

**UNITED
NATIONS**

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

Case No. IT-05-88-A
Date: 15 February 2013

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

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

PUBLIC

**PROSECUTION APPEAL BRIEF (GROUNDS AGAINST
MILAN GVERO)**

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I. GROUND FOUR: THE CHAMBER ERRED IN ACQUITTING GVERO OF THE POTOČARI OPPORTUNISTIC KILLINGS

A. Overview

1. Gvero should be convicted for the murders of ten Muslim men by Bosnian Serb Forces in Potočari on 13 July 1995 (Potočari opportunistic killings).¹ These murders were a natural and foreseeable consequence of the JCE to Forcibly Remove.² Gvero joined this JCE knowing that the plan was to expel tens of thousands of Bosnian Muslims through extreme violence, including through cruel and inhumane treatment and terrorisation.³ Throughout the JCE, he was provided with information which made the possibility of killings foreseeable to him. The only reasonable conclusion is that he was aware of and accepted the possibility of murders in the course of the violent expulsion of the Bosnian Muslims. He should be held liable for the Potočari opportunistic killings pursuant to JCE III.

2. The Chamber erred in law and/or in fact in acquitting Gvero of these murders. It erred in law by requiring Gvero to foresee the *probability* instead of the *possibility* of the opportunistic killings. Applying the correct standard, Gvero must be convicted of murder and murder as an act of persecution. Additionally or alternatively, the Chamber erred in fact in failing to find that Gvero foresaw that opportunistic killings would be perpetrated by Bosnian Serb forces in the course of the forcible transfer.

B. The Chamber erred in law in acquitting Gvero of the Potočari killings

1. The Chamber applied an erroneous legal standard for JCE III liability

3. The Chamber applied an erroneous *mens rea* standard for JCE III by requiring Gvero to foresee the *probability* of the opportunistic killings instead of their *possibility*.⁴

¹ Judgement, paras.359, 361, 794(2).

² Judgement, para.1088.

³ Judgement, paras.1803, 1822, 1832-1833. *See also* Judgement, paras.1747-1757, 1765-1779, 1805-1807, 1815-1816 on Gvero's role and extensive knowledge with respect to the events surrounding the fall of Srebrenica in July 1995.

⁴ Judgement, paras.1830, 1834. *See also* Judgement, paras.1169, 1304, 1393, 1726-1727, 1733, 1735 (same error, without any impact on the verdict, for other accused).

4. The Appeals Chamber has expressly rejected the probability standard.⁵ The correct standard for JCE III *mens rea* requires that (1) it was foreseeable that the crime *might* be perpetrated and (2) the accused willingly took that risk in the sense that he/she acted with the awareness that the crime was a *possible* consequence of the implementation of the JCE and decided to participate in that enterprise.⁶ As the Appeals Chamber explained, this standard is not satisfied by “implausibly remote scenarios” but the possibility of the JCE III crime must be sufficiently substantial as to be foreseeable to the accused.⁷

5. While the Chamber properly set out the law on JCE III,⁸ it then applied a higher, erroneous, “probability” standard when assessing Gvero’s liability. The Chamber was not satisfied that Gvero “would foresee that ‘opportunistic’ killings *would* be perpetrated by members of the VRS in the course of the forcible transfer”⁹ and found that “it was not foreseeable to Gvero that ‘opportunistic’ killings *would* be a *probable* consequence of the JCE to Forcibly Remove.”¹⁰

6. Had the Chamber applied the correct standard, it would have concluded, on the basis of its own factual findings and the evidence before it, that it was foreseeable to Gvero that opportunistic killings might occur and that he willingly took that risk.

2. Gvero knew and accepted that killings might occur in the implementation of the JCE to Forcibly Remove

7. The Chamber’s findings demonstrate that Gvero knew of the possibility of opportunistic killings in the implementation of the JCE to Forcibly Remove. Gvero knew about and intended the violent means chosen to forcibly remove tens of thousands of Bosnian Muslims, including cruel and inhumane treatment and terrorisation.¹¹ Given his senior position in the VRS and his role in the JCE, Gvero was provided with all the information necessary to make it foreseeable to him that civilians might be killed during the operation to forcibly remove them. He would have

⁵ Karadžić JCE III Decision, para.18.

⁶ Karadžić JCE III Decision, paras.15, 17-18 and cases cited.

⁷ Karadžić JCE III Decision, para.18. In this brief, the word “possibility” is used to refer to a “sufficiently substantial” possibility, in accordance with the Karadžić JCE III Decision.

⁸ Judgement, para.1030.

⁹ Judgement, para.1830 (emphasis added).

¹⁰ Judgement, para.1834 (emphasis added).

¹¹ Judgement, paras.1803, 1822, 1832-1833.

known that the risk of killings was much more than an “implausibly remote scenario”.¹² He nevertheless continued to participate in the JCE, thereby establishing his acceptance of the possibility of killings and his liability pursuant to JCE III.

(a) Gvero’s acquittal is inconsistent with the Chamber’s own finding on foreseeability

8. In its general findings on the JCE to Forcibly Remove, the Chamber held that

in the circumstances of this forced movement of an entire population, numbering in the thousands, it was foreseeable that “opportunistic” killings *would* occur. This is particularly the case where the movement was accompanied by acts of cruel and inhumane treatment and terrorisation. Therefore, the Trial Chamber is satisfied that “opportunistic” killings were a natural and foreseeable consequence of the JCE to Forcibly Remove [...] the killings which occurred in Potočari were foreseeable consequences of the forcible removal of the population.¹³

9. The Chamber thus found that, in the circumstances, it was foreseeable that opportunistic killings “would occur”, not just “might occur.” The Chamber also found that Gvero knew about all the relevant circumstances underlying this conclusion. It found that he knew that the plan was to forcibly expel the entire Bosnian Muslim population of the enclaves, and that cruel/inhumane treatment and terrorisation were integral components of the forcible transfer operation.¹⁴ Gvero’s acquittal for the opportunistic killings is thus inconsistent with the Chamber’s own “general” finding on foreseeability.

(b) Gvero had the information to foresee that killings might occur

10. In any event, Gvero had all the information necessary to foresee that civilians might be killed during the operation to forcibly remove them. It is irrelevant that he was not involved in the logistics or physically present in Potočari.¹⁵

11. Gvero knew of and participated in the plan from its inception¹⁶ and “throughout its implementation”.¹⁷ From 1992 he was aware of the Bosnian Serb

¹² Cf. *Karadžić* JCE III Decision, para.18.

¹³ Judgement, para.1088 (emphasis added).

¹⁴ Judgement, paras.1086-1087, 1801-1803, 1822, 1832-1833. See also Judgement, paras.1747-1757, 1765-1779, 1805-1807, 1815-1816.

¹⁵ *Contra* Judgement, para.1830.

leadership's plan to expel the Bosnian Muslim population by force.¹⁸ At the beginning of 1995, he had "a wide and substantive knowledge of the strategies and goals of the political leadership" of Republika Srpska including forcing civilian populations from the enclaves.¹⁹

12. He had full knowledge of Directive 7,²⁰ the plan to create "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa."²¹ In fact, Directive 7 contained sections setting out Gvero's tasks including "avoiding condemnation [of the RS organs] by the international community" for reducing the supply of material resources to the Bosnian Muslim population and making them dependent on the RS forces' good will.²²

13. Because of his position and functions as one of the most senior officers in the VRS Main Staff,²³ Gvero was fully informed of VRS operations and how they were carried out.²⁴ As Assistant Commander for Morale directly subordinated to Mladić²⁵ Gvero participated in the decision-making process in the Main Staff by presenting proposals, positions or opinions.²⁶ Taking part in this process provided him with full information about the situation on the ground. Knowledge of the events was also essential to Gvero's tasks of disseminating information and propaganda for the troops²⁷ and of remaining attuned to the perception of the VRS in the international media.²⁸ Gvero's duty to make sure the fighting spirit was at a maximum level further required his familiarity with events on the ground and involved monitoring the situation within units.²⁹ For instance, on Mladić's 12 May 1995 order, Gvero and other Main Staff officers were dispatched to the field to assess the situation in the

¹⁶ Judgement, para.1830, citing Chapter V, Section B.8.(c)(i).

¹⁷ Judgement, para.2205.

¹⁸ Judgement, paras.91, 1758, 1801.

¹⁹ Judgement, para.1759.

²⁰ Judgement, para.1833. *See also* Judgement, paras.1802-1803.

²¹ Judgement, para.1086.

²² Judgement, paras.199, 1760-1761; Exh.P5, p.14, para.6.1.

²³ Judgement, paras.1756-1757, 1805.

²⁴ Judgement, paras.1747-1757, 1803, 1805-1807, 1815-1816.

²⁵ Judgement, para.1747.

²⁶ Judgement, paras.1748, 1750.

²⁷ Judgement, paras.1752, 1806. He was supported in this connection by his sub-department for information and propaganda: para.1749.

²⁸ Judgement, para.1753.

²⁹ Judgement, paras.1750, 1806.

units to ensure a more efficient execution of the tasks derived from Directive 7/1 and the realisation of planned operations.³⁰

14. Gvero was involved throughout the *Krivaja-95* and *Žepa* operations: he “was provided with crucial information and was involved at critical junctures”³¹ and “was a specific recipient of key documents and was generally informed as to the progress of the military action.”³² In particular on the fateful days of July 1995:

- On 9 July 1995, Gvero went to the IKM in Pribićevec and discussed with Krstić the military activities concerning Srebrenica.³³ That same day, the telegram forwarding Karadžić’s order to capture Srebrenica was sent to Gvero and Krstić personally.³⁴
- On 10 July 1995, the VRS heavily shelled Srebrenica town, which was crowded with refugees. The UNPROFOR compound was also targeted. Two heavy shells hit the surroundings of the hospital where 2,000 civilians had gathered for refuge: six of them were killed.³⁵ The Chamber found these acts to be part of the indiscriminate and disproportionate attack against the civilian population, and part of the terrorisation against civilians.³⁶ Gvero had full knowledge of these events³⁷ when he lied to the world and reported these crimes as normal VRS combat activities directed towards the Muslim terrorists, and “in no way directed against civilians or members of UNPROFOR”.³⁸
- On 11 July 1995, knowing that “the VRS had already taken-over Srebrenica town and that Bosnian Muslims had fled into the DutchBat compound in Potočari,” Gvero threatened General Nicolai with reprisals against UNPROFOR troops and the civilians in Potočari if NATO air strikes did not stop.³⁹ The same day, Gvero had all the information to be

³⁰ Judgement, para.1751, citing Exh.5D714.

³¹ Judgement, para.1805.

³² Judgement, para.1806.

³³ Judgement, paras.1765-1766, 1805.

³⁴ Judgement, paras.1767, 1806.

³⁵ Judgement, paras.255, 770.

³⁶ Judgement, paras.775, 979, 996-999.

³⁷ Judgement, para.1815.

³⁸ Judgement, paras.1768, 1814.

³⁹ Judgement, paras.258, 1770, 1816 (citation at para.1816).

able to reassure Karadžić that the take-over of Srebrenica and the forcible removal of the civilian population was going according to plan.⁴⁰

- On 12 July 1995, Gvero and General Nicolai discussed the meeting held that morning at Hotel Fontana and the matter of the “evacuation of the refugees” from Srebrenica, disagreeing in particular on the transportation of wounded by air.⁴¹
- In the afternoon of 13 July 1995, Gvero was copied on Tolimir’s order prohibiting the filming of prisoners and instructing to place them “indoors or in the area protected from sighting from the ground or the air”.⁴² Later that night, Gvero was also a recipient of Tolimir’s further instructions regarding the “accommodation of prisoners of war”⁴³ and of Mladić’s order to the Drina Corps which, in line with Tolimir’s proposals, instructed that certain measures be taken to prevent any leaks and media attention, in particular as concerns the prisoners of war and evacuated civilians.⁴⁴ Gvero thus knew that the (mis)treatment of the refugees and prisoners had to be kept secret.
- At times Gvero was the most senior officer present at the VRS Main Staff headquarters — *e.g.* 13, 19 and 25 July.⁴⁵ As such he was kept up to date on the central aspects of the Srebrenica and Žepa campaigns and any related issues.⁴⁶ For instance, Gvero knew that a column of Bosnian Muslims was trying to escape through the forest: on 13 July, he ordered that they be discovered, blocked, disarmed and captured.⁴⁷

15. Gvero’s knowledge of the Srebrenica events is also demonstrated by the fact that during July 1995 he had contacts with international agencies (UNPROFOR, ICRC and UNHCR) concerning the situation in Srebrenica and the prisoners.⁴⁸ In

⁴⁰ Judgement, paras.1772-1775, 1822.

⁴¹ Judgement, paras.1790-1791.

⁴² Judgement, para.1778, citing Exh.P192. *See also* Judgement, paras.465, 1806.

⁴³ Judgement, paras.466, 1778, citing Exh.P131.

⁴⁴ Judgement, paras.467, 1779, citing Exh.5DP35.

⁴⁵ Judgement, para.1756.

⁴⁶ Judgement, para.1807.

⁴⁷ Judgement, paras.464, 1777, 1807.

⁴⁸ Judgement, para.1755. *See also* Judgement, paras.345-346, 348-349.

addition to Gvero's interactions mentioned above, he also accompanied Mladić and other VRS officer to meetings with UNPROFOR.⁴⁹

16. The only reasonable conclusion is that, given his knowledge of the plan and the events on the ground, Gvero was aware of the possibility of opportunistic killings. He not only knew about the violent means with which the plan was being implemented, but also that the clear message to the VRS troops was that violence against civilians and terrorisation was a necessary part of the expulsion process. Given all this knowledge, it is irrelevant that Gvero did not have logistical functions and was not physically present in Potočari.⁵⁰ He had sufficient information to make him aware of the possibility that opportunistic killings against Bosnian Muslim civilians taking no active part in the hostilities might be perpetrated by Bosnian Serb forces in the course of the forcible transfer. He also had foresight of the possibility that these killings might be committed on discriminatory grounds, given his knowledge that the entire operation was directed against Bosnian Muslims. Gvero nevertheless continued to participate in the JCE, thereby establishing his acceptance of the possibility of opportunistic killings and persecution through murder. Had the Chamber applied the correct legal standard for *mens rea*, it would have convicted Gvero of murder (Counts 4 and 5) and murder as an act of persecution (Count 6) pursuant to JCE III.

C. The Chamber erred in fact in acquitting Gvero of the Potočari killings

17. Additionally or in the alternative, the Chamber erred in fact in failing to find that Gvero would have foreseen that opportunistic killings would be perpetrated by Bosnian Serb forces in the course of the forcible transfer, and that he accepted that risk. In light of the facts as found and the evidence on the record, no reasonable trial chamber would have concluded as the Chamber did. The Appeals Chamber should correct this error and convict Gvero for murder and persecution through murder.

18. The Chamber found that—in the circumstances of the forced movement of an entire population numbering in the thousands, where the movement was accompanied by acts of cruel and inhumane treatment, and terrorisation—it was natural and

⁴⁹ Judgement, para.1755.

⁵⁰ *Contra* Judgement, para.1830.

foreseeable that “opportunistic” killings “would occur”.⁵¹ The Chamber also found that Gvero knew that the plan was to forcibly expel the entire Bosnian Muslim population of the enclaves, and that cruel/inhumane treatment and terrorisation were integral components of the forcible transfer operation.⁵² Given these findings and the findings on Gvero’s knowledge of the events outlined above, the Chamber could only have found that Gvero foresaw and accepted that “opportunistic” killings would be perpetrated by Bosnian Serb forces in the course of the JCE to Forcibly Remove. As explained above,⁵³ it is irrelevant that Gvero did not have logistical functions and was not physically present in Potočari.⁵⁴

D. Relief sought

19. Gvero should be found criminally liable for the Potočari opportunistic killings pursuant to JCE III and convicted of murder as a crime against humanity under Count 4, murder as a violation of the laws or customs of war under Count 5, and murder as an act of persecution under Count 6.⁵⁵ Gvero’s sentence should be increased accordingly.

⁵¹ Judgement, para.1088.

⁵² Judgement, paras.1086-1087, 1801-1803, 1822, 1832-1833. *See also* Judgement, paras.1747-1757, 1765-1779, 1805-1807, 1815-1816.

⁵³ *See above* I. B. 2.

⁵⁴ *Contra* Judgement, para.1830.

⁵⁵ With respect to Counts 4 and 6, the Chamber has already found that Gvero met the knowledge requirement (with respect to the attack against the civilian population) for crimes against humanity: Judgement, para.1824. Given’s Gvero’s position and knowledge, it is clear that he also met the knowledge requirement for Count 5 (violation of the laws or customs of war). Indeed, it is indisputable that Gvero knew that there was an armed conflict between the RS forces and the BiH forces, and that his acts and the crimes were connected to this armed conflict. Thus, Gvero should be convicted for murder as a violation of the laws or customs of war (Count 5), just like Miletić. *See* Ground 9 of the Prosecution’s Appeal.

II. GROUND FIVE: THE CHAMBER IMPOSED A MANIFESTLY INADEQUATE SENTENCE ON GVERO

A. Overview

20. Gvero's five-year sentence for his participation in the forcible removal of tens of thousands of Bosnian Muslims is manifestly inadequate. It utterly fails to reflect the seriousness of the crimes for which he was convicted and the extent of his involvement in them. It cannot be justified by the mitigating circumstances identified by the Chamber and cannot be reconciled with the key objectives of deterrence and retribution. The Appeals Chamber should substantially increase Gvero's sentence.

21. Gvero was found to have committed inhumane acts (forcible transfer) and persecution through his participation in the JCE to Forcibly Remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves.⁵⁶ This forcible removal was premeditated, systematic and brutal. It was perpetrated through violence, terror, and literally starving the civilian population out of their homes. The forcible transfer and persecution of the Bosnian Muslim population caused immeasurable harm to thousands of victims. These were crimes of the gravest magnitude.

22. Further, Gvero's involvement in the JCE was significant⁵⁷ and it "was not limited to the initial stages of the plan, but continued throughout its implementation."⁵⁸ As one of the most senior officers in the VRS Main Staff, he played an important role in overseeing the strategy to forcibly remove the Bosnian Muslims from Srebrenica and Žepa.⁵⁹ In this respect, his "involvement is noticeable throughout the *Krivaja-95* and Žepa operations: he was provided with crucial information and was involved at critical junctures."⁶⁰ He also significantly contributed to the JCE through his efforts to delay and block international protective intervention, at the moment when such intervention was the last remaining obstacle to the take-over and ethnic cleansing of Srebrenica.⁶¹

⁵⁶ Judgement, paras.1822, 1825-1826, 1833, 1836, 2109.

⁵⁷ Judgement, para.1822.

⁵⁸ Judgement, para.2205.

⁵⁹ Judgement, paras.1805-1807.

⁶⁰ Judgement, para.1805.

⁶¹ Judgement, paras.1818, 1820, 1822, 2203.

23. While the Chamber is entitled to a margin of discretion with respect to sentencing, this discretion is not unlimited.⁶² Here, the Chamber ventured outside the scope of its discretion in imposing a five-year sentence. Clearly, this sentence was “taken from the wrong shelf.”⁶³ The Appeals Chamber should substitute this sentence with one that reflects the truly heinous nature of these crimes and Gvero’s participation therein.

B. The seriousness of the underlying crimes warrants an increase in the sentence

24. Although the Chamber acknowledged that the underlying crimes were amongst the gravest,⁶⁴ it imposed a sentence that simply cannot be justified in light of the crimes perpetrated, especially for an accused who was convicted as a perpetrator and JCE member. The underlying crimes were particularly grave due to their magnitude and scale; the brutal and inhumane manner in which they were carried out; the vulnerability of the victims affected; and their severe and lasting consequences. When these factors are given due consideration, Gvero’s sentence falls far short of reflecting the inherent seriousness of the crimes for which he was convicted.⁶⁵

1. Scale of the crimes

25. The victims of the forcible transfer operation were in the tens of thousands.⁶⁶ An estimated twenty to thirty thousand people sought refuge at the DutchBat compound alone.⁶⁷ This is in addition to the civilian component of the column—an estimated ten thousand⁶⁸—and the further four to five thousand civilians and wounded expelled from Žepa.⁶⁹ As noted by the Chamber, the cleansing of the

⁶² *Gacumbitsi* AJ, para.205.

⁶³ *Galić* AJ, para.455.

⁶⁴ *See* Judgement, paras.2148-2152.

⁶⁵ The Chamber noted that it had the discretion to determine whether certain factors are considered as contributing to the gravity of the crimes or as aggravating factors: Judgement, para.2138. Likewise, in these submissions it is acknowledged that certain factors could be considered in either context, but that the Chamber did not give adequate weight to these considerations in assessing either the seriousness of the crimes or the aggravating factors.

⁶⁶ Judgement, para.2149.

⁶⁷ Judgement, paras.266, 272, 309, 992. *See also* Judgement, para.341.

⁶⁸ *See* Judgement, paras.269-270.

⁶⁹ Judgement, para.719.

Srebrenica and Žepa enclaves constituted the forced movement of an entire population.⁷⁰

2. Methodology of forcible transfer – the creation of a humanitarian crisis, cruel and inhumane treatment, and terrorisation

26. The manner in which the forcible transfer campaign was carried out was calculated and brutal. It resulted in extraordinary human suffering. Victims were threatened and targeted over a period of months in an escalating campaign of terror. The Chamber found that terrorising the civilian population, and cruel and inhumane treatment were inherent components of the common plan.⁷¹ However, despite this finding, the sentence imposed by the Chamber does not reflect the inhumane and callous way in which the civilians were purged from Srebrenica and Žepa, and the preceding months of terror that precipitated their removal.

27. Directive 7 set out the invidious goal to “create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa”.⁷² The cleansing of the enclaves was an integral step in the broader plan set out in Directive 4, to ultimately eliminate the Muslim presence in Eastern Bosnia.⁷³

28. The Bosnian Serb forces undertook a concerted campaign to starve the civilian population of supplies through the restriction of humanitarian convoys.⁷⁴ In the months preceding the *Krivaja-95* attack, convoys were increasingly denied clearance.⁷⁵ The levels of food and medical supplies were significantly reduced and at times critical.⁷⁶ By early July the food supplies in the UNHCR warehouse were “almost zero” and “there [was] not even sufficient stock to run the social kitchens to provide one meal a day for the most vulnerable.”⁷⁷

29. The crippling of the enclaves was coupled with a campaign of terrorisation, which ultimately led to a full-scale, indiscriminate and disproportionate military

⁷⁰ Judgement, para.1088.

⁷¹ Judgement, paras.1086-1087.

⁷² Judgement, para.199, citing Exh.P5, p.10.

⁷³ Judgement, para.91.

⁷⁴ See Judgement, para.760, finding that the “strangulation” of the enclaves through the restriction of supplies formed part of the widespread and systematic attack against the Bosnian Muslim population. See also Judgement, paras.766-767.

⁷⁵ Judgement, paras.228-229.

⁷⁶ Judgement, para.228.

attack by the VRS.⁷⁸ The civilian population was indiscriminately attacked and randomly targeted.⁷⁹

30. By the end of June, the Srebrenica enclave was subject to almost daily shelling.⁸⁰ Momir Nikolić called the sniping of civilians “one of the segments which was conducive to the creation of a difficult life for people living in the enclave”.⁸¹ Spreading terror among the civilian population was integral to the ultimate cleansing of the enclaves. The purpose was to cause extensive trauma and psychological damage and ultimately to force the Muslim population to flee.⁸²

31. In the final days before its fall, Srebrenica was subjected to intense and constant shelling from all directions.⁸³ Civilians were killed when shells landed in the vicinity of the hospital, where people had gathered for refuge.⁸⁴

32. The catastrophic humanitarian situation, combined with the military attack, prompted the civilians in Srebrenica to flee to Potočari.⁸⁵ The shelling followed them on the journey.⁸⁶ People were wounded and there were dead bodies along the road. The civilians were terrified⁸⁷ and felt as if they were hunted.⁸⁸ Thousands of people, desperate for protection, sought refuge in the DutchBat compound.⁸⁹ The situation there was marked by panic, fear and despair.⁹⁰

33. Shells continued to fly over the compound. People were exhausted and frightened.⁹¹ As the Bosnian Serb forces advanced to Potočari, they searched houses and burned homes and haystacks, causing further panic.⁹² When the Bosnian Serb forces surrounded the Bosnian Muslim population, instances of ethnic-based insults

77 Judgement, para.236.
 78 Judgement, para.775.
 79 Judgement, paras.207, 210, 666, 768.
 80 Judgement, para.210.
 81 Judgement, para.210.
 82 Judgement, para.998.
 83 Judgement, para.249. *See also* Judgement, para.255.
 84 Judgement, paras.255, 770.
 85 Judgement, para.782.
 86 Judgement, paras.257, 265, 770.
 87 Judgement, para.265.
 88 Boering, T.1938, referred to in Judgement, fn.885.
 89 Judgement, para.264.
 90 Judgement, paras.917, 992.
 91 Judgement, paras.266, 272.
 92 Judgement, para.303.

and threats⁹³ coupled with assaults and rumours of rape and murder led to an “unbearable situation of terror” marked by hopelessness and vulnerability.⁹⁴

34. The humanitarian situation at Potočari was horrendous. Civilians suffered through the stifling heat of day and the cold of night unprotected. Food and water were scarce.⁹⁵ Hygiene conditions deteriorated rapidly.⁹⁶ Too scared to leave the compound, people used it as a toilet and even gave birth there.⁹⁷ There was at least one suicide and a number of deaths.⁹⁸ People injured themselves, in the hope that if they were injured they could be treated and evacuated.⁹⁹

35. The night between 12 and 13 July was horrific for the refugees. Bosnian Muslim men and women were picked out from the crowd. Shouting, moaning, screaming and bursts of fire could be heard.¹⁰⁰

It couldn't have been worse. I think that it was hell on earth. They say hell is in the other world, but actually there is a hell in this world too, and that night I spent in hell.¹⁰¹

[T]hat night [...] was terrible, killings, raping, it was horror.¹⁰²

30.000 people all screaming at the same time, there is just no way to describe that situation.¹⁰³

36. The separation of women, children and elderly from the men took place in an oppressive environment marked by fear and intimidation.¹⁰⁴ Men were singled out while families literally tried to keep hold of each other.¹⁰⁵ The women, children and elderly faced a painful separation from their men,¹⁰⁶ coupled with the uncertainty as to

⁹³ Judgement, para.304.

⁹⁴ Judgement, para.917.

⁹⁵ Judgement, para.309.

⁹⁶ Judgement, para.311.

⁹⁷ Judgement, para.312.

⁹⁸ Judgement, para.312.

⁹⁹ Judgement, para.311.

¹⁰⁰ Judgement, paras.313-314.

¹⁰¹ Hasić, T.1177, cited in part in Judgement, para.315.

¹⁰² H.Hafizović, Exh.P3230 at ERN 0100-3533, cited in Judgement, para.315.

¹⁰³ Judgement, para.315, citing PW-125, T.3311.

¹⁰⁴ Judgement, paras.918, 997.

¹⁰⁵ Judgement, paras.319-324; van Duijn, T.2291-2292.

¹⁰⁶ Judgement, para.918.

their own fate and the fate of the men left behind.¹⁰⁷ In Potočari, the Bosnian Serb forces acted with a deliberate intent to terrify the civilian population.¹⁰⁸

3. Vulnerability of victims

37. The victims of the ethnic cleansing campaign were inherently vulnerable. Many of the civilians who fled Srebrenica and Žepa were already internally displaced persons, who had fled from their villages as the conflict advanced, and sought refuge in the enclaves.¹⁰⁹ They came to the “safe areas”¹¹⁰ of Srebrenica and Žepa seeking protection.¹¹¹ Just before the attack on Srebrenica, an estimated 85% of its inhabitants were internally displaced persons.¹¹² Of the 6,500 to 8,000 people living in Žepa, an estimated 65% of the population were internally displaced.¹¹³

38. The vulnerability of these victims was compounded by the concerted campaign of shelling and terrorisation within the Srebrenica enclave over a period of months¹¹⁴ and the dire shortages of food, fuel and provisions due to the strangulation of the enclaves through the restriction of humanitarian supplies.¹¹⁵ They were victims of persistent and continuous terrorisation and were deprived of the most basic needs for survival. By the time the Bosnian Muslim population fled to Potočari for protection, they were desperate and terrified.¹¹⁶ The civilians bussed out of Potočari and Žepa were predominantly women, children and the elderly.¹¹⁷

39. Despite its own findings relating to the vulnerability of the victims,¹¹⁸ the Chamber cannot possibly have given adequate weight to this consideration, in light of the sentence imposed.

¹⁰⁷ Judgement, para.994.

¹⁰⁸ Judgement, para.997.

¹⁰⁹ Judgement, paras.213, 667, 837, 865, 923, 948.

¹¹⁰ Judgement, paras.93-95, 761.

¹¹¹ Judgement, para.837.

¹¹² Judgement, paras.213, 923.

¹¹³ Judgement, para.948.

¹¹⁴ Judgement, paras.207, 210, 775.

¹¹⁵ Judgement, paras.228-229, 235, 760.

¹¹⁶ Judgement, paras.257, 264-266, 917, 992.

¹¹⁷ Judgement, paras.316, 715-716, 2153.

¹¹⁸ *See e.g.* Judgement, para.2153.

4. Victim impact and lasting consequences

40. The forcible transfer of the Bosnian Muslim population caused irreparable harm and had severe and lasting consequences.¹¹⁹ Victims were “torn from their homes and all which was familiar to them”.¹²⁰ Beyond the terrible conditions the victims endured in the enclaves and at Potočari, many of the women, children and elderly endured the heart-wrenching process of witnessing their loved-ones being separated from them.¹²¹

41. The suffering of the twenty thousand or so refugees that arrived in Tuzla continued as they remained uncertain about the fate of the men they had been separated from.¹²² A UNPROFOR officer described the overwhelming scene when the buses of distraught refugees arrived.¹²³ He recalled the desperation of one Bosnian Muslim woman attempting to scale a barbed-wire fence with her bare hands as a rumour had circulated that some of the Srebrenica men were nearby.¹²⁴

42. The quality of life of the Bosnian Muslim population was sharply reduced by losing their homes and possessions as a result of the expulsions.¹²⁵ Many witnessed their homes being burned and others returned to find their property destroyed.¹²⁶ Today, survivors continue to live in poverty due to unemployment and meagre funds to support their families.¹²⁷ Some have had to live in refugee settlements or temporary housing, without basic amenities such as running water or a toilet.¹²⁸ They continue to feel persecuted due to the conditions they now find themselves living in;¹²⁹ being a refugee is a stressful and traumatic event in itself.¹³⁰

¹¹⁹ Judgement, para.2151.

¹²⁰ Judgement, para.846.

¹²¹ Judgement, para.2149.

¹²² Judgement, para.2151; Joseph, T.14151:5-14152:1.

¹²³ Judgement, para.847; Joseph, T.14151.

¹²⁴ Joseph, T.14152.

¹²⁵ Judgement, para.2151.

¹²⁶ *See e.g.* H.Hafizović, Exh.P3230 at ERN 0100-3533.

¹²⁷ *See e.g.* S.Suljić, Exh.P3242 at ERN 0100-3553; H.Hafizović, Exh.P3230 at ERN 0100-3534.

¹²⁸ Malkić, Exh.P3229 at ERN 0100-3562.

¹²⁹ Ibrahimefendić, Exh.P2228 at T.5816.

¹³⁰ Ibrahimefendić, Exh.P2228 at T.5824.

C. The gravity of Gvero's conduct warrants an increase in sentence

43. Gvero's role as a perpetrator of these nefarious crimes was not tangential, trivial or minimal. Gvero made a significant contribution¹³¹ to one of the most notorious campaigns of ethnic cleansing in modern history. He "participated in the JCE to Forcibly Remove from its inception" and "[h]is involvement was not limited to the initial stages of the plan, but continued throughout its implementation".¹³² As one of the most senior officers in the VRS Main Staff, he played an important role in overseeing the strategy to forcibly remove the Bosnian Muslims from Srebrenica and Žepa.¹³³ He also contributed to the JCE through his efforts to delay and block international protective intervention.¹³⁴ Given those findings and the seriousness of the crimes for which he was convicted, a sentence of five years is manifestly inadequate.

44. The Chamber's basis for imposing such a surprisingly low sentence seems to be its characterisation of Gvero's contributions as "not decisive" and "not numerous".¹³⁵ The Chamber also considered there was "no evidence of his involvement in the decision-making process with regard to any military action relating to the plan."¹³⁶ But the Chamber could only make these statements by ignoring its own previous findings.

45. Gvero shared the intent and played an important role throughout the JCE to Forcibly Remove. He was aware from 1992 onwards of the plan to expel the Bosnian Muslim population.¹³⁷ From 1995, Gvero had "a wide and substantive knowledge of the strategies and goals of the political leadership of RS" including forcing civilian populations from the enclaves.¹³⁸ He acted with full knowledge of Directive 7;¹³⁹ the plan to create "an unbearable situation of total insecurity with no hope of further

¹³¹ Judgement, paras.1820, 1822, 2203.

¹³² Judgement, para.2205.

¹³³ Judgement, paras.1805-1807. *See also* Judgement, para.1820 ("Gvero played a limited but important role in supporting VRS' military action, which was essential to the success of the plan to forcibly transfer").

¹³⁴ Judgement, paras.1820, 1822, 2203.

¹³⁵ Judgement, para.2203.

¹³⁶ Judgement, para.2203.

¹³⁷ Judgement, paras.91, 1758.

¹³⁸ Judgement, para.1759.

¹³⁹ Judgement, para.1833. *See also* Judgement, paras.1801-1803.

survival or life for the inhabitants of Srebrenica and Žepa.”¹⁴⁰ He knew the role of the VRS in implementing this policy and the methods agreed for achieving it, including the restriction of humanitarian aid and the military attack on the enclaves.¹⁴¹ With this knowledge, he participated in the JCE throughout its implementation.¹⁴²

46. Gvero played a vital role within the VRS Main Staff in support of the forcible removal operation. As the Chamber found, “Gvero’s involvement is noticeable throughout the *Krivaja-95* and Žepa operations: he was provided with crucial information and was involved at critical junctures.”¹⁴³ For instance, Gvero was personally present at the IKM in Pribićevec on 9 July 1995, together with Krstić, who was leading the VRS’ advances on Srebrenica.¹⁴⁴ He was kept informed of military actions and was the specific recipient of key documents—including Tolimir’s telegram forwarding Karadžić’s order to capture Srebrenica on 9 July and a memorandum from Tolimir and Mladić on 13 July with specific instructions on POWs.¹⁴⁵ Gvero was also kept abreast of the negotiations concerning Žepa.¹⁴⁶ Further, as the most senior officer present at the VRS Main Staff at times during 13, 19 and 25 July, assistant commanders reported to Gvero and he was required to intervene directly in military action.¹⁴⁷ The importance of his role is exemplified by his direct order on 13 July to capture men from the column.¹⁴⁸ These findings not only show Gvero’s important contributions to the JCE, but also show his direct involvement in the decision-making process with regard to military actions related to the JCE, thus contradicting the Chamber’s statement at paragraph 2203.

47. Further, Gvero used his position within the Main Staff to delay and block international protective intervention, at a critical juncture in the realisation of the JCE. Through his intentionally misleading communiqué to the press¹⁴⁹ and his false and

¹⁴⁰ Judgement, para.1086.

¹⁴¹ Judgement, para.1803.

¹⁴² Judgement, para.2205. While the Chamber did not find this factor to be specifically aggravating, it is nonetheless indicative of the extent and duration of Gvero’s involvement.

¹⁴³ Judgement, para.1805.

¹⁴⁴ Judgement, para.1805.

¹⁴⁵ Judgement, para.1806.

¹⁴⁶ Judgement, para.1806.

¹⁴⁷ Judgement, para.1807.

¹⁴⁸ Judgement, para.1807.

¹⁴⁹ Judgement, para.1815.

threatening statements to General Nicolai,¹⁵⁰ Gvero acted in order to halt NATO air support.¹⁵¹ At that point:

NATO air strikes were essentially the only means by which the VRS' advance towards and capture of the enclave could be halted. From the VRS' perspective, this was the last significant obstacle to the completion of the plan to take over the Srebrenica enclave and forcibly remove its inhabitants.¹⁵²

48. The language at paragraph 2203 is thus contradicted by the Chamber's own findings. Accepting Gvero's nature and degree of participation as found by the Chamber, a five-year sentence is utterly inadequate.

D. The sentence is completely outside the range of sentences imposed in similar cases

49. The manifest failure to give due weight to the seriousness of Gvero's offences is highlighted by reference to other cases that have considered the crimes of persecution and forcible transfer and, in particular, the forcible transfer from Srebrenica.

50. While the precedential effect of sentences rendered by the Tribunal is limited, as sentences must be tailored to fit the specific circumstances of each case,¹⁵³ a sentence should not be "out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences".¹⁵⁴

51. Here, Gvero's sentence is completely outside the range of sentences imposed for accused convicted for forcible displacement crimes.¹⁵⁵ In fact, the Chamber did not consider any Tribunal decisions in its assessment of the appropriate sentence,

¹⁵⁰ Judgement, para.1816.

¹⁵¹ Judgement, para.1818.

¹⁵² Judgement, para.1818.

¹⁵³ See e.g. *Blagojević* AJ, para.333.

¹⁵⁴ *Jelisić* AJ, para.96, cited with approval in *Babić* AJ, para.33; *Kordić* AJ, para.1064. See also *Čelebići* AJ, paras.756-758.

¹⁵⁵ See e.g. *Krajišnik* AJ (paras.797, 819) where Krajišnik was sentenced to 20 years' imprisonment for persecution (forcible displacements), deportation and forcible transfer as a JCE member. See also *Simić* TJ, where Miroslav Tadić was convicted for aiding and abetting persecution based on the forcible displacement of 16 named individuals (paras.1042-1044, 1052, 1093, 1119). He did not share the persecutory intent and he demonstrated remorse (paras.1043, 1098). He received a sentence of eight years' imprisonment (para.1122).

something it should have done.¹⁵⁶ In particular, the Chamber should have considered the *Blagojević* decision, which highlights the manifest inadequacy of Gvero's sentence.

52. Vidoje Blagojević was sentenced to 15 years' imprisonment, following appeal proceedings, for his participation in the ethnic cleansing of Srebrenica.¹⁵⁷ He was convicted for aiding and abetting murder, persecutions and inhumane acts (forcible transfer).¹⁵⁸ The murder convictions related solely to opportunistic killings.¹⁵⁹ He was not one of the major participants in the commission of the crimes. In contrast to the commanders of the Main Staff and MUP who played key roles in designing and executing the common plan, Blagojević's contribution was primarily through his assistance to the forcible transfer operation.¹⁶⁰ The trial chamber recognized the inherent gravity of the offences, noting that the campaign of persecutions was "enormous in scale" and included a criminal enterprise to forcibly transfer over 25,000 Bosnian Muslims.¹⁶¹ Although Blagojević was convicted for a greater range of crimes than Gvero,¹⁶² his primary contribution was to the forcible transfer. He was not a major participant and he was convicted only as an aider and abettor, not a perpetrator. However, the significantly greater sentence imposed on Blagojević recognizes the inherent gravity and scale of the ethnic cleansing operation in Srebrenica. The sentence handed down to Gvero does not.

E. The mitigating factors recognised by the Chamber do not justify such a plainly inadequate sentence

53. None of the mitigating factors identified by the Chamber could justify such a plainly inadequate sentence. In relation to Gvero's age and medical conditions, the Chamber indicated that it afforded these factors "some weight".¹⁶³ With respect to his character, the Chamber noted that it gave very limited weight to this as a mitigating factor.¹⁶⁴ By the Chamber's own reasoning, none of these mitigating factors were

¹⁵⁶ *Krstić* AJ, para.250; *Čelebići* AJ, para.757.

¹⁵⁷ *Blagojević* AJ, Chapter VI, Disposition.

¹⁵⁸ *Blagojević* TJ, Chapter X, Disposition.

¹⁵⁹ *Blagojević* TJ, paras.746-749.

¹⁶⁰ *Blagojević* TJ, para.835.

¹⁶¹ *Blagojević* TJ, para.837.

¹⁶² However, the Prosecution has appealed Gvero's acquittal for opportunistic killings: *see supra* I.

¹⁶³ Judgement, para.2208.

¹⁶⁴ Judgement, para.2209.

accorded significant weight.¹⁶⁵ The mitigating factors identified by the Chamber do not, therefore, explain the unreasonably low sentence imposed upon Gvero.

54. In any case, while in appropriate circumstances compelling mitigating factors could justify a substantial “discount” in sentence, none of the factors applicable to Gvero justify such a reduction. In the context of crimes of such gravity, little weight should be given to the personal circumstances of an accused.¹⁶⁶

F. The sentence imposed undermines the primary purposes of deterrence and retribution

55. Although the Chamber recognized the importance of the purposes of retribution and deterrence,¹⁶⁷ the sentence imposed simply cannot be reconciled with these sentencing purposes and further demonstrates that it has been “taken from the wrong shelf”.

56. A sentence of five years’ imprisonment fails to reflect the outrage of the international community for these crimes and to adequately condemn “the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct”.¹⁶⁸ The forced purging of the Srebrenica and Žepa enclaves, coupled with the dire humanitarian crisis that occurred at Potočari, endures as a truly horrific and defining moment of the conflict. Moreover, a sentence of only five years’ imprisonment falls woefully short of providing justice to the victims of this massive ethnic cleansing operation.

57. The sentence imposed by the Chamber also fails to meet the purpose of deterrence. Gvero significantly contributed to a common plan to engage in ethnic cleansing, which was carried out *inter alia* through terrorisation of the Bosnian Muslim civilian population, and cruel and inhumane treatment. He acted with discriminatory intent. The victims of this operation were in the tens of thousands. A clear message must be sent to those who perpetrate crimes on such a massive scale

¹⁶⁵ Although the Chamber recognised Gvero’s voluntary surrender as a mitigating circumstance, it did not state that this should be given significant weight (*cf.* Judgement, para.2222). In any case, the mere voluntary surrender of Gvero cannot justify the unreasonably low sentence he received.

¹⁶⁶ See *e.g.* the approach in *Kordić TJ*, para.848; *Blaškić TJ*, para.782; *Banović SJ*, para.75, *Mrda SJ*, para.92.

¹⁶⁷ Judgement, paras.2128-2129.

that this conduct will be severely punished. A sentence of five years imprisonment for offending of this nature will not have the effect of deterring other potential perpetrators from committing similar crimes.¹⁶⁹

G. Remedy

58. The Appeals Chamber should substitute the manifestly inadequate sentence with one that is just and reasonable.

Word Count: 6,650

Dated this 15th day of February 2013
At The Hague, The Netherlands



Peter Kremer QC
Chief of Appeals Division

¹⁶⁸ *Kordić* AJ, para.1075, citing *R. v. M. (C.A.)* [1996] 1 S.C.R., para.80.

¹⁶⁹ *Krajišnik* AJ, para.805.

RULE 111 DECLARATION

The Prosecutor will exercise due diligence to comply with his continuing Rule 68 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to the Accused all material under Rule 68(i) which has come into his actual knowledge and, in addition, has made available to them collections of relevant material held by the Prosecutor.



Peter Kremer, QC
Chief of Appeals Division

GLOSSARY

Prosecutor v. Vujadin Popović et al., Case No. IT-05-88

Abbreviation used in Prosecution Appeal Brief	Full citation
Chamber	Trial Chamber in <i>Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević</i> , Case No. IT-05-88-T
Judgement	<i>Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević</i> , Case No. IT-05-88-T, T.Ch., Judgement, 10 June 2010

ICTY Authorities

Abbreviation used in Prosecution Appeal Brief	Full citation
<i>Babić</i> AJ	<i>Prosecutor v. Milan Babić</i> , Case No.IT-03-72-A, App.Ch., Judgement on Sentencing Appeal, 18 July 2005
<i>Banović</i> SJ	<i>Prosecutor v. Predrag Banović</i> , Case No.IT-02-65/1-S, T.Ch., Sentencing Judgement, 28 October 2003
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No.IT-95-14-T, T.Ch., Judgement, 3 March 2000
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No.IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Blagojević</i> TJ	<i>Prosecutor v. Vidoje Blagojević and Dragan Jokić</i> , Case No.IT-02-60-T, T.Ch., Judgement, 17 January 2005
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić et al.</i> , Case No.IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No.IT-98-29-A, App.Ch., Judgement, 30 November 2006
<i>Jelisić</i> AJ	<i>Prosecutor v. Goran Jelisić</i> , Case No.IT-95-10-A, App.Ch., Judgement, 5 July 2001

Abbreviation used in Prosecution Appeal Brief	Full citation
<i>Karadžić</i> JCE III Decision	<i>Prosecutor v. Radovan Karadžić</i> , Case No.IT-95-5/18-AR.72.4, App.Ch., Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004
<i>Kordić</i> TJ	<i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , Case No. IT-95-14/2-A, T.Ch., Judgement, 26 February 2001
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No.IT-00-39-A, App.Ch., Judgement, 17 March 2009
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić</i> , Case No.IT-98-33-A, App.Ch., 19 April 2004
<i>Mrda</i> SJ	<i>Prosecutor v. Darko Mrda</i> , Case No.IT-02-59-S, T.Ch., Sentencing Judgement, 31 March 2004
<i>Simić</i> TJ	<i>Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić</i> , Case No.IT-95-9-T, T.Ch., Judgement, 17 October 2003

ICTR Authorities

Abbreviation used in Prosecution Appeal Brief	Full citation
<i>Gacumbitsi</i> AJ	<i>Prosecutor v. Sylvestre Gacumbitsi</i> , Case No. ICTR-2001-64-A, App.Ch., 7 July 2006

Other Abbreviations

Abbreviation used in Prosecution Appeal Brief	Full citation
BiH	Bosnia and Herzegovina

Abbreviation used in Prosecution Appeal Brief	Full citation
fn.	Footnote
Exh.	Exhibit
ICRC	International Committee of the Red Cross
IKM	Forward command post (<i>Istureno komandno mesto</i>)
JCE	Joint criminal enterprise
JCE III	Third category of joint criminal enterprise
MUP	Bosnian Serb Ministry of Internal Affairs
NATO	North Atlantic Treaty Organization
p.	Page
para.	Paragraph
paras.	Paragraphs
POWs	Prisoners of War
RS	Republika Srpska
Rule	Rules of Procedure and Evidence
T.	Trial Transcript
UNHCR	United Nations High Commissioner for Refugees
UNPROFOR	United Nations Protection Force
VRS	Bosnian Serb Army