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

Case: IT-05-88/2-A

Date: 28 February 2014

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Khalida Richard Khan
Judge Jean-Claude Antonetti

Registrar: **Mr. John Hocking**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

PUBLIC REDACTED VERSION OF THE CONSOLIDATED APPEAL BRIEF

The Office of the Prosecutor
Mr. Serge Bramertz
Mr. Paul Rogers
The Defence
Acussed-Mr. Zdravko Tolimir
Legal Adviser-Dr. Aleksandar Gajić

Prosecutor v. Zdravko Tolimir

IT-05-88/2

Consolidated APPEAL BRIEF

[redacted]

1. Pursuant to Decision on Tolimir's Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief[1], Mr. Zdravko Tolimir (Appellant) respectfully submits the following Consolidated Appellate Brief setting forth his grounds of appeal against the Judgment of the TC II in case of *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, pronounced on 12 December 2013 (Judgment).

RELEVANT PROCEDURAL HISTORY

2. The Third Amended Indictment was filed on 4 November 2009. The trial commenced on 26/02/2010, and closing arguments were presented from 21-23 August 2012. The Judgment was pronounced on 12/12/2013.

3. The Majority of the TC, Judge Nyambe dissented, founded the Appellant guilty pursuant to Article 7(1) of the Statute, through committing (JCE type I or III), on the following counts: Count 1-Genocide, Count 2-Conspiracy to Commit Genocide, Count 3-Extermination, Count 5-Murder, a violation of laws and customs of war, Count 6-Persecutions, a crime against humanity and Count 7-Inhuman Acts through Forcible Transfer, a crime against humanity. The Majority did not enter conviction on Count 4 – Murder, a Crime Aagainst Humanity, and founded Appellant not guilty on Count 8- Deportation. The Majority, Judge Nyambe dissented, sentenced the Appellant to a sentence of life imprisonment.[2]

4. The Appellant filed its Amended Notice of Appeal on 09 September 2013.

[1] 4 September 2013.
[2] Judgement,paras1239-1242.

5. In order to avoid unnecessary repetition through various grounds of appeal, and to preserve word limits in the case of submission that the TC erred in law, the Appeals Chamber is requested to articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly, and when necessary, to apply the correct legal standard to the evidence contained in the trial record and to determine whether it is itself convicted beyond reasonable doubt as to the factual findings challenged before that finding is confirmed on appeal. In the case of submission that the Trial Chamber erred in fact, the Appeals Chamber is requested to substitute its own finding for that of the Trial Chamber and to overturn a decision rendered by the TC.

Ground 1 - ADJUDICATED FACTS

6. The TC erred in law by taking judicial notice of 523 AFs; most having significantly affected the outcome of the trial and in the assessment of judicially noticed AF's.[3]

7. In its 94(B)-Decision the TC has stated, *inter alia*, that "in each instance where a proposed fact goes to the core of the case, the TC considers that it would not serve the interests of justice to take judicial notice of it"[4] Despite this explicit standard, the TC took judicial notice of certain facts that went "to the core of the case" or systematized AF under heading that contains crucial legal findings. As Word limits prevent us from going in to detail, the most significant issues of AFs will be elaborated.

8. The very structure of the AFs had a significant impact on the Majority conclusions. For example, AFs433-558 are presented under the heading "Operation to forcibly remove the Bosnian Muslim Population of Srebrenica" (and following subheadings "Violence and Terror in Potočari'', Forcible Transfer of the Women, Children and Elderly", Separation of Men), AFs559-557 are presented under heading "Opportunistic Killings Which Were A Foreseeable Consequence of the Forcible Removal of the Bosnian Muslim Population from Srebrenica", AF578-585 "Widespread Knowledge of the Crimes," AF586-594 " The Impact of the Crimes on the Bosnian Muslim Community of Srebrenica" and Reliability of Intercepted Communications [5]

9. At the start of the trial, the TC had predetermined qualification of groups of facts. In the 94bis decision there is no explanation why certain facts are of such nature that go "into the core of the case", and no discussion about permissibility to take judicial notice of AFs.

10. AFs which significantly affected the outcome are those concerning alleged "Decisions of Strategic Objectives" (AF18), Directive 4(AF53) concerning estimation of the humanitarian situation in Srebrenica, (AF61-62) concerning the relationship between directives 7 and 7/1, Hotel Fontana meetings (AF156-190), AF201 (most .. were slaughtered in carefully orchestrated mass executions, commencing on 13 July 1995, in the region just north of Srebrenica), AF202 (serious bodily or mental harm was done to the few individuals who survived the mass executions), AF203 (in executing the captured Bosnian Muslim men, no effort was made to distinguish the soldiers from the civilians), AF205 (All of the executions systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers), AF206 (The groups of Bosnian Muslims killed by the

[3] 94B-Decision
[4] 94B-Decision,para. 33
[5] Paras.595-604

VRS included boys and elderly men normally considered outside the range of military age), AF208 (between 7000-8000 Bosnian Muslim men were systematically murdered), AF209 (The massacred men amounted to about one fifth of the overall Srebrenica community), AF434(the refugees fleeing to Potočari were shot at and shelled), AF435 (estimation that by the end of 11 July there were 20.000-25.000 Bosnian Muslims in Potočari), AF439 (alleged terror campaign in Potočari), AFs441-442,444,460 (The refugees in Potočari did not have a genuine choice of whether to remain in the Srebrenica enclave), AF464, 470 (The VRS stole 16-18 DutchBat Jeeps as well as around 100 small armed, which rendered further DutchBat escorts impossible), AF491 (No effort ... was made to distinguish the soldiers from the civilians), AF492 (Separations were frequently aggressive), AF523 (the VRS forcibly transferred thousands of Bosnian Muslim civilians from the Srebrenica enclave), AFs540,541,553 (As many as 8000 to 1000 men from Muslim column of 10000 to 15000 men were eventually reported as missing(AFs.581-558,586-604)

11. While those AFs are clear examples of ones which are "on the core of the case" in its Decision on Request for Certification on Decision on Prosecution Motion for Judicial Notice of AFs[6], the TC concluded that "to mount a fully adequate defense it is not incumbent on the accused to rebut each fact presented in the course of the Prosecution case"[7]. Additionally, it has been stated 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"[8]. It was further concluded that the "Impugned Decision does not involve an issue that would significantly affect the outcome of the Trial".[9]

12. That the facts judicially noticed went into the core of the case and speak on the TC's findings based precisely on those facts, legal or factual qualifications that are stated in the heading of the group of AFs. For example, the AF stating that refugees in Potočari "did not have a genuine choice of whether to remain in the Srebrenica enclave" is a key finding for the existence of forcible transfer as a crime against humanity, while the fact stating "carefully orchestrated mass executions" is a basis for many conclusions leading to findings concerning alleged significant contribution of the Appellant to the JCE to Murder.

13. While the TC qualified those facts as facts which do not "significantly affect the outcome of the Trial", it was duty bound to treat them as such, or to disregard them during estimation of evidence. Further, it is the very essence of judicial notice of AFs that their purpose is to avoid presentation of evidence of those facts. As stated by Judge Kwon, "The

[6] 23/02/2010.
[7] Decision,p3.
[8] Ibidem.
[9] Ibidem.

purpose behind judicially noticing facts adjudicated in prior proceedings is to reduce the need for repetitive testimony and exhibits in successive cases".[10] However, in Tolimir's case, 94B Decision had no impact on the Prosecution's 65ter list, nor had the TC instructed the Prosecution to reduce its presentation of evidence on the basis of AFs.

14. By taking judicial notice, the TC created a presumption of their accuracy.[11] However, in taking judicial notice, the TC did not consider evidence which the other TC had relied on in reaching this specific conclusion. The Defense put forth the argument that "a decision on judicial notice of a fact loses its meaning if the moving party present evidence about the fact in issue" and even more than in the trial from which an adjudicated fact originates.

15. For example, the TC took judicial notice concerning the Hotel Fontana meetings (AF156-194), and in addition received evidence about those meetings including video recordings of those meetings and statements of the witnesses who testified either viva voce, either received in accordance with Rules 92bis or 92ter.[12]

16. The TC concluded that TC has made numerous factual findings in which AF have been supported or amplified by other evidence that has been admitted. The TC noted during the submission of the Appellant that "whenever evidence is presented before the TC, or when even more evidence is presented than in the proceedings which resulted in the judgment on the basis of which judicial notice of these facts was taken ..., the Chamber should refrain from relying on the 'AFs'." The Chamber is of the view that this stance conflicts with the principle stated above in that the weight of the AFs should be assessed in light of the totality of evidence in the case.[13]

17. In this particular case, the TC did not quote examples of those findings. However, if an adjudicated fact is based on the same evidence as in the current proceedings, then the main role of the TC, which is to estimate evidence, has been deprived of its substance.

18. The purpose of AFs is that the moving party does not present evidence about them. Whenever evidence is presented before the TC, or when even more evidence is presented than in the proceedings which result is the judgment on the basis of which judicial notice of these facts was taken, the TC should refrain from relying on AFs, and instead make its own factual findings based on the evidence on the record.

19. While taking judicial notice of particular AFs in order to "relive the Prosecution of its

[10] O-Gon Kwon, IICL 5/2007,p.369.;A.Gajić,APF,2/2012.
[11] Judgement,para.76.
[12] See paras.245-261 and evidence quoted in footnotes.
[13] Judgment, para.77

initial burden to produce evidence on that point"[14], the TC was obliged to bar the prosecution of producing evidence on that point, or to significantly reduce the OTP 65ter list. Since the *Krstić* and *Blagojević and Jokić* cases are cases in which much of the evidence is virtually the same, it is contrary to a good administration of justice to support factual presumptions (AFs) with the same evidence that was served as the very basis for factual finding, that in another trial served as a presumption of the accuracy of the fact.

20. While taking judicial notice of the AFs, the TC made presumptions concerning the core issue of the case (except the issue of acts and conduct of the Appellant), which directed the TC to assess other evidence not independently (as required by the principles of sound administration of justice), but in the light of the framework established by the 94B decision.

21. These errors invalidate the Judgment. The AC is requested to formulate correct legal standards, and to review all of the TC findings relying on AF's, or to order a re-trial.

[14] Judgement,para.9

Ground 2 – INTERCEPTED COMMUNICATIONS

22. The TC erred in fact and law in findings that "overwhelming weight of evidence is in favour of the reliability and authenticity of the intercepts" and that "the intercepts have a high degree of validity to the conversations they purport to record."[15] Also, by taking judicial notice of AF 595-604, the TC made an error in law that invalidates the Judgement.

23. The TC did not provide a reasonable opinion and failed to consider evidence on the record that challenges the presumption of reliability and authenticity of intercepted communications.[16]

24. The TC completely disregarded the Defence arguments concerning authenticity and reliability of intercepted communications.[17] The TC disregarded Ex.D48, namely a part of the NIOD's report concerning Srebrenica, that is the most reliable and the most comprehensive study on intercepted communications that contains detailed elaboration about all aspects of intercepted communications, including Bosnian Muslim's ability to record intercepted communications, and present a clear evidence that ABiH and BH MUP did not have a real time intelligence, and a capacity on the two sites (Konjuh and Okresanica) to record intercepted communications of the VRS was unattainable.

25. The TC particularly relied on statement of the Prosecution's investigator Stephanie Frease[18] without any caution in estimation of her evidence on the basis of her association with the Prosecution (OTP investigator and analyst)[19], and because her knowledge about intercepts are hearsay, and that she analysed only internal consistency of information she received from other persons, particularly those who provided intercepts to the Prosecution.

26. The TC emphasised "the procedures that were followed in producing the intercepts that have been admitted".[20] Those procedures and a capacity to produce intercepts are substantially discussed in D48 on which the TC paid no attention. In relevant part of the study it is clearly stated as follows:"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, than near-real time processing and reporting is

[15] Rule 94B decision, paras. 64-66.;Decision on Request for Certification.
[16] Presumption was created by taking judicial notice of AF nos.595-604.
[17] Defence Final Trial Brief,paras.107-135
[18] Judgement,para.63
[19] See arguments presented under Ground 4.
[20] Judgement, para. 63.

impossible...For the Electonic Warfare Units to have operated in real time the Bosnian national security service in Okresanica would have needed at least 120 while the ABiH units would have needed at least 210 people in bothe Okresanica and Konjuh."[21]

27. The fact that some of the intercepts received corroboration from other sources[22] is not a cogent reason to treat all of the intercepts admitted in the evidence as authentic and reliable. The Trial Chamber particularly emphasised a conversation between Nicolai and the Appellant. While there is a lots of evidence on this conversation[23], the TC failed to consider that the ABiH intercept(P311) is incomplete, and thus less reliable than other documentary evidence.

28. In reaching conclusions concerning intercepted communication the TC failed to consider whether any action taken by the ABiH on the basis of intercepted communication. The TC took judicial notice of the fact that objective of monitoring enemy communication "being to discover the plans and movements of the opposing side in order to take pre-empty action".[24] Dispite a large number of intercepts from July 1995, there is no evidence that in that particular time ABiH ever acted upon the information contained therein, what is a strong indication that those intercepts are not the ABiH or BH MUP intercepts, but intercepts from some other service. As noted in the NIOD report: "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 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"[25]

29. The TC erred in law in taking judicial notice of AF595-604, that significantly affected their reasoning on authenticity and reliability of intercepted communications. Taking judicial notice about reliability of evidence that at the time of taking judicial notice has not been tendered into the evidence is legally unacceptable. Particularly, it is obviously completely unacceptable to take judicial notice of facts that concerns the Prosecution investigation.

30. These errors invalidate the Judgment.

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[21] D48, p.46-7(e-court), pp. 299-300.
[22] Judgement, para. 65.
[23] See. Fn.168.
[24] AF595
[25] D48,p.47(e-court)

Ground 3 – EXPERT EVIDENCE

31. The TC erred in law in finding Richard Butler to be an expert witness.[26]

32. Reports of Butler were not disclosed pursuant to Rule 94bis. The TC considered that that the Appellant "was on notice of the Prosecution intention to call Butler as an expert witness and of his intention to tender his reports" and that "the Chamber has been clear, in its references thorough the testimony, that he was giving evidence as an expert".[27]

33. One person cannot be treated as an expert witness if his reports were not submitted in accordance with the Rule 94bis. Rule 94bis of the Rules is mandatory and provides an obligatory procedure, and not procedure of optional nature.

34. Butler's report[28] has been included in the 65ter list while the Appellant had no opportunity to exercise the rights which he is entitled to under Rule 94bis(B). Rule 94bis is not a meaningless rule, but a mandatory rule that allows for no exceptions.

35. The fact that it was the intention of the Prosecution to submit Butler's reports as an expert reports and that the Appellant was on a long notice of this intention is not a relevant fact since procedure under Rule 94bis is mandatory, and that intention or position of the Prosecution might change during the trial for a variety of reasons. Particularly, under Rule 94bis(B)(iii) as the Accused is required to file a notice indicating whether "it challenges the qualification of the witness as an expert…". If one witness testifies, but his statements/reports were not disclosed in accordance with the Rule 94bis, he needs not to raise the issue of expert qualifications and other issues connected with the expert reports.

36. Since Butler is associated with the Prosecution, and has been so particularly with the Prosecution's Senior Trial Attorney for a long time and is engaged in the collection of evidence and its processing, interpretation etc., it was reasonable to treat such a witness as the Prosecution's investigator, and not as an expert.

37. As a member of the Prosecution team he has the obligation of loyalty towards the Prosecution (as do other members of the Prosecution team)[29].

38. It is impermissible to accept and to present reports as expert reports in violation of Rule 94bis, particularly because an expert is by definition a person who can provide his/her

[26] Judgement,para.41
[27] Judgement,fn.97
[28] Enumerated inJudgement,fn.97
[29] Dušan Janc,22.04.2010,T.1270-1271,Blaszcyk, 27.04.2010,T.1477-1478.

opinion on the basis of specialized knowledge. The TC was obliged not to treat statements of Butler as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly.

39. Butler has no expert qualifications necessary to provide reliable opinions concerning strategic organs of the armies such as GŠVRS. He was involved during the Gulf war in the US intelligence, but his status as a non-commissioned or warrant officer is unclear. In his words "the highest warrant officer is still not superior to the youngest lieutenant"[30] and has experience in a very narrow field. As a warrant officer, he does not have experience and knowledge of reliable sources of knowledge concerning military structures, particularly strategic organs of the VRS, nor specialized knowledge of the issues he wrote about in his reports (for example to interpret strategic goals, relationship between the most senior military personnel etc)[31,32]

40. The most crucial Majority findings are based on Butler's opinions without showing any caution concerning his association with the Prosecution and his limited experience.[33] He was not a member of the VRS or any of the Army that is not formed in accordance with NATO standards, nor has previous experience as an expert before Srebrenica cases before the Tribunal. Butler's experience in military intelligence is not the experience of an officer but a warrant officer who has not finished Military Academy or any sort of education of equivalent nature.

41. While witnesses are expected to testify about facts, experts provide opinions on which the TC may rely. While opinions of the witnesses are inadmissible as evidence, expert opinions are treated differently. Because of the special nature of expert evidence, Rule 94bis provides a special procedure that allows the parties to be under proper notice that a person will be called as an expert, and to challenge the report as an expert report.

42. In treating Butler as an expert witness, and relying on his statements as expert opinions, a great amount of errors where produced which occasioned a miscarriage of justice. Evidence of Butler is pervasive in every aspect of the case, which is visible even on the first sight.

43. The AC is requested to reverse the TC findings concerning the status of Butler, to treat Butler as an investigator, and to review the TC findings based on his evidence.

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[30] Butler,7.7.2011,16277.
[31] That is also supported by his statement that warrant officers hold specialisation in a „very narrow field". Butler,7.7.2011,T.16277
[32] See Savčić,T.15917-15924-and D291.
[33] P2469.

Ground 5 – EVIDENCE OF THE PROSECUTOR'S INVESTIGATORS

44. The TC erred in law by not demonstrating appropriate caution in the estimation of evidence of the Prosecution investigators including particularly: Janc, Butler, Ruez, Manning, Gallagher, Blaszczyk, and Friese. The TC erred in law in applying very low standards of estimation of theirs evidence, and not applying the standard articulated in the Martić case.[34]

45. The TC heavily relied on the evidence of OTP investigators, who testified on a number of core issues in this case, providing not only evidence about their investigative tasks, but also opinions concerning core issue of the case. Even the TC expressed certain concerns[35], in the entire judgment there is not a single incident that the concern has been executed in estimation of evidence of the Prosecution's investigators. On the contrary, the TC relied on their evidence on some of the most important issues.

46. The TC failed to provide caution as formulated in the Martić case:

47. „ ...Ari Kerkkanen, who was previously employed as a Criminal Intelligence Analyst by the Prosecution, testified before the TC as a witness for the Prosecution. His written statement was admitted in redacted form on 19 April 2006. The TC recalls that Ari Kerkkanen was one of the organizers 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 TC 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 TC has attached no weight whatsoever to such views, conclusions and analysis of Ari Kerkkanen."[36]

48. The TC was obliged to attach no weight to views and conclusions of the Prosecution's investigators, and to treat their evidence with great caution.

49. Particularly, the TC attached significant weight to the evidence of Butler, Friese, Janc and Blaszceck, even though they are not experts in the fields or in regards to issues they testified about. It would be no overstatement that the Prosecution had no evidence, or that the

[34] MarticTJ,para.35
[35] Judgement,para.38
[36] MarticTJ,para.35

evidence was very weak on every point, which was covered by the testimonies of its investigators, including Butler.

50. That no weight can be attached to the opinions, such as second-hand knowledge, analysis etc. by the investigators is clear from the statements of the investigators. For instance, investigator Dušan Janc testifies that he got assignments and instructions mainly from trial attorneys, and the senior trial attorney in Tolimir case was at the same time the head of the team to which investigators belong. As members of the Prosecution, they are obliged to protect the interest of the Prosecution, and to coordinate their activities with those of the Prosecution. They are not allowed to speak in public without certain permission which also contains instructions about what the investigator is entitled to talk about. And as stated by Janc "it wouldn't be possible to talk about something which differs from the official position of the Prosecution."[37] Also, investigators are not allowed to publish results of their activities without permission of their supervisors.[38]

51. The TC relied heavily on the evidence of the OTP investigators; they are directly subordinated to the senior trial attorneys who represent the Prosecution[39] and are not free to express its independent opinions, but are to protect the interests of the Prosecution.

52. This TC error invalidates the Judgment. The AC is requested to formulate correct legal standards for the evaluation of evidence of the OTP investigators, to review the TC and/or Majority findings.

Ground 5: JOINT CRIMINAL ENTERPRISE AS A MODE OF LIABILITY

53. The TC erred in law when it held that the joint criminal enterprise is a mode of liability under international customary law. In addition, there is no clear majority about application of the JCE liability in the present case.

54. The principle of legality requires the ICTY to refrain from relying on the JCE as a mode of liability, since there is no evidence that this form of liability forms a well established international custom.[40]

[37] Dušan Janc,22.04.2010,T.1270-1271
[38] Blasycyk,27.04.2010,T.1477-1478.
[39] Blaszcyk,27.04.2010.,T.1477
[40] Schomburg,Jurisprudencer on JCE,p.2

55. If the JCE is a mode of liability under customary international law, the drafters of the Rome Statute would include this mode of liability as developed by the ICTY jurisprudence, or at least; this mode of liability would be inferred by the chambers of the ICC from other provisions of the ICC Statute.

56. The TC confused perpetration and co-perpetration with other forms of liability that includes participation in the crime. The Proper concept of perpetration or co-perpetration is elaborated in the ICC jurisprudence that is based on the concept of the control over crime[41]

57. The ICC Chamber stated that: "Proper meaning of co-perpetration based on joint control over crime is rooted in 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. Hence, although none of the participants has overall control over the offense because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task".[42]

58. The most problematic mode of liability is a JCEIII as developed in the ICTY jurisprudence. Particularly, the mental element of the most serious crimes is lower below the acceptable level.

59. Judge Nyambe dissented on all relevant points and voted for the judgment of acquittal on all counts. However, one member of the Majority wrote a separate opinion (Judge Mindua) in which he stated:

> „I believe that when an accused can be found liable under the classical modes of liability for individual criminal responsibility under Articles 7(1),(2),(3),. and (4) of the Statute, these modes of liability are preferable to that of JCE liability because, in the event that such a JCE is not established, the accused remains accountable for his individual criminal behavior and, in so doing, the victims are not left without remedy."

60. If one of the Judges of the Majority consisted of the two judges having the opinion that „other modes of liability are preferable to that of the JCE", then the Majority was obliged to discuss whether there are grounds for conviction under other modes of liability under Article 7(1) as charged in the Indictment. The TC does not demonstrate that it considered other

[41] LubngaCase.no ICC-01/4-01/6 Decision on confirmation of charges,340
[42] Ibid.,para.342,343-367.

modes of liability.[43] Under the specific circumstances of this case, the Majority was obliged to discuss in more detail alternate modes of liability since one of the judges has stated that those modes of liability „are preferable to that of the JCE", and that various modes of liability under Article 7(1) have necessitates different legal findings.

61. Judge Mindua in his Separate Opinion wrote that those modes of liability „are preferable to that of the JCE", because ordering, instigating, aiding and abetting are preferable to that of the „commission" which is contrary to the AC jurisprudence. "Preferable" modes of liability needs to be considered first. If the two judges have different opinions concerning preferable modes of liability, the TC was obliged to produce all necessary findings on those "alternate", and in Judge Mindua's words, "preferable" modes of liability.

62. A Separate opinion of Judge Mindua[44] reveals that there is no Majority as to the application of the JCE as a mode of liability in this particular case, and his separate opinion is contrary to the TC's position as stated in para.884 of the Judgment.

63. If one of the Judges considers that „other modes of liability" are preferable to that of the JCE, a clear demonstration must be made that those modes of liability are distinct, and not a „classical mode of liability".[45] The position of Judge Mindua is further in line with the argument that JCE is not a mode of liability under customary law, he stated that „[t]he JCE mode of liability…is not developed *expressis verbis* in the Statute… It is also absent from the Rome Statute of the ICC and is not applied before that Court"[46]. In the context of his opinion, some modes of liability are "preferable" and some modes of liability are classical. It is clear that there is no Majority concerning applicability of JCE in this case. Separate Opinion of Judge Mindua is in sharp contradiction with the TC's reasoning in para. 887; particularly concerning the existence of the JCE in customary international law.

64. Under these circumstances, keeping the position of one of the two judges who formed the Majority in question, the majority made a legal error that invalidates the Judgment. The AC is requested to quash the Judgement or to order a re-trial.

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[43] Judgement, paras.1174,1182,1186,1192,1196,
[44] Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, part XII of the Judgement.
[45] SO-JudgeMindua,para.6
[46] SO-JudgeMinudua,para.4.

Ground 6 – EXTERMINATION AS A CRIME AGAINST HUMANITY AND PERSONS PLACED *HORS DE COMBAT*

65. The TC erred in law in not requiring that the mens rea requirement for extermination as a crime against humanity must include civilian population as the intended target of mass murder.

66. It is explicit in Article 5 that the ICTY has jurisdiction "to prosecute persons responsible for crimes .... directed against civilian population.."[47] An attack is composed of acts of violence, or the kind of mistreatment referred to in Article 5 (a) through (i)".[48] In other words specific attack – killing on a large scale – needs to satisfy the requirement of being directed towards civilian population in order for it to classify as the crime of extermination.

67. The TC erred in fact and law in finding that "the Bosnian Muslim males were also targeted with little to no effort by the Bosnian Serb Forces to distinguish between civilians and combatants."[49] This error occasioned a miscarriage of justice because it cannot be argued that the alleged murder operation was in itself or part of the widespread or systematic attack against the civilian population. The TC has established that the victims were persons of military age, 16-65 years-old, either separated in Potočari or captured from the column that was engaged in a typical military operation (breakthrough).

68. The groups of those who have been killed were composed predominantly of persons of military age that were considered by the BiH as members of the AbiH. A few days before the enclave of Srebrenica was taken over, there was an order of general mobilization. [50] That means all men of military age (able bodied) were considered as combatants or members of the Army and could not claim civilian status. So it cannot be concluded that intended target of mass murder were civilians, but military aged men that were considered to be members of the Army.

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[47] Judgement,para.690.
[48] e.g.Gotovina TJ, para.1702,NahimanaAJ,para.918.
[49] Judgement,para.708.
[50] J. R. Ruez,30/03/2013,T.1068 "... I will say that one could consider that none of them was civilian except the women since a few days before the enclave was taken over, there was an order of general mobilisation of all the men within the enclave..... Either they were military dressed in military or military dressed in civilian clothes or total civilians, doesn't matter once their status is the one of the stats of prisoners"
Škrbić,30/01/2012,T.18528. "When general mobilisation is proclaimed, then men are not called up but, rather, units can freely recruit all able-bodied men and engage them in units".31/01/2012,T18624-18635

69. The TC erred in considering killings of Harić, Palić and Imamović as a part of a single murder operation. Those three persons were killed in incidents for which no evidence was presented before the TC in a period after the killing operation of those from Srebrenica was ended.[51] Under these circumstances, these three persons cannot be considered victims of the crime of extermination.

70. It is reasonable to conclude that victims of mass murder were not civilians or that the targeted population was not civilian population or at least not comprised predominantly of civilians.

71. The AC is requested to overturn the TC findings and to enter a judgment of acquittal on Count 3.

Ground 7 – FORCIBLE REMOVAL AS AN ACTUS REUS OF GENOCIDE AND EVIDENCE OF INTENT

72. The TC erred in law in articulation of "seriously bodily or mental harm" as *actus reus* of crime of genocide.[52]

73. The TC defined that the harm must be „of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group" it must ... „inflict 'grave and long term disadvantage to a person's ability to lead normal and constructive life". The TC in fn.3105 quoted references from *Krstić, Blagojević and Jokić* and *Gatate* Trial Judgements. This description of the harm is too general and imprecise, and does not contribute to the appropriate understanding of the „serious bodily or mental harm". It was not the intention of the state parties to the Genocide Convention to include such a wide understanding of serious bodily or mental harm. It seems that the TC understanding of the concept of "serious bodily or mental harm" is not based on the Convention, rather on the First Draft of the Genocide Convention[53] (E/447) which contained a definition of Genocide that was rejected, that "In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part *or of*

[51] Judgment, paras.728,737-739,764-765,741,748.
[52] Judgment para.737-739
[53] Secretariat-Draft-First Draft of the Genocide Convention, Prepared by the UN Secretariat, [May] 1947 [UN Doc. E/447] See Article II(Acts.qualified.as.Genocide)

preventing its preservation or development."This definition of genocide is substantially different from definition contained in Article IV of the Statute.

74. Proper understanding of serious bodily and mental harm is given, for example, in the United States understanding attached when ratifying the Genocide Convention. In the relevant part of this "understanding" it is stated that: "the term "mental harm" in article II(b) means permanent impairment of mental faculties through drugs, torture and similar techniques".[54]

75. Transfer of population from one place to another is not an act of genocide, and cannot be considered as "serious bodily or mental harm" or "deliberate inflicting the group condition of life calculated to bring about their physical destruction". The TC stated that forcible transfer can, in certain circumstances, "be an underlying act causing serious bodily or mental harm – in particular if the forcible transfer operation was conducted under such circumstances as to lead to the death of all or part of the displaced population."[55] As it will be explained below, that is only the case if the group is transferred in a manner or in a locations such as concentration camps, ghettos etc in which they are imposed to the conditions of life that lead to their destruction.

76. The relevant criteria "as to lead to the death of all or part of the displaced population" is not applicable, since transfer of persons from Potpčari and Žepa to Tuzla were not of such a nature that led to the death of all or part of the displaced population. Rather, they were transferred to the Muslim held territory and within the group that is religiously, ethnically and racially similar as the transferred group within the territory where civilian and military were organized.

77. The TC erred because it applied erroneous legal criteria that was based on the First Draft of the Genocide convention and does not present lex lata of the contemporary international law.

78. The TC erred in law in holding that the evidence of intent to forcibly remove may... constitute evidence of the intent to destroy a group "when considered in connection with other culpable acts systematically directed against the same group".[56] In order for there to be an actus reus of genocide, the act itself must be one of the acts that are the actus reus of genocide.

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[54] Quoted by Schabas, p.162. The TC relied on the Draft Genocide Convention, UN Doc E/447, p.20.
[55] Judgement,para.739.
[56] Judgment para.748

79. The TC rightly concluded that "evidence of intent to forcibly remove is not necessary indicative of an intent to destroy the group"; however it erred in conclusion that "it may nevertheless constitute evidence of the latter when considered in connection with other culpable acts systematically directed against the same group"[57] as it is the question directed against what group, the group that was imposed to "other culpable acts", or the same "protected group", and also whether those culpable acts must satisfy Article 4 requirements.

80. Forcible transfer can be considered as evidence of genocidal intent only if the group which has been forcibly transferred is exposed to some of the genocide acts enumerated in Article 4, particularly if they are transferred in a place on which there are living and other conditions leading to their death or destruction. For instance if they are on the transferred territory exposed to enslavement, starvation, detention in ghettos or concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as a human beings, or to suppress them and cause them inhumane suffering and torture"[58]. Essentially, intent has to be established in relation to a group that has been transferred. If another part of the group is imposed to certain measures that lead to their death (for example murder), that cannot be considered in union with the transfer of other part of the group that do not lead to the destruction of the transferred group.

81. Particularly, suffering caused by the death or their relatives, however strong, cannot be considered as serious bodily or mental harm for the purpose of the application of the Convention of Genocide. This suffering by itself does not lead the group to their destruction in whole or in part.

82. This TC error invalidates the Judgement.

GROUND 8 – ERRORS CONCERNING "PROTECTED GROUP" REQUIREMENT

83. The TC did not provide a reasoned opinion, as required under Article 23 of the Statute, as to why it considered Bosnian Muslims and Bosnian Muslims of Eastern Bosnia as a substantial component of the entire group in the sense of Article 4 of the Statute, and thus

[57] Judgement, para.748.
[58] A-G Israel v. Eichman, 1968, District Court of Jerusalim. Quoted by Schabas, p.160

made an error in law that invalidates the Judgment. In addition, The TC erred in law because in its findings in paragraphs 750 and 774, 775, it has relied on the Trial and AC conclusions from other cases (*Krstić, Blagojević and Jokić* and *Popović at all* cases)[59] without taking judicial notice of it (either as AF's or as facts of common knowledge). The TC did not take (and could not take) judicial notice of those facts and conclusions, and since those finding are not articulations of legal norms or standards, the TC was obliged to make its own findings.

84. In determination of "protected group" being an element of the crime of genocide, the TC has stated as follows:"The identification of the Bosnian Muslims as a protected group within the meaning of Article 4 of the Statute is an issue that has been settled by the AC and consequently, the Chamber does not deem it necessary to revisit the issue here".[60]

85. The identification of the Bosnian Muslims as a protected group is factual issue. It is not a legal standard or something that the TC can incorporate in to the Judgment by reference. The mere fact that the AC, in some previous cases or all cases, has established that fact is not a proper explanation, e. g. reasoned opinion as required by Article 23 of the Statute.[61] If the fact is notorious, the TC was obliged to take judicial notice of it. Factual and legal findings from other cases before the Tribunal "have no binding force except between the parties in respect of a particular case".[62]

86. The same is true for TC's findings in paragraphs 774 and 775 of the Judgment in which the TC discussed the issue concerning "Intent to Destroy the Group "in Whole or in Part". The TC again relied on the findings made by the AC, quoting not original judgments, but certain paragraphs of the *Popović*TJ.

87. This manner of making factual findings is impermissible. The TC erred in law because it was obliged to make its own findings on the basis of evidence on the record in Tolimir's case e.g. it was duty bound to "revisit the issue".

88. This error alone invalidates the Judgment. Since it is to be determined whether a certain group is a protected group under Article 4 of the Statute, one of the core elements of the crime of genocide - "protected group" - cannot be considered as established. That further means that it cannot be concluded that the TC established on the basis of the available

[59] Judgement, fn.3141,3214.
[60] Judgement,para.750.
[61] Border and Transborder Armed Actions Case (Nicaragua v Honduras), Judgment, International Court of Justice Reports 1988, para.54.Karemera, 29/05/2009.
[62] See:Simic-at-all,25/03/1999,p.4.

evidence in Tolimir's case one of the core and indispensable elements of genocide as well as of conspiracy to commit genocide. For that reasons the AC is requested to overturn the decision of the TC on Counts 1 and 2.

GROUND 9 – ERRORS CONCERNING KILLING INCIDENTS AND NUMBER OF PERSONS KILLED

89. The TC(Majority) erred in fact in finding that Bosnian Serb Forces, in the specific circumstances alleged in paragraphs 21.1-21.4 of the Indictment killed 4970 Bosnian Muslim men, and that total of 5749 Bosnian Muslims from Srebrenica were killed by Bosnian Serb Forces[63] .Those findings had a significant impact on the TC findings concerning all counts of the Indictment. Particularly those have significant impact on the estimation of the gravity of the crime and its impact on the determination of sentence.

90. The TC erred in law as it was engaged in the calculation of the alleged total number of persons killed other than in combat that are not specified in the Indictment.[64]

91. The TC was obliged not to overstep the boundaries of the Indictment, and all of its findings should have been based only on those crimes that were specifically included in the Indictment. These are paragraphs 21.1-21.4 of the Indictment. "Incidents" not specified in the indictment were not subject of proof, and the TC did not establish circumstances of their death. For that reasons, that calculation cannot serve as a basis for findings on the gravity of the crime or whether a certain crime (genocide or extermination) has been committed. In alternative, even if the TC estimated the total number of persons allegedly killed in the aftermath of Srebrenica, the TC was obliged not to rely on that estimation in relation to legal findings. This TC error invalidates the Judgement. The AC is requested to formulate correct legal standard and to review the TC findings in relation to Counts 1-7.

92. The TC erred in fact and law concerning facts that relate to a number of persons killed in specific cases specified in the Indictment.

[63] See, paras.751, 596,570.
[64] Judgment paras.570,583-591,595-597

93. The TC erred in finding that app. 1.000-1.500 Bosnian Muslims were shot and killed at Branjevo Military Farm and 500 at Pilica Cultural Center[65] because it did not properly estimate evidence on the record and did not consider all factual findings it reached in making that conclusion.

94. The TC established that the killing of Bosnian Muslims lasted from approximately 10AM until 3 or 4PM on 16 July 1995.[66] Concerning the number of persons summarily executed. The TC relied on Erdemović's estimation that 15 to 20 busses arrived at Branjevo farm, and the PW-073 estimation that between 1000 and 1500 bodies were lying in the field following the shootings.

95. Erdemović calculated that app. 1000-1200 persons have been summarily executed[67] based on estimation of an alleged number of busses that were arriving. However, he stated that he „don't know exactly". Erdemovic testified that he did not count the busses, but that that was his estimate.[68] The estimate of PW-073 is not an estimate that the TC could not rely on reasonably, keeping in mind the circumstances in which he was trapped.[69]

96. Even 1000 person is an unreliable estimate that is not supported by the evidence of the specific incident bearing in mind that Erdemović's description of how those executions were conducted and presented in paragraphs 491-494 of the Judgement. If that killings begun at 10AM and ended at 3 or 4 PM, that would mean that they lasted for 5 or 6 hours, and further that the rate of killings was 200-166 per hour. That is simply impossible in circumstances established by the TC. During those 5 or 6 hours, arguments transpired between soldiers on how to proceed with killings,attempt to conduct with different weapons, there was a need for each group of persons to reach the killing site to turn around on their backs and lie down.[70]

97. Under the aforementioned circumstances, no reasonable TC could rely on the estimation that between 1000 and 1500 persons has been killed at Branjevo Military farm.

98. This error occasioned a miscarriage of justice as it is relevant for an estimation of total number of persons killed in the specific incidents to be specified in the Indictment, and also in estimation of the gravity of the crime.

[65] Judgment, paras.459,491-500.
[66] Judgement,para.494.
[67] ErdemovićT.10983
[68] ErdemovićT.1881.
[69] Ex.P48,p.1208 (the TC in Judgement quoted p. 36 what is a page in the e-court)
[70] Judgment,492-493.

99. **The TC erred in fact and law in finding that after 23 July 1995 members of Bosnian Serb Forces killed persons named in para. 533.** The main circumstance was established on the basis of highly unreliable witness statement of witness PW-057[71]. The TC did not provide any caution in estimation of his evidence[72] which, in addition was based on hearsay. Circumstances of their disappearance and destiny are unknown, not whether those people had been actually killed. The very fact that they appeared in the most recent list of missing persons is not indicative of the alleged circumstances of their death, and their remains remain undiscovered.[73]. Under these circumstances no reasonable TC could have found that those persons were killed by Bosnian Serb forces.

100. The AC is requested to revise the findings that Bosnian Serb Forces killed persons named in para.533 of the Judgement, and to revise the TC convictions on Counts 1-6.

101. **The TC erred in fact in finding that the Bosnian Serb Forces killed 4 Bosnian Muslim men named in para 451.**The TC finding that Bosnian Serb Forces "killed them shortly after 26 July 1995" is based on the "context of the events taking place since the fall of Srebrenica and in view of the circumstances of their disappearance". However, the TC has not established any facts concerning their disappearance, but that they "just disappeared".[74] All alleged circumstances of Drago Nikolić's communication are based on the evidence of PW-057 that is highly unreliable.

102. The AC is requested to revise finding that Bosnian Serb Forces killed persons named in para.451 of the Judgement, and to revise the TC convictions on Counts 1, 2, 3 and 4.

103. The TC erred in fact in findings concerning number of Bosnian Muslim Males who died as a result of combat, suicide and other causes as well as in findings concerning total number of Srebrenica related missing and identification of Srebrenica related missing and total number of killed[75]

104. In estimating the total number of persons missing or killed in the aftermath of Srebrenica, the Majority concluded as follows: "The demographic and forensic evidence assembled in this section together with the mass of testimony relating to many specific episodes that led to killing provides a much firmer basis for findings as to what happened to

[71] Judgement,para.531.
[72] See DO- Judge Nyambe, paras.5-14.
[73] Judgment,para.532
[74] Judgment,para.540
[75] Judgment,para.592-594,572-582

the Srebrenica-related missing. The Chamber finds that while the deaths of some of the can be attributed to combat and some to individual cases of suicide and other causes, the Majority considers that these were very much of a minority." The position of the Appellant was that on the basis of evidence, the total number of killed in specific incidents charged in the Indictment as well as the total number of unlawful killing (4970 and 5749) is unrealistic. The Majority based its conclusion on the presumption that all persons who are buried in mass graves are victims of summary execution.

105. In the whole Judgement, the TC avoided to make a proper estimate of the fighting with the column that was engaged in typical military operation – breakthrough. Also, the locations of some of the mass graves are on the line of the column movement.

106. The TC erred because it did not provide an estimate concerning a total number of those who died as a result of combat, suicide, infighting among the members of the column.[76] There is much of evidence from which it may be reasonably concluded that those who went missing and many of those found in the mass graves lost their life otherwise than summary execution, and that some of them died before or long after the events of July 1995.

107. The Majority has stated that it is "satisfied that the most precise and reliable method of calculating the number of Bosnian Muslim killed in the aftermath of the fall of Srebrenica is through an analysis on number of people reported missing, identification of persons in grave-sites associated with the Srebrenica events and forensic and other evidence of the circumstances leading to the death of those exhumed from these graves"[77]. While this approach might seem reasonable at first sight, it is unreasonable to conduct such an examination in this manner without considering other factors such as the data concerning Srebrenica population, shortcomings concerning presentation of the results of the DNA analysis and in particular, it has to be answered whether all persons buried in mass graves associated with Srebrenica are summarily executed, or as the TC has qualified (killed otherwise than in combat).

108. The Majority acted on the presumption that all remains from Srebrenica related mass graves were summarily executed. It is obvious that the Majority acted on the basis of this presumption, since the Chamber considered all those found in mass graves as victims of murder.

[76] Judgement,para594,fn.5287.
[77] Judgment,para.575

109. In paragraph 60 of the Judgment the TC has stated that: "There are inconsistencies between DNA-based identification of Srebrenica related missing, and court declarations regarding the death of the same person; however the Chamber finds that in such cases the DNA-based identification is more reliable."

110. In reaching this conclusion the TC relied on the testimony of Ms. Tabeau, particularly on her position that "further information would be needed to establish the reasons for the variation" stating that "court declarations usually are not based on precise information about the death, because the person is missing and so the circumstances regarding the date, the place and the cause of death are unknown".[78]

111. No reasonable trier of fact could have found that this conclusion of the TC is reasonable for the following reasons. DNA identifications and information's collected by the ICMP does not say on which occasion and on which date one person died, but merely provides identification of that person. The ICMP connected the place and date of disappearance of some individual on the basis of statements of some person. No reliable record of those statements is provided during the trial.

112. Particular attention has to be paid to two court declarations –exh.D316 and exh.D317. D316 contains precise information about the date (07.07.1995) and a manner of death and even when and where the person was buried (on Kazani cemetery). All data has been published in the Official Gazette. These information was based on witness statements. This information provides a reasonable ground to conclude that they are accurate.

113. D317 contains data that the person named in this declaration disappeared on 15 March 1995 as a member of the ABiH in Žepa.

114. Information that those two declarations contain are in sharp contradiction with Ms. Tabeau's opinion on which the TC relied.

115. The fact that their bodies were identified in mass graves that relates to Srebrenica is strong evidence that in those graves not only a victims of summary execution has been buried, but also persons died in combat and even those that had been buried on Kazani grave in Srebrenica.[79]

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[78] Judgement,para.60

[79] D316.That Kazani cemetery is located in Srebrenica see,PW-007,T.518

116. The fact that their bodies were identified in mass graves which relate to Srebrenica is strong evidence that in those graves not only victims of summary execution had been buried, but also persons who died in combat, including those buried in Kazani graves in Srebrenica. In addition, there is a little evidence of burial and so called reburial operation which is a fact which no reasonable TC could reach the conclusion on that all of those founded in mass graves were summary executed.

117. The TC rejected the Defence argument that "inconsistency with ABiH records of soldiers and other persons associated with the ABiH who were killed gives rise to reasonable doubt about the accuracy of the ICMP data."[80] Rejection of this argument requires the AC's attention, since no reasonable trier of fact could deny the accuracy of the fact that 140 persons were identified in Srebrenica-related graves, albeit having died in events that are not related to those covered by the Indictment. The very fact that "the scale of inconsistency is very small"[81] is not a reason for the rejection of the argument, just as the fact that they were identified from Srebrenica related graves is not a reason for rejection of the argument but for the conclusion that Srebrenica related mass graves contains bodies of persons died in events not related to Srebrenica.

118. The TC based its conclusion on the assessment of the Prosecution demographer (the same one that is of opinion that court declarations are unreliable) which entails that "reporting of cases in ABiH record is not highly reliable since attention is mainly given to whether the person in question has died, with details of death being less important".[82] This conclusion is highly speculative and not based on evidence. Particularly, this statement is based, as explained in EXH.1776,p.94,fn.87, on the personal communication of the writer of the Report with persons from NGO's, including Mirsad Tokača and interpreters with whom she worked in Bosnia. There is no data from the, for example, former or present members of the Army of the BiH concerning reliability of those data.

119. The TC erred in fact by concluding that "while the deaths of some of them can be attributed to combat and some to individual cases of suicide and other causes, the Majority considers that these were very much of minority".[83] Judge Nyambe on the other hand

[80] Judgement para.61
[81] Judgment para.61
[82] Judgment para.61
[83] Judgement, para.595

considers "that the Chamber does not have the evidence before it to make the findings that these deaths constituted a minority of the Srebrenica-related missing.[84]

120. The TC stated in paragraph 592 of the Judgement that it "has evidence before it that a number of Bosnian Muslim died as a result of combat activities, land mines, and other causes" quoting video evidence (D280) filmed immediately after the events, in which eyewitnesses provided estimates of approximately 2000 or 3000. A report from UNPROFOR civil affairs of 17 July stated that those who arrived at the Tuzla Airbase had said that up to 3000 were killed mostly by mines and engagement in combat VRS.[85]

121. Other evidence also supports an estimate that app. 3000 persons were killed in combat or from other reasons than murder. For example, D268, D269, D270 and D271. The TC relied on interpretation provided by the OTP investigator Dušan Janc. However, the TC has stated that "individual members of the column were only in position to make rough estimates of the number of persons killed by military action on the part of Bosnian Serb Forces".[86] Considering that it is an issue of large numbers (app. 3000), only estimates can be provided. The TC did not provide reasons why those rough estimates are not reliable.

122. The position that app. 3000 persons died as result of combat activities or from other causes not connected with the summary execution is supported by the Secretary General Report "the Fall of Srebrenica"[87] and even with the Prosecution's witness Richard Butler.[88]

123. That estimate entailed that approximately 3.000 Bosnian Muslims died in the combat and in other ways not connected with the summary execution is supported by testimony of the witness PW-057.[89]

124. Considering the list of missing persons and those who died on various occasions, the TC has stated that "5749 is the minimum number killed and that the actual figure can be expected to be significantly higher"[90]. However, neither the TC, neither the OTP in various reports and testimonies of its investigators, considered information provided by the Ministry of Dutch Government. exh. D320, is a report from 21-06-2011 stating that "Defence minister ans Hillen agreed to reveal the whereabouts of mass grave in Srebrenica during an interview

[84] Judgement, fn.2588 and Dissenting opinion, paras.8
[85] P588p.2
[86] Judgment,para.593
[87] D122,p.86, para.387
[88] Butler.T.17403.See also P2585,
[89] PW-057,15/06/2011,T.15500,see also14/06/2011 T.15472-15473(confidential)
[90] Judgment,para.596

with TV programme Nieuswsuur". This is a mass graveyard containing a minimum of 7 bodies of persons that has not been summarily executed.

125. No reasonable TC can rely that each and every grave connected with Srebrenica events contains bodies of those who has been summarily executed.

126. In paragraphs 574-757 of the Judgement the TC explained why it rejected the Appellant's submission which entails "that if the number of people about whom the WHO had information in the area of Tuzla-Podrinje Canton on 29 July – 34,341 – is subtracted from the number of those in Srebrenica in January 1995 -37,555 people- "the argument that 7,000 were killed (executed) is simply untenable".

127. The TC has stated that figures contained in the WHO report are approximations.[91] Exh.P2873 contains approximations on which the TC did not pronounce on their reliability. The position of the Appellant is that those estimates are reliable. Firstly, total number is calculated on 4 August 1995, when the breakthrough of the column was over, in particular the "murder operation". In that report the precise figures are stated regarding persons housed in private accommodations and collection centres (17.383+9749) including 6.500 in the Tuzla Air base camp. While the number of 6.500 is an approximation, it is a reliable one, which can be concluded from other data in the set of documents that are admitted as EX.P2873. There is precise data about the percentage of age structure of the Srebrenica displaced persons (p.2). Since it was a wide area of Air Base, WHO could provide a reliable estimate with a very little margin of error. Page 4 The WHO document of 29/07/95 in which it was provided and estimates that the amount was 7.400 persons in the Air Base. Together with those in private accommodation and collective centres, the total number amounted to 34.341. Page 4 is a document about "Geographical distribution and age/sex structure of the displaced persons from Srebrenica (total no excluding the Air Base camp is 26.941, and that on the airbase, at the time this document was produced, there were around 6.500 persons.) The most important is the document on p.7 that contains data concerning "prevalence of the most common diseases among the displaced persons from Srebrenica accommodated at the Air Base" in period 13 July until 26 July 1995, provided on 29. July 1995, and in document on p. 8 their health status in period from 17 July until 26 July 1995. This data was produced by respective organizations under UN authority. Bearing in mind the nature of the figures, no reasonable trier of fact will disregard this document from consideration on the basis of the fact that it

[91] Judgment para.574

contains approximations, In addition, p.9and10 contains very precise figures, not approximation. The only reasonable conclusion from the P2873 is that the facts and estimates provided are reliable.

128. The TC also erred in refusing to take into account document D117 in estimation of total number of persons killed and missing. The TC concluded that "the value of the data on population in Srebrenica in January 1995 is limited by the fact that they concern a time six months prior the fall of the enclave and by the difficult conditions subsisting at the time" and also that "the absence of data on individuals reduces the utility of figures for detail demographic analysis". This argument is erroneous for the following reasons and provides a clear demonstration that evidence in this case was not considered in an appropriate manner.

129. The fact that this document is produced six months before the fall of the enclave does not imply a connection with its reliability concerning estimation of total of Srebrenica population. This document contains precise figures not approximations. There is evidence that until January throughout July, some people left Srebrenica. There were not additional refuges arriving in Srebrenica in this period. Secondly, the absence of the "data on individuals" having an impact on the comprehensive demographic analysis is not of importance for establishing probable numbers of missing persons, or as a corrective factor, casting doubt on the analysis conducted by the Prosecution's demographers. Document D117 is, contrary to the TC finding, strong evidence that in Srebrenica, at the time proceeded, its fall was at a maximum or less than 36.051 persons.

130. The TC has stated that the approach presented in the Final Trial Brief "ignores the significant amount of testimony on the circumstances of the killings and the related forensic and other analysis conducted in connection with the bodies that have been recovered which the Camber finds to have been reliable".[92] The Majority relied on its conclusions stated in paras.49-62, and 67-70.

131. First, the position of the Appellant was, and still remains, that the figure of 7000 is untenable. The Majority has found that the total number of persons killed as alleged in paras 21.4-22.4 of the Indictment is 4.970. This is far less than 7000 as claimed by the Prosecution. However, the TC also erred in this conclusion, as well as in its conclusion concerning 5749 of total number of killed, and concerning total number of Srebrenica Missing which according to the TC and Brunborg and Tabeau Report is more than 7000. .

[92] Judgment para.574

132. In paras.49-62, the TC made findings and presented arguments concerning reliability of evidence that forms the basis for the identification of the Srebrenica related missing through DNA. The TC has stated that findings "on number of persons killed in various incidents alleged in the Indictment.. have largely been derived form the identification of Srebrenica related missing through DNA analysis (para. 49).

133. Demographic data is not conclusive concerning the reliability of a day or place of disappearance. On the other hand, while the TC accepted Brunborg's report in response to a report by S.Radovanović.[93] Radovanovic's report has never been tendered into the evidence. Reliability of those reports is subject of concern that casts doubt on their reliability. No reasonable TC could have found those reports as reliable evidence of place and date of disappearance.

134. Reliability of DNA might be considered only in relation to mere identification, and not other circumstances. The TC rejected the defence argument that the "DNA method cannot be used on its own determination of identity because a DNA mach requires endorsement from the pathologist before the death certificate is signed".[94] The TC has stated that it does not accept this submission, because it rests on administrative practice which cannot as such undermine the validity of DNA identification for which there is strong evidence. What was provided in evidence is just lists in an excel table without supporting materials such as electrocardiograms, reports of the interview with the persons who report certain persons missing, and pathologist reports. The TC just quoted that "The Accused cites articles in the proceedings of the American Academy of Forensic Science, which establish that traditional methods of anthropological assessment are still necessary"[95] The TC has not anthropological evidence concerning the most individuals listed, nor death certificates and just relied on the Person's statement that that "concordance of DNA and non-DNA data was important and was one of the pillars of the ICMP identification process".[96] There is no evidence of that practice, and the OTP did not provide any evidence in that respect. Articles cited were of the ICMP members.

135. Trial record only contains an excel table of DNA matches. However, A.B. Arloty had stated that: „One misconception regarding DNA-led identifications is that once a DNA match

[93] Judgment,para.54
[94] fn.144
[95] fn.144
[96] fn.144

is made, than a positive identification automatically follows". This is far from true: it is imperative that traditional forensic scientist review the tentatively identified remains and related evidence to ensure that the match is valid. "There is no evidence that ICMP used traditional forensic scientist reviews and related evidence to ensure that the match is valid. Especially, they did not have approval from family members. Parsons stated that the ICMP does not issue death certificates, but local pathologists appointed by the relevant court.[97] No such evidence is in the record. Even if one considers that DNA analysis is reliable, no reasonable TC would rely on excel tables presenting various information about identification of persons and related information without requiring death certificates. Particularly, since death certificates are not hard to obtain, and only those documents can be considered sufficient evidence that one person is identified. Parsons testified that the ICMP "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."[98] The ICMP data is not reliable concerning date and place of disappearance, and they included just two nominal dates for that area.[99]

136. The TC erred because it did not request documents needed for an expert report to be reliable. In order for it to be a reliable source of information and findings, it must be capable of verifying it. The reasons why certain information capable of verification was not provided was explained by Parsons in following way: "And we know for a fact that the families have great concern in turning over genetic profiles, their personal genetic information, to individuals who they consider complicit in the death of their family members."[100] However this explanation is not proper, since this information could be provided to the Prosecution, TC or to defence counsels, that is to persons who are not responsible to death of their family members.

137. T.Parsons was honest to the point that in order to verify the accuracy of a DNA report, it is necessary to have an electroencephalogram.[101] [redacted] However,

[97] Parsons,T10364-10365
[98] Parsons.T.10422
[99] P136,P137,T.20875
[100] Parsons,25/02/12 T.10445
[101] T. 10443

DNA reports do not provide any information concerning time, cause and manner of death of particular persons.[102]

138. In order to be reliable, the expert statement or report must meet the minimum standards of reliability. It is the practise of the ICTY that "there must be sufficient information as to the sources used in support of the statement. The sources must be clearly indicated and accessible in order to allow the other party or the TC to test or challenge the basis on which the expert witness reached his or her conclusions. In absence of clear references or accessible sources, the TC 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".[103]

139. None of those requirements have been satisfied in connection with the Parson'sstatements, and all of the reports based on DNA identifications. In those circumstances there, where there is no possibility to check those reports, no reasonable TC could have reached a conclusion concerning the report's reliability.

140. Concerning ICMP and ICRC lists, they cannot be considered as completely reliable. Family members as well as friends and relatives are those who reported some person missing. In addition, there is no reliable evidence on how those lists are updated, or whether there is an organized effort to check the accuracy of those lists. That reporting missing is not completely reliable shows, inter alia, evidence of the situation in the column during the breakthrough. For example, Ramiz Bećirović, who at the time was a commander of the 28th Division and who headed the breakthrough, stated: "...when they started naming the persons who had been killed, I saw that these persons had been with us in the Drc sector, so I could not accept all this information as accurate ".[104]

141. Concerning the argument that in the Defence's Final Brief the Appellant ignored evidence on the record[105] is without foundation. Evidence that was quoted in the Final Trial Brief, and in this Brief, clearly shows that the TC method of estimation of evidence was based solely on the Prosecution position that was not critically examined, and that the TC conclusions are not beyond reasonable doubt.

142. The TC errors occasioned a miscarriage of justice and invalidate theJudgement.

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[102] Parsons, T. 10435, T.10472
[103] Stanišić&Simatović, IT-03-69-PT, Decision..., 18/03/2008,para.9.
[104] D1,p.15
[105] Judgement, para.574

GROUND 10: ACTUS REUS OF GENOCIDE

143. The TC erred in fact and law in finding that "the suffering" of a group of men separated in Potočari and taken to White House, as well as the group of men who surrendered or were captured from the column through 13 July "amounted to serious bodily or mental harm."[106]

144. As stated under Ground 7, mental harm can properly be interpreted only as "permanent impairment to mental faculties". In order to satisfy that requirement, it is requested that bodily or mental harm in itself is of such a serious nature that it contributes or tend to contributes to the destruction of the group. If that group was subsequently killed, harm previously committed cannot be taken into account since it cannot be reasonably concluded that that particular harm was imposed in order to destroy a group as such, or that that ill treatment contributed or could have tended to contribute to the destruction of the group as such.

145. The fact that the detainees "would have been aware at one stage or another of the real possibility that they would ultimately met their death"[107] cannot be a proper basis for inference that that awareness immediately or in short period before their death is amount to serious bodily or mental harm. If another *actus reus* has been committed (killing) against the same persons, the question whether immediately before their killing, they were imposed to mental harm is relevant for the establishment of the gravity of the crime, and is not a separate crime.

146. The TC erred in fact and law in finding that the events in which harm was caused to those who survived the killings "was of such a nature as to contribute or tend to contribute to the destruction of all or part of the group in that their suffering prevented these members of the group from leading a normal and constructive life."[108]

147. Genocide is a crime of which its ultimate goal of incrimination is to safeguard the very survival of the group, not individuals. In order to satisfy genocide requirement, the group as such must be subjected to serious or bodily or mental harm. Not isolated individuals who in this case where those who survived the killing operation. Here, the TC confused attempted

[106] Judgment,para.753-754
[107] Judgment,para.754
[108] Judgment,para.755

murder with causing serious mental harm. In order to satisfy the requirements of Article 4, the harm must be committed against the whole or part of the group as such.

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148. The TC erred in law and fact in finding that the suffering of the woman, children and the elderly who were forcibly transferred from Srebrenica to Tuzla amounted to serious bodily and mental harm.[109]

149. Forcible transfer is not *per se* an act of genocide. While the TC provided a description of suffering of those who ended up in Tuzla, it does not satisfy requirement of serious mental harm, since that harm must be of such a nature that it "contributes or tends to contribute to the destruction of the protected group as such" or that that harm permanently impaired mental faculties of the members of the group who were transported from Srebrenica to Kladanj.

150. In para. 757, the TC enumerated a number of circumstances that cannot be taken into account in estimating whether certain acts present serious mental harm, such as the inability to return to their former homes, fear of population living in surrounded villages and quality of life. Those fears or inabilities do not satisfy the requirements of Article 4.

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151. The TC erred in fact and law in finding that "serious mental harm was inflicted upon the Bosnian Muslims who were forcibly transferred out of Žepa between 25 and 27 July 1995." (para. 758)

152. There is no evidence that those who were transported from Žepa suffered serious mental harm. Many of the findings in paragraph 758 are erroneous or have been erroneously interpreted.

153. First, concerning the acts of the Appellant from 25-27 July 1995, substantial evidence on the record suggests that the TC erred in finding that the Appellant brandished his weapon in the air. In footnote 3181, the TC quoted the wrong paragraph (673 addressing another issue), and clear evidence on the record shows that the Appellant was at that time in Žepa and unarmed, carrying no weapon. Čarkić, in his interview with the Prosecution (D217) has stated: "I said I saw General TOLIMIR several times and once in Zepa I, he generally and, and I' m witness to this he had put his own head at risk to help evacuation of the Zepa population and make it and to go right, If I may say yes, General TOLIMIR had come into

[109] Judgment,para.753-758

Zepa bef-, with one or with two or three military policemen before our Army came into Zepa. He came unarmed and amongst the thousands of civilian populations and before I had gone in" (D217,p13:7-13) He also testified that Tolimir insisted that "nothing should happened to the people" (D217,p.14)

154. The TC's conclusion concerning Mladić's suggests that while he was entering the busses, the TC just pointed to one sentence. However, Mladić talked a lot and he entered in all or almost all of the busses. It had been recorded that he "wishes a safe journey" and "good health" and "not to be afraid" of anything.[110] In a few instances he stated in one of the buses "I am saving you and your children. And our children were killed in 1992 in Žepa canyon... You heard about me for a very long time. Now you are looking at me. I am General Mladić. There are able-bodied people among you. You are all safe. And you are all going to be transported to Kladanj. We wish you a safe journey and good bye."[111]

155. The TC took several of Mladić's words out of the context, namely that in some busses he told the passengers that he gave them their lives as a gift.[112] The video compilation presented by the Prosecution showed the recording as follows: "you who are of military age don't go to the front again. No more forgiveness. Now I am giving you your life as a gift". In another bus the monologue was as follows: "I am General Mladić. There are able-bodied people among you who shot at me before. I forgive you all and am giving you your life as a present. Don't come before me at the from. Next time there won't be forgiveness", and in another as: "I have mercy for you and you did not have any for our children in 1992 in the Žepa canyon. Have a safe journey and good bye"[113]

156. Those words could not be understood as words that caused or has potential to cause serious mental harm to the Žepa population. The explanations provided by the Majority are so erroneous that no reasonable trier of fact could have reached. Transportation of people from Žepa to Kladanj was with several incidents only, and regarding incidents that have occurred, the Appellant ordered investigation that was successfully conducted.[114]

157. The TC has stated that "transportation of the population from Žepa ... was accompanied by slightly different circumstances, although there are some important

[110] P740,p.26-eng
[111] P740,p.30
[112] Judgment,para.758
[113] P740,p.31
[114] P1434,p6,see also Judgement,para.999andfn.3954.,

similarities"[115] This conclusion is erroneous; as it is apparent from the TC's findings that no reasons are provided for that conclusion.

158. The TC also disregarded evidence that Mlaidić ordered that „nothing must be taken from the ... whom we evacuated from Žepa and that they must not be maletreated".[116]

159. For the foregoing reasons, the Majority's conclusion that "suffering of the Bosnian Muslim Population that was transferred from Srebrenica and Žepa raises to the level of serious bodily and mental harm" e. g. "as an act of genocide pursuant to Article 4(2)(b))[117] is of such a nature that no reasonable TC could have reached such a conclusion on the basis of the evidence.

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160. The Majority erred in fact in finding that "the conditions resulting from the acts if Bosnian Serb Forces, as part of the combined effect of the forcible transfer and killing operations were deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern Bosnia and Herzegovina."[118]

161. This conclusion is based on the wrong understanding of the terms "physical and biological destruction"[119], erroneous factual findings, omission to take into consideration relevant evidence, and selection of facts stated in para. 66. The TC did not provide reasoned opinion as requested by Article 23 of the Statute.

162. In reaching their conclusions, the Majority considered the alleged "overall effect of not only the forcible transfer operations ... but also the killing of at least 5,749 Bosnian Muslim men form the same group".[120]

163. The Majority has found that "those operations /transfer and killing/ had a devastating effect on the physical survival of the Bosnian Muslim Population of the Eastern BiH, these operations were aimed at destroying the Bosnian Muslim community and preventing reconstitution of the group *in this area*".[121] However, this conclusion is erroneous since the

[115] Judgment,para.758
[116] P2427.
[117] Judgment,para.759
[118] Judgment para.66
[119] Judgment para.764
[120] Judgment para.766
[121] Judgment para.766

very survival of the group *as such* is the protective object of the genocide and not that group in particular area.

164. The TC erred because it did not make separate estimates for Srebrenica and for Žepa. However, in both cases, population was transferred to Muslim held territory, in which it was not imposed to living conditions that "calculated to bring about its destruction". That the population was imposed to such conditions is simply not supported by evidence.

165. In order to find that the group was imposed to condition of life calculated to bring about their destruction, it is not permissible to combine elements of other actus reus of genocide in order to reach conclusion about third actus reus. It must be proven that the whole population or its respective part is imposed to living conditions that are calculated to bring about their destruction. Transfer of population that does not in itself present actus reus of genocide, combined by killing members of the group, cannot lead to the conclusion that transferred part of the group is imposed to living conditions that leads to their biological or physical destruction.

166. These errors invalidate the Judgement and caused miscarriage of justice. Findings addressed in this Ground of appeal were crucial in relation to the conviction on Counts 1 of the Indictment. The AC is requested to revise the TC findings and to enter a Judgement of acquittal on Ground 1 of the Indictment.

Ground 11: GENOCIDAL INTENT

167. The Majority erred in fact and law in finding that "Bosnian Serb Forces who committed the underlying acts set out in Article 4(2)(a)-(c) intended physical destruction of the Bosnian Muslim population of Eastern Bosnia and Herzegovina."[122]

168. The TC inferred genocidal intent merely from the acts it considered to be actus reus of genocide, and the consequences of those acts.

169. Facts on the basis of which the Majority inferred genocidal intent include:

170. (a)Opportunistic killings. Those killings cannot be taken as a support of genocidal intent since there were no - as stated in the indictment - natural and feasible consequences of the JCE to murder. "Opportunistic killings' by its very nature constitutive a vary limited basis

[122] Judgment, para.773

for inferring genocidal intent"[123]

171. (b) Capturing of thousands of Bosnian Muslim men from the column.. in and of themselves, telling the intent of the Bosnian Serb Forces concerning the fate of this part of the group".(para.769) Capture of enemy soldiers involved in military operation, whether offensive or defensive, cannot provide a basis for finding on genocidal intent, whether alone whether in combination with other facts.

172. c) Burning of documents of those who had been detained in Potočari does not provide any indication of genocidal intent.

173. (d) The Inhumane conditions of the detention are not an indication of genocidal intent.

174. (e) The TC erred in considering that the specific intent "can be inferred from the fact that the proposal to open up a corridor and let the column, headed by the ABiH members ... was opposed; instead, the column was systematically targeted in order to capture and kill as many Bosnian Men possible. It was not until Bosnian Serb forces were forced to accept that it was costing them too much manpower to engage in combat with the armed members of the column that a decision was made, ultimately to open up such a corridor". Evidence, on which the TC relied, particularly in paragraphs 512 and 513, provides no basis for the inference of genocidal intent.[124] Destruction of enemy military forces engaged in military operation cannot be considered as an act of genocide. There is also evidence that the strength of the column was not known by that time.[125]

175. (f) Even the large number has been killed (see para. 770), that fact alone, or in combination with other above enumerated facts, cannot, per se, be considered as a proof of genocidal intent.

176. (g) the fact that the bodies of those who were killed were buried, and later reburied is not evidence of genocidal intent, but that of the intention to conceal murders.

177. (h) The Majority concluded that several layers of leadership were involved in the murder operation.[126] This conclusion is not per se evidence of genocidal intent, and evidence on the record, as well as TC specific findings about involvement of various persons in murder

[123] Judgement, fn. 3131,quoting Blagojević and Jokić AJ, para.123
[124]
[125] PW-057,14/06/2011,15425-15426.
[126] Judgment para.770,para.1070

operations does not support the conclusion that the whole "layers of leadership " were involved in murder operations or had an intent to commit genocide. Rather, the only reasonable conclusion from the evidence on the record is that relatively small numbers of persons were involved in the murder operations, and not the whole leadership or units, but only certain individuals.

178. (i) The Majority further took into consideration its findings concerning suffering inflicted to those who were separated, detained and killed, of those who survived killings, and suffering of women, children and elderly that were transferred from Potočari and Žepa, and also the combined effect of forcible removal and the killing operation[127]

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179. The Majority erred in concluding that "it would be artificial to make a finding that genocidal intent existed for some acts, and not for others". While it is good approach to consider whether "all of the evidence, taken together, demonstrated a genocidal mental state",[128] not all of the acts might be perpetrated with genocidal intent. Since genocide is a double intent crime, it has to be established for all of the actus reus that has been committed intentionally and with genocidal intent. From the facts enumerated in paragraphs 769-772, genocidal intent cannot be inferred beyond reasonable doubt.

180. Particularly, The TC erred in inferring genocidal intent from alleged suffering of those who were transferred from Žepa. The TC disregarded evidence that Mlaidić ordered that „nothing must be taken from the ... whom we evacuated from Žepa and that they must not be maletreated".[129] This specific order, as well as attitude of the Appellant during evacuation of Žepa pouplation, namely that he insisted that "nothing should happened to the people" (D217,p.14) is clear manifestation of absence of any genocidal intent in relation to Žepa population.

181. These errors invalidate the Judgement and occasioned a miscarriage of justice. The AC is requested to enter a judgement of acquittal on Count 1and2

[127] Judgment,para.772
[128] StakicAJ,para.55
[129] P2427.

Ground 12: GENOCIDAL INTENT IN RELATION TO MEHMED HAJRIĆ, AMIR IMAMOVIĆ AND AVDO PALIĆ

182. The Majority erred in fact and law in finding that "the Bosnian Serb forces killed" Mehmed Harjić, Amir Imamović and Avdo Palić "with specific genocidal intent of destroying part of the Bosnian Muslim population as such", basing its finding on erroneous finding that those persons "were key for the survival of a small community"[130]

183. As pointed by Judge Kreća, "the creation of leadership is ambiguous and subjective. Is not clear whether it applies to the political, military or intellectual elite, or whether it has a generic meaning. It also introduces through the back door the consideration that the leaders of the group, regardless of the type of leadership, are subject to special, stronger protection than the other members of the group, in whole or in part, that they constitute, which is in fact a distinct subgroup. Moreover, this criterion has an element of the concealed promotion of the political group to the status of a protected object of the Convention — the subsequent division of the members of the group into elite and ordinary members in modern society has an anachronistic and discriminatory connotation flagrantly at odds with the ideas, which represent the bases of the rights and liberties of individuals and groups. Last but not least, comes understanding part of the group in terms of its leadership, of which there is no trace in the *travaux préparatoires* of the Convention."[131]

184. In this context it has to be noted that members of War Presidency was not elected but appointed from Sarajevo, e.g. President of the BiH.[132]

185. There is no evidence on who and when killed each of named persons, and how they ended in Vragolovi grave. However, the Majority concluded that it was done by Bosnian Serb Forces and buried them in the same mass grave. In those circumstances, there is no place for finding that *"those responsible for killing* ... targeted them because they were leading figures in the Žepa enclave."[133] Second, the TC did not discuss of possible reasons for their killings.

186. No reasonable TC, on the evidence on the record could reasonably conclude that they were killed because they were leading figures in the Žepa enclave. It is not enough to establish that certain person was "a leading figure" in some community, but that that person was targeted with genocidal intent, namely, to destroy, in whole or in part, a protected group as such.

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[130] Paragraphs.777-782.
[131] Dissenting opinion of Judge Kreća, ICJ-BHY,para.90
[132] D162,p.2ENG.
[133] para.779

187. The Majority concluded that "while the individuals killed were only three in number, in view of the size of Žepa, they constitute the core of its civilian and military leadership" However, even they were the prominent figures in the Žepa leadership it cannot be concluded that they were key for the survival of the small community.

188. The TC particularly relied on evidence of E.Palić without critical examination of her evidence. E.Palić was a wife of Avdo Palić and gave a very emotional statement the TC quoted in fn. 3224. During her testimony she even lied about the role of Avdo Palić during the armed conflict.[134] However, Palić was not so respected as claimed by E.Palić. The OTP investigator/analyst Bezruchenko summarized documents concerning the fall of Žepa and stated that "the political situation in the enclave /was/ difficult. Brigade Commander Avdo Palić and Chief CJB Jurem Šehić did not communicate with each other. Intellectuals and people capable of organizing life in Žepa were trying to leave Žepa for Srebrenica. ... On 10 June 1995 Colonel Avdo Palić sent another desperate letter to General Delić, complaining about the SDA and civilian authorities, and containing a tiny veiled threat to resign: "If I interfere as a person who is fighting for the state of BiH, and whom this group of people does not tolerate, for them I am not even a Moslem".[135]

189. The TC relied on communication between Palić, Pećanac and Kušić and Ćarkić from 1993-1995, as a support for finding that "Palić was considered to be a central figure in Žepa, and represented its population." However, those communications were between military personnel of the opposing parties, and those who knew each other before the war. Palić was a commander of the BiH Army 285th Brigade, whose concept of operation "was bases on rigid defence and use of difficult terrain.. Special emphasis was made on diversionary actions on small groups behind enemy lines. There was no articulated fall back plan in the case of a massive VRS offensive. In case of such eventuality the Command of the 285th Brigade was planned to request unspecified assistance from the 8th Operational Group, disarm the Ukrainan UNPROFOR company, and take the UN personnel hostage"[136] As Bezruchenko concluded, "this strategy showed absence of professional military panning, defied reality on the ground and military logic, and therefore was a harbinger of a command disaster".[137]

[134] For example, Palić,27/04/2011 claiming that Palić did not let others to attack Serbian villages, contra for example D62, D55, paras.3,9,10,36
[135] D55,para.12
[136] D55,para.8
[137] D55,para.8

Because of his concept of operations, it cannot be argued that he was a key for the survival of the very small community.

190. As a military leader Avdo Palić was not supposed to be in Žepa enclave, or more precisely, his stay in the enclave as a military leader was illegal under the law of war. In accordance with the Article 5 of the Demilitarization Agreement of 8 May 1993 and Article 6 of the COHA of 1994, "combatants will not be allowed to enter or to be in the demilitarized zone"[138] That reason alone is enough to consider that Avdo Palić (Commander of the Žepa Brigade), Mehmed Harjić (President of the War Presidency heavily involved in military issues), and Amir Imamović (who participated in almost all combat activities outside the Žepa enclave), cannot be considered as persons who were "key for the survival of a small community".

191. The TC, in para. 780, speculate about the reasons why Hamdija Trolak (president of the Executive Board of Žepa), who was also POW in Rasadnik together with Imamović and Hajrić, stating that the fact that he was negotiating with Mlaidć what was well documented on video, is "posible reason why he was not killed". This specific finding reveals the TC's reasoning based on the presumption that Palić, Hajrić and Imović were killed with genocidal intent.

192. The Majority also erred in conclusion that "forcible transfer of Žepa population "immediately prior to killing of these three leaders is a factor which supports its finding on genocidal intent"[139]. The TC has established that Avdo Palić was alive on 5th September, but that Imamović and Hajrić were removed from Rasadnik Prison somewhere in the middle-August.[140] The time of their disappearance and lack of any evidence concerning circumstances of their death cannot be conclude that they were killed with genocidal intent, particularly when the population of Žepa had already been transferred. There is no evidence that any other military or intellectual or political leader had been targeted. In that context, it should be mentioned that Ramiz Dumanjić, religious leader /imam/ of the Žepa Muslims[141] left the enclave on 26th of July together with civilian population.[142]

[138] D21,P1011
[139] Judgment,para.781
[140] Judgment,para.665
[141] Dumanjić,T.17929(Dumanjć has never been in Military)
[142] Dumanjić,T.17938-17939.

193. There is evidence, the TC failed to acknowledge that Imamović and Hajrić escaped from Rasadnik. They were run away while they were on work detail in Žepa during the NATO bombing of the VRS positions.[143] Under those circumstances, it is unreasonable to conclude that they were killed with genocidal intent.

194. The TC failed to consider evidence concerning involvement of Palić, Imamović and Hajrić in criminal activities, and to make an estimate whether it was a possible reason for their deaths or disappearance. Namely, on the record there are evidence about incidents on 4 June 1992 when Žepa military killed 45 wounded and captures soldiers of the VRS.[144] [redacted][145]

195. From at least those arguments, it cannot be concluded beyond reasonable doubt that Palić, Imamović and Hajrić were killed because of their leadership position and that they were key for the survival of Žepa population, and also no reasonable Chamber could have concluded beyond reasonable doubt that there were killed with genocidal intent.

196. This TC finding was crucial for the finding on Count 1 (Genocide), in relation to paragraph 23.1 of the Indictment. The AC is requested to overturn this conviction

[143] See.P2818, see also:
[144] D55,para.3,D91,D92.
[145] [redacted] There is no evidence that Torlak participated in ambush operation.T12788

GROUND 13: FORCIBLE REMOVAL- SREBRENICA AND ŽEPA

197. The TC (Majority) erred in fact and law in finding that "the bussing of approximately 25.000-30.000 Bosnian Muslims out of Potočari on 12 and 13 July 1995 and nearly 44000 Bosnian Muslims from Žepa constitutes crime of forcible transfer".[146]

198. As noted by the TC "the forced character of the displacement is determined by the absence of genuine choice by the victim in his or her displacement" (para. 795). However, in order to establish criminal responsibility of the accused, the TC is obliged, inter alia, to establish whether displacement was forced, and particularly who was the one who made a decision or forced the population to leave Srebrenica and Žepa.

199. If the civilians were "ordered" to move from the area by authority to whom they fell to owe loyalty (In this case Muslim authorities), one could not hold the accused responsible for the displacement. On 9 July Srebrenica authorities asked for a possibility to open a corridor for the population to move to the "nearest R BH" terriry[147]. There is also evidence that it was ordered to civilian population to go to out of the enclave, and it was suggested to Serbian side to "authorise the safe evacuation of civilians" [148]. The TC rejected arguments concerning UN policy, clearly expressed in D174, that was based on the UNHCR reports that 80-90%of the population of Srebrenica are displaced persons that "will probably intended in leaving for Tuzla" and that "virtually everuaone in the enclave wishes to leave" and stated that "The Dutch will be instructed to remain in Srebrenica enclave at least until arrangements have been negotiated and finalized with Bosnian Serbs to allow *all residents of Srebrenica* for the departure from the enclave of those people".[149] Failing to consider entire document (D174) the TC erred, and made illogical conclusions. One of the prominent one is that "Military actions had ceased in the area thereby negating a need for a military evacuation"[150]. The evidence also shows that Mr.Karremans(commander of the DutchBat) on hotel Fontana meetings worked on implementation of the UNPF policy. Namely, he requested General Mladić to facilitate evacuation of civilians from Potočari.[151] Evidence shows that Commander of the VRS did not want to make decision concerning evacuation of civilians before he hared representatives of civilian population.

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[146] Para. 842 of the Judgement.
[147] P990.
[148] D538,pp.4-6., See also D.O.Nyambe,para.31.
[149] D174,para.b.
[150] Judgment, para.812.
[151] P1008,pp.19-27.

200. In both cases the TC failed to establish that leaving enclaves was planned long before the attack on Srebrenica and Žepa.[152]

201. The whole part of the Judgement designated to forcible transfer is full of erroneous factual findings, and selective reference to unreliable witness statements, that all of the evidence need to be estimated de novo. Clear example, is in, for example reliance on Kingory opinion and presenting that opinion as Majoritys finding, without any critical examination of his statement (para.810), in elaboration of the reasons for forcible displacement, the TC erred in stating "inter alia" that "In the Hotel Fontana meetings, Mladić issued warning tht if NATO strikes continued, he would shell UN compound in Potočari...". This finding is partiucally erroneous, and based on one DutchBat report (P1436), However, video recording of Fontana meetings does not present any trace of such a warning.[153] It can be reasonably concluded that this part of the P1436 is not a accurate presentation of Hotel Fontana meeting, but false reporting.[154]

202. The TC failed to establish that authorities in Žepa and Sarajevo, before the attack and during attack was seeking way to evacuate civilian population, and subsequently to abuse 19 July and 24 July Agreement.(See exh.,D363,D54,D60, D55,paras.108-110)

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203. The TC failed to establish, in violation of Article 23 of the Statute that civilian population of Srebrenica and Žepa were moved "within a national border".[155] In the whole judgement there is no even a trace of those considerations.

204. The border between RS and the Federation of Bosnia and Herzegovina was *de jure* or *de facto* state border, since during the war those entities were separate states.

205. RS had its own legal system, including Constitution[156], system of state organs, including Assembly, Government, Judiciary, Army (VRS), and other state organs, and in the period covered by the Indictment was functioning as a state entity. Its functioning was in accordance with the Constitutions and other laws and the organs of the Federation had no authority over any of the acts of the organs of RS, and effective control on its territory. In one word, in relevant period RS had all elements of statehood, permanent population, defined territory, government, capacity to enter into relations with other state and to assume

[152] P2369,Para.4.8.
[153] See:P1008
[154] See.D192(Smith's statement) testifying that UNPROFOR comanders sometimes submited falce reports.
[155] See:Judgement,para.739
[156] P2215. See also legislative acts enumerated in Judgement,fn.220

international obligations, and acted as an independent state entity, with its own and exclusive legislative and executive authority.

206. In accordance with the Rule 2 of the Rules of Procedure and Evidence an entity exercising governmental functions, whether recognized as state or not, should be considered as a state. If follows that a border of that entity, in this case RS, should be considered as a state border.

207. In those circumstances transfer of population across the border of the RS cannot be considered as forcible transfer, since the very element of the definition of forcible transfer is that the population is transferred "within a national border".[157]

208. This error invalidates the Judgement, and the Appeals Chamber is requested to overturn the TC conviction on Count 7 and enter the Judgement of acquittal.

Ground 14: COMMAND AND DIRECTION(CONTROL) AND CONTROL (RUKOVOĐENJE, KOMANDOVANJE I KONTROLA) AND POSITION OF THE APPELLANT AS AN ASSISTANT COMMANDER FOR INTTELLIGENCE AND SECURITY AFFAIRS

209. The TC made a number of legal and factual errors in the determination of the criminal responsibility of the Appellant. Particularly, the TC erred in fact in findings related to military principles and the role of the Accused as an Assistant Commander for Intelligence and Security Affairs. Relying on its erroneous findings concerning the institutional position of the Appellant, it concluded that he was a participant in the JCE to Murder and JCE to Forcibly Remove. Errors presented under this ground of appeal alone caused a miscarriage of justice that all convictions against the Appellant need to be overturned.

210. Judge P. Nyambe in her Dissenting Opinion clearly stated that:

"the evidence against the Accused on all counts charged is entirely circumstantial, based on presumptions, suppositions, and his professional association with those who committed the crimes that are the subject of the Indictment. There is no evidence linking him to crimes perpetrated by his subordinates, nor does the evidence demonstrate that he knew that those crimes were being perpetrated. The Accused's connection to the crimes is entirely derived

[157] Judgement,para.800.

from the professional chain of command with those who did commit those crimes."[158]

211. This qualification of Judge Nyambe is an accurate statement regarding the nature of the TC's findings against the Appellant. The mere institutional position of the Appellant cannot provide a valid ground for factual findings about criminal responsibility, and the rules that were in force in the VRS at the relevant time were frequently misinterpreted which created total confusion and frequent misunderstanding. If the Majority erred in findings about the alleged knowledge from the contacts with those persons, which is an improper evidentiary basis, that erroneous finding cast doubt upon the TC's overall conclusions concerning knowledge, intent and contribution to the JCEs.[159]

212. The TC erred in finding that "command and control", unity and subordination are basic military principles[160] The TC confused principles with rules, since the only principle referred in para.88 is the principle of "unity of command" and subordination. Additionally, management/or direction/ and command /rukovodjenje i komandovanje/ (frequently translated by the CLSS as command and control) is an integrated system based on certain military principles.[161]

213. The TC failed to establish basic military principle of singleness of command, that means that "the commander has the exclusive right to command, and he is responsible for the overall level of combat readiness. And for that, he is responsible to his superior; he, and nobody else."[162] Everybody is subordinated to the commander who direct, control and command subordinate units and institutions within the scope of the responsibility he received.[163]

214. At the outset it should be noted that translation of the words "rukovođenje and komandovanje" are in the English translation reversed and frequently improperly translated as "command and control". If the word ordrer is respected that would be management/direction and command. The reason for that is explained during the trial. Namely, upon frequent remarks concerning confusion created by inaccurate translation of military terms, during Todorović's testimony, the CLSS reveals the very origin of the errors. On T.13052 they provided the following note: "It's been a long-standing practice of the CLSS to translate "rukovodjenje" and "komandovanje" as command and control, C2, It is standard NATO terminology". The very translation, as will be provided below caused an incorrect

[158] D.O Judge Nyambe,para.4
[159] See Krstić AJ, para.98
[160] Judgment,para.88
[161] See for example,D148,p.35,t.107
[162] Obradović,31/03/2011,12859-12861. See also D202,Article9.
[163] D202,Article9.

understanding.

215. The translation issue caused much misunderstanding and led the TC to wrong conclusions, particularly because the term "rukovodjenje" or "rukovoditi" is not same as control (kontrola) (which the function of the commander was; not assistant commander). Command and control are functions of the commander (for example Mladić).

216. While terms rukovodjenje and kontrola are frequently translated into the "control", when put together, the CLSS frequently did not translate the word "kontrola".[164]

217. Using NATO terminology for translation of the technical terms used by the VRS is completely erroneous. General Novica Simić testified that „the NATO doctrine and command and military principles of the VRS were quite different, and that VRS doctrine was based on Russian doctrine and the old kingdom of Yugoslavia doctrine."[165] Thus, C2 of the NATO rules, is not as same as command and maniging/directing (komandovanje i kontrola) under the rules of the VRS and former Yugoslavia. They are military orgaizations based on completly different principles.[166]

218. The TC understands of the basic military principles and position of the Appellant was influenced also by permutation of the terms. The Chamber quoted Todorović's evidence in para. 90 and fn.251 of the Judgement. Todorović gave an accurate statement misinterpreted by the TC. Todorović explained as follows :"Command or commanding is a method applied to directly manage certain units or institutions of the army ... So there is a right to engage directly and make direct decisions on the activities of a unit, including personnel issues. In this way, the commander in question directly imposes his decisions on his subordinates." Control/rukovodjenje/, as the second term, includes professional or specialist assistance to the commander. The commander, of course, cannot be specialised in all the areas, starting with the military police, the engineering corps, the nuclear defence units, et cetera. That is why he has his assistants -- assistants, to provide professional work and guidance, as well as training for those units and the way that they ought to be used. The third term used is "kontrola". As of the moment the commander issues a task, there is a process of control in place to oversee the implementation of those orders. If there is a need for correction of the order, then this is made based on the situation found and based on recommendations made by the professional or specialist organs. This can also be done if the commander himself realises that he had ordered something which cannot be implemented. Then he will amend his order, and he will

[164] Todorović,19/04/2011,T.13051-13052
[165] P2756,T.28647
[166] R.Smith,P2132,p.5:18-21(„The British Army is almost the opposite, in philosophy and organization, to that of the VRS")

be included personally so as to see that the task is correctly implemented."

219. Particularly, the TC has erred in finding that the term- managing -"refers to the process of overseeing the implementation of the orders issued by the commander". From Todorović's evidence and other evidence on the record, it follows that control is a function of the commander, and that managing does not ferer to the process of overseeing the implementation of orders issued by the commander. The TC has stated in fn.249 that "kontrola" /proper translation is control/ "is perfomed by the commander by way of his immediate insight or through his organs in a certain space, a certain time, in a certain unit" The TC completely misinterpreted his evidence that caused a wrong understanding of the basic military rules.

220. Translating military terms is not a task free of difficulties, meanings that additional translation of the term cannot be taken into account in the process of estimation of evidence. During the testimony of witness General Petar Škribić, the TC hard translation of those terms from inerpretators . They provide the following translations :„komandovanje" as „command", rukovođenje, the translators stated that „in military terms it would be translaed as „control" but in another context it can bear meanings such as „managing" „running", „administrating" et cetera" and for the term „kontrola", „control". [167] Having in mind this observations, the TC was obliged not to confuse /rukovodjenje/control (direction or management) and /kontrola/control. Unfortunately, an abudance of errors in the record caused almost irreparable harm to understanding the issue that has been considered as very important for the final outcome of the case.

221. Further, the TC did not enter into the substance of the command(komandovanje), direction(rukovođenje) and control(kontrola), and almost completely disregarded rules and regulations applied by the VRS. Namely, in description of the command, direction and control, the TC did not quote, nor consider a bulk of evidence on the record particularly military rules and instructions, particularly those that concerns work of the security and intelligence organs, such as D202, D203, D248, D148, P1297. Particularly the TC failed to consider those rules in reaching conclusions concerning position of the Assistant Commander.

222. Having in mind that the Appellant was responsible for "rukovođenje" of the Intelligence and Security organist cannot be implied that he had a control of all of his actions, but that he managed that unit in sense that he provided professional guidance.[168] Particularly, the TC did not enter into the substance of the security and intelligence, and made wrong conclusions concerning acts and events that fall outside the scope of the jurisdiction of

[167] T.18572-18573 page 30/01/2012 See also Petar Škrbić,T.18572-18573
[168] See, Petar Škrbić,T18548-18549.

intelligence and security organs.

223. Wrong understanding of basic military rules seems to guide the TC to form inexistent rules and terms such as "professional command", "professional line of command", "subordinated in relation to professional activities", professional subordination, "professional subordinates"[169]. Those terms were used by the Prosecution, and are not part of evidence.[170] Those *sintagma* are not part of evidence. The Prosecution uses that terms without any corroboration in military rules.

224. The TC disregarded evidence on the record, including evidence of Slavko Čulić (professional officer) who provided clear answers not challenged by the Prosecution and who provided account on the manner in which Tolimir behaved during his professional service. The Chamber disregarded this essential piece of evidence of particular importance as it reflects not only accurate understanding of military rules and principles but also indicate the manner in which Tolimir performed his tasks in 1995.

225. He testified that security organs on various levels of command is "professional element and the work they did, and that was provided by the rules of organs and service – envisage that in the process of decision making, those professional organs proposed the ways how certain task would be carried out. However, exclusive right of command and use was in the hand of commander,"[171] and the commander is responsible for his decision and he had the exclusive right to command and control." To the security organ, only the commander has a right to command, and that included the security organ. [172]

226. Witness Čulić was clear in that "The rules of system of command and rukovođenje /translated as control, but proper translation is direction/management/. All the orders followed the system of command. When it come to certain information, intelligence, certain analysis, certain issues pertaining to professional and special training, obviously the organ of the superior command would sent that mail to us, and then organ informed us about, for example activities of the enemy, and everything else that did not interfere with the system of command and control. ..security organs did not receive orders from the superior security organs. **They were their superiors only in terms of professional education**".[173]

227. Concerning Tolimir's conduct, Slavko Čulić testified - in line with other evidence presented during the trial - as follows:

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[169] for example, paragraphs,109,1151,128,133,146,118,131,1093,1098,1163,113,121,128,924,952,1158
[170] See, Closing Arguments,T.19528-19530
[171] T.19278
[172] Čulić,T.19278-19279.
[173] Slavko Čulić,15/02/2012,T.19279-19280 See also,D202,Article9t.6, 29t.9, d203para.6-25.

228. "Knowing General Tolimir personally, I have to be very clear: He never requested to do that. He never did that because he was very familiar with the system of control/rukovođenje/ and command and he would not have waned to humiliate either me or any other commander by giving orders to his security or intelligence organs. I know personally that General Tolimir ... never wanted to impose himself as an officer from the Main Staff who had the last say. .. He always wanted to listen to us, to hear us out, and to propose the best measures. And all the measures that were undertaken in order to implement certain tasks were implemented pursuant to the orders and commands of the superior command."[174]

229. This statement is in line with the rules that the VRS applied in 1995. In various rules that the VRS applied in 1995, there are not any terms such as "professional command" or "professional line of command" or similar terms.

230. The TC findings and operation with the terms "professional command", "professional line of command", "subordinated in relation to professional activities", professional subordination, "professional subordinates", is wholly erroneous, and affected all of the findings concerning the responsibility of the Appellant. The TC practically introduced some "parallel chain of command" that was inexistent, and which is not in conformity with the main military principle of singleness or unity of command and subordination.

231. The TC failed to note, for example, that Security Organs, "in managing the military police unit, the secutity organ ... has the same rights and duties as officers of arms and services of commands, units, institutions and staffs of the armed forces in managing units of the arms and services of those commands, units, institutions and staffs".[175] Those are also rights and duties of the Head of Intelligence and Security sectors in the VRS in relation to the security and intelligence units of lower commands.

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232. In paragraph 104, the TC took the following witness statement out of the context: "the Accused was the one to "decide who will get what information, what will be referred to whom"[176] this part of the statement of witness Salapura was taken out of the context, and concerns the methods and problems that involves security, intelligence administration and management of the work of those two administrations;[177] not about each particular piece of information.

[174] Slavko Čuli6,15/02/2012,T.19280.See alsoT.19281
[175] See,D203(para.23(2).
[176] Judgment,para.314
[177] Salapura,13483,para.117,fn.379

233. In para. 917 the TC concluded that Mladić transferred certain authorities of the 410 of the Intelligence Centre to the Appellant. Škrbić did not testify that Mladić had done so, but had stated: "I don't rule out that possibility".[178] As an independent Main Staff unit, 410the Intelligence Centre was subordinated to Mladić. Thus, there is no evidence that he transferred certain authorities to the Appellant. This finding, being not so crucial, is a manifestation of lack of proper care in the estimation of evidence on the record.

234. The TC found that the Appellant controlled the appointment of security and intelligence officers,[179] and quoted the names of those who later turned out to be members of the JCEs. However, the TC failed to provide what the real role of the Appellant was in that process; and which was only contained in terms of professional abilities. This particular finding, in a way that was expressed in para.914, based on Butler testimony.

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235. The TC erred in fact in finding that the Accused played a central role in the convoy approval process which was instrumental in matters related to POW exchanges.[180] As will be explained later in more detail in order to avoid repetition of arguments under grounds 15 and 16, the TC's qualifications are not correct. First, the role of the Appellant in the process of approval of the UNPROFOR convoys was connected with his position as a representative of the VRS in the Joint Central Commission formed by COHA.[181] He could issue proposals in line with the Decision of the CJC, but the Appellant could not issue approvals. His role was not central as the TC has found. Second, concerning POW exchanges, there is a little evidence about this task of the Appellant in 1995. Therefore, his role cannot be, on the basis of evidence, be described as "instrumental". Namely, failed to consider P2610(P2609) that the Appellant's role was in charge for determination of the competences, content and manner of the preparation of VRS members who "on whatever basis" are in contact with the UNPROFOR or engaged in commissions for exchanges of POWs, in order to undergo preparations with security and intelligence organs and carry out tasks provided by these organs.[182]Dealing with the issue of POW exchanges means dealing with the lists and papers, and does not affect responsibilities of the units who keep POWs for their proper treatment.

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[178] Petar Škrbić,T.18789
[179] Para.914,Richard ButlerT.16341
[180] Para.920
[181] See Kralj,
[182] See, para.7

236. The TC erred in the description of the relationship between Mladić and the Appellant. It is not in dispute that their relation was good and professional. In this context it is important to observe that all findings on criminal responsibility of the Appellant held significant weight in this relationship; particularly in quoting general Smith's opinion, that they were "closer to being equals" and Milovanović's statement that the Appellant was Mladić's "eyes and ears" on the ground.[183]

237. As a Commander Mladić was superior to Tolimir, relying on Smith's testimony, who had no insight in the work of the Main Staff, is fundamentally flawed. Mr. Smiths opinion is based on his experience in negotiations, and the description that they were "closer to be equals rather than a direct subordinate" is fundamentally wrong based on Smith's reading of "body language" and cannot be one on which a reasonable TC can rely in making crucial factual and legal findings on the responsibility of the Appellant. The TC failed to consider that that impression might be the result of the fact that the Appellant was frequently tasked for negotiations on behalf of the VRS, and that he was, "considered to be as the most skilful diplomat" among the VRS members.[184] His engagement in Dayton negotiations led to the peace in Bosnia and Herzegovina and subsequently in Vienna meetings concerning stabilisation etc., participation in the work of the CJCs formed on the basis of COHA clearly proves that.

238. Concerning Milovanović's statement, being the Appellant was Mladić's "eyes and ears" is wrongly interpreted and taken out of the context.[185] This expression is not one on which a reasonable TC can rely as it deals with the symbolic description of the intelligence and security affairs. Namely, Milovanović testified that the Appellant "was in charge of gathering intelligence. Those would be Mladic's ears. He also prevented any leaks of information from the VRS, meaning he was there to open Mladic's eyes."[186]

239. The TC also heavily relied also on Milovanović's statement that Tolimir "always knew more" than his immediate subordinates Salapura and Beara.[187] Milovanović's statement that Tolimir „„always knew more" than his immediate subordinates, Salapura and Beara" is illogical since it was the duty of Salapura and Beara to keep Tolimir informed, to present reports etc. However, since they were heads of respective administrations, they, by the nature of things had more detailed information.

[183] See, for example para.921,1165,915,1074,1109,1165.
[184] M.Milovanović,18/05/2011,T.14263
[185] Judgement,para.915
[186] Milovanović,17/05/2011,14247-14248.
[187] Judgement,para.915.

240. Those "impressions" are not suitable for making factual conclusions since it is indeterminable what the subject of that knowledge is. In the same paragraph the TC relied on Mitrović's statement that available information was always presented to the Accused, "and that Tolimir always new more", is not particularly reliable and cannot be used to make inferences on specific findings /concerning specific events/. Mitrović's evidence, for example D267, p. 95) is of general nature representing a normal course of events. However, even Mitrović said that that was not absolute and that he/Mitrović/ did not report certain crimes (quoting example of destruction of religious buildings).[188]

241. This position of Judge Nyambe clearly explains the position of the Majority, which is evidenced by reasoning in Section VIII of the Judgement, particularly in Subsections E, F, G and H. Particularly, in paragraph 1165 the Majority has stated "In reaching its conclusions that the accused was a member of the both JCEs, the Majority particularly took into account the Accused's functions and authority". The second fact that was of crucial importance was the Appellants close relationship with General Mladić. For example in para. 1093 the Majority has stated that "By virtue of his capacity as Assistant Commander and Chief of the Sector for Intelligence and Security of the Main Staff, and against the backdrop of his close relationship with Mladić, the Accused was a coordinating and directing factor – and indeed, a vital link – in the events leading up to the VRS takeover of both enclaves and removal of their respective populations." Also, for example, in paragraph 1089. The TC's findings, based on his position in the VRS, concerning Branjevo and Bišina killings: "the Accused was communicating with Salapura on 16 July and Popovic on 22 July. Given his authority, it is inconceivable that the Accused was kept in the dark about the murders in the relevant sites at the time; instead, he tacitly approved to make these murders happen."[189] His position in the VRS was of the main reason for conviction of the Appellant for alleged failure to protect Bosnian Muslims from Srebrenica. In para. 1172 the Majority concluded that „in view of the fact that in his position as Chief of the Sector for Intelligence and Security Affairs the Accused had knowledge of the large-scale criminal operations on the ground, that he knew of the genocidal intentions of the JCE members, that he actively contributed to the JCEs... "[190]

242. These errors occasioned a miscarriage of justice and invalidate the decision. The AC is requested to grant this ground of appeal, to review the TC's findings, and to find the accused not guilty on all charged, e. g. to enter a Judgement of acquittal on Counts 1, 2, 3, 4, 5, 6 and

[188] D267,p.95
[189] Para.1112
[190]

7.

GROUND 15: ERRORS CONCERNING MAJORITY FINDINGS ON ALLEGED JCE TO FORCIBLY REMOVE AND ALLEGED SIGNIFICANT PARTICIPATION OF THE APPELLANT IN THE JCE TO FORCIBLY REMOVE

243. The TC erred in fact and law in that the Appellant was a member of the JCE to Forcibly Remove and that he provide a significant contribution to the JCE to forcible remove.

244. The Trial Chamber erred in findings that by March 1995 the Appellant "was aware of that politically and military there was an aim to create conditions seeking to rid the enclaves of its Bosnian Muslim Population."[191]

245. Even if the Appellant was present at the Assembly meeting, /and he was not/ the TC disregarded the fact that alleged 6 strategic objectives have never been adopted by the Assembly.[192] Discussion which transpired at the Assembly meeting does not reflect any unlawful policy. In P2477 discussion about alleged 3rd objective: „We now see a possibility for some Muslim municipalities to be set up along the Drina as Enclaves, in order for them to achieve their rights, but that belt along the Drina must basically belong to Serbian/BiH/"[193] Of particular importance is Mladić's long discussion in which he stated „inter alia" „we cannot wage war on all fronts nor against peoples... we do not want a war against the Muslims as a people, or against the Croats as a people, but against those who streed and pitted these people against us[194]...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"[195].

246. The TC thus erred in relying on alleged presence in the Assembly meeting in inferring alleged knowledge unlawful policy.[196] Those objectives cannot serve as a conclusion that the RS wanted to "get rid" of Muslim population.[197]

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[191] Para.1078,1077,1078,1010,162-165,1012
[192] P2477 contains no record of adoption of any of the decision.
[193] P2477,p.13
[194] p.37
[195] p.39
[196] P22 contains an erroneous translation. In that document there is wording of "state delimitation from other two national communities"
[197] See also.M.Milovanović,T.14277.

247. The TC erred in law failing to establish real strategic objectives of the RS and VRS that were formulated in Directive 6[198] which was operative until 8 March 1995. That Directive was issued after Srebrenica and Žepa were declared as demilitarized zones",[199] and which does not contain language of Directive 4. Concerning Srebrenica and Žepa, the Directive is clear that "the Dirina Corps got task to „use some of the forces to maintain the blockade of enemy forces in the Žepa, Srebrenica and Goražde enclave, constantly inflict losses on them and disrupt their communications, and put up decisive defence on the front towards Kladanj and Olovo"[200]

248. In inferring alleged knowledge of the Appellant of the unlawful policy,[201] the Majority relied on the part of the sentence of M. Lazić evidence that was taken out of the context. Lazić provided his *opinion* in following words: "I think that the main objective of the VRS was to defend the Serb population from the attacks coming from the other side, and if there was no other solution available, then to separate all of us on ethnic principles. And I believe that that was the understanding of every individual member of the VRS."[202] Nothing illegal is in this opinion.

249. In reaching conclusions concerning the alleged policy, the TC erred in law because it failed to establish facts that concern the events of 1992-1995 in the Podrinje region; particularly concerning Srebrenica and Žepa. Those facts are of importance for understanding Lazić's testimony and situation in that area. There is a lot of evidence on the record that the TC failed to consider concerning history of that region a political context.[203] If the TC considered that evidence, it would reach different conclusions, not only for period 1992-1995, but also about events in July 1995. Particularly, the TC failed to consider relevant evidence about BiH policy toward Serbs.[204]

250. The Majority erred in fact in interpretation of Directive 7, its relationship with directive 7/1 and in finding that Directive 7 was implemented in relation to Srebrenica and Žepa. The Majority also erred in finding that Directive 7/1 „was intended to amplify and

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[198] D399/11.11.1993)
[199] D300,p.3
[200] D300,p.5
[201] Judgment,para.1077
[202] P2733, T.21835. Exact reference is provided in fn.4228 of the Judgement.
[203] D73, Nikolić,/12/04/2012,T.12680, D160,p.2, see also, Božo Momčilović, 14/02/2011, T.9802-9808. PW-063, 19/10/2011,6503,D365,D122,para.10-17,D212.D234,Salapura:T.13639-13700.,D261
[204] See.D539,D540.Deence final Brief,paras.350-353.

supplement Directive 7 by providing more specific military tasks to individual corps, including the Drina Corps"[205].

251. The main factual and legal findings of the Majority on the JCE to Forcibly Remove are based on the Directive 7, and opinions provided by Richard Butler who was the OTP employee for a long time.[206]

252. The Majority's finding that Directive 7/1 „was intended to amplify and supplement Directive 7 by providing more specific military tasks for individual corps, including Drina corps"[207] is, in fact, an opinion of the OTP investigator Richard Butler, who has been working for the Prosecution for a long time. His opinion and the Majority finding are unsupported by evidence. The Judgement is right in stating that „the language of Directive 7/1... did not include reference to „[creating] unbearable situation of total insecurity with no hope for further survival or life for the inhabitants of both enclaves"

253. The TC concluded, based on Butler's opinion that Directive 7/1 provided „more specific military tasks". However, the Majority did not explain that specificity, and comparison of Directive 7 and Directive 7/1 does not support that conclusion since they were formulated at the same level of abstraction. Instead of creating unbearable living conditions, Directive 7/1 stipulates, as noted by the TC that VRS need to restore „the reputation of the VRS among the people and the world, and facing the enemy to negotiate an end the war at the achieved lines through successful actions by the VRS forces along chosen axes." However, that the goal Karadžić put in directive 7 concerning „unbearable living conditions" are in obvious contradiction to the goal of restoration of reputation of the VRS in the world.

254. The TC further concluded in that Military orders issued after Directive 7/1 set out tasks pursuant to Directive 7 and Directive 7/1.[208] However, the alleged task of creating „unbearable living conditions „have never been implemented, and the Majority erred in estimating the evidence. Namely, in fn.3992, referring to Ex.P2509, p.1 concerns preparations „of *defence* around Enclaves"[209] „in accordance with your order", stating that Drina Corps is „currently unable to implement your order to fully close off the enclaves and carry out attacks against them because we do not have sufficient forces". The Majority further quoted Butler's

[205] Judgment,para.191
[206] See:Grounds 3and4.
[207] Judgment,para.191
[208] Judgment,para. 1012
[209] Underline added.

opinion that the task to „fully close off enclaves is a task articulated in Directive 7. This argument is erroneous which no reasonable Majority could have reached. In this specific order, it is the issue of the DEFENCE around enclaves, because, as stated in both directives and much intelligence information, the goal of the Army of Bosnia and Herzegovina was to connect the enclaves of Srebrenica, Žepa and Goražde with the rest of the Muslim held territories.[210]

255. The Majority further relied on Živanović's order of 2 July 1995, concerning creation of „conditions for the elimination of the enclaves".[211] There is no explanation why the TC considered that this order is in fact implementation of the goal to create unbearable conditions. In this Order, it is clearly stated that DK „believe that in the coming period, the enemy will intensify offensive activities against the DK area of responsibility, mainly in the Tuzla Zvornik and Kladanj-Vlasenica Directions, with simultaneous activity by the 28th Division forces from the Enclaves of Srebrenica and Žepa, in order to cut the DK area of responsibility in two and connect the enclaves with the central part of the territory of former Bosnia and Herzegovina, which is held by the Muslim forces. During last few days, Muslim forces from the enclaves of Žepa and Srebrenica have been particularly active"[212]. While in that order it is stated that „Security organs and military police will indicate the areas for gathering and securing prisoners of war and war booty. In dealing with prisoners of war and civilian population behave in every way in accordance with the Geneva Convention."[213] On the basis of evidence relied by the Majority, no reasonable tier of facts could have found that „the political goals set out in Directive 7 ... were implemented through military orders".[214]

256. The Majority erred in finding that "even if it accepts that/the Appellant/ did not take part in drafting of the tasks assigned to the Drina Corps but that he received the entirety of the text upon the issuance of the Directive". „[215] Concluding that „the Accused was aware that politically and militarily, there was an aim to create conditions seeking to rid the eastern enclaves of Bosnian Muslim Population. "[216]

257. The TC erred in finding that Tolimir received entirety of the text of directive 7 upon its issuance (para.1078). However, there is no support in evidence. Obradović had no personal

[210] SeeP2369;P1199,pp.1and2,P1214:4and5.
[211] Judgment,para.1012 (see also Exh.3993.
[212] Ex.3993, p.1
[213] Ex.P3993,p.7
[214] Judgement, para. 1102.
[215] Judgment,para.1078
[216] ibidem.

knowledgeand provide just his opinion.[217]The same is with Savčić statement revails that this is just a theoretical presumption. Without further evidence the TC should refrain from making explicite and incriminatory findings, such as alleged knowledge of alleged unlawful policy, particularly because it has no evidence about the Appellant's support to such alleged policy. In addition, since directives had status of State Secrets, they are distributed in only one copy and only to intended recipient. Documents issued by the Appelant clearly show that he took no part in implementation of that alleged aim, but always insisted on protection of civilian population.[218]

258. The TC made an error in law as it failed to consider relevant evidence concerning Appellants knowledge about intentions of the ABiH, about crimes that committed sabotage-terrorist groups from the enclaves, about abuse of convoys that were used for the supply of the ABiH in the enclaves, that until COHA, the ABiH used cessation of hostilities in order to arm itself in order to conduct military offensive, about involvement of UNPROFOR in the support to the ABiH. In the light of this evidence, no reasonable trier of fact could have found that the Appellant intended or contributed to the alleged JCE to forcibly remove population of Srebrenica and Žepa, but that his actions were directed strictly against enemy forces in the enclaves.[219]

259. In the light of this evidence, no reasonable trier of fact could have concluded that "the Accused was aware that politically and military, there was an aim to create conditions seeking to rid the enclaves of its Muslim Population".[220]

260. The TC erred in finding that by March of 1995, through the fall of the enclaves, the Accused participated in restrictions of convoys entering the enclaves and that he actively contributed to the aim of limiting UNPROFOR's ability to carry out his mandate.[221] This error in fact is a consequence of erroneous evaluation of the evidence on the record concerning UNPROFOR and humanitarian aid convoys, authority of the VRS and of the accused in the convoy approval process, the purpose of UNPROFOR and humanitarian aid convoys. Also, the Trial Chamber erred in law by not applying the relevant rules of international

[217] Obradović, T12048
[218] See, for example D41,D85. For early period see, for exampleD274.
[219] See, for example, D145,D178,p.3,para.5 that relates to Srebrenica and Žepa. Škrbić,T.1863-18639. See also, P2369,D53, Момир Николић,11/04/2011. T. 12565-12567 testifying that the information that the VRS had that the plan to link Srebrenica and Žepa with the rest of the Muslim held territory would be implemented between the 20th and the 25th July 1995.
[220] Judgment,para.1079
[221] ibid.

humanitarian law concerning UNPROFOR, re-supply convoys and humanitarian aid, and omits to make relevant factual findings on the evidence on the record.

261. The TC erred in finding that only from 14 May 1995 "there were to be separate process for convoy approval based on whether they concerned UNPROFOR resupply convoys or humanitarian convoys".[222] The TC failed to establish from the evidence on the record that that process was separated a long time before that moment and that the VRS had no authority over humanitarian convoys. The TC failed to take account on D303, Milovanović's order in which it was stated that the Coordinating Body and Ministry of Health only had competence in relation to humanitarian aid convoy. In relevant part it reads "the Main Staff of the VRS no longer has any jurisdiction or responsibility concerning approval of entry and movement of teams and convoys of humanitarian organizations through the territory of" RS." He indicated that the VRS had the obligation to check teams and convoys of humanitarian organization, and that all information that the VRS had about those convoys were obtained from approvals issued by Coordination Body and Ministry of Health."[223]

262. There is no evidence that Tolimir, during 1995, had any authority or that he was engaged in the convoy approval process regarding humanitarian aid convoys.

263. The TC erred in finding that "security organs under the Accused's professional control actively engaged in the system of restrictions placed on humanitarian convoys entering the enclaves".[224]

264. The TC failed to acknowledge that authorisations for humanitarian aid convoys might be amended only by the body that issued that authorisation and that VRS Mains Staff did not have the authority to alter those documents,[225] nor to stop those convoys that received authorisation, except if there is a case of the abuse of convoys. The TC in fn.4239 relied on document showing that the VRS checked the convoys, and have a mandate to prevent the passage of unauthorised convoy movements.[226] Preventing the passage of unauthorised convoy movements cannot be consider as an activity that contributed to the alleged JCE to Forcibly remove. In accordance with the rules of IHL, the warring party had authority to issue

[222] Judgment, para.193.
[223] See-alsoD307.
[224] Para.1079,para.1016.
[225] Kralj,25/01/2012,T.18383-18384. For the Role of the VRS see also D79,t.1and2.
[226] Judgement,para.196.

approvals and to prevent unauthorised passage of convoys,[227] and to stop convoys in the case of the abuse.[228]

265. The TC in para.186 relied mainly on statements of UNPROFOR officials. However, they got reasons not to be honest in regards to the issue. In the first place, because of the abuse of convoys (such as transportation of ammunition and arms) and for other reasons, particularly to avoid agreed procedures.[229] The TC, on the examination of evidence on the record, made erroneous conclusions.

266. The TC failed to give credit to P619, in which it was clearly stated "The lack of UNHCR convoys had a major negative influence on the morale of population and diminished the state of readiness of the ABiH".[230] A Particular part of the Report deals with the problems between UNHCR and Dutchbat, which as a result provided cancellation of convoys, or that the humanitarian aid convoy was sent back.[231] From the evidence on the record, no reasonable trier of fact could reached conclusion that the VRS participated in restriction of convoys. In reaching conclusions concerning humanitarian convoys the Majority did not analyse the needs of the population in Srebrenica, how many convoys were rejected against the number of how many were approved to be able to conclude that these rejections resulted in insufficient food for civilians. However, the TC had before it exhibits that clearly shows that significant amount of food reached Srebrenica and Žepa in the period covered by the Indictment.[232]

267. The TC made fundamentally erroneous conclusions concerning alleged restrictions of UNPROFOR convoys, and that the Appellant contributed to the JCE by those restrictions.

268. The TC failed to establish the purpose of the UNPROFOR resupply convoys in relation to civilian population, and only relied on the UNPROFOR mandate to facilitate distribution of humanitarian aid within the enclave.[233] The TC erred particularly because it failed to take into account evidence on the record.

269. First, the role of the Appellant in the convoy approval process is well documented. He signed on behalf of the VRS agreement with the UNPROFOR named "Principles for freedom

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[227] See Article 70 Add. Protocol I.
[228] ee,P2126,D78,D73,D214,D197,D198,D199. PW-073,T.642
[229] See D254. The TC did not rely on this document.
[230] P619,p1.
[231] P619,p.4-7.
[232] See D.O-Judge Nyambe, paras.32-33, see also:d209, d212, d213, p2569, p2571, p2410, p2411,p2563, p2567, p2568, p2575, d75,d79.
[233] Judgment,para.1179.

of movement"[234] in which detailed procedure for issuance approvals for UNPROFOR convoys has been set up. He participated, in the work of the CJC formed in accordance with COHA.[235] The Appellant had no authority to issue authorisations; only Mladić or Milovanović. On the meetings of the CJC there were discussions about the items and quantities which could be transported."[236]The role of the appellant was to provide information whether certain important items, such fuel and quantities were approved at the level of CJC.[237]

270. Any restriction on UNPROFOR convoys had no influence on its ability to carry its mandate to assist distribution of humanitarian aid. There is evidence that DutchBat had within months that preceded the fall of the enclave checked the UNHCR convoys that resulted in cessation of certain UNHCR convoys in June.[238] There is also evidence, the TC failed to take into account, that DutchBat, "even explicitly informed that the medical supplies provided to UNPROFOR were only to be used for UN personnel, and not for the treatment of refugees"[239] received sufficient quantity of those supplies that "all waries of medical supplied" used for local population "were completely solved".[240]

271. The TC also failed to consider that the VRS had verified information that UNHCR an UNPROFOR convoys were being used to supply ammunition and even weapons, as well as fuel to the enclaves or protected areas.[241] There is also evidence that DutchBat provided food and fuel to the ABiH in Srebrenica[242].

272. In the context of the Appellants knowledge that UNPROFOR provided certain goods to the ABiH, that the ABiH is preparing the offensive actions of the ABiH, that there was a plan of the ABiH to capture the weapons and other means from UNPOFOR in the case of offensive operation or the attack on the enclave,[243], that UNPROFOR did not have a freedom of movement inside the enclave,[244] that UNPROFOR never carried its mandate to disarm the ABiH, no reasonable trier of fact could have been reached the finding that the Appellant

[234] D77
[235] P1011-.
[236] Slavko Kralj, T.18281.
[237] Kralj24/02/2012,T.18312-18313, D327,D328.
[238] P619.
[239] D618,p.1
[240] D618,p.4.The only temporary reduction was in Jan and Feb.1995.
[241] See,P2126,D78,D73,D214,D197,D198,D199. PW-073,T.642
[242] D80.
[243] D178, D360, P2369, D63, D67, .D55,para.94.
[244] D66,Boering,16/12/2012,9032,9405-6,P2120

intended and contributed to the JCE to forcibly remove. Reasonable TC, on the evidence on the record, would conclude that the Appellant acted in full conformity with the rules of IHL.

273. The Trial Chamber erred in law in taking into consideration allegations of the so called "Tunnel Attack" during the night of 23/24 June 1995, as this incident is not even mentioned in the Indictment, particularly not in paragraph 60 of the Indictment.

274. The AC position is that "charges against the accused and the material facts supporting those charges must be pled with sufficient precision in the indictment as to provide notice to the accused".[245] The TC considered that this attack is covered by para.38 of the Indictment. Alleged contribution of the appellant is clearly specified in para.60 of the Indictment, and paragraphs 35-57 of the Indictment provides description of the JCE alleged in the Indictment. For that reasons the Trial Chamber erred in law by considering that attack as an alleged contribution to the JCE to forcibly remove. Further, para.38 of the Indictment, deals with the alleged "shelling and sniping", and the "tunnel attack" which is demonstrative action that did not include shelling neither sniping.

275. This error invalidates the Judgement.

276. The TC erred in finding that the "tunnel attack" had a function of terrorising civilian population in accordance with the alleged "goal of making life inside the enclave unbearable"[246]. The TC particularly did so, when examining the alleged and his participation of the Appellant in the JCE, he was obliged to consider his acts and conduct, and also to determine his mens rea.

277. The aim of the attack, contrary to the TC finding, was clearly specified in P2200 (signed by Salapura) which provides clear instructions to the 10th Sabotage Unit how to proceed with the task, and specially instructed that "there should be no danger to UNPROFOR members" and "avoid causing causalities among woman and children".[247]

278. The TC qualification of the operation in para.1021 is merely speculative as it is based on no evidence or expert opinion. For the purpose of the alleged contribution to the JCE, two main facts exist which the TC failed to give credit to. First, Salapura testified that he did not received report(s) about any casualties[248], and secondly, who was responsible for conducting

[245] GotovinaAJ,para.45
[246] Judgment,para.1081,1021.
[247] P2200,t.6
[248] Salapura,02/05/2011,T13544.

that operation (that certainly was not the Appellant), and whether Tolimir was informed about the casualties. Salapua testified that he did not receive any report; in the intelligence report it is stated that that the ABiH was spreading disinformation, but not that an attack occurred as the TC has interpreted in para. 1083, but that sabotage attack was directed against civilian features. This information, which is of intelligent nature, cannot be considered as such to confirm that the Appellant spread disinformation "in order to influence opinion of those who received report." This conclusion is mere speculation with no supporting evidence. Even the Appellant was informed (there is no evidence that he was), that cannot be taken as his participation in the alleged JCE.

279. The TC further erred in conclusion that the Accused role in the attack was not passive.[249] Salapura explained, in detail, every aspect of preparation and execution of the task provided to the 10th Sabotage Unit. The TC in fn.4246 explained that between Pale and Main Staff, there is a short distance, which is not a proper basis for inferences that are beyond reasonable doubt.

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280. The TC stated that "the Accused actively contributed to the aim of limiting UNPROFOR's ability to carry out its mandate"[250]

281. The TC erred in finding that the attitude of the Appellant "towards the UN generally is demonstrated by his proposal that UN forces that had been taken hostage by the VRS following NATO air strikes at the end of May 1995 be placed in an area of possible NATO air strikes"[251]. This finding is completely erroneous since there is no evidence that suggests that it was Tolimir's proposal. The TC based its finding on the document that was not signed by the Appellant, and there is not enough evidence on the record about his conduct in relation to the NATO bombing of in May 1995. Further, The TC erred in law because this incident was not mentioned in the Indictment. Further, since situation with the UNPROFOR members was not part of the Indictment it was not subject to discussion and proof, and there is no evidence about the Appellant's involvement in that "situation". This incident particularly cannot be taken into account in determination of the attitude of the Appellant towards UN. In providing attitude towards UNPROFOR the TC had on its disposal various intelligence information

[249] Judgment,para.1083
[250] Judgment, para.1084
[251] Judgment,paras.1084,923

from which it can acquire certain knowledge about UNPROFOR and the position of the Appellant towards UNPROFOR.

282. The TC erred in conclusion that the Appellant contributed to the JCE by disabling UNPROFOR, that "he kept UNPROFOR at bay by denying VRS intentions, stalling communications on UNPROFORs concerns regarding military activities, and deflecting attention to the ABiH."[252]

283. In reaching conclusions, the TC erred because it disregarded evidence regarding the VRS and the Appellant attitude towards UN, particularly after the COHA agreement, and UN position towards VRS, particularly in the enclave, and particularly that enclave which was not demilitarized and that the VRS had a right to attack the enclave, and that that was well known to the Appellant.

284. The enclave was not demilitarized, which was the mandate of the UNPROFOR. The TC constantly disregarded this fact and even for the enclaves that presented a serious threat to the ABiH stated that "the demilitarization was never fully realised".[253] Evidence on the record provides clear proof that there was no demilitarization; in contrarily, there was a constant provision of arms and ammunitions to the ABiH in the enclave and training of their forces, mandated of UNPROFOR, based on demilitarization and ceasefire agreement and SC resolutions which was to monitor compliance with the ceasefire and "to disarm the BH Army",[254] On the other hand the VRS had a right to attack the enclave, and the military operation against enclave was in compliance with the IHL.

285. The TC erred in law and fact in finding that Srebrenica and Žepa, because they were declared as "safe areas", and thus being inviolable, e. g. that it is irrelevant that ABiH committed material breaches of Article 60 of Additional Protocol I. Particularly the trial Chamber erred in finding that "the ABiH did not honor the ... cease-fire agreements or that some military targets existed in the enclaves could not provide a basis for the VRS to attack what had been designated by the UN as "safe areas".[255] This TC finding is fundamentally

[252] Ibidem.
[253] Para.180.
[254] D20,paragraph.2.23.
[255] Judgment,para.704

flawed in law, and had no basis in the IHL. The fact that Srebrenica and Žepa were declared as "safe areas" by the UNSC does not render those zones absolutely inviolable.[256]

286. If the status of the zone is subject of material breach by the party in which an interest-protected area is established, this area ceases to be immune from the attack. In this particular case, it is established that Srebrenica and Žepa were used by the ABiH in military purposes in violation to both relevant SC resolution, and 1993 Demilitarization Agreement and 1994 COHA.[257]

287. The overall aim of the safety zones created by the UNSG was to „keep a certain area free of attacks in order to protect persecuted persons, to ensure access of humanitarian aid, prevent mass flights to neighbouring countries, and in the long run to enable peace talks." They can be seen as reactions in the case of inability of parties to agree of safety zones under IHL such as neutral zones, undefended cities and demilitarized zones. If such zones are used for military purpose, for example training, equipment of troops and for planning or carrying out military actions there cannot be considered as immune from an attack.

288. If order to preserve the status of demilitarized zones or safety zones, it is mandatory that „all combatants, as well as mobile weapons and mobile military equipment must have been evacuated", that „no hostile use shall be made of fixed military installations or establishment" „no acts of hostility shall be committed by the authorities or by population, and no activities in support of military operations shall be undertaken"[258]

289. For the status of all safety zones, including those created by the UNSC it is common, as in the case of demilitarized zones, that „if one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 o 6, the other party shall be released from its obligation under the agreement conferring upon the zone the status of demilitarized zones. In such an eventuality, the zone loses its status but shall continue to enjoy the protection

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[256] In the jurisprudence of the ICTY there is no extensive discussion on the issue of whether areas declared as "safe areas" may be subject of attack. However, at least in the Gotovina case, the AC paid no attention to the status of the RSK as UN protected area,

[257] See for example,D122,paras.50,51, 127,128;D16,D53,D52, D63,D67,D68,D76,D96.

[258] Add. Protocol I,Article 59(2)

provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict".[259]

290. Relying on the concept of a "safe area", the Majority concluded that "while the evidence in this case does indicated that ABiH units were located in the enclaves at the time of these attacks, this does not provide a justification for the attacks of the Bosnian Serb Forces against population known to be of predominantly civilian in character..."instead of specifically targeting the ABiH in actions, the Bosnian Serb Forces repeatedly acted against the whole Bosnian Muslim Population in the Srebrenica and Žepa enclaves" [260]

291. This explanation of the TC position is fundamentally flawed in law. This legal position can verify the BiH practice that "safety zones" can be used as a military establishment for training and preparing forces for offensive attacks and those forces might only be attacked "in action".[261]

292. The very reason for the attack was well explained by witness Savčić, who testified that: "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."[262]

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293. While communicating with the UNPROFOR, Nikolai and other UNPROFOR members were seeking for a solution of how to organise air strikes against the VRS positions.[263] Despite constant threats with air strikes, and taking measures on the field in order to provoke air strikes,[264] Tolimir insisted on protection of UNPROFOR.[265]

294. The TC erred in finding that Tolimir "deflected attention to the ABiH. From the evidence on the record it is clear that the ABiH was using combat means of UNPROFOR.[266] A Reasonable TC could not concluded that Tolimir "deflected" attention to the ABiH, but that

[259] Article6(7)
[260] Judgement,para.706.also 207-208, 210-212.
[261]
[262] Savcic T.15830
[263] P585,p.96-107.
[264] Nikolai,D70,p.10.
[265] D41,D85.
[266] Franken,T.3456-3459,P1225.

he was complying on what was happening on the ground, that ABiH is using UNPROFOR combat means.

295. That Tolimir had no intention to attack UNPROFOR clearly speaks on evidence on the record. For example, D85[267] Tolimir, in order to communicate with UNPROFOR send a following request: "Pay particular attention to protecting members of the UNPROFOR and the civilians".

296. A Similar message was sent on 9 July when Karadžić ordered attack on Srebrenica.[268] The TC stated that "the Accused relies on this particular passage /D41/ in support of his position that he cannot be attributed the intent necessary for an attack on civilian population"[269], and the Majority concluded that this instruction to Krstić was *merely* relied on by the Accused from Karadžić". This note of the Majority does not take into account document D85 that contains similar wording as D41, and that it is relevant for the establishment whether Tolimir had knowledge that the attack was directed against civilian population (Article 5 requirement). However, contrary to the TC finding, that particular instruction concerning protection of civilians and UNPROFOR was Tolimir's instruction. From the evidence on the record, no reasonable Trial Chamber could have concluded that Tolimir intended or was aware that the attack was directed against civilian population.

297. Summarizing its previous findings (some of them erroneous) the TC concluded that "Accused's position on that point, Karadžić's instruction to ensure protection of the civilian population has no bearing upon the state of mind of the Accused." In the light of arguments presented above this finding is wholly erroneous. Even if the Appellant only relied on his instruction that was a clear indication that he did not have any knowledge that the attack was directed against UNPROFOR. Second, the Appellant was not on the field and obviously he did not command to the troops or to anyone engaged in Krivaja 95 and subsequent events.

298. The TC further concluded that by his acts described in paras932and933performed "with a view to ensuring the VRS maintained its control over enclave." (para.1086) Since those acts had no impact on civilian population, and are perfectly legal in which Tolimir provided warnings about intention of the Muslim leadership(The Muslims wish to portray Srebrenica as a demilitarized zone with nothing but a civilian population of it. That is why

[267] see para.224,fn.863
[268] D41.
[269] Judgement,para.1085

they ordered all men fit for military service to illegally pull out from the area... so that they could accuse the VRS an of an unprovoked attack on civilians in the safe haven), and that it is very important to list the names of all military aged men who are being evacuated from the UNPROFOR base in Potpčari (D64) no reasonable TC could have reached challenged finding.

299. The TC erred in findings that the Appellant was informed of the events on the ground (in Potočari) on 12 and 13 July by Janković and through the involvement of subordinate officers of the security and intelligence organs at the brigade and corps level including Popović, Keserović and Momir Nikolić"[270] There is no evidence that he was in contact with those persons in relevant time or that he received information about events that might be used as a basis for the inference that he had any knowledge about inappropriate of unlawful treatment of civilian population.

300. These positions, as well as other finding in para.1087 are wholly erroneous and not based on evidence. Again, the TC relied merely on the position of the Appellant in the VRS. First, the TC disregarded the fact that Janković at that time was resubordinated to Drina Corps[271] and worked as a liaison officer with UNPROFOR and Mlaidić's interpreter. There is no evidence that Tolimir was informed about any of the Fontana meetings, or that he got information about situation in Potočari prior or during evacuation of civilians.

301. There is no evidence, and from the evidence on the record it cannot be concluded that Tolimir took any part in evacuation of civilians from Srebrenica or that he was timely informed about relevant events. At the time of evacuation, Tolimir was in Žepa.

302. The TC erred in that Popović and Nikolić were subordinated to Tolimir (see ground 14).

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303. The Trial Chamber erred in finding that the Appellant's involvement in Žepa operation (his acts and conduct during negotiations, military operation and evacuation of civilians) are significant contribution to the JCE to Forcibly Remove.[272]

[270] Judgment,paras. 1087, 257, 258
[271] Salapura,03/05/2011,13577-13578.Momir Nikolić, Keserović14140, Nikolić,06/04/2011,T.12365-12367.
[272] T.1088-1092

304. As will be presented hear through the most prominent examples, those errors are of such a nature that the Appeals Chamber should consider all of the evidence *de novo*.

305. The TC failed in rejecting the Appellants Argument that Žepa operation was not directed against civilian population. Particularly the TC rejected argument concerning Krstić order launching attack on Žepa states that "the civilian Muslim population and UNPROFOR are not targets of our operation. Collect them together and keep them under guard, but crush and destroy armed Muslim groups"[273] The Majority argued that "*mere* inclusion of this language in Krstić's report does not convince the Majority, in and of itself, that the VRS operation against Žepa was only aimed against at the ABiH". The TC erred because it failed to consider that orders, especially orders for launching attack, does not contain meaningless terms, but clear orders and instructions for subordinate units that must be executed.

306. The TC's considerations of events in the months prior the attack on the enclave failed to consider that during the same period, the ABiH from Žepa launched attacks against VRS including an attack against the VRS Main Staff. Particularly, the attacks of, for example 9 coordinated groups described in D62 and many witnesses[274], and reported by Tolimir.[275] The TC failed to recognize that the VRS had information that there is preparation for offensive military operations from Srebrenica and Žepa in coordination with the offensive operation of the forces from Kladanj[276]. In the Appellant's report of 24/06/1995 it is stated that there were such plans. The TC also failed to consider that in middle June, in one convoy to Žepa just before those attacks VRS discovered in one UNHCR leading to Žepa large quantum of ammunition during the usual checking procedure.[277] Those events left no possibility to the VRS than to attack Žepa.

307. The TC, in reaching conclusion that the attack was directed against civilian population erroneously founded that „the operation against Žepa was aimed not only at targeting ABiH which had not been demilitarized, but also taking control over safe zone, and thereby civilian population."[278] This finding contains several errors. It was not the AbiH which had not been demilitarized, but the enclave of Žepa had not been demilitarized in accordance with the 1993

[273] P1225,p.4 Judgment,para.1028-fn,4061.
[274] Savčić,15926-15928, Obradović,T.12015.
[275] D145.
[276] P2369,D145,D178,p.3,para.5 that relates to Srebrenica and Žepa. Škrbić,T.18663-18639. See also, P2365,D53, Момир Николић,11/04/2011. T. 12565-12567 testifying that the information that the VRS had that the plan to link Srebrenica and Žepa with the rest of the Muslim held territory would be implemented between the 20th and the 25th July 1995.
[277] D2126,D78.
[278] Judgement,para.1029.

Agreement and COHA. Taking control over „safe zone" is not illegal task in the circumstances of this particular case, but action that was fully lawful under IHL. Article 28 of the IV Geneva Convention stipulates that "The presence of a protected person may not be used to render certain points or areas immune from military operations."[279] Article 51(7) of the I Add. Protocol is also clear that 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 in order to attempt to shield military objectives from attacks or to shield."

308. This error occasioned miscarriage of justice and invalidates the decision.

309. The TC erred in findings concerning negotiations of 13 July 1995 and the role of the Appellant. The TC founded that "on 13 July … a meeting was held at Bokšanica where the Accused told those present, at the outset, that Srebrenica had fallen and now it is Žepa turn, adding the only alternative to Žepa evacuation was military force against the enclave". This finding is based on testimony of witness Torlak. However, contemporaneous evidence provide completely different story. P491(Tolimir's report) and P596 (UN Memorandum). In the UN document[280] it is stated that „The Serbs asked the Bosnians in Žepa pocket to drop their weapons, *after which the civilian population may either leave or stay*." In para 9 it is reported „The Serbs also want the Ukr to leave all their Ops but the Bosniaks have set up obstacles in their paths and will not let them pul out. ... The Serbs want to capture the pocket without fight if possible".

310. The only reasonable conclusion from the evidence on the record is that Tolimir there was no intention to forcibly remove Žepa population. In addition issuing ultimatum, „surrender of weapons or military attack", not as the TC concluded „evacuation or military attack" is perfectly legal ultimatum/warning.

311. The Majority further erred in fact that the Appellant contributed to the efficiency of the VRS takeover of Žepa ... through ensuring UNPROFOR's inability to intervene. (para. 1089). However, UNPROFOR was not at the time under threat of the VRS but AbiH in the enclave.

[279] "Those words refer here to any acts of warfare committed by the enemy's…forces, whether it is a matter of bombing or bombardments of any kind or of attacks by units near at hand" ICRC-Commentary.
[280] P569,para.8

That is well documented by D55, and other documents. For example, in one of his reports Avdo Palić reported „We are disarming UNPROFOR in accordance with the directive we received earlier"[281], and, at the same time Palic also threatened to kill UNPROFOR soliders.

312. The TC erred in finding that "proposal to capture Žepa within 21 hours so as to avoid condemnation and reaction from the international community demonstrates ... that he was well aware that there was nothing legal in Žepa's takeover" (para. 1089) The Appellant, as a trained military officer was well aware of above stated rules of IHL that permit attack on the enclave. His proposal for fast capture concerns efficiency of military operation and take into consideration political climate at that time. As an intelligence officer he was perfectly aware of that politics.

313. The TC failed to establish whether there were casualties during the combat. There is no record of civilian casualties, while military targets, just like in Srebrenica were situated in the villages.

314. The TC further erred in findings concerning P488 that was based on erroneous translation. Concerning document D488, the Majority erred in finding that "the only reasonable inference to be drawn by the Majority is that his document manifests the Accused's determination to destroy the Bosnian Muslim Population." (para. 1171). Namely, The TC referred to "groups of Muslim refugees" however in original "zbegova muslimanskog stanovništva". Namely the word "zbegova" was wrongly trnaslated, while the word "groups" is not present in the original document drafted in BCS. The term "zbjeg", as testified by Trivić, "refer to the area, the sector" not to refugees.[282] Second, the word "fleeing" does not appear in the original version of the document.[283]

315. In connection with this document, Savčić testified that those locations were "absolutely out of the range of our weapons, because we had only light infantry weapons..." and provides a total description of the terrain.[284]

316. The TC failed to acknowledge that this alleged proposal has never been implemented, so that it cannot be taken as a contribution to the alleged JCE to forcibly remove. Thus, the TC erred in law.

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[281] D105.
[282] Trivić, 09/12/2010,T.8624. See also, D.O.Judge-Nyambe, para.79
[283] P488eng/bcs
[284] Savčić,T.

317. The Trial Chamber erred in findings regarding Appellants involvement in negotiations and erred in finding that the members of War Presidency was not authorised with any issues related to the ABiH. (para. 1090) Further, The TC erred in law because participation in negotiations after 13 July was not covered by para. 60 of the Indictment.

318. However, this particular error shows lack of proper estimation of evidence. While Torlak claimed that he was not authorised to talk in the name of Military, video recordings from 19 July meeting shows the opposite. First, the TC failed to acknowledge that they were parliamentarian in accordance with the law of war, and that he was empowered, on 19 July and 24 July negotiations to talk in the name of the ABiH as a member of the War Presidency. There is also evidence that members of the presidency communicated with their bosses in Sarajevo concerning evacuation of civilians and army matters.[285]

319. That Torlak and others were empowered to speak in the name of military clearly shows video record of the meeting of 19 July at Bokšanica. When members of the Žepa war presidency were asked by Mladić „Are you ready to surrender your weapon" Kulovac answered „Yes we are". [286] However, the AbiH did not honour 19 July agreement.

320. The TC further erred in fact that 24 July Agreement was not genuine.[287] That position is, also, fundamentally flawed in law. Namely, agreements such as capitulations are never the matter of completely free will. That are military agreements that concerns surrender of troops, the place they are defending etc. In accordance with military rules, "all persons covered by capitulation become prisoners of war and subject to the orders of the adverse party and are liable to punishment if these are disobeyed."[288] Concerning civilian population, the intentions of the VRS was clear, as stated in 24 July Agreement:"In accordance with the Geneva Conventions... the civilian population of Žepa shall be given the freedom to choose their place of residence while hostilities continue."[289] That is perfectly in accordance with Article 35 of the IV Geneva Convention: "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State."[290]

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[285] D60, d55, D363,D362,p.5,
[286] D108.
[287] Judgment,para.1035.
[288] See Green,pp.116-117.
[289] D51,T.7
[290] L. C. Green argued that this provision "operate to prevent departure of those likely to be of assistance to the adverse party in his war effort." The Contemporary Law of Armed Conflict, 3rd ed, p.111

321. First,there is no evidence or basis for the conclusion that Tolimir was "in charge" of the alleged operation to remove Žepa population(para. 1092). The TC relied on findings in paras.977-978, particularly that the Appellant was present at the 24 July meeting. Not denying that he was present in the area and aware of that meeting and reached agreement, at the very meeting Tolimir was not present, particularly not in the blue suit in the time of military operations, and as video shows refusing to shake hands with Mladić. This video is not authentic and contradicts the reasons of logic that Tolimir was in civilian suit (like one he had in Vienna and Dayton during negotiations) on that particular day why all others were in uniforms. Second, during evacuation Mladić was present at Bokšanica and he was in charge as a commander, so intercept quoted in para.978 cannot be taken as a reliable evidence for the events during evacuation and after that.

322. The TC particularly erred in finding that the Appellant's "continued involvement in prisoners related matters in the month of August and thereafter demonstrated to the Majority his dedication of the follow up of the forcible removal operation, he did not take these actions in a vacuum." While the TC relied on paras 1002-1006 there is nothing illegal in those activities and that he was engaged in a manner that provide evidence of his alleged intent or actus reus of any of the crimes charged in the indictment. The TC failed to consider what are those prisoners related matters that concerns forcible transfer. Involvement in POW exchanges, as described elsewhere in this Brief, has nothing with the alleged forcible removal.

323. The TC finding that the Appellant "contributed to the to the threatening atmosphere during " process of evacuation "by pointing out pistol up at the sky intended to frightened the Bosnian Muslim civilians".[291] That conclusion is fundamentally erroneous and based on unreliable statement of witness. There are evidence that Tolimir did not make threatening atmosphere, there are a lots of evidence about his presence in Žepa during evaculation, and particularly Čarkić statement:

324. "I said I saw General TOLIMIR several times and once in Zepa I, he generally and, and I' m witness to this he had put his own head at risk to help evacuation of the Zepa population and make it and to go right, If I may say yes, General TOLIMIR had come into Zepa bef-, with one or with two or three military policemen before our Army came into Zepa.

[291] para. 1092, 758, 982

He came unarmed and amongst the thousands of civilian populations and before I had gone in"[292]

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325. The TC conslusions stated in paras 1093 and 1095 are erroneous, and based on his position as Assistant Commander and his close relationship with Mladić. On the basis of this the TC inferred a number of wrong conclusions concerning, participation in the convoy restrictions, limiting UN ability to carry out iths mandatre, facilitating takeover of the enclaves, making false claims concerning VRS intentions, passing Karadzić instruction to takeover Srebrenica, and that he was allegedly aware of forcible removal of those gathered in Potočari. (1093). None of those conclusions can be affirmed on the Appeal, since they are of such a nature that no reasonable trier of facts could reach, and they are based on wrong understanding of IHL, particularly that part concerning military agreements such as capitulations, status of demilitarized zones or safety areas.

326. *

327. None of the activities of the Appellant can be understood as that he from March 1995 to August 1995 actively contributed to the implementation of aim set in Directive 7. His acts cannot be qualified as contribution (needless to say significant contribution) to the Alleged JCE to Forcibly remove, not population of Srebrenica not for population of Žepa.

328. Trial Chamber's errors invalidate the Judgement and caused a miscarriage of Justice. The Appeals Chamber is requested to find the Appelant not guilty on Counts 3-7.

[292] D217,p13:7-13)

GROUND 16: THE TRIAL CAMBER ERRORS CONCERNING ALLEGED SIGNIFICANT PARTICIPATION OF THE APPELLANT IN THE JCE TO MURDER

329. The TC erred in fact and law by concluding that the Appellant was a member of the JCE to murder and that he, through his actions "contributed significantly to the common purpose of the JCE to Murder, sharing intent to implement it with other members of this JCE".[293]

330. The case against the Appellant was one based on circumstantial evidence of which the findings of the TC were largely based upon a combination of circumstantial facts. In those circumstances the main one was the position of the Appellant in the VRS as an Assistant Commander for Intelligence and Security Affairs, and erroneous facts concerning his possibilities, duties and responsibilities. As stated by Judge Nyambe, "the Accused's connection to the crimes is entirely derived from the professional chain of command with those who did commit crimes."[294]

331. It should be emphasised that there is no direct evidence that the Appellant had any knowledge of the alleged murder operation, and that only knowledge contemporary with the murder operation might be relevant for establishment whether the Appellant was a participant of the alleged JCE to Murder. The mere contact with certain persons, whether it were subordinates or superiors is not a proper basis for the inference of required knowledge. If the Majority erred in findings about the alleged knowledge from the contacts with those persons, which is an improper evidentiary basis, that erroneous finding cast doubt upon the TC's overall conclusions concerning knowledge, intent and contribution to the JCE.[295]

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332. The TC, as a starting point in estimation of evidence concerning alleged knowledge, intent and contribution to the JCE to Murder, quoted his position as a Chief of the Sector for Intelligence and Security affairs, and erroneous finding that there was in existence, an alleged "professional chain of command". Arguments presented under ground 14 are also part of this ground.

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[293] Judgement,paras.1096-1115.
[294] D.O.Judge Nyambe,para.4.
[295] See Krstić AJ, para.98

333. The TC erred in fact in finding that the Appellant "had knowledge of murder operation at latest by the afternoon of 13 July, and from the moment he was became aware of it, he started to become actively involved in the accomplishment of the murder plan"[296]

334. The TC erred in finding that Tolimir was aware of separation of the Bosnian Muslim males in Potočari, as it based its conclusion on P2069. There is no evidence that prior to the trial, the Appellant ever received or red this document. The original version of the document, in the right left corner, contains initials of those who red that document. The record shows that there is evidence that "these kind of original documents are very seldom red by the head of the sector". It was registered in intelligence administration that, particularly "Tolimir never had this documents in his hands otherwise he would put his initials".[297]

335. The TC considers document D64, and, within the content of that document drew conclusions that "the evidence is insufficient for the Chamber to conclude that the Accused had knowledge of the" plan to kill Bosnian Muslims form Srebrenica on the night of 12 July, the TC made two erroneous inferences. The first one is that this document demonstrates that the Accused was kept in touch with *all the relevant* personnel and organs and was made aware of the situation that transpired on the ground in Srebrenica". The second one is that the Appellant "stressed the importance of arresting the Bosnian Muslims form the column and of registering the names of the able bodied Bosnian Muslim men in Potočari " " conspicuously reassembles Mladić's remark in Potočari tat the men would be screen to identify war criminals" [298]No reasonable trier of fact could have made these findings.

336. In the document dated 12 July 1995 (D64), it is stated within its relevant part that "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[299]. For proper understanding of the position of the Appellant at that time it is necessary to point out another part of this document in which it is stated that "The Muslim wish to portray Srebrenica as a demilitarised zone with nothing but civilian population in it. That is why they ordered all armed men for military service to illegally pull out from the area ...so that they could accuse the VRS of the unprovoked attack on civilian safe haven." In continuation it is stated that "Although it is important to arrest as many members of the shattered Muslim units as possible, or liquidate if they resist, it is

[296] Judgment,para.1104.
[297] Pecanac,16/01/2012,T.1813-1814
[298] para.1101
[299] D64,p.2

equally important to note down the names of all men fit for military service who are being evacuated from the UNPROFO base in Potočari."[300]

337. The TC failed to establish that the only reasonable conclusion from the evidence is that the Appellant wanted to prevent accusations that attack on Srebrenica was an attack on civilian population, what further support proposition that it is unreliable to consider that he (willingly or unwillingly) joined the JCE at some latter moment.

338. The TC further established that as of 13 July the Appellant was frequently in the area of Žepa "dealing with the issue of evacuation of Bosnian Muslims from Žepa enclave",[301] initiating the starting point of evaluation of further evidence concerning the Appellants alleged involvement in the JCE to Murder. The TC's findings are insufficient since the Appellant was dealing at the time with negotiations and military operations in Žepa.

339. The TC erroneous finding about his knowledge of and contribution to the JCE to Murder is based on Ex.P125.[302] The TC erred in its finding regarding authenticity of P125, or alternatively, that the alleged proposed measures "reflect the coordinated effort to conceal the despicable plan contemplate among the members of the JCE to Murder", and that this document "demonstrates his intent to contribute to the JE to Murder"[303] Even if considered authentic, it cannot serve as a basis for finding that the Appellant had knowledge of Murder operation in contribution to the JCE to Murder.

340. First, the Majority stated that „Malinić testified that he could not remember having received" Exh.P125 and that „Savčić could not recall having drafted it, although he could not exclude the possibility he did". Neither of the witnesses could personally authenticate Exh.P125. The TC concluded that this „inability is not necessary dispositive of the document authenticity."[304]. The Majority further stated that it has approached "these two witnesses evidence with caution, as they too were closely connected to this document and thus both had incentive to minimise or question its authenticity.[305] The TC erred because there is no ground for that conclusion as both witnesses extensively testified about that document providing reliable statements and did not cover up their involvement in Srebrenica events.

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[300] D64,p.2
[301] Judgment, para.1102.
[302] Judgment, para.1103
[303] Judgment para1103,936,937-944
[304] Judgment para.940
[305] Ibidem

341. Other factors provide cogent reasons concerning authenticity of that document. First, IKM of the 65the Protection Regiment was non-existent. The Majority quoted Savčić's statement that he did not set up IKM at Borike.[306] The TC ruled out this argument on the basis of the facts that a) „IKM of Rogatica Brigade was located in Borike"[307], and on the explanation of the OTP Investigator Mr. Blasycyk, who has opinion that „usually where the commander is present .. there is a forward command post whether this is officially called [a] forward command post of a particular unit or a forward command post of [an] another unit co-operating with particular unit this is a different question" Those arguments cannot be used to support the conclusion that the 65th Protection Regiment Forward Command Post was in existence. In all documents, clear indication exists from which Forward Command Post has sent particular document. For example, even the documents designated for Assistant Commander Tolimir always has had a clear and precise reference of the post from which there were sent. Blaszcyk's is not a military expert and was not called to testify about military organization, but about the way the OTP received so called Drina Core collection, and he is not in possession of first hand knowledge of the issue. Reference to 65th Protection Regiment Forward Command Post clearly, and taking in account other factors, casts serious doubt upon the authenticity of Exh.P125.

342. Exh. P125 does not bear the sender's handwritten signature.[308] Gojković's testimony on that issue is not of particular importance since he does not have any recollection of this document; however he did identified his signature. The fact that there is a signature similar or the same as Gojković's is not a decisive element in providing authenticity, since it is very easy to forge the signature.

343. Again, Blaszcyk's presumption that „has the Exhibit P125 been handed to Gojković by a superior officer from the Rogatica Brigade Command, Gojović would have simply send it" is a mere speculation.[309] Absence of the Savčić's signature is the indication that it lacks authenticity (contrary, the Judgement, para. 944). Malinić, who was an experienced officer of the Military police, testified about proper procedure: „I would write that a document is of

[306] Judgment,para.941
[307] Judgment,para.941
[308] Judgement,para .942
[309] Judgement,para.924

doubtful origin and that there is no confirmation that the document was really sent for coding".[310]

344. The TC rejected the argument that „Malinić suggested that he had not acted upon the orders contained" in P125.[311]. Malinić did not suggest, but clearly stated that he did not act on the orders contained in P125 because he never received that order. The fact that Mladić issued a similar order „in the evening of the same day".[312], is not a proof of authenticity, since, as stated by Malinić: „ I do not see anything in this order that would be wrong. In this proposal/order, I don't see anything that has to do with the time and area of combat operations that would be wrong. All armed forces in the world work the same way".[313]So, it cannot be reasonably concluded that it is „evident to the Majority that the Accused's proposal in Exhibit P125 were acted upon."

345. The Majority stated that „both Savčić and Mladić question the authenticity of Exhibit P125 on the basis that its content is illogical, as it combines an order with proposal"[314]. The Majority argued that „in the absence of any evidence indicating that such combinations were prohibited or even rare, however, especially given the exigencies of war, the Majority disagrees", recalling responsibilities of Mr. Tolimir and Mr. Savčić at a relevant period. In footnote, it quoted the opinion of the Prosecution's investigator Mr. Blaszcyk,[315] which shows that for him it were logical for these elements to be combined. The Appellant, again, claims that Blaszcyk is not a military expert and that he has duty of loyalty to the Prosecution.

346. In the record there is a number of Military Rules and a great number of proposals and orders. The TC was in position to establish that there is no similar order/proposal of such illogical content.

347. The fact that on 13 July, Savčić and Tolimir were present in the same area is not a fact that favours the authenticity; on the contrary, each of them could have sent separate documents. On the same day Tolimir sent a few documents concerning situation in Žepa,[316] and it is illogical that Savćić (whose rank and position was significantly below that of Tolimir) sent such documents" to Main Staff. As noted by the TC in para. 950, on 13 July

[310] Malinić,T.15391, see also13590-13591
[311] Judgment para.946
[312] Judgment para.946
[313] Malinić,T.15375
[314] Judgment para.945
[315] Judgment,fn.3770.
[316] Judgment,para.948-950.

„late Accused wrote a report to the VRS Main Staff and Mlacić..." including 65Protection Regiment, concerning situation in Žepa.

348. For the reasons set above, the Majority's conclusion concerning authenticity of P125 is of such a nature that no reasonable TC could have reached it.

349. Even If the Appeals Chamber finds this document authentic, this cannot serve as a basis for the conclusion that the Appellant knew or contributed to the JCE to Murder. Malinić testified that he did not see

„anything in this order that would be wrong. In this particular proposal/order, I don't see anything that has to do with the time and area of combat operations that would /sic/ wrong. All armed forces in the world work the same way".[317]

The TC failed to consider other evidence that corroborate Malinić statement. For example, P2754 /Plan for taking security measures for operation Sadejstvo-95) contains the following entry "restrict movement and presence of uninvited persons, civilians and especially foreigners, journalists, members of UNPROFOR, UNHCR, /ICRC/ and other international organizations."[318]

350. The TC particularly noted that measures allegedly proposed by the Appellant "are analogous to those in Mladić's order issued on the same day"[319]However, measures ordered by Mlaidć are the same as measures commonly applied by any army in the world. From the fact that those measures are similar no conclusion about alleged knowledge of the Appellant or his contribution can be inferred by a reasonable TC. In the area there were security officers with who Mladić was in direct contact and who could propose similar measures.

351. The TC /e.g. Majority/ also erred in fact in finding that "Mladić and Gvero were timely informed on the Accused's proposed measures by Ex.P125". There is not a single piece of evidence on which this conclusion is based; neither that conclusion might be inferred from the other properly established facts.

352. The TC failed to consider other relevant evidence. That conclusion is not supported with the evidence of 13/07/1995 (P2537) in which it was stated that Beara sent to Kasaba certain transportation means for transportation of captured Muslims who "will be sent ... to

[317] Malinić,T.15375.
[318] P2754,T.5
[319] para.1103, P2420

argumentation will be provided later in order to avoid unnecessary repetition in relation to document D49.

355. The TC erred that the Appellant's knowledge is corroborated by alleged Appellant's direction to Todorović on 12 July to prepare Batkovići Center for arrival of approximately 1.000-1.3000 soldiers over the next few days. That could not have been Tolimir on that day because at the time the Bosnian Serb Forces had no that number of POWs. A large number of POWs surrendered only on the night 12 July and on 13 July. Even Tolimir was in Bjeljina on 12 July and from Todorović's statement it cannot be concluded beyond reasonable doubt that Tolimir provided instruction for the preparation of the Detention Centre for such a large number of prisoners.

356. Todorović was not sure who, when and by what means instructions for preparation arrived.[326] When presented with the document from 16 July 1993 issued by Milovanović Todorović reacted: "Thank God that finally I can see that document we have been discussing all along. I've been trying to say that there must have been a document issued to the Command of the Eastern Bosnia Corps when it was ordered to receive prisoners from the area of the Drina Corps".[327] On the question of Judge Flugge, he explained that he could not recall the date and specific details about an order for the preparation of Batkovići Camp in July 1995. From the evidence of Milenko Todorović, it can reasonably be concluded that an order arrived in written form similar to the order issued in 1993.[328] Todorović's testimony is also evidential that it was not the Appellant who might have ordered the preparation of the accommodation of POWs, but only the commander or his deputy.

357. Concerning the TCs finding that Tolimir "on 13 July at earliest" responded to Todorović call that all preparations should stop,[329] the Chamber was not able to make finding on the precise day[330]. There is strong evidence that this testimony is not reliable when keeping in mind the short time (day or a few days) in which it was not possible that Todorović, who was in Bjeljina, could reach Tolimir on the telephone while he was in Žepa. In particular, it would have not been possible on 13 July.

[326] fn.3709,TJ
[327] Milenko Todorović,20/04/2011,T.13141-13143
[328] T.13143.
[329] Judgment para.951
[330] Judgment para.951

358. Todoroviæ's testimony does not correspond with N.Simić evidence. The TC concluded that Todorović called on behalf of Novica Simić[331] , and in Simić's testimony it was not even mentioned. Unfortunately during the trial in Tolimir's case, he was not available because of illness and subsequently died. Todorović testified from 18 -21 April 2011, when the Decision on the Prosecution's Motion to admit the evidence of Simić pursuant to Rule 92qauter (1 November 2011) has been rendered only on November 2011. For that reason, there was no possibility to test the truthfulness of Todorović's evidence concerning the alleged communications between the Appellant and Todorović, and Simić and Todorović. However, Simić gave evidence in *Popović et all.* Relevant part of his testimony is recorded on P2756,T.28565-28570 regarding his communications on the same issue where he described in details his communication with Miletić, Mladić and Krstić. Failing to give credit to Simić evidence the TC erred in law.

359. The TC findings concerning the alleged Tolimir's conversation with Todorović is of such a nature that no reasonable chamber could have reached. In any case, providing information that POWs will not arrive, without further evidence was not indicative of the knowledge of the murder operation.

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360. The TC made a number of erroneous inferences concerning D49.[332]

361. The TC erroneously quoted its content. In para. 1105 the TC stated: "had been arranged in agricultural buildings in Sjemeč" while the document cited"in the objects of the 1st plpbr in Sjemeč."[333] Those are objects that one unit of Rogatica brigade used 1992-1993[334]. In that document Tolimir insist on adequate accommodation of all POWs from Srebrenica (D49), and its contents are completely in line with the Geneva Convention.[335] There is also evidence concerning circumstances under which this document had been drafted (the Appellant dictate the content to Čarkić in Bokšanica).[336]

362. The TC concluded that 800 POWs would have been beyond the ability of Rogatica Brigade, and relying on Razdoljac testimony, that no one got a task for preparation of those

[331] Judgment para.951
[332] Judgment para.1105
[333] (D49) /with the reference to para.1105
[334] Zoran Čarkić,13/04/2011,T.12740,12727-12728.
[335] See Articles 19,Ch.II,Part III,Ch.IV,
[336] D49,p.2,Čarkić,T.12723-12725

objects for the arrival of POWs, and that there was no farm work to be done. No reasonable TC could use that subsequent testimony as a basis for the finding stated in para.1106. The Appellant at that time was in Bokšanica and in contact with Rajko Kušić, commander of the Brigade responsible for everything in that brigade, including logistic. It can be reasonably concluded that information about possible accommodation of POW the Appellant got from Kušić. The TC disregarded the fact that it was only a proposal- so until accepted -there was no need to take any preparatory measure. Further, the TC erred in comporting this document with the alleged Appellants instruction that preparation of Batkovići Camp for accommodation of POWs should cease.

363. Content of D49 contains a certain measures which the TC failed to consider, but which are in line with appropriate measures taken in relation to transportation of POWs. The TC failed to consider this document. It is clear that Tolimir was not in charge of the treatment of POWs. At the very beginning, the Appellant stated "If you are unable" - indicating that he is not in charge of the treatment of POWs - ,and in continuation stated "to find adequate accommodation for all POWs form Srebrenica". This is indicative that he had no knowledge of the murder operation, and that he had no knowledge where the POWs from Srebrenica would have been detained.

364. For the foregoing reasons, and many more reasons, the TC's conclusion that "the Accused was looking for a place for prisoners to be out of the sight with an aim to further the goal shared with the other JCE members"[337](JCE to Murder) is wholly erroneous, as well as findings in para.1107.

365. The TC erred in fact by concluding that the accused warning's concerning an unmanned aircraft[338] was sent "in order that the murder operation would be carried without being detected"[339]. The Majority based this finding on the alleged function of the Appellant to prevent information leaks, and that on this day (14 July) killings started in Orahovac. The TC erred in rejecting these Defence arguments. Namely because, it is clear that at the time there were preparations for Žepa operation, that there was a constant threat of NATO bombing and that VRS forces were on their way to Žepa. Tolimir was, as evidence clearly show, engaged in preparation of military operation on Žepa on 14 July, and that he was not involved in any of the activities concerning Srebrenica and Srebrenica POWs. The only reasonable conclusion

[337] Judgment,para.1006
[338] Exhibits128,P121,P147,P148
[339] Judgment para.1108

form the evidence is that this warning was provided not to conceal murder operation, but to protect VRS forces engaged in military operation.[340] That is further supported by Exh.P129, the Appellant's report, in which it was stated "we plan to keep the UN checkpoints at current locations in order to protect our combat formations from NATO aviation"[341]and asked permission to implement proposals contained in this document.

366. The Majority erred in fact in finding that the Appellant "possessed a high level of knowledge of the scale of murder operations, supported criminal activities his subordinates were engaging in, and coordinated their work"[342]. The TC further erred in fact by concluding that "the accused was informed about the ongoing murder operation in Zvornik area"[343]

367. The Majority's explanation in para 1109 is based primarily on the position of the Appellant as an Assistant Commander, without paying due regard that he was involved in relevant time in the Žepa operation. Further, the Majority erred that the Appellant returned to the Main Staff on 16 July. it would be a proper conclusion from the evidence on the record that he returned on 17 or 18 July (because Mlaidić was in Belgrade on 16 July [344].However, the mere communication with the officers from the VRS Main Staff is not sufficient proof of the Appellant's knowledge and engagement in the murder operation.[345] The fact that he knew where Beara and Janković were is not sufficient proof since they were in the Drina Corps AOR on the Mladić's order. There is evidence that without any direct or proper circumstantial evidence, the Majority just concluded that "the only reasonable inference to be drawn in the circumstances" described in para. 1109 "is that when the Accused was in the VRS Main Staff Headquaters, he was informed about murder operation in Zvornik area." That finding is without any reasonable ground.

368. There is evidence that at the relevant time, Janković was re-subordinated to Drina Corps[346] and that certain officers were sent to Drina Corps including Keserović, and that they

[340] It is usual in military, especially during the war that alerts of this kind have priority. Čulić testified as follows: "I can say with full certainty that I never received a written order from the Main Staff for information which was sent along the information line, and I'm talking about alert signals." those signals include air rais signals etc. Čulić, 15/02/2012,T.19321-19322.
[341] P129,p.2
[342] Judgment para.1109
[343] Judgment para.1109
[344] Smith/28/03/2011/T.11844-11845.
[345] KrsticAJ, para. 98
[346] Salapura,03/05/2011,13577-13578.Momir Nikolić, Keserović,14140, Nikolić,06/04/2011,T.12365-12367.

were not duty bound to report to the Appellant. Tolimir was not the one who sent them on the assignment. That was the prerogatives of the Commander of the Main Staff.[347]

369. The Majority erred in fact in concluding that the accused supervised the evacuation of wounded and the local MSF staff in Srebrenica, and also that it was done "with the view to divert attention and pressure from international community about the Bosnian Muslim males from Srebrenica, and that it "notably corresponds to his competence – to obscure the VRS's real goals."[348] This TC error is wholly erroneous and speculative. This finding is indicative that the Majority acted on the assumption of the guilt of the Appellant and that did not estimate evidence and made inference in accordance with the requisite standard of proof. There is no evidence that Tolimir, who was engaged in Žepa operation, was even in position to supervise evacuation.

370. The TC erred in fact by concluding that "given /the Accused's/ authority, it is inconceivable that the Accused was kept in the dark about the murders in the relevant sites at the time, instead, he tacitly approved to make this murder happen" and that he "shared the intent to carry out these criminal activities" [349] The TC erred in fact – in finding that the Accused was informed about activities of 10 Sabotage unit on 16 and 23 July, as well as that the Intelligence Administration had in the relevant time period any information about 10 Sabotage Unit engagements on 16 and 23 July in Branjevo and Bišina.[350] – Particularly the TC erred in finding that the Accused was communicating with Salapura on 16 July about the Branjevo killings[351] and in connecting conversation with Popović on 22 July in relation to Bišina killings.

371. There is no evidence that Tolimir was informed about involvement of certain members of the 10th Sabotage units in those killings. As the TC noted, 10th Sabotage Detachment was an independent VRS unit directly subordinated to Mladć. However, the TC erred in relationship between that unit and Intelligence Administration (as discussed elsewhere in this Brief). There is evidence about commanding, managing and controlling this Detachment, and Salapura testified that "providing the unit was re subordinated ... to the corps command to certain mission. The commander of the Main Staff can say, okay, this unit will be re subordinated to the Drina Corps or some other corps.... The commander may issue an order

[347] P126.
[348] Judgment para.1110
[349] Judgment para.1112
[350] Judgment para.1111-1112
[351] Salapura,T.13615-13616,13620-13622.

without asking either myself or Tolimir. We don't even know anything about that."[352] Also, Salapura testified that the first conflict upon his return from the Belgrade was telephone conversation on 19 July.[353]

372. Conversation between Popović and Tolimir on 22 July[354] cannot be a basis for concluding that Popovič informed Tolimir about the Bišina killings or that those killings were planned or about on 22 July. The Majority just cut relevant part of the intercept (P765) without which the words "do your job" cannot be understood. Popović in answering Tolimir's question "How are things with you", he replied to have no particular problems, that he is in his base and that he has something to finish in the "base." Reasonable conclusion is that "base" is his office or military barracks. Tolimir answered "do your job"..."all the best to you". No reasonable TC could establish a connection with this intercept and Bišina killings of 23 July, or that Tolimir was informed about any of Popivoć's participation in the murder operation.

373. The Chamber concluded that giving Appellants authority, "it is inconceivable that the Accused was kept in dark about the murders in relevant sites at the time, instead he tactically approved to make these murders happen."[355][356] This finding is wholly erroneous, and not based on evidence. The mere position of the Appellant in the VRS is not, and could not be, a determinative factor about his knowledge.

374. While the Srebrenica operation was in progress, "the commander strictly prohibited that this should be written about",[357] and nothing has been written. From the evidence on the record, it could not be concluded that oral reports were presented to Tolimir, since Beara was not in contact with Tolimir at that time.

375. The Majority further erred in finding in relation to P494 that the Appellant in July 1995 was concerned about diverting pressure from the ABiH with respect to the missing Bosnian Muslim males form Srebrenica and his involvement in concealing the fate of Bosnian Muslim males[358]

[352] Salapura,T.13493.
[353] D535,pp.31-32. Salapura,T.13562-13563
[354] Judgment para.1111
[355] Judgment para1112
[356] Judgment,para.1112
[357] Salapura,02/05/2011,T.13521-13523, see also PW-057,14/06/2011,T.15430
[358] Judgement para.1113

376. The TC's findings in paras. 1113 and 1114 are irrelevant as until the time, murder operation had been finished. Further, the Majority interpreted those documents in an inappropriate manner. Proposal to the State Commission of POW exchanges cannot be considered as a "diverting pressure from the ABiH with respect to the missing Bosnian Muslim Males from Srebrenica". This is a mere speculation. The Appellant was engaged in the Žepa operation, and the document is clear in that Tolimir was only concerned with the implementation of the 24 July agreement concerning POW exchange agreement. In para 1 P494 the Applicant stated as follows: "Our representative for exchange of war prisoners cannot make arrangements with the Muslims renouncing the text of the agreement, Muslims in Zepa accepted the agreement and agreed to the status of prisoners of war until all our war prisoners are exchanged, Our commission should demand all our war prisoners including one from Gorazde and Bihac, Our war prisoners have to be released between 25 and 28 July 1995."

377. The TC wrongly understood the document stating that "Bosnian Muslim could take advantage of the 24 July 1995 Agreement under pressure from Sarajevo, "which they already tried to do so by bringing up the issue of prisoners from Srebrenica" instead of an advantageous side, Tolimir is speaking about the abuse of the agreement. In the Serbian version of the document, there is no word which translates into the term "advantage", but there is one which does translate into "abuse". (P. 494)

378. The TC failed to consider relevant evidence. Particularly, the TC did not paid attention of conversation between Tolimir and Čarkić during Žepa evacuation. Namely, when Čarkić asked Tolimir for the possibility of exchange of one of the Žepa people for the VRS soliders captured in Goražde

"Tolimir was absolutely against it, against any combinations or anything. He said that the agreement was already signed and that there's no combination anout exchange or releasing for those from Goražde."[359]

379. There is no basis for the conclusion that this document can be interpreted that Tolimir had knowledge about the destiny of Srebrenica POWs, or that he wanted to divert pressure. He insisted on implementation of 24 July agreement. In addition, he instructed that delegates of the ICRC from Pale should be called on the UNPROFOR check point 2 at Bokšanica

[359] D217,pp-14-15.

[360]which indicates that his intention concerning Žepa population was clear in that they wanted a proper execution of the 24 July agreement. It is unreasonable to conclude that it is "evident from his report dated 25 July ... " that he was involved in concealing the fate of Bosnian Muslim males from Srebrenica." since he, at the time, was not aware of the destiny of Srebrenica POWs.

380. In para. 1114 the Majority concluded that Tolimir "lied about the reasons why did not have enough Bosnian Muslim prisoners for exchanges..." (P2250) Particularly the relevant document stated that "the Main Staff is not responsible for this situation..", and that "This act cannot be interpreted as Tolimir's intention to hide the destiny of Srebrenica POWs. On the other hand, he was not indicted for concealing crimes, and the document in question was issued on 3 September 1995. It is established that Tolimir at that time was engaged in the other part of the Republic of Srpska, and that this document is indicative only in regards to his knowledge of how many prisoners from Srebrenica and Žepa are in his prisons.

381. Findings challenged under this ground are crucial for convictions on Counts 1, 2, 3, 4, 5 and 6 (persecution) because are based on the Majority's erroneous finding that Tolimir significantly contributed to the JCE to Murder. The AC is requested to find the Appellant not guilty for crimes charged under enumerated counts and to enter a Judgement of acquittal.

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382. The TC erred in fact and law in finding that the Appellant failed to exercise its duty to protect POWs from Srebrenica, that he had the material ability to protect the Bosnian Muslim prisoners from Srebrenica, at which the Accused's role was to facilitate the implementation murder operation, and that he had done so under the Mladić's orders[361]

383. It is beyond doubt that all members of the military and police were under the obligation to respect international and municipal law (which was in complete harmony with international law) concerning treatment of POWs, and that the Appellant as a high ranking officer had knowledge of relevant rules of international law.

384. In drawing conclusions, the TC relied on paras. 103 and 920 which states that the appellant "played a central role in POW exchanges", and that he had extensive knowledge of the procedures for exchange of prisoners". However, POW exchanges are not the same as

[360] P494,para.3
[361] Judgment para.1126

treatment of POWs, because officer involved in exchanges, particularly officer from the Main Staff, are not responsible for the treatment of POWs that were under the responsibility of units of the VRS or MUP. Involvement in POW exchanges process does not mean providing treatment to POWs since that would mean that in that process, at the level of Main Staff, they only got a list of POWs. The TC demonstrated in para.1122, that the appellant strictly adhered by the rules concerning treatment of POWs whenever he was in position to do so and, the Appellant also always insisted on adequate treatment of POWs. [362]

385. Concerning the finding in para.1123, in that the Appellant willingly assisted in the JCE to Murder, by "issuing orders conflicting with the rules"- those documents concerning alleged captives from Žepa (there were not any of them), has no connection with Murder operation of Srebrenica captives, and the intention was not to impose those prisoners to ill treatment. No reasonable trier of fact could have reached that conclusion. EXH.P122 and P2875 are obviously not connected with the Murder operation. The Chamber interpreted P122 and P2875, not to register POWs and "conflicting instructions". However, the TC did not take into consideration that Serbian POWs have never been registered. In the relevant paragraph it is stated that "we are going to keep them for exchange *in case the Muslim do not carry out the agreement or they make the break through from the encirclement*". In any case, the fact that he provided the proposal not to be registered until "cessation of fire" temporarily limited their unregistered status. On the other hand, on the instruction of the Appellant, as established by the Chamber, all POWs in Rasadnik Prison had been registered. This particular document does not relate to JCE to Murder, and this particular instruction does not present a serious violation of the Geneva Convention.

386. The TC inference in para.1124 is particularly erroneous. The TC reasoned that the Appellant "was tasked with dealing with POW exchanges through the conflict. Irrespective of the fact that the Accused was not physically present in Bratunac and Zvornik areas, where the detention, murders, burials and reburials of Bosnian Muslim prisoners took place, the evidence leads the Majority to conclude beyond doubt that the Accused failed to exercise his duty to protect these prisoners". The Majority concluded that "in order to implement his duty, the Accused would have needed intelligence and counter-intelligence information through his subordinate units and personnel who were on the ground", and further put argument that

[362] Skrbic,T.18699:25-18700:18; see also. Salapura T.13653:19-13654:25

Mladić's instructions on command and control of the VRS security and intelligence organ reveal that the Accused had central control of their activities, relying on P1112.

387. It is clear from this instruction that "monitoring of professionalism, legality and correctness of the work of security an intelligence organ shall be carried out exclusively by first superior organ for security and intelligence affairs, except in that part of their engagement relating to command and staff affairs. "Concretely seen Tolimir was not the first superior organ, but Beara and Salapura were. So if was on the Head of security administration to monitor professionalism, legality and correctness of the work of security organs in Drina Corps, and on Popović to monitor security organs of the various Brigades, including Bratunac and Zvornik brigades. In any way, monitoring of professionalism, legality and correctness is not a real time operation contemporary with the acts performed. During the relevant period, Tolimir was in Žepa, heavily engaged in the Žepa operation, and far away from Zvornik and Bratunac. There is no evidence that he received any report concerning treatment of POWs.

388. In para 1126, the Majority again made inferences on the basis of Tolimir's relationship with Mladić. First, there is no evidence that at the time of the Žepa operation Tolimir was present at daily meetings at collegiums with the Main Staff. The fact that he was involved in Negotiations cannot be used as a reasonable basis that Tolimir had material ability to act in relation to Bosnian Muslims from Srebrenica. The Majority suggestion on what the Appellant "could do" is an erroneous conclusion as it is speculative and not based on any evidence. On the contrary, evidence shows that on those meetings frequently insisted on proper treatment of POWs and that "written orders should be issued, specific orders to each and every unit on how to treat prisoners of war and to import on them the precise stipulations from the international humanitarian law."[363]

389. The Majority stated that the Appellant "could have directed his subordinates to comply with the rules governing the treatment of POWs" [364]. In fact, Tolimir had done that on 9 July 1995. D41is explicit and Tolimir provided instruction to "Ban torching of residual buildings and treat the civilian population and *war prisoners in accordance with the Geneva Conventions of 12 August 1949*". On 12 July Tolimir issued instruction that "it is equally important to note down the names of all men fit for military service who are being evacuated from UNPROFOR base in Potočari".[365] Every Person or unit who holds POW's is duty

[363] Škrbić,18699-18700.
[364] Judgment para.1126
[365] D64

bound to act in accordance with the rules that regulates the treatment of POWs with or without specific instructions from the superior.

390. The Majority further stated that "Alternatively, he could have confronted Mladić as to what was in unfolding with the Bosnian Muslim prisoners from Srebrenica, which was in stark contrast to what they were ostensibly proposing to the Bosnian Muslim local representatives in Žepa, namely, the exchange of prisoners.[366] This conclusion is a mere speculation, since there is no evidence that Tolimr discussed with Mladić anything in regards to prisoners from Srebrenica, or that anybody informed Tolimir about the destiny of POWs from Srebrenica in relevant time.

391. In para. 1128 the Majority put argument connected with the command responsibility, stating "that the accused together with his subordinates... were in position to deal with crimes when he found out that they being committed by their own soldiers." However, that was the task of security administration, not of Assistant commander Tolimir, as can be seen from the document the Majority relied in the footnote no. 4410.[367] In addition, the TC made a legal error because it failed to establish that it is the duty of the commander for "taking measures concerning crimes..."[368] and take into consideration.

392. Finally the TC from the mere position of the Appellant inferred that he willingly contributed to the furtherance of the common purpose of the JCE to Murder. The Majority concluded "despite his knowledge of the situation on the ground and his obligations towards POWs, there is no evidence that the Accused attempted to distance himself from the crimes or that any action to fulfil his duties toward POWs, and instead actively the Accused engaged himself in covering up the common purpose of the JCE, which is in keeping with his competence as Assistant commander for I and S. .."This conclusion is simply erroneous, and based on wrong understanding, and based only on general statements of his rules as Assistant Commander and without any foundation in evidence.

393. From the evidence on the record, it cannot be concluded that Tolimir had any obligation in relation to the Srebrenica prisoners and more so, was in position to act and deliberately choose not to act. Having in mind his attitude towards POWs (particularly in

[366] Judgment para.1126
[367] Ex. P2256
[368] D202,Article9,t.12(p.7)

Rasadnik prison and his instructions concerning POWs), it cannot be reasonably concluded that Tolimir willingly chose not to act.

394. The Majority confused responsibility of State and individuals for treatment of POWs. The TC rightly cited a part of Mrkšić&Šljivančanin AJ "all state agents who find themselves *with custody of prisoners of war* owe them a duty of protection…".[369]

395. However, in the whole Judgement, or from the evidence on the record, it cannot be concluded that the Appellant find himself "with custody of" POWs from Srebrenica.

396. POWs from Srebrenica were in custody of the units that captured them, and Tolimir was not a commander of those units nor responsible for those units and their acts. There is no evidence that Tolimir received reports concerning POWs from Srebrenica. In that context, it should be emphasised that Tolimir on 13 July sent a telegram in which it was stated "if you are unable to find adequate accommodation for all POWs from Srebrenica"[370]what is a strong evidence that it was not Tolimir one who was responsible for Srebrenica POWs.

397. Findings challenged under this ground are crucial for all convictions on Counts 1, 2, 3, 4, 5 and 6 (persecution) because all of them are based on the Majority's erroneous finding that Tolimir significantly contributed to the JCE to Murder. The AC is requested to find Appellant not guilty for crimes charged under enumerated counts and to enter a Judgement of acquittal.

GROUND 17: THE TRIAL CHAMBER ERRED IN FACT AND LAW THAT PERSECUTORY ACTS AND OPPORTUNISTIC KILLINGS WERE REASONABLY FEASIBLE TO THE ACCUSED.

398. The Trial Chamber erred in fact and law in finding that persecutory acts and opportunistic killings that occurred on the night of 13 July and after that date (para. 22.2d, 22b-c, 22.3 and 22.4 of the Indictment) were reasonably feasible to the Accused on the basis of his membership in the JCE and that he willingly accepted the risk of persecutory acts including murder.[371]

399. As stated in grounds 15 and 16, the Majority erred in finding that the Appellant was a member of the JCE to Forcibly remove, and also erred in finding that he "joined the JCE to

[369] Underlines added.
[370] D49.
[371] Judgment,paras.1136-1144.

Murder at least by the afternoon of 13 July"[372] In that context, this ground of appeal is of alternative nature.

400. The question before the Majority was "whether the persecutory acts ... and opportunistic killings...were foreseeable to him".

401. The TC concluded that in the context of alleged facts presented in para.1136, that it was feasible to the members of the JCE that persecutory acts and opportunistic killings would be committed (para.1137). While this finding does not concerns directly the appellant, the mere existence of the JCE is not a sufficient basis for the conclusion of the alleged foreseeability. Whether the crimes outside the scope of the JCE were foreseeable or not must be estimated on the basis of the information that was in possession of the Appellant at relevant time period.

402. The Majority relied of the fact that the Appellant had knowledge of the fact that the VRS forces had seized control of Potočari. That fact was not privileged information, but matter of common knowledge. On the other hand, there is no evidence, as explained under grounds 15 and 16, that the Appellant received information about situation on the ground in Potočari, Bratunac, Zvornik area etc, nor that he was participant in the events on the ground. From 12or13 July the Appellant was involved in Žepa operation and was continuously present in the Žepa area.

403. There is no evidence that the Appellant "fully shared the intent to make life for the inhabitants of Srebrenica enclave unbearable with the view of their removal".[373]However, that fact alone is not a sufficient proof of the alleged foreseeability that the crimes would be committed.

404. The TC erred in finding that "he was no doubt aware of the ethnic hatred between Bosnian Muslims and Serbs, having himself reverted to derogatory slang on multiply occasions through the course of the conflict."[374]

405. The TC failed to provide reasons concerning alleged "ethnic hatred" and thus made an error in law.

406. Concerning alleged derogatory language, the TC failed to consider those terms such as "Turks" and "Balijas" whether they were used in order to encourage or promote crimes against Muslim population. There is no such evidence on the record, and the TC failed to consider whether the use of those terms had any result on the behavior of others. The TC also

[372] See Judgement, para.1139, grounds 31 and 32.
[373] Judgment,para.1140, see.ground31.
[374] Judgment,para.1140.

failed to consider evidence on the record from the period covered by the Indictment in which the Appellant constantly used term "Muslims".[375] In addition, acts that were referred in fn. 4432 are not all Tolimir's acts or there clear evidence that he did not draft those documents. P2485 from 1993 is drafted by LJB (Ljubiša Beara) as indicated in right left corner of the document, and probably signed in the absence of the Appellant from the Main Staff; and that is probably the case with the P2274.

407. The TC failed to identify information that was beyond reasonable doubt known to the Appellant at the relevant time. Without those findings, the test articulated in para.1139 and 827 of the Judgement, and that was based on the jurisprudence of the Tribunal must fail.

408. The TC further erred in law because it did not consider evidence of the Appellants acts in relevant time, particularly D41, D85, that is in clear opposition with the Majority's finding that persecutory acts and opportunistic killings were foreseeable to the Appellant or that he willingly took the risk in relation to those crimes.

409. Having in mind that the Appellant was not present on the ground in Potočari, that he had no information or very limited information of the situation on the ground due his involvement in Žepa operation, that in Potočari there were a number of high ranking officers of the VRS (including Mladić, Krstić and Borovčanin) together with representatives of media, there is no reasonable basis for the conclusion that persecutory crimes and opportunistic killings were foreseeable to him, and particularly that he willingly took the risk.

410. Finding on elements of the JCEIII must be reached beyond reasonable doubt. There is no evidence on the record that the Appellant was in possession of information that enable him to reasonably foresee that opportunistic killings and persecutory acts would be committed.

411. These errors invalidate the Judgement.

[375] Appeal Brief,para.422

Ground 18: Alleged Feasible Targeted killings of Three Muslim Leaders from Žepa

412. The TC erred in finding that it was foreseeable to the Appellant that the killings of Avdo Palić, Amir Imamović and Mehmed Hajrić "might be committed by Bosnian Serb Forces in the completion of the JCE to forcibly remove the Bosnian Muslim population form Žepa, and that he "willingly accepted the risk by participating in the JCE with the awareness that these crimes were a possible consequence of its implementation".[376]

413. The TC finding and reasoning that served as a basis for this conclusion is entirely erroneous.

414. First, The time frame of the JCE to forcibly remove set by paragraph35 of the Indictment started of about 8 March 1995 through the end of August 1995. Responsibility under JCE III cannot extend beyond time frame set by the Indictment for the alleged JCE. Palić was alive on 5 September and Imamović and Hajrić were alive in August 1995. At the probable time of their alleged killings population was already transferred to Kladanj and Sarajevo and Žepa operation was fully completed, so the reasonable TC could not conclude beyond reasonable doubt that their alleged killings were committed in the alleged completion of the JCE to Forcibly Remove.

415. The TC in its findings confused situation in Srebrenica and Žepa, practically taking situation in Potočari and Srebrenica as a model[377]. It is obvious from the evidence presented that situation in Žepa was completely different.

416. The mere fact that Palić, Harjić and Imamović were prominent and important representatives of Žepa Muslim population is not evidence that can serve as a basis of finding that their killing was foreseeable or that the Appellant willingly took the risk, neither that there was killed because of their respective positions. See also arguments presented under Ground 12.

417. The TC further erred in relying on Dumanjić's testimony that he feared for his life should the VRS find that he was imam. The TC erred in considering this statement as a basis for the challenged conclusion since the VRS got all information about religious staff and political and military leaders in a very small Žepa village that Dumanjić was evacuated during

[376] Judgement,paras.1148-1150.
[377] Judgement,paras.1148-1150

the first day of transport of civilian population[378], that Mladić entered his bus, and he safely reached Kladanj.[379] Alleged personal fear of evacuated person cannot serve as a basis for finding that certain killings were foreseeable for the Appellant.

418. The TC erred in fact that "security organs" were under his "professional command." As stated under ground 14 of appeal, "professional command" is simply inexistent, and it cannot be concluded that the mere involvement of security organs in relation to those three persons is reasonable basis for the conclusion that those killings were foreseeable.

419. Further, the TC based its finding on the basis of erroneous conclusion that Tolimir had a duty to "ensure safety of these prisoners". No such specific duty in relation to Palić, Imamović and Hajrić existed on the part of the Appellant, particularly not to monitor the treatment of POWs, and further, since he was on the completely other part of the RS (Grahovo and Glamoć front) he was not in position to monitor, control or whatsoever treatment of prisoners of war. However, in another context, the TC recognized a number of evidence about Tolimir's correct treatment of the POWs, particularly POWs from Žepa. When Tolimr was in contact with the POWs he provided clear instructions concerning their treatment that is in full conformity with the applicable rules of international humanitarian law.[380] It seems that the Majority equated involvement in POW exchanges and responsibility for the treatment of POWs. His involvement in POW exchanges had nothing to do with treatment of POWs which were in custody of particular units who had responsibility for their proper treatment. His involvement in prisoners exchange was result of specific tasks provided by the rules of the VRS, and that has no connection with the treatment of POWs.[381] Namely, failed to consider P2610(P2609) that the Appellant's role was in charge for determination of the competences, content and manner of the preparation of VRS members who "on whatever basis" are in contact with the UNPROFOR or engaged in commissions for exchanges of POWs, in order to undergo preparations with security and intelligence organs and carry out tasks provided by these organs.[382]Dealing with the issue of POW exchanges means dealing with the lists and papers, and does not affect responsibilities of the units who keep POWs for their proper treatement.

Imamović and Hajrić

[378] R. Dumanjić,29/09/2011,T.17937
[379] R.Dumanjić,29/09/2011,T.17939-17940
[380] P1434,p.5 and other evidence relied in para.1122 and related fns.
[381] P2610.
[382] See, para.7.

420. The TC erred in finding that "the fact that an ICRC team visited Rasadnik prison on 30 July and reiterated the POWs held there eat the time has no bearing on the Accused's foreseeability that these men could be killed".[383] While the Accused was informed about that registration, there was no reason for him to belief that those persons could be killed; particularly that he gave instructions concerning their proper treatment.[384] The Majority also failed to provide reasons why it considers that registration of POWs by the ICRC has no bearing on the Appellant's foreseeability that those men could be killed. The TC also failed to note that registration of POWs by the ICRC is a factor that does not support the thesis that the Appellant willingly took the risk that those persons might be killed.

421. Circumstances about their alleged disappearance and death were not properly elaborated by the Majority, and in addition, there is no evidence who, when, for what reason and how killed them. The TC relied on Meho Džebo testimony, namely his opinions and rumours he allegedly hared[385] and disregarding contemporaneous evidence. Particularly, the TC failed to consider intercepted communication P2818. In that intercept of 22/10/1995 "Zoka" /Zoran Čarkić/ told that three POWs run away while there were on work detail, and that one run away during NATO bombing.[386] That evidence is supported by other contemporaneous evidence particularly with the evidence that the ICRC was informed that three prisoners were run away.[387] Having in mind that NATO bombing of the Zlovrh in Žepa (30/08/1995 [388]) the only reasonable conclusion is that until that moment, and for certain time after that moment there were alive, and probably at the time of the conversation recorded in intercept P2818.

422. In those circumstances, particularly having in mind the possible timing of their killing (September or October 1995), no reasonable TC could have concluded that their killing was foreseeable consequences of the alleged JCE to forcibly transfer, and particularly that it has been reasonably foreseeable for the Appellant.

Avdo Palić

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[383] Judgement,para.1152
[384] P1434,p.5.
[385] Judgement, para.1152.
[386] P2818
[387] P2253
[388] D187.

423. The TC based its findings concerning foreseeability of the killing of Avdo Palić on alleged "personal dealings" of the Appellant with Palić, Beara's involvement in his transfer to Military prison on 10 August 1995, and that he was taken from that prison by Pećanac) on 4/5 September 1995) and made an error in fact that Pecanac was subordinate to Appellant. The TC also erred in rejecting argument that the Appellant from 30 July 1995 was at Grahovo and Glamoč front.[389]

424. Personal contacts of the Appellant with Avdo Palić during evacuation cannot serve as a reasonable basis for the challenged finding, since there is no connection between those contacts and subsequent events, and the TC failed to provide reasons why those contacts are of relevance for the alleged foreseeability.

425. The TC failed to consider evidence on the record that clearly contradicts finding that his killing was foreseeable to the Appellant, particularly P434 and Čarkić's evidence. Namely, Čarkić's report of 30 July 1995 is clear that "Atlantida /code name for A. Palić/ – 1958 – is in the safe place and at another location". That document alone contradicts that it was foreseeable that he would be killed. Upon his capture and transfer to Rogatica, A. Palić was given a code name and he enjoyed a special status, protection and maximum security.[390] Failing to consider evidence on the record the TC made an error of law that leads to wrong factual conclusions concerning foreseeability of his killing. However, having in mind that last information about Palić is from the night of 4/5 September 1995, obviously outside the time frame of the JCE to Forcibly Transfer, that he enjoyed full protection and security, there is no basis for inference that it was foreseeable to the Appellant that he would be killed.

426. Further the TC erred that Pecanac on 4/5 September was an Appellant's subordinate. At that time Pećanac was engaged in Mladić's office and as his personal security[391].

427. The TC also failed to note that there is no evidence that Tolimir after 30 July received any information about Palić.

428. The TC, further, erred in finding that "physical absence from the Rogatica area is irrelevant in the Chamber's determination of whether murders of Palić, Harrić and Imamović were foreseeable to him".[392] First, the Appellant was not only in Rogatica area, he was not in the Main Staff, but on the completely other part of the front dealing with the aggression of Croatian, ABiH and NATO forces on the RS. Second, the Appellant was informed that Palić

[389] Judgment,paras.1153-1154,1001.

[390] [redacted]

[391] [redacted] See Judgment, para.109. See also, fn.373.

[392] Judgment,para.1154.

had a better accommodation, and it is only reasonable to conclude that the Appellant belief that Palić's life is secured. The fact that he had been alive for a substantial period of time after the Žepa operation, and in the absence of any evidence on circumstances related to his killing, it cannot be concluded that it was foreseeable for the Appellant, neither that he willingly took the risk that Palić might be killed.

429. This error occasioned a miscarriage of justice and invalidates the Judgement in relation to Counts 1-7.

GROUND 19 – KRAVICA KILLINGS

430. The Trial Chamber erred in fact and law in finding that killings at Kravica Warehouse were executed so as to achieve the common plan. (para. 1054-1055), e. g. that those killings are part of the JCE to Murder.

431. Kravica killings occurred on 13 July. Borovčanin, who commanded the units in the area was recorded in the car while he was trespassing that location and that recording was subsequently broadcasted on Studio B. Video clearly speaks that he saw nothing. The TC findings (para.354-363) demonstrate that, as stated by Judge Nyambe "the killings were set-off by a retaliatory action" which is "an extraordinarily disproportionate and inappropriate response".[393] Other evidence on which the TC relied does not support conclusion that those killings are planned, e.g. that they are part of the JCE to Murder.

432. This error occasioned a miscarriage of justice.

[393] DO Nyambe,para.66

GROUND 20 – TRNOVO KILLINGS

433. The TC erred in considering that the killing of 6 men in Trnovo committed by members of the so-called „Scorpions" unit from the Republic of Serbian Krajina are part of the JCE to Murder.

434. The TC did not discuss whether those who committed murder are members of the JCE, neither that their acts form a part of the JCE to Murder as defined by the Indictment.

435. In paragraph 551 the TC has found that „following the fall of Srebrenica, the Scorpions Unit, which at the time was operating under the direction of Bosnian Serb Forces, summarily killed six Bosnian Muslim males from Srebrenica near the town of Trnovo".[394] However, it is established that they were deployed in Trnovo before the Srebrenica operation, and that they were not participants of the Srebrenica operation.

436. In paragraphs 1041-1072 there is no discussion of whether the Trnovo killings form a part of the JCE to Murder, or whether the members of the Scorpions were part of the JCE as defined in the Indictment and in the Judgment.

437. It is not in dispute that this unit operated under any relevant capacity under the direction of the Bosnian Serb Forces. However, they operated in a specific area that is very distant from Srebrenica, in the region of Responsibility of Sarajevo-Romanija Corps.

438. There is no evidence as to how those six men arrived at Trnovo or into custody of the Scorpions[395]. There is no evidence about any contact of the alleged members of the JCE with the members of Scorpion Units, or any other evidence on the basis of which it might be inferred that they were participating in the JCE to Murder as defined in the Judgement and in the Indictment[396]

439. The Geographical proximity between Srebrenica and other crime sites in the Zvornik and Bratunac areas does not support the conclusion that they were acting as a part of the JCE to Murder. All of the killings were committed in the Drina Corps area of responsibility, while Trnovo is app. 200 kilometers away from Srebrenica, and app. 150 km form the those places

[394] See also,para.547.
[395] Seee.g.Dušan Janc,29/10/2010,T.7037,7040
[396] This argument is also supported by the Dissenting Opinion of Judge Kwon in Popović at all, pp.850-851. The OTP
Janc, 29/10/2010, T.7042-7043.

in the area of responsibility of completely different Corps of the VRS (Sarajevo-Romanija Corps)[397].

440. It is obvious from the evidence on the record that there was an order to record those murders.[398] Unlike other murders that were kept secret, those murders were recorded, and the events on the ground provide a strong reason for inference that those who ordered those murders also ordered their recording.[399]

441. The only connection with the Bosnian Serb Forces the TC has found in the fact was that at that time the Scorpion Unit „was operating under the direction of Bosnian Serb Forces". There is evidence that their deployment was in order to replace some of the VRS units, and that they were engaged in fighting with the AbiH in Sarajevo front.[400] They were deployed in the area of responsibility of Sarajevo-Romanija Corps[401], and evidence on the record shows that they were deployed on the request of the Supreme Command. However, there is no evidence about any connection with this unit, or their commander, and of any contact with any of the alleged participants in the Murder operation. The mere fact that they operated „on the direction of Bosnian Serb Forces" is not a sufficient basis for the inference that Scorpion Unit acted in concert with other members of the alleged JCE. In order to attribute those killings to the JCE to Murder, it is necessary to establish that this particular unit committed those murders in order to achieve the common purpose of the JCE and in concert with other members of the JCE. There is no a single evidence that can lead to that conclusion.

442. The Conclusion that a group of persons or a unit acted as a member of the JCE (plurality of persons and common purpose criterias) needs to be based on evidence and reached beyond any reasonable doubt. Keeping in mind the geographical proximity of Trnovo to other murder sites (in completely different region), including the nature of that unit (Unit from Republic of Serbian Krajina), it cannot be concluded that those who killed 6 men from Srebrenica were part of the JCE to Murder. Rather, video recording of the killings, the location of the Scorpion Unit at the time, the purpose of their deployment in Republika Srpska, lead to the conclusion that this was an terrible criminal act that the members of the Scorpion Unit committed on their own.

[397] Janc,29/10/2010,T.7033-7034
[398] See, P1024 –Transcript,p.8bcs..
[399] Ibidem.
[400] PW-078,20/06/2011,15664-15665
[401] PW-078,20/06/2011,15677

443. By failing to consider and provide reasons whether Trinovo Killings are part of the JCE to Murder, the TC committed a legal error that invalidates the decision.

444. This TC's error occasioned a miscarriage of justice and invalidates the decision.

Ground 21- GENOCIDE AND CONSPIRACY TO COMMIT GENOCIDE

445. The Majority erred in finding that the Appellant is criminally responsible for committing the crime of genocide through his participation in the JCE to Murder and JCE to Forcibly Remove[402] This TC finding is based on the erroneous finding that the Appellant had a genocidal intent, and his contribution to the the JCE to Murder and JCE to Forcibly Remove.

446. In paragraph 1161 the Chamber stated that it was "guided by the jurisprudence of the Tribunal that has indications of such intent are rarely overt, inference is allowed based on totality of evidence." The fact that indication of the genocidal intent is rarely overt was a starting point in examination of evidence or other facts on which the Chamber relied in making conclusion concerning the Appellant's alleged genocidal intent. The fact that genocidal intent is "rarely overt" might be theoretical conclusion based on analysis of the practice of various tribunals, but not as a starting point in determination of *mens rea*.

447. While inferring genocidal intent the TC did not take into account time frame set in the Indictment. Namely, in para. 10 of the Indictment time framework of the alleged genocide is define between 11 July and 1 November 1995. While the TC connected findings concerning conspiracy to commit genocide starting "by morning 12 July 1995" connected with the alleged and erroneously established knowledge of the murder operation (13 July). However, the TC in estimation of the alleged genocidal intent took into account many (mostly erroneous) factual findings that oversteps the boundaries of the alleged genocide, involving implementation of the Directive 7, restriction of convoys, contribution to the aim of limiting UNPROFOR ability to carry out its mandate, facilitation of takeover of the enclaves[403] Those and other facts enumerated in para. 1163 cannot be considered as an indication of genocidal intent. However, the TC provided no reasons why it considered those facts as an indication or manifestation of genocidal intent, or that they just present recapitulation of previous findings.

[402] para.1172
[403] para.1163

On this point the Judgement is not clear.

448. The TC inferred alleged genocidal intent on the part of the Appellant on the basis of alleged participation in the two JCEs[404]

449. In reaching conclusion the Majority particularly emphasized that "the Accused was one of Mlaidć's most trusted associates, even within the collegiums" and that he was "Mladić's right hand" man and they were "closer to being equals" and Mladić's "eyes and ears" and that "the Accused was even more influential and better positioned to take part in all actions of the Main Staff of the VRS in the relevant time"[405]. There is no a single piece of evidence that Tolimir was informed about the destiny of Srebrenica POWs, or that he was in contact with Mladić while he was in Belgrade from 14 until morning of 17 July.

450. Tolimir's acts after the events (when the so-called murder operation was over)[406] cannot be considered as a fact that provides a reason for inference of the genocidal intent. The TC based its finding particularly on two documents that no reasonable trier of fact could have relied as indication of the genocidal intent.

451. In that context, particular attention should be paid to P2433. Namely, it is not established that Tolimir had a knowledge of that list, he stated that "he could not provide to the President... with any information regarding the refugees from the list sent by Ibro Nuhanović to Dutch Embassy... because persons from the list had never be registered as refugees in Republic of Srpska by the Army of Republic of Srpska" [407]and that those persons were never recorded, and provided opinion that "Muslim government wants to legalize, through the Dutch Embassy the list of 239 refugees ... and make it official in order to be able to use it officially at a later stage, because no such list had been compiled by UNPROFOR and ICRS when Srebrenica refugees being transported across the territory of Republic of Srpska" and suggested that "the legalisation of this list no be allowed, both for legal reasons and because it was complied form Mr. Nuhanović's memory and because anyone could be included, even people who had been evacuated in an organized manner or had gone missing prior the evacuation during combat operations". This particular document cannot serve as an indication of genocidal intent or concealment of the so called murder operation. Particularly he suggested that "all persons potentially interested in this topic should be spoken personally

[404] Ibid
[405] para.1165, see also1166
[406] para.1166. fn.4484,para.1114
[407] P2433(p.2)

and instructed to look for the exchange and search for refugees or missing persons"[408]

452. The Majority made erroneous conclusions about knowledge and intent of the Appellant only or predominantly on the basis of his position in the VRS.

453. One of the reasons the TC stated in support of its conclusion that the Appellant had a genocidal intent is a "free use of derogatory and dehumanising language" (para. 1172,1167-1169). The TC did not consider consistent pattern of expressions that the Appellant used during relevant period, as well as practice of using certain terms by various members of the military.

454. If not in all, than in almost all of the documents Tolimir used term "Muslim" or "Muslim group". For example, in D41 (of 9 July 1995) the Appellant is demanding "full protection of civilian Muslim population", in D145 (24. June 1995) The Appellant is speaking of a "Muslim" even about those who participated in the Attack on the Main Staff, in all intelligence reports signed or type signed by Tolimir there is a constant reference to Muslims (not Turks or Balias), in P122 (30 July 1995) Tolimir is speaking about "Muslims" and "Muslim side", in P123, p.2 about Muslims. Use of "derogatory terms" of some of the members in the VRS cannot be used as a basis for inference about genocidal intent. The Chamber relied on Batler's estimation, providing opinion that used of derogatory terms such as "Turks" is generally not an acceptable practice in military and has a negative impact on the behavior of subordinates.[409]The TC erred in relying on that opinion, and failed to consider other evidence on the record. There is evidence that those terms were constantly used during the war. For example, Čulić testified, inter alia, that "during the war there was a lot belittling and demeaning and insults... nowadays it wouldn't be politically correct, but at the time it was being used and it was something normal .... At that time, words being used that could possibly not be permissible today. Just as we used to call them balijas, they used they used to call us Chetniks. [410]

455. These errors caused a miscarriage of justice and invalidate the decision. The AC is requested to enter the Judgement of Acquittal on count 1 and 2.

[408] See also Savčić,22/06/2011,T.15867-15871.Concerning information how this list were created and that it was hidden from the VRS see: PW-071,30/09/2010,6091-6093.
[409] ,para. 1169
[410] Culic 15/02/12 T.19317-19318

Ground 22: Responsibility for conspiracy to commit genocide

456. The Trial Chamber erred in fact and law in finding that the Appellant is criminally responsible for conspiracy to commit genocide (Count 2)

457. As stated under other grounds The TC erred in finding that the accused had genocidal intent, that he was actively engaged in concealing the murder operation and failure to protect Bosnian Muslim prisoners was a deliberate inaction with view to assist the common purpose shared with the other members, resulting in commission of crimes.[411] For that reason this ground of appeal is of alternative nature, but raise the issue that is of significance for the jurisprudence of the Tribunal.

458. At the outset, it should be emphasised that charged conspiracy to commit genocide is "limited to the agreement to kill the able bodied men from Srebrenica",[412] and the TC inferred the alleged genocidal intent on the much wider factual basis[413]. The Appellant recalls that it challenged this finding under ground 21, 15 and 16). The TC failed to consider whether Murder Operation alone constitutes genocide, or that genocidal intent or plan appeared earlier. On that point the Judgement is not clear.

459. The Majority provides no explanation concerning the Appellant's *actus reus* of conspiracy to commit genocide and failed to provide a reasoned opinion for what reasons it found the appellant guilty for conspiracy to commit genocide *on the basis of Article 7(1) of the Statute*.[414]

460. In paras.1175 -1176 there is no explicit finding (failure to provide reasoned opinion as required by Article 23 of the Statute) about his alleged entering the alleged agreement while in para.1026 of the Judgement it is stated that "the Majority has inferred that the Accused acceded to an agreement to commit genocide". In paragraph 1776 the TC completely equated responsibility for genocide with conspiracy to commit genocide. The Majority revealed its position concerning relationship between genocide and conspiracy to commit genocide in section to cumulative convictions stating that "the rationale for criminalising conspiracy to commit genocide involves not only preventing the commission of the substantive offence, but also punishing the collaborative aspect of the crime..."[415]

[411] Contra, Judgement, paras.1175-1176.
[412] Judgment, para.789.
[413] Judgement,para.1158.
[414] Judgment,para.1239.
[415] Judgment, para.1027.

461. If the conspiracy is understood as a "collaborative aspect of the crime" it cannot be considered as a separate crime if principal crime had been committed.

462. It seems that the conception of conspiracy that the TC applied every person responsible for genocide is also responsible for conspiracy to commit genocide, what is legally unacceptable solution. Since the TC considered conspiracy as a distinct crime, not as a form of participation in the crime, it was obliged to distinguish genocide and conspiracy to commit genocide, and not to take the finding on genocide as a sole basis for finding of conspiracy to commit genocide. While the TC stated in para.1026 that it is clear that "the two convictions are not based upon the same underlying conduct", it failed to provide specific finding which conduct of the Appellant it consider as a separate conduct leading to the conclusion that the Appellant is responsible for conspiracy to commit genocide.[416]

463. If considered as separate crime, the TC was obliged to state under which mode of liability it convicted the Appellant, and in what manner if differs from the alleged participation in the JCE. However, in para.1239, the TC found the Appellant guilty for conspiracy on the basis of Article 7(1). In paragraphs 1775-1776 there is no discussion on the basis of what mode of liability the appellant is responsible for conspiracy to commit genocide.

464. Conspiracy is a separate mode of liability not provided in Article 7(1), while in the Appellant's opinion conspiracy should be considered only as a mode of liability. All other solutions outside the common law tradition, including international criminal law, are connected with legal difficulties that cannot be overcome.

465. If the elements of conspiracy are identical as elements of the JCE as a mode of liability, the TC was obliged to acquit the Appellant on count 2, not only because those convictions are impermissibly cumulative, but also because the TC did not establish specific element of the conspiracy to commit genocide. In addition, there is no evidence that the Appellant had any communication with any of the alleged members of the JCE that relates to alleged murder operation.

466. This error invalidates the Judgement in relation to Count 2.

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GROUND 23- CRIMES UNDER ARTICLE 5 – KNOWLEDGE AND ACT OF THE ACCUSED

467. The TC erred in fact in finding that the accused had knowledge that attacks on Srebrenica and Žepa was attacks against civilian population.[417]

468. The key TC findings are based on the text of Directive 7 challenged under 15. The TC basing its findings on the Directive 7 and presumption that every act was in implementation of, and failed to examine whether specific part of that directive was implemented, or that those acts provide a reasonable basis for other conclusions. The TC all of the facts looked through the prism of Directive 7, and completely disregarded explicit wording of a number of documents produced after 8 March 1995, including those of the Appellant. In particular, concerning attack on Srebrenica and Žepa the TC, contrary to the rule of interpretation - *lex posterior derogate legi priori* - gave priority to directive 7, instead to clear orders for the protection of civilian population. (Krivaja 95, P1202" in which it was clearly ordered "In dealing with prisoners of war and the civilian population behave in every way in accordance with the Geneva Conventions,"[418] that P1225 (Order Stupčanica 95) in which it was stated "The civilian Muslim population and UNPROFOR are not targets of our operations") and particularly the Appellant's documents D41, D85 in which he insisted on protection of civilian population.

469. From the evidence on the record no reasonable TC could have concluded beyond reasonable doubt that Tolimr had knowledge that attacks on Srebrenica and Žepa were directed against civilian population, as well as that his acts form part of the attack on civilian population.

470. This error invalidates the Judgement in relation to Counts 3,(4),6and7.

[417] Judgment,para.1178-1179.
[418] P1202,p7;Judgment,para.217.

GROUND 24: CUMULATIVE CONVICTIONS

471. The TC erred in law in finding that convictions for persecution and murders, as well as "other inhuman acts" and forcibly transfer as a persecutory act are permissibly cumulative.[419] The issue concerns cumulative intra-Article 5 convictions. The Appellant considers the arguments of judges Schomburg and Güney as persuasive and cogent in that it reflects a correct understanding of international criminal law. Word limits forced us to incorporate those arguments by reference.[420]

472. In addition, the very formulation of Article 5 does not provide reasons for cumulative convictions. Namely, the category of "other inhuman acts" reveal that the intention of the legislator was not to open the door for cumulative convictions, but to transfer a power to judges to determine which inhuman acts, except for those enumerated in sub-paragraphs (a)-(h) are of such a serious nature that have to be punished.

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473. Actual jurisprudence of the ICTY considers it permissible to enter cumulative conviction for genocide and crime against humanity and murder as a war crime.[421]

474. At first sight, elements of genocide and crimes against humanity are distinct. However, the differences are of such nature, that it is impermissible to enter cumulative convictions.As one author observed "with respect to cumulative convictions for genocide and crimes against humanity, there is much authority for the proposition that genocide is an aggravated form of crimes against humanity."[422] Today, "it seems generally accepted that genocide inheres within the boarder concept of crimes against humanity". In the Genocide Convention, the genocide was not described as a crime against humanity in order to avoid doubts whether crime against humanity may be committed in the absence of armed conflict. As noted by Schabas "In order to avoid any ambiguity and acutely conscious of the limitations in the Nuremberg Charter, the drafters of the Convention decided not to describe genocide as a form of crime against

[419] Judgment,para.1203.
[420] Joint DO of Judge Schomburg and Judge Güney, para.4-7
[421] KrsticAJ, paras.222-223,226-227, NtakirumtimanaAJ, para.542.
[422] See Schabas,The UN International Criminal Tribunals.., p.436

humanity, although only after protracted debate," and "Article I of the Convention confirms that genocide may be committed in time of peace as well as in time of war." [423]

475. The first Distinction is on the requirement that the crime against humanity be committed in the context of "widespread or systematic attack on civilian population" is that it is not a requirement for genocide. Mens rea and actus reus of genocide makes necessary that that it is directed against civilian population. In order to establish genocide, it is necessary to establish systematic or widespread nature of the punishable acts. That requirement is explicitly mentioned in the Elements of Crimes of the ICC. This element, even not mentioned in the Statute or Genocide Convention is a very characteristic of genocide.[424]

476. The second element that needs to be discussed is *mens rea*. Genocidal intent is much more serious than intent for any of the crimes against humanity. While those two intents are not legally identical[425], the question is whether they are materially distinct in a way that entering cumulative convictions is impermissible. Namely, genocidal intent, by its very nature, even not by definition, always encompasses civilians. This is particularly apparent from paragraphs c, d and e, as well as for the formulation of the intent requirement „as such". While the requirement of the crime against humanity is that the accused is aware that his acts form a part of the widespread/systematic attack directed against civilian population, genocidal element is destruction of the protected group, that necessarily involve its civilian component.

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477. Position that the common law concept of genocide should apply is not in line with the nature of the ICTY as an international criminal tribunal. The law of conspiracy needs to be interpreted as an international law concept, not mere common law concept, and must at least be acceptable to both common law and civil law. That is particularly in the light of differences between the "conspiracy" and "*complot*". While the mens rea of conspiracy to commit genocide is genocidal intent, the *actus reus* is a "concerted agreement to" commit genocide. As "the element of acting 'in concert' is key because it distinguishes conspiracy from mere "conscious parallelism".[426]

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[423] Schabas,p.11
[424] „Article 6. Elements of Crimes, International Criminal Court.
[425] Ibidem.
[426] The UN Genocide Convention – A Commentary, p.196

478. Conspiracy to commit genocide is an inchoate offence, however, conspiracy is a mode of liability that, and in modern international criminal law is applicable only in relation to genocide.

479. Article 4 of the Statute adopts the exact wording of the Genocide convention. In it, punishable acts are formulated as having in mind all applicable modes of liability (commission, conspiracy, instigation and complicity). Unlike the ICC Statute or national criminal codes, the Genocide convention does not contain separate provisions on modes of liability, but Article III of the Genocide defines punishable acts by way of defining various modes of liability for genocide.

480. The relationship between Article 4 and Article 7(1) is of such a nature that article 7(1) might only serve as an additional means of interpretation of Article 4, for example in the case of complicity to commit genocide.[427] However, Article 7(1) does not apply in relation to conspiracy to commit genocide. For example, it would be illogical to hold an accused responsible for conspiracy to commit genocide on the basis of commission, planning or ordering as modes of liability.

481. In the Judgement, the majority has stated that "there are multiply reasons to permit simultaneous convictions for genocide and conspiracy to commit genocide. The rationale for criminalizing conspiracy to commit genocide involves not only preventing the commission of the substantive offence, but also punishing the collaborative aspect of the crime which inherently poses a specific danger regardless of whether the substantive crime is ultimately committed."[428]

482. Conspiracy and joint criminal enterprise are modes of liability. Its formulation as a separate crime or particular mode of liability is a matter of legislative technique and not of a substance.

483. As stated by the AC: „Joint criminal enterprise and conspiracy are two different forms of liability. While conspiracy requires showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, ***in addition to such a showing***, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a

[427] Krstić AJ,para.
[428] Judgement,para.1207. See also, Gatete AJ, para. 262.

member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise."[429]

484. Entering cumulative convictions for both conspiracy to commit genocide and genocide on the basis of the participation in the JCE is impermissibly cumulative because in that case there is confusion between two different modes of liability. On the other hand, since the ICC Statute does not provide responsibility for conspiracy, it is evidential that there are neither legal, nor sociological reasons to enter cumulative convictions. As stated by W. Schabas "by its very nature, the crime of genocide will inevitably involve conspiracy and conspirators"[430]

485. There are other reasons that do not support the thesis of permissibility of cumulative convictions.

486. As Judge Agius observed "it is precisely inchoate nature of conspiracy which renders the additional conviction for that crime unnecessary in circumstances where the substantive crime of genocide has been committed, and particularly where the accused's responsibility for that substantive crime is found to be based on his participation in a joint criminal enterprise"[431]

487. In international criminal lawis in a phase of development. The Appellant cannot be caught in the trap of legislative techniques since conspiracy is a mode of liability, and on the other hand a separate crime. As noted by the Popović TC, "in civil law countries, convicting for both conspiracy and the underlying offence is not possible"[432]

488. Conspiracy as a substantive offence is excluded from the ICC Statute, for all offences, because the drafters of the Statute could not agree to its inclusion.[433] Fletcher is of the opinion that ICTY and ICTR inclusion of conspiracy to commit genocide "reflect the afterglow of a dying concept".[434]

489. The TC in Tolimir's case, neither the AC in Getate case explained what those "collaborative aspects of the crime" are. Namely collaborative aspects of the crime are consumed by the crime itself, and in determination of the sentence, those aspects should be

[429] Ojdanić, Decision, para.23
[430] Schabas,,p.259
[431] Gatate Appeal Judgement, DO by Judge Agius, para.5
[432] PopovićTJ, para.2122, MusemaTJ para. 196.
[433] Ibid,p.199
[434] Ibid,p199.

taken into consideration instead of entering cumulative conviction for one "aspect of the crime".

490. This legal error invalidates the Judgement.

GROUND 25- MANIFESTLY EXCESSIVE SENTENCE

491. The TC made a discernible error in the exercise of its discretionary authority when it sentenced the Appellant to a life imprisonment, which is a manifestly excessive and disproportionate sentence. Even the Majority has stated that "a sentence should not be capricious or out of line with similar crimes, and with similar circumstances" and noted a long history of Srebrenica related cases, it provide no explanation on that point.

492. The TC considered gravity of the offence as "a factor of primary importance".[435] However, in determination of the sentence, under this heading, the Majority did not explain the gravity of the alleged criminal behaviour of the Appellant, but gravity of the crimes it established. It only mentioned, in para. 1216 that Majority found the Appellant responsible for committing a number of crimes, including genocide[436], and all individual circumstances discussed under the heading "aggravating and mitigating circumstances".

493. In determination of the sentence, the Majority was obliged to explain totality of the alleged criminal activities of the Appellant. Namely, the sentence must be individualised and explained in detail, particularly in the case of imposing life sentence. In this particular case, from the explanation provided in paragraphs 1215-1218, there is not a single sentence that might be interpreted as individualisation of the sentence.

494. The Majority particularly confused factors concerning aggravating and mitigating circumstances with those the nature and the extent of his alleged involvement in commission of crimes, improperly taking certain factors as aggravating circumstances.

495. The TC erred in fact in finding that "the extreme magnitude and scale of crimes committed could only have been achieved by an organized, interconnected military structure working in unison"[437] This is more presumption than conclusion, that was probably based on the Prosecution witness Richard Butler who has opinion that "the fact that a military has been ordered to carry out an unlawful order doesn't mean that they're going to carry it out in a non-military manner. It operates along a defined structure and hierarchy. A commander is overall – in any echelon the commander is ultimately responsible for the acts and omission of his

[435] Judgement,para.1215.
[436] Judgement,para.1216.
[437] para.1216

subordinates. … The truth in a military context is that everyday has to participate."[438] The Majority conclusion as well as Butler's opinion that served as a starting position in drawing inferences is fundamentally erroneous. Particularly because in the VRS professional officers were trained to respect law of war and duty to reject to execute the unlawful order. Even if certain measure contribute the commission of crime, this need to be done intentionally, and ordinary military measures, such as those for the secrecy of operation (what is inherent even in small scale and pace time operations) and not as an coincidence.

496. In determination of the sentence the TC was obliged to take into account only those crimes specified in the Indictment. In relation to JCE to Murder, only on findings on crimes specified in paragraphs 21.1-21.4 of the Indictment.

497. In determination of the gravity of the crime, the Majority relied on erroneous factual findings challenged under different grounds of appeal.

498. The TC erred in findings concerning alleged impact of the crimes on victims. The TC relied primarily on the evidence of Teufika Ibrahimefendić and on AF's, and a few 92bis statement.[439]

499. Impact of the crimes on victims is something that must be considered as "a core of the case". However, the TC took judicial notice of those facts, and the other facts are mainly based on Ibrahimefendić's evidence, of the person engaged in the work of the organization with the limited number of patients. However, she did not gave evidence as an expert witness, but as ordinary witness, and provided a second hand knowledge about events, and description she provided does not much differ from the experience of other people who were imposed to suffering for the loss of their beloved one during the war. Their experience is about trauma caused by the events of the war,[440] including those concerning Srebrenica.

500. Her knowledge and qualifications as a person involved in the work of the organization Viva Žene, has never been tested through expert report. As she has stated "nobody ever asked for" her "views" and she was never requested to write down an expert report.[441] Her testimony is based on a very limited and second hand knowledge of the events and the most important aspects has never been investigated by the witness, for example, talking about

[438] Butler,8/07/2011,T.16371-16372.
[439] paras.1217-1218
[440] Ibrahimefendic,10088-10089.
[441] Ibid.,10090.

younger population she told that a "small number of them were separated in Potočari itself" [442]and particularly important aspect that the most of the people ranging 20-30 years old went in a breakthrough. The witness did not investigate relevant aspects necessary for the determination of impact of the crimes, an not only war events that happen in and around Srebrenica in July 1995.[443]

501. The Impact of the crimes on the victims is very serious. However, Ms. Ibrahimefendić provided unreliable and untruthful evidence about certain alleged events and their impact on victims.[444] Her statements were more general in nature and experience based on overall personal experience not on events that specifically relates to Srebrenica.[445]

502. The Majority in reaching conclusion expressed in para.1218, relied on Ibrahimefendić evidence that "In the new communities, in the new towns, they had already started a life. conflicts regarding the return exist in the family. So that makes things complicated, as does unemployment, the economic situation, or the return to their original place of residence. And this means that they can't have medical insurance, they can't get educated. And social problems are similar in all of Bosnia and Herzegovina.[446]

503. The Majority erred because it merged impact of economic situation in the country with the impact of the crimes on the victims.

504. The Majority concluded that "the events have left a society to disappear, losing its leadership, identity and three generations of Bosnian Muslim man within only a few days". This is unsupported by evidence in the Trial. It is not established that leadership from Srebrenica has disappear. The TC did not make a proper distinction of victims of combat and other situations not connected with the so called murder operation, or elaborate consequences of those events and those of killing operation. On the other Hand, there is no evidence, except Ibrhimefendic's statement that the lost its identity. Their identity seems to be clear even today, and particularly they did not lost their identity as a Bosnian Muslims what is of relevance for determination of whether the crime of genocide has been committed, and in relation to sentence.

505. It was on the Prosecution to provide, in connection with the Ibrahimefendić testimony,

[442] T.10091
[443] T.10091
[444] T.10092-10039.
[445] See:T.10100
[446] Ibrahimefendić,T.10101

evidence about the impact of the crimes on Bosnian Muslim Population. Even the entire database is ready available[447] evidence has never been presented by the Prosecution.

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506. The Majority erred in law in taking a number of factors as aggravating factors. The TC based its conclusion of aggravating circumstances on the erroneous finding that "he was in contact with his subordinates receiving information about what was happening on the ground in Srebrenica, and in turn he directed and supervised their criminal activity"[448]. For this conclusion there is no a single evidence as explained elsewhere in this Brief. In determination of his position in para. 1224, his "high rank, central position as an assistant commander", that he was familiar with the rules regarding the treatment of POWs and POW exchanges, the TC made a number of errors, on the following paragraphs only the most significant will be elaborated.

507. The TC failed to consider evidence that the Appellant permanently insisted on correct treatment of the POWs.[449]

508. The Majority considered that the Appellant "contributed to the JCE to Murder using his position as the Chief of the Sector for Intelligence and Security Affairs to cover up the crimes of his fellow JCE members"[450] particularly his alleged instructions concerning Nova Kasaba. That is erroneous statements, and no act of the accused can be considered as concealing crimes at the time of preparation of or conduct of murder operation. From enumerated facts the Majority founded that the Appellant abused his authority. This statement is primarily based on his position as Assistant Commander, what is simply not true and not in accord with the evidence presented during this trial.

509. As an aggravating circumstance, the TC took that "The Accused played the pivotal role in two JCEs by also forming plans and issuing orders and instructions that were consciously designed to further their goals. The accused's actions and omissions were deliberate".[451] However, this erroneous factual finding is not an aggravating factor. Position of the Appellant in the VRS was taken as a main factor for drawing all inferences concerning his alleged responsibility. There is no evidence on the record that the Appellant had any plans and

[447] Ibrahimefendić,T10102.
[448] para. 1224
[449] Škrbić T.18699:25-18700:18
[450] para.1225, para.1128
[451] para.1127

that he issued orders concerning crimes alleged in the Indictment. However, when the TC based its finding on the alleged "abuse of convicted person's superior position or leadership" as a contribution to the JCE[452] this factor cannot be taken again as an aggravating circumstance.

510. The TC erred in fact and law in not identifying all mitigating circumstances that may be established from the trial record. In paragraph 1231 the Majority stated that "recalling that the Accused did not argue for any mitigating factors, the Majority accordingly inquires no further, and gives these factors no weight". However, having in mind that it is responsibility of the TC to determine just and individualised sentence, it was duty bound to inquire whether there are any mitigating factors. In that respect, the TC was not tied with the argument of the parties, or the absence of those arguments.

511. As a mitigating circumstance the Majority was duty bound to take into consideration actions of the Appellant during the war and in the course of the events in July 1995 on prevention of crimes and his persistent insistence on the observance of international humanitarian law, particularly Geneva conventions."[453][454] and particularly that through the war the Appellant insisted on the proper treatment of the POWs.[455]

512. The TC erred because it did not take post-conflict conduct of the Appellant as mitigating factor.[456] The Appellant was participant in negotiations concluded by 1995 General Framework for Peace in Bosnia and Herzegovina (Dayton Agreement), and also was instrumental in negotiations and implementation of the military part of the agreement,[457] and participant in the negotiations in the framework of the Agreement of Regional Stabilisation, This factor the TC should take into account and attribute significant weight.[458]

513. Even the Majority listed possible mitigating factors, it did not take into account good behaviour of the Appellant in the UNDU.

514. The Majority did not take into account as a mitigating circumstance that Tolimir was imposed to deprivation of sleep for a long time during his stay in the UNDU (1 June 2007-21 August 2010) was woken up during a night time for every 30 minutes. That deprivation of

[452] para.1116-1127
[453] D69
[454] D64
[455] Skrbic ,01/02/2012 T.18699:25-18700:18
[456] Prosecutor v. Biljana Plavšić, IT-00-39&40, Sentencing Judgement, 27/02/2003, paras.85,94
[457] Slavko Kralj,25/01/2012,18407-18411.
[458] D223,D224,Manojlo Milovanović,18/05/2011,14263.Judgment,fn.3641.

sleep ended only upon the intervention of the TC with very problematic explanation on 21 August 2010. Having in mind that those deprivation of sleep caused serious harm to the Appellant, what he raised a number of time during Pre-Trial. However, this factor the Majority was duty bound to take into account while estimating his behaviour during Pre-Trial. The Majority should also take into account that the Appellant start effective preparation for the trial only after he was provided with the appropriate legal help.

515. The Majority was obliged to elaborate whether the Appellant during the trial demonstrated sincere sympathy, compassion and sorrow for the victims of the crimes. The Majority was in position to do that on the basis of direct observation.

516. The TC erred in law because it did not investigate the good character of the appellant. For example, [redacted]"[459]

517. The Majority's errors concerning determination of sentence, together with other factual and legal errors presented under other grounds of appeal, leads to the conclusion that the Majority imposed a manifestly excessive and disproportionate sentence.

518. The Appellant, taking into account other grounds of appeal, requests the AC to enter a Judgement of acquittal on all counts. This ground of appeal is of alternative nature, and the Appellant requests the AC, if it found that the Appellant is criminally responsible, to significantly reduce the sentence imposed by the AC.

[459] [redacted]

CONCLUSION

519. On the basis of the grounds and arguments set out above, the Appellant invites the Appeals Chamber to reverse the Judgment, overturn all convictions and enter the judgment of acquittal, or to significantly reduce the manifestly excessive sentence imposed by the Majority.

Word count:44.997

Zdravko Tolimir – Self represented accused

Dr Aleksandar Gajić
Legal Adviser

ANNEX A – TABLE OF CONTENTS

ANNEX B

1. In accordance with the Decision on Tolimir's Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief of 04 September 2013[1] that was distributed on the same day (Decision), and in accordance with paragraph 16 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal[2], the Appellant (Zdravko Tolimir) filed following submissions: Amended Notice of Appeal on 9 September 2013[3] and Consolidated Appeal Brief on 24 September 2013.
2. The Appeals Chamber ordered "Tolimir to file a consolidated appeal brief within 20 days of filing of this decision, including which paragraphs and/or line numbers contain new arguments not included in the original Appeal Brief or the Supplemental Appeal Brief.
3. In this submission the Appellant indicates any changes of the original Appeal Brief and Supplemental Appeal Brief, except obvious typographical and grammatical errors.
4. In introducing any new arguments or references, the Appellant was guided by guideline the Appeals Chamber set in paragraph 17 of the Decision.
5. Consolidated Appeal Brief is composed of the text of the Appeal Brief and Supplemental Appeal Brief with the following changes.

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6. Correction of obvious typographical errors and changes certain sintagma with acronyms in order to improve consistency of the Appeal Brief and to obey word limits requirements (Adjudicated facts with AF, Trial Chamber with TC, World Health Organization with WHO) are not included in the attached table.

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7. Amendment of the Appeal Brief introducing new arguments or new references to exhibits or testimonies from the Trial. Including those references is if not the same, than very similar to introducing new arguments. In certain instances there was no need

[1] The Prosecutor v. Tolimir, IT-05-88/2-A, 04 September 2013, para 18.
[2] ICTY, IT/155 Rev.4, 04 April 2012.
[3] Amended Notice of Appeal is exactly the same as the Notice of Appeal attached as an annex to the Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief, filed on 06 August 2013, except introductory paragraph 1.

to introduce new argument in the main text, but only in the footnote.

8. Finally in order to preserve word limits requirement (45.000 words) a part of the text of the original Appeal Brief and Supplemental Appeal Brief was deleted.

Ground no. and paragraph numbers Original Notice of Appeal and Appeal Brief		New no. of the ground and paragraph nos. in the Consolidated Appeal Brief		FORMAL CHANGES	SUBSTANTIAL CHANGES
Ground 1	AB 7-22	Ground 1: Adjudicated facts	6-21	adjudicated facts >AF	-
Ground 2	SAB 2-10	Ground 2: Intercepted communications	22-30	-	-
Ground 4	AB 23-35	Ground 3: Expert evidence	31-43	Para 23AB, para. 44 CAB,para. 44 Dean > Manning Fn. 19 reference to Ground 4.	
Ground 5	AB 36-45	Ground 4: Evidence of the OTP investigators	44-52	Para. 43 and 44 of the AB are merged and para. 43 of the AB deleted.	In para 43 "or to order a re-trial" – deleted since this remedy is not included in the Notice of Appeal.
Ground 7	AB 46-57	Ground 5: Joint Criminal Enterprise as a mode of liability	53-64	-	-
Ground 9	AB 58-64	Ground 6: Extermination as a crime against humanity and persons placed hors de combat	65-71	One sentence has been added in paragraph 66(It is explicit in Article 5 that the ICTY has jurisdiction "to prosecute persons responsible for crimes .... directed against civilian population. "[4]). This change is mirror and already contained in reference to Article 5 of the Statute. The Defence just took the opportunity to make argument more clear. This omission in original AB is a result of cutting certain part of a much longer text in order to satisfy word limits requirements.	
Ground 13	AB 65-76	Ground 7: Forcible removal as an actus reus of genocide and evidence of intent	72-82		Para 72 of the AB – deleted as unnecessary in order to obey word limits.

[4] Judgement,para.690.

Ground 14	AB 77-82	Ground 8: Errors concerning "protected group" requirement	83-88		In para 88 "or to order a re-trial" – deleted since this remedy is not included in the Notice of Appeal.
Ground 15	AB 83-138	Ground 9: Errors concerning killing incidents and number of persons killed	90-146	Changes in original AB are in bringing Consolidated Appeal Brief in line with the Amended Appeal Brief. Reference to P2585 in fn.88 of the CAB was added.	
Ground 16	AB 139-161	Ground 10: Actus resus of Genocide	143-166	Ground 13> Ground 7	Para. 153 (last sentence), FN.116 HAS BEEN ADDED. Fn114 -added. Para 160 has been added.
Ground 17	162-177	Ground 11: Genocidal intent	167-181		Para.174 and 176 of the original appeal brief has been deleted as unnecessary in order to obey word limits requriement. Paragraph 180 - added
Ground 18	178-192	Ground 12: Genocidal Intent in relation to Mehmed Hajrić, Amir Imamović and Avdo Palić	182-196	In para 193 words "working on obligation" was replaced with "work detail". In para 195 word "not" has been deleted.	
Ground 22	11-17	Ground 13: Forcible Removal- Srebrenica and Žepa -errors in fact and law	197-209	SAB-last sentence deleted as unnecessary in order to preserve word limits.	Paras 198-203-added
Ground 25	AB 193-227	Ground 14: Command and direction (control) and control (rukovođenje, komandovanje i kontrola), position of the Appellant as a Assistant Commander for Intelligence and	210-243	Para 215, line 3 (word>word order) Para 226 "He testified that"-added at the very beginning. Para 230 word provision replaced with "statement"/	Para 216 – last sentence –added. Para 220 –lines a part of 2nd, and 3rd sentence –added. Para 222-added. Para 225 line 5 Para 232 –added/ Para 236 lines 10-17 –added. Para 238-last sentence-added.

		Security Affairs			
Ground 31	AB243-324	Ground 15: "Errors concerning Majority findings on alleged JCE to forcibly remove and alleged significant participation of the Appellant in the JCE to forcibly remove"	244-324	Para 254 line 5 Directive 7 replaced with Directive 7/1. Para. 323 deleted as unnecessary and in order to preserve word limits. Minor changes in formulation of para. 307. +fn.added. In para 305 (AB)/306(CAB) word not" –added"in line 1.	In para. 247 ", line 1and he was not – added Fn. 211 –added. Fn218 –added. Fn220-added Fn230-added. Fn232-added Para.258 – added. Para 267-lines7-11-added. Para 282, lines 8-14 –added. Fn258 –added. Fn266- referemce to D41 –added. Para.298-lines 4-8 – added Para 299-added. Para 300, lines4-8. –added. Fns.275 (one reference added), Fn. 277 –added. Para 312, line 6 -added Paras 322-323 added/ Fn293-added. Paras326-328-added
Ground 32	AB 325-392	Ground 16: The Trial Camber errors concerning alleged significant participation of the Appellant in the JCE to Murder	325-398	Fn294-added In para. 382 "as a basis of", replaced with "are based on"	Para 341, last line. Para 347, lines 3 and 3 –added. Fn.346 –added. Para 374 (in line 4 words "and could not be" –added. Para 379 –added. Para 389, last sentence added.
Ground 33	SAB 18-31	Ground 17: The Trial Chamber erred in fact and law that persecutory acts and opportunistic killings were reasonably	399-412	"grounds 33 and 17 replaced with grounds 15 and 16	-

		feasible to the accused.			
Ground 34	SAB 32-50	Ground 18: Alleged Foreseeable Targeted killings of Three Muslim Leaders from Žepa	413-430		Para 420,lines 14-21 added.
Ground 28	AB 228-230	Ground 19: Kravica killings	431-433		
Ground 29	AB 231-242	Ground 20: Trnovo Killings	434-445		
Ground 35	AB393-403	Ground 21 – Genocide and conspiracy to commit genocide	446-456		
Ground 37	SAB 51-61	Ground 22: Responsibility for conspiracy to commit genocide	457-471		Para 63 of the SAB deleted in order to obey word limits requirement.
Ground 38	SAB 62-66	Ground 23 Crimes under Article 5 of the Statute crimes against humanity – knowledge and act of the accused	468-472		
Ground 40	AB 404-438	Ground 24: Cumulative convictions	472-491		Paragraphs 404-417 of the Appeal Brief deleted in order to obey word limits requirement and to bring Appeal Brief in line with the Notice of Appeal.
Ground 41	AB 439-466	Ground 25: Manifestly excessive sentence	492-519.		
Conclusion	AB 467		520		

Batkovići".[320] That is evidential as on 13 July, during the time indicated in the document, there was no plan to kill captured Muslims, but to transport them to Batkovići. There is also evidence that Malinić issued an order to his soldiers to register the prisoners in accordance with the rules of the Military police and that almost all of them had been listed[321]. PW-016 testified that Mladić ordered the soldiers to list those who had been captured. [322]On the evening of 13 July "Jasikovac told members of the MUP" to provide security for prisoners who would most likely be transported to Tuzla the next day.[323] On the basis of this fact, it cannot be concluded that the plan to murder able bodied men from Srebrencia was in existence on 13 July 1995, but that the plan was to transport them to Batkovići Collection Center.

353. There is no doubt that the fact that there were prisoners from Srebrenica, particularly in Nova Kasaba, was well known, including to UNPROFOR[324]. Malinić testified that he received an order from Jazić on 13/07/1995 concerning TV crews which filmed prisons, and that the filming of prisoners was approved by the Main Staff. He also testified that "during the filming of the POWs, they had complete freedom. They could talk to prisoners, interview them"etc. However, in such circumstances, and bearing in mind that Savčić was a commander of the 65th Protection Regiment, and familiar with the situation, it would be completely unreasonable for the accused to propose measures to hide POWs in order to contribute to the JCE to Murder.

354. The Majority finding that the Appellant's allegedly proposed measures "reflect the coordinated effort to conceal the despicable plan contemplated among the members of the JCE to Murder" is wholly erroneous. The Majority further erred in fact that "the accused's knowledge of the murder operation is further supported by the fact that on 13 July at the earliest, in response to Milenko Todorović's inquiry about non arrival of the anticipated 1000-1300 AbiH soldiers, the Accused replied that preparations should stop."[325]. Even the Majority considered this argument not as a proof of knowledge but as evidence which support conclusions, in the light of the evidence on the record it cannot be sustained. Detailed

[320] P2537(13/07/95 11:25hours), Butler,16713-16714.
[321] Judgment para.338
[322] Judgement,fn.1480. His evidence and evidence of Malinić are not in contradiction since it might be that when Mladić arrived listing of prisoners stopped for some reason, and that upon Mladić order continued.
[323] Judgement, para.414
[324]Judgement, Fn.1466 (references to Egbers testimony)
[325] Judgement para.1103