UNITED NATIONS

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

Case No: IT-98-33-A

Date: 19 April 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

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I. INTRODUCTION

1. The Appeals Chamber of the 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 is seised of two appeals from the written Judgement rendered by the Trial Chamber on 2 August 2001 in the case of *Prosecutor* v. *Radislav Krstić*, Case No. IT-98-33-T ("Trial Judgement"). Having considered the written and oral submissions of the Prosecution and the Defence, the Appeals Chamber hereby renders its Judgement.

2. Srebrenica is located in eastern Bosnia and Herzegovina. It gave its name to a United Nations so-called safe area, which was intended as an enclave of safety set up to protect its civilian population from the surrounding war. Since July 1995, however, Srebrenica has also lent its name to an event the horrors of which form the background to this case. The depravity, brutality and cruelty with which the Bosnian Serb Army ("VRS") treated the innocent inhabitants of the safe area are now well known and documented.[1] Bosnian women, children and elderly were removed from the enclave,[2] and between 7,000 – 8,000 Bosnian Muslim men were systematically murdered.[3]

3. Srebrenica is located in the area for which the Drina Corps of the VRS was responsible. Radislav Krstić was a General-Major in the VRS and Commander of the Drina Corps at the time the crimes at issue were committed. For his involvement in these events, the Trial Chamber found Radislav Krstić guilty of genocide; persecution through murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property; and murder as a violation of the laws or customs of war. Radislav Krstić was sentenced to forty-six years of imprisonment.

4. For ease of reference, two annexes are appended to this Judgement. Annex A contains a Procedural Background, detailing the progress of this appeal. Annex B contains a Glossary of Terms, which provides references to and definitions of citations and terms used in this Judgement.

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[1] Trial Judgement, paras. 6 *et seq:* "The Take-over of Srebrenica and its Aftermath."
[2] *Ibid*., para. 52.
[3] *Ibid*., para. 84.

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II. THE TRIAL CHAMBER'S FINDING THAT GENOCIDE OCCURRED IN SREBRENICA

5. The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber both misconstrued the legal definition of genocide and erred in applying the definition to the circumstances of this case.[4] With respect to the legal challenge, the Defence's argument is two-fold. First, Krstić contends that the Trial Chamber's definition of the part of the national group he was found to have intended to destroy was unacceptably narrow. Second, the Defence argues that the Trial Chamber erroneously enlarged the term "destroy" in the prohibition of genocide to include the geographical displacement of a community.

A. The Definition of the Part of the Group

6. Article 4 of the Tribunal's Statute, like the Genocide Convention,[5] covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The Indictment in this case alleged, with respect to the count of genocide, that Radislav Krstić "intend[ed] to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group."[6] The targeted group identified in the Indictment, and accepted by the Trial Chamber, was that of the Bosnian Muslims.[7] The Trial Chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4.[8] This conclusion is not challenged in this appeal.[9]

7. As is evident from the Indictment, Krstić was not alleged to have intended to destroy the entire national group of Bosnian Muslims, but only a part of that group. The first question presented in this appeal is whether, in finding that Radislav Krstić had genocidal intent, the Trial Chamber defined the relevant part of the Bosnian Muslim group in a way which comports with the requirements of Article 4 and of the Genocide Convention.

8. It is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted

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[4] The latter challenge is examined in Part III of this Judgement, which considers whether the Trial Chamber was correct to find that the facts of this case supported the charge of genocide.
[5] Article II of the Genocide Convention.
[6] Indictment, para. 21.
[7] *See* Trial Judgement, para. 558 ("the indictment in this case defined the targeted group as the Bosnian Muslims").
[8] *Ibid.*, paras. 559 - 560.
[9] *See* Defence Appeal Brief, paras. 28, 38.

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must be significant enough to have an impact on the group as a whole. Although the Appeals Chamber has not yet addressed this issue, two Trial Chambers of this Tribunal have examined it. In *Jelisić*, the first case to confront the question, the Trial Chamber noted that, "[g]iven the goal of the [Genocide] Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group."[10] The same conclusion was reached by the *Sikirica* Trial Chamber: "This part of the definition calls for evidence of an intention to destroy a substantial number relative to the total population of the group."[11] As these Trial Chambers explained, the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group.[12]

9. The question has also been considered by Trial Chambers of the ICTR, whose Statute contains an identical definition of the crime of genocide.[13] These Chambers arrived at the same conclusion. In *Kayishema*, the Trial Chamber concluded, after having canvassed the authorities interpreting the Genocide Convention, that the term "'in part' requires the intention to destroy a considerable number of individuals who are part of the group."[14] This definition was accepted and refined by the Trial Chambers in *Bagilishema* and *Semanza*, which stated that the intent to destroy must be, at least, an intent to destroy a substantial part of the group.[15]

10. This interpretation is supported by scholarly opinion. The early commentators on the Genocide Convention emphasized that the term "in part" contains a substantiality requirement. Raphael Lemkin, a prominent international criminal lawyer who coined the term "genocide" and was instrumental in the drafting of the Genocide Convention, addressed the issue during the 1950 debate in the United States Senate on the ratification of the Convention. Lemkin explained that "the

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[10] *Jelisić* Trial Judgement, para. 82 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), p. 89; Nehemiah Robinson, *The Genocide Convention: A Commentary* (1960) (1st ed. 1949), p. 63; *Genocide Convention, Report of the Committee on Foreign Relations*, U.S. Senate, 18 July 1981), p. 22). The *Jelisić* Trial Judgement was reversed in part by the Appeals Chamber on other grounds. *See Jelisić* Appeal Judgement, para. 72. The Trial Chamber's definition of what constitutes an appropriate part of the group protected by the Genocide Convention was not challenged.
[11] *Sikirica* Judgement on Defence Motions to Acquit, para. 65.
[12] *Jelisić* Trial Judgement, para. 82; *Sikirica* Judgement on Defence Motions to Acquit, para. 77.
[13] *See* Art. 2 of the ICTR Statute (defining the specific intent requirement of genocide as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such").
[14] *Kayishema and Ruzindana* Trial Judgement, para. 97.
[15] *See Bagilishema* Trial Judgement, para. 64 ("the intention to destroy must target at least a substantial part of the group") (citing *Kayishema and Ruzindana* Trial Judgement, para. 97); *Semanza* Trial Judgement and Sentence, para. 316 ("The intention to destroy must be, at least, to destroy a substantial part of the group") (citing *Bagilishema* Trial Judgement, para. 64). While *Kayishema* used the term "considerable number" rather than "substantial part," *Semanza* and *Bagilishema* make it clear that *Kayishema* did not intend to adopt a different standard with respect to the definition of the term "a part." The standard adopted by the Trial Chambers of the ICTR is therefore consistent with the jurisprudence of this Tribunal.

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destruction in part must be of a substantial nature so as to affect the entirety."[16] He further suggested that the Senate clarify, in a statement of understanding to accompany the ratification, that "the Convention applies only to actions undertaken on a mass scale."[17] Another noted early commentator, Nehemiah Robinson, echoed this view, explaining that a perpetrator of genocide must possess the intent to destroy a substantial number of individuals constituting the targeted group.[18] In discussing this requirement, Robinson stressed, as did Lemkin, that "the act must be directed toward the destruction of a *group*," this formulation being the aim of the Convention.[19]

11. Recent commentators have adhered to this view. The International Law Commission, charged by the UN General Assembly with the drafting of a comprehensive code of crimes prohibited by international law, stated that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[20] The same interpretation was adopted earlier by the 1985 report of Benjamin Whitaker, the Special Rapporteur to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[21]

12. The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.[22]

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[16] 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series (1976), p. 370; *see also Jelisić* Trial Judgement, para. 82; William A. Schabas, *Genocide in International Law* (2000), p. 238.
[17] *Ibid.*, *cited in* William A. Schabas, *Genocide in International Law* (2000), p. 238.
[18] Nehemia Robinson, *The Genocide Convention: A Commentary* (1960), pp. 63.
[19] *Ibid.,* p.58.
[20] Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996, p. 89. The Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission, contains a prohibition of the offence of genocide substantively similar to the prohibition present in the Genocide Convention. The Draft code is not binding as a matter of international law, but is an authoritative instrument, parts of which may constitute evidence of customary international law, clarify customary rules, or, at the very least, "be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world." *Furundžija* Trial Judgement, para. 227.
[21] Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, para. 29 ("'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership."); *see also Jelisić* Trial Judgement, para. 65 (quoting the report); Trial Judgement, para. 587 (same).
[22] The Trial Chambers in *Jelisić* and *Sikirica* referred to this factor as an independent consideration which is sufficient, in and of itself, to satisfy the requirement of substantiality. *See Jelisić* Trial Judgement, para. 82; *Sikirica* Trial

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13. The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders.[23] The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.

14. These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.

15. In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia.[24] This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people.[25] This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region.[26] Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the

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Judgement, para. 65. Properly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied.

[23] For a discussion of these examples, see William A. Schabas, *Genocide in International Law* (2000), p. 235.

[24] Trial Judgement, para. 560 ("The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4."). *See also* Trial Judgement, para. 591. Although the Trial Chamber did not delineate clearly the interrelationship between these two alternative definitions, an explanation can be gleaned from its Judgement. As the Trial Chamber found, "most of the Bosnian Muslims residing in Srebrenica at the time of the [Serbian] attack were not originally from Srebrenica but from all around the central Podrinje region." Trial Judgement, para. 559; *see also ibid.*, para. 592 (speaking about "the Bosnian Muslim community of Srebrenica and its surrounds"). The Trial Chamber used the term "Bosnian Muslims of Srebrenica" as a short-hand for the Muslims of both Srebrenica and the surrounding areas, most of whom had, by the time of the Serbian attack against the city, sought refuge with the enclave. This is also the sense in which the term will be used in this Judgement.

[25] While the Trial Chamber did not make a definitive determination as to the size of the Bosnian Muslim community in Srebrenica, the issue was not in dispute. The Prosecution estimated the number to be between 38,000 and 42,000. *See* Trial Judgement, para. 592. The Defence's estimate was 40,000. *See ibid.*, para. 593.

[26] The pre-war Muslim population of the municipality of Srebrenica was 27,000. Trial Judgement, para. 11. By January 1993, four months before the UN Security Council declared Srebrenica to be a safe area, its population swelled to about 50,000 – 60,000, due to the influx of refugees from nearby regions. *Ibid.*, para. 14. Between 8,000 and 9,000 of those who found shelter in Srebrenica were subsequently evacuated in March – April 1993 by the UN High Commissioner for Refugees. *Ibid.*, para. 16.

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importance of the Muslim community of Srebrenica is not captured solely by its size.[27] As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted.[28] The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.

16. In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the "safe areas" established by the UN Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it "should be free from armed attack or any other hostile act."[29] This guarantee of protection was re-affirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops.[30] The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.

17. Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.

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[27] The Muslim population of Bosnia and Herzegovina in 1995, when the attack against Srebrenica took place, was approximately 1,400,000. *See* http://www.unhabitat.org/habrdd/conditions/southeurope/bosnia.htm, accessed 26/03/2004 (estimating that the Muslims constituted 40 percent of the 1995 population of 3,569,000). The Bosnian Muslims of Srebrenica therefore formed about 2.9 percent of the overall population.

[28] Trial Judgement, para. 12; *see also* para. 17.

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18. In fact, the Defence does not argue that the Trial Chamber's characterization of the Bosnian Muslims of Srebrenica as a substantial part of the targeted group contravenes Article 4 of the Tribunal's Statute. Rather, the Defence contends that the Trial Chamber made a further finding, concluding that the part Krstić intended to destroy was the Bosnian Muslim men of military age of Srebrenica.[31] In the Defence's view, the Trial Chamber then engaged in an impermissible sequential reasoning, measuring the latter part of the group against the larger part (the Bosnian Muslims of Srebrenica) to find the substantiality requirement satisfied.[32] The Defence submits that if the correct approach is properly applied, and the military age men are measured against the entire group of Bosnian Muslims, the substantiality requirement would not be met.[33]

19. The Defence misunderstands the Trial Chamber's analysis. The Trial Chamber stated that the part of the group Radislav Krstić intended to destroy was the Bosnian Muslim population of Srebrenica.[34] The men of military age, who formed a further part of that group, were not viewed by the Trial Chamber as a separate, smaller part within the meaning of Article 4. Rather, the Trial Chamber treated the killing of the men of military age as evidence from which to infer that Radislav Krstić and some members of the VRS Main Staff had the requisite intent to destroy all the Bosnian Muslims of Srebrenica, the only part of the protected group relevant to the Article 4 analysis.

20. In support of its argument, the Defence identifies the Trial Chamber's determination that, in the context of this case, "the intent to kill the men [of military age] amounted to an intent to destroy a substantial part of the Bosnian Muslim group."[35] The Trial Chamber's observation was proper. As a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part. The proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.

21. The Trial Chamber determined that Radislav Krstić had the intent to kill the Srebrenica Bosnian Muslim men of military age. This finding is one of intent to commit the requisite genocidal act – in this case, the killing of the members of the protected group, prohibited by Article 4(2)(a) of the Statute. From this intent to kill, the Trial Chamber also drew the further inference

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[29] Security Council Resolution 819, UN Doc. S/RES/819 (1993), quoted in Trial Judgement, para. 18 & n. 17. The two other protected enclaves created by the Security Council were Žepa and Goražde. *See* Security Council Resolution 824, UN Doc. S/RES/824 (1993); Trial Judgement, para. 18 & n. 18.
[30] Trial Judgement, paras. 15, 19 - 20.
[31] Defence Appeal Brief, paras. 38 - 39.
[32] *Ibid.*, para. 40.
[33] *Ibid.*
[34] Trial Judgement, paras. 560, 561.
[35] Defence Appeal Brief, para. 40 (quoting Trial Judgement, para. 634) (internal quotation marks omitted).

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that Krstić shared the genocidal intent of some members of the VRS Main Staff to destroy a substantial part of the targeted group, the Bosnian Muslims of Srebrenica.

22. It must be acknowledged that in portions of its Judgement, the Trial Chamber used imprecise language which lends support to the Defence's argument.[36] The Trial Chamber should have expressed its reasoning more carefully. As explained above, however, the Trial Chamber's overall discussion makes clear that it identified the Bosnian Muslims of Srebrenica as the substantial part in this case.

23. The Trial Chamber's determination of the substantial part of the protected group was correct. The Defence's appeal on this issue is dismissed.

B. <u>The Determination of the Intent to Destroy</u>

24. The Defence also argues that the Trial Chamber erred in describing the conduct with which Radislav Krstić is charged as genocide. The Trial Chamber, the Defence submits, impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.[37] By adopting this approach, the Defence argues, the Trial Chamber departed from the established meaning of the term genocide in the Genocide Convention - as applying only to instances of physical or biological destruction of a group - to include geographic displacement.[38]

25. The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.[39] The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated: "[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological

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[36] *See, e.g.*, para. 581 ("Since in this case primarily the Bosnian Muslim men of military age were killed, a second issue is whether this group of victims represents a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an 'intent to destroy the group in whole or in part' under Article 4 of the Statute."); para. 634 ("[T]he Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica.").
[37] Defence Appeal Brief, para. 43.
[38] *Ibid.*, paras. 46 - 47.
[39] The International Law Commission, when drafting a code of crimes which it submitted to the ICC Preparatory Committee, has examined closely the *travaux préparatoires* of the Convention in order to elucidate the meaning of the term "destroy" in the Convention's description of the requisite intent. The Commission concluded: "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group." Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), pp. 90-91. The commentators agree. *See, e.g.*, William A. Schabas, *Genocide in International Law* (2000), p. 229 (concluding that the drafting history of the Convention would not sustain a construction of the genocidal intent which extends beyond an intent at physical destruction).

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destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide."[40]

26. Given that the Trial Chamber correctly identified the governing legal principle, the Defence must discharge the burden of persuading the Appeals Chamber that, despite having correctly stated the law, the Trial Chamber erred in applying it. The main evidence underlying the Trial Chamber's conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community.[41] The Trial Chamber rejected the Defence's argument that the killing of these men was motivated solely by the desire to eliminate them as a potential military threat.[42] The Trial Chamber based this conclusion on a number of factual findings, which must be accepted as long as a reasonable Trial Chamber could have arrived at the same conclusions. The Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians.[43] Though civilians undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers. The Trial Chamber was therefore justified in drawing the inference that, by killing the civilian prisoners, the VRS did not intend only to eliminate them as a military danger. The Trial Chamber also found that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants.[44] This evidence further supports the Trial Chamber's conclusion that the extermination of these men was not driven solely by a military rationale.

27. Moreover, as the Trial Chamber emphasized, the term "men of military age" was itself a misnomer, for the group killed by the VRS included boys and elderly men normally considered to be outside that range.[45] Although the younger and older men could still be capable of bearing arms, the Trial Chamber was entitled to conclude that they did not present a serious military threat, and to draw a further inference that the VRS decision to kill them did not stem solely from the intent to eliminate them as a threat. The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent.

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[40] Trial Judgement, para. 580. *See also ibid.*, para. 576 (discussing the conclusion of the International Law Commission, quoted in note 39, *supra*).
[41] Trial Judgement, para. 594.
[42] *Ibid.*, para. 593.
[43] *Ibid.*, paras. 547, 594.
[44] *Ibid.*, para. 75 & n. 155.
[45] *Ibid.*, n. 3.

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28. The Trial Chamber was also entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community. In examining these consequences, the Trial Chamber properly focused on the likelihood of the community's physical survival. As the Trial Chamber found, the massacred men amounted to about one fifth of the overall Srebrenica community.[46] The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would "inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica."[47] Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children.[48] The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.

29. This is the type of physical destruction the Genocide Convention is designed to prevent. The Trial Chamber found that the Bosnian Serb forces were aware of these consequences when they decided to systematically eliminate the captured Muslim men.[49] The finding that some members of the VRS Main Staff devised the killing of the male prisoners with full knowledge of the detrimental consequences it would have for the physical survival of the Bosnian Muslim community in Srebrenica further supports the Trial Chamber's conclusion that the instigators of that operation had the requisite genocidal intent.

30. The Defence argues that the VRS decision to transfer, rather than to kill, the women and children of Srebrenica in their custody undermines the finding of genocidal intent.[50] This conduct, the Defence submits, is inconsistent with the indiscriminate approach that has characterized all previously recognized instances of modern genocide.[51]

31. The decision by Bosnian Serb forces to transfer the women, children and elderly within their control to other areas of Muslim-controlled Bosnia could be consistent with the Defence argument. This evidence, however, is also susceptible of an alternative interpretation. As the Trial Chamber explained, forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal

[46] *See ibid.*, paras. 592 - 594 (finding, on the basis of the parties' estimates, the number of the killed men to be approximately 7,500 and the overall size of the Srebrenica community, augmented by refugees from the surrounding areas, to be approximately 40,000).
[47] *Ibid.*, para. 595.
[48] *See ibid.*, para. 93 & notes 195, 196.
[49] *Ibid.*, para. 595.
[50] Defence Appeal Brief, paras. 53 - 57.
[51] *Ibid.*, para. 53.

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of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.[52] The decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure.

32. In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.

33. The Trial Chamber - as the best assessor of the evidence presented at trial - was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act[53] does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of "other culpable acts systematically directed against the same group."[54]

34. The Defence also argues that the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica.[55] The absence of such statements is not determinative. Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.[56] The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified. If the crime committed satisfies the other

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[52] Trial Judgement, para. 595.
[53] *See Stakić* Trial Judgement, para. 519 & nn. 1097 - 1098 (citing K. Kreß, *Münchner Kommentar zum StGB*, Rn 57, section 6 VStGB (2003); William A. Schabas, *Genocide in International Law* (2000), p. 200; BGH v. 21.2.2001 – 3 StR 244/00, NJW 2001, 2732 (2733)).
[54] *Jelisić* Appeal Judgement, para. 47.
[55] Defence Appeal Brief, paras. 74-77.
[56] *Jelisić* Appeal Judgement, para. 47; *see also Rutaganda* Appeal Judgement, para. 528.

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requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered.

35. In this case, the factual circumstances, as found by the Trial Chamber, permit the inference that the killing of the Bosnian Muslim men was done with genocidal intent. As already explained, the scale of the killing, combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific intent. The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS.[57] The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.

36. Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.

37. The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states

[57] Trial Judgement, paras. 591 - 599.

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unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

38. In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.

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III. ALLEGED FACTUAL ERRORS RELATING TO JOINT CRIMINAL ENTERPRISE TO COMMIT GENOCIDE

39. As already stated, the crime of genocide was committed at Srebrenica in July 1995, a determination which the Trial Chamber correctly made. The Defence argues, however, that even if the finding of genocide was correct, the Trial Chamber erred in finding the evidence sufficient to establish that Radislav Krstić was a member of a joint criminal enterprise to commit genocide.[58]

40. It is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.[59] Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[60] Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[61]

41. The Appeals Chamber has taken the view that, when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.[62]

42. The Trial Chamber based its conclusion that Radislav Krstić shared the intent of a joint criminal enterprise to commit genocide on inferences drawn from its findings with respect to his knowledge about the situation facing the Bosnian Muslim civilians after the take-over of Srebrenica, his interaction with the main participants of the joint criminal enterprise, and the evidence it accepted as establishing that resources and soldiers under his command and control were used to facilitate the killings. Relying on this evidence, the Trial Chamber held that, from the evening of 13 July 1995, Radislav Krstić intentionally participated in the joint criminal enterprise to execute the Bosnian Muslims of Srebrenica.[63]

43. In attacking this conclusion, the Defence advances three arguments. First, the Defence challenges the Trial Chamber's finding that Radislav Krstić assumed effective command over the Drina Corps and Drina Corps assets on 13 July 1995, and not later.[64] Secondly, the Defence contests the Trial Chamber's rejection of its argument that a parallel chain of command, running

[58] Appellant Appeal Brief, paras. 84 - 101.
[59] *Krnojelac* Appeal Judgement, para. 11.
[60] *Ibid*., para. 12; *Tadić* Appeal Judgement, para. 64; *Čelebići* Appeal Judgement, para. 434; *Aleksovski* Appeal Judgement, para. 63.
[61] *Krnojelac* Appeal Judgement, paras. 13, 39; *Vasiljević* Appeal Judgement, para. 8
[62] *Vasiljević* Appeals Judgement, para. 121; *see also Vasiljević* Judgement, para. 68; *Krnojelac* Judgement, para. 83.
[63] Trial Judgement, paras. 633, 644.
[64] Defence Appeal Brief, paras. 204 - 210.

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from the Main Staff of the VRS through the security organs of the Drina Corps, excluded Radislav Krstić from participation in (and even knowledge of) the executions.[65] Thirdly, the Defence challenges the finding of the Trial Chamber that Krstić directly participated in the executions and argues that, even if the evidence before the Trial Chamber is sufficient to establish knowledge on his part about the genocide committed in Srebrenica, it is not sufficient to establish that he intended to commit genocide.[66]

44. As a final, additional argument, the Defence submits that Radislav Krstić could not reasonably have foreseen the commission of the opportunistic crimes at Potočari on 12 and 13 July 1995, and that the crimes were not a natural and foreseeable consequence of the ethnic cleansing campaign.[67] The Appeals Chamber will consider the first three of these arguments, and will then detail its analysis of Krstić's criminal liability in light of its findings, before considering the final, additional argument.

A. The Trial Chamber's finding as to the date on which Radislav Krstić assumed command of the Drina Corps

45. The Trial Chamber found that Radislav Krstić became the *de facto* commander of the Drina Corps on the evening of 13 July 1995, with the formal confirmation of his command following a 15 July 1995 decree issued by President Karadžić.[68] The Defence challenges this finding, relying on the fact that the Presidential Decree appointing him as Corps Commander provided that the appointment was to take effect only on 15 July.[69] The Defence also relies on the fact that the VRS formalities, which had to be completed prior to the transfer of the command, were not completed until 20 July,[70] and on the evidence showing that General Živanović retained command until that date.[71]

46. The arguments the Defence now puts forward were extensively considered by the Trial Chamber. The Chamber, relying on eye-witness and documentary evidence, found that despite the date specified by the decree, the transfer of command to Radislav Krstić took place on 13 July. In support of its finding, the Trial Chamber relied, for example, on the evidence that a formal ceremony, attended by the officers of the Drina Corps at Vlasenica Headquarters, at which General

[65] *Ibid*., paras. 176 - 203.
[66] *Ibid*., paras. 157 - 175.
[67] *Ibid*., para. 143, 154.
[68] *Ibid*., paras. 328 - 331, 625.
[69] Defence Appeal Brief, para. 205.
[70] *Ibid*., para. 206.
[71] *Ibid*., paras. 207 - 208.

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Mladić conferred the command on Krstić, took place on 13 July.[72] The Trial Chamber also concluded that the exigencies of war may have necessitated dispensation with the formal procedures for the transfer of the command.[73] The Trial Chamber considered the evidence of General Živanović's continued role in the Drina Corps and found that that evidence was outweighed by the evidence that Krstić assumed and began to exercise command on 13 July 1995.[74] The Trial Chamber's conclusion is further supported by the combat report dated 13 July, and signed by Radislav Krstić as the Commander, which the Prosecution presented in this Appeal as additional evidence.[75]

47. The conclusions of the Trial Chamber are entirely reasonable and supported by ample evidence. The Defence has failed to demonstrate any error on the part of the Trial Chamber, much less that the finding was one that no reasonable Trial Chamber could have reached.

B. The Trial Chamber's rejection of the Defence of Parallel Chain of Command

48. The Defence next argues that the Trial Chamber erred in rejecting its claim that the executions were ordered and supervised through a parallel chain of command maintained by the VRS security forces, over which Radislav Krstić did not have control. According to the Defence, this chain of command originated with General Mladić, went through his Security Commander, Colonel Beara of the VRS Main Staff, to Colonel Popović of the Drina Corps and finally to the Zvornik Brigade Security Officer, Dragan Nikolić.[76] Acting through this parallel chain of command, the Defence submits, the Main Staff of the VRS could and did commandeer Drina Corps assets without consulting the Drina Corps Command.[77]

49. The Defence's argument is an exact repetition of the argument it presented at trial. This argument was fully considered by the Trial Chamber. The Trial Chamber acknowledged that General Mladić exercised some control over the Drina Corps within its zone of responsibility. The Chamber concluded, however, that the evidence could not support a finding that the Drina Corps command was completely excluded from all knowledge or authority with respect to the involvement of its troops and assets in the execution of the Bosnian Muslim civilians.[78]

[72] Trial Judgement, paras. 312 - 315.
[73] *Ibid*., paras. 329, 317.
[74] *Ibid*., para. 330.
[75] T, pp. 406 - 407, Annex 7.
[76] Defence Appeal Brief, paras. 197 - 198.
[77] *Ibid*., para. 177.
[78] Trial Judgement, paras. 88 - 89.

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1. The Trial Chamber's finding that the Main Staff of the VRS and the MUP forces subordinate to it received co-operation from Radislav Krstić and the Drina Corps

(a) The treatment of prisoners

50. The Defence argues, as it did at trial, that the Trial Chamber erred in finding that the Main Staff of the VRS and the MUP forces subordinate to it received co-operation from Radislav Krstić and the Drina Corps in carrying out the executions. The Defence relies on an order issued on 13 July 1995 by General Gvero, the Assistant Commander of the Main Staff, directing that the "Superior Command" be immediately informed as to the location where the prisoners were taken. The Defence argues that this order shows that the Main Staff assumed responsibility for the prisoners.[79] The Defence also relies on General Mladić's statement to the prisoners held at Sandići Meadow and Nova Kasaba that General Mladić was personally making arrangements for their exchange or transportation.[80] Finally, the Defence relies on the fact that the Trial Chamber was unable to conclude beyond reasonable doubt that the Drina Corps had participated in the capture of the prisoners.[81]

51. As the Trial Chamber explained, however, General Gvero's order was issued to the Drina Corps Command and the relevant subordinate Brigades,[82] and therefore constitutes strong evidence that the Drina Corps knew about the capture of the prisoners and acted in "close co-ordination and co-operation" with the MUP units.[83] The Trial Chamber also considered the appearance of General Mladić and his address to the prisoners at Sandići Meadow and Nova Kosaba. These actions were consistent with General Mladić's position as the Commander of all VRS forces, including the Drina Corps, and do not support an inference that subordinate commanders, such as Krstić, were excluded from the normal military chain of command.[84] The absence of a finding by the Trial Chamber that the Drina Corps participated in the capture of the prisoners is similarly inapposite. Relying on considerable evidence, the Trial Chamber established that the Drina Corps and Radislav Krstić knew that thousands of Bosnian Muslim prisoners had been captured on 13 July 1995, and continued to be informed about their situation.[85]

52. In advancing a similar argument with respect to the execution of the prisoners, the Defence points to the fact that these executions were conducted by the 10th Sabotage Detachment of the

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[79] Defence Appeal Brief, para. 177.
[80] *Ibid*., paras. 179 - 180.
[81] *Ibid*., paras. 178 - 185.
[82] Trial Judgement, para. 168.
[83] *Ibid*., para. 289.
[84] *Ibid*., paras. 268.
[85] *Ibid*., paras. 168 - 178, 377.

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Main Staff, with General Mladić appearing at the execution site at Orahovac.[86] The Defence also relies on an intercepted conversation of 13 July 1995, in which General Živanović, the General-Major in command of the Drina Corps before Radislav Krstić, expressed concern about identifying war criminals among the prisoners. This conversation, the Defence submits, shows that even General Živanović was unaware that the prisoners were being executed.[87]

53. As further evidence of the Drina Corps Command's non-involvement, the Defence quotes from an intercepted conversation of 17 July 1995, during which Radislav Krstić asked a subordinate: "On whose approval did you send soldiers down there?" The answer was: "On orders from the Main Staff."[88] The Defence also points to the order of 17 July 1995 issued by General Mladić to the Zvornik Brigade, which stated that personnel from the Main Staff would be "responsible for command of the forces carrying out the task."[89] Finally, the Defence relies on combat reports of Colonel Pandurević, the Zvornik Brigade Commander, in which Colonel Pandurević complained that the placement of the prisoners in the zone of his Brigade created a great burden, and he threatened to have them released.[90] These reports, the Defence argues, show that Colonel Pandurević was unaware that the Main Staff had already arranged for the prisoners to be executed.[91]

54. The evidence on which the Defence relies was considered by the Trial Chamber when it analysed the respective involvement of the Main Staff and the Drina Corps Command in the capture and detention of the Bosnian Muslim prisoners.[92] The Trial Chamber accepted that the evidence demonstrated that the Main Staff was "heavily involved in the direction of events following the take over of Srebrenica," and that there were "indications that Drina Corps units were not always informed or consulted about what the Main Staff was doing in their area of concern during the week following 11 July."[93] The Trial Chamber found, however, that the evidence made it "abundantly clear that the Main Staff could not, and did not, handle the entire Srebrenica follow-up operation on its own and at almost every stage had to, and did, call upon Drina Corps resources for assistance."[94] The Defence does not dispute this finding, which the Appeals Chamber accepts.

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[86] *Ibid*., para. 186.
[87] Defence Appeal Brief, para. 188.
[88] Exh. P364/2, tab 14/2; Trial Judgement, para. 194.
[89] Exh. P649; Trial Judgement, paras. 195, 264.
[90] Trial Judgement, para. 192 - 193.
[91] Exh. P609.
[92] Trial Judgement, paras. 265 - 272.
[93] *Ibid*., para. 265.
[94] *Ibid*., para. 266.

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(b) The selection of sites

55. The Defence next argues that the selection of sites for the detention of the prisoners, initially in Bratunac, was conducted entirely by the Main Staff with no participation by the Drina Corps. Relying on the vehicle records of the Zvornik Brigade, the Defence argues that contrary to the Trial Chamber's finding, the Zvornik Brigade did not know that one of its vehicles was being used in this operation.[95] According to the Defence, the intercepted conversation of 14 July 1995 between the Zvornik Brigade duty officer and Colonel Beara, in which the issue of the captured prisoners was discussed, confirms that Colonel Beara was not following the normal chain of command because he was speaking to the duty officer directly. This, the Defence claims, confirms that the Main Staff could and did utilise Zvornik Brigade assets without going through the Zvornik Brigade Command.[96]

56. Once again, each of the arguments made by the Defence was presented to the Trial Chamber. The Trial Chamber found that the Zvornik Brigade must have known the purpose for which the vehicle was being used, as vehicle records established that it was operated by members of the Zvornik Brigade military police.[97] The intercept of 14 July, on which the Defence relies, does not undermine this finding or otherwise support the Defence's argument. Although the Trial Chamber did not conclude that the Drina Corps Command was directly involved in making the arrangements to detain the men at Bratunac, it concluded that the Drina Corps was aware that those men were being so detained.[98] This finding is supported by sufficient evidence, and the Appeals Chamber accepts it.

(c) Use of Drina Corps resources without the knowledge of Drina Corps Command

57. The Defence's argument, then, is that even though Drina Corps resources were utilised in the executions, the requisition of these resources was done without the knowledge of the Drina Corps Command. In rejecting this argument, the Trial Chamber relied on the fact that, in accordance with the military principles of the VRS, the Main Staff could not have come into the Drina Corps zone of responsibility and assumed complete control of its assets and personnel without the consent of the Corps Command.[99] The Trial Chamber also emphasised the involvement of the Drina Corps in the organisation of the buses for the transportation of the Bosnian Muslim civilians, which contradicted the theory that the Main Staff had taken over direct command of

[95] Defence Appeal Brief, paras. 183 - 184.
[96] *Ibid.*, para. 184 - 185.
[97] *Ibid.*, paras. 187 - 191, 239.
[98] *Ibid.*, para. 181.
[99] *Ibid.*, para. 268.

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subordinate Drina Corps Brigades.[100] As the Trial Chamber explained, the Drina Corps Command was kept informed by the Main Staff about activities within its zone. This was shown, for example, in an intercept of 15 July, in which Colonel Beara made an urgent request to Krstić for assistance and was directed to contact the Commander of the Bratunac Brigade. [101] This evidence, in the Trial Chamber's estimation, strongly undermined the notion that the Main Staff was directing activities of the Drina Corps subordinate units without consulting the Drina Corps Command.[102]

58. The Defence argues that the Trial Chamber failed to recognise the significance of the Security Service within the VRS, which in accordance with the traditions of Communist Yugoslavia, still operated independently of the traditional chain of command.[103] In particular, the Defence argues, the VRS security organs were under no obligation to report to the military command but instead reported to the command of their own security service.[104] In this case, that meant Colonel Popović reporting directly to Colonel Beara while bypassing Krstić. In the Defence's view, this fact is confirmed by the absence of any intercepted conversations between Colonel Popović and Krstić during the period of 13-17 July 1995, when Colonel Popović was assisting Colonel Beara.

59. In support of this argument, the Defence adduced as additional evidence three police reports made by Dragomir Vasić, Chief of the Centre of Public Security at Zvornik, to the Ministry of the Interior (MUP) of Republika Srpska, the Headquarters of the Police Forces in Biljelani, and the Cabinet of Ministers and the Agency of Public Security.[105] In the first report, dated 12 July, Dragomir Vasić stated that the evacuation and transportation of the civilian population of Srebrenica was ongoing, and he provided information on the situation regarding Bosnian Muslim forces and civilians in the area. The second report, dated 13 July 1995, discussed the confrontation between the MUP and the Bosnian Muslim soldiers and stated that the MUP "have no cooperation or assistance from VRS in blocking and annihilation of the huge number of enemy soldiers." Vasić therefore expected a "great number of problems until the end of the action because MUP is working alone in this action." The final report, also dated 13 July 1995, documents a meeting held with General Mladić, at which he informed the others attending that the VRS was resuming the Žepa operation and that all other tasks were being yielded to the MUP. These tasks included the evacuation by bus of 15,000 civilians remaining in Srebrenica towards Kladanj, the liquidation of

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[100] *Ibid*., para. 269.
[101] *Ibid*., paras. 269 - 270.
[102] *Ibid*., para. 270.
[103] Defence Appeal Brief, para. 198.
[104] Exh. D160; D158.
[105] Rule 115 Defence Motion to Present Additional Evidence, 10 January 2003, paras. 7 - 10; Annex Tabs 1 - 3.

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8,000 Muslim soldiers trapped in the wooded terrain around Konjević Polje, and ensuring security for all essential facilities in the town of Srebrenica.

60. Lastly, the Defence relies on a statement of a protected witness that Radislav Krstić and the Drina Corps Command were unaware of the activities carried out by military police units of the Zvornik Brigade, and that, in general, the security organs acted for the Main Staff independently of the normal chain of command. The Defence conceded, however, that in light of the witness's failure to appear at the Appeal hearing to confirm his testimony, little weight could be attached to the statement.[106]

61. These reports do indeed lend support to the Defence's argument that the MUP was acting on its own in carrying out the executions. The Trial Chamber, however, did not disagree. In fact, it expressly refused to "discount the possibility that the execution plan was initially devised by members of the VRS Main Staff without consultation with the Drina Corps command generally and Radislav Krstić in particular," and that General Mladić may have directed the operation.[107] As the Trial Chamber emphasised, however, the Main Staff lacked the resources to carry out the executions on its own and therefore had to call on the resources of the Drina Corps. The Trial Chamber found, moreover, that the Drina Corps Command knew about the Main Staff's requests and about the subsequent use of the Corps' resources in the executions. The Defence's challenges to these findings have already been rejected.[108]

62. In support of the Trial Chamber's findings, the Prosecution adduced, as rebuttal material on Appeal, two combat reports of 16 and 18 July 1995, signed by Radislav Krstić as the Commander of the Drina Corps. In both reports, Krstić directed his troops to co-ordinate with the MUP in the blockage and capture of the Bosnian Muslims escaping from the enclave.[109] These reports support the Trial Chamber's finding that the Drina Corps aided the forces of the MUP in the task of blocking and capturing the escaping Bosnian Muslims, and that they co-ordinated their military efforts with the MUP forces.

63. The Trial Chamber's rejection of the Defence's argument as to the parallel chain of command, even when examined in light of the Defence's additional evidence, is not one that no reasonable trier of fact could have made.

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[106] AT, p. 190.
[107] Trial Judgement, para. 362.
[108] See Section III.B.1(a) of this Judgement.
[109] T, p. 407.

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C. The Trial Chamber's finding that Radislav Krstić directly participated in the executions

64. As stated above, the Defence challenges the finding of the Trial Chamber that Radislav Krstić directly participated in the executions and argues that, even if the evidence before the Trial Chamber is sufficient to establish knowledge on his part of the genocide committed in Srebrenica, it is not sufficient to establish that he intended to commit genocide.

1. The Trial Chamber's conclusions regarding the Bratunac Brigade's participation in the executions

65. The Defence argues that the Trial Chamber erred in concluding that on 16 July 1995 members of the Bratunac Brigade, a unit of the Drina Corps subordinate to Radislav Krstić, participated in the killings at Branjevo Farm and the Pilica Cultural Dom.[110]

(a) The evidence of Drazen Erdemović

66. The Defence argues that the evidence of Drazen Erdemović (a member of the 10th Sabotage Brigade who participated in the killings at Branjevo Farm), which formed the crucial factual basis for the Trial Chamber's conclusion, did not in fact establish that the men participating in the executions were from the Bratunac Brigade instead of simply originating from the town of Bratunac.[111] The Defence also claims that the Trial Chamber erroneously interpreted an intercept of 16 July 1995 between Colonel Popović and Mr. Rašić, a duty officer of the Drina Corps, as referring to the deployment of men from the Bratunac Brigade to assist in the executions. In fact, the Defence submits, that intercept referred to their deployment to the front lines of the battle led by Colonel Pandurević against a column formed of able-bodied civilians and members of the 28th Division, and which took to the woods in an attempt to break through to Bosnian Muslim-held territories to the north of Srebrenica.[112] The Defence argues that this interpretation is supported by the Zvornik Brigade Combat Report of 16 July 1995 prepared by Colonel Pandurević.[113]

67. The evidence given by Mr. Erdemović was that he and other members of his unit, the 10th Sabotage Unit, had received orders relating to the executions on the morning of 16 July 1995. In carrying out those orders, they first stopped at the Zvornik Brigade headquarters. From there, they were accompanied by an unidentified Lieutenant Colonel and two Drina Corps military police officers to the Branjevo Military Farm. After about half an hour, buses of Bosnian Muslim civilians began to arrive escorted by military police officers wearing the insignia of the Drina

[110] Trial Judgement, para. 158.
[111] Defence Appeal Brief, paras. 157 - 164.
[112] *Ibid.*, paras. 165 - 169. Regarding the column, see also paras. 60 *et seq.*
[113] *Ibid.*, para. 169.

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Corps, who supervised the unloading of the civilians from the buses.[114] The executions commenced at 10.00 hours and continued until 15.00 hours. Between 13.00 and 14.00 hours ten soldiers joined Mr. Erdemović's unit to assist in the shootings. Once the executions at Branjevo Military Farm were complete, Mr. Erdemović and other members of his unit refused to carry out further killings and went to a café. The men that had arrived from Bratunac went to the Pilica Dom where they continued with the executions. They arrived in the café after 15-20 minutes and stated that "everything was over."[115]

68. With respect to the identification of the men from Bratunac, Mr. Erdemović's evidence was that he had heard that they were from Bratunac, they were dressed in VRS uniform and they knew some of the Bosnian Muslim men of Srebrenica, which suggested to him that they were local. Mr. Erdemović provided no evidence that these men belonged to the Bratunac Brigade, rather than to other military units. In fact, the only man Mr. Erdemović positively identified from photographs belonged to another military unit, one not commanded by Krstić. As such, the evidence of Mr. Erdemović is insufficient to establish that the men were from the Bratunac Brigade.

69. The insufficiency of Mr. Erdemović's evidence is highlighted by the testimony of the Prosecution military expert, Richard Butler. Correcting evidence he gave during trial, Mr. Butler made clear during the Appeal hearing that Mr. Erdemović had never said that the men who were sent to assist in the executions were from the Bratunac Brigade, only that they were from the town of Bratunac.[116] Mr. Butler also confirmed that one of the men referred to by Mr. Erdemović was identified as being a member of the Panteri unit from the East Bosnia Corps.[117] In light of this fact, Mr. Butler now concluded that the men that arrived to assist in the executions did not belong to the Bratunac Brigade.[118]

70. In light of the above, the Appeals Chamber finds that the Trial Chamber's conclusion that the men of the Bratunac Brigade participated in the executions at Branjevo Farm and the Pilica Dom on 16 July 1995 is not one that a reasonable trier of fact could have made. There was no direct evidence to establish the involvement of the Drina Corps in carrying out these executions.

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[114] Trial Judgement, para. 239.
[115] *Ibid*., para. 244.
[116] Testimony of Richard Butler pursuant to the Order of the Appeals Chamber granting the Appellant's Oral Rule 115 Motion, 24 November 2003 ("Butler Report"), T, p. 4617.
[117] *Ibid*., T, p. 4621.
[118] *Ibid*., T, pp. 4171 - 4718.

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(b) The Zvornik Brigade Report

71. The Trial Chamber also based its finding that the men participating in the executions were from the Bratunac Brigade on a Zvornik Brigade Report of 16 July 1995, which stated that, in addition to the regular troops of the Zvornik Brigade forces, two platoons from the Bratunac Brigade were operating under its command.[119] This evidence, however, can only establish that platoons from the Bratunac Brigade were operating under the command of the Zvornik Brigade; it does not establish the involvement of those troops in the executions. In fact, the Trial Chamber only relied upon this evidence to establish that Bratunac troops were in the vicinity at that time in order to corroborate the evidence given by Mr. Erdemović.[120]

(c) The Trial Chamber's findings with respect to certain intercepts

(i) The intercept of 16 July 1995

72. The Trial Chamber also relied on an intercepted conversation of 16 July 1995, in which Colonel Popović asked to be connected to Radislav Krstić. When told that Krstić was unavailable, he asked to be connected to the Commanding Officer. Colonel Popović then spoke with Mr. Rašić, a duty officer of the Drina Corps. Colonel Popović reported to Mr. Rašić that he was "just up there … with the boss personally," that he has "finished the job," and that Mr. Rašić should inform the "General."[121] Mr. Rašić asked Colonel Popović whether the men from Colonel Blagojević's command arrived on time, and Colonel Popović replied that these men were "up there" but had arrived late and "that is why the Commander who was here had problems." Relying upon the evidence given by Mr. Butler, the Trial Chamber concluded that the reference to Colonel Popović being "up there" meant that Colonel Popović has just returned from an area north of Zvornik, (i.e. the Pilica area) and that Mr. Rašić (and therefore the Drina Corps Command) knew of the executions that had occurred there.[122]

73. On appeal, however, Mr. Butler corrected the evidence that he gave at trial in light of the evidence he had given in the *Blagojević* trial.[123] In particular, he explained, the second reference made to "up there" and the problems resulting from the late arrival of Colonel Blagojević's men were a reference to the area of the battlefield towards the IKM (or Forward Command Post) and the Baljkovica area, where the most significant fighting took place. The problems mentioned during

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[119] Trial Judgement, paras. 240, 246.
[120] *Ibid.*, para. 240.
[121] Defence Appeal Brief, paras. 165 - 166.
[122] Trial Judgement, para. 401.
[123] AT, pp. 217 - 221; the relevant evidence is at *Prosecutor* v. *Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Transcript of hearing dated 14 November 2003, page 4608 *et seq.*

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the phone conversation concerned the late arrival of reinforcements, which resulted in a situation where Colonel Pandurević had to open a corridor to allow the column of Bosnian Muslim men to go through.[124] The Trial Chamber, however, had relied upon this intercept as further evidence that the men were sent from the Bratunac Brigade to assist in the executions on 16 July 1995 following Colonel Beara's request to Radislav Krstić for additional men on the morning of 15 July.[125] In light of the additional evidence given by Mr. Butler, this inference is unsustainable.

(ii) The Trial Chamber's reliance on two further intercepted conversations dated 15 July 1995

74. The Defence further argues that the Trial Chamber erroneously interpreted an intercept of 15 July 1995 between Radislav Krstić and Colonel Beara as establishing that Krstić agreed to provide, and did provide, Colonel Beara with men from the Bratunac Brigade to assist in the executions. In fact, the Defence argues, the facts show that Radislav Krstić never followed up on Colonel Beara's request.[126]

75. The Trial Chamber relied upon two other intercepted conversations, both dated 15 July, as establishing that Krstić provided direct assistance to the executions.[127] In the first intercept, Colonel Beara requested General Živanović to send more men. General Živanović refused this request, and referred Colonel Beara to Radislav Krstić. Colonel Beara then urgently requested the assistance of Krstić in the distribution of "3,500 parcels," telling him that "Furtula didn't carry out the boss's order." The Trial Chamber concluded that this was a code term used in military communications to signify captured Muslim men who were to be killed. Krstić suggested that Colonel Beara seek help from other units, including the Bratunac and Milići Brigades of the Drina Corps, as well as the MUP. Colonel Beara replied that they are not available. Krstić then stated that he would see what he could do.[128] The Trial Chamber interpreted this response as evidencing an undertaking to secure the assistance requested.[129]

76. The Trial Chamber based its conclusion that the term "parcel" was a reference to Bosnian Muslims on evidence in other intercepts in which that term was used, and more specifically on an intercept in which a reference to "people" was corrected to "parcels."[130] As for the Trial Chamber's conclusion that the word "distribute" referred to killing, that conclusion appears to be

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[124] Butler Report, T, pp. 4615 - 4616.
[125] Trial Judgement, para. 401.
[126] Defence Appeal Brief., paras. 174 - 175.
[127] Trial Judgement, para. 380.
[128] *Ibid.*, para. 382.
[129] *Ibid.*, paras. 385, 387.
[130] *Ibid.*, par 383.

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based solely on the Prosecution's opening statement, where it argued that "distribute" meant to kill.[131] The Trial Chamber found the Prosecution's argument persuasive, and, in the absence of any further examination of the term, the Trial Chamber does not appear to have based its understanding of the word "distribute" on anything more than the Prosecution's assertion. While such an inference may be drawn from this coded language, its meaning is insufficiently clear to conclude that no alternative interpretation is possible. Moreover, Krstić's statements to Colonel Beara that he "will see what he can do" cannot support the weight of reliance the Trial Chamber placed upon it. Rather than a firm promise of help, the statements could have been a refusal to commit, an effort by Krstić to end the conversation without saying a firm "no" but also without assuming an unambiguous obligation to help.

(d) The considerations of the Appeals Chamber

77. Given the evidence relied upon by the Trial Chamber, and the corrections made to that evidence by Mr. Butler, the finding of the Trial Chamber that men from the Bratunac Brigade were dispatched by Krstić to assist in the executions at Branjevo Farm and Pilica Dom is one that no reasonable trier of fact could have made. The evidence fails to establish the direct involvement of the Drina Corps in carrying out the executions, and as such cannot be relied upon as evidence of Radislav Krstić's direct involvement in assisting the executions.

78. The evidence does, however, establish the involvement of Drina Corps personnel and assets in facilitating the executions. The Trial Chamber's finding on that point is supported by Mr. Erdemović's evidence that his unit was accompanied to the Branjevo Military Farm by two Drina Corps military police officers, and that military police officers wearing the insignia of the Drina Corps escorted the buses of Bosnian Muslim civilians to the Branjevo Military Farm, and supervised their unloading.

D. The Appeals Chamber's Analysis of Radislav Krstić's Criminal Responsibility

79. It remains for the Appeals Chamber to determine whether the Trial Chamber erred in finding that Radislav Krstić shared the genocidal intent of a joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica. The Appeals Chamber will now proceed with its analysis of Krstić's criminal responsibility in light of its findings above.

[131] *Ibid.*, n. 1015 (citing T 483).

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1. <u>The Trial Chamber's finding that Radislav Krstić shared the intent of a joint criminal enterprise to commit genocide</u>

80. The Defence argues that in finding that Radislav Krstić shared the intent to commit genocide, the Trial Chamber failed to accord to him the presumption of innocence. The Defence identifies a number of instances in which the Trial Chamber used the language "must have known," "could not have failed to know," and "could only surmise" as illustrative of this failure.[132] The Defence argues that the Trial Chamber adopted this language to mask the lack of a proper evidentiary basis for its finding that Krstić possessed the intent to commit genocide.[133]

81. The Trial Chamber properly articulated the standard of proof to be applied to the Defence as being one of proof beyond reasonable doubt.[134] The Trial Chamber's reliance upon language such as "must have known" is indicative of the nature of the case against Krstić being one based upon circumstantial evidence. While the Trial Chamber should have used less ambiguous language when making findings concerning Krstić's knowledge and intent, the regrettable choice of phraseology alone is not sufficient to overturn the Trial Chamber's findings.

82. The Defence argues, however, that even if the Trial Chamber properly articulated the standard of proof, its conclusion that Krstić shared the genocidal intent of the joint criminal enterprise is erroneous. The Appeals Chamber therefore considers the evidence on which the Trial Chamber relied to establish that Krstić shared the intent of the joint criminal enterprise to commit genocide.

83. As already stated, the case against Radislav Krstić was one based on circumstantial evidence, and the finding of the Trial Chamber was largely based upon a combination of circumstantial facts. In convicting Krstić as a participant in a joint criminal enterprise to commit genocide, the Trial Chamber relied upon evidence establishing his knowledge of the intention on the part of General Mladić and other members of the VRS Main Staff to execute the Bosnian Muslims of Srebrenica, his knowledge of the use of personnel and resources of the Drina Corps to carry out that intention given his command position, and upon evidence that Radislav Krstić supervised the participation of his subordinates in carrying out those executions.

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[132] Defence Appeal Brief, para. 96.
[133] *Ibid.*, para. 97.
[134] Trial Judgement, para. 2.

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2. Contacts between Radislav Krstić and other participants in the joint criminal enterprise

84. The Trial Chamber found the contacts between Krstić and General Mladić to be crucial to establishing Radislav Krstić's genocidal intent. The parties agreed that General Mladić was the main figure behind the killings. The Trial Chamber found that Generals Krstić and Mladić were in constant contact throughout the relevant period.[135] The Trial Chamber concluded that "if General Mladić knew about the killings, it would be natural for Krstić to know as well".[136]

(a) Radislav Krstić's presence at the meetings in the Hotel Fontana

85. Reaching this conclusion, the Trial Chamber first relied upon the presence of Krstić at the second and third of three meetings convened by General Mladić at the Hotel Fontana on 11 and 12 July 1995. The fate of the Bosnian Muslims following the fall of Srebrenica was discussed at these meetings.[137] Based on his presence at two of these meetings, the Trial Chamber concluded that Radislav Krstić "was put on notice that the survival of the Bosnian Muslim population was in question following the take-over of Srebrenica."[138]

86. All three meetings convened by General Mladić were attended by UNPROFOR leaders and Bosnian civilians leaders selected by UNPROFOR.[139] At the first of these meetings, at which Krstić was not present, Colonel Karremans of Dutch-bat sought assurances from General Mladić that the Bosnian Muslim population of Srebrenica, together with Dutch-bat personnel, would be allowed to withdraw from the area. General Mladić stated that the Bosnian Muslim civilian population was not the target of his actions, and he asked UNPROFOR if they could provide buses for the transportation of the civilian population.[140] It was at the second meeting, at which Krstić was present, that the plan to transport the civilian population crystallised.[141]

87. The most that Radislav Krstić's presence at these meetings established is his knowledge about General Mladić's decisions to transfer the population from Potočari to Muslim-held territory on buses, and to screen the male members of this population prior to transportation for war criminals. As the Trial Chamber acknowledged, the decision to screen was neither criminal nor unreasonable. The Bratunac Brigade had drawn up a list of over 350 suspected war criminals thought to be in the Srebrenica area.[142] Although General Mladić also announced that the survival

[135] *Ibid*., para. 407.
[136] *Ibid*.
[137] *Ibid*., para. 339.
[138] *Ibid*., para. 343.
[139] *Ibid*, para. 126.
[140] *Ibid*., para. 130.
[141] *Ibid*.
[142] *Ibid*., para. 156.

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of the population depended upon the complete surrender of the ABiH, it is unlikely that General Mladić would be disclosing his genocidal intent in the presence of UNPROFOR leaders and foreign media, or that those present at the meeting, including Krstić, would have interpreted his comments in that light. There was no evidence to suggest that at this time Radislav Krstić knew about the intent on the part of General Mladić to execute the Bosnian Muslim civilians who were to be transferred.

88. There was, however, evidence to suggest that Krstić was aware of the intention of the members of the Main Staff to take total control of Srebrenica and make the situation unbearable for the Bosnian Muslims in Srebrenica, both military and civilian. In March 1995, the President of Republika Srpska, Radovan Karadžić, in reaction to the pressure of the international community to end the war and create a peace agreement, issued a directive to the VRS, "Directive 7" setting out the long-term strategy of the VRS. Directive 7 specified that the VRS was to "complete the physical separation of Srebrenica from Zepa as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica."

89. Part of the plan included the blocking of aid convoys. The Directive declared that

> the relevant State and military organs responsible for the work of UNPROFOR and humanitarian organisations shall, through planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding the condemnation of the international community and international public opinion.

On 31 March 1995, the VRS Main Staff issued Directive 7.1. This Directive, signed by General Mladić, sought to implement Directive 7 and directed the Drina Corps to conduct "active combat operations … around the enclaves."

90. Directives 7 and 7.1 are insufficiently clear to establish that there was a genocidal intent on the part of the members of the Main Staff who issued them. Indeed, the Trial Chamber did not even find that those who issued Directive 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallised at a later stage. At most, Krstić's knowledge of these Directives alerted him to the military plan to take over Srebrenica and Zepa, and to create conditions that would lead to the total defeat of the Bosnian Muslim military forces in the area, without whose protection the civilian population would be compelled to leave the area. It also alerted Radislav Krstić to the intention of the Main Staff to obstruct humanitarian aid to the civilians of Srebrenica so that their conditions would become unbearable and further motivate them to leave the area.

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91. It is reasonable to infer that the meetings at Hotel Fontana were a further step in the implementation of the goals of the Directive. At each of those meetings, General Mladić called for the total surrender of the Bosnian Military forces in the area. In the two meetings at which Krstić was present, General Mladić's primary concern was securing the surrender of the Bosnian military forces in the area. In the second meeting, General Mladić said that the population had to choose whether to stay or whether to go, and he demanded that all ABiH troops in the area surrender their weapons, and emphasised that the survival of the civilian population in the enclave was linked to the surrender of the ABiH troops.[143] At the third meeting, he again made it clear that the survival of the civilian population in the area was conditional upon the capitulation of the ABiH forces.[144] He said "you can either survive or disappear … For your survival, I request: that all your armed men who attacked and committed crimes – and many did – against our people, hand over their weapons to the Army of the Republika Srpska … on handing over weapons you may … choose to stay in the territory … or, if it suits you, go where you want. The wish of every individual will be observed, no matter how many of you there are."[145] To secure the surrender of the ABiH forces General Mladić was willing to threaten severe repercussions for the civilian population that chose to remain in the area but was also willing to facilitate their removal. As already stated, however, the public nature of the meeting at which these threats were made, and particularly, the presence of members of the international community, make it difficult to conclude that General Mladić was in fact publicly stating his genocidal intent.

(b) The evidence of Momir Nikolić and Miroslav Deronjić

92. The Prosecution argues, as it did at trial, that Radislav Krstić knew at the time of his attendance at the third meeting at the Hotel Fontana of the genocidal intent of the Serb leadership. The Prosecution relies upon the additional evidence given by Momir Nikolić in the *Blagojević* trial, and admitted in this Appeal, and upon the evidence of Miroslav Deronjić, who was summoned by the Appeals Chamber on its own initiative.

93. Momir Nikolić testified that on the morning of the 12 July 1995, and prior to the third meeting at the Fontana Hotel, he met with Lieutenant Colonel Kosotić and Colonel Popović, and was told by Colonel Popović that on that day the women and children would be evacuated but the men would be temporarily detained and then killed. The Prosecution argues that this evidence shows that a firm plan to kill the Muslim men of Srebrenica was formed as early as

[143] *Ibid*, para 130.
[144] *Ibid*, para 132.
[145] *Ibid.*

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12 July 1995.[146] While this evidence may support the existence of such a plan on the part of the Main Staff of the VRS, it does not go to Krstić's knowledge of or participation in such a plan.

94. The evidence given by Miroslav Deronjić does not help the Prosecution either. Although Mr. Deronjić gave some evidence of an intention on the part of the Serb leadership prior to 13 July 1995 to kill the Bosnian Muslim civilians in Srebrenica should military operations in that region be successful, he gave no evidence linking Radislav Krstić to a genocidal plan or indicating that Krstić was aware of that intention on the part of the Bosnian Serb leadership.[147] As such, the evidence of neither additional witness supports the Prosecution's argument. Further, the Appeals Chamber is hesitant to base any decision on Mr. Deronjić's testimony without having corroborating evidence. The discrepancies in the evidence given by Mr. Deronjić and the ambiguities surrounding some of the statements he made, particularly with respect to his sighting of Krstić at Hotel Fontana, caution the Appeals Chamber against relying on his evidence alone.

(c) The Trial Chamber's findings regarding Radislav Krstić's presence around Potočari and the removal of the men from the buses at Tišća

95. The Trial Chamber rejected the Prosecution's argument that Krstić's assistance in organising the transportation of the women, children and elderly from Potočari were acts carried out pursuant to a joint criminal enterprise to commit genocide. The Trial Chamber did however rely on the presence of Radislav Krstić in and around the Potočari compound for between one and two hours in the afternoon of 12 July, at which time he was seen conferring with other high ranking military officers, including General Mladić, as evidence of his growing knowledge that genocide would be committed.[148] The Trial Chamber found that as a result of his presence there, Krstić "must have known of the appalling conditions facing the Bosnian Muslim refugees and the general mistreatment inflicted upon them by VRS soldiers on that day."[149] The Trial Chamber further found that, based on Krstić's presence at the White House, he was aware that the segregated men were being detained in terrible conditions and were not being treated in accordance with accepted practice for war crime screening.[150] The Trial Chamber concluded that he must have realised, as did all other witnesses present around the compound, that the fate of these men was terribly uncertain but that he made no effort to clarify this with General Mladić or anyone else.[151]

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[146] T, p. 401.
[147] Appeal Proceedings, Friday 21 November 2003, T, pp. 101 - 174.
[148] Trial Judgement, paras. 352 - 354.
[149] *Ibid*., para. 354.
[150] *Ibid*., para. 367.
[151] *Ibid*.

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96. However, the Trial Chamber also concluded that it was not until 13 July 1995 that Dutch-bat troops witnessed definite signs that Bosnian Serbs were executing some of the Bosnian Muslim men who had been separated; that it was not until all the Bosnian Muslim civilians were removed from Potočari that the personal belongings of the separated men were destroyed; and that Dutch-bat troops were certain that the story of screening for war criminals was not true.[152] The Trial Chamber was unable to conclude that any Drina Corps personnel were still in the compound at that time, and there was no evidence that Krstić was either aware of the shootings at the White House, or the destruction of the personal belongings of the separated men.[153]

97. The Trial Chamber also found that Radislav Krstić must have known that men who managed to board the buses with the women, children and elderly were being removed from them at Tišća.[154] Evidence of an intercept of 12 July 1995 established that Krstić ordered the Drina Corps to secure the road from Vlasenica toward Tuzla. The Trial Chamber concluded that this fact gave rise to the inference that he must have known men were being taken off the buses at Tišća. It further found that the Chief of Staff of the Milići Brigade, and troops from his unit, were present at the Tišća screening site upon the orders of the Drina Corps Command.[155] On the basis of this evidence the Trial Chamber concluded that it was clear that Krstić must have known that men were being separated at Tišća and taken to detention sites. Notably, however, the Trial Chamber did not establish at this point that Radislav Krstić knew the prisoners were to be executed.[156]

98. It should be clear by now that - despite the Trial Chamber's assertion that if General Mladić knew about the killings, then Krstić must have also known - the Trial Chamber did not actually establish, from Krstić's contacts with General Mladić during the relevant period, that Radislav Krstić in fact learned of the intention to execute the Bosnian Muslims as a result of those contacts. The Trial Chamber's assertion was without a proper evidentiary basis. Without having established that Krstić knew of that intention on the part of General Mladić, no reasonable Trial Chamber could have made the further inference that Krstić shared that intention. Although the Trial Chamber placed relatively little weight upon the finding in terms of determining the criminal liability of Radislav Krstić, this erroneous finding of the Trial Chamber casts some doubt upon its overall conclusion that Radislav Krstić shared the genocidal intent.

[152] *Ibid*., para. 58.
[153] *Ibid*., paras. 160, 367.
[154] *Ibid*., para. 368.
[155] *Ibid*., para. 369.
[156] *Ibid*.

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(d) The Trial Chamber's reliance on various other facts

99. The Trial Chamber based its finding as to Krstić's intent on a number of other facts as well. The men separated at Potočari were transported to Bratunac, along with other Bosnian Muslim prisoners captured in the wooded terrain. The Trial Chamber found that the Bratunac Brigade would have informed the Drina Corps Command about the arrival of the prisoners,[157] and that the Drina Corps Command must have known that the prisoners were not being transferred to regular prisoner of war facilities, but were being detained in Bratunac without any provision for food and water etc.[158] From Radislav Krstić's presence in Potočari and his role in organising the transportation, the Trial Chamber concluded that he must known that the men were being separated from women and children and either detained, or were being transported elsewhere.[159]

100. This evidence does not by itself establish that Krstić knew about the joint criminal enterprise to destroy the Bosnian Muslim population. As the Trial Chamber itself acknowledged, the separation of the men and their detention elsewhere may have been equally consistent with General Mladić's publicly stated intention that they be screened for possible war criminals. The separation and detention of the men was also consistent with an intention to exchange the prisoners for the Serbian soldiers captured by the Bosnian Muslims. The Trial Chamber heard evidence that such exchanges were frequent during the military conflict in the former Yugoslavia and that "a new infusion of Bosnian Muslim prisoners would have been a potentially useful bargaining tool for the Bosnian Serbs in future exchange negotiations."[160] Indeed, the decision to execute the Bosnian Muslim civilians was, according to the Prosecution expert, "unfathomable in military terms".[161] If this decision was so unexpected and irrational, it is surely unreasonable to expect Radislav Krstić to anticipate such a course of events on the basis of observations that are equally (if not more so) consistent with an innocent outcome. Krstić's knowledge of the detention of prisoners in Bratunac is therefore not sufficient to support an inference of actual knowledge about the execution plan, and by extension, an inference of genocidal intent on the part of Krstić.

101. The Trial Chamber found that because the subordinate brigades continued to operate under the Command of the Drina Corps, the command itself, including Radislav Krstić, must have known of the involvement of these subordinate units in the executions as of 14 July 1995.[162] In support of this conclusion the Trial Chamber relied upon what it described as direct evidence of Krstić's

[157] *Ibid*., para. 183.
[158] *Ibid*., para. 295.
[159] *Ibid*., para. 363.
[160] *Ibid*., para. 156.
[161] *Ibid*., para. 70.
[162] *Ibid*., para. 296.

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knowledge of and involvement in the executions.[163] The Trial Chamber found that, although at the time the genocidal plan was implemented, Radislav Krstić was commanding the Žepa operation, he was nevertheless constantly travelling to the Drina Corps forward command post in Vlasenica. The Trial Chamber found, moreover, that he was in communication with all of the officers in his zone of responsibility. The Trial Chamber acknowledged that these contacts alone could not support the inference that Krstić was involved in the executions. These contacts, in the Trial Chamber's view, merely provided additional support to the other evidence of Krstić's involvement in the executions.[164]

(i) <u>The Trial Chamber's reliance upon contacts with Colonel Beara</u>

102. First, the Trial Chamber relied heavily upon Radislav Krstić's contacts with Colonel Beara, who was closely involved in the killings,[165] and in particular the evidence of conversation intercepts of 15 July 1995, as discussed above. In the first intercept, Colonel Beara requested General Živanović to send more men, but General Živanović refused and referred Colonel Beara to Radislav Krstić. Colonel Beara then urgently requested the assistance of Krstić in the distribution of "3,500 parcels," telling him that "Furtula didn't carry out the boss' order." The Trial Chamber concluded that this was a code term used in military communications to signify captured Muslim men. Radislav Krstić suggested that Colonel Beara seek help from other units, but Colonel Beara replied that these units were not available and that he was at a loss as to what to do. He told Krstić that he only needed the men for a few hours and could return them at the end of the day. Radislav Krstić replied that he would see what he could do.[166]

103. The Trial Chamber found that both Živanović and Radislav Krstić knew about the prior "boss's order" to send 30 men with Boban Inđić three days earlier, on 13 July 1995. The Trial Chamber stated further that the commencement of the executions on 13 July 1995 supported an inference that these 30 men, who did not arrive, were to assist in the executions.[167] The Trial Chamber found that Colonel Beara's statement that he only needed the men for a few hours indicated a short and discreet assignment rather than a deployment for combat.[168] It stated that the intercept strongly implied that when the MUP troops declined to carry out the killings, Krstić agreed to help and arranged for Bratunac Brigade members to assist in the killings at Branjevo Farm and the Pilica Dom the following day.[169] The Trial Chamber concluded that Radislav

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[163] *Ibid.*, para. 379.
[164] *Ibid.*, para. 400.
[165] *Ibid.*, para. 408.
[166] *Ibid.*, paras. 380 - 387, 408.
[167] *Ibid.*, para. 381.
[168] *Ibid.*, para. 384.
[169] *Ibid.*, para. 423.

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Krstić's initial reluctance to assist was consistent with the fact that by this time units from the Zvornik Brigade had been withdrawn from Žepa and sent back to address the urgent situation in their zone of responsibility.[170] As such, the Trial Chamber relied upon this intercept as establishing that Krstić knew about the executions, and with that knowledge he undertook to assist Colonel Beara by supplying the additional men needed to carry out those executions.[171]

104. The Trial Chamber's reliance upon Radislav Krstić's knowledge from this intercept as establishing intent on the part of Krstić to participate in a genocidal plan is unreasonable. Krstić's statement to Colonel Beara ("You guys fucked me up so much"), coupled with his next comment, "Fuck it, now I'll be the one to blame," [172] shows at most that Radislav Krstić was aware that killings were occurring.[173] The conversation, moreover, easily lends itself to the interpretation that, prior to the conversation, Krstić had no knowledge that Colonel Beara was involved in the execution of Muslims, and was angry with Colonel Beara that responsibility would now be attached to him. Even if it is accepted that the conversation between Radislav Krstić and Colonel Beara related to the execution of Muslim prisoners, it only establishes knowledge on the part of Krstić that genocide was being committed. It cannot establish intent to commit genocide. Likewise, the fact that Krstić suggested that men be taken from his subordinates may support a finding of knowledge that executions of Bosnian Muslims were taking place, but it cannot establish that Radislav Krstić shared the intent to commit genocide. At most, a reasonable trier of fact could conclude that from this time, Krstić had knowledge of the genocidal intent of some members of the VRS Main Staff.

105. The Trial Chamber pointed to the evidence that Colonel Beara was amongst the Command Staff at Žepa along with General Mladić, and was involved in negotiations at Žepa from mid-July 1995, and to evidence of Colonel Beara seeing Radislav Krstić at an UNPROFOR checkpoint in Žepa during the Žepa operation.[174] The evidence of such other contacts Krstić had with Colonel Beara during the relevant period is also insufficient to support an inference of genocidal intent on the part of Radislav Krstić.

106. The Trial Chamber referred to the fact that the Defence denied that he had had this conversation with Colonel Beara. It found that at the time the conversation took place on 15 July 1995, Radislav Krstić knew that the executions were occurring, and that he undertook to assist

[170] Trial Judgement, para. 382.
[171] *Ibid.*, para. 423.
[172] T, pp. 340 - 341.
[173] Butler Report.
[174] Trial Judgement, para. 408.

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Colonel Beara in obtaining the necessary personnel to carry them out.[175] On Appeal, the Defence accepted that the conversation had occurred, but denied that Krstić had acted on Colonel Beara's request. This inconsistency in Krstić's testimony does not, however, establish that Krstić lied in order to hide the fact that he shared the genocidal intent of some members of the Main Staff. As a general principle, where an accused is shown to have lied about a fact during a criminal trial, an inference that he lied to obfuscate his own guilt may only be drawn where all other reasonable possible explanations for that lie have been excluded. The most that can be said about the Defence's inconsistent position is that Radislav Krstić knew, from his conversation with Colonel Beara, that killings were being carried out with genocidal intent. It cannot be concluded, as a result of Krstić's inconsistencies, that he subscribed to that genocidal intent. His lie is explicable as a desire to avoid just such an adverse inference being drawn to his detriment, and it cannot support the inference that he shared the genocidal intent of some members of the Main Staff.

(ii) The Trial Chamber's reliance upon contacts with Colonel Pandurević

107. Secondly, the Trial Chamber relied on evidence of Radislav Krstić's close contact during the relevant period with the commander of the Zvornik Brigade, Colonel Vinko Pandurević. The Trial Chamber found that Colonel Pandurević was ordered back by Krstić to his area of responsibility on 14 July 1995, (following requests made to Radislav Krstić by General Živanović and Major Obrenović)[176] in light of the dual problems of Muslim combatants and prisoners.[177] Once Colonel Pandurević was back in the Zvornik Brigade area of responsibility, he sent an interim combat report to the Commander of the Drina Corps on 15 July 1995 concerning the threat posed to the Zvornik Brigade by the Bosnian Muslim column. Colonel Pandurević stated that "[a]n additional burden for us is the large numbers of prisoners distributed throughout schools in the brigade area as well as obligations of security and restoration of the terrain…This command cannot take care of these problems any longer, as it has neither the material nor other resources. If no one takes on this responsibility I will be forced to let them go."[178]

108. At the time Colonel Pandurević sent this report the prisoners held at Orahovac and Petkovci Dam had already been executed, though the prisoners in Pilica and those who were at Kozluk were still alive. The Trial Chamber found that the report made clear that Colonel Pandurević knew about the prisoner situation in his area of responsibility and that he was concerned about the diversion of resources from combat with the 28th Division of the ABiH in order to meet the situation caused by

[175] *Ibid.*, para. 385.
[176] Major Obrenović was subsequently promoted to the rank of Lieutenant-Colonel.
[177] *Ibid.*, paras. 388 - 389.
[178] *Ibid.*, para. 389.

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prisoners in his zone.[179] The Trial Chamber concluded that at the time he wrote the report, Colonel Pandurević knew about the ongoing execution of Bosnian Muslim prisoners in his zone of responsibility.

109. The Trial Chamber further found that Colonel Pandurević's knowledge of the execution was consistent with his complaint that vital resources were being diverted to deal with prisoners. On 13 and 14 July 1995, Zvornik Brigade resources had been used to locate detention sites for the prisoners, and on 14 and 15 July 1995, Zvornik Brigade resources had been used to assist with the executions at Orahavoc and Petkovci Dam.[180] As Commander of the Zvornik Brigade, Colonel Pandurević would have been informed about the deployment of resources for this purpose given the impact that this diversion was having on the ability of the Zvornik Brigade to respond to the military threat posed by the Bosnian Muslim column. The Trial Chamber accepted that the interim combat report was written on the assumption that the Drina Corps Command, and Radislav Krstić as its Commander, knew about both the prisoner situation and the executions being carried out in the Zvornik Brigade's area of responsibility.[181] It found that until that time, the Zvornik Brigade had been assigned tasks relating to the prisoners and that Colonel Pandurević "warned his Command that he would not tolerate the situation any longer".[182]

110. On 15 July 1995, another report was received by Radislav Krstić from Colonel Milanović, who believed that Krstić knew about Colonel Pandurević's situation.[183] Further, an intercepted conversation on 16 July 1995 showed that Krstić was taking steps to remain fully informed of the developing situation of the Zvornik Brigade.[184] On 17 July 1995 an intercepted conversation between Krstić and the Duty Officer, Captain Trbić, was recorded in which Captain Trbić informed Radislav Krstić that there were no further problems pursuant to the 16 July 1995 Combat Report, and that everything was under control. In that intercept Krstić was heard to ask "have you killed the Turks up there?" This was conceded by the Prosecution to be a reference to combat activities and not the Bosnian Muslim prisoners.[185] In an intercepted conversation of 19 July 1995, Colonel Cerović stated that he had presented an interim report to Radislav Krstić. The Trial Chamber relied on this evidence as further establishing that Krstić knew what was happening in Zvornik and was kept fully informed about the executions.[186]

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[179] *Ibid*., para. 390.
[180] *Ibid*., para. 392.
[181] *Ibid*., para. 393.
[182] *Ibid*., para. 390.
[183] Trial Judgement, para. 395.
[184] *Ibid*., para. 396.
[185] Appeal Hearing, Thursday 27 November T, p. 421.
[186] Trial Judgement, paras. 388 - 399, 411.

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111. The evidence before the Trial Chamber of military reports being sent to Radislav Krstić by Colonel Pandurević does establish that even while Krstić was away and engaged in military operations in the area of Žepa, he was monitoring the situation within the zone of responsibility of the Zvornik Brigade. The reports do not establish, however, that Radislav Krstić was being informed about the executions or other mishandling of prisoners. In fact, one of the reports states, to the contrary, that both the military and the MUP forces will "protect the population and property". The more logical inference is that he was receiving reports about the combat activities with the column. Even accepting that Krstić was aware, on the basis of these reports, that executions were being carried out in the Zvornik Brigade's area of responsibility, this knowledge cannot support an inference of genocidal intent on his part. There was no evidence that Radislav Krstić was in fact directing those executions or supervising their commission by the Zvornik Brigade.

112. During the trial the military expert for the Defence, Mr. Radinović, conceded that the proper interpretation of a further interim combat report sent by Colonel Pandurević on July 1995 was that Colonel Pandurević was expressing strong discontent about the crimes that had occurred in his area of responsibility.[187] While the Trial Chamber relied upon this concession as further evidence of knowledge of the executions on the part of Radislav Krstić, the fact that his subordinate was expressing discontent about the executions in reports to Krstić speaks against rather than in favour of a genocidal intent on the part of Radislav Krstić. Again, the most this report establishes is that Krstić knew that those executions had taken place.

(iii) <u>The Trial Chamber's reliance upon contacts with Colonel Popović</u>

113. Next, the Trial Chamber relied on the evidence of Radislav Krstić's frequent contacts with Colonel Popović during the relevant period.[188] On 16 July 1995, an intercepted conversation recorded a request being made to the Drina Corps Command for fuel on behalf of Colonel Popović, who was in the zone of the Zvornik Brigade. The Zvornik Brigade Duty Officer making the request stated that Colonel Popović would not continue the work he was doing unless the fuel requested was supplied, and later in the conversation, stated that "the bus loaded with oil is to go to Pilica village." Records for 16 July 1995 confirmed that 500 litres of fuel were dispatched to Colonel Popović, and the Drina Corps Command is noted as the recipient.[189] The Trial Chamber relied upon this evidence to establish that Krstić, as the Commander of the Drina Corps, must have

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[187] *Ibid*., para. 397.
[188] *Ibid*., para. 409 - 410.

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known that the fuel had been allocated to Colonel Popović and that the fuel was being used to assist Colonel Popović in the executions.[190] Again, the only inference this evidence is capable of sustaining is one of knowledge on the part of Krstić, not of shared genocidal intent.

114. The Trial Chamber also relied upon an intercept of 17 July 1995 as establishing that Colonel Popović was reporting specifically to Radislav Krstić about the executions. On 17 July 1995 Krstić called Major Golić from the Intelligence sector of the Drina Corps looking for Colonel Popović. He was informed that Colonel Popović was still in Zvornik but would be back in the afternoon. Radislav Krstić then instructed Major Golić to locate Colonel Popović and tell him to "call the Forward Command Post immediately." A few hours later, Colonel Popović was overheard in a conversation with an individual he addressed as "boss" in which he stated that the job was done and "the grade was an A."[191]

115. The Trial Chamber found that although Krstić was not identified in the conversation, given that at the time of Colonel Popović's call the executions had been completed, and that some hours earlier Radislav Krstić had been trying to contact Colonel Popović, and given Colonel Popović's reference to "boss," there was nevertheless a strong inference that Colonel Popović was reporting to Krstić. While the Trial Chamber's finding that Colonel Popović was reporting to Radislav Krstić on the murder operation is plausible, no reasonable trier of fact could have concluded that this was the only reasonable inference that could be drawn from the evidence. The reason why Krstić wanted Colonel Popović to call him was never identified, and the inference that he wished to receive a report about the killing operation is therefore conjecture. It is also far from certain that the individual to whom Colonel Popović was reporting was Krstić. The call was made some hours after Radislav Krstić attempted to speak with Colonel Popović. In the preceding intercept, the Trial Chamber found a reference to "boss" to be a reference to Colonel Pandurević, and a reference to "General" to be a reference to Radislav Krstić.[192] This finding was made in circumstances identical to the intercept at issue here, namely where the caller was Colonel Popović. Given these factors, the inference drawn from this intercept by the Trial Chamber was not the only one a reasonable trier of fact could have made.

116. Other contacts with Colonel Popović referred to by the Trial Chamber are to Colonel Popović's presence with Radislav Krstić and other VRS officers who walked through the streets of Srebrenica on the afternoon of 11 July, Colonel Popović's attendance at the Hotel Fontana meeting on the morning of 12 July 1995, his presence in Potočari on 12 July 1995 and his presence behind

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[189] *Ibid*., para. 242.
[190] *Ibid*., paras. 400 - 410.
[191] *Ibid*., para. 403.

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Krstić while he gave his interview in Potočari on 12 July 1995. All that this evidence establishes is the fact that these contacts occurred at these times.

(iv) The Trial Chamber's reliance upon contacts with Colonel Borovčanin

117. Finally, the Trial Chamber relied upon the contacts Radislav Krstić had with Colonel Borovčanin from the MUP during the relevant period.[193] In an intercepted conversation of 13 July 1995 Krstić spoke to Colonel Borovčanin. In response to Radislav Krstić's inquiry as to how things were going, Colonel Borovčanin informed him that things were "going well." Krstić then said, "Don't tell me that you have any problems." Colonel Borovčanin answered, "I don't, I don't."[194] The Trial Chamber relied upon this conversation to show that Radislav Krstić must have known, that by the evening of 13 July, there were several thousand Bosnian Muslim men being held prisoner in the zone of responsibility of the Drina Corps and that by the evening of 13 July, the Drina Corps must have been aware that the executions had taken place. [195]

118. The Prosecution asks the Appeals Chamber to consider the intercept of 13 July 1995 in light of the additional evidence given by Mr. Deronjić and Colonel Obrenović. According to Mr. Deronjić, Colonel Borovčanin had admitted that his men had carried out the Kravica mass execution in retaliation for the killing of two Serb policemen.[196] This evidence was corroborated by Colonel Obrenović's evidence that Colonel Borovčanin told him that Borovčanin's unit had blockaded the road from Konjević Polje to Kravica, that it experienced a lot of fighting and casualties, and had taken quite a few Muslim prisoners.[197] The Prosecution argues that this evidence establishes that Colonel Borovčanin's troops had committed a mass execution on that day and that Colonel Borovčanin was reporting to Krstić the results. According to the Prosecution, this was yet another piece of evidence showing that Radislav Krstić knew about and agreed wholeheartedly with the murder operation, and was in fact monitoring the MUP forces.

119. The intercepted conversation between Colonel Borovčanin and Radislav Krstić is too oblique to support an inference that the conversation was a report by Colonel Borovčanin about a

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[192] *Ibid*., para. 400.
[193] *Ibid*., paras. 283 - 289, 375 - 377.
[194] *Ibid*., para. 143.
[195] Trial Judgement, para. 177, read with paras 215, 446, 624..
[196] His evidence at the Appeal hearing was that he had reported to President Karadžić "about the incidents in connection with the detained or captured Muslims that I was aware of up until that time that is in the 14th in the morning. A major incident or a major tragedy that occurred on the 13th in the evening was the killing of a large number of Muslims in the agricultural farm in Kravica. Muslims were held there, and I received this information from the ground – or the Muslims who had surrendered … And an incident broke out between the army of the Republika Srpska, members of the police, the special police forces, and those captured Muslims. A killing occurred of several Serb policemen – one, actually – and several were wounded in this clash. And then the policeman or the soldiers, whoever was there … took their revenge on those captured, and according to the information passed on to me by Mr. Borovčanin, about 300 men were killed." AT, p. 124

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successfully completed execution of Muslims at the Kravica Farm on 13 July. Moreover, Mr. Deronjić's evidence was that the execution at the Kravica Farm was not planned, but was instead a spontaneous reprisal following a clash between the Muslim prisoners and the guards.[198] If so, then the initiative for the massacre could have resided with the camp authorities rather than with the higher military commanders such as Krstić. This evidence, therefore, does not support an inference of genocidal intent on the part of Krstić.

(v) Additional Evidence from Captain Nikolić

120. The Prosecution also relies upon the additional evidence presented during the Appeals hearing by Captain Momir Nikolić about a burial operation on 12 July 1995. Captain Nikolić's evidence was that his troops were involved in a reburial operation, and that he informed his Commander, Colonel Blagojević, about everything that was to be done in relation to the operation. Captain Nikolić also informed the Commander of the military police, Mirko Janković, because the military police had a role to play in that burial operation.[199] This evidence lends no support to the Prosecution's argument. The earliest evidence of an extermination of Muslim prisoners appears to be the execution at the Kravica Farm on 13 July 1995. The events described by Captain Nikolić occurred on 12 July 1995. It is, moreover, not clear who the individuals to be reburied were. In any event, even if there is a connection between the reburial operation and the murders at issue in this case, there is no reference in Captain Nikolić's testimony to Radislav Krstić, nor is there any reference elsewhere in the record to Colonel Blagojević informing Krstić about this particular reburial operation.

121. In conclusion, Radislav Krstić's contacts with those who appeared to be the main participants in the executions establish, at most, that Krstić was aware that those executions were taking place. Radislav Krstić's knowledge of those executions is insufficient to support an inference that he shared the intent to commit genocide.

(vi) The Trial Chamber's reliance upon evidence of the use of Drina Corps resources

122. The Trial Chamber also relied upon evidence that Drina Corps personnel and resources were used in carrying out the executions. The Trial Chamber rejected the Prosecution's argument that the Drina Corps participated in the executions at Jadar River and Čerska Valley.[200] While the Trial Chamber did not establish direct participation by the Drina Corps in the executions at the Kravica Warehouse, it concluded that the Drina Corps Command must have

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[197] T, pp. 2527 - 2259, Annex B-32.
[198] AT, p. 124 – 125.
[199] Annex 3, Evidence of Nikolić (T, p. 402).

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been aware that the buses used to transport the women, children and elderly had been diverted from that purpose to transfer the prisoners to the Kravica warehouse. Furthermore, based on the close proximity of the Bratunac Brigade to the executions and burial sites, and the scale of the executions, the Trial Chamber concluded that the Drina Corps would have known that those executions were being carried out.[201]

123. The Trial Chamber found that substantial evidence linked the Zvornik Brigade to the executions at Orahovac.[202] First, Orahovac was located within the zone of responsibility of the 4th Battalion of the Zvornik brigade. Second, a vehicle belonging to the Zvornik Brigade had visited the area on 13 and 14 July 1995, and the vehicle records established that two Zvornik military police officers had been assigned this vehicle. Third, Zvornik Brigade records established that a detachment of military police from the Zvornik Brigade was dispatched to Orahovac on the evening of 13 July 1995. Fourth, a survivor of the executions testified that he recognised the voice of a former colleague, Gojko Simić, among the executioners. Gojko Simić was established as being the Commander of the Heavy Weapons Platoon of the 4th Infantry Battalion of the 1st Zvornik Infantry Brigade. Fifth, the records of the Zvornik Brigade's Engineer Company recorded vehicles, excavators, loaders and trucks, as well as fuel being used in relation to Orahovac from 14 to 16 July 1995 inclusive.[203]

124. On the basis of this evidence, the Trial Chamber concluded that the Zvornik Brigade of the Drina Corps participated in the executions on 14 July 1995. The Trial Chamber found that members of the Zvornik Brigade military police were present in the area prior to the executions, "presumably for such purposes as guarding the prisoners and then facilitating their transportation to the execution fields." It also found that personnel from the 4th Battalion of the Zvornik Brigade were present at Orahovac during the executions and assisted in their commission. Finally, machinery and equipment belonging to the Engineers Company of the Zvornik Brigade was used for tasks related to the burial of the victims between 14 and 16 July 1995.[204]

125. With respect to the executions at the Petkovci Dam, the Trial Chamber found that Vehicle and Daily Order Records of the Zvornik Brigade established that drivers and trucks from the 6th Infantry Battalion of the Zvornik Brigade were used to transport the prisoners from Petkovci School to the detention site at Petkovci Dam on 15 July, and that the Zvornik Brigade

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[200] Trial Judgement, paras. 195 - 204.
[201] *Ibid*., para. 215.
[202] *Ibid*., paras. 220 - 225.
[203] *Ibid*., para. 224.
[204] *Ibid*., para. 225.

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Engineer Company was assigned to work with earthmoving equipment to assist in the burial of the victims.[205]

126. The Trial Chamber also relied on the evidence linking the Drina Corps to the executions at the Branjevo Farm and Pilica Dom. The Appeals Chamber has already determined that the Trial Chamber's conclusion that Krstić deployed troops from the Bratunac Brigade to assist in the executions at Branjevo Military Farm and Pilica Dom was not a finding that a reasonable trier of fact would have made. This conclusion, however, leaves undisturbed the Trial Chamber's finding that Drina Corps military police escorted the Bosnian Muslim civilians on the buses that had earlier been procured to transport the women, children and elderly to the execution site at Branjevo Military Farm, and that Zvornik Brigade equipment was used for activities related to the burial of the victims. Also undisturbed is the finding of the Trial Chamber that Colonel Popović was involved in procuring fuel from the Drina Corps Command to transport the Bosnian Muslim prisoners to the execution sites.[206] Further, the Bratunac Brigade Military Police Platoon log for 16 July 1995 recorded that "one police patrol remained in Pilica to secure and watch over the Bosnian Muslims". The Trial Chamber found that as there was no combat in Pilica, this patrol must have been guarding the Bosnian Muslim prisoners.[207]

127. With respect to the executions at Kozluk and Nezuk, the Trial Chamber found that records from the Zvornik Brigade established that its excavators and bulldozers had operated in the Kozluk area from 16 July 1995 and that this equipment was used for work related to the burial of the victims executed there.[208] The Trial Chamber further found that units of the 16th Krajina Brigade, operating under the command of the Zvornik Brigade, participated in the execution at Nezuk of 11 to 13 Bosnian Muslims on 19 July 1995.[209]

128. Finally, while the Trial Chamber found the evidence to be insufficient to establish the participation of the Drina Corps in the reburial of bodies from primary to secondary gravesites during the Autumn of 1995, it was satisfied, given the scale of the operation carried out within the Drina Corps zone of responsibility, that the Drina Corps must have at least known that this activity was occurring.[210]

129. The Trial Chamber concluded that, given that the subordinate Brigades continued to operate under the Command of the Drina Corps, the Command itself, including Radislav Krstić

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[205] *Ibid*., para. 232.
[206] *Ibid*., paras. 239 - 243.
[207] *Ibid*., para. 246.
[208] *Ibid*., paras. 252 - 253.
[209] *Ibid*., paras. 254 - 256.
[210] *Ibid*., paras. 257 - 261.

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as the Commander, must have known of their involvement in the executions as of 14 July 1995.[211] The Trial Chamber found that Krstić knew that Drina Corps personnel and resources were being used to assist in those executions yet took no steps to punish his subordinates for that participation.[212] As the Trial Chamber put it, "there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets."[213] The Trial Chamber inferred the genocidal intent of the accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. However, knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent on his part.

130. Further, at the Appeals hearing the Prosecution emphasised - as evidence of Krstić's genocidal intent - the Trial Chamber's findings of incidents in which he was heard to use derogatory language in relation to the Bosnian Muslims. The Trial Chamber accepted that "this type of charged language is commonplace amongst military personnel during war."[214] The Appeals Chamber agrees with this assessment and finds that no weight can be placed upon Radislav Krstić's use of derogatory language in establishing his genocidal intent.

(e) <u>The Trial Chamber's other findings militating against a finding of genocidal intent</u>

131. The Trial Chamber also made numerous findings that militate against a conclusion that Radislav Krstić had genocidal intent. It found that although Krstić was not a reluctant participant in the forcible transfer of the Bosnian Muslim population, he did appear concerned to ensure that the operation was conducted in an orderly fashion. He simply wanted the civilian population out of the area and he had no interest in mistreating them along the way. The Trial Chamber acknowledged, moreover, that the evidence could not establish that "Radislav Krstić himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population" and that he "appeared as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July

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[211] *Ibid*., para. 296.
[212] *Ibid*., para. 418.
[213] *Ibid*., para. 633.
[214] *Ibid*., para. 336.

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1995."[215] The Trial Chamber found that "left to his own devices, it seems doubtful that Krstić would have been associated with such a plan at all."[216]

132. The Trial Chamber also found that Radislav Krstić made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potočari. In an intercept of 12 July 1995, he was heard ordering that no harm must come to the civilians and, in the interview he gave in Potočari on 12 July 1995, guaranteed their safe transportation out.[217] The Trial Chamber found that Krstić showed similar concerns for the Bosnian Muslim civilians during the Žepa campaign. In an intercept of 25 July 1995 he was heard to order that a convoy of civilians bound for Kladanj be treated in a civilised manner, "so that nothing of the kind of problem we had before happens."[218] The Trial Chamber concluded that while this intercept suggested that Radislav Krstić was anxious for the transfer to proceed properly, it also indicated that he was aware of problems with earlier transfers.[219] The conclusion that he was "aware of problems with earlier transfers," and now took steps to avoid mistreatment, goes against the Trial Chamber's conclusion that Krstić had been a willing participant in a joint criminal enterprise of genocide.

133. Finally, the Trial Chamber referred to the evidence of a Defence witness that on 13 July 1995 he had a conversation about the Bosnian Muslim column with Krstić, who had expressed the view that the VRS should allow the column to pass so that the situation could be "ended as it should." The Trial Chamber relied on the evidence as indicating awareness on the part of Radislav Krstić that attempts were being made to capture the men from the column. The evidence, however, indicates that Krstić harboured no genocidal intent.[220] His own particular intent was directed to a forcible displacement. Some other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. It would be erroneous, however, to link Krstić's specific intent to carry out forcible displacement with the same intent possessed by other members of the Main Staff, to whom the forcible displacement was a means of advancing the genocidal plan.

[215] *Ibid*., para. 420.
[216] *Ibid*.
[217] *Ibid*., para. 358.
[218] *Ibid*., para. 359.
[219] *Ibid*., para. 360.
[220] *Ibid*., para. 374.

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(f) The Appeals Chamber's preliminary conclusion regarding the Trial Chamber's finding of Radislav Krstić's genocidal intent

134. As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.

E. The Criminal Responsibility of Radislav Krstić: Aiding and Abetting Genocide

135. The issue that arises now is the level of Radislav Krstić's criminal responsibility in the circumstances as properly established. All of the crimes that followed the fall of Srebrenica occurred in the Drina Corps zone of responsibility. There was no evidence that the Drina Corps devised or instigated any of the atrocities, and the evidence strongly suggested that the criminal activity was being directed by some members of the VRS Main Staff under the direction of General Mladić.[221] At the time the executions commenced Krstić was engaged in preparing for combat activities at Žepa and, from 14 July 1995 onwards, directing the attack itself.[222]

136. At trial the Defence had argued that, given the involvement of General Mladić, Radislav Krstić could do nothing to prevail upon General Mladić and stop the executions.[223] The Trial Chamber however found evidence of General Mladić's orders being challenged by the Drina Corps Command, and in particular, evidence of Krstić countering an order issued by the Main Staff.[224] The Trial Chamber also found evidence of Radislav Krstić's continued loyalty to General Mladić despite his knowledge of General Mladić's role in the genocide at Srebrenica.[225]

137. As has been found above, it was reasonable for the Trial Chamber to conclude that, at least from 15 July 1995, Radislav Krstić had knowledge of the genocidal intent of some of the Members of the VRS Main Staff. Radislav Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main

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[221] *Ibid*., para. 290.
[222] *Ibid*., para. 378.
[223] *Ibid*., para. 416.
[224] *Ibid*., para. 416, 417.
[225] *Ibid*., para. 417.

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Staff would not have been able to implement its genocidal plan. Krstić knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstić is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator.[226] This charge is fairly encompassed by the indictment, which alleged that Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.[227]

138. Krstić's responsibility is accurately characterized as aiding and abetting genocide under Article 7(1) of the Statute, not as complicity in genocide under Article 4(3)(e). The charge of complicity was also alleged in the indictment, as Count 2.[228] The Trial Chamber did not enter a conviction on this count, concluding that Radislav Krstić's responsibility was that of a principal perpetrator.[229] As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide.[230] There is support for a position that Article 4(3) may be the more specific provision (*lex specialis*) in relation to Article 7(1).[231] There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal's Statute directs, into Article 4(3), and so the proper characterization of such individual's criminal liability would be that of aiding and abetting genocide.[232]

139. The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any "crime referred to in articles 2 to 5 of the present Statute," including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is

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[226] *See Krnojelac* Appeal Judgement, para. 52; *Vasiljević* Appeal Judgement, para. 102.
[227] Indictment, paras. 18, 23.
[228] Indictment, paras. 21 - 26. The Appeals Chamber notes that there was ample discussion on the issue of aiding and abetting versus complicity to genocide during the Appeals hearing, in response to questions posed by the bench. T 431-437.
[229] Trial Judgement, paras. 642 – 644.
[230] *See ibid.*, para. 640; *see also Semanza* Trial Judgement, paras. 394 - 395 & n. 655.
[231] *See Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 *Bis* Motion for Judgement of Acquittal, para. 47; *Semanza* Trial Judgement, paras. 394 – 395.
[232] *See Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 *Bis* Motion for Judgement of Acquittal, para. 47.

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possible. In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting.[233] Given the Statute's express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić's responsibility is properly characterized as that of aiding and abetting genocide.[234]

140. This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.[235] This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.

141. Many domestic jurisdictions, both common and civil law, take the same approach with respect to the *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of genocide. Under French law, for example, an aider and abettor need only be aware that he is aiding the principal perpetrator by his contribution,[236] and this general requirement is applied to the specific prohibition of the crime of genocide.[237] German law similarly requires that, in offences mandating a showing of a specific intent (*dolus specialis*), an aider and abettor need not possess the same degree of *mens rea* as the principal perpetrator, but only to be aware of the perpetrator's intent.[238] This general principle is applied to the prohibition of genocide in Section 6 of the German

[233] *See Krnojelac* Appeal Judgement, para. 70 ("The Appeals Chamber notes first of all that, in the case-law of the Tribunal … this term [*accomplice*] has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.") (citing *Tadić* Appeal Judgement, paras. 220, 229).

[234] In this Appeal, the Appeals Chamber is concerned solely with the application to Article 4(3) of only one mode of liability deriving from Article 7(1), that of aiding and abetting. The Appeals Chamber expresses no opinion regarding other modes of liability listed in Article 7(1).

[235] *See Krnojelac* Appeal Judgement, para. 52 ("the aider and abettor in persecution, an offence with a specific intent, must be aware . . . of the discriminatory intent of the perpetrators of that crime," but "need not share th[at] intent"); *Vasiljević* Appeal Judgement, para. 142 ("In order to convict [the accused] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that [he] had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate . . . ."); *see also Tadić* Appeal Judgement, para. 229 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.").

[236] *Code Pénal*, Art. 121-7 ("Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation."); *see also* Cour de Cassation, Chambre criminelle, 1st October 1984, summary 96.

[237] *Code Pénal*, Art. 211-1.

[238] *See* section 27(1) of the German Penal Code (*Strafgesetzbuch*). According to section 2 of the German Code of Crimes Against International Law (CCIL), section 27(1) of the German Penal Code is applicable to crimes of genocide.

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Code of Crimes Against International Law.[239] The criminal law of Switzerland takes the same position, holding that knowledge of another's specific intent is sufficient to convict a defendant for having aided a crime.[240] Among the common law jurisdictions, the criminal law of England follows the same approach, specifying that an aider and abettor need only have knowledge of the principal perpetrator's intent.[241] This general principle again applies to the prohibition of genocide under the domestic English law.[242] The English approach to the *mens rea* requirement in cases of aiding and abetting has been followed in Canada and Australia,[243] and in some jurisdictions in the United States.[244]

142. By contrast, there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group. Article 4 of the Statute is most naturally read to suggest that Article 4(2)'s requirement that a perpetrator of genocide possess the requisite "intent to destroy" a protected group applies to all of the prohibited acts enumerated in Article 4(3), including complicity in genocide.[245] There is also evidence that the drafters of the Genocide Convention intended the charge of complicity in genocide to require a showing of genocidal intent. The U.K. delegate in the Sixth Committee of the General Assembly "proposed adding the word 'deliberate' before 'complicity,'" explaining that "it was important to specify that complicity must be deliberate,

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See Albin Eser & Helmut Kreicker, Nationale Strafverfolgung Völkerrechtlicher Verbrechen (Freiburg 2003), Vol. I, pp. 107, 108.

[239] With the implementation of the Statute of the International Criminal Court (ICC) in Germany, Section 6 of the CCIL recently replaced former § 220a of the German Penal Code. *See* Gerhard Werle & Florian Jessberger *International Criminal Justice Is Coming Home: The New German Code of Crimes Against International Law*," Criminal Law Forum 13, (2002), pp. 201 - 202. The new provision is substantively similar. *See ibid.*, pp. 191 – 223. This article also provides a full reprint of the CCIL in English. The text is also available, both in English and in several other languages, at http://www.iuscrim.mpg.de/forsch/online_pub.html.

[240] *See* Arts. 25, 65 of the Swiss Criminal Code (*Schweizerisches Strafgesetzbuch*) ("La peine pourra être atténuée (art 65) à l'égard de celui qui aura intentiollement prêté assistance pour commetre un crime ou un délit."); *see also* Judgement of the Swiss Federal Supreme Court (*Schweizerisches Bundesgericht*) of 17 February 1995, Decisions of the Swiss Federal Supreme Court (*Bundesgerichtsentscheide*, 121 IV, pp. 109, 120.

[241] *See, e.g.*, *National Coal Board* v. *Gamble* [1959] 1 Q.B. 11.

[242] *See* Schedule 8, Art. 6 of the International Criminal Court Act of 2001 (specifying that a determination of liability in aiding and abetting genocide follows the general regulations of Section 8 of the Accessories and Abettors Act of 1861). The approach was the same under the pre-ICC English law. *See* Genocide Act of 1969 (replaced by the International Criminal Court Act on 31 August 2001); Official Report, Fifth Series, Parliamentary debates, Commons 1968-69, Vol. 777, 3 - 14 February 1969, pp. 480-509 (explaining that secondary liability with respect to genocide will be governed by the general principles of the English criminal law).

[243] *See Dunlop and Sylvester* v. *Regina* [1979] 2 S.C.R. 881 (Supreme Court of Canada) ("one must be able to infer that the accused had prior knowledge that an offence of the type committed was planned"); *Giorgianni* (1985) 58 A.L.R. 641 (High Court of Australia) (relying on *National Coal Board* to hold that, to "be convicted of aiding, abetting, counselling or procuring the commission of an offence," the accused must "know … all the essential facts which made what was done a crime").

[244] *See* Candace Courteau, Note, *The Mental Element Required for Accomplice Liability*, 59 La. L. Rev. 325, 334 (1998) (while the majority of federal and state jurisdictions in the United States require a showing that an aider and abettor shared the principal perpetrator's intent, some states still find knowledge to be sufficient).

[245] The same analysis applies to the relationship between Article II of the Genocide Convention, which contains the requirement of specific intent, and the Convention's Article III, which lists the proscribed acts, including that of complicity.

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because there existed some systems where complicity required intent, and others where it did not. Several delegates [representing Luxembourg, Egypt, Soviet Union, Yugoslavia] said that this was unnecessary, because there had never been any doubt that complicity in genocide must be intentional. The United Kingdom eventually withdrew its amendment, 'since it was understood that, to be punishable, complicity in genocide must be deliberate.'"[246] The texts of the Tribunal's Statute and of the Genocide Convention, combined with the evidence in the Convention's *travaux préparatoires*, provide additional support to the conclusion that the drafters of the Statute opted for applying the notion of aiding and abetting to the prohibition of genocide under Article 4.[247]

143. The fact that the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise does not negate the finding that Radislav Krstić was aware of their genocidal intent. A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.[248] In *Vasiljević*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators.[249] Accordingly, the Trial Chamber's conviction of Krstić as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead.[250]

144. The Appeals Chamber's examination of Radislav Krstić's participation in the crime of genocide has implications for his criminal responsibility for the murders of the Bosnian Muslim

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[246] William Schabas, *Genocide in International Law*, at 289 (2000) (quoting UN Doc. A/C.6/236 & Corr. 1; UN Doc. A/C.6/SR.87).

[247] As it is not at issue in this case, the Appeals Chamber takes no position on the *mens rea* requirement for the conviction for the offence of complicity in genocide under Article 4(3) of the Statute where this offense strikes broader than the prohibition of aiding and abetting.

[248] *See, e,g.*, *Krnojelac* Trial Judgement, paras. 489-490 (finding a defendant liable for having aided and abetted the crime of persecution, which requires the specific intent to discriminate, where the principal perpetrators of the crime were not identified). Although the Appeals Chamber, on unrelated grounds, increased the defendant's level of responsibility to that of a co-perpetrator, it rejected the defendant's appeal against his conviction as an aider and abettor. *See Krnojelac* Appeal Judgement, paras. 35-53. *See also Stakić* Trial Judgement, para. 534 (stating that "an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified") (citing *Musema* Trial Judgement, para. 174); *Akayesu* Trial Judgement, para. 531 (same).

[249] *See Vasiljević* Trial Judgement, para. 143.

[250] In entering a conviction against General Krstić as a participant in a joint criminal enterprise to commit genocide under Article 7(1) the Trial Chamber stated that he could also bear responsibility as a Commander pursuant to Article 7(3). The Trial Chamber concluded, however, that a conviction under Article 7(1) sufficiently expressed General Krstić's criminality. Trial Judgement, para. 652. The Appeals Chamber's determination that General Krstić is responsible as an aider and abettor is also based on Article 7(1). Even if General Krstić is also found to be responsible as a Commander, the Appeals Chamber concludes, as did the Trial Chamber, that the mode of liability under Article 7(1) best encapsulates General Krstić's criminality. This is because the most he could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior, General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so. *See Krnojelac* Trial Judgement, para. 127; not disturbed on appeal, *see Krnojelac* Appeal Judgement.

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civilians under Article 3, violations of the laws or customs of war, and for extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. As the preceding factual examination has established, there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.

F. Radislav Krstić's Criminal Responsibility for the Opportunistic Crimes Committed at Potočari

145. The Defence also contests the findings of the Trial Chamber in relation to Krstić's criminal responsibility for the crimes committed on 12 and 13 July 1995 at Potočari. The Trial Chamber found that Radislav Krstić was a participant in a joint criminal enterprise to forcibly remove the Bosnian Muslim civilians from Potočari, and so incurred criminal responsibility for the murders, beatings and abuses committed there as natural and foreseeable consequences of that joint criminal enterprise. The Defence argues that these crimes were not natural and foreseeable consequences of the ethnic cleansing campaign, and that the Trial Chamber's finding that Krstić was aware of them is contrary to the presumption of innocence.

146. According to the Defence, the evidence established that he was at Potočari on 12 July 1995 for at most two hours. There was no evidence to support the conclusion of the Trial Chamber that he had "first-hand knowledge that the refugees were being mistreated by VRS or other armed forces," or that he witnessed the inhumane conditions of the White House and the killing of civilians there. The Defence argues that, to the contrary, the evidence establishes that there were orders from the military authorities to treat the civilians humanely.[251] The Defence refers to an order of 9 July 1995 issued by Mr. Karadžić as Supreme Commander of the Serb forces, which expressly provided that the civilian population was to be treated in accordance with the Geneva Conventions,[252] the evidence of Drazen Erdemović that soldiers entering the town of Srebrenica were explicitly told not to fire at civilians,[253] the intercept of 12 July 1995 in which Radislav Krstić stated that nothing must happen to the civilians transported from

[251] Defence Appeal Brief, paras. 143 - 156.
[252] *Ibid.*, para. 154; Exh. D432.
[253] *Ibid.*, para. 154; Trial Testimony of Drazen Erdemović, T, p. 3083 (14 April 2000).

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Potočari,[254] and the statements he made in an interview given on 12 July 1995 during the bussing operation, that the Drina Corps had guaranteed the safety of the civilian population.[255]

147. The ethnic cleansing of the Bosnian Muslim civilians from Srebrenica was part of the Krivaja 95 operation in which Krstić was found to have played a leading role. Radislav Krstić knew that the shelling of Srebrenica would force tens of thousands of Bosnian Muslim civilians into Potočari because of the UN presence there. He was also well aware that there were inadequate facilities at Potočari to accommodate the Bosnian civilians.[256] As such, the Trial Chamber found he was responsible for setting the stage at Potočari for the crimes that followed.[257] Further, from his presence at two meetings convened by General Mladić at the Hotel Fontana he knew that the Bosnian Muslim civilians were in fact facing a humanitarian crisis at Potočari.[258] There was, therefore, sufficient evidence for the Trial Chamber to be satisfied that Radislav Krstić was aware that the Bosnian Muslim civilians at Potočari would be subject to other criminal acts.

148. As the Defence has argued, the Trial Chamber could only establish that Radislav Krstić was present in Potočari for one or two hours in the afternoon of 12 July. At this time he was involved in overseeing the bussing operation along with other VRS Officers, including General Mladić. However, VRS soldiers were generally mistreating the Bosnian Muslim civilians, and the situation facing the Bosnian Muslim civilians at Potočari was so obviously appalling that the Trial Chamber concluded that these conditions must have been apparent to him.[259] Further, while he was found to have been physically present for only a short period of time, the evidence established that he played a principal role in procuring and monitoring the movement of the buses throughout that day.[260] It also established that Drina Corp units under his command were heavily involved in organising and monitoring the transfer of the Bosnian civilians from Potočari. While the Trial Chamber found that this aspect of the operation appeared to be one of the more disciplined ones, and that it could not be satisfied that the Drina Corps was directly involved in any of the opportunistic crimes committed, the Trial Chamber nevertheless found that the Drina Corp units present at Potočari were also in a position to observe the pervasive mistreatment of the Bosnian Muslim civilians by other Serb forces. While the evidence established that on two occasions Krstić issued orders that the Bosnian Muslim civilians being transported on the buses were not to be harmed, there was no evidence of any

[254] *Ibid.*, para. 154, Trial Judgement para. 358.
[255] *Ibid.*
[256] Trial Judgement, paras. 355, 337.
[257] Trial Judgement, para. 335.
[258] Trial Judgement, paras. 339-343.
[259] Trial Judgement, paras. 350-354.
[260] Trial Judgement, para. 344 – 345, 347.

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attempts being made on the part of Radislav Krstić to ensure that these orders were respected.[261] There was also no evidence of Drina Corps units under his command taking any steps to ensure that the orders of their Commander were respected, or to report any contravention of these orders to him.

149. In these circumstances, the Defence's argument that the crimes committed against the civilian population of Potočari were not natural and foreseeable consequences of the joint criminal enterprise to forcibly transfer the Bosnian civilians is not convincing. The Trial Chamber reasonably found that the creation of a humanitarian crisis in Potočari fell within the scope of the intended joint criminal enterprise to forcibly transfer the civilian population. The Trial Chamber expressly found that, "given the circumstances at the time the plan was formed, Radislav Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and sheer lack of sufficient numbers of UN soldiers to provide protection."[262] The Appeals Chamber agrees with this finding. Further, given Krstić's role in causing the humanitarian crisis in Potočari, the issuance of orders directing that civilians not be harmed is not sufficient to establish that the crimes which occurred were not a natural and foreseeable consequence of the plan to forcibly transfer the civilians.

150. The Defence further argues that he cannot be held responsible for crimes that he was unaware were actually occurring. In making this argument, the Defence misunderstands the third category of joint criminal enterprise liability. For an accused to incur criminal responsibility for acts that are natural and foreseeable consequences of a joint criminal enterprise, it is not necessary to establish that he was aware in fact that those other acts would have occurred. It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result. As such, it was unnecessary for the Trial Chamber to conclude that Radislav Krstić was actually aware that those other criminal acts were being committed; it was sufficient that their occurrence was foreseeable to him and that those other crimes did in fact occur.

151. The Defence further asserts that Radislav Krstić should not be found guilty with respect to the crimes committed at Potočari on 12 and 13 July 1995 because General Živanović was

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[261] *Ibid.*, para. 358.
[262] *Ibid.*, para. 616.

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Commander of the Drina Corps until 13 July 1995.[263] This argument is inapposite. The responsibility of Radislav Krstić for the crimes committed at Potočari arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians. The opportunistic crimes were natural and foreseeable consequences of that joint criminal enterprise. His conviction for these crimes does not depend upon the rank Krstić held in the Drina Corps staff at the time of their commission. Radislav Krstić's appeal against his convictions for the opportunistic crimes that occurred at Potočari as a natural and foreseeable consequence of his participation in the joint criminal enterprise to forcibly transfer is dismissed.

[263] Defence Appeal Brief, para. 208.

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IV. THE DISCLOSURE PRACTICES OF THE PROSECUTION AND RADISLAV KRSTIĆ'S RIGHT TO A FAIR TRIAL

152. The Defence has alleged, as a further ground for appeal, that the Prosecutor's disclosure practices violated Radislav Krstić's right to a fair trial under Article 20 of the Statute.[264] The Appeals Chamber will address each of the alleged practices which the Defence argues resulted in prejudice to its case, namely: withholding copies of exhibits for tactical reasons; concealing a tape for later submission as evidence in cross-examination; various violations of Rule 68 (disclosure of exculpatory material); and the questionable credibility of the testimony of two witnesses.

153. As a general proposition, where the Defence seeks a remedy for the Prosecution's breach of its disclosure obligations under Rule 68, the Defence must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence's case suffered material prejudice as a result.[265] In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply[266] before considering whether a remedy is appropriate.[267]

A. <u>Withholding copies of exhibits for tactical reasons</u>

154. Prior to trial, and pursuant to Rule 65*ter*(E) (as it then was),[268] the Defence sought copies of exhibits upon which the Prosecution intended to rely at trial. The Prosecution refused to disclose these exhibits on the basis that it was not bound to do so absent a request for reciprocal disclosure under Rule 67(C).[269] The matter was raised in a pre-trial conference, where the Defence was denied access to the documents in question.[270] The exhibits relied upon by the Prosecution were subsequently disclosed on a piecemeal basis throughout the trial.

155. In refusing to order the Prosecution to disclose its exhibits prior to trial, the pre-trial Judge held that if the Prosecution was obliged to communicate all of its exhibits to the Defence, in the

[264] *Ibid*., paras. 102 - 142.
[265] *Blaškić* Decision on the Appellant's Motion for the Production of Material, para. 38. *See also Akayesu* Appeal Judgement, para. 340.
[266] *Brđjanin* Decision on Motion for Relief from Rule 68 Violations by the Prosecutor.
[267] For example, where the Defence knew of the existence of the non-disclosed evidence, prejudice cannot be shown. In the *Blaškić* Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, it was held that "the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation."
[268] Rule 65*ter* has since been amended.
[269] Prosecution's Response to Motion for Production of Evidence, 10 December 2001, para. 41; incorporated by reference into the Prosecutor's Response Appeal Brief at para. 3.51.
[270] Transcript of Pre-Trial Conference (6 March 2000), pp. 398 - 400.

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absence of any reciprocal disclosure by the Defence under Rule 67,[271] an inequality of arms would result.[272]

156. On appeal, the Defence argues that the pre-trial judge erred in finding that the Prosecution was not obliged by Rule 65*ter* to disclose copies of exhibits to the Defence prior to the commencement of trial, and that Krstić therefore did not receive a fair trial.[273] The Defence seeks a re-trial as a remedy.[274]

Was the Prosecution obliged to disclose copies of exhibits under Rule 65*ter* (as it was) at the time of trial?

157. The Defence makes its submission in two parts. The first part relies on the reasoning set out in a decision in *Krajišnik & Plavšić,*[275] delivered after the closure of arguments in the *Krstić* trial. That decision held that Rule 65*ter*(E) obliged the Prosecution to disclose copies of exhibits to the Defence prior to trial.[276]

158. The second part of the Defence's submission relies upon an amendment to Rule 65*ter*(E), which was adopted by the Judges of the Tribunal on 13 December 2001.[277] That amendment altered the terms of Rule 65*ter*(E) so as to explicitly require the Prosecution to provide to the Defence copies of exhibits listed in pre-trial disclosure.[278] The Defence submits that this subsequent amendment demonstrates that the decision in *Krajišnik & Plavšić* was adopted by the entire Tribunal.[279]

159. In contrast to the finding in the *Krstić* pre-trial conference, the Trial Chamber in *Krajišnik & Plavšić* held:

> The only way in which a defence can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely, including exhibits. The Prosecution, by not disclosing the documents prior to trial, places the defence in a position in which it will not be able to prepare properly; and it is this fact that is likely to lead to a violation of the principle of equality of arms.[280]

160. As such, that Trial Chamber held that Rule 65*ter*(E)(iii) required the Prosecution to disclose the actual exhibits appearing in the list, irrespective of any reciprocal pre-trial disclosure of exhibits

[271] Presumably the pre-trial judge was referring to Rule 67, and not Rule 68 as stated in the transcript.
[272] Transcript of Pre-Trial Conference (6 March 2000), pp. 398 - 400.
[273] Defence Appeal Brief, paras. 105 and 107.
[274] *Ibid.*
[275] *Krajišnik & Plavšić* Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65*ter*, 66(B) and 67(C).
[276] *Krajišnik & Plavšić,* paras. 7 and 8.
[277] The amendment entered into force on 28 December 2001.
[278] Rule 65*ter*(E)(iii): "The Prosecutor shall serve on the defence copies of the exhibits … listed."
[279] Defence Appeal Brief, para. 106.

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by the Defence under Rule 67. The Trial Chamber in *Krajišnik & Plavšić* reasoned that, since Rule 65*ter*(E)(iii) referred to possible objections by the Defence to the authenticity of the exhibits, the Defence would need to have access to those exhibits in order to assess their authenticity.[281]

161. The subsequent amendment of the Rule adopts this approach. At issue is whether the amendment to Rule 65*ter* reflects a consensus as to the proper interpretation of the former Rule, and whether the Trial Chamber in *Krajišnik & Plavšić* accurately described that interpretation.

162. The Appeals Chamber rejects the argument by the Defence that the amendment to Rule 65*ter*(E) binds the Appeals Chamber to adopt the interpretation submitted by the Defence. It is common for the Rules to be amended from time to time where those Rules are shown through practice to require clarification or modification. At most, the amendment of the Rule may cast light on the ambiguity of the former formulation of the Rule, but it does not necessarily assist in the interpretation of it. The new Rule 65*ter*(E) requires the Prosecution to provide the Defence with access to copies of the Prosecution's exhibits prior to trial. Prior to the amendment, however, the actual scope of the Rule was open to interpretation, as shown by the contrasting decisions of the *Krstić* pre-trial conference and of the Trial Chamber in *Krajišnik & Plavšić*.

163. The text of the former Rule 65*ter*(E) did not expressly require exhibits themselves to be disclosed, but referred only to them being "listed", suggesting that Rule 65*ter*(E) was not a means by which the disclosure of exhibits could be secured. The subsequent amendment to the Rules suggests, however, that the judges of the Tribunal have recognised that this practice may lead both the Defence and the Prosecution into difficulties when it comes to contesting the authenticity of exhibits. Where the parties contest exhibits, delays to the trial could occur while adjournments are granted in order to permit the parties to investigate those exhibits as they are tendered. As such, the subsequent amendment may have been a matter relevant to the efficient management of the trial itself, and not the result of any perceived unfairness to the Defence.

164. Furthermore, in this case the Prosecutor had reached an agreement with Defence Counsel – at the suggestion of the Trial Chamber - and established a regime for the disclosure of certain evidence.[282] In agreeing to the disclosure regime with the Defence, the Prosecution was in fact exceeding its obligations under the Rules in as much as those obligations had been determined pre-trial.[283] At trial, the Defence did not object to this agreement[284] and made no complaint regarding

[280] *Krajišnik & Plavšić,* para. 7.
[281] *Ibid*, para. 8.
[282] Prosecution Response, paras. 3.27 - 3.37. While this agreement governed military documents for which admission as evidence was sought, that category of evidence constituted a substantial part of the Prosecution's case.
[283] As noted by the Prosecution in its Response to the Defence Appeal Brief, para. 3.28.
[284] Prosecution Response, para. 3.36.

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the disclosure regime.[285] On appeal, the Prosecution argues that the Defence's acceptance of this regime means that the Defence cannot now claim that the regime was unfair.

165. The Appeals Chamber does not agree that initial compliance by the Defence with the disclosure regime can be a basis for refusing to allow the Defence to argue on appeal that it was unfair. However, to succeed on this ground of appeal, the Defence would have to establish that it was prevented from properly investigating the authenticity of the exhibits by the Trial Chamber's interpretation of the Rule, and that it suffered prejudice as a result. The Defence has not established this. On the contrary, the Trial Chamber did permit adjournments which allowed the Defence the opportunity to contest the authenticity of various exhibits tendered by the Prosecution.[286]

166. The Appeals Chamber accordingly dismisses this ground of appeal.

B. Concealing a tape and its later submission as evidence in cross-examination

167. During the presentation of the Defence's case at trial, the Prosecution introduced taped evidence that was played to Radislav Krstić during his cross-examination. The existence of the taped evidence had not been disclosed to the Defence until after the closure of both the Prosecution's case and the evidence-in-chief of the accused,[287] even though the Prosecution had been in possession of it for some time. The Defence had, however, been aware of the contents of the tape prior to its introduction to the Trial Chamber,[288] and had not objected to it being played at the time.[289]

168. On this appeal, the Defence submits that a new trial should be ordered for two reasons: the alleged impossibility of the Trial Chamber ignoring the contents of the tape; and the Prosecution's employment of so-called "sharp" trial tactics.[290]

1. The alleged impossibility of the Trial Chamber ignoring the contents of the tape

169. The Defence argues that, once the tape had been played to the Trial Chamber, it became impossible for the Trial Chamber to ignore its contents when deciding on the guilt and sentence of the accused,[291] even though the Trial Chamber had excluded it from evidence.[292]

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[285] *Ibid*.
[286] *Ibid.*
[287] Defence Appeal Brief, paras. 118 - 119.
[288] The tape had been disclosed to the Defence the day before it was used at trial. *See* Prosecution's Response, para. 3.44, citing T. 6799.
[289] Prosecution Response, para. 3.45.
[290] Defence Appeal Brief, para. 110 - 123.
[291] *Ibid*., para. 121.

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170. The Appeals Chamber does not accept this argument. The role of Judges as arbiters of both fact and of law is essential to the basic functioning of the Tribunal. Judges are frequently required to disregard evidence from their deliberations, not only as an incident to their role as Judges, but also as an acknowledged part of their judicial function in assessing the admissibility of evidence at trial. [293]

171. The Defence has shown neither the existence of any prejudice[294] resulting from the playing of the tape, nor that the contents of the tape were taken into account or relied upon by the Trial Chamber in arriving at its conclusions.[295] There are no grounds to support the Defence's submission that the playing of the tape influenced the Judges, and therefore no re-trial is warranted.

2. "Sharp" Trial Tactics

172. The Defence argues that the manner in which the tape was used constituted a "sharp" trial tactic and that the Appeals Chamber should deter future prosecutorial misconduct by granting the Defence a re-trial.[296] The Prosecution has defended its conduct by arguing that there is no directly applicable Rule prohibiting parties from introducing evidence in the manner described.[297]

173. The allegation made by the Defence is serious, and the Appeals Chamber treats it accordingly. The Defence suggests that the Prosecution deliberately declined to disclose the tape as an exhibit, deciding instead for tactical reasons to conceal it for use in cross-examination "so that the defence would not have an opportunity to explain it."[298] It is true that the contents of the tape were ultimately excluded by a Decision of the Trial Chamber.[299] In that Decision, the Trial Chamber considered the Tribunal's practice relating to the admission of rebuttal evidence.[300] That practice precludes the admission of rebuttal evidence which could not reasonably have been anticipated.

[292] Decision on the Defence Motions to Exclude Exhibits in Rebuttal Evidence and Motion for Continuance (confidential), 25 April 2001; references are to the public version of 4 May 2001. This Decision was made after hearing nine witnesses testify about the evidence in rebuttal, and after considering thirty exhibits relating to the conversation and hearing it played multiple times in court. *See* Defence Appeal Brief, para. 120.
[293] See *Akayesu* Appeal Judgement, para. 343.
[294] *Akayesu* Appeal Judgement, paras. 341 - 344.
[295] *Ibid.*
[296] Defence Appeal Brief, paras. 122 - 123.
[297] In the Prosecution Response at paragraph 3.50, the Prosecution submitted that no Rule at that time precluded it from introducing the tape solely for the purpose of impeachment. Rule 65*ter*(E) applies only to exhibits and not to evidence submitted for the purposes of impeachment.
[298] Defence Appeal Brief, para. 113.
[299] Decision on the Defence Motions to Exclude Exhibits in Rebuttal Evidence and Motion for Continuance (confidential), 25 April 2001, public version 4 May 2001.
[300] *Ibid.*, paras. 10 – 13.

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174. The Decision of the Trial Chamber, together with the nature of the evidence in question and the amount of time in which the Prosecution possessed it, support the Defence's submission. There appear to be sufficient grounds in the circumstances to question the propriety of the Prosecution as regards the disclosure of this evidence. Where counsel has engaged in such misconduct, the appropriate sanctions are provided by Rule 46 (Misconduct of Counsel). Given that the tape was excluded from consideration at trial, the Appeals Chamber concludes that the application of those Rules, and not a re-trial, is the correct way to address the conduct of the Prosecution as regards the concealed tape.

175. The Defence's appeal for a re-trial on the grounds of concealing the tape is accordingly dismissed, and the Appeals Chamber considers the appropriate response to the Prosecution's conduct below.

C. The Various Violations of Rule 68

176. The Defence argues that the Prosecution violated its disclosure obligations under Rule 68 by: failing to disclose a number of witness statements containing exculpatory material; failing to disclose exculpatory material amongst other evidence without identifying that material as exculpatory; preventing the Defence from taking copies of exculpatory materials, and instead requiring the Defence to view the materials at the offices of the Prosecution; and failing to make two disclosures as soon as practicable.

1. Alleged Breach of Rule 68 for failure to disclose witness statements containing exculpatory material

177. The Defence submits that a number of interviews with witnesses, conducted by the Prosecution prior to the Trial Chamber delivering Judgement, contained exculpatory evidence and that the failure of the Prosecution to disclose this material at that time constituted a breach of Rule 68.[301] The Prosecution conceded that of the ten witness statements filed by the Defence in its first

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[301] See Defence Rule 68 Brief, para. 1. On 30 November 2001, the Defence filed its Motion for Production of Evidence, 30 November 2001, seeking the production of material which it alleged the Prosecution should have disclosed to it at trial under Rule 68. Following this motion, a number of filings were made by each party on the issue (see Annex A, Procedural Background). A number of reports updating the status of disclosure were also filed by the parties after they had reached an agreement: Prosecution's Status Report (partly confidential), 28 July 2003; Status Report (filed by the Prosecution, partly confidential), 17 March 2003; Prosecution's Status Report on Disclosure as of November 2002, 14 November 2002; Second Status Report on Appellant's Request for Deferral of Decision on Motion for Production of Evidence, 4 June 2002; Prosecution's Status Report on Disclosure, signed 5 June 2002, filed 6 June 2002; Status Report on Appellant's Request for Deferral of Decision on Motion for Production of Evidence, signed 19 March 2002, filed 20 March 2002. The additional disclosure by the Prosecution culminated in the Defence filing a motion for the admission of additional evidence on appeal pursuant to Rule 115 (Rule 115 Defence Motion to Present Additional Evidence, 10 January 2003; Supplemental Rule 115 Defence Motion to Present Additional Evidence, filed confidentially 20 Jan 2003; Defence Addendum to Rule 115 Motion with Request for Authorisation to Exceed Page Limit on the Rule 115 Motion, filed confidentially 27 January 2003; Defence Addendum to Rule 115 Motion with

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Rule 115 Motion, six "fall within the ambit of Rule 68,"[302] but submits that the other four statements did not fall within the Rule, and that in any case, the Defence has been unable to establish prejudice resulting from the failure to disclose.[303]

(a) Standard for characterisation of evidence as Rule 68 Material

178. The jurisprudence of the Tribunal mirrors the text of the Rule itself, and has established that material will fall within the ambit of Rule 68 if it tends to suggest the innocence or mitigate the guilt of the accused, or affects the credibility of Prosecution evidence.[304] Material will affect the credibility of the Prosecution's evidence if it undermines the case presented by the Prosecution at trial; material to be disclosed under Rule 68 is not restricted to material which is in a form which would be admissible in evidence.[305] Rather, it includes all information which in any way tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of Prosecution evidence, as well as material which may put an accused on notice that such material exists.[306]

179. The Prosecution argues that any interpretation of Rule 68 should draw upon the practice of domestic jurisdictions with comparable disclosure regimes.[307] It relies heavily upon cases from the United States in arguing that, for a document to fall within Rule 68, it must be exculpatory "on its face."[308] The Appeals Chamber finds the meaning and purpose of Rule 68 to be sufficiently clear, and does not accept that the jurisprudence of the United States or other jurisdictions is relevant to determining its scope.

180. The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of

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Request for Authorisation to Exceed the Page Limit in the Rule 115 Motion Filed on 27 January 2003, public version filed on 12 February 2003; Defence Reply to the Prosecution's Response to Defence Motions for Additional Evidence Under Rule 115, filed confidentially on 12 February 2003; Supplemental Rule 115 Motion to Present Additional Evidence, filed confidentially on 12 February 2003; Rule 115 Defence Motion to Present Additional Evidence Filed on 10 January 2003, public version filed on 12 February 2003.) It was in that motion that the Defence made submissions relating to violations of Rule 68. The parties subsequently agreed (Status Conferences, 27 August 2002, Transcript p. 43; 25 November 2002, Transcript pp. 58 - 59, 65, 67 - 68; 19 March 2003, Transcript, pp. 79 - 80) that allegations relating to Rule 68 and the fairness of the trial should be dealt with separately from the Rule 115 motion. In accordance with this agreement, the Defence confidentially filed its "Defence Appeal Brief Concerning Rule 68 Violations," on 11 April 2003 ("Defence Rule 68 Brief") to which the Prosecution responded confidentially in its Response to Defence Appeal Brief Concerning Rule 68 Violations, 8 May 2003 ("Prosecution Rule 68 Brief").

[302] Prosecution Rule 68 Brief, para. 2.1; See para. 3.9 where the Prosecution specifies that six statements rather than five contain Rule 68 materials.

[303] *Ibid*.

[304] *Čelebići* Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68, para. 12.

[305] Decision on Prosecution's Extremely Urgent Request for Variation of Orders Regarding Private Session Testimony, 14 November 2003.

[306] *Krstić* Decision on Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), 27 Mar 2003, p 4; *Kordić & Čerkez* Decision on Motion by Dario Kordić for Access to Unredacted Portions of October 2002 Interviews with Witness "AT", para. 24.

[307] Prosecution Rule 68 Brief, para. 2.7.

[308] *Ibid*., para. 2.15, citing *United States v Comosona*, 848 F. 2d 1110 (10th Cir 1988) at p. 1115.

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whether the governing Rule has been breached. The Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope for application in the manner suggested by the Prosecution.

181. The Appeals Chamber will proceed with its consideration of the Rule 68-based arguments relating to exculpatory material on this basis.

(b) Did the four witness statements constitute exculpatory evidence?

182. As discussed above, the disputed evidence relates to the statements of four protected witnesses submitted on appeal as additional evidence pursuant to Rule 115.[309]

183. In the first statement, it was said that Colonel Beara had directly requested the witness to prepare for the burial of Muslim men executed after the fall of Srebrenica. The Defence claims that this is evidence of the existence of a parallel chain of command, because Colonel Beara did not involve Radislav Krstić in the action.[310] The Appeals Chamber has already determined that the testimony of this witness does not support the Defence's submissions.[311]

184. Regarding the second statement, the Defence submits that it was an additional example of General Mladić and the Main Staff bypassing the traditional chain of command, thereby distancing Krstić from the events that occurred.[312] The Appeals Chamber has found that this evidence does not constitute direct evidence that the Main Staff bypassed Radislav Krstić,[313] and that in any event, this evidence could not have altered the verdict of the Trial Chamber.[314]

185. The third statement is from a witness who allegedly told the Prosecution that the prisoners in Bratunac were under the control of the military's Security Service.[315] The Defence argues that this evidence supports Radislav Krstić's position that he had no control over the prisoners, and that the Security Service acted independently of the Corps Command.[316] The Appeals Chamber has already found that this evidence would not have made a difference to the verdict of the Trial Chamber, in

[309] *Krstić* Decision on Applications for Admission of Additional Evidence on Appeal.
[310] Defence Rule 68 Brief, para. 27.
[311] Rule 115 Reasons, para. 43.
[312] Defence Rule 68 Brief, para. 28.
[313] Rule 115 Reasons, para. 50.
[314] *Op cit.*, para. 54.
[315] Defence Rule 68 Brief, para. 29.
[316] *Ibid.*

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that it does not in any way suggest that the Drina Corps did not or would not have known of those events.[317]

186. The fourth statement is that of a witness who indicated that while the order appointing Krstić to the position of Corps Commander was dated 13 July 1995, this did not necessarily imply that Radislav Krstić took up his duties at that time, nor that he had to cover the duty on that day.[318] The Appeals Chamber has already determined that this evidence is insignificant in light of the abundant evidence considered by the Trial Chamber that Krstić in fact assumed his command on 13 July 1995.[319]

(c) Remedy

187. As a potential remedy, the Defence has submitted that the Prosecution's failure to disclose material exculpatory under Rule 68 warrants a re-trial.[320] In addition, where an accused has been prejudiced by a breach of Rule 68, that prejudice may be remedied where appropriate through the admission of additional evidence on appeal under Rule 115.[321] On this appeal, the evidence in question did not justify its admission under Rule 115,[322] and the Appeals Chamber finds that it does not justify a re-trial. Nevertheless, it remains the fact that the Defence was able to seek admission of the material as additional evidence. It has therefore not shown that Radislav Krstić have suffered any prejudice. The Defence's petition is therefore dismissed.

188. To the extent that the Appeals Chamber has found that the Prosecution has failed to respect its obligations under the Rules, those breaches fall to be addressed by the appropriate remedies, namely Rule 46 (Misconduct of Counsel) and Rule 68*bis* (Failure to Comply with Disclosure Obligations).

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[317] Rule 115 Reasons, para. 56.
[318] Defence Rule 68 Brief, para. 37.
[319] Rule 115 Reasons, para. 119.
[320] Defence Rule 68 Brief, para. 40, citing the *Blaškić* Decision on the Defence Motion for Sanction's for the Prosecutor's Continuing Violation of Rule 68. The *Blaškić* Decision stated at p. 3 that "possible violations of Rule 68 are governed less by a system of sanctions than by the judge's definitive evaluation of the evidence presented by either of the parties, and the possibility which the opposing party will have had to contest it."
[321] For example, the evidence of Dragan Obrenović was admitted under Rule 115, while the evidence of other witnesses whose statements form the subject of this application was rejected. *See Krstić* Decision on Applications for Admission of Additional Evidence on Appeal, and Rule 115 Reasons, para. 3.
[322] Rule 115 Reasons.

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2. <u>Alleged Breach of Rule 68 for the Prosecution's failure to identify evidence disclosed under Rule 68 as being exculpatory</u>

189. The Defence submits that the Rule 68 disclosures of 25 June 2000 and 5 March 2001 made during trial were buried beneath other material provided at the time, and that the failure of the Prosecution to identify the disclosed material as being disclosed under Rule 68 breached the spirit and letter of that Rule.[323] In response, the Prosecution argues that there is no specific requirement obliging it to indicate the provision in accordance with which a disclosure of documents occurs, or to identify the specific material disclosed as exculpatory.[324]

190. The Appeals Chamber agrees with the Prosecution that Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory. The jurisprudence of the Tribunal shows that while some Trial Chambers have recognised that it would be fairer for the Prosecution to do so,[325] there is no *prima facie* requirement, absent an order of the Trial Chamber to that effect, that it must do so.

191. However, the fact that there is no *prima facie* obligation on the Prosecution to identify the disclosed Rule 68 material as exculpatory does not prevent the accused from arguing, as a ground of appeal, that he suffered prejudice as a result of the Prosecution's failure to do so.

192. In this case, the Appeals Chamber has not been persuaded by the Defence that the failure of the Prosecution to identify exculpatory evidence it disclosed resulted in any prejudice to the Defence. The Defence had both sufficient time in which to analyse the material, and the opportunity to challenge it during cross-examination.

193. This ground of appeal accordingly is dismissed.

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323 Defence Appeal Brief, para. 128.
324 Prosecution Response, para. 3.53.
325 *Krajišnik & Plavšić* Decision on Motion from Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, p. 2: "as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it."

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3. Whether Rule 68 requires the Prosecution to allow the Defence to take copies of exculpatory material

194. The Defence submits that, in only being permitted to view copies of exculpatory evidence in the Prosecution's office, and being refused copies of the materials, the Prosecution breached Rule 68, as well as its obligation to act as a "minister of justice."[326]

195. On a plain reading of Rule 68, the Prosecution is merely obliged to disclose the existence of Rule 68 material, not to provide the actual material itself. If the Defence had demonstrated that the preparation of its case had been prejudiced by the Defence only being able to view the Rule 68 material held by the Prosecutor, then it should have brought this prejudice to the attention of the Trial Chamber. The Prosecution did disclose the existence of this material. The Defence has not persuaded the Appeals Chamber that it did indeed suffer any prejudice during the trial, and this ground of appeal is dismissed.

4. Whether two disclosures were made "as soon as practicable"

196. The Defence submits that certain disclosures[327] were not made "as soon as practicable," as required by Rule 68. For example, the disclosures of 25 June 2000 occurred over two years after the Prosecution came into possession of the evidence, and more than three months after the trial had begun.[328] The disclosures of 5 March 2001 occurred over three months after the Prosecution came into possession of the evidence.[329] The Defence has also alleged that the Prosecution deliberately withheld evidence in order eventually to avail itself of the reciprocal discovery mechanism of Rules 67(B) and 67(C).[330]

197. The Appeals Chamber is sympathetic to the argument of the Prosecution that in most instances material requires processing, translation, analysis and identification as exculpatory material. The Prosecution cannot be expected to disclose material which – despite its best efforts - it has not been able to review and assess.[331] Nevertheless, the Prosecution did take an inordinate amount of time before disclosing material in this case, and has failed to provide a satisfactory explanation for the delay. The Prosecution's submission that the Defence had enough time to consider the material[332] may allay allegations of prejudice to the Defence's case, but it does not

[326] Defence Appeal Brief, para. 129.
[327] Notably the disclosures of 25 June 2000 and 5 March 2001.
[328] Defence Appeal Brief, para. 129.
[329] *Ibid.*
[330] *Ibid.*, para. 129 *et seq.*
[331] Prosecution Response, para. 3.59.
[332] In its response at para. 3.60 the Prosecution submits that, in relation to the 25 June 2000 disclosure, the Defence had 24 days to examine the binders before commencement of cross examination, and that any material not identified as

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contradict the allegation that the Prosecution breached Rule 68 by not providing the material as soon as practicable. It is not for the Prosecution to determine the amount of time the Defence requires to conduct its case.

198. In the absence of sufficient evidence, the Appeals Chamber decides not to consider whether or not the Prosecution deliberately withheld evidence from the Defence as a trial tactic. However, the Appeals Chamber does find that the disclosures of 25 June 2000 and 5 March 2001 were not made as soon as practicable, and that the Prosecution has, as a result, breached Rule 68.

199. As has already been discussed,[333] a prerequisite for the remedy sought on appeal for breaches of Rule 68 is proof of consequential prejudice to the Defence. The Defence has not established any such prejudice from the delayed disclosures by the Prosecution.

200. The Appeals Chamber does, however, find that the Prosecution did not meet its obligations under the Rules. The consequences are governed by Rule 46 (Misconduct of Counsel) and Rule 68*bis* (Failure to Comply with Disclosure Obligations).[334]

D. The Questionable Credibility of the Witnesses: Sefer Halilović and Enver Hadžihasanović

201. The Trial Chamber called witnesses *proprio motu* to testify at trial pursuant to its powers under Rule 98.[335] Two of the witnesses were at the time the subject of separate Prosecution investigations, a fact which – along with the evidence from those investigations - was disclosed to the Trial Chamber, but not to the Defence.[336]

202. The first witness, Enver Hadžihasanović, was subsequently indicted in a sealed indictment on 5 July 2001.[337] Mr. Hadžihasanović's indictment was made public on the same day (2 August 2001) that the Judgement of the Trial Chamber in this case was rendered. The second witness, Sefer Halilović, was indicted in a sealed indictment on 10 September 2001.[338]

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exculpatory at that stage could have been introduced in the Defence's case-in-chief. In relation to the 5 March 2001 disclosure, the Prosecution submits that the material was disclosed 14 days prior to the commencement of the Prosecution's case in rebuttal and that the Defence could have used the material in the Prosecution's rebuttal or in its own rejoinder, which began on 2 April 2001.

[333] See the discussion regarding prejudice at paragraph 153 above.

[334] See the discussion under Section E below.

[335] See *inter alia* Order for a Witness to Appear, 13 December 2000; and Further Order for a Witness to Appear, 18 December 2000.

[336] See the Order on Prosecution's Motion to Lift *Ex Parte* Status of Meeting with the Trial Chamber on 11 January 2002, 7 March 2002 (confidential), in which the Pre-Appeal Judge granted the Prosecution's request to permit access to notes taken of the meeting of 11 January 2001, at which meeting the Prosecution disclosed these circumstances to the Trial Chamber.

[337] *Hadžihasanović et al* Indictment (confidential).

[338] *Halilović* Indictment.

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203. The Defence argues that the Prosecution's failure to disclose information relating to the investigations of these two witnesses constituted a breach of Rule 68,[339] in that the information may have affected the credibility of the witnesses concerned. The Prosecution responds that the evidence in question was not exculpatory within the terms of Rule 68,[340] and that in any event it fulfilled its obligations by disclosing the relevant information to the Trial Chamber. [341]

204. While the Prosecution did disclose to the Trial Chamber the fact that the two witnesses were under investigation, it has not been established that the Prosecution also disclosed to the Trial Chamber any other evidence that may have been of relevance to the credibility of those same witnesses. The Appeals Chamber does not accept that evidence called *proprio motu* by a Trial Chamber can relieve the Prosecution of its obligation under Rule 68 in relation to that evidence. The scope of Rule 68 is clear: It applies to any material known to the Prosecution that either suggests the innocence or mitigates the guilt of the accused, or evidence that may affect the credibility of Prosecution evidence.

205. The Prosecution has submitted that where a witness is called by the Trial Chamber *proprio motu* under Rule 98 to give evidence, the favourable or unfavourable nature of that evidence will ordinarily only be known after the evidence is given. As such, the Prosecution argues that a finding for the Defence in this case would impose a burden on the Prosecution to disclose any information in its possession which could conceivably be used for the impeachment of a witness, and that such a burden would be too onerous.[342]

206. The Appeals Chamber cannot see the relevance of this argument. The Prosecution's obligation to disclose under Rule 68 is a continuing obligation,[343] precisely because the relevance to the case of certain material held by the Prosecution may not be immediately clear. Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.

207. The testimony of the two witnesses concerned was not relevant merely to peripheral background matters, as the Prosecution suggests.[344] The testimony of Mr. Halilović was favourable to the Prosecution's case because it supported the conclusions that the Serbian forces possessed a genocidal intent during their operations in the Drina River valley, and also that the men who fled in

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[339] Defence Appeal Brief, para. 139.
[340] Prosecution Response, p. 46.
[341] *Ibid*, para. 3.72.
[342] *Ibid.*, paras. 3.67 - 3.69.
[343] *Kordić & Čerkez* Order on Motion to Compel Compliance by the Prosecution with Rules 66 (A) and 68.
[344] Prosecution's Response, para. 3.83.

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the column were doing so as a result of fear.[345] This climate of fear was later held by the Trial Chamber to have been part of the purpose of a joint criminal enterprise.[346] The testimony of Mr. Hadžihasanović was favourable in part to the Prosecution's case for the same reasons.[347]

208. In light of the fact that the Prosecution was adhering to an order of the Trial Chamber that it disclose the witness statements only to the Trial Chamber under seal and *ex parte,*[348] the Appeals Chamber cannot find fault with the conduct of the Prosecution. Furthermore, the Defence has failed to demonstrate that its case was materially prejudiced as a result of the reliance by the Trial Chamber on the testimony of these witnesses. The Defence itself had in fact relied on some of this testimony in its closing submissions. As the Trial Chamber was aware of the circumstances in which this evidence was handled, and notwithstanding the pertinence of this testimony to the Prosecution's case, the Appeals Chamber finds that there could have been no prejudice to the Defence's case.

209. As such, the Appeals Chamber finds that no prejudice has been suffered by the Defence. This ground of appeal is dismissed.

E. Addressing the Conduct of the Prosecution

210. It remains for the Appeals Chamber to consider what disciplinary avenues, if any, are the appropriate means of addressing the conduct of the Prosecution in this case.

211. The right of an accused to a fair trial is a fundamental right, protected by the Statute, and Rule 68 is essential for the conduct of fair trials before the Tribunal. Where an accused can only seek a remedy for the breaches of a Rule in exceptional circumstances – in particular where the very enforcement of that Rule relies for its effectiveness upon the proper conduct of the Prosecution - any failure by the Appeals Chamber to act in defence of the Rule would endanger its application. The Appeals Chamber has a number of options at its disposal in these circumstances, based on Rule 46 (Misconduct of Counsel) and Rule 68*bis* (Failure to Comply with Disclosure Obligations).

212. Rule 68*bis* in particular is specific to disclosure obligations, and provides the Tribunal with a broad discretionary power to impose sanctions on a defaulting party, *proprio motu* if necessary.

213. The Appeals Chamber notes that the Prosecution has already described in some detail why certain materials were not disclosed, including declarations by Senior Trial Attorneys in the Office

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[345] T, pp. 9439 - 9505.
[346] Trial Judgement, paras. 613 - 615.
[347] T, p. 9595 - 9617.
[348] Prosecution Response, para. 3.73. See the *Krstić* Order to Appear and Order to Appear (2).

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of the Prosecutor.[349] While the disclosure practices of the Prosecution in this case have on occasion fallen short of its obligations under the applicable Rules, the Appeals Chamber is unable to determine whether the Prosecution deliberately breached its obligations.

214. In light of the absence of material prejudice to the Defence in this case, the Appeals Chamber does not issue a formal sanction against the Prosecution for its breaches of its obligations under Rule 68. The Appeals Chamber is persuaded that, on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology which, in light of the findings above, must be revised so as to ensure future compliance with the obligations incumbent upon the Office of the Prosecutor. This finding must not however be mistaken for the Appeals Chamber's acquiescence in questionable conduct by the Prosecution.

215. In light of the allegations of misconduct being made against the Prosecution in this case, the Appeals Chamber orders that the Prosecutor investigate the complaints alleged and take appropriate action. The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.

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[349] Further Response to Appellant's 24 December 2001 Supplemental Reply, 11 March 2002; Prosecution Request for Leave to File a Further Response to "Defence Appeal Brief Concerning Rule 68 Violations", 23 May 2003; Prosecution's Further Response to the Reply filed by Radislav Krstić on 22 May 2003 Regarding Rule 68 Violations, 30 June 2003.

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V. THE TRIAL CHAMBER'S ANALYSIS OF CUMULATIVE CONVICTIONS

216. The Prosecution challenges the Trial Chamber's non-entry, as impermissibly cumulative, of Radislav Krstić's convictions for extermination and persecution of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995, and for murder and inhumane acts as crimes against humanity committed against the Bosnian Muslim civilians in Potočari between 10 and 13 July 1995. The Trial Chamber disallowed convictions for extermination and persecution as impermissibly cumulative with Krstić's conviction for genocide. It also concluded that the offences of murder and inhumane acts as crimes against humanity are subsumed within the offence of persecution where murder and inhumane acts form the underlying acts of the persecution conviction.

217. The Defence urges a dismissal of the Prosecution's appeal because the Prosecution does not seek an increase of the sentence in the event its appeal is successful.[350] As the Appeals Chamber emphasised, however, the import of cumulative convictions is not limited to their impact on the sentence. Cumulative convictions impose additional stigma on the accused and may imperil his eligibility for early release.[351] On the other hand, multiple convictions, where permissible, serve to describe the full culpability of the accused and to provide a complete picture of his criminal conduct.[352] The Prosecution's appeal is therefore admissible notwithstanding the fact that it does not challenge the sentence.

A. Applicable Law

218. The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other.[353] An element is materially distinct from another if it requires proof of a fact not required by the other element.[354] Where this test is not met, only the conviction under the more specific provision will be entered.[355]

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[350] Defence Response, para. 7.
[351] *See Kunarac et al.* Appeal Judgement, para. 169; *Mucić et al.* Judgement on Sentence Appeal, para. 25.
[352] *Kunarac et al.* Appeal Judgement, para. 169.
[353] *Čelebići* Appeal Judgement, para. 412; *see* also *Jelisić* Appeal Judgement, para. 78; *Kupreškić et al.* Appeal Judgement, para. 387; *Kunarac et al.* Appeal Judgement, para. 168; *Vasiljević* Appeal Judgement, paras. 135, 146. This approach has also been endorsed by the Appeals Chamber of the ICTR. *See Musema* Appeal Judgement, para. 363.
[354] *Čelebići* Appeal Judgement, para. 412; *see* also *Jelisić* Appeal Judgement, para. 78; *Kupreškić et al.* Appeal Judgement, para. 387; *Kunarac et al.* Appeal Judgement, paras. 168, 173.
[355] *Čelebići* Appeal Judgement, para. 413; *see* also *Jelisić* Appeal Judgement, para. 79; *Kupreškić et al.* Appeal Judgement, para. 387; *Kunarac et al.* Appeal Judgement, para. 168.

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The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.

B. Conviction for Extermination as a Crime Against Humanity

219. The first vacated conviction that the Prosecution seeks to reinstate is the conviction for extermination under Article 5 based on the killing of the Bosnian Muslim men of Srebrenica.[356] The Trial Chamber held that this conviction was impermissibly cumulative with Radislav Krstić's conviction for genocide under Article 4, which was based on the same facts.[357] The Prosecution argues that this decision rests on an erroneous premise, namely that Article 5's requirement for the enumerated crimes to be part of a widespread or systematic attack against a civilian population is subsumed within the statutory elements of genocide.[358]

220. This issue was confronted by the ICTR Appeals Chamber in *Musema*. There, the Appeals Chamber arrived at a conclusion contrary to the one reached by the Trial Chamber in this case. Echoing the Prosecution's argument here, the ICTR Appeals Chamber permitted convictions for genocide and extermination based on the same conduct because "[g]enocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, [which] is not required by extermination," while "[e]xtermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide."[359]

221. The Trial Chamber in this case concluded that the requirement of a widespread and systematic attack against a civilian population was subsumed within the genocide requirement that there be an intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[360] In the Trial Chamber's opinion, in order to satisfy this intent requirement, a perpetrator of genocide must commit the prohibited acts "in the context of a manifest pattern of similar conduct," or those acts must "themselves constitute a conduct that could in itself effect the destruction of the group, in whole or part, as such."[361] Because this requirement excluded "random or isolated acts," the Trial Chamber concluded that it duplicated the requirement of Article 5 that a crime against humanity,

[356] Prosecution Appeal Brief, paras. 1.6, 3.38.
[357] Trial Judgement, paras. 682, 685 - 686.
[358] Prosecution Appeal Brief, para. 3.34.
[359] *Musema* Appeal Judgement, para. 366. At the Appeal hearing, the Defence conceded that, under the reasoning of *Musema*, convictions for extermination and genocide are not impermissibly cumulative. *See* AT, p. 281.
[360] Trial Judgement, para. 682.
[361] *Ibid.*

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such as extermination, form a part of a widespread or systematic attack against a civilian population.[362]

222. The intent requirement of genocide, however, contains none of the elements the Trial Chamber read into it. As the Trial Chamber correctly acknowledged, the intent requirement of genocide is the intent to destroy, in whole or in part, a group enumerated both in Article 4 and in the Genocide Convention.[363] This intent differs in several ways from the intent required for a conviction for extermination.

223. The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship.[364] These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population.[365]

224. In reasoning otherwise, the Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber, "indicates clearly that genocide requires that 'the conduct took place in the context of a manifest pattern of similar conduct.'"[366] The Trial Chamber's reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite. As already explained, the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention

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[362] *Ibid.*

[363] Trial Judgement, para. 544; *see* also *Jelisić* Appeal Judgement, para. 46 ("The specific intent [of genocide] requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.") (footnote omitted).

[364] *Tadić* Appeal Judgement, para. 248; *see* also *Kunarac et al.* Appeal Judgement, paras. 85, 96, 102.

[365] *See, e.g.*, 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at p. 340 (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

[366] Trial Judgement, n. 1455 (quoting Report of the Preparatory Commission for the International Criminal Court, 6 July 2000, PCNICC/2000/INF/3/Add.2). The Trial Chamber stated that this definition was present in the Statute of the ICC; the definition, of course, is given only in the Elements of Crimes. There is a difference between the two. The Elements of Crimes, adopted by the Assembly of States Parties to the ICC pursuant to Article 9(1) of the ICC Statute, are intended only to "assist the Court in the interpretation and application" of the substantive definitions of crimes given in the Statute itself. *See* Elements of Crimes, General Introduction, para. 1. Unlike the definitions present in the Statute, the definitions given in the Elements of Crimes are not binding rules, but only auxiliary means of interpretation. *See* 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at p. 348. Article 6 of the ICC Statute, which defines genocide, does not prescribe the requirement introduced in the Elements of Crimes. *Ibid.*, at p. 349.

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and was not mandated by customary international law.[367] Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber's conclusion.

225. The Trial Chamber also concluded that the definitions of intent for extermination and genocide "both require that the killings be part of an extensive plan to kill a substantial part of a civilian population."[368] The Appeals Chamber has explained, however, that "the existence of a plan or policy is not a legal ingredient of the crime" of genocide.[369] While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence.[370] Similarly, the Appeals Chamber has rejected the argument that the legal elements of crimes against humanity (which include extermination) require a proof of the existence of a plan or policy to commit these crimes.[371] The presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic, but it is not a legal element of a crime against humanity. As neither extermination nor genocide requires the proof of a plan or policy to carry out the underlying act, this factor cannot support the Trial Chamber's conclusion that the offence of extermination is subsumed in genocide.

226. Finally, the intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator's genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide. As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law.[372] The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.

227. The Trial Chamber's conclusion that convictions for extermination under Article 5 and genocide under Article 4 are impermissibly cumulative was, accordingly, erroneous.

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[367] *See* 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at pp. 339 – 340, 348 - 350.
[368] Trial Judgement, para. 685.
[369] *Jelisić* Appeal Judgement, para. 48.
[370] *See ibid.*
[371] *Kunarac et al.* Appeal Judgement, para. 98
[372] *Ibid.*, para. 174.

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C. Conviction for Persecution as a Crime Against Humanity

228. The Prosecution next argues that the Trial Chamber erred in setting aside Krstić's conviction for persecution under Article 5 for the crimes resulting from the killings of Bosnian Muslims of Srebrenica.[373] The Trial Chamber concluded, for the same reasons it disallowed the conviction for extermination, that the offence of persecution as a crime against humanity was impermissibly cumulative with the conviction for genocide.[374]

229. Persecution and extermination, as crimes against humanity under Article 5, share the requirement that the underlying act form a part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection. The analysis above concerning extermination therefore applies also to the relationship between the statutory elements of persecution and genocide. The offence of genocide does not subsume that of persecution. The Trial Chamber's conclusion to the contrary was erroneous.

D. Convictions for Murder and Inhumane Acts as Crimes Against Humanity

230. The Prosecution seeks reinstatement of two other convictions. The first is the conviction for murder, as a crime against humanity, of Bosnian Muslim civilians in Potočari.[375] The Trial Chamber set aside this conviction as impermissibly cumulative with the conviction for persecution perpetrated through murder of these civilians.[376] The second is the conviction for inhumane acts, based on the forcible transfer of Bosnian Muslim civilians to Potočari.[377] The Trial Chamber concluded that this conviction was subsumed within the conviction for persecution based on the inhumane acts of forcible transfer.[378]

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[373] Prosecution Appeal Brief, paras. 1.6, 3.47.
[374] Trial Judgement, paras. 682 - 686.
[375] Prosecution Appeal Brief, paras. 1.6, 3.49.
[376] Trial Judgement, para. 675. The Trial Chamber's Judgement is rather unclear as to what convictions the Chamber actually entered. Two different sets of crimes were at issue in this case: the crimes committed in Potočari between 11 and 13 July 1995, and the crimes committed against Bosnian Muslims of Srebrenica between 13 and 19 July 1995. With respect to the first set, the Trial Chamber stated, in the section on General Krstić's criminal responsibility, that he was guilty of inhumane acts of forcible transfer as a crime against humanity (Count 8) and of persecution as a crime against humanity, carried out through murder, forcible transfer and other means (Count 6). *See ibid.*, para. 653; *see also ibid.*, para. 618 & notes 1367 - 1368. Notably absent was a finding of guilt for murder as a crime against humanity (Count 4) on the basis of the acts committed in Potočari. In the section on cumulative convictions, however, the Trial Chamber suddenly announced that the murders committed at Potočari could "be legally characterised" as murders under Article 5 (Count 4). *See ibid.*, para. 671. The Chamber then proceeded to analyse whether this murder conviction was impermissibly cumulative with the conviction for persecution based on the same acts, eventually setting aside the murder conviction. *See ibid.*, paras. 673, 675. Given that the Appeals Chamber affirms the Trial Chamber's conclusion that these convictions are impermissibly cumulative, there is no need to decide whether General Krstić's conviction for murder as a crime against humanity based on the acts committed in Potočari must be vacated because he was, in fact, never found guilty of that crime by the Trial Chamber.
[377] Prosecution Appeal Brief, paras. 1.6, 3.80.
[378] Trial Judgement, para. 676.

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231. The Appeals Chamber addressed these two issues in its recent decisions in *Vasiljević* and *Krnojelac*. In *Vasiljević*, the Appeals Chamber disallowed convictions for murder and inhumane acts under Article 5 as impermissibly cumulative with the conviction for persecution under Article 5 where the persecution was accomplished through murder and inhumane acts.[379] The Appeals Chamber concluded that the offence of persecution is more specific than the offences of murder and inhumane acts as crimes against humanity because, in addition to the facts necessary to prove murder and inhumane acts, persecution requires the proof of a materially distinct element of a discriminatory intent in the commission of the act.[380] The same result was reached by the Appeals Chamber in *Krnojelac*, which concluded that "the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts."[381]

232. The Prosecution argues at length that the crime of persecution can be committed in many ways other than through murders or inhumane acts.[382] This observation is accurate, but entirely inapposite. Where the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure the conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts *necessarily* includes proof of murder or inhumane acts under Article 5. These offences become subsumed within the offence of persecution.[383]

233. The Trial Chamber correctly recognised this principle, and the Prosecution's appeal on these issues is therefore dismissed.

[379] *Vasiljević* Appeals Judgement, paras. 135, 146.
[380] *Ibid.*, para. 146.
[381] *Krnojelac* Appeal Judgement, para. 188. The Prosecution argues that the *Krnojelac* Appeal Judgement is not binding because the issue was adjudicated by the Appeals Chamber *proprio motu*, and without the benefit of briefing or argument. AT, p. 233. There is no indication, however, that the Appeals Chamber in *Krnojelac* reached its decision without due consideration of the issue. In any event, the conclusion reached by the *Krnojelac* Appeals Chamber was subsequently re-affirmed in the *Vasiljević* Appeal Judgement, a decision which post-dates the appeal hearing in this case.
[382] Prosecution Appeal Brief, paras. 3.54 - 3.55, 3.73 - 3.75.
[383] The jurisprudence of the United States Supreme Court, on whose *Blockburger* test the Tribunal's approach to cumulative convictions is based, *see Kunarac et al.* Appeal Judgement, para. 168, is instructive in this regard. In *Ball* v. *United States*, 470 U.S. 856 (1985), the U.S. Supreme Court examined the question of whether convicting a felon for receiving a firearm and possessing the same firearm was impermissibly cumulative. Applying the *Blockburger* test, the court easily concluded that the legislator "did not intend to subject felons to two convictions [because] proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." *Ibid.*, at 862.

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VI. SENTENCING

234. The Trial Chamber imposed on Radislav Krstić a single sentence of 46 years' imprisonment.[384] Both the Prosecution and the Defence have appealed this sentence.[385]

A. Submissions

235. The Prosecution argues that the sentence imposed by the Trial Chamber was inadequate because it failed properly to account either for the gravity of the crimes committed or for the participation of Radislav Krstić in those crimes;[386] is inconsistent with ICTR jurisprudence in comparable genocide cases;[387] is based on Krstić's "palpably lesser guilt";[388] and because the Trial Chamber erred in finding that premeditation was inapplicable as an aggravating factor in this case.[389] Consequently, the Prosecution argues that the Trial Chamber imposed a sentence beyond its discretion,[390] and that the sentence should be increased to life imprisonment, with a minimum of 30 years.[391]

236. The Defence argues that in imposing the sentence, the Trial Chamber failed to have due regard to the sentencing practice of the former Yugoslavia and the courts of Bosnia and Herzegovina[392] and to give adequate weight to what the Defence submits are mitigating circumstances.[393] The Defence accordingly argues that the sentence should be reduced to a maximum of 20 years.[394]

B. Discussion

237. The Appeals Chamber has overturned Krstić s conviction as a participant in a joint criminal enterprise to commit genocide. It has also disagreed with the Trial Chamber that he was a direct participant in the murders of the Bosnian Muslims under Article 3, and in extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. In relation to each of these offences the Appeals Chamber has instead concluded that Krstić aided and abetted the commission of these crimes.

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[384] Trial Judgement, para. 726.
[385] See Annex A, Procedural Background.
[386] Prosecution Appeal Brief, section 4(A).
[387] *Ibid*., section 4(B).
[388] Trial Judgement, para. 724, Prosecution Appeal Brief, section 4(C).
[389] Trial Judgement, paras. 711 - 712, Prosecution Appeal Brief, section 4(D).
[390] Prosecution Appeal Brief, para. 2.2, citing the test established in the *Kupreškić et al.* Appeal Judgement.
[391] *Ibid*., paras. 5.2 - 5.3.
[392] Defence Response to Prosecution Appeal Brief, paras. 38 - 50; Trial Judgement, para. 697.
[393] Trial Judgement, paras. 713 - 716, Defence Response to Prosecution Appeal Brief, para. 99.
[394] Defence Response to Prosecution Appeal Brief, para. 100.

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238. In finding Krstić criminally responsible as an aider and abettor, the Appeals Chamber concluded that the contribution by the Drina Corps personnel and assets under his command was a substantial one. Indeed, without that assistance, the Main Staff would not have been able to carry out its plan to execute the Bosnian Muslims of Srebrenica. Krstić knew that buses he had assisted in procuring for the transfer of the women, children and elderly were being used to transfer the males to various detention sites. He also knew that Drina Corps vehicles and personnel were being used to scout for detention sites and to escort and guard the Bosnian Muslim prisoners at various detention sites. He also knew that heavy vehicles and equipment belonging to the Drina Corps under his command were being used to further the execution of the Bosnian Muslim civilians. This knowledge and these modes of assistance constitute a substantial contribution to the commission of the crimes as required for a conviction for aiding and abetting the genocide of the Bosnian Muslims of Srebrenica.

239. The Appeals Chamber concluded that Radislav Krstić willingly participated in the joint criminal enterprise resulting in the humanitarian crisis at Potočari, and was aware that a natural and reasonable consequence of that humanitarian crisis was that crimes would be committed against the civilian population. The Appeals Chamber has therefore upheld Krstić's convictions for persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians arising out of the treatment of the Bosnian Muslim civilians at Potočari. While upholding this conviction, the Appeals Chamber has acknowledged, however, that Radislav Krstić and the Drina Corps under his command did not personally commit any crimes against the Bosnian Muslim civilians, other than assist in the organisation of the forcible transfer. Notably, it was established that Krstić was only present in Potočari for an hour or two at the most, and there was no evidence that he actually witnessed any of the crimes being committed against the Bosnian Muslim civilians, or that his subordinates in the Drina Corps directly witnessed them and reported to Krstić. Furthermore, the Trial Chamber accepted that the transfer of the Bosnian Muslim civilians organised by the Drina Corps was a disciplined and orderly operation, and that Krstić specifically ordered that no harm was to befall the Bosnian Muslim civilians being transferred forcibly.

240. In light of the findings in relation to Radislav Krstić's form of responsibility, an adjustment of the sentence will be necessary in any event. It is nevertheless appropriate first to consider and resolve the issues relating to sentencing raised on appeal.[395]

[395] *Vasiljević* Appeal Judgement, para. 149.

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241. The relevant provisions on sentencing are Articles 23 and 24 of the Statute, and Rules 100 to 106 of the Rules of Procedure and Evidence. These provisions constitute factors to be taken into consideration by the Trial Chamber when deciding a sentence on conviction.[396] They do not constitute binding limitations on a Chamber's discretion to impose a sentence,[397] which must always be decided according to the facts of each particular case.[398]

242. The jurisprudence of the ICTY and ICTR has also generated a body of relevant factors to consider during sentencing.[399] The Appeals Chamber has emphasised, however, that it is "inappropriate to set down a definitive list of sentencing guidelines for future reference,"[400] given that the imposition of a sentence is a discretionary decision. The Appeals Chamber has further explained that only a "discernible error" in the exercise of that sentencing discretion by the Trial Chamber may justify a revision of the sentence.[401]

243. It is therefore for the Appeals Chamber to determine whether the Trial Chamber committed a discernible error in imposing a sentence of 46 years on Radislav Krstić.

1. The arguments concerning the gravity of the crimes Radislav Krstić has committed and his participation therein

244. Both the Defence and the Prosecution have submitted arguments concerning the gravity of the crimes alleged. The Prosecution argues that in light of the gravity of the crimes Krstić committed, he should be sentenced to life imprisonment.[402] The Defence focuses on the Trial Chamber's recognition of Krstić's limited participation in the events of July 1995 and submits that the sentence was unduly harsh.[403]

245. As discussed above, the Appeals Chamber will consider arguments relating to sentencing only insofar as they allege the commission of a discernible error in the Trial Chamber's exercise of

[396] Rule 101(B). *See also Čelebići* Appeal Judgement, para. 716 ("These 'general guidelines' amount to an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances, … the gravity of the offence, the individual circumstances of the convicted person and the general practice regarding prison sentences in the courts of the former Yugoslavia.").
[397] *Čelebići* Appeal Judgement, para. 780. *See also Kambanda* Appeal Judgement, para. 124 (while the Trial Chamber is bound by the Rules to consider the mitigating factors, the weight to be accorded to those factors "is a matter for the discretion of the Trial Chamber.").
[398] *Jelisić* Appeal Judgement, para. 101; *see also* Trial Judgement para. 700.
[399] See below.
[400] *Čelebići* Appeal Judgement, para. 715. *See also Furundžija* Appeal Judgement, para. 238.
[401] *Vasiljević* Appeal Judgement, para. 9. *See also Jelisić* Appeal Judgement, para. 99; *Čelebići* Appeal Judgement para. 725; *Furundžija* Appeal Judgement, para. 239; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22.
[402] Prosecution's Appeal Brief, paras. 4.1 *et seq*; and para. 4.23.
[403] Defence Response, paras. 51 - 64.

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its discretion.[404] As to the level of Krstić's participation in these crimes, the Appeals Chamber has found his criminal responsibility to be of lower magnitude than that found by the Trial Chamber, and the impact of this finding is addressed below.

2. The arguments for consistent sentencing practice

246. The Prosecution argues, relying on the *Jelisić* Appeal Judgement, that the Trial Chamber erred in the exercise of its discretion by imposing a sentence that is not consistent with sentences imposed for similar offences.[405] In *Jelisić*, the Appeals Chamber did indeed recognise that a sentence "may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences."[406]

247. The Appeals Chamber in the *Jelisić* case also held, however, that similar cases do not provide "a legally binding tariff of sentences but a pattern which emerges from individual cases," and that "[w]here there is … disparity, the Appeals Chamber *may* infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case."[407]

248. The conclusion of the Appeals Chamber in the *Jelisić* case, as well as in others,[408] is unequivocal: The sentencing practice of the Tribunal in cases involving similar circumstances is but one factor which a Chamber must consider when exercising its discretion in imposing a sentence.[409] The decision is a discretionary one, turning on the circumstances of the particular case. "What is important is that due regard is given to the relevant provisions of the Statute and the Rules, [the] jurisprudence of the Tribunal and ICTR, and the circumstances of the case."[410]

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[404] *Čelebići* Appeal Judgement, para. 712.
[405] *Jelisić* Appeal Judgement, cited in the Prosecution Appeal Brief, paras. 4.25 *et seq*.
[406] *Jelisić* Appeal Judgement, para. 96.
[407] *Ibid*., emphasis added.
[408] *See, e.g.*, the *Furundzija* Appeal Judgement, para. 250 ("The sentencing provisions in the Statute and the Rules provide Trial Chambers with the *discretion to take into account the circumstances of each crime in assessing the sentence to be given*. A previous decision on sentence *may* indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules") (emphasis added); *see also Čelebići* Appeal Judgement, paras. 719, 721, 757 - 758, 798; *Kupreškić et al.* Appeal Judgement, para. 443. The ICTR follows the same practice. *Kajelijeli* Trial Judgement, para. 963 ("Principal perpetrators convicted of either genocide or extermination as a crime against humanity or both have been punished with sentences ranging from fifteen years to life imprisonment. Secondary or indirect forms of participation have generally resulted in a lower sentence."); *see* also the *Serushago* Sentence, para. 22 (the accused was convicted of genocide and three counts of crimes against humanity (murder, extermination, and torture) and sentenced to 15 years imprisonment in light of the circumstances of that case).
[409] *Čelebići* Appeal Judgement, para. 757: "When such a range or pattern has appeared, a Trial Chamber would be obliged to *consider* that range or pattern of sentences, without being *bound* by it."
[410] *Kupreškić et al.* Appeal Judgement, para. 444.

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249. The Prosecution also argues that the Trial Chamber erred by failing to consider carefully the ICTR jurisprudence relating to sentencing.[411] Although the Trial Chamber's analysis of the ICTR jurisprudence relating to sentencing was not as extensive or detailed as that now provided by the Prosecution, the Trial Chamber did expressly consider that jurisprudence.[412] The Appeals Chamber concludes that the sentence of 46 years' imprisonment imposed by the Trial Chamber – the highest fixed-term sentence imposed by this Tribunal to date[413] – sufficiently reflected the gravity of the crimes of which Radislav Krstić was convicted. In addition, a review of ICTR sentencing practice in comparable cases does not reveal a fixed rule requiring the imposition of a specified sentence for genocide.[414] The Trial Chamber's sentence was therefore consistent with the practice of the ICTR.

250. In any event, and as already explained, the sentencing practice in comparable cases is but one of several factors a Chamber must consider in determining an appropriate sentence. The Trial Chamber has a broad discretion to assess that factor, depending on the particular circumstances of the case before it. In this case, the Trial Chamber imposed on Krstić a sentence which it deemed appropriate on the basis of the particular circumstances surrounding his conduct in and around Srebrenica in July 1995. The Trial chamber did not commit a discernible error in the exercise of its sentencing discretion.

251. Given that the Appeals Chamber has reduced the level of criminal responsibility in this case to aiding and abetting genocide, the submission of the Prosecution in this regard is in any event moot.

252. The Prosecution's appeal on this ground is therefore dismissed.

3. The argument relating to "palpably lesser guilt"

253. The Trial Chamber held that Radislav Krstić "is guilty, but his guilt is palpably lesser than others who devised and supervised the executions all through [the relevant period]."[415] The Prosecution argues that the Trial Chamber erred in deciding that Krstić deserved a lesser sentence

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[411] Prosecution Appeal Brief, paras. 4.24 - 4.86.

[412] Trial Judgement, para. 696. *See* also the following footnotes: 1464, 1465, 1474, 1479, 1484, 1491, 1492, 1497, 1507, 1509, 1511 and 1513.

[413] In the *Stakić* Trial Judgement, the accused was sentenced to life imprisonment.

[414] The ICTR has frequently imposed life sentences on persons convicted of genocide. *See*, for example, the *Kambanda* Trial Judgement (affirmed on appeal); the *Akayesu* Trial Judgement (affirmed on appeal); the *Kayishema & Ruzindana* Trial Judgement, imposing on Clement Kayishema a life sentence (affirmed on appeal); the *Rutaganda* Trial Judgement (appeal pending); the *Musema* Trial Judgement (affirmed on appeal); the *Kamuhanda* Trial Judgement (appeal pending); and the *Niyitegeka* Trial Judgement (appeal pending). However, the ICTR has also issued lesser sentences than life imprisonment for convictions of genocide. In the *Kayishema & Ruzindana* Trial Judgement, Obed Ruzindana was sentenced to 25 years imprisonment (affirmed on appeal); in the *Serushago* Trial Judgement, the Defendant was sentenced to 15 years imprisonment (affirmed on appeal); and in the *Ntakirutimana* Trial Judgement and Sentence, the defendants were sentenced to 10 and 25 years imprisonment (appeal pending).

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than other perpetrators of these crimes whose guilt was not adjudicated in this case. The Prosecution further argues that, by elevating this factor to a "pivotal" level, the Trial Chamber failed to give appropriate consideration to Krstić's individual responsibility.[416]

254. The Appeals Chamber agrees that Radislav Krstić's guilt should have been assessed on an individual basis. The Appeals Chamber further agrees that the comparative guilt of other alleged co-conspirators, not adjudicated in this case, is not a relevant consideration. The Appeals Chamber does not, however, share the Prosecution's interpretation of the Trial Judgement.[417] The Trial Chamber was entitled to consider the conduct of Krstić in the proper context, which includes the conduct of any alleged co-perpetrators. A comprehensive understanding of the facts of a particular case not only permits a consideration of the culpability of other actors; indeed, it requires it in order to accurately comprehend the events in question and to impose the appropriate sentence.[418] While the wording of the Trial Judgement may be misleading, the Trial Chamber did not consider the allegedly higher culpability of others in an inappropriate way.

255. The Prosecution's appeal on this ground is therefore dismissed.

4. The Prosecution's argument concerning premeditation as an aggravating factor

256. The Trial Chamber held that Radislav Krstić's delayed participation precluded a finding of any premeditation on his part.[419] The Prosecution submits that the Trial Chamber erred discernibly in concluding that premeditation was not an aggravating factor in this case.[420]

257. On the facts considered by the Trial Chamber, it was within the Trial Chamber's discretion to conclude that premeditation was not present and so could not be an aggravating factor. With respect to the finding that Krstić participated in genocide, no premeditation was established.[421] The same applies to Krstić for the opportunistic crimes that occurred at Potočari on 12 – 13 July 1995.

258. There was an element of premeditation in the decision forcibly to transfer the civilian population, but it was within the discretion of the Trial Chamber to discount this factor from having any bearing on the sentence imposed.

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[415] Trial Judgement, para. 724.
[416] Prosecution Appeal Brief, para. 4.91.
[417] *Ibid.*
[418] The Tribunal has recognised the practice of 'gradation of sentence'; *cf.* the *Aleksovski* Appeal Judgement, para. 184.
[419] Trial Judgement, paras. 710 - 712.
[420] Prosecution's Appeal Brief, paras. 4.113 *et seq.*
[421] The Appeals Chamber has, of course, concluded in any event that general Krstić was not a participant in a genocidal enterprise, but only an aider and abettor of genocide.

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259. The Trial Chamber did not err in concluding that premeditation was not an aggravating factor in this case.

5. The Defence's argument regarding the sentencing practice of the Former Yugoslavia

260. The Defence submits that the Trial Chamber incorrectly considered the 1998 law of Bosnia-Herzegovina, as opposed to the law of the former Yugoslavia, in its decision on sentence.[422] The approach of the Tribunal regarding recourse to the sentencing practice of the former Yugoslavia, pursuant to Article 24(1) of the Statute and to Rule 101(B)(iii), is best expressed in the decision of the Trial Chamber in *Prosecutor v. Kunarać et al*:

> Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.[423]

261. The Trial Chamber was therefore required to consider the sentencing practice in the former Yugoslavia; this it did in paragraph 697 of the Trial Judgement. The footnotes to that paragraph demonstrate that the Trial Chamber considered the relevant legislation as required and analysed that legislation in relation to its findings. The Trial Chamber was entitled to consider, in addition to the SFRY law in force at the time of the commission of the crimes by Radislav Krstić, how that law evolved subsequently. The Trial Chamber ascertained that the sentencing practice of the former Yugoslavia evolved in a way consonant with the sentencing principles of this Tribunal. For example, the law of Bosnia-Herzegovina abolished the death penalty for crimes of which Krstić is convicted.[424] Given the coherence of that abolishment with this Tribunal's own sentencing powers as set out in Article 24, the Trial Chamber did not commit a discernible error in referring to the 1998 law of Bosnia-Herzegovina.

262. Finally, the Tribunal – while being obliged to consider the sentencing practice in the former Yugoslavia – is not bound by it.[425] The Tribunal is not prevented from imposing a greater or lesser sentence than would have been imposed under the legal regime of the Former Yugoslavia.[426]

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[422] Defence Response to Prosecution Appeal Brief, paras. 46 - 50.
[423] *Kunarać et al* Trial Judgement, para. 29. This reasoning has been consistently adopted by the Appeals Chamber. *See Kunarać et al* Appeal Judgement, para. 347 – 349; *Tadić* Judgement in Sentencing Appeals, para. 21; *Čelebići* Appeal Judgement, paras. 813 and 820; *Kupreškić et al.* Appeal Judgement, para. 418.
[424] *See also Todorović* Sentencing Judgement, paras. 96 *et seq.* (which conducted a similar analysis of the Bosnia-Herzegovinian law).
[425] *Plavsić* Sentencing Judgement, para. 115; *Nikolić* Sentencing Judgement, para. 96.

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263. The Appeals Chamber is therefore unable to find a discernible error in the reasoning of the Trial Chamber in this regard. The Defence's appeal on this ground is dismissed.

6. <u>The Defence's argument as to inadequate weight accorded to mitigating circumstances</u>

264. The Defence submits that the Trial Chamber failed to give adequate weight to the alleged mitigating circumstances.[427]

265. The Trial Chamber considered the circumstances identified by the defence, but concluded that they did not constitute mitigating circumstances.[428] The Trial Chamber has discretion in deciding whether a particular circumstance should be regarded as a mitigating one. The Defence has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in this regard, and the ground of appeal is dismissed.

C. The Appeals Chamber's Considerations

266. The Appeals Chamber decides that the sentence must be adjusted due to the fact that it has found Radislav Krstić responsible as an aider and abettor to genocide and to murders as a violation of the laws or customs of war committed between 13 and 19 July 1995, instead of as a co-perpetrator, as found by the Trial Chamber. In accordance with its power to do so without remitting the matter to the Trial Chamber,[429] the Appeals Chamber proceeds with the adjustment of Krstić's sentence in light of its findings, and in accordance with the requirements of the Statute and the Rules.

267. As correctly stated by the Trial Chamber,[430] the general sentencing principles applicable in this case include the following: (i) the gravity of the crime(s) alleged;[431] (ii) the general practice of

[426] *Banović* Sentencing Judgement, para. 89.
[427] Defence Response to Prosecution Appeal Brief, paras. 66 - 72 and 99. *See* Trial Judgement at paras. 713 – 717 and 723. The alleged mitigating circumstances were: good personal character; no previous record; poor health; and cooperation with the Prosecution.
[428] Trial Judgement, para. 713.
[429] *Vasiljević* Appeal Judgement, para. 181.
[430] Paras. 697 *et seq*.
[431] Article 24(2), recognized as "normally the starting point for consideration of an appropriate sentence" in the *Aleksovski* Appeal Judgement, para. 182: "the most important consideration, which may be regarded as the litmus test for the appropriate sentence." *See also Čelebići* Trial Judgement, para. 1225 ("By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.").

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prison sentences in the courts of the former Yugoslavia;[432] (iii) the individual circumstances of the convicted person;[433] and (iv) any aggravating or mitigating circumstances.[434]

268. Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. [435] This principle has also been recognized in the ICTR and in many national jurisdictions.[436] While Radislav Krstić's crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Krstić's responsibility for the murders as a violation of laws or customs of war committed between 13 and 19 July 1995 in Srebrenica. As such, the revision of Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.

269. The Appeals Chamber has also concluded that the Trial Chamber erred in setting aside Radislav Krstić's convictions for Counts Three (extermination as a crime against humanity) and Six (persecution as a crime against humanity) as impermissibly cumulative with the conviction for genocide. The Appeals Chamber concluded, however, that Krstić's level of responsibility with respect to these two offences was that of an aider and abettor and not of a principal perpetrator. While these conclusions may alter the overall picture of Radislav Krstić's criminal conduct, the Prosecution did not seek an increase in sentence on the basis of these convictions.[437] The Appeals Chamber therefore does not take Krstić's participation in these crimes into account in determining the sentence appropriate to the gravity of his conduct.

270. As regards the general sentencing practice of the courts of the former Yugoslavia, the Appeals Chamber has already explained that the Tribunal is not bound by such practice, and may, if the interests of justice so merit, impose a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia. In the above discussion of this factor, the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the sentence of a person who

[432] Article 24(1) of the Statute, Rule 101(B)(iii).
[433] Article 24(2).
[434] Rules 101(B)(i) and (ii).
[435] *Vasiljević* Appeal Judgement, paras. 181 – 182, n.291.
[436] *Kajelijeli* Trial Judgement, para. 963; *Vasiljević* Appeal Judgement, n. 291 (citing the law of seven common law and civil law jurisdictions).
[437] Prosecution Appeal Brief, para. 3.95.

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aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator.[438]

271. The Trial Chamber has considered the individual circumstances of Radislav Krstić, including aggravating and mitigating circumstances. The Defence submits that the Trial Chamber erred in not according any weight in sentencing to Krstić's poor health, his good personal character, his clear record to date,[439] and his cooperation with the Tribunal and contribution to reconciliation in the former Yugoslavia.[440] The Appeals Chamber adopts the Trial Chamber's findings as to these factors, and concludes that they do not constitute mitigating circumstances in the context of this case. The Appeals Chamber also concludes that no aggravating factors are present in this case.

272. The Appeals Chamber believes, however, that four further factors must be accounted for in mitigation of Krstić's sentence, namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potočari for at most two hours; and (iv) his written order to treat Muslims humanely.

273. First, while Radislav Krstić made a substantial contribution to the realization of the genocidal plan and to the murder of the Bosnian Muslims of Srebrenica, his actual involvement in facilitating the use of Drina Corps personnel and assets under his command was a limited one. Second, while the Appeals Chamber has found that Krstić assumed command of the Drina Corps on 13 July 1995, it accepts that the recent nature of his appointment, coupled with his preoccupation with conducting ongoing combat operations in the region around Žepa, meant that his personal impact on the events described was further limited. Third, Krstić was present in and around the Potočari compound during the afternoon of 12 July 1995 for at most two hours,[441] a period which, the Appeals Chamber finds, is sufficiently brief so as to justify a mitigation of sentence.[442] Finally, as discussed above,[443] Radislav Krstić made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potočari, he issued an order that no harm befall civilians while guaranteeing their safe transportation out of the Srebrenica area, and he showed similar concerns for the Bosnian Muslim civilians during the Žepa campaign. Krstić's personal integrity as a serious career military officer who would ordinarily not have been associated with such a plan at all, is also a factor in mitigation.

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[438] *See* Art. 24 of the Criminal Code of FRY ("A person, who premedidately aided another person in perpetration of a criminal act, will be punished as if he had committed it, his sentence can also be reduced.").
[439] Defence Response to Prosecution Appeal Brief, para. 69.
[440] *Ibid.*, para.72.
[441] *See* para. 82, *supra*.
[442] *See* para. 272, *supra*.
[443] *See* para. 132, *supra*.

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274. The Appeals Chamber notes that the Prosecution requested the imposition of a minimum sentence of 30 years' imprisonment.[444] As the Appeals Chamber explained in the *Tadić* Judgement in Sentencing Appeals, the decision whether to impose a minimum sentence is within the sentencing Chamber's discretion.[445] The imposition of a minimum sentence is ordered only rarely. In the absence of compelling reasons from the Prosecution as to why it should do so, the Appeals Chamber does not believe that a minimum sentence is appropriate in this case.

275. The Appeals Chamber finds that Radislav Krstić is responsible for very serious violations of international humanitarian law. The crime of genocide, in particular, is universally viewed as an especially grievous and reprehensible violation. In the light of the circumstances of this case, as well as the nature of the grave crimes Radislav Krstić has aided and abetted or committed, the Appeals Chamber, taking into account the principle of proportionality, considers that the sentence imposed by the Trial Chamber should be reduced to 35 years.

[444] Prosecution Appeal Brief, 5.3.
[445] *Tadić* Judgement in Sentencing Appeals, paras. 28, 32.

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VII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 26 and 27 November 2003;

SITTING in open session;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić's conviction as a participant in a joint criminal enterprise to commit genocide (Count 1), and **FINDS**, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting genocide;

RESOLVES that the Trial Chamber incorrectly disallowed Radislav Krstić's convictions as a participant in extermination and persecution (Counts 3 and 6) committed between 13 and 19 July 1995, but that his level of responsibility was that of an aider and abettor in extermination and persecution as crimes against humanity;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić's conviction as a participant in murder under Article 3 (Count 5) committed between 13 and 19 July 1995, and **FINDS**, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting murder as a violation of the laws or customs of war;

AFFIRMS Radislav Krstić's convictions as a participant in murder as a violation of the laws or customs of war (Count 5) and in persecution (Count 6) committed between 10 and 13 July 1995 in Potočari;

DISMISSES the Defence and the Prosecution appeals concerning Radislav Krstić's convictions in all other respects;

DISMISSES the Defence and the Prosecution appeals against Radislav Krstić's sentence and **IMPOSES** a new sentence, taking into account Radislav Krstić's responsibility as established on appeal;

SENTENCES Radislav Krstić to 35 years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules of Procedure and Evidence for the period

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Radislav Krstić has already spent in detention, that is from 3 December 1998 to the present day;

ORDERS, in accordance with Rules 103(C) and 107 of the Rules of Procedure and Evidence, that Radislav Krstić is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

Done in English and French, the English text being authoritative.

Judge Theodor Meron Presiding	Judge Fausto Pocar	Judge Mohamed Shahabuddeen

Judge Mehmet Güney	Judge Wolfgang Schomburg

Judge Mohamed Shahabuddeen appends a partial dissenting opinion.

Dated this 19th day of April 2004
At The Hague,
The Netherlands.

[SEAL OF THE TRIBUNAL]

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VIII. PARTIAL DISSENTING OPINION OF JUDGE SHAHABUDDEEN

A. Preliminary

1. In this appeal, counsel for General Krstić told the Appeals Chamber: "We agree with the introductory comments of the Trial Chamber [that the] 'events of the nine days from 10th to 19th July 1995 in Srebrenica defy description in their horror and their implications for humankind's capacity to revert to acts of brutality under the stresses of conflict.'"[446] Recognising that horror, the Trial Chamber said, "in the words of Nuremberg Prosecutor Telford Taylor," that it was "important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable …".[447] Accordingly, the Trial Chamber took the view that it was "imperative to document these 'incredible events' in detail."[448] The documentation does not defeat the expectation.

2. At the end of its task, the Trial Chamber found that Srebrenica was a genocide and that General Krstić ("appellant") had criminal responsibility for it. The Appeals Chamber agrees with that finding, and I respectfully concur, as I do on many other aspects. However, the Appeals Chamber disagrees with the Trial Chamber as to the level of the appellant's criminal responsibility. Whereas the Trial Chamber considered that the appellant's criminal responsibility was that of a "principal perpetrator"[449] of genocide, the Appeals Chamber considers that the level should be that of an aider and abettor. I agree with the Trial Chamber.

3. On some aspects of cumulation of convictions I have a doubt and I express this later. But on sentence, I am in agreement with the Appeals Chamber. Thus, on the practical outcome, my position is the same as that of the Appeals Chamber. But, in the circumstances, I should like to explain how I have got there. In order to deal with the central question as to the level of the appellant's criminal responsibility, it will be necessary to recapitulate the main facts.

B. The background

4. The President of Republika Srpska was Mr. Radovan Karadžić. He was also the supreme commander of the Bosnian Serb Army ("VRS"). Subject to that control, General Mladić was Commander of all VRS forces. The army was divided into corps. One corps was the Drina Corps. The killings occurred within the area of responsibility of the Drina Corps.

[446] Appeals Chamber's transcript, 27 November 2003, p. 343, referring to the impugned judgment, para. 2.
[447] Impugned judgment, para. 95.
[448] Ibid.
[449] Ibid., para. 644.

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5. The Drina Corps was earlier commanded by General Zivanović, with the appellant as the Chief of Staff and Deputy Commander – then Colonel, later General-Major, and still later (after these events) Lieutenant Colonel-General. The evidence of Mr. Deronjić (a witness called by the Appeals Chamber) showed that President Karadžić came to have reservations about the efficiency of General Zivanović. In consequence, President Karadžić replaced General Zivanović with the appellant. The Trial Chamber found that the appellant became the *de facto* Commander of the Drina Corps from the evening of 13 July 1995 onwards and the *de jure* Commander from 15 July 1995 onwards.[450]

6. The killings occurred in July 1995. One way or another they spanned a period during which the appellant had responsibility at first as Chief of Staff and Deputy Commander of the Drina Corps and later as its Commander. Moreover, the particular position which he held in the military hierarchy is not decisive on the question whether he was a party to a joint criminal enterprise to commit genocide, the charge which is of relevance here; the particular hierarchical position is only relevant in so far as it may assist in determining whether he was in a position to make a significant contribution to the working of the enterprise and whether therefore he was a party to it.

7. The Trial Chamber found that "the Drina Corps Command must have known about the plan to execute the Bosnian Muslim men as of the evening of 13 July 1995."[451] That plan has to be understood against a background which went back in time.

8. On 16 April 1993, the Security Council resolved that "all parties and others treat Srebrenica and its surroundings as a 'safe area' that should be free from armed attack or any other hostile act."[452] At the same time, the Security Council created two other protected enclaves, namely, Žepa and Goražde.[453] The VRS was all around; the Bosnian Serbs desired to create a state for themselves and saw the Muslim population of these three places as in the way.

9. In April-May 1993, the commanders of the opposing military forces signed a Srebrenica "safe area" agreement. The Trial Chamber found that "[f]rom the outset, both parties to the conflict violated the 'safe area' agreement,"[454] but that, "[d]espite these violations of the 'safe area' agreement by both sides to the conflict, a two-year period of relative stability followed the

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[450] Ibid., paras. 330, 331, 625 and 631.
[451] Ibid., para. 362.
[452] Ibid., para. 18.
[453] Ibid., para. 18.
[454] Ibid., para. 22.

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establishment of the enclave, although the prevailing conditions for the inhabitants of Srebrenica were far from ideal."[455] Between March 1995 and July 1995 the situation changed.

10. On 8 March 1995, President Karadžić issued a Directive to the VRS concerning the strategy of the VRS forces in the Srebrenica area. As set out in the judgment of the Trial Chamber and as recalled in paragraph 88 of the judgment of the Appeals Chamber, the Directive, known as "Directive No. 7", specified that the VRS was to -

> complete the physical separation of Srebrenica from Žepa as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica.[456]

11. As indicated by the Trial Chamber in paragraph 28 of its judgment and by the Appeals Chamber in paragraph 89 of its judgment, the Directive called for the blocking of aid convoys, making the Muslim population "dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion." Careful as was the articulation, that strategy was obviously designed to promote the policy to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica." The first fruits of the policy were noted by the Trial Chamber thus:

> Just as envisaged by this decree, by mid 1995, the humanitarian situation of the Bosnian Muslim civilians and military personnel in the enclave was catastrophic. In early July 1995, a series of reports issued by the 28th Division reflected the urgent pleas of the ABiH forces [the opposing army] in the enclave for the humanitarian corridor to be deblocked and, when this failed, the tragedy of civilians dying from starvation.[457]

The appellant being a senior military officer in the VRS and particularly concerned with Srebrenica, it may be inferred that Directive No. 7 duly came to his notice. Also, it is to be taken that he understood the prescribed object of the stipulated "combat operations."

12. A little later, on 31 March 1995, the VRS Main Staff issued Directive No. 7.1. This Directive showed that it was issued "on the basis of Directive No. 7", which had been previously issued by President Karadžić. According to the Trial Chamber, the new Directive ordered the Drina Corps, *inter alia*, to conduct "active combat operations … around the enclaves."[458]

13. Then, by a letter of 9 July 1995, the Bosnian Serb leadership ordered the VRS to take Srebrenica;[459] the Trial Chamber found that the letter "came with instructions to deliver 'personally'

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[455] Ibid., para. 25.
[456] Ibid., para. 28.
[457] Ibid.
[458] Ibid., para. 29.
[459] Ibid., paras. 33 and 334.

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to General Krstić."[460] A reasonable inference is that the appellant understood that this order was intended to implement the earlier policy as set out in Directive No. 7 and advanced by Directive No. 7.1.

C. The central policy to commit genocide

14. As previously mentioned, Mr. Deronjić was called by the Appeals Chamber. He testified, *inter alia*, to a conversation which he had with the Bosnian Serb leadership on 8 or 9 July 1995. The Appeals Chamber found that "Mr. Deronjić gave some evidence of an intention on the part of the Bosnian Serb leadership prior to 13 July 1995 to kill the Bosnian Muslim civilians in Srebrenica should military operations in that region be successful."[461] The Appeals Chamber gave no details of the conversation or as to the identity of Mr. Deronjić's interlocutor. It found that Mr. Deronjić's evidence did not help the prosecution because he "gave no evidence linking Radislav Krstić to a genocidal plan or indicating that Krstić was aware of that intention on the part of the Bosnian Serb leadership."[462]

15. In any event, the Appeals Chamber also found that it could not rely on Mr. Deronjić's testimony, speaking of "discrepancies in the evidence given by" him and of "ambiguities surrounding some of the statements he made." These "discrepancies" and "ambiguities" have not been particularized. The witness was speaking – and he was the only one to do so - of the origins of a policy which was of importance to the case. With respect, I am not persuaded that a basis has been satisfactorily laid for excluding the substance of his testimony on that point. His testimony was accepted by the Appeals Chamber on a matter favouring the appellant, as shown in paragraph 119 of its judgment and paragraph 25 below. So it is not the case that Mr. Deronjić's testimony was wholly discredited. A court may of course accept evidence in part and reject it in part. But I am without a basis for sharing the Appeals Chamber's conclusion that Mr. Deronjić's testimony was to be rejected on a point of significance.

16. The Bosnian Serb leadership indicated to Mr. Deronjić that it would communicate further through a messenger. A messenger, in the person of Colonel Beara, duly appeared on 12 July 1995; he was instrumental in commencing the killings.

17. The letter written by General Tolmir on 9 July 1995 (already referred to) conveyed a declaration by the Bosnian Serb leadership that the Geneva Conventions were to be adhered to. However, Mr. Deronjić testified that he informed the leadership on more than one occasion that

[460] Ibid., para. 334.
[461] Judgment of the Appeals Chamber, para. 94.
[462] Ibid.

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killings were going on.[463] There is no evidence of any objection; it may be inferred that there was none. That must be taken into account in estimating the purpose of the declaration issued by the leadership and conveyed in General Tolmir's letter. As was indicated in Directive No. 7, it was important to avoid "the condemnation of the international community and international public opinion."

D. Whether the appellant knew of the intent to commit genocide

18. Consistent with the central policy as set out in Directive No. 7 is General Mladić's statement at the second of three meetings held at Hotel Fontana on 11-12 July 1995 that he wanted a clear position whether the Bosnian Muslims in Srebrenica wanted to "survive, stay, or disappear."[464] So too with his ultimatum at that meeting to Mr Mandzić, "an unofficial Bosnian Muslim representative who was plucked from the crowd at Potočari,"[465] that the latter should "bring people who can secure the surrender of weapons and save your people from destruction."[466] The appellant was at that meeting. At the third meeting, he was sitting at the side of General Mladić when the latter said that the Srebrenica Muslims "can either survive or disappear."[467] With apparent acceptance, the Trial Chamber noted that two witnesses "testified before the Trial Chamber that the clear message conveyed by General Mladić in this meeting was that the Bosnian Muslim refugees could only survive by leaving Srebrenica."[468]

19. The Appeals Chamber does not seem to be taking the same position as the Trial Chamber on whether the appellant appreciated the import of what General Mladić was saying. Referring to General Mladić's announcement "that the survival of the population depended upon the complete surrender of the ABiH" and noting the presence at the meetings of UNPROFOR leaders and foreign media, the Appeals Chamber says that there "was no evidence to suggest that at this time Radislav Krstić knew about the intent on the part of General Mladić to execute the Bosnian Muslim civilians who were to be transferred."[469] So, General Mladić's intent to execute was not in doubt; the question was whether the appellant knew of it.

20. Paragraph 341 of the judgment of the Trial Chamber, to which reference is made in the judgment of the Appeals Chamber, referred to the hearing of the death cries of a slaughtered pig (offensive to Bosnian Muslims) and to the placing of a broken signboard from the Srebrenica Town

[463] Appeals Chamber's transcript, 21 November 2003, pp. 116, 124, 125, testimony of Mr Deronjić.
[464] Impugned judgment, para. 130.
[465] Ibid., para. 128.
[466] Ibid., para. 130.
[467] Ibid., para. 132.
[468] Ibid., 133. See also, ibid., paras. 130-132.
[469] Judgment of the Appeals Chamber., para. 87.

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Hall in front of Mr Mandzić at the second Hotel Fontana meeting. The Trial Chamber stated that these things "could hardly be ignored by anyone at the meeting. Most importantly, General Krstić was present when General Mladić announced that the survival of the Bosnian Muslim population was linked to the complete surrender of the ABiH." It followed that, if the ABiH did not surrender, the Bosnian Muslim population would not survive. The Trial Chamber correctly added that, as a result of the Hotel Fontana meetings, the appellant "was put on notice that the survival of the Bosnian Muslim population was in question following the take-over of Srebrenica."[470]

21. The submission of counsel for the appellant to the Appeals Chamber was that General Mladić "said words to the effect, you know, 'You can either face death or you can go.'"[471] Later counsel added: "But at some point I think the Trial Chamber – again, we – we have to accept this. We wish we didn't, but I think we do under the Rules of the Chamber and under the Rules of this Tribunal - when General Mladić started to speak, he made it unfortunately clear that there was no real true choice for the civilians to leave the area."[472] The appellant was present when General Mladić spoke; he was General Mladić's lieutenant so far as concerned Srebrenica and the surrounding area. It is unarguable, particularly against the combat policy set out in Directive No. 7, that the appellant did not know what was afoot.

22. Without doubt, General Mladić was a forceful figure. However, in my view this does not affect the question whether the appellant knew of the intention of his immediate commander, namely, General Mladić. Moreover, as the Trial Chamber found, there were numerous opportunities for oral contact between General Mladić and the appellant, so that, as the Trial Chamber said, "If General Mladić knew about the killings, it would be natural for General Krstić to know as well."[473] This is not fanciful speculation or guilty by association, but a reasonable inference which the Trial Chamber was entitled to draw from the material before it. The appellant knew of the intent to kill and, in the circumstances, to commit genocide.

E. Whether the appellant shared the intent to commit genocide

23. Though of the view that at the time of the Hotel Fontana meetings the appellant did not know of the intent to execute,[474] the Appeals Chamber proceeds on view that later – on 15 July 1995[475] - the appellant did come to know of that intent while the executions were in progress. However, contrary to the finding of the Trial Chamber, the Appeals Chamber holds that the

[470] Impugned judgment, para. 343.
[471] Appeals Chamber's transcript, 26 November 2003, p. 274.
[472] Ibid., 27 November 2003, p. 360.
[473] Impugned judgment, para. 407.
[474] Judgment of the Appeals Chamber, para. 87.
[475] Ibid, paras. 101, 134.

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appellant did not share that intent. I consider that the Trial Chamber was right in holding that the appellant both knew of and shared the intent to kill and that he did so before 15 July 1995. I shall refer to four pieces of evidence.

1. The Kravica Farm massacre

24. The first piece of evidence relates to the case of Colonel Borovćanin. Admittedly, the colonel's troops had carried out a mass murder at Kravica Farm at around 1800 hours on 13 July 1995. Some 1000 to 1,500 unarmed civilian prisoners were in a warehouse; they were practically all killed;[476] there were few survivors.[477] The evidence shows that some two and a half hours later, at 2040 hours, there was a telephone conversation between Colonel Borovćanin and the appellant. In the conversation, the appellant asked, "How's it going?" Borovćanin replied, "It's going well". The appellant responded, "Don't tell me you have problems." To which the answer was, "I don't, I don't."[478] The conversation ended with the appellant saying, "OK, we'll be in touch."

25. The Appeals Chamber states that the "intercepted conversation between Colonel Borovćanin and Radislav Krstić is too oblique to support an inference that the conversation was a report by Colonel Borovćanin about a successfully completed execution of Muslims at the Kravica Farm on 13 July."[479] In support of its view that the conversation was "too oblique", the Appeals Chamber refers to the evidence of Mr. Deronjić "that the execution at Kravica Farm was not planned, but was instead a spontaneous reprisal following a clash between the Muslim prisoners and the guards. If so, then the initiative for the massacre could have resided with the camp authorities rather than with the higher military commanders such as Krstić."[480]

26. But the question is not whether the appellant took the "initiative for the massacre", but whether he shared the intent with which the "massacre" was committed. However the event may be explained, it cannot be justified: the Appeals Chamber itself calls it a "massacre". It is not conceivable that Borovćanin was not reporting to the appellant about so momentous an event. It may be inferred from the record of the conversation that the appellant did not object. Even if the evidence does not go all the way to establish that the appellant was himself a party to the massacre, it strongly suggests that the massacre accorded with his understanding of a general policy to execute. In other words, he shared the policy.

[476] See the impugned judgment, paras. 205ff. Cf. judgment of the Appeals Chamber, para. 118, footnote 197, for the evidence of Mr Deronjić stating that "according to information passed on to me by Mr Borovćanin, about 300 men were killed." The Trial Chamber relied on direct evidence.
[477] Impugned judgment, para. 211.
[478] See exhibit P 529, referred to in the impugned judgment at para. 176, footnote 430, at para. 287, footnote 758, and at para. 376, footnote 1005.
[479] Judgment of the Appeals Chamber, para. 119.
[480] Ibid.

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2. The "distribution" of 3,500 "parcels"

27. The second piece of evidence is more to the point. Colonel Beara was the messenger from the Bosnian Serb leadership. The Appeals Chamber refers to him as having been "closely involved in the killings."[481] Indeed, he was principally instrumental in the implementation of the execution policy. An intercept of 15 July 1995 recorded a conversation between him and the appellant. The intercept read as follows:[482]

> B: General, FURTULA didn't carry out the boss's order.
>
> K: Listen, he ordered him to lead out a tank, not a train.
>
> B: But I need 30 men just like it was ordered.
>
> K: Take them from NASTIĆ or BLAGOJEVIĆ, I can't pull anybody out of here for you.
>
> B: But I don't have any here. I need them today and I'll give them back tonight. Krle, you have to understand. I can't explain it like this to you.
>
> K: I'll disturb everything on this axis if I pull them out, and a lot depends on him.
>
> B: I can't do anything without 15 to 30 men with Boban INDIĆ.
>
> K: Ljubo, this/line/is not secure.
>
> B: I know, I know.
>
> K: I'll see what I can do, but I'll disturb a lot. Check down with NASTIĆ and BLAGOJEVIĆ
>
> B: But I don't have any. If I did, I wouldn't still be asking for the 3rd day.
>
> K: Check with BLAGOJEVIĆ, take his Red Berets.
>
> B: They're not there, only 4 of them are still there. They took off, fuck 'em, they're not there any more.
>
> K: I'll see what I can do.
>
> B: Check it out and have them go to Drago's.
>
> K: I can't guarantee anything.
>
> B: Krle, I don't know what to do anymore.
>
> K: Ljubo, then take those MUP/Ministry of Interior/guys from up there.
>
> B: No, they won't do anything, I talked to them. There's no other solution but for those 15 to 30 men with INDIĆ. That were supposed to arrive on the 13th but didn't.
>
> K: Ljubo, you have to understand me, you guys fucked me up so much.

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[481] Ibid., para.102. And see the impugned judgment, para. 384, stating: "Both the Prosecution and the Defence agreed that Colonel Beara was fully involved in the killings" (footnote omitted).

[482] Impugned judgment, para. 380.

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B: I understand, but you have to understand me too, had this been done then, we wouldn't be arguing over it now.

K: Fuck it, now I'll be the one to blame.

B: I don't know what to do. I mean it, Krle. There are still 3,500 parcels that I have to distribute and I have no solution.

K: Fuck it, I'll see what I can do.

28. The meaning of the intercepted conversation is clear. In the disingenuous coded language used, the reference to "3,500 parcels" was a reference to 3,500 captured civilians. The reference to "distribute" was a reference to a programme to kill them. The Trial Chamber found that. With respect, the Appeals Chamber is not persuasive when it says, in paragraph 76 of its judgment, that that finding is unsupported by anything other than the argument of the prosecution. It is difficult to imagine much scope for evidence on the point; the matter is pre-eminently one of interpretation involving argument. The Appeals Chamber has not been able to suggest an alternative meaning.

29. What was sought was not a fighting battalion, but only about 15 to 30 men, and then only for some hours. It is not in dispute that the appellant knew that he was being asked to provide executioners. And the appellant was willing to provide them through his subordinates[483] Nastić and Blagojević, if they had spare capacity. So the Trial Chamber correctly found "that, at the time this conversation took place on 15 July 1995, General Krstić knew the executions were occurring and that he undertook to assist Colonel Beara in obtaining the necessary personnel to carry them out."[484]

30. Referring to the conversation, counsel for the appellant accepted before the Appeals Chamber that the appellant "did know about the killings", but he contended that the appellant "really never was part of the plan to kill the men."[485] The Appeals Chamber, in substance, agrees with the submission of counsel for the appellant. It considers that the appellant's "statements to Colonel Beara that he 'will see what he can do' cannot support the weight of reliance the Trial Chamber placed upon it. Rather than a firm promise of help, the statements could have been a refusal to commit, an effort by Krstić to end the conversation without saying a firm 'no' but also without assuming an unambiguous obligation to help."[486] The Appeals Chamber adds that "the fact that Krstić requested that men be taken from his subordinates may support a finding of knowledge

[483] See, below, the reference by the Appeals Chamber in paragraph 104 of its judgment to "subordinates".
[484] Impugned judgment, para. 385.
[485] See also Appeals Chamber's transcript, 26 November 2003, pp. 278-279, where counsel for the appellant is recorded as saying that "the only direct evidence of his involvement was that July 15th telephone conversation with Colonel Beara in which you can legitimately infer General Krstić's knowledge that men were being killed – not, mind you, a genocidal plan, but that men were being killed. And, it is our submission – and we'll be speaking to that in more detail later – that he never did anything to further the enterprise. He didn't participate in that sense."
[486] Judgment of the Appeals Chamber, para. 76.

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that executions of Bosnian Muslims were taking place, but it cannot establish that Radislav Krstić shared the intent to commit genocide."[487] There are two difficulties with these views.

31. First, before the Trial Chamber the appellant denied that this conversation ever took place;[488] by contrast, his attack on appeal was directed to the meaning of the conversation, his contention, as the Appeals Chamber observed, being that his statements were meant as a discreet refusal of the assistance sought.[489] But the implication of the new contention is that he now accepts that the conversation did take place. The denial had been made precisely because the appellant correctly recognised the evidential significance of the conversation. Faced with the difficulty of denying the undeniable, namely, that the conversation took place, the appellant has changed tactic – he now accepts that the conversation took place but seeks to place an exculpatory interpretation on it.

32. Second, before concerning itself with the appellant's later words – "I'll see what I can do" - the Appeals Chamber might pause a little more over his earlier words, "Take them from Nastić or Blagojević, I can't pull anybody out of here for you." Then there are his subsequent words, "Check with BLAGOJEVIĆ, take his Red Berets." Those words show that, if the men had been available from the appellant's "subordinates"[490] (Nastić and Blagojević), they would in fact have been assigned by the appellant to help out with the executions. It happened that the men were not available from the subordinates, but of this the appellant himself did not know. That was the only reason why the men were not used as executioners. Thus, the appellant's state of mind was one of readiness to provide some of the actual executioners. To prove that, it is not necessary to show that the men were in fact available from the subordinates whom the appellant indicated or that they actually stood in the firing line.

33. An undertaking to provide executioners was not merely the provision of substantial assistance in the carrying out of genocide by another person, if that other person proceeded to realize his known intent to perpetrate genocide, so as to make the person providing the executioners liable only as an aider and abettor: it signified a sharing of the intent of that other person to commit genocide, and not mere knowledge of that intent. Accordingly, such an undertaking amounted to evidence of participation in the crime of genocide so as to make the genocide a crime committed by the person undertaking to provide executioners.

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[487] Ibid., para. 104.
[488] Impugned judgment, para. 385.
[489] Or, as it was put in paragraph 174 of the Defence Appeal Brief of 10 January 2002, "The true facts show that General Krstić never followed up on Beara's request."
[490] The Appeals Chamber itself calls them "subordinates" in paragraph 104 of its judgment.

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3. The transportation of women and children

34. The third piece of evidence concerns the appellant's admitted role in organising the transfer of women, children and the elderly by bus out of Srebrenica. In the words of his counsel, "There was unchallenged evidence that General Krstić had organised the transfer of women, children and the elderly from the Srebrenica area so that they would not be affected by the coming holocaust."[491] Thus, according to his counsel, the appellant recognised that a "coming holocaust" awaited those who had not been transferred. The transfer and the holocaust combined to constitute one single act of genocide. The Appeals Chamber saw this when it said:[492]

> The decision by Bosnian Serb forces to transfer the women, children and elderly within their control to other areas of Muslim-controlled Bosnia could be consistent with the Defence argument. This evidence, however, is also susceptible of an alternative interpretation. As the Trial Chamber explained, forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself. The decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure.

The Appeals Chamber added:[493]

> The Trial Chamber – as the best assessor of the evidence presented at trial – was entitled to conclude that the evidence of the transfer supported its finding that members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of "other culpable acts systematically directed against the same group."

35. Thus, standing alone, forcible transfer is not genocide. But in this case the transfer did not stand alone, and that indeed is the basis on which the Appeals Chamber rejected the defence argument that it showed that there was no genocide. It was part – an integral part – of one single scheme to commit genocide, involving killings, forcible transfer and destruction of homes. In particular, it showed that the intent with which the killings were done was indeed to destroy the Srebrenica part of the Bosnian Muslim group. In my view, the judgment of the Appeals Chamber has to be understood as affirming that, by taking on the role of chief executor of the policy of forcible transfer - an inseparable element of the genocide - the appellant shared the intent of the Main Staff to commit the crime of genocide.

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[491] Appeals Chamber's transcript, 27 November 2003, p. 332; emphasis added.
[492] Judgment of the Appeals Chamber, para. 31, footnotes omitted.
[493] Ibid., para. 33, footnotes omitted.

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36. The indictment (in paragraph 24.4 relating to counts 1 and 2 concerning genocide and complicity to commit genocide respectively) did aver that the "wide-scale and organized killing of Bosnian men … included[494] [the fact that the] … VRS military personnel, under the command of Radislav Krstić, transported the Bosnian women and children, who had been separated from male members of their families in Potočari to an area near to Tisca village. Most of the Bosnian women and children driven to Tisca were permitted to cross into Bosnian Muslim territory." Thus, it was the contention of the prosecution that the "wide-scale and organized killing of Bosnian men … included" the transportation of women and children. That contention was duly notified by the prosecution to the appellant in the text of the indictment; the contention was proved.

4. Use of personnel and resources under the control of the appellant

37. The Appeals Chamber accepts that the appellant had knowledge of the use of personnel and resources under his command for the purposes of the genocide.[495] It mentioned the use of Drina Corps personnel to escort prisoners to execution sites, the use of Zvornik Brigade equipment for burial of victims, the use of Drina Corps fuel for the transport of prisoners to execution sites, the use of units of the Krajina Brigade (operating under the command of the Zvornik Brigade) as executioners.[496] All these things were under the appellant's control. The Main Staff could call upon these resources, but the appellant knew that the Main Staff also depended on his cooperation.[497] As the Appeals Chamber observed, the appellant "knew that by *allowing* Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners,"[498] and "*permitted* the Main Staff to use personnel and resources under his command to facilitate them."[499]

38. Referring to these matters, the Appeals Chamber states that the "Trial Chamber inferred the genocidal intent of the accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. However, knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent on his part."[500] The line between knowledge of intent and a sharing of intent can be a subtle one. It turns on an appreciation of the evidence. In accordance with settled principles regulating the appeal process, the appreciation should be left to the Trial Chamber – even in the case of a stringent test. A stringent test does not empower the Appeals Chamber to step in where

[494] Emphasis added.
[495] Judgment of the Appeals Chamber, para. 126.
[496] Ibid., paras. 126-128.
[497] Ibid., para. 137.
[498] Ibid., para. 137.
[499] Ibid., para. 144, emphasis added.
[500] Ibid., para. 129.

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otherwise it could not. This is so except in cases of error - often qualified as having to be clear. I am not able to see any error here.

39. Having agreed with the Trial Chamber in rejecting the appellant's claim that there was a parallel line of authority from which he was totally excluded, having recognized that the personnel and resources in question were under the appellant's command, having acknowledged that the appellant knew that his personnel and resources were being used to carry out the executions, having spoken of the appellant "allowing" his resources to be so used and of such use being "permitted" by him, the Appeals Chamber was not in a good position to reject the Trial Chamber's finding that the appellant not only had knowledge of the executions but that he also shared the intent of the executions.

5. Conclusion as to sharing of intent

40. Counsel for the appellant conceded that "the Trial Chamber was warranted in finding that everything from that point on [the second Hotel Fontana meeting on 11 July 1995] constituted a joint criminal enterprise, at least in terms of who participated to deport the civilians."[501] The concession was rightly made, but I am not persuaded that it can be limited to deportation. There is no reason to disagree with the Trial Chamber in finding "beyond reasonable doubt that General Krstić participated in a joint criminal enterprise[502] to kill the Bosnian Muslim military-aged men from Srebrenica from the evening of 13 July 1995 onward."[503] Having shared the intent, that fixed him with criminal responsibility for genocide as a perpetrator, and the Trial Chamber so found. By contrast, the Appeals Chamber considers that his level of criminal responsibility was that of an aider and abettor. To this difference of opinion I shall return.

F. Whether there was genocide

1. Preliminary

41. Meanwhile, it is proposed to address a submission by counsel for the appellant that, in law, there was no genocide. The challenge turns on the Genocide Convention of 1948, which, it is agreed, has the status of customary international law. The provisions of articles II and III of the Convention appear in paragraphs 2 and 3 respectively of article 4 of the Statute, which reads as follows:

[501] Appeals Chamber's transcript, 27 November 2003, pp. 360-361.
[502] The Trial Chamber overruled a defence submission that the prosecution could not rely on the doctrine. See impugned judgment, para. 602.
[503] Impugned judgment, para. 633. See also, ibid., paras. 631 and 632.

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Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

42. On the basis of these provisions, three questions have been raised. They have been considered in the judgment of the Appeals Chamber. I agree with the outcome of the judgment on the points in question, but I should like to give my views.

2. "Part of a part" of a group

43. The first question was raised by counsel for the appellant under the rubric "part of a part."[504] I understand counsel's argument this way: The Trial Chamber found that the "group" for genocide purposes was the Bosnian Muslims, and that a "part" of that group was represented by the Bosnian Muslim community of Srebrenica.[505] Having so found, the Trial Chamber then –

> measured the killing of military age men against the Bosnian Muslim community at Srebrenica and found it to be substantial. But, in doing so, it incorrectly diluted the genocide formula by measuring a part (military age men) against another part (of Srebrenica) and finding it substantial.

[504] Defence Appeal Brief, 10 January 2002, p. 13 above para. 35.
[505] Impugned judgment, paras. 560 and 591.

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> The Trial Chamber never employed the correct formula of measuring the part intended to be destroyed (military age men of Srebrenica) against the group (Bosnian Muslims).[506]

Thus, counsel for the appellant submits that the task of the Trial Chamber was to determine whether the men killed constituted a "part" of the Bosnian Muslim group as a whole and that, in doing so, it used the wrong yardstick of measurement.

44. I respectfully agree with the Appeals Chamber that the "Defence misunderstands the Trial Chamber's analysis."[507] The Trial Chamber found – and this has not been challenged – that the Srebrenica Muslims were "part" of the Bosnian Muslim group. Some of them were killed. The question then was whether those who were killed were killed with intent to destroy the Srebrenica "part" of the group. The Trial Chamber answered the question in the affirmative, using the killings, together with certain other matters, as evidence of that intent. Certainly, those who were killed *belonged* to the Srebrenica part of the Bosnian Muslim group, but no question really arose as to whether they constituted *"part" of any group within the meaning of the chapeau of article 4(2) of the Statute*; it was unnecessary to consider any such question. Accordingly also, no question arose as to the correct yardstick to be used to determine whether those killed constituted a "part" of any group.

3. Whether intent has to be to cause the physical or biological destruction of the group

45. Second, counsel for the appellant submits that an intent to destroy was inconsistent with the fact that women and children (including young males) were transported by the attacking Bosnian Serb forces to Muslim-held territory. Underlying the submission is the proposition, stressed by counsel, that the intent with which an act listed in article 4(2) of the Statute ("listed act") is done always has to be to cause the physical or biological destruction of the group in whole or in part, so that an inconsistency arises if the intent is in fact to allow a substantial number of members of the group to survive.

46. The Appeals Chamber accepted the fundamental contention of counsel for the appellant that the intent had to be to destroy physically or biologically[508] the Srebrenica part of the Bosnian Muslim group.[509] That being so, an intent to allow a substantial number of Srebrenican Muslims to survive meant that there was no intent to destroy the Srebrenica part of the group physically. As the Appeals Chamber noted, "The decision by Bosnian Serb forces to transfer the women, children and

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[506] Defence Appeal Brief, 10 January 2002, para. 40. See also, ibid., paras.37-39. And see argument by counsel for General Krstić in Appeals Chamber's transcript, 26 November 2003, at pp. 297ff, and 27 November 2003, pp. 351-352.
[507] Judgment of the Appeals Chamber, para. 19.
[508] Ibid., paras. 24 and 25.

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elderly within their control to other areas of Muslim-controlled Bosnia could be consistent with the Defence argument."[510] Therefore, the appeal would have to be allowed if the transfer was unqualified. But, for reasons showing that it was materially qualified, the appeal on the point was dismissed.

47. I agree with the dismissal. If the proposition of counsel for the appellant is right, then, for the reasons given by the Trial Chamber and by the Appeals Chamber, I consider that the alleged requirement for proof of intent to destroy the group physically or biologically was met by the disastrous consequences for the family structures on which the Srebrenica part of the Bosnian Muslim group was based. The Trial Chamber was correct in finding that the Bosnian Serb forces knew that their activities "would inevitably result in the *physical disappearance* of the Bosnian Muslim population at Srebrenica."[511] But I do not think the proposition of counsel for the appellant is right. These are my reasons.

48. The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed "acts" and the "intent" with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character.[512] There are exceptions. Article 4(2)(c) of the Statute speaks of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," and an intent to cause physical or biological destruction of the group in whole or in part is also implied in the case of article 4(2)(d) proscribing "measures intended to prevent births within the group." However, *a contrario*, it would seem that, in other cases, the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.

49. The *a contrario* position applies in relation to article 4(2)(a) of the Statute concerned with "killing members of the group," which was involved in this case. Of course those who were killed were destroyed physically. But that is not the question. The question is whether, to prove genocide, it was necessary to show that the intent with which they were killed was to cause the physical or biological destruction of the Srebrenica part of the Bosnian Muslim group. The stress placed in the literature on the need for physical or biological destruction implies, correctly, that a group can be destroyed in non-physical or non-biological ways. It is not apparent why an intent to destroy a

[509] Ibid., paras. 28, 29, 37 and 38.
[510] Ibid., para. 31.
[511] Impugned judgment, para. 595, emphasis added.

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group in a non-physical or non-biological way should be outside the ordinary reach of the Convention on which the Statute is based, provided that that intent attached to a listed act, this being of a physical or biological nature.

50. Counsel for the appellant correctly recognised that the attack is directed to the existence of the group; in his words, "the principle [is] that genocide is not a crime against individuals; it is a crime against human groups."[513] It is the group which is protected. A group is constituted by characteristics – often intangible - binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.

51. Counsel for the appellant understandably relies on views expressed by the International Law Commission in 1991. Referring to the standard formula concerning "intent to destroy", the Commission stated that "the word 'destruction' … must be taken only in its material sense, its physical or biological sense."[514] The focus there was on whether the term "genocide", as used in the Convention, included cultural genocide, the generally accepted answer being in the negative. If that does not account for the view expressed by the Commission, then, with respect, that view is not correct. The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.

52. The *travaux préparatoires* relating to the Genocide Convention are of course valuable; they have been and will be consulted with profit. But I am not satisfied that there is anything in them which is inconsistent with this interpretation of the Convention. However, if there is an inconsistency, the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*.[515] On settled principles of construction, there is no need to consult this material, however interesting it may be.

53. Out of abundant caution, I would make two things clear. First, the question is whether there was the required intent, not whether the intent was in fact realised. Second, the foregoing is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the

[512] The distinction is not made in paragraph 580 of the impugned judgment which states that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group," but the focus there was on the question whether cultural destruction fell within the definition of genocide.
[513] Defence Brief in Reply, 6 March 2002, para. 26.
[514] Report of the International Law Commission to the General Assembly on the Work of its Forty-third Session, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, para. (4), chapter iv, concerning article 19, "Genocide", in the "Draft Code of Crimes against the Peace and Security of Mankind."
[515] See a helpful discussion in William A. Schabas, *Genocide in International Law, The Crime of Crimes* (Cambridge, 2000), pp. 229-230.

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culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.[516]

54. In sum, I consider that the Statute is to be read to mean that, provided that there is a listed act (this being physical or biological), the intent to destroy the group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part, except in particular cases in which physical destruction is required by the Statute. This is not an excepted case. Consequently, the fact that, in this case, women, children and the elderly were allowed to survive did not signify an intent which was at variance with that which is required.

4. Whether there was a mere displacement as distinguished from genocide

55. Third, it was contended for the appellant that what happened in Srebrenica was a displacement and not a genocide. Displacement, in the sense of compulsory relocation, is a common feature of wars. According to one commentator, displacement is not genocide even if the consequence is dissolution of the group,[517] a proposition on which I reserve my opinion where it is proven that, there being an initial listed act, the deliberate object of the relocation is to accomplish such a dissolution.

56. In support of his submission that displacement is not genocide, counsel for the appellant cited the fact that displacement is not listed in article 4(2) of the Statute as one of the means of perpetrating genocide, and he drew a contrast with article 5(d) which specifically sets out deportation as a crime against humanity.[518] There is also the fact that the only case of transfer which amounts to genocide, if there is the required intent, is a case of "forcibly transferring children of the group to another group" within the meaning of article 4(2)(e) of the Statute.

57. No doubt, mere displacement does not amount to genocide. But, in this case, there was more than mere displacement. The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, constituted a single operation which was executed with intent to destroy a group

[516] I agree in these respects with paras. 580 and 595 of the impugned judgment.
[517] See the citation from K. Kreß, Münchner Kommentar zum StGB, Rn 57, § 6 VStGB, (Munich 2003), given in paragraph 519 of *Stakić*, IT-97-24-T, of 31 July 2003.
[518] Transcript of the Appeals Chamber, 27 November 2003, pp. 343 and 354.

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in whole or in part within the meaning of the chapeau to paragraph 2 of article 4 of the Statute.[519] It was this combination of factors to which the Trial Chamber referred when it stated in paragraph 595 of its judgment that the "Bosnian Serb forces knew, by the time they decided to kill all of the military-aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica." It was likewise a combination of factors which led the German Supreme Court in a 1999 case to hold that there was no mere displacement but genocide in that case.[520]

5. Conclusion as to whether there was genocide

58. In support of his interesting submission that Srebrenica was not a genocide, counsel for the appellant contended that, while "calling the atrocities at Srebrenica genocide would be of some short term comfort to the families of the victims, and a politically correct thing to do at this moment in time, this Court's judgment must be written for the ages."[521] Counsel is right in the important sense that the duty of the Tribunal is to adjudicate on the basis of legal principles; it is not its mission to decree on the convenience of political considerations. Yet, however vigorous the reminder, the Appeals Chamber does not need it. In this case, guided by what it finds to be the applicable legal norms, it found that Srebrenica was a genocide. I agree with the finding.

G. Aiding and abetting

1. There is a crime of aiding and abetting the commission of genocide

59. I agree with the Appeals Chamber that, under customary international law, there is a crime of aiding and abetting the commission of genocide and that it has power to substitute a conviction for aiding and abetting genocide for a conviction by the Trial Chamber for committing genocide as a perpetrator.

60. An argument is that the reference to a "person who … aided and abetted …" in article 7(1) of the Statute does not authorize a prosecution for aiding and abetting genocide. The asserted reason is that genocide and any crime related to genocide are exclusively regulated by article 4 of the Statute and that that article does not comprehend a crime of aiding and abetting genocide. More particularly, it is said that article 4 requires proof that an accused had the specific genocidal intent if he is charged with any of the crimes listed in that article including a crime of "complicity in

[519] By contrast, counsel for General Krstić argued that the deportation showed "an avoidance of an attempt to commit genocide" and could not be taken together with the killings. See transcript of the Appeals Chamber, 27 November 2003, pp. 355-356.
[520] BGH 3 StR 215/98, Urteil vom 30.4.1999, BGH St 45,65ff.
[521] Defence Brief in Reply, 6 March 2002, para. 27.

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genocide" as mentioned in article 4(3)(e), and that aiding and abetting does not require such proof, it being only necessary to prove that an accused charged with aiding and abetting had knowledge of the intent. Therefore, a crime of aiding and abetting genocide would add to the genocidal crimes authorized by article 4, relevant provisions of which correspond to articles II and III of the Genocide Convention of 1948, which in turn reflect customary international law. That would be in breach of the well understood prohibition against adding to crimes which existed under customary international law.

61. It will be convenient to pause for the purpose of dealing with an initial question as to whether a person charged with aiding and abetting the commission of a crime of specific intent has to be shown to have had that intent, as distinguished from merely knowing of it. The judgment of the Appeals Chamber indicates that an affirmative answer is given to the question in most states of the United States, but that a negative answer is given in other jurisdictions (including a minority of states in the United States).[522] I understand the Appeals Chamber to be taking the view that it is the latter position which is relevant to this case, that is to say, that proof of possession of specific intent is not required for aiding and abetting the commission of a crime of specific intent, mere knowledge of the intent being enough. It is on this basis, with which I agree, that the inquiry will proceed.

62. As to the main question, it seems to me that either aiding and abetting is part of complicity in genocide as the latter is referred to in article 4(3)(e) of the Statute or it is not. If it is not part of complicity in genocide, it follows that, so far as the operation of the Convention is concerned, it cannot be part of customary international law. To make an act punishable as aiding and abetting under article 7(1) of the Statute when it is not punishable as complicity in genocide under article 4(3)(e) is therefore to add impermissibly to customary international law.

63. On the other hand, if aiding and abetting is part of complicity in genocide, it is part of customary international law by reason of complicity in genocide being provided for in the Genocide Convention in 1948. In that case, the reference to aiding and abetting in article 7(1)of the Statute merely reproduces customary international law as contained in the reference to complicity in genocide as mentioned in article 4(3)(e) of the Statute. So neither provision is in breach of the prohibition against adding to customary international law.

64. But is aiding and abetting part of complicity in genocide? I see nothing in the text of the Genocide Convention or in the relevant *travaux préparatoires* which is inconsistent with the ordinary meaning of "complicity in genocide" as including aiding and abetting. As has been noticed by the Appeals Chamber, the case law of the Tribunal shows that the cognate term "accomplice"

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has different meanings depending on the context; the term may refer to a co-perpetrator or to an aider and abettor.[523] In my view, the reference in article 4(3)(e) of the Statute to "complicity in genocide" can and does include aiding and abetting.

65. If the Statute falls to be construed to mean that it has incorporated aiding and abetting as part of complicity in genocide, it appears to me that it has also imported the general law relating to aiding and abetting, in accordance with which, as has been discussed, it has to be shown that the aider and abettor had knowledge of the intent to commit genocide, not that he shared that intent.

66. This does not mean that the act of the aider and abettor does not have to be shown to be intentional. Intent must always be proved, but the intent of the perpetrator of genocide is not the same as the intent of the aider and abettor. The perpetrator's intent is to commit genocide. The intent of the aider and abettor is not to commit genocide; his intent is to provide the means by which the perpetrator, if he wishes, can realise his own intent to commit genocide.[524] Nor does it follow that proof of genocidal intent is in no sense required. But what has to be shown is that the perpetrator had that intent; it does not have to be shown that the aider and abettor himself had that intent. In the case of the aider and abettor what has to be shown is that he had knowledge that the perpetrator had that intent.

67. The framers of the Genocide Convention would not have learnt from their recent past if, as the opposing argument implies, the Convention failed to criminalise a case in which commercial suppliers sold a deadly gas knowing of the intent of the purchaser to use his purchase for the purpose of liquidating a national, ethnical, racial or religious group but not themselves sharing the purchaser's intent.[525] In my opinion, the Genocide Convention did not make that mistake; the case would be caught by the concept of aiding and abetting, which would in turn be caught by the reference in the Convention to "complicity in genocide."

68. This conclusion is in keeping with the case law of this Tribunal and of the ICTR to the effect that "complicity in genocide", as mentioned in article 4(3)(e) of the ICTY Statute [article 2(3)(e) of the ICTR Statute], includes aiding and abetting as referred to in article 7(1) of the ICTY Statute [article 6(1) of the ICTR Statute]. The case law is correct: aiding and abetting genocide does not represent an addition to crimes known to customary international law but has always formed part of that law.

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[522] Ibid., paras. 137-138.
[523] Judgment of the Appeals Chamber, para. 139.

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2. <u>But, on the facts, the Appeals Chamber cannot impose a conviction for aiding and abetting</u>

69. While I agree with the Appeals Chamber that it has competence to impose a conviction for aiding and abetting the commission of genocide, I am not able to support its decision that such a conviction should be imposed in this case.

70. There are many things to be said in favour of the appellant. The Trial Chamber correctly remarked that he "found himself squarely in the middle of one of the most heinous wartime acts committed in Europe since the Second World War."[526] He appeared to the Trial Chamber "as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995."[527] Speaking on 12 July 1995 of the women and children being transported out of Potočari, he warned with impeccable military propriety that "not a hair must be touched on their heads."[528] In an interview given on the same day, he emphasised that the civilians would be treated properly and transported wherever they wanted to go.[529] In the words of the Trial Chamber, "the security unit of the Main Staff was heavily involved in carrying out the crimes and there are indications on the Trial Record that the Drina Corps was not always consulted about what was going on within its zone of responsibility."[530] And the appellant did at the same time have to concentrate on another task, namely, the capturing of the UN protected enclave of Žepa.

71. The question is whether these matters sound in mitigation of guilt as a co-perpetrator or whether they go to prove that the appellant's guilt was that only of an aider and abettor. The difference between committing a crime as a co-perpetrator in a joint criminal enterprise and aiding and abetting its commission was explained in *Tadić*.[531] In "the case of aiding and abetting, the requisite element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal purpose were likely to be committed)…".

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[524] See, generally, the reasoning relating to aiding and abetting in *National Coal Board v. Gamble*, [1959] 1 Q.B. 11, concurring opinion of Devlin J, and *DPP for Northern Ireland v. Lynch*, [1975] AC 653, HL, dissenting opinion of Lord Simon of Glaisdale.
[525] See and compare *The Zyklon B Case*, *Law Reports of Trials of War Criminals*, Vol. 1 (London, 1947), p. 93.
[526] Impugned judgment, para. 421.
[527] Ibid., para. 420.
[528] Ibid., para. 358.
[529] Ibid.
[530] Ibid., para. 361.
[531] IT-94-1-A, of 15 July 1999, para. 229(iv).

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72. On the basis of this distinction, it appears to me that the Trial Chamber correctly found that the appellant not merely knew of an intent to commit genocide but that he also shared that intent and that he was therefore guilty as a co-perpetrator of genocide,[532] matters in his favour being taken into account in sentencing. The position was rightly understood by the Trial Chamber when it stated as follows in paragraph 724 of its judgment, concerned with sentencing:

> The Trial Chamber's overall assessment is that General Krstić is a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica, but would not likely, on his own, have embarked on a genocidal venture; however, he allowed himself, as he assumed command responsibility for the Drina Corps, to be drawn into the heinous scheme and to sanction the use of Corps assets to assist with the genocide…. Afterwards, as word of the executions filtered in, he kept silent and even expressed sentiments lionising the Bosnian Serb campaign in Srebrenica. … His story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realisation of this hideous design.

73. Subject to weight, it appears to me that that approach was a fair one. It took account of the professionalism of the appellant as a career military officer and of the fact that, by himself, he would not commit the crimes into which he allowed himself to be led. These are matters which go to mitigate his guilt as a co-perpetrator of genocide and not to reduce his criminal responsibility to that of an aider and abettor. To adopt and adapt the words of *Tadić*,[533] to hold him liable only as an aider and abettor would be to understate the degree of his criminal responsibility.

74. It seems to me that there are problems in reaching the conclusion that the appellant's guilt was that of an aider and abettor. The Appeals Chamber accepts that Drina Corps personnel and resources were used for the killings.[534] Explaining this, it said that the appellant "knew that by *allowing* Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he did nothing to prevent the Main Staff from calling upon Drina Corps resources, and he *permitted* that employment of those resources."[535]

75. A substantial contribution for the purpose of aiding and abetting is a contribution that assists the perpetrator to commit his crime if he wishes to do so. That must be distinguished from participating in the commission of the crime itself. If, as I think, by "allowing," or by reason of the fact that he "permitted," the use of Drina Corps personnel and resources for the executions, the appellant authorized that use for that purpose, I would think that he was participating in the

[532] Impugned judgment, para. 644.
[533] IT-94-1-A, of 15 July 1999, para. 192.
[534] Judgment of the Appeals Chamber, paras. 56, 61 and 78.
[535] Ibid., para. 137, emphasis added.

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commission of the crime itself and not merely enabling the perpetrator to commit the crime if he so wished. He was therefore correctly adjudged to be guilty of genocide.

H. Cumulation

76. Finally, there is a question as to whether convictions can be cumulated where criminality arises from the same conduct. I respectfully agree with the Appeals Chamber in allowing the appeal by the prosecution against the decision of the Trial Chamber that a conviction for extermination cannot be cumulated with a conviction for genocide and that a conviction for persecution cannot be cumulated with a conviction for genocide.

77. I only note that, without discussion, the Appeals Chamber has not recorded corresponding convictions, an omission not reconcilable with controlling jurisprudence. The question has not been whether the Appeals Chamber could reverse an acquittal and replace it by a conviction, but whether there is a right of appeal from such a conviction and, if so, to which body. [536] The second part of the question does not control the first. Either an appellant has a right of appeal from a conviction by the Appeals Chamber or he has not. If he has such a right of appeal, he can exercise his right of appeal to whatever may be the correct forum. If he has no such right of appeal, it does not follow that there can be no conviction. That is not my reading of the Statute and applicable human rights instruments.[537]

78. Suppose that an accused has been acquitted on all charges by the Trial Chamber, but that the acquittals are all reversed by the Appeals Chamber. On the view that no convictions are to be entered, the accused, though found to have committed possibly very serious crimes, goes free. This needs to be compared with Rule 99(B) of the Rules of Evidence and Procedure. That Sub-Rule provides that, though acquitted, an accused may be detained pending appeal by the prosecution. It is reasonable to suppose that that implies an understanding by the judges who legislated the Sub-Rule that a sentence of imprisonment can be passed by the Appeals Chamber and that therefore the Appeals Chamber is competent to make a conviction. If the Appeals Chamber is not competent to make a conviction, that Sub-Rule would have to be revoked, as there would be no juridical basis for detaining an acquitted accused pending appeal by the prosecution.

79. A possible answer to these problems is to say that the Appeals Chamber can remit the matter to the Trial Chamber for a conviction to be made and for sentence appropriate to the conviction to

[536] See *Rutaganda*, ICTR-96-3-A, of 26 May 2003, and the opinions appended thereto. In that case (Judge Pocar dissenting), acquittals by the Trial Chamber were in fact reversed and replaced by convictions imposed by the ICTR Appeals Chamber.
[537] My position was given in a separate opinion appended to *Rutaganda*, ICTR-96-3-A, of 26 May 2003.

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be passed. But, wide as it is, the power to remit is not at large. It does not embrace a case in which, as I opine, the only reason for remitting is an erroneous assumption that the Appeals Chamber is itself not competent to convict. The existence of that competence is shown by Rule 99(B).

80. To return to the remaining points on cumulation, I accept the Appeals Chamber's decision that a conviction for murder as a crime against humanity cannot be cumulated with a conviction for persecution and that a conviction for inhumane acts cannot be cumulated with a conviction for persecution. Previous decisions of the Appeals Chamber (to some of which I was a party)[538] point this way. However, had it not been for those decisions I should have had difficulty in joining in with the decision of the Appeals Chamber. I note below the reasons for this difficulty.

1. Persecution and murder

81. First, then, there is the question whether a conviction for persecution, as a crime against humanity under article 5(h) of the Statute, may be cumulated with a conviction for murder, as a crime against humanity under article 5(a), in relation to the same conduct. The Trial Chamber held that only a conviction for persecution was possible; it dismissed the charge of murder.[539] There could be a problem with that view.

82. The question of cumulation is approached in some jurisdictions through the concept of abuse of process. In the Tribunal, it is regulated by principles deriving from the *Blockburger*[540] test as adopted in *Delalić*.[541] It is accepted that an accused is only to be punished for his actual criminal conduct. But his actual criminal conduct may embrace several crimes. If it does, more than one conviction may be necessary to describe the full criminality of his conduct, any overlapping being taken into account in sentencing.

83. Thus, it is possible that murder has been committed under paragraph (a) of article 5 without any additional features to indicate that it was also committed with intent to persecute the victim on "political, racial and religious grounds" under paragraph (h) of that article. If that is the case, then the conviction has to be for murder alone. If that is not the case, the full criminality of the offender's conduct will not be dealt with unless there is also a conviction for persecution. But it is said that the elements of murder are subsumed by those of persecution and that therefore only a conviction for persecution is possible. Is the argument sound?

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[538] The judgment in *Krnojelac*, IT-97-25-A, of 17 September 2003, paras. 178,188, was set out in a few lines, without much discussion. So too with *Vasiljević*, IT-38-92-A, of 25 February 2004, para. 146.
[539] Impugned judgment, para. 675.
[540] *Blockburger v. United States*, 284 U.S. 299.
[541] IT-96-21-A, of 20 February 2001, paras. 412-413.

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84. Under article 5 of the Statute, it is possible to cumulate extermination and enslavement, enslavement and deportation, deportation and imprisonment, imprisonment and torture, torture and rape, all charged under different paragraphs of that article. However, on the Appeals Chamber's view, it will not be possible to cumulate persecution under paragraph (h) of that article with any of these crimes. In other words, once persecution is brought on the basis of the other crimes, it will not be possible to proceed independently for any of them. In particular, it will not be possible to make an independent conviction for murder under paragraph (a) of that provision if, under paragraph (h), there is also a conviction for persecution. That seems curious.

85. In probing this curiosity, it is helpful to note that the substantial idea underlying the *Blockburger*[542] principles is that the lawgiver "does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense', they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."[543] I am unable to see that the "same offense" was being proscribed by the two provisions in this case. The intention was to defend different interests of the international community, and that in my view remains a valid way in which an international criminal tribunal should look at the matter. Those interests do not of course replace any formal tests adopted by the Tribunal, but it will be superficial to suggest that, in an institution of this kind, those interests do not serve to explain the import and operation of those tests.[544]

86. The jurisprudence in Australia could be restated in terms of *Blockburger*, but it is interesting and useful to note that the courts there seem to apply a gist or gravamen approach to the problem of cumulation. In *Pearce v. The Queen*,[545] the appellant was convicted of "grievous bodily harm" under the usual provision dealing directly with that subject and also of "grievous bodily harm" under another provision which dealt with that offence when committed in the course of breaking and entering a dwelling house. In holding that there were impermissible double convictions, the leading judgment of the High Court of Australia said that "a single act (the appellant's inflicting grievous bodily harm on his victim) was an element of each of the offences."[546] As the gist of that act would be included in the offence when committed in the course of breaking and entering a dwelling house, a conviction for both offences was not permissible.

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[542] Ibid.
[543] *Whalen v. United States*, 445 U.S. 684 (1980), at 692, confirming *Blockburger*.
[544] *Albernaz v. U.S.*, 450 U.S. 333(1981), at 343, reaffirming *Blockburger* but stating (*per* Justice Rehnquist delivering the opinion of the Court): "The conclusion we reach today regarding the intent of Congress is reinforced by the fact that the two conspiracy statutes are directed to separate evils presented by drug trafficking. 'Importation' and 'distribution' of marihuana impose diverse *societal harms* …" (Emphasis added).
[545] 194 CLR 610 (1998).
[546] McHugh, Hayne and Callinan, JJ., at p. 623.

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87. That is consistent with the seemingly different position taken by the Supreme Court of New South Wales (Court of Criminal Appeal) in *R. v. Lucy Dudko*.[547] There, force was used to rescue a prisoner at a penitentiary and at the same time the same force was used as a threat to accomplish the hijacking of a helicopter which was used to transport him. In the leading judgment, Spigelman, C.J., said:

> [I]n one case the focus was on a rescue by force and in the other case, on a hijack by threat. Even though the force and the threat was constituted by the same act, it cannot be concluded in this case, unlike *Pearce*, that the Appellant has been "doubly punished for a single act." In *Pearce*, the single act was the infliction of grievous bodily harm. That was much more than simply an element of the offence, it was the gist or gravamen of the criminal behaviour. In the present case the gist or gravamen of the criminal behaviour was not the same in the two offences. In my opinion it is not correct to say that there was a double punishment on the facts of this case.

88. In *Dudko*, there was a common physical act, but its focus was not the same in the two offences: the gist or gravamen of each offence was different from that of the other. In the present matter, the gist or gravamen of one case is that the appellant murdered civilians; in the other case, the different gist or gravamen is that the appellant persecuted those victims as evidenced by the murders. The focus is different; the first crime, together with the circumstances in which it occurred, is evidence of the second crime but it is not the same as the second.

89. I think this is the theory on which the indictment was based. Paragraph 31 of the indictment reads as follows:

> The crime of persecutions was perpetrated, executed, and carried out by or through the following means:
>
> a. the murder of thousands of Bosnian Muslim civilians, including men, women, children, and elderly persons;
>
> b. the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings;
>
> c. the terrorizing of Bosnian Muslim civilians;
>
> d. the destruction of personal property of Bosnian Muslims; and,
>
> e. the deportation or forcible transfer of Bosnian Muslims from the Srebenića enclave.
>
> By these acts or omissions, and the acts and omissions described in paragraphs 4, 6, 7, 11 and 22 through 26, RADISLAV KRSTIĆ committed:
>
> COUNT 6: Persecutions on political, racial and religious grounds, a CRIME AGAINST HUMANITY, punishable under Articles 5(h), and 7(1) and 7(3) of the Statute of the Tribunal.

While this part of the indictment speaks of "murder", it does so by way of stating a "means" through which persecution was committed.

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[547] [200] NSWCCA, 336 (2002).

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90. It is important to bear in mind the distinction between the legal elements of an offence and the evidence on which those elements are based. It is accepted that persecution is "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited under Article 5."[548] There is nothing in that definition which replicates the legal elements of the crime of murder. Murder is a crime of specific intent,[549] the intent being to cause the death of the victim. That element is not required by persecution. The conduct of the appellant in committing the crime of murder may be evidence of the crime of persecution, but the legal elements of the crime of murder are not themselves part of the legal elements of the crime of persecution.

91. Were it otherwise, the legal elements of the crime of persecution would vary according to the legal elements of the particular crime on which the persecution is based. The legal elements of the crime of persecution would include the legal elements of the crime of enslavement if enslavement were alleged to be the basis of the persecution charged. Similarly with respect to deportation, imprisonment, torture and rape. The legal elements of a charge for persecution would thus vary from case to case; in the present case, they would include the legal elements of all the crimes on which the persecution is alleged to have been based. That variability is not reconcilable with the stability, definitiveness and certainty with which the legal elements of a crime should be known. Those elements must not depend on accidents of prosecution; they must clearly appear once and for all from a reading of the provision defining the crime.

92. Paragraph 31 of the indictment alleges that persecution was committed "through the following means", murder and four other matters being cited, some clearly falling under article 5 of the Statute. It cannot be that a conviction for persecution was intended to embrace convictions for all these other crimes. A conviction for persecution as a crime against humanity does not focus on the guilt of the appellant in committing a particular crime of murder as a crime against humanity. On the other hand, a conviction for murder as a crime against humanity does not focus on those aspects of the conduct involved in the commission of that crime which portray an intention to persecute. To have recourse to the jurisprudence of Australia, the gravamen or gist of the crime of persecution is different from the gravamen or gist of the crime of murder.

93. In short, all the legal elements of the crime of murder lie outside of the legal elements of the crime of persecution: the facts of the murder are only evidence on which the charge of persecution

[548] *Kupreškić*, IT-95-16-T, of 14 January 2000, para. 621.
[549] *Archbold, Criminal Pleading, Evidence and Practice 2003* (London, 2003), paras. 17-34(a), and *Blackstone's Criminal Practice 2003* (Oxford, 2003), para, B1.11(a).

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is based. *Delalić* does not mandate non-cumulation in this case. There could therefore be difficulty with the holding in paragraph 675 of the impugned decision in favour of non-cumulation.

2. Persecution and inhumane acts

94. Second, there is the question whether a conviction for persecution under article 5(h) of the Statute may be cumulated with a conviction for inhumane acts (in relation to forcible transfers) under article 5(i). The Trial Chamber held that cumulation was not permissible, considering that a conviction for persecution was enough. The same reasoning as above suggests difficulties with that holding.

I. Conclusion

95. Genocide is the "crime of crimes". The Appeals Chamber has said, correctly, that it "is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent."[550] But, with respect, the stringency should not be overrated; to suggest that the requirement of proof of specific intent was not observed by the Trial Chamber in this case is not plausible.

96. In my view, it has not been shown that no reasonable tribunal of fact could have assessed the evidence as the Trial Chamber did; going further, I opine that no reasonable tribunal of fact could have assessed the evidence differently from the way in which the Trial Chamber assessed it. The appellant was a "principal perpetrator" of genocide, as the Trial Chamber said he was.

97. However, I consider that effect to the mitigating matters referred to indicates that the proper sentence should be imprisonment for thirty-five years, being the same period as that fixed by the Appeals Chamber on another approach.

Done in both English and French, the English text being authoritative.

Mohamed Shahabuddeen

Dated this 19th April 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

[550] Judgment of the Appeals Chamber, para. 134.

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IX. ANNEX A: PROCEDURAL BACKGROUND

1. The main aspects of the appeal proceedings are summarised below.

A. Notices of Appeal and Issues Relating to Judges

2. The Trial Judgement was handed down on 2 August 2001.[551] In accordance with Rule 108 of the Rules, the Defence and the Prosecution filed their Notices of Appeal on 15 August[552] and 16 August 2001, respectively. On 17 September 2001, the then-President of the Tribunal, Judge Jorda, issued an order assigning the following judges to the Appeals Chamber: Judge Hunt, Judge Shahabuddeen, Judge Güney, Judge Gunawardana, and Judge Pocar.[553] On 28 September 2001, the Presiding Judge, Judge Shahabuddeen, designated Judge Hunt as the Pre-Appeal Judge in this case.[554]

3. On 8 November 2002, Judge Jorda, as President, issued an order assigning Judge Meron to replace Judge Gunawardana on the bench of the Appeals Chamber.[555]

4. On 24 July 2003, Judge Meron, as President, issued an order assigning Judge Schomburg to replace Judge Hunt on the bench of the Appeals Chamber.[556]

5. On 14 October 2003, Judge Meron, as President, issued an order designating himself as the Pre-Appeal Judge in this case.[557]

B. Filings

6. The Prosecution filed its Appeal Brief on 14 November 2001.[558] On 5 November 2001, the Pre-Appeal Judge had granted the Defence's request for an extension of time to file its Appeal Brief,[559] and the Defence filed a confidential version of its Appeal Brief on 10 January 2002.[560]

[551] Available in B/C/S on 21 November 2001.
[552] Signed 14 August 2001.
[553] Order of the President Assigning Judges to the Appeals Chamber, 17 September 2001.
[554] Order Designating a Pre-Appeal Judge, 28 September 2001.
[555] Order of the President Assigning a Judge to the Appeals Chamber, signed 8 November 2002, filed 13 November 2002.
[556] Order Replacing a Judge in a Case Before the Appeals Chamber, 24 July 2002.
[557] Order Designating a Pre-Appeal Judge, 14 October 2003.
[558] Prosecution Appeal Brief, 14 November 2001.
[559] Order Granting Extension of Time, 5 November 2001, which granted an additional 50 days.
[560] Confidential Defence Appeal Brief, 10 January 2002.

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7. On 17 December 2001, The Pre-Appeal Judge rejected the Defence's petition for an extension of time to file its Response to the Prosecution Appeals Brief,[561] and on 21 December 2001 the Defence filed its Response to the Prosecution Appeals Brief.[562]

8. Following the Pre-Appeal Judge's Decision allowing an extension of time for the filing of its Brief in Reply,[563] the Prosecution filed its Brief in Reply on 14 January 2002.[564] The Prosecution then filed confidentially its Response to the Defence Appeal Brief on 19 February 2002.[565] The Defence filed its Brief in Reply on 6 March 2002.[566]

9. On 10 April 2002, the Pre-Appeal Judge ordered the Prosecution and the Defence to file within 28 days public redacted versions of the Prosecution Response to the Appeal Brief and the Defence Appeal Brief, respectively.[567] The Defence filed its public version of the Defence Appeal Brief on 7 May 2002.[568] The Prosecution filed a public version of its Response to Defence Appeal Brief on 8 May 2002.[569]

C. Grounds of Appeal

10. The Prosecution bases its appeal on two grounds. First, the Prosecution appeals against the Trial Chamber's conclusion on impermissibly cumulative convictions.[570] Second, the Prosecution appeals against the sentence imposed by the Trial Chamber.[571] It requested the imposition of a life sentence on Radislav Krstić, with a minimum of 30 years imprisonment.

11. The Defence bases its appeal on four grounds. First, it appeals against the conviction for genocide of Radislav Krstić on the basis that factual and legal errors had been committed by the Trial Chamber;[572] second, it appeals on the basis of various disclosure practices of the Prosecution which it alleges deprived Krstić of a fair trial;[573] third, it alleges that the Trial Chamber made a

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[561] Decision on Application by Appellant to Suspend Briefing Schedule or for Extension of Time, signed 17 December 2001, filed 18 December 2001.
[562] Defence Response to Prosecution Appeal Brief, 21 December 2001.
[563] Decision on Prosecution Motion for Extension of Time, 24 December 2001.
[564] Prosecution Brief in Reply, 14 January 2002.
[565] Prosecution Response to the Defence Appeal Brief, 19 February 2002. The Prosecution later filed a *corrigendum* to this Response on 21 February 2002.
[566] Defence Brief in Reply, 6 March 2002.
[567] Order, 10 April 2002.
[568] Defence Appeal Brief (Public Version), 7 May 2002.
[569] Prosecution Response to Defence Appeal Brief (Public Version), 8 May 2002.
[570] Prosecution Appeal Brief, section 3.
[571] Prosecution Appeal Brief, section 4. The Prosecution submits that the sentence (a) was manifestly inadequate because of the gravity of the offences, and because of the accused's degree of participation in the events; (b) was in manifest disparity with ICTR genocide cases; (c) was erroneous in that it found that the accused had palpably lesser guilt than other unidentified participants in the events; and (d) failed to include pre-meditation as an aggravating factor.
[572] Defence Appeal Brief, pp. 5 - 35.
[573] *Op cit.*, pp. 35 - 47.

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number of factual and legal errors;[574] and fourth, it appeals against the sentence handed down to Krstić because the Trial Chamber failed adequately to take into account the sentencing practice in the former Yugoslavia, and to give sufficient weight to the alleged mitigating circumstances.[575]

D. Issues Relating to Evidence (1): General

12. During these proceedings, the Appeals Chamber received a number of requests from third parties, mostly for access to evidence submitted in this case. In addressing these requests, the Appeals Chamber was asked to vary certain protective measures pursuant to Rule 75(G).

E. Issues Relating to Evidence (2): Rule 68

13. On 30 November 2001, the Defence filed a Motion for Production of Evidence.[576] On 10 December 2001, the Prosecution filed confidentially its Response to that Motion;[577] the Defence filed its Reply on 11 December 2001,[578] and the Defence on 24 December 2001 then filed confidentially a Supplemental Reply[579] to which, subject to the Pre-Appeal Judge's subsequent order granting it leave to do so,[580] the Prosecution filed a response on 12 February 2002.[581] The Defence then filed a Request for Deferral of Decision on 20 February 2002.[582] The Prosecution responded to this Request on 5 March 2002,[583] in which it did not oppose the Defence's Request.

14. On 1 March 2002,[584] the Pre-Appeal Judge granted leave to the Prosecution to file a further Response concerning conceded violations of its obligations under Rule 68 by 8 March 2002.[585] On 11 March 2002, the Prosecution filed its Further Response to Appellant's 24 December 2001 Supplemental Reply,[586] and on 26 March 2002, the Defence confidentially filed its Further Reply to the Prosecutor's 11 March 2002 Further Response.[587]

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[574] *Op cit.*, pp. 47 - 52.
[575] *Op cit.*, p. 68; and Defence Brief in Response, pp. 15 - 33.
[576] Motion for the Production of Evidence, 30 November 2001.
[577] Prosecution's Response to Motion for Production of Evidence (Confidential), 10 December 2001.
[578] Reply to Prosecution's Response to Motion for Production of Evidence, 11 December 2001.
[579] Supplemental Reply: Motion for Production of Evidence, 24 December 2001.
[580] Order on Prosecution's Request for Leave to File a Response to Appellant's 24 December 2001 Supplemental Reply, 15 February 2002.
[581] Request for Leave to File a Supplementary Response and Prosecution's Supplementary Response to Appellant's 24 December 2001 Supplementary Reply, signed 11 February 2002, filed 12 February 2002.
[582] Request for Deferral of Decision: Motion for Production of Evidence, signed 19 February 2002, filed 20 February 2002.
[583] Prosecution Response to Request for Deferral of Decision, 5 March 2002.
[584] In response to the Prosecution's Motion for Leave to File a Further Supplementary Response, 28 February 2002.
[585] Scheduling Order, 1 March 2002. This late filing was authorised by the Pre-Appeal Judge in its Order following requests by both parties for an extension of time to file documents, and by the Prosecution's request for authority to exceed the page limit for its further response of 21 March 2002, pursuant to Rule 127 and paragraph 7 of the Practice Direction.
[586] Prosecution's Further Response to Defence's Supplemental Reply of 24 December 2001, 11 March 2002.
[587] Further Reply to the Prosecutor's 11 March Further Response (Confidential), 26 March 2002.

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15. On 10 April 2002 the Prosecution filed a Motion proposing a procedure for the further proceedings on the Motion for Production of Evidence filed on 30 November 2001, or alternatively a request for extension of time.[588]

16. The Defence confidentially filed its Appeal Brief concerning Rule 68 violations on 11 April 2003.[589] Following the granting of an extension of time,[590] the Prosecution filed confidentially its Response to the Defence's Brief Concerning Rule 68 Violations on 8 May 2003.[591] The Defence confidentially filed its Reply on 22 May 2003.[592] Having being granted leave to do so,[593] the Prosecution then confidentially filed a Further Response on 30 June 2003.[594] Subsequent to being granted an extension of time to do so,[595] the Defence confidentially filed its Further Reply to Prosecution's Further Response to Reply on 14 July 2003.[596]

17. On 18 November 2003, the Prosecution filed its Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115.[597] The Defence filed its Reply to this motion on 20 November 2003.[598] The Prosecution subsequently withdrew its Motion on 20 November 2003.[599]

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[588] Prosecution Motion Proposing Procedure for the Continued Litigation on the Motion for Production of Evidence Filed on 30 November 2001 or Alternatively a Request for Extension of Time, 10 April 2002. The Prosecution filed a public redacted version of this motion on 12 April 2002.
[589] Defence Appeal Brief Concerning Rule 68 Violations (Confidential), signed 10 April 2003, filed 11 April 2003.
[590] Order on Extension of Time, 1 May 2003.
[591] Prosecution Response to Defence Appeal Brief Concerning Rule 68 Violations (Confidential), 8 May 2003.
[592] Defence Reply to Prosecution Response to Brief Concerning Rule 68 Violations (Confidential), 22 May 2003.
[593] Decision Granting Leave for Supplementary Response, 29 May 2003.
[594] Prosecution's Further Response to the Reply Filed by Radislav Krstić on 22 May 2003 Regarding Rule 68 Violations, 30 June 2003.
[595] Order on Extension of Time, 8 May 2003.
[596] Defence Further Reply to Prosecution's Further Response to Reply Filed by Radislav Krstić on 22 May 2003 Regarding Rule 68 Violations (Confidential), signed 11 July 2003, filed 14 July 2003.
[597] Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115, 18 November 2003.
[598] Defence Reply to the Prosecution's Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115, 20 November 2003.
[599] Withdrawal of "Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115", 20 November 2003.

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F. Issues Relating to Evidence (3): Witnesses

18. On 1 April 2003, the Defence confidentially filed a Motion seeking the issuance of subpoena for witnesses.[600] By Order of 1 July 2003, the Appeals Chamber granted the issuance of the two subpoenas sought.[601] The subpoenas were issued confidentially on 10 July 2003.

19. In its Decision of 19 November 2003, the Appeals Chamber summoned a witness *proprio motu* pursuant to Rules 98 and 107.[602]

G. Issues Relating to Evidence (4): Rule 115 Motions

20. The Defence confidentially filed a Rule 115 Motion for the admission of additional evidence on 10 January 2003,[603] and a confidential Supplemental Motion on 21 January 2003.[604] Having been granted an extension of time,[605] the Prosecution confidentially filed its Response to the Defence's Rule 115 Motions on 31 January.[606] The Defence filed confidentially its reply on 12 February 2003[607] following the granting of an extension of time.[608] By Order of 26 February 2002,[609] the Prosecution was granted leave[610] to amend its Response to the Defence's Rule 115 Motion. On 5 August 2003, the Appeals Chamber ordered that some of the evidence be admitted as additional evidence on appeal pursuant to Rule 115.[611]

21. On 24 September 2003, the Appeals Chamber issued a Scheduling Order requiring the Prosecution to file a Notice indicating whether or not it would seek to rely on any rebuttal evidence, and if so, to submit such evidence.[612] The Prosecution filed its Notice pursuant to that Order on 3 October 2003.[613] Following a Decision granting it an extension of time,[614] the Defence filed its

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[600] Defence Motions for Issuance of Subpoena (confidential), 1 April 2003. An *addendum* to this Motion was filed on 3 April 2003.
[601] Decision on Application for Subpoenas, 1 July 2003 (Judge Shahabuddeen dissenting).
[602] Decision to Summon a Witness *Proprio Motu*, 19 November 2003.
[603] Rule 115 Defence Motion to Present Additional Evidence, 10 January 2003 (Public Version filed on 12 February 2003).
[604] Supplemental Rule 115 Motion to Present Additional Evidence, 21 January 2003 (Public Version filed 12 February 2001). A further *addendum* was filed on 27 January 2003 (Public Version 12 February 2001).
[605] Order on Extension of Time, 13 February 2003.
[606] Prosecution's Response to Defence Motion to Present Additional Evidence under Rule 115, 31 January 2003 (confidential).
[607] Defence Reply to the Prosecution's Response to Defence Motions for Admission of Additional Evidence under Rule 115, 12 February 2003 (Public Version filed on 21 February 2003).
[608] Orders on Extension of Pages and Extension of Time, 4 February 2003.
[609] Order Granting Prosecution Motion of 24 February 2003, 26 February 2003.
[610] Pursuant to the Prosecution's Motion Seeking Leave to Amend the 'Prosecution Response to Defence Motions for Admission of Additional Evidence under Rule 115', 24 February 2003.
[611] Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003. Reasons (confidential in part) for this Decision were given on 6 April 2004.
[612] Scheduling Order, 24 September 2003.
[613] Prosecution's Notice and Filing of Rebuttal Evidence and Arguments in Compliance with the Appeals Chamber's Scheduling Order (Confidential); and Prosecution's Notice and Filing of Rebuttal Evidence and Arguments in Compliance with the Appeals Chamber's Scheduling Order, both of 3 October 2003. The Prosecution filed its further

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Reply on 30 October 2003.[615] In its Decision of 19 November 2003, the Appeals Chamber ordered the admission of the evidence submitted by the Prosecution.[616]

22. The Defence confidentially filed a further Rule 115 Motion for the admission of additional evidence (two witness statements) on 7 August 2003.[617] The Prosecution filed a confidential Response on 15 August 2003.[618] The Defence's Motion was denied by the Appeals Chamber in its Decision of 15 September 2003.[619]

23. On 4 November 2003, the Defence filed a Supplemental Motion to Present Additional Evidence Pursuant to Rule 115,[620] to which the Prosecution responded confidentially on 11 November 2003.[621] The Defence replied confidentially to the Prosecution's Response on 17 November 2003.[622] In its Decision of 20 November 2003,[623] the Appeals Chamber granted the Motion.

24. On 30 October 2003, the Defence sought to admit a report prepared by its military expert.[624] On 12 November 2003, the Prosecution submitted confidentially a Motion[625] to disallow this evidence submitted by the Defence, together with a subsequent supplement.[626] The Defence filed its Answer to this Motion on 17 November 2003,[627] and the Prosecution responded on 18 November

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notice and filing of rebuttal evidence and arguments in compliance with the Appeals Chamber's Scheduling Order (confidential) on 21 October 2003.

[614] Decision for the Defence's Motion for Extension of Time, 15 October 2003.

[615] Reply to Prosecution's Notice and Further Notice and Filing of Rebuttal Evidence and Arguments in Compliance with the Appeals Chamber's Scheduling Order (confidential), 30 October 2003.

[616] Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on appeal, 19 November 2003.

[617] Motion for Leave to Present Further Evidence in Support of Defence Rule 115 Motion to Produce Additional Evidence, 7 August 2003.

[618] Prosecution's Response to Applicant's Confidential Motion for Leave to Present Further Evidence in Support of Defence Rule 115 Motion to Produce Additional Evidence, and Prosecution Request for Extension of Page Limit, 15 August 2003.

[619] Decision on Application for Admission of Further Additional Evidence on Appeal, 15 September 2003. Reasons (confidential in part) for this Decision were given on 6 April 2004.

[620] Supplemental Motion to Present Additional Evidence pursuant to Rule 115, 4 November 2003.

[621] Prosecution Response to Defence's Supplemental Motion to Present Additional Evidence pursuant to Rule 115 (Confidential), 11 November 2003.

[622] Defence Reply to the Prosecution Response to Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule115 (confidential), 17 November 2003.

[623] Decision on the Defence Supplemental Motion to Present Additional Evidence 20 November 2003.

[624] Defence Reply to prosecution's notice and further Notice and Filing of rebuttal Evidence and Arguments in Compliance with the Appeals Chamber's Scheduling Order (confidential), 30 October 2003.

[625] Prosecution Motion to Disallow Opinion of Appellant's Military Expert, Request for Leave to Address recent Challenge to Admissibility of Rebuttal Documents, and Notice of Position on Outstanding Evidentiary Issues, 12 November 2003. The Prosecution filed a Supplement to this Motion on 13 November 2003.

[626] Supplement to Prosecution's Motion to Disallow Opinion of Appellant's Military Expert, Request for Leave to Address Recent Challenge to Admissibility of Rebuttal Documents, and Notice of Position on Outstanding Evidentiary Issues, (confidential) 13 November 2003.

[627] Answer to Prosecution's Motion to Disallow Opinion of Appellant's Military Expert, Request for Leave to Address Recent Challenge to Admissibility of Rebuttal Documents, and Notice of Position on Outstanding Evidentiary Issues, 17 November 2003.

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2003.[628] In its Decision of 20 November 2003, the Appeals Chamber dismissed the Defence's submission.[629]

25. The Prosecution submitted a Motion for the Admission of Additional Evidence on 11 November 2003, which was partly confidential and *ex parte*,[630] to which the Defence replied on 17 November 2003.[631] Subsequently, the Prosecution filed its Reply.[632] The Appeals Chamber dismissed the motion in its Decision of 19 November 2003.[633]

H. Status Conferences

26. Status Conferences were held pursuant to Rule 65*bis* of the Rules on 11 December 2001; 5 April 2002; 27 August 2002; 25 November 2002; 19 March 2003; 30 July 2003; and 1 April 2004.

I. Hearings

27. The evidentiary portion of the hearing was held on 21 November 2003. The remainder of the hearing was held on 26 and 27 November 2003.

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[628] Response to "Answer to Prosecution's Motion to Disallow Opinion of Appellant's Military Expert", 18 November 2003.
[629] Decision on the Defence Request to Admit a Report of the Defence Military Expert, 20 November 2003.
[630] Prosecution's Motion for the Admission of Additional Evidence (partly confidential and *ex parte* annex C), 11 November 2003.
[631] Response to Prosecution's 11 November 2003 Motion for Admission of Additional Evidence (confidential), 17 November 2003.
[632] Prosecution's Reply Regarding the Prosecution's motion of 11 November 03 to Admit Additional Evidence, 18 November 2003.
[633] Decision on the Prosecution's Motion for Admission of Additional Evidence, 19 November 2003.

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X. ANNEX B: GLOSSARY OF TERMS

A. List of Court Decisions

1. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BANOVIĆ
Prosecutor v. Pedrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement").

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Decision on the Production of Discovery Materials, Case No. IT-95-14-PT, Trial Chamber, signed 27 January 1997, filed 30 January 1997 ("*Blaškić* Decision on the Production of Discovery Materials").

Prosecutor v Tihomir Blaškić, Decision on the Defence Motion for Sanction's for the Prosecutor's Continuing Violation of Rule 68, Case No. IT-95-14-T, 28 September 1998 ("*Blaškić* Decision on the Defence Motion for Sanction's for the Prosecutor's Continuing Violation of Rule 68").

Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Findings, Case No. IT-95-14-A, Bench of the Appeals Chamber, 26 September 2000 ("*Blaškić* Decision on the Appellant's Motion for the Production of Material").

BRĐANIN AND TALIĆ
Prosecutor v. Radoslav Brđjanin, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment while Matters affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, Trial Chamber II, 30 October 2002 ("*Brđjanin* Decision on Motion for Relief from Rule 68 Violations by the Prosecutor").

ČELEBIĆI
Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-T, Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information, 24 June 1997 ("*Čelebići* Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68").

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C. List of Abbreviations

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

28th Division	The military unit of the ABiH that was present in the Srebrenica enclave at the time the events took place
ABiH	Army of Bosnia and Herzegovina
ACHR	American Convention of Human Rights of 22 November 1969
ARK	Autonomous Region of Bosanska Krajina
AT	Transcript page from hearings before the Appeals Chamber. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
BiH	Bosnia and Herzegovina
Butler Report	The Testimony of Richard Butler pursuant to the Order of the Appeals Chamber granting the Appellant's Oral Rule 115 Motion, 24 November 2003 ("Butler Report").
D	Denotes a Defence Exhibit (Exh.D)
Defence	Counsel for Radislav Krstić

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Dutch-bat	The battalion of UNPROFOR troops from the Netherlands stationed in the Srebrenica enclave from January 1995.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1959 (European Convention on Human Rights)
Exh.	Exhibit
Federation	The Federation of Bosnia and Herzegovina, being one of the entities of BiH
FRY	Federal Republic of Yugoslavia (*now*: Serbia and Montenegro)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948
ICC	International Criminal Court
ICC Statute	(Rome) Statute of the International Criminal Court, of 17 July 1998, UN Doc. A/CONF.183/9
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTR Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, in force
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, established by Security Council Resolution 955
ICTY	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
IKM	Serbo-Croatian acronym for *istureno komandno mesto,* the equivalent of ‘Forward Command Post’
Indictment	Amended Indictment by the Prosecutor of The Tribunal Against Radislav Krstić, 27 October 1999.
MUP	Ministry of the Interior of the *Republika Srpska*
OTP/Prosecution	Office of the Prosecutor
p.	Page
pp.	Pages
para.	Paragraph
paras.	Paragraphs
Rules	Rules of Procedure and Evidence of the ICTY in force

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P	Denotes a Prosecution Exhibit (Exh.P)
Statute	The Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827
T	Transcript page from hearings before the Trial Chamber. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
Tribunal	See: ICTY
UN	United Nations
Vol	Volume
VRS	Bosnian Serb Army

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