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 Andrésia Vaz

Registrar: Mr. John Hocking

Date filed: 3 August 2011

THE PROSECUTOR

v.

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

PUBLIC

SECOND NOTICE OF RE-CLASSIFICATION AND RE-FILING OF PUBLIC REDACTED VERSION OF APPELLANT'S BRIEF ON BEHALF OF DRAGO NIKOLIĆ

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Mr. Dragan Krgović and Mr. David Josse, Counsel for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis, Counsel for Vinko Pandurević

1. On 6 April 2011, the Defence filed the Public Redacted Version of *"Appellant's Brief on Behalf of Drago Nikolić*" (the "6 April 2011 Filing"). On 14 July 2011, the Prosecution observed that part of one paragraph and 2 footnotes of the 6 April 2011 Filing require additional redaction.

2. Accordingly, on 18 July 2011, the Defence filed the "*Notice of Re-Classification and Re-Filing of Public Redacted Version of Appellant's Brief on Behalf of Drago Nikolić*" (the "18 July 2011 Filing"). Despite its preceding review, on 26 July 2011, the Prosecution observed that the 18 July 2011 Filing contains additional confidential information.

3. While the Defence does not necessarily agree that confidential information was in fact revealed in the 18 July 2011 Filing, it requests the Registrar to re-classify the 18 July 2011 Filing as confidential and re-files a corrected Public Redacted Version of *"Appellant's Brief on Behalf of Drago Nikolić*" out of an abundance of caution and in the spirit of co-operation.

Word Count: 163 words

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF AUGUST 2011
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INTRODUCTION

1. Pursuant to Article 25 and Rules 107, 108 and 111, Drago Nikolić hereby respectfully submits his Appellant's Brief.

2. The Nikolić Appeal comprises in excess of 20 Grounds of Appeal, indicating the severe inadequacy of the Judgment. All errors of fact and law raised in the Nikolić Appeal either invalidate the Judgment or occasioned a miscarriage of justice.[1] Furthermore, all factual errors raised in this Nikolić Appeal are invariably findings that "*no reasonable trier of fact could have reached*".[2] Moreover, not anywhere does this Nikolić Appeal amount to a repetition of arguments.[3] All failures of the TC to consider evidence constitute errors "*warranting the intervention of the Appeals Chamber*"[4] due to serious "*indication[s] of disregard*" considering that evidence "*clearly relevant to the findings*" is not addressed by the TC's reasoning on numerous occasions.[5]

3. As indicated in the Nikolić Notice, the Appellant respectfully reserves the right to raise additional errors of law and fact.[6] This includes but is not limited to errors of law and fact committed by the TC in relation to charges for which the Appellant was acquitted on trial insofar the Prosecution is appealing the relevant acquittal.[7]

4. The overall relief sought by the Appellant has been set out in detail in the Nikolić Notice.[8] Should the Appeals Chamber grant Grounds of Appeal 2 through 25, the Appellant's sentence must be reduced to no more than 15 years' imprisonment.[9] Should the Appeals Chamber reject Ground of Appeal 7 but grant one or more Grounds contained in Grounds of Appeal 2 through 6 and/or Grounds of Appeal 8 through 25, the Appellant's sentence must be decreased to a maximum of 20 years'

[1] Boškoski-Tarčulovski-AJ,para.9.
[2] Boškoski-Tarčulovski-AJ,para.13.
[3] Boškoski-Tarčulovski-AJ,para.16;Kvočka,AJ,para.23.
[4] Boškoski-Tarčulovski-AJ,para.16.
[5] Kvočka-AJ-para.23.
[6] Nikolić-Notice,para.16.
[7] Judgment,para.870-876,1416;Prosecution-Notice,para.38-40.
[8] Nikolić-Notice,para.7-15.
[9] Nikolić-Notice,para.12-14,Grounds-2-25.

imprisonment.[10] Finally, should the Appeals Chamber only grant Ground of Appeal 1, the Appellant's sentence must be revised to no more than 25 years' imprisonment.[11]

1st GROUND

Introduction

5. The TC committed discernible errors in exercising its sentencing discretion, resulting in a manifestly excessive sentence of 35 years' imprisonment imposed on the Appellant.[12] Whilst not detracting from the validity of the Appellant's Grounds of Appeal *infra*, this sentence is, on the basis of the findings in the Judgment, "*so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly*".[13]

SUB-GROUND 1.1

6. The gravity of the offence is the prime consideration in determining the appropriate sentence, which does not refer to the "*objective gravity*" of a crime but rather to the "*particular circumstances surrounding the case and the form and degree of the accused's participation in the crime*".[14] The TC erred noticeably when assessing the "*form and degree*" of the Appellant's participation.

7. Firstly, the TC "*made a clear error as to the facts upon which it exercised its discretion*"[15] in relation to the time-frame of the Appellant's participation. The TC concluded that the Appellant's participation began "*on the night of 13 July 1995 and ending suddenly on midday of 16 July*"[16] but its findings demonstrate that the Appellant's role in the JCE to murder ended on the very early morning of 15 July 1995. The TC found that the Appellant spoke to Aćimović around 07h00 or 08h00 on 15 July 1995[17] and, even though it concluded that the Appellant told Aćimović that he himself would meet him in front of Roćević School on the morning of 15 July 1995, it

[10] Nikolić-Notice,para.15,Ground-2-6,8-25.
[11] Nikolić-Notice,para.7-9,Ground-1.
[12] Judgment,p.828.
[13] Galić-AJ,para.444.
[14] Mrkšić-Šljivančanin-AJ,para.375.
[15] Galić-AJ,para.394.
[16] Judgment,para.1410.
[17] Judgment,para.1368;Nikolić-Notice,Ground-18.

was Popović who appeared and not the Appellant.[18] Pandurević testified that, on 15 July 1995, there were regular communications between the IKM and the Duty Operations Officer unrelated to the killing operations,[19] implying that the Appellant carried out his regular military duties. Moreover, according to the TC, the Appellant did not travel to Roćević School during his stint as Duty Operations Officer on 15 July 1995[20] and the Appellant's entries in the Zvornik Brigade Notebook on 16 July 1995 were unrelated to the killing operation.[21] In addition, from the afternoon of 16 July 1995 to the evening of 17 July 1995, the Appellant attended his cousin's funeral,[22] which overlapped with the mass killings and burials in Pilica/Branjevo.[23] Thereafter, the Appellant was neither involved in the smaller-scale killings after 17 July 1995 - at Baljkovica;[24] the Branjevo Survivors;[25] at Snagovo;[26] the wounded prisoners from Milići Hospital;[27] and near Trnovo[28] - nor in the reburial operation in September and October 1995.[29]

8. The fact that the Appellant ceased to contribute to the JCE even before the mass killings in Roćević/Kozluk and Branjevo/Pilica places the extent of his involvement in an entirely different light. Effectively, the contribution of the Appellant stretches no more than approximately 36 hours, from the evening of 13 July 1995 until the early morning of 15 July 1995, which is highly limited in comparison to other JCE members.

9. Secondly, when finding that "***Nikolić*** *played an important role in the JCE to Murder in terms of planning and organising detentions and executions*",[30] the TC committed a discernible error in exercising its discretion as it "*failed to give weight or sufficient weight to relevant considerations*"[31] demonstrating that the Appellant's role did not assume great importance in the overall context of the crimes. The TC's factual

[18] Judgment,para.1369;Nikolić-Notice,Ground-18.
[19] Pandurević,T.31574-T.31576.
[20] Judgment,para.1370.
[21] Judgment,para.1372.
[22] Judgment,para.1373.
[23] Judgment,para.532-547.
[24] Judgment,para.565-569.
[25] Judgment,para.584-589,1379.
[26] Judgment,para.578-583.
[27] Judgment,para.570-579,1380.
[28] Judgment,para.597-599.
[29] Judgment,para.600-606,1384.
[30] Judgment,para.2171.
[31] Galić-AJ,para.394.

findings portray the Appellant as a junior officer drawn into specific aspects of an ongoing, overwhelming operation that he possesses limited knowledge of.

10. Unlike the other Appellants as well as other individuals convicted for the same crimes, including Borovčanin, the Appellant was neither involved in nor physically close to the events in and around Srebrenica when crucial decisions were made concerning the fate of the population of Srebrenica.[32] Also, the TC found that the Appellant was merely provided scarce information on 13 July 1995 after a significant component of the operation had already been executed.[33] According to the TC, on 13 July 1995, Popović informed the Appellant that a large number of prisoners were coming from the direction of Bratunac and that they were to be shot on Mladić's orders,[34] whereas, after his meeting with Beara and Popović on 14 July 1995, the Appellant knew that the impending executions were to be carried out in multiple locations and that the victims would number in the hundreds to the thousands.[35] This information is thus essentially the same and no additional details were disclosed: the Appellant lacked crucial knowledge of the preceding events in Srebrenica, Potočari and Bratunac as well as of the scope of the operation targeting all able-bodied men from Srebrenica.

11. Moreover, the TC's findings demonstrate that, thereafter, the Appellant's "*importance*" is not augmented. The Judgment exhibits limited contact between the Appellant and Beara/Popović. On 14 July 1995, the Appellant points Beara out to Marko Milošević in Petkovci but the TC did not find that the Appellant spoke to Beara on this occasion.[36] According to the TC, the Appellant was informed that Beara was coming to Standard on 15 July 1995[37] but no finding was adopted that the Appellant actually received the message from the Duty Operations Officer or that the Appellant and Beara met on this date.[38] Also, no finding was reached as to any communications between the Appellant and Popović on 15 July 1995 concerning Popović's presence at Roćević as opposed to the Appellant's.[39] According to the TC, Beara and Popović met at Standard after 18h30 on 15 July 1995 but the Appellant was not present.[40] Strikingly, no findings were adopted concerning any contacts between the Appellant

[32] Judgment,para.1344.
[33] Judgment,para.1402.
[34] [REDACTED];Nikolić-Notice,Ground-14.
[35] Judgment,para.1404;Nikolić-Notice,Ground-23.
[36] Judgment,para.1279,1366.
[37] Judgment,para.1368.
[38] Judgment,para.1281-1284,1367-T.1371.
[39] Judgment,para.1117-1123,1369.
[40] Judgment,para.1123,1284,1367-1371.

and Beara/Popović on 16 July 1995.[41] In addition, despite PW-168's claims about the Appellant's involvement,[42] no finding was reached that either Obrenović or Pandurević spoke to the Appellant to acquire a clearer picture when Obrenović informs Pandurević about the killing operation on 15 July 1995.[43] Moreover, the Appellant's involvement in the crimes is limited as well. The TC found that the Appellant appears physically at one of five mass-execution sites only.[44] On the very early morning of 15 July 1995, the contribution of the Appellant ceases abruptly[45] even though he was demonstrably in a position to further the JCE. From midday 16 July 1995 until the evening of 17 July 1995, the Appellant attended his cousin's funeral.[46] Had the Appellant truly been "*important*", Beara and Popović would not have allowed his absence during the events in Branjevo/Pilica.

12. In addition, the Appellant was not selected to perform certain important tasks. For instance, not the Appellant, but Milorad Trbić, the Appellant's deputy, was entrusted with the responsibility to coordinate the reburial operation within the Zvornik Brigade.[47] In an intercept, which refers to the reburial operation according to the TC, the Appellant specifically said that he is "*out of it*",[48] indicating that he is not involved in the reburial. It is significant to note that the decision to appoint Trbić was taken on the level of the Main Staff and that the Appellant is not mentioned in this context at all.[49] This is all the more surprising considering that Momir Nikolić, a Bratunac Brigade Security Officer, did coordinate the reburial operation in the area of responsibility of his Brigade.[50] Even though special emphasis was placed on the "*heavy hand*" of the Security Service,[51] the Appellant was ignored for important tasks.

13. Furthermore, the TC's depiction of the role of the Appellant in the JCE to murder as "*important*" is directly at odds with other findings concerning the nature of the Appellant's acts and conduct. The TC explicitly described the Appellant as participating with "*little authority of his own*" in an operation designed on a level far

[41] Judgment,para.1124-1138,1285-1287,1372-1373.
[42] Nikolić-Notice,Ground-14.
[43] Judgment,para.1861,1934-1959.
[44] Judgment,para.1361-1378;Nikolić-Notice,Ground-19.
[45] Judgment,para.1369-1384.
[46] Judgment,para.1373.
[47] Judgment,para.605;1384.
[48] P02391;Judgment,fn.4476.
[49] Judgment,para.602.
[50] Judgment,para.601;603-604.
[51] Judgment,para.1068.

beyond his rank.[52] The TC also specifically found that the Appellant: (i) carried out specific tasks in contrast to Beara and Popović who were the architects of the operation; (ii) did not venture beyond his sphere of responsibility; (iii) did not participate in the operation in an overarching manner as he was not involved in: selecting the prisoners; arranging the movements of the prisoners from Bratunac to Zvornik; recruiting personnel beyond the Zvornik Brigade; securing equipment; arranging the burials; and the reburial operation; and (iv) did not harm the wounded prisoners from Milići Hospital and the Branjevo Survivors.[53]

14. Thirdly, when finding that the Appellant's contribution "*can be properly described as persistent and determined; he demonstrated a resolve to carry out his assigned tasks in this murderous operation*",[54] the TC committed a discernible error in exercising its discretion as it "*failed to give weight or sufficient weight to relevant considerations*" indicating that the Appellant did not augment his contribution to the JCE despite possessing the demonstrable capability to do so.

15. As indicated *supra*, according to the TC, the Appellant's contribution ceased on the early morning of 15 July 1995.[55] Thereafter, he could have significantly furthered the JCE to murder in his capacity as Duty Operations Officer on 15 and 16 July but he did not do so. The TC specifically found that the Appellant did not travel to Roćević on 15 July 1995 and that the entries he made in the Zvornik Brigade Notebook on 16 July 1995 did not relate to the murder operation.[56] In fact, on 15-16 July 1995, the Appellant carried out his regular military duties as there was an exchange of information concerning issues unconnected to the crimes between Pandurević at the IKM and the Duty Operations Officer.[57] In comparison, Jokić was convicted for his involvement in the same events in the Zvornik area while performing his duty as Duty Operations Officer on 14 July 1995.[58] The Judgment furthermore indicates that Jokić actually played a key role in the crimes by communicating with different battalions concerning the prisoners and interacting on different occasions with Beara, Popović, Obrenović and Pandurević in relation to the prisoners[59]

[52] Judgment,para.1412.
[53] Judgment,para.1410-1412.
[54] Judgment,para.2171.
[55] Judgment,para.1368;Nikolić-Notice,Ground-18.
[56] Judgment,para.1369-1373.
[57] Pandurević,T.31574-T.31576.
[58] Blagojević-Jokić,TJ,para.763-764.
[59] Judgment,para.494,1122,1280,1949,1960.

16. In addition, the Appellant could have clearly escalated his contribution in other manners but he opted not to. The Appellant left the Zvornik Brigade at midday on 16 July 1995 to attend his cousin's funeral,[60] before the mass executions at Pilica/Branjevo.[61] Moreover, he remained absent during the burial of the victims on 16 and 17 July 1995.[62] Had the Appellant been "*persistent and determined*", he would have involved himself with the climax of the killing operation. In the aftermath of the mass killings, the Appellant played a role in the custody of the wounded prisoners from Milići Hospital and the Branjevo Survivors but no harm came to them at that time.[63] Also, the Appellant was bypassed for the reburial operation.[64] Considering that Momir Nikolić coordinated the reburial operation in the Bratunac Brigade's zone of responsibility, the Appellant should normally have been tasked with this responsibility, or he could have insisted on carrying it out, but this did not happen.[65]

17. Finally, the TC failed entirely to deal with the disparity "*between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great*".[66]

18. The disparity between the limited contribution of the Appellant and the overwhelmingly large contributions of Beara and Popović, the only two other Accused found to be members of the JCE to murder,[67] is nevertheless colossal. As mentioned *supra*, the Appellant played a role limited in time, extent and influence in an operation involving high-ranking officers. In contrast, Beara and Popović were the architects of the operation.[68] They also played a pivotal role in the events prior to the execution of the plan in Srebrenica, Potočari and Bratunac.[69] Subsequently, in the Zvornik area, they involved themselves with all or most aspects of the operation – the transport and detention of the prisoners, the procurement of personnel and equipment, the selection of sites, the large- and small-scale executions, the burials and the reburial.[70]

[60] Judgment,para.1373.
[61] Judgment,para.536,540-541.
[62] Judgment,para.542-547.
[63] Judgment,para.1379-1380.
[64] Judgment,para.605,1384.
[65] Judgment,para.1384.
[66] Brđanin-AJ,para.432.
[67] Judgment,para.1541,2007.
[68] Judgment,para.1410.
[69] Judgment,para.1096-1104;1255-1271.
[70] Judgment,para.1166-1168;1299-1301.

19. It becomes apparent from the TC's evaluation that, in disregard of the actual extent of the Appellant's involvement and without proper factual basis, the harsh sentence imposed on the Appellant stems from his affiliation with the Security Service.

20. The enormous disparity between the contribution of the Appellant and the contributions of Beara and Popović is not reflected in their sentences. Bearing in mind the Appellant's age and the date on which he would become eligible for early release, there is no substantial difference between his sentence of 35 years' imprisonment and Popović and Beara's sentences of life imprisonment. Undoubtedly, the Appellant's sentence requires substantive mitigation to reflect this disparity.

SUB-GROUND 1.2

21. The TC discernibly erred in exercising its discretion in relation to the applicable aggravating circumstances as it "*failed to give weight or sufficient weight to relevant considerations*".[71]

22. Firstly, when finding that the aggravating circumstance of abuse of authority was not proved beyond a reasonable doubt,[72] the TC committed a discernible error when failing to consider the absence of abuse of authority a mitigating circumstance. The fact that the Appellant did not abuse his authority is consistent with, and adds additional weight to, other findings demonstrating that the Appellant played a limited role in the crimes.[73] Moreover, the absence of this aggravating circumstance assumes even more importance in light of the TC's findings concerning Beara and Popović. The TC considered for both of them that "*[i]t was the abuse of this senior position within the VRS which allowed him to utilise the resources at his disposal to orchestrate the crimes*".[74]

23. Secondly, when finding that the aggravating factor of zeal or enthusiasm had not been established,[75] the TC committed a discernible error when failing to consider the Appellant's distress about the illegal orders a mitigating circumstance. The Appellant stands in stark contrast to Popović who displayed "*a manifest enthusiasm*"[76] in

[71] Galić-AJ,para.394.
[72] Judgment,para.2173.
[73] Nikolić-Notice,Ground-1.1.
[74] Judgment,para.2158,2165.
[75] Judgment,para.2174.
[76] Judgment,para.2159.

committing crimes and Beara whose actions were "*cold and calculated*".[77] In addition, the TC even considered that there was evidence that the Appellant "*was disturbed by what he was asked to do*".[78] Birčaković namely testified that, after the meeting with Beara and Popović on 14 July 1995, the Appellant was "*very angry*".[79] The Appellant's sentence ought to have been mitigated on this basis. The TC namely found that, as opposed to Popović and Beara, the Appellant was in fact troubled by the illegal orders he received, clearly indicating his reluctance to involve himself.

24. Finally, by rejecting the Prosecution's arguments concerning the Appellant's abuse of authority and zeal or enthusiasm, the TC effectively recognized that no aggravating circumstances were applicable specifically to the Appellant. This is highly significant in the specific context of this case because the Appellant had every opportunity to escalate his contribution but no opportunity to withdraw. Furthermore, it makes the Appellant's conduct stand out even more in relation to Beara and Popović and is fully in line with the TC's findings depicting the Appellant as a junior officer drawn into overwhelming events for a brief period of time.

SUB-GROUND 1.3

25. The TC discernibly erred in exercising its discretion concerning the mitigating circumstances applicable to the Appellant as it "*failed to give weight or sufficient weight to relevant considerations*".[80]

26. Firstly, the TC found that "*given his active involvement in the commission of mass murder in the Zvornik area*", no weight should be given to the Appellant's characteristics as a military officer as a mitigating circumstance.[81] However, the TC failed to recognize that the Appellant's military ethos lay partially at the basis of his limited contribution, which did not assume the importance that it could have.

27. The TC found that, on the whole, the Appellant's contribution to the crimes consisted of implementing specific orders issued by Beara and Popović.[82] Also, according to the TC, the Appellant's devotion to the Security Service led him to execute the orders he

[77] Judgment,para.2166.
[78] Judgment,para.2174.
[79] Judgment,fn.6285;Birčaković,T.11133.
[80] Galić-AJ,para.394.
[81] Judgment,para.2176.
[82] Judgment,para.1410.

received.[83] Further findings indicate that the Appellant acted exclusively on the orders of his superiors, such as seeking permission from Obrenović to be relieved on 13 July 1995.[84] However, the Appellant never exceeded the orders issued to him as he continued to carry out his regular military duties which were unrelated to the murder operation. On 15 July, the Appellant did not interrupt his stint as Duty Operations Officer to travel to Roćević in relation to the killing operation.[85] In addition, Pandurević testified that there was an exchange of information between the IKM and the Duty Operations Officer on 15 July 1995 concerning issues unrelated to the killing operation.[86] This is especially striking as, at this point in time, Pandurević was aware of the killing operation.[87] Moreover, the TC found that, at the time of the killings in Branjevo/Pilica on 16 July 1995, the Appellant' entries in the Duty Operations Notebook did not concern the killing operation.[88]

28. Moreover, the *Krstić* TC found that "*keen sense for the soldiering profession*" can constitute a mitigating circumstance[89] and held that "*General Krstić is a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica, but would not likely, on his own, have embarked on a genocidal venture.*"[90] The Appellant too was a professional soldier who was drawn into overwhelming events which he would not have set in motion on his own. He did not participate in any of the crucial events preceding the crimes in the Zvornik area and did not escalate his contribution even though he could have chosen to do so.

29. Secondly, in assessing the applicable mitigating circumstances, the TC entirely overlooked its finding that, from the afternoon of 16 July 1995 until the evening of 17 July 1995, the Appellant was involved in the funeral of his cousin.[91] In accordance with the TC's finding, the Appellant's contribution had ceased on the early morning of 15 July 1995. In addition, at the climax of the killing operation in Branjevo/Pilica,[92] the Appellant decided to physically separate himself from the events in the Zvornik area.[93] Indeed, the TC found that, due to his absence, the Appellant was "*not directly*

[83] Judgment,para.1413.
[84] Judgment,para.470-471,1345;Nikolić-Notice,Ground-14.
[85] Judgment,para.1370.
[86] T.31574-31576.
[87] Judgment,para.1934-1960.
[88] Judgment,para.1372.
[89] Krstić-TJ,para.714.
[90] Krstić-TJ,para.724.
[91] Judgment,para.1373.
[92] Judgment,para.536,540-541.
[93] Judgment,para.1370-1384.

implicated in the killings at the Branjevo Military Farm or Pilica Cultural Centre".[94] These are not the acts of a man who plays an important role in a criminal operation designed by his superiors and who is resolved to ensure that it is completed. These are the decisions and actions of a junior officer engulfed by dramatic events and keen on minimising his role to the extent possible.

30. Thirdly, when considering that the Appellant "*expressed no remorse"* but according "*some weight to **Nikolić's** partial acceptance of his responsibility*",[95] the TC "*made a clear error as to the facts upon which it exercised its discretion*".[96] In contrast to many others, the Appellant recognized that he deserved to be punished for his involvement in Orahovac and unequivocally expressed remorse for his limited contribution to the horrific crimes. The Appellant expressly stated: "*I understand that I bear some part of the responsibility because at certain moments I was at Orahovac school on the 14th of July*".[97] Also, the Appellant expressed his remorse for everything that happened during the war, including Srebrenica, saying that: *"[s]o many lives were lost, so much damage has been done, that nobody can ever feel good again after all that happened. The war has changed my life and the lives of many other people. In the war, I lost friends, relatives, my home, and the country in which I was born and where I lived. What happened in July 1995 destroyed everything I believed in as a soldier. I was not aware of the events of those days until I found myself in the middle of all that. For the rest of my life, I will keep asking myself whether there was something I could have done that could have changed the course of those events*."[98] These admissions unequivocally constitute expressions of remorse. Moreover, in the *Orić* case, the TC considered the few instances in which the Accused's Counsel expressed sympathy for the fait of victims a mitigating circumstance, even though the Accused did not express remorse himself.[99] Undoubtedly, in comparison, the Appellant's comments are markedly clearer expressions of remorse and must mitigate his sentence.

31. Finally, the TC entirely failed to consider the Appellant's "*limited participation in the commission of the crime*"[100] a mitigating factor. As described *supra*,[101] the Appellant was not involved in the crucial events leading up the crimes in the Zvornik area and,

[94] Judgment,para.1410.
[95] Judgment,para.2178.
[96] Galić-AJ,para.394.
[97] T.34899;Nikolić-Final-Brief,para.72.
[98] T.34897.
[99] Orić-TJ,para.752.
[100] Krstić-AJ,para.273.
[101] Sub-Ground-1.1.

thereupon, he was involved in a limited manner during a limited period of time even though he was in a position to substantially escalate his contribution.

SUB-GROUND 1.4

32. 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*".[102] The significant disparity between the sentences imposed on the Appellant and other VRS officers convicted on the basis of the same facts pertaining to the crimes related to Srebrenica establishes "*that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules*".[103]

33. Firstly, in comparison to Dragan Jokić who was sentenced to nine years' imprisonment, the Appellant received a nearly quadruple sentence despite their highly comparable involvement and individual circumstances.

34. Dragan Jokić and the Appellant were convicted for their involvement in exactly the same execution sites: Orahovac, Roćević/Kozluk and Branjevo/Pilica.[104] Moreover, neither Jokić nor the Appellant committed any acts directly engaging their culpability in relation to the crimes at the school in Petkovci.[105] Furthermore, neither person incurred individual criminal responsibility for the events preceding the crimes committed in the Zvornik area, such as the forcible transfer operation in Srebrenica/Potočari and the opportunistic killings in Bratunac.[106] Both were involved in the operation for merely a number of days. Dragan Jokić's involvement lasted from 14 July 1995 until 17 July 1995, whereas the Appellant's involvement stretches from the evening of 13 July 1995 until the very early morning of 15 July 1995.[107]Also, neither Jokić nor the Appellant was involved in the events following the mass-executions in Zvornik, such as the smaller-scale killings and the reburial operation.[108]

35. Moreover, both occupied low-ranking positions in the Zvornik Brigade. The Appellant, a 2nd Lieutenant, was the Chief of Security, while Jokić, a Major, occupied

[102] Jelisić-AJ,para.96.
[103] Jelisić-AJ,para.96.
[104] Blagojević-Jokić,TJ,para.763-764,766-769;Judgment,para.1361-1365,1367-1373.
[105] Blagojević-Jokić,TJ,para.765;Judgment,para.1366,1389-1392.
[106] Blagojević-Jokić,TJ,para.525;Judgment,para.1344-1345,1402-1403.
[107] Blagojević-Jokić,TJ,para.525-532;Judgment,para.1345-1373,1410.
[108] Blagojević-Jokić,TJ,para.390,525-532;Judgment,para.1379-1384.

the position of Chief of Engineering.[109] In addition, besides their low positions *de jure*, they played secondary roles in the murder operation *de facto*. Both executed specific tasks but, in an operation run by high-ranking officers, they did not assume an overarching role and were bypassed for important aspects.[110] For instance, the involvement of both commenced only after criminal activity had already been set in motion and not from its inception.[111] Also, neither was involved in the reburial operation[112] which is anomalous considering that Momir Nikolić did coordinate the reburials in the Bratunac area and that Jokić had been involved in the burials that followed the mass-executions.[113] The enormous difference between the sentences of the Appellant and Dragan Jokić seems thus to result exclusively from the Appellant's connection to the Security Service.

36. Secondly, Dragan Obrenović was sentenced to 17 years' imprisonment pursuant to a plea agreement reached with the Prosecution, but, in spite of the same set of events laying at the basis of their convictions, Obrenović's leadership position and his prolonged involvement, the Appellant's sentence is more than twice as harsh.

37. Obrenović and the Appellant were found to be members of the same JCE to murder.[114] Obrenović contributed to this JCE by authorising the release of Zvornik Brigade members to participate in the implementation of the common plan on at least three occasions.[115] However, Obrenović's responsibility is not limited to Article 7(1) of the Statute, like the Appellant's. Obrenović was also convicted on the basis of command responsibility for failing to prevent and/or punish his subordinates' crimes.[116] Also, unlike the Appellant, Obrenović occupied a high-ranking position within the Zvornik Brigade and, until midday on 15 July 1995, he was even in charge of the Zvornik Brigade due to the absence of Pandurević.[117] In this position, and in light of Obrenović's knowledge of the murder operation as of 13 July 1995, Obrenović possessed significantly more authority to influence the events than the Appellant. This is confirmed by his conviction on the basis of Article 7(3) of the Statute, entailing that he possessed the ability to act. Moreover, Obrenović admitted to having been involved

[109] Blagojević-Jokić,TJ,para.11;Judgment,para.1337,1412.
[110] Blagojević-Jokić,TJ,para.525-532;Judgment,para.1410
[111] Blagojević-Jokić,TJ,para.525-532;Judgment,para.1344-1345,1402-1403.
[112] Blagojević-Jokić,TJ,para.390;Judgment,para.1384,1410.
[113] Blagojević-Jokić,TJ,para.525-532;Judgment,para.601,603-604.
[114] Obrenović-SJ,para.86.
[115] Obrenović-SJ,para.85.
[116] Obrenović-SJ,para.87.
[117] Obrenović-SJ,para.81.

in crimes from 12 July 1995 until about 19 July 1995.[118] This is significantly longer than the Appellant's involvement, who became involved on the evening of 13 July 1995 and who ended his contribution on the early morning of 15 July 1995.[119]

38. Thirdly, Momir Nikolić was convicted to 20 years' imprisonment pursuant to a plea-deal negotiated with the Prosecution even though his responsibility was far more extensive in terms of the crimes he was involved in and his overall role in the operation.

39. Momir Nikolić was found responsible for the crimes of cruel and inhumane treatment, terrorising civilians, destruction of personal property and forcible transfer committed in the area of Srebrenica and Potočari.[120] Conversely, the Appellant was not convicted for any of the acts of persecutions that occurred in the area of Srebrenica, Potočari and Bratunac,[121] while he was specifically acquitted of responsibility for the crime of forcible transfer.[122] Also, Momir Nikolić's involvement commences as early as 12 July 1995 and lasts until the reburial operation in September/October 1995[123] while the Appellant only became involved on the late evening of 13 July 1995 and his contribution ceases approximately 36 hours later on the morning of 15 July 1995.[124]

40. Moreover, by rank and position, Momir Nikolić was fare more influential than the Appellant. Momir Nikolić was a "*security intelligence organ*" while the Appellant was a "*security chief*".[125] Also, Momir Nikolić's role in the events significantly exceeds the Appellant's. Momir Nikolić was closely involved in the crucial meetings that decided the fate of the Bosnian Muslim population in Srebrenica.[126] He interacted closely with high-ranking security officers[127] and even provided suggestions in relation to possible detention and execution sites.[128] He also was close to the discussions concerning the killing operation in Bratunac on the evening of 13 July 1995.[129] The Appellant was only informed at a late stage of the operation and merely

[118] Obrenović-SJ,para.85.
[119] Judgment,para.1345-1373.
[120] M.Nikolić-SJ,para.36-42.
[121] Judgment,para.1001,1425-1428.
[122] Judgment,para.1344-1345.
[123] Judgment,para.280,603-604.
[124] Nikolić-Notice,Ground-1.1.
[125] M.Nikolić,T33216-T.33217;Judgment,para.153.
[126] M.Nikolić-SJ,para.33;Judgment,para.280.
[127] M.Nikolić-SJ,para.33;Judgment,para.280.
[128] M.Nikolić-SJ,para.33;Judgment,para.280.
[129] M.Nikolić-SJ,para.35.

executed specific tasks, as opposed to assuming an overarching role.[130] In addition, Momir Nikolić was selected to coordinate the reburial operation in the zone of the Bratunac Brigade while the Appellant was uninvolved in the reburial operation in the zone of the Zvornik Brigade.[131] Unmistakably, Momir Nikolić enjoyed far more trust with his superiors in executing criminal tasks than the Appellant did.

41. Finally, even though the Appellant and Krstić received exactly the same sentence, Krstić was, unlike the Appellant, also held accountable for crimes committed in Srebrenica/Potočari and occupied a high-ranking position in the Drina Corps.

42. Krstić was found to have played an important role in Krivaja-95 and was closely involved in the Hotel Fontana meetings from 11 to 12 July 1995 during which the faith of the Bosnian Muslim population was decided.[132] Besides his conviction for participating in the crimes committed in the area of Zvornik, Krstić was also convicted for inhumane acts and persecutions, as crimes against humanity, through participating in a JCE to forcibly transfer.[133] In addition, he incurred liability for the incidental murders, rapes, beatings and abuses committed during the execution of this JCE pursuant to the third category of JCE.[134] As mentioned *supra*, the Appellant was not involved in any of these crimes in any manner.[135]

43. Highly significantly, Krstić was a high-ranking officer in the VRS who possessed the capability to influence the situation in Zvornik while the Appellant did not. According to the Appeals Chamber, there was evidence of the Drina Corps Command challenging General Mladić's orders and, specifically, of Krstić countering a Main Staff Order.[136] Krstić's actions could thus have made a difference in the murder operation. In the absence of Krstić's orders and support, the scope of the killings could have been reduced. However, Krstić failed to act out of loyalty to General Mladić.[137] Conversely, the Appellant was a low-ranking officer who possessed practically no authority of his own in an operation run by his superiors.[138]

44. In conclusion, the sentence of 35 years' imprisonment imposed on the Appellant is unreasonably disproportionate to the sentences received by these individuals.

[130] Judgment,para.1402-1403,1410.
[131] Judgment,para.603-604,1384,1410.
[132] Krstić-AJ,para.147.
[133] Krstić-TJ,para.617-618.
[134] Krstić-TJ,para.617.
[135] Judgment,para.1001,1344-1345,1425-1428.
[136] Krstić-AJ,para.136.
[137] Krstić-AJ,para.136.
[138] Judgment-para.1412.

However, the Defence is not submitting that the Appellant's situation is identical to any of these individuals. Indistinguishable circumstances are not even required as the applicable legal standard concerns a comparison between "*a line of sentences passed in similar circumstances for the same offences*".[139] The overriding concern necessitating an adjustment of the Appellant's sentence is that highly similar circumstances, forms of responsibility and criminal offences lie at the basis of the convictions of the Appellant, Jokić and Obrenović. In addition, these elements, together with extended factors, also underlie the convictions of Momir Nikolić and Krstić. Therefore, in the submission of the Defence, weighing all the similarities and dissimilarities, a sentence in-between the sentences imposed on Momir Nikolić and Krstić would adequately repair the disproportion in the line of sentences applicable to these individuals who were all convicted on an identical factual basis pertaining to the crimes related to Srebrenica.

Conclusion

45. Accordingly, before the errors of the TC as identified *infra* are assessed, the intervention of the Appeals Chamber is warranted in order to correct the TC's erroneous exercise of its discretion which led to the "*unreasonable or plainly unjust*"[140] sentence imposed on the Appellant. In the respectful submission of the Appellant, on the basis of the Trial Judgment as it stands, a sentence of no more than 25 years' imprisonment would appropriately reflect his limited contribution to, and involvement in, a larger operation designed, supervised and implemented by officers far out-ranking him, the aggravating and mitigating circumstances applicable to him as well as the International Tribunal's sentencing practice.

[139] Jelisić-AJ,para.96(emphasis added).
[140] Galić-AJ,para.444.

2ND GROUND

Introduction

46. The TC erred in law when refusing to permit the Defence to call Prof. Schabas as an Expert Witness and to tender his Expert Report. In essence, Prof. Schabas' proposed expert testimony concerns the historical evolvement of the legal definition of genocide in light of the interplay between the law of State responsibility and individual criminal responsibility.[141] Prof. Schabas posits that State policy must be treated as an element of the crime of genocide for the purpose of establishing individual criminal responsibility.[142] By disallowing the expert evidence of Prof. Schabas, the TC violated the Appellant's right to "*obtain the attendance and examination of witnesses on his behalf*".[143]

Argument

47. Firstly, the TC erroneously held that Prof. Schabas' expertise falls directly within the competence of the TC.[144] In arriving at this erroneous finding, the TC misconstrued the subject-matter of the Schabas Report.

48. First and foremost, in violation of its duty to provide a "*reasoned opinion*",[145] the TC's Decisions are marked by a complete absence of reasoning in this respect. The TC merely proffered a conclusion – "*the Chamber is of the view that the subject on which his expertise is offered … is a matter which falls directly within the competence of the Trial Chamber*"[146] - but entirely failed to provide supporting reasons justifying its conclusion. In addition, the Schabas Report definitely did not propose to assist the TC in the exercise of its classical judicial functions, such as its assessment of the individual criminal responsibility of the Accused. In any event, Prof. Schabas' expertise on the historical-legal evolvement of genocide in the fields of State responsibility and individual criminal responsibility certainly does not fall directly within the competence of the TC. The International Tribunal is not competent in

[141] Nikolić-Final-Trial-Brief,Annex-A,p.6-8.
[142] Nikolić-Final-Trial-Brief,Annex-A,p.9.
[143] Art.21(4)(e),Statute.
[144] TC-Decision-1,para.8;TC-Decision-2,p.2.
[145] Furundžija-AJ,para.41.
[146] TC-Decision-1,para.8.

matters pertaining to general international law, as recognized by the ICJ.[147] Moreover, the TC lacks a historical-legal perspective in respect of the crime of genocide.

49. Secondly, the TC erroneously relied on the Appeals Chamber's holding in *Nahimana,* which can not find application in this case.

50. The TC ostensibly based itself on the Appeals Chamber's finding in *Nahimana,* stating that a TC has discretion to refuse proposed expert evidence provided by a witness whose expertise concerns only legal matters which might be addressed by Counsel in oral or written arguments.[148] However, the TC's refusal of expert witness Baker in that case was motivated by the fact that the Mr. Baker's expert evidence related to the freedom of speech and intellectual property as such.[149] However, Prof. Schabas' expertise evidently extends beyond the law on the crime of genocide as such, combining a historical-legal approach in respect of issues on the intersection between two distinct fields of law. Respectfully, such expertise is not in the possession of the Defence who specialize exclusively in (international) criminal law.

51. Thirdly, even though Prof. Schabas' Report does not fall directly within the competence of the TC, the TC markedly departed from previous instances in which expert testimony was allowed despite a limited overlap between the subject-matter of the proposed expert testimony and the charges faced by certain Accused.

52. In *Čelebići, w*itnesses Gow and Economidis provided expert testimony on Geneva Convention IV,[150] notwithstanding the fact that the Accused faced charges involving Grave Violations of the Geneva Conventions.[151] In *Milošević*, expert witness Zwaan provided evidence in regard of genocide,[152] even though this crime featured in the Indictment against the Accused.[153] Similarly, the proposed expert testimony of Prof. Schabas generally concerns the crime of genocide in the context of a criminal trial involving genocide charges but this does not entail that Prof. Schabas would have usurped the TC's essential judicial functions. Prof. Schabas would not have, for instance, commented upon the weight to be attributed to the evidence against the Accused in respect of the charges of genocide. To the contrary, he would have assisted

[147] ICJ-Genocide-Case,para.405.
[148] Nahimana-AJ,para.293-294.
[149] Nahimana-TC-Decision,para.20.
[150] Čelebići-TC-Decision.
[151] Čelebići-Indictment.
[152] Milošević-TC-Decision.
[153] Milošević-Amended-Indictment,Counts 1-2.

the TC in grasping the historical-legal development of the crime of genocide so as to ensure a proper legal basis for criminal trials involving charges of genocide.

Conclusion

53. Ultimately, the TC dismissed "*as speculation Professor Schabas' view that the issue of State policy was not addressed by the drafters of the* [Genocide] *Convention because it was self-evident*",[154] compounding its erroneous decision refusing Prof. Schabas' expert evidence. The TC lightly rejected Prof. Schabas' views without allowing him the opportunity to present his views so as to ensure an informed consideration of the matter and without properly according evidentiary status to the Schabas Report.

54. The errors identified *supra* as well as the violation of the Appellant's right to full answer and defence can only be remedied by allowing Prof. Schabas to testify at the Appeals Hearing. Moreover, the Appeals Chamber, as the highest judicial organ of the International Tribunal, must ensure that a full-blown legal discussion on the law of genocide is permitted in the biggest genocide-related case in the history of the International Tribunal. The International Tribunal's case-law must namely embrace broader legal developments concerning the law of genocide as it can not stand in isolation. Ultimately, by entertaining these arguments, the Appeals Chamber will ascertain that genocide trials proceed on a sound legal foundation.

3RD GROUND

Introduction

55. The TC erred in law when failing to recognize that State policy is not an essential legal element of the crime of genocide.[155] On the basis of a historical-legal analysis of the evolvement of the crime of genocide in the context of State responsibility and individual criminal responsibility, Prof. Schabas finds that State policy must form a legal element of this crime. Prof. Schabas advances that: (i) the theoretical possibility of a person committing genocide without the support of an overarching State policy is

[154] Judgment,para.828.
[155] Judgment,para.828.

insufficiently substantiated;[156] (ii) a symbiosis exists between the requirement of State policy for crimes against humanity, as required by the Rome Statute, and for genocide;[157] (iii) the State responsibility debate concerning genocide involved an inquiry into the existence of State policy to commit genocide rather than a search for the lone individual with genocidal intent;[158] and (iv) even though genocide is described as a crime of "*specific intent*", this term does not appear in Article II of the Genocide Convention.[159]

Argument

56. The TC erroneously found that "***Nikolić*** *is offering arguments that have already been considered by the jurisprudence of the ICTY and the ICTR*" and that "*[t]his jurisprudence has made it clear that a plan or policy is not a statutory element of the crime of genocide*".[160] Evidently, Prof. Schabas' theory has not been considered yet.

57. Firstly, the TC invokes the *Krstić* Appeals Judgment, in which the Appeals Chamber found that "*[t]he offence of genocide … does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population.*"[161] This finding, as such, does not discuss State policy as a legal element of the crime of genocide. A widespread and systematic attack, as a *chapeau* element of Article 5 of the Statute, may not be equated with State policy to commit genocide. In addition, the Appeals Chamber rendered this finding in the context of an appeal launched by the Prosecution seeking a reinstatement of Krstić's conviction for extermination as a crime against humanity which the TC found impermissibly cumulative with Krstić's conviction for genocide.[162] The Appeals Chamber thus discussed the legal dissimilarities between these crimes in the context of cumulative convictions. It did not thereby address the legal elements of the crime of genocide.

58. Secondly, the TC relies on *Jelisić* and *Kayishema/Ruzindana*, in which the Appeals Chamber found that "*the existence of a plan or policy is not a legal ingredient of the*

[156] Nikolic-Final-Brief,Annex-A,p.9-16.
[157] Nikolic-Final-Brief,Annex-A,p.16-23.
[158] Nikolic-Final-Brief,Annex-A,p.23-28.
[159] Nikolic-Final-Brief,Annex-A,p.28-33.
[160] Judgment,para.828.
[161] Krstić-AJ,para.223(emphasis added).
[162] Judgment,para.828;Krstić-AJ,para.219.

crime [of genocide]."[163] However, there is no indication in these decisions that the issue of State policy was addressed specifically from the vantage points of State responsibility and individual criminal responsibility. Moreover, the context of *Jelisić* and *Kayishema/Ruzindana* indicates that the Appeals Chamber arrived at this conclusion within a discussion focussing on manners of proving genocidal intent.[164] This differs significantly from the framework in which Prof. Schabas' arguments are proffered, as he did not discuss manners of proving genocidal intent but asserts that a historical-legal analysis demonstrates that the proper interpretation of the crime of genocide includes the element of State policy.

Conclusion

59. The TC evidently erred in law by failing to recognize that State policy forms an essential element of the crime of genocide. Moreover, the TC's error further strengthens the argument that the TC erred when failing to permit Prof. Schabas to testify.[165] In addition, Prof. Schabas' Report establishes that the Appeals Chamber's previous rulings in this respect[166] were rendered *per incuriam,* which constitutes a cogent reason in the interests of justice to depart from previous jurisprudence.[167]

60. The TC's legal error invalidates the Judgment considering that the charge of genocide was adjudicated on the basis of a definition of the crime of genocide excluding the legal element of State policy. The Defence respectfully requests the Appeals Chamber to find, on the basis of a definition of the crime of genocide including the element of State policy, that no genocide was committed during the period relevant to the Indictment.

61. The Appeals Chamber has found that "*Directives 7 and 7.1 are insufficiently clear to establish that there was a genocidal intent on the part of the members of the Main Staff who issued them. Indeed, the* [Krstić] *Trial Chamber did not even find that those who issued Directive 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallised at a later stage*".[168] In addition, as Directive 7 was "*aimed*

[163] Judgment,para.828;Jelisić-AJ,para.48;Kayishema-AJ,para.138.
[164] Jelisić-AJ,para.47;Kayishema-AJ-para.139-146.
[165] Nikolić-Notice,Ground-2.
[166] Krstić-AJ,para.223;Jelisić,AJ,para. 48.
[167] Aleksovski-AJ,para.108.
[168] Krstić-AJ,para.90;ICJ-Genocide-Case,para.281.

at forcing the populations of Srebrenica and Žepa to leave the enclaves",[169] this document neither refers to nor implies the commission of any of the underlying acts of genocide considering that forcible transfer does not in and of itself constitute a genocidal act.[170] What is more, Directive 7 does not reflect genocidal intent as the TC found that intent to forcibly transfer and intent to murder are mutually exclusive in relation to the same victims.[171] It follows, *a contrario,* that if the aim of Directive 7 was to force the populations to leave the enclaves, no genocidal intent is discernible from Directive 7.

62. In addition, even though the TC found that a plan to murder was developed by the Bosnian Serb Forces,[172] this plan may not be equated with State policy to commit genocide. As the TC recognized, this criminal plan was developed hastily by a select group of people within the RS military authorities over a period of a few days. Such a plan does not constitute a State policy considering the lack of involvement of representative, civilian authorities. Moreover, the fact that high-ranking VRS officers such as Krstić, Blagojević and Pandurević were not privy to the plan from its inception indicates that this was a clandestinely developed agreement involving a selected group of persons, rather than a fully-fledged plan bearing the hallmarks of State policy.

Alternative Argument

63. In the alternative, should the Appeals Chamber not accept that the TC erred in this regard, it is the Defence's submission that cogent reasons in the interests of justice[173] require a departure from the Appeals Chamber's jurisprudence in respect of the issue of State policy to commit genocide as a legal element of the crime of genocide.

64. Firstly, an adjustment of the Appeals Chamber's jurisprudence is required to ensure a unified approach towards genocide from the perspectives of State responsibility and individual criminal responsibility. In this manner, the Appeals Chamber would enable these two distinct legal regimes to function in a complementary manner. This would effectively allow different judicial institutions to take full account of each others'

[169] Judgment,para.762.
[170] Krstić-AJ,para.33;Blagojević-Jokić,AJ,para.123;ICJ-Genocide-Case,para.190.
[171] Judgment,para.933.
[172] Judgment,para.1050-1072.
[173] Aleksovski-AJ,para.107.

findings, as they would operate on the basis of a definition of genocide comprising identical legal elements, and would eliminate the possibility of contradictory outcomes in terms of State responsibility and individual criminal responsibility. The credibility and effectiveness of international judicial institutions would thereby be increased and the protection of victims of genocide would ultimately be augmented.

65. Secondly, the uniformity of International Criminal Law compels a correction of the legal definition of genocide. The Rome Statute excludes the lone *génocidaire* theory applied by the International Tribunal by requiring that acts of genocide be committed in the context of a manifest pattern of similar conduct.[174] In addition, in respect of crimes against humanity, the Rome Statute explicitly requires proof of a State or organizational policy.[175] This is highly relevant because of the close nexus between crimes against humanity and genocide: the International Tribunal found, for instance, that "*when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide*".[176] It would be detrimental to the credibility and effectiveness of International Criminal Law to allow trials involving the same charges to proceed on the basis of disparate legal definitions of genocide. Such a state of affairs might, *inter alia*, lead to legal uncertainty due to perceptions of international criminal proceedings as hazy concerning the applicable law as well as conflicting outcomes. The Appeals Chamber is uniquely placed to prevent this fragmentation.

66. Finally, the prevention of further trials involving charges of genocide before the International Tribunal proceeding on the basis of an erroneously articulated definition of genocide necessitates a departure from previous decisions of the Appeals Chamber in this respect. In order to fully ensure fair trials for Accused facing extremely serious charges, the legal definition of genocide must be adjusted so as to include the element of State policy to commit genocide.

[174] ICC,Elements-of-Crimes,Art.6.
[175] Rome-Statute,Art.7(2)(a).
[176] Kupreškić-TJ,para.636.

4TH GROUND

67. In the alternative, should the Appeals Chamber reject Grounds of Appeal 2 and 3, it is the submission of the Defence that the TC erred in fact and law when finding that the acts of killing and infliction of serious bodily and mental harm against the Bosnian Muslims of Eastern Bosnia "*were perpetrated with genocidal intent*".[177]

SUB-GROUND 4.1

68. When finding that, *inter alia*, the scale and nature of the murder operation *"proves beyond reasonable doubt that members of the Bosnian Serb Forces ... intended to destroy the Muslims of Eastern Bosnia as a group*",[178] the TC erroneously assessed the scope and scale of the murder operation in light of the allegations in the Indictment and it failed to consider the absence of genocidal acts against the Muslims of Žepa.

69. In *Krstić*, the Appeals Chamber found that "*the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia*."[179] Significantly, the Appeals Chamber clarified that *"[t]he Trial Chamber used the term 'Bosnian Muslims of Srebrenica' as a short-hand for the Muslims of both Srebrenica and the surrounding areas, most of whom had, by the time of the Serbian attack against the city, sought refuge with the enclave.*"[180] This definition clearly excludes the Bosnian Muslims of Žepa or other towns who were not residing in Srebrenica at the relevant time. However, a clear distinction must be drawn between *Krstić* and the case at hand. The Prosecution's position in this case is that "*the group is the Muslims of Eastern Bosnia, and those are defined as the Muslims of Srebrenica and Žepa, and should include Goražde but primarily Srebrenica and Žepa, though Goražde is also part of Eastern Bosnia and they were also the focus of the ethnic cleansing campaign*".[181] The TC accepted the Prosecution's case[182] and it is on this basis that the scope of the genocidal enterprise must thus be measured.

70. It is, therefore, extremely significant to take account of the absence of acts of genocide committed against the Bosnian Muslims of Žepa in determining whether the crimes

[177] Judgment,para.861,863.
[178] Judgment,para.856.
[179] Krstić-AJ,para.15.
[180] Krstić-AJ,fn.24.
[181] T.34276(emphasis added);Judgment,fn.2978;Indictment,para.26,33.
[182] Judgment,para.839-840,849-855.

committed against the Bosnian Muslims of Eastern Bosnia displayed intent to commit genocide. The Bosnian Serb Forces took full control of the enclave after a period of intermittent fighting and were thus in a demonstrable position to escalate the killing operation.[183] However, there were no mass killings against the Bosnian Muslims of Žepa[184] and, as the findings of the TC demonstrate, some able-bodied Bosnian Muslim men from Žepa under the control of the VRS were exchanged.[185] Moreover, the TC restricted its findings concerning the causing of serious bodily or mental harm to harm caused by the killing operation.[186] As no killing operation took place in Žepa, no serious bodily or mental harm was caused to Bosnian Muslims of Žepa within the meaning of Article 4(2)(b). Also, the TC found that the evidence concerning the Prosecution's allegations concerning Article 4(2)(c) and 4(2)(d) was insufficient to conclude that such acts were perpetrated against the Bosnian Muslims of Srebrenica or Žepa.[187] Even though forcible transfer was committed against the Bosnian Muslims of Žepa, the TC found that this crime does not in and of itself constitute an underlying act of genocide.[188] Thus, even though the Prosecution specifically alleged that the Bosnian Muslims of Žepa were targeted for genocide, no genocidal acts were perpetrated against them.

SUB-GROUND 4.2

71. When considering additional indicators of genocidal intent, such as the "*grim determination to ensure that each and every prisoner would be killed*" displayed by the killings[189] and the fact that searches were conducted after the fall of Srebrenica to ensure that no Bosnian Muslim male escaped,[190] the TC failed to heed findings related to the passage of the column, demonstrating that, irrespective of the reasons pertaining thereto, thousands of Bosnian Muslims males were not killed perfidiously.

72. On 16 and 17 July, following several rounds of negotiations, a decision was taken amidst the killing operation to allow up to ten thousand Bosnian Muslim males to pass

[183] Judgment,para.665-736.
[184] Judgment,para.725-738.
[185] Judgment,para.720.
[186] Judgment,para.843.
[187] Judgment,para.855.
[188] Judgment,para.843.
[189] Judgment,para.859.
[190] Judgment,para.860.

through the defence lines of the Zvornik Brigade.[191] Several witnesses testified that, in light of the strength of the column, considerable losses would have been suffered on both sides had the column been engaged.[192] Nevertheless, by attacking the column, the Bosnian Serb Forces could have significantly increased the number of victims from the protected group. Pandurević stated that he could have betrayed the agreement by firing on the 28th Division once they had concentrated in one place.[193] In addition, in Ristić's opinion, together with the forces that arrived on that day, the column could have been prevented from passing through.[194] Trkulja also considered that, as the column was located in a depression, the Zvornik Brigade could have attacked it.[195]

73. Undoubtedly, had the Bosnian Serb Forces been determined to ensure that no Bosnian Muslim male would escape their grasp, the passage of the column would not have been allowed, in spite of the possibility of Serb casualties. A genocidal force faced with the possibility of drastically escalating the number of victims from the targeted group in pursuit of the group's annihilation would not have been deterred for this reason.

SUB-GROUND 4.3

74. When relying on the "*plain intention to eliminate every Bosnian Muslim male who was captured or surrendered"*[196] to determine that Bosnian Serb Forces committed the crimes in July 1995 with genocidal intent, the Trial Chamber entirely failed to take account of numerous instances in which a significant number of Muslim males were exchanged during or shortly after the mass executions.

75. The TC found that, during the killing operation, Bosnian Muslim prisoners from Srebrenica, Bratunac and Žepa were taken to different detention camps from 18 to 26 July 1995. On 18 July 1995, 20 prisoners were transferred from Bratunac Hospital to Batković Camp on VRS Main Staff orders.[197] From 23 to 26 July 1995, between 140 and 150 prisoners, some of whom had been detained since as early as 20 July 1995, were transferred from the Standard Barracks military prison to Batković Camp on

[191] Judgment,para.557-558.
[192] L.Ristić,T.10159-T.10160;Sladojević,T.14373-T.14374,T.14375.
[193] Pandurević,T.31027,T.31041.
[194] L.Ristić,T.10160.
[195] Trkulja,T.15116-T.15117.
[196] Judgment,para.856.
[197] Judgment,para.591.

Drina Corps orders.[198] On 26 July 1995, Bijelina civilian police escorted prisoners from Pilica to Batković Camp.[199] In addition, from mid to late July 1995, a number of Bosnian Muslims from Srebrenica and Potočari, who had crossed into Serbia, were returned to the Bratunac Brigade and then transferred to detention centres in Knezina, Batković or Vlasenica pursuant to Drina Corps orders.[200]

76. Even though the Bosnian Serb Forces had a significant number of members of the protected group under their control, they failed to escalate the killing operation and further the destruction of the group. In addition to two instances of exchanges involving an unknown number of men, at least between 160 and 170 Bosnian Muslim males were exchanged and not killed. In addition, the exchanges took place during and shortly after the killing operation, between 18 July 1995 and late July 1995. Moreover, different command levels were involved, such as the VRS Main Staff, the Drina Corps Command and the Zvornik Brigade Command. Considering that a large number of men were exchanged on several separate occasions and that different levels of command were involved, it can not be maintained that these were isolated incidents.

77. The failure to take the exchanges into consideration becomes all the more striking in light of the TC's findings that the killing operation displayed "*a grim determination to ensure that each and every prisoner would be killed*"[201] as well as that searches were conducted "*to ensure that no Bosnian Muslim male escaped the grasp of the VRS Main Staff and Security Branch*".[202] Had the crimes truly borne these hallmarks, the significant number of Bosnian Muslim prisoners kept in the detention facilities of the Bosnian Serb Forces could not have escaped the genocidaires' attention.

SUB-GROUND 4.4

78. When finding that finding that at least 5,336 persons were executed in the crimes following the fall of Srebrenica,[203] the TC erroneously estimated the number of persons killed on the basis of forensic and demographic evidence.

[198] Judgment,para.592-593.
[199] Judgment,para.594.
[200] Judgment,para.594.
[201] Judgment,para.859(emphasis added).
[202] Judgment,para.860(emphasis added).
[203] Judgment,para.659-664.

79. Firstly, the TC erred when rejecting the testimony of Demography Expert Dr. Radovanović,[204] establishing that, applying a correct methodology, no more than 3225 people from the 2005 List of Missing can be matched with the 1991 census.[205]

80. In this regard, no reasonable TC could have rejected Dr. Radovanović's expert opinion that approximately 1000 persons could not have been included in the 2005 List of Missing as they did not appear on the 1991 Census,[206] on the basis that Brunborg "*tried to fill gaps in his work using other available data*".[207] The fact that Brunborg attempted to fill gaps in his work with by employing a flawed methodology is, namely, the specific problem Dr. Radovanović identified. Brunborg simply explained the methodology he employed, saying that, when faced with difficulties in matching the persons from the 2005 List of Missing with the 1991 Census on the basis of their names, up to 71 additional criteria were used, such as: the first three letters of a surname or the year of birth plus or minus three years.[208] Subsequently, Dr. Radovanović specifically demonstrated that Brunborg's deviation from a unique identification key is methodologically flawed.[209] According to Dr. Radovanović, by relaxing the identifications keys in the manner Brunborg did, 129% of the 2005 List of Missing can be identified,[210] clearly establishing Brunborg's errors. Moreover, contrary to the TC's finding, Brunborg could not have "*addressed this issue raised by Radovanović*"[211] as he testified prior to Dr. Radovanović.

81. In addition, no reasonable TC could have disagreed with Dr. Radovanović's expert assertion that another 1000 persons were wrongfully included in the 2005 List of Missing as they were not associated with the July 1995 events in Srebrenica, on the basis of Tabeau's evidence that persons on the ABiH List who were recorded as missing prior to July 1995 were ultimately identified in Srebrenica Related Graves.[212] Tabeau, namely, never testified to this effect.[213] Tabeau provided two observations in relation to nine examples of persons included in the 2005 List of Missing while, according to ABiH records, these persons went missing prior to 1995 in other areas.

[204] Judgment,para.635-637.
[205] 3D398,p.31-32.
[206] Judgment,para.635.
[207] Judgment,para.635.
[208] Brunborg,T.11202-T.11204.
[209] 3D398,p.24-25.
[210] 3D398,p.25.
[211] Judgment,para.635.
[212] Judgment,para.636.
[213] Judgment,fn.2315;E.Tabeau,T.21052.

According to Tabeau, a clarification of the BiH authorities is required for these cases.[214] Also, Tabeau stated that, as the cause of death is missing or unknown for these individuals, the date of disappearance *"might"* be the date they were last seen and *"[t]his does not contradict the fact that the persons later died during the fall of Srebrenica"*.[215] Tabeau was clearly uncertain and she neither stated that these persons were found in Srebrenica Related Graves nor did she approximate their number.

82. Finally, no reasonable TC could have dismissed Dr. Radovanović's evidence as "*speculation*", as she "*cannot identify the source of*" the documents identified as D000-2101, D000-2102, D000-2103 and D000-2104.[216] The TC, however, entirely failed to consider that, in her Expert Report, Dr. Radovanović explicitly indicated the 22 sources utilized by her[217] and her Expert Report thus certainly does not hinge on these four documents making up merely one source. Furthermore, the TC disregarded that the four documents in question were admitted into evidence,[218] detailing the ERN-numbers of OTP disclosure material relied upon by Dr. Radovanović. Contrary to its finding,[219] these exhibits provided the TC with a basis to assess their reliability. Also, the TC failed to attach sufficient weight to Dr. Radovanović's specific testimony that "*those are CDs that I have received from the Defence as materials disclosed by the OTP*" and that "*it's easy to establish who the author of those lists is*",[220] clearly indicating that she was aware of the provenance of the four documents.

83. Secondly, the TC erred when finding, on the basis of Janc's Expert Report, that "*at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica*"[221] as it failed to consider evidence establishing that a significant number of victims perished as a result of suicide or legitimate combat.

84. Janc relied primarily on the 2009 ICMP List of Deceased[222] but Parsons stated that the ICMP established neither the time nor manner of death.[223] Moreover, Janc specifically testified that the number of victims of suicides and legitimate combat activities could amount to 1,000 but that it could also be higher.[224] As entirely ignored by the TC, a

[214] E.Tabeau,T.21052-T.21053.
[215] E.Tabeau,T.21052.
[216] Judgment,para.637,fn.2316-2317.
[217] 3D398,p.33-34.
[218] 3D403;3D404;3D405;3D406.
[219] Judgment,para.637.
[220] S.Radovanović,T.24503-T.24504.
[221] Judgment,para.660-663.
[222] D.Janc,T.33378-T.33382;Judgment,para.650.
[223] T.Parsons,T.20919.
[224] D.Janc,T.33593-T.33594;Judgment,para.617.

number significantly higher than 1,000 victims of suicides and legitimate combat activities is supported by additional evidence on the record: (i) Prosecution Expert Butler testified that "*the 1.000 to 2.000 number would be reasonable with respect to the combat casualties starting … from 12 July [1995] through … 18 July [1995]*";[225] (ii) an eyewitness saw as much as 2,000 to 3,000 dead as a result of combat engagements in the Pobuđe region;[226] and (iii) a UN report of 17 July 1995 confirms that *"up to 3.000 were killed on the way, mostly by mines and BSA engagement."*[227] Furthermore, the TC ignored a memorandum by Tabeau, indicating that up to 73% of the persons on the 2005 List of Missing can be matched with ABiH military records, providing further corroboration of a high number of combat casualties.[228]

85. Consequently, in light of Dr. Radovanović's evidence that no more than 3,225 missing persons can be matched with the 1991 Census and the evidence that up to 3,000 persons perished as a result of suicides or legitimate combat engagements, the TC erred in finding that 5,336 persons were executed in the crimes following the fall of Srebrenica. Therefore, the number of victims of the mass-executions must be revised downwards.

Conclusion

86. The *Krstić* Appeals Chamber found that "*[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him.*"[229] Evidently, in light of the TC's findings and the underlying record, the Bosnian Serb Forces had ample opportunity to significantly escalate the killing operation beyond the mass executions by: (i) perpetrating genocidal acts against the Bosnian Muslims of Žepa who, in the Prosecution's allegations, were targeted by the genocidal enterprise; (ii) attacking the column passing through VRS defence lines; and (iii) murdering the significant number of Bosnian Muslim males in the custody of the Bosnian Serb Forces during or shortly after the killing operation. Yet, despite these opportunities, the Bosnian Serb Forces did not do so, demonstrating a lack of genocidal intent. It can not be maintained that the Bosnian Serb Forces refrained from escalating the murders

[225] R.Butler,T.20251.
[226] 2D00669,p.5.
[227] 1D00374,p.2.
[228] 3D00457.
[229] Krstić-AJ,para.13.

due to "*public opinion*"[230] as these events - and the passage of the column and the detainees in particular - could have been concealed easier than the mass-killings.

87. Moreover, the *Krstić* Appeals Chamber also found that the scope of the killing operation establishes genocidal intent.[231] However, the significant body of forensic and demographic evidence establishes that the number of victims that perished in the mass executions is significantly lower than assumed hitherto. In conjunction with the Bosnian Serb Forces' failure to increase the number of victims, the significantly reduced number of victims who died in the mass-executions additionally exhibits that the crimes do no evince the intent to destroy, in whole or in part, the Bosnian Muslims of Eastern Bosnia, as such.

88. Therefore, no reasonable TC could have found that the murder operation was perpetrated with genocidal intent.[232] The time has come for the Appeals Chamber to find, on the basis of the allegations and the evidentiary record pertaining to this case specifically, that the crimes perpetrated in Srebrenica in July 1995, horrific though they may have been, do not constitute genocide. Consequently, the TC's error invalidates the Judgment and/or occasioned a miscarriage of justice as the Appellant could not have been found to bear individual criminal responsibility for aiding and abetting genocide. The Defence thus respectfully requests the Appeals Chamber to quash the Appellant's conviction in this respect.

5TH GROUND

Introduction

89. The TC committed a combined error of fact and law when finding that "*[t]he frenzied efforts to forcibly remove the remainder of the population* [of Srebrenica] *while the male members of the community were targeted for murder, provides further evidence that the intent was to destroy.*"[233] Two significant precedents rendered after the *Krstić* Appeal Judgment, and ignored by the TC, establish that a killing operation targeting a

[230] Krstić-AJ,para.31.
[231] Krstić-AJ,para.35.
[232] Judgment-para.861.
[233] Judgment,para.862.

selected group of men,[234] in conjunction with the removal of the remainder of the population, does not evidence the existence of genocidal intent.

Argument

90. Firstly, the Report of the International Commission of Inquiry on Darfur (the "Darfur Commission"), presided over by the distinguished legal scholar and former President of the International Tribunal Antonio Cassese, provides important indications.

91. After finding that "*[s]ome elements emerging from the facts ... could be indicative of the genocidal intent*",[235] the Darfur Commission significantly considered that "*there are other more indicative elements that show the lack of genocidal intent.*"[236] The Commission went on to hold that "*[t]he fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element.*"[237] The Commission also found that the fact that "*the populations surviving attacks on villages ... [were] not killed outright, so as to eradicate the group [but that] they [were] rather forced to abandon their homes and live together in areas selected by the Government*" was indicative of the absence of genocidal intent too.[238] Also, the Commission provided an example of the case of two brothers in which the Janjaweed Rebels took away their cattle while killing one of the two brothers and sparing the other. The Commission concluded that "*had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.*"[239]

92. The parallel with Srebrenica is unmistakable. The Bosnian Muslim population that gathered in Potočari and Žepa was not killed but was allowed to leave. In addition, a selected group of men, consisting of able-bodied men from the crowd in Potočari and able-bodied men from the column leaving the Srebrenica enclave, was killed. Many men who could have been killed secretly in the absence of international scrutiny, however, were spared, such as the men from Žepa,[240] the men from the column[241] and

[234] Nikolić-Notice,Ground-4.
[235] Report-Darfur-Commission,para.513.
[236] Report-Darfur-Commission,para.513(emphasis supplied).
[237] Report-Darfur-Commission,para.513(emphasis supplied).
[238] Report-Darfur-Commission,para.515.
[239] Report-Darfur-Commission,para.517(emphasis supplied).
[240] Nikolić-Notice,Ground-4.1;Judgment,para.710-738.

the men that were exchanged.[242] The findings of the Darfur Commission clearly establish that such conduct indicates an absence of genocidal intent.

93. Secondly, the Darfur related cases at the ICC provide similar indications warranting a conclusion that the Trial Chamber erroneously inferred genocidal intent from the crimes committed against the Bosnian Muslims from Eastern Bosnia.

94. In the case against Ahmad Harun and Ali Kushayb, a Sudanese Minister and a Janjaweed Militia Leader respectively, Arrest Warrants were issued on the basis of reasonable grounds to believe that they were responsible for different crimes against humanity and war crimes in the Darfur region.[243] Significantly, the ICC Prosecutor did not seek to prosecute these two persons for genocide, indirectly endorsing the findings of the Darfur Commission that the crimes in Darfur do not display genocidal intent.

95. In addition, in its first decision on the ICC Prosecutor's application for a warrant of arrest against Al-Bashir, the current President of the Sudan, the ICC Pre-Trial Chamber found that "*the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces*".[244] More specifically, in respect of the underlying acts of murder, the Pre-Trial Chamber found that during most attacks on villages "*the large majority of their inhabitants were neither killed nor injured despite the fact that the attackers … either had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels forming a wide line*."[245] Furthermore, the Pre-Trial Chamber held that "*GoS forces did not attempt to prevent civilians belonging to the Fur, Masalit and Zaghawa groups from crossing the border to go to refugee camps in Chad, and that the great majority of those who left their villages after the attacks by GoS forces reached IDP Camps in Darfur or refugee camps in Chad*."[246]

96. Subsequently, following an appeal by the Prosecution, a Warrant of Arrest was issued against Al-Bashir for charges of genocide. However, this was the result of a misapplication of the standard of proof at this particular stage of ICC proceedings as opposed to a substantive departure from the substance of the First Al-Bashir Decision. The ICC Appeals Chamber found that the Pre-Trial Chamber acted erroneously by

[241] Nikolić-Notice,Ground-4.2;Judgment,para.551-561.
[242] Nikolić-Notice,Ground-4.3;Judgment,para.590-594.
[243] ICC-Harun-Decision.
[244] ICC-Al-Bashir-Decision-1,para.201.
[245] ICC-Al-Bashir-Decision-1,para.196(emphasis supplied).
[246] ICC-Al-Bashir-Decision-1,para.198(emphasis supplied).

denying to issue an Arrest Warrant on the basis that "*the existence of [...] genocidal intent is only one of several reasonable conclusions available*."[247] Consequently, the Pre-Trial Chamber reversed its decision but held that, on the basis of its First Al-Bashir Decision, *one* of the conclusions was that there were reasonable grounds to believe that Al-Bashir harboured genocidal intent.[248] This clearly demonstrates that the conclusion that Al-Bashir entertained genocidal intent would in all likelihood not be accepted when applying the trial standard of proof "*beyond reasonable doubt*".

97. The findings of the ICC Pre-Trial Chamber are *mutatis mutandis* applicable to the situation in Srebrenica. In the attack against Srebrenica and Žepa, the vast majority of the population was not killed despite the possibility to do so.[249] Alike the Sudanese forces, the Bosnian Serb Forces were militarily superior and had the equipment in place to launch, for instance, a massive bombing campaign against Žepa to increase the number of victims from the protected group. Also, the number of able-bodied men killed could have been augmented by, for instance, attacking the column perfidiously. Moreover, similar to the situation in Darfur, the VRS did not prevent the Bosnian Muslim population from leaving the Srebrenica and Žepa enclaves.

Conclusion

98. No reasonable Trial Chamber could have concluded that the crimes committed against the Bosnian Muslims of Eastern Bosnia during the Indictment period display genocidal intent had relevant precedents been taken into account. As established *supra*, the Bosnian Serb Forces failed to escalate the killing operation targeting a select group of men and removed the remainder of the population. Important judicial precedents indicate that such crimes do not evince genocidal intent. The Appeals Chamber must adhere to these precedents to avoid a further fragmentation of international law.

99. The Trial Chamber's error invalidated the decision and/or occasioned a miscarriage of justice since the Appellant was convicted on the basis of an erroneous legal qualification of the crimes committed in Srebrenica. Consequently, the Appellant could not have been found to bear individual criminal responsibility for aiding and

[247] ICC-Al-Bashir-Decision-2,para.1.
[248] ICC-Al-Bashir-Decision-3,para.4.
[249] Nikolić-Notice,Ground-4.

abetting genocide and the Appeals Chamber is respectfully requested to quash the Appellant's conviction in this respect.

6TH GROUND

Introduction

100. Irrespective of the outcome of the remainder of the Appellant's Grounds of Appeal related to genocide,[250] the TC erred in fact when finding that "s*oon after the inception of his involvement in the killing operation, and certainly by the time of the executions at Orahovac, **Nikolić** knew that this was a massive killing operation being carried out with genocidal intent*".[251] No reasonable TC could thus have found that the Appellant entertained the requisite *mens rea* for aiding and abetting genocide.

Argument

101. Firstly, the TC erred when finding that the fact that, after meeting with Beara and Popović on 14 July 1995, the Appellant "*knows the details of the plan; the executions were to be carried out in multiple locations in the Zvornik area and the victims would number in the hundreds to thousands*"[252] provided the Appellant with knowledge of the genocidal intent behind the operation. The TC ignored to consider that the totality of the evidence undoubtedly establishes that the nature of the Appellant's knowledge on 13 July 1995, even if upheld on appeal,[253] did not alter or develop significantly thereafter.

102. Crucially, on 13 July 1995, the Appellant lacks knowledge of key aspects of the genocidal enterprise that had already been set in motion. According to the TC, the Appellant did not know of: (i) the forcible transfer operation in Potočari;[254] (ii) the development of the common plan pertaining to the JCE to murder;[255] (iii) the manner in which the able-bodied Bosnian Muslim men ended up in the custody of the Bosnian

[250] Nikolić-Notice,Ground-2-Ground-5.
[251] Judgment,para.1407.
[252] Judgment,para.1404;Nikolić-Notice,Ground-23.
[253] Nikolić-Notice,Ground-14,Ground-20.
[254] Judgment,para.1395.
[255] Judgment,para.1051-1060,1395.

Serb Forces;[256] (iv) the detentions in Bratunac;[257] (v) the killings on 13 July 1995;[258] and (vi) the composition of the group of prisoners.[259] Undoubtedly, considering the Appellant's absence from the Srebrenica region on this day, the Appellant also did not communicate with the driving forces behind the genocide, such as Mladić, Beara and Krstić.

103. On 13 July 1995, according to a challenged finding of the TC, the Appellant learned of the impending execution of an undefined number of prisoners of unknown geographical origin arriving from the direction of Bratunac.[260] However, crucially, the TC found that the Appellant was not aware "*that this murderous enterprise went well beyond killing those who had fallen into VRS custody and was in fact an operation designed to maximise the number of victims, with the aim of destruction of the group*" and "*of some of the key features of the operation which would evidence genocidal intent*".[261]

104. Considering that, according to another challenged finding of the TC,[262] after the meeting with Beara and Popović on 14 July 1995, the Appellant knows that hundreds to thousands of prisoners of unknown geographical origin are to be executed in multiple locations in Zvornik, no reasonable TC could have found that his knowledge had expanded sufficiently to provide him with knowledge of others' genocidal intent. Except for learning of multiple, unspecified execution-sites,[263] the Appellant did not acquire additional information compared to the knowledge already in his possession.

105. The Appellant was not provided the essential information he lacked prior to this meeting, such as information concerning the events in and around Srebrenica, the development of the genocidal plan, the scope of the operation, etc. In fact, his state of knowledge is more ambiguous in terms of knowledge of the principal perpetrators' genocidal intent. Whereas, according to challenged findings of the TC, the Appellant knows of the impending execution of "*a large number*" of prisoners on 13 July 1995,[264] he learns that the victims will number "*in the hundreds to the thousands*" on

[256] Judgment,para.1402-1403.
[257] Judgment,para.1402-1403.
[258] Judgment,para.1402-1403.
[259] Judgment,para.1402-1403.
[260] Judgment,para.1345,1402;Nikolić-Notice,Ground-14,Ground-20.
[261] Judgment,para.1403;Nikolić-Notice,Ground-14.
[262] Judgment,para.1404;Nikolić-Notice,Ground-23.
[263] Judgment,para.1404;Nikolić-Notice,Ground-23.
[264] Judgment,para.1403;Nikolić-Notice,Ground-14.

14 July 1995.[265] Whereas he would have realized Beara and Popović intended o commit a grave crime, the massive difference in the estimated scope of the crime did not allow the Appellant to conclude that they intended the destruction of a protected group, as such. Moreover, the TC did not reach a finding that the Appellant was provided more details about the victims' geographical origin and the Appellant could thus not have surmised that a protected group, as such, was targeted.

106. Also, whereas the TC supports its finding concerning the Appellant's evolving knowledge following the meeting with Beara and Popović on 14 July 1995 by finding that the Appellant "*sees the convoy of buses and subsequently he acquires first hand information from his observations at Orahovac about the composition of the victims: soldiers and civilians, men, boys and elderly*" later that morning,[266] it erred by ignoring evidence indicating that, throughout, the Appellant remained under the impression that detainees held for reasons related to the conflict were targeted.

107. Milorad Birčaković testified that, after the meeting with Beara and Popović, the Appellant told him that "*there would be some people coming in for exchange*" and that he was angry because "*he was not consulted beforehand but was only ordered to find some accommodation*".[267] Moreover, the Appellant spoke to Slavko Perić on the morning of 14 July and he explicitly mentioned the arrival of prisoners, as opposed to the arrival of soldiers and civilians.[268] Furthermore, at the Vidikovac Hotel, Milorad Birčaković boarded the buses but the Appellant did not.[269] The Appellant's state of knowledge is not altered significantly by his observations at Orahovac either. The Appellant only saw men but he did not see women and his observations of combatants of all ages in civilian attire are commonplace in non-international armed conflicts. The Appellant's perception of these persons as ABiH affiliates is confirmed by his statement to Lazar Ristić in the aftermath of the events in question, telling him that he had just been told to place detainees in a schoolhouse pending an exchange.[270] The fact that the overwhelming majority of the prisoners were in fact ABiH affiliates is confirmed by Tableau's memorandum, stating that up to 73% of the 2005 List of Missing matches with ABiH military records.[271]

[265] Judgment,para.1404;Nikolić-Notice,Ground-23.
[266] Judgment,para.1404;Nikolić-Notice,Ground-19.
[267] M.Birčaković,T.11120;Judgment,fn.4400.
[268] Judgment,para.1359.
[269] M.Birčaković,T.11018;Judgment,para.1358.
[270] L.Ristić,T.10088-T.10089.
[271] 3D00457.

108. Secondly, the TC erred in finding that the Appellant "*observed first hand the systematic and organised manner in which the killing operation was planned and carried out and further he took an active role in it"* as it failed to consider evidence establishing the limited overall extent of the Appellant's involvement in the crimes.

109. The Appellant was not involved in, or cognizant of, the crimes in the wider area of Srebrenica,[272] the planning of the murder operation or its inception[273] and he only acquired knowledge of the crimes after a significant number of crimes had already been perpetrated.[274] Thereafter, according to challenged findings of the TC, the Appellant only appears physically in Orahovac at the time of the mass-executions[275] and his involvement abruptly ceases after approximately 36 hours on the very early morning of 15 July 1995.[276] Subsequently, the Appellant did not augment or extend his involvement in the crimes, despite his demonstrated capability and suitability to do so.[277]

110. Such a limited degree of participation was insufficient to fully grasp the manner in which the operation was organised and to apprehend that others intended to commit genocide. Whereas, at the very most, the Appellant acquired knowledge of a crime against a specific group of prisoners he perceived of as ABiH affiliates, he could not have surmised on this basis that the destruction of a group, as such, was intended. Such a *mens rea* requires knowledge of additional elements as the Prosecution alleged that the genocidal acts consisted of killing members of the group and causing serious bodily and mental harm by, *inter alia,* separating the able-bodied men and forcible removing the population[278] as well as that the alleged perpetrators knew that the forcible transfer created conditions contributing to the destruction of the entire population of Eastern Bosnia.[279] The Appellant was clearly unaware of these elements.

111. Thirdly, the TC erred in finding that the Appellant "*through this interaction* [with Beara and Popović]*... would have known of their genocidal intent*"[280] as well as that he *"saw evidence of the sheer determination that every detained Bosnian Muslim male would be killed, including the incident when Popović enjoined the soldiers at an*

[272] Judgment,para.1345,1395.
[273] Judgment,para.1410.
[274] Judgment,para.1402.
[275] Judgment,para.1366-1372;Nikolić-Notice,Ground-19.
[276] Judgment,para.1361-1368;Nikolić-Notice,Ground-18.
[277] Judgment,para.1369-1373,1379-1380.
[278] Indictment,para.26.
[279] Indictment,para.33.
[280] Judgment,para.1406.

execution site to shoot a young boy",[281] as it failed to consider important pieces of evidence concerning the Appellant's limited interaction with Beara and Popović in the relevant time-period and his repeated observations of the sparing of victims.

112. Although the Appellant pointed Beara out to Marko Milošević on 14 July 1995 in Petkovci, the TC made no finding as to whether the Appellant spoke to Beara on this occasion and, if so, what may or may not have been discussed.[282] According to the TC, the Appellant was informed that Beara was coming to Standard on 15 July 1995[283] but no finding was adopted that the Appellant actually received this message from the Duty Operations Officer or that the Appellant and Beara met on this date.[284] Also, according to a challenged finding of the TC, the Appellant talked to Aćimović on the morning of 15 July but it was Popović who met Aćimović[285] and the TC failed to find whether the Appellant communicated with Popović on this occasion and, if so, whether the Appellant was provided with information indicative of Popović's genocidal intent. According to the TC, Beara and Popović met at Standard after 18h30 on 15 July 1995 but no finding was adopted that the Appellant was present too.[286] Strikingly, no findings were reached concerning any contacts between the Appellant and Beara/Popović on 16 July 1995.[287] Thus, the TC did not find that the Appellant met with Beara and Popović after their meeting on 14 July 1995, indicating the limited extent of their contacts.

113. In addition, the TC failed to refer to evidence establishing that the child that was to be shot on Popović's orders was in fact spared, malicious though the enjoinment must have been. This child was subsequently transported to Zvornik Hospital.[288] Moreover, according to the TC, the Appellant witnessed the unharmed detention of the four Branjevo Farm survivors and the ten Milići Hospital patients.[289] Furthermore, before departing to the Krajina in September 1995,[290] the Appellant must have been aware of the unharmed detention of at least 140 to 150 prisoners at the Zvornik Brigade prior to their exchange.[291] Evidently, no reasonable TC could have found that the Appellant

[281] Judgment,para.1405.
[282] Judgment,para.1366.
[283] Judgment,para.1368.
[284] Judgment,para.1281-1284,1367-T.1371.
[285] Judgment,para.1369.
[286] Judgment,para.1123,1284,1367-1371.
[287] Judgment,para.1124-1138,1285-1287,1372-1373.
[288] Judgment,para.487-488.
[289] Judgment,para.1379,1380,1411.
[290] 7DP02925.
[291] Judgment,para.592-593.

was aware of a grim determination to execute every detained Bosnian Muslim male as he witnessed that members of the protected group were spared on various occasions.

114. Finally, the TC's error is rendered even more obvious when comparing the Appellant's limited knowledge to the state of knowledge possessed by those acquitted of genocide.

115. Pandurević was not convicted for genocide,[292] even though (i) he was close to the events from 6 to 12 July 1995 in Srebrenica, Potočari and Bratunac, interacting with high-ranking VRS officers such as Mladić and Krstić;[293] (ii) he learned of the crimes around noon on 15 July 1995, prior to the mass executions in Roćević/Kozluk and Branjevo/Pilica;[294] and (iii) he met with Popović on 16 July 1995[295] and was informed that Popović would come on 23 July 1995 to take care of the situation with the wounded prisoners.[296] Borovčanin was also acquitted of genocide,[297] despite: (i) his physical proximity to and awareness of the events in Srebrenica, Potočari and Bratunac when the plan to murder was developed;[298] (ii) his interaction with Mladić, Krstić and Momir Nikolić during these days;[299] and (iii) his witnessing of bodies in front of the Kravica warehouse.[300] In addition, Dragan Jokić was not even indicted for genocide, in spite of: (i) his involvement in the identical crime-sites in comparison with the Appellant, i.e. Orahovac, Roćević/Kozluk and Branjevo/Pilica, although several of these findings are appealed herein;[301] and (ii) his communications with different Battalions and with Beara, Popović, Obrenović and Pandurević in relation to the prisoners concerning the prisoners on different occasions.[302]

116. Undoubtedly, in light of the similarity of the circumstances pertaining to the Appellant, Pandurević, Borovčanin and Jokić in relation to their knowledge of others' genocidal intent, no reasonable TC could have found that the Appellant possesses the requisite *mens rea* for aiding and abetting genocide. Unlike Pandurević and Borovčanin, the Appellant was not present in Srebrenica and Potočari when the plan was developed and set in motion and he did not interact with the high-ranking officers

[292] Judgment,para.2110.
[293] Judgment,para.1846-1855.
[294] Judgment,para.1861.
[295] Judgment,para.1875.
[296] Judgment,para.1907.
[297] Judgment,para.2107.
[298] Judgment,para.1507.
[299] Judgment,para.1507.
[300] Judgment,para.1519.
[301] Blagojević-Jokić,TJ,para.763-764,766-769;Judgment,para.1361-1373;Nikolić-Notice,Ground-14,18-25.
[302] Judgment,para.494,1122,1280,1949,1960.

present on-site. Thereafter, like these three officers, the information received by the Appellant is partial and indefinite and his limited first-hand observations do not encapsulate the full scale and nature of the operation. Also, similar to Pandurević and Jokić, the Appellant only sporadically interacted with Beara and Popović, which was insufficient to allow him to learn of their genocidal intent. Clearly, if these individuals did not know of others' genocidal intent, neither did the Appellant.

Conclusion

117. No reasonable TC could have found that the Appellant knew of the principal perpetrators' genocidal intent. The TC's conviction of the Appellant flies in the face of the totality of the evidence on the record and seems to have been based primarily on his affiliation with the Security Service rather than his actual state of knowledge.

118. In addition, as detailed *infra,* certain Grounds of Appeal are intimately linked to the TC's error concerning the Appellant's *mens rea* for aiding and abetting genocide.[303] Should the Appeals Chamber accept one or more of these Grounds of Appeal, it must concomitantly assess their impact on the Appellant's *mens rea* for aiding and abetting genocide as they invariably concern the Appellant's additional lack of knowledge of the genocidal intent behind the killing operation through his reduced involvement in the crimes and/or the lesser degree of information made available to him.

119. The TC's error occasioned a miscarriage of justice because the Appellant was convicted for aiding and abetting genocide even though he lacked the requisite *mens rea,* leading to an unwarrantedly excessive sentence. The Defence, therefore, respectfully requests the Appeals Chamber to quash the Appellant's conviction for aiding and abetting genocide and reduce his sentence accordingly.

[303] Nikolić-Notice,Ground-7,Ground-14,Ground-18-25.

7TH GROUND

Introduction

120. The TC erred in fact and law when identifying and specifying the common purpose of the JCE to murder[304] and when finding that the Appellant harboured the requisite *mens rea* for the JCE mode of liability.[305]

Argument

121. Firstly, the TC violated its obligation to "*specify the common criminal purpose in terms of both the criminal goal intended and its scope*".[306]

122. Throughout, the Prosecution alleged the existence of a common purpose to kill **all** able-bodied men **from Srebrenica**. In the Indictment,[307] the Opening Statement,[308] the Rule 98*bis* submissions[309] and its Final Brief,[310] the Prosecution submitted that **the** able-bodied men **from Srebrenica** were targeted and the only reasonable conclusion is that the Prosecution meant **all** able-bodied Bosnian Muslim men from Srebrenica. The expansion of the scope of the common plan – from the men in Potočari to the men in the column[311] - demonstrates namely that the JCE members targeted **all** the able-bodied men from Srebrenica depending on their knowledge concerning the whereabouts of these men. In addition, the Prosecution specifically asserts that the opportunistic killings of Bosnian Muslim men were "*the natural and foreseeable consequence of the Joint Criminal Enterprise to murder **all** the able-bodied Muslim men from Srebrenica*".[312] In addition, within the second count of the Indictment, the Prosecution alleges the existence of "*The Conspiracy and Joint Criminal Enterprise to Murder **all** the Able-bodied Muslim Men from Srebrenica*".[313]

[304] Judgment,para.1050.
[305] Judgment,para.1389,1392.
[306] Brđanin-AJ,para.430.
[307] Indictment, heading between paragraphs 26-27,para.28,29,38,39,40,41,42,43,44.
[308] T.383.
[309] T.21433.
[310] Prosecution-Final-Brief,para.460.
[311] Indictment,para.27-29.
[312] Indictment,para.31(emphasis supplied).
[313] Indictment, heading between paragraphs 35-36 (emphasis supplied).

123. However, as opposed to determining whether the evidence on the record supports a finding a common purpose to murder **all** the able-bodied Muslim men from Srebrenica existed, the TC found that "*[o]ver a period of a few days in July 1995, the Bosnian Serb Forces executed* ***several thousand Bosnian Muslim males*** *from in and around Srebrenica in a large scale, systematic operation.*"[314] This finding merely described the ensuing events but omits to specify the common purpose, as developed and intended by the JCE members prior to its execution, on the basis of the allegations in the Indictment. The sections following the TC's consideration of the common purpose,[315] also omit a description of the exact contours of the common purpose. However, in the section about the third category JCE, the TC notes that it is satisfied that certain opportunistic killings *"were foreseeable consequences of the plan to kill* ***all*** *the able-bodied Bosnian Muslim males from Srebrenica.*"[316] While this finding illustrates that the TC recognized the extent of the Prosecution's allegation, it can not substitute the TC's duty to identify and specify the common purpose as it is not made in the section weighing the evidence pertaining to the common purpose.

124. Secondly, while the TC found that "*[o]n the evening of 13 July 1995,* ***Nikolić*** *knew that the Bosnian Muslim able-bodied males from Srebrenica were to be brought from Bratunac to Zvornik to be killed*",[317] no reasonable TC could have found that the Appellant knew of a common purpose to murder **all** able-bodied men from **Srebrenica**.

125. In terms of the prisoners' geographical origin, it follows from the testimonies of both PW-168 and Momir Nikolić that the Appellant only knew that certain Bosnian Muslim prisoners were arriving from the direction of Bratunac. [REDACTED][318] whereas Momir Nikolić does not provide any details in this regard.[319] The Appellant thus did not know that these men came from the Srebrenica enclave. This conclusion is strengthened by the TC's findings that there is no evidence supporting a finding that the Appellant knew about the 20 March 1995 Drina Corps and that the Appellant was not involved in the forcible transfer operation in Srebrenica.[320] The Appellant thus considered the information provided to him without knowing of preceding events in

[314] Judgment,para.1050(emphasis supplied).
[315] Judgment,para.1051-1080.
[316] Judgment,para.1082(emphasis supplied).
[317] Judgment,para.1389.
[318] REDACTED;Nikolić-Notice,Ground-14.
[319] Judgment,para.1354;Nikolić-Notice,Ground-20.
[320] Judgment,para.1395.

the Srebrenica enclave. Moreover, considering that the conflict covered a large part of BiH in the summer of 1995, these prisoners could have originated from any pocket of conflict, in the Appellant's mind.

126. Also, as concerns the scope of the killing operation, the TC found that, on 13 July 1995, the Appellant knew at the most of a large number of victims but not that all able-bodied men from Srebrenica were targeted. [REDACTED][321] whereas Momir Nikolić omits any reference to a number of victims mentioned to the Appellant.[322] Importantly, the TC found that the Appellant did not know of the events in the Srebrenica enclave, such as the separation process in Potočari and the capture of men from the column.[323] The Appellant did thus not learn of crucial circumstances that could have provided him with additional knowledge of the common purpose of the JCE to murder.

127. A review of the TC's analysis of its findings in respect of the Appellant's responsibility for genocide confirms the conclusion that the Appellant did not know of the common purpose to murder **all** able-bodied men **from Srebrenica**. The TC found that, on 13 July 1995, the Appellant was not aware of key aspects of the killing operation.[324] According to the TC, the Appellant only knew about the arrival of a large number of prisoners from Bratunac to be executed after a significant number of murders had already been perpetrated.[325] Moreover, the TC found that the Appellant did not know of the events preceding the arrival of the prisoners and thus that "*he was not aware that this murderous enterprise went well **beyond** killing those who had fallen into VRS custody and was in fact an operation designed to maximise the number of victims.*"[326]

128. In addition, the TC's finding that, after meeting with Beara and Popović on the morning of 14 July 1995, the Appellant knew that *the executions were to be carried out in multiple locations in the Zvornik area and the victims would number in the hundreds to thousands*",[327] also does not support the conclusion that the Appellant knew of a common purpose to kill **all** able-bodied Bosnian Muslim males **from Srebrenica**. Whereas the Appellant knew that an unspecified but large number of

[321] REDACTED;Nikolić-Notice,Ground-14.
[322] Judgment,para.1354;Nikolić-Notice,Ground-20.
[323] Judgment,para.1403.
[324] Judgment,para.1403.
[325] Judgment,para.1402.
[326] Judgment,para.1403.
[327] Judgment,para.1404;Nikolić-Notice,Ground-23.

prisoners were arriving prior to the meeting, he leaves the meeting in the knowledge that the victims will number in the hundreds to thousands. Such a disparity could not have provided him with knowledge that **all** able-bodied Bosnian Muslim men from Srebrenica were targeted. In addition, the TC did not find that, after the meeting, the Appellant gained more knowledge of the geographical origin of the victims.

129. Moreover, the Appellant's limited involvement in the events also could not have provided him with knowledge of the common plan. The TC found that the Appellant: (i) was physically absent from all mass execution sites with the exception of Orahovac;[328] (ii) contributed to the JCE for 36 hours at the most, from the evening of 13 July 1995 until the early morning of 15 July, and that his contribution ended abruptly before the mass executions had been completed;[329] (iii) was not involved in the smaller scale executions in the aftermath of the mass executions;[330] and (iv) had no involvement in the reburial operation.[331]

130. Thirdly, no reasonable TC could have found that from the Appellant's "*steadfast and resolute approach to the task given to him in the murder operation, it is clear that he shared the intent of the common purpose.*"[332] In evident disregard of the well-established standard that "*a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence",*[333] the TC ignored the equally reasonable inference that the Appellant's approach to the task bestowed upon him demonstrates that he did not share the intent of the common purpose to kill **all** able-bodied Bosnian Muslim men **from Srebrenica** as he was used as a tool by the JCE members to perform specific tasks in blind dedication to the Security Service.

131. Indeed, as discussed *supra,* the TC's findings demonstrate that the Appellant played a role limited in time and extent in the murder operation. Had the Appellant truly harboured the intent to achieve the common purpose to kill **all** able-bodied Bosnian Muslim men **from Srebrenica,** Beara and Popović would have involved him to a far greater extent. Also, the Appellant would have for instance, continued to contribute to the murder operation on 15 and 16 July as Duty Operations Officer and he would not have left for a combat mission in September 1995 during the reburial operation.

[328] Judgment,para.1366-1373;Nikolić-Notice,Ground-19.
[329] Judgment,para.1369-1373.
[330] Judgment,para.1379-1380.
[331] Judgment,para.1384.
[332] Judgment,para.1392.
[333] Brđanin-AJ,para.429.

132. It is significant to note that the TC found, in the context of the Appellant's responsibility for genocide, that "*while Beara and Popović can properly be described as architects of this genocidal operation, Nikolić was brought in to carry out specific tasks assigned to him, in implementation of a monstrous plan, designed by others.*"[334] The TC also found that, besides the conclusion that the Appellant harboured genocidal intent, an equally reasonable conclusion is that "***Nikolić's*** *blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation.*"[335] Even though these findings also establish the equally reasonable inference that the Appellant carried out specific tasks and did not share the common purpose of the JCE to murder, the TC failed to assess them in this context.

Conclusion

133. The TC's combined error invalidates the Judgment and/or occasioned a miscarriage of justice as, in spite of his lack of the requisite *mens rea*, the Appellant was found to bear individual criminal responsibility on the basis of the JCE mode of liability and received an excessive and disproportionate sentence on this basis. Consequently, the Appellant respectfully requests the Appeals Chamber to quash his conviction for all Counts pursuant to the JCE mode of liability.

8TH GROUND

Introduction

134. The TC erred in fact when finding that the Appellant harboured the requisite *mens rea* for crimes against humanity.[336] No reasonable TC could have found that "***Nikolić's*** *acts of murder are clearly tied to the attack on Srebrenica and* ***Nikolić*** *knew that this was the case",*[337] considering: the Appellant's highly limited contextual knowledge covering at the most regular armed activities; his perception that exclusively prisoners affiliated with the ABiH were targeted; and his limited involvement in comparison to others.

[334] Judgment,para.1410.
[335] Judgment,para.1414.
[336] Judgment,para.1418-1419.
[337] Judgment,para.1418.

Argument

135. Firstly, the TC erred in finding that the Appellant's knowledge of the military attack against Srebrenica because of his Commander's involvement[338] is relevant to his *mens rea* for crimes against humanity.

136. The notions of "attack against a civilian population" and "armed conflict" are not identical "*because then crimes against humanity would, by definition, always take place in armed conflict*".[339] In addition, the TC found that the attack on Srebrenica also involved *"legitimate military aims"*.[340] Moreover, the TC concluded that Pandurević intended exclusively *"to achieve the military objective of defeating the ABiH 28th Division forces in both enclaves*".[341]

137. In addition, the TC found that the attack against the civilian population of Srebrenica encompassed four components[342] but that the Appellant only knew, in part, of the planned military assault on the enclaves, lacking knowledge of three out of four components. Moreover, the TC found that, as Chief of Security, the Appellant "*should have known*" about the 20 March 1995 Drina Corps Order,[343] clearly indicating the lack of evidence supporting such a finding. Moreover, the TC found that the Appellant did not contribute to the removal of the Bosnian Muslims from Srebrenica.[344]

138. Secondly, the TC erred when finding that the Appellant knew that the prisoners "*had come into the custody of the VRS as a result of the attack on the civilian enclave of Srebrenica*",[345] as it ignored several pieces of evidence demonstrating that the Appellant was unaware of the prisoners' geographical origin.

139. The TC refers to the functions of the Security Organ[346] but it failed to consider that the Appellant was exclusively responsible for security and counter-intelligence issues and not for intelligence affairs,[347] which significantly reduced his knowledge about the combat activities in Srebrenica as he focused on internal threats to the Zvornik

[338] Judgment,para.1418.
[339] Tadić-AJ,para.251.
[340] Judgment,para.774.
[341] Judgment,para.2000.
[342] Judgment,para.760.
[343] Judgment,para.1395.
[344] Judgment,para.1395.
[345] Judgment,para.1418.
[346] Judgment,fn.4526.
[347] Judgment,para.153-154;M.Nikolić,T.33216-T.33217.

Brigade. [REDACTED][348] [349]. Moreover, thereafter, Momir Nikolić did not inform the Appellant about the prisoners' origin[350] and the TC did not find that, during the meeting with Beara and Popović on 14 July 1995, the Appellant acquired this information.[351] Furthermore, the TC found that the Appellant did not know of the separation of men in Potočari,[352] the forcible transfer of the remainder of the population,[353] and the transport of the men from Potočari to Bratunac.[354]

140. Thirdly, when finding that the Appellant saw that the prisoners in Orahovac "*were not only soldiers, but also civilians and that no distinction or selection was made in terms of those to be executed*",[355] it failed to consider evidence indicating that the Appellant believed that only persons affiliated with the ABiH were targeted.

141. As indicated *supra*, the Appellant was neither physically present at nor cognizant of the events preceding the arrival of the prisoners[356] and he was merely informed of the arrival of "prisoners",[357] as opposed to another description of the victims such as "civilians" or "Bosnian Muslims". Also, even after meeting with Beara and Popović on 14 July 1995, the Appellant believed that prisoners had been brought in as Birčaković testified that the Appellant was angry "*because he was not consulted beforehand but was only ordered to find some accommodation*" for people coming in for exchange.[358] Thereafter, the Appellant spoke to Perić about the arrival of "*prisoners*".[359]

142. The events the Appellant witnessed at Orahovac did not alter his knowledge significantly. The Appellant did not witness women but only men. Even though some men supported civilian attire, this was common-place in BiH's non-international conflict. The difference in the prisoners' ages reflects the unfortunate reality of a civil war. Moreover, the Appellant's state of knowledge presupposes that some type of selection had already been carried out as he believed that the prisoners had been marked for exchange. Even after these events, in response to a question from Lazar

[348] [REDACTED]
[349] [REDACTED]
[350] Judgment,para.1354;M.Nikolić,T.33211-33212;Nikolić-Notice,Ground-20.
[351] Judgment,para.1404;Nikolić-Notice,Ground-23.
[352] Judgment,para.1403.
[353] Judgment,para.1395.
[354] Judgment,para.1403.
[355] Judgment,para.1418.
[356] Judgment,1395,1403.
[357] [REDACTED]
[358] Judgment,fn.4400;T.11120.
[359] S.Perić,T.11375-T.11376.

Ristić about the prisoners, the Appellant replied that "*he had been told just to place them in the schoolhouse pending an exchange in Batkovici*".[360] Further confirmation concerning the Appellant's perception comes from Tabeau who found that up to 73% of the 2005 List of Missing matches with ABiH military records.[361]

143. Finally, the TC erred when failing to take account of the limited involvement of the Accused in comparison with others. Miletić and Gvero were high-ranking officers in the VRS Main Staff who were aware of, or even drew up, Directive 7[362] and they had a full overview of the events in the Srebrenica enclave.[363] Popović and Beara, a Drina Corps and Main Staff officer respectively, were closely involved in the events in Srebrenica, Potočari and Bratunac and were the architects of the killing operation in the Zvornik area.[364] Even though Pandurević was close to the events from 6 to 12 July 1995 in Srebrenica, Potočari and Bratunac, interacting with high-ranking VRS officers such as Mladić,[365] the TC found that Pandurević was involved solely in legitimate military assignments.[366] Borovčanin was also physically close to the events in Srebrenica, Potočari and Bratunac.[367]

144. In comparison, as a low-ranking officer,[368] the Appellant had no knowledge of Directive 7 and he was not physically present in the area of Srebrenica during the relevant time-period.[369] Thereafter, he only acquired limited information about the impending arrival of certain prisoners from Bratunac, without a specification as to their origin.[370] He was only physically present at Orahovac and did not witness first-hand the full scale and nature of the operation.[371] The Appellant subsequently only carried out specific tasks[372] until the very early morning of 15 July 1995[373] without escalating his contribution[374] or prolonging his involvement.[375]

[360] L.Ristić,T.10088-T.10089.
[361] 3D00457.
[362] Judgment,para.1719,1824.
[363] Judgment,para.1719,1824.
[364] Judgment,para.1166,1299-1300.
[365] Judgment,para.1846-1855.
[366] Judgment,para.2000.
[367] Judgment,para.1436-1453,1483,1587.
[368] Judgment,para.1412.
[369] Judgment,para.1345,1395.
[370] Judgment,para.1345;Nikolić-Notice,Ground-14;Judgment,para.1354;Nikolić-Notice,Ground-20.
[371] Judgment,para.1361-1373;Nikolić-Notice,Ground-19.
[372] Judgment,para.1410,1412.
[373] Judgment,para.1367-1373;Nikolić-Notice,Ground-18.
[374] Judgment,para.1367-1372.
[375] Judgment,para.1379-1381.

Conclusion

145. The TC's error occasioned a miscarriage of justice as the Appellant was convicted for crimes against humanity despite his lack of the relevant *mens rea,* leading to an unwarrantedly harsh sentence. The Appellant, therefore, respectfully requests the Appeals Chamber to quash his conviction for all crimes against humanity.

9TH GROUND

Introduction

146. Should the Appeals Chamber find that the TC did not err in law in finding that the Appellant possessed the *mens rea* for crimes against humanity,[376] it is the submission of the Appellant that the TC erred in law and fact when finding that the Appellant harboured the requisite *mens rea* for persecutions.

Argument

147. Firstly, the TC erred in law when failing to require that the Appellant consciously discriminated against the Bosnian Muslims, as mandated by law.

148. The TC found that "***Nikolić*** *participated in the killing operation with the specific intent to discriminate on political, racial or religious grounds*"[377] although the jurisprudence specifically requires intent to *consciously* discriminate on political, racial or religious grounds: "*[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 against the victim or victims* (dolus specialis)".[378] The TC's factual errors, demonstrated *infra,* establish that, applying the correct legal standard, no reasonable TC could have found that the Appellant consciously discriminated against the Bosnian Muslims.

149. Secondly, the TC erred in fact in finding that "***Nikolić's*** *involvement in the organisation and coordination of the massive scale murder of single ethnic group –*

[376] Nikolić-Notice,Ground-8.
[377] Judgment,para.1426.
[378] Lukić-TJ,para.994,Kvočka-AJ,para.32;Milutinović-TJ,para.179;Kupreškić-TJ,para.615(e);Krnojelac-TJ,para.434.

the Bosnian Muslims – shows his discriminatory intent"[379] as it failed to consider that the Appellant only learned of the arrival of prisoners he perceived of as ABiH affiliates in the context of the only armed conflict he knew.

150. As established *supra*, the Appellant exclusively received information concerning the arrival or "prisoners", as opposed to "civilians" or "Bosnian Muslims" for example, and consistently referred to these persons as "persons coming in for exchange" or "prisoners".[380] The fact that a single ethnic group was concerned is irrelevant as there were no other conflicts than the conflict between the VRS and the ABiH in the Eastern BiH region. The Appellant thus did not consciously single out the Bosnian Muslims.

151. Thirdly, the TC erred when finding that the Appellant's "*active participation in the detention, killing and reburial, the circumstances and manner of which plainly display discriminatory intent …, is further proof of* ***Nikolić's*** *intent*"[381] as the general context may not be employed for establishing discriminatory intent and the Appellant's limited involvement establishes, in any event, that he did not possess such intent.

152. The Appeals Chamber found that the intent for persecutions "*may not be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity*."[382] However, the TC did exactly this when referring to "*the massive scale of the murder operation aimed at only one ethnic group, the Bosnian Muslims, the systematic manner in which it was carried out, and the behaviour and general attitude of the perpetrators in the murder*" as evidence of the discriminatory intent of the Bosnian Serbs[383] and inferring the Appellant's discriminatory intent on this basis.[384].

153. At any rate, when considering the "*general conduct of the Accused seen in its entirety*",[385] the appropriate basis for such inferences, no reasonable TC could have drawn this inference. The TC omitted to consider the Appellant's belated entry and limited knowledge of the operation. As described *supra*, the Appellant was unaware of the circumstances preceding the arrival of the prisoners in the Zvornik area, including the crimes in Srebrenica, Potočari, Bratunac and Kravica.[386] Thereafter, the Appellant learned of the arrival and impending execution of certain prisoners of unknown

[379] Judgment,para.1426.
[380] Nikolić-Notice,Ground-8.
[381] Judgment,para.1426.
[382] Kvočka-AJ,para.460.
[383] Judgment,para.991.
[384] Judgment,fn.4538.
[385] Kordić-Čerkez-AJ,para.460.
[386] Nikolić-Notice,Ground-8.

geographical origin coming in from the direction of Bratunac.[387] The Appellant was thus faced with a *fait accompli* when he was informed of the arrival of the prisoners and he did not exercise a conscious decision, selecting the Bosnian Muslims, to direct his acts against them on the basis of their ethnicity or religion. Thereafter, the contribution of the Appellant was limited, appearing physically at Orahovac only[388] and terminating his contribution on the morning of 15 July 1995.[389]

154. Moreover, when describing the discriminatory characteristics of the murder operation, the TC referred to the execution sites from which the Appellant was absent at the time of the executions,[390] except for Orahovac.[391] The TC refers in this regard to incidents in Petkovci on two occasions, Kravica, and Luke School. In relation to Orahovac, the TC only mentions the testimony of Ahmo Hasić about a Bosnian Serb soldier mentioning committing genocide but the TC neither found that the Appellant witnessed this specific incident nor that he otherwise acquired knowledge thereof.[392]

155. Finally, the TC erred by failing to consider the equally reasonable inference that the Appellant, during his limited involvement, was not led by the prisoners' ethnic or religious background but by his dedication to the Security Service.

156. These circumstances[393] led the TC to infer that, as opposed to entertaining genocidal intent, "***Nikolić's*** *blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation*".[394] This inference was equally reasonable in respect of the Appellant's *mens rea* for persecutions, considering that both crimes relate to the exact same factual basis, i.e. the Appellant's limited participation in the murder operation. This is all the more so considering that, in law, the *mens rea* standards for genocide and persecutions are intimately linked: "*[f]rom the viewpoint of* mens rea*, genocide is an extreme and most inhuman form of persecution*".[395]

[387] Nikolić-Notice,Ground-14,Ground-20,Ground-23.
[388] Nikolić-Notice,Ground-19.
[389] Judgment,para.1367-1380;Nikolić-Notice,Ground-1,Ground-18.
[390] Judgment,fn.3278.
[391] Nikolić-Notice,Ground-19.
[392] Judgment,para.1361-1365.
[393] Judgment,para.1410,1412,2173.
[394] Judgment,para.1414.
[395] Kupreškić-TJ,para.636.

Conclusion

157. The TC's error invalidates the Judgment and/or occasioned a miscarriage of justice as the Appellant was convicted for the crime of persecutions despite the absence of intent to discriminate consciously against the Bosnian Muslims on his part, leading to an excessive sentence unreflective of the Appellant's responsibility. The Appellant thus respectfully requests the Appeals Chamber to quash his conviction for persecutions as a crime against humanity and lower his sentence accordingly.

10TH GROUND

158. [REDACTED]
159. [REDACTED] [396] [397]
160. [REDACTED] [398]
161. [REDACTED] [399]
162. [REDACTED][400]
163. [REDACTED][401]
164. [REDACTED][402] [403] [404]
165. [REDACTED]
166. [REDACTED][405] [406] [407]
167. [REDACTED][408]
168. [REDACTED][409] [410]
169. [REDACTED][411] [412]

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11TH GROUND

170. [REDACTED]

12TH GROUND

171. [REDACTED]

13TH GROUND

172. [REDACTED] [413] [414]

173. [REDACTED] [415]

174. [REDACTED] [416] [417] [418] [419] [420] [421]

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184. [REDACTED] [447]

185. [REDACTED] *[448]*

14TH GROUND

186. [REDACTED] [449] [450]

187. [REDACTED] [451] [452] [453]

188. [REDACTED] [454] [455] *[456]* *[457]*

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191. [REDACTED] [460] [461]

192. [REDACTED] [462] *[463]* [464] [465] [466]

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213. [REDACTED] [529] [530] [531] [532] [533]

214. [REDACTED] [534] [535] [536] [537] [538]

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215. [REDACTED] [539]

SUB-GROUND 14.1

216. [REDACTED] [540]
217. [REDACTED] [541] [542] [543]
218. [REDACTED] [544]
219. [REDACTED] [545] [546] [547]
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222. [REDACTED] [551] [552]
223. [REDACTED] [553] [554] [555]
224. [REDACTED]

SUB-GROUND 14.2

225. [REDACTED] [556]
226. [REDACTED]
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228. [REDACTED] [557] [558] [559]
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230. [REDACTED] [566]

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233. [REDACTED] [569] [570] [571] [572] [573] [574] [575]

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238. [REDACTED] [579] [580] [581]

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241. [REDACTED]

SUB-GROUND 14.3

242. [REDACTED] [584]

243. [REDACTED] [585] [586] [587] [588]

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250. [REDACTED] [614] [615] [616]

251. [REDACTED] [617]

15TH GROUND

252. [REDACTED] [618] [619]

253. [REDACTED] [620]

254. [REDACTED] [621] [622] [623] [624] [625] [626]

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[589] [REDACTED].
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255. [REDACTED] [627] [628] [629]

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261. [REDACTED] [642]

262. [REDACTED]

16TH GROUND

Introduction

263. The TC committed a combined error of fact and law when finding that "*how exactly the instruction was received is a peripheral issue*".[643] Due to the importance of Aćimović's testimony, as the only witness implicating the Appellant in the crimes in Roćević/Kozluk in an attempt to minimise his own responsibility,[644] this issue directly establishes Aćimović's complete lack of credibility and is thus anything but peripheral.

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[642] [REDACTED].
[643] Judgment,para.509.
[644] Nikolić-Notice,Ground-18.

Argument

264. Firstly, and most importantly, even though the TC specifically found that "*the inconsistencies uncovered between parts of Aćimović's testimony and other evidence before the Trial Chamber in most instances arise from his attempt to minimise his own responsibility*",[645] it failed to consider that Aćimović's claims about the *coded* telegrams obviously form part and parcel of these attempts. Evidently, by claiming that the telegrams were *coded*, Aćimović hoped that his lies would remain concealed. Had these matters been considered, no reasonable TC could have detached Aćimović's claims in this regard from his attempts to minimise his responsibility.

265. In respect of the contradictions between Aćimović's "*successive statements*",[646] the TC entirely failed to consider that Aćimović did not even mention the receipt of the coded telegrams during his first interview with the Prosecution.[647] Aćimović unconvincingly claimed a lack of memory,[648] and he was thus clearly unable to explain this inconsistency on "*cross-examination*".[649] Moreover, the TC noted "*the conflicting testimony regarding the mode ... of delivery of the telegram*",[650] which is nothing short of an admission that there are severe contradictions between Aćimović's "*testimony and other evidence*".[651] Indeed, Cvijetinović, who was the 2nd Battalion Communicator on duty during the night of 14-15 July 1995,[652] testified that the 2nd Battalion did not possess the capacity to code/decode telegrams and that no coded telegrams were received that night.[653] Stevanović, a witness called by the Prosecution in rebuttal, was also adamant that, in the night of 14-15 July 1995, no codes were used by the 2nd Battalion and that no coded telegrams were received.[654] Furthermore, the TC failed to consider that a telegram is an official message communicated orally and noted down by hand by the sender and the receiver[655] but that Aćimović neither knew who signed the telegram nor to whom his reply telegram was addressed.[656] In addition,

[645] Judgment,para.506.
[646] Nahimana-AJ,para.194.
[647] Aćimović,T.13079-T.13080.
[648] Aćimović,T.13082-T.13083,T.13086-T.13087.
[649] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[650] Judgment,para.509.
[651] Nahimana-AJ,para.194.
[652] Cvijetinović,T.25826-T.25827.
[653] Cvijetinović,T.25835-T.25838,T.25855,T.25891.
[654] Stevanović,T.32848-T.32849,T.32856.
[655] Aćimović,T.13124-T.13126;Cvijetinović,T.25832-T.25834.
[656] Aćimović,T.12946-T.12947,T.13011-T.13012.

the TC failed to consider that secure lines of communication existed, obviating the need for codes.[657] These testimonies thus clearly reveal that Aćimović's lies were designed to mask his involvement.

266. Secondly, the TC only decided that the manner of receipt is peripheral during deliberations after the parties had "*completed their presentation of the case*".[658] In light of the enormous importance of Aćimović's testimony and his credibility, no reasonable TC could have found that this matter is peripheral without exercising its discretionary powers to elucidate this issue during the proceedings.

267. The Prosecution's case was clear throughout. In its Pre-Trial Brief, the Prosecution argued that the 2nd Battalion received two *coded* telegrams.[659] The Prosecution extensively questioned Aćimović and Mitar Lazarević on these *coded* telegrams.[660] Thereafter, the Prosecution cross-examined several Defence witnesses in relation to the *coded* telegrams.[661] The Prosecution also presented rebuttal evidence concerning the *coded* telegrams.[662] In the Prosecution's Final Trial Brief, an entire section was devoted to *coded* telegrams.[663] Finally, during Closing Arguments, the Prosecution reiterated its position.[664] Nevertheless, the TC did not, for instance, "*at any stage put any question to*",[665] witnesses concerning the manner of receipt of the order. This clearly violates the right of the Appellant to "*be informed promptly and in detail of the nature and cause of the charges against him*".[666]

268. Thirdly, when permitting the Prosecution to present rebuttal evidence, the TC deemed the issue of the coded telegrams "*significant*". No reasonable TC could have subsequently found that the manner of receipt is peripheral.

269. The Prosecution called Stevanović[667] in relation to the evidence provided by Cvijetinović[668] concerning the 2nd Battalion's inability to code/decode telegrams. The TC ruled that rebuttal evidence "*must relate to a significant issue arising directly out*

[657] [REDACTED];Aćimović,T.13071-T.13072,T.13075;M.Lazarević,T.13394-T.13395.
[658] Rule-87.
[659] Prosecution-Pre-Trial-Brief,para.83;337.
[660] Aćimović,T.12944-T.12949;M.Lazarević,T.13373-T.13377.
[661] Cvijetinović,T.25853-T.25860;Radić,T.26154-T.26159;Tomić,T.26187-T.26188.
[662] Prosecution-Motion-2,para.22-32.
[663] Prosecution-Final-Brief,para.2738-2743.
[664] T.34168-T.34169.
[665] Rule85(B).
[666] Statute,Art.21(4)(a).
[667] Prosecution-Motion-2,para.22-29;Defence-Response-1,para.57-98;Prosecution-Reply-1,para.4-10;TC-Decision-10,para.105-110;Defence-Motion-5,para.9-30;Prosecution-Response-3,para.4-12;TC-Decision,T.32803-T.32804.
[668] Defence-Motion-6,Enclosure-1.

of defence evidence which could not reasonably have been anticipated" and that "*[e]vidence of peripheral or background issues will be excluded*".[669] In addition, the TC specifically held that "*Stevanović's proposed evidence does have probative value for important issues in the case*".[670] This contradictory stance clearly exemplifies its error.

Conclusion

270. The TC's error occasioned a miscarriage of justice and/or invalidates the Judgment as, had these matters been properly considered, no reasonable TC could have found, in conjunction with the TC's related errors,[671] that Aćimović's testimony about the receipt of the coded telegrams is truthful. In turn, the TC's finding that the Appellant called Aćimović could not have followed.[672] If Aćimović did not receive the coded telegrams, the Appellant could not have exerted pressure on Aćimović to carry out the orders. Consequently, bearing in mind that the Appellant was not involved in the crimes in Roćević/Kozluk in any other manner,[673] the extent of the Appellant's individual criminal responsibility must be reassessed, either on the basis of his membership in the JCE or another form of liability.[674] In any event, a significant reduction of the Appellant's sentence is warranted as he was not involved in one of the most significant crimes related to Srebrenica.

17TH GROUND

271. Withdrawn.

18TH GROUND

272. The TC committed two mixed errors of fact and law by finding, on the basis of Aćimović's incredible and uncorroborated testimony shaped to cover up his hands-on involvement in the crimes in Roćević/Kozluk, that the 2nd Battalion received two

[669] TC-Decision-10,para.95(emphasis supplied)
[670] TC-Decision-10,para.105(emphasis supplied).
[671] Nikolić-Notice,Ground-18.
[672] Judgment,para.510.
[673] Judgment,para.1370.
[674] Nikolić-Notice,Ground-7.

telegrams/orders to assemble a platoon to execute prisoners in Roćević School[675] and that the Appellant pressured Aćimović over the phone to carry out this order.[676]

273. The TC's appraisal of Aćimović's credibility must be dismissed as "*wholly erroneous"* as the TC failed "*to consider several matters going directly to the credibility of*"[677] Aćimović in respect of these claims. Had Aćimović's credibility been properly assessed pursuant to the relevant criteria[678] and the totality of the evidence on the record, no reasonable TC could have adopted these findings.[679]

INTRODUCTION

274. Firstly, in respect of Aćimović's "*involvement in the events in question"* and his "*motivation to lie*",[680] the TC specifically found that Aćimović attempted to minimise his involvement in the crimes but it failed to consider this factor in relation to Aćimović's account about the telegrams/orders and the conversations with the Appellant.

275. When assessing Aćimović's claims in this regard, no reasonable TC could have failed to consider that these untruths are quintessential examples of Aćimović's obvious strategy to save his own skin. Aćimović concocted attempts to reject superior orders to commit crimes and falsely implicated others, believing that this would justify his presence at Roćević School and reduce the risk of criminal prosecution for his involvement in the crimes.

276. According to the TC, "*Aćimović sought to downplay his own involvement in the events at Ročević*" and "*the inconsistencies uncovered between parts of Aćimović's testimony and other evidence before the Trial Chamber in most instances arise from his attempt to minimise his own responsibility*".[681] Specifically, Aćimović was found to have been untruthful about his attempts to recruit volunteers for the executions[682] as well as drivers to transport the prisoners to the execution site.[683]

[675] Judgment,para.509;1367.
[676] Judgment,para.510;1368.
[677] Kupreškić-AJ,para.223-225.
[678] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[679] Also: Nikolić-Notice,Ground-15-16.
[680] Nahimana-AJ,para.194.
[681] Judgment,para.506.
[682] Judgment,para.511,fn.1874.
[683] Judgment,para.513.

277. However, the TC failed to consider additional aspects of Aćimović's involvement in the crimes. The evidence reveals that Aćimović: (i) obtained ammunition for the executions;[684] (ii) was involved in the loading of prisoners onto trucks at Roćević School;[685] (iii) assisted in selecting the execution location;[686] and (iv) [REDACTED].[687]

278. Also, the TC failed to take into account that Aćimović's claims to have repeatedly attempted to contact his superiors at the Zvornik Brigade in relation to the events at Roćević/Kozluk constitutes another aspect of Aćimović's strategy to conceal his criminal activities.[688] Aćimović never attempted to do so, in light of: (i) the absence of relevant entries in the Duty Operations Officer Note Book concerning Aćimović's messages and calls;[689] (ii) the established possibility to reach Obrenović wherever he was deployed on 14-15 July through the Zvornik Brigade Operations Duty Officer;[690] (iii) the evidence establishing Obrenović's presence at the Zvornik Brigade on several occasions from 14-15 July;[691] and (iv) the presence of Obrenović and Pandurević at the Zvornik Brigade Command at noon on 15 July 1995,[692] at virtually the exact same time of Aćimović's final attempt to reach his superiors.[693]

279. In addition, even though many other elements were ignored in this respect, the TC specifically noted "*the conflicting testimony regarding the mode and timing of delivery of the telegram, as well as the number of telegrams received*".[694] In conjunction with the numerous other contradictions identified *infra*, these testimonies heavily compounded the need for the TC to assess Aćimović's motivation to lie in relation to the alleged telegrams and the conversations with the Appellant. Furthermore, the TC failed to consider in this regard that a telegram is an official message communicated orally and noted down by hand by the sender and the receiver[695] but that Aćimović neither knew who signed the telegram nor to whom his

[684] V.Ivanović,T.18176-T.18177,[REDACTED]
[685] V.Ivanović,T.18177-T.18178;[REDACTED]
[686] Jović,T.18058-T.18060,[REDACTED];Aćimović,T.12965-T.12966,[REDACTED].
[687] [REDACTED].
[688] Aćimović,T.12937-T.12940,T.12943,T.12956,-T.12957,T.12989-T.12990.
[689] P377,p.126-144.
[690] P377,p.138.
[691] N.Stojanović,3D511,p.34,35,40,48,49;Z.Jovanović,T.22420-T.22423;M.Gavrić,T.26470-T.26480;[REDACTED];S.Milošević,T.33976.
[692] P2853,p.105;[REDACTED];[REDACTED].
[693] Aćimović,T.12989-T.12990.
[694] Judgment,para.509;Nikolić-Notice,Ground-16.
[695] Aćimović,T.13124-T.13126;Cvijetinović,T.25832-T.25834.

reply telegram was addressed.[696] Undoubtedly, Aćimović hoped to conceal his lies by referring to unverifiable, coded telegrams despite the existence of secure lines of communication obviating the need for codes.[697]

280. Moreover, Aćimović's vitiated account about the telegrams/orders is inextricably tied to his alleged phone conversations with the Appellant as Aćimović claimed that the Appellant specifically called him to execute the order contained in the *telegrams.* This implies that, if Aćimović did not receive the telegrams/orders, his conversations with the Appellant also did not take place as there would have been no reason for the Appellant to contact Aćimović. Clearly, Aćimović's account of his conversations with the Appellant forms part of his inventions concerning the telegrams/orders.

281. Secondly, as concerns Aćimović's credibility concerning the two coded telegrams and the phone conversations with the Appellant, the TC entirely overlooked "*contradictions and discrepancies in … successive statements*" [698] made by Aćimović as well as his nebulous "*responses during cross-examination*" in this respect.[699]

282. During his first interview with the Prosecution, Aćimović did not even mention the receipt of the coded telegrams[700] or the ensuing conversations with the Appellant.[701] Aćimović was, moreover, unable to explain these discrepancies on cross-examination. When it was suggested to him that he surely would have remembered events of such importance, Aćimović nebulously replied that he could not recall how much he exactly remembered at the time.[702] Moreover, when asked whether he had decided to provide this information before his second interview or whether he suddenly remembered these events when prompted by the Prosecution, Aćimović was once more evasive: "*I really can't remember. I think that I remembered at that moment because of the question*".[703] Moreover, Aćimović testified that, during his proofing session with the Prosecution three days before his testimony, he provided no less than ten pieces of information to the Prosecution that he had not mentioned during previous interviews.[704] The modifications to Aćimović's story did not end here as Aćimović admitted to having mentioned another four pieces of information for the first time

[696] Aćimović,T.12946-T.12947,T.13011-T.13012.
[697] [REDACTED];Aćimović,T.13071-T.13072,T.13075;M.Lazarević,T.13394-T.13395.
[698] Nahimana-AJ,para.194.
[699] Nahimana-AJ,para.194;Nchamihigo,AJ,para.47.
[700] Aćimović,T.13079-T.13080.
[701] Aćimović,T.13080.
[702] Aćimović,T.13082-T.13083.
[703] Aćimović,T.13086-T.13087.
[704] [REDACTED].

during his testimony.[705] Moreover, Aćimović clearly displayed a "*grudge*"[706] against the Appellant by snapping at his Counsel: "*I would advise you to consult with your client, the person you are representing, and he will give you precise information about all this*".[707]

283. No reasonable TC could have ignored these matters as Aćimović's continuous modifications of his evidence, combined with the absence of explanation, demonstrate that his miraculous recovery of memory concerning the two coded telegrams and the conversations with the Appellant was motivated by his attempts to blame others. Unquestionably, such events are not easily forgotten and Aćimović's conduct establishes that he was continuously moulding his story to protect himself.

284. Thirdly, despite its legal obligation, the TC did not assess Mitar Lazarević's "*motivation to lie*"[708] and it did not "*explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused*".[709]

285. [REDACTED][710] [711] [712] Even though the TC disregarded numerous other inconsistencies between Aćimović and Mitar Lazarević as detailed *infra*, it specifically found that, whereas Aćimović claimed to have discussed *two* coded telegrams with Vujo Lazarević and Mitar Lazarević and to have sent *two* replies, Mitar Lazarević testified that there was only *one* telegram and *one* reply.[713]

286. Despite Mitar Lazarević's attempt to protect his Commander, there is thus a critical inconsistency in their stories, which, in conjunction with other inconsistencies indentified *infra*, further heightened the need for the TC to assess Mitar Lazarević's ulterior motives. Had these matters been properly assessed, no reasonable TC could have found that Mitar Lazarević's evidence corroborates Aćimović.[714]

[705] Aćimović,T.13104-T.13108.
[706] Nchamihigo-AJ,para.47.
[707] Aćimović,T.13129.
[708] Nahimana-AJ,para.194.
[709] Krajišnik-AJ,para.146.
[710] [REDACTED]
[711] [REDACTED]
[712] [REDACTED]
[713] Judgment,para.508
[714] Judgment,para.509.

SUB-GROUND 18.1

287. In relation to the "*plausibility and clarity*"[715] of Aćimović's testimony as well as the "*contradictions or inconsistencies*"[716] between his testimony and other evidence, the TC failed "*to consider several matters going directly to the credibility of*"[717] Aćimović in respect of his specific claims about the two coded telegrams. Had these elements been properly considered in light of Aćimović's distortions of the truth, no reasonable TC could have found that Aćimović received two telegrams/orders to dispatch soldiers to execute prisoners at Roćević School in the night of 14-15 July 1995.

288. Firstly, the TC failed to consider numerous wholesale denials of the existence of the telegrams/orders. The TC noted "*the conflicting testimony regarding the mode and timing of delivery of the telegram, as well as the number of telegrams received*"[718] but, in the corresponding footnote, the TC enumerates the evidence of several witnesses who were unaware of the telegrams' *existence*.[719]

289. Cvijetinović was never told about the existence of the telegrams requesting 2nd Battalion members to participate in executions,[720] even though Aćimović said 2nd Battalion Members decoded them[721] and Mitar Lazarević specifically claimed that either Pisić, Ilić, Stevanović or Cvijetinović decoded the only telegram he was aware of.[722] Radić, the Commander of the 3rd Company, and Tomić, Deputy Commander of the 3rd Company, were also never informed about the existence of the telegrams,[723] directly contradicting Aćimović's claim that he discussed them with his (Deputy) Company Commanders.[724] Jović, Aćimović's driver who exposed several of his lies,[725] also never heard of the existence of the telegrams.[726] Stevanović was also unaware of the existence of such telegrams,[727] further contradicting Aćimović's claim that 2nd Battalion members decoded the telegrams.[728] [REDACTED][729]

[715] Nahimana-AJ,para.194.
[716] Nahimana-AJ,para.194.
[717] Kupreškić-AJ,para.223-225.
[718] Judgment,para.509.
[719] Judgment,fn.1860.
[720] Cvijetinović;T.25836.
[721] Aćimović,T.12945-T.12946,T.13020-T.13021.
[722] M.Lazarević,T.13373-T.13376,T.13399-T.13400.
[723] Radić;3D00477,p.2;P.Tomić,T.26181.
[724] Aćimović,T.12948-T.12949.
[725] Judgment,fn.1874,para.513.
[726] Jović,T.18086.
[727] Stevanović,T.32848-T.32849.
[728] Aćimović,T.12945-T.12946,T.13020-T.13021.

290. These testimonies were thus not limited to the *"mode and timing of delivery of the telegram"* or "*the number of telegrams received"* but concerned the *inexistence* of the telegrams/orders, directly contradicting Aćimović's assertions in this regard.

291. Secondly, the TC strikingly found that Mitar Lazarević contradicted Aćimović on the number of telegrams received and the number of telegrams sent in reply[730] but it completely failed to consider numerous other glaring inconsistencies between these accomplices' evidence. Had these matters been properly assessed, no reasonable TC could have concluded that Lazarević's testimony corroborates Aćimović.[731]

292. Aćimović said that he would have learned of the presence of the prisoners in the evening of 14 July 1995 through the President of the Roćević Local Commune and the local priest,[732] whereas it was Mitar Lazarević's testimony that Aćimović explained the events at Roćević School to those present in the 2nd Battalion Command already in the afternoon of 14 July 1995.[733] Mitar Lazarević asserted that all those present in the 2nd Battalion read the only telegram that arrived[734] but Aćimović claimed to have discussed both telegrams only with Vujo Lazarević[735] and Mitar Lazarević in the Command.[736] Clearly, Mitar Lazarević never mentioned discussing two coded telegrams with Vujo Lazarević and Aćimović.

293. Also, Aćimović averred that, after the second telegram was received, he consulted the (Deputy) Company Commanders in the field via a secure line[737] but Mitar Lazarević completely contradicted him on this point, saying that the Company Commanders were at the Command to discuss the telegram.[738] This enormous contradiction effectively demonstrates the complete collision between the two. What is more, the evidence on the record entirely invalidates both their claims. Radić decidedly testified that he did not communicate with the 2nd Battalion on 15 July 1995 and Tomić vowed that he neither knew of the telegram nor did he inform Radić about it.[739]

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[729] [REDACTED]
[730] Judgment,para.508-509.
[731] Judgment,para.509.
[732] Aćimović,T.12934-T.12935;T.13006-T.13007,T.13068.
[733] M.Lazarević,T.13366-T.13373.
[734] M.Lazarević,T.13387,T.13405.
[735] Nikolić-Notice,Ground-15.
[736] Aćimović,T.12943,T.12948-T.12949.
[737] Aćimović,T.12948-T.12949.
[738] M.Lazarević,T.13375-T.13376,T.13405-T.13406.
[739] Radić,T.26150-T.26151;Tomić,T.26181.

294. Thirdly, the TC blatantly failed to consider that 2nd Battalion members did not partake in the executions in Kozluk, belying Aćimović's claim that executioners were required from the 2nd Battalion through the two coded telegrams.

295. Jović testified that the Military Police who guarded the prisoners at Roćević School accompanied the prisoners in his truck to the execution site and unloaded them.[740] The TC found that the MPs guarding the prisoners were from the Bratunac Brigade and the Zvornik Brigade.[741] Jović did not see any members of the 2nd Battalion at the execution site.[742] [REDACTED][743] [744] [745] [746] [747] [748]

296. No reasonable TC could thus have found that "*[t]he essence of the evidence* [of Aćimović] *is further corroborated by the fact that soldiers from the 2nd Battalion were in fact sent to Ročević School, and the prisoners there were executed*".[749] The executioners had already been provided for and came from other VRS units. It appears on the basis of the totality of the evidence that, as opposed to executioners, logistical support was required of the 2nd Battalion and Aćimović provided exactly this. After meeting Popović on 15 July 1995, Aćimović assisted, *inter alia,* in selecting the execution location,[750] securing ammunition[751] and procuring transport facilities.[752]

297. Finally, the TC failed to consider the numerous dissimilarities between the receipt of the telegrams at the 2nd Battalion and the remaining Battalions, further establishing the absurdity of Aćimović's assertions in this respect.

298. The TC found that, on the morning of 14 July 1995, a telegram was received by the 1st Battalion to prepare the School in Kula for the arrival of 100 to 200 prisoners and that the Appellant provided Slavko Perić with similar information over the phone.[753] The evidence on the record indicates that certain other Battalions were also informed on 14 July 1995 about the impending arrival or prisoners and not during the night of 14-15 July as would have been the case in Roćević. The 4th Battalion was informed of

[740] Jović,T.18059-T.18060.
[741] Judgment,para.502,512,515.
[742] Jović,T.18064.
[743] [REDACTED]
[744] [REDACTED]
[745] [REDACTED]
[746] [REDACTED]
[747] [REDACTED]
[748] [REDACTED]
[749] Judgment,para.509,referring to para.517,518-520.
[750] Jović,T.18058-T.18060,[REDACTED];Aćimović,T.12965-T.12966,[REDACTED].
[751] V.Ivanović,T.18176-T.18177,[REDACTED].
[752] Jović,T.18059-T.18060,V.Ivanović,T.18174,T.18177-T.18178.
[753] Judgment,para.527.

problems with prisoners at Grbavci School and requested to send additional men for security duties on 14 July 1995.[754] The 6th Battalion Command was informed between 10h00 and 12h00 on 14 July 1995 about the arrival of prisoners to Petkovci School.[755] Other Battalions were thus informed earlier of the arrival of prisoners and it is highly probable that the 2nd Battalion was too, contrary to Aćimović's claims. In any event, Mitar Lazarević testified that Aćimović already learned about the presence of prisoners on the afternoon of 14 July 1995,[756] and not on the evening of 14 July 1995.[757]

299. Moreover, whereas the TC noted that killings were not mentioned in the communications to the 1st Battalion, it failed to attach sufficient weight to this enormous dissimilarity. The TC also entirely disregarded that the communications to the 4th and 6th Battalion were devoid of references to killings as well.[758] Considering Aćimović's inclination to distort the truth, his claims that only the 2nd Battalion received an explicit illegal order via coded telegrams evidently forms part of his strategy to minimise his own involvement and to implicate others.

300. Had these massive disparities been taken considered, no reasonable TC could have found that the process concerning the guarding of the prisoners in Kula School provides some further corroboration for the essence of Aćimović's testimony.[759] Quite to the contrary, the differences in timing and, most importantly, the absence of references to killings set them entirely apart from Aćimović's claims and additionally indicate that Aćimović fabricated his evidence.

SUB-GROUND 18.2

301. In relation to the "*plausibility and clarity*"[760] of Aćimović's testimony as well as the "*contradictions or inconsistencies*"[761] between Aćimović's testimony and other evidence, the TC failed "*to consider several matters going directly to the credibility of*"[762] Aćimović in respect of his specific claims about the phone conversations with

[754] L.Ristić,T.10062,T.10067-T.10068;Judgment,para.479.
[755] M.Milošević,T.13300-T.13301;Judgment,para.494.
[756] M.Lazarević,T.13366-T.13373.
[757] Aćimović,T.12934-T.12935;T.13006-T.13007,T.13068.
[758] Judgment,para.479,494.
[759] Judgment,para.509.
[760] Nahimana-AJ,para.194.
[761] Nahimana-AJ,para.194.
[762] Kupreškić-AJ,para.223-225.

the Appellant. Had these elements been properly considered in light of Aćimović's inclination to distort the truth in order to protect himself, no reasonable TC could have found that the Appellant pressured Aćimović over the phone to carry out the order contained in the two coded telegrams.[763]

302. Firstly, the TC failed to consider massive contradictions and inconsistencies between the evidence of Aćimović and his henchman Mitar Lazarević. Had these matters been considered, no reasonable TC could have treated Mitar Lazarević's testimony as corroborative of Aćimović's claims that he spoke to the Appellant on two occasions.[764]

303. Mitar Lazarević only mentioned one telephone conversation his Commander Aćimović would have conducted on the morning of 15 July 1995,[765] whereas Aćimović claims to have spoken on two occasions to the Appellant.[766] Astonishingly, the TC accepted Aćimović's evidence that two conversations took place and its finding as to one of these two conversations stands thus entirely uncorroborated.[767]

304. Moreover, according to Aćimović, Vujo and Mitar Lazarević were present to the phone conversation with the Appellant around 07h00 on 15 July 1995[768] and Aćimović claimed to have discussed this phone conversation with Vujo and Mitar Lazarević.[769] Mitar Lazarević, on the other hand, never mentioned being present during his Commander's conversation and stated that he merely overheard Aćimović speaking to an unknown person on the phone.[770] [REDACTED][771]

305. Most importantly, however, Mitar Lazarević stated that Aćimović never mentioned the Appellant and that he has no knowledge of Aćimović having a conversation with the Appellant.[772] This contradiction, bearing in mind Aćimović's claim that Vujo and Mitar Lazarević were present during his conversation with the Appellant and that the three of them discussed the conversation, could not be more obvious. It indicates that, despite his apparent eagerness, Mitar Lazarević was unable to corroborate his Commander.

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[763] Judgment,para.510;1368.
[764] Judgment,para.510.
[765] M.Lazarević,T.13377-T.13378.
[766] Aćimović,T.12949-T.12952.
[767] Judgment,para.510.
[768] Aćimović,T.13123.
[769] Aćimović,T.12957.
[770] M.Lazarević,T.13377-T.13378.
[771] [REDACTED]
[772] M.Lazarević,T.13388.

306. Secondly, the TC erred when failing to consider that the events at Roćević School do not correspond to Aćimović's claims concerning the conversations with the Appellant. Had the inconsistencies and contradictions between Aćimović's claims and the ensuing events at Roćević School been considered, no reasonable TC could have found that the Appellant called Aćimović to pressure him to execute the telegram/order.

307. As mentioned *supra,* 2nd Battalion members did not participate in the executions of prisoners from Roćević School, contradicting Aćimović's claim that the Appellant would have needed to pressure him to dispatch soldiers to participate in the executions.[773] Logistical support was required of the 2nd Battalion by Popović on 15 July 1995 and Aćimović provided it zealously.[774]

308. Moreover, Aćimović specifically testified that, during his second conversation with the Appellant on 15 July 1995, the Appellant told Aćimović to wait for him in front of the Roćević School in the morning but, upon arrival, Popović awaited Aćimović.[775] However, the TC found that, at the time of the second phone conversation around 07h00 or 08h00, the Appellant had already assumed his duty as Duty Operations Officer.[776] It would therefore have been wholly illogical for the Appellant to tell Aćimović that he would meet him. Moreover, simply inconceivably, Aćimović did not testify about asking Popović anything about the absence of the Appellant.[777] This is impossible considering that Aćimović claimed to have been dumbfounded by the second phone conversation with the Appellant.[778]

309. In addition, in light of the complete absence of evidence in respect of the circumstances surrounding Popović's presence and the Appellant's absence from Roćević School on 15 July 1995, no reasonable TC could have considered this a manifestation of the coordinated manner in which the Security Branch operated.[779]

310. Thirdly, the TC failed to take account of Aćimović's conflicting testimony concerning the aftermath of the events at Roćević School. Had these matters been considered properly, no reasonable TC could have found that Aćimović spoke to the Appellant during the night of 14-15 July 1995.

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[773] Nikolić-Notice,Ground-18.1.
[774] V.Ivanović,T.18174,T.18176-T.18178,[REDACTED];Jović,T.18058-T.18060,[REDACTED]
[775] Aćimović,T.12957-T.12959;Judgment,para.1369.
[776] Judgment,fn.4427.
[777] Aćimović,T.12957-T.12959.
[778] Aćimović,T.12949-T.12953.
[779] Judgment,para.1069.

311. Highly significantly, Aćimović claimed to have spoken to the Zvornik Brigade Duty Operations Officer between 11h30 and 12h15 on 15 July.[780] However, completely contradictorily, Aćimović claimed that he did not speak to the Appellant on this occasion,[781] even though it is established that the Appellant had assumed the duty of Duty Operations Officer at the latest at 06h30 on 15 July 1995.[782] Had Aćimović truly spoken on two occasions to the Appellant just a few hours prior to the conversation on 15 July, and had he really been shocked by these conversations, Aćimović would surely have recognized the Appellant's voice. This is one more illustration of Aćimović's strategy to mask his involvement in the crimes, rendering his account about the Appellant's role simply incredible.

312. Finally, the TC failed to consider important elements of Aćimović's testimony that render the events at the 2nd Battalion on 14-15 July 1995 completely dissimilar to the events at the 1st Battalion. Had these enormous dissimilarities been considered, no reasonable TC could have concluded that a conversation of an entirely different nature corroborates Aćimović's assertions.[783]

313. The Appellant, lacking the power to issue orders as Chief of Security,[784] certainly could not have issued an order to the Commander of the 2nd Battalion. Moreover, the Appellant merely suggested to Perić that it would be a good idea to go and verify that there were no problems with the local population at Kula School,[785] whereas Aćimović claimed that the Appellant openly pressured him on two occasions to execute an illegal order.[786] Indeed, Perić specifically testified that he never interpreted the conversation with the Appellant as an instruction to commit crimes.[787] The fact that the Appellant did not refer to killings in this conversation sets it thus entirely apart from Aćimović's assertions. Aćimović claims to have been the only one to have openly received illegal orders clearly exemplify his attempts to shift the responsibility to others.

[780] Aćimović,T.12989-T.12990;T.13140.
[781] Aćimović,T.13140.
[782] Judgment,para.1367,fn.4427.
[783] Judgment,para.509.
[784] Nikolić-Notice,Ground-24;Judgment,para.121,124;L.Ristić,T.10127-T.10128;Butler,T.19635-T.19636;Vuga,T.23330.
[785] Judgment,para.527;Nikolić-Notice,Ground-24.
[786] Judgment,para.510.
[787] Perić,T.11443,T.11469-T.11470.

CONCLUSION

314. The TC's errors occasioned a significant miscarriage of justice. On the basis of unreasonable findings resting on an erroneous assessment of Aćimović's credibility, the Appellant was found to have co-organized the crimes in Roćević.[788] Had it not been for these flagrant errors, the Appellant could not have incurred individual criminal responsibility for these crimes as the Appellant was not involved in the crimes in Roćević in any other manner.[789]

315. Consequently, had it not been for the TC's errors, the extent of his individual criminal responsibility, as well as his sentence, would have been significantly diminished. Therefore, the Appeals Chamber must reassess the extent of the contribution of the Appellant to the JCE to murder, or in case the Appellant is not found to be a member of this JCE,[790] to quash the Appellant's conviction pertaining to the crimes in Roćević pursuant to any other mode of liability. On this basis, the Appellant's sentence must be significantly reduced as he was not involved in one of the biggest mass-executions related to the fall of Srebrenica.

19TH GROUND

Introduction

316. The TC committed a combined error of fact and law when finding, on the basis of a "*wholly erroneous*"[791] assessment of PW-101's credibility in light of the totality of the evidence on the record, that the Appellant was present at the Orahovac killing site on 14 July 1995.[792] Had these matters been properly considered in accordance with the applicable criteria,[793] no reasonable TC could have adopted this finding.

[788] Judgment,para.1367-1369;1390.
[789] Judgment,para.1370.
[790] Nikolić-Notice,Ground-7.
[791] Kupreškić-AJ,para.223-225.
[792] Judgment,para.486,1111,1362,1364,1390,1409.
[793] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.

Argument

317. Firstly, the TC erred in failing "*to consider several matters going directly to the credibility of*"[794] PW-101 in relation to the "*plausibility and clarity*"[795] of PW-101's testimony about the child as well as the "*contradictions or inconsistencies*"[796] between PW-101's testimony and the evidence on the record in this respect.

318. No reasonable TC could have concluded that "*the contradictions in the evidence are not capable of undermining the essence of PW-101's testimony, nor are they capable of undermining PW-101's credibility*".[797] However, the crux of the matter is that these contradictions strike directly at the heart of PW-101's testimony and his credibility, since they establish that PW-101 never went farther than Orahovac School on 14 July 1995, necessarily invalidating his claim that he saw the Appellant at the killing site.

319. PW-101 claimed that: (i) he followed the trucks carrying the prisoners to the killing site;[798] (ii) he parked his van at the water point;[799] (iii) at the killing site, a child appeared from a pile of bodies;[800] and (iv) he placed the child in his van and drove him directly to Zvornik Hospital by himself.[801] However, the totality of the evidence reveals an entirely different picture. 3DPW-10, [REDACTED] [802] who undertook several trips in his truck from Orahovac School to the execution site,[803] decidedly testified that: (i) [REDACTED][804] (ii) [REDACTED][805] and (iii) [REDACTED][806]

320. While the TC referred, in part, to certain aspects of this evidence when accepting PW-101's assertions,[807] the TC erred by failing to consider numerous, decisive issues in relation to the surviving child. Undoubtedly, as only one person could have collected the child, these matters necessarily expose PW-101's untruths about his presence at the execution-site and his corresponding fabrications about the Appellant.

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[794] Kupreškić-AJ,para.223-225.
[795] Nahimana-AJ,para.194.
[796] Nahimana-AJ,para.194.
[797] Judgment,fn.1772.
[798] PW-101,T.7579-T.7580.
[799] PW-101,T.7579-T.7580,T.7583.
[800] PW-101,T.7580-T.7583.
[801] PW-101,T.7583-T.7584.
[802] [REDACTED]]
[803] 3DPW-10,T.25664-T.25668,T.25671-T.25673.
[804] [REDACTED]
[805] [REDACTED]
[806] [REDACTED]
[807] Judgment,fn.1772.

321. Primarily, the TC entirely failed to consider the credibility of 3DPW-10. This witness was highly credible as, having admitted to his involvement in the crimes in Orahovac,[808] he had no reason to invent the events about the child. [REDACTED] [809] Moreover, various elements of 3DPW-10's testimony are corroborated, such as the process of transportation of the prisoners from Orahovac School to the killing site[810] and the presence of heavy equipment at the killing site.[811] Furthermore, the TC employed his testimony in reaching two separate findings,[812] further establishing his credibility.

322. [REDACTED] [813] [814] [815] [816]

323. [REDACTED] [817] [818] [819] [820] [821]

324. Furthermore, the TC failed to address the contradictions between PW-101's account of the treatment of the child at Zvornik Hospital and the evidence on the record, further demonstrating PW-101's fabrications. [REDACTED][822] but two doctors from Zvornik Hospital, Dr. Vela Jovičić and Dr. Jugoslav Gavrić, testified that the boy was well-treated at all times and that no nurse was threatened for taking care of him.[823]

325. Secondly, the TC erred in failing "*to consider several matters going directly to the credibility of*"[824] PW-101 in relation to the "*plausibility and clarity*"[825] of crucial aspects of PW-101's testimony as well as the "*contradictions or inconsistencies*"[826] between PW-101's testimony and the evidence on the record in this respect, further establishing the untruthfulness of PW-101's testimony.

326. The TC failed to consider the glaring contradictions in PW-101's testimony about the loading of the prisoners at Orahovac School, which clearly establish that he never

[808] 3DPW-10,T.25664-T.25668,T.25671-T.25673.
[809] [REDACTED]
[810] 3DPW-10,T.25664-T.25668;Orić,T.953-T.956;M.Birčaković,T.11025-T.11026,T.11038.
[811] 3DPW-10,T.25674,PW-110,T.715;Orić,T.964,T.967;M.Birčaković,T.11031-T.11035;Ristanović,T.13625.
[812] Judgment,para.481,fn.1752;Judgment,para.483,fn.1756.
[813] [REDACTED]
[814] [REDACTED]
[815] [REDACTED]
[816] [REDACTED]
[817] Judgment,fn.1772.
[818] [REDACTED]
[819] [REDACTED]
[820] [REDACTED]
[821] [REDACTED]
[822] [REDACTED]
[823] Gavrić,T.9121;Jovičić,T.25720.
[824] Kupreškić-AJ,para.223-225.
[825] Nahimana-AJ,para.194.
[826] Nahimana-AJ,para.194.

witnessed this event. [REDACTED] [827] [828] [829] Also, PW-101 asserted that the prisoners passed through a corridor of soldiers before entering a truck[830] but [REDACTED][831] and PW-142 also never mentioned a corridor set up by soldiers.[832] Survivors also testified about boarding the trucks directly.[833] Finally, at Roćević School, the prisoners were directly placed onto the trucks as well.[834]

327. In addition, the TC failed to consider that, if PW-101 did not witness the loading of the prisoners, his claim to have seen two prisoners being shot[835] is also false. Moreover, Tanić saw the two bodies in the afternoon,[836] well before PW-101 arrived around dusk.

328. Also, the TC completely failed to take account of PW-101's inaccurate description of the presence of heavy machinery in Orahovac. PW-101 testified that he did not witness heavy machinery at the killing site,[837] even though 3DPW-10, Ristanović and Orić clearly testified to the presence of such equipment,[838] as accepted by the TC.[839]

329. Furthermore, as entirely disregarded by the TC, PW-101's account of the delivery of foodstuffs to the execution site is heavily contradicted by the evidence on the record too. [REDACTED][840] Milošević, however, decidedly testified that: (i) he did not make arrangements for the delivery of foodstuffs to Orahovac; (ii) he did not order PW-101 to take the foodstuffs to the execution site and; (iii) he did not witness the delivery of any foodstuffs to Orahovac on 14 July 1995.[841] Moreover, Ristanović, Ivanović and Stanoje Birčaković confirmed that no foodstuffs were delivered on the date in question.[842] In addition, illustrative of his fabrications, PW-101 claimed to have simply picked up no less than three crates of juices and mineral water, three crates of rolls and pastry, two paper sacks of bread totalling 40 to 50 kilograms and, as he

[827] [REDACTED]
[828] [REDACTED]
[829] [REDACTED]
[830] PW-101,T.7571-T.7572.
[831] [REDACTED]
[832] PW-142,T.6454.
[833] Orić,T.949-T.953;[REDACTED]
[834] V.Ivanović,T.18177.
[835] PW-101,T.7677-T.7678.
[836] Tanić,T.10334,T.10336,T.10384.
[837] PW-101,T.7690-T.7691.
[838] 3DPW-10,T.25674;Ristanović,T.13625;Orić,T.964,T.967.
[839] Judgment,para.482,489.
[840] [REDACTED]
[841] S.Milošević,T.33985-T.33987.
[842] Ristanović,T.13622-T.13623;Ivanović,T.14565;S.Birčaković,T.10771.

added for the first time on cross-examination, the stupendous amount of 200 to 500 kilos of meat,[843] notwithstanding the prevailing war-time scarcity.[844]

330. Thirdly, in respect of PW-101's "*motivation to lie*",[845] the TC failed to "*explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused*", notwithstanding its legal duty to do so.[846]

331. [REDACTED].[847] [848]

332. Finally, the TC erred in finding that "*PW-101 was consistent in his testimony that **Nikolić** was present at the execution site and … that his testimony was not shaken in cross-examination*"[849] as: (i) the extensive contradictions can not be redeemed by PW-101's – inconsistent and irresolute - comportment during testimony;[850] and (ii) the TC completely failed to consider numerous instances of evasive responses by PW-101 as well as his repudiation of essential parts of his testimony.[851]

333. In *Kupreškić,* the TC accepted a crucial witness' evidence on account of her "*unshaken*" impression[852] but the Appeals Chamber found that "*a Trial Chamber must be careful to allow for the fact that, very often, a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy*"[853] and overturned the TC's findings as this witness' testimony was "*seriously at odds with the extensive difficulties revealed on the evidentiary record …, which strike at the core of*" this witness' evidence.[854] Also, Canadian jurisprudence establishes that "*the validity of evidence does not depend in the final analysis on the circumstance … that the Judge may have remarked favourably or unfavourably on … the demeanour of a witness.*"[855] Evidently, PW-101's demeanour is outweighed by the difficulties revealed *supra.*

334. Decisively, PW-101's "*responses during cross-examination*"[856] illustrate that PW-101 was highly evasive and nebulous. The Judges cautioned PW-101 at least four times to

[843] PW-101,T.7565,T.7625,T.7633.
[844] S.Milošević,T.33986-T.33987.
[845] Nahimana-AJ,para.194.
[846] Krajišnik-AJ,para.146.
[847] [REDACTED]
[848] [REDACTED]
[849] Judgment,fn.4421.
[850] PW-101,[REDACTED],[REDACTED],T.7626-T.7628,T.7657,[REDACTED],T.7689.
[851] PW-101,T.7626-T.7628,[REDACTED],T.7688-T.7689,T.7696,[REDACTED].
[852] Kupreškić-TJ,para.425.
[853] Kupreškić-AJ,para.138.
[854] Kupreškić-AJ,para.223.
[855] Faryna-Chorny,p.356.
[856] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.

shorten his answers and to answer the questions put to him.[857] PW-101 was particularly reticent about the "*contradictions and discrepancies in ... successive statements*"[858] concerning his failure to mention the Appellant's presence at the execution site. When asked when he would have learned hereof, PW-101 irrelevantly recounted about hearing stories in cafes about the Appellant and the Appellant's duties in the VRS.[859] The Presiding Judge intervened and specifically asked PW-101: "*[w]hat is required from you is an explanation why these actions that Mr. Bourgon is referring to, you only mentioned in December 2006 and not before*".[860] Nevertheless, PW-101 again failed to answer, irrationally saying that he was not a "*lawyer nor an intern to be able to know the time-line and to know which are the most important things*".[861] Ultimately, PW-101 simply failed to respond to these extremely important questions. Also, when describing the time-frame of his supposed journey, PW-101 said that he was "*a romantic by nature*",[862] which is something no true witness of a mass-execution would have uttered.

335. In addition, as ignored by the TC, PW-101 was severely shaken on cross-examination, recanting and/or modifying crucial parts of his testimony. PW-101 testified that he said in his 2005 Statement that Pantić had ordered him to Orahovac and that, upon his return, he had a discussion with Pantić about taking days off.[863] However, on cross-examination, PW-101 confusingly stated that either Pantić or Pavićević ordered him to Orahovac on 14 July 1995 and authorized him to take days off[864] [REDACTED][865] Sakotić confirmed the absence of Pantić, adding that he himself did not order PW-101 to Orahovac and that Pavićević and himself did not have the authority to allow PW-101 to take days off.[866] Despite the TC's intervention, PW-101 was unable to explain this discrepancy.[867]

336. Finally, PW-101 was completely distressed and confused when cross-examined about the child from the execution site. When PW-101 was confronted with the statements of Milošević and Tanić that they were together with him in the van from Orahovac to

[857] [REDACTED]
[858] Nahimana-AJ,para.194.
[859] PW-101,T.7688-T.7689.
[860] PW-101,T.7689.
[861] PW-101,T.7690.
[862] PW-101,T.7624.
[863] PW-101,T.7625-T.7626.
[864] PW-101,T.7626-T.7628.
[865] [REDACTED]
[866] Sakotić,T.25759-25760,T.25770-T.25771.
[867] PW-101,T.7626-T.7628.

Zvornik, PW-101 desperately appealed to the TC: "*[y]our Honours, I am not a lawyer, so I'm going to ask you to intervene, if necessary, or I don't know what.*"[868] [REDACTED].[869]

337. Thus, when confronted with the plethora of contradictions, PW-101 openly admitted that a second child was collected at the execution site, clearly demonstrating the extent to which he was shaken. This is nothing short of a retraction of the defining moment of PW-101's journey to Orahovac and entirely annuls his testimony about his presence at the execution site. Moreover, PW-101 acknowledged the validity of the evidence provided by 3DPW-10, adding considerable weight to it. This must lead the Appeals Chamber to conclude that the TC erred in assessing PW-101's claims in light of the totality of the evidence on the record and, in particular, PW-101's lack of credibility.

Conclusion

338. The TC's error occasioned a miscarriage of justice and/or invalidated the Judgment. Had the credibility of PW-101's been properly assessed in light of the extensive contradictions between his testimony and the totality of the evidence on the record, [REDACTED], and the fact that he was profoundly shaken on cross-examination, no reasonable TC could have accepted PW-101's testimony that he saw the Appellant at the Orahovac killing site on 14 July 1995. In addition, as PW-101's fabrications stand entirely uncorroborated, there is no other evidence placing the Appellant at the Orahovac execution site on 14 July 1995. To the contrary, as ignored by the TC, 3DPW-10 did not see the Appellant at the Orahovac execution site.[870]

339. As the TC attached significant weight to the Appellant's presence at the Orahovac execution site,[871] a rectification of the TC's error warrants a significant reduction of the extent of the Appellant's individual criminal responsibility, either on the basis of his JCE membership or another mode of liability.[872] Moreover, the reduced extent of the Appellant's individual criminal responsibility must also lead to a significant downwards revision of his sentence.

[868] PW-101,T.7696.
[869] [REDACTED]
[870] 3DPW-10,T.25680.
[871] Judgment,para.1390,1409.
[872] Nikolić-Notice,Ground-7.

20TH GROUND

Introduction

340. The TC committed a combined error of fact and law when finding, on the basis of a "*wholly erroneous"*[873] assessment of Momir Nikolić's credibility in light of the totality of the evidence, that Momir Nikolić informed the Appellant at the IKM on 13 July 1995 "*that thousands of Bosnian Muslims were held in Bratunac and would be sent to Zvornik"* to be executed.[874] Had these matters been properly considered in keeping with the applicable criteria,[875] no reasonable TC could have adopted this finding.[876] Whereas the TC professed that it would adopt a "*very cautious and careful approach"* to Momir Nikolić's evidence,[877] the TC's flagrant errors undoubtedly demonstrate that it did not.

Argument

341. Firstly, the TC erred in finding that Momir Nikolić's "*evidence on these points ... is highly self-incriminatory, adding to its reliability*"[878] as it failed "*to consider several matters going directly to the credibility of*"[879] Momir Nikolić as "*an accomplice witness*" in relation to his testimony provided pursuant to a "*plea agreement*", which is exacerbated by "*prior examples of false testimony*" provided by Momir Nikolić.[880]

342. The International Tribunal's plea-agreement procedure necessarily envisages the provision of self-incriminatory information by an Accused[881] and such information can thus not add to Momir Nikolić's credibility in a separate trial. Momir Nikolić, namely, provided such information pursuant to a contractual obligation arising from his plea-agreement and he is thus shielded from criminal prosecution. His situation is therefore nothing like that of an uninterested witness who provides self-incriminating

[873] Kupreškić-AJ,para.223-225.
[874] Judgment,para.1266,1354.
[875] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[876] Also:Nikolić-Notice,Ground-14,Ground,21.
[877] Judgment,para.51.
[878] Judgment,para.1269.
[879] Kupreškić-AJ,para.223-225.
[880] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[881] M.Nikolić-SJ,para.48.

testimony regardless of the possibility of a severe sentence due to the absence of the protection of a plea-deal and who may truly be considered credible on this basis.

343. The TC's error is compounded by that fact that, despite the obligation accepted by Momir Nikolić,[882] it did not attach sufficient weight to his stubborn refusal to provide truthful information, which irreparably harms his credibility. Momir Nikolić: (i) confessed having fabricated his involvement in the Kravica Warehouse massacre to secure a more favourable plea-deal;[883] (ii) was found evasive and unforthcoming by the *Momir Nikolić* TC;[884] and (iii) provided testimony that was, in significant parts, dismissed by the *Blagojević-Jokić* TC.[885] Astonishingly, Momir Nikolić's lies continued in this case as: (i) the Prosecution overtly abandoned Momir Nikolić as a witness not worthy of belief despite the plea-agreement;[886] (ii) he attempted to diminish his role and responsibility;[887] and (iii) he denied acts clearly established by other evidence.[888]

344. Secondly, the TC erred in failing "*to consider several matters going directly to the credibility of*"[889] Momir Nikolić in relation to the "*plausibility and clarity*"[890] of his testimony about his visit to the Appellant at the IKM as well as the "*contradictions or inconsistencies*"[891] between his testimony and the totality of the evidence in this regard.

345. The TC failed to consider that Janjić testified that, while guarding buses in Bratunac between 22h00 and midnight on 13 July 1995, Momir Nikolić came by and told him and others to continue working.[892] Janjić thus directly contradicted Momir Nikolić's account that, between 20h30 and midnight on 13 July 1995, he was absent from Bratunac to travel to the IKM.[893] Also, the TC completely failed to take account of the evidence of Jeremić, the Zvornik Brigade MP who was alone on duty at the gate of Standard Barracks from 13 to 14 July 1995,[894] who explicitly stated that he neither called the Zvornik Brigade Duty Officer to announce any visitors nor did he

[882] M.Nikolić-Joint-Motion,Annex-A,para.9,11.
[883] M.Nikolić-ASJ,para.107.
[884] M.Nikolić-SJ,para.156.
[885] Blagojević-Jokić-TJ,para.472.
[886] T.17398.
[887] Judgment,para.51.
[888] M.Nikolić,T.33078-T.33080,Trišić,T.27059-T.27104,3D583,Judgment,fn.76.
[889] Kupreškić-AJ,para.223-225.
[890] Nahimana-AJ,para.194.
[891] Nahimana-AJ,para.194.
[892] Janjić,T.17931.
[893] M.Nikolić,C1,para.10.
[894] Jeremić,T.10455.

accompany any visitors to the Command building on 13 July 1995.[895] Jeremić thus undoubtedly invalidates Momir Nikolić's assertions that he: (i) saw a group of persons at the Standard Barracks' gate;[896] (ii) provided his ID and identified himself as the Security Organ of the Bratunac Brigade;[897] (iii) specifically requested to see the Appellant;[898] and (iv) was accompanied to the Command building by one of the persons at the gate.[899] The TC, furthermore, failed to consider the evidence of Kostić, the MP Company clerk,[900] who testified that there were no MPs present after the fall of Srebrenica and that, therefore, Jeremić was alone on duty at the gate for 24 hours.[901] Clearly, Kostić renders Momir Nikolić's claim that he was escorted to the IKM by a MP impossible.[902]

346. Moreover, the TC erred in dismissing Milošević's evidence,[903] the Zvornik Brigade Duty Operations Officer on 13 July 1995,[904] that he did not see Momir Nikolić at the Standard Barracks that evening,[905] as it failed to consider that it follows from Milošević's testimony, that, at the time Momir Nikolić would have visited the Zvornik Brigade, Milošević was in fact at his post. Milošević testified that the entries not made by him in the Duty Operations Officer Notebook occurred, firstly, between 09h50 and 13h15 on 13 July 1995 and, secondly, between midnight of 13 July 1995 and 05h00 on 14 July 1995,[906] clearly indicating that he was at his post between 13h15 and midnight on 13 July 1995. This clearly invalidates Momir Nikolić's claim that he spoke to the Duty Operations Officer around 21h45 or shortly thereafter.[907] Also, the TC failed to consider that the absence of references to Momir Nikolić's supposed visit in the Duty Operations Officer Notebook[908] corroborates Milošević, who testified that visits by officers not belonging to the Zvornik Brigade would be noted.[909] As further ignored by the TC, the Duty Operations Officer Notebook does not contain entries

[895] Jeremić,T.26090-T.26091;3D587,para.5.
[896] M.Nikolić,T.33224.
[897] M.Nikolić,T.33223-T.33224.
[898] M.Nikolić,T.33237.
[899] M.Nikolić,T.33224.
[900] Kostić,T.25982.
[901] Kostić,T.26007.
[902] M.Nikolić,C1,para.10.
[903] Judgment,fn.4393.
[904] Milošević,T.33961.
[905] Milošević,T.33971.
[906] Milošević,T.34036.
[907] M.Nikolić,C1,para.10.
[908] P377,p.120(ERN-02935738)-p.126(ERN-02935744).
[909] Milošević,T.33971.

concerning calls informing the Appellant of Momir Nikolić's visit,[910] further invalidating his claims. In addition, the TC failed to consider that Milošević had no reason to lie about the fact that Momir Nikolić did not visit the Zvornik Brigade as this does not affect any responsibility Milošević may have incurred. This is all the more so considering that Milošević admitted being sent to Orahovac the next day.[911]

347. Furthermore, the TC failed to take account of Momir Nikolić's retraction of an important aspect of his testimony about the visit to the IKM in *Blagojević*. In that case, Momir Nikolić said that, when he arrived at the IKM, he "*just went inside that house*"[912] but, in this case, Momir Nikolić said that he never stated this in *Blagojević*.[913] Clearly, in order to avoid questions establishing his ignorance about the interior of the IKM, Momir Nikolić significantly altered his evidence.

348. In addition, the TC failed to consider that Momir Nikolić severely contradicted himself by saying that he informed the Appellant of the arrival of prisoners on the evening of 13 July 1995 even though he claims this decision was taken thereafter. Momir Nikolić testified that, upon his return to Bratunac from his visit to the Appellant, Beara and Deronjić were still having heated debates about the exact locations for the executions,[914] decisions about the prisoners were changed constantly[915] and that the decision to transfer them to Zvornik was only taken in the early morning of 14 July 1995.[916]

349. Thirdly, the TC erred when finding that, "*[w]hile the evidence of Momir Nikolić does not correspond to that of PW-168 in all its particulars, the TC is satisfied that the core of the evidence of both witnesses is substantially similar*"[917] as it failed to take account of numerous glaring contradictions.

350. [REDACTED][918 919 920 921 922 923]

351. [REDACTED][924 925 926 927 928 929]

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[910] P377,p.120(ERN-02935738)-p.126(ERN-02935744).
[911] Milošević,T.33976.
[912] M.Nikolić,T.33251;Blagojević-T.2289.
[913] M.Nikolić,T.33251.
[914] M.Nikolić,T.32940,T.33193-T.33194.
[915] M.Nikolić,T.33182.
[916] M.Nikolić,C1,p.6;M.Nikolić,T.32944-T.32945,T.33180.
[917] Judgment,para.1354.
[918] [REDACTED]
[919] [REDACTED]
[920] [REDACTED]
[921] [REDACTED]
[922] [REDACTED]
[923] [REDACTED]

Conclusion

352. Thus, in conjunction with related errors committed by the TC,[930] no reasonable TC could have found "*the evidence of PW-168 and Momir Nikolić as to the knowledge and actions of* ***Drago Nikolić*** *on the night of 13 July 1995 to be mutually corroborative and reliable*".[931] This error occasioned a miscarriage of justice and/or invalidates the Judgment as the TC ascribed significant weight to the fact that the Appellant learned of the arrival and impending executions of the prisoners on the evening of 13 July 1995 in the assessment of his individual criminal responsibility.[932] Consequently, the Appellant respectfully requests the Appeals Chamber to reassess his individual criminal responsibility and to significantly reduce his sentence on this basis.

21ST GROUND

Introduction

353. The TC committed a mixed error of fact and law when finding that "*Mihajlo Galić's testimony, as well as the contemporaneous IKM logbook entry that Galić made in the Zvornik Brigade Logbook, evidence that*" the Appellant was released from duty at the IKM on 13 July 1995.[933] The TC's appraisal of Galić's credibility must be dismissed as "*wholly erroneous"* as the TC failed "*to consider several matters going directly to the credibility of*"[934] Galić in respect of these claims. Had Galić's credibility been properly assessed pursuant to the relevant criteria[935] and the totality of the evidence on the record, no reasonable TC could have adopted these findings.[936]

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[924] [REDACTED]
[925] [REDACTED]
[926] [REDACTED]
[927] [REDACTED]
[928] [REDACTED]
[929] [REDACTED]
[930] Nikolić-Notice,Ground-14,Ground-21,Ground-22.
[931] Judgment,para.1354.
[932] Judgment,para.1389,1402,1418.
[933] Judgment,para.1349.
[934] Kupreškić-AJ,para.223-225.
[935] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[936] Also:Nikolić-Notice,Ground-14,20.

Argument

354. Firstly, the TC entirely overlooked "*contradictions and discrepancies in … successive statements*" [937] made by Galić as well as his nebulous "*responses during cross-examination*" in this respect.[938]. These matters provide serious indications that Galić coordinated with others to provide testimony suiting his and others' interests.

355. In his first statement, Galić stated that, in the period from 10 to 20 July 1995, he was generally in the Zvornik Brigade Command and he never mentioned his unscheduled replacement of the Appellant at the IKM.[939] [REDACTED] [940] In addition, shortly before Stojkić's testimony, Galić visited him to convince him to remember that they had been on duty together on 13-14 July 1995,[941] even though Galić incongruously testified that he could not remember who was with him that night.[942] Moreover, as ignored by the TC, there would have been no reason for Galić to speak to Stojkić if the latter was absent from Zvornik on 13 July 1995, as found by the TC.[943] Galić also amazingly claimed that, without the IKM Logbook and discussions with others, he would not have remembered anything about the evening in question.[944]

356. Secondly, in relation to the "*plausibility and clarity*"[945] of Galić's testimony as well as the "*contradictions or inconsistencies*"[946] between his testimony and other evidence, the TC failed "*to consider several matters going directly to the credibility of*"[947] Galić.

357. Galić did not know: (i) who woke him up, either by name or position;[948] (ii) the name of the duty officer who ordered him to go to the IKM;[949] (iii) the name of the driver who took him to the IKM;[950] (iv) the type of car in which he was taken to the IKM;[951] (v) the name of the communicators on duty at the IKM;[952] (vi) different details about

[937] Nahimana-AJ,para.194.
[938] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[939] Galić,T.10526-T.10527,T.10536,T.10626-T.10627.
[940] [REDACTED]
[941] Stojkić,T.21999-T.22000.
[942] Galić,T.10550.
[943] Judgment,fn.4380.
[944] Galić,T.10546.
[945] Nahimana-AJ,para.194.
[946] Nahimana-AJ,para.194.
[947] Kupreškić,AJ,para.223-225.
[948] Galić,T.10549.
[949] Galić,T.10549.
[950] Galić,T.10549.
[951] Galić,T.10550.
[952] Galić,T.10550.

the IKM;[953] (vi) the large fire lit by the Muslim forces near Nezuk;[954] or (vii) the Jerkić family, living close to the IKM,[955] whom an IKM Duty Officer must have known.[956]

358. Moreover, Galić asserted that no visitors came to the IKM from 13 to 15 July 1995[957] but: (i) an entry in the Operations Duty Officer Notebook,[958] as confirmed by Stojkić and Dragutinović,[959] demonstrates that a Security Officer called the Zvornik Brigade Operations Duty Officer from the IKM, between 10h24 and 15h03 on 14 July 1995, clearly indicating that someone visited the IKM; (ii) Birčaković testified that he drove the Appellant to the IKM to collect his personal affairs on the evening of 14 July 1995,[960] and Galić would thus necessarily have had to encounter them; and (iii) Momir Nikolić would have left Standard Barracks after 21h45 on 13 July 1995 to go to the IKM where he would have departed from to arrive in Bratunac around midnight,[961] indicating that Momir Nikolić and Galić would have had to encounter each other, either at the IKM or on the way to the IKM.

359. [REDACTED] [962] [963] [964] [965]

360. Also, the TC failed to consider important pieces of evidence in relation to Stojkić's testimony that he was at the IKM with the Appellant on 13-14 July 1995.[966] The TC found that Stojkić was in Rijeka on the evening of 13 July 1995 as part of TG-1 but entirely disregarded: (i) Stojkić's testimony that he already returned on the morning of 13 July 1995;[967] and (ii) Pandurević's testimony that one of his TG 1 tank companies returned on 13 July 1995,[968] corroborating Stojkić.

361. Finally, the TC's erroneous assessment of Galić's evidence culminated into the adoption of mutually exclusive findings, clearly establishing its errors. In finding that the Appellant attended a meeting with Beara and Popović on the morning of 14 July

[953] Galić,T.10552-T.10554.
[954] Galić,T.10550.
[955] Galić,T.10449-T.10552.
[956] Z.Aćimović,T.22050;Stojkić,T.21990.
[957] Galić,T.10555.
[958] P377,p.ERN5747(ENG),p.ERN5748(BCS).
[959] Dragutinović,T.12773;Stojkić,T.21998-T.21999.
[960] M.Birčaković,T.11042-T.11043;Judgment,para.1363.
[961] M.Nikolić,C1,para.10,Nikolić-Notice,Ground-20.
[962] [REDACTED]
[963] [REDACTED]
[964] [REDACTED]
[965] [REDACTED]
[966] Judgment,fn.4380.
[967] Stojkić,T.22011.
[968] Pandurević,T.31722-T.31723.

1995,[969] the TC refers to Birčaković's testimony that he picked up the Appellant at the IKM on the morning of 14 July 1995.[970] Birčaković was unambiguous: "*Q. Now, did you go to the forward command post to pick up Drago Nikolic, as ordered? A. Yes. I went there and I brought him back.*"[971] Moreover, when asked by the Judge whether he encountered someone else at the IKM on the morning of 14 July 1995, Birčaković testified *"[w]ell, no. I didn't find anybody there*",[972] clearly repudiating Galić's account. Birčaković had no reason to protect the Appellant in this regard as he also provided certain incriminating details concerning himself as well as the Appellant.[973]

Conclusion

362. The TC's error occasioned a miscarriage of justice and/or invalidated the Judgment. In assessing the Appellant's responsibility and his sentence, the TC placed heavy emphasis on the Appellant's purported departure from the IKM.[974] Therefore, the Appellant's individual criminal responsibility, either on the basis of the JCE mode of liability or another mode,[975] must be reassessed and his sentence reduced significantly.

22ND GROUND

Introduction

363. The TC committed a mixed error of fact and law when finding, on the basis of a "*wholly erroneous"*[976] assessment of PW-143's credibility as well as questions exceeding the scope of PW-143's re-examination, that the Appellant was present at Orahovac School on the night of 13 July 1995.[977] Had PW-143's credibility been properly assessed pursuant to the criteria laid down by the Appeals Chamber[978] and

[969] Judgment,para.472,1357.
[970] Judgment,fn.1715,4398;Birčaković,T.11013-T.11017.
[971] Birčaković,T.11014.
[972] Birčaković,T.11173.
[973] M.Birčaković,T.11038,Judgment,para.438,fn.1756;M.Birčaković,T.11120,Judgment,para.1363,fn.4423.
[974] Judgment,para.1389.
[975] Nikolić-Notice,Ground-7.
[976] Kupreškić-AJ,para.223-225.
[977] Judgment,para.471,1350.
[978] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.

the totality of the evidence and had the Prosecution's re-examination of PW-143 been appropriately restricted,[979] no reasonable TC could have adopted this finding.[980]

Argument

364. Firstly, the TC failed "*to consider several matters going directly to the credibility of*"[981] PW-143 in relation to the "*contradictions or inconsistencies*"[982] between PW-143's testimony and the totality of the evidence on the record.

365. Moreover, the TC failed to consider the testimony of Stanoje Birčaković that the Appellant did not travel with him to Orahovac on 13 July 1995 and that, during the time Birčaković spent in Orahovac, he only saw the Appellant on one occasion, i.e. on 14 July 1995.[983] The TC also entirely disregarded that Ivanović testified that, upon arriving in Orahovac on the evening of 13 July 1995, only Jasikovac addressed the MPs.[984] A comprehensive consideration of Ivanović's testimony adds decisive weight to his statement that the Appellant only arrived in the morning of 14 July 1995 in Orahovac,[985] further establishing that the Appellant was not present on the night of 13 July 1995. Significantly, the TC did not question the credibility of Birčaković or Ivanović[986] and it employed both witnesses' testimonies in reaching a separate finding on the Appellant's presence at Orahovac School on 14 July 1995.[987]

366. In addition, when finding that the Vehicle Log corroborates the Appellant's presence at Orahovac School on the evening of 13 July 1995,[988] the TC failed to attached sufficient weight to Milorad Birčaković's testimony, the Appellant's driver, that he did not remember going to Orahovac on 13 July 1995 and that this Log does not reflect the reality of the vehicle's movements.[989] Moreover, the TC failed to consider that the vehicle was also used by others, such as Trbić.[990] The TC also entirely failed to consider that Milorad Birčaković testified that, on the morning of 14 July 1995, he

[979] Prlić-Decision-2,para.9;Archbold,8-247;Levey,p.393.
[980] Nikolić-Notice,Ground-21.
[981] Kupreškić-AJ,para.223-225.
[982] Nahimana-AJ,para.194.
[983] S.Birčaković,T.10766-T.10767.
[984] D.Ivanović,T.14540-T.14541.
[985] D.Ivanović,T.14544;Judgment,fn.4385.
[986] Judgment,fn.4382,4385.
[987] Judgment,fn.4414.
[988] Judgment,fn.4386.
[989] M.Birčaković,T.11052-T.11054.
[990] M.Birčaković,T.11143-T.11144,T.11147.

picked up the Appellant at the IKM,[991] indicating that the Appellant did not leave the IKM in the night of 13-14 July 1995. Crucially, Milorad Birčaković's credibility was not questioned[992] and his evidence formed the basis for several important findings.[993] Also, in light of the totality of the evidence on the record and the fact that the presence of the Appellant at Orahovac is disputed as opposed to the presence of the MPs, no reasonable TC could have employed the Transport Service Log, exclusively establishing the presence of MPs without referring to the Appellant, as corroboration for its finding.[994]

367. Secondly, PW-143's "*responses during cross-examination*"[995] as well as the "*plausibility and clarity*"[996] of PW-143's testimony demonstrate that PW-143 was highly uncertain about the events at Orahovac School on 13 July 1995.

368. [REDACTED][997] [998] [999] [1000]

369. [REDACTED] [1001]

370. Re-examination must be limited to "*matters raised in cross-examination*".[1002] Undoubtedly, the Prosecution examined PW-143 on the presence of the Appellant at Orahovac School,[1003] whereupon PW-143 was cross-examined[1004] on the "*subject-matter of the evidence-in-chief*".[1005] PW-143 having answered this question,[1006] this matter was thus not raised on cross-examination and no re-examination by the Prosecution could have been permitted. Specifically, Levey writes: "*[a] question often employed … is: 'Are you still certain about your testimony in-chief when you testified that …?' This is not proper re-examination as it does not explain or qualify testimony in-chief*".[1007] The Prosecution did exactly this as it asked PW-143, following his complete uncertainty exposed on cross-examination, whether he was still certain about

[991] M.Birčaković,T.11013-T.11014.
[992] Judgment,fn.4386.
[993] Judgment,para.1357,1358,1363.
[994] Judgment,para.1350,fn.4387.
[995] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[996] Nahimana-AJ,para.194.
[997] [REDACTED]
[998] [REDACTED]
[999] [REDACTED]
[1000] [REDACTED]
[1001] [REDACTED]
[1002] Prlić-Decision-2,para.9;Archbold,8-247.
[1003] PW-143,T.6532-T.6536.
[1004] [REDACTED].
[1005] Rule-90(H)(i).
[1006] [REDACTED],T.34504.
[1007] Levey,p.393.

his testimony in-chief about seeing the Appellant in Orahovac on 13 July 1995. These questions obviously outside the scope of re-examination and must be disregarded.

Conclusion

371. Consequently, as PW-143's ambiguous and contradicted testimony stands entirely uncorroborated, no reasonable TC could have found that the Appellant was at Orahovac School on 13 July 1995. Even if the Appeals Chamber would uphold the TC's finding that Galić replaced the Appellant on 13 July 1995, contrary to the arguments of the Defence,[1008] the TC's error in this respect remains unaffected in light of the complete lack of additional evidence concerning the Appellant's whereabouts on this evening.

372. As the TC attached significant weight to the Appellant's presence at Orahovac School on the evening of 13 July 1995 in assessing his responsibility and determining his sentence,[1009] the TC's error occasioned a miscarriage of justice and/or invalidates the Judgment. Therefore, in order to repair the TC's error, a significant reduction of the extent of the Appellant's individual criminal responsibility, either on the basis of his JCE membership or another mode of liability,[1010] and his sentence is warranted.

23RD GROUND

Introduction

373. The TC committed a mixed error of fact and law when inferring, despite the lack of direct evidence,[1011] that the meeting between Beara, Popović and the Appellant around 8 a.m. on 14 July 1995 "*concerned the organisation and coordination of the killing operation*"[1012] as it failed to consider the equally reasonable inference available on the basis of the evidence on the record that Beara and Popović merely informed the Appellant of the arrival of prisoners for exchange. Had this evidence been properly

[1008] Nikolić-Notice,Ground-21.
[1009] Judgment,para.1364,1390,1409.
[1010] Nikolić-Notice,Ground-7.
[1011] Judgment,para.para.472.
[1012] Judgment,para.472,1106,1272,1357.

considered, no reasonable TC could have found that the only reasonable inference is that the meeting concerned the killing operation.

Argument

374. Prior to discussing the TC's specific errors in relation to the meeting, it must be recalled that no reasonable TC could have found that the Appellant was informed about the impending executions on the night of 13 July 1995.[1013] Therefore, before meeting with Beara and Popović, the Appellant did not know of the murder operation.

375. Firstly, the TC entirely failed to consider crucial evidence establishing that the Appellant believed that the prisoners were brought in for exchange.

376. The TC failed to consider Birčaković's testimony that, when the Appellant came out of the meeting, he specifically told him what had been discussed. According to Birčaković, the Appellant was angry "*because he had not been consulted beforehand but was only ordered to find some accommodation*" for people coming in for exchange.[1014] Furthermore, the TC failed to consider that Birčaković had no reason to protect the Appellant in this regard as he also provided certain incriminating details concerning himself as well as the Appellant.[1015] The TC also relied on Birčaković's testimony in reaching separate findings,[1016] further establishing that it could not have ignored his critical evidence about the meeting.

377. Moreover, the TC failed to consider that immediately after the meeting, the Appellant was under the impression that the prisoners were to be exchanged. Perić testified that, after the receipt of a telegram to prepare Kula School for the arrival of 100 to 200 prisoners who were to be exchanged, the Appellant told him "*something very similar*" to the contents of the telegram on the morning of 14 July 1995.[1017] Clearly, Perić corroborates Birčaković in relation to the Appellant's knowledge. Indeed, Perić confirmed that an exchange of the prisoners remained one of the options until their departure.[1018] Also, Perić did not interpret the conversation with the Appellant as an instruction to commit crimes.[1019]

[1013] Nikolić-Notice,Ground-14,Ground-20.
[1014] M.Birčaković,T.11120.
[1015] M.Birčaković,T.11038,Judgment,para.438,fn.1756;M.Birčaković,T.11120,Judgment,para.1363,fn.4423.
[1016] Judgment,para.472,fn.1717;Judgment,para.438,fn.1756.
[1017] Judgment,para.527,S.Perić,T.11376;Nikolić-Notice,Ground-24.
[1018] S.Perić,T.11439;Nikolić-Notice,Ground-24.
[1019] S.Perić,T.11443,T.11469-T.11470;Nikolić-Notice,Ground-24.

378. What is more, Lazar Ristić said that, on one occasion in the aftermath of the events in Orahovac, he asked the Appellant why the detainees had been brought there considering the dangers, to which the Appellant responded that he had just been told to place the detainees in a schoolhouse pending an exchange.[1020] Ristić's testimony further confirms that the Birčaković and Perić that the Appellant only possessed information that prisoners had been brought in for exchange.

379. Secondly, the TC erred by relying on the Appellant's facilitation of the transport of the prisoners to the Zvornik area as establishing the contents of the meeting with Beara and Popović as it failed to consider that the Appellant's acts are consistent with the equally reasonable inference that he was only informed of the impending exchange of the prisoners and not their execution.

380. The Appellant awaited the convoy at the Vidikovac Hotel from where the Appellant believed that the prisoners would be taken to different temporary detention locations. This is in line with the conversation between Birčaković and the Appellant indicating that the Appellant was supposed to find accommodation for the prisoners.[1021]

381. Moreover, the Appellant's conduct is in line with his prerogatives as Security Organ dealing with internal threats against the security of the Zvornik Brigade.[1022] As confirmed by several witnesses, the arrival of the prisoners constituted a significant security threat.[1023] The VRS Defence Lines were thinly stretched and a revolt by the prisoners would have gravely impaired the security of the VRS and the villages in question. Also, the local populace expressed considerable hostility towards the prisoners.[1024]

382. Thirdly, the TC erred when it noted the role of the Security Branch in inferring the contents of the meeting between Beara, Popović and the Appellant[1025] as it failed to consider that the role of the Appellant is highly limited in comparison to Beara, Popović and Momir Nikolić, bringing about the inference that the Appellant was not important enough for Beara and Popović to fully disclose the criminal plan to him.

383. The Appellant was a low-ranking officer, not wielding authority of his own.[1026] In addition, the Appellant was not involved in important aspects of the operation. He was

[1020] L.Ristić,T.10088-T.10089.
[1021] M.Birčaković,T.11120.
[1022] Judgment,para.120;Vuga,T.23052.
[1023] L.Ristić,T.10088-T.10089,T.10140;Dragutinović,T.12784;Vuga,T23307.
[1024] [REDACTED];S.Perić,T.11439.
[1025] Judgment,fn.1716.
[1026] Judgment,para.1412.

not implicated in the inception of the plan in the area of Zvornik and Bratunac,[1027] which is surprising considering the role of the Bratunac Brigade Security Organ. While the TC found that "*Momir Nikolić was heavily involved in the separations and the capture of men in the immediate vicinity of Srebrenica [and] pivotal to the organisation of detentions and executions once the Zvornik area was selected for the bulk of the executions*",[1028] it concluded that the Appellant's "*participation and role in the operation viewed in this context is not overarching*".[1029] Moreover, the Appellant's contribution to the crimes ceases in the early morning of 15 July 1995[1030] and, in the afternoon of 16 July 1995, he even physically separates himself from the crimes.[1031] Thereafter, the Appellant was not involved in executions of a smaller scale[1032] or the reburial operation,[1033] unlike the substantive responsibility assumed by the Bratunac Brigade Chief of Security, Momir Nikolić, for the reburial operation in the Bratunac area.[1034] It is evident that the Appellant was not an important player in the Security Branch.

Conclusion

384. The TC's error occasioned a miscarriage of justice and/or invalidated the Judgment as the inference about the contents of the meeting heavily affected its assessment of the extent and gravity of the Appellant's individual criminal responsibility. In relation to the Appellant's involvement in the JCE to murder, the TC relied heavily on the Appellant's meeting with Popović and Beara.[1035] In addition, the TC found that the Appellant learned of the genocidal intent of Beara and Popović by, *inter alia,* discussing the killing operation with them at the meeting.[1036] In relation to sentencing, the TC found that the Appellant "*played an important role in the JCE to murder in terms of planning and organising detentions and executions*".[1037] Therefore, so as to remedy this error, the extent of the Appellant's individual criminal responsibility must

[1027] Judgment,para.1344,1395,1402-1403.
[1028] Judgment,para.1068(emphases supplied).
[1029] Judgment,para.1410.
[1030] Judgment,para.1367-1372;Nikolić-Notice,Ground-1.
[1031] Judgment,para.1373.
[1032] Judgment,para.1379-1380.
[1033] Judgment,para.1384,1410.
[1034] Judgment,para.603-604.
[1035] Judgment,para.1390,1392.
[1036] Judgment,para.1404,1406.
[1037] Judgment,para.2171.

be reassessed as he did not carry sufficient weight to be informed by Popović and Beara about the details of the criminal plan. Consequently, a significant reduction of the Appellant's sentence is warranted.

24TH GROUND

Introduction

385. The TC committed an error of fact when finding that the Appellant *"ordered Perić of the Zvornik Brigade 1st Battalion to secure the prisoners at the Kula School in the awareness that these prisoners were to be executed*"[1038] as it failed to consider critical pieces of evidence establishing that the Appellant never issued an order to Perić.

Argument

386. Firstly, as established *supra*, no reasonable TC could have found that the Appellant was informed about the murder operation during his meeting with Beara and Popović on 14 July 1995.[1039] This fully accords with the contents of the conversation as Perić unequivocally testified that he did not interpret the conversation as an instruction to commit crimes.[1040] Thus, no reasonable TC could have found that the Appellant spoke to Perić in the awareness that the prisoners were to be executed.[1041]

387. Secondly, no reasonable TC could have found that Perić "*classified the instruction from **Nikolić** as an order*"[1042] as it failed to consider that Perić vehemently dismissed attempts to classify the conversation with the Appellant as an order. Perić repeatedly testified that the Appellant said that "*it would be a good idea*" for him to go to Kula School,[1043] indicating that the Appellant *suggested*, as opposed to ordered, a certain course of action. Moreover, the Appellant provided this suggestion *"regardless of who is appointed by the deputy commander to go to the school",*[1044] indicating that the Appellant acknowledged that not he but the Deputy Commander possessed the

[1038] Judgment,para.1360.
[1039] Nikolić-Notice,Ground-23.
[1040] S.Perić,T.11443,T.11469-T.11470.
[1041] Judgment,para.1360.
[1042] Judgment,para.1359,fn.4411.
[1043] S.Perić,T.11376,T.11378.
[1044] S.Perić,T.11376,T.11378.

authority to issue orders to Perić. Moreover, Perić averred that the 1st Battalion Commander "*was the kind of man who would be able not to comply with the order from the brigade command",*[1045] clearly denoting the telegram received by the 1st Battalion on 14 July 1995[1046] and not the conversation with the Appellant. Moreover, Perić explicitly negated that his departure to Kula School was influenced by the conversation: "*No. You're trying to put it to me that Drago Nikolic had ordered me to go to the school*".[1047]

388. Thirdly, the TC erred in finding that "*[i]n the professional line, **Nikolić** could also give an order to Slavko Perić*"[1048] as it failed to consider evidence establishing that the Appellant did not possess such authority. The TC found that the principle of the unity of command was applicable in the VRS and that the speciality line did not supersede the regular command chain,[1049] necessarily excluding authority to issue orders on the part of Appellant. The TC also found that Security Organs receive *"instructions"* from superior Security Organs on counter-intelligence duties,[1050] which may not be equated with orders. Expert Butler indicated that the "*technical or management chain"* of the Security Organ serves for the provision of "*additional guidance*",[1051] clearly excluding orders. Moreover, Expert Vuga unequivocally testified that the Security Organ did not possess the right to command.[1052] In addition, Slavko Perić and Lazar Ristić, (former) Assistant Commanders for Security in the 1st and 4th Battalion, both testified that the Appellant could not issue orders to them.[1053] Slavko Perić added that *"it's only the commander and the deputy commander who have authority to issue orders*".[1054]

389. Finally, the TC failed to take account of several critical aspects of Perić's testimony. Perić indicated that his departure to Kula School was the result of an agreement reached between three or four persons from the Battalion Command in the presence of the Deputy Commander of the 1st Battalion,[1055] and that the conversation with the Appellant did not influence his departure.[1056] Perić also said that he would have gone

[1045] S.Perić,T.11380.
[1046] S.Perić,T.11375-T.11376;R.Babić,T.10214-T.10217;[REDACTED].
[1047] S.Perić,T.11380.
[1048] Judgment,fn.4411.
[1049] Judgment,para.121.
[1050] Judgment,para.121.
[1051] Butler,T.19635-T.19636.
[1052] Vuga,T.23330.
[1053] L.Ristić,T.10127-T.10128;S.Perić,T.11378.
[1054] S.Perić,T.11374(emphasis supplied).
[1055] S.Perić,T.11379.
[1056] S.Perić,T.11379-T.11380.

to Kula School anyway as the arrival of the prisoners caused him to fear for his family and friends.[1057] Moreover, according to Perić, the Appellant suggested going to Kula School to "*avoid any problems with the surrounding citizenry*",[1058] and their conversation thus did not even concern the guarding of prisoners. Indeed, Perić added that the prisoners were under the sole authority of the soldiers present at Kula School[1059] and that the 1st Battalion soldiers could not have influenced the situation,[1060] establishing that Perić was not under the *de facto* authority of the Appellant and that their conversation was not an order as it did not provide Perić with any authority to act.

Conclusion

390. The TC's blatant error occasioned a miscarriage of justice as it led the TC to conclude that the Appellant contributed to the crimes at Branjevo/Pilica.[1061] Moreover, the Appellant did not otherwise contribute to these crimes. The Appellant's activities as Brigade Duty Operations Officer on 15-16 July 1995 were unrelated to the executions.[1062] In addition, from 16-17 July 1995, the Appellant attended a funeral and he was thus physically absent from the crime sites.[1063]

391. Therefore, the scope of the Appellants contribution to the JCE, or his individual criminal responsibility pursuant to another mode of liability, must be reassessed. The Appellant was not involved in one of the biggest instances of mass murder, warranting a significant downwards revision of his sentence.

[1057] S.Perić,T.11379,T.11439.
[1058] S.Perić,T.11376,T.11378.
[1059] S.Perić,T.11385.
[1060] S.Perić,T.11383;T.11385,T.11439-T.11440.
[1061] Judgment,para.1360,1390.
[1062] Judgment,para.1372.
[1063] Judgment,para.1373.

25TH GROUND

Introduction

392. The TC committed a mixed error of fact and law when finding, on the basis of a "*wholly erroneous*"[1064] assessment of PW-143's credibility as well as questions exceeding the scope of PW-143's re-examination, that the Appellant drove in the direction to which the trucks transporting prisoners to the execution field headed in Orahovac on 14 July 1995.[1065] Had PW-143's credibility been properly assessed pursuant to the criteria laid down by the Appeals Chamber[1066] and the totality of the evidence and had the Prosecution's re-examination of PW-143 been appropriately restricted,[1067] no reasonable TC could have adopted this finding.[1068]

Argument

393. Firstly, the TC failed "*to consider several matters going directly to the credibility of*"[1069] PW-143 in relation to the "*contradictions or inconsistencies*"[1070] between PW-143's testimony and the totality of the evidence on the record.

394. The TC failed to consider the testimony of Stanoje Birčaković that he did not see the Appellant accompanying the trucks transporting prisoners.[1071] Moreover, the TC entirely disregarded the evidence of Milorad Birčaković, the Appellant's driver who escorted the trucks four to six times,[1072] that he never took the Appellant with him on these trips on 14 July 1995.[1073] Significantly, the TC did not question the credibility of Stanoje Birčaković and Milorad Birčaković and it reached important, separate findings on the basis of their testimonies.[1074]

[1064] Kupreškić-AJ,para.223-225.
[1065] Judgment,para.1362.
[1066] Nahimana-AJ,para.194;Nchamihigo-AJ,para.47.
[1067] Prlić-Decision-2,para.9;Archbold,8-247;Levey,p.393.
[1068] Nikolić-Notice,Ground-21.
[1069] Kupreškić-AJ,para.223-225.
[1070] Nahimana-AJ,para.194.
[1071] S.Birčaković,T.10770.
[1072] M.Birčaković,T.11026.
[1073] M.Birčaković,T.11027-T.11028.
[1074] Judgment,para.486,fn.1766;Judgment,fn.4382;Judgment,para.1361,fn.4414;Judgment,para.1363,fn.4423.

395. Secondly, PW-143's "*responses during cross-examination*"[1075] as well as the "*plausibility and clarity*"[1076] of PW-143's testimony demonstrate that PW-143 was entirely inconclusive in this regard.

396. [REDACTED][1077 1078 1079 1080 1081 1082 1083 1084]

397. Thirdly, [REDACTED][1085] the TC erred in law by impermissibly allowing the Prosecution to re-examine PW-143 in this regard. As has been indicated *supra*,[1086] these questions exceeded the scope of re-examination and must be discounted in the assessment of the evidence concerning the Appellant's acts in Orahovac on 14 July 1995.

Conclusion

398. Consequently, as PW-143's ambiguous and contradicted testimony stands entirely uncorroborated,[1087] no reasonable TC could have found that the Appellant drove in the direction to which the trucks transporting prisoners to the execution field headed. As the TC attached significant weight to the impugned finding in assessing the Appellant's responsibility and determining his sentence,[1088] the TC's error occasioned a miscarriage of justice and/or invalidates the Judgment. Therefore, in order to repair the TC's error, a significant reduction of the extent of the Appellant's individual criminal responsibility, either on the basis of his JCE membership or another mode of liability,[1089] and his sentence is warranted.

[1075] Nahimana-AJ,para.194.
[1076] Nahimana-AJ,para.194.
[1077] [REDACTED]
[1078] [REDACTED]
[1079] [REDACTED]
[1080] [REDACTED]
[1081] [REDACTED]
[1082] [REDACTED]
[1083] [REDACTED]
[1084] [REDACTED]
[1085] [REDACTED]
[1086] Nikolić-Notice,Ground-22.
[1087] Judgment,para.1362,fn.4419-4420.
[1088] Judgment,para.1364,1390,1409.
[1089] Nikolić-Notice,Ground-7.

26TH GROUND

399. Withdrawn due to word-limit.

OVERALL CONCLUSION

400. The Appellant respectfully requests[1090] the Appeals Chamber to:

(A) **QUASH** his convictions and **IMPOSE** a new sentence of no more than 15 years' imprisonment should Grounds of Appeal 2 through 25 would be granted; or

(B) **QUASH** his conviction(s) and **IMPOSE** a new sentence of no more than 20 years' imprisonment in the event Ground of Appeal 7 is rejected but Grounds of Appeal 2 through 25, in whole or in part, are granted; or

(C) **REVISE** his sentence and **IMPOSE** a new sentence of no more than 25 years' imprisonment in the event Ground of Appeal 1 is granted.

Word Count: 30,281[1091]

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF AUGUST 2011

Jelena Nikolić and Stéphane Bourgon
Counsel for Drago Nikolić

[1090] Nikolić-Notice,para.7-15.
[1091] Excluding Table-of-Contents.

ANNEX A

ANNEX A - GLOSSARY OF TERMS

OTHER CASES

Aleksovki-AJ	Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, *Judgement,* 24 March 2000
Blagojević-Jokić-AJ	Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-A, *Judgement,* 9 May 2007
Blagojević-Jokic-TJ	Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-T, *Judgement,* 17 January 2005
Boškoski-Tarčulovski-AJ	Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No IT-04-82-A, *Judgement,* 19 Mai 2010
Brdanin-AJ	Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-A, *Judgement,* 3 April 2007
Brdanin-TJ	Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-T, *Judgement,* 1 September 2004
Čelebici-Indictment	Prosecutor v. Zejnil Delalić, Zdravko Mučić, also known as "Pavo", Hazim Delić, Esad Landžo, also known as "Zenga", Case No. 96-21-I, *Indictment,* 19 March 1996
Čelebici-TC-Decision	The Prosecutor v. Zejnil Delalić, Zdravko Mučić, also known as "Pavo", Hazim Delić, Esad Landžo, also known as "Zenga", Case No. IT-96-21, *Order on the Prosecution's Motion for Leave to Call Additional Expert Witnesses,* 13 November 1997
Faryna-v-Chorny	Faryna c. Chorny [1951] 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354 (C.A.C.B.), à la page des D.L.R.

Furundžija-AJ	Prosecutor v. Anto Furundžija, Case No IT-95-17/1-A, *Judgement*, 21 July 2000
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