fn.4419, 4420.

⁶³¹ Prosecution-Response, para.337.

⁶³² [REDACTED]

⁶³³ Kvočka-AJ, para.23.

⁶³⁴ [REDACTED]

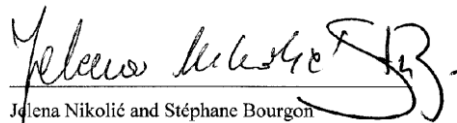
⁶³⁵ Nikolić-Appeal, para.397-398.

CONCLUSION

182. The Appellant respectfully requests the Appeals Chamber to **GRANT** the Nikolić Appeal.

Word Count: 7,631 words⁶³⁶

RESPECTFULLY SUBMITTED ON THIS 18th DAY OF JULY 2011



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⁶³⁶ Excluding Table of Contents.

ANNEX A

GLOSSARY OF TERMS

ABBREVIATIONS

1Bn	1 st Battalion
2Bn	2 nd Battalion
AC	Appeals Chamber
DrinaK	Drina Corps
MP	Military Police
TC	Trial Chamber
ZBde	Zvornik Brigade

CASE NO. IT-05-88-T AND IT-05-88-A RELATED DOCUMENTS

Indictment	<i>Indictment</i> , 4 August 2006
Judgment	<i>Judgement</i> , 10 June 2010
Nikolić-Appeal	<i>Appellant's Brief on Behalf of Drago Nikolić</i> , 21 January 2011
Nikolić-Notice	<i>Notice of Appeal on behalf of Drago Nikolić</i> , 8 September 2010
Nikolić-Response	<i>Respondent's Brief on Behalf of Drago Nikolić</i> , 4 April 2011
Prosecution-Appeal	<i>Prosecution Appeal Brief</i> , 21 January 2011

Prosecution-Notice	<i>Prosecution's Notice of Appeal, 8 September 2010</i>
Prosecution-Response	<i>Prosecution Response to Nikolić Appeal, 4 April 2011</i>
Prosecution-65ter	<i>Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65 ter and List of Exhibit Pursuant to Rule 65 ter (E) (v), 28 April 2006</i>
Schabas-Report	<i>Final Trial Brief on Behalf of Drago Nikolić, 30 July 2009, Annex E SCHABAS William, State Policy as an Element of the Crime of Genocide, 30 April 2008</i>
TRIAL CHAMBER DECISIONS	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
TC-Decision-11	<i>Decision on Defence Request for Guidelines Concerning the Use of Statements not in Evidence and the Admissibility of Evidence During Cross-Examination, 17 December 2008</i>
TC-Decision-12	<i>Order Concerning the Presentation of Evidence and Conduct of Parties During the Defence Cases, 26 May 2008</i>
DEFENCE MOTIONS	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]
Defence-Motion-9	<i>Motion on Behalf of Drago Nikolić Joining the Borovčanin Defence Standing Objection and Request for Guidelines Concerning Use of Statements not in Evidence, 27 October 2008</i>
Defence-Motion-10	<i>Joint Defence Motion Joining in Part the Borovčanin Motion of 27 October 2008 and Seeking Confirmation of the Purpose for Which Documents Adduced by the Prosecution During Cross-Examination Were Admitted, 4 November 2008</i>
DEFENCE REPLIES	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Defence-Reply-5	<i>Joint Defence Motion Seeking Leave to Reply and Reply to the Prosecution Consolidated Response to Borovčanin Defence and Joint Defence Motions Concerning the Admissibility of Documentary Evidence Tendered by the Prosecution During Cross-Examination, 25 November 2008</i>
PROSECUTION-RESPONSES	
Prosecution-Response-4	<i>Prosecution Consolidated Response to Borovčanin Defence and Joint Defence Motions Concerning the Admissibility of Documentary Evidence Tendered by the Prosecution During Cross-Examination, 18 November 2008</i>

OTHER SOURCES

Blagojević-AJ	Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-A, <i>Judgement</i> , 9 May 2007
Blagojević-Jokić-TJ	Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, <i>Judgement</i> , 17 January 2005
Blaskic-AJ	Prosecutor v. Tihomir Blaskić, Case No. IT-95-14-A, <i>Judgement</i> , 29 July 2004
Boškoski-Tarčulovski-AJ	Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No IT-04-82-A, <i>Judgement</i> , 19 Mai 2010
Brđanin-AJ	Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, <i>Judgement</i> , 3 April 2007
Darfur-Report	Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005
Furundžija-AJ	Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, <i>Judgement</i> , 21 July 2000
Galić-AJ	Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, <i>Judgement</i> , 30 November 2006
ICC,AC,Al-Bashir-Decision	Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-OA, Judgment on the appeal of the Prosecutor against the " <i>Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir</i> ", 3 February 2010

ICC,PTC,Al-Bashir-Decision	Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No.: ICC-02/05-01/09, <i>Second Decision on the Prosecution's Application for a Warrant of Arrest</i> , 12 July 2010
ICC-Elements-of-Crimes	ICC, Elements of Crimes, ICC-ASP/1/3(part II-B)
ICJ-Genocide-Case	Bosnia and Herzegovina v. Serbia and Montenegro, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, Judgement, 26 February 2007
Jelisić-AJ	Prosecution v. Goran Jelisić, Case No. IT-95-10-A, <i>Judgement</i> , 5 July 2001
Krajišnik-AJ	Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, <i>Judgement</i> , 17 March 2009
Krnojelac-AJ	Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, <i>Judgement</i> , 17 September 2003
Krstić-AJ	Prosecutor v. Radislav Krstić, Case No IT-98-33-A, <i>Judgement</i> , 19 April 2004
Krstić-TJ	Prosecutor v. Radislav Krstić, Case No IT-98-33-T, <i>Judgement</i> , 2 August 2001
Kupreškić-AJ	Prosecutor v. Zoran Kupreškić and al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001
Kvočka-AJ	Prosecutor v. Miroslav Kvočka, Milado Radić, Zoran Zigić and Dragoljub Prcać, Case No. IT-98-30/1-A, <i>Judgement</i> , 28 February 2005
Lukić-TJ	Prosecutor v. Milan Lukić and Sredoje Lujčić,

	Case No. IT-98-32/1-T, <i>Judgement</i> , 20 July 2009
M.Nikolić-Joint-Motion	Prosecutor v. Vidoje Blagojević et. al., Case No. IT-02-60-PT, Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of Prosecution, 7 May 2003
M.Nikolić-SJ	Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, <i>Sentencing Judgement</i> , 2 December 2003
Milošević-Rule-98bis-Decision	Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004
Mrkšić-Šljivančanin-AJ	Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, <i>Judgement</i> , 5 May 2009
Nahimana-AJ	Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, <i>Appeals Judgment</i> , 28 November 2007
Nchamihigo-AJ	Prosecutor v. Siméon Nchamihigo, Case No. ICTR-2001-63-A, <i>Judgement</i> , 18 March 2010
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Obrenović-SJ	Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, <i>Sentencing Judgement</i> , 10 December 2003
[REDACTED]	[REDACTED]
Stakić-AJ	Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, <i>Judgement</i> , 22 March 2006

Statute	Statute of the International Tribunal for the Former Yugoslavia, 25 May 1993
Strugar-AJ	Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, <i>Judgement</i> , 17 July 2008
Tadić-Decision	Prosecutor v. Duško Tadić a/k/a “Dule”, Case No. IT-94-1-T, <i>Decision on Defense Motion on Hearsay</i> , 5 August 1996
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