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-95-11-A

Date: 8 October 2008

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IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Judgement of: **8 October 2008**

PROSECUTOR

v.

MILAN MARTIĆ

PUBLIC

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 ("Appeals Chamber" and "Tribunal", respectively) is seized of two appeals from the judgement rendered by Trial Chamber I ("Trial Chamber") on 12 June 2007 in the case of *Prosecutor v. Milan Martić*, Case No. IT-95-11-T ("Trial Judgement").[1]

A. Background

2. Milan Martić (also, "Martić") was born in 1954 in Žagrović, Croatia, at the time in the Socialist Federal Republic of Yugoslavia ("SFRY"). From January 1991 to August 1995, he held various positions within the government of the Serbian Autonomous Region of Krajina ("SAO Krajina"), which later evolved into the Republic of Serbian Krajina ("RSK"), including Chief of the Police in Knin, Secretary for Internal Affairs of the SAO Krajina, Deputy Commander of the Territorial Defence ("TO") of the SAO Krajina, Minister of Defence of the SAO Krajina, Minister of the Interior of the SAO Krajina and of the RSK and, from 25 January 1994 onwards, President of the RSK.[2]

3. The events giving rise to this appeal took place between August 1991 and December 1995 in the SAO Krajina and the RSK.[3] The Trial Chamber found that Milan Martić participated in a joint criminal enterprise (also, "JCE") with other individuals, including Blagoje Adžić, Milan Babić, Radmilo Bogdanović, Veljko Kadijević, Radovan Karadžić, Slobodan Milošević, Ratko Mladić, Vojislav Šešelj, Franko "Frenki" Simatović, Jovica Stanišić, and Dragan Vasiljković, the common purpose of which was the establishment of an ethnically Serb territory through the displacement of the non-Serb population.[4] It concluded that Martić participated in the JCE by providing substantive financial, logistical and military support to the SAO Krajina and the RSK, by actively working together with the other JCE participants to fulfil the objective of a united Serb state, by exercising his authority over the Ministry of Internal Affairs ("MUP") of the SAO Krajina and the RSK, by

[1] **Prosecution's Appeal**: Prosecution's Notice of Appeal, 12 July 2007 ("Prosecution Notice of Appeal"); Prosecution's Appeal Brief, 25 September 2007 ("Prosecution Appeal Brief"); Respondent's Brief on Behalf of the Appellant, 14 January 2008 ("Defence Response Brief"); Prosecution's Reply Brief, 29 January 2008 ("Prosecution Reply Brief"); **Martić's Appeal**: Defence Notice of Appeal Against the Judgement of 12 June 2007, 12 July 2007; Milan Martić's Motion for Variation of the Grounds of Appeal, 4 January 2008; Defence Notice of Appeal, 14 January 2008 ("Defence Notice of Appeal"); Confidential Corrected Version of Appellant's Brief, 31 January 2008 and Appellant's Brief Redacted Versions of 31 March 2008 and of 5 May 2008 ("Defence Appeal Brief"); Prosecution Response Brief, 25 February 2008 and Notice of Filing of Public Redacted Version of Prosecution's Response Brief, 28 March 2008 ("Prosecution Response Brief"); Confidential Appellant's Brief Reply, 12 March 2008 ("Defence Reply Brief").
[2] Trial Judgement, paras 1 and 2.
[3] Trial Judgement, para. 4.
[4] Trial Judgement, paras 445-446.

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fuelling an atmosphere of insecurity and fear through public statements, and by participating in the forcible removal of the non-Serb population.[5] The Trial Chamber concluded that Martić incurred individual criminal responsibility pursuant to Article 7(1) of the Tribunal's Statute ("Statute"). Martić was convicted of the following crimes: Count 1, persecution as a crime against humanity; Count 3, murder as a crime against humanity; Count 4, murder as a violation of the laws or customs of war; Count 5, imprisonment as a crime against humanity; Count 6, torture as a crime against humanity; Count 7, inhumane acts as a crime against humanity; Count 8, torture as a violation of the laws or customs of war; Count 9, cruel treatment as a violation of the laws or customs of war; Count 10, deportation as a crime against humanity; Count 11, forcible transfer as a crime against humanity; Count 12, wanton destruction of villages or devastation not justified by military necessity as a violation of the laws or customs of war; Count 13, destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war; and Count 14, plunder of public or private property as a violation of the laws or customs of war.[6] More specifically, the Trial Chamber concluded that the crimes under Counts 10, 11, and 1 (in relation to the deportations and forcible transfers) all fell within the common purpose of the JCE, while the crimes under Counts 3 to 9, 12 to 14, and 1 (insofar as it related to those Counts), fell outside the common purpose but were "foreseeable to Martić". The Trial Chamber therefore convicted Martić under the basic ("first") form of JCE for Counts 10, 11, and 1 (in part) and under the extended ("third") form of JCE for Counts 3 to 9, 12 to 14 and 1 (in part).[7] The Trial Chamber acquitted Martić of Count 2, extermination as a crime against humanity.[8]

4. The Trial Chamber further found that Martić ordered the shelling of Zagreb on 2 and 3 May 1995. It thus held that he incurred individual criminal responsibility pursuant to Article 7(1) of the Statute for ordering under Count 15, murder as a crime against humanity; Count 16, murder as a violation of the laws or customs of war; Count 17, inhumane acts as a crime against humanity; Count 18, cruel treatment as a violation of the laws or customs of war; and Count 19, attacks on civilians as a violation of the laws or customs of war.[9] The Trial Chamber did not enter convictions under Counts 16 and 18, having found that these crimes were impermissibly cumulative with Count 19.[10]

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[5] Trial Judgement, paras 447-455.
[6] Trial Judgement, paras 455 and 518.
[7] Trial Judgement, paras 452-455. For the forms of JCE, see *infra* paras 68 and 168-172.
[8] Trial Judgement, paras 406 and 517.
[9] Trial Judgement, paras 460, 470-473 and 518.
[10] Trial Judgement, para. 478.

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5. The Trial Chamber sentenced Milan Martić to a single sentence of thirty-five years of imprisonment.[11]

B. The Appeal

6. Milan Martić sets forth ten grounds of appeal against the Trial Judgement: an alleged error of law by not providing a reasoned judgement; alleged violations of his right to be tried by an impartial tribunal and to be presumed innocent; an alleged error of law regarding the evaluation of evidence; alleged errors of law regarding JCE; alleged errors of fact in findings concerning the JCE; an alleged error of law regarding the mode of commission of ordering; alleged errors of fact concerning the shelling of Zagreb; alleged errors of fact in making erroneous and insufficient findings; alleged errors of law regarding sentencing; and alleged errors of fact concerning sentencing. Milan Martić seeks an acquittal on all charges. Alternatively, he requests that he be given a new trial or that his sentence be significantly reduced.[12]

7. The Office of the Prosecutor ("Prosecution") sets forth one ground of appeal against the Trial Judgement. It argues that the Trial Chamber erred in law in finding that Article 5 of the Statute does not encompass crimes committed against persons *hors de combat*. It requests that the Appeals Chamber correct the legal error, revise the Trial Chamber's factual findings relating to Counts charged under Article 5 of the Statute, and adjust Milan Martić's sentence accordingly.[13]

[11] Trial Judgement, para. 519.
[12] Defence Notice of Appeal; Defence Appeal Brief.
[13] Prosecution Notice of Appeal; Prosecution Appeal Brief.

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II. APPELLATE REVIEW

A. Standard for appellate review

8. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of the *ad hoc* Tribunals.[14] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the Trial Judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[15] Article 25 of the Statute also states that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

9. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there was an error of law.[16] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments which an appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[17]

10. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[18] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[19] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself

[14] *Strugar* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6. For jurisprudence under Article 24 of the Statute of the ICTR, see *Ndindabahizi* Appeal Judgement, paras 8-10; *Ntagerura et al.* Appeal Judgement, paras 11-12; *Gacumbitsi* Appeal Judgement, paras 6-9.

[15] *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6.

[16] *Strugar* Appeal Judgement, para. 11; *Hadžihasanović and Kubura* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 16. See also *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7.

[17] *Strugar* Appeal Judgement, para. 11; *Halilović* Appeal Judgement, para. 7.

[18] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8.

[19] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8.

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convinced beyond a reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[20]

11. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[21] The Appeals Chamber bears in mind that, in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[22] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[23] Furthermore, the Appeals Chamber recalls, as a general principle, the approach adopted in *Kupreškić et al.*, wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[24]

Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[25]

12. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[26] Under Article 25(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate "an error of fact that occasioned a miscarriage of justice." Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against

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[20] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8; see also *Ntagerura et al.* Appeal Judgement, para. 136.

[21] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10.

[22] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Bagilishema* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.

[23] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 13. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. See *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.

[24] *Kupreškić et al.* Appeal Judgement, para. 30.

[25] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Vasiljević* Appeal Judgement, para. 8.

[26] *Strugar* Appeal Judgement, para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13.

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acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[27]

13. Furthermore, the Appeals Chamber reiterates that it does not review the entire trial record *de novo*; in principle, it takes into account only evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[28]

B. Standard for summary dismissal

14. The Appeals Chamber recalls that it has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing.[29] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively.[30] A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[31] Additionally, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[32]

15. When applying these basic principles, the Appeals Chamber has identified a number of categories of deficient submissions on appeal which are liable to be summarily dismissed.[33] The Appeals Chamber in the present case has identified the following five categories as most pertinent to the arguments of the parties.

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[27] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11.

[28] *Strugar* Appeal Judgement, para. 15; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Bagilishema* Appeal Judgement, para. 11.

[29] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 10; *Kamuhanda* Appeal Judgement, para. 10.

[30] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 43.

[31] *Strugar* Appeal Judgement, para. 16; *Halilović* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 9.

[32] *Brđanin* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11.

[33] *Strugar* Appeal Judgement, paras 18-24; *Brđanin* Appeal Judgement, paras 17-31.

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1. Challenges to factual findings on which a conviction does not rely

16. An appellant must show on appeal that an alleged error of fact is a conclusion which no reasonable trier of fact could have reached and which occasioned a miscarriage of justice, defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[34] It is only these factual errors that will result in the Appeals Chamber overturning a Trial Chamber's decision.[35]

17. As long as the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement. Accordingly, the Appeals Chamber declines, as a general rule, to discuss those alleged errors which have no impact on the conviction or sentence.[36] Where the Appeals Chamber considers that an appellant is challenging factual findings on which a conviction or sentence does not rely or making submissions that are clearly irrelevant to the Trial Chamber's factual findings, it will summarily dismiss that alleged error or argument ("category 1").[37]

2. Arguments that fail to identify the challenged factual findings, that misrepresent the factual findings, or that ignore other relevant factual findings

18. The Appeals Chamber recalls that an appellant is expected to identify the challenged factual finding and put forward its factual arguments with specific reference to the page number and paragraph number.[38] Similarly, submissions which either misrepresent the Trial Chamber's factual findings or the evidence on which the Trial Chamber relies, or ignore other relevant factual findings made by the Trial Chamber, will not be considered in detail.[39] As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument ("category 2").

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[34] *Strugar* Appeal Judgement, para. 18; *Brđanin* Appeal Judgement, para. 19; *Simić* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, para. 39; *Kupreškić et al.* Appeal Judgement, para. 29; *Furundžija* Appeal Judgement, para. 37.

[35] *Strugar* Appeal Judgement, para. 18; *Brđanin* Appeal Judgement, para. 19; *Kordić and Čerkez* Appeal Judgement, para. 19; *Furundžija* Appeal Judgement, para. 37.

[36] *Strugar* Appeal Judgement, para. 19; *Brđanin* Appeal Judgement, para. 21.

[37] *Strugar* Appeal Judgement, para. 19; *Brđanin* Appeal Judgement, para. 22.

[38] See Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras 1(c)(iii), 1(c)(iv), 4(b)(ii). See also *Strugar* Appeal Judgement, para. 20.

[39] *Strugar* Appeal Judgement, para. 20; *Brđanin* Appeal Judgement, para. 23.

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3. Mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner

19. Mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[40] Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that of the Trial Chamber, such submissions may be dismissed without detailed reasoning.[41] The same applies to claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence without further explanation ("category 3").[42]

4. Mere assertions unsupported by any evidence

20. Submissions will be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments.[43] As a general rule, in instances where this is not done, the Appeals Chamber will summarily dismiss the alleged error or argument ("category 4").

5. Arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence

21. Submissions will be dismissed without detailed reasoning where an appellant merely disputes the Trial Chamber's reliance on one of several pieces of evidence to establish a certain fact, but fails to explain why the convictions should not stand on the basis of the remaining evidence. The Appeals Chamber will summarily dismiss mere assertions that the Trial Chamber's finding was contrary to the testimony of a specific witness, or that the Trial Chamber should or should not have relied on the testimony of a specific witness, provided that the appellant does not show that an alleged error of fact occurred that occasioned a miscarriage of justice.[44] Similarly, submissions will be dismissed without detailed reasoning where an appellant merely argues that the testimony of a witness is uncorroborated.[45] Where the Appeals Chamber considers that an appellant

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[40] *Strugar* Appeal Judgement, para. 21; *Brđanin* Appeal Judgement, para. 24.
[41] *Strugar* Appeal Judgement, para. 21. See also *Kunarac et al.* Appeal Judgement, para. 48; *Halilović* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 24.
[42] *Strugar* Appeal Judgement, para. 21; *Brđanin* Appeal Judgement, para. 25.
[43] Practice Direction on Formal Requirements for Appeals from Judgement, paras 1(c)(iii), 1(c)(iv), 4(b)(ii). See *Strugar* Appeal Judgement, para. 22.
[44] *Strugar* Appeal Judgement, para. 23; *Brđanin* Appeal Judgement, paras 27-28.
[45] The Appeals Chamber recalls that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence: *Limaj et al.* Appeal Judgement, para. 203; *Kordić and Čerkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506.

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makes such assertions without substantiating them, it will summarily dismiss that alleged error or argument ("category 5").

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III. ALLEGED VIOLATION OF THE RIGHT TO A REASONED OPINION FROM THE TRIAL CHAMBER (MILAN MARTIĆ'S FIRST GROUND OF APPEAL)

A. Introduction

22. In his first ground of appeal, Milan Martić alleges that the Trial Chamber violated his right under Article 23(2) of the Statute to be provided with a reasoned opinion. He claims that the Trial Judgement did not provide sufficient reasons for finding him guilty of Counts 1, 3 through 14,[46] and 15 through 19.[47] He argues that this alleged error by the Trial Chamber should invalidate the whole Trial Judgement.[48]

B. Arguments of the Parties

23. Martić alleges that the Trial Chamber committed six principal errors. First, he submits that the Trial Chamber did not properly analyze and apply the law on joint criminal enterprise, by failing to properly establish a connection between each crime and his membership in the JCE or that of any of the other eleven persons enumerated in paragraph 446 of the Trial Judgement.[49] Second, he argues that the Trial Chamber failed to establish that a common criminal purpose existed among the eleven alleged participants.[50] Third, Martić suggests that the Trial Chamber "failed to provide cogent reasons for the establishment of the" JCE.[51] Fourth, he argues that the Trial Chamber failed to properly establish that he participated in furtherance of the alleged JCE.[52] Fifth, Martić claims that the Trial Chamber failed to find that he had the requisite *mens rea* or that he ordered the crimes charged in Counts 15 through 19.[53] Finally, he claims that the Trial Chamber misapplied Article 7(1) of the Statute when it found him individually responsible for Counts 1 and 3 through 14, because he had no obligation to prevent the commission of those crimes or to ensure that the inhabitants of the territories under his authority enjoyed respect for their human rights.[54] In this respect, Martić argues that the Trial Chamber misconstrued the law when it failed to differentiate

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[46] Defence Appeal Brief, para. 6. The Appeals Chamber finds that Count 2 was appealed in error, since the Trial Chamber found Martić not guilty of this Count (Trial Judgement, para. 479) and because the Defence Appeal Brief refers to both Counts "1, 2-14" and Counts "1, 3-14" in its discussion. See Defence Appeal Brief, paras 6-7 and 62.
[47] Defence Appeal Brief, para. 11.
[48] Defence Appeal Brief, para. 259.
[49] Defence Appeal Brief, para. 7, referring to Trial Judgement, para. 446.
[50] Defence Appeal Brief, para. 9, referring to Trial Judgement, para. 446.
[51] Defence Appeal Brief, para. 10.
[52] Defence Appeal Brief, para. 10.
[53] Defence Appeal Brief, para. 11.
[54] Defence Appeal Brief, paras 12 and 14.

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between obligations of conduct and obligations of result, imposing a duty on Martić to prevent crimes and ensure respect for human rights where he had no obligation to do so.[55]

24. In response, the Prosecution argues that several deficient submissions in Martić's Appeal Brief warrant summary dismissal.[56] In particular, the Prosecution claims that Martić merely expresses his dissatisfaction with the Trial Chamber's conclusions without properly explaining why those conclusions could not form part of a reasoned opinion.[57] The Prosecution also contends that Martić bases his submissions to the Appeals Chamber on passages of the Trial Judgement taken out of context[58] and fails to properly link the Trial Chamber's alleged errors with any real impact on the conviction or sentence.[59]

C. Discussion

25. The Appeals Chamber finds that Martić's first ground of appeal suffers from vagueness and obscurity[60] and in particular, that he has failed to demonstrate how the alleged errors impact his conviction or sentence as he is required to do.[61] The case-law of the Tribunal is clear that "a party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision."[62] Further, in an appeal where the party alleges errors of law that potentially impact every piece of evidence and every finding in the Trial Judgement, "the appellate party is required to develop its arguments more precisely by referring to specific portions of the Trial Judgement, thus limiting the import of its allegations – lest the appeal procedure effectively becomes a trial *de novo*."[63] The Appeals Chamber finds that because his first ground of appeal effectively challenges almost the entire Judgement,[64] Martić must meet this requirement.

26. While the Appeals Chamber has reached this conclusion in respect of Martić's first ground of appeal, it will address some of the arguments raised under this ground which have been raised in

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[55] Defence Appeal Brief, paras 12, 14. See also Defence Reply Brief, paras 6-7 and 12.
[56] Prosecution Response Brief, paras 8-22.
[57] Prosecution Response Brief, paras 199-200.
[58] Prosecution Response Brief, paras 201-203. Specifically, the Prosecution takes issue with the "core" of the Appellant's first ground of appeal, namely that paragraph 480 of the Trial Judgement does not demonstrate the requisite links between each crime and either Martić or another member of the JCE. The Prosecution points out that paragraph 480 is merely a summary of the Counts for which Martić was found guilty and that the substance of the Trial Judgement appears elsewhere. But see Defence Appeal Brief, para. 7 (referencing footnotes 1280-1292 of the Trial Judgement, which cite to numerous substantive paragraphs).
[59] Prosecution Response Brief, paras 10-11.
[60] See, for example, Defence Appeal Brief, para. 13 ("[...] the Trial Chamber considered [the] Appellant as some kind of mighty God in SAO Krajina/RSK who had all the authority and control in Krajina, in every place and over every person.") (emphasis omitted); Defence Reply Brief, para. 10.
[61] See generally Defence Appeal Brief, paras 6-14.
[62] *Halilović* Appeal Judgement, para. 120.
[63] *Halilović* Appeal Judgement, para. 120.

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greater specificity under other grounds. Martić's first argument that the Trial Chamber failed to properly establish the link between each crime and himself or one of the eleven persons enumerated in paragraph 446 of the Trial Judgement will be addressed below, under his fifth ground of appeal.[65] This argument, vaguely raised under the first ground of appeal, is elaborated in other parts of the Appeal Brief[66] and hinges on other challenges raised in relation to the applicability of the form of responsibility of JCE in this case. Elsewhere, the argument is not explicitly made, but is implicit in Martić's contentions that the crimes should not be attributed to him.

27. The Appeals Chamber will consider Martić's argument that the Trial Chamber failed to establish that a common criminal purpose existed among the eleven alleged members of the JCE with his arguments under his fifth ground.[67] As for the arguments that the Trial Chamber failed to provide cogent reasons for its conclusions regarding the establishment of the JCE and his participation in this JCE, these will also be dealt with under his fifth ground.[68] The Appeals Chamber will address arguments related to the allegation that the Trial Chamber failed to find that he had the requisite *mens rea* or that he ordered the crimes charged in Counts 15 through 19 when dealing with Martić's seventh ground.[69]

28. Finally, the Appeals Chamber turns to Martić's argument that the Trial Chamber misapplied Article 7(1) of the Statute when it found him individually responsible for Counts 1 and 3 through 14, because he had no obligation to prevent the commission of those crimes. The Trial Chamber observed that "the evidence includes only scarce reference to Milan Martić acting to take measures to prevent or punish such crimes"[70] – language very close to Article 7(3) of the Statute. However, the Appeals Chamber takes into consideration that these statements were made in order to establish that Martić had the requisite *mens rea* to be held criminally responsible as a participant in the JCE,[71] thus asserting criminal responsibility under Article 7(1) of the Statute, not Article 7(3). Moreover, the Trial Chamber's summary of factual findings does not include any reference to findings relating to Martić's failure to intervene.[72] Whether or not Martić had any duty to intervene against the perpetrators of such crimes is irrelevant to the issue of his knowledge of the existence of such crimes and his disposition towards them and the non-Serb population generally, which is an element required for conviction under JCE. Accordingly, this sub-ground of appeal is rejected.

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[64] Defence Appeal Brief, paras 6-14.
[65] See *infra*, paras 182-212.
[66] See, in particular, apart from Defence Appeal Brief, para. 7 (under ground 1), the references to the issue of Martić's "connection" with the crimes in Defence Appeal Brief, para. 57 (under ground 4) and para. 170 (under ground 5).
[67] See *infra*, paras 119-125; see also Defence Appeal Brief, paras 107-116.
[68] See *infra*, paras 126-130; see also Defence Appeal Brief, paras 117-146.
[69] See *infra*, paras 225-236; see also Defence Appeal Brief, paras 216-252.
[70] Trial Judgement, para. 454; see also Trial Judgement, para. 451.
[71] See Trial Judgement, paras 337-342, 451 and 454.
[72] Trial Judgement, Sections IV.B.3 and IV.B.4.

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D. Conclusion

29. For the foregoing reasons, the Appeals Chamber dismisses Martić's first ground of appeal in its entirety, subject to the analysis of the related arguments brought under the fifth and seventh grounds of appeal.

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IV. ALLEGED VIOLATION OF THE RIGHTS TO BE TRIED BY AN IMPARTIAL TRIBUNAL AND PRESUMED INNOCENT (MILAN MARTIĆ'S SECOND GROUND OF APPEAL)

A. Introduction

30. Under this ground of appeal, Milan Martić alleges that the Trial Chamber erred in law by violating his right to be tried by an impartial tribunal and to be presumed innocent.[73]

B. Arguments of the Parties

31. Martić claims that the Trial Chamber was biased and violated his right to be presumed innocent. He submits that the Trial Chamber's lack of impartiality and disrespect for the presumption of innocence is demonstrated at paragraphs 510 and 511 of the Trial Judgement,[74] where the Trial Chamber opined:

> The Trial Chamber notes that the first Indictment against Milan Martić was confirmed on 25 July 1995 and made public on 23 January 1996. According to Milan Martić's own admission on the last day of the trial, he was aware of the first Indictment issued against him. In this respect, the Trial Chamber recalls the decision taken during the pre-trial phase in this case wherein it was considered that Milan Martić's surrender on 15 May 2002 was not necessarily fully voluntary. The Trial Chamber notes that Milan Martić evaded justice for around seven years in the knowledge that an indictment was issued against him. Rather than surrender in order to respond to the charges brought against him, he chose to publicly make disparaging remarks about the Tribunal. The Trial Chamber finds that the fact that Milan Martić surrendered to the Tribunal in 2002, although constituting a mitigating factor in this case, will be given only minimal weight.
>
> The Trial Chamber notes the Defence's submission of the neuropsychiatrist's opinion describing Milan Martić as having "a stable personality structure with a dominating quantum of emotions" and finding him to be "socially integrated, non-conflictive [and] conciliatory". However, in light of Milan Martić's conduct demonstrated during the trial, especially the fact that he did not express any remorse for any of the crimes for which he has been found guilty, the Trial Chamber rejects this opinion.[75]

Martić argues that in paragraph 511, the Trial Chamber revealed its opinion regarding his personality, an opinion which, he claims, substantially influenced the Trial Chamber's finding of guilt on Counts 1 and 3 through 19.[76] Martić adds that, in doing so, the Trial Chamber violated his

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[73] Defence Notice of Appeal, paras 8-10; Defence Appeal Brief, paras 15-26; Defence Reply Brief, paras 14-23; AT. 32.
[74] Defence Appeal Brief, paras 15-18. See also Defence Appeal Brief, para. 21. Martić's arguments are far from clear in this respect. He claims that "[his] conduct during the trial must not have any impact on the question of his innocence or guilt or in relation to evaluation of his personality. His personality was not the factor that has to be considered for the purpose of sentencing, but also in determination of his *mens rea*." Defence Appeal Brief, para. 18 (emphasis in original); Defence Reply Brief, para. 16; AT. 32.
[75] Original references in the Trial Judgement omitted.
[76] Defence Appeal Brief, para. 18.

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right to be presumed innocent, specifically his right to remain silent or "to say what he found proper",[77] and demonstrated its bias against him.[78]

32. Martić submits that the Trial Chamber erred in ignoring or incorrectly considering certain facts and contentions, even though they were supported by evidence at trial, namely (i) that the conduct of Croatian authorities impacted on the decision of Croats of SAO Krajina to leave that region;[79] (ii) Martić's concern for the fate of Croat and other non-Serb populations;[80] (iii) the Croat policy towards the Serb population during the Second World War as well as in the 1990s;[81] (iv) and the actions that Martić was required to take in order to prevent a genocide against Serbs by Croatian forces.[82] Martić concludes from items (ii) and (iv) above, as well as from the way the Trial Chamber interpreted the Kijevo ultimatum, that the Trial Chamber violated his rights to be presumed innocent and to be tried before an impartial tribunal.[83]

33. Martić also argues that Judge Frank Höpfel, Austrian by nationality, showed his prejudice against Martić when he stated in court that he was irritated when Witness Nikola Dobrijević testified that Austria was one of the "sponsors" of the Second World War.[84] Moreover, Martić claims that Judge Justice Bakone Moloto showed his bias by ruling that certain issues raised by Martić were irrelevant in the present case[85] and by telling a witness that he thought that Serbs should have left the regions they inhabited in Croatia and moved to Serbia.[86]

34. The Prosecution responds that the Judges at trial did not violate Martić's right to be presumed innocent and that he was tried by an impartial tribunal.[87] It claims that Martić confuses the Trial Chamber's findings on sentencing with its findings of guilt: the Trial Chamber only considered Martić's behaviour at trial in order to sentence him, not to establish his guilt.[88] Moreover, the Prosecution submits that the Trial Chamber considered Martić's contention that he

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[77] Defence Appeal Brief, para. 17.
[78] Defence Appeal Brief, paras 15 and 17.
[79] Defence Appeal Brief, para. 22, referring to the testimonies of Witnesses John McElligot and MM-078. See also Defence Reply Brief, paras 21-22; AT. 33-34.
[80] Defence Appeal Brief, para. 23, referring to the evidence of Witnesses Rade Rašeta, Charles Kirudja, MM-096, MM-090, MM-117, MM-105, Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993" and Exhibit 966, "MUP Press Release, 31 December 1991". See also Defence Reply Brief, paras 16 and 21; AT. 34-35, 50-57.
[81] Defence Appeal Brief, paras 24 and 26.
[82] Defence Appeal Brief, paras 19-20, referring to Milan Martić, 13 Dec 2005, T. 316-317. See also Defence Appeal Brief, para. 26 and Defence Reply Brief, para. 19.
[83] Defence Appeal Brief, paras 23-24. The issue of the interpretation of the Kijevo ultimatum is more thoroughly addressed by Martić in ground 5. See *infra*, paras 102-107.
[84] Defence Appeal Brief, paras 24-25, referring to Witness Nikola Dobrijević, 10 Nov 2006, T. 10926-10928; Judge Höpfel, 10 Nov 2006, T. 10929-10930 in combination with Defence Reply Brief, paras 20-21. See also AT. 36.
[85] Defence Appeal Brief, para. 26, referring to Judge Moloto, 12 Sep 2006, T. 8179 in combination with Defence Reply Brief, paras 20 and 21; AT. 41-43.
[86] Defence Reply Brief, para. 20, citing Judge Moloto, 15 Sep 2006, T. 8413-8414; see also AT. 65-66.
[87] Prosecution Response Brief, paras 204-214.

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protected all citizens of the RSK irrespective of their ethnic origin and religious beliefs.[89] The Prosecution submits that the Trial Chamber acknowledged evidence lending support to this submission by Martić, but that such evidence was outweighed by substantial factors pointing to the contrary conclusion.[90]

35. Martić replies that he does not confuse the Trial Chamber's sentencing deliberations with the determination of guilt. It is his position that the Trial Chamber revealed its opinion on his personality in the sentencing section.[91] Furthermore, Martić claims that his conduct during the trial does not outweigh the conclusions of a credible and reliable neuropsychiatrist.[92] Martić also claims that the Trial Chamber demonstrated its bias by disregarding his temporary nausea in the hearing on 14 March 2006.[93]

C. Discussion

1. Alleged violation of Martić's right to be presumed innocent

36. The Appeals Chamber first notes that, in the introductory section of the Trial Judgement, the Trial Chamber stated:

> Article 21(3) of the Statute provides that the accused shall be presumed innocent until proven guilty. The Prosecution therefore bears the burden of proving the guilt of the accused, and in accordance with Rule 87(A) of the Rules [of Procedure and Evidence ("Rules")], the Prosecution must do so beyond reasonable doubt. In determining whether the Prosecution has done so with respect to each particular count, the Trial Chamber has carefully considered whether there is any reasonable conclusion available from the evidence other than the guilt of the accused.[94]

In accordance with Article 21(4)(g) of the Statute, the Trial Chamber also explained that no negative conclusions were drawn from the fact that Martić chose not to testify at trial.[95]

37. Concerning Martić's allegation that the Trial Chamber violated his right to be presumed innocent and to remain silent in paragraphs 510 and 511 of the Trial Judgement, the Appeals Chamber observes that both paragraphs deal exclusively with sentencing and conclude the Trial Chamber's assessment of the mitigating circumstances submitted by Martić. In this respect, the Trial Chamber considered evidence, *inter alia*, that Martić surrendered about seven years after he became aware of an indictment against him and that he has a stable personality and a non-

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[88] Prosecution Response Brief, paras 205-206.
[89] Prosecution Response Brief, para. 208.
[90] Prosecution Response Brief, para. 212, referring to Trial Judgement, paras 341-342. See also, in general, Prosecution Response Brief, paras 209-214.
[91] Defence Reply Brief, para. 16.
[92] Defence Reply Brief, para. 17, referring to hearing, 14 Mar 2006, T. 2244-2245.
[93] Defence Reply Brief, para. 17.
[94] Trial Judgement, para. 21 (references omitted).
[95] Trial Judgement, para. 22.

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conflictive character. As regards his surrender, the Trial Chamber found this to be a mitigating circumstance, albeit one with minimal weight. The Appeals Chamber has held that the Trial Chamber has discretion to decide whether or not to accept an accused's voluntary surrender[96] and how much weight to attribute to it,[97] in mitigation of sentence. Concerning Martić's personality, the Trial Chamber justifiably considered his conduct once he chose to waive his right to remain silent and proceeded to make statements at trial.[98] The Appeals Chamber observes that there is no evidence that the Trial Chamber regarded the lack of any regret as an aggravating circumstance. The Trial Chamber merely used its discretion to conclude that evidence of Martić's good character was outweighed by evidence to the contrary.[99] Martić's arguments are therefore rejected.

38. The Appeals Chamber dismisses the following submissions by Martić relating to the substance of the Trial Chamber's findings and not to the presumption of innocence: (i) Martić's claim that his right to be presumed innocent was violated when the Trial Chamber ignored "Croatian policy towards Serbian population"[100] and his alleged motive to prevent a genocide by Croatia;[101] (ii) his allegations that the Trial Chamber erred when finding that he consciously disregarded the fate of non-Serbs[102] and that it was Croatia's actions that led Croats to leave the Krajina region.[103] Considering the discussion on these allegations elsewhere in this Judgement,[104] the Appeals Chamber concludes that they cannot support the claim that the Trial Chamber violated Martić's right to be presumed innocent.

2. Alleged violation of Martić's right to be tried before an impartial tribunal

39. The Appeals Chamber recalls that the right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial, as guaranteed in Article 21 of the Statute.[105] Article 13 of the Statute stipulates that Judges of the Tribunal "shall be persons of high moral character, impartiality and integrity". More specifically, the requirement of impartiality is recognised in Rule 15(A) of the Rules which provides that "[a] Judge may not sit on a trial or

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[96] *Blaškic* Appeal Judgement, para. 701, referring to *Kunarac et al*. Trial Judgement, para. 868.
[97] *Kordić and Čerkez* Appeal Judgement, para. 1053; *Kupreškic et al.* Appeal Judgement, para. 430.
[98] See, for example, Milan Martić, 13 Dec 2005, T. 296-318 and hearing, 12 Jan 2007, T. 11441.
[99] Trial Judgement, para. 505.
[100] Defence Appeal Brief, para. 24.
[101] Defence Appeal Brief, paras 19-20, referring to Milan Martić, 13 Dec 2005, T. 316-317; Defence Reply Brief, para. 19.
[102] The passage quoted by Martić in that regard reads: "Milan Martić's conscious disregard for the fate of the Croat and other non-Serb population and persistent pursuance to create a Serb state." Defence Appeal Brief, para. 23, referring to Trial Judgment, para. 342. See also Defence Appeal Brief, paras 19-20, referring to Milan Martić, 13 Dec 2005, T. 297. See also Defence Reply Brief, para. 16; AT. 34-35.
[103] Defence Appeal Brief, para. 22; Defence Reply Brief, paras 21-22.
[104] See *infra*, Section VII.D.
[105] *Furundžija* Appeal Judgement, para. 177; *Galić* Appeal Judgement, para. 37. For the corresponding provisions of the ICTR Statute, see also *Nahimana et al.* Appeal Judgement, para. 47; *Kayishema and Ruzindana* Appeal Judgement, para. 51; *Rutaganda* Appeal Judgement, para. 39.

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appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality."

40. In its interpretation and application of the impartiality requirement, the Appeals Chamber held in the *Furundžija* Appeal Judgement:

> [T]here is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[106]

There is an appearance of bias if:

> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[107]

41. The Appeals Chamber has held that, absent evidence to the contrary, it must be presumed that Judges of the Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions".[108] Consequently, it is for the party casting doubts on the impartiality of a Judge to present reliable and sufficient evidence to the Appeals Chamber to rebut this presumption of impartiality. There is a high threshold to reach in order to rebut the presumption of impartiality.[109]

42. Most of Martić's assertions that his right to be tried before an impartial tribunal was violated are not supported by any substantive arguments and are therefore summarily dismissed as impermissibly vague and unsubstantiated allegations.[110] The Appeals Chamber will therefore only consider the allegations for which Martić did provide at least some substantive arguments.

43. The Appeals Chamber finds that, considered in its context, a reasonable observer would conclude that Judge Moloto was simply enquiring about the options available to the Serbs in the

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[106] *Furundžija* Appeal Judgement, para. 189.
[107] *Galić* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 189. The Appeals Chamber has defined a reasonable observer as follows: "[T]he reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold." See, for example, *Galić* Appeal Judgement, para. 40.
[108] *Furundžija* Appeal Judgement, para. 197.
[109] *Hadžihasanović and Kubura* Appeal Judgement, para. 78; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, para. 197; *Nahimana et al.* Appeal Judgement, para. 48; *Semanza* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 45; *Akayesu* Appeal Judgement, para. 91.
[110] Defence Appeal Brief, paras 15, 21 and 23; Defence Reply Brief, paras 17-18 and 21.

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region at the time of the events when questioning Witness Lazar Macura and would not therefore reasonably apprehend any bias on Judge Moloto's part.[111]

44. As far as the statements about the crimes committed during the Second World War are concerned, the Appeals Chamber finds that no appearance of bias has been demonstrated in Judge Moloto's ruling that these issues are irrelevant in a criminal trial for offences committed between 1991 and 1995. In reaching this finding, the Appeals Chamber also notes that Counsel for the Defence did not suggest, at the time, that the ruling showed any impropriety.[112]

45. Turning to Judge Höpfel's impugned statements, the Appeals Chamber observes that Counsel for the Defence himself stated in court, at the time, that these statements fell outside the remit of the proceedings and declared that he would not insist further on this matter.[113] The issue was therefore discussed and solved during the trial proceedings – Martić is not raising any new argument capable of showing an appearance of bias.

46. Finally, Martić's assertion that the Trial Chamber revealed its bias by disregarding his suffering from nausea[114] is without any basis. The Appeals Chamber observes that Judge Moloto, in explaining Martić's absence, emphasised the Trial Chamber's sympathetic disposition to his health problems.[115] For these reasons, Martić's allegation that his right to be tried by an impartial tribunal was violated is rejected.

D. Conclusion

47. For the foregoing reasons, the Appeals Chamber dismisses Martić's second ground of appeal in its entirety.

[111] Judge Moloto, 15 Sep 2006, T. 8414-8415.
[112] Judge Moloto, 12 Sep 2006, T. 8178-8179.
[113] Hearing, 10 Nov 2006, T. 10929-10930.
[114] Defence Reply Brief, para. 17.
[115] Judge Moloto, 14 Mar 2006, T. 2241-2242 (private session).

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V. ALLEGED ERROR OF LAW CONCERNING THE EVALUATION OF EVIDENCE (MILAN MARTIĆ'S THIRD GROUND OF APPEAL)

A. Introduction

48. Under this ground of appeal, Milan Martić claims that the Trial Chamber erred in law (i) by applying to the Prosecution's evidence a standard of proof lower than the one required in international criminal law as a consequence of an incorrect interpretation of the notion of "proof beyond reasonable doubt"; and (ii) by giving weight to the testimony of witnesses whose reliability has been substantially challenged.[116] Martić claims that these errors invalidated the Trial Judgement and caused a miscarriage of justice. He requests that the Appeals Chamber enunciate the correct legal standard and adjust the Trial Chamber's findings accordingly.[117]

B. Arguments of the Parties

49. Milan Martić claims that the Trial Chamber did not correctly interpret the standard of "beyond reasonable doubt" when it interpreted the standard as "a high degree of probability, [which] does not mean certainty or proof beyond a shadow of a doubt."[118] Moreover, to support his contention that the Trial Chamber wrongly interpreted the standard of proof, he cites a statement by Presiding Judge Moloto, who said in court:

> those four points, that the Trial Chamber had asked that the parties try to reach agreement on have not been agreed upon, and the only way forward at this stage is that the Prosecution must proceed and prove its case as best it can. And if there's any agreement that the parties might reach as the proceedings go -- progress, so be it.[119]

Martić argues that the standard adopted by the Trial Chamber is "a reasonable degree of probability", which is insufficient for a conviction.[120] He elaborates that the Trial Chamber should have clearly discussed in the main text the import of Rule 87(A) of the Rules, according to which "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".[121] Furthermore, Martić claims that a "reasonable

[116] Defence Notice of Appeal, paras 13-16; Defence Appeal Brief, paras 27-39; Defence Reply Brief, paras 24-30; AT. 37-38.
[117] Defence Appeal Brief, para. 261.
[118] Defence Appeal Brief, paras 27-29, citing Trial Judgement, fn. 19; AT. 36-37.
[119] Defence Appeal Brief, para. 29, referring to Judge Moloto, T. 342.
[120] Defence Appeal Brief, para. 29.
[121] Defence Appeal Brief, para. 39; Defence Reply Brief, para. 26, referring to Trial Judgement, para. 21. See also Defence Reply Brief, para. 28.

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conclusion that goes in favor of the accused need not to be stronger than those [*sic*] of the Prosecution."[122]

50. Martić asserts that the standard of "beyond reasonable doubt" should be interpreted as "a high level of certainty."[123] He further claims that the interpretation by the Trial Chamber conflicts with the jurisprudence of the Tribunal and the International Court of Justice ("ICJ").[124] In this respect, he relies on a passage from the *Bosnian Genocide Case*, where the ICJ held that it needed "proof at a high level of certainty appropriate to the seriousness of the allegation" in order to establish the responsibility of Serbia and Montenegro for genocide.[125] Furthermore, Martić refers to the *Corfu Channel Case* which he claims to be of a "quasi-criminal nature".[126] In this case, the ICJ held that the territorial State's knowledge of acts originating in its territory must be proven, and that such proof may be inferred from the facts under the condition that they leave no room for reasonable doubt.[127]

51. In addition, Martić alleges that the Trial Chamber erred in accepting the testimony of Witnesses Milan Babić (also, "Babić") and MM-003, despite doubts regarding their credibility and despite the fact that Babić's cross-examination was not completed.[128] In particular, on 15 to 17, 20 and 21 February and on 2 and 3 March 2006, Milan Babić, who was previously convicted by the Tribunal, testified during the Prosecution case. However, he died prior to the completion of his cross-examination.[129] Moreover, the Prosecution gave assistance to Witness MM-003 in his asylum case.[130] Martić therefore claims that the evidence of these witnesses is unreliable and submits that

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[122] Defence Appeal Brief, para. 39; Defence Reply Brief, para. 26.
[123] Defence Appeal Brief, para. 31, referring to Separate Opinion of Vice-President Wolfrum, *The M/V "Saiga" (no. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgement of 1 July 1999, para. 12.
[124] Defence Appeal Brief, para. 30; Defence Reply Brief, para. 25.
[125] Defence Appeal Brief, para. 30, quoting from *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgement of 26 February 2007, General List No. 91, para. 210.
[126] Defence Appeal Brief, para. 32.
[127] Defence Appeal Brief, para. 32, referring to *Corfu Channel Case* (*United Kingdom v. Albania)*, International Court of Justice, Judgement of 9 April 1949, ICJ Reports 1949 ("*Corfu Channel Case*"), p. 18.
[128] Defence Appeal Brief, para. 38; Defence Reply Brief, para. 27; AT. 37-38.
[129] Trial Judgement, para. 33. The Defence filed a motion to exclude the evidence of Babić from the trial record as a result of the incomplete cross-examination (*Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Motion to Exclude Testimony of Witness Milan Babić, Together with Associated Exhibits from Evidence, 2 May 2006). The motion was denied by the Trial Chamber's Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, 9 June 2006, in turn affirmed by the Appeals Chamber in *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006.
[130] Trial Judgement, para. 36.

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"[s]ufficient corroboration would be if credible and reliable evidence supports the statement of the witness in such a manner that leaves no room for reasonable doubt."[131]

52. The Prosecution responds that the Trial Chamber was correct in interpreting the "beyond reasonable doubt" standard as a "high degree of probability", since the same definition was implicitly accepted in the *Halilović* Appeal Judgement.[132]

53. The Prosecution advances two arguments to refute Martić's allegation that the Trial Chamber erred when holding that mutual corroboration between Babić and Witness MM-003 was sufficient to establish the credibility of their evidence on a particular point. First, it claims that the Trial Chamber was not required, as such, to seek corroboration for every portion of Babić's testimony; it merely compelled itself to do so.[133] Second, the Prosecution avers that even if the Trial Chamber had erred in this instance, this would not impact its determination of Martić's guilt, because the finding challenged only concerns the attack on Lovinac, an attack that is not mentioned in the Indictment.[134]

54. Martić replies that the Trial Chamber not only used the challenged standard of corroboration in relation to the attack on Lovinac, but used it for the whole Trial Judgement.[135] Thus, according to him, the Appeals Chamber should reconsider all of the Trial Chamber's findings in which the Trial Chamber relied on a witness whose credibility had been substantially challenged.[136]

C. Discussion

1. Interpretation of "beyond reasonable doubt"

55. The Appeals Chamber observes that for a finding of guilt on an alleged crime, a reasonable trier of fact must have reached the conclusion that all the facts which are material to the elements of that crime have been proven beyond reasonable doubt by the Prosecution. At the conclusion of the case, the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[137]

56. In its Judgement, the Trial Chamber clearly referred to the principle laid down in Article 21(3) of the Statute that an accused must be considered innocent until proven guilty.[138] Moreover, the Trial Chamber recalled that, according to Rule 87(A) of the Rules, it is for the Prosecution to

[131] Defence Appeal Brief, para. 38. The Appeals Chamber notes further submissions by Martić, who however does not allege any specific error. See, for example, Defence Appeal Brief, paras 35-36.
[132] Prosecution Response Brief, para. 215, referring to *Halilović* Appeal Judgement, fn. 296, para. 110.
[133] Prosecution Response Brief, para. 217.
[134] Prosecution Response Brief, para. 218.
[135] Defence Reply Brief, para. 30.
[136] Defence Reply Brief, paras 29-30.
[137] *Čelebići* Trial Judgement, para. 601. See also *Halilović* Appeal Judgement, para. 109.

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prove beyond reasonable doubt that the accused is guilty.[139] In a footnote, the Trial Chamber specified that it interpreted the "beyond reasonable doubt" standard as a "high degree of probability", but not as "certainty or proof beyond a shadow of doubt".[140]

57. The Appeals Chamber finds that the Trial Chamber's reference to a "high degree of probability" in one of the footnotes to the section on standard of proof is confusing and not in accordance with the standard of proof of a criminal trial. However, the Appeals Chamber is not satisfied that Martić has shown that the Trial Chamber's application of the standard of proof as requiring the trier of fact to be satisfied of guilt beyond reasonable doubt was in error.

58. The Appeals Chamber finds that, despite making reference to a probability standard once in a footnote, the Trial Chamber's other statements regarding the standard of proof establish that it properly understood the requisite standard.[141]

59. Moreover, with respect to the application of the standard, the Trial Chamber adopted the proper standard in its consideration of the evidence by consistently holding that a conviction could not be entered when there was a reasonable conclusion other than the guilt of the accused.[142] Following this approach, the Trial Chamber only made findings leading to a conviction when stating that it was satisfied "beyond reasonable doubt" that they were correct.[143] In various instances, the Trial Chamber refrained from making a finding of guilt, when a reasonable doubt remained.[144]

60. As such, while the wording used in the footnote mentioned is unfortunate, in light of the overall discussion by the Trial Chamber and its application of the standard to the evidence, the Appeals Chamber finds that Martić has failed to show that the Trial Chamber actually erred in its application of the standard of proof.

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[138] Trial Judgement, para. 21.
[139] Trial Judgement, para. 21, referring, *inter alia*, to *Krnojelac* Trial Judgement, para. 66.
[140] Trial Judgement, fn. 19.
[141] Trial Judgement, para. 21, referring to *Limaj et al.* Trial Judgement, para. 10, which reads "[T]he Chamber has determined in respect of each of the counts charged against each of the Accused, whether it is satisfied beyond reasonable doubt, on the basis of the whole of the evidence, that every element of that crime and the forms of liability charged in the Indictment have been established. In so doing, in respect of some issues, it has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count."
[142] Trial Judgement, para. 21 (last sentence) and references to *Ntakirutimana* Appeal Judgement, para. 140 and *Niyitegeka* Appeal Judgement, para. 60. See also *Halilović* Appeal Judgement, para. 109.
[143] See Trial Judgement, paras 183, 188, 190, 234, 254, 353, 354, 359, 363-365, 368, 370- 372, 374, 375, 378, 379, 386, 389, 390, 392, 403, 411, 414, 416, 428, 445, 454, 460 and fn. 774.
[144] Trial Judgement, paras 185, 191, 192, 247, 356, 366, 379, 384, 392, 417, 473, fns 657 and 754.

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61. As for Martić's claim that the standard of "beyond reasonable doubt" should be interpreted as a "high level of certainty",[145] the Appeals Chamber notes that it is unhelpful to try and explain the standard of proof other than by stating that the standard requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.[146]

62. Concerning Martić's allegation that Judge Moloto's comment "that the Prosecution must proceed and prove its case as best it can" revealed the Trial Chamber's (mis)understanding of the "beyond reasonable doubt" standard,[147] the Appeals Chamber notes the following. As the parties had not reached an agreement on certain facts, the Presiding Judge simply remarked that the only way to proceed was to let the Prosecution prove its case "as best as it can".[148] In doing so, he did not articulate the standard of proof to be employed by the Trial Chamber, but simply recalled that the burden of proof rests on the Prosecution. As Martić has not demonstrated a discernible error by the Trial Chamber, the Appeals Chamber dismisses this argument.

63. Martić has therefore failed to show that the Trial Chamber committed a legal error that invalidates the Trial Judgement and this sub-ground of appeal is dismissed. However, this does not prevent Martić from alleging an error with regard to specific factual findings – the Appeals Chamber will consider any such arguments under other grounds of appeal.[149]

2. Corroboration of witness testimony

64. The Trial Chamber stated that it took due regard of the fact that the Defence was not able to cross-examine Babić on the entirety of his evidence. In order to minimise prejudice accruing to Martić as a result of his inability to test all of Babić's evidence in chief, it granted the Defence the right to present further evidence.[150] The Trial Chamber also considered that Milan Babić had entered into a plea agreement with the Prosecution and that he pleaded guilty to having participated in a joint criminal enterprise together with Martić.[151] Moreover, the Trial Chamber took into consideration that the Prosecution had given assistance to Witness MM-003 in his asylum case.[152] For these reasons, the Trial Chamber cast "significant doubt" on the credibility of Babić and Witness MM-003 and held that their testimony needed to be corroborated.[153] However, it sufficed

[145] Defence Appeal Brief, para. 31.
[146] *Cf. Halilović* Appeal Judgement, para. 109.
[147] Defence Appeal Brief, paras 27-29.
[148] Judge Moloto, 16 Jan 2006, T. 342.
[149] See, *mutatis mutandis*, *Halilović* Appeal Judgement, para. 110.
[150] Trial Judgement, para. 33.
[151] Trial Judgement, para. 34.
[152] Trial Judgement, para. 36.
[153] Trial Judgement, paras 34, 38.

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for the Trial Chamber that the evidence given by one of these two witnesses was corroborated by the other.[154]

65. Regarding Martić's *specific* allegation that the Trial Chamber erred when finding that mutual corroboration between Milan Babić and Witness MM-003 was sufficient, the Appeals Chamber observes that the Trial Chamber did not use the testimony of one or both of these two witnesses alone in order to convict Martić. The Trial Chamber relied on their testimony as background information,[155] or in Martić's favour,[156] or corroborated their testimony with other evidence.[157]

66. Concerning Martić's allegation that the Trial Chamber *in general* did not require sufficient corroboration of the testimony of witnesses whose credibility had been substantially challenged,[158] the Appeals Chamber notes that he does not point to any further instances to substantiate this allegation. Martić has failed to demonstrate that the Trial Chamber committed a discernible error. The Appeals Chamber therefore rejects this sub-ground of appeal.

D. Conclusion

67. For the foregoing reasons, the Appeals Chamber dismisses Martić's third ground of appeal in its entirety.

[154] Trial Judgement, fn. 387.
[155] Trial Judgement, fn. 386, establishing Martić's participation in the attack on Lovinac.
[156] See, for example, Trial Judgement, fn. 1056.
[157] See, for example, Trial Judgement, fn. 729.
[158] Defence Reply Brief, paras 29-30.

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VI. ALLEGED ERROR OF LAW IN THE APPLICATION OF THE JCE THEORY (MILAN MARTIĆ'S FOURTH GROUND OF APPEAL)

A. Introduction

68. At the outset of its analysis of the legal elements of Martić's individual criminal responsibility, the Trial Chamber found that he incurred responsibility in relation to Counts 3 to 14 and Count 1 insofar as it related to those Counts, as a participant in a joint criminal enterprise ("JCE"), pursuant to Article 7(1) of the Statute.[159] It then proceeded to state the law applicable to individual criminal responsibility for the "first" and "third" categories of JCE in the following terms, citing the Tribunal's relevant case law:

> 435. JCE is established as a form of liability within the meaning of "commission" under Article 7(1) of the Statute. The Appeals Chamber found that "whoever contributes to the commission of crimes by [a] group of persons or some members of [a] group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions". Three categories of JCE have been identified in customary international law […]. As stated by the Appeals Chamber, regardless of the categories of JCE, a conviction requires a finding that the accused participated in a JCE. There are three requirements for such a finding: a plurality of persons, the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute and the participation of the accused in this common purpose.
>
> 436. A JCE exists when a plurality of persons participate in the realisation of a common criminal purpose. However, they need not be organised in a military, political or administrative structure.
>
> 437. The first form of JCE requires the existence of a common purpose, which amounts to, or involves the commission of one or more crimes provided for in the Statute. The common purpose need not be previously arranged or formulated and may materialise extemporaneously.
>
> 438. It is not required that the principal perpetrators of the crimes which are part of the common purpose be members of a JCE. An accused or another member of a JCE may use the principal perpetrators to carry out the *actus reus* of a crime. However, "an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*." This may be inferred, *inter alia,* from the fact that "the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose."
>
> 439. For the first form of JCE, it is also required that the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission. For the third form of JCE, the accused is held responsible for a crime outside the common purpose if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk* (*dolus eventualis*). The crime must be shown to have been foreseeable to the accused in particular.
>
> 440. The requirement of participation for both forms of JCE is satisfied when the accused assisted or contributed to the execution of the common purpose. The accused need not have performed any part of the *actus reus* of the perpetrated crime. It is also not required that his participation be necessary or substantial to the crimes for which the accused is found responsible. Nevertheless, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[160]

[159] Trial Judgement, para. 434.
[160] Trial Judgement, paras 435-440 (footnotes omitted; emphasis in original).

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69. Under this ground of appeal, Martić alleges that the Trial Chamber erred in law by failing to properly elaborate on the elements of the JCE theory.[161]

B. Arguments of the Parties

70. Martić contends that the Trial Chamber's approach towards JCE is inconsistent with the fundamental principles of international law.[162] In essence, he claims that JCE theory "is not a concept of international customary law" or, alternatively, that the third category of JCE is not grounded in customary international law.[163] In support of this general proposition, Martić submits various arguments.

71. First, Martić contends that the Trial Chamber inadequately elaborated on the concept of JCE. He acknowledges the existence of precedents in this Tribunal applying JCE,[164] but submits that the Trial Chamber was not compelled to follow them, as the rule of *stare decisis* is not applicable in the Tribunal and, in any event, the present case differs substantially from previous ones. He asserts that, as a consequence, the Trial Chamber should have clarified the origin of the concept of JCE and how it found support for it in Article 7(1) of the Statute.[165] Martić further asserts that the laconic and improper elaboration of the JCE theory by the Trial Chamber led it to erroneous conclusions with regard to the ultimate question of his guilt or innocence. He elaborates that "clear proof" of the Trial Chamber's misunderstanding of JCE theory can be found at paragraphs 442-445, where the Trial Chamber erroneously applied it.[166] He claims that, while the Trial Chamber was right when stating that JCE requires that a plurality of persons participate in the realization of the common purpose, it failed to elaborate on the elements required for a finding on that "participation".[167]

72. Second, Martić argues that the Trial Chamber erred in law by not providing sufficient reasons for the application of the JCE theory to his case from the standpoint of the principle of legality.[168] Martić argues that the theory of JCE is not part of customary international law[169] and submits that the few post-World War II cases cited in the Tribunal's jurisprudence do not form a sufficient basis for a finding that JCE was part of customary international law at the time relevant to

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[161] Defence Notice of Appeal, para. 17; Defence Appeal Brief, para. 40.
[162] Defence Appeal Brief, para. 40. See also Defence Appeal Brief, para. 41, quoting *Stakić* Appeal Judgement, para. 59, and Defence Reply Brief, paras 31-38.
[163] Defence Appeal Brief, para. 49.
[164] Defence Appeal Brief, para. 50.
[165] Defence Notice of Appeal, para. 18.
[166] Defence Appeal Brief, para. 40.
[167] Defence Appeal Brief, paras 51-52.
[168] Defence Appeal Brief, para. 43.
[169] Defence Appeal Brief, paras 42-43 and 49.

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the present case.[170] He further argues that JCE does not meet the criteria to be considered a rule of customary international law, since State practice on JCE is not uniform and the theory is not supported by *opinio juris*.[171] In addition, he submits that General Assembly resolutions and treaties in the ambit of international criminal law do not refer to this concept; in particular, JCE as applied by the Tribunal's jurisprudence was not incorporated in Article 25 of the ICC Statute.[172] Martić further contends that the concept of JCE is based on an impermissible teleological interpretation of the Statute of the Tribunal.[173]

73. Third, Martić contends that the Trial Chamber's misinterpretation of JCE is demonstrated, *inter alia*, by its reference to a statement in the *Brđanin* Appeal Judgement that responsibility for crimes committed by another member of a JCE can be imputed to an accused member of that JCE.[174] Martić argues that the application of this statement to the present case "seems to be problematic". He claims that "individual [criminal] responsibility is responsibility for its own acts, not acts of other persons" and that no criminal liability can be imputed to "any accused […] for a crime committed by another person". He asserts that JCE may not derogate from this principle.[175] Further, Martić claims that when the evidence was insufficient, the Trial Chamber, instead of entering a finding of not guilty, followed the allegedly erroneous approach suggested in the *Tadić* Appeal Judgement when it stated that "[t]he question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killings of the five men […] even though there is no evidence that he personally killed any of them".[176] He affirms that the proper question is whether an accused "can be held responsible regardless of whether he had perpetrated the *actus reus* of the crime".[177]

74. Fourth, Martić submits that for a finding of guilt under JCE, it is necessary that the accused's participation be "in [furtherance] of the common purpose at the core of the JCE" and significantly contribute to the crimes.[178] He contends that, in this respect, while legal considerations are the same when small or large groups are involved in a JCE, the factual situation is more

[170] Defence Appeal Brief, para. 48.
[171] Defence Appeal Brief, para. 49. Martić argues that Italy, Germany and Switzerland would not apply JCE theory if they were to try an accused for the crimes encompassed by the Statute.
[172] Defence Appeal Brief, para. 49.
[173] Defence Appeal Brief, paras 44-47. Martić further affirms that, when adopting the Statute, the Security Council, an organ which has no legislative power, could "at very best, only reproduce the rules and principles of international law that [were] already in existence", but was not allowed to introduce "progressive" developments. Martić submits that, in any event, the principle of "individual and personal criminal responsibility" and "the rule of strict interpretation", which are consistent with the principle *in dubio pro reo*, should be borne in mind by the Appeals Chamber in articulating and applying the JCE mode of liability (Defence Appeal Brief, para. 50).
[174] Defence Notice of Appeal, para. 19.
[175] Defence Notice of Appeal, para. 19.
[176] Defence Appeal Brief, para. 55, referring to *Tadić* Appeal Judgement, para. 185 (emphasis in original).
[177] Defence Appeal Brief, para. 56.

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complex in the case involving political and military leadership. He further affirms that "where there is no evidence that some crimes were committed [the trier of fact is not entitled] to reduce or extend some of the elements of JCE in order to find the accused guilty".[179] He finally contends that "guilty association" cannot be presumed between "members of the political and military leadership" and that the proof of a connection between these persons is a prerequisite for a finding on the JCE elements.[180]

75. Fifth, Martić states that no one, even if he is part of a JCE, can be found responsible for the crimes committed by members of a JCE on the sole basis that he created the conditions making possible the commission of the crime.[181]

76. Finally, Martić contends that the "very categorization of JCE is problematic". He states, referring to a scholarly article, that the third category of JCE is controversial because it lowers the *mens rea* required for the commission of the principal crime without affording any formal diminution in the sentence imposed and warns the Appeals Chamber that its current formulation might call into question the legitimacy of international criminal law.[182]

77. The Prosecution responds that the Trial Chamber did not introduce a new theory of liability when convicting Martić using JCE and that it correctly stated and applied the elements of JCE as defined in the Tribunal's jurisprudence. It contends that Martić simply tries to re-argue his trial submissions on appeal without seeking to establish an error in the Trial Judgement.[183]

C. <u>Discussion</u>

78. A number of Martić's submissions, above, are presented in general terms without clearly identifying alleged errors. The Appeals Chamber will only address arguments which support Martić's claims of legal errors.

79. The Appeals Chamber finds that the Trial Chamber correctly stated the law applicable to JCE and duly described the requirements for a conviction pursuant to that mode of liability. Contrary to Martić's submissions,[184] while relying on the Tribunal's case law, the Trial Chamber was not compelled to elaborate on each and every aspect of the mode of criminal responsibility in

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[178] Defence Appeal Brief, para. 53, citing *Tadić* Appeal Judgement, para. 277, *Stakić* Appeal Judgement, para. 64, and *Brđanin* Appeal Judgement, paras 427 and 430.
[179] Defence Appeal Brief, para. 54.
[180] Defence Appeal Brief, para. 57.
[181] Defence Appeal Brief, para. 58.
[182] Defence Appeal Brief, paras 59-61, referring to a scholarly paper.
[183] Prosecution Response Brief, paras 219-220.
[184] See, in particular, Defence Appeal Brief, paras 50-52.

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question. Therefore, the general contention that the Trial Chamber erred by failing to sufficiently explain JCE as a mode of criminal liability is dismissed.

80. With regard to the contention that JCE had no basis in international customary law at the time relevant to Martić's case,[185] the Appeals Chamber recalls that it is well established in the Tribunal's jurisprudence that JCE existed in customary international law at the time relevant to the charges against Martić.[186] In *Tadić*, the Appeals Chamber conducted a thorough analysis of pre-1991 international criminal case-law and concluded that "the notion of common design as a form of accomplice liability is firmly established in customary international law".[187]

81. While Martić challenges in general terms the conclusion that JCE was part of customary international law, he has failed to point to cogent reasons in the interests of justice requiring a departure from this established jurisprudence.[188] Moreover, the Appeals Chamber recalls that it is established law before the Tribunal that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers".[189] As a result, the Trial Chamber in this case was bound to adopt the definition of JCE elaborated by the jurisprudence of the Appeals Chamber and to apply it to the facts of the case. This also leads to the conclusion that the Appeals Chamber need not consider Martić's arguments to the effect that the "very categorization of JCE is problematic" and Martić's statement that the current formulation of the third category of JCE might call into question the "legitimacy of international criminal law".[190]

82. The Appeals Chamber finds no merit in Martić's claim that the Trial Chamber erred by relying on the *Brđanin* Appeal Judgement when it stated that, under the first category of JCE, the crime must form part of the criminal purpose in order to be imputed to an accused.[191] This is a correct statement of law, which is not contradicted by the Trial Chamber's elaboration on the *mens rea* requirement for responsibility pursuant to the first category of JCE.[192] The Appeals Chamber recalls that the principle expressed in Article 7(1) of the Statute is that of personal culpability, according to which "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)".[193] The

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[185] See, in particular, Defence Appeal Brief, paras 42-49.
[186] *Tadić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 410. See also *Vasiljević* Appeal Judgement, para. 95.
[187] *Tadić* Appeal Judgement, paras 194-220.
[188] *Aleksovski* Appeal Judgement, para. 107.
[189] *Aleksovski* Appeal Judgement, para. 113.
[190] Defence Appeal Brief, para. 61. See, in respect of policy considerations, *mutatis mutandis*, *Brđanin* Appeal Judgement, para. 421.
[191] See, in particular, Defence Appeal Brief, para. 54.
[192] Trial Judgement, para. 439.
[193] *Tadić* Appeal Judgement, para. 186.

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crimes contemplated in the Statute mostly constitute the manifestations of collective criminality and are often carried out by groups of individuals acting in pursuance of a common criminal design or purpose.[194] However, the mode of criminal liability of JCE is not a form of collective responsibility and its contours, described in the jurisprudence of the Tribunal, contain sufficient safeguards to avoid this.[195]

83. Martić also submits that the test for a finding of responsibility is not whether the accused has created the conditions making the commission of the crime possible, even under the third category of JCE.[196] In this respect, the Appeals Chamber agrees. For a finding of responsibility under the third category of JCE, it is not sufficient that an accused created the conditions making the commission of a crime falling outside the common purpose possible; it is actually necessary that the occurrence of such crime was foreseeable to the accused and that he willingly took the risk that this crime might be committed. As this is exactly the test enunciated by the Trial Chamber in paragraph 439 of the Trial Judgement, this submission stands to be rejected.

84. Turning to Martić's claim that the third category of JCE is controversial as it "lowers the *mens rea* required for commission of the principal crime without affording any formal diminution in the sentence imposed",[197] the Appeals Chamber recalls that it has already found that "in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great."[198] It is up to the trier of fact to consider the level of contribution – as well as the category of JCE under which responsibility attaches – when assessing the appropriate sentence, which shall reflect not only the intrinsic gravity of the crime, but also the personal criminal conduct of the convicted person and take into account any other relevant circumstance. This argument thus stands to be rejected.

D. Conclusion

85. For the foregoing reasons, the Appeals Chamber dismisses Martić's fourth ground of appeal in its entirety.

[194] *Tadić* Appeal Judgement, para. 191.
[195] See, in particular, *Brđanin* Appeal Judgement, paras 427-431.
[196] See, in particular, Defence Appeal Brief, paras 58-60.
[197] See, in particular, Defence Appeal Brief, para. 61.
[198] *Brđanin* Appeal Judgement, para. 432.

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VII. ALLEGED ERRORS OF FACT IN THE TRIAL CHAMBER'S FINDINGS ON JOINT CRIMINAL ENTERPRISE (MILAN MARTIĆ'S FIFTH GROUND OF APPEAL)

A. Introduction

86. In his fifth ground of appeal, Martić alleges errors of fact in the Trial Chamber's findings relating to the general requirements of Articles 3 and 5 of the Statute, the existence of the JCE, his participation in the JCE and the crimes committed in furtherance of the common criminal purpose of the JCE.[199] He argues that these errors led the Trial Chamber to incorrectly hold that he incurred criminal responsibility pursuant to Article 7(1) of the Statute for Counts 1 and 3 to 14.[200] In addition, Martić also argues under various grounds of appeal that the Trial Chamber erred in failing to properly establish a link between himself and the principal perpetrators of the crimes.[201] The Appeals Chamber will address this line of argument after having analyzed arguments presented under his fifth ground of appeal.[202]

B. Alleged errors regarding the general requirements of Articles 3 and 5 of the Statute

87. The Trial Chamber found that a state of armed conflict existed in the relevant territories of Croatia and the Republic of Bosnia and Herzegovina ("BiH") during the Indictment period and that the crimes charged were committed in the context of this armed conflict.[203] The Trial Chamber also found that there was a widespread and systematic attack directed against the Croat and other non-Serb civilian population in the relevant territories of Croatia and BiH during the Indictment period.[204] It thus held that the *chapeau* requirements of both Articles 3 and 5 of the Statute were met.[205] Martić submits that the Trial Chamber erred in making these findings.[206]

1. Arguments of the Parties

88. Martić argues that the Trial Chamber misinterpreted his argument at trial on armed rebellion, which related primarily to the nature of the armed conflict and the context in which the

[199] Defence Appeal Brief, paras 62-213.
[200] Defence Appeal Brief, para. 62.
[201] See Defence Appeal Brief, para. 7 (under ground 1), para. 57 (under ground 4) and paras 170, 174 and 176 (under ground 5). Elsewhere, the argument is not explicitly raised as a ground of appeal, but is implicit in Martić's contentions that the crimes should not be attributed to him.
[202] See *infra*, paras 165-212.
[203] Trial Judgement, para. 347.
[204] Trial Judgement, paras 352-353.
[205] Trial Judgement, paras 347 and 353.
[206] Defence Notice of Appeal, para. 28; Defence Appeal Brief, paras 63, 65 and 67.

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events in the SAO Krajina should have been examined.[207] He thus avers that armed attacks were not carried out against civilians in Croat majority villages, but against armed formations present in these villages. He claims that the civilian population in those villages was heavily armed by the Croatian Democratic Union ("HDZ"), and that the Croatian side did not respect the principle of distinction. According to Martić, the Trial Chamber thus failed to recognize that all actions from the Serbian side referred to in the Trial Judgement were defensive in nature. He submits finally that none of the armed attacks by the Serbian side mentioned in the Trial Judgement were aimed at attacking civilians and that casualties occurred because the Croat side was heavily armed and did not abide by its obligation under humanitarian law to separate civilians from combatants.[208]

89. The Prosecution responds that Martić's submission should be summarily dismissed as he has merely asserted that the Trial Chamber erred.[209]

2. Discussion

90. The Appeals Chamber notes that, in relation to the period between 1990 and 1992, the Trial Chamber considered and dismissed Martić's argument that "an armed rebellion organized by Croatian authorities existed in the territory of Croatia".[210] Thus Martić has merely suggested an interpretation of the facts at odds with that of the Trial Chamber. The Trial Judgement discusses the relevance of the armed clashes between Croat and Serb forces in the region[211] and moreover, the Trial Judgement is premised on the established jurisprudence that the existence of an armed conflict or of a widespread or systematic attack, the *chapeau* requirements for findings pursuant to Article 3 and 5 of the Statute, do not hinge upon a finding on which side attacks and which side defends itself.[212] As such, Martić has failed to show that the Trial Chamber erred in its findings on the existence of a state of armed conflict and of a widespread or systematic attack directed against a civilian population.

91. In light of the foregoing, this sub-ground of appeal is dismissed.

[207] Defence Appeal Brief, para. 63, referring to Trial Judgement, paras 343 and 347.
[208] Defence Appeal Brief, para. 65, referring to Trial Judgement, paras 349-353. See also AT. 59, referring to Trial Judgement, para. 443.
[209] Prosecution Response Brief, paras 12-13.
[210] Trial Judgement, paras 343 and 347.
[211] Trial Judgement, paras 41-43 and 344-347 and references therein.
[212] Trial Judgement, paras 49 and 349-353. See, *inter alia*, *Kunarac et al.* Appeal Judgement, para. 87, citing with approval *Kupreškić et al.* Trial Judgement, para. 765.

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C. Alleged errors regarding the existence of the JCE

1. Introduction

92. The Trial Chamber identified the "common purpose" of the JCE charged pursuant to Counts 1 to 14 of the Indictment as "the establishment of an ethnically Serb territory" which – under the prevailing circumstances – "necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory."[213] The Trial Chamber also identified the plurality of persons participating in this JCE,[214] and found that Martić participated in the JCE "willingly"[215] and "actively participated in the forcible removal of the non-Serb population both through his own actions and those of the members of the MUP."[216]

93. On the basis of the foregoing, the Trial Chamber concluded that Martić incurred individual criminal responsibility as a participant in JCE for: Count 3, murder as a crime against humanity; Count 4, murder as a violation of the laws or customs of war; Count 5, imprisonment as a crime against humanity; Count 6, torture as a crime against humanity; Count 7, inhumane acts as a crime against humanity; Count 8, torture as a violation of the laws or customs of war; Count 9, cruel treatment as a violation of the laws or customs of war; Count 10, deportation as a crime against humanity; Count 11, inhumane acts (forcible transfers) as a crime against humanity; Count 12, wanton destruction of villages, or devastation not justified by military necessity as a violation of the laws or customs of war; Count 13, destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war; Count 14, plunder of public or private property as a violation of the laws or customs of war; and for Count 1, persecution as a crime against humanity, in relation to the underlying acts contained in Counts 3 to 14.[217]

94. Martić appeals numerous conclusions of the Trial Chamber in fact and law regarding the existence and the scope of the JCE.[218] The Appeals Chamber will consider each of these sub-grounds of appeal in turn.

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[213] Trial Judgement, para. 445.
[214] Trial Judgement, para. 446. The following persons were identified as participants in the JCE: Blagoje Adžić, Chief of the General Staff of the JNA in 1991 (Trial Judgement, para. 331), Milan Babić, President of SAO Krajina in 1991(Trial Judgement, para. 135), Radmilo Bogdanović, Minister of the Interior of Serbia (Trial Judgement, para. 140), Veljko Kadijević, Yugoslav Federal Secretary for Defence (Trial Judgement, para. 138), Radovan Karadžić, Bosnian Serb President (Trial Judgement, fn. 351), Slobodan Milošević, President of Serbia (Trial Judgement, para. 329), Ratko Mladić, JNA Commander of the 9th Corps in 1991 and later Commander of the Main Staff of the VRS (Trial Judgement, paras 283 and 315), Vojislav Šešelj, from the Serbian Radical Party (Trial Judgement, para. 416), Franko "Frenki" Simatović, an SDB official (Trial Judgement, para. 140), Jovica Stanišić, Chief of the SDB (Trial Judgement, para. 140), and Captain Dragan Vasiljković, Captain from the SDB of Serbia (Trial Judgement, para. 144).
[215] Trial Judgement, para. 454.
[216] Trial Judgement, para. 452.
[217] Trial Judgement, para. 455; Indictment, paras 25-48.
[218] Defence Notice of Appeal, paras 33-42; Defence Appeal Brief, paras 66-116.

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2. Alleged errors regarding the armed attack on Kijevo

95. In discussing the armed clashes between Serb and Croatian forces in the spring and summer of 1991, the Trial Chamber focused, *inter alia*, on the clashes of 26 August 1991 in and around the village of Kijevo, finding that there was inconsistent evidence on the trial record as to the purpose of the attack.[219] Martić impugns this finding.[220]

(a) Arguments of the parties

96. Martić takes issue with the lack of an explicit finding by the Trial Chamber in relation to the purpose of the attack, averring that it was a lawful military operation in response to irresponsible action by Croatian authorities. He claims that any conclusion to the contrary is unsupported by the evidence.[221] Moreover, Martić notes that, according to the trial record, the destruction of a Catholic church during this attack was due to the fact that Croatian forces used its bell-tower as a machine-gun nest[222] and that he ordered that captured uniformed police officers not be harmed.[223]

97. The Prosecution responds that Martić does not explain how the alleged errors under this sub-ground impact the Trial Judgement, especially as the destruction of the Kijevo church was not included among the crimes alleged in Counts 1, 12, 13, or 14.[224] It also contends that the Trial Chamber considered Martić's "overtures of fair treatment" towards non-Serbs in light of the overall record of an ongoing pattern of attacks against non-Serb civilians[225] and arrived at the impugned findings on the basis of overwhelming evidence.[226]

(b) Discussion

98. The Appeals Chamber observes that the Trial Chamber did not consider the evidence of the destruction of the local Catholic church as an instance of criminal conduct underpinning the charge of persecution as it was not one of the crimes charged in the Indictment. However, the Trial Chamber did rely upon the evidence that the church was attacked as part of a pattern of persecutions against the non-Serb population of Kijevo. In relying upon the evidence for this purpose, the Trial Chamber did not consider whether the church was a legitimate military target[227] and disregarded the evidence that it might have been a legitimate military objective. The Appeals Chamber finds that in

[219] Trial Judgement, para. 168.
[220] Defence Notice of Appeal, para. 35; Defence Appeal Brief, paras 68-69 and 71-72.
[221] Defence Appeal Brief, paras 68-69; Defence Reply Brief, paras 42-44 and 91. See also AT. 92-93.
[222] Defence Appeal Brief, para. 71, referring to Trial Judgement, para. 169; Defence Reply Brief, para. 43.
[223] Defence Appeal Brief, para. 72.
[224] Prosecution Response Brief, paras 62-63.
[225] Prosecution Response Brief, paras 55-56, referring to Trial Judgement, paras 338, 341-342 and 349.
[226] Prosecution Response Brief, paras 63-65.
[227] Trial Judgement, para. 169; see also Trial Judgement, para. 426.

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so doing, the Trial Chamber erred as this evidence was "clearly relevant to the findings" in question.[228] However, as the Appeals Chamber considers that the destruction of the church was not a decisive factor in the overall findings of the Trial Chamber on persecution, which included findings of torching of civilian buildings, looting and the effect of the ultimatum on the civilian population of Kijevo and other villages, the error of the Trial Chamber is not such as to warrant the interference of the Appeals Chamber.[229]

99. Furthermore, and contrary to what Martić suggests, the Trial Chamber explicitly cited the order issued by him not to mistreat detained uniformed police officers when considering his knowledge of crimes and his reaction to them.[230]

100. Finally, in relation to the acceptance by the Trial Chamber that the purpose of the Kijevo attack was to cleanse the village of its Croatian population, Martić has not shown that no reasonable trier of fact could have reached this conclusion beyond a reasonable doubt, considering the evidence of Witness MM-078[231] together with the overall context of the situation discussed, *inter alia*, by Witnesses MM-078,[232] Dragišić[233] and Đukić,[234] as well as descriptions in documents presented at trial and cited in the Trial Judgement.[235]

101. In light of the foregoing, this sub-ground of appeal is dismissed.

3. Alleged errors regarding the ultimatum by Martić in relation to the attack on Kijevo

102. The Trial Chamber relied on events surrounding the attack on Kijevo in the parts of the Trial Judgement related to the common purpose of the JCE[236] and to Martić's participation in the JCE.[237] As regards the former findings, the Trial Chamber stated that

> beginning with the armed attack on the predominantly Croat village of Kijevo in August 1991, the SAO Krajina MUP and TOP forces cooperated with the JNA [Yugoslav People's Army]. As of this point in time, the JNA was firmly involved on the side of the SAO Krajina authorities in the struggle to take control of territory in order to unite predominantly Serb areas. The Trial Chamber recalls the ultimatum given by Milan Martić on 26 August 1991 in relation to the imminent attack on Kijevo that "[y]ou and your leadership [*vrhovništvo*] have brought relations between the Serbian and Croatian populations to such a state that further co-existence [*življenja*] in our Serbian territories of the SAO Krajina is impossible". From at least this point in time until early 1992,

[228] See *Limaj et al.* Appeal Judgement, para. 86, referring to *Kvočka et al.* Appeal Judgement, para. 23.
[229] See, in general, Trial Judgement, paras 166-169, 426-430 and 432.
[230] Trial Judgement, para. 338 and fn. 1055.
[231] MM-078, 24 May 2006, T. 4443.
[232] MM-078, 24 May 2006, T. 4431-4432 (private session) and 4443-4444.
[233] Dragišić, 19 Sep 2006, T. 8602.
[234] Đukić, 20 Oct 2006, T. 9885-9886.
[235] See, *inter alia*, Exhibit 496, "Interview with Martić, 14 October 1994", pp. 11-12 and Exhibit 45, "Minutes of Bosnian-Serb Assembly, 12 May 1992", p. 48 (mentioned in Trial Judgement, fn. 397).
[236] Trial Judgement, para. 443.
[237] Trial Judgement, para. 450.

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> several other predominantly Croatian villages were attacked by forces of the TO and the police forces of the SAO Krajina and of the JNA acting in cooperation. The Trial Chamber recalls that these attacks followed a generally similar pattern, which involved the killing and the removal of the Croat population.[238]

As regards the latter findings, the Trial Chamber found that the above-mentioned ultimatum was indicative of Martić's mindset in relation to the Croat population of the SAO Krajina.[239] Martić impugns these findings.[240]

(a) Arguments of the parties

103. Martić appeals the inferences drawn by the Trial Chamber from the August 1991 ultimatum, arguing that it was the "most erroneously interpreted piece of evidence in the whole Judgement".[241] He refers to the first sentence of the ultimatum, which reads: "You and your leadership have brought relations between the Serbian and Croatian populations to such a state that further co-existence in our Serbian territories of the SAO Krajina is impossible".[242] Martić argues that this sentence, coupled with the true meaning of the term "*življenja*", which also signifies "way of living", was wrongly used by the Trial Chamber to support its conclusion that he participated in a common criminal purpose. Moreover, Martić stresses that the term used for "leadership" in the original language of the ultimatum denoted, when used by non-Croats in the 1990s, Croatian leadership similar to the "Ustasha regime" of the 1940s.[243] A reasonable trier of fact, according to Martić, should have taken these semantic differences into account and drawn the inference that the ultimatum stigmatized the actions of the Croatian leadership, but did not intend any harm to the Croat population, nor supported a pattern of killing and removal of non-Serbs.[244] This conclusion would have further been supported by the public statements of organs of the SAO Krajina[245] and by events on the ground.[246]

104. The Prosecution responds that the Trial Chamber properly considered the full text of the ultimatum in light of the whole of the evidence regarding the context of the events at the time, thus reaching a reasonable conclusion.[247]

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[238] Trial Judgement, para. 443 (references omitted).
[239] Trial Judgement, para. 450.
[240] Defence Notice of Appeal, paras 36-37; Defence Appeal Brief, paras 73-78.
[241] Defence Appeal Brief, para. 73.
[242] Exhibit 212, "Ultimatum to Kijevo, 18 August 1991". See, in particular, Trial Judgement, para. 166.
[243] Defence Appeal Brief, para. 74. See also Defence Reply Brief, para. 52.
[244] Defence Appeal Brief, paras 74-75 and 78.
[245] Defence Appeal Brief, paras 76-77, referring in particular to Exhibits 89, "Report of the 51st PBR, 15 September 1993" and 966, "MUP Press Release, 31 December 1991".
[246] Defence Reply Brief, paras 49 and 52. See also Defence Reply Brief, para. 53; AT. 38-40.
[247] Prosecution Response Brief, paras 67-72. The Prosecution also points out that the language of the ultimatum was contained in a list of agreed facts (Exhibit 820, "Agreed Facts") as well as in a contemporaneous document (Exhibit 212, "Ultimatum to Kijevo, 18 August 1991") and was never challenged at trial.

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(b) Discussion

105. At the outset, the Appeals Chamber notes that the text of the ultimatum in relation to the attack on Kijevo, or excerpts thereof, is cited and referenced in various sections of the Trial Judgement[248] and that Martić failed to raise any argument related to the English translation of the ultimatum at trial.[249] Second, the other documents cited by Martić in connection with the ultimatum, Exhibits 89 and 966, are dated, respectively, 15 September 1993 and 31 December 1991 (*i.e.*, well after the events in Kijevo). While both of these documents were aimed at protecting civilians in the area of combat operations, in light of the findings elsewhere in the Trial Judgement[250] that by December 1991 most of the attacks against predominantly non-Serb towns had ceased, it was reasonable for the Trial Chamber to exercise considerable caution when assessing these statements in relation to the forcible take-over of the territories which took place between August and October 1991.

106. In any event, the Trial Chamber considered Exhibit 966 when assessing Martić's knowledge of, and reaction to, the crimes committed; there is no indication that it disregarded this document when assessing the overall significance of the ultimatum in practice.[251] Similarly, Exhibit 89 was explicitly mentioned when dealing with the involvement of the JNA in the shelling of Zagreb.[252] Third, and more importantly, in the section of the Trial Judgement dealing with JCE, the Trial Chamber used the text of the ultimatum, among other pieces of evidence, to establish that the attack on Kijevo resulted in deportation, forcible transfer and persecution of the local non-Serb population[253] and that Martić contributed to the joint effort of the JNA, the TO and the SAO Krajina MUP during this and later attacks.[254] In this respect, Martić has failed to establish that a reasonable trier of fact could not have reached these conclusions beyond a reasonable doubt on the whole of the evidence considered.

107. In light of the foregoing, this sub-ground of appeal is dismissed.

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[248] Trial Judgement, paras 166, 426, 443 and 450.
[249] The language of the ultimatum was included in a list of agreed facts: see Exhibit 820 "Agreed Facts", para. 20, cited in Trial Judgement, fn. 394. The language of the ultimatum was also included in Exhibit 212 "Ultimatum to Kijevo, 18 August 1991", the admission of which was not challenged at trial by Martić: Babić, 17 Feb 2006, T. 1554-1556.
[250] See, in particular, Trial Judgement, paras 161-172, 175, 180-183, 186-188, 200, 202-206 and 212-219.
[251] Trial Judgement, fn. 1071.
[252] Trial Judgement, fn. 983.
[253] Trial Judgement, para. 426.
[254] Trial Judgement, paras 443 and 450.

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4. Alleged errors in failing to reach findings on the background and in reaching findings on the political objectives of the Serb leadership

108. Martić appeals the decision of the Trial Chamber not to make certain factual findings on the basis that it considered them irrelevant because, in his view, they are important to understanding the Kijevo ultimatum, the objectives of the Serbian leadership and the cooperation of its members, as well as the overall "coercive atmosphere" in the territory now comprising Croatia.[255]

(a) Arguments of the parties

109. Martić argues that Serbs in SAO Krajina, for historical reasons, had a right to claim self-determination in accordance with international law and that instead of being able to exercise this right, they ended up being persecuted by the Croatian authorities in the 1990s in a way similar to the persecutions and massacres of Serbs by Croats during the 1940s.[256] After the HDZ won the first multi-party elections in Croatia, it "started the process of separation from the rest of Yugoslavia and discrimination on ethnic grounds" by, *inter alia*, establishing paramilitary units and adopting Ustasha symbols and discourse.[257] Martić submits that the aim of the new Croat authorities was that of killing and expelling almost the entire Serb population of Croatia.[258] The terrorisation of Serbs proceeded, according to Martić, with the canonisation of Archbishop Stepinac – an important Catholic backer of the Ustasha regime – by the Roman Pontiff[259] and with racist and inflammatory statements by important Croatian politicians, including President Franjo Tuđman.[260] Finally, Martić highlights statements related to the Croatian offensive (denominated "Storm") against Serb-held Croatian Krajina in 1995, averring that this operation was "a final phase of the realization of Croatian policy towards Serbs in Croatia", *i.e.*, their slaughter.[261] In sum, Martić argues that had the Trial Chamber taken into account the preceding historical context, it would have reached different findings on the goals and objectives of the Serb leadership and on the lack of existence of a JCE.[262] In particular, it would have understood that Martić advocated an independent Serb state or at least a

[255] Defence Notice of Appeal, paras 34-36; Defence Appeal Brief, para. 79.
[256] Defence Appeal Brief, paras 80-85 and 91. See also AT. 41-42.
[257] Defence Appeal Brief, paras 86 and 98-99. See also AT. 42.
[258] Defence Appeal Brief, paras 87-89.
[259] Defence Appeal Brief, para. 87.
[260] Defence Appeal Brief, paras 89-90. See also AT. 43-44. Martić in particular dwells on Exhibit 237, "Recording of a conversation between Špegelj and Boljkovac, 14 October 1990", the transcript of a recorded intercepted conversation between two ministers in 1990, which was presented at trial during the cross-examination of Witness Milan Babić (Milan Babić, 3 Mar 2006, T. 1859-1884) but never mentioned in the Trial Judgement. Martić asserts that the conversation in question not only shows the extent to which criminal conduct was assumed to be necessary for Croatia to gain its independence and to oust the Serb minority from the territories it claimed as "Croat", but that when considered in conjunction with later events, it shows that the Croatian leadership proceeded to plan events, which later occurred (Defence Appeal Brief, paras 91-97. See also AT. 44-47).
[261] Defence Appeal Brief, paras 100-101. See also AT. 45.
[262] Defence Reply Brief, paras 54-56 and 59-60.

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substantial degree of autonomy within Croatia as a response to the aims of the Croatian authorities.[263]

110. The Prosecution responds generally that the crimes committed in furtherance of the JCE cannot be justified by crimes committed against Serbs in Croatia, as Martić appears to suggest, because *tu quoque* is not a valid defence before the Tribunal and no justification exists for deliberately targeting civilians.[264] More specifically, the Prosecution argues that the Trial Chamber was not required to make findings on the oppression of Serbs in Croatia, whether during the Second World War or in the 1990s, because these events were not essential for a finding on Martić's individual criminal responsibility.[265]

(b) Discussion

111. To the extent that Martić's argument is an attempt to plead a defence of *tu quoque*, *i.e.*, to plead that the acts for which he was found responsible should not be considered criminal because they were in response to crimes committed against him and his people, it must be rejected. It is well established in the jurisprudence of the Tribunal that arguments based on reciprocity, including the *tu quoque* argument, are no defence to serious violations of international humanitarian law.[266]

112. To the extent that Martić argues that the Trial Chamber erred in failing to take into account relevant contextual factors or erred in its findings on such factors, in particular the political objectives of the Serb leadership, the Appeals Chamber is not persuaded that the Trial Chamber erred in either respect. In the Trial Judgement, the Trial Chamber carefully considered that the political aims of the Serb leadership "to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory" did not "amount to a common purpose within the meaning of the law on JCE pursuant to Article 7(1) of the Statute".[267] The Trial Chamber rather held that "where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose."[268] As such, Martić's submissions fail to show any error in findings of relevance to his conviction, including the Trial Chamber's findings that the objectives of the Serb leadership were "implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and

[263] AT. 46. Martić also clarifies that he is not making a *tu quoque* argument: Defence Reply Brief, para. 57.
[264] Prosecution Response Brief, paras 52-54.
[265] Prosecution Response Brief, paras 73-76.
[266] See, for example, *Kupreškić et al.* Trial Judgement, paras 515-520, as confirmed by *Kupreškić et al.* Appeal Judgement, para. 25.
[267] Trial Judgement, para. 442.
[268] Trial Judgement, para. 442.

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through the commission of acts of violence and intimidation", which "necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory."[269]

113. Martić's argument may also be understood as alleging that the Trial Chamber failed to consider the possibility that the prevailing circumstances in the SAO Krajina, and in Croatia in general, created the conditions for acts of violence erupting throughout the territory relevant to the Indictment period, despite Martić's willingness to deal with the situation in a legal and peaceful way. In this respect, the Appeals Chamber notes that

> [e]vidence of an attack by the other party on the accused's civilian population may not be introduced unless it tends "to prove or disprove any of the allegations made in the indictment", notably to refute the Prosecutor's contention that there was a widespread or systematic attack against a civilian population.[270]

Further, if Martić is arguing that the Croatian leadership started a process of separation and discrimination unacceptable to the Serb population and that this process, together with ancestral fears due to past animosity and conflicts, led to the commission of decentralised and uncoordinated crimes,[271] the Appeals Chamber notes that this argument was carefully considered and rejected by the Trial Chamber at trial.[272] As Martić has failed to show that the Trial Chamber's finding was unreasonable, this argument stands to be rejected.

114. In light of the foregoing, these sub-grounds of appeal are dismissed.

5. Alleged errors regarding the participation of members of the JCE in a common criminal purpose

115. The Trial Chamber found that a number of individuals participated in the JCE by furthering a common criminal purpose.[273] Martić claims that the Trial Chamber erred in relying on cooperation among these individuals to reach a finding on their participation in the JCE, arguing that cooperation with other individuals relevant to a JCE must either be "in achievement of a

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[269] Trial Judgement, para. 445.
[270] *Kunarac et al.* Appeal Judgement, para. 88 (footnotes omitted).
[271] See, in particular, Defence Appeal Brief, paras 86-89. See also AT. 41-42, 45-46.
[272] At the stage of the Judgement of Acquittal pursuant to Rule 98 *bis* of the Rules, Martić submitted that there was "no evidence […] to show that there was an oral or a written plan of the joint criminal enterprise". The Trial Chamber found however that there was evidence that Martić shared the intent of the principal perpetrators of the crimes committed in furtherance of the common purpose of the joint criminal enterprise (Oral Decision on Motion for Judgement of Acquittal, 3 July 2006, T. 5963-5967). The Trial Judgement also shows that the Trial Chamber considered Martić's arguments in this respect, but found them unwarranted on the evidence, coming to the conclusion beyond a reasonable doubt that there was a common plan of the Serb leadership (Trial Judgement, paras 329-336) and that the common plan shared by Martić was criminal in nature (Trial Judgement, paras 442-445, 447-455).
[273] See Trial Judgement, para. 446.

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criminal goal" or, where the objective is not criminal in nature, must be made sharing the criminal intent to further the legal objective by criminal means.[274]

116. With respect to Martić's general submission that the Trial Chamber should not have relied on cooperation among the JCE members in order to reach a finding on their participation in the JCE, the Appeals Chamber notes that the Trial Chamber did discuss the structure of the SAO Krajina/RSK and its relationship with federal (Yugoslav) authorities. While the Trial Chamber made its findings in this respect in another section of the Trial Judgement,[275] it is clear that conclusions on the interactions between SAO Krajina and RSK structures, the JNA and other relevant actors were pertinent to the questions of the "common purpose" and of the "plurality of persons" discussed at paragraph 442 through 446 of the Trial Judgement. As far as the cooperation between the various members of the JCE is concerned, the Appeals Chamber finds that Martić has merely asserted that the Trial Chamber should have interpreted evidence in a particular manner. Specifically, the findings of the Trial Chamber – even taking into account the evidence referred to by Martić – are such that a reasonable trier of fact could have reached them beyond reasonable doubt, taking into account the timeframe of the JCE, its evolution, and the fact that motives and personal ambitions are irrelevant for the common criminal purpose. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 2, as including arguments which ignore and misrepresent the Trial Chamber's findings, and category 3, as including mere assertions that the Trial Chamber should have interpreted evidence in a particular manner.

D. Alleged errors regarding Martić's participation in the JCE

1. Introduction

117. The Trial Chamber found that Martić actively participated in the furtherance of the common purpose of the JCE by providing substantive financial, logistical and military support to the SAO Krajina and the RSK, by actively working together with the other JCE participants to fulfil the objective of a united Serb state, by fuelling an atmosphere of insecurity and fear through radio speeches, by refraining from intervening against perpetrators who committed crimes against the non-Serb population, and by actively participating in the forcible removal of the non-Serb population.[276] Although it concluded that the crimes found to have been perpetrated against the non-Serb population under Counts 1, 3 to 9, and 12 to 14 were outside of the common purpose of the JCE, the Trial Chamber held that Martić willingly took the risk that these crimes might be

[274] Defence Notice of Appeal, para. 44; Defence Appeal Brief, paras 108-116. See also AT. 47-48 and 91-92.
[275] Trial Judgement, in particular paras 127-160.
[276] Trial Judgement, paras 448-453.

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perpetrated against the non-Serb population.[277] As a result, the Trial Chamber found that Martić incurred individual criminal responsibility pursuant to Article 7(1) of the Statute for Counts 1 and 3 to 14.[278]

118. Martić submits that the Trial Chamber erred in finding that he actively participated in the furtherance of the common purpose of the JCE. He argues that the Trial Chamber's findings are mainly based on circumstantial evidence and that they do not satisfy the requirement that inferences of fact should leave no room for reasonable doubt.[279]

2. Alleged errors regarding the common purpose of the JCE

119. Martić impugns the Trial Chamber's conclusion that the common purpose of the JCE was criminal and that crimes were committed as a result of this common purpose.[280]

(a) Arguments of the Parties

120. Martić submits that it was not established that he cooperated with any person in the realisation of a common criminal purpose. He avers that the Trial Chamber's finding that he worked actively with other JCE participants to fulfil the objective of creating a united Serb state cannot support the conclusion that he participated in a JCE. In this respect, he refers to the Trial Chamber's statement that this objective "does not amount to a common purpose within the meaning of the law on JCE."[281] Martić also submits that he did not want an ethnically pure state.[282] He maintains that when the policy of unification failed, "all Serbs were expelled from the territory on which they had lived for centuries." He contends that the policy he advocated was the policy of the majority of the SAO Krajina and that the crimes committed in the SAO Krajina were not the result of the policy he supported. In this regard, Martić maintains that the policy which he advocated was supported by Cedric Thornberry (also, "Thornberry"), the UNPROFOR Director of Civil Affairs, who stated that he agreed that "[t]here are just few Serbs in protected zones that will accept to live under Croatian rule. Also, I know that only few Croats are ready not to accept this territory as their own".[283]

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[277] Trial Judgement, para. 454.
[278] Trial Judgement, para. 455.
[279] Defence Appeal Brief, para. 146, referring to *Corfu Channel Case*, p. 18.
[280] Defence Notice of Appeal, paras 43-45; Defence Appeal Brief, paras 118-119 and 138-139.
[281] Defence Appeal Brief, paras 118-119, referring to Trial Judgement, para. 442.
[282] Martić also refers to arguments presented in paragraphs 66 to 116 of his Appeal Brief in support of this sub-ground of appeal (Defence Appeal Brief, para. 139). The Appeals Chamber addressed these submissions above and dismissed all arguments which might be of relevance to this sub-ground of appeal: see *supra*, paras 108-116.
[283] Defence Appeal Brief, para. 139, citing Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993", p. 6.

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121. In addition, Martić submits that the political objectives of the Serb leadership do not provide any support for the Trial Chamber's findings on the JCE.[284] He avers not only that the evidence does not establish that the Serb leadership wanted to create a Serb-dominated State in the SAO Krajina, citing disagreements among the leadership's members,[285] but also that the only finding that was warranted beyond reasonable doubt was that these leaders merely intended to protect Serbs in Croatia.[286]

122. The Prosecution responds that the policy of creating a unified Serb state through the commission of crimes could not be legitimised by its popularity amongst the majority of the SAO Krajina, nor through the purported support of a UNPROFOR representative.[287] It suggests that Martić merely posits an alternative interpretation of the evidence, instead of showing an error on the part of the Trial Chamber.[288] The Prosecution also responds that Martić fails to identify the findings he challenges with sufficient particularity, as well as fails to explain how it was unreasonable for the Trial Chamber to conclude that the crimes committed outside the common criminal purpose were foreseeable.[289]

(b) Discussion

123. As recalled above,[290] the Appeals Chamber observes that while the Trial Chamber held that the objective of uniting with other ethnically similar areas did not in and of itself amount to a common criminal purpose within the meaning of the law on JCE pursuant to Article 7(1) of the Statute, it also held that "where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose."[291] The Trial Chamber indeed found that "the political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation" and that "the implementation of the political objective to establish a unified Serb territory in these circumstances necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory."[292] Finally, the Appeals Chamber finds that Martić does not explain how the disagreements within the Serb leadership on the political objectives to be achieved impact on the Trial Chamber's pivotal finding

[284] Defence Appeal Brief, paras 102-106, referring to Trial Judgement, paras 34, 133-134, 329, 333 and 442-443.
[285] Defence Appeal Brief, paras 103-104. See also Defence Reply Brief, paras 60-61.
[286] Defence Appeal Brief, para. 105.
[287] Prosecution Response Brief, para. 85.
[288] Prosecution Response Brief, para. 83.
[289] Prosecution Response Brief, para. 86.
[290] See *supra*, para. 112.
[291] Trial Judgement, para. 442.
[292] Trial Judgement, para. 445.

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related to the common criminal purpose that evolved during the Indictment period. As such, Martić has failed to show any error in the Trial Chamber's finding that he and others participated in a common criminal purpose.

124. Moreover, the Appeals Chamber finds that whatever Martić's purported intentions and policy objectives may have been and whatever the support which these objectives may have received from majority of the SAO Krajina and the UNPROFOR Director of Civil Affairs, these arguments do not point to any error in the Trial Chamber's finding that crimes were committed in furtherance of the common criminal purpose of the JCE. Nor do these arguments show that the Trial Chamber erred when it found that "Martić was aware that the non-Serb population was being subjected to widespread and systematic crimes, including killings, unlawful detentions, beatings and mistreatment in detention, and crimes against property, as a result of the coercive atmosphere in the SAO Krajina and the RSK" and that "this atmosphere was created and sustained by the actions of Milan Martić and other members of the JCE."[293] As a result, Martić has failed to demonstrate that the Trial Chamber's conclusions were unreasonable.

125. In light of the foregoing, this sub-ground of appeal is dismissed.

3. Alleged error regarding Martić's cooperation with other JCE Participants

126. The Trial Chamber found that Martić "exercised absolute authority over the MUP."[294] Martić impugns this finding.[295]

(a) Arguments of the Parties

127. Martić argues that the Trial Chamber erred in finding that he "exercised absolute authority over the MUP."[296] He avers, referring to the testimony of Nikola Medaković and Nikola Dobrijević, that he exercised his powers and authority in accordance with the law, that there is no evidence that he ever ordered something unlawful, and that he did not exercise absolute authority over the MUP.[297] He also argues that the Trial Chamber erred in giving too much weight to the

[293] Trial Judgement, para. 454.
[294] Trial Judgement, para. 449.
[295] Defence Notice of Appeal, paras 43-44; Defence Appeal Brief, paras 120-121.
[296] Defence Appeal Brief, para. 120, referring to Trial Judgement, para. 449.
[297] Defence Appeal Brief, para. 120, referring to Nikola Medaković, 9 Oct 2006, T. 8968; Nikola Dobrijević, 13 Nov 2006, T. 10958. See also AT. 48-49. Nikola Medaković was the commander of the *Milicija Krajine* unit in Plaški in 1991 (Trial Judgement, para. 147) and Nikola Dobrijević was an official at the Ministry of the Interior in 1992-1993 (Nikola Dobrijević, 10 Nov 2006, T. 10855).

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terms "Martić's Police" and "Martić's Men" (*Martićevci*) and refers to the evidence of Witness Radoslav Maksić, who stated that these terms "in essence […] did not really mean anything."[298]

128. The Prosecution responds that Martić merely asserts that the Trial Chamber erred and that this sub-ground of appeal should be summarily dismissed.[299] It argues that Martić relies on Nikola Dobrijević's general comment as well as Radoslav Maksić's testimony – to which the Trial Chamber referred in the Trial Judgement – without showing how the Trial Chamber's finding was erroneous.[300]

(b) Discussion

129. The Appeals Chamber finds that Martić has failed to explain how his reference to Medaković's and Dobrijević's testimony contradicts the Trial Chamber's findings in any way or renders them erroneous. In addition, the Appeals Chamber notes that the Trial Chamber referred extensively to Medaković's testimony in the Trial Judgement, including the portion of the transcript to which Martić refers in his submissions.[301] With respect to the testimony of Radoslav Maksić, the Appeals Chamber notes that the Trial Chamber expressly referred to the testimony to which Martić refers in his submissions in its findings on "Martić's Police."[302] As such, Martić has merely asserted that the Trial Chamber should have interpreted evidence differently and has failed to show that the Trial Chamber's conclusions were unreasonable (category 3).

130. In light of the foregoing, this sub-ground of appeal is dismissed.

4. Alleged error regarding Martić's radio speeches

131. The Trial Chamber found that Martić contributed to the displacement of non-Serbs "by fuelling the atmosphere of insecurity and fear through radio speeches wherein he stated he could not guarantee the safety of the non-Serb population."[303] Martić submits that the Trial Chamber erred in making this finding.[304]

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[298] Defence Appeal Brief, para. 121, referring to Radoslav Maksić, 7 Feb 2006, T. 1191. See also AT. 49-50.
[299] Prosecution Response Brief, paras 13, 47 and 87.
[300] Prosecution Response Brief, para. 100.
[301] See, for example, Trial Judgement, fns 257, 270, 272, 297, 305, 310, 311, 315, 317, 321, 515, 517-523, 525-529, 593-596, 599, 601-602, 609-611, 614-617 and 663. Nikola Medaković, 9 Oct 2006, T. 8968, is specifically referred to in fn. 310.
[302] Trial Judgement, fn. 320.
[303] Trial Judgement, para. 450. See also paras 295-301.
[304] Defence Notice of Appeal, para. 44; Defence Appeal Brief, paras 122-123.

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(a) Arguments of the Parties

132. Martić submits that Witness MM-078 "made a mix-up" in his testimony because he (Martić) had stated that he could not guarantee the safety of Croatian refugees upon their return. He also claims that this witness heard him state that all citizens of the RSK had equal rights regardless of nationality.[305]

133. The Prosecution responds that Martić does not explain the way in which Witness MM-078 "made a mix-up" in his testimony. Moreover, the Prosecution avers that Witness MM-078 specifically stated that he was unaware of statements by Martić regarding equal treatment of non-Serbs.[306]

(b) Discussion

134. The Appeals Chamber notes that Martić's submission that Witness MM-078 "made a mix-up" in his testimony is unsupported by reference to any evidence. In addition, contrary to Martić's submission, in response to the question of whether he had ever heard of "Milan Martić's statements over the mass media where he stated that all the citizens of the Republic of Serbian Krajina were equal in their rights," Witness MM-078, who testified about numerous events and crimes, most notably those taking place in Knin, expressly stated: "I didn't have occasion to hear or read that."[307]

135. In light of the foregoing, this sub-ground of appeal is dismissed.

5. Alleged errors regarding Martić's failure to intervene against perpetrators

136. Martić submits that no reasonable trier of fact could have concluded that he had deliberately refrained from intervening against perpetrators who committed crimes against the non-Serb population.[308]

(a) Arguments of the parties

137. Martić first argues that the Trial Chamber failed to differentiate between obligations of result and obligations of conduct and failed to consider that he was performing his functions during a war and that his awareness of crimes being committed depended on whether his requests and

[305] Defence Appeal Brief, para. 123, referring to MM-078, 25 May 2006, T. 4518 (private session). Martić also refers to arguments presented in paras 73-78 of his Appeal Brief in support of this sub-ground of appeal. The Appeals Chamber dismissed these submissions above: see *supra*, para. 100.
[306] Prosecution Response Brief, para. 88, referring to MM-078, 25 May 2006, T. 4518 (private session).
[307] MM-078, 25 May 2006, T. 4518 (private session).
[308] Defence Notice of Appeal, paras 43-45; Defence Appeal Brief, para. 125, referring to Trial Judgement, para. 451.

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orders were followed.[309] Second, Martić claims that the Trial Chamber erred in finding that it had only been presented with "a few examples" of instances in which he had intervened to punish members of the MUP. In this respect, he refers to evidence which purports to establish that he acted to protect non-Serbs from criminal activity and intervened against those who had committed crimes.[310] Alternatively, Martić argues that even if there were only a few examples of such evidence, this does not provide support for the conclusion that he deliberately refrained from intervening against perpetrators of crimes against non-Serbs.[311] Third, Martić argues that the Trial Chamber erred in finding that after the attack on Struga (a village located a few kilometres north of Dvor along the Una river), he ordered Captain Dragan Vasiljković to release ten men allegedly responsible for killing several civilians.[312] He submits that this finding was based on hearsay testimony of Aernout van Lynden, that this testimony was untruthful in one other respect and that there is no evidence that the ten men in question had committed any crime.[313] Finally, Martić contends that the evidence shows that he wanted properly trained officers.[314]

138. The Prosecution responds that Witness MM-117's general reference to the war and public pressure does not have any relevance to whether Martić took steps to stop crimes committed against non-Serbs.[315] The Prosecution also responds that the Trial Chamber considered the evidence to which Martić refers and that he fails to show that its findings were unreasonable.[316] The Prosecution finally responds that there is evidence that in the "few examples" in which Martić was given credit for preventing crimes, he was not motivated by a concern for equal treatment or the prevention of crime and that he effectively failed to follow through on preliminary steps to prevent crime.[317]

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[309] Defence Appeal Brief, paras 12, 126, 130, referring to MM-117, 13 Oct 2006, T. 9352. See also AT. 30-32, 103 (arguing that Martić's position within the SAO Krajina did not automatically mean that he was aware of each crime committed in the territory of Krajina).

[310] Defence Appeal Brief, paras 126-129, 131-132, referring to Ljubica Vujanić, T. 9498-9499 (private session) (though probably referring to 18 Sept 2006, T. 8498-8499); MM-096, 25 Aug 2006, T. 7174-7175; MM-117, 13 Oct 2006, T. 9352; Nikola Dobrijević, 10 Nov 2006, T. 10893; Exhibit 518, "Report of meeting, 12 December 1991", p. 4; Exhibit 541, "Order from the MUP to the Special Brigade of the Republic of Serb Krajina, 7 September 1993"; Exhibit 602, "Order issued by Milan Martić regarding the area of Dubica, 26 November 1991"; Exhibit 966, "MUP Press Release, 31 December 1991". Martić further refers to paragraphs 337-339 and 451 of the Trial Judgement, which relate to actions he undertook against criminal activities. See also AT. 50-52.

[311] Defence Appeal Brief, para. 143. See also AT. 56-57.

[312] Defence Appeal Brief, para. 133, referring to Trial Judgement, para. 340.

[313] Defence Appeal Brief, para. 133, referring to Aernout van Lynden, 2 Jun 2004, T. 5017-5019.

[314] Defence Appeal Brief, para. 136, referring to Nikola Medaković, 9 Oct 2006, T. 8966-8967. See also AT. 58.

[315] Prosecution Response Brief, para. 95.

[316] Prosecution Response Brief, paras 92-95, 103, referring to Trial Judgement, para. 144. The Prosecution also argues that part of the hearsay evidence of Aernout van Lynden was in fact corroborated by documentary evidence and that the Trial Chamber was entitled to accept this evidence as reliable and credible: Prosecution Response Brief, para. 93, referring to Exhibit 588, "Request for Relief of Duty from the Chief of the war Staff of Dvor, 28 July 1991"; Exhibit 568, "Report of Krajina SJM to the MUP, 19 September 1992", p. 2.

[317] Prosecution Response Brief, para. 96, referring to Trial Judgement, paras 338-339, 354, 357-358, fn. 1055; MM-022, 20 Mar 2006, T. 2315-2317, 2353 (closed session); Josip Josipović, 6 Apr 2006, T. 3358. See also AT. 88-89.

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(b) Discussion

139. As noted above,[318] the Trial Chamber did not convict Martić for his failure to intervene against the perpetrators of crimes committed against non-Serbs. Indeed, the Trial Chamber referred to Martić's knowledge of and reaction to crimes committed against the non-Serb population, among other factors, to establish that the *mens rea* requirement for the JCE had been met.[319] This is also clear from the Trial Chamber's summary of its factual findings, which do not include any reference, under any Count, to the Trial Chamber's findings relating to Martić's failure to intervene against perpetrators.[320] As such, Martić's submission is only relevant to the extent that it challenges the Trial Chamber's overall finding on his *mens rea*.

140. The Appeals Chamber notes that the issue of whether the Trial Chamber imposed something akin to an obligation of result upon Martić is of limited relevance to the issue of his *mens rea*. Whether or not Martić had an obligation of result or to intervene against the perpetrators of crimes committed against non-Serbs is unrelated to the issue of his knowledge of the existence of such crimes and his disposition towards them and the non-Serb population generally.

141. Moreover, in light of the evidence showing that the crimes committed in the SAO Krajina and the RSK were common knowledge, discussed at sessions of governmental bodies, and reported by international personnel present in the area,[321] the Appeals Chamber is not satisfied that Martić has shown that the Trial Chamber erred in reaching the conclusion beyond a reasonable doubt that he knew about these crimes.

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[318] See *supra*, para. 28.
[319] See Trial Judgement, paras 337-342, 451 and 454. See, in particular, paras 342 ("The evidence shows that Milan Martić actively advocated and pursued the goal of creating an ethnically Serb state in spite of his awareness of the serious and widespread crimes, which were being perpetrated against the Croat and other non-Serb civilian population as a result of this policy. While the Trial Chamber notes the evidence presented above that Milan Martić did not personally express hatred towards Croats or other non-Serbs, and on one occasion instructed that Serb and Croat refugees be treated equally, this evidence does not serve to outweigh the substantial evidence of Milan Martić's conscious disregard for the fate of the Croat and other non-Serb population and persistent pursuance of the goal to create a Serb state.") and 454 ("The Trial Chamber finds that the crimes found to have been perpetrated against the non-Serb population under Counts 3 to 9, Counts 12 to 14, and Count 1 insofar as it relates to these Counts, were outside of the common purpose of the JCE. However, the Trial Chamber recalls that Milan Martić was aware that the non-Serb population was being subjected to widespread and systematic crimes, including killings, unlawful detentions, beatings while detained, and crimes against property, as a result of the coercive atmosphere in the SAO Krajina and the RSK. The Trial Chamber considers that this atmosphere was created and sustained by the actions of Milan Martić and other members of the JCE. The Trial Chamber therefore finds that the crimes which have been found to be outside the common purpose were foreseeable to Milan Martić. Furthermore, the evidence includes only scarce reference to Milan Martić acting to take measures to prevent or punish such crimes. Moreover, despite the overwhelming evidence of the scale and gravity of the crimes being committed against the non-Serb population, Milan Martić persisted in pursuing the common purpose of the JCE. *Thus, the Trial Chamber considers it proven beyond reasonable doubt that Milan Martić willingly took the risk that the crimes which have been found to be outside the common purpose might be perpetrated against the non-Serb population.*") (emphasis added).
[320] Trial Judgement, Sections IV.B.3 and IV.B.4.
[321] See, in particular, Trial Judgement, para. 451.

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142. On the other hand, the Appeals Chamber finds that it was not for Martić to bring evidence that he took action to punish the perpetrators of crimes committed against non-Serbs, but rather for the Prosecution to prove that he failed to do so. The fact that the Trial Chamber was presented with only a few instances of examples of punishment of criminal behaviour by Martić is not, on its own, a sufficient basis for a finding that the only reasonable conclusion was that he deliberately refrained from punishing the crimes committed against non-Serbs. The Appeals Chamber finds that the Trial Chamber erred in finding otherwise.

143. The Appeals Chamber must consider whether this error of fact occasioned a miscarriage of justice. Having due regard to the Trial Chamber's findings on Martić's *mens rea* as a whole, in particular at paragraphs 342 and 454 of the Trial Judgement,[322] the Appeals Chamber finds that the Trial Chamber's overall conclusion on his *mens rea* is one which a reasonable trier of fact could have made beyond a reasonable doubt and is therefore unaffected by this error.

144. In light of the foregoing, this sub-ground of appeal is dismissed.

6. Alleged errors regarding Martić's active participation in the forcible removal of non-Serbs

145. In relation to Counts 1, persecution as a crime against humanity, 10, deportation as a crime against humanity, and 11, inhumane acts (forcible transfers) as a crime against humanity, the Trial Chamber found that the non-Serb population of the Knin area was subjected to increasingly severe forms of discrimination from 1990 through the spring of 1991.[323] This discrimination culminated in the forcible removal of large numbers of non-Serbs by the end of 1991 from the territory of the SAO Krajina[324] and of almost all of the remaining population between 1992 and 1995.[325] Martić submits that the Trial Chamber erred in finding that he actively participated in the forcible removal of the non-Serb population.[326]

(a) Arguments of the parties

146. Martić first submits that the events at the collection centre at Vrpolje did not amount to any sort of forcible deportation attributable to him because the police protected "those 'who desired to leave the RSK territory'." Moreover, Martić claims that the Trial Chamber erred in failing to explain why he "requested that Croats who wish to leave the RSK sign a statement that no one had

[322] See *supra*, fn. 320.
[323] Trial Judgement, para. 426.
[324] Trial Judgement, para. 429.
[325] Trial Judgement, paras 430-431.
[326] Defence Notice of Appeal, paras 43-45; Defence Appeal Brief, paras 140 and 201-213. Martić also refers to his earlier submissions at Defence Appeal Brief, paras 68-101.

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put pressure on them to leave".[327] In this regard, he refers to the minutes of a meeting which he held with Cedric Thornberry, the UNPROFOR Director of Civil Affairs, during which the latter agreed to Martić's requests that Croats who wished to leave the RSK sign statements that no one had put pressure on them to leave and that these statements bear the signature of a United Nations representative.[328] Martić argues that the Trial Chamber erred in not relying on the following statement made by Thornberry to Martić: "Now, I accept your statement that you protect people in very difficult conditions".[329]

147. Martić secondly submits that the Trial Chamber erred in finding that the non-Serb population was forcefully removed from the territory of the SAO Krajina.[330] He argues that the Trial Chamber failed to take into consideration that all of the acts occurred during the war and that "'feeling safe' is reserved for peace time."[331] Referring back to his earlier submissions, he further states that civilians left the area because the Croatian authorities conducted unlawful military operations and because they invited the Croatian civilians to leave the area.[332] He also argues that there is no evidence that the RSK government committed or supported any crime and that there is, on the other hand, clear evidence that all citizens were treated on a non-discriminatory basis. He reiterates that he took measures to prevent the commission of crimes against the Croatian population, provided it with assistance and made no differentiation between the crimes committed against Croatians and the crimes committed against Serbs.[333] He moreover refers to the testimony of Slobodan Jarčević to the effect "that the RSK 'did not take any steps against members of any other nation or ethnic group' and that it was difficult for the RSK government to protect the Croats who remained in the RSK because many of the crimes were committed out of revenge for loosing [*sic*] family members".[334] He finally argues that, as there is no evidence that the RSK government committed crimes against Croats or other ethnic groups, its good faith is to be presumed.[335]

148. Martić thirdly submits that the Trial Chamber erred in finding that he was aware of the forcible removal of the non-Serb population.[336] He argues that knowledge of the conditions which

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[327] Defence Appeal Brief, para. 140, referring to Trial Judgement, para. 453; Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993", pp. 7-8.
[328] AT. 52-54, 56, citing Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993", pp. 7-8.
[329] Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993", p. 8.
[330] Defence Appeal Brief, paras 204, 212, referring to Trial Judgement, paras 427-432.
[331] Defence Appeal Brief, paras 211-212.
[332] Defence Appeal Brief, para. 204, referring to Trial Judgement, paras 147-213.
[333] Defence Appeal Brief, paras 205, 210.
[334] Defence Appeal Brief, paras 141-142, referring to Slobodan Jarčević, 13 Jul 2006, T. 6209; Exhibit 518, "Report of meeting, 12 December 1991", p. 4. See also AT. 54-55.
[335] Defence Appeal Brief, para. 145, referring to a scholarly work.
[336] Defence Appeal Brief, para. 203, referring to Trial Judgement, para. 425 (actually referring to para. 452).

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motivated the non-Serb population to leave was not a sufficient ground for establishing his criminal intent. He avers moreover that he actively promoted the coexistence of the Croats and Serbs in the RSK and was taking measures to effect this coexistence.[337] Martić finally submits that it has been proven beyond a reasonable doubt that he did not hate Croats and that he insisted that all citizens be treated equally regardless of their nationality.[338]

149. Martić finally challenges the Trial Chamber's reliance on, and assessment of, evidence in its factual findings on the crimes of deportation and forcible transfer. He argues that it incorrectly interpreted the evidence of Witnesses MM-078, MM-096 and MM-117.[339] He also argues that the Trial Chamber should not have relied on Milan Babić's testimony because it was uncorroborated,[340] nor on the testimony of Witness MM-079 because the Trial Chamber itself found that his evidence should be assessed with caution.[341]

150. The Prosecution responds that the Trial Chamber reasonably concluded that from 1991 onwards, and obviously by the time of his meeting with Thornberry, Martić was aware of the widespread forced removal of non-Serbs from the Krajina.[342] The Prosecution also responds that the Trial Chamber duly considered the evidence to which he refers in his submissions.[343] As for the testimony of Witness MM-114, to which the Trial Chamber did not refer in the Trial Judgement, the Prosecution submits that Martić has failed to show how this evidence would affect the Trial Chamber's findings.[344] With respect to Martić's challenges to the Trial Chamber's treatment of evidence, the Prosecution responds that he fails to show that the Trial Chamber's interpretation of

[337] Defence Appeal Brief, para. 203.
[338] Defence Appeal Brief, paras 134-135, 137, referring to MM-117, 13 Oct 2006, T. 9339: 20-21, 9346: 13-14 (private session), 16 Oct 2006, T. 9504-9505 (private session); Patrick Barriot, 9 Nov 2006, T. 10750, 10753-10754; MM-096, 21 Aug 2006, T. 6846; MM-116, T. 7527-7528 (probably referring to MM-090, 31 Aug 2006, T. 7521-7528 (closed session)); Ljubica Vujanić, 18 Sep 2006, T. 8500: 1-8; Dragan Knežević, 3 Nov 2006, T. 10675; Exhibit 965, "Minutes of a meeting between Martić and Thornberry of UNPROFOR, 14 June 1993"; Exhibit 966, "MUP Press Release, 31 December 1991". See also AT. 57-58 and 65.
[339] Defence Appeal Brief, paras 206-209, referring to Trial Judgement, fns 918, 919 and 921.
[340] Defence Appeal Brief, para. 207, referring to Trial Judgement, fns 919-920. See AT. 94.
[341] Defence Appeal Brief, para. 209, referring to Trial Judgement, fn. 931, paras 32 and 37.
[342] Prosecution Response Brief, para. 144; AT. 87-88, 90. See also Prosecution Response Brief, paras 98 and 101.
[343] Prosecution Response Brief, paras 94 and 103, referring to Trial Judgement: para. 341, fn. 1071 (Exhibit 66, "Proposal for Colonel Đukić's Promotion issued by Martić, 2 June 1992"; MM-117, 16 Oct 2006, T. 9450 (private session)); para. 339 (Exhibit 541, "Order from the MUP to the Special Brigade of the Republic of Serb Krajina, 7 September 1993"); para. 339, fn. 1068 (Exhibit 602, "Order issued by Martić regarding the area of Dubica, 26 November 1991"); fns 890, 916, 1007, 1041, 1222 (Exhibit 518, "Report of meeting, 12 December 1991",); para. 339, fn. 1066 (MM-096, 21 Aug 2006, T. 7173-7174); para. 338, fn. 1061 (Nikola Dobrijević, 10 Nov 2006, T. 10890); para. 338 (MM-096, 21 Aug 2006, T. 6846: 6-10); para. 503 (MM-116, T. 7527:25-7528:2 (probably referring to MM-090, 31 Aug 2006, T. 7521-7528 (closed session)); para. 341 (Ljubica Vujanić, 18 Sep 2006, T. 8498-8499).
[344] Prosecution Response Brief, para. 104, referring to, *inter alia*, *Kvočka et al.* Appeal Judgement, para. 23.

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the testimony of Witnesses MM-096 and MM-117 was unreasonable[345] and points out that the testimonies of Milan Babić and Witness MM-079 were in fact corroborated by other evidence.[346]

(b) Discussion

151. At the outset, the Appeals Chamber observes that Martić has merely posited alternative interpretations of the evidence, essentially requesting a re-trial and without specifically showing why no reasonable trier of fact could have reached the conclusions of the Trial Chamber beyond a reasonable doubt. In doing so, Martić often misrepresents the Trial Chamber's findings or presents them in a selective manner. Therefore, the Appeals Chamber will address Martić's submissions only briefly.

152. With respect to Martić's first set of submissions regarding his participation in the forcible removal of civilians, the Appeals Chamber notes that contrary to Martić's claim, the Trial Chamber found that the MUP at the collection centre at Vrpolje was directly involved in securing the collection centre and in ensuring transportation of non-Serbs.[347] As for his agreement with Cedric Thornberry to the effect that Croats who wished to leave the RSK sign statements that no one had put pressure on them to leave, the Appeals Chamber notes that the Trial Chamber expressly referred to this evidence in the Trial Judgement.[348] The Appeals Chamber is satified that it was open to a reasonable trier of fact to attach limited weight to this evidence in light of the Trial Chamber's other findings – and the considerable evidence on which it relied – regarding the harassment and intimidation to which Croatians were subjected in the territory of the SAO Krajina and the RSK throughout the Indictment period.[349] Furthermore, Martić does not account for the findings, elsewhere in the Trial Judgement, according to which there was a high degree of coordination within the "Serb leadership" and the various military and police forces present in the territory of the SAO Krajina and the RSK.[350] These arguments are thus rejected pursuant to category 3.

153. With respect to Martić's second set of submissions regarding the forcible removal of non-Serbs, the Appeals Chamber observes that contrary to Martić's contention, the Trial Chamber's finding that the non-Serb population was forcefully removed from the territory of the SAO Krajina is amply supported by the evidence and the Trial Chamber's other factual findings.[351] The Appeals Chamber also notes that the Trial Chamber was clearly aware of the fact that an armed conflict was

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345 Prosecution Response Brief, paras 146-147.
346 Prosecution Response Brief, paras 146, 148.
347 Trial Judgement, para. 452.
348 Trial Judgement, para. 299.
349 See Trial Judgement, paras 295-301.
350 See, for example, Trial Judgement, paras 143-144 and 159-160.
351 Trial Judgement, paras 127-273 (especially, 167, 177, 180, 186, 189, 202, 209, 212, 222, 228, 236-237, 239 and 242), 295-301 and 450-452 (and evidence cited therein).

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ongoing during the Indictment period,[352] but drew a different conclusion from Martić as to the significance of this fact in its assessment of the evidence as a whole. As for his submissions regarding the conduct of the Croatian authorities and the measures which he undertook to the benefit of the Croatian population, the Appeals Chamber recalls that it previously dismissed similar claims in its earlier findings.[353] Finally, in terms of his reference to the testimony of Slobodan Jarčević, the Appeals Chamber notes that he has failed to show that the Trial Chamber erred in not finding this testimony credible.[354] These arguments are thus rejected pursuant to categories 3 and 4.

154. With respect to Martić's third set of submissions regarding his awareness of the forcible removal of civilians, the Appeals Chamber observes that in establishing that Martić intended to forcibly displace the non-Serb population from the RSK and the SAO Krajina, the Trial Chamber relied not merely on evidence that he was aware of a coercive atmosphere in the SAO Krajina, but also on evidence establishing that he had participated in the forcible removal of the non-Serb population and that he had contributed to fuelling this coercive atmosphere.[355] As for Martić's argument that he actively promoted the coexistence of the Croats and Serbs in the RSK and was taking measures to effect this coexistence, the Appeals Chamber recalls that it previously dismissed similar claims in its earlier findings.[356] To the extent that this argument is meant to stand on its own, the Appeals Chamber finds that it is in any case unsupported by any reference to the evidence. Finally, the Appeals Chamber notes that Martić also attaches significance to his purported personal motives, which the Tribunal's jurisprudence considers irrelevant.[357] These arguments are thus rejected pursuant to categories 3 and 4.

155. With respect to Martić's fourth set of submissions challenging the Trial Chamber's consideration of the evidence, the Appeals Chamber finds that he merely asserts that the Trial Chamber failed to interpret the evidence of Witnesses MM-078, MM-096 and MM-117 in a particular manner, without showing any error in the Trial Chamber's interpretation.[358] As for his challenges regarding the testimony of Babić and Witness MM-079,[359] the Appeals Chamber finds that Martić has misrepresented the Trial Judgement in that the testimonies of these two witnesses were in fact found to have been corroborated by the Trial Chamber.[360] These arguments are thus rejected pursuant to categories 2 and 3.

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[352] See, for example, Trial Judgement, paras 343-347.
[353] See *supra*, paras 88-91 and 95-114.
[354] Trial Judgement, fn. 1222.
[355] Trial Judgement, paras 450-452.
[356] See *supra*, paras 108-116.
[357] See, *inter alia*, *Tadić* Appeal Judgement, para. 270.
[358] Defence Appeal Brief, paras 207-209.
[359] Defence Appeal Brief, paras 207 and 209.
[360] Trial Judgement, fns 919-920 and 931.

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156. In light of the foregoing, this sub-ground of appeal is dismissed.

E. Alleged errors regarding findings on the crimes committed in furtherance of the common criminal purpose of the JCE

1. Crimes committed during armed clashes and in detention centres

157. The Trial Judgement discusses crimes committed during several armed clashes between Serb and Croatian forces in the SAO Krajina.[361] In particular, the Trial Chamber entered findings on clashes, during which crimes were committed, in the areas of: Hrvastka Dubica, Cerovljani as well as Baćin and its surroundings;[362] Saborsko;[363] Škabrnja and Nadin;[364] and Bruška.[365] Moreover, the Trial Chamber reached conclusions on the crimes enumerated under Counts 1 (persecution) and 5-9 (imprisonment as a crime against humanity, torture as a crime against humanity, inhumane acts as a crime against humanity, torture as a war crime) in relation to various detention facilities.[366] Martić contests many of these findings and the inferences drawn by the Trial Chamber in relation to his individual criminal responsibility, particularly regarding the elements of JCE for Counts 1 and 3-14.[367]

158. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 1, as including challenges to factual findings on which a conviction does not rely;[368] category 2, as including arguments which misrepresent or ignore the Trial Chamber's factual findings;[369] category 3, as including assertions that the Trial Chamber should have interpreted evidence in a particular manner;[370] category 4, as including assertions unsupported by any evidence;[371] and category 5, as

[361] Trial Judgement, paras 161-172.
[362] Trial Judgement, paras 173-195.
[363] Trial Judgement, paras 196-234.
[364] Trial Judgement, paras 235-264.
[365] Trial Judgement, paras 265-273.
[366] Trial Judgement, paras 274-294, 407-425, 432. These findings were pivotal in the Trial Chamber's overall conclusions on Martić's individual criminal responsibility: Trial Judgement, paras 343-406.
[367] Defence Notice of Appeal, paras 46-57; Defence Appeal Brief, paras 147-200; AT. 60-65, 96-97.
[368] In relation to crimes committed in detention facilities, Martić merely states that the detention facilities were under the control of the Ministry of Justice and had its own employees but does not in any way explain how this assertion shows that the Trial Chamber's findings were erroneous (Defence Appeal Brief, para. 199). In relation to the attacks as a whole, Martić alleges an error of law which is of no relevance to a factual finding on which his conviction relies. For the reasons explained above (see *supra*, paras 87-91 and 95-101), Martić does not show how the Trial Chamber's failure to make findings that crimes were committed by Croatian forces against Serbs or that some of the attacks considered by the Trial Chamber were actually legitimate military operations renders its other findings erroneous. In relation to the armed clashes in the spring and summer of 1991, Martić's submissions includes challenges on issues which are irrelevant to the Trial Chamber's factual findings (Defence Appeal Brief, paras 149 and 152).
[369] See in particular Martić's submissions in relation to the clashes in Škabrnja and Nadin (Defence Appeal Brief, paras 188-189). In his submission regarding the ICRC's visit to the detention facilities, Martić does not address the Trial Chamber's factual findings that some detainees did not dare speak to the ICRC representatives and that other detainees were placed in rooms to which the ICRC had no access (Trial Judgement, para. 292).
[370] See in particular Martić's submissions in relation to the identity of the perpetrators of the crimes committed in Bruška (Defence Appeal Brief, para. 190). In relation to these crimes, Martić merely refers to evidence that surviving residents of Bruška were treated fairly by the Serbs and does not show how this evidence impugns the Trial Chamber's

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including assertions that the Trial Chamber should not have relied on certain pieces of evidence.[372] The Appeals Chamber will, however, consider Martić's challenges to the links between himself and the perpetrators of the crimes in the next section, along with other similar challenges made by Martić in other parts of his Appeal Brief.

2. Crimes committed in Benkovac

159. The Trial Chamber found that on 14 October 1991, Croats Ivan Atelj and Šime Čaćić were detained at the Public Security Station ("SJB") in Benkovac and were threatened and severely beaten by police officers during their detention. The Trial Chamber held that the elements of torture as a violation of the laws or customs of war (Count 8) and cruel treatment as a violation of the laws or customs of war (Count 9) had been established in relation to these acts.[373] The Trial Chamber also found that three children were detained by the JNA at a kindergarten in Benkovac following the attack on Škabrnja on 18 November 1991. The Trial Chamber held that the elements of

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findings (Defence Appeal Brief, para. 191). In relation to his *mens rea*, Martić merely asserts that the Trial Chamber should have drawn a particular conclusion on the basis of the evidence (Defence Appeal Brief, paras 159-160, 192). However, the Trial Chamber expressly considered the evidence to which Martić refers (in relation to the disbandment of a rogue police unit, see Trial Judgement, para. 338; in relation to his instruction to treat the detainees lawfully, see Trial Judgement, para. 338, fn. 1055).

[371] See in particular Martić's submissions in relation to the clashes in Škabrnja and Nadin, especially an unsubstantiated statement that local paramilitary groups were "acting on their own" (Defence Appeal Brief, para. 188). See also Martić's submissions in relation to the armed clashes in the spring and summer of 1991 (Defence Appeal Brief, para. 149).

[372] In relation to the armed clashes during the spring and summer of 1991, Martić merely asserts that the Trial Chamber should have relied on the testimony of Borislav Đukić (testimony to which, in any case, the Trial Chamber expressly referred: Trial Judgement, fns 404-405, 407-408 and 410) and should not have relied on the testimony of Witness MM-0078 and Exhibit 221, "BBC report on Martić's announcement regarding Ljubovo attack, 5 July 1991" (Defence Appeal Brief, para. 151-155). In relation to the attacks on Hrvatska Dubica, Cerovljani as well as Baćin and its surroundings, Martić merely asserts that the Trial Chamber's findings were contrary to the testimony of Nikola Dobrijević (Defence Appeal Brief, paras 157-159 and 161; see also Defence Reply Brief, paras 76-78). In any case, Dobrijević's testimony does not in fact discuss these two groups, but rather concerns crimes committed by self-organised groups (Nikola Dobrijević, 10 Nov 2006, T. 10888-10889). In relation to the clashes in Saborsko, Martić merely asserts that the Trial Chamber's findings were contrary to the testimony of Nikola Medaković (Defence Appeal Brief, paras 162-165, 171-173). Moreover, while Martić suggests that Medaković's testimony contradicts the Trial Chamber's findings, he either fails to show how this is the case (Defence Appeal Brief, para. 173) or relies on misrepresentations of his testimony (compare Defence Appeal Brief, para. 165 and AT. 64, with Nikola Medaković, 9 Oct 2006, T. 9030). In relation to the clashes in Lipovača, Martić merely asserts that the Trial Chamber should not have relied on the testimony of Witness MM-036 (Defence Appeal Brief, paras 174-175). In relation to the clashes in Škabrnja and Nadin, Martić asserts that the Trial Chamber's findings were contrary to the testimony of Witness MM-080 (Defence Appeal Brief, para. 186). In relation to the agreement on prisoner exchange, Martić merely asserts that the Trial Chamber should have relied upon the evidence of this agreement (Defence Appeal Brief, para. 193, referring to Exhibit 958, "Agreement on exchange of prisoners, 6 November 1991"). In his submission regarding the ICRC's visit of the detention facilities, Martić merely asserts that the Trial Chamber should have relied on the testimony of Stevo Plejo (Defence Appeal Brief, para. 200). In relation to the crimes related to detention facilities, Martić merely asserts that the Trial Chamber should not have relied on Exhibits 826, "Witness statement of Tomislav Šegarić, 28 September 2000", 959, "Official note, 3 May 1992", and 984, "ECMM Report, 19 November 1991" and the testimony of Luka Brkić, without showing that the Trial Chamber erred in doing so (Defence Appeal Brief, paras 198-199). In this regard, a reasonable trier of facts may rely on the testimony of a single witness or on hearsay evidence (*Kordić and Čerkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506; *Naletilić and Martinović* Appeal Judgement, paras 217-228). The Appeals Chamber notes that the above evidence was corroborated by other evidence or supported by other factual findings (Exhibit 826, "Witness statement of Tomislav Šegarić, 28 September 2000": Trial Judgement, para. 251, in particular fn. 753; the testimony of Luka Brkić: Trial Judgement, para. 282, in particular fn. 862).

[373] Trial Judgement, paras 277, 421.

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inhumane acts as a crime against humanity (Count 7) and cruel treatment as a violation of the laws or customs of war (Count 9) had been established in relation to these acts.[374]

(a) Arguments of the Parties

160. Martić submits that the Trial Chamber erred in making these findings because the evidence upon which the Trial Chamber relied was unsupported and uncorroborated.[375]

161. During the Appeal Hearing, the Prosecution acknowledged that these convictions should be reversed for reasons of fairness as these charges did not form part of the case against Martić and the Prosecution did not seek a conviction for these incidents.[376]

(b) Discussion

162. The Appeals Chamber recalls that, in accordance with Article 21(4)(a) of the Statute, an accused has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". The Prosecution is required to plead in an indictment all the material facts underpinning the charges in an indictment, but not the evidence by which the material facts are to be proven.[377]

163. The prejudicial effect of a defective indictment may only be "remedied" if the Prosecution provided the accused with clear, timely and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges.[378] Whether the Prosecution has cured a defect in an indictment and whether the defect has caused any prejudice to the accused are questions aimed at assessing whether the trial was rendered unfair.[379] In this regard, the Appeals Chamber reiterates that a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused. The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[380]

[374] Trial Judgement, paras 278, 424.
[375] Defence Appeal Brief, para. 197.
[376] AT. 85-86.
[377] *Simić* Appeal Judgement, para. 20; *Muvunyi* Appeal Judgement, para. 18; *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88.
[378] *Simić* Appeal Judgement, para. 23; *Muvunyi* Appeal Judgement, para. 20; *Gacumbitsi* Appeal Judgement, para. 163; *Ntagerura et al.* Appeal Judgement, para. 29; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, paras 33-34; see also *Kupreškić et al.* Appeal Judgement, para. 114.
[379] See *Ntagerura et al.* Appeal Judgement, para. 30. On the applicable burden of proof in relation to this issue, see *Simić* Appeal Judgement, para. 25.
[380] *Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, paras 27-28 and 58; *Kupreškić et al.* Appeal Judgement, paras 119-122. *Simić* Appeal Judgement, para. 24; *Kordić and Čerkez* Appeal Judgement, para. 169; *Kupreškić et al.* Appeal Judgement, paras 117-118.

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164. In the present case, the Appeals Chamber notes that the Prosecution has conceded that Martić did not have notice of the charges relating to the crimes committed in Benkovac and that the prejudicial effect of this lack of notice was never cured.[381] On the basis of the foregoing, and in application of the relevant law, the Appeals Chamber considers that the Trial Chamber erred in convicting Martić for crimes committed in Benkovac. The Appeals Chamber therefore reverses Martić's conviction for Counts 8 and 9 in respect of the crimes perpetrated against Ivan Atelj and Šime Čaćić in Benkovac and Counts 7 and 9 in respect of the crimes perpetrated against the three children detained in a kindergarten in Benkovac.

F. Alleged errors regarding the links between Martić and the principal perpetrators of crimes falling within the scope of the JCE

1. Introduction

165. As noted above, in various sections of his appeal brief, Martić challenges the findings of the Trial Chamber establishing a link between the principal perpetrators of the criminal acts charged in the Indictment and himself. More specifically, Martić alleges that the Trial Chamber erred on various occasions in reaching the conclusion that crimes were committed by forces under his control or the control of another member of the JCE because the evidence shows that they were instead committed by unidentified individuals and/or by unsubordinated or "renegade" units.[382] Submissions of this kind relate to the armed clashes during the spring and summer of 1991,[383] to the attacks of Hrvastka Dubica, Cerovljani as well as Baćin and its surroundings,[384] to the clashes in Saborsko,[385] Lipovača,[386] Poljanak and Vukovići,[387] Škabrnja and Nadin,[388] Bruška,[389] and to crimes related to detention facilities.[390] Martić also argues that, in certain instances, the situation described by the Trial Chamber was too uncertain and could not provide the basis for crimes committed by Serb forces attributable to him. Particularly in relation to the attack on the Saborsko area and on the municipality of Plaški, he seems to suggest that crimes were perpetrated not just by

[381] AT. 85-86.
[382] See, generally, AT. 60-62, 97-98 and 101.
[383] Defence Appeal Brief, paras 149-150.
[384] Defence Appeal Brief, paras 157-159 and 161.
[385] Defence Appeal Brief, paras 171-173.
[386] Defence Appeal Brief, paras 174-175.
[387] Defence Appeal Brief, paras 176-177. The Appeals Chamber finds that the arguments under paras 178-179 lack the appropriate precision to be considered.
[388] Defence Appeal Brief, paras 180-182, 188. See also para. 189 in relation to the church of the Assumption of the Virgin in the centre of Škabrnja.
[389] Defence Appeal Brief, para. 190.
[390] Defence Appeal Brief, para. 199.

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unknown individuals, but occurred "spontaneously" due to the hardship experienced by civilians on the ground.[391]

166. The Prosecution responds that the Trial Chamber correctly identified all of the legal elements set out in the *Brđanin* Appeal Judgement to establish Martić's responsibility pursuant to joint criminal enterprise:[392] his participation in a common criminal purpose, his *mens rea* pursuant to the third category of JCE, the plurality of persons that shared the common criminal purpose, the fact that the common criminal purpose resulted in the intended crimes and his significant contribution to these crimes.[393] The Prosecution emphasizes moreover that the Trial Chamber identified each of the principal perpetrators with a member of the JCE and found that the various groups (including the JNA, TO, *Milicija Krajina*, SAO Krajina armed forces) under the control of members of the JCE were cooperating with each other and coordinating their actions.[394] As such, it argues that crimes were committed as a result of the use by the members of the JCE of these groups as well as paramilitaries and local Serbs to achieve their criminal aim.[395] The Prosecution also submits that local Serbs which participated in attacks led by the foregoing groups were acting as part of, or in cooperation with, one of these groups.[396]

167. To address Martić's arguments that the crimes should not have been attributed to either him or to the JCE, the Appeals Chamber will recall the applicable law as set out by the Tribunal's jurisprudence and then review the factual findings of the Trial Chamber.

2. Discussion

(a) Applicable Law

168. In *Brđanin*, the Appeals Chamber held that the decisive issue under the basic form of JCE was not whether a given crime had been committed by a member of the JCE, but whether this crime fell within the common criminal purpose of the JCE.[397] For the extended form of JCE, the accused may be found responsible provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the

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[391] Defence Appeal Brief, paras 162-165.
[392] *Brđanin* Appeal Judgement, paras 429-430.
[393] AT. 69, referring to Trial Judgement, paras 446-454, 480. See also AT. 70 and 75-78.
[394] AT. 71-75, 78 and 80 referring to Trial Judgement, paras 135, 137, 140-143, 189 and 443-449. See also AT. 80-83.
[395] AT. 78-79. The Prosecution notes that the existence of such use is a factual assessment which should be conducted on a case-by-case basis and which may be inferred from various circumstances, including the fact that the accused or any other member of the JCE cooperated with the principal perpetrators in order to further the common criminal purpose (referring to *Brđanin* Appeal Judgement, paras 410, 413). See also AT. 84-85.
[396] AT. 75 and 81, referring to Witness MM-022, 20 Mar 2006, T. 2343-2344.
[397] *Brđanin* Appeal Judgement, paras 410, 418 and 431.

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JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk.[398] The Appeals Chamber thus held that members of a JCE could be held liable for crimes committed by principal perpetrators who were not members of the JCE provided that it had been shown that the crimes could be imputed to at least one member of the JCE and that this member, when using a principal perpetrator, acted in accordance with the common plan.[399]

169. The establishment of a link between the crimes in question and a member of the JCE is a matter to be assessed on a case-by-case basis.[400] When entering a conviction for JCE *proprio motu* in *Stakić*, the Appeals Chamber considered the plurality of persons acting together in the implementation of a common goal, *i.e.*, a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control. The plurality of persons included leaders of political bodies, the army, and the police as well as members of the Army of the Republika Srpska ("VRS"), Serb and Bosnian Serb paramilitary forces.[401] With respect to the crimes falling *within* the common criminal purpose, the Appeals Chamber established that Milomir Stakić intended to further this common purpose and accepted the finding of the Trial Chamber that the crimes at issue were in fact committed by forces under the control of JCE members.[402] As for the crimes falling *outside* the scope of the JCE, the Appeals Chamber considered whether crimes outside the common purpose did occur,[403] whether such crimes were a natural and foreseeable consequence of the implementation of the common purpose, and whether Stakić acted in furtherance of the common purpose despite his awareness that the crimes were a possible consequence thereof.[404] On this basis, it proceeded to convict Stakić under the first and third form of JCE.[405] The Appeals Chamber finds this approach to be instructive of the methodology to assess whether it was reasonable for a Trial Chamber to impute certain crimes to an accused, as a member of a JCE, when his fellow members used principal perpetrators to further the common purpose.[406]

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[398] *Brđanin* Appeal Judgement, para. 411.
[399] *Brđanin* Appeal Judgement, para. 413. See also *Brđanin* Appeal Judgement, para. 430.
[400] *Brđanin* Appeal Judgement, para. 413.
[401] *Stakić* Appeal Judgement, paras 69-70.
[402] *Stakić* Appeal Judgement, paras 79-85. See also *Brđanin* Appeal Judgement, para. 409.
[403] *Stakić* Appeal Judgement, paras 88-90.
[404] *Stakić* Appeal Judgement, paras 91-98.
[405] *Stakić* Appeal Judgement, para. 104.
[406] In the instant case, the necessary findings were made by the Trial Chamber in other sections of the Trial Judgement. See: Trial Judgement, para. 446 (referring to the names of the JCE members); Trial Judgement, Section III (in particular paras 140-148) (on the authority and tasks of the JCE members); Trial Judgement, paras 283, 331 and 344 and others (on the interaction between the JCE members).

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170. In this case, and in light of the foregoing, the Appeals Chamber is only called upon to decide whether a reasonable trier of fact could reach the same finding beyond reasonable doubt as the Trial Chamber did when it established a link between Martić and the principal perpetrators.

171. In order to convict a member of a JCE for crimes committed by non-members of the JCE, a Trial Chamber must be satisfied beyond a reasonable doubt that the commission of the crimes by non-members of the JCE formed part of a common criminal purpose (first category of JCE), or of an organised criminal system (second category of JCE), or were a natural and foreseeable consequence of a common criminal purpose (third category of JCE).[407]

172. The Appeals Chamber reiterates that when all the elements of JCE are met in a particular case, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Thus, he is appropriately held liable also for those actions of other JCE members, or individuals used by them, that further the common criminal purpose (first category of JCE) or criminal system (second category of JCE), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE).[408]

173. In light of the characterization of the common purpose of the JCE and of Martić's participation in the crimes under Counts 1 and 3 through 14,[409] the Appeals Chamber will therefore discuss whether the Trial Chamber correctly applied the above-mentioned principles in the instant case.

(b) <u>The Trial Chamber's general findings regarding Martić's responsibilities and roles in the SAO Krajina and RSK Governments</u>

174. Before reviewing the Trial Chamber's factual findings on the link between Martić and the principal perpetrators of the crimes falling within the scope of the JCE, the Appeals Chamber will recall the Trial Chamber's findings on Martić's role and responsibilities in the SAO Krajina and RSK governments. This way, while bearing in mind the deference afforded to triers of fact in reaching factual findings,[410] the Appeals Chamber will consider whether the factual findings in the Trial Judgement as a whole warrant the conclusion that the interaction of the members of the JCE in the implementation of the common criminal objective, together with other elements of proof, can serve as a basis for establishing a link between the crimes committed and Martić.

[407] *Brđanin* Appeal Judgement, paras 410, 411 and 418.
[408] *Brđanin* Appeal Judgement, para. 431.
[409] See *supra*, para. 3.
[410] See *supra*, para. 11.

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175. The Trial Chamber found that, on 4 January 1991, the Executive Council of the SAO Krajina established the Regional Secretariat for Internal Affairs ("SUP") in Knin and appointed Martić Secretary for Internal Affairs.[411] On 1 April 1991, Milan Babić ordered the mobilisation of the TO and volunteer units of the SAO Krajina. In practice, however, volunteers and the *Milicija Krajina* (see below) were to remain the SAO Krajina's only effectively functioning armed forces until August 1991.[412]

176. The Trial Chamber further established that on 29 May 1991, Babić became the President of the newly constituted SAO Krajina government.[413] He appointed Martić as Minister of Defence.[414] On the same day, the Assembly of the SAO Krajina established "special purpose police units" named *Milicija Krajine*, in addition to the previously established Public Security Service ("SJB") police and State Security Service ("SDB") police.[415] The Trial Chamber accepted the evidence of a witness who testified that the SJB was responsible for maintaining law and order and the SDB handled political crime, terrorism, extremism, and intelligence work, while the *Milicija Krajine* units defended the territorial integrity of the SAO Krajina, secured vital facilities, infiltrated sabotage groups, and could be used in military operations.[416] The *Milicija Krajine* was established within the MUP, but was at first put under the authority of the Ministry of Defence – this was at the insistence of Martić himself, who did not want to lose his control over the special police units.[417] Its units wore patches reading in Cyrillic "*Milicija Krajine*".[418]

177. According to the Trial Chamber, as Minister of Defence of the SAO Krajina government from 29 May 1991 to 27 June 1991, Martić held authority over the *Milicia Krajine*.[419] On 27 June, he was then appointed Minister of Interior.[420] The Trial Judgement established that, even before 29 May and after 27 June, however, Martić exercised control over the *Milicia Krajine*.[421] This was conceded by Martić himself.[422] The Trial Chamber relied on evidence that the "leader" of the *Milicija Krajine* would be accountable to the Minister of the Interior, *i.e.*, Martić.[423] On 30 November 1991, the SAO Krajina adopted its own Law on Defence, whereby the TO was "part of the unified armed forces of the [SFRY]" and the President of the SAO Krajina led "the armed

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[411] Trial Judgement, para. 131.
[412] Trial Judgement, para. 133, in particular fn. 259.
[413] Trial Judgement, para. 135.
[414] Trial Judgement, para. 135.
[415] Trial Judgement, para. 135.
[416] Trial Judgement, para. 135, fn. 270.
[417] Trial Judgement, para. 135, in particular fn. 271.
[418] Trial Judgement, para. 135.
[419] Trial Judgement, para. 135, referring to Exhibit 820, "Agreed Facts", para. 15.
[420] Trial Judgement, para. 135.
[421] Examples of the close links between Martić and the *Milicija Krajine* can be found, for example, in Trial Judgement, paras 164 and 333.
[422] Defence Appeal Brief, para. 165.

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forces in times of peace and in times of war."[424] Martić was also the Minister of the Interior in the new government formed on 26 February 1992.[425]

178. The Trial Chamber established that, after 1 August 1991, the *Milicija Krajine* units and the TO were combined into the "armed forces" of the SAO Krajina.[426] On 8 August 1991, Martić was appointed Deputy Commander of the TO, in which position he remained until 30 September 1991.[427] He continued to serve as Minister of the Interior while he was TO Deputy Commander.[428] The Trial Chamber found that, after the summer of 1991, the SAO Krajina TO could be subordinated to the JNA for combat operations and that there was operational cooperation between the JNA and the armed forces of the SAO Krajina.[429] The Trial Chamber relied on Babić's testimony that, in August and September 1991, Martić cooperated with the 9th JNA Corps concerning coordination between JNA and MUP units.[430] Moreover, beginning in August 1990 and through the summer of 1991, officials of the MUP of Serbia, including the Chief of the SDB, Jovica Stanišić, and Franko "Frenki" Simatović, met with the SAO Krajina leadership, in particular with Martić, concerning financial, logistical, and military assistance.[431]

179. The Trial Chamber found that, as Minister of the Interior, Martić "exercised absolute authority over the MUP",[432] with the power to intervene and punish perpetrators who committed crimes against the non-Serb population.[433] He was kept informed about military activities during the fall of 1991 and maintained "excellent communications" with the units subordinated to the MUP.[434] His authority over the armed forces in the SAO Krajina during this period was established by the Trial Chamber,[435] based on evidence that included testimony from several witnesses that Martić was *de jure* and *de facto* in control of the SAO Krajina and RSK police from 1991 through 1993.[436]

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[423] Trial Judgement, para. 135, fn. 271.
[424] Trial Judgement, para. 139, referring to Exhibit 36, "SAO Krajina Law on Defence, 30 November 1991".
[425] Trial Judgement, para. 151.
[426] Trial Judgement, para. 137.
[427] Trial Judgement, para. 137.
[428] Trial Judgement, para. 137.
[429] Trial Judgement, paras 137, 141-142, 166-167. See also Trial Judgement, paras 165, 204, 214, 225, 244, 246.
[430] Trial Judgement, para. 142, fn. 298.
[431] Trial Judgement, para. 140.
[432] Trial Judgement, para. 449.
[433] Trial Judgement, para. 451.
[434] Trial Judgement, para. 337.
[435] See, for example, Trial Judgement, paras 140-141 (Serbian officials met with Martić concerning provision of financial, logistical, and military assistance; Martić sent requests to the Serbian government for military assistance; SAO Krajina police were financed with funds and materials from the MUP and SDB of Serbia); para. 142 (SAO Krajina TO was subordinated to the JNA after the summer of 1991; evidence of operational cooperation between the JNA and the SAO Krajina armed forces); paras 144-148 (Martić's involvement with the training camp in Golubić). See also Trial Judgement, paras 337-341.
[436] Trial Judgement, para. 337.

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180. With respect to JNA forces active in the region, the Trial Chamber found that the JNA was under the control of a number of the members of the JCE, in particular Ratko Mladić, the Commander of the 9th Corps of the JNA,[437] and General Blagoje Adžić, JNA Chief of the General Staff.[438] Other JCE members with important roles in setting the policy of the JNA and in implementing its objectives were: Radmilo Bogdanović, the Minister of the Interior of Serbia;[439] Jovica Stanišić, the Chief of the SDB;[440] Franko "Frenki" Simatović, an official of the SDB;[441] and General Veljiko Kadijević, the SFRY Federal Secretary for Defence.[442] The Trial Chamber further found that the SFRY Federal Secretariat of National Defence of the JNA had made unit and personnel changes within the SAO Krajina armed forces, and that the former cooperated with the latter in joint operations.[443]

181. The Trial Chamber considered that the JNA, the police and other Serb forces active on the territory of the SAO Krajina and the RSK were structured hierarchically[444] and closely coordinated one with the other.[445] In conjunction with such findings, and its conclusions regarding the plurality of people sharing the common criminal purpose and Martić's contribution to it,[446] the Trial Chamber explicitly found that the objective of establishing a unified Serb territory was implemented "through widespread and systematic armed attacks […] and through the commission of acts of violence and intimidation".[447] Considering in addition the "scale and gravity of the crimes […] committed against the non-Serb population",[448] the attacks could not have been carried out by members of the JCE individually, but only by using the forces under their control. Therefore, the only reasonable interpretation of these findings is that the Trial Chamber was satisfied beyond reasonable doubt that members of the JCE, when using these forces, were acting in accordance with the common purpose, *i.e.*, the establishment of a unified Serb territory through the forcible removal of the non-Serb population.[449] The Appeals Chamber finds that, while the Trial Chamber should have made an explicit finding on this question, this omission, in such circumstances, does not invalidate the Trial Judgement. However, in relation to some armed structures and paramilitary units, including those referred to as "Martić's men" or "Martić's police" (*Martićevci*),[450] the Trial

[437] Trial Judgement, para. 283.
[438] Trial Judgement, para. 331.
[439] Trial Judgement, paras 140-141.
[440] Trial Judgement, para. 140.
[441] Trial Judgement, para. 140.
[442] Trial Judgement, para. 330.
[443] Trial Judgement, paras 142, 344 and 446. See also Trial Judgement, paras 248, 274 and 284.
[444] See, for example, Trial Judgement, paras 135, 141-142 and 155.
[445] See, for example, Trial Judgement, paras 140, 143, 159-160 and 446 (with cited references).
[446] Trial Judgement, paras 446 and 453-455.
[447] Trial Judgement, para. 445.
[448] Trial Judgement, para. 454.
[449] Trial Judgement, para. 445.
[450] Trial Judgement, paras 147-148.

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Chamber did not reach any definite finding on their link with Martić. The Appeals Chamber will take this into account when reviewing the Trial Chamber's findings.

(c) Review of the Trial Chamber's findings on the attribution of responsibility to Martić for crimes committed by non-members of the JCE

182. The Appeals Chamber will now proceed to analyse the Trial Chamber's findings on the crimes for which it held Martić responsible as a participant in the JCE, bearing in mind that if a crime falling within the common purpose is imputable to one of the members of the JCE, and all other elements are met, it would be open to a reasonable trier of fact to find that Martić bore criminal responsibility for that crime.[451]

(i) Crimes committed by the *Milicija Krajine*, the JNA, the TO, the MUP or a combination thereof

183. The Trial Chamber found that the *Milicija Krajine* was responsible for the murder of 41 persons detained in the fire station in Hrvatska Dubica on 20 October 1991[452] and the murder of nine civilians in Bruška on 21 December 1991.[453] The Trial Chamber also found that the *Milicija Krajine* or units of the JNA or TO, or a combination thereof intentionally killed nine people in Cerovljani in September and October 1991[454] and intentionally killed seven civilians in Baćin sometime after mid-October 1991 and another group of 21 civilians from Baćin around October 1991.[455] The Trial Chamber found that all the elements of persecution as a crime against humanity (Count 1), murder as crime against humanity (Count 3) and murder as a violation of the laws and customs of war (Count 4) had been established in relation to these killings and that although the commission of the crimes fell outside the common purpose of the JCE, they were a foreseeable consequence of its implementation and thus convicted Martić.[456]

184. The Trial Chamber found that the *Milicija Krajine* or units of the JNA or TO, or a combination thereof took part in the looting of Croat houses in Hrvatska Dubica from mid-September 1991 and that the elements of plunder of public or private property as a violation of the laws and customs of war (Count 14) had been established in relation to these acts[457] and convicted

[451] *Brđanin* Appeal Judgement, paras 424 and 430-431.
[452] Trial Judgement, paras 354 and 358.
[453] Trial Judgement, paras 400 and 403.
[454] Trial Judgement, paras 359 and 363. This paragraph actually refers to ten victims, but paragraphs 359-362 show only nine. The Appeals Chamber understands the number "ten" to be a mistake.
[455] Trial Judgement, paras 364-365 and 367.
[456] Trial Judgement, paras 454-455.
[457] Trial Judgement, para. 357.

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Martić on the basis that the commission of the crimes was a foreseeable consequence of the implementation of the common purpose of the JCE.[458]

185. The Trial Chamber found that between 75 and 200 persons were detained by the JNA at the JNA 9th Corps barracks in Knin, including Croat and other non-Serb civilians, and members of the Croatian armed forces and formations, and that they were beaten and mistreated while detained. The Trial Chamber moreover concluded that, while the evidence was insufficient to establish who specifically carried out the beatings and the mistreatment at the premises of the JNA 9th Corps barracks, the beatings and mistreatment were carried out at locations under the control of the JNA.[459] The Trial Chamber also found that from mid-1991 to mid-1992, between 120 and 300 people were detained in the old hospital in Knin, including Croats and other non-Serb civilians, as well as members of the Croatian armed forces and formations, and that they were beaten and mistreated while detained there. The Trial Chamber concluded that, as of the summer of 1991, the Ministry of Justice of the SAO Krajina ran the detention facility and that the beatings, mistreatment, and torture of the detainees were conducted by members of the MUP (referred to as "Martić's police" and wearing blue uniforms), by the *Milicija Krajine*, and by persons in camouflage uniforms. It also concluded that the leadership had permitted civilians and Serb detainees to beat and mistreat the non-Serb detainees.[460] The Trial Chamber found that the elements for the crimes of imprisonment as a crime against humanity (Count 5), torture as a crime against humanity (Count 6), inhumane acts as a crime against humanity (Count 7), torture as a violation of the laws or customs of war (Count 8), and cruel treatment as a violation of the laws or customs of war (Count 9) had been perpetrated against detainees at the JNA 9th Corps barracks in Knin and the old hospital in Knin[461] and that despite falling outside the common purpose of the JCE, the crimes were a natural and foreseeable consequence of its implementation and thus convicted Martić.[462]

186. The Trial Chamber found that detainees were severely mistreated at the Titova Korenica facility by, *inter alia*, members of the MUP who referred to themselves as "Martić's men" and by people wearing camouflage uniforms. The Trial Chamber also found that members of the *Milicija Krajine* were present, but failed to stop the beatings. It held that the elements of inhumane acts as a crime against humanity (Count 7), torture as a violation of the laws or customs of war (Count 8), and cruel treatment as a violation of the laws or customs of war (Count 9) had been established in relation to certain acts of mistreatment committed against certain of these detainees.[463] While the

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[458] Trial Judgement, paras 454-455.
[459] Trial Judgement, paras 407-410.
[460] Trial Judgement, paras 412-415.
[461] Trial Judgement, paras 410 and 415.
[462] Trial Judgement, paras 454-455.
[463] Trial Judgement, para. 275; Trial Judgement, paras 417-419.

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Trial Chamber found that these crimes fell outside the common purpose of the JCE, it convicted Martić for these crimes as a natural and foreseeable consequence of the JCE.[464]

187. The Appeals Chamber finds that a reasonable trier of fact could have reached the conclusion that Martić was responsible for the crimes perpetrated by the JNA, TO and *Milicija Krajine*.[465] In this regard, the Appeals Chamber recalls the Trial Chamber's findings on Martić's position as Minister of the Interior and his absolute authority over the MUP, his control over the armed forces, the TO and *Milicija Krajine*, the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO Krajina, and the control over the JNA and the TO exercised by other members of the JCE[466] as well as its findings regarding Martić's conduct and *mens rea*.[467]

188. In addition to the Trial Chamber's findings on Martić's general roles and responsibilities in the SAO Krajina, the Appeals Chamber makes the following observations. In its findings on the events in Hrvatska Dubica, the Trial Chamber referred to evidence establishing that the JNA, the TO and the *Milicija Krajine* cooperated with each other in committing the above crimes[468] and established that the JNA and the TO were under the control of other members of the JCE.[469] In its findings on the events in Bruška, the Trial Chamber found that the victims were all Croats and that prior to their deaths, armed men identifying themselves as "Martić's men" or "Martić's Militia" would come to Bruška daily to intimidate the inhabitants, calling them "Ustašas", telling them that Bruška would be a part of a Greater Serbia and that they should leave.[470] In its findings on the events at the barracks in Knin, the Trial Chamber referred to evidence that in addition to JNA soldiers, there were also soldiers wearing SAO Krajina and White Eagles insignia present at the barracks in Knin,[471] that some detainees were beaten and verbally abused by men in JNA uniforms while they were being taken to the barracks in Knin[472] and that Ratko Mladić, then commander of the JNA 9th Corps and a member of the JCE, visited the barracks twice and taunted the detainees there.[473] In its findings on the events at the old hospital in Knin, the Trial Chamber referred to evidence establishing that the old hospital was sometimes referred to as "Martić's prison" among other names,[474] that JNA soldiers were involved in transferring soldiers to this prison and were in control of a part of the hospital,[475] that Ratko Mladić, then commander of the JNA 9th Corps, and

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[464] Trial Judgement, paras 454-455.
[465] Trial Judgement, para. 454.
[466] See *supra*, paras 174-181.
[467] Trial Judgement, paras 450-454.
[468] Trial Judgement, paras 178-181.
[469] Trial Judgement, paras 443-444 and 446.
[470] Trial Judgement, para. 266.
[471] Trial Judgement, para. 284.
[472] Trial Judgement, para. 281.
[473] Trial Judgement, para. 283.
[474] Trial Judgement, para. 285.
[475] Trial Judgement, paras 286-287.

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Vojislav Šešelj, from the Serbian Radical Party – both members of the JCE[476] – visited the old hospital and Šešelj insulted the detainees there,[477] and that Martić himself was seen in the prison "wearing a camouflage uniform with the insignia of the *Milicija Krajine*."[478] In its findings on the events at the Titova Korenica facility, the Trial Chamber found that members of the MUP had been responsible for the mistreatment of detainees and that the facility was staffed by *Milicija Krajine* as well as soldiers in JNA uniforms and in camouflage uniforms.[479] Based on these findings, and on the finding that these crimes were a natural and foreseeable consequence of the JCE, the Trial Chamber convicted Martić under Count 1, persecution as a crime against humanity, Count 3, murder as a crime against humanity, Count 4, murder as a violation of the laws or customs of war, Count 5, imprisonment as a crime against humanity, Count 6, torture as a crime against humanity, Count 7 inhumane acts as a crime against humanity, Count 8, torture as a violation of the laws or customs of war, and Count 9, cruel treatment as a violation of the laws or customs of war.[480]

189. In light of the above, and of Trial Chamber's findings that the common purpose was implemented through widespread and systematic armed attacks,[481] the Appeals Chamber finds that Martić has failed to show an error of the Trial Chamber in establishing the required link between him and the perpetrators of the crimes who were members of the *Milicija Krajine*, the JNA, the TO and the MUP or a combination thereof in Hrvatska Dubica, Cerovljani, Baćin, Bruška, the JNA 9th Corps barracks in Knin, the old hospital in Knin, and the Titova Korenica facility.

190. In light of the foregoing, the sub-grounds of appeal relating to these crimes are dismissed.

(ii) Crimes committed in Cerovljani by armed Serbs from Živaja led by Nikola Begović

191. The Trial Chamber also found that on 13, 21 and 24 September 1991, armed Serbs from Živaja led by Nikola Begović burnt ten houses and damaged the Catholic church in the village of Cerovljani. The Trial Chamber concluded that the elements of persecution as a crime against humanity (Count 1), wanton destruction of villages, or devastation not justified by military necessity, as a violation of the laws or customs of war (Count 12) and destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war

[476] Trial Judgement, para. 446.
[477] Trial Judgement, paras 286 and 288.
[478] Trial Judgement, para. 294.
[479] Trial Judgement, paras 274-275.
[480] Trial Judgement, paras 454-455.
[481] Trial Judgement, para. 445; see also *supra*, para. 181. The Appeals Chamber has summarily dismissed most of Martić's challenges to the Trial Chamber's findings relating to the crimes which occurred during the armed clashes. See, for instance, *supra*, paras 157-158.

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(Count 13) had been established in relation to these acts[482] and convicted Martić on the basis that the commission of the crimes was a natural and foreseeable consequence of the implementation of the common purpose of the JCE.[483]

192. The Appeals Chamber finds that a reasonable trier of fact could not have reached the conclusion that Martić was responsible for the acts of destruction perpetrated by armed Serbs from Živaja led by Nikola Begović. Having due regard to the Trial Chamber's findings and the evidence on which they relied,[484] the Appeals Chamber concludes that the Trial Chamber erred in establishing a link between Martić and these perpetrators. In particular, Exhibit 273, a witness statement of Antun Blažević, on which much of these findings depend, only suggests that the armed men under Begović had received weapons from the JNA, without any evidence of additional control or influence by Martić or other members of the JCE.[485] Without any further elaboration on the link between these forces and the JNA, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE. The link between the principal perpetrators of these crimes and members of the JCE is therefore too tenuous to support Martić's conviction.

193. The Appeals Chamber considers that this error resulted in a miscarriage of justice and accordingly reverses Martić's conviction for Counts 1, 12 and 13 in respect of the acts of destruction committed in Cerovljani by armed Serbs from Živaja led by Nikola Begović.[486]

(iii) Crimes committed in Lipovača by Serb paramilitary forces

194. The Trial Chamber found that Serb paramilitary forces intentionally killed seven civilians in Lipovača towards the end of October 1991. The Trial Chamber concluded that all the elements of persecution as a crime against humanity (Count 1), murder as a crime against humanity (Count 3)

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[482] Trial Judgement, paras 360-361 and 363.
[483] Trial Judgement, paras 454-455.
[484] Trial Judgement, paras 186-188, 360-361 and 363.
[485] See Trial Judgement, paras 186-188.
[486] In respect to the findings related to Exhibit 273, "Rule 92 *bis* statement of Antun Blažević, 13 March 2002", the witness statement of Antun Blažević, the Appeals Chamber is also bound to make another clarification. On 16 January 2006, the Trial Chamber admitted this witness statement under Rule 92 *bis* of the Rules, without providing Martić the opportunity to cross-examine the witness in question (Decision on Prosecution's Motions for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006, paras 16-17, 26, 28 and 37 (where the witness is identified as MM-019)). As noted above, much of the findings in relation to the crimes in Cerovljani – and in particular the findings related to a possible link between the armed men and Martić through the JNA – depend exclusively on this statement, with no corroboration. Thus, this evidence is pivotal to Martić's responsibility and, lacking sufficient corroboration, Martić should have been granted the opportunity to cross-examine the witness in question (*Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, paras 13-15. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, especially paras 53 and 59). The Appeals Chamber finds that the failure to accord Martić a right to cross-examine this witness constitutes a miscarriage of justice and accordingly his convictions for the crimes in Cerovljani would have been reversible on this ground, too.

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and murder as a violation of the laws or customs of war (Count 4) had been established in relation to these killings[487] and convicted Martić on the basis that these crimes were a natural and foreseeable consequence of the implementation of the common purpose of the JCE.[488]

195. The Appeals Chamber finds that a reasonable trier of fact could have reached the conclusion that Martić was responsible for the killings perpetrated in Lipovača by Serb paramilitary forces. The Appeals Chamber notes that, in its findings on the killings in Lipovača, the Trial Chamber referred to evidence establishing that the JNA had warned the villagers to beware of Serb paramilitary units that would arrive after the JNA left, that the Serb paramilitary units arrived after the JNA as warned and that these paramilitary units were called "reserve forces, Martić's troops or Martić's army" and wore uniforms like those of the army.[489] The Appeals Chamber is therefore satisfied that a reasonable trier of fact could have been satisfied beyond a reasonable doubt that the Serb paramilitary forces in question were in fact JNA or TO soldiers or were at least acting in concert with the JNA. Taking into account the warning provided by the JNA, the denomination of these troops and their uniforms, as well as the general pattern of take-over and criminal conduct in the area, it was reasonable for the Trial Chamber to conclude that these crimes were committed by a member of a paramilitary group with a link to a member of the JCE, and, therefore, that they were imputable to Martić as a participant in that JCE.

196. In light of the above, and of Trial Chamber's findings that the common purpose was implemented through widespread and systematic armed attacks,[490] the sub-ground of appeal relating to these crimes is dismissed.

(iv) Crimes committed in Vukovići and Poljanak by unidentified armed Serbs or soldiers

197. The Trial Chamber found that a civilian by the name of Tomo Vuković was killed by unidentified armed Serbs in Vukovići on 8 October 1991 and that two civilians were killed in Poljanak by 20 armed soldiers wearing camouflage and olive-green uniforms on 7 November 1991. The Trial Chamber concluded that all the elements of persecution as a crime against humanity (Count 1), murder as crime against humanity (Count 3) and murder as a violation of the laws and customs of war (Count 4) had been established in relation to these killings.[491]

[487] Trial Judgement, paras 368 and 370.
[488] Trial Judgement, paras 454-455.
[489] Trial Judgement, paras 202-203.
[490] Trial Judgement, para. 445; see also *supra*, para. 181.
[491] Trial Judgement, paras 212, 216, 371-372 and 377.

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198. The Trial Chamber also found that, on 7 November 1991, several houses, cars and sheds were burnt down in Poljanak by "armed soldiers dressed in camouflage and olive-drab uniforms". The Trial Chamber concluded that the elements of persecution as a crime against humanity (Count 1) and wanton destruction of villages, or devastation not justified by military necessity, as a violation of the laws or customs of war (Count 12) had been established in relation to these acts.[492]

199. Although the Trial Chamber found that the crimes committed in Vukovići and Poljanak fell outside the common purpose of the JCE, it convicted Martić for these crimes on the basis that they were a natural and foreseeable consequence of its implementation.[493]

200. The Appeals Chamber finds that the Trial Chamber erred in finding Martić responsible for the murder of civilian Tomo Vuković in Vukovići, the murder of two civilians in Poljanak and the acts of destruction perpetrated in Poljanak by unidentified armed Serbs or soldiers.[494] Having due regard to the Trial Chamber's findings and the evidence on which they relied, the Appeals Chamber concludes that the Trial Chamber erred in establishing a link between Martić and the perpetrators of these crimes. In particular, the Appeals Chamber finds that the origin of the armed men and their affiliation remains uncertain.[495] Without any further elaboration on the affiliation of these armed men, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE.

201. The Appeals Chamber considers that these errors resulted in a miscarriage of justice and therefore reverses Martić's conviction for Counts 1, 3 and 4 in respect of the killing of Tomo Vuković in Vukovići and of two civilians in Poljanak and Counts 1 and 12 in respect of the acts of destruction perpetrated in Poljanak by unidentified armed Serbs or soldiers.

(v) Crimes committed in Škabrnja and Nadin, Vukovići and Saborsko by a combination of JNA soldiers or TO soldiers and other units

202. The Trial Chamber found that a number of individuals were killed in Škabrnja and Nadin by JNA units composed of regular soldiers and reservists, TO units and paramilitary units.[496] On 18 November 1991, twelve civilians and two members of the Croatian defence forces not taking part in the hostilities were killed in Škabrnja by members of local paramilitary units, who participated, together with other SAO Krajina forces, in the attack on Škabrnja and who wore camouflage

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[492] Trial Judgement, paras 216, 219, 375 and 378.
[493] Trial Judgement, paras 454-455.
[494] See Trial Judgement, para. 454.
[495] See Trial Judgement, paras 210-219, 372 and 375.
[496] Trial Judgement, paras 239-247.

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uniforms, some of which had an SAO Krajina patch.[497] On 19 November 1991, seven civilians were killed in Nadin by soldiers wearing JNA uniforms.[498] On 18 and 19 November 1991, 25 civilians were killed in Škabrnja, Nadin, or Benkovac and five members of the Croatian defence forces not taking part in the hostilities were killed in Škabrnja and Nadin by members of the same units which took part in the attack on Škabrnja and Nadin on 18 and 19 November, including JNA and TO units.[499] On 11 March 1992, four civilians were killed in Škabrnja and between 18 November 1991 and 11 March 1992, 14 civilians were intentionally killed by members of JNA units, units from a TO brigade under JNA command and paramilitary units.[500] The Trial Chamber concluded that all of the elements of persecution as a crime against humanity (Count 1), murder as a crime against humanity (Count 3), and murder as a violation of the laws or customs of war (Count 4) were established for these killings (though Count 3 was not applied to members of the Croatian defence forces).[501] The Trial Chamber also found that the church of the Assumption of the Virgin in the centre of Škabrnja was shot at by a JNA tank on 18 November 1991 and that thereafter soldiers entered the church and fired their weapons. It held that the elements of persecution as a crime against humanity (Count 1) and destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war (Count 13) had been established.[502] The Trial Chamber convicted Martić for these crimes as a natural and foreseeable consequence of the JCE.[503]

203. The Trial Chamber found that Saborsko was attacked mid-morning on 12 November 1991 by JNA forces as well as a unit of the Plaški SDB, the Plaški TO Brigade and *Milicija Krajine* units. After the attack on Saborsko, many Serb soldiers and policemen remained in the centre of Saborsko.[504] The Trial Chamber found that 20 persons, 13 of whom were determined beyond a reasonable doubt to be civilians, were intentionally killed in Saborsko on 12 November 1991.[505] The Trial Chamber concluded that all the elements of persecution as a crime against humanity (Count 1), murder as a crime against humanity (Count 3) and murder as a violation of the laws or customs of war (Count 4) had been established in relation to these killings.[506] The Trial Chamber also found that after the attack on Saborsko, civilian houses and property were burnt on a large

[497] Trial Judgement, paras 386-387.
[498] Trial Judgement, para. 388.
[499] Trial Judgement, paras 389-391.
[500] Trial Judgement, para. 392.
[501] Trial Judgement, paras 386-392 and 398.
[502] Trial Judgement, paras 395 and 399.
[503] Trial Judgement, paras 454-455.
[504] Trial Judgement, paras 225 and 227.
[505] Trial Judgement, paras 229 and 379. Eight of the victims were found to have been killed by soldiers wearing camouflage and olive-grey uniforms, as well as two soldiers wearing Serbian dark-grey uniforms and helmets featuring a red five-point star. Twelve of the victims were killed by members of the units present in Saborsko after the attack of 12 November 1991.
[506] Trial Judgement, paras 379 and 383.

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scale by the Serb forces which had entered the village and that the elements of wanton destruction of villages, or devastation not justified by military necessity, as a violation of the laws or customs of war (Count 12) had been met in relation to these acts.[507] Finally, the Trial Chamber concluded that Serb soldiers and policemen who participated in the attack looted shops and businesses and took tractors, cars and livestock, thus meeting the elements of the crime of plunder of public or private property under Article 3 (Count 14).[508] Martić was convicted for the crimes committed in Saborsko as a natural and foreseeable consequence of the implementation of the common purpose of the JCE.[509]

204. The Trial Chamber found that eight civilians were killed in Vukovići by a mixture of JNA soldiers, including members of a JNA special unit from Niš and local armed men, on 7 November 1991 and that the elements of persecution as a crime against humanity (Count 1), murder as crime against humanity (Count 3) and murder as a violation of the laws and customs of war (Count 4) had been established in relation to these killings.[510] The Trial Chamber also found that, on 7 November 1991, one or two houses were burnt down in Vukovići by a group of soldiers composed of JNA soldiers and local inhabitants and that the elements of persecution as a crime against humanity (Count 1) and wanton destruction of villages, or devastation not justified by military necessity, as a violation of the laws or customs of war (Count 12) had been established in relation to these acts.[511] The Trial Chamber convicted Martić for these crimes as a natural and foreseeable consequence of the JCE.[512]

205. The Appeals Chamber finds that a reasonable trier of fact could have reached the conclusion that Martić was responsible for the killings perpetrated in Škabrnja and Nadin, Saborsko, and Vukovići as well as for the acts of destruction perpetrated in the first two locations by a combination of JNA soldiers or TO soldiers and paramilitary units, Serb soldiers and policemen, and local armed men.[513] In this regard, the Appeals Chamber recalls the Trial Chamber's findings on Martić's position as Minister of the Interior and his absolute authority over the MUP, his control over the armed forces, the TO and *Milicija Krajine*, the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO Krajina, and the control over the JNA and the TO exercised by other members of the JCE[514] as well as its findings regarding Martić's conduct and

[507] Trial Judgement, paras 227 and 381.
[508] Trial Judgement, paras 227 and 382.
[509] Trial Judgement, paras 454-455.
[510] Trial Judgement, paras 214, 371 and 377.
[511] Trial Judgement, paras 214, 374 and 378.
[512] Trial Judgement, paras 454-455.
[513] Trial Judgement, para. 454.
[514] See *supra*, paras 174-181.

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mens rea.[515] The fact that a paramilitary group, a group of Serb soldiers and policemen or a local armed group also participated in the crimes does not relieve Martić of responsibility, as it was open to a reasonable trier of fact, given the findings by the Trial Chamber, to conclude that these units acted together and in concert with the JNA and TO soldiers. In particular, with respect to the attack against Škabrnja and Nadin, the Appeals Chamber notes that the Trial Chamber found that JNA units composed of regular soldiers and reservists from neighbouring Serb villages as well as TO units wearing either JNA uniforms, uniforms with the Serbian flag on them, uniforms with a white band on the shoulder, and/or SAO Krajina patches on their uniforms, and paramilitary units wearing JNA uniforms, some featuring an insignia with four of the Cyrillic "S" perpetrated these crimes.[516]

206. In light of the above, and of Trial Chamber's findings that the common purpose was implemented through widespread and systematic armed attacks,[517] the Appeals Chamber finds that Martić has failed to show an error of the Trial Chamber in establishing the required link between him and the perpetrators of the killings committed in Škabrnja and Nadin, Saborsko, and Vukovići as well as for the acts of destruction perpetrated in the first two locations by a combination of JNA soldiers or TO soldiers and paramilitary units, Serb soldiers and policemen, and local armed men.

207. As for the acts of destruction perpetrated in Vukovići, having found that the perpetrators of the shelling of at least three houses in Vukovići could not be identified, the Trial Chamber found that the elements of the crime of wanton destruction of villages, or devastation not justified by military necessity, had been established in respect of the destruction of only one or two houses by soldiers.[518] However, the Trial Chamber held that "the burning of four or five houses constitutes destruction on a large scale."[519] As such, the Appeals Chamber concludes that the Trial Chamber erred in including acts which it could not attribute to Martić in the *actus reus* of a crime for which it held him responsible – *i.e.*, the three additional houses in Vukovići. Nevertheless, Martić's conviction stands for the one or two remaining houses.

208. The Appeals Chamber considers that this error resulted in a miscarriage of justice and therefore reverses Martić's conviction for Counts 1 and 12 in respect of the three houses destroyed as a result of the shelling by unidentified people.

[515] Trial Judgement, paras 450-454.
[516] Trial Judgement, paras 244-247.
[517] Trial Judgement, para. 445; see also *supra*, para. 181.
[518] Trial Judgement, para. 374. See also Trial Judgement, para. 214.
[519] Trial Judgement, para. 374.

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(vi) <u>Crimes of persecution and deportation committed by the JNA, the TO, the *Milicija Krajine*, the MUP, the armed forces or police forces of the SAO Krajina and the RSK</u>

209. On the basis of its earlier findings, the Trial Chamber concluded that systematic acts of violence and intimidation had been carried out by the JNA, the TO, the *Milicija Krajine*, and the armed forces or police forces of the SAO Krajina and the RSK from 1990 to 1992 against the non-Serb populations in Croat-majority villages and areas, including Knin, Lovinac, Ljubovo, Glina, Struga, Kijevo, Vrlika, Drniš, Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Škabrnja, Nadin and other locations in the SAO Krajina, with the intention to drive out the non-Serb population from the territory of the SAO Krajina.[520] The Trial Chamber also concluded that a similar campaign of violence and intimidation had been carried out against the non-Serb population from 1992 to 1995 throughout the RSK territory and that RSK authorities, including the RSK MUP, cooperated in the displacement of the non-Serb population from RSK territory.[521] The Trial Chamber held that the elements of persecution as a crime against humanity (Count 1) as well as deportation and forcible transfer as crimes against humanity (Counts 10 and 11) had been established in relation to these acts[522] and that the crimes fell within the common purpose of the JCE and thus convicted Martić on those counts.[523]

210. The Appeals Chamber finds that a reasonable trier of fact could have found Martić responsible for the crimes of persecution and deportation committed by the JNA, the TO, the *Milicija Krajine*, the armed forces or police forces of the SAO Krajina and the RSK. In this regard, the Appeals Chamber recalls the Trial Chamber's findings on Martić's position as Minister of the Interior and his absolute authority over the MUP, his control over the armed forces, the TO and *Milicija Krajine*, the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO Krajina, the control over the JNA and the TO exercised by other members of the JCE[524] as well as its findings regarding Martić's conduct and *mens rea*.[525]

211. In light of the above, and of Trial Chamber's findings that the common purpose was implemented through widespread and systematic armed attacks,[526] the Appeals Chamber finds that Martić failed to show an error of the Trial Chamber in establishing the required link between him

[520] Trial Judgement, paras 426-428.
[521] Trial Judgement, paras 300, 327-328 and 430. The Appeals Chamber notes that, while the Trial Chamber referred to the commission of crimes throughout the RSK territory, it did not as such hold Martić liable for these crimes.
[522] Trial Judgement, paras 429, 431-432.
[523] Trial Judgement, paras 452-453.
[524] See *supra*, paras 174-181.
[525] Trial Judgement, paras 450-454.
[526] Trial Judgement, para. 445; see also *supra*, para. 181.

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and the crimes of persecution and deportation committed by the JNA, the TO, the *Milicija Krajine*, the MUP, the armed forces or police forces of the SAO Krajina and the RSK.

212. However, the Appeals Chamber notes that some of the underlying acts upon which the Trial Chamber relied to establish that the crime of deportation had been committed from 1990 to 1992 were incorrectly linked to Martić[527] or were incorrectly found to have been established[528] and have already been reversed by the Appeals Chamber. As such, these crimes cannot form the basis of Martić's conviction for the crime of deportation. The Appeals Chamber considers that this error resulted in a miscarriage of justice and therefore reverses Martić's conviction for Count 10 in respect of these crimes.

G. Conclusion

213. On the basis of the foregoing, the Appeals Chamber allows a number of Martić's sub-grounds of appeal relating to the absence of a link between him and the principal perpetrators of the crimes and thus reverses Martić's convictions for Counts 1, 12 and 13 in respect of the acts of destruction committed in Cerovljani by armed Serbs from Živaja led by Nikola Begović; Counts 1, 3 and 4 in respect of the killing of Tomo Vuković in Vukovići and of two civilians in Poljanak; and Counts 1 and 12 in respect of the acts of destruction perpetrated in Poljanak by unidentified armed Serbs or soldiers. In addition, the Appeals Chamber allows Martić's sub-grounds of appeal relating to Counts 8 and 9 in respect of the crimes perpetrated against Ivan Atelj and Šime Čaćić in Benkovac, Counts 7 and 9 in respect of the crimes perpetrated against the three children detained in a kindergarten in Benkovac, Counts 1 and 12 in respect of the acts of destruction committed in Vukovići by JNA soldiers and local armed men and Count 10 in respect of said crimes as well as the conclusions on forcible removal of people from the places affected by these reversals.

214. The Appeals Chamber notes that as there are other crimes which fall under these different Counts, these reversals do not affect the Trial Chamber's overall findings of guilt under each of these Counts. The Appeals Chamber will determine the impact of these errors, if any, on Martić's sentence in the section of this Judgement on sentencing, below.[529]

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[527] The Appeals Chamber reversed Martić's convictions for Counts 1, 12 and 13 in respect of the acts of destruction committed in Čerovljani by armed Serbs from Živaja led by Nikola Begović (see *supra*, para. 193), Counts 1, 3 and 4 in respect of the killing of Tomo Vuković in Vukovići and of two civilians in Poljanak and Counts 1 and 12 in respect of the acts of destruction perpetrated in Poljanak by unidentified armed Serbs or soldiers (see *supra*, para. 201).
[528] The Appeals Chamber reversed Martić's convictions for Counts 8 and 9 in respect of the crimes perpetrated against Ivan Atelj and Šime Čaćić in Benkovac, Counts 7 and 9 in respect of the crimes perpetrated against the three children detained in a kindergarten in Benkovac (see *supra*, para. 164) and for Counts 1 and 12 in respect of the acts of destruction committed in Vukovići by JNA soldiers and local armed men (see *supra*, para. 201).
[529] See *infra*, Section X.

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215. The Appeals Chamber dismisses the remainder of Martić's fifth ground of appeal.

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VIII. ALLEGED ERRORS OF LAW AND FACT CONCERNING MILAN MARTIĆ'S RESPONSIBILITY FOR THE SHELLING OF ZAGREB (MILAN MARTIĆ'S SIXTH, SEVENTH AND EIGHTH GROUNDS OF APPEAL)

A. Introduction

216. The Trial Chamber found that on 2 and 3 May 1995, following a military offensive launched by the armed forces of Croatia known as "Operation Flash", Milan Martić ordered that Zagreb be shelled by Orkan rockets.[530] The Trial Chamber found that as a result of the shelling, five people were killed and at least 160 people were injured on 2 May 1995,[531] and two people were killed and 54 people were injured on 3 May 1995.[532] It also held that the M-87 Orkan used for the shelling was an indiscriminate weapon,[533] that the shelling constituted a widespread attack against the civilian population,[534] and that this conduct could not be justified as a reprisal.[535] It consequently held Martić responsible for ordering the shelling of Zagreb and found him guilty on the basis of Articles 3, 5 and 7(1) of the Statute under Counts 15 (murder as a crime against humanity), 16 (murder as a violation of the laws or customs of war), 17 (inhumane acts as a crime against humanity), 18 (cruel treatment as a violation of the laws or customs of war), and 19 (attacks on civilians as a violation of the laws or customs of war).[536]

217. Martić challenges most of these findings. He alleges that the Trial Chamber erred in law when interpreting the concept of "ordering" pursuant to Article 7(1) of the Statute[537] and erred in fact when it found that he ordered the shelling of Zagreb.[538] He further argues that the Trial Chamber made other erroneous and insufficient findings in relation to the shelling of Zagreb.[539] Martić submits that these alleged errors invalidate the Trial Judgement.[540] The Appeals Chamber will address these submissions in turn.

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[530] Trial Judgement, paras 302-305, 309 and 456-460.
[531] Trial Judgement, para. 308.
[532] Trial Judgement, para. 313.
[533] Trial Judgement, paras 462-463.
[534] Trial Judgement, para. 469.
[535] Trial Judgement, para. 468.
[536] Trial Judgement, paras 470-472. However, the Trial Chamber proceeded to enter convictions only for Counts 15, 17 and 19 since the crimes under Counts 16 and 17 were absorbed by the crime of attacks on civilians under Count 19 (Trial Judgement, paras 478 and 480).
[537] Defence Notice of Appeal, paras 54-56; Defence Appeal Brief, paras 214-215 (ground six).
[538] Defence Notice of Appeal, paras 57-59; Defence Appeal Brief, paras 216-219 (ground seven).
[539] Defence Notice of Appeal, paras 60-65; Defence Appeal Brief, paras 220-252 (ground eight).
[540] Defence Notice of Appeal, paras 56, 59 and 65.

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B. Alleged error of law in relation to ordering pursuant to Article 7(1) of the Statute (Milan Martić's Sixth Ground of Appeal)

1. Submissions of the Parties

218. Martić submits that the Trial Chamber erred in the way it set out the mental element of ordering a crime pursuant to Article 7(1) of the Statute. In particular, he claims that the Trial Chamber erroneously stated that indirect intent is sufficient for ordering. He refers to the *Blaškić* Appeal Judgement and argues that the Trial Chamber was supposed to follow the standard set out therein, *i.e.*, that knowledge of any risk, however low, does not suffice for the imposition of criminal responsibility. Martić submits that the Trial Chamber failed to specify the degree of risk that must be proven by the Prosecution.[541] He requests that the Appeals Chamber, in the event it affirms the Trial Chamber's finding that he ordered the shelling, rule on whether he did so with "awareness of a higher likelihood of risk and a volitional element."[542]

219. The Prosecution responds that Martić incorrectly relies on the *Blaškić* Appeal Judgement, which, according to the Prosecution, endorsed an indirect intent standard for the mode of liability of "ordering" under Article 7(1) of the Statute.[543] The Prosecution further avers that the Trial Chamber convicted Martić on the basis of his direct intent to attack civilians;[544] moreover, the Trial Chamber's conclusions regarding Martić's awareness of the deaths and injuries resulting from the shelling were reasonable.[545]

2. Discussion

220. Martić challenges the Trial Chamber's articulation of the *mens rea* elements of ordering a crime pursuant to Article 7(1) of the Statute.[546] In this respect, the Trial Chamber held the following:

> The mens rea [of ordering] is either direct intent in relation to the perpetrator's own ordering or indirect intent, that is, a person who orders with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for this mode of liability under Article 7(1) of the Statute.[547]

221. From the outset, the Appeals Chamber recalls its discussion in the *Blaškić* Appeal Judgement of the requisite subjective element for "ordering" a crime under the Statute. The Appeals

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[541] Defence Appeal Brief, paras 214-215; see also Defence Reply Brief, para. 95.
[542] Defence Reply Brief, para. 96.
[543] Prosecution Response Brief, para. 183.
[544] Prosecution Response Brief, para. 184.
[545] Prosecution Response Brief, para. 185.
[546] Defence Notice of Appeal, para. 54, referring exclusively to Trial Judgement, para. 441.
[547] Trial Judgement, para. 441.

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Chamber in that case had to address the question of "whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, and if so, how it should be defined."[548] After an extensive analysis,[549] the Appeals Chamber concluded as follows:

> The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting the crime.[550]

222. The Appeals Chamber explained that there is indeed a lower form of intent than direct intent. It specified, however, that the "knowledge of any kind of risk, however low, does not suffice"[551] to impose criminal responsibility under the Statute. It considered that "an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard."[552] Hence, it reached its conclusion that the person giving the order must act with the awareness of the *substantial* likelihood that a crime will be committed in the execution of the order. This reasoning was confirmed in the *Kordić and Čerkez* and *Galić* Appeal Judgements.[553]

223. In this case, the Trial Chamber merely repeated the standard set out in the *Blaškić* Appeal Judgement, *i.e.* it required that the person giving the order acted with awareness of the substantial likelihood that a crime would be committed in the execution of that order, thus accepting the crime. The Appeals Chamber can find no error in this. Insofar as Martić in his Reply Brief alleges that the *application* of that standard was erroneous, the Appeals Chamber notes that in his Notice of Appeal and his Appeal Brief, under this ground of appeal Martić challenged only the Trial Chamber's articulation of the standard.[554] His further submissions[555] will therefore only be considered to the extent that they are relevant under Martić's eighth ground of appeal.[556]

3. Conclusion

224. For the foregoing reasons, the Appeals Chamber dismisses Martić's sixth ground of appeal in its entirety.

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[548] *Blaškić* Appeal Judgement, para. 32.
[549] *Blaškić* Appeal Judgement, paras 33-41.
[550] *Blaškić* Appeal Judgement, para. 42. See also *Blaškić* Appeal Judgement, fn. 76, providing a French translation of that standard: "*Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la* mens rea *requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime*".
[551] *Blaškić* Appeal Judgement, para. 41.
[552] *Blaškić* Appeal Judgement, para. 41; *Nahimana et al.* Appeal Judgement, para. 481.
[553] *Kordić and Čerkez* Appeal Judgement, paras 29-30; *Galić* Appeal Judgement, para. 152. See for the application of the same standard to the modes of liability of planning and instigating under Article 7(1) of the Statute: *Kordić and Čerkez* Appeal Judgement, paras 31-32.
[554] Defence Notice of Appeal, paras 54-56; Defence Appeal Brief, paras 214-215.
[555] Defence Reply Brief, paras 95-96.
[556] See *infra*, paras 237 ff.

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C. Alleged error in finding that Milan Martić ordered the shelling of Zagreb (Milan Martić's Seventh Ground of Appeal)

1. Submissions of the Parties

225. Martić claims that the Trial Chamber erred when it found that he ordered the shelling of Zagreb on 2 and 3 May 1995,[557] asserting that the Trial Chamber did not apply the standard of proof beyond reasonable doubt in reaching this finding.[558] Martić claims that this finding "is reasonable, but not beyond reasonable doubt".[559] In particular, he submits that the Trial Chamber erred in its assessment of the evidence given by Witness Patrick Barriot (also, "Barriot") who had testified that Martić merely took responsibility for the shelling of Zagreb without having ordered it. Martić claims that this witness's testimony is "supported by significant evidence."[560] He stresses that in some public statements, he took responsibility for the shelling which is not the same as admitting that he ordered the shelling.[561] Martić claims that the Trial Chamber's finding that he was involved in the military response to Operation Flash is not sufficient to conclude beyond reasonable doubt that he ordered the shelling of Zagreb, particularly when considering that it was Milan Čeleketić (also, "Čeleketić"), the Chief of the Army of the RSK ("SVK") Main Staff, who had ordered the shelling of Sisak on 1 May 1995.[562] Martić alleges further that the Trial Chamber did not properly consider a statement issued by the Croatian Ministry of Defence, which contained references to Čeleketić and a certain Lončar as having given the orders to shell Zagreb.[563] Finally, Martić argues that Čeleketić was actually replaced specifically for having ordered the shelling of Zagreb.[564]

226. The Prosecution responds that, given the weight of the evidence, specifically Martić's own admissions to having ordered the shelling of Zagreb, the Trial Chamber's conclusion that Martić ordered the shelling was reasonable.[565] The Prosecution argues that the Trial Chamber considered Čeleketić's dismissal, but still found that Martić had ordered the attack.[566] The Prosecution moreover submits that there is evidence that Martić threatened to shell Zagreb and that he ordered the shelling.[567] It further argues that while Čeleketić might have *transmitted* the order, this does not

[557] Defence Notice of Appeal, paras 57-59; Defence Appeal Brief, paras 216-219.
[558] Defence Appeal Brief, para. 216.
[559] Defence Reply Brief, para. 97.
[560] Defence Appeal Brief, para. 217.
[561] Defence Reply Brief, para. 98.
[562] Defence Appeal Brief, para. 218.
[563] Defence Appeal Brief, para. 219. Martić refers to an unspecified exhibit, see Defence Appeal Brief, fn. 234.
[564] Defence Appeal Brief, para. 219.
[565] Prosecution Response Brief, paras 161-164.
[566] Prosecution Response Brief, para. 177.
[567] Prosecution Response Brief, para. 180.

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relieve Martić from criminal responsibility.[568] Moreover, the Prosecution submits, a crime can be ordered by more than one individual.[569] The Prosecution finally argues that Čeleketić's removal from command following the shelling of Zagreb does not contradict the Trial Chamber's finding that Martić ordered the shelling and is consistent with the other findings made by the Trial Chamber.[570]

227. Martić replies that the RSK Commission report on the fall on Western Slavonia, referred to by the Trial Chamber, does not support the conclusion that he ordered the shelling of Zagreb and "does not exclude [the] possibility that he did not issue the order for shelling."[571] Moreover, Martić claims that the Trial Chamber failed to consider the fact that Čeleketić was the operative commander and that it was impossible that he would wait for him (Martić) to make decisions amidst the general fighting between the Croatian and Serbian forces.[572]

2. Discussion

228. The Appeals Chamber observes that the Trial Chamber relied on two prongs of evidence when it found that Martić ordered the shelling of Zagreb on 2 and 3 May 1995. First, it found that Martić had repeatedly admitted in media statements that he had ordered the shelling. Second, it found that "this persuasive evidence" was further supported by "circumstantial evidence."[573]

229. To the extent that Martić appears to challenge for the first time in his Reply Brief the finding of the Trial Chamber that he admitted to having ordered the shelling of Zagreb,[574] the Appeals Chamber must point out that it is not required to consider this argument. In *Kupreškić et al.*, the Appeals Chamber held that "ordinarily a reply is restricted to dealing with issues raised in an opposing party's response. If a party raises a new argument or request for the first time in a reply then the opposing party is deprived of an opportunity to respond. This could harm the fairness of the appeal proceedings."[575] However, given the fact that Martić's Notice of Appeal is broadly worded[576] and that the Prosecution in its Response has referred to the findings of the Trial Chamber

[568] Prosecution Response Brief, para. 181.
[569] Prosecution Response Brief, para. 181.
[570] Prosecution Response Brief, para. 182.
[571] Defence Reply Brief, para. 99.
[572] Defence Reply Brief, para. 100.
[573] Trial Judgement, para. 456. See also Trial Judgement, para. 460.
[574] Defence Reply Brief, para. 98.
[575] *Prosecutor v. Vlatko Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kuprešić and Mirjan Kupreškić to Admit Additional Evidence, filed confidentially on 26 February 2001, para. 70. See also *Prosecutor v. Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on "Prosecution's Motion to Strike Out Portions of Kordić's Reply Filed 13 April 2004", filed confidentially on 11 May 2004, para. 14.
[576] Defence Notice of Appeal, para. 57. "In Defence's opinion, it was not proved beyond reasonable doubt that Appellant had ordered the shelling of Zagreb on 2 and 3 may [*sic*] 1995. Finding of the Trial Chamber that he ordered the shelling was based on improper evaluation of evidence and in disregard of strong arguments presented during trial."

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in relation to Martić's admission to having ordered the shelling of Zagreb,[577] in the circumstances of this case the Appeals Chamber will exercise its inherent discretion[578] and address all of Martić's arguments in turn for the sake of completeness.

230. The Trial Chamber based its finding that Martić repeatedly admitted to the shelling of Zagreb[579] on a broad array of evidence.[580] Contrary to Martić's argument that he merely took responsibility for the shelling while implying that he did not admit to ordering it, the Trial Chamber considered evidence that was explicit as to the nature of Martić's utterances. For example, the Trial Chamber referred to a radio interview that Martić gave on 5 May 1995, in which he stated that "the order [to shell Zagreb] was given by me, personally […]."[581] The Trial Chamber also mentioned Exhibit 98, the transcript of a radio interview that Martić gave on 6 May 1995, in which he stated that "[o]ur … my order to shell Zagreb ensued and I would say that was what influenced them most to halt the aggression."[582] The Trial Chamber made further reference to an intercept of a conversation in which Slobodan Milošević said that Martić had "boasted about having shelled Zagreb,"[583] and to a cable by a United Nations envoy, reporting on a conversation in which Martić had stated the following: "Had I not ordered the rocket attacks […] they would have continued to bomb our cities."[584]

231. Martić has not properly challenged any of this evidence.[585] He only makes reference to Exhibit 388, a transcript of a television appearance by Martić, in which he stated that "we have shelled all their cities."[586] If Martić's complaint is that in light of this exhibit, the Trial Chamber erred when coming to the conclusion that he had admitted to having ordered the shelling, as opposed to merely taking responsibility for the actions of others, his argument must fail. Given the abundant evidence on which the Trial Chamber relied, it was reasonable for the Trial Chamber to conclude beyond reasonable doubt that Martić himself had admitted to ordering the shelling of Zagreb.

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[577] Prosecution Response Brief, paras 161-164 and 176.
[578] *Cf.* for example *Simba* Appeal Judgement, para. 12.
[579] Trial Judgement, para. 456.
[580] Trial Judgement, paras 314-322.
[581] Trial Judgement, para. 320. Exhibit 389, "Radio interview with Martić, 5 May 1995".
[582] Trial Judgement, fn. 992, see also Reynaud Theunes, 27 Jan 2006, T. 837.
[583] Trial Judgement, para. 319. Exhibit 233, "Intercept of conversation between Milošević and Mikelić", p. 6.
[584] Trial Judgement, para. 320. Exhibit 97, "Cable from UN envoy Akashi, 6 May 1995", para. 13.
[585] The Appeals Chamber notes that Martić in his Reply Brief argues under his eighth ground of appeal that the Trial Chamber's "[a]rgument in [para.] 175 [of the Trial Judgement] is unfounded, [as] it is based on Milošević's words" and that "there is no evidence that Martić was busting [sic] about having shelled Zagreb." Given the standard of appellate review, the Appeals Chamber does not consider this argument as a proper challenge to the evaluation of that particular piece of evidence by the Trial Chamber.
[586] Defence Reply Brief, para. 98, fn. 86.

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232. As mentioned above, the Trial Chamber relied not just on Martić's admissions, but also based its findings on circumstantial evidence. It found that even in 1992 and 1993, Martić, as Minister of the Interior, had considered attacking Zagreb and that on 24 October 1994, Martić, as President of the RSK, had threatened to strike Zagreb with rockets in case of a Croatian attack on the RSK.[587] Martić does not challenge these particular findings. The Trial Chamber further found that General Čeleketić, the Chief of the SVK Main Staff, had moved the Orkan M-87 Unit to a position south of Zagreb on 1 May 1995,[588] and that following a meeting with Martić in which both favoured a non-peaceful solution, Čeleketić, in Martić's presence, gave the order to shell Sisak.[589] The Trial Chamber thus concluded that Martić was involved "from the beginning" in the RSK response to "Operation Flash."[590] In this context, it stated that it found the evidence of Patrick Barriot, who had testified that Martić merely took responsibility for the shelling of Zagreb without actually having ordered it himself, "unconvincing."[591] The Trial Chamber finally found that Martić and Čeleketić "circumvented the [collegiate body of the] Supreme Defence Council", which according to the RSK constitution should have been the responsible organ for making a decision such as the shelling of Zagreb.[592] The Trial Chamber found that this fact was also supported by two reports of commissions set up by the RSK to investigate the fall of Western Slavonia to Croat forces.[593]

233. The Appeals Chamber considers that the ultimate weight to be attached to each piece of evidence cannot be determined in isolation. Even though in some instances a piece of evidence, viewed alone, may not be sufficient to satisfy the burden of proof beyond reasonable doubt, it is the totality of the evidence that must be weighed to determine whether the Prosecution has met the burden upon it.[594]

234. Martić has not demonstrated that the Trial Chamber erred when it assessed the circumstantial evidence before it. It must be kept in mind that the Trial Chamber considered this evidence only against the backdrop of the "persuasive evidence"[595] that Martić had repeatedly admitted in media statements to having ordered the shelling of Zagreb. While Martić may be correct when stating that his general involvement in the military response to Operation Flash alone does not prove that he ordered the shelling, the Trial Chamber took a holistic approach to the evidence

[587] Trial Judgement, paras 314, 316 and 457.
[588] Trial Judgement, paras 304 and 458.
[589] Trial Judgement, paras 303 and 458.
[590] Trial Judgement, para. 458.
[591] Trial Judgement, para. 458.
[592] Trial Judgement, paras 155 and 459.
[593] Trial Judgement, paras 321 and 459.
[594] See, for example, *Limaj et al.* Appeal Judgement, para. 154 and *Halilović* Appeal Judgement, para. 124.
[595] Trial Judgement, para. 456.

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before it. In particular, the fact that Čeleketić had ordered the shelling of Sisak does not render unreasonable the Trial Chamber's finding that it was Martić himself who later ordered the shelling of Zagreb. Indeed, the Trial Chamber found that Martić was present when Čeleketić gave the order to shell Sisak and that he was therefore involved from the beginning in the military operation.[596] Likewise, Čeleketić's resignation from his command after the shelling – an event considered by the Trial Chamber[597] – does not affect the reasonableness of the Trial Chamber's findings in relation to Martić's responsibility, especially given that the reasons for Čeleketić's resignation are not entirely clear.[598] Moreover, the Trial Chamber found, unchallenged by Martić, that Martić and Čeleketić had worked closely together[599] and that Čeleketić was involved in the preparations to shell Zagreb.[600] Under these circumstances, it was also reasonable for the Trial Chamber to reject Barriot's evidence as "unconvincing."[601] The Appeals Chamber furthermore notes that Barriot was not an eyewitness to the events but based his assessment that Martić did not order the shelling himself only on later talks with Martić and an "analysis of his personality."[602]

235. The Appeals Chamber accordingly finds that Martić has not shown that the Trial Chamber erred when it found that he had admitted to the ordering of the shelling of Zagreb and that circumstantial evidence also supported a finding that he did in fact issue such an order. Consequently, the Trial Chamber's conclusion "in light of the totality of the evidence"[603] that it was proven beyond a reasonable doubt that Martić had ordered the shelling of Zagreb stands.

3. Conclusion

236. For the foregoing reasons, the Appeals Chamber dismisses Martić's seventh ground of appeal in its entirety.

D. Alleged Errors regarding the Shelling of Zagreb (Milan Martić's Eighth Ground of Appeal)

1. Submissions of the Parties

237. Martić argues that the shelling of Zagreb constituted a lawful reprisal.[604] He contends that the Trial Chamber failed to consider the unlawful purpose and effects of Operation Flash, launched

[596] Trial Judgement, paras 303 and 458.
[597] Trial Judgement, para. 322.
[598] Trial Judgement, para. 322. See also Trial Judgement, fn. 1000.
[599] Trial Judgement, paras 321-322 and 459.
[600] Trial Judgement, paras 303-304.
[601] Trial Judgement, para. 458.
[602] Patrick Barriot, 9 Nov 2006, T. 10777. See also T. 10773-10774, 10778 and 10 Nov 2006, T. 10839.
[603] Trial Judgement, para. 460.
[604] Defence Appeal Brief, para. 233.

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by Croat forces, which allegedly intended the complete extermination of the Serb population in Western Slavonia and was accompanied by the commission of serious crimes, in breach of a cease fire agreement.[605] He avers that in doing so, the Trial Chamber disregarded relevant evidence.[606] He further submits that Operation Flash constituted a widespread and systematic attack.[607] Moreover, Martić alleges that, contrary to the Trial Chamber's finding, the shelling of Zagreb was carried out as a defensive measure of last resort, as the Croats rejected peace negotiations.[608] He asserts that no impartial tribunal could qualify the events of 1 May 1995 as preparation for attack.[609]

238. Martić concedes that there is no evidence that the RSK formally warned Croatia before this specific shelling,[610] but asserts that the repeated warning that Zagreb would be shelled in the case of "aggression" against the RSK, the context of peace negotiations, and the practice of announcing military targets to save civilians meant that no reasonable trier of fact could have concluded that no warning had been given "during negotiations or subsequently."[611]

239. In the alternative, Martić argues that the shelling of Zagreb was a lawful military action conducted in self-defence.[612] He specifically challenges the Trial Chamber's finding that the shelling of Zagreb constituted a widespread attack against the civilian population.[613] He claims that the Trial Chamber erred when it held that the M-87 Orkan is an indiscriminate weapon.[614] He argues that the M-87 Orkan is precise, even from a long distance, the targets aimed at were large and similar weapons have been used by many armies in the recent past.[615] Martić claims further that the Prosecution's expert witnesses were not experienced in relation to the use of the M-87 Orkan and that they used outdated material and disregarded relevant information. [616] Martić also argues that the Trial Chamber failed to consider that, apart from the M-87 Orkan, the SVK disposed only

[605] Defence Appeal Brief, paras 221-228, referring, *inter alia*, to Exhibit 929, "Cease-Fire agreement, 29 March 1994", containing the text of the cease fire agreement of 29 March 1994. See also AT. 66-67. See also Defence Reply Brief, paras 116-121.
[606] He refers to Exhibits 96, "Report by Trgovčević, 4 May 1995", 112, "UNPROFOR fax regarding arrest of Serbs, May 1995", 728, "UNPROFOR situation report, 27 October 1992", 929, "Cease-Fire agreement, 29 March 1994", 931, "All My Battles, book by General Bobetko", 934, "Transcript from Defence Council and Security Council of Croatia, 30 April 1995", and the testimony of expert witness Reynaud Theunens, 3 Feb 2006, T. 1087.
[607] Defence Appeal Brief, para. 225.
[608] Defence Appeal Brief, para. 231, referring in particular to Trial Judgement, fn. 943, and paras 229-230 and 244. See also Defence Reply Brief, para. 121.
[609] Defence Appeal Brief, para. 229.
[610] Defence Appeal Brief, para. 232.
[611] Defence Appeal Brief, para. 232. See also Defence Reply Brief, paras 119-121.
[612] Defence Appeal Brief, para. 233.
[613] Defence Appeal Brief, para. 234.
[614] Defence Appeal Brief, paras 240-243.
[615] Defence Appeal Brief, paras 242-243. See also Defence Reply Brief, para. 108.
[616] Defence Appeal Brief, para. 241, referring to the testimonies of expert Witnesses Jožef Poje and Reynaud Theunens.

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of the more powerful Luna rocket system.[617] He adds that only a small number of rockets were fired and that the full capacity of the M-87 Orkan was not used.[618]

240. Martić contends that, even assuming that he ordered the shelling of Zagreb, he could not be held responsible for an attack against the civilian population,[619] because (i) the M-87 Orkan aimed at military targets in Zagreb, not the civilian population;[620] (ii) he did not have the necessary *mens rea* since he did not have the military knowledge to evaluate the impact of the M-87 Orkan and he was not in charge of the selection of appropriate weapons for the attack;[621] and (iii) it was not possible to fully "observe and analyse" accidental or inevitable errors, especially since artillery fire is fraught with the possibility of such errors.[622] Martić also claims that Croatian authorities, who were aware of the possibility of a shelling, failed to take precautionary measures to protect the civilian population, such as its evacuation, in clear violation of Article 58 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 ("Additional Protocol I"). He claims that if Croatia had taken precautions, there would have been no casualties among the civilian population.[623]

241. The Prosecution responds that the Trial Chamber correctly inferred that the shelling of Zagreb was an attack directed against civilians and that busy civilian areas were in fact attacked.[624] It maintains that the Trial Chamber correctly rejected the claim that military targets were the object of the attack on Zagreb[625] and submits that the Trial Chamber correctly found that no warning was given prior to the attack,[626] and that the M-87 Orkan was an indiscriminate weapon.[627] The Prosecution rejects Martić's claim that the M-87 Orkan was more appropriate for targeting Zagreb than the Luna weapon, which according to the Prosecution would have been the "more logical choice of weapon" if Martić had sought to strike specific military targets.[628] The Prosecution further submits that the evidence supported the Trial Chamber's conclusion that Martić intended to target the civilian population by using the M-87 Orkan.[629] It specifically argues that Martić's military experience and his position as commander in chief provided him with experience and the

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[617] Defence Appeal Brief, para. 244, referring to Exhibit 776, "Firing tables for the M-87 Orkan". See also Defence Reply Brief, paras 106 and 107.
[618] Defence Appeal Brief, para. 244.
[619] Defence Appeal Brief, paras 234-238, challenging the findings at paragraphs 469-472 of the Trial Judgement.
[620] Defence Appeal Brief, paras 234-235.
[621] Defence Appeal Brief, paras 237-238, relying on the testimony of Witness Rade Rašeta.
[622] Defence Appeal Brief, para. 239, referring to an unspecified exhibit.
[623] Defence Appeal Brief, paras 245 -252.
[624] Prosecution Response Brief, paras 150-160.
[625] Prosecution Response Brief, para. 165.
[626] Prosecution Response Brief, para. 166.
[627] Prosecution Response Brief, para. 167.
[628] Prosecution Response Brief, para. 169.

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character of the M-87 Orkan was well-known.[630] Furthermore, even if Martić had been unaware of the M-87 Orkan's indiscriminate nature on the first day of the attack, he would have been aware of it by the second day.[631] The Prosecution also points to Martić's "boasting" about the shellings after the attack as showing that "Martić was satisfied that the attacks were hitting their intended targets – heavily populated civilian areas."[632]

242. As to Martić's reprisal arguments, the Prosecution submits that the Trial Chamber correctly concluded that the preconditions of a lawful reprisal were not met.[633] The Prosecution points out that even if these preconditions had been met, the Trial Chamber's findings demonstrate that the other prerequisites of a lawful reprisal would not have been fulfilled.[634] Furthermore, it argues that Martić's decision to shell Zagreb was "not guided by the perceived futility of peace negotiations, but by revenge"[635] and that there was evidence that Martić preferred a non-peaceful response even before negotiations with Croatia had commenced.[636] Finally, the Prosecution submits that the Trial Chamber's characterisation of the RSK/SVK activities on 1 May 1995 as "preparation for attack" was correct.[637] It further avers that the alleged error only relates to a heading, rather than a finding on which Martić's conviction was based.[638]

243. In reply, Martić claims that the findings by the Trial Chamber on the shelling of Zagreb reveal its "prejudged position"[639] and "demonstrate the bias of the Trial Chamber."[640] He argues that the attack was focused on legitimate military targets and that the Trial Chamber did not distinguish between "what was targeted" and "what was actually hit."[641]

244. Martić further argues that even if he had ordered the shelling, there was no direct proof that he had intended to target the civilian population.[642] Martić asserts that he did not have knowledge of the nature of the M-87 Orkan and of the possible consequences of its use; his formal position in this regard was irrelevant.[643] He avers that the extensive media coverage after the first shelling of

[629] Prosecution Response Brief, para. 170. See also Prosecution Response Brief, para. 168.
[630] Prosecution Response Brief, paras 171-172.
[631] Prosecution Response Brief, paras 173-174.
[632] Prosecution Response Brief, para. 175.
[633] Prosecution Response Brief, para. 191.
[634] Prosecution Response Brief, para. 192.
[635] Prosecution Response Brief, para. 195.
[636] Prosecution Response Brief, paras 193-194.
[637] Prosecution Response Brief, para. 196.
[638] Prosecution Response Brief, para. 197.
[639] Defence Reply Brief, para. 103. See also para. 102.
[640] Defence Reply Brief, para. 104. See also AT. 66.
[641] Defence Reply Brief, para. 105.
[642] Defence Reply Brief, para. 110.
[643] Defence Reply Brief, paras 111-115.

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Zagreb on 2 May 1995 did not warrant an inference that he intended to target civilians.[644] He states that there is no evidence that he "was busting [*sic*] about having shelled Zagreb."[645]

2. Discussion

245. The Appeals Chamber notes that none of Martić's arguments in relation to his assertion that the Trial Chamber was not impartial when considering the shelling of Zagreb are covered by the eighth ground of Martić's Notice of Appeal.[646] This includes his claim that the Trial Chamber erred when it named the heading under G. III. 2. a. of the Trial Judgement "1 May 1995 – Preparation for attack." They are therefore dismissed. In this context, the Appeals Chamber recalls that Martic's challenges as to the impartiality of the Trial Chamber have been addressed and dismissed elsewhere.[647]

246. From Martić's remaining submissions, the Appeals Chamber can discern the following challenges: the Trial Chamber allegedly erred (i) when it considered the M-87 Orkan rocket to be an indiscriminate weapon incapable of hitting specific targets; (ii) when it found that the shelling of Zagreb was a widespread attack directed against the civilian population of which Martić had knowledge; (iii) when it found that the civilian population was wilfully made the object of attack by Martić; (iv) when it rejected the argument that the shelling was a lawful reprisal or justified by self-defence; and (v) when it did not consider the obligations allegedly incumbent on Croatia in protecting her civilians.

(a) The M-87 Orkan rocket as an indiscriminate weapon incapable of hitting specific targets

247. The Trial Chamber concluded that the M-87 Orkan was used as an indiscriminate weapon.[648] It found that the distance from which the rockets were fired was close to the maximum range (50 km) of the M-87 Orkan, at which the dispersion error is about 1,000m in every direction, with the area of the dispersion of the bomblets on the ground being about 2 hectares.[649] The Trial Chamber reasoned that the M-87 Orkan, "by virtue of its characteristics and the firing range in the specific instance" was "incapable of hitting specific targets." [650] Using the M-87 Orkan from such a range in a densely populated urban area like Zagreb "will result in the infliction of severe

[644] Defence Reply Brief, para. 114.
[645] Defence Reply Brief, para. 115.
[646] See Defence Notice of Appeal, paras 60-65.
[647] See *supra*, paras 39-47.
[648] Trial Judgement, paras 462-463.
[649] Trial Judgement, para. 462.
[650] Trial Judgement, para. 463.

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casualties."[651] The Trial Chamber elaborated that considering the indiscriminate character of the M-87 Orkan, the presence of military targets in Zagreb was irrelevant.[652]

248. At the outset, the Appeals Chamber rejects Martić's arguments in relation to the Luna rocket system. Whether the RSK had another artillery system at its disposal is irrelevant as regards the inquiry into whether the Trial Chamber erred when it considered the M-87 Orkan to be an indiscriminate weapon. The weapon used in the shelling of Zagreb was the M-87 Orkan.[653] Martić has not challenged this finding by the Trial Chamber.

249. The Appeals Chamber also rejects Martić's challenges relating to the qualification of the expert Witnesses Jožef Poje and Rheynaud Theunens.[654] The Appeals Chamber recalls that "just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony."[655] In fact, the Trial Chamber stated that it had "carefully examined the limitation of the expertise of each expert witness and the relevance and reliability of his or her evidence."[656]Apart from making general claims such as that "none of the Prosecution experts had any experience in using Orkan,"[657] Martić has not pointed to any specific lack of expertise or specific error allegedly committed by the experts which would have made it unreasonable for the Trial Chamber to rely on their evidence.[658] In particular, the Appeals Chamber notes that none of Martić's allegations refer to specific evidence given by the expert witnesses. Rather, Martić seems to challenge their methodology and personal experience,[659] without giving any indication of the purported impact of these challenges on the Trial Chamber's findings. In fact, and somewhat in contradiction to his claims, Martić himself in his Appeal Brief relies on expert testimony given by Jožef Poje[660] and the report prepared by Rheynaud Theunens.[661]

250. Martić further argues that the Trial Chamber erred when it "failed to note that, due to its technical characteristics, Orkan is precise even fired from a maximum range."[662] In support of this argument, he refers generally to Exhibit 776, which contains the firing tables for the M-87 Orkan, but without pointing to any particular piece of information in this exhibit. The Appeals Chamber notes that the Trial Chamber admitted into evidence not the whole of Exhibit 776, but only the

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651 Trial Judgement, paras 462-463.
652 Trial Judgement, para. 461.
653 Trial Judgement, paras 461-463.
654 Defence Appeal Brief, para. 241; See also Defence Reply Brief, para. 109.
655 *Simba* Appeal Judgement, para. 174.
656 Trial Judgement, para. 29 (footnote omitted).
657 Defence Appeal Brief, para. 241.
658 Defence Appeal Brief, para. 241.
659 Defence Appeal Brief, para. 241.
660 See Defence Appeal Brief, paras 239 and 242-243.
661 See Defence Appeal Brief, fn. 264.
662 Defence Appeal Brief, para. 242.

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firing tables contained in it[663] and that expert Witness Jožef Poje prepared his report on the basis of those tables.[664] During his testimony, the Witness described in detail how he came to the conclusion that when fired from a range of 49 km,[665] the dispersion error of the M-87 Orkan is about 1000m in each direction.[666] The Trial Chamber relied on this evidence.[667] As a challenge to the Trial Chamber's findings, Martić merely refers to the Expert Report of Theunens (Exhibits 6) and a memorandum from the United Nations Military Observers ("UNMO") headquarters dated 6 May 1995 (Exhibit 94),[668] which state that in relation to the M-87 Orkan "[a] typical dispersion error for a warhead at payload release height would be an ellipse of 180m x 165m."[669] However, the Appeals Chamber notes that these numbers are devoid of any detail as to how they were calculated. This is especially important since the dispersion pattern depends on a number of factors, including the firing range.[670] Moreover, even if accepting Martić's figures, a dispersion pattern of such proportion would hardly make the finding of the Trial Chamber that the M-87 Orkan was incapable of hitting specific targets unreasonable. In this context, Martić's reliance on the purported fact that the M-87 Orkan "was the most sophisticated rocket launcher produced by Yugoslavia"[671] is beside the point.

251. The Appeals Chamber considers that Martić's reference to expert Witness Jožef Poje's statement that certain governmental and military buildings and facilities in Zagreb were "possible targets which you could target with the Orkan system"[672] is misguided. The Witness was explicit in stating that "the Orkan is not principally suitable for use in populated areas" and because of its characteristics "is not intended for deployment in populated areas."[673] He also testified that "because of the high dispersion that kind of targeting [hitting a military target] was not suited…"[674] The Trial Chamber took this evidence into account.[675] Consequently, the Appeals Chamber is satisfied that the Trial Chamber, given its findings on the nature of the M-87 Orkan, could disregard

[663] Oral Decision, 6 Jun 2006, T. 5087.
[664] Jožef Poje, 6 Jun 2006, T. 5087. See also Exhibit 7, "Expert Report of Poje", fn. 37.
[665] The Trial Chamber found that "the M-87 Orkan was fired on 2 and 3 May 1995 from the Vojnić area, near Slavsko Polje, between 47 and 51 kilometres from Zagreb" (Trial Judgement, para. 463). Martić has not challenged this finding.
[666] The witness testified that the semi-axes of the ellipse formed by the dispersion pattern when fired from a distance of 49 kilometres are 972 and 1032 metres, respectively. Jožef Poje, 6 Jun 2006, T. 5100-5103.
[667] Trial Judgement, para. 462 and fn. 1248.
[668] The Appeals Chamber notes that Exhibit 6, "Expert report of Theunens", pp. 185 *et seq*. actually does little more than quoting from Exhibit 94, "Memorandum from UNMO HQ / MIO, 6 May 1995", in particular p. 8.
[669] Defence Appeal Brief, para. 242, quoting from said exhibits.
[670] Trial Judgement, para. 462; see also Exhibit 7, "Expert report of Poje", p. 64.
[671] Defence Appeal Brief, para. 242, quoting from Exhibits 6, "Expert report of Theunens", and 94, "Memorandum from UNMO HQ / MIO, 6 May 1995".
[672] Defence Appeal Brief, para. 243, quoting Jožef Poje, 7 Jun 2006, T. 5211.
[673] Jožef Poje, 6 Jun 2006, T. 5065. See also T. 5108.
[674] Jožef Poje, 6 Jun 2006, T. 5108.
[675] Trial Judgement, fn. 1248.

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the presence of military targets in Zagreb.[676] The Appeals Chamber finally rejects Martić's argument that "many armies had and used in the recent past similar weapons"[677] as irrelevant.

252. For the foregoing reasons, Martić has not demonstrated that the Trial Chamber erred when it found that the M-87 Orkan was an indiscriminate weapon, incapable of hitting specific targets in the circumstances of the case as presented before the Trial Chamber. This sub-ground of appeal is accordingly dismissed.

(b) <u>The shelling of Zagreb as a widespread attack directed against the civilian population of which Martić had knowledge</u>

253. The Trial Chamber held that the shelling of Zagreb was a widespread attack against the civilian population.[678] It reached this conclusion on the basis of the large scale nature of the attack and the indiscriminate nature of the M-87 Orkan.[679] It considered that it was proven beyond reasonable doubt that Martić was aware of this attack.[680]

254. The Appeals Chamber notes that Martić seems to confuse the notion of a widespread attack on the civilian population (as a threshold requirement under Article 5 of the Statute) with the crime of attacks on civilians (pursuant to Article 3 of the Statute).[681] The Appeals Chamber will nevertheless address Martić's arguments in relation to both issues. In this Section, it will deal with the question of whether the Trial Chamber erred when it found that the shelling of Zagreb was part of a widespread attack against the civilian population, in the sense of Article 5 of the Statute, of which Martić had knowledge. After this, the Appeals Chamber will deal with alleged errors committed by the Trial Chamber when assessing Martić's responsibility for the crime of attack against civilians under Article 3 of the Statute.

255. The Appeals Chamber recalls that the Trial Chamber reasonably found that Martić had ordered the shelling of Zagreb.[682] The Trial Chamber, when setting out the applicable law, correctly stated that in order for criminal responsibility to arise under Article 5 of the Statute, "the acts of the accused must have formed part of a widespread or systematic attack directed against any civilian population."[683] Martić has not challenged the high number of civilian casualties caused by the

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[676] Trial Judgement, para. 461.
[677] Defence Appeal Brief, para. 243.
[678] Trial Judgement, para. 469.
[679] Trial Judgement, para. 469.
[680] Trial Judgement, para. 469.
[681] See Defence Appeal Brief, para. 234.
[682] See *supra*, para. 235.
[683] Trial Judgement, para. 49.

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shelling of Zagreb with the M-87 Orkan.[684] Likewise, he does not object to the Trial Chamber's finding that of the purported military targets, only one was hit.[685] The Appeals Chamber has already found that the Trial Chamber did not err when it found that the M-87 Orkan was an indiscriminate weapon, incapable of hitting specific targets. Thus, Martić has failed to show that the Trial Chamber erred when it found that "due to the characteristics of the M-87 Orkan and due to the large-scale nature of the attack" the shelling of Zagreb was a widespread attack directed against the civilian population of Zagreb.[686]

256. The heart of Martić's arguments in relation to his *mens rea* is that he did not have the appropriate military knowledge of the effects of the M-87 Orkan.[687] To support his claim, Martić refers to the testimony of expert Witness Jožef Poje that "not everyone is familiar with the consequences of the use of the Orkan."[688] The Appeals Chamber notes that the Trial Chamber made reference to this statement in the Trial Judgement.[689] The Appeals Chamber further notes the Trial Chamber's finding that "the effects of firing the M-87 Orkan on Zagreb were known to those involved."[690] The Trial Chamber *inter alia* referred to a letter from Martić to Slobodan Milošević of 9 June 1993 in which he informed the latter that the P-65 Luna rocket system had been moved "to prevent aggression or to carry out possible attacks on Zagreb."[691] The Trial Chamber also quoted Witness Peter Galbraith who testified that Martić on 24 October 1993 had "in effect [said] that attacking civilian targets in Zagreb, attacking the city itself was an option…"[692] It further mentioned the cable by a United Nations envoy, who reported that Martić "spoke of massive rocket attacks on Zagreb which would leave 100,000 people dead."[693] Martić also argues that he relied on his advisors and articles published in Serbian newspapers.[694] However, given the evidence before the Trial Chamber which pointed to Martić's involvement in matters concerning the weaponry in the possession of the RSK, his statements in relation to the shelling itself and his position as President of the RSK and leader of the SVK,[695] the Appeals Chamber is satisfied that a reasonable Trial Chamber could have come to the conclusion beyond reasonable doubt that Martić knew about the effects of the M-87 Orkan when he ordered the shelling of Zagreb.

[684] Trial Judgement, paras 305-313.
[685] Trial Judgement, para. 461.
[686] Trial Judgement, para. 469.
[687] Defence Appeal Brief, paras 237-240; Defence Reply Brief, paras 112-115.
[688] Defence Reply Brief, para. 112, referring to Jožef Poje, 6 Jun 2006, T. 5114.
[689] Trial Judgement, fn. 1248.
[690] Trial Judgement, para. 463, referring in fn. 1251 to Section III G 2 of the Trial Judgement.
[691] Trial Judgement, para. 314, referring to Exhibit 12, "Letter from Martić to Milošević, 9 June 1993", p. 2.
[692] Trial Judgement, para. 316, referring to Peter Galbraith, 25 Apr 2006, T. 3778.
[693] Trial Judgement, para. 320, referring to Exhibit 97, "Cable from UN envoy Akashi, 6 May 1995", p. 1.
[694] Defence Reply Brief, para. 112.
[695] Trial Judgement, paras 155, 459.

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257. Moreover, the Appeals Chamber finds that the Trial Chamber reasonably concluded that because of the extensive media coverage of the shelling of 2 May 1995, the impact of the M-87 Orkan was known before the second round of shellings on 3 May 1995.[696] Martić's argument that little "structural damage" was caused by the first shelling, and that he had the right to assume that even if the M-87 Orkan had missed the military targets once again, the Croatian authorities would take the measures necessary for the protection of the civilian population[697] fails to address this finding by the Trial Chamber.

258. Consequently, this sub-ground of appeal is dismissed.

(c) <u>The civilian population was wilfully made the object of attack by Martić</u>

259. Based on its finding that the M-87 Orkan was an indiscriminate weapon and that Martić knew of its effects, the Trial Chamber found that Martić wilfully made the civilian population of Zagreb the object of the attack under Article 3 of the Statute.[698]

260. In relation to this crime, the Appeals Chamber considers that the Trial Chamber correctly stated the applicable law when it held that "a direct attack against civilians can be inferred from the indiscriminate weapon used."[699] The Trial Chamber also stated the requirement that "the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks."[700] Contrary to Martić's submissions, the Trial Chamber was not required to establish that the attack on Zagreb was one with "the primary purpose [...] to spread terror among the civilian population."[701] The Appeals Chamber notes that such a requirement only applies to the distinct crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.[702]

261. As stated above, the Trial Chamber correctly found that Martić had ordered the shelling of Zagreb, which resulted in the death and serious injury of numerous civilians. Considering that the Trial Chamber did not err when it found that the M-87 Orkan was an indiscriminate weapon, Martić's arguments as to the purported targeting of military objects in Zagreb[703] fail. In relation to

[696] Trial Judgement, para. 463.
[697] Defence Reply Brief, para. 114.
[698] Trial Judgement, para. 472.
[699] Trial Judgement, para. 69, referring to *Galić* Appeal Judgement, para. 132. See also *Strugar* Appeal Judgement, para. 275.
[700] Trial Judgement, para. 70, referring to *Kordić and Čerkez* Appeal Judgement, paras 55-67.
[701] Defence Appeal Brief, para. 235.
[702] See *Galić* Appeal Judgement, paras 99-104.
[703] Defence Appeal Brief, para. 235.

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Martić's *mens rea*, the Appeals Chamber recalls that the Trial Chamber reasonably found that he knew about the effects of the M-87 Orkan, yet ordered the shelling nevertheless.[704]

262. Consequently, this sub-ground of appeal is dismissed.

(d) The justification of the shelling of Zagreb as a reprisal or as a means of survival

263. On the question of reprisals, the Trial Chamber first recalled that a belligerent reprisal is an otherwise unlawful act rendered lawful by the fact that it is made in response to a violation of international humanitarian law by another belligerent.[705] It stated that a reprisal is subject to strict conditions and is only to be used as an exceptional measure.[706] Moreover, the Trial Chamber held that, even if Croatian units had committed serious violations of international humanitarian law as alleged by Martić, two of the other conditions that justify a reprisal would not have been met. First, the shelling was not a measure of last resort, because peace negotiations were conducted during Operation Flash until 3 May 1995.[707] Second, the RSK authorities had not formally warned the Croatian authorities before shelling Zagreb.[708] As a result, the Trial Chamber held that the shelling of Zagreb was illegal because it was not shown that the conditions justifying a reprisal had been met.[709]

264. The Appeals Chamber will begin by considering Martić's challenges to the Trial Chamber's findings regarding the existence of the two conditions, which the Trial Chamber found wanting. In support of his argument that the shelling of Zagreb was a measure of last resort, Martić refers to Exhibit 97, a message from Yasushi Akashi, United Nations Special Envoy, to Kofi Annan, Head of United Nations Peace Forces, dated 6 May 1995. Martić claims that this exhibit establishes that the shelling was ordered after Croatian forces had shelled Serb civilians fleeing Western Slavonija.[710] The Appeals Chamber notes that the Trial Chamber cited this exhibit and indicated that it had considered it in relation to Martić's argument regarding reprisals.[711] The Appeals Chamber further notes that the passage cited by Martić in his Appeal Brief does not in fact appear in this exhibit. Indeed, the author of the cable, Yasushi Akashi, merely recorded various statements made by Martić that the shelling had been ordered in response to shelling which had already been

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[704] See *supra*, paras 256-257.
[705] Trial Judgement, para. 465 referring to Claude Pillot, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva/Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987) ("ICRC Commentary on Additional Protocols"), para. 3457; *Kupreškić et al*. Trial Judgement, para. 535.
[706] Trial Judgement, paras 465-467.
[707] Trial Judgement, paras 302 and 468, fn. 943 referring to Witness MM-117, 13 Oct 2006, T. 9402-9403.
[708] Trial Judgement, para. 468.
[709] Trial Judgement, para. 468.
[710] Defence Appeal Brief, para. 230.
[711] Trial Judgement, fns 993-994.

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initiated by Croatian forces.[712] The Appeals Chamber thus finds that Martić has failed to show how the Trial Chamber erred in interpreting this exhibit.

265. Martić also claims that the Trial Chamber's conclusion that all other means had not been exhausted as peace negotiations were on-going at the time is erroneous in light of the fact that the Croatian side had rejected a Serb proposal for a cessation of the hostilities.[713] The Appeals Chamber first notes that Martić misrepresents the content of footnote 943 of the Trial Judgement. Witness MM-117, to whom the footnote made reference, just stated that on 1 May 1995, the Croatian side rejected the cessation of hostilities on that particular day. The Witness further testified that negotiations continued until an agreement was reached on 3 May 1995.[714] The two statements are not necessarily in contradiction one with the other. Moreover, having due regard to the Trial Chamber's findings on the on-going peace negotiations and the circumstances leading up to the shelling of Zagreb,[715] the Appeals Chamber finds that the Trial Chamber's conclusion was reasonable. In this last regard, the Appeals Chamber notes that Martić challenges the Trial Chamber's conclusion that he was in favour of non-peaceful solutions to the situation which had arisen in Western Slavonia.[716] However, as Martić merely reiterates that his decision to order the shelling of Zagreb was "legal and legitimate" and thus fails to show that the Trial Chamber erred in its assessment of the relevant evidence, this challenge is dismissed under category 4.

266. As for the condition of a prior formal warning, Martić concedes that there is no direct evidence that such a warning was given, but nonetheless asserts that the circumstances created a reasonable doubt that a warning had been given by the RSK.[717] The Appeals Chamber notes that the Trial Chamber considered the circumstances to which Martić refers and concluded otherwise.[718] As Martić merely seeks to substitute his interpretation of the evidence for that of the Trial Chamber's, this challenge is dismissed under category 3.

267. The Appeals Chamber finds that Martić has failed to show that the Trial Chamber erred in concluding that two conditions justifying reprisals had not been met and does not therefore deem it necessary to address Martić's other related challenges under this sub-ground of appeal.

268. As for Martić's alternative argument that the shelling of Zagreb was a lawful military action conducted in self-defence,[719] the Appeals Chamber recalls that "whether an attack was ordered as

[712] See Exhibit 97, paras 1, 4, 13 and 15.
[713] Defence Appeal Brief, para. 231, referring to Trial Judgement, fn. 943.
[714] Witness MM-117, 13 Oct 2006, T. 9402-9409.
[715] Trial Judgement, paras 302-303, 314-322.
[716] Defence Appeal Brief, para. 229.
[717] Defence Appeal Brief, para. 232.
[718] Trial Judgement, paras 302-313 and 468. See, in particular, fn. 1264.
[719] Defence Appeal Brief, paras 233-234.

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pre-emptive, defensive or offensive is from a legal point of view irrelevant […]. The issue at hand is whether the way the military action was carried out was criminal or not."[720] The Appeals Chamber has previously rejected Martić's challenges to the Trial Chamber's findings that the M-87 Orkan was an indiscriminate weapon,[721] that the shelling of Zagreb constituted a widespread attack against the civilian population,[722] that Martić made the civilian population the object of attack,[723] and that he ordered the shelling of Zagreb.[724] As Martić has failed to show any error in the Trial Chamber's conclusion that he deliberately targeted the civilian population of Zagreb,[725] his argument that the shelling of Zagreb was conducted in self-defence must fail. The Appeals Chamber takes note of Martić's arguments in his concluding statement at the appeal hearing that "the Serbs were not aggressors but rather defended themselves in a situation when the United Nations made no attempt to protect them […]."[726] However, in particular in light of the fact that the prohibition against attacking civilians is absolute,[727] the Appeals Chamber fails to see how this claim could justify Martić's actions in relation to the shelling of Zagreb.

269. This sub-ground of appeal is therefore dismissed.

(e) Precautions pursuant to Article 58 Additional Protocol I

270. The Trial Chamber did not address the question of whether or not Croatia had obligations to take precautions against the effects of attacks according to Article 58 of Additional Protocol I. Martić's argues that the Trial Chamber was required to find a violation of Article 58 of Additional Protocol I by Croatia because "if preventive measures were taken, there would have been no civilian casualties."[728] The Appeals Chamber squarely rejects this argument. It is one of the pillars of international humanitarian law that its provisions have to be applied in all circumstances.[729] One side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all of its obligations.[730] Consequently, Martić's arguments as to alleged violations of Article 58 of Additional Protocol I by Croatia are irrelevant when assessing his individual criminal responsibility for violating international humanitarian law, in this case the

[720] *Kordić and Čerkez* Appeal Judgement, para. 812. See also *Kordić and Čerkez* Trial Judgement, para. 452 and ICRC Commentary on Additional Protocols, para. 1927.
[721] See *supra*, para. 252.
[722] See *supra*, para. 255.
[723] See *supra*, para. 261.
[724] See *supra*, para. 235.
[725] Trial Judgement, para. 472.
[726] AT. 163.
[727] *Strugar* Appeal Judgement, para. 275 and references cited in fn. 688.
[728] Defence Appeal Brief, para. 252.
[729] See Article 1 common to the Geneva Conventions and Article 1 of Additional Protocol I.
[730] See ICRC Commentary on Additional Protocols, paras 47 *et seq*.

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prohibition to make the civilian population the object of attack. This sub-ground of appeal is thus dismissed.

3. Conclusion

271. For the foregoing reasons, the Appeals Chamber dismisses Martić's eighth ground of appeal.

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IX. ALLEGED ERROR OF LAW CONCERNING ARTICLE 5 OF THE STATUTE (PROSECUTION'S GROUND OF APPEAL)

A. Introduction

272. The Prosecution's sole ground of appeal concerns the Trial Chamber's legal analysis of Article 5 of the Statue and its applicability to persons *hors de combat*. Article 5 of the Statute reads:

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

273. In considering crimes against humanity under Article 5 of the Statute, the Trial Chamber held that the Prosecution must prove beyond a reasonable doubt that the victim of the alleged offence was a civilian in accordance with Article 50 of Additional Protocol I, which reads in part:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.[731]

It accordingly held that persons *hors de combat* do not constitute civilians for the purposes of Article 5 of the Statute.[732] The Trial Chamber also found that the application of Article 5 of the Statute to persons *hors de combat* would impermissibly blur the principle of distinction between civilians and combatants.[733]

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[731] Article 4(A) of the Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949 ("Third (Geneva) Convention") reads, in its relevant part: "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. […] (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." Article 43 of Additional Protocol I reads, in part: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates".
[732] Trial Judgement, paras 51 and 55.
[733] Trial Judgement, para. 56.

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274. The Prosecution submits that the Trial Chamber committed an error of law in finding that persons *hors de combat* could not constitute victims of crimes against humanity. It requests that the Appeals Chamber correct the legal error, revise the Trial Chamber's factual findings relating to Counts charged under Article 5 of the Statute, and adjust Milan Martić's sentence accordingly.[734]

B. Arguments of the Parties

1. Prosecution

275. In support of its Appeal, the Prosecution presents two arguments. First, the Prosecution argues that the expression "civilian population" (or "civilians") under Article 5 of the Statute should not be limited to its meaning under international humanitarian law (that is, individuals who are not member of the armed forces),[735] but should also include other categories of persons, in particular persons *hors de combat*. Second, the Prosecution argues that, in any event, the requirement that the crimes be "directed against any civilian population" does not necessarily entail that each single victim of the crimes actually be a civilian.

276. With respect to its first argument, the Prosecution advances three principal errors in the Trial Chamber's findings. First, the Prosecution alleges that the Trial Chamber erred in not following the approach adopted in the *Kordić and Čerkez* Appeal Judgement, in which the Appeals Chamber upheld Article 5 convictions for acts committed against persons *hors de combat*.[736] The Prosecution contends that the relevant holdings of the *Kordić and Čerkez* Appeal Judgement [737] were binding *ratio decidendi* for the Trial Chamber.[738]

277. The Prosecution submits that the broad interpretation of the term "civilians" adopted in *Kordić and Čerkez* accords with the overall object and purpose of crimes against humanity of protecting human dignity in all circumstances.[739] The Prosecution claims further that the term "civilians" in the sense of Article 5 of the Statute should be interpreted to mean all individuals covered by Common Article 3 of the Geneva Conventions ("Common Article 3"), to whom the Prosecution refers as "non-combatants" in a generic sense. This interpretation would exclude as

[734] Prosecution Notice of Appeal, paras 2-5.

[735] The Appeals Chamber notes that the parties often refer to "international humanitarian law", apparently to refer to the law of armed conflict in a strict sense, excluding crimes against humanity. The Appeals Chamber will adopt the same language for ease of reference.

[736] Prosecution Appeal Brief, paras 14, 19-20, citing *Kordić and Čerkez* Appeal Judgement, paras 421-422, 480, 570-571.

[737] See, in particular, *Kordić and Čerkez* Appeal Judgement, para. 421.

[738] Prosecution Appeal Brief, para. 32, referring to *Aleksovski* Appeal Judgement, paras 110 and 113.

[739] Prosecution Appeal Brief, paras 21-24, citing *Kupreškić et al.* Trial Judgement, paras 547-548; *Jelisić* Trial Judgement, para. 54. See also Prosecution Reply Brief, para. 18; Prosecution Appeal Brief, para. 26, citing a number of ICTR and ICTY precedents.

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possible victims those civilians who, by taking active part in the hostilities, have lost their protected status, but still remain civilians according to the laws of war.[740] The Prosecution also submits that, contrary to the Trial Chamber's finding,[741] the *Kordić and Čerkez* Appeal Judgement is internally consistent.[742]

278. Second, the Prosecution alleges that the Trial Chamber erred in applying the definition of civilian provided by Article 50 of Additional Protocol I to the context of crimes against humanity.[743] The Prosecution submits that, although Article 50 of Additional Protocol I provides a useful starting point for a definition of the term "civilian" under Article 5 of the Statute, the distinct features of crimes against humanity should be taken into account.[744] It argues that a strict adoption of the definition found in Article 50 of Additional Protocol I, which reflects the particular legal framework regulating international armed conflicts,[745] deprives crimes against humanity of their distinctive purpose of protecting human dignity in cases that may fall beyond the reach of international humanitarian law.[746] The Prosecution argues that such a definition is too narrow in that it excludes persons who are not lawful targets under international humanitarian law (persons *hors de combat*) as well as too broad in that it includes lawful targets (civilians participating in the hostilities).[747] It submits moreover that this definition is not directly transferable to non-international armed conflicts where the notion of "combatant" does not exist.[748] Furthermore, it argues that the interpretation followed by the Trial Chamber would lead to absurd results in the

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[740] AT. 118-125, citing *inter alia* the ICRC Commentary on Additional Protocols regarding Article 41 of Additional Protocol I ("It is a fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked. In this respect, harmless civilians and soldiers hors de combat are *a priori* on the same footing"). See also AT. 130 and Prosecution Reply Brief, paras 17 and 43-46, referring to Prosecution Appeal Brief, paras 28-31. This argument appears to follow the one according to which victims who were *hors de combat* should be regarded as civilians under Article 5 of the Statute because they are not lawful objects of attack under international humanitarian law. See Prosecution Appeal Brief, para. 27, citing Common Article 3; Additional Protocol I, Articles 41(1), 41(2) and 85(3); ICRC Commentary on Additional Protocols, para. 1605. See also AT. 108 and Prosecution Appeal Brief, paras 28-31, citing Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge: Cambridge University Press, 2005), vol. I, p. 3; ICRC Commentary on Additional Protocols, para. 1602; Drafting History to Additional Protocol I, CDDH/III/SR.29, para. 33, p. 276.

[741] Prosecution Appeal Brief, para. 33, referring to Trial Judgement, para. 53, fn. 105. See also Prosecution Reply Brief, paras 12-16, referring to *Kordić and Čerkez* Appeal Judgement, paras 421, 570.

[742] Prosecution Appeal Brief, para. 33, referring to Trial Judgement, para. 53, referring to *Kordić and Čerkez* Appeal Judgement, para. 458. See also Prosecution Appeal Brief, para. 33, referring to the Third Geneva Convention, Articles 21-24; Fourth Geneva Convention, Articles 42-43 and 78.

[743] Article 50 of the Additional Protocol I provides: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

[744] Prosecution Appeal Brief, paras 35-37.

[745] Prosecution Appeal Brief, paras 38-39. See also Prosecution Reply Brief, paras 20 and 38-40.

[746] Prosecution Appeal Brief, para. 35.

[747] Prosecution Appeal Brief, paras 40-41, relying, *inter alia*, on Additional Protocol I, Articles 48 and 51(3). See also AT. 108 and 117.

[748] Prosecution Appeal Brief, paras 42-43.

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territory of the former Yugoslavia, where the system of Territorial Defence effectively meant that every adult male was, in a sense, a member of the armed forces.[749] Finally, the Prosecution refers to post World-War II jurisprudence, which holds that victims of crimes against humanity can include members of the armed forces[750] and resistance fighters[751] as well as to the negotiations of the Rome Statute,[752] during which several delegations argued that the term "civilian population" in the context of crimes against humanity should not be interpreted as strictly limited to civilians.[753]

279. Third, the Prosecution alleges that the Trial Chamber erred in concluding that the *Blaškić* and *Galić* Appeal Judgements compelled it to find that persons *hors de combat* could not constitute victims of crimes against humanity pursuant to Article 5 of the Statute.[754] With respect to *Blaškić*, the Prosecution argues that the Appeals Chamber merely held that Article 50 of Additional Protocol I was relevant to the definition of civilians under Article 5 of the Statute and it did not consider whether persons *hors de combat* constitute an exception to that definition.[755] The Prosecution also submits that the *Blaškić* Appeals Chamber's pronouncements on part-time combatants are not relevant to persons *hors de combat*.[756] With respect to *Galić*, the Prosecution argues that the Appeals Chamber's equivocal statement on persons *hors de combat* "in the context of international humanitarian law" does not exclude the possibility that persons *hors de combat* may nevertheless be civilians in the distinct context of crimes against humanity.[757]

280. With respect to its alternative ground of appeal, the Prosecution submits that even if the Appeals Chamber found that *hors de combat* victims do not constitute civilians for the purposes of Article 5 of the Statute, it should nevertheless find that persons *hors de combat* are covered by the

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[749] AT. 108-109.
[750] Prosecution Appeal Brief, para. 44, referring to *Supreme Court in the British Occupied Zone*, OGHSt 1, 217 (228); *Supreme Court in the British Occupied Zone*, OGHSt 1, 45 (47); *Supreme Court in the British Occupied Zone*, OGHSt 2, 231 (241-242). In respect of these cases, see also AT. 154-155.
[751] Prosecution Appeal Brief, para. 45, referring to *Crim. 20 décembre 1985, Bull. n°407, Cour de cassation (chambre criminelle)*, *M. Barbie*, translated and reprinted in ILR, vol. 78, pp. 125-148, at 140 ; *Crim. 27 novembre 1992, Bull. n°394, Cour de cassation (chambre criminelle)*, *M. Touvier*, translated and reprinted in ILR, vol. 100, pp. 338-364, at 352.
[752] Prosecution Appeal Brief, para. 46, referring to Rome Statute of the International Criminal Court, 37 I.L.M. 1002, 2187 U.N.T.S. 90.
[753] Prosecution Appeal Brief, para. 46, referring to Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court", in Roy S. Lee ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer, 1999), pp. 79-126, at 97, fn. 54. See also AT. 127-129 on the post-World War II developments.
[754] Prosecution Appeal Brief, para. 47, referring to Trial Judgement, paras 51-55. See also AT. 125-126, also referring to the *Krajišnik* Trial Judgement, para. 706, and the *Haradinaj* Trial Judgement, para. 107.
[755] Prosecution Appeal Brief, para. 49, referring to *Blaškić* Appeal Judgement, paras 110 and 113.
[756] Prosecution Appeal Brief, paras 50-51.
[757] Prosecution Appeal Brief, paras 56-57, citing *Galić* Appeal Judgement, para. 144. See also Prosecution Appeal Brief, para. 58 as well as AT. 109, referring to: *Naletilić and Martinović* Trial Judgement; *Krstić* Trial Judgement; *Blagojević and Jokić* Trial Judgement; *Prosecutor v. Moinina Fofana et al.*, Case No. SCSL-04-14-A, Judgement, 28 May 2008.

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provision on crimes against humanity. Relying on case-law and academic opinion,[758] the Prosecution argues that Article 5 of the Statute does not require that individual victims of crimes against humanity be civilians, but only that the crimes be committed *as part of a widespread or systematic attack* directed against the civilian population.[759]

281. In response to a specific question addressed to both parties at the Appeal Hearing,[760] the Prosecution elaborated on this argument.[761] In particular, it claimed that the inclusion of the "civilian population" clause in the *chapeau* of Article 5 of the Statute served to ensure that legitimate combat action is excluded from the reach of crimes against humanity: without this clause, any widespread or systematic attack against combatants could attract criminal responsibility under Article 5 of the Statute.[762]

282. The Prosecution further submits that the inclusion of *hors de combat* victims within the scope of Article 5 of the Statute does not infringe the principle of legality[763] and that in 1991 customary international law did not exclude members of the armed forces from the scope of application of crimes against humanity.[764]

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[758] Prosecution Appeal Brief, para. 60, citing *Kordić and Čerkez* Appeal Judgement, para. 480; *Naletilić and Martinović* Trial Judgement, paras 263-271, 445-447. See, however, AT. 107 and 117, where the Prosecution suggests that the two arguments may also be interpreted as not being pleaded in the alternative, but rather as "mutually reinforcing".

[759] Prosecution Reply Brief, para. 6, referring to, *inter alia*, *Tadić* Appeal Judgement, paras 248, 271; *Kunarac et al.* Appeal Judgement, paras 85-97; *Kordić and Čerkez* Appeal Judgement, paras 93-100; *Galić* Appeal Judgement, paras 142-146; Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993), U.N. Doc. 5/25704, 3 May 1993, para. 48. See also AT. 110 and Prosecution Reply Brief, paras 7-10, referring to, *inter alia*, *Kunarac et al.* Appeal Judgement, para. 91; *Blaškić* Appeal Judgement, paras 106-107, 437-441; *Kordić and Čerkez* Appeal Judgement, para. 96; *Galić* Appeal Judgement, para. 132.

[760] See Order for Preparation of Appeal Hearing, 29 May 2008, p. 2. The question reads: "As an alternative to its submissions under Ground 1, the Prosecution argues that, even if the Appeals Chamber were to find that *hors de combat* victims do not constitute civilians for the purposes of Article 5 of the Statute, it should nevertheless find that persons *hors de combat* are covered by that Article (Prosecution Appeal Brief, para. 60 and Prosecution Reply Brief, paras 6-11). The Appeals Chamber invites the parties to elaborate on this issue, especially in light of the *chapeau* of Article 5 of the Statute and the relevant jurisprudence."

[761] AT. 110-116, referring, *inter alia*, to *Tadić* Trial Judgement, para. 644, *Kunarac et al.* Appeal Judgement, paras 85 and 96 and *Blaškić* Appeal Judgement, para. 101.

[762] AT. 117. See also Prosecution Reply Brief, paras 18-19, referring to, *inter alia*, *Kunarac et al.* Appeal Judgement, para. 91.

[763] Prosecution Reply Brief, paras 23-25, referring to *Kordić and Čerkez* Appeal Judgement, paras 421-422, 480, 570-571; *Krstić* Trial Judgement, paras 61-67, 504; *Naletilić and Martinović* Trial Judgement, paras 334, 681; *Blagojević and Jokić* Trial Judgement, paras 489-491, 552.

[764] AT. 130; Prosecution Reply Brief, paras 26-37, referring to, *inter alia*, Fourth Hague Convention of 18 October 1907, Respecting the Laws and Customs of War on Land, Regulations, 118 L.N.T.S. 342 ("Fourth Hague Convention"), Preamble, para. 7; Charter of the International Military Tribunal of 8 August 1945, 82 U.N.T.S. 279 ("Nuremberg Charter"), Article 6(c); Charter of the International Military Tribunal for the Far East of 19 January 1946 (amended 26 April 1946), T.I.A.S. 1589, Article 5(c); Law No. 10 of the Control Council for Germany, Official Gazette of the Control Council for Germany, No. 3, p. 22 ("Control Council Law No. 10"), Article 2(1)(c); *United States v. Wilhelm von Leeb et al.*, "*The High Command Case*" Judgement of 27 October 1948, Military Tribunal V, Law Reports of Trials of War Criminals (Buffalo, New York: William S. Hein & Co., Inc., 1997) ("Law Reports of Trials of War Criminals"), vol. XI, at pp. 520, 675, 679, 683; Report of the International Law Commission on the Work of its 43rd Session, 29 April – 9 July 1991, UN GAOR, 46th Session, Supplement No. 10, U.N. Doc. A/46/10 , p. 103; Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, UN GAOR, 51st Session, Supplement No. 10, U.N. Doc. A/51/10, p. 47; International Convention on the Suppression and Punishment of the

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283. Finally, the Prosecution submits that the fact that crimes committed against persons *hors de combat* may also be covered under Article 2 or Article 3 of the Statute is not a substitute for crimes against humanity protections. The Prosecution emphasises that crimes against humanity are distinct from war crimes in that they pertain to crimes committed on a large scale and address the impact of the perpetrator's conduct on the whole of humanity.[765]

284. As a result, the Prosecution claims that the *hors de combat* victims should have been included in Milan Martić's Article 5 convictions for murder (count 3),[766] torture (count 6),[767] and inhumane acts (count 7)[768] and persecution (count 1).[769] Consequently, the Prosecution requests that the Appeals Chamber revise Martić's sentence to include the persons *hors de combat* and to thus more appropriately convey the gravity of those crimes.[770]

2. Defence

285. Martić responds that the Trial Chamber did not err in concluding that persons *hors de combat* could not constitute victims of crimes against humanity under Article 5 of the Statute. He submits that the *Kordić and Čerkez* Appeal Judgement does not contain binding *ratio decidendi* pertaining to the status of persons *hors de combat* under Article 5 of the Statute. Further, he claims that the conclusions of the Appeals Chamber in *Kordić and Čerkez* should be interpreted as implying that civilians were victims of murder under Article 5 of the Statute while soldiers *hors de combat* were victims of wilful killings under Article 2 of the Statute.[771] In the alternative, Martić argues that the *Kordić and Čerkez* ruling is not sufficiently clear.[772]

286. Martić argues that persons *hors de combat* are members of the armed forces, cannot claim civilian status under international humanitarian law and, while they may constitute protected

Crime of Apartheid of 30 November 1973, 1015 U.N.T.S. 243 ("Apartheid Convention"); Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277. The Prosecution also refers to post-World War II case law from para. 23 of its Appeal Brief.

[765] Prosecution Reply Brief, paras 47-48, referring to *Erdemović* Judgement on Sentencing Appeal, Separate Opinion of Judge McDonald and Judge Vorah, para. 21; *Tadić* Appeal Judgement, para. 286. The Prosecution also points out that under the Tribunal's case law on cumulative convictions, war crimes and crimes against humanity are distinct crimes which justify multiple convictions: *Čelebiči* Appeal Judgement, paras 412-413; *Jelisić* Appeal Judgement, para. 82; *Kunarac et al.* Appeal Judgement, para. 176.

[766] Prosecution Appeal Brief, paras 62-63, referring to Trial Judgement, paras 251, 254, 259, 387, 390-391.

[767] Prosecution Appeal Brief, paras 65-68, 70-71, 76-77, referring to Trial Judgement, paras 277, 407-411, 415-419, 420-422.

[768] Prosecution Appeal Brief, paras 65-68, 70-71, 73-74, 76-77, referring to Trial Judgement, paras 277, 407-411, 415-419, 420-422.

[769] Prosecution Appeal Brief, paras 65-68, referring to Trial Judgement, paras 407-411, 415-416.

[770] Prosecution Appeal Brief, paras 81-83. See also AT. 131-133.

[771] Defence Response Brief, paras 8-11, referring to *Kordić and Čerkez* Appeal Judgement, paras 421-422, 820.

[772] Defence Response Brief, para. 12.

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persons under Article 2 of the Statute, cannot thereby be equated with civilians.[773] In this respect, he stresses that the *Kordić and Čerkez* Appeal Judgement upheld convictions for the crime of imprisonment only in relation to individuals who were not members of the armed forces[774] and notes that the case-law of the Tribunal in this respect is inconsistent.[775]

287. Martić also distinguishes the national case-law cited by the Prosecution on the basis that Article 5 of the Statute expressly refers to the civilian status of the victim of a crime against humanity.[776] He thus submits that granting civilian status to members of the armed forces for the purposes of Article 5 of the Statute goes against the very aim of the crimes against humanity provision, which is concerned with protecting the civilian population.[777] In addition, Martić contends that, contrary to the Prosecution's submissions, the determination of a person's status as a civilian, especially for the purposes of crimes against humanity, is not affected by whether a given conflict is international or non-international.[778] He finally argues that crimes against humanity are not simply an extension of war crimes. Rather, they encompass offences which cannot be regarded as war crimes and, in particular, do not include conduct targeting members of the armed forces.[779]

288. Martić argues further that the rules of interpretation fail to support the Prosecution's contention that the term civilian under Article 5 of the Statute should encompass persons *hors de combat*[780] as that interpretation does not accord with the ordinary meaning of the term "civilian" as defined by Article 50 of Additional Protocol I.[781] He also claims that there is no evidence that the Security Council or any State intended to give the term a special meaning in the Statute of the Tribunal.[782] Martić further contends that this interpretation is not consistent with the objective of crimes against humanity, namely the protection of the civilian population from the horrors of war.[783] Martić claims that the Prosecution's interpretation is contrary to the rule of strict interpretation in criminal law.[784]

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[773] Defence Response Brief, paras 23-27, 30-32 and 34-35, referring, *inter alia*, to ICRC Commentary on Additional Protocols, para. 1602. See also AT. 134-136.
[774] Defence Response Brief, para. 33.
[775] AT. 136-138.
[776] Defence Response Brief, para. 28. See also AT. 140-141.
[777] Defence Response Brief, paras 13-14.
[778] Defence Response Brief, paras 19-21.
[779] Defence Response Brief, paras 27 and 29, referring to UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: United Nations War Crimes Commission by His Majesty's Stationery Office, 1948), pp. 174 and 178.
[780] Defence Response Brief, para. 15.
[781] Defence Response Brief, para. 16, referring to Additional Protocol I, Article 50; *Blaškić* Appeal Judgement, paras 110-111; see also AT. 148-151, on the distinction between civilians, individuals *hors de combat* and other members of the armed forces who are nonetheless protected under humanitarian law.
[782] Defence Response Brief, para. 17. See also AT. 138-139.
[783] Defence Response Brief, paras 18-19. See also AT. 145.
[784] Defence Response Brief, para. 22. See also AT. 141-144.

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289. Martić also submits that the reasoning in the *Mrkšić et al.* Trial Judgement regarding the applicability of Article 5 of the Statute to persons *hors de combat* should be regarded as part of his submissions in the present case.[785] He contends that all victims of crimes against humanity must meet the strict definition of "civilian", which is a "general requirement for the application of Article 5 of the Statute".[786] In other words, there is no effective difference between the "civilian population" and individual "civilians".[787]

290. Martić thus opposes the Prosecution's request that the Appeals Chamber revise the sentence imposed on him. He stresses the Prosecution's duty to seek fair convictions and truth[788] and argues that his sentence cannot be determined based on a mere calculation of the number of victims because the Trial Chamber's finding that he was responsible for the corresponding crimes is erroneous.[789]

C. Discussion

1. The definition of "civilian"

291. The Prosecution's central argument is that the Trial Chamber erred in defining "civilian" too narrowly as not including other categories of individuals protected by international humanitarian law, such as persons *hors de combat*.

292. In *Blaškić*, the Appeals Chamber overturned the Trial Chamber's holding that the specific situation of the victim at the time of the crime may be determinative of his civilian or non-civilian status and held that members of the armed forces and other combatants (militias, volunteer corps and members of organised resistance groups) cannot claim civilian status.[790] In its reasoning, the Appeals Chamber considered that

> [i]n determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts." Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.[791]

The Appeals Chamber went on to find that:

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[785] Defence Response Brief, para. 37, referring to *Mrkšić et al.* Trial Judgement, paras 440-463; see also AT. 136-137.
[786] AT. 138 and 154.
[787] AT. 147 and 152-153.
[788] Defence Response Brief, paras 39-40.
[789] Defence Response Brief, paras 38-39, 41.
[790] *Blaškić* Appeal Judgement, paras 113-114.
[791] *Blaškić* Appeal Judgement, para. 110.

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> Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.[792]

It therefore concluded that the Trial Chamber had erred in its characterization of the civilian population and of civilians under Article 5 of the Statute by holding that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining whether the victim is a "civilian".[793]

293. While the Prosecution argues that the Appeals Chamber in *Kordić and Čerkez*, apparently departing from *Blaškić*, established a binding precedent when it found that persons placed *hors de combat* "were without a doubt […] 'civilians' in the sense of Article 5 of the Statute",[794] the Appeals Chamber does not find this argument persuasive.

294. First, the *Kordić and Čerkez* Appeals Chamber did not, at any point, set out reasoning in support of an expansive interpretation of the term civilian, nor did it address the prior holding rendered in the *Blaškić* Appeal Judgement on this same issue.[795] On the contrary, in its discussion of the relevant applicable law, the *Kordić and Čerkez* Appeals Chamber followed the *Blaškić* precedent:

> In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. The Appeals Chamber considers that Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.[796]

295. Second, the Appeals Chamber recalls that, in the *Blaškić* and *Galić* Appeal Judgements, it found that the definition of civilian contained in Article 50(1) of Additional Protocol I was applicable to crimes against humanity.[797] In *Blaškić*, the Appeals Chamber expressly rejected giving the term civilian a broad interpretation for the purposes of crimes against humanity:

> As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed

[792] *Blaškić* Appeal Judgement, para. 113.
[793] *Blaškić* Appeal Judgement, para. 116.
[794] *Kordić and Čerkez* Appeal Judgement, para. 421. See also *Kordić and Čerkez* Appeal Judgement, paras 480, 570-571.
[795] See *Blaškić* Appeal Judgement, para. 114.
[796] *Kordić and Čerkez* Appeal Judgement, para. 97 (footnotes referring to the *Blaškić* Appeal Judgement omitted). The application of this principle is arguably somewhat inconsistent (compare *Kordić and Čerkez* Appeal Judgement, para. 480 with paras 596, 602, 607, 614-616, 630, 632 and 635).
[797] See *Blaškić* Appeal Judgement, paras 110-114; *Galić* Appeal Judgement, para. 144, fn. 437.

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organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.[798]

The *Galić* Appeal Judgement is likewise unambiguous in this respect.[799]

296. These holdings formed part and parcel of the Appeals Chamber's reasoning on errors alleged by the appellants in these two cases.[800] Accordingly, the Appeals Chamber finds that the Trial Chamber did not err by following the line of authority set in the *Blaškić* and *Galić* Appeal Judgements on the definition of "civilian" under Article 5 of the Statute.

297. With respect to the argument of the Prosecution that the definition of civilian enshrined in Article 50(1) of Additional Protocol I is not applicable to the distinctive context of crimes against humanity,[801] the Appeals Chamber recalls that the Tribunal has consistently held, since its first cases, that provisions of the Statute must be interpreted according to the "natural and ordinary meaning in the context in which they occur", taking into account their object and purpose.[802] In this regard, the Appeals Chamber observes that the definition of civilian found in Article 50(1) of Additional Protocol I accords with the ordinary meaning of the term "civilian" (in English) and "*civil*" (in French) as persons who are not members of the armed forces.[803] As such, the definition

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[798] *Blaškić* Appeal Judgement, para. 114.
[799] See, in particular, *Galić* Appeal Judgement, para. 144 ("The Trial Chamber held, when considering the *chapeau* requirement of a 'civilian population', that '[t]he definition of a 'civilian' is expansive and includes individuals who at one time performed acts of resistance, as well as persons *hors de combat* when the crime was perpetrated'. The Trial Chamber did not intend to give a definition of an individual civilian; indeed, it would not necessarily be correct to state, as the Trial Chamber's wording seems to suggest, that a person *hors de combat* is a civilian in the context of international humanitarian law. The Appeals Chamber understands the Trial Chamber to reiterate well-established jurisprudence regarding the *chapeau* element of 'civilian population'. As such, the Appeals Chamber has previously held that 'the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic'. Likewise, the presence of soldiers does not necessarily deprive a civilian population of its civilian character, nor does the presence of persons *hors de combat*.") and fn. 437 ("Persons *hors de combat* are certainly protected in armed conflicts through Common Article 3 of the Geneva Conventions. This reflects a principle of customary international law. Even *hors de combat*, however, they would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention; as such, they are not civilians in the context of Article 50, paragraph 1, of Additional Protocol I. Common Article 3 of the Geneva Conventions supports this conclusion in referring to '[p]ersons taking no active part in the hostilities, including *members of armed forces* who have laid down their arms *and those placed hors de combat* by sickness, wounds, detention, or any other cause'" (reference omitted)). This principle has been also followed by *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, para. 219 (confirmed on appeal).
[800] See *Blaškić* Appeal Judgement, paras 103-116; *Galić* Appeal Judgement, paras 142-144.
[801] See *supra*, para. 278 (and references cited therein).
[802] *Tadić* Appeal Judgement, paras 282-283, 285 (quoting with approval the *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1949, ICJ Reports 1950, p. 8), in relation to the wording of Article 5 of the Statute.
[803] Oxford English Dictionary (Oxford: Oxford University Press, 2007), "civilian": "One who does not professionally belong to the Army or the Navy; a non-military person." Dictionnaire de l'Académie Française 9th Edition (Paris : Éditions Fayard, 1991), "civil": "Par opposition à *Militaire*. " (emphasis in the original).

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of civilians relied upon by the Prosecution is contrary to the ordinary meaning of the term "civilian."

298. As for the Prosecution's reference to case-law considering whether or not victims of Article 3 crimes were participating in the hostilities at the time of the offence,[804] the Appeals Chamber notes that this jurisprudence does not redefine the meaning of the term "civilian", but merely refers to the rule laid down in Article 51(3) of Additional Protocol I, according to which civilians enjoy "general protection against dangers arising from military operations" unless and for such time as they take a direct part in hostilities.[805]

299. The Appeals Chamber considers that while certain terms have been defined differently in international humanitarian law and in the context of crimes against humanity, the fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings under Article 3 and Article 5 of the Statute.[806] Such definitional consistency also accords with the historical development of crimes against humanity, intended as they were to fill the gap left by the provisions pertaining to crimes against peace and war crimes in the Charter of the International Military Tribunal of 8 August 1945 ("Nuremberg Charter").[807]

300. As for the Prosecution's argument that the definition in Article 50 of Additional Protocol I is not directly transferable to non-international armed conflicts (where the notion of "combatant" does not exist),[808] the Appeals Chamber notes that Article 13 of Additional Protocol II[809] refers to the protection of civilians and the civilian population. According to the ICRC Commentary, this provision corresponds with Article 50 of Additional Protocol I and, as a result, civilians in the

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[804] See *supra*, para. 278 (and references cited therein).
[805] See, for example, *Galić* Trial Judgement, para. 48.
[806] See, on the relevance of international humanitarian law to crimes against humanity, *Kunarac et al.* Appeal Judgement, para. 91 (to the extent that the crimes against humanity were committed in the course of an armed conflict); *Blaškić* Appeal Judgement, para. 106; *Krnojelac* Trial Judgment, para. 54; *Galić* Trial Judgement, para. 144. See also, on the need for a rigorous and clear definition of the notion of civilian, ICRC Commentary on Additional Protocols, paras 1911-1913. The Appeals Chamber notes, moreover, that the Prosecution argues that the principle of distinction would be undermined by excluding persons *hors de combat* from the purview of crimes against humanity. The Appeals Chamber recalls, however, that the principle of distinction in fact refers to the obligation for warring parties to distinguish at all times between civilians and combatants.
[807] See UNWCC Report, p. 174: "The notion of crimes against humanity, as it evolved in the Commission, was based upon the opinion that many offences committed by the enemy could not technically be regarded as war crimes *stricto sensu* on account of one of several elements, which were of a different nature. (…) It was felt that, but for the fact that the victims were technically enemy nationals, such persecutions were otherwise in every respect similar to war crimes." See also Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), pp. 17 and 22-24; Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2nd ed. 2008), pp. 117-123. See, in particular, the *Neddermeier* case, decided on 10 March 1949 by the British Court of Appeal established under Control Council Law No. 10 (text in Germany – British Zone of Control, Control Commission Courts, Court of Appeals Report, Criminal Cases, 1949, no. 1, 58-60).
[808] See *supra*, para. 278.

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context of non-international armed conflicts can be defined as those persons who do not belong to the armed forces, militias or volunteer corps forming part of such armed forces, organised resistance groups or a *levée en masse*.[810]

301. The Prosecution also refers to post World-War II jurisprudence, which holds that victims of crimes against humanity can include members of the armed forces and resistance fighters.[811] Insofar as this argument tends to demonstrate that members of the armed forces and resistance fighters *hors de combat* are civilians, it is rejected on the basis of the foregoing discussion. However, if this contention by the Prosecution challenges the Trial Chamber's finding that *any victim* of crimes against humanity must necessarily be civilian, the Appeals Chamber will address it in the next section.

302. In light of the above, the Appeals Chamber finds that the definition of civilian contained in Article 50 of Additional Protocol I reflects the definition of civilian for the purpose of applying Article 5 of the Statute and that the Trial Chamber did not err in finding that the term civilian in that context did not include persons *hors de combat*. This does not, however, answer the second contention raised by the Prosecution, *i.e.*, whether the fact that persons *hors de combat* are not civilians for the purpose of Article 5 means that only civilians may be victims of crimes against humanity. The Appeals Chamber will turn to this second argument in the next section.

2. Individual victims as civilians

303. The second issue raised by the Prosecution is whether the condition under the *chapeau* of Article 5 of the Statute – that the attack be directed against a civilian population – also requires that all victims of each individual crime under Article 5 have civilian status, and in particular, whether the *chapeau* excludes persons *hors de combat* who are present within the civilian population from constituting victims of a crime against humanity. In response, Martić argues that a proper reading of the Statute requires that individual victims also be civilians in order to fall under the jurisdiction of the Tribunal pursuant to Article 5 of the Statute.[812] In this respect, he argues that the reference to "civilians" in Article 5 should be considered as meaning that both the *chapeau* requirement of a widespread or systematic attack *and* the individual crimes listed in that provision must target civilians.

[809] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva of 8 June 1977, 1125 U.N.T.S. 609.
[810] ICRC Commentary on Additional Protocols, paras 4761-4789.
[811] Prosecution Appeal Brief, paras 44-45 and AT. 154-155.
[812] Defence Response Brief, para. 28. See also AT. 140-141.

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304. As discussed above, provisions of the Statute must be interpreted according to the "natural and ordinary meaning in the context in which they occur", taking into account their object and purpose.[813] Article 5 of the Statute reads, in part:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population […]

305. When dealing with the expression "directed against any civilian population", the Tribunal has interpreted it as requiring "that the acts be undertaken on a widespread or systematic basis".[814] The Appeals Chamber has indeed clarified that

> "[t]he expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.' In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[815]

Thus, on the face of it, the requirement that the acts of an accused must be part of a widespread or systematic attack directed against any civilian population does not necessarily imply that the criminal acts within this attack must be committed against civilians only. The *chapeau* rather requires a showing that an attack was primarily directed against a civilian population, rather than "against a limited and randomly selected number of individuals."[816]

306. Relevant interpretative sources tend to show that the drafters of the Statute did not in fact intend to exclude persons *hors de combat* from the purview of victims under Article 5. In its discussion of crimes against humanity, the Report of the Secretary-General recommending the establishment of the Tribunal expressly referred to Common Article 3.[817] Moreover, in its report, the Commission of Experts Established Pursuant to Security Council Resolution 780 referred to

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[813] *Tadić* Appeal Judgement, paras 282-283 and 285 (quoting with approval the ICJ Advisory Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion of 3 March 1949, ICJ Reports 1950, p. 8), in relation to the wording of Article 5 of the Statute.

[814] *Tadić* Trial Judgement, para. 626.

[815] *Kunarac et al.* Appeal Judgement, para. 91 (footnotes omitted). See also *Tadić* Appeal Judgement, para. 248 (holding, in part, that "it may be inferred from the words 'directed against any civilian population' in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population").

[816] *Kunarac et al.* Appeal Judgement, para. 90, also cited in *Kordić and Čerkez* Appeal Judgement, para. 95; *Blaškić* Appeal Judgement, para. 105.

[817] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, fn. 9 and Resolution 827 (1993), U.N. Doc. S/RES/827, 25 May 1993 (approving the Report of the Secretary-General).

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Common Article 3 and noted as well that article 4 of Additional Protocol II addressed "fundamental guarantees" and included in the protected group "all persons who do not take a direct part or who have ceased to take part in hostilities."[818]

307. Indeed, in the cases cited by the parties to support their interpretations of the meaning of "civilian" referenced above, the issue at stake was whether a population as a whole could be regarded as "civilian", while single individuals in its midst – the exact number depending on the circumstances – could still be combatants without modifying the status of the population as a whole.[819] These statements were made by the Appeals Chamber in the context of illustrating the scope of the "well-established jurisprudence regarding the *chapeau* element of 'civilian population'."[820] Thus, the authorities cited by the Trial Chamber in order to exclude persons *hors de combat* from the victims of crimes against humanity (as opposed to the category of persons who may be object of the attack according to the *chapeau* of Article 5) are misleading. There is nothing in the text of Article 5 of the Statute, or previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians.

308. The Appeals Chamber notes that this approach has been followed by the Tribunal, albeit implicitly, in a number of cases. Nothing for instance suggests that in the *Krstić* case,[821] the Trial Chamber or the Appeals Chamber required a distinction between the categories of victims – civilian and persons *hors de combat* according to international humanitarian law – in order to reach a finding on extermination as a crime against humanity.[822] The other final judgements related to the Srebrenica massacre adhered to the same line of reasoning.[823] A similar conclusion follows from an analysis of the more recent *Brđanin* Appeal Judgement.[824] It should be noted that, in these and other

[818] Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780, U.N. SCOR, 49th Session, Annex U.N. Doc. S/1994/674, paras 77-80.
[819] *Blaškić* Appeal Judgement, paras 114-115; *Kordić and Čerkez* Appeal Judgement, paras 50, 97; *Galić* Appeal Judgement, paras 136-137.
[820] See, for example, *Galić* Appeal Judgement, para. 144.
[821] See, in particular, the whole discussion on victims of extermination as a crime against humanity in the *Krstić* Trial Judgement, at paras 34, 37, 41-47, 53-67, 80-84, 499, 503-505, 547 and 594. Although the Trial Chamber eventually excluded extermination because it considered this crime to be impermissibly cumulative with genocide (*Krstić* Trial Judgement, paras 646 and 685), this finding was overturned on appeal (*Krstić* Appeal Judgement, para. 227). The Appeals Chamber, by correcting the error of the Trial Chamber and entering a conviction for extermination, endorsed the inclusion by the Trial Chamber of members of the armed forces *hors de combat* in the group of victims of extermination as a crime against humanity committed at Srebrenica (*Krstić* Appeal Judgement, para. 269).
[822] The Appeals Chamber confines this analysis to extermination as a crime against humanity, but finds that it is applicable to other crimes within this category in the case-law of the Tribunal and of the ICTR.
[823] See, in particular, *Blagojević and Jokić* Trial Judgement, paras 114-115, 213, 218-221, 567-569, 577, 619, 732-733, 736, 738 and *Blagojević and Jokić* Appeal Judgement, paras 59 and 101.
[824] In *Brđanin*, the Trial Chamber found that the *actus reus* of extermination as a crime against humanity was "any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals" (*Brđanin* Trial Judgement, para. 389) and went on to find that murders on a large scale had occurred during attacks of towns as well as in camps and detention facilities, without ever distinguishing the type of victim except for saying that they were "non-combatants" (*Brđanin* Trial Judgement, para. 465). It is clear from the context that this refers to the fact that the victims in question were either civilians or detained former combatants, who, as such, were not taking part in

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cases, the Tribunal has generally discussed victims of crimes against humanity simply as "persons", "people", or "individuals" targeted during a widespread and systematic attack against the civilian population, without attempting to establish whether single victims were "civilians" in the sense of international humanitarian law.[825] The relevance of the "civilian population", however, of course remained for the purpose of the *chapeau* requirement.[826]

309. The Appeals Chamber is satisfied that this approach reflects customary international law. The Nuremberg Charter and Allied Control Council Law No. 10 identified crimes against humanity of murder, extermination, enslavement, and deportation as crimes being committed against "any civilian population",[827] but subsequent practice established that the status of a victim of a crime against humanity was not restricted to "civilians".[828] This practice includes the *High Command Case* before the United States Military Tribunal,[829] cases of the Supreme Court in the British Occupied zone,[830] and the French cases of *Barbie* and *Touvier*.[831]

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the hostilities (see, in particular, *Brđanin* Trial Judgement, paras 436, 439, 449 and 476, in relation to *Brđanin* Trial Judgement, para. 395).

[825] See also, for example, *Stakić* Appeal Judgement, paras 246 (the "issue is whether the Trial Chamber erred in concluding that the attacks against the non-Serb civilian population of the Prijedor Municipality […] were widespread or systematic"), 259 (referring to *Ntakirutimana* Appeal Judgement, para. 522, "the *actus reus* of extermination [as a crime against humanity] is 'the act of killing on a large scale'" and the "*mens rea* required for extermination is that the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths") and 264 ("the Appeals Chamber has found the Appellant liable for the crime of extermination on the basis [of] massive killings of individuals"). These findings confirmed, *inter alia*, the Trial Judgement's findings at paras 651-655; no distinction was made in relation to the victims of these crimes, in particular when committed in detention facilities against both civilians and prisoners of war (see Trial Judgement, paras 159-227).

[826] See, in particular, the discussion in *Blagojević and Jokić* Appeal Judgement, paras 99-103. See also *Krstić* Appeal Judgement, para. 223 (discussion on cumulative conviction, relevant to the need to prove this requirement).

[827] Nuremberg Charter, Article 6(c) ("murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated"); Control Council Law No. 10, Article 2(1)(c) ("[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated").

[828] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; Apartheid Convention ("Genocide Convention"). See *Tadić* Appeal Decision on Jurisdiction, para. 140. It is noteworthy that in the negotiations of the Genocide Convention, proposals to refer to the Nuremberg Judgement in the preamble to the Convention were rejected in part because crimes against humanity had been interpreted restrictively by the International Military Tribunal: see generally U.N. GAOR 6th Committee, 3rd Session, 109th Meeting (1948), U.N. Doc. A/C.6/SR.109, in particular pp. 497-498, and U.N. Doc. A/C.6/SR.110, in particular pp. 502 *et seq.*. See also ILC Yearbook, 1996, vol. 2, part II, pp. 47-50. See also Article 21 of the 1991 version of the Draft Code of Crimes against Peace and the Security of Mankind and its Commentary (ILC Yearbook, 1991, vol. 2, part II, pp. 96-97 and pp. 103-104).

[829] *United States v. Wilhelm von Leeb et al.*, "*The High Command Case*", Judgement of 27 October 1948, Military Tribunal V, Law Reports of the Trials of War Criminals, vol. XI, at pp. 520, 596-599, 675, 679, 683. See also *United States v. Ernst Von Weizsaecker et al.*, *"The Ministries Case"*, Judgement of 11-13 April 1949, Military Tribunal IV, Law Reports of the Trials of War Criminals, vol. XIV, at pp. 541-546.

[830] *Supreme Court in the British Occupied Zone*, OGHSt 1, 217-229; *Supreme Court in the British Occupied Zone*, OGHSt 2, 231-246; *Supreme Court in the British Occupied Zone*, OGHSt 1, 45-49.

[831] *Crim. 20 décembre 1985, Bull. n°407, Cour de cassation (chambre criminelle)*, *M. Barbie*: "*Mais attendu qu'en prononçant comme elle l'a fait, en excluant la qualification de crimes contre l'humanité pour l'ensemble des actes*

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310. Further, the Appeals Chamber notes that while post-World War II case-law generally considered war crimes and crimes against humanity together,[832] when military tribunals did distinguish between them, they did so *not* on the basis of the status of their victims, but on the element of scale or organisation involved in crimes against humanity:

> It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. *It is significant that the* enactment *employs the words "against any civilian population" instead of "against any civilian individual."* The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.[833]

311. In light of the above, the Appeals Chamber finds that the interpretation of the Statute according to which persons *hors de combat* fall within the purview of Article 5 of the Statute as victims is consistent with the status of applicable customary international law.

312. As for Martić's argument that extending Article 5 of the Statute to persons *hors de combat* would encompass offences already punishable under Article 2 or 3 of the Statute and would thus obviate the need for these provisions, the Appeals Chamber recalls its pronouncement in the *Tadić* Appeal Judgement, according to which "those who drafted the Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished

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imputés à l'inculpé qui auraient été commis contre des personnes appartenant ou pouvant appartenir à la Résistance, alors que l'arrêt constate que les crimes 'atroces' dont ces personnes ont été systématiquement ou collectivement les victimes étaient présentes, par ceux au nom de qui ils ont été perpétrés, comme justifiés politiquement par l'idéologie nationale-socialiste, et alors que ni les mobiles animant ces victimes, ni leur éventuelle qualité de combattants, ne sauraient exclure l'existence, à la charge de l'inculpé, de l'élément intentionnel constitutif des infractions poursuivies, la Chambre d'accusation a méconnu le sens et la portée des textes visés aux moyens" (translated and reprinted in ILR, vol. 78, pp. 125-148, at 140); *Crim. 27 novembre 1992, Bull. n°394, Cour de cassation (chambre criminelle)*, *M. Touvier*: "*La Cour ne s'attachera pas, dans les développements qui suivent à la question des résistants, puisque, dans l'affaire de Rillieux, comme il a été mentionné supra toutes les victimes (six, en tout cas, sur les sept) étaient juives, qu'elles ont été fusillées à ce titre, et que, si certaines d'entre elles appartenaient à la Résistance, les auteurs du massacre l'ignoraient selon toute apparence*" (translated and reprinted in ILR, vol. 100, pp. 338-364, at 352).

[832] See, for example, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946 (Buffalo, New York: William S. Hein & Co., Inc., 1995) ("Trial of Major War Criminals"), vol. 1, Judgement, pp. 254-255. On the other hand, war crimes and crimes against humanity under Count Three of the Indictment and crimes against humanity under Count Four referred to acts committed against civilians only. Likewise, the two defendants convicted by the International Military Tribunal of crimes against humanity only – Streicher and von Schirach – were found guilty of acts committed against Jewish *civilians* (Trial of the Major War Criminals, vol. 1, Judgement, pp. 302-304, 318-320).

[833] *United States v. Josef Altstoetter et al., "The Justice Case"*, Judgement of 3-4 December 1947, Military Tribunal III, Law Reports of Trials of War Criminals, vol. III, p. 973 (emphasis added). See also *ibid.*, p. 982; *United States v. Friedrich Flick et al.*, Judgement of 22 December 1947, Military Tribunal IV, Law Reports of War Criminals, vol. IX, p. 28. This position was aptly summed up in this passage from the commentaries to the *Altstoetter* case included in the Law Reports of Trials of War Criminals: "(…) it is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic matter, on political, racial or religious grounds, they may amount also to crimes against humanity." *United States v. Josef Altstoetter et al., "The Justice Case"*, Judgement of 3-4 December 1947, Military Tribunal III, Law Reports of Trials of War Criminals, vol. VI, p. 79.

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accordingly."[834] The Appeals Chamber has indeed consistently held that crimes against humanity constitute crimes which are distinct from the offences encompassed in Articles 2 and 3 of the Statute.[835]

3. Conclusion

313. Under Article 5 of the Statute, a person *hors de combat* may thus be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population. Further, the Appeals Chamber is satisfied that the commission of crimes under Article 5 of the Statute against persons *hors de combat* attracted individual criminal responsibility under customary international law at the time of the commission of the offences. Therefore, the principle of *nullum crimen sine lege* is not violated.[836]

314. On the basis of the above, the Appeals Chamber finds that the Trial Chamber erred in finding that, under Article 5 of the Statute, persons *hors de combat* are excluded from the ambit of crimes against humanity when the crimes committed against them occur as part of a widespread or systematic attack against the civilian population. Provided this *chapeau* requirement is satisfied, a person *hors de combat* may be a victim of crimes against humanity.

4. Application of the correct legal standard

315. Having found that the Trial Chamber committed an error of law, the Appeals Chamber must then consider whether this error invalidates the Trial Judgement.[837]

316. The Trial Chamber discussed the *chapeau* requirements of Article 5 of the Statute in paragraph 49 of the Trial Judgement. In particular, it correctly stated that "the acts of the perpetrator must objectively form part of the attack on the civilian population" and that "the perpetrator must have known of the attack on the civilian population and that his or her acts formed part of the attack, or at least have taken the risk that his or her acts were part of the attack."

317. In its findings on Martić's individual criminal responsibility, the Trial Chamber concluded that from around June 1991 through December 1991, a widespread or systematic attack in the sense of Article 5 of the Statute was carried out by various armed formations against predominantly Croat

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[834] *Tadić* Appeal Judgement, para. 286.
[835] See *Kunarac et al.* Appeal Judgement, para. 176; *Kupreškić et al.* Appeal Judgement, paras 387-388; *Jelisić* Appeal Judgement, para. 82; *Vasiljević* Appeal Judgement, para. 145; *Kordić and Čerkez* Appeal Judgement, paras 1036-1037.
[836] *Cf. Hadžihasanović et al.* Appeal Decision on Command Responsibility, para. 44.

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villages in the SAO Krajina, including Potkonije, Vrpolje, Glina, Kijevo, Drniš, Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Škabrnja, Nadin and Bruška.[838] Although the attacked civilian population in some of the villages mentioned did comprise armed Croatian formations, who at times took part in the hostilities, the Trial Chamber reached the finding that the civilian nature of the population had not been altered.[839] It further found that the evidence established beyond reasonable doubt that the perpetrators of the crimes in question knew about the attack on the civilian population and that their acts were part thereof.[840]

318. The Appeals Chamber finds that had the Trial Chamber not committed the above error, it would have entered Article 5 convictions for murder (Count 3),[841] torture (Count 6),[842] and inhumane acts (Count 7)[843] and persecution (Count 1) [844] for acts committed against victims who were *hors de combat* at the time of the commission of the offence.[845] Taking into account the circumstances of the commission of these crimes described in the Trial Judgement – in particular the timing, the perpetrators and the fact that the crimes occurred in connection with the attack and with other similar crimes against civilians – the only reasonable inference in such cases is that the crimes against persons *hors de combat* were also part of the widespread and systematic attack against the civilian population.

319. The Appeals Chamber finds that all the elements of these offences have been met in relation to these victims.[846] Such convictions relate to seven victims of murder (Count 3), about 26 victims of torture (Count 6), about 28 victims of inhumane acts (Count 7), and about 23 victims of

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837 *Cf. Krnojelac* Appeal Judgement, paras 10, 15 and 74; *Halilović* Appeal Judgement, paras 98 and 203; *Blagojević and Jokić* Appeal Judgement, para. 46; *Simić* Appeal Judgement, para. 221; *Kvocka et al.* Appeal Judgement, para. 502; *Galić* Appeal Judgement, para. 197.

838 Trial Judgement, paras 349 and 351-352.

839 Trial Judgement, para. 350.

840 Trial Judgement, para. 353.

841 Mile Pavičić and Ivica Šegarić (Trial Judgement, paras 251 and 387); Ante Ražov (*Ibid.*, paras 254 and 390-391); Vladimir Horvat, Gašpar Perica and Marko Rogić (*Ibid.*, paras 259 and 390-391); Šime Šegarić (*Ibid.*, paras 256 and 390-391).

842 "[Detainees] who were not civilian" at the premises of the JNA 9th Corps barracks in Knin, including Luka Brkić, Ante "Neno" Gurlica and Marin Gurlica (Trial Judgement, paras 280-284 and 407-411); about 20 persons *hors de combat* (*ibid.*, para. 286) detained at the old hospital in Knin (*Ibid.*, paras 412-416); Vlado Vuković (*Ibid.*, 417-419); Ivan Atelj and Šime Čačić (*Ibid.*, paras 277 and 420-422).

843 "[Detainees] who were not civilian" detained at the premises of the JNA 9th Corps barracks in Knin, including Luka Brkić, Ante "Neno" Gurlica and Marin Gurlica (Trial Judgement, paras 280-284 and 407-411); about 20 persons *hors de combat* (*Ibid.*, para. 286) detained at the old hospital in Knin (*Ibid.*, paras 412-416); Vlado Vuković, Perica Bićanić and Ivica Bićanić (*Ibid.*, paras 276, 417-419); Ivan Atelj and Šime Čačić (*Ibid.*, paras 277 and 420-422).

844 "[Detainees] who were not civilian" detained at the premises of the JNA 9th Corps barracks in Knin, including Luka Brkić, Ante "Neno" Gurlica and Marin Gurlica (Trial Judgement, paras 407-411); about 20 persons *hors de combat* (*Ibid.*, para. 286) detained at the old hospital in Knin (*Ibid.*, paras 412-416).

845 The appeal against the acquittals for imprisonment (Count 5) was withdrawn by the Prosecution (see Prosecution Appeal Brief, paras 64, 69 and 75).

846 The Appeals Chamber also recalls that convictions pursuant to Article 3 and Article 5 of the Statute are permissibly cumulative: see *Kunarac et al.* Appeal Judgement, para. 176; *Kupreškić et al.* Appeal Judgement, paras 387-388; *Jelisić* Appeal Judgement, para. 82; *Kordić and Čerkez* Appeal Judgement, paras 1036-1037.

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persecution (Count 1). However, in light of its findings on lack of notice, the Appeals Chamber has reversed all of Martić's convictions in relation to crimes committed in Benkovac related to Ivan Atelj and Šime Čačić and the three children detained at the kindergarten in Benkovac.[847] Accordingly, no new convictions are entered for the crimes committed there. The Appeals Chamber notes that, referring to the applicable law relied upon by the Trial Chamber, the Prosecution is not seeking cumulative convictions for torture and inhumane acts under Article 5 of the Statute.[848]

320. As the above-mentioned legal error affected the criminal conduct for which Martić was held liable, it invalidated the Trial Judgement.

D. Conclusion

321. For the foregoing reasons, the Appeals Chamber allows this ground of appeal, alternatively presented by the Prosecution,[849] and will determine the impact of this finding on Milan Martić's sentence in the section on sentencing.

[847] See *supra*, para. 164.
[848] AT. 132, referring to Trial Judgement, para. 477.
[849] Prosecution Appeal Brief, para. 60, and Prosecution Reply Brief, paras 6-11.

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X. SENTENCING

A. Alleged Errors on Sentencing (Milan Martić's Ninth and Tenth Grounds of Appeal)

1. Introduction

322. As mentioned above, the Trial Chamber found Milan Martić guilty of persecution as a crime against humanity (Count 1), murder as a crime against humanity (Counts 3 and 15), murder as a violation of the laws or customs of war (Count 4), imprisonment as a crime against humanity (Count 5), torture as a crime against humanity (Count 6), inhumane acts as a crime against humanity (Counts 7 and 17), torture as a violation of the laws or customs of war (Count 8), cruel treatment as a violation of the laws or customs of war (Count 9), deportation as a crime against humanity (Count 10), forcible transfer as a crime against humanity (Count 11), wanton destruction of villages, or devastation not justified by military necessity as a violation of the laws or customs of war (Count 12), destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war (Count 13), plunder of public or private property as a violation of the laws or customs of war (Count 14), and attacks on civilians as a violation of the laws or customs of war (Count 19). The Trial Chamber proceeded to impose on Martić a single sentence of 35 years of imprisonment.[850]

323. In assessing the gravity of Martić's criminal conduct, the Trial Chamber took into account as aggravating circumstances his discriminatory intent, the widespread and systematic nature of the crimes, the special vulnerability of the victims, and the impact and long-lasting effects of the crimes on the victims.[851] It highlighted his leadership position within the SAO Krajina and RSK, his significant role within the JCE, and the extended four-year period and geographical scope over which the crimes were committed.[852] Though limited, it considered as mitigating circumstances the expulsion and displacement of Martić and his family following the military operation launched by the Croatian Army and police forces on the RSK ("Operation Storm") as well as his surrender to the Tribunal in 2002.[853]

324. Martić appeals the sentence in his ninth and tenth grounds of appeal.[854] The Appeals Chamber will consider these grounds of appeal and the impact of the errors identified in the Trial Judgement on his sentence.

[850] Trial Judgement, paras 518-519.
[851] Trial Judgement, paras 488-491.
[852] Trial Judgement, paras 498-499.
[853] Trial Judgement, paras 509-510.
[854] Defence Notice of Appeal, paras 66-77.

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2. Standard for appellate review on sentencing

325. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general factors that a Trial Chamber is required to take into account: the general practice regarding prison sentences in the courts of the former Yugoslavia, the gravity of the offences or totality of the conduct, the individual circumstances of the accused (including aggravating and mitigating circumstances), credit to be given for any time spent in detention pending transfer to the Tribunal, trial, or appeal, and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[855]

326. Appeals against sentence are of a corrective nature and are not trials *de novo*.[856] Trial Chambers are vested with broad discretion in determining an appropriate sentence, including discretion as to how much weight should be given to mitigating or aggravating circumstances.[857] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.[858] Merely claiming that the Trial Chamber has erred is not a valid argument on appeal. Rather, it is for an appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[859]

3. Interpretation and application of Article 24 of the Statute and Rule 101 of the Rules (Milan Martić's ninth ground of appeal)

(a) Arguments of the Parties

327. In his ninth ground of appeal, Milan Martić submits that the Trial Chamber erred both in law and in fact in interpreting and applying Article 24 of the Statute and Rule 101 of the Rules,[860] and that these errors invalidate the Trial Judgement and occasioned a miscarriage of justice.[861] He first

[855] *Zelenović* Judgement on Sentencing Appeal, para. 9; *Limaj et al.* Appeal Judgement, para. 126; *Blagojević and Jokić* Appeal Judgement, para. 320 and fn. 879; *Bralo* Judgement on Sentencing Appeal, para. 7 and fn. 19 (and sources cited therein).
[856] *Limaj et al.* Appeal Judgement, para. 127; *Galić* Appeal Judgement, para. 393.
[857] *Brđanin* Appeal Judgement, para. 500; see also *Zelenović* Judgement on Sentencing Appeal, para. 11; *Limaj et al.* Appeal Judgement, para. 127.
[858] *Zelenović* Judgement on Sentencing Appeal, para. 11; *Limaj et al.* Appeal Judgement, para. 127.
[859] *Limaj et al.* Appeal Judgement, para. 128; see also *Brđanin* Appeal Judgement, para. 500.
[860] Defence Notice of Appeal, paras 66-69; Defence Appeal Brief, paras 253-256.
[861] Defence Appeal Brief, para. 267.

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contends that the Trial Chamber erred in asserting that these provisions do not impose binding obligations.[862] He also argues that the Trial Chamber failed to provide clear and cogent reasons when it decided to be guided by the *Babić* case in determining Martić's sentence.[863] He emphasises that the *Babić* case is not comparable to his because (i) Milan Babić pled guilty to secure a lower sentence; (ii) on appeal, Babić argued that he had been coerced by the trial judges to enter a plea of guilty as a co-perpetrator; (iii) Babić's plea was only valid for the purposes of the *Babić* case; and (iv) many facts undisputed or agreed to by Babić were challenged during his (Martić's) trial.[864]

328. The Prosecution responds that the Trial Chamber correctly followed the relevant case-law, which obliges Trial Chambers to consider the factors enumerated in Article 24 of the Statute and Rule 101 of the Rules, and vests it with the discretion to identify and weigh these factors based on the facts of each particular case.[865] The Prosecution also challenges Martić's contention that the Trial Chamber took guidance from the *Babić* case.[866] Alternatively, it contends that because Babić and Martić occupied similar positions of authority and participated in the same JCE, such comparison with the *Babić* case was permissible, though limited by the facts that Milan Babić entered a guilty plea and his criminal conduct occurred within a more limited timeframe.[867]

(b) Discussion

329. At paragraph 481 of the Trial Judgement, the Trial Chamber held that Article 24 of the Statute and Rule 101 of the Rules "do not constitute binding limitations on the Trial Chamber's discretion to impose a sentence". In doing so, it simply reiterated a consistent holding of this Tribunal, according to which the Statute and Rules do not define exhaustively the mitigating or aggravating factors which may be considered by a Trial Chamber in sentencing. While Trial Chambers are obliged to take into account the factors listed in these provisions when determining a sentence,[868] they are not limited to considering these factors alone, and are vested with a broad discretion as regards the weight to be accorded to them, based on the facts of the particular case.[869]

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[862] Defence Appeal Brief, para. 253. Although Martić refers to Article 23 of the Statute in this paragraph, the Appeals Chamber understands that he, in fact, challenges the finding, at paragraph 481 of the Trial Judgement, that Article 24 of the Statute and Rule 101 of the Rules do not constitute binding limitations on the Trial Chamber's discretion to impose a sentence.
[863] Defence Appeal Brief, para. 254, referring in particular to Trial Judgement, paras 482-483. See also Defence Reply Brief, para. 122.
[864] Defence Appeal Brief, paras 255-256. See also Defence Reply Brief, para. 122.
[865] Prosecution Response Brief, paras 226-229.
[866] Prosecution Response Brief, paras 230-231.
[867] Prosecution Response Brief, paras 232-233.
[868] These factors are restated *supra*, para. 325.
[869] *Čelebići* Appeal Judgement, para. 780. See also *Simić* Appeal Judgement, paras 234-235; *Krstić* Appeal Judgement, para. 241.

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Martić has not demonstrated that the Trial Chamber erred in stating the applicable law on sentencing. The Appeals Chamber thus rejects this alleged error.

330. With respect to Martić's submission that the Trial Chamber committed a discernible error in taking guidance from the *Babić* case, the Appeals Chamber recalls that sentences of like individuals in like cases should be comparable.[870] While similar cases do not provide a binding assessment of the appropriate sentence, they can be of assistance if they involve the commission of the same offences in substantially similar circumstances.[871] However, the relevance of previous sentences is often limited to a number of elements relating, *inter alia*, to the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances. These elements dictate different results in different cases, such that it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another.[872] Thus, on appeal, a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error only if the former is out of reasonable proportion with the latter. Such a disparity is not in itself erroneous, but rather may give rise to an inference that the Trial Chamber failed to exercise its discretion properly in applying the law on sentencing.[873]

331. The Prosecution requested that the Trial Chamber compare the culpability of Milan Martić to that of Milan Babić – who had previously pled guilty and been convicted and sentenced by this Tribunal for his criminal conduct – for the purpose of sentencing Martić. The Trial Chamber found that the *Babić* case could provide limited guidance.[874] The Trial Judgment shows that the Trial Chamber did indeed only take limited guidance from the *Babić* Sentencing Judgement, which is only mentioned in footnotes 1329 and 1346 of the Trial Judgement for the sole purpose of re-stating the applicable law on the assessment of the seriousness of the criminal conduct and the standard of proof of mitigating factors, respectively.

332. The Appeals Chamber in any event does not accept that the limited guidance taken by the Trial Chamber from the *Babić* case constituted an error. The Trial Chamber first observed that on 25 January 1994, Milan Martić succeeded Milan Babić to the Presidency of the RSK and that on 21 April 1994, a new government was formed under Martić, *inter alia*, with Babić as Foreign Minister

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[870] *Kvočka et al.* Appeal Judgement, para. 681.
[871] See *Furundžija* Appeal Judgement, para. 250. See also *Kvočka et al.* Appeal Judgement, para. 681; *Jelisić* Appeal Judgement, paras 96, 101; *Čelebići* Appeal Judgement, paras 721, 756-757.
[872] *Kvočka et al.* Appeal Judgement, para. 681. See also *Čelebići* Appeal Judgement, paras 719 and 721; *Furundžija* Appeal Judgement, para. 250; *Limaj et al.* Appeal Judgement, para. 135, *Blagojević and Jokić* Appeal Judgement, para. 333; *Musema* Appeal Judgement, para. 387.
[873] *Jelisić* Appeal Judgement, para. 96.
[874] Trial Judgement, para. 483.

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and later as Prime Minister.[875] The Trial Chamber also duly took into consideration that Milan Babić pled guilty as co-perpetrator in a joint criminal enterprise which allegedly comprised Martić, among others.[876]

333. Consequently, Martić has not demonstrated that the Trial Chamber committed a discernible error in exercising its discretion.

4. Gravity of the criminal conduct and determination of aggravating and mitigating circumstances (Milan Martić's tenth ground of appeal)

(a) Arguments of the Parties

334. In his tenth ground of appeal, Milan Martić alleges that the Trial Chamber erred in fact and in law in determining the gravity of the offence as well as the aggravating and mitigating factors.[877] These errors, he claims, invalidate the Trial Judgement and occasioned a miscarriage of justice.[878] Martić contends that the Trial Chamber examined the gravity of offences that he did not commit.[879] He also argues that the Trial Chamber erred in determining the aggravating circumstances, notably because it improperly analysed his obligation to prevent the commission of crimes as an obligation of result.[880]

335. With regard to mitigating circumstances, Martić asserts that the Trial Chamber revealed its "position" towards Martić in paragraphs 504 to 511 of the Trial Judgement[881] and showed bias by ignoring the Croatian policy and behaviour towards the Serb population.[882] Furthermore, Martić asserts that the Trial Chamber erred in finding, at paragraph 510 of the Trial Judgement, that his surrender was not necessarily fully voluntary. In doing so, he argues, the Trial Chamber ignored the difference between voluntary and willing surrender.[883] In addition, Martić requests the Appeals Chamber to take account of his good character and of the fact that he did not have any criminal convictions.[884] He also claims that the Trial Chamber failed to take into consideration Witness

[875] Trial Judgement, para. 156 and fn. 358.
[876] See Trial Judgement, para. 34. The Appeals Chamber notes that Babić was convicted for having participated in a JCE, the purpose of which was, from 1 August 1991 until 15 February 1992, the permanent forcible removal of the majority of the Croat and other non-Serb population from approximately one-third of the territory of Croatia, in order to make it part of a new Serb-dominated state (see *Babić* Sentencing Judgement, paras 14, 16-17 and 34).
[877] Defence Notice of Appeal, paras 70-75; Defence Appeal Brief, paras 257-258; Defence Reply Brief, paras 123-127.
[878] Defence Appeal Brief, para. 268.
[879] Defence Appeal Brief, para. 257, referring to Trial Judgement, paras 488-492. See also Defence Reply Brief, para. 123.
[880] Defence Appeal Brief, para. 258, referring to Defence Appeal Brief, paras 12-14.
[881] Defence Appeal Brief, para. 258, referring to Defence Appeal Brief, paras 15-26.
[882] Defence Reply Brief, para. 124.
[883] Defence Appeal Brief, para. 258; Defence Reply Brief, para. 126.
[884] Defence Reply Brief, para. 127. See also Defence Appeal Brief, para. 258, referring to paras 16-26, 69, 72-80, 93, 104-148, 160-162, 164 and 193.

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MM-078's testimony and the lack of evidence regarding the outcome of the disciplinary procedure against Martić when it assessed his reputation.[885]

336. The Prosecution responds that the Trial Chamber duly evaluated the gravity of the crimes for which Martić was found responsible as a member of the JCE, consistent with the jurisprudence of this Tribunal.[886] The Prosecution also submits that the Trial Chamber correctly identified Martić's abuse of his position of authority, and the extensive duration and geographical scope of his crimes as aggravating circumstances.[887] It emphasises that, although the Trial Chamber considered the "widespread" nature of the crimes when assessing both the gravity and the aggravating factors, it did not count this factor twice.[888]

337. As to mitigating circumstances, the Prosecution first argues that the Trial Chamber did not regard Martić's lack of remorse, his lack of cooperation or his inappropriate conduct as aggravating factors, but merely declined to consider them as mitigating circumstances. Thus, the Prosecution claims that the Trial Chamber did not infringe upon Martić's right to remain silent or the presumption of innocence. Rather, it was Martić who waived his right to remain silent when he made statements at trial.[889] Second, the Prosecution contends that the Trial Chamber correctly found that Martić's surrender was not fully voluntary and, consequently, decided to accord minimal mitigating weight to it, in accordance with the Trial Chamber's discretion.[890] Third, the Prosecution avers that, contrary to Martić's claim, Witness MM-078 testified that Martić's reputation was not good.[891] Recalling that the Trial Chamber is best suited to weigh evidence, the Prosecution also contends that the outcome of a disciplinary procedure is irrelevant to the assessment of mitigating circumstances. It adds that the Trial Chamber merely considered that Witness MM-078's credible evidence regarding Martić's abuse of position outweighed Witness MM-078's testimony that he was not aware of any case in which Martić had "ordered someone to do something harmful to someone else."[892]

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[885] Defence Appeal Brief, para. 258.
[886] Prosecution Response Brief, para. 234, referring to *Blaškić* Appeal Judgement, para. 683.
[887] Prosecution Response Brief, para. 235, referring to Trial Judgement, paras 498-499; *Galić* Appeal Judgement, paras 451-452; *Babić* Judgement on Sentencing Appeal, para. 91; *Deronjić* Judgement on Sentencing Appeal, para. 106; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 27; *Kunarac et al.* Appeal Judgement, para. 356; *Babić* Sentencing Judgement, para. 53; *Todorović* Sentencing Judgement, para. 65.
[888] Prosecution Response Brief, para. 236. In this respect, the Prosecution stresses that, when assessing gravity, the Trial Chamber used the term "widespread" in order to reflect the large number of victims and that, when considering aggravating circumstances, the Trial Chamber referred to "widespread" in the assessment of the duration and the territorial scope of the crimes.
[889] Prosecution Response Brief, paras 237-240, referring, *inter alia*, to *Krnojelac* Appeal Judgement, para. 257 and *Čelebići* Appeal Judgement, para. 786.
[890] Prosecution Response Brief, para. 241, referring to Trial Judgement, para. 510.
[891] Prosecution Response Brief, para. 242.
[892] Prosecution Response Brief, paras 243-244.

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338. Martić replies that the Trial Chamber erred when considering the duration of the conflict as an aggravating factor, as he was not responsible for its duration.[893] Moreover, he asserts that the Trial Chamber committed an error when it rejected the neuropsychiatrist's opinion on his personality in light of his behaviour at trial. In that regard, he also disputes the Prosecution's contention that his behaviour was uncooperative.[894]

(b) Discussion

339. The wording of paragraphs 488 to 491 of the Trial Judgement shows that the Trial Chamber considered the gravity of crimes for which Martić had been found responsible.[895] The Appeals Chamber disagrees with Martić's claim that the Trial Chamber examined the gravity of offences that he did not commit. Since he does not put forward any argument to substantiate his claim, this sub-ground of appeal is dismissed.

340. With respect to the assessment of aggravating circumstances, the Appeals Chamber dismisses Martić's submission that the Trial Chamber erred when it improperly analysed his obligation to prevent the commission of crimes as an obligation of result. As explained above, the Trial Chamber correctly considered many factors when assessing Martić's effective participation in the crimes.[896] Concerning Martić's contention regarding the duration of the conflict, the Appeals Chamber observes that Martić misunderstood the Trial Chamber. Contrary to Martić's assertion, the Trial Chamber did not hold him responsible for the length of the *conflict* itself, but for the fact that the *crimes* for which he was found guilty were committed over a period of more than four years.[897] The jurisprudence of the Tribunal allows a trier of fact to consider as an aggravating circumstance the length of time during which crimes continued.[898]

341. Turning to mitigating circumstances, the Appeals Chamber recalls that the Trial Chamber has discretion to decide whether to accept an accused's voluntary surrender[899] and how much weight to accord to it,[900] in mitigation of a sentence. Contrary to Martić's contention, the Trial Chamber did not confuse "willing" and "voluntary", but simply concluded that Martić's surrender was not fully voluntary.[901] Martić's contention is therefore rejected.

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[893] Defence Reply Brief, para. 124.
[894] Defence Reply Brief, para. 125.
[895] See also Trial Judgement, para. 480.
[896] See in particular *supra*, paras 28 (under ground 1) and 151-155 (under ground 5).
[897] Trial Judgement, para. 499.
[898] *Blaškić* Appeal Judgement, para. 686, referring to *Kunarac et al.* Appeal Judgement, para. 356; *Todorović* Sentencing Judgement, para. 65.
[899] *Blaškic* Appeal Judgement, para. 701, referring to *Kunarac et al.* Trial Judgement, para. 868.
[900] *Kordić and Čerkez* Appeal Judgement, para. 1053; *Kupreškić et al.* Appeal Judgement, para. 430.
[901] Trial Judgement, para. 510.

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342. Concerning reputation as a mitigating factor, the Appeals Chamber observes that, in contradiction to Martić's claim, Witness MM-078 testified that Martić's reputation "wasn't brilliant".[902] Martić further refers to a series of paragraphs in his Defence Appeal Brief,[903] but fails to explain how they support his claim or to advance any other evidence in support of his claim. Moreover, the Appeals Chamber has already summarily dismissed the contention that the Trial Chamber abused its discretion when it ruled that the neuropsychiatrist's evidence on Martić's personality was outweighed by evidence to the contrary.[904] Consequently, Martić's submission is dismissed.

343. As to Martić's claim regarding the disciplinary procedure, the Appeals Chamber observes that the Trial Chamber did not consider this procedure. In the absence of a showing by Martić that the Trial Chamber committed a discernible error, the Appeals Chamber rejects his claim.

344. Regarding Martić's allegation that the Trial Chamber was biased and that it did not respect his right to be presumed innocent, the Appeals Chamber observes that Martić restates previous arguments which the Appeals Chamber has already rejected.[905] Thus, Martić's claim fails.

5. Conclusions

345. For the foregoing reasons, the Appeals Chamber dismisses Martić's ninth and tenth grounds of appeal.

B. Impact of the Appeals Chamber's findings on sentencing

1. Introduction

346. The Appeals Chamber notes that it has allowed a number of Martić's sub-grounds of appeal under Ground 5, as well as the Prosecutor's sole ground of appeal. In particular, the Appeals Chamber reversed Martić's convictions for crimes perpetrated in Benkovac;[906] reversed several convictions due to the absence of a link between the principle perpetrators of the crimes charged and Martić;[907] and entered convictions under Article 5 of the Statute in relation to seven victims of

[902] Witness MM-078, 24 May 2006, T. 4393-4394 (private session).
[903] Defence Appeal Brief, para. 258 referring to paras 16-26, 69, 72-80, 93, 104-148, 160-162, 164 and 193.
[904] See *supra*, para. 42 (under ground 2).
[905] See *supra*, paras 36-47 (under ground 2).
[906] See *supra*, para. 164 (reversing Martić's convictions under Counts 8 and 9 in relation to crimes perpetrated against Ivan Atelj and Šime Čaćić, as well as Counts 7 and 9 in relation to crimes perpetrated against three children detained in a kindergarten in Benkovac).
[907] See *supra*, paras 193 (reversing Martić's convictions under Counts 1, 12 and 13 in respect of the acts of destruction committed in Cerovljani by armed Serbs from Živaja), 201 (reversing Martić's convictions for Counts 1, 3, and 4 in respect of the killing of Tomo Vuković and of two civilians in Poljanak, as well as Counts 1 and 12 in respect of the acts of destruction perpetrated in Poljanak by unidentified armed Serbs or soldiers), 208 (reversing Martić's convictions for Counts 1 and 12 in respect of the acts of destruction committed in Vukovići by JNA soldiers and local armed men)

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murder under Count 3, about 24 victims of torture under Count 6, about three victims of other inhumane acts under Count 7 and about 23 victims of persecution under Count 1.[908]

347. In light of its findings above, the Appeals Chamber will consequently consider whether an adjustment of Martić's sentence is appropriate.[909]

2. Arguments of the parties

348. Martić has not proposed a specific remedy with respect to the convictions reversed pursuant to his fifth ground of appeal, but requests, in general, that the Appeals Chamber significantly reduce the sentence imposed by the Trial Chamber.[910] In response to Martić's fifth ground of appeal, the Prosecution advanced submissions only with respect to the crimes committed in Benkovac and argues that there should be no reduction in sentence despite the quashing of the related convictions.[911] The Prosecution submits that the crimes in question formed only a small part of the underlying crime-base supporting Martić's convictions for crimes committed against detainees and therefore that Martić's sentence remains reasonable.[912]

349. With respect to its own appeal, the Prosecution submits that the Appeals Chamber should revise Martić's sentence to ensure that it reflects the higher number of victims, the gravity of his conviction for crimes against humanity and his overall criminal culpability.[913] In response, Martić rejects the request that his sentence should be increased, arguing that the sentence imposed should reflect the gravity of the crimes, rather than a mathematical calculation of the number of victims.[914] Martić stresses that the focus at sentencing should remain on individual criminal responsibility and that increasing his "enormous" sentence of 35 years would not serve the interests of either international criminal law or the victims.[915]

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and 212 (reversing Martić's conviction for deportation under Count 10, where the underlying acts were reversed on appeal).

[908] See *supra*, para. 319. Thus, the Appeals Chamber has not entered new convictions for the crimes committed in Benkovac and has not entered cumulative convictions for torture (Count 6) and inhumane acts (Count 7) under Article 5 of the Statute.

[909] *Cf. Krstić* Appeal Judgement, para. 266, referring to *Vasiljević* Appeal Judgement, para. 181. See also *Blaškić* Appeal Judgement, para. 680; *Aleksovski* Appeal Judgement, para. 187.

[910] Defence Appeal Brief, para. 271.

[911] AT. 86.

[912] AT. 86.

[913] Prosecution Appeal Brief, paras 81-83; AT. 131 and 133.

[914] Defence Response Brief, para. 39.

[915] Defence Response Brief, paras 39-41.

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3. Discussion

350. The primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.[916] While the gravity of the offence is the primary factor to be taken into account in imposing a sentence,[917] the inherent gravity of a crime must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime.[918] The position of leadership of an accused may increase the relative seriousness of his crimes, when there has been an abuse of this position, even if the person did not materially and directly commit the crimes, but ordered them or participated as a member of a joint criminal enterprise.[919]

351. As discussed above, the Appeals Chamber has entered new convictions under Article 5 of the Statute in relation to acts underlying convictions already entered by the Trial Chamber under Article 3.[920] With respect to these new convictions, the Prosecution requests that the Appeals Chamber ensure that Martić's sentence reflect the gravity of his crimes, whether or not this "results in an actual increase of the sentence".[921]

352. Despite the ambiguity in the Prosecution's submissions regarding sentencing, the Appeals Chamber does not understand the Prosecution to be seeking a general increase in the sentence, but merely that the sentence reflect the enlarged group of victims now encompassed by the additional convictions under Article 5 of the Statute. Given that these additional convictions are based exclusively on the same underlying acts, the Appeals Chamber finds that no increase of sentence is warranted.

353. In relation to the convictions entered by the Trial Chamber, but reversed on appeal, the Appeals Chamber considers that these reversals have minimal impact on Martić's overall culpability in light of the remaining crimes for which he was convicted and the impact they had on the victims.

354. In view of the foregoing, and in particular having considered the relative gravity of the crimes for which Martić's convictions have been overturned and that of the crimes for which

[916] *Čelebići* Appeals Judgment, para. 430.
[917] *Galić* Appeals Judgment, para. 442.
[918] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 18, referring to, *inter alia*, *Blaškić* Appeal Judgement, para. 680; *Jelisić* Appeal Judgement, para. 101; *Čelebići* Appeal Judgement, para. 731; *Aleksovski* Appeal Judgement, para. 182.
[919] See, for example, *Tadić* Judgement in Sentencing Appeals, paras 55-56; *Aleksovski* Appeal Judgement, para. 183; *Stakić* Appeal Judgement, para. 411; *Galić* Appeal Judgement, para. 452; *Hadžihasanović* Appeal Judgement, para. 320.
[920] See *supra*, para. 319.

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Martić's convictions have been upheld, the Appeals Chamber affirms the sentence of 35 years of imprisonment imposed by the Trial Chamber.

[921] AT. 133. On this issue, see also Prosecution Appeal Brief, paras 62-79 and the references to the Trial Judgement contained therein.

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XI. DISPOSITION

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

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 25 and 26 June 2008;

SITTING in open session;

ALLOWS Milan Martić's fifth ground of appeal, in relation to the crimes committed in Benkovac (Counts 7, 8 and 9, in part), Cerovljani (Counts 1, 12 and 13, in part), Vukovići (Counts 1, 3, 4 and 12, in part) and Poljanak (Counts 1, 3, 4 and 12, in part), as well as in relation to Count 10, in part;

DISMISSES all other grounds of appeal submitted by Milan Martić;

ALLOWS the Prosecution's alternative ground of appeal;

AFFIRMS Milan Martić's sentence of 35 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that Milan Martić 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.

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

Judge Fausto Pocar, Presiding	Judge Mohamed Shahabuddeen

Judge Mehmet Güney	Judge Andrésia Vaz	Judge Wolfgang Schomburg

Judge Wolfgang Schomburg appends a separate opinion.

Dated this eighth day of October 2008,
At The Hague,
The Netherlands

[Seal of the Tribunal]

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XII. SEPARATE OPINION OF JUDGE SCHOMBURG ON THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF MILAN MARTIĆ

1. I agree with the outcome of today's Judgement of the Appeals Chamber. The only fact to be highlighted is that it was solely Milan Martić who unambiguously appealed the sentence in general. Thus, with a view to the prohibition of *reformatio in peius*,[1] the question of whether the sentence imposed by the Trial Chamber was taken from the wrong shelf[2] and should therefore be increased was not as such before the Appeals Chamber.

2. However, I feel compelled to write separately because I firmly believe that Martić's criminal conduct has to be qualified as that of a (co)-perpetrator under the mode of liability of "committing" pursuant to Article 7(1) of the Statute of the International Tribunal. My concern is that Martić's criminal conduct is primarily qualified as relying on membership in a group – the so-called joint criminal enterprise (JCE) – which cannot be reconciled with the Statute and on the contrary seems to trivialize Martić's guilt. Martić has to be seen as a high-ranking principal perpetrator and not just as a member of a criminal group.

3. At the same time, *de arguendo* accepting the concept of JCE, I am primarily concerned that the definition of the third "extended"[3] category of JCE lacks both in specificity and objective criteria – such as control over the crime. Precisely defining these missing elements would better describe the criminal conduct and provide the sharp contours necessary in substantive criminal law in order to satisfy the principle of *nullum crimen sine lege stricta*. Finally, the compartmentalized theory of JCE does not assist in focusing on the individual criminal contribution to a crime, an element indispensable for determining the appropriate sentence.

4. The only point of departure for determining the mode of liability under which an accused can be convicted is the exhaustive wording of Article 7(1) of the Statute, which holds individually responsible

> [a] person who planned, instigated, ordered, *committed* or otherwise aided and abetted in the planning, preparation or execution of a crime …[4]

[1] See also *Muvunyi* Appeal Judgement, para. 170 and fn. 382.
[2] See *Galić* Appeal Judgement, para. 455. A contemporaneous assessment of Martić's culpability and accordingly the appropriate sentence should have taken into account *inter alia* the expert report prepared by the Max Planck Institute for Foreign and International Law and filed in the *Dragan Nikolić* case. (ULRICH SIEBER, THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE [2004], 2 Volumes).
[3] See *e.g.* Judgement, para. 3. Such a term should never be used in substantive criminal law.
[4] Italics added for emphasis.

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Nowhere does the Statute mention the term "joint criminal enterprise." It was therefore nothing but an unsupported dictum when the Appeals Chamber in *Stakić* held that "joint criminal enterprise is a mode of liability which is 'firmly established in customary international law'".[5] This might well be the case. It is, however, only a secondary question. The primary question to be answered in relation to the scope of jurisdiction concerns the power vested in this International Tribunal. This power is limited by the Statute and its explicit and exhaustive wording. To go beyond the explicit and exhaustive wording of Article 7 of the Statute might even be seen as a violation of the principle *nullum crimen sine lege*.

5. The Statute does not penalize individual criminal responsibility through JCE. The Statute does not criminalize the membership in any association or organization. The purpose of this International Tribunal is to punish individuals and not to decide on the responsibility of states, organizations or associations. As stated in Nuremberg:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[6]

Consequently, any idea of collective responsibility, shifting the blame from individuals to associations or organizations and deducing criminal responsibility from membership in such associations or organizations, must be rejected as not only *ultra vires* but also counterproductive to the International Tribunal's mandate of bringing peace and reconciliation to the territory of the former Yugoslavia. It is therefore that I cannot agree with this Judgement when it describes a perpetrator as "a member of the JCE,"[7] when it speaks of "members of a JCE [who] could be held liable for crimes committed by principal perpetrators who were not members of the JCE"[8] and when it refers to the accused's "fellow members [of the JCE]."[9] While the Appeals Chamber has in the past explicitly stated that "criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes,"[10] the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary. In this context, I recall the report of the Secretary-General of the United Nations, in which he stated that:

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[5] *Stakić* Appeal Judgement, para. 62.
[6] International Military Tribunal, Judgement and Sentence of 1 October 1946, in: TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, Vol. I, p. 223.
[7] Judgement, para. 168.
[8] Judgement, para. 168.
[9] Judgement, para. 169.
[10] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 26.

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> The question arises … whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such person would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.[11]

6. I need not reiterate the fact that the Appeals Chamber of this International Tribunal has unnecessarily and without any reasoning *proprio motu* discarded[12] internationally accepted definitions of the term "committing," such as the concepts of co-perpetration, perpetrator behind the perpetrator or indirect perpetrator, all of them forming part of customary international law[13] as was held in particular in the most important recent decisions of the International Criminal Court.[14] Suffice it to say that it is not helpful at all, at this stage of the development of international criminal law, that there now exist two competing concepts of commission as a mode of liability. The unambiguous language of both decisions rendered by Pre-Trial Chamber I of the International Criminal Court endorses the concept of co-perpetration when interpreting the word "to commit" under Article 25(3)(a) of the ICC Statute.[15] For this mode of liability, there can be only one definition in international criminal law.[16]

7. Furthermore, the Appeals Chamber's constant adjustment of what is encompassed by the notion of JCE[17] raises serious concerns with regard to the principle of *nullum crimen sine lege*. The lack of an objective element in the so-called third ("extended") category of JCE is particularly worrying. It cannot be sufficient to state that the accused person is liable for any actions by another individual, where "the commission of the crimes … were a natural and foreseeable consequence of a common criminal purpose."[18] What is missing here is an additional objective component, such as

[11] The Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. Doc S/25704 (3 May 1993), para. 51.
[12] *Stakić* Appeal Judgement, paras 58 *et seq*.
[13] See for a detailed argument: *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Appeal Judgement, Dissenting Opinion of Judge Schomburg, 28 November 2006 and *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006.
[14] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007.
[15] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 510. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 338.
[16] The need for harmonization was already expressed in my Dissenting Opinion to the *Simić* Appeal Judgement (*see supra* note 13), para. 17 (p. 133).
[17] See for instance the varying language employed in the *Tadić* Appeal Judgement (paras 204 *et seq*., para. 228), the *Brđanin* Appeal Judgement (paras 410 *et seq*., paras 418 *et seq*.), the *Limaj* Appeal Judgement (para. 119), explicitly limiting the responsibility for crimes committed by members [*sic*] of the JCE, whereas in this Judgement, at para. 171, such limitation is explicitly rejected.
[18] Judgement, para. 171.

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control over the crime,[19] as would be provided under the concepts of co-perpetration or indirect perpetration. This necessary element of having control over the crime would on the one hand serve as a safeguard to adequately limit the scope of *individual* criminal responsibility, and on the other hand properly distinguish between a principal and an accessory. By contrast, the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association.

8. To avoid any misunderstanding: In the present case, based on the sum of all findings of the Trial Chamber, Martić exercised the necessary control over the criminal conduct and was consequently a principal perpetrator of *all* the crimes for which he was convicted. It is immaterial that he was physically removed from many of the crimes. As was posited by the Jerusalem District Court in the *Eichmann* case:

> In such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in various modes of activity - the planners, the organizers and those executing the acts, according to their various ranks -there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command…[20]

9. I also note with concern that neither the artificial concept of JCE nor its compartmentalization in three categories has any added value when it comes to sentencing. The decisive element must be in principle the individual contribution of an accused. At times, the incorrect impression is given that the third category of JCE attracts a lower sentence simply because of its catch-all nature. However, in principle, a person's guilt must be described as increasing in tandem with his position in the hierarchy: The higher in rank or further detached the mastermind is from the person who commits a crime with his own hands, the greater is his responsibility.[21]

10. It cannot be in the sound interest of the International Tribunal to base Martić's responsibility and sentence primarily on the vague and seemingly boundless concept of JCE.[22] On the contrary, it does a disservice to international justice when the impression is given that convictions and consequently sentences are founded on a compartmentalized form of individual criminal

[19] See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 485 with further exhaustive references.
[20] *Attorney General of Israel v. Adolf Eichmann*, District Court of Jerusalem, Judgement of 12 December 1961, 36 ILR 18 (1968), para. 197.
[21] See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 503.
[22] See Judgement, para. 350, last sentence.

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responsibility that does not have the necessary explicit basis in the Statute of the International Tribunal.

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

Dated this 8th day of October 2008,
At The Hague,
The Netherlands.

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Judge Wolfgang Schomburg

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XIII. ANNEX A – PROCEDURAL HISTORY

A. Trial Proceedings

1. An initial indictment against Milan Martić was confirmed by Judge Jean-Claude Jorda on 25 July 1995.[1] Corrected or amended versions of this indictment were filed on 18 December 2002[2] and 14 July 2003.[3] The Second Amended Indictment was filed on 9 September 2003[4] and re-filed on 9 December 2005. It charged Martić with 19 Counts under Articles 3 and 5 of the Statute.

2. Subsequent to the issuance of an international arrest warrant for Martić on 8 March 1996, on 15 May 2002 Martić was transferred to the Tribunal, where he was detained on remand at the United Nations Detention Unit in The Hague without any interruption until today. His initial appearance was held on 21 May 2002, when he entered a plea of not guilty to the charges against him. On 28 January 2003, Martić entered a plea of not guilty to additional charges. The trial hearings commenced on 13 December 2005 and concluded on 12 January 2007.

3. On 12 June 2007, the Trial Chamber rendered its judgement. The Trial Chamber found Martić not guilty under Count 2 of the Indictment and entered convictions under Counts 1, 3-15, 17, and 19 for crimes against humanity and war crimes pursuant to Articles 3, 5 and 7(1) of the Statute.[5] The Trial Chamber sentenced Martić to a single sentence of 35 years of imprisonment.

B. Appeal Proceedings

1. Notices of appeal

4. On 12 July 2007, the Prosecution filed its Notice of Appeal against the Trial Judgement, containing one ground of appeal.[6] On the same day, Martić filed his Notice of Appeal, which detailed ten grounds of appeal.[7] Martić filed a reorganised Notice of Appeal on 14 January 2008.[8]

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[1] Review of the Indictment, 25 July 1995.
[2] Motion to Request Leave to File an Amended Indictment, 26 August 2002; Motion to Request Leave to File a Corrected Amended Indictment, 2 September 2002; Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002; Prosecution's Filing of Amended Indictment, 18 December 2002. This indictment added some new charges.
[3] Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003; Prosecution's Motion to File Amended Indictment Pursuant to Trial Chamber's Decision on Preliminary Motion Against the Amended Indictment, 14 July 2003.
[4] Decision on Prosecution Motion to File an Amended Indictment and on Second Motion Against the Amended Indictment, 5 September 2003; Prosecution's Second Amended Indictment Pursuant to Trial Chamber's Decision of 05 September 2003.
[5] The Trial Chamber did not enter convictions under Counts 16 and 18 since the crimes charged thereunder were absorbed by the crime of attack on civilians under Count 19. See Trial Judgement, para. 480.
[6] Prosecution Notice of Appeal. See also Prosecution's Notice of Partial Withdrawal of Parts III and IV of Prosecution's Notice of Appeal, 25 September 2007.

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2. Composition of the bench

5. By order of 20 July 2007, the President of the Tribunal designated the following Judges to form the Appeals Chamber bench hearing the case: Judge Fausto Pocar, Presiding; Judge Mohamed Shahabuddeen; Judge Mehmet Güney; Judge Andrésia Vaz; and Judge Wolfgang Schomburg.[9] Pursuant to Rule 65 *ter* and Rule 107 of the Rules, Judge Wolfgang Schomburg was designated Pre-Appeal Judge.[10]

6. On 17 August 2007, Martić filed a motion before the President of the Tribunal, requesting that Judge Wolfgang Schomburg be disqualified from sitting on the Appeals Chamber in this case and from his function as Pre-Appeal Judge.[11] By his order of 23 October 2007, the Vice-President of the Tribunal dismissed the motion for disqualification in its entirety.[12]

3. Filing of the Appeal Briefs

7. The Prosecution filed its Appeal Brief on 25 September 2007.[13] Martić filed his Response Brief on 14 January 2008.[14] The Prosecution replied on 29 January 2008.[15]

8. Martić filed his Appeal Brief confidentially on 14 January 2008.[16] On 31 January 2008, Martić submitted confidentially a corrected version of his Appeal Brief.[17] A public version of Martić's Appeal Brief was filed on 31 March 2008,[18] but replaced by another public version on 5 May 2008.[19] The Prosecution filed its Response Brief confidentially on 25 February 2008.[20] A

[7] Defence Notice of Appeal Against the Judgement of 12 June 2007, 12 July 2007.
[8] Defence Notice of Appeal; Decision on Defence Motion for Variation of the Grounds of Appeal, 10 January 2008.
[9] Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 20 July 2007.
[10] Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 20 July 2007.
[11] Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal, 17 August 2007.
[12] Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal, 23 October 2007 and annexed Report to the Vice-President Pursuant to Rule 15(B)(ii) Concerning Defence Motion to Disqualify Judge Schomburg from Sitting on Appeal, 19 October 2007.
[13] Prosecution Appeal Brief; Book of Authorities for Prosecution's Appeal Brief, 25 September 2007. See also the Supplement Book of Authorities for Prosecution's Appeal Brief, 11 October 2007.
[14] Decision on Motion for Extension of Time for filing the Respondent's Brief, 31 October 2007; Status Conference, 9 November 2007, AT. 3-5; Book of Authorities for Respondent's Brief on behalf of Appellant, 14 January 2008.
[15] Prosecution Reply Brief. See also Book of Authorities for Prosecution's Reply Brief, 29 January 2008.
[16] Decision on Motion for Extension of Time and Enlargement of Word Limit, 21 September 2007. The requested enlargement of the word limit was denied during the Status Conference of 9 November 2007, AT. 3-5.
[17] Confidential Corrected Version of Appellant's Brief, 31 January 2008; Notification of Submission of a Corrected Version of Appellant's Brief, 31 January 2008; Order Concerning Milan Martić's Submission of a Corrected Version of His Appellant's Brief, 11 February 2008.
[18] Public Redacted Version of Appellant's Brief, 31 March 2008. This version was subsequently made confidential.
[19] Public Redacted Version of Appellant's Brief, 5 May 2008.
[20] Prosecution Response Brief, 25 February 2008.

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public version of the Prosecution Response Brief was filed on 28 March 2008.[21] Martić filed his Reply Brief confidentially on 12 March 2008.[22]

4. Status Conferences

9. Status Conferences in accordance with Rule 65 *bis*(B) of the Rules were held before the Pre-Appeal Judge on 9 November 2007 and on 29 February 2008.

5. Appeal Hearing

10. The hearing on the merits of the appeal took place on 25 and 26 June 2008.

[21] Notice of Filing of Public Redacted Version of Prosecution's Response Brief, 28 March 2008.

[22] Defence Reply Brief. During the Status Conference of 29 February 2008 (AT. 18), the Pre-Appeal Judge denied a motion by Martić, which requested that the Prosecution re-file its Response Brief and asked for an extension of time for the filing of his Reply Brief (Motion to Order the Prosecution to Re-File the Respondent's Brief, 28 February 2008). The Appeals Chamber subsequently denied a motion to reconsider this decision (Decision on Motion for Reconsideration of Oral Decision Issued on 29 February 2008, 10 March 2008).

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XIV. ANNEX B – GLOSSARY

A. Jurisprudence

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GALIĆ

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C. List of Designated Terms and Abbreviations

Term	Definition
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva of 8 June 1977, 1125 U.N.T.S. 609
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, 1015 U.N.T.S. 243
AT.	Transcript page from hearings on appeal in the present case (25 and 26 July 2008)
BiH	*Bosna i Hercegovina* – Republic of Bosnia and Herzegovina
Common Article 3	Article 3 common to the four Geneva Conventions
Third (Geneva) Convention	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277
Fourth Hague Convention	Fourth Hague Convention of 18 October 1907, Respecting the Laws and Customs of War on Land, Regulations, 118 L.N.T.S. 342
HDZ	*Hrvatska demokratska zajednica* – Croatian Democratic Union
HVO	*Hrvatsko vijeće obrane* – Croatian Armed Forces
ICJ	International Court of Justice
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
Indictment	*Prosecutor v. Milan Martić*, Case No. IT-99-36, Second Amended Indictment, 9 December 2005
JNA	*Jugoslovenska narodna armija* – Yugoslav People's Army
MUP	*Ministarstvo unutrašnjih poslova* – Ministry of Internal Affairs
Nuremberg Charter	Charter of the International Military Tribunal of 8 August 1945
Rome Statute	Rome Statute of the International Criminal Court
Rules	Rules of Procedure and Evidence of the Tribunal
RSK	*Republika Srpska Krajina* – Republic of Serbian Krajina
SAO	*Srpska autonomna oblast* – Serbian Autonomous District
SDB	*Služba državne bezbednosti* – State Security Service
SFRY	Socialist Federal Republic of Yugoslavia (Yugoslavia)
SJB	*Stanica javne bezbjednosti* – Public Security Station, *i.e.* police station

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Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827(1992), as amended
SUP	*Sekretarijat za unutrašnje poslove* – Secretariat of Internal Affairs
SVK	*Srpska Vojska Krajine* - Army of the RSK
T.	Transcript page from hearings on trial in the present case
TO	*Teritorijalna odbrana* – Territorial Defence
Trial Chamber	Trial Chamber I as composed for *Prosecutor v. Milan Martić,* Case No. IT-95-11-T, Judgement, 12 June 2007
Trial Judgement	*Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007
Tribunal	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
UN	United Nations
UNMO	United Nations Military Observers
UNPROFOR	United Nations Protection Force
VRS	*Vojska Srpske Republike Bosne i Herzegovine*, later *Vojska Republike Srpske* – Army of the Republika Srpska

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