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-00-39-A
		Date:	17 March 2009
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: **Mr. John Hocking**

Judgement of: **17 March 2009**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter M. Kremer QC
Ms. Shelagh McCall
Ms. Barbara Goy
Ms. Katharina Margetts
Mr. Steffen Wirth
Ms. Anna Kotzeva
Mr. Matteo Costi
Ms. Julia Thibord

Momčilo Krajišnik *pro se*

Counsel for Momčilo Krajišnik on JCE:
Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz

***Amicus Curiae*:**
Mr. Colin Nicholls QC

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I. INTRODUCTION

1. The Appeals Chamber of the 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals against the judgement rendered by Trial Chamber I ("Trial Chamber") on 27 September 2006 in the case of *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-T ("Trial Judgement").

A. Momčilo Krajišnik

2. Momčilo Krajišnik ("Krajišnik") was born in Zabrđe, Novi Grad municipality, Sarajevo, Bosnia and Herzegovina, in 1945. He studied economics and worked in various companies in Sarajevo.[1] Krajišnik, who had become a member of the Serbian Democratic Party ("SDS") at its founding in July 1990, was elected to the Bosnia and Herzegovina Assembly on 20 September 1990 and became the President of this Assembly on 20 December 1990. On 12 July 1991, he was elected to the SDS Main Board.[2] When the Bosnian-Serb Republic was created, Krajišnik held several high-ranking positions in its institutions. From 24 October 1991 through November 1995, Krajišnik was President of the Bosnian-Serb Assembly. He was also a member of the National Security Council. The Trial Chamber found that from 12 May until 17 December 1992 Krajišnik was an active member of the Presidency of the Bosnian-Serb Republic.[3]

B. Trial Judgement and Sentence

3. Krajišnik was tried on the basis of an indictment dated 7 March 2002 ("Indictment").[4] The Office of the Prosecutor ("Prosecution") charged Krajišnik with individual criminal responsibility for crimes committed in 35 municipalities between 1 July 1991 and 30 December 1992.[5] The Trial Chamber found Krajišnik responsible, pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), for persecution as a crime against humanity (Count 3); extermination as a crime against humanity (Count 4); murder as a crime against humanity (Count 5); deportation as a crime against humanity (Count 7); and inhumane acts (forced transfer) as a crime against humanity (Count 8).[6] The Trial Chamber found Krajišnik not guilty of the crimes of genocide (Count 1), complicity in

[1] Trial Judgement, para. 1.
[2] Trial Judgement, para. 3.
[3] Trial Judgement, para. 4.
[4] *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39&40-PT, Amended Consolidated Indictment, 7 March 2002. *See* Trial Judgement, paras 11 and 1215.
[5] Indictment, paras 3-31.
[6] Trial Judgement, para. 1182.

genocide (Count 2) and murder as a violation of the laws or customs of war (Count 6).[7] The Trial Chamber imposed a single sentence of 27 years of imprisonment.[8]

4. The Trial Chamber, in reaching its verdict and sentence, found that Krajišnik participated in a joint criminal enterprise whose objective was to ethnically recompose the territories under the control of the Bosnian-Serb Republic by drastically reducing the proportion of Bosnian Muslims and Bosnian Croats through the commission of various crimes.[9] It considered that there was a leadership component of the group, based in the Bosnian-Serb capital of Pale, which included Krajišnik, Radovan Karadžić and other Bosnian-Serb leaders; the rank and file of this joint criminal enterprise was based in the regions and municipalities of the Bosnian-Serb Republic and maintained close links with the Pale-based leadership.[10]

C. The Appeals

1. Krajišnik

5. Krajišnik, who chose and was authorised to represent himself,[11] seeks a reversal of the Trial Judgement and argues that he should be acquitted of all charges, or alternatively that there be a re-trial.[12] In his Notice of Appeal, Krajišnik claims that his right to a fair trial was infringed by the Trial Chamber and by the Registry,[13] that he was not represented by competent counsel at trial,[14] and that the Trial Chamber was biased.[15] Moreover, he raises numerous challenges to the factual findings of the Trial Chamber, denying in particular that (1) he possessed and abused *de facto*

[7] Trial Judgement, para. 1181. With respect to murder as a violation of the laws or customs of war (Count 6), the Trial Chamber explained (Trial Judgement, para. 849):

> All incidents of killings have been found to constitute either murder or extermination as crimes against humanity (*see* part 5.2.2, above). As murder as a violation of the laws or customs of war was charged in the alternative to these crimes, the Chamber will not make any legal findings on the former. The Chamber has classified all proven killings under Article 5 of the Statute, so the allegation regarding Article 3 of the Statute (violations of the laws or customs of war), which was charged in the alternative to murder as a crime against humanity, is rendered moot.

[8] Trial Judgement, para. 1183.
[9] *See* Trial Judgement, paras 1078-1121.
[10] Trial Judgement, para. 1087.
[11] Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 ("Decision on Self-Representation"), paras 13 and 24.
[12] Notice of Appeal, the original version being dated 12 February 2007 and the English translation having been filed on 20 February 2007 ("Krajišnik's Notice of Appeal"), p. 13; Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, further redacted version filed in English on 28 February 2008 ("Krajišnik's Appeal Brief"), p. 84; Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Confidential), the original version being dated 15 January 2008 and the English translation having been filed on 1 February 2008 ("Krajišnik's Appeal Brief (Confidential)"), p. 84. *See* also Reply to Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, dated 14 May 2008, the English translation having been filed on 26 May 2008 ("Krajišnik's Reply").
[13] Krajišnik's Notice of Appeal, paras 1-8, 10.
[14] Krajišnik's Notice of Appeal, paras 9-10.
[15] Krajišnik's Notice of Appeal, para. 11.

executive power and authority;[16] (2) he was informed about the committed crimes but did not punish them;[17] (3) he was a member of a joint criminal enterprise;[18] (4) he supported and advocated the commission of crimes against Muslims and Croats.[19] He also challenges the Trial Chamber's reliance on certain testimonies[20] and its findings pertaining to the creation, objectives and functioning of the Bosnian-Serb authorities.[21] His Appeal Brief does not follow this order,[22] but rather presents contentions under five titles: (1) "Introduction",[23] (2) "Legal and Procedural Errors During Trial",[24] (3) "Erroneous conclusion on the part of the Chamber that the Accused was a member of JCE",[25] (4) "Errors of fact",[26] and (5) "Relief sought".[27]

6. In response, the Prosecution requests that the Appeals Chamber dismiss Krajišnik's appeal and affirm his convictions.[28]

7. On 28 February 2008, the Appeals Chamber authorised Krajišnik to retain the services of attorney Alan Dershowitz ("JCE counsel") to prepare on his behalf a supplementary brief on the subject of joint criminal enterprise.[29] It is argued in this supplementary brief that (1) joint criminal enterprise is not a legitimate theory of liability; (2) the Trial Chamber erred in not requiring a substantial contribution of Krajišnik to the joint criminal enterprise; and (3) joint criminal enterprise, as applied to Krajišnik, is an inconsistent and incoherent theory of liability.[30] The Prosecution responds that these three grounds of appeal should be dismissed.[31]

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[16] Krajišnik's Notice of Appeal, para. 12.
[17] Krajišnik's Notice of Appeal, paras 13, 22 and 27.
[18] Krajišnik's Notice of Appeal, paras 14-20.
[19] Krajišnik's Notice of Appeal, para. 21.
[20] Krajišnik's Notice of Appeal, para. 24.
[21] Krajišnik's Notice of Appeal, paras 22-23, 25-27.
[22] In violation of the Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, para. 4 *in fine*.
[23] Krajišnik's Appeal Brief, p. 3.
[24] Krajišnik's Appeal Brief, paras 1-8.
[25] Krajišnik's Appeal Brief, paras 9-24.
[26] Krajišnik's Appeal Brief, paras 25-452.
[27] Krajišnik's Appeal Brief, pp. 82-85.
[28] Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, filed confidentially on 12 March 2008 ("Prosecution's Response to Krajišnik (Confidential)"), para. 263. A public version of this response ("Prosecution's Response to Krajišnik") was filed on 18 March 2008: Notice of Filing of Public Redacted Version of Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006.
[29] Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008. *See* also Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, 11 March 2008.
[30] Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, dated 4 April 2008 but filed on 7 April 2008 ("Dershowitz Brief"). *See* also Addendum to the Brief on Joint Criminal Enterprise of Alan M. Dershowitz, Submitted Pursuant to the Decision and Order Dated 11 April 2008, 16 April 2008.
[31] Response to Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, 25 April 2008 ("Prosecution's Response to Dershowitz").

2. *Amicus Curiae*

8. On 11 May 2007, the Appeals Chamber authorised self-representation by Krajišnik and invited the participation of an *amicus curiae* to assist the Appeals Chamber by arguing in favour of Krajišnik's interests.[32] More specifically, the *amicus curiae* was asked to "make submissions to the Appeals Chamber similar to those which a party would make".[33] Mr. Colin Nicholls, who had previously acted as lead counsel in this appeal, was appointed as *amicus curiae*[34] ("*Amicus Curiae*") and, in accordance with the instructions of the Appeals Chamber, he filed a notice of appeal and an appeal brief in which he requested Krajišnik's convictions to be quashed or alternatively that the Appeals Chamber orders a re-trial.[35] The grounds raised by the *Amicus Curiae* are the following:

(1) Krajišnik was not accorded a fair trial;

(2) the Trial Chamber failed to provide a reasoned opinion;

(3) the Trial Chamber's conclusions on joint criminal enterprise were erroneous in law and in fact;

(4) and (5) the Trial Chamber erred in law and in fact in its findings on the crimes of deportation and of forcible transfer;

(6) the Trial Chamber erred in fact in its assessment of Krajišnik's hierarchical position;

(7) the Trial Chamber erred in fact in concluding that Krajišnik possessed the requisite *mens rea* to be convicted;

(8) the Trial Chamber erred in law by allowing the Prosecution to breach Rule 90(H)(ii) of the Rules of Procedure and Evidence ("Rules") with impunity;

(9) the Trial Chamber's approach to Krajišnik's evidence was wholly unreasonable;

(10) the Trial Chamber impermissibly cumulated convictions;

(11) the sentence of 27 years' imprisonment imposed by the Trial Chamber is excessive and disproportionate.

[32] Decision on Self-Representation, para. 19.
[33] Decision on Self-Representation, para. 21.
[34] Decision of the Deputy Registrar, 8 June 2007.
[35] Public and Redacted *Amicus Curiae*'s Notice of Appeal, 8 June 2007 ("*Amicus Curiae*'s Notice of Appeal"), para. 88; Public and Redacted *Amicus Curiae*'s Appellate Brief, 31 August 2007 ("*Amicus Curiae*'s Appeal Brief"), para. 241. The *Amicus Curiae* also filed confidential versions of these documents: Confidential *Amicus Curiae*'s Notice of Appeal, 8 June 2007, as corrected on 14 January 2008 ("*Amicus Curiae*'s Notice of Appeal (Confidential)"); *Amicus Curiae*'s Appellate Brief, 3 August 2007 ("*Amicus Curiae*'s Appeal Brief (Confidential)"). *See* also Confidential *Amicus Curiae*'s Reply to the Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 26 September 2007 ("*Amicus Curiae*'s Reply (Confidential)"), a public version of this reply having been filed on 24 June 2008 ("*Amicus Curiae*'s Reply").

9. The Prosecution responds that all grounds of appeal raised by *Amicus Curiae* should be dismissed, with the partial exception of Ground 4, for which the Prosecution concedes that the intervention of the Appeals Chamber is required.[36]

3. Prosecution

10. The Prosecution raises a single ground of appeal, arguing that the Trial Chamber abused its discretion and imposed a manifestly inadequate sentence, and asks that the sentence of 27 years' imprisonment imposed on Krajišnik be substituted by a sentence of life imprisonment.[37] Krajišnik and the *Amicus Curiae* respond that the Prosecution's appeal should be dismissed.[38]

II. APPELLATE REVIEW

A. Standard for Appellate Review

11. 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.[39] 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.[40]

12. 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 is an error of law.[41] It is necessary

[36] Notice of Filing of Public Redacted Version of the Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 14 September 2007 ("Prosecution's Response to *Amicus Curiae*"), paras 1, 127, 197. A confidential version had been filed on 12 September 2007: The Prosecution's Response to *Amicus Curiae*'s Appellate Brief ("Prosecution's Response to *Amicus Curiae* (Confidential)").
[37] Prosecution's Notice of Appeal, 26 October 2006 ("Prosecution's Notice of Appeal"); Prosecution's Appeal Brief, 27 November 2006 ("Prosecution's Appeal Brief"), para. 72. *See also* The Prosecution's Reply Brief, 22 February 2007 ("Prosecution's Reply to *Amicus Curiae*"); The Prosecution's Second Reply Brief, 27 February 2007 ("Prosecution's Reply to Krajišnik").
[38] Counsel's Response to the Prosecution's Appeal Brief, 12 February 2007 ("*Amicus Curiae*'s Response"); Response to the Prosecution's Appeal Brief, the original version being dated 12 February 2007 and the English translation having been filed on 20 February 2007 ("Krajišnik's Response").
[39] *Martić* Appeal Judgement, para. 8; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6.
[40] *Martić* Appeal Judgement, para. 8; *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7.
[41] *Martić* Appeal Judgement, para. 9; *Strugar* Appeal Judgement, para. 11; *Hadžihasanović and Kubura* Appeal Judgement, para. 8. *See* also *Ntagerura et al.* Appeal Judgement, para. 11.

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.[42]

13. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[43] 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.[44] 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 convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[45] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account 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.[46]

14. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[47] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[48] Further, 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.[49]

15. Furthermore, when factual errors are alleged on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules provides that the Appeals Chamber shall pronounce judgement "on the basis of the record on appeal together with such additional evidence as has been presented to it." The Appeals Chamber recalls the standard of review to be applied on appeal in relation to findings challenged only by the Defence, in the absence of a Prosecution

[42] *Martić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9.
[43] *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 8.
[44] *Martić* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9.
[45] *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9.
[46] *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8.
[47] *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12.
[48] *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10.
[49] *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10.

appeal, in situations where (i) an alleged error of fact is raised, (ii) additional evidence has been admitted on appeal and (iii) there is no error in the legal standard applied in relation to the factual finding:

- The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.

- If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[50]

In situations in which the Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and additional evidence has been admitted on appeal, two steps are involved:

- The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.

- If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt.[51]

B. Standard for Summary Dismissal

16. 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. 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

[50] *Blaškić* Appeal Judgement, para. 24(c).
[51] *Blaškić* Appeal Judgement, para. 24(d).

is expected to present its case clearly, logically and exhaustively. As well, 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.[52]

17. When applying these basic principles, the Appeals Chamber recalls that it has identified deficient submissions on appeal which were liable to be summarily dismissed.[53] The Appeals Chamber in the present case has identified the following types of arguments as warranting summary dismissal.

1. Arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, 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.[54] 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.[55] 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.[56]

2. Mere assertions that the Trial Chamber must have failed to consider relevant evidence

19. A Trial Chamber does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record and failure to do so does not necessarily indicate lack of consideration.[57] This holds true "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence". Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[58] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence, could

[52] *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, paras 13 and 14 (with further references).
[53] *Martić* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 17; *Brdanin* Appeal Judgement, paras 17-31; *Galić* Appeal Judgement, paras 256-313.
[54] *Martić* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, para. 20; *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 *Halilović* Appeal Judgement para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brdanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.
[55] *Martić* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, para. 20; *Brdanin* Appeal Judgement, para. 23.
[56] *Martić* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, para. 20.
[57] *Strugar* Appeal Judgement, para. 24; *Kvočka et al.* Appeal Judgement, para. 23; *Kupreškić et al.* Appeal Judgement, para. 458.

have reached the same conclusion as the Trial Chamber did, it will, as a general rule, summarily dismiss that alleged error or argument.[59]

3. Challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding

20. The Appeals Chamber recalls that 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.[60] Similarly, the Appeals Chamber will summarily dismiss arguments or alleged errors that are clearly irrelevant to the Trial Chamber's convictions or sentence, or which would actually lend support to the challenged finding or would not be inconsistent with it.[61]

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

21. Submissions will usually 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.[62] The Appeals Chamber will also usually summarily dismiss mere assertions that the Trial Chamber's findings were contrary to the testimony of a specific witness or a particular piece of other evidence, or that the Trial Chamber should or should not have relied on the testimony of a specific witness or a particular piece of other evidence, unless the appellant shows that an alleged error of fact occurred that occasioned a miscarriage of justice.[63] Similarly, as a general rule, submissions will be dismissed without detailed reasoning where an appellant merely argues that the testimony of a witness is uncorroborated.[64] Where the Appeals Chamber considers that an appellant makes such assertions without substantiating them, it will usually summarily dismiss that alleged error or argument.[65]

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[58] *Strugar* Appeal Judgement, para. 24; *Limaj* Appeal Judgement, para. 86.
[59] *Brdanin* Appeal Judgement, para. 24; *Galić* Appeal Judgement, paras 257-258.
[60] *Martić* Appeal Judgement, para. 17; *Brdanin* Appeal Judgement, para. 26; *Galić* Appeal Judgement, paras 264-265.
[61] *See Martić* Appeal Judgement, para. 17; *Brdanin* Appeal Judgement, para. 26; *Galić* Appeal Judgement, paras 264-265.
[62] *Martić* Appeal Judgement, para. 21; *Strugar* Appeal Judgement, para. 23; *Brdanin* Appeal Judgement, paras 27-28; *Galić* Appeal Judgement, paras 300, 302, 305-307.
[63] *See Martić* Appeal Judgement, para. 21; *Strugar* Appeal Judgement, para. 23; *Brdanin* Appeal Judgement, paras 27-28.
[64] *Martić* Appeal Judgement, para. 21; 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.
[65] *Martić* Appeal Judgement, para. 21.

5. Arguments contrary to common sense

22. The Appeals Chamber will, as a general rule, summarily dismiss arguments and allegations that are contrary to common sense.[66]

6. Challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the Appellant

23. When an appellant raises arguments against factual findings by the Trial Chamber without elaborating on how the alleged error of fact had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice, the Appeals Chamber will, as a general rule, summarily dismiss the alleged error or argument.[67]

7. Mere repetition of arguments that were unsuccessful at trial

24. The Appeals Chamber will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[68]

8. Allegations based on material not on record

25. The Appeals Chamber will summarily dismiss arguments and allegations based on material that is not part of the trial record and that has not been admitted on appeal pursuant to Rule 115 of the Rules.[69]

9. Mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error

26. 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.[70] As a general rule, in instances where this is not done, the Appeals Chamber will

[66] *Brdanin* Appeal Judgement, para. 30; *Galić* Appeal Judgement, paras 308 and 310.
[67] *Brdanin* Appeal Judgement, para. 31.
[68] *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Halilović* Appeal Judgement para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, paras 10 and 303; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[69] *Galić* Appeal Judgement, paras 311-313.
[70] *Martić* Appeal Judgement, para. 20; *Strugar* Appeal Judgement, para. 22. *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 *Halilović* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brdanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.

summarily dismiss the alleged error or argument.[71] Similarly, the Appeals Chamber will, as a general rule, summarily dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error committed by the Trial Chamber.[72]

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

27. As a general rule, 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.[73] 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. The same applies to claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence without further explanation.[74]

[71] *Martić* Appeal Judgement, para. 20.
[72] *Galić* Appeal Judgement, para. 297.
[73] *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21; *Brdanin* Appeal Judgement, para. 24.
[74] *Martić* Appeal Judgement, para. 19; *Strugar* Appeal Judgement, para. 21.

III. GROUNDS OF APPEAL RAISED BY *AMICUS CURIAE*

A. Alleged violations of the right to a fair trial (Ground 1)

28. In the first ground raised by *Amicus Curiae*,[75] he submits that Krajišnik's right to a fair trial was infringed in the following ways:

> 1) Krajišnik did not receive effective assistance of counsel prior to and during the trial;[76]
>
> 2) Krajišnik was denied the right to have adequate time and facilities for the preparation of his defence;[77]
>
> 3) The Trial Chamber impermissibly restricted Krajišnik's right to examine the witnesses against him and to call witnesses on his own behalf;[78]
>
> 4) The circumstances surrounding the replacement of Judge El Mahdi by Judge Hanoteau rendered the trial unfair;[79]
>
> 5) The Trial Chamber failed to properly deliberate after the parties had completed their presentation of the case.[80]

The Appeals Chamber will examine these allegations in turn. Before doing so, the Appeals Chamber recalls that where a party alleges on appeal that the right to a fair trial has been infringed, it must prove that 1) provisions of the Statute and/or the Rules were violated; and 2) the violation caused prejudice or "unfairness" to the alleging party, such as to amount to an error of law invalidating the trial judgement.[81] The Appeals Chamber will also briefly recall the history of the proceedings in this case.

1. Relevant background

29. Krajišnik made his initial appearance before the Tribunal on 7 April 2000, when he was represented by Mr. Igor Pantelić. On 3 May 2000, the Registrar assigned Mr. Goran Nešković as temporary counsel.[82] At Krajišnik's request, on 10 April 2001 the Registrar withdrew Mr. Nešković

[75] *Amicus Curiae*'s Notice of Appeal, Ground 1, paras 6-24; *Amicus Curiae*'s Appeal Brief, paras 2-124. On 26 July 2007 ("*Amicus Curiae*'s Motion for Variance Concerning the Order and Numbering of the Arguments on Appeal"), *Amicus Curiae* requested the Appeals Chamber to vary the order of two sub-grounds 1(A) and 1(B) in his Appeal Brief. On 3 August 2007 ("*Amicus Curiae*'s Motion to Withdraw Sub-Ground of Appeal"), *Amicus Curiae* requested the Appeals Chamber to remove sub-ground 1(D).
[76] *Amicus Curiae*'s Notice of Appeal, paras 10-14; *Amicus Curiae*'s Appeal Brief, paras 3-68.
[77] *Amicus Curiae*'s Notice of Appeal, paras 7-9; *Amicus Curiae*'s Appeal Brief, paras 69-87.
[78] *Amicus Curiae*'s Notice of Appeal, paras 15-16; *Amicus Curiae*'s Appeal Brief, paras 88-110.
[79] *Amicus Curiae*'s Notice of Appeal, paras 19-20; *Amicus Curiae*'s Appeal Brief, paras 111-119.
[80] *Amicus Curiae*'s Notice of Appeal, paras 21-22; *Amicus Curiae*'s Appeal Brief, paras 120-124.
[81] *Kordić and Čerkez* Appeal Judgement, para. 119.
[82] Trial Judgement, para. 1206.

as counsel and assigned in his place Mr. Deyan Ranko Brashich.[83] On 2 May 2003 the Registrar issued a decision withdrawing Mr. Brashich as lead counsel for Krajišnik, reassigning him as legal consultant for a period of three months. The decision was in response to a US court order, dated 1 April 2003, suspending Mr. Brashich from the practice of law for a period of one year, effective 1 May 2003. The commencement of the trial, which had been scheduled for 12 May 2003, was as a result delayed.[84]

30. On 12 June 2003, the Registrar concluded that Krajišnik was only partially indigent and that he was liable for part of the defence costs.[85]

31. On 30 July 2003, Mr. Nicholas Stewart was assigned to Krajišnik as new lead counsel;[86] Ms. Chrissa Loukas was assigned as co-counsel on 16 September 2003.[87] The trial commenced on 3 February 2004,[88] the schedule allowing for 30 days of recess and only 18 sitting days until 12 April 2004.[89] Further adjournments were granted by the Trial Chamber (from late April to late May and from late June to mid-July 2004), in particular to allow the parties to negotiate an extension of their agreement on facts and other matters relevant to the Indictment; these talks came to an end on 12 July 2004 when the Defence informed the Trial Chamber that it had decided to discontinue them.[90] Two days later, the Defence filed a motion seeking an adjournment until 4 October 2004 to obtain more time to prepare;[91] this motion was denied orally on 16 July 2004,[92] with written reasons given on 21 September 2004.[93] The trial continued for a week at the end of

[83] Trial Judgement, para. 1211. However, it appears that Mr. Nešković continued to act as co-counsel until early May 2003, and that he continued to provide some assistance to the new Defence team assigned thereafter: Decision on Defense Motion for Adjournment (Written Reasons), 21 September 2004 ("First Decision on Adjournment (Written Reasons)"), para. 3.
[84] Trial Judgement, para. 1227.
[85] Trial Judgement, paras 1229-1234. Several decisions and orders suggest that Krajišnik refused to pay his assessed contribution. *See*, *e.g.*, Reasons for Decision Denying Defence Motion for Time to Call Additional Witnesses, 16 August 2006 ("Reasons for Denying Motion to Call Additional Witnesses"), para. 36; Decision on Defence's Rule 74 *bis* Motion; Amended Trial Schedule, 27 February 2006 ("Decision of 27 February 2006"), para. 9; Decision on (Second) Defence Motion for Adjournment, 4 March 2005 ("Second Decision on Adjournment"), para. 17 (affirmed on appeal: Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005 ("Decision on Interlocutory Appeal"), para. 46); Decision on Defence Motion to Further Delay the Commencement of the Defence Case, 28 September 2005 ("Decision of 28 September 2005"), pp. 2-3; Order pursuant to Rule 65 *ter* (G) with Consequential Variation of Trial Schedule, 26 August 2005, p. 2. *See* also Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005 ("Reasons for Denying Request to Proceed Unrepresented by Counsel"), para. 18, quoting a memorandum of the Registrar stating that Krajišnik did not pay his contribution to the Hague-based defence team.
[86] The terms "Counsel", "Counsel Stewart", "Defence" and "Defence Counsel" are used interchangeably.
[87] Trial Judgement, para. 1228.
[88] T. 299 (opening statement of the Prosecution).
[89] Trial Judgement, para. 1235 (erroneously referring to 2 February 2004 as the starting date).
[90] Trial Judgement, para. 1236.
[91] Defence Motion for Adjournment, 14 July 2004.
[92] T. 4515-4519 ("First Decision on Adjournment").
[93] First Decision on Adjournment (Written Reasons).

July 2004. After one month of judicial recess, the sittings resumed on 30 August 2004, with numerous breaks.[94]

32. On 10 December 2004, the trial was interrupted following Judge El Mahdi's announcement that he was withdrawing from the case as of 14 January 2005. After Krajišnik refused to consent to the continuation of the proceedings with another Judge, the two remaining Judges issued a decision under Rule 15 *bis* (D) of the Rules to continue the proceedings with a substitute Judge.[95] On 25 January 2005, the President recomposed the Trial Chamber, replacing Judge El Mahdi with Judge Hanoteau. On 25 February 2005, Judge Hanoteau certified that he had familiarised himself with the record of the proceedings, as required by Rule 15 *bis* (D) of the Rules; the trial resumed on 28 February 2005.[96]

33. On 22 February 2005, the Defence filed a second motion for adjournment, seeking a six-month suspension of proceedings to permit it more time in preparation;[97] that motion was denied on 4 March 2005,[98] and an interlocutory appeal against that decision was rejected on 25 April 2005.[99]

34. On 24 May 2005, Krajišnik announced that he wished to represent himself in all proceedings before the Tribunal.[100] On 26 May 2005, the Trial Chamber issued a provisional decision, to the effect that Krajišnik would continue to be represented by counsel until the issue of legal representation was finally decided, but allowing exceptionally and temporarily Krajišnik to supplement his counsel's cross-examination with his own questions to the witness.[101]

35. The Prosecution case ended on 22 July 2005. On the same date, the Trial Chamber rendered an oral decision denying the application for self-representation by Krajišnik,[102] with written reasons given on 18 August 2005.[103] Also on 22 July 2005, the Registrar withdrew the assignment of Ms. Loukas as co-counsel for Krajišnik, assigning Mr. David Josse – who had previously been working on the case as a legal assistant – as new co-counsel for Krajišnik.[104]

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[94] During the Prosecution phase there were 189 sitting days and 166 non-sitting days, not counting weekends, public holidays and court recesses. The high number of non-sitting days was the result of Defence requests granted by the Trial Chamber to decelerate the pace of trial to provide more time for preparation by the Defence: Reasons for Denying Motion to Call Additional Witnesses, para. 17 and fn. 21.
[95] Trial Judgement, para. 1240.
[96] T. 9543 (the Trial Judgement, at para. 1241, erroneously states that the trial resumed on 25 February 2005).
[97] Defence Motion for Adjournment, 22 February 2005.
[98] Second Decision on Adjournment.
[99] Decision on Interlocutory Appeal.
[100] Trial Judgement, para. 1244.
[101] Trial Judgement, para. 1245. This practice was subsequently extended to allow Krajišnik a limited role in complementing his Counsel's examination-in-chief of Defence witnesses, subject to the Trial Chamber's supervision: Trial Judgement, para. 1246.
[102] T. 17048.
[103] Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005.
[104] Decision of the Registrar, 22 July 2005.

36. On 16 August 2005, Krajišnik applied for acquittal under Rule 98 *bis* of the Rules; this motion was dismissed orally on 19 August 2005.[105] The Defence case was set to start on 12 September 2005 but the Trial Chamber granted a further adjournment of four weeks and the Defence case ultimately started on 10 October 2005.[106] The Defence case ended on 22 June 2006. Again, the schedule afforded for numerous non-sitting days for the parties to prepare.[107] In the period from 23 June through 14 July 2006, six Trial Chamber witnesses were heard.[108] Both parties filed their final briefs on 18 August 2006, followed by closing arguments from 29 to 31 August 2006.[109] The Trial Judgement was rendered on 27 September 2006.

2. Additional evidence on appeal

37. Three witnesses were heard on appeal in relation to the claim that Krajišnik's trial was unfair.[110] The first witness, Mr. George Mano, worked as a volunteer intern for Krajišnik's defence team between 5 July and 24 September 2004.[111] The second witness, Mr. Stefan Karganović, worked as a case manager and interpreter for the defence team from April 2005 until May 2006.[112] Third, the Appeals Chamber heard evidence from Mr. Nicholas Stewart, former lead counsel. A number of documents related to the fair trial issue were also admitted on appeal, in particular, previous statements by Messr. Mano and Karganović and documents authored by Mr. Stewart.[113] *Amicus Curiae* submits that this additional evidence is relevant to his sub-grounds 1(A), 1(B) and 1(C), to which the Appeals Chamber now turns.[114]

3. Alleged ineffective assistance of counsel (sub-ground 1(A))

(a) Submissions

38. *Amicus Curiae* alleges that Krajišnik was ineffectively assisted during the pre-trial and trial periods, resulting in a denial of Krajišnik's right to a fair trial or, "alternatively", rendering "the trial

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[105] T. 17112-17132.
[106] Trial Judgement, paras 1250-1251.
[107] *See* Reasons for Denying Motion to Call Additional Witnesses, para. 20:

> During the Defence phase, there were 106 sitting days. Forty of these days were spent on the testimony of Mr. Krajišnik. Between the commencement of the Defence case on 10 October 2005 and the last day of Mr. Krajišnik's testimony, on 22 June 2006, there were 52 non-sitting days (not counting weekends, public holidays and court recesses). If one were to count non-sitting days from the date on which the Defence case was originally scheduled to start (12 September 2005), there were 73 non-sitting days. If one were to count from the end of the Prosecution case, there were 90 non-sitting days.

[108] Reasons for Decision Denying Defence Motion for Time to Call Additional Witnesses, 16 August 2006, para. 21.
[109] Trial Judgement, para. 1258.
[110] *See infra* VIII.E.
[111] AT. 357.
[112] AT. 431, 434-436.
[113] *See infra* VIII.E.
[114] *Amicus Curiae*'s Supplemental Brief, para. 3.

verdict unreliable by introducing reasonable doubt as to whether a miscarriage of justice occurred".[115] *Amicus Curiae* also argues that the problems concerning Krajišnik's representation were known to the Trial Chamber, which should have taken further steps to ensure the fairness of trial.[116]

39. *Amicus Curiae* further argues that Counsel Brashich failed to disclose to the Registrar between 22 September 2002 and 10 April 2003 that he had been disciplined for misconduct in New York, that this amounted to a gross breach of his obligation under Article 35(c) of the ICTY's Code of Professional Conduct for Counsel, and that Counsel Brashich's deception - which resulted in his subsequent removal as counsel ten days before the planned commencement date of the trial - had a significant impact on Krajišnik's right to effective legal assistance in all phases of proceedings.[117]

40. *Amicus Curiae* also raises a number of specific allegations with respect to Counsel Brashich's[118] and Counsel Stewart's[119] legal assistance.

41. The Prosecution responds that assigned counsel is presumed competent and that this presumption can only be rebutted by "evidence of tangible examples of misconduct which establish that counsel was grossly incompetent and that a miscarriage of justice resulted."[120] It asserts that *Amicus Curiae* has not shown that the allegedly incompetent decisions of Krajišnik's counsel were demonstrably wrong or were not taken as part of a strategy agreed upon beforehand; *Amicus Curiae* thus fails to rebut the presumption of competence of counsel.[121] The Prosecution argues further that *Amicus Curiae* fails "to demonstrate the impact of the wrongdoings on the fairness of the trial."[122]

(b) Analysis

42. As recently recalled by the Appeals Chamber:

> A participant in the International Tribunal's legal aid system has the right to competent assigned counsel. An assigned counsel is presumed to be competent and such a presumption can only be

[115] *Amicus Curiae*'s Appeal Brief, para. 3. *See* also paras 15-18 and *Amicus Curiae*'s Reply, paras 4-5, and AT. 301-302.
[116] *See* for instance *Amicus Curiae*'s Appeal Brief, paras 18, 28, 34, 46, 49, 55, 58-60, 65-66. In several of these paragraphs, *Amicus Curiae* argues that the Trial Chamber should have given more time to the Defence to prepare. Such arguments do not relate to the competence of counsel, but rather to the question of whether the Defence was afforded adequate time and facilities to prepare.
[117] *Amicus Curiae*'s Appeal Brief, paras 19-21; AT. 302-303,
[118] *Amicus Curiae*'s Appeal Brief, paras 22-26; *Amicus Curiae*'s Supplemental Brief, paras 14-15 . *See* also AT. 301. In this respect, *Amicus Curiae* argues in particular that the documents which were eventually received from Mr. Brashich were in complete disorder and that many of the boxes with relevant documents for the trial had not been opened at all, revealing that Mr. Brashich's team had not conducted any work on the documents these boxes contained.
[119] *Amicus Curiae*'s Appeal Brief, paras 27-28, 30-34, 37-53, 56, 61-65. *See* also *Amicus Curiae*'s Supplemental Brief (Confidential), paras 17-18, 20-25, 32-45. *See* also *Amicus Curiae*'s Reply, para. 9.
[120] Prosecution's Response to *Amicus Curiae*, paras 21-22. *See* also Prosecution's Supplemental Brief, paras 5-11.
[121] Prosecution's Response to *Amicus Curiae*, paras 23-24.
[122] Prosecution's Response to *Amicus Curiae*, para. 25.

> rebutted by evidence to the contrary. Among other things, an appellant must demonstrate "gross incompetence" on the part of the assigned counsel.[123]

The Appeals Chamber further recalls that unless gross negligence is shown in the conduct of defence counsel, due diligence as a matter of professional conduct of counsel will be presumed.[124] In addition, while a Trial Chamber is required to guarantee a fair and expeditious trial with full respect for the rights of the accused (Article 20(1) of the Statute), it is not for the Trial Chamber to dictate to a party how to conduct its case. If an accused believes that his right to effective assistance is being infringed by the conduct of his counsel, it is his responsibility to draw the Trial Chamber's attention to the problem. If this was not done at trial, he can only be successful on appeal upon showing that the counsel's incompetence was manifest and that the Trial Chamber's failure to intervene occasioned a miscarriage of justice.[125]

43. In the case at hand, *Amicus Curiae* argues that Krajišnik's right to effective representation was infringed by the conduct of both Counsel Brashich and Counsel Stewart. The Appeals Chamber will first consider the allegations concerning Counsel Brashich.

(i) Alleged failures of Counsel Brashich

44. At the outset, the Appeals Chamber observes that *Amicus Curiae* did not argue in his Notice of Appeal that Krajišnik's right to effective legal assistance was affected by Counsel Brashich's failure to disclose to the Registrar that he (Counsel Brashich) had been disciplined for misconduct in New York.[126] Consequently, this part of *Amicus Curiae*'s sub-ground 1(A) is rejected.

45. *Amicus Curiae* argues first that Counsel Brashich failed to hand over the case material to the new counsel in a timely and orderly manner.[127] However, the Trial Chamber was aware of this problem[128] and, in keeping with the new Defence team's suggestion, adjusted the pace of the trial to allow for numerous non-sitting days.[129] Coupled with the facts that the new Defence team benefited from the assistance of persons who had previously been members of the Brashich Defence team[130] and that Krajišnik himself could serve as a link between the old Defence team and the new Defence

[123] *Blagojević and Jokić* Appeal Judgement, para. 23 (footnotes omitted). *See* also *Nahimana et al.* Appeal Judgement, para. 130.
[124] *Prosecutor v. Duško Tadić*, Case No. 94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998, para. 48.
[125] *Nahimana et al.* Appeal Judgement, para. 131.
[126] *See Amicus Curiae*'s Notice of Appeal, paras 10-14.
[127] *Amicus Curiae*'s Appeal Brief, paras 22-24, 26; *Amicus Curiae*'s Supplemental Brief, para. 14, referencing Witness Stewart, AT. 624-625, 663.
[128] First Decision on Adjournment (Written Reasons), para. 3 (bullet 4) ("Reportedly, the transfer of case materials from the old to the new team was very problematic; there were significant delays in communication and the material was in a disorderly state").
[129] First Decision on Adjournment (Written Reasons), paras 3-4, 7-8. *See* also Second Decision on Adjournment, paras 4-5.

team,[131] the Appeals Chamber is not convinced that Counsel Brashich's failure to hand over the case material to the new counsel in a timely and orderly manner resulted in a miscarriage of justice.

46. *Amicus Curiae* also asserts that Counsel Brashich failed to provide the new Defence team with any significant work product.[132] The Appeals Chamber notes that two and a half months before Counsel Stewart took over from him, on 12 May 2003 Counsel Brashich stated before the Trial Chamber that "most of the preparation that [he] had done [was] locked in [his] brain".[133] Further, Counsel Stewart testified on appeal that when he met with Counsel Brashich in August 2003, the latter only brought "a few scraps of papers here and there", and that he eventually received "a vast amount of material in a barely organised state" from Counsel Brashich.[134]

47. The Appeals Chamber accepts that the work product handed over from Counsel Brashich to Counsel Stewart was not in as good a state as it should have been. Nonetheless, the new Defence team benefited from some of the work done by the Brashich team, in particular the pre-trial brief.[135] Moreover, the Trial Chamber and the Registrar were aware of the situation, and addressed it by adjusting the pace of trial and allotting the new Defence team substantial legal-aid time for pre-trial preparation.[136]

48. The Appeals Chamber can see no error in this,[137] and concludes that Krajišnik suffered no prejudice as a result of the failures of Counsel Brashich such as to occasion a miscarriage of justice.

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[130] *See* First Decision on Adjournment (Written Reasons), paras 3 (bullet 2) and 11. *See* also Witness Stewart, AT. 669.
[131] In this regard *see* for instance First Decision on Adjournment (Written Reasons), para. 18, and Second Decision on Adjournment, para. 4. *See* also Witness Stewart, AT. 694.
[132] *Amicus Curiae*'s Appeal Brief, paras 25-26; *Amicus Curiae*'s Supplemental Brief, para. 15.
[133] T. 137.
[134] Witness Stewart, AT. 624.
[135] Witness Stewart, AT. 684. *See* also *Amicus Curiae*'s Supplemental Brief, para. 16. *Amicus Curiae* asserts that the Brashich pre-trial brief was of poor quality (*Amicus Curiae*'s Reply, para. 11). In support, he refers to a statement of Counsel Stewart to the effect that "the pre-trial brief might be thought to be rather less informative than pre-trial briefs sometimes are, and that's a bit of an understatement" (T. 4458). This is insufficient to show that the pre-trial brief was so deficient as to be useless to the new Defence team.
[136] *See* First Decision on Adjournment (Written Reasons), para. 5 (footnote omitted).
[137] In particular, the reduction of 25% in the number of counsel hours for pre-trial preparation was reasonable considering, *inter alia*, that the new Defence team did not have to prepare a pre-trial brief (*see* First Decision on Adjournment (Written Reasons), paras 5-7.

(ii) Alleged failures of the Stewart team

a. Commencing a case when manifestly unprepared

49. *Amicus Curiae* contends that Counsel Stewart was manifestly unprepared to commence the trial in February 2004 and committed a grave error in failing to apply for deferral prior to the commencement of trial.[138]

50. At the outset, the Appeals Chamber recalls that some preparatory work had been carried out prior to the commencement of the trial on 3 February 2004,[139] and that the new Defence team benefited from the assistance of persons who had previously been members of the Brashich Defence team.[140] Also, Krajišnik himself could serve as a link between the old and the new Defence team and assist in the preparation.

51. Counsel Stewart testified that when the trial began on 3 February 2004, he had only read one or two per cent of the case papers.[141] Yet he emphasised that "there is such thing as delegation […] and common sense sifting".[142] Questioned by *Amicus Curiae* whether his team was "grossly unprepared to commence a trial" on 3 February 2004, Counsel Stewart answered: "If you're looking at the whole trial, yes, we were; of course we were".[143] However, asked by the Bench about his preparedess to start the trial, Counsel Stewart gave a more nuanced answer. He said, though the trial should not have started when it did, "it was not actually at that point of the trial in February that we found ourselves significantly hampered."[144] Contrary to *Amicus Curiae*'s claim,[145] Counsel Stewart thus did not accept that his team was "grossly unprepared" to commence trial on 3 February 2004.

52. That said, it is clear that the Defence team was insufficiently prepared to commence trial on 3 February 2004, and Counsel Stewart indeed raised this issue during an informal meeting on 18 December 2003 with two Judges and other Chambers staff in which he proposed a reduced schedule of sitting days.[146] The Trial Chamber took into account the difficulties expressed by Defence Counsel and decided to adjust the pace of the trial, sitting only 18 (out of 48) days between

[138] *Amicus Curiae*'s Appeal Brief, paras 29-36; *Amicus Curiae*'s Supplemental Brief, paras 17-31.
[139] In particular, a pre-trial brief had already been filed, and new Counsel had already billed a number of hours in preparation (*see* First Decision on Adjournment (Written Reasons), para. 6: "From the submissions of the Defence it appears that in the period up to the commencement of trial in February 2004, some 1,045 counsel hours were billed by the new team").
[140] *See* First Decision on Adjournment (Written Reasons), paras 3 (bullet 2) and 11.
[141] Witness Stewart, AT. 668.
[142] Witness Stewart, AT. 632, 660.
[143] Witness Stewart, AT. 671. *See* also AT. 672.
[144] Witness Stewart, AT. 629-630. *See* also Witness Stewart, AT. 669-670.
[145] *Amicus Curiae*'s Supplemental Brief, para. 18.
[146] First Decision on Adjournment (Written Reasons), para. 3 (bullet 5).

3 February and 1 August 2004.[147] Counsel Stewart testified that this arrangement, "with hard work and difficulty, [was] manageable".[148]

53. *Amicus Curiae* disagrees, and argues that the proper remedy for the Defence's unpreparedness would have been for Counsel Stewart to request an adjournment,[149] thereby putting the matter before the full Trial Chamber and potentially before the Appeals Chamber.[150] To this, Counsel Stewart testified that though his Co-counsel strongly suggested requesting an adjournment,[151] given the reduced schedule already agreed on and the Presiding Judge's resolve to start the trial on 3 February 2004, he made the strategic decision not to seek an adjournment at that juncture.[152] Given the circumstances at the time, the Appeals Chamber agrees with the Prosecution that this decision was within the limits of professional judgement by counsel.[153]

54. In light of the foregoing, the Appeals Chamber concludes that Krajišnik's defence was not grossly unprepared to commence trial on 3 February 2004. *Amicus Curiae* has not demonstrated that the insufficient preparation of the Stewart Defence team at the beginning of the trial resulted in a miscarriage of justice. His argument is therefore dismissed.

b. Failure to utilise the pre-trial resources allocation properly

55. *Amicus Curiae* claims that Counsel Stewart did not utilise the pre-trial resources allocation properly. He asserts first that Counsel Stewart failed to employ sufficient support staff in The Hague.[154] However, Counsel Stewart himself was of the view that his team – which included two Serbo-Croatian-speaking legal assistants – was adequately sized and well qualified.[155] *Amicus Curiae* only avers that the "Registry recommends five support staff for a level-3 case" or that "[a] cursory review of the budget allocation indicates that there were grossly insufficient support staff to facilitate the proper running of the case, let alone to remedy the problem posed by the ill-sorted deluge of papers from former counsel".[156] These general assertions are insufficient to show that Counsel Stewart committed gross negligence in failing to retain additional support staff in the present case, particularly since his team already included persons who had been working on the

[147] First Decision on Adjournment (Written Reasons), paras 3-4, 7-8.
[148] Witness Stewart, AT. 630, 672.
[149] *Amicus Curiae*'s Supplemental Brief, paras 20, 22.
[150] *Amicus Curiae*'s Supplemental Brief, para. 23.
[151] Witness Stewart, AT. 664.
[152] Witness Stewart, AT. 627, 664-666.
[153] Prosecution's Supplemental Brief, para. 29.
[154] *Amicus Curiae*'s Appeal Brief, paras 37-39.
[155] T. 4471.
[156] *Amicus Curiae*'s Appeal Brief, para. 38.

previous Defence team and were thus familiar with the case and the case materials. This argument is rejected.

56. Second, *Amicus Curiae* argues that Counsel Stewart failed to instruct and manage investigators in Pale adequately, and he refers in this connection to a statement of Counsel Stewart - made in the context of a motion for adjournment - to the effect that there was no time to instruct and control them properly.[157] This is insufficiently specific to show that Counsel Stewart committed gross negligence,[158] or how Krajišnik was prejudiced by this. Further, this argument seems more relevant to the question of whether the Defence was accorded adequate time, which will be examined under sub-ground 1(B).[159]

57. Third, *Amicus Curiae* asserts that Counsel Stewart failed to invest in software (in particular Zylab) that would have alleviated the burden of reviewing documents.[160] The Appeals Chamber notes that the only reference *Amicus Curiae* provides in this regard does not clearly show that the Defence did not have the software he mentions.[161] In any case, even if the Defence had failed to acquire software to facilitate the review of documents before July 2004 (when the Defence Motion for Adjournment was filed), *Amicus Curiae* does not indicate concretely how this prejudiced Krajišnik's defence. Indeed, *Amicus Curiae* fails to identify any evidence that would have been missed by the Defence, that would otherwise have been discovered had the software been acquired in time, and that could have influenced the verdict. This argument is rejected.

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[157] *Amicus Curiae*'s Appeal Brief, paras 37, 39, referring to T. 4476.

[158] In this context, the Appeals Chamber observes that any difficulties in managing the Pale investigators might have been due to Krajišnik himself. Indeed, as noted in a memorandum of the Registrar to the Trial Chamber quoted at paragraph 18 of the Reasons for Denying Request to Proceed Unrepresented by Counsel:

> The investigators are family members, friends and associates of Mr. Krajišnik. They appear to be unwilling or unable to work directly for Mr. Stewart, preferring instead to receive instructions from Mr. Krajišnik himself. This often renders the work performed by the Pale-based investigators unusable for Mr. Krajišnik's Hague-based defence team.

[159] *See infra* III.A.4.

[160] *Amicus Curiae*'s Appeal Brief, para. 37 and footnote 74, referring to paragraph 16 of the Defence Motion for Adjournment of 14 July 2004, and affirming that this paragraph showed that Zylab software had not been purchased by the Defence as of July 2004.

[161] Paragraph 16 of the Defence Motion for Adjournment of 14 July 2004 reads as follows:

> The Defence now have about 150 CDs of Prosecution material, obviously varying in the amount of content but many containing a large number of files. The Defence have spent more than €7000 on high quality computers in The Hague to supplement the quite good facilities that they already individually owned before this case. It is fortunate that Ms Cmeric is an experienced and skilled Case Manager who is adept with IT and that between them the other two members of the Core Team probably have at least an average IT competence for experienced lawyers. But the organization, indexing and labeling of files on the CDs makes them very difficult to handle and scanned documents (as opposed to Word files or similar) are frequently in a format which makes them very slow and difficult to read and manage.

c. Failure to review disclosure materials adequately

58. *Amicus Curiae* submits that Counsel Stewart failed to review the material disclosed to the Defence adequately and that as a result he failed to test the witness evidence adequately and to identify any exculpatory material or material which undermined Prosecution evidence.[162] *Amicus Curiae* argues that Counsel Stewart had read only one to two per cent of the case papers when the trial started, and recalls Counsel Stewart's statement that he had read no more than fifteen per cent of the documents thirteen months into the trial, and in fact never completed a review and analysis of the relevant material.[163]

59. The Appeals Chamber notes that the Trial Chamber was aware of the amount of material disclosed to the Defence.[164] However, it correctly considered that

> [a] case in which the number of events and the structure of power and responsibility underlying the criminal charges cover a large territory, a long period of time, and many victims, cannot realistically be dealt with at the same level of detail as a case on a smaller scale. This necessitates and justifies limitations in case presentation by the parties. It requires the parties to identify those aspects of the case to which greater or lesser degrees of attention will be given, and to find a balance among those aspects. In the context of such constraints, the exploration, say, or the historical context of the armed conflict, necessarily competes for time with the need to verify or introduce details of "crime-base" evidence, or with the need to understand the relationships and interactions among people operating in the environment in which the Accused is alleged to have operated. Experienced counsel are expected to find a proper balance among these aspects, something expected of them also in complex domestic trials.[165]

60. In addition, it was not necessary for Counsel Stewart himself to read line by line every single document disclosed to the Defence. A selection had to be made with the assistance of his team and Krajišnik,[166] and, as acknowledged by Counsel Stewart, he also had to – and indeed did – delegate the review of the documents to his team as appropriate.[167]

61. In this respect, *Amicus Curiae* contends that there was never any appropriate delegation and that neither Counsel Stewart nor his team ever reviewed the majority of the disclosed material.[168] The Appeals Chamber notes Counsel Stewart's testimony that it was problematic to identify relevant documents in the large amount of disclosed material within the given time limits[169] and that he and his team were never able to review it to ensure they did not miss anything.[170] *Amicus Curiae* correctly notes that this evidence is consistent with arguments in the Defence's Motion for

[162] *Amicus Curiae*'s Appeal Brief, paras 40-47; *Amicus Curiae*'s Supplemental Brief, paras 25, 32, 39-41.
[163] *Amicus Curiae*'s Supplemental Brief, para. 32.
[164] First Decision on Adjournment (Written Reasons), para. 12.
[165] First Decision on Adjournment (Written Reasons), para. 15.
[166] In this respect, *see* also Second Decision on Adjournment, para. 13, affirmed on appeal: Decision on Interlocutory Appeal, para. 42.
[167] Witness Stewart, AT. 632, 660, 669.
[168] *Amicus Curiae*'s Supplemental Brief, paras 31, 33-37, 39, 40.
[169] Witness Stewart, AT. 633.
[170] Witness Stewart, AT. 643-644, 658, 675-676.

Adjournment in July 2004 and Counsel Stewart's statements at trial in February 2005, to the effect that he had not been able to review the many tens of thousands of files in the Defence's possession.[171]

62. Yet in spite of these difficulties, Counsel Stewart managed to mount a defence which in his view met his professional obligations.[172] He confirmed that the Defence had a specific understanding of the defence strategy when cross-examining the first Prosecution witness.[173] Together with his team, he was able to review relevant witness materials in preparation for cross-examination of Prosecution witnesses.[174] In preparing for cross-examination, they focused on key points and built detail around it.[175] Also, although testifying that the cross-examinations suffered from inadequate preparation generally, Counsel Stewart could not point to a specific example to illustrate this,[176] and *Amicus Curiae* did not put any such examples to him.

63. On balance, the Appeals Chamber finds that *Amicus Curiae* has not demonstrated that the Defence's review of the disclosure material, imperfect though it may have been, has occasioned a miscarriage of justice. *Amicus Curiae*'s argument thus fails.

d. Failure to work full time on the case during the trial period

64. *Amicus Curiae* argues that Counsel Stewart decided to undertake other substantive professional commitments in March 2004, working only about 100 hours on the case when he should have been fully devoted to case preparation.[177] The Appeals Chamber notes that, when asked to explain this by the Trial Chamber, Counsel Stewart stated personal reasons and pre-existing commitments in his defence.[178] On appeal, he testified that he did have ongoing cases in London when he took on Krajišnik's case, but that he had to "wrap them up" and release himself "sufficiently to be able to do [Krajišnik's] case".[179] The Appeals Chamber emphasises that when accepting to represent an accused before the Tribunal, absolute priority must be given to this

[171] *Amicus Curiae*'s Supplemental Brief, paras 36-37; T. 9598-9599; Defence Motion for Adjournment, 14 July 2004, paras 14, 15. *See* also *Amicus Curiae*'s Appeal Brief, paras 42-43.
[172] Witness Stewart, AT. 705. The Appeals Chamber considers that Counsel Stewart's statement on 16 July 2004 (referenced at *Amicus Curiae*'s Appeal Brief, para. 77) that his team was "not able to defend Mr. Krajišnik properly" (T. 4478) was made in the beginning of the trial and so does not detract from his retrospective appreciation before the Appeals Chamber of whether he managed to mount a defence in accordance with his professional obligations.
[173] Witness Stewart, AT. 685-688, 702. The Appeals Chamber thus rejects *Amicus Curiae*'s evaluation of Counsel Stewart's testimony in this regard: *see Amicus Curiae*'s Supplemental Brief, para. 27.
[174] Witness Stewart, AT. 669.
[175] Witness Stewart, AT. 643.
[176] Witness Stewart, AT. 712.
[177] *Amicus Curiae*'s Appeal Brief, paras 48-50; *Amicus Curiae*'s Supplemental Brief, para. 38.
[178] T. 4466-4468.
[179] Witness Stewart, AT. 625.

mandate.[180] Nevertheless, the Appeals Chamber is not convinced that the fact that Counsel Stewart only billed about 100 hours for his work on the case in March 2004 shows in itself that he was grossly negligent.[181] The Appeals Chamber also notes that there does not appear to have been any complaints of insufficient time spent on the case after March 2004. This argument is rejected.

e. Failure to develop or implement a defence strategy

65. *Amicus Curiae* avers that Counsel Stewart failed to obtain proper instructions from Krajišnik prior to the commencement of the trial to determine an appropriate defence strategy, asserting in particular that "[t]he lack of a functional defence strategy is manifestly obvious from the trial record and the explicit filings of the defence team".[182] In this connection, *Amicus Curiae* refers to statements of Co-counsel Loukas, made in support of the Second Defence Motion for Adjournment, to the effect that, because of the insufficient preparation time, the defence strategy has been inadequately developed.[183]

66. The Appeals Chamber notes Counsel Stewart's testimony that he had a specific understanding of the defence strategy prior to trial, based in large part on instructions from Krajišnik.[184] This strategy was later reflected in the Defence's opening statement.[185] Moreover, some of the main aspects of the defence strategy were also outlined in the Defence pre-trial brief, which had been adopted by the Stewart team. Consequently, the Appeals Chamber cannot accept that the Defence commenced the trial without any underlying strategy. In addition, it is not determinative whether the strategy was completely articulated prior to trial, as it is to be expected that the strategy will be refined in light of the case presented by the Prosecution as it unfolds.[186] As *Amicus Curiae* does not indicate any specific acts and/or omissions of Counsel from which to infer gross negligence in relation to the strategy of the Defence, this argument is dismissed.

[180] *Cf. Emmanuel Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Decision on "Requête Urgente aux Fins de Prorogation de Délai pour le Dépôt du Mémoire en Appel", 1 April 2005, p. 3; Decision on Momčilo Krajišnik's Motion for Permission for Nathan Z. Dershowitz to Act as Counsel with Alan M. Dershowitz and for Extension of Time, 5 September 2008, para. 10.
[181] Further and as noted by the Trial Chamber, "not all hours spent on a case are billable hours in the remuneration system of the Tribunal" (First Decision on Adjournment (Written Reasons), para. 6).
[182] *Amicus Curiae*'s Appeal Brief, paras 51-52 (citation taken from para. 51).
[183] *Amicus Curiae*'s Appeal Brief, para. 51, referring to T. 9577-9578.
[184] Witness Stewart, AT. 688.
[185] Witness Stewart, AT. 688; T. 17330-17348. *See* Prosecution's Supplemental Brief, para. 18.
[186] Decision on Interlocutory Appeal, para. 29.

f. Failure to test Prosecution evidence adequately

67. *Amicus Curiae* submits that Counsel Stewart failed to ensure that sufficient investigations in the field were conducted or to review Prosecution disclosure, and that as a result he did not test the witness evidence against Krajišnik adequately.[187] The Appeals Chamber has addressed the alleged failure to review the disclosure material above,[188] and in remaining parts *Amicus Curiae*'s assertion is unsubstantiated. This argument is therefore dismissed.

g. Failure to properly select witnesses to be called on behalf of Krajišnik

68. *Amicus Curiae* contends that Counsel Stewart and his team were insufficiently prepared to call defence witnesses; were unable to instruct investigators in Pale properly in order to identify and interview defence witnesses; failed to duly consider whether to call expert evidence; and ultimately failed to prepare Krajišnik properly for giving evidence adequately.[189] However, the statements quoted by *Amicus Curiae* in support indicate that these alleged failings resulted from insufficient time for defence preparation.[190] This issue will be addressed under sub-ground 1(B), concerning whether the Defence was accorded adequate time and facilities.[191]

h. Failure to appeal significant decisions

69. *Amicus Curiae* submits that Counsel Stewart was grossly negligent in failing to appeal a series of decisions which in his view undermined Krajišnik's right to a fair trial.[192] However, *Amicus Curiae* does not attempt to demonstrate that certification to appeal these decisions would have been granted (for instance by showing that the criteria of Rules 72(B) or 73(B) of the Rules were met). While *Amicus Curiae* challenges some of these decisions in other parts of his appeal, the Appeals Chamber finds that his challenges to the decisions mentioned in paragraphs 61 to 65 of his Appeal Brief are unmeritorious. *Amicus Curiae* has not shown that Counsel Stewart committed gross negligence in failing to appeal the decisions mentioned by *Amicus Curiae*.

[187] *Amicus Curiae*'s Appeal Brief, paras 53-55. *See* also *Amicus Curiae*'s Supplemental Brief, paras 39-41.
[188] *See supra* III.A.3.(b)(ii)(c).
[189] *Amicus Curiae*'s Appeal Brief, paras 56-60. *See* also *Amicus Curiae*'s Reply, paras 15-16, where it is argued that the failure to identify, instruct and utilise expert testimony in a leadership case of this temporal and geographical breadth was a fatal error.
[190] *See Amicus Curiae*'s Appeal Brief, para. 58.
[191] *See infra* III.A.4.
[192] *Amicus Curiae*'s Appeal Brief, paras 61-65.

i. Resignation of key Defence team members

70. *Amicus Curiae* submits that the inadequacies in the preparation of the Defence case led Co-counsel Loukas and case manager Ms. Čmerić to withdraw from the case in 2005.[193] Whatever the precise reasons for their withdrawal,[194] *Amicus Curiae* posits, this deprived Krajišnik of continuity of representation throughout his trial, which further diminished the effectiveness of his representation.[195]

71. The Appeals Chamber notes that Ms. Loukas was immediately replaced by Mr. David Josse, who was already familiar with the case, having worked as a legal consultant to the Defence in the three months preceeding Ms. Loukas' withdrawal.[196] Ms. Čmerić, who left the case on 14 April 2005, was immediately replaced by Mr. Stefan Karganović. *Amicus Curiae* does not explain how or in what respect these replacements hampered the continuity of Krajišnik's representation, in particular given that Counsel Stewart remained on the case until the end of the trial. This argument is dismissed.

j. Conclusion

72. In terms of the alleged ineffective assistance of Counsel, the Appeals Chamber finds that *Amicus Curiae* has failed to establish that Counsel Stewart committed gross professional negligence which led to a miscarriage of justice.

4. Adequate time and facilities for the preparation of the Defence (sub-ground 1(B))

73. *Amicus Curiae* alleges that the Trial Chamber denied Krajišnik adequate time and facilities for the preparation of his defence and that this violation caused prejudice and unfairness to Krajišnik, amounting to an error of law invalidating the Trial Judgement.[197]

(a) Submissions

74. *Amicus Curiae* contends first that the Trial Chamber erred in law in requiring Krajišnik's trial to commence on 3 February 2004, depriving new counsel of sufficient time to prepare.[198]

[193] *Amicus Curiae*'s Appeal Brief, paras 66-67; *Amicus Curiae*'s Supplemental Brief, para. 43.
[194] As *Amicus Curiae* appears to concede, the evidence he invokes is ambiguous as to whether Ms. Loukas and Ms. Čmerić withdrew due to poor management by Counsel Stewart, or because of the time pressures of the case (*Amicus Curiae*'s Supplemental Brief, paras 44-45, referencing Exhibits AD4, pp. 1, 4, (Confidential); AD6, pp. 2, 3; *Amicus Curiae*'s Appeal Brief, para. 66, referencing T. 6646, 9592, 9599) Accordingly, *Amicus Curiae* cannot be understood to argue that the prejudice allegedly resulting from their resignation was caused by Counsel Stewart, and so his present claim is not one of ineffective assistance by Counsel Stewart.
[195] *Amicus Curiae*'s Supplemental Brief, paras 43, 45. *See* also *ibid*., para. 26.
[196] Decision of the Registrar, 22 July 2005.
[197] *Amicus Curiae*'s Notice of Appeal, paras 7-9; *Amicus Curiae*'s Appeal Brief, para. 69.

Amicus Curiae avers that the period when Mr. Brashich was counsel must be entirely disregarded in the assessment of time and resources accorded to Krajišnik as, for the reasons outlined in *Amicus Curiae*'s previous sub-ground, the Stewart Defence Team was required to make trial preparations *ab initio*; the preparation time of only two months was therefore manifestly inadequate.[199] *Amicus Curiae* argues that the Trial Chamber was aware four days before the trial started of the Defence's difficulties on disclosure,[200] and it was obliged to defer the commencement of trial, even in the absence of a formal request to do so.[201]

75. Second, *Amicus Curiae* asserts that the Trial Chamber, after having led Counsel into thinking that there would be adequate adjournments during the course of trial, erroneously rejected two adjournment motions presented by the Defence.[202] He maintains that the first adjournment motion was rejected on the ground that the Defence had 75 non-sitting days to conduct pre-trial preparation from February 2004 to mid-July 2004, but that this analysis was misconceived as the vast majority of these non-sitting days were either used attempting to agree on facts or for preparing for scheduled witnesses, not in pre-trial preparation.[203] He adds that the Trial Chamber also erred 1) in finding that the reduced pre-trial allocation by the Registry - to account for the supposed benefit of the preparatory work undertaken by the previous Defence team - was reasonable, since the previous Defence team failed to provide the new team with any useful work product;[204] and 2) in relying on the fact that lead counsel was not working full-time on the case in concluding that the fairness of Krajišnik's trial was not prejudiced.[205] As to the second adjournment application, *Amicus Curiae* recognises that the decision of the Trial Chamber has been upheld by the Appeals Chamber, but submits that this was done on the erroneous assumption that Krajišnik's interests were effectively represented by counsel; this misconception had fundamental repercussions for the trial and should therefore lead the Appeals Chamber to disregard its decision on the second adjournment motion.[206]

76. Third, *Amicus Curiae* maintains that the Trial Chamber erred in according the Defence a manifestly inadequate amount of time to prepare the final brief.[207] In this connection, *Amicus Curiae* states first:

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[198] *Amicus Curiae*'s Appeal Brief, para. 70.
[199] *Amicus Curiae*'s Appeal Brief, para. 71.
[200] AT. 305. *See* also *Amicus Curiae*'s Appeal Brief (Confidential), paras 72-73.
[201] *Amicus Curiae*'s Appeal Brief, para. 74.
[202] *Amicus Curiae*'s Appeal Brief, paras 75-82, referring to the motions of 14 July 2004 and 22 February 2005.
[203] *Amicus Curiae*'s Appeal Brief, para. 78. *Amicus Curiae*'s Reply, para. 12.
[204] *Amicus Curiae*'s Appeal Brief, paras 25, 79. *Amicus Curiae*'s Reply, para. 11.
[205] *Amicus Curiae*'s Appeal Brief, para. 80.
[206] *Amicus Curiae*'s Appeal Brief, paras 81-82; *Amicus Curiae*'s Reply, para. 13.
[207] *Amicus Curiae*'s Appeal Brief, para. 83.

> A mere eleven days to prepare a document as significant as the Final Brief in a trial of this size and complexity, especially in light of the acknowledged inadequacies in pre-trial and trial preparation, was plainly insufficient. The Chamber was aware that neither Lead Counsel nor Co-Counsel had undertaken any work on the Final Brief during trial.[208]

Amicus Curiae adds that the Trial Chamber further erred in considering as relevant to the issue under consideration that the inability of Krajišnik's counsel to work on the Final Trial Brief during trial may have been due to the fact that Krajišnik had not paid his assessed contribution to his defence.[209]

77. The Prosecution responds that Krajišnik had sufficient time and facilities available to prepare and present his defence, recalling that:

> He had lawyers engaged throughout the proceedings. He was intimately involved in the case preparation and was uniquely able to direct the strategy of the case given his position within the hierarchy of the SDS and the Bosnian-Serb Republic. He said of himself: "I am the best source of information, because I was on the spot". He filed a pre-trial brief, which was adopted by the Stewart team, and gave evidence at length consistent with it. He called 24 witnesses in support of his case, and filed a detailed final brief reiterating his case and making arguments on the law and the evidence. He had adequate time to enable him to advance his defence as a result of frequent adjournments granted after commencement of trial.[210]

The Prosecution submits that in protecting the Krajišnik's right to adequate time and facilities, the Trial Chamber had regard to the "entirety of the proceeding" including the time and facilities afforded to the Stewart team as well as to Krajišnik himself since the beginning of the case, an approach endorsed by the Appeals Chamber.[211] The Prosecution adds that, in determining whether the time for preparation had been adequate, the Trial Chamber assessed the circumstances of Krajišnik's case and its complexity, properly finding that such a complex leadership case could not be viewed in the same level of detail as smaller cases and that parties were required and expected to find a balance between aspects of greater and lesser importance and adjust the level of detail accordingly.[212]

78. The Prosecution argues that all complaints of inadequate time relating to matters prior to the Appeals Chamber's Decision on the Interlocutory Appeal have been considered expressly or impliedly in that decision, and have thus been finally adjudicated. As to the time granted to prepare the final brief, the Prosecution argues that the Stewart team was informed at the end of April 2006

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[208] *Amicus Curiae*'s Appeal Brief, para. 83 (emphasis in original, footnote omitted).
[209] *Amicus Curiae*'s Appeal Brief, paras 84-85. In this connection, *Amicus Curiae* asserts that the fact that the Trial Chamber was aware of this problem and took no steps to resolve it (such as directing the Registry to assume responsibility for collecting any assessed contribution) constituted an error.
[210] Prosecution's Response to *Amicus Curiae*, para. 26 (footnotes omitted). *See*, however, *Amicus Curiae*'s Reply, para. 10.
[211] Prosecution's Response to *Amicus Curiae*, para. 27, referring to Decision on Interlocutory Appeal, para. 16. The Prosecution recalls that the Appeals Chamber held that the contribution of the former Defence team may be taken into account, and that Krajišnik could serve as an important link between the old and new Defence team: Prosecution's Response to *Amicus Curiae*, para. 27, referring to Decision on Interlocutory Appeal, para. 33.

that the brief was to be filed by 14 July 2006, and that the Defence was required to allocate its resources in such a way as to allow for the development of the brief over the course of the trial.[213] The Prosecution adds that in any case the filing date for the final brief was extended to 18 August 2006, and that the Defence thus had the "additional few weeks" *Amicus Curiae* complains should have been allowed as additional preparation. The Prosecution finally submits that *Amicus Curiae* does not show that the Trial Judgement was invalidated or that Krajišnik's trial was rendered unfair.[214]

79. As to the time for the filing of the Final Brief, *Amicus Curiae* reiterates that Counsel informed the Trial Chamber that they would not have time to do any significant work on the final brief before the conclusion of the oral hearings. He adds that while the filing date for the final brief was ultimately extended by 34 days, only 11 were working days and the defence team was unpaid over the summer recess.[215]

(b) Analysis

80. As part of his right to a fair trial (Article 20(1) of the Statute), an accused is entitled "to have adequate time and facilities for the preparation of his defence" (Article 21(4)(b) of the Statute). What constitutes "adequate time and facilities" cannot be assessed in the abstract, but will depend on the circumstances of the case.[216] Further, "[w]hen considering an appellant's submission regarding this right, the Appeals Chamber must assess whether the Defence as a whole, and not any individual counsel, was deprived of adequate time and facilities."[217]

81. The Appeals Chamber recalls that decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber. The Trial Chamber's decisions concerning the time and facilities afforded to the Defence are such discretionary decisions which the Appeals Chamber must treat with deference. In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error" resulting in prejudice to that party. The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to

[212] Prosecution's Response to *Amicus Curiae,* para. 28.
[213] Prosecution's Response to *Amicus Curiae*, paras 29-30, referring to Decision of 24 April 2006, paras 18-21. The Prosecution also recalls that, in that decision, the Trial Chamber noted that a junior member of the Defence had been working on the final brief since 2005, although neither Counsel nor Co-counsel for Krajišnik had been able to spend any significant amount of time on the project (*see* Decision of 24 April 2006, para. 18).
[214] Prosecution's Response to *Amicus Curiae*, para. 30.
[215] *Amicus Curiae*'s Reply, para. 14.
[216] *Nahimana et al.* Appeal Judgement, para. 220.

constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[218]

82. At the outset, the Appeals Chamber notes that some of the arguments raised by *Amicus Curiae* in this sub-ground have been considered and rejected in the Decision on Interlocutory Appeal of 25 April 2005, which disposed of the Defence appeal against the decision rejecting the Second Defence Motion for Adjournment. Nevertheless, *Amicus Curiae* argues that the Appeals Chamber should disregard this decision as it was based "on the erroneous assumption that [Krajišnik's] interests were effectively represented by counsel".[219] The Appeals Chamber has rejected the arguments of *Amicus Curiae* in this regard elsewhere.[220] Thus, the Appeals Chamber sees no need to revisit the issues decided in the Decision on Interlocutory Appeal.

(i) Time for pre-trial preparation

83. *Amicus Curiae* alleges that the Trial Chamber erred in law in requiring Krajišnik's trial to commence at the beginning of February 2004 because, despite its awareness that Counsel Stewart as new counsel was manifestly unprepared to commence a trial, it exerted pressure on the Defence to commence trial.[221]

84. The Appeals Chamber has found that Counsel Stewart's team was not grossly unprepared to commence trial on 3 February 2004.[222] It further recalls that the Trial Chamber adjusted the pace of the trial on the Defence's suggestion by including numerous non-sitting days.[223] Therefore, *Amicus Curiae* has failed to demonstrate any discernible error by the Trial Chamber, and as a result, his argument is dismissed.

(ii) Rejection of First Motion for Adjournment

85. *Amicus Curiae* submits that the Trial Chamber erred in several respects in rejecting the Defence Motion for Adjournment of 14 July 2004.[224] He argues first that, while the Defence had 75

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[217] *Nahimana et al.* Appeal Judgement, para. 220 (footnote omitted). *See* also Decision on Interlocutory Appeal, para. 16.
[218] *See* for instance *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Decision Appeal of the Decision on Future Course of Proceedings, 16 May 2008, paras 4-5; *Gacumbitsi* Appeal Judgement, para. 19; Decision on Interlocutory Appeal, para. 7; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, paras 9-10.
[219] *Amicus Curiae*'s Appeal Brief, para. 81. *See* also *Amicus Curiae*'s Reply, para. 13.
[220] *See supra* III.A.3.
[221] *Amicus Curiae*'s Appeal Brief, paras 70-74; *Amicus Curiae*'s Supplemental Brief, paras 46-50.
[222] *See supra* III.A.3.(b)(ii)(a).
[223] First Decision on Adjournment (Written Reasons), paras 3-4, 7-8.
[224] Defence Motion for Adjournment, 14 July 2004, para. 7.

non-sitting days to conduct pre-trial preparation from February 2004 to mid-July 2004, the vast majority of these non-sitting days were either used attempting to agree on facts or for preparing for scheduled witnesses, not in pre-trial preparation.[225] However, he fails to indicate precisely how much time was spent on attempting to agree on facts and preparing for scheduled witnesses, and thus to show that the time remaining was insufficient for other "pre-trial preparation" that still had to be done.[226] This is insufficient to show that the Trial Chamber abused its discretion.[227] In addition, the Appeals Chamber recalls that the allegation that the Defence did not have adequate time for pre-trial preparation had already been rejected in the Decision on Interlocutory Appeal.[228]

86. Next, *Amicus Curiae* argues that the Trial Chamber erred in finding that the reduced pre-trial allocation by the Registry (2100 counsel hours for pre-trial instead of 2800 as is usual for Category 3 cases)[229] was reasonable because the Brashich team had failed to provide the new team with any useful work product.[230] The Trial Chamber found that preparatory work of some benefit to the Stewart team had been performed by the Brashich team, noting in particular that 1) the new Defence team did not have to prepare and submit a pre-trial brief; and 2) some of the expertise gained by members of the Brashich team was preserved since they transferred to the new team or otherwise assisted the new counsel.[231] As explained above,[232] *Amicus Curiae* has not shown that this conclusion was erroneous, and this argument is rejected.

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[225] *Amicus Curiae*'s Appeal Brief, para. 78. *See* also *Amicus Curiae*'s Reply, para. 12.
[226] In this connection, it should also be noted that a "sitting day" was a little less than 5 hours, and that the Defence thus had time to conduct further work even on sitting days.
[227] In his Reply, *Amicus Curiae* also argues that "being granted preparation time once evidence has already commenced is manifestly inadequate" as "[a] defence team has to be sufficiently prepared, including being aware of documents for use in cross-examination, *prior to the commencement of trial* in order to ensure a fair proceeding" (*Amicus Curiae's* Reply, para. 12 (emphasis in original)). However, *Amicus Curiae* does not provide any concrete example of how Krajišnik's Defence was prejudiced by the solution retained, and this argument is rejected.
[228] Decision on Interlocutory Appeal, para. 23 (footnotes omitted):

> The Appeals Chamber is satisfied that the Trial Chamber gave sufficient weight to the arguments of the Defence that they were having difficulty in catching up with work which should have been completed pre-trial. In the Impugned Decision the Trial Chamber noted that since the Trial commenced, the Krajišnik Defence has had several thousand out-of-court hours available to it to prepare. The Trial Chamber also noted that the transfer of case materials from the old team to the new team had been problematic, in that there were communication delays and the material was in a disorderly state and that it had always taken these difficulties into account and "had adjusted the start and pace of the trial accordingly." The Trial Chamber considered the submission that counsel had been able to read only 15% of the documents between them, which it calculated as representing 38% of the English collection, a finding that is not challenged by Counsel. The Trial Chamber further considered the specific areas in which the Krajišnik Defence claimed to be insufficiently prepared. It reasonably found that adequate time had been allowed for preparation of cross examination of witnesses, and that in other areas the Krajišnik Defence would have sufficient time during preparation of the defence case, and in the presentation of it, to prepare adequately. The Appeals Chamber is not satisfied that the Krajišnik Defence has identified any abuse of discretion in the reasoning of the Trial Chamber.

[229] *See* First Decision on Adjournment, para. 5.
[230] *Amicus Curiae*'s Appeal Brief, paras 25, 79.
[231] First Decision on Adjournment, para. 5 and fn. 7.
[232] *See supra* III.A.3(b).

87. *Amicus Curiae* also avers that the Trial Chamber erred in relying on the fact that Counsel Stewart was not working full-time on the case in concluding that the fairness of Krajišnik's trial was not prejudiced.[233] This argument seems related to *Amicus Curiae*'s argument that Counsel Stewart committed gross negligence in working only about 100 hours on the case in March 2004:[234] if Counsel Stewart was negligent in doing so, then the Trial Chamber should not have taken this into account to conclude that the time granted to the Defence had been adequate and that the requested adjournment was not necessary. The Appeals Chamber has already explained that it was not convinced that the relatively limited number of hours worked by Counsel Stewart in March 2004 suffice to reverse the presumption of his competence.[235] Accordingly, the Appeals Chamber cannot conclude that the Trial Chamber erred in taking this into account in assessing whether adequate time had been provided to the Defence.

(iii) Procedural decisions based on irrelevant considerations

88. According to *Amicus Curiae*, the additional evidence on appeal shows that the Trial Chamber based procedural decisions adverse to Krajišnik on irrelevant considerations.[236] First, he argues, the Trial Chamber "punished" Krajišnik for Counsel Stewart's decision to discontinue the negotiations on agreed facts on 12 July 2004 by refusing adjournments thereafter.[237] Second, he claims the Trial Chamber denied Krajišnik more time because it considered Counsel Stewart a bad manager and so any extra time would not be properly used.[238] Third, *Amicus Curiae* claims that the Trial Chamber's alleged dislike of Counsel Stewart affected its decisions as to Defence requests.[239]

89. The Appeals Chamber is unable to entertain these claims. First, the additional evidence is inconclusive as to the Trial Chamber's view of Counsel Stewart's management skills and whether it disliked him.[240] Second, notwithstanding the Presiding Judge's alleged dissatisfaction with the breakdown of the agreed facts process on 12 July 2004,[241] the pace of the subsequent proceedings

[233] *Amicus Curiae*'s Appeal Brief, para. 80.
[234] *Amicus Curiae*'s Appeal Brief, paras 48-50.
[235] *See supra* III.A.3.(b)(ii)(d).
[236] *Amicus Curiae*'s Supplemental Brief, paras 51, 57-59.
[237] *Amicus Curiae*'s Supplemental Brief, paras 52-53.
[238] *Amicus Curiae*'s Supplemental Brief, paras 54-55.
[239] *Amicus Curiae*'s Supplemental Brief, paras 56, 60.
[240] Exhibit AD6, pp. 1, 4, authored by Counsel Stewart himself, lends some support to *Amicus Curiae*'s submission that the Trial Chamber refused extra time to the Defence because of Counsel Stewart's mismanagement and that the Judges disliked him. However, Exhibit AD8, which is authored by a Judge of the Trial Chamber, puts the accuracy of this information in serious doubt. In any event, the Appeals Chamber recalls that there is a strong presumption of impartiality of Judges, which *Amicus Curiae* fails to rebut in the present case.
[241] *See* Witness Stewart, AT. 638-639.

does not qualify as "punishment".[242] Lastly, *Amicus Curiae* fails to identify which specific decisions were affected by the alleged irrelevant considerations. This argument is dismissed.

(iv) Failure to investigate fair trial issues raised by Defence Counsel

90. *Amicus Curiae* contends that the Trial Chamber erred in failing to investigate and, if necessary, take appropriate measures to ensure the fairness of the trial in view of the concerns about the time constraints on the Defence relayed to it by Counsel Stewart in a letter of 28 October 2005,[243] which was about three weeks into the Defence case.[244] The Appeals Chamber notes that, according to Counsel Stewart's own notes (confidential Exhibit AD5), he and the Presiding Judge of the Trial Chamber met on 31 October 2005 to discuss the concerns raised in his letter.[245]

91. *Amicus Curiae* fails to substantiate what measures were necessary in addition to this meeting to ensure a fair trial. Instead, he argues that the private, off-the-record meeting was an unsatisfactory forum to address the trial schedule in this case because it was not open to scrutiny.[246] However, *Amicus Curiae* fails to identify how the Defence was materially affected, in particular in light of Counsel Stewart's testimony that the presentation of the Defence case "once we were into it, […] wasn't the most dire and difficult aspect of the case" for his team.[247]

92. *Amicus Curiae*'s further arguments[248] are not supported by the evidence invoked, and *Amicus Curiae* fails to demonstrate that a miscarriage of justice resulted. These arguments are dismissed.

(v) Time to prepare the final brief

93. *Amicus Curiae*'s last contention under this sub-ground is that the Trial Chamber accorded the Defence a manifestly inadequate amount of time to prepare the final brief.[249] The Appeals Chamber notes that the Trial Chamber discussed at length the issue of the deadline for the filing of the final briefs in its Decision of 24 April 2006:

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[242] As correctly noted in the Prosecution's Supplemental Brief, para. 42, the Trial Chamber sat five working days a week for only six out of 21 weeks between 12 July 2004 and the break in the proceedings on 10 December 2004 when Judge El-Mahdi withdrew. That period also included the four week summer break and adjournments of two weeks in September and one week in both October and November.
[243] *Amicus Curiae*'s Supplemental Brief (Confidential), paras 61-62, referencing Exhibit AD4 (Confidential).
[244] The Defence case started on 10 October 2005: Trial Judgement, paras 1250-1251.
[245] Exhibit AD5 (Confidential). p. 4, according to which the Presiding Judge offered to approach the Registry about granting more resources to the Defence team and told Defence Counsel that he would consult the other Judges regarding the trial schedule.
[246] *Amicus Curiae*'s Supplemental Brief, paras 63-65.
[247] Witness Stewart, AT. 677.
[248] *Amicus Curiae*'s Supplemental Brief (Confidential), paras 68-69, referencing Exhibit AD5 (Confidential).
[249] *Amicus Curiae*'s Appeal Brief, paras 83-87; *Amicus Curiae*'s Reply, para. 14.

> Counsel for the Defence informed the Chamber that the Defence would need six weeks from the date of the last evidentiary hearing to submit a final trial brief in accordance with Rule 86 of the Tribunal's Rules. Counsel submitted that although the Defence brief had been in progress (the project was described in a report addressed to the Chamber entitled "Krajišnik Defence Team since 22 July 2005", signed by counsel for the Defence and dated 28 October 2005), the project was being carried out by a junior member of the Defence team. Neither lead counsel nor co-counsel for Mr Krajišnik has been able to spend any significant amount of time on the project.
>
> The Chamber's scheduling order of 26 April 2005, which in this respect has not been modified by later orders, gave the parties eleven working days from the date of the last evidentiary hearing to submit their final trial briefs. This, in our view, is sufficient time in which to finalize a trial brief, as a party must allocate its resources in such a way as to allow for the development of the brief over the course of the trial.
>
> That counsel for the Defence has not found time to work on the brief may be due to Mr Krajišnik's non-payment, since the start of the trial, of his assessed contribution to his defence fund, which is a significant proportion of the whole. The Chamber has had cause to note on several occasions that it would run contrary to the interests of justice, and make a mockery of the Tribunal's legal aid programme, to dole out grants of the Tribunal's precious time to compensate for the Accused's decision to keep his defence team underfunded.
>
> The Chamber does not expect the deadline for final briefs to be later than 14 July 2006. The date of the last evidentiary hearing shall fall at least eleven working days prior to the deadline, which the Chamber will be in a position to determine once it has decided whether it will call Chamber witnesses.[250]

The Trial Chamber decided to call witnesses and the case closed on 14 July 2006. In conformity with what had been announced earlier, the parties were required to file their final briefs eleven working days later. Because of a three-week judicial recess at the end of July and beginning of August, this meant that the parties had to file their final briefs by 18 August 2006, which they did.[251]

94. From the above, the Appeals Chamber notes that the Defence was informed as early as 26 April 2005 that 1) the final brief would be due eleven working days after the close of the case, and that 2) it had to "allocate its resources in such a way as to allow for the development of the brief over the course of the trial".[252] In light of the numerous non-sitting days throughout the trial,[253] the fact that the Trial Chamber sat less than five hours on a sitting day and the fact that the Defence had three additional weeks to work on the final brief during the summer recess, the Appeals Chamber concludes that the Trial Chamber did not abuse its discretion in ordering that the final briefs be filed by 18 August 2006. *Amicus Curiae*'s submissions based on the additional evidence on appeal do not alter this conclusion.[254]

(vi) Conclusion

[250] Decision on 24 April 2006, paras 18-21 (footnotes omitted).
[251] *See* Trial Judgement, para. 1258.
[252] Decision on 24 April 2006, para. 19.
[253] *See*, *e.g.*, Reasons for Decision Denying Defence Motion for Time to Call Additional Witnesses, 16 August 2006 ("Reasons for Denying Motion to Call Additional Witnesses"), paras 17-21, 24, 44.
[254] *Amicus Curiae*'s Supplemental Brief, paras 70-71.

95. *Amicus Curiae* has not shown that Krajišnik was deprived of adequate time and facilities to prepare his Defence, or that the trial was rendered unfair. This sub-ground of appeal is dismissed.

5. Restrictions on the conduct of the Defence (sub-ground 1(C))

(a) Submissions

96. *Amicus Curiae* argues that the Trial Chamber breached the fairness of Krajišnik's trial, in particular by impermissibly restricting his right to examine the witnesses against him and to call witnesses on his own behalf.[255] The specific arguments of *Amicus Curiae* relate to (i) the time to prepare for and to cross-examine Prosecution witnesses;[256] (ii) the time for the preparation of the Defence case;[257] (iii) the time to investigate properly the calling of experts;[258] (iv) the time allotted to call Defence witnesses and the Trial Chamber's decisions to refuse the Defence's applications to call certain witnesses;[259] (v) the allegedly erroneous restriction of time for Krajišnik's testimony;[260] (vi) the time to prepare for the cross-examination of Trial Chamber witnesses;[261] and (vii) Krajišnik's participation in the trial proceedings.[262]

97. The Prosecution responds that the Trial Chamber's decisions managing the conduct of Krajišnik's Defence did not deprive him of a fair trial,[263] and that the imposition of time limits for cross-examining and calling witnesses is within a Trial Chamber's discretion, adding that the Defence is not entitled as of right to precisely the same amount of time as the Prosecution,.[264] The Prosecution argues that, in the case at hand, additional time was granted after the Defence case had begun[265] and *Amicus Curiae* fails to show how the exercise of the Trial Chamber's discretion was wrong, why the time allotted was not proportionate, or what prejudice was caused.[266] The

[255] *Amicus Curiae*'s Appeal Brief, para. 88.
[256] *Amicus Curiae*'s Appeal Brief, paras 89-96. *See* also *Amicus Curiae's* Reply, para. 19, where *Amicus Curiae* explains that he "does not object to the admission of documents from the bar table […] *per se*, but to the admission of materials so voluminous that there was no real opportunity for the defence to review their contents and make an informed decision as to whether to object to their admission".
[257] *Amicus Curiae*'s Appeal Brief, paras 29-47, 97.
[258] *Amicus Curiae*'s Appeal Brief, paras 98-100 (citation taken from para. 98).
[259] *Amicus Curiae*'s Appeal Brief, paras 101-103. *See* also *Amicus Curiae*'s Reply, paras 18, 20.
[260] *Amicus Curiae*'s Appeal Brief, para. 105.
[261] *Amicus Curiae*'s Appeal Brief, paras 106-107 (footnote omitted). *See* also *Amicus Curiae*'s Reply, paras 21-22.
[262] *Amicus Curiae*'s Appeal Brief, paras 108-110. *See* also *Amicus Curiae*'s Reply, paras 23-24.
[263] Prosecution's Response to *Amicus Curiae*, paras 33-43.
[264] Prosecution's Response to *Amicus Curiae*, para. 36.
[265] Prosecution's Response to *Amicus Curiae*, para. 36, noting that the "Order Prioritizing Defence Witnesses" of 9 February 2006 required that the Defence close by 28 April 2006 yet Krajišnik was still giving evidence in May 2006.
[266] Prosecution's Response to *Amicus Curiae*, paras 36-37, referring to Reasons for Denying Motion to Call Additional Witnesses, para. 38.

Prosecution also submits that the Trial Chamber correctly exercised its discretion in refusing to call certain other witnesses, and in granting time for the cross-examination of Chamber witnesses.[267]

98. With respect to Krajišnik's request for self-representation, the Prosecution avers that self-representation is not an absolute right, that the Trial Chamber was thus entitled to deny Krajišnik's request, and that *Amicus Curiae* does not show how this decision was erroneous.[268]

(b) Analysis

99. As noted above, decisions relating to the conduct of trial proceedings are matters within the discretion of the Trial Chamber and the Appeals Chamber treats them with due deference.[269]

(i) Time to prepare for and to cross-examine Prosecution witnesses

100. *Amicus Curiae* submits that the Defence was granted insufficient time for preparation for and cross-examination of key Prosecution witnesses.[270] As to preparation for cross-examination, the Appeals Chamber notes that *Amicus Curiae*'s submissions do not add to those already considered above under sub-grounds 1(A)[271] and 1(B).[272] They are therefore rejected.

101. As to the time given to the Defence to cross-examine Prosecution witnesses, *Amicus Curiae* claims that the Trial Chamber erred in imposing a time-limit of 60% of the time accorded to the Prosecution's examination-in-chief as this was arbitrary and operated to the prejudice of the Defence.[273] *Amicus Curiae* refers in this respect to Counsel's complaints of lack of time to cross-examine Expert Witness Brown and Witness Bjelobrk,[274] but fails to detail how the Trial Chamber abused its discretion under Rule 90(F) of the Rules in the specific instances. The same defect applies to *Amicus Curiae*'s contention that the Trial Chamber erred in allowing the introduction of municipal binders.[275] These arguments are rejected.

[267] Prosecution's Response to *Amicus Curiae*, paras 39-40.
[268] Prosecution's Response to *Amicus Curiae*, paras 41-43.
[269] *See supra* III.A.4(b).
[270] *Amicus Curiae*'s Appeal Brief, paras 89-96; *Amicus Curiae*'s Supplemental Brief, para. 72.
[271] *See supra* III.A.3(b)(c).
[272] *See supra* III.A.4.
[273] *Amicus Curiae*'s Appeal Brief, para. 93; *Amicus Curiae*'s Supplemental Brief, para. 72.
[274] *Amicus Curiae*'s Appeal Brief, para. 93 and fns 174 and 175. *See* also *Amicus Curiae*'s Supplemental Brief, para. 72 (invoking Witness Stewart's testimony at AT. 658 to argue that Counsel Stewart's cross-examination was repeatedly and unfairly stopped by the Trial Chamber, but without providing specific examples from the trial record).
[275] *Amicus Curiae*'s Appeal Brief, para. 94.

(ii) Insufficient time for the preparation of the Defence case

102. *Amicus Curiae* argues that insufficient time was granted for the preparation of the Defence case (from 22 July 2005 to 10 October 2005) in light of the inadequacy of resources, the deficient preparation time[276] and the complexity of the case.[277]

103. The Appeals Chamber notes that, on 26 April 2005, the Trial Chamber issued a scheduling order providing *inter alia* that 1) the Prosecution's case was to close on or before 22 July 2005; 2) any Defence motion pursuant to Rule 98 *bis* of the Rules was to be heard on 16 August 2005, with the decision thereon to be rendered on or before 19 August 2005; and 3) the Defence case was to commence on 12 September 2005 (or 5 September 2005 in case the Defence did not move for acquittal under Rule 98 *bis*).[278] As scheduled, the Prosecution case closed on 22 July 2005, the parties were heard on the Defence's Rule 98 *bis* motion on 16 August 2005, and the Trial Chamber's decision rejecting this motion was rendered orally on 19 August 2005.[279] However, on 23 August 2005 the Defence informed the Trial Chamber that it would not be able to start its case on 12 September 2005. On 26 August 2005, the Trial Chamber postponed the beginning of the Defence case to 3 October 2005 but explained that this discretionary relief was not based on a showing of good cause.[280] On 26 September 2005, the Defence filed a motion for extension of time for filing the Rule 65(G) material and to postpone the start of the Defence case to 25 October 2005. The Trial Chamber found that no good cause had been shown for such an additional extension, noting in particular that "it is not in the interests of justice that an accused who has never made his assessed contribution to his defence fund should be allowed to make good the žsignificant detrimental effect' of non-payment through repeated grants of additional time in preparation" – but it nevertheless delayed the start of the Defence case to 10 October 2005.[281] The Defence case effectively commenced on that date.[282]

104. While *Amicus Curiae* asserts that the time granted to prepare the Defence was insufficient, he does not demonstrate how the Trial Chamber abused its discretion in making the decisions mentioned above, nor how Krajišnik suffered any specific prejudice as a result of these decisions. This contention is dismissed.

[276] In this connection, *Amicus Curiae* refers to his arguments in paragraphs 29-47 of his Appeal Brief.
[277] *Amicus Curiae*'s Appeal Brief, para. 97.
[278] Scheduling Order of 26 April 2005, p. 2.
[279] Trial Judgement, paras 1243,1248.
[280] Order pursuant to Rule 65 *ter* (G) with Consequential Variation of Trial Schedule, 26 August 2005, p. 2.
[281] Decision on Defence Motion to Further Delay the Commencement of the Defence Case, 28 September 2005, p. 3.
[282] Trial Judgement, para. 1250.

(iii) Time to investigate properly the calling of experts

105. *Amicus Curiae* argues that the Trial Chamber erred in failing to allow the Defence sufficient time to investigate properly the calling of experts.[283] A similar argument was considered and rejected in the Decision on Interlocutory Appeal.[284] *Amicus Curiae* brings no new element which could show that the Trial Chamber abused its discretion by not giving more time to the Defence to investigate the calling of experts. Further, *Amicus Curiae* fails to show how the admission of expert evidence would have impacted on the Trial Judgement. This branch of sub-ground 1(C) is dismissed.

(iv) Time allotted to call Defence witnesses

106. The Appeals Chamber has previously explained:

> The Appeals Chamber has long recognized that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.
>
> In addition, it should be noted that although Rule 73 *ter* gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.[285]

107. *Amicus Curiae* contends that the time allotted to the Defence case was insufficient. The issue of the time allotted to the Defence case was discussed at length at trial, and the Appeals Chamber deems it useful to quote from a Trial Chamber's decision which summarises the relevant developments:

> During the 65 ter conference on 23 August 2005, the Chamber allotted to the Defence an amount of time it deemed appropriate for a fair presentation of its case. The Chamber explained that, in its experience, an allocation of time to the Defence of 60 per cent of the time taken by the Prosecution was a reasonable guideline. Nevertheless, the Chamber proceeded to allot an amount of time closer to 70 per cent of the time taken by the Prosecution.

[283] *Amicus Curiae*'s Appeal Brief, paras 98-100.
[284] Decision on Interlocutory Appeal, para. 52.
[285] *Prosecutor v. Naser Orić,* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision on Length of Defence Case"), paras 7-8 (footnotes omitted). *See* also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal against "Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge" 1 July 2008, paras 16, 19, 39.

> As mentioned above, on 26 April 2005, the Chamber initially ordered that the Defence case should start on 12 September 2005. The Chamber then decided to postpone the commencement of the Defence case to 3 October 2005 because the Defence had informed the Chamber that it needed more time for preparation. On 26 September 2005, the Defence filed another motion for further postponement of the commencement of the Defence case. The Chamber granted this motion in part and postponed the commencement of the Defence case for another week. Due to these postponements the Defence was provided with four additional weeks for the preparation of its case.
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> After the commencement of the Defence case, the Defence submitted numerous requests for postponement and adjournment in order to have more time for the preparation of its case. The Chamber recalls its decision of 18 November 2005 which granted the Defence seven additional weeks to prepare and present its case. The Chamber left it to the Defence to decide how to divide this additional time between preparation and presentation of evidence, on the condition that the Defence case would in any event close by 28 April 2006. The Defence decided to spend a big proportion of the additional time on the preparation of its case.
>
> At a hearing on 23 February 2006, the Defence informed the Chamber that the Defence was unable to meet the deadline of 28 April 2006 for closing the defence case and requested an uninterrupted block of out-of-court time until 1 May 2006 for further preparation. On 27 February 2006, the Chamber granted a one-month extension of the deadline as a "final extension" for the Defence.
>
> The Chamber, moreover, recalls its decision of 24 March 2006 in which it granted the Defence four additional days for the preparation of the examination-in-chief of Mr. Krajišnik.
>
> The closing date of the Defence case was eventually pushed back 15 weeks, from the original deadline [of] 10 March 2006 to 22 June 2006.
>
> In summary, the Chamber showed flexibility as to the date of commencement of the Defence case, the actual proportion of time allotted to the Defence, and the finishing date of the Defence case. It granted the Defence a large amount of time in which to prepare and present its case and allowed the Defence to determine how to allocate this time. The Defence opted to spen[d] a considerable amount of the time allotted on out-of-court preparation, as the above-mentioned high number of non-sitting days shows (73 non-sitting days, if calculated from the scheduled start of the Defence case, or 90 non-sitting days, if calculated from the end of the Prosecution case, not counting weekends, public holidays and court recesses).[286]

108. In light of the above, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion by failing to accord sufficient time to the Defence. First, the general assertions made by *Amicus Curiae*[287] are insufficient to show that the time allocated to the Defence was not reasonably proportional to the time allocated to the Prosecution or was not "objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights".[288] Further, even if the Defence only used 138.5 hours of examination-in-chief time,[289] this is attributable not to the Trial Chamber but to the Defence itself: as noted above, the Defence was given considerable discretion to determine the time to spend on preparation and on presentation of evidence, as long as the Defence case closed on a certain date (which date was pushed back several times to accommodate the Defence). It was up to the Defence to organise its case within the time limits imposed.

[286] Reasons for Denying Motion to Call Additional Witnesses, paras 38-44 (footnotes omitted).
[287] *See* in particular *Amicus Curiae*'s Appeal Brief, para. 101.
[288] *Orić* Decision on Length of Defence Case, para. 8
[289] *See Amicus Curiae*'s Reply, para. 18; Reasons for Denying Motion to Call Additional Witnesses, para. 3.

109. *Amicus Curiae* also argues that the Trial Chamber erroneously denied the Defence the possibility of calling witnesses who corroborated Krajišnik's testimony as well as Witnesses Čizmović, Sarac and Durković.[290] The Appeals Chamber notes that, after the Defence case closed on 22 June 2006, the Defence presented a motion for further time to call additional witnesses.[291] The Trial Chamber dismissed this motion, rejecting in particular the argument that Krajišnik was entitled to further time to present evidence to corroborate his testimony:

> The Chamber does not find any merit in the assertion that the Accused must be given a reasonable opportunity for corroborative evidence, in effect that he is entitled not to testify as the last Defence witness. Rule 85(C) of the Rules does not specify at what stage of the Defence case an accused may appear. It is the task of the Defence to organize the presentation of the evidence during the Defence phase. Had the Defence considered it necessary to present evidence corroborating the testimony of the Accused, it should have called the Accused to testify earlier than it did.[292]

The Appeals Chamber can see no error in this. As to Witnesses Čizmović, Sarac and Durković, it seems that the Trial Chamber refused to call them not only because they could have been called by the Defence within the time afforded for its case, but also because the summaries of their anticipated testimony provided on 30 June 2006 by the Defence did not "reveal any significant field of evidence which has not already been covered or without which it would be unfair to decide the case".[293] *Amicus Curiae* does not show this conclusion to be erroneous and the Appeals Chamber cannot conclude that the Trial Chamber abused its discretion in refusing to call these witnesses. Furthermore, the Appeals Chamber notes that *Amicus Curiae* has not mentioned any example where the Trial Chamber rejected portions of Krajišnik's oral testimony for lack of corroboration.

110. Finally, *Amicus Curiae* contends that the Trial Chamber erroneously restricted the time for Krajišnik's testimony.[294] The Appeals Chamber recalls that 1) on 27 February 2006 the Trial Chamber allotted to the Defence a total of 20 days for Krajišnik's examination-in-chief; 2) on 19 May 2006, an additional day was granted; 3) on 22 May 2006, the Defence requested three additional days; and 4) on 23 May 2006, the Trial Chamber granted this request in part, allowing an additional day for examination-in-chief.[295] *Amicus Curiae* fails to show why the decision of 23 May 2006 constituted an abuse of discretion. In particular, he fails to indicate concretely why the time granted by the Trial Chamber was insufficient. The Appeals Chamber rejects this contention. In light of this, it is not necessary to examine whether the Trial Chamber should have granted certification to appeal the decision of 23 May 2006.

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[290] *Amicus Curiae*'s Appeal Brief, paras 102-103.
[291] Defence Motion for Time to Call Further Defence Witnesses, 30 June 2006.
[292] Reasons for Denying Motion to Call Additional Witnesses, para. 49.
[293] Reasons for Denying Motion to Call Additional Witnesses, para. 50. *See* also *ibid.*, para. 51.
[294] *Amicus Curiae*'s Appeal Brief, para. 105.
[295] *See* Decision on Defence Application for Certification to Appeal Against Trial Chamber's Decision of 23 May 2006, 2 June 2006, p. 2. *See* also T. 24599-24605.

(v) Cross-examination of Trial Chamber witnesses

111. *Amicus Curiae* asserts that the Defence was not accorded sufficient time and resources to prepare for cross-examination of the Trial Chamber witnesses.[296] He avers that these witnesses were called to the stand one day after Krajišnik finished testifying and submitting exhibits, and that Krajišnik thus had no opportunity to consider the disclosure materials relating to these witnesses and to instruct his counsel for cross-examination.[297]

112. The Appeals Chamber notes that the Trial Chamber announced on 30 March 2006 that it intended to call witnesses pursuant to Rule 98 of the Rules.[298] The main witnesses it had in mind - Bogdan Subotić, Velibor Ostojić, Biljana Plavšić and Branko Đerić, all former members of the Bosnian-Serb leadership - were identified on 11 April 2006.[299] On 24 April 2006, the Trial Chamber issued a decision specifying the procedure for calling and examining Trial Chamber witnesses. This procedure provided in particular that the statements of Trial Chamber witnesses were to be provided to the parties at least seven days prior to the date on which the testimony of the witness was scheduled, with a B/C/S version to be provided to the witness and the parties.[300] Krajišnik's testimony lasted from 25 April to 22 June 2006. The testimony of Trial Chamber witnesses was set to start on Monday 26 June 2006 but because the scheduled witness did not appear, the session of 26 June 2006 was devoted to "housekeeping and procedural matters",[301] and the first Trial Chamber witness was heard on Tuesday 27 June 2006.

113. From the above, the Appeals Chamber notes that the Defence was informed well ahead of time of the main witnesses the Trial Chamber intended to call, that these witnesses were well-known to Krajišnik and his Defence - the four had previously been listed as potential Defence witnesses and the Defence had even provided the Trial Chamber with Rule 65 *ter* summaries of their expected testimony[302] - and that the Defence received the material related to these witnesses reasonably in advance of their testimony.[303] Further, while Krajišnik was not able to discuss with his Defence team in the period when he was testifying,[304] his testimony ended on 22 June 2006, and the first Trial Chamber witness testified only on 27 June 2006. In the circumstances and absent

[296] *Amicus Curiae*'s Appeal Brief, para. 106.
[297] *Amicus Curiae*'s Reply, para. 21.
[298] T. 22233-22234; Trial Judgement, para. 1255.
[299] Trial Judgement, para. 1255.
[300] Decision of 24 April 2006, Annex, para. 14. *See* also Decision of 24 April 2006, para. 9, stating that the Trial Chamber will aim to give the parties at least two weeks' notice in practice.
[301] T. 26286-26288 (citation taken from T. 26288).
[302] As recalled in paragraph 2 of the Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, 14 August 2006 ("Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses").
[303] In this connection, *see*, *e.g.* Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses, paras 4-6, 15.

demonstration of any concrete prejudice, the Appeals Chamber cannot conclude that the Trial Chamber accorded insufficient time to the Defence to prepare for the cross-examination of Trial Chamber witnesses.

114. *Amicus Curiae* also argues that the Defence was accorded insufficient time to cross-examine the Trial Chamber witnesses. He asserts that "the defence was granted a mere two hours to cross examine Ms Plavsic [*sic*], a fundamentally key witness on whom the Chamber subsequently greatly relied".[305] The Appeals Chamber notes that this objection was raised at trial and rejected in the following fashion:

> With regard to the time allotted for cross-examination, the Defence was informed on 20 June 2006 that Mrs Plavšić's testimony would last three days. The Chamber then allocated to the Prosecution one hour and twenty minutes for questioning, whereas the Defence was given two hours and forty minutes. Ultimately, the Chamber used two hours and forty minutes, the Prosecution used half an hour, and the Defence used two hours. The Defence thus enjoyed 75 percent of the Chamber's time, which is well above the 60 percent the Chamber used as guidance for the parties in this case. In light of the fact that the Defence had earlier been provided with all the material relevant to cross-examination, including Mrs Plavšić's statement and the translated book excerpts, the Defence had the opportunity to apportion the allocated time as it saw fit and put to Mrs Plavšić the questions it considered most important.[306]

115. In the Appeals Chamber's view, *Amicus Curiae* fails to demonstrate that the time allotted to the Defence for the cross-examination of Ms. Plavšić was insufficient or that this resulted in actual prejudice to Krajišnik. In particular, while he refers to Counsel Stewart's testimony that the Defence was prevented from pursuing questions on Ms. Plavšić's book and that Krajišnik was "peremptorily and unjustifiably cut off" from examining her,[307] *Amicus Curiae* fails to identify the relevant parts of Ms. Plavšić's testimony and explain the impact on the Trial Chamber's appreciation of Ms. Plavšić's evidence as well as the verdict. Further, the Defence only used three quarters of the two hours and 40 minutes allotted by the Trial Chamber to cross-examine Ms. Plavšić. This argument is rejected.

116. Finally, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion in asking Ms. Plavšić to identify parts of her book, arranging for the translation of the excerpts in question and admitting them in evidence. Contrary to what is asserted by *Amicus Curiae*,[308] Ms. Plavšić was not allowed to select the material relevant to an assessment of her credibility but was simply asked to identify the pages in her book which related to Krajišnik.[309] Further, it was not

[304] Decision of 24 April 2006, paras 29-31.
[305] *Amicus Curiae*'s Appeal Brief, para. 106.
[306] Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses, para. 17 (footnotes omitted).
[307] *Amicus Curiae*'s Supplemental Brief, para. 73, referencing Witness Stewart, AT. 620-622.
[308] *Amicus Curiae*'s Appeal Brief, para. 107.
[309] *See* Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses, paras 5-6.

necessary to translate the entire book into English as Krajišnik - who had read the book himself[310] - could indicate to his Counsel any part relevant to the cross-examination of Ms. Plavšić.

(vi) Krajišnik's participation in the proceedings

a. Decision denying self-representation

117. Towards the end of the Prosecution's case, Krajišnik announced that he wished to represent himself in all proceedings before the Tribunal.[311] This request was denied orally on 22 July 2005,[312] and written reasons were provided on 18 August 2005.[313] The Trial Chamber found that Krajišnik's request had been persistently equivocal, adding that even if this had not been the case, the request would have been denied as a matter of principle because:

> while an accused has, in the jurisprudence of this Tribunal, a presumptive right to self-representation prior to the commencement of the trial, the effect to be given to that right when it is asserted after the commencement of trial is subject to the public interest in the efficient administration of justice. The Chamber has broad discretion to deny an accused's request to continue unrepresented when the request is made at mid trial and has the potential to heavily disrupt trial proceedings.[314]

118. As to the first reason given by the Trial Chamber, *Amicus Curiae* asserts that Krajišnik's request for self-representation was no less equivocal than the similar request that was granted by the Appeals Chamber on 11 May 2007.[315] However, he does not develop this assertion, which could justify a summary dismissal thereof. In any case, the Appeals Chamber notes that the Trial Chamber found that Krajišnik's request to self-represent "was equivocal because in reality it was a means to another end",[316] *i.e.* obtaining additional resources to prepare and present his defence.[317] Given the reasons for the Trial Chamber's decision, the Appeals Chamber cannot find that the Trial Chamber's conclusion was erroneous. Furthermore, the Trial Chamber could properly take into account the possible disruption to the proceedings in such an advanced stage of the trial in deciding on Krajišnik's request for self-representation.[318] *Amicus Curiae*'s suggestion that a request to self-

[310] T. 26966.
[311] T. 13399.
[312] T. 17048.
[313] Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005 ("Reasons for Denying Request to Proceed Unrepresented by Counsel").
[314] Trial Judgement, para. 1244. *See* also Reasons for Denying Request to Proceed Unrepresented by Counsel.
[315] *Amicus Curiae*'s Reply, para. 23.
[316] Reasons for Denying Request to Proceed Unrepresented by Counsel, para. 21.
[317] In this connection, *see* Reasons for Denying Request to Proceed Unrepresented by Counsel, paras 10 ("Early on, then, it became plain to the Chamber that the self-representation request was really a drive on the part of Mr. Krajišnik for financial and structural improvements to be made to the Defence team") and following.
[318] *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal on Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, paras 13-14.

represent must always be honoured in the absence of persistent obstructionist conduct on the part of the accused[319] is rejected.

b. Krajišnik's participation in cross-examinations

119. As noted above,[320] the Trial Chamber exceptionally and temporarily allowed Krajišnik to supplement his Counsel's cross-examination with his own questions to the witness pending final decision on his request to self-represent.[321] The Appeals Chamber is of the view that the Trial Chamber acted within its discretion in doing so. The Appeals Chamber has already recognised that an accused represented by counsel may in certain circumstances directly put questions to a witness, subject to the Trial Chamber's supervision.[322] In the Appeals Chamber's opinion, the circumstances at hand (the pending request to self-represent) made it appropriate to allow Krajišnik to put questions to the witnesses after the cross-examination of Counsel. The Appeals Chamber further notes that the Trial Chamber explicitly warned Krajišnik of the risks connected with taking an active role in cross-examinations.[323] In the circumstances, the Appeals Chamber is not persuaded that *Amicus Curiae* has shown that the Trial Chamber's decision rendered the trial unfair. The only concrete prejudice alleged by *Amicus Curiae* concerns Krajišnik's handling of the cross-examination of Witness Davidović,[324] but he does not provide any reference in this regard and the Appeals Chamber can not thus assess this contention.

(vii) Conclusion

120. *Amicus Curiae* fails to show an error or abuse of discretion on the part of the Trial Chamber. This sub-ground of appeal is rejected.

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[319] *See Amicus Curiae*'s Reply, para. 23.
[320] *See supra* III.A.1.
[321] Trial Judgement, para. 1245. This practice was extended even after Krajišnik's request for self-representation was denied: the Trial Chamber allowed Krajišnik a limited role in complementing his Counsel's examination-in-chief of Defence witnesses, subject to the Trial Chamber's supervision (T. 17205-17206; Trial Judgement, para. 1246). *Amicus Curiae* does not seem to argue that the Trial Chamber erred in doing so. In any case, the Appeals Chamber can see no error in this, for the reasons given below.
[322] *Prosecutor v. Jandranko Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007. *See* also *Nahimana et al*, Appeal Judgement, para. 267; *Prosecutor v. Jandranko Prlić et al.*, Case No. IT-04-74-AR73.11, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses Dated 26 June 2008, 11 September 2008, para. 22.
[323] T. 13440:

> […] your lack of legal experience means that there is a serious risk that you'll damage your position. You should be aware that if you inadvertently damage your position through questioning witnesses, that it's something you shall have to live with. The Chamber therefore strongly advises you to consult your assigned counsel about any line of questioning you wish to pursue.

[324] *Amicus Curiae*'s Reply, para. 24.

6. Replacement of Judge El Mahdi by Judge Hanoteau (sub-ground 1(E))[325]

(a) Submissions

121. *Amicus Curiae* argues that the Trial Chamber erred in law by allowing Judge El Mahdi to be replaced by Judge Hanoteau under circumstances which rendered the trial unfair.[326] *Amicus Curiae* acknowledges that this issue was not raised at trial, but he submits that the ineffective assistance of counsel at trial amounts to a special circumstance which permits the error to be raised on appeal.[327]

122. *Amicus Curiae* submits that the Judges of the recomposed Trial Chamber abused their discretion and erred in law by ordering the resumption of trial although it was obvious that Judge Hanoteau, the substitute Judge, had not acquired the requisite familiarity with the case.[328] In this connection, *Amicus Curiae* argues that a substitute Judge is required to "fully review the entirety of the trial record, žwhatever that record may contain' – consisting as it does, *inter alia*, of video recordings, transcripts, exhibits, depositions, decisions, orders",[329] something Judge Hanoteau could not have done in only one month of preparation.[330] According to *Amicus Curiae*, the appeal provided for under Rule 15 *bis*(D) of the Rules only relates to the remaining Judges' decision to continue the proceedings with a substitute Judge, but not to the challenge of the subsequent exercise of discretion by the substitute Judge and/or the newly composed Trial Chamber to resume proceedings. *Amicus Curiae* concludes that only two Judges had adequate mastery of the case and that the missing input of one of three Judges caused actual prejudice to Krajišnik, as he was denied the right to a competent and properly constituted tribunal, adding that this rendered the verdict fundamentally unsafe.[331]

123. The Prosecution responds that since no appeal was made within seven days against the decision to continue the proceedings with a substitute Judge, this ground of appeal is now time-barred.[332] The Prosecution submits that, in any case, *Amicus Curiae* has not shown that the Trial Chamber abused its discretion in continuing the trial after receipt of the certificate of Judge Hanoteau. First, the remaining Judges do not have a power of review over the certification of another Judge. Second, the rule on certification by the substitute Judge acts as a safeguard to ensure that the trial process is fair, and it is to be expected that a Judge will act in accordance with his solemn oath. In the case at hand, there is no evidence that the trial was unfair as a result of the

[325] As noted above (fn. 75), sub-ground 1(D) was withdrawn by *Amicus Curiae*.
[326] *Amicus Curiae*'s Notice of Appeal, paras 19-20.
[327] *Amicus Curiae*'s Appeal Brief, para. 111. *See* also *Amicus Curiae's* Reply, para. 26.
[328] *Amicus Curiae*'s Appeal Brief, paras 112, 118.
[329] *Amicus Curiae*'s Appeal Brief, para. 112 (footnotes omitted).
[330] *Amicus Curiae*'s Appeal Brief, paras 114-117.
[331] *Amicus Curiae*'s Appeal Brief, paras 118-119.
[332] Prosecution's Response to *Amicus Curiae*, para. 44.

certification by Judge Hanoteau and *Amicus Curiae* cannot objectively justify any doubt about the impartiality of Judge Hanoteau.[333] Third, the necessary familiarisation with the trial record does not require that every document be read line by line; rather, what is required is for the Judge to "appreciate was has happened".[334] *Amicus Curiae* does not bring forward any evidence that Judge Hanoteau had not sufficiently familiarised himself with the case to be able to properly discharge his functions, that is to reach a fair decision at the end of the trial based on the totality of the evidence.[335]

124. *Amicus Curiae* replies that the time-bar of seven days invoked by the Prosecution only applies to the decision to continue the proceedings with a substitute Judge, whereas the present challenge relates to "the *subsequent* exercise of discretion by the substitute and/or the newly-composed Chamber to resume proceedings."[336] "Further/alternatively", *Amicus Curiae* submits that the "prejudice obligation necessarily means appeals of this nature are only justiciable *after* the period specified in Rule 15*bis*(D)".[337]

125. Replying to the Prosecution's contention that the remaining Judges could not review the certification of another Judge, *Amicus Curiae* avers that:

> Certification does not automatically cause the resumption of proceedings; a further order from the Chamber is required […] if it is manifest that the certification cannot meet the requisite standard, proceedings should be postponed. This is not a power of review but a circumstance for mandatory consideration in the exercise of the Chamber's independent scheduling discretion.[338]

126. *Amicus Curiae* also contends that proving prejudice to the verdict, rather than procedural prejudice, resulting from an aspect of judicial conduct is almost impossible, and hence appellate practice requires examination of the extent to which the conduct *could* have affected the verdict.[339] *Amicus Curiae* also reiterates that it is not sufficient for the substitute Judge to "appreciate what has happened"; he must have reviewed the record in its entirety.[340]

(b) Analysis

127. Rule 15 *bis*(D) of the Rules provides that if an accused withholds his consent to the continuation of the proceedings with a substitute Judge pursuant to Rule 15 *bis*(C) of the Rules, the

[333] Prosecution's Response to *Amicus Curiae*, para. 45.
[334] Prosecution's Response to *Amicus Curiae*, para. 46, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15 *bis*, Decision in the Matter of Proceeding under Rule 15 *bis*(D), 24 September 2003, para. 33.
[335] Prosecution's Response to *Amicus Curiae*, paras 46-47.
[336] *Amicus Curiae*'s Reply, para. 25 (emphasis in original).
[337] *Amicus Curiae*'s Reply, para. 26 (emphasis in original).
[338] *Amicus Curiae*'s Reply, para. 27 (footnote omitted).
[339] *Amicus Curiae*'s Reply, para. 28.
[340] *Amicus Curiae*'s Reply, paras 30-31.

remaining Judges may nonetheless decide to continue the proceedings with a substitute Judge if this would serve the interests of justice. It further specifies:

> This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

128. The Appeals Chamber agrees with *Amicus Curiae* that the appeal provided for under Rule 15 *bis*(D) of the Rules only relates to the remaining Judges' decision to continue the proceedings with a substitute Judge, but not to the challenge of the subsequent exercise of discretion by the substitute Judge and/or the newly composed Trial Chamber to resume proceedings. The Trial Chamber, by continuing with the case with the substitute Judge, impliedly acquiesced in the certification that Judge Hanoteau was familiar with the case to the requisite degree. *Amicus Curiae* fails to bring forward any evidence that Judge Hanoteau had not sufficiently familiarised himself with the case to be able to properly discharge his functions. Consequently, *Amicus Curiae* does not demonstrate that the Trial Chamber abused its discretion in continuing the trial after receipt of the certificate of Judge Hanoteau and thus rendered the trial unfair. This sub-ground is dismissed.

7. Alleged failure to deliberate properly (sub-ground 1(F))

(a) Submissions

129. *Amicus Curiae* contends that the Trial Chamber failed to deliberate properly as demonstrated by the fact that the Trial Judgement was rendered only 29 days after the end of the closing arguments, a period "self-evidently insufficient" for the Judges to deliberate on the copious body of evidence presented. In *Amicus Curiae*'s view, this constitutes an error of law invalidating the Trial Judgement.[341]

130. *Amicus Curiae* argues that the wording of Rule 87 makes clear that the process of deliberation can only begin after the close of the parties' presentations; while some preparatory work can be done prior to the close of the case, it is only when the entirety of the evidence has been received that the Trial Chamber is in a position to properly and fully consider the evidence.[342] *Amicus Curiae* recalls that the duty of deliberation cannot be delegated, and he asserts that it is

[341] *Amicus Curiae*'s Notice of Appeal, paras 21-22; *Amicus Curiae*'s Appeal Brief, para. 120; *Amicus Curiae*'s Reply, para. 32.

[342] *Amicus Curiae*'s Appeal Brief, para. 121. At paragraph 122, *Amicus Curiae* adds:

> If the deliberative process is begun before the close of the parties' presentations, a Chamber renders itself unable to assess the totality of the evidence with an open mind since initial

impossible that the three Judges of the Trial Chamber were able to deliberate carefully on the voluminous evidence and produce such a comprehensive Trial Judgement in less than a month.[343]

131. The Prosecution responds that there is no objective evidence to establish bias or error in the Trial Chamber's fact finding based solely on the number of days of deliberation. The Prosecution submits that *Amicus Curiae* does not demonstrate how preparatory work has overreached into the area of deliberation, he simply asserts that the period of time was "self-evidently insufficient".[344] However, general comments on the length of deliberation do not support a valid ground of appeal; instead, "the alleging party must show some manifest error on the face of the findings demonstrating where the chamber has erred, or giving rise to a reasonable inference that the deliberative process was compromised as alleged".[345] The Prosecution concludes:

> *Amicus curiae* does not show any failure to take relevant materials into account, or where account has been taken of irrelevant material. He does not show objective bias by pointing to manifestly unreasonable findings of fact or law which show a concluded view was reached prior to the close of the case.[346]

132. *Amicus Curiae* replies that "[t]he permissible period of non-delegable deliberation here is so short that the reasonable observer might well apprehend that significant conclusions on the evidence had either been reached prior to the close of the parties' cases or were made by people other than the Trial Judges."[347]

(b) Analysis

133. The Appeals Chamber recalls that before taking up duties, every Judge of the Tribunal solemnly declares that he will perform his or her duties and exercise his or her powers honourably, faithfully, impartially and conscientiously.[348] There is a strong presumption that the Judges act in accordance with this oath.[349] A party must adduce sufficient evidence to rebut this presumption.[350] The Appeals Chamber is not convinced that *Amicus Curiae* has done so here.

> assessments and conclusions in respect of earlier evidence would already have been reached. Not only does this give an appearance of bias, it might also result in actual bias.

[343] *Amicus Curiae*'s Appeal Brief, paras 123-124.
[344] Prosecution's Response to *Amicus Curiae*, paras 48-49.
[345] Prosecution's Response to *Amicus Curiae*, para. 49. *See* also *ibid.*, para. 50, quoting para. 19 of *SZHNE v. Minister of Immigration and Multicultural & Indigenous Affairs*, [2006] FCA 597, 22 May 2006 (Australia):

> The fact that a judgement is delivered *ex tempore* is not itself an appealable error. The proper question is whether the evidence and submissions of a party were properly considered and not how long the evidence and submissions were under consideration.

[346] Prosecution's Response to *Amicus Curiae*, para. 51.
[347] *Amicus Curiae*'s Reply, para. 33.
[348] Rule 14 of the Rules.
[349] *Furundžija* Appeal Judgement, para. 197.
[350] *Ibid.*

134. Just as general observations on the length of the Trial Judgement, or of particular parts of the Trial Judgement, usually do not suffice to show an error of law because of a lack of reasoned opinion,[351] general comments on the length of the deliberations are insufficient to show improprieties in the deliberative process. Here, *Amicus Curiae* claims that it was impossible to deliberate properly on such a complex case in only 18 working days, but he brings no evidence to substantiate this claim. In particular, he fails to show that conclusions were reached by other persons than the Judges or that preparatory work overreached into the area of deliberation. In this connection, the Appeals Chamber considers that in cases of the size and complexity of the case at stake, given that as a matter of fairness judgements must be issued in a reasonable time, preparatory work can and should be done as the case goes. This is not to suggest that decisions should be taken by others than the Judges or that any improper decisions should be taken by the Judges in advance of hearing all the evidence. However, there are numerous steps than can and should be taken which will place the Bench in the best situation possible following closing arguments to prepare a reasoned, clear and concise judgement within a reasonable time frame. Against this background, the Appeals Chamber cannot infer that the deliberation process was corrupted. This sub-ground is dismissed.

8. Concluding remark

135. The Appeals Chamber has dismissed *Amicus Curiae*'s assertion that Krajišnik's trial was unfair. That said, the Appeals Chamber notes that certain aspects of the conduct of the trial were not free from defects and may have created an appearance of unfairness. However, based on a holistic assessment of the trial record and the additional evidence on appeal, the Appeals Chamber is not satisfied that *Amicus Curiae* has shown that these defects amount to a miscarriage of justice which would undermine the fairness of the trial received by Krajišnik. This ground of appeal is therefore dismissed in its entirety.

B. Alleged failure to provide a reasoned opinion (Ground 2)

1. Submissions

136. *Amicus Curiae* submits that the Trial Chamber erred in law by failing to provide a sufficiently reasoned judgement,[352] opting for an "illustrative approach" instead of giving reasons as to why certain witnesses or exhibits were found credible and others not.[353] He argues in particular

[351] *Kvočka et al*. Appeal Judgement, para. 25.
[352] *Amicus Curiae*'s Notice of Appeal, paras 25-28; *Amicus Curiae*'s Appeal Brief, paras 125-138.
[353] *Amicus Curiae*'s Appeal Brief, paras 129-132. In this connection, *Amicus Curiae* refers specifically to paragraphs 292 and 889 of the Trial Judgement.

that the Trial Chamber erred in failing to give sufficient reasons for its conclusions on (1) crucial issues of responsibility[354] and (2) the credibility of certain witnesses who had been convicted of or were suspected of having committed serious war crimes.[355] In this last respect, *Amicus Curiae* avers that these witnesses were of doubtful credibility, especially as they may have sought to inculpate Krajišnik and exculpate themselves,[356] and that the Defence had challenged their evidence;[357] the Trial Chamber thus had the obligation to provide adequate and explicit reasons why it considered it safe to rely on the evidence of these witnesses for essential findings.[358] *Amicus Curiae* provides a list of those witnesses he considers, *prima facie*, to have been of dubious credibility and in respect of whom the Trial Chamber allegedly failed to give adequate reasons for relying on their evidence.[359]

137. The Prosecution responds that the Trial Judgement, when read as a whole, does not adopt an "illustrative approach" and submits that the Trial Chamber's conclusions on Krajišnik's responsibility in Part 6 of the Trial Judgement are based on detailed findings of fact and evidence mentioned in earlier parts of the judgement.[360] With regard to "insider witnesses", including the former co-accused or other convicted persons, the Prosecution argues that the Trial Chamber was not required to make specific findings on the credibility of such witnesses, but that its duty was to carefully examine their evidence, which is what it did.[361] The Prosecution, referring to the Trial Chamber's own statement that it "carefully deliberated on th[e] vast amount of evidence",[362] recalls the presumption that the Trial Chamber indeed evaluated all the evidence, and that the Trial Chamber need not explain its decision in every detail.[363] According to the Prosecution, *Amicus Curiae* has failed to show any specific error of the Trial Chamber in its evaluation of the evidence

[354] *Amicus Curiae*'s Appeal Brief, para. 132, referring to Trial Judgement, paras 336 and 987.
[355] *Amicus Curiae*'s Appeal Brief, paras 133-138.
[356] *Amicus Curiae*'s Appeal Brief, paras 133, 135, 137-138.
[357] *Amicus Curiae*'s Appeal Brief, paras 135-136 (this last paragraph referring to Krajišnik's Final Trial Brief (Confidential), paras 38-42, 74-78).
[358] *Amicus Curiae*'s Appeal Brief, paras 133, 135. According to *Amicus Curiae*, the Trial Chamber erred when it stated that a "conclusion on the credibility of a witness cannot always be fully explained, nor is a Trial Chamber required to give such an explanation" (*Amicus Curiae*'s Appeal Brief, para. 136, quoting Trial Judgement, para. 888).
[359] *Amicus Curiae*'s Appeal Brief, paras 133, 135 and 138, naming Witnesses Biljana Plavšić, Momčilo Mandić, Witness 625, Branko Đerić, Miroslav Deronjić, Witness 666, Milan Trbojević, Witness 623, Nedeljko Prstojević, Dragan Đokanović and Witness 680.
[360] Prosecution's Response to *Amicus Curiae*, paras 53-54, referring in particular to Part 3 of the Trial Judgement entitled "Administration of the Bosnian-Serb Republic". The Prosecution adds that *Amicus Curiae*'s specific references to paragraphs 336 and 987 of the Trial Judgement do not demonstrate a lack of reasoning by the Trial Chamber on any material issue: Prosecution's Response to *Amicus Curiae*, paras 55-57. According to the Prosecution, paragraph 336 of the Trial Judgement is irrelevant to *Amicus Curiae*'s argument, as it does not contain a material finding of the Trial Chamber. As for paragraph 987 of the Trial Judgement, the Prosecution argues that *Amicus Curiae* erroneously ignores other relevant parts of the Trial Judgement underpinning the conclusion in question and providing detailed reasons for it.
[361] Prosecution's Response to *Amicus Curiae*, para. 59.
[362] Trial Judgement, para. 889.
[363] Prosecution's Response to *Amicus Curiae*, para. 60.

of insider witnesses.[364] The Prosecution concludes that, in any event, Krajišnik was convicted "on the basis of a whole tapestry of evidence, including contemporaneous documents, intercepts, and important international witnesses", and that *Amicus Curiae* has failed to show that no reasonable trial chamber could have found Krajišnik guilty based on this evidence taken as a whole.[365]

138. *Amicus Curiae* replies that the Trial Chamber did adopt an illustrative approach and that the earlier parts of the Trial Judgement invoked by the Prosecution merely provide a background and context to the judgement, but that they are devoid of in-depth analysis of individual responsibility for crimes. In particular, he claims that the parts of the Trial Judgement addressing the commission of crimes and Krajišnik's responsibility are not sufficiently linked.[366] *Amicus Curiae* further submits that the individual witnesses referred to in his Appeal Brief are of "objectively adverse credibility", and that the Trial Chamber nevertheless extensively relied upon their evidence without adequately explaining why it was considered reliable.[367] *Amicus Curiae* also contends that there is no presumption that the Trial Chamber evaluated all the evidence.[368]

2. Analysis

(a) The requirement to provide a reasoned opinion

139. As recently recalled by the Appeals Chamber:

> The fair trial requirements of the Statute include the right of each accused to a reasoned opinion by the Trial Chamber under Article 23 of the Statute and Rule 98*ter*(C) of the Rules. A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals. The reasoned opinion requirement, however, relates to a Trial Chamber's judgement rather than to each and every submission made at trial.[369]

As a general rule, a Trial Chamber "is required only to make findings on those facts which are essential to the determination of guilt on a particular count";[370] it "is not required to articulate every

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[364] Prosecution's Response to *Amicus Curiae*, para. 60. The Prosecution illustrates the "[Trial] Chamber's sound approach in assessing reliability of evidence" by referring to the Trial Chamber's assessment of the testimonies of Witnesses Đerić and Mandić as reflected in paragraphs 267 and 1085 of the Trial Judgement (Prosecution's Response to *Amicus Curiae*, para. 61). The Prosecution adds that, by simply listing impugned paragraphs and through the mere naming of "insider witnesses" without adequate reasoning, *Amicus Curiae* fails to explain why no reasonable trier of fact could have relied on the evidence in question (Prosecution's Response to *Amicus Curiae*, paras 62-63).
[365] Prosecution's Response to *Amicus Curiae*, para. 64.
[366] *Amicus Curiae*'s Reply, paras 35-36.
[367] *Amicus Curiae*'s Reply, paras 37-40. The *Amicus Curiae* avers that the Trial Judgement contains no reflection of the Trial Chamber's assurance that it would treat this evidence with caution (*Amicus Curiae*'s Reply, para. 38).
[368] *Amicus Curiae*'s Reply, para. 40.
[369] *Limaj et al.* Appeal Judgement, para. 81 (references omitted). *See* also *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, paras 23 and 288.
[370] *Hadžihasanović and Kubura* Appeal Judgement, para. 13.

step of its reasoning for each particular finding it makes"[371] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[372] However, the requirements to be met by the Trial Chamber may be higher in certain cases.[373] It will be "necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[374]

(b) Whether the Trial Chamber erred in using an "illustrative approach"

140. *Amicus Curiae* contends that the Trial Chamber used an "illustrative approach" with regard to the evidence it considered, and that it failed to provide adequate reasons for its findings. *Amicus Curiae* refers more specifically to paragraphs 292 and 889 of the Trial Judgement, which read as follows:

> 292. The Chamber notes that there is no practical way of presenting in detail all the evidence it has heard and received during the trial. The Chamber has been able to present only the most relevant parts of the evidence in detail, but generally has had to confine itself to presenting evidence in a summarized form.
>
> 889. Second, the Chamber cannot possibly discuss here all the evidence relevant to the Accused's responsibility which it received in the course of two-and-a-half years of trial and subsequently analysed. Having carefully deliberated on this vast amount of evidence, what the Chamber can (and must) do is to illustrate the types of fact that underlie its conclusions, so that these conclusions are sufficiently explained.

141. The Appeals Chamber is not convinced that these paragraphs demonstrate the Trial Chamber's failure to provide adequate reasons for its decision. The Trial Chamber does not have to refer to the testimony of every witness or every piece of evidence on the trial record; it is to be presumed that the Trial Chamber evaluated all the evidence before it.[375] In fact, the Trial Chamber specifically stated that it had "carefully deliberated" on the evidence presented to it. Both impugned passages merely stress the fact that the Trial Chamber could not *present and discuss* "all the evidence" in the judgement, a statement which cannot, by itself, be equated with a failure to *examine* the evidence in question, nor with a failure to provide sufficient reasons for the conclusions reached in the Trial Judgement. The Appeals Chamber considers that the approach taken by the Trial Chamber in the impugned paragraphs was not in error.

142. The Appeals Chamber also recalls that it is necessary for any appellant claiming an error of law based on the lack of a reasoned opinion to identify the specific issues, factual findings or

[371] *Musema* Appeal Judgement, para. 18. *See* also *Brdanin* Appeal Judgement, para. 39.
[372] *Musema* Appeal Judgement, para. 20.
[373] *Kvočka et al.* Appeal Judgement, para. 24.
[374] *Kvočka et al.* Appeal Judgement, para. 25 (reference omitted). *See* also *Halilović* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9.

arguments, which the appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[376] In the instant case, *Amicus Curiae* claims broadly that the Trial Chamber "fail[ed] to provide adequate reasons for its conclusions on crucial issues of responsibility".[377] The alleged error of law potentially impacts on every finding made by the Trial Chamber relating to Krajišnik's responsibility, and *Amicus Curiae* was therefore required to develop its arguments more precisely by referring to specific paragraphs of the Trial Judgement; it is not enough to allege a general deficiency throughout the Trial Judgement and request review of unspecified findings of the Trial Chamber – lest the appeal procedure effectively becomes a trial *de novo*.[378] The only parts of the Trial Judgement specifically identified by *Amicus Curiae* to substantiate his allegation of a lack of reasoned opinion are paragraphs 336 and 987 of the Trial Judgement,[379] and the Appeals Chamber will limit its assessment of the alleged error to these two paragraphs.

143. Turning first to paragraph 336 of the Trial Judgement, the Appeals Chamber considers that *Amicus Curiae* has failed to show how reference to this paragraph, which contains purely factual findings on the destruction of religious sites in Brčko municipality in 1992, could support his claim that the Trial Chamber's "conclusions on crucial issues of responsibility" lacked a reasoned opinion.[380]

144. As for *Amicus Curiae*'s reference to paragraph 987 of the Trial Judgement, the Appeals Chamber considers that the conclusions therein, namely that Krajišnik and Radovan Karadžić "ran Republika Srpska as a personal fief" and that "[t]hey intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations", cannot be examined in isolation. This paragraph does not stand alone, but rather summarises the Trial Chamber's findings on Krajišnik's "style of leadership": the following paragraphs of the Trial Judgement discuss in detail the relevant evidence underlying the finding in question.[381] Moreover, as pointed out by the Prosecution,[382] the conclusion in paragraph 987 of the Trial Judgement is further based and relies on a number of findings in earlier parts of the Trial Judgement, detailing Krajišnik's involvement in the Bosnian-Serb decision-making process.[383] The Appeals Chamber considers therefore that *Amicus Curiae* has

[375] *Kvočka et al.* Appeal Judgement, para. 23.
[376] *Halilović* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 25.
[377] *Amicus Curiae*'s Appeal Brief, para. 132.
[378] *Halilović* Appeal Judgement, paras 120, 126.
[379] *Amicus Curiae*'s Appeal Brief, fn. 236.
[380] *Amicus Curiae*'s Appeal Brief, para. 132. The Appeals Chamber also notes that the Trial Chamber provided references to several pieces of evidence in order to support the factual findings in the impugned paragraph.
[381] Trial Judgement, paras 988-1005.
[382] Prosecution's Response to *Amicus Curiae*, para. 57.
[383] *See*, *inter alia*, Trial Judgement, paras 161-162, 187, 205-207, 267-278.

failed to show that the Trial Chamber did not provide sufficient reasons for its findings in paragraph 987 of the Trial Judgement.

(c) Whether the Trial Chamber failed to give sufficient reasons in relation to witnesses with "adverse credibility issues"

145. *Amicus Curiae* submits that the Trial Chamber failed to give sufficient reasons for relying on evidence provided by witnesses whose credibility was allegedly in serious doubt, in order to find Krajišnik guilty. He also seems to argue that this alleged lack of reasons shows a failure of the Trial Chamber to scrutinise the evidence of these witnesses with the required caution.[384]

146. The Appeals Chamber recalls at the outset that it is well established in the jurisprudence of both *ad hoc* Tribunals that nothing prohibits a Trial Chamber from relying on evidence given by a convicted person, including evidence of a partner in crime of the person being tried before the Trial Chamber.[385] Indeed, accomplice evidence, and, more broadly, evidence of witnesses who might have motives or incentives to implicate the accused is not *per se* unreliable, especially where such a witness may be thoroughly cross-examined; therefore, reliance upon this evidence does not, as such, constitute a legal error.[386] However, "considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered".[387] As a corollary, a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence.

147. In the case at hand, the Trial Chamber stated its approach when examining the testimony of other accused or convicted persons:

> *Testimony of other accused or convicted persons*. Some of the witnesses in this case had pleaded guilty and were awaiting sentencing at the time of their testimony. The Chamber is aware of the problems associated with such testimonies – notably the witness's incentive to testify untruthfully for the purpose of improving his or her chances at the sentencing stage. The Chamber has used the testimonies of such witnesses with great caution. It is settled jurisprudence of the Tribunal that a

[384] *See Amicus Curiae*'s Notice of Appeal, para. 25 ("If the Chamber had properly scrutinised the evidence of witnesses in this category, as the exercise of giving reasons would have forced the Chamber to do, the Chamber would not have relied, or would not have relied to the same extent, on their evidence in convicting [Krajišnik]"); *Amicus Curiae*'s Appeal Brief, paras 134 *et seq*.
[385] *Nahimana et al.* Appeal Judgement, para. 439. *See* also *Blagojević and Jokić* Appeal Judgement, para. 82; *Ntagerura et al.* Appeal Judgement, paras 203-206; *Niyitegeka* Appeal Judgement, para. 98.
[386] *Niyitegeka* Appeal Judgement, para. 98. *See* also *Ntagerura et al.* Appeal Judgement, para. 204, and *Blagojević and Jokić* Appeal Judgement, para. 82.
[387] *Niyitegeka* Appeal Judgement, para. 98. *See* also *Nahimana et al.* Appeal Judgement, para. 439; *Ntagerura et al.* Appeal Judgement, paras 204 and 206, and *Blagojević and Jokić* Appeal Judgement, para. 82.

> Trial Chamber may find some parts of a witness's testimony credible, and rely on them, while rejecting other parts as not credible.[388]

The Appeals Chamber notes that the Trial Chamber did not identify the witnesses for whose testimonies it considered "great caution" to be required, nor did it expressly examine the reliability of each of these witnesses individually. Nevertheless, the Trial Chamber implicitly explained its acceptance of certain parts of the evidence in question: in referring to other evidence, it showed that it accepted the impugned testimony because it considered it to be in agreement with other evidence adduced.[389] The Appeals Chamber is thus of the view that the Trial Judgement provided sufficient reasons for its decision to allow Krajišnik to exercise his right of appeal.

148. As to the argument that the Trial Chamber did not assess the evidence in question with the required caution, the Appeals Chamber considers that the above statement of the Trial Chamber[390] cannot, of course, in itself establish an irrefutable presumption that the evidence given by each of these witnesses was indeed examined by the Trial Chamber with caution. However, it is a clear indication that the Trial Chamber, in its evaluation of the evidence in question, was well aware of the potential risks related to its use. Already during the trial, the Trial Chamber stressed its approach of special caution and emphasised an "extra degree of suspicion and scrutiny" with regard to a witness who might have an interest in testifying before the Trial Chamber.[391] While the Trial Judgement does not expressly reflect the Trial Chamber's evaluation of the evidence given by the impugned witnesses, its cautious approach towards this evidence is apparent from its assessment of the evidence as a whole and, in particular, from its reliance on numerous pieces of evidence for its findings.[392]

149. In particular, the Appeals Chamber considers that *Amicus Curiae* has failed to show any error by the Trial Chamber when examining the testimonies before it, nor has he demonstrated that the Trial Chamber erroneously relied on this evidence for findings essential to the determination of

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[388] Trial Judgement, para. 1203 (internal footnotes omitted).
[389] In this context, the Appeals Chamber also notes the Trial Chamber's general explanation of its approach in dealing with evidence it considered unreliable or irrelevant when it stated that it "has, on occasions, explicitly refuted some evidence. However, it has generally simply disregarded evidence when, after having considered the record as a whole, it deemed it unreliable or irrelevant for the purpose of reaching an informed decision." (Trial Judgement, para. 22).
[390] Trial Judgement, para. 1203.
[391] *See* Decision on the Defence's Motion to Preclude Miroslav Deronjić from Giving Testimony Prior to Being Sentenced, 16 February 2004 ("Decision on Deronjić's Testimony"), paras 9-10, where the Trial Chamber acknowledged that a person in Mr. Deronjić's position, who had pleaded guilty but had not yet been sentenced, "might be tempted to improve his chances before the sentencing panel by giving untruthful evidence to this Chamber that significantly assists the Prosecution's case", and thus stated that it would "exercise particular caution in scrutinizing, weighing up, and finding corroboration for the evidence that Deronjić places before it" and that it would "closely control the examination of the witness".
[392] *Cf. Ntagerura et al.* Appeal Judgement, para. 174, stating that "[i]ndividual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness,

Krajišnik's guilt. The Appeals Chamber stresses that the mere listing of witnesses of allegedly "doubtful credibility" by *Amicus Curiae* and the enumeration of paragraphs of the Trial Judgement which, according to him, rely erroneously on these witnesses, is insufficient in itself to substantiate an error of the Trial Chamber. In any event, the examples summarily provided by *Amicus Curiae*[393] do not contain any indication of an error by the Trial Chamber in its assessment of the evidence as a whole. In fact, in most of these examples, the testimony of the impugned witnesses is but one of several pieces of evidence relied upon by the Trial Chamber in reaching its findings.[394]

150. Moreover, the Trial Chamber's cautious approach in its assessment of the reliability of the challenged witness testimonies is further evidenced by the correct exercise of its discretion to rely on specific parts of these testimonies and to reject other parts as not credible.[395] Indeed, the assessment whether to rely on the evidence given by a person who might have certain interests while testifying before the Tribunal will vastly depend on the specific context of the provided information, as correctly reflected in the analysis of the Trial Chamber.[396]

151. In light of these considerations, the Appeals Chamber finds that *Amicus Curiae* has failed to show that the Trial Chamber erred when examining the evidence of witnesses of allegedly "doubtful credibility" and has failed to demonstrate that the Trial Chamber erroneously relied on their evidence in convicting Krajišnik. *Amicus Curiae* has not shown any error in the Trial Chamber's approach when assessing the evidence as a whole.

152. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal of *Amicus Curiae*.

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that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible."

[393] *Amicus Curiae*'s Appeal Brief, fns 237 and 240.

[394] The Appeals Chamber also notes that, in some cases, the challenged evidence relied upon by the Trial Chamber (*see*, for example, Trial Judgement, paras 953, 958 and 1022) is based on evidence stemming from the Indictment period. The Trial Chamber's reliance on these specific, contemporaneous phone intercepts can therefore not reflect an intention of the witness to "implicate the accused person before the Tribunal" (*Ntagerura et al.* Appeal Judgement, para. 204) and is therefore unsuitable to show that the Trial Chamber did not apply the required caution when assessing the evidence of potentially interested witnesses testifying before it.

[395] *See*, *inter alia*, *Blagojević and Jokić* Appeal Judgement, para. 82.

[396] This is evidenced, *inter alia*, by the Trial Chamber's graded assessment of the testimony given by Momčilo Mandić, one of the witnesses claimed by *Amicus Curiae* to be of "objectively adverse credibility" (*Amicus Curiae*'s Reply, para. 37. *See* also *Amicus Curiae*'s Appeal Brief, para. 138 and fn. 237). While in paragraph 1085 of the Trial Judgement, the Trial Chamber chose to rely on Mr. Mandić's opinion, which it found to be equivalent to Witness Đerić's assessment, and concluded that Mr. Mandić's opinion was correct "in light of all the evidence"; in other parts of the Trial Judgement, the Trial Chamber, "in view of the evidence on the record", rejected the evidence provided by Mr. Mandić (Trial Judgement, para. 267).

C. Alleged Errors Relating to the Joint Criminal Enterprise (Ground 3)

153. *Amicus Curiae* argues that the Trial Chamber erred in fact and in law in finding that Krajišnik participated in a joint criminal enterprise ("JCE") whose objective was the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina through the commission of various crimes.[397] For *Amicus Curiae*:

> the result of the Chamber's approach is that [Krajišnik] may be held responsible for every single crime committed by the Bosnian Serb side during the conflict, without the need to prove any demonstrable link between [Krajišnik] and any given perpetrator, and without any demonstration, much less proof beyond a reasonable doubt, that the crimes were committed in pursuance of the JCE.[398]

1. Identification of members of JCE (sub-ground 3(A))

(a) Submissions

154. *Amicus Curiae* avers that, in failing to give an exhaustive list of the "rank and file" participants in the JCE and in referring to generic groups without identifying individuals, the Trial Chamber did not correctly identify the participants in the JCE and could thus not conclude beyond reasonable doubt on the existence of a common objective between them and Krajišnik.[399]

155. The Prosecution responds that the Trial Chamber did not have to fully specify the membership in the JCE and that it could refer to some of the JCE members by way of their membership in groups, without identifying individuals by name.[400] It adds that "[i]n fact, in addition to identifying the persons involved by reference to their groups, the Chamber went further than it was required to, by naming Pale-based leadership members and providing a non-exhaustive list of rank and file JCE members."[401]

(b) Analysis

156. While a Trial Chamber must identify the plurality of persons belonging to the JCE, it is not necessary to identify by name each of the persons involved. Depending on the circumstances of the

[397] *Amicus Curiae*'s Notice of Appeal, paras 29-56.
[398] *Amicus Curiae*'s Notice of Appeal, para. 29.
[399] *Amicus Curiae*'s Appeal Brief, paras 139-140; *Amicus Curiae*'s Reply, para. 46.
[400] Prosecution's Response to *Amicus Curiae*, paras 66-67, referring, *e.g.*, to *Brdanin* Appeal Judgement, para. 430.
[401] Prosecution's Response to *Amicus Curiae*, para. 67.

case, it can be sufficient to refer to categories or groups of persons.[402] In the case at hand, the Trial Chamber found that

> 1087. […] There was a Pale-based leadership component of the group, including, but not limited to, the Accused, Radovan Karadžić, Biljana Plavšić, Nikola Koljević, Momčilo Mandić, Velibor Ostojić, Mićo Stanišić, and, as of 12 May 1992, General Ratko Mladić. The JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others. It was based in the regions and municipalities of the Bosnian-Serb Republic, and maintained close links with Pale.
>
> 1088. The local component included Arkan (Željko Ražnatović), Dr Beli (proper name Milenko Vojnović: a local SDS official, deputy to the Bosnian-Serb Assembly, and SDS Main Board member), Mirko Blagojević (paramilitary leader), Radoslav Brđanin (ARK crisis staff president and deputy to Bosnian-Serb Assembly), Simo Drljača (chief of Prijedor SJB), Rajko Dukić (president of SDS Executive Board and SDS Main Board member), Gojko Kličković (president of Bosanska Krupa war presidency and SDS Main Board member), "Vojo" Kuprešanin (president of ARK and SDS Main Board member), Rajko Kušić (SDS leader of Rogatica, paramilitary leader, and SDS Main Board member), Mauzer (paramilitary leader; proper name Ljubiša Savić), Jovan Mijatović (member of Zvornik crisis staff and deputy to Bosnian-Serb Assembly), Veljko Milanković (paramilitary leader), Nedeljko Rašula (president of Sanski Most municipal assembly and deputy to Bosnian-Serb Assembly), Momir Talić (commander of 1st Krajina Corps), Jovan Tintor (president of Vogošća crisis staff and SDS Main Board member), Vojin (Žućo) Vučković (paramilitary leader), and Stojan Župljanin (chief of Banja Luka SJB), among others.[403]

157. The issue before the Appeals Chamber is whether the Trial Chamber's finding in paragraph 1087 that the JCE included a "rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others" was erroneously unspecific as far as this finding is *not* further specified by the rank and file JCE members individually named in paragraph 1088. The Appeals Chamber finds that the Trial Chamber indeed erred in this respect. The Trial Chamber failed to specify whether all or only some of the local politicians, militaries, police commanders and paramilitary leaders were rank and file JCE members. Furthermore, the finding in paragraph 1087 does not refer to any time period that could further specify who was found to be a rank and file JCE member. Also, the reference to the geographical scope ("regions and municipalities of the Bosnian-Serb Republic") is too broad to dispel the ambiguity as to whom the Trial Chamber found was a rank and file JCE member in paragraph 1087. Therefore, inasmuch as the Trial Chamber included persons in the JCE merely by reference to the JCE "rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others", its identification of the JCE members is impermissibly vague. Sub-ground 3(A) submitted by *Amicus Curiae* is therefore granted.[404]

[402] *Limaj et al.* Appeal Judgement, para. 99; *Brđanin* Appeal Judgement, para. 430. *See* also *Stakić* Appeal Judgement, para. 69.
[403] Trial Judgement, paras 1087-1088 (references omitted).
[404] As to the effect of this finding on Krajišnik's convictions, *see infra* III.C.11.

2. Beginning of Krajišnik's criminal liability (sub-ground 3(B))

(a) Submissions

158. In sub-ground 3(B), *Amicus Curiae* argues that the Trial Chamber erred in finding that Krajišnik's responsibility arose first with the killings committed in Bijeljina at the beginning of April 1992 because it failed to show that Krajišnik possessed the intent to kill at the time of these killings.[405]

159. The Prosecution responds that *Amicus Curiae*'s argument is based on the erroneous premise that the Trial Chamber convicted Krajišnik for all crimes pursuant to JCE Category 1; however, paragraphs 1096 to 1099 of the Trial Judgement show that the Trial Chamber in fact convicted Krajišnik on the basis of JCE Categories 1 and 3.[406] According to the Prosecution, the Trial Chamber found that the first killings – as well as the first of each of the "expanded" crimes – were foreseeable by Krajišnik in the implementation of the common criminal objective, and that his liability for them arises under JCE Category 3.[407]

160. *Amicus Curiae* replies that the Trial Chamber at no point applied the "natural and foreseeable consequence" test required for JCE Category 3 liability, nor did it state that JCE Category 3 formed the basis of liability for the first offence of each of the expanded crimes.[408] *Amicus Curiae* also avers that the Prosecution's assertion that the JCE Category 3 test was met is drawn from highly generalised statements in the Trial Judgement, but that these statements "do not come close to fulfilling the JCE 3 test."[409]

(b) Analysis

161. *Amicus Curiae* alleges that the Trial Chamber did not make the findings necessary for Krajišnik's conviction for killings in April 1992,[410] as it failed to find that he had the requisite intent

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[405] *Amicus Curiae*'s Appeal Brief, para. 142, explaining that the Trial Chamber "relied on the notion of a žfeedback loop of coordination and support' to prove intent. However, the Chamber failed to refer to killings that occurred in the preceding months, or any other evidence that would demonstrate that [Krajišnik] possessed the requisite intent to kill in April 1992."

[406] Prosecution's Response to *Amicus Curiae*, para. 68.

[407] Prosecution's Response to *Amicus Curiae*, paras 68-70. At paragraph 70, the Prosecution refers to excerpts of the Trial Judgement to show that the Trial Chamber found that, even before the first killing in Bijeljina were committed in 1992, Krajišnik was aware that killings, unlawful detention, inhuman treatment, plunder, unlawful destruction and other crimes were possible consequences of the implementation of the common criminal objective yet he willingly took the risk.

[408] *Amicus Curiae*'s Reply, para. 43. In the words of *Amicus Curiae*:

> The Chamber never made the requisite factual findings in respect of the appropriate standard: that it had been proven beyond reasonable doubt that [Krajišnik] knew that specific offences were natural and foreseeable consequences of the implementation of a common criminal objective.

[409] *Amicus Curiae*'s Reply, para. 44.

[410] *See Amicus Curiae*'s Appeal Brief, paras 142-143.

to kill at that time. In other words, Amicus Curiae alleges that the Trial Chamber failed to make findings as to whether the killings formed part of the JCE and could thus be imputed to Krajišnik. The Appeals Chamber's inquiry will therefore be limited to whether the Trial Chamber made those findings, as it was required to do by law.[411]

162. The Trial Chamber found that the common criminal objective of the joint criminal enterprise was the permanent removal by force of Bosnian Muslims and Bosnian Croats from large areas of Bosnia and Herzegovina.[412] It found that the crimes of deportation and forcible transfer (as charged under Counts 7 and 8 of the Indictment and as incorporated in the charge of persecution in Count 3) were the crimes which constituted the JCE's common objective as of late March 1992; the Trial Chamber subsequently referred to them as the "original" crimes.[413] It then found that new – "expanded" – crimes were later added to the common objective:

> An expansion of the criminal means of the objective is proven when leading members of the JCE are informed of new types of crime committed pursuant to the implementation of the common objective, take no effective measures to prevent recurrence of such crimes, and persist in the implementation of the common objective of the JCE. Where this holds, JCE members are shown to have accepted the expansion of means, since implementation of the common objective can no longer be understood to be limited to commission of the original crimes. With acceptance of the actual commission of new types of crime and continued contribution to the objective, comes intent, meaning that subsequent commission of such crimes by the JCE will give rise to liability under JCE form 1. […]
>
> The Chamber finds that, whereas in the early stages of the Bosnian-Serb campaign the common objective of the JCE was discriminatory deportation and forced transfer, soon thereafter it became clear to the members of the JCE, including the Accused, that the implementation of the common objective involved, as a matter of fact, the commission of an expanded set of crimes. These crimes came to redefine the criminal means of the JCE's common objective during the course of the indictment period. In accordance with the reasoning set out earlier in this section, acceptance of this greater range of criminal means, coupled with persistence in implementation, signalled an intention to pursue the common objective through those new means.[414]

The Trial Chamber thus found that:

> 1) the crimes of deportation and forcible transfer were the original crimes of the JCE and Krajišnik shared the intent to commit these crimes from the beginning of the JCE; he must thus be held liable for these crimes pursuant to JCE Category 1;
>
> 2) other crimes were added to the JCE, after *leading JCE members* became aware of them, accepted them and came to intend them; Krajišnik must thus be held liable pursuant to JCE Category 1 for the commission of these "expanded" crimes *after* they became part of the JCE.[415]

[411] *Kordić and Čerkez* Appeal Judgement, paras 384-385; *see also Orić* Appeal Judgement, paras 47 and 52.
[412] Trial Judgement, paras 1089-1090 and fn. 2214.
[413] Trial Judgement, para. 1097.
[414] Trial Judgement, paras 1098, 1118.
[415] As stated at paragraph 1098 of the Trial Judgement (emphasis added):

163. In this context, the Appeals Chamber is not convinced that the Trial Chamber invented a novel JCE category, as argued by *Amicus Curiae* elsewhere.[416] Rather, it found that the criminal means of realising the common objective of the JCE can evolve over time.[417] The Appeals Chamber can see no error in this: a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means. In this respect, it is not necessary to show that the JCE members *explicitly* agreed to the expansion of criminal means; this agreement may materialise extemporaneously and be inferred from circumstantial evidence.[418]

164. Therefore, the Appeals Chamber has to address two outstanding issues. First, it will analyse whether the Trial Chamber found that Krajišnik had the intent for the commission of the expanded crimes *before* they became part of the JCE – as exemplified in the submission of *Amicus Curiae* with respect to the killings in Bijeljina –, because they were a natural and foreseeable consequence of the implementation of the common objective.

165. Second, the Appeals Chamber will examine the Trial Chamber's findings as to how and when the expanded crimes became encompassed by the common objective of the JCE.

(i) Whether the Trial Chamber made findings to the effect that Krajišnik's responsibility for the first commissions of expanded crimes arose under JCE Category 3

166. According to the Prosecution, the Trial Chamber found that Krajišnik incurred responsibility for the expanded crimes – that is, crimes which were not part of the original common objective, but were later incorporated into it – even *before* they became part of the common objective. His liability in this regard, it argues, arose under JCE Category 3, because they were a natural and foreseeable consequence of the implementation of the common objective.[419]

167. The Appeals Chamber first notes that, in the Indictment, the Prosecution pled Krajišnik's liability pursuant to JCE Category 1 and alternatively, pursuant to JCE Category 3.[420] However, the

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> With acceptance of the actual commission of new types of crimes and continued contribution to the objective, comes intent, meaning that *subsequent* commission of such crimes by the JCE will give rise to liability under JCE form 1.

The Trial Chamber does not explicitly state which these new types of crimes are. However, the Appeals Chamber is satisfied that the crimes mentioned in paragraphs 1095 and 1100 to 1118 were found to be encompassed by this category ("expanded crimes").

[416] *See supra* III.C.7.

[417] Trial Judgement, para. 1098.

[418] It is well established that the common objective need not have been previously arranged or formulated, and that it may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise: *Brdanin* Appeal Judgement, para. 418; *Kvočka et al.* Appeal Judgement, paras 96 and 117; *Vasiljević* Appeal Judgement, paras 100, 108-109; *Krnojelac* Appeal Judgement, para. 31; *Tadić* Appeal Judgement, para. 227. The same applies to an expansion of the criminal means.

[419] AT. 321-325.

[420] Indictment, para. 5.

Appeals Chamber is not persuaded by the submission that the Trial Chamber found that Krajišnik incurred responsibility pursuant to JCE Category 3. First, although the Trial Chamber raised the question of whether Krajišnik incurred liability under JCE Category 3 for some of the crimes,[421] it never returned to answer that question. Instead, it focused its analysis on whether the expanded crimes became incorporated into the common objective,[422] thereby resulting in responsibility for Krajišnik under JCE Category 1 once they had been incorporated.[423] Had the Trial Chamber intended to find Krajišnik liable for the expanded crimes under JCE Category 3 *before* they had become part of the common objective, it would, at the very least, have made some distinction between the *first* commissions of the expanded crimes (when they were not yet part of the common objective) and their commission after they had become part of the common objective. However, the Trial Chamber made no such distinction. This indicates that the Trial Chamber found Krajišnik responsible under JCE Category 1 alone, and not under JCE Category 3.

168. Likewise, the other findings of the Trial Chamber invoked by the Prosecution do not reveal that it found Krajišnik criminally responsible under JCE Category 3. The Trial Chamber found that "even before the Bosnian-Serb take-overs began in April 1992, the Accused and Radovan Karadžić were aware that an armed conflict between the ethnic groups would have devastating consequences".[424] This finding falls short, however, of demonstrating Krajišnik's *mens rea* for JCE Category 3. Similarly, the Trial Chamber's finding that "the Accused's criminal responsibility arises with the attack and crimes committed in Bijeljina municipality in the beginning of April 1992"[425] does not show that the commission of expanded crimes was a natural and foreseeable consequence of the common objective. Its broad, summary finding in paragraph 1119 of the Trial Judgement that Krajišnik "had the mens rea required for the commission of the crimes which the Chamber, in part 5 of this judgement, has found were committed" does not address whether and when his liability arose under JCE Category 1 or JCE Category 3.[426] The preceding paragraphs 1110 to 1118 of the Trial Judgement do not clarify the matter, as they only generally describe how JCE members became aware of the commission of the expanded crimes "during the course of the indictment period".[427] The Trial Chamber also found that "[t]ake-overs, killings, detention, abuse, expulsions, and appropriation and destruction of property […] were launched in

[421] Trial Judgement, para. 1096.
[422] Trial Judgement, paras 1100-1117.
[423] Trial Judgement, para. 1098: "With acceptance of the actual commission of new types of crimes and continued contribution to the objective, comes intent, meaning that *subsequent* commission of such crimes by the JCE will give rise to liability under JCE form 1." (emphasis added).
[424] Trial Judgement, para. 1099.
[425] Trial Judgement, para. 1124.
[426] Trial Judgement, para. 1119.

early April 1992, and were repeated throughout the claimed territories in the months to come. *This* was the Bosnian-Serb leadership's goal".[428] However, this finding was made in the context of rejecting the Prosecution's interpretation of the "Six Strategic Goals",[429] and before the Trial Chamber had even reached the question of whether Krajišnik incurred liability pursuant to JCE Category 3.

169. Thus, having considered the Trial Judgement as a whole, the Appeals Chamber is not satisfied that the Trial Chamber made a finding that Krajišnik incurred criminal liability under JCE Category 3 for the *first* commissions of the expanded crimes, that is, before they became part of the common objective. Instead, the Trial Chamber only held Krajišnik responsible under JCE Category 1 for their subsequent commissions, that is, once they had become part of the JCE.

(ii) Whether the Trial Chamber made findings as to how and when the expanded crimes were added to the common objective of the JCE

170. As mentioned above, this sub-ground of appeal is limited to an alleged lack of findings as to whether the expanded crimes, that is, the crimes not originally encompassed by the JCE, formed part of the JCE and could thus be imputed to Krajišnik. The Appeals Chamber has satisfied itself that the Trial Chamber found that the crimes of deportation and forcible transfer were the original crimes of the JCE and that Krajišnik shared the intent to commit these crimes from the beginning of the JCE. It has concluded that the Trial Chamber generally found that other, expanded crimes were added to the JCE, after leading members of the JCE were informed of them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective, thereby coming to intend these expanded crimes. As a consequence, the Trial Chamber found that Krajišnik was liable pursuant to JCE Category 1 for the commission of these expanded crimes *after* they became part of the JCE.

171. The Appeals Chamber notes that in order to impute responsibility to leading JCE members, including Krajišnik, for the expanded crimes, the Trial Chamber was therefore required to make findings as to (1) whether leading members of the JCE were informed of the crimes, (2) whether they did nothing to prevent their recurrence and persisted in the implementation of this expansion of the common objective, and (3) *when* the expanded crimes became incorporated into the common objective. It is apparent that the Trial Chamber only made scarce findings in relation to each of these requirements.

[427] Trial Judgement, para. 1118. For instance, the Trial Chamber found that JCE members became aware of extermination and killings in detention as late as August 1992 and November 1992, respectively (*ibid.*, paras 1104 and 1109, respectively).

172. The Appeals Chamber first notes that the Trial Judgement's section on the common objective[430] offers only a few "illustrative" factual findings[431] on when "leading JCE members" – a term nowhere defined in the Trial Judgement[432] – became "aware" of the commission of expanded crimes.[433] Furthermore, the Trial Chamber did not make any findings in accordance with its prior statement that in order for expanded crimes to be included in the common objective, "leading JCE members" not only had to be informed of them but, additionally, took no effective measures to prevent their recurrence, and persist in the implementation of the common objective, thereby coming to intend these expanded crimes.

173. Even more significantly, while the Trial Chamber characterised "the common objective [of the JCE] as fluid in its criminal means",[434] it did not explicitly find at which specific point in time the expanded crimes became part of the common plan and whether the JCE members had any intent in respect thereof. For instance, the Trial Chamber stated that the murder of civilians "was *soon* incorporated as an intended crime",[435] that the Bosnian-Serb leadership "*very soon* came not only to accept killings […] but also to encourage them",[436] and that the "appropriation of property […] *had become* a means of forcible ethnic recomposition".[437] The Trial Chamber only generally found that these crimes "came to redefine the criminal means of the JCE's common objective *during the course of the indictment period*."[438] Similarly, in those instances where the Trial Chamber referred to a particular month in which leading JCE members became aware of the commission of expanded crimes, it did not specify the date when this happened or whether Krajišnik was among the leading JCE members who gained such awareness, let alone when leading JCE members went from being merely aware of the crime to intending it.

174. Furthermore, with respect to the "local component" of the JCE,[439]the Trial Chamber did not make any findings when members of this group became aware of the expanded crimes. Consequently, the Trial Chamber did not find at what point in time the expanded crimes became incorporated in the common objective through the involvement of the members of the local component of the JCE.

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[430] Trial Judgement, paras 1089-1119.
[431] Trial Judgement, para. 1100 (fn. 2223).
[432] The Trial Chamber apparently did make a distinction between a "Pale-based leadership component" of the JCE (para. 1087) and a "local component" (para. 1088) but it is unclear whether the term "leading JCE members" (para. 1098) accords with either of these two groups.
[433] *See e.g.* paras 1108 (murder of civilians outside detention); 1109 (extermination), 1111 (plunder and appropriation of property), 1114 (destruction of cultural monuments and sacred sites).
[434] Trial Judgement, para. 1098.
[435] Trial Judgement, para. 1108 (emphasis added).
[436] *Ibid.*
[437] Trial Judgement, para. 1113 (emphasis added).
[438] Trial Judgement, para. 1118 (emphasis added).
[439] *See* Trial Judgement, para. 1088.

175. In light of these scarce – or entirely absent – findings, the Appeals Chamber is not able to conclude with the necessary preciseness how and at which point in time the common objective of the JCE expanded to include other crimes that originally were not included in it, and, consequently, on what basis the Trial Chamber imputed those expanded crimes to Krajišnik.

176. Neither the Appeals Chamber nor the Parties can be required to engage in speculation on the meaning of the Trial Chamber's findings – or lack thereof – in relation to such a central element of Krajišnik's individual criminal responsibility as the scope of the common objective of the JCE. Aside from merely stating that the common objective was "fluid",[440] the Trial Chamber was required to precisely find how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan, *i.e* the expanded crimes.

177. In conclusion, the Appeals Chamber finds that the Trial Chamber committed a legal error[441] in failing to make the findings necessary for Krajišnik's conviction in relation to the following expanded crimes, which were not included in the original common objective of the JCE:

- persecution (count 3) with the underlying acts of the imposition and maintenance of restrictive and discriminatory measures; killings during and after attacks; cruel or inhumane treatment during and after attacks; unlawful detention; killings related to detention facilities; cruel or inhumane treatment in detention facilities; inhumane living conditions in detention facilities; forced labour at front lines; use of human shields; appropriation or plunder of property; and destruction of private property, cultural monuments, and sacred sites;
- extermination (count 4); and
- murder (count 5).[442]

178. Consequently, the Appeals Chamber grants sub-ground 3(B) submitted by *Amicus Curiae* to the extent that Krajišnik cannot be held liable for the above-mentioned expanded crimes that fell outside the original common objective of the JCE, which only encompassed the crimes of deportation and forcible transfer under Counts 7 and 8 of the Indictment as well as their incorporation as underlying acts of persecution under Count 3 of the Indictment. Thus, Krajišnik's

[440] Trial Judgement, para. 1098.
[441] As to the effect of this legal error, *see infra* III.C.11.
[442] Trial Judgement, paras 1095-1119. The "original" crimes of the JCE are: persecution (Count 3) with the underlying acts of deportation or forced transfer; deportation (Count 7); and inhumane acts (forced transfer, Count 8) (*ibid*., para. 1097).

convictions for expanded crimes under Counts 3, 4 and 5 are quashed. The remainder of this part of sub-ground 3 (B) is dismissed.

3. Conclusion of the JCE (further sub-ground 3(B))

(a) Submissions

179. *Amicus Curiae* argues that the Trial Chamber erred in law "by failing to specify when the final crimes occurred which were committed pursuant to the JCE".[443] The Prosecution responds that the Trial Chamber did not have to make an explicit finding as to when the JCE ended because

> [w]hether members of the JCE (or others on their behalf) continued to act after the expiry of the indictment period is irrelevant. What matters is that the Chamber found that a JCE existed when the crimes were committed and that all of the crimes for which Krajišnik was convicted were committed pursuant to the common criminal objective.[444]

(b) Analysis

180. It is not entirely clear what *Amicus Curiae* seeks to argue here. To the extent that he asserts that the Trial Chamber had to specify when the JCE ended, this contention must be rejected. Indeed, all that the Trial Chamber had to find is that the crimes for which Krajišnik was convicted were committed pursuant to the JCE; this it did.[445] To the extent that *Amicus Curiae* avers that the Trial Judgement does not clearly state the crimes for which Krajišnik is being held liable because it does not explicitly identify the final crimes for which Krajišnik is being held responsible, this contention must also be rejected. Indeed, the Trial Chamber specified that Krajišnik was being held liable for the "crimes mentioned in part 5" of the Trial Judgement.[446] The Appeals Chamber notes that this part of the Trial Judgement details a number of crimes which occurred between April 1992 and 30 December 1992.[447] Therefore, the Appeals Chamber is satisfied that the Trial Chamber sufficiently specified the crimes for which Krajišnik was being held liable. Therefore, this part of sub-ground 3(B) is dismissed.

4. Type of JCE (sub-ground 3(C))

181. In sub-ground 3(C), *Amicus Curiae* contends that the Trial Chamber erred in law in convicting Krajišnik for the crimes referred to in Counts 3 (persecution as a crime against

[443] *Amicus Curiae*'s Appeal Brief, para. 143.
[444] Prosecution's Response to *Amicus Curiae*, para. 71.
[445] *See* Trial Judgement, paras 1078 and following.
[446] Trial Judgement, para. 1078.
[447] This is in keeping with the Indictment, which charged crimes occurring between 1 July 1991 and 30 December 1992: Indictment, paras 15, 18, 24, 27, as well as the schedules.

humanity[448]), 4 (extermination as a crime against humanity) and 5 (murder as a crime against humanity) on the basis of JCE "Category 1" liability because the Trial Chamber "failed to find the existence of an intent shared by [Krajišnik]" to commit these crimes. *Amicus Curiae* also avers that Krajišnik could not be convicted of these crimes on the basis of JCE Category 3 liability because the Trial Chamber failed to find that they "were natural and foreseeable consequences".[449] The Appeals Chamber recalls its finding that the Trial Chamber committed an error of law in failing to make the findings necessary for Krajišnik's conviction in relation to the expanded crimes which were not included in the original common objective of the JCE.[450] Thus, *Amicus Curiae*'s submissions under this sub-ground are moot.

5. Common objective (sub-ground 3(D)(i))

(a) Submissions

182. *Amicus Curiae* argues that the Trial Chamber erred in law by replacing the requirement that an accused must share a common objective with others, with the lesser requirement of being "sufficiently connected and concerned with persons who committed crimes".[451] *Amicus Curiae* further contends that the Trial Chamber erred in failing to consider whether there existed "a consensus or shared understanding amounting to a psychological causal nexus" between Krajišnik and other members of the alleged JCE.[452]

183. The Prosecution responds that the Trial Chamber did not replace the requirement of a common objective or purpose with a lesser one, and that it correctly applied the law in finding that a common objective existed and that Krajišnik acted pursuant to it.[453] The Prosecution maintains that, in requiring Krajišnik to be "sufficiently connected and concerned with persons who committed crimes pursuant to the common objective",[454] the Trial Chamber only reiterated the correct legal principle that there is no requirement to identify by name every single member of the JCE.[455]

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[448] Except in so far as the crimes of deportation and forcible transfer are incorporated.
[449] *Amicus Curiae*'s Appeal Brief, para. 144.
[450] *See supra* III.C.2.
[451] *Amicus Curiae*'s Appeal Brief, para. 147, quoting Trial Judgement, para. 1086. *See* also *Amicus Curiae*'s Reply, para. 47.
[452] *Amicus Curiae*'s Appeal Brief, para. 148. *See* also *Amicus Curiae*'s Reply, para. 48. *Amicus Curiae* avers that the requirement of "a consensus or shared understanding amounting to a psychological causal nexus" has been recognised in the *Tadić* Appeal Judgement, para. 215.
[453] Prosecution's Response to *Amicus Curiae*, para. 75, referring to Trial Judgement, paras 1097-1098, 1100-1101, 1104, 1115, 1118-1119.
[454] Trial Judgement, para. 1086.
[455] Prosecution's Response to *Amicus Curiae*, para. 76.

Finally, the Prosecution avers that there is no requirement of a psychological causal nexus for JCE liability.[456]

(b) Analysis

184. The Appeals Chamber is not persuaded that the Trial Chamber replaced the requirement of a common objective with a lesser requirement. Although the Trial Chamber stated that Krajišnik had to be "sufficiently connected and concerned with persons who committed crimes",[457] this was in the context of discussing the JCE requirement of a "plurality of persons" – more particularly in explaining that it was not necessary to fully specify the membership of the JCE.[458] *Amicus Curiae* does not show that the Trial Chamber effectively failed to require proof of a common criminal purpose. In fact, in summarising the elements of a JCE, the Trial Chamber recalled that "a common objective which amounts to or involves the commission of a crime provided for in the Statute"[459] had to be proven. It then explained that:

> the common objective need not have been previously arranged or formulated. This means that the second JCE element does not presume preparatory planning or explicit agreement among JCE participants.[460]

The Appeals Chamber is of the view that the Trial Chamber correctly identified the applicable law.[461] It then properly applied this law to the present case, ultimately concluding that a common objective involving the commission of several crimes had been established.[462] *Amicus Curiae*'s argument is rejected.

185. The Appeals Chamber further finds that the Trial Chamber did not have to decide whether there was "a consensus or shared understanding amounting to a psychological causal nexus" between Krajišnik and the other members of the JCE. Contrary to what *Amicus Curiae* claims, the *Tadić* Appeal Judgement merely noted the Italian case law to this effect,[463] but it did not embrace

[456] Prosecution's Response to *Amicus Curiae*, para. 77.
[457] Trial Judgement, para. 1086.
[458] *See* Trial Judgement, para. 1086, in sub-section 6.17.1 entitled "Plurality of persons":

> It is clear that paragraph 7 of the indictment alleges a JCE consisting of a large and indefinite group of persons. The Chamber does not find it possible on the evidence to specify fully the membership of the JCE; and even if it were possible, it is neither desirable nor necessary to do so. What is necessary is to be convinced that the Accused was sufficiently connected and concerned with persons who committed crimes pursuant to the common objective in various capacities, or who procured other persons to do so.

[459] Trial Judgement, para. 883(ii).
[460] Trial Judgement, para. 883(ii) (references omitted).
[461] *Tadić* Appeal Judgement, para. 227. *See* also *Brdanin* Appeal Judgement, para. 418; *Kvočka et al.* Appeal Judgement, paras 96, 117; *Vasiljević* Appeal Judgement, paras 100, 108-109; *Krnojelac* Appeal Judgement, para. 31.
[462] Trial Judgement, paras 1089-1119.
[463] *Tadić* Appeal Judgement, para. 215.

such requirement,[464] nor did the subsequent case-law of this Appeals Chamber or that of the ICTR. This sub-ground is dismissed.

6. Original objective (sub-ground 3(D)(ii))

(a) Submissions

186. *Amicus Curiae* argues that the Trial Chamber failed to make a conclusive finding of fact in respect of the objective of the JCE at its inception, stating instead that its conclusion did not exclude the possibility that the original crimes of the JCE were not limited to deportation and forcible transfer.[465] According to *Amicus Curiae*, the Trial Chamber should have rather stated that it had not been proven beyond reasonable doubt that murder, extermination and persecution originally formed part of the JCE.[466]

187. The Prosecution responds that the Trial Chamber explicitly found that 1) the JCE initially embraced the crimes of discriminatory deportation and forcible transfer, and 2) even if the additional crimes were not original crimes, they soon became intended as means to achieve the common criminal objective.[467] For the Prosecution, "the Trial Chamber's comment that it was possible that the original crimes of the JCE were not limited to deportation and forced transfer does not dilute these findings."[468]

(b) Analysis

188. The Appeals Chamber is not convinced that *Amicus Curiae* has shown any error in the Trial Judgement. The Trial Chamber clearly made conclusive findings as to the crimes originally involved in the JCE:

> The Chamber finds that the crimes of deportation and forced transfer (as charged under counts 7 and 8 of the indictment and as incorporated in the charge of persecution in count 3) were necessary means of implementing the common objective of removal by force of Bosnian Muslims and Bosnian Croats from large areas of Bosnia-Herzegovina. The Chamber will refer to these crimes as "original" crimes. These were the crimes which constituted the JCE's common objective as of late March 1992, when the Accused called for "implementing what we have agreed upon, the ethnic division on the ground".[469]

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[464] *Tadić* Appeal Judgement, paras 220-227.
[465] *Amicus Curiae*'s Appeal Brief, para. 149, referring to Trial Judgement, paras 1098, 1118.
[466] *Amicus Curiae*'s Appeal Brief, para. 150.
[467] Prosecution's Response to *Amicus Curiae*, paras 78-79.
[468] Prosecution's Response to *Amicus Curiae*, para. 80.
[469] Trial Judgement, para. 1097. *See* also para. 1118:

> The Chamber finds that, whereas in the early stages of the Bosnian-Serb campaign the common objective of the JCE was discriminatory deportation and forced transfer, soon thereafter it became clear to the members of the JCE, including the Accused, that the implementation of the common objective involved, as a matter of fact, the commission of an expanded set of crimes.

The Trial Chamber then stated that, although it was possible that the JCE embraced other crimes from its inception, this had not been established on the evidence.[470] It thus effectively found that it had not been proven beyond reasonable doubt that murder, extermination and persecution originally formed part of the JCE. This sub-ground is dismissed.

7. "Fluid concept of JCE" (sub-ground 3(D)(iii))

189. *Amicus Curiae* asserts that the Trial Chamber erred in law in finding that the JCE expanded during the course of its duration; in his view, the concept of a "fluid" JCE is not supported by international customary law or the Tribunal's jurisprudence, and is irreconcilable with the principle of legality.[471] The Appeals Chamber recalls its finding that the Trial Chamber committed an error of law in failing to make the findings necessary for Krajišnik's conviction in relation to the expanded crimes which were not included in the original common objective of the JCE.[472] Thus, *Amicus Curiae*'s submissions under this sub-ground are moot.

8. Proof of common objective (sub-ground 3(D)(iv))

(a) Submissions

190. *Amicus Curiae* submits that the Trial Chamber erred 1) by relying extensively on broad statements – such as Krajišnik's call to the deputies to "[implement] what we have agreed upon, the ethnic division on the ground"[473] – to infer a common objective involving the commission of specific crimes[474]; and 2) "by categorising support for broad political goals, such as žethnic division' as necessarily amounting to intent to commit specific crimes" and failing to consider whether there were other reasonable inferences possible.[475] *Amicus Curiae* also contends that the Trial Chamber conflated elements of command responsibility with JCE when it found that the fact that JCE members did not take effective measures to prevent the recurrence of new crimes was a relevant element to show the expansion of the criminal means of the objective.[476] Further, *Amicus Curiae* claims that the Trial Chamber erred in considering Krajišnik's omission to take effective measures as relevant despite having expressly held that the evidence did not demonstrate that

[470] Trial Judgement, paras 1098, 1118.
[471] *Amicus Curiae*'s Appeal Brief, para. 151.
[472] *See supra* III.C.2.
[473] Trial Judgement, para. 1097, citing Exhibit P65 tab 109, p. 12.
[474] *Amicus Curiae*'s Appeal Brief, para. 154.
[475] *Amicus Curiae*'s Appeal Brief, para. 155.
[476] *Amicus Curiae*'s Appeal Brief, para. 156, quoting Trial Judgement, para. 1098.

Krajišnik had the material ability to prevent, punish, or take criminal or disciplinary measures against the principal perpetrators of the expanded crimes.[477]

191. The Prosecution responds that the Trial Chamber did not blur the distinction between broad political goals and the common criminal objective, nor did it err in basing its findings on a broad range of evidence which included political statements.[478] The Prosecution also submits that the Trial Chamber did not confuse superior responsibility with JCE: first, the Trial Chamber relied upon the JCE members' failure to take measures to prevent the recurrence of the new crimes as forming part of the evidentiary basis from which to infer their *mens rea*, not as contributions to the criminal objective; second, the Trial Chamber correctly treated this failure together with the persistent implementation of the original common objective as proof that the JCE members intended the new crimes as additional criminal means necessary to achieve the common criminal objective.[479]

(b) Analysis

192. The Appeals Chamber is not convinced that the Trial Chamber blurred the distinction between broad political goals and the common criminal objective of the JCE or erred in relying on political statements of Krajišnik to infer the existence of the JCE and the intent to commit specific crimes. *Amicus Curiae* only refers to one statement of Krajišnik – Krajišnik's call to the deputies to "[implement] what we have agreed upon, the ethnic division on the ground" – but he does not explain why such a statement should not have been relied on and why this invalidates the conclusions of the Trial Chamber, which were based on a broad range of evidence.[480] The Appeals Chamber is of the view that the Trial Chamber could reasonably rely on such a statement, along with other evidence, to conclude to 1) the existence of a common objective of removal by force of Bosnian Muslims and Bosnian Croats from large areas of Bosnia and Herzegovina, and 2) Krajišnik's intent to commit various crimes designed to achieve this objective. The Appeals Chamber also rejects *Amicus Curiae*'s assertion that the Trial Chamber erred in failing to consider other possible inferences. The Trial Chamber did not have to discuss other inferences it considered as long as it was satisfied that the one it retained was the only reasonable one.

[477] *Amicus Curiae*'s Appeal Brief, para. 157. *Amicus Curiae* adds that "the evidence before the Chamber did not demonstrate that [Krajišnik] had effective control over Bosnian Serb Political and Governmental organs or Bosnian Serb forces, and thus that he had a material ability to prevent or punish crimes committed by them": *Amicus Curiae*'s Reply, para. 52.
[478] Prosecution's Response to *Amicus Curiae*, para. 83.
[479] Prosecution's Response to *Amicus Curiae*, para. 84.
[480] Discussed throughout part 6 of the Trial Judgement and summarised in sub-section 6.17.2 (paras 1089-1119).

193. The Appeals Chamber is also not persuaded by *Amicus Curiae*'s contention that the Trial Chamber conflated elements of command responsibility with JCE. The Trial Chamber stated "[a]n expansion of the criminal means of the objective is proven when leading members of the JCE are informed of new types of crime committed pursuant to the implementation of the common objective, take no effective measures to prevent recurrence of such crimes, and persist in the implementation of the common objective of the JCE".[481] The Trial Chamber's choice of words ("effective measures to prevent") is unfortunate in that it corresponds to the legal requirements in the context of superior responsibility, and this may create some confusion. Nonetheless, the Appeals Chamber agrees that the failure to take effective measures to prevent recurrence of the expanded crimes could constitute one of the factors to take into account in determining whether the evidence showed that the JCE members accepted an expansion of the criminal means to realise the common objective.

194. *Amicus Curiae* also argues that the Trial Chamber erred in considering Krajišnik's failure to take effective measures to prevent recurrence of crimes as relevant to the existence and breadth of the common purpose, while at the same time finding that Krajišnik did not have the material ability to prevent such crimes.[482] The Appeals Chamber notes that the Trial Chamber found that, although it could not conclude that Krajišnik himself had effective control (for the purposes of Article 7(3) of the Statute) over the Bosnian-Serb political and governmental organs and Bosnian-Serb forces, it was established that Krajišnik had some power and influence over those bodies,[483] that "he had the power to intervene",[484] but that he failed to exercise that power.[485] In the view of the Appeals Chamber, the Trial Chamber could rightfully consider this failure to intervene as one of the elements tending to prove Krajišnik's acceptance of certain crimes, even though he might not have had himself effective control over the Bosnian-Serb political and governmental organs and Bosnian-Serb forces. This sub-ground is dismissed.

9. *Mens rea* (sub-ground 3(E) and Ground 7)

(a) Submissions

195. *Amicus Curiae* argues that the Trial Chamber erred in law by convicting Krajišnik without requiring proof beyond reasonable doubt of the requisite *mens rea* with respect to the individual

[481] Trial Judgement, para. 1098.
[482] *Amicus Curiae*'s Appeal Brief, para. 157.
[483] Trial Judgement, para. 1121(e).
[484] Trial Judgement, para. 1119.
[485] In this respect, *see* for instance Trial Judgement, para. 955:

members of the JCE.[486] He submits that in analysing the "fluid" concept of JCE, the Trial Chamber diluted the requirement of a "shared intent" of the JCE members "with the lesser requirement of (i) notice of new crimes, (ii) failure to take measures to prevent such crimes, (iii) and persistence in implementing the common purpose".[487] *Amicus Curiae* also avers that the Trial Chamber erred in law by basing its conclusion of intent directly on findings of knowledge and substantial assistance, without first drawing the necessary inferences from the evidence before it and without asking itself whether other reasonable conclusions were possible.[488]

196. *Amicus Curiae* also submits that the Trial Chamber erred by failing to establish Krajišnik's *mens rea*, only referring to information reaching the "Bosnian-Serb leadership".[489] According to *Amicus Curiae*, the Trial Chamber "simply added" new crimes to the JCE whenever they were committed and the Bosnian-Serb leadership learned of them.[490] He also argues that Radovan Karadžić's additional evidence shows that Krajišnik did not have a criminal state of mind.[491]

197. *Amicus Curiae* further contends that the Trial Chamber shifted the burden of proof to Krajišnik by requiring him to prove that certain matters were "kept from him".[492] He argues that several findings in the Trial Judgement with respect to Krajišnik's *mens rea* are based on mere speculation.[493]

> The Chamber has not found any evidence that the Accused ever tried to defend Muslims in the Assembly, or ever tried to prevent any Assembly delegate from "doing anything" against Muslims, or ever tried to confront proponents of extreme views with a "What are you talking about?"

[486] *Amicus Curiae*'s Notice of Appeal, para. 45.
[487] *Amicus Curiae*'s Appeal Brief, para. 161.
[488] *Amicus Curiae*'s Appeal Brief, paras 162 (quoting *Prosecutor v Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić* (Interlocutory), Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Decision on Joint Criminal Enterprise"), Separate Opinion of Judge Hunt, fn. 39) and 163; *Amicus Curiae*'s Reply, para. 53.
[489] *Amicus Curiae*'s Appeal Brief, para. 164.
[490] *Amicus Curiae*'s Appeal Brief, para. 164.
[491] *Amicus Curiae*'s Supplemental Brief, paras 91-93, referring to *Amicus Curiae*'s Appeal Brief, paras 213-215; AD3, pp. 11-12, 14; AT. 589.
[492] *Amicus Curiae*'s Appeal Brief, para. 165, referring to Trial Judgement, para. 892.
[493] *Amicus Curiae*'s Appeal Brief, para. 214, impugning the following findings of the Trial Chamber:

> (a) information regarding power takeovers in the municipalities made its way to Krajišnik (Trial Judgement, para. 940);
>
> (b) Krajišnik knew of the JNA's cooperation in the Bosnian-Serb takeover of power (Trial Judgement, para. 947);
>
> (c) information relating to the forced displacement of Bosnian Muslims was communicated to Krajišnik, and at the same time that "it is not the Chamber's finding that the Accused received the reports [himself]" (While *Amicus Curiae* does not cite any specific paragraph of the Trial Judgement, he seems to refer to Trial Judgement, para. 1024);
>
> (d) "many of the facts" about detention of civilians were known to Krajišnik well before August 1992 (Trial Judgement, para. 1037); and

198. The Prosecution responds that, in finding that Krajišnik had the intent for the crimes, the Trial Chamber correctly identified and applied the standard of proof (*i.e.*, beyond reasonable doubt),[494] the applicable law on the *mens rea* for JCE[495] and the standard for drawing inferences from circumstantial evidence.[496] The Prosecution maintains that the Trial Chamber based its findings on a large body of both direct and circumstantial evidence, which established beyond reasonable doubt Krajišnik's knowledge of the expanded crimes and his support of their commission.[497]

199. Finally, the Prosecution submits that the Trial Chamber did not shift the burden of proof to Krajišnik, but rather found that there was no evidence contradicting the extensive evidence proving that he was well-informed and had even actively sought information.[498]

(b) Analysis

200. *Amicus Curiae* first argues that the Trial Chamber erred in law by diluting the requirement of "shared intent", requiring instead only (i) notice of new crimes, (ii) failure to take measures to prevent such crimes, (iii) and persistence in implementing the common purpose. The Appeals Chamber is not persuaded by this argument. The Appeals Chamber notes that the Trial Chamber correctly identified the required *mens rea* for the first form of JCE, explaining that it must be shown that "the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out";[499] the Trial Chamber then inferred, based on circumstantial evidence, that Krajišnik and other JCE members came to share this intent to commit the expanded crimes.[500] Thus, when the Trial Chamber stated that "[w]ith acceptance of the actual commission of new types of crime and continued contribution to the objective comes intent",[501] it did not state a different *mens rea* standard, but simply explained

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(e) that Krajišnik knew of the sickly conditions of the detainees which led to pardons is justified on the basis that "the Presidency *would have been* informed by the military prosecutor" (Trial Judgement, para. 1062 (emphasis added by *Amicus Curiae*)).

Amicus Curiae's Appeal Brief, paras 213 and 215, referring to Trial Judgement, paras 970, 974, 1056.

[494] Prosecution's Response to *Amicus Curiae*, paras 85 (referring to Trial Judgement, para. 1201) and 86 (referring to Trial Judgement, paras 974-975, 996, 1089-1090, 1094, 1108, 1115, 1119).

[495] Prosecution's Response to *Amicus Curiae*, para. 85, referring to Trial Judgement, para. 883.

[496] Prosecution's Response to *Amicus Curiae*, paras 85 (referring to Trial Judgement, paras 890, 1196) and 87 (quoting Trial Judgement, paras 890, 1098). Prosecution's Response to *Amicus Curiae*, paras 159-166.

[497] Prosecution's Response to *Amicus Curiae*, paras 88-94.

[498] Prosecution's Response to *Amicus Curiae*, para. 95.

[499] Trial Judgement, para. 883(ii), referring to *Tadić* Appeal Judgement, para. 227.

[500] Trial Judgement, paras 1098, 1118. *See* also para. 890, where the Trial Chamber made some findings with regard to Krajišnik's "knowledge of events, acceptance of new circumstances, and general intentionality during the indictment period" were based on secure inferences from other proven evidence.

[501] Trial Judgement, para. 1098.

the bases for its inference as to the intent of Krajišnik and other JCE members with respect to the expanded crimes. This does not constitute an error of law.

201. *Amicus Curiae* also submits that the Trial Chamber erred in law and fact by basing its conclusion on Krajišnik's *mens rea* directly on findings of knowledge and substantial assistance, and in concluding that Krajišnik possessed the requisite *mens rea* to commit the JCE crimes – both the *original* crimes and the *expanded* crimes.[502]

202. The Appeals Chamber notes that the Trial Chamber was cautious in drawing inferences on Krajišnik's intent. The Trial Chamber was plainly aware that, before entering a factual finding on the basis of circumstantial evidence, it had to determine whether other reasonable inferences were possible.[503] It stressed that "knowledge combined with continuing participation *can* be conclusive as to a person's intent" and stated that therefore the "information the Accused received during this period is an *important element* for the determination of his responsibility".[504]

203. As set out above,[505] the Trial Chamber did not make the necessary findings with respect to the JCE members' *mens rea* in relation to the *expanded* crimes. The Trial Chamber found that these crimes became encompassed by the common objective when leading members of the JCE were informed about them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective of the JCE.[506] The Trial Chamber did not find, however, at *which point in time* the leading members of the JCE became aware of each of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber has found that the Trial Chamber committed a legal error by convicting Krajišnik for the expanded crimes.[507]

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[502] *Amicus Curiae*'s Appeal Brief, paras 162 (citing footnote 39 of the Separate Opinion of Judge David Hunt in *Ojdanić* Decision on Joint Criminal Enterprise), 163, 212-215. *Amicus Curiae*'s Reply, para. 53. With respect to *Amicus Curiae*'s submission that the Trial Chamber failed to make the necessary findings with respect to Krajišnik's intent for the first commissions of the expanded crimes *see supra* III.C.2.

[503] Trial Judgement, para. 1196:

> In making its findings, the Trial Chamber relied to some extent on inferences from circumstantial evidence. A finding must be more than reasonable inference from the circumstances. It must be the *only* reasonable inference. (Emphasis in original, references omitted).

See also Trial Judgement, para. 1201 ("An accused must be acquitted if there is any reasonable explanation of the evidence accepted by the Chamber other than the guilt of the accused").

[504] Trial Judgement, para. 890 (emphasis added). *See* also *ibid.*, paras 892-893.

[505] *See supra* III.C.2.

[506] Trial Judgement, para. 1098.

[507] *See supra* III.C.2.

204. With respect to the Trial Chamber's findings on the JCE members' *mens rea* in relation to the *original* crimes,[508] the Appeals Chamber is satisfied that, in light of the quantity and quality of the information received by Krajišnik and other members of the JCE with respect to original crimes,[509] together with the fact that he did not intervene to prevent the recurrence of crimes[510] and his persistence in the implementation of the JCE,[511] *Amicus Curiae* has neither shown that the Trial Chamber erred in law, nor that no reasonable trier of fact could have found, based on the evidence, that Krajišnik's and the other JCE members' *mens rea* with respect to the original crimes was the only reasonable inference possible.

205. With regard to Radovan Karadžić's evidence, the Appeals Chamber is not convinced that *Amicus Curiae*'s mere references to limited parts of his testimony[512] and of the Karadžić Rule 92 *ter* Statement[513] undermine the extensive evidence relied on by the Trial Chamber in making the above-mentioned findings regarding Krajišnik's *mens rea* with respect to the original crimes.[514] The Appeals Chamber is thus not satisfied that the Karadžić 92 *ter* Statement and his testimony raise a reasonable doubt that would cause the Appeals Chamber to reverse the finding on Krajišnik's *mens rea* in relation to the original crimes.

206. The Appeals Chamber finds, moreover, that *Amicus Curiae*'s argument that the Trial Chamber imposed a burden of proof on Krajišnik to prove that matters were "kept from him" is without merit.[515] Indeed, the Trial Chamber found that – especially due to the very structure of the

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[508] *See supra* III.C.2. *See* also Trial Judgement, paras 911-912, 1097. *See* also *ibid.*, para. 1119 ("He wanted the Muslims and Croats moved out of the Bosnian-Serb territories in large numbers").
[509] *See*, for example, Trial Judgement, paras 964 (Dragan Đokanović reported to Krajišnik what he had heard about people being driven from their homes); 1021-1022 (Mandić participating in a conversation on the politics of ethnic cleansing); 1023 (Krajišnik was informed in an Assembly Session about the take-over and ethnic cleansing of Ilidža); 1024 ("the forced displacement of Muslims was reported up to the VRS line of command to the Main Staff, and, therefore, to General Mladić, who kept the Presidency members informed […]" and "the Chamber does find that information of this kind was communicated to the Accused"); 1025 (General Talić was talking about the attempt to expel Muslim and Croat refugees to Central Bosnia); 1027 (Krajišnik was present at a meeting in Banja Luka where Radovan Karadžić complained that "insufficient steps had been taken to remove Muslims and Croats from Banja Luka"); 1028 (Radoslav Brđanin praised the "cleansing efforts" in Prijedor); 1031 (the issue of "ethnic cleansing" was raised at the meetings with Herbert Okun and Cyrus Vance in Geneva); and 1041 (conversation between Krajišnik and Momčilo Mandić about, *inter alia*, the forced displacement of civilians).
[510] In this connection, *see supra* III.C.8(b).
[511] As to Krajišnik's persistence in the implementation of the JCE, *see* for instance Trial Judgement, para. 1115.
[512] *Amicus Curiae*'s Supplemental Brief, paras 91-93, referring to AT. 589.
[513] AD3, p. 11-12, 14.
[514] *See*, for example, Trial Judgement, paras 964 (Dragan Đokanović reported to Krajišnik what he had heard about people being driven from their homes); 1023 (Krajišnik was informed in an Assembly Session about the take-over and ethnic cleansing of Ilidža); 1024 ("the forced displacement of Muslims was reported up to the VRS line of command to the Main Staff, and, therefore, to General Mladić, who kept the Presidency members informed […]" and "the Chamber does find that information of this kind was communicated to the Accused"); 1027 (Krajišnik was present at a meeting in Banja Luka where Radovan Karadžić complained that "insufficient steps had been taken to remove Muslims and Croats from Banja Luka"); 1031 (the issue of "ethnic cleansing" was raised at the meetings with Herbert Okun and Cyrus Vance in Geneva); and 1041 (conversation between Krajišnik and Momčilo Mandić about, *inter alia*, the forced displacement of civilians).
[515] *Amicus Curiae*'s Appeal Brief, para. 165.

Bosnian-Serb leadership – its members, and in particular Krajišnik and Radovan Karadžić, shared the most sensitive information.[516] Krajišnik was not only well-informed, but actively sought to obtain detailed information about the unfolding of events.[517] To state that no contradictory evidence had been submitted by Krajišnik when reaching its findings on the evidence as a whole with regard to Krajišnik's knowledge of events does not constitute a shift in the burden of proof.

207. Finally, *Amicus Curiae*'s arguments that several findings in the Trial Judgement are based on mere speculation are dismissed for being unsupported and unreasonable[518] and for disregarding the evidence underlying each of the impugned conclusions.[519]

208. For the foregoing reasons, the Appeals Chamber concludes that the Trial Chamber has erred in law in failing to find that Krajišnik had the *mens rea* with respect to the expanded crimes. The remainder of this sub-ground is dismissed.

10. Material contribution to the JCE (sub-ground 3(F))

(a) Submissions

209. *Amicus Curiae* argues that Krajišnik's acts retained by the Trial Chamber do not amount to a significant enough contribution to the JCE to justify his liability for the JCE crimes.[520] He explains:

> The Chamber appears to have considered that because [Krajišnik] did not stop MPs in the Assembly from making inflammatory statements, that, as speaker, he was in effect encouraging and adopting their statements. This in itself is a tacit acknowledgement that [Krajišnik] himself did not make inflammatory statements. It also ignores the constitutional role of a speaker in a legislative assembly, whose task is emphatically not to gag speakers from making comments, but rather to facilitate parliamentarians to have their say, in other words to let them speak. A speaker cannot be held responsible for whatever is said in the parliamentary assembly. The approach appears to conflate the "*prevent/punish*" requirement of command responsibility with JCE.[521]

210. *Amicus Curiae* also alleges that the Trial Chamber failed to find that certain of Krajišnik's acts did co-exist in time and correspond with the common purpose of the JCE. In this respect, *Amicus Curiae* maintains that the Trial Chamber considered that Krajišnik's main contribution to

[516] Trial Judgement, paras 892-893.
[517] Trial Judgement, para. 893.
[518] *Amicus Curiae*'s Appeal Brief, para. 214.
[519] Contrary to *Amicus Curiae*'s submission (*Amicus Curiae*'s Appeal Brief, para. 213), the Trial Chamber based its finding on Krajišnik's knowledge of the arming of the Bosnian-Serb population not only on Krajišnik's oral testimony, but also on other evidence showing that the SDS started arming the Serb population and that the preparations for self-defence were known to the SDS leadership and to Krajišnik in particular (*See* Trial Judgement, paras 35-36 and fn. 62, paras 927-928). Furthermore, it was not unreasonable for the Trial Chamber to refer to T. 25284-25286, which reflect the questioning of Krajišnik in relation to a phone conversation of 1991, in which he had been informed that about the (planned) purchase of a thousand automatic weapons by Rajkoć, president of the SDS Executive Board.
[520] *Amicus Curiae*'s Appeal Brief, paras 167-168. In this context, *Amicus Curiae* recalls that, in the *Brdanin* Appeal Judgement (para. 427), the Appeals Chamber emphasised that the contribution of an accused to the JCE has to reach a certain level of significance to entail his liability for the crimes committed.
[521] *Amicus Curiae*'s Appeal Brief, para. 169 (emphasis in original).

the JCE was in setting up and supporting Serbian Democratic Party (SDS) structures. He further avers that the SDS has not been declared a criminal organisation, and that it was therefore not criminal to be involved in the setting up of SDS structures.[522]

211. Finally, *Amicus Curiae* submits that the Trial Chamber erred in fact by finding that Krajišnik had participated in the JCE because the evidence in this regard was insufficient.[523]

212. The Prosecution responds that *Amicus Curiae*'s contentions are unsubstantiated, do not meet the standard of review on appeal and should thus be rejected summarily.[524] To the Prosecution, the Trial Chamber made a wealth of findings regarding Krajišnik's contributions to the JCE, which included "his coordinating, directing and supervising the implementation of the JCE through the various high-level political positions he held and the powers that he exercises over the organs and persons involved in the commission of crimes".[525]

213. The Prosecution alleges that, contrary to what *Amicus Curiae* asserts, the Trial Chamber did not find that Krajišnik's contribution to the JCE consisted in his failure to prevent other members of the Bosnian-Serb Assembly from making inflammatory statements; rather, the Trial Chamber considered his presence and behaviour during Assembly discussions as one of the factors demonstrating his knowledge, support and intent for the crimes.[526] Further, the Prosecution notes that the Trial Chamber did find that Krajišnik himself had made inflammatory statements.[527]

214. As to *Amicus Curiae*'s argument that the Trial Chamber should not have considered Krajišnik's acts in the establishment of SDS structures, the Prosecution responds:

> This argument misconstrues the Chamber's analysis. The Chamber found that Krajišnik's principal contribution to the common criminal objective was through the power and influence he exerted due to his high position in the Bosnian-Serb leadership. It found that he "deployed his political skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objective." The Chamber described the creation of the SDS and Krajišnik's role in the establishment of the SDS structures in Part 2 – Political Precursors. This identifies the organs that Krajišnik was able to control, and the powers that he derived from them. In essence these findings set out the tools Krajišnik was able to marshal to implement the common criminal objective once it became operational by late March 1992. They do not demonstrate that the Chamber erroneously considered his actions before there was a common criminal objective. […]
>
> In any event, the Chamber did not find that Krajišnik's role in the establishment of the SDS party was a contribution to the JCE, rather his "support and maintenance of SDS and Bosnian-Serb

[522] *Amicus Curiae*'s Appeal Brief, para. 170.
[523] *Amicus Curiae*'s Appeal Brief, para. 172.
[524] Prosecution's Response to *Amicus Curiae*, para. 98.
[525] Prosecution's Response to *Amicus Curiae*, para. 99, referring to Trial Judgement, paras 1120-1121, as well as paras 140, 975, 987, 1002, 1119, 1158-1160.
[526] Prosecution's Response to *Amicus Curiae*, para. 100.
[527] Prosecution's Response to *Amicus Curiae*, para. 101, referring to Trial Judgement, paras 46, 73, 115, 194, 901, 911, 917, 923, 954, 1015, 1092, 1121.

> government bodies at the Republic, regional, municipal and local levels" was a contribution. Paragraph 1120 makes clear that Krajišnik's participation derived from the fact that he could exert control over these structures once the common criminal objective began to be implemented, not from his establishment of the SDS party itself.[528]

The Prosecution also avers that the fact that the SDS was not identified as an illegal organisation is irrelevant since the contribution of a member to a JCE need not itself be illegal.[529]

(b) Analysis

215. The Appeals Chamber recalls that the participation of an accused person in a JCE need not involve the commission of a crime, but that it may take the form of assistance in, or contribution to, the execution of the common objective or purpose.[530] The contribution need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible.[531]

216. In the case at hand, the Trial Chamber found that Krajišnik had a central position in the JCE as he "not only participated in the implementation of the common objective but was one of the driving forces behind it". The Trial Chamber stated that Krajišnik's overall contribution to the JCE was to

> help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes. He also deployed his political skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objective.[532]

More specifically, the Trial Chamber found that the following alleged contributions[533] of Krajišnik to the JCE had been established:

(a) Formulating, initiating, promoting, participating in, and/or encouraging the development and implementation of SDS and Bosnian-Serb governmental policies intended to advance the objective of the joint criminal enterprise;

(b) Participating in the establishment, support or maintenance of SDS and Bosnian-Serb government bodies at the Republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, War Commissions ("Bosnian-Serb Political and Governmental Organs") and the VRS, TO, and the MUP ("Bosnian-Serb Forces") through which [he] could implement the objective of the joint criminal enterprise;[534]

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[528] Prosecution's Response to *Amicus Curiae*, paras 103 and 105 (references omitted).
[529] Prosecution's Response to *Amicus Curiae*, para. 105.
[530] *Kvočka et al.* Appeal Judgement, para. 99; *Babić* Appeal Judgement, para. 38; *Ntakirutimana* Appeal Judgement, para. 466; *Vasiljević* Appeal Judgement, para. 100; *Krnojelac* Appeal Judgement, paras 31 and 81; *Tadić* Appeal Judgement, para. 227(iii).
[531] *Brdanin* Appeal Judgement, para. 430.
[532] Trial Judgement, paras 1119-1120.
[533] Indictment, para. 8.
[534] Except in relation to the establishment of the SDS party and the establishment of the TO.

(c) Supporting, encouraging, facilitating or participating in the dissemination of information to Bosnian Serbs that they were in jeopardy of oppression at the hands of Bosnian Muslims and Bosnian Croats, that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian-Serb land, or that was otherwise intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the joint criminal enterprise;

(d) Directing, instigating, encouraging and authorizing the Bosnian-Serb Political and Governmental Organs and the Bosnian-Serb Forces to carry out acts in order to further the objective of the joint criminal enterprise;

(e) Aiding or abetting or instigating the commission of further crimes by failing to investigate, to follow up on investigations, […] crimes committed against Bosnian Muslims, Bosnian Croats or other non-Serbs throughout the period described in this indictment;

(f) Engaging in, supporting or facilitating efforts directed at representatives of the international community, non-governmental organizations and the public denying or providing misleading information about crimes against Bosnian Muslims, Bosnian Croats or other non-Serbs of Bosnia and Herzegovina and about the role that Bosnian-Serb Forces had played in those crimes.[535]

217. *Amicus Curiae* submits that the conduct identified by the Trial Chamber does not amount to a significant contribution to the JCE, but he does not develop his argument except to state that the Trial Chamber erred in considering his failure to prevent other members of the Bosnian-Serb Assembly from making inflammatory statements as a contribution to the JCE.[536] In this connection, the Appeals Chamber notes that it is not clear whether the Trial Chamber found that this failure constituted a contribution to the JCE[537] or simply referred to this as one of the factors demonstrating Krajišnik's knowledge, support and intent for the crimes,[538] as the Prosecution contends.[539] In any case, the Trial Chamber found that Krajišnik did not act as a neutral parliamentary speaker, stating that "[w]hen he was not generating or echoing extreme political views himself, his method was to lend support to aggressive elements in the Assembly by giving them a platform for their views"[540] and that there was no evidence that Krajišnik ever tried to moderate extreme views.[541] This could arguably constitute a significant contribution to the JCE. More importantly, the Trial Chamber

[535] Trial Judgement, para. 1121.
[536] *Amicus Curiae*'s Appeal Brief, paras 167-169.
[537] Indeed, the failure to prevent other members of the Bosnian-Serb Assembly from making inflammatory statements could arguably fall under proven allegation (c) Supporting, encouraging, facilitating or participating in the dissemination of information to Bosnian Serbs that they were in jeopardy of oppression at the hands of Bosnian Muslims and Bosnian Croats, that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian Serb land, or that was otherwise intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the joint criminal enterprise.
[538] To support his argument that the Trial Chamber found that Krajišnik contributed to the JCE by failing to prevent other members of the Bosnian-Serb Assembly from making inflammatory statements, *Amicus Curiae* refers to Trial Judgement, paras 954-955, in a section entitled "Knowledge of and support for crimes related to attacks".
[539] Prosecution's Response to *Amicus Curiae*, para. 100.
[540] Trial Judgement, para. 954. *See* also paras 46, 73, 115, 194, 901, 911, 917, 923, 1015, 1092, 1121, where the Trial Chamber discusses inflammatory statements of Krajišnik.
[541] Trial Judgement, para. 955.

clearly did not find that Krajišnik's contribution to the JCE was limited to his failure to prevent other members of the Bosnian-Serb Assembly from making inflammatory statements. As noted above, the Trial Chamber found that Krajišnik contributed to the realisation of the JCE in various wide-ranging ways. *Amicus Curiae* does not show that these other contributions of Krajišnik were not significant enough to entail his liability for the crimes committed in furtherance of the JCE.

218. The Appeals Chamber also rejects *Amicus Curiae*'s assertion that the Trial Chamber erred in concluding that Krajišnik's main contribution to the JCE was in setting up and supporting Serbian Democratic Party (SDS) structures. As noted above, the Trial Chamber found that Krajišnik's overall contribution to the JCE was "to help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes."[542] The use of the term "perpetuate" shows that the Trial Chamber was convinced that Krajišnik's contribution was not limited to the establishment of SDS structures but to the active implementation of the common purpose throughout the Indictment period. Moreover, the fact that it was not criminal to be involved in the setting up of SDS structures is irrelevant: as explained above, the participation of an accused in the JCE need not involve the commission of a crime, what is important is that it furthers the execution of the common objective or purpose involving the commission of crimes.[543] *Amicus Curiae* has failed to show that Krajišnik's role in establishing and perpetuating SDS structures did not contribute to the realisation of the JCE.

219. Finally, *Amicus Curiae*'s assertion that the Trial Chamber erred in fact in finding that Krajišnik participated in the JCE is undeveloped and unsupported, and thus dismissed.

11. Use of principal perpetrators as "tools" by a member of the JCE (sub-ground 3(G))

(a) Submissions

220. In his Notice of Appeal, *Amicus Curiae* argues that the Trial Chamber erred in law "by holding, without the requisite safeguards, that a person [*i.e.*, a JCE member] can be criminally responsible for the acts of persons who were not members of the JCE and who potentially did not even know of the existence or purpose of the JCE."[544] *Amicus Curiae* submits in this regard that JCE members will only be held liable for the crimes committed by non-JCE members when (1) the

[542] Trial Judgement, para. 1120. *See* also para. 1121, where the Trial Chamber found that Krajišnik "Participat[ed] in the establishment, support or maintenance of SDS and Bosnian Serb government bodies at the Republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, War Commissions ("Bosnian Serb Political and Governmental Organs") and the VRS, TO, and the MUP ("Bosnian Serb Forces") through which [he] could implement the objective of the joint criminal enterprise".

[543] *Kvočka et al.* Appeal Judgement, para. 99; *Babić* Appeal Judgement, para. 38; *Ntakirutimana* Appeal Judgement, para. 466; *Vasiljević* Appeal Judgement, para. 100; *Krnojelac* Appeal Judgement, paras 31 and 81; *Tadić* Appeal Judgement, para. 227(iii).

crime can be imputed to a member of the JCE who used the principal perpetrator as a tool to carry out acts in accordance with the common objective, and (2) there is a link between the accused and the crime.[545] As to the first of these requirements, *Amicus Curiae* asserts that the *Brđanin* Appeal Judgement show that crimes committed by non-JCE members will be imputed to JCE members in only three situations: when a JCE member uses another individual as an instrument or a tool to carry out the *actus reus* of a crime, when a JCE member orders or instigates another individual to commit a crime.[546] *Amicus Curiae* avers that the Trial Chamber erred in departing from this and adopting a non-exhaustive list of indicia with irrelevant factors.[547] He also contends that the Trial Chamber failed to make the crucial findings on imputation:

> the Chamber failed to go through the required process of applying the law to the evidence and satisfying itself that each of the crimes of which [Krajišnik] was convicted could be "imputed to at least one member of the JCE." The Chamber failed to find that Principal Perpetrators were instrumentalised or used as tools to carry out the actus reus of crimes by members of the JCE, or that they were ordered or instigated to commit crimes. Furthermore, having identified an incorrect legal standard, the Chamber compounded the error by failing to apply the žindicia' to the evidence in respect of the specific crimes charged. [548]

As to the second alleged requirement, *Amicus Curiae* argues that the Trial Chamber failed to find the existence of a link between Krajišnik and the crimes, and it "failed to consider the relevance of [Krajišnik's] denial of *de jure* authority over the commission of the crimes."[549]

221. The Prosecution responds that the Trial Chamber's approach accords with the *Brđanin* Appeal Judgement and that *Amicus Curiae* bases his contentions on two misconceptions: (1) that the Appeals Chamber adopted a two-prong test to attribute criminal responsibility to JCE members for crimes of non-members and (2) that the attribution of crimes is limited to cases where the JCE member either orders or instigates a non-member, or uses the principal perpetrator as a tool.[550] In this last respect, the Prosecution submits that the *Brđanin* Appeal Judgement acknowledges that the link may be established in a variety of other ways, such as when a JCE member and the principal perpetrator act in furtherance of a separate JCE or when a JCE member uses non-innocent agents as tools to commit crimes.[551]

222. The Prosecution also avers that *Amicus Curiae* fails to show that the Trial Chamber's findings which allowed it to impute the crimes of the principal perpetrators to JCE members were

[544] *Amicus Curiae*'s Notice of Appeal, para. 50, referring to Trial Judgement, para. 883.
[545] *Amicus Curiae*'s Appeal Brief, paras 173-175.
[546] *Amicus Curiae*'s Appeal Brief, paras 177-179.
[547] *Amicus Curiae*'s Appeal Brief, para. 180, referring to Trial Judgement, para. 1082.
[548] *Amicus Curiae*'s Appeal Brief, para. 181.
[549] *Amicus Curiae*'s Appeal Brief, para. 182.
[550] Prosecution's Response to *Amicus Curiae*, paras 106, 108-114.
[551] Prosecution's Response to *Amicus Curiae*, paras 111-113.

deficient.[552] First, the Prosecution contends that, contrary to what is asserted by *Amicus Curiae*, the Trial Chamber did find that the crimes of principal perpetrators could be imputed to JCE members when it dealt extensively with the structures linking the JCE members to the principal perpetrators in Part 3 and subsections 6.4 to 6.16 of the Trial Judgement; the fact that the Trial Chamber did not summarise these findings in subsection 6.17 is not an appealable error.[553] Second, the Prosecution submits that *Amicus Curiae* has failed to discharge his burden on appeal since he has not addressed the specific findings of the Trial Chamber showing how the principal perpetrators were linked to the JCE members. In this connection, the Prosecution maintains that the Trial Chamber was aware of the necessity to link Krajišnik with the persons who physically committed crimes as well as of the necessity to distinguish persons acting as part of the JCE from others committing similar crimes but not acting as part of the JCE, that it adopted a list of factors indicating relationships among persons working together, that it relied on these factors to find that the various JCE members relied on each other's contributions as well as on acts of non-members procured to commit crimes, and that it analysed a wealth of evidence and set out with precision the structures linking the JCE members with the principal perpetrators.[554] Finally, the Prosecution notes that the Trial Chamber explained in paragraphs 1083-1085 of the Trial Judgement why it rejected Krajišnik's denial of any link to those who carried out the crimes and argues that, contrary to what *Amicus Curiae* asserts, the Trial Chamber thus considered Krajišnik's denial of *de jure* authority.[555]

223. *Amicus Curiae* replies that the additional ways to impute crimes of non-JCE members to a JCE member suggested by the Prosecution (*i.e.*, commission in a separate JCE and commission *via* a non-innocent agent) "encounter normative difficulties associated with causal remoteness from the crime, and the Prosecution fail[s] to demonstrate that such modes of liability are foreseen by the Statute or are part of customary law";[556] in any case, discussion of these modes of liability is essentially *obiter*, as such modes were not referred to or identified by the Trial Chamber, or proved on the evidence.[557]

224. *Amicus Curiae* contends that the Prosecution implicitly concedes that the parts of the Trial Judgement relevant to the crimes (Parts 4 and 5) and Krajišnik's responsibility for those crimes (Part 6) do not identify the required link between Krajišnik and the crimes.[558] *Amicus Curiae* submits that, contrary to what the Prosecution asserts, Part 3 does not provide the crucial linkage

[552] Prosecution's Response to *Amicus Curiae*, paras 107, 115-121.
[553] Prosecution's Response to *Amicus Curiae*, para. 115.
[554] Prosecution's Response to *Amicus Curiae*, paras 116-119.
[555] Prosecution's Response to *Amicus Curiae*, para. 120. The Prosecution adds that, in any case, *Amicus Curiae* does not demonstrate how Krajišnik's denial of *de jure* authority relates to his liability which was based on JCE.
[556] *Amicus Curiae*'s Reply, para. 58.
[557] *Amicus Curiae*'s Reply, para. 59.
[558] *Amicus Curiae*'s Reply, para. 61.

evidence but simply an overview which provides background, outlines the statutory framework and power structures.[559]

(b) Analysis

(i) Applicable law

225. In the *Brdanin* Appeal Judgement, the Appeals Chamber held that members of a JCE can incur liability for crimes committed by principal perpetrators who were non-JCE members, provided that it has been established that the crimes can be imputed to at least one member of the JCE and that this member – when using the principal perpetrators – acted in accordance with the common objective.[560] Such a link is established by a showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE.[561]

226. The establishment of a link between the crime in question and a member of the JCE is a matter to be assessed on a case-by-case basis.[562] Factors indicative of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime. However, it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that he knew of the existence of the JCE; what matters in JCE Category 1 is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.[563]

(ii) Findings of the Trial Chamber

227. In summing up the applicable law on joint criminal enterprise, the Trial Chamber stated that "a JCE may exist even if none or only some of the principal perpetrators are part of it, because, for example, they are not aware of the JCE or its objective and are *procured* by members of the JCE to commit crimes which further that objective."[564] The Trial Chamber then proceeded to identify the JCE members in the present case.[565] It first cited paragraph 7 of the Indictment[566] and noted that the

[559] *Amicus Curiae*'s Reply, para. 62.
[560] *Brdanin* Appeal Judgement, paras 413, 430. *See* also *Martić* Appeal Judgement, para. 168.
[561] *Brdanin* Appeal Judgement, para. 413. *See* also *Limaj et al.* Appeal Judgement, para. 120.
[562] *Brdanin* Appeal Judgement, para. 413. *Martić* Appeal Judgement, para. 169.
[563] *Brdanin* Appeal Judgement, para. 410.
[564] Trial Judgement, para. 883(ii) (emphasis added), referring to *Prosecutor v. Milan Milutinović et al.,* Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, Separate Opinion of Judge Bonomy. *See* also Trial Judgement, paras 1082 (where the Trial Chamber refers to the "acts of persons who are not members of the JCE but who have been procured to commit crimes") and 1086 (where the Trial Chamber refers to JCE members "who committed crimes pursuant to the common objective in various capacities, or who procured other persons to do so").
[565] Trial Judgement, paras 1079-1088.
[566] Trial Judgmeent, para. 1079. Paragraph 7 of the Indictment reads as follows:

Prosecution allowed for the existence of a JCE constituted by a "core group" of persons in its final trial brief.[567] The Trial Chamber then explained that it had invited the Prosecution to comment on "the kinds of evidence which would distinguish perpetrators of crimes acting as part of a JCE from persons not part of that JCE but who were committing similar crimes"[568] and that the Prosecution had listed the following distinguishing factors:

> Whether the perpetrator was a member of, or associated with, any organised bodies connected to the JCE; whether the crimes committed were consistent with the pattern of similar crimes by JCE members against similar kinds of victims; whether the perpetrator acted at the same time as members of the JCE, or as persons who were tools or instruments of the JCE; whether the perpetrator's act advanced the objective of the JCE; whether the perpetrator's act was ratified implicitly or explicitly by members of the JCE; whether the perpetrator acted in cooperation or conjunction with members of the JCE at any relevant time; whether any meaningful effort was made to punish the act by any member of the JCE in a position to do so; whether similar acts were punished by JCE members in a position to do so; whether members of the JCE or those who were tools of the JCE continued to affiliate with the perpetrators after the act; finally – and this is a non-exhaustive list – whether the acts were performed in the context of a systematic attack, including one of relatively low intensity over a long period.[569]

These submissions were accepted by the Trial Chamber, which added:

> A person not in the JCE may share the general objective of the group but not be linked with the operations of the group. Crimes committed by such a person are of course not attributable to the group. On the other hand, links forged in pursuit of a common objective transform individuals into members of a criminal enterprise. These persons rely on each other's contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.[570]

228. The Trial Chamber next rejected Krajišnik's denial of any link with persons who might have been connected with the commission of crimes, finding in particular that, in terms of power and

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> Numerous individuals participated in this joint criminal enterprise. Each participant, by acts or omissions, contributed to achieving the objective of the enterprise. Momčilo Krajišnik and Biljana Plavšić worked in concert with other members of the joint criminal enterprise, including Radovan Karadžić and Nikola Koljević. Other members of the joint criminal enterprise included: Slobodan Milošević, Željko Ražnatović (aka "Arkan"), General Ratko Mladić, General Momir Talić, Radoslav Brdanin, and other members of the Bosnian Serb leadership at the Republic, regional and municipal levels; members of the SDS leadership at the Republic, regional and municipal levels; members of the Yugoslav People's Army ("JNA"), the Yugoslav Army ("VJ"), the army of the Serbian Republic of Bosnia and Herzegovina, later the army of the Republika Srpska ("VRS"), the Bosnian Serb Territorial Defence ("TO"), the Bosnian Serb police ("MUP"), and members of Serbian and Bosnian Serb paramilitary forces and volunteer units and military and political figures from the (Socialist) Federal Republic of Yugoslavia, the Republic of Serbia and the Republic of Montenegro.

[567] Trial Judgement, para. 1080, citing Prosecution's Final Trial Brief, para. 3:

> Should the Trial Chamber find that the members of the JCE consisted only of a core group (such as Krajišnik, Karadžić, Plavšić, Koljević, Mladić, Mićo Stanišić and Mandić), liability still attaches to Krajišnik for participation in that JCE, as the principal perpetrators of the crimes were acting as instruments of that JCE. Similarly, insofar as any crimes were committed by local Bosnian Serbs who were not members of the JCE, those Serbs were acting as instruments under the direction of participants in the JCE.

[568] Trial Judgement, para. 1081.
[569] T. 27468-27469.
[570] Trial Judgement, para. 1082.

influence, Krajišnik was number two after Radovan Karadžić.[571] It then stated that it was not possible, desirable or necessary to specify fully the membership of the JCE; rather, what was necessary was "to be convinced that the Accused was sufficiently connected and concerned with persons who committed crimes pursuant to the common objective in various capacities, or who procured other persons to do so."[572] The Trial Chamber subsequently made its findings as to the membership in the JCE,[573] outlined the crimes which in its view formed part of the JCE, and concluded that, given Krajišnik's overall contribution to the JCE, he was liable for these crimes, starting with the crimes committed in Bijeljina in the beginning of April 1992.[574]

(iii) Findings on crimes committed by JCE members without having used principal perpetrators

229. Prior to the examination of the Trial Chamber's findings on crimes that were committed by JCE members without having used principal perpetrators, it is necessary to recall the Trial Chamber's findings on the identity of the JCE members and the crimes involved in their common objective.

230. The Trial Chamber found that the JCE comprised the following individuals:

In the *Pale-based leadership*: Krajišnik; Radovan Karadžić; Biljana Plavšić; Nikola Koljević; Momčilo Mandić; Velibor Ostojić; Mićo Stanišić; and General Ratko Mladić (as of 12 May 1992).[575]

In the *local component of the rank and file JCE members*: Arkan (Željko Ražnatović); Dr. Beli (proper name Milenko Vojnović); Mirko Blagojević; Radoslav Brđanin; Simo Drljača; Rajko Dukić; Gojko Kličković; "Vojo" Kuprešanin; Rajko Kušić; Mauzer; (proper name Ljubiša Savić); Jovan Mijatović; Veljko Milanković; Nedeljko Rašula; Momir Talić; Jovan Tintor; Vojin (Žućo) Vučković; and Stojan Župljanin.[576]

231. In addition, the Trial Chamber found that the "JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others."[577] The Appeals Chamber recalls that it has already found this finding, without more, erroneous because it is

[571] Trial Judgement, paras 1083-1085.
[572] Trial Judgement, para. 1086. The Appeals Chamber recalls that it has already found that this statement does not suffice to show that the Trial Chamber failed to require the existence of a shared common objective: *see supra* III.C.5.
[573] Trial Judgement, paras 1087-1088.
[574] Trial Judgement, paras 1089-1124.
[575] Trial Judgement, para. 1087.
[576] Trial Judgement, para. 1088.
[577] Trial Judgement, para. 1087.

unspecific and impermissibly vague.[578] In remaining parts, however, the Trial Chamber's findings on the identity of the JCE members stand.[579]

232. Furthermore, the Appeals Chamber recalls that it is not satisfied that the Trial Chamber made the required findings as to the scope of the JCE's common objective in relation to the expanded crimes, as well as to the *mens rea* of Krajišnik with respect to this expanded common objective.[580] The Appeals Chamber will therefore not consider findings by the Trial Chamber addressing whether *expanded* crimes were committed by JCE members themselves.

233. In addition, upon a review of the Trial Judgement, the Appeals Chamber concludes that it does not contain any findings on *original* crimes (*i.e.* deportation, forcible transfer and persecution with either of these crimes as underlying offence) committed by JCE members themselves.

234. The Appeals Chamber will now turn to *Amicus Curiae*'s claim that the Trial Chamber erred in its application of the legal standard of JCE liability and failed to find that principal perpetrators were *used* to commit crimes by members of the JCE.[581]

(iv) Findings on crimes committed by principal perpetrators used by JCE members

a. Did the Trial Chamber use an erroneous legal standard of JCE liability?

235. The Appeals Chamber recalls its finding in *Brđanin* that all JCE members are responsible for a crime committed by a non-JCE member if it is shown that the crime can be imputed to at least one JCE member, and that this JCE member – when using the non-JCE member – acted in accordance with the common objective.[582]

236. At paragraphs 883(ii), 1082 and 1086 of the Trial Judgement, the Trial Chamber held that a JCE member could incur liability for crimes committed by other JCE members or by principal perpetrators "procured" by a JCE member to commit crimes which further the common objective. The Appeals Chamber is satisfied that this standard corresponds in substance to the standard outlined in the *Brđanin* Appeal Judgement which was rendered after the Trial Judgement in the present case.[583] *Amicus Curiae* therefore fails to show an error by the Trial Chamber in this respect.

[578] *See supra* III.C.1.
[579] *Cf.* Trial Judgement, paras 1087-1088. *See supra* III.C.1.
[580] *See supra* III.C.2.
[581] *Amicus Curiae*'s Appeal Brief, para. 181.
[582] *Brđanin* Appeal Judgement, paras 413, 430. *Martić* Appeal Judgement, para. 168.
[583] *Ibid.*

b. Did the Trial Chamber fail to make findings on JCE members' use of non-JCE members committing crimes?

237. The Appeals Chamber will now analyse whether the Trial Chamber made the necessary factual findings establishing links between the principal perpetrators of the crimes and the JCE members identified above;[584] in other words, whether the JCE members used the principal perpetrators to commit crimes in furtherance of the common purpose in the sense that the crimes can be imputed to the JCE members.[585] At the outset, the Appeals Chamber observes that the Trial Chamber did not explicitly state that JCE members procured or used principal perpetrators to commit specific crimes in furtherance of the common purpose. The Appeals Chamber finds that, while the Trial Chamber should have made such a finding, this omission, in the circumstances of this case, does not as such invalidate the Trial Judgement,[586] because the Trial Chamber otherwise established a link between JCE members and principal perpetrators of crimes forming part of the common objective. However, in relation to a large number of principal perpetrators, the Trial Chamber did not reach any definite finding on their link with one of the JCE members. The Appeals Chamber will take this into account when reviewing the Trial Chamber's findings. This analysis must be conducted on the basis of the Trial Judgement as a whole. It is therefore useful to first examine the Trial Chamber's general findings on the responsibilities and roles of the "Pale-based leadership" (also referred to as the "Bosnian-Serb leadership"), and its relationship to the different organs of the Bosnian-Serb state apparatus. Against this backdrop, the Appeals Chamber will then analyse the specific findings relating to each of the JCE members – both the leadership component and the local component – and their links to the principal perpetrators. As discussed above, this analysis will be limited to the perpetrators of the *original* crimes only, as the Trial Chamber did not make the findings required for inclusion of *expanded* crimes in the common objective of the JCE; consequently, these crimes cannot be imputed to Krajišnik.[587]

c. The Trial Chamber's general findings regarding the Bosnian-Serb leadership's relation to the VRS, crisis staffs, war presidencies, war commissions and paramilitary groups

238. In this section, the Appeals Chamber will analyse, in turn, the Bosnian-Serb leadership's relation to the VRS, crisis staffs, war presidencies, war commissions and paramilitary groups. The relationship between the Bosnian-Serb leadership and the JNA and the TO will be addressed separately in subsequent sub-sections.

[584] Whether those findings withstand other challenges on appeal – in particular, whether they were open to a reasonable trier of fact – is left for later consideration as necessary.
[585] *Brdanin* Appeal Judgement, paras 413, 430. *Martić* Appeal Judgement, para. 168.

239. With respect to the VRS, the Trial Chamber found that Radovan Karadžić was its supreme military commander, and that directly below him was Ratko Mladić, as of 12 May 1992 the Commander of the VRS Main Staff.[588] The Trial Chamber held that from May to November 1992, Mladić would consult the Bosnian-Serb leadership regularly, and that the Presidency would make decisions on military-related matters.[589] It also held that the VRS would regularly report to the Presidency, in written or oral form, on "crisis areas" and on the situation in the field.[590] Furthermore, the Trial Chamber held that the Presidency had the authority to initiate investigations on alleged crimes related to combat activities, order ceasefires, halt military operations, and release prisoners of war.[591] The Trial Chamber found that a close relationship existed between the Presidency and the Main Staff, and that orders were passed from the political leadership to military officers.[592] It also found that the Bosnian-Serb leadership actively supervised the operations of the Bosnian-Serb forces,[593] and that the VRS had a plan of action broadly formulated by the political leadership.[594]

240. The Trial Chamber further found that the "Bosnian-Serb leadership started exercising military pressure on Sarajevo already in April 1992"[595] and that the Presidency only called off the attack against Sarajevo in June 1992,[596] and it held that the VRS briefed the Presidency on operational details and objectives.[597]

241. In light of the above, the Appeals Chamber holds that the Trial Chamber found that there was a general link between the VRS and the Bosnian-Serb leadership, and will take this into account in its later determination of whether the Trial Chamber imputed the crimes committed by members of these institutions to any of the JCE members.

242. In relation to crisis staffs, the Trial Chamber found that each of them included at least one Assembly deputy among its members and that, therefore, the Bosnian-Serb leadership exercised "a substantial amount of control over" crisis staffs.[598] The Trial Chamber further found that the Bosnian-Serb leadership issued direct orders or instructions to crisis staffs, and that these were

[586] *Cf. Martić* Appeal Judgement, para. 181.
[587] *See supra* III.C.2.
[588] Trial Judgement, paras 194, 205.
[589] Trial Judgement, para. 205. The Trial Chamber also noted Krajišnik's concession that Mladić was directly subordinated to the Presidency, Trial Judgement, para. 194.
[590] Trial Judgement, para. 200.
[591] Trial Judgement, para. 205.
[592] Trial Judgement, paras 206, 961.
[593] Trial Judgement, para. 975. *See* also para. 977.
[594] Trial Judgement, para. 994. *See* also paras 996, 998.
[595] Trial Judgement, para. 952.
[596] Trial Judgement, para. 957. *See* also paras 959, 961.
[597] Trial Judgement, para. 1008. *See* also para. 1009, which mentions other such meetings between the leadership and the Main Staff in the course of 1992.

received and acted upon.[599] It also found that crisis staffs reported to the Bosnian-Serb leadership.[600]

243. However, the Trial Chamber also held that "it was not through direct or operational control of crisis staffs that the Bosnian-Serb leadership managed to achieve its objectives on the ground."[601] Furthermore, it did not find that the Bosnian-Serb leadership had control over all crisis staffs in all municipalities. Instead, the Trial Chamber concluded that "*despite the occasional loss of direct or operational control in some municipalities*, the Bosnian-Serb leadership still held a tight grip over the crisis staffs in the majority of the municipalities and, through them, over the municipalities themselves."[602] The Trial Chamber did not explicitly set out in which municipalities the Bosnian-Serb leadership did not have direct control over crisis staffs.

244. With respect to war presidencies and war commissions, the Trial Chamber found that they were established by the Bosnian-Serb leadership,[603] which gave instructions for their organisation and work in conditions of war and clarified that the war presidencies had "to organize, co-ordinate and synchronize activities for the defence of the Serbian people, and to establish governmental power".[604] The Trial Chamber also found that war commissions were keeping the Presidency informed about the situation on the ground.[605]

245. In light of the above, the Appeals Chamber holds that the Trial Chamber did not reach any general finding on the link between the Bosnian-Serb leadership and crisis staffs, but that it did find that there was a general link between the Bosnian-Serb leadership and war presidencies and war commissions. The Appeals Chamber will take this into account when reviewing the Trial Chamber's findings on the involvement of members of these organs in the crimes committed.

246. With respect to the relationship between the Bosnian-Serb leadership and paramilitary groups, the Trial Chamber found that the Bosnian-Serb leadership teetered between endorsing anybody who would fight for the "Serbian cause" and accepting among their ranks only those who would subordinate themselves to the army.[606] The Trial Chamber found that

> [t]he Bosnian-Serb leadership vacillated in its relationship with paramilitary groups, including "volunteers" from Serbia, using them opportunistically to terrorize Muslims and Croats, or at other

[598] Trial Judgement, para. 267.
[599] Trial Judgement, para. 268.
[600] Trial Judgement, para. 270. *See* also Trial Judgement, paras 272, 284.
[601] Trial Judgement, para. 267.
[602] Trial Judgement, para. 271 (emphasis added). More specifically, the Trial Chamber found that in April 1992, the Bosnian-Serb leadership had a meeting with local authorities of Ilidža, on security and military matters, *ibid.*, para. 992.
[603] Trial Judgement, paras 272, 274, 276.
[604] Trial Judgement, para. 273, citing to Exhibit P529 tab 108, item 4.
[605] Trial Judgement, para. 279.
[606] Trial Judgement, para. 209.

> times complaining about them when their actions threatened the new order of the Bosnian-Serb Republic. There is evidence that, from July 1992 onwards, when most of the territories had already been seized, the Bosnian-Serb leadership generally regarded paramilitaries as a nuisance.[607]

The Trial Chamber further held that the Bosnian-Serb leadership was aware of the serious problems caused by the paramilitaries in various municipalities, as well as their unruly behaviour.[608]

247. On the other hand, the Trial Chamber found that the Bosnian-Serb leadership and the VRS attempted, on several occasions, to incorporate the paramilitaries into the regular VRS units.[609] Also, the Yellow Wasps had direct contact with the Pale-based leadership and were subordinated to the VRS towards the end of May 1992.[610] Furthermore, the Trial Chamber held that during the take-over of Bijeljina and Bratunac in April 1992, the services of the paramilitary groups were appreciated by the Bosnian-Serb leadership.[611] Also, it found that Rajko Kusic, a paramilitary JCE member, had to report to the Bosnian-Serb leadership in Pale on why he was running late with the cleansing of Rogatica.[612] In light of the above, the Appeals Chamber holds that the Trial Chamber did not reach any definite finding on the link between the Bosnian-Serb leadership and the paramilitaries in general. The Appeals Chamber will take this into account when reviewing the Trial Chamber's findings on the crimes committed by paramilitary formations.

248. Furthermore, the Trial Chamber established a general pattern followed in the municipalities regarding the nature of the attack on the Muslim and Croat civilian population during the Indictment period. In this regard, the Trial Chamber established the existence of a *modus operandi*, which "required the involvement of the Bosnian-Serb authorities, on central, regional, and municipal levels".[613]

d. The Trial Chamber's findings regarding the use of principal perpetrators by individual JCE members

249. A review of the Trial Chamber's findings on the JCE members' use of principal perpetrators shows that the Trial Chamber only made such findings with respect to the following JCE members: Ratko Mladić, Gojko Kličković, Jovan Mijatović, Vojin (Žućo) Vučković, "Vojo" Kuprešanin, Radoslav Brđanin, Ljubiša (Mauzer) Savić and Veljko Milanković.

[607] Trial Judgement, para. 979.
[608] Trial Judgement, para. 222.
[609] Trial Judgement, para. 222. *See* also *ibid*., para. 938.
[610] Trial Judgement, para. 213.
[611] Trial Judgement, para. 980.
[612] Trial Judgement, para. 1029.
[613] Trial Judgement, para. 710. *See* also *ibid.*, paras 708-710.

i. General Ratko Mladić

(a) Findings on Ratko Mladić's responsibilities and role as VRS commander

250. The Trial Chamber found that Ratko Mladić was a member of the Pale-based leadership component of the JCE as of 12 May 1992.[614] He was commander of the VRS as of 12 May 1992, when the VRS was established,[615] and directly subordinated to the Presidency.[616]

(b) Findings on Ratko Mladić's general involvement in crimes

251. The Trial Chamber found that, in a speech to the Bosnian-Serb Assembly on 12 May 1992, Ratko Mladić advised the Bosnian-Serb leadership on how to achieve controversial military objectives "quietly, cynically, ruthlessly, while staying below the radar of international attention":

> We should not say: we will destroy Sarajevo, we need Sarajevo. We are not going to say that we are going to destroy the power supply pylons or turn off the water supply, no, because that would get America out of its seat, but ... one day there is no water at all in Sarajevo. What it is we do not know ... And the same with the electrical power ... we have to wisely tell the world, it was they who were shooting, hit the transmission line and the power went off, they were shooting at the power supply facilities ... that is what diplomacy is.[617]

252. Further, the Trial Chamber held that in an order to subordinate officers on 22 July 1992, Ratko Mladić illustrated the integration of Bosnian-Serb political and military affairs and represented Krajišnik's wish of 18 March 1992 to create "facts on the ground" to strengthen their negotiating position.[618]

253. The Trial Chamber also quoted an order by Ratko Mladić of 19 November 1992 to illustrate that the political goal of ethnic recomposition became absorbed into regular army orders. Mladić ordered *inter alia* that the enemy in Birač, Žepa and Goražde be forced to leave "together with the Muslim population". The order was reproduced in the orders of officers down the line of

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[614] Trial Judgement, para. 1087.
[615] Trial Judgement, paras 138, 194.
[616] Trial Judgement, paras 194, 205. *See* also Trial Judgement, paras 1004, 1009, 1011 (detailing instances when Ratko Mladić briefed the Presidency), 1012. The VRS was divided into five Corps: the 1st Krajina Corps (formerly the JNA 5th Corps, headed by Momir Talić from 17 March 1992); the 2nd Krajina Corps (formerly the JNA 10th Corps); the East Bosnia Corps (formerly the JNA 17th Corps); the Sarajevo-Romanija Corps (formerly the JNA 4th Corps); and the Herzegovina Corps (formerly part of the JNA 9th Corps). In November 1992, the Drina Corps was created: *ibid*., para. 197.
[617] Trial Judgement, para. 975, citing to Exhibit P65 tab 127, pp. 42-43.
[618] Trial Judgement, para. 998.

command.[619] Krajišnik conceded at trial that Ratko Mladić's order and its offshoots called for "ethnic cleansing" and were criminal.[620]

254. The Trial Chamber further found that the forced displacement of Muslims was reported up the VRS line of command to the Main Staff and, therefore, to Ratko Mladić.[621] Also, according to Witness 583, a member of an international organisation, protests about the illegality of the forced mass expulsions on ethnic grounds were addressed on a regular basis to Ratko Mladić.[622]

255. Against the backdrop of the abovementioned findings, the Appeals Chamber now proceeds to examine whether the Trial Chamber imputed *original* crimes of the JCE committed by VRS troops to Ratko Mladić.

(c) Crimes committed by VRS troops

256. Bratunac: With respect to the crimes of deportation and forcible transfer committed in Bratunac, the Trial Chamber found:

> Another illustration of a municipality take-over conducted *under the auspices of the Bosnian-Serb leadership* is the case of Bratunac. Miroslav Deronjić, the SDS leader in Bratunac, testified that around 10 May 1992, after the Muslim population of the village of Glogova was forcibly transferred (leaving behind 65 dead in the partially burned village), he was summoned to Pale to a meeting of SDS crisis-staff and municipality presidents chaired by Ratko Mladić, Radovan Karadžić, and Velibor Ostojić. There were about 50 people in attendance. The purpose of the meeting was for local officials to report to Mladić on the military situation in the municipalities. Deronjić reported the attack on Glogova and the continuing operation to transfer the Muslim population out of Bratunac municipality. He said that he received a round of congratulatory applause. Ostojić commented that Bratunac municipality could now be painted blue on the map, the colour used to represent Serb ethnicity.[623]

Although this finding does not refer to members of the VRS as principal perpetrators, the Appeals Chamber is satisfied that the references to the "auspices of the Bosnian-Serb leadership"[624] and to the purpose of the meeting (reporting to Ratko Mladić) shows that the Trial Chamber found that the Bosnian-Serb leadership, of which Ratko Mladić was a member, used principal perpetrators to commit the crimes of deportation (Count 7)[625] and other inhumane acts (forcible transfer, Count 8)[626] in furtherance of the common purpose.

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[619] Trial Judgement, para. 999.
[620] Trial Judgement, para. 1000. Krajišnik added that "I don't know why [Ratko Mladić] did that": *ibid.*
[621] Trial Judgement, paras 1024-1027.
[622] Trial Judgement, para. 1030.
[623] Trial Judgement, para. 941 (emphasis added, footnotes omitted). *See* also *ibid*., paras 311-312, 314, 316-317, 320.
[624] The Appeals Chamber finds that it does not have to examine whether these crimes were imputed to other members of the Bosnian-Serb leadership, because the imputation to one of the JCE members is sufficient to impute criminal responsibility for these crimes to the other JCE members.
[625] Trial Judgement, paras 727, 732. *See infra* III.D where this conviction is quashed.
[626] Trial Judgement, paras 727, 732.

257. Zvornik: The Trial Chamber found that, around 28 May 1992, Major Svetozar Andrić, commander of the VRS 1st Birač Brigade, ordered the Zvornik TO to organise and co-ordinate the moving out of the Muslim population with municipalities through which they would pass.[627] In view of the Trial Chamber's findings on Ratko Mladić's position within the VRS, coupled with his support for and repeated receipt of reports on forced expulsions, the Appeals Chamber is satisfied that the Trial Chamber found that Ratko Mladić used Major Svetozar Andrić for the commission of these crimes of deportation and forcible transfer in accordance with the common purpose (deportation, Count 7; inhumane acts, Count 8).[628]

258. Banja Luka: The Trial Chamber further found that Predrag Radić, General Momir Talić, commander of the VRS 1st Krajina Corps, and Lieutenant Colonel Božidar Popović, head of the Manjača camp, explained to Witness Amir Džonlić during his visit with a human rights delegation to the camp in late May or early June 1992 that the camp was under the control of the VRS 1st Krajina Corps, and that almost all detainees were prisoners of war.[629] On 6 August 1992, a colonel of the VRS 1st Krajina Corps sent the Prijedor SJB chief a letter advising him that the number of detainees in Manjača camp that could not be properly characterised as prisoners of war was "quite large" and urged him to organize their release. On 22 August 1992, a list of prisoners for whom there was no evidence that they participated in combat operations was considered in the presence of the camp commander and a major of the 1st Krajina Corps. Manjača camp was not closed until 16 December 1992.[630] Furthermore, the Trial Chamber found that the Main Staff was informed on 14 and 16 December 1992 by the 1st Krajina Corps of convoys of buses transporting two groups of detainees (1,008 detainees, and 1,001 detainees, respectively) from Manjača Camp out of the territory of the Bosnian-Serb Republic. Security was provided by General Kelečević of the VRS.[631]

259. In view of the findings on (i) the VRS' control over Manjača camp, including the power to release prisoners; (ii) the failure to investigate the reported mistreatments; (iii) reports to the VRS Main Staff; (iv) the extended period during which the camp operated; (v) and Ratko Mladić's own engagement in covering-up detention crimes,[632] the Appeals Chamber concludes that the Trial Chamber imputed the crime of deportation (Count 7)[633] to Ratko Mladić.

260. Trnovo: The Trial Chamber found that Serb forces under the command of Colonel Ratko Bundalo of the VRS attacked Trnovo town and deliberately destroyed houses owned by Muslims

[627] Trial Judgement, para. 365.
[628] Trial Judgement, para. 732.
[629] Trial Judgement, para. 384.
[630] Trial Judgement, paras 389-390.
[631] Trial Judgement, paras 1026.
[632] Trial Judgement, para. 1054.
[633] Trial Judgement, paras 727, 732.

and the town mosque at the end of May 1992. More than half of the Muslim population left Trnovo municipality as a result of the attack and other restrictions imposed on them. Some Muslims left the municipality after having being detained.[634] The Trial Chamber found that these incidents constituted inhumane acts (forcible transfer, Count 8).[635] Given that no other units than the VRS are mentioned in relation to these crimes, and considering Ratko Mladić's general influence over the VRS principal perpetrators of crimes, the Appeals Chamber finds that the Trial Chamber found that Mladić used the principal perpetrators to commit this crime.

261. Sokolac: On 22 September 1992, the Trial Chamber found, members of the VRS 2nd Romanija Brigade surrounded the village of Novoseoci and, despite there being no armed resistance, on General Radislav Krstić's order[636] killed 40 to 45 Muslim men and put the women and children on buses and transported them to Sarajevo. General Krstić informed the VRS Main Staff on the same date that "[d]uring the day, the village of Novoseoci was cleansed".[637] The Trial Chamber found this incident to be an inhumane act (forcible transfer, Count 8).[638] For reasons stated above,[639] the Appeals Chamber finds that the Trial Chamber imputed this crime to Ratko Mladić.

262. Thus, the Appeals Chamber is satisfied that the Trial Chamber found that Ratko Mladić used principal perpetrators to commit the following original crimes in accordance with the common purpose: deportation (Count 7) in Bratunac,[640] Banja Luka and Zvornik; and inhumane acts (forcible transfer, Count 8) in Bratunac, Zvornik, Trnovo, Sokolac.

ii. Gojko Kličković

263. The Trial Chamber found that on 28 April 1992, Gojko Kličković, the president of the Bosanska Krupa war presidency and a member of the local component of the JCE, ordered the commanders of three battalions of the 1st Podgrmeč Brigade to immediately "evacuate Muslim population" from the territory under their control.[641] Pursuant to this order, on 1 May 1992 the executive committee of Arapuša commune, jointly with the local "refugee committee" and the "battalion command", issued instructions for the evacuation of all Arapuša residents and refugees

[634] Trial Judgement, para. 591-593.
[635] Trial Judgement, paras 727, 732.
[636] Trial Judgement, para. 971.
[637] Trial Judgement, para. 691. *See* also Trial Judgement, para. 1114.
[638] Trial Judgement, paras 727, 732.
[639] *See supra* III.C.11(b)(iv)(d)(i)(a) and (b).
[640] *See infra* III.D.
[641] Trial Judgement, paras 398, 1088.

(460 people in total) to the village of Fajtovići in Sanski Most municipality.[642] The Trial Chamber further found that on 22 May 1992, the Bosanska Krupa war presidency ordered the SJB and the military police "[t]o evacuate the remaining Muslim population from the territory of the Serb municipality of Bosanska Krupa", and three days later, it "proposed" to the command of the 1st Podgrmeč Brigade to prepare for a "mop-up" of the left bank of the Una river.[643]

264. In light of the above findings, the Appeals Chamber is satisfied that the Trial Chamber found that Gojko Kličković used principal perpetrators to commit the crime of inhumane acts (forcible transfer, Count 8)[644] in furtherance of the common purpose.

iii. Jovan Mijatović

265. The Trial Chamber found that Jovan Mijatović was a member of the Zvornik crisis staff, a deputy to the Bosnian-Serb Assembly and a member of the local component of the JCE.[645]

266. The Trial Chamber found that on 26 June 1992, a large number of Serb soldiers, TO, and paramilitary units entered the village of Kozluk (Zvornik municipality) with tanks and other military vehicles.[646] It held that Jovan Mijatović was among this group which then informed the Muslims that they had one hour to leave and to gather their personal belongings, or else they would be killed. The villagers were also forced to sign statements surrendering their property.[647] The Trial Chamber held that on the same day, a convoy of vehicles organised by the Serbs who had attacked and taken over Kozluk transported approximately 1,800 persons out of the municipality to Serbia,[648] constituting deportation (Count 7).[649]

267. The Appeals Chamber is satisfied that the Trial Chamber found that Jovan Mijatović arrived with the attacking forces and together with them informed the villagers that they would have to leave in one hour, or else would be killed. On the same day, the villagers were forced to sign statements surrendering their property, and the attacking forces deported about 1,800 people. In light of these findings, the Appeals Chamber is satisfied that the Trial Chamber found that Mijatović used the principal perpetrators of the crime of deportation (Count 7) and imputed this crime to him.

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[642] Trial Judgement, para. 398.
[643] Trial Judgement, para. 400.
[644] Trial Judgement, paras 727, 732.
[645] Trial Judgement, para. 1088.
[646] Trial Judgement, para. 366.
[647] Trial Judgement, para. 366.
[648] Trial Judgement, para. 366.
[649] Trial Judgement, paras 728, 732.

iv. Vojin (Žućo) Vučković

268. The Trial Chamber found that Vojin (Žućo) Vučković, together with his brother Dušan (Repić) Vučković, led the paramilitary unit called Yellow Wasps, which was comprised of around 100 men.[650] While the Trial Chamber found that both brothers had several men under their command,[651] it considered only Vojin Vučković to have been a member of local component of the JCE.[652]

269. The Trial Chamber held that from April to May 1992, the Yellow Wasps co-operated closely with the TO in Zvornik and were even issued arms by the TO's logistic staff.[653] It further held that after the establishment of the VRS Zvornik Brigade, the Yellow Wasps were subordinated to it,[654] and that Vojin Vučković received weapons from the Pale SJB and met with Plavšić and with the Minister of Defence Subotić, who informed him that as soon as military units took orders from the VRS, they were considered to be a member of the VRS.[655]

270. Zvornik: The Trial Chamber found that around 28 May 1992, between 400 and 500 Muslims from Divič village, including women, children, and elderly persons, were forced onto buses by members of the Yellow Wasps and were told that they would be taken to Muslim territory.[656] In Crni Vrh, the captives were released and allowed to depart on foot.[657] On the basis of these findings, and given that the Yellow Wasps were headed by Vojin Vučković, the Appeals Chamber is satisfied that the Trial Chamber established that he used the principal perpetrators to commit the crime of deportation (Count 7) in accordance with the common purpose.[658]

v. "Vojo" Kuprešanin

271. The Trial Chamber found that Vojo Kuprešanin, president of ARK and SDS main board member, was a member of the local component of the JCE.[659] It also made the following findings on the displacements of Muslims and Croats from Sanski Most municipality, constituting deportation (Count 7) and inhumane acts (Count 8):[660] (1) On 30 May 1992, the Sanski Most crisis staff decided that all persons who had not taken up arms and who wished to leave the municipality

[650] Trial Judgement, paras 213, 949.
[651] *See* Trial Judgement, para. 372 (referring to "Repić's men").
[652] Trial Judgement, para. 1088. *See also* AT. 264, for the submissions of the Prosecution regarding the relationship between the Bosnian-Serb leadership and paramilitary leaders like Vojin (Žućo) Vučković.
[653] Trial Judgement, para. 213.
[654] *Ibid.*
[655] *See ibid.*
[656] Trial Judgement, para. 365.
[657] *Ibid.*
[658] Trial Judgement, paras 728, 730, 732.
[659] Trial Judgement, para. 1088.

would be allowed to do so and "decided to contact the ARK leadership regarding population resettlement"; and (2) On 22 June 1992, the ARK crisis staff informed the Sanski Most crisis staff of its decision that every municipality in the region was to appoint a person responsible for matters relating to the removal and exchange of populations and prisoners, "and that this person was to report to Vojo Kuprešanin".[661] The Sanski Most crisis staff appointed Vlado Vrkeš, president of the Sanski Most SDS, for this purpose and set up a committee for population migration.[662]

272. As the Trial Chamber mentioned Vlado Vrkeš and the committee in the context of its findings on displacements from Sanski Most, the Appeals Chamber is satisfied that the Trial Chamber considered that both Vrkeš and the committee were involved in these displacements.[663] Also, the Appeals Chamber finds that the Trial Chamber held that the ARK leadership in general and Vojo Kuprešanin in particular exercised influence over these displacements, in co-operation with the Sanski Most crisis staff.[664] In these circumstances, and considering the general findings on the influence of the SDS Main Board (of which Vojo Kuprešanin was a member) over the crisis staffs,[665] the Appeals Chamber concludes that the Trial Chamber found that Vojo Kuprešanin used Vlado Vrkeš to commit the crimes of deportation (Count 7)[666] and inhumane acts (Count 8)[667] in accordance with the JCE's common purpose of deportation and forcible transfer.

vi. Radoslav Brđanin

273. According to the Trial Chamber, Radoslav Brđanin was the ARK crisis staff president, deputy to the Bosnian-Serb Assembly and a member of the local component of the JCE.[668] The Appeals Chamber recalls that the Trial Chamber found that the "municipal crisis staffs in the ARK received instructions from, acted upon decisions of, and reported to the ARK crisis staff".[669]

274. The Trial Chamber found that an "agency for resettlements, known as žBrđanin's agency' in reference to Radoslav Brđanin, managed all aspects of relocation of the population",[670] and that "in

[660] Trial Judgement, paras 727, 732.
[661] Trial Judgement, para. 531.
[662] Trial Judgement, paras 529, 531.
[663] *See* Trial Judgement, paras 529-533.
[664] *See* also Trial Judgement, paras 905, 1002 (finding that Vojo Kuprešanin was one of the "strongmen" in the ARK).
[665] *See* Trial Judgement, para. 270. *See* also Trial Judgement, para. 529 (noting evidence that, according to Vlado Vrkeš, the SDS opined that the forcing out of people from their homes in a Muslim area was taken as a countermove to Muslim action elsewhere and that Muslims had to be resettled so that Sanski Most could become a purely Serb town).
[666] *See infra* III.D.
[667] Trial Judgement, paras 727, 730.
[668] Trial Judgement, paras 491, 1088.
[669] Trial Judgement, para. 262. *See* also *ibid.*, paras 260-261. The Trial Chamber also established that it was the SDS Executive Board which assigned "coordinators" for the ARK, responsible for implementing the decisions of the Bosnian-Serb Assembly and the Bosnian-Serb Government and to take part in the work of the regional crisis staffs. (Trial Judgement, para. 262).
[670] Trial Judgement, para. 380.

July and August 1992, crowds were seen queuing at the offices of Brđanin's agency".[671] The Trial Chamber held that "from May 1992 onwards, many Muslims and Croats left Banja Luka out of fear and due to unbearable circumstances. An agency for resettlement managed all the aspects of relocation. In July and August 1992, busloads of people left the municipality for Croatia and other destinations almost daily."[672] The Trial Chamber held that this displacement of Muslims and Croats constituted deportation (Count 7).[673]

275. As the Trial Chamber found that "Brđanin's agency" for resettlement was instrumental in the organisation of the displacement of non-Serbs from Banja Luka, and that it was created based on a decision of the ARK crisis staff,[674] the Appeals Chamber is satisfied that the Trial Chamber found that Radoslav Brđanin used the members of this resettlement agency in order to commit the crime of deportation (Count 7) in pursuance of the common objective.

vii. Ljubiša (Mauzer) Savić

276. The Trial Chamber found that Ljubiša (Mauzer) Savić was a leading SDS figure in Bijeljina, commander of the Serb (National) Guard paramilitary unit,[675] and a member of the local component of the JCE.[676]

277. Bijeljina: The Trial Chamber found that on 15 June 1992, Ljubiša (Mauzer) Savić stated that, "all Muslims would be fired from their jobs and expelled from the territory".[677] The Trial Chamber then went on to find that "[f]rom at least July 1992, Muslims in Bijeljina were targeted by an organized campaign of looting and expulsion".[678] It explained that, on the basis of a list of names of wealthy Muslims compiled by the Bijeljina SDS, Vojkan Đurković of the Bijeljina SDS, aided by Mauzer's men, "paid visits to those on the list in order to extort property from them"; some Muslims "were detained immediately, stripped of their valuables, and transferred to žno-man's land' between the warring factions, where they remained, sometimes for days, before being able to cross into Muslim-controlled territory".[679] The Trial Chamber found that Muslim residents were

[671] *Ibid.*
[672] Trial Judgement, para. 380.
[673] Trial Judgement, paras 728, 732.
[674] P512.A (Džonlić transcript), pp. 2397-2398: "Everyone in town said that this was Brdjanin's agency, and that is how people -- everyone called it, Brdjanin's agency. Some people even thought that Brdjanin and Perka were related. But they referred to the agency as Brdjanin's and later on, I learnt that the Krajina Crisis Staff had taken a decision to set up this agency for resettlement and as Brdjanin headed that Crisis Staff, it was probably for that reason that it was known as Brdjanin's resettlement agency".
[675] Trial Judgement, para. 305.
[676] Trial Judgement, para 1088.
[677] Trial Judgement, para. 306.
[678] Trial Judgement, para. 307.
[679] Trial Judgement, para. 307.

"terrorized" by paramilitary groups in Bijeljina, including Mauzer's men, through home invasions, looting or rapes, and left Bijeljina as a result of this "pressure and terrorisation".[680]

278. The Appeals Chamber is satisfied that the Trial Chamber found that Mauzer used his men to commit the crimes of deportation (Count 7)[681] and inhumane acts (Count 8) of Muslims from Bijeljina to further the common criminal purpose.[682]

viii. Veljko Milanković

279. The Trial Chamber found that in the summer of 1991 in Prnjavor, Veljko Milanković headed the Wolves of Vučjak, a paramilitary group of about 150 men, and that he was a member of the local component of the JCE.[683] It further found that the Wolves were transferred from the Prnjavor TO to the command of the 327th Motorised Brigade on 5 June 1992, by General Talić, commander of the 1st Krajina Corps, who commended the Wolves on several occasions.

280. The Trial Chamber further found that around March 1992, a group consisting of police, Serb soldiers from Laktaši, and Veljko Milanković ordered the inhabitants of the Muslim village of Lišnja to leave their homes. Most of the villagers were taken and brought to a sawmill in Vijaka, where JNA soldiers and police officers were present.[684] Some of the persons detained at the sawmill in Vijaka were released a day later, while about 250 to 300 Muslim men were put on buses and taken to the town of Prnjavor. They were guarded and interrogated by Serb police officers, and subjected to beating by guards, local Serb reserve police officers and soldiers who were passing through the municipality. The detainees were not provided with food other than that brought by friends and relatives, and they were forced to labour at various tasks. Some detainees were taken to the SJB in Prnjavor town where they were interrogated and beaten.[685]

281. The Appeals Chamber finds that the Trial Chamber did not make a finding on a link between Veljko Milanković and the principal perpetrators of the abovementioned crimes. While he was found to have ordered, around March 1992, the Muslim inhabitants of Lišnja to leave their

[680] Trial Judgement, paras 306, 966.
[681] *See infra* III.D.
[682] *See* Trial Judgement, paras 727-728, 732.
[683] Trial Judgement, paras 214, 218, 1088.
[684] Trial Judgement, para. 502.
[685] Trial Judgement, para. 502.

homes,[686] there is no finding indicating whether he or the Wolves of Vučjak were participating in the ensuing crimes in the sawmill in Vijaka and later on in the town of Prnjavor.

282. The Trial Chamber further found that it was in particular the Wolves of Vučjak who harassed and attacked Muslims in Prnjavor, and that from the first half of 1992 and onwards, Muslims and Croats left the municipality in the direction of the Hungarian border because of pressure and threats from the Serbs.[687] The Appeals Chamber is satisfied that the Trial Chamber found that the Wolves of Vučjak were among these Serbs who were found to have pressured and threatened Muslims and Croats to leave Prnjavor for Hungary. Consequently, the Appeals Chamber is satisfied that the Trial Chamber found that Veljko Milanković used his men to commit the crime of deportation committed in Prnjavor (Count 7) in furtherance of the common purpose.[688]

(c) Conclusion

283. On the basis of the foregoing, the Appeals Chamber concludes that the Trial Chamber found that the following original crimes were committed by JCE members by way of using principal perpetrators, in furtherance of the common purpose:

1. **Count 3, persecution (deportation):** Bratunac; Zvornik; Sanski Most; Banja Luka; Bijeljina; and Prnjavor;[689]

2. **Count 3, persecution (forcible transfer):** Bijeljina; Bratunac; Zvornik; Bosanska Krupa; Sanski Most; Trnovo; and Sokolac;

3. **Count 7, deportation:** Bratunac; Zvornik; Sanski Most; Banja Luka; Bijeljina;and Prnjavor;[690]

4. **Count 8, inhumane acts (forcible transfer):** Bijeljina; Bratunac; Zvornik; Bosanska Krupa; Sanski Most; Trnovo; and Sokolac.

284. Krajišnik's convictions for the remainder of the original crimes under Counts 3, 7 and 8 are thus quashed.

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[686] The Appeals Chamber notes that the Trial Chamber found that the crime of deportation was committed in Prnjavor, but that there is no such finding on forcible transfer. Since it found that the Muslims from Lišnja were displaced within territory under Bosnian-Serb control, Krajišnik was not convicted for this crime.
[687] Trial Judgement, paras 504, 507.
[688] Trial Judgement, paras 507, 732.
[689] The Appeals Chamber notes that the convictions for deportation as a crime against humanity are quashed elsewhere (*see infra* III.D) in relation to Bratunac, Sanski Most and Bijeljina.
[690] The Appeals Chamber notes that the conviction for deportations as a crime against humanity are quashed elsewhere (*see infra* III.D) in relation to Bratunac, Sanski Most and Bijeljina.

12. Sufficient notice of JCE (sub-ground 3(H))

(a) Submissions

285. *Amicus Curiae* submits that Krajišnik was not timely put on notice that he was charged with participation in a JCE where the physical perpetrators of the crimes allegedly committed pursuant to the JCE were being used as instruments by JCE members; therefore, the Trial Chamber could not convict him on this basis.[691]

286. The Prosecution responds that Krajišnik had sufficient notice that he could incur liability for crimes committed by non-JCE members who were used by JCE members to commit crimes.[692] The Prosecution refers in particular to paragraphs 5 and 7 of the Indictment and submits that several other paragraphs informed Krajišnik that persons acted as the instruments of JCE members, by using the term "agents" and referring to acting "through".[693] The Prosecution also maintains that it provided further details in this respect in its pre-trial brief and opening statement.[694] The Prosecution adds in any case that as this issue was not raised at trial, any alleged defect in the Indictment must be shown to have seriously impacted the Defence, yet *Amicus Curiae* does not show how the Defence was prejudiced.[695]

287. *Amicus Curiae* replies that the Prosecution fails to demonstrate where sufficient notice was provided, adding:

> Given that the applicable legal theory was not clear at the stage of the trial's final submissions, it is difficult to conceive how [Krajišnik] could adequately prepare his defence case to meet the requirements of the legal theory on which he was convicted. It is manifestly inappropriate for the applicable theory of liability to be an afterthought to the trial.[696]

(b) Analysis

288. The Appeals Chamber is of the view that the Indictment made Krajišnik aware that he could be held liable for crimes committed by non-JCE members. It firstly notes that various paragraphs of the Indictment pleaded that the crimes had been committed by JCE members "and their agents":

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[691] *Amicus Curiae*'s Appeal Brief, paras 184-187. *Amicus Curiae* contends that the Prosecution only specified the nature of its case with respect to the alleged JCE in its Final Trial Brief: *Amicus Curiae*'s Appeal Brief, para. 184, referring to Prosecution's Final Trial Brief, para. 3.
[692] Prosecution's Response to *Amicus Curiae*, paras 122-126.
[693] Prosecution's Response to *Amicus Curiae*, paras 124-125, referring to Indictment, paras 8, 12, 16, 19-21, 22-23, 25-26.
[694] Prosecution's Response to *Amicus Curiae*, para. 126, referring to Prosecution pre-trial brief, paras 246, 260, 266, 271, 277, 303, 318, 321, 330, 332, 347, 356, 359, 363, 374, 376, 397, 399, 408, 412, 414, 450, 473, 494, 544; Prosecution Opening Statement, T. 314, 355, 356.
[695] Prosecution's Response to *Amicus Curiae*, para. 122.
[696] *Amicus Curiae*'s Reply, para. 63.

- Paragraph 12 alleges that Krajišnik "had *de facto* control and authority over the Bosnian-Serb Forces and Bosnian-Serb Political and Governmental Organs and their agents, who participated in the crimes alleged" in the Indictment;

- Paragraph 16 (Counts 1 and 2 – Genocide and Complicity in Genocide) alleges that significant sections of the Bosnian Muslim and Bosnian Croat groups "were targeted by Bosnian-Serb Forces and Bosnian-Serb Political and Governmental Organs and their agents for intended destruction";

- Paragraph 19 (Count 3 – Persecution, as well as Counts 4, 5 and 6 – Extermination and killing,[697] and Counts 7 and 8 – Deportation and Inhumane Acts[698]) alleges that "Bosnian Serb Forces and Bosnian Serb Political and Governmental Organs and their agents committed persecutions".[699]

289. The Appeals Chamber also notes that paragraph 8 of the Indictment reads that Krajišnik acted "through" associations, positions and memberships enumerated elsewhere in the Indictment. The commission of crimes by non-JCE members is also implied in paragraph 26 of the Indictment.[700]

290. The Appeals Chamber concludes that the Indictment put Krajišnik on notice that he could incur liability for the crimes committed by non-JCE members. In particular, the Appeals Chamber recalls that a JCE member's liability for crimes committed by a non-member of the JCE who is used by the former in accordance with the common objective, was within "the contours of joint criminal enterprise liability in customary international law".[701] This sub-ground is rejected.

D. Deportation (Ground 4)

291. The Trial Chamber found Krajišnik guilty of deportation as a crime against humanity pursuant to Article 7(1) of the Statute, for forced displacements of persons from a number of municipalities of Bosnia and Herzegovina, namely Banja Luka, Bijeljina, Bileća, Bosanski Novi, Bratunac, Brčko, Čajniče, Doboj, Foča, Gacko, Nevesinje, Pale, Prnjavor, Rogatica, Sanski Most, Vlasenica and Zvornik.[702] *Amicus Curiae* challenges these convictions.[703]

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[697] *See* Indictment, para. 25, incorporating by reference paragraphs 18 to 23.
[698] *See* Indictment, para. 26, incorporating by reference paragraphs 18 to 23.
[699] *See* also Indictment, paras 20-23.
[700] *See* Indictment, paras 12, 16, 19-21, 22-23, 25-26. Furthermore, paragraph 7 of the Indictment pleaded a very wide JCE including in particular "members of the Yugoslav People's Army (žJNA'), the Yugoslav Army (žVJ'), the army of the Serbian Republic of Bosnia and Herzegovina, later the army of the *Republika Srpska* (žVRS'), the Bosnian Serb Territorial Defence (žTO'), the Bosnian Serb police (žMUP'), and members of Serbian and Bosnian Serb paramilitary forces and volunteer units […] from the (Socialist) Federal Republic of Yugoslavia, the Republic of Serbia and the Republic of Montenegro". Thus, this paragraph put Krajišnik on notice that he could be held liable of the crimes committed by the members of various military and paramilitary forces, even if it suggested that this liability arose because these persons were also members of the JCE (rather than instruments of the JCE members).
[701] *Brdanin* Appeal Judgement, para. 413.
[702] Trial Judgement, paras 732, 1182. However, the Appeals Chamber in *Amicus Curiae*'s sub-ground 3(G) above, has only established links between physical perpetrators and JCE members for the crime of deportation in the municipalities

1. Submissions

292. *Amicus Curiae* alleges that the following elements must be established to prove deportation: (1) (a) a forced displacement, (b) of persons who are lawfully present in an area, (c) across a *de jure* or *de facto* state border, (d) without grounds permitted under international law; and (2) there must be an intent to remove permanently.[704] With respect to deportation across a *de facto* border, *Amicus Curiae* argues that it must be a *de facto* state border, otherwise the reference to a border and the distinction between deportation and forcible transfer would lose their meaning.[705]

293. *Amicus Curiae* then alleges four errors on the part of the Trial Chamber. First, he submits that the Trial Chamber failed to make the requisite predicate findings for a conviction for deportation.[706] Specifically, *Amicus Curiae* contends that the Trial Chamber did not find that the displacements had taken place without grounds permitted under international law[707] and that the displacements had occurred across a *de jure* or a *de facto* state border.[708] With regard to this last assertion, *Amicus Curiae* avers that the Trial Chamber did not specify "whether persons were displaced to Macedonia or Croatia in sufficiently significant numbers to constitute deportation" therefore leaving open the possibility that most or all displaced persons were only internally displaced within Bosnia and Herzegovina. *Amicus Curiae* adds that it is no answer to maintain that there was a *de facto* state border within Bosnia and Herzegovina because the Trial Chamber did not find that there was occupation of part of the territory of Bosnia by another state.[709]

294. Second, *Amicus Curiae* alleges that the Trial Chamber erred in law by failing to make the relevant findings with regard to each municipality.[710] *Amicus Curiae* submits that the Trial Chamber's global approach to the issue of deportation makes it impossible for Krajišnik to understand and challenge the Trial Judgement's findings.[711]

295. Third, *Amicus Curiae* argues that the Trial Chamber erred in law in finding that the Prosecution had established beyond reasonable doubt that: (1) any or any significant number of civilians had been displaced across a *de jure* or a *de facto* state border; (2) the displacements were

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of Bratunac, Zvornik, Sanski Most, Banja Luka, Bijeljina and Prnjavor. Consequently, *Amicus Curiae*'s submissions in relation to the remaining convictions of deportation are moot and do not have to be addressed under this ground of appeal.

[703] *Amicus Curiae*'s Notice of Appeal, paras 57-61. *Amicus Curiae* also alleges that the Trial Chamber erred in convicting Krajišnik for deportation as an act of persecution (*Amicus Curiae*'s Notice of Appeal, paras 58-59), but he does not develop this allegation in his Appeal Brief. It will therefore not be considered by the Appeals Chamber.

[704] *Amicus Curiae*'s Appeal Brief, para. 189.

[705] *Amicus Curiae*'s Appeal Brief, paras 190-191.

[706] *Amicus Curiae*'s Appeal Brief, paras 192-195.

[707] *Amicus Curiae*'s Appeal Brief, para. 192.

[708] *Amicus Curiae*'s Appeal Brief, paras 193-195. *See* also *Amicus Curiae*'s Reply, para. 67.

[709] *Amicus Curiae*'s Appeal Brief, paras 193-194.

[710] *Amicus Curiae*'s Appeal Brief, paras 196-198. *See* also *Amicus Curiae*'s Reply, para. 66.

not justified by any grounds permitted under international law; and (3) any or any significant number of civilians were displaced physically, or by some form of coercion, rather than fleeing because of other reasons.[712]

296. Fourth, *Amicus Curiae* submits that the Trial Chamber, in the alternative, committed an error of fact causing a miscarriage of justice by finding Krajišnik guilty of deportation, since no reasonable fact finder could have made such a finding based on the evidence presented at trial.[713]

297. The Prosecution agrees with *Amicus Curiae* that the Trial Chamber's application of the law on deportation was incorrect insofar as it "failed to perform the required case by case analysis of whether a sufficient *de facto* border was crossed with respect to displacement within [Bosnia and Herzegovina]."[714] The Prosecution however argues that the remainder of *Amicus Curiae*'s arguments are unfounded.[715]

298. The Prosecution submits that the Trial Chamber correctly stated the law on deportation;[716] contrary to *Amicus Curiae*'s assertion, deportation does not require proof of either an intention to displace permanently, or a minimum number of persons displaced. The Prosecution also argues that *Amicus Curiae*'s contention that "*de facto* border" necessarily mean *de facto* state border is not supported by the international humanitarian law sources he refers to.[717] The Prosecution recalls that the *Stakić* Appeal Judgement set out three alternatives as to what would be sufficient for deportation, namely, displacement across a *de jure* border to another country, displacement from occupied territory and displacement across a *de facto* border.[718] The Prosecution thus contends that it cannot be concluded that a *de facto* border absolutely needs to be a state border or that proving a situation of occupation is required in order to establish a *de facto* border.[719]

299. The Prosecution then submits that the Trial Chamber was clearly aware that deportation and forcible transfer required displacements "without grounds permitted in international law",[720] and that it did find that the displacements in the case at hand were illegal as they occurred as a direct result of the persecutory regime led by Radovan Karadžić and Krajišnik.[721]

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[711] *Amicus Curiae*'s Appeal Brief, paras 196, 198.
[712] *Amicus Curiae*'s Appeal Brief, para. 199.
[713] *Amicus Curiae*'s Appeal Brief, para. 201.
[714] Prosecution's Response to *Amicus Curiae*, para. 127; *see* also for Krajišnik, AT. 327.
[715] Prosecution's Response to *Amicus Curiae*, para. 127.
[716] Prosecution's Response to *Amicus Curiae*, para. 128, referring to Trial Judgement, para. 723.
[717] Prosecution's Response to *Amicus Curiae*, paras 128-129.
[718] Prosecution's Response to *Amicus Curiae*, para. 129, referring to *Stakić* Appeal Judgement, para. 300.
[719] Prosecution's Response to *Amicus Curiae*, paras 129-131.
[720] Prosecution's Response to *Amicus Curiae*, para. 132, referring to Trial Judgement, paras 723, 725.
[721] Prosecution's Response to *Amicus Curiae*, para. 133, referring to Trial Judgement, paras 729-731, 1144.

300. As to the adequacy of the Trial Chamber's findings concerning the crossing of borders, the Prosecution asserts that the Trial Chamber convicted Krajišnik of deportation for two types of displacements: (1) displacements across *de jure* borders to other countries such as Macedonia and Croatia and (2) displacements to locations outside Bosnian-Serb control but within Bosnia and Herzegovina.[722] The Prosecution concedes that, with regard to the second type of displacements the Trial Chamber should have analysed, for each municipality, whether a *de facto* border was crossed; as a consequence of its failure to do so, the findings on deportation relating to a number of municipalities should be revisited by the Appeals Chamber.[723]

301. The Prosecution further argues that the Trial Chamber made sufficient factual findings with respect to deportation and forcible transfer for each of the relevant municipalities.[724]

302. Finally, the Prosecution argues that *Amicus Curiae* has failed to substantiate his allegations that the Trial Chamber committed an error of fact in finding Krajišnik guilty of deportation.[725]

303. In reply, *Amicus Curiae* reasserts that the Trial Chamber failed to make a specific finding about the illegality of the displacements and adds that the Prosecution's response only refers to "contextual statements concerning the element of force which *could* give rise to an inference of illegality", which is insufficient.[726] He also reasserts that the Trial Chamber failed to make the requisite findings as to displacements across *de jure* borders,[727] and with respect to each municipality.[728]

2. Analysis

304. The Appeals Chamber has held "that the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law"[729] and that the *mens rea* of that crime does not

[722] Prosecution's Response to *Amicus Curiae*, para. 134, referring to Trial Judgement, para. 728.
[723] More precisely, the Prosecution explains that the Appeals Chamber should (1) quash the conviction for deportation and enter a conviction for forcible transfer for the forced displacements from the municipalities of Brčko, Doboj, Nevesinje and Vlasenica; (2) quash the conviction for deportation but uphold the conviction for forcible transfer for the forced displacements from the municipalities of Bratunac, Sanski Most, Pale and Rogatica;[723] and (3) affirm the convictions for deportation and forcible transfer for the forced displacements from the municipality of Bijeljina[723] (Prosecution's Response to *Amicus Curiae*, paras 135-137, 139). As previously stated, these submissions are moot.
[724] Prosecution's Response to *Amicus Curiae*, paras 140-142. The Prosecution refers in particular to Part 4 of the Trial Judgement which provides details on the displacements in each municipality.
[725] Prosecution's Response to *Amicus Curiae*, para. 143.
[726] *Amicus Curiae*'s Reply, para. 65 (emphasis in original).
[727] *Amicus Curiae*'s Reply, para. 67.
[728] *Amicus Curiae*'s Reply, para. 66.
[729] *Stakić* Appeal Judgement, para. 278. *See* also para. 300, which adds that "[c]ustomary international law also recognises that displacement from žoccupied territory', as expressly set out in Article 49 of Geneva Convention IV and

require an intention to displace the persons across the border on a permanent basis.[730] The Trial Chamber correctly identified the applicable law on deportation.[731]

305. *Amicus Curiae* alleges that for a forced displacement across a *de facto* border to constitute deportation, the displacement must be across a *de facto state* border.[732] As conceded by the Prosecution,[733] in finding that deportation had occurred in several municipalities, the Trial Chamber did not examine whether the forced displacement occurred across a *de facto* border such that the displacement amounted to deportation. Thus, if any finding of deportation is to be maintained, it is on the basis that the displacement occurred across a *de jure* state border. Therefore, the Appeals Chamber refrains from deciding this question.

306. The Appeals Chamber will now examine the specific errors alleged by *Amicus Curiae*.

(a) Displacements not authorised under international law

307. *Amicus Curiae* first argues that the Trial Chamber failed to find that the displacements had taken place without grounds permitted under international law.[734] He also asserts that the Prosecution had not established beyond reasonable doubt that the displacements had taken place in the absence of grounds permitted under international law, but he does not develop this assertion further.[735]

308. At the outset, the Appeals Chamber notes that the Trial Chamber correctly set out that "[d]eportation and forcible transfer both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law",[736] adding that international humanitarian law recognises limited circumstances under which the displacement of civilians during armed conflict is allowed.[737] The Trial Chamber was thus clearly aware of the requirement that the forced displacement be "without grounds permitted under international law". While the Trial Chamber did not explicitly find that the forced displacements in the case at hand were "without grounds permitted under international law", the Appeals Chamber is not satisfied that this defect of the Trial Judgement invalidates the verdict. Indeed, several sections of the Trial Judgement make clear that the Trial Chamber implicitly found that the forced displacements were

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as recognised by numerous Security Council Resolutions, is also sufficient to amount to deportation" (footnotes omitted).
[730] *Stakić* Appeal Judgement, paras 278, 307; *Brdanin* Appeal Judgement, para. 206.
[731] Trial Judgement, paras 722-726.
[732] *Amicus Curiae*'s Appeal Brief, paras 190-191.
[733] Prosecution's Response to *Amicus Curiae*, paras 127, 135-139.
[734] *Amicus Curiae*'s Appeal Brief, para. 192.
[735] *Amicus Curiae*'s Appeal Brief, para. 199.
[736] Trial Judgement, para. 723.
[737] Trial Judgement, para. 725.

"without grounds permitted under international law", and that they occurred as a direct result of the "severe living conditions" created by the Serb authorities and forces.[738] The Appeals Chamber agrees: clearly, the forced displacements could not be justified under international law.[739] In fact, *Amicus Curiae* does not even suggest that they could. These arguments are rejected.

(b) Displacements across a border

309. *Amicus Curiae* avers that the Trial Chamber failed to make a finding as to whether a sufficient number of displacements occurred across a *de jure* or a *de facto* border. It is unclear whether *Amicus Curiae* is challenging the absence of finding regarding the nature of the border crossed, or the uncertainty around the exact number of deported persons.[740] With regard to the latter, the Appeals Chamber agrees with the statement in the *Stakić* Trial Judgement that deportation does not require "that a minimum number of individuals must have been forcibly transferred for the perpetrator to incur criminal responsibility" as such a requirement would be "tantamount to negating the protective effect of the prohibition against deportation."[741] The Appeals Chamber also recalls that, except for extermination, it is not necessary that a crime be carried out against a multiplicity of victims to constitute a crime against humanity: an act directed against a limited number of victims or even against a single victim can constitute a crime against humanity, provided it forms part of a widespread or systematic attack directed against a civilian population.[742] This argument of *Amicus Curiae* is therefore dismissed.

310. As for the argument that the Trial Chamber failed to find that a *de jure* or *de facto* border was crossed, the Appeals Chamber finds, as conceded by the Prosecution,[743] that the Trial Chamber "failed to perform the required analysis of whether a sufficient *de facto* border was crossed with respect to displacements within BiH" and that some findings on deportation must fall.[744] However, the Appeals Chamber is of the view that the Trial Chamber, with respect to some municipalities, did

[738] *See* Trial Judgement, Part 4 (describing systematically the forced displacements in the Indictment municipalities) and paras 727-732.
[739] In this connection, the Appeals Chamber recalls that the displacement for humanitarian reasons "is not justifiable [under international law] where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity": *Stakić* Appeal Judgement, para. 287.
[740] *Amicus Curiae*'s Appeal Brief, para. 193.
[741] *Stakić* Trial Judgement, para. 685.
[742] *Nahimana et al.* Appeal Judgement, para. 924; *Deronjić* Appeal Judgement, para. 109; *Kordić and Čerkez* Appeal Judgement, para. 94; *Blaškić* Appeal Judgement, para. 101; *Kunarac et al.* Appeal Judgement, para. 96.
[743] Prosecution's Response to *Amicus Curiae*, para. 127. *See* also *ibid*., para. 135.
[744] Prosecution's Response to *Amicus Curiae*, paras 135-139.

make the required findings on the displacements across *de jure* borders in Part 4 of the Trial Judgement.[745]

(c) Alleged failure to make the relevant findings in relation to each municipality

311. *Amicus Curiae* argues that, in finding that the elements of deportation had been met, the Trial Chamber only made a global finding for all municipalities, which made it impossible for Krajišnik to understand what was found with regard to each of the municipalities.[746]

312. The Appeals Chamber notes that *Amicus Curiae* fails to provide precise references to relevant paragraphs in the Trial Judgement against which his challenge is made. The Appeals Chamber nonetheless understands that *Amicus Curiae* is, in all probabilities, referring to paragraphs 727 to 732 of the Trial Judgement, where the Trial Chamber established a list of municipalities where it considered that deportation occurred.

313. The Appeals Chamber does not agree with *Amicus Curiae* on the lack of specificity of the findings with regard to each relevant municipality. As noted by the Prosecution,[747] the Trial Chamber conducted a thorough analysis of the crimes perpetrated in each municipality in Part 4 of the Trial Judgement. The legal findings on the crime of deportation must therefore be read in conjunction with these factual findings. This argument is rejected.

(d) Alleged errors of the Trial Chamber in finding that the elements of deportation had been found beyond reasonable doubt

314. In this third sub-ground of appeal, *Amicus Curiae* asserts that the Trial Chamber erred in finding that the Prosecution had demonstrated beyond reasonable doubt that civilians were displaced across a *de jure* or a *de facto* state border, that the displacements were perpetrated without grounds permitted under international law and that the civilians were displaced physically through coercion rather than fleeing because of other reasons.[748] The Appeals Chamber recalls that it has already concluded that the Trial Chamber implicitly found that the displacements were perpetrated without grounds permitted under international law, and that this was reasonable.[749]

315. The other assertions made by *Amicus Curiae* are not developed in any way; he thus fails to meet his burden on appeal. Nevertheless, the Appeals Chamber agrees with the Prosecution that the

[745] *See* Trial Judgement, paras 366 (finding that civilians were transported from Zvornik to Serbia), 380 and 392 (finding that Muslims and Croats were forced to flee Banja Luka and go to Croatia and other places), 504 and 507 (finding that Muslims and Croats were forced to leave Prnjavor and go to Hungary).
[746] *Amicus Curiae*'s Appeal Brief, paras 196-198.
[747] Prosecution's Response to *Amicus Curiae*, para. 141.
[748] *Amicus Curiae*'s Appeal Brief, para. 199.

Trial Chamber erred in finding that deportation had occurred in several municipalities without finding that a sufficient *de facto* border had been crossed. Accordingly, the Appeals Chamber will examine the Trial Chamber's factual findings to determine whether the findings of deportation in relation to each municipality can be maintained. The Appeals Chamber will also explain briefly why it was reasonable for the Trial Chamber to find that the displacements in the case at hand were in fact forcible displacements.

(i) Review of the findings for each municipality

316. Having carefully reviewed the factual findings for each relevant municipality, the Appeals Chamber notes that the Trial Chamber expressly found that forced displacements of persons across *de jure* state borders occurred in the municipalities of Zvornik,[750] Banja Luka,[751] and Prnjavor.[752] The Trial Chamber then correctly went on to find that these displacements constituted the crime against humanity of deportation.[753]

317. However, the Trial Chamber failed to find that individuals from the municipalities of Bijeljina,[754] Bratunac,[755] and Sanski Most[756] were forcibly displaced over a *de jure* state border. Moreover, the Trial Chamber did not make any finding with regard to the crossing of any *de facto* border. Therefore, the Trial Chamber erred in entering convictions for the crime of deportation with respect to these municipalities.

318. The Prosecution also argues that, with regard to the municipalities of Brčko, Doboj, Nevesinje and Vlasenica, the factual findings made by the Trial Chamber indicate that persons were forcibly displaced, but no conviction for other inhumane acts (forcible transfer) was entered by the Trial Chamber.[757] The Appeals Chamber agrees[758] and it finds that the Trial Chamber erred in failing to enter such convictions. Nonetheless, in the absence of an appeal of the Prosecution on this question, the Appeals Chamber will not enter convictions for other inhumane acts (forcible transfer) for these municipalities.

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[749] *See supra* III.D.2(a).
[750] Trial Judgement, para. 366.
[751] Trial Judgement, paras 380, 392.
[752] Trial Judgement, paras 504, 507.
[753] Trial Judgement, para. 732.
[754] Trial Judgement, paras 307, 309. The Prosecution argues that the Trial Chamber relied on Witness Davidović's testimony for its deportation finding in Bijeljina (Prosecution's Response to *Amicus Curiae*, para. 139, referring to Davidović, T. 14235, cited at footnote 700 of the Trial Judgement. *See* also for *Amicus Curiae*, AT. 328-329). The Appeals Chamber, however, notes that the context in which the Trial Chamber referred to this part of Witness Davidović's testimony is unrelated to the question of displacement across a *de jure* border (Trial Judgement, para. 307 and fn. 700).
[755] Trial Judgement, paras 317, 320.
[756] Trial Judgement, para. 516.
[757] Prosecution's Response to *Amicus Curiae*, para. 136.
[758] *See* Trial Judgement, paras 337 (Brčko), 345 (Doboj), 358 (Vlasenica), 670 (Nevesinje).

(ii) Were the displacements forced?

319. Turning to *Amicus Curiae*'s assertion that the Trial Chamber erred in finding that the displacements were forced, the Appeals Chamber recalls that "the term žforced', when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[759] The Trial Chamber determined that the Serb authorities and forces created "severe living conditions" for Muslims and Croats which made it impossible for them to remain in their municipalities.[760] Moreover, with respect to a number of municipalities, the Trial Chamber found that "Serb authorities and Serb forces often proceeded to physically drive [the Muslims and Croats] out."[761] *Amicus Curiae* does not show that these findings were unreasonable or that no trier of fact could reasonably find that the displacements were in fact "forcible displacements" within the meaning of the crime of deportation.[762]

(e) Alleged errors of fact

320. *Amicus Curiae* alleges alternatively that the Trial Chamber committed errors of fact which occasioned a miscarriage of justice.[763] However, he does not provide any specific argument or reference in this connection. The Appeals Chamber therefore finds that *Amicus Curiae*'s submissions under this sub-ground of appeal fail to meet the standard of review and declines to address them further.

3. Conclusion

321. In light of the above, the Appeals Chamber partly grants the fourth ground of appeal submitted by *Amicus Curiae* and quashes the convictions for deportation as a crime against humanity for the municipalities of Bijeljina, Bratunac and Sanski Most. The remainder of this ground of appeal is dismissed.

[759] *Stakić* Appeal Judgement, para. 281. *See* also *Krnojelac* Appeal Judgement, paras 229, 233. The Trial Chamber duly noted the applicable law on this question: Trial Judgement, para. 724.
[760] Trial Judgement, para. 729.
[761] Trial Judgement, para. 730.
[762] In particular, *Amicus Curiae*'s assertion that civilians were "fleeing because of fear of being caught in hostilities between armed forces or fear of discrimination or for other reasons not amounting to coercion" (*Amicus Curiae*'s Appeal Brief, para. 199) is unsupported and thus insufficient to show an error of the Trial Chamber.
[763] *Amicus Curiae*'s Appeal Brief, para. 201.

E. Forcible transfer (Ground 5)

322. The Trial Chamber found Krajišnik guilty of inhumane acts (forcible transfer) as a crime against humanity pursuant to Article 7(1) of the Statute, for displacements of persons from a number of municipalities of Bosnia and Herzegovina, namely Bijeljina, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Bratunac, Čajniče, Čelinac, Donji Vakuf, Foča, Gacko, Hadžići, Ilidža, Ilijaš, Ključ, Novi Grad, Novo Sarajevo, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Trnovo, Višegrad and Zvornik.[764] *Amicus Curiae* challenges this conviction.[765]

1. Submissions

323. *Amicus Curiae* first submits that the Trial Chamber erred in law when finding Krajišnik guilty of other inhumane acts (forcible transfer) as a crime against humanity, without making the prior findings that these displacements were of sufficient gravity to constitute other inhumane acts, that they caused serious mental or physical harm, or constituted a serious attack on human dignity, and that the acts constitutive of forcible transfer were intentionally perpetrated by Krajišnik or by a person for which Krajišnik bears criminal responsibility.[766]

324. Second, *Amicus Curiae* submits that the Trial Chamber failed to find that the Prosecution proved beyond reasonable doubt, for each relevant municipality, that the displacements of persons occurred without lawful grounds and that a significant number of persons were physically displaced by coercion rather than fleeing because of other reasons.[767] With regard to this last point, *Amicus Curiae* further submits that the Trial Chamber should have considered the possibility that the alleged victims could have fled involuntarily, but out of necessity. This, for *Amicus Curiae*, would not amount to coercion and would thus not trigger Krajišnik's individual criminal responsibility.[768]

325. Finally, *Amicus Curiae* argues that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice in finding Krajišnik guilty of other inhumane acts for acts of

[764] Trial Judgement, paras 732, 1182. However, the Appeals Chamber in *Amicus Curiae*'s sub-ground 3(G) above, has only established links between physical perpetrators and JCE members for the crime of other inhumane acts (forcible transfer) in the municipalities of Bijeljina, Bosanska Krupa, Bratunac, Sanski Most, Sokolac, Trnovo and Zvornik. Consequently, *Amicus Curiae*'s submissions in relation to the remaining convictions of other inhumane acts (forcible transfer) are moot and do not have to be addressed under this ground of appeal.
[765] *Amicus Curiae*'s Notice of Appeal, paras 62-66. *Amicus Curiae* also alleges that the Trial Chamber erred in convicting Krajišnik for forcible transfer as an act of persecution (*Amicus Curiae*'s Notice of Appeal, paras 63-64), but he does not develop this allegation in his Appeal Brief. It will therefore not be considered by the Appeals Chamber.
[766] *Amicus Curiae*'s Appeal Brief, paras 204-205; *Amicus Curiae*'s Reply, para. 68.
[767] *Amicus Curiae*'s Appeal Brief, para. 206.
[768] *Amicus Curiae*'s Appeal Brief, paras 207-208; *Amicus Curiae*'s Reply, para. 69.

forcible transfer, as no reasonable fact finder could have made such a finding based on the evidence presented at trial.[769]

326. The Prosecution responds that the Trial Chamber made all the necessary findings in support of the conviction for other inhumane acts (forcible transfer). The Prosecution further argues that the Trial Chamber "was not required to determine whether the specific underlying acts of displacement were sufficiently serious to qualify as other inhumane acts under Article 5(i) because the same acts were sufficiently serious to qualify as deportation under Article 5(d)."[770]

327. The Prosecution submits that, contrary to what is asserted by *Amicus Curiae*, the Trial Chamber explicitly found that Krajišnik intended the forcible transfers, adding that the forcible displacement of Muslims and Croats was the very aim of the discriminatory attack against these groups and that it constituted the JCE common objective.[771]

328. As to *Amicus Curiae*'s arguments on "a threshold requirement and the absence of legal grounds", the Prosecution contends that they should be dismissed for the reasons already set out in relation to the fourth ground of appeal submitted by *Amicus Curiae*. The Prosecution adds that *Amicus Curiae*'s assertion that the Trial Chamber did not properly consider the forced nature of the displacements is unsupported.[772]

329. Finally, the Prosecution argues that *Amicus Curiae* did not substantiate his assertion that the Trial Chamber committed an error of fact.[773]

2. Analysis

(a) Alleged error regarding the threshold of seriousness required for forcible transfer as other inhumane acts

330. The Appeals Chamber has held that "acts of forcible transfer *may* be sufficiently serious as to amount to other inhumane acts".[774] Accordingly, a Trial Chamber should examine if the specific instances of forcible transfer in the case before it were sufficiently serious to amount to "other inhumane acts" under Article 5(i) of the Statute. The Trial Chamber did not do so in the present case; rather, it seemed to have assumed that the acts of forcible transfer amounted to "other

[769] *Amicus Curiae*'s Appeal Brief, para. 209.
[770] Prosecution's Response to *Amicus Curiae*, para. 144. *See* also para. 146.
[771] Prosecution's Response to *Amicus Curiae*, para. 148, referring to Trial Judgement, paras 809, 1097-1099, 1119.
[772] Prosecution's Response to *Amicus Curiae*, para. 149.
[773] Prosecution's Response to *Amicus Curiae*, para. 150.
[774] *Stakić* Appeal Judgement, para. 317 (emphasis added).

inhumane acts" under Article 5(i) of the Statute.[775] The Appeals Chamber finds that this was in error, but is not convinced that this error invalidates the Appellant's conviction for other inhumane acts (forcible transfer).

331. When finding that specific acts of forcible transfer amount to "other inhumane acts" under Article 5(i) of the Statute, a Trial Chamber has to be convinced that the forcible transfer is of a similar seriousness to other enumerated crimes against humanity.[776] This condition is satisfied in the present case. The acts of forcible transfer[777] were of similar seriousness to the instances of deportation,[778] as they involved a forced departure from the residence and the community, without guarantees concerning the possibility to return in the future, with the victims of such forced transfers invariably suffering serious mental harm.[779]

332. *Amicus Curiae* also alleges that the Trial Chamber failed to find that the acts or omissions of displacing persons were performed intentionally by Krajišnik or by person(s) for which he bears liability. The Appeals Chamber disagrees. The Trial Chamber clearly found that the Serb authorities and Serb forces intended the forced displacements.[780] Further, the Trial Chamber concluded that Krajišnik

> knew about, and intended, the mass detention and expulsion of civilians […]. He wanted the Muslims and Croats moved out of the Bosnian-Serb territories in large numbers, and if suffering, death, and destruction were necessary to achieve Serb domination and a viable statehood, he accepted that many Muslims and Croats of all ages would pay a heavy price.[781]

Amicus Curiae fails to show that these findings were erroneous. This sub-ground is rejected.

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[775] Trial Judgement, paras 722-726.
[776] *Blagojević and Jokić* Trial Judgement, para. 626; *Galić* Trial Judgement, para. 152; *Vasiljević* Trial Judgement, para. 234; *Krnojelac* Trial Judgement, para. 130. *See* also *Kupreškić* Trial Judgement, para. 566, and *Kayishema and Ruzindana* Trial Judgement, paras 151, 154 (stating that the acts or omissions must be as serious as the other crimes against humanity).
[777] *See* Trial Judgement paras 309 (Bijeljina), 402 (Bosanska Krupa), 314 (Bratunac), 533 (Sanski Most), 693 (Sokolac), 593 (Trnovo) and 365 (Zvornik).
[778] *See* Trial Chamber Judgement paras 380 (Banja Luka), 611 (Bileća), 419 (Bosanski Novi), 621 (Čajniče), 637 (Foča), 658-659 (Gacko), 507 (Prnjavor) and 366 (Zvornik).
[779] In this connection, *see Blagojević and Jokić* Trial Judgement, para. 629; *Krstić* Trial Judgement, para. 523; *Kupreškić et al.* Trial Judgement, para. 566.
[780] *See* for instance Trial Judgement, paras 729 ("Serb municipal authorities and Serb forces created severe living conditions for Muslims and Croats which aimed, and succeeded, in making it practically impossible for most of them to remain"), 730 ("Serb authorities and Serb forces often proceeded to physically drive these groups [*i.e.*, the Muslims and Croats who remained in their homes despite the killings, arrests and widespread discrimination] out").
[781] Trial Judgement, para. 1119. The Trial Chamber also found Krajišnik participated and was one of the driving forces of the joint criminal enterprise, which objective was "the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina": Trial Judgement, para. 1089, citing Indictment, paras 4-5.

(b) Alleged error regarding the failure of the Trial Chamber to make the predicate findings for the crime of forcible transfer

333. Under this sub-ground, *Amicus Curiae* argues that the Trial Chamber failed to make a finding, for each municipality, as to whether displacements of persons occurred without lawful grounds and whether a significant number of persons were physically displaced by coercion rather than fleeing because of other reasons.[782] The Appeals Chamber notes that these are essentially the same arguments as the ones *Amicus Curiae* made under his fourth ground of appeal, with respect to the crime of deportation, and they are rejected for the same reasons: 1) the Trial Chamber implicitly found that the forcible transfers were without lawful grounds; 2) just as with the crime of deportation, the crime of other inhumane acts (forcible transfer) does not require that a minimum number of individuals be forcibly transferred; and 3) the Trial Chamber reasonably found that the victims were either physically forced or did not genuinely consent to their displacement.[783]

(c) Alleged error of fact

334. In addition, *Amicus Curiae* alleges that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice.[784] However, he does not provide any specific argument or reference in this connection. The Appeals Chamber therefore finds that *Amicus Curiae*'s submissions under this sub-ground of appeal fail to meet the standard of review and declines to address them further.

3. Conclusion

335. In light of the foregoing, the fifth ground of appeal submitted by *Amicus Curiae* is dismissed in its entirety.

F. Krajišnik's hierarchical position (Ground 6)

1. Submissions

336. *Amicus Curiae* submits that the Trial Chamber erred in fact when making findings with respect to Krajišnik's hierarchical position.[785] He contends that this error of fact occasioned a

[782] *Amicus Curiae*'s Notice of Appeal, para. 62; *Amicus Curiae*'s Appeal Brief, para. 206.
[783] *See supra* III.D.
[784] *Amicus Curiae*'s Appeal Brief, para. 209.
[785] *Amicus Curiae*'s Notice of Appeal, para. 67; *Amicus Curiae*'s Appeal Brief, para. 210.

miscarriage of justice,[786] warranting Krajišnik's convictions on Counts 3-5, 7 and 8 to be quashed.[787]

337. More specifically, *Amicus Curiae* asserts that the Trial Chamber erred in concluding (i) that Krajišnik was "number two" in the Bosnian-Serb hierarchy; (ii) that Krajišnik and Radovan Karadžić ran Republika Srpska "as a personal fief"; (iii) that Krajišnik had direct access to the levers of Bosnian-Serb state power; and (iv) that he "actively supervised" operations of the Bosnian-Serb armed forces and that the Bosnian-Serb Assembly was a forum for the "formulation and coordination of military strategy".[788] According to *Amicus Curiae*, the Trial Chamber erroneously relied for these important findings nearly exclusively on the evidence of former Minister of Justice Momčilo Mandić and former Prime Minister Branko Đerić, witnesses who were unreliable as self-interested or accomplice witnesses.[789] *Amicus Curiae* adds that the Trial Chamber misconstrued Witness Mandić's evidence. He further submits that the Trial Chamber expressly found that Krajišnik lacked effective control, a finding which contradicts the impugned conclusions.[790] Finally, he refers to contradictory evidence which the Trial Chamber allegedly failed to explain and challenges the use of terms such as "number two" and "personal fief" for their inherent vagueness and generalisation.[791]

338. *Amicus Curiae* moreover alleges that Radovan Karadžić's additional evidence admitted on appeal lends further support to his submissions that the Trial Chamber erred in assessing Krajišnik's hierarchical position.[792]

339. In support of his first submission, *Amicus Curiae* alleges that Radovan Karadžić's evidence demonstrates that the Trial Chamber erred in finding that Krajišnik was "number two" of the Bosnian-Serb leadership, after Karadžić.[793] He argues that the Karadžić Rule 92 *ter* Statement rather indicates that the key decision-making individuals were the three members of the Presidency, namely Nikola Koljević, Biljana Plavšić and Karadžić,[794] and that Krajišnik never took part in the decision making within the Presidency.[795] *Amicus Curiae* asserts that Karadžić's evidence shows that Krajišnik only attended sessions of the Presidency to provide information in his capacity as President of the Assembly, in conformity with his obligation under the Parliamentary Rules of

[786] *Amicus Curiae*'s Notice of Appeal, para. 68.
[787] *Amicus Curiae*'s Notice of Appeal, para. 70.
[788] *Amicus Curiae*'s Appeal Brief, para. 210, referring to Trial Judgement, paras 949, 975, 1085, as well as 987.
[789] *Amicus Curiae*'s Appeal Brief, para. 211; *Amicus Curiae*'s Reply, para. 70.
[790] *Amicus Curiae*'s Appeal Brief, para. 211, referring to Trial Judgement, para. 1121.
[791] *Amicus Curiae*'s Appeal Brief, para. 211, referring to Trial Judgement, para. 1085.
[792] *Amicus Curiae*'s Supplemental Brief, paras 80-81.
[793] *Amicus Curiae*'s Supplemental Brief, paras 82-84.
[794] *Amicus Curiae*'s Supplemental Brief, para. 82, referring to AD3, pp. 4, 6, 12; AT. 595.
[795] *Amicus Curiae*'s Supplemental Brief, para. 82, referring to AD3, p. 4; AT. 599.

Procedure,[796] and that in the same vein, government Ministers would occasionally do the same, without for that reason only being considered members of the Presidency.[797]

340. In support of his second submission, *Amicus Curiae* alleges that Radovan Karadžić's evidence shows that the Trial Chamber erred in finding that Krajišnik and Karadžić ran Republika Sprksa as a "personal fief".[798] *Amicus Curiae* argues that the Karadžić Rule 92 *ter* Statement demonstrates that Republika Srpska was a republic "with a deeply entrenched constitutional tradition";[799] that Krajišnik's role within the Bosnian-Serb Assembly was merely "to maintain order and govern parliamentary procedure, but not to act as a substantive driver in the decision making process";[800] and that Krajišnik "did not involve himself in government operations extraneous to his parliamentary post".[801]

341. In support of his third submission, *Amicus Curiae* alleges that Radovan Karadžić's testimony shows that Krajišnik did not have direct access to the levers of Bosnian-Serb state powers.[802] For example, the Karadžić Rule 92 *ter* Statement demonstrates that Krajišnik did not: (i) attend cabinet meetings and influence the work of the cabinet;[803] (ii) participate in the establishment of crisis staffs and have impact on their work;[804] (iii) participate in the establishment of war presidencies and have influence on their work;[805] (iv) take part in the setting up of war commissions;[806] (v) participate in the setting up of regional and municipal structures;[807] (vi) take part in the founding of the SDS; and that he was (vii) not a member of its executive committee; [808] (viii) not close to Momčilo Mandić or Mico Stanišić;[809] and (ix) never regarded by Karadžić as "his private prime minister".[810]

342. Finally, *Amicus Curiae* argues that the Karadžić Rule 92 *ter* Statement demonstrates that the Trial Chamber erred in finding that Krajišnik actively supervised operations of the Bosnian-Serb

[796] *Amicus Curiae*'s Supplemental Brief, para. 83, referring to AD3, p. 4.
[797] *Amicus Curiae*'s Supplemental Brief, para. 84, referring to AT. 538-539, 545-546, 568-569, 571, 582-583, 595-598, 601.
[798] *Amicus Curiae*'s Supplemental Brief, paras 85-87.
[799] *Amicus Curiae*'s Supplemental Brief, para. 85, referring to AD3, p. 5-7; AT. 533.
[800] *Amicus Curiae*'s Supplemental Brief, para. 86, referring to AD3, p. 9; AT. 570.
[801] *Amicus Curiae*'s Supplemental Brief, para. 87, quoting AD3, p. 12. As an example, *Amicus Curiae* stresses that Krajišnik had no authority to carry out investigations, and that as President of the Assembly, he did not have his own investigative organ. *See Amicus Curiae*'s Supplemental Brief, para. 87, referring to AD3, pp. 10-11.
[802] *Amicus Curiae*'s Supplemental Brief, paras 88-89. *See* in particular para. 89, where *Amicus Curiae* refers to Karadžić's testimony that Krajišnik "had no powever whatsoever within the government" (AT. 575-576).
[803] *Amicus Curiae*'s Supplemental Brief, para. 88 a., referring to AD3, p. 6.
[804] *Amicus Curiae*'s Supplemental Brief, para. 88 b., referring to AD3, p. 7.
[805] *Amicus Curiae*'s Supplemental Brief, para. 88 c., referring to AD3, p. 8.
[806] *Amicus Curiae*'s Supplemental Brief, para. 88 d., referring to AD3, p. 8.
[807] *Amicus Curiae*'s Supplemental Brief, para. 88 e., referring to AD3, p. 9.
[808] *Amicus Curiae*'s Supplemental Brief, para. 88 f., referring to AD3, p. 9.
[809] *Amicus Curiae*'s Supplemental Brief, para. 88 g., referring to AD3, p. 12.
[810] *Amicus Curiae*'s Supplemental Brief, para. 88 h., referring to AD3, p. 12.

armed forces and that the Bosnian-Serb Assembly was a forum for the formulation and coordination of military strategy. The Karadžić Rule 92 *ter* Statement and his testimony allegedly show that Krajišnik had no influence over military activities,[811] and was not in the military chain of command.[812] *Amicus Curiae* finally argues that according to Karadžić, Krajišnik had no authority over the MUP and in the setting up of the TO, and that he did not give orders to the Main Staff.[813]

343. The Prosecution responds that this ground of appeal should be dismissed.[814] It argues that *Amicus Curiae* ignores relevant factual findings and supporting evidence, which underlie the findings of the Trial Chamber.[815]

344. In response to Radovan Karadžić's additional evidence, the Prosecution argues that his assertions with respect to Krajišnik's hierarchical position in the Republika Srpska are contradicted by the evidence.[816]

345. *Amicus Curiae* replies that the Prosecution misconstrues his submissions relating to Krajišnik's "hierarchical position" by erroneously addressing this issue in terms of his "power and authority".[817] He also disputes that the section of the Trial Judgement entitled "Knowledge and support for take-over operations" supports the finding that Krajišnik had direct access to the levers of Bosnian-Serb state power.[818]

2. Analysis

346. The Appeals Chamber stresses that the four findings challenged by *Amicus Curiae* cannot be examined in isolation, but have to be considered together with other factual findings which underlie them. In this connection, the Appeals Chamber notes that the findings on what *Amicus Curiae* refers to as Krajišnik's "hierarchical position"[819] within the Bosnian-Serb leadership are intrinsically linked to the findings on Krajišnik's power and authority in the Bosnian-Serb Republic (later Republika Srpska). In particular, the Trial Chamber found that Krajišnik was "number two" after Radovan Karadžić in terms of "power and influence".[820] The Appeals Chamber thus rejects *Amicus*

[811] *Amicus Curiae*'s Supplemental Brief, para. 90, referring to AD3, p. 12; AT. 592, 604-605.
[812] *Amicus Curiae*'s Supplemental Brief, para. 90, referring to AD3, p. 14.
[813] *Amicus Curiae*'s Supplemental Brief, para. 90, referring to AD3, pp. 7-10.
[814] Prosecution's Response to *Amicus Curiae*, para. 158.
[815] Prosecution's Response to *Amicus Curiae*, paras 151-155, referring to Trial Judgement, paras 137, 140, 168-169, 173, 174-182, 184-186, 262, 267-271, 272-279, 285, 912, 935-948, 957, 976-986, 988-1005, 1018, 1076. *See* also Prosecution's Response to *Amicus Curiae*, paras 156-157.
[816] Prosecution's Supplemental Brief, paras 50-53, 56, 59-62, 82-83, referring to extensive testimonial evidence and trial exhibits.
[817] *Amicus Curiae*'s Reply, para. 71.
[818] *Amicus Curiae*'s Reply, para. 72.
[819] *Amicus Curiae*'s Reply, para. 71.
[820] Trial Judgement, para. 1085.

Curiae's argument that Krajišnik's power and authority is unrelated to his alleged position as "number two" in the Bosnian-Serb hierarchy.[821]

(a) Alleged dearth and unreliability of evidence

347. *Amicus Curiae* argues that the Trial Chamber relied "nearly exclusively" on the testimonies of Witnesses Mandić and Đerić for its finding at paragraph 1085 of the Trial Judgement that Krajišnik was "number two" after Radovan Karadžić.[822] The Appeals Chamber is not persuaded by this argument. The Trial Chamber found that the testimonies of Witnesses Mandić and Đerić in this respect were correct "in light of all the evidence";[823] the Trial Chamber's finding is thus not based only on the evidence of Witnesses Mandić and Đerić. While the Trial Chamber did not repeat all the evidence underlying its finding, it is obvious that it referred to the evidence discussed throughout Parts 3 and 6 of the Trial Judgement and demonstrating Krajišnik's power and influence.[824] This evidence, which also underlies in part the impugned conclusions in paragraphs 949, 975 and 987 of the Trial Judgement, is not specifically challenged by *Amicus Curiae.*

348. The Appeals Chamber is not convinced either that the Trial Chamber erred in accepting the testimonies of Witnesses Mandić and Đerić on this question. The Appeals Chamber has already discussed in detail the issue of the reliance on evidence given by witnesses who might have a motive to incriminate the accused.[825] In this respect, the Appeals Chamber recalls that reliance upon evidence of such witnesses does not *per se* constitute a legal error, but that particular caution is

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[821] *See Amicus Curiae*'s Reply, para. 71.

[822] *Amicus Curiae*'s Appeal Brief, para. 211. While *Amicus Curiae* alleges generally the dearth of evidence for the findings at paragraphs 949, 975, 987 and 1085 of the Trial Judgement, he only makes specific arguments to challenge the finding at paragraph 1085.

[823] Trial Judgement, para. 1085.

[824] *See* the evidence discussed and the findings made by the Trial Chamber with respect to Krajišnik membership in the National Security Council (SNB) and the Presidency (Trial Judgement, paras 137, 168-169, 173-187), his position as President of the Bosnian-Serb Assembly and his prominent place in the SDS (Trial Judgement, paras 3, 140, 173, 187). In particular, the Trial Chamber accepted evidence showing Krajišnik's position of authority next to Radovan Karadžić (*see*, *e.g.*, Trial Judgement, paras 169 and 957 (finding that in the absence of Karadžić, Krajišnik chaired the sessions of the Presidency), 180 and 1013 (citing various evidence for the finding that Krajišnik was always at the centre of power together with Radovan Karadžić), 183-185 (finding that various ministers reported not to the Government but directly to Krajišnik and Radovan Karadžić)) and concluded at paragraph 187:

> [T]he the Bosnian-Serb Government, and by extension, the Bosnian-Serb Republic, was nothing more than an agency implementing policies dictated by the leadership of the SDS under the watchful eyes and strong hands of Karadžić and the Accused.

In addition to the evidence mentioned in these paragraphs, the Appeals Chamber also notes that several witnesses whose evidence was accepted by the Trial Chamber described Krajišnik and Radovan Karadžić as the two most important Bosnian-Serb leaders. *See*, *inter alia*, Trial Judgement, para. 140, referring to Witness Nešković (T. 16606-16607: "Krajišnik and Karadžić were at the highest level of power"), Witness Prstojević (T. 14566-14567, where he stated, when asked whom he considered to be the leadership of Republika Srpska, "from the top going further down": "That is perfectly clear. Dr. Radovan Karadžić, Mr. Momo Krajišnik, Prime Minister Đerić, ministers of internal affairs and ministers -- the minister of justice."), and Ambassador Okun (T. 4154: "Well, President Krajišnik was without question one of the two top leaders of the Bosnian Serbs, the other being Dr. Karadzic.") – some of these references are further mentioned in paras 262, 279 and 912.

[825] *See supra* III.B.2(c).

required when using their evidence. Indeed, in assessing the reliability of this evidence, the Trial Chamber must consider whether the witness has a specific motive to testify as he did and to lie.[826]

349. In the case at hand, the Trial Chamber did not expressly state that it had exercised "great caution" in assessing the evidence of Witnesses Mandić and Đerić, or that it had examined whether they had a personal motive to give false testimony. However, the Trial Chamber did exercise caution: it found that the assessment of Witnesses Mandić and Đerić was correct "in light of all the evidence".[827] Further, the fact that the Trial Chamber did not specifically refer to Witnesses Mandić's and Đerić's possible motives to lie does not mean that it failed to take them into consideration.[828] The Appeals Chamber stresses that a Trial Chamber is not obliged to justify every step in its reasoning.[829]

350. The Appeals Chamber also rejects the assertion that the Trial Chamber misconstrued the testimony of Witness Mandić. Although Witness Mandić referred to the fact that Biljana Plavšić and Nikola Koljević both considered that they should be "number two",[830] he made it clear that, in his opinion, Krajišnik was "the number-two man" after Radovan Karadžić.[831]

351. Furthermore, the Appeals Chamber is not convinced that the Karadžić Rule 92 *ter* Statement and his oral testimony on their own, are sufficient to undermine the extensive evidence supporting the Trial Chamber's findings.[832] Therefore, the Appeals Chamber finds that the Karadžić 92 *ter* Statement and his oral testimony do not create a reasonable doubt that would cause the Appeals Chamber to reverse the findings on Krajišnik's hierarchical position in the Bosnian-Serb leadership. This part of the sixth ground of appeal submitted by *Amicus Curiae* is rejected.

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[826] *Ntagerura et al.* Appeal Judgement, para. 206.
[827] Trial Judgement, para. 1085.
[828] *See Ntagerura et al.* Appeal Judgement, para. 206.
[829] *See Kvočka et al.* Appeal Judgement, para. 23. *See* also *Ntagerura et al.* Appeal Judgement, para. 206.
[830] Mandić, T. 8618-8619, 9281-9282.
[831] The Appeals Chamber notes that both during the examination-in-chief (T. 8618-8619) and during his cross-examination (T. 9281-9282), Witness Mandić explained his view that Krajišnik was "number two" in the leadership behind Radovan Karadžić.
[832] Krajišnik was "number two" (Nešković, T. 16843; Đokanović, T. 10626-10627. For further references, *see* Prosecution's Supplemental Brief, paras 50-51); Krajišnik had no power to investigate crimes (Krajišnik, T. 24475-24477. For further references, *see* Prosecution's Supplemental Brief, paras 82-83); Krajišnik's access to the levers of power (*see* references in Trial Judgement, paras 183-186, and Prosecution's Supplemental Brief, para. 52); Krajišnik was involved in the work of the SDS, crisis staffs, and in their transformation into war presidencies and war commissions (*see* references in Trial Judgement, paras 263, 272-279, and Prosecution's Supplemental Brief, paras 53-56); Krajišnik exercised authority over the VRS and the TO (*see* references in Trial Judgement, para. 1004, and Prosecution's Supplemental Brief, paras 59-62).

(b) Whether the impugned conclusions contradict other findings of the Trial Chamber

352. *Amicus Curiae* argues that the Trial Chamber's findings regarding Krajišnik's powers and authority are at odds with its conclusion that he lacked effective control.[833] The Appeals Chamber disagrees. The Trial Chamber clarified in the impugned paragraph 1121(e) of the Trial Judgement that

> [w]hile evidence in the present case demonstrates that the Accused had power and influence over those bodies which the indictment refers to as the Bosnian-Serb political and governmental organs and Bosnian-Serb forces, it does not demonstrate that he himself had effective control over those bodies.

The Trial Chamber itself thereby clearly differentiated between, on the one hand, its findings regarding power and influence held by Krajišnik and the consequences to be drawn therefrom for his criminal responsibility as a member of a JCE, and, on the other hand, his lack of effective control – for the purposes of Article 7(3) liability – over the Bosnian-Serb political and governmental organs, as well as its armed forces. In so doing, the Trial Chamber correctly held that "žeffective control' is not a required element of JCE liability",[834] the only form of responsibility found applicable to Krajišnik. The Appeals Chamber can see no error or contradiction in the Trial Chamber's findings.

(c) Alleged failure to explain contradictory evidence

353. *Amicus Curiae* further asserts that the Trial Chamber failed to address contradictory evidence before it.[835] The Appeals Chamber recalls that it is well-established in the jurisprudence of the Tribunal that "[i]f the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings".[836] Indeed, there is no need for the Trial Chamber to refer to the testimony of every witness or every piece of evidence in the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence".[837]

354. In the present case, a reading of the Trial Judgement shows that the Trial Chamber did not disregard the testimony of the witnesses referred to by *Amicus Curiae*. On the contrary, it relied on

[833] *Amicus Curiae*'s Appeal Brief, para. 211, referring to Trial Judgement, para. 1121.
[834] Trial Judgement, para. 1121(e).
[835] *Amicus Curiae*'s Appeal Brief, para. 211 and fn. 307, giving examples of such contradictory witness testimonies.
[836] *Kvočka et al.* Appeal Judgement, para. 23.
[837] *Kvočka et al.* Appeal Judgement, para. 23. *See* also *Limaj et al.* Appeal Judgement, para. 86.

the evidence of each of these witnesses to reach various findings within the Trial Judgement.[838] In this context, the Appeals Chamber stresses that it is not unreasonable for a Trial Chamber to accept certain parts of a witness's testimony and reject others.[839]

355. The Appeals Chamber therefore finds that *Amicus Curiae* has failed to show that the Trial Chamber erred in its assessment and reliance on the evidence before it when reaching the impugned findings in paragraphs 949, 975, 987 and 1085 of the Trial Judgement.

(d) Alleged vagueness and generalisation of terms

356. *Amicus Curiae* claims an inherent vagueness of the terms "number two", "personal fief" and "enormous powers".[840] While it is true that these terms might be seen, when examined in isolation, as rather vague, with a connotation of a somewhat symbolic appreciation of Krajišnik's position, they are unambiguous in the context of the Trial Chamber's analysis of Krajišnik's power and influence within the Bosnian-Serb leadership.

357. In particular, as discussed above,[841] paragraph 987 of the Trial Judgement, in which the Trial Chamber held that Krajišnik and Radovan Karadžić "ran Republika Srpska as a personal fief", does not stand alone, but summarises the Trial Chamber's findings with regard to Krajišnik's style of leadership.[842] In this context, the use of the term "personal fief" is neither vague nor obscure – its significance is clarified by the Trial Chamber, when specifying that Krajišnik and Radovan Karadžić "intervened and exerted direct influence at all levels of Bosnian-Serb affairs".[843]

358. Similarly, while the reliance on Mandić's reference to Krajišnik as "number two" in the Trial Chamber's findings[844] could be seen as of rather broad scope when considered in isolation, in the context of the Trial Chamber's analysis it is clear that, as discussed above, the Trial Chamber did not intend to reach a hierarchical finding establishing a concrete chain of command. It rather considered Krajišnik's power and influence within the Bosnian-Serb leadership.

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[838] *See* Trial Judgement, fns 69, 92, 263, 457, 458, 639, 1144, 1148, 1150, 1151, 1153 (Witness Vasić); fns 35, 41, 43, 44, 61, 63, 311, 378, 600, 1311, 1316, 1318, 2272 (Witness Divčić); fns 553, 857, 2273 (Witness Kasagić); fns 315, 378, 403, 404, 446, 599, 660, 1317 (Witness Kapetina); fns 35, 58, 71, 105-107, 206, 276, 293, 295, 378, 576, 788, 789, 793 (Witness Savkić); fns 447, 611, 1357 (Witness Poplašen); and fns 265, 309, 311, 313, 314, 316-319, 321, 326, 369, 378, 386, 393-395, 661, 1317 (Witness Lakić).
[839] *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333. *See* also *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.
[840] *Amicus Curiae*'s Appeal Brief, para. 211.
[841] *See supra* III.B.2(b).
[842] Trial Judgement, paras 987-1005.
[843] Trial Judgement, para. 947.
[844] Trial Judgement, para. 1085.

359. The Appeals Chamber considers that *Amicus Curiae* has failed to show how the impugned terminology impacted on the Trial Chamber's legal conclusions on Krajišnik's role within the Bosnian-Serb leadership underlying his responsibility as member of the JCE. *Amicus Curiae* has therefore not demonstrated any error of the Trial Chamber when using the terms in question.

3. Conclusion

360. The Appeals Chamber therefore finds that *Amicus Curiae* has failed to show that the findings at paragraphs 949, 975, 987 and 1085 of the Trial Judgement were erroneous, and it dismisses the sixth ground of appeal submitted by *Amicus Curiae*.

G. Alleged breach of Rule 90(H)(ii) (Ground 8)

1. Submissions

361. *Amicus Curiae* submits that 1) the Prosecution breached Rule 90(H)(ii) of the Rules when it failed to put to Krajišnik, during his testimony, material matters on which it relied to prove his guilt and which were in contradiction with his evidence,[845] and 2) the Trial Chamber erred in law in allowing this violation and in finding that certain matters, in regard to which Krajišnik had never been questioned, had been proven.[846] *Amicus Curiae* also submits that, in matters in which Krajišnik gave evidence and the Prosecution did not cross-examine him, the Trial Chamber would have been bound to accept Krajišnik's account.[847]

362. The Prosecution responds that Rule 90(H)(ii) of the Rules does not apply to an accused who chooses to testify.[848] It submits that "[i]n Rule 90 as a whole, reference to žwitness' sometimes includes the accused and sometimes does not",[849] and that an examination of the purpose of Rule 90(H)(ii) – which is to protect the witness "from being ambushed", as witnesses are generally unaware of the other evidence in the case – clearly shows that this Rule did not apply to Krajišnik, who was fully aware of the Prosecution case against him by the time he entered the witness box and

[845] *Amicus Curiae*'s Notice of Appeal, para. 76; *Amicus Curiae*'s Appeal Brief, paras 216-218.
[846] *Amicus Curiae*'s Notice of Appeal, para. 76; *Amicus Curiae*'s Appeal Brief, para. 217; *Amicus Curiae*'s Reply, para. 78. He argues in particular that the following conclusions in the Trial Judgement were never put to Krajišnik during the course of his testimony: (1) in 1996, Krajišnik praised in a speech the leader of the Wolves of Vučjak; (2) he discussed the "strategic situation" with the Ilidža crisis staff and channelled their requests to the Government; and (3) he and others arrived at Lukavica by helicopter (*Amicus Curiae*'s Appeal Brief, para. 217, referring to Trial Judgement, paras 986, 992 and 1044 respectively).
[847] *Amicus Curiae*'s Appeal Brief, para. 221.
[848] Prosecution's Response to *Amicus Curiae*, paras 168-173.
[849] Prosecution's Response to *Amicus Curiae*, para. 170. The Prosecution gives the following examples:

> Rule 90(C) prohibiting the presence of a witness in court during other testimony clearly does not apply to the accused. By contrast, Rule 90(F) allowing the trial chamber to control the order or mode of interrogation of a witness extends to the accused.

who knew which aspects of his evidence were in contradiction with the Prosecution case.[850] The Prosecution adds that there is "no obligation to raise a matter in cross-examination in circumstances where the witness is on notice that his version is contested" such as is the case of an accused who goes to trial.[851]

363. The Prosecution also submits that, even if Rule 90(H)(ii) of the Rules was applicable, it was not violated because the nature of the Prosecution's case was put to Krajišnik and this Rule does not require to put to the witness every detail that the party does not accept.[852] Moreover, *Amicus Curiae* has failed to explain how the alleged breach of the Rule invalidates the Trial Judgement.[853]

364. The Prosecution finally avers that it was within the Trial Chamber's discretion to disregard Krajišnik's evidence even without cross-examination, as it was incredible, unconvincing and contradicted by other evidence which appeared credible.[854]

365. *Amicus Curiae* replies by reiterating that Krajišnik could not "show his mettle" on important issues and that the Prosecution's arguments suggest a reversal of the burden of proof, as the accused would have a duty to anticipate all areas in which the Prosecution will later invite the Trial Chamber to make adverse findings against him.[855]

2. Analysis

(a) General

366. Rule 90(H)(ii) of the Rules provides as follows:

> In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

367. The Appeals Chamber recalls that this Rule

> seeks to facilitate the fair and efficient presentation of evidence whilst affording the witness being cross-examined the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party's evidence, so saving the witness from having to reappear needlessly in

[850] Prosecution's Response to *Amicus Curiae*, paras 169, 171-172.
[851] Prosecution's Response to *Amicus Curiae*, para. 173.
[852] Prosecution's Response to *Amicus Curiae*, paras 174, 176. The Prosecution contends that Krajišnik could duly comment during his cross-examination on the Prosecution's case in relation to (1) his awareness of and support for the involvement of paramilitaries; (2) his relationship with the municipalities; and (3) his knowledge of and support for detentions of civilians: *see* Prosecution's Response to *Amicus Curiae*, para. 176, referring to various parts of the transcript.
[853] Prosecution's Response to *Amicus Curiae*, para. 175.
[854] Prosecution's Response to *Amicus Curiae*, para. 177, referring in particular to *Bulstrode v. Trimble*, [1970] V.R. 840 (Australia, Supreme Court of Victoria), and *Chalmers v. Griffiths*, (2005) S.C.C.R. 30 (Scotland, Appeal Court). *Amicus Curiae* replies that the reference to *Chalmers v. Griffiths* is inapposite: *Amicus Curiae*'s Reply, paras 79-80.
[855] *Amicus Curiae*'s Reply, para. 78.

> order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more accurately owing to the explanation of the witness or his counsel.[856]

Hence, the Appeals Chamber agrees that the central purpose of the Rule in question "is to promote the fairness of proceedings by enabling the witness on the stand to appreciate the *context* of the cross-examining party's questions, and to comment on the contradictory version of the events in question".[857]

368. The Appeals Chamber stresses that, in order to fulfil the requirements of Rule 90(H)(ii) of the Rules, it is sufficient that the cross-examining party put the nature of its case to the witness, meaning the general *substance* of its case conflicting with the evidence of the witness, chiefly to protect this witness against any confusion.[858] There is no need for the cross-examining party to explain every detail of the contradictory evidence, and the Rule allows for some flexibility depending on the circumstances of the trial.[859] In particular, if it is obvious in the circumstances of the case that the version of the witness is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness.[860]

(b) Application of Rule 90(H)(ii) to Krajišnik as a witness

369. The ICTR Appeals Chamber has held, regarding the similarly worded Rule 90(G)(ii) of the ICTR Rules of Procedure and Evidence:

> When an accused testifies in his own defence, he is well aware of the context of the Prosecution's questions and of the Prosecution's case, insofar as he has received sufficient notice of the charges and the material facts supporting them.[861]

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[856] *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-AR73.7, Decision on the Interlocutory Appeal against a Decision of the Trial Chamber, as of right, 13 June 2002 ("*Brdanin and Talić* Appeal Decision"), p. 4.

[857] *Karera* Appeal Judgement, para. 25; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Order Setting Forth Guidelines for the Procedure under Rule 90(H)(ii), 6 March 2007 ("*Popović et al.* Order setting Guidelines"), para. 1 (emphasis added). *See* also *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T, Decision on "Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brdanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić, 22 March 2002 ("*Brdanin and Talić* Decision on Rule 90(H)(ii)"), paras 13, 17.

[858] *Prosecutor v. Naser Orić,* Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule (90)(H)(ii), 17 January 2006 ("*Orić* Decision on Rule 90(H)(ii)"), pp. 1-2. *See* also *Popović et al.* Order setting Guidelines, para. 2; *Prosecution v. Stanislav Galić*, Case No. IT-98-29-T, T. 6465 (2 April 2002); *Brdanin and Talić* Decision on Rule 90(H)(ii), paras 13, 17.

[859] *Karera* Appeal Judgement, para. 26; *Brdanin and Talić* Decision on Rule 90(H)(ii), para. 14. *See* also *Orić* Decision on Rule 90(H)(ii), pp.1-2, and *Popović et al.* Order setting Guidelines, para. 2.

[860] *See*, for instance, *Browne v. Dunn*, (1893) 6 R. 1894, 67 (recognised as the leading case on this question in the common law jurisdictions having adopted a rule similar to Rule 90(H)(ii) of the Rules), where Lord Herschell (L.C.) states at p. 71 that the requirement to put the case to the witness does not apply when it is

> otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it.

[861] *Karera* Appeal Judgement, para. 27.

The ICTR Appeals Chamber therefore found that Rule 90(G)(ii) of the Rules was not intended to apply to an accused testifying as a witness in his own case. The Appeals Chamber agrees with this reasoning for the purposes of Rule 90(H)(ii) of the Rules.

370. In the present case, the Appeals Chamber is satisfied that, when taking the stand to testify in his own defence, Krajišnik was well aware of the context of the Prosecution's questions and of the Prosecution's case against him. In particular, the Indictment, the Prosecution pre-trial brief,[862] and the witness lists issued in accordance with Rule 65 *ter*(E)(ii), as well as his presence during the trial proceedings as a whole informed Krajišnik, the last person testifying for the Defence, of the case against him. In these circumstances, the Appeals Chamber concludes that the Prosecution was not required to put the nature of its case to Krajišnik when cross-examining him.

(c) Parts of Krajišnik's testimony that were not specifically challenged in cross-examination

371. *Amicus Curiae* also argues that, with regard to matters about which Krajišnik testified and the Prosecution did not cross-examine him, the Trial Chamber was bound to accept Krajišnik's account.[863] The Appeals Chamber first stresses that *Amicus Curiae* has not provided any reference to a specific finding in the Trial Judgement in which the Trial Chamber allegedly dismissed Krajišnik's evidence although he had not been cross-examined on this matter. Moreover, while it is true that the questioning of a witness by the cross-examining party with regard to contradicting evidence enables a trier of fact to evaluate more accurately the credibility of the witness,[864] this credibility can be challenged by other evidence[865] (as long as the witness is made aware that his credibility is being challenged) and the appreciation of a witness's credibility as a whole lies within the discretion of the trier of fact. In the present case, the Trial Chamber specifically detailed its assessment of Krajišnik's credibility during his testimony,[866] concluding that Krajišnik was, "especially upon cross-examination, […] of very low credibility".[867] The Appeals Chamber considers that *Amicus Curiae* has failed to demonstrate any error of the Trial Chamber in its evaluation of Krajišnik's credibility as a whole. Thus, it was open to the Trial Chamber not to believe parts of Krajišnik's testimony even if he was not specifically cross-examined on them.

372. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

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[862] *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39&40-PT, Prosecution Pre-Trial Brief, 2 May 2002.
[863] *Amicus Curiae*'s Appeal Brief, para. 221. *See* also *Amicus Curiae*'s Reply, para. 80.
[864] *Brđanin and Talić* Decision on Rule 90(H)(ii), para. 13, upheld in *Brđanin and Talić* Appeal Decision, p. 4. *See* also *Popović et al.* Order setting Guidelines, p. 1.
[865] *See*, for instance, *Nahimana et al.* Appeal Judgement, paras 820, 824, as well as footnote 1893, explaining that a Trial Chamber is not obliged to accept parts of the testimony of a witness that were not specifically challenged in cross-examination.

H. Assessment of Krajišnik's evidence (Ground 9)

1. Submissions

373. *Amicus Curiae* submits that the Trial Chamber's finding on Krajišnik's "very low credibility"[868] suggests that his evidence was hence of some credibility and that, in areas where the Trial Chamber found him credible, he should have been given the benefit of any reasonable doubt.[869] He further challenges the Trial Chamber's statement that it could not "possibly discuss here all the evidence relevant to the Accused's responsibility"[870] as "neither right in principle nor fair on [Krajišnik]"[871] and avers that the Trial Chamber reversed the burden of proof in relation to his knowledge of various matters.[872]

374. *Amicus Curiae* further argues that the Trial Chamber erroneously relied on "intemperate speeches" of Krajišnik or those made in his presence, without mentioning Krajišnik's correspondent explanation during his testimony.[873] The Trial Chamber's allegedly unfair approach in this regard is further demonstrated, according to *Amicus Curiae*, through its rejection of evidence showing that Krajišnik was a moderate,[874] in particular its rejection of two character evidence letters without inviting their authors to attend for cross-examination.[875]

375. The Prosecution responds that the Trial Chamber did not err in assessing Krajišnik's credibility as it was entitled to accept some parts of his testimony while rejecting others. The Prosecution adds that "[t]he Chamber did not have to canvass all the evidence relating to Krajišnik's responsibility in the Judgement provided it considered all relevant evidence and gave a reasoned opinion on the findings essential for the verdict". It also explains that "[e]ven where testimony expressly contradicted the Chamber's findings, it need not have been discussed in the

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[866] Krajišnik testified for 40 days, 13 days of which were spent in cross-examination (Trial Judgement, para. 1202).
[867] Trial Judgement, para. 888.
[868] Trial Judgement, para. 888. *See* also *ibid*., para. 902.
[869] *Amicus Curiae*'s Appeal Brief, para. 222. In paragraph 81 of his Reply, *Amicus Curiae* specifies that he was indeed referring to any "reasonable" doubt.
[870] Trial Judgement, para. 889.
[871] *Amicus Curiae*'s Appeal Brief, para. 223.
[872] *Amicus Curiae*'s Appeal Brief, paras 223-224, referring to Trial Judgement, para. 892.
[873] *Amicus Curiae*'s Appeal Brief, para. 225, referring to Trial Judgement, paras 896-902, and Krajišnik, T. 24877. *Amicus Curiae* also seems to contend that the Trial Chamber unfairly relied on this evidence in the Trial Judgement because during Krajišnik's cross-examination by the Prosecution, the presiding judge allegedly showed that he was not "impressed or interested in this type of evidence" (*Amicus Curiae*'s Appeal Brief, para. 225, referring to Krajišnik, T. 24877-24878). The Appeals Chamber considers that *Amicus Curiae* distorts the comments of the presiding judge, who was simply inviting the Prosecution to prioritise and use its time efficiently (T. 24877-24878).
[874] *Amicus Curiae*'s Appeal Brief, para. 226, referring to Trial Judgement, fn. 1765. *Amicus Curiae* submits that fn. 1765 illustrates the Trial Chamber's alleged "unreasonably dismissive and pre-ordained approach to evidence from [Krajišnik]" (*Amicus Curiae*'s Reply, para. 85).
[875] *Amicus Curiae*'s Appeal Brief, para. 226, referring to Exhibits D263 and D264, two letters submitted by Krajišnik containing statements on his character.

Judgement as long as it was considered", and submits that *Amicus Curiae* fails to show that the Trial Chamber failed to consider all the evidence or reached an unreasonable conclusion on the basis of all the evidence.[876] The Prosecution argues that the Trial Chamber did not reverse the burden of proof and that the impugned finding was taken out of context by *Amicus Curiae*.[877]

376. The Prosecution submits that the Trial Chamber could rely on evidence of intemperate speeches without referring to Krajišnik's testimony about it, as the Trial Chamber was not required to mention every piece of contradicting evidence; in any case, the Trial Chamber did refer to Krajišnik's testimony claiming that he did not share these extreme views.[878] The Prosecution finally responds that the Trial Chamber correctly rejected evidence portraying Krajišnik as a moderate, on the basis of his own statements characterising Muslims as "a fake people".[879]

2. Analysis

377. The Appeals Chamber notes that the Trial Chamber carefully explained its assessment of Krajišnik's credibility.[880] *Amicus Curiae* does not seem to contest the Trial Chamber's finding of Krajišnik's "very low credibility", but he claims that this finding suggests "some credibility" in certain areas. However, *Amicus Curiae* fails to specify in which areas the Trial Chamber considered (or ought to have considered) Krajišnik to be credible and allegedly failed to give the appropriate weight to his evidence, thereby causing a miscarriage of justice. This argument is rejected.

378. As discussed above,[881] the Trial Chamber's statement that it could not *discuss* "all the evidence" in the Judgement, cannot, by itself, be equated with a failure to *examine* the evidence in question. *Amicus Curiae* has failed to identify any specific finding in which the Trial Chamber did not consider all the evidence before it. The Appeals Chamber reiterates therefore that the approach taken by the Trial Chamber in paragraph 889 of the Trial Judgement was not in error. Similarly, the Appeals Chamber has already discussed the allegation that the Trial Chamber had reversed the burden of proof in paragraph 892 of the Trial Judgement and has found this allegation to be without merit.[882]

[876] Prosecution's Response to *Amicus Curiae*, paras 179-181.
[877] Prosecution's Response to *Amicus Curiae*, paras 182-183, referring to Trial Judgement, paras 891-892.
[878] Prosecution's Response to *Amicus Curiae*, paras 184-185.
[879] Prosecution's Response to *Amicus Curiae*, paras 186-187.
[880] *See* in particular Trial Judgement, para. 888. The Trial Chamber also provides more detail in various paragraphs throughout the Trial Judgement (particularly in Part 6) to explain its assessment of Krajišnik's testimony. *See* for instance Trial Judgement, paras 902, 947-948, 951, 955, 985, 998, 1005, 1012, 1036-1037, 1053-1054, 1059, 1062.
[881] *See supra* III.B.2.
[882] *See supra* III.C.9(b).

379. With respect to *Amicus Curiae*'s allegation that the Trial Chamber erroneously relied on "intemperate speeches" without mentioning Krajišnik's testimony on this,[883] the Appeals Chamber first reiterates that the Trial Chamber is not required to refer to every piece of evidence or every submission made at trial, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[884] In the present case, *Amicus Curiae* has failed to show that the Trial Chamber did not consider Krajišnik's testimony with regard to these speeches. On the contrary, the Trial Chamber referred repeatedly to the corresponding evidence given by Krajišnik when questioned during trial, clearly showing that it assessed Krajišnik's testimony on these issues.[885]

380. Similarly, *Amicus Curiae*'s challenge of the weighing of evidence by the Trial Chamber in footnote 1765 of the Trial Judgement is without merit. *Amicus Curiae* has failed to show how the Trial Chamber erred when it accepted Krajišnik's own testimony on this issue. The Trial Chamber had found that Krajišnik, "in a rare moment of relative frankness", deplored a statement he had made at a session of the Bosnian-Serb Assembly in January 1993, questioning the very existence of a Muslim identity. Against this backdrop of Krajišnik's own testimony[886] it was not unreasonable for the Trial Chamber to reject other evidence submitting that Krajišnik "was a moderate who never expressed animosity towards other ethnicities".[887]

381. For the foregoing reasons, the Appeals Chamber dismisses the ninth ground of appeal submitted by *Amicus Curiae*.

I. Cumulative convictions (Ground 10)

382. The Trial Chamber found that the conviction for persecution as a crime against humanity could be cumulated with the convictions for murder, extermination, deportation and inhumane acts (forcible transfer), all constitutive of crimes against humanity, entered against Krajišnik.[888] *Amicus Curiae* challenges the Trial Chamber's application of the law on cumulative convictions and

[883] *Amicus Curiae*'s Appeal Brief, para. 225. The Appeals Chamber notes that such speeches are discussed twice in the Trial Judgement: once with regard to speeches held in the Bosnian-Serb Assembly during the Indictment period (Trial Judgement, paras 954-955), as well as once in relation to speeches given in the period posterior to the Indictment (Trial Judgement, paras 896-902, challenged by *Amicus Curiae*), which the Trial Chamber found were aimed by Krajišnik and other Bosnian-Serb leaders at maintaining "control of the territories they had grabbed and ethnically recomposed through force" (Trial Judgement, para. 896).
[884] *Kvočka et al.* Appeal Judgement, para. 23. *See* also *Čelebići* Appeal Judgement, para. 498.
[885] Trial Judgement, para. 897, referring to Krajišnik, T. 24946-24949; para. 898, referring to Krajišnik, T. 25718-25724; para. 899, referring to Krajišnik, T. 25749; para. 900, referring to Krajišnik, T. 24878-24879, T. 25663; para. 901, referring to Krajišnik, T. 24964-24966; para. 902, referring to Krajišnik, T. 24967, 24983-24989.
[886] Krajišnik, T. 24967.
[887] Trial Judgement, fn. 1765. Further, the Trial Chamber was entitled to refuse to accord any weight to two character evidence letters, and it did not have to invite their authors to attend for cross-examination.
[888] Trial Judgement, para. 1130.

requests the Appeals Chamber to quash the convictions on Count 3 (persecution), or alternatively, on Counts 5 (murder), 7 (deportation) and 8 (inhumane acts) of the Indictment.[889]

1. Submissions

383. *Amicus Curiae* alleges that the Trial Chamber erroneously applied the law on cumulative convictions.[890] According to *Amicus Curiae*, the crime of persecution requires a materially distinct element, namely the intent to discriminate on specific grounds, which is not required by the crimes against humanity of murder, extermination, deportation and inhumane acts (forcible transfer).[891] But *Amicus Curiae* submits that since the latter crimes constitute the underlying acts of persecution, this conviction subsumes the others, and cumulative convictions are impermissible.[892] *Amicus Curiae* contends that his position is supported by the jurisprudence of the Tribunal,[893] and that the *Kordić and Čerkez* Appeal Judgement wrongly departed from this jurisprudence and should not be followed.[894]

384. The Prosecution responds that it is settled law that a conviction for persecution as a crime against humanity can be cumulated with convictions for the crimes against humanity of murder, extermination, deportation and inhumane acts (forcible transfer).[895] The Prosecution contends that it cannot be argued that the *Kordić and Čerkez* Appeal Judgement "was rendered in ignorance of law or fact, nor that it was based on a wrong legal principle". In this connection, the Prosecution argues that the *Kordić and Čerkez* Appeal Judgement considered the existing jurisprudence, that it determined that the reasoning in the *Krnojelac*, *Vasiljević* and *Krstić* Appeal Judgements was in direct contradiction to the reasoning and proper application of the *Čelebići* test in *Jelisić*, *Kupreškić*, *Kunarac* and *Musema*, and that there thus existed cogent reasons to depart from *Krnojelac*, *Vasiljević* and *Krstić*. The Prosecution adds that *Amicus Curiae* did not sufficiently substantiate his

[889] *Amicus Curiae*'s Notice of Appeal, paras 83-85. In paragraph 232 of his Appeal Brief, *Amicus Curiae* also requests the Appeals Chamber to quash the conviction entered under Count 4 (extermination). This request is going beyond the *Amicus Curiae*'s Notice of Appeal and could thus be summarily dismissed but, as explained below, the contentions of *Amicus Curiae* are in any case deprived of merits.
[890] *Amicus Curiae*'s Appeal Brief, para. 227.
[891] *Amicus Curiae*'s Appeal Brief, para. 229.
[892] *Amicus Curiae*'s Appeal Brief, paras 229-230, 232, referring to *Krstić* Appeal Judgement, para. 231, and to *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 5.
[893] *Amicus Curiae*'s Appeal Brief, para. 233, referring to the *Krstić, Vasiljević* and *Krnojelac* Appeal Judgements (no specific reference provided).
[894] *Amicus Curiae*'s Appeal Brief, paras 233-235; *Amicus Curiae*'s Reply, para. 86. At paragraph 236 of his Appeal Brief, *Amicus Curiae* adds that the cumulative convictions in the instant case are unnecessary to reflect full culpability as "a conviction for persecution can nonetheless describe žmeticulously' an individual's crime".
[895] Prosecution's Response to *Amicus Curiae*, para. 189, referring to *Naletilić and Martinović* Appeal Judgement, para. 589; *Stakić* Appeal Judgement, paras 359-367; *Kordić and Čerkez* Appeal Judgement, paras 1039-1043.

allegation that the *Kordić and Čerkez* Appeal Judgement was wrong in its application of the law on cumulative convictions.[896]

385. In reply, *Amicus Curiae* contends that the Prosecution fails to address his arguments as well as the dissenting opinion on which they are based.[897]

2. Analysis

386. The jurisprudence of the Tribunal on the issue of cumulative convictions is well-established. The test was put forward by the Appeals Chamber in the *Čelebići* Appeal Judgement:

> multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[898]

387. Whether the same conduct violates two distinct statutory provisions is a question of law.[899] Thus, "the *Čelebići* test focuses on the legal elements of each crime that may be the subject of a cumulative conviction rather than on the underlying conduct of the accused."[900]

388. Addressing the more specific issue of intra-Article 5 cumulative convictions, the *Kordić and Čerkez* Appeal Judgement ruled that a correct application of the *Čelebići* test required "an examination, as a matter of law, of the elements of each offence in the Statute that pertain to that conduct for which the accused has been convicted." Based on this reasoning, the Appeals Chamber admitted that convictions for the crimes against humanity of persecution on the one hand, and murder, other inhumane acts and imprisonment on the other hand, could be cumulated, since all of these offences contained "an element that requires proof of a fact not required by the other[s]".[901]

389. In the instant case, *Amicus Curiae* alleges that the *Kordić and Čerkez* Appeal Judgement is an incorrect application of the *Čelebići* test and should therefore not be used as a precedent. The Appeals Chamber cannot agree with this interpretation. While prior jurisprudence adopted another

[896] Prosecution's Response to *Amicus Curiae*, paras 191-192.
[897] *Amicus Curiae*'s Reply, para. 87.
[898] *Čelebići* Appeal Judgement, paras 412-413.
[899] *Kunarac et al.* Appeal Judgement, para. 174. *See* also *Strugar* Appeal Judgement, para. 322.
[900] *Stakić* Appeal Judgement, para. 356.
[901] *Kordić and Čerkez* Appeal Judgement, paras 1040-1043.

point of view,[902] in the *Kordić and Čerkez* Appeal Judgement the Appeals Chamber clearly explained the reasons that warranted the departure from previous cases.[903] Subsequent appeal judgements in the *Stakić*, *Naletilić and Martinović* and *Nahimana et al.* cases confirmed the approach adopted in *Kordić and Čerkez*.[904] The Appeals Chamber therefore sees no cogent reason to depart from the current jurisprudence with respect to intra-Article 5 cumulative convictions.

390. In the Trial Judgement, the Trial Chamber determined that:

> [p]ersecution as a crime against humanity has a materially distinct element from murder as a crime against humanity in that persecution requires proof that an act or omission discriminates in fact, and proof that the act or omission was committed with specific intent to discriminate. Conversely, murder as a crime against humanity requires proof that the accused caused the victim's death, which is not an element required for proof of persecution. As a result, a cumulative conviction for persecution and murder under Article 5 of the Statute is permissible. The same reasoning applies to extermination, deportation, and forced transfer as an inhumane act.[905]

391. The Appeals Chamber, by majority, Judge Güney dissenting,[906] considers that this is a correct application of the law on cumulative convictions. Therefore, the Trial Chamber did not err in cumulating the conviction for persecution as a crime against humanity with the convictions for the crimes against humanity of murder, extermination, deportation and inhumane acts (forcible transfer). This ground of appeal is dismissed.

[902] *See Krstić* Appeal Judgement, paras 230-233; *Vasiljević* Appeal Judgement, paras 144-146; *Krnojelac* Appeal Judgement, para. 188.
[903] *Kordić and Čerkez* Appeal Judgement, para. 1040.
[904] *See Nahimana et al.* Appeal Judgement, paras 1026-1027; *Naletilić and Martinović* Appeal Judgement, paras 587-591; *Stakić* Appeal Judgement, paras 355-367.
[905] Trial Judgement, para. 1130.
[906] *See Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Güney, para. 5.

IV. THE APPEAL OF MOMČILO KRAJIŠNIK

392. Krajišnik seeks a reversal of the Trial Judgement and argues that he should be acquitted of all charges, or alternatively that there be a re-trial.[907] As noted above, Krajišnik's Notice of Appeal and Appeal Brief do not follow the same order.[908] The Appeals Chamber will proceed following the four parts identified in Krajišnik's Appeal Brief.

A. Argument raised in the introduction of Krajišnik's Appeal Brief

393. Krajišnik argues that the Trial Chamber erred in concluding that an armed conflict existed in 1991, because none of the legally relevant actions that he has been charged with occurred in 1991.[909] The Prosecution responds that this claim is not found in Krajišnik's Notice of Appeal and should be struck.[910] In reply, Krajišnik recognises that this argument was not raised in his Notice of Appeal, but nevertheless asks the Appeals Chamber to consider it.[911]

394. The Appeals Chamber agrees with the Prosecution that this argument can be dismissed as going beyond the scope of the Notice of Appeal. In any case, whether or not there was an armed conflict in Bosnia and Herzegovina in 1991 is irrelevant to Krajišnik's liability. Indeed, he was only found liable for crimes committed in the period between April and December 1992, and the Trial Chamber clearly found that an armed conflict which focused on Bosnia and Herzegovina existed in that period, a finding which is not contested by Krajišnik.[912] Thus, his argument is rejected.

B. Alleged violation of the right to a fair trial

395. In part two of his Appeal Brief, Krajišnik alleges that the Trial Chamber violated his fair trial rights in several respects. First, he argues that the Trial Chamber ignored his complaints relating to poor co-operation with counsel and rejected his request for self-representation.[913] Second, he contends that appointed counsel was not diligent, asserting specifically that:

- During his testimony, he presented several exhibits, but instead of admitting them, the Trial Chamber returned them to his counsel and the Prosecution for their comments. Counsel then

[907] Krajišnik's Notice of Appeal, p. 13; Krajišnik's Appeal Brief, p. 84.
[908] *See supra* I.C.1.
[909] Krajišnik's Appeal Brief, p. 3.
[910] Prosecution's Response to Krajišnik, paras 3-4.
[911] Krajišnik's Reply, para. 2.
[912] Trial Judgement, para. 707.
[913] Krajišnik's Appeal Brief, para. 1. The Prosecution responds that Krajišnik does not address the Trial Chamber's reasons for denying self-representation, which took into account his complaints of poor co-operation with counsel: Prosecution's Response to Krajišnik, para. 19.

forgot to tender the documents for admission, and the Trial Chamber relied on this omission to conclude that it could not attach any considerable weight to his testimony;[914]

- His counsel assumed the "behaviour of the prosecutor";[915]

- His counsel should have requested postponement of the proceedings, and the Trial Chamber should have understood and approved the request.[916]

Third, Krajišnik avers that the Trial Chamber "kept restricting [him] while he was questioning witnesses, occasionally even brutally preventing him from questioning them at all."[917]

396. The Appeals Chamber rejects these contentions. First, Krajišnik does not explain how the Trial Chamber ignored his complaints of poor co-operation with his counsel, nor does he show how the Trial Chamber erred in rejecting his request for self-representation.[918] Similar problems affect Krajišnik's contention that appointed counsel was not diligent:

- Krajišnik alleges that his counsel omitted to tender documents for admission, but he fails to show that any failure of his counsel to tender these documents led to an ineffective assistance at trial;[919]

- Krajišnik seems to suggest that his counsel "assumed the behaviour of the prosecution", but he does not explain how;

- Krajišnik argues that his counsel should have requested adjournments, but his counsel in fact made a number of requests for adjournments. Further, Krajišnik fails to show how the Trial Chamber erred in its discretion when deciding these requests.

Finally, Krajišnik does not explain how the Trial Chamber abused its discretion in restricting his questioning of witnesses.[920] These arguments are rejected.

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[914] Krajišnik's Appeal Brief, paras 2-4. The Prosecution responds that appointed counsel was diligent and that 1) Krajišnik fails to specify the documents the Trial Chamber failed to admit and how their admission would have impacted on the verdict; 2) the Trial Chamber did in fact admit a large number of documents presented during Krajišnik's testimony; and 3) while documents sent by Krajišnik to the Registry after his testimony were returned to him to discuss with counsel whether to tender them, Krajišnik "does not explain how counsel demonstrably erred in not seeking their admission": Prosecution's Response to Krajišnik, paras 20-22.

[915] Krajišnik's Appeal Brief, para. 5. The Prosecution responds that Krajišnik does not explain how his counsel "assumed the behaviour of the prosecutor": Prosecution's Response to Krajišnik, para. 23.

[916] Krajišnik's Appeal Brief, para. 6. The Prosecution responds that Krajišnik's counsel in fact made a number of requests for adjournments, yet Krajišnik fails to show how the Trial Chamber erred in its discretion when deciding these requests. The Prosecution adds that complaints about inadequate time for preparation prior to the "Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment" of 25 April 2005 have been finally adjudicated by the Appeals Chamber in this decision. *See* Prosecution's Response to Krajišnik, para. 25.

[917] Krajišnik's Appeal Brief, para. 8, referring to Plavšić, T. 26965 and 26966. The Prosecution responds that Krajišnik fails to substantiate how the Trial Chamber abused its discretion under Rule 90(F) of the Rules: Prosecution's Response to Krajišnik, para. 26.

[918] *See* T. 17048 and Reasons for Denying Request to Proceed Unrepresented by Counsel. *See* also Trial Judgement, para. 1244.

[919] *See* Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, filed publicly on 4 November 2008 ("Rule 115 Decision of 20 August 2008"), paras 11-22.

[920] Krajišnik only refers to one excerpt of the transcript in this regard (T. 26965 and 26966, during the testimony of Biljana Plavšić). A simple reference to a transcript does not suffice to show that the Trial Chamber committed an error.

397. However, in his Supplemental Brief, Krajišnik expounds on the alleged ineffective assistance of his counsel, Mr. Nicholas Stewart, at trial. He argues that Counsel Stewart (1) was grossly unprepared for the case; (2) mismanaged the case; (3) failed to secure information from his team; and (4) was disinterested in the case. These defects, he contends, resulted in a gross lack of knowledge of the case by Counsel Stewart and a failure to test the Prosecution evidence and to present his defence effectively.[921] The Appeals Chamber will now address these claims in turn.

1. Counsel's preparedness

398. Krajišnik argues that Counsel Stewart's team was grossly unprepared to commence trial when it started on 3 February 2004, and that his Defence could never make up for the lack of preparation it experienced at the outset of the trial.[922] The Appeals Chamber dismisses these contentions for reasons explained under the first ground of appeal submitted by *Amicus Curiae*, which raises essentially the same arguments.[923]

2. Counsel's management of the case

399. First, Krajišnik argues that Counsel Stewart mismanaged the case by failing to apply for an adjournment to avoid a commencement of trial on 3 February 2004.[924] This argument is rejected for reasons detailed under the first ground of appeal submitted by *Amicus Curiae*.[925]

In any case, the Appeals Chamber has reviewed this excerpt and it cannot conclude that the Trial Chamber abused its discretion under Rule 90(H) of the Rules: having given special permission to Krajišnik to ask questions directly to the witness, it reminded him to do that (ask questions) and not to make statements on other subjects. Krajišnik did not adhere to these instructions and the Trial Chamber decided to put an end to his questioning. This was within its discretion.

[921] Krajišnik's Supplemental Brief, para. 4. The Appeals Chamber further notes Krajišnik's "Urgent Submission in Relation to the Impact of the Milutinović et al. Judgment on the Appellant's Case", filed on 6 March 2009 ("Urgent Submission"), in which he argues that the *Milutinović et al.* Trial Judgement supports his claim regarding the ineffective assistance of his counsel. The Appeals Chamber may consider post-hearing submissions if they relate to a variation of the grounds of appeal or if it has made a specific request to the parties for further information (*see The Prosecutor v. Tharcisse Muvunyi*, ICTR-00-55A-A, Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008, para. 6). The Appeals Chamber does not understand the Urgent Submission to be a motion for variation of a ground of appeal pursuant to Rule 108 of the Rules. Rather, it provides an additional argument in support of Krajišnik's ground of appeal regarding the ineffective assistance of his counsel. Furthermore, the Appeals Chamber notes that in preparing a Judgement, it considers all relevant jurisprudence, including decisions issued after the hearing of an appeal. If additional submissions from the parties on the *Milutinović et al.* Trial Judgement had been necessary for a fair determination of the appeal in this case, the Appeals Chamber would have requested Krajišnik to provide further submissions. The Appeals Chamber has not done so. Hence, the Urgent Submission is dismissed.

[922] Krajišnik's Supplemental Brief, paras 5-14.

[923] As to the hand-over and quality of the work product of former counsel Brashich (Krajišnik's Supplemental Brief, paras 5, 15), *see supra* III.A.3(b)(i); as to Counsel Stewart's alleged failure to properly review the case documents (Krajišnik's Supplemental Brief, paras 7-15), *see supra* III.A.3(b)(ii).

[924] Krajišnik's Supplemental Brief, paras 16, 18. In this context, Krajišnik also avers that Counsel Stewart's prior practice was mainly in commercial law, but fails to articulate how, if at all, this affects his work as counsel or the Registrar's decision to assign him as such.

[925] *See supra* III.A.3(b)(ii)(a).

400. Second, Krajišnik refers to parts of Counsel Stewart's testimony on appeal and statements during trial to argue that Counsel Stewart himself did not consider it possible to defend Krajišnik in an appropriate manner.[926] The Appeals Chamber has already accepted evidence on Counsel Stewart's overall appreciation that he managed to mount a defence in accordance with his professional obligations.[927] While demonstrating that this was not without difficulties, the statements invoked by Krajišnik do not alter the Appeals Chamber's evaluation of that evidence.

401. Third, Krajišnik contends that confidential Exhibit AD 5 and Exhibit AD 6 show that both the Trial Chamber and the Registry were concerned about Counsel Stewart's inability to manage the case.[928] He further invokes[929] the testimony of George Mano that the work of the Defence was handled in a "kind of haphazard disorganised way",[930] and Stefan Karganović's testimony that the Defence team's work was "improvisation".[931] The Appeals Chamber acknowledges that Exhibit AD5 is reflective of some concerns the Trial Chamber might have had as to Counsel Stewart's ability to manage the case,[932] but it falls short of demonstrating gross negligence on his part in conducting Krajišnik's defence.[933] Mr. Mano's appreciation of Counsel Stewart's management of the Defence team cannot be accorded any significant weight in view of his limited legal experience in general and of Krajišnik's case in particular.[934] Mr. Karganović referred to the work as "improvisation" because, he said, "there was no consistent well-thought-out plan underlying what we were doing".[935] The Appeals Chamber does not consider this testimony reliable, in particular since Mr. Karganović was not privy to all discussions between counsel regarding trial strategy.[936]

402. Lastly, Krajišnik provides three other examples of Counsel Stewart's alleged mismanagement. First, he claims that Counsel Stewart sent Co-counsel David Josse to Bosnia and Herzegovina although Mr. Josse at the time knew nothing about the local affairs and was sent without a team member who spoke both English and B/C/S fluently.[937] However, the Appeals Chamber notes, as does Krajišnik himself, that Mr. Josse was accompanied by a B/C/S speaker during this trip.[938] The remaining evidence does not show any particular mismanagement by

[926] Krajišnik's Supplemental Brief, paras 17, 19, 20, 72.
[927] *See supra* III.A.3 and 4; Witness Stewart, AT. 705.
[928] Krajišnik's Supplemental Brief, paras 21-22.
[929] Krajišnik's Supplemental Brief, para. 23.
[930] Witness Mano, AT. 363.
[931] Witness Karganović, AT. 437.
[932] Exhibit AD5, p. 1 (Confidential).
[933] The implications in Exhibit AD6, p. 3 that the Trial Chamber considered Mr. Stewart a poor manager are unreliable in light of Exhibit AD8, pp. 1-2.
[934] *See* Witness Mano, AT. 357, 391-392. *See* also Witness Stewart, AT. 698.
[935] Witness Karganović, AT. 437.
[936] Witness Stewart, AT. 698.
[937] Krajišnik's Supplemental Brief, para. 24.
[938] Krajišnik's Supplemental Brief, para. 24.

Counsel Stewart.[939] Second, Krajišnik argues that Defence witnesses were often chosen without his knowledge, not according to strategic decisions, and had very little to say about determinative issues in the case.[940] The evidence Krajišnik refers to in support[941] does not alter the Appeals Chamber's consideration of the similar argument already rejected under the first ground of appeal submitted by *Amicus Curiae*.[942] Third, Krajišnik asserts that the Defence's Final Trial Brief was inadequate, but fails to explain how, or in what parts.[943]

403. For these reasons, the Appeals Chamber rejects Krajišnik's claim that Counsel Stewart mismanaged the case.

3. Counsel's alleged failure to secure information from his team and from Krajišnik

404. Krajišnik submits that the Judges of the Trial Chamber considered Counsel Stewart "arrogant and unpleasant", and that this caused Krajišnik harm.[944] Also, he posits, Counsel Stewart was condescending with and would not take advice from people he thought inferior to him and would dismiss suggestions by his team unless he came up with an idea on his own.[945] The Appeals Chamber considers the part of Exhibit AD6 Krajišnik relies on as being unreliable in light of Exhibit AD8. In remaining parts, he invokes the testimonies of Messr. Mano and Karganović[946] and Mr. Mano's statement admitted as Exhibit AD1. However, this evidence contains but sweeping, subjective and, save for one instance, unsubstantiated assertions as to Counsel Stewart's personality, and is in Mr. Mano's case also based on a very limited period of time. The one substantiated example concerns Counsel Stewart's decision not to consult Mr. Mano, who was specialised in Balkan history, on events relevant to the Indictment, while at the same time "complaining" at trial that his knowledge of the historical facts of the case was only that of an "educated layman".[947] Yet, the evidence invoked is silent on the reasons for Counsel Stewart's choice not to consult Mr. Mano, and, in any event, does not demonstrate gross negligence on behalf of Counsel Stewart.

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[939] Mr. Karganović's testimony, on which Krajišnik relies here, reflects the witness' personal disagreement with Mr. Stewart's choice of translator for the trip more than the general view advocated by Krajišnik that Mr. Stewart was a bad manager: Witness Karganović, AT. 464-465.
[940] Krajišnik's Supplemental Brief, para. 25.
[941] Witness Karganović, AT. 467, 474, 476. This evidence cannot be accorded significant weight, primarily given Mr. Karganović's limited legal expertise as counsel (*see* Witness Karganović, AT. 429) and the fact that he was not privy to all strategic decisions made by counsel (Witness Stewart, AT. 698).
[942] *See supra* III.A.3(b)(ii)(g).
[943] Krajišnik's Supplemental Brief, para. 26. *See* also *ibid*., para. 70.
[944] Krajišnik's Supplemental Brief, para. 27.
[945] Krajišnik's Supplemental Brief, paras 28, 30.
[946] Witness Mano, AT. 363, 364, 369; Witness Karganović, AT. 441, 453, 480. Krajišnik also refers to Counsel Stewart's testimony, without more, that the Defence had insufficient time to instruct and review reports from the investigators in Pale (Krajišnik's Supplemental Brief, para. 31). Absent any further substantiation of this argument, the Appeals Chamber dismisses it.
[947] Krajišnik's Supplemental Brief, para. 29, referencing T. 4463-4464.

405. Krajišnik also argues that Counsel Stewart failed to receive instructions from him.[948] In support, he argues that Counsel Stewart withdrew from the agreed facts process without consulting him first, but does not account for the evidence that Krajišnik did not object to the withdrawal when informed of it.[949] The remaining arguments here are either inconsequential[950] or already addressed.[951] For these reasons, Krajišnik's arguments are dismissed.

4. Counsel's alleged disinterest in the case

406. Krajišnik argues that Mr. Stewart took little personal interest in the case, showed no concern about its outcome, was disinterested in the factual background, and prioritised private interests over case-related tasks.[952] As noted by the Prosecution,[953] save for the subjective impressions of Messr. Mano and Karganović invoked by Krajišnik,[954] the record does not indicate a lack of interest in the case by Counsel Stewart. His short travels – during which he testified he worked[955] – referred to by Mr. Mano[956] are not out of the ordinary. This claim is thus dismissed.

407. Having dismissed the alleged shortcomings on behalf on Krajišnik's former counsel in the preceding sections, there is no basis for examining the prejudice Krajišnik claims resulted from those shortcomings (namely, lack of knowledge of the case by Counsel Stewart and failure to test the Prosecution evidence and to present the defence effectively). However, Krajišnik also brings support for this alleged prejudice, which the Appeals Chamber deems it appropriate to address.

5. Counsel's alleged lack of knowledge of the case

408. Krajišnik contends that the Defence's inability to adequately review the case documents resulted in a lack of knowledge of the case. In particular, he claims, this was manifest in the lack of a proper Defence strategy.[957] Aside from arguments already addressed,[958] Krajišnik supports this

[948] Krajišnik's Supplemental Brief, paras 65-69.
[949] Witness Stewart, AT. 685.
[950] Krajišnik's Supplemental Brief, paras 65-66 (incorrectly attaching weight to a jocular comment by Counsel Stewart (AT. 693) regarding a counsel's duty to guide his client), and 69 (arguing that Krajišnik did contribute to his Defence team).
[951] Krajišnik's Supplemental Brief, paras 67-68 (arguing that any instructions given by Krajišnik to Counsel Stewart were futile given the Defence team's alleged inadequate grasp of the case documentation). *See supra* III.A.3(b)(ii)(a).
[952] Krajišnik's Supplemental Brief, paras 32-33.
[953] Prosecution's Supplemental Brief, para. 37.
[954] Witness Mano, AT. 363, 417; Witness Karganović, AT. 459; Exhibits AD1, AD2. The Appeals Chamber also notes that Mr. Karganović's invoked testimony does not unequivocally support Krajišnik's contention that Counsel Stewart was unconcerned about the outcome of the case.
[955] Witness Stewart, AT. 692.
[956] Witness Mano, AT. 363, 365, 402. *See* also Exhibit AD2, para. 3.
[957] Krajišnik's Supplemental Brief, para. 35.
[958] Krajišnik's Supplemental Brief, paras 34-35, 64; *see supra* III.A.3.

assertion with the testimonies of Messr. Mano and Karganović.[959] The Appeals Chamber does not find either testimony reliable for the present purposes.[960]

409. Krajišnik further invokes Counsel Stewart's own testimony that the concept of JCE was "a new animal to him" and Mr. Karganović's statement in Exhibit AD2 that Counsel Stewart said he did not understand the case and "had no idea" how to mount a defence.[961] The Appeals Chamber notes that Counsel Stewart admitted he knew little about JCE when he took on the case, but testified that he fully familiarised himself with the concept before the trial started in order to meet the interconnected factual challenges later on.[962] The Appeals Chamber sees no gross negligence in this. Mr. Karganović's related statement in Exhibit AD2 is contradicted by, and does not alter the Appeals Chamber's appreciations of, evidence already accepted.[963] For these reasons, Krajišnik's arguments are rejected.

6. Counsel's alleged failure to test Prosecution evidence

410. Krajišnik submits that Counsel Stewart and his team failed to effectively cross-examine witnesses against him.[964] As a result, he contends, their evidence relied on by the Trial Chamber is unreliable.[965] Krajišnik relies on Counsel Stewart's testimony and a number of statements by Counsel Stewart and Co-counsel Loukas at trial.[966] Having carefully perused these statements, the Appeals Chamber considers them indicative of the fact, acknowledged above,[967] that Krajišnik's Defence was not without difficulties. However, they fall short of showing that the evidence of the witnesses in question[968] is unreliable as argued. Indeed, during his testimony Counsel Stewart failed to identify specific instances where his cross-examination was hampered,[969] and Krajišnik did not confront him with any.[970] Quite to the contrary, Counsel Stewart testified that he and his team were

[959] Krajišnik's Supplemental Brief, para. 35.
[960] Mr. Mano worked on the Defence team for a very limited period, and has limited legal experience. Similarly, Mr. Karganović only joined the Defence team about one year into the trial, and also does not have experience as legal counsel. Furthermore, Counsel Stewart testified that Messr. Mano and Karganović were not privy to all discussions between Counsel Stewart and Co-counsel Josse, AT. 698.
[961] Krajišnik's Supplemental Brief, para. 36, referencing Witness Stewart, AT. 703-704; Exhibit AD2, para. 6.
[962] Witness Stewart, AT. 703-704.
[963] *See supra* III.A.3(b)(ii).
[964] Krajišnik's Supplemental Brief, paras 37-49, 59, 62-63.
[965] Krajišnik's Supplemental Brief, para. 49.
[966] Krajišnik's Supplemental Brief, paras 39-47, Annex A.
[967] *See supra* III.A.3(b)(ii).
[968] Namely: Treanor, Plavšić, Đerić, Trbojević, Đokanović, Nielsen, Mandić, Hanson, Prstojević, Deronjić, Donia, Nešković, Witness 623, Babić, Bjelobrk, Kljujić, Radić, Witness 680, Witness 583, Okun, Čengić and Davidović. *See* Krajišnik's Supplemental Brief, Annex A.
[969] Witness Stewart, AT. 712.
[970] *See* also *supra* III.A.3(b)(ii)(f).

able to prepare for cross-examination of Prosecution witnesses.[971] As a result, Krajišnik's contention fails.

7. Counsel's alleged failure to conduct an effective defence case

411. Krajišnik essentially posits that Counsel Stewart was negligent in choosing Defence witnesses. First, he relies on Mr. Karganović's testimony that the Defence witnesses were not chosen based on strategic decisions that they would be helpful to the Defence, and that they had very little to say about determinative issues in the case.[972] He also invokes Mr. Karganović's statement in Exhibit AD2 that, when the Defence case started, Counsel Stewart had done nothing to meet with Defence witnesses and did not have a Defence plan.[973] In addition, Krajišnik argues, Counsel Stewart testified that calling witnesses in any particular order was "low down on the list of priorities" and that he did not sufficiently prepare the Defence case.[974]

412. The Appeals Chamber rejects the invoked parts of Mr. Karganović's testimony for reasons stated above.[975] His statement in Exhibit AD2 is directly contradicted by evidence already accepted showing that the Defence team did have a strategy from the outset of the Prosecution case, which it then adhered to throughout the trial.[976] Turning to Counsel Stewart's evidence, he did not testify that he failed to sufficiently prepare the Defence case; he merely said he was concerned as to whether he had sufficient time to prepare it.[977] This contention has already been addressed and dismissed.[978] Finally, Krajišnik fails to explain what prejudice allegedly resulted from Counsel Stewart's decision not to call the Defence witnesses in any particular order.

413. Next, Krajišnik contends that Counsel Stewart failed to call crucial expert witnesses.[979] The Appeals Chamber notes Counsel Stewart's statement at trial that the time constraints had compelled him to take a "robust decision" to strike expert witnesses off the list of Defence witnesses. He said, "we certainly would have preferred to reach a considered conclusion, but we haven't". However, Counsel Stewart clarified at the same time that the Defence team "is not particularly wedded to the notion that excessive expert evidence is going to help anybody".[980] This qualification is consistent with his testimony on appeal that, "[w]e came to a reasonably firm provisional conclusion that actually there was very limited potential, real usefulness of expert witnesses on your side of the

[971] Witness Stewart, AT. 669.
[972] Krajišnik's Supplemental Brief, para. 51, referencing Witness Karganović, AT. 476.
[973] Krajišnik's Supplemental Brief, para. 52, referencing Exhibit AD2, paras 5, 9.
[974] Krajišnik's Supplemental Brief, para. 51, referencing Witness Stewart, AT. 677.
[975] *See supra* IV.B.2.
[976] *See supra* III.A.3(b)(ii). *See* also Prosecution's Supplemental Brief, paras 17-23.
[977] Witness Stewart, AT. 676.
[978] *See supra* III.A.5(b).
[979] Krajišnik's Supplemental Brief, paras 53-55.

case, Mr. Krajišnik".[981] The other evidence Krajišnik refers to either does not support his contention that Counsel Stewart's decision to abandon expert witnesses was negligent,[982] or is purely speculative.[983]

414. Krajišnik's argument that Counsel Stewart failed to conduct an effective defence case is therefore rejected.

8. Conclusion

415. The Appeals Chamber dismisses Krajišnik's claim that his trial was unfair.

C. Alleged error in finding that Krajišnik was a JCE member and alleged failure to properly impute crimes by non-JCE members

416. In part three of his Appeal Brief, Krajišnik submits that the Trial Chamber erred in law and in fact in finding that he was a JCE member.[984] The Appeals Chamber discusses here the alleged errors of law.

417. Krajišnik first avers that he and the other alleged members of the JCE were not acting together or according to a criminal plan, but were simply individuals carrying out tasks within their lawful competencies, as part of the functioning of the state administration and in accordance with the Constitution.[985] Krajišnik adds that his actions cannot be categorised as any of the crimes sanctionable by the Statute.[986]

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[980] T. 20854.
[981] Witness Stewart, AT. 646. This discussion was largely based on a comprehensive memorandum on expert witnesses prepared by Counsel Stewart's Co-counsel: AT. 645-646. Counsel Stewart confirmed on appeal that he stood by this decision not to call expert witnesses (AT. 646).
[982] Mr. Karganović's testimony primarily relays Krajišnik's own disagreement with that decision (AT. 442-444), and to the extent it expresses Mr. Karganović's view on the appropriateness of not calling expert witnesses, it is unreliable (AT. 473).
[983] Krajišnik's Supplemental Brief, paras 56-58. *See* also *ibid*., para. 94. The Appeals Chamber also notes that Krajišnik has made an alternative request, if his request for a reversal of all convictions or for a retrial on all counts is not granted ("Alternative Request"). *See* Consolidated Supplemental Brief in Relation to the Additional Evidence, 18 November 2008, paras 95-97. In the Alternative Request, Krajišnik requests the Appeals Chamber to recall important Prosecution witnesses, to allow him to call additional expert evidence, and to call *proprio motu* Chrissa Loukas to testify about the issue of ineffective assistance of counsel (Consolidated Supplemental Brief in Relation to the Additional Evidence, 18 November 2008, para. 97). The Appeals Chamber finds that the first two requests effectively amount to a motion to present additional evidence, however without showing cogent reasons for the delay of this filing. With respect to the third request, Krajišnik does not present any argument why the Appeals Chamber should call *proprio motu* Chrissa Loukas as a witness. Furthermore, the Appeals Chamber has already dismissed Krajišnik's request to have Chrissa Loukas called as a witness under Rule 115 of the Rules (*see* Decision on Momčilo Krajišnik's Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision not to Call Former Counsel, 6 November 2008). Consequently, the Alternative Request is dismissed.
[984] Krajišnik's Appeal Brief, paras 9-24.
[985] Krajišnik's Appeal Brief, paras 9-10. *See* also paras 134, 187, 203.
[986] Krajišnik's Appeal Brief, para. 13. *See* also para. 196.

418. The Prosecution responds that Krajišnik was not convicted because of his involvement in Bosnian-Serb institutions but because of his participation in criminal actions.[987] Further, it is irrelevant that Krajišnik's actions cannot be categorised as any crime under the Statute as his participation in the JCE need not involve the commission of any crime but may take the form of assistance in the execution of that JCE.[988]

419. The Appeals Chamber will later examine Krajišnik's allegation that he and other alleged JCE members did not act together in pursuit of a criminal plan. However, the Appeals Chamber immediately dismisses his argument that the alleged JCE members were acting within their lawful competencies and in accordance with the Constitution, as this is irrelevant to determine whether the actions of the concerned persons resulted in criminal liability under the Statute.

420. Krajišnik also maintains that the Trial Chamber failed to distinguish crimes committed in pursuit of the common objective from crimes which were similar but which could not be attributed to the JCE.[989] He contends in particular that the Trial Chamber should have examined, in relation to each crime found committed, whether the perpetrators shared the premeditation and objectives with the participants of the JCE[990] and concludes that he should be relieved of responsibility for crimes committed in BiH by rogue elements or outsiders.[991]

421. The Prosecution responds that the Trial Chamber was aware of this distinction and that it used appropriate criteria to make it.[992]

422. Krajišnik's submission essentially turns on whether he and the other JCE members "used" non-JCE members to commit crimes in furtherance of the common purpose. As such, the Appeals Chamber refers to its analysis of this question below.[993]

D. Alleged errors of fact

423. In the fourth part of his Appeal Brief,[994] Krajišnik raises a number of challenges to the Trial Chamber's factual findings, but these are not presented in any specific order. As noted above, Krajišnik's Appeal Brief fails to follow the structure of Krajišnik's Notice of Appeal. Further, Krajišnik's arguments do not seem to have been organised according to themes, nor do they

[987] Prosecution's Response to Krajišnik, para. 34.
[988] Prosecution's Response to Krajišnik, para. 35, referring to *Tadić* Appeal Judgement, para. 227. On this specific issue, *see infra*, IV.E.2(b)(iii).
[989] Krajišnik's Appeal Brief, paras 18-24.
[990] Krajišnik's Appeal Brief, para. 21, referring to the *Limaj et al.* Appeal Judgement.
[991] Krajišnik's Appeal Brief, para. 22. *See also* Krajišnik's Reply, paras 12-16.
[992] Prosecution's Response to Krajišnik, paras 33, 36-37. At paragraph 38, the Prosecution adds that Krajišnik fails to show that any crime was wrongly imputed to JCE members by the Trial Chamber.
[993] *See infra* IV.D.4(c).

generally follow the structure of the Trial Judgement.[995] The Appeals Chamber will not consider Krajišnik's arguments one by one in numerical order, but it will group them following the outline of the Trial Judgement, as far as this is possible.

424. The Appeals Chamber also notes that Krajišnik often refers to documents identified by the letter "K", followed by a number, in support of his arguments.[996] Some of these documents were admitted as exhibits at trial, albeit under different exhibit numbers.[997] In these instances, the Appeals Chamber understands that Krajišnik challenges the Trial Chamber's evaluation of the evidence before it. Most of these documents, however, were not admitted at trial. With the exception of parts of document "K-0005", which are unrelated to the subject-matter of his present arguments, the Appeals Chamber has dismissed Krajišnik's request to have these documents admitted as evidence on appeal.[998] The Appeals Chamber will therefore dismiss arguments, or parts thereof, which rely solely on these documents.

425. With regard to additional evidence admitted on appeal which could support Krajišnik's arguments, the Appeals Chamber will only examine it insofar as it was referred to in his Supplemental Brief, as reflective of his views on the impact of such evidence on the Trial Chamber's findings.[999]

1. Challenges to findings on events preceding the crimes (mainly Part 2 of the Trial Judgement)

426. Krajišnik brings a number of challenges to the Trial Chamber's findings regarding the events in 1991 and early 1992 leading up to the crimes charged against him. While he does not seem to present these arguments in any specific order, they largely follow the outline of the Trial Judgement. The Appeals Chamber will therefore address them under sections corresponding to those used in the Trial Judgement, with the exception of Krajišnik's personal participation in these events, which will be dealt with separately.

427. At the outset, the Appeals Chamber notes that the information provided in Part 2 of the Trial Judgement is mostly background information. Krajišnik challenges several of the findings in this

[994] Paragraphs 25-452, appearing under the heading "3. Errors of Fact".
[995] As a result of the deficiencies in the structure of Ground 4 of Krajišnik's Appeal Brief, the Prosecution's Response to Krajišnik groups the issues raised under six themes: 1) membership in JCE; 2) common objective; 3) connection to crimes/principal perpetrators; 4) contribution; 5) *mens rea*; and 6) crimes: Prosecution's Response to Krajišnik, para. 15. The Prosecution adds that if this approach does not conform to the relevant practice direction, then it seeks leave from the Appeals Chamber to be allowed to proceed this way: Prosecution's Response to Krajišnik, para. 17. The Appeals Chamber grants the leave requested by the Prosecution.
[996] *See* for instance Krajišnik's Appeal Brief, paras 28, 31, 56, 80, 81, 84, 101, 102, 108, 110, 120, 124, 131, 132, 154, 157, 168, 184, 208, 211, 239, 251, 254, 257-259, 265, 279, 280, 286, 292, 306, 362, 389, 409, 417, 429, 430.
[997] *See* Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, para. 10.
[998] *See* Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, para. 149.

Part, but he generally fails to articulate the impact of the alleged errors. Many of his arguments challenge factual findings on which his conviction does not rely, or the relevance which has not been explained by Krajišnik. Nonetheless, the Appeals Chamber notes that Part 2 of the Trial Judgement to some extent concerns Krajišnik's role in the events leading up to the creation of various institutions of the Bosnian-Serb Republic, and that this was one of the bases for his liability pursuant to JCE.[1000] The Appeals Chamber therefore proceeds to consider the arguments raised by Krajišnik against the factual findings in Section 2 of the Trial Judgement.

(a) Political precursors

428. Section 2 of the Trial Judgement, entitled "Political precursors", provides an account of the background to the conflict in Bosnia and Herzegovina.[1001] The section sets out the Trial Chamber's findings on the creation of the SDS and the division of power between the SDA, SDS and HDZ following the first multi-party elections in Bosnia and Herzegovina (Section 2.1), the SDS's role in arming and mobilising the Serb population of BiH from the Spring of 1991 (Section 2.2), the SDS's exploitation of the Bosnian Serbs' fear to be left in a minority in an independent BiH (Section 2.3), the creation of Serb autonomous regions and districts in 1991 (Section 2.4), the creation of the Bosnian-Serb Assembly (Section 2.5), the SDS's "Variant A and B Instructions" of 19 December 1991 (Section 2.6) and the proclamation and subsequent establishment of the Bosnian-Serb Republic in 1992 (Sections 2.7 and 2.8). The Appeals Chamber will now examine Krajišnik's arguments related to these Sections.

(i) Creation of Serb autonomous regions and districts (Section 2.4)

429. The Trial Chamber found that during the first months of 1991 the SDS began to organise Serb-majority municipalities in BiH into communities of municipalities, which led to the creation of the Community of Municipalities of the Bosnian Krajina on 7 April 1991, followed by two other associations in May 1991.[1002] It found that, although SDS party leaders justified the associations in terms of economic necessity,

> among the functions the SDS assigned to the Bosnian Krajina community of municipalities was the organization of its defence in times of war or imminent threat of war. The Chamber finds that, when considered together with the arming and mobilization of the Serbian population, this policy

[999] *Cf.* Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, Disposition.
[1000] Trial Judgement, para. 1120 ("In the Chamber's view, the Accused's overall contribution to the JCE was to help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes.").
[1001] Trial Judgement, para. 24.
[1002] Trial Judgement, para. 48.

> shows that the SDS was prepared to oppose even by force the possibility that Bosnia-Herzegovina would become an independent unitary state.[1003]

430. Krajišnik challenges these findings and submits that, while the creation of the Autonomous Region of Krajina ("ARK") was in accordance with the BiH Constitution and justified by the "economic neglect and historical aspirations of the Bosnian and Serbian Krajinas to be united", the Muslim aspiration "to make BH a unitary Muslim state was the most important reason."[1004] The Appeals Chamber considers that these contentions are irrelevant to, or in any event not inconsistent with, the impugned findings. As such, they are dismissed.

431. The Trial Chamber further found that "[t]he SDS leadership, in agreement with the political establishment in Serbia, began considering options for a break-up of [BiH] along ethnic lines and a realignment of component parts with neighbouring states". It referred, *inter alia*, to a meeting between Slobodan Milošević, Radovan Karadžić, Biljana Plavšić and Krajišnik on 14 February 1991.[1005]

432. Krajišnik challenges this finding on the basis of a document which does not form part of the trial record and was not admitted on appeal.[1006] The Appeals Chamber therefore dismisses his argument, adding that Krajišnik in any case fails to explain why the Trial Chamber could not reasonably have reached its conclusion on the basis of the other evidence it relied on.[1007]

433. Continuing its recount of the creation of Serb autonomous regions, the Trial Chamber described a confidential SDS document, dated 23 February 1991, considering specific actions to be taken should BiH move towards independence.[1008] In a seeming attempt to challenge the authenticity of this document, Krajišnik argues that it is unsigned and of unknown origin.[1009] The Appeals Chamber dismisses Krajišnik's argument because it does not address the remaining evidence the Trial Chamber relied on for its analysis of the document.[1010]

434. Next, the Trial Chamber found that by June 1991 the SDS leadership ordered municipal SDS organs to prepare maps of the municipalities showing the ethnic composition of each territory.[1011] Krajišnik submits that, in June 1992, the map drawing ethnic lines between the three sides in BiH was the most important issue in negotiations.[1012] The Appeals Chamber fails to see the

[1003] Trial Judgement, para. 49.
[1004] Krajišnik's Appeal Brief, para. 250.
[1005] Trial Judgement, para. 50.
[1006] Krajišnik's Appeal Brief, para. 251.
[1007] Trial Judgement, fn. 122.
[1008] Trial Judgement, para. 51, referring to P65, tab 19 (Document on steps to be undertaken by municipalities).
[1009] Krajišnik's Appeal Brief, para. 252.
[1010] Trial Judgement, fns. 123-126.
[1011] Trial Judgement, para. 52.
[1012] Krajišnik's Appeal Brief, para. 253.

immediate relevance of this argument to the impugned finding. In any case, his argument is unsupported. The Appeals Chamber dismisses this submission.

435. Krajišnik then asserts that the Trial Chamber's finding that the armed conflicts in Slovenia and Croatia incited SDS leaders to contemplate the creation of a separate Serb territory in BiH is erroneous.[1013] Krajišnik relies for his challenge on a document which is not part of the record; in addition, Krajišnik fails to account for the other evidence the Trial Chamber relied on in making its finding.[1014] The Appeals Chamber dismisses this argument.

436. The Trial Chamber further found that, from its inception in September 1991, the ARK started taking over television and radio installations, broadcasting "Serb" programmes that intimidated other nationalities and barring Muslim leaders from the radio while giving SDS leaders unlimited access.[1015] Krajišnik asserts that the taking of control over the television relays was due to the "one-sided programmes broadcast on RTV [Radio Television] Sarajevo and other Muslim-controlled media from Sarajevo".[1016] This bare assertion is dismissed.

437. Next, Krajišnik challenges the Trial Chamber's reliance on the testimony of Witness Kljuić to find that a meeting involving Krajišnik and other SDS leaders had taken place in Krajišnik's office in the autumn of 1991.[1017] Krajišnik contends that, while the witness said there were six people at the meeting, there were only four armchairs in the office.[1018] The Appeals Chamber dismisses this irrelevant and unsupported assertion.

438. The Trial Chamber concluded its findings in Section 2.4 of the Trial Judgement by holding that, by autumn 1991, the SDS was ready to have "Serb" territories secede from an independent BiH if that was the only way for Serbs to remain in Yugoslavia.[1019] Krajišnik submits that the Trial Chamber erred in this conclusion, because BiH was not an independent state.[1020] The Appeals Chamber notes that this argument is not inconsistent with the impugned finding and dismisses it. Krajišnik further contends that the Serbs first opposed the "unconstitutional secession of BH from Yugoslavia", but later agreed as a compromise to the secession of BiH as a decentralised state.[1021] There are at least three flaws in this argument: 1) it is unsupported; 2) it is insufficiently precise to

[1013] Krajišnik's Appeal Brief, para. 254, referring to Trial Judgement, para. 55.
[1014] Trial Judgement, fns. 133, 134.
[1015] Trial Judgement, para. 58.
[1016] Krajišnik's Appeal Brief, para. 255, referring to Trial Judgement, para. 58.
[1017] Krajišnik's Appeal Brief, para. 256, referring to Trial Judgement, para. 61.
[1018] Krajišnik's Appeal Brief, para. 256, referring to Trial Judgement, para. 61.
[1019] Trial Judgement, para. 62.
[1020] Krajišnik's Appeal Brief, para. 257.
[1021] Krajišnik's Appeal Brief, para. 257. *See* also AT. 177-178.

show that the Trial Chamber's conclusion was erroneous;[1022] and 3) it ignores relevant intermediary findings of the Trial Chamber[1023] and the evidence cited by the Trial Chamber.[1024] As such, this assertion is dismissed.

(ii) Creation of Bosnian-Serb Assembly (Section 2.5)

439. Section 2.5 of the Trial Judgement concerns the establishment of the Assembly of the Serbian People of BiH ("Bosnian-Serb Assembly") by SDS deputies on 24 October 1991.[1025] As a general matter, Krajišnik argues that the initiative to establish the Bosnian-Serb Assembly "was a response of the Serbian side to the unconstitutional decision of their partners in the BH Assembly on 15 October 1991".[1026] The Prosecution responds that the Trial Chamber took into account the political events preceding the creation of the Assembly, and that Krajišnik has not shown any error in the Trial Chamber's findings.[1027] The Appeals Chamber agrees and notes that Krajišnik's argument is also unsupported. His argument is dismissed.

440. Part of the political events preceding the creation of the Assembly, the Trial Chamber found, was the protest by the SDS that a declaration of sovereignty of BiH would be unconstitutional as it would infringe on Serbs' rights and had not been vetted by the Council for Ethnic Equality.[1028] Krajišnik argues that the Serbian deputies did not protest, but put the decision of BiH's future structure before the Council for the Protection of Vital Interests of Nations and Minorities in BiH.[1029] As this argument relies on material that is not part of the record, it is dismissed.

441. The Trial Chamber further found that during the debate on 14 and 15 October 1991 on whether to vote on a declaration of sovereignty of Bosnia and Herzegovina, Krajišnik, as President of the BiH Assembly, adjourned the session when the other parties decided to proceed with the vote.[1030] Krajišnik challenges this finding and argues that he did not adjourn the discussion, but concluded it, after which he could no longer intervene.[1031] Krajišnik brings no evidentiary support for this argument, which is thus dismissed.

[1022] In particular, the assertion that the Bosnian Serbs later agreed to the secession of BiH as a decentralised state does not show that the Trial Chamber erred in finding that, by autumn 1991, the SDS was ready to have "Serb" territories secede from an independent BiH if that was the only way for Serbs to remain in Yugoslavia.
[1023] Such as the finding that Krajišnik, Radovan Karadžić and Nikola Koljević all insisted that BiH as a whole would remain in Yugoslavia or it would be divided (Trial Judgement, para. 61).
[1024] *See* in particular Trial Judgement, fn. 153, referring to Witness 623, T. 5686-5696.
[1025] Trial Judgement, para. 67.
[1026] Krajišnik's Appeal Brief, para. 221.
[1027] Prosecution's Response to Krajišnik, para. 152, referring to Trial Judgement, Parts 2 and 3, particularly, paras 63-69.
[1028] Trial Judgement, para. 63.
[1029] Krajišnik's Appeal Brief, para. 258.
[1030] Trial Judgement, para. 64.
[1031] Krajišnik's Appeal Brief, para. 258.

442. On 15 October 1991, the Trial Chamber continued, the SDS Political Council met to assess the prevailing situation. Krajišnik addressed the meeting and suggested that, since the decision to adopt the declaration of sovereignty of Bosnia and Herzegovina was illegal and unconstitutional, the SDS had to find a way to denounce it.[1032] Krajišnik argues that the Trial Chamber misquoted his statement at this meeting.[1033] The Appeals Chamber notes that, according to Exhibit P65, tab 47, Krajišnik stated that the SDS had to "find a method of proving" the illegality and unconstitutionality of the decision; he did not explicitly state that the SDS had to find a way to "denounce" it.[1034] However, the quotation of his statement as it appears in the Exhibit is not inconsistent with the impugned finding, and Krajišnik fails to explain why the latter cannot stand on the basis of the evidence the Trial Chamber relied on.[1035] His argument is therefore dismissed. Krajišnik's additional assertion that the Serbian side publicly requested the annulment of unconstitutional decisions[1036] is dismissed. His argument in reply that the SDS Council did not state that parallel institutions should be established in the BiH is dismissed too.[1037]

443. Next, Krajišnik challenges the Trial Chamber's finding that he, Radovan Karadžić, Nikola Koljević and Biljana Plavšić met with the Yugoslav Presidency to calculate the percentage of the population in former Yugoslavia who supported "the concept of Federation" promoted by Slobodan Milošević.[1038] He argues that the reason why he and other representatives of the Bosnian Serbs consulted with representatives of the Federal state was that they all recognised the existence of Yugoslavia.[1039] This argument is unsupported and in any event not in contradiction with the impugned finding. As such, it is dismissed.

444. Section 2.5 of the Trial Judgement also describes some early examples of SDS documents requiring direct implementation of instructions by republican and regional institutions.[1040] One such example was when Radovan Karadžić, on 18 October 1991, declared a state of emergency in the SDS and ordered daily meetings of SDS municipal boards and round-the-clock duty watches. There was evidence that two SDS municipal boards responded to the emergency by setting up crisis staffs.[1041] Krajišnik argues that "a state of emergency in the SDS boiled down to the introduction of duty shifts in the party" and that crisis staffs in BiH were customary and established on all three

[1032] Trial Judgement, para. 65.
[1033] Krajišnik's Appeal Brief, para. 259, referencing Exhibit P65, tab 47.
[1034] Exhibit P65, tab 47, p. 2.
[1035] Trial Judgement, fn. 159, referencing, in addition to Exhibit P65, tab 47, the testimony of Witness Treanor, T. 1423-1430 and Exhibit C7, para. 11.
[1036] Krajišnik's Appeal Brief, para. 259.
[1037] Krajišnik's Reply, para. 37, referencing Exhibit P65, tab 47 but failing to address the evidence relied on in the Trial Judgement, para. 65, fns 159-160.
[1038] Trial Judgement, para. 66.
[1039] Krajišnik's Appeal Brief, para. 260.
[1040] Trial Judgement, paras 70-72.
[1041] Trial Judgement, para. 71.

sides without a legal framework.[1042] The Appeals Chamber notes that, to the extent they are sufficiently developed, these arguments are not at odds with the impugned findings. Moreover, Krajišnik relies on evidence considered by the Trial Chamber without explaining how it erred in its assessment thereof.[1043] The Appeals Chamber therefore dismisses Krajišnik's arguments.

445. Additionally, Krajišnik submits that the order introducing a state of emergency in the SDS "is an example of the Defence's claim that the decisions of its žtop party leaders' were declarative pamphlets which were never implemented".[1044] The Appeals Chamber dismisses this unsupported contention.

(iii) SDS Instructions of 19 December 1991 ("Variant A and B Instructions")

446. The Trial Chamber found that, "between November and December 1991 […] the SDS leadership began practical preparations for a separate state, should Bosnia and Herzegovina secede from the Yugoslav federation".[1045] In this connection, Section 2.6 of the Trial Judgement discusses the 19 December 1991 "Instructions for the Organisation and Activity of the Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances" and the so-called "Variant A and B Instructions" contained therein. The Trial Chamber ultimately found that these Instructions reflected SDS policy, that they found their way to local SDS leaders between 20 December 1991 and early 1992, that they were received and implemented, fully or partially, in several municipalities of Bosnia and Herzegovina, and that the SDS in several municipalities relied on them for actions.[1046]

447. At the outset, Krajišnik brings three challenges to the introductory findings in Section 2.6. He first argues that the Trial Chamber erred in finding that the Bosnian-Serb leadership began practical preparations for a separate state between November and December 1991, as the preparations for the establishment of a Bosnian-Serb state began after the European Community's invitation for the recognition of BiH as a sovereign state and after the "unlawful decision of the BiH Presidency and Government".[1047] The Appeals Chamber observes that these arguments are not inconsistent with the impugned finding. As such, they are dismissed.

448. Second, Krajišnik submits that the Trial Chamber erred when it held that a letter signed by him on 19 December 1991, addressed to the self-proclaimed Serbian Krajina government, reflected

[1042] Krajišnik's Appeal Brief, para. 261, referencing Exhibits P65, tab 51, P529, tab 8, P65, tab 52, P529, tab 10; Krajišnik's Reply, para. 67.
[1043] Trial Judgement, fn. 175, referencing Exhibits P65, tab 51, P529, tab 8, P65, tab 52, P529, tab 10; *ibid.*, fns. 776, 778, referencing Witness 132, T. 12536, 12537.
[1044] Krajišnik's Appeal Brief, para. 262.
[1045] Trial Judgement, para. 81.
[1046] Trial Judgement, para. 97.
[1047] Krajišnik's Appeal Brief, para. 263, referencing Exhibit P64, tab 543, without any further precision.

both the goal that all Serbs live in one state and that Serbs in Croatia and BiH were on territory historically belonging to them.[1048] He asserts that "[c]ongratulations to the Republic of Serbian Krajina were a matter of political protocol in line with the political moment."[1049] The Appeals Chamber dismisses this argument because, even if accepted, it is not inconsistent with the impugned finding.

449. Third, Krajišnik challenges the Trial Chamber's reference, based in part on Herbert Okun's testimony, to a meeting on 2 December 1991 between the witness, Cyrus Vance and Radovan Karadžić,[1050] arguing first that he did not attend this meeting. Because the Trial Chamber did not find otherwise, this argument is irrelevant and accordingly dismissed. Krajišnik's second claim, namely that at the meeting Radovan Karadžić "expressed his concern to Mr. Okun regarding the announcement that BH could become an independent state in an unconstitutional way", is dismissed as it is irrelevant, undeveloped and a mere assertion that the Trial Chamber should have interpreted the evidence in a particular manner. Finally, Krajišnik's assertion that Witness Okun was wrong because on 21 December 1991 the Serbian side did accept an independent but transformed BiH is dismissed as relying solely on material not on the record.[1051] In any case, even if the Serbian side had accepted an independent but transformed BiH, this would still not demonstrate an error of the Trial Chamber, which found that

> [t]he SDS leadership thus decided to proceed on two tracks, in order to keep its options open for as long as possible. On the one hand, they participated in negotiations with the other parties to find acceptable arrangements for the three nationalities in Bosnia-Herzegovina. On the other hand, they actively prepared for unilateral separation of what they considered Serb territories from Bosnia-Herzegovina in case the negotiations failed to achieve results.[1052]

450. The Appeals Chamber now turns to Krajišnik's challenges to the Trial Chamber's specific findings on the Variant A and B Instructions. First, he submits that the Trial Chamber erred in finding that he was present at a meeting of high-level SDS representatives on 19 or 20 December 1991 when the Instructions were introduced.[1053] Krajišnik refers to his testimony and to Exhibits P529, tab 383, and P64A, tab 543, but fails to explain why the Trial Chamber erred in relying on the testimony of Nedjeljko Prstojević for the impugned finding.[1054] The Appeals Chamber dismisses his argument.

[1048] Krajišnik's Appeal Brief, para. 264, referring to Trial Judgement, para. 82.
[1049] Krajišnik's Appeal Brief, para. 264.
[1050] Trial Judgement, para. 83.
[1051] Krajišnik's Appeal Brief, para. 265. *See* also Krajišnik's Reply, para. 24.
[1052] Trial Judgement, para. 105.
[1053] Krajišnik's Appeal Brief, para. 40; Krajišnik's Reply, paras 27, 64, 67 (contending that he did not confirm being present at the meeting). The relevant finding is made in paragraph 86 of the Trial Judgement.
[1054] Trial Judgement, fn. 200.

451. Second, Krajišnik challenges the Trial Chamber's reference to a telephone conversation between him and Radovan Karadžić on 21 December 1991, arguing that they did not discuss the Variant A and B Instructions.[1055] The Trial Chamber relied on evidence of this conversation (Exhibit P529, tab 383, p. 3), as well as on numerous other testimonial and documentary evidence, for its finding that "[p]reparations for take-over in municipalities started immediately after the Instructions were announced."[1056] Because Krajišnik fails to explain why the Trial Chamber could not reasonably have made this finding on the basis of all the evidence it referred to, the Appeals Chamber dismisses his argument.

452. Third, Krajišnik submits that the Variant A and B Instructions "were not a design hatched by a criminal enterprise" and refers to Exhibit D9 in support. He also argues that the Instructions were unnecessary because on 11 December 1991 the Bosnian-Serb Assembly had issued a recommendation creating a legal avenue for the establishment of municipal assemblies where necessary.[1057] The Prosecution responds that the Trial Chamber did not find that the December instructions were a criminal plan; it only used them to find the existence of a new central authority.[1058] In reply, Krajišnik concedes that the Trial Judgement does not depict the Instructions as a plan for a JCE, but argues that the Trial Chamber erred in finding that they established a new central government.[1059]

453. The Appeals Chamber notes that the Trial Chamber did not find that the Variant A and B Instructions were "a design hatched by a criminal enterprise". Rather, in its analysis of Krajišnik's criminal responsibility, it found that the significance of these Instructions lay "in the fact that [they] were endorsed by the Bosnian-Serb leadership and had been received by many Bosnian-Serb municipal authorities".[1060] It held that the Instructions worked to Krajišnik's and his associates' end of concocting an idea of central authority and to promote that idea throughout the Bosnian-Serb territories, and "served to shape calls for joint and coordinated action".[1061] The Trial Chamber concluded that "[t]he document represented a trapping of central authority, and such authority was an essential prerequisite for the success of Bosnian-Serb secessionism."[1062] As to the argument that the 19-20 December 1991 Instructions were unnecessary in light of the 11 December 1991 recommendation, the Appeals Chamber notes that the Trial Chamber did consider the 11 December 1991 recommendation, but found that, while this recommendation was passed as alleged, the

[1055] Krajišnik's Appeal Brief, para. 41; Trial Judgement, fn. 209.
[1056] Trial Judgement, para. 98.
[1057] Krajišnik's Appeal Brief, para. 42.
[1058] Prosecution's Response to Krajišnik, para. 59.
[1059] Krajišnik's Reply, para. 26. *See* also para. 64.
[1060] Trial Judgement, para. 904.
[1061] Trial Judgement, para. 904.

Bosnian-Serb Assembly emphasised at the same time that the deputies should continue to work in their (BiH) municipalities and organs.[1063] As a result, contrary to Krajišnik's claim, it does not follow from the mere fact that this recommendation was passed that the Variant A and B Instructions were "unnecessary".[1064] Krajišnik does not show how the Trial Chamber's conclusions on the 11 December 1991 recommendation and the 19-20 December 1991 Instructions were erroneous. His challenge in reply is unsupported and dismissed.

454. Fourth, Krajišnik argues that only a few municipalities mentioned in the Instructions referred to them in their work and that none of the Variant A municipalities either implemented or referred to the Instructions.[1065] The Appeals Chamber notes that Krajišnik does not support this argument and fails to account for the evidence on which the Trial Chamber based its finding that several SDS officials in Bosnia and Herzegovina deemed the Instructions as providing guidance.[1066] Therefore, this argument is dismissed.

455. Having noted previously in Section 2.6 of the Trial Judgement that the Variant A and B Instructions envisaged the creation of SDS crisis staffs in the municipalities,[1067] the Trial Chamber concluded this section by finding that most of the crisis staffs were established in the first months of 1992.[1068] Krajišnik challenges this finding based on Exhibit P64.A, tab 362,[1069] but fails to explain why it cannot stand in light of all the other evidence the Trial Chamber relied on.[1070] His challenge is therefore dismissed.

(iv) Proclamation of Bosnian-Serb Republic

456. In Section 2.7 of the Trial Judgement, the Trial Chamber made findings on various events surrounding the proclamation of the Bosnian-Serb Republic on 9 January 1992.

457. At the outset, Krajišnik challenges the Trial Chamber's finding that, on 21 December 1991, the Bosnian-Serb Assembly decided to commence preparations for the establishment of the Bosnian-Serb Republic,[1071] by arguing that the Bosnian Serbs were informed that they would get their own constituent national unit, which was soon offered by the international community through

[1062] Trial Judgement, para. 904. *See* also para. 995.
[1063] Trial Judgement, para. 85.
[1064] Indeed, Krajišnik himself recognises that a few municipalities discussed the "Variant A and B instructions" and referred to them in their work: Krajišnik's Appeal Brief, para. 42.
[1065] Krajišnik's Appeal Brief, paras 42, 43; Krajišnik's Reply, para. 64.
[1066] Trial Judgement, para. 98. *See* also para. 904 ("[…] which is not to say that some municipal organs did not purport to act pursuant to [the Instructions], or that general similarities cannot be found between the arrangements outlined in that document and actual events").
[1067] Trial Judgement, paras 88, 92.
[1068] Trial Judgement, para. 99.
[1069] Krajišnik's Appeal Brief, para. 266.
[1070] Trial Judgement, fn. 211.

Mr. Cutileiro, and that the preparations for the establishment of the Bosnian-Serb Republic were in line with Mr. Cutileiro's plan.[1072] The Appeals Chamber dismisses Krajišnik's arguments.

458. Next, Krajišnik challenges the Trial Chamber's reliance on a telephone conversation between him and Radovan Karadžić on 1 January 1992, reacting to Alija Izetbegović's call for an independent BiH the day before.[1073] According to the Trial Chamber:

> Karadžić said that "We will release our tigers and let them do their job … we shouldn't hold them back." The Accused replied "We have to, but they'll do it anyway, whether you want them to or not." They both agreed that following Izetbegović's proclamation they would no longer be able to calm the Serb people, as they had managed to do until that moment. Karadžić said that "he [Izetbegović] wants war. He's playing with fire thinking Serbs wouldn't …"; the Accused interjected, saying "We have to use the first opportunity to tell him that he's playing with fire."[1074]

Krajišnik contends that the Trial Chamber misquoted this conversation. Relying on Exhibit P64.A, tab 65, he argues that he said: "We *don't have* to release them [*i.e.*, the Serb tigers]…".[1075] The Appeals Chamber notes that in making its finding, the Trial Chamber relied on Exhibit P403.A.1, which has the same content in relevant parts as Exhibit P64.A, tab 65.[1076] The original B/C/S version reports Krajišnik as saying "We don't have to…", whereas the English translation erroneously states "We have to…".[1077] However, the Appeals Chamber agrees with the Prosecution that Krajišnik fails to demonstrate an impact of this error, in light of the remainder of the conversation.[1078] Krajišnik's additional claim that "[i]n his interview of 1 January 1992", he "called for a peaceful resolution of the organisation of BH through its transformation according to the Belgian or Swiss models"[1079] is unsupported and dismissed.

459. Further, the Trial Chamber found that, on 17 January 1992, in the presence of Krajišnik, a draft programme of work for the Bosnian-Serb Ministerial Council was presented. The draft called, *inter alia*, for the adoption of the Constitution and the enlargement of territory.[1080] As Krajišnik fails to indicate in what respect, or how, his assertion regarding this finding shows an error by the Trial Chamber[1081] his argument is dismissed.

460. The Trial Chamber further found that as the military conflict became likely for the SDS, arming of the population in co-operation with the JNA increased. The Trial Chamber noted as an

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[1071] Trial Judgement, para. 101.
[1072] Krajišnik's Appeal Brief, paras 267-269.
[1073] Krajišnik's Appeal Brief, para. 273.
[1074] Trial Judgement, para. 104.
[1075] Krajišnik's Appeal Brief, para. 273, citing Exhibit P64.A, tab 65, p. 0322-0531, second box (emphasis added by Krajišnik).
[1076] Trial Judgement, fn. 230. The Appeals Chamber notes that, as a result of an apparent clerical error, the Trial Chamber referred to Exhibit P403.B for its finding.
[1077] Exhibit P64.A, tab 65, p. 0322-0530 (English version); Exhibit P64.A, tab 65, p. 0322-0531 (B/C/S version).
[1078] Prosecution's Response to Krajišnik, para. 79.
[1079] Krajišnik's Appeal Brief, para. 270.
[1080] Trial Judgement, para. 107.
[1081] Krajišnik's Appeal Brief, para. 274.

example that between January and March 1992 the SDS formed its own military unit in Milići, which was equipped by the JNA's 216th Brigade.[1082] Krajišnik submits that Tomislav Savkić testified that the military forces in Milići were not a paramilitary SDS unit, but a JNA unit.[1083] The Appeals Chamber notes that Krajišnik fails to explain how Witness Savkić's testimony, which concerns the presence of paramilitary units in Milići from April 1992 onwards,[1084] detracts from the impugned finding, which relates to the period January-March 1992. Moreover, Krajišnik does not address the other evidence the Trial Chamber relied on.[1085] Thus, the Appeals Chamber finds that Krajišnik fails to demonstrate an error and accordingly dismisses his argument.

461. As another example of co-operation with the JNA, the Trial Chamber described "[a] confidential document [Exhibit P64.A, tab 308], contextually dated January or early February 1992, from the žorgans of the Republic of Serbian Bosnia-Herzegovina' to the JNA Chief of the Main Staff in Belgrade and the commanders of the 2nd and 4th Military Districts", requesting various forms of assistance from the JNA.[1086] Krajišnik submits that the Trial Chamber erred in "attaching importance" to this Exhibit because it is an unsigned "document of intentions" of unknown date and sender.[1087] The Appeals Chamber notes that Krajišnik neither clarifies what he means by "document of intentions" nor the significance thereof for the document's admissibility or reliability. He also fails to explain why the Trial Chamber, having noted that the document was undated,[1088] could not reasonably have dated it contextually. Moreover, while the document does not include a specific sender-line, it is apparent on its face that it was sent by "organs of the Republic of Serbian BH".[1089] In this regard, Krajišnik contends that the only organ existing at the time was the Bosnian-Serb Assembly, but the evidence he relies on does not support this assertion.[1090] In any event, it appears from the Trial Judgement that the significance of the document did not lie in the exact identity of its sender, but, rather, in the fact that the authorities of the nascent Bosnian-Serb Republic requested assistance from the JNA as part of their preparations for military conflict.[1091] In light of all the other evidence corroborating the JNA's assistance in the ensuing events,[1092] the Appeals Chamber is not satisfied that the Trial Chamber erred in relying on the document merely because it was unsigned. For these reasons, Krajišnik's challenges to Exhibit P64.A, tab 308 are dismissed.

[1082] Trial Judgement, para. 108.
[1083] Krajišnik's Appeal Brief, para. 275, referencing Tomislav Savkić, T. 20600.
[1084] Tomislav Savkić, T. 20600.
[1085] Trial Judgement, fn. 237.
[1086] Trial Judgement, para. 109.
[1087] Krajišnik's Appeal Brief, para. 276.
[1088] Trial Judgement, para. 109 and fn. 239.
[1089] Exhibit P64.A, tab 308, p. 1.
[1090] Krajišnik's Appeal Brief, para. 276, referring to Exhibit P64, para. 176, fn. 566 [*sic*: should be fn. 466].
[1091] Trial Judgement, paras 108, 109, fn. 1855.
[1092] *See e.g.* Trial Judgement, paras 42, 191-193, 196. *See* also *ibid.*, paras 36-38 (on the support by the JNA in 1991).

462. Krajišnik's next challenge concerns a meeting held on or about 12 February 1992 attended by him where an exchange of population was discussed.[1093] The Trial Chamber relied on the testimony of Patrick Treanor and on Exhibit P65, tab 86, a newspaper article, for its findings in this regard.[1094] Krajišnik submits that the Trial Chamber erred in relying on the newspaper article to conclude that population exchange was the official position of the SDS, especially because such a position was not expressed on any other occasion.[1095] The Appeals Chamber notes that Krajišnik does not allege an error in the Trial Chamber's assessment of Treanor's testimony. In addition, Krajišnik misrepresents the Trial Chamber's finding based on the meeting as being that population exchange was the official position of the SDS.[1096] His arguments are thus dismissed.

463. Continuing its recount of events, the Trial Chamber noted that in a speech on 14 February 1992, Radovan Karadžić called for a "slow" implementation of the Variant A and B Instructions.[1097] Krajišnik submits that this is a mischaracterisation of Radovan Karadžić's speech, because he stated that "power should be taken over in a civilised way", and did not envisage Variants A and B.[1098] The Appeals Chamber dismisses this argument as Krajišnik neither explains how the Trial Chamber erred in relying on the parts of Radovan Karadžić's speech it referred to, nor why its finding cannot stand on the basis of all the evidence it relied on.[1099]

464. Krajišnik's next challenge relates to the finding that, according to its draft Constitution, the Bosnian-Serb Republic "would become" part of federal Yugoslavia;[1100] he argues that the Constitution said that the Republic "is a part" of the Federal Republic.[1101] The Appeals Chamber considers that, as the finding concerned the draft Constitution, not yet adopted, the Trial Chamber made no error in using the future tense. In any case, the important point is that the drafters of the Constitution envisaged that the Bosnian-Serb Republic would separate from BiH in case the latter declared its independence from federal Yugoslavia.

465. On a parallel track to the discussion of the Bosnian-Serb Constitution, the Trial Chamber held that, by 23 February 1992, the SDS and the other two national groups had agreed on principles for a new constitutional arrangement for BiH. This included, *inter alia*, that freedom of movement

[1093] Trial Judgement, para. 111.
[1094] Trial Judgement, fn. 245.
[1095] Krajišnik's Appeal Brief, para. 277.
[1096] Rather, the Trial Chamber found that "at this point in time, the SDS leadership considered transfer of population at least as a possible corollary to the establishment of authorities in order to create entities that were geographically and ethnically homogenous": Trial Judgement, para. 111.
[1097] Trial Judgement, para. 112.
[1098] Krajišnik's Appeal Brief, para. 278, citing Exhibit P67, tab 27.
[1099] Trial Judgement, fn. 246, referencing Exhibit P67.A, tab 27 (Record of speech by Radovan Karadžić, 14 February 1992); Treanor, T. 1574, 1578-1581, 2152-2162.
[1100] Trial Judgement, para. 113.
[1101] Krajišnik's Appeal Brief, para. 279. For the Prosecution's arguments in response, *see* Prosecution's Response to Krajišnik, para. 80 (arguing that the Trial Chamber addressed the draft Constitution). *See* also Krajišnik's Reply, para. 39 (replying that the draft Constitution did not differ from the adopted Constitution).

would be allowed only within each constituent unit, while resettlement from one unit to another would be subject to a "special permit".[1102] Krajišnik submits that the Trial Chamber misquoted Radovan Karadžić's statement at the Bosnian-Serb Assembly session of 25 February 1992, relayed in Exhibit P65, tab 93, in making this finding. The correct quotation should in his view be: "This includes absolute freedom of movement, which means resettling from one constituent unit to another part of the same unit. *Therefore, no unnecessary relocation is foreseen*, permits, from one unit to another, so as to avoid disturbing the ethnic composition."[1103] The Appeals Chamber notes that the English translation of the latter sentence as it appears on Exhibit P65, tab 93 reads: "In other words, major relocations from one unit to another without a special permit are not foreseen as that would upset the national mix."[1104] Given the specific attention paid by the Trial Chamber to the translation of this part of the Exhibit during Patrick Treanor's testimony,[1105] the Appeals Chamber is satisfied that it acted reasonably in relying on the aforementioned English version for its finding. Krajišnik's argument is dismissed.

466. The Trial Chamber further found that, at the Bosnian-Serb Assembly session of 25 February 1992, Krajišnik told the deputies that they could either fight by political means or win their territories by force.[1106] Krajišnik challenges this finding and submits that he merely "briefed the deputies on the Lisbon negotiations, trying to convince them to accept the information".[1107] This assertion is a bare request that the Trial Chamber's assessment of the evidence (Exhibit P65, tab 93[1108]) should be replaced by his own. As such, it is dismissed.

467. Next, the Trial Chamber found that "[d]uring negotiations, the SDS advocated establishing security links between Bosnian Serbs and Serbia, ethnic division within [BiH], and the possibility of relocating populations".[1109] It relied on the testimony of Patrick Treanor and a record of the Bosnian-Serb Assembly session of 25 February 1992 (Exhibit P65, tab 93) for these findings.[1110] Krajišnik challenges the Trial Chamber's reliance on Witness Treanor's testimony, apparently based on an alleged inconsistency between the witness's testimony and Exhibit P65, tab 93. He argues that at the Bosnian-Serb Assembly session in question Radovan "Karadžić discussed the transformation of [BiH] within Cutileiro's plan, which was proposed by the international

[1102] Trial Judgement, para. 114.
[1103] Krajišnik's Appeal Brief, para. 284, citing Exhibit P65, tab 93 (emphasis added by Krajišnik).
[1104] Exhibit P65, tab 93, p. 9.
[1105] Patrick Treanor, T. 1595, 1596. The Trial Chamber referred to this part of Treanor's testimony concerning the translation for its impugned finding: Trial Judgement, fn. 250.
[1106] Trial Judgement, para. 115.
[1107] Krajišnik's Appeal Brief, para. 281, referencing Exhibit P64.A, tab 624.
[1108] Trial Judgement, fn. 251, referencing Exhibit P65, tab 93. The Appeals Chamber notes that Exhibit P64.A, tab 624, invoked by Krajišnik, is identical to Exhibit P65, tab 93.
[1109] Trial Judgement, para. 116.
[1110] Trial Judgement, fn. 253, referencing Patrick Treanor, T. 1594-1610; Exhibit P65, tab 93, pp. 8-10, 19, 23.

community and accepted by all three parties in [BiH]".[1111] The Prosecution responds that Krajišnik's argument is irrelevant.[1112]

468. The Appeals Chamber notes that Krajišnik is correct that Radovan Karadžić referred to negotiations with the European Community ("EC") and Mr. Cutileiro in the parts of his address to the Bosnian-Serb Assembly relied on by the Trial Chamber.[1113] However, this alone detracts neither from the Trial Chamber's finding nor from Patrick Treanor's testimony.[1114] Moreover, the Trial Chamber also relied on statements of other speakers during this Bosnian-Serb Assembly session.[1115] The Appeals Chamber thus dismisses Krajišnik's argument. His additional challenges to the impugned findings are either irrelevant[1116] or unsupported,[1117] and thus dismissed.

469. Finally, Krajišnik challenges the Trial Chamber's finding that the SDS deputies withdrew from the BiH Assembly on 25 and 26 January 1992 during the proceedings on a referendum on independence.[1118] This challenge rests on material not on the record[1119] and is therefore dismissed, along with two related assertions suffering from the same defect.[1120]

470. In addition to the above arguments, Krajišnik also makes three submissions which fail to identify the findings challenged and to articulate an error.[1121] These are dismissed.

(v) Establishment of Bosnian-Serb Republic

471. The Trial Chamber found that by 24 March 1992 the Bosnian-Serb leadership "was increasingly losing its confidence in diplomatic efforts".[1122] Krajišnik challenges this finding by

[1111] Krajišnik's Appeal Brief, para. 282. Krajišnik's Reply, para. 24.
[1112] Prosecution's Response to Krajišnik, para. 51 (bullet 4).
[1113] Exhibit P65, tab 93, p. 10.
[1114] *See e.g.* Patrick Treanor, T. 1594, 1600.
[1115] Trial Judgement, fn. 116, referencing Exhibit P65, tab 93, pp. 8-10, 19, 23.
[1116] Krajišnik argues that the Trial Chamber erred in concluding that the Muslim side was against the linking of Bosnian Serbs with Serbia: Krajišnik's Appeal Brief, para. 283.
[1117] Krajišnik argues that the Serbs did not support population resettlement in the "Cutileiro negotiations": Krajišnik's Appeal Brief, para. 283. He also contends that the Muslims, the Croats and the EC, but not the Serbs, advocated a division of BiH during negotiations, and that the Trial Chamber erroneously concluded that the Serbian side had "teamed up" to implement a JCE: Krajišnik's Reply, para. 23.
[1118] Trial Judgement, para. 119.
[1119] Krajišnik's Appeal Brief, para. 286.
[1120] Krajišnik argues that "[t]he Muslim-Croatian side organised a referendum on the independence of [BiH] in an unconstitutional way" (Krajišnik's Appeal Brief, para. 279) and that "the Muslim side had withdrawn from the agreement on the composition of [BiH] and did not want an agreement to be reached" (Krajišnik's Appeal Brief, paras 280, 285; *see* also Krajišnik's Reply, para. 76).
[1121] The first assertion is that, in a telephone conversation between Krajišnik and Radovan Karadžić on 21 December 1991, the latter "said that he told journalists that the Serbs would give up on secession, but not on the transformation of [BiH]": Krajišnik's Appeal Brief, para. 271. The second contention is that "when the Muslim and the Croatian sides said that they would not annul the unconstitutional decisions", deputies of the Bosnian-Serb Assembly adopted the declaration on the establishment of the Bosnian-Serb Republic unconditionally: Krajišnik's Appeal Brief, para. 272 (*see* Prosecution Response to Krajišnik, para. 75 (bullet 4)). The third argument is that the Constitution of the Bosnian-Serb Republic was promulgated on 27 March 1992 and compatible with Cutileiro's plan: Krajišnik's Appeal Brief, paras 280, 285).
[1122] Trial Judgement, paras 127-128.

arguing, without support, that the Serbian side believed the "international community would not recognise [BiH] without a political solution agreed on previously by the three sides".[1123] This argument is dismissed.

(b) Krajišnik's participation in the establishment of Bosnian-Serb organs

472. In its conclusion on Krajišnik's contribution to the JCE,[1124] the Trial Chamber found that he participated, *inter alia*, in the establishment, support or maintenance of Bosnian-Serb government bodies at the Republic, regional, municipal and local levels, including crisis staffs, war presidencies, war commissions, the VRS and the MUP.[1125] Krajišnik presents four sets of challenges to these findings, which are addressed in turn below.

(i) State, party, regional and local structures

473. Krajišnik first submits that he "did not participate in the establishment of state and party structures".[1126] According to him, the Bosnian-Serb Assembly was established by "the Serbian side in response to the unconstitutional decision of their partners in the BiH Assembly on 15 October 1991".[1127] Krajišnik fails, however, to support these contentions. Further, the second allegation is not inconsistent with the Trial Chamber's finding that Krajišnik participated in the establishment of state and party structures. The Appeals Chamber dismisses these arguments.

474. Second, Krajišnik contends that he "did not participate in the establishment of regional and local organs" and that he "was not informed of the creation of the ARK", which, he argues, was constitutionally declared on 26 April 1991.[1128] The Appeals Chamber notes that the evidence Krajišnik invokes only supports that the ARK was declared by reference to the BiH Constitution,[1129] which is a fact on which his conviction does not rely. The remainder of Krajišnik's arguments is unsupported. The Appeals Chamber therefore dismisses these contentions.

475. Krajišnik also submits, without more, that "[t]he Bosnian-Serb Assembly verified the established regions", but fails to explain the relevance of this contention to the impugned findings.[1130] As such, his argument is dismissed.

[1123] Krajišnik's Appeal Brief, para. 287.
[1124] Trial Judgement, Section 6.17.3.
[1125] Trial Judgement, para. 1121.
[1126] Krajišnik's Appeal Brief, paras 219-220. Krajišnik asserts in this connection that he "was not a member of the founding board of the BH SDS" (fn. 310), but the Trial Chamber did not find that he was involved in the establishment of the SDS (*see* Trial Judgement, para. 25).
[1127] Krajišnik's Appeal Brief, para. 221; Krajišnik's Reply, para. 86. *See* also AT. 180, where Krajišnik argued that the Bosnian-Serb Assembly would only "start operating when the vital interests of the Serbian people are in danger".
[1128] Krajišnik's Appeal Brief, para. 224, referencing Exhibit P64.A, tab 464.
[1129] Exhibit P64.A, tab 464.
[1130] Krajišnik's Appeal Brief, para. 226, referencing Exhibit P64.A, tab 633.

(ii) Crisis staffs

476. Krajišnik argues that he did not participate in the establishment of crisis staffs.[1131] The Appeals Chamber notes that the Trial Chamber did not find that Krajišnik directly participated in the establishment of crisis staffs. It did find, however, that he was present at the high-level SDS meeting on 19 or 20 December 1991 when the Variant A and B Instructions and the idea of SDS crisis staffs were introduced.[1132] Krajišnik fails to explain the relevance of Exhibit P64.A, tab 362, a record of the Bosnian-Serb Assembly session of 27 March 1992, in challenging this finding. His additional claim that the crisis staffs were created spontaneously[1133] does not address all the evidence the Trial Chamber relied on in finding that several municipalities implemented the Variant A and B Instructions, which envisaged SDS crisis staffs, and that the majority of Serb crisis staffs were created by the first months of 1992.[1134] Furthermore, it appears that the most important findings regarding Krajišnik's relationship with crisis staffs, as far as his conviction is concerned, relate to the Bosnian-Serb leadership's control over the SDS crisis staffs once they were established.[1135] Krajišnik's challenges to these findings have been addressed and rejected elsewhere.[1136] The Appeals Chamber therefore dismisses Krajišnik's arguments.

477. Krajišnik's second challenge concerns the Trial Chamber's finding that instructions by the Bosnian-Serb Government to the crisis staffs dated 26 April 1992 (admitted as Exhibit P529, tab 76) were distributed and implemented throughout BiH.[1137] Relying on Exhibit P64.A, tab 699, Krajišnik contends that the Government withdrew the instructions on 27 April 1992, concluding that new, extended instructions were needed.[1138] The Appeals Chamber observes that, according to Exhibit P64.A, tab 699, the SNB and the Government concluded on 27 April 1992 that "a more detailed instruction shall be drafted for crisis staffs".[1139] However, this does not show that the instructions were withdrawn. In addition, Krajišnik does not account for the evidence establishing that the instructions were distributed and implemented.[1140] His further argument that the Presidency

[1131] Krajišnik's Appeal Brief, para. 225, referencing Exhibit P64.A, tab 362.
[1132] Trial Judgement, para. 86.
[1133] Krajišnik's Appeal Brief, para. 230, referencing Exhibit C3, para. 8. *See* also Krajišnik's Reply, paras 67, 69 (bullet 5), 70.
[1134] Trial Judgement, paras 97-99.
[1135] *See* Trial Judgement, Section 3.6.3.
[1136] *See infra* IV.D.2(b).
[1137] Trial Judgement, paras 263-264.
[1138] Krajišnik's Appeal Brief, paras 228, 299 (bullet 4), referring to Exhibit P529, tab 76. However, this Exhibit does not show that the instructions to the crisis staffs were withdrawn on 27 April 1992. *See* also *ibid.*, para. 336, referring to Trial Judgement, para. 263. *See* also Krajišnik's Reply, para. 68. *See* also P529, tab 107 which merely shows that the Government concluded that measures to abolish crisis staffs and replace them with war presidencies should be undertaken (item 4).
[1139] Exhibit P64.A, tab 699, p. 2.
[1140] Trial Judgement, para. 264.

"formally abolished" crisis staffs on 23 May 1992[1141] is also rejected: the exhibit mentioned by Krajišnik shows that on 23 May 1992 the Government started discussing the abolition of crisis staffs and their replacement with war presidencies.[1142] This is consistent with the Trial Chamber's finding that the abolition of crisis staffs was merely "discussed" within the Government on that date.[1143] For these reasons, the Appeals Chamber dismisses Krajišnik's arguments.

(iii) War presidencies and war commissions

478. Krajišnik argues that the Presidency's decisions to form war presidencies[1144] and to amend the Constitution to allow war presidencies at both the republican and municipal levels[1145] were adopted in closed session and that he was not informed of these decisions.[1146] The Appeals Chamber notes that the evidence Krajišnik refers to supports neither of these contentions. In addition, the decisions were both published in the Official Gazette shortly after they were taken.[1147] Moreover, Krajišnik's present argument does not challenge the Trial Chamber's findings that he was a member of the Presidency,[1148] that he and other Bosnian-Serb leaders exchanged information, and that he and Radovan Karadžić shared between themselves all important information about Bosnian-Serb affairs.[1149] The Appeals Chamber therefore dismisses Krajišnik's submission.

(iv) Ministry of Internal Affairs ("MUP")

479. Krajišnik argues that the basis upon which the Bosnian-Serb Assembly adopted the Law on Internal Affairs was that, "[a]ccording to Mr. Cutileiro's plan, the constituent units were entitled to have their own MUP".[1150] The Appeals Chamber fails to see the immediate relevance of Krajišnik's argument to the Trial Chamber's findings on the adoption of said law.[1151] Krajišnik does not specify any further which finding he challenges or how his contention shows an error therein, and the Appeals Chamber dismisses his argument, along with two additional submissions suffering from the same defects.[1152]

[1141] Krajišnik's Appeal Brief, para. 229, referencing Exhibit P529, tab 107; *ibid*., para. 299 (bullet 4), referring to Exhibit P583, tab 9. *See* also Krajišnik's Reply, para. 68.
[1142] Exhibit P529, tab 107, para. 4.
[1143] Trial Judgement, para. 273, fn. 587, referencing Exhibit P529, tab 107; Hanson, T. 9700.
[1144] Trial Judgement, para. 274.
[1145] Trial Judgement, para. 275.
[1146] Krajišnik's Appeal Brief, para. 231, referencing Exhibit P65, tabs 141 and 144.
[1147] Exhibit P65, tabs 143 (referred to by the Trial Chamber: Trial Judgement, para. 274) and 144.
[1148] Trial Judgement, para. 181.
[1149] Trial Judgement, paras 892-893.
[1150] Krajišnik's Appeal Brief, para. 234.
[1151] *See* Trial Judgement, paras 225, 235.
[1152] These submissions are: (1) the argument that "[t]he žDecision to Establish Municipal Commissions' and the concept of work of these bodies was agreed by Dragan Đokanović and Radovan Karadžić" (Krajišnik's Appeal Brief, para. 232); and (2) that "[t]he Law on the Army was proposed to the Bosnian Serb Assembly by the Minister of Defence Bogdan Subotić" (Krajišnik's Appeal Brief, para. 233).

480. Krajišnik also argues that, "[a]fter the beginning of the war, the Bosnian-Serb MUP began to operate with segments and organisations of the disbanded [BiH] MUP", which existed before the war.[1153] This assertion does not contradict the Trial Chamber's findings on how the Bosnian-Serb MUP was established in practice[1154] and is accordingly dismissed.

(c) Preparations leading up to the take-over of municipalities

481. In its analysis of Krajišnik's criminal responsibility, the Trial Chamber examined in detail the Bosnian-Serb leadership's preparations leading up to the take-over of the municipalities beginning on 1 April 1992.[1155] It described the consolidation of Bosnian-Serb central authority (Section 6.5 of the Trial Judgement), the expansionism of ethnically recomposed territories (Section 6.6) and Krajišnik's knowledge of and support for arming activities (Section 6.7).

(i) Consolidation of Bosnian-Serb central authority

482. The Trial Chamber found that "[c]alls to take over territories and create a Serb-dominated state in [BiH started to become] strong and distinct in the Bosnian-Serb Assembly in January 1992".[1156] Krajišnik submits that the Serbian side only strove to take over power in the municipalities where they were in the majority, not to take over territories.[1157] He appears to argue that the Serbian side had a legitimate claim to take power, but was unable to do so, in those municipalities where it had won in the 1990 elections.[1158] He also refers to the following statements by Radovan Karadžić at the session of 27 March 1992:

> We must study the situation regarding the saving of lives, property and territory. We have no other plans. […] We do not need a show of force, but checkpoints should be controlled.[1159]

483. The Prosecution responds that Krajišnik's contention is factually wrong and rests on an artificial distinction between the take-over of power and of territory.[1160]

484. The Appeals Chamber first notes that the Trial Chamber found that local level posts in the BiH municipalities were divided between the three parties (SDS, SDA and HDZ) in accordance with the percentage gained by each party in the 18 November 1990 elections, this percentage

[1153] Krajišnik's Appeal Brief, para. 235.
[1154] Trial Judgement, paras 236-238.
[1155] *See* Trial Judgement, paras 925-934.
[1156] Trial Judgement, para. 903.
[1157] Krajišnik's Appeal Brief, paras 16, 17, 25, 28, 33. *See* also Krajišnik's Notice of Appeal, para. 23. *See* also Krajišnik's Reply, para. 25.
[1158] Krajišnik's Appeal Brief, paras 17, 25, 28, 33. Presumably, Krajišnik is referring to the first multi-party elections, held on 18 November 1990, the outcome of which essentially reflected the ethnic census of the population, since each ethnic group voted for the party claiming to represent its nationality: Trial Judgement, paras 19, 27.
[1159] Krajišnik's Appeal Brief, paras 26-27, referencing Exhibit P65, tab 114 and Exhibit P64.A, tab 362.
[1160] Prosecution's Response to Krajišnik, paras 53-58.

corresponding to the ethnic composition of each municipality.[1161] Krajišnik asserts that the Serbs were unable to take over power in accordance with the November 1990 elections, but this assertion is unsupported[1162] and fails to show that the Trial Chamber's conclusion could not have been reached on the basis of the evidence relied on.[1163] Hence, it is dismissed.

485. Moreover, Krajišnik's contention that the Bosnian-Serb leadership's goal was limited to taking over power (as opposed to territories) relies on an ambiguous distinction which the Trial Chamber did not make, and which, in any event, is irrelevant to his conviction. Obviously employing the terms take-over of "power" and take-over of "territories" interchangeably,[1164] the determining factor for the Trial Chamber was that the implementation of the JCE's common objective necessitated the expulsion of great numbers of non-Serbs to achieve complete Bosnian-Serb control over the claimed territories.[1165] Krajišnik's references to the statements of 24 and 27 March 1992 do not show an error in the Trial Chamber's appreciation of the early calls for such control in January 1992.[1166] His argument is therefore dismissed. His additional claims, to the extent they are supported, rely on material not on the record and are therefore dismissed.[1167]

(ii) Expansionism and the pursuit of ethnically recomposed territories

486. In Section 6.6 of the Trial Judgement, the Trial Chamber examined various statements related to Bosnian-Serb expansionism and the idea of ethnically recomposing territories. One such statement was Deputy Rakić's proposal that "we occupy our territories and keep them", made at the Bosnian-Serb Assembly a week before 18 March 1992.[1168] Krajišnik submits that the Trial Chamber misinterpreted this statement because Deputy Rakić in fact said: "I propose that we occupy *our* territories and *keep* them, and not surrender them to anyone".[1169] Krajišnik argues, it is clear that Deputy Rakić spoke "about defending Serbian territories, not about taking someone else's".[1170] However, the part of Deputy Rakić's statement omitted by the Trial Chamber ("and not surrender them to anyone"[1171]) does not alter the part of his statement the Trial Chamber referred to.

[1161] Trial Judgement, para. 31.
[1162] Krajišnik only asserts, without support, that "[t]he power was in the hands of the pre-election officials": Krajišnik's Appeal Brief, fn. 20.
[1163] Trial Judgement, fn. 58.
[1164] *See e.g.* Trial Judgement, paras. 289, 903, 910, 934, 947.
[1165] The Trial Chamber found that the common objective of the JCE was to "ethnically recompose the territories under the [Bosnian-Serb leadership's] control by expelling and thereby drastically reducing the proportion of Bosnian Muslims and Bosnian Croats living there": Trial Judgement, para. 1090. *See* also *ibid.*, paras 1118, 1142.
[1166] Trial Judgement, paras 903-904.
[1167] Krajišnik argues that, after the Muslim side's rejection of the Lisbon Peace Plan on 25 March 1992, "the Serbian side adopted the Constitution žto threaten to take over power' in the territories where it had won the elections but was not exercising power": Krajišnik's Appeal Brief, para. 28.
[1168] Trial Judgement, para. 911.
[1169] Krajišnik's Appeal Brief, para. 29 (emphasis added by Krajišnik).
[1170] Krajišnik's Appeal Brief, para. 29.
[1171] Exhibit P65, tab 107, p. 36.

Krajišnik's argument thus remains an unsubstantiated request that the Trial Chamber's assessment of Deputy Rakić's statement should be replaced by his own. As such, it is dismissed.

487. Next, Krajišnik challenges the Trial Chamber's finding that his speech at the 18 March 1992 Bosnian-Serb Assembly session was a "call to arms".[1172] At that session, Krajišnik said:

> the problem is that they [the Muslims] want Bosnia and Herzegovina to be internationally recognised at any cost. They want it to be a state. In this respect, it would be good if we could do one thing for strategic reasons: if we could start implementing what we have agreed upon, the ethnic division on the ground. That we start determining the territory, and once the territory is determined, it remains to be established in additional negotiations whose authorities are to function and in what way. I cannot say whether this will be fair in political terms, there is not much fairness in politics after all, and yes, if it does not turn out to be fair, the Serbian people will be blamed. But we cannot accept a state designed in the mind of the SDA people.[1173]

The Trial Chamber then found:

> The essence of the Accused's message to the representatives of the Bosnian-Serb people was that he wanted new facts created on the ground in order to strengthen the hand of the Bosnian-Serb negotiators, of whom himself and Karadžić were the most prominent. […] The Accused acknowledged that strengthening a negotiating position through the creation of facts which were the very subject of the negotiations was not a fair method; yet, he insinuated, better that the Serbs be unfair to the Muslims, than vice versa. The 18 March speech was a call to arms.[1174]

488. Krajišnik submits that his speech merely presented proposals in the context of Cutileiro's plan and refers to the testimony of Dragan Đokanović and Exhibit P65, tab 109 in support.[1175] The Appeals Chamber notes that Krajišnik raised the same argument at trial.[1176] The Trial Chamber rejected it because, had it been true, Krajišnik would not have mentioned an SDA design necessitating pre-emptive action by the Serbs, nor would there have been talk of unfairness.[1177] The Appeals Chamber finds that the part of Dragan Đokanović's testimony Krajišnik invokes, where the witness testified that Krajišnik was talking about the Cutileiro plan,[1178] does not render this assessment unreasonable. Krajišnik's reference to Exhibit P65, tab 109 does not address the parts of that Exhibit the Trial Chamber relied on.[1179] The Appeals Chamber thus dismisses his submission.

489. Krajišnik further contends that he "subsequently" obtained the video recording of the Bosnian-Serb Assembly session of 18 March 1992, which recording he argues contains parts of his

[1172] Krajišnik's Appeal Brief, para. 30, referring to Trial Judgement, para. 911. *See* also AT. 184-185.
[1173] Trial Judgement, para. 911, citing P65, tab 109, pp. 12-13.
[1174] Trial Judgement, para. 912.
[1175] Krajišnik's Appeal Brief, paras 30, 32, referencing Dragan Đokanović, T. 10653-10658; Exhibit P65, tab 109, pp. 46-47. *See* also AT. 184-158, 223 and 288.
[1176] Trial Judgement, para. 913. The Appeals Chamber notes that, at trial, Krajišnik argued that his speech pertained to the "Sarajevo agreement": *ibid*. However, it is clear from Krajišnik's arguments and the evidence he invokes that his argument on appeal, although referring to "Cutileiro's Plan", is the same as that raised at trial.
[1177] Trial Judgement, para. 913.
[1178] Dragan Đokanović, T. 10657-10661.
[1179] Trial Judgement, fn. 1775, referencing Exhibit P65, tab 109, pp. 12-13.

speech that are missing from the transcript of the session.[1180] The Appeals Chamber notes that this argument relies on material which is not part of the record and therefore dismisses it.

(iii) Knowledge of and support for arming activities

490. Section 6.7 of the Trial Judgement sets out the Trial Chamber's findings on Krajišnik's knowledge of and support for arming activities.[1181]

491. Krajišnik first makes two unsupported challenges to the Trial Chamber's reliance on Witness 636 and Exhibit P51 for its background findings on the arming and mobilisation of the population in 1991.[1182] These arguments are dismissed.

492. Second, Krajišnik submits that the Trial Chamber erred in finding that he knew that the Bosnian-Serb population was being armed beginning around mid-1991.[1183] The Trial Chamber did not find, however, that Krajišnik participated in the acquisition and distribution of arms.[1184] As for his knowledge of these activities, Krajišnik refers to Sinisa Krsman's testimony, but fails to explain why the Trial Chamber could not reasonably have made its finding on the basis of the other evidence it relied on.[1185] The Appeals Chamber thus dismisses Krajišnik's arguments.

493. Section 6.7 of the Trial Judgement also contains some more general findings on the Bosnian-Serb leadership's preparations for assuming power. In particular, the Trial Chamber found that Krajišnik "instructed the [Bosnian-Serb] Government to prepare by 27 March 1992, ža plan of assuming power and rendering operational the authorities'" in the Bosnian-Serb Republic.[1186] Krajišnik argues that he merely summarised the proposal of the previous speakers, Miroslav Vještica and Branko Đerić, thereby avoiding to put the proposal to vote.[1187] Krajišnik refers to Exhibit P65, tab 114 for this assertion, but fails to explain why the Trial Chamber's assessment of the Exhibit was unreasonable.[1188] As such, his argument is dismissed. His additional contention that

[1180] Krajišnik's Appeal Brief, para. 31, referencing "K-0196 ND in connection with P 529-388". The Appeals Chamber observes that document K-0196 has not been admitted as additional evidence (Rule 115 Decision of 20 August 2008, paras 32-33) and that Exhibit P529, tab 388 is identical in relevant parts to the exhibit relied on by the Trial Chamber for its reference to the speech in question: Trial Judgement, fn. 1775, referencing Exhibit P65, tab 109, pp. 12-13; *cf.* Exhibit P529, tab 388, pp. 13-14.
[1181] *See* also Section 2.2 of the Trial Judgement.
[1182] Krajišnik's Appeal Brief, paras 245 (where Krajišnik asserts that Witness 636 "refers to people and territories affected by war in Croatia before the war in BH"), 246 (where Krajišnik asserts that Exhibit P51 is unreliable because the Second Military District could not have known how many weapons were distributed by the SDS if the distribution was secret and how many weapons the Muslims and Croats had). *See* Trial Judgement, paras 35-37.
[1183] Krajišnik's Appeal Brief, paras 86-87, referencing Sinisa Krsman, T. 21911-21912, and Trial Judgement, para. 926.
[1184] Trial Judgement, para. 1121(f).
[1185] Trial Judgement, para. 926. *See* also *ibid.*, para. 890.
[1186] Trial Judgement, para. 933.
[1187] Krajišnik's Appeal Brief, para. 88. *See* also Krajišnik's Reply, paras 87, 103.
[1188] Trial Judgement, para. 933 and fn. 1820.

the Government did not subsequently draft or present the plan in question relies on an unreferenced statement by Radovan Karadžić[1189] and is dismissed, too.

(d) Conclusion

494. The Appeals Chamber dismisses this sub-ground of appeal.

2. Challenges to factual findings regarding the Bosnian-Serb leadership

(a) Introduction

495. Krajišnik makes a series of arguments challenging the Trial Chamber's findings regarding the structure of the Bosnian-Serb leadership and his position therein. The Appeals Chamber will address each of Krajišnik's arguments in turn.

496. At the outset, Krajišnik alleges that the Trial Chamber committed an error in referring to him as a "member of the Bosnian-Serb leadership", as this term is not recognised by the "organisation of government administration".[1190] This is irrelevant and fails to show that the Trial Chamber erred in finding that Krajišnik was one of the most important leaders of the Bosnian Serbs. This argument is dismissed.

(b) Arguments related to the administration of the Bosnian-Serb Republic (Part 3 of the Trial Judgement)

(i) Alleged errors in the findings on the Bosnian-Serb Assembly (Section 3.1)

497. Krajišnik appears to allege that the Trial Chamber erred in finding that the Bosnian-Serb Constitution foresaw that in some circumstances, the President of the Assembly was to assume the duties of the President of the Bosnian-Serb Republic.[1191] In support of his assertion, Krajišnik refers to the Decision on Proclaiming the Constitutional Law for Implementing the Constitution of the Serb Republic of Bosnia and Herzegovina[1192] and challenges the testimony of Witness Treanor related to the provisions of the Constitutional law. The Appeals Chamber notes that, in support of its finding, the Trial Chamber referred to Article 87 of the Constitution of the Serb Republic of Bosnia and Herzegovina,[1193] which provides in its relevant part that "[i]n the event that the office of President of the Republic has to ceases [*sic*] prior to the expiry of his term of office or should he be

[1189] Krajišnik's Appeal Brief, para. 89 (bullet 1).
[1190] Krajišnik's Appeal Brief, para. 361, referring to Trial Judgement, paras 289-296.
[1191] Krajišnik's Appeal Brief, para. 288, referring to Trial Judgement, para. 135.
[1192] P64.A, tab 621.
[1193] Trial Judgement, fn. 287, referring to Exhibit P65, tab 96.

[*sic*] for any reason temporarily not be able to perform his duties, the president of the National Assembly shall act for him".[1194] Krajišnik fails to explain how the decision he refers to would contradict this provision. Krajišnik also fails to indicate the relevant transcript reference to Witness Treanor's testimony to support his contention that it "overlooked provisions of the Constitutional Law". Therefore, the Appeals Chamber dismisses this argument.[1195]

498. Krajišnik submits that he was not elected to the SNB.[1196] He also appears to argue that there were two separate bodies referred to as "SNB", *i.e.*, the SNB established by the SDS and that established by the Bosnian-Serb Assembly,[1197] although he challenges the fact that the second one was ever officially established.[1198] The Appeals Chamber notes that the Trial Chamber found that the Bosnian-Serb Assembly established the SNB on 27 March 1992[1199] and that Krajišnik was an *ex officio* member by virtue of his position as President of the Assembly.[1200] Krajišnik does not address the evidence relied on by the Trial Chamber and fails to show an error in these findings. His allegation that the SNB mentioned in the minutes is the SNB of the SDS and not that of the Assembly is rejected as being undeveloped.[1201]

499. Krajišnik contends that the Trial Chamber erred in finding that the Decision on an Imminent Threat of War was adopted by the SNB because it was in fact adopted by the two-member Presidency, and confirmed by the Bosnian-Serb Assembly.[1202] The Appeals Chamber notes that the Trial Chamber did not find at paragraph 137 of the Trial Judgement that the SNB adopted a Decision on an Imminent Threat of War, nor is such a decision even mentioned in this paragraph, which is dealing with the links between the SNB, the President of the Bosnian-Serb Republic and the Bosnian-Serb Assembly. The documents referred to by Krajišnik are irrelevant and fail to show

[1194] Exhibit P65, tab 96.
[1195] The Appeals Chamber also notes that Krajišnik acknowledges in his reply that "[a]ccording to the Constitutional Law, Krajišnik stood in for the President of RS" (Krajišnik's Reply, para. 56).
[1196] Krajišnik's Appeal Brief, para. 241. *See* also Krajišnik's Reply, para. 49, where Krajišnik argues that he never became a member of the SNB.
[1197] Krajišnik's Appeal Brief, para. 299.
[1198] Krajišnik's Appeal Brief, para. 299; Krajišnik's Reply, para. 45. *See* also Krajišnik's argument that the Bosnian-Serb Assembly's decision of 27 March 1992 to establish the SNB was not published in the Official Gazette of the Bosnian-Serb Republic, nor recorded in the minutes (Krajišnik's Appeal Brief, para. 298).
[1199] *See* Trial Judgement, para. 137 and evidence cited at fn. 289. *See* also para. 161.
[1200] Trial Judgement, para. 137, fn. 292 referring to P65, tab 116, p. 1. *See* also para. 161, fn. 336.
[1201] In this connection, Krajišnik refers to Exhibit P64.A, tab 784 but this Exhibit only refers to the "SNB" without indicating that it is an organ of the SDS. Krajišnik also argues the "stamp on the statement dated 4 April 1992 proves that it was not issued by the SNB established by the Bosnian-Serb Assembly," as it is identical to the stamp of the SDS Main Staff (Krajišnik's Appeal Brief, para. 299). The Appeals Chamber cannot verify this assertion as the stamp on the document dated 4 April 1992 (Exhibit P65, tab 118, original in BCS) is hardly visible. It finds, however, that even if the SDS stamp appeared on the SNB document of 4 April 1992 (as alleged by Krajišnik), this is insufficient to demonstrate that there were two SNBs, especially as there was no clear separation between the Bosnian-Serb institutions and the SDS (in this connection, *see* for instance Trial Judgement, para. 187).
[1202] Krajišnik's Appeal Brief, para. 289, referring to Trial Judgement, para. 137. Krajišnik's Reply, paras 45-46.

any error in the findings at paragraph 137 of the Trial Judgement.[1203] The Appeals Chamber dismisses this argument.

500. Referring to paragraph 138 of the Trial Judgement, Krajišnik further argues that he "took part in discussions as a member of the negotiating team".[1204] Krajišnik fails to articulate any particular error. He merely refers to the exhibit entitled "Stances on the Resolution of the Yugoslav State Crisis and the Position of Bosnia and Herzegovina in Yugoslavia" of 10 June 1991,[1205] without specifying the relevance of this document in relation to his argument. He also refers to "parts of footnote 294 [of the Trial Judgement]",[1206] without specifying which of the documents listed in this footnote he refers to in support of his argument. In any event, the impugned paragraph of the Trial Judgement does not mention anything about "discussions" or about any "negotiating team", but rather gives an overview of who attended the sessions of the Bosnian-Serb Assembly. In light of this, the Appeals Chamber dismisses this argument.

501. Krajišnik asserts that the Trial Chamber erred in concluding that he played an important role in effecting the SDS's influence over the Bosnian-Serb Assembly.[1207] In support of this assertion, he submits that witnesses testified that the deputies of the Assembly were independent;[1208] he specifically refers to the testimonies of Witnesses Trbojević[1209] and Kasagić,[1210] as well as to Radovan Karadžić's Rule 92 *ter* statement.[1211] Having considered these testimonies and the extensive testimonial evidence on which the Trial Chamber relied for its finding, [1212] the Appeals Chamber is not satisfied that the Karadžić statement raises a reasonable doubt that would cause the Appeals Chamber to reverse the finding. This argument is dismissed.

[1203] Krajišnik refers to P64.A, tab 702 (Decision on the establishment of penitentiary-reeducation institutions in the territory of the Serbian Republic of Bosnia and Herzegovina) and to P65, tab 127 (Minutes of the 16th session of the Assembly of the Serbian People in Bosnia and Herzegovina held on 12 May 1992 in Banja Luka). Exhibit P65, tab 127, p. 2 (item 3) does suggest that the Decision on an Imminent Threat of War was adopted by the Presidency and confirmed by the Assembly, as argued by Krajišnik. However, this is not necessarily inconsistent with the findings of the Trial Chamber, which concluded that the SNB acted as predecessor to the Presidency (Trial Judgement, paras 161-167) and that the state of imminent threat of war was declared on 15 April 1992 during a joint session of the SNB and the Government (Trial Judgement, para. 172).
[1204] Krajišnik's Appeal Brief, para. 290, referring to Trial Judgement, para. 138.
[1205] P65, tab 27.
[1206] Krajišnik's Appeal Brief, fn. 381.
[1207] Krajišnik's Appeal Brief, para. 291, referring to Trial Judgement, para. 140. *See* also Krajišnik's Reply, para. 85; Krajišnik's Supplemental Brief, para. 87.
[1208] Krajišnik's Appeal Brief, para. 291. *See* also Krajišnik's Reply, paras 57, 59.
[1209] Krajišnik's Appeal Brief, para. 291 and fn. 382, referring to Trbojević, T. 11726.
[1210] Krajišnik's Appeal Brief, para. 291 and fn. 383, referring to Kasagić, T. 18545-18546.
[1211] Krajišnik's Supplemental Brief, para. 87, referring to AD3, p. 9.
[1212] Trial Judgement, fn. 299.

(ii) Alleged errors in the findings on the Bosnian-Serb government and judiciary (Section 3.2)

502. Krajišnik appears to allege that the Trial Chamber erred when it mentioned Bosnian-Serb Republic's news agency's (SRNA) press clippings of 1992, as they were not presented at trial.[1213] The Appeals Chamber notes that the Trial Chamber found that "[t]he Bosnian-Serb Republic's news agency (SRNA) produced press clippings in Serbo-Croatian, summarizing foreign press releases and submitting them to the President of the Republic, the President of the Assembly, the Prime Minister, and other Government Ministers"; the Trial Chamber relied for this finding on the testimony of Witness Ostojić.[1214] Krajišnik fails to show that the Trial Chamber erred in relying on this testimony and this argument is thus rejected.

503. Krajišnik argues that the Trial Chamber erred in its findings as to his presence at joint meetings of the SNB and the government; he submits in this connection that he only attended two such meetings.[1215] It appears that Krajišnik's argument is directed at paragraph 146 of the Trial Judgement, where the Trial Chamber stated that "[t]he Accused participated […] in joint meetings of the SNB and the Government."[1216] The Trial Chamber did not specify the number of meetings attended by Krajišnik and his argument that he only attended two meetings thus fails to show an error in the Trial Chamber's factual finding. The argument is thus dismissed as it is not inconsistent with the Trial Chamber's finding.

504. Krajišnik appears to allege that the Trial Chamber erred when it stated that the Government had its first session as an independent body on 23 May 1992, instead of 14 May 1992.[1217] In support of his allegation that the Government had its first session as an independent body on 14 May 1992, Krajišnik refers to the minutes of a joint session of the SNB and the government of the Serbian Republic of Bosnia and Herzegovina held on that date.[1218] However, the Trial Chamber found that "[t]he Government sat for the first time as an independent executive body, *distinct from the SNB* […] on 23 May 1992."[1219] Krajišnik thus fails to show an error in the Trial Chamber's finding. As for the second allegation regarding the signing of the minutes, it fails to articulate an error of the Trial Chamber and is dismissed.

[1213] Krajišnik's Appeal Brief, para. 292, referring to Trial Judgement, paras 145-146.
[1214] Trial Judgement, para. 145, fn. 306.
[1215] Krajišnik's Appeal Brief, paras 241, 299; Krajišnik's Reply, para. 45.
[1216] Trial Judgement, para. 146.
[1217] Krajišnik's Appeal Brief, para. 294 (bullet 1) and (*chapeau*). This argument seems to be related to Trial Judgement, para. 146.
[1218] P583, tab 6.
[1219] Trial Judgement, para. 146 (emphasis added).

505. Krajišnik appears to challenge the Trial Chamber's finding that he moved to Pale on or about 15 April 1992.[1220] The transcript pages cited by Krajišnik show that he admitted going to Pale on 15 April 1992 to attend a meeting, as well as going back to Pale "for good" a few days later.[1221] Therefore, Krajišnik fails to show an error of the Trial Chamber.

506. Krajišnik contends that Witness Kapetina confirmed that the Republican Information Centre was inoperative, contrary to the finding of the Trial Chamber.[1222] The transcript of Witness Kapetina's testimony referred to by Krajišnik is far from clear as to whether the Republican Information Centre was operative or not.[1223] Moreover, Krajišnik fails to explain how the exhibit he also refers to supports his argument.[1224] These two references are therefore not sufficient to undermine the Trial Chamber's finding. The Appeals Chamber dismisses this allegation.

(iii) Alleged errors in the findings regarding the Bosnian-Serb Presidency (Section 3.3)

507. Krajišnik submits generally that the Trial Chamber erred in its conclusions regarding the functioning and role of the Bosnian-Serb Presidency, his role in this organ and in its finding that he was well-informed by members of the Presidency of the crimes occurring in the municipalities. He also asserts that the "significance attached to the SNB was erroneous".[1225] The Appeals Chamber will consider the specific arguments raised by Krajišnik in this connection.

508. Krajišnik asserts that "the claim that the SNB received reports from crisis staffs is incorrect, because this is just an undefined agenda item."[1226] The Appeals Chamber notes that the minutes of the 28 April 1992 joint meeting of the SNB and the government indeed have two agenda items which mention reports on the work of crisis staffs and the use of these reports.[1227] Krajišnik does not show why it would have been unreasonable for the Trial Chamber to infer from these minutes that crisis staffs were reporting to the SNB. Krajišnik's argument is therefore dismissed.

509. Krajišnik alleges that the President of the Presidency was neither a head of state nor a commander of the armed forces, but that he had *de facto* command over the armed forces.[1228] Krajišnik fails to indicate which paragraph of the Trial Judgement he is challenging, although it

[1220] Krajišnik's Appeal Brief, para. 295, referring to Krajišnik, T. 23927-23930. This argument seems related to paragraph 147 of the Trial Judgement.
[1221] Krajišnik, T. 23927.
[1222] Krajišnik's Appeal Brief, para. 297, referring to Trial Judgement, para. 153. *See* also Krajišnik's Reply, para. 131.
[1223] Kapetina, T. 20069-20070.
[1224] P64.A, tab 800.
[1225] Krajišnik's Appeal Brief, para. 44, heading before para. 298. *See* also Krajišnik's Reply, para. 61.
[1226] Krajišnik's Appeal Brief, para. 299 (bullet 3), referring to P65, tab 124. The Appeals Chamber notes that this argument seems related to paragraph 162 of the Trial Judgement. *See* also Krajišnik's Reply, paras 6, 65.
[1227] P65, tab 124 (Minutes from a meeting of the National Security Council and the Government of the Serbian Republic of Bosnia and Herzegovina, held on 28 April 1992), items 9-10.
[1228] Krajišnik's Appeal Brief, para. 300. *See* also Krajišnik's Reply, para. 84.

would appear that he refers to paragraph 165 of the Trial Judgement and the finding that, as President of the Presidency, Radovan Karadžić was bestowed with the authority to appoint, promote, and discharge military officers, military judges and military prosecutors. He further fails to articulate an error and to support it. The Appeals Chamber dismisses this allegation.

510. Krajišnik argues that the Trial Chamber erred in concluding that the SNB acted as the Presidency from 1 April to 12 May 1992, and in stating that the SNB made decisions on behalf of the President of the Bosnian-Serb Republic.[1229] The Appeals Chamber notes that paragraph 167 of the Trial Judgement actually states that "[f]ollowing the establishment of the Presidency, the last reported meeting of the SNB took place on 15 May 1992. The SNB was effectively replaced by the Presidency" which is different from what Krajišnik alleges. Also, the document cited by Krajišnik is clearly irrelevant to his claim.[1230] His argument is dismissed.

511. Krajišnik alleges that the "consultation meetings which were called Presidency sessions were a continuation of the consultations called joint meetings of the SNB and the Government".[1231] He also contends that these meetings were informal, that no decisions were voted on, and that the presence of some persons was not recorded in the minutes.[1232] These arguments can be dismissed as they fail to articulate an error,[1233] are unsupported or are undeveloped.

512. Krajišnik also submits that Witness Đerić was confused in his testimony when asked about the presence of Krajišnik at Presidency sessions.[1234] However, he does not even refer to the two pieces of evidence on which the Trial Chamber relied to conclude at paragraph 167 of the Trial Judgement that Krajišnik was present at all recorded official sessions of the Presidency in 1992, except possibly for one.[1235] This argument is dismissed.

513. Krajišnik challenges the finding that he was a member of the Presidency.[1236] First, he argues that he attended the Presidency meetings only as a guest.[1237] However, this argument has clearly

[1229] Krajišnik's Appeal Brief, para. 301, referring to Trial Judgement, para. 167. *See* also Krajišnik's Reply, para. 51.
[1230] The item 2 of the minutes of the 12 May 1992 session of the Bosnian-Serb Assembly is related to the adoption of an oath. *See* P65, tab 127.
[1231] Krajišnik's Appeal Brief, para. 302 (*chapeau*, bullet 1), referring to Trial Judgement, para. 168. *See* also Krajišnik Appeal Brief, paras 189, 305 (bullet 2); Krajišnik's Reply, para. 50.
[1232] Krajišnik's Appeal Brief, paras 189, 303 (bullet 2), 304 (*chapeau*), referring to Trial Judgement, paras 171-175. *See* also Krajišnik's Reply, para. 50.
[1233] In fact, many of Krajišnik's assertions are consistent with the findings at paragraphs 168-171 of the Trial Judgement, for instance the findings that the sessions were informal (para. 169), and that there was no formal voting as the Presidency operated on the basis of a consensus (para. 170).
[1234] Krajišnik's Appeal Brief, para. 303 (*chapeau*), referring to Đerić, T. 27073.
[1235] Trial Judgement, para. 168, fn. 349, referring to P64 (Treanor Report), pp. 186-7 and Krajišnik, T. 24789.
[1236] Krajišnik's Appeal Brief, paras 131, 189, 206, 242, 303, 305-311; Krajišnik's Reply, paras 6, 47-54; AT. 182, 532-534. Trial Judgement, paras 174-181.
[1237] Krajišnik's Appeal Brief, para. 189, referring to Witness D-24, T. 22826-22828; Subotić, T. 26553-26556; Kapetina, T. 19950-19953; P65, tab 214; P529, tab 411. *See* also Krajišnik's Reply, paras 6, 52.

been rejected by the Trial Chamber.[1238] The Trial Chamber has based its finding that Krajišnik was in fact a member of the Presidency on extensive evidence,[1239] which Krajišnik does not address in his Appeal Brief. The Appeals Chamber dismisses this argument.

514. Krajišnik further submits that the Trial Chamber erred in accepting the testimony of Witness Plavšić on the fact that Krajišnik chaired the Presidency meetings in Karadžić's absence, because this statement was refuted by Witness Đerić.[1240] Again, Krajišnik not only fails to explain why the relevant portion of the testimony of Witnesses Đerić should have been found more credible than that of Witness Plavšić, he also fails to discuss the other evidence on which the Trial Chamber relied to make the challenged findings at paragraphs 169 and 177 of the Trial Judgement. This argument is thus dismissed.

515. Krajišnik argues that the authenticity of the minutes of the Presidency meetings which were presented at trial was questioned by Witness Plavšić.[1241] Referring to Exhibit D171, Krajišnik adds that "[o]n 14 December 1993, the person who took the minutes submitted 31 of these documents taken in the period from 12 May, up to and including 7 September 1992, to the office of the Presidency […] which confirms that all other minutes that appeared in the Tribunal were not the minutes of the Presidency."[1242] Krajišnik's first argument is dismissed as unfounded. As to the second argument, Exhibit D171 does not appear to lend support to Krajišnik's allegation related to the authenticity of the minutes admitted at trial and Krajišnik fails to explain how it "confirms that all other minutes that appeared in the Tribunal were not the minutes of the Presidency". This argument is rejected.

516. Krajišnik contends that the Trial Chamber erred in paragraph 176 of the Trial Judgement, when based on the first Presidency minutes of 12 May 1992 it found that the session was attended by him and Witness Đerić, thereby "laying the foundation for the assumption" that his mere presence at a session is sufficient to declare him member of the Presidency.[1243] He further contends that the fact that the minutes of the 12 May 1992 meeting were signed by Mrs. Plavšić shows that they were written after the meeting, since Mrs. Plavšić was in Sarajevo on that day.[1244] He fails to show how the Trial Chamber erred in finding that he and Witness Đerić attended the 12 May 1992 session of the Presidency. Further, this finding did not constitute the only basis for the Trial

[1238] Trial Judgement, paras 178-179.
[1239] In particular, *see* the evidence cited at paragraphs 176-177 and 180-181 of the Trial Judgement.
[1240] Krajišnik's Appeal Brief, para. 303 (bullet 1). *See* also Krajišnik's Reply, paras 48, 51, 54, 82.
[1241] Krajišnik's Appeal Brief, para. 304 (bullet 1), referring to Trial Judgement, paras 171-175. *See* also Krajišnik's Reply, paras 50 (*chapeau*), 53.
[1242] Krajišnik's Appeal Brief, para. 304 (bullet 2). *See* also Krajišnik's Reply, paras 49-50.
[1243] Krajišnik's Appeal Brief, para. 305 (*chapeau*).
[1244] Krajišnik's Appeal Brief, para. 305 (bullet 1).

Chamber's conclusion that Krajišnik was a member of the Presidency.[1245] As to his argument that the minutes of the 12 May 1992 meeting were written at a later date, this was acknowledged by the Trial Chamber.[1246] These arguments are dismissed.

517. Krajišnik submits that the fact that the Presidency did not want to establish an expanded presidency "is shown in the conclusion of the session held on 31 May 1992, when a decision was adopted to establish municipal presidencies instead of a republican presidency."[1247] He further submits that he did not attend the Presidency's first "independent" meeting of 1 or 2 June 1992, where the Law on Amendments to the Constitutional Law on the Implementation of the Constitution of the Bosnian-Serb Republic (which provided the basis for an expanded Presidency) was adopted.[1248] Krajišnik finally asserts that on 30 November 1992, the Presidency concluded that, since no state of war had been declared, an expanded presidency could not be established.[1249] Krajišnik fails to articulate any error, and these arguments do not contradict the Trial Chamber's findings. In particular, the Trial Chamber accepted that no expanded presidency was formally established[1250] and Krajišnik is unsuccessful in its challenge of the Trial Chamber's finding that such expanded Presidency existed *de facto*.[1251] These arguments are dismissed.

518. Krajišnik further refers to the testimony of a number of witnesses,[1252] to the minutes of the 30 November 1992 Presidency session,[1253] as well as to the transcript of the 23 and 24 November 1992 session of the Bosnian-Serb Assembly.[1254] Krajišnik also challenges the Trial Chamber's reliance on the minutes of the 2 August 1992 meeting, and argues that the person who took the minutes made a mistake in listing him as a Presidency member. Krajišnik moreover affirms that the minutes of the 9 October 1992 meeting were not sent to the Presidency's files on 14 December 1993 and, according to Witness Đerić, were forged.[1255] The Appeals Chamber is not convinced that this shows that the Trial Chamber's finding that Krajišnik was a member of the Presidency was erroneous:

- The testimonies mentioned by Krajišnik were considered by the Trial Chamber,[1256] and Krajišnik fails to show that the conclusions of the Trial Chamber – also based on a

[1245] *See supra* IV.D.2(b)(iii) and Trial Judgement, paras 176-181.
[1246] Trial Judgement, para. 170.
[1247] Krajišnik's Appeal Brief, para. 305 (bullet 3).
[1248] Krajišnik's Appeal Brief, para. 305 (bullet 4).
[1249] Krajišnik's Appeal Brief, paras 131 (bullet 1), 188, 305 (bullet 5); Krajišnik's Reply, para. 49. *See* also Krajišnik's Supplemental Brief, para. 91, referring to AT. 598-600.
[1250] Trial Judgement, para. 175.
[1251] Trial Judgement, para. 180.
[1252] Krajišnik's Appeal Brief, para. 131 (bullet 2). *See* also Krajišnik's Reply, paras 48-49.
[1253] Krajišnik's Appeal Brief, para. 131 (bullet 3).
[1254] Krajišnik's Appeal Brief, para. 131 (bullet 5).
[1255] Krajišnik's Appeal Brief, para. 306. *See* also Krajišnik's Reply, para. 53; AT. 534.
[1256] *See* Trial Judgement, para. 178, fn. 378.

number of other pieces of evidence,[1257] which Krajišnik does not even refer to, or does not successfully challenge – were unreasonable;

- The references made to the minutes of the 30 November 1992 Presidency session and to the transcript of the 23 and 24 November 1992 session of the Bosnian-Serb Assembly are not sufficiently specific to support Krajišnik's argument;

- Krajišnik does not substantiate his allegation that the minutes of the 2 August 1992 meeting erroneously referred to him as a Presidency member;

- Krajišnik fails to articulate the error committed regarding the 9 October 1992 meeting.

The arguments above are dismissed.

519. Krajišnik argues that the Trial Chamber erred in finding that "the Presidency operated *de facto* with a membership of five until 17 December 1992, because this was not the case in at least 15 of its sessions."[1258] The fact that some Presidency members did not attend some sessions is insufficient to show an error in the finding that the Presidency operated in fact with five members, especially as the Trial Chamber itself noted that at the Presidency's session on 9 October 1992, only three persons were present.[1259] His assertion is dismissed as being undeveloped.

520. Krajišnik also submits that the Trial Chamber erred in finding that he attended all sessions of the Presidency.[1260] Krajišnik, however, misrepresents the findings of the Trial Chamber. The Trial Chamber held that Krajišnik "was present at practically every recorded meeting of the Presidency […] as well as in informal meetings […]".[1261] Further, while Krajišnik refers to a series of documents to show that he did not attend a number of Presidency sessions, most of these documents do not form part of the record. This argument is dismissed.

521. Krajišnik appears to challenge the Trial Chamber finding that he was an active member of a five-member Presidency or a *de facto* expanded Presidency, arguing that he participated in consultation meetings as President of the Assembly. He also argues that on 6 July 1992, he agreed "to stand in for Mr. Koljević, who threatened to resign, and not because this was part of his duties as a member of the Presidency".[1262] However, some of the exhibits relied upon by Krajišnik do not support his views. For example, the minutes of the session of the Presidency of Republika Srpska held on 26 October 1992 expressly list Krajišnik as a member of the Presidency.[1263] Other exhibits

[1257] *See* Trial Judgement, paras 176-177.
[1258] Krajišnik's Appeal Brief, para. 308. The Appeals Chamber notes that this argument seems related to paragraphs 178-181 of the Trial Judgement.
[1259] Trial Judgement, para. 177.
[1260] Krajišnik's Appeal Brief, para. 309; Krajišnik's Reply, para. 52.
[1261] Trial Judgement, para. 179.
[1262] Krajišnik's Appeal Brief, paras 310-311, referring to Trial Judgement, paras 180, 182. Krajišnik's Reply, paras 44, 49-51.
[1263] P65, tab 208.

simply do not demonstrate Krajišnik's argument.[1264] These arguments are dismissed as being unsupported.

(iv) Alleged errors in the findings regarding the armed forces (Section 3.4)

522. The Trial Chamber found that:

> The supreme military commander of the VRS was the President of the Republic, Radovan Karadžić. Directly below him was Mladić, who was the Commander of the VRS Main Staff. Despite the Accused's attempts at downplaying the role of the Presidency, the Chamber received sufficient evidence to conclude that, from May to November 1992, General Mladić would consult the Bosnian-Serb leadership regularly. The Presidency would frequently discuss military-related issues and make decisions on those matters. In addition, the Presidency had the authority to initiate investigations on alleged crimes related to combat activities, order cease-fires, and halt military operations if political or diplomatic needs so dictated. It was the Presidency that had the power to secure the release of prisoners of war.[1265]

523. Krajišnik argues that he was not part of the chain of command over the Bosnian-Serb armed forces.[1266] He submits in this connection that his "conversation with Mr. Milošević" was incorrectly used by the Trial Chamber.[1267] However, Krajišnik's argument is unclear, as he fails to specify to which conversation he refers, and to indicate which specific finding of the Trial Judgement he is challenging. This argument is dismissed. The same applies to Krajišnik's argument that he did not participate in the adoption of the Law on the Army.[1268]

524. Krajišnik submits that the Trial Chamber erred in finding that General Mladić consulted the Bosnian-Serb leadership.[1269] In this regard, Krajišnik alleges that the reference to T. 13032-13033 is erroneous,[1270] that Witness Treanor made an error in his interpretation of the minutes of the Presidency meeting of 13 July 1992,[1271] and that the Trial Chamber erred in disregarding the testimony of Witness Subotić, who testified that Mladić was autonomous in decision making.[1272] While Krajišnik rightly points out that the Trial Chamber erred in quoting certain transcript pages in support of its finding,[1273] this error alone is not sufficient to invalidate the factual finding, which is based on other evidence in the trial record.[1274] Further, Krajišnik fails to demonstrate that Witness Treanor erred in its assessment of Mladić's role during the 13 July 1992 Presidency session: the

[1264] P64.A, tab 430; P64.A, tab 726.
[1265] Trial Judgement, para. 205 (footnotes omitted).
[1266] Krajišnik's Appeal Brief, para. 312.
[1267] Krajišnik's Appeal Brief, para. 312 (bullet 1). *See* also Krajišnik's Reply, para. 84.
[1268] Krajišnik's Appeal Brief, para. 312 (bullet 2).
[1269] Krajišnik's Appeal Brief, para. 312 (bullets 5, 7, 8 and 12).
[1270] Krajišnik's Appeal Brief, para. 312 (bullet 7).
[1271] Krajišnik's Appeal Brief, para. 312 (bullet 8). In this connection, Krajišnik avers that the Presidency session of 13 July 1992 was "a consultation meeting focusing on the London conference on BH, where heavy weapons control was to be discussed".
[1272] Krajišnik's Appeal Brief, paras 312 (bullet 12), 421, 441 (bullets 1-2). *See* also Krajišnik's Reply, para. 83.
[1273] The Trial Chamber wrongly cited Wilson, T. 13032-13033, as evidence of Mladić's links with the Bosnian-Serb leardership.
[1274] *See* Trial Judgement, fn. 433.

part of the testimony of Witness Treanor he refers to does not illuminate his contention[1275] and he refers to a document not on the record. Finally, with respect to Witness Subotić, Krajišnik merely argues that the Trial Chamber should have taken into account one specific part of his testimony, but fails to indicate why this part was more reliable than the rest of the evidence given by Witness Subotić, or than the other pieces of evidence relied upon by the Trial Chamber.[1276] These arguments are dismissed.

525. Krajišnik submits that the Trial Chamber erred in finding that the Presidency often discussed operational military issues, as the Presidency had only four meetings with the GŠVRS in 1992.[1277] Krajišnik's argument would appear directed at the finding in paragraph 205 of the Trial Judgement that the Presidency frequently discussed military-related issues. Krajišnik does not, however, explain why the exhibits he points to are more reliable than the evidence the Trial Chamber used to support its finding.[1278] This argument is dismissed.

526. Krajišnik makes a number of arguments with respect to the Presidency's power to investigate. He first alleges that members of the Presidency initiated investigations on alleged crimes.[1279] He further alleges that while the Trial Chamber concluded that the Presidency had the power to initiate investigations, it disregarded the fact that the Presidency's request to the Main Staff to conduct a thorough investigation of the killing of 45 Serbs was never conducted.[1280] Krajišnik adds that on two other occasions, the Presidency ordered to initiate investigations, which were not carried out.[1281] Krajišnik finally submits that Karadžić, Plavšić, Đerić, Stanišić and Mandić "conducted investigations from the position of their office […] although it is questionable whether these investigations were conducted"[1282] but, that "there is no such example" for Krajišnik.[1283] However, Krajišnik fails to articulate a particular error, other than that the Trial Chamber – when concluding that "the Presidency had the power to initiate investigations" – disregarded "the fact that this was the Presidency's request to the Main Staff to conduct a thorough investigation of the killing of 45 Serbs, which was never conducted". This contention is not inconsistent with the Trial Chamber's finding. Further, the documents cited by Krajišnik in support of his argument regarding the Presidency's requests to conduct investigations, and with regard to

[1275] *See* Treanor, T. 1754-1756.
[1276] *See* Trial Judgement, fns 434, 437.
[1277] Krajišnik's Appeal Brief, para. 312 (bullet 6), referring to P64.A, tab 723, P65, tab 184, P65, tab 194.
[1278] Trial Judgement, fn. 434.
[1279] Krajišnik's Appeal Brief, para. 312 (bullet 8), referring to P200, tab 8A; AT. 187.
[1280] Krajišnik's Appeal Brief, para. 312 (bullet 9), referring to Trial Judgement, fn. 435.
[1281] Krajišnik's Appeal Brief, para. 312 (bullet 9). *See* also Krajišnik's Reply, paras 88, 91.
[1282] Krajišnik's Appeal Brief, para. 312 (bullet 10).
[1283] Krajišnik's Appeal Brief, para. 312 (bullet 10). *See* also Krajišnik's Reply, paras 88, 91.

investigations conducted by Karadžić, Plavšić, Đerić, Stanišić and Mandić do not demonstrate any error of the Trial Chamber.[1284] The Appeals Chamber dismisses Krajišnik's arguments.

527. Krajišnik alleges that the Trial Chamber erred in concluding that the Presidency had the power of ordering a ceasefire on the basis of a conversation between Plavšić and Stanišić.[1285] Krajišnik fails to show why the conversation between Plavšić and Stanišić is an inadequate basis for the Trial Chamber's conclusion. He does not either address the relevant parts of his own testimony, upon which the Trial Chamber relied to conclude that the Presidency had the power to order ceasefires.[1286] Therefore, this argument is dismissed.

528. Krajišnik's submission as to Witness 680's testimony on a telephone conversation "between a superior and a subordinate" fails to explain why the testimony of this witness should have been preferred to that of Witness Brown.[1287] Thus, this argument is dismissed.

529. Krajišnik alleges that the Trial Chamber incorrectly concluded that the Bosnian-Serb government was thoroughly briefed by the Main Staff.[1288] It must firstly be noted that Krajišnik's reference to paragraph 207 of the Trial Judgement is erroneous. His argument appears related to the finding at paragraph 206 of the Trial Judgement, that the Presidency was well briefed by the Main Staff on the military situation throughout the Bosnian-Serb Republic. Krajišnik fails to substantiate his allegation. The reference he makes to paragraph 1024 of the Trial Judgement, referring to the report of forced displacement of Muslims up the VRS line of command to the Main Staff and the fact that General Mladić would keep the Presidency members informed about the growth and stabilisation of the Bosnian-Serb Republic, does not support the existence of an error on the part of the Trial Chamber. Moreover, Krajišnik fails to address the fact that the Trial Chamber's finding is supported by other evidence,[1289] which he does not even attempt to challenge. In consequence, this argument is dismissed.

530. Krajišnik asserts that the Trial Chamber erred when concluding that he knew how volunteers were recruited in Serbia, since the evidence shows that Plavšić invited volunteers.[1290] The Appeals Chamber finds that Krajišnik fails to cite any compelling evidence in support of his contention.

[1284] Documents K-0177 and K-0037 which Krajišnik relies on in Krajišnik's Appeal Brief, para. 312 (bullet 10) were found to be part of the trial record (P64A, tab. 798; P892, tab 84 and D252, *see* Rule 115 Decision of 20 August 2008, para. 10). P892, tab 84 was already referred to in Krajišnik's Appeal Brief and, like P64A, tab 798, does not alter the analysis.
[1285] Krajišnik's Appeal Brief, para. 312 (bullet 11), referring to Trial Judgement, fn. 436.
[1286] Trial Judgement, fn. 436, referring to Krajišnik, T. 24637-24638, 24640.
[1287] Krajišnik's Appeal Brief, paragraph following 313 (bullet 1; confidential) (erroneously numbered 368 in the Brief). *See* also Krajišnik's Reply, para. 82.
[1288] Krajišnik's Appeal Brief, para. 314, referring to Trial Judgement, para. 207.
[1289] Trial Judgement, fn. 441.
[1290] Krajišnik's Appeal Brief, para. 315, referring to Trial Judgement, para. 208. *See* also Krajišnik's Reply, para. 112.

Krajišnik also fails to address the Trial Chamber's reliance on other pieces of evidence in reaching its finding. Therefore, this argument is dismissed.

531. Krajišnik alleges that the Trial Chamber erred in its findings regarding Tolimir's report and the events that followed.[1291] Krajišnik submits that the report was sent on 28 July 1992, and that the same day, Mladić responded by issuing an order to disarm paramilitary formations. Krajišnik further submits that Karadžić also responded, "through the MUP, by ordering the so-called special units to be disbanded and resubordinated to the RS army and MUP",[1292] and that the officials in charge then took action. Krajišnik does not articulate the alleged error of the Trial Chamber in paragraph 210 of the Trial Judgement. In any event, this paragraph does not relate to the events that followed the sending of the 28 July 1992 report, but only to the content of the report itself. The Appeals Chamber dismisses Krajišnik's arguments.

532. Krajišnik contends that Witnesses Radić and Kasagić stated during their testimonies that nobody could command the SOS unit.[1293] This argument seems to be directed at the Trial Chamber's finding that the ARK assembly formally placed the SOS under the control of the Banja Luka CSB. Krajišnik fails to identify the relevant portions of the testimonies of Witnesses Radić and Kasagić. In any event, his argument takes no account of the Trial Chamber's further finding that the SOS retained a certain degree of autonomy and does not show that the Trial Chamber erred in making such finding. The Appeals Chamber dismisses this argument.

533. Krajišnik submits that the Trial Judgement's finding, based on the evidence given by Witness 682, that paramilitary formations were linked with Pale, is contrary to the testimony of Witness Subotić.[1294] However, the findings of the Trial Chamber regarding the link between the paramilitary formations and the BS leadership in Pale are not solely based on the testimony of Witness 682, as the Trial Chamber referred to a number of other pieces of evidence.[1295] Krajišnik fails to address this evidence. He does not either explain why the testimony of Witness Subotić should have been preferred over that of Witness 682. This argument is dismissed.

534. Krajišnik alleges that Mladić, the Main Staff and the President of the Presidency "disapproved of paramilitary formations and took concrete measures against them."[1296] Krajišnik fails to articulate any error in paragraph 216 of the Trial Judgement. His argument that Mladić and the Main Staff took measures against paramilitary groups is not inconsistent with the Trial

[1291] Krajišnik's Appeal Brief, para. 316, referring to Trial Judgement, para. 210.
[1292] Krajišnik's Appeal Brief, para. 316.
[1293] Krajišnik's Appeal Brief, para. 317, referring to Trial Judgement, para. 212.
[1294] Krajišnik's Appeal Brief, para. 319, referring to Trial Judgement, para. 213.
[1295] *See* Trial Judgement, fns 454-456.
[1296] Krajišnik's Appeal Brief, para. 320, referring to Trial Judgement, para. 216.

Chamber's findings that "Mladić issued an order regarding the disarmament of paramilitary formations" and that he ordered that "any member of a paramilitary unit who refused to submit to the unified command of the VRS was to be disarmed and arrested."[1297] The Appeals Chamber dismisses this argument.

535. Krajišnik asserts that a "large number of orders show the army's intention to introduce respect for law."[1298] Krajišnik fails to articulate any error committed by the Trial Chamber in paragraph 217 of the Trial Judgement which only relates to the content of the 28 July 1992 report, and not to the other actions of the army. This argument is dismissed.

536. Krajišnik alleges that "[t]he Wolves of Vučjak were not a paramilitary formation but a unit in the composition of the 1st KK."[1299] The Appeals Chamber sees no inconsistency between Krajišnik's argument and the Trial Chamber's finding that "[t]he group led by Veljko Mlianković, active in Prnjavor, was integrated into the 1st Krajina Corps in 1992 […]."[1300] This argument is dismissed.

537. Krajišnik submits that the Trial Chamber erred in relying on the testimony of Witness Selak for its findings at paragraph 219 of the Trial Judgement, because as a Muslim, this witness was biased.[1301] However, Krajišnik does not refer to any evidence in support of his allegation that Witness Selak was biased. In any case, the allegation that he was a Muslim is insufficient to show that the Trial Chamber erred in relying on his testimony. This argument is dismissed.

538. Krajišnik contends that the White Eagles unit was temporarily subordinated to the command of another VRS unit.[1302] The Appeals Chamber sees no inconsistency between Krajišnik's argument and the Trial Chamber's finding that the commander of the Zvornik Brigade "ordered the temporary transfer of the White Eagles unit from the Zvornik Brigade to the Birač Brigade […]."[1303] This argument is therefore dismissed.

539. Krajišnik submits that the finding at paragraph 222 of the Trial Judgement, that the Bosnian-Serb leadership tried to incorporate paramilitary groups into the regular VRS units because they were causing problems, is incomplete. According to Krajišnik, because the paramilitary formations caused problems, "the GŠVRS [Main Staff] and the MUP tried to resubordinate, disarm, expel and

[1297] Trial Judgement, para. 216.
[1298] Krajišnik's Appeal Brief, para. 321, referring to Trial Judgement, para. 217.
[1299] Krajišnik's Appeal Brief, para. 322, referring to Trial Judgement, para. 218.
[1300] Trial Judgement, para. 218.
[1301] Krajišnik's Appeal Brief, para. 323, referring erroneously to Trial Judgement, para. 220.
[1302] Krajišnik's Appeal Brief, para. 324, referring to Trial Judgement, para. 221.
[1303] Trial Judgement, para. 221.

punish them, but were not successful".[1304] Krajišnik does not point out any material in the trial record to support his contention. The argument is thus dismissed.

(v) Alleged errors in the findings regarding the Ministry of Internal Affairs (MUP) (Section 3.5)

540. Krajišnik makes a series of arguments with respect to the statutory framework of the MUP.[1305] He first alleges that the MUP was legally bound to gather information and to send it to the Bosnian-Serb President, not to him.[1306] Then, Krajišnik argues that "[a]ccording to Cutileiro's plan, each constituent unit was entitled to have its own MUP."[1307] He adds that the Minister of Interior was elected on 24 May 1992,[1308] and that the Bosnian-Serb government was constituted on 12 May 1992.[1309] Krajišnik further argues that "Mandić sent a dispatch on the division of the MUP on his own initiative, because the Assembly did not adopt a decision on the establishment of the MUP on 27 March as Mandić claimed in his testimony."[1310] He finally argues that after the beginning of the war, the MUP operated with the same organisational structure as before,[1311] and that "the linking of parts of the RS MUP began after the election of the Government at the Assembly on 12 May 1992."[1312] Krajišnik's submissions do not articulate any specific error in the Trial Judgement and they are dismissed.

541. Krajišnik contends that the Trial Chamber erred in relying on "[a] proposal to award decorations" to prove the co-operation between the Bosnian-Serb MUP and the Serbian and Yugoslav MUP.[1313] He further contends that while it is possible that both MUPs co-operated, there are examples to prove the contrary.[1314] Krajišnik's reference to a "proposal to award decorations" is unclear. The document he refers to in this context does not suggest that the co-operation between the Bosnian-Serb MUP and the Serbian and Yugoslav MUP was limited to "a proposal to award decorations".[1315] As to the examples allegedly disproving this co-operation, Krajišnik only refers to

[1304] Krajišnik's Appeal Brief, para. 325, referring to Trial Judgement, para. 222.
[1305] Krajišnik's Appeal Brief, para. 327, referring to Trial Judgement, paras 225-235. *See* also Krajišnik's Reply, para. 77.
[1306] Krajišnik's Appeal Brief, para. 327 (*chapeau*).
[1307] Krajišnik's Appeal Brief, para. 327 (bullet 1).
[1308] Krajišnik's Appeal Brief, para. 327 (bullet 2).
[1309] Krajišnik's Appeal Brief, para. 327 (bullet 3).
[1310] Krajišnik's Appeal Brief, para. 327 (bullet 4). *See* also Krajišnik's Reply, para. 79.
[1311] Krajišnik's Appeal Brief, para. 327 (bullet 5).
[1312] Krajišnik's Appeal Brief, para. 327 (bullet 6).
[1313] Krajišnik's Appeal Brief, para. 328, referring to Trial Judgement, para. 240, and to P763.A (Addendum to the Expert Report of Christian Nielsen), para. 14.
[1314] Krajišnik's Appeal Brief, para. 328, referring to Trial Judgement, para. 240.
[1315] P763.A, para. 14 (footnotes omitted):

> The RS Ministry of Internal Affairs co-ordinated and co-operated with SFRJ forces and forces of the Republic of Serbia in the take-over of power and maintenance of power on the territories claimed by the Bosnian Serbs in BH. Reports prepared by the Federal State Security Services in

Exhibit P763C, tab 66.[1316] However, while this Exhibit could arguably suggest that the MUP central office co-operated with a regional MUP office,[1317] it does not disprove the co-operation between the Bosnian-Serb MUP and the Serbian and Yugoslav MUP. These arguments are rejected.

542. Krajišnik contends that in a dispatch dated 20 July 1992, Župljanin suggested exchanging Muslim men of military age for Serbs detained in Muslim prisons.[1318] He further contends that on 6 August 1992, the Prime Minister proposed that the detainees be divided into three categories, and treated in accordance with the Geneva Conventions.[1319] He finally asserts that pursuant to a proposal of the MUP commission, some detainees were pardoned and some were released.[1320] Krajišnik does not articulate any specific error in the Trial Judgement, and his arguments are accordingly dismissed.

543. Krajišnik submits that the Trial Chamber erred when concluding that "Karadžić issued Guidelines on the tasks and functioning of defence forces in a state of war."[1321] He asserts that it was decided in July 1992 that ministries should adopt operational plans instead of the Guidelines, but that the government finally abandoned the idea of operational plans, since it required either a constitutional amendment, or a declared state of war.[1322] The only document cited by Krajišnik in support of his contention does not prove that Karadžić did not issue the Guidelines mentioned in the Trial Judgement.[1323] Krajišnik thus fails to demonstrate the alleged error of the Trial Chamber, and his argument is dismissed.

544. Krajišnik alleges that civilian courts had jurisdiction over MUP members, as demonstrated by the Koričanske Stijene case.[1324] It is not entirely clear which finding Krajišnik seeks to challenge, but it seems to be the finding that "no disciplinary committees or courts were ever established" to punish MUP employees who had been involved in the commission of illegal acts.[1325]

March 1992 confirm that there was a formal plan for co-operation between the SSUP and the Bosnian Serb police in BH. Petar M1HAJLOVIĆ, an inspector in the SSUP, was appointed as the co-ordinator for this operation. This co-ordination plan included the deployment of members of the MUP Serbia and the SSUP in BH. From at least July 1991 the Bosnian Serbs in SRBiH MUP collaborated with MUP Serbia in arming the Serbian people on the territory of BH.

[1316] Krajišnik's Appeal Brief, fn. 479.
[1317] P763.C, tab 66, p. 24, where Kljajić (allegedly from MUP central office) requests 500 uniforms from Župljanin (allegedly from a regional office).
[1318] Krajišnik's Appeal Brief, para. 330 (*chapeau*), referring to Trial Judgement, paras 245-250.
[1319] Krajišnik's Appeal Brief, para. 330 (bullet 1).
[1320] Krajišnik's Appeal Brief, para. 330 (bullet 2).
[1321] Krajišnik's Appeal Brief, para. 331, referring to Trial Judgement, para. 251.
[1322] Krajišnik's Appeal Brief, para. 331, referring to Trial Judgement, para. 251.
[1323] *See* Krajišnik Appeal Brief, fn. 483, referring to P583, tab 34.
[1324] Krajišnik's Appeal Brief, para. 332, referring to Trial Judgement, paras 252-254.
[1325] Trial Judgement, para. 252, referring to P763, paras 216, 236.

However, the fact that civilian courts might also have had jurisdiction over MUP employees[1326] is insufficient to show that it was not necessary to take disciplinary actions against MUP employees involved in illegal acts. In any event, the important finding is that MUP members were not, in fact, brought before any courts and that "[t]he MUP Ministry and the Bosnian-Serb leadership would only go so far as placing those who misbehaved under the auspices of the VRS".[1327] Krajišnik fails to show an error in this finding and his argument is rejected.

(vi) Alleged errors in the findings regarding crisis staffs, war presidencies and war commissions

545. Krajišnik contends that it is incorrect to link crisis staffs with the SDS, because, he alleges, the SDS stopped operating during the war.[1328] Krajišnik does not support his assertion with any material in the trial record or any finding in the Trial Judgement. This argument is dismissed.

546. Krajišnik submits that the Trial Chamber erred when finding that the TO existed until 15 June 1992 in Bosanski Novi municipality while, he asserts, the TO was disbanded on 12 May 1992, and the VRS was established instead.[1329] Krajišnik fails to show why no reasonable Trial Chamber could have reached the finding that "from 1 April to 15 June 1992, municipal and regional SDS organs played a major role in organising TO units", on the basis of the evidence related to the Bosanski Novi municipality,[1330] and he fails to cite compelling evidence in support of his contention. Further, he fails to address the Trial Chamber's finding at paragraph 195 of the Trial Judgement that despite the creation of the VRS, TO units were not fully disbanded and the role of the TO remained significant. Krajišnik in particular fails to show that no reasonable Trial Chamber could have reached this finding on the basis of the evidence it considered.[1331] Krajišnik's argument is dismissed.

547. Krajišnik submits that the Trial Chamber erred in accepting Prstojević's allegation that the Bosnian-Serb Assembly established crisis staffs.[1332] He further alleges that it was an error to find that the crisis staffs were established at the Bosnian-Serb Assembly session of 27 March 1992,[1333] because, he alleges, at the time Mr. Karadžić only reminded the deputies that they had the legal

[1326] In this connection, Krajišnik refers to Subotić, T. 26593-26594, but this simply mentions the presence of the President of District Court of Banja Luka as well as an investigating judge and another judge, at a meeting with the Witness Subotić called upon request of the Presidency after the Koričanske Stijene events.
[1327] Trial Judgement, para. 252.
[1328] Krajišnik's Appeal Brief, para. 334, referring to Trial Judgement, paras 256-259.
[1329] Krajišnik's Appeal Brief, para. 335, referring to Trial Judgement, paras 260-261.
[1330] *See* Trial Judgement, fn. 554, in particular the reference to P892, tab 50 (Report from Bosanski Novi SJB, 15 August 1992), p. 1.
[1331] *See* Trial Judgement, fn. 414.
[1332] Krajišnik's Appeal Brief, para. 337, referring to Trial Judgement, para. 267. *See* also Krajišnik's Reply, para. 67.
[1333] Krajišnik's Appeal Brief, para. 340.

right to establish crisis staffs. Finally, he submits that the letter sent by Vlado Lakić was an exception and that "the statement of one of the participants in the discussion at a Novo Sarajevo OOSDS session – that crisis staffs were established by the Bosnian-Serb Assembly – is wrong."[1334] The Appeals Chamber notes that the Trial Judgement does not state that the Bosnian-Serb Assembly created the crisis staffs. At most, the Trial Judgement found that Witness Prstojević "perceived this system [including the exceptional role as local legislative power of the crisis staff as well as the fact that the Bosnian-Serb Assembly deputies were linked to the crisis staff] as one of organisational subordination of the crisis staffs to the President of the Assembly himself."[1335] These arguments are dismissed.

548. Krajišnik alleges that the Trial Chamber erred when concluding that the "central level" ensured that deputies were in crisis staffs, as Karadžić's speech to the Assembly did not mention deputies, and as it "was not specified in the instructions of the Krajina AR Crisis Staff for the establishment of crisis staffs."[1336] Krajišnik further alleges that the Trial Chamber erred when stating that Živinice's letter was sent by the crisis staff, as it was rather sent to BiH officials by the Živinice's SDS Municipal Board (OOSDS). The latter sent the letter after barricades were set up by the Serbian population. It therefore cannot be linked to reports of the crisis staff to Bosnian-Serb leaders.[1337] The Appeals Chamber notes that paragraph 268 of the Trial Judgement does not contain the findings Krajišnik challenges. His arguments are therefore unclear and unsupported; they are dismissed.

549. Krajišnik denies that the Bosnian-Serb leadership firmly controlled crisis staffs.[1338] He first avers that the Trial Chamber erred in finding, on the basis of the testimony of Witness Hanson, that Serbian leaders issued direct orders or instructions to crisis staffs which were then implemented,[1339] because, as he explained in his testimony, crisis staffs were autonomous in decision making.[1340] Krajišnik fails to substantiate his allegations that no orders or instructions were given to and implemented by crisis staffs. The evidence he refers to at footnotes 495 and 496 of his Appeal Brief supports the findings he attempts to challenge.[1341] Further, Krajišnik does not even provide a

[1334] Krajišnik's Appeal Brief, para. 339. *See* also Krajišnik's Reply, para. 67.
[1335] Trial Judgement, para. 267.
[1336] Krajišnik's Appeal Brief, para. 338 (*chapeau*), referring to Trial Judgement, para. 268.
[1337] Krajišnik's Appeal Brief, para. 338 (bullet 1).
[1338] Krajišnik's Appeal Brief, para. 345 (*chapeau*), referring to Trial Judgement, para. 271.
[1339] Krajišnik's Appeal Brief, para. 341. The Appeals Chamber notes that this argument seems related to paragraph 268 of the Trial Judgement.
[1340] Krajišnik's Appeal Brief, para. 342, referring to Trial Judgement, para. 269. *See* also Krajišnik's Reply, para. 69.
[1341] Footnote 495 refers to P528, para. 20, which states in particular that "municipal Crisis Staffs received orders from, and reported to, the SDS leadership via the Main Board, the Bosnian Serb Assembly, or personal approaches to Karadžić, Momčilo Krajišnik and others." Krajišnik seems to be challenging more the assertion at footnote 24 of Exhibit P528 that the Živinice crisis staff sent an appeal to Krajišnik and Karadžić, among others, to help resolve a crisis (*see* Krajišnik's Appeal Brief, fn. 495, referring to "SA02-4584-5, Živinice SDS and others"). However, he does

specific reference to his own testimony[1342] and he fails to explain why the finding at paragraph 268 of the Trial Judgement could not be made on the basis of the remaining evidence considered by the Trial Chamber. This argument is dismissed.

550. Next, Krajišnik makes a series of twelve arguments, unrelated *inter se*, with respect to the Trial Chamber's findings on the interaction of central authorities and crisis staffs.[1343] The arguments aim at challenging the findings and the evidence relied upon by the Trial Chamber in paragraph 270 of the Trial Judgement. These arguments are all dismissed, for the following reasons:

- First, Krajišnik's argument that the Bosnian-Serb Government tried to abolish crisis staffs and to replace them with legal organs of authority[1344] is unrelated to paragraph 270 of the Trial Judgement where the Trial Chamber provides other "examples of attempts at centralization". This argument is dismissed;

- Second, Krajišnik argues that "Witness Božo Antić explained that there was a mistake in the example of weapons issued."[1345] This argument seems related to the Trial Chamber's finding that the central authorities would support crisis staffs materially for instance by providing weapons.[1346] However, Krajišnik does not attempt to demonstrate how the Trial Chamber erred in relying on Exhibit P529, tab 176 – a letter from Božidar Antić, Minister of Economy, on the issuance of various specified weapons and ammunitions to the Grbavica crisis staff – and the Appeals Chamber fails to see how the part of Witness Antić's testimony referred to by Krajišnik would contradict Exhibit P529, tab 176.[1347] Krajišnik further fails to show that no reasonable trier of fact could have concluded that there were examples of material support from the central authorities to crisis staffs in the form of weapons on the basis of the other evidence specified in footnote 579 of the Trial Judgement.[1348] This argument is dismissed;

- Third, Krajišnik alleges that Exhibit P529, tab 178 demonstrates that the Bosnian-Serb government asked help from the *Boksit Milići* company, but not from crisis staffs.[1349] Exhibit P529, tab 178 – which clearly shows that, at the request of the Pale crisis staff, the Government requested *Boksit* to provide fuel to the Pale crisis staff and to invoice the Government – was referred to by the Trial Chamber in support of its finding that the Government supported crisis staffs by providing material.[1350] The Appeals Chamber can see no error in this;

- Fourth, Krajišnik contends that "[g]overnmental assistance to two Sarajevo municipalities is an exception because there is a large number of cases where the

not explain how this is incorrect or refer to evidence on record. Footnote 496 refers to P.64.A, tab 697 (Minutes of the SND and Government session of 27 April 1992). These minutes only state that "[i]t was concluded that comprehensive instructions for crisis staffs should be drafted in which the manner of political work on the ground and organisation of the functioning of the authorities will be presented" (p. 2).

[1342] *See* Krajišnik's Appeal Brief, para. 342.

[1343] Krajišnik's Appeal Brief, para. 343, referring to Trial Judgement, para. 270.

[1344] Krajišnik's Appeal Brief, para. 343 (bullet 1).

[1345] Krajišnik's Appeal Brief, para. 343 (bullet 2).

[1346] Trial Judgement, para. 270, more particularly fn. 579, referring to P529, tab 176 (Letter by Božidar Antić, Minister of Economy, about issuing certain specific weapons and ammunition to Grbavica crisis staff).

[1347] Antić, T. 18232.

[1348] *See* Trial Judgement, para. 270, fn. 579.

[1349] Krajišnik's Appeal Brief, para. 343 (bullet 3), referring to Exhibit 529, tab 178.

[1350] *See* Trial Judgement, para. 270, fn. 579.

municipalities financed activities from the responsibility of the Government".[1351] This contention seems to be related to the Trial Chamber's finding that central authorities provided loans and direct funding to crisis staffs.[1352] It is dismissed as Krajišnik does not explain why the finding should not stand on the basis of the evidence considered by the Trial Chamber, and as Krajišnik merely asserts that the Trial Chamber failed to give sufficient weight to certain evidence;

- The fifth argument relating to the "party's reporting before the war and before establishment of crisis staffs"[1353] is dismissed as Krajišnik does not refer to any evidence in support of his argument;

- The sixth argument with regard to the fact that the Ilijaš TO commander addressed Karadžić as the "Supreme Commander and President of the BH SDS"[1354] does not relate to the Trial Chamber's finding that crisis staffs requested help from the Bosnian-Serb government,[1355] and is dismissed.

- Krajišnik's seventh argument with regard to his visit to Ilijaš on 28 June 1992[1356] is dismissed. Indeed, the Trial Chamber did not find that Krajišnik visited Ilijaš as a guest of the crisis staff; rather it relied on Exhibit P529, tab 195 to find that crisis staffs sometimes reported directly to the Bosnian-Serb leadership.[1357] Krajišnik fails to show that this constituted an error; to the contrary, the Exhibit cited by Krajišnik in fact supports the Trial Chamber's finding in stating that the delegation he headed was informed by crisis staffs of a number of events,[1358] and as his own testimony alone is insufficient to undermine the challenged finding. Krajišnik also fails to address the other evidence mentioned by the Trial Chamber in footnote 584 of the Trial Judgement;

- Krajišnik's eighth argument, which challenges Witness Hanson's testimony related to the Novo Sarajevo OOSDS session,[1359] is unsupported and fails to address the remaining evidence supporting the Trial Chamber's finding.[1360] As such, it is dismissed;

- The ninth argument of paragraph 343 of Krajišnik's Brief, in which he states that Mr. Vještica was not a member of the crisis staff,[1361] is not supported by the exhibit cited by Krajišnik.[1362] It is dismissed;

- Krajišnik's tenth and eleventh arguments regarding Karadžić's speech of 24 March 1992 before the Bosnian-Serb Assembly[1363] and based on Witness Hanson's testimony are dismissed, since they neglect to address the other evidence which support the Trial Chamber's finding, and since Krajišnik fails to properly support his contentions;[1364]

[1351] Krajišnik's Appeal Brief, para. 343 (bullet 4), referring to Exhibits P65, tab 137, P529, tab 403, Item 8, P830 and P1149.
[1352] *See* Trial Judgement, para. 270, fns 577 and 578.
[1353] Krajišnik's Appeal Brief, para. 343 (bullet 5).
[1354] Krajišnik's Appeal Brief, para. 343 (bullet 6).
[1355] *See* Trial Judgement, para. 270, fn. 580.
[1356] Krajišnik's Appeal Brief, para. 343 (bullet 7), referring to P529, tab 195 and Krajišnik, T. 24478-24481.
[1357] Trial Judgement, para. 270, fn. 584.
[1358] *See* P529, tab 195.
[1359] Krajišnik's Appeal Brief, para. 343 (bullet 8).
[1360] *See* Trial Judgement, para. 270, fn. 582.
[1361] Krajišnik's Appeal Brief, para. 343 (bullet 9).
[1362] *See* P65, tab 109, pp. 35-38.
[1363] Krajišnik's Appeal Brief, para. 343 (bullets 10 and 11).
[1364] Krajišnik's references to Exhibits P64A, tab 362 and P529, tab 389 are insufficient to support his contention, as they omit to specify the page number of the relevant evidence.

- Finally, Krajišnik merely points at various paragraphs of the Trial Judgement in support of his twelfth argument challenging the finding at paragraph 270 of the Trial Judgement, that "[d]eputies were not members of crisis staffs, nor a transmission between central authorities and municipalities",[1365] and the relevance of these references is not apparent. This argument is dismissed.

551. At paragraph 344 of his Appeal Brief, Krajišnik raises further challenges to the findings in paragraph 270 of the Trial Judgement. These are all dismissed, for the following reasons:

- First, Krajišnik alleges that the Trial Chamber erred when stating that Karadžić announced the taking over of Zvornik through the police.[1366] However, Krajišnik does not specify which particular finding of the Trial Judgement he wishes to challenge and the relevance of his allegation is unclear. This argument is dismissed;

- Second, Krajišnik asserts that Karadžić, in his speech of 24 March 1992 before the Bosnian-Serb Assembly, tried to appease the deputies' concerns and prevent the adoption of radical decisions. Krajišnik adds that it is wrong to compare Karadžić's speech with the Variant A and B Instructions.[1367] Krajišnik's argument does not directly challenge the Trial Judgement, but rather part of the testimony of Witness Hanson.[1368] Since this testimony was used in support of the finding that crisis staffs reported through the Bosnian-Serb Assembly,[1369] Krajišnik's argument appears irrelevant. In any case, Krajišnik does not even attempt to show why the finding in question could not stand on the basis of the remaining evidence relied upon by the Trial Chamber. This argument is dismissed;

- Third, Krajišnik contends that the Trial Chamber misinterpreted his phone conversations with Jovan Tintor and Momo Garić.[1370] The Trial Chamber relied on both telephone conversations to find that crisis staffs reported through individual leaders such as Karadžić or Krajišnik. In support of his contention, Krajišnik refers to his own testimony, as well as to paragraph 990 of the Trial Judgement. The latter reference does not support Krajišnik's argument, as it in fact confirms the impugned finding. Further, Krajišnik fails to refer to any other evidence than his own testimony, and does not even attempt to show why the finding in question could not stand on the basis of the remaining evidence relied upon by the Trial Chamber.[1371] Finally, he also fails to show that no reasonable Trial Chamber could have interpreted the telephone conversations as evidence of reporting from crisis staffs via individual leaders, including himself. His challenge is dismissed;

- Krajišnik alleges that he was in Lisbon on 28 April 1992 and he therefore did not attend the joint session of the SNB and the Bosnian-Serb government, in which the latter was briefed on the situation in Serbian Sarajevo.[1372] Krajišnik seems to be challenging the Trial Chamber's reliance on the minutes of the 28 April 1992 joint session of the SNB

[1365] Krajišnik's Appeal Brief, para. 343 (bullet 12).
[1366] Krajišnik's Appeal Brief, para. 344 (*chapeau*).
[1367] Krajišnik's Appeal Brief, para. 344 (bullet 1). The Appeals Chamber notes that this argument seems related to para. 270, fn. 582 of the Trial Judgement.
[1368] *See* Krajišnik's Appeal Brief, fn. 513, citing Hanson, T. 9682-9683.
[1369] *See* Trial Judgement, para. 270, fn. 582.
[1370] Krajišnik's Appeal Brief, para. 344 (bullet 2).
[1371] *See* Trial Judgement, para. 270, fn. 583.
[1372] Krajišnik's Appeal Brief, para. 344 (bullet 4). *See* also Krajišnik's Reply, para. 45.

and the Bosnian-Serb government[1373] to conclude that crisis staffs sometimes reported directly to the Bosnian-Serb Presidency. In support of his contention, Krajišnik refers to the minutes of the meeting, but these minutes do not indicate who attended the 28 April 1992 meeting. Krajišnik's further reference to paragraph 977 of the Trial Chamber does not support his point, as this paragraph does not refer either to his presence in Lisbon, nor to the 28 April 1992 meeting. Finally, Krajišnik relies on material which is not in the trial record. In any event, Krajišnik does not even attempt to show why the finding in question could not stand on the basis of the remaining evidence relied upon by the Trial Chamber.[1374] Consequently, this argument is dismissed.

552. Krajišnik further submits that crisis staffs were spontaneously established in reaction to the crisis in Bosnia and Herzegovina, "and not as a criminal act",[1375] and that a crisis staff had already been established by the Bosnian-Serb Presidency in July 1991.[1376] Krajišnik's arguments are irrelevant to the Trial Chamber's findings at paragraph 271 of the Trial Judgement. Further, the only reference made by Krajišnik in support of his arguments is to a document which does not form part of the trial record. This contention is dismissed.

553. Krajišnik asserts that the Bosnian-Serb government, as well as Plavšić and Karadžić, participated in the establishment of municipal war presidencies, but that these were rapidly abrogated by Karadžić.[1377] The Appeals Chamber first notes that Krajišnik does not specify which Trial Chamber's finding he is challenging. However, since the issue of the creation of municipal war presidencies is addressed in paragraphs 272 to 279 of the Trial Judgement, it is assumed that the argument is related to these paragraphs. The Trial Judgement states that the Bosnian-Serb leadership undertook to transform crisis staffs into war presidencies.[1378] In this regard, there is no inconsistency with Krajišnik's argument that the BiH government, Plavšić and Karadžić participated in the establishment of municipal war presidencies. The Trial Judgement further states that on 10 June 1992, the Bosnian-Serb government "decided to replace municipal was presidencies with war commissions."[1379] In support of this finding, the Trial Chamber cited the Decision on the establishment of war commissions in municipalities[1380] which was adopted by Karadžić and superseded the Decision on formation of war presidencies.[1381] The same decision is cited by Krajišnik in support of his contention. Therefore, Krajišnik does not show an inconsistency between the findings made in the Trial Judgement and his arguments. The Appeals Chamber thus dismisses these arguments.

[1373] P65, tab 124.
[1374] *See* Trial Judgement, para. 270, fn. 584.
[1375] Krajišnik's Appeal Brief, para. 346 (*chapeau*), referring to Trial Judgement, para. 271.
[1376] Krajišnik's Appeal Brief, para. 346 (*chapeau*), referring to Trial Judgement, para. 271. *See* also Krajišnik's Reply, para. 70.
[1377] Krajišnik's Appeal Brief, para. 346 (bullet 1).
[1378] Trial Judgement, para. 272.
[1379] Trial Judgement, para. 276.
[1380] P529, tab 112.
[1381] P65, tab 143.

554. Krajišnik submits that the Trial Chamber erred in finding that he took care of commissioners and that he appointed them.[1382] Krajišnik merely asserts that the Trial Chamber was wrong, but does not invoke any compelling evidence, and fails to address the evidence used by the Trial Chamber in reaching its finding. The argument is dismissed.

555. Krajišnik makes a series of arguments relating to municipal presidencies. He first alleges that Plavšić signed by mistake the instructions for the work of municipal presidencies of 24 May 1992, as the Decision on the formation of municipal presidencies was only adopted on 31 May 1992.[1383] This Decision, according to Krajišnik, did not include the same provisions as the Decision on the formation of municipal commissions.[1384] These assertions, however, fail to articulate an error of the Trial Chamber and they are dismissed. Krajišnik further alleges that the Decision on the formation of municipal presidencies was revoked before any presidency could in fact be created,[1385] and that since the Decision was abrogated ten days after its adoption, it is wrong to say that municipal presidencies had the task of coordinating and implementing policies.[1386] The Appeals Chamber notes that the Trial Chamber was aware that the 31 May 1992 Decision on the formation of war presidencies was revoked on 10 June 1992[1387] and took this fact into consideration in making its findings. Krajišnik's further argument that the Decision on the formation of municipal commissions and the Decision on the formation of municipal presidencies contained different provisions fails to articulate an error of the Trial Chamber and is not incompatible with the Trial Chamber's findings at paragraph 274 of the Trial Judgement. These arguments are dismissed.

556. Krajišnik alleges that the Trial Chamber committed an error when it referred to the letter by the SDS Secretary Trifko Komad on the implementation of the decision to create war presidencies, as the municipalities which received it did not act based on this letter, and as no appointment of regional commissioners was planned.[1388] Krajišnik's argument is misdirected. The Trial Judgement merely referred to the letter in question to show that the municipal authorities to whom it was addressed were informed about the 31 May 1992 Decision.[1389] It did not mention whether any actions were taken as a result of this letter. Krajišnik's argument thus fails to show any error in the Trial Chamber's findings. As such, it is dismissed.

[1382] Krajišnik's Appeal Brief, paras 346 (bullet 2), 351, referring to Trial Judgement, para. 277. *See* also Krajišnik's Reply, paras 75, 135.
[1383] Krajišnik's Appeal Brief, para. 347 (*chapeau*), referring to Trial Judgement, para. 273.
[1384] Krajišnik's Appeal Brief, para. 348 (bullet 1).
[1385] Krajišnik's Appeal Brief, para. 348 (*chapeau*), referring to Trial Judgement, para. 274.
[1386] Krajišnik's Appeal Brief, para. 347 (bullet 1).
[1387] Trial Judgement, para. 276.
[1388] Krajišnik's Appeal Brief, para. 349, referring to Trial Judgement, para. 275.
[1389] Trial Judgement, para. 275.

557. Krajišnik submits that Mr. Đokanović appointed members of municipal commissions, which other republican commissioners did not do.[1390] Krajišnik fails to articulate an error allegedly committed by the Trial Chamber. Moreover, the Trial Judgement does not mention that Đokanović appointed members of municipal commissions, but only that he was himself appointed state commissioner.[1391] Krajišnik's submission thus rests on a misrepresentation of the Trial Judgement. This argument is dismissed.

558. Krajišnik asserts that Plavšić was not informed of what Krajišnik discussed with municipal representatives and that she was therefore not in a position to say that Krajišnik could solve the representatives' problems because of his position.[1392] The Trial Chamber relied on Witness Plavšić's testimony to conclude that Krajišnik "regularly [met] with municipal representatives",[1393] and not, as suggested by Krajišnik, to determine what was discussed during these meetings. The argument brought forward by Krajišnik is thus based on a misrepresentation of the Trial Chamber's finding. As such, it is dismissed.

559. Krajišnik contends that the main task of the commissioners was to assist in establishing local governments, and that they did not have to brief the Bosnian-Serb Assembly.[1394] The first argument is not inconsistent with the Trial Chamber's finding that commissioners "assist[ed] in establishing governments".[1395] As to the argument that the commissioners did not have to brief the Assembly, the Trial Chamber considered the exhibit Krajišnik is relying on in support of his argument, and specifically referred to the interventions of Mr. Maksimović and Mr. Mijatović,[1396] as does Krajišnik. Moreover, the said interventions do not clearly show that the commissioners did not have to brief the Bosnian-Serb Assembly. Finally, Krajišnik fails to address the evidence relied on by the Trial Chamber in support of its finding that "the main role of war commissions was to keep the Presidency and the Bosnian-Serb Assembly informed about the situation on the

[1390] Krajišnik's Appeal Brief, para. 350, referring to Trial Judgement, para. 276.
[1391] Trial Judgement, para. 276.
[1392] Krajišnik's Appeal Brief, para. 352 (*chapeau*), referring to Trial Judgement, para. 278.
[1393] Trial Judgement, para. 278.
[1394] Krajišnik's Appeal Brief, para. 352 (bullet 1). Although Krajišnik merely refers to Trial Judgement, para. 278 (*see* Krajišnik's Appeal Brief, para. 352 (*chapeau*)) his argument that commissioners did not have to brief the Bosnian-Serb Assembly would appear to be directed at the Trial Chamber's finding at paragraph 279 of the Trial Judgement that the main role of the war commissions was to keep the Presidency and the Bosnian-Serb Assembly informed about the situation on the ground.
[1395] Trial Judgement, para. 278.
[1396] *See* the reference to P65, tab 213, pp. 106-107, 109-111 in Trial Judgement, para. 278, fn. 616.

ground."[1397] These assertions are dismissed as they are not inconsistent with the findings, and because Krajišnik does not refer to the evidence relied on by the Trial Chamber.[1398]

560. Krajišnik next makes a number of challenges to the findings in paragraphs 280-281 of the Trial Judgement. These challenges are rejected for the following reasons:

- First, Krajišnik asserts that the Trial Chamber committed an error when finding that crisis staffs filled the gap between the withdrawal of the JNA and the establishment of the VRS, "because the VRS was established before the JNA left BH".[1399] However, the Trial Chamber found that crisis staffs filled the gap until "the establishment of a VRS *with effective control of the armed forces on the ground*."[1400] The Trial Chamber therefore did not imply that the VRS was only established once the JNA had completely withdrawn, contrary to what Krajišnik seems to argue. This argument is therefore dismissed;

- Second, Krajišnik asserts that it is incorrect to say that "the VRS assumed control in mid-June 1992".[1401] In this connection, he points to two exhibits ("Analysis of combat readiness and activities of the VRS in 1992, April 1993" (Exhibit P529, tab 255) and the Law on the Army (Exhibit P 64A, tab 806)) without identifying any specific excerpts of these documents in support of his assertion. He also fails to discuss the evidence relied upon by the Trial Chamber in making its finding.[1402] This argument is dismissed;

- Third, Krajišnik avers that the Trial Chamber erred in finding that the SDS formed military units "because on 27 March 1992, seven days before the war, Mr Karadžić said that it was necessary to form TO units and place the armed people under the command of the JNA".[1403] However, Krajišnik fails to show the relevance of this averment, which is dismissed;

- Fourth, Krajišnik states that in Bosanska Krupa, a municipality bordering with Croatia where there was war, "they organised themselves on their own account."[1404] Again, Krajišnik fails to demonstrate the relevance of this statement, which is dismissed.

561. Krajišnik submits that Expert Witness Brown erred in inferring that, on Đerić's instructions, "crisis staffs were an instrument of the military and civilian government organs to achieve the common objective".[1405] Krajišnik fails to explain why the fact that Đerić's instructions "were in effect only two days" would contradict the relevant Trial Chamber's finding, based on Brown's report that "Karadžić's 27 March instruction and its implementation in the ARK municipalities

[1397] Trial Judgement, para. 279.
[1398] Similarly, the assertion that "Mr. Trbojević confirmed that the crisis staffs, war presidencies and war commissions did not send reports to the Government" (Krajišnik's Appeal Brief, para. 353, challenging Trial Judgement, para. 289) is summarily rejected.
[1399] Krajišnik's Appeal Brief, para. 354 (*chapeau*), referring to Trial Judgement, paras 280-281.
[1400] Trial Judgement, para. 281 (emphasis added).
[1401] Krajišnik's Appeal Brief, para. 354 (bullet 1).
[1402] *See* Trial Judgement, para. 281, fn. 621.
[1403] Krajišnik's Appeal Brief, para. 354 (bullet 2).
[1404] Krajišnik's Appeal Brief, para. 354 (bullet 3).
[1405] Krajišnik's Appeal Brief, para. 356, referring to Trial Judgement, para. 284.

show that crisis staffs and the military had common objectives, but that one did not have authority over the other."[1406] This argument is dismissed.

562. Krajišnik alleges that the TO was replaced by the VRS, by amendment to the Constitution adopted on 12 May 1992.[1407] This submission is not inconsistent with the paragraph of the Trial Judgement he refers to.[1408] This argument is dismissed.

563. Krajišnik asserts that crisis staffs did not interfere in the command of the VRS, and he refers to an example of a crisis staff not being able to issue orders to the armed forces.[1409] In the Appeals Chamber's view, Krajišnik fails to demonstrate that it was erroneous for the Trial Chamber to conclude that crisis staffs also issued orders to the armed forces. First, the Trial Chamber did not state that all crisis staffs were always able to do so. Second, the piece of evidence Krajišnik refers to was considered by the Trial Chamber,[1410] and Krajišnik fails to show that it was unreasonable for the Trial Chamber to reach its conclusion on the basis of the other evidence it relied upon.[1411] This argument is dismissed.

564. Krajišnik contends that the Bosnian-Serb police "was subordinated to the Minister", and that crisis staffs worked independently.[1412] The Trial Chamber's findings regarding the links between crisis staffs and the Bosnian-Serb police are based on extensive evidence in the trial record,[1413] which Krajišnik does not address in his challenge. The mere reference to the testimony of Witness Đokanović, who, when asked whether "the impression that he had when he arrived in Pale was that the Crisis Staffs acted independently of the higher authority",[1414] confirmed that it was his impression, is insufficient to demonstrate an error of the Trial Chamber. Further, the portion of the Transcript referred to by Krajišnik does not state that the Bosnian-Serb police "was subordinated to the Minister". This argument is dismissed.

[1406] Trial Judgement, para. 284.
[1407] Krajišnik's Appeal Brief, para. 357, referring to Trial Judgement, para. 285.
[1408] *See* Trial Judgement, para. 285:

> As stated earlier, at the Bosnian-Serb Assembly session of 27 March 1992, Karadžić recommended that TO units formed by the crisis staffs should, where possible, be placed under the command of the JNA. Some of these units were integrated into the JNA, while other existing Bosnian-Serb forces were integrated into the TO. Once the JNA formally withdrew from Bosnia-Herzegovina they all became part of the VRS.

[1409] Krajišnik's Appeal Brief, para. 358, referring to Trial Judgement, paras 286-287, and to P843.
[1410] P843, cited in Trial Judgement, fn. 650.
[1411] *See* Trial Judgement, fns 640-650.
[1412] Krajišnik's Appeal Brief, para. 359, referencing Trial Judgement, para. 288. Krajišnik's Reply, paras 42, 69, 78.
[1413] *See* Trial Judgement, para. 288.
[1414] Đokanović, T. 10699.

(c) Arguments related to Krajišnik's responsibility (Part 6 of the Trial Judgement)

(i) Alleged errors in the findings on Krajišnik's support for armed forces (Section 6.10)

565. The Trial Chamber found, at paragraph 975 of the Trial Judgement, that Krajišnik "actively supervised [the operations of the Bosnian-Serb armed forces in 1992] as a member of the leadership", and that the Bosnian-Serb Assembly "was a forum for the formulation and coordination of military strategy". Krajišnik challenges these findings and submits that they are contrary to the evidence presented.[1415] First, he asserts that he did not send orders to the Bosnian-Serb armed forces,[1416] and that the Constitution and the Law on the Army clearly stated who commanded the armed forces.[1417] Krajišnik fails to support the first assertion, which is therefore dismissed. As for the argument relating to the Constitution and the Law on the Army, even if Krajišnik's vague reference to the text of these documents[1418] and to the testimony of Radovan Karadžić[1419] seem to indicate that, from a legal point of view, Krajišnik did not have the power to give orders to the armed forces, Krajišnik fails to address the Trial Chamber's finding that "whether it had the right to or not, [the Presidency] did give orders."[1420] This argument thus ignores other relevant factual findings made by the Trial Chamber, and is undeveloped. As such, it is dismissed.

566. Krajišnik challenges the Trial Chamber's analysis of Mladić's 12 May 1992 speech to the Bosnian-Serb Assembly,[1421] arguing that it was "not a call for ethnic cleansing, but an address delivered by a self-promoting general".[1422] Krajišnik further argues that the Trial Chamber erred in finding that in the 12 May 1992 speech, Mladić spoke of secret information and plans of the political leadership, as before that day, he had not been involved in Bosnian-Serb politics and could not know the policies of the Assembly.[1423] The first of these assertions fails to articulate the error committed by the Trial Chamber. In any case, the Appeals Chamber notes that the Trial Chamber did not qualify Mladić's speech a "call for ethnic cleansing", but merely reported Mladić's words that according to his vision

> we cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that Serbs would fall through and the rest leave. … I do not know how Mr. Krajišnik and Mr. Karadžić would explain this to the world that would be genocide

[1415] Krajišnik's Appeal Brief, paras 116-129, challenging the findings in paragraphs 975-993 of the Trial Judgement. *See* also Krajišnik's Reply, para. 121.
[1416] Krajišnik's Appeal Brief, paras 118 (*chapeau*), 421; AT. 183-184.
[1417] Krajišnik's Appeal Brief, para. 117 (bullet 1). *See* also Krajišnik's Supplemental Brief, para. 92, refering to AT. 605.
[1418] Krajišnik's Appeal Brief, fn. 147, referring to P64.A, tab 806; P64.A, tab 598.
[1419] Krajišnik's Supplemental Brief, para. 92, referring to AT. 605.
[1420] Trial Judgement, para. 961.
[1421] *See* Trial Judgement, para. 975.
[1422] Krajišnik's Appeal Brief, para. 118 (bullet 1). *See* also Krajišnik's Reply, para. 33.
[1423] Krajišnik's Appeal Brief, para. 119.

and therefore exposed what the Trial Chamber referred to as an alternative way to "achieve controversial military objectives quietly, cynically, ruthlessly, while staying below the radar of international attention".[1424] The argument seems based on a misrepresentation of the Trial Chamber's findings. It is thus dismissed. As to the second alleged error, it is not supported and is therefore dismissed.

567. Krajišnik challenges the Trial Chamber's conclusion that he cynically proposed the adoption of a unilateral ceasefire following Mladić's 12 May 1992 speech.[1425] In support, Krajišnik refers to material, some of which is not on the trial record, allegedly showing that the unilateral ceasefire was sincere.[1426] The Trial Chamber found that Krajišnik, seizing on "Mladić's notion of ždiplomacy', spoke in support of declaring a unilateral ceasefire whose real purpose would be to buy the Bosnian Serbs time to reorganize their armed forces as well as gain some credit at the international level."[1427] The Trial Chamber based this finding on Krajišnik's reaction to Mladić's speech at the 12 May 1992 Assembly session,[1428] and on parts of Krajišnik's testimony.[1429] The Appeals Chamber notes that what Krajišnik said at the Assembly did show a certain degree of cynicism, when he said on one hand that "[a] unilateral proclamation of a cease-fire, in political terms it is quite useful to have the Assembly of the Serbian People adopting, saying, there, we want to do it, see, we are letting the world see"[1430] and on the other hand that

> it is obvious that we must not believe that we are only playing at war. We are at war, and it will be possible to solve this thing with Muslims and Croats only by war. And the politics will be instrumental in bringing it to an end.[1431]

In light of this, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude as it did. Krajišnik argues that the Trial Chamber should have considered other pieces of evidence which prove that the call for a ceasefire was genuine.[1432] The Appeals Chamber finds that while the evidence relied upon by Krajišnik tends to demonstrate that it was the intention of Bosnian-Serb authorities to respect the five-day ceasefire, it fails to show that it was unreasonable for the Trial Chamber to conclude that the real purpose of declaring a unilateral ceasefire was to

[1424] *See* Trial Judgement, para. 975.
[1425] Krajišnik's Appeal Brief, para. 120. *See* also Krajišnik's Reply, paras 33, 127.
[1426] Krajišnik's Appeal Brief, para. 120 (bullets 1-4).
[1427] Trial Judgement, para. 977.
[1428] P65, tab 127, pp. 49-51.
[1429] Krajišnik, T. 25430-25436.
[1430] P65, tab 127, p. 49.
[1431] P65, tab 127, pp. 50-51.
[1432] P64A, tab 369 and in particular item one of Karadžić's platform of 22 April 1992 for resolving the crisis in BiH, calling for an immediate and unconditional ceasefire; P64A, tab 221, transcript of phone conversation between Mrs. Plavsić and Mićo Stanisić of 15 May 1992, where she refers to "our decision from Banja Luka that there is a five days cease fire there" and; P529, tab 221, transcript of a conversation between Mladić and Unković on 13 May 1992 where the former says that "the five days cease-fire must be observed".

buy the Bosnian Serbs time to reorganise their armed forces as well as gain some credit at the international level. This argument is therefore dismissed.

568. Krajišnik alleges that, during the Assembly session of 12 May 1992, he summarised the political platform on the resolution of the crisis in Bosnia and Herzegovina, and did not speak about "territorial expansion"[1433] or advocate violence.[1434] These allegations are dismissed as mere assertions that the Trial Chamber failed to interpret the evidence in a particular manner. Krajišnik also submits that the minutes of the Assembly session held on 12 May 1992 show that the deputies were in favour of a political solution and against a military one.[1435] The Appeals Chamber notes that Krajišnik fails to articulate an error and does not point to any specific Trial Chamber's finding. Second, the reference to the minutes of the 16th Bosnian-Serb Assembly session[1436] is vague, since Krajišnik fails to indicate a specific page number to support his contention. This argument is dismissed.

569. Krajišnik then makes a series of challenges to the Trial Chamber's findings regarding the relationship between the Bosnian-Serb leadership and paramilitary groups.[1437] First, Krajišnik argues that the 28 July 1992 report on paramilitary forces was not sent to him, but only to the President of the Bosnian-Serb Presidency and to the Prime Minister.[1438] This argument is dismissed as Krajišnik fails to identify the findings challenged and to articulate the error committed by the Trial Chamber.[1439] Krajišnik adds that even if the VRS Main Staff was unable to execute the order to eliminate paramilitary formations, it should not be concluded that the Bosnian-Serb leadership tolerated paramilitary groups.[1440] The Trial Chamber found that "[t]he Bosnian-Serb leadership vacillated in its relationship with paramilitary groups".[1441] The pieces of evidence cited by Krajišnik in support of his contention indicate that the Bosnian-Serb leadership, at times, attempted to eliminate paramilitary groups, does not contradict this finding.[1442] Further, Krajišnik fails to show that the evidence in question was incompatible with the finding by the Trial Chamber that, at other times, the Bosnian-Serb leadership actually benefited from the acts of paramilitary formations, or

[1433] Krajišnik's Appeal Brief, para. 121.
[1434] Krajišnik's Appeal Brief, para. 394.
[1435] Krajišnik's Appeal Brief, para. 139.
[1436] P65, tab 127.
[1437] Krajišnik's Appeal Brief, paras 122-128.
[1438] Krajišnik's Appeal Brief, para. 122.
[1439] The Appeals Chamber notes that the report in question (P529, tab 463) was referred to in support of the finding that "from July 1992 onwards, when most of the territories had already been seized, the Bosnian-Serb leadership generally regarded paramilitairies as a nuisance" (Trial Judgement, para. 979). To the extent that Krajišnik wishes to challenge this finding, his arguments fail to show any error on the part of the Trial Chamber.
[1440] Krajišnik's Appeal Brief, para. 122.
[1441] Trial Judgement, para. 979.
[1442] *See*, for example, Trial Judgement, para. 979.

that this finding was unreasonable based on the evidence considered by the Trial Chamber.[1443] Krajišnik therefore fails to show an error of the Trial Chamber. This contention is dismissed.

570. Second, Krajišnik submits that the Trial Chamber misinterpreted the telephone conversations he had on 21 April 1992, during which he enquired about the events in Sarajevo. Krajišnik alleges that he was only concerned about his hometown and that it cannot be concluded that he was informed of military operations.[1444] In addition, he contends that the conversations show that he was unaware that Šešelj's men were in Grbavica and that he did not know who had launched the military operation.[1445] The Trial Chamber's finding regarding the 21 April 1992 telephone conversations of Krajišnik relies on the transcripts of three such conversations.[1446] Krajišnik, in his argument, appears to be contesting only one of them.[1447] He merely offers his interpretation of the evidence in question but fails to explain why the Trial Chamber drew erroneous conclusions from this conversation and the two others. Further, the relevant part of the testimony of Witness Prstojević to which Krajišnik refers as to the reason why he was interested in the situation in Sarajevo, is insufficient to undermine these conclusions, as the Witness takes no stance on Krajišnik's knowledge of military operations.[1448] Krajišnik's arguments are dismissed.

571. Third, Krajišnik challenges the Trial Chamber's findings on his knowledge of and support for the activities of Arkan's paramilitary group.[1449] Krajišnik appears to challenge more specifically the Trial Chamber's finding[1450] that he attended a meeting in April or May 1992 at Bosanska villa along with Karadžić, Stanišić and Arkan, during which tasks were distributed and Arkan permitted a free hand to do anything that was not specifically prohibited.[1451] Krajišnik argues that the Trial Chamber could not draw this conclusion from Witness Davidović's evidence, as the latter did not testify about Krajišnik's involvement in planning Arkan's war operations, but merely stated that he (Krajišnik) came in "with a man" while "they" were sitting in the Bosanska villa.[1452] Krajišnik further alleges that he did not meet Arkan before 1995, and then only accidentally.[1453] Krajišnik finally lists a number of alleged "false allegations" made by Witness Davidović.[1454] Krajišnik's

[1443] Trial Judgement, paras 980-986.
[1444] Krajišnik's Appeal Brief, paras 123 (*chapeau*), 135, 393 (bullet 4).
[1445] Krajišnik's Appeal Brief, para. 123 (bullet 1). *See* also *ibid.*, para. 393 (bullet 5).
[1446] Trial Judgement, para. 982, fns 1964-1965.
[1447] *See* Krajišnik's Appeal Brief, fn. 157, where he refers to Exhibit P64, tab 30A.
[1448] Prstojević, T. 14568-14573, 14584.
[1449] Krajišnik's Appeal Brief, para. 124.
[1450] Krajišnik fails to identify the relevant paragraph of the Trial Judgement. The relevant Trial Chamber's finding is actually found at paragraph 983 of the Trial Judgement, referring to various part of Witness Davidović's testimony: T. 14255-14257, 14354-14355, 14362-14363, 15281.
[1451] Krajišnik's Appeal Brief, para. 124 (*chapeau*).
[1452] Krajišnik's Appeal Brief, para. 124 (*chapeau*), referring to Davidović, T. 15281.
[1453] Krajišnik's Appeal Brief, para. 124 (bullet 1); AT. 184.
[1454] Krajišnik's Appeal Brief, para. 124 (bullets 2-9). *See* also Krajišnik's Appeal Brief, paras 125, 366, 398, 400; Krajišnik's Reply, para. 136.

mere reliance on a sole transcript page[1455] to support his allegation that the Trial Chamber could not conclude as it did is insufficient. The Trial Chamber supported its finding with other relevant parts of Witness Davidović's testimony, which Krajišnik fails to address.[1456] Further, Krajišnik fails to support his argument that he only met Arkan in 1995 and it is therefore dismissed. As to the challenges to the credibility of Witness Davidović, they are rejected for the following reasons:

- Krajišnik argues, first, that the witness's testimony is replete with "second-hand" information to glorify the witness's role in fighting crime.[1457] Krajišnik's only example of this is evidence stating that "Mićo Stanišić […] is to go to Bijeljina at once and solve the questions raised regarding the work of the Centre for Security in SAO Semberija".[1458] As Krajišnik fails to juxtapose this evidence to any part of the witness's testimony, let alone explain how it affects Witness Davidović's credibility, the Appeals Chamber dismisses his argument;

- Second, Krajišnik refers to a number of alleged false statements by the witness.[1459] The Appeals Chamber dismisses these contentions for lack of evidentiary support,[1460] lack of specific references,[1461] failure to rely on material on the record[1462] and failure to explain an error in the Trial Chamber's assessment;[1463]

- Third, Krajišnik submits that "[t]he witnesses 'implicated' by Milorad Davidović during his testimony verified that he gave false testimony".[1464] Krajišnik relies partly on Exhibits D219 and D220 for this assertion, but because he fails to indicate to which passages of the witness's testimony they relate, it is impossible for the Appeals Chamber to address his argument on the merits. The remainder of Krajišnik's submission relies on material which is not part of the record. The Appeals Chamber therefore dismisses his argument;

- Krajišnik also brings a specific challenge to the Trial Chamber's reliance on Milorad Davidović's testimony for its findings related to the Bosnian-Serb leadership's approval of the presence of Arkan's men in Bijeljina and Zvornik.[1465] Krajišnik refers to Biljana Plavšić's testimony, but does not attempt to explain why the Trial Chamber acted unreasonably in relying on Witness Davidović's testimony in this respect.[1466] The Appeals Chamber dismisses this argument.

572. Krajišnik further alleges that the Trial Chamber erred in finding that he publicly praised Arkan for his services to the Bosnian-Serb Republic, submitting in particular that he only praised

[1455] *See* Krajišnik's Appeal Brief, fn. 159.
[1456] Davidović, T. 14255-14257, 14354-14355, 14362-14363.
[1457] Krajišnik's Appeal Brief, para. 400, referencing Exhibit P583, tab 26.
[1458] Exhibit P583, tab 26, p. 6.
[1459] Krajišnik's Appeal Brief, paras 124, 400.
[1460] Krajišnik's Appeal Brief, para. 124 (bullet 9).
[1461] Krajišnik's Appeal Brief, para. 124 (bullets 6, 8); *ibid*., para. 400 (bullets 1, 3).
[1462] Krajišnik's Appeal Brief, para. 124 (bullets 4-5); *ibid*., para. 400 (bullet 3).
[1463] Krajišnik's Appeal Brief, para. 124 (bullets 3, 7-8); *ibid*., para. 400 (bullets 2-3).
[1464] Krajišnik's Appeal Brief, para. 366, referencing Exhibits D219 and D220.
[1465] Trial Judgement, para. 939.
[1466] Krajišnik's Appeal Brief, para. 398.

Arkan as a "politician", not as a "warrior".[1467] Krajišnik's mere reliance on his own testimony,[1468] which the Trial Chamber also took into account together with other evidence,[1469] is insufficient to show an error of the Trial Chamber. This argument is dismissed.

573. Fourth, with regard to both Šešelj's and Arkan's men, Krajišnik argues that he knew nothing of their "sins", that they were followers of the Serbian Radical Party and that he was convinced that "their role was craftily used to intimidate žthe other side'".[1470] Krajišnik's unsupported assertion that he knew nothing of their sins fails to demonstrate an error of the Trial Chamber. This assertion is dismissed.[1471]

574. Lastly, Krajišnik alleges that he was informed about the "Wolves of Vučjak" by the population of Prnjavor. He adds that he was reassured that it was an elite unit of the 1st Krajina Corps, and that many of them had been killed.[1472] Krajišnik does not articulate an error, nor does he point to any specific Trial Chamber's finding. The part of the testimony of Witness Vasić referred to by Krajišnik does not support his argument as it merely explains who were the "Wolves of Vučjak" and is irrelevant do the Trial Chambers' findings about Krajišnik's knowledge or praise of their activities at paragraph 986 of the Trial Judgement.[1473] The argument is thus unsupported; it is dismissed.

(ii) Alleged errors in the findings regarding Krajišnik's style of leadership (Section 6.11)

575. The Trial Chamber held that Krajišnik and Radovan Karadžić in reality "ran Republika Srpska as a personal fief" and that they intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations.[1474] Krajišnik alleges that the Trial Chamber erred in reaching this conclusion.[1475] He first submits that the Trial Chamber erred in concluding that he had power on account of his rapport with Karadžić.[1476] In support, he makes a number of arguments to distance himself from Karadžić and the SDS.[1477] Most of Krajišnik's arguments are

[1467] Krajišnik's Appeal Brief, para. 126. The Appeals Chamber notes that this argument is related to Trial Judgement, para. 985.
[1468] Krajišnik's Appeal Brief, para. 126, referring to Krajišnik, T. 25439-25440.
[1469] Trial Judgement, para. 985 and fn. 1971, referring to P1021.A; Krajišnik, T.25386-25388, 25439-25440.
[1470] Krajišnik's Appeal Brief, para. 127.
[1471] The Appeals Chamber also notes that the Trial Chamber rejected Krajišnik's claim that "he was not aware that Arkan's or Šešelj's men, among other paramilitary formations, fought on the side of the Bosnian Serbs" (Trial Judgement, para. 985).
[1472] Krajišnik's Appeal Brief, para. 128. The Appeals Chamber notes that this argument seems related to Trial Judgement, para. 986.
[1473] *See* Vasić, T. 17426.
[1474] Trial Judgement, para. 987.
[1475] Krajišnik's Appeal Brief, para. 129. *See* also Krajišnik's Reply, para. 56.
[1476] Krajišnik's Appeal Brief, para. 130, referring to Trial Judgement, paras 987-1005. *See* also Krajišnik's Reply, para. 56.
[1477] Krajišnik's Appeal Brief, para. 130 (bullets 1-11). *See* also Krajišnik's Reply, para. 17.

mere assertions, without any specific reference to the Trial Judgement or to material on the record, and are in any case not inconsistent with the Trial Chamber's findings.[1478] The fact that two of these assertions[1479] are supported by the allegations contained in Radovan Karadžić's Rule 92 *ter* Statement does not cure this last defect.[1480] Hence, these arguments are dismissed. As to the remaining arguments,[1481] they are of unclear relevance and do not contradict the relevant findings of the Trial Chamber; they are thus dismissed, too.

576. Krajišnik submits that in 1996, Karadžić appointed Aleksa Buha to succeed him (Karadžić) in the SDS, and Plavšić as his successor as President of the Republic, which shows that the Trial Chamber erred in finding that he was the second in rank in Republika Srpska and close to Karadžić.[1482] Krajišnik also appears to challenge Plavšić's credibility in court, as he argues that she sought revenge against him.[1483] The Appeals Chamber notes that the first argument is based on material which is not part of the trial record. In any case, even if Karadžić appointed Buha and Plavšić as his successors in 1996, this does not demonstrate that no reasonable trier of fact could have concluded that, in 1992, Krajišnik was second in rank and close to Karadžić. This argument is thus dismissed. As for Krajišnik's challenge to Plavšić's credibility as a witness, the Trial Chamber was cognisant that she and Krajišnik were on bad terms.[1484] It nonetheless based a number of findings on her testimony, and it was in its discretion to do so. Krajišnik fails to show that no reasonable trier of fact would have accepted her testimony in this regard.

577. At paragraph 992 of the Trial Judgement, the Trial Chamber concluded that, around 17 April 1992, a meeting was held in Ilidža between members of the Bosnia and Herzegovina government and the local authorities, during which "security and military matters relating to the municipality" were discussed. Krajišnik alleges that the discussions were related to the premises of the government and to the security issues imposed by the break-out of war, but not to military issues.[1485] The Trial Chamber's finding was based on the testimony of Witness Prstojević.[1486] The Appeals Chamber notes that Witness Prstojević effectively testified that the question of the defence of Ilidža was discussed at the 17 April 1992 meeting.[1487] The Appeals Chamber finds that the fact

[1478] Krajišnik's Appeal Brief, para. 130 (bullets 1-3, 5-9). *See* also Krajišnik's Supplemental Brief, para. 87
[1479] Krajišnik's Appeal Brief, para. 130 (bullets 1, 8).
[1480] Krajišnik's Supplemental Brief, para. 87, referring to AD3, p. 9.
[1481] Krajišnik's Appeal Brief, para. 130 (bullets 4 ("The Accused was proposed for the post of the President of the BH Assembly by the deputies after Milan Trbojević's failure to be elected to the post"), 10 ("When the war broke out, the Accused was in the house in Zabrde") and 11 ("The National Security Council never adopted a single decision on behalf of the Presidency or the Government of Republika Srpska, as claimed in the Judgment")).
[1482] Krajišnik's Appeal Brief, paras 132, 208. *See* also Krajišnik's Reply, paras 43, 56.
[1483] Krajišnik's Appeal Brief, para. 133.
[1484] *See* Plavšić, T. 26782-26783.
[1485] Krajišnik's Appeal Brief, para. 136, referring to Prstojević, T. 14568-14573.
[1486] Trial Judgement, fn. 1981, referring to Prstojević, T. 14663-14664, 14819-14821.
[1487] Prstojević, T. 14663-14664, 14820.

that Witness Prstojević had earlier told the Trial Chamber that there were *generally* "no discussions or there was no planning of military operations or military activity of any description"[1488] during meetings does not contradict his testimony as to what was discussed during the 17 April 1992 meeting. Krajišnik therefore fails to demonstrate an error in the Trial Chamber's finding, and this argument is dismissed.

578. Krajišnik challenges the Trial Chamber's reference to Trifko Radić's statement that if Krajišnik and Mladić had not come, Ilijaš would have fallen. He argues that Radić's statement was "confusing, panicked and untrue".[1489] The Appeals Chamber finds that Krajišnik merely repeats his argument at trial without showing an error in the Trial Judgement.[1490] The evidence he points to is irrelevant to his claim.[1491] His argument is dismissed.

579. Challenging the findings in paragraphs 994-997 of the Trial Judgement, Krajišnik first alleges that the "Six Strategic Goals" did not constitute a secret criminal plan, but were merely a platform used during the negotiations of Cutileiro's plan.[1492] The Appeals Chamber notes that the Trial Chamber did not state that the "Six Strategic Goals" were a criminal plan. It rather found that they were "anodyne statements", and that if any insidious hidden meaning could be found in them it is because of the events that followed.[1493] It further held that an anachronistic reading of these goals would be inadvisable and would miss the point, as the goals "lacked substance and utility"; instead, for the Trial Chamber, these goals were only relevant because they

> symbolize[d] a new central authority at a time when the old order had disintegrated. The extent to which they found currency among Bosnian Serbs is an indication of the degree of acceptance of that new authority.[1494]

Krajišnik does not challenge these findings. His argument is based on a misrepresentation of the Trial Chamber's findings, and it is dismissed.

580. Krajišnik submits that the Presidency, the leadership of the Assembly and the Bosnian-Serb government suggested a new proposal to the deputies, which was confirmed in a letter sent to the European Community.[1495] Krajišnik fails to clearly articulate the error committed by the Trial Chamber. Further, the exhibit mentioned by Krajišnik in support of his contention was considered

[1488] Prstojević, T. 14577.
[1489] Krajišnik's Appeal Brief, para. 137. The Appeals Chamber finds that this argument is related to Trial Judgement, para. 993.
[1490] *See* Krajišnik, T. 25502-25504.
[1491] His references to P529, tab 195, and to his own testimony (Krajišnik, T. 24478-24481) merely prove that he was in Ilijaš on 28 June 1992.
[1492] Krajišnik's Appeal Brief, para. 37. *See* also Krajišnik's Reply, para. 26.
[1493] Trial Judgement, para. 995.
[1494] Trial Judgement, para. 995.
[1495] Krajišnik's Appeal Brief, para. 38.

by the Trial Chamber, when it explained the content of the "Six Strategic Goals".[1496] Finally, Krajišnik's argument seems only remotely linked to the Trial Chamber's findings concerning the Goals, and as such is irrelevant to a challenge of these findings. This argument is therefore dismissed.

581. Commenting on the findings made at paragraphs 999 and 1000 of the Trial Judgement, Krajišnik argues that he was not informed of the 19 November 1992 order by Mladić to the Drina Corps and there is no evidence that he was informed of similar documents.[1497] However, Krajišnik fails to articulate the error allegedly committed by the Trial Chamber in this respect, and these assertions are dismissed. Krajišnik also contends that the order issued by Mladić did not result from a co-ordinated policy in which he participated, and that when the order was issued, he made two public statements opposing ethnic cleansing.[1498] Krajišnik bases this contention on his testimony and that of Witness Thompson.[1499] The evidence of Witness Thompson that he (the witness) is not surprised to hear that Krajišnik declared himself against ethnic cleansing, must be read in context. Witness Thompson further testified that he did not believe Krajišnik's statement had any real meaning, considering the situation on the ground.[1500] Thus, Krajišnik's argument fails to demonstrate an error in the interpretation of Witness Thompson's evidence or in the findings.

582. Krajišnik argues that the Trial Chamber erred when relying on a statement by Dr. Beli before the Bosnian-Serb Assembly to find that Krajišnik "may have been a reliable public expounder of Serbian leadership policies".[1501] Krajišnik merely points to the text of Beli's statement, but fails to explain why it was unreasonable for the Trial Chamber to rely on it to conclude that Krajišnik could be relied on to communicate the ideas of the Bosnian-Serb leadership to the Bosnian-Serb public directly. This argument is dismissed.

583. Krajišnik alleges that the Trial Chamber erred when concluding that the Bosnian-Serb Assembly had jurisdiction over military matters, based on a speech by Vojo Kuprešanin at a meeting of the deputies in July 1992.[1502] Krajišnik submits that the words used by Kuprešanin that "ultimate goals be defined so that he could tell the soldiers" show that contrary to the Trial Chamber's conclusion, the Assembly did not adopt goals regarding the military establishment of

[1496] *See* Trial Judgement, fn. 1990.
[1497] Krajišnik's Appeal Brief, para. 140 (*chapeau*).
[1498] Krajišnik's Appeal Brief, para. 140 (bullets 1-2). *See* also Krajišnik's Reply, paras 94, 139.
[1499] *See* Krajišnik's Appeal Brief, fns 189-190, referring to Thompson, T. 15601-15603 and Krajišnik, T. 25607.
[1500] Thompson, T. 15603.
[1501] Krajišnik's Appeal Brief, para. 142 (*chapeau*), referring to Trial Judgement, para. 1001.
[1502] Krajišnik's Appeal Brief, para. 143 (*chapeau*), referring to Trial Judgement, para. 1002.

borders during the 12 May 1992 session.[1503] His allegations are dismissed as mere assertions that the Trial Chamber failed to interpret evidence in a particular manner.

584. Krajišnik alleges, based on the testimony of Witness Trbojević, that the Assembly did not define any military goals during the entire war,[1504] and that his speech during the 17th Assembly was misinterpreted and did not relate to military tasks, but, instead, to upcoming negotiations in London.[1505] The testimony of Witness Trbojević referred to by Krajišnik does not show that the Assembly never adopted military goals.[1506] As to the second assertion, Krajišnik fails to explain how the Trial Chamber misinterpreted his speech during the 17th Assembly session. The mere reference to the text of the speech[1507] does not suffice to show an error of the Trial Chamber. These arguments is dismissed.

585. Krajišnik raises a number of arguments to challenge the following findings in paragraphs 1004-1005 of the Trial Judgement.

Krajišnik's arguments, set out below, can all be rejected, for the following reasons:

- Krajišnik first submits that he did not confirm the existence of an informal supreme command before the creation of the official Supreme Command, and that he was not briefed by the VRS Main Staff.[1508] However, Krajišnik only refers to a portion of his testimony. This is insufficient to show that the Trial Chamber erred when it relied on another portion of his testimony to conclude that he had accepted that an informal Supreme Command existed before the creation of the official Supreme Command, especially in light of Krajišnik's letter of 28 May 1992. This argument is dismissed;[1509]

- Second, Krajišnik argues that the 1992 sessions of the Presidency were attended by representatives of the Main Staff on only four occasions, in June and August.[1510] However, Krajišnik fails to link this argument to a finding in paragraphs 1004 or 1005, and he fails to articulate the error allegedly committed by the Trial Chamber. This argument is dismissed;

- Third, Krajišnik asserts that the Supreme Command was established on 20 December 1992, and that it was merely an advisory body.[1511] However, the documents he cites in fact confirm the Trial Chamber's finding that the Supreme Command was formally established in November 1992,[1512] and they do not support Krajišnik's claim that the Supreme Command was only an advisory body. This argument is dismissed;

[1503] Krajišnik's Appeal Brief, para. 143 (bullet 1).
[1504] Krajišnik's Appeal Brief, para. 145 (bullet 1).
[1505] Krajišnik's Appeal Brief, para. 145 (bullet 2).
[1506] Trbojević, T. 11647-11648.
[1507] P65, tab 182, pp. 48-50.
[1508] Krajišnik's Appeal Brief, para. 146, referring to Krajišnik, T. 25613-25614. *See* also Krajišnik's Reply, para. 84.
[1509] *See* Trial Judgement, fn. 2005, referring to Krajišnik, T. 24638-24640.
[1510] Krajišnik's Appeal Brief, para. 147.
[1511] Krajišnik's Appeal Brief, para. 148. *See* also Krajišnik's Reply, para. 84.
[1512] *See* Trial Judgement, para. 1004; P64A, tab 729; P64A, tab 728.

- Fourth, Krajišnik submits that on 28 May 1992, 16 days after the three members of the Supreme Command were elected, he sent a letter to Lord Carrington and others, in his capacity as the President of the Parliament.[1513] The Trial Chamber relied on the text of the letter to conclude that, *in fact*, Krajišnik "was, and may have even regarded himself, as one of the most important figures in the Bosnian-Serb military establishment at the time".[1514] The mere fact that Krajišnik may have signed this letter as President of the Assembly is insufficient to show an error of the Trial Chamber. This argument is dismissed;

- Fifth, Krajišnik argues that while much evidence shows that he was not even an informal member of the Supreme Command, no evidence confirmed the Trial Chamber's conclusion that he was.[1515] However, the exhibits mentioned by Krajišnik do not support his claim.[1516] This argument is dismissed;

- Sixth, Krajišnik contends that he did not issue any orders to the army, the police or any other institution, and that the army and Mladić did not report to him.[1517] In support of this contention, Krajišnik cites his own testimony, as well as the statements of Witnesses Subotić and Plavšić. Here again, Krajišnik fails to indicate why a reasonable trier of fact would have preferred this evidence to the evidence accepted by the Trial Chamber in making its findings regarding the links between Krajišnik and the army.[1518] In addition, the reliance on his own testimony is in fact a repetition of an argument already made at trial. He fails to support his assertion that he never issued orders to the army or the police. Krajišnik's submissions can thus be dismissed;

- Seventh, Krajišnik submits that Witness Subotić confirmed that discussions were held from 8 to 12 May 1992 "only at the governmental sessions" and that he submitted reports to the government, the Supreme Commander and the President of the Republic.[1519] This submission is dismissed as being irrelevant;

- Finally, Krajišnik contends that there is no evidence of reports sent from the Main Staff to him. He specifically challenges the Trial Chamber's conclusion that he tried to mislead the Trial Chamber into thinking that he was a weak and isolated bureaucrat who dealt exclusively with inconsequential matters of administration, such as food and clothing. He argues that, in accordance with the Constitution, as President of the Assembly he did not interfere with the jurisdiction of others.[1520] Krajišnik's assertions are unsupported, and they ignore the findings of the Trial Chamber and the evidence it relied on.[1521] These arguments are dismissed.

(iii) Alleged errors in the findings regarding information flows (Section 6.12)

586. Krajišnik argues that the Trial Chamber erred in finding that Mladić informed him of military operations during the 9 June 1992 Presidency session, as this session was only a

[1513] Krajišnik's Appeal Brief, para. 149 (*chapeau*).
[1514] Trial Judgement, para. 1004.
[1515] Krajišnik's Appeal Brief, para. 149 (bullet 1).
[1516] P64A, tabs 430 and 632.
[1517] Krajišnik's Appeal Brief, para. 149 (bullets 2-4), 190, 313 (*chapeau*), 382 (bullet 1), 421; AT. 184.
[1518] *See* for example, Trial Judgement, fns 434, 437.
[1519] Krajišnik's Appeal Brief, para. 149 (bullet 5).
[1520] Krajišnik's Appeal Brief, para. 150.
[1521] *See, e.g.*, Trial Judgement, paras 987-993 (findings on Krajišnik's direct influence at all levels of Bosnian-Serb affairs, including military operations), referring to *inter alia* P67, tab 30, p. 2; T. 25446-25458; P625.A, p. 2; P67, tab 29.

consultation between the political leadership and representatives of the army.[1522] The minutes of the 9 June 1992 Presidency session, referred to by Krajišnik, actually indicate that Mladić did brief the members of the Presidency on military operations, including Krajišnik.[1523] This argument is dismissed.

587. Krajišnik alleges that the Trial Chamber erroneously referred to the 12 May 1992 Decision on the establishment of the Bosnian-Serb Army as an incriminatory act.[1524] Contrary to Krajišnik's contention, the Trial Chamber did not refer to the 12 May 1992 Decision as an "incriminatory act". The Trial Chamber merely quoted, as an example of its finding that the topmost leadership of the Bosnian Serbs dealt with matters of utmost seriousness,[1525] the agenda prepared at a joint SNB/Government meeting, for a session of the Assembly including the adoption of an amendment to the Bosnian-Serb Constitution relating to "replenishment" of the armed forces and a decision to incorporate JNA soldiers into the Bosnian-Serb Army. Moreover, Krajišnik fails to support his argument, which is dismissed.

588. In support of its finding that the topmost leadership of the Bosnian Serbs dealt with matters of utmost seriousness,[1526] the Trial Chamber also gave the following examples:

> [o]n 15 May 1992 the Bosanski Šamac crisis staff sent a fax to the attention of Prime Minister Đerić requesting aviation and armoured mechanized equipment for combat use. The text of the fax bore the handwritten notes "Forwarded to the Government at 2300 hours" and "Very urgent! Personal attention: Karadžić and Krajišnik". (On that day, the situation in Bosanski Šamac was discussed at the joint SNB/Government meeting.) And as a last example, at the 31 August 1992 session of the Presidency, again attended by Mladić and General Gvero, the following was noted: "The Generals briefed the Presidency in detail on military and strategic questions, the state and position of military units, their equipment ... All details were discussed, but they were not put on the record because of the level of their confidentiality. Certain conclusions were adopted on the basis of the detailed discussion which are not recorded here."[1527]

Krajišnik asserts that the Trial Chamber erred when finding, based on the fax message, that he was informed about the military situation and that he could issue decisions regarding military matters.[1528] Krajišnik argues that he was not in Pale on that date, and that decisions on the engagement of aircraft were made by the General Staff in Belgrade, and not by someone in RS.[1529] He further argues that the 14 May 1992 meeting was not a joint session of the Government and the SNB, but only a government session, which is why the minutes were signed by Đerić and not just

[1522] Krajišnik's Appeal Brief, paras 382 (*chapeau*), 423, referring to Trial Judgement, paras 1009-1010.
[1523] P64A, tab 723.
[1524] Krajišnik's Appeal Brief, para. 424, referring to Trial Judgement, para. 1011.
[1525] Trial Judgement, paras 1010-1011.
[1526] Trial Judgement, para. 1010.
[1527] Trial Judgement, para. 1011 (footnotes omitted).
[1528] Krajišnik's Appeal Brief, para. 425 (*chapeau*).
[1529] Krajišnik's Appeal Brief, para. 425 (bullet 1).

Karadžić.[1530] Finally, he argues that the Trial Chamber erred in footnote 2019 of the Trial Judgement (relating to the 31 August 1992 Presidency session), because the soldiers came unannounced to the session and participated in it.[1531] Krajišnik's assertions that the Trial Chamber erred in its assessment of the fax message and that the decisions on engagement of aircraft were made in Belgrade are unsupported. His argument relating to the 14 May 1992 meeting is unclear, as the Trial Chamber did not mention this meeting in the impugned findings.[1532] Also, the Trial Chamber did not find that Krajišnik was in Pale on that day. Finally, it is unclear to what "statement" Krajišnik is referring when mentioning footnote 2019 of the Trial Judgement, as this refers to a document containing the minutes of a Presidency session[1533] as well as to Krajišnik's own testimony at trial.[1534] The challenge therefore seems to be based on a misunderstanding of the evidence. Consequently, Krajišnik's arguments are dismissed.

(iv) Alleged errors in the findings regarding Krajišnik's knowledge of and support of detention of civilians (Section 6.14)

589. Krajišnik asserts that the pardoning of prisoners was under the jurisdiction of the Presidency. Krajišnik does not specify which paragraph of the Trial Judgment he challenges. The Appeals Chamber notes that the Trial Chamber mentioned the pardoning of prisoners by the Presidency at paragraphs 1059-1060 of the Trial Judgement. However, the Appeals Chamber can see no inconsistency between Krajišnik's first argument and the Trial Judgement. As to Krajišnik's additional claim that the report of the 1st KK demonstrates that the situation in Majača prison was not portrayed accurately, it is undeveloped.[1535] These challenges are dismissed.

(v) Alleged errors in the findings regarding Krajišnik's responsibility (Section 6.17)

590. Krajišnik submits that the Trial Chamber erred in concluding that he was close to Mrs. Plavšić, Mr. Mandić and Mr. Stanišić.[1536] The Appeals Chamber notes that the Trial Chamber did not find that Krajišnik was close to Plavšić, but rather stated that "[a]ccording to Biljana Plavšić, Momčilo Mandić […] and Mićo Stanišić […] were very close to the [Appellant]".[1537] As to his relationship with Mandić and Stanišić, Krajišnik fails to cite any evidence in support of his argument. This challenge is dismissed.

[1530] Krajišnik's Appeal Brief, para. 425 (bullets 2-3).
[1531] Krajišnik's Appeal Brief, para. 425 (bullet 4).
[1532] *See* Trial Judgement, para. 1011.
[1533] P65, tab 194.
[1534] Krajišnik, T. 25617-25618.
[1535] Krajišnik's Appeal Brief, paras 180, 312 (bullet 13).
[1536] Krajišnik's Appeal Brief, para. 204, referring to Trial Judgement, para. 1085.
[1537] Trial Judgement, para. 1085.

591. Krajišnik submits that the Trial Chamber erred in finding that the Bosnian-Serb MUP was established by a decision of the Assembly dated 27 March 1992.[1538] In its initial findings related to the MUP, the Trial Chamber correctly set out that the Law on Internal Affairs establishing the MUP was adopted on 28 February 1992.[1539] The latter mention of 27 March 1992 as the date of the establishment of the MUP[1540] is therefore an error of the Trial Chamber. However, Krajišnik fails to demonstrate that this error has any impact on the verdict. The Appeals Chamber finds that there is no such impact and therefore, this argument is dismissed.

(d) Other summary dismissals

592. Other assertions dismissed summarily, either for failing to identify the challenged finding or for misrepresenting factual findings:

- "Karadžić's telegram to Sokolac municipality and the reply that followed cannot be used as a basis to conclude that crisis staffs reported to the central authorities";[1541]
- Krajišnik's assertion that the Trial Chamber found that the "Six Strategic Goals" were discussed in the "Analysis of Combat Readiness".[1542]

593. Other assertions dismissed summarily as being unsupported or undeveloped assertions or for failure to articulate an alleged error by the Trial Chamber:

- "The Accused did not engage in party activities";[1543]
- "The Accused attended the meeting on 15 April 1992, after which he returned to Zabrđe and he was not informed of the decision to withdraw party representatives from BH governmental structures";[1544]
- "All meetings for which there are recorded minutes were held during a state of an imminent threat of war and not a state of war and cannot be considered Presidency sessions";[1545]
- The assertion that Karadžić consulted Plavšić and Koljević on military issues;[1546]
- "The Accused gave impartial testimony on his role in the period of the indictment";[1547]

[1538] Krajišnik's Appeal Brief, para. 393 (bullet 3), referring to Trial Judgement, paras 1121, 1123.
[1539] Trial Judgement, paras 118, 225.
[1540] *See* Trial Judgement, para. 1121.
[1541] Krajišnik's Appeal Brief, para. 344 (bullet 3). Krajišnik fails to identify the challenged finding.
[1542] Krajišnik's Appeal Brief, para. 39. The Trial Chamber did not make such a finding: *see* Trial Judgement, para. 997.
[1543] Krajišnik's Appeal Brief, para. 244, referring to Trial Judgement, para. 26. *See* also Krajišnik's Supplemental Brief, para. 87, where Krajišnik refers to Radovan Karadžić's Rule 92 *ter* statement in support of his argument. However, Krajišnik fails to articulate an alleged error, and the impugned paragraph of the Trial Judgement does not mention the participation of Krajišnik in party's activities.
[1544] Krajišnik's Appeal Brief, para. 299 (bullet 1, footnotes omitted).
[1545] Krajišnik's Appeal Brief, para. 307, referring to Trial Judgement, para. 178.
[1546] Krajišnik's Appeal Brief, para. 309 (bullet 1), referring to Subotić, T. 26459. *See* also Krajišnik's Reply, para. 17.
[1547] Krajišnik's Appeal Brief, para. 312 (bullet 1), referring to Trial Judgement, para. 205.

- Assertion with respect to General Talić's order in relation to a Presidency session on 29 May 1992;[1548]

- "The issue of the military judiciary was discussed at the consultation meeting on 24 July 1992, because a draft document for the establishment of military courts was expected at the Assembly session on the same day";[1549]

- "The number of RS MUP members increased because the MUP took part in war operations";[1550]

- "The example of Zvornik municipality, where žthe Zvornik municipality command staff of the JNA' is mentioned as a non-existent concept can be linked to žVariant A and B' because this body was not stipulated in this document";[1551]

- The allegation that the resolution concerning the borders which was adopted during the Assembly's 17th session constituted a platform for the upcoming negotiations, and not a military task;[1552]

- The allegation that deputy M. Mijatović did not propose a redefinition of military goals at the 40th Assembly session of 11 May 1994, but only criticised the Contact Group plan;[1553]

- The allegation that Krajišnik was not authorised to conduct investigations or punish the perpetrators of the crimes committed, which is why he never did;[1554]

- "The Chamber drew an erroneous conclusion that the Accused cast himself as a pathetic figure";[1555]

- The allegation that the Trial Judgement is inconsistent in presenting Krajišnik as an intelligent, educated and powerful man, without explaining why he "did not legalise his role, but instead posed illegally as the head of state";[1556]

- "Deputies criticised the Government for its (in)activity already at the second žwar' session, so it is not true that Mr Đerić was prevented from carrying out his duties. Deputies requested his resignation already at the 3rd session of the Bosnian-Serb Assembly, having assessed that he found it hard to cope as the head of the Government";[1557]

[1548] Krajišnik's Appeal Brief (Confidential), paragraph following 313 (erroneously numbered 368 in the Brief), referring to Trial Judgement, fn. 442.
[1549] Krajišnik's Appeal Brief, para. 326, referring to Trial Judgement, para. 223. Krajišnik fails to articulate the error committed by the Trial Chamber.
[1550] Krajišnik's Appeal Brief, para. 329, referring to Trial Judgement, paras 241-244. Krajišnik fails to articulate the error committed by the Trial Chamber.
[1551] Krajišnik's Appeal Brief, para. 355, referring to Trial Judgement, paras 282-283 (footnote omitted).
[1552] Krajišnik's Appeal Brief, para. 144, referring to Trial Judgement, para. 1003. Krajišnik fails to refer to a specific part of the minutes of the 17th Assembly meeting (P65, tab 182) which would support his claim.
[1553] Krajišnik's Appeal Brief, para. 145 (*chapeau*). Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1554] Krajišnik's Appeal Brief, paras 194, 217, as well as fn. 290. *See* also Krajišnik's Reply, paras 88-89, 92. Krajišnik fails to support his argument.
[1555] Krajišnik's Appeal Brief, para. 206 (*chapeau*).
[1556] Krajišnik's Appeal Brief, para. 207.
[1557] Krajišnik's Appeal Brief, para. 209. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.

- "At the session of the Bosnian-Serb Assembly, Mandić explained the background of his disagreement with Đerić and said that Đerić tended to interfere with other people's work while neglecting his own";[1558]

- "The Accused attended joint sessions of the Deputies' Club and the SDSGO [Serbian Democratic Party Main Board] in 1991 and 1992 as a deputy";[1559]

- "General Subotić confirmed that before the establishment of the Supreme Command Mr Karadžić consulted members of the Presidency, Mr Koljević and Mrs Plavšić, before anyone else".[1560]

(e) Conclusion

594. For the foregoing reasons, Krajišnik's challenges against the Trial Chamber's findings related to his position in the Bosnian-Serb leadership are dismissed.

3. Challenges to findings concerning Krajišnik's knowledge of crimes committed

595. The Appeals Chamber recalls that it has already held in its discussion of the grounds of appeal raised by *Amicus Curiae* that it has neither been shown that the Trial Chamber erred in law, nor that no reasonable trier of fact could have found, based on the evidence, that Krajišnik's intent was the only reasonable inference with respect to the original crimes.[1561] Consequently, Krajišnik's challenges regarding his knowledges of crimes committed are moot.

4. Challenges to findings concerning JCE liability

596. Krajišnik alleges generally that the elements for his responsibility pursuant to a JCE have not been established.[1562] For the most part, he limits himself to bare assertions that the Trial Chamber's conclusions were erroneous. The Appeals Chamber will only entertain the arguments that are developed and supported. A list of the arguments that are summarily dismissed is provided at the end of this section.[1563]

[1558] Krajišnik's Appeal Brief, para. 210. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1559] Krajišnik's Appeal Brief, para. 243. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1560] Krajišnik's Appeal Brief, para. 441 (bullet 4).
[1561] *See supra* III.C.9.
[1562] *See* for instance Krajišnik's Appeal Brief, paras 11-14, 46, 49-52, 61-67, 75, 141, 182, 185, 196-199, 217 (2nd para. with number "217")-218, 227. *See* also Krajišnik's Reply, paras 4, 6, fifth and sixth arguments, 15-16, 96; AT. 177-191.
[1563] *See infra* IV.D.4(e).

(a) Membership in the JCE

597. Krajišnik denies that he and other political and military Bosnian-Serb leaders participated in a JCE.[1564]

598. Krajišnik first submits that a JCE cannot consist of participants at a leadership level unless they use the principal perpetrators as their "instruments". This was not the case here, he argues, because he never "made any arrangements with anyone" and he did not act in concert with principal perpetrators of crimes.[1565] The Appeals Chamber recalls that an accused can be held liable for crimes committed by non-JCE members when these crimes can be imputed to a JCE member who – when using the principal perpetrators – acted in accordance with the common objective;[1566] it is not necessary to show that the accused entered into an agreement or acted in concert with non-JCE members physically perpetrating the crimes.[1567] Whether the physical perpetrators of the crimes committed in the case at hand were used by one or more JCE members has already been considered, and the Appeals Chamber refers to its earlier discussion of this question.[1568]

599. Krajišnik then argues that the Trial Chamber erred when describing how Arkan became involved in the JCE but he fails to articulate the specific error allegedly committed by the Trial Chamber.[1569] In addition, the evidence he refers to does not illuminate or support his contention. Krajišnik quotes the testimony of Biljana Plavšić where she referred to her statement (Exhibit C7) and stated that she did not know Arkan at the time.[1570] Three paragraphs further down in her statement, however, Biljana Plavšić describes how she visited Muslim houses with Arkan in Bijeljina.[1571] Similarly, Exhibit P529, tab 265 is a telephone conversation of 13 May 1992 in which Ratko Mladić indicates that Arkan's men were under VRS command.[1572] This argument is rejected.

600. Krajišnik submits that as a member of the so-called JCE, Mr. Mandić was acquitted by the Court in Sarajevo of the crimes he (Mr. Mandić) was implicitly found guilty of in the Trial Judgement.[1573] It is not clear to which finding of the Trial Chamber this statement refers, and the

[1564] *See* for instance Krajišnik's Appeal Brief, paras 9-11, 14, 60, 185, 187, 196, 199; Krajišnik's Reply, paras 4-5. *See* also Krajišnik's Supplemental Brief, paras 85 and 93, where Krajišnik alleges that Radovan Karadžić's Rule 92 *ter* statement and testimony support the argument that Krajišnik was not a member of the JCE.
[1565] Krajišnik's Appeal Brief, paras 49, 60.
[1566] *Brdanin* Appeal Judgement, paras 413, 430. *Martić* Appeal Judgement, para. 168.
[1567] *Brdanin* Appeal Judgement, para. 418.
[1568] *See supra* III.C.11.
[1569] Krajišnik's Appeal Brief, para. 185, with reference to Trial Judgement, paras 1078-1086, 1090, 1095, 1103-1119, as well as to Biljana Plavšić, T. 26794-26795 and Exhibit P529, tab 265. *See* also Krajišnik's Reply, para. 18.
[1570] Plavšić, T. 26794.
[1571] Exhibit C7, para. 16.
[1572] Exhibit P529, tab 265 ("Unković: We have some Arkan's men here. […] Are they under our command? Mladić: All are. All under arms are under my command, if they want to stay alive that is.")
[1573] Krajišnik's Appeal Brief, para. 239; Krajišnik's Reply, para. 19.

Trial Chamber is not bound by any national court's judgement. This argument is dismissed for failure to articulate an error committed by the Trial Chamber.

601. Krajišnik further submits that the Trial Chamber erred in finding that he was a member of the JCE based on his attendance at "informal consultation meetings, referred to as sessions of the Presidency, where no voting took place and no incriminating decisions were adopted".[1574] He argues that the Trial Chamber neglected that the Instructions on the Implementation of the Geneva Conventions, the Decision on the Return of Displaced Persons and other similar documents were adopted at these meetings, and adds that he was not in charge of their implementation.[1575] Since the Trial Chamber did not base its conclusion that Krajišnik was a member of the JCE on the basis of his participation in meetings alone,[1576] the Appeals Chamber dismisses his first allegation, as an argument that ignores other relevant findings made by the Trial Chamber. Furthermore, the Appeals Chamber notes that the first document mentioned by Krajišnik was considered by the Trial Chamber, albeit in a different context.[1577] With respect to the second document, the Appeals Chamber notes that it reads that those who did not return or failed to justify their inability to return would lose the citizenship of the Serbian Republic of BiH.[1578] However, the forcible displacement and the murder of many Croats and Muslims made it impossible for them to return at the time. Hence, Krajišnik does not show how the decision facilitated the return of displaced persons. Finally, Krajišnik's assertion that he was not responsible for their implementation fails to indicate any relevance for his conviction. Consequently, the Appeals Chamber dismisses this allegation as being irrelevant.

602. Krajišnik further submits that he was not a member of the JCE in 1991 or 1992, arguing that "[t]he Chamber concluded that General Mladić joined the JCE on 12 May 1992 and remained a member, together with other JCE members, until the end of the war, while according to the Judgement, the [Appellant] resigned from the JCE in December 1992, although he continued to participate in consultation meetings with RS leaders as the President of the Bosnian Serb Assembly and a member of the negotiating team".[1579] The Appeals Chamber notes that, contrary to Krajišnik's assertion, the Trial Chamber never concluded that Krajišnik "resigned from the JCE in December 1992". The Appeals Chamber dismisses this argument.

[1574] Krajišnik's Appeal Brief, para. 73. *See* also paras 218, 222.
[1575] Krajišnik's Appeal Brief, para. 74. The Prosecution responds that the Trial Chamber did not neglect the documentary evidence in this respect; in particular, the Decision on the Return of Displaced Persons was found to have made it impossible for Croats and Muslims to return (Prosecution's Response to Krajišnik, para. 195). Krajišnik replies by disputing the Prosecution's interpretation of the Decision on the Return of Displaced Persons (Krajišnik's Reply, para. 110).
[1576] *See inter alia* "Conclusions on the Accused's Responsibility", Trial Judgement, paras 1078 *et seq.*
[1577] Trial Judgement, para. 957, fn. 1899.

603. Krajišnik also submits that Bosnian-Serb leaders were in conflict with Slobodan Milošević, due to political differences.[1580] The Appeals Chamber dismisses this allegation as being an unsupported assertion and failing to articulate an error of the Trial Chamber.

604. Krajišnik further states that before the war, he sent optimistic messages to the public and tried to prevent the war by working in the BiH Assembly until 5 April 1992. Also, in June 1991, in a TV programme, he supported peace and a political resolution in BiH, at a time when he allegedly became a JCE member.[1581] The Appeals Chamber dismisses the first allegation, as being an unsupported assertion. With respect to the second argument, the Appeals Chamber has considered the evidence referred to by Krajišnik as well as the evidence on which the Trial Chamber made the impugned finding, [1582] and is not satisfied that the Karadžić statement creates a reasonable doubt that would cause the Appeals Chamber to reverse the finding.

(b) Common objective

(i) Submissions related to the taking over of territory

605. The Trial Chamber found that the Bosnian-Serb leaders wanted to "create facts on the ground for the purpose of strengthening their negotiating position".[1583] Krajišnik argues that this finding is erroneous, as in every draft agreement the Serbian side was prepared to make territorial concessions.[1584] The Appeals Chamber dismisses this allegation, as including a challenge to the Trial Chamber's failure to rely on evidence without explaining why its finding cannot stand on the basis of the remaining evidence.[1585] Furthermore, Krajišnik's argument relies on a document not on record and is thus dismissed.

606. With respect to the events in Bijeljina, Krajišnik argues that the Trial Chamber erred in finding that the first armed clashes started in Bijeljina and that the conflict in Bijeljina was the initiation of the Serbian side's plan to expel Muslims and cause war. He argues that the population in Bijeljina was comprised of 59 per cent Serbs and 31 per cent Muslims, with an absolute power of the Serbs in the municipal government; hence, there was no reason for Serbs to take power by force. Krajišnik further asserts that it was the Muslims who caused an incident, which turned into an armed conflict, and that volunteers arrived from all three sides in BiH. He also alleges that there had

[1578] Exhibit P529, tab 165.
[1579] Krajišnik's Appeal Brief, para. 240.
[1580] Krajišnik's Appeal Brief, para. 186.
[1581] Krajišnik's Appeal Brief, para. 247, with reference to Trial Judgement, para. 43, and D177A. *See* also Krajišnik's Reply, para. 102; Krajišnik's Supplemental Brief, para. 87, referring to AT. 589, 593.
[1582] *Cf.* Trial Judgement, paras 870 *et seq.*
[1583] Trial Judgement, para. 998.
[1584] Krajišnik's Appeal Brief, para. 422, referring to D114.

been earlier clashes in Čapljina, Bosanski Brod and Kupres where Serbs were attacked, and that two days before the clashes, Karadžić said at the Assembly that the Bosnian Serbs should strive to maintain peace.[1586] The Appeals Chamber notes that the Trial Chamber did not find that the first clashes started in Bijeljina, but that "Bijeljina was the first municipality in Bosnia-Herzegovina to be taken over by the Bosnian Serbs in 1992".[1587] Krajišnik's present, irrelevant assertions fail to demonstrate an error in the Trial Chamber's finding that Krajišnik's criminal responsibility arose with the crimes committed during this attack.[1588] The Appeals Chamber dismisses these allegations.

607. Krajišnik argues that the Trial Chamber erred in its interpretation of Karadžić's statement of July 1994 that the Bosnian Serbs had to "get rid of the enemy in our house, meaning the Croats and Muslims",[1589] because the key part of Karadžić's sentence was neglected: "We know for a fact that we have to relinquish something. That's beyond doubt."[1590] The Appeals Chamber dismisses this allegation as a mere assertion that the Trial Chamber failed to interpret the evidence in a particular manner.

(ii) The crimes committed were allegedly not part of any common objective

608. Krajišnik challenges paragraph 1096 of the Trial Judgement and submits – without any reference to evidence – that the crimes on Serb-controlled territory were a result of the war, and not a criminal design, and that identical crimes were committed in Muslim and Croat-controlled territories.[1591] He further states that the Serbian side did not have a plan to commit crimes, and that no evidence was adduced to show that he was informed of such a goal.[1592] These allegations are dismissed as being unsupported. In a related argument, Krajišnik challenges the Trial Chamber's finding that the common objective of the JCE was the permanent removal by force or other means of non-Serb inhabitants from large parts of BiH,[1593] relying on evidence which purportedly shows "that the transfer of the Serbian population occurred on a more massive scale than that of the Muslims."[1594] This argument is dismissed as being clearly irrelevant.

609. Krajišnik then submits that Brđanin's statement on the "cleansing efforts" given to *Kozarski Vjesnik* on 17 July 1992 reflects his personal view and cannot be linked to him or to the official

[1585] Exhibit P1236, p. 1, and Krajišnik, T. 25600-25602, referred to in Trial Judgement, para. 998.
[1586] Krajišnik's Appeal Brief, para. 362, with reference to Trial Judgement, paras 297-309. *See* also Krajišnik's Reply, paras 28-29, 160.
[1587] Trial Judgement, para. 298.
[1588] Trial Judgement, para. 1124. *See* however *supra* III.C.3.
[1589] Exhibit P1201, p. 2, quoted at paras 897 and 1116 of the Trial Judgement.
[1590] Krajišnik's Appeal Brief, para. 392, with reference to Trial Judgement, para. 1116.
[1591] Krajišnik's Appeal Brief, para. 48.
[1592] Krajišnik's Appeal Brief, para. 217 [as printed], with reference to Trial Judgement, paras 903-909, 874-875, 964, 976, 983, 995, 1000, 1078-1080, 1086-1087, 1096. *See* also AT. 186.
[1593] *See* Trial Judgement, paras 1089-1090.

SDS policy.[1595] The Appeals Chamber notes that the Trial Chamber did not find that Brđanin's statement could be linked to Krajišnik or to the official SDS policy. Thus, the argument is dismissed as misrepresenting the Trial Chamber's finding.

610. At paragraph 1090 of the Trial Judgement, the Trial Chamber referred to a decision of representatives from various municipalities to illustrate its finding that the Bosnian-Serb leadership wanted to ethnically recompose the territory under its control by expelling and thereby drastically reducing the proportion of Bosnian Muslims and Bosnian Croats living there. Krajišnik avers that it was erroneous to refer to the conclusions of municipalities' representatives of 7 June 1992 as Witness Pašić questioned their authenticity.[1596] However, Pašić did not question the authenticity of the record. Rather, he stated that he could not remember if he attended the specific meeting. Hence, the Appeals Chamber is not satisfied that the Trial Chamber unreasonably relied on the above-mentioned conclusions. Krajišnik adds that Witness Pašić also stated that the Serbian side did not have a policy to expel Muslims by force;[1597] this assertion is dismissed as a mere assertion that the Trial Chamber failed to rely on one element of the evidence.

(iii) Submissions that crimes were either not committed, or that they were investigated

611. Krajišnik argues that according to Witness Radojko, the Muslims had left at their own request, and that the Trial Chamber disregarded his testimony that all Serbs were brutally expelled in 1995 from this community by Muslim troops and many killed. Hence, the Trial Chamber allegedly erred in finding that ethnic cleansing of Muslims happened in Bosanski Petrovac.[1598] The first allegation in relation to Radojko is dismissed as an argument challenging the Trial Chamber's failure to rely on one piece of evidence without explaining why the finding should not be based on other evidence. The remainder of the arguments is dismissed as being irrelevant.

(iv) Statements were allegedly not indicative of the existence of a common objective

612. The Trial Chamber found that, at the Assembly session of 25 July 1992, Krajišnik asserted that the take-over of territories to date had been insufficient.[1599] Krajišnik argues that at the Assembly session of 24-26 July 1992, he "spoke about the platform for the upcoming session of

[1594] Krajišnik's Appeal Brief, paras 46-47.
[1595] Krajišnik's Appeal Brief, para. 426, with reference to Trial Judgement, para. 1028. *See* also Krajišnik's Reply, para. 140.
[1596] Krajišnik's Appeal Brief, para. 213, with reference to Exhibit P192, and Radomir Pašić, T. 19780-19785. *See* also Krajišnik's Reply, para. 31.
[1597] Krajišnik's Appeal Brief, para. 213 (bullet 2), with reference to Radomir Pašić, T. 19777. *See* also Krajišnik's Reply, para. 31.
[1598] Krajišnik's Appeal Brief, para. 378 (bullets 1-2), with reference to Jovo Radojko, T. 21174-21264. *See* also Krajišnik's Reply, paras 158-159.

negotiations where the map of the constituent units was the most important issue, and as not all aspirations could be included, [he] therefore said that the only objective of the Serbian side was to reach their goal through negotiations so that the Serbian side would acquire the areas that are Serbian, and in order to appease the deputies, he said that not all Serbian areas were included in the existing map."[1600] Furthermore, Krajišnik refers to the additional evidence of Radovan Karadžić who stated that Krajišnik was involved in efforts prior to the outbreak of war to come up with a political solution, and that he never encouraged, advocated or suggested ethnic cleansing, the movement of civilian population, or the murder of Muslims.[1601] Having considered the evidence on which the Trial Chamber's findings were based,[1602] the Appeals Chamber is not satisfied that the additional evidence creates a reasonable doubt that would prompt the Appeals Chamber to reverse the impugned finding.

613. At paragraph 1099 of the Trial Judgement, the Trial Chamber found that "even before the Bosnian-Serb take-overs began in April 1992, the Accused and Radovan Karadžić were aware that an armed conflict between the ethnic groups would have devastating consequences" and it cited in this connection Karadžić's statement at the BiH Assembly session on 15 October 1991. Krajišnik argues that "the Defence presented evidence showing that Mr. Karadžić in fact just repeated the words spoken from the same rostrum by Muhamed Filipović on 10 October 1991, as Karadžić himself explained in his interview in *Politika* newspaper of 17 October 1991."[1603] This is insufficient to show that the Trial Chamber's findings in paragraph 1099 of the Trial Judgement were unreasonable. Krajišnik also argues that it is evident from what Karadžić said that this speech was not a threat, as he reiterated several times "I am not threatening"; Krajišnik adds that, chairing the session, he did not consider the statement as alarming as it was presented later in the media.[1604] The Appeals Chamber dismisses this allegation as being a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner. Krajišnik further submits that Karadžić's platform was the platform of the Serbian delegation at the talks in Lisbon on 26 April 1992.[1605] The Appeals Chamber dismisses this allegation as being irrelevant and for failing to articulate an error of the Trial Chamber.

614. Krajišnik also challenges the findings at paragraph 1076 of the Trial Judgement. First, he submits that the Trial Chamber erred in finding that a map he used during an 1992 interview on Serbian TV was from 1992, as the map presented during the interview did not show the protected

[1599] Trial Judgement, paras 1003 (referring to P65, tab 182), 1115.
[1600] Krajišnik's Appeal Brief, para. 390.
[1601] Krajišnik's Supplemental Brief, para. 87.
[1602] Exhibit P65, tab 182; Krajišnik, T. 25671-25672.
[1603] Krajišnik's Appeal Brief, para. 445.
[1604] Krajišnik's Appeal Brief, para. 445 (bullet 1).

zones of Srebrenica, Žepa and Goražde, who were under Muslim control.[1606] The Trial Chamber reached the conclusion that the map was from 1992 on the basis of the testimony of Witness Okun, and Krajišnik does not show that this was an unreasonable inference. This submission is dismissed. Krajišnik further argues that maps number 9 and 10 from David Owen's book *Balkan Odyssey*, pp. 246-247, show that the map P70 does not even represent the factual situation in 1993 either.[1607] Since the Trial Chamber held that the map referred to 1992, it is irrelevant whether it represented the factual situation in 1993. Hence, this argument is dismissed. Krajišnik further argues that during his testimony he objected to the authenticity of the video footage of the interview, indicating that it comprised two unconnected parts, and that due to the part taken out of the interview, the Trial Chamber erred in finding that this was a military demarcation between the sides to the conflict in BiH in 1992.[1608] The Appeals Chamber dismisses the first allegation as a mere repetition of an argument that was unsuccessful at trial without showing an error of the Trial Chamber, and the second allegation as an unsupported assertion.

615. Krajišnik submits that the Serbian side used the "historical fact that genocide was carried out against the Serbs in WWII" as a "tactical argument" in negotiations to reach its goal of gaining 64 per cent of BiH, which represented the territory privately owned by Serbs. He disputes that this was a call for the take-over of territories because Cutileiro's plan envisaged the creation of constituent units based on the 1971, 1981 and 1991 censuses.[1609] The Appeals Chamber considers that Krajišnik fails to address the evidence showing that the recount of World War II atrocities was not limited to negotiations[1610] and that it was used by Karadžić and Koljević in response to allegations by Mr. Okun that "ethnic cleansing" was taking place.[1611] Hence, the Appeals Chamber dismisses Krajišnik's allegation as an argument that challenges the Trial Chamber's analysis of a piece of evidence without explaining why the Trial Chamber's finding should not stand on the basis of the remaining evidence.

616. Krajišnik also argues that the Trial Chamber misinterpreted his statement on the demarcation between Croats, Serbs and Muslims after the meeting in Sokolac on 17 May 1992.[1612] This argument is dismissed as a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner.

[1605] Krajišnik's Appeal Brief, para. 393 (bullet 8), with reference to Trial Judgement, paras 977-1121(d).
[1606] Krajišnik's Appeal Brief, paras 184, 438 (bullet 1).
[1607] Krajišnik's Appeal Brief, para. 438 (bullet 5).
[1608] Krajišnik's Appeal Brief, para. 438 (bullets 2-3).
[1609] Krajišnik's Appeal Brief, para. 85. *See* also Krajišnik's Reply, para. 25.
[1610] Trial Judgement, para. 896. *See* also *ibid.*, para. 923.
[1611] Trial Judgement, para. 1031.
[1612] Krajišnik's Appeal Brief, paras 395, 405, with references to Trial Judgement, paras 1015, 1121(d).

617. Furthermore, in his interview on 26 January 1992, Krajišnik arguably gave a well-intentioned message to the Muslim side that if they gained international recognition in an unconstitutional way, it would be an imposed resolution for the Serbs, in which the Serbs would see BiH as a Muslim state and when many of them would relocate to Serbia because they would not want to be downgraded from a nation to a minority in BiH.[1613] The Appeals Chamber dismisses these allegations for failure to articulate an alleged error of the Trial Chamber.

(v) Krajišnik's support for ethnic recomposition

618. Krajišnik challenges the Trial Chamber's reliance on statements and other evidence related to the issue of ethnic recomposition. As a general matter, he argues that he did not advocate changing the ethnic structure of BiH and that he was one of the few officials who publicly opposed ethnic cleansing.[1614] Krajišnik does not refer to evidence considered by the Trial Chamber in making its finding that he provided support for ethnic recomposition.[1615] Hence, he does not show that the Trial Chamber's finding in that respect was unreasonable.

619. Krajišnik also argues that ethnic recomposition was never his objective and that the Prosecution adduced no evidence for this assertion.[1616] He submits that at the Vogošća Assembly session, he made a joke commonly used when members of the Serbian people are at odds, and that the Trial Chamber erred in concluding that he supported ethnic cleansing at this session.[1617] The Appeals Chamber notes that the Trial Chamber did not infer from his joke in the impugned paragraphs that he supported ethnic cleansing at this session. Hence, his argument is dismissed as an argument that misrepresents the Trial Chamber's factual finding.

620. Krajišnik further argues that he was not responsible for the forcible expulsion of the non-Serbian population,[1618] without, however, explaining how the portion of Radomir Pašić's testimony he refers to can support this argument. Hence, it is dismissed as an undeveloped assertion. He also submits that he did not intend to change the ethnic composition of the population in BiH by forced population transfers because evidence shows that a greater number of Serbs than Muslims had left

[1613] Krajišnik's Appeal Brief, para. 248, with reference to Exhibit P404 and Trial Judgement, para. 46, fn. 115.
[1614] Krajišnik's Appeal Brief, paras 47, 439 (bullet 4).
[1615] *See*, *e.g.*, Trial Judgement, paras 911, 1076-1077.
[1616] Krajišnik's Appeal Brief, para. 182. *See* also Krajišnik's Reply, para. 141.
[1617] Krajišnik's Appeal Brief, para. 183, with reference to Trial Judgement, paras 1076-1077. *See* also Krajišnik's Reply, para. 100.
[1618] Krajišnik's Appeal Brief, para. 184 (bullet 4), with reference to Trial Judgement, paras 962, 999-1000, 1021-1035, and Radomir Pašić, T. 19772-19869.

their homes, and even Muslims from "pure" Muslim regions in the FBiH left their homes during the war.[1619] The Appeals Chamber dismisses both allegations as irrelevant assertions.

621. Krajišnik argues that the Trial Chamber erroneously held that he advocated ethnically clean Serbian territories during peace talks. He argues that there is a linguistic misunderstanding, as he was in favour of "Serbian territories" and the terms "Serbian", "Muslim" or "Croatian" territories were the working terms used by the negotiators and meant areas where one of the three ethnic communities had a relative or absolute majority.[1620] This allegation is dismissed as being a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner.

622. Furthermore, Krajišnik argues that he and the entire Bosnian-Serb delegation supported the return of refugees. The Serbian side had agreed to withdraw from 23.9 per cent of the territory held by the VRS in order to reach a political solution.[1621] The Trial Chamber considered Witness 623's testimony that, at the Geneva peace negotiations, Krajišnik and Karadžić insisted on having an ethnically pure Serb area in BiH.[1622] Hence, Krajišnik does not show any error on the part of the Trial Chamber.

623. Krajišnik also submits that the Trial Chamber erred in stating that the public statements about the threat to the Serbian people were intended to engender hatred of the other two ethnic groups.[1623] He suggests that, when he addressed the Assembly on 18 March 1992, he discussed Cutileiro's plan and the drawing of maps in the field.[1624] The Appeals Chamber dismisses these allegations as mere assertions that the Trial Chamber failed to interpret evidence in a particular manner.

624. Krajišnik challenges the Trial Chamber's finding that he "expressed admiration for fellow speakers on a Banja Luka television show, whose chauvinistic and self-congratulatory addresses aimed at cementing the status quo".[1625] Krajišnik submits that the Trial Chamber erred in finding that he approved of Kuprešanin's statement about ethnic purity, because his own speech delivered on the same occasion concerned the "Contact Group plan", and the Trial Chamber disregarded the part of his speech that called for a peaceful resolution to the crisis in BiH and stressed that the Serbs should not hate the Muslims and the Croats. He also argues that he advocated a fair political resolution and an unconditional end to the war, and for all these allegations he refers to Exhibit

[1619] Krajišnik's Appeal Brief, paras 437, 439. *See* also Krajišnik's Reply, para. 163.
[1620] Krajišnik's Appeal Brief, para. 391, with reference to Trial Judgement, paras 1045, 1087, 1096, 1098, 1115.
[1621] Krajišnik's Appeal Brief, para. 391, with reference to D114.
[1622] Trial Judgement, para. 950, with reference to Witness 623, T. 5838.
[1623] Krajišnik's Appeal Brief, para. 393 (*chapeau*), with reference to Trial Judgement, paras 1121(c), (d) and 1123.
[1624] Krajišnik's Appeal Brief, para. 393 (bullet 1), with reference to Trial Judgement, paras 912-913.
[1625] Trial Judgement, para. 896; Krajišnik's Appeal Brief, para. 76.

P1184, the transcript of a TV broadcast of 21 August 1994.[1626] The Appeals Chamber notes, however, that the Trial Chamber considered this Exhibit[1627] and that Krajišnik stated in the same statement: "This land has been created in blood and we shall defend it", and that "[o]ur goal is that all this we are fighting for today becomes a united state."[1628] Hence, Krajišnik does not show that the Trial Chamber's finding was unreasonable. The argument that Karadžić at the same gathering also advocated political negotiations[1629] is dismissed as being an unsupported assertion.

625. Krajišnik also challenges the Trial Chamber's conclusion that his interview in *Oslobođenje* in November 1994 set out his vision of an ethnically cleansed Sarajevo. He argues that the interview was a "political response" to the pressure on the Serbian side to relinquish its rights in Sarajevo.[1630] The Appeals Chamber dismisses this argument, as a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner. Krajišnik also argues that the Trial Chamber was biased in concluding that ethnic cleansing would have resulted from handing Sarajevo over to the Serbs, but not from handing it over to the Muslims.[1631] The Appeals Chamber dismisses this argument as being unsupported.

626. Krajišnik further challenges the Trial Chamber's finding that he praised an incendiary speech by Kovačević at an Assembly meeting on 8 January 1993 when the former said: "I have to admit that you are at your best when facing an opponent", while thanking him. Krajišnik argues that he in fact criticised Kovačević for a pathos-filled speech, and that his thanks were sarcastic.[1632] The Appeals Chamber dismisses this allegation as a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner.

627. Krajišnik also submits that the Trial Chamber erred in concluding that he wanted "a new factual situation on the ground" to strengthen the hand of the Bosnian-Serb negotiators. He argues that he did not call for the deportation of other nationals from Serb-claimed areas or for the eradication of Muslim and Croatian enclaves, nor did he intend the secession of Serb-dominated or Serb-claimed areas from BiH.[1633] The Appeals Chamber dismisses these allegations for ignoring relevant findings of the Trial Chamber and as being undeveloped and unsupported.

[1626] Krajišnik's Appeal Brief, paras 76, 184, with reference to Exhibit P1184: "We offer peace and talks; peace and equality; peace and negotiations […] We do not hate the Muslims or the Croats." (pp. 9, 12). *See* also Krajišnik's Reply, para. 98.
[1627] *See* Trial Judgement, para. 896.
[1628] Exhibit P1184, p. 12.
[1629] Krajišnik's Appeal Brief, para. 76.
[1630] Krajišnik's Appeal Brief, paras 77-78, 392 (bullet 1), with reference to Trial Judgement, paras 898, 1116.
[1631] Krajišnik's Appeal Brief, para. 78.
[1632] Krajišnik's Appeal Brief, para. 80, (first two sub-paragraphs), with reference to Trial Judgement, para. 900.
[1633] Krajišnik's Appeal Brief, para. 79.

628. The Trial Chamber further found that Krajišnik's directive regarding the "new facts created on the ground in order to strengthen the hand of the Bosnian-Serb negotiators" was endorsed by the deputies in the Assembly, referring to statements of Milovan Bjelošević, Vidoje Ijačić and Miroslav Vještica in March 1992 in support.[1634] Krajišnik appears to dispute this finding, arguing that (1) in March 1992, "disturbing moves" by Muslims against Serbs "caused the deputies to speak emotionally and panic"; (2) both Bjelošević's and Ijačić's speeches were affected by local events; and (3) Vještica did not address Krajišnik during his speech but rather the President of the party.[1635] The Appeals Chamber dismisses the first two allegations as being mere arguments that the Trial Chamber failed to interpret evidence in a particular manner, and the third allegation as relying on a document not on record.

629. The Trial Chamber rejected Krajišnik's defence that he could not say anything in favour of the Muslims in the Assembly without being accused of defending them, by holding that it had not found any evidence that Krajišnik ever tried to defend Muslims in the Assembly.[1636] Krajišnik submits that this conclusion is "unrealistic and unusual" and that it disregards the fact that the Muslims and the Serbs were enemies in the war. He further argues that the Trial Chamber failed to take into account that he, despite crimes committed by Muslims against his family and village, never showed animosity, but, rather, advocated a fair political solution with the Muslims and publicly conveyed that Serbs should not hate the Muslims and Croats.[1637] However, the Trial Chamber found that "[s]ome lone voices *did* try" to have a more moderate stance.[1638] Hence, Krajišnik does not show that the Trial Chamber unreasonably rejected his first argument. Also, his last allegation is dismissed as an argument challenging a Trial Chamber's failure to rely on a piece of evidence without explaining why the finding of the Trial Chamber on his support for a non-political solution should not stand on the basis of the remaining evidence.[1639]

630. Krajišnik also submits that the Trial Chamber erred in concluding, based on Witness 623's testimony, that his position was that co-existence with the Muslims was impossible.[1640] The Appeals Chamber dismisses this allegation as being a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner. As to Krajišnik's further challenge to Witness 623's credibility or reliability, the Appeals Chamber notes that these largely unsupported and undeveloped allegations do not show that the Trial Chamber unreasonably relied on Witness 623. Hence, the allegations are dismissed.

[1634] Trial Judgement, paras 912 and 914 (citation taken from para. 912).
[1635] Krajišnik's Appeal Brief, para. 80 (bullets 5, 7-9).
[1636] Trial Judgement, para. 955.
[1637] Krajišnik's Appeal Brief, para. 106. *See* also Krajišnik's Reply, paras 22, 109.
[1638] Trial Judgement, para. 956.

631. Krajišnik argues that the Trial Chamber erroneously found that he advocated the division of BiH. He argues that it was the Muslims, the Croats and the international community, who supported the division as one possible scenario. He refers to the Joint Declaration and Confederate Agreement between the Muslims and the Croats of 14 September 1992, the Joint Serbian-Muslim Declaration of 18 September 1992, the Constitutional Law proposed by the Muslims on 28 September 1992, and Exhibit D60.[1641] The Appeals Chamber notes that even if the other sides in the conflict also supported such division, this does not detract from the Trial Chamber's findings that Krajišnik supported an ethnic partition. Hence, the Appeals Chamber dismisses the allegations as being irrelevant.

632. Krajišnik further challenges the Trial Chamber's finding at paragraph 999 of the Trial Judgement that Mladić absorbed the political goal of ethnic recomposition into regular army orders. For its finding, the Trial Chamber relied, *inter alia*, on an order by Mladić to the Drina Corps dated 19 November 1992. In support of his challenge, Krajišnik argues that he was not informed of the order; that there is no evidence that he was informed of similar documents; and that the order did not result from a co-ordinated policy in which he participated. The Appeals Chamber notes that Krajišnik does not substantiate his arguments and dismisses it, as being unsupported and undeveloped assertions. Krajišnik also argues that when the order was issued, he made two public statements opposing ethnic cleansing, quoting in support Witness Thompson.[1642] However, Witness Thompson also testified that "I would have thought that the contrast between such commendable statements [of Krajišnik] on the one hand and the events on the ground would have appeared grotesque to that population."[1643] In addition, Krajišnik argues that Defence witnesses refuted the allegation of "a Bosnian-Serb plan for the ethnic cleansing of villages" and that no witness connected him with the departure of Muslims.[1644] While Krajišnik refers to several Defence witnesses to support his argument (without, however, providing any specific references), he does not show that the Trial Chamber erroneously applied the "only reasonably inference"-standard when it inferred from other evidence that he had the goal of ethnic recomposition.[1645] Hence, his argument is rejected.

633. Krajišnik argues that he advocated the prevention of war, pointing to the danger of the unconstitutional recognition of BiH independence.[1646] He also argues that immediately before the

[1639] *See* Trial Judgement, paras 911-913.
[1640] Krajišnik's Appeal Brief (Confidential), paras 99, 446, with reference to Trial Judgement, para. 950.
[1641] Krajišnik's Appeal Brief, paras 100-101. *See* also Krajišnik's Reply, paras 23, 63, 120.
[1642] Krajišnik's Appeal Brief, para. 140.
[1643] Mark Thompson, T. 15603.
[1644] Krajišnik's Appeal Brief, para. 141.
[1645] *See* Trial Judgement, paras 911-913.
[1646] Krajišnik's Appeal Brief, para. 211. *See* also Krajišnik's Reply, para. 38.

war, Karadžić addressed the deputies in support of peace,[1647] and that he (Krajišnik) supported this stance throughout the war. The Appeals Chamber finds that in light of the evidence considered by the Trial Chamber in relation to Karadžić's position towards an armed conflict,[1648] Krajišnik does not show that the findings of the Trial Chamber were unreasonable. Also, the final argument is unsupported by evidence and it is thus dismissed.

(vi) Statements regarding Muslim nationhood

634. The Trial Chamber found that, at the 8 January 1993 session of the Assembly, Krajišnik questioned the very existence of a Muslim identity.[1649] Krajišnik makes five arguments to challenge this finding.[1650]

- First, he asserts that the conclusion that he denied Muslims the right to nationality when their armed forces took his village is erroneous.[1651] However, the Trial Chamber did not make such a finding; Krajišnik's argument is thus dismissed;

- Second, the Trial Chamber's conclusion that he belittled Muslims is contrary to Judge Orie's statements during trial and to the adjudicated facts.[1652] The Appeals Chamber dismisses this allegation as a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner.

- Third, the Serbian side supported the Muslims' right to territory on equal footing with Serbs and Croats within BiH.[1653] The Appeals Chamber notes that Exhibit P65, tab 218 shows that one of the conclusions adopted by the Assembly on 8 January 1993 stated that "[t]he Serb people, as one of old European nations, which constituted itself as a nation, have the right to self-determination and state/legal continuity, while recognising the same right to other nations."[1654] But this conclusion does not specifically refer to the Muslims as one of the nations entitled to self-determination. In any case, the Appeals Chamber cannot see how the reference to this exhibit could invalidate the conclusion that Krajišnik questioned the very existence of a Muslim identity;

- Fourth, both the Vance-Owen plan and Cutileiro's plan were discussed in the Bosnian-Serb Assembly.[1655] This assertion is dismissed as undeveloped;

- Fifth, at the time, the Serbs had not made any move to take over the territory.[1656] This assertion is dismissed as undeveloped.

[1647] Krajišnik's Appeal Brief, para. 212, with reference to Exhibit P65 tab 115. *See* also Krajišnik's Reply, para. 103.
[1648] *See* Trial Judgement, para. 1099.
[1649] Trial Judgement, para. 901.
[1650] Krajišnik's Appeal Brief, paras 80, 392.
[1651] Krajišnik's Appeal Brief, para. 80 (bullet 1), referring to Krajišnik, T. 24876-24877.
[1652] Krajišnik's Appeal Brief, para. 80 (bullet 2), referring to T. 24877 and to "Adjudicated fact 2-4, paragraph 12, žThe Muslims owe their religion and culture to the Turks.'"
[1653] Krajišnik's Appeal Brief, para. 80 (bullet 3), referring to Exhibit P65, tab 218.
[1654] Exhibit P65, tab 218, p. 74.
[1655] Krajišnik's Appeal Brief, para. 80 (bullets 3-4)
[1656] Krajišnik's Appeal Brief, para. 80 (bullet 6).

635. Krajišnik submits that the Trial Chamber erred in finding that he alarmed the Deputies' Club on 28 February 1992 that the Muslims wished to establish an Islamic state. He argues that both negotiators and Izetbegović had expressed such a wish.[1657] The Appeals Chamber notes that the referenced pages of Exhibit D260 do not support Krajišnik's allegation that Izetbegović outlined his position on the incompatibility of Islam and all that is non-Islamic, and his negative attitude towards Christianity and Judaism. Also, the Trial Chamber's point with respect to Krajišnik's statements during this meeting does not appear to have been whether or not the Muslims wanted to create an Islamic state, but rather that Krajišnik advocated the view that the Serbs could not afford to share their living space with the Muslims.[1658] Consequently, the Appeals Chamber dismisses Krajišnik's arguments, as allegations that misrepresent the Trial Chamber's factual findings, and as being undeveloped assertions.

636. Krajišnik further submits that the Trial Chamber's finding that he advocated the view that the Serbs could not share their living space with the Muslims is "incorrect and dangerous".[1659] He argues that because the Muslims had refused to live together with the Serbs, the Serbian side was concerned that they would impose their domination on them. The position of the Serbian side with regard to living together with the Muslims in BiH, he argues, was that it agreed to BiH being an independent, but decentralised, state.[1660] The Appeals Chamber notes that Krajišnik refers to an Exhibit page that does not exist. Similarly, Krajišnik asserts that on 26 January 1992, the Serbian side accepted the BiH Government's proposal for the regionalisation of BiH, and, in return, pledged to call on the Serbs to vote for the independence of BiH; however, Izetbegović went back on the compromise, which led the Serbian side to impose a veto. The Muslim-Croatian side's decision to call a referendum on independence despite the veto, he argues, was the prelude to the war.[1661] Krajišnik supports these arguments with documents not on the trial record. Hence, his allegations are dismissed.

637. The Trial Chamber also found that Krajišnik stated in an interview published on 26 January 1992 that in his view an independent BiH would become "an Islamic state" within ten years and that it was comprehensible that the Serbs did not want to risk having to live in such a state.[1662] Krajišnik contends that the Trial Chamber "misinterpreted" his statement in *Oslobođenje*.[1663] The

[1657] Krajišnik's Appeal Brief, para. 81, referring to Trial Judgement, paras 917-918 and with reference to Exhibit D260, pp. 3, 18-19, 22, 27, 32, 37-38, 43, 46, 53-54.
[1658] Trial Judgement, paras 917-918.
[1659] Krajišnik's Appeal Brief, para. 83, with reference to Trial Judgement, paras 918-919. *See* also Krajišnik's Reply, para. 101.
[1660] Krajišnik's Appeal Brief, para. 83, with reference to Exhibit P64A, tab 207, p. SA02-5624, para. 2.
[1661] Krajišnik's Appeal Brief, para. 84, with reference to Trial Judgement, para. 923.
[1662] Trial Judgement, para. 46.
[1663] Krajišnik's Appeal Brief, para. 82, with reference to Exhibit P404, p. 2.

Appeals Chamber dismisses this argument, as a mere assertion that the Trial Chamber failed to interpret evidence in a particular manner.

(c) Connection between Krajišnik and the crimes/physical perpetrators of the crimes

638. Krajišnik argues that no evidence was presented at trial linking him to the events at Bratunac, and that Witness Deronjić's testimony was contested by Witness Đerić.[1664] Krajišnik does not show why the Trial Chamber should have preferred Đerić's testimony over that of Deronjić. Hence, the Trial Chamber's reliance on Đerić's testimony is not unreasonable.

639. Krajišnik argues that he was not a superior to direct perpetrators of the crimes; that he did not know them; that he was not in physical contact with them; and that therefore, these perpetrators could not have been an instrument in his hands.[1665] These allegations are dismissed as being unsupported assertions.

(i) Challenges related to specific instances of involvement

640. Krajišnik challenges the Trial Chamber's finding at paragraph 994 of the Trial Judgement that he and Karadžić had chosen Mladić as Commander of the VRS Main Staff. He argues that Karadžić was the one who had chosen Mladić.[1666] This Exhibit, however, explicitly reads that "[w]e [Karadžić and Krajišnik] asked for Mladić".[1667] This argument is dismissed as being a mere assertion that the Trial Chamber should have interpreted evidence in a particular manner.

(ii) Challenges related to activities of paramilitary groups

641. Krajišnik argues that the Trial Chamber erred in finding that he knew that there were Šešelj's men among TO members.[1668] These allegations are unsupported and dismissed.

(d) Challenges to findings concerning Krajišnik's contribution to the JCE

642. Krajišnik argues that there was no evidence that his behaviour "was aimed at procuring or giving assistance" to a crime within the common purpose.[1669] Furthermore, he contends that there was no example of him attending meetings where, even if "the slightest indication" existed of crimes having been committed, no active steps were taken to investigate the matter and punish the

[1664] Krajišnik's Appeal Brief, para. 367, with reference to Trial Judgement, paras 310-320, and Branko Đerić, T. 27135.
[1665] Krajišnik's Appeal Brief, paras 200-201.
[1666] Krajišnik's Appeal Brief, para. 138, with reference to Exhibit P65, tab 224. *See* also Krajišnik's Reply, para. 62.
[1667] Exhibit P65, tab 224, p. 146.
[1668] Krajišnik's Appeal Brief, para. 393 (bullet 5), with reference to Trial Judgement, paras 975-993.
[1669] Krajišnik's Appeal Brief, para. 65. *See* also Krajišnik's Reply, para. 60.

perpetrators.[1670] He also argues that he did not take part in the procurement and distribution of weapons.[1671] These allegations are not based on evidence, or with respect to the final argument, it is not clear how the evidence he refers to supports his argument. Hence, they are dismissed as being unsupported and undeveloped.

643. Krajišnik further submits that the Trial Chamber did not adduce any evidence showing how he, as President of the BiH Assembly, and later President of the Bosnian-Serb Assembly, could have influenced the implementation of a criminal plan. He also alleges that the Trial Chamber's conclusion that he used his political skills to implement a criminal enterprise at local and international levels is without proof.[1672] The Appeals Chamber dismisses these arguments, as unsupported and undeveloped assertions.

644. Krajišnik argues that the Trial Chamber erred in finding that he issued instructions to take over power,[1673] as well as in finding that he advocated violence at the Assembly session on 12 May 1992.[1674] These allegations are dismissed as being unsupported.

(e) Other assertions dismissed summarily

645. The following assertions are dismissed summarily, as being irrelevant:

> - "The same applies to BH municipalities where the Muslims were in the majority after the war broke out, the Muslims did not share power with the Serbs and the Croats";[1675]
>
> - "Prior to Bijeljina, conflict erupted in Čapljina, Bosanski Brod and Kupres, towns which were also visited by Mrs Plavšić. Unlike Bijeljina, where the Serbs had absolute power, in Bosanski Brod and Kupres, where a terrible massacre was carried out against the Serbian civilian population, the Croats and Muslims did not have absolute power. In fact, in Kupres the Serbs were in the majority"; [1676]
>
> - "On the eve of the war, due to the Muslims' refusal to respond to mobilisation, the JNA was predominantly composed of the Serbs defending their villages and towns. The demarcation line established at the time remained the same until the very end of the war";[1677]

646. The following assertions are dismissed summarily, for being undeveloped, unsupported or failing to articulate an error of the Trial Chamber:

[1670] Krajišnik's Appeal Brief, paras 70, 195. *See* also Krajišnik's Reply, para. 35.
[1671] Krajišnik's Appeal Brief, para. 184 (bullet 1), with reference to Sinisa Krsman, T. 21911-21912.
[1672] Krajišnik's Appeal Brief, paras 222-223. *See* also Krajišnik's Reply, para. 43.
[1673] Krajišnik's Appeal Brief, para. 393 (bullet 2), referencing Trial Judgement, paras 1121(d), 903-909, 934, 297-309.
[1674] Krajišnik's Appeal Brief, para. 394, with reference to Exhibit P64.A, tab 612, p. 00847752.
[1675] Krajišnik's Appeal Brief, para. 35 (footnote omitted). The argument is clearly irrelevant.
[1676] Krajišnik's Appeal Brief, para. 36 (footnotes omitted). The argument is clearly irrelevant.
[1677] Krajišnik's Appeal Brief, para. 96. This argument is clearly irrelevant.

- Krajišnik was not a member of the "core group" of the JCE;[1678]

- "The Chamber erroneously concluded that the central authorities in Republika Srpska did not wish to set up a legal system through which perpetrators of crimes would be punished";[1679]

- Krajišnik was unaware of any plan of extermination or persecution, and no evidence of such plan was ever presented;[1680]

- "The telephone coversation of Stanišić and Mandić with Stojić and Kesić was a humourous exchange between colleagues from the MUP BH and had no political agenda whatsoever";[1681]

- "An example in which one of the deputies at a session of the Bosnian-Serb Assembly disapproved of the appointment of Muslim judges indicates the kind of problem RS leaders were facing in BH in wartime. Although the appointments were made, they were never carried out because the appointed judges refused to take oaths and declined the positions";[1682]

- "A majority of deputies at the 17th session of the Assembly vigorously criticised the Government and demanded that a rule of law be established";[1683]

- "Major Andrić did not act in accordance with the position of the RS Government – this can be seen in the Decision on the Establishment of the a Prison in Sušica dated 31 May, which he adopted pursuant to a decision of the Birač SAO Government";[1684]

- "[Krajišnik] did not give any information to international representatives and the international public or embellish information";[1685]

- "[Krajišnik] did not enjoy privileges because he was close with Mr Karadžić";[1686]

- Krajišnik did not act together with other alleged JCE members;[1687]

- "The evidentiary procedure failed to present a single example of a crime in which the Accused participated by following a pattern of similar crimes";[1688]

- "Witnesses confirmed that the Accused had not been in contact with them or with municipal leaders at the time the crimes were committed";[1689]

[1678] Krajišnik's Appeal Brief, para. 11. This submission is unsupported and undeveloped.
[1679] Krajišnik's Appeal Brief, para. 15. This submission is unsupported and undeveloped.
[1680] Krajišnik's Appeal Brief, para. 60, referring to Exhibit P64A, tab 362 p. 31 (p. 24 of the English translation).
[1681] Krajišnik's Appeal Brief, para. 105. This submission is unsupported.
[1682] Krajišnik's Appeal Brief, para. 160. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1683] Krajišnik's Appeal Brief, para. 162, with reference to Trial Judgement, para. 1023. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1684] Krajišnik's Appeal Brief, para. 173. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1685] Krajišnik's Appeal Brief, para. 184 (bullet 18). Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1686] Krajišnik's Appeal Brief, para. 184 (bullet 20). Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1687] Krajišnik's Appeal Brief, paras 187, 199. This submission is unsupported and undeveloped.
[1688] Krajišnik's Appeal Brief, para. 197. This submission is unsupported and undeveloped.
[1689] Krajišnik's Appeal Brief, para. 202, naming certain witnesses without any reference to the record.

- "The unconstitutional decision of some members of the BiH Government and Presidency to become ža candidate' for international recognition caused additional fear among the Serbian people";[1690]

- "Not commenting on Višegrad municipality, Mr Deronjić said that there was a pattern for expelling Muslims throughout the Podrinje region, failing to explain the inconsistency deriving from his claim that Goran Zekić brought volunteers to Bratunac and Srebrenica, but did not free his municipality of Srebrenica. The žDeronjić method' was not applied in Zvornik either";[1691]

- "Batković prison was a military prison and the Accused did not know about this prison either";[1692]

- "The unit commanded by Mauzer was a unit of the VRS Eastern Bosnia Corps and not a paramilitary unit";[1693]

- "Protected Witness 666 confirmed that hiding detainees was not a government policy. Minister Ostojić's visit to the prison with ICRC representatives surprised him. Before Mr Ostojić's visit to Sušica prison the MUP Minister ordered the closing of all prisons";[1694]

- "According to Witness Kasagić's statement, the events in Banja Luka on 3 April 1992 were arranged by the local authorities";[1695]

- "The Chamber made an error of fact when it accepted the allegation under P-425 that in addition to the Muslims, Croats were also among the victims in Bosanski Petrovac because there were 366 Croats in the municipality";[1696]

- "Serbian forces had not conducted any successful military operations in Sarajevo before 22 April 1992 when Mr Karadžić proposed reinforcement of the ceasefire agreement of 12 April 1992. Therefore, the objective was not to hold on to the territorial gains, because there were not any, but to stop the war";[1697]

- "On 28 July 1992, after a session of the Assembly (24 July 1992), the Government decided to send a group of ministers led by Deputy Prime Minister Trbojević to visit Banja Luka and examine the problem of prisoners in order to close the prisons. At its session of 29 July 1992, the Government discussed the obligations from the Assembly session of 24-27 July 1992. Prior to that, on 19 July 1992, the MUP Minister requested information on prisoners and prisons from all Security Services Centres. According to a dispatch from the

[1690] Krajišnik's Appeal Brief, para. 249, with reference to Trial Judgement, para. 47. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1691] Krajišnik's Appeal Brief, para. 362 (bullet 9, footnotes omitted), with reference to Trial Judgement, paras 297-309. Krajišnik fails to articulate an error allegedly committed by the Trial Chamber. To the extent that Krajišnik challenges the Trial Chamber's reliance on the testimony of Witness Deronjić mentioned in footnote 667 of paragraph 298, his assertion is dismissed as mere assertion that the Trial Chamber should have interpreted evidence in a particular way.
[1692] Krajišnik's Appeal Brief, para. 363, with reference to Trial Judgement, paras 304-305. Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1693] Krajišnik's Appeal Brief, para. 364, seemingly with reference to Trial Judgement, para. 305. Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1694] Krajišnik's Appeal Brief, para. 372 (bullets 1-2), with reference to Trial Judgement, para. 1063. Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1695] Krajišnik's Appeal Brief, para. 375, with reference to Trial Judgement, paras 375-392. Krajišnik fails to articulate the error allegedly committed by the Trial Chamber.
[1696] Krajišnik's Appeal Brief, para. 378, with reference to Trial Judgement, paras 420-429. *See* also Krajišnik's Reply, para. 157. This argument is unsupported.
[1697] Krajišnik's Appeal Brief, para. 393 (bullet 7), with reference to Trial Judgement, para. 1121(d). Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.

MUP Minister, this was followed by an operation by all MUP Security Centres and the Decision of the President of the Presidency on disbandment of the so-called special police units";[1698]

- "Evidence D-70 represents one of the proposals of the Serbian side within the Vance-Owen Plan in 1993 in which Mr. Okun did not participate, although he testified about this evidence with authority";[1699]

- The Trial Chamber found that Krajišnik "had played a role in the creation of the Serb municipality of Rajlovac, which split away from the Sarajevo municipality of Novi Grad".[1700] Krajišnik asserts that it is incorrect that he "played *the main role* in the creation of the Rajlovac Municipal Assembly". He argues that this municipal assembly was based on an initiative by assemblymen in the summer of 1991 and concluded on 12 May 1992, as a result of illegalities by Muslim assemblymen and by the President of Novi Grad municipality "who opposed any change in the situation".[1701]

- Krajišnik also submits that he did not issue a single order to any member of the armed forces or perpetrator of a crime who may be regarded a member of the JCE; that he did not present himself as a person who commanded the army or the police of RS; that he did not support the partition of BiH and ethnic separation, but supported Cutileiro's principles; and that he did not give a single statement or make a political move with the aim of ethnic cleansing.[1702]

- Krajišnik submits that Plavšić confirmed that not even the Presidency could give orders to Mladić.[1703]

- Krajišnik further argues that he was not aware of the alleged crimes of Arkan's and Šešelj's men. In support, he refers to Exhibit P67A, tab 30 and to his own testimony.[1704]

647. In conclusion, the Appeals Chamber finds that Krajišnik does not show any error in the Trial Chamber's finding that a JCE existed with the common objective to permanently remove, by force or other means, Bosnian Muslims and Bosnian Croats from large areas of Bosnia and Herzegovina

[1698] Krajišnik's Appeal Brief, para. 429 (references and emphasis omitted). Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1699] Krajišnik's Appeal Brief, para. 438 (bullet 4). The Appeals Chamber notes that Exhibit D70 does not support Krajišnik's argument.
[1700] Trial Judgement, para. 952.
[1701] Krajišnik's Appeal Brief, para. 104 (emphasis added). This submission fails to articulate an alleged error of the Trial Chamber.
[1702] Krajišnik's Appeal Brief, para. 184 (bullets 21-24). *See* also Krajišnik's Supplemental Brief, paras 87, 92. While most of these allegations are not supported by any evidence, two of them are supported by the testimony of Radovan Karadžić on appeal: However, the argument that Krajišnik never encouraged or advocated ethnic cleansing has already been dismissed *supra* IV.D.4(b)(v) and IV.D.2(c)(i).
[1703] Krajišnik's Appeal Brief, para. 382, with reference to Trial Judgement, para. 1010. Krajišnik fails to articulate an error allegedly committed by the Trial Chamber.
[1704] Krajišnik's Appeal Brief, para. 184, with reference to Momčilo Krajišnik, T. 25439. This evidence does not support his allegation.

through the commission of crimes, and that he had the required *mens rea* and contributed to it.[1705] The Appeals Chamber thus dismisses this sub-ground of appeal.

E. Supplementary legal challenges relating to JCE

648. Through the JCE counsel, Krajišnik challenges the Trial Chamber's application of JCE on three legal grounds. He argues that: (1) JCE is not a legitimate theory of liability; (2) the Trial Chamber erred in not requiring a substantial contribution of Krajišnik to the JCE; and (3) JCE, as applied to Krajišnik, is an inconsistent and incoherent theory of liability.

649. The Appeals Chamber notes that these submissions to some extent overlap with those Krajišnik presents in his *pro se* brief. JCE counsel submit that the brief on behalf of Krajišnik does not contradict any of Krajišnik's *pro se* legal arguments regarding JCE, but aims to flesh out, complement or expand these legal arguments.[1706] The Appeals Chamber finds it appropriate to deal with all the arguments presented by JCE counsel on behalf of Krajišnik separately in this section.

1. Legitimacy of JCE liability (Ground 1)

650. On 9 April 2008, the Prosecution filed a motion to strike Ground 1 of the Dershowitz Brief as going beyond Krajišnik's Notice of Appeal.[1707] On 11 April 2008, the Appeals Chamber explained that "the prudent course is to preserve all possible remedies to the alleged problem and does not find it apposite, at this juncture, to strike a portion of the Dershowitz Brief".[1708]

651. The Appeals Chamber observes that Ground 1 goes beyond Krajišnik's Notice of Appeal and is contrary to the directives given to Mr. A. Dershowitz on 11 March 2008.[1709] Indeed, Krajišnik's Notice of Appeal does not assert that JCE liability is not legitimate, but only that the Trial Chamber erred in finding Krajišnik liable as a JCE member.[1710] Krajišnik has not filed any motion to amend his Notice of Appeal. However, the Appeals Chamber notes that Krajišnik is self-represented and that at the time of filing of the Notice of Appeal, he was not yet assisted by JCE counsel. Furthermore, the question of whether or not JCE exists goes to very heart of the case

[1705] For the temporal scope of the common objective, the identity of the JCE members and the crimes comprised by the common objective *see supra* III.C.11.
[1706] Addendum to the Brief on Joint Criminal Enterprise of Alan M. Dershowitz, Submitted Pursuant to the Decision and Order Dated 11 April 2008, 16 April 2008 ("Dershowitz Addendum"), paras 5-6.
[1707] Prosecution's Motion to Strike Ground 1 from Brief on Joint Criminal Enterprise and to Order Counsel to Comply with the Appeals Chamber's Order.
[1708] Decision on Prosecution's Motion to Strike Ground 1of the Dershowitz Brief and Order Counsel to Comply with the Decision of 11 March 2008, p. 1.
[1709] Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, 11 March 2008, para. 10 ("The Appeals Chamber will remind Mr. Dershowitz, however, that the arguments he advances must be within the ambit of issues that Mr. Krajišnik set forth in his notice of appeal").
[1710] Krajišnik's Notice of Appeal, paras 14 *et seq*.

against him. Hence, the Appeals Chamber finds that in the circumstances of this case, it is in the interests of justice to consider this ground of appeal as validly filed.

(a) Statutory basis for JCE (sub-ground 1(A))

(i) Submissions

652. JCE counsel submit that the Trial Chamber erred in finding that JCE was the appropriate theory of liability for determining Krajišnik's guilt.[1711] First, they contend that JCE is without any textual basis in the Statute.[1712] Second, JCE counsel contend that JCE was created and developed by the Tribunal's Judges as an improper expansion of criminal liability beyond that contemplated by the Statute's drafters and in circumvention of Article 7(3) of the Statute.[1713] They also argue that JCE expands cognate domestic doctrines of vicarious liability – purportedly risking the United States' rejection of the Tribunal's work – and indiscriminately combines both civil and common law concepts.[1714]

653. The Prosecution responds that JCE is part of "committing" under Article 7(1) of the Statute[1715] and argues that it does not follow from the sole fact that Articles 7(2) and 7(3) of the Statute apply to heads of state that such persons are excluded from Article 7(1) liability.[1716]

(ii) Analysis

654. As a preliminary matter, the Appeals Chamber notes that Krajišnik did not raise the issue of the statutory basis for JCE at trial. As such, he may be deemed to have waived his right to raise this issue on appeal.[1717]

655. In any event, the Appeals Chamber considers that JCE counsel advance no cogent reason[1718] why it should depart from its holding that "the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability".[1719] First, they do not address the teleological interpretation of the Statute as applied by the Tribunal that extends jurisdiction over all those responsible for serious violations of international humanitarian law, including those who did not

[1711] Dershowitz Brief, para. 1.
[1712] Dershowitz Brief, paras 2-9; AT. 204. JCE counsel submit that Article 7(1) of the Statute is exhaustive. They also refer to the Secretary-General's Report, paras 55-56.
[1713] Dershowitz Brief, paras 5, 6, 10.
[1714] Dershowitz Brief, paras 53-55. Although presented by JCE counsel under Ground 3, this argument is materially closer to Ground 1, and so the Appeals Chamber deals with it under Ground 1.
[1715] Prosecution's Response to Dershowitz, paras 4, 6.
[1716] Prosecution's Response to Dershowitz, para. 6.
[1717] *See Blaškić* Appeal Judgement, para. 222; *Niyitegeka* Appeal Judgement, para. 200; *Akayesu* Appeal Judgement, para. 361; *Furundžija* Appeal Judgement, para. 174.
[1718] *Galić* Appeal Judgement, para. 117; *Aleksovski* Appeal Judgement, para. 107.
[1719] *Ojdanić* Decision on Joint Criminal Enterprise, para. 21. *See* also *Tadić* Appeal Judgement, paras 187-193.

actually carry out the *actus reus* of the crimes, and that this may amount to "committing" under Article 7(1) of the Statute. Second, the fact that Articles 7(2) and 7(3) of the Statute apply to government officials and others who might be removed from the actual crime does not mean that these persons are exempted from other forms of liability under the Statute. Indeed, quite the contrary to JCE counsel's claim, the Secretary-General's Report explicitly called for individual criminal responsibility for "*all* persons who *participate*" in the planning, preparation or execution of crimes under the Statute.[1720] As such, there is also no merit to JCE counsel's argument that JCE "circumvents" Article 7(3) of the Statute. Finally, because JCE does not go beyond the Statute and forms part of custom as explained below, JCE counsel's claim that the Judges "created" this form of liability fails.

656. JCE counsel's additional assertion that JCE expands cognate domestic doctrines and combines different legal concepts is, apart from the unsubstantiated assertion that this might lead to the U.S. rejecting the Tribunal's work, undeveloped and dismissed. This sub-ground is dismissed.

(b) Basis for JCE in customary international law (sub-ground 1(B))

(i) Submissions

657. JCE counsel contest the finding in the *Tadić* Appeal Judgement that JCE existed under customary international law.[1721] Relying on two scholarly articles,[1722] they first submit that *Tadić* "simply inferred" the grounds for conviction from "isolated statements by the prosecutors" in the WWII cases it referred to when a clear judicial statement was unavailable.[1723] They also argue that these cases do not provide a legal basis for the large-scale JCEs used in later Tribunal cases such as Krajišnik's case. Second, they contend that the *Tadić* Appeals Chamber did not develop JCE disinterestedly; rather, they claim, it "molded" precedents to fit a theory that would permit convicting Duško Tadić. Lastly, JCE counsel argue that JCE shares features of criminal-organisation and conspiracy-based forms of liability, but that the former was explicitly rejected by the Secretary-General's Report and that the latter only exist in the Statute for the crime of genocide, of which Krajišnik was not found guilty.[1724]

[1720] *Tadić* Appeal Judgement, para. 190, citing Secretary-General's Report, para. 54.
[1721] Dershowitz Brief, paras 11, 18; AT. 205.
[1722] Dershowitz Brief, paras 13-15, 18, referring to Jenny S. Martinez & Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005); Steven Powles, *Joint Criminal Enterprise, Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. Int'l Crim. Just. 606 (2004).
[1723] Dershowitz Brief, paras 12, 15.
[1724] Dershowitz Brief, paras 15-17.

658. The Prosecution responds, first, that JCE counsel fail to provide any cogent reasons why the *Tadić* Appeals Chamber was wrong to recognise JCE as part of customary international law, or why JCE is not applicable to his case. Second, the Prosecution contends that JCE counsel refers to a "scholarly consensus", but merely cites two articles. Lastly, it submits that *Tadić* relied on the *RuSHA* and *Justice* cases, both of which it argues are large-scale cases and have been held to recognise JCE liability.[1725]

(ii) Analysis

659. The Appeals Chamber recalls that it provided a detailed reasoning for inferring the grounds for conviction in the WWII cases it cited in *Tadić*.[1726] JCE counsel do not address this reasoning. The Appeals Chamber further recalls that both the *Einsatzgruppen* and *Justice* cases show that JCE apply to large-scale cases,[1727] and that JCE is legally distinct from conspiracy and organisational liability.[1728] JCE counsel address neither one of these holdings. Their further claim that the *Tadić* Appeals Chamber "molded" precedent to convict the accused is unsubstantiated. This sub-ground is dismissed.

(c) JCE as a form of "commission" (sub-ground 1(C))

(i) Submissions

660. JCE counsel submit that the Trial Chamber erred in finding that JCE is a form of "commission" under Article 7(1) of the Statute.[1729] They argue, first, that such an interpretation would render nugatory the other modes of liability enlisted in Article 7(1) of the Statute.[1730] Second, JCE counsel submit that Krajišnik's contribution as described by the Trial Chamber was at least two levels removed from the actual commission of the crimes.[1731] Third, they argue that the *Brđanin* Appeal Judgement implicitly recognised the impropriety of locating JCE within "commission" in cases of high-level actors such as Krajišnik, and where the principal perpetrators of the crimes are not JCE members.[1732] Finally, JCE counsel contend that, "[g]iven how the [Trial Chamber] incorporated certain crimes into JCE liability", it essentially found that Krajišnik "committed" crimes which were neither part of his initial objective nor necessary to the objectives of the JCE,

[1725] Prosecution's Response to Dershowitz, para. 5.
[1726] *Tadić* Appeal Judgement, paras 195-219; *see* more particularly paras 202-203, 208-209, 212-213.
[1727] *Brđanin* Appeal Judgement, paras 422-423; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 ("*Rwamakuba* Appeal Decision"), para. 25.
[1728] *Ojdanić* Decision on Joint Criminal Enterprise, paras 23, 25-26.
[1729] Dershowitz Brief, para. 19, referencing Trial Judgement, paras 877, 1078.
[1730] Dershowitz Brief, para. 20.
[1731] Dershowitz Brief, paras 23-24, referencing Trial Judgement, paras 1120-1121.
[1732] Dershowitz Brief, paras 25-26, referencing *Brđanin* Appeal Judgement, fn. 891.

and which were carried out by people with whom he had no contact and over whom he had no control.[1733]

661. The Prosecution responds that the Tribunal's jurisprudence has characterised JCE liability as part of "committing" in Article 7(1) of the Statute. It posits that this does not render the other modes of liability under Article 7(1) of the Statute nugatory because the elements of JCE distinguish it from them.[1734] The Prosecution also argues that Krajišnik's individual contributions to the JCE need not amount to physical commission, or be direct or material.[1735] Finally, it contends that JCE is "committing" regardless of whether the principal perpetrators are part of the JCE. It avers that a group with a common purpose amounting to or involving the commission of crimes under the Statute poses a greater danger than individual perpetrators and merits a serious form of liability in the form of "commission".[1736]

(ii) Analysis

662. The Appeals Chamber has consistently held that participation in a JCE is a form of "commission" under Article 7(1) of the Statute.[1737] Although the facts of a given case might establish the accused's liability under both JCE and other forms of liability under Article 7(1), the legal elements of JCE distinguish it from these other forms. In the first place, none of the other forms require a plurality of persons sharing a common criminal purpose. Moreover, whereas JCE requires that the accused intended to participate and contribute to such a purpose,[1738] an accused may be found responsible for planning, instigating or ordering a crime if he intended that the crime be committed or acted with the awareness of the substantial likelihood that a crime would be committed.[1739] In terms of *actus reus*, planning and instigating consists of acts "substantially contributing" to the perpetration of a certain specific crime[1740] and ordering means "instructing" a person commit an offence.[1741] By contrast, JCE requires that the accused contributes to the common purpose in a way that lends a significant contribution to the crimes.[1742] The differences between

[1733] Dershowitz Brief, para. 27.
[1734] Prosecution's Response to Dershowitz, paras 6-7.
[1735] Prosecution's Response to Dershowitz, para. 8, referencing *Tadić* Appeal Judgement, para. 277; *Brdanin* Trial Judgement, para. 263; *Rwamakuba* Appeal Decision, para. 25; *Brdanin* Appeal Judgement, para. 425.
[1736] Prosecution's Response to Dershowitz, para 9.
[1737] *E.g. Kvočka et al.* Appeal Judgement, paras 79-80; *Tadić* Appeal Judgement, paras 188; *Ojdanić* Decision on Joint Criminal Enterprise, para. 20.
[1738] *Kvočka et al.* Appeal Judgement, paras 82-83. In the case of JCE Catergory 3, it must also have been foreseeable to the accused that a crime other than the one agreed upon in the common objective might be perpetrated by a member of the JCE, or by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose, and the accused willingly took that risk by joining or continuing to participate in the enterprise.
[1739] *Nahimana et al.* Appeal Judgement, paras 479-481; *Kordić and Čerkez* Appeal Judgement, paras 30-32.
[1740] *Kordić and Čerkez* Appeal Judgement, paras 26-27.
[1741] *Kordić and Čerkez* Appeal Judgement, para. 28.
[1742] *Brdanin* Appeal Judgement, para. 430; *Kvočka et al.* Appeal Judgement, paras 96-97.

JCE and aiding and abetting are well-established and need not be repeated here.[1743] JCE counsel's argument that JCE renders the other forms of liability under the Article 7(1) nugatory is thus without merit.

663. The Appeals Chamber notes that the question of whether Krajišnik was removed from the actual commission of the crimes is legally irrelevant to his conviction under JCE.[1744] His remoteness *vis-à-vis* the crimes is also not directly relevant to whether his acts can be characterised as "commission" under JCE. As explained in *Kvočka et al.*, participation in a JCE as a form of "commission"

> is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question. [1745]

664. JCE counsel argue that it is improper to locate JCE within "commission" where the principal perpetrators of the crime are not JCE members. In the *Brđanin* Appeal Judgement, the Appeals Chamber left open the question of whether equating JCE with "commission" is appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.[1746] In the present case, Krajišnik was indeed convicted at least in part on the basis of crimes committed by non-JCE members but imputed to JCE members.[1747]

665. In any case, whether Krajišnik should be held responsible for having "committed" the crimes in question or pursuant to another mode of responsibility, it remains that the Trial Chamber did not err in convicting him under Article 7(1) of the Statute for these crimes. As such, JCE counsel fail to demonstrate how the alleged error invalidates the decision.

666. To the extent JCE counsel's unreferenced argument regarding "how the [Trial Chamber] incorporated certain crimes into JCE liability" refers to the Trial Chamber's findings concerning the expansion of the JCE over time, the Appeals Chamber notes that this issue has been dealt with

[1743] *Kvočka et al.* Appeal Judgement, paras 89-90; *Vasiljević* Appeal Judgement, para. 102.
[1744] *See Tadić* Appeal Judgement, para. 227(iii).
[1745] *Kvočka et al.* Appeal Judgement, para. 80, citing *Tadić* Appeal Judgement, para. 191.
[1746] *Brđanin* Appeal Judgement, fn. 891.
[1747] *See supra* III.C.11.

elsewhere.[1748] In remaining parts, insofar as it is developed, this argument appears to be simply another attempt by JCE counsel to distance Krajišnik from the crimes and thereby show the inappropriateness of qualifying his liability as "commission". For reasons stated above, that argument fails. This sub-ground is dismissed.

(d) JCE and the *nullum crimen sine lege* principle (sub-ground 1(D))

(i) Submissions

667. Given the "flaws" of JCE described in his previous sub-grounds, JCE counsel submit that Krajišnik lacked proper notice that he faced JCE liability.[1749] They argue that the acts or omissions underlying his conviction took place in 1992, while the concept of JCE liability did not arise until the *Tadić* Appeal Judgement in 1999,[1750] and that the concept has expanded beyond the low-level mob violence in *Tadić*, to include high-level officials with only tenuous connections to the crimes.[1751] Therefore, JCE counsel argue, the imposition of JCE liability conflicts with the *nullum crimen sine lege* principle and is vulnerable to political influence.[1752]

668. The Prosecution responds that the egregious nature of Krajišnik's crimes, Article 26 of the Criminal Code of the Federal Republic of Yugoslavia, the extensive state practice noted in *Tadić* and the many domestic jurisdictions providing for such a form of liability under various names running parallel to custom, provided Krajišnik with notice that he would have incurred JCE liability.[1753]

(ii) Analysis

669. As a preliminary matter, the Appeals Chamber notes that Krajišnik did not challenge but, in fact, expressly recognised at trial that the fact that *Tadić* was rendered after his alleged acts took place does not lead to a conflict between JCE and the *nullum crimen sine lege* principle.[1754] Therefore, as far as JCE counsel now argue that the *Tadić* Appeal Judgement violated that principle, Krajišnik may be deemed to have waived his right to bring this challenge on appeal.[1755] In any

[1748] *See supra* III.C.2.
[1749] Dershowitz Brief, para. 28; AT. 205.
[1750] Dershowitz Brief, paras 28, 30.
[1751] Dershowitz Brief, para. 28; AT. 194-195.
[1752] Dershowitz Brief, paras 29-30, citing Secretary-General's Report, para. 34; AT. 234-235.
[1753] Prosecution's Response to Dershowitz, para. 10, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 43.
[1754] Defence Final Trial Brief, para. 134, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 8.
[1755] *See Blaškić* Appeal Judgement, para. 222; *Niyitegeka* Appeal Judgement, para. 200; *Akayesu* Appeal Judgement, para. 361; *Furundžija* Appeal Judgement, para. 174.

event, JCE counsel fail to address the jurisprudence holding that the notion of JCE as established in *Tadić* does not violate the *nullum crimen sine lege* principle.[1756]

670. Regarding JCE counsel's challenge that the alleged "expansion" of JCE after *Tadić* violates the principle, which challenge Krajišnik did raise at trial,[1757] the Appeals Chamber first recalls that when it interprets the JCE doctrine, it does not create new law. Instead, similarly to other provisions under the Statute, it merely identifies what the proper interpretation of that doctrine has always been, even though not previously expressed that way.[1758] This does not contravene the *nullum crimen sine lege* principle, which

> "does not prevent a court from interpreting and clarifying the elements of a particular crime." Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification.[1759]

671. Turning to the present case, the Appeals Chamber notes that, although *Tadić* concerned a relatively low-level accused, the legal elements of JCE set out in that case remain the same in a case where JCE is applied to a high-level accused. Therefore, JCE counsel are wrong to speak about an "expansion" of JCE to cases such as the one of Krajišnik. Moreover, the Appeals Chamber considers that, while pronounced in relation to acts allegedly committed in 1999, its holding in the *Ojdanić* Decision on Joint Criminal Enterprise applies also to Krajišnik in this case:

> Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić,* the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom, and the egregious nature of the crimes charged would have provided notice to anyone that the acts committed by the accused […] would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.[1760]

672. JCE counsel's additional argument that the imposition of JCE liability is vulnerable to political influence is unsupported and dismissed. This sub-ground is dismissed.

[1756] *Stakić* Appeal Judgement, para. 101; *Ojdanić* Decision on Joint Criminal Enterprise, para. 41.
[1757] Defence Final Trial Brief, para. 134(b).
[1758] *See Kordić and Čerkez* Appeal Judgement, para. 310; *Aleksovski* Appeal Judgement, para. 135.
[1759] *Ojdanić* Decision on Joint Criminal Enterprise, para. 38 (footnotes omitted).
[1760] *Ojdanić* Decision on Joint Criminal Enterprise, para. 43 (footnote omitted).

2. Krajišnik's contribution to the JCE (Ground 2)

(a) Allegation that the contribution must be substantial (sub-ground 2(A))

(i) Submissions

673. JCE counsel submit that the Trial Chamber erred in law in not requiring that Krajišnik's contribution to the JCE be substantial.[1761] They argue that the Appeals Chamber in *Kvočka et al.* has "recognised the importance of a substantiality requirement" and that the absence thereof would essentially criminalise holding beliefs supportive of the commission of crimes.[1762]

674. The Prosecution responds that the *actus reus* of JCE does not require a substantial contribution, nor is such contribution necessary to infer the *mens rea* needed for JCE.[1763] It argues that the accused's contribution need only be significant.[1764] The Prosecution acknowledges that the Appeals Chamber recognised an exception to that rule in the *Kvočka et al.* Appeal Judgement, but submits that Krajišnik's case is distinguishable from that case. The Prosecution adds that there is no risk of criminalising holding beliefs because the contribution must be significant.[1765]

(ii) Analysis

675. The Trial Chamber held that a contribution of the accused to the JCE need not, as a matter of law, be substantial.[1766] The Appeals Chamber agrees and rejects JCE counsel's contention to the contrary. It also recalls that the accused's contribution to the crimes for which he is found responsible should at least be significant.[1767] As such, JCE counsel is wrong to suggest that JCE criminalises the mere holding of beliefs supportive of crimes.

676. In *Kvočka et al.*, the Appeals Chamber held that "there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the [JCE]".[1768] However, its application of this exception to Zoran Žigić was strictly confined to the facts of that case.[1769] Therefore, *Kvočka et al.* does not represent the broad legal recognition of a substantiality requirement JCE counsel allege.

[1761] Dershowitz Brief, paras 31-32; AT. 211.
[1762] Dershowitz Brief, paras 33-37, citing *Kvočka et al.* Appeal Judgement, paras 97 and 599.
[1763] Prosecution's Response to Dershowitz, para. 11. *See* also *ibid.*, para. 20.
[1764] Prosecution's Response to Dershowitz, paras 13 (citing *Brdanin* Appeal Judgement, para. 430), 19.
[1765] Prosecution's Response to Dershowitz, paras 15-18. *See* also AT. 235.
[1766] Trial Judgement, para. 883 (iii).
[1767] *Brdanin* Appeal Judgement, para. 430. *Kvočka et al.* Appeal Judgement, para. 97.
[1768] *Kvočka et al.* Appeal Judgement, para. 97.
[1769] *Kvočka et al.* Appeal Judgement, para. 599 (footnote omitted):

677. Inasmuch as JCE counsel contend that the Trial Chamber should have found an exception to the general rule in his case, they fail to support this argument beyond the reference to the Appeals Chamber's reversal of Zoran Žigić's conviction in *Kvočka et al*. It suffices to note, therefore, that the factual circumstances underlying that reversal are too distinct from those pertaining to Krajišnik's role in the JCE in the present case for any meaningful analogy to be made.[1770] This sub-ground is dismissed.

(b) Alleged failure to consider the contribution in assessing *mens rea* (sub-ground 2(B))

(i) Submissions

678. JCE counsel submit that the Trial Chamber erred in failing to take into account the substantiality and nature of Krajišnik's contribution when considering his intent to pursue the common purpose of the JCE.[1771] They aver in this regard that his contribution was limited, and that the Trial Chamber found that several forms of participation alleged in the Indictment were not proven.[1772] JCE counsel contend that, instead of examining Krajišnik's contribution, the Trial Chamber relied mainly on general testimony that he was at some level aware of some of the crimes being committed to conclude on his intent.[1773] In addition, JCE counsel assert that Krajišnik's "isolated statements" that he wished to change the facts on the ground and that Serbs and Muslims cannot live together do not lead to the only reasonable inference that he had the requisite intent.[1774] As these statements, they argue, give rise to the reasonable inference that he supported the creation of an independent Serbian state by other means that the commission of crimes, his common intent with the JCE was not proven.[1775]

> In the view of the Appeals Chamber, it would not be appropriate to hold every visitor to the camp who committed a crime there responsible as a participant in the joint criminal enterprise. The Appeals Chamber maintains the general rule that a substantial contribution to the joint criminal enterprise is not required, but finds that, in the present case of "opportunistic visitors", a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine.

[1770] Zoran Žigić was an "opportunistic visitor" who entered the Omarska detention camp to commit crimes. He did not hold any official position in the camp nor was he a guard; the incidents in which he participated, though grave, "formed only mosaic stones in the general picture of violence and oppression": *Kvočka et al*. Appeal Judgement, para. 599. Krajišnik, by contrast, "held a central position in the JCE"; "[h]e not only participated in the implementation of the common objective but was one of the driving forces behind it": Trial Judgement, para. 1119.
[1771] Dershowitz Brief, paras 41, 43, referencing *Kvočka et al*. Appeal Judgement, para. 97.
[1772] Dershowitz Brief, paras 38-40, referencing Trial Judgement, paras 3, 25, 1120-1121.
[1773] Dershowitz Brief, paras 41, 43, referencing Trial Judgement, para. 891.
[1774] Dershowitz Brief, para. 42, referencing *Brdanin* Appeal Judgement, para. 429; Trial Judgement, paras 897, 998.
[1775] Dershowitz Brief, para. 42.

679. The Prosecution responds that the level of contribution is but one means to infer intent. It refers to findings in the Trial Judgement to argue that the Trial Chamber correctly found that Krajišnik made a significant contribution to the JCE and that he had the requisite intent.[1776]

(ii) Analysis

680. The Appeals Chamber in *Kvočka et al.* held that, "[i]n practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."[1777] This, however, does not amount to a legal requirement that the Trial Chamber take the significance - or, in the words of JCE counsel, the "substantiality or nature" - of an accused's contribution into account in assessing his intent. That assessment is more a matter of evidence than of substantive law. In any case, the Trial Chamber did note the significance of Krajišnik's contribution in concluding on his *mens rea*.[1778] It did not err in doing so.

681. The Appeals Chamber understands the remainder of this sub-ground to be alleging that the Trial Chamber erred in concluding on Krajišnik's *mens rea*. JCE counsel argue in support that Krajišnik's contribution was overstated and limited, that the testimony the Trial Chamber relied on was general and pertained only to his knowledge, and that the two "isolated statements" they refer to give rise to a reasonable inference consistent with his innocence. Further, JCE counsel argue that the additional evidence of Radovan Karadžić shows that Krajišnik continued to seek to negotiate a peaceful solution during all of 1992.[1779]

682. The Trial Chamber found that Krajišnik's overall contribution was that he "help[ed] establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes."[1780] JCE counsel argue that the words "help establish" overstate this contribution because the Trial Chamber found he did not participate in establishing the SDS party.[1781] JCE counsel further argue that the Karadžić Rule 92 *ter* Statement shows that Krajišnik had no part in the founding of the SDS.[1782] The Appeals Chamber notes that, on its face, the impugned finding does not pertain to Krajišnik's alleged participation in the establishment or founding of the SDS party as such, but, instead, to his help in establishing those SDS structures *that*

[1776] Prosecution's Response to Dershowitz, paras 20-31.
[1777] *Kvočka et al.* Appeal Judgement, para. 97.
[1778] Trial Judgement, para. 1119, noting that Krajišnik "held a central position in the JCE" and that he "was one of the driving forces behind it".
[1779] Krajišnik's Supplemental Brief, para. 87, with reference to AT. 603.
[1780] Trial Judgement, para. 1120.
[1781] Dershowitz Brief, para. 39; Trial Judgement, para. 1121. *See ibid.*, paras 3, 25.
[1782] Krajišnik's Supplemental Brief, para. 87, with reference to Karadžić Rule 92 *ter* Statement, p. 9.

were instrumental to the commission of the crimes.[1783] JCE counsel thus misconstrue the impugned finding to support their argument.

683. In any event, assuming *arguendo* that the Trial Chamber did overstate Krajišnik's contribution as he claims, the Appeals Chamber is not satisfied that his contribution in remaining parts[1784] was "limited" or otherwise of a quality that would raise a reasonable doubt regarding whether he intended to pursue to the common purpose.

684. The Trial Chamber relied on testimony concerning Krajišnik's knowledge because, it held, "knowledge combined with continuing participation can be conclusive as to a person's intent."[1785] JCE counsel do not challenge this holding.[1786] Their additional claim that the testimony in question was general is undeveloped and therefore dismissed.

685. Turning to Krajišnik's two statements, the Appeals Chamber considers that it is not determinative that they, on their own, could lead to a reasonable inference consistent with his innocence. Rather, the question is whether the only reasonable inference on the evidence as a whole was that Krajišnik had the required *mens rea*.[1787] The Trial Chamber was therefore correct to evaluate the two statements in the context of other events during the Indictment period and in light of other evidence.[1788] As JCE counsel do not attempt to explain why or in what respect this holistic assessment of the evidence was unreasonable, the Appeals Chamber need not consider this argument any further. Furthermore, the Appeals Chamber does not find that in light of the evidence considered by the Trial Chamber, the additional evidence of Radovan Karadžić on Krajišnik's continued attempt to negotiate a peaceful solution during all of 1992 creates a reasonable doubt that would cause the Appeals Chamber to reverse the Trial Chamber's findings on Krajišnik's *mens rea*.

(iii) Did the Trial Chamber err in finding that Krajišnik's political activity formed part of his contribution to the JCE?

686. The Trial Chamber found that Krajišnik's

> overall contribution to the JCE was to help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes. He also deployed his political

[1783] This is consistent with the Trial Chamber's holding that Krajišnik formulated, initiated, promoted, participated in and/or encouraged the development and implementation of SDS policies intended to advance the objective of the JCE: Trial Judgement, para. 1121.
[1784] *See supra* III.C.10.
[1785] Trial Judgement, paras 890-891 (citation taken from para. 890).
[1786] *See* also AT. 225.
[1787] *See Stakić* Appeal Judgement, para. 219; *Kvočka et al*. Appeal Judgement, para. 233.
[1788] Trial Judgement, paras 897, 998.

> skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objective.[1789]

687. The Trial Chamber then went on to make findings on Krajišnik's specific forms of contribution. It found that he contributed to the JCE in six ways,[1790] essentially through his political activities within the SDS and the Bosnian-Serb leadership.

688. Krajišnik argues that the Trial Chamber erred in finding that these political activities constituted a contribution to the JCE. He contends that

> [b]y generally linking the actions of the Serbian side with "aggression" and "secession", the Chamber has, to my detriment, practically erased the differences on the Serbian side in BiH between criminal conduct and legitimate political activity. When participation in aggression and secession is ascribed to me *a priori*, any purely political conduct is criminalised indiscriminately from that moment on. By assessing my political conduct from an angle that almost in advance rules out any interpretation which would be in my favour, the Trial Chamber takes a biased stance from the outset, thus rendering superfluous any further review or analysis of the evidence, and so ensuring my guilt in advance.[1791]

In his Appeal Brief, Krajišnik further argues that "[i]n their legal form, [his actions] cannot be classified as any of the crimes sanctionable by the ICTY Statute."[1792]

689. Similarly, JCE counsel argue that "the conduct individually attributable to Krajišnik was largely protected speech and political activity" and that such conduct does not violate the law defined in the Statute.[1793] JCE counsel contend that the Trial Judgement does not contain any finding regarding Krajišnik's actual participation in crimes, therefore rendering the findings on his contribution to the JCE erroneous.[1794]

690. During the Appeal Hearing, JCE counsel further developed the argument, stating that Krajišnik was convicted on the basis of political statements which represented a legitimate point of view.[1795] JCE counsel argued that Krajišnik was found guilty by association, because he "espoused a political view" shared by those who committed war crimes.[1796]

691. JCE counsel's argument is threefold. First, they allege that the Trial Chamber erred in finding that Krajišnik's political activity was a sufficient *actus reus*. JCE counsel contend that Krajišnik was not found guilty of committing "any of the *actus reuses* that are specified" in Article

[1789] Trial Judgement, para. 1120.
[1790] Trial Judgement, para. 1121(a), (b), (c), (d), (j), (k).
[1791] Krajišnik's Notice of Appeal, para. 11.
[1792] Krajišnik's Appeal Brief, para. 13.
[1793] Dershowitz Brief, Introduction, p. 1.
[1794] Dershowitz Brief, para. 51.
[1795] AT. 192. *See* also AT. 210.
[1796] AT. 193. *See* also AT. 203.

7(1) of the Statute.[1797] They allege that this is the first time in any international tribunal where a "defendant's *actus reus* [is] completely based on constitutionally protected and human rights protected conduct."[1798] JCE counsel assert that the Trial Chamber failed to recognise and resolve the clear conflict between Krajišnik's protected human rights, namely his right of speech and political activities, and the protected human rights of victims.[1799] In JCE counsel's opinion, the law should not deter legitimate political activities.[1800] They finally contend that the contribution to JCE has to be "substantial" and that mere political speeches do not meet this threshold.[1801]

692. Second, JCE counsel allege that the Trial Chamber erred in its interpretation of some of Krajišnik's speeches. They contend that in analysing the speeches, the Trial Chamber systematically opted for the "inference most adverse to the defendant."[1802] The Appeals Chamber has already examined the alleged Trial Chamber's errors relating to Krajišnik's speeches along with the other alleged errors of fact raised by Krajišnik.[1803]

693. Third, JCE counsel assert that the Trial Chamber erred in finding that knowledge was sufficient to prove Krajišnik's *mens rea*. They contend that knowledge "is simply not enough for *mens rea* when it comes to political speech",[1804] and that "[a] politician must be encouraged to continue to speak even with the knowledge that there are crimes being committed," unless he has been indicted for having made the speeches.[1805] They finally stress that the "criteria of *mens rea* must be different"[1806] and that a person whose goals and means are only political does not reach the threshold of culpability required under the law of JCE.[1807]

694. In its Response to Krajišnik's Appeal Brief, the Prosecution did not specifically respond to the issue of protected political speech and activity, merely mentioning that Krajišnik's argument that "his actions cannot be classified as any crime under the Statute, is irrelevant to his liability under JCE", as participation in "the common design žneed not involve commission of a specific crimes under one of [the] provisions [of the Statute], but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.'"[1808] During the Appeal Hearing, the

[1797] AT. 208, 211.
[1798] AT. 210.
[1799] AT. 214.
[1800] AT. 213.
[1801] AT. 211-212.
[1802] AT. 223.
[1803] *See supra* IV. D.
[1804] AT. 225.
[1805] AT. 226, 232.
[1806] AT. 228.
[1807] AT. 228-230.
[1808] Prosecution's Response to Krajišnik, para. 35 (footnote omitted), citing *Tadić* Appeal Judgement, para. 227. *See* also AT. 235.

Prosecution also stated that "this case is not about hate speech".[1809] It argued that a distinction must be made between the *actus reus* of the crime charged and the contribution that the JCE member has to make. Thus, the contribution does not have to be criminal as long as it contributes to the commission of the crime charged, so that the criminal liability results from the contribution coupled with the common purpose and intent shared with the other JCE members.[1810] The Prosecution further argues that in any event, the Trial Chamber's findings on Krajišnik's *mens rea* "[were] not formed only on the speeches that Mr. Krajišnik made [but] on the basis of all of the evidence, all of the evidence involving the participation of the Bosnian Serb leadership in the implementation and carrying out of the common purpose."[1811]

695. The Appeals Chamber finds that contrary to JCE counsel's allegation, the Trial Chamber did not find that the political activities of Krajišnik formed the *actus reus* of any of the crimes against humanity of which he was convicted. Instead, Krajišnik was convicted for crimes for which he was found criminally responsible under the mode of liability of JCE, which requires that the defendant "has made a significant contribution to the crime's commission."[1812] The Tribunal's jurisprudence does not require such contribution to be criminal *per se*. Indeed, the Appeals Chamber has explicitly held that the contribution "need not involve commission of a specific crime" under the Statute.[1813] Moreover, the Appeals Chamber has repeatedly found that contribution to a JCE "may take the form of assistance in, or contribution to, the execution of the common purpose,"[1814] and that it is not required that the accused physically committed or participated in the *actus reus* of the perpetrated crime.[1815] It is sufficient that the accused "perform acts that in some way are directed to the furthering" of the JCE[1816] in the sense that he significantly contributes to the commission of the crimes involved in the JCE. For these reasons, the Appeals Chamber holds that the contribution to a JCE need not, in and of itself, be criminal. JCE counsel's claim to the contrary is dismissed.

696. JCE counsel further assert that Krajišnik's speeches cannot, as a matter of law, constitute a contribution to a JCE, because they were protected under his right to freedom of speech.[1817] The Appeals Chamber disagrees. What matters in terms of law is that the accused lends a significant

[1809] AT. 279.
[1810] AT. 235.
[1811] AT. 279. *See* also AT. 235.
[1812] *Brdanin* Appeal Judgement, para. 431.
[1813] *Tadić* Appeal Judgement, para. 227.
[1814] *Brdanin* Appeal Judgement, para. 424, with reference to *Vasiljević* Appeal Judgement, para. 100.
[1815] *Brdanin* Appeal Judgement, paras 424, 427; *Babić* Judgement on Sentencing Appeal, para. 38; *Vasiljević* Appeal Judgement, para. 100; *Kvočka et al.* Appeal Judgement, paras 99, 263; *Knojelac* Appeal Judgement, paras 31, 81; *Tadić* Appeal Judgement, para. 227.
[1816] *Tadić* Appeal Judgement, para. 229.
[1817] AT. 213-214, 225, 230.

contribution to the commission of the crimes involved in the JCE.[1818] Beyond that, the law does not foresee specific types of conduct which *per se* could not be considered a contribution to the common purpose. Within these legal confines, the question of whether the accused contributed to a JCE is a question of fact to be determined on a case-by-case basis.[1819] As JCE counsel's present argument is limited to a question of law, the Appeals Chamber need not address it further.

697. Finally, JCE counsel refer to Krajišnik's *mens rea*, arguing that knowledge "[of crimes] is simply not enough for *mens rea* when it comes to political speech"[1820] and that "[a] politician must be encouraged to continue to speak even with the knowledge that there are crimes being committed", unless he has been indicted for having made the speeches.[1821] The Appeals Chamber finds that the Trial Chamber did not hold that Krajišnik's mere knowledge of crimes was sufficient to establish his *mens rea*. Instead, the Trial Chamber found that

> [t]he information the Accused received during this period is an important element for the determination of his responsibility, because *knowledge combined with continuing participation can be conclusive as to a person's intent*.[1822]

JCE counsel fail to show that the Trial Chamber erred in this respect.

698. For the above reasons, this sub-ground is dismissed.

3. Consistency and coherence of JCE as applied to Krajišnik (Ground 3)

(a) Alleged vagueness of the Indictment and the Trial Judgement with respect to JCE (sub-ground 3(A))

(i) Submissions

699. JCE counsel submit that the common objective of the JCE as charged in the Indictment was not itself a crime under the Statute that could be achieved only through statutory crimes.[1823] They posit that the objective alleged in the Indictment could be achieved either illegally by violating the Statute, illegally but without such violation, or legally,[1824] and that the means of the JCE were only generally identified as "crimes punishable under Articles 3, 4 and 5".[1825] JCE counsel argue that,

[1818] *Brdanin* Appeal Judgement, para. 430.
[1819] As JCE counsel himself appears to concede: *see* AT. 231-233.
[1820] AT. 225.
[1821] AT. 226, 232.
[1822] Trial Judgement, para. 890 (emphasis added).
[1823] Dershowitz Brief, paras 44-45, 49; AT. 200.
[1824] Dershowitz Brief, paras 44-45, citing Indictment, para. 4. Krajišnik argues that the objective was pleaded as "the permanent removal by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina".
[1825] Dershowitz Brief, para. 46, citing Indictment, para. 4.

because the Trial Chamber did not expressly find Krajišnik's liability under JCE Category 3, it is implied that it was predicated on JCE Category 1,[1826] yet the Trial Chamber's description of the common objective as "fluid" led to an "amorphous and shifting definition" of the JCE, its objectives and its means, and this is inconsistent with the *Tadić* requirements for JCE Category 1.[1827]

700. Next, JCE counsel submits that the Trial Chamber erred in failing to show that Krajišnik participated in the crimes of the JCE in some direct or material way. They claim that the forms of contribution alleged but found not proven show that the *actus reus* required under *Tadić* was not and could not be proven.[1828]

701. JCE counsel also contend that the Trial Judgement conflicts with *Tadić* because it did not require proof that the JCE participants "personally agreed" to employ the illegal means contemplated by the JCE. Absence of such proof, they argue, risks that JCE liability will attach for mere adherence to a lawful objective.[1829]

702. Lastly, JCE counsel assert that the Trial Chamber articulated those actors ultimately linked to the JCE in a general manner, not because there was evidence that they contributed to and shared the common objective of the JCE, "but only because they committed or were closer to the commission of criminal acts and therefore had to be linked to the JCE" to hold Krajišnik liable.[1830] The Trial Chamber, they contend, subverted the requirement of shared common intent and improperly and concluded that many of the principal perpetrators were in fact members of the JCE.[1831] JCE counsel further aver that the members of the JCE listed by the Trial Chamber should have been pleaded in the Indictment and that specific and individualised evidence was needed to support their involvement in the JCE. They add that the Trial Judgement did not specify the level of proof necessary to show that a perpetrator acted pursuant to the direction of Krajišnik or had any nexus or link to him except that their acts advanced the objective of the JCE. In their view, the Trial Chamber thus disregarded the question whether the principal perpetrators pursued their own agenda.[1832]

[1826] Dershowitz Brief, para. 48; AT. 209.
[1827] Dershowitz Brief, para. 50, citing Trial Judgement, paras 1096-1099.
[1828] Dershowitz Brief, para. 51, referencing Trial Judgement, para. 1121(e) – (j). *See* also Dershowitz Brief, para. 52.
[1829] Dershowitz Brief, paras 56-58.
[1830] Dershowitz Brief, paras 59-63, citing the discussion of the *Brdanin* Trial Judgement in Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109, 127-128 (2007).
[1831] Dershowitz Brief, para. 63.
[1832] Dershowitz Brief, para. 64.

703. The Prosecution responds that the theory of JCE presented in the Indictment and the Trial Judgement is clear. It first notes that the Indictment pleaded the enumerated crimes as within the object of the JCE; alternatively, they were charged under the JCE Category 3. As to the Trial Chamber's description of the common objective as "fluid", the Prosecution posits that what matters is that at the time the crimes are committed, they form part of the common purpose or are foreseeable consequences of other crimes forming part of it.[1833] The Prosecution further submits that the findings in the Trial Judgement demonstrate that Krajišnik's conviction rested on both JCE Category 1 and JCE Category 3. It argues in this connection that the crimes which were not originally part of the common objective became so over time, because as they were committed and accepted by leading JCE members who continued to contribute to the common criminal objective, they became intended and their subsequent commission led to JCE Category 1 liability; in addition, the first of these "expanded crimes" were foreseeable outcomes of the (original) common criminal objective to deport and forcibly transfer and fell within JCE Category 3. The Prosecution also denies that JCE liability can attach for mere adherence to an objective: JCE requires a common objective amounting to or involving the commission of a crime under the Statute, and the shared intent of the participants. The Prosecution argues that the Trial Chamber correctly required a criminal objective common to the persons acting together in a JCE, and not merely the same objective.[1834] It further submits that the principal perpetrators need not share the common objective, provided the crime can be imputed to a JCE member. Finally, it argues that the Trial Chamber, based on its analysis of the distinction between the JCE members and others, made findings on the participants in the JCE and described the structures linking them with the principal perpetrators; JCE counsel fail to show that the Trial Chamber erred in determining the group of JCE members or connections between the principal perpetrators and members of the JCE.[1835]

(ii) Analysis

a. Common objective

704. The Appeals Chamber recalls that a common purpose within the JCE doctrine must "amount to or involve the commission of a crime provided for in the Statute".[1836] The Indictment pleaded the objective of the JCE as follows:

[1833] Prosecution's Response to Dershowitz, paras 32 (referencing Indictment, para. 5), 33.
[1834] Prosecution's Response to Dershowitz, paras 34 (referencing Trial Judgement, paras 1096-1119), 35-37.
[1835] Prosecution's Response to Dershowitz, paras 38 (referencing *Brdanin* Appeal Judgement, para. 413), 39-40.
[1836] *Tadić* Appeal Judgement, para. 227; *Krnojelac* Appeal Judgement, para. 31; *Vasiljević* Appeal Judgement, para. 100; *Kvočka et al.* Appeal Judgement, para. 81; *Stakić* Appeal Judgement, para. 73; *Brdanin* Appeal Judgement, para. 390.

> the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina through the commission of crimes which are punishable under Articles 3, 4, and 5 of the Statute of the Tribunal.[1837]

These alleged crimes were specified in subsequent parts of the Indictment.[1838] The Indictment thus pleaded a common purpose which involved the commission of crimes under the Statute. JCE counsel's challenge to the pleading of the JCE's common objective therefore fails.

705. As for their challenges to the description of the common objective in the Trial Judgement, the Appeals Chamber refers to its discussion of sub-grounds 3(B), 3(C) and 3(D) submitted by *Amicus Curiae*.[1839]

b. *Actus reus* and *mens rea*

706. Contrary to JCE counsel's argument,[1840] it was not required that Krajišnik "participated in the crime" involved in the JCE in some direct or material way. For JCE liability to attach, it suffices that the accused's participation in the common purpose lent a significant contribution to the crimes for which he is to be found responsible.[1841] JCE counsel fail to demonstrate that Krajišnik's contribution as found by the Trial Chamber fell short of this threshold.

707. With regard to Krajišnik's *mens rea*, the Appeals Chamber has already found that the Trial Chamber correctly required proof that "the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out."[1842] Under this standard, there is no room to argue, as JCE counsel do,[1843] that JCE liability can attach for mere adherence to a lawful objective. To the extent they claim that JCE liability requires an agreement, additional to the common purpose, between the JCE participants to commit the crimes,[1844] this argument is erroneous in law.[1845] The "bridge", to use JCE counsel's term,[1846] between the JCE's objective and Krajišnik's criminal liability, as far as his *mens rea* is concerned, consisted of the shared intent that the crimes involved in the common objective be carried out. Such intent was both pleaded in the Indictment[1847] and required by the

[1837] Indictment, para. 4.
[1838] Indictment, para. 5, "The Charges".
[1839] *See supra* III.C.2-8. *See* Dershowitz Brief, para. 78(b)-(d).
[1840] Dershowitz Brief, para. 51.
[1841] *Brdanin* Appeal Judgement, para. 430. *See Kvočka et al.* Appeal Judgement, para. 96; *Vasiljević* Appeal Judgement, para. 100; *Tadić* Appeal Judgement, para. 227.
[1842] Trial Judgement, para. 883(ii), referring to *Tadić* Appeal Judgement, para. 228. *See supra* III.C.9(b).
[1843] Dershowitz Brief, paras 56-57.
[1844] Dershowitz Brief, para. 57.
[1845] *Brdanin* Appeal Judgement, para. 418. *See Tadić* Appeal Judgement, para. 227(ii). *See* also *supra* III.C.5(b).
[1846] Dershowitz Brief, para. 58.
[1847] Indictment, para. 5.

Trial Chamber.[1848] JCE counsel's additional, bare assertion that the evidence regarding Krajišnik's objective for Sarajevo is insufficient for criminal liability is dismissed.[1849]

c. Members of the JCE and principal perpetrators

708. The Appeals Chamber now turns to JCE counsel's arguments concerning the members of the JCE. It will first consider their contention that they were not, or not sufficiently, pleaded in the Indictment.[1850]

709. The Appeals Chamber notes that the Indictment listed many of the individuals[1851] the Trial Chamber found were members of the JCE.[1852] The Indictment further alleged that the JCE included "other members of the Bosnian Serb leadership" and of "the SDS leadership" at "the Republic, regional and municipal levels", members of the "Bosnian Serb police (žMUP')" and "members of Serbian and Bosnian Serb paramilitary forces and volunteer units".[1853] Those individuals not identified by name in the Indictment, but found to be JCE members by the Trial Chamber, all fall within either one of these categories.[1854] The Appeals Chamber therefore does not consider the Indictment defective in this respect.[1855]

710. In addition, the roles of all but three of these persons were described in the Prosecution pre-trial brief, filed almost two years before the trial started.[1856] Therefore, to the extent that the

[1848] Trial Judgement, para. 883(ii).
[1849] *See e.g.* Trial Judgement, paras 898, 1115-1116, 1119.
[1850] Dershowitz Brief, para. 64; AT. 197-198.
[1851] Indictment, para. 7 (listing Krajišnik, Biljana Plavšić, Radovan Karadžić, Željko Ražnatović (a.k.a. "Arkan"), Ratko Mladić, Momir Talić and Radoslav Brđanin among the alleged members of the JCE).
[1852] Trial Judgement, paras 1087-1088.
[1853] Indictment, para. 7.
[1854] Momčilo Mandić, Velibor Ostojić and Mićo Stanišić were part of the Bosnian-Serb leadership: Trial Judgement, para. 1087. Milenko Vojnović, a.k.a. "Dr. Beli", Rajko Dukić, Gojko Kličković, "Vojo" Kuprešanin, Rajko Kušić and Jovan Tintor were members of the SDS Main Board: Trial Judgement, para. 1088. Simo Drljača and Stojan Župljanin were municipal SJB chiefs, and thus members of the MUP: Trial Judgement, paras 228, 235, 242, 249, 489, 1088. Jovan Mijatović and Nedeljko Rašula, in addition to their respective positions as member of Zvornik crisis staff and president of Sanski Most municipal assembly, were both deputies to the Bosnian-Serb Assembly, and thus part of the Bosnian-Serb leadership on both the municipal and Republic levels: Trial Judgement, para. 1088. Finally, Mirko Blagojević, Ljubiša Savić, a.k.a. "Mauzer", Veljko Milanković and Vojin (Žućo) Vučković were paramilitary leaders: Trial Judgement, para. 1088.
[1855] *Cf. Stakić* Appeal Judgement, para. 70. *See* also *supra* III.C.1, where it is explained that while a Trial Chamber must identify the plurality of persons belonging to the JCE, it is not necessary to identify by name each of the persons involved: it can be sufficient to refer to categories or groups of persons. The same principle applies to the pleading of the JCE members in the Indictment.
[1856] *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Prosecution's pre-trial brief, 2 May 2002 ("Prosecution pre-trial brief"), paras 148, 154-156, 239, 310, 338, 349, 368, 380, 455 (Momčilo Mandić), 25, 150, 265, 315, 362, 380, 383, 406, 567 (Velibor Ostojić), 112, 127, 147, 1448, 157, 383, (Mićo Stanišić), 169, 284 (Rajko Dukić), 408, 416 (Gojko Kličković), fn. 104 ("Vojo" Kuprešanin), paras 260-261, 263 (Rajko Kušić), 337-338, 341-342 (Jovan Tintor), 161 (Simo Drljača), 161, 406, 485 (Stojan Župljanin), 544 (Nedeljko Rašula), 258 (Mirko Blagojević), 254, 258 (Ljubiša Savić), 533-534, 536-537 (Veljko Milanković).

Indictment left Krajišnik with any doubt as to the exact identity of the participants in the JCE, such alleged vagueness did not materially impair the preparation of his defence.[1857]

711. Turning to the Trial Judgement, JCE counsel essentially argue that the Trial Chamber enumerated the JCE members without consideration of whether they contributed to and shared the common purpose of the JCE.[1858]

712. The Appeals Chamber notes, first, that the Trial Chamber required that "the JCE participants, including the accused, had a common state of mind".[1859] Second, contrary to JCE counsel's claim,[1860] the Trial Chamber did analyse the issue of independent groups potentially sharing a common objective without any contact, or "pursuing their own agendas". It held that "a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives",[1861] and continued:

> A person not in the JCE may share the general objective of the group but not be linked with the operations of the group. Crimes committed by such a person are of course not attributable to the group. On the other hand, links forged in pursuit of a common objective transform individuals into members of a criminal enterprise. These persons rely on each other's contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.[1862]

The Trial Chamber then went on to find who the individual members of the JCE were.[1863]

713. JCE counsel's reference, without more, to "the need for specific and individualised evidence to support [the JCE members'] involvement in the JCE"[1864] fails to articulate an error in the Trial Chamber's analysis of the evidence pertaining to their involvement[1865] and is dismissed.

714. Finally, inasmuch as JCE counsel's argument concerns the principal perpetrators who were not JCE members but "procured" by JCE members to commit crimes,[1866] the Appeals Chamber recalls that these perpetrators need not, as a matter of law, contribute to or share the common objective of the JCE. Krajišnik could be held responsible for their crimes as long as they could be

[1857] *E.g. Simić* Appeal Judgement, para. 24; *Ntagerura et al.* Appeal Judgement, para. 30.
[1858] Krajišnik's bare assertion that the Trial Chamber identified the JCE members in a general and summary manner (Dershowitz Brief, paras 59, 63) is dismissed to the extent set out above in III.C.1.
[1859] Trial Judgement, para. 883(ii).
[1860] Dershowitz Brief, paras 61, 64.
[1861] Trial Judgement, para. 884.
[1862] Trial Judgement, para. 1082.
[1863] Trial Judgement, paras 1087-1088.
[1864] Dershowitz Brief, para. 64.
[1865] As for the "local component" of the JCE: *see* Trial Judgement, para. 1088, with references. Regarding the members of the "Pale leadership component" of the JCE (Trial Judgement para. 1087), the Trial Judgement contains numerous findings on their involvement, which cannot all be enumerated here. For examples, *see e.g.* paras 893-895, 919, 983 (Radovan Karadžić); 938, 963, 981 (Biljana Plavšić), 45, 584, 935, 957, 959, 963 (Nikola Koljević), 953, 1021-1022 (Momčilo Mandić), 25, 922, 941, (Velibor Ostojić), 939, 983 (Mićo Stanišić) and 975-977, 1121(d) (Ratko Mladić).
[1866] Dershowitz Brief, paras 62-63, 64 (second sentence).

imputed to a JCE member who used the non-member principal perpetrators in accordance with the common objective.[1867] As to whether the Trial Chamber made the necessary factual findings in this respect, the Appeals Chamber refers to its discussion of sub-ground 3(G) submitted by *Amicus Curiae*.[1868]

715. To the extent that JCE counsel assert an error in the Trial Chamber's finding that the "JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others",[1869] this sub-ground of appeal is granted. Furthermore, inasmuch as JCE counsel's submissions refer to the scope of the common objective, this sub-ground is granted to the extent detailed under *Amicus Curiae*'s sub-ground 3(B) above. Finally, insofar as JCE counsel argue that the Trial Chamber erred in imputing the crimes committed by non-JCE members to Krajišnik, this sub-ground is granted to the extent detailed under *Amicus Curiae*'s sub-ground 3(G) above. The remainder of this sub-ground is dismissed.

(b) Alleged inconsistencies in the Trial Chamber's application of JCE (sub-ground 3(B))

(i) Submissions

716. JCE counsel submit that the Trial Chamber's application of JCE liability is inconsistent in two respects, which, they argue, shows the deficiency of the Trial Judgement and the JCE theory.[1870] The first relates to the finding at paragraph 1118 of the Trial Judgement that, whereas in the early stages of the Bosnian-Serb campaign the common objective was discriminatory deportation and forced transfer, the common objective later came to include an expanded set of crimes, and that acceptance of this greater range of criminal means, coupled with persistence in implementation, signalled an intention to pursue the common objective through those new means.[1871] JCE counsel submit that this analysis is erroneous[1872] and inconsistent with the finding that Krajišnik's criminal responsibility began with the first killings during the attack in Bijeljina in early April 1992.[1873] It is inconsistent, they argue, because Krajišnik's liability for these killings, which were not part of the JCE's original objective, could arise only after he had received reports on the killings and nevertheless persisted in his actions. Therefore, under the Trial Chamber's own

[1867] *Brdanin* Appeal Judgement, paras 413, 430. *Martić* Appeal Judgement, para. 168.
[1868] *See supra* III.C.11.
[1869] Trial Judgement, para. 1087. *See supra* III.C.1.
[1870] Dershowitz Brief, paras 66, 71, 74.
[1871] Dershowitz Brief, para. 67, referencing Trial Judgement, para. 1118.
[1872] Dershowitz Brief, para. 67.
[1873] Dershowitz Brief, paras 65, 68-70, referencing Trial Judgement, paras 300, 1123-1124.

approach in paragraph 1118, JCE counsel aver that there was no basis for his liability for killings in Bijeljina in early April 1992.[1874]

717. The second alleged inconsistency concerns deportation, which was found to be one of the original crimes contemplated by the JCE. JCE counsel allege that the Trial Chamber found Krajišnik responsible for this crime based on the movements of 9,000 Muslims and Croats into Croatia in July 1992 and of 1,008 and 1,001 detainees from Manjača camp out of the Bosnian-Serb Republic on two occasions around December 1992.[1875] However, JCE counsel contend that because the section of the Trial Judgement on municipality crimes dealing with Manjača contains no findings on the movement of the detainees, this appears not to have been among the crimes the Trial Chamber found.[1876] Also, they argue that the 9,000 persons were not found to have been moved by JCE members, but rather under the supervision of the UNHCR.[1877]

718. The Prosecution responds that the Trial Judgement is consistent in the application of the common objective. It refers first to its earlier submissions that Krajišnik's liability arises both under JCE Category 1 and JCE Category 3.[1878] It then argues that the groups of 1,008 and 1,001 detainees from Manjača do appear in the "Municipality Crimes" section of the Trial Judgement and was imputed to Krajišnik through Momir Talić, a JCE member.[1879] The movements of the 9,000 persons, the Prosecution contends, was a result of the measures taken by the Bosnian-Serb municipal authorities in Bosanski Novi and imputed to local politicians and military and police commanders who were members of the JCE.[1880] It asserts that the involvement of the ICRC or the UNHCR neither renders the deportations lawful nor disconnects the acts from the JCE members.[1881]

(ii) Analysis

719. The Appeals Chamber first notes that JCE counsel fail to develop their challenge to the finding as such in paragraph 1118 of the Trial Judgement.[1882] This argument is dismissed.

720. Second, JCE counsel's argument that the finding in paragraph 1118, even if correct, is inconsistent with the finding that Krajišnik's liability arose with the first killings during the attack

[1874] Dershowitz Brief, para. 70. *See* also AT. 290.
[1875] Dershowitz Brief, paras 72-73, referencing Trial Judgement, para. 1097.
[1876] Dershowitz Brief, para. 73.
[1877] Dershowitz Brief, para. 73, referencing Trial Judgement, para. 417.
[1878] Prosecution's Response to Dershowitz, para. 41, fn. 98, referring to its submissions under sub-ground 3(A).
[1879] Prosecution's Response to Dershowitz, paras 42 (referring to Trial Judgement, para. 390 and fn. 884), 43.
[1880] Prosecution's Response to Dershowitz, para. 44, referring to Trial Judgement, paras 406-419.
[1881] Prosecution's Response to Dershowitz, para. 45.
[1882] Dershowitz Brief, para. 67.

in Bijeljina, is addressed under *Amicus Curiae*'s sub-ground 3(B). As such, the Appeals Chamber refers to its analysis of that question above.[1883]

721. Turning to the second alleged inconsistency, the Appeals Chamber notes that the Trial Chamber mentioned the movements of the groups of 1,008 and 1,001 detainees from Manjača camp and of the 9,000 Muslims and Croats in connection with its finding that deportation and forced transfer were the "original" crimes of the JCE.[1884] The Trial Chamber did not make any explicit finding on the former movements in the section of its Judgement entitled "Municipality crimes". It did, however, refer to the evidence on these movements to find, in that section, that detainees from Manjača camp were transferred to Croatia.[1885] The Appeals Chamber therefore rejects JCE counsel's submission that the movements of the groups of 1,008 and 1,001 detainees from Manjača camp were not among the crimes found by the Trial Chamber.[1886]

722. The Trial Chamber found that the displacement of the 9,000 Muslims and Croats was involuntary due to the pressure exerted on them to leave by the Bosnian-Serb municipal authorities.[1887] The Appeals Chamber has already upheld this finding to the extent set out above,[1888] and it finds that the fact that the displaced persons were accompanied by international forces[1889] did not render their displacement lawful.[1890]

723. JCE counsel fail to show an inconsistency in the Trial Chamber's findings on the movements of the 1,008 and 1,001 detainees from Manjača and of the 9,000 Muslims and Croats in July 1992.

724. To the extent JCE counsel argue that paragraph 1118 is inconsistent with the Trial Chamber's finding that his liability arose with the first killings during the attack in Bijeljina, this sub-ground of appeal is granted.[1891] The remainder of this sub-ground is dismissed.

[1883] *See supra* III.C.2.
[1884] Trial Judgement, para. 1097.
[1885] Trial Judgement, para. 390, fn. 884, referencing Exhibits P891, para. 2.132; P892, tab 99. In addition, the Trial Chamber referred to these movements for its findings on Krajišnik's knowledge of and support for population expulsions: Trial Judgement, para. 1026, fns 2057-2058, referencing Exhibits P891, para. 2.132; P892, tab 99, p. 1.
[1886] *See* also Trial Judgement, para. 732 (finding that the "displacement of Muslims and Croats from Banja Luka", where Manjača camp was located, constituted deportation).
[1887] Trial Judgement, paras 417, 419, 730-732.
[1888] *See supra* III.D and E.
[1889] Trial Judgement, para. 417.
[1890] *See Simić* Appeal Judgement, para. 180; *Stakić* Appeal Judgement, para. 286.
[1891] *See supra* III.C.2.

(c) Arguments related to the Prosecution's presentation of JCE (sub-ground 3(C))

(i) Submissions

725. JCE counsel submit that the Prosecution's contention in its Response to Krajišnik that the Trial Chamber applied the correct law on JCE "illuminates fundamental problems with JCE liability".[1892] They argue that the Prosecution's definition of JCE[1893] begs many of the questions addressed previously by JCE counsel.[1894] In particular, they posit that the Prosecution fails to specify the required intent *vis-à-vis* the common objective, the group, or the crimes which may be committed by others pursuant to the common objective in the future.[1895] In their view, the Prosecution's assertion that an accused must be "sufficiently connected and concerned with" those who committed, or procured others to commit, crimes pursuant to the common objective fails to articulate the accused's *actus reus* and *mens rea*.[1896] JCE counsel argue that it is at the heart of the matter that Krajišnik's actions cannot be classified as any crime; according to them, Krajišnik cannot be punished unless, by his actions, he is responsible for a crime listed in the Statute.[1897]

726. The Prosecution responds that Krajišnik's Appeal Brief fails to articulate an error in the legal requirements set out by the Trial Chamber. It also posits that JCE counsel, in arguing that Krajišnik's actions cannot be classified as a crime, overlook that participation in a JCE need not involve the commission of a specific crime.[1898]

[1892] Dershowitz Brief, para. 75, referencing Prosecution's Response to Krajišnik, paras 31-35.
[1893] Krajišnik refers to the Prosecution's submission that it is the "common objective that *begins to transform* a plurality of persons into a group or enterprise" (emphasis by Krajišnik): Dershowitz Brief, para. 75.
[1894] "[F]or example, when do people become a group and what does an individual need to know, intend, or do to become liable for crimes committed by other group members": Dershowitz Brief, para. 75.
[1895] Dershowitz Brief, para. 76.
[1896] Dershowitz Brief, para. 76, referencing Prosecution's Response to Krajišnik, para. 32.
[1897] Dershowitz Brief, para. 77, referencing Prosecution's Response to Krajišnik, para. 35 (arguing that whether Krajišnik's actions can be classified a crime under the Statute is irrelevant to his liability under JCE).
[1898] Prosecution's Response to Dershowitz, paras 47-48.

(ii) Analysis

727. JCE counsel fail to articulate an error on behalf of the Trial Chamber under this sub-ground. Rather, they merely address arguments raised in the Prosecution's Response to Krajišnik's Appeal Brief. As such, this sub-ground effectively constitutes a second reply on behalf of Krajišnik to the Prosecution's Response to Krajišnik, in violation of Rule 113 of the Rules.[1899]

728. In any event, the Appeals Chamber notes that JCE counsel's arguments essentially concern the constituent elements of the *actus reus* and *mens rea* of JCE liability. These are well-established and need not be repeated here.[1900] This sub-ground is dismissed.

4. Conclusion

729. The Appeals Chamber dismisses grounds 1 and 2 of the Dershowitz Brief in their entirety.

730. Ground 3 of the Dershowitz Brief is granted to the extent it asserts an error in the Trial Chamber's finding that the "JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others".[1901] Insofar as JCE counsel argue in this ground 3 that the Trial Chamber erred in imputing the crimes committed by non-JCE members to Krajišnik, his sub-ground is granted to the extent set out in *Amicus Curiae*'s sub-ground 3(G).

731. Furthermore, inasmuch JCE counsel argue in grounds 3(A) and (B) that the Trial Chamber erred in its analysis of the common objective, including the argument that paragraph 1118 of the Trial Judgement is inconsistent with the Trial Chamber's finding that Krajišnik's liability arose with the first killings during the attack in Bijeljina, this sub-ground is granted to the extent detailed under *Amicus Curiae*'s sub-ground 3(B) above.[1902] The remainder of ground 3 is dismissed.

[1899] *See* Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008 ("Decision of 28 February 2008"), para. 11 (holding that the Appeals Chamber will regard Mr. Dershowitz's submissions "as a supplementary brief on behalf of Mr. Krajišnik").
[1900] *E.g. Brdanin* Appeal Judgement, paras 410-413 (setting out the *actus reus* and *mens rea* for JCE members to be held responsible for crimes committed by persons not part of the JCE); *Kvočka et al.* Appeal Judgement, paras 81-83 (defining, *inter alia*, the requirement of a "plurality" of persons and the *mens rea* required for crimes committed beyond the common purpose, but which are a natural and foreseeable consequence of the common purpose); *Tadić* Appeal Judgement, paras 227-228 participation in a JCE need not involve the commission of a specific statutory crime).
[1901] Trial Judgement, para. 1087. *See supra* III.C.1.
[1902] *See supra* III.C.2.

V. APPEALS AGAINST SENTENCE

732. The Appeals Chamber recalls that the Trial Chamber sentenced Krajišnik to a single sentence of 27 years of imprisonment. *Amicus Curiae*, Krajišnik and the Prosecution have appealed this sentence. *Amicus Curiae* argues that the penalty is excessive given that Krajišnik did not directly perpetrate or order any of the crimes. He adds that the Trial Chamber wrongly considered the acts of others in calculating Krajišnik's sentence. Krajišnik submits that the Trial Chamber did not consider the general practice on sentencing in the former Yugoslavia, erred by not analysing the gravity of the crimes and the aggravating circumstances separately, and imposed a penalty that seemed to be a reprisal. The Prosecution argues that the Trial Chamber abused its discretion and imposed a manifestly inadequate sentence.

A. Applicable law and standard of review

733. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, a Trial Chamber must take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[1903]

734. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[1904] Trial Chambers are vested with a broad discretion in determining an appropriate sentence.[1905] 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.[1906] It is for the party challenging the sentence to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[1907]

735. To show that the Trial Chamber committed a discernible error in exercising its discretion, an appellant "has 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

[1903] *Blagojević and Jokić* Appeal Judgement, para. 320; *Bralo* Appeal Judgement, para. 7; *Galić* Appeal Judgement, para. 392; *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account 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, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[1904] *Kupreškić et al.* Appeal Judgement, para. 408; *Galić* Appeal Judgement, para. 393; *Bralo* Appeal Judgement, para. 9.
[1905] *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393; *Jokić* Judgement on Sentencing Appeal, para. 8.
[1906] *Blagojević and Jokić* Appeal Judgement, para. 321; *Bralo* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 393.
[1907] *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393; *Čelebići* Appeal Judgement, para. 725.

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".[1908]

B. *Amicus Curiae*'s appeal against sentence (Ground 11)

736. *Amicus Curiae* argues that the sentence imposed by the Trial Chamber is excessive and disproportionate given that Krajišnik did not directly perpetrate or order any of the crimes.[1909] He adds that the Trial Judgement also wrongly considered the acts of others in calculating Krajišnik's sentence.[1910]

737. The Prosecution responds that the fact that Krajišnik did not physically perpetrate or specifically order any of the crimes does not mean that a lesser sentence is warranted because he participated in crimes through a JCE in which he held a central position. The Prosecution recalls in this respect that the Trial Chamber found that Krajišnik was one of the driving forces behind the JCE, that his role in the commission of the crimes was crucial and vital, and that his influence was very extensive.[1911] The Prosecution also submits that paragraph 1121 of the Trial Judgement – referred to by *Amicus Curiae* to state that the Trial Chamber considered the acts of others in calculating Krajišnik's sentence – deals exclusively with Krajišnik's contributions to the JCE and makes no mention of the acts of others.[1912]

738. *Amicus Curiae* replies that the basis of Krajišnik's criminal liability is so attenuated that it cannot properly form the basis of a 27-year sentence.[1913] According to *Amicus Curiae*:

> [Krajišnik's] liability for counts 3-5 is based upon his (often inferred) knowledge *ex post facto* of acts by other members of the JCE. Furthermore, [Krajišnik] was not found to have been directly involved in any of the crimes alleged. Indeed, the Chamber specifically rejected allegations that [Krajišnik]:
>
> a. had effective control over the Bosnian-Serb organisations or armed forces which facilitated the crimes;
>
> b. encouraged or participated in the distribution of arms to Bosnian Serbs;
>
> c. requested or coordinated the activities of the Bosnian Serb forces;
>
> d. directed or encouraged suspected criminal paramilitaries to incorporate into the Bosnian Serb forces.[1914]

[1908] *Bralo* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 394; *Momir Nikolić* Judgement on Sentencing Appeal, para. 95; *Babić* Judgement on Sentencing Appeal, para. 44.
[1909] *Amicus Curiae*'s Notice of Appeal, para. 86; *Amicus Curiae*'s Appeal Brief, para. 240; *Amicus Curiae*'s Reply, paras 88-89.
[1910] *Amicus Curiae*'s Appeal Brief, para. 240, referring to Trial Judgement, para. 1121.
[1911] Prosecution's Response to *Amicus Curiae*, para. 194, referring to Trial Judgement, paras 1119, 1158-1159.
[1912] Prosecution's Response to *Amicus Curiae*, para. 195.
[1913] *Amicus Curiae*'s Reply, para. 89.
[1914] *Amicus Curiae*'s Reply, para. 89 (emphases in original, references omitted).

739. The Appeals Chamber is of the view that the fact that Krajišnik did not directly perpetrate or order any of the crimes, or that some allegations of the Indictment as to Krajišnik's contribution were not established, does not necessarily entail that Krajišnik should be entitled to a lesser sentence. To the contrary, the Appeals Chamber agrees with the Prosecution that Krajišnik's contributions to the JCE were extensive, and that a severe sentence was warranted.

740. As to the allegation that the Trial Chamber referred to acts of others in calculating Krajišnik's sentence, the Appeals Chamber notes that paragraph 1121 of the Trial Judgement referred to by *Amicus Curiae* only deals with Krajišnik's personal contribution to the JCE. To the extent *Amicus Curiae* wanted to argue that the acts and crimes committed by others pursuant to the JCE cannot be taken into account in determining the appropriate sentence, he is clearly wrong. This ground of appeal is rejected.

C. Krajišnik's appeal against sentence

1. Introduction

741. Krajišnik alleges that the Trial Chamber committed errors in the application of the law on sentencing.[1915] Krajišnik does not request a reduction of his sentence, but rather that the Trial Judgement be vacated and a new judgement on acquittal be issued or, alternatively, that the Trial Judgement be vacated and a retrial ordered.[1916] The Appeals Chamber will analyse Krajišnik's arguments below.

2. Submissions

742. Krajišnik first argues that the Trial Chamber did not consider the general practice on sentencing in the former Yugoslavia. He asserts that the Trial Chamber "did not comply with the obligations to observe the laws which were in effect at the time when a crime was committed." Krajišnik argues that when the penalty for a crime is reduced through a legislative amendment, the more lenient penalty should be applied retroactively, as guaranteed by a number of international conventions and instruments. In this case, Krajišnik submits that Articles 38, 48 and 142 of the Criminal Code of the Socialist Federative Republic of Yugoslavia should have been applied in meting out his sentence. In particular, Krajišnik points to Article 38 of the Criminal Code, which stipulates that the most severe sentence that can be applied is 20 years' imprisonment, and that this sentence can only be applied for the crimes that would have previously been punished by the death

[1915] Krajišnik Appeal Brief, p. 82.
[1916] Krajišnik Appeal Brief, p. 84.

penalty. Krajišnik finally submits that "[a]ll penalties must be proportional to the crimes committed and must not violate any international standards."[1917]

743. Second, Krajišnik alleges that the Trial Chamber erred by not analysing the gravity of the crimes and the aggravating circumstances separately.[1918] He submits that the Trial Chamber considered as an aggravating factor the long period over which the crimes were committed. Krajišnik argues that no recognition was given to "his efforts and involvement in finding a solution to the crisis by participating in numerous meetings with international mediators." He moreover alleges that the fact that he acted in conformity with his "legal authority" should have been considered as a mitigating factor, and a "contribution to preventing all the crimes that happened later."[1919]

744. Krajišnik further alleges that in his case, the penalty "seems like a reprisal", does not favour deterrence, and does not have any effect on the "development of the social responsibility and discipline of members of the public." Finally, he alleges that the sentence which was imposed to him "instils doubt […] throughout the world in general, that it is possible to prove one's innocence."[1920]

745. The Prosecution responds that Krajišnik's arguments in relation to his sentence should be struck, as they were not announced in the Notice of Appeal and are therefore entirely new. The Prosecution adds that the "requirement in Rule 108 for a notice of appeal to set forth grounds becomes redundant if the Appeals Chamber allows an appellant to go beyond the notice and raise entirely new arguments in his brief without showing good cause and obtaining leave."[1921]

746. Krajišnik replies that "although the Prosecution's arguments are technically correct, [the Appeals Chamber] should not dismiss the arguments which are not found in his Notice of Appeal, but were added in order to enable a better understanding of the whole".[1922]

3. Analysis

747. Rule 108 of the Rules states that:

> A party seeking to appeal a judgement shall […] file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision of ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors

[1917] Krajišnik Appeal Brief, p. 82.
[1918] Krajišnik Appeal Brief, p. 82.
[1919] Krajišnik Appeal Brief, p. 83.
[1920] Krajišnik Appeal Brief, p. 83.
[1921] Prosecution's Response to Krajišnik, paras 3-4.
[1922] Krajišnik's Reply, para. 2.

> and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

748. The Appeals Chamber notes that Krajišnik's Notice of Appeal does not contain any challenge to the sentence imposed on him by the Trial Chamber. Krajišnik's arguments relating to sentencing are therefore new, and consequently, he should have sought leave to amend his Notice of Appeal to include the additional allegations. Krajišnik has failed to do so. The Appeals Chamber further notes that the Prosecution has objected to the arguments as being absent from the Notice of Appeal,[1923] and has not addressed them in its Response. However, the Appeals Chamber finds that under the circumstances of the present case, "the Prosecution was not materially prejudiced by the failure to seek a variation of the Notice of Appeal pursuant to Rule 108 of the Rules, and that therefore, pursuant to Rule 5 of the Rules, relief in the form of a refusal to hear the Appellant's arguments is not required."[1924] Hence, the Appeals Chamber will proceed to analyse these arguments on the merits.

749. First, with regard to Krajišnik's contention that the Trial Chamber erred in not considering the general practice on sentencing in the former Yugoslavia, the Appeals Chamber recalls that although the Statute of the Tribunal requires trial chambers to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, "such practices only provide guidance and are not binding."[1925]

750. In the instant case, the Trial Chamber complied with its obligation to consider this issue, which was examined in paragraphs 1170 to 1175 of the Trial Judgement. It further considered the fact that the SFRY Criminal Code provides that the maximum term of imprisonment is 15 years, or for the most serious crimes, 20 years.[1926] The Appeals Chamber finds, in agreement with the Trial Chamber, that "the Tribunal may impose a sentence in excess of that which would be applicable under the relevant law in the former Yugoslavia".[1927] As stated in the *Stakić* Appeal Judgement, "the Trial Chamber was bound to apply the law of this Tribunal and not that of the former Yugoslavia"[1928] and therefore, Krajišnik's argument that the Trial Chamber violated the principles of *nullum crimen sine lege* and *nulla poena sine lege* is without merit.

[1923] Prosecution's Response to Krajišnik, paras 3-4.
[1924] *Deronjić* Judgement on Sentencing Appeal, para. 102.
[1925] *Hadžihasanović and Kubura* Appeal Judgement, para. 335; *Kupreškić* Appeal Judgement, para. 418.
[1926] Trial Judgement, para. 1174.
[1927] Trial Judgement, para. 1170, referring to *Momir Nikolić* Sentencing Judgement, paras 97-100; *Dragan Nikolić* Sentencing Judgement, paras 157-165.
[1928] *Stakić* Appeal Judgement, para. 398.

751. Second, with regard to Krajišnik's argument that the Trial Chamber failed to assess the gravity of the crimes and the aggravating circumstances separately,[1929] the Appeals Chamber notes that the Trial Chamber explained this choice when it stated that it would "assess [the crimes'] inherent gravity together with any factors which may increase or decrease the relative seriousness of the [Appellant's] conduct" in order to "[avoid] the risk of double-counting any specific factor."[1930] This approach is consistent with the *Deronjić* Judgement on Sentencing Appeal, where the Appeals Chamber found that even if it is preferable to deal with the gravity of the crimes and the aggravating circumstances separately, "it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting by taking into account matters relevant to the gravity of the offence as additional aggravating circumstances as well."[1931] In the instant case, the Trial Judgement "clearly shows that the Trial Chamber indeed distinguished between aggravating circumstances on the one hand and the gravity of the crimes on the other, albeit considering them under the same heading."[1932] This argument is therefore rejected.

752. Krajišnik then asserts that it was an error for the Trial Chamber to consider the long period over which the crimes were committed as an aggravating factor.[1933] He does not, however, explain why or give any reference in support of his assertion. He does not either address the cases cited by the Trial Chamber in support of its decision to consider the length of time as an aggravating factor.[1934] The Appeals Chamber dismisses this argument, as it is undeveloped and unsupported.

753. Krajišnik contends that the Trial Chamber should have considered his efforts and his involvement in peace negotiations, as well as the fact that he acted within his "legal authority" in mitigation of his sentence.[1935] He does not, however, support his argument with any evidence or any reference to the Trial Judgement. The Appeals Chamber recalls that "Trial Chambers are vested with a broad discretion in determining an appropriate sentence."[1936] It is for Krajišnik to demonstrate that the Trial Chamber committed a discernible error by abusing this discretion or has failed to follow the applicable law.[1937] In the instant case, the Appeals Chamber notes that the Trial Chamber did not specifically mention Krajišnik's involvement in peace negotiations in its analysis of mitigating factors. However, after listing the said factors, the Trial Chamber stated that

[1929] Krajišnik Appeal Brief, p. 82.
[1930] Trial Judgement, para. 1140.
[1931] *Deronjić* Judgement on Sentencing Appeal, para. 106.
[1932] *Deronjić* Judgement on Sentencing Appeal, para. 107.
[1933] Krajišnik Appeal Brief, p. 83.
[1934] Trial Judgement, para. 1153, referring to *Kunarac et al* Appeal Judgement, para. 356; *Krnojelac* Trial Judgement, para. 517; *Ntakirutimana and Ntakirutimana* Trial Judgement, para. 912.
[1935] Krajišnik Appeal Brief, p. 83.
[1936] *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393; *Jokić* Judgement on Sentencing Appeal, para. 8.

"[a]dditional character evidence was considered […] but, on the balance, the Chamber has not found it of assistance in determining a sentence."[1938] Although it is not clear whether Krajišnik's involvement in peace negotiations and the fact that he acted within his "legal authority" were among this "additional character evidence", the broad formulation of the Trial Judgement seems to indicate that these factors could indeed have been considered. In any event, even if this were not the case, Krajišnik fails to demonstrate that these factors would have been accorded sufficient weight to have any impact on the sentence, especially considering the fact that the Trial Chamber granted only "very limited" weight in mitigation to the factors explicitly considered.[1939] This argument is thus rejected.

754. Finally, with regard to Krajišnik's argument that his penalty "seems like a reprisal", does not favour deterrence, and does not have any effect on the "development of the social responsibility and discipline of members of the public",[1940] the Appeals Chamber notes that Krajišnik does not support his contention. His argument amounts to a mere assertion, and does not show any error. The Appeals Chamber therefore dismisses it.

4. Conclusion

755. The Appeals Chamber dismisses all of Krajišnik's challenges to his sentence.

D. Prosecution's appeal against sentence

756. The Prosecution raises a single ground of appeal, arguing that the Trial Chamber abused its discretion and imposed a manifestly inadequate sentence, thereby committing an error of law invalidating the decision.[1941] The Prosecution claims that this error resulted from two sub-errors: (1) the sentence does not reflect the sentencing principles of deterrence and retribution, the gravity of the crimes and Krajišnik's role in their commission; and (2) the Trial Chamber erred twice in applying Rule 101(B) of the Rules as it did not separately consider aggravating circumstances and gravity of the offence, and it gave weight to irrelevant and extraneous factors in mitigation.[1942] Consequently, the Prosecution requests the Appeals Chamber to replace the sentence of 27 years imposed on Krajišnik by a sentence of life imprisonment.[1943]

[1937] *Blagojević and Jokić* Appeal Judgement, para. 321; *Bralo* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 393.
[1938] Trial Judgement, para. 1169.
[1939] Trial Judgement, para. 1168.
[1940] Krajišnik Appeal Brief, p. 83.
[1941] Prosecution's Notice of Appeal, para. 1.
[1942] Prosecution's Notice of Appeal, paras 2.1-2.4.
[1943] Prosecution's Notice of Appeal, para. 3.

1. Sub-ground 1: Sentencing principles, gravity of the criminal conduct

(a) Submissions

757. The Prosecution contends that a life sentence was the only sentence proportionate to the overall magnitude of Krajišnik's crimes and the suffering imposed upon his victims, adding that "[o]nly a life sentence can meet the principles of retribution and deterrence and appropriately convey the reprobation and indignation of the international community, ensuring the effectiveness of international criminal law".[1944]

758. As to the gravity of the criminal conduct, the Prosecution recalls that Krajišnik and Radovan Karadžić

> were the two most prominent and powerful leaders of the Bosnian Serbs in 1991-1992. Together they ruled the Republika Srpska throughout the indictment period. They were "two bodies in one soul". They were the architects of policies that allowed the Bosnian-Serb leadership to ethnically recompose large areas of Bosnia-Herzegovina by the forcible expulsion of Bosnian Muslims and Bosnian Croats in vast numbers. They led the most extensive campaign of ethnic cleansing in post-World War II Europe.
>
> [Krajišnik] pursued this goal ceaselessly from the apex of power in the Bosnian-Serb Republic.[1945]

The Prosecution points to a number of the Trial Chamber's findings to illustrate the gravity of the crimes for which Krajišnik was found liable and his key role in the commission of these crimes.[1946]

759. As to the objectives of sentencing, the Prosecution alleges that the sentence imposed on Krajišnik fails to satisfy the primary principles of retribution and deterrence.[1947] First, the sentence imposed cannot be reconciled with the principle of retribution because it does not comport with the universal norm that the most serious offenders should receive the highest sentences; it fails to stigmatise and appropriately punish the seriousness of Krajišnik's conduct; and it does not have regard to the "international risk-taking" of Krajišnik and fails to make plain the condemnation of the international community.[1948] Second, the sentence imposed does not align with the principle of deterrence because "[f]ar from strengthening the legal order and reassuring society of the effectiveness of its penal provisions, a sentence of 27 years in the context of the overall magnitude of the [Appellant's] crimes only weakens respect for the international legal order."[1949]

760. The Prosecution also argues that the disparity in the sentence ultimately imposed on Milomir Stakić (40 years) and that imposed on Krajišnik (27 years) is striking, considering that

[1944] Prosecution's Appeal Brief, para. 4. *See* also paras 13, 28, 42.
[1945] Prosecution's Appeal Brief, paras 5-6 (footnotes omitted).
[1946] Prosecution's Appeal Brief, paras 6-12. *See* also paras 30-33, 35-41.
[1947] Prosecution's Appeal Brief, paras 18-26.
[1948] Prosecution's Appeal Brief, para. 24.

Krajišnik's crimes subsume those of Milomir Stakić and include in addition the crimes committed in 34 other municipalities.[1950] The Prosecution makes a similar argument with respect to the *Brdanin* case.[1951]

761. Krajišnik responds that the Prosecution's Appeal should be dismissed as unfounded.[1952] He first challenges the Trial Chamber's findings mentioned by the Prosecution.[1953] In response to the Prosecution's arguments concerning the inherent gravity of the crimes, Krajišnik states that he cannot comment on whether the crimes occurred at all or on the accuracy of their description and that "[t]he description of the crimes cannot be the basis for the Prosecution to use in order to justify its arguments in the appeal".[1954] As to his role in the crimes, Krajišnik denies having given the go-ahead for the expulsion of Muslims and Croats to begin.[1955] He further argues that (1) the Assembly he chaired never adopted any unlawful decision or decision that would discriminate against Muslims or Croats;[1956] (2) there is nothing in the evidence to show that he supported the expulsion of Muslims and Croats from "Serbian areas";[1957] (3) the evidence did not establish that he had control over the armed forces;[1958] (4) he was not an active member of the Bosnian-Serb Presidency;[1959] (5) the SDS was not predominant in the RS, and there is no evidence that any of the organs were under his "watchful eyes" or that he attended any session of the SDS Executive Committee.[1960] Krajišnik also avers that he did not contribute in any way to the crimes listed in the Trial Judgement.[1961]

762. Krajišnik submits that the principle of retribution cannot apply to him as he cannot be held responsible for the suffering of the victims of war.[1962] As to deterrence, he argues that "Mr Babić pleaded guilty and it is understandable that the Trial Chamber found grounds to punish him as an example to others not to commit crimes in the future".[1963]

[1949] Prosecution's Appeal Brief, para. 26.
[1950] Prosecution's Appeal Brief, paras 14-17. *See* also paras 66-71.
[1951] Prosecution's Appeal Brief, paras 66-71.
[1952] Krajišnik's Response, p. 2 and para. 72.
[1953] Krajišnik's Response, paras 3-13. In particular, Krajišnik denies (1) that he and Radovan Karadžić were the most prominent and powerful leaders of the Bosnian Serbs in 1991-1992 and that they were the architects of ethnic cleansing policies (para. 5); (2) that he pursued actively the goal of ethnic separation at all costs (paras 6-7); (3) that he was linked in any way to the crimes committed (paras 8-9); and (4) that he knew about the crimes committed, supported them or hid criminals (paras 10-13).
[1954] Krajišnik's Response, paras 29-33.
[1955] Krajišnik's Response, pp. 8-10 (paras "34-42").
[1956] Krajišnik's Response, para. 37.
[1957] Krajišnik's Response, para. 38.
[1958] Krajišnik's Response, para. 39.
[1959] Krajišnik's Response, para. 40.
[1960] Krajišnik's Response, para. 41.
[1961] Krajišnik's Response, para. 42.
[1962] Krajišnik's Response, p. 8 (para. "2 to 23", under the heading "[ii] Retribution").
[1963] Krajišnik's Response, paras 25-26.

763. To the Prosecution's argument that his sentence is in disparity with that imposed on Milomir Stakić and Radoslav Brđanin, Krajišnik opposes that he did not have any contact with these persons throughout the critical period or order them to commit any crimes, that he did not know what was going on at the time in Prijedor or in the ARK, and that it could not be concluded that he encouraged anyone to commit crimes.[1964] He also denies having been Stakić's superior or that of some other person in a lower position, and that "[i]t would be more relevant had the Prosecution likened my position to the position held by Mrs Biljana Plavšić and Milan Babić".[1965]

764. *Amicus Curiae* also submits that the Prosecution's Appeal should be dismissed.[1966] He avers that "the Prosecution engages in a simple quantitative assessment that ignores the more complex qualitative assessments that were clearly made by the Trial Chamber",[1967] that the Prosecution seeks to make Krajišnik pay for the continued failure to apprehend Radovan Karadžić, and that "[t]he Prosecution's overtly political stance ignores the fundamental tenets of the Tribunal's jurisprudence, namely that it is the overriding duty of each Trial Chamber to tailor the penalty to fit the individual circumstances of the accused person and the gravity of the crime".[1968]

765. According to *Amicus Curiae*, the fact that an accused occupied a high political position in a campaign that resulted in the commission of crimes of the utmost seriousness does not entail that a life sentence is the only appropriate sentence in the absence of a guilty plea.[1969] *Amicus Curiae* further contends that the Prosecution's call for a life sentence "obfuscates the distinction within the JCE doctrine between individual criminal liability and appropriate sentencing."[1970] In this connection, *Amicus Curiae* argues that the fact that Krajišnik was found liable as a member of the JCE rather than as a direct perpetrator should be reflected in the sentence imposed upon him.[1971]

766. *Amicus Curiae* maintains that stating that Krajišnik falls into the category of the most serious offenders due to his high political position, as the Prosecution does, grossly simplifies the form and degree of Krajišnik's participation in the crimes.[1972] According to *Amicus Curiae*, the

[1964] Krajišnik's Response, paras 14-17, 66-71.
[1965] Krajišnik's Response, paras 14-17.
[1966] *Amicus Curiae*'s Response, paras 8, 51.
[1967] *Amicus Curiae*'s Response, paras 11, 20, 31.
[1968] *Amicus Curiae*'s Response, paras 13-14.
[1969] *Amicus Curiae*'s Response, para. 17, referring to *Plavšić* Sentencing Judgement, para. 60, and to *Kordić and Čerkez* Appeal Judgement, paras 1057-1066. *See* also *Amicus Curiae*'s Response, para. 32.
[1970] *Amicus Curiae*'s Response, para. 15.
[1971] *Amicus Curiae*'s Response, para. 15. *See* also para. 18, where *Amicus Curiae* asserts that "[a]lthough all members of a JCE may be held criminally liable for offences committed by individuals within their number irrespective of their particular role or participation in the offences in question, those differing roles and levels of participation are reflected in the sentence imposed upon each individual".
[1972] *Amicus Curiae*'s Response, paras 28, 32.

large scope of the crimes for which Krajišnik has been found liable is not the only factor to be assessed; it is essential to consider also Krajišnik's role in the crimes.[1973] *Amicus Curiae* argues:

> While the Trial Chamber did find that the SDS (Serbian Democratic Party) and state structures were instrumental to the commission of the crimes committed through the implementation of the JCE's common objective to recompose ethnically the territory under its control, and that Mr. Krajišnik contributed to the JCE through helping to establish and perpetuate those political institutions, it found that Mr. Krajišnik's laibility for counts 3 to 5 (persecution, extermination and murder as crimes against humanity) is based upon his (often inferred) knowledge of such acts by other members of the JCE in furtherance of the common objective. While Mr. Krajišnik undoubtedly occupied a very high political position, contrary to the suggestion by the Prosecution, the Trial Chamber rejected the allegation that he had effective control over the Bosnian-Serb political and government organisations or the armed forces which participated in or facilitated the commission of the indicted crimes. The Trial Chamber also rejected the allegation that Mr. Krajišnik had encouraged, assisted or participated in the acquisition or distribution of arms to Bosnian Serbs to further the common objective of the JCE, or that he had requested, either directly or indirectly, the assistance or facilitated or coordinated the participation of the JNA or VRS forces or Bosnian Serb paramilitary or other informal units to further the common objective. Further, the Trial Chamber also rejected the allegation that Mr. Krajišnik had directed, supported or encouraged the incorporation into the Bosnian Serb forces, of members of the paramilitary units known or suspected to have participated in criminal conduct.[1974]

767. In response to the Prosecution's arguments based on the principles of sentencing, *Amicus Curiae* submits that an integral part of the principle of retribution is restraint and that the principle of deterrence must not be accorded undue prominence in sentencing decisions. He further argues that these principles "cannot justify a departure from the fundamental principle that an individual defendant should be punished solely on the basis of his wrongdoing".[1975] *Amicus Curiae* adds that, in any case, it cannot be said that the sentence imposed by the Trial Chamber fails to properly express the outrage of the international community and to provide sufficient deterrence.[1976]

768. *Amicus Curiae* also argues that the comparison with sentences given in other cases is unhelpful as "qualitative differences between the actions of the individual defendants in those cases and the acts of Mr. Krajišnik are such that while sentences of life and/or terms in excess of thirty years may have been appropriate for those defendants they are not appropriate for [him]".[1977]

[1973] *Amicus Curiae*'s Response, paras 30-31.
[1974] *Amicus Curiae*'s Response, para. 33, referring to Trial Judgement, paras 893, 1120-1121.
[1975] *Amicus Curiae*'s Response, para. 24.
[1976] *Amicus Curiae*'s Response, para. 26.
[1977] *Amicus Curiae*'s Response, paras 20-21 (citation taken from para. 21, emphasis omitted). *Amicus Curiae* avers specifically:

- Momčilo Krajišnik's participation in the crimes is distinct from that of Milomir Stakić in the Prijedor municipality, as the latter "was found, *inter alia*, to have actively participated in the setting up and running the notorious camps at Omarska, Keraterm and Trnopolje and was party to an agreement to use armed forces against civilians." It is also distinct from that of Radoslav Brdanin, who was found guilty of having aided and abetted various crimes in the ARK (*Amicus Curiae*'s Response, para. 34 (emphasis omitted));
- The conduct for which Krajišnik has been convicted is, qualitatively, of a different nature from that of Sylvestre Gacumbitsi – who was found to have ordered and participated in the massacres, to have instigated rape and to have exhibited particular sadism – or of Stanislav Galić – whose crimes were characterised by exceptional brutality and cruelty and whose participation in the crimes was systematic, prolonged and premeditated (*Amicus Curiae*'s Response, paras 35-37).

769. The Prosecution replies that Krajišnik's response fails to address its arguments in support of a life sentence; rather, Krajišnik denies guilt and challenges both the findings of fact and legal conclusions of criminal responsibility.[1978] The Prosecution adds that Krajišnik fails to make proper submissions, opting instead to give evidence, referring extensively to documents without providing references to the trial record or exhibit numbers, or even to material not on record.[1979]

770. The Prosecution further states that it does not seek a "symbolic sentence"; that it does not adopt any political position, let alone an "overtly political stance"; that it is not the product of any frustration nor is its position dependent on the status of any other accused; and that it seeks only an appropriate sentence for the crimes for which the Trial Chamber found Momčilo Krajišnik responsible, based on the gravity of those crimes and his role in them.[1980] The Prosecution further submits that *Amicus Curiae* misrepresents the Prosecution's position in several respects.[1981]

771. As to the inherent gravity of the crimes, the Prosecution avers that this "should include a quantitative evaluation of the numbers of victims and the temporal and geographical scale of the crimes" and "a qualitative assessment of the nature of the crimes". According to the Prosecution, *Amicus Curiae* attempts to deflect attention from the vast number of victims in this case. The Prosecution reasserts that the sentence imposed by the Trial Chamber did not properly reflect the number of victims and the scope of the crimes.[1982]

772. With respect to Krajišnik's role in the crimes, the Prosecution contends that, while a physical perpetrator may deserve a higher sentence than a JCE member who makes only a minor contribution to the enterprise, Krajišnik made major contributions to the JCE and must be sentenced for his role as one of the architects of the policy of ethnic cleansing.[1983] It argues that, in an effort to minimise Krajišnik's role in the crimes, *Amicus Curiae* fails to address all of the Trial Chamber's findings concerning the significant contributions of Krajišnik to the JCE. The Prosecution recalls that the Trial Chamber found that Krajišnik held a central position in the JCE and that he was one of the driving forces behind it.[1984] Further, the Prosecution points to six specific Trial Chamber's

[1978] Prosecution's Reply to Krajišnik, para. 3.
[1979] Prosecution's Reply to Krajišnik, paras 3-4. In particular, the Prosecution submits that the references to "video footage" in paragraphs 34-42 and footnote 9 of the Krajišnik's Response, as well as the references in paragraph 72 of that response should be ignored unless they are admitted under Rule 115.
[1980] Prosecution's Reply to *Amicus Curiae*, para. 3, referring to *Amicus Curiae*'s Response, paras 13-14, and to Prosecution's Appeal Brief, paras 27, 29-42.
[1981] Prosecution's Reply to *Amicus Curiae*, para. 4.
[1982] Prosecution's Reply to *Amicus Curiae*, paras 6-8.
[1983] Prosecution's Reply to *Amicus Curiae*, para. 9.
[1984] Prosecution's Reply to *Amicus Curiae*, paras 13-14, citing Trial Judgement, para. 1119.

findings related to the participation of Krajišnik in the JCE, to show that his contribution was not limited to helping establish and perpetuate political institutions.[1985]

773. The Prosecution finally submits that *Amicus Curiae*'s suggestion that Milomir Stakić and Radoslav Brđanin had more "hands on" involvement in the commission of crimes than Krajišnik is incorrect as "[t]he three are in fact the same in that they were political leaders, none of whom physically perpetrated crimes.".[1986]

(b) Analysis

774. The Appeals Chamber reasserts that the primary consideration in sentencing is the gravity of the criminal conduct;[1987] a sentence should reflect the inherent gravity of the crimes and the form and degree of responsibility of the accused for these crimes.[1988] In this connection, the Prosecution argues that the sentence imposed by the Trial Chamber is not proportionate to the gravity of the criminal conduct of Krajišnik. But the Prosecution also argues that the sentence imposed by the Trial Chamber fails to meet the objectives of retribution and deterrence. The Appeals Chamber is of the view that this last argument is in fact linked to the first one.

775. It is well established that, at the Tribunal and at the ICTR, retribution and deterrence are the main objectives of sentencing.[1989] As to retribution, the Appeals Chamber has explained that "[t]his is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes";[1990] retribution should be seen as

> an objective, reasoned and measured determination of an appropriate punishment which properly reflects the […] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.[1991]

[1985] Prosecution's Reply to *Amicus Curiae*, para. 15, referring to Trial Judgement, paras 1121(a), (b), (c), (d), and (k).
[1986] Prosecution's Reply to *Amicus Curiae*, paras 16-17.
[1987] *Nahimana et al.* Appeal Judgement, para. 1038; *Stakić* Appeal Judgement, paras 375, 380; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 18; *Čelebići* Appeal Judgement, paras 731, 847-849.
[1988] *Nahimana et al.* Appeal Judgement, para. 1038; *Limaj et al.* Appeal Judgement, para. 133; *Galić* Appeal Judgement, para. 409; *Stakić* Appeal Judgement, paras 375, 380; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 18; *Blaškić* Appeal Judgement, para. 683; *Čelebići* Appeal Judgement, paras 731, 847-849.
[1989] *Nahimana et al.* Appeal Judgement, para. 1057; *Stakić* Appeal Judgement, para. 402; *Deronjić* Judgement on Sentencing Appeal, paras 136-137; *Kordić and Čerkez* Appeal Judgement, para. 1074; *Čelebići* Appeal Judgement, para. 806. In the case at hand, the Trial Chamber duly noted that the objective of rehabilitation was less important than those of retribution and deterrence: Trial Judgement, para. 1138.
[1990] *Aleksovski* Appeal Judgement, para. 185.
[1991] *Kordić and Čerkez* Appeal Judgement, para. 1075, citing *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, para. 80 (emphasis in original).

Thus, retribution has to be understood in the more modern sense of "just desert" and the punishment has to be proportional to the gravity of the crime and the guilt of the accused.[1992] The Trial Chamber was clearly aware of these principles.[1993]

776. With respect to deterrence, a sentence should be adequate to discourage an accused from recidivism (individual deterrence) as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).[1994] Whether a sentence provides sufficient deterrence cannot be divorced from the gravity of the criminal conduct at hand. In other words, if the sentence is too lenient in comparison to the gravity of the criminal conduct, then it will not properly achieve the objective of deterrence.[1995]

777. Thus, both retribution and deterrence include a reference to proportionality with the criminal conduct. Further, the Appeals Chamber is of the view that a sentence proportional to the gravity of the criminal conduct will necessarily provide sufficient retribution and deterrence. As recognised by the Prosecution, "a Trial Chamber's duty is to impose punishment proportionate to the gravity of the crimes and the individual culpability of the accused. In this way, the sentencing principles of retribution and deterrence are met."[1996] The Appeals Chamber concludes that the Prosecution's assertions with respect to the objectives of retribution and deterrence in fact collapse into its arguments that the sentence imposed was not proportionate to the gravity of Krajišnik's conduct. The Appeals Chamber will now consider those arguments.

(i) Findings of the Trial Chamber

a. Gravity of the crimes

778. The Trial Chamber found Krajišnik liable for very serious crimes, noting in particular the following: 1) the killing (murder and extermination) of approximately 3,000 Bosnian Muslims and Bosnian Croats; 2) the forcible removal of more than 100,000 Bosnian Muslims and Croats from a

[1992] *Kordić and Čerkez* Appeal Judgement, para. 1075, citing with approval *Erdemović* 1996 Sentencing Judgement, para. 65.
[1993] Trial Judgement, para. 1135.
[1994] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 45; *Kordić and Čerkez* Appeal Judgement, paras 1076-1078. The Trial Chamber duly took notice of these principles: Trial Judgement, paras 1136-1137.
[1995] Similarly, a sentence should not be disproportionately severe in comparison to the criminal conduct at hand just to ensure maximum deterrence, as this would be unfair and contrary to the basic principle that an accused must be punished solely on the basis of his or her wrongdoing. It is in this sense that the Appeals Chamber has stated that the objective of deterrence should not be given undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal: *Kordić and Čerkez* Appeal Judgement, para. 1078; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 46; *Čelebići* Appeal Judgement, para. 801; *Aleksovski* Appeal Judgement, para. 185; *Tadić* Judgement on Sentencing Appeal, para. 48.
[1996] Prosecution's Appeal Brief, para. 15.

large area of Bosnia and Herzegovina;[1997] and 3) the campaign of persecution against non-Serbs which underlying acts included "killings; cruel and inhumane treatment, physical or psychological abuse, and sexual violence; unlawful detention; forced transfer and deportation; forced labour; intentional or wanton destruction of property; and plunder".[1998] The Trial Chamber also recalled that countless stories of brutality, violence and depravation had been brought to its attention.[1999]

779. Although the Appeals Chamber has held that the Trial Chamber erroneously imputed criminal liability for most of the crimes to Krajišnik, with respect to the remaining crimes it is still apposite to observe the Trial Chamber's statement that, when determining the relative seriousness of the crimes, it had to consider

> the number of people killed, the physical and mental trauma suffered and still felt by those who survived, and the consequences of the crimes for those close to the victims. The Chamber may also consider the economic and social consequences suffered by the targeted groups, including the consequences of destruction of the property of its members and their cultural and religious monuments.[2000]

The Trial Chamber added that it could "also take into account the special vulnerability of some victims, such as children, the elderly, the disabled or wounded, and those held in confinement".[2001] It then noted "the number of victims, their vulnerability and economic consequences for the region stemming from the crimes"[2002] and concluded that "[i]mmense suffering was inflicted upon the victims in this case, and the consequences that the crimes have had on the entire Muslim and Croat community in Bosnia-Herzegovina have been profound [… and] will persist in Bosnia-Herzegovina for decades, affecting hundreds of thousands of people."[2003]

[1997] Trial Judgement, paras 1143-1144.

[1998] Trial Judgement, para. 1145. *See* also para. 1144:

> Forcible removal in this case was part of the campaign of persecution, which began, at least in certain municipalities, with non-Serbs being fired from their jobs and being, in general, discriminated against. This process culminated in many tens of thousands of people being excluded from the economic and social life of their communities.

[1999] Trial Judgement, para. 1146.

[2000] Trial Judgement, para. 1148 (footnotes omitted).

[2001] Trial Judgement, para. 1149 (footnote omitted).

[2002] Trial Judgement, para. 1150, which continues:

> The Chamber adds that not only the targeted groups, but also others who did not participate in achieving the JCE objectives, including Serbs, suffered because of the crimes committed. Killings detailed in part 4 of this judgement were often overly brutal, showing unjustified hatred or appalling lack of concern. In detention centres, women and men, young and elderly, were held in cramped and poor hygienic conditions, at the mercy of their captors. While being held in inhumane living conditions, victims were beaten, raped, and subjected to psychological and physical abuse. More than one hundred thousand Bosnian Muslims and Bosnian Croats were forced to leave their homes. Many of them were forced to relinquish their property to Bosnian-Serb authorities, and were separated from their families. Their houses and places of worship were destroyed on a massive scale, their property abandoned to plunder.

[2003] Trial Judgement, para. 1151.

780. Finally, the Trial Chamber found that the criminal campaign spanned a long period of time and that crimes were committed in 35 municipalities of Bosnia and Herzegovina, which increased the seriousness of the criminal conduct.[2004]

b. Krajišnik's role in the commission of the crimes

781. The Trial Chamber found that Krajišnik's role in the commission of the crimes was crucial:

> As President of the Bosnian-Serb Assembly, member of the SDS Main Board, member of the SNB, and member of the Presidency, Momčilo Krajišnik played a vital role in implementing the objective to permanently remove Muslims and Croats from parts of Bosnia-Herzegovina. His positions gave him the possibility to propagate his views, as well as the authority to enable local authorities, military, police and paramilitary groups to implement the objective of the JCE. The fact that Momčilo Krajišnik was not a principal perpetrator of the crimes does not make him any less responsible.[2005]

The Trial Chamber added that "[a]s a political leader, holding several important public positions, Momčilo Krajišnik had a duty to tend to the well-being of the entire population" but that he "used his powers to implement a campaign of persecution against the Muslim and Croat populations, instead of protecting them".[2006]

(ii) Discussion

782. As noted above, the Trial Chamber expressly noted that the crimes for which Krajišnik was convicted were very serious, and that Krajišnik played a crucial role in their commission. The Prosecution does not point to any element which would have been omitted by the Trial Chamber in determining the sentence; it only argues that the sentence does not properly reflect the gravity of Krajišnik's criminal conduct and fails to ensure sufficient retribution and deterrence. However, the Appeals Chamber cannot conclude that the Trial Chamber abused its discretion or imposed a manifestly inadequate sentence. A sentence of imprisonment of 27 years is a very serious sentence, especially when the advanced age of Krajišnik is taken into account.[2007] As such, it cannot be said that the sentence imposed completely fails to reflect the seriousness of Krajišnik's criminal conduct or that it does not express the outrage of the international community and that it is grossly insufficient to ensure deterrence. Therefore, the sentence imposed on Krajišnik cannot be said to fall outside the range of sentences available to the Trial Chamber.

[2004] Trial Judgement, para. 1153.
[2005] Trial Judgement, para. 1158.
[2006] Trial Judgement, para. 1159. *See* also para. 1160.
[2007] As noted above (para. 2), Krajišnik was born in 1945 and is now 64 years old. If he were to serve his entire sentence, he would only be released in 2027 at the age of 82.

783. Nor can it be said that the sentence is manifestly inadequate in light of the disparities with the sentences imposed in other cases, notably the *Stakić* and *Brđanin* cases. Indeed, the very fact that Trial Chambers are entitled to a margin of discretion in sentencing matters implies that some disparity is possible, even between cases involving similar facts. In this connection, the Appeals Chamber notes that the sentence imposed in the present case (27 years) and that ultimately imposed in the *Brđanin* case (30 years[2008]) are in the same range. Further, the Appeals Chamber recalls that Trial Chambers must tailor the penalties to fit the individual circumstances of the accused and the gravity of the criminal conduct;[2009] therefore, the comparison between the sentences imposed in different cases is generally of limited assistance.[2010] Here in particular, considering the differences in the personal circumstances between Krajišnik and those prevailing in the *Stakić* case,[2011] the Appeals Chamber does not find that the former is "out of reasonable proportion" with the latter.[2012] The Prosecution's first sub-ground is therefore dismissed.

2. Sub-ground 2

(a) Alleged error in failing to consider aggravating circumstances separately from the gravity of the offence

(i) Submissions

784. The Prosecution alleges that the Trial Chamber erred in its application of Rule 101(B) of the Rules by failing to consider aggravating circumstances separately from the gravity of the offence, considering instead "any factors which may increase or decrease the relative seriousness of his conduct" in its assessment of inherent gravity in order to "avoid the risk of double counting".[2013] According to the Prosecution, this error led the Trial Chamber to deny itself the opportunity to use the aggravating circumstances to increase the sentence or to negate the effects of the mitigating factors. The Prosecution mentions the following factors which it says the Trial Chamber should have considered as aggravating factors (rather than factors "increasing seriousness"): Krajišnik's

[2008] *Brđanin* Appeal Judgement, para. 506.
[2009] *Nahimana et al.* Appeal Judgement, para. 1046; *Stakić* Appeal Judgement, para. 375; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 9; *Krstić* Appeal Judgement, para. 248; *Čelebići* Appeal Judgement, para. 717.
[2010] *Nahimana et al.* Appeal Judgement, para. 1046; *Limaj et al.* Appeal Judgement, para. 135; *Blagojević and Jokić* Appeal Judgement, para. 333; *Momir Nikolić* Judgement on Sentencing Appeal, para. 38; *Babić* Judgement on Sentencing Appeal, para. 32; *Semanza* Appeal Judgement, para. 394; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19; *Jelisić* Appeal Judgement, para. 101; *Čelebići* Appeal Judgement, paras 719, 821.
[2011] For instance, the accused in the *Stakić* case was born in 1962 (*Stakić* Appeal Judgement, para. 2) and was ultimately sentenced to 40 years. If he were to serve his entire sentence, he would only be released in 2041 at the age of 79. If Krajišnik were to serve his entire sentence, he would only be released in 2027 at the age of 82. *See* also *Stakić* Appeal Judgement, para. 413 (noting various forms of participation – which were not found in the present case – as aggravating circumstances).
[2012] *Strugar* Appeal Judgement, para. 349.
[2013] Prosecution's Appeal Brief, para. 45, citing Trial Judgement, para. 1140.

education and professional background, the abuse of his position of power and his role in planning the joint criminal enterprise over a significant period.[2014]

785. Krajišnik does not respond to these arguments. *Amicus Curiae* responds that it makes "little practical difference whether the factors increasing the seriousness of the offending were taken into account when considering the overall gravity of the offences or whether they were considered at a later stage of the sentencing exercise under the separate heading of žaggravating factors'". *Amicus Curiae* adds:

> It is not contested that an accused's education and professional background, the abuse of positions of power, and involvement in the planning of features concerned with the subsequent commission of offences are capable of being considered as aggravating factors. However, these factors are also capable (in the alternative) of increasing the gravity of the offences since they are relevant to evaluating an individual accused's role in the crimes for which he has been convicted.[2015]

(ii) Analysis

786. The Trial Chamber considered that "[s]eeking to analyse the gravity of the crimes and any aggravating circumstances separately would be an artificial exercise"[2016] and explained that it was going to "examine the crimes of which Momčilo Krajišnik has been convicted to assess their inherent gravity, together with any factors which may increase or decrease the relative seriousness of his conduct" to avoid the risk of double-counting any specific factor.[2017] As to factors increasing the seriousness of Krajišnik's conduct, the Trial Chamber specifically noted that Krajišnik was an educated man and that he had abused his powers and his public positions.[2018]

787. The Appeals Chamber is of the view that, while a Trial Chamber should strive to distinguish between the gravity of the criminal conduct and the aggravating circumstances,[2019] it might be difficult or artificial to separate the two in some cases. For instance, in the present case, Krajišnik's contribution to the crimes of the JCE is precisely his abuse of his powers and public positions; this element arguably concerns both the "gravity of the criminal conduct" and the "aggravating circumstances". What is important is to avoid double-counting (*i.e.*, no factor should be taken into account twice in sentencing); this, the Trial Chamber clearly did. Nevertheless, the Appeals

[2014] Prosecution's Appeal Brief, paras 46-49.
[2015] *Amicus Curiae*'s Response, paras 39-40. *See* also para. 41.
[2016] Trial Judgement, para. 1139, with reference to *Bralo* Sentencing Judgement, para. 27.
[2017] Trial Judgement, para. 1140, with reference to *Deronjić* Judgement on Sentencing Appeal, para. 106.
[2018] Trial Judgement, paras 1158-1160. Contrary to what the Prosecution seems to assert (Prosecution's Appeal Brief, para. 47), the Trial Chamber did not explicitly note that Krajišnik's "role in planning the joint criminal enterprise over a significant period" increased the seriousness of his conduct, although it noted that the criminal campaign spanned a long period of time and that this increased the relative seriousness of the criminal conduct: Trial Judgement, para. 1153.
[2019] In particular because the gravity of the offence is, as noted above, the "litmus test". Further, a separate analysis shows that both the gravity of the offence and the aggravating circumstances were considered, as is requested by Article 24 of the Statute and Rule 101 of the Rules.

Chamber cannot conclude that the Trial Chamber erred in its application of Rule 101(B) of the Rules by not considering separately the gravity of the offence and the aggravating circumstances.

(b) Alleged error in considering irrelevant and extraneous factors in mitigation

(i) Submissions

788. The Prosecution argues that no mitigating factors in this case justified the imposition of anything less than life imprisonment and that the factors which the Trial Chamber took into account in mitigation were irrelevant and extraneous.[2020] The Prosecution first submits that "[t]he Trial Chamber's decision to give some weight in mitigation to the history of inter-ethnic conflict and tension and the awareness that violence was not used exclusively by Bosnian Serbs highlights its failure to recognise the importance of the objectives of retribution and deterrence. In addition, it contradicts its own factual findings."[2021] In this connection, the Prosecution alleges:

- Ethnic tension and conflict cannot mitigate Krajišnik's culpability as the Trial Chamber found that Krajišnik "used historic and current inter-ethnic violence to justify his campaign of persecution, extermination, deportation, murder and other inhumane acts";[2022]

- "International humanitarian law serves to regulate situations of conflict. If mitigatory credit is allowed for the existence of the conflict itself and the difficulties inevitably faced in wartime, it will undermine the very reason for the existence of this body of law in the first place";[2023]

- "To permit historical wrongs and past or current crimes to mitigate the [Appellant's] sentence in any way, however slight, creates a dangerous precedent because it signals to others that they may be partially insulated from the consequences of their criminality by events the type of which the Tribunal is attempting to end".[2024]

789. The Prosecution avers next that the Trial Chamber erred in taking Krajišnik's age in mitigation. The Prosecution contends that, from the point of view of retribution, Krajišnik's age is not mitigatory because 1) his age is not particularly advanced (48 years old at the time of the crimes and 61 years old at the time of sentence), nor is it combined with any health issues; and 2) his relative age is a shared characteristic with most of those sentenced by the Tribunal. The Prosecution adds that one would expect leaders holding high office to be of a similar age as Krajišnik and that

[2020] Prosecution's Appeal Brief, para. 51.
[2021] Prosecution's Appeal Brief, para. 52.
[2022] Prosecution's Appeal Brief, para. 53, referring to Trial Judgement, paras 43, 45. *See* also Prosecution's Appeal Brief, para. 54. The Prosecution adds that ethnic tension and conflict may only be relevant in mitigation where an individual has been dramatically personally affected by the conflict prior to the commission of crimes, but that this is not the case with Krajišnik (Prosecution's Appeal Brief, para. 53).
[2023] Prosecution's Appeal Brief, para. 55, referring to *Bralo* Sentencing Judgement, para. 52, and to *Blaškić* Appeal Judgement, para. 711.
[2024] Prosecution's Appeal Brief, para. 56.

"[g]eneral deterrence requires that leaders in this age range not receive mitigation on account of age when sentenced for the most serious international crimes committed during the height of their political or military power."[2025]

790. Third, the Prosecution submits that the Trial Chamber erroneously gave Krajišnik credit twice for the time spent in detention.[2026]

791. Finally, the Prosecution maintains that the Trial Chamber should not have given credit in mitigation to Krajišnik's failure to abscond.[2027] The Prosecution argues that the fact that an accused did not attempt to abscond has never been recognised as a mitigatory factor in the jurisprudence of the Tribunal; only voluntary surrender has been considered as mitigating because it is an intentional and positive act of co-operation with the Prosecution.[2028] The Prosecution submits that, in the case at hand, the Indictment had been sealed and the Trial Chamber's finding that Krajišnik was "most likely aware that charges might be brought against him" but nevertheless did not abscond was unfounded and impermissible speculation. The Prosecution adds that, in any case, the decision not to abscond cannot be considered in mitigation as it does not amount to co-operation.[2029]

792. Krajišnik does not respond to these arguments. *Amicus Curiae* responds that the Trial Chamber found that the personal circumstances of Krajišnik had an almost negligible effect on the sentence.[2030] He thus appears to argue that, if any error was committed by the Trial Chamber in identifying factors in mitigation, such error did not have an impact on the sentence.[2031] *Amicus Curiae* also submits that the Trial Chamber could properly take Krajišnik's age into account because 1) the natural physical deterioration associated with advanced years makes serving the same sentence of imprisonment harder for an older person, and 2) an older offender may have little worthwhile life left upon release. According to *Amicus Curiae*, "[t]he reality of this case is that it is doubtful whether Mr. Krajišnik will live to see his release from custody given that he is already in his sixties".[2032] *Amicus Curiae* further submits that, contrary to the Prosecution's assertions, 1) age has also been taken into consideration for men in their sixties at the time of sentencing in at least two cases, 2) there is no principle that limits the consideration of age to cases in which there is evidence of current ill-health, and 3) Trial Chambers are not precluded from considering the advanced age of those who occupied senior positions on the basis that one would normally reach

[2025] Prosecution's Appeal Brief, paras 57-60.
[2026] Prosecution's Appeal Brief, para. 61, referring to Trial Judgement, paras 1166, 1168, 1180.
[2027] Prosecution's Appeal Brief, paras 62-65.
[2028] Prosecution's Appeal Brief, para. 62, referring to *Blagojević and Jokić* Trial Judgement, para. 857.
[2029] Prosecution's Appeal Brief, paras 63-65.
[2030] *Amicus Curiae*'s Response, para. 43, referring to Trial Judgement, para. 1168.
[2031] In this connection, *see Amicus Curiae*'s Response, paras 48, 50-51.
[2032] *Amicus Curiae*'s Response, paras 46-47.

those positions in older age.[2033] *Amicus Curiae* finally denies that there was any double-counting of the time spent in custody[2034] or that the Trial Chamber assessed as a full mitigating factor the fact that Krajišnik did not attempt to evade justice.[2035]

793. The Prosecution replies that the fact that a sentenced person might die in prison is not recognised as a mitigating factor.[2036]

(ii) Analysis

794. Under the heading "Individual circumstances of Momčilo Krajišnik", the Trial Chamber found *inter alia*:

- Krajišnik's age should be considered when imposing a sentence.[2037] In this connection, the Trial Chamber explained that "[t]he rationale for mitigation based on age rests on the fact that physical deterioration associated with advanced years makes serving the same sentence harder for an older person. Moreover, an older person may have few years left to be lived in freedom, upon release";[2038]

- even though his Indictment was sealed until the day of his arrest, "Momčilo Krajišnik was most likely aware that charges might be brought against him. He nevertheless did not attempt to abscond. This element has a very limited impact in his favour when imposing a sentence";[2039]

- "Momčilo Krajišnik spent a long period in detention, between his arrest on 3 April 2000 and 3 February 2004, when his trial started";[2040]

- "The evidence the Chamber received on the history of the conflict and on the growing inter-ethnic tensions preceding it, as well as the awareness that violence was not used exclusively by Bosnian Serbs, has led the Chamber to an understanding of the conflict in which Momčilo Krajišnik committed the crimes. The totality of the conduct which the Chamber has considered comprises these circumstances".[2041]

The Trial Chamber then stated that "[w]hile each of the above-mentioned factors by itself, does not constitute a mitigating circumstance, taken together these factors amount to personal circumstances of a kind which may be accorded some, although very limited, weight in mitigation."[2042]

[2033] *Amicus Curiae*'s Response, paras 47-48.
[2034] In this connection, *Amicus Curiae* argues that, at paragraph 1168 of the Trial Judgement, the Trial Chamber emphasised that none of the factors it identified amounted, standing alone, to a mitigating factor: *Amicus Curiae*'s Response, para. 49.
[2035] *Amicus Curiae*'s Response, para. 50.
[2036] Prosecution's Reply to *Amicus Curiae*, para. 18.
[2037] Trial Judgement, para. 1164.
[2038] Trial Judgement, para. 1162, referring to *Plavšić* Sentencing Judgement, para. 105.
[2039] Trial Judgement, para. 1165.
[2040] Trial Judgement, para. 1166.
[2041] Trial Judgement, para. 1167.
[2042] Trial Judgement, para. 1168.

795. The Appeals Chamber is puzzled by this formulation. A factor is either a mitigating circumstance or it is not. If it is not, it cannot be taken in mitigation even when considered with other factors which do not either constitute mitigating circumstances. The Trial Chamber should have specified which elements constituted in its view mitigating circumstances. That would have allowed the convicted person to understand its reasoning more clearly, and the Appeals Chamber to exercise its review properly. Nevertheless, even if the Appeals Chamber were to find that the Trial Chamber erred in retaining some of the above-mentioned factors in mitigation,[2043] it would still not be clear that such error had any impact on sentence imposed, as the Trial Chamber itself stated that it accorded very limited weight in mitigation to these factors.[2044] Thus, the Appeals Chamber could not in any case conclude that the Prosecution has demonstrated an error which invalidates the decision on the sentence. This argument of the Prosecution is thus rejected without further analysis.

3. Conclusion

796. For the foregoing reasons, the Prosecution's ground of appeal relating to the sentence is dismissed.

E. Considerations of the Appeals Chamber

797. The Trial Chamber convicted Krajišnik pursuant to Article 7(1) of the Statute for Counts 3 (persecution), 4 (extermination), 5 (murder), 7 (deportation) and 8 (inhumane acts (forced transfer)). The Trial Chamber convicted Krajišnik on five counts of the Indictment and imposed a single sentence of 27 years' imprisonment. The Appeals Chamber has granted Krajišnik's and *Amicus Curiae*'s appeals in part and has as a result significantly revised the findings of the Trial Chamber. While Krajišnik's convictions for three counts of the Indictment (persecution; deportation; inhumane acts (forced transfer)) remain intact, the Trial Chamber erroneously imputed criminal liability to Krajišnik for two other counts and most of the crimes mentioned in Parts 4 and 5 of the Trial Judgement.

798. The Appeals Chamber recalls that in some cases, the circumstances have warranted it to ascertain itself whether the Trial Chamber's findings on their own or in combination with relevant evidence sustain the conviction.[2045] Given the factually complex circumstances of this case, an

[2043] In this regard, it is quite obvious that the time already spent in detention should not be considered in mitigation, but that credit therefor should be given pursuant to Rule 101(C) of the Rules. Further, the Appeals Chamber has already held that it sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants: *Blaškić* Appeal Judgement, para. 711; *see* also *Bralo* Appeal Judgement, paras 13, 29.
[2044] Trial Judgement, para. 1168.
[2045] *See Simić* Appeal Judgement, paras 75, 84; *Kordić and Čerkez* Appeal Judgement, paras 385-386; *Blaškić* Appeal Judgement, paras 659, 662; *Aleksovski* Appeal Judgement, paras 170-172.

appellate assessment of the crimes for which the Trial Chamber erroneously imputed criminal liability to Krajišnik would require the Appeals Chamber to re-evaluate the entire trial record. However, an appeal is not a trial *de novo* and the Appeals Chamber cannot be expected to act as a primary trier of fact, as it is not, as a general rule, in the best position to assess the reliability and credibility of the evidence.[2046]

799. While Rule 117(C) of the Rules vests the Appeals Chamber with discretion to order a retrial in appropriate circumstances, the Appeals Chamber is not obliged, having identified an error, to remit the case for retrial. An order for retrial is an exceptional measure to which resort must necessarily be limited.[2047] The Appeals Chamber notes that the convictions for the majority of crimes, of which Krajišnik had been found guilty, have been quashed. However, convictions for persecution, deportation and forcible transfer have been upheld, and the gravity of these crimes requires a severe and proportionate sentence. Therefore, in the circumstances of this particular case, the Appeals Chamber considers that it is not in the interests of justice to remit the case for further proceedings.

800. Like the Trial Chamber, the Appeals Chamber has no doubt that grave crimes were committed against Bosnian Muslims and Bosnian Croats in large areas of Bosnia and Herzegovina between April 1992 and December 1992. However, proof that crimes have occurred is not sufficient to sustain a conviction of an individual: Criminal proceedings require evidence establishing beyond reasonable doubt that the accused is responsible for the crimes before a conviction can be entered. Where an accused is charged with JCE liability, the Prosecution must, *inter alia*, prove beyond reasonable doubt that the participants in the JCE had the *mens rea* with respect to the common objective which amounts to or involves the commission of a statutory crime.[2048] The Trial Chamber made insufficient findings on this fundamental element.

801. The Appeals Chamber will now determine the adequate sentence for the crimes which were correctly imputed to Krajišnik.

1. The adequate sentence for Krajišnik

(a) The applicable purposes of sentencing

802. The relevant provisions when determining a sentence are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. In imposing a sentence, the Appeals Chamber has consistently

[2046] *See supra* II.A.
[2047] *Cf. Muvunyi* Appeal Judgement, para. 148, and *Jelisić* Appeal Judgement, para. 77.
[2048] *See Tadić* Appeal Judgement, para. 227.

held that the following purposes of sentencing shall be considered: (i) individual and general deterrence; (ii) individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced; (iii) retribution; (iv) public reprobation and stigmatisation by the international community; and (v) rehabilitation.[2049]

803. In relation to retribution and deterrence, the Appeals Chamber stated in *Čelebići* that

> the Appeals Chamber (and the Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution.[2050]

(i) Retribution

804. The Appeals Chamber recalls that retribution should not be misunderstood as a way of expressing revenge or vengeance,[2051] but rather as

> an objective, reasoned and measured determination of an appropriate punishment which properly reflects the […] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.[2052]

Thus, retribution has to be understood as "just deserts".[2053]

(ii) Deterrence

805. While the aim of individual deterrence is to impose a sentence in order to dissuade the convicted person from re-offending once he has served his sentence and has been released, general deterrence refers to a sentence's effect to dissuade other potential perpetrators from committing the same or a similar crimes.[2054] It is important to note, however, that this sentencing factor must not be given "undue prominence" when determining a sentence.[2055]

(iii) Rehabilitation

806. The Appeals Chamber recalls its finding in *Čelebići* that

> although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in

[2049] *Blaškić* Appeal Judgement, para. 678 (with further references).
[2050] *Čelebići* Appeal Judgement, para. 806 (footnotes omitted).
[2051] *Kordić and Čerkez* Appeal Judgement, para. 1075.
[2052] *Ibid*., with reference to *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, para. 80 (emphasis in original).
[2053] *Erdemović* 1996 Sentencing Judgement, para. 65.
[2054] *Kordić and Čerkez* Appeal Judgement, paras 1076-1078.
[2055] *Čelebići* Appeal Judgement, para. 801.

> sentencing, this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.[2056]

In the light of the gravity of many of the crimes under the International Tribunal's jurisdiction, the weight of rehabilitative considerations may be limited in some cases.[2057]

(iv) Individual and general affirmative prevention

807. The educational function of a sentence imposed by the Tribunal aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances, and in doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.[2058]

808. The Appeals Chamber recalls that all the above mentioned sentencing purposes constitute the matrix in which the proportionate sentence is meted out, based on the sentencing factors as provided for in Article 24 of the Statute and Rule 101 of the Rules.

(b) Article 24 of the Statute and Rule 101 of the Rules

809. In imposing a sentence, the following factors are among those that have to be taken into consideration: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the crime(s) or the totality of the accused's conduct; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal.[2059]

810. The Appeals Chamber recalls that as a principle, the individual guilt of each accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits that are defined by the individual guilt.[2060]

(i) The general practice regarding prison sentences in the courts of the former Yugoslavia

811. It is established in the Tribunal's jurisprudence that while the sentencing practices in the former Yugoslavia have to be considered when determining the appropriate sentence, they are not binding upon the Tribunal.[2061]

[2056] *Čelebići* Appeal Judgement, para. 806 (emphasis in original; footnote omitted), referring to Article 10(3) ICCPR; *General Comment* 21/44 U.N.GAOR, Human Rights Committee, 47th Sess., para. 10, UN Doc. CCPR/C/21/Rev.1/Add.3(1992); Article 5(6) ACHR.
[2057] *Cf. Blaškić* Trial Judgement, para. 782.
[2058] *Kordić and Čerkez* Appeal Judgement, paras 1080-1082.
[2059] *Cf. Blaškić* Appeal Judgement, para. 679.
[2060] *Kordić and Čerkez* Appeal Judgement, para. 1087.

812. The Appeals Chamber notes that Articles 141 through 156 of Chapter XVI of the Criminal Code of the SFRY of 1976/77 regulated the general aspects of criminal law and some specific offences, such as genocide and war crimes perpetrated against the civilian population. Such crimes were punishable with imprisonment of a minimum of five years and with the death penalty as a maximum. The latter could be substituted by punishment of imprisonment for a term of 20 years pursuant to Article 38(2) of the Criminal Code of the SFRY.[2062]

(ii) The gravity of the crime(s) of the totality of an accused's conduct

813. The Appeals Chamber considers the crimes of which Krajišnik has been found guilty as being among the most severe crimes known to mankind: persecution; deportation; and inhumane acts (forcible transfer).

(iii) The individual circumstances of an accused, including aggravating and mitigating circumstances

814. The Appeals Chamber has identified the following aggravating circumstances that were proven beyond reasonable doubt: (i) Krajišnik's position as a member of the Bosnian-Serb leadership; (ii) the number and vulnerability of many of the victims; and (iii) the time period in which the crimes were committed.

815. The Appeals Chamber has upheld the Trial Chamber's findings that Krajišnik intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations, and that he was "number two" in terms of power and influence in the Republika Srpska.[2063] Furthermore, the Appeals Chamber has upheld Krajišnik's convictions for deportation in Zvornik, Banja Luka and Prnjavor, and for forcible transfer in Bijeljina, Bratunac, Zvornik, Bosanska Krupa, Sanski Most, Trnovo and Sokolac, as well as for persecution on the basis of the afore-mentioned crimes. These crimes encompass the forcible displacement of several thousands of Muslim and Croat civilians, among them women, children and elderly persons, throughout the period of April to December 1992.[2064]

816. The Appeals Chamber considers the following mitigating circumstances were proven on the balance of probabilities: (i) some efforts by Krajišnik to provide help to non-Serb individuals;[2065]

[2061] *Blaškić* Appeal Judgement, paras 681-82, referring to *Čelebići* Appeal Judgement, paras 813, 816; *Kunarac et al.* Appeal Judgement, para. 377; *Jelisić* Appeal Judgement, paras 116-117.
[2062] *Kordić and Čerkez* Appeal Judgement, para. 1086, with further reference.
[2063] *See supra* F.3.
[2064] *See* Trial Judgement, paras 366, 380, 392, 504, 507 (deportation); *ibid.* paras 309, 314, 365, 402, 533, 593, 693 (forcible transfer).
[2065] *See* Trial Judgement, para. 1163.

(ii) the fact that Krajišnik did not have a prior criminal record; (iii) his good conduct in detention; and (iv) his age and family circumstances.[2066]

817. In particular, the Appeals Chamber considers Krajišnik's sporadic assistance in releasing non-Serb individuals from detention and the fact that he brought medication to Muslim individuals he knew. In addition, Krajišnik had humanitarian aid distributed evenly among different ethnicities in July 1992 in Sarajevo.[2067] However, the Appeals Chamber finds that in light of the gravity of the crimes set out above, these mitigating factors can only have a limited impact on the sentence.

(iv) Credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal

818. Krajišnik has been detained since his arrest on 3 April 2000. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for the time spent in detention, which at the date of this judgement amounts to 3271 days.

2. Conclusion

819. For the foregoing reasons, the Appeals Chamber sentences Krajišnik to 20 years of imprisonment.

[2066] *See* Trial Judgement, para. 1164.
[2067] Trial Judgement, para. 1163.

VI. DISPOSITION

820. 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 *Amicus Curiae* and the arguments they presented at the appeal hearing on 21 August 2008;

SITTING in open session;

GRANTS sub-ground 3(A) submitted by *Amicus Curiae*;

GRANTS, in part, sub-grounds 3(B), 3(E), 3(G) and grounds 4 and 7 submitted by *Amicus Curiae*;

DISMISSES, Judge Güney dissenting in relation to ground 10, the remainder of the grounds of appeal submitted by *Amicus Curiae*;

GRANTS the third ground of appeal of the Dershowitz Brief in part;

DISMISSES the remainder of Krajišnik's appeal;

REVERSES Krajišnik's convictions under Counts 4 and 5;

REVERSES, in part, Krajišnik's convictions under Counts 3, 7 and 8;

DISMISSES the Prosecution's ground of appeal related to the sentence;

SENTENCES Krajišnik to 20 years of imprisonment to run as of this day, subject to credit being given under Rule 101(C) and Rule 107 of the Rules for the period Krajišnik has already spent in detention since his arrest on 3 April 2000;

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

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

_____	_____
Judge Fausto Pocar, Presiding	Judge Mohamed Shahabuddeen

_____	_____	_____
Judge Mehmet Güney	Judge Andrésia Vaz	Judge Theodor Meron

Judge Mohamed Shahabuddeen appends a separate opinion.

Dated this seventeenth day of March 2009,
At The Hague,
The Netherlands

[Seal of the Tribunal]

VII. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A. Preliminary

1. Despite reservations on some aspects of the reasoning of this understandably lengthy judgement, I agree with its conclusions. Except for one reservation (which I mention below), this separate opinion is directed to explaining the reasons which disable me from accepting the Appellant's arguments on joint criminal enterprise (JCE).

2. The excepted reservation concerns the Appeals Chamber's finding that the Trial Chamber was "impermissibly vague" in speaking of the "rank and file" of the JCE to the extent that the persons concerned were not specifically named in paragraph 1088 of the Trial Judgement.[1] What happened was that paragraph 7 of the Indictment referred, in several lines, to various people in a certain relationship. Thereupon, the Trial Chamber, rather than setting out the full reference repetitiously, used the phrase "rank and file". It was clear that the phrase was not intended to include every conceivable person who might be thought of as "rank and file" but only those within the description given in the Indictment. However, I do not feel strongly enough to dissent on the point, given the strength of the contrary position taken by respected Colleagues.

3. As to the main point of this separate opinion, the Appellant himself had not physically perpetrated any of the crimes for which he was charged. Nor does the Prosecution so assert. Its case is that the Appellant's liability is founded on JCE, a doctrine which it says applies in customary international law. Counsel for the Appellant questions that.[2] The Appeals Chamber has more than once answered the question raised by counsel for the Appellant against the contention addressed by him, particularly in *Tadić*[3] and *Ojdanić*.[4] The Appellant does not accept that answer; his counsel opposes it with vigour.

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[1] Appeal Judgement, para. 157.

[2] *Amicus Curiae* is apparently not arguing this; his contention is that JCE was not correctly applied. As a general point, I recall my opposition against the *locus standi* of *amicus curiae* to bring an appeal in his own right. However, I am not pursuing the point and abide by the contrary view of the Appeals Chamber. *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amicus Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, Separate Opinion of Judge Shahabuddeen, paras 4, 5 and 6.

[3] *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

[4] *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, 21 May 2003 ("*Ojdanić* Decision on Joint Criminal Enterprise").

4. It is temptingly easy to throw politics into the discussion. A suggestion[5] that politics might have had something to do with the work of the Trial Chamber was made on behalf of the appellant but was withdrawn, creditably, by Mr. Alan Dershowitz at the oral hearings in the Appeals Chamber.[6]

5. The Appellant has not shown any cogent reasons in the interests of justice why the previous holdings of the Appeals Chamber should be departed from, within the meaning of the settled practice of the Appeals Chamber as laid down by it in *Aleksovski.*[7] A similar point was taken in *Ojdanić*[8] and upheld there. In that case, no cogent reasons in the interests of justice warranting a departure were shown; in this respect, the present case is not different. However, if I am wrong in that, I shall proceed with the substance of the case.

6. Before going into the substance, there is an initial point to be noticed. Learned counsel for the Appellant submits that there "is a general scholarly consensus that the *Tadić* Appeals Chamber's reading of the relevant precedents was flawed".[9] The Tribunal takes into consideration scholarly writings in ascertaining the law. I acknowledge the helpfulness of such writings.[10] The circumstance that, according to counsel, there "is a general scholarly consensus" supportive of his arguments is, no doubt, intended to enhance that helpfulness by reason of the consensus. But is counsel entitled to argue that there is such a consensus?

7. The Prosecution submits that counsel for the Appellant cites only two articles[11] in support of his argument that there is a "general scholarly consensus" that the Appeals Chamber's reading of the precedents is "flawed"; that, says the Prosecution, is not sufficient to establish that there is such a general scholarly consensus. The Prosecution is correct in so far as it says that counsel for the Appellant has cited only two articles. But, while it is sparing to mention only two articles in support

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[5] On behalf of the appellant, counsel said: "Perhaps politics dictated one result in one case, and another elsewhere". *See Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, dated 4 April 2008, filed 7 April 2008 ("Dershowitz Brief"), para. 30.
[6] AT. 233.
[7] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, paras 107-108. The *Aleksovski* principle rests on practice, not on law. The decisions of the Appeals Chamber may provide precedents but not in the sense of binding precedents. The doctrine of *stare decisis*, which *Aleksovski* mimics, does not apply in international law.
[8] *Ojdanić* Decision on Joint Criminal Enterprise, paras 18 and 30. *See* also *Prosecutor v. Mitar Vasiljević,* Case No. IT-98-32-A, Judgement, 25 February 2004, para. 95, and *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 405.
[9] Dershowitz Brief, para. 13.
[10] The Tribunal in practice seldom refers to such writings. *See* William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2006) 107-112. However, such writings are taken into account. The British House of Lords also refers to the writings of distinguished academics. *See R. v. Woollin*, [1999] 1 A.C. 82, 94.
[11] *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-A, Response to Brief on Joint Criminal Enterprise on Behalf of Momčilo Krajišnik, 25 April 2008, para. 5. The interesting article by Jenny S. Martinez & Allison Marston Danner,

of a sweeping proposition that there "is a general scholarly consensus that the *Tadić* Appeals Chamber's reading of the relevant precedents was flawed", the economy of references is relieved by the fact that those two articles refer to other works critical of *Tadić*.

8. In my view, the Appellant is entitled to argue that there is such a consensus. However, it is not really necessary to determine whether he is correct. This is because, assuming that there is such a consensus, the consensus is not well founded. The following are my reasons for that conclusion.

B. The general doctrine of JCE

1. The Appellant's general attack on JCE

9. The substance of the Appellant's submissions is addressed to the general question whether JCE is known to customary international law, as distinguished from the validity of any particular category of JCE. The Trial Judgement did refer to categories 1 and 3 of JCE,[12] but the Appellant's attack is directed to the basic form of JCE. It is in this broad sense that the matter will be approached in this part, criticisms other than those made by the Appellant being also taken into account.

2. JCE is not an additional mode of liability but is part of an existing mode of liability

10. The burden of the Appellant's argument is that JCE is a mode of liability in addition to the modes of liability prescribed by Article 7(1) of the Statute and that the Tribunal cannot add to the prescribed modes. The argument rests on a misunderstanding.

11. I agree with the Appellant that the Tribunal cannot add to the modes of liability prescribed by the Statute, since to do so would illegally amend the Statute. But I am not satisfied that JCE is an additional mode of liability which could only be noticed if the Statute were first amended by the Security Council to provide for it. It is part of an existing mode of liability, namely, committing a prescribed crime; it is not a new mode of liability. The Appeals Chamber "regards joint criminal enterprise as a form of žcommission' pursuant to Article 7(1) of the Statute".[13]

12. Forms of "commission" may vary. JCE describes one form of "commission". In *Tadić* and *Ojdanić*, the Appeals Chamber assisted the reader by explaining that possible forms of commission included acting through the machinery of a JCE. Thus, JCE was regarded as one method by which a prescribed mode of liability ("committing") could be accomplished. In that sense, JCE can no doubt

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Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75 (2005) was considered in useful papers appearing in 5 J. Int'l Crim. J. (2007) 69-108.

[12] *See*, e.g., *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, para. 1096.

be described as a mode of liability. But it is not a mode of liability *in addition* to the modes of liability now prescribed by the Statute; as said above, it is part of an existing mode of liability.

13. The Statute, a brief document, uses concepts without embroidery. It prescribes modes of liability but has not furnished details that may be required to decide whether those modes of liability have been satisfied in a particular case. It is easy to see that details may be required in deciding whether an accused has been engaged in planning, instigating, ordering or committing a prescribed crime, or aiding and abetting in the planning, preparation or execution of it – modes of liability prescribed by Article 7(1) of the Statute. The Statute is to be taken as authorising the Tribunal to interpret these modes of liability and to say what concrete actions will constitute them. An interpretation given by the Tribunal will not be faulted just because it uses an unlisted term.

14. In relation to "committing", for example, a question may arise whether murder is committed only by a person who pulls the trigger, or whether a person who requests him to do so has also *committed* murder. There may be a similar question where the shooting is done by a member of a plurality of persons who agree that they, or any of them, would do the shooting; would a member other than the actual shooter be guilty of *committing* murder?

15. The Tribunal may be justly regarded as authorised by the Statute to give reasonable answers to these questions, as indeed is the general practice of courts; if the Tribunal answers the questions in the affirmative, as I expect it will, its answers would be eminently authorised by the Statute. In both of the above cases, what the Tribunal will be doing is to interpret a single authorised mode of liability, namely, "committing" murder, as embracing two different methods of acting; the Tribunal will not be instituting a mode of liability on top of that authorised mode of liability.

3. The fact that the Statute does not mention JCE does not show that JCE is not permitted as a form of "commission"

16. In amplification of his arguments, counsel for the Appellant submits that the Statute nowhere mentions JCE. That is true; the point was made before the Appeals Chamber in *Ojdanić*.[14] Article 7(1) speaks of a "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute […]". JCE is not referred to. Therefore, contends counsel for the Appellant, the Tribunal cannot competently adjudicate on the basis of JCE.

[13] *Ojdanić* Decision on Joint Criminal Enterprise, para. 20.
[14] *Ibid.*, para. 13.

17. Again, the assumption of the argument is that JCE is a mode of liability additional to the modes of liability prescribed by Article 7(1) of the Statute. It is not. It is merely a method of executing one of those modes, i.e., "committing". It is a term used by the Tribunal to refer to that method. The fact therefore that Article 7(1) of the Statute does not mention JCE is not relevant, as was correctly held by the Appeals Chamber to be the case in *Ojdanić*.[15]

4. JCE does not render nugatory the other prescribed modes of liability

18. The Appellant also argues that "[r]eading žcommitted' to include JCE liability renders nugatory the other modes of liability explicitly listed in Article 7(1)" of the Statute.[16] That must mean that "committing" by JCE would include, say, planning, ordering or instigating – these being other modes of liability listed in that provision. But it is not easy to see how JCE as a method of "committing" will suffice to make it unnecessary to prove an act of planning or an act of ordering or an act of instigating in a prosecution for planning or ordering or instigating. Features peculiar to each mode of liability must always be proved; the distinguishing features of an act of "planning" or of an act of "ordering" or of an act of "instigating" are not comprehended by the use of JCE as a method of "committing".

5. JCE is not a crime of membership of a designated criminal organisation

19. The matter is clouded by a propensity to assimilate committing a crime by acting through a JCE to the World War II crime of membership of a designated criminal organisation. The Tribunal has no jurisdiction over any crime of membership of a designated criminal organisation. So, on the assumption that committing a crime by acting through a JCE is the same thing as the crime of membership of a designated criminal organisation, it is said that the Tribunal can have no jurisdiction over the former. That is an interesting argument, but its assumption is not correct.

20. Committing a crime of membership of a designated criminal organisation is not the same thing as committing a crime by acting through a JCE. The two ideas were distinguished in *Ojdanić*.[17] In the former case, the crime is perfected on proof of membership of an organisation designated by a competent authority; membership of the designated organisation is itself a crime. In the latter case, no organisation is designated; criminality is not complete on proof of membership of a group; there has to be proof of a common purpose to commit a stipulated crime and of participation, through the machinery of the group, in the perpetration of that crime.

[15] *Ibid.*, para. 19.
[16] Dershowitz Brief, para. 20.
[17] *Ojdanić* Decision on Joint Criminal Enterprise, paras 25 and 26.

21. This area of argument does have the virtue of reminding the Tribunal of its standing duty to be watchful of the risk of finding guilt by association. In the circumstances of the case, it would however be debasing the currency to use that duty as a battering ram.

6. JCE is distinguishable from conspiracy

22. As the Appeals Chamber made clear in *Ojdanić*, liability through JCE is also different from liability through conspiracy.[18] Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a JCE requires, in addition to such a showing, proof that the parties to that agreement took action in furtherance of that agreement.[19] In other words, liability based on JCE requires that crimes have actually been committed[20] – a distinction borne out in the fact that this mode of liability is a form of commission. Thus, as the Appeals Chamber pointed out, "even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of žcommission' pursuant to Article 7(1) of the Statute".[21]

7. The arguments of counsel in another case are admissible in proving what is customary international law

23. Referring to *Tadić,*[22] counsel for the Appellant submits that "a review of that precedent reveals that the *Tadić* Chamber took wide latitude in its interpretation, repeatedly – and unsoundly – inferring the bases for liability from isolated statements by the prosecutors, when a clear judicial statement was unavailable".[23] It is not possible to deny the forcefulness of learned counsel's submission; the question is whether the submission is correct.

24. Counsel's submission does not overcome a view that, in searching World War II cases for evidence of customary international law, the Appeals Chamber was competent, particularly "when a clear judicial statement was unavailable", to examine the statements of counsel engaged in those cases to ascertain how the court in fact proceeded; courts sometimes do that. The arguments of counsel are given in the better law reports of some jurisdictions before the judgement is laid out. That practice, where it applies, is not an ornamental flourish on the part of the reporter: counsels' arguments help appreciation of what the issues were. Thus, it cannot be wrong to refer to counsel's

[18] *Ibid*., para. 23.
[19] *Ibid.*, para. 23, citing *XV Law Reports of Trials of War Criminals*, pp. 95 and 97. The United Nations War Crimes Commission stated that "the difference between a charge of conspiracy and one of acting in pursuant of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it." *Ibid*., pp. 97-98.
[20] *Ojdanić* Decision on Joint Criminal Enterprise, para. 23.
[21] *Ibid*.
[22] *Tadić* Appeal Judgement.

arguments. As to the statements being "isolated", the material question is whether they correctly reflected customary international law.

8. The size of victim groups is not determinative of what was customary international law

25. Counsel for the Appellant also quotes a statement of two writers (referring to the 1999 Judgement of the Appeals Chamber in *Tadić*[24]) on "unlawful killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople".[25] There the stress is placed on the smallness of the victim group. In the search of World War II cases for evidence of customary international law, the size of the victim group does not necessarily matter: the principles regulating the attacking group's responsibility do.

9. The control test makes no difference

26. In some legal systems, the responsibility of the accused for a group crime may be based on the notion of control,[26] giving rise to the concept of co-perpetration. On the basis of such control, the accused may be found guilty though he was far removed from the scene of the actual crime. Thus, accused "behind the scenes" have been made criminally responsible.[27] The literature regards that as a significant consequence of co-perpetratorship, and so it is. But it is a consequence which flows equally from the principles of JCE. So here, there seems to be a quarrel of words, rather than a difference of substance.

10. Commingling of civil law and common law concepts does not detract from the soundness of JCE

27. The foregoing leads to an examination of the contention of learned counsel for the Appellant that "JCE doctrine indiscriminately combines both civil law concepts and common law categories".[28] The contention seems to presage a strong submission. Coming to it, counsel cites an article by Cassese and says that that distinguished jurist "has acknowledged that the confusion resulting from combining analytically distinct concepts žmay have contributed to misgivings or

[23] Dershowitz Brief, para. 12.
[24] *Tadić* Appeal Judgement.
[25] Dershowitz Brief, para. 14, citing Jenny S. Martinez and Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 110 (2005).
[26] Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed. (Berlin and New York, 1994), 278.
[27] *See* the *Politbüro* case (BGHSt, 40, pp. 236ff, 26 July 1974), which concerned the criminal responsibility of East German high political officials for the killings of escaping citizens, and *Videla and others*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, Docket No. 13, 9 December 1985, which concerned the criminal responsibility of Argentine leaders for "disappearances". Both cases involved accused who were "behind the scenes".
[28] Dershowitz Brief, para. 55.

misinterpretation'."[29] In that article Cassese immediately adds a passage not reproduced in learned counsel's submission. The passage reads: "The fact remains, however, that the fundamentals of the doctrine are solid, and the use of slightly misleading language does not detract from the basic soundness of the concept".[30] I agree.

11. Cassese did not later resile from his support for JCE

28. Counsel for the Appellant relies on various statements made by Professor Cassese.[31] It is feared that this may give the impression that Cassese supports counsel's challenge to JCE. I pause to observe that Cassese was a member of the 1999 *Tadić* Appeals Chamber[32] which *unanimously* put forward the idea of JCE that is now under attack; *Tadić* is of course the *locus classicus* of the doctrine within the Tribunal. Cassese has not resiled from his support in that case for the principle of JCE.[33] In addition, I note that Cassese recently outlined the reasons for his support (including international law sources) of the doctrine of JCE in an *amicus curiae* brief submitted by him and members of the board of editors and editorial committee of the *Journal of International Criminal Justice* to the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia.[34] Those reasons are consistent with the foregoing.

C. Category III of JCE

29. Categories 1 and 2 of JCE may be regarded as subsumed by the foregoing remarks on the general doctrine of JCE. It is appropriate to deal specifically with category III as this has come in for particular criticism, it being said that the category allows for conviction of a crime of specific intent without need for proof of intent.

30. In a prefatory way, it may be noted that counsel for the Appellant submitted that JCE "has much in common with American notions of *Pinkerton* liability (vicarious liability for foreseeable crimes committed in furtherance of the conspiracy)".[35] These doctrines, he says, "are controversial even in the United States because of žtheir elasticity'".[36] However, the similarity is overstated.

[29] Dershowitz Brief, para. 55.
[30] Cassese, *The Proper Limits of Individual Responsibility*, 115.
[31] Dershowitz Brief, paras 36, 55, 62, 63.
[32] *Tadić* Appeal Judgement.
[33] Cassese's conclusion of the article cited is entitled "The Notion at Issue Has Passed the Test of Judicial Scrutiny", wherein he shows general support for the principle of JCE while exhorting judges to examine evidence of its existence in a given case with care. Cassese, *The Proper Limits of Individual Responsibility*, 133.
[34] Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 27 October 2008.
[35] Dershowitz Brief, para. 53, referring to *Pinkerton v. United States*, 328 U.S. 640 (1946). *See* in this connection, Jens Meierhenrich, *Conspiracy in International Law*, 2 Annu. Rev. Law Soc. Sci. 341-57 (2006).
[36] Dershowitz Brief, para. 54.

31. In *Tadić*, the Appeals Chamber did take note of the *Pinkerton* case in a footnote,[37] but only as one of a number of examples of cases in both civil law and common law jurisdictions in which liability has been recognised for all persons taking part in a common criminal plan or enterprise for crimes committed outside the common plan that were nonetheless foreseeable.[38] Further, the Appeals Chamber emphasised that "reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems".[39] The basis for the Appeals Chamber's finding that JCE liability was founded in international customary law was the "consistency and cogency of the case law and the treaties" referred to earlier in its discussion.[40] So, there is need to be careful in comparing JCE with *Pinkerton* liability.

32. With regard to the question of intent, I offer two solutions. They are put forward on the basis that references to the primary offender are references to the actual perpetrator of the additional crime; references to the secondary offender are references to the member of the JCE who had foresight of the risk of an additional crime being committed by the primary offender and was willing to take that risk. Also, I shall be referring to English cases, not of course by way of authority,[41] but only as illustrating general juridical verities. On this footing, I put forward the following two positions:

a). Assuming that proof of intent is required, the secondary offender may acquire the intent of the primary offender to commit the additional crime and be convicted for it.

b). In the alternative, the normal requirement to prove intent is removed by the law relating to accessories or by the objects of the criminal law

1. <u>Assuming that proof of intent is required, the secondary offender may acquire the intent of the primary offender to commit the additional crime and be convicted for it.</u>

33. In his speech in the British House of Lords in *Powell*,[42] Lord Steyn said that the "established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater

[37] *Tadić* Appeal Judgement, footnote 289.
[38] *Ibid*., para. 224 and accompanying footnotes, referring to cases in France, Italy, England and Wales, Canada, the United States, Australia and Zambia.
[39] *Ibid*., para. 225.
[40] *Ibid*, para. 226; paras 185-223.
[41] Largely, it seems to me, as a matter of internal discipline and not because of any general principle of binding precedent, it has been decided by the Appeals Chamber that Trial Chambers must follow the decisions of the Appeals Chamber, but it is hard to see any exemption from the general principle that there is no doctrine of binding precedent in international law. There are elements of the Tribunal's jurisprudence which mimic that general principle.
[42] [1999] 1 A.C. 1, 12-13.

criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend". Or, as it was put in the same case by Lord Hutton, "when two parties embark on a joint criminal enterprise one party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise even if he has not tacitly agreed to that act".[43] There would be the seeming anomaly noted by Lord Steyn when he observed, "At first glance […] it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence".[44] So those views, which are not singular to one jurisdiction, are on the basis that the secondary offender is responsible for the additional crime committed by the primary offender although the secondary offender himself lacked intent, having only foresight.

34. It is recognised that foresight, while technically different from intent, can be *evidence* of intent.[45] In *Hancock*,[46] Lord Scarman, referring to *Moloney*,[47] said:

> [T]he House [of Lords] made it absolutely clear that foresight of consequences is no more than evidence of the existence of intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention, though it may be a fact from which when considered with all the other evidence a jury may think it right to infer the necessary intent.

However, the jurisprudential development is in the direction of eliminating any distinction between foresight and intent. Where the foresight of the secondary offender was not that of a disinterested onlooker, but that of a person who identified with the outcome, and where the relevant act or acts were not "wholly outside the subject-matter of the concerted agreement",[48] it is myopic to aver that the secondary offender did not acquire the intent of the primary offender.

35. According to *Tadić*,[49] "the event must have been predictable";[50] murder may occur where there is a "forcible removal of civilians at gunpoint";[51] in the *Borkum* case, the murder convictions were presumably "on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault";[52] in the *Manelli* case, the Italian Court of Cassation said "he

[43] *Ibid.*, 20; and *see* 18.
[44] *Ibid*., at 14.
[45] *Ibid.*, at 22.
[46] *R. v. Hancock* [1986] A.C. 455, 471-472.
[47] *R. v. Moloney* [1985] A.C. 905.
[48] *R. v. Smith (Wesley),* [1963] 1 WLR 1200, 1205F, Slade J.
[49] *Tadić* Appeal Judgement.
[50] *Ibid.,* para. 218.
[51] *Ibid*., para. 204.
[52] *Ibid*., para. 213.

who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of the intended offence, […]".[53]

36. The emphasis has been on the need for proof of circumstances from which the additional crime perpetrated by the primary offender could, in the judgement of the trial court, be regarded by the secondary offender as a "logical development" of the first crime. The situation must be such as to associate the secondary offender with the intent of the primary offender to commit the additional crime. How far is the secondary offender from outrightly acquiring the intent of the primary offender?

37. As it was correctly said in *Tadić*, "more than negligence is required";[54] it must be a case in which "the accused *willingly took [the] risk*"[55] that an additional crime would be committed. What does *"willingly*" taking the risk mean? A reasonable interpretation is that the secondary offender *"willingly"* takes the risk of an additional crime being committed by the primary offender if the secondary offender accepts the crime, if committed, as being also his crime. So, in putting forward the idea of the third category, *Tadić* did not have in mind foresight and intent as wholly separate notions; it assumed a vital link between them.

38. To illustrate, *Tadić* concerned a case in which it was "foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians".[56] A secondary offender, being engaged in a JCE for the forcible removal of the civilians at *gunpoint* and being therefore aware of the risk of death resulting from the execution of the JCE by that dangerous method, is identified with the intent of the primary offender who causes a death in the course of such a removal. The requirement that there should be this connection between foreseeability on the part of the secondary offender and intent on the part of the primary offender removes the substance of the criticism that the secondary offender is being convicted of a crime in respect of which he lacks the necessary intent.

39. The position is apt to be obscured by the concept of recklessness. Lord Steyn noted that "[r]ecklessness may suffice in the case of the secondary party but it does not in the case of the primary offender";[57] the primary offender has to be shown to have had intent. But what if the particular circumstances adduced to show the "recklessness" of the secondary offender actually show something more on his part? To adopt the explanation given by Sir John Smith, a leading

[53] *Giustizia penale*, 1950, Part II, cols. 696-697 cited in *Tadić* Appeal Judgement, para. 218.
[54] *Tadić* Appeal Judgement, para. 220.
[55] *Ibid.*, para. 228. Emphasis in original.
[56] *Ibid.*, para. 204.
[57] *R. v. Powell*, [1999] 1 A.C. 1, 14.

English jurist, in the case of murder (which requires proof of specific intent[58]), the secondary offender "must be proved to have been reckless, not merely whether death might be caused, but whether murder might be committed; he must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused *intentionally* […]".[59]

40. Thus, the foresight required of the secondary offender is not at large; it has to be of the intent of the primary offender such that the secondary offender may be taken to agree to the commission by the primary offender of the additional crime if particular circumstances were to arise. Explaining this in the British House of Lords, Lord Mustill said in *Powell*:[60]

> Throughout the modern history of the law on secondary criminal liability (at least of the type with which this appeal is concerned) the responsibility of the secondary defendant has been founded on his participation in a *joint enterprise* of which the commission of the crime by the principal offender formed part. Any doubts on this score were set at rest by *Reg. v. Anderson*; *Reg. v. Morris* [1966] 2 Q.B. 110 by reference to which countless juries have been directed over the years. As it seemed to me the House should not depart from this long-established principle without the strongest reasons. The problem is to accommodate in the principle the foresight of the secondary party about what the main offender might do. Two aspects of this problem are simple. If S did not foresee what was actually done by P he is not liable for it, since it could not have been part of any *joint enterprise*. This is what the court decided in *Reg. v. Anderson*; *Reg. v. Morris*. Conversely, if S did foresee P's act [S being the secondary offender, P being the primary offender] this would always, as a matter of common sense, be relevant to the jury's decision on whether it formed part of a course of action to which both S and P *agreed*, albeit often on the basis that the action would be taken if particular circumstances should arise.[61]

41. An accused who, though guilty of the first crime, is not guilty of an additional crime committed by the primary offender if he does not foresee it or if the additional crime is wholly outside the ambit of the JCE. It is otherwise if he foresees a crime within that ambit being committed by the primary offender in addition to the crime originally agreed. Why? Because, as Lord Mustill explained, the additional crime would have "formed part of a course of action to which both [the secondary offender and the primary offender] *agreed,* albeit often on the basis that the action would be taken if particular circumstances should arise".[62] The secondary offender being *agreed* with the primary offender on the commission of the additional crime, the secondary offender acquires the primary offender's intent to commit that crime. The commission of the additional crime was part of the joint enterprise within the meaning of that term as used by Lord Mustill in

[58] Murder is a crime of specific intent. *See Archbold Criminal Pleading, Evidence and Practice 2007* (London, 2007), paras 17-35(a) and 17-37 and *Blackstone's Criminal Practice 2007* (Oxford, 2007), para. B1.11(a).
[59] Sir John Smith, *Criminal Liability of Accessories: Law and Law Reform*, 113 L.Q.R. 453, 464 (1997), cited by Lord Steyn in *R. v. Powell,* [1999] 1 A.C.1, 13-14 (emphasis added).
[60] [1999] 1 A.C. 1, 10-11.
[61] *Ibid.,* italics added to the words "joint enterprise" and the word "agreed".
[62] Emphasis added.

Powell.[63] It has to be remembered that in international law, even more than in national law, it is the substance which matters.[64]

42. The Tribunal has been reminded of the consequences of "a failure to understand the philosophical significance of knowledge and intentionality in criminal law theory".[65] However, it is not knowledge alone which is concerned here; it is knowledge coupled with willingness to take the risk of the crime being committed by the primary offender. That willingness forms a sufficiently substantial link between knowledge and intent to justify the secondary offender being regarded as sharing the intent of the primary offender and so liable to be convicted for the additional crime perpetrated by the latter.

2. In the alternative, the normal requirement to prove intent is removed by the law relating to accessories or by the objects of the criminal law

43. Alternatively, accepting that there is a distinction between foresight and intent,[66] the distinction does not lead to the acquittal of the secondary offender. It has been said that "[f]oresight and intention are not synonymous terms".[67] A man may have foresight of an event but no intention to cause it to happen. Thus, it is said that the secondary offender may have foresight of the additional crime perpetrated by the primary offender, but that foresight, not being intent, does not justify the conviction of the secondary offender for the additional crime. Proof of intent being a general[68] requirement of the criminal law, how is the conviction to be justified?

44. The answer is that proof of intent is simply not required in these cases. This proposition stands on two legs: The first is the law, namely, the law relating to accessories. The second is the policy of the law relating to the objects of the criminal law.

45. As to the exclusion of the normal requirement for proof of intent by the effect of the law relating to accessories, it is useful to bear in mind that, as the cases demonstrate, "it does not follow that žintent' has precisely the same meaning in every context in the criminal law".[69] As explained in *Powell*, liability in these cases is founded on the accessory principle, which is one of general

[63] [1999] 1 A.C. 1, at 10-11.
[64] *Barcelona Traction, Light and Power Company Ltd,* Preliminary Objections, ICJ Reports 1964, pp. 62-63, Judge Koo; *Barcelona Traction, Light and Power Company Ltd,* Second Phase, I.C.J. Reports 1970, p. 127, Judge Tanaka.
[65] Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim J. 69, 79 (2007).
[66] *See Archbold Criminal Pleading, Evidence and Practice 2007* (London, 2007), para. 17-35(b).
[67] *R. v. Powell* [1999] 1 A.C.1, 13.
[68] It may be a necessary implication of a statute that intent is not required for a crime, as in cases of "strict liability" offences. *See Warner v. Metropolitan Police Commissioner* [1969] 2 A.C. 256.
[69] Lord Steyn in *R. v. Woollin* [1999] 1 A.C. 82, 90.

application in criminal law.[70] "Under the accessory principle criminal liability is dependent on proof of subjective foresight on the part of a participant in the criminal enterprise that the primary offender might commit a greater offence".[71] In contrast to the general requirement of the criminal law relating to intent, "foresight is a necessary and sufficient ground of the liability of accessories".[72]

46. Thus, an aider and abettor is guilty of the full crime[73] though, on established jurisprudence, he did not intend the commission of that crime; intention to commit the full crime is not in fact consistent with aiding and abetting it. It is not necessary to give examples from national law; the principle appears from Article 7(1) of the Statute, which reads:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation of execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The aider and abettor is "responsible for the crime" (that is, the full crime). He commits the full crime although he did not intend to commit it – as he would not in a case of aiding and abetting. All that he would have had was foresight.

47. As earlier mentioned, in *Powell* Lord Steyn said, "At first glance […] it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence".[74] But there is no anomaly when it is borne in mind that cases which stress the need for proof of intent concerned the primary offender.[75] In the case of the secondary offender, the applicable principle is that deriving from accessory liability, under which foresight is enough.

48. As to the exclusion of the normal requirement for proof of intent by the objects of the criminal law, dealing with the seeming anomaly referred to above, Lord Steyn explained:

> The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it

[70] *R. v. Powell* [1999] 1 A.C.1, 12.
[71] *Ibid.*, 12.
[72] *Ibid.*, 13, Lord Steyn.
[73] *See*, for example, s. 8 of the Accessories and Abettors Act 1861 (U.K.), providing: "Whoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender".
[74] *R. v. Powell* [1999] 1 A.C.1, 14.
[75] *Ibid.,* 13.

> would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law [which it is not necessary to elaborate here] must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.[76]

49. There are references here to the accessory principle; but a wider view is also apparent. Lord Steyn's statement that the "criminal justice system exists to control crime" refers to a reality which the law must take into account. It is the criminal justice system, as it is, which international criminal law enforces, and not an intellectual construct or a logical remake of what the system should be. In *Powell*, Lord Hutton likewise observed:

> I recognise that as a matter of logic there is force in the argument advanced on behalf of the Appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *Reg. v. Majewski* [1977] A.C. 443,482E, in rejecting criticism based on strict logic of a rule of the common law, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic."[77]

In short, Lord Hutton considered that "there are practical considerations of weight and importance related to considerations of public policy […] which prevail over considerations of strict logic".[78]

50. As recalled above, the explanation of Lord Steyn was that it "is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder",[79] i.e., although he lacked the specific intent to murder. "The liability is imposed because the secondary party [through the JCE] is assisting in and encouraging a criminal enterprise which he is aware might result in the commission of a greater offence".[80] In such a case, even if the secondary offender does not acquire the primary offender's intent, that does not mean that the secondary offender cannot be convicted of the primary offender's crime.

51. The common sense of a practical solution overbears preoccupation with dried and parched categories of erudite discussions: these might lead to an elegant new model which however fails to deliver what is needed by the criminal law as a system of social control. "The life of the law is not

[76] *Ibid.,* 23.
[77] *Ibid.*, 25.
[78] *Ibid.* This point was made by Antonio Cassese in Cassese, *The Proper Limits of Individual Responsibility*, 117-119.
[79] *R.v. Powell,* [1999] 1 A.C. 1, 14.
[80] *Ibid.*

logic, but experience", said Holmes.[81] That well-known aphorism does not mean that logic has no place in the law: as the cases will easily attest, it has. What the statement means is that logic has to be applied to the fruits of experience; when so applied, logic supports the conclusion reached by Lord Steyn and Lord Hutton to the effect that the objects of the criminal law exclude the normal requirement for proof of specific intent in these cases.

52. The position reached is that the normal requirement for proof of specific intent is removed by operation of the law relating to accessories. Alternatively, it is removed by the true objects of the criminal law. It is with the implementation of the objects of the criminal law that the case is concerned.

D. Conclusion

53. As in domestic law, in international criminal law the accused need not be proved to have personally fired the fatal shot. Personal culpability is essential to guilt, but, under notions of criminal responsibility which are generally shared and are undoubtedly part of international criminal law, the want of evidence of direct action by the accused does not necessarily affect his "personal culpability". If "A" asks "B" to shoot "C", "A" has personal culpability for the resulting death of "C" although "A" never wielded any weapon; that is true the world over. It is difficult to see any principled difference where "A" agrees with a group that the group or some member of it will kill "C" or cause "C" to be killed. I have no doubt that the principle of JCE (the exact term is not important) is universally known and is part of customary international law.

54. JCE is not new. A look at the books will show that, in some national systems, there have been various words for the concept,[82] including the precise term "joint criminal enterprise".[83] Internationally, the substantive components of the term were not made up by the Appeals Chamber – they existed before the Chamber was established. It is generally recognised that the doctrine has its roots in World War II cases. Stressing the substance, as it must, international law will find the essential elements of JCE throughout the world. The concept deserves better than to be reduced to a term of intellectual abuse.

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[81] Oliver Wendell Holmes, *The Common Law* (Boston, 1881) 1, a remark which has spawned much commentary. *See* also the comments of Lord Steyn and Lord Hutton in *R. v. Powell* [1999] 1 A.C.1, 14 and 25. For the view that the judicial function is an art, *see* Sir Robert Y. Jennings, "The Judicial Function and the Rule of Law in International Relations", in *International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, Vol. III (Milan, 1987) 148.

[82] *See Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24 and *Ojdanić* Decision on Joint Criminal Enterprise, Separate Opinion of Judge Shahabuddeen, paras 4 and 5.

[83] The term "joint criminal enterprise" was repeatedly used in 1997 in a House of Lords judgement. *See* Lord Steyn in *R. v. Powell* [1999] 1 A.C.1, 12, 14, 15, and Lord Hutton, first paragraph of his speech. The fact that the case dates from 1997 is not relevant; the term as used looks back on previous practice.

55. The Appellant's arguments are interesting, but they rest on a misunderstanding and lead to needless inflation of illegality. I am not persuaded.

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

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Mohamed Shahabuddeen

Dated this 17th day of March 2009,
At The Hague, The Netherlands.

[Seal of the International Tribunal]

VIII. ANNEX A: PROCEDURAL BACKGROUND

1. The Trial Chamber delivered its Judgement in this case on 27 September 2006.[1] Both Krajišnik and the Prosecution filed an appeal against the Trial Judgement. In addition, as explained below, an *Amicus Curiae* was authorised to file a separate appeal. The main aspects of the appeal proceedings are summarised hereafter.[2]

A. Composition of the Appeals Chamber

2. On 26 October 2006, the then President of the Tribunal assigned the following Judges to the Appeals Bench in this case: Judge Fausto Pocar, Presiding and Pre-Appeal Judge; Judge Mohamed Shahabuddeen; Judge Andrésia Vaz; Judge Theodor Meron; and Judge Wolfgang Schomburg.[3] Judge Wolfgang Schomburg was assigned as Pre-Appeal Judge by order of the then President issued on 2 November 2006.[4] On 16 May 2007, Judge Mehmet Güney was assigned to replace Judge Wolfgang Schomburg; Judge Theodor Meron was assigned as Pre-Appeal Judge.[5]

B. Representation of Krajišnik

3. On 2 October 2006, Krajišnik informed representatives of the Registrar that he did not wish to be represented on appeal by his trial counsel, and selected a counsel that was not on, and could not be added to, the Registrar's list of counsel qualified to represent indigent suspects.[6] On 19 October 2006, Krajišnik proposed the name of a counsel from the United States,[7] but this counsel ultimately did not consent to his assignment to the case in accordance with the Directive on the assignment of defence counsel.[8] On 6 December 2006, taking into account that counsel had still not been assigned, that Krajišnik's Notice of Appeal was due 30 days after the assignment of counsel[9], and that a status conference was scheduled for Monday 11 December 2006, the Pre-

[1] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("Trial Judgement").
[2] No mention will be made here of the various motions filed by third parties to obtain access to and use confidential material from the present case in other proceedings.
[3] Order Assigning Judges to a Case before the Appeals Chamber and Appointing a Pre-Appeal Judge, 26 October 2006.
[4] Order Reassigning a Pre-Appeal Judge in a Case before the Appeals Chamber, 2 November 2006.
[5] Order Replacing a Judge in a Case before the Appeals Chamber and Reassigning a Pre-Appeal Judge, 16 May 2007.
[6] *See* Decision of the Registrar, 8 December 2006, p. 1. Mr. Krajišnik selected Mr. Deyan Ranko Brashich. This person had previously been withdrawn as Mr. Krajišnik's lead counsel because he had been suspended from practice for a year by the New York authorities: *see Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision of the Registrar, 2 May 2003). Further, disciplinary proceedings initiated by the Registrar against Mr. Brashich were still pending (the Disciplinary Board eventually found that Mr. Brashich had violated Article 35(v) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal: *see* In the Matter of Mr Deyan Ranko Brashich, Attorney at Law from the United States (filed in *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A), Decision in the Appeal by the Registrar to the Disciplinary Board (Decision of the Disciplinary Board), 22 March 2007).
[7] Mr. Alan Dershowitz.
[8] *See* Decision of the Registrar, 8 December 2006, p. 1. The problems surrounding the assignment of Mr. Dershowitz to the present case were discussed at the Status Conference of 11 December 2006 (AT. 3-4, 7-10).
[9] *See* Decision on Request for Extension of Time to File Notice of Appeal, 26 October 2006.

Appeal Judge instructed the Registry to assign permanent counsel to Krajišnik before 8 December 2006.[10] On that date, the Registrar appointed Mr. Colin Nicholls QC as permanent counsel to Krajišnik.[11]

4. At the Status Conference held on 11 December 2006, Mr. Nicholls explained that Krajišnik wished to represent himself since his preferred counsel had not been assigned.[12] The Pre-Appeal Judge issued an oral decision confirming the Registrar's decision to assign Mr. Nicholls.[13] On 18 December 2006, Mr. Nicholls requested certification to appeal that decision;[14] the Pre-Appeal Judge referred this request to the full bench of the Appeals Chamber.[15] Krajišnik also filed an appeal against the assignment of Mr. Nicholls.[16]

5. On 27 December 2006, Mr. Nicholls filed a request to the President and a motion to the Appeals Chamber, both seeking review of the decisions of the Registry appointing him as lead counsel to Krajišnik.[17] The request to the President was dismissed in its entirety;[18] the motion was dismissed in part, the Appeals Chamber remaining seized of the request pertaining to self-representation by Krajišnik.[19]

[10] *See* Decision of the Registrar, 8 December 2006, p. 2.
[11] Decision of the Registrar, 8 December 2006, p. 2. The Registrar explained that Mr. Krajišnik refused to select a counsel from a list that had been provided to him; Mr. Nicholls, who was on the list and had agreed to be assigned as Mr. Krajišnik's counsel was thus assigned.
[12] Status Conference on Appeal, AT. 3-4.
[13] Status Conference on Appeal, AT. 12-14.
[14] Request for Certification to Appeal Against the Oral Decision of Pre-Appeal Judge Schomburg Affirming the Registrar's Decision to Assign Counsel to Mr Krajišnik, 18 December 2006.
[15] Order on Referral of Request pursuant to Rules 65 *ter*(J) and 107, 20 December 2006.
[16] Notification of Appeal Against the Assignment of Colin Nicholls, dated 15 December 2006, the English translation of the notification having been filed on 18 January 2007 and the translation of the appeal itself having been filed on 2 February 2007 (Confidential).
[17] Request for Review by the President of the Decisions of the Registry in Relation to Assignment of Counsel, 27 December 2006 (corrected on 5 January 2007: Corrigendum to "Request for Review by the President of the Decisions of the Registry in relation to Assignment of Counsel"); Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel, 27 December 2006 (corrected on 5 January 2007: Corrigendum to "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel"). The Registrar filed submissions in response (Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions on Assignment of Counsel, 16 January 2007; Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions in Relation to Assignment of Counsel, 17 January 2007), to which Counsel Nicholls replied on 26 January 2007 (Response to "Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions in Relation to Assignment of Counsel"; Response to "Registrar's Submission on Counsel's Request for Review of the Registrar's Decisions on Assignment of Counsel").
[18] Decision on Request for Review of the Decision of the Registry in relation to Assignment of Counsel, 1 February 2007.
[19] Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007.

6. On 2 January 2007, in light of Krajišnik's request to represent himself, Mr. Nicholls filed a motion seeking his assignment as *Amicus Curiae* rather than counsel.[20] Mr. Nicholls later filed some clarifications to this motion.[21]

7. During a Status Conference held on 26 March 2007, the Pre-Appeal Judge invited Mr. Nicholls and the Prosecution to file further submissions on the issue of self-representation on appeal,[22] which they did.[23] On 11 May 2007, the Appeals Chamber issued a decision recognising Krajišnik's right to self-represent and granted the motions filed by Mr. Nicholls concerning the assignment of an *Amicus Curiae*.[24] In particular, the *Amicus Curiae* was invited to "make submissions to the Appeals Chamber similar to those which a party would make (including a notice of appeal, appeal brief, response brief, and reply brief)."[25] Following that decision, the Deputy Registrar withdrew the assignment of Mr. Nicholls as counsel for Krajišnik[26] and, after the Appeals Chamber had given certain clarifications concerning the appointment of an *Amicus Curiae*,[27] the Deputy Registrar assigned Mr. Nicholls as *Amicus Curiae*.[28]

8. On 21 February 2008, Krajišnik filed a motion seeking, *inter alia*, authorisation from the Appeals Chamber to retain the services of attorney Alan Dershowitz to prepare a brief on the subject of joint criminal enterprise.[29] This was granted by the Appeals Chamber on 28 February 2008.[30] On 29 February 2008, the Prosecution filed a motion for clarification and reconsideration of this decision.[31] The Appeals Chamber granted that motion in part.[32] Krajišnik then requested an

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[20] Motion Requesting Assignment as *Amici Curiae*, 2 January 2007.
[21] Motion regarding Proposed Assignment as *Amicus*, 12 April 2007.
[22] Status Conference on Appeal, AT. 42, 49.
[23] Further Submissions relating to Self-Representation on Appeal, 2 April 2007; Prosecution's Submissions in relation to the Right to Self-Representation and the Role of *Amicus Curiae* in Appellate Proceedings, 2 April 2007 (corrected on 3 April 2007: Prosecution's Corrigendum Re Submissions).
[24] Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 ("Decision of 11 May 2007"). A "Corrigendum to Dissenting Opinion" was filed on 16 May 2007.
[25] Decision of 11 May 2007, para. 21, which also specified that "the word counts for *Amicus Curiae* are limited to two-thirds of those available to the parties under the Practice Direction on the Length of Briefs and Motions".
[26] Decision of the Deputy Registrar, 17 May 2007.
[27] Decision regarding Registry Submission of 18 May 2007, 25 May 2007. The Registrar had previously filed written submissions seeking some clarifications: Registry Submission pursuant to Rule 33(B) of the Rules and Request for Clarification regarding the Appointment of *Amicus Curiae*, dated 17 May 2007 but filed on 18 May 2007; Addendum to Registry Submission Pursuant to Rule 33(B) of the Rules and Request for Clarification regarding the Appointment of *Amicus Curiae*, 23 May 2007.
[28] Decision of the Deputy Registrar, 8 June 2007.
[29] Motion of Momčilo Krajišnik to Reschedule the Date of Status Conference and for Permission for Alan Dershowitz to Make a Special Appearance, dated 21 February 2008, its English translation having been filed on 22 February 2008.
[30] Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008.
[31] Prosecution Motion for Clarification and Reconsideration of the Appeals Chamber's "Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear" (with confidential annexes), 29 February 2008.
[32] Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, 11 March 2008.

extension of time for the filing of Mr. Alan Dershowitz's brief,[33] a request that was rejected by the Appeals Chamber on 27 March 2008.[34] The Pre-Appeal Judge nevertheless granted a short extension of time during a status conference held on 31 March 2008.[35] On 4 April 2008, the Deputy Registrar decided "to admit Mr. Dershowitz to represent the Accused before the Tribunal in accordance with the parameters of the Appeals Chamber Decision".[36]

9. On 2 September 2008, Mr. Alan Dershowitz requested permission for Mr. Nathan Dershowitz to act as counsel with himself on behalf of Krajišnik on the issue of JCE and to conduct an interview of Radovan Karadžić with respect to a possible motion pursuant to Rule 115 of the Rules.[37] The Appeals Chamber granted the motion in part and allowed Mr. Nathan Dershowitz to approach the Registry at the earliest opportunity with a view to be appointed as co-counsel on the matter of JCE in compliance with Rule 44 of the Rules.[38] On 12 September 2008, the Deputy Registrar decided to permit Mr. Nathan Dershowitz to represent Krajišnik before the Tribunal with respect to the issue of JCE.[39]

C. Notices of Appeal and Briefs

1. Prosecution's Appeal

10. The Prosecution filed its Notice of Appeal on 26 October 2006[40] and its Appeal Brief on 27 November 2006.[41] After the Pre-Appeal Judge had granted two motions for extension of time for the filing of the response,[42] Mr. Nicholls[43] and Krajišnik[44] responded separately on 12 February 2007. The Prosecution replied to the response filed by Mr. Nicholls on 22 February 2007[45] and,

[33] Motion of Momčilo Krajišnik to Reschedule the Filing of Mr. Alan Dershowitz's Submission on Joint Criminal Enterprise, dated 20 March 2008, the English translation having been filed on 26 March 2008.
[34] Decision on Mr. Krajišnik's Motion to Reschedule the Deadline for Submission of Mr. Dershowitz's Supplementary Brief, 27 March 2008.
[35] Status Conference on Appeal, AT. 143. The Pre-Appeal Judge ordered that the supplementary brief of Mr. Dershowitz be filed no later than 7 April 2008.
[36] Decision of the Deputy Registrar, 4 April 2008, p. 2.
[37] Motion A) for Permission for Nathan Z. Dershowitz to Act as Counsel with Alan M. Dershowitz on Behalf of Mr. Momčilo Krajišnik on the Issue of JCE and to Conduct the Interview of Radovan Karadžić as Allowed by Order Dated August 20, 2008 and B) to Extend the Deadline of September 15, 2008 Contained in Said Order to September 29, 2008, 2 September 2008.
[38] Decision on Momčilo Krajišnik's Motion for Permission for Nathan Z. Dershowitz to Act as Counsel with Alan M. Dershowitz and for Extension of Time, 8 September 2008.
[39] Decision of the Deputy Registrar, 12 September 2008.
[40] Prosecution's Notice of Appeal, 26 October 2006.
[41] Prosecution's Appeal Brief, 27 November 2006.
[42] *See* Status Conference on Appeal, AT. 17-18 (11 December 2006), extending the deadline to file the response to the Prosecution's Appeal Brief until 5 February 2007; Order on Extension of Time for Filing the Notice of Appeal, 11 January 2007, granting an extension of time until 12 February 2007.
[43] Counsel's Response to the Prosecution's Appeal Brief, 12 February 2007. After the appointment of Mr. Nicholls as *Amicus Curiae*, this document was considered as the response of the *Amicus Curiae* to the Prosecution's Appeal Brief.
[44] Response to the Prosecution's Appeal Brief against the Judgement of 27 September 2006 of the ICTY in the case of Momčilo Krajišnik, 12 February 2007, the English translation having been filed on 20 February 2007.
[45] Prosecution's Reply Brief, 22 February 2007.

although it objected to the filing of a separate response by Krajišnik,[46] it also replied to that response on 27 February 2007.[47] The response filed by Krajišnik was later found a valid exercise of his right to self-represent.[48]

2. Krajišnik's Appeal and *Amicus Curiae*'s Appeal

11. On 20 October 2006, Krajišnik filed two requests seeking an extension of time for the filing of a notice of appeal until a defence team has been engaged and until a B/C/S version of the Trial Judgement has become available.[49] The Pre-Appeal Judge granted these requests in part and ordered Krajišnik to file his notice of appeal no later than 30 days after the assignment of counsel.[50] During a Status Conference held on 11 December 2006, newly-assigned Counsel Mr. Nicholls requested a further extension of time to file a Notice of Appeal; the Pre-Appeal Judge ordered that the Notice of Appeal be filed at the latest on 5 February 2007.[51] On 11 January 2007 the Pre-Appeal Judge issued an order granting a third extension of time for filing the notice of appeal, ordering that it be filed at the latest 12 February 2007.[52] Counsel Nicholls filed a motion for a fourth extension of time[53], which was dismissed by the Pre-Appeal Judge.[54]

12. On 12 February 2007, Mr. Nicholls[55] and Krajišnik[56] filed separate notices of appeal. On 16 February 2007, the Prosecution filed a motion objecting to the filing of a separate notice of appeal by Krajišnik himself.[57]

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[46] Prosecution Motion regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik, 16 February 2007 (Confidential).
[47] Prosecution's Second Reply Brief, 27 February 2007.
[48] Decision of 11 May 2007, para. 14.
[49] Mr. Krajišnik made these requests in two letters dated 17 October 2006, the English translation of these letters having been filed on 20 October 2006 (pages 2 and 5 of the Registry file). The Prosecution responded on 25 October 2006 (Prosecution's Consolidated Response to Momčilo Krajišnik's Requests for Extension of Time to File a Notice of Appeal).
[50] Decision on Request for Extension of Time to File Notice of Appeal, 26 October 2006.
[51] Status Conference on Appeal, AT. 18.
[52] Order on Extension of Time for Filing the Notice of Appeal, 11 January 2007.
[53] Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgement into the Language of the Convicted Person, 29 January 2007. The Prosecution Responded on 30 January 2007 (Prosecution's Response to "Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgement into the Language of the Convicted Person"). On 31 January 2007, the Pre-Appeal Judge ordered Counsel Nicholls to file his reply no later than 1 February 2007 (Urgent Order Varying Time Limit for Filing Reply to "Prosecution's Response to Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgement into the Language of the Convicted Person'"), which he did (Reply to "Prosecution's Response to Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgement into the Language of the Convicted Person").
[54] Decision on "Urgent Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgment into the Language of the Convicted Person", 1 February 2007.
[55] Counsel's Notice of Appeal (Confidential) and Public and Redacted Counsel's Notice of Appeal, both filed on 12 February 2007.
[56] Notice of Appeal, dated 12 February 2007, the English translation having been filed on 20 February 2007.
[57] Prosecution Motion Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik, 16 February 2007 (Confidential). Counsel Nicholls Responded on 22 February 2007; Response to "Prosecution Motion Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik") (Confidential) and the Prosecution Replied on 26 February

13. During a Status Conference held on 5 April 2007, the Pre-Appeal Judge granted an extension of time to file Krajišnik's brief until 25 days after the filing of the B/C/S translation of the Trial Judgement.[58]

14. On 27 April 2007, Mr. Nicholls filed a "Notification of Impossibility of Filing an Appellate Brief in a Manner Consistent with Counsel's Professional Ethics". However, the problem raised by Counsel became moot as a result of the Decision of 11 May 2007.

15. In the Decision of 11 May 2007, the Appeals Chamber recognised the Notice of Appeal filed by Krajišnik as a valid exercise of his right to self-represent, and ordered him to file his Appeal Brief within 75 days of the filing of the Trial Judgement translated into B/C/S and his Reply Brief within 15 days of the translation into B/C/S of the Prosecution Response.[59]

(a) Appeal of *Amicus Curiae*

16. Following the Decision of 11 May 2007 and his assignment as *Amicus Curiae*, Mr. Nicholls filed a new Notice of Appeal on 8 June 2007.[60] *Amicus Curiae* requested an extension of time of nine days for the filing of his appeal brief,[61] which was granted by the Pre-Appeal Judge[62]. On 26 July 2007, *Amicus Curiae* filed a motion seeking an extension of the word limit for his appeal brief[63] and a "Motion for Variance concerning the Order and Numbering of the Arguments on Appeal"; the first motion was denied while the second was granted.[64]

17. *Amicus Curiae* filed a confidential version of his Appeal Brief on 3 August 2007[65] (a public and redacted version was filed on 31 August 2007[66]), together with a motion to withdraw a sub-ground of appeal.[67] The Prosecution filed a confidential response on 12 September 2007 and a

2007 (Confidential Prosecution Reply Regarding Filing of Notice of Appeal and Response by Momčilo Krajišnik) (Confidential).
[58] Status Conference on Appeal, AT. 91.
[59] Decision of 11 May 2007, paras 14-15.
[60] *Amicus Curiae*'s Notice of Appeal (Confidential) and Public & Redacted *Amicus Curiae*'s Notice of Appeal.
[61] Motion for Extension of Time for Filing Appellate Brief, dated 6 July 2007 but filed 9 July 2007.
[62] Order Varying Time Limits, 11 July 2007.
[63] Motion for Extension of Word Limit for *Amicus Curiae*'s Appellate Brief, 26 July 2007.
[64] Order on *Amicus Curiae*'s Motions regarding Word Limits and Ordering of his Appeal Brief, 31 July 2007.
[65] *Amicus Curiae*'s Appellate Brief, 3 August 2007 (Confidential); Book of Authorities for *Amicus Curiae*'s Appellate Brief, 3 August 2007. A confidential corrigendum to *Amicus Curiae*'s Appeal Brief was filed on 14 January 2008: *see* Notice of filing of Corrigendum to *Amicus Curiae*'s Appellate Brief, 14 January 2008; Corrigendum to *Amicus Curiae*'s Appellate Brief, 14 January 2008.
[66] Public and Redacted *Amicus Curiae*'s Appellate Brief, 31 August 2007.
[67] *Amicus Curiae*'s Motion to Withdraw Sub-Ground of Appeal, 3 August 2007. That motion was treated as a notice of the withdrawal of a sub-ground: Order Regarding *Amicus Curiae*'s Motion to Withdraw Sub-Ground of Appeal, 23 August 2007.

public redacted version on 14 September 2007.[68] *Amicus Curiae* filed his reply on 26 September 2007.[69]

(b) Appeal of Krajišnik

18. Following the Decision of 11 May 2007, Krajišnik requested an extension of the deadline for the submission of his Appellant's brief beyond 75 days of the filing of B/C/S translation of the Trial Judgement.[70] The request was dismissed.[71]

19. The B/C/S translation of Trial Judgement was received by Krajišnik on 24 July 2007.[72]

20. On 21 September 2007, Krajišnik sought reconsideration of the Appeals Chamber's refusal to extend the deadline for the filing of his appellate brief; he also requested to be allowed to exceed the word limit.[73] The Appeals Chamber denied the request for an appeal brief longer than 30,000 words but extended the deadline for the submission of Krajišnik's appeal brief until 29 October 2007.[74]

21. Krajišnik filed a second motion for reconsideration,[75] requesting the Appeals Chamber to allow him to exceed the established word limit. This was denied by the Appeals Chamber on 18 October 2007.[76]

22. Krajišnik filed his Appeal Brief on 29 October 2007, its English translation having been filed on 16 November 2007.[77] This brief was made confidential by the Appeals Chamber[78] to

[68] Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 12 September 2007 (Confidential); Book of Authorities for Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 13 September 2007; Notice of Filing of Public Redacted Version of the Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 14 September 2007.
[69] *Amicus Curiae*'s Reply to Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 26 September 2007 (public redacted version filed on 24 June 2008).
[70] Request to Provide Conditions to Work and to Reverse the Decision of the Registry of 7 June 2007, dated 10 June 2007, the English translation having been filed on 18 June 2007, para. 17. *See also* Prosecution Response to Momčilo Krajišnik's Request, 28 June 2007, paras 37-43; *Amicus Curiae*'s Reply to Prosecution Response to Momčilo Krajišnik's Request, 2 July 2007, paras 16-19; Reply by the Accused to the Prosecution Response to Momčilo Krajišnik's Request, dated 28 July 2007, the English translation having been filed on 21 August 2007 (the English translation of a corrigendum dated 28 July 2007 having also been filed on 21 August 2007), para. 28.
[71] Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("Decision of 11 September 2007"), para. 28.
[72] *See* Procès-Verbal filed on 26 July 2007.
[73] Motion by Momčilo Krajišnik for Reconsideration of the Appellate Chamber's Decision of September 11, 2007, dated 21 September 2007, the English translation having been filed on 24 September 2007.
[74] Decision on "Motion by Momčilo Krajišnik for Reconsideration of the Appellate Chamber's Decision of September 11, 2007", 27 September 2007.
[75] Motion by Momčilo Krajišnik for Reconsideration of the Trial [*sic*] Chamber's Decision of 27 September 2007, dated 5 October 2007, the English translation having been filed on 15 October 2007. *See also* Prosecution Response to Motion by Momčilo Krajišnik for Reconsideration of the Appeals Chamber's Decision of 27 September 2007, 15 October 2007.
[76] Decision on Momčilo Krajišnik's Motion for Reconsideration of the Appeals Chamber's Decision of 27 September 2007, 18 October 2007.

prevent the disclosure of the identities of protected witnesses. Following further exchanges between the parties,[79] the Appeals Chamber ordered Krajišnik to file a public version of his Appeal Brief incorporating certain redactions.[80] The Appeals Chamber also ordered Krajišnik to re-submit confidential and public versions of his Appeal Brief not exceeding 30,000 words within two weeks of receiving a translation of the order.[81] Krajišnik requested an extension of time to comply with this order,[82] which was subsequently granted, Krajišnik being ordered to resubmit his Appeal Brief by 15 January 2008.[83] Krajišnik did so, and the English translation of his Appeal Brief was filed on 1 February 2008.[84]

23. On 5 February 2008, the Prosecution requested the Appeals Chamber to order Krajišnik to make certain redactions to the public version of his Appeal Brief to bring it in compliance with the order dated 5 December 2007; it also requested the Appeals Chamber to direct the Registrar to re-file the current public version as confidential.[85] The Pre-Appeal Judge granted this motion on 11 February 2008.[86] A further redacted version of Krajišnik's Appeal Brief was filed on 28 February 2008.[87]

24. Pursuant to a decision of 11 March 2008,[88] the Prosecution filed a confidential response to Krajišnik's Appeal Brief on 12 March 2008;[89] a public redacted version of the response was filed on 18 March 2008.[90]

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[77] Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, filed together with two DVDs. Krajišnik thereafter filed corrections to this brief (Amendments to the Appeal of 29 October 2007, dated 14 November 2007, the English translation having been filed on 7 December 2007) and an additional CD (*see* Letter dated 19 November 2007, the translation having been filed confidentially on 14 December 2007).
[78] Order on Appeal by Momčilo Krajišnik, 20 November 2007.
[79] Prosecution Response to Appeals Chamber Order on Appeal by Momčilo Krajišnik, 21 November 2007 (with a confidential annex); Appellant's Objection to the Prosecution's Motion of 21 November 2007 to Declare Parts of the Appellant's Appeal Confidential, dated 22 November 2007 (the English translation having been filed on 27 November 2007) and made confidential pursuant to the direction of the Appeals Chamber on 27 November 2007; Prosecution Reply to "Appellant's Objection to the Prosecution's Motion of 21 November 2007 to Declare Parts of the Appellant's Appeal Confidential", 29 November 2007.
[80] Order on the Public Version of Momčilo Krajišnik's Appeal Brief, 5 December 2007.
[81] Order to Comply with Appeal Brief Word Limit, 3 December 2007.
[82] Request to Extend the Deadline for Submitting the Appeal following the Order of the Appeals Chamber to Respect the Word Limit, of 07 December 2007 [*sic*], dated 17 December 2007, the English translation having been filed on 28 December 2007.
[83] Decision on Request by Momčilo Krajišnik for Extension of Time to Comply with Appeal Brief Word Limit, 7 January 2008.
[84] Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Confidential and public versions).
[85] Prosecution Motion for the Appellant to Further Redact the Public Version of His Brief (Confidential), 5 February 2008.
[86] Order to Redact the Public Version of Momčilo Krajišnik's Appeal Brief in Accordance with the Order of 5 December 2007 (Confidential), 11 February 2008.
[87] Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006.
[88] Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, 11 March 2008.
[89] Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Confidential), 12 March 2008.

25. On 25 March 2008, *Amicus Curiae* filed a motion requesting leave to file a submission to address the Appeals Chamber on questions arising from the Prosecution's response to Krajišnik's Appeal Brief.[91] The Prosecution responded on 2 April 2008.[92] The Appeals Chamber denied the motion.[93]

26. Having received a B/C/S translation of the Prosecution's response to Krajišnik's Appeal Brief on 29 April 2008, Krajišnik filed on 9 May 2008 a motion requesting an extension of time for the filing of his brief in reply.[94] The Prosecution responded to this motion on the same day.[95] On 13 May 2008, the Pre-appeal Judge dismissed the motion.[96] Krajišnik sent his reply on 14 May 2008 and its English translation was filed on 26 May 2008.[97]

- Supplementary Brief of Mr. Alan Dershowitz

27. Mr. Alan Dershowitz's supplementary brief on joint criminal enterprise was filed on 7 April 2008.[98] On 9 April 2008, the Prosecution filed an urgent motion to strike part of this brief and to order counsel to comply with the Appeals Chamber's directives.[99] The Appeals Chamber rendered its decision on 11 April 2008, ordering Mr. Alan Dershowitz to provide an addendum to his brief and granting to the Prosecution an extension of three working days to file its response to Mr. Alan Dershowitz's brief.[100] Mr. Alan Dershowitz's addendum was received and filed on 16 April 2008.[101] The Prosecution's Response to Mr. Alan Dershowitz's brief was filed on 25 April 2008.[102]

[90] Notice of Filing of Public Redacted Version of Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006.
[91] *Amicus Curiae* Motion Requesting Leave to File a Submission with Annex, 25 March 2008.
[92] Prosecution Response to *Amicus Curiae* Motion Requesting Leave to File a Submission with Annex, 2 April 2008.
[93] Decision on *Amicus Curiae* Motion Requesting Leave to File a Submission, 18 April 2008.
[94] Motion of Momčilo Krajišnik to Reschedule the Filing of his Brief in Reply to the Prosecution's Response to his Appellate Brief, 9 May 2008.
[95] Prosecution Response to Motion of Momčilo Krajišnik to Reschedule the Filing of his Brief in Reply to the Prosecution's Response to his Appellate Brief, 9 May 2008.
[96] Decision on Krajišnik Motion for Extension to File a Reply, 13 May 2008.
[97] Reply to Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, dated 14 May 2008, the English translation having been filed on 26 May 2008. On 6 March 2009, Krajišnik filed an Urgent Submission in Relation to the Impact of the Milutinović et al. Judgment on the Appellant's Case.
[98] Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, filed on 7 April 2008 together with a Book of Authorities on Behalf of Momčilo Krajišnik, 7 April 2008.
[99] Prosecution's Motion to Strike Ground 1 from Brief on Joint Criminal Enterprise and to Order Counsel to Comply with the Appeals Chamber's Order. Mr. Dershowitz responded after the Appeals Chamber had rendered its decision on this motion: Response to Prosecution's Motion to Strike Ground 1 from Brief on Joint Criminal Enterprise and to Order Counsel to Comply with the Appeals Chamber's Order, dated 11 April 2008 but filed on 14 April 2008.
[100] Decision on Prosecution's Motion to Strike Ground 1 of the Dershowitz Brief and Order Counsel to Comply with the Decision of 11 March 2008, 11 April 2008.
[101] Addendum to the Brief on Joint Criminal Enterprise of Alan M. Dershowitz, Submitted Pursuant to the Decision and Order dated 11 April 2008, 16 April 2008.
[102] Response to Brief on Joint Criminal Enterprise on Behalf of Momčilo Krajišnik, 25 April 2008.

28. On 2 May 2008, Mr. Alan Dershowitz filed a motion to file further submissions in reply.[103] The Prosecution responded on 7 May 2008.[104] The motion was dismissed by the Appeals Chamber.[105]

D. Motions related to Conditions of Self-Representation and Modalities of *Amicus Curiae*'s Role

29. Following the Decision of 11 May 2007, the Registry and Krajišnik entered into discussions as to the modalities of the exercise of his self-representation. On 10 June 2007, Krajišnik requested the Appeals Chamber to reverse certain of the Registry's determinations and to provide him with specified work conditions.[106] The Prosecution responded on 28 June 2007[107] and *Amicus Curiae* replied on 2 July 2007.[108] On 19 July 2007, the Registry filed written submissions pursuant to Rule 33(B) of the Rules.[109] Krajišnik also filed a reply to the Prosecution's response[110] and a reply to the Registry's written submissions.[111] The Appeals Chamber rendered its Decision of 11 September 2007, dismissing Krajišnik's request but requesting the Registry to take certain steps to facilitate his self-representation.[112] Krajišnik sought reconsideration of this decision,[113] which was denied (except as concerns the request for an extension of time to file Krajišnik's brief).[114]

30. On 28 June 2007, *Amicus Curiae* filed a confidential motion seeking 1) authorisation to access and utilise certain documents generated by Krajišnik's pre-trial, trial and appeal teams which do not form part of the trial record to prepare the *Amicus Curiae*'s ground of ineffective assistance of counsel; and 2) the appointment of an independent person to conduct an investigation into the

[103] Motion for Leave to File Letter Submission Correcting Erroneous Assertions in the Prosecution's Response to Brief on Joint Criminal Enterprise and the Letter Submission for which Leave to File is Sought, dated 1 May 2008 but filed on 2 May 2008.
[104] Prosecution's Response to Motion for Leave to File Letter Submission, 7 May 2008.
[105] Decision on Defence Motion for Leave to File a Letter Submission, 14 May 2008.
[106] Request to Provide Conditions to Work and Reverse the Decision of the Registry of 7 June 2007, dated 10 June 2007, the English translation having been filed on 18 June 2007.
[107] Prosecution Response to Momčilo Krajišnik's Request, 28 June 2007.
[108] *Amicus Curiae*'s Reply to Prosecution Response to Momčilo Krajisnik's Request, 2 July 2007. This reply was later accepted as validly filed: Decision of 11 September 2007, para. 22.
[109] Registry Submission on Momčilo Krajišnik's Request to Reverse the Decision of the Registry of 7 June 2007, 19 July 2007 (with *ex parte* annexes) (Confidential).
[110] Reply by the Accused to the Prosecution Response to Momčilo Krajišnik's Request, dated 28 July 2007, the English translation having been filed on 21 August 2007 (the English translation of a corrigendum dated 28 July 2007 having also been filed on 21 August 2007).
[111] Reply of the Accused to Registry Submission on Momčilo Krajišnik's Request, dated 13 August 2007, the English translation having been filed on 21 August 2007. The Appeals Chamber later accepted this reply as validly filed: Decision of 11 September 2007, para. 24. *See* also Order regarding Time Limits, 31 July 2007, in which the Pre-Appeal Judge indicated that if Mr. Krajišnik wished to reply to the Registry's submissions, he had to do so within 4 days of receiving the B/C/S translation of these submissions.
[112] Decision of 11 September 2007, paras 29-46, 51.
[113] Motion by Momčilo Krajišnik for Reconsideration of the Appellate Chamber's Decision of September 11, 2007, dated 21 September 2007, the English translation having been filed on 24 September 2007.
[114] Decision on "Motion by Momčilo Krajišnik for Reconsideration of the Appellate Chamber's Decision of September 11, 2007", 27 September 2007.

alleged ineffective assistance of previous counsel.[115] The Prosecution responded confidentially on 9 July 2007[116] and *Amicus Curiae* replied confidentially on 13 July 2007.[117] On 20 July 2007, the Appeals Chamber rendered a public decision denying the motion in its entirety and requesting the Registry to lift the confidentiality of the motion, the response, the reply and the relevant portion of *Amicus Curiae*'s Notice of Appeal.[118]

31. On 5 July 2007, following the filing of an *Amicus Curiae* reply to a Prosecution response to a request by Krajišnik,[119] the Prosecution filed a "Motion for Clarification of the Order of Filings and the Calculation of Time Limits for Filings". *Amicus Curiae* responded on 16 July 2007[120] and the Prosecution replied on 20 July 2007.[121] On 11 September 2007, the Appeals Chamber provided directives as to the applicable procedure when *Amicus Curiae* makes a submission upon consideration of a Prosecution response to a motion brought by Krajišnik.[122]

32. On 6 November 2007, *Amicus Curiae* filed a "Motion Requesting Permission for *Amicus Curiae* to File Submission on Matters Arising out of Appellant's Appeal Brief, Prosecution Response and Appellant's Reply". The Prosecution responded on 9 November 2007.[123] The Appeals Chamber denied the motion on 23 November 2007.[124]

33. On 6 June 2008, *Amicus Curiae* filed a motion to obtain guidance as to a request by Krajišnik for a meeting with *Amicus Curiae* at UNDU.[125] The Pre-Appeal Judge rendered a decision on 11 June 2008, clarifying that "*Amicus Curiae* remains under an obligation to work independently from Mr. Krajišnik and that the meeting sought by Mr. Krajišnik would consequently be inappropriate".[126]

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[115] Motion Regarding Appellate Ground of Ineffective Assistance of Counsel, 28 June 2007 (Confidential).
[116] Prosecution Response to Motion by *Amicus Curiae* Regarding Appellate Ground of Ineffective Assistance of Counsel, 9 July 2007 (Confidential).
[117] Reply to Prosecution Response to Motion by *Amicus Curiae* Regarding Appellate Ground of Ineffective Assistance of Counsel, 13 July 2007 (Confidential).
[118] Decision on Motion of *Amicus Curiae* regarding Appellate Ground of Ineffective Assistance of Counsel, 20 July 2007.
[119] *Amicus Curiae*'s Reply to Prosecution Response to Momčilo Krajisnik's Request, 2 July 2007.
[120] Response to Prosecution's Motion for Clarification of the Order of Filings and the Calculation of the Time Limits for Filings, 16 July 2007.
[121] Prosecution Reply to *Amicus* Response to Motion for Clarification of the Order of Filings and the Calculation of the Time Limits for Filings, 20 July 2007.
[122] Decision of 11 September 2007, para. 50.
[123] Prosecution Response to Motion Requesting Permission for *Amicus Curiae* to File Submission on Matters Arising Out of Appellant's Appeal Brief, Prosecution Response and Appellant's Reply, 9 November 2007.
[124] Decision on Motion Requesting Permission for *Amicus Curiae* to File Submission on Matters Arising Out of Appellant's Appeal Brief, Prosecution Response and Appellant's Reply, 23 November 2007.
[125] *Amicus Curiae* Motion Regarding Request for UNDU Visit by Mr Krajisnik (public with a confidential annex), 6 June 2008 (Confidential).
[126] Decision on *Amicus Curiae* Motion for Guidance, 11 June 2008, p. 1.

34. On 26 June 2008, Krajišnik filed a motion for review of the Pre-Appeal Judge's decision of 11 June 2008 regarding *Amicus Curiae*'s visit to Krajišnik and also an objection to *Amicus Curiae*'s motion of 6 June 2008, in which Krajišnik argued that *Amicus Curiae* misinterpreted Krajišnik's request.[127] The Appeals Chamber denied the motion, holding that Krajišnik had not met the standard that would justify granting his request for reconsideration[128]

35. On 6 August 2008, *Amicus Curiae* made a submission regarding procedural fairness for former counsel in an ineffective assistance claim, requesting that the Appeals Chamber give consideration to lifting the confidentiality of the redacted portions of sub-ground 1(A) of *Amicus Curiae*'s Appellate Brief for Mr. Brashich and Mr. Stewart QC, and inviting Mr. Brashich and Mr. Stewart to respond to *Amicus Curiae*'s Appeal Brief.[129] The Prosecution responded that the submission should be dismissed because both requests were unnecessary.[130] In his reply, *Amicus Curiae* reiterated the request and noted the legitimacy of the appeal as he had been instructed by the Appeals Chamber to act to protect the best interests of Krajišnik.[131]

36. The Appeals Chamber dismissed the motion, considering that no precedent existed for such a right of response by former counsel; that the public version of the *Amicus Curiae*'s Appeal Brief provides former counsel with sufficient notice of allegations against them for the purpose of assessing whether they would like to make submissions relating to those allegations; and that neither former counsel had indicated that they would like to be heard on the said allegations. Furthermore, the Appeals Chamber, pending the examination of evidence adduced by the parties pursuant to Rule 115 of the Rules, did not find it in the interests of justice to call the former counsel to appear under Rules 98 and 107 of the Rules.[132]

37. On 24 September 2008, *Amicus Curiae* requested permission from the Appeals Chamber to inform Krajišnik of the existence of particular documents in his possession which were of direct relevance to the issues raised in a statement of Stefan Karganović which had been admitted as additional evidence on appeal (Exhibit AD2).[133] Alternatively, Krajišnik requested that the Appeals

[127] Motion for Review of the Appeal Judge's Decision of 11 June 2008 Regarding the *Amicus Curiae*'s Visit to Krajišnik and Objection to *Amicus Curiae* Motion of 6 June 2008, 26 June 2008.
[128] Decision on Momčilo Krajišnik's Request for Reconsideration of the Pre-Appeal Judge's Decision of 11 June 2008, 4 July 2008.
[129] *Amicus Curiae* Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim, 6 August 2008.
[130] Prosecution Response to *Amicus Curiae* Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim, 11 August 2008.
[131] Reply to Prosecution Response to *Amicus Curiae* Submission Regarding Procedural Fairness for Former Counsel in Ineffective Assistance Claim, 12 August 2008.
[132] Decision on Motion of *Amicus Curiae* to Make a Submission on Procedural Fairness to Former Counsel, 8 October 2008.
[133] Request for Permission to Notify the Appellant of the Existence of Certain Documents, 24 September 2008 (public redacted version filed on 16 February 2009).

Chamber *proprio motu* take the relevant documents into consideration.[134] The Appeals Chamber granted the request and allowed *Amicus Curiae* to inform Krajišnik through his Legal Associate of the existence of the particular documents in Krajišnik's possession which were of direct relevance to the issues raised in Exhibit AD2.[135]

38. On 30 October 2008, *Amicus Curiae* made a request regarding his attendance at the evidentiary hearings on 3 and 5 November 2008. As the testimony of Mr. Karganović and Mr. Mano was set down for 3 November 2008 and in light of *Amicus Curiae*'s submission that he was unable to examine these witnesses, *Amicus Curiae* requested that he be excused from attending the hearing on 3 November 2008. Furthermore, having considered Krajišnik's "Notification of the Summary of Facts upon which Radovan Karadžić may Give Evidence", *Amicus Curiae* took the view that there may be matters upon which it is appropriate for cross-examination by himself.[136] The Appeals Chamber, considering that Mr. Mano and Mr. Karganović were both called as a witness by the Appeals Chamber and not by either of the parties; that *Amicus Curiae* was appointed by the Appeals Chamber to assist the Chamber; and that at that point in time of this decision, the Appeals Chamber could not say at what stage and in what respects *Amicus Curiae* might be required to give that assistance, rejected the request.[137]

39. On 31 October 2008, *Amicus Curiae* made an urgent request to meet with Radovan Karadžić at the UNDU, arguing that it would be in Krajišnik's best interests to fully ascertain Mr. Karadžić's knowledge of matters relevant to these grounds of appeal, before asking him questions on any such matters.[138] The Appeals Chamber denied the request, considering that Mr. Karadžić was called to testify by Krajišnik and that both himself and Counsel on the matter of JCE would have proofed Mr. Karadžić on the issues on which Krajišnik sought his testimony prior to his appearance in court. A meeting would therefore not be necessary in order to assist the Appeals Chamber.[139]

[134] Submission Relating to *Amicus Curiae*'s Request to Notify the Appellant of the Existence of Certain Documents, 1 October 2008 (public redacted version filed on 9 February 2009).
[135] Decision on Request by *Amicus Curiae* to Notify the Appellant of the Existence of Certain Documents, 8 October 2008.
[136] Request Regarding Attendance at Evidential Hearings on 3 and 5 November 2008, 30 October 2008 (public redacted version filed on 16 February 2009).
[137] Decision on *Amicus Curiae*'s Request Regarding Attendance At Evidential Hearings on 3 and 5 November 2008, 31 October 2008.
[138] Urgent *Amicus* Request to Meet with Mr. Karadžić, 31 October 2008.
[139] Decision on Urgent *Amicus* Request to Meet with Mr. Karadžić, 4 November 2008.

E. Important Filings Pursuant to Rule 115 of the Rules

40. On 18 June 2008, Krajišnik filed a motion to present additional evidence pursuant to Rule 115 of the Rules.[140] Krajišnik subsequently filed a supplement to the motion, including additional material considered to be an integral part of the original motion,[141] which was followed by a corrigendum.[142]

41. On 16 July 2008, the Prosecution filed an urgent motion to extend the word limit of its response to Krajišnik's Rule 115 motion. It argued that the additional words were necessary to respond to the lengthy, complex and often unclear submissions made by Krajišnik.[143] On 18 July 2008, Krajišnik requested that the Appeals Chamber retroactively permit an additional 7,405 words in both his motion and its supplement.[144] The Appeals Chamber granted the extension of the word limit to Krajišnik and further granted an extension of the word limit to the Prosecution.[145]

42. On 18 July 2008, the Prosecution filed its response to the Motion, arguing that the Motion and Supplement should be dismissed in their entirety. The Prosecution argued that most of the proposed material and witnesses were available at trial, and that in any event, it could not have had an impact on the Trial Chamber's findings.[146] Krajišnik and JCE counsel replied to the Prosecution's response on 14 August 2008, arguing that the Appeals Chamber "should accept all new motions in order to, at least partially rectify the mistakes made during the trial".[147] The Appeals Chamber granted the Motion with respect to the statements of George Mano and Stefan Karganović (Exhibits AD1 and AD2, respectively); the remainder of the Motion was dismissed.[148]

43. On 14 August 2008, Krajišnik filed a motion to interview Radovan Karadžić with a view to then calling him as a witness pursuant to Rule 115 of the Rules.[149] On 18 August 2008, the

[140] Motion to Present Additional Evidence Pursuant to Rule 115 to the Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, 18 June 2008 ("Motion").
[141] Supplement to the Motion to Present Additional Evidence of 29 May Pursuant to Rule 115 by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, 18 June 2008 ("Supplement").
[142] Corrigendum to the Motion to Present Additional Evidence in Relation to the ICTY Judgement of 27 September 2006, Filed on 29 May and 7 June 2008 by Momčilo Krajišnik Pursuant to Rule 115, 24 June 2008.
[143] Urgent Prosecution Motion to Extend Word Limit of its Response to Krajišnik's Rule 115 Motion, 16 July 2008, para. 2.
[144] Urgent Request by the Appellant for Permission to File a Submission With More Words than Rule 115 Permits, 18 July 2008, para. 7.
[145] Decision on Urgent Requests to Extend Word Limits, 18 July 2008.
[146] Prosecution Response to Krajišnik's Motion to Present Additional Evidence and Supplement, 18 July 2008 (public redacted version filed on 11 February 2009).
[147] Reply to the Prosecution's Response to the Appellant's Motion to Present Additional Evidence Pursuant to Rule 115 to the Appeal to the ICTY Judgement of 27 September 2006, 18 August 2008, para. 57.
[148] Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008.
[149] Motion to Interview Radovan Karadžić With a View to Then Calling Him as a Witness Pursuant to Rule 115, 14 August 2008.

Prosecution filed a response, requesting that the motion be dismissed and arguing that under the Appeals Chamber Decision of 11 May 2007, the matter should be settled by the Registrar.[150]

44. Krajišnik sought leave to reply to the Prosecution's response, arguing that it should be dismissed and Krajišnik allowed to interview Radovan Karadžić.[151] The Appeals Chamber ordered that Krajišnik be allowed to speak to Mr. Karadžić and directed the Registrar to provide for the necessary arrangements.[152]

45. On 15 September 2008, the Prosecution filed a motion to adduce rebuttal material against Exhibits AD1 and AD2.[153] Krajišnik filed a response in which he submitted that the documents and affidavits proposed by the Prosecution were irrelevant and requested that the Appeals Chamber dismiss the Prosecution motion.[154] The Appeals Chamber granted the motion in part and decided that the seven documents contained in the rebuttal evidence be admitted as rebuttal material pursuant to Rule 115 of the Rules.[155]

46. On 15 September 2008, Krajišnik filed a motion to allow him to call Radovan Karadžić as a witness under Rule 115 of the Rules. Krajišnik requested that the Appeals Chamber take into consideration the fact that further meetings with Mr. Karadžić were necessary in order to determine the precise scope of his evidence.[156] JCE counsel then filed a motion to join the Second Rule 115 Motion for leave to call Mr. Karadžić as a witness pursuant to Rule 115, and, if said motion was granted, for JCE counsel to be allowed to participate in such proceedings and to question Mr. Karadžić on issues relating to JCE.[157] The Prosecution filed a consolidated response in which it requested that the Second Rule 115 Motion and JCE counsel's motion be dismissed. The Prosecution argued that both requests failed to meet the requirements for admission of additional evidence on appeal pursuant to Rule 115, as neither Krajišnik nor JCE counsel had filed any material, in the form of a statement or proof indicating the scope of Mr. Karadžić's proposed

[150] Prosecution Response to Krajišnik Motion to Interview Radovan Karadžić With a View to Then Calling Him as a Witness Pursuant to Rule 115, 18 August 2008, para. 1.
[151] Request For Leave to Reply and Reply to Prosecution Response to Krajišnik Motion to Interview Radovan Karadžić with a View to Presenting His Statement and Then Calling Him as a Witness Pursuant to Rule 115, 19 August 2008.
[152] Order on "Motion to Interview Radovan Karadžić With a View to Then Calling Him as a Witness Pursuant to Rule 115", 20 August 2008.
[153] Prosecution's Motion to Adduce Rebuttal Material, 15 September 2008.
[154] Response to Prosecution's Motion to Adduce Rebuttal Material, 24 September 2008 (public redacted version filed on 6 February 2009).
[155] Decision on Prosecution's Motion to Adduce Rebuttal Material, 8 October 2008.
[156] Motion to Call Radovan Karadžić Pursuant to Rule 115, 15 September 2008 ("Second Rule 115 Motion").
[157] Motion by JCE counsel to Join Momčilo Krajišnik's Motion for Leave to Call Radovan Karadžić as a Witness Pursuant to Rule 115, and, if Said Motion is Granted, for JCE counsel to be Allowed to Participate in Such Proceedings, 16 September 2008.

evidence.[158] Krajišnik replied to the Prosecution Consolidated Response, requesting that the Appeals Chamber dismiss it and allow him to call Mr. Karadžić as a witness under Rule 115 of the Rules.[159]

47. On 24 September 2008, *Amicus Curiae* requested that the Appeals Chamber grant the Second Rule 115 Motion. *Amicus Curiae* also requested the Appeals Chamber to order the Registrar to facilitate further interviews between Krajišnik, JCE counsel and Mr. Karadžić, and to allow JCE counsel to act on behalf of Krajišnik, in interviewing Mr. Karadžić and examining him before the Appeals Chamber.[160]

48. The Appeals Chamber granted the Second Rule 115 Motion and ordered that an evidentiary hearing be held before the Appeals Chamber on 3 and 5 November 2008. The Appeals Chamber ordered Krajišnik to file by 27 October 2008 a summary of facts upon which Mr. Karadžić would testify. In addtion, it granted JCE counsel's request to interview Mr. Karadžić and to question him on issues relating to JCE during the evidentiary hearing.[161]

49. On 21 October 2008, the Prosecution filed an urgent motion for clarification of the Appeals Chamber Second Rule 115 Decision.[162] The Prosecution sought clarification of the meaning of the summary of facts to be provided and submitted that it should be a detailed summary of the specific facts and the content of Radovan Karadžić's accepted evidence.

50. Krajišnik filed a response, in which he submitted that the Prosecution motion should be dismissed, *inter alia* because it was premature; an attempt to circumvent the Appeals Chamber's ruling that Krajišnik was not required to take a statement from Radovan Karadžić; and it would be prejudicial to Krajišnik to produce such a detailed summary. In the event that the Appeals Chamber granted the Prosecution's motion, Krajišnik submitted that he should be allowed additional time. Furthermore, Krajišnik requested that the Appeals Chamber reschedule the testimony of Mr.

[158] Prosecution Consolidated Response to "Krajišnik's Motion to Call Radovan Karadžic Pursuant to Rule 115" and Motion by JCE counsel to Join Momčilo Krajišnik's Motion, 23 September 2008 ("Prosecution Consolidated Response").
[159] Reply to Prosecution Consolidated Response to Motion to Call Radovan Karadžić Pursuant to Rule 115, 1 October 2008.
[160] Submission Relating to the Appellant's Motion to Call Radovan Karadžić as a Witness, 24 September 2008.
[161] Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008 ("Second Rule 115 Decision").
[162] Urgent Prosecution Motion for Clarification of the Appeals Chamber Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 20 October 2008.

Karadžić for a later date.[163] The Appeals Chamber granted the Prosecution's request for clarification of the motion.[164]

51. On 27 October 2008, Krajišnik sought leave to expand the scope of Radovan Karadžić's evidence, while reserving the right to further supplement the summary of facts subject to the approval of the Appeals Chamber. Krajišnik furthermore urged the Appeals Chamber to instruct the Registry to provide him with extra assistance of at least two additional support staff. Finally, Krajišnik requested that the Appeals Chamber grant him sufficient time to properly and adequately prepare the presentation of Mr. Karadžić's evidence.[165]

52. The Prosecution filed an urgent motion, arguing that Krajišnik's notification did not comply with the Second Rule 115 Decision and the Clarification Decision.[166] The Appeals Chamber found that Krajišnik had not shown good cause for his request for further time to prepare the presentation for Radovan Karadžić's evidence and therefore denied his request. The Appeals Chamber granted the Prosecution's request and ordered Krajišnik to submit a summary of facts on which Mr. Karadžić would testify during the evidentiary hearing.[167]

53. On 31 October 2008, Krajišnik filed a notification of the summary of facts upon which Radovan Karadžić would give evidence.[168]

54. On 3 November 2008, Krajišnik requested, pursuant to Rule 92 *ter* of the Rules, that the written statement of Radovan Karadžić be admitted as evidence at the evidentiary hearing of 5 November 2008.[169] The Prosecution responded that the Appeals Chamber should not admit the statement as evidence, as Krajišnik did not provide reasons as to why it would be compatible with the interests of justice to allow Mr. Karadžić's evidence in the form of a written document.[170] The

[163] Response to Urgent Prosecution Motion for Clarification of the Appeals Chamber Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 23 October 2008.
[164] Decision on Urgent Prosecution Motion for Clarification of the Appeals Chamber Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 23 October 2008 ("Clarification Decision").
[165] Notification of the Summary of Facts Upon Which Radovan Karadžić May Give Evidence and Urgent Request for Additional Resources, 27 October 2008.
[166] Urgent Prosecution Motion for Filing a Proper Summary of Facts and Prosecution's Consolidated Response to Krajišnik's "Submission Relating to Further Appeals Proceedings" and "Notification of the Summary of Facts", 29 October 2008, para. 1. *See* also JCE counsel's Response to Urgent Prosecution motion dated October 29, 2008, 30 October 2008; Consolidated *Amicus Curiae* Submission Relating to the Appellant's "Submission Relating to Further Appeals Proceedings" filed 23 October 2008; and Prosecution Response to Said Motion Filed on 29 October 2008, 31 October 2008.
[167] Decision on Momčilo Krajišnik's "Notification of the Summary of Facts Upon Which Radovan Karadžić May Give Evidence and Urgent Request for Additional Resources", 30 October 2008.
[168] Notification of the Summary of Facts Upon Which Radovan Karadžić will Give Evidence, 31 October 2008.
[169] Request to File Radovan Karadžić's Statement Pursuant to Rule 92 *ter*, 3 November 2008.
[170] Prosecution Response to Krajišnik's Request for Leave to File a Document Under Rule 92 *ter*, 3 November 2008.

written statement of Mr. Karadžić was admitted into evidence as Exhibit AD3 pursuant to Rule 92 *ter* of the Rules at the evidentiary hearing on 5 November 2008.[171]

55. Furthermore, on 15 October 2008, Krajišnik filed a motion, requesting that the Appeals Chamber call three additional witnesses and, should it find it appropriate, "other persons involved in the matters set out in [the] motion".[172] Krajišnik further requested that the Appeals Chamber admitted into evidence six documents set out in the confidential annex of his motion. Finally, Krajišnik sought leave to exceed the word limit of 9,000 words on matters relating to Rule 115 additional evidence.[173]

56. The Prosecution responded that the Third Rule 115 Motion should be dismissed.[174] *Amicus Curiae* filed a submission in support of Krajišnik's motion.[175] The Appeals Chamber granted the Third Rule 115 Motion in part and decided to hear one additional witness and to admit the additional documents into evidence pursuant to Rule 115 of the Rules.[176] Exhibit numbers were assigned to the documents admitted.[177]

F. Other Motions relating to evidence

57. On 29 May 2007, the Prosecution filed a confidential request seeking that Exhibits P564D, P564E and P564H, which were inadvertently admitted as public exhibits during trial, be placed under seal.[178] On 20 June 2007, the Appeals Chamber ordered that these exhibits be placed under

[171] AT. 607.
[172] Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former Counsel, 15 October 2008 ("Third Rule 115 Motion") (public redacted version filed on 6 February 2009), para. 47.
[173] Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former Counsel, 15 October 2008, paras 48-49.
[174] Prosecution Response to "Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115 and to Reconsider Decision Not to Call Former Counsel", 21 October 2008 (public redacted version filed on 11 February 2009).
[175] *Amicus Curiae* Submission Relating to Prosecution Response to "Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115 and to Reconsider Decision Not to Call Former Counsel", 30 October 2008 (public redacted version filed on 16 February 2009).
[176] Decision on Momčilo Krajišnik's Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115 and to Reconsider Decision not to Call Former Counsel, 6 November 2008.
[177] Exhibit Numbers Assigned to Documents Admitted Pursuant to Appeals Chamber Decision on Momčilo Krajišnik's Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115 and to Reconsider Decision Not to Call Former Counsel, 7 November 2008.
[178] Request for Leave for Exhibits P564D, P564E, P564H to be Placed Under Seal (Confidential), 29 May 2007, as corrected on 28 June 2007: Prosecution's Corrigendum to Request for Leave for Exhibits P564D, P564E, P564H to be Placed Under Seal (Confidential).

seal and that public versions be filed.[179] On 21 June 2007, the Prosecution filed public versions of Exhibits P564D, P564E and P564H.[180]

58. On 23 November 2007, the Prosecution filed a confidential "Motion to Lift Seal on Exhibit P152", which the Appeals Chamber granted on 8 February 2008.[181]

59. On 6 August 2008, JCE counsel filed a motion for an order directing the Prosecution to identify specific references in the record and to provide the references, and copies to Krajišnik. He sought directive on behalf of Krajišnik pertaining specifically to the final paragraph of the Scheduling Order of 18 July 2008, which permitted the Prosecution to identify the relevant findings in the Trial Judgement and/or supporting evidence in the record showing the links between each of the crimes and Krajišnik.[182] The Prosecution requested that this motion be dismissed, as the Scheduling Order envisioned oral submissions on the question.[183] On 11 August 2008, the Duty Judge denied JCE counsel's motion, stating that the Prosecution offered to provide the requested references at least 48 hours prior to the appeal hearing.[184]

60. On 19 August 2008, the Prosecution requested that the Appeals Chamber strike Krajišnik's filing of 18 August 2008 entitled "References from the (*sic*) Krajišnik Appeal against the Trial Judgement Prepared for the Hearing Scheduled for 21 August 2008". The Prosecution argued that there was no basis for such a filing, that Krajišnik had not applied for leave to make an additional filing, and that to accept an additional written argument two days before the appeal hearing would seriously prejudice the Prosecution.[185] Krajišnik filed a response, arguing that the Appeals Chamber should dismiss the Prosecution motion to strike the table, as it contained no new extensive arguments and was nothing more than a summary of Krajišnik's arguments relating to specific paragraphs in the Trial Judgement that had been submitted in his Appeal Brief.[186] The Appeals Chamber denied the Prosecution's motion.[187]

61. On 27 October 2008, the Prosecution filed an urgent request to direct the Registry and Krajišnik to disclose certain correspondence and decisions relating to a Registry letter of

[179] Order on the Placement of Exhibits P564D, P564E and P564H Under Seal and the Filing of Public Versions of These Exhibits (Confidential), 20 June 2007.
[180] Prosecution's Filing of Public Redacted Versions of Trial Exhibits P564D, P564E and P564H, 21 June 2007, as corrected on 28 June 2007: Corrigendum to Prosecution's Filing of Public Redacted Versions of Trial Exhibits P564D, P564E and P564H.
[181] Decision on Prosecution's Motion to Lift Seal on Exhibit P152, 8 February 2008.
[182] Motion for an Order Directing the Prosecution to Identify Specific References in the Record and to Provide the References, and Copies Thereof, to Mr. Krajišnik and his Counsel, 6 August 2008.
[183] Prosecution Response to Counsel Motion on Behalf of Momčilo Krajišnik dated 6 August 2008, 8 August 2008. *See* also Order for the Prosecution to File a Response, 7 August 2008.
[184] Decision on Defence Motion for Provision of References, 11 August 2008.
[185] Urgent Motion to Strike, 19 August 2008.
[186] Krajišnik Response to Prosecution Urgent Motion to Strike, 20 August 2008.

6 September 2007.[188] Krajišnik filed a notice in response, stating that he was not in the possession of the correspondence referred to in the Prosecution's urgent request. Furthermore, he stated that he was not in a position to advance arguments in relation to the issue of *ex parte* privileged communication of the documents in question until he had an opportunity to research and consider the matter. Krajišnik argued that in any event, the statements did not seem essential for the Prosecution's preparation of cross-examination of Mr. Karganović and that the Prosecution's request should therefore be dismissed.[189] The Appeals Chamber granted the request, ordering the Registry to disclose parts of the correspondence, with the exception of specifically detained documents.[190]

G. Status Conferences

62. Status Conferences in accordance with Rule 65 *bis* of the Rules were held on 11 December 2006,[191] 26 March 2007,[192] 5 April 2007,[193] 5 July 2007,[194] 2 November 2007,[195] 31 March 2008,[196] and 21 July 2008.[197].

H. Hearing of the appeals

63. The hearing in this appeal was held on 21 August 2008.[198]

I. Evidentiary hearings

64. On 21 October 2008, the Appeals Chamber ordered that an evidentiary hearing would take place on 3 and 5 November 2008, informing the parties and *Amicus Curiae* that Mr. Mano and Mr. Karganović would be heard on 3 November 2008 and Mr. Karadžić on 5 November 2008.[199] On 6 November 2008, the Appeals Chamber informed the parties and *Amicus Curiae* that an

[187] Decision on Prosecution's Motion to Strike, 20 August 2008.
[188] Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decisions, 27 October 2008.
[189] Notice in Relation to Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decisions, 30 October 2008 (Confidential).
[190] Decision on Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decisions, 30 October 2008.
[191] *See* Scheduling Order for Status Conference, 6 November 2006.
[192] *See* Scheduling Order, 20 February 2007.
[193] The Status Conference of 5 April 2007 took place pursuant to an oral order rendered by the Pre-Appeal Judge on 26 March 2007: Status Conference on Appeal, AT. 64, 70.
[194] *See* Scheduling Order, 14 June 2007.
[195] *See* Scheduling Order, 25 October 2007, as Modified by Scheduling Order, 29 October 2007.
[196] *See* Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008.
[197] Scheduling Order, 11 July 2008. *See* also Scheduling Order for Status Conference, 10 March 2009, and Order Cancelling Status Conference, 12 March 2009.
[198] *See* Scheduling Order for Appeals Hearing, 18 July 2008.
[199] Scheduling Order for Evidentiary Hearing, 21 October 2008.

evidentiary hearing would be held on 11 November 2008 in which Mr. Nicholas Stewart would be heard.[200]

65. On 18 November 2008, the Prosecution filed a supplemental brief on the additional evidence,[201] in addition to a book of authorities[202] and annexes.[203] The Accused filed a consolidated supplemental brief.[204] *Amicus Curiae* filed a supplemental brief focusing on the evidence given by Mr. Mano, Mr. Karganović, Mr. Stewart and Mr. Karadžić.[205] On 28 November 2008, the Prosecution filed a public redacted version of its supplemental brief on the additional evidence and a request to lift the confidentiality of appendices thereto and of the Prosecution's book of authorities.[206] On 23 January 2009,[207] the Appeals Chamber granted the Prosecution's request in part, and ordered that (1) the Prosecution file a public version of the appendices to its supplemental brief; (2) the confidentiality of the Book of Authorities to the Prosecution's supplemental brief be lifted; (3) the parties file public versions of their supplemental briefs, redacting references to Exhibits AD4 and AD5 and the parts of Mr. Nicholas Stewart's testimony in private session; (4) the confidential status of a number of decisions be lifted;[208] (5) Exhibits AD1, AD2, AD6-AD9, AP1-AP7, the testimonies of Mr. George Mano, Mr. Stefan Karganović and Mr. Nicholas Stewart[209] be rendered public; (6) the confidential status of relevant parts of the transcript of the appeal hearing of 21 August 2008 be lifted[210]; and (7) the parties "file public redacted versions of their submissions adjudicated in the Decisions and Orders". The Appeals Chamber further issued a public redacted version of the Decision on Momčilo Krajišnik's Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former

[200] *See* Scheduling Order for Evidentiary Hearing, 6 November 2008.
[201] Consolidated Supplemental Brief on the Additional Evidence, 18 November 2008.
[202] Book of Authorities for Prosecution's Consolidated Supplemental Brief on the Additional Evidence, 18 November 2008.
[203] Annexes to Consolidated Supplemental Brief on the Additional Evidence, 18 November 2008.
[204] Accused Consolidated Supplemental Brief in Relation to the Additional Evidence, 18 November 2008 (public redacted version filed on 6 February 2009).
[205] *Amicus Curiae*'s Supplemental Appellate Brief on Additional Evidence, 19 November 2008 (public redacted version filed on 16 February 2009).
[206] Notice of Filing of Public Redacted Version of Prosecution Consolidated Supplemental Brief and Request to Lift Confidentiality of Appendices to the Consolidated Supplemental Brief and of the Prosecution's Book of Authorities, 28 November 2008.
[207] Order Lifting Confidentiality, 23 January 2009.
[208] Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008; Order on Rebuttal Material, 26 August 2008; Decision on Prosecution's Motion to Adduce Rebuttal Material, 8 October 2008; Decision on Request by *Amicus Curiae* to Notify the Appellant of the Existence of Certain Documents, 8 October 2008; Decision on Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decision, 30 October 2008; Decision on *Amicus Curiae*'s Request Regarding Attendance at Evidential Hearings on 3 and 5 November 2008, 31 October 2008; Order to Redact the Public Transcript and the Public Broadcast of a Hearing, 3 November 2008.
[209] Except for AT. 618, lines 17-20 and AT. 696, lines 19-23.
[210] AT. 174 (line 22), 175 (line 12), 299 (line 1), 300 (line 2), 315 (line 8), 316 (line 16).

Counsel of 6 November 2008. On 10 March 2009, the Appeals Chamber ordered the lifting of confidentiality of further Prosecution filings.[211]

[211] Order Regarding Prosecution Requests to Lift Confidentiality of Certain Prosecution Filings, 10 March 2009.

IX. ANNEX B: GLOSSARY AND LISTS OF REFERENCES

A. List of Cited Court Decisions

1. ICTY

ALEKSOVSKI

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

BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Sentencing Judgement, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal")

V. BLAGOJEVIĆ AND D. JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement"*)*

Prosecutor v.Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement*")*

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BRALO

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Appeal Judgement")

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Judgement on Sentencing Appeal")

ERDEMOVIĆ

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* 1996 Sentencing Judgement")

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement")

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2005 ("*Halilović* Appeal Judgement")

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal")

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Oral Decision on Defense Motion for Adjournment, 16 July 2004, T. 4515-4519 ("First Decision on Adjournment")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Decision on Defense Motion for Adjournment (Written Reasons), 21 September 2004, ("First Decision on Adjournment (Written Reasons)")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T*,* Decision on (Second) Defence Motion for Adjournment, 4 March 2005 ("Second Decision on Adjournment")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-AR.73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005 ("Decision on Interlocutory Appeal")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005 ("Reasons for Denying Request to Proceed Unrepresented by Counsel")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Decision on Defence Motion to Further Delay the Commencement of the Defence Case, 28 September 2005 ("Decision of 28 September 2005")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Decision on Defence's Rule 74 *bis* Motion; Amended Trial Schedule, 27 February 2006 ("Decision of 27 February 2006")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Finalised Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006 ("Decision of 24 April 2006")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T*,* Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavšić and Branko Đerić and Decision on Admission into Evidence of Biljana Plavšić's Statement and Book Extracts, 14 August 2006 ("Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T*,* Reasons for Decision Denying Defence Motion for Time to Call Additional Witnesses, 16 August 2006 ("Reasons for Denying Motion to Call Additional Witnesses")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 ("Trial Judgement")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae,* and on the Prosecution Motion of 16 February 2007, 11 May 2007 ("Decision on Self-Representation")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, filed publicly on 4 November 2008 ("Rule 115 Decision of 20 August 2008")

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC *et al.*

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ *et al.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA *et al.*

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

LIMAJ *et al.*

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement")

MILUTINOVIĆ *et al.*

Prosecutor v .Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Case No. IT-05-87-T, Judgement, 26 February 2009 ("*Milutinović et al.* Trial Judgement")

Prosecutor v .Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić (Interlocutory), Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Decision on Joint Criminal Enterprise")

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-02-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement")

Prosecutor v. Dragan Nikolić, Case No. IT-94-02-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

M. NIKOLIĆ

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Momir Nikolić* Sentencing Judgement")

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ORIĆ

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Prosecutor v. Naser Orić, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule (90)(H)(ii), 17 January 2006 ("*Orić* Decision on Rule 90(H)(ii)")

Prosecutor v. Nase Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement")

PLAVŠIĆ

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POPOVIĆ *et al.*

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B. SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement")

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

STRUGAR

Prosecutor v. Pavle Strugar Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement")

D. TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

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VASILJEVIĆ

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2. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

GACUMBITSI

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KAMBANDA

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KAMUHANDA

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KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement")

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement")

MUSEMA

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NAHIMANA *et al.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52- A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement")

NIYITEGEKA

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

NTAKIRUTIMANA

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement")

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-A, Appeal Judgement, 9 December 2004 ("*Ntakirutimana* Appeal Judgement")

NTAGERURA *et al.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement and Sentence, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement")

NYIRAMASUHUKO *et al.*

The Prosecutor v. Pauline Nyiramasuhuko et al., Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceeding under Rule 15*bis*(D), 24 September 2003

RWAMAKUBA

The Prosecutor v. André Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 ("*Rwamakuba* Appeal Decision")

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2003 ("*Semanza* Appeal Judgement")

B. Articles

Cassese, Antonio, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 Journal of International Criminal Justice 109 (2007)

Martinez, Jenny S./Danner, Allison Marston, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 California Law Review 75 (2005)

Powles, Steven, *Joint Criminal Enterprise, Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 Journal of International Criminal Justice 606 (2004)

C. List of Abbreviations

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

ABiH	Army of the Republic of Bosnia and Herzegovina
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), 8 June 1977
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), 8 June 1977
a.k.a.	Also known as

Amicus Curiae's Appeal Brief	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Public and Redacted *Amicus Curiae*'s Appellate Brief, 31 August 2007
Amicus Curiae's Appeal Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Confidential *Amicus Curiae*'s Appellate Brief, 3 August 2007, corrected on 14 January 2008
Amicus Curiae's Notice of Appeal	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Public and Redacted *Amicus Curiae*'s Notice of Appeal, 8 June 2007
Amicus Curiae's Notice of Appeal (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Confidential *Amicus Curiae*'s Notice of Appeal, 8 June 2007
Amicus Curiae's Reply	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, *Amicus Curiae*'s Reply to Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 24 June 2008
Amicus Curiae's Reply (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Confidential *Amicus Curiae*'s Reply to Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 26 September 2007
Amicus Curiae's Response	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Counsel's Response to the Prosecution's Appeal Brief, 12 February 2007
Amicus Curiae's Supplemental Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, *Amicus Curiae*'s Supplemental Appellate Brief on Additional Evidence, 18 November 2008 (public redacted version: 16 February 2009)
APCs	Armoured personnel carriers
ARK	*Autonomna Regija Krajina* – Autonomous Region of Krajina
AT	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise.
B/C/S	Bosnian/Serbian/Croatian
BiH	Bosnia and Herzegovina
Cf.	Compare with
CSB	Centre for Public Security
Defence Final Trial Brief (Confidential)	Defence Final Brief Pursuant to Rule 86(B), 18 August 2006
Defence Pre-Trial Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 &40, The Krajisnik Defense Rule 65 *ter* (F) Pre Trial Brief, 14 October 2002
Dershowitz Brief	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, dated 4 April 2008,

	filed on 7 April 2008
FBiH	Federation of Bosnia and Herzegovina
Fn(s).	Footnote(s)
G/ŠVK	Main Staff of the Supreme Command (in B/C/S: "Glavni Staba Vrhovne Kommande")
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 2
HVO	Croatian Defence Council
ICRC	International Committee of the Red Cross
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indictment	*Prosecutor v. Momčilo Krajišnik and Biljana Plavšić,* Case No. IT-00-39&40-PT, Amended Consolidated Indictment, 7 March 2002
Indictment municipalities	Banja Luka, Bijeljina, Bileća, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Bratunac, Brčko, Čajniče, Čelinac, Doboj, Donji Vakuf, Foča, Gacko, Hadžići, Ilidža, Ilijaš, Ključ, Kalinovik, Kotor Varoš, Nevesinje, Novi Grad, Novo Sarajevo, Pale, Prijedor, Prnjavor, Rogatica, Rudo,[212] Sanski Most, Šipovo,[213] Sokolac, Teslić, Trnovo, Višegrad, Vlasenica, Vogošća, Zvornik
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Karadžić Rule 92 *ter* Statement	Written statement of Radovan Karadžić, admitted into evidence pursuant to Rule 92 *ter* of the Rules at the evidentiary hearing on 5 November 2008
Krajišnik's Appeal Brief	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, final public redacted version filed in English on 28 February 2008
Krajišnik's Appeal Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, final confidential version filed in English on 1 February 2008
Krajišnik's Notice of Appeal	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Krajišnik's Notice of Appeal, the original version being dated 12 February 2007 and the English translation having been filed on 20 February 2007
Krajišnik's Reply	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Reply to Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, the original version being dated 14 May

[212] The parties agreed to exclude Rudo, Rule 98 bis decision, T. 17133.
[213] The parties agreed to exclude Šipovo, Rule 98 bis decision, T. 17133.

	2008 and the English translation having been filed on 26 May 2008
Krajišnik's Response	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Response to Prosecution's Appeal Brief against the Judgement of the ICTY in the Case of Momčilo Krajišnik, the original version being dated 12 February 2007 and the English translation having been filed on 20 February 2007
Krajišnik's Supplemental Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Consolidated Supplemental Brief In Relation to the Additional Evidence (Confidential), 18 November 2008 (public redacted version: 6 February 2009)
MUP	*Ministarstvo Unutrašnjih Poslova* – Ministry of Internal Affairs of BiH
Parties	The Prosecution and the Defence
Prosecution	Office of the Prosecutor
Prosecution's Appeal Brief	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Prosecution's Appeal Brief, 27 November 2006
Prosecution Final Trial Brief	Prosecution's Final Brief, 18 August 2006
Prosecution's Notice of Appeal	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Prosecution's Notice of Appeal, 26 October 2006
Prosecution Pre-Trial Brief	*Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Prosecution's Pre-Trial Brief, 2 May 2002
Prosecution's Reply to *Amicus Curiae*	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, The Prosecution's Reply Brief, 22 February 2007
Prosecution's Reply to Krajišnik	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, The Prosecution's Second Reply Brief, 27 February 2007
Prosecution's Response to *Amicus Curiae*	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Prosecution's Response to *Amicus Curiae*'s Appellate Brief, 12 September 2007
Prosecution's Response to Dershowitz	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Response to Brief on Joint Criminal Enterprise on behalf of Momčilo Krajišnik, 25 April 2008
Prosecution's Response to Krajišnik	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Notice of Filing of Public Redacted Version of Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006, 18 March 2008
Prosecution's Response to Krajišnik (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Prosecution Response to Appeal by Momčilo Krajišnik to the ICTY Judgement of 27 September 2006 (Confidential), 12 March 2008
Prosecution's Supplemental Brief (Confidential)	*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Consolidated Supplemental Brief on the Additional Evidence of George Mano, Stefan Karganović, Radovan Karadžić and Nicholas Stewart (Confidential), 18 November 2008 (public redacted version: 11 February 2008).

RS	Republika Srpska
Rules	Rules of Procedure and Evidence of the ICTY
Secretary-General's Report	Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993). UN doc. S/1993/25704
SDB	State Security Service
SDS	*Srpska Demokratska Stranka* – Serbian Democratic Party (main political party of Bosnian Serbs)
SJB	*Stanica Javne Bezbjednosti* – Public Security Station
SNB	*Savjet za Nacionalnu Bezbjednost* – National Security Council
SVB	Military Security Service
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827, as amended by S/RES 1166 (1998), S/RES 1329 (2000), S/RES 1411 (2002), S/RES 1431 (2002), S/RES 1481 (2003), S/RES 1597 (2005), S/RES 1660 (2006), S/RES 1668 (2006)
SFRY	Socialist Federal Republic of Yugoslavia
SIS	HVO Security and Information Service
SUP	Secretariat of Internal Affairs
T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise.
TO	*Teritorijalna Odbrana* - Territorial Defence
Trial Chamber	Trial Chamber I
Trial Judgement	*Prosecutor v. Prosecutor v. Momčilo Krajišnik, Case* No. IT-00-39-T, Judgement, 27 September 2006
Tribunal	*See* ICTY
UNPROFOR	United Nations Protection Force
Wolves of Vučjak	*Vukovi s Vučjaka* – Serbian paramilitary formation
VRS	Army of the Republika Srpska