INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/2-T

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr John Hocking

Date: 1 October 2012

THE PROSECUTOR
v.
ZDRAVKO TOLIMIR

PUBLIC REDACTED VERSION

DEFENCE FINAL TRIAL BRIEF
with corrigendum

The Office of the Prosecutor:

Peter McCloskey

Defence:

The Accused: Zdravko Tolimir

Legal Adviser to the Accused: Aleksandar Gajić

1. Pursuant to the order of the Trial Chamber of 23 August 2012 and in accordance with instructions for redacting public versions of confidential submissions, the Defence hereby submits the public redacted version of the final trial brief.

2. The Defence also hereby also submits a corrigendum which is of a strictly technical nature, considering that these are apparent typing mistakes.

in footnote 136 instead of D214 it should be **P**214.
in footnote 140 instead of D21 it should be **P**21
in footnote 141 instead of D29 it should be **P**29.

With faith in God,

/signed/
Zdravko Tolimir
Self-Represented Accused

The Defence hereby submits the DEFENCE FINAL TRIAL BRIEF pursuant to Articles 20 and 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Rules 54 and 86 of the Rules of Procedure and Evidence, the Scheduling Order on Final Trial Briefs and Closing Arguments issued by the Trial Chamber on 14 February 2012,[1] partially modified by the Trial Chamber's decision of 14 May 2012 which set 11 June 2012 as the deadline for the submission of the Final Briefs,[2] and the Decision on Prosecution's Motion for Variation of the Word Limit for Its Final Trial Brief of 12 January 2012, whereby the Trial Chamber set "the limit for the length of the parties' Final Brief to 120,000 words", expected "the parties to *strictly confine themselves* to addressing matters relevant to the charges in the Indictment" and said that "it would be benefited by precision and conciseness of the Final Briefs".

Word count /in original/: 59,041

/signed/
Zdravko Tolimir
Self-Represented Accused

[1] In this decision, the Chamber ordered that "a) the parties shall file their Final Briefs by no later than Thursday 31 May 2012" and that "b) there shall be no written responses to the Final Briefs".
[2] In its decision of 1 July 1992, the Trial Chamber denied the Defence motion for reconsideration of the Trial Chamber's decision of 14 May 2012, refusing to grant an extension of the deadline for the submission of the Final Brief.

DEFENCE FINAL TRIAL BRIEF

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THE BASIC ARGUMENT OF THE DEFENCE

1. The basic argument of the Defence is that there is no evidence or credible evidence on the basis of which the Trial Chamber could beyond reasonable doubt establish facts that would provide grounds to find Zdravko Tolimir guilty (criminally responsible). No act, action or conduct on the part of ZDRAVKO TOLIMIR, viewed either in isolation or in a correctly established context, can serve as a basis for establishing criminal responsibility for any of the crimes charged in the Indictment. Therefore, the only reasonable decision that the Trial Chamber can reach in this case is to acquit.

DEFENCE FINAL TRIAL BRIEF

INTRODUCTORY PART

INTRODUCTION

2. In this Final Brief, the Defence presents its views and elements of analysis of the relevant factual and legal matters that are important for reaching a decision and judgement on the charges set forth in the Third Amended Indictment ("Indictment"). In the course of the trial, many witnesses have been heard and an enormous number of exhibits have been admitted into evidence. Not all the exhibits and facts presented in the course of the trial are equally important.

3. The Defence finds it necessary to mention that during the drafting of this Final Brief, it took into account the entire case file. However, the available time and space do not allow for a thorough elaboration in the Final Brief of every exhibit and every statement of every witness, but only of those that are necessary for reaching a final judgement. The Defence will put forward additional arguments orally at the sessions envisaged for the closing arguments of the parties.[3]

4. The Statute and the Rules do not stipulate which elements should be covered in a Final Trial Brief. This brief examines only those factual and legal matters that are important for resolving the main issue in these criminal proceedings initiated pursuant to the Third Amended Indictment. The Defence is of the view that the transcript of the proceedings in the *Prosecutor v. Zdravko Tolimir* case, as well as the entire case file (including the submissions filed by the parties and the Chamber's interlocutory decisions), are materials that should be considered in the course of rendering a final judgement. As regards the submissions filed by the Defence, the Defence especially wishes to point out that it expects that, when rendering its final judgement, the Trial Chamber will also take into account the arguments set forth in the submissions filed pursuant to Rules 92 *bis*, 92 *ter* and 92 *quater*, as well as the arguments set forth in the motions for admission into evidence of exhibits from the bar table.

5. Trial proceedings do not and must not recognise official and unofficial versions of events (defined by politics and interests). Unlike the principle of the rule of political interests, the principle of the rule of law should recognise only facts that are relevant to the matters raised in the indictment and established beyond reasonable doubt in proceedings based on law.

6. The central point of a trial is the question of the criminal responsibility of the accused, which is at the same time the criterion for establishing the relevance of the factual and legal questions raised in this case. The Defence drafts this Trial Brief conscious that the only task of the Trial Chamber is to consider the factual and legal questions in order to establish whether, in accordance with the law that was in force in 1995 (that is, during the time period covered by the Indictment), the Accused Zdravko Tolimir bears criminal responsibility. As pointed out by Judge O-Gon Kwon:

> The task of determining guilt or innocence must take precedence over other, not strictly judicial, considerations. Ours is first and foremost a criminal court:

[3] Scheduled for 22 and 23 August 2012.

> the successful prosecution of the guilty and the exoneration of the innocent must remain our central concern.[4]

7. The subject-matter of the trial in the *Prosecutor v. Zdravko Tolimir* case are factual and legal matters linked to events which took place in 1995 that have been the subject-matter of many trials before this Tribunal and national courts. The manner of reaching a decision, which the Defence had in mind while drafting the Final Brief, is an approach which is peculiar to resolving disputes in court, as clearly expressed in recent decisions of International Court of Justice, which stated: "The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative,"[5] and also:

> [D]espite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will *make its own determination of the facts*, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.[6]

8. Since trial proceedings deal only with the relevant issues and are not the occasion for lengthy academic discussion of all aspects of a problem, some of which may not even exist in the case at hand, in this brief we will confine ourselves to legal considerations that we deem to be especially relevant and that have to do with specific factual allegations. This consideration is not only a reflection of the principle of the expeditiousness of proceedings.

9. In the Indictment, the Prosecution makes a series of factual assertions. The Prosecution has also made a great number of factual assertions in the course of the trial: in its Pre-Trial Brief, in other submissions, during hearings and the examination of witnesses, as well as in other contexts and situations. The purpose of these submissions varied. The standard that the Tribunal should apply when establishing

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[4] "The Challenge of an International Criminal Trial as Seen from the Bench", JICJ, 2007, p. 14.

[5] In its Judgement in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice pointed out the following:
"The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Merits, Judgment, ICJ Reports 1986, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda*), Judgment, ICJ Reports 2005, pp. 200-201, paras. 57-61." Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ Reports, 2007.

[6] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, 20 April 2010, para. 168.

facts which are said to be the basis for the charges against the accused is the standard of "proof beyond reasonable doubt".[7]

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10. In accordance with the general legal principles of international criminal law and Article 21(3) of the Statute of the Tribunal, the accused is presumed innocent until proven guilty in criminal proceedings during which the principle of fair trial is applied.[8] Both in national and international criminal proceedings, the burden of proof of every fact on which the charges are based rests with the prosecutor. To discharge the burden of proof, the prosecution must prove beyond reasonable doubt the facts on which the charges are based and which are founded on law. The accused does not bear the burden of proof, which rests with the prosecution until the end of the trial. The standard of "beyond reasonable doubt" will be defined in a separate chapter.

11. The Defence finds it necessary to mention that individuals covered by the Indictment as members of an alleged (and non-existent) joint criminal enterprise are currently facing trial before this Tribunal and proceedings are in different phases (*The Prosecutor v. Ratko Mladić* and *The Prosecutor v. Radovan Karadžić* cases are in the trial phase, *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević* case is in the appeals phase), while some cases have already been concluded (*The Prosecutor v. Radislav Krstić*, *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, *The Prosecutor v. Momir Nikolić*, *The Prosecutor v. Dragan Obrenović*, *The Prosecutor v. Dražen Erdemović*). The Defence is of the view that, when rendering its final judgement, the Trial Chamber should in no way rely on these judgements, but should independently determine the facts and examine the legal matters that are important for rendering the final judgement.

12. In its Pre-Trial Brief, the Defence stressed that the position, conduct, acts and omissions of other VRS officers and other individuals from Republika Srpska with regard to the events in Srebrenica in July 1995 were explained separately. The fact that the Defence refrained from examining all exhibits linked to the individuals whom the Prosecution alleged to be participants in alleged joint criminal enterprises can in no way be understood as acceptance of the Prosecution's position and argument. On the contrary, the actions of other individuals were examined to the extent the Defence deemed appropriate in this case, especially bearing in mind the fact that the case inevitably focused on the actions and conduct of Zdravko Tolimir.

13. If several requirements need to be fulfilled cumulatively in order to reach a decision on a count of the Indictment, the non-fulfilment of only one of these requirements would, in accordance with the principle of judicial economy, render any

[7] The general legal rule for estimating the well-foundedness of an assertion was formulated by Huber, who stated the following: "The value and the weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal", *Island of Palmas* Case (or *Mingas*), *United States of America v. The Netherlands*, Award of the Tribunal, Permanent Court of Arbitration, The Hague, 4 April 1928, p. 10.
[8] *See*, for example, Article 14 of the International Covenant on Civil and Political Rights or Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

further consideration moot. Should the Trial Chamber establish that the actions and conduct of the Accused are of such a nature that there are no grounds to assert that he was a member of an alleged joint criminal enterprise, it would be appropriate for it to refrain from establishing facts about the conduct of other individuals who have not had the opportunity to respond to the factual assertions in this case.

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14. At the pre-trial conference of 25 February 2010, the Presiding Judge issued the following warning:

> [T]he Chamber would like to give you some guidance in this respect, taking into account what you just stated. You have the right to remain silent during the whole trial. You are not obliged to give evidence, to question witnesses, or to make submissions. You may, however, give evidence on your own behalf at the appropriate time, in which case you will be subject to cross-examination. Other than when giving evidence, you are not obliged to answer any questions about the facts of the case, but you should be aware that if you do make statements about the facts during submissions to the Court, such statements may be part of the material considered by the Trial Chamber in reaching its decision on the case.

PARAGRAPHS 21.4.1 AND 49 OF THE INDICTMENT

15. On 10 October 2011, the Prosecution submitted the "Prosecution's Submission Concerning Paragraphs 21.4.1. and 49 of the Indictment" in which it said that "no evidence has been adduced to support the allegations of killings at Sandići Meadow on 13 July 1995 as detailed at paragraph 21.4.1 of the Indictment"[9] and that "this unproven alleged killing incident is also referred to at paragraph 49 of the Indictment."[10] At the status conference of 5 December 2011, the Presiding Judge said: "The Chamber acknowledges this submission and advises the Defence that, as a result, they will not need to address this allegation during the Defence case."[11]

16. Consequently, in this Final Trial Brief, the Defence will not address the issues raised in the aforementioned paragraphs of the Indictment.

[9] "Prosecution's Submission Concerning Paragraphs 21.4.1 and 49 of the Indictment", 10 October 2011, para. 1.
[10] *Ibid.*, para. 2.
[11] 5 December 2011, T. 17974.

NAMES OF DOCUMENTS, QUOTATIONS FROM DOCUMENTS AND WITNESS STATEMENTS

17. The names of the documents given when they were being uploaded into the e-court system, irrespective of whether this was done by the Prosecution or the Defence, were given only for referencing purposes (easier management of documents) and they can have no probative value or impact on the assessment of exhibits. The document reference names given in this Final Brief do not always correspond to the names given in the e-court system. The main criterion for identifying a document is the exhibit number. A short description of the document, if provided in a footnote or in the main body of the text, often helps to identify the document and remove any doubts about which document is being referred to in situations were there is a typographical or any other kind of error.

18. Parts of documents or witness statements are quoted or referred to throughout the Final Brief. The giving of a quote does not mean that this is the only relevant quote; instead, the entire document is taken into account. The same applies to quotes from witness statements. The fact that a part of a document, a document or a witness testimony has not been quoted must not be interpreted as meaning that the Defence automatically accepts the Prosecution's position with regard to that document or considers that witness statement to be reliable.

DEFENCE FINAL TRIAL BRIEF

PART I – PRELIMINARY ISSUES

REMARKS ON THE CASE AND THE STANDARD OF PROOF

19. The case against Zdravko Tolimir is a circumstantial case. In other words, the Prosecution does not say that Zdravko Tolimir has ordered or directly committed any of the crimes with which he is charged in the Indictment; instead, it bases its case for Zdravko Tolimir's criminal responsibility on allegations of his alleged contribution to two joint criminal enterprises which the Indictment defines as a joint criminal enterprise to forcibly transfer and deport the population of Srebrenica and Žepa, and a joint criminal enterprise to kill the able-bodied Muslim men from Srebrenica.

20. The Statute and the Rules of the Tribunal do not contain any specific guidelines with regard to the assessment of evidence. The law applied by the Tribunal and other courts recognises the principle of the *free assessment of evidence*, which is diametrically opposed to the principle of the associated assessment of evidence. The principle of the free assessment of evidence does not mean, however, that evidence is assessed arbitrarily; on the contrary, the exercise of this authority is subject to limitations stemming from the general principles of law recognised by civilised peoples.[12] Rule 87 of the Rules of Procedure and Evidence specifically states that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved *beyond reasonable doubt*." *Proof beyond reasonable doubt* is the generally accepted standard of proof and represents a *high level of certainty* about the well-foundedness of a factual assertion.[13] Defining the standard of proof beyond reasonable doubt as a high degree of probability is erroneous and confusing.[14]

21. In order to prove that an accused is guilty in accordance with the requisite standard of proof, each element of the charges must also be proven beyond reasonable doubt. As pointed out by the Appeals Chamber in the *Martić* case:

> The Appeals Chamber observes that for a finding of guilt on an alleged crime, a reasonable trier of fact must have reached the conclusion that all the facts which are material to the elements of that crime have been proven beyond reasonable doubt by the Prosecution. At the conclusion of the case, the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[15]

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[12] On the general principles of law as a source of international procedural law, *see* Aleksandar Gajić, *Dokazivanje pred Medunarodnim sudom pravde* /Presentation of Evidence before the International Court of Justice/, PhD thesis, Belgrade, 2012, paras. 95-115.

[13] "The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania),* Judgment, ICJ Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III [of the Convention on the Prevention and Punishment of the Crime of Genocide, remark by A. Gajić] have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts. […] In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports.

[14] *The Prosecutor v. Milan Martić,* Appeals Judgement, para. 57.

[15] *The Prosecutor v. Milan Martić*, Appeals Judgement, para. 55.

22. Evidence must be appraised in a way that ensures a fair determination by assessing each piece of evidence individually and all pieces of evidence together, in accordance with the principle of *in dubio pro reo*, which means, among other things, that priority must be given to the approach that is the most favourable to the accused.[16] This should be especially emphasised in circumstantial cases such as the *Prosecutor v. Zdravko Tolimir* case. When determining whether the Prosecution has discharged the burden of proof with regard to each count of the Indictment, it must be carefully examined whether, on the basis of the evidence adduced, it is possible to draw any reasonable conclusion other than that the accused is guilty.

23. While assessing circumstantial evidence, which makes up the largest part of the evidence in this case, the jurisprudence of the Tribunal and other international courts requires that such evidence must logically point to one conclusion. A large number of facts and exhibits presented in this case can serve as a basis for different theories. In accordance with the requisite standard of proof, for the purpose of proving the elements of the indictment, all conclusions supporting the allegation of the criminal responsibility of the accused must be *beyond reasonable doubt*, which is often interpreted as "the only reasonable conclusion".[17] However, the only conclusion that the adduced evidence points to is not necessarily also a conclusion which fulfils the standard of "beyond reasonable doubt". Evidence may be very suggestive but nothing more than suggestive, and may not necessarily provide grounds for a conclusion which meets the standard of clear and conclusive evidence or proof "beyond reasonable doubt".[18] In other words, although only one conclusion can be drawn from the proposed evidence, that conclusion is necessarily such as would establish the fact in dispute or fulfil the standard of "proof beyond reasonable doubt".

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[16] Trial Judgement in the *Popović* case, para. 2127: "The Trial Chamber favours the approach adopted in the *Musema* Trial Judgement that the position most favourable to the accused must be paramount."

[17] See *The Prosecutor v. Milutinović et al.*, Trial Judgement, para. 47, accompanying footnote; *see* also *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 458 (emphasis in the original).

[18] As an example, *see* the approach that the International Court of Justice took in appraising evidence in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgement of 6 November 2003, ICJ Reports, 2003, para. 59.
In a part of the Judgement, the International Court of Justice reasoned as follows:
"As in the case of the attack on the *Sea Isle City*, the first question is whether the United States has discharged the burden of proof that the USS *Samuel B. Roberts* was the victim of a mine laid by Iran. The Court notes that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for this particular mine. In its communication to the Security Council in connection with the attack of 18 April 1988, the United States alleged that 'The mines were laid in shipping lanes known by Iran to be used by U.S. vessels, and intended by them to damage or sink such vessels.' […] Iran has claimed that it laid mines only for defensive purposes in the Khor Abdullah Channel, but the United States has submitted evidence suggesting that Iran's mining operations were more extensive. The main evidence that the mine struck by the USS *Samuel B. Roberts* was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel *Iran Ajr* […]. This evidence is highly suggestive, but not conclusive", *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgement of 6 November 2003, ICJ Reports, 2003, para. 71.

24. The Accused does not bear the burden of proof, nor can the burden of proof be shifted onto the Accused in the course of a trial by creating the presumption that an important fact is correct.[19] This will be addressed in more detail in the part of the Brief which discusses the Trial Chamber's decision on the judicial notice of adjudicated facts.

25. In the Indictment, in its Pre-Trial Brief and during the course of the trial, the Prosecution has made a series of assertions based on alleged circumstantial evidence. This therefore raises a general question of the assessment of circumstantial evidence for the purpose of establishing the facts that are relevant for reaching a decision on each count of the indictment.

26. Circumstantial evidence and the method of its appraisal have perhaps best been defined by Judge Badawi, who pointed out the following:

> In a system of evidence which is based upon free appraisal by the judge, as is the case in national criminal legislation and in international law, circumstantial evidence means facts which, while not supplying immediate proof of the charge, yet make the charge probable with the assistance of reasoning. The elements of such circumstantial evidence must be interpreted and associated in order to draw the relevant inferences and reconstruct the data on which the hypothesis of responsibility is founded. In this process of interpretation and association, there is a risk of committing errors of appreciation, of letting the imagination fill in the gaps in the evidence, or of reasoning in a specious manner. This method of evidence, which seeks or pretends to arrive at certainty, most often attains only a high degree of probability. The fact remains that under some legislations, circumstantial evidence must be weighty, accurate and concordant. On the other hand, the most reliable doctrine takes the view that "proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual and contrary to the way of the world." These rules must be a constant guide in weighing evidence.[20]

THE RULES OF DOMESTIC LAW AS THE OBJECT OF PROOF

27. The evidence contains a large number of rules that the VRS /Army of Republika Srpska/ applied (and which it had adopted from the Yugoslav People's Army), the Constitution of Republika Srpska, laws, subordinate legislation, etc. These documents belong to the municipal law of Republika Srpska. Since they do not form part of international public law (in which case the principle of *iura novit curia* applies)[21], the rules and principles of the municipal law of Republika Srpska

[19] This will be addressed in more detail in the part of the Brief where the Trial Chamber's decision on the judicial notice of adjudicated facts is discussed.
[20] "Dissenting Opinion by Judge Badawi Pasha", *The Corfy Channel Case*, Merits, Judgement of 9 April 1949, ICJ Reports, 1949, pp. 59-60.
[21] On the scope of the principle of *iura novit curia* see Aleksandar Gajić, *Dokazivanje pred Medunarodnim sudom pravde* /Presentation of Evidence before the International Court of Justice/,

(including the Constitution of Republika Srpska, laws, subordinate legislation, regulations and the rules that the VRS applied) were the object of proof in the course of the trial. In international jurisprudence, it is incontestable that "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States."[22] As pointed out in *Oppenheim's International Law* (9th edition):

> From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law; and insofar as the International Court of Justice [or any other international court, remark by A. Gajić] is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court.[23]

28. The nature of this evidence is somewhat different from that of other evidence because it concerns elements of a legal system and appropriate legal knowledge is required to understand this system. National laws and other regulations are facts which, like any other fact, can (if relevant) be the object of proof, and they are not covered by the principle of *iura novit curia*.[24] Nevertheless, while determining these facts, the Tribunal does not have the power to substitute its own interpretation for the interpretation of these regulations by the authority that applied them during the relevant time period.[25]

Faculty of Law, University of Belgrade, 2012 (The object of proof and the scope of the principle of *iura novit curia*, paras. 87-124).

[22] *German Interests in Polish Upper Silesia*, Merits, 1926, PCIJ Series A, No. 7, p. 19; *Serbian Loans*, PCIJ Series A, Nos. 20/21, p. 46; *Brazilian Loans*, PCIJ Series A, Nos. 20/21, p. 124; *Lighthouses Case (France v. Greece)*, PCIJ Series A/B, No. 62, p. 22; *Panevezys-Saldutiskis Railway Case*, PCIJ, Series A/B, No. 76, p. 19; "Dissenting Opinion of Judge Read", *Nottebohm*, Second Phase, Judgment, ICJ Reports 1955, p. 36. For a discussion on this incontestable rule of international law *see* also "Separate Opinion of Judge Parra-Aranguren", *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States of America*), Judgment of 31 March 2004, paras. 5-9.

[23] *Oppenheim's International Law*, 9th edition, edited by Sir Robert Jennings, Q.C., and Sir Arthur Watts, K.C.M.G., Q.C., Vol. 1, "Peace", Introduction and Part I, 1996, p. 83.

[24] "[The Court…] is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken," *Brazilian Loans*, 1929, PCIJ Series A, Nos. 20/21, p. 124.

[25] As pointed out by the International Court of Justice in the case *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgement, 30 November 2010, para. 70:
"The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans,* Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, p. 46 and *Brazilian Loans,* Judgment No. 15, 1929, P.C.I.J., Series A, No. 21, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation."

29. In the context of this case, many witnesses have given testimony about the rules that were applied in Republika Srpska and specifically the rules to which the VRS adhered.[26]

30. The Defence recalls that the relevant rules were drawn up in the Serbian language and that, while interpreting them or drawing the relevant inferences, the Trial Chamber must bear in mind the meaning that these terms have in the Serbian language and not in other languages. This refers in particular to the rules applied by the Army of Republika Srpska; technical terms (*terminus technicus*) are terms that must be interpreted within the meaning they had in the VRS and not within the meaning they have, for example, in armies that have conformed their rules to match NATO standards, not only because of differences in the semantics of languages, but also because of the fundamental differences in the organisation of these armies.[27] Not only was NATO an adversary of the VRS and an aggressor against Republika Srpska, but the VRS is organised in a completely different way to NATO.[28] Therefore, English NATO terminology is not analogous to the terminology, organisation and rules that were applicable in the Army of Republika Srpska. The problem was resolved, at least with respect to the terms "rukovođenje", "komandovanje" and "kontrola", during the testimony of General Petar Škrbić, but the errors in previous records (trial transcripts) are almost incorrigible.[29] However, the evidence includes

[26] Mikajlo Mitrović, Ljubomir Obradović, Slavko Čulić, Milomir Savčić, Petar Salapura, etc.

[27] During Mikajlo Mitrović's testimony, the interpreters indicated that it was their practice to translate military terms in conformity with NATO standards:
"JUDGE FLUEGGE: May I ask you to repeat the three terms. You explained the three terms Mr. Tolimir was asking you about. Could you please repeat only the three terms without an explanation, because we have a translation issue here.
THE WITNESS: [Interpretation] "Komandovanje," command; "Rukovođenje," control; and "kontrola".
JUDGE FLUEGGE: Thank you. Mr. Gajić.
MR. GAJIĆ: [Interpretation] Mr. President, I dislike doing this [In English] The term "control" have to be translated in Serbian "kontrola". Directing, managing is something what is in Serbian "rukovođenje". [Interpretation] We are discussing technical terms. However, we have repeated errors in the transcript. So as to avoid translating "kontrola" with "control," whereas the word "rukovođenje" is constantly being translated as "kontrola."
THE INTERPRETER: *Interpreter's note: It's been a long-standing practice of the CLSS to translate "rukovođenje" and "komandovanje" as command and control, C2. It is standard NATO terminology.*
JUDGE FLUEGGE: It is true. We have dealt with this problem several times here in this trial, and we will not solve this problem today I'm sure, but we know what we have to do in future." 19 April 2011
The problem was finally resolved during the testimony of Colonel Petar Škrbić.

[28] Statement by Rupert Smith, P2132 – English – p. 5:18-21. Although this statement is entitled "Expert Statement of General Sir Rupert Smith Taken on 13 July 2006", it cannot be considered as nor does it fulfil the conditions for being an expert report.
"Q. Would you speak a little bit, General, about how the Main Staff operated in the British Army in your experience?
A: The British Army is almost an opposite, in philosophy and organisation, to that of the VRS."

[29] Petar Škrbić, 30 January 2012, T.18556:
"Q. Thank you. Before this correction, please tell us what the closest synonym is of the B/C/S term "rukovođenje"?
A. There is no complete synonym for 'rukovođenje'. I said at the outset that sometimes 'komandovanje' and 'rukovođenje', 'command' and 'control', are synonyms. They are compatible, but there are distinctions that must be born in mind. Whereas the term 'rukovođenje' has no synonym.
Q. Thank you. Is there a synonym for 'komandovanje', 'command?
A. There is a synonym. Oftentimes the term 'issuing orders' is used.

VRS rule books which can be consulted to establish the relevant rules that were applied in the VRS.

Q. Thank you. Is there a synonym for 'kontrola' that would correspond to some of the activities carried out in the framework of command and control?
A. In the Serbian language there is no synonym for 'kontrola'.
Q. Thank you, Mr. Škrbić. Let us not dwell on this any longer. Please take a look at the schematic that you see in front of you."

ORIGINALS AND TRANSLATIONS OF DOCUMENTS

31. The official languages of the Tribunal should be understood in the sense of the working languages used by the Chambers of the Tribunal and the parties to proceedings, and not necessary as languages in which the original documents were produced. Most of the documents were produced in the Serbian language and, despite the fact that they have been translated into English and/or French, the translation of a document cannot replace the original. If the meaning of a term or syntagm is a matter of dispute, the Trial Chamber should rely on the meaning attributed to it in the original language and not in the translation.

32. There is no such thing as a perfect translation. Depending on its quality and the expressive potential of the given language, a translation is usually a more or less adequate version of the original, but is almost never completely adequate. Thus, the problem of communication may prove to be an obstacle to fair adjudication, despite the best intentions and the most competent translators. This is especially so in case of translation from Serbian into English or French, which belong to different families of languages whose semantics is significantly different.

33. In the course of the trial, there have been several instances of this kind. Amongst many examples, which are not all equally relevant and significant, the term "*rukovodenje i komandovanje*" especially caused almost insurmountable problems, because the term "*rukovodenje*" was almost always translated as "control" and in the translation of this syntagm it was put after the word "command". When translated into the Serbian language, the same term has a completely different meaning and sense. Problems also arose during the translation of the term "*hemijska sredstva*" (chemical means or chemical agents) in contrast to the term "*hemijsko oružje*" (chemical weapons). Translations are sometimes such that they do not reflect what the original document says.

34. As for technical terms – for instance, the technical military terms used in the VRS during the relevant time period – the meaning given to them should be the one they have in the original language, irrespective of how they have been translated into English and/or French. Since most of the issues have to do with the rules that were applied in the VRS, the meaning they are given must be the one they have in the Serbian language and not the meaning they have in armies organised in accordance with NATO standards or in any other armies.

SOME CONSIDERATIONS REGARDING THE INDICTMENT AND THE DETERMINATION OF RELEVANT FACTS

35. Pursuant to Article 21(4)(a), the accused is entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." An indictment is a primary indictment instrument, which should contain all the facts that the Prosecution deems material and on which it bases its charges. This also means that the allegations made in an indictment must be sufficiently specific and that the facts on which the Prosecution bases its charges must be stated in sufficient detail.

36. The function of an indictment is not only to "clearly inform" the accused of the charges levelled against him, but also to set the boundaries within which the Trial Chamber deliberates and renders its judgement. In other words, an indictment should provide certainty not only with regard to the acts with which the accused has been charged and the facts on which the charges are based, but also with regard to the facts that are relevant for rendering a final judgement. Any subsequent expansion of the indictment that is not made in accordance with the envisaged procedure for doing so is unacceptable. Deficiencies caused by a lack of or ambiguous, imprecise or insufficiently clear allegations in the indictment cannot always be cured even by the provision of timely, clear and consistent information,[30] without changing the indictment.

37. The indictment, as the initial document of criminal proceedings, sets the boundaries which the Trial Chamber cannot cross when rendering a final judgement. Hence the requirement that "the Prosecution is expected to know its case before it goes to trial" and that "[i]t is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds."[31] In a nutshell, an indictment is the initial document which sets criminal proceedings in motion, proceedings are conducted in order to either uphold it or refute it, and in the final analysis it is the basis on which a decision on the criminal responsibility of the accused is made.

38. Every indictment, including the Third Amended Indictment in the *Prosecutor v. Zdravko Tolimir* case, must be considered primarily within the context of the individual, personal and subjective criminal responsibility of the accused. In proceedings before the Tribunal, which take a long time, an enormous amount of evidence is brought forward which is not always relevant for reaching a decision on the material aspects of the Indictment. In the *Prosecutor v. Zdravko Tolimir* case, plentiful evidence was presented on the part played in the events of July 1995 by

[30] "The principle that a defect in the indictment may be cured is however not without limits. It should not lead to a 'radical transformation' of the Prosecution's case against the accused. The risk that expansion of the charges may lead to unfairness and prejudice to the accused should always be borne in mind. Accordingly, an omission of a charge from an indictment, as opposed to a vague or imprecise indictment, cannot be cured by the provision of timely, clear, and consistent information", *The Prosecutor v. Popović et al.*, Judgement, Vol. II, "Dissenting and Separate Opinions of Judge Kwon", para. 6, p. 835.
[31] *See* Tochilovsky, p. 2, and the jurisprudence of the Tribunal cited therein.

many individuals who, by the nature of things, did not have an opportunity to confirm or refute it. The Defence therefore believes that, unless it is strictly necessary for reaching a decision on the material aspects of the Indictment, no conclusions should be made about the role of these individuals in the events of July 1995.

39. Some facts, although relevant, are not always necessary for rendering a final judgement. The Defence suggests that only those facts and legal considerations that are strictly necessary be examined in the process of rendering a final judgement.

40.

THE CHARGES AND COUNTS OF THE INDICTMENT AND THE NATURE OF THE CASE AGAINST ZDRAVKO TOLIMIR

41. The Third Amended Indictment ("Indictment") charges Zdravko Tolimir with genocide, conspiracy to commit genocide, crimes against humanity and violations of the laws or customs of war (war crimes), including extermination, murder, persecutions, forcible transfer and deportation. Zdravko Tolimir was charged under multiple grounds of responsibility.

42. Paragraph 66 of the Indictment states that Zdravko Tolimir is responsible for the commission of "a form of co-perpetration called Joint Criminal Enterprise", for planning, instigating, ordering and otherwise aiding and abetting in the planning, preparation and execution of the charges set out in the Indictment. In other words, Zdravko Tolimir is charged under all grounds of responsibility **except for** the grounds of responsibility laid down in Article 7(3) of the Statute of the Tribunal (command responsibility).

43. The charges brought against Zdravko Tolimir can be summarised as follows: Zdravko Tolimir is charged with participating, as the Assistant Commander for Intelligence and Security of the Main Staff of the Army of Republika Srpska (GŠ VRS), in two alleged joint criminal enterprises: 1) to murder the able-bodied men captured after the fall of Srebrenica (JCE to murder); and 2) to forcibly remove the Muslim populations of Srebrenica and Žepa, and to deport the population of Žepa (JCE to forcibly transfer and deport). Each charge of the Indictment will be examined in detail below.

44. The Prosecution states that the JCE to murder was committed from 11 July 1995 to 1 November 1995. According to the Indictment, the JCE to forcibly transfer and deport was committed from 8 March to the end of August 1995.[32]

45. In the Indictment, the Prosecution charges the Accused under multiple grounds of responsibility. Paragraph 66 of the Indictment, for example, contains the following allegation:

> Pursuant to Article 7(1) of the Statute of the Tribunal, **ZDRAVKO TOLIMIR** is individually responsible for the crimes charged against him in

[32] Paragraph 35 of the Indictment.

this Indictment. He committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution of these charged crimes, as set out in detail in this Indictment. The term "committed" as it is used herein, includes a form of coperpetration called Joint Criminal Enterprise ("JCE"). As described in this Indictment, JCE includes membership of at least two persons in a criminal enterprise with an agreement to achieve the criminal objective.

46. The Prosecution leaves it to the Trial Chamber to choose any possible grounds of responsibility under Article 7(1). In paragraph 386 of its Pre-Trial Brief, the Prosecution states the following: "The Prosecution submits that the Trial Chamber's discretion is not limited by the classification of the mode of liability under Article 7(1), and that it is appropriate for a Trial Chamber to make findings as to the proper head of responsibility where multiple heads have been charged."

47. Since the Indictment covers all grounds of responsibility under Article 7(1) of the Statute of the Tribunal and the JCE, while drawing up its Final Brief, the Defence bore in mind each and every ground of responsibility.

APPLICABLE LAW – *NULLUM CRIMEN SINE LEGE*

48. With respect to the application of international law, the International Criminal Tribunal is limited to the application of the positive international law that was in force in 1995, that is, during the time period covered by the Indictment.

49. As pointed out in the Secretary-General's Report:

> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, **the International Tribunal would have the task of applying existing international humanitarian law**.[33] [34]

50. The Statute of the Tribunal is not a criminal code; it contains only general norms which the Tribunal should follow and which represent the boundaries for the interpretation and application of law. The international criminal law that the Tribunal (should) apply is an integral part of international public law and cannot cross the boundaries that were in place during the time period relevant to the Indictment (the year 1995). Special caution should be exercised in this respect, because international criminal law is a relatively young branch of law that has developed only in the last few decades and because the elements *de lege lata* and *de lege ferenda* are often confused in discussions. Establishing the positive international law is one of the primary tasks of the Tribunal and the re-examination of views on the law that was applicable during the conflict in the former Yugoslavia should not be based on some desirable solutions, but rather on the actual state of the law in 1995. This is the only approach that is in accordance with the principle of a fair trial and the fundamental principals of criminal law.

51. *Nullum crimen sine lege* is a basic and generally-accepted principle of international criminal law. It means that nobody can be punished for conduct that did not constitute a crime at the time it was committed. The principle of *nullum crimen sine lege* applies equally to punishable acts and grounds of responsibility. Therefore, grounds of responsibility that were not known before the adoption of the Statute of the Tribunal cannot be applied when determining questions of criminal responsibility.

52. The Statute of the Tribunal is not a complete code and special importance should be given to the principle of legality in all cases when there is a doubt that a certain rule is a rule of international customary law. The principle of *nullum crimen sine lege* is formulated in Article 22(1) and (2) of the Statute of the International Criminal Court, which clearly stipulates that "the definition of a crime shall be strictly construed and shall not be extended by analogy" and that in case of ambiguity, the definition will be interpreted in favour of the accused.

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[33] Secretary-General's Report, para. 29.

[34] International humanitarian law and international criminal law are integral parts of international public law. *See* Aleksandar Gajić: *Nekoliko napomena o odnosu međunarodnog krivičnog prava i unutrašnjeg prava* /Some Remarks on the Relationship Between International Criminal Law and Domestic Law/, in the collection of papers *Primena međunarodnog krivičnog prava u unutrašnjim zakonodavstvima* /Application of International Criminal Law in National Legislation/, 2005, STR.

53. Regarding the identification of the norms that are to be applied in the case at hand, a reliable guideline was given in the Secretary-General's Report, which says the following:

> The part of the conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Convention of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

54. Most, if not all, norms of international criminal law used to determine international crimes are of a blanket character. International criminal law derives from international humanitarian law. This particular case involves the part of international law applied during armed conflict.

55. International criminal law derives from the international law of armed conflict (or rather, international humanitarian law).[35] The rules of the international law of armed conflict (or the international humanitarian that is law applied during armed conflicts) are *primary rules* that govern certain conducts and establish prohibitions that are in force during armed conflicts. The rules of international criminal law are *secondary rules* that stipulate the requirements for criminal responsibility for violations of the rules of the international law of armed conflict. In this respect, various types of responsibility are envisaged for breaches of the law of armed conflict: criminal responsibility, disciplinary responsibility, civic responsibility, state responsibility, the responsibility of individuals to act effectively, the responsibility of other entities, etc. It must always be borne in mind that not every breach of the law of armed conflict is such that it entails criminal responsibility, and that international criminal law applies solely and exclusively to serious violations of the international law of armed conflict.[36]

56. Criminal responsibility is inevitably individual and subjective. The objectivisation of criminal responsibility, whether essentially on the basis of membership of a group or a position within this group (for example, the military, the police or a civilian political body), would undermine the very foundations of criminal law which rest on civilised norms that nowadays have the status of cogent norms of international law.

57. Responsibility for acts that were not incriminating at the time they were committed cannot be envisaged through secondary rules on individual criminal

[35] In this Final Brief, we will not discuss the meaning and scope of these two terms, and we will be using them as synonyms. Given that the scope of international humanitarian law is broader than that of the international law of armed conflict and since the jurisdiction of the Tribunal is limited to acts that were committed during the armed conflict in the former Yugoslavia, only the part of international humanitarian law applicable during an armed conflict is of relevance here.
[36] *See*

responsibility; on the other hand, special caution should be exercised during the interpretation of the rules of international criminal law relying on the rules of international humanitarian law.

58. The nature of armed conflicts and their consequences is such that great caution must be exercised when determining whether a certain conduct constitutes an international crime punishable under the Statute of the Tribunal. The primary rules of international public law stipulate the conditions that must be fulfilled for conduct or actions to be deemed unlawful. Only on condition that one of these norms has been violated can the issue of individual criminal responsibility be raised and consideration given as to whether such violation of the rules of international humanitarian law also constitutes a crime according to international law, because not all violations of international law are crimes.

59. If the actions of the accused are in keeping with the rules of positive international law – the law that was applicable at the time the action was undertaken – the issue of his criminal responsibility cannot be raised by presenting speculative argumentation. Unfortunately, war by definition entails violence and suffering, and armed conflict is only channelled by law in order to protect certain values.

60. The nature of the armed conflict in Bosnia and Herzegovina is specific. This was not a classic international conflict on the basis of which were built the rules of the international law of armed conflict (including international humanitarian law), for example, with regard to occupation, etc. Some rules - inasmuch as the Defence deems them important for reaching a final judgement – will be cited later in this brief, but we find it appropriate to mention that they should be applied in all instances in which the Chamber finds it necessary to apply other rules that are not specifically discussed in this brief.

SOME REMARKS ABOUT CRIMES AGAINST HUMANITY AS CRIMES UNDER INTERNATIONAL LAW

61. Crimes against humanity are envisaged under Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

62. The consolidated jurisprudence of the Tribunal has identified the general criteria (general requirements) for crimes against humanity. The acts enumerated under (a) to (i) must be committed "in armed conflict" and "directed against any civilian population". In this connection, the requirement that the act must be committed in armed conflict is the condition for exercising the jurisdiction of the Tribunal *ratione materiae*.

63. The other requirement for the existence of a crime against humanity is that the victim is the civilian population. The question of whether individuals who have been put out of action (*hors de combat*) may be considered victims of crimes against humanity has been resolved in various ways in the Tribunal's jurisprudence.[37] [38]

64. The Defence is of the view that the Prosecution must prove beyond reasonable doubt that the victim of a crime is a civilian within the meaning of Article 50 of Additional Protocol I to the Geneva Conventions.[39] Therefore, individuals who are

[37] Respecting the instruction that the Final Brief should be concise, we will not here repeat views on this issue here, but will only refer to the discussion in the *Prosecutor v. Milan Martić* case, summarised in para. 272 *et sqq.* of the Judgement, Appeals Chamber, 8 October 2008.
Antonio Cassese is of the view that victims of a crime against humanity "may be civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities, as well as under customary international law (but not under the Statute of the ICTY, ICTR and the ICC), enemy combatants."

[38] For a detailed discussion on this issue *see* Aleksandar Gajić, "The term 'civilian' in the context of Article 5 of the Statute of the ICTY does not include members of armed forces placed *hors de combat*", *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU* /The Development of the Legal System of Serbia and Harmonisation with EU Law/, Contributions to Project 2007, Belgrade, 2008, pp. 223-238.

[39] "1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

captured, incapacitated for combat or in any other way put out of action (*hors de combat*) are not civilians within the meaning of Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

65. International criminal law contains norms of a secondary nature (it stipulates the conditions for punishment for violations of the primary norms of international law) and as such it must inevitably rely on the terms "civilian" and "civilian population" as defined in the Geneva Conventions and the Additional Protocols. Given that international crimes are usually of a blanket character and, by their nature, require the application of the primary rules of the international law of armed conflict, the terms whose content has been defined by the primary rules cannot be expanded through the stipulation or interpretation of the provisions of the Statute of the Tribunal.

66. The qualification that crimes against humanity are "directed against any civilian population" means that a civilian population is the primary object of attack. This can in no way provide a basis for the interpretation that individuals who have left a certain area, who have been deported, etc. and have the status of combatants are victims of crimes against humanity. Of course, the commission of the prohibited acts against these individuals (for instance, the murder or torture of prisoners of war), even within the context of an attack directed against a civilian population, meets the requirements for a war crime. The question of whether the term "civilian population" in the context of the discussion of crimes against humanity also covers members of the armed forces who have been put *out of action* will be addressed in more detail in the next section.

67. At the moment when the International Criminal Tribunal for the Former Yugoslavia was set up, international customary law had not reached a point of stability with regard to matters of international criminal law. Examples from the practice of national courts and the International Military Tribunal in Nuremberg could not be used as reliable catalysts of practice. In addition, it may rightly be asked to what extent can the practice of international courts generate rules of international customary law, since the practice of the courts boils down to the application of existing international law (which can be interpreted differently) and is nothing more than an instrument for establishing the legal rules. Variations in views on the scope of crimes against humanity also find expression in a series of judgements handed down by the International Criminal Tribunal for the Former Yugoslavia.[40]

68. Furthermore, Article 5 of the Statute of the Tribunal explicitly stipulates that crimes against humanity are crimes directed against a civilian population. Individuals who are *hors de combat* because they have been put out of action do not cease to be members of the armed forces and this has no impact on their status as combatants in accordance with international law. On the contrary, it is exactly as combatants who have been placed *hors de combat* that they enjoy the corresponding protection of international law, but the procedure that can be applied to them is significantly different from the procedures that can be applied to a civilian population (for

"2. The civilian population comprises all persons who are civilians."
[40] For jurisprudence, *see* the Judgement of the Appeals Chamber in the *Martić* case.

example, combatants can have the status of prisoners of war for whom special measures of detention and accommodation are applied).

69. An argument in support of the submission that members of the armed forces who have been put out of action cannot be considered victims of crimes against humanity is contained in the general prohibition on attacking them. Article 41 of Additional Protocol I to the Geneva Conventions (Safeguard of an enemy *hors de combat*) thus stipulates that

> [a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.

The establishment of this prohibition alongside the prohibition of attacks on civilian populations makes it impossible to define individuals who are *hors de combat* and retain the status of combatants when they are no longer able to fight (for example, when they are taken prisoner) as victims of crimes against humanity.

70. With regard to the criterion that the attack must be directed against a civilian population, the Tribunal's jurisprudence often mentions that "[i]n order to qualify as a civilian population for the purposes of Article 5, the target population must be of a predominantly civilian nature".[41] This criterion is rather unclear and may result in illogicalities. The presence of a civilian population cannot in itself be regarded as an obstacle to an attack. Discussion of the nature of an attack usually takes place within the framework of an attack on a particular place or an area. If we take this criterion to its extreme, every attack on a place or an attempt to take control of a town, village or area would constitute an attack on a civilian population, because, almost as a rule, non-combatants account for the majority of the population of inhabited places. Whether an attack is directed against a civilian population is primarily a subjective category, that is, a subjective requirement is introduced which is reflected in the intention of the attacker, who launches the attack with the intention and knowledge that it will endanger or hurt the civilian population.

71. The view of the Legal Committee of the UN War Crimes Commission can be cited as an illustrative example of the proper understanding of the object of protection in crimes against humanity. Among other things, it states the following:

72. "Referring to the definitions of the Nuremberg and Tokyo Charters, as well as that of Law No. 10 of the Control Council for Germany" the Legal Committee concluded, *inter alia*, that "crimes against humanity of the murder type were offences committed against civilian population. Offences committed against members of the armed forces were outside the scope of this type, and probably also outside the scope of the persecution type."[42] Or, as it was stated later in the same report, "the words 'civilian population' appear to indicate that 'crimes against humanity' are restricted to

[41] *The Prosecutor v. Popović et al.*, Judgement, para. 754 and the jurisprudence cited therein.
[42] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission, London, 1948, p. 178.

inhumane acts committed against civilians as opposed to members of the armed forces."[43]

73. In other words, since the object of protection in crimes against humanity are civilians and the civilian population, members of the armed forces cannot be victims of crimes against humanity. The commission of certain illegal acts against individuals who are *hors de combat* constitutes a war crime or a grave violation of the Geneva Conventions, but not a crime against humanity.

74. Not every attack on an inhabited area is an attack on a civilian population. The only clear situation of an attack on a civilian population is an attack on a place that is not being defended. In situations like those in Srebrenica and Žepa, where civilian and military targets are mixed together in a restricted space (because, for example, the other warring side fails to comply with its obligations regarding the protection of civilians by relocating them outside the war zone, and by ensuring that military facilities are not close to civilian targets and that civilians cannot be used as shields against attacks and so on), the fact that a civilian target is jeopardised or damaged during an attack does not automatically characterise that attack as an attack on the civilian population.

75. The rules of international law create obligations for the parties to the conflict with regard to the protection of the civilian population, and these obligations are reciprocal. Failure to comply with these obligations may result (and usually does result) in exposure of the civilian population to the dangers of war operations. Just as the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive that population of its civilian character,[44] in the same way international humanitarian law does not impose on the warring parties an absolute inviolability of civilians.

76. In this case, at least the following several rules explicitly set out in Protocol I to the Geneva Conventions are of special relevance. They will be examined in more detail later within the context of the events in Srebrenica and Žepa.

77. Article 51(3) of Protocol I states:

> Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

78. Article 51(7) states:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians

[43] *Ibid.*, p. 193.
[44] Article 50(3) of Additional Protocol I. *See* also the Judgement of the Trial Chamber in the *Tadić* case, para. 638, and the Judgement of the Trial Chamber in the *Popović et al.* case, para. 754.

in order to attempt to shield military objectives from attacks or to shield military operations.

79. During defence or attack (in combat operations), the parties to a conflict must take precautions envisaged under, among others, Article 57 of Protocol I, which stipulates precautions in attack,[45] as well as precautions that the attacked party must take against consequences resulting from the attack, envisaged under Article 58 of Protocol I, which explicitly stipulates the following:

80. The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

81. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War sets forth certain prohibitions that must be taken into consideration when determining whether an attack that has been carried out constitutes an attack directed against a civilian population.

[45] "1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

82. Article 28 of the Fourth Geneva Convention stipulates that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." In other words, using protected persons to exclude places or areas from military operations is prohibited.

83. Further requirements for the existence of a crime against humanity are that the attack must be widespread and systematic, and that the actions of the perpetrator must be part of the attack. The term "widespread" refers to the large-scale nature of the attack and the large number of victims, while the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[46] The actions of the accused must be part of the systematic or widespread attack on the civilian population and the accused must have the requisite intent to commit the underlying offence(s) with which he or she is charged, and he or she must know that there is an attack on the civilian population and that his or her acts comprise part of that attack.[47]

84. In discussions of legal and factual matters relating to crimes against humanity, we must bear in mind the very nature of armed conflict as a state which, by definition, causes pain and suffering. The purpose of the rules of international humanitarian law is to alleviate these sufferings.[48] As pointed out by Yoram Dinstein, Professor of International Law at Tel Aviv University and Stockton Professor of International Law at the US Naval War College, in the introduction to his textbook intended for those gaining their first knowledge of the law of armed conflict:

> Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities. The law of international armed conflict can and does forbid some modes of behaviour, with a view to minimizing the losses, the suffering and the pain. But it can do so only when there are realistic alternatives to the military goal of victory in war. Should nothing be theoretically permissible to a belligerent engaged in war, ultimately everything will be permitted in practice – because the rules will be ignored.[49]

SOME REMARKS ABOUT THE CRIME OF GENOCIDE AND CONSPIRACY TO COMMIT GENOCIDE

[46] *See* the Judgement in the *Popović et al.* case and the jurisprudence cited therein, paras. 756-757.
[47] *Ibid.*, para. 758 and the jurisprudence cited therein.
[48] Article 13 of the Fourth Geneva Conventions states that the provisions on the general protection of populations against certain consequences of war are intended "to alleviate the sufferings caused by war".
[49] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 7th printing, 2009, pp. 2-3.
This is by no means to suggest that the killing of prisoners of war is something linked to a military need. On the contrary, the killing of prisoners of war is a criminal act.

85. The crime of genocide (as the crime of all crimes and the most serious crime) is a crime which, precisely because of its gravity, can be determined only on the basis of the most rigorous requirements. This brief will not present all the legal considerations with regard to genocide and other acts punishable under Article 4(3)(b) and (c) of the Statute of the Tribunal, but will address only some issues that might turn out to be contentious.

86. As pointed out by the Secretary-General in his Report pursuant to paragraph 2 of Security Council Resolution 808 (1993):

> The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute.[50]

The Statute of the Tribunal has therefore not changed the customary legal rules of international law which are incorporated in the Convention on the Prevention and Punishment of the Crime of Genocide, nor can they be changed through interpretation. The Statute of the Tribunal has consistently reproduced the provisions of this Convention. When interpreting the provisions of the Statute, the Tribunal should refrain from applying those norms that are applied in the case of war crimes and crimes against humanity, and, for the acts that have been particularly envisaged by the Convention on the Prevention and Punishment of the Crime of Genocide, apply the norms that have been accepted with regard to this extremely specific and very serious crime.

87. A distinctive feature of the Convention on the Prevention and Punishment of the Crime of Genocide is that it stipulates not only the elements of the crime, but also the elements of the grounds of responsibility for genocide. The provisions of Article 4 of the Statute of the Tribunal are a *lex specialis* in relation to the provisions of Article 7(1) of the Statute of the Tribunal.

88. Although the Indictment states all modes of responsibility under Article 7(1) of the Statute of the Tribunal for all counts of the Indictment, genocide and conspiracy to commit genocide are not only separate crimes, but they also include a relevant form of responsibility. In addition to genocide and conspiracy to commit genocide, the Convention on the Prevention and Punishment of the Crime of Genocide and the Statute of the Tribunal also envisage direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. Since the Genocide Convention itself (which is a reflection of international customary and treaty law that was incorporated in the Statute in such a way that its provisions were practically only reproduced) sets forth the relevant forms of complicity in the commission of a crime, they should be specifically stated in the Indictment.

89. Aiding and abetting, planning and instigating cannot be considered separate modes of responsibility for genocide because complicity in genocide, conspiracy to commit genocide and direct and public incitement to commit genocide are separate crimes punishable under Article 4(3) (a) to (e) of the Statute of the Tribunal and the Genocide Convention. Thus complicity in genocide as a separate crime also subsumes

[50] Report of the Secretary-General, para. 46.

the corresponding mode of responsibility that is incorporated in the very essence of that crime.[51]

90. If it is established that an individual has aided and abetted genocide, or directly and publicly incited to commit genocide, or aided and abetted genocide, he or she cannot be convicted of genocide but only of "direct and public incitement to genocide, attempt to commit genocide or complicity in genocide". Since genocide and other punishable acts envisaged by the Convention and the Statute relating to this crime have specific characteristics (especially because of the requirement that there must be genocidal intent and qualitative requirements linked to incitement, attempt, etc.), these crimes are envisaged separately and rule out the application of the forms of responsibility for complicity envisaged under Article 7(1) of the Statute of the Tribunal.

91. Article 4(3) of the Statute of the Tribunal states that "[t]he following acts shall be punishable: …" If a punishable act is not mentioned in the indictment, the accused cannot be convicted of genocide using a combination of the modes of responsibility envisaged under Article 7(1) of the Statute of the Tribunal. In other words, the method by which norms are established is such that Article 4(3) of the Statute rules out the application of Article 7(1) of the Statute of the Tribunal.[52]

92. Genocidal intent is the *sine qua non* of the crime of genocide. The acts enumerated in Article 4(3) (a) to (e) of the Statute of the Tribunal (and in Article II, sub-paragraphs (a) to (e) of the Convention on the Prevention and Punishment of the Crime of Genocide) are not genocidal acts *per se*, but the *actus reus* of the crime of genocide and may constitute the physical or material expression of specific genocidal intent. To be able to speak about the crime of genocide, the Prosecution must prove beyond reasonable doubt that there is a *nexus* between genocidal intent and at least one of the acts enumerated in sub-paragraphs (a) to (e) of Article 4(3) of the Statute of the Tribunal. If there is no genocidal intent – irrespective of the scale and consequences of, for example, murder – we cannot speak about genocide, but rather about other crimes, for instance, a crime against humanity (extermination or murder as a crime against humanity) or a war crime.

93. Strict criteria must be applied to prove genocidal intent. Conclusions about the existence of genocidal intent should not be drawn only on the basis of the acts that have been carried out and their consequences. It has to be established with a high degree of certainty, and the scale of the consequences of carrying out the acts

[51] "Probably all criminal law systems punish accomplices, that is, those who aid, abet, counsel and procure or otherwise participate in criminal offences, even if they are not the principal offenders." *See* Schabas, *op. cit.*, p. 285.

[52] A different method of establishing norms was applied, for example, in the United Kingdom. When it incorporated the Genocide Convention in its domestic legal system, the provision on punishment for complicity in genocide was not included. "Parliamentary Secretary Elystan Morgan, in explaining the legislation to Parliament, noted that 'Complicity in genocide has not been included in Clause 2(1) [because] we take the view that the sub-heading in Article III is subsumed in the act of genocide itself in exactly the same way as, under our domestic criminal law, aiding and abetting is a situation in which a person so charged should be charged as a principal in relation to the offence itself.'" Schabas, *op. cit.*, p. 278 (as quoted from the Official Report, Fifth Series, Parliamentary Debate, Commons 1968-1969, Vol. 777, 3-4, February 1969, pp. 480-509).

enumerated in Article 4(2) (a) to (e) (*actus reus*) can be taken as only one element (but not the key element) in drawing a conclusion about whether there was genocidal intent or not. In other words, genocide is characterised by special intent (*dolus specialis*), irrespective of the seriousness and the consequences of carrying out the acts envisaged under Article 4(2) of the Statute of the Tribunal.

94. The question arises of whether genocide is a crime of consequence or a crime of action. Here is how the notion of genocide is defined:

> Genocide means any of the following acts [enumerated in items (a) to (e)] *committed with intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

95. From the way it is defined, it clearly follows that genocide is not a crime of consequence. It is an act characterised by specific intent (genocidal intent, *dolus specialis*) and precisely defined actions by which this intent is carried out and manifested. In carrying out genocidal intent, the consequence (destruction, in whole or in part, of a protected group) is not necessarily achieved; in other words, the materialisation of genocidal intent is not necessarily coupled with the achievement of the intended consequence (the destruction, in whole or in part, of a protected group).

96. Establishing specific genocidal intent is the main feature of the crime of genocide, which should be distinguished from the crime of extermination as a crime against humanity, which is characterised by "the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths".[53] Unlike genocide, extermination does not require that the accused has the intent to destroy a protected group in whole or in part. Specific genocidal intent is an element that differentiates genocide from other crimes with which it shares the same objective element. In the absence of that intent, whatever the degree of atrocity of an act and however similar it might to be to the acts referred to in Article 4 of the Statute of the Tribunal, that act cannot be called genocide .[54]

97. The *dolus specialis* of genocide means that it is not sufficient that the accused knows that his acts may contribute to the destruction of a group as such; a much higher degree of intent needs to be proven. In the *Prosecutor v. Goran Jelisić* case, the Trial Chamber held as follows:

> The Prosecutor proposes a broad understanding of the intention required under Article 7(1) of the Statute and submits that an accused need not *seek* the destruction in whole or in part of a group. Instead, she claims that it suffices that he *knows* that his acts will inevitably, or even only probably, result in the destruction of the group in question. Furthermore, she states that premeditation is not required. The Trial Chamber notes that, contrary to the Prosecutor's contention, the Tribunal for Rwanda in the *Akayesu* case considered that any

[53] *See*, for example, the Judgement of the Appeals Chamber in the *Prosecutor v. Stakić* case.
[54] *See* Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th meeting (quoted from Milenko Kreća, *Medunarodno javno pravo* /International Public Law/, Belgrade, 2011, pp. 677-678).

> person accused of genocide for having committed, executed or even only aided and abetted must have had "the specific intent to commit genocide", defined as "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such". The *Akayesu* Trial Chamber found that an accused could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of a group. It declared that such an individual must be convicted of complicity in genocide.[55]

98. Destruction as an element of special genocidal intent implies the material (physical and biological) type of genocide. Physical genocide refers to killings, grave violations of physical and mental integrity, and the infliction on the group of conditions calculated to bring about its destruction, while biological genocide refers to measures intended to prevent births within the group and the forcible transfer of the children of the group to another group.[56] The intent to destroy a group thus implies the carrying out of acts that result in the death of members of the protected group.

99. The object of destruction (as an element of special intent) is the group as such on account of its national, ethnic, racial or religious characteristics. The crime of genocide is depersonalised and the intent to destroy only certain members of a group cannot be considered genocide. The qualification "intent to destroy a national, ethnic, racial or religious group" points to the collective nature of the crime: an individual or a group of individuals is targeted because of membership in the protected group and not because of some other characteristics. The term "as such" is a qualification of the qualification, because the intent to destroy is directed against the group as a protected group. As pointed out in the Draft Code of Crimes against the Peace and Security of Mankind, "[t]he definition of this crime requires a particular state of mind or specific intent with respect to the overall consequences of the prohibited act".[57] The qualification "as such" means that the intent must be to destroy the group "as such" in the sense of "as a separate and distinct entity, and not merely some individuals because of their membership in a particular group".[58] As pointed out by Judge Kreća:

> The qualification "as such" serves also as *differentia specifica* between discriminatory intent as suggestive of an element of the crime of persecution, which also may have, as its target for genocidal intent, a racial, excluding ethnic, group.
>
> As a consequence, if prohibited acts under Article II of the Convention targeted a large portion of a protected group such acts would not constitute genocide if they were a part of a random campaign of violence or general pattern of war. [59]

[55] *The Prosecutor v. Goran Jelisić*, Judgement of the Trial Chamber, paras. 85-86.
[56] Milenko Kreća, *Medunarodno javno pravo* /International Public Law/, Belgrade, 2011, p. 679.
[57] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Report of the ILC, 1996, Vol. II, Part Two, commentary to Article 17, para. 5.
[58] *Ibid.*, para. 7.
[59] "Dissenting Opinion of Judge Kreća", *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports, p. 524.

100. The scope of destruction (in whole or in part) means a substantial part of a group. This is a quantitative criterion which must be included in the perpetrator's intent. However, the qualification "in whole or in part" is not without ambiguities, particularly in terms of whether it refers to the scope of the intent or the scope of the act. Interpretation of the grammar and purpose of the Convention give grounds for the conclusion that it is an element of intent.[60]

101. Conspiracy to commit genocide is a separate crime and as such it has been envisaged by both the Statute and the Convention on the Prevention and Punishment of the Crime of Genocide. Its relationship to the crime of genocide is such that genocide *subsumes* conspiracy to commit genocide. In other words, one and the same act cannot be characterised both as genocide and conspiracy to commit genocide,[61] because acts of conspiracy to commit genocide are essentially of a preparatory character in relation to genocide and are therefore covered by it. Article III of the Convention on the Prevention and Punishment of the Crime of Genocide sets forth separate forms of participation in the crime of genocide, including *conspiracy to commit genocide*, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. Strictly speaking, these "other acts" do not constitute genocide, but forms of so-called "secondary responsibility".[62] As Schabas correctly observes, "by its very nature, the crime of genocide will inevitably involve conspiracy and conspirators."[63] As such, conspiracy to commit genocide is a form of participation in committing the crime of genocide; therefore, the relationship between these two crimes – genocide and conspiracy to commit genocide – is one of subsumption. The punishment for the crime of genocide depends on several factors, including whether the individual has participated in developing a plan that was later implemented. If conspiracy to commit genocide has not resulted in the commission of genocide (it was not carried out at all or remained at the stage of a failed attempt), the Convention on the Prevention and Punishment of the Crime of Genocide and the Statute of the Tribunal also envisage responsibility for conspiracy to commit genocide itself. As for the requirements that have to be fulfilled in order to establish that an individual has committed the act of "conspiracy to commit genocide", it must be pointed out that membership in an organisation is not sufficient in itself to prove "conspiracy".[64]

102. Finally, paragraphs 10(b) and 22 of the Indictment allege causing serious bodily or mental harm to both female and male members of the populations of Srebrenica and Žepa by the separation of able-bodied men from their families, the forced movement of the population from their homes and the murder of able-bodied men.

[60] *Ibid.*, p. 486.
[61] The Trial Chamber sitting in the *Musema* case before the International Criminal Tribunal for Rwanda concluded that an accused cannot be convicted of both genocide and conspiracy to commit genocide. Trial Judgement in the *Musema* case, para. 198.
[62] *See* W. A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p. 257.
[63] *Ibid.*, p. 259.
[64] See *France et al. v. Goering et al.*, IMT, Vol. 22, p. 469; *see* also Schabas, *op. cit.*, pp. 262-263.

103. First, murder cannot be used as a "double" *actus reus* of the crime of genocide. Murder is in itself genocide if committed with intent to destroy a group in whole or in part. It would be contrary to the object and objective of the Convention to characterise one and the same act both as the *actus reus* of murder and the *actus reus* of causing serious bodily or mental harm.

104. Under certain conditions, the forced movement of a population fulfils the requirements for a crime against humanity, but it does not in itself constitute genocide. The removal of a population (irrespective of whether this removal is characterised as unlawful or lawful) is not an *actus reus* of genocide and is not an act of genocide envisaged by the Genocide Convention or the Statute.[65] Furthermore, the transfer of a population from one territory to another is not an act that contributes to destruction.

105. The crime of genocide does not refer to the survival of a group in a certain locality or in a certain part of the territory, but to the survival of the group as such. The elements for the identification of a group are linked to this. A national, ethnic, racial or religious group as such is not defined in terms of the locality where it is, but in terms of the ethnic, racial or religious characteristics on account of which that group is afforded the status of a protected group.

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[65] This can also be concluded from the *Travaux Préparatoires* of the Genocide Convention. Here is how Judge Kreća summarised the relevant considerations in his Separate Opinion:
"Acts constituting the *actus reus* of genocide are listed *a limine* in Article II of the Convention. Article II of the Convention does not include 'ethnic cleansing' as an act of genocide.
In the course of the drafting of the Genocide Convention, there were proposals, it is true, to place the subsumed acts under the heading ethnic cleansing as the sixth act of genocide. But these proposals were not accepted. Syria submitted an amendment to include the imposition of 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' as an *actus reus* of genocide. The amendment was supported by the Yugoslav representative, Bartos, citing the Nazi displacement of the Slav population from a part of Yugoslavia as an action 'tantamount to the deliberate destruction of a group'. He added that 'genocide could be committed by forcing members of a group to abandon their homes'.
The amendment was, however, rejected by a clear majority of 29 votes against and five in favour with eight abstentions, the explanation having been offered that it deviated too much from the concept of genocide. Specifically discussing the contention that forced displacement practiced by the Nazis was tantamount to the deliberate destruction of a group, the Soviet representative Morozov emphasized that this was consequence, not genocide itself.
The exhaustive listing of the acts constituting the *actus reus* of genocide is the proper and cogent expression of the fundamental principle of criminal law, domestic or international: *nullum crimen, nulla poena sine lege*.
During the debate in the Sixth Committee, two amendments were submitted proposing the adoption of an illustrative definition of acts of genocide. After discussion the amendments were rejected on the basis of the argument that an exhaustive enumeration was necessitated by the fundamental principle *nulla poena sine lege*. It was also observed that an advantage of the exhaustive enumeration method was that it allowed for the subsequent amendment of the Convention by the addition of further acts to the enumeration.
It should be noted that at no time during the drafting Statutes of the two *ad hoc* tribunals or the Rome Statute of the International Criminal Court was it even proposed to expand the list of acts or to deem the enumeration in Article II of the Convention to be non-exhaustive. The intrinsic, highly complex structure of 'ethnic cleansing' also militates against its inclusion among acts of genocide. It encompasses acts belonging to different genera of international crimes that accompany acts which, although violative of internationally recognized human rights, are not *per se* punishable." Separate Opinion of Judge *ad hoc* Kreća, para. 102.

SOME REMARKS ON JOINT CRIMINAL ENTERPRISE AS A FORM OF LIABILITY IN INTERNATIONAL CRIMINAL LAW

106. In the Indictment, the Accused is charged with participation in two joint criminal enterprises (JCE), a JCE to murder the able-bodied Muslim men captured from the Srebrenica enclave and a JCE to drive out the population of Srebrenica and Žepa. Moreover, the Prosecution has brought charges against the Accused on the basis of the first form of the joint criminal enterprise and the third form of the joint criminal enterprise for alleged opportunistic killings and foreseeable targeted killings.

107. In the light of developments in the recent jurisprudence of international criminal courts and tribunals, the need to re-examine the concept of joint criminal enterprise, as it is understood in the case law of the International Criminal Tribunal for the Former Yugoslavia, is well founded. In particular, the reasons set out by Judge Schomburg in his Separate Opinion on the individual criminal responsibility of Milan Martić[66] contain a host of reasons supporting the argument that the joint criminal enterprise is unacceptable as a mode of liability.

108. Discussing the question of individual criminal responsibility, Judge Schomburg pointed out, among other things, the following: "My concern is that Martić's criminal conduct is primarily qualified as relying on membership in a group – the so-called joint criminal enterprise (JCE) – which cannot be reconciled with the Statute…"[67] and added:

> Nowhere does the Statute mention the term "joint criminal enterprise." It was therefore nothing but an unsupported dictum when the Appeals Chamber in *Stakić* held that "joint criminal enterprise is a mode of liability which is 'firmly established in customary international law.'" This might well be the case. It is, however, only a secondary question. The primary question to be answered in relation to the scope of jurisdiction concerns the power vested in this International Tribunal. This power is limited by the Statute and its explicit and exhaustive wording. To go beyond the explicit and exhaustive wording of Article 7 of the Statute might even be seen as a violation of the principle *nullum crimen sine lege*.[68]

109. The recent jurisprudence of international criminal courts and tribunals demonstrates that Judge Schomburg's view is not a mere assertion,[69] which unambiguously leads to the conclusion that the concept of joint criminal enterprise, as formulated in the Tribunal's consolidated jurisprudence, should be re-examined.[70]

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[66] *The Prosecutor v. Milan Martić*, Judgement, "Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić."
[67] "Separate Opinion of Judge Schomburg", para. 2.
[68] "Separate Opinion of Judge Schomburg", para. 4 (footnotes omitted).
[69] Above all, the permanent International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia.
[70]

110. JCE is not specifically envisaged as a form of liability under the Statute of the Tribunal, nor can its interpretation lead to the conclusion that it constitutes a ground of liability in international criminal law. Some elements of co-perpetration combined with other elements have led to the construction of this form of liability in which elements of co-perpetration are mixed with various forms of complicity.

111. Joint criminal enterprise was first applied as a basis of liability in the case law of the International Criminal Tribunal for the Former Yugoslavia.[71] The Defence believes that the Tribunal has overstepped its jurisdiction by becoming involved in the progressive development of international law (which is not permissible for a court), instead of applying positive law, the law that was in force at the time of the commission of the crimes with which the Accused is charged.

112. The concept of joint criminal enterprise, as interpreted in the case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, is derived from Article 7(1) of the Statute of the Tribunal – commission as a form of co-perpetration.[72] Nevertheless, the elements of joint criminal enterprise, as defined in the Tribunal's jurisprudence, can hardly be placed under co-perpetration and individual criminal responsibility. As Judge Schomburg pointed out:

> While the Appeals Chamber has in the past explicitly stated that "criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes," the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary.[73]

113. As the Pre-Trial Chamber of the International Criminal Court held in *The Prosecutor v. Thomas Lubanga Dyilo*:

> The Chamber is of the view that the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributors of a plurality of persons results in the realisation of the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[74]

114. When determining the boundary or difference between the responsibility of the perpetrator and co-perpetrator and accomplice, at the theoretical level one can apply several concepts which are mutually exclusive and which are not equally

[71] *The Prosecutor v. Dušan Tadić*, Appeals Chamber Judgement.
[72] When discussing the concept of joint criminal enterprise, as defined in the Tribunal's jurisprudence, the Defence relies on the Tribunal's "consolidated" jurisprudence, and the definition of the joint criminal enterprise in the Appeals Chamber Judgement in *The Prosecutor v. Milan Martić*, paragraphs 68-84, or the Trial Chamber Judgement in *The Prosecutor v. Vujadin Popović et al.*, paragraphs 1021-1032.
[73] "Separate Opinion of Judge Schomburg", para. 5 (footnotes omitted).
[74] International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/4-01/6, "Decision on the confirmation of charges" – Public Redacted Version.

founded on currently valid law and the jurisprudence of criminal courts.[75] The International Criminal Tribunal for the Former Yugoslavia applies the so-called "subjective approach", since the focus is moved from the level of contribution to the commission of the crime to the state of mind in which the contribution to the crime was made.[76]

115. The concept accepted in the International Criminal Court's jurisprudence is the concept of co-perpetration based on the theory of control over the commission of the crime. This approach is applied in many national legal systems.[77] As the Chamber of the International Criminal Court held:

> This notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[78]

116. It is precisely this approach that corresponds to the concept of co-perpetration (as opposed to complicity) and includes both the objective and subjective element. The objective element consists of the "appropriate factual circumstances for exercising control over the crime," while the subjective element consists of the knowledge (awareness) of such circumstances.[79]

117. Both complicity and co-perpetration have one element in common – it is the awareness of joint action – which means the realisation of a specific objective or plan, or at least that the accused knew of the objective. Nevertheless, not every person who took part in the commission of the crime can be considered a co-perpetrator (or, in the concept of the International Criminal Tribunal for the Former Yugoslavia, a participant in a joint criminal enterprise).

118. Unlike complicity (for example, inciting, instigating, aiding and abetting in the planning, preparation or execution of a crime), the concept of co-perpetration which is based on "joint control over the crime" is based on the "principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner."[80] Only in this case is it reasonable to talk about co-perpetration, or responsibility for the commission of a crime within the meaning of Article 7(1) of the Statute of the Tribunal.

119. Article 7(1) of the Statute of the Tribunal does not explicitly mention co-perpetration and complicity, but it includes the forms of these two categories. Considering that Article 7(1) includes a number of forms of responsibility for planning, instigating, ordering, committing or otherwise aiding and abetting in the

[75] *See* International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/4-01/6, "Decision on the confirmation of charges" – Public Redacted Version, paras 322-341.
[76] *Ibid*, para. 329.
[77] *Ibidem*, para. 330, fn. 418.
[78] *Ibidem*, para. 330.
[79] *Ibidem*, para. 331.
[80] *Ibidem*, para. 342.

planning, preparation or execution of a crime falling under the jurisdiction of the Tribunal, which cover a whole spectrum of the grounds of responsibility, it is necessary to make a clear distinction between these notions which is grounded both in theory and in the practice of international and national courts. The concept applied by the International Criminal Tribunal for the Former Yugoslavia is not in accord with the Statute of the International Criminal Court and its jurisprudence.[81]

120. The Defence submits that the Trial Chamber should apply the concept of joint criminal enterprise, or co-perpetration, in the manner defined in the Statute and jurisprudence of the International Criminal since this reflects positive international law, the law explicitly accepted by a large number of states.

121. Type 3 of JCE as defined in the Tribunal's case law, the Concept of Joint Criminal Enterprise, as defined in the Tribunal's case law, "is hardly *lex lata* of the contemporary international law, and it is not surprising that acronym of this mode of liability (JCE) got colloquial interpretation – just convict everybody. Contrary to the ICTY's judge made law, Statute of the International Criminal Law (that is international treaty that reflects positive international law and its progressive development) does not allow recklessness as a culpable *mens rea*. Article 30 of the ICC Statute defines mental element as consisting of intent and knowledge, allowing exceptions only if otherwise provided by the Statute.[82] The ICTY Statute does not provide exceptions that culpable *mens rea* may be other than intent and knowledge."[83]

122. Subjecting the so-called third category of joint criminal enterprise to strong criticism, Judge Schomburg pointed out:

> Furthermore, the Appeals Chamber's constant adjustment of what is encompassed by the notion of JCE raises serious concerns with regard to the principle of *nullum crimen sine lege*. The lack of an objective element in the so-called third ("extended") category of JCE is particularly worrying. It cannot be sufficient to state that the accused person is liable for any actions by another individual, where "the commission of the crimes … were a natural and foreseeable consequence of a common criminal purpose."[18] What is missing here is an additional objective component, such as control over the crime,[19] as would be provided under the concepts of co-perpetration or indirect perpetration.[84]

[81] *Ibidem*, para. 335.
[82] "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
For the purpose of this article a person has intent where a) in relation to conduct, the person means to engage in the conduct; b) in relation to a consequence, the person means to cause that consequence or is aware that it will occur in the ordinary course of events.
For purpose of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events."
[83] Aleksandar Gajić, "International Criminal Tribunal for the Former Yugoslavia – Human Rights Perspective".
[84] "Separate Opinion of Judge Schomburg", para. 7 (footnotes omitted).

123. Contrary to the Tribunal's consolidated case law, the ECCC Trial Chamber dismissed this form of liability, finding that there was not enough evidence that there is a similar norm with regard to vicarious liability for crimes committed outside the purpose.[85]

124. International criminal law has long lacked a "general part" regulating questions such as the question of the form of liability in a sufficiently clear way. Its development was initially put in the hands of the international criminal tribunals for the former Yugoslavia and Rwanda. Then, with the establishment of the Permanent Criminal Court (in the manner which is usual for the establishment of international courts under international law), their jurisprudence was dismissed with regard to one of the most important questions of international criminal law, the question of the form of liability.

[85] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, "Decision on the Applicability of Joint Criminal Enterprise", 12 September 2011, E100/6 ("Decision").

DEFENCE FINAL TRIAL BRIEF

PART TWO

DISCUSSION OF THE PROBATIVE VALUE OF CERTAIN EVIDENCE OR TYPES OF EVIDENCE

INTRODUCTION

125. This part of the brief presents a discussion of some exhibits or categories of exhibits. The discussion presented below is not exhaustive and it should not be concluded that the Defence believes that evidence which is not specifically referred to in this section is reliable and of such probative value that it can be used to establish the facts.

126. Some exhibits and the question of their reliability and probative value will be discussed in other parts of the brief. This is especially the case with reports of some Prosecution investigators or Prosecution experts.

Intercepted communications

127. The Defence takes issue with the reliability and authenticity of communications intercepted by the BH Army and the BH MUP /Ministry of the Interior/. Reports on intercepted communications constitute a considerable part of the evidentiary material in this case. The fact that a piece of evidence is admitted into the record does not automatically mean that the Chamber can rely on it when rendering the final judgement. Whether it can rely on it depends on a number of factors which have to be taken into consideration, including the nature of the organ that intercepted the communications, the evidence that they were used in the relevant period, how they were obtained for the purposes of presentation of evidence in court proceedings, the continuity and chain of custody of these documents, and so on.

128. There are many reasons why the Defence believes that the so-called intercepted communications cannot serve as documentary evidence on the basis of which a conclusion about the facts relevant for rendering the final judgement can be drawn. Nevertheless, before that it is necessary to discuss the question of adjudicated facts about intercepted communications of which judicial notice has been taken.

129. With its "Decision on Adjudicated Facts", the Trial Chamber took notice of the facts listed in the Annex to the Decision under numbers 595-604.[86] The Defence maintains that the Trial Chamber cannot rely on these facts, that is, that it should not consider them to be established facts, because the Prosecution devoted a great deal of court time precisely to discussing questions connected to the so-called intercepted communications. The case file contains a large number of reports on intercepted communications, and many of the so-called intercept operators who testified as

[86] *See* Annex attached to the "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)", 17 December 2009.

witnesses or gave statements that were admitted into evidence pursuant to Rule 92 *bis*. Presenting a large quantity of evidence on the so-called intercepted communications renders the purpose of taking judicial notice of adjudicated facts senseless, and there is sufficient evidence before the Trial Chamber on the basis of which it can independently make a decision on the reliability of intercepted communications in general, and on the reliability and probative value of specific intercepts.

130. Evidence in this case – the so-called intercepted communications or summaries of alleged intercepted communications – was presented from several sources. For some it is asserted that their author, or the organ that intercepted them, is the BH Army, for others it is the State Security of the MUP of Bosnia and Herzegovina, while the source of the third group is said to be the Croatian Army. All witnesses from the category of intercept operators testified under extensive protective measures. In addition, the Prosecution investigator Stefanie Frease also testified in this case[87] and many exhibits were tendered through her.[88] Her testimony should be treated in accordance with the standards of assessment of testimonies of Prosecution investigators described separately below, and therefore we will not unnecessarily repeat it here.

131. Investigator Stefanie Frease, who worked on the Prosecution's "interception" project, had no previous training or experience with the processing of intercepted communications material.[89] Her work on the processing of this material included mainly its systematisation in Excel tables.[90]

132. According to Stefanie Frease's testimony, the Prosecution also tried to establish contact with the United States with the aim of obtaining intercepted communications. It follows from the witness's answer that such contact was established and that they received some information from US services.[91] At the time, the Prosecution investigation team could not verify through foreign services the reliability of the material of the alleged intercepted communications.[92] However, this question is far from simple, and neither the Defence nor the Trial Chamber have the necessary information which would be such that it can be admitted into evidence, considering that the Prosecution's contacts regarding intercepted communications materials are covered by Rule 70 of the Rules. As the prosecutor explained during the cross-examination of investigator Stefanie Frease:

> We -- it's very possible we are making -- we make Rule 70 requests to many governments. As you're aware, we make Rule 70 requests on these topics, and the actual request is -- is something that, you know, I think we've gone into that and she's answered it, but any more detail than this and we may be getting

[87] 7, 8, 10, 13 and 14 September 2010.
[88] About 107 exhibits, *see* exhibits P758-P865.
[89] Stefanie Frease, 10 September 2010, T.5157.
[90] Stefanie Frease, 10 September 2010, T.5157.
[91] "We attempted to establish contact with the United States on this subject, but we didn't get very far. My recollection is that they were able to confirm a few of the code-names, *Panorama*, *Badem*, *Palma*, that sort of thing, but nothing more. Or maybe I should say unwilling." 10 September 2010, T.5176.
[92] Stefanie Frease, 10 September 2010, T.5172, T.5176.

into responses to such, and that is something that I -- I'm sorry to take out of turn, but I need to protect the record for because we need to protect Rule 70.[93]

133. The Defence understands the limitations under Rule 70, but it points out that they support the doubts as to the reliability of the evidentiary material – reports on intercepted communications – especially as to whether these reports are from the Army of Bosnia and Herzegovina, the SDB of Bosnia and Herzegovina, or the intelligence service of another country. However, the Prosecution's argument about Rule 70 limitations is not fully convincing if viewed in the context of the study of the Dutch Institute for War Documentation,[94] which provides a lot of information that this Institute obtained during its investigation of Srebrenica. It is hard to imagine that such a lengthy and thorough study conducted by the NIOD was unknown to the Tribunal's very organised and diligent Prosecution.

134. Moreover, the nature of the organ dealing with intercepted communications also makes it certain that members of the service, even when they testify under oath before the court, cannot provide relevant information as to who intercepted certain communications and how they did it. Therefore, the testimonies of intercept operators, who testified under extensive protective measures, should be assessed with a great deal of caution, constantly bearing in mind the nature of the service for which they worked and the fact that they are still required to be loyal to it and withhold information about its work. Witnesses from the BH Army confirmed that they had gone to interviews at the order of their superior commander.[95]

135. The bulk of the testimony of these witnesses is rather implausible. Namely, the evidence contains a large number of intercepted communications, but several witnesses, including Witness PW-032, gave testimony on the modest resources and lack of professional equipment, and the lack of professional training of the personnel who worked at the north and south location, and the alleged manner of collecting information.[96] The implausibility of the testimony goes so far that he makes an assertion that the group under his control exchanged flour for notebooks to record intercepted communications,[97] saying that he really does not know whether his superior in the chain of command knew about the lack of material and that the lack of notebooks was the "last thing that senior officers and commanders would be concerned about."[98] This fact indicates that the superior command did not receive the information that was presented in court, since it is reasonable to assume that commanders were very eager to receive information obtained from intercepted communications.

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[93] JUDGE FLUEGGE: Is the Defence aware of the conditions of this state made by your -- for your application?
MR McCLOSKEY:… And as for areas related to intercepted conversations, it's -- there is no history of that. I have not had any discussions with Mr. Gajić about that, and, frankly, I can't remember if there even is a history at this point, but it's just a sensitive area and I think it's something that we need to take into consideration. T.5178
[94] *See* Exhibit D48.
[95] *See*, for example, PW-032, 2 June 2010, T.2389, 2399.
[96] *See*, for example, 25 May 2010, T.2160.
[97] 28 May 2010, T.2181.
[98] 2 June 2010, T.2393.

136. According to Stefanie Frease, as early as July 1995 Jean-René Ruez, the leader of the Prosecution's investigation team, asked the SDB or the BH Army in Tuzla whether there were intercepted communications, because, as the investigator said, "there were rumours" that there were.[99] However, this material, which would be sensitive in any country, was disclosed to the Prosecution only in March 1998.[100] The first material that the Prosecution received consisted of about 550 pages of material in a green binder.[101] These were obviously selected materials specially prepared for disclosure to the Prosecution of the Tribunal.[102] In other words, the reliability of the intercepted communications is significantly affected by the fact that they were sent to the Prosecution of the Tribunal relatively late, although it was in the interest of the party that sent them – the service of the BH Federation – to contribute to establishing responsibility for the events related to the fall of Srebrenica. When they were sent, the relevant BH Army organ selected them, and there was ample time to draft many of these documents subsequently, especially considering that, as we will elaborate in detail below, foreign intelligence services of the USA, the UK and Croatia in particular, but also of some other countries, tried to intercept VRS communications with much more modern and better equipment than was available to the BH Army and the SDB of the BH Army.

137. Certainly the largest and most thorough study of the events related to the fall of Srebrenica is the study of the Dutch Institute for War Documentation (NIOD). A part of that study relating to intercepted communications and the work of intelligence services which dealt with these matters has been published and is among the exhibits in this case. It is the relevant part of Cees Wiebes's study entitled "Intelligence and the War in Bosnia 1992-1995" (Lit Verlag, Münster-Hamburg-London, 2003, hereinafter: "D48").[103] The sources used and the methodology, analytical method and quantity of information taken into consideration show that it is a very reliable study. This study is thorough and comprehensive, and the conclusions contained therein are fairly reliable and drawn on the basis of a large number of documents, statements and so on. The sources used during its drafting are far superior to the sources presented as Prosecution evidence in this case.[104]

138. The interception of communications, as a form of SIGINT, is one of the "most secret methods of gathering intelligence".[105] Not only the legality of obtaining

[99] Stefanie Frease, 10 September 2010, T.5172, T.5174.
[100] Stefanie Frease, 10 September 2010, T.5172.
[101] Stefanie Frease, 10 September 2010, T.5174.
[102] *See* Stefanie Frease, 10 September 2010, T.5231.
[103] The Defence adds that, although this study was admitted into evidence in the early phases of the presentation of evidence, the Prosecution did not present special evidence challenging the facts and conclusions given in this study.
Page 5 (Introduction) says: "This study is an appendix to the Srebrenica Report by the Netherlands Institute for War Documentation (NIOD). A central position in the study is occupied by the role of national and international intelligence and security services in the war in Bosnia in general and Srebrenica in particular."
[104] The Prosecution investigator denies that she was familiar with the study of the Dutch Institute for War Documentation which deals, among other things, with the question of intercepted communications. Stefanie Frease, 10 September 2010, T.5174.
[105] D48, p. 7.

evidence through the interception of communications, but also, above all, the nature of the service that does this and the manner in which it gathers and disseminates such evidence go strongly in favour of its unreliability as evidence in proceedings before courts and tribunals.

139. There are considerable limitations with regard to the possibility of using intercepted communications in proceedings before courts. The International Criminal Tribunal for the Former Yugoslavia is required to comply with the general principles derived from national legislations in relation to intercepted communications. They may be used as evidence in court proceedings only if the interception of communications is carried out with the approval of a relevant court.

140. Reports on intercepted communications are materials whose distribution is very limited and, as a rule, they are only sent to people on a "need-to-know basis".[106] The reliability of this information is also illustrated by the fact that during the Cold War, intelligence information gathered through the interception of communication "was not regarded as a sufficiently reliable source".[107] One of the reasons for the unreliability of intercepted communications is that the sides in the conflict can spread disinformation by enabling the other side to intercept their communications, or use different forms of communication as a cunning strategy.[108] Also, by announcing that it has some intercepted communications, the other warring side can use them as an element in the fight against the enemy, like cunning strategies which it can also use after the end of hostilities. These reasons, and many others, support the argument that the use of these materials is unacceptable.

141. Intercepted communications can be considered reliable only if there is an audio or video recording on the basis of which they were created. In that case, however, it is the audio recording itself that is the evidence, and the transcript can be used only for the purposes of facilitating the processing of information. Even in this instance, the intercepted communication should be approached with a great deal of caution because the context of the intercepted conversation may be unknown.

142. During the war in the former Yugoslavia, many intelligence services engaged in the interception of communications. One of the most active services in BH was the National Security Agency, which showed strong interest in the fighting in BH and intensified its activities in this area after Clinton's inauguration as US President in January 1993.[109] One of the basic problems that they faced was the lack of translators who spoke Serbo-Croat.[110] The USA had a special interest in intercepting communications, because its air and naval forces were deeply involved in the conflict in BH.[111]

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[106] *See* D48, p. 10.
[107] D48, p. 10 (p. 225, last paragraph).
[108] This assertion is supported by, for example, the testimony of Novica Simić in *The Prosecutor v. Popović*, where he mentioned that camouflage measures also included sending fake telegrams with a view to concealing the real purpose of the planned operations. Novica Simić (P2756) T.28509.
[109] D48, p. 12.
[110] D48, p. 12.
[111] D48, p. 13.

143. As Cees Wiebes's study says:

> Sigint satellites and aircraft formed the chief resource for "hoovering up" the telephone, radio, digital and analogue computer data, fax and modem transmissions between computers and GSM traffic. A new generation was in use at this time, the Mercury (Advance Vortex) satellite which is supposedly able to intercept from space even very low-power radio transmissions such as those from walkie-talkies.[112]

144. Between 1994 and 1997, the USA launched three new satellites for intercepting communications. In 2006, the Director of the Central Intelligence Agency (CIA) of the USA officially confirmed the existence of these satellites.[113] In addition to these satellites, special unmanned and manned aircraft were used to intercept communications (RC-135, U-2R EP3 of the US Navy).[114]

145. In addition to US services, the intelligence services of Canada and the United Kingdom[115] were also very active in intercepting communications in BH.

146. As of 1994, a special Bosnia Group operated at the NSA, and according to an American intelligence official, "in this period this NSA team carried out one of the best operations in its history."[116] After a conversation was intercepted, it was processed and analysed, and within four hours it was on the desk of intelligence customers such as the CIA or the State Department.[117]

147. The Prosecution asserts, or tried to prove, that the UN was blocked and helpless in the enclaves. On the contrary, Cees Wiebes's study shows that the countries engaged in BH had strong intelligence services which operated especially by intercepting communications and that they had relevant information. Particularly noted was the activity of the USA, the United Kingdom, Canada, Germany and France, but also other European countries,[118] which used satellite, stationary and other equipment to gather intelligence.

148. An important fact for the purposes of this case is that the USA was ready to hand over the intercepts to the Tribunal in 1996, but that process was allegedly blocked by the United Kingdom.[119] Although there were exchanges of information gathered through communications interception,[120] "Governments have never released any information about possible results achieved through Comint. Moreover, such material has never been declassified on the basis of the US Freedom of Information

[112] D48, p. 13 (p. 230, last paragraph).
[113] D48, p. 13.
[114] For more on this, *see* D48, p. 13.
[115] D48, p. 1
[116] D48, p. 22 in e-court.
[117] D48, p. 22 in e-court.
[118] *See* D48.
[119] D48, p. 18.
[120] *See* D48, pp. 18-21.

Act or any other similar act,"[121] although allegedly there have been disclosures in the last few years.

149. As Wiebes's study says, "A major part of the efforts of the NSA regarding Comint was concentrated on the VRS, under the command of General Ratko Mladić and his headquarters in Han Pijesak in eastern Bosnia."[122] According to Wiebes's study, some VRS communications could only be intercepted by RC-135 aircraft, but even then only under perfect conditions.[123]

150. The target of the BH Army's intelligence service was primarily the UNPROFOR headquarters in Sarajevo.[124] The NIOD's study provides relevant information, including, as an illustration, that "Van Baal said that General Rose sometimes called out – for a joke – that an attack was pending. Shortly afterwards, a call would come from ABiH headquarters claiming that an attack was underway."[125]

151. General Michael Rose claims in his memoirs that his headquarters in Sarajevo was monitored by US intelligence services in 1994 and 1995. The USA monitored Smith and Rose and probably the entire UNPROFOR headquarters in Sarajevo.[126]

152. There is some suspicion that the Croatian intelligence service, which had much greater capabilities of communications interception than the BH Army, passed on intercepted communications to the BH Army,[127] or at least part of those intercepted communications that did not concern Croatia's security interests.

153. One in a series of key questions about the assessment of the authenticity and reliability of intercepted communications is whether they were carried out in real time[128] and, if they existed, why they were not sent to UNPROFOR or NATO immediately after receipt. Cees Wiebes's study provides the following analysis:

> The question that now needs to be answered is: what was possible regarding the processing of the intercepts in real time? Simple arithmetic shows that, if the number of channels multiplied by the number of required personnel is greater than the number of available personnel, then near real-time processing and reporting is impossible. A conservative estimate indicates that the monitored channels probably covered telephone calls from Okresanica via live interception or relayed intercepts. In addition to non-military traffic, the Bosnian national security service was bound to have been interested in the VRS high command and the operational levels immediately below. If we assume on the basis of this estimate that an absolute minimum of ten channels

[121] *See* D48, p. 21.
[122] D48, p. 25.
[123] D48, p. 25 in e-court.
[124] D48, p. 49.
[125] D48, p. 48 in e-court.
[126] D48, p. 28.
[127] "The Croats supposedly had identical intelligence, which they passed on to the Bosnian Muslims. According to these sources, no clear orders were ever issued for mass executions but there were vague references such as 'getting rid of the problem'." D48, p. 44 in e-court and p. 295 in the book. /Redacted/
[128] D48, p. 46.

had to be monitored continuously, that three persons were needed per channel for interception, transcription and reporting and that there was a rotation of three shifts a day and a seven-day working week, then at least 90 Sigint operators would have had to be active in Okresanica. Not to mention 15 or 20 staff for support, technology, security, catering and so on. Hence, if there were 20 channels – probably a more realistic estimate – then at least 180 people would be needed. In reality, a maximum of ten people worked in Okresanica. Most of the communication was recorded on tape. It seems therefore that near real-time analysis and processing was unattainable.[129]

…

"The VHF radio traffic was intercepted by the Electronic Warfare Units of the ABiH in Okresanica and Konjuh. We can perform some simple arithmetic on these activities as well. It appears from all the descriptions that these were standard Comint sites where the listener tuned in manually to the channels that were being monitored. On the basis of a very conservative estimate, around 30 channels would have to be manned permanently, including five frequencies at the level of high command, ten at operational level and ten tactical frequencies between units in the field. Thirty frequencies are regarded as the absolute minimum by US Sigint experts. The command and operational frequencies had to be monitored round-the clock and the tactical frequencies 18 hours a day by three teams, each consisting of three listeners, who were individually responsible for interception, transcription and reporting. On the basis of this absolute minimum, around 210 people would have to be working in Okresanica and Konjuh. The station was, moreover, not only responsible for monitoring communications around Srebrenica, but also the battles around Mount Vis, the northern part of Republika Srpska and other areas. At least 400 people would have been needed to follow all this traffic. In fact the level of personnel was no higher than twenty. So, near real-time analysis was impossible here as well. We have already shown that the Electronic Warfare Units were also very modest in size.[130]

For the electronic Warfare Units to have operated in real time the Bosnian national security service in Okresanica would have needed a staff of at least 120 while the ABiH units would have needed at least 210 people in both Okresanica and Konjuh. The very fact the Electronic Warfare Units existed implies, however, that they must have delivered valuable intelligence from time to time, but this will only have been a drop in the ocean compared with the huge flow of Bosnian Serb communications. It may be safely assumed that the VRS used more than a hundred walkie-talkies during the attack. Given the number of available personnel, there can never have been any question of large-scale real-time intelligence.[131]

[129] D48, p. 46 in e-court and p. 299 in the book.
[130] D48, p. 46 in e-court and p. 299 in the book.
[131] D48, p. 47, p. 46 in e-court and p. 300 in the book.

In summary, we can draw certain conclusions about the Bosnian efforts regarding Sigint. To begin with intelligence is useless (except in hindsight) if the information is not presented to the consumer promptly in a form that is both understandable and usable. If the intelligence is not reported or is kept secret for fear of compromising the source, then there is no point in collecting it, except for latter use or storage in an archive. Taking the Bosnian efforts as a whole it must be concluded that the service responsible for the Sigint was simply too undermanned (ten people per station) and too poorly equipped to fulfil its mission adequately. Though there were many intercepts, the processing, analysis and reporting were totally inadequate. Intercepts were not typed out immediately in a word-processing program but transcribed by hand in a logbook: tapes bearing messages were re-used and hardly any use was made of computers to process and disseminate the data flow.[132]

Moreover, there was no Comint analyst at the interception stations to analyse the messages and assess their value. There were no secure lines with various regional ABiH headquarters and no indications that the Bosnian services had any intelligence analyst at brigade, corps or higher level who were able to swiftly integrate the Comint, with, say, Humint. Even if Bosnia had had the political will to publish the most volatile intercepts worldwide, it would never have succeeded because the intelligence structure was simply not geared for this. Even the real-time intercepts were too fragmented. There is, furthermore, no evidence that the ABiH Comint service shared intelligence with Dutchbat, Western services or UNPROFOR.[133]

Or was there near-real-time intelligence after all? Nonetheless, an ABiH general claimed that the messages were actually intercepted and analysed in real time. This assertion should, however, be treated with the utmost scepticism. If the Bosnian Muslims did have real-time Comint then why did they not use it? According to a US intelligence official, this would have been the "best PR stunt ever", and the Bosnian Muslims could have screamed "bloody hell and murder". He suspected that the ABiH simply did not have real-time capacity. He offered the following example. If, in the best case scenario, the ABiH had had 150 people in Konjuh, some of them would have had friends or even family in the enclave or in the column. Keeping the Comint under wraps would have triggered a "stampede" among the staff in Okresanica, Konjuh or Tuzla for they would have done everything possible to save these people. According to this official, the "absence of stampede" implies an absence of real-time intercepts. In his opinion, the ABiH did not know about the contents of the intercepts until weeks, months, or even years after the fall of Srebrenica. If ABiH intercepts were to have any influence on military and political measures, they should have been available on the evening of 10 July at the latest.

There is yet another indication that the Bosnian Muslims did not have real-time Sigint. The many intercepts that were later published and disclosed at the

[132] D48, e-court p. 47, p. 300 in document.
[133] D48, e-court p. 47, p. 300 in document.

> trial of General Krstić give the impression that the VRS troop movements were efficiently followed by the Muslims in real time. There were dozens of intercepts which showed that the ABiH intercept stations in Konjuh, Okresanica and Tuzla closely followed the VRS conversations about the column heading for Tuzla. However, at Krstić's trial no attention was paid to whether this intelligence was shared with UNPROFOR. This would, after all, have been a logical step, given that the Bosnian Muslims dearly wanted to get UNPROFOR or NATO on their side in the fight against the VRS.[134]

154. /REDACTED/

155. For the foregoing reasons, taking into account all the evidence presented during the trial, including the witness testimony of intercept operators, the allegations made in the reports on intercepted communications of the BH Army and the BH SDB cannot be considered as evidence on which factual findings can be based.

[134] D48, e-court p. 47.

"Imagery from the American Intelligence Community"

156. The exhibits in this case contain a number of photographs which the Prosecution usually refers to as "aerial images".[135] It is the material disclosed to the Prosecution of the Tribunal under Rule 70 of the Rules, with the following restrictions: the Prosecution may only refer to the "U.S. reconnaissance systems" as the author of the material, but the Prosecution is not authorised to "discuss in courtroom proceedings any information relating to the technical or analytical sources, methods, or capabilities of the systems, organisations, or personnel used to collect, analyze, or produce these imagery-derived products,"[136] and the "Trial Chamber may not order either party to produce additional evidence received from the person or entity providing the initial information."[137]

157. Jean-René Ruez and Dean Manning testified about these exhibits, without revealing any information about these photographs. However, they always bear the date, time and location covered. During the trial no evidence was presented on the manner they were created or the method of their interpretation, which considerably affects the possibility of using them as reliable evidence.

158. In order to understand these photographs, it is necessary to "understand their nature and methods of their creation" in order to establish what they really contain. No evidence or explanations were presented to the Trial Chamber as to whether these are satellite photographs, photographs taken by unmanned aircraft or photographs taken in another way, for example, by freezing the frames of a video recording. Namely, at least two questions arise: the first is the question of the method of their creation, and the second is their interpretation. Without further information it is not possible to interpret these photographs, and therefore the Trial Chamber cannot rely on them when rendering the final judgement.

159. Commenting on this kind of exhibits, Riddel and Plant indicate that:

> "while satellite imagery, as a graphical representation of data which has been collected by sophisticated automated process, may appear to provide accurate, objective information about a particular location, the fact that so many interpretative steps are required to convert the raw data into a useful visualisation admits the possibility that the images submitted to the Court could be exaggerated or biased depictions of the underlying data, or else could be based on improperly selected data sets."[138]

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[135] *See*, for example, P94 pages 10, 28, 31, 32, 36, 44, 46, 62, 65, 68, 69, 82, 96, 123, 125, 141, 159, 175, 214, 222, 223, 224, 240, 243, 244, 245, 246, 247, 248, 251, 253, 256, 258, 261, 264 and Exhibits P216, P223, P643, P858, P962, P1062, P1066, and so on.
[136] P214 (Correspondence from the Office of the Legal Counsellor, Embassy of the United States of America, regarding Rule 70 issues in relation to aerial imagery, signed by Heather A. Schildge, dated 3 November 2006).
[137] *Ibidem*.
[138] Riddel, Plant: *Evidence before the International Court of Justice*, British Institute of International and Comparative Law, London 2009, p. 292.

160. The argument of the Defence is that these photographs cannot be considered reliable evidence for the purposes of establishing facts, because there is no information to ascertain their origin, the manner of their creation, the manner of their processing, whether they were handed over to the Prosecution in their original form or previously processed in some way, and so on.

Testimonies of Witnesses who Concluded a Plea Agreement with the Prosecution

161. Several witnesses who concluded a plea agreement with the Prosecution testified in the proceedings before the Tribunal under Rule 92 *ter*, or their testimonies were admitted under Rule 92 *quater*. They are witnesses Momir Nikolić, /REDACTED/ and Dražen Erdemović (who testified under Rule 92 *ter* of the Rules) and witness Miroslav Deronjić (who died and whose testimony was admitted under Rule 92 *quater* and so the discussion on his testimony will be given in that part).

162. The testimonies of these witnesses should be examined with a great deal of caution. Their evidence is moulded so as to support the Prosecution argument concerning the events relevant to the Indictment.

163. The fact that a part of their testimonies is such that it leads to self-incrimination is not an argument in favour of the authenticity of their testimonies about the events in which they took part. Considering that these witnesses had already been convicted by the time they gave testimony, the fact that a large part of their testimonies is self-incriminating has hardly any importance (*ne bis in idem*). There are reasonable grounds to suspect that their testimonies were moulded to achieve the most favourable possible plea agreement for them and obtain a more favourable position (a shorter sentence and good conditions for serving the sentence) by implicating others who had been accused by the Prosecution of the Tribunal.

164. That plea agreements cannot be taken as reliable is shown, for example, by the fact that, summoned by the Trial Chamber in the *Popović* case, Momir Nikolić gave a new statement which was in many important parts not in accord with his previously concluded plea agreement.[139]

165. With regard to exhibits P219, P2175, /REDACTED/, P2339, P664, P2157 and P2342, which are, in effect, joint motions for consideration of plea agreements or their annexes, these are essentially agreements between the accused and the Prosecution of the Tribunal, and therefore the facts contained therein cannot constitute either grounds for judicial notice or a source of reliable information.

Miroslav Deronjić

166. The statements of witness Miroslav Deronjić were admitted pursuant to the "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*" of 25 November 2009. The Defence opposed the admission of Miroslav Deronjić's evidence. The Defence notes that the decision was rendered by the same Chamber which heard the case of *The Prosecutor v. Vujadin Popović et al*.

167. The Defence adds that Deronjić concluded a plea agreement with the Prosecution of the Tribunal, but that the agreement did not include the charges for Srebrenica, although in his interviews with the Prosecution Deronjić gave plenty of self-incriminating information. Namely, in the Plea Agreement which Deronjić concluded through his counsel with the Prosecution of the Tribunal, the Prosecution

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mentioned his "full and substantial co-operation", dropped some counts of the Indictment and promised to take "necessary and reasonable steps to ensure the safety and protection of Miroslav Deronjić and members of his family." For his part, Miroslav Deronjić promised full co-operation.[140]

168. The Defence is of the view that Miroslav Deronjić had a strong motive to give untruthful and dishonest answers. Deronjić gave testimony in *The Prosecutor v. Slobodan Milošević* only a few months after concluding the plea agreement.[141] The Defence believes that Miroslav Deronjić's primary motive was to implicate others in order to secure the best possible plea agreement, evade charges for the events related to Srebrenica, and probably obtain protection for his family.

169. Both the Prosecution and the Chamber noted that there were inconsistencies in Deronjić's testimony.[142] In its submission of 17 March 2009, the Prosecution noted that there are a number of inconsistencies in Deronjić's various statements, as well as between "Deronjić's testimony in the *Blagojević* trial and that of other witnesses in the *Popović* trial in relation to the meetings held at the SDS headquarters in Bratunac on 12 and 13 July 1995 and the extent of Deronjić's own involvement in these events."[143] In addition, the name of the accused is mentioned in several of his statements, but they do not say anything directly about his acts and conduct, but only about whether he knew of or had received a document sent by Zdravko Tolimir on 9 July 19/9/5 (now D41), and about the alleged relationship between Tolimir and Beara mentioned in the interview with Jean-René Ruez.[144]

170. Considering that the late Miroslav Deronjić is unavailable, he cannot be cross-examined. The unreliability of his testimony is corroborated by the "Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjić) pursuant to Rule 92 *quater*,"[145] in which the Trial Chamber sitting in the *Karadžić* case denied the Prosecutor's motion for admission of Miroslav Deronjić's testimony.

[140] D21 (part of the exhibit entitled "Plea Agreement", paragraph 10).
[141] D29 – (Transcript of testimony of Miroslav Deronjić in *The Prosecutor v. Slododan Milošević*, Case No. IT-02-54-T, dated 26 and 27 November 2003). Deronjić concluded the plea agreement with the Prosecution on 29 September 2003.
[142] "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*" dated 25 November 2009, para. 23.
[143] "Prosecution's Motion to Admit the Evidence of Bojanović, Jekić and Deronjić Pursuant to Rule 92 *quater*," confidential, 17 March 2009, para. 40.
[144] For references *see ibidem*, footnotes 56 and 57.
[145] IT-95-5/18-T, 23 March 2010.

Evidence admitted pursuant to Rules 92 *bis* and 92 *quater*

171. During the trial the Prosecution requested the admission of a large number of exhibits pursuant to Rules 92 *bis* and 92 *quater* of the Rules. The admission of evidence in this manner, especially a large quantity of evidence, is not a procedure which is in the interest of justice, especially because the accused is prevented from cross-examining these witnesses. The principle respected in the Tribunal's previous case law was that the evidence admitted pursuant to Rules 92 *bis* and 92 *quater* "may lead to a conviction only if there is other evidence which corroborates the statement."[146] In other words, evidence admitted in this manner cannot be taken as the sole basis for a conviction.

172. A judgement based on the statements of witnesses whom the accused has had no opportunity to examine is incompatible with the right to a fair trial.[147] Even the restricted use of statements pursuant to Rule 92 *bis*, meaning that they have to be substantiated before they can be used as proof of the Prosecution's arguments, could potentially cause irreparable damage and essentially constitutes a denial of the right to a fair trial.

173. Although the evidence that goes to proof of the acts and conduct of the accused may not be admitted under Rule 92 *bis*, it often goes to proof of the context in which the acts and conduct of the accused are viewed for the purposes of making final factual conclusions, or it goes to proof of the acts and conduct of the persons who the Prosecution asserts are members of an alleged joint criminal enterprise. Therefore special attention must be paid when assessing this evidence, especially considering the fact that the accused has had no opportunity to cross-examine these witnesses.

174. The Defence takes the view that the requirement for this evidence to be substantiated is not met if it fits into the "general picture of the events" or the context of other evidence or is in agreement with other evidence. It would have to be supported by credible evidence from which it is possible to establish certainty beyond reasonable doubt.

175. Following the Prosecution motion for admission of evidence pursuant to Rule 92 *bis*, the Defence filed a response in four submissions with a detailed analysis of the testimonies. The Defence stands by the arguments presented in these submissions and calls on the Chamber to take them into consideration when rendering the final decision.

176. /REDACTED/

[146] *The Prosecutor v. Galić*, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", 7 June 2002, fn. 3.
[147] *See Popović et. al*, Judgement, paragraph 62 and the cited jurisprudence of the European Court of Human Rights.

TESTIMONIES OF PROSECUTION INVESTIGATORS

177. Many Prosecution investigators were examined as witnesses during the trial. At issue were testimonies and reports specially prepared for the purposes of presentation of evidence in this case and other cases before the Tribunal. Even in those instances where it seems that a high standard of objectivity has been demonstrated, these reports could not serve as the only basis for establishing the facts.

178. Several Prosecution investigators gave testimony or presented reports during the trial: Witness no. 1, Jean-René Ruez; Witness no. 2, Dean Manning; Witness no. 3, Tomasz Blaszczyk; Witness no. 4, Erin Gallagher; Witness no. 5, Dušan Janc; and Witness no. 6, Stefanie Frease. With regard to another two Prosecution witnesses, the Defence believes that they too should be classed as Prosecution investigators (for reasons which will be set out below): Witness no. 7, Richard Butler; and Witness no. 8, Ewa Tabeau.

179. Prosecution investigators, and those who are employed or were employed at the Prosecution, testified about a large number of topics which the Prosecution believes to be crucial for proving its argument.

180. First, these are materials specially prepared for the purposes of the presentation of evidence before the Tribunal. The following position has been defined in the consolidated case law of the International Court of Justice:

> The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge.[148]

181. Prosecution investigators receive relevant tasks mostly from senior trial attorneys and other trial attorneys. They are bound by obligations of professional confidentiality (and they are not released from those obligations even for the purposes of testimony); they cannot speak in public without the appropriate permission of the relevant organ of the Prosecution of the Tribunal; and it is their duty to protect the interests of the Prosecution and co-ordinate their activities with the Prosecution. In addition, they are not allowed to speak in public unless the relevant organ of the Prosecution issues them an appropriate permission, which would also contain certain instructions as to what they are authorised to talk about, and they may not give statements that differ from the "official position of the Prosecution".[149]

182. A view defined in the Tribunal's case law, specifically in the case of *The Prosecutor v. Milan Martić*, is that no weight can be attached to the views, conclusions and analyses of Prosecution investigators. As the Trial Chamber held (and this was not contested in the appeal proceedings):

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[148] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)," Judgement of 26 February 2007, ICJ Reports 2007, paragraph 231 and the jurisprudence cited therein.
[149] Dušan Janc, 22 April 2010, T.1269-1271.

> On 4, 5 and 9 May 2006, Ari Kerkkanen, who was previously employed as a Criminal Intelligence Analyst by the Prosecution, testified before the Trial Chamber as a witness for the Prosecution. His written statement was admitted in redacted form on 19 April 2006. The Trial Chamber recalls that Ari Kerkkanen was one of the organisers of, and participants in, several archive missions undertaken by the Prosecution, including to the Croatian State Archive, to collect documents on the MUP of the SAO Krajina and of the RSK. The Trial Chamber observes that both during his testimony and in his written statement on the documents collected, Ari Kerkkanen presented views on and drew conclusions from the information contained in the documents, although he neither possesses expertise in this area nor personal knowledge of the information. Accordingly, the Trial Chamber has attached no weight whatsoever to such views, conclusions and analyses of Ari Kerkkanen.[150]

183. The reports and testimonies of Dušan Janc, Dean Manning, Richard Butler, Stefanie Frease and Ewa Tabeau will be discussed below.

[150] *The Prosecutor v. Milan Martić*, IT-95-11-T, Judgement, 12 June 2007, paragraph 35 (footnotes omitted).

THE REPORTS AND TESTIMONIES OF RICHARD BUTLER

184. Witness Richard Butler testified on 7, 8, 11, 12, 13, 14, 18, 19, 20 and 21 July and 22, 23, 24, 25, 29 and 31 August 2011. Several reports which he compiled for the needs of the Prosecution have been admitted, namely P2470 ("VRS Corps Command Responsibility Report" with supporting documents, dated 5 April 2000), P2471 ("Srebrenica Military Narrative – Operation *Krivaja 95*" with supporting documents, dated 15 May 2000), P2472 ("VRS Brigade Command Responsibility Report" with supporting documents, dated 31 October 2002), P2473 ("Srebrenica Military Narrative (Revised) – Operation *Krivaja 95*" with supporting documents, dated 1 November 2002), P2474 (Report entitled "Chapter 8, Analytical Addendum to Srebrenica Military Narrative (Revised)" with supporting documents, dated 2003), P2475 (Report entitled "VRS Main Staff Command Responsibility Report", by Richard Butler).

185. Richard Butler has testified as an expert in several Srebrenica cases (*The Prosecutor v. Krstić*, *The Prosecutor v. Blagojević and Jokić*, *The Prosecutor v. Popović et al*., and *The Prosecutor v. Momčilo Perišić*).[151] In the case of *The Prosecutor v. Tolimir*, his reports were not presented or disclosed in accordance with Rule 94 *bis*. This is only one of the reasons why Richard Butler's reports cannot be treated as expert witness reports. The Defence holds that the reports and testimonies of Witness Butler should be treated as reports and testimonies of a Prosecution investigator. This is supported by the fact that Butler was part of the Prosecutor's investigation team for Srebrenica from the very start of the investigation and he had a specific role in interviewing witnesses and gathering other information,[152] and probably in formulating the basic arguments of the Prosecution. As a member of the Prosecution, Richard Butler had an obligation to be loyal to the Prosecution, just like other investigators of the Prosecution.

186. With regard to Richard Butler's education and military experience, he is a non-commissioned officer with some military knowledge, but not enough to qualify him as an expert, especially not on questions relating to strategy and strategic military organs, such as the Main Staff of the VRS.[153] Namely, Witness Butler has experience only with regard to "military intelligence and analysis in support of tactical and operational level U.S. military commanders."[154] This is perhaps one of the reasons for the misunderstanding of the role and responsibility of officers of the GŠVRS.

[151] Richard Butler, 7 July 2011, T.16274.
[152] Richard Butler.
[153] For the nature of the GŠVRS as a strategic organ, *see* P2756, Transcript of testimony of Novica Simić in *The Prosecutor v. Popović*, Case No. IT-05-88-T, dated 19, 20, 21 and 24 November 2008, T.28489:12-19. However, in his report (P2475, paragraph 2.0), Richard Butler describes the Main Staff of the VRS as the "highest operative body". With the failure to understand the strategic importance of the GŠVRS, Butler also shows that he does not understand the relations at high levels of control and command. Namely, as explained by General Novica Simić, the GŠVRS was a strategic organ, while the corps was the organ at the operational level, and the brigade was at the tactical level. (*See* P2756, T.28489, T.28506).
[154] P2469 (Updated CV of Richard Butler, dated 10 June 2011), p. 1.

187. In the adversarial model of proceedings, as a rule, experts are appointed by the parties to the proceedings. As far as Richard Butler is concerned, as an officer of the Prosecution, his work involved not only analysis of the evidence gathered, but also efforts to obtain certain evidence, and supporting or formulating the arguments of the Prosecution. Therefore Richard Butler cannot be seen as an impartial expert. His role can be fully compared to that of Jean-René Ruez, Dušan Janc and Dean Manning. Therefore, in establishing the facts, the Chamber should not rely on the conclusions and analyses of Richard Butler.

188. The work and activities of the GŠVRS are beyond Mr Butler's expert knowledge.[155] Moreover, Richard Butler also offered certain interpretations of the regulations valid in the VRS which were often clearly intended to support arguments about the criminal responsibility of certain people. Furthermore, Richard Butler engaged in analysing regulations governing internal affairs in Republika Srpska, namely the SFRY Criminal Code which was applied in Republika Srpska (P16307), Guidelines for Criminal Prosecution, and other regulations. His interpretation of these documents is often very problematic and speculative.

189. Particularly unacceptable are the interpretations provided by Butler of whether, given his position in the GŠVRS, Tolimir was a commander,[156] the question of responsibility for the treatment of prisoners of war,[157] and other questions (not all Butler's mistaken views are cited in this part). Moreover, his understanding of the situation facing the VRS in August, September and October 1995 is clearly calculated to serve as a kind of excuse for NATO's aggression against Republika Srpska.[158] Mr Butler's statement that crimes can be carried out in a manner that is not nonmilitary is particularly problematic.[159] The Defence holds that the commission of crimes is an nonmilitary act and it therefore cannot be carried out in a "military" manner. Many of R. Butler's statements are speculative, and some of them will be discussed below.

190. The Defence notes that untrue or incorrect information is not as dangerous as the combining of true and untrue information in argumentation that incorporates elements of speculation. Without touching on whether Butler personally believes in what he said during the trial or wrote in his reports, the Defence submits that many of his views cannot be considered to be correct or based on facts. His reports, in particular, are one-sided, and they do not take into account that any conflict involves at least two warring parties, or more, as in Bosnia and Herzegovina.

191. The basic focus of Richard Butler's reports is on the events in Srebrenica in July 1995. The basic initial assumption in Richard Butler's discussion is the following view:

> The -- the fact that a military has been ordered to carry out an unlawful order

[155] *See* D291 (excerpt from Richard Butler's report) regarding Milomir Savčić's testimony on 23 June 2011, T.15917-T.15923.
[156] Richard Butler, 8 July 2011, T.16312-16313. (The role of assistant commander will be discussed below.)
[157] Richard Butler, 8 July 2011, T.16318-16326, T.16336.
[158] Richard Butler, 8 July 2011, T.16333.
[159] Richard Butler, 8 July 2011, T.16371-16372.

> doesn't mean that they're going to carry it out in a nonmilitary manner. A military organisation is just that, it is an organisation. It operates along a defined structure and hierarchy. A commander is overall -- in any echelon the commander is ultimately responsible for the acts and omissions of his subordinates. A commander has to be advised what's going on because he is the one who has to give orders for various actions to take place. Historically in these past proceedings, commanders tend to try and put the blame for these acts on security officials, saying that they happened in complete isolation; and on the other hand, security officers tend to claim that the commanders are solely responsible. The truth in a military context is that everybody has to participate. A commander can no more organise this type of an unlawful activity without the role of the security function any more than he can do so without the assistance of his logistics commanders and staff officers in order to arrange transportation. Despite the involvement in unlawful acts, the people that he needs to involve are those military professionals who by training and by profession are responsible for making certain activities happen within a military organisation…[160]

192. Such argumentation of Richard Butler is of a highly speculative nature and it does not take into account the crucial elements that are necessary to establish responsibility. It is based on a thesis of the objective responsibility and involvement of everyone and, in the context of the Prosecution argument about the events of July 1995, the criminal nature of the whole organisation. Starting from such an assumption, it is sufficient to prove that someone held a certain position to consider him criminally responsible, that is, a participant in the execution of an unlawful order. It is not necessary to present evidence that the planning and carrying out of a crime is usually secret and that as few people as possible are involved in it in order not to frustrate the criminal objective. This is especially true of the army, whose officers are trained to apply the rules of the law of war. As an illustration of his argument, Butler says that if someone needs fuel for the purposes of carrying out or covering up an unlawful act, he does not have the right simply to requisition it but must obtain it from the logistics organ.[161] However, it is certain that the logistics organ does not have to know the purpose for which the fuel is used. Nor do other persons carrying out their regular tasks or carrying out other tasks at the time. In an organisation like the army, it is not reasonable to assume that everybody knows everything. Those involved in crimes, although they are obliged to respect the chain of command, deviate from it considerably, considering that, as a rule, they want to carry out their unlawful acts secretly in order to avoid various forms of responsibility (as a rule, criminal responsibility and responsibility before the commander). If a crime is planned, it is normally accompanied by a deviation from the customary course of events and chain of command, given that the chain of command in the VRS was established in a way which ensured, in situations when it functioned as prescribed, application of the rules of the law of war.

193. An illustrative example of unfounded argumentation is Butler's interpretation of the so-called Decision on Strategic Objectives (P22), and his unfamiliarity with the

[160] Richard Butler, 8 July 2011, 16371-16372.
[161] Richard Butler, 8 July 2011, T.16371-16372.

bases of the work of the Assembly whose alleged decisions he cites indicates his attempt to interpret each document in his own context without critical re-examination of his position.[162] As a skilful speaker he simply speculates or covers his views with statements about his unfamiliarity with certain rules which do not have to be the subject of proof. For example, commenting on the publication of the alleged decision on strategic objectives in the *Official Gazette*, although the minutes of the Assembly's session make no mention of its adoption, Butler makes the following comment: "I can't explain that, sir. The inner workings of the Republika Srpska Assembly and the legal processes behind them were not an area and are not an area of my expertise."[163] Nevertheless, in his report (P2475, paragraph 1.16) he makes categorical statements on the basis of an assumption that the Assembly adopted something that it did not adopt, and draws further inferences from that.

194. The Defence believes that the same criterion should be applied to Richard Butler as is applied to other Prosecution investigators, because they are one-sided, biased and unobjective, and specially prepared in the Office of the Prosecutor for the purposes of the trial. His conclusions are nothing more than the view of the Prosecution expressed through a person testifying before the Trial Chamber.

[162] Richard Butler, T.16890-16892.
[163] Richard Butler, 20 July 2011, T.16891:8-10.

STATEMENTS OF BOSNIAN MUSLIM WITNESSES

195. With regard to the statements of Bosnian Muslim witnesses, the Court should exercise particular caution when assessing them. One of the characteristics of their statements is a tendency to exaggerate, and a tendency to give statements which are within the parameters of the "official Muslim policy" regarding Srebrenica, and especially to claim or emphasise that Srebrenica and Žepa were demilitarised zones, despite clear and unambiguous evidence that the Srebrenica and Žepa enclaves were not only not demilitarised, but actually served as a safe and secure stronghold of the BH Army. These and similar problems are not rare in the Tribunal's case law. In the case of *The Prosecutor v. Milutinović et al*., the Trial Chamber faced a similar problem and found that:

> The Trial Chamber detected a tendency for some witnesses to overstate or exaggerate the events of which they spoke and the impact or effects of these events. That is understandable where two opposing sides are set against each other in conflict and they continue to bear a measure of animosity towards one another. Whether exaggeration so taints evidence as to make it unreliable is a question of circumstances and degree.[164]

196. A particular concern with respect to these witnesses stems from the fact that most of them have a tendency to exaggerate or give clearly untrue and dishonest statements, such as the statements that the eastern enclaves of Srebrenica and Žepa were demilitarised (which is still the official version, despite indisputable evidence that demilitarisation had not been carried out). The information, views and reports of the trial published after the events in Srebrenica and Žepa are of such a nature that this has influenced Muslims, including witnesses (especially those who lost their loved ones), to adapt their statements to match the "official version of events".

197. /REDACTED/[165]

198. When assessing the evidence in this case, special attention should be paid to the document admitted into evidence as Defence Exhibit D32, issued by the Security Department of 2nd Corps Command of the BH Army on 10 August 1995 under the working title:

> "Statements given by members of the 28th Division", which says that the statements previously collected "contain information relating for the most part to the transit of a group of combatants and civilians from Srebrenica to the free territory and very few, or no facts at all, about war crimes and the crime of

[164] *The Prosecutor v. Milutinović et al*., Judgement, paragraph 53. In paragraph 55, the Trial Chamber which rendered the judgement in *The Prosecutor v. Milutinović et al*. held that: "55. A number of Kosovo Albanian witnesses, living in areas where the Kosovo Liberation Army ("KLA") had a presence and were widely known to be active, denied any knowledge of the KLA's activity or even presence in the area. In some instances, even when confronted with apparently reliable material clearly indicating a basis for concluding that the witness must have known something of the KLA, the witness maintained the denial. This seemed to border upon the irrational."
The Trial Chamber hearing the case of *The Prosecutor v. Tolimir* faces almost the same problem.
[165] /REDACTED/

> genocide /RZiZG/. According to the guidelines we have given you, as well as the instructions you received during the lecture delivered on 3 August 1995 at the Veterans' Centre of the 2nd Corps Command, you should have taken statements on the circumstances surrounding the RZiZG."

199. These /REDACTED/ come from the same organ and reveal the intention to collect statements about the "circumstances surrounding war crimes and the crime of genocide" at any cost, since the 2nd Corps Command had very little evidence about that at the time, and at the same time prevent journalists and others from approaching people who had fought their way through VRS defence lines (members of the column). The documents mention the relevant instructions, and there is suspicion that these instructions concern not only the manner of taking statements, but also what the statements should specifically contain. The Defence believes that the security organs of the 2nd Corps significantly influenced the content of these statements and that they most likely contain also fabricated information. Most witnesses who testified in this case gave such statements to the relevant organs of the MUP and the BH Army.

200. When considering the statements of Bosnian Muslim witnesses, the Trial Chamber should be very careful and exercise extreme caution. Namely, as noted by the Trial Chamber which heard the case of *The Prosecutor v. Rasim Delić*:

> The Prosecution submits that the Trial Chamber should exercise "extreme caution" when considering the testimony of witnesses who are former members of the ABiH. It contends that their versions of the events… might represent "a form of historical revisionism" as these witnesses would have a motive to deny anything that might call into question the "sincerity of the [ABiH's] goal of maintaining a secular and multi-ethnic Bosnia".

The Trial Chamber took the position that it would take these considerations into account when assessing the credibility of these witnesses.[166] The Defence adds that many of these witnesses used the word "genocide" in their statements and tried to model their statements on their understanding of the meaning of that word.

201. A separate discussion of this evidence will be presented below, but the Defence believes that the Trial Chamber should exercise particular caution whenever assessing the statements of Bosnian Muslim witnesses who were participants or direct witnesses of the events of July 1995. To give only one of the reasons in support of this, these witnesses have a tendency to deny that terrible crimes were committed against the Serbs in Podrinje (of which the Chamber has sufficient evidence and which will be discussed in this submission below) and, on the other hand, to support

[166] D39-ICTY, *The Prosecutor v. Rasim Delić*, IT-04-83-T, Judgement of 15 September 2008, para. 32. *See also*: the reasons set out by the Defence in the case *The Prosecutor v. Zdravko Tolimir*: "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, Part Two (Bosnian Muslim Witnesses)", 15 June 2009, paragraphs 25-30, and the analysis of the evidence of some witnesses whose statements were tendered pursuant to Rule 92 *bis*.

the unfounded argument concerning the "civilian status" of the Srebrenica enclave and the claim that the eastern enclaves were demilitarised zones.[167]

202. Particular caution should be exercised when assessing the evidence of witnesses who refused to testify until they had secured the right to remain in another state (until they received a permanent residence permit and so on).[168] These witnesses have a strong motive to deny their participation in the BH armed forces during the war, especially in Podrinje, which was the scene of massacres of the Serbian population (which will be discussed in this submission below).

203. The Defence formulates these general considerations because not each individual statement of Bosnian Muslim witnesses will be analysed separately. An analysis of the testimony of some Muslim witnesses was given in "Zdravko Tolimir's Response to the Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, Part Two (Bosnian Muslim Witnesses)" of 15 June 2009 and the Defence stands by the views set out in that submission.

204. /REDACTED/[169]
/REDACTED/,[170] /REDACTED/,[171]
/REDACTED/.[172] /REDACTED/.[173] /REDACTED.[174] /REDACTED /.[175]

"/REDACTED/"

205. /REDACTED/.[176]

206. /REDACTED/.[177]

207. /REDACTED/[178] REDACTED/.[179]

ADJUDICATED FACTS

208. On 17 December 2009 the Trial Chamber issued the "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)" ("Decision

[167] For example,/REDACTED/. For example, witness /REDACTED/ testified that he had seen General Mladić at the time when he could not have physically been at that location. T. *See* PW-023, 22 March 2010, T.776-777. Witness Mevludin Orić also gave false testimony that he had seen R. Karadžić, the President of Republika Srpska, Mevludin Orić, 25 March 2010, T.886. /REDACTED/
[168] /REDACTED/
[169] /REDACTED/
[170] /REDACTED/
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[178] /REDACTED/.
[179] /REDACTED/

on Adjudicated Facts"), in which it took judicial notice of a large number of facts. This Decision was issued in the early stages of the pre-trial proceedings with the goal, as stated in the Decision, of ensuring the expeditiousness of the trial. The Defence opposed taking judicial notice of any facts established in the cases of *The Prosecutor v. Radislav Krstić* and *The Prosecutor v. Vidoje Blagojević and Jokić*.

209. In accordance with the law as it has been defined in the Tribunal's jurisprudence, taking judicial notice of a fact presupposes that it is correct, and the moving party is released from the duty of presenting evidence in its support. However, a decision on taking judicial notice of a fact loses its meaning if the moving party presents evidence about the fact in question. The decision was issued on 17 December 2009, that is, before the commencement of the trial. The Defence recalls that, pursuant to the "Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts,"[180] the Defence motion was denied.

210. During the Prosecution phase of the trial, a large part of the evidence presented concerned so-called adjudicated facts, and therefore the Trial Chamber should not rely on this when issuing the final judgement.

211. Almost all the facts covered by the Chamber's Decision of 17 December 2009 were, in effect, the subject of proof, and evidence of them was presented. Taking into account that the purpose of adjudicated facts is that the moving party does not present evidence about them (but only the party making the assertion that they are not correct), the purpose of taking judicial notice has disappeared. During the proceedings, evidence was presented about many facts or factual assertions of which judicial notice was taken. Whenever evidence is presented before the Trial Chamber, or when even more evidence is presented than in the proceedings which resulted in the judgement on the basis of which judicial notice of these facts was taken (the judgements of the Trial Chambers and the Appeals Chamber which heard the *Krstić* and *Blagojević and Jokić* cases), the Defence suggests that the Trial Chamber should refrain from relying on the "adjudicated facts". The Defence holds that the Trial Chamber should independently draw factual conclusions from the evidence in the case file, without relying on the assumption that the adjudicated facts are correct. The Defence believes that in instances where evidence is presented about a fact of which the Chamber had already taken judicial notice pursuant to Rule 94 (B) of the Rules, judicial notice should not serve to corroborate the argument that the fact in question has been proven beyond reasonable doubt, or to corroborate evidence from which it is not possible to draw a conclusion about the existence beyond reasonable doubt of the fact in question.

212. However, the Decision on Adjudicated Facts and the Chamber's Decision of 23 February 2010 have a wider significance. The Defence recalls that in its Decision of 23 February 2010 the Chamber concluded the following:

[180] Trial Chamber Decision of 23 February 2010, filed in a language which the Accused understands on 1 March 2010.

> **NOTING** that the Trial Chamber held in the Impugned Decision that Adjudicated Facts must not relate to the acts, conduct or mental state of the Accused and that where a proposed fact went to the core of the case, it would not serve the interests of justice to take judicial notice of it;
>
> **CONSIDERING**, therefore, that the Impugned Decision does not involve an issue that would significantly affect the outcome of the trial;[181]

213. Given this view of the Chamber, it is reasonable to conclude that not one of the adjudicated facts can serve as a basis for drawing inferences (conclusions) about the criminal responsibility of the Accused.

214. As stated in the Chamber's Decision of 23 February 2010, one of the reasons for denying the Defence motion to file an appeal against the Decision of 17 December 2009 is as follows:

> **NOTING** that to mount a fully adequate defence it is not incumbent on an accused to rebut each fact presented in the course of the Prosecution case.[182]

215. The Defence has understood these conclusions of the Trial Chamber as particular guidelines which are not related only to the Decision on Adjudicated Facts. The Defence recalls that the adjudicated facts include alleged facts about the strategic objectives (see adjudicated fact no. 16), Directive 4 (adjudicated fact no. 18), Directive 7 (adjudicated fact no. 61), facts about the establishment of "safe areas" (26-48), the situation in Srebrenica in 1995 (adjudicated facts no. 49, 52-54, 56, 58-59), facts about the attack on the enclave and its fall (adjudicated facts 60-116), the "column of Bosnian Muslim men" (adjudicated facts 117-126), the overview and structure of the Drina Corps (131-154), the meetings at the Hotel Fontana (156-194), evidence relating to the charged crimes (adjudicated facts 195-348), the reburial operation (349-432), as well as the alleged operation to forcibly remove the population of Srebrenica (433-523), the column of Bosnian Muslims (524-558), opportunistic killings (559-577), the allegedly widespread knowledge of the crimes (578-585), the impact of the crimes on the Bosnian Muslim community of Srebrenica (586-594), and the reliability of intercepted communications (595-604)

216. The Defence is of the view that many of the adjudicated facts have not been properly established in previous cases. Some of them will be discussed in detail in the subsequent sections of this submission or during the oral submission.

217. As a question of principle, the Defence suggests that, when rendering the final judgement, the Trial Chamber should re-examine each adjudicated fact of which it has taken judicial notice.

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[181] Footnotes omitted.
[182] "Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 23 February 2010.

THE ZVORNIK BRIGADE LOG BOOK

218. The Prosecution relies heavily on the log book of the duty operations officer of the Zvornik Brigade in order to establish the facts and sequence of events relating to the fall of Srebrenica. The evidence contains the whole log book,[183] as well as some of its parts[184] and a bilingual version in which Prosecution investigators noted the probable dates on which some entries were made,[185] about which the Prosecution investigator Erin Gallagher testified.[186]

219. Although some witnesses confirmed the authenticity of their entries, the person who had control over it after the war and during the preparations for the trial had an interest in changing some entries, adding to them, and so on. Namely, the problem is twofold: one concerns the chain of custody and the other the dates which were entered by Dragan Obrenović.

220. The Defence believes that the dates subsequently entered into the log book of the duty operations officer cannot always be considered correct. Nor can all the entries for the relevant period. As the Prosecution investigator Erin Gallagher pointed out:

> The only thing that the OTP has determined that has been added later has been the parts in pencil. It's been the dates in pencil and a couple of the notations of the duty officer that Dragan Obrenović had stated to us that he had added in.[187]

221. Some entries show that the dates entered by Prosecution investigators in the bilingual version (Zvornik Brigade Duty Officer Log Book – Teacher's edition P1459) are not entirely logical and that the real time of entry cannot be established with a sufficient degree of certainty.[188]

222. The Defence believes that, for the purposes of establishing the facts, whenever there is other, more reliable evidence about events which might be of interest to the Trial Chamber, the Chamber should rely on that evidence, and that this log book cannot serve as the only basis for establishing any fact. Moreover, the Defence notes that the name of Zdravko Tolimir is not mentioned anywhere in the relevant parts of this log book and it is therefore not relevant for establishing the acts, conduct and mental state of the Accused.

EXHIBIT P125 AND THE *ATLANTIDA* COLLECTION OF DOCUMENTS

223. A lot of attention was paid during the trial to the discussion of Exhibit P125. The following witnesses testified about this exhibit: its alleged author, General

[183] Exhibit P14.
[184] P943 Page from the Zvornik Brigade Duty Officer's Log Book – page dated 14 July 1995 (complete ERN 0293-5619-0293-5806), P946 (Page from the Zvornik Brigade Duty Officer's Log Book – page dated 14 July 1995 (complete ERN 0293-5619-0293-5806).
[185] P1459.
[186] Erin Gallagher, 14 December 2010, T.8923-8958.
[187] Erin Gallagher, 14 December 2010, T.8954:17-20.
[188] *See* Erin Gallagher, 14 December 2010, T.8956-8958.

Milomir Savčić; the person to whom it was allegedly sent, Colonel Zoran Malinić; Danko Gojković; the Prosecution investigator Tomasz Blaszczyk; the expert witness Kathryn Barr; and Richard Butler. As we will elaborate in detail below, neither the alleged author nor the alleged recipient of this document (General Savčić, who was a colonel at the time, and Major Zoran Malinić) could confirm the authenticity of this document, and facts were presented which indicated that it is not authentic.

224. Although this document does not contain anything unlawful and cannot be taken as a basis for any conclusion about Zdravko Tolimir's alleged contribution to the JCE of killing, its form and content are such that they create grounds for a reasonable conclusion that this is not an authentic document.

225. In this part of the submission we will deal with another question, namely the binder in which the document was found. This collection of documents bears the name *Atlantida*. The binder of documents was found in a collection which the Prosecution refers to as the Drina Corps collection. The Prosecution investigator Blaszczyk testified about the strange route "travelled" by the Drina Corps archives and added that "it was possible that somebody could put whatever binder or any document in this collection" because the Prosecution had no control over it.[189] None of the witnesses who appeared in court knew anything about the existence of a separate collection or binder of documents entitled *Atlantida*.[190]

226. The fact that a document – Exhibit P125 – was found in a binder of authentic documents cannot serve as an argument in support of its authenticity or lack of authenticity.

VIKTOR BEZRUCHENKO'S REPORT – THE FALL OF ŽEPA (EXHIBIT D55)

227. At the trial the Defence moved for the admission of Viktor Bezruchenko's report entitled *The Fall of Žepa*,[191] and it was admitted. Viktor Bezruchenko drafted this analysis (or narrative with elements of analysis) as an analyst employed by the Prosecution.[192] The Prosecution did not oppose its admission into the record.[193] The Defence used this document several times during the trial and believes that it constitutes a correct analysis on which the Trial Chamber can rely when establishing the facts. The Defence believes, in particular, that the documents referred to in this report are cited correctly, and that every document cited by Viktor Bezruchenko in his report is authentic.

228. Although the Defence relies heavily on this Report (D55), given its content, the fact that it is not disputed and that its authorship, reliability and probative value were established when it was admitted into the record (admitted as an exhibit), there

[189] Tomasz Blaszczyk, 9 July 2010, T.3790.
[190] Đoko Razdoljac, 30 November 2010, T.8231, Blaszczyk, 8 July 2010, T.3677, witness Danko Gojković was thoroughly examined on 15 June 2010 and 16 June 2010 about this collection of documents and about document P125.
[191] Exhibit D55.
[192] *See*: *The Prosecutor v. Tolimir*, 29 June 2010, T.3251:7-8.
[193] *See*: *The Prosecutor v. Tolimir*, 29 June 2010, T.3251:24-25.

was no need to take other measures regarding this report, such as calling Viktor Bezruchenko as an expert or Defence witness.

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DEFENCE FINAL TRIAL BRIEF

PART THREE: FORENSIC EVIDENCE

THE RELIABILITY OF REPORTS BASED ON DNA ANALYSES

229. In adducing evidence as to the number of people who lost their lives in different ways in connection with the fall of Srebrenica, the Prosecution relies on tables provided by the International Commission on Missing Persons (ICMP). The key Prosecution witness who testified about these reports was Thomas Parsons, an employee of this organisation.

230. The Defence asserts that the reported DNA matches cannot be used as the sole method of establishing the facts. The Defence bases this assertion on the importance of traditional anthropological methods in identifying human remains.

231. A number of scholarly research papers published by the American Academy of Forensic Sciences point out that traditional anthropological approaches to human identification cannot be circumvented. These papers were published by members of the International Commission on Missing Persons. For example, an article published by A. B. Arlotti *et al*. and entitled *The Influence of Large-Scale DNA Testing on the Traditional Anthropological Approach to Human Identification*: *The Experience in Bosnia and Herzegovina* states *inter alia:*

> One misconception regarding DNA-led identifications is that once a DNA match is made, then a positive identification automatically follows. This is far from true: it is imperative that traditional forensic scientists review the tentatively identified remains and related evidence to ensure that the match is valid.[194]

232. Another article, entitled *The Importance of Using Traditional Anthropological Methods in a DNA-Led Identification System*, stresses *inter alia* that in order to identify a large number of missing persons, "traditional methods of anthropological analysis are still necessary"[195]:

> In Bosnia-Herzegovina, the International Commission on Missing Persons (ICMP) is using a large scale DNA-led system to identify approximately 30,000 individuals who went missing as a result of the conflict in the 1990's. This has led to a misconception, especially among laypersons, that a positive DNA match between a set of remains and his or her family members constitutes a positive identification of that individual. Unfortunately, due to

[194] P1994 (Ana Boza-Arlotti, PhD * Edwin E. Huffine, MS, and Richard J Harrington, PhD, International Commission on Missing Persons, Alipašina 45a, Sarajevo, Bosnia and Herzegovina, *The Influence of Large-Scale DNA Testing on the Traditional Anthropological Approach to Human Identification: The Experience in Bosnia and Herzegovina.*

[195] "The goal of this presentation is to demonstrate, using several case studies, that even with the use of advanced DNA technology for the identification of large numbers of missing persons, traditional methods of anthropological analysis are still necessary." Prosecution exhibit P1993, p. 2. (H50, "The Importance of Using Traditional Anthropological Methods in a DNA-Led Identifcation System," *Proceedings of the American Academy of Forensic Sciences*, Laura N. Yazedjian MSc*, Rifat Kešetović, MD, Ana Boza-Arlotti, PhD and Željko Karan, MD, International Commission on Missing Persons, Alipašina 45a, Sarajevo, 71000, Bosnia and Herzegovina).

> various taphonomic factors, such as scavenging, deliberate attempts to hide evidence and poor excavation methods, many of these remains are highly commingled.[196]

233. DNA results alone do not identify a person. Parsons explained that the International Commission on Missing Persons does not issue death certificates, which are instead issued on the basis of a report from the local pathologist appointed by the competent court, and the remains are then returned to the family.[197] In fact, the Defence holds that a competent public authority (a competent court or a registrar) issues the death certificate based on a report from a court-appointed pathologist. The official certificate confirming death is established by a pathologist who, in the words of Dr Parsons, "takes into account the DNA matching report".[198] In other words, the DNA report can be considered only as a preliminary but under no circumstances the final finding, "and a very important component of the identification is the hand-over of the remains to the families."[199]

234. Although witness Parsons, who works for the International Commission on Missing Persons, refers to the high level of reliability of DNA findings, this position cannot be accepted, at least not as a very reliable position, as evidenced by the scholarly papers of his colleagues from the International Commission on Missing Persons.

235. As emphasized by Parsons, "The ICMP does have influence over what it receives, but does not always have control over what it receives."[200] and, "So we don't … always have control over what we do receive or how it's labeled."[201] The same witness pointed out that the International Commission on Missing Persons operates a "blind system":

> With regard to the DNA typing process, we operate a completely objective and blind system. So the samples come to us without any information where they came from, who they may be related to, and that applies both to the bone samples as well as the blood samples. They are immediately stripped of any such identifiers.[202]

236. The witness Dr Parsons also testified that the International Commission on Missing Persons has no obligation to oversee the work of the Federal Commission in the process of gathering information and identifying missing persons.[203] The International Commission on Missing Persons is only routinely informed of the

[196] *Ibidem*.
[197] The ICMP also has a formal system of review for all DNA reports. Dr Parsons testified that the ICMP does not issue death certificates; rather, local pathologists deal with this process. As such, a case is considered closed when the court-appointed pathologist by the Bosnian national authorities issues a death certificate and returns the remains to the family members. Parsons, 10364:21-10365:1.
[198] Parsons, 25 February 2011, T.10471:17-25.
[199] Parsons, 25 February 2011, T.20-25
[200] Parsons, 24 February 2011, T.10383:25-10384:1
[201] Parsons, 24 February 2011, T.10384:20-22.
[202] Parsons, 24 February 2011, T.10385.
[203] Parsons, 25 February 2011, T.10413.

excavations of graves;[204] it receives some information about the grave site, but its "conduct really is not dependent upon information that we have or do not have" and, as witness Parsons said:

> Honestly, I don't think that there is a lot of specific information that is frequently given to us.[205]

237. The fact that the International Commission on Missing Persons was not in any way involved in the exhumation of mass graves in the "early period" carries certain weight.[206]

238. The Defence has some doubts as to the impartiality of and external influence exerted on the International Commission on Missing Persons. Although Parsons claimed that the International Commission on Missing Persons was an independent agency and that it was independent of any government, corporation or external influence,[207] this organisation is not accountable to anyone and no external body audits its work. Additionally, it enjoys diplomatic privileges and immunities.[208] Based on the information provided by Dr Parsons, enjoying diplomatic privileges and immunities means that such organisations may not be held to account (their employees cannot be prosecuted or held accountable in any other way) for their work. In other words, they are exempt from the jurisdiction of both national and international courts.

239. With regard to establishing the identity of persons and linking them with the fall of Srebrenica, the data of the International Commission on Missing Persons are not reliable. In fact, Dr Parsons pointed out:

> We do not have a comprehensive investigative programme that would seek to reconcile the various lists or to further investigate in any definitive fashion the nature of that missing person's report as it comes to us from the families.[209]

240. The International Commission on Missing Persons has no obligation and does not cross-reference its data with data from other archives and registers such as the archives and lists of the Army of Bosnia and Herzegovina.[210]

241. The job of the International Commission on Missing Persons is to perform DNA analysis and not, as stated above, to establish officially the death or the identity of a person. On the other hand, data from the International Commission on Missing Persons concerning the date and place of the disappearance of a person are unreliable. The witness Parsons stated that it was almost impossible to resolve the issue of the reported date of disappearance and that different family members could provide

[204] P1936 (Transcript of testimony of Dr Parsons in case *Popović et al.*) T.20880:22-25.
[205] Parsons, 25 February 2011, T.10417:5-7.
[206] Parsons, 25 February 2011, T.10418.
[207] Parsons, 24 February 2011, T.10370.
[208] Parsons, 24 February 2011, T.10370-371.
[209] Parsons, 24 February 2011, T.10422:16-23.
[210] *See:* Parsons, 25 February 2011, T.10426-10427.

different information because they last saw that person at different times,[211] and the International Commission on Missing Persons considered this very difficult to resolve and did not "undertake a systematic effort to try to resolve" this issue. Information concerning the time and place of disappearance, as Parsons said, "is not critical with regard to our primary effort to identify these individuals".[212]

242. Dr Parsons explained that because of the confusing nature of events related to the fall of Srebrenica and because it was difficult to arrive at a specific date and place of disappearance, the International Commission on Missing Persons had decided to establish two nominal denominations for that area.[213] This means that, instead of the actual dates of disappearance, nominal dates are established, which creates a great deal of confusion when relying on the documents submitted by the International Commission on Missing Persons.[214] In addition, the Prosecution did not tender in evidence or disclose interviews with persons who had been involved in the identification project and had registered the time and place of death.

243. The submitted results of the work of the International Commission on Missing Persons do not meet the criteria of reliability because they cannot be verified. An expert report or a list drawn up after the actual events which they are intended to establish must be verifiable, especially in view of the expert nature of the reports. Unverifiable claims cannot be considered reliable and the Trial Chamber cannot rest on them in establishing the relevant facts. Namely, to check the results of DNA analysis and verify the accuracy of the DNA reports, the electropherograms which served as the basis for DNA analysis or the attempt at the DNA identification of a person must be available.[215]

244. Only a limited number of electropherograms were submitted in the process of disclosure[216] and these are related exclusively to a single grave site. No other electropherograms have been disclosed. Given the size of the list, such a small number does not allow any verification.

245. The Defence argues that it is virtually impossible to obtain an electropherogram on the basis of which the accuracy of the lists of the Commission on Missing Persons could be verified. The Prosecution and demographic experts and investigators of the Office of the Prosecution relied unreservedly on these lists. Dr Parsons stressed that the consent of the families or individuals who had given DNA samples had to be obtained for such information to be disclosed. Dr Parsons added: "And we know for a fact that the families have great concern in turning over genetic

[211] Parsons, 25 February 2011, T.10427-10428.
[212] Parsons, 25 February 2011, T.1027:20-22
[213] P1936, P1937, T.20875:16-18.
[214] *See:* Parsons, 25 April 2011, T.10433-10434.
[215] Parsons, 25 April 2011, T.10443:17-22 "MR. TOLIMIR Q. Mr. Parsons, based on what we just said about the molecular structure, my next question would be: Does this mean that in order to verify the accuracy of a DNA report, it is necessary to have an electropherogram based on which the DNA analysis results were obtained? A. In order to do a full scientific technical analysis of the data, that would be correct."
[216] Only electropherogram relevant for the Bišina grave site. 25 February 2011, T.10451:22-24

profiles, their personal genetic information, to individuals who they consider complicit in the death of their family members."[217]

246. Dr Parsons said that DNA data "doesn't provide any information regarding manner -- cause or manner of death."[218]

247. For the reasons set out above, the Defence argues that the lists of the International Commission on Missing Persons lack the sufficient degree of reliability that would allow the Chamber to rest on them in reaching its final conclusions. In addition, the time of death cannot be established through DNA analysis.[219]

[217] Parsons, 25 April 2011, T.10445:15-18.
[218] Parsons, 25 February 2011, T.10435:14-15.
[219] Parsons, 25 February 2011, T.10472:4-6.

THE REPORT OF DUŠAN JANC AND DEAN MANNING

248. For the purposes of the trial, Dušan Janc, an investigator of the Office of the Prosecutor, complied a report entitled "Update to the Summary of Forensic Evidence - Exhumation of the Graves and Surface Remains Recoveries Related to Srebrenica and Žepa - April 2010". The report was admitted into evidence as Exhibit D170. /REDACTED/

249. The Prosecution clearly relies heavily on this Report, but the Defence would dispute its probative value. The Defence submits that the Trial Chamber cannot rely on this Report in establishing the facts, but can only regard it as a report in which the Prosecution outlines its position, which has yet to be corroborated by other evidence.

250. The Report by Dušan Janc falls into the category of material specifically prepared by the Prosecution (by an investigator of the Office of the Prosecutor) for the purposes of leading evidence in the *Prosecutor v. Tolimir* case.[220] This report updates a report of 13 March 2009 by the same investigator of the Office of the Prosecutor, and the reports of Dean Manning, another investigator of the Office of the Prosecutor.

251. The Report by Dušan Janc is not an expert report. During its disclosure the procedure envisaged in Rule 94 *bis* (B) of the Rules of Procedure and Evidence was not followed. These reports fall within the group of documents specially prepared for the trial, and for this reason the Tribunal needs to consider them with exceptional caution.

252. Although the Report of Dušan Janc is not by its nature an expert report (but an investigator's report), it complements and updates the reports which the investigator of the Office of the Prosecutor, Dean Manning, submitted in accordance with the procedure under Rule 94 *bis*.[221]

253. The issue of the status of the investigator Dean Manning was not clearly resolved during the proceedings, although the reports were admitted pursuant to Rule 92 *bis* C with the explanation that they pertain to "issues including the methodologies of exhumation of mass graves and the linking of primary and secondary graves, as well as the methods of analysis used by the Prosecution and experts."[222]

254. In any event, it is inappropriate for one report by an investigator or expert to follow the procedure provided for in Article 94 *bis*, whereas another does not and is instead added to the Rule 65 *ter* list and admitted into evidence in the same way as other documents whose nature is not that of an expert report. Although the issue of form should not obscure the issue of essence, some additional information

[220] Probably also in other cases which involve charges relating to Srebrenica and Žepa.
[221] And admitted into evidence as exhibits P1915, P1916 and P1825. See: P170 (Report by Dušan Janc of April 2010) p. 2.
[222] *Ibid*., para. 133.

demonstrates that the Court, in determining the facts, should not rely on the report by Mr Dušan Janc (or on the preceding reports which this report complements).

255. These are certainly issues which are appropriately dealt with by experts (experts in DNA testing, anthropologists, pathologists and similar professionals). Neither Dean Manning nor Dušan Janc have such qualifications. The Defence recalls the criteria concerning the qualifications of experts, which were applied in deciding not to admit into evidence an expert report by Ratko Škrbić.

256. FIRST, this is a report by an investigator of the Office of the Prosecutor and for this reason, when assessing the probative value of the this report and the report by Dean Manning (P170 and P167), the Chamber should apply the criterion clearly articulated in the case of *The Prosecutor v. Milan Martić*, which states the following:

> On 4, 5 and 9 May 2006, Ari Kerkkanen, who was previously employed as a Criminal Intelligence Analyst by the Prosecution, testified before the Trial Chamber as a witness for the Prosecution. His written statement was admitted in redacted form on 19 April 2006. The Trial Chamber recalls that Ari Kerkkanen was one of the organisers of, and participants in, several archive missions undertaken by the Prosecution, including to the Croatian State Archive, to collect documents on the MUP /Ministry of the Interior/ of the SAO /Serbian Autonomous District of/ Krajina and of the RSK /Republic of Serbian Krajina/. The Trial Chamber observes that both during his testimony and in his written statement on the documents collected, Ari Kerkkanen presented views on and drew conclusions from the information contained in the documents, although he neither possesses expertise in this area nor personal knowledge of the information. Accordingly, the Trial Chamber has attached no weight whatsoever to such views, conclusions and analyses of Ari Kerkkanen.[223]

257. The investigator of the Office of the Prosecutor Dušan Janc and the investigator of the Office of the Prosecutor Dean Manning have no expertise in DNA analysis, yet they dealt in their reports with a plethora of issues which necessitate this analysis. Whilst the Trial Chamber may hear their evidence, their reports cannot be considered a basis for drawing any inference about the facts while applying the required standard of proof. As presented, in the view of the Defence, they constitute factual allegations by the Prosecution which are yet to be supported by other credible evidence and expert testimony, expert literature and the like. The Chamber therefore cannot give any weight to their views concerning, for example, links between the mass graves, which are based on DNA analysis.

258. Whether these reports are sufficiently substantiated is another matter. They deal with specific facts which need to be clearly established and supported for the Trial Chamber to be able to establish them. The reports of Dušan Janc and Dean Manning concerning DNA analysis, which seek to establish alleged links between the mass graves, are not sufficiently substantiated. According to the criteria to be applied

[223] *Prosecutor v. Milan Martić*, IT-95-11-T, Judgement, 12 June 2007, para. 35 (footnotes omitted).

before this Tribunal, to which the Defence referred in the pre-trial proceedings,[224] a report must be reliable for it to be accepted, and the minimum criterion of reliability of reports is determined by the sufficiency of the information used and the availability of such information or documents from which it derives. Thus, in accordance with the unique jurisprudence of the Tribunal, the Trial Chamber in the case of *Prosecutor v. Staništi*ć *and Simatovi*ć stated the following:

> The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions.[225]

259. The same Chamber concluded that, "in the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly."[226]

260. Not only were the sources of information on the DNA analysis, including *inter alia* the report or pherogram and the consent of the family, not adduced during the trial. They were not even subject to disclosure and therefore cannot serve as a basis for making reliable inferences.

261. The Defence in this section refers to the reasons for the inadmissibility of the reports of Dean Manning that were presented in the Notice of Zdravko Tolimir under Rule 94 *bis* (B) (ii) of 6 May 2009,[227] and the Defence fully stands by the views expressed in this submission and holds that the Chamber should take them into consideration when issuing a final judgment or in determining the degree of their reliability and probative value. What is said in these filings with regard to the reports of Dean Manning applies equally to the reports of Dušan Janc.

[224] *See:* Notice by Zdravko Tolimir Pursuant to Rule 94 *bis* (B) (ii), 6 May 2009.
[225] Decision on the Prosecution motion filed concerning expert reports of Nena Tromp and Christian Nielsen, pursuant to Rule 94 *bis*, *The Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, 18 March 2008, para. 6, and Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 February 2003, para. 9.
[226] Decision Stanišić and Simatović, para. 9.
[227] Paragraphs 17-48

DEFENCE FINAL TRIAL BRIEF

PART FOUR

ALLEGATIONS ABOUT THE SCALE OF THE SREBRENICA CRIME

THE INDICTMENT

262. In paragraph 9 of the Indictment, the Prosecution alleges that "by 1 November 1995, … over 7,000 Muslim men and boys from Srebrenica had been murdered by the forces of the MUP /Ministry of the Interior/ and VRS /Army of Republika Srpska/". In paragraph 10 of the Indictment, the Prosecution refers to the period between 11 July 1995 and 1 November 1995. A conclusion is drawn from this that more than 7,000 people were executed precisely in this period, although the Prosecution does not specify the number of murders with which it charges Zdravko Tolimir, nor does the claim about more that 7,000 executed people rest at the very foundation of the Prosecutor's argument about genocide and conspiracy to commit genocide.

THE DEFENCE'S ARGUMENT

263. The Defence argument is that the Prosecutor's claim that the VRS and MUP forces executed more than 7,000 Muslim men after the fall of the Srebrenica enclave is not based on credible evidence.

264. In the context of this case the Prosecution's argument suffers from a number of deficiencies related primarily to the fact that no distinction is made between the number of those executed in an illegal way (shot) and the number of those who lost their lives in some other way (in combat, committed suicide or were killed by other Muslims). The question arises as to the number of those who lost their lives in combat operations in the period up to 11 July 1995 and the number of those who died at the base in Potočari or elsewhere, of whose fate almost nothing or very little is known.

265. The Defence holds that the evidence presented in this case supports the argument that it cannot be reasonably established that "over 7,000" people were murdered in the events related to the fall of Srebrenica, as alleged in Paragraph 9 of the Indictment.

266. A serious analysis of what happened in July 1995 cannot be complete without a detailed probe into the number of those who lost their lives in an unlawful manner, i.e. by being executed or summarily executed, and those who lost their lives during the breakthrough from Šušnjari and Jaglići towards the territory controlled by the BH Army (the territory of the Tuzla-Podrinje district) in various ways, such as combat, infighting, suicide or under other unexplained circumstances. The Prosecution expert reports (first and foremost those of Brunborg and Tabeau) do not make this distinction and place them all in the category of "Srebrenica victims". In criminal proceedings, however, the main issue concerns not only the numbers but also the circumstances under which a person died in order to determine whether this contains elements of a criminal offence. Lists of the missing and allegedly missing and identified and supposedly identified do not solve this dilemma.

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267. An extensive amount of demographic and forensic material was presented during the trial. However, the forensic material is usually associated with the

exhumation of mass graves by the Office of the Prosecutor of the Tribunal, whereas forensic evidence from the mass graves that were exhumed or reportedly exhumed by the BH authorities for the most part did not find its place in the case file. The Office of the Prosecutor conducted exhumations in and around Srebrenica in the period from 1996 until 2001, when the responsibility for exhumations was handed over to the BH Government.[228] Only experts who conducted exhumations in the period from 1996 to 2001 testified during the proceedings, while the reports from other burial sites were admitted through investigators of the Office of the Prosecutor or did not find their place in the case file at all. As stated in the report of H. Brunborg and E. Tabeau (P1776):

> A concise yet exhaustive overview of the exhumation and identification status in the former Yugoslavia, and in Srebrenica in particular, is not available from a single organisation. For Srebrenica alone, which is by far the most advanced exhumations area, this information is scattered among several agencies. … the Institute for Missing Persons … and the BH State Commission for Tracing Missing Persons … are now in the process of creating a central database on exhumations and identifications. Unfortunately, this database does not yet exist in a usable electronic format.[229]

268. With respect to demographic evidence, a large number of successive reports were submitted by experts hired by the Prosecution, Helge Brunborg and Ewa Tabeau. For the purposes of producing the final brief and presenting its arguments about the expert demographic reports, the Defence used "The 2009 Integrated Report on Srebrenica Missing Including a Progress Report on DNA-Based Identification" submitted by H. Brunborg, E. Tabeau and A. Hetland and dated 9 April 2009 (Exhibit P1776) /REDACTED/

269. The sources used to compile the lists are the sources and lists of the International Commission on Missing Persons, Doctors Without Borders and the International Committee of the Red Cross.[230] These lists differ, and it is the position of the Defence that it is not possible to arrive at reliable data by simply combining them.

270. As a basis for calculating the total number of persons whose disappearance or death are related to the events in July 1995, the Prosecution relies considerably on a list of the International Commission on Missing Persons. Both Helge Brunborg and Ewa Tabeau stated in their 2009 Report their view that the "most reliable source on the exhumed and identified persons is without doubt the ICMP."[231] However, Helge Brunborg and Ewa Tabeau neglect the manner in which International Commission on Missing Persons obtained the data which it used to link some people with Srebrenica and the fact that the dates and places of disappearance were nominally determined and statements or interviews with donors are not available.

[228] Exhibit P1915-Updated Summary of Forensic Evidence Exhumation of Mass Graves, prepared by Dean MANNING, with Annex, dated 27 November 2007.
[229] Exhibit P1776, p. 42
[230] P1776 (Report by Brunborg *et al.* p. 2).
[231] P1776 (Report by Brunborg and Tabeau, p. 43.

271. We have already expressed the view that the DNA method cannot be used as the only method for determining identity and that in order to obtain reliable findings it must be combined with traditional anthropological methods. Brunborg and Tabeau also state the following in their 2009 Report:

> Once a match is made, the result is sent to a pathologist, who, if satisfied, will sign the death certificate.[232]

272. We consider that this indisputable statement supports the conclusion that DNA results alone are not reliable; instead, they must be confirmed by an appropriate pathologist. Unfortunately, when the Demographic Unit of the Office of the Prosecutor compiled the list of missing and identified persons, it did not use forensic reports but only the data of the International Commission on Missing Persons.

273. Prosecution expert witness Baraybar[233] testified about the anthropological methods used in determining the minimum number of individuals. He also compiled a separate report entitled "Calculation of the Minimal Number of Individuals Exhumed by the International Criminal Tribunal for the Former Yugoslavia between 1996 and 2001, dated January 2004."[234] Everything seems to suggest, however, that this method of determining the minimum number of people was abandoned. In his report from 2007 Dean Manning said:

> Previously the ICTY relied on an anthopological assessment of the remains, known as MNI or Minimal Number of Individuals. The MNI was calculated on an anthropological examination of specific bones and was used as many of the bodies have been fragmented during execution, initial burial and later reburial. ICMP's DNA analysis of the human remains provides a much more accurate indication of the number of individuals located within the graves. The results of this DNA analysis are therefore used in preference to the previously used anthropological MNI.[235]

274. Bearing in mind the need for the DNA results to be confirmed by traditional anthropological methods (as explained above), the number of persons cannot be determined solely on the basis of unverifiable reports of the International Commission on Missing Persons. The only credible evidence on the basis of which lists of identified persons could be complied would be judicial documents (judgments and decisions) issued on the basis of pathologist's reports or witness statements.

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275. In preparing the lists of missing persons, the Prosecution experts did not use the military records of soldiers and other persons associated with the BH Army who

[232] Exhibit P1776, p. 43.
[233] Jose Pablo Baraybar, 3 November 2010.
[234] Exhibit P938.
[235] Exhibit P1915 - Updated Summary of Forensic Evidence Exhumation of Mass Graves, prepared by Dean Manning, with Annex, dated 27 November 2007, p. 3.

were killed.[236] However, the Brunborg-Tabeau report (P1776) states that there were 5,371 matches in the BH Army records, which represents about 70% of the list of the Office of the Prosecutor.[237] Moreover, a comparison of BH Army records with the lists of the International Commission on Missing Persons produces 3,437 matches, which represents about 67% of military records.[238] However, OTP demographers do not consider BH Army records to be "highly reliable" as they are "made for post-mortem pension purposes, so attention was predominantly paid to the fact whether or not a given person died."[239] The criteria that the authors of the report appreciated were that the cause of death was not always "clearly stated" that for missing persons it was merely stated "missing", that "inconsistencies are seen in the reported date of death when cross-referenced with other sources" and so on. The Defence deems that this position is unacceptable and that, as a rule, military records are very accurate, although some data may be missing.

276. It is particularly telling that the demographers did not accept 220 cases where the date of death was not the same in both the OTP list and the BH Army records. One of the reasons proffered in support of the argument on the inconsistency of 220 cases was that "140 have been confirmed as identified and related to Srebrenica grave sites by the ICMP (according to the July 2008 update)." For 38 cases which were not covered by the DNA identification no clarification had been received from the BH Ministry of Defence.[240]

277. It is the position of the Defence that, when cross-referencing BH Army records with the OTP list, priority should be given to the BH Army records because the fact that the data from the military records (regardless of its purpose) does not match the data of, say, the International Commission on Missing Persons, creates reasonable doubt, and even more than reasonable doubt, as to the accuracy of the lists of the International Commission on Missing Persons and the OTP, especially in criminal proceedings in which the death of a person must established beyond reasonable doubt.

278. Discrepancies between the BH Army records and the OTP list (shown in Table 6.4 of the Report of Brunborg and Tabeau) provide a basis for the conclusion that the graves related to Srebrenica (Kozluk, Kravica, Lažete 2, Glogova 2, Čančari 2, Liplje 2, Hadžići Put 5, Čančarski Put 12, Hadžići Put 6 (Snagovo 1), Cerska, Zeleni Jadar 5, Branjev, Rabunici, and so on) contain the bodies of persons who disappeared at some other time, during 1993 or 1994, and not in the events related to the fall of Srebrenica.

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[236] See: Exhibit P1776, Annex 3.6 (BH Army Military Records of Dead and Missing Soldiers and Other Military Personnel, p. 56).
[237] Exhibit P1776, p. 94.
[238] *Ibidem*.
[239] Exhibit P1776, p. 94. Footnote 87 states that this statement is based on the conversations the author (presumably Mr Brunborg or E. Tabeau) had with several persons in Bosnia and Herzegovina, including Mirsad Tokača.
[240] P1776, p. 95.

279. The fact that the grave sites contain people who lost their lives before the fall of Srebrenica and who may even have been buried elsewhere previously is attested to by the Ruling of the Lower Court in Lukavac[241] declaring Suljo Husić to be dead. The Ruling states that the application to the Court to have him declared dead had been filed by his wife and that "he was killed on the elevation called Ljubisavljevići on 7 July 1995 as a member of the 28th Mountain Battalion" and that this was confirmed by witnesses Mehudin Hasanović, Mevlid Osmanović and Osman Omerović. The Ruling states that "on the morning of 7 July 1995 his unit carried out an attack on the enemy-held elevation called Ljubisavljevići, during which Suljo Husić was killed, and that he was buried at the town cemetery called Kazani on the next day, i.e. 8 July 1995." It is further said that these facts "are also confirmed by certificate of death no. 07/02-216-22/50" issued by the command of the 28th Division on 19 March 1997, which gives the location where Suljo Husić was killed.

280. /REDACTED/[242]

281. /REDACTED/[243] /REDACTED/[244] It can be concluded on the basis of the trial testimony of PW-007 that the said Kazani cemetery is in the Srebrenica area.[245]

282. This example supports the argument that the graves which have been linked to Srebrenica also contain persons who perished in events that cannot be linked to the fall of Srebrenica.

283. A document issued by the Kladanj Municipal Court and dated 31 March 2011 was adduced during the trial. It declares Samir Ahmetović (son of Šećan) dead. Based on the statements of the petitioner seeking to have the named person declared dead and the statements of two other witnesses, the court established that he had disappeared as a member of the BH Army in Žepa, Rogatica municipality, on 15 March 1995.[246] The OTP list (in Exhibit P1777: report entitled Srebrenica Missing; the 2009 Progress Report on the DNA-Based Identification by ICMP, by Helge Brunborg, Ewa Tabeau and Arve Hetland, dated 9 April 2009, p. 13 in e-court) states that the same person disappeared in Potočari on 13 July 1995 and that his death was confirmed. The OTP list does not indicate that this person was identified by the International Commission on Missing Persons, but states that his death was confirmed and gives the registration number of the International Committee of the Red Cross.

284. The Defence holds that Exhibit D316 is yet another proof that the OTP list is unreliable. This exhibit also points to the unreliability or insufficient reliability of the lists of the International Committee of the Red Cross. Specifically, the Statement of Reasons states that the petitioner (the mother of Samir Ahmetović) heard that her son

[241] D316 (Decision from the district court in Lukavac /as printed/ No. R-276/97 dated 20 June 1997)
[242] The Prosecution expert witness Ewa Tabeau did not accept the facts set out in the Ruling of the Lower Court in Lukavac (Ewa Tabeau, 1 September 2011, T.17505 - 17513).
[243] Page 5 in e-court.
[244] /REDACTED/
[245] "When we arrived in Srebrenica, there was a Bosniak there, and in Kazani near the graveyard, he was waiting there, and he offered accommodation." PW-007, T.518.
[246] D317 (The Court issued another Ruling on 25 May 1995 to correct an error in the previous Ruling with respect to the date of birth.)

"was allegedly killed during the fall of Srebrenica, while crossing to the free territory." The Defence holds that is it is reasonable to conclude that it was actually on the basis of this information that she reported the case to the International Committee of the Red Cross. However, in the proceedings to determine the death before the Kladanj Municipal Court, two witnesses, Zurajet Muminović and Mevludin Muminović, made statements as persons who were in the same unit as Samir Ahmetović (as members of the BH Army), and on the basis of their statements the date of death was determined to be 15 March 1995.

285. Prosecution expert E. Tabeau did not accept that the relevant entry on the OTP list was inaccurate. The Defence maintains that the argument she put forward on this occasion was of a speculative nature.[247]

286. At the promotion of the *Bosanski atlas zločina* /Bosnian War Crimes Atlas/ in Banja Luka, the Director of the Sarajevo Investigation and Documentation Centre Mirsad Tokač pointed out that "the biggest problem in BH is a perfidious monopoly on information," and that it had been established during the course of research conducted by the organisation he led that "about 500 living residents of Srebrenica" had been found, adding, "We also have information that just over 7,000 persons were killed in the area, but not all of them were from Srebrenica. There were residents of Vlasenica, Zvornik, Bratunac, Višegrad and Rogatica and this is also attested to by the fact that we registered 70 people who were buried at the Potočari Memorial Centre but who did not perish in Srebrenica."[248]

287. The Office of the Prosecutor of the Tribunal has not been provided with this information because of the alleged technical features of the database maintained by the Investigation and Documentation Centre in Sarajevo.[249] At one point in the report

[247] Ewa Tabeau, 1 September 2012, T.17515 – 17519.
[248] D38 24 (Hours Info- Tokača: "We have discovered 500 alive listed as missing").
[249] "A. I did receive a list, but not of 500 but 240 people. I am aware of the discussion in the media in Bosnia and Herzegovina of the 500 potential survivors that Tokača allegedly included in his database, the Bosnian Book of Dead. The OTP requested this list of 500 in order to be able to cross-reference this list with our sources, that would be the Srebrenica list of missing persons. In response we received a letter in which Tokača says that he's unable to provide the list of 500 because the 500, be it 500 or approximately 500, whatever, his database, he explained, is made in such a way that any record deleted from the database at some point cannot be recovered anymore. So he clarified that in the course of time possibly the -- his centre have identified, they did, 500 survivors of Srebrenica who were immediately excluded from the records of the database. In order to provide us with what he had and what was still available, he sent us a list of 240 names. And these 240 names he said were coming -- first of all, are not in the records of war victims in his database, but they are aware of these names at this stage still and this is why they are providing this. So these 240 names were provided to us. Interestingly it was claimed that these 240 names were established based on ICTY sources and even more interestingly based on the Demographic Unit sources." Ewa Tabeau, 17 March 2011, T.11452-11453.
The Prosecution cites an article published on the Internet with an alleged denial of Tokač's statement that 500 residents of Srebrenica had been found alive. However, careful reading of the article cited by the Prosecution (P1370- Press article entitled, "Denial regarding quotes of Mr Mirsad TOKAČA regarding genocide victims in Srebrenica," issued by the Sarajevo Investigation and Documentation Centre, dated 21 April 2010, reveals that no one denies that the sentence that "500 residents of Srebrenica were still alive" was uttered; it is only claimed that it was taken out of context. The first paragraph states that the investigation which revealed that 500 Srebrenica residents were still alive was carried out from 2004 to 2007. The denials in a newspaper article to which the Prosecution refers are

by Helge Brunborg and Ewa Tabeau (P1776, footnote 87), the investigators and experts of the Office of the Prosecutor relied on Tokač's view with regard to another issue (the reliability of BH Army records). The Defence regrets that this data was not available for the purpose of determining the truth about Srebrenica. However, the fact that dozens of people - 70, according to Tokača - were buried in the Potočari Memorial Centre although they were not killed in events connected to the fall of Srebrenica, points to the manipulation of data on the number of those who perished after 11 July 1995.

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288. The report by Helge Brunborg, Ewa Tabeau and Arve Hetland (P1776) contains false statements about the work of experts of the Office of the Prosecutor. This report specifically says:

> In our search for Srebrenica survivors we systematically applied several approaches:
> …
> - Additionally, any indication of Srebrenica survivors that came to our attention from any document, data source, press report, book, report and witness recollection (be it a statement or testimony of the person) brought to our attention by others (including both the Prosecution and the Defence) were always checked one by one and excluded if survival was confirmed.[250]

289. However, the statement of expert Ewa Tabeau leads to a different conclusion. Specifically, to the question, "Does your Demographic Unit analyse all sources that could have some relevant information about the place, date, or manner of death? And does it also analyse testimony of the witnesses who appear in these proceedings?" she replied:

> A. Well, it would be an impossible task to analyse all the sources and all the testimonies. It is not feasible, simply. Well, we plan our reports according to what we think is the most appropriate and feasible, and we try to restrict ourselves in our work. We have certain goals we want to reach, and we select sources that allow us to do so.[251]

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290. Regrettably, the nature and purpose of the demographers' expert report are not fully contained in their actual reports, but in the articles published in various journals. An article by Helge Brunborg, H. Urdal, and T. H. Lyngstad, entitled "Accounting for genocide: How many were killed in Srebrenica?" states that the research questions

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not consistent with the statement of Ms Tabeau, concerning what Mr Tokač told her in connection with these 500 people.
[250] P1776, p. 89 (Serbian).
[251] Ewa Tabeau, 17 March 2011, T.11492.

that guided the demographic project on Srebrenica were defined by the Office of the Prosecutor as:

> • What was the minimum number of victims from Srebrenica who were killed by the VRS after the fall of the enclave on July 11 1995 who can be identified by name?
> • What is the reliability of this list of victims?[252]

291. Prosecution expert Ewa Tabeau denied that she was given such a task and stressed that the Demographic Unit did not examine the causes and manner of deaths.[253]

292. The authors of the above article (including Brunborg) identified the following question as being crucial in judicial proceedings: "How many victims must be established to convict someone of genocide?"[254] They viewed this question in the completely inappropriate context of unsubstantiated allegations. The Defence maintains that the content of this article, which the Chamber will certainly take into consideration, points to an objective which the OTP demographers sought to achieve and which is expressed on page 3 in the statement: "How many victims must be established to convict someone of genocide?"

293. This article also shows that its description of the Srebrenica-related events seeks to categorise everyone who lost their lives in the events of July 1995 as victims of genocide and does so in the manner formulated in paragraph 9 of the Indictment.

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294. The Defence believes it necessary to mention especially that the arguments put forward in a well-argued article by Jonathan Rooper entitled "The Numbers Game" could also provide a basis for determining the reliability of demographic (and other) evidence.[255]

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295. For at least the foregoing reasons the Defence maintains that the reports of the expert demographers are not reliable and cannot serve as a basis for establishing the facts with a sufficient degree of certainty.

THE POPULATION OF SREBRENICA

[252] Exhibit D159, p. 4.
[253] Ewa Tabeau, 17 March 2011, T.11478.
[254] P159, p. 3.
[255] Exhibit D365 (Foreword and Chapter Four taken from the book entitled *Srebrenica Massacre: Evidence, Context, Politics*).

296. The subject of controversy in this case is the number of residents of Srebrenica in the period immediately before the attack on the enclave and the number of residents of Srebrenica who crossed over to the territory under the control of BH.

297. Two documents, one from 1994 and the other from 199/5/, discuss the number of residents of Srebrenica before July 1995, and the Defence believes them to be reliable.

298. A document sent on 11 January 1994 by the President of the Presidency of Srebrenica Municipality to the BH Office of Statistics in Sarajevo, the Department of Statistics in Tuzla and the District Secretariat of Defence in Tuzla stated that a total of 37,255 people (9,791 + 10,756 + 16,708) were living in Srebrenica, but noted also:

> The requested data that we hereby provide for the purposes of statistics should not be shown to international organisations because with them we use a figure of 45,000 inhabitants.

299. In a document issued a year later, in January 1995, the Municipal Civil Defence Staff of Srebrenica gives a breakdown of the total number of inhabitants of Srebrenica and puts forward the figure of 36,051. The document also specifies the structure of the population according to the places from which they have been displaced, as well as sex and age. The document states that of the total population, 19,566 were men, and divides them into the age groups of 18-60 years (11,495), up to 18 years of age (6,294) and over 60 years of age (1,577). The document also lists the data on the number of BH Army members who were killed (1,489) and civilians who were killed and whose time and place of death is known (654).[256]

300. The real reason why "a figure of 45,000 inhabitants" was used with the international organisations is certainly to be found in attempts by the municipal authorities to secure larger quantities of humanitarian aid, as well as in propaganda reasons.[257]

301. From 1994 to 1995 there was a tendency towards a decrease in the population numbers in the enclaves of Srebrenica and Žepa, due to both voluntary departures (which the BH Army sought to prevent) and losses in the armed conflict.[258]

302. The number of inhabitants in the period from January 1995 to July 1995 could only have been lower than the number stated in the document, primarily because people were leaving the enclave illegally. In fact, "the problem of people leaving the enclave" had been present from the time when Srebrenica was declared a "safe area",[259] which the BH Government in Sarajevo had opposed. The attempts of the BH Army to prevent people from leaving the enclaves were unsuccessful. On 25 May 1995, Ramiz Bećirović (the then Chief of Staff of the 28th Division, standing in for Commander Naser Orić) issued an order that measures be taken "to prevent members

[256] Exhibit D117 Report by Srebrenica Civilian Defence Municipal HQ re: demographic structure.
[257] Ratko Škrbić, T.18834 – 18835.
[258]
[259] Report of the Secretary-General, The Fall of Srebrenica, Exhibit D112, paragraph 40

of the Army and civilians from attempting to leave the d/z /demilitarised zone/ of Srebrenica and Žepa."[260]

303. However, as early as on 21 June 1995, Ramiz Bećirović notified the Command of the 2nd Corps of the BH Army of the problem of "members of the Army of the Republic of BH and civilians leaving the Srebrenica and Žepa safe areas." In his report Bećirović says: "For all those who complain about the lack of food and, for that reason, intend to leave these areas, we have found possibilities for providing assistance in this regard. However, in the summer months it is as if some unknown wave flows through the people, suddenly creating a euphoria that the best solution is to leave for Tuzla. This literally causes waves throughout the entire area, and the majority of people are then ready to leave. This has been the case in the last few days."[261]

304. After the BH Army's breakout from Srebrenica and the evacuation of civilians, records were kept of the new arrivals. A document entitled "Chronicle of the Events of the Breakthrough by the 28th Division" and dated 27 July 1995[262] gives precise details on the number of incoming refugees and the number of soldiers who had broken out of the encirclement up to that day. The document leads to the unambiguous conclusion that fairly precise records were kept. On 12 July and 13 July alone, between 22,000 and 23,000 people arrived in the area on the first day of the evacuation, and some of the civilians had arrived via Baljkovica and Sapna. The municipalities reported that a total of 29,336 persons (giving precise data) were taken in and that about 6,000 persons were billeted in a tent camp at Dubrave airfield.[263] By 20 July, the 28th Division already had 2,080 members in its ranks and they were engaged in systematic tasks.[264] This number did not include those who were "receiving treatment at hospitals and military medical institutions".

305. According to the Bulletin of the BH Army General Staff's Military Security Service Administration, "In the early evening hours of 16 July 1995, approximately ten thousand members of the 28th Division arrived in the free territory when the main body of these forces carried out a *breakthrough*. The breakthrough was assisted by units of the 24th Division, which launched a strong counterattack against the Chetnik lines in the Baljkovica sector (the general sector of Memići and Nezuk) and linked up with units of the 28th Division at around 1700 hours."[265] This number, by the nature of things, did not include about 700 members of the BH Army who had set off towards Žepa.

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[260] Exhibit D61. 28th Division Command, strictly confidential number 01-57/95 Order - taking measures to prevent unauthorised departure from the DMZ. The document states that: "Any violation of this Order by army members will be punished in accordance with the laws in force. I hereby make unit commanders responsible for the implementation of the Order." See also exhibit D100 of the BH Army, strictly confidential number 08-13-75/95.
[261] 261 Exhibit D144 BH Army, 28th Division Command, no. 01-132/95, report, type signed by Ramiz Bećirović.
[262] Exhibit D171.
[263] Exhibit D171, p. 4.
[264] Exhibit D171, p. 6.
[265] Exhibit D346.

306. On 4 August the Staff of the Northeast Sector reported that approximately 35,632 persons were in the zone, of whom 9,749 were in collection centres and 17,383 in private accommodation, and about 6,500 thousand people.[266]

307. If the number of people about whom the World Health Organization had information is deducted from the number of those who were in Srebrenica (not in July but in January 1995), the argument that 7,000 were killed (executed) is simply untenable.

308. Moreover, the information of the Northeast Sector, the World Health Organization and the local municipalities can be considered reliable. The only estimate is that concerning the number of people who were at Dubrave airfield, but this estimate too can be considered reliable since the World Health Organization shows quite precisely in a separate table the "prevalence of the most common diseases among displaced persons from Srebrenica who are accommodated at the air base"[267] and then their health status.[268]

THE NATURE OF THE BREAKOUT

309. A breakout is one of the most difficult and complex military operations. The breakout performed by the 28th Division from Srebrenica has the characteristics of a classic breakout. According to a rule applied in the VRS, a breakout is defined as follows:

> The forces may attempt to break out of encirclement towards their own forces along one or several axes either in the direction of the front or of the PZT /temporarily occupied territory/. Preparations for the breakout begin as soon as the forces become surrounded or when fighting in encirclement begins. As a rule, the breakout is performed at night and in limited visibility, in cooperation with forces operating from the outside. The time and axis of the breakout, unless stipulated in the order of the superior, are determined by the brigade commander. In a favourable situation (incomplete encirclement, favourable terrain, night and limited visibility in general, and so on), the units may pull out of the encirclement without a fight – along several axes, in smaller elements and with the assistance of the units from outside the surrounded area.
>
> The battle order for the breakout will usually consist of breakout forces, a reserve and protection forces.[269]

310. The breakout of the 28th Division was organised in the classic manner in accordance with the rules of the military doctrine, and this is clear from the witness

[266] On 29 July 1995, the World Health Organisation reported that a total of 34,341 people were in the area of the Tuzla-Podrinje Canton.
[267] P2873, p. 7.
[268] P3837, p. 8.
[269] D148. JNA Manual from 1984 - Brigade Rules (for Infantry, Motorised, Naval, Hill, Mountain and Light brigades).

statements and BH Army documents, where the military operation carried out by the BH from the enclave is explicitly referred to and described as a breakout.

311. For example, according to Mevludin Orić's statement:

> All able-bodied men, including the local commanders of the BH Army in Srebrenica, gathered in the village of Šušnjari. We talked about what we should do because they might kill us if we were to leave with a convoy of women and children. I heard the BH Army commander in Srebrenica, Ramiz Bećirović, order us to form a column and set off towards Tuzla. Bećirović ordered the BH Army armed soldiers to travel at the head and the tail of the column in order to provide at least some protection.[270]

312. The Command of the 2nd Corps provided a chronology of the breakout from the moment when the forces of the 28th Division found themselves encircled, or from the moment of the attack and up until 26 July 1995.[271]

313. The strength and danger coming from the column which was breaking out from Šušnjari and Jaglići towards Tuzla is attested to by the fact that the commander of the GŠVRS /Main Staff of the Army of Republika Srpska/ ordered that security measures be taken because they had information at the time that the armed forces making their way through the forests were located in the immediate vicinity of the rear command post. Based on this information, those who were at the rear command post had to organise its defence because the 65th Protection Regiment did not have enough units to protect the rear command post.[272] As Petar Škrbić explained: "The forces that broke through these roads from Srebrenica and Žepa in the direction of Olovo and Kladanj, these forces had to pass through the forest through Romanija and Han Pijesak itself. And for a stretch of the road, they had to pass through the area above Vlasenica."[273]

314. The breakout of the 28th Division from Srebrenica was characterised by at least two things: first, the breakout was successful (in military terms since the units of the 28th Division linked up with the units of the 2nd Corps of the BH Army) and, second, during the breakout a very large number of people were killed in combat or by mines or in internal conflicts or other situations.

315. In a document entitled "Report on the Situation in Srebrenica" dated 16 July 1995, the General Staff of the BH Army reported:

316. "Units of the 28th dKoV /Army Division/ are pulling out from Srebrenica while still fighting. The units of the 28th dKov have remained compact. On the temporarily occupied territory they are scoring success after success. In combat they are inflicting major losses on the aggressor. So far, they have captured six Chetniks (live). The units of the 28th dKoV have linked up with infiltrated units of the 2nd

[270] Quoted according to Škrbić, Srebrenica and Žepa (expert report), p. 65 (exhibit D367).
[271] Exhibit D171.
[272] Petar Škrbić, 31 January 2012, T.18607
[273] Petar Škrbić, 31 January 2012, T.18607: 15-18.

Corps. With joint forces they continue to fight on the PZT /temporarily occupied territory/. A full link-up with these units is expected soon. Activities are underway to exploit the success of the units in the breakthrough."[274]

317. However, the BH Army suffered heavy casualties in this operation. Statements by those who were in the column are consistent in that many people around them lost their lives in various ways. It is estimated that about 3,000 people were killed in the column. The report of the Secretary-General on the fall of Srebrenica reads:

> The men interviewed estimated that up to 3,000 of the 12,000 to 15,000 in the column had either been killed during combat with the BSA /Bosnian Serb Army/ or when crossing over mines, while an undetermined number among them had also surrendered to the BSA.[275]

Witness statements of the men from the column support the claim that about 3,000 people lost their lives in different ways, mostly when the column was shelled.[276]

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[274] D155, p. 3.

[275] Exhibit D122, Report of the Secretary-General, The Fall of Srebrenica, para. 387.

[276] "In the further course of the interview Enver told us that when the 285th and 282nd Brigades left at around 1000 hours on the same day, Chetnik paramilitaries opened strong artillery fire on the remaining brigades and the civilians who were in Buljin, where in his estimate about 100 soldiers and civilians were killed. They were shelled from PAMs /anti-aircraft machine-guns/, AA guns, *pragas* /self-propelled anti-aircraft gun 30/2 mm/, *zoljas* /hand-held rocket launchers/, and rifle-launched grenades. After the shelling, the Chetniks surrounded those who remained, demanding that they surrender, which most of them did, but Enver could not say how many people surrendered because he managed to escape from the encirclement with a group of about 150, and they then proceeded towards Jadar, then Konjević Polje and Cerska." (RBH, MUP/Ministry of the Interior/, Tuzla SDB /State Security Service/ Sector, Official Note related to interview with Enver Avdić, D268, p. 2)

"Near Kamenica, before the asphalt road between Konjević Polje and Nova Kasaba, near Kaldrmica, the column came under fire from *pragas*, artillery and infantry weapons from all sides. The Chetniks were very close in some places, so I concluded that we were surrounded. Once we got organised, we put up resistance and opened up a narrow passage out of the ring, and most people passed through it. I estimate that about 1,000 people were killed and several hundreds were wounded in the Chetnik attack." (BH, MUP, Tuzla SDB Sector, Official Note related to interview with Hasan Alić, D269, p. 2)

"Near Kamenica, before the asphalt road between Konjević Polje and Nova Kasaba, near Kaldrmica, the column came under fire from *pragas*, artillery and infantry weapons from all sides. The Chetniks were very close in some places, so I concluded that we were surrounded. Once we got organised, we put up resistance and opened up a narrow passage out of the ring, and most people passed through it. I estimate that about 1,000 people were killed and several hundreds were wounded in the Chetnik attack." (BH, AID /Agency for Investigation and Documentation/ Tuzla Sector, Record of Statement of Suljo Halilović, D270)

"However, a tree fell at about 2100 hours which was followed by fire from infantry weapons, PAMs and PATs /anti-aircraft guns/, causing chaos among the people. The shooting lasted for about 15 minutes and when it stopped, everything fell silent. According to my estimate, about 1,000 men were killed there. We went back to pull out the wounded, but it was practically impossible to make one's way through the bodies." (BH, AID Tuzla Sector Sarajevo, Record of Statement of Sado Ramić, D271)

PW-008.A: "So since the attack was ongoing, the whole time, when the ambush began, there was shelling and shooting the whole time, the wounded were falling constantly, moaning, there were dead people. After the shelling stopped in the morning, after that night, I could see five or six people dead around me. Some of them I knew by name. We were below one hill. When we crossed that hill during

318. /REDACTED/[277] /REDACTED /:

/REDACTED/

/REDACTED/

/REDACTED/

.[278]

319. No charge in the Indictment refers to the human losses suffered by the column that carried out the breakthrough.

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the day, after we began to surrender, then going past the dead I could see how many there were, because we were passing by dead people. There was some 300 (Real time transcript read in error "500") to 500, in my estimate." (PW-008 14 December 2010 T.8899: 12-20)

PW-015"40 to 50 wounded persons were carried from Jaglići to the first ambush at Kamenica in the evening, and maybe a dozen people were killed. I said that but it may not have been recorded." (PW-015, 26 April 2010, T.1376: 12-14)

PW-017: "It's important to say here for the Trial Chamber that this route actually meant a lot of people were killed on the way because of this minefield, as they crossed the minefield, and there were also ambushes on the hills around it. And actually the route led along a small river, so that it was very easy for the Serb soldiers to actually set ambushes around." (PW-017, T.712 18 March 2010: T.712: 9-14)

[277] /REDACTED/
[278] /REDACTED/

DEFENCE FINAL TRIAL BRIEF

PART FIVE: THE NATURE AND CONTEXT OF THE CONFLICT

REGULATION OF THE POSITION OF THE CIVILIAN POPULATION

1. The nature of armed conflicts in the former Yugoslavia was distinctive. The conflict in the territory of BH was the kind of a civil war which inevitably affects the civilian population in particular. The subject of negotiations and talks, especially during 199/2/ and 1993, was how to find ways to improve the situation of the civilian population. A good illustration of such efforts is the "Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina", adopted at a meeting held on 30 September and 1 October 1992 which was organised by the International Committee of the Red Cross and attended by Mr Trnka (as a representative of Alija Izetbegović to whom the document refers as President of BH), Mr Kalinić (as a representative of Radovan Karadžić), Mr Ćorić (as a representative of Mr Boban) and three other participants.[279] The meeting was chaired by Mr Thierry Germond, ICRC Delegate General for Europe, and took place in the presence of observers from the Federal Republic of Yugoslavia, Croatia. The Director of the Regional Office for Europe of the High Commission for Refugees was also present.[280]
2. The adopted recommendations concern the status of the civilian population in the territory of Bosnia and Herzegovina. Reaffirming the principle of the prohibition of any discrimination and "recalling that the presence of civilians must not be used to render certain areas immune from military conflict", the signatories to the document adopted several recommendations concerning the status of civilians and their right to temporarily leave a certain territory, the need to allow them to leave in an organised transfer under international supervision, guarantees to those who temporarily leave the territory, and the right to international assistance.

ELEMENTS OF CONTEXT (1991-1994)

320. The Defence notes at the very outset that relatively little evidence was adduced during the trial about events which took place before the period covered by the Indictment and which were relevant to the nature of the conflict in the former Yugoslavia. It is simply impossible to condense a period of four years of war into a few paragraphs that could reflect the true nature of that conflict. On the other hand, in the first part of the Indictment, in paragraphs 3 to 8 under the subheading "BACKGROUND", the Prosecution selectively cites several facts from which it draws a conclusion about the criminal intentions of Republika Srpska and the Army of Republika Srpska, which is a claim that does not and cannot have any foundation. In particular, it has no foundation in proceedings that should be concerned with the issue of individual criminal responsibility and in which the elements of the context must be linked to the Accused and his role in the war.

321. We will summarise below only some of the elements of the context which the Trial Chamber should keep in mind when making the final judgment. Much of this information has been admitted into evidence and some elements of the context will find their place in other sections of this submission or will be presented in the closing arguments, depending on their subject matter.

[279] Exhibit D537.
[280]

322. During the period covered by paragraphs 3-8 of the Indictment there was a quite unique armed conflict in the territory of today's Bosnia and Herzegovina which took place against a wide-ranging historical background and reflected many conflicting interests. The elements of the nature of this conflict and of its development are perhaps best attested to by the intelligence gathered for and provided to the GŠVRS by the Sector for Intelligence and Security of the GŠVRS headed by Zdravko Tolimir.[281] Some information about the context of the conflict is set out in the Report of the Secretary-General on the fall of Srebrenica,[282] albeit very selectively and often largely concealing the true role of some organisations. Some other studies which have been admitted in evidence can be used for establishing elements of the context of the July 1995 events related to Srebrenica and Žepa, such as Cees Wiebes' study, *Intelligence and the War in Bosnia, 1992-1995*.[283]

323. The Indictment and the decision on adjudicated facts raised certain issues relevant to the beginning of the armed conflict and its development. The information given in the following paragraphs can under no circumstance be considered an exhaustive account of the elements of context.

324. In addition, no argument, fact or conclusion can be understood as *tu quoque* defence, but as elements to be taken into consideration when drawing conclusions and making decisions about guilt or innocence.

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325. In his foreword to the study *The Srebrenica Massacre: Evidence, Context, Politics*, Phillip Corwin, the highest civilian official of the United Nations in Bosnia and Herzegovina in July 1995, said:

> On July 11, 1995, the town of Srebrenica fell to the Bosnian Serb army. At the time, I was the highest ranking United Nations civilian official in Bosnia-Herzegovina. In my book, *Dubious Mandate*, I made some comments on that tragedy. Beyond that, I decried the distortions of the international press in their reporting, not only on that event, but on the wars in Yugoslavia (1992-95) in general. I expressed the wish that there could have been, and must be, some balance in telling the story of what actually happened in Srebrenica and in all of former Yugoslavia, if we are to learn from our experience.[284]

326. Although the roots of the crisis in the former Yugoslavia run much deeper, its beginnings are usually linked to the acceleration of the violent dissolution of the Socialist Federal Republic of Yugoslavia[285] when the SR /Socialist Republic/ of Croatia and SR of Slovenia declared independence (25 June 1991). The proclamation

[281] /REDACTED/
[282] D122, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 - The Fall of Srebrenica
[283] D222.
[284] Exhibit D365 - The Srebrenica Massacre: Evidence, Context, Politics.
[285] Foreword by Phillip Corwin (subtitled The Violent Breakup of Yugoslavia).

of independence generated the conflict, and this was also noted by the then UN Secretary-General, Pérez de Cuéllar, who said:

> Early, selective recognition could widen the ongoing conflict and fuel an explosive situation, especially in Bosnia and Herzegovina.[286]

327. As a result of the recognition of Croatia, the large Serbian population in Croatia had the status of a national minority in this secessionist republic, although they had represented a constituent people before the recognition and were settled on a substantial part of the territory. The consequence of the policy pursued at the time by some Western countries (primarily by the USA, some countries of the then European Community, the Islamic countries and Croatia) was that almost the entire Serbian population were either killed or expelled from Croatia and the areas under the control of the BH government in Sarajevo.

328. Phillip Corwin correctly observes that: "The breakup of Yugoslavia, in fact, was contrary to the last Yugoslav Constitution (1974), which invested the right of self-determination in Yugoslavia's six constituent 'nations' (Croats, Macedonians, Montenegrins, Muslims, Serbs, and Slovenes), and required that all of these nations had to agree to the dissolution of the federal state for it to be legal."[287]

329. At its session of 15 October 1991, the BH Assembly adopted a declaration of sovereignty of BH that was contrary to the Constitution in force at that time. At the suggestion of the Badinter Commission, on 29 February and 1 March a referendum was held "on the independence of BH" in which the Serbian population did not take part and only 63% of Muslims and Croats turned out. The constitutional requirement that two-thirds of voters take part was therefore not met, but this did not stop the Badinter Commission from falsely reporting to the UN Security Council that everyone in BH had come out to vote and the voters had decided in favour of independence".[288] This was followed by the declaration of independence on 3 March 1992.

330. The proclamations of independence turned the Serbian populations in the Republic of Croatia and BH from constituent peoples into a "disenfranchised ethnic group".[289] As stressed by Corwin:

> We allow certain peoples to have historical memory. We allow the Jewish people to remember the Holocaust. And they should remember it. It was a terrible tragedy. But we do not allow the Serbian people to remember their massacre during World War II at the hands of the Nazis and their Bosnian and Croatian fascist puppets. This is not to say that all Bosnians and Croatians were Nazi collaborators; but the Croatian Ustaše regime, which included Bosnia, was. And why should Serbs not have been suspicious and angry when they were suddenly told that vast numbers of their people were about to become minorities in new countries that were led by people who were their

[286] D122, quoted in (C/23280) paragraph 10.
[287] Foreword by Phillip Corwin (subtitled The Violent Breakup of Yugoslavia).
[288] D122, p. 4.
[289] D212, p. 2.

killers during World War II? Especially when the Serbs had never even been consulted![290]

331. A proclamation of 4 April 1992[291] and an order of the BH Presidency declared a general mobilisation. This is the period before the formation of the VRS. "A threat of war was declared on 8 April, and on 12 April Alija Izetbegović issued directives of the TO /Territorial Defence/ Main Staff for an all-out attack on the JNA barracks."[292] These actions were carried out with an exceptionally high degree of brutality.[293] A general mobilisation was declared, *inter alia*, by a special document of the President of the War Presidency in Srebrenica municipality which ordered: "immediately mobilise all able-bodied citizens aged between 16 and 60 years of age for inclusion in the TO units, public security station, CZ /Civilian Protection/ units and compulsory work service."[294]

332. Neither Croatia nor BH met the conditions for the recognition of independence;[295] the governments of both these areas did not have effective control over significant parts of their territories, and the biggest part of the territory of Bosnia and Herzegovina was outside government control. Despite this, Bosnia and Herzegovina was recognised by the European Community on 6 April and by the United States of America on 7 April 1992.[296]

333. The organised and systematic arming of the Muslims in BH had started very early – already in 1991.[297] However, the armed formation called the Army of Bosnia and Herzegovina was officially established on 15 April 1992, and it was composed of several elements: "territorial defence units, police forces, paramilitary forces and criminal elements."[298] Weapons supply channels went mostly through Croatia.[299]

334. The Yugoslav People's Army withdrew from BH on 10 May 1992. The last armed formation to be established in the area of BH was the Army of Republika Srpska. Manojlo Milovanović, who testified as a witness for the Prosecution on 17, 18 and 19 May 2011, considers the creation and development of the VRS in an article entitled "The Creation and Development of the Army of Republika Srpska during the Defensive Fatherland War, 1992 - 1995." In the introduction to this article he says:

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[290] Foreword by Phillip Corwin (subtitled The Violent Breakup of Yugoslavia).
[291] D212, pp. 1 and 2.
[292] D212, p.4
[293] *See:* Petar Salapura, T.13639-13700, D234.
[294] The order was signed by the President of the War Presidency, Hajrudin Avdić. /REDACTED/
[295] D122, para 10.
[296] D122, para 15.
[297] See: D77- Milivoje Ivanišević, The Chronicle of our Cemetery, pp. 2 and 3 in e-court.
[298] P122, paragraph 17.
[299] "Prior to April 1993, when fighting broke out between Bosniaks and Croats, the ARBH was able to secure a limited amount of military materiel from foreign supporters via Croatia. The Croats, who constituted 17 per cent of the population, were dominant in the HVO. This force also brought together territorial defence units, police forces, paramilitaries and certain prominent criminals. Unlike the ARBH, however, the HVO enjoyed the backing of the Republic of Croatia, which provided a broad range of support." P122, para. 17.

> When it was obvious that the other two ethnic communities in BH (the Muslims and the Croats) were forming their own armies, the formation of the Army of the Serbian Republic of BH began, pursuant to the Decision of the National Assembly of RS of 12 May 1992. On 8 May 1992 the incomplete (rump) SFRY /Socialist Federative Republic of Yugoslavia/ Presidency adopted a decision that the remaining parts of the JNA /Yugoslav People's Army/ be withdrawn from the territory of BH by 19 May, although it had previously been agreed that it would remain for the next five years - until 1997 - and protect each of the three peoples equally until a political settlement was reached. The decision was implemented by 20 May. The unprotected Serbs had to organise their own army, for they lacked any other protection. At the 19th session of the National Assembly of RS, on 12 August 1992, the Serbian Republic of BH changed its name to Republika Srpska, which required that the Army too change its name, and from then until its dissolution (on 31 December 2005) it was called the Army of Republika Srpska (VRS).[300]

335. The war waged in the territory of the former Yugoslavia in 1991, "was a warning to the Serbian people in BH that a resumption of the pogroms from the period 1941-1945 was coming. Secessionist exclusivity, supported by the external factor, was the order of the day. Slovenia and Croatia, and then the Muslim-Croat coalition in BH as well, started a civil war in Yugoslavia."[301] The concern of the UN Secretary-General that "early, selective recognition could widen the ongoing conflict and fuel an explosive situation, especially in Bosnia and Herzegovina"[302] proved to be well-founded, and, after the secession of Slovenia and Croatia, and later Macedonia, the Muslim and Croatian leaders abandoned the search for peaceful coexistence and decided, against the will of the Serbian people which represented about 31% of the total population of BH, "on independence at any price, including war, which is what they brought about."[303]

336. From its formation and effectively until its abolition in 2005, the VRS was up against not only the armed forces of the Muslims and the Croats, but also NATO. The Muslims started the ethnic cleansing of the Serbian villages and settlements as early as 1992, while labelling the Serbs "Chetniks" and "aggressors" and using these terms in official documents.

337. In the period 1992-1995 massacres and persecutions were committed against the Serbian population throughout BH. Some evidence of these massacres of the Serbian population, especially in the Podrinje area, is in the case file. These are images of horror and unprecedented atrocities committed against this population.

338. Religious leaders also took part in the arming of Muslims in Podrinje. For example, the religious official or *hodja* effendi Munib Ahmetović from Vlasenica made a statement before the authorities of the Ministry of the Interior of BH in this

[300] Manojlo Milovanović, *The Creation and Development of the Army of Republika Srpska during the Defensive Fatherland War in BH, 1992 - 1995* (D261, p.1).
[301] D261, p. 1.
[302] D122, quoted in (S/23280) paragraph 10.
[303] D212, p. 1.

municipality on 24 April 1992 to the effect that he had been engaged since the beginning of that year in the procurement of weapons which he either distributed or sold to Muslims, mainly in villages in Vlasenica and Milići municipalities but also in other municipalities. At the time he gave that statement to the Serbian and Muslim officials, he had been engaged in this activity for about four months.[304] The channels of weapons supplies were numerous.[305]

339. Around this time, the Crisis Staff of the Muslim SDA /Party of Democratic Action/ of Bratunac, as stated in the study of Milivoje Ivanišević, "The Chronicle of our Cemetery", issued "a kind of proclamation" where the following is said:

> Spare no efforts to achieve our sovereignty; do not respond to call-ups and deployment of our young men to the JNA; operate in strict secrecy and do not think that the fate that befell Croatia will not befall us; intensify surveillance of military facilities and other significant facilities; this is where our people employed with the police could play an important role, given that they are authorised to stop a suspicious person, check his identity, conduct a search and seize his weapon which will then be used to arm our people; work out a plan for the destruction or takeover of vital facilities; elaborate in detail how to block road communications; make up a list of Muslim traitors who should be liquidated at once, before all this begins, because they are likely to make more difficult the realisation of our plans.[306]

340. In Srebrenica, Bratunac, Milići, Vlasenica and other Podrinje municipalities "it was predominantly the helpless Serbian hamlets in the villages with mixed populations that came under attack first; then followed the completely isolated Serbian villages surrounded by the Muslim environment, and only then the compact Serbian areas."[307] As stated in "The Chronicle of our Cemetery":

> The ethnic cleansing of the Serbian territories in the municipalities of Bratunac, Milići, Srebrenica and Skelani began by Muslim attacks on the small hamlets of Gniona in Srebrenica municipality, Blječeva (6 May, St. George's Day) in Bratunac municipality, and Metaljka (2 June 1992) in Milići municipality. Then followed attacks on other Serbian villages (Rupovo Brdo, Loznica, Ratkovci, Brezani, Zagoni, Kmijci, Magašici, Ježeštica, Podravanje and others). During this campaign against the Serbian settlements, the Muslims swept away everything in their path and enlarged the occupied territory every day. The Serbs were constantly retreating and after only six months of this ethnic invasion, they managed to hold onto a dozen villages. Meanwhile, the Muslims occupied more than thirty ethnically pure Serbian villages and all hamlets in the mixed villages and local communes (around 70). But that was not the culmination of the ethnic cleansing of these territories.

[304] D74, p. 3.
[305] D74, p. 3.
[306] D74, p. 4.
[307] D74, pp. 6-7.

> In January 1993 (on Christmas Day and in the next ten days), crazed attacks, torching and destruction were unleashed on the last large Serbian areas, such as Kravica and Skelani and the surrounding villages. That was the peak of the Muslim aggression in the Podrinje area. They occupied almost everything, except for the narrow stretch along the Drina River and the centres of the Serbian municipalities of Milići, Skelani and Bratunac.[308]

341. The Serbs fled Srebrenica en mass and in panic on 9 May 1992, taking with them "only items they could grab in a hurry".[309]

342. The chronicle of the attack on the undefended or poorly defended Serbian villages and settlements is set out in detail in Milivoje Ivanišević's study "The Chronicle of our Cemetery", which gives the dates of the attacks and sometimes descriptions of the attacks, as well as lists of persons who were killed in those places and identified direct perpetrators of these crimes. Many Serbian victims were killed in the most brutal way: they were set on fire, their abdomens were cut open, or they were decapitated or trampled, or they suffered blows with blunt objects or had their throats slit.[310] Naser Orić, Zulfo Tursunović and other Srebrenica military commanders were prominent among the attackers.[311] These attacks were accompanied by devastation. According to Ivanišević, out of approximately 8,000 Serbian households, about 5,400 or 68%, lost their property.[312]

343. Claims made in Milivoje Ivanišević's book concerning the crimes committed against the Serbian population of Podrinje are supported by video and documentary evidence that has been admitted during the trial, as well as by witness statements.[313] This evidence includes *inter alia* the following: /REDACTED/. The crimes and their monstrous nature are attested to by numerous video clips admitted into evidence as Prosecution exhibits P02734: Video clips of crimes in Pobrđe, Zagoni (aftermath), Video clips of massacre at Rogosija (aftermath), Attack on Skelani 16 January 1993 (aftermath), Attack on Bjelovac, Sikirica (aftermath).

344. One of many examples of the atrocities committed against the Serbs of Podrinje was described by witness Božo Momčilović. In his statement he says:

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[308] D74, p. 6. *See also,* for example, Momir Nikolić, 12 April 2011, T.12680: "The well-known Kravica Christmas attack of January 7th, 1993? A. I think you misunderstood me about that answer I gave to the Presiding Judge. I said, "For example," and then I mentioned the attack on Kravica, so I wasn't speaking about a specific attack on Kravica. And for you present in the courtroom here, the attack of the 7th of January may be the most prominent, and I know about it, but I was just citing an example, saying in case of attack or attacks on villages such as Kravica. And in 1992, there were about 30 attacks of that kind. So I wasn't talking specifically about the attack on Kravica of the 7th of January, 1993."
[309] D74, p. 6.
[310] D74, p. 16.
[311] D74 p. 9-16. *See also:* P1098, which is identical to P1626 (List of War Criminals Known to VRS Who committed crimes in Bratunac, Vlasenica, Milići and Skelani municipalities, dated 12 July 1995).
[312] D74, p. 29.
[313] *See in particular:* testimony of Božo Momčilović and Witness PW-063.

> I was in Kravica on the Orthodox Christmas Day of 7 January 1993 when the Muslims attacked my village. My father didn't want to withdraw with the refugee column and abandon his home. I found him on 17 March 1993, when the village had been liberated. He was lying dead in front of the house, and his head had been cut off and thrown next to a fence nearby. His house had been destroyed, as had all the other houses in the village.[314]

345. The witness said, among other things, the following:

> Q. Can you tell us, please, if there were any attacks on other Serbian villages in the environs of Srebrenica in 1992, 1993, and 1994 that you are aware of?
>
> In 1993, when Kravica was torched there was also Skelani, which was then also attacked on the 16th and the 17th. So except for Bratunac, all the villages had been attacked and destroyed by mid-March except for Bratunac.
>
> Q. Thank you. So who destroyed them and what year was this in? You said that all the Serbian villages had been destroyed?
>
> Q. Could you please repeat for the transcript who attacked the other villages after the 7th of January 1993? Which villages were destroyed in 1993 by the Muslims? Thank you.
>
> A. Under the command of their commander, Naser Oric, from the centre which was located in Srebrenica, villages along the Drina were burned; these were Fakovići, Bjelovac, Skelani. That was in one day. All the surrounding, smaller villages in the area of Bratunac, Srebrenica, the entire Kravica in 1993. Then there was some other villages from May to August that were destroyed. So by mid-May, Bratunac was the only village that had not fallen in that area where we were. And perhaps a couple of other villages along the Drina.[315]

346. Speaking about the crimes against the Serbian population in the Podrinje municipalities, witness PW-063 said:

> All Serb villages in the territory of the Bratunac municipality were destroyed and torched. All of them. It was only the town that remained whereas all the villages were destroyed except for this very small area down by the Drina where the Muslims could not -- that the Muslims could not get to because they

[314] D160 (Statement of Božo Momčilović) p. 2.
"Please, could you describe to the Trial Chamber when the Muslim attack occurred on Kravica, on which occasion your father was killed?
A. The 7th of January, 1993, and then the war actions began in May.
A. It was all completely destroyed, all the houses, the barns. Only two persons were captured, an elderly man in his 60s and a woman older than that. Later they were exchanged.
An army soldier was captured. He was killed in Srebrenica and he was found after Srebrenica was liberated. Some 38 people were killed and that was the number of those killed at that Christmas attack."
Božo Momčilović, T.9804-9805.
[315] Božo Momčilović, 14 February 2011. *See:* T.9802-9805. *See also:* T.9807-9808.

> would have to go through town in order to reach that area, but all the other Serb villages were torched and destroyed.[316]

347. Witness PW-063 testified about the massacres committed in 1992 and 1993 and about the "tragic situation in Bjelovac when 109 people were killed in one day. Of these, 90% were civilians. In January, on Christmas Day, 60 people were killed in Kravica. About 30 people were also killed in Bjelovac, and then 25 in Pakovci. These were the worst large-scale murders in the territory of Srebrenica."[317]

348. A similar fate befell the Serbian population in places occupied by the Muslim forces. For example, witness Marko Milošević[318] testified that the entire Serb population was expelled from Kladanj municipality and places where they lived and all their belongings were destroyed. The population – the elderly and unarmed civilians – who did not escape from the territory of Kladanj municipality were captured and held in Stupari.[319] Some were housed in camps and kept there for some time until they were exchanged.

349. In short, as witness PW-065 testified:

> Since the Serb villages in the territory of the municipality of Srebrenica were burned down 100 per cent, all the Serb population from Srebrenica was in Bratunac and all the Serb population from the municipality of Bratunac from the burned down villages were staying in the town of Bratunac. So the town which before the war had a population of about 7,000 must have had about 12,000 at that point.[320]

350. Even after Srebrenica and Žepa were declared safe and demilitarised zones, attacks were continually launched from them,[321] as will be discussed in greater detail below in the section on the reasons and nature of the attacks on Srebrenica and Žepa.

351. The Muslims fought the propaganda war against the Serbs on a number of fronts while enjoying the status of a victim in the eyes of the international community. However, the most monstrous atrocities inflicted on the Serbian population were hardly ever discussed.

352. During the examination of witness Škrbić, the Prosecution presented the following point of view:

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[316] PW-063, 19 October 201, 6503:7-13.
[317] /REDACTED/ (PW-063, 19 October 2010, 6500-6502).
[318] Marko Milošević, 8 October 2010.
[319] *See:* Marko Milošević, 8 October 2010, T.2375–2378.
[320] PW-063, 19 October 2010, T.6503: 17-22
[321] "Q. Can you please tell us if you remember, since you were mobilised as it was mentioned in the summary in 1994, were there any attacks from the safe area by the Muslims on surrounding Serbian villages in the area after 1993, after the demilitarised area was declared?
A. The provocations never stopped. People kept getting killed, passages were mined. There were actions of that nature, yes." *See:* Božo Momčilović, 14 February 2011, T.9809: 19-24.

> And it's the position of the Prosecution, General, that that second position, when General Mladić and General Krstić and the other commanders say to their troops and say to their people that "the Croats and the Muslims are coming to commit genocide on you," that that was done for the purpose of to vilify the Muslim people and engender hatred against them. And that it's this kind of propaganda and politicising war that can lead and does lead and did lead to mass execution.[322]

353. However, while the Serbs were aware of the danger of having to face a third pogrom (which did take place during the war in the former Yugoslavia), the Muslims were openly calling for the killing of Serbs and celebrated each Serbian life lost. Thus Mr Ključanin, the editor of the magazine *Ljiljan* and an author whose "works" are included in all the recent anthologies of Bosnian literature,[323] wrote the following on 23 February 1994:

> There are some 500 Serbian orphans in Ugljevik. *Mashallah* /what Allah wills/! The BH Army has so far sent about 50 thousand Chetniks to Hell. *Eyvallah* /so be it/! In the future, Serbian mothers will, as Ibrahim would put it, give birth to clods of ice instead of children. *Insallah* /Allah willing/! Every Serbian orphan is only a sign that Allah, Glory to Him, is slowly but surely evening the scales whose one side reads EVIL and the other GOOD. The only hand that equalises the Scales of God is the hand of the Bosnian soldier. The souls of our martyrs will not rest until every criminal Serbian soul ends in Hell. Then and only then, can the war end .... A Serb comes close to being a man only if he is dead or imprisoned.[324]

354. A statement such as this undoubtedly contains the powerful charge of a directly expressed genocidal intent (the intent to destroy all the Serbs in the territory of the former Yugoslavia).

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355. *The Prosecutor v. Tolimir* case concerns events during the armed conflict in the former Yugoslavia, which was a specific armed conflict with deep roots (stretching back to before the Second World War), powerful historical residues and an even more powerful influence of the international factor on its development and final outcome.

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[322] T18720:17-24 (1 February 2012) The witness answered this question as follows: "THE WITNESS: [Interpretation] Your Honours, words have a very precise meaning to me, and if they don't, I cannot interpret them. It was interpreted to me that Mr. McCloskey said that the Muslims were coming. That is a -- that is an action which takes place at a moment in time. The moment -- but that wasn't so. The Muslims were coming to uproot the Serbs. However, it never happened that we were told, 'The Muslims are coming to kill you.' This instantaneous action, here they are. No, that never happened. Apart from that, the analysis of combat readiness from 1992 is a document at the disposal of this Tribunal, too. And it says in that document that genocide against the Serbian people is a possibility." T.18721:5-15.
[323] About this author see Exhibit D540.
[324] D539

356. The war in the former Yugoslavia was a battlefield of numerous local and international interests, with the prevalent influence of what theory now refers to as "international politics" of different factors.[325] For establishing both the relevant events and the role of Zdravko Tolimir, it is necessary to take into account as facts relevant to this case not only the activities of the VRS (which was only an armed formation of one party to the conflict - Republika Srpska), but also the activities of the BH Army as the other warring party and, indirectly, as will become apparent below, the role of the Croatian Armed Forces. However, because of the witnesses who testified in this case and also because of the impact of UNPROFOR and NATO on the development and, indeed, escalation of the conflict, special attention must be paid to their role during the war when they came down on the side opposing (against) Republika Srpska (and consequently against the VRS).

357. The meaning and significance of the events in the former Yugoslavia during the war in the '90s, including the events in Podrinje and in connection with the unfortunate enclaves of Srebrenica and Žepa, can be understood only in a broader context. /REDACTED/ which is a solid reminder and indicator of the nature of the conflict:

/REDACTED/.[326]

358. The Accused in the present criminal proceedings was an assistant commander for intelligence and security. His role cannot be viewed only in the context of events which took place at two, not very large, locations. As indicated by a number of intelligence reports (a few were admitted into evidence; other available intelligence reports were not admitted because they were not translated into English), the enclaves were not the only object of interest, but they were a significant factor in the war because the entire conflict was reflected through them: threats, blackmail, wartime trading of territories, arms trading (a very lucrative activity), the influence of the Islamic world and so on. Republika Srpska and the VRS, as it seems in many cases, stood alone against everyone, and their leadership did not want to accept all the evil deeds which the foreign policy of the time was committing through the medium of the conflict in Bosnia and Herzegovina.

359. As Phillip Corwin has pointed out, "It was geopolitics, not original sin, that drove NATO ambitions."[327] At one meeting that General Tolimir had with Admiral Leighton Smith, the Commander of NATO forces in Europe, "Admiral said that their role was to establish a balance of forces between the ABH and VRS."[328]

360. Top-ranking foreign representatives regularly threatened the VRS and Republika Srpska with bombing. On at least several occasions they actually stated the

[325] /REDACTED/
[326] /REDACTED/
[327] D365.
[328] Petar Škrbić, 31 January 2012, T.18652. At another meeting of VRS representatives with General Clark and Saakashvili, General Clark claimed that their assessment was there was not a balance of power in Bosnia-Herzegovina until 1995 and that he would do his best in order to restore this balance of power or, rather, that the balance be tipped to the advantage of the Army of Bosnia and Herzegovina. Petar Škrbić, 31 January 2012, T.18649.

real reasons behind these threats. General Škrbić [329] well remembers the following words of General Wesley Clark, then US Secretary of Defence, at a meeting between Clark, Saakashvili and General Rose and representatives of the VRS:

> General Wesley Clark told General Mladić that he had come to reach an agreement or to try to exert some influence for the contact group's plan to be adopted. In that respect, he highlighted a number of facts that would compel the VRS to accept the plan of the contact group. He told General Mladić that the Army of Bosnia and Herzegovina had 450 tanks, 300 pieces of artillery, that it also had more troops than the Army of Republika Srpska. He also said that he was not going to go into how skilled they were, but they were obviously having larger numbers and that this was going to disrupt the balance of power and that eventually the Army of Republika Srpska would find itself in dire straits. He suggested to General Mladić, being an influential man and an experienced soldier, to do his best to have the plan accepted.

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361. In the Indictment and the Pre-trial Brief, the Prosecution depicts the events in a manner which loses sight of the fact that a civil war was underway and that it involved many protagonists, both domestic and international. This is shown *inter alia* by the intelligence reports of the Intelligence and Security Sector of the Main Staff of the VRS and numerous other items of evidence presented during the trial. These include /REDACTED/, the book by Rupert Smith and so on.

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362. The Prosecution cites the following as elements of the context: an alleged Decision on Strategic Objectives (P22), attacks by paramilitary formations, Directive No. 4, resolutions of the Security Council declaring Srebrenica, Žepa and Goražde safe areas, a document written by Slavko Ognjenović and Directive No. 7 (Paragraphs 3-8 of the Indictment). It cites Directive No. 7 as key evidence for the alleged "Joint Criminal Enterprise, the common purpose of which was to force the Muslim population out of the Srebrenica and Žepa enclaves" (paragraph 36 of the Indictment). However, the Prosecution allegations about the policy of ethnic cleansing and so on cannot be attributed to Zdravko Tolimir, neither within the context nor outside it.[330]

[329] Petar Škrbić, 31 January 2012, T.18648.

[330] *See, for example:* D 274, VRS Main Staff, Security and Intelligence Administration, 28 July 1992, Report on paramilitary formations in the territory of the former Yugoslavia. Paramilitary formations and groups are an important feature of the war in the former Yugoslavia. The paramilitary formations in the territory of the SR BH have identifying markings such as … and display iconography ranging from Orthodox ornaments and Chetnik symbols to Vietnam war symbols. Their basic characteristics are described on the entire six pages in order to conclude: "The presence and activity of paramilitary formations affect the Serbian people adversely in two ways: (1) by diminishing their trust in the government and its strength to deal with war profiteers, criminals and mass murderers; and (2) by immensely demoralising members of SR BH Army, which often results in their abandoning positions."

363. Before considering the key issues relating to the Indictment, the Defence asserts that the elements of the context set out in paragraphs 3-8 of the Indictment cannot serve as a basis for examining the role of Zdravko Tolimir in the events relating to 1995.

364. However, the immediate context in which the events in Srebrenica and Žepa should be considered is the situation that existed in the period from the end of 1994 until the beginning of operation *Krivaja 1995*. The causes of the events referred to as "the fall of Srebrenica" materialised precisely in this period of time. Before that, we will only touch on some of the issues raised by Indictment and on the arguments of the Prosecution in connection with the alleged Decision on Strategic Objectives, and we will try to determine what the true strategic objectives of Republika Srpska were and, in particular, which strategic objectives were to be achieved by the VRS.

THE STRATEGIC OBJECTIVES AND DIRECTIVE NUMBER 6

365. In paragraph 2 of the Indictment, the Prosecution mentions an alleged "Decision on the Strategic Objectives of the Serbian People in Bosnia and Herzegovina" which, according to the Indictment, was passed on 12 May 1992 (when it was supposedly signed by Momčilo Krajišnik, President of the Assembly) and published on 26 November 1993. (P22) In its Pre-Trial Brief, the Prosecution said that the contents of these alleged strategic objectives "reflected the policy to remove the Bosnian Muslim population from the Drina valley region".[331]

366. The alleged decision on the strategic objectives was never adopted by the Assembly of Republika Srpska. The "Record of the 16th Session of the Assembly of the Serbian People of Bosnia and Herzegovina held on 12 May 1992 in Banja Luka"[332] does not contain a decision on strategic objectives. The preamble of the decision which was published in the *Official Gazette of Republika Srpska* about a year and a half later (as we will later show by mistake), namely on 26 November 1993, says that "The Assembly of the Serbian People in Bosnia and Herzegovina, at its session of 12 May 1992, passed a Decision on the Strategic Objectives of the Serbian People…"[333] This discrepancy clearly indicates that such a decision was never passed.

367. According to the testimony of Momčilo Krajišnik (in the case of the *Prosecutor v. Popović et al*), who was President of the Assembly at the time in question, the alleged strategic objectives were presented at that session in order to acquaint deputies with the positions of the delegation at the negotiations. The goal of this presentation was not "to oblige anyone by adopting any decisions. Our goal was to continue with the negotiations."[334] With respect to the publication of this "decision", not even Momčilo Krajišnik, who was President of the Assembly in 1992, had any information that it had been published.

368. When certain members of the newly-formed GŠVRS /Army of Republika Srpska Main Staff/[335] met with the representatives of the political leadership on 16 May 1992, only a few days after the 12 May session, there was a question about the goals of the war, "so that the Main Staff could come up with strategy for waging the war". However, they were not told about the strategic objectives. The first time Manojlo Milovanović heard about these strategic objectives was during the trial in the case of the *Prosecutor v. Milošević*.[336]

369. The Trial Chamber ruling in the *Prosecutor v. Krajišnik* case, commented on this document by saying, "An anachronistic reading of the May goals is not only inadvisable, it misses the point,"[337] indicating that they lacked content and useability.

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[331] Prosecution Pre-Trial Brief, paragraph 11.
[332] P2477
[333] P22 (p. 886 of the *Official Gazette of Republika Srpska* of Friday, 25 November 1993).
[334] D299, Selection of pages from the testimony of Momčilo Krajišnik in Case no. IT-05-88 dated 2 June 2008, p. 2 in E-court.
[335] General Mladić, General Milovanović and Colonel Tolimir (Manojlo Milovanović, 18 May 2011, T. 14277.
[336] Manojlo Milovanović, 18 May 2011, T. 14277.
[337] *Prosecutor v. Krajišnik*, Trial Chamber, Judgment, paragraph 995.

370. However, these goals, presented by Radovan Karadžić, President of Republika Srpska, at the session of the Assembly of the Serbian People in BH on 12 May 1992, do not contain a single provision which could be considered unlawful or might hint at the alleged policy of persecution. In the *Official Gazette* which published the non-existent decision, these goals were formulated in the following way:

1. State delineation from the other two ethnic communities.
2. Corridor between Semberija and Krajina.
3. Establishment of a corridor in the Drina river valley, that is to say, the elimination of the Drina as a border between Serbian states.
4. Establishment of a border on the Una and Neretva rivers.
5. Division of the city of Sarajevo into Serbian and Muslim parts, and establishment of effective state authorities in each part.
6. Access for Republika Srpska to the sea.

371. At the Assembly session, President Karadžić did not put forward a proposal to adopt the decision, but a kind of action programme of the political leadership of Bosnia and Herzegovina. The goals presented by President Karadžić at the Assembly session are in full accordance with international law and they contain legitimate aspirations. The context of these strategic objectives, as Karadžić presented them, is on pages five to eight of the Assembly session minutes.[338] The strategic objectives are explained there. First, the state delineation from the other two ethnic communities can in no way be interpreted as the implementation of a policy of ethnic cleansing. State delineation is not the same as the formation of an ethnically pure national state, but the formation of two states in the territory of Bosnia and Herzegovina.[339] The formation of an ethnically clean Serbian state was not the goal of either the military or the political leadership. State delineation implies the creation of states in each of which one nation is the primary holder of sovereignty, but not the creation of an ethnically pure state. Karadžić explained this clearly at the Assembly session by equating "separation from the two other ethnic communities" with "separation of states".[340]

372. In terms of the alleged third strategic objective, "the elimination of the Drina as a border between Serbian states" can in no way be interpreted as the ethnic cleansing of Podrinje /the Drina valley/. At the 16 May 1992 session, President Karadžić called the establishment of a corridor on the Drina river the "elimination of the Drina as a border between two worlds".[341] That the thought behind this strategic objective was not the ethnic cleansing of Podrinje is clear from the minutes, which say, "We now see a possibility for some Muslim municipalities to be set up along the

[338] P2477, pp. 8-12 in E-Court.
[339] Contrary to paragraph 12 of the Pre-Trial Brief: "Strategic Objectives 1 and 3 reflected the policy to remove the Bosnian Muslim population from the Drina Valley region. These objectives were largely completed with the removal of the Bosnian Muslim population from the Srebrenica and Žepa enclaves in July 1995. Only the Goražde enclave survived intact until the end of the war."

[340] P2477 (Minutes …) p. 8 in Serbian, last paragraph and p. 9 first paragraph.
[341] P2477, p. 13 in E-Court.

Drina as enclaves, in order for them to achieve their rights, but that belt along the Drina must *basically* belong to Serbian Bosnia and Herzegovina."

373. General Ratko Mladić spoke at the Assembly session, particularly stressing that "we must respect the law of war" and clearly saying that the goal was not the killing or deportation of the Muslim population:

> We cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that the Serbs would fall through and the rest leave. Well that is, that will not, I do not know how Mr Krajišnik and Mr Karadžić would explain this to the world. People, that would be genocide. **We have to call upon any man who has bowed his forehead to the ground to embrace these areas and the territory of the state we plan to make. He has his place with us and next to us.**[342]

374. However, instead of a non-existent decision about the strategic objectives, the strategic objectives are defined in another document. It is clear that the strategic objectives published in the *Official Gazette of Republika Srpska* on 26 November 1993 were published by mistake. This is clear from Directive no. 6 (exhibit D300), which was published earlier, on 11 November 2003, before the publication of the alleged decision about the strategic objectives in the Official Gazette, and it was operational at the time when the alleged decision about the strategic objectives was published.

375. Directive no. 6 by the Supreme Command of the Republika Srpska Armed Forces, signed by Radovan Karadžić and passed on 11 November 1993,[343] in other words after Srebrenica, Žepa and Goražde had been proclaimed "safe areas", lays down the strategic objectives:

376. In terms of the Tasks of the VRS /Army of Republika Srpska/ (item 3 of Directive no. 6, exhibit D300), one of the tasks of the VRS is listed as the following:

> Create objective conditions for achievement of the strategic war goals of the Army of Republika Srpska, including:
> a) the liberation of Sarajevo;,
> b) defining the borders of Republika Srpska on the Neretva river and gaining access to the sea in the Neum — Zaton and the Cavtat — Prevlaka sectors,
> c) defining the borders of Republika Srpska in the Una river basin, and
> d) expanding the borders of Republika Srpska in its northeastern part and establishing firmer ties with Serbia.

377. These strategic objectives contain nothing that relates to the Srebrenica, Žepa and Goražde enclaves. The strategic war objective of expanding the north-eastern part

[342]

[343] D300

of Republika Srpska relates to the area where the corridor that connects the two parts of Republika Srpska is very narrow.[344]

378. Directive no. 6, which was adopted after Srebrenica, Žepa and Goražde had been proclaimed safe areas, says in the part entitled "probable intentions": "Secure sufficient quantities of heavy weapons and ordnance for extensive offensive operations towards VRS-controlled territory in order to gain access to the Sava river (in the Brčko area) and the Drina river (in the Goražde and Srebrenica areas)."[345] Since the Srebrenica, Žepa and Goražde enclaves were not demilitarised, the Drina Corps was given the task to "use some of the forces to maintain the blockade of enemy forces in the Žepa, Srebrenica and Goražde enclaves, constantly inflict losses on them and disrupt their communications, and put up decisive defence on the front towards Kladanj and Olovo."[346]

379. In one word, the position of the Prosecution (and of Richard Butler) that the strategic objectives reflected the policy of ethnic cleansing is speculative and unfounded. On the other hand, the above materials (Minutes from the Assembly session of 12 May 1992 and the entire content of Directive no. 6) clearly illustrate the situation in which Republika Srpska found itself at the time[347] and the wider geo-strategic situation within which Bosnia and Herzegovina then existed.

[344] See D301. Compare with P104, map 4 (see Richard Butler, 16920-16922, in particular 16921: 20-16922:9).
[345] D300, p. 2 (Serbian).
[346] D300, p. 5 (Serbian).
[347] See item 1 of Directive no. 6.

DIRECTIVES 7 AND 7/1

380. The Indictment links the alleged "joint criminal enterprise to forcibly remove the Muslim population of Srebrenica and Žepa" to the period after 8 March 1995, which was the day that Directive no. 7 was issued. The position of the Defence is that the part of Directive 7 relating to the tasks of the Drina Corps regarding the civilian population was never applied. The vague formulation of the tasks of the Drina Corps was entirely ignored and replaced by Directive 7/1 of the GŠVRS Commander.

381. In Republika Srpska directives could be issued by the Supreme Commander (i.e. the President of Republika Srpska) or the Commander of the Army of Republika Srpska Main Staff.[348] The drafting of directives was done in accordance with the instructions for the work of commands and staffs using a set methodology. There was a full, or complete method of work, an abridged method of work, or a method which was called "work without consulting the organs and commands".[349] Colonel Ljubomir Obradović testified about the process of drafting directives. However, as he said during the trial, he described the general process but he had never participated in drafting any of the directives.[350] He found out about Directive 7 by accident when he had to get something from the safe of General Miletić.[351] There is no reliable information about how the tasks of the Drina Corps came to be formulated in Directive 7. However, the rule is that "the part which pertains to the enemy is the part that is processed and then proposed as the finalised product by the intelligence organ. From the basic idea to the defining of the combat task and all in between is defined by the staff."

382. The role of the Intelligence and Security Sector could possibly have been only to supply information relevant to items 1 and 2 of the Directive (basic characteristics of the international military and political situation and the Croat-Muslim armed forces),[352] but not to formulate tasks for the corps.

383. The information contained in Directive 7 (items 1 and 2) talks about a highly unfavourable situation and the "probable goal and intentions of the Muslim forces". Among other things, item 2.1.1.1. of the Directive says that the Muslims are planning to launch a spring offensive on selected axes (towards Šipovo, Srbobran, Vlašić, Teslić, Doboj, Brčko, Majevica, **Kozluk, Šehovići, Vlasenica, Han Pijesak**, the Semizovac – Olovo road, Trnovo, Borci, Nevesinje and Ripče".

> In the second phase they will probably extend their operations in order to occupy the remaining territory of the RS, and to join Muslim territories in

[348] Novica Simić (P) T. 28659.
[349] Ljubomir Obradović, 29 March 2011, T. 11992-11993.
[350] Ljubomir Obradović, 29 March 2011, T. 11995.
[351] Ljubomir Obradović, 29 March 2011, T. 11996.
[352] "We only worked on collecting intelligence on the enemy, I repeat. But we were also interested in intelligence on the activities of the international community, because we were looking for a way to end the war. Our service also dealt with contacts and activities further afield with similar institutions and organisations in other neighbouring countries, countries in the region." Petar Salapura, 2 May 2011, 13482: 12-17.

> order to create a unitary state, focussing on joining the enclaves and reaching the Driva river.[353]

384. However, tasks issued in directives were not always carried out. After Directive 7 was issued (on 8 March 1995), General Mladić issued Directive 7/1 (31 March 1995),[354] referring to the tasks issued to the VRS in Directive 7 and setting specific tasks for the Drina Corps which did not mention anywhere the creating of unbearable conditions for the locals of Srebrenica and Žepa. In other words, Directive 7/1 replaced Directive 7 and the Drina Corps was given a new task. Had the VRS intended to create unbearable conditions for the population of Srebrenica and Žepa, that would have had to be in the Directive.

385. Prosecution investigator Richard Butler responded to one question as follows:

> Could you please tell us, based on your research, does a directive cease to be valid when a new directive is issued, unless the second directive repeats a goal that was outlined in the previous directive?
>
> In the context of Directive 6, for example, being superseded by Directive 7, I would agree. However, in the context of looking at Directive 7 and Directive 7-1, it's clearly evidence that Directive 7-1 is not designed to supersede Directive 7; it is designed to supplement it with additional and more detailed guidance.[355]

386. This position cannot be accepted because the GŠVRS is the strategic organ that commands the corps. If it amends a task that it issued in the previous directive, then the amended task is what is valid, and not the one from the previous directive. In this specific case, the principle applied is that the later legal act supersedes the previous one in every aspect in which the two do not correspond, and certainly the task issued to the Drina Corps in Directive 7/1 is significantly different from the task issued to it in Directive 7. Had the GŠVRS Commander intended to meet all the elements of Directive 7, it would have been illogical to issue a new directive.

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[353] Colonel Salapura, who was at the time in question Chief of the Intelligence Administration, said: "A: I was not aware of the directive. I was not a participant in its drafting. I didn't even know that it was being prepared. I claim with full responsibility that people who were members of my organ didn't know either. As far as I know, I learned of that directive only in 1997. That's when I learned that it had been done. Lazić, an operative in the Drina Corps, told me that, and he was one of those who had participated in its drafting. I suppose that that was done by the commanders in a circle consisting of his assistants. I believe that a lot of intelligence information went into the directive, and they could have been obtained from the Drina Corps. And in the ops room there was a detailed map, an intelligence map which was updated every day by intelligence officers. And if you consulted the computer, you could have the updated information on Žepa and Srebrenica in five minutes, and that could have been provided either to Tolimir or Miletić. That was our obligation. We as intelligence officers were obliged to do that without even knowing what the purpose of that exercise was." (Salapura, 13496-13497).

[354] Exhibit P1199.
[355] Richard Butler, 20 July 2011, T. 16923.

387. Apart from this, there is no evidence in the Directive from which one could conclude that the part of Directive 7 which relates to the Drina Corps was ever implemented. On the contrary, the situation on the ground, regarding the convoys, for example, had an entirely different background and in no way does it constitute implementation of the tasks of the Drina Corps. For example, the Drina Corps was not authorised to issue or refuse to issue passes for the passage of humanitarian aid, etc. And as we will later see, humanitarian aid did reach the enclaves during that period. In one word, the task issued to the Drina Corps was pointless. Directive 7 did not give the Army of Republika Srpska a similar task (in item 3 of the Directive).

388. Apart from this, there is no evidence that Tolimir participated in formulating the tasks for the Drina Corps in Directive 7, or that Tolimir shared the intention expressed therein regarding the tasks issued to the Drina Corps, or that he worked on implementing the tasks of the Drina Corps.

DEFENCE FINAL TRIAL BRIEF

SREBRENICA, ŽEPA AND GORAŽDE AS UNDEMILITARISED ZONES AND THE REASONS FOR THE ATTACK ON SREBRENICA AND ŽEPA

389. In paragraph 18 of its Pre-Trial Brief, the Prosecution put forward the position that the "enclave was never *completely* demilitarised" and that the BH Army 28th Division, under the command of Naser Orić, regularly attacked the nearby villages of the Bosnian Serbs in order to get food, supplies and weapons. That was an organised attempt to tie down VRS units and keep them away from the Sarajevo front.

390. The position of the Defence is that the Prosecution is twisting the real situation and downplaying the fact that, contrary to the Security Council resolutions and the Demilitarisation Agreement, the Srebrenica, Žepa and Goražde enclaves were not only not demilitarised, but were actually used by the BH Army as military strongholds. However, they were demilitarised only on paper. In UN reports these zones were marked as having been demilitarised, while the real situation on the ground was completely different.

391. The legal significance of the fact that the Srebrenica and Žepa enclaves were not demilitarised lies in the fact that the failure of one party to a conflict to respect the Demilitarisation Agreement relieves the other party of the obligation to respect the legal regime of the demilitarised zones. Moreover, whether the zone was demilitarised or not is not a matter of proclamation but of fact.

THE DEMILITARISATION AGREEMENT

392. The United Nations Security Council adopted Resolution 819 on 16 April 1993, when it declared that, "All parties and others treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act." Resolution 824 placed Srebrenica and Žepa under UN protection. As the Report of the Secretary-General says, "Following the adoption of Resolution 819 (1993), and on the basis of consultations with members of the Council, the Secretariat informed the UNPROFOR Force Commander that, in its view, the resolution, calling as it did for the parties to take certain actions, created no military obligations for UNPROFOR to establish or protect such a safe area."[356] The text of the demilitarisation agreement was agreed in Sarajevo on 17 April and signed the next day, 18 April 1993, by General Mladić and General Halilović. However, the Muslim side maintained that the text of the agreement related only to the urban area of Srebrenica. The first contingent of UNPROFOR forces (Canadians) arrived in Srebrenica on 18 April 1993. The Muslims in Srebrenica were obliged to surrender all their weapons to UNPROFOR. However, General Halilović gave an order that no useable weapons be surrendered, with the result that only practically unusable

[356] Report of the Secretary-General, "The Fall of Srebrenica", D122, paragraph 58.

weapons were surrendered.[357] As Naser Orić, then 8th OG /Operations Group/ Commander, later 28th Division Commander, later explained, "We did not want the Chetniks to see the weapons that we had not delivered. That would be an argument for them to refuse signing the agreement, or to do who knows what. We had some 2,000 barrels, I knew that for sure. And I did not know everything. Weapons were being hidden. We kept some 20 cannons, 21 four-barrelled ones, which we turned into single-barrelled cannons, so in the end they were PATs /anti-aircraft guns/."[358]

393. As the Secretary-General's report on the fall of Srebrenica says:

> The Secretariat informed the force commander that, in the light of the views of several Security Council members, he should not pursue the demilitarisation process in Srebrenica with undue zeal, ruling out, for example, house-to-house searches for weapons. On 21 April UNPROFOR released a press statement entitled "Demilitarisation of Srebrenica success". That document stated that "UNPROFOR troops, civilian police and military observers had been deployed in Srebrenica since 18 April to collect weapons, ammunitions, mines, explosives and combat supplies and that by noon today they had completed the task of demilitarising the town." The statement further noted that "almost 500 sick and wounded had also been evacuated from Srebrenica by helicopters and humanitarian aid convoys have been entering the town since Sunday." The Force Commander was quoted as saying, "I can confirm that from noon today the town has been demilitarised … The UNPROFOR team prepared a final inventory of all the collected weapons and munitions, which were then destroyed by UNPROFOR."[359]

394. The agreement of 18 April 1/99/3 was followed on 8 May by a more comprehensive demilitarisation agreement in which generals Mladić and Halilović agreed on the establishment of a legal regime in the Srebrenica and Žepa safe areas.[360]

395. The Demilitarisation Agreement again confirmed Security Council Resolution 824 and the ceasefire agreement signed the same day, and it confirmed that the Geneva Conventions of 12 August 1949 and Additional Protocol I (relating to the Protection of the Victims of International Armed Conflicts) were fully applicable to the conflict in Bosnia and Herzegovina. The Agreement implemented Article 60 of Additional Protocol I, which regulated the legal regime in a demilitarised zone.[361]

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[357] *Ibid*, 61, also see D126 (Article from the newspaper *Oslobođenje* by Edina Kamenica, "Weapons that were handed over were out of order." Subject: Private conversation between Naser Orić and Dr Rusmir Mahmutčehajić).
[358] Exhibit D126.
[359] D122, paragraph 62.
[360] See Exhibit D21.
[361] Article 60 of Additional Protocol I
1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.
2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after

396. The Agreement envisaged that the areas of Srebrenica and Žepa would be demilitarised, that this would include the area within the current lines of conflict and that the UNPROFOR Commander would mark the precise boundaries on the ground after consultations (see Articles 1 and 2).

397. The provisions of the Agreement envisaged the following:

> Article 3.
>
> Every military or paramilitary unit will have either to withdraw from the demilitarised zone or submit/hand over their weapons. Ammunition, mines and explosives and combat supplies in the demilitarised zones will be handed over/submitted to UNPROFOR.
>
> After submission/hand over of all weapons, ammunition, mines and combat supplies in the DMZ, the contracting parties will declare that the demilitarisation is complete.

398. The Agreement envisaged that the handover or surrender of weapons and ammunition would be completed by 1700 hours on 10 May 1993 in Srebrenica, and by 1700 hours on 12 May in Žepa (Article 3). The Agreement also envisaged that UNPROFOR would control the demilitarised zone and that UNPROFOR would have freedom of movement both inside and outside the zone in order to get supplies and carry out rotation.

399. Article 5 of the Agreement especially envisaged the following:

> Non combatants who are in or who are willing to enter the demilitarised zone, except members of UNPROFOR, are not permitted to have in their possession any weapon, ammunition or explosives. Weapons, ammunition and explosives in their possession shall be seized by UNPROFOR. Combatants will not be allowed to enter or to be in the demilitarised zone.

400. In one word, the Demilitarisation Agreement defined the legal status of the area in accordance with Article 60 of Protocol I of the Geneva Conventions. The BH Army never respected the Agreement or adhered to a single one of its provisions. On the other hand, they enjoyed UNPROFOR protection. As the Report Based on the Debriefing on Srebrenica[362] says, the Dutch Battalion was given the following tasks, which were based on the aforementioned ceasefire agreement and Security Council resolutions:

> a. to monitor compliance with the ceasefire;
> b. to disarm the BH Army;

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the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

[362] Assen, 4 October 1995 (Exhibit D20), paragraph 2.23.

c. to support the provision of humanitarian aid.

401. However, neither did the BH Army adhere to its obligations under the Agreement, nor did the Dutch Battalion in Srebrenica or the Ukrainian Battalion in Žepa endeavour to demilitarise the enclave in accordance with their mandate.

* * *

402. The basic characteristics of the situation in Srebrenica, especially during 1995, were as follows: UNPROFOR did not have freedom of movement within the enclave; the Srebrenica and Žepa enclaves were being regularly supplied with weapons and made preparations for offensive combat operations from the enclave, and they carried out sabotage and terrorist operations from the enclave. UNPROFOR did not do anything to disarm them and prevent the attacks from the enclave, or use force to enable freedom of movement in the enclave.

403. Within the enclave, UNPROFOR had limited freedom of movement. This became particularly obvious when around 100 members of the Dutch Battalion were taken hostage in the Bandera triangle.[363] As Major Boering said, "In any case, after having been detained for two or three days, we were able to return to our base. True freedom of movement, however, we did not have."[364]

404. UNPROFOR did not only tolerate the presence of the BH Army in Srebrenica; they even held regular weekly meetings with them,[365] and the situation regarding the smuggling of weapons from Žepa could not have remained unknown to them. Moreover, as will later be presented in detail (in the section on the UNPROFOR convoys), the Dutch Battalion was providing the BH Army with certain equipment.[366]

405. The Srebrenica and Žepa enclaves were intensively arming themselves and preparing to carry out offensive combat operations. They also carried out sabotage and terrorist attacks from the enclave (there will be more about this later).

406. The VRS protested in vain about the attacks from the enclave, but the Dutch Battalion did not do anything to stop these attacks.[367]

407. At one point in May 1995, the Dutch Battalion and the BH Army signed an agreement on the joint defence of the enclave in case of a VRS attack. At that meeting, attended by Major Franken and Sergeant Major Rave, they insisted that this

[363] See exhibit D66.
[364] Pieter Boering, 16 December 2010, T. 9032. For the location of the Bandera triangle, see D67.
[365] Pieter Boering, 16 December 2010, T. 940-5-6; see also
[366] P2120, BH Army 2nd Corps report No. 02/9-2-3140/95 on meeting with DutchBat, signed by Esad Hadžić, dated 30 May 1995.
[367] For example, at the request of the command (probably the Main Staff), Momir Nikolić complained to the Dutch Battalion several times that the demilitarisation had not been carried out as it should have been. Record of interview with Momir Nikolić, Srebrenica, 20 October 2000, NIOD /Dutch Institute for War Documentation/, exhibit D206.

"remain at the highest level of secrecy" and said that they did not want military observers to attend the meeting.[368]

* * *

408. This state of affairs gave the VRS (that is to say, the armed forces of Republika Srpska) the right to carry out an attack on the enclave in accordance with Article 60 of Protocol I. Namely, pursuant to Article 60 of Protocol I:

> If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

409. The Prosecution gives as the reasons for the attacks of the BH Army (28th Division, later 8th OG) from the enclave that they carried out the attacks in order to get food and weapons, and to tie down VRS units and to keep them away from the Sarajevo front. However, the primary goal of these attacks from the enclave was not to collect food but to score significant military results. There is no evidence to show that the attacks were carried out to get food (which arrived in humanitarian aid convoys, or was locally produced or came from Žepa). The tying down of the VRS in order to keep it away from the Sarajevo front (that is to say, to weaken the position of the VRS on the Sarajevo front) had an entirely different purpose. It was a secondary or marginal military goal, with the primary goal being the joining of this territory with the rest of the territory under BH Army control.

THE REASONS FOR THE ATTACK ON SREBRENICA AND ŽEPA – THE OBJECTIVE OF OPERATION *KRIVAJA 95*

410. The reasons for the attack on Srebrenica and Žepa do not lie in Directive 7 or 7/1, nor in the intention to expel the civilian population of Srebrenica and Žepa, but in the fact that offensive combat operations were being carried out from Srebrenica and Žepa, and preparations were under way for joining the territory of the Srebrenica and Žepa enclaves with the territories of the Tuzla and Podrinje district.

411. As Milomir SAVČIĆ said:

> I can say here with full responsibility that if they hadn't attacked us, if they had not launched offensives against us (the VRS), the VRS would never have attacked that area because we did not have either tactical or operative or strategic reasons to place that area under our control.[369]

412. The plans of the BH Army were not unknown to UNPROFOR. On the contrary, the Dutch Battalion II had reliable information about the plans of the BH

[368]

[369] Milomir Savčić, T. 15289: 21-25.

Army and the fact that the VRS knew about the plan to join the enclave with the central part of the territory. This operation was supposed to be carried out by the 28th Division from Srebrenica and units of the BH Army 24th Corps. An intelligence report by the 8th OG from Srebrenica dated 29 July 1994 says the following:

> In a conversation with UNPROFOR representatives in Srebrenica on 29 July 1994, we found out that they were informed and in possession of information on the preparation for combat operations of high intensity from the direction of Kladanj, towards Han Pijesak and Vlasenica, which will be carried out in the coming days.
> UN forces' representatives also found out in a conversation with one of the Commanders of the BH Army, who is currently visiting Kladanj, that a brigade was being formed in the Kladanj area of inhabitants from the municipalities of Han Pijesak and Vlasenica, which will carry out b/d /combat operations/ and liberate these towns. UN representatives also have at their disposal information that the Commander of the 2nd Corps has been staying in Kladanj and is personally making the preparations for carrying out b/d.
> There is also suspicion that Serbian intelligence sources have breached the UN forces satellite communication system and are in possession of information on preparations and carrying out b/d in this area.[370]

413. Various reports discuss the large quantities of weapons in Srebrenica and Žepa. One report entitled "Enemy units in the Srebrenica area"[371] says that during July 1994, the UN facilitated the visit of the following people to Sarajevo: Ramiz Bećirović, Nenad Bektić and Hakija Meholjić. The report says that the work on reorganisation was completed in September 1994 and that the 8th OG included … The document says that they had significant quantities of weapons, including automatic and semi-automatic infantry weapons, light machine-guns, *Zoljas* /hand-held rocket launchers/, hand-held launchers, anti-aircraft guns, 60-mm mortars, howitzers and PATs /anti-aircraft guns/.

THE PLAN TO JOIN UP THE ENCLAVES AND THE PLAN IN THE EVENT OF A VRS ATTACK ON THE ENCLAVE AND THE ARMING OF THE SREBRENICA AND ŽEPA ENCLAVES AND THE BACKUP PLAN TO (BREAK OUT OF ENCIRCLEMENT IN THE EVENT OF A VRS ATTACK)

414. Even earlier, the BH Army had tried to join up the enclaves with the central part of the territory controlled by the BH Army. However, in late 1994, plans were drafted.[372] The Supreme Command of the BH Armed Forces worked on drafting this plan together with the BH Army 2nd Corps. A letter sent by General Hadžihasanović to Srebrenica 8th OG Commander Naser Orić says the following:

[370] Exhibit D360 (BH Army, 8th OG Command, Intelligence Section, No: 130-26-16/94, Intelligence report regarding 28 and 29 July 1994).
[371] D207 (in the top left corner there is a stamp from military post 2996 from Milići with the date 14 April 1995).
[372] Exhibit P2369. Also see: Richard Butler, 20 July 2011 T. 16939: 1-25, 21 July 2011 16948: 16-25 16962: 1-5; Petar Škrbić 1 February 2012 18688-18689: 1-19; Ratko Škrbić 7 February 2012 18927: 16-25 18943: 1-25.

> The plan is: Liberate in active combat actions part of the temporarily seized territory of Bosnia and Herzegovina – the municipalities of Bratunac, Vlasenica, Šekovići, Zvornik and Kalesija, and link the free territories of Žepa and Srebrenica with the free territories of Zvornik, Kalesija and Živinice, in order to create a permanent free corridor for the supply of the population and logistics support to the units of the Army of BH, and a basis for the further liberation of northeastern Bosnia as a whole.[373]

415. The concept defined in detail the borders of the corridor and the way the task was to be carried out with the engagement of the 8th OG forces from Srebrenica, the forces from Žepa and certain units of the BH Army 2nd Corps. The document says that a significant precondition for the execution of the operation would be the supply of the "minimal quantity of ammunition and UBS /weapons/" (item 4.5). It says that everything would be "prepared fast" and it envisages the use of helicopters "just before the beginning of the operation for the transfer of ammunition and UBS and during the operation for the evacuation of the seriously wounded" (item 4.12). The plan of preparations required secrecy during its realisation and the provision of information "only in segments" without providing the entirety of it "to anyone until the specified moment and our approval" (item 4.9).[374]

416. This document provides a plan in the event of an attack on the enclave. Namely, item 4.8 says the following:

> We have realistic information that the Chetniks are preparing to attack you, but we do not know yet when and how. Should this be the case, a troublesome defence lies in store for you in the final breakthrough from the encirclement, which is a very complex operation, because you will have the people on your back, the loss of free territory and movement through occupied territory. Compared to that, this operation does not have such significant problems. It is essential that we commence the operation before the Chetniks decide to attack. We can and will help you to break through the encirclement, but certainly on a smaller scale and less effectively than in the execution of the operation.

417. In other words, there were two plans: a primary one for offensive operations to join up the territories;[375] and a second plan to break out of encirclement if the enclave were attacked.

418. The evidence presented during the trial indicates that the BH Army did serious work on preparations for the launching of the planned offensive operations, which included, among other things, the reorganisation of the 28th Division and the taking of measures to raise combat readiness and provide supplies both by land and through "airlifts"[376] (17 helicopter sorties), etc.

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[373] *Ibidem.*
[374] *Ibidem.*
[375]
[376] D63 (Final Analysis of the Srebrenica and Žepa airlift), D67 (OU-Sarajevo, PEB Section for Communication and PEZ, BH Army HQ; No. 1/825-1147 Report by 1st Corps Command).

419. The VRS had reliable information about these plans and their realisation. For example, an intelligence report of 2 April 1995 with the typed signature of Zdravko Tolimir says the following:

> It has been confirmed that the Muslim forces in Srebrenica, Žepa and Goražde are continuing with preparations for offensive operations, and that they are using the Srebrenica - Žepa axis for the manoeuvre of forces and the movement of civilians and goods. They are supplying ammunition and weapons by air. A great deal of the population is expressing fear and the wish to leave the enclaves because of the announced escalation of combat operations and the feeling of isolation. On 22 April of this year, the Muslim forces carried out reinforcement on the axes leading to Borci village and stepped up artillery fire from the Bijela village sector (Konjic).[377]

ATTACKS FROM THE SREBRENICA AND ŽEPA ENCLAVES

420. The attacks from the enclave against the territory of the Main Staff of the Army of Republika Srpska were very frequent. The main command post of the GŠVRS in Crna Rijeka was exposed to threats "on a daily basis", which made the work of the GŠVRS very difficult. As General Petar Škrbić said:[378]

> On the Han Pijesak-Crna Rijeka road, I also received information that workers at a petrol station had been killed. This petrol station was used by the Army of Republika Srpska, and it was in the village of Pod Plane, between Han Pijesak and Crna Rijeka, and this was also done by a sabotage group.
>
> When I came to the Main Staff, the basic command post was threatened on a daily basis by fire coming from mortars or other weapons. The rear command post in Han Pijesak was not in danger from those same directions. It was in danger from the direction of Pjenovac, which is in a completely opposite way. In addition to that, during the digging of trenches for water-pipes, General Mladić and I found a place on a hill where members of the BH Army had been staying, members from Žepa. We found a piece of paper, and then the commander told me, "You see, general, how seriously threatened we had been."
>
> In addition to that, Your Honour, the Crna Rijeka command post was fortified for defence. But in spite of that, our soldiers were being killed every day. Members of the protection regiment were recruits. They were not people who were drafted. And I am talking about young men between the ages of 17 and 21. This was particularly emotionally difficult for us.
>
> When expanded meetings of senior staff members with the commander of the Main Staff were being held, we would meet in an underground facility under

[377] D178 (HQ VRS, Intelligence Sector, Str. conf. no: 12/45-4 6, intelligence information).
[378] Petar Škrbić, 31 March 2012, T. 18638-18639,; see also Milomir Savčić and Slavko Kralj.

> the Žepa mountain particularly in order to avoid exposing ourselves to any danger. Around the command post, we had defence lines built with dugouts and trenches, and we had a round-the-clock combat duty service in those facilities.
>
> Now, these are these basic elements that indicate that there were armed operations coming from Žepa and Srebrenica and targeting the Main Staff".

421. The road used by the officers of the Main Staff from the command post in Crna Rijeka to the logistics command post in Han Pijesak was very risky. Due to the constant danger of attacks by groups from Srebrenica and Žepa, especially in 1995, the commander ordered the military police to provide escort or combat security.[379] The VRS Main Staff was familiar with the axes used by (BH Army) armed groups from Srebrenica and Žepa, and they used caves for temporary accommodation. This road joined Žepa and Srebrenica with Kladanj and Olovo. They called the axes used by the Muslims "Allah's road".[380]

422. Tolimir sent the following report about one of those attacks:

> On 23 June of this year at 0200 hours, a unit of approximately 300 soldiers headed out from Srebrenica led by Ibrahim MANDŽIĆ, the commander of the 280th iblb /Eastern Bosnia Light Brigade/, Vejz ŠABIĆ, the commander of the 284th iblb, his deputy Šemso SALIHOVIĆ, and a Muslim guide called Zoran ČARDAKOVIĆ. The unit's task was to insert itself that same day at approximately 2000 hours into the general sector of Ružina Voda, Han Pijesak municipality, via Žepa and Radava. This group is equipped with automatic weapons with a couple of 60 mm mortars and some RPG /rocket propelled grenades/.
>
> In the above sector, this group is to use combat to attract the VRS forces in order to secure safe passage for Naser ORIĆ, who is also travelling with a large group from the direction of Kladanj and will supposedly travel through Pjenovac, Podžeplje and Radava to Srebrenica. If it comes to large-scale combat in this area, the plan is to have Zulfo TURSUNOVIĆ commence combat with his unit from Sućeska in the direction of Bešića Brdo in order to link up the forces.
>
> According to our information, the return of Naser ORIĆ is connected with plans to commence combat operations from the Srebrenica enclave, which, supposedly, is conditioned by the possible taking of the Vis elevation in the Serbian municipality of Kalesija by the Muslim forces from the direction of Kalesija, whereby they would create conditions for further penetration towards the municipality of Šekovići. Following this, combat would supposedly begin from the direction of Kladanj towards the VRS defence lines in the zone of responsibility of the Vlasenica Brigade, when the units from Srebrenica would

[379] (Petar Škrbić, 31 January 2012, 18642).
[380] T. 18642-3.

> insert themselves towards Konjević Polje via the sector of Buljim in the Milići municipality.[381]

KRIVAJA 95

423. The goal of Operation *Krivaja* was not to expel the civilian population but to prevent the realisation of offensive combat operations by the Muslims from Srebrenica and Žepa. The goal of Operation *Krivaja* is given in the Order for Active Combat Operations issued by the then DK /Drina Corps/ Commander on 2 July 1995,[382] which clearly says:

> As part of an all out offensive against Republika Srpska territory, the enemy has carried out attacks with a limited objective against the DK /Drina Corps/ units. We believe that in the coming period the enemy will intensify offensive operations against the DK zone of responsibility, mainly on the Tuzla-Zvornik and Kladanj-Vlasenica axes, with simultaneous activity by the 28th Division forces from the enclaves of Srebrenica and Žepa, in order to cut the DK zone of responsibility in two, and connect the enclaves with the central part of the territory of the former Bosnia and Herzegovina, which is held by the Muslim forces. During the last few days, Muslim forces from the enclaves of Žepa and Srebrenica have been particularly active. They are infiltrating DTG /sabotage and terrorist groups/ which are attacking and burning unprotected villages, killing civilians and small isolated units around the enclaves of Žepa and Srebrenica. They are trying especially hard to link up the enclaves and open a corridor to Kladanj.

Further in the text of the Order there is detailed information about the available data regarding the engagement of the forces of the 28th Division from Srebrenica and Žepa and it contains their plans.

424. The goal of this operation is stated as the following: "By a surprise attack, to divide and reduce in size the Srebrenica and Žepa enclaves, improve the tactical position of the forces in the depth of the zone and create conditions for the elimination of the enclaves."

425. No reasonable trier of facts could conclude that civilians were the targets of the attack. The reason for the attack is clearly given in the Order, which also determined its target. From a legal point of view, pursuant to Article 60 of Additional Protocol I and the Geneva Conventions, the VRS had an indisputable right to carry out an attack against the enclave. The position of the Defence is that none of the other evidence adduced suggests that the attack targeted the civilian population.

426. *Krivaja* had a limited military purpose, which was only to shrink the enclaves and create conditions to occupy them. There was a change in the decision on 9 July 1995, but even then the target was not the civilian population.

[381] GŠVRS Sector for Intelligence and Security information report (12/44-77/1) on enemy activities in the area of Srebrenica – Han Pijesak, signed by Major General Zdravko Tolimir.
[382] Exhibit P1201.

427. On 9 July 1995, General Zdravko Tolimir passed on the approval of the President of the Republic to continue fighting in Srebrenica. The document conveying this approval to occupy Srebrenica speaks clearly about the intention regarding Srebrenica. This was not a document that was meant to be shown to the public, but one bearing the classification "strictly confidential". Therefore, there can be no speculation that this document was issued for purposes other than that it had to be strictly adhered to during the conduct of further combat operations. The document firmly states:

> The President of Republika Srpska has been informed of successful combat operations around Srebrenica by units of the Drina Corps and that they have achieved results which enable them to occupy the very town of Srebrenica.

428. The second paragraph stresses clearly the goal of occupying Srebrenica, which is in no way connected to an attack against the civilian population. Namely, this document says:

> The President of the Republic is satisfied with the results of combat operations around Srebrenica and has agreed with the continuation of operations *for the takeover of Srebrenica, disarming of Muslim terrorist gangs and complete demilitarisation of the Srebrenica enclave*.

429. The same document conveys an order which is formulated in a way that leaves no room for the kind of speculation or interpretation in which the Prosecution engages:

> The President of Republika Srpska ordered that in the follow-up combat operations full protection be ensured to UNPROFOR members and the Muslim civilian population and that they be guaranteed safety in the event of their cross-over to the territory of Republika Srpska.

430. Zdravko Tolimir *phrased* the next paragraph *in the form of an order*:

> **In accordance with the order of the President of Republika Srpska, issue an order to all combat units participating in combat operations around Srebrenica to offer maximum protection and safety to all UNPROFOR members and the civilian Muslim population. Order subordinate units to refrain from destroying civilian targets unless forced to do so because of strong enemy resistance. Ban the torching of residential buildings and treat the civilian population and war prisoners in accordance with the Geneva Conventions of 12 August 1949.**

THE OBJECTIVE OF THE ATTACK ON ŽEPA

431. Just as the objective of *Krivaja 95* was not to attack the civilian population, nor was this the objective of the attack on Žepa. Pursuant to an order by General

Ratko Mladić, on 13 July 1995 Radislav Krstić (at the time the order was issued still Chief of Staff of the Drina Corps) issued the order for an attack on the Žepa enclave (*Stupčanica 95*).[383]

432. The introductory part of the Order says that the enemy had been completely crushed in the Žepa enclave, that mopping up of the terrain was under way and that in Žepa enclave "defence has been organised by the forces of the Žepa Brigade, and they have about 1,200 men" and that, apart from them, about 700-1,000 soldiers from the defeated units in the Srebrenica enclave had escaped to Žepa and were expected to join the defence of the Žepa enclave. In item 9(c) of the order, it explicitly states that:

> The civilian Muslim population and UNPROFOR are not targets of our operations. Collect them together and keep them under guard, but crush and destroy armed Muslim groups.

[383] P1225.

DEFENCE FINAL TRIAL BRIEF

THE UNFOUNDED NATURE OF THE CHARGES OF GENOCIDE (COUNT 1 OF THE INDICTMENT), CONSPIRACY TO COMMIT GENOCIDE (COUNT 2 OF THE INDICTMENT) AND MURDER AS A CRIME AGAINST HUMANITY AND VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

COUNTS 1-5 OF THE INDICTMENT

433. Count 1 of the Indictment charges the Accused of genocide, Count 2 of the Indictment of conspiracy to commit genocide, Count 3 of extermination as a crime against humanity, count 4 of murder as a crime against humanity and count 5 of murder as a violation of the laws or customs of war. The time frame mentioned in the indictment for these crimes is the period between 11 July 1995 and 1 November 1995.

434. Since the charges of alleged participation in and contribution to a joint criminal enterprise and murder partially overlap with the alleged contribution to a joint criminal enterprise to forcibly transfer and deport, this part of the arguments will follow the structure of the Indictment as far as it is possible to do so.

*

435. As a part of these charges, the Prosecution claims that: 1) Tolimir acted with genocidal intentions (paragraph 18 of the Indictment); 2) Tolimir and the people mentioned in the Indictment had an agreement to kill all able-bodied Muslims from Srebrenica who were captured after the fall of the enclave, and to remove the remaining Muslim population in order to exterminate them; 2) he oversaw Ljubiša Beara in the execution of the alleged task to organise and facilitate transportation, summary executions and the burial of Muslim victims (paragraph 18 of the Indictment); 3) Zdravko Tolimir allegedly knew that the alleged forcible transportation of women and children from Srebrenica and the separation of the men in Potočari would create conditions which would contribute to the extermination of the entire Muslim population in Eastern Bosnia, among others, because they would not be able to lead normal lives or reproduce; 3) he knew about the plan to exterminate and bury able-bodied men in Srebrenica and allegedly facilitated the forcible transfer and deportation of the Muslim population of Srebrenica; 4) he proposed to General Mladić that hundreds of people captured along the Konjević Polje-Bratunac road be secreted from the international forces by being placed in buildings so they could not be viewed from the air; 5) he oversaw the 10th Sabotage Detachment when parts of this unit killed over 1,700 men at the Branjevo Military Farm and the Pilica Cultural Centre, and on around 23 July 1995 when parts of this unit killed 39 Muslim men in Bišina; 6) pursuant to the powers given to him by Commander Mladić, he was responsible for the treatment of all Muslims captured after the fall of the Srebrenica enclave and obliged to ensure their safety and welfare, which he allegedly failed to do.

OVERSEEING LJUBIŠA BEARA

436. Zdravko Tolimir is charged with overseeing Ljubiša Beara who, according to the Indictment, was allegedly "given authority for organising, coordinating and facilitating the detention, transportation, summary execution and burial of the Muslim victims." In this Brief, the Defence will not discuss the role of Naval Captain Ljubiša Beara in the events related to July 1995. Given the lack of evidence that in the relevant time period Tolimir oversaw him, the question of the role and the actions of Ljubiša Beara is irrelevant. During trial, not a single piece of credible evidence was or

could have been presented that Tolimir oversaw Ljubiša Beara during the time frame when the Prosecution claims the mass murders occurred (paragraphs 21.1-21.15).

437. The Defence would like to take this opportunity to reiterate that Zdravko Tolimir is not accused on the basis of command responsibility. The fact that Tolimir was Assistant Commander for Intelligence and Security and, as such, Chief of the Intelligence and Security Sector, to which the Security Administration belonged, is not sufficient grounds to infer (a conclusion which would satisfy the standard of beyond reasonable doubt) that in the relevant time period Tolimir knew what tasks Naval Captain Ljubiša Beara was engaged on, or that he oversaw him. For example, the evidence does not contain a single report by Ljubiša Beara or any other officer that would lead to the conclusion that Beara informed Tolimir about any of his activities linked to the fall of Srebrenica.

438. The position of the Defence is that Zdravko Tolimir did not oversee Ljubiša Beara during the time that the alleged murders described in paragraphs 21 and 22 of the Indictment were being committed. This is supported by the fact that from 12 July Zdravko Tolimir was dealing with events in Žepa, and during that period Beara was in entirely different locations.

439. **Conclusion**: One cannot conclude beyond reasonable doubt on the basis of all the evidence presented during the trial that Tolimir oversaw Ljubiša Beara in the relevant period.

CHARGES OF OVERSEEING THE 10th SABOTAGE DETACHMENT

440. Paragraph 21.11 of the Indictment contains the charge of the murder of captured Muslims at the Branjevo Military Farm and in Pilica (locations in the zone of responsibility of the Zvornik Brigade). Paragraph 21.15.2 of the Indictment contains the charge of murder in Bišina, which, according to the Indictment, was carried out by the members of the 10th Sabotage Detachment.

441. There is no evidence that in the relevant time period Tolimir oversaw the 10th Sabotage Detachment as the Indictment says, or that he participated in any way whatsoever in the engagement of the 10th Sabotage Detachment. On the relevant dates Tolimir was in Žepa. Colonel Salapura stated that when he tried to get in touch with him on 12 July, he was told by the Intelligence Administration (by Mamlić or some other officer) that Tolimir was in Žepa and so they could not convey to him an important intelligence report regarding plans for an attack on the Republic of Serbian Krajina (*Storm* 1995). He first talked to Tolimir on the telephone on 19 July.[384] Salapura who was in the professional sense in charge of the 10th Sabotage Detachment did not know that the members of this unit were in Branjevo on 16 July.

442. The Prosecution appears to base its position regarding the overseeing of the 10th Sabotage Detachment on its false perception of the position of the 10th Sabotage

[384] *See:* Petar Salapura, D535, p. 32; Petar Salapura, 13562-13563.

Detachment and the powers that the Intelligence Administration and the Intelligence and Security Sector had in relation to this headquarters support unit.

443. The 10th Sabotage Detachment was an independent unit of the GŠVRS and was directly subordinated to the Commander of the VRS Main Staff.[385]

444. The following rules apply to the overseeing of sabotage and reconnaissance units, as explained by Colonel Salapura:

> These units are subordinated from the brigade up to the corps, to the corps chief of staff. The detachment that we had at the Main Staff is directly subordinated to the commander, and all of these units were independent units. That was the status they had. A detachment – the detachment, for example, had the status that was the same or equal to that of the brigade and the regiment, so they were subject to all the rules applying to that particular level of command and they were subordinate to the command. The intelligence organ can only, in the expert sense, propose to the commander the use of the unit, but exclusively in relation to sabotage and reconnaissance tasks. Other than that, they don't have any other powers and cannot – and I don't think any commander would propose anything like that, because those who were in charge of those units wanted these units to be used in the manner that they were meant to be used. The use of units is something that is in the domain of the commander or the chief of staff's duties.
>
> Q: When you say that this is non-standard use, would you say that expert organs are obliged to oversee the non-standard use of some unit; for example, an artillery unit?
>
> No, they are not. We are not able to monitor that either. Something that is ordered by the commander or the chief of staff, or if the unit is re-subordinated, then in that case that is not part of our jurisdiction. We only participate in the preparation of a unit, a reconnaissance unit, for reconnaissance duties, infiltration into enemy areas, gathering of information in order for an attack to be carried out in a certain area or at a military target, and we would check whether the unit has been appropriately trained for such a task in order to prevent excessive losses and to make sure that we send out the unit and that the unit comes back safely.[386]

445. During the attack on Srebrenica on 10 July 1995, the 10th Sabotage Detachment was resubordinated to the Drina Corps Command.[387]

446. The engagement of the 10th Sabotage Detachment on 16 July 1995 and allegedly on 23 July 1995 was an illegal use of this unit for a purpose other than its

[385] Petar Škrbić, 30 January 2012, T. 18654-18656; Petar Salapura, D525, p. 41; Petar Salapura: 13486-13487.
[386] Salapura: 4 May 2011, T. 13648-13649.
[387] Salapura, T. 14393-14394.

designated purpose. The Intelligence Administration and the Intelligence and Security Sector had nothing to do with it.[388]

447. The Defence notes that the evidence regarding the manner of engagement of the 10th Sabotage Detachment on 16 July 1995 in connection with events at the Branjevo Military Farm and Pilica is self-contradictory. This especially relates to the testimony of Erdemović, Dragan Todorović and Dragomir Pećanac regarding the engagement of individuals from the 10th Sabotage Detachment. However, since the only relevant question regarding the engagement of the 10th Sabotage Detachment is whether Tolimir oversaw this unit in the way described in paragraphs 21.11 and 21.15.2 of the Indictment, the other matters are irrelevant to the establishing of guilt or innocence.

448. Conclusion: **The Prosecution has not proved that Tolimir oversaw the 10th Sabotage Detachment on 16 and 23 July 1995.**

[388] Petar Salapura, D535, pp. 40-44.

THE ALLEGED CONTRIBUTION TO THE JCE TO DETAIN AND MURDER BY PROPOSING TO GENERAL MLADIĆ THAT HUNDREDS OF CAPTURED PEOPLE ALONG THE KONJEVIĆ POLJE-BRATUNAC ROAD BE SECRETED FROM THE INTERNATIONAL FORCES BY BEING PLACED IN BUILDINGS SO THEY COULD NOT BE VIEWED FROM THE AIR (EXHIBIT P125)

449. In paragraph 29(b) of the Indictment Tolimir is charged with the following: "On 13 July 1995, he assisted in the JCE to detain and execute the able-bodied men from Srebrenica by proposing to his commander Ratko Mladić that the hundreds of Muslim prisoners being detained along the Konjević Polje-Bratunac road be secreted from international forces by being placed in buildings so they could not be viewed from the air" (paragraph 29b of the Indictment).

450. The Prosecution did not prove that the piece of paper admitted into evidence as exhibit P125 is authentic. There are many arguments to support the position that this document is not authentic. However, even if the Chamber considers the document to be authentic, it does not contain anything illegal, nor any fact which, linked to other facts, could serve as a basis for the conclusion that this document is a contribution to the JCE. Third, no action was ever taken on the alleged orders in this document.

451. The document is a part of an alleged collection of documents called *Atlantida* /Atlantis/, but none of the witnesses ever confirmed that such a collection really existed (as discussed in more detail above).

452. It says in the document that it was issued from a non-existent forward command post.[389] Namely, at that time, Colonel Savčić did not have enough men to establish a forward command post.[390] In other words, the 65th Motorised Protection Regiment never had a forward command post in Borike or at the school in Sevojsko. As witness Čarkić testified, there was no forward command post in Sevojsko, only the command post of one of the battalions of the Rogatica Brigade.

453. This document could never have been sent via teleprinter in this form because it was not signed.[391] As Colonel Savčić said:

> What matters and what is controversial is that there is no signature here. I can guarantee that none of the communications officers would have dared to receive the document and process it and sent it without that signature. There is no stamp. There is no signature. There's nothing. You have many years of legal practice yourself, and if you consider that this document is useable, I certainly don't mind. But I'm saying again the content of the document is not controversial.[392]

[389] Namely, Milomir Savčić and 30 soldiers from the Protection Regiment, whom he commanded, were in Borike, which was in the zone of responsibility of the Rogatica Brigade. At that time there was no third unit. If that was someone's command post, then it would have been the forward command post of that unit and not of the 65th Protection Regiment /and/ Milomir Savčić.
[390] Milomir Savčić, T. 15756.
[391] Zoran Malinić, T. 1530.
[392] Milomir Savčić, 21 June 2011, T. 15812

454. During the period in question, Savčić did not have a teleprinter machine at the place where he was. As witness Savčić said, "And even if you (Tolimir) asked me to help you out with that, I would not have been able to do that."[393] Moreover, that same day, 13 July, Tolimir sent two telegrams via the Rogatica Brigade[394] and it is therefore unreasonable to assume that he would have sent a proposal to General Mladić "for his information" through the commander of the 65th Protection Regiment.

455. The form of the document leaves much to be desired and it does not look like a document issued by a professional army officer. As Major Malinić, to whom this document was allegedly sent, said, "Anyone who has ever issued a single order would tell you that an order may not look like this and not in this form."[395] His testimony fully accords with the testimony of Milomir Savčić, who is the supposed author of this document, and who said that, "What's controversial is the form. The … General Tolimir is making suggestions a little, and I am making suggestions myself."[396]

456. Major Zoran Malinić testified that he never acted on this alleged order,[397] nor did he have the equipment that would make it possible for him to carry out the order he had allegedly received.

457. In terms of the content of the proposal, there was nothing illegal about it, nor anything that could lead to a conclusion about involvement in a criminal activity.[398]

458. On 13 July 1995, the unit of Zoran Malinić, who at the time was the commander of a military police battalion, was making a list of prisoners of war.[399]

THE ACTIONS AND ROLE OF ZDRAVKO TOLIMIR IN THE RELEVANT TIME PERIOD OBVIOUSLY CONFLICT WITH THE POSITION OF THE PROSECUTION REGARDING HIS ALLEGED PARTICIPATION IN THE KILLING OF ABLE-BODIED CITIZENS OF SREBRENICA

I don't think it's questionable any more whether I would have sent it this way. The question is whether anybody among the encrypting officers would have dared to accept it without a signature, because anybody in Borike who owns a typewriter could have written anything and bring it to the encrypting officer to be sent. You know that I was very well respected, not only in the Protection Regiment, but in all the units of the VRS, but I still don't believe that any encrypting officer, any communications officer, would have dared to accept a document without my signature (T. 15815-15817). *See also:* T. 15821-15823, 15825.

[393] Savčić, T. 15823

[394] Exhibits P123 and P145, 1st Plpbr report No. 04-520-52/95 to Mladić and Krstić personally, re: situation in Žepa enclave, type-signed Major General Zdravko Tolimir, Assistant Commander, dated 13 July 1995; P491, 1st Plpbr report re: situation in Žepa enclave, type-signed Major General Zdravko Tolimir, Assistant Commander, dated 13 July 1995.

[395] Zoran Malinić, T. 15371.

[396] Milomir Savčić, T. 015811: 15-17.

[397] Zoran Malinić, T. 15368-15369.

[398] *See also:* Zoran Malinić, T. 13575.

[399] Zoran Malinić, T. 15376-15378.

459. The Prosecution claims that on 12 July 1995, Tolimir sent a communication which says, among other things:

> The Muslims wish to portray Srebrenica as a demilitarised zone with nothing but a civilian population in it. That is why they ordered all armed men fit for military service to illegally pull out from the area, cross RS territory, and reach the Muslim-controlled area so that they could accuse the VRS /Army of the Republic of Srpska/ of an unprovoked attack on civilians in a safe haven.
>
> Although it is very important to arrest as many members of the shattered Muslim units as possible, or liquidate them if they resist, it is equally important to note down the names of all men fit for military service who are being evacuated from the UNPROFOR base in Potočari[400]

460. The Prosecution claims that when this document was sent, Tolimir did not know about the plan to kill the able-bodied men of Srebrenica.[401] In the same paragraph, the Prosecution says that Tolimir "was closely monitoring the movement of the column". However, the evidence presented during the trial does not suggest such a conclusion. Namely, considering the place where he was from 12 July onwards, namely, "in the Žepa sector", "close monitoring" of the column breaking through would have been practically impossible.

461. In a document that was also sent on 12 July 1995, soon after the above-quoted document, there is a proposal to:

> Prevent the illegal pull-out of armed Muslims towards Tuzla and Kladanj, *set up ambushes at all possible pull-out axes in order to arrest them* and prevent any possible surprises which could be caused to the civilian population and war units on the axis of movement.

462. In this document, Tolimir does not mention the pull-out axes, but talks only about the "possible pull-out axes" and indicates the need to "prevent any possible surprises which could be caused to the civilian population and war units on the axis of movement."

463. This document does not provide any basis for the conclusion that Tolimir knew about any plan to kill the able-bodied men of Srebrenica, or that such an alleged plan was being carried out. Rather, it indicates that Tolimir was concerned about the safety of the civilian population on the possible axes of movement of army units.

464. In its Pre-Trial Brief, opening statement and during the trial, the Prosecution referred to a document with the typed signature of Zdravko Tolimir (D49) sent to General Gvero on 13 July 1995 as a document in which Zdravko Tolimir allegedly

[400] Exhibit P
[401] To be specific, in paragraph 208 of its Pre-Trial Brief, the Prosecution presented a position from which it did not shift during the trial, namely, "Had he (Tolimir, note by A. Gajić) been informed of the plan at this time, he would not have proposed that the names of the able-bodied Bosnian Muslim men of Srebrenica be placed on a list".

contributed to the implementation of an alleged plan to murder the able-bodied men of Srebrenica. In its Pre-Trial Brief, the Prosecution says:

> On 13 July 1995, at around 22:30 hours, **Tolimir** sent another communication, to the attention of General Gvero personally, regarding the accommodation of prisoners from Srebrenica. **Tolimir** suggested that if Gvero was unable to find adequate accommodation for all prisoners of war from Srebrenica, space for 800 prisoners had been arranged in the area of the 1st Podrinje Light Infantry Brigade. **Tolimir** also stated that "it would be best if this is a new group which has not been in contact with the other r/zs /prisoners of war/."[402] In this document, **Tolimir** proposed the use of 800 of the many thousands of Muslim prisoners captured on 13 July, for agricultural work. Significantly, **Tolimir** insisted that the 800 chosen for agricultural work had not been in contact with the many hundreds of other prisoners. The only reasonable inference from this proposal is that **Tolimir** did not want the 800 prisoners chosen for work to be able to report on the existence of hundreds of other prisoners who would soon be executed and thus give away the murder operation.

465. The Prosecution's claim is unfounded and based on obviously speculative arguments. Namely, the relevant part of the document (exhibit D49) says:

> If you are unable to find adequate accommodation for all r/zs from Srebremca, we hereby inform you that space with /unknown word/ has been arranged for 800 prisoners of war in the 1 plpbr in Sjemeč.
>
> The 1st plpbr can guard them with its own forces and would use them for agricultural work, maintaining the horse, pig and sheep farm.
>
> It you send them to this sector this must be done at night, using 1st plpbr transport and troops. It would be best if this is a new group which has not been in contact with the other r/zs.

466. Zoran Čarkić confirmed that the handwritten document with the same content (D49, p. 2) contains his handwriting and he described the possible circumstances in which the document came into being.[403] Regarding the location mentioned in this document, Čarkić said that this was probably a building used by a unit of the Rogatica Brigade during 1992 until mid-1993, and that after this the building was not used for any military purposes.[404]

467. In this document, delivered at 2230 hours, from which the Prosecution makes the unfounded claim that there was a plan of killing and that Tolimir was aware of it, hours, Tolimir insists on the **adequate accommodation of the prisoners of war from Srebrenica**. In the document he says, "If you are unable to find adequate accommodation for all r/zs from Srebrenica, we hereby inform you that space with /unknown word/ has been arranged for 800 prisoners of war in the 1 plpbr in Sjemeč."

[402] *Ibidem.*
[403] Zoran Čarkić, 13 April 2011, T. 12723-12725.
[404] Zoran Čarkić, 13 April 2011, T. 12740; *see also:* T. 12727-12728.

468. Had there been a plan to murder the prisoners of war, he would not have insisted on providing **adequate accommodation for the prisoners of war**. Second, had there been a plan of killing and had Tolimir participated in it or wished to participate in it, he would not have expressed himself using the conditional, "*If you are unable* to find adequate accommodation…" Third, he would not have asked the question, "If you are unable to find adequate accommodation for ALL prisoners of war from Srebrenica." Therefore, Tolimir was interested in ADEQUATE ACCOMMODATION FOR ALL PRISONERS OF WAR FROM SREBRENICA. Adequate accommodation may mean only what is prescribed in the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

469. The "adequate accommodation" that Tolimir discusses in his communication can be understood only as accommodation which 1) implies evacuation to camps far enough from the combat zone so they would be out of danger (Article 19 of the Convention); and 2) is in keeping with Chapter II of the Geneva Convention Relative to the Treatment of Prisoners of War.

470. The fact that Tolimir stresses that these prisoners of war would be employed to work on specifically mentioned tasks, namely "agricultural work maintaining the horse, pig and sheep farm", suggests an intention to provide adequate conditions for them in accordance with the provisions of the Geneva Convention which regulate the accommodation of prisoners of war, in other words, to provide conditions which correspond to the "customs and habits of the prisoners of war, and to Chapter VIII, Section III, which states, "The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health."

471. As regards the instruction that "it would be best if this is a new group which has not been in contact with the other r/zs", the Prosecution draws the completely unreasonable conclusion that "**Tolimir** did not want the 800 prisoners chosen for work to be able to report on the existence of hundreds of other prisoners who would soon be executed and thus give away the murder operation." First, Tolimir **did not insist**, but said **it would be best** if it was a new group. Second, there was no conspiracy and no public plan was being executed. Simply, contact between the various groups of prisoners of war is prevented in all armies, including the VRS, for the sake of army intelligence and security, for example, in order to protect information about the strength, level of training, morale, condition of materiel and technical equipment, condition and location of military features and infrastructure and security measures for these buildings, the direction of movement of units the prisoners of war were in contact with, etc. It was not some special measure that was being applied to the prisoners of war from Srebrenica. It was a normal measure of intelligence support for the armed forces which is applied whenever possible. It is not necessary for a certain person to be specially trained for gathering such information. Almost any person, even one with poorer observation skills, can be the source of such information. This must be particularly stressed because every prisoner of war is interviewed by a professional after he or she is exchanged for the purposes of gathering information.

THE UNFOUNDED NATURE OF THE CHARGE OF FORESEEABLE TARGETED MURDER OF BOSNIAN MUSLIMS

472. Paragraph 23.1 of the Indictment says:

> On or about 27 July 1995, VRS personnel seized Mehmed Hajrić, Amir Imamović and Avdo Palić, three Bosnian Muslim leaders from Žepa, imprisoned them and subsequently executed them and buried their bodies in a mass grave in Vragolovi, Rogatica municipality. These targeted killings were the natural and foreseeable consequence of the Joint Criminal Enterprise to forcibly transfer the Muslim populations of Žepa.

473. The Prosecution refers to this charge in Counts 1-6 of the Indictment.

* * *

474. The charge contained in paragraph 23.1 of the Indictment has an interesting history. In its Pre-Trial Brief of 28 November 2008, the allegations regarding Avdo Palić, Mehmed Hajrić and Amir Imamović are referred to under the heading "Uncharged killings". Paragraph 23.1 appears only in the amended Indictment. In the amended Pre-Trial Brief the only novelty is the change of the title and the addition of information about the exhumation of a mass grave in Vragolovi and the DNA analysis.[405] The Prosecution did not give a reason for amending the Indictment, nor was there any explanation in its Pre-Trial Brief about other new facts or circumstances regarding its claims in paragraph 23.1 of the Indictment.

475. During the trial a lot of time was devoted to the presentation of evidence relating to this charge. For the reasons which will be presented in the following paragraphs, the Defence claims that the charge of alleged foreseeable, targeted killings contained in paragraph 23.1 of the Indictment is unfounded, and that Zdravko Tolimir cannot be held criminally responsible.

476. During the trial, both the Prosecution and the Defence endeavoured to establish the circumstances under which Avdo Palić, Mehmed Hajrić and Amir Imamović lost their lives, as well as the circumstances of the origin of the mass grave in Vragolovi in which their mortal remains were allegedly found. However, all these attempts were unsuccessful.

* * *

477. With regard to the charge under paragraph 23.1, the Prosecution claims that the Accused is criminally responsible for the alleged murder of Hajrić, Imamović and Palić pursuant to the extended form of joint criminal enterprise (JCE III). Paragraph 61 of the Indictment says that Zdravko Tolimir and the others listed in that paragraph

[405] *See:* Prosecution Amended Pre-Trial Brief, filed pursuant to the Trial Chamber's decision on Accused's preliminary motion pursuant to Rule 72(A)(ii), 16 February 2010, paragraphs 212-218.

could have foreseen that, during the joint criminal enterprise to forcibly transfer and deport the population of the Srebrenica and Žepa enclaves, the Serbian forces would commit the individual opportunistic killings, foreseeable targeted killings and acts of persecution described in paragraphs 22, 23 and 34 of the Indictment.

478. The basic questions regarding these alleged killings are the following: who carried out these killings and under what circumstances, and could Tolimir have reasonably foreseen them? Tolimir is not charged with participating in these killings. However, since Tolimir did not participate in the alleged joint criminal enterprise to forcibly transfer and deport, the charge of alleged "foreseeable targeted killings" is unfounded.

479. /REDACTED/ testified that Amir Imamović and Mehmed Hajrić disappeared from the *Rasadnik* holding centre some time in mid-August. As regards Avdo Palić, he was most certainly alive on 5 September 1995, when Dragomir Pećanac took him from the *Vanekov Mlin* military prison (which was in the zone of responsibility of the Eastern Bosnia Corps).

480. Avdo Palić[406], Amir Imamović[407] and Mehmed Hajrić[408] were captured in the Žepa sector. Mehmed Hajrić and Amir Imamović were accommodated at the *Rasadnik* holding centre in Rogatica municipality. Avdo Palić spent some time in the apartment of Captain Zoran Čarkić and from there he was moved to *Vanekov Mlin*. Witness Zoran Čarkić testified about this in detail, indicating that his main concern was for the safety of Avdo Palić.

481. A document dated 30 July 1995 and classified as "very urgent", which was sent from the 1st Blpbr /Bratunac Light Infantry Brigade/ Command to the GŠVRS Security and Intelligence Sector Security Administration and the Security Department of the Drina Corps Command, contains information about the prisoners of war accommodated at the holding centre in Rogatica. The document is reliable proof that Amir Imamović, Mehmet Hajrić and the other prisoners of war mentioned in the document were indeed accommodated at the holding centre in Rogatica, while a person with the pseudonym "Atlantida" was, according to the document, "in a safe place and at another location".

482. Regarding the treatment of prisoners of war, the document says:

> Pursuant to the orders and instructions of General Tolimir all the necessary measures are taken and in accordance to the possibility they are mainly being carried out. Among other things the following was done:
>
> Categorisation of r/z /prisoners of war/ was done and they are placed in three rooms: the healthy in one room, the wounded and the sick in another room and the members of the former leadership in the third room.

[406] Žepa Brigade Commander.
[407] /REDACTED/
[408] President of Žepa War Presidency.

483. As for Atlantida (Avdo Palić), it says that he "is separated and placed at another location and has better accommodation".

484. Regarding the effendi (Mehmed Hajrić), it says that he is "allowed to pray in the room five times a day".

> All prisoners of war have food three times a day, use an outhouse, and on 30 July 1995 they were visited and registered by an ICRC delegation –office at Pale.

485. The same day (30 July 1995), Captain Zoran Čarkić informed the GŠVRS and the Drina Corps Command that on 30 July 1995 a delegation of the International Committee of the Red Cross visited the prisoners of war at the military holding centre in Rogatica.[409] The ICRC was given approval to visit and talk to the prisoners of war, and to take letters from them which they had written to their families. These were sent mainly to their relatives at various addresses in Kladanj, and the sender's address is given as the "Rogatica holding centre".

486. Considering that Mehmed Hajrić and Amir Imamović were accommodated in an adequate holding centre, treated as prisoners of war, registered by the International Committee of the Red Cross and allowed to send letters to their families, their alleged murder cannot be considered reasonably foreseeable. Tolimir's instructions contained in this document (exhibit P1434) provide additional confirmation that Tolimir took an interest in the correct treatment of the prisoners of war from Žepa.

487. A working document of the ICRC also confirmed that its representatives did indeed visit the holding centre in Rogatica. The document describes the course of the visit on 30 July 1995 and /REDACTED/ and the observations. It says that they visited a total of 44 prisoners of war, of whom 32 were visited and registered for the first time, and that the remaining 12 had already been registered in Žepa on 26 July 1995. The circumstances regarding the conditions in which the prisoners of war were accommodated match those from the document bearing the typed signature of Zoran Čarkić.[410] It is especially important to note that all the detainees "had the possibility to write Red Cross messages with the full consent of the Authority."[411]

488. Based on the document by Zoran Čarkić of 30 July 1995 (exhibit P1434), which lists the names of the 44 prisoners of war accommodated at the holding centre in Rogatica and the ICRC report (P2270), which says that 44 prisoners of war were visited, one can undoubtedly conclude that the ICRC had access to all the prisoners of war at the *Rasadnik* holding centre, including access to Mehmed Hajrić and Amir Imamović.

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[409] Exhibit D211 (Rogatica Brigade Organ for Security and Intelligence, report no. 04-520-6?/95 re: visit of prisoners of war in the Rogatica military holding centre by the ICRC delegation, type-signed Zoran Čarkić, dated 30 July 1995). On that occasion, assistance was sought from the ICRC regarding medical and sanitation supplies, food, blankets and mattresses for the needs of the prisoners of war. The ICRC promised these supplies.
[410] P1434, /REDACTED/
[411] /REDACTED/

489. /REDACTED/

490. The International Commission on Missing Persons apparently made some mistakes during the identification of the mortal remains of Avdo Palić.[412] As Thomas Parsons said:

> But, in fact, the case of Avdo Palić was rather unique in a number of regards, and there was a great deal of international attention addressed to the attempt to recover the remains of Colonel Palić. There's a great deal of investigative activity outside of the ICMP, and we responded on many occasions to evacuations specifically related to the possibility that Colonel Palić might be in a particular grave.
>
> So I do not actually know what information came into the possession of Mrs. Palić or the Office of the High Representative relating to this particular grave, called here Vragolovi. But they did have some other information based on other investigations that caused them to inquire of the ICMP to check and see if that could -- if those could be related to Colonel Palić.[413]

491. Dr Parsons did not know why there was a request to check whether the mortal remains in Vragolovi were the mortal remains of Avdo Palić,[414] nor did the wife of Avdo Palić (witness Esma Palić) state any of the reasons.

492. This information from the testimony of Dr Parsons suggests that something may be wrong with the information regarding the mass grave in Vragolovi. During the trial, the Defence had a strong interest in ensuring that the Trial Chamber received all the information regarding the origins of the mass grave in Vragolovi, but unfortunately the parties and the Trial Chamber were denied this information.

493. The question was posed in this case as to whether the Vragolovi mass grave was a primary or secondary grave. Among the exhibits is a statement by Ms Ewa Klonowski on which the investigators of the Prosecution relied. She drew her conclusion based on the position of the bodies and how complete the remains were.[415] The Defence holds that this statement is not full or reliable. Dr Klonowski was not called as a witness or an expert in this case and the opinion of the Prosecution's investigator (which the Defence interprets as the opinion of the Prosecution) is not sufficiently corroborated. Esma Palić (the wife of Avdo Palić), who was especially interested in discovering the mortal remains, spoke of signs that this was a secondary grave.[416]

494. The fact that the MUP was also interested in his treatment also indicates that the capture of Avdo Palić was not unknown, as does a document dated 29 July 1995

[412] *See:* D170; *see also:* Parsons, 25 February 2011, T. 10459 onwards.
[413] Parsons, 25 February 2011, T. 10466-10467.
[414] Parsons, 25 February 2011, T. 10468: 7-11.
[415] P2246 (Statement by witness Ewa Klonowski). *See:* Dušan Janc, 30 May 2011, T. 14770-14772.
[416] Esma Palić, 13338: 23-25.

from the Sarajevo CJB /Security Services Centre/ bearing the typed signature of Vlado Marković (exhibit P2801).

495. Tolimir had already left for the Grahovo and Glamoč front on 30 July 1995 (P2457).

496. Regarding Avdo Palić, evidence was presented concerning his capture and accommodation in Rogatica (in the apartment of Captain Zoran Čarkić) and then in the *Vanekov Mlin*, before he was taken over by Captain 1st Class Dragomir Pećanac in the night between 4 and 5 September 1995. The further destiny of Avdo Palić, the circumstances in which he lost his life, and the circumstances in which the Vragolovi mass grave came into existence … Not a single piece of evidence presented during the trial provides reasons to suspect that his alleged murder could have been foreseen at the time of his capture.

THE UNFOUNDED NATURE OF THE CHARGES FOR MURDERS COMMITTED IN TRNOVO BY THE *SCORPIONS* UNIT

497. Paragraph 21.16 of the Indictment, "Execution of six Muslim men and boys near the town of Trnovo" says that some time "in July or August 1995, after the fall of the Srebrenica enclave, a Serbian MUP unit called the *Scorpions*, working with the VRS and/or RS MUP, summarily executed six Muslims from Srebrenica near the town of Trnovo in Bosnia and Herzegovina."[417]

498. In this charge the Prosecution made several untrue claims. First, it called the *Scorpions* a unit of the Serbian MUP. Second, it said that they committed the executions working with either the VRS or the MUP. The Indictment does not say to which Serbian MUP this unit belonged, while from the Prosecution submissions and the position it held during the trial, it follows that the Prosecution believes that this *Scorpions* unit was a part of the MUP of the Republic of Serbia. The Defence believes that the Prosecution's position is wrong and unfounded and that the *Scorpions* unit was a part of the Army of the Republic of Serbian Krajina.

499. Regarding the second claim that this unit was working with the VRS or the Republika Srpska MUP when carrying out the execution of the six men, the Defence holds that this claim is unfounded and that there is no evidence (not only is there not sufficient evidence, but there is no evidence at all) based on which one could draw such a conclusion.

500. The members of the *Scorpions* who participated in the killings in Trnovo, namely, Slobodan Medić, Pero Petrašević, Aleksandar Medić and Branislav Medić, were sentenced in a judgment of the Belgrade District Court War Crimes Chamber to long prison sentences.[418] With regard to the facts of this crime, the Defence asserts that the Trial Chamber may rely in full on the judgment issued in this case, which contains all relevant information regarding the way in which the crime was

[417] Azmir Alispahić, Safet Fejzić, Smajil Ibrahimović, Sidik Salki, Jusu Delić, Sino Salihović.
[418] Exhibit P1437.

committed, including the information as to whom the *Scorpions* unit belonged. The judgment was issued after reviewing a much larger quantity of evidence than in the *Prosecutor v. Tolimir* case. Apart from this, the testimony of witness PW-075 and witness Slobodan Stojković, who also testified in the proceedings before the court in Belgrade, accord with the factual findings given in the judgment.

501. The Belgrade District Court concluded that the unit called the *Scorpions* was formed in Đeletovci, which is in accordance with the evidence presented in this case:

> When an attack on the Republic of Serbian Krajina by Croatia took place in 1993 and the Army of the Serbian Krajina was formed, the NIK Security grew into a military unit and fell under command of Slavonia-Baranja Corps which had headquarters in Vukovar. In the same year this unit gets the name the Scorpios. The accused Slobodan Medić receives the status of the unit commander in the summer of 1993. Prior to its status within the Army of the Serbian Krajina, the Scorpios unit was under jurisdiction of the MUP Republic of Serbian Krajina for a while, that was following the arrival of the UN to the territory of Republic of Serbian Krajina, i.e. Eastern Slavonia, Baranja and Western Srem, i.e. some time from around May 1992 and it was in that status until 1993, i.e. until the above mentioned attack of Croatia on the Republic of Serbian Krajina.
>
> When the Army of the Serbian Krajina was formed, the Corps Command treated the Scorpios unit as a special battalion. From the moment they fell under the Army of the Serbian Krajina, this unit received orders exclusively from Slavonia – Baranja Corps who they belonged to according to the formation and territorially. Head of this Corps from 1994 was General Lončar. Prior to him this function was performed by Colonel Bogdan Sladojević.[419]

502. In brief, the *Scorpions* unit was not a unit of the Serbian MUP, but a unit of the Army of the Republic of Serbian Krajina. The *Scorpions* and their engagement had nothing to do with the Republic of Serbia MUP. In the proceedings before the Belgrade Court, as the judgment says:

> Witness Tomislav Kovač explained in his statement that that Republika Srpska had asked the Republic of Serbia for assistance in 1995 and that Serbia then sent assistance consisting of 500 members of the police — MUP of Serbia, but he also said that their activity was not reflected in participation in combat operations but only in regulating traffic along the Banja Luka-Bijeljina communication, this when refugees were coming out of the Republic of Serbian Krajina and moving towards Serbia. He also explained that these 500 members had come to this territory precisely pursuant to his conversation with the now deceased Radovan Stojičić aka Badža and that this was the only police-type cooperation between the Republic of Serbia MUP and Republika Srpska – which was also known to members of the international forces in this area – having concluded that this form of cooperation was a classic form of

[419] P1437, section 7, 5, 1 (formation of unit).

> police cooperation and not military cooperation, as well as that they never received any aid from the Army of the Republic of Serbia. Therein, this witness – Tomislav Kovač, who was Deputy MUP Minister of Republika Srpska, does not have any knowledge of the *Scorpions* – which had come from the Republic of Serbian Krajina – having had any connection with the Serbian MUP.[420]

503. As regards the engagement of this unit in the territory of Trnovo, based on the testimony of credible witnesses, the Belgrade District Court established the following:

> From the statement of witness Milan Milanović, former Assistant Minister of the Interior of the so-called Republic of Serbian Krajina, which the court accepted as logical and conclusive, given by a person who was, by virtue of the duty he was performing at the time, in a position to provide the Court with the most information in relation to the *Scorpions* unit in terms of when and on whose order the unit was formed and also when and how it was disbanded, it was established that the *Scorpions* unit had the status of a special unit of the Army of the Republic of Serbian Krajina as of 1993, and that it was dispatched to the Trnovo front in late June 1995 by the RSK Government as assistance at the prior invitation of the Republika Srpska Supreme Command.
>
> Witness Tomislav Kovač (in the disputed period Republika Srpska Deputy MUP Minister) confirms in his statement the claims of the witness Milanović. He explained that the *Scorpions* unit arrived in the area of Trnovo as a unit of Republic of Serbian Krajina from Erdut, which is well known to him because the arrival of any unit from any area could not have passed at the time without coordination with him.

504. The Defence is of the opinion that the recording of the execution was ordered, and that this recording was not accidental, as a regular or routine recording of the activities of the unit. The same conclusion can be drawn from watching the video tape of the killings (the video tape was admitted into evidence as exhibit P1024).[421]

505. During the trial, Prosecution investigator Dušan Janc confirmed under cross-examination that the Prosecution did not have any information that Tolimir had any contacts with the members of the *Scorpions* unit, and that he had no information that any of those who participated in the killings in Trnovo might also have been in Žepa in the relevant time period.[422] Regarding the killings in Trnovo, apart from identifying the perpetrators, there is no other information as to whether they had been given

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[420] P1437, Judgment, p. 125.
[421] In the relevant parts of the video, the following was recorded:
The words of the cameraman (Bugar), "Zekan, go quickly, turn the truck round and bring it back – my battery's died."
Then, after the killing has already started, "Zekan, stop, let's change the tape…" Cameraman, "Oh, fuck it, this one's finished too!" In the background, "Did he at least film these ones? Bugar, go fuck your mother! Motherfucker, do you want to finish with them?" (The position of the Defence is that he would be killed unless he recorded the killings to the end.) Cameraman, "Yes, I swear, but it'll keep filming. Get to work!" (Transcript of the video, page 8 in the Serbian version).
[422] Dušan Janc, T. 7327.

orders and by whom, there is no information as to how the Muslims from Srebrenica were transported to Trnovo, how they were captured and by whom, and there is no information about who ordered that the killings be recorded.[423]

CONCLUSION REGARDING COUNTS 1-5 OF THE INDICTMENT

506. At least for the aforementioned reasons, and also for the reasons put forward in the following chapter, it has not been proven beyond reasonable doubt that Tolimir participated in the joint criminal enterprise of murder, or that he participated in any way whatsoever to the realisation of the alleged objective of murdering the able-bodied Muslims. The only reasonable judgment the Court could issue is one of not guilty.

/signed/
Zdravko Tolimir,
Self-Represented Accused

[423] Dušan Janc, T. 17327-17328.