IT-99-36-A
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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-99-36-A
		Date:	3 April 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 April 2007**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Helen Brady
Ms. Kristina Carey
Ms. Katharina Margetts

Counsel for the Accused:

Mr. John Ackerman

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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 seised of appeals from both parties against the judgement rendered by Trial Chamber II on 1 September 2004 in the case of *Prosecutor v. Radoslav Brđanin* ("Trial Judgement").[1]

A. Radoslav Brđanin

2. Radoslav Brđanin ("Brđanin") is a civil engineer by profession.[2] In 1990, he was elected to the Assembly of the Socialist Republic of Bosnia and Herzegovina as a Serbian Democratic Party ("SDS") deputy from Čelinac Municipality. Upon the creation of the Autonomous Region of Krajina ("ARK") on 16 September 1991, Brđanin became its First Vice-President.[3] In October 1991, he became a member of the Assembly of the Serbian People of Bosnia and Herzegovina ("Bosnian Serb Assembly").[4] On 5 May 1992, he was appointed President of the newly created ARK Crisis Staff, which became the ARK War Presidency on 9 July. He retained his position at the head of this body until the abolition of the ARK on 15 September 1992.[5]

B. Trial Judgement and Sentence

3. Brđanin was tried on the basis of the Sixth Amended Indictment ("Indictment").[6] The Office of the Prosecutor ("Prosecution") charged Brđanin with individual criminal responsibility for crimes committed between 1 April and 31 December 1992.[7] The Trial Chamber found Brđanin responsible, pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), for: persecution as a crime against humanity (Count 3), incorporating torture as a crime against humanity (Count 6), deportation as a crime against humanity (Count 8), and inhumane acts (forcible transfer) as a crime against humanity (Count 9); wilful killing as a grave breach of the Geneva Conventions (Count 5); torture as a grave breach of the Geneva Conventions (Count 7); wanton destruction of cities, towns

[1] Prosecution's Notice of Appeal, 30 September 2004 ("Prosecution Notice of Appeal"); Brđanin's Notice of Appeal, 1 October 2004 ("Brđanin Notice of Appeal"); Prosecution's Brief on Appeal, 28 January 2005 ("Prosecution Appeal Brief"); Brđanin's Supplementary Notice of Appeal, 20 May 2005 ("Brđanin Supplemental Notice of Appeal"); Appellant Brđanin's Brief on Appeal, 25 July 2005 ("Brđanin Appeal Brief").
[2] Trial Judgement, para. 1113.
[3] Trial Judgement, paras 289-290.
[4] Trial Judgement, para. 290.
[5] Trial Judgement, paras 96, 190, 289, 296.
[6] Sixth Amended Indictment, 9 December 2003.
[7] Indictment, paras 35-64.

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or villages, or devastation not justified by military necessity as a violation of the laws or customs of war (Count 11); and destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war (Count 12).[8] The Trial Chamber found Brđanin not guilty of the crimes of genocide (Count 1); complicity in genocide (Count 2); extermination as a crime against humanity (Count 4); and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity as a grave breach of the Geneva Conventions (Count 10).[9] The Trial Chamber imposed a single sentence of 32 years of imprisonment.[10]

4. The Trial Chamber, in reaching its verdict and sentence, found that the Bosnian Serb leadership, including the members of the Main Board of the SDS and other members of the SDS, as well as Bosnian Serb representatives of the armed forces, formulated a plan to link Serb-populated areas in Bosnia and Herzegovina ("BiH") together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed. It defined this plan as the "Strategic Plan" and found that it was pursued in the awareness that it could only be implemented by force.[11]

C. The Appeals

5. Brđanin argues that he should be acquitted of all charges.[12] He submits numerous challenges to the legal and factual findings of the Trial Chamber. In particular, his challenges to the Trial Judgement concern: (1) the role of the ARK Crisis Staff in the crimes that occurred in the territory of the ARK during the relevant period; (2) Brđanin's own power and role in relation to the ARK, his relationship with Radovan Karadžić, and his role in the implementation of the Strategic Plan; and (3) Brđanin's individual responsibility for the crimes that occurred as a result of the implementation of the Strategic Plan.

6. The Prosecution presented five grounds of appeal.[13] It submits that the Trial Chamber erred when it: (1) dismissed joint criminal enterprise (also "JCE") as an appropriate mode of liability for this case and held that the physical perpetrator of a crime must be a member of the joint criminal enterprise concerned; (2) held that the first category (also "basic form") of joint criminal enterprise requires an understanding or agreement between an accused and the physical perpetrator of the

[8] Trial Judgement, para. 1152.
[9] Trial Judgement, para. 1152.
[10] Trial Judgement, para. 1153.
[11] Trial Judgement, para. 65
[12] Brđanin Appeal Brief, para. 337; Response to the Prosecution's Brief on Appeal, 18 October 2005 ("Brđanin Response Brief"), para. 119. In his notices of appeal, Brđanin submitted that there were 172 Alleged Errors in the Trial Judgement. In his Appeal Brief, Brđanin declined to argue Alleged Errors 4, 6, 8, 16, and 62. Thus, the Appeals Chamber considers these alleged errors withdrawn.
[13] Prosecution Notice of Appeal; Prosecution Appeal Brief.

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crime; (3) found Brđanin not liable for killings related to detention facilities other than those in Teslić Municipality; (4) found Brđanin not liable for the crime of extermination; and (5) held that the required *mens rea* for the crimes of deportation and forcible transfer includes the intent that the victims be displaced permanently. The fifth ground was subsequently withdrawn. [14] The Prosecution, though not setting forth a separate ground of appeal on sentencing, also seeks an increase of Brđanin's sentence.[15]

[14] Withdrawal of Prosecution's Fifth Ground of Appeal, 7 June 2006, para. 4.
[15] Prosecution Notice of Appeals, paras 7, 12, 16, 20; Prosecution Appeal Brief, paras 1.3, 8.1; AT. 7 December 2006, p. 60.

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II. APPELLATE REVIEW

A. Standard for Appellate Review

7. Article 25 of the Statute provides that an appeal can be brought on the grounds either that an error of law invalidates the decision, or that an error of fact occasions a miscarriage of justice. Article 25 of the Statute also provides that the Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chamber.

8. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the Tribunal[16] and the ICTR.[17] 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 judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[18]

1. Errors of law

9. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[19] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[20] It is 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 the appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[21]

10. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[22] Where the Appeals Chamber finds an error of law in the Trial Judgement

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[16] *See,* for example, *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.

[17] *See Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[18] *Tadić* Appeal Judgement, para. 247.

[19] *Krnojelac* Appeal Judgement, para. 10.

[20] *Kupreškić et al.* Appeal Judgement, para. 26; *Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

[21] *Kvočka et al.* Appeal Judgement, para. 25.

[22] *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

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arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[23] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[24]

2. Errors of fact

11. Evidence before a Trial Chamber is notoriously voluminous: a Trial Chamber cannot be expected to refer to all of it. The Appeals Chamber has to presume that all relevant evidence was taken into consideration by the Trial Chamber even if not expressly referred to by it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[25] A Trial Chamber does not have to explain every decision it makes, as long as the decision, with a view to the evidence, is reasonable.

12. In this case, the parties disagree on the standard that the Trial Chamber should have applied and on the standard on appeal regarding challenges to inferences drawn from circumstantial evidence.[26] It is settled jurisprudence that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and the applicable mode of liability, as well as any fact indispensable for entering the conviction beyond a reasonable doubt.[27]

13. In light of the above, and regardless of whether a finding of fact was based on direct or circumstantial evidence,[28] in the case of an appeal against a conviction the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. Therefore, an accused must show that, after taking into account the Trial Chamber's error, there is reasonable doubt as to his guilt.[29]

14. The same standard of reasonableness applies when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, as when considering an appeal by

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[23] *Blaškić* Appeal Judgement, para. 15.
[24] *Blaškić* Appeal Judgement, para. 15; *Ntagerura at al.* Appeal Judgement, para. 136..
[25] *Kvočka et al.* Appeal Judgement, para. 23.
[26] *See*, for example, Prosecution Response Brief, paras 5.1-5.6; Brđanin Reply Brief, paras 73-74; AT. 8 December 2006, p. 133.
[27] *Stakić* Appeal Judgement, para. 219; *Kupreškić* Appeal Judgement, para. 303; *Kordić and Čerkez* Appeal Judgement, para. 834; *Ntagerura et al.* Appeal Judgement, paras 174-175.
[28] *Čelebići* Appeal Judgement, para. 458.
[29] *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 220; *Blaškić* Appeal Judgement, para. 16; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

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the accused, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding.[30]

15. The Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes 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, if any.[31] In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[32]

16. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber. Arguments of a party which are evidently unfounded or do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits. The Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[33]

B. Summary dismissals

17. In his appeal, Brđanin raises numerous challenges to the factual findings of the Trial Judgement claiming, in particular, that these findings were not proven beyond reasonable doubt or were not supported by a reasoned opinion, or both. In addition to responding to each of the alleged factual errors that Brđanin asserts, the Prosecution raises more general questions concerning the standard of appellate review and argues that many of Brđanin's arguments could be dismissed on a systematic basis because he does not meet the requirements on appeal.

18. In application of the basic principles recalled above, the Appeals Chamber has identified eight categories of deficiencies related to several alleged errors of fact pursuant to which it will dismiss the pertinent alleged errors or arguments in a summary way.

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[30] *Bagilishema* Appeal Judgement, paras 13-14.
[31] *Blaškič* Appeal Judgement, para. 13.
[32] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), para. 4(b). *See also Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[33] *Galić* Appeal Judgement, para. 12; *Stakić* Appeal Judgement, paras 11, 13; *Gacumbitsi* Appeal Judgement, paras 9-10; *Ntagerura et al.* Appeal Judgement, paras 13-14; *Kajelijeli* Appeal Judgement, paras 6, 8; *Rutaganda* Appeal Judgement, para. 19.

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

19. The burden which Brđanin is called on to discharge on appeal in relation to factual findings related to his conviction is to show that an alleged error of fact is a conclusion which no reasonable trier of fact could have reached and which occasioned a miscarriage of justice, which has been defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[34] It is only these factual errors that will result in the Appeals Chamber overturning a Trial Chamber's decision.[35]

20. In light of the large number of errors of fact alleged by Brđanin and considering that he had failed to indicate adequately the relevant paragraphs of the Trial Judgement in his briefs,[36] on 24 July 2006 the Appeals Chamber invited Brđanin to file a table indicating the relevant paragraphs of the Trial Judgement corresponding to each of the factual findings that, according to him, provided the basis for a conviction and could not properly have been made beyond a reasonable doubt.[37] On 21 August 2006, Brđanin filed his response in the form of a table, addressing 57 of the errors identified in his filings and providing the paragraph numbers of the Trial Judgement which he submits contain erroneous factual findings that were relied upon to establish an element of a crime or mode of liability, or to aggravate his sentence.[38]

21. On 15 January 2007, following a question posed on 3 November 2006[39] that was briefly addressed also at the Appeal Hearing,[40] Brđanin notified the Appeals Chamber that some errors alleged in the Appeal Brief do not actually have any impact on the conviction or on the sentence. These are Alleged Errors 2, 7, 12, 15, 17-21, 23, 26, 38, 42-47, 49-53, 56,[41] 81, 123, S1-S5, and S7-S12. However, he maintained that they are not abandoned, "since they are exemplary of the deficiencies in the Judgment as a whole" and could be significant should the Appeals Chamber use those portions of the Trial Judgement to enter a conviction pursuant to joint criminal enterprise.[42] During the Appeal Hearing, Brđanin submitted that "many of the conclusions reached by the Trial Chamber [are] without support. Those conclusions taken as a whole affect this judgement and

[34] *Kunarac et al.* Appeal Judgement, para. 39; *Kupreškić et al.* Appeal Judgement, para. 29; *Furundžija* Appeal Judgement, para. 37; *Simić* Appeal Judgement, para. 10.
[35] *Kordić and Čerkez* Appeal Judgement, para. 19; *Furundžija* Appeal Judgement, para. 37.
[36] *See* Practice Direction on Appeals Requirements, para. 4(b)(ii).
[37] Order to File a Table, 24 July 2006.
[38] The errors addressed in the table were the following: 1, 5, 9, 10, 11, 13, 14, 29-33, 36, 39, 40, 55, 60, 61, 63-80, 82-85, 87-119, 133 (Response to Order of 24 July 2006, 21 August 2006).
[39] Scheduling Order for Preparation of Appeal Hearing, 3 November 2006, pp. 1-2.
[40] AT. 8 December 2006, p. 139.
[41] In this respect, the Appeals Chamber notes that Alleged Errors 57-59 refer back, without any additional argument, to Alleged Error 56. Therefore, the Appeals Chamber considers it appropriate to deal with all of them together.
[42] E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2006.

demand that it be set aside in its entirety".[43] As explained above, only factual errors occasioning a miscarriage of justice justify a reversal. 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, as Brđanin acknowledges, have no impact on the conviction or sentence.

22. Brđanin occasionally shows that the contested finding of the Trial Chamber is one which underlies a conviction. However, he frequently asserts an erroneous factual finding without adequately demonstrating that it is a finding on which the Trial Chamber relied for a conviction. The omission constitutes a failure to discharge a burden incumbent upon him. Where the Appeals Chamber considers that Brđanin challenges factual findings on which a conviction or sentence does not rely, it will summarily dismiss that alleged error or argument ("category 1").

2. Arguments that misrepresent the Trial Chamber's factual findings or the evidence, or that ignore other relevant factual findings made by the Trial Chamber

23. In several instances, Brđanin makes a submission which either misrepresents the Trial Chamber's factual findings or the evidence on which the Trial Chamber relies, or ignores other relevant factual findings made by the Trial Chamber. Where such an assertion is evidently incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument ("category 2").

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

24. In several instances, Brđanin submits that the Trial Chamber must have failed to consider all relevant evidence, must have given insufficient weight to certain evidence, or should have interpreted evidence in a particular manner and reached a particular conclusion with regard to certain evidence. Where Brđanin does not explain why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber did, the Appeals Chamber will summarily dismiss the alleged error or argument ("category 3").

4. Mere assertions that no reasonable Trial Chamber could have reached a particular conclusion by inferring it from circumstantial evidence

25. In several instances, Brđanin claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence but he neither offers an alternative inference nor explains

[43] AT. 7 December 2006, p. 138.

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why no reasonable Trial Chamber could have excluded such an alternative inference. In such instances, the Appeals Chamber will summarily dismiss the alleged error or argument ("category 4").

5. Arguments that are clearly irrelevant or that lend support to the challenged finding

26. In several instances, Brđanin submits arguments or alleges errors that are clearly irrelevant to the Trial Chamber's convictions or sentence. In other instances, he submits arguments or alleges errors which, if true, would actually lend support to the finding he is attempting to challenge. Where the Appeals Chamber considers that Brđanin brings such challenges, it will summarily dismiss the alleged error or argument on that basis ("category 5").

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

27. In several instances, Brđanin submits arguments that merely dispute 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.

28. In other instances, Brđanin argues that the Trial Chamber's finding was contrary to the testimony of a specific witness, or that the Trial Chamber should or should not have relied on the testimony of a specific witness. However, as mentioned above, Brđanin must show that an alleged error of fact occasioned a miscarriage of justice. Mere assertions that the testimony of one witness is inconsistent with the conclusions of the Trial Chamber are insufficient. Accordingly, Brđanin must show how the finding is wrong, and how the Trial Chamber erred in relying on it so as to occasion a miscarriage of justice.

29. Where the Appeals Chamber considers that Brđanin makes such assertions without substantiating them, it will summarily dismiss that alleged error or argument ("category 6").

7. Arguments contrary to common sense

30. In several instances, Brđanin submits arguments or makes allegations that are contrary to common sense. Where the Appeals Chamber considers that Brđanin brings such challenges, it will summarily dismiss them ("category 7").

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

31. In several instances, Brđanin submits 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. Where the Appeals Chamber considers that Brđanin fails to explain how the alleged factual error had an effect on the conclusions in the Trial Judgement, it will summarily dismiss that alleged error or argument ("category 8").

C. Brđanin's further clarifications as to certain alleged errors

32. In the filing of 15 January 2007 mentioned above, Brđanin also withdrew Alleged Error 10.[44] Further, he declared that Alleged Errors 124-132 and 134-137, not addressed in the table of 21 August 2006, were "application paragraphs based on findings dealt with in other assignments of error", without identifying the "other assignments".[45] Unless the relevance of these submissions is clearly identifiable, the Appeals Chamber will not take them into further consideration.

33. In the same communication, Brđanin clarified that certain alleged errors should be considered to be combined with others. These are Alleged Errors: 3 (included in Alleged Error 1); 24-25 and 27 (included in Alleged Error 11); 34 (included in Alleged Error 33); 37 (included in Alleged Error 39); 41 (included in Alleged Error 40); 48 (included in Alleged Error 1); 54 (included in Alleged Error 36); 57-59 (included in Alleged Error 56);[46] 120-122 (included in Alleged Error 39); and S6 (included in Alleged Error 33).[47] The Appeals Chamber will take this submission into consideration when addressing these Alleged Errors.

[44] E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2006.
[45] E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2006.
[46] The Appeals Chamber, as mentioned before, notes that Alleged Error 56 is said to be one of the conclusions that does "not impact the Judgement or Sentence."
[47] E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2006.

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III. BRĐANIN'S CHALLENGES TO THE TRIAL CHAMBER'S USE OF EVIDENCE

A. Illegal intercept evidence

34. Brđanin submits that the Trial Chamber erred in law in its decision of 3 October 2003 in rejecting his objection that the intercepted telephone calls were illegally obtained as their authorization did not conform with the then-existing law of BiH (Alleged Error 159).[48] In support of this assertion, Brđanin refers to the arguments he made in his Objection to Intercept Evidence and Supplemented Objection to Intercept Evidence, filed by the Defence on 3 July 2003 and 18 July 2003, and also refers to paragraph 1191 of the Trial Judgement.[49]

35. The Appeals Chamber rejects Brđanin's submission as he has not even attempted to provide arguments to support this alleged error. Merely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal since an appellant has to show that the Trial Chamber erred in fact or in law in such a way as to warrant the intervention of the Appeals Chamber.[50]

B. Trial Chamber's analysis of the authenticity of exhibits

36. Brđanin alleges that the Trial Chamber should have provided a reasoned opinion on the authenticity of each Prosecution exhibit before the conclusion of the case (Alleged Error 160). He argues that the failure to do so has left the parties confused as to which exhibits the Trial Chamber regarded as authentic and therefore capable of being considered in its conclusions, which made the final briefing process at trial difficult.[51] He adds that this failure also places the parties and the Appeals Chamber in a difficult position with regards to determining which Prosecution exhibits are available for the Appeals Chamber's consideration.[52]

37. The Prosecution responds that the requirement to provide a reasoned opinion enshrined in Article 23(2) of the Statute applies to the written judgement while Brđanin's arguments seem to refer to the largely oral decisions regarding the admissibility of evidence made by the Trial Chamber during the trial.[53] The Prosecution asserts that neither party could be in any confusion as

[48] Brđanin Appeal Brief, para. 312; Brđanin Reply Brief, para. 1.1. *See* Objection to Intercept Evidence and a Supplemented Objection to Intercept Evidence filed by the Defence on 3 July 2003 and 18 July 2003, respectively.
[49] Brđanin Appeal Brief, para. 312.
[50] Practice Direction on Appeals Requirements, para. 4(b)(ii).
[51] Brđanin Appeal Brief, para. 313.
[52] Brđanin Appeal Brief, para. 314.
[53] Prosecution Response Brief, para. 7.29.

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to which evidence was submitted at trial because each party was present at the time the exhibits were tendered into evidence.[54] The Prosecution further argues that the Trial Chamber is only obliged to provide a general written overview of how it evaluated the credibility of its witnesses,[55] and asserts that Brđanin misunderstands the law if he believes that a reasoned opinion must be produced in relation to the authenticity of each exhibit.[56] The Prosecution stated that the Trial Chamber gave an adequate overview of the authenticity of evidence in the beginning of the Trial Judgement and that Brđanin has not addressed this issue.[57]

38. The Appeals Chamber notes that the Trial Judgement set out that "[i]n order to assess the authenticity of documents, the Trial Chamber considered them in light of evidence as to their source and custody and other documentary evidence and witness testimony". The Trial Chamber held that "[k]eeping in mind at all times the principle that the burden of proving authenticity remains with the Prosecution, the Trial Chamber reviewed all these documents, one by one, and is satisfied that the Prosecution has proved their authenticity beyond reasonable doubt."[58]

39. The Appeals Chamber finds that the approach taken by the Trial Chamber was not in error. The Appeals Chamber recalls that, although the Trial Chamber must always provide a "reasoned opinion in writing",[59] it is not required to articulate every step of its reasoning for each particular finding it makes.[60] The Appeals Chamber finds that it was open for the Trial Chamber in this case to state at the outset of the Trial Judgement the approach it has taken with respect to the authenticity of the exhibits.[61] The Trial Chamber was not obliged to explain for each exhibit how it came to the conclusion that it was authentic. As to the argument of Brđanin that due to the lack of reasoned opinion the parties and the Appeals Chamber still do not know which exhibits were found to be authentic,[62] the Appeals Chamber finds that it is clear from the Trial Chamber's findings at the outset of the Trial Judgement that all of the exhibits relied upon by the Trial Chamber were considered to be authentic.

40. As to Brđanin's argument that the Trial Chamber should have decided on the authenticity of each exhibit before the conclusion of the case, Brđanin also failed to explain how this would have been possible. As correctly noted by the Trial Chamber, the authenticity of an exhibit, in particular if unsigned, undated, or unstamped, has to be assessed in light of its source and custody as well as

[54] Prosecution Response Brief, para. 7.29.
[55] Prosecution Response Brief, para. 7.30, referring to *Rutaganda* Appeal Judgement, paras 217, 228.
[56] Prosecution Response Brief, para. 7.30.
[57] Prosecution Response Brief, para. 7.31, referring to Trial Judgement, para. 31.
[58] Trial Judgement, para. 31.
[59] Article 23(2) of the Statute.
[60] *Musema* Appeal Judgement, para. 18.
[61] *See*, in particular, *Rutaganda* Appeal Judgement, para. 228.

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the other evidence at trial, including documentary evidence and witness testimony.[63] While a trier of fact may legitimately decide not to admit evidence where it is so patently unreliable that it can have no probative value, such an assessment is appropriately done after the conclusion of the case. The Trial Chamber did not err in making a definite finding of the authenticity of the exhibits in its Trial Judgement, and not before the conclusion of the case.

41. For the foregoing reasons, Brđanin's arguments are rejected.

[62] Brđanin Appeal Brief, para. 314.
[63] Trial Judgement, para. 31.

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IV. BRĐANIN'S CHALLENGES RELATED TO THE BOSNIAN SERB POLITICAL AGENDA AND HIS OWN ROLE IN ITS IMPLEMENTATION

A. The Bosnian Serb leadership's political agenda

42. Brđanin claims that the Trial Chamber made several factual errors in its findings regarding the nature of the Bosnian Serb leadership's political agenda, including its Strategic Plan. According to the Trial Chamber, "[t]he Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear".[64] The Trial Chamber also found that the Strategic Plan consisted of "a plan to link Serb-populated areas in BiH together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed"[65] and that "the actual methods used to implement the Strategic Plan were controlled and coordinated from a level higher than the respective municipalities".[66]

43. In particular, Brđanin argues that no reasonable Trial Chamber could have reached beyond reasonable doubt the conclusion that the Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear (Alleged Error 1).[67] This alleged error is dismissed summarily under categories 2, 3 (argument in paragraph 7 of Brđanin Appeal Brief), and 6 (arguments in paragraphs 8 and 9 of Brđanin Appeal Brief), above.

44. Brđanin also contends that no reasonable Trial Chamber could have concluded beyond reasonable doubt that "the actual methods used to implement the Strategic Plan were controlled and coordinated from a level higher than the respective municipalities" (Alleged Error 11).[68] The Appeals Chamber dismisses summarily the arguments used by Brđanin to challenge this finding under category 8, above. The same applies to Alleged Errors 24, 25, and 27 which are dependent on these arguments under Alleged Error 11.[69]

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[64] Trial Judgement, para. 65.
[65] Trial Judgement, para. 65.
[66] Trial Judgement, para. 119.
[67] Brđanin Appeal Brief, paras 5-7; *see also* paras 11, 209, 286 (Alleged Errors 3, 48, 103), which, without adding new arguments, refer to Alleged Error 1 discussed in Brđanin Appeal Brief, paras 5-9.
[68] Brđanin Appeal Brief, para. 26, referring to Trial Judgement, para. 119. Other arguments related to this Alleged Error are dealt with *infra*, in paras 75-90, "Municipalities' acceptance of the ARK Crisis Staff's authority."
[69] E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2007.

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B. The discriminatory dismissals of non-Serbs

45. Brđanin claims that no reasonable Trial Chamber could have found beyond a reasonable doubt that the impact of the war in Croatia on the economy in the Bosnian Krajina did not justify the dismissals of non-Serbs (Alleged Error 5).[70] This alleged error is dismissed summarily under categories 4 (on the discriminatory nature of dismissals), 3 (on the allegation that the Trial Chamber must have ignored other evidence), and 2 above.

C. Steps towards the creation of the ARK

1. The ARK as a step towards the implementation of the Strategic Plan

46. The Trial Chamber found that the establishment of the ARK and other entities known as Serbian Autonomous District (*Srpska autonomna oblast*, "SAO"), and their coordination by the authorities of the Serbian Republic of Bosnia-Herzegovina ("SerBiH"), was a crucial and vital step towards the implementation of the Strategic Plan.[71]

47. Brđanin submits that no reasonable trier of fact could have reached this finding beyond reasonable doubt (Alleged Error 13).[72] Brđanin puts forward three arguments to challenge this finding.

48. First, Brđanin contends that, in reaching this finding, the Trial Chamber relied on the appointment of Jovan Čizmović, a member of the Ministerial Council of the SerBiH Assembly, as coordinator of the governments of the SAOs. He argues that there is no evidence that Jovan Čizmović ever took up his duties as a coordinator.[73] The Prosecution responds that there is specific evidence of Čizmović's coordination.[74] In reply, Brđanin reiterates that there is no evidence of any coordination by Jovan Čizmović, arguing that Jovan Čizmović never attended a meeting of the ARK Assembly or the ARK Crisis Staff or communicated with those bodies in any way and that the telephone interview referred to in the Trial Judgement cannot support the Trial Chamber's finding as it took place five months before the creation of the ARK Crisis Staff.[75]

49. Second, Brđanin claims that the intercepted telephone conversation between Radovan Karadžić and Jovan Čizmović relied upon by the Trial Chamber to make its finding was "vague and

[70] Brđanin Appeal Brief, para. 13, referring to Trial Judgement, para. 84.
[71] Trial Judgement, para. 167.
[72] Brđanin Appeal Brief, paras 59-62.
[73] Brđanin Appeal Brief, para. 60.
[74] Prosecution Response Brief, paras 6.52-6.56, referring to Exs P2470 and P2367, both cited by the Trial Chamber in the relevant footnote (*see* Trial Judgement, fn. 434).
[75] Brđanin Reply Brief, para. 39.

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confusing".[76] Brđanin submits that Jovan Čizmović refers during this conversation to the establishment of a crisis staff but there is no indication as to which crisis staff he was referring to or whether it ever functioned.[77] The Prosecution responds that it is clear from the conversation that Jovan Čizmović was referring to a regional crisis staff, which, by then, had started functioning.[78] Brđanin replies that it cannot be concluded from this telephone conversation that the ARK Assembly or the ARK Crisis Staff was being discussed and stresses that only one of the persons referred to in this conversation can be identified as a "Krajina person".[79]

50. Lastly, Brđanin argues that the testimony by Expert Witness Patrick Treanor referred to by the Trial Chamber is mere speculation.[80] The Prosecution responds that Treanor did not provide direct evidence on the issue but he nevertheless gave his expert opinion which corroborated direct evidence from other sources.[81]

51. The gist of Brđanin's argument is that the Trial Chamber erred in finding that the authorities of the SerBiH coordinated the ARK and other SAOs in BiH. Contrary to Brđanin's first argument, the evidence cited by the Trial Chamber shows that Jovan Čizmović was not only appointed coordinator of the governments of the ARK and the other SAOs in December 1991, but that he also carried out the tasks related to this position.[82] As correctly noted by the Trial Chamber,[83] exhibit P2470 shows that Čizmović called for the implementation of a document entitled "Instructions for the Organization and Activity of Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances" ("Variant A and B Instructions")[84] during the sixth session of the SerBiH Assembly and that he was present at this session in his function as "co-ordinator of the regions",[85] that is as coordinator of the ARK and the other SAOs.

52. Exhibit P2367, an intercepted telephone conversation between Karadžić and Čizmović, also shows that Čizmović took up his duties as coordinator of the ARK and the other SAOs. In this conversation, Čizmović refers to Doboj (a municipality of SAO Northern Bosnia), Bijeljina (a municipality of SAO Semberija), and Birač, Romanjia, and Herzegovina (that is, SAOs Romanija-Birač and Herzegovina).[86] In addition, although Brđanin argues that the names mentioned in the

[76] Brđanin Appeal Brief, para. 61.
[77] Brđanin Appeal Brief, para. 61.
[78] Prosecution Response Brief, para. 6.57.
[79] Brđanin Reply Brief, paras 40-41.
[80] Brđanin Appeal Brief, fn. 62.
[81] Prosecution Response Brief, para. 6.58.
[82] Trial Judgement, para. 167; *see* in particular Ex. P2363, p. 2.
[83] Trial Judgement, fn. 434.
[84] Trial Judgement, para. 69.
[85] Ex. P2470, pp. 13, 29.
[86] Ex. P2367, p. 5; *see also* Ex. P2359.

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telephone conversation cannot be associated with the ARK, he acknowledges that "Vukić can be identified as a Krajina person".[87] Furthermore, during the same conversation, Radovan Karadžić told Čizmović that he should "sit together with Vukić" to discuss some issues.[88]

53. Brđanin's argument that Čizmović never participated in any ARK Assembly or ARK Crisis Staff meeting is also misplaced as, according to the minutes of the 14th session of the ARK Assembly on 29 February 1992, Jovan Čizmović was present and participated at this session as "coordinator in the Serbian government of BH".[89] Brđanin's first argument is therefore rejected.

54. Turning to Brđanin's argument in relation to Čizmović's conversation with Karadžić, the Appeals Chamber dismisses it summarily under categories 4 and 7, above.

55. Brđanin's argument in relation to Expert Witness Patrick Treanor's evidence is also summarily dismissed under category 6, above. Brđanin also appears to challenge the finding that the coordination by the SerBiH authorities was a "crucial and vital step" towards the implementation of the Strategic Plan.[90] Since he does not present any argument in this respect, this argument is summarily dismissed under category 4, above.

56. For the foregoing reasons, Alleged Error 13 is dismissed.

2. The ARK as an intermediate level of authority

57. Brđanin challenges the Trial Chamber's repeated findings that the ARK was an intermediate level of authority between the SerBiH top leadership and the municipalities (Alleged Error 14). Brđanin specifically challenges the findings made by the Trial Chamber in paragraph 170 of the Trial Judgement as to the ARK's intermediate level of authority. Also, he challenges the Trial Chamber's reliance on a decision to appoint Radislav Vukić to the position of "member-in-charge coordinator for the SAO Krajina" (Exhibit P116) which is, in Brđanin's view, not related to the ARK.[91] The Trial Chamber cited Exhibit P116 as a decision of the SDS Executive Board appointing Radislav Vukić "member-in-charge coordinator" of SAO Krajina.[92]

58. Brđanin submits that no reasonable Trial Chamber could have reached beyond reasonable doubt the conclusions that the ARK operated as an intermediate level of authority between the

[87] Brđanin Reply Brief, para. 41.
[88] Ex. P2367, p. 4. Vukić was "member-in-charge coordinator" for the ARK (Trial Judgement, para. 184).
[89] Ex. P35/P118, p. 2. This exhibit was several times referred to by the Trial Chamber, *see* Trial Judgement, fns 452, 453, 471-472, 482.
[90] Brđanin Appeal Brief, para. 59.
[91] Brđanin Appeal Brief, paras 63-65; AT. 8 December 2006, pp. 136-138.
[92] Trial Judgement, paras 184, 200.

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SerBiH and the municipalities[93] and that its principal role was to coordinate the implementation by the municipalities of the instructions issued by the SerBiH and the SDS Main Board.[94] Brđanin argues that there is not a single document or testimony about any such documents showing that instructions were initiated by the government, passed on to the regional level, and from there passed down to the municipalities.[95] He claims that the testimonies relied upon by the Trial Chamber on this are "equivocal".[96]

59. The Prosecution responds that the lack of documents showing a chain of command does not render the Trial Chamber's findings unreasonable.[97] It argues that the findings in paragraph 170 of the Trial Judgement constitute a conclusion based on evidence scrutinised elsewhere in the Trial Judgement.[98] It contends that the testimonies on this issue are not equivocal and support the findings.[99]

60. With respect to the appointment of Radislav Vukić, Brđanin claims that the reference to a "SAO Krajina" in Exhibit P116 refers to the Croatian Krajina. Thus, in his opinion, the Trial Chamber erred in using this exhibit as evidence for findings regarding the ARK in BiH (see also Alleged Errors 18 and 24).[100] SAO Krajina and the ARK were two separate entities, as evidence led at trial shows.[101] Brđanin also recalls that the document in question is dated 24 February 1992, while the ARK Crisis Staff did not come into existence until 5 May 1992.[102]

61. The Prosecution points out that the Croatian Krajina was called "Serb Autonomous District" until December 1991 but was renamed "Republic of Srpska Krajina" after that. This shows that Exhibit P116 (dated 24 February 1992) could not be referring to Croatian Krajina.[103] The Prosecution further argues that the document only refers to Bosnia-Herzegovina. Moreover, there is other evidence indicating that the document in question refers to the ARK.[104]

62. In reply, Brđanin submits that Exhibit P116 is, as acknowledged by the Trial Chamber,[105] the only document addressing the relationship between the ARK Crisis Staff and the municipal

[93] Brđanin Appeal Brief, para. 63, referring to Trial Judgement, para. 170.
[94] Brđanin Appeal Brief, para. 65.
[95] Brđanin Appeal Brief, para. 63.
[96] Brđanin Appeal Brief, para. 64.
[97] Prosecution Response Brief, para. 6.60.
[98] Prosecution Response Brief, para. 6.60.
[99] Prosecution Response Brief, para. 6.61.
[100] Brđanin Notice of Appeal, para. 26; Brđanin Appeal Brief, para. 33, citing Trial Judgement, para. 200 and Brđanin Appeal Brief, para. 76, referring to Trial Judgement, para. 184; *see also* Brđanin Notice of Appeal, para. 20.
[101] Brđanin Appeal Brief, paras 33, 35. In Brđanin Appeal Brief, para. 34, Brđanin cites the testimony of Witness BT-79, T. 11359 (closed session).
[102] Brđanin Appeal Brief, para. 33, referring to Ex. P168; *see also* Brđanin Notice of Appeal, para. 20.
[103] Prosecution Response Brief, paras 6.26-6.27.
[104] Prosecution Response Brief, para. 6.27; AT. 8 December 2006, pp. 174-176.
[105] Trial Judgement, para. 200.

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authorities.[106] In an attempt to "finally clarify and resolve this matter",[107] Brđanin refers to other evidence which, in his view, shows that SAO Krajina was in Croatia.[108] At the Appeal Hearing, Brđanin reiterated his position, referring once again to witnesses called by the Prosecution, as well as to a number of exhibits, all, in his view, supporting his position.[109]

63. Contrary to Brđanin's argument, the Trial Chamber was not obliged to rely on documentary evidence to conclude that the ARK operated as an intermediate level of authority with coordinating functions, as long as witness testimonies supported this conclusion.[110] Brđanin's argument that the witness testimonies are "equivocal"[111] is also dismissed summarily pursuant to categories 2 and 3, above.

64. Exhibit P116 is a decision of the Executive Board of the SDS Main Board to appoint Radislav Vukić to the position of "member-in-charge coordinator for the SAO Krajina". The Trial Chamber relied on this exhibit to make findings on the coordinating function of the ARK and the authority of the ARK Crisis Staff over the member municipalities.[112]

65. Most of the evidence referred to by Brđanin shows that a distinction is to be drawn between the Serbian Autonomous districts in Croatia, in particular the Croatian Krajina, and the ARK in Bosnia.[113] The Trial Chamber was aware that these entities had to be kept distinct.[114] Exhibit P116 refers to "SAO Krajina" and "SAO Krajina Crisis Staff" (as mentioned before, SAO stands for *Srpska autonomna oblast* or Serbian autonomous district). The expression "SAO Krajina" was also used to refer to the Serbian Autonomous District in Croatia, as can be seen from the evidence referred to by Brđanin in reply.[115] However, by 24 February 1992, the date on the exhibit, Croatian Krajina had been long renamed Republic of Serbian Krajina (or "RSK").[116]

66. In view of the above, Brđanin has failed to show that it was unreasonable for the Trial Chamber to conclude that Exhibit P116, a decision to appoint Vukić to the position of "member-in-charge Coordinator for the SAO Krajina", deals with the ARK. On the contrary, the text of Exhibit P116 suggests that this decision does not relate to Croatian Krajina. The decision was taken by the "Serbian Democratic Party of Bosnia and Herzegovina – Executive Board" in Sarajevo, pursuant to

[106] Brđanin Reply Brief, para. 15.
[107] Brđanin Reply Brief, para. 17.
[108] Brđanin Reply Brief, paras 18-36. In this respect, *see* Decision on Defence Motion to Admit Additional Evidence Pursuant to Rule 115, 3 March 2006, para. 7.
[109] AT. 8 December 2006, pp. 136-138.
[110] *See* Trial Judgement, fn. 442, referring to witnesses Predrag Radić and BT-95.
[111] Brđanin Appeal Brief, para. 64.
[112] Trial Judgement, paras 184, 200.
[113] Brđanin Reply Brief, paras 18-36.
[114] *See* Trial Judgement, fn. 426.
[115] Brđanin Reply Brief, paras 18-36.

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the Statute of the Bosnia-Herzegovina SDS.[117] Further, the appointee was a member of the Executive Board of the SDS of Bosnia-Herzegovina,[118] whose duties as coordinator of the region, according to Exhibit P116, included that of reporting back to this Executive Board[119] and of ensuring the implementation of decisions and conclusions of the Assembly of the Serbian People of Bosnia-Herzegovina and its Ministerial Council.[120] It was thus not unreasonable for the Trial Chamber to reach the conclusion it did.

67. Furthermore, having *proprio motu* reviewed the trial record in fairness to Brđanin, the Appeals Chamber finds that the Trial Chamber's interpretation of Exhibit P116 is supported by two additional decisions entered into evidence. These two decisions concern the appointment of members of the SDS executive board as coordinators for "SAO Romania" and "SAO Eastern Herzegovina" (two entities in BiH), issued on the same date as Exhibit P116.[121] These decisions support the conclusion that, on the same date, a coordinator was also appointed to the ARK.

68. Thus, the Appeals Chamber finds that the Trial Chamber did not err in relying on Exhibit P116 in reaching its conclusions. Alleged Error 14 is dismissed.

D. Municipalities' awareness of ARK Crisis Staff decisions

69. The Trial Chamber found that the municipalities were made aware of the content of the ARK Crisis Staff decisions through the ARK Official Gazette, the Banja Luka Radio Station, and the newspaper *Glas*.[122]

70. Brđanin claims that no reasonable trier of fact could have reached beyond reasonable doubt that conclusion (Alleged Error 22).[123] First, he submits that the ARK Official Gazette was issued for the first time on 5 June 1992 (one month after the establishment of the ARK Crisis Staff) and that, therefore, it could have had no impact on events prior to that date.[124] He adds that the Trial Chamber failed to cite proof that all the municipalities received, or subscribed to, the ARK Gazette.[125] Second, Brđanin claims that the Trial Chamber only relied on one example for its

[116] Ex. P2467. *See also Tadić* Trial Judgement, para. 77.
[117] The decision refers to article 41, item 8, of the SDS statute; *see* Ex. P2353.
[118] Ex. P116, point 1 of the decision. On occasions, this body is being referred to as "Executive Committee". For consistency purposes, however, the Appeals Chamber will refer to it as "Executive Board" (*see* Trial Judgement, fn. 481, choosing this expression).
[119] Ex. P116, point 2 of the decision, item 4.
[120] Ex. P116, point 2 of the decision, item 2.
[121] Exs P2616 and P2617. These exhibits were not cited in the Trial Judgement and are not referred to by the parties in the transcript or in their briefs. They were, however, tendered by the Prosecution on 1 August 2003 and admitted by the Trial Chamber the same day, *see* T. 20573.
[122] Trial Judgement, para. 195.
[123] Brđanin Appeal Brief, para. 90.
[124] Brđanin Appeal Brief, para. 91.
[125] Brđanin Appeal Brief, para. 91.

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finding regarding the Banja Luka Radio Station and *Glas* newspaper. The Trial Chamber should have instead established that the decisions were routinely read out on the radio or published in the newspaper.[126] Third, Brđanin argues that the general public had no access to the ARK Official Gazette.[127] Finally, Brđanin claims that the finding regarding the awareness of citizens and soldiers of ARK Crisis Staff decisions and his own speeches was "crucial" to the Trial Chamber's other findings regarding his liability.[128]

71. The Prosecution responds that there is ample evidence showing the municipal authorities' awareness of ARK Crisis Staff decisions and submits that Brđanin was well known in the region because of his access to the regional media.[129]

72. The Trial Chamber, apart from the rather general statement that the municipalities were informed of the content of the ARK Crisis Staff decisions through the ARK Official Gazette, a radio station, and a newspaper, did not explicitly mention the specific means by which municipal authorities were made aware of the ARK Crisis Staff's decisions and conclusions. However, despite lack of clarity on the way this information was disseminated, the Trial Chamber's findings, supported by the evidence cited in the Trial Judgement's section on "[t]he authority of the ARK Crisis Staff with respect to municipal authorities", indicate that the municipalities of the ARK were in fact aware of the decisions and conclusions of the ARK Crisis Staff.[130] In light of the evidence referred to by the Trial Chamber, the Appeals Chamber finds that this conclusion was open to a reasonable trier of fact.

73. Brđanin's argument that a finding as to the awareness of ARK Crisis Staff decisions and his own speeches by civilians and soldiers would have been "crucial" to the Trial Chamber's other findings regarding his liability (argument under Alleged Error 22) will be dealt with in the context of Brđanin's responsibility for the specific crimes. However, the other arguments made under Alleged Error 22 are dismissed.

E. Authority of the ARK Crisis Staff over municipal authorities

74. The Trial Chamber found that the ARK Crisis Staff exercised *de facto* authority over the municipalities in the ARK and coordinated their work.[131] Brđanin challenges several factual

[126] Brđanin Appeal Brief, paras 92-93.
[127] Brđanin Appeal Brief, para. 94.
[128] Brđanin Appeal Brief, para. 95.
[129] Prosecution Response Brief, paras 6.90-6.91.
[130] Trial Judgement, paras 200-210.
[131] Trial Judgement, paras 197, 200.

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findings in the Trial Judgement, which concern the authority of the ARK Crisis Staff over the municipal authorities.

1. Municipalities' acceptance of the ARK Crisis Staff's authority

75. Brđanin challenges the Trial Chamber's finding that "[w]ith the exception of Prijedor municipality, all ARK municipalities unquestionably accepted the authority of the ARK Crisis Staff to issue instructions that were binding upon them" (Alleged Error 25, discussed together with Alleged Error 11).[132] He claims that this finding conflicts with the other finding that Brđanin was responsible for the crimes that occurred in Prijedor[133] and that the evidence shows that the majority of municipalities did not accept the authority of the ARK Crisis Staff and several municipalities operated independently from the ARK Crisis Staff.[134]

(a) The ARK Crisis Staff's authority over Prijedor

76. Brđanin claims that the Trial Chamber erred in finding him guilty for the crimes that occurred in the Prijedor municipality, after having found that this municipality did not accept the authority of the ARK Crisis Staff.[135] The Prosecution responds that Brđanin's allegation is misleading because he fails to mention that the Trial Chamber found that Prijedor municipality decided to implement the ARK Crisis Staff's decisions once its conflict with the ARK Crisis Staff was resolved.[136]

77. The Trial Chamber found that all ARK municipalities, except Prijedor, "unquestionably" accepted the authority of the ARK Crisis Staff to issue binding decisions.[137] Prijedor municipal authorities did question the authority of the ARK Crisis Staff's decisions. Thus, on 23 June 1992, the Prijedor Crisis Staff issued a decision according to which ARK Crisis Staff decisions enacted prior to 22 June 1992 were considered invalid.[138] The Trial Chamber nevertheless found that the ARK Crisis Staff had *de facto* authority over the municipalities in the ARK, including Prijedor.[139]

78. The Trial Chamber reached the conclusion that the Prijedor municipality ultimately accepted the authority of the ARK Crisis Staff relying on various sources. The 23 June decision, which had declared previous ARK Crisis Staff decisions invalid, stated that the Prijedor Crisis Staff would

[132] Brđanin Appeal Brief, para. 43, referring to Trial Judgement, para. 205. *See also* Alleged Error 27, discussed at Brđanin Appeal Brief, para. 103.
[133] Brđanin Appeal Brief, para. 44.
[134] Brđanin Appeal Brief, paras 36-42, 44, 103; *see also*, in general, AT. 8 December 2006, pp. 141-148.
[135] Brđanin Appeal Brief, para. 44; AT. 8 December 2006, p. 145.
[136] Prosecution Response Brief, para. 6.32, referring to Trial Judgement, paras 207-208.
[137] Trial Judgement, para. 205.
[138] Trial Judgement, para. 207.
[139] Trial Judgement, para. 200.

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implement ARK Crisis Staff acts enacted after 22 June 1992.[140] Two joint statements issued in conjunction with the other municipalities prior to 22 June 1992 indicated that the Prijedor municipality also accepted the authority of the ARK Crisis Staff before 22 June 1992.[141] Further, the decision establishing the Prijedor Crisis Staff of 20 May 1992 explicitly mentions the decisions of the responsible organs of the ARK as one of the foundations for the work of the Prijedor Crisis Staff.[142] The Trial Chamber also cited evidence showing that the municipal authorities of Prijedor did in fact have regular communication with, and implemented decisions of, the ARK Crisis Staff issued before 22 June 1992.[143]

79. The Trial Chamber held that the Prijedor municipality did not *unquestionably* accept the ARK Crisis Staff decisions as binding. However, the Trial Chamber explained that the Prijedor municipality, though reluctant, came to accept and implement the decisions of the ARK Crisis Staff, even those prior to 22 June 1992. Brđanin has failed to demonstrate that it was unreasonable for the Trial Chamber to find that the *de facto* authority of the ARK Crisis Staff over the municipalities included the Prijedor municipality.

(b) Binding nature of the ARK Crisis Staff's instructions

80. Brđanin claims that the evidence was "overwhelming" that the majority of municipalities did not accept the authority of the ARK Crisis Staff (Alleged Error 11).[144] First, he refers to the Treanor Report, which concluded that the available documentary evidence did not allow an inference of mandatory implementation.[145] He adds that the Treanor Report shows that the rate of the decisions actually implemented was very low.[146] Second, he asserts that the largest ARK municipality, Banja Luka, ignored the ARK Crisis Staff, referring to the example of the ARK Crisis Staff's inability to close the Banja Luka travel agency.[147] Third, he cited several witnesses who testified that they did not consider the ARK Crisis Staff's decisions mandatory.[148]

81. To Brđanin's first and second arguments, the Prosecution responds that there is ample evidence in support of the Trial Chamber's finding that Banja Luka accepted the authority of the ARK Crisis Staff.[149] Also, in respect of the second argument, the Prosecution submits that the Banja

[140] Trial Judgement, para. 207, referring to Ex. P1261.
[141] Trial Judgement, para. 208, fn. 539, referring to Trial Judgement, para. 206.
[142] Trial Judgement, para. 208.
[143] Trial Judgement, para. 208.
[144] Brđanin Appeal Brief, para. 44.
[145] Brđanin Appeal Brief, para. 45.
[146] Brđanin Appeal Brief, paras 49-52; AT. 8 December 2006, pp. 156-157; *see also* discussion under Alleged Error 29 (Brđanin Appeal Brief, para. 112).
[147] Brđanin Appeal Brief, paras 46-47.
[148] Brđanin Appeal Brief, para. 48.
[149] Prosecution Response Brief, paras 6.33, 6.38.

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Luka municipal authorities could not, and in fact did not, ignore the ARK Crisis Staff decision on the agency.[150] On Brđanin's argument about the testimonies of witnesses from ARK municipalities, the Prosecution responds that there is ample contradicting evidence.[151]

82. As correctly indicated by Brđanin, the report of Expert Witness Patrick Treanor states that "[t]he available documentary evidence would not suffice to prove, or to infer reasonably, a scheme of systematic and mandatory implementation of all of Brđanin's enactments by the municipal bodies".[152] However, in the next paragraph, the Treanor Report also concludes that "[n]evertheless, the available documentary evidence is more compelling in the above-mentioned critical areas [that is, dismissals of non-Serb professionals, disarmament of the non-Serb population, and resettlement of the non-Serb population]" and that "[Brđanin's] enactments were in fact implemented for these three critical purposes".[153] This accords with the Trial Chamber's decision to limit its findings on the implementation of ARK Crisis Staff decisions by the municipalities to those three key areas.[154]

83. Brđanin also argues that the Treanor Report shows that the implementation rate of the ARK Crisis Staff decisions was very low.[155] He argues that the finding by the Treanor Expert Report that "the municipal institutions acted either directly prompted by [Brđanin] *or in a way concurrent and consistent with his policies*"[156] in relation to the three key areas shows that the municipalities were not subordinate to the ARK Crisis Staff. Overall, he claims, the evidence shows that more than 96.5% of ARK Crisis Staff decisions were *not* implemented by the municipalities[157] and, if considering only disarmament and resettlement decisions, the implementation rate was even lower.[158]

84. Regarding the argument that the decisions of the ARK Crisis Staff were only rarely implemented by the municipalities, in a different portion of his Appeal Brief Brđanin also disputes the Trial Chamber's finding that the only reasonable inference that can be drawn from the evidence is that the municipalities systematically implemented the ARK Crisis Staff decisions in the three

[150] Prosecution Response Brief, paras 6.40-6.44.
[151] Prosecution Response Brief, para. 6.39.
[152] Ex. P2352, para. 186. This report is referred to by the trial record (T. 18691) and by the Trial Chamber as Ex. P2351 (*see*, for example, Trial Judgement, fns 538, 543, 548), although Registry records – on which the Appeals Chamber relies – mark it as Ex. P2352.
[153] Ex. P2352, para. 187.
[154] Trial Judgement, para. 210.
[155] Brđanin Appeal Brief, paras 49-52.
[156] Brđanin Appeal Brief, para. 49, referring to Ex. P2352, para. 187 (emphasis added by Brđanin).
[157] Brđanin Appeal Brief, para. 51; AT. 8 December 2006, p. 157.
[158] Brđanin Appeal Brief, para. 52. Additionally, Brđanin claims that the disarmament decision was imposed by an order issued by the Secretary to the Regional Secretariat for National Defence on 4 May 1992, *i.e.*, one day before the ARK Crisis Staff came into existence. Brđanin refers to an argument made in relation to Alleged Error 37 (Brđanin Appeal Brief, para. 52, referring to Brđanin Appeal Brief, paras 151-152); this Alleged Error is addressed *infra*, at paras 143-149.

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key areas of the Strategic Plan (Alleged Error 29).[159] He similarly argues that the implementation rate for the three key areas is very low and that no reasonable trier of fact could have come to this conclusion.[160] The Appeals Chamber considers these arguments interconnected and addresses them jointly.

85. The Trial Chamber held that the evidence demonstrates a pattern of conduct that allows only one reasonable inference, namely that the ARK Crisis Staff decisions were systematically implemented in the municipalities in the three key areas of: dismissals of non-Serb professionals; disarmament of paramilitary units and individuals who illegally possess weapons, selectively enforced against non-Serbs; and resettlement of the non-Serb population.[161] It acknowledged that documentary evidence on this issue was limited and that the available documents only constituted a sample of all such documents issued by the thirteen municipalities. It relied on all the evidence to infer that the municipalities systematically implemented the ARK Crisis Staff decisions in the three key areas.[162]

86. Also, there is evidence showing that the decisions of the ARK Crisis Staff were implemented in the municipalities in the three key areas. When drawing that inference, the Trial Chamber referred to the Trial Judgement's section on the role of the ARK Crisis Staff in the implementation of the Strategic Plan.[163] In this section, the Trial Chamber described in detail the ARK Crisis Staff decisions regarding the Strategic Plan, and referred to the implementation of those decisions in the municipalities.[164]

87. The Appeals Chamber, therefore, finds that Brđanin has failed to demonstrate why no reasonable trier of fact could conclude from the evidence, which goes far beyond the Treanor Report, that the municipalities systematically implemented ARK Crisis Staff decisions in the three key areas identified above.

88. Brđanin also claims that the largest ARK municipality, Banja Luka, ignored the ARK Crisis Staff (argument under Alleged Error 11).[165] This argument is dismissed summarily under categories 2 and 7, above.

89. Brđanin also claims that numerous witnesses gave evidence that, in their municipalities, the authority of the ARK Crisis Staff was not accepted (argument under Alleged Error 11).[166] This

[159] Brđanin Appeal Brief, para. 109, referring to Trial Judgement, para. 210.
[160] Brđanin Appeal Brief, paras 112-113.
[161] Trial Judgement, para. 210.
[162] Trial Judgement, para. 210.
[163] Trial Judgement, para. 210, fn. 550.
[164] Trial Judgement, paras 230-255.
[165] Brđanin Appeal Brief, para. 46.

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argument is dismissed summarily under categories 2 (on lack of sanctions and Vidić's and BT-92's testimonies) and 5 (on Radojko's and Dejenović's testimonies), above.

(c) Lack of authority of ARK Crisis Staff over several municipalities

90. Brđanin submits that the Trial Chamber erred in finding that the evidence submitted at trial was not sufficient to demonstrate a lack of authority of the ARK Crisis Staff over the ARK municipalities (argument under Alleged Error 11).[167] This alleged error is dismissed summarily under categories 2 and 5, above.

2. Trial Chamber's findings regarding "renegade municipalities"

91. The Trial Chamber found that "[the crimes committed] followed the general pattern of conduct envisaged for the implementation of the Strategic Plan, a plan that originated from the top level of the Bosnian Serb leadership and whose implementation by the municipalities was co-ordinated by the regional authorities of the ARK".[168]

92. Brđanin submits that the Trial Chamber erroneously rejected his argument at trial that certain municipalities were governed by strong individuals who acted independently and ignored the ARK Crisis Staff, that is Prijedor, Sanski Most, Bosanski Petrovac, Ključ and Bosanska Krupa ("renegade municipalities")[169] (Alleged Error 28).[170] He claims that the Trial Chamber gave no reasoned opinion as to why it did not rely on the exculpatory and unchallenged testimonies of Witnesses Dodik and Witness BT-95.[171] Brđanin also asserts that no reasonable trier of fact could have reached the Trial Chamber's conclusion.[172]

93. The Prosecution responds that Brđanin is merely repeating arguments made at trial.[173] As to Witness Dodik's testimony, the Prosecution submits that the Trial Chamber referred to his testimony so there is a presumption that the Trial Chamber evaluated it.[174] The Prosecution acknowledges that the testimony of Witness BT-95 was not referred to by the Trial Chamber but argues that this does not mean that it was not considered.[175]

[166] Brđanin Appeal Brief, para. 48.
[167] Brđanin Appeal Brief, para. 36.
[168] Trial Judgement, para. 209.
[169] Trial Judgement, para. 209.
[170] Brđanin Appeal Brief, paras 104, 108.
[171] Brđanin Appeal Brief, paras 105, 106, 108.
[172] Brđanin Appeal Brief, para. 108.
[173] Prosecution Response Brief, para. 6.104.
[174] Prosecution Response Brief, para. 7.18.
[175] Prosecution Response Brief, para. 7.19.

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94. With respect to Brđanin's argument that no reasoned opinion was given as to why the Trial Chamber rejected or ignored the testimony of witnesses, the Appeals Chamber observes that the Trial Chamber noted Brđanin's submission suggesting that some municipalities acted independently of the ARK authorities,[176] and explicitly cited to evidence that supported such claim, in particular the testimony of Witness Dodik.[177] It is thus clear that the Trial Chamber took his testimony into account but decided that it could still come to its conclusion, notwithstanding his testimony.

95. Regarding Witness BT-95, the Appeals Chamber notes that the Trial Chamber did not cite this witness's testimony in the present context. As mentioned above, the mere fact that the Trial Chamber did not cite to a witness testimony, even if contradictory to the Trial Chamber's finding, does not mean that the Trial Chamber ignored this evidence.[178] Since the Trial Chamber did cite relevant evidence in coming to a specific conclusion, Brđanin has not demonstrated that the Trial Chamber failed to give a reasoned opinion.

96. With respect to Brđanin's argument that no reasonable trier of fact could have reached the conclusion of the Trial Chamber, no specific argument is advanced in support of his claim.[179] The Trial Chamber supported its conclusion in the impugned paragraph by making reference to a different section of the Trial Judgement, in which it outlined the implementation of the Strategic Plan in the Bosnian Krajina.[180] Brđanin merely argues that he has disputed the findings of that section earlier in his Appeal Brief.[181] The Appeals Chamber has already dismissed all his arguments in this regard.[182] Brđanin's argument is therefore rejected.

97. The finding of the Trial Chamber that, notwithstanding a certain frustration towards the ARK Crisis Staff, all municipalities, including the alleged "renegade municipalities", agreed to implement the Strategic Plan under the coordination of the ARK Crisis Staff, stands.[183] The Appeals Chamber finds that Brđanin has failed to show that the Trial Chamber's conclusion was either unreasoned or unreasonable.

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[176] Trial Judgement, para. 209.
[177] Trial Judgement, para. 209, fn. 545.
[178] *See supra*, para. 11.
[179] Brđanin Appeal Brief, paras 105-106.
[180] *See* Trial Judgement, para. 209, fn. 546.
[181] Brđanin Appeal Brief, para. 107, referring to Alleged Errors 5 to 11.
[182] *See* Alleged Errors 5-11. Alleged Error 5 has already been summarily dismissed; Alleged Errors 6-8 and 10 are considered withdrawn; Alleged Error 9 is summarily dismissed under category 1, above; Alleged Error 11 was dismissed above.
[183] *See*, in particular, Trial Judgement, paras 206-208.

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F. Authority of the ARK Crisis Staff over the police

98. Brđanin claims that no reasonable Trial Chamber could have found beyond reasonable doubt that the ARK Crisis Staff had *de facto* authority over the police and coordinated its actions (Alleged Error 30).[184] He argues that this conclusion is "certainly not the only reasonable conclusion that can be drawn from the evidence".[185]

1. Challenges to the witnesses mentioned in the Trial Judgement

99. Brđanin challenges three of the four testimonies on which the Trial Chamber relied on this issue.[186] Brđanin argues that the testimony of Witness Jovica Radojko was taken out of context and does not support the Trial Chamber's conclusion that the police carried out certain instructions of the ARK Assembly and Crisis Staff as this witness only spoke about the Bosanski Petrovac Assembly and Crisis Staff and not about the ARK authorities.[187] Brđanin also claims that Witness Muhamed Sadiković testified that the only civilian authority in the police chain of command was the Ministry of the Interior (MUP) based in Sarajevo. According to him, the municipal assembly made only suggestions to the police.[188] In this context, Brđanin refers to Exhibit P157, instructions "for the work of the municipal Crisis Staffs" issued by the SerBiH. According to this document, the police remain under the authority of their "professional staff" even in emergency situations.[189] Brđanin also submits that the testimony of Witness BT-72, referred to by the Trial Chamber, contradicts the Trial Chamber's finding.[190]

100. The Prosecution responds that Brđanin fails to address one piece of evidence cited by the Trial Chamber and he fails to explain why the other evidence, cited by the Trial Chamber in previous paragraphs, is insufficient to sustain the Trial Chamber's finding.[191] The Prosecution argues that it was reasonable for the Trial Chamber to rely on the evidence cited.[192] As to Witness Jovica Radojko, the Prosecution submits that he gave evidence that the decisions of the ARK Crisis

[184] Brđanin Appeal Brief, paras 114-122, referring to Trial Judgement, para. 213.
[185] Brđanin Notice of Appeal, para. 32. Brđanin also contends that, even if it may be argued that there were ARK Crisis Staff conclusions directed to the police, the ARK Crisis Staff did not ask the police to do anything illegal. In particular, disarmament decisions were calling for the enforcement of the law, which demanded the confiscation of *illegal* weapons (Brđanin Appeal Brief, para. 121). This issue was addressed by the Trial Chamber, which held that, in spite of some announcements calling for the surrender of all illegally owned weapons, "these calls were intended to address only the Bosnian Muslim and Bosnian Croat population" and were selectively enforced against non-Serbs only (Trial Judgement, paras 90, 237). Brđanin has challenged this finding (Brđanin Appeal Brief, para. 318) (Alleged Error S3) but later stated that this error does "not impact the Judgement or Sentence" (*see* E-mail From John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2007).
[186] Brđanin Appeal Brief, paras 115-118.
[187] Brđanin Appeal Brief, para. 115.
[188] Brđanin Appeal Brief, para. 116.
[189] Brđanin Appeal Brief, para. 116.
[190] Brđanin Appeal Brief, para. 117.
[191] Prosecution Response Brief, para. 6.111.
[192] Prosecution Response Brief, para. 6.116.

Staff were mandatory.[193] Regarding Witness Muhamed Sadiković, the Prosecution responds that this witness testified that, in normal peacetime circumstances, the assembly had no authority. However, in an emergency situation a different law would apply for the crisis staffs.[194]

101. The challenged portion of Witness Jovica Radojko' testimony is equivocal and, as Brđanin suggests, might refer the ARK Crisis Staff or to municipal crisis staffs.[195] However, the witness also testified that the Security Service Centre ("CSB") was obliged to abide by the instructions of the ARK Crisis Staff.[196] Therefore, since the Public Security Stations of the municipalities ("SJBs") had to implement orders from the CSB[197] and the chief of the CSB was also a member of the ARK Crisis Staff,[198] it was not unreasonable for the Trial Chamber to conclude that the testimony of Witness Jovica Radojko as a whole shows that the ARK Crisis Staff had *de facto* authority over the police.[199]

102. Witness Muhamed Sadiković, as Brđanin states, spoke about municipal crisis staffs and not about the ARK Crisis Staff. He also confirmed that, under normal circumstances, the municipal assembly had no power over the police.[200] Exhibit P157, referred to in footnote 558 of the Trial Judgement, also supports the conclusion that the crisis staffs had no legal authority over the police. Indeed, the Trial Chamber explicitly acknowledged this fact, and drew the conclusion that the ARK Crisis Staff did not possess *de jure* authority to issue orders to the police.[201]

103. Sadiković also testified, as the Trial Chamber noted, that in emergency situations, crisis staffs were vested with more powers than the municipal assembly was in normal circumstances. Thus, he testified, a crisis staff "can have its say in army or police matters too".[202] His testimony clearly indicates that, despite the assembly's lack of *de jure* authority over the police in peace time, the crisis staffs could have some authority over the police in time of emergency.

104. In view of the fact that Sadiković only testified on municipal crisis staffs, this evidence is not directly related to the Trial Chamber's finding of the ARK Crisis Staff's *de facto* authority over the police. However, it corroborates the Trial Chamber's finding, since the Trial Chamber found that the ARK Crisis Staff was formed along the same lines as the municipal crisis staffs.[203] The

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[193] Prosecution Response Brief, para. 6.118.
[194] Prosecution Response Brief, para. 6.117.
[195] T. 20055.
[196] T. 20056-20057.
[197] Trial Judgement, para. 212; Brđanin's submission in his Appeal Brief, para. 117.
[198] Trial Judgement, para. 213.
[199] The SJBs and the CSB are collectively referred to as "the police". *See* Trial Judgement, fn. 556.
[200] T. 18215.
[201] Trial Judgement, para. 212.
[202] T. 18215-18216; *see also* T. 18351.
[203] *See* Trial Judgement, para. 191.

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Appeals Chamber will take into account the fact that this testimony only indirectly supports the Trial Chamber's conclusion when evaluating the overall question of whether the Trial Chamber's finding that the ARK Crisis Staff had *de facto* authority over the police was reasonable.

105. The Appeals Chamber disagrees with Brđanin's claim that the testimony of Witness BT-72, referred to by the Trial Chamber, contradicts the Trial Chamber's finding (argument under Alleged Error 30).[204] This argument is dismissed summarily under category 5, above.

2. Relevant witnesses overlooked

106. Brđanin contends that the Trial Chamber failed to give a reasoned opinion as to why the evidence of Witnesses BW-1 and Milenko Savić was unreliable (argument under Alleged Error 30).[205] This argument is dismissed summarily under category 6, above.

3. Evidence of orders to police

107. Brđanin contends that the lack of evidence that the ARK Crisis Staff issued orders to the police at any time is fatal to his conviction (argument under Alleged Error 30).[206] This argument is dismissed summarily under category 2, above.

4. Conclusion of the Appeals Chamber

108. Based on the above findings and considerations, and bearing in mind that: (1) the Chief of the CSB was a member of the ARK Crisis Staff; (2) the SJBs were subordinate to the CSB; and (3) the statement of Chief of the CSB to the chiefs of the SJBs that, in all their activities, they were "obliged to observe all measures and apply all procedures ordered by the Crisis Staff of the Autonomous Region",[207] Brđanin has failed to demonstrate that no reasonable trier of fact could find that the ARK Crisis Staff had *de facto* authority over the police. Alleged Error 30 is therefore rejected.

G. ARK Crisis Staff and VRS

109. The Trial Chamber found that the civilian authorities of the ARK and of the municipalities had no *de jure* or *de facto* authority over the armed forces.[208] However, it held that the interaction between civilian and military hierarchies was close at the regional level, and this allowed the ARK Crisis Staff to exercise great influence over the 1st Krajina Corps ("1st KK") of the Army of the

[204] Brđanin Appeal Brief, para. 117.
[205] Brđanin Appeal Brief, paras 119-120.
[206] Brđanin Appeal Brief, para. 118.
[207] Trial Judgement, para. 213, referring to Ex. P202.

SerBiH ("VRS").[209] Brđanin challenges several findings of the Trial Chamber relating to the authority of the ARK Crisis Staff over the army (Alleged Errors 31-35).[210]

1. The visit of a member of the ARK Crisis Staff to detention facilities

110. Brđanin claims that the Trial Chamber's finding that "a prominent member of the ARK Crisis Staff was granted access to military detention facilities" [211] (Alleged Error 34) is not supported by the evidence beyond reasonable doubt.[212] He also argues that the Trial Chamber's reliance on the visit of Tadeusz Mazowiecki (UN Special Rapporteur on Human Rights in the former Yugoslavia) to the Manjača camp is erroneous because: (1) the visit never took place; and (2) the cited exhibit does not support the finding that the ARK Crisis Staff assisted in the organisation of the visit (Alleged Error 33).[213]

111. The Prosecution acknowledges that Mazowiecki did not visit the military camp. However, it argued that Vojo Kuprešanin's visit to the camp makes the Trial Chamber's finding that "a prominent member" visited the camp reasonable.[214] Brđanin replies that Kuprešanin visited the Manjača camp only *after* the ARK Crisis Staff had ceased to exist and, therefore, the visit cannot be said to be related to that body.[215]

112. The Appeals Chamber dismisses summarily the argument related to the alleged visit of Tadeusz Mazowiecki to the camp under category 8, above.

113. The question remains, however, whether it was reasonable for the Trial Chamber to find that Vojo Kuprešanin visited the camp as a member of the ARK Crisis Staff. According to the Trial Chamber, Kuprešanin's visit took place on 8 August 1992.[216] In relation to the ARK Crisis Staff, the Trial Chamber also made the following finding:

> On 17 July 1992, all decisions and conclusions adopted by the ARK Crisis Staff and the ARK War Presidency were ratified by the ARK Assembly at its 18th session. There is no indication that the ARK War Presidency was disbanded at this time. On the contrary, the ARK War Presidency continued to meet at least until 8 September 1992, just one week prior to the adoption of the SerBiH constitutional amendment that abolished the ARK as a territorial unit of the SerBiH. However, the trial record does not include any decision or reference to a decision of the ARK

[208] Trial Judgement, para. 216.
[209] Trial Judgement, para. 224.
[210] Brđanin Appeal Brief, paras 123-141.
[211] Trial Judgement, para. 224.
[212] Brđanin Notice of Appeal, para. 36; Brđanin Appeal Brief, para. 137.
[213] Brđanin Appeal Brief, para. 135; AT. 8 December 2006, p. 135.
[214] Prosecution Response Brief, para. 6.131.
[215] Brđanin Reply Brief, para. 44.
[216] Trial Judgement, fn. 606.

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> Crisis Staff issued after 17 July 1992 and the Trial Chamber is satisfied that by this date, in practice, the ARK Crisis Staff had stopped exercising its powers and functions.[217]

However, as the Trial Chamber explained, "[o]n 9 July 1994, the ARK Crisis Staff renamed itself the War Presidency, while retaining the same scope of authority."[218] Moreover, the Trial Chamber explicitly stated that "[r]eferences to the ARK Crisis Staff [from paragraph 197 of the Trial Judgement onwards] also include the ARK War Presidency."[219] As the Trial Chamber found that ARK Crisis Staff continued to meet at least until 8 September 1992, Brđanin's claim that it had ceased to exist on 8 August 1992 is misplaced.

114. Thus, it appears that the Trial Chamber, working on the basis of its finding that the ARK War Presidency was essentially the same body as its predecessor (the ARK Crisis Staff), considered the visit by Vojo Kuprešanin on 8 August 1992 as one by "a prominent member of ARK Crisis Staff".[220] In light of the foregoing, Brđanin has failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber did.

2. Relationship between ARK Crisis Staff and VRS

115. The Trial Chamber found that General Momir Talić briefed the ARK Assembly on military operations and informed his subordinates within the 1st KK of the decisions of the ARK Crisis Staff.[221]

116. Brđanin submits that the Trial Chamber's conclusion is not supported by the evidence (Alleged Error S6).[222] He contends that General Talić's briefing to the ARK Assembly concerned military operations in the Posavina, which is not part of the ARK.[223] Moreover, Brđanin argues that, on the one occasion General Talić reported to his subordinate officers about a meeting of the ARK Crisis Staff which he had attended, the topic discussed actually concerned the poor coordination between the ARK Crisis Staff and the VRS.[224]

117. The Prosecution responds that the Trial Chamber's finding was reasonable, and that Brđanin ignores all but one piece of the evidence relied upon by the Trial Chamber.[225]

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[217] Trial Judgement, para. 196 (footnotes omitted).
[218] Trial Judgement, para. 196
[219] Trial Judgement, fn. 509.
[220] Trial Judgement, para. 224.
[221] Trial Judgement, para. 223.
[222] Brđanin Appeal Brief, paras 321-323.
[223] Brđanin Appeal Brief, para. 322.
[224] Brđanin Appeal Brief, para. 323.
[225] Prosecution Appeal Brief, paras 6.295-6.299.

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118. Brđanin's submission that the evidence does not support the conclusion that General Talić regularly reported to his subordinates about decisions and conclusions of the ARK Crisis Staff is correct. Yet, the Trial Chamber did not make the finding that General Talić informed his subordinates regularly. Moreover, the Trial Chamber's finding that the briefing was on "military operations" is not rendered unreasonable by the fact that General Talić briefed the ARK Assembly on a military operation in Posavina. Brđanin's argument is therefore rejected.

119. The Trial Chamber's core finding in the relevant portion of the Trial Judgement is that "cooperative links" between the military and civilian authorities existed at the regional level.[226] Regarding General Talić's involvement, the evidence referred to by the Trial Chamber shows the following: (1) upon the establishment and the mobilisation of the VRS, General Talić emphasized that units had to establish the "closest possible cooperation with the people and legal authorities within their zones of responsibility";[227] (2) General Talić was a member of the ARK Crisis Staff;[228] (3) General Talić briefed the ARK Assembly on military operations in the Posavina on 17 July 1992;[229] and (4) General Talić informed subordinate "core command staff" of the ARK Crisis Staff decisions on 18 May 1992.[230] The Appeals Chamber finds that a reasonable trier of fact could conclude that this evidence shows not only the existence of cooperative links between military and civilian authorities at the regional level, but also General Talić's involvement in establishing and maintaining those links.[231] Therefore, the Appeals Chamber is not persuaded by Brđanin's arguments in this respect and dismisses Alleged Error S6.

3. SerBiH government's support of cooperation between ARK Crisis Staff and VRS

120. The Trial Chamber found that "[t]he SerBiH Government supported cooperation between the ARK Crisis Staff and the army and the fact that the ARK Crisis Staff could influence the 1st KK's activity."[232]

121. Brđanin argues that no reasonable Trial Chamber could have made this finding (Alleged Error 35).[233] Brđanin claims that the Trial Chamber provides only one source for this conclusion, namely a *Glas* newspaper article, and argues that, in the course of the trial, articles from *Glas* were shown to be unreliable.[234] Moreover, he submits that the comments of SerBiH Defence Minister

[226] Trial Judgement, para. 221.
[227] *See* Trial Judgement, para. 217, fn. 577, referring to Ex. P1597.
[228] Trial Judgement, para. 221.
[229] Ex. P285, p. 1.
[230] Witness Selak, T. 13079 and Ex. P1600, pp. 139-140.
[231] *See also* Trial Judgement, fn. 846.
[232] Trial Judgement, para. 225.
[233] Brđanin Appeal Brief, paras 138-141, referring to Trial Judgement, para. 225.
[234] Brđanin Appeal Brief, para. 139.

Bogdan Subotić, relied on by the Trial Chamber in support of its conclusion, are actually not from an article in the *Glas* newspaper as stated by the Trial Chamber but a "hearsay report of a diarist who claims to have read and recorded the quote from *Glas* newspaper".[235] Finally, he argues that the meaning of the Subotić's quote is questionable because it is dated 27 July 1992, after the ARK Crisis Staff had ceased functioning. Subotić was also quoted in the 7 July 1992 issue of *Glas* newspaper proposing that the SerBiH government abolish the crisis staff.[236]

122. The Prosecution denies that articles from *Glas* newspaper were shown at trial to be unreliable.[237] The Prosecution argues that the finding in question was reasonable in light of the totality of the evidence,[238] and specifically points to three findings of the Trial Chamber which it says support its conclusion that the SerBiH government supported cooperation between the ARK Crisis Staff and the military. First, the structure of the ARK Crisis Staff, which included high officers of the army, ensured cooperation between civilian and military bodies. Second, the ARK Crisis Staff, and specifically Brđanin, had contacts with the leadership of the SerBiH government, which, according to the Prosecution, demonstrates that the SerBiH government's intention was to facilitate the cooperation between the regional Serb political leaders and the military.[239] Third, the Trial Chamber found that the military and civilian authorities were united in the same goal, the implementation of the Strategic Plan, which emanated from the leadership of the SerBiH government.[240]

123. Brđanin replies that none of the Prosecution's arguments shows that the SerBiH government supported the cooperation between the ARK Crisis Staff and the military.[241]

124. In respect to the impugned finding, the Trial Chamber stated that the source of the quote by Subotić was the *Glas* newspaper article, entitled "Every Time is the Time for Freedom", dated 27 July 1992 and referred to Exhibit P2326.[242] Exhibit P2326 is a diary of a witness, in which the witness collected articles of *Glas* newspaper, often commenting them. The Appeals Chamber has reviewed the article cited by the Trial Chamber and finds that it does not include the quote of Subotić. Indeed, this article does not appear to be related to the issue at hand.[243]

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[235] Brđanin Appeal Brief, para. 140.
[236] Brđanin Appeal Brief, para. 141.
[237] Prosecution Response Brief, para. 6.134.
[238] Prosecution Response Brief, para. 6.132.
[239] Prosecution Response Brief, para. 6.135.
[240] Prosecution Response Brief, para. 6.136, referring to Trial Judgement, para. 225, fn. 608.
[241] Brđanin Reply Brief, para. 47.
[242] Trial Judgement, fn. 609.
[243] Ex. P2326 (under seal), pp. L0046838-L0046839.

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125. The Trial Chamber also made reference to page 11 of Exhibit P2326.[244] On this page, the witness indeed recorded an answer given by Subotić in an interview for *Glas* newspaper (article entitled "State borders indisputable", dated 28 July 1992). The same page of the diary reads: "However, all decisions passed by the Crisis Staffs and War Presidencies, that is Brđanin's and Radić's camarilla, are still implemented without any hindrance." This sentence, however, appears to be the witness's own comment on the statement of Subotić. Therefore, the Trial Chamber erred when it stated that this quote is attributable to Subotić.

126. The question arises whether, notwithstanding this error, it was reasonable for the Trial Chamber to conclude that the SerBiH Government supported cooperation between the ARK Crisis Staff and the army, and the SerBiH Government supported the fact that the ARK Crisis Staff could influence the activity of VRS 1st KK.[245]

127. As to whether the SerBiH Government supported cooperation between the ARK Crisis Staff and the VRS, the Appeals Chamber recalls that, according to the Trial Judgement, the Strategic Plan was formulated by the Bosnian Serb leadership and the Bosnian Serb representatives of the armed forces.[246] The ARK Crisis Staff was established primarily to ensure the cooperation between political authorities, the army, and the police at the regional level, with a view to coordinating the implementation of the Strategic Plan.[247] It was therefore reasonable to conclude that the SerBiH government supported cooperation between the ARK Crisis Staff and the army in pursuing the implementation of the Strategic Plan.

128. As to whether the SerBiH government supported the fact that the ARK Crisis Staff could influence the 1st KK, the Appeals Chamber notes that there is no direct evidence to support this finding. The Prosecution argues that the evidence demonstrates that the intention of the SerBiH government was to facilitate cooperation between the ARK and the military[248] and that the SerBiH government supported cooperation between the military and the ARK Crisis Staff in furtherance of this goal.[249] However, this does not show that the SerBiH government supported the fact that the ARK Crisis Staff had the authority to influence the 1st KK.

129. In light of the fact that the Trial Chamber erroneously attributed the impugned quote to SerBiH Defence Minister Bogdan Subotić and that there is no other evidence pointing to the conclusion of the Trial Chamber, no reasonable trier of fact could conclude beyond reasonable

[244] Ex. P2326 (under seal), p. L0046848.
[245] Trial Judgement, para. 225.
[246] Trial Judgement, para. 65.
[247] Trial Judgement, para. 192.
[248] Prosecution Response Brief, para. 6.135.
[249] Prosecution Response Brief, para. 6.136.

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doubt that the SerBiH government supported the fact that the ARK Crisis Staff could influence the 1st KK's activity.

130. Brđanin has not tried to show that the Trial Chamber's erroneous finding, on its own, occasioned a miscarriage of justice.[250] Nevertheless, the Appeals Chamber will take this error into account when addressing whether no reasonable trier of fact could have reached the more general conclusion that the ARK Crisis Staff exercised great influence over the 1st KK of the army.

4. Other instances of influence of the ARK Crisis Staff over the army

131. Brđanin claims that, for him to be criminally responsible for the crimes of VRS personnel, these crimes have to be committed at the behest of the ARK Crisis Staff. Failing this, the fact that the ARK Crisis Staff exercised great influence over the 1st KK becomes "meaningless" (argument under Alleged Error 33).[251] He also claims that the Trial Chamber failed to cite any evidence demonstrating that the decisions of the ARK Crisis Staff impacted on military activity (argument under Alleged Error 33).[252] The Appeals Chamber dismisses summarily these arguments under category 2. Furthermore, the Appeals Chamber also dismisses summarily the following two errors: the alleged error relating to the influence of municipal crisis staffs over the military (Alleged Error 31),[253] under category 1, above; and the alleged error relating to whether municipal crisis staffs influenced the VRS to a large extent (Alleged Error 32),[254] under category 8, above.

5. Conclusion of the Appeals Chamber

132. The Appeals Chamber has identified one error of the Trial Chamber in the section on the authority of the ARK Crisis Staff over the army. No reasonable trier of fact could have concluded beyond reasonable doubt that the SerBiH government supported the fact that the ARK Crisis Staff could influence the 1st KK's activity.

133. In light of the evidence cited by the Trial Chamber, such as decisions of the ARK Crisis Staff regarding military activity,[255] the close interaction between civilian and military hierarchies on the regional level,[256] in particular the fact that VRS officials General Talić, Lieutenant Colonel Milorad Sajić, and Major Zoran Jokić were all members of the ARK Crisis Staff,[257] and the fact that

[250] Alleged Error 35 is not referred to in the table filed on 21 August 2006, *see* Response to Order of 24 July 2006.
[251] Brđanin Appeal Brief, para. 134; Brđanin Reply Brief, para. 46.
[252] Brđanin Appeal Brief, para. 135.
[253] Brđanin Appeal Brief, paras 123-125.
[254] Brđanin Appeal Brief, paras 126-132.
[255] Trial Judgement, para. 224.
[256] Trial Judgement, para. 224; *see also* para. 217.
[257] Trial Judgement, para. 221.

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all three, at some point, attended meetings of the ARK Crisis Staff,[258] Brđanin has failed to show that no reasonable trier of fact could have concluded beyond reasonable doubt that the ARK Crisis Staff exercised great influence over the 1st KK.

134. For the foregoing reasons, Brđanin's challenges to the Trial Chamber's findings that the ARK Crisis Staff exercised great influence over the VRS are dismissed.

H. ARK Crisis Staff and paramilitary groups

1. Use by ARK Crisis Staff of "Serbian Defence Forces" paramilitary group

135. The Trial Chamber found that a paramilitary formation called "Serbian Defence Forces" (SOS) "at a minimum was closely associated to the SDS and to the ARK Crisis Staff who used the SOS as an operative tool that contributed to the implementation of the Strategic Plan".[259]

136. Brđanin claims that no reasonable trier of fact could have reached this conclusion beyond reasonable doubt (Alleged Error 36). Brđanin submits that the SOS arrived in Banja Luka on 3 April 1992 demanding that an *ad hoc* crisis staff be formed to negotiate over their demands. Local authorities complied. Brđanin notes that this crisis staff is to be distinguished from the ARK Crisis Staff, which was established on 5 May 1992.[260] In this context, Brđanin contends, the Trial Chamber relied on a newspaper article dated 21 April 1992, which precedes the creation of the ARK Crisis Staff. When the ARK Crisis Staff was finally created, the SOS had already left Banja Luka or had been dissolved.[261] In this respect, Brđanin claims that the evidence on the SOS was contradictory, so that it is not clear how long the SOS remained in Banja Luka.[262] Finally, he avers that the evidence does not show that there was any interaction between the ARK Crisis Staff and the SOS.[263]

137. The Prosecution responds that Brđanin's arguments in relation to the short period of time the SOS was present in Banja Luka, which predated the creation of the ARK Crisis Staff, rest on the premise that the Trial Chamber erred in concluding that an ARK Crisis Staff was covertly formed on 22 January 1992.[264] The Prosecution argues that, therefore, the only relevant issue is whether the

[258] Trial Judgement, para. 221.
[259] Brđanin Appeal Brief, para. 142, citing Trial Judgement, para. 227. In this respect, Brđanin also challenges the finding of the Trial Chamber in paragraph 318 of the Trial Judgement that "the ARK Crisis Staff used the SOS as an operative tool that contributed to the implementation of the Strategic Plan" (*see* Brđanin Notice of Appeal, para. 56 and Brđanin Appeal Brief, para. 223) where he just refers to his discussion regarding Alleged Error 36.
[260] Brđanin Appeal Brief, para. 143.
[261] Brđanin Notice of Appeal, para. 38.
[262] Brđanin Appeal Brief, para. 144; AT. 8 December 2006, pp. 139-141.
[263] Brđanin Appeal Brief, para. 145.
[264] Prosecution Response Brief, para. 6.139.

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ARK Crisis Staff used the SOS as a tool to implement the Strategic Plan.[265] On this issue, the Prosecution submits that Brđanin did not provide any argument in support of his statement that the ARK Crisis Staff did not use the SOS as a tool for implementing the Strategic Plan.[266] With regard to the witnesses' testimonies, the Prosecution submits that there are at most only minor inconsistencies typical of such testimonies.[267]

138. In reply, Brđanin states that the SOS did not exist while the ARK Crisis Staff was in existence.[268] However, he does not cite any evidence to this effect.

139. Brđanin has provided no argument to show that the SOS was not closely associated to the SDS. This argument within Alleged Error 36[269] is therefore dismissed under category 4, above.

140. As to the link between the ARK Crisis Staff and the SOS, the statement of Brđanin relied upon by the Trial Chamber is an excerpt of an interview by Brđanin to *Glas* newspaper on 21 April 1992.[270] The article identifies Brđanin as the vice-president of the ARK Assembly and member of the Banja Luka (municipal) Crisis Staff.[271]

141. Contrary to Brđanin's argument, whether the ARK Crisis Staff existed at the time of *Glas* newspaper article on 21 April 1992[272] is irrelevant. The Trial Chamber found that the evidence indicated that: (1) there was some interaction between members of the ARK Crisis Staff and the SOS;[273] (2) the SOS was closely associated to the SDS;[274] and (3) the VRS and the SDS used paramilitary groups as an operative tool for the implementation of the Strategic Plan.[275] However, no evidence cited by the Trial Chamber indicates that the ARK Crisis Staff directly used the SOS as an operative tool for the implementation of the Strategic Plan.[276]

142. The Appeals Chamber therefore concludes that the Trial Chamber failed to provide a reasoned opinion[277] for its conclusion that the ARK Crisis Staff used the SOS paramilitary group as an operative tool. This does not, however, necessarily impinge on the finding of the Trial Chamber

[265] Prosecution Response Brief, para. 6.139; AT. 8 December 2006, p. 174.
[266] Prosecution Response Brief, para. 6.141.
[267] Prosecution Response Brief, para. 6.140.
[268] Brđanin Reply Brief, para. 48.
[269] Brđanin Appeal Brief, para. 142.
[270] Trial Judgement, fn. 620.
[271] Ex. P154.
[272] Trial Judgement, fn. 620.
[273] Trial Judgement, para. 227.
[274] Trial Judgement, para. 227.
[275] Trial Judgement, paras 97, 99.
[276] *See* Trial Judgement, paras 227, 318.
[277] *See Kordić and Čerkez* Appeal Judgement, para. 386.

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that the ARK Crisis Staff had great influence over the SOS – the issue that the Appeals Chamber now turns to address.

2. ARK Crisis Staff influence over paramilitary groups

143. The Trial Chamber found that the ARK Crisis Staff had great influence over the SOS and indirect influence over the paramilitary groups participating in combat operations with the 1st KK.[278]

144. Brđanin submits that, on the basis of the available evidence, no reasonable Trial Chamber could have reached this finding beyond reasonable doubt (Alleged Error 37).[279] He argues that the Trial Chamber misinterpreted the impact of the disarmament decisions of the ARK Crisis Staff.[280] Brđanin claims that the evidence demonstrates that there were no non-Serb paramilitaries in the area,[281] which, in turn, indicates that all decisions on disarmament of paramilitary formations related to Serb paramilitaries.[282] The reason behind the disarmament of those Serb paramilitaries was their tendency to attack Serbs and Serb property.[283]

145. The Prosecution responds that the submissions of Brđanin are not related to evidence cited in the paragraphs which Brđanin challenges.[284]

146. The part of the interview referred to by the Trial Chamber in which Brđanin states that "if individual people in the Banja Luka companies who have been asked to withdraw do not do so in a period of three days, then members of the SOS will come onto the scene"[285] clearly shows that Brđanin knew the SOS supported his initiative and was ready to implement dismissals by force. From this, it could be reasonably inferred that this support by the SOS continued from 5 May 1992 onwards, when the ARK Crisis Staff officially started functioning with Brđanin as its President, and with Nenad Stevandić and Slobodan Dubočanin – the head and a member of the SOS, respectively – as members of the ARK Crisis Staff.[286] The Trial Chamber also found that the SOS, together with other paramilitary groups acting in the ARK, were under the command and the control of the VRS

[278] Trial Judgement, para. 229. In a different portion of the Trial Judgement, the Trial Chamber held that the ARK Crisis Staff had "substantial influence over the SOS" (Trial Judgement, para. 318).
[279] Brđanin Appeal Brief, paras 146-158. According to Brđanin, however, this Alleged Error is to be considered together with Alleged Error 39 (Brđanin Appeal Brief, paras 163-182). *See* E-mail from John Ackerman to Helen Brady of 2 December 2006, filed on 15 January 2006. The Appeals Chamber will bear this notification in mind.
[280] Brđanin Appeal Brief, paras 147-154.
[281] Brđanin Appeal Brief, paras 155-156.
[282] Brđanin Appeal Brief, para. 156.
[283] Brđanin Appeal Brief, para. 158.
[284] Prosecution Response Brief, paras 6.142-6.143. *See also* Brđanin Reply Brief, para. 49.
[285] Trial Judgement, fn. 620, citing Ex. P154.
[286] Trial Judgement, para. 227.

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"[f]rom early June 1992 onwards",[287] which indicates that the SOS was acting in the territory of the ARK not under direct military control at least until late May 1992.

147. For these reasons, the Appeals Chamber concludes that Brđanin has failed to show that no reasonable trier of fact could have found that the ARK Crisis Staff had great influence over the SOS.

148. With respect to the other paramilitary groups acting in the ARK, the Trial Chamber found that the ARK Crisis Staff had indirect influence over them, "by exercising great influence over the army".[288] The Appeals Chamber understands that the Trial Chamber found that the ARK Crisis Staff had indirect influence over the paramilitary groups from the time they were put under the command and control of the VRS and where those groups participated in combat operations together with the 1st KK of the VRS. Having found that the ARK Crisis Staff had great influence over the army, the finding of "indirect influence" over those paramilitary units that acted in concert with the 1st KK or under the command of the army was not unreasonable.

149. For the foregoing reasons, the Appeals Chamber concludes that Brđanin has not demonstrated that no reasonable trier of fact could have found beyond reasonable doubt that the ARK Crisis Staff had great influence over the SOS and indirect influence over the other paramilitary groups. These arguments under Alleged Error 37 are therefore dismissed.[289]

I. ARK Crisis Staff's leading role

150. The Trial Chamber found that "the ARK Crisis Staff, acting as the highest civilian authority in the region, played a leading role in the implementation of the Strategic Plan by directing and coordinating the activities of the police, the army and the municipal authorities within the ARK."[290]

151. Brđanin has failed to substantiate his argument that there would have been no difference had there not been an ARK Crisis Staff, a claim that is not sufficient to demonstrate an error by the Trial Chamber. The Appeals Chamber notes that the question of the substantial effect depends on the circumstances of the case and that Brđanin has challenged various Trial Chamber's findings in this regard. These specific challenges will be addressed below.[291] When establishing the criminal responsibility of an accused for a certain crime, the question is not whether "nothing would have been different" but whether the elements of the mode of liability are proven. Thus, for example, in

[287] Trial Judgement, para. 228.
[288] Trial Judgement, para. 229.
[289] Other arguments under this Alleged Error are dealt with *infra*, paras 155-156.
[290] Trial Judgement, para. 230.
[291] *See*, for example, Alleged Errors 84, 85, 91, 93, 94.

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the case of aiding and abetting, the issue is whether, *inter alia*, the acts of the aider and abettor had a substantial effect on the commission of the crime of the principal offender.[292] The Appeals Chamber has held that for the mode of liability of joint criminal enterprise, the Prosecution need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed.[293] Thus, the Appeals Chamber disregards Brđanin's general arguments on this issue, but will consider the specific ones when raised in respect of relevant Alleged Errors.

J. Contribution of ARK Crisis Staff decisions to the dismissals, disarmament, and resettlement of the non-Serb population

152. The Trial Chamber found that the decisions of the ARK Crisis Staff on disarmament, dismissals, and resettlement were issued in pursuit of the Strategic Plan and substantially contributed to the commission of the crimes.[294]

153. Brđanin claims that no reasonable Trial Chamber could have reached that conclusion (Alleged Error 39).[295] His specific challenges to the findings of the Trial Chamber are addressed below.

1. ARK Crisis Staff decisions on disarmament

154. Brđanin claims that, if the disarmament in the ARK occurred as a result of the 4 May 1992 decision of the ARK Secretariat for National Defence, it would be unreasonable to find that the ARK Crisis Staff could have substantially contributed to disarmament because this decision was issued one day *before* the establishment of the ARK Crisis Staff (argument under Alleged Error 39).[296]

155. Brđanin submits that, in its decision of 14 May 1992, the ARK Crisis Staff refers to one of its own decisions concerning disarmament of paramilitary units or individuals in unlawful possession of weapons and ammunition. Brđanin argues that this reference to a previous ARK Crisis Staff decision is "most likely a misprint or drafting error" and that the 14 May 1992 decision

[292] *Tadić* Appeal Judgement, para. 229.
[293] *See Kvočka et al.* Appeal Judgement, para. 98. "However, 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 joint criminal enterprise" (*Kvočka et al.* Appeal Judgement, para. 97).
[294] Trial Judgement, para. 232.
[295] Brđanin Notice of Appeal, para. 41; Brđanin Appeal Brief, para. 163 (Alleged Error 39), referring to Trial Judgement, para. 232. Brđanin also challenges the similar findings enunciated in the concluding paragraph 256 of the Trial Judgement, *see* Brđanin Notice of Appeal, para. 43 (Alleged Error 41); however, in his Appeal Brief, he refers to his arguments made with respect to Alleged Errors 39 and 40, and does not put forward any additional argument, *see* Brđanin Appeal Brief, para. 196 (Alleged Error 41).
[296] Brđanin Appeal Brief, para. 165.

of the ARK Crisis Staff rather clearly refers to the ARK Secretariat of National Defence decision of 4 May 1992 (argument under Alleged Error 37).[297] The Appeals Chamber dismisses summarily this argument under category 3, above.

156. Brđanin claims that the Trial Chamber erred in its interpretation of the decisions of the ARK Crisis Staff on disarmament, because these decisions are concerned with all the paramilitary formations and individuals who "illegally" owned weapons or ammunition and not only non-Serbs, as held by the Trial Chamber (argument under Alleged Error 37).[298] The Appeals Chamber dismisses summarily this argument under category 2, above. In connection to this, the Appeals Chamber also dismisses Alleged Error 92 (related to Brđanin's contribution to attacks on non-Serb town, villages, or neighbourhoods through the ARK Crisis Staff's decisions on disarmament)[299] under category 4, above.

157. In view of the foregoing reasons, the Appeals Chamber concludes that Brđanin failed to show that no reasonable trier of fact could have found beyond reasonable doubt that the disarmament decisions of the ARK Crisis Staff, which were selectively enforced against non-Serbs, substantially contributed to the commission of crimes in the ARK.

2. ARK Crisis Staff decisions on dismissals of non-Serbs

(a) Issuance of ARK Crisis Staff decisions on dismissals

158. Brđanin claims that no reasonable Trial Chamber could have found beyond reasonable doubt that the decisions of the ARK Crisis Staff on dismissals were issued in pursuit of the Strategic Plan and substantially contributed to the commission of crimes (arguments under Alleged Error 39).[300] Brđanin points to various findings of the Trial Chamber, relating to the dismissals of non-Serb professionals, which he argues are erroneous.[301]

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[297] Brđanin Appeal Brief, para. 151.
[298] Brđanin Appeal Brief, paras 147-158; *see also* AT. 8 December 2006, pp. 152-153.
[299] Brđanin Appeal Brief, paras 269-270; *see also* AT. 8 December 2006, pp. 151-152.
[300] Brđanin Appeal Brief, paras 166-182.
[301] *See* Brđanin Appeal Brief, paras 166-182. Brđanin also challenges the Trial Chamber's finding that "that most employments were in fact terminated on discriminatory grounds, for the prevailing reason that the employee in question was a Bosnian Muslim or a Bosnian Croat" (Brđanin Notice of Appeal, para. 122 (Alleged Error 120), citing Trial Judgement, para. 1037). In his Appeal Brief, Brđanin merely refers to paras 166-182 (Alleged Error 37), without providing any additional argument, *see* Brđanin Appeal Brief, para. 298 (Alleged Errors 120-122). Similarly, Brđanin challenges in his Notice of Appeal further findings of the Trial Chamber related to dismissals of non-Serb professionals (Brđanin Notice of Appeal, paras 123, 135-137 (Alleged Errors 121, 133-135)), without providing additional arguments in his Appeal Brief (Brđanin Appeal Brief, paras 298, 301, 303), but – in part implicitly – referring to Brđanin Appeal Brief, paras 166-182. The Appeals Chamber considers that the arguments in Brđanin Appeal Brief, paras 166-182, encompass also Brđanin's Alleged Errors 39, 120-121, 133-135.

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159. Brđanin submits that some municipalities had already enforced dismissals prior to any decision of the ARK Crisis Staff (argument under Alleged Error 39).[302] The Appeals Chamber dismisses summarily this argument under category 2, above.

160. Brđanin also seems to imply that the Trial Chamber found that the police engaged in the dismissal of persons in other organisations.[303] This argument is summarily dismissed under category 2, above.

161. The Appeals Chamber concludes that Brđanin has failed to demonstrate that no reasonable trier of fact could have found that the ARK Crisis Staff issued orders to the police force concerning the dismissal of non-Serb professionals. Brđanin's arguments are rejected.

(b) Implementation of ARK Crisis Staff decisions on dismissals

162. The Appeals Chamber will consider Brđanin's arguments challenging the ARK Crisis Staff decisions on dismissals only insofar as they challenge the Dismissal Decision of 22 June, since he has not shown that the decisions of the ARK Crisis Staff between 8 May 1992 and 26 May 1992 had any impact on his conviction (argument under Alleged Error 39).[304]

163. Brđanin claims that there is no conclusive evidence that the Dismissal Decision of 22 June was implemented in any municipalities other than Bosanski Petrovac and Banja Luka. Noting that the Trial Chamber relied on the Treanor Report, which concerned, *inter alia*, the implementation of this decision, he claims that none of the evidence referred to in this report shows that people were dismissed because of ARK Crisis Staff decisions.[305] He claims that the report only found evidence of implementation in the Bosanski Petrovac municipality,[306] while there was no evidence of implementation in the other municipalities.[307] Brđanin also notes that the penal and correctional facility in the Banja Luka municipality implemented the Dismissal Decision of 22 June.[308] Regarding the implementation in the municipalities of Banja Luka and Bosanski Petrovac, he

[302] Brđanin Appeal Brief, para. 170, referring to Trial Judgement, para. 201.
[303] Brđanin Appeal Brief, para. 172.
[304] Brđanin Appeal Brief, para. 181; Trial Judgement, paras 1065, 1067.
[305] Brđanin Appeal Brief, para. 173.
[306] Brđanin Appeal Brief, para. 175. Brđanin also notes that one decision of the Petrovac municipality implementing dismissals refers to a decision of the ARK Crisis Staff erroneously dated 11 June 1992 instead of 22 June 1992, *see* Brđanin Appeal Brief, para. 175. The Prosecution understands this to be an attempt of Brđanin to show an inconsistency or contradiction of the evidence which would invalidate the Trial Chamber's conclusion (Prosecution Response Brief, paras 6.163-6.164). The Appeals Chamber disagrees with the Prosecution and considers that Brđanin's statement is a clarification; in any case, if Brđanin intended to allege an error, he has not put forward any argument in this regard.
[307] Brđanin Appeal Brief, para. 174.
[308] Brđanin Appeal Brief, para. 176.

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argues, however, that dismissals for "security reasons" were permitted by the Geneva Conventions of 1949.[309]

164. The Prosecution responds that the evidence shows that the Dismissal Decision of 22 June was implemented in numerous municipalities including Bosanski Petrovac, Ključ, and Prijedor. Regarding the issue of whether dismissals are permitted for security concerns, the Prosecution responds that the Trial Chamber specifically addressed the issue and rejected Brđanin's claim.[310]

165. The Dismissal Decision of 22 June was directed to all the municipal crisis staffs.[311] It was forwarded by the Prijedor Crisis Staff "for the purpose of its implementation",[312] and was reported to have been implemented in the municipal police station (that is, the SJB).[313] Further, there is evidence that this decision was implemented in the municipalities of Bosanski Petrovac and Banja Luka.[314] Additionally, the Trial Chamber found that: (1) the ARK Crisis Staff had *de facto* authority over the municipalities in the ARK;[315] (2) several municipalities (including Prijedor and Bosanski Petrovac) in a joint statement expressly stated that decisions of the ARK Crisis Staff had to be implemented;[316] and (3) the evidence demonstrates a pattern of conduct, which allows for only one reasonable inference to be drawn, namely that the municipalities systematically implemented ARK Crisis Staff decisions in the area of dismissals.[317] The Appeals Chamber concludes that Brđanin has failed to show that no reasonable trier of fact could have found that the ARK Crisis Staff Dismissal Decision of 22 June was implemented in the ARK.

166. With respect to Brđanin's claim that Article 27 of Geneva Convention IV[318] allows dismissals for security reasons, the Appeals Chamber notes that the Trial Chamber specifically addressed this issue, stating that:

> The termination of employment of Bosnian Muslims and Bosnian Croats during the relevant period took place within the context of a plan to ethnically cleanse the territory claimed by the Bosnian Serb authorities. It is this plan which governs the considerations of this Trial Chamber. The concerns of control and security that the Defence suggests, cannot be considered outside this

[309] Brđanin Appeal Brief, paras 177-180.
[310] Prosecution Response Brief, paras 6.160-6.161; *see also* Prosecution Response Brief, para. 7.32.
[311] Trial Judgement, para. 235, fn. 637.
[312] Exs P1290, P1262.
[313] Ex. P1294.
[314] Trial Judgement, fn. 2609; Brđanin Appeal Brief, paras 175-176.
[315] Trial Judgement, para. 200.
[316] Trial Judgement, para. 206. Brđanin points out that the Prijedor Crisis Staff determined that all decisions of the ARK Crisis Staff prior to 22 June 1992 were invalid (Brđanin Appeal Brief, para. 181); however the authorities in Prijedor explicitly agreed to implement all ARK Crisis Staff decisions after that date (Trial Judgement, para. 207).
[317] Trial Judgement, para. 210.
[318] In its relevant part, Article 27 of the Geneva Convention IV reads: "However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

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> context of illegality. Consequently, Article 27 of Geneva Convention IV has no place in the consideration of this Trial Chamber.[319]

167. The Appeals Chamber agrees with the Trial Chamber, as it is clear from the ARK Crisis Staff decisions that the reason for the dismissals was the ethnicity of the individuals concerned.[320] In particular, the Appeals Chamber notes that, in the context of persecution, the lawfulness of the measures taken under Article 27 of Geneva Convention IV is appropriately dealt with when considering the general elements of crimes against humanity and when considering whether an act is carried out on discriminatory grounds.

(c) Lack of loyalty as basis for dismissal

168. Brđanin submits that non-Serb managers were able to keep their jobs if they demonstrated their loyalty, an indication that "the basis for the dismissals was not ethnicity, but loyalty". Furthermore, he points out that the reason given for the dismissals in the 8 May 1992 decision of the ARK Crisis Staff was lack of loyalty.[321]

169. The Prosecution responds that the evidence relied on by Brđanin does not invalidate the Trial Chamber's conclusion that most employments were terminated on discriminatory grounds.[322]

170. Although some of the decisions of the ARK Crisis Staff on dismissals indeed refer to the "absolute" loyalty of the personnel to the SerBiH,[323] this is not a sufficient basis for arguing that the dismissals were due to a lack of loyalty.[324] Instead, on the basis of the evidence, it was not unreasonable for the Trial Chamber to conclude that, in the context of the implementation of the Strategic Plan, the requirement of loyalty was a pretext for excluding non-Serbs from the workforce. This conclusion is supported, *inter alia*, by the fact that the Dismissal Decision of 22 June, on which the Trial Chamber relied to establish Brđanin's criminal responsibility,[325] clearly states that all the positions important to the running of the economy may only be held "by personnel of Serbian nationality", while referring to loyalty as a requirement for Serb nationals only.[326] Brđanin's arguments are therefore rejected.

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[319] Trial Judgement, para. 1039.
[320] Trial Judgement, paras 233-235, 1037.
[321] Brđanin Appeal Brief, paras 181-182; Brđanin Appeal Brief, Confidential Annex 1, referring to the testimony of Witness BT-88.
[322] Prosecution Response Brief, paras 6.165-6.166.
[323] Trial Judgement, paras 234, 1064.
[324] Trial Judgement, para. 1039.
[325] Trial Judgement, para. 1065.
[326] Exs P254, P255 cited in Trial Judgement, paras 235, 1037. Ex. P255 *additionally* states that these positions can also not be held by "employees of Serbian nationality who have not confirmed by Plebiscite or who in their minds have not made ideologically clear that the Serbian Democratic Party is the sole representative of the Serbian people" (Trial Judgement, para. 235).

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171. Brđanin has failed to demonstrate that no reasonable trier of fact could have found beyond a reasonable doubt that the decisions of the ARK Crisis Staff on dismissals were issued in pursuit of the Strategic Plan and that their implementation substantially contributed to the criminal acts cited by the Trial Chamber.

3. Resettlement of non-Serb population

172. The Trial Chamber found that "[t]he ARK Crisis Staff decisions on resettlement ensured the permanent removal of non-Serbs from the territory of the ARK".[327] It specifically referred to two decisions issued on 28 and 29 May 1992 by the ARK Crisis Staff (Decision of 28 May and Decision of 29 May, respectively).

173. Brđanin submits various arguments to challenge this finding, claiming that no reasonable trier of fact could have reached this conclusion on the resettlement of the non-Serb population (Alleged Error 40).[328]

(a) Decisions setting out resettlement policy

174. Regarding the Decision of 28 May, Brđanin claims that the Trial Chamber should have relied on the "official" version of this decision (which appeared in the Official Gazette of the ARK), and not on another version of the same decision. He argues that the paragraph relied on by the Trial Chamber does not appear in the "official" version of the decision (argument under Alleged Error 40).[329] The Appeals Chamber summarily dismisses this argument under category 3, above.

175. Brđanin further argues that the Trial Chamber only cited one paragraph of the Decision of 29 May, ignoring the subsequent paragraphs which explained that Serbs from central Bosnia, an area under Muslim control, were effectively being held hostage and restrained from entering the Krajina (argument under Alleged Error 40).[330] The Appeals Chamber dismisses this argument under category 3, above.

176. Brđanin also refers to another decision (Exhibit P240) cited by the Trial Chamber in a footnote (argument under Alleged Error 40).[331] The Appeals Chamber dismisses this argument summarily under category 1, above.

[327] Trial Judgement, para. 255; *see also* paras 249-252, 254.
[328] Brđanin Appeal Brief, paras 183-195.
[329] Brđanin Appeal Brief, fn. 175.
[330] Brđanin Appeal Brief, para. 185.
[331] Brđanin Appeal Brief, para. 186, referring to Trial Judgement, fn. 670.

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177. Brđanin argues that the decisions of the ARK Crisis Staff of 28 and 29 May 1992 do not contain coercive language; rather, they speak of voluntary resettlement.[332] Furthermore, Brđanin submits that the Decision of 29 May called for other political parties to become involved in facilitating the voluntary resettlement of populations.[333]

178. The Prosecution responds that the Trial Chamber addressed the issue of whether the resettlement was voluntary and found that life was made intolerable for non-Serbs and they were left with no option but to escape.[334]

179. Brđanin's argument is limited to the claim that the decisions of the ARK Crisis Staff did not suggest that the Bosnian Muslims and Bosnian Croats were forced to leave the territory of the ARK. The Appeals Chamber agrees with Brđanin that the decisions referred to by the Trial Chamber were not worded in coercive language.[335]

180. The Trial Chamber expressed awareness of the fact that the decisions of the ARK Crisis Staff were not worded in a way that demonstrated the coercive nature of the resettlement policy. It even cited one document indicating the contrary.[336] Yet, taking into account the context in which these decisions were taken and implemented, the Trial Chamber came to the opposite conclusion. The Trial Chamber explained that, despite the fact the ARK Crisis Staff decisions called for voluntary compliance and reciprocity, the resettlement of non-Serbs resulted from the intolerable conditions imposed on them by the Bosnian Serb authorities and the crimes committed against them in pursuit of the Strategic Plan. These conditions made it impossible for Bosnian Muslims and Bosnian Croats to continue living in this area and left them no option but to depart.[337]

181. Further, in the context of its assessment of Brđanin's individual responsibility, the Trial Chamber considered that, although the Decision of 28 May and the Decision of 29 May are framed in terms of voluntary compliance, other elements were to be taken into account. In light of Brđanin's unambiguous public declarations from early April 1992 onwards, which repeatedly called for the non-Serb population to leave the territory of the ARK and stated that only a small percentage

[332] Brđanin Appeal Brief, paras 184-185, referring to Trial Judgement, para. 249.
[333] Brđanin Appeal Brief, para. 185.
[334] Prosecution Response Brief, para. 6.170.
[335] *See* Exs P211 and P227 cited in Trial Judgement, para. 249.
[336] Ex. P1869, cited in Trial Judgement, fn. 671.
[337] Trial Judgement, para. 255: "Although the ARK decisions called for voluntary compliance and reciprocity, the resettlement of non-Serbs was in part a result of the intolerable conditions imposed on them by the Bosnian Serb authorities, including the shelling, looting and destruction of non-Serb towns and houses, the dismissals from posts and the other crimes carried out against non-Serbs in pursuit of the Strategic Plan." *See also* Trial Judgement, para. 551 (footnote omitted): "These people [Bosnian Muslims and Bosnian Croats] were left with no option but to escape. Those who were not expelled and did not manage to escape were subjected to intolerable living conditions imposed by the Bosnian Serb authorities, which made it impossible for them to continue living there and forced them to seek permission to leave."

of non-Serbs would be allowed to stay, those decisions could only have been considered as a direct incitement to the authorities to deport and forcibly transfer non-Serbs from the territory of the ARK.[338]

182. In short, the Trial Chamber took into account these facts to come to the conclusion that the resettlement of the non-Serb population was not voluntary, and that it was spurred on by the decisions of the ARK Crisis Staff. By contrast, Brđanin has only pointed to the language of these decisions without explaining why the Trial Chamber's reasoning was flawed. As such, Brđanin has failed to show that no reasonable trier of fact could have reached this conclusion beyond reasonable doubt.

183. The Appeals Chamber concludes that a reasonable trier of fact could rely on the Decision of 28 May and the Decision of 29 May to find a basis for the resettlement policy followed by the ARK Crisis Staff. In light of the fact that the Trial Chamber did not rely solely on those decisions to find that the resettlement of the non-Serb population was induced by the ARK Crisis Staff by coercive measures, but relied on several other findings and evidence cited in the Trial Judgement,[339] Brđanin has failed to demonstrate an error by the Trial Chamber. His arguments under Alleged Error 40 are accordingly dismissed.

(b) Implementation by ARK municipalities of decisions on resettlement

184. The Trial Chamber found that "municipal organs" within the ARK discussed the Decision of 29 May and called for its implementation.[340]

185. Brđanin claims that the Trial Chamber erred in reaching this conclusion, arguing that the evidence cited by the Trial Chamber does not show that there was a plurality of municipalities calling for the implementation of the ARK Crisis Staff decision, but rather there was only one municipality that did so (argument under Alleged Error 40).[341]

186. In this regard, Brđanin refers to a decision from the Ključ Crisis Staff, in which the permanent removal of citizens of Ključ municipality is addressed.[342] He points out that, even though the decision of the Ključ Crisis Staff is similar to the Decision of 29 May of the ARK Crisis Staff because they both concern resettlement, the decision of the Ključ Crisis Staff does not allude to the ARK Crisis Staff's insistence on reciprocity for the Serb population fleeing from Muslim-

[338] Trial Judgement, para. 574.
[339] Trial Judgement, paras 255, 551, 574.
[340] Trial Judgement, para. 250.
[341] Brđanin Appeal Brief, paras 190-191.
[342] Trial Judgement, para. 250; fn. 672, citing Ex. P957.

controlled areas in central Bosnia. Brđanin argues that the document cited by the Trial Chamber does not demonstrate the discussion or implementation of the Decision of 29 May of the ARK Crisis Staff in the Sanski Most municipality. He submits that the document instead speaks of reporting to Vojo Kuprešanin in respect of the removal and exchange of population. However, Brđanin argues, the fact that Vojo Kuprešanin was member of the ARK Crisis Staff does not necessarily show a connection to the ARK Crisis Staff. Brđanin contends that "it is more likely the report was going to him in his capacity as President of the ARK Assembly – thus unrelated to any role he played upon the [ARK] Crisis Staff".[343]

187. The Prosecution does not specifically address this issue.[344]

188. Brđanin failed to show that the Trial Chamber's finding that the organs of the ARK municipalities discussed the Decision of 29 May and called for its implementation was unreasonable. To come to this conclusion, the Trial Chamber relied on its findings that the Decision of 29 May was implemented in the Petrovac, Ključ, and Sanski Most municipalities.[345] The evidence relied upon will be addressed in turn.

189. Brđanin does not challenge the Trial Chamber's finding that the Petrovac Crisis Staff formed a board for the implementation of the Decision of 29 May.[346]

190. The Ključ decision does not identify an ARK Crisis Staff decision as its source.[347] However, it should be recalled that the Trial Chamber found that the municipalities accepted the authority of the ARK Crisis Staff,[348] and that they systematically implemented its decisions, *inter alia,* in the area of the resettlement of the non-Serb population.[349] Regarding the ARK Crisis Staff's authority over the Ključ municipality, the Trial Chamber cited evidence, namely the "Report on the work of the Ključ Crisis Staff in the period from 15 May 1992 to July 1992", which states that the Ključ Crisis Staff considered the binding conclusions of the ARK Crisis Staff at every meeting.[350] Other evidence also supports this acceptance of the ARK Crisis Staff authority.[351] Brđanin has therefore failed to demonstrate why no reasonable trier of fact could have relied on the document cited by the

[343] Brđanin Appeal Brief, para. 191.
[344] The Prosecution understands Brđanin to argue that the municipalities were not obligated to implement the decisions of the ARK Crisis Staff and refers to its arguments addressing this issue elsewhere in its Response Brief, *see* Prosecution Response Brief, para. 6.171.
[345] Trial Judgement, para. 250.
[346] Trial Judgement, para. 250.
[347] Ex. P957.
[348] Trial Judgement, paras 200, 205.
[349] Trial Judgement, para. 210.
[350] Ex. P1010, p. 4, cited in Trial Judgement, fn. 528.
[351] Ex. P171, pp. 1-2, cited in Trial Judgement, fn. 528.

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Trial Chamber in support of its finding that the Ključ Crisis Staff was one of the organs within the ARK that discussed the Decision of 29 May and called for its implementation.

191. As to the Trial Chamber's reference to the Sanski Most Municipality, Brđanin is correct in stating that the document cited by the Trial Chamber (Exhibit P690) does not explicitly indicate any discussion or implementation of the Decision of 29 May.[352] Yet, upon review of the exhibit, the Appeals Chamber notes that the issue of removal and exchange of population was considered by the Sanski Most Crisis Staff in light of the ARK Crisis Staff decisions. This is so because the part of the decision of the Sanski Most Crisis Staff quoted by the Trial Chamber is situated under the heading "Realisation of the conclusions of the Crisis Staff of the Autonomous Region of Krajina".[353] Brđanin's argument is therefore rejected.

192. As for Brđanin's assertion that "it is more likely" that Vojo Kuprešanin is mentioned in the decision of the Sanski Most Crisis Staff (Exhibit P690) in his capacity as president of the ARK Assembly and not as a member of the ARK Crisis Staff,[354] the Appeals Chamber dismisses this argument summarily under category 3, above.

193. For the foregoing reasons, the Appeals Chamber concludes that Brđanin has failed to show that no reasonable trier of fact could conclude beyond reasonable doubt that the organs of the municipalities within the ARK discussed the Decision of 29 May and called for its implementation.

(c) Implementation of decisions on resettlement through the SJBs

194. The Trial Chamber found that the resettlement from the municipalities in Prijedor, Bosanski Novi, and Sanski Most occurred in furtherance of both the ARK Crisis Staff decisions on resettlement and the subsequent municipal decisions implementing this policy.[355]

195. Brđanin claims that no reasonable trier of fact could have relied on Exhibit P717 to reach this conclusion. Exhibit P717 is composed of a series of reports, including reports issued by the municipal SJBs of Sanski Most ("Sanski Most Report"), Bosanski Novi ("Bosanski Novi Report"), and Prijedor ("Prijedor Report"), as well as the report of the CSB summarising these SJB reports ("CSB Report"). Except for the Sanski Most Report, all reports refer several times to decisions of the "Government of the AR of Krajina". Exhibit P717 contains only one reference to the ARK, namely a reference to a "Decision on the Voluntary Moving Out of Citizens" which was issued by the "Government of the AR [Autonomous Region] of Krajina" (argument under Alleged Error 40).

[352] Brđanin Appeal Brief, para. 191.
[353] Ex. P690, p. 1.
[354] Brđanin Appeal Brief, para. 191.

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Brđanin contends that the "Government of the AR Krajina" is an entity separate from the ARK Crisis Staff and suggests that even if the "Government of the AR of Krajina" issued such decisions, it is not part of the evidence in this case.[356]

196. The Prosecution responds that the evidence relied upon by the Trial Chamber should be read in its totality, and the fact that the bodies implementing the decisions of the ARK Crisis Staff refer to those decisions with small variations or do not identify the ARK Crisis Staff as the source of the relevant decision does not render the Trial Chamber's conclusion unreasonable.[357]

197. While there is no doubt that the Trial Chamber was mindful of the distinction between the ARK Crisis Staff and the ARK Government,[358] the question arises whether the Trial Chamber correctly inferred from Exhibit P717 that the notion of the "Government of the AR of Krajina" refers to the ARK Crisis Staff.[359]

198. The Bosanski Novi Report makes several references to the "Government of the AR of Krajina".[360] In the part of the Bosanski Novi Report concerning a resettlement decision of the "Government of the AR of Krajina" referred to by Brđanin,[361] no further clarification is given as to which body the expression "Government of the AR of Krajina" refers. However, in a different part of this report, reference is made to a decision of the "Government of the AR of Krajina", namely a decision that is dated 4 May 1992, concerning disarmament. The report states that this decision was taken on the basis of the decision number 1/92 of the Ministry of National Defence of the SerBiH dated 16 April 1992.[362] This reference makes it clear that the decision of 4 May 1992 – issued by the "Government of the AR of Krajina", according to the Bosanski Novi Report – was in fact the decision which the Trial Chamber found to have been issued by the ARK Secretariat for National Defence.[363]

199. Next, the Prijedor Report also makes reference to the "Government of the AR of Krajina". It refers to a "Decision to disarm all paramilitary units, groups and individuals in the Serbian Republic" adopted by the Ministry of National Defence of the Serbian Republic and "the Government of the Autonomous Region of Krajina".[364] This reference in the Prijedor Report to the

[355] Trial Judgement, para. 251.
[356] Brđanin Appeal Brief, para. 192.
[357] Prosecution Response Brief, para. 6.172.
[358] *See*, for example, Trial Judgement, para. 207, in which the Trial Chamber held that the Prijedor Crisis Staff challenged not only the authority of the ARK Crisis Staff but also that of the ARK Government.
[359] Trial Judgement, para. 251, citing Ex. P717.
[360] Ex. P717, pp. 01109856, 01109858, 01109860.
[361] Brđanin Appeal Brief, para. 192, fn. 180, referring to Ex. P717, p. 20 (01109860).
[362] Ex. P717, pp. 01109856, 01109858.
[363] Trial Judgement, para. 253, referring to Ex. P227, p. 00882890.
[364] Ex. P717, p. 01109080.

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decision of the "Government of the Autonomous Region of Krajina" stands for the ARK Secretariat for National Defence decision of 4 May 1992, which implemented the decision of the Ministry of National Defence of the SerBiH dated 16 April 1992.

200. Lastly, the CSB Report, when summarising the Bosanski Novi Report, also makes reference to a decision on the voluntary moving out of citizens of the "Government of the AR of Krajina", in the same context as the Bosanski Novi Report.[365] No further clarification can be found in the CSB Report.

201. Thus, Exhibit P717, when mentioning a decision on disarmament of the "Government of the AR of Krajina", refers to the decision taken by the ARK Secretariat for National Defence, which was an organ of the ARK Assembly that had jurisdiction over defence.[366] However, the portions discussed above of Exhibit P717 (where the reports mention the decision of the ARK Secretariat for National Defence to *disarm* paramilitary groups) are not the portions of Exhibit P717 relied upon by the Trial Chamber regarding the issue of the implementation of the ARK Crisis Staff's policy on *resettlement*. Rather, the Trial Chamber likely relied on the reference, in another part of Exhibit P717, to a "Decision on the Voluntary Moving Out of Citizens" issued by the "Government of the AR of Krajina".[367] In such circumstances, a reasonable trier of fact could not have excluded the possibility that the notion of "Government of AR of Krajina" was used in different parts of Exhibit P717 to refer to different bodies. In particular, it might be open to question that an organ of the ARK Assembly that had jurisdiction over defence (the ARK Secretariat for National Defence) issued a decision on the resettlement of a part of the civilian population.

202. As he is required to do in order to meet his burden on appeal when challenging an inference of the Trial Chamber, Brđanin proposes his own assessment of Exhibit P717 and suggests that the notion of "Government of the AR of Krajina" is a reference to the ARK body headed by Nikola Erceg.[368] Brđanin refers to Exs DB212 and DB218 to demonstrate that the body headed by Nikola Erceg was the ARK Government. The Appeals Chamber notes that Exhibit DB218, dated 18 June 1992, indeed indicates that Nicola Erceg was "President of Government"; however, Exhibit DB212, dated 29 June 1992, indicates that Nicola Erceg was "President of Executive Council", which is in accordance with the Trial Chamber's finding that Nicola Erceg headed the ARK Executive Council.[369] In any case, as shown above, the reports clearly show that some references to the "Government of the AR of Krajina" in Exhibit P717 refer to decisions taken by the ARK Secretariat

[365] Ex. P717, p. 03008564.
[366] Trial Judgement, para. 238.
[367] Trial Judgement, fn. 674; Ex. P717 (Bosanski Novi Report), p. 01109860; *see also* Ex. P717 (CSB Report), p. 03008564.
[368] Brđanin Appeal Brief, para. 192.

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for National Defence, a different body than that headed by Nikola Erceg. Brđanin's interpretation that the notion "Government of the AR of Krajina" refers to the body headed by Nikola Erceg is not decisive.

203. The Appeals Chamber concludes that it is not clear, at least from Exhibit P717 alone, whether the decision on resettlement by the "Government of the AR Krajina" mentioned in Exhibit P717 is a reference to the resettlement decisions of the ARK Crisis Staff as found by the Trial Chamber.[370] The Trial Chamber has failed to explain how it could infer, solely from Exhibit P717, its finding that the resettlement from the municipalities in Prijedor, Bosanski Novi and Sanski Most occurred pursuant to both the ARK Crisis Staff decisions on resettlement and the subsequent municipal decisions implementing this policy.

204. Despite this lack of clarity, the Appeals Chamber notes that the impugned finding in paragraph 251 of the Trial Judgement (and its reference to Exhibit P717) is only one of several findings of the Trial Judgement, in turn based on several pieces of evidence,[371] that the Trial Chamber took into account when arriving at its conclusion that "[t]he ARK Crisis Staff decisions on resettlement ensured the permanent removal of non-Serbs from the territory of the ARK".[372] It is this overall conclusion that Brđanin seeks to be reversed. The Appeals Chamber will take the lack of clarity in Exhibit P717 into account when evaluating whether it will reverse, as sought by Brđanin, that overall finding of the Trial Chamber.[373]

(d) Report of the 1st KK

205. Brđanin submits that the report of the 1st KK dated 1 June 1992 refers to the Decision of 29 May of the ARK Crisis Staff but argues that this report adds that "those departing will not be allowed to return" (argument under Alleged Error 40).[374] Brđanin argues that the Trial Chamber appears to have attributed this statement[375] to the ARK Crisis Staff, whereas there is no evidence showing that the ARK Crisis Staff made any pronouncements about permission to return.[376]

206. Even assuming that the Trial Chamber attributed this statement to the ARK Crisis Staff, as suggested by Brđanin, the Appeals Chamber considers that the intention of permanent removal is not a finding relevant to Brđanin's conviction. As clarified in the *Stakić* Appeal Judgement, and

[369] Trial Judgement, para. 190.
[370] Trial Judgement, para. 251.
[371] Trial Judgement, paras 249-250, 252-254; fns 669-673, 675-681.
[372] Trial Judgement, para. 255.
[373] Brđanin Appeal Brief, paras 183, 195, referring to Trial Judgement, para. 255.
[374] Brđanin Appeal Brief, para. 193.
[375] Ex. P380, cited in Trial Judgement, para. 252.
[376] Brđanin Appeal Brief, para. 193.

contrary to the Trial Chamber's finding,[377] neither the crime of deportation nor the crime of forcible transfer necessitates that the accused's intention must be that of permanent removal.[378] Brđanin's argument is therefore irrelevant to his conviction and will not be considered further.

(e) Agency for the Movement of People and Exchange of Properties

207. The Trial Chamber found that the ARK Crisis Staff established the Agency for the Movement of People and Exchange of Properties, and related municipal agencies, to aid the implementation of the resettlement policy and that those departures from the ARK had to be authorized by such agencies, whereby Bosnian Muslims and Croats usually had to deregister from their places of residence and either relinquish their property without compensation or occasionally exchange their property for property outside the ARK.[379] In a different part of the Trial Judgement, the Trial Chamber also found that while this Agency was set up for the exchange of flats and the resettlement of populations, this was "nothing else but an integral part of the ethnic cleansing plan".[380] As these two findings are related to the Agency and Brđanin refers to both findings in his Appeal Brief, the Appeals Chamber understands that he challenges both findings of the Trial Chamber.[381]

208. Brđanin submits that the Trial Chamber implied that the establishment of the Agency was part of an effort by the ARK Crisis Staff to implement the Strategic Plan by forcibly transferring non-Serbs from Banja Luka, and he claims that no reasonable Trial Chamber could have reached this conclusion as no evidence supports it (arguments under Alleged Error 40).[382] He argues that two documents (one from Radio Banja Luka[383] and one from *Glas* newspaper[384]), issued after the ARK Crisis Staff ceased to function, showed that the ethnicity of the persons served by the Agency is of secondary importance.[385] The Appeals Chamber dismisses summarily this argument relating to under category 2, above.

209. Brđanin then relies on the evidence of the director of the Agency, Miloš Bojinović, who testified that the Agency was established with the purpose of assisting people of all ethnicities and it

[377] Trial Judgement, para. 545.
[378] *Stakić* Appeal Judgement, para. 307.
[379] Trial Judgement, para. 254.
[380] Trial Judgement, para. 552.
[381] In his Notice of Appeal, Brđanin does not specifically challenge paragraph 254 of the Trial Judgement. However, Brđanin challenges paragraph 552 of the Trial Judgement, which also concerns the Agency (Brđanin Notice of Appeal, para. 103; Alleged Error 101). In the Brđanin Appeal Brief, however, the error in respect of the Agency is discussed with reference to paragraph 254 of the Trial Judgement; when addressing Alleged Error 101, Brđanin merely refers back to the arguments made in relation to paragraph 254 of the Trial Judgement (Brđanin Appeal Brief, paras 281-282).
[382] Brđanin Appeal Brief, para. 194.
[383] Ex. P288.
[384] Ex. P292.
[385] Brđanin Appeal Brief, para. 194.

was initially only Serbs who were being served[386] and that he travelled on a bus transporting persons from the Banja Luka area, which he was certain included Muslims, Croats, Slovenes, and, he believed, Serbs.[387] The Appeals Chamber dismisses summarily this argument under categories 3 and 8, above.

210. Brđanin additionally relies on the testimony of Witness BT-88,[388] who also testified about the work of the Agency. The Appeals Chamber dismisses summarily this argument under category 6, above.

211. For the foregoing reasons, the Appeals Chambers concludes that Brđanin has failed to show why no reasonable trier of fact could find beyond reasonable doubt that the Agency was nothing more than an integral part of the ethnic cleansing plan. Accordingly, Brđanin's arguments are rejected.

(f) Conclusion

212. Brđanin has challenged the overall conclusion of the Trial Chamber that "[t]he ARK Crisis Staff decisions on resettlement ensured the permanent removal of non-Serbs from the territory of the ARK". The Appeals Chamber has held that the Trial Chamber did not give reasons as to why it could infer, at least from Exhibit P717 alone, whether the decision on resettlement by the "Government of the AR Krajina" mentioned in Exhibit P717 is a reference to the resettlement decisions of the ARK Crisis Staff as found by the Trial Chamber. However, the Appeals Chamber has dismissed all other errors alleged by Brđanin relating to the issue of the resettlement of the non-Serb population. The Appeals Chamber considers that the Trial Chamber relied on ample evidence to arrive at its overall conclusion, and Brđanin's own evaluation of Exhibit P717 was not an inference that the Trial Chamber had to consider. The Appeals Chamber concludes that, in any case, Brđanin has failed to demonstrate that no reasonable trier of fact could have reached the impugned conclusion. For the foregoing reasons, Brđanin's arguments related to resettlement under Alleged Error 40 are dismissed. Alleged Error 101, which is related to it,[389] is therefore also dismissed.

[386] Brđanin Appeal Brief, para. 194, referring to T. 22776-22777.
[387] Brđanin Appeal Brief, para. 194, referring to T. 22803, 22768, 22770.
[388] Brđanin Appeal Brief, para. 194, Confidential Annex 2 to the Brđanin Appeal Brief.
[389] Brđanin Appeal Brief, para. 282.

K. Brđanin's authority and role in the implementation of the Strategic Plan

213. Brđanin submits that the Trial Chamber committed numerous errors in its findings concerning his power and his role in the events that occurred in the territory of the ARK in 1991 and 1992. The Appeals Chamber will address these challenges under three main categories: (1) Brđanin's power before the creation of the ARK Crisis Staff; (2) Brđanin's role in the implementation of the Strategic Plan; and (3) Brđanin's position after the abolishment of the ARK Crisis Staff.

1. Brđanin's knowledge of, and contribution to, the Strategic Plan

214. Brđanin submits that the Trial Chamber made an erroneous finding concerning his knowledge of and contribution to the Strategic Plan.[390] Brđanin contends that there is no evidence to support the Trial Chamber's conclusion beyond reasonable doubt that, along with the Bosnian Serb leadership, he supported the Strategic Plan, and that he knew that the Strategic Plan could only be implemented by the use of force and fear (Alleged Error 48).[391]

215. Regarding Brđanin's alleged crucial and substantial contribution to the implementation of the Strategic Plan, the Prosecution refers to Exhibit P89 (the same document as Exhibit P22) – an order signed by Brđanin as coordinator for implementing decisions – to show that Brđanin was an essential link between the leadership of the SDS (and hence the SerBiH government) and the municipalities in the ARK.[392]

216. As to Brđanin's knowledge that the Strategic Plan could only be implemented through force and fear, the Appeals Chamber notes that Brđanin has failed to substantiate his claim.[393] Brđanin merely refers to his arguments put forward against the Trial Chamber's finding that the "Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear".[394] The Appeals Chamber has already found that Brđanin has failed to demonstrate that no reasonable trier of fact could have reached that conclusion.[395] The Trial Chamber's finding that

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[390] In his Notice of Appeal, Brđanin also alleged a factual error in Paragraph 369 of the Trial Judgement (Brđanin Notice of Appeal, para. 64, Alleged Error 62). The Appeals Chamber considers this argument to have been withdrawn (Brđanin Appeal Brief, para. 2).
[391] Brđanin Appeal Brief, para. 209; Trial Judgement, para. 305.
[392] Prosecution Response Brief, para. 6.193. Regarding Brđanin's assertion that he neither supported the Strategic Plan nor knew that the Strategic Plan could only be implemented by the use of force and fear, the Prosecution referred to the arguments on Alleged Error 1 (Prosecution Appeal Brief, fn. 24).
[393] Brđanin refers only to his arguments challenging the Bosnian Serb leadership's knowledge that the Strategic Plan could only be implemented by the use of force and fear (Brđanin Appeal Brief, para. 209, referring to Brđanin Appeal Brief, paras 5-9; Alleged Errors 1, 48), without challenging the Trial Chamber's finding regarding *his* knowledge of the use of force and fear.
[394] Trial Judgement, paras 65, 67.
[395] Alleged Error 1 was summarily dismissed *supra*, para. 43.

Brđanin was also aware of the implementation of the use of force and fear[396] is based on evidence dealing with numerous intercepted telephone conversations between Karadžić and Brđanin or other political leaders, as well as Brđanin's acts and conduct, his public speeches, and his speeches during Assembly sessions of the ARK and the SerBiH, which he attended as a deputy.[397] Contrary to Brđanin's assertion, this evidence does support the Trial Chamber's conclusion. Brđanin has failed to demonstrate that no reasonable trier of fact could have come to the conclusion beyond reasonable doubt that he was aware that the Strategic Plan could only be implemented by the use of force and fear.

217. In connection to this finding, the Appeals Chamber also dismisses summarily under category 3, above, the challenge to the Trial Chamber's conclusion that Brđanin was an essential link between republican and municipal authorities (argument under Alleged Error 49).[398]

2. Karadžić's reliance on Brđanin to implement Bosnian Serb policies

218. Brđanin claims that there is no evidence from the period of the Indictment to support the Trial Chamber's conclusion that Radovan Karadžić relied on him to establish civilian commands, to ensure defence and civilian protection, to liaise with military officers and prepare for the mobilisation of the Bosnian Serb military, and to implement the policy of dismissing non-Serbs from their jobs during the period of the Indictment (Alleged Error 51).[399] The Appeals Chamber dismisses summarily this alleged error under category 2, above.

3. Decisions of the ARK Crisis Staff attributed to Brđanin

219. Brđanin submits that the Trial Chamber's conclusion that the decisions of the ARK Crisis Staff are attributable to him was unreasoned, and that the Trial Chamber failed to consider relevant evidence (Alleged Error 55).[400] The Appeals Chamber dismisses summarily this alleged error under category 2, above.

[396] Trial Judgement, para. 305.
[397] Trial Judgement, para. 306, referring to: Exs P2382.3, P2382.4, P2355, P2382.8, P2358, P2597, P50, pp. 22, 29-30, P12, P21, P2467, P2469.
[398] Brđanin Appeal Brief, para. 210.
[399] Brđanin Appeal Brief, paras 212-214, referring to Trial Judgement, para. 310.
[400] Brđanin Appeal Brief, para. 224, referring to Trial Judgement, para. 319.

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L. Brđanin's knowledge of crimes

1. Reliance on Exhibit P284

220. Brđanin takes issue with the use by the Trial Chamber of Exhibit P284, a newspaper article (Alleged Error 61).[401] Exhibit P284 is an extract from *Kozarski Vjesnik* newspaper dated 17 July 1992. The relevant portion is entitled "Representatives of the Krajina in Prijedor: It is not easy for anyone".[402] The article detailed a visit to Prijedor of ARK representatives, including Brđanin, who reportedly said: "What we have seen in Prijedor is an example of a job well done and it is a pity that many in Banja Luka, are not aware of it yet, just as they are not aware of what might happen in Banja Luka in the very near future".[403] He submits that no reasonable trier of fact could have inferred from this exhibit that he "had detailed knowledge that crimes were being committed", because: (1) no evidence was advanced to confirm that Brđanin made that statement; (2) there is no evidence to substantiate what was meant by a "job well done;" and (3) the statement itself makes no reference to any crime.[404]

221. The Prosecution responds that the Trial Chamber considered how Brđanin objected to all newspaper articles and reports introduced into evidence by the Prosecution on the basis *inter alia* that they are unreliable and that they amount to hearsay evidence.[405] It submits that Brđanin wrongly suggests that the Trial Chamber relied on a single piece of evidence, referring to the other evidence the Trial Chamber relied upon, and that the paragraph concerned is one among others in which the evidence of Brđanin's knowledge of crimes was discussed.[406]

222. The Appeals Chamber defers to the Trial Chamber's assessment of this exhibit for the following three reasons. First, Brđanin has not shown how this exhibit was contested at trial. Second, Witness Radić, former President of the Municipal Assembly of Banja Luka, confirmed the attendees at Omarska as reported in the exhibit and did not contest the veracity of the exhibit in any way.[407] Third, Witness Sivac explained how he saw Brđanin making a statement similar to the one reported in Exhibit P284 on Serb television in Banja Luka.[408] As a result, the Appeals Chamber

[401] Brđanin Appeal Brief, paras 235-236.
[402] Ex. P284. The English translation of Ex. P284 instead contains the title "Nobody finds it easy", but the formulation "It is not easy for anyone" was preferred by the Trial Chamber; *see* Trial Judgement, paras 355, 536, 1058, 1073.
[403] Ex. P284.
[404] Brđanin Appeal Brief, paras 235-236. Brđanin also submits that the Prosecution did not present any evidence to show that the newspaper, from which Ex. P284 is taken, is a reliable source of information (Brđanin Appeal Brief, para. 306, Alleged Error 149). The Appeals Chamber summarily dismisses this argument under category 4, above.
[405] Prosecution Response Brief, para. 7.45.
[406] Prosecution Response Brief, para. 6.239.
[407] T. 21996-21999.
[408] T. 12776-12777.

considers that, notwithstanding the absence of evidence directly corroborating Exhibit P284, it was reasonable for the Trial Chamber to conclude that Brđanin did make this statement.[409]

223. It is clear that the Trial Chamber relied on this exhibit, together with other evidence, to draw the inference that he was aware of the crimes being committed in Prijedor. The Trial Chamber interpreted the passage in question as meaning that Brđanin was congratulating the representatives from the Prijedor authorities for their execution of the Strategic Plan, which included the commission of crimes.[410] However, Brđanin's contention that Exhibit P284 does not expressly refer to any crime is correct.

224. The comment by Brđanin about "a job well done" and the fact that it was made after "a tour of the combat areas and collection centres"[411] leads to some ambiguity. The Appeals Chamber finds that, had the Trial Chamber drawn its inference solely from Exhibit P284, the finding would indeed have been one that no trier of fact could have made beyond reasonable doubt. However, the Trial Chamber considered Exhibit P284 and its context, along with evidence detailing how Brđanin kept abreast of the implementation of the Strategic Plan,[412] how he visited the front lines,[413] how senior military and police personnel were members of the ARK Crisis Staff,[414] and how it was common knowledge in the ARK at the time that crimes were being committed.[415] Considered in the context of these facts, the Appeals Chamber is satisfied that a reasonable trier of fact could rely, *inter alia*, on the statement made by Brđanin and recorded in Exhibit P284 to reach the conclusion that Brđanin was aware that crimes were being committed.[416] For these reasons, Alleged Error 61 is dismissed.

2. Trial Chamber's inference that Brđanin had knowledge of crimes

225. Brđanin claims that there is insufficient evidence to support the Trial Chamber's conclusion that he had detailed knowledge of crimes being committed in pursuit of the Strategic Plan, or that

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[409] The Appeals Chamber notes that the Trial Chamber also held that newspaper articles in general "can be an appropriate instrument for verifying the truth of the facts of a case" (Trial Judgement, para. 33), and explained its general approach to the evidence before it at the outset of the Trial Judgement (Trial Judgement, paras 20-36).
[410] Trial Judgement, paras 333-336.
[411] Ex. P284.
[412] Trial Judgement, para. 334; Witness Radić, T. 22271; Witness Sajić, T. 23684-23685; Witness Selak, T. 13111; Exs P1725, P1590, P1598.
[413] Exs P284, P1590.
[414] Trial Judgement, para. 336.
[415] Trial Judgement, para. 338; fn. 872: The Trial Chamber was satisfied that, by travelling to the front, Brđanin saw the result of the destruction perpetrated by the Bosnian Serb forces.
[416] The Appeals Chamber also notes that Brđanin has addressed this Alleged Error 61 in his table, filed 21 August 2006. He refers to paras 536, 1058 and 1073 of the Trial Judgement. In these paragraphs, the Trial Chamber referred, *inter alia*, to Ex. P284 when finding that Brđanin made public statements about camps and detention facilities. Brđanin has failed to demonstrate that the Trial Chamber could not rely on Ex. P284 to support its findings.

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he had knowledge of even one of the crimes (Alleged Error 60).[417] He submits further that neither the presence of senior military and police personnel on the ARK Crisis Staff, nor his receipt or delivery of reports from or to the ARK municipalities on actions being taken, problems being encountered, or the military situation on the front line, supports the conclusion that he had any detailed knowledge of any crimes. He avers that the Trial Chamber erred in using a " 'must have' or even a 'might have' standard" of knowledge.[418]

226. The Prosecution responds to this allegation together with other alleged errors relating to Brđanin's awareness of crimes, and submits that these arguments should be dismissed for "lack of argument or ... proper conceptualisation", and that the Trial Chamber's findings were in any event entirely reasonable.[419]

227. The Trial Chamber based its reasoning on the following findings: Brđanin's receipt of reports during ARK Crisis Staff meetings from municipal Crisis Staff representatives;[420] the membership of senior police and army personnel in the ARK Crisis Staff;[421] Brđanin's visit on at least one occasion to combat areas, and to the Omarska Camp;[422] Brđanin's briefing to the Presidents of the ARK municipalities attending ARK Crisis Staff meetings on what was occurring in their areas[423] (which were places he visited[424] and where he was briefed by military personnel);[425] Brđanin's criticism in one instance of criminal activity (in the form of looting and war profiteering);[426] the common knowledge among the general public in the ARK that crimes (including the forcible displacement of the non-Serb civilian population) were being committed; and the conclusion that Brđanin would have been better informed than the ordinary public due to his position.[427]

228. Considering the evidence and the findings cited above, the Appeals Chamber is not persuaded that the Trial Chamber erred in inferring that Brđanin knew that crimes were being committed in execution of the Strategic Plan. The evidence cited above supports the Trial

[417] Brđanin Appeal Brief, paras 232-234; Trial Judgement, para. 333. *See also* Brđanin Reply Brief, paras 65-69.
[418] Brđanin Reply Brief, para. 67.
[419] Prosecution Response Brief, paras 6.227-6.238, referring to Brđanin Appeal Brief, paras 232-234.
[420] Trial Judgement, para. 334.
[421] Trial Judgement, para. 336, fn. 869, referring to paras 188-196, 211-215, 216-225.
[422] Trial Judgement, para. 335, fn. 868. While Brđanin contests the meaning of the statement he made, and which is reported in this article, he fails to challenge the other evidence to which the Trial Chamber referred in making its finding: Trial Judgement, para. 334, fn. 864; para. 334, fn. 867; para. 336, fn. 869; para. 337, fns 870-871.
[423] Trial Judgement, para. 334.
[424] Trial Judgement, para. 334.
[425] Trial Judgement, para. 334.
[426] Trial Judgement, para. 337.
[427] Trial Judgement, para. 338. The Trial Chamber arrived at this conclusion as the "only reasonable inference" to be drawn from the large-scale forcible displacement of the non-Serb civilian population, the armed attacks on non-Serb villages and towns, and the extent of the criminal activity throughout the ARK.

Chamber's conclusion.[428] Brđanin has failed to demonstrate that no reasonable trier of fact could have concluded that the inference drawn was the only reasonable one that could be drawn from the evidence presented. Alleged Error 60 is therefore dismissed.

[428] This evidence includes: the information Brđanin received from municipal Crisis Staff representatives during ARK Crisis Staff meetings; the membership in the ARK Crisis Staff of senior ARK police and military personnel; his visits to combat areas and the Omarska Camp; his briefings to the Presidents of the ARK municipalities at ARK Crisis Staff meetings on what was occurring in their own areas; and his frequent visits to the municipalities and the "front lines" (The term "front lines" is adopted from Exs P1598 and P1590).

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V. BRĐANIN'S CHALLENGES TO THE UNDERLYING CRIMES AND FORMS OF RESPONSIBILITY

A. Findings on wilful killing

229. The Trial Chamber found Brđanin responsible for aiding and abetting killings that occurred during and immediately after attacks by Bosnian Serb forces on non-Serb towns, villages, and neighbourhoods, while acquitting him of killings that were not committed in the context of those armed attacks.[429]

1. Nature of the "Bosnian Serb forces"

230. Brđanin submits that, since the Indictment alleged that he was responsible for killings committed by "Bosnian Serb forces",[430] it was incumbent upon the Prosecution to prove that these crimes were committed by Bosnian Serb forces, that is, Serb forces from Bosnia.[431] He argues that this was not so, since the perpetrators of these killings were usually identified simply as "uniformed persons" and not as "Bosnian Serb forces".[432] Brđanin stresses that as a result no distinction could be drawn between criminals dressed in old JNA uniforms,[433] paramilitary groups (occasionally from Serbia), and the "Bosnian Serb forces",[434] and he submits that some of the killings may have been committed by criminal elements[435] or individuals, who did not fall within the definition of "Bosnian Serb forces" and over whom he exercised no control or influence.[436] Consequently, Brđanin claims that the Trial Chamber erred in finding him responsible for killings committed by forces other than Serb forces from Bosnia[437] and accordingly challenges the finding that he is responsible for the killings committed in various localities (Alleged Errors 63-80).[438]

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[429] Trial Judgement, paras 471-476. For this reason, Alleged Error 9, related to the massacre at Keraterm Camp, is summarily dismissed under category 1, above.
[430] Indictment, paras 37-38; *see also* Indictment, paras 47(1), 51, 52.
[431] Brđanin Appeal Brief, para. 237 (Alleged Errors 63-80).
[432] Brđanin Appeal Brief, para. 238 (Alleged Errors 63-80).
[433] Brđanin Appeal Brief, para. 238, referring to Witness BT-94, T. 24743-24744, and Ex. P227.
[434] Brđanin Appeal Brief, paras 238-241, referring to Ex. P400; Witness BT-19, T. 3344; Witness Sivac, T. 12832-12833; Witness Odobašić, T. 15106.
[435] Brđanin Appeal Brief, para. 238; Brđanin Reply Brief, paras 55, 58. In addition, Brđanin contests his supposed responsibility simply for "any Serb committing a crime during the indictment period", Brđanin Reply Brief, para. 61. This argument is summarily dismissed under category 3, above, though it is also related to the discussion on JCE, *infra* Part VI.D.
[436] Brđanin Reply Brief, para. 59. Brđanin submits that he had at most control over the 1st KK, the Bosnian police forces, and units under the command of these two bodies, and that the Prosecution's submission amounts to an argument that "as long as the crime was committed by a Serb from somewhere, or by someone somebody thought was a Serb from somewhere the evidence was sufficient to prove the crime was committed by a member of the Bosnian Serb forces." (Brđanin Reply Brief, para. 55.)
[437] Brđanin Reply Brief, para. 61.
[438] Brđanin Appeal Brief, para. 243; *see also* Brđanin Notice of Appeal, paras 65-82 (Alleged Errors 63-80). The specific locations referred to by the Trial Chamber, and challenged by Brđanin, are the following: Kozarac and the

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231. The Prosecution responds that Brđanin mischaracterizes the term "Bosnian Serb forces".[439] It stresses that the Indictment defines the term "Bosnian Serb forces" as "army, paramilitary, territorial defence ('TO'), police units and civilians armed by these forces" without any reference to geographic origin or national identity.[440] The Prosecution avers instead that the term "Bosnian Serb forces" was nothing more than a phrase used to describe the army, paramilitary or other armed groups, or individuals responsible for crimes alleged in the Indictment.[441] It recalls that the meaning of "Bosnian Serb forces" was clarified during the pre-trial phase of the case[442] and that Brđanin did not contest it at trial.[443] The Prosecution avers that the result of this clarification is evident from the Trial Chamber's consideration and dismissal of the two arguments that "mere criminals" were responsible for the crimes alleged in the Indictment,[444] and that various municipalities in the ARK were "renegade municipalities" which acted independently.[445]

232. The expression "Bosnian Serb forces" appeared consistently in this case from the issuance of the first indictment onwards. The Indictment defined Bosnian Serb forces as "army, paramilitary, territorial defence ('TO'), police units and civilians armed by these forces."[446] The Trial Chamber

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surrounding areas (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 65; Alleged Error 63; Trial Judgement, para. 403); Kozarac, the Kevljani area (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 66; Alleged Error 64; Trial Judgement, para. 404); the village of Kamičani (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 67; Alleged Error 65; Trial Judgement, para. 405); the village of Jaskići (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 68; Alleged Error 66; Trial Judgement, para. 406); the village of Bisćani (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 69; Alleged Error 67; Trial Judgement, para. 407); Mrkalji (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 70; Alleged Error 68; Trial Judgement, para. 408); the Brdo area (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 71; Alleged Error 69; Trial Judgement, para. 409); the village of Čarakovo (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 72; Alleged Error 70; Trial Judgement, para. 410); the Ljubija football stadium (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 73; Alleged Error 71; Trial Judgement, para. 413); the Ljubija iron ore mine (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 74; Alleged Error 72; Trial Judgement, para. 414); Kukavice hamlet, Hrustovo village (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 75; Alleged Error 73; Trial Judgement, paras 418-419); Budim hamlet, Lukavica village (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 76; Alleged Error 74; Trial Judgement, para. 421); the village of Prhovo (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 77; Alleged Error 75; Trial Judgement, para. 424); the road between Prhovo and Peći (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 78; Alleged Error 76; Trial Judgement, para. 425); Hanifići (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 79; Alleged Error 77; Trial Judgement, para. 430); Čirkino Brdo (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 80; Alleged Error 78; Trial Judgement, para. 431); Grabovica (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 81; Alleged Error 79; Trial Judgement, paras 432-433); and Keraterm Camp (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 82; Alleged Error 80; Trial Judgement, paras 455-456).

[439] Prosecution Response Brief, para. 6.212.

[440] Prosecution Response Brief, para. 6.214, referring to the Indictment, para. 8.

[441] Prosecution Response Brief, para. 6.215.

[442] Prosecution Response Brief, para. 6.216, referring to T. 313.

[443] Prosecution Response Brief, para. 6.219.

[444] Prosecution Response Brief, para. 6.222, referring to Trial Judgement, paras 100, 119.

[445] Prosecution Response Brief, para. 6.224, referring to Trial Judgement, para. 209.

[446] Indictment, para. 8. *See also* (first) Indictment, 14 March 1999, para. 30 (referring to "members of the Bosnian Serb forces under the control of the 1st Krajina Corps"); Amended (second) Indictment, 20 December 1999, para. 16 (referring to "forces under the control of the Bosnian Serb authorities" (referred to as "Serb forces") and "comprised of the army, paramilitary, territorial defence ("TO") and police units."); Further Amended (third) Indictment, 12 March 2001, para. 8 (defining "army, paramilitary, territorial defence ("TO"), police units and civilians armed by these forces" as "Bosnian Serb forces", a term which was again used in paras 8, 37(1), 38, 39, 41, 42, 44, 47(1), 47(3), 48, 51, 52, 55, 56, 60, 63, 64); Corrected Version of Fourth Amended Indictment, 10 December 2001 and Fifth Amended Indictment, 7

acknowledged and expressly adopted that definition,[447] and proceeded to refer to "Bosnian Serb forces" frequently throughout the Trial Judgement.[448]

233. The Appeals Chamber recalls that Brđanin argued at trial that the Indictment pleaded no material facts which would show that he had "control over the Bosnian Serb forces who allegedly committed the acts alleged."[449] Because Brđanin submitted arguments at trial regarding the forces over which he allegedly exercised control, with reference to "Bosnian Serb forces", the Appeals Chamber does not agree with the Prosecution's submission that Brđanin failed to contest the meaning of the term at trial. Brđanin challenged the Prosecution's claim as to the extent of the forces he controlled, if any.

234. The expression "Bosnian Serb forces" could, in theory, be interpreted in many different ways. In a restrictive interpretation, "Bosnian Serb forces" could be understood to mean those forces whose members are of Bosnian Serb "origin" or "national identity". However, this was clearly not the meaning given by the Prosecution at trial. In its opening statement, for instance, the Prosecution stipulated that the crimes it enumerated were committed by Bosnian Serbs, and also by Serbs from Serbia and Montenegro.[450] A less restrictive interpretation of the expression "Bosnian Serb forces" could embrace forces "under the control of the leadership of the Bosnian Serbs" irrespective of the origin of its members.[451] An even broader interpretation could also include all forces acting on the side of the Bosnian Serb leadership, irrespective of the origin of the members of the forces in question, or of whether the relevant leadership had effective control over such forces.

235. The Trial Judgement shows that the Trial Chamber did not use the expression "Bosnian Serb forces" in the restrictive sense proposed by Brđanin. A review of the evidence cited by the Trial Chamber confirms that it did not construe the expression "Bosnian Serb forces" as one limited to forces composed of Serbs from Bosnia. Many of the Trial Chamber's findings that civilians were

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October 2002 (both of which, like the (sixth, final) Indictment, contain the same wording, in the same paragraphs, as the Further Amended (third) Indictment).

[447] Trial Judgement, para. 6: "The Prosecution alleges that, from March 1992 onwards, army, paramilitary, territorial defence, police units and civilians armed by those forces (collectively 'Bosnian Serb forces') seised control of those municipalities comprising the ARK", referring to the Indictment, para. 8. *See also* paras 14, 15-19, 737, and the *Glossary*, where "Bosnian Serb Forces" is again defined as "Bosnian Serb Army, paramilitary, territorial defence, police units and civilians armed by these forces (as defined in [the Indictment])".

[448] Trial Judgement, paras 74, 92, 106, 107, 111, 112, 113, 116, 118, 144, 147, 151, 407, 409, 430, 431, 434, 435, 461, 465, 470, 471, 473-476, 478, 496, 501, 508, 529, 530, 532-536, 538, 549, 559, 600, 602, 608, 611, 612, 614, 620, 622-627, 631, 633-636, 639, 640, 644, 646-651, 653-658, 664, 665, 667-670, 673, 675-678, 738, 978, 983, 999, 1055, 1057.

[449] Brđanin Final Brief, p. 14 ("There is absolutely no pleading of material facts which show that Brđanin had control over the Bosnian Serb forces who allegedly committed the acts alleged."); *see also* Brđanin Final Brief, p. 15.

[450] T. 693.

[451] *See*, for instance, Indictment, para. 18, describing the alleged superior responsibility of Brđanin *vis à vis* crimes, purportedly committed by members of the municipal Crisis Staffs or by members of the armed forces under the control of the leadership of the Bosnian Serbs.

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killed by Bosnian Serb soldiers clearly rely on evidence that "Serb soldiers" or "Serb forces" were involved in the killings, without specifying whether these were Serbs from Bosnia or Serbs from elsewhere.[452] The Appeals Chamber notes further the Trial Chamber's finding at paragraph 100 of the Judgement:

> When the armed conflict broke out in BiH, the scale of crimes committed against the non-Serb civilian population in the Bosnian Krajina escalated. These crimes came about through close co-operation between the Bosnian Serb police, the army and Serbian paramilitary groups. The clearly recognisable pattern of criminal activity allows for only one reasonable conclusion, namely that these crimes were committed *with the aim of implementing the Strategic Plan of the Bosnian Serb leadership to take control of the territory claimed for the Serbian State within BiH and to permanently remove most non-Serbs from this territory.*[453]

236. From this paragraph, the Appeals Chamber understands that the Trial Chamber's interpretation of the expression "Bosnian Serb forces" comprises all forces, including the Bosnian Serb police, the army, and Serbian paramilitary groups, which took part in the implementation of the Strategic Plan of the Bosnian Serb leadership.

237. Brđanin was aware from the Indictment of the meaning ascribed to the term "Bosnian Serb forces" by the Prosecution.[454] On appeal, he has failed to show how either the Prosecution or the Trial Chamber understood the expression "Bosnian Serb forces" to be limited to "Serb forces from Bosnia" to the exclusion of any other forces, or to "forces under the control of the leadership of the Bosnian Serbs".

238. The Appeals Chamber therefore dismisses Brđanin's argument that the Trial Chamber erred by failing to establish that members of the forces in question were all Serbs from Bosnia.[455]

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[452] Brđanin was found responsible for the wilful killings committed in context of the armed attacks by the Bosnian Serb forces on non-Serb towns, villages, and neighbourhoods (Trial Judgement, para. 471), namely: the village of Ćulum-Kostić (Trial Judgement, para. 400); Hambarine (Trial Judgement, para. 401); Kozarac and surrounding areas (Trial Judgement, paras 402-404); the village of Kamičani (Trial Judgement, para. 405); the village of Jaskići (Trial Judgement, para. 406; the village of Bišćani (Trial Judgement, para. 407); Blagaj Japra (Trial Judgement, para. 106); the Brdo area, including Bišćani (Trial Judgement, para. 407); Mrkalji hamlet (Trial Judgement, para. 408); the Brdo area, including Hegići, and a bus stop between Alagići and Čemernica (Trial Judgement, para. 409); the village of Čarakovo (Trial Judgement, para. 410); the village of Briševo in the commune of Ljubija (Trial Judgement, paras 411-412); the Ljubija football stadium (Trial Judgement, para. 413); the Ljubija iron ore mine (Trial Judgement, para. 414); Tomašica village (Trial Judgement, para. 415); Begići village and the Vrhpolje bridge over the Sana River (Trial Judgement, paras 416-417); the hamlet of Kukavice in Hrustovo village (Trial Judgement, paras 418-419); the Kriva Cesta area near the Partisan cemetery in Sanski Most (Trial Judgement, para. 420); Budim hamlet in Lukavica village (Trial Judgement, para. 421); Škrljevita village (Trial Judgement, para. 422); Pudin Han village in Ključ municipality (Trial Judgement, para. 423); Prhovo village and the road to Peći (Trial Judgement, paras 425-426); the school in Velagići (Trial Judgement, para. 427); the Medical Centre in Kotor Varoš (Trial Judgement, para. 428); the village of Dabovci (Trial Judgement, para. 429); the village of Hanifići (Trial Judgement, para. 430); the village of Čirkići (Trial Judgement, para. 431); the school in Grabovica (Trial Judgement, para. 433); Blagaj Japra village and surrounding areas (Trial Judgement, para. 434); the village of Alići (Trial Judgement, para. 435).

[453] Emphasis added and footnote omitted.

[454] Brđanin Final Trial Brief, pp. 14, 15; *see supra* fn. 446.

[455] The Appeals Chamber agrees with Brđanin that it was not reasonable for the Trial Chamber to conclude that "Bosnian Serb forces" committed the killings in the mosque in Čirkići. However, the Appeals Chamber notes that the Trial Chamber did not convict Brđanin for those killings (*see* Trial Judgement, para. 476). Regarding this incident, the

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239. For these reasons, the Appeals Chamber rejects Alleged Errors 63-80.

2. Challenges to criminal responsibility for the crime of wilful killing

240. Alleged Errors 82-85 relate to Brđanin's awareness of the attacks against non-Serb towns by Bosnian Serb forces[456] and to his substantial contribution to the activities of the Bosnian Serb forces.[457] These Alleged Errors are dismissed summarily under category 2, above.

Trial Chamber found that in mid-August of 1992, "Bosnian Serb forces" killed six women and one man when they burned the Bosnian Muslim village of Čirkići (Brđanin Appeal Brief, para. 243; Notice of Appeal, para. 80; Alleged Error 78; Trial Judgement, para. 431), but the Appeals Chamber concludes that this finding is not supported by the evidence relied upon by the Trial Chamber. That evidence was the testimony of Witness Čirkić, who had heard about the killings in the mosque in Čirkići (T. 17862; *see also* Ex. P2008, "Exhumations and Proof of Death - Autonomous Region of Krajina, Nicolas Sébire, 16 May 2003", pp. 02927989-02927999), but did not sufficiently identify the perpetrators of the killings.

[456] Brđanin Appeal Brief, paras 245-248 and 249-250.

[457] Brđanin Appeal Brief, paras 251-254.

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B. Findings on torture

1. Legal and factual findings regarding the crime of torture

(a) Introduction

241. The Trial Chamber convicted Brđanin of aiding and abetting numerous acts of torture. It divided these acts into two categories: acts of torture committed "in [the] context of the armed attacks [by] Bosnian Serb forces on non-Serb towns, villages and neighbourhoods",[458] and acts of torture committed in "camps and detention facilities"[459] run by Bosnian Serb authorities.

242. The Trial Chamber pointed out that, under the Tribunal's jurisprudence, torture consists of "the infliction, by act or omission, of severe pain or suffering, whether physical or mental"[460] and that "the threshold level of suffering or pain required for the crime of torture [...] depends on the individual circumstances of each case."[461] The Trial Chamber further held that, in assessing whether that threshold level of suffering or pain has been met, "the objective severity of the harm inflicted must be considered," as must "[s]ubjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority".[462] The Trial Chamber noted that "[p]ermanent injury is not a requirement for torture".[463]

243. Brđanin submits that acts amount to torture only when they cause a greater amount of pain than the Trial Chamber required, and that the Trial Chamber therefore erred in law when convicting him of aiding and abetting torture (Alleged Error 86).[464] He also challenges numerous factual

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[458] Trial Judgement, para. 534. The acts falling into this category are: the torture of Bosnian Muslim civilians during and after the takeover of Bosanski Petrovac town in early June 1992; the torture of a number of Bosnian Muslim civilians during and after the armed attack on Kotor Varoš throughout June 1992; the torture of at least 35 Bosnian Muslims in the hamlet of Čermenica near the village of Bišćani on 20 July 1992; the torture of a number of Bosnian Muslim civilians in the village of Čarakovo on 23 July 1992; the torture of a number of Bosnian Muslim men in the area around the village of Bišćani; and the torture of a Bosnian Muslim woman in Teslić in July 1992. *See* Trial Judgement, para. 535.

[459] *See,* for example, Trial Judgement, para. 537. The acts falling into this category are: the torture of a number of Bosnian Muslim civilians in the Kozila camp in early July 1992; the torture of a number of Bosnian Muslim women in the Keraterm camp in July 1992; the torture of a number of Bosnian Muslim women in the Trnopolje camp between May and October 1992; the torture of a number of Bosnian Muslim women in the Omarska camp in June 1992; the torture of a number of Bosnian Muslim men in the SUP building in Teslić; and the torture of a number of Bosnian Muslim and Bosnian Croat civilians in the community building in Pribinić in June 1992. *See* Trial Judgement, para. 538.

[460] Trial Judgement, para. 481 (citing *Furundžija* Trial Judgement, para. 162; *Čelebići* Trial Judgement, para. 468; *Semanza* Trial Judgement, para. 343).

[461] Trial Judgement, para. 483 (citing *Čelebići* Trial Judgement, para. 469; *Kunarac et al.* Trial Judgement, para. 476).

[462] Trial Judgement, para. 484 (citing *Kvočka et al.* Trial Judgement, para. 143; *Krnojelac* Trial Judgement, para. 182).

[463] Trial Judgement, para. 484 (citing *Kvočka et al.* Trial Judgement, para. 148).

[464] Brđanin Appeal Brief, paras 255-257. In this respect, the Appeals Chamber also notes Alleged Errors 150-151. Brđanin first submits that the finding (Trial Judgement, para. 507) that forcing people to watch executions constitutes torture is an error of law (Brđanin Appeal Brief, para. 307). This assertion is inapposite, since the Trial Chamber found

findings in the Trial Judgement related to certain specific acts on which his conviction for torture is based (Alleged Errors 87-90), and he denies that he is responsible for having aided and abetted that crime (Alleged Errors 91, 93-94; 95-100).[465]

(b) Severity of pain inflicted

244. Brđanin submits that the Trial Chamber erred in law in its determination of what acts constitute torture. Brđanin asserts that current customary international law on the amount of harm that must have been caused by the act "is best exemplified by a pronouncement from the Office of Legal Counsel of the United States Justice Department."[466] He then quotes this "pronouncement", which is in fact a memorandum to the Counsel to the President of the United States ("Bybee Memorandum"), for the proposition that:

> [F]or an act to constitute torture ... it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.[467]

Asserting that the Trial Chamber erred by failing to apply this newly recognized standard, Brđanin asks that "all alleged acts of torture in this case should be reviewed in light of it."[468]

245. The Prosecution responds that Brđanin's argument is misleading and defective,[469] and points out that the above-mentioned memorandum is Brđanin's sole support for his assertion of customary international law.[470] The Prosecution also observes that Brđanin "makes no submissions on the customary international law-requirements of general state practice and *opinio juris*".[471] Additionally, the Prosecution notes that a second memorandum from the U.S. Office of Legal

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that executing some Bosnian Muslim non-combatants while forcing others to watch "was aimed at intimidating the victims", and not that this conduct "constituted torture", as Brđanin erroneously asserts. Alleged Error 150 is therefore dismissed as unfounded. In Alleged Error 151, Brđanin submits that the Trial Chamber's finding (Trial Judgement, para. 211) that forcing people to collect dead bodies constitutes torture is an error of law (Brđanin Appeal Brief, para. 307). The Appeals Chamber finds that, in this case, Brđanin mischaracterises the finding – which was a factual one, since the Trial Chamber stated that coercing Bosnian Muslim non-combatants in the Brđo area and the Ljubija football stadium in July 1992, as well as at Trnopolje between May and October 1992, "could not but cause severe pain and suffering." This alleged error is therefore also dismissed as unfounded.

[465] Brđanin Appeal Brief, paras 255-262, 265-268, 280.

[466] Brđanin Appeal Brief, paras 255-256.

[467] Brđanin Appeal Brief, para. 256. The only citation provided for the block quote on paragraph 256 of the Appellant's Brief is "Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib,* Harper Collins, New York, 2004, p. 4-5." *See* Brđanin Appeal Brief, fn. 227. The quoted text is originally from: Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dept of Justice, to Alberto R. Gonzales, Counsel to the President, 1 August 2002, p. 1, available at: http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf.

[468] Brđanin Appeal Brief, para. 257.

[469] Prosecution Response Brief, para. 7.38.

[470] Prosecution Response Brief, para. 7.34.

[471] Prosecution Response Brief, para. 7.37.

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Counsel ("Levin Memorandum") "takes back the very passage relied upon by Brđanin".[472] Brđanin makes no submissions in reply.

246. The Appeals Chamber has previously explained that the definition of the crime of torture, as set out in the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("Convention against Torture") "may be considered to reflect customary international law."[473] Accordingly, the Appeals Chamber has drawn verbatim from the Convention against Torture when explaining the amount of harm an act must cause in order to constitute torture: it must cause "severe pain or suffering, whether physical or mental".[474] By examining if the acts charged in the indictment as torture caused "severe pain or suffering, whether physical or mental" – and not if they caused some greater amount of pain or suffering – the Trial Chamber was not only applying clear Appeals Chamber jurisprudence, it was also properly determining whether a conviction would be consistent with customary international law. In the discussion that follows, the Appeals Chamber will focus on developments relating to the law of torture after the indictment period, considering whether the definition of torture has, as suggested by Brđanin, changed to his benefit. Therefore, this discussion should not be in any way construed as an application of *ex post facto* law that could be prejudicial to Brđanin.

247. To support his argument that the requisite amount of harm has increased, Brđanin cites only the 2002 Bybee Memorandum[475] – a memorandum in which the U.S. Department of Justice interpreted the criminal prohibition on torture found in U.S. federal law.[476] Yet even if the U.S. executive branch determined that, for an act causing physical pain or suffering to amount to torture, it must "inflict pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death",[477] this would not suffice to make pain of such intensity a requirement for conviction under customary international law. No matter how powerful or influential a country is, its practice does not automatically become customary international law.[478]

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[472] Prosecution Response Brief, para. 7.36 (citing Memorandum Opinion for the Deputy Attorney General, 30 December 2004). The text of this memorandum may be found at http://www.usdoj.gov/olc/18usc23402340a2.htm.
[473] *Kunarac et al.* Appeal Judgement, para. 146 (citing *Furundžija* Appeal Judgement, para. 111).
[474] *See Furundžija* Appeal Judgement, para. 111; Convention against Torture, Article 1(1).
[475] Brđanin Appeal Brief, paras 255-257.
[476] 18 U.S.C. § 2340.
[477] Bybee Memorandum, p. 1.
[478] *See*, for example, *Tadić* Appeal Decision on Jurisdiction, para. 83. In that decision, the Appeals Chamber considered a proposed interpretation of Article 2 of the Statute and held that: "seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize."

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248. Not only does Brđanin merely cite one memorandum for the proposition that there is a new customary international law standard for the amount of harm required for a torture conviction: he cites a memorandum that was withdrawn.[479] The Levin memorandum, which superseded the Bybee memorandum,[480] did not endorse the view that physical torture consists only of those acts that "inflict pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[481] To the contrary, the Levin memorandum suggested that the criminal prohibition on torture found in U.S. federal law was not intended "to reach only conduct involving excruciating and agonizing pain or suffering."[482] Moreover, this memorandum concluded that the criminal prohibition on torture found in U.S. law covers some acts that cause severe physical suffering even if the acts do not also cause severe physical pain.[483]

249. The Convention against Torture's requirement of "severe" pain or suffering was not itself meant to require "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death". Indeed, during negotiations over the text of the Convention against Torture, the United Kingdom (seeking to make the definition of torture more restrictive) proposed that the infliction of "extreme pain or suffering" should be required.[484] This wording was rejected.[485] Hence, the Convention against Torture's drafting history makes clear that "severe pain or suffering" is not synonymous with "extreme pain or suffering", and that the latter is a more intense level of pain and suffering – one that might come closer to "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" – not required by the Convention against Torture. As the Convention against Torture is recognized to be declarative of customary international law on torture,[486] it is therefore clear that, under customary international law, physical torture can include acts inflicting physical pain or suffering less severe than "extreme pain or suffering" or "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death".

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[479] Levin Memorandum, p. 1 (formally withdrawing the Bybee Memorandum).
[480] *See* Levin Memorandum.
[481] Bybee Memorandum, p. 1.
[482] Levin Memorandum, p. 5 (internal quotation marks omitted).
[483] Levin Memorandum, p. 6.
[484] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) ("CAT Handbook"), p. 45.
[485] CAT Handbook, p. 117.
[486] *Kunarac et al.* Appeal Judgement, para. 146; *Furundžija* Appeal Judgement, para. 111; CAT Handbook, p. 1 (noting that the Convention against Torture does not outlaw new practices, but instead describes practices "already outlawed under international law" and seeks "to strengthen the existing prohibition of such practices by a number of supportive measures").

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250. Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") declares that torture is prohibited, without defining it. Nonetheless, cases decided by the European Court of Human Rights ("ECtHR") applying the ECHR have shed light on the degree of harm that Court considers is required for an act to amount to torture.[487] In a decision the ECtHR observed that "what might have been inhumane treatment in the past is now seen as torture in the light of the increasingly higher standard of human rights protections."[488] ECtHR's more recent judgements, moreover, have endorsed the definition of torture contained in the Convention against Torture.[489] This Court's approach thus confirms that no more than "severe" pain or suffering is required under customary international law.

251. The amount of harm required under customary international law for an act to constitute torture has not increased since 2000, when the Appeals Chamber endorsed the above-mentioned standards in *Furundžija*.[490] Acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury. An act may give rise to a conviction for torture when it inflicts severe pain or suffering. Whether it does so is a fact-specific inquiry. As the Appeals Chamber explained in the *Naletilić and Martinović* Appeal Judgement:

> torture is constituted by an act or an omission giving rise to severe pain or suffering, whether physical or mental, but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture. Thus, while the suffering inflicted by some acts may be so obvious that the acts amount *per se* to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted.[491]

252. Thus, in assessing whether the harm caused by the acts charged suffices to support a torture conviction, the Trial Chamber applied principles that the Appeals Chamber has endorsed and that reflect customary international law. Brđanin has failed to demonstrate that the Trial Chamber made an error of law which invalidated the decision.

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[487] *See*, among others, *Aydın v. Turkey*, Judgement of 25 September 1997, *Reports of Judgments and Decisions* 1997-VI, para. 82. For examples of acts constituting torture, *see also* Report of the Special Rapporteur Kooijmans, UN Doc. Res. 1985/33, E/CN.4/1986/15, 19 February 1986, para. 119.
[488] *Selmouni v. France* [GC], no. 25803/94, para. 101, ECHR 1999-V.
[489] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press 2002), p. 51, fn. 23 pointing to *Ilhan v. Turkey* [GC], no. 22277/93, para. 85, ECHR 2000-VII; *Salman v. Turkey* [GC], no. 21986/93, para. 114, ECHR 2000-VII and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, para. 115, ECHR 2000-X.
[490] *Furundžija* Appeal Judgement, para. 111.
[491] *Naletilić and Martinović* Appeal Judgement, para. 299 (footnotes and punctuation omitted).

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2. Findings on four specific incidents of torture

253. Brđanin challenges factual findings by the Trial Chamber relating to a number of specific incidents of torture on which his conviction is based, arguing that no reasonable trier of fact could have concluded as the Trial Chamber did. First, he alleges the evidence does not support the Trial Chamber's finding that Bosnian Muslims suffered torture in a June 1992 convoy that departed from Blagaj Rijeka (Alleged Error 87).[492] Second, Brđanin asserts that the evidence does not support the finding that, in three other separate incidents, persons forced to collect dead bodies had suffered harm amounting to torture (Alleged Error 88).[493] Third, Brđanin asserts that he should not have been convicted of torture based on rapes and sexual assaults occurring in camps in the Prijedor area, because the Trial Chamber failed to find that the rapes and sexual assaults occurring in this camp were committed by Serb forces (Alleged Error 89).[494] Fourth, Brđanin alleges that rapes committed in Teslić municipality "were clearly not part of a 'campaign of terror' but were individual domestic crimes", and that they therefore could not form a basis for conviction under Count 6 (torture as a crime against humanity) (Alleged Error 90).[495] Likewise, as to Count 7 (torture as a grave breach of the Geneva Conventions), Brđanin submits that it is insufficient simply to prove that a war was going on at the time the rapes were committed.[496]

254. With regard to Alleged Errors 87 and 89, the Prosecution does not raise specific responses.[497] In respect of Alleged Error 88, the Prosecution notes that Brđanin makes no submissions regarding any factual error, has failed to demonstrate any legal error, and has therefore failed to demonstrate how the Trial Chamber erred.[498]As to Alleged Error 90, the Prosecution points out that Brđanin provides no support for his assertion that the rapes in Teslić were domestic crimes.[499] The Prosecution recalls that the Trial Chamber found the rapes in Teslić to have been committed against Muslim women by "uniformed armed Serb perpetrators" abusing their position as members of the police, or as soldiers searching for weapons, and the crimes were therefore clearly part of a widespread or systematic attack against a civilian population.[500] The Prosecution submits that where the nexus requirement of Article 5 of the Statute is met, then the nexus requirement of Article 2 of the Statute and the jurisdictional requirement of Article 5 of the Statute

[492] Brđanin Appeal Brief, paras 258-259, referring to Trial Judgement, paras 493-495.
[493] *See* Brđanin Appeal Brief, paras 260-261, referring to Trial Judgement, paras 508-511.
[494] Brđanin Appeal Brief, para. 262, referring to Trial Judgement, para. 518.
[495] Brđanin Appeal Brief, paras 263-264.
[496] *See* Brđanin Appeal Brief, para. 264.
[497] *See* Prosecution Response Brief, paras 7.33-7.39 (addressing Alleged Errors 86-88 without specifically mentioning this Alleged Error, numbered 87 by Brđanin). *See* Prosecution Response Brief, paras 6.212-6.225 (addressing errors 63-80, 89, 93-95, 110, and 113-116 without specifically mentioning Alleged Error 89).
[498] Prosecution Response Brief, para. 7.39.
[499] Prosecution Response Brief, para. 7.40.
[500] Prosecution Response Brief, para. 7.42.

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are also met.[501] Thus, as long as the crime (in this case rape) was committed "under the guise of war", this requirement is met,[502] and it may form the basis of a conviction both for crimes against humanity or grave breaches of the Geneva Conventions.[503]

255. Concerning Brđanin's challenge, namely that the evidence does not support the Trial Chamber's finding that Bosnian Muslims suffered torture in a June 1992 convoy that departed from Blagaj Rijeka, the Appeals Chamber notes that Brđanin was not convicted for that incident.[504] This finding is therefore unable to prejudice Brđanin, and the Appeals Chamber summarily dismisses Alleged Error 88 under category 1, above. Alleged Errors 88 and 89 are dismissed summarily under categories 4 and 2, respectively.

256. The first argument under Alleged Error 90 essentially states that a conviction under Article 2 of the Statute may not rely solely on the fact that the rapes were committed during a war. The Appeals Chamber has previously stated that the jurisdictional prerequisites for the application of Article 2 of the Statute have been exhaustively considered in the jurisprudence.[505] One of those prerequisites, correctly stated by the Trial Chamber,[506] is that the offence alleged to violate Article 2 of the Statute must be committed in the context of an international armed conflict.[507] The Trial Chamber concluded that there was an international armed conflict in 1992 in the territory of the ARK at the relevant time.[508] When concluding that the members of the Bosnian Serb police and the VRS committed rapes in Teslić municipality, the Trial Chamber cited witnesses who described rapes associated with weapons searches.[509] The Appeals Chamber considers that the Trial Chamber clearly established the existence of an international armed conflict and furthermore reasonably concluded that the rapes in Teslić, committed as they were during weapons searches, were committed in the context of the armed conflict, and were not "individual domestic crimes" as suggested by Brđanin.[510] Crimes committed by combatants and by members of forces accompanying them while searching for weapons during an armed conflict, and taking advantage of

[501] Prosecution Response Brief, para. 7.41.
[502] Prosecution Response Brief, para. 7.41, referring to the *Kunarac et al.* Appeal Judgement, para. 58: "the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."
[503] Prosecution Response Brief, para. 7.41, referring to *Tadić* Appeal Judgement, para. 70. The Prosecution also refers to the *Rutaganda* Appeal Judgement, para. 570.
[504] *See* Trial Judgement, para. 535.
[505] *Blaškić* Appeal Judgement, para. 170.
[506] Trial Judgement, para. 121.
[507] *Blaškić* Appeal Judgement, para. 170. *See also Tadić* Jurisdiction Decision, para. 70.
[508] Trial Judgement, paras 140 and 154.
[509] Trial Judgement, para. 523, referring to Witness BT-67 (Ex. P1965, pp. 00943111-00943112 (under seal)); Witness BT-68 (Ex. P1967, pp. 00943117-00943118 (under seal)); Witness BT-63 (Ex. P1968, p. 00963794 (under seal)); Witness BT-63 (Ex. P1968, pp. 01002844-01002847 (under seal)).
[510] *See also Kunarac et al.* Appeal Judgement, para. 58, explaining the distinction between a purely domestic offense and a war crime under Article 3 of the Statute.

their position, clearly fall into the category of crimes committed "in the context of the armed conflict." The Trial Chamber did not err in concluding that the rapes at issue could form a basis for conviction under Article 2 of the Statute.

257. Considering Brđanin's submissions concerning rape as a crime against humanity (second argument under Alleged Error 90), the Appeals Chamber notes that a basis for a conviction for all crimes against humanity under Article 5 of the Statute is that the alleged crime must be part of a widespread or systematic attack directed against a civilian population.[511] The Trial Chamber found that there was a widespread or systematic attack against the Bosnian Muslim civilian population in the Bosnian Krajina during the period relevant to the Indictment, and specifically that the crime of rape was one of the many crimes against humanity committed.[512] In further concluding that the "Bosnian Serb police and the VRS" committed rapes in Teslić municipality, the Trial Chamber relied on testimony from witnesses who described the rape of Muslim women by Serb soldiers and policemen in a municipality where, over the same period, Serb forces detained and beat numerous Muslim men (who were occasionally deprived of medical care),[513] business premises were damaged,[514] and a number of mosques, as well as one Roman Catholic Church, were destroyed.[515] The Appeals Chamber accordingly finds that a reasonable trier of fact could conclude beyond reasonable doubt that these rapes occurred as part of a widespread or systematic attack. Brđanin has failed to show how the Trial Chamber erred in concluding that the rapes at issue formed a basis for conviction under Article 5 of the Statute.

258. For these reasons, the Appeals Chamber dismisses Alleged Errors 87-90.

3. Findings on aiding and abetting torture

(a) Acts of torture committed during attacks on towns, villages, and neighbourhoods

259. Brđanin challenges the Trial Chamber's conclusion that he aided and abetted acts of torture committed during attacks on towns, villages, and neighbourhoods, contending that there is no evidence to show that: (1) the decisions of the ARK Crisis Staff "had a *substantial effect* on the commission of the charged acts" (Alleged Error 91);[516] (2) participants in the armed attacks "had

[511] *Kordić and Čerkez* Appeal Judgement, para. 93; *Blaškić* Appeal Judgement, para. 102; *Kunarac et al.* Appeal Judgement, para. 85.
[512] Trial Judgement, para. 159.
[513] *See* Trial Judgement, paras 519-522 (describing detention and beatings), 523 (finding rapes and citing Witness BT-67 (Ex. P1965, pp. 00943111-00943112 (under seal)); Witness BT-68 (Ex. P1967, pp. 00943117-00943118 (under seal)); Witness BT-63 (Ex. P1968, p. 00963794 (under seal)); Witness BT-63 (Ex. P1968, pp. 01002844-01002847 (under seal)). *See also* Trial Judgement, paras 955-958.
[514] Trial Judgement, para. 635.
[515] Trial Judgement, para. 657.
[516] Brđanin Appeal Brief, para. 266 (emphasis in original).

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any knowledge whatsoever of the pronouncements of the ARK CS on disarmament or [were] in any way motivated thereby" (Alleged Error 94);[517] or (3) he knew "about imminent attacks on any town, village, or neighbourhood" (Alleged Error 93).[518]

260. The Prosecution responds that Brđanin's argument is unsubstantiated, ignores the Trial Chamber's right to draw inferences from circumstantial evidence, and fails to explain why the Trial Chamber's conclusions were unreasonable.[519] The Prosecution recalls that the Trial Chamber found the disarmament orders made a significant contribution to the attacks in two ways: by disarming the non-Serbs and thereby limiting their ability to defend themselves; and by imposing deadlines for the handing over of weapons that then served as a pretext for the attacks.[520] The Prosecution also submits that, as a matter of law, it is not required that the perpetrator knows of the aider and abettor's contribution.[521]

261. With regard to Brđanin's *mens rea*, the Prosecution asserts that a reasonable Trial Chamber could have inferred that he knew that towns, villages, and neighbourhoods in the territory of the ARK would be attacked.[522] The Prosecution points to Brđanin's links to Radovan Karadžić,[523] General Momir Talić, Stojan Župljanin, and other leaders, and notes that Brđanin fails to explain why a reasonable trier of fact could not infer from these links that Brđanin was aware of the impeding attacks, since it was reasonable to infer that these attacks would have been discussed by the leadership in the ARK.[524] The Prosecution adds that the Trial Chamber did not just rely on these links, but that it also relied, *inter alia*, on its findings that the "attacks were an integral part of the implementation of the Strategic Plan in the ARK",[525] and that Brđanin knew the Strategic "Plan could only be implemented through force and fear".[526]

262. Alleged Errors 91 and 93 are dismissed summarily under category 6, above.

263. As to whether or not there is evidence to show that participants in the armed attacks knew of the ARK Crisis Staff's decisions on disarmament or were motivated by them, the Appeals Chamber considers this argument to be lacking in relevance. The Appeals Chamber has clearly established

[517] Brđanin Appeal Brief, para. 267.
[518] Brđanin Appeal Brief, para. 267.
[519] Prosecution Response Brief, paras 6.258, 6.260.
[520] Prosecution Response Brief, para. 6.259.
[521] Prosecution Response Brief, para. 6.262, referring to *Tadić* Appeal Judgement, para. 229(ii).
[522] Prosecution Response Brief, paras 6.240-6.243.
[523] The Prosecution Response Brief, at para. 6.241, refers to "Radoslav Karadžić". The Appeals Chamber understands this to refer to Radovan Karadžić.
[524] Prosecution Response Brief, para. 6.241.
[525] Prosecution Response Brief, para. 6.242 (citing Trial Judgement, paras 80-119).
[526] Prosecution Response Brief, para. 6.242 (citing Trial Judgement, paras 65-79). The Brđanin Reply Brief does not specifically discuss Brđanin's responsibility for acts of torture committed during attacks on towns, villages, and neighbourhoods.

that in the case of aiding and abetting, in principle, "no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution."[527]

264. For these reasons, the Appeals Chamber dismisses this argument and accordingly dismisses Alleged Error 94.

(b) Acts of torture committed in camps and detention facilities

265. Brđanin submits that the Trial Chamber erred in finding that he aided and abetted torture in the camps and detention facilities, since that finding is unsupported by any evidence (Alleged Errors 95-100).[528] Specifically, he argues that there is no evidence to support the findings that he knew that camps were mushrooming everywhere in the territory of the ARK,[529] or that he was aware of the camps and of the mistreatment of the detainees there,[530] or that those running the camps enjoyed the full support of the ARK Crisis Staff and its President.[531] As such, Brđanin alleges that no reasonable trier of fact could have reached these conclusions.

266. Brđanin further submits that there is no evidence to support the finding that he adopted a *laissez-faire* attitude during the relevant period,[532] and that the only evidence of a public attitude the Trial Chamber considered was a televised statement that he submits couldn't have constituted "moral support" for army and police personnel running the camps, since the offending camps had already been closed at the time of that broadcast.[533] Concerning Brđanin's other statement considered by the Trial Chamber ("what we have seen in Prijedor is an example of a job well done"), Brđanin emphasizes that this statement was a reference to Prijedor in general, and not the specific camp of Omarska, which he had visited that day during a visit to Prijedor, and that any conclusion that he was referring to Omarska Camp is "pure speculation".[534]

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[527] *Tadić* Appeal Judgement, para. 229(ii); *Simić* Appeal Judgement, paras 85-86.
[528] Brđanin Appeal Brief, para. 280 (Alleged Errors 95-100).
[529] Brđanin Appeal Brief, paras 271-272 (Alleged Error 96), referring to Trial Judgement, para. 536: "The Trial Chamber is convinced that the Accused was fully aware of this and equally knew that such camps and detention facilities were mushrooming everywhere in the ARK for which he was made responsible as President of the ARK Crisis Staff."
[530] Brđanin Appeal Brief, para. 276.
[531] Brđanin Appeal Brief, para. 279.
[532] Brđanin Appeal Brief, para. 277.
[533] Brđanin Appeal Brief, para. 278, referring to Trial Judgement, para. 536, fn. 1368, where Brđanin is reported to have said on television at the end of August 1992: "Those who are not loyal are free to go and the few loyal Croats and Muslims can stay. As Šešelj said about the 7000 Albanians in Kosovo, they will be treated like gold and this is exactly how we are going to treat our 1.200 to 1.500 Muslims and Croats (...) If Hitler, Stalin and Churchill could have working camps so can we. Oh come on, we are in a war after all." (Ex. P2326 (under seal)).
[534] Brđanin Appeal Brief, para. 274, referring to Trial Judgement, para. 537, fn. 1368.

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267. Referring to the Trial Chamber's finding that the evidence did not establish beyond a reasonable doubt that he knew of the killings inside the camps, Brđanin asserts that there is no greater evidence to establish that he knew people were tortured than there is to establish that he knew people were killed.[535]

268. The Prosecution responds that there is ample evidence indicating that Brđanin was aware of crimes committed in the camps and detention facilities, including torture.[536] The Prosecution submits that it was open to the Trial Chamber to conclude that Brđanin made a substantial contribution to the torture of the detainees in the camps in the ARK, because Brđanin's complete inactivity and public attitude could only serve the purpose of leaving no doubt in the minds of those running the camps that they had the full support of the ARK Crisis Staff.[537] Furthermore, the finding that Brđanin made a substantial contribution should, according to the Prosecution, be read in the context of the establishment of the camps as an integral part of the Strategic Plan.[538]

269. Concerning Brđanin's statement that Prijedor was "job well done", the Prosecution emphasizes that, after his visit there, Brđanin did not denounce the conditions in the camp he had visited (Omarska), he did not explain the statement so as to make clear that he was not talking about the camps, and he took no steps subsequently to address the conditions he saw in the camp.[539] The Prosecution also refers the Appeals Chamber's attention to Brđanin's August 1992 statement that "[i]f Hitler, Stalin and Churchill could have working camps so can we".[540]

270. At the Appeal Hearing, the Appeals Chamber drew the parties' attention to the question whether Brđanin could be held responsible for the crimes in the camp under the legal concept of commission by omission.[541] In response to the Appeals Chamber's question, the Prosecution submits that its main position is that Brđanin is to be held responsible due to his actions.[542] Drawing

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[535] Brđanin Appeal Brief, para. 276.
[536] Prosecution Response Brief, paras 6.249-6.254.
[537] Prosecution Response Brief, para. 6.264. The Prosecution concedes that it did not present any direct evidence from the people running the camps in the ARK to show that they were encouraged by Brđanin's lack of intervention or his public attitude towards the camps, but argues that this in no way renders the Trial Chamber's finding unreasonable. The Prosecution further asserts that the Trial Chamber considered carefully Brđanin's extensive propaganda campaign, as well as how the extremist nature of his frequent statements in the media and public rallies was proven (Prosecution Response Brief, para. 6.266).
[538] Prosecution Response Brief, para. 6.265.
[539] Prosecution Response Brief, para. 6.267. The Prosecution notes that Witness Radić, who also visited Omarska that day, was appalled about the camps (Trial Judgement, para. 536, fn. 1368).
[540] Prosecution Response Brief, para. 6.267 (quoting Trial Judgement, para. 322, fn. 847). This statement is also quoted in fn. 1368 of the Trial Judgement. Though the Brđanin Reply Brief does not specifically address torture committed in camps and detention facilities, it emphasizes that, in order to prove Brđanin liable for aiding and abetting a crime, the Prosecution must prove that his acts had a substantial effect on the commission of the crime. *See* Brđanin Reply Brief, paras 70-71.
[541] Scheduling Order, 3 November 2006, p. 2.
[542] AT. 8 December 2006, p. 160.

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a distinction between responsibility under Article 7(3) of the Statute and omission,[543] the Prosecution argues that the Trial Chamber's findings of aiding and abetting by omission[544] were properly made in the context of Brđanin's responsibility as an aider and abettor.[545] Nevertheless, the Prosecution also submits that the Trial Chamber would have been entitled to rely only on Brđanin's omissions as a basis for responsibility, arguing that Brđanin had a duty to act to prevent the crimes from being committed, due to the fact that his propaganda campaign against Bosnian Muslims and Bosnian Croats created a danger for them. Moreover, a duty to act alternatively stemmed from his position as head of the regional government.[546]

271. Brđanin responds that he could not be held responsible for omissions because his acts could not affect the situation.[547] Even if there was a legal duty to act, which Brđanin opposes,[548] "common sense" would dictate that liability may not be imposed due to the failure to act if the actions would not have been enough to change the situation.[549] Finally, he suggests that the statement referring to camps during World War II may not lead to any inference suggesting his criminal responsibility.[550]

(i) Mode of responsibility

272. The Trial Judgement findings related to the responsibility of Brđanin for the crimes in the camps can be found in paragraph 537 of the Trial Judgement (footnote omitted):

> There is also ample evidence that throughout the entire period when the Accused was President of the ARK Crisis Staff, not only did the Accused not take a stand either in public or at the meetings of the ARK Crisis Staff but that he adopted a *laissez-faire* attitude. Although the Accused did not actively assist in the commission of any of the crimes committed in these camps and detention facilities, in the light of his position as the President of the ARK Crisis Staff, the Trial Chamber is satisfied beyond reasonable doubt that his inactivity as well as his public attitude with respect to the camps and detention facilities constituted encouragement and moral support to the members of the army and the police to continue running these camps and detention facilities in the way described to the Trial Chamber throughout the trial. This complete inactivity combined with the public attitude on the part of the Accused could only serve the purpose of leaving no doubt in the mind of those running the camps and detention facilities that they enjoyed the full support of the ARK Crisis Staff and its President. The Trial Chamber is satisfied that this fact had a substantial effect on the commission of torture in the camps and detention facilities throughout the ARK.

[543] AT. 7 December 2006, pp. 120-121.
[544] Trial Judgement, para. 537
[545] AT. 8 December 2006, p. 160.
[546] AT. 8 December 2006, pp. 160-161. During the Appeal Hearing, the Prosecution cited the *Orić* Trial Judgement (paras 283, 304), the *Synagogue fire* case, the *Blaškić* Appeal Judgement (fn. 1384) and the *Rutaganira* Trial Judgement (paras 78-79), as well as other case-law supporting the existence of duties to act. *See* AT. 8 December 2006, pp. 162-167.
[547] AT. 8 December 2006, p. 180.
[548] AT. 7 December 2006, pp. 89-93, 103-104; 8 December 2006, pp. 183-184.
[549] AT. 8 December 2006, p. 184.
[550] AT. 8 December 2006, p. 154.

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It is not entirely clear to which mode of responsibility the Trial Chamber refers in this paragraph. Two interpretations of the Trial Chamber's position are possible.

273. The Trial Chamber might have intended to apply in this case the theory of aiding and abetting by tacit approval and encouragement. An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[551] This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission.[552] In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement.[553] The Trial Chamber in *Kayishema and Ruzindana* held that "individual responsibility pursuant to Article 6(1) [that is, individual criminal responsibility under 7(1) of the Tribunal's Statute] is based, in this instance, not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission."[554] In such cases the combination of a position of authority and physical presence on the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[555]

274. Alternatively, the Trial Chamber might have had in mind the theory of aiding and abetting by omission proper. The Appeals Chamber has recently affirmed that omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[556] However, it has never set out the requirements for a conviction for omission in detail,[557] and it has so far declined to analyse whether omission proper may lead to individual criminal

[551] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706.
[552] *Ntagerura et al.* Appeal Judgement, para. 338 (for the parallel provision in Article 6(1) of the ICTR Statute).
[553] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706. *See also Furundžija* Trial Judgement, paras 205-207, discussing the *Synagogue* case.
[554] *Kayishema and Ruzindana* Trial Judgement, para. 202, upheld by *Kayishema and Ruzindana* Appeal Judgement, paras 201-202.
[555] *Kayishema and Ruzindana* Trial Judgement, para. 200, referring to the discussion of the *Synagogue* case in the *Furundžija* Trial Judgement, para. 207.
[556] *Galić* Appeal Judgement, para. 175, referring to *Blaškić* Appeal Judgement, para. 663 and *Ntagerura et al.* Appeal Judgement, para. 334. *See also Tadić* Appeal Judgement, para. 188: "This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."
[557] The most comprehensive statement of these requirements can be found in the *Ntagerura et al.* Trial Judgement, para. 659, cited by *Ntagerura et al.* Appeal Judgement, para. 333: "[I]n order to hold an accused criminally responsible for an omission as a principal perpetrator, the following elements must be established: (a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime."

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responsibility for aiding and abetting.[558] In light of the considerations that follow, the Appeals Chamber finds that it is inappropriate to do so in the present case.

275. The Trial Chamber's reference to the fact that the behaviour of Brđanin provided "encouragement and moral support" to the physical perpetrators appears to indicate that the Trial Chamber had this particular mode of aiding and abetting in mind when it discussed Brđanin's responsibility in paragraph 537. Further, the Trial Chamber did not even mention, let alone discuss in detail, the legal requirements for commission by omission proper. In fact, commission by omission was not mentioned at all in the Indictment[559] and, accordingly, was not an issue at trial. Even during the Appeal Hearing, the Prosecution addressed only one of the possible requirements for commission by omission, *i.e.* the duty to act.[560] Under these circumstances, the Appeals Chamber finds that it would be unfair to consider on appeal Brđanin's responsibility for the crimes committed in the camps under the doctrine of "commission by omission".

276. For the reasons that follow in the discussion below, the Appeals Chamber considers that the Trial Chamber's finding that Brđanin aided and abetted acts of torture committed in camps and detention facilities is not one which a reasonable trier of fact could have reached. There was insufficient evidence to prove beyond a reasonable doubt that Brđanin's conduct constituted either encouragement or moral support for the camp personnel (*actus reus*), which had a substantial effect on the commission of torture.

(ii) Encouragement or moral support

277. It is recognized in the jurisprudence of the Tribunal that "encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime.[561] As recalled above, the encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a "silent

[558] "The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting", *Blaškić* Appeal Judgement, para. 47; *see also Simić* Appeal Judgement, para. 85, fn. 259. In the *Simić* Appeal Judgement (para. 133), the Appeals Chamber upheld Simić's conviction for aiding and abetting persecutions (confinement under inhumane conditions) *inter alia* for the "deliberate denial of adequate medical care to the detainees". But this was understood as "active participation in the crime of persecutions", *Simić* Appeal Judgement, para. 82, fn. 254.

[559] There are a number of references to Brđanin's alleged failure to act in the Indictment, in particular paras 52 (Counts 4 and 5) and 56 (Counts 6 and 7), but they all support the charges pursuant to Article 7(3) of the Statute. The Indictment does not refer to any (alleged) duty to act, nor does it mention any other legal requirement for a conviction for commission by omission.

[560] AT. 8 December 2006, pp. 160-161.

[561] *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simić* Appeal Judgement, para. 85.

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spectator" can be construed as the tacit approval or encouragement of the crime.[562] In any case, the contribution to the crime of this encouragement or moral support must always be substantial.[563] As the *Furundžija* Trial Chamber put it, "[w]hile any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle – the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals".[564] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.[565] It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.[566] Accordingly, the Appeals Chamber finds that, in this case, encouragement and moral support could only have had a substantial effect if the camp personnel committing torture were aware that Brđanin made encouraging and supporting statements or encouraged and supported through his inaction.[567]

278. The Trial Chamber's examination of Brđanin's responsibility for torture in camps and detention facilities refers to no evidence indicating that the personnel running the camps and detention facilities were encouraged to commit torture by Brđanin's inactivity or public attitude, and the Prosecution does not contest this point.[568] Rather, the Prosecution contends in essence that it was reasonable for the Trial Chamber to infer, from circumstantial evidence, that Brđanin's failure to intervene, together with his public attitude, had the effect of encouraging camp and detention facilities personnel to commit acts of torture.

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[562] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706; *Bagilishema* Trial Judgement, para. 36; *see also Furundžija* Trial Judgement, para. 207, discussing the *Synagogue* case.

[563] *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Furundžija* Trial Judgement, para. 234.

[564] *Furundžija* Trial Judgement, para. 232.

[565] *Kayishema and Ruzindana* Appeal Judgement, para. 201; *Akayesu* Trial Judgement, paras 706-707; *Furundžija* Trial Judgement, paras 207-209; *Aleksovski* Trial Judgement, para. 88; *Bagilishema* Trial Judgement, para. 36; *Ndindabahizi* Trial Judgement, para. 457.

[566] In *Simić*, the Appeals Chamber found with regard to Simić's alleged tacit encouragement of beatings in detention centres: "[t]he Appeals Chamber emphasises that the Trial Chamber's findings do not allow for a clear inference as to how the Appellant's conduct was construed by the principal perpetrators committing the beatings, or as to what effect his conduct may have had on their acts." *Simić* Appeal Judgement, para. 130. *See also Bagilishema* Trial Judgement, para. 36; *Semanza* Trial Judgement, para. 389; *Ntagerura et al.* Appeal Judgement, para. 374.

[567] The Appeals Chamber notes that the Trial Chamber speaks of encouragement and moral support given to the persons running the camps and detention facilities (Trial Judgement, para. 537), and not to those actually committing the crime of torture. The Appeals Chamber understands that the Trial Chamber also meant to say that Brđanin's statements provided encouragement and moral support to the perpetrators committing the crime of torture.

[568] The Prosecution concedes that it did not present direct evidence from the people running the camps in the ARK to show that they were encouraged by Brđanin's lack of intervention or his public attitude. (Prosecution Response Brief,

279. The Trial Chamber also refers to no evidence showing that camp and detention facilities personnel were even aware of Brđanin's public attitude towards the camps and facilities, or that personnel believed that Brđanin supported (albeit passively) the torture of detainees.[569] Again, the Prosecution considers that this finding can reasonably be inferred.

280. The Appeals Chamber agrees that the awareness of the perpetrators can be inferred from the facts of the case. However, this must be the only reasonable inference from the evidence.

281. The evidence the Trial Chamber did consider included two statements by Brđanin. The first statement – that "[i]f Hitler, Stalin and Churchill could have working camps so can we" could have alerted the personnel running the camps to Brđanin's support for the camps, assuming the statement was actually heard by camp personnel.[570] Yet, even under this assumption,[571] it does not necessarily follow that such a statement would have been interpreted as a signal of acquiescence to the torture of detainees. It might alternatively have been taken as a signal of acquiescence to the maintenance of the camps and detention facilities.

282. The second statement relates to Brđanin's visit to Prijedor Municipality, which included a visit to Omarska camp on 17 July 1992.[572] On that day, Brđanin was reported to have publicly stated that "what we have seen in Prijedor is an example of a job well done" and "it is a pity that many in Banja Luka, are not aware of it yet, just as they are not aware of what might happen in Banja Luka in the very near future."[573] This statement could be sufficient to show Brđanin's support for the camps and detention facilities, but it is insufficient to show that camp personnel were aware of Brđanin's visit to Omarska, or that he supported the fact that torture was being committed in camps or detention facilities. The statement never mentions camps or detention facilities, or any acts of torture and mistreatment committed there. Hence, even if it can be shown that personnel running the camps had heard the statement, it does not necessarily follow that they understood it to express support or encouragement for the camps, much less for the commission of torture within them.

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para. 6.264.) In its Response Brief, moreover, the Prosecution identifies no other evidence showing that people running camps and detention facilities were encouraged by this "lack of intervention" or this public attitude.

[569] *See* Trial Judgement, paras 536-538.

[570] *See* Prosecution Response Brief, para. 6.267.

[571] Brđanin suggests that the statement, which the Trial Chamber found he made in August 1992 (*see* Trial Judgement, para. 536, fn. 1368), could not have been heard by camp personnel since, according to him, it was made after "the offending camps had already been closed" (Brđanin Appeal Brief, para. 278). The Trial Chamber, however, found that "[T]rnopolje camp was officially closed down at the end of September 1992, but some of the detainees stayed there longer" (Trial Judgement, para. 450). The Trial Chamber also found Brđanin guilty for acts of torture committed there between May and October of 1992 (*see* Trial Judgement, paras 510, 513-514).

[572] Trial Judgement, para. 335.

[573] Trial Judgement, para. 335.

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283. In addition to the two statements mentioned above, the Trial Chamber also considered other evidence before finding that the personnel running the camps and facilities were encouraged to commit torture by Brđanin's inactivity or public attitude.[574] However, while this evidence is illustrative of the existence and nature of the camps, it does not permit the drawing of inferences relating specifically to the crime of torture committed in the camps or detention facilities. There is simply no evidence which would support the conclusion that Brđanin encouraged or supported torture in the camps by his conduct.

284. There is also the issue of Brđanin's failure to speak out against the camps. Again, there is no evidence that the personnel running the camps and detention facilities were aware that Brđanin had failed to condemn the conditions in the camps, either in the Trial Judgement, or in the Prosecution's submissions.

285. The Prosecution has invited the Appeals Chamber to consider how Brđanin's failure to intervene, together with his public attitude, made a substantial contribution to acts of torture in camps when read in the context of the finding that the establishment of the camps was an integral part of the Strategic Plan.[575] This context may render more probable the conclusion that camp personnel, if they were aware both of Brđanin's statements and his failure to condemn torture, would have taken this conduct as an indication of Brđanin's approval, and they would thereby have been encouraged to commit of acts of torture. It does not, however, render it the only reasonable inference that could have been made.

286. The Appeals Chamber considers that there is scant evidence to support the inference that Brđanin's failure to intervene, together with his public attitude, actually had the effect of encouraging camp and detention facilities personnel to commit acts of torture. The same can be said of the inference that camp and detention facility personnel were aware of Brđanin's alleged support for their crime of torture. The Appeals Chamber concludes that, even within the context of the Strategic Plan, no reasonable trier of fact could have come to the conclusion that these inferences were the only reasonable ones that could have been drawn from the evidence.

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[574] Trial Judgement, para. 536: Brđanin "knew that such camps and detention facilities were mushrooming everywhere in the ARK" (referring back to VIII.C.6 of the Trial Judgement); the conditions in some of these camps and detention facilities attracted the attention of international agencies and organisations as well as of the international press; the camps and detention facilities were discussed during ARK Crisis Staff meetings; Vojo Kuprešanin (a politician at the level of the ARK) visited Manjača camp; Adil Medić complained with General Talić about the conditions in Manjača camp; several reports that refer to so-called "collection centres" were compiled at the instance of Stojan Župljanin, the Chief of the CSB.

[575] Prosecution Response Brief, para. 6.265.

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(iii) Knowledge of torture in camps and detention facilities

287. Given the conclusion reached in the previous section that the Trial Chamber erred when it found that Brđanin committed the *actus reus* of aiding and abetting torture in the camps and detention facilities, the Appeals Chamber declines to discuss whether the Trial Chamber also erred when it found that Brđanin was aware of the fact that crimes of torture were committed in the camps and detention facilities.

4. Conclusion

288. The Appeals Chamber rejects Brđanin's submissions regarding the severity of the pain that must be inflicted for an act to constitute torture, as well as his challenges to factual findings related to specific acts of torture. However, the Appeals Chamber finds that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities.

289. The Appeals Chamber therefore overturns Brđanin's conviction for torture insofar as he has been found guilty for aiding and abetting torture in the camps and detention facilities.[576] This decision's impact, if any, on the sentence will be addressed in Part IX of this Judgement.

[576] The acts of torture at issue are those listed in paragraph 538 of the Trial Judgement, namely: the torture of a number of Bosnian Muslim civilians in the Kozila camp in early July 1992; the torture of a number of Bosnian Muslim women in the Keraterm camp in July 1992; the torture of a number of Bosnian Muslim women in the Trnopolje camp between May and October 1992; the torture of a number of Bosnian Muslim women in the Omarska camp in June 1992; the torture of a number of Bosnian Muslim men in the SUP building in Teslić; and the torture of a number of Bosnian Muslim and Bosnian Croat civilians in the community building in Pribinić in June 1992.

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C. Findings on persecution

1. Introduction

290. The Trial Chamber found that Brđanin aided and abetted the crime of persecution with respect to the following acts: wilful killing;[577] torture;[578] destruction of property and religious buildings;[579] deportation and forcible transfer;[580] physical violence;[581] rapes;[582] sexual assault;[583] constant humiliation and degradation;[584] denial of the right to freedom of movement;[585] and denial of the right to proper judicial process.[586] The Trial Chamber also found that Brđanin instigated the crime of persecution with respect to deportation and forcible transfer[587] and ordered the crime of persecution with respect to the denial of the right of employment.[588]

291. Brđanin submits factual and legal challenges to these finding of the Trial Chamber.[589] The Appeals Chamber will respond to each of these allegations in turn.

2. Legal challenges to underlying acts of persecution

292. Brđanin submits that the acts of physical violence and the denial of the rights of employment, freedom of movement, proper medical care, and proper judicial process do not amount to crimes of torture or persecution.[590] He also claims that these acts do not fall under the jurisdiction of the Tribunal because they do not rise to the level of "serious violations" of international humanitarian law (Alleged Errors 154-158).[591]

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[577] Trial Judgement, para. 1054.
[578] Trial Judgement, para. 1054.
[579] Trial Judgement, para. 1054.
[580] Trial Judgement, para. 1054.
[581] Trial Judgement, para. 1061.
[582] Trial Judgement, para. 1061.
[583] Trial Judgement, para. 1061.
[584] Trial Judgement, para. 1061.
[585] Trial Judgement, para. 1071.
[586] Trial Judgement, para. 1075.
[587] Trial Judgement, para. 1054.
[588] Trial Judgement, para. 1067.
[589] The Appeals Chamber notes that in his Appeal Brief (paras 301-302), Brđanin alleges numerous errors, stating that "[t]he findings in many of these paragraph [*sic*] have been discussed separately in this brief." However, in respect of the alleged errors 124-125, 130-132, 136-139, and 141-147, it is not clear to which paragraphs Brđanin is referring. Furthermore, in his 21 August 2006 Response to the Appeals Chamber's 24 July 2006 Order to File a Table, Brđanin did not include these alleged errors of fact among those he asserts provided the basis for a conviction and could not properly have made beyond a reasonable doubt. The Appeals Chamber therefore considers that these Alleged Errors fall to be dismissed summarily pursuant to Category 1. The Appeals Chamber further considers that Alleged Error 140 is addressed in its treatment of Alleged Errors 30, 31, and 61 since Brđanin's elaboration of the former alleged errors is limited to a cross-reference to the discussion of the latter (Brđanin Appeal Brief, para. 301).
[590] Brđanin Appeal Brief, para. 311.
[591] Brđanin Appeal Brief, para. 311. In Alleged Error 152 (Brđanin Appeal Brief, para. 308) Brđanin also submits that the threat of rape is neither sexual assault nor torture, and that the Trial Chamber committed an error of law in reaching the opposite conclusion (Trial Judgement, para. 516). In his Appeal Brief, Brđanin merely alleges this error, and

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293. The Prosecution responds that Brđanin has failed to address any of the Trial Chamber's legal findings and supporting jurisprudence cited in the Trial Judgement, and has therefore failed to show an error of law.[592] As to the argument that the Trial Chamber erred in finding that physical violence amounted to the crime of persecution, the Prosecution argues that the Trial Chamber was correct in its approach because a considerable body of jurisprudence exists in support of this view.[593] The Prosecution further notes that the Trial Chamber in the *Stakić* case dealt with the same acts of physical violence in the Omarska, Keraterm, and Trnopolje camps, and found that they amount to crimes against humanity.[594]

294. The Trial Chamber found that, considering the cumulative effect of the denial of the rights to employment, freedom of movement, proper judicial process, and proper medical care in the context of the conflict, these rights were "fundamental rights" for the purposes of establishing persecution.[595] Moreover, "the denial of these rights was of equal gravity to other crimes listed in Article 5 of the Statute", "discriminatory in fact", and "carried out with the requisite discriminatory intent by the direct perpetrators on racial, religious and political grounds".[596] Similarly, the Trial Chamber found that the acts of physical violence committed against Bosnian Muslim and Bosnian Croat detainees in camps and detention facilities had the "same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute", "were discriminatory in fact", and "were carried out with the intention to discriminate against the Bosnian Muslims and Bosnian Croats concerned on racial, religious, or political grounds".[597]

295. Brđanin contends that the denial of the rights to employment, freedom of movement, proper judicial process, and proper medical care all fall outside the jurisdiction of the Tribunal as they do not rise to the level of "serious violations of international humanitarian law", a formulation enshrined in Article 1 of the Statute.[598] This argument is misplaced. The Trial Chamber found that these acts constituted persecutions, a crime listed in the Statute, which is no doubt a "serious

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provides no explanation or authority for his assertion. He also fails to account for the finding in the *Kvočka et al.* Trial Judgement (para. 561) that the "threat of rape or other forms of sexual violence undoubtedly caused severe pain and suffering... and thus, the elements of torture are also satisfied." This legal finding was affirmed on appeal in the *Kvočka et al.* Appeal Judgement, where the Appeals Chamber held that "the Trial Chamber considered that the requirement of severe pain or suffering was met for each of the incidents listed in Schedule A [which included threats of rape and other forms of sexual violence amounting to torture] which had been factually established" (*Kvočka et al.* Appeal Judgement, paras 287, 291). Alleged Error 152 is therefore dismissed.

[592] Prosecution Response Brief, para. 7.49.

[593] Prosecution Response Brief, para. 7.48.

[594] Prosecution Response Brief, para. 7.48, citing *Stakić* Trial Judgement, paras 786-790.

[595] Trial Judgement, para. 1049. As Brđanin was not convicted of the crime of persecution with respect to the denial of medical care (*see* Trial Judgement, para. 1076), this specific allegation will not be considered further.

[596] Trial Judgement, para. 1049.

[597] Trial Judgement, paras 1006-1007.

[598] Brđanin Appeal Brief, para. 311.

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violation." Therefore, these acts did fall under the jurisdiction of the Tribunal. Determining whether the acts actually constituted persecution is a fact-specific inquiry.

296. It is settled jurisprudence that the crime of persecution can include acts which are listed as crimes under Article 5 of the Statute, or under other articles of the Statute,[599] as well as acts which are not listed in the Statute.[600] The Appeals Chamber recalls that acts underlying persecutions under Article 5(h) of the Statute need not necessarily be considered a crime in international law.[601] For the acts not enumerated as a crime in the Statute to amount to the crime of persecution pursuant to Article 5(h) of the Statute, they must be of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts.[602]

297. The Appeals Chambers therefore dismisses Brđanin's argument that, as a matter of law, the acts of physical violence and the denial of the right not to be denied employment and the rights of freedom of movement and proper judicial process fall outside the jurisdiction of the Tribunal. Since this is Brđanin's only argument against the law which was stipulated by the Trial Chamber, and since he does not allege that the Trial Chamber erred in fact where it found that the denial of the rights were of equal gravity to other crimes listed under Article 5 of the Statute,[603] the Appeals Chamber dismisses this argument.

3. Factual challenges to findings on the right to proper judicial process

298. Brđanin submits that no reasonable Trial Chamber could have reached the conclusion that Bosnian Muslims and Bosnian Croats in the municipalities of the ARK were denied the right to proper judicial process on discriminatory grounds (Alleged Error 122).[604] Brđanin argues that it is a "legally impermissible speculation" to infer that the two witnesses mentioned by the Trial Chamber, who had lost their jobs for failure to respond to the mobilisation orders, were denied access to judicial process based on the fact that they were dismissed on discriminatory grounds.[605] Brđanin

[599] *See Krnojelac* Appeal Judgement, para. 219.
[600] *See Kvočka et al.* Appeal Judgement, paras 321-323.
[601] *Kvočka et al.* Appeal Judgement, para. 323.
[602] *Kvočka et al.* Appeal Judgement, paras 321-323; *Naletilić and Martinović* Appeal Judgement, para. 574; *Simić* Appeal Judgement, para. 177.
[603] It is clear from his Notice of Appeal and from his Appeal Brief that Brđanin is only claiming an error of law in this respect (Brđanin Notice of Appeal, pp. 40-42; Brđanin Appeal Brief, para. 311: "these findings are incorrect as a matter of law").
[604] Brđanin Appeal Brief, para. 299. The Appeals Chamber also notes that Brđanin rejects the Trial Chamber's findings at paras 1037 and 1041 of the Trial Judgement (Brđanin Appeal Brief, para. 298; Alleged Errors 120 and 121). He refers to page 47 of his Appeal Brief, which is part of his discussion on the dismissals in the ARK as part of Alleged Error 39. As no further explanation is given, the Appeals Chamber summarily dismisses these Alleged Errors under categories 2 and 8, above.
[605] Brđanin Appeal Brief, para. 299. What Brđanin in fact states here is: "It is legally impermissible speculation to jump from denial of judicial process to discriminatory dismissal". Since Brđanin is also alleging that no reasonable trier of fact could have reached the conclusion that there was a denial of the right to proper judicial process, the Appeals Chamber assumes that Brđanin has erred here and, in the interests of fairness, has corrected his mistake.

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further contends that the Prosecution cannot, on the one hand, advance the argument that there was a state of chaos in the municipalities and, on the other, complain that the courts were not functioning properly.[606] He also argues that, in any case, three months would be the normal period for a case to be heard by the Banja Luka court under ordinary circumstances.[607] He notes that no evidence was presented in respect of the other municipalities.[608]

299. The Prosecution did not respond to these submissions.

300. The Trial Chamber found that Bosnian Muslims and Bosnian Croats in the municipalities of the ARK were denied the right to proper judicial process on discriminatory grounds.[609] The Trial Chamber based its reasoning on the following considerations: that Bosnian Muslims and Bosnian Croats were arbitrarily arrested and detained in camps and detention facilities with a near absence of any judicial process;[610] their property was relinquished without recourse to any due legal process and, frequently, without compensation;[611] and the majority of lawsuits initiated by Bosnian Muslims and Bosnian Croats in response to their dismissals were never dealt with by the courts.[612]

301. The Appeals Chamber notes that Brđanin only challenges the evidence that the majority of lawsuits initiated by Bosnian Muslims and Bosnian Croats in response to their dismissals were never dealt with by the courts. This argument is therefore summarily dismissed under category 6, above.[613]

302. In suggesting that it was judicial chaos and inefficiency that led to the apparent denial of the right to judicial process, Brđanin relies on the evidence of Witness Džonlić. Witness Džonlić did testify that, under normal circumstances, the ordinary time-period for a case to be reviewed by local courts would be three months. However, he added that, when an organ of the court would be addressed directly, a hearing would be scheduled immediately.[614] The witness noted that this did

[606] Brđanin Appeal Brief, para. 299.
[607] Brđanin Appeal Brief, para. 299.
[608] Brđanin Appeal Brief, para. 299.
[609] Trial Judgement, para. 1045.
[610] Trial Judgement, para. 1044.
[611] Trial Judgement, para. 1045.
[612] Trial Judgement, para. 1045.
[613] In any event, Brđanin also fails to show why the evidence he is challenging could not be used in support of the statement. Brđanin contends that the testimony of the witnesses cited by the Trial Chamber only demonstrated that people lost their jobs through failure to respond to mobilisation orders. This is not the case, *see* Amir Džonlić, T. 2335-2336 (stating that the lawsuits he lodged on behalf of Bosnian Muslim and Bosnian Croats in relation to their reinstatement following their dismissals all failed), and Jasmin Odobašić, T. 15114-15115 (who did say that Bosnian Muslim and Bosnian Croats were dismissed because of their failure to mobilise; however, the witness also testified that he was not aware of any successful attempt by Bosnian Muslims and Bosnian Croats to complete legal proceedings against their former employers).
[614] Amir Džonlić, T. 2335.

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not happen in any of the cases he mentioned.[615] He finally testified that he had received no response from the court in respect of any of the appeals he had filed.[616]

303. For the foregoing reasons, the Appeals Chamber finds that Brđanin has failed to show why no reasonable trier of fact could have reached the conclusion, beyond reasonable doubt, that Bosnian Muslims and Croats in the municipalities of the ARK were denied the right to proper judicial process on discriminatory grounds. Alleged Error 122 is therefore dismissed.

[615] Amir Džonlić, T. 2335.
[616] Amir Džonlić, T. 2335.

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D. Findings on deportation and forcible transfer

304. The Trial Chamber found that Brđanin was responsible for aiding and abetting and instigating the crimes against humanity of deportation pursuant to Article 5(d) of the Statute, and forcible transfer pursuant to Article 5(i) of the Statute.[617] Brđanin appeals against those findings (Alleged Errors 101-109).[618]

1. Finding that Brđanin aided and abetted deportation and forcible transfer

305. Brđanin submits that the Trial Chamber erred in finding that he aided and abetted the crimes of deportation and forcible transfer.[619] Brđanin claims that no reasonable Trial Chamber could have arrived at these conclusions beyond reasonable doubt based on the evidence presented in this case.[620]

306. These Alleged Errors are dismissed summarily under categories 3 and 6, above.

2. Finding that Brđanin instigated deportation and forcible transfer

307. Brđanin submits that the Trial Chamber's finding that he instigated the crimes of deportation and forcible transfer was unsupported by any evidence and was unreasonable, because the Trial Chamber failed to refer to any evidence of instigation or to explain why the forcible transfer and deportation occurred before the ARK Crisis Staff became active.[621] Brđanin also submits that the Trial Chamber erred when it found that he intended to induce the commission of the crimes of deportation and forcible transfer through his espousal, implementation, and coordination of the Strategic Plan, which he knew could only be implemented through force and fear.[622] He claims that none of these findings could have been made beyond reasonable doubt.[623]

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[617] Trial Judgement, para. 583; *see also* paras 571-582. Due to the precision of the charges pleaded in the Indictment, the Trial Chamber did not consider incidents "where the transfer destination was to locations other than to Travnik or Karlovac" and limited itself to considering only deportation in the case of transfers to Karlovac, and forcible transfer in the case of transfers to Travnik (Trial Judgement, para. 546).
[618] Regarding Alleged Errors 101 and 107, related to the Agency for the Movement of People, Brđanin merely refers to his discussion of the Agency as part of his challenges regarding the resettlement of the population (Alleged Error 40, Brđanin Appeal Brief, paras 183-195). These arguments have been dismissed by the Appeals Chamber in a different part of this judgement. *See supra*, para. 212.
[619] Brđanin Appeal Brief, paras 283-288. The Appeals Chamber notes that Alleged Error 102, as described in Brđanin's Notice of the Appeal (no evidentiary basis for the finding beyond reasonable doubt that the ARK Crisis Staff's decisions of 28 and 29 May 1992 prompted the municipal authorities and the police, who implemented them, to commit the crimes of deportation and forcible transfer after those dates) was not pursued in his Appeal Brief. Alleged Error 102 is therefore considered together with Alleged Error 101. Moreover, in his Appeal Brief, Brđanin does not distinguish between the remaining errors, but considers them all together.
[620] Brđanin Appeal Brief, para. 284.
[621] Brđanin Appeal Brief, paras 283-284, 287, referring to Trial Judgement, para. 577.
[622] Brđanin Appeal Brief, paras 283-284, 286, referring to Trial Judgement, para. 575.
[623] Brđanin Appeal Brief, para. 284.

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308. Brđanin argues that the Trial Chamber erred in concluding that the ARK Crisis Staff Decisions of 28 and 29 May 1992 prompted the municipal authorities and the police who implemented them to commit and instigate the crimes of deportation and forcible transfers after that date.[624] Brđanin suggests instead that the Decisions of 28 and 29 May did not order deportation or forcible transfer, but rather a "simple and fair exchange" of people who wished to leave.[625] He points out that non-Serbs were leaving the territory of the ARK well before the dates of these pronouncements. He questions whether the departures of non-Serbs would have ended on 27 May 1992 were it not for the Decisions of 28 and 29 May.[626] He claims that it would be impossible to separate the departures that were caused by the Decisions of 28 and 29 May from those that occurred for other reasons, and that the Trial Chamber's failure to provide a reasoned explanation for these departures renders its finding unreasonable.[627]

309. The Prosecution responds that the Trial Chamber examined the Decisions of 28 and 29 May in the context of other evidence – including the intolerable conditions non-Serbs endured and the propaganda campaign organized by Brđanin himself – and correctly concluded that the decisions were a conscious incitement to deportation and forcible transfer.[628] The Prosecution points out that the Trial Chamber made findings only with respect to deportations that took place after the Decisions of 28 and 29 May were issued,[629] or that were specifically caused by the ARK Crisis Staff.[630] Therefore, the Prosecution claims it is irrelevant to the Trial Chamber's findings whether certain non-Serbs had already left the territory of the ARK before the Decisions of 28 and 29 May were announced,[631] or whether certain other individuals left the territory of the ARK for other reasons.[632]

310. The Prosecution generally interprets Brđanin's argument as a contention that there was no instigation on the basis that the whole series of deportations and forcible transfers were some sort of "indivisible crime" because they were preceded by other deportations and forcible transfers from the territory of the ARK.[633] The Prosecution argues that the fact that similar crimes were committed or instigated at different times by other people is irrelevant to the determination of liability

[624] Brđanin Appeal Brief, paras 283-285, referring to Trial Judgement, paras 574, 575, 577-580, 582.
[625] Brđanin Appeal Brief, paras 283-285 (argument under Alleged Error 102).
[626] Brđanin Appeal Brief, para. 285.
[627] Brđanin Appeal Brief, paras 285, 287.
[628] Prosecution Response Brief, para. 6.275, referring to Trial Judgement, paras 255, 574.
[629] Prosecution Response Brief, para. 6.276. The Trial Chamber limited itself to pronouncing only on those forced removals of non-Serbs that occurred *after* the decisions were issued (Trial Judgement, para. 576, fn. 1480).
[630] Prosecution Response Brief, para. 6.276.
[631] Prosecution Response Brief, paras 6.276-6.277.
[632] Prosecution Response Brief, para. 6.277.
[633] Prosecution Response Brief, para. 6.279.

surrounding a particular displacement, and for this reason, transfers before the decisions of May 1992 do not prevent a finding of instigation by Brđanin during and after May 1992.[634]

311. The Trial Chamber found that Brđanin instigated the crimes of forcible transfers to Travnik, and deportations to Karlovac, that occurred after the dates of the Decisions of 28 and 29 May.[635]

312. The Trial Chamber considered that the ARK Crisis Staff decisions – attributable to Brđanin – were "a direct incitement to deport and forcibly transfer non-Serbs from the territory of the ARK."[636] This finding meets the requirement for the objective element of instigating (prompting another person to commit an offence);[637] the Trial Chamber expressly stated that the ARK Crisis Staff decisions prompted the commission of these crimes.[638] Furthermore, the Trial Chamber expressly stated that Brđanin intended to induce the commission of these crimes, thereby finding that the subjective element requirement had been met.[639]

313. The Trial Chamber found that the Decisions of 28 and 29 May prompted the municipal authorities and the police to commit the crimes of deportation and forcible transfer after those dates.[640] The municipal authorities and the police were found to have implemented the decisions.[641]

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[634] Prosecution Response Brief, para. 6.280.
[635] Trial Judgement, paras 360, 576-577. The Trial Chamber was not satisfied that any other decisions of the ARK Crisis Staff constituted instigation of deportation or forcible transfer (Trial Judgement, para. 581). The Trial Chamber also found that Brđanin was responsible for instigating persecution on account of the underlying acts of deportation and forcible transfer (Trial Judgement, para. 1054). The Trial Chamber did not find Brđanin responsible for instigating the other crimes alleged in the Indictment (Trial Judgement, paras 467 (extermination and wilful killing), 526 (torture), 661 (wanton destruction of cities, towns, and villages, or devastation not justified by military necessity), and 671 (destruction or wilful damage done to institutions dedicated to religion)).
[636] Trial Judgement, para. 574.
[637] *Kordić and Čerkez* Appeal Judgement, paras 27, 32.
[638] Trial Judgement, para. 574.
[639] Trial Judgement, para. 575.
[640] Trial Judgement, para. 574. Ex. P211 is the ARK Crisis Staff Decision of 28 May 1992 (no. 03-361/92), signed by Brđanin on 29 May 1992, stating: "If Muslims and Croats, or members of the SDA or HDZ wish to leave or move out of the Autonomous Region of Krajina ... they must enable endangered Serbian people, against whom unprecedented genocide is being conducted, to move collectively into their places, i.e. they must facilitate an exchange based on reciprocity." Ex. P227 contains an extract from the Official ARK Gazette of 5 June 1992, and Decision no. 03-364/92 of 29 May 1992 contains the conclusion reached by the ARK Crisis Staff *inter alia* that "[i]t has been decided that all Muslims and Croats, who so wish, should be able to move out of the area of the Autonomous Region of Krajina, but on condition that Serbs living outside the Serbian autonomous districts and regions are allowed to move into the territories of the Serbian Republic of Bosnia and Herzegovina and the Autonomous Region of Krajina. In this manner, an exchange of population, or, more precisely, a resettlement of people from one part of the former SR BiH [Socialist Republic of Bosnia and Herzegovina] to another would be carried out in an organised manner." (*See* Trial Judgement, para. 249).
[641] Trial Judgement, para. 574. As evidence that these decisions were implemented by municipal organs, the Trial Chamber considered Ex. P1869 ("Minutes of the 24th Session of the Crisis Staff of Petrovac Municipality", dated 3 June 1992); Ex. P957 ("Statement of the Ključ Municipal Assembly of 4 June 1992"); Ex. P690 ("Conclusions of the Sanski Most Crisis Staff adopted at a session held on 23 June 1992"). The Trial Chamber further considered a report submitted to the CSB by the Commission for the Inspection of the municipalities and the Prijedor, Bosanski Novi, and Sanski Most SJBs (Ex. P717) which concluded that the resettlement of Bosnian Muslims and Bosnian Croats from the Bosnian Krajina occurred in furtherance of both the ARK Crisis Staff decisions on resettlement, and the subsequent municipal decisions implementing this policy (Trial Judgement, para. 251). Ex. P380, a report on "current political and security

314. Brđanin advances two arguments, namely: (1) that the Trial Chamber erred in relying on the Decisions of 28 and 29 May, and (2) that the Trial Chamber's reasoning fails to account for the non-Serbs who left the territory of the ARK before the decisions were issued. The Appeals Chamber addresses these arguments in turn.[642]

315. The Trial Chamber did not find that the Decisions of 28 and 29 May initiated a mere exchange of people who wished to leave.[643] Instead, it considered the context within which those decisions were promulgated, and found that the non-Serbs who left the territory of the ARK had "no option but to escape" and otherwise faced "intolerable living conditions imposed by the Bosnian Serb authorities" including shelling, looting, dismissal, the destruction of their homes and towns, and the other crimes carried out against them.[644] Non-Serbs were required to seek authorization to leave, and more often than not had to relinquish their property without compensation.[645] This occurred when Brđanin was issuing inflammatory and discriminatory public statements advocating the departure from the territory of the ARK of its non-Serb population,[646] which the Trial Chamber considered to be direct threats to the non-Serb population.[647]

316. Seen in the context of these events (and of the evidence establishing them), the Appeals Chamber considers that Brđanin has not demonstrated how the Trial Chamber erred in finding that the Decisions of 28 and 29 May prompted the authorities who implemented them to commit the crimes of deportation and forcible transfer after those dates. Brđanin's argument is, therefore, rejected.

317. As to Brđanin's submission that the Trial Chamber's reasoning fails to account for the non-Serbs who left the territory of the ARK before the decisions were issued, the Appeals Chamber considers this argument to be without merit. The Trial Chamber expressly found Brđanin responsible for acts of deportation (in the case of transfers to Karlovac) and forcible transfer (in the case of transfers to Travnik) that occurred after the dates of the Decisions of 28 and 29 May.[648] In so doing, the Trial Chamber considered the Decisions of 28 and 29 May, and their imputability to

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situation from the 1st KK to the Command", dated 1 June 1992, likewise confirmed the implementation of these decisions.

[642] Regarding Brđanin's claim that the Trial Chamber erred when it found that he intended to induce the commission of the crimes of deportation and forcible transfer through his espousal, implementation, and co-ordination of the Strategic Plan, which he knew could only be implemented through force and fear (Brđanin Appeal Brief, paras 283-284, 286 (Alleged Error 103), referring to Trial Judgement, para. 575), the Appeals Chamber notes that this claim is a mere assertion, not supported by any arguments. It is therefore rejected without further analysis.

[643] The Appeals Chamber has already considered Brđanin's arguments contesting the Decisions of 28 and 29 May, in relation to Alleged Error 40, *supra*, para. 212.

[644] Trial Judgement, paras 255, 551.

[645] Trial Judgement, para. 254.

[646] Trial Judgement, paras 323-332, 574.

[647] Trial Judgement, para. 578.

[648] Trial Judgement, para. 576.

Brđanin.[649] In addition, it considered Brđanin's public statements,[650] his espousal of the Strategic Plan,[651] his role in the establishment of the Agency,[652] and the previous ARK Crisis Staff decisions on disarmament.[653]

318. The Trial Chamber's reasoning does not permit the postulate that Brđanin advances, namely that the departures of non-Serbs would have ended on 27 May 1992 but for Decisions of 28 and 29 May. Rather, the Trial Chamber found Brđanin responsible for these crimes due to a number of factors. One of these factors was constituted by those decisions, which it considered prompted departures after they were issued, and which – together with other factors – show Brđanin's criminal responsibility. Departures of non-Serbs did occur before the decisions were issued, but these earlier departures are immaterial to Brđanin's conviction for deportation and transfers that occurred after the Decisions of 28 and 29 May. The Trial Chamber therefore was under no obligation to refer to them.

319. The Appeals Chamber concludes that the occurrence of non-Serbs leaving the territory of the ARK before the Decisions of 28 and 29 May is not incompatible with Brđanin's responsibility for instigating those crimes after that time. The Trial Chamber did not err in not addressing departures preceding the Decisions of 28 and 29 May. Brđanin's argument is therefore rejected.

3. Conclusion

320. The Appeals Chamber concludes that Brđanin has failed to demonstrate that no reasonable trier of fact could have found him responsible for instigating and aiding and abetting the crimes against humanity of deportation pursuant to Article 5(d) of the Statute and forcible transfer pursuant to Article 5(i) of the Statute.

[649] Trial Judgement, para. 572.
[650] Trial Judgement, paras 574, 578.
[651] Trial Judgement, para. 575.
[652] Trial Judgement, para. 580.
[653] Trial Judgement, para. 579.

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E. Findings related to destruction of property

321. The Trial Chamber found that Brđanin was guilty of aiding and abetting both the crimes of: (1) wanton destruction of cities, towns, and villages or devastation not justified by military necessity; and (2) destruction or wilful damage done to religious institutions.[654] It held that these crimes were committed by Bosnian Serb forces in the context of the armed attacks on specified non-Serb towns, villages, and neighbourhoods after 9 May 1992, the date on which the ARK Crisis Staff issued its first disarmament decision.[655] Brđanin appeals against those findings.

1. Wanton destruction of cities, towns, and villages not justified by military necessity

322. Brđanin claims that no reasonable Trial Chamber could have found beyond reasonable doubt that Bosnian Serb forces were responsible for wanton destruction in eleven localities described in the Trial Judgement (Alleged Error 110),[656] because the evidence indicates that those responsible for such destruction were not Bosnian Serb forces.[657] He also argues that every Serb in the region was in uniform, so it was impossible to distinguish civilians from military members.[658]

323. The Prosecution responds that Brđanin mischaracterizes the term "Bosnian Serb forces", which is a term without reference to a specific geographic origin or national identity[659] and an abbreviation for the army, paramilitary, or other armed groups or individuals responsible for offences specifically enumerated in the Indictment.[660]

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[654] Trial Judgement, paras 639, 669 (wanton destruction) and 658, 677 (destruction or wilful damage to institutions dedicated to religion). Brđanin was found responsible under Articles 3(b), "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" and 3(d), "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science", of the Statute.

[655] Trial Judgement, paras 669-670.

[656] Brđanin Appeal Brief, para. 290, referring to Trial Judgement, paras 603-635; Brđanin Notice of Appeal, para. 112, referring to Trial Judgement, para. 636. The ten specific locations to which he refers are: Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Čelinac, Donji Vakuf, Prnjavor, Sanski Most, Šipovo, and Teslić. This appears to be a mistake, since Brđanin was actually convicted on this count for destruction in eleven municipalities, namely: Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Čelinac, Donji Vakuf, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Teslic.

[657] Brđanin Appeal Brief, para. 290, fn. 238 refers to testimony stating that in Bosanska Krupa, the attackers were described as White Eagles from Serbia (T. 17289). Brđanin Appeal Brief, fn. 239 (Alleged Error 110) refers to the alleged testimony of Witness BT-50, who stated that in relation to Bosanski Novi, every Serb was in uniform, and distinguishing civilian from military personnel was impossible; Brđanin provides no page reference for this citation. Referring to Witness BT-87 (Ex. P1643, p. 00942599) he alleges that in Bosanski Novi, the attacking forces were described as soldiers from Croatia. Brđanin Appeal Brief, para. 290, fn. 241 refers to Witness BT-51, who gave evidence that in relation to Prnjavor the entire Serb population was in uniform (Ex. P1784, p. 00635472) and that distinguishing between uniformed civilians and Bosnian Serb forces would have been "difficult". Brđanin Appeal Brief, para. 290, fn. 242 refers to the description by a witness of the participation of the 6th Sana Brigade, but notes that neither this witness, nor Witness BT-15, identify Bosnian Serb forces in the attack on Sanski Most.

[658] Brđanin Appeal Brief, fns 239 and 241.

[659] Prosecution Response Brief, para. 6.214.

[660] Prosecution Response Brief, para. 6.215.

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324. Brđanin replies that, since the Indictment only referred to Bosnian Serb forces (and not the JNA, Croatian Serbs, paramilitary units from Serbia or common criminals[661]), he can only be responsible for crimes perpetrated by individuals to whom he was linked, a category that excludes Serbs from outside Bosnia.[662]

325. The Appeals Chamber has already considered the meaning of the expression "Bosnian Serb forces", as employed by the Prosecution and the Trial Chamber, dismissing this argument by Brđanin in relation to another crime.[663] Brđanin's argument that he can only be responsible for crimes perpetrated by "Bosnian" Serbs only, to the exclusion of Serbs from outside Bosnia, must therefore fail.

326. The Appeals Chamber notes Brđanin's additional argument that no reasonable Trial Chamber could have found beyond reasonable doubt that Bosnian Serb forces were responsible for destruction and appropriation of property in ten specific locations. With regard to six of these locations, Brđanin's submissions are mere unsubstantiated assertions which make no reference to any of the evidence considered by the Trial Chamber. The arguments in relation to these specific locations are accordingly dismissed summarily under category 4, above.[664] In relation to the remaining four locations, Brđanin has referred to at least some evidence to substantiate his assertions.

327. The first location is Bosanska Krupa, where Brđanin alleges Witness Jadranko Šaran identified the attackers as White Eagles from Serbia. Not only is this reference incorrect,[665] but Witness Jadranko Šaran in fact testified that "[t]he White Eagles were in that area after Bosanska Krupa had fallen"[666] following an attack by infantry supported by artillery.[667] Brđanin has mischaracterised the witness's testimony, which neither identifies the White Eagles as the attackers of Bosanska Krupa, nor undermines the Trial Chamber's conclusion that Bosnian Serb forces attacked Bosanska Krupa on 22 April 1992. However, the Appeals Chamber, *proprio motu,* sets aside Brđanin's conviction for aiding and abetting the crime of wanton destruction or devastation not justified by military necessity in the municipality of Bosanska Krupa.[668] The Trial Chamber found that Brđanin's responsibility is limited to those crimes of wanton destruction or devastation

[661] Brđanin Reply Brief, para. 58.
[662] Brđanin Reply Brief, para. 59.
[663] *See supra*, paras 232-239.
[664] Those six locations are: Banja Luka, Bosanski Petrovac, Čelinac, Donji Vakuf, Šipovo, and Teslić.
[665] Brđanin (Brđanin Appeal Brief, fn. 238) refers to Witness Jadranko Šaran's testimony, T. 17289. Witness Jadranko Šaran makes no such assertion on this transcript page.
[666] Witness Jadranko Šaran, T. 17223.
[667] Witness Jadranko Šaran, T. 17288-17289.
[668] *See* Trial Judgement, para. 670 (finding that Brđanin aided and abetted wanton destruction or devastation not justified by military necessity in Bosanska Krupa).

not justified by military necessity which occurred "in the context of the armed attack ... after 9 May 1992".[669] As the attack on the town of Bosanska Krupa occurred on 22 April 1992, the Trial Chamber erred in listing this incident among the acts of wanton destruction of cities, towns, and villages, it considered for Brđanin's conviction.[670]

328. The second location is Bosanski Novi, in relation to which Brđanin refers to the testimony of Witness BT-50 that every Serb was in uniform and distinguishing civilian from military personnel was hence impossible,[671] and of Witness BT-87 who described the attacking forces as soldiers from Croatia.[672] Witness BT-50 did indeed state that "[t]here were no Serb civilians at this time. Young and old were in uniform."[673] However, Witness BT-50 consistently described the actions of "the Serbs" during the attack, and testified that "[t]he Serb army could be seen coming down from the hills towards Suhača and the Serbs started to loot the empty houses."[674] The evidence of Witness BT-87, which Brđanin misquotes, is that he "heard some information that Serb forces positioned in our village had come from Croatia".[675] The testimony of neither Witness BT-50 nor of Witness BT-87 undermines the Trial Chamber's conclusion that "Bosnian Serb forces" attacked Bosanski Novi in June 1992.

329. The Trial Chamber's factual findings with respect to the third (Prnjavor) and fourth (Sanski Most) locations that Brđanin contests will not be considered further. The arguments of Brđanin in respect of Prnjavor are summarily dismissed since Brđanin was not convicted for these crimes in Prnjavor.[676] With respect to Sanski Most, Brđanin's arguments are dismissed summarily pursuant to category 2, above.

330. The Appeals Chamber concludes that Brđanin has failed to demonstrate that the Trial Chamber erred in finding that Bosnian Serb forces caused wanton destruction of cities, towns, and villages not justified by military necessity. For these reasons, the Appeals Chamber rejects this argument. However, the Appeals Chamber has set aside, *proprio motu*, his conviction for aiding

[669] Trial Judgement, para. 669.
[670] Trial Judgement, para. 670.
[671] Brđanin Appeal Brief, para. 290, fn. 239, referring to the alleged testimony of Witness BT-50. However, Brđanin provides no page reference for this citation. Witness BT-50's witness statement was admitted at trial pursuant to Rule 92*bis* as Ex. P1641.
[672] Brđanin Appeal Brief, para. 290, fn. 239, referring to the alleged testimony of Witness BT-87. Witness BT-87's witness statement was admitted at trial pursuant to Rule 92*bis* as Ex. P1643.
[673] Ex. P1641, p. 00672855.
[674] Ex. P1641, p. 00672858.
[675] Ex. P1643, p. 00942599.
[676] The municipality of Prnjavor is not listed in paragraph 670 of the Trial Judgement.

and abetting the crime of wanton destruction or devastation not justified by military necessity in the municipality of Bosanska Krupa.[677]

2. Destruction of religious institutions

331. Brđanin submits that there was no evidence to show that the destroyed religious institutions had not been used for military purposes, or that such destruction was caused by Bosnian Serb forces (Alleged Error 111).[678] Furthermore, Brđanin claims that no reasonable Trial Chamber could have concluded beyond reasonable doubt that Bosnian Serb forces were responsible for the destruction of religious institutions in eleven specific locations described in the Trial Judgement.[679] Brđanin makes specific reference to Bosanski Novi, saying that Witness BT-82 claimed the destruction was caused by local citizens or the JNA,[680] and Donji Vakuf, saying that it was open to the Trial Chamber to conclude that the Šeherdžik mosque was destroyed by Bosnian Serb forces, but only on 8 August 1992 after the ARK Crisis Staff had been disbanded (Alleged Errors 111-112).[681]

332. The Prosecution responds that it was in fact reasonable for the Trial Chamber to infer from the consistent pattern of destruction of non-Serb religious institutions throughout the territory of the ARK over a protracted period of time that the destruction of the religious institutions had no military purpose.[682] It argues that the Prosecution Expert Witness, Witness Kaiser, and a witness for the Defence (Witness Radić) testified to the effect that the religious institutions were destroyed for non-military purposes.[683]

333. The Trial Chamber found that wilful damage done to both Muslim and Roman Catholic religious buildings and institutions ("Religious Buildings") was committed by Bosnian Serb forces, and that the Religious Buildings were not used for military purposes.[684]

334. As to the question of whether the wilful damage done to Religious Buildings was committed by Bosnian Serb forces, the Appeals Chamber notes that the Trial Chamber expressly stated that Bosnian Serb forces were responsible for such acts in specific locations.[685]

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[677] *See supra*, para. 237.
[678] Brđanin Appeal Brief, para. 292.
[679] Brđanin Appeal Brief, para. 293. The 11 locations Brđanin specifies are: Banja Luka, Bosanska Krupa (where he alleges the destruction occurred on 23 April 1991, before the ARK Crisis Staff had been established), Bosanski Novi (in relation to which he refers to Witness BT-82 (T. 13788) who claimed the destruction was caused by local citizens or the JNA), Bosanski Petrovac, Čelinac, Donji Vakuf (where he points out the Šeherdžik mosque was destroyed on 8 August 1992), Kotor Varoš, Prijedor, Prnjavor, Šipovo, and Teslić. Brđanin does not mention Ključ and Sanski Most.
[680] Brđanin Appeal Brief, para. 293, fn. 244.
[681] Brđanin Appeal Brief, para. 293, fn. 245.
[682] Prosecution Response Brief, para. 6.226.
[683] Prosecution Response Brief, para. 6.226, fn. 289.
[684] Trial Judgement, paras 640, 658.

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335. The alleged error in respect of Bosanski Novi municipality is dismissed summarily under category 4, above.

336. Brđanin also specifically refers to Donji Vakuf, saying that it was open to the Trial Chamber to conclude that the Šeherdžik mosque was destroyed by Bosnian Serb forces, but only on 8 August 1992 (after the ARK Crisis Staff had been disbanded).[686] The Appeals Chamber fails to see how this submission is pertinent. Even disregarding the fact that the ARK War Presidency replaced the ARK Crisis Staff,[687] the decisions of the ARK Crisis Staff had by then had an effect, and the Trial Chamber found that Brđanin aided and abetted in the destruction or wilful damage done to Religious Buildings after 9 May 1992, the date when the ARK Crisis Staff issued its first decision on disarmament. The substantial contribution having been made, it does not follow that the official disbandment of the ARK Crisis Staff precludes the finding that Brđanin is responsible.

337. Turning now to the question of whether Religious Buildings had not been used for military purposes, the Appeals Chamber recalls that the Prosecution must establish that the destruction in question was not justified by military necessity; this cannot be presumed.[688] Determining whether the Prosecution has fulfilled its burden of proof in a particular case necessarily requires that the trier of fact, considering all direct and circumstantial evidence, assess the factual context within which the destruction occurred. [689] Determining whether destruction occurred pursuant to military necessity involves a determination of what constitutes a military objective. Article 52 of Additional Protocol I contains a widely acknowledged definition of military objectives as being limited to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".[690]

338. The Prosecution refers to Witnesses Kaiser and Radić to demonstrate that the institutions were not used by military forces. Witness Kaiser, a self-described UNESCO functionary, was the author of a report submitted into evidence concerning the damage done to Muslim and Roman

[685] Bosanski Novi (Trial Judgement, para. 645); Bosanski Petrovac (Trial Judgement, para. 647); Čelinac (Trial Judgement, para. 648); Donji Vakuf (Trial Judgement, para. 649); Ključ (Trial Judgement, para. 650); Prijedor and surrounding areas (Trial Judgement, paras 652-653); Prnjavor (Trial Judgement, para. 654); Sanski Most (Trial Judgement, para. 655); Šipovo (Trial Judgement, para. 656); and Teslić (Trial Judgement, para. 657).
[686] Brđanin Appeal Brief, para. 293, fn. 245 (Alleged Errors 117-119). The Trial Judgement, at para. 649, actually refers to 9 August 1992.
[687] See Trial Judgement, fn. 509.
[688] *Kordić and Čerkez* Appeal Judgement, para. 495.
[689] *Strugar* Trial Judgement, para. 295. *See also Kordić and Čerkez* Appeal Judgement, paras 465-466, 503 (analysing evidence of specific examples of destruction).
[690] Additional Protocol I, Article 52(2). *See Kordić and Čerkez* Appeal Judgement, para. 53; *Strugar* Trial Judgement, para. 295; *Galić* Trial Judgement, para. 51 (not disturbed on appeal). On the applicability of The Hague Regulations, *see Kordić and Čerkez* Appeal Judgement, para. 92.

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Catholic buildings in specific municipalities during the war.[691] He also gave evidence before the Trial Chamber[692] and confirmed the conclusions reached in his Expert Report that, considering the cumulative effect of the damage done to places of worship, and "given the concentration of significant damage within a period of a few months across most of the municipalities, we are confronted by a targeted, controlled, and deliberate campaign of devastation, kind of blitzkrieg against places of worship."[693]

339. Witness Radić (a leading politician within the ARK[694]), testified that the purpose of the destruction of mosques was to prevent people from returning.[695] When asked whether it was Serb policy to blow up mosques, Witness Radić replied that "[y]ou won't find any such explicitly defined policies, and I didn't find them anywhere. But this went without saying because all orthodox churches had previously been destroyed in Croatia, all of them. And that was the answer. Destroying all the mosques in the territory of the Republic of Serbia. These policies were never stated in such an explicit manner."[696]

340. The evidence referred to in the Trial Judgement in relation to the religious sites destroyed in the territory of the ARK in 1992 does not suggest that any of these sites may have been used for military purpose, or that their total or partial destruction offered a definite military advantage to the Bosnian Serb forces. Brđanin refers to no such evidence on appeal. To the contrary, there is evidence that these sites were destroyed as a part of a campaign to ethnically cleanse the area of its Muslim and Croat citizens. This is consistent with the Trial Chamber's findings regarding "the deliberate campaign of devastation of the Bosnian Muslim and Bosnian Croat religious and cultural institutions", which "was just another element of the larger attack. The final objective, however, was the removal of the population and the destruction of their homes."[697]

341. The various methods employed in damaging or destroying the institutions dedicated to religion in the various locations include: being targeted by a hand-held rocket launcher;[698] mining,

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[691] Ex. P1183.1.
[692] Witness Kaiser cited in Trial Judgement, paras 645-647, 649, 653.
[693] Witness Kaiser, T. 16475. When asked what he thought the reason was for why this campaign was pursued, Witness Kaiser speculated that it was to send a message: "one part of the message is 'we don't respect you, we don't respect your system of belief, we don't respect your culture or psychology.' Another one is 'we don't want you.' ... But there's the other message that is sort of towards society, where you find the urban pattern of destruction, which is annihilation, bulldozing a monument, it's like saying, 'they weren't there' basically. Or even if you left a cemetery, 'well, they were there but you left nothing of value.'" (Witness Kaiser, T. 16477).
[694] Trial Judgement, para. 176.
[695] Witness Radić, T. 22136.
[696] Witness Radić, T. 22136-22137.
[697] Trial Judgement, para. 118.
[698] Banja Luka (Trial Judgement, para. 643).

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or destruction by explosives;[699] shelling and arson;[700] and the use of heavy machinery.[701] The very manner in which many of the sites were damaged or destroyed,[702] including the time required to mine churches, mosques, and minarets and to blow them up (or to set them on fire), suggests that these installations contained no military threat, but were instead systematically destroyed because of their religious significance to the ethnicities targeted. There is nothing to suggest that their destruction provided any kind of advantage in weakening the military forces opposing the Bosnian Serbs, favoured the Bosnian Serb position, or was otherwise justified by military necessity.

342. In light of the foregoing, Brđanin has failed to demonstrate that the Trial Chamber's findings were findings which no reasonable trier of fact could have made beyond reasonable doubt.

343. For the foregoing reasons, Alleged Errors 111-112 and 117-119 are rejected.

3. Brđanin's role in the commission of wanton destruction of cities, towns, and villages or devastation not justified by military necessity and of destruction or wilful damage done to religious institutions

344. Brđanin submits that the Trial Chamber erred when it found that the only reasonable inference that could be drawn was that, when the ARK Crisis Staff decisions on disarmament were issued, Brđanin was aware that Bosnian Serb forces were to attack non-Serb towns, villages, and neighbourhoods and that through the decisions he rendered practical assistance which amounted to substantial contribution to those forces (Alleged Errors 113-116).[703] Brđanin argues that, among the alternative inferences that a reasonable Trial Chamber could and should have drawn, is that neither the ARK Crisis Staff nor Brđanin had any effect whatsoever upon the commission of the crimes, and these crimes would have occurred in any event, even without Brđanin or the disarmament decisions.[704] Brđanin argues further that no reasonable trier of fact could have concluded that the destructions in certain specific municipalities were committed by Bosnian Serb forces, or that, in

[699] Bosanska Krupa (Trial Judgement, para. 644); Bosanski Petrovac (Trial Judgement, para. 647); Čelinac (Trial Judgement, para. 648); Donji Vakuf (Trial Judgement, para. 649); Kotor Varoš (Trial Judgement, para. 651); Prijedor and surrounding areas (Trial Judgement, paras 652-653); Šipovo (Trial Judgement, para. 656).
[700] Bosanski Novi (Trial Judgement, para. 645); Donji Vakuf (Trial Judgement, para. 649); Ključ (Trial Judgement, para. 650); Kotor Varoš (Trial Judgement, para. 651); Prijedor and surrounding areas (Trial Judgement, paras 652-653); Prnjavor (Trial Judgement, para. 654)
[701] Bosanski Novi (Trial Judgement, para. 645).
[702] For example, Witness BT-81 gave evidence that, regarding the city mosque in Bosanski Novi: "I think what they were trying to do was to destroy the foundations of the tower, in spite of their efforts it was not pulled down. ... I do know it took them quite some time and effort" (T. 13788).
[703] Brđanin Appeal Brief, para. 295, referring to Trial Judgement, para. 667. *See also* Brđanin Appeal Brief, para. 292.
[704] Brđanin Appeal Brief, para. 296.

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the remaining locations, Brđanin aided and abetted the Bosnian Serb forces which may have perpetrated them.[705]

345. The Prosecution responds that Brđanin's submissions are contradictory and unsupported.[706] It stresses that a Trial Chamber is entitled to draw inferences from circumstantial evidence, and that the Trial Chamber's conclusions were based on a considerable body of evidence.[707] It claims that Brđanin's challenges to circumstantial evidence are selective, and do not address all of the evidence on which the Trial Chamber based its conclusions. These conclusions permit the reasonable inference that Brđanin was aware of the attacks[708] and of the crime of wanton destruction in the context of the attacks.[709] The Prosecution defends the inferences drawn by the Trial Chamber as reasonable, assuming that the Trial Chamber considered the evidence in its entirety, and claims that Brđanin considered the single pieces of evidence in isolation in his Appeal Brief.[710] The Prosecution points out that Brđanin himself concedes in his brief that his awareness that Bosnian Serb forces would engage in destruction was a reasonable inference to draw, before suggesting a purportedly more reasonable inference.[711] This challenge should therefore be dismissed, the Prosecution contends, since Brđanin is effectively conceding that the inference that he was aware of the crimes could be drawn from the evidence.[712] The Prosecution concludes that the Trial Chamber correctly applied the substantial contribution requirement in relation to the attacks,[713] and that Brđanin has failed to explain why the Trial Chamber's findings were unreasonable.[714]

346. In reply, Brđanin argues that in order to prove that he aided and abetted crimes, it must be shown that the physical perpetrators were assisted by, encouraged by, or received moral support from him, *and* that they knew of his existence and that he was assisting, encouraging or morally supporting them.[715] Even if the assistance, encouragement, or moral support, and the knowledge thereof are shown, Brđanin submits that it must also be proven that the assistance, encouragement or moral support had a substantial effect on the commission of a crime, which "must have been

[705] Brđanin Appeal Brief, paras 296-297. Brđanin identifies those municipalities as: Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Čelinac, Donji Vakuf, Sanski Most, and Teslić. The municipalities where he apparently concedes that Bosnian Serb forces may have been responsible are Ključ, Kotor Varoš, and Prijedor.
[706] Prosecution Response Brief, para. 6.232.
[707] Prosecution Response Brief, para. 6.234.
[708] Prosecution Response Brief, paras 6.240-6.248.
[709] Prosecution Response Brief, paras 6.240-6.248.
[710] Prosecution Response Brief, paras 6.242, 6.245-6.248.
[711] Prosecution Response Brief, para. 6.247.
[712] Prosecution Response Brief, para. 6.247.
[713] Prosecution Response Brief, paras 6.256-6.257.
[714] Prosecution Response Brief, paras 6.259- 6.260.
[715] Brđanin Reply Brief, paras 62-63, referring to *Kordić and Čerkez* Appeal Judgement, para. 765; *Strugar* Trial Judgement, para. 349 (in turn referring to *Blaškić* Appeal Judgement, para. 47).

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among those few effects that did make a difference between whether the crime was committed."[716] Brđanin claims that there is no evidence supporting these findings.[717]

347. Brđanin's argument that the Trial Chamber erred in finding that he was aware that Bosnian Serb forces were to attack non-Serb towns, villages, and neighbourhoods and that he rendered practical assistance and a substantial contribution to those forces through the ARK Crisis Staff decisions, have been raised in his appeal against his conviction for wilful killings. In that section, the Appeals Chamber has already concluded that Brđanin has failed to show how the Trial Chamber erred.[718]

348. Nevertheless, in this respect, Brđanin advances an alternative finding that he considers to be more reasonable: that the destruction would have occurred without his participation or that of the ARK Crisis Staff, just as it did elsewhere during the conflicts in the former Yugoslavia. This argument is inapposite. Brđanin is essentially suggesting that, since his conduct was not the *conditio sine qua non* of the destruction in the territory of the ARK, he cannot therefore be responsible for aiding and abetting it. However, the jurisprudence of the Tribunal has established that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required.[719] What is required is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime.[720] As that is the only argument Brđanin puts forward, he has failed to demonstrate that no reasonable trier of fact could have drawn the inference, as the only reasonable one, that through the above-mentioned decisions he rendered practical assistance which amounted to substantial contribution to the Bosnian Serb forces.

349. As to whether the principal perpetrators to which an aider and abettor provides assistance must know of the aider and abettor's existence, and that he or she was in fact assisting, supporting, or encouraging them, the Appeals Chamber recalls that, in principle, it is not required as an element of that mode of liability that the principal perpetrators know of the aider and abettor's existence or of his assistance to them.[721] The Appeals Chamber finds that Brđanin has not shown that the Trial Chamber erred in concluding beyond reasonable doubt that Brđanin rendered practical assistance

[716] Brđanin Reply Brief, para. 71.
[717] Brđanin Reply Brief, paras 71-72.
[718] *See supra*, para. 240.
[719] *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85.
[720] *Blaškić* Appeal Judgement, paras 46, 48; *Ntagerura et al.* Appeal Judgement, para. 370. *See also Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229.
[721] *See Tadić* Appeal Judgement, para. 229(ii).

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and a substantial contribution to the Bosnian Serb forces carrying out the attacks during which destruction occurred.

350. Turning to Brđanin's argument that it was unreasonable for the Trial Chamber to conclude that destruction in certain specific municipalities was committed by Bosnian Serb forces, and that in other locations Brđanin aided and abetted the Bosnian Serb forces perpetrating them, the Appeals Chamber recalls its findings above relating to the responsibility of Bosnian Serb forces for the wanton destruction of cities, towns, and villages not justified by military necessity. The Appeals Chamber has already dismissed Brđanin's arguments in relation to Banja Luka,[722] Bosanska Krupa,[723] Bosanski Novi, Bosanski Petrovac, Čelinac, Donji Vakuf, Prnjavor, Sanski Most, and Teslić, and Brđanin offers no evidence in this argument to justify disturbing that conclusion.[724] Brđanin's arguments in relation to Ključ, Kotor Varoš, and Prijedor have been summarily dismissed under category 3, above.

4. Conclusion

351. The Appeals Chamber concludes that the Trial Chamber did not err in finding Brđanin responsible beyond reasonable doubt for aiding and abetting the crimes of (1) wanton destruction of cities, towns, and villages or devastation not justified by military necessity; and (2) destruction or wilful damage done to religious institutions. However, the Appeals Chamber has set aside, *proprio motu*, his conviction for aiding and abetting the crime of wanton destruction of cities, towns and villages or devastation not justified by military necessity perpetrated in the municipality of Bosanska Krupa.[725]

F. Application of the law on aiding and abetting

352. Brđanin claims that the Trial Chamber misapplied the law of aiding and abetting and erred in finding that, for the purposes of aiding and abetting, his actions had a substantial effect on the various crimes committed (Alleged Error 153).[726] He argues that the Trial Chamber failed to provide a reasoned opinion to explain its conclusion that his actions had a substantial effect on the

[722] The Appeals Chamber also notes that Brđanin was not convicted for the crime of destruction or wilful damage done to institutions dedicated to religion in the municipality of Banja Luka (Trial Judgement, para. 678, and, in particular, fn. 1687).
[723] As seen *supra*, the Appeals Chamber has set aside, *proprio motu*, Brđanin's conviction for aiding and abetting the crime of wanton destruction of cities, towns, and villages or devastation not justified by military necessity perpetrated in the municipality of Bosanska Krupa. With respect to the crime of destruction or wilful damage done to institutions dedicated to religion, the Appeals Chamber notes that Brđanin was not convicted for the crime of destruction or wilful damage done to institutions dedicated to religion in the municipality of Bosanska Krupa (Trial Judgement, para. 678, and, in particular, fn. 1687).
[724] *See supra,* paras 325-330.
[725] *See supra*, para. 327.
[726] Brđanin Appeal Brief, para. 309; AT. 8 December 2006, pp. 148-149, 153-154.

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perpetrators of the crimes.[727] He claims that it is "simply illogical" to find a substantial effect when the perpetrators cannot be identified.[728]

353. The Prosecution responds that Brđanin has failed to specify which paragraphs in the Trial Judgement he finds to be deficient.[729] The Prosecution argues that there is in fact considerable evidence,[730] which was thoroughly analysed in the Trial Judgement, to support the Trial Chamber's conclusion that Brđanin did indeed make a significant contribution to the commission of the various crimes.[731]

354. The Appeals Chamber has addressed the requirement of a reasoned opinion with regard to factual findings above.[732] The onus of demonstrating which of the Trial Chamber's findings are unreasoned and why and how this omission invalidates the related parts of the Trial Judgement lies with Brđanin. It is not sufficient to state, as Brđanin does, that the Trial Chamber misapplied the law "[t]hroughout the Judgement".[733]

355. As to Brđanin's argument that the perpetrators of the crimes have to be identified, the Appeals Chamber recalls that a defendant may be convicted for having aided and abetted a crime even if the principal perpetrators have not been tried or identified.[734] In any case, the Appeals Chamber notes that the perpetrators were identified as members of the "Bosnian Serb forces". Brđanin's arguments against the use of this expression were already rejected above.[735]

356. Where Brđanin has provided arguments regarding the mode of liability of aiding and abetting for specific crimes, the Appeals Chamber has addressed Brđanin's arguments in relation to those crimes.

[727] Brđanin Appeal Brief, para. 310.
[728] Brđanin Appeal Brief, para. 310.
[729] Prosecution Response Brief, paras 7.23-7.27.
[730] Prosecution Response Brief, para. 6.232.
[731] Prosecution Appeal Brief, para. 6.256. The Prosecution mentions four kinds of "significant contributions" identified in the Trial Judgement: (1) co-ordination and implementation of the strategic plan in the ARK; (2) the ARK Crisis Staff decisions on dismissals, disarmament, and resettlement; (3) Brđanin's propaganda campaign; and (4) Brđanin's attitude in public, coupled with his failure to intervene in the way the camps were being run.
[732] *See supra,* paras 11-16.
[733] Brđanin Appeal Brief, para. 309.
[734] *See Krstić* Appeal Judgement, para. 143.
[735] *See supra,* paras 232-239.

VI. PROSECUTION'S FIRST AND SECOND GROUNDS OF APPEAL: JOINT CRIMINAL ENTERPRISE

A. Introduction

357. After discussing the legal principles on which the doctrine of joint criminal enterprise (also, "JCE") is based in customary international law and in the jurisprudence of the Tribunal, and considering the evidence of the case, the Trial Chamber dismissed the doctrine's application to describe Brđanin's criminal responsibility in this case.[736]

358. The Prosecution's first two grounds of appeal concern the Trial Chamber's decision to dismiss the application of joint criminal enterprise to describe Brđanin's criminal responsibility.[737] The Prosecution submits that the Trial Chamber erred by: (1) requiring that the principal perpetrator of a crime be a member of the JCE ("Ground 1"),[738] and (2) holding that the mode of liability of JCE is limited to small cases and necessitates a direct agreement between each JCE member regarding the commission of the crimes ("Ground 2").[739]

359. On 5 July 2005, with permission of the Appeals Chamber,[740] the Tribunal's Association of Defence Counsel ("ADC") filed an *amicus curiae* brief in support of the position adopted by the Trial Chamber concerning the issue raised in Ground 1 ("Amicus Brief").[741]

B. Preliminary Issues

360. Prior to addressing the substantive issues of Ground 1, the Appeals Chamber will discuss two preliminary issues in order to clarify the extent of review it will conduct with regard to this Ground.

361. Contrary to its original submission in the Notice of Appeal,[742] the Prosecution does not seek a reversal of the Trial Judgement or a revision of the sentence with regard to Ground 1 as it does under Ground 2. The Prosecution merely seeks clarification by the Appeals Chamber as to the

[736] Trial Judgement, paras 355-356. The Appeals Chamber refers to the discussion in paras 340-344 (dealing with the law of JCE) and 345-356 (considering the evidence of the case in light of that law) of the Trial Judgement.
[737] Prosecution Appeal Brief, paras 1.2(1) and 1.2(2), referring to Trial Judgement, paras 355-356.
[738] Prosecution Appeal Brief, para. 3.1. As a basis for this ground of appeal, the Prosecution does not point to any finding of the Trial Chamber expressly stating that a perpetrator must be a member of the JCE. Instead, the Prosecution has only pointed to para. 344 of the Trial Judgement. As will be made clear later, the finding that the person who carried out the *actus reus* of the crimes concerned must be a member of the JCE is implicit in the conclusion reached in paragraph 344 of the Trial Judgement. *See* Prosecution Appeal Brief, para. 3.3 (Ground 1).
[739] Prosecution Appeal Brief, para. 4.1.
[740] Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005.
[741] Amicus Brief of Association of Defence Counsel – ICTY ("Amicus Brief"), 5 July 2005.
[742] Prosecution Notice of Appeal, paras 6, 7.

applicable law. This is because, as noted by the Prosecution in its Appeal Brief, both it and the Trial Chamber "proceeded at trial on the basis that the JCE in the present case must include the physical perpetrators" ("understanding *inter partes*").[743] The Prosecution thus conceded that it would be unfair to enter new convictions based on a finding that principal perpetrators need not be JCE members: Brđanin could reasonably have thought that he could defeat the Prosecution's case by showing that principal perpetrators were not JCE members, and he might have foregone other lines of defence on this assumption. The Appeals Chamber agrees with the Prosecution that it would be unfair to Brđanin to enter new convictions based on a finding that principal perpetrators do not need to be JCE members. For this reason, and although it is not for the parties to decide through an understanding what the applicable law is, the Appeals Chamber will not proceed to enter a conviction, even in case it concludes that the legal interpretation advocated by the Prosecution under Ground 1 is correct. Although the resolution of the issues raised in Ground 1 will not have an impact on the outcome of this case, the Appeals Chamber has decided to address these issues as they are "of considerable significance to the Tribunal's jurisprudence".[744] Furthermore, the Appeals Chamber deems this clarification necessary in order to address the closely connected issues raised in Ground 2.

362. This issue also allows the Appeals Chamber to raise a matter of terminology. The parties and the Trial Chamber have used various expressions to identify the people "on the ground" who "pulled the trigger" or otherwise committed the *actus reus* of the crimes identified in the indictment. These expressions include "material perpetrators", "physical perpetrators", or "Relevant Physical Perpetrators" (also, "RPPs") when referring to members of the army and Serb paramilitary forces. However, at times, crimes might have been committed by omission, without any "physical" or "material" acts. Moreover, the *actus reus* carried out by these individuals might have not been accompanied by the requisite *mens rea*. Thus, the Appeals Chamber refers to these individuals, in the discussions that follow, as persons who carry out the *actus reus* of the crime(s) or, more simply, as "principal perpetrators".[745]

[743] Prosecution Appeal Brief, para. 3.3.
[744] Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3.
[745] At times, when the Appeals Chamber is merely summarizing or recalling the arguments of the parties, it might however retain the language used by them for reasons of clarity. Thus, the acronym "RPPs" ("Relevant Physical Perpetrators") used by the Trial Chamber and by the parties will, for example, feature in this Part of the Judgement.

C. Arguments of the Parties

1. Introduction

363. The Appeals Chamber in *Tadić* held that JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia. It did so after reviewing relevant treaties and national legislation, as well as several post-World War II war-crimes cases, and concluding that these warranted the conclusion that JCE liability is consonant with the principles of criminal responsibility under customary international law.[746]

364. The Tribunal's jurisprudence recognises three categories of joint criminal enterprise.[747] Regardless of the category at issue, or of the charge under consideration, a conviction requires a finding that the accused participated in a joint criminal enterprise. There are three requirements for such a finding. First, a plurality of persons.[748] Second, the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute.[749] Third, the participation of the accused in this common purpose.[750]

365. The *mens rea* required for a finding of guilt differs according to the category of joint criminal enterprise liability under consideration. Where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime[751] and intend to participate in a common plan aimed at its commission.[752] For second category joint criminal enterprise liability, the accused must be shown to have personal knowledge of an organized criminal system and intent to further the criminal purpose of the system.[753] The Tribunal's jurisprudence has also held that, for convictions under the third category of JCE, the accused can only be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk* (*dolus eventualis*).[754] The crime must be shown to have been foreseeable to the accused in particular.[755]

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[746] *Tadić* Appeal Judgement, para. 226. *See also Vasiljević* Appeal Judgement, para. 95.
[747] *Vasiljević* Appeal Judgement, paras 96-99. *See also Tadić* Appeal Judgement, paras 195-225; *Krnojelac* Appeal Judgement, paras 83-84.
[748] *Tadić* Appeal Judgement, para. 227.
[749] *Tadić* Appeal Judgement, para. 227.
[750] *Tadić* Appeal Judgement, para. 227.
[751] *Vasiljević* Appeal Judgement, paras 97, 101.
[752] *Kvočka et al.* Appeal Judgement, para. 82 (requiring "intent to effect the common purpose"). *See also Blaškić* Appeal Judgement, para. 33.
[753] *Tadić* Appeal Judgement, paras 202-203, 228.
[754] *Tadić* Appeal Judgement, para. 228; *Kvočka* Appeal Judgement, para. 83.
[755] *Tadić* Appeal Judgement, para. 220. *See also Kvočka* Appeal Judgement, para. 86, *Blaškić* Appeal Judgement, para. 33, and *Stakić* Appeal Judgement, paras 65, 99-103.

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2. Principal perpetrators as members of the JCE (Ground 1)

366. The Trial Chamber held, *inter alia*, that the common plan of the JCE "has to amount to, or involve, an understanding or an agreement between two or more persons that *they* will commit a crime within the Statute".[756] According to the Trial Chamber, this entails that the principal perpetrators must all be members of the JCE for liability to attach to a member of the JCE for their actions. This issue has not yet been explicitly addressed by the Appeals Chamber.

367. In support of its allegation that the Trial Chamber erred in law in holding that the principal perpetrator must be a member of the JCE, the Prosecution submits that "a JCE may consist of members none of whom physically commits a crime, but who use the physical perpetrators to have the crimes carried out."[757] Thus, a JCE may in principle exist entirely at a leadership level.[758] Therefore, the principal perpetrators may agree with the purpose of the high level perpetrators and share the same criminal purpose, but this is not necessarily so.[759] Regarding the senior leaders, the Prosecution suggests that, even though other modes of liability (ordering, planning, instigating, aiding and abetting) may apply, they do not necessarily always capture "the true situation and the true culpability of the high-level offenders".[760]

368. The Prosecution claims that there is no basis for concluding that physical perpetrators must be members of the JCE.[761] The Prosecution argues that the ICTR Appeals Chamber has acknowledged that post-World War II jurisprudence, including the *RuSHA* case and the IMT Judgement, employed "a basis equivalent to that of joint criminal enterprise",[762] and it did so while not requiring that the physical perpetrators be among the members of the JCE.[763] The Prosecution notes that the IMT Charter stated in the last paragraph of Article 6 that "[l]eaders ... of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts *performed by any persons in execution of such plan.*"[764] The Prosecution further stresses that post-World War II jurisprudence determined the responsibility of defendants on a senior hierarchical level, without referring to the individuals who carried out the *actus reus* of the crimes ascribed to them.[765] It relies in particular, on a portion of the *Justice* case which states that the accused were charged with

[756] Trial Judgement, para. 342 (emphasis added).
[757] Prosecution Appeal Brief, para. 3.1, referring to Trial Judgement, para. 344.
[758] AT. 7 December 2006, p. 61.
[759] AT. 7 December 2006, p. 61.
[760] AT. 7 December 2006, p. 62.
[761] Prosecution Appeal Brief, paras 3.14-3.23 and paras 3.24-3.33; AT. 7 December 2006, p. 60.
[762] *Rwamakuba* Appeal Decision, para. 15 and authorities cited thereof (including *United States v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948 ("*RuSHA* Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1951), vol. V).
[763] Prosecution Appeal Brief, para. 3.16.
[764] Prosecution Appeal Brief, para. 3.18.
[765] Prosecution Appeal Brief, para. 3.22.

"conscious participation in a *nation wide* government-organized system of cruelty and injustice".[766] The Prosecution emphasizes that acting pursuant to a common purpose was already regarded as an acceptable mode of liability, and that reference to the individuals who were materially involved in the execution of the *actus reus* underlying the common plan was not required.[767] According to the Prosecution, the *Justice* case stands for the proposition that the only elements required to establish an accused's guilt under JCE are: (1) that the accused had knowledge of an offence charged in the indictment and established by evidence; and (2) that he or she was connected to the commission of the crime.[768]

369. As to the jurisprudence of the Tribunal, and referring to the Appeals Chamber's judgements in the *Tadić* and *Vasiljević* cases, the Prosecution submits that the "objective elements for liability under JCE" do not include an explicit requirement that the physical perpetrator be among the members of the JCE, but rather require that the common design involves the perpetration of crimes provided for in the Statute.[769] According to the Prosecution, there are ways to link a crime to a JCE short of requiring that the principal perpetrator be part of that JCE, such as using another person as a tool to perform the *actus reus* of the crime.[770] Looking at the way the jurisprudence of the Tribunal has applied the requirements for JCE liability to attach responsibility for the conduct of others to an accused, the Prosecution stresses that there is no consistent requirement of the Tribunal that an accused and a physical perpetrator share a common purpose.[771] The *Krstić* Trial judgement, for example, does not explicitly state who the members of the JCE in that case were. The only persons mentioned as being participants in the JCE were those in the higher echelons of the hierarchy. This would show that there is no requirement that principal perpetrators be members of the JCE.[772] The Prosecution submits that this conclusion is further supported by the *Krnojelac* Appeal Judgement, which requires only the principal offender to be a member of the JCE while language in the judgement would tend to show that the expression "principal offender" includes more than just the "physical perpetrator".[773]

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[766] Prosecution Appeal Brief, para. 3.19, citing *United States v. Altstoetter et al.*, U.S. Military Tribunal, Judgement, 3-4 December 1947 ("*Justice* Case"), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1951), vol. III (emphasis added by the Prosecution).
[767] Prosecution Appeal Brief, para. 3.22.
[768] Prosecution Appeal Brief, para. 3.21, citing *Justice* case, p. 1093.
[769] Prosecution Appeal Brief, paras 3.24-3.25; *see also* AT. 7 December 2006, p. 116.
[770] Prosecution Appeal Brief, para. 3.26, referring to *Stakić* Trial Judgement, para. 439 and *Simić et al.* Trial Judgement, para. 137. According to the Prosecution, commission through somebody else is recognized as a general principle of law, is known in domestic law, and is accepted by other international tribunals. *See also* Prosecution Appeal Brief, paras 3.41-3.47.
[771] Prosecution Appeal Brief, paras 3.26-3.28.
[772] Prosecution Appeal Brief, paras 3.29-3.30; AT. 7 December 2007, pp. 63-66 (citing other Tribunal's cases) and pp. 66-69 (citing cases from other jurisdictions).
[773] Prosecution Appeal Brief, paras 3.31-3.32.

370. More generally, the Prosecution argues that, in order to fulfil the object and purpose of international criminal law, it is necessary to prosecute and punish those who commit international crimes as leaders and not only their subordinates.[774] The Prosecution claims that a different approach would be against the common-sense notion that high-level individuals directing the execution of crimes have a higher degree of responsibility than the individuals who physically perpetrate the crimes.[775] The existing safeguards integrated in the concept of JCE as understood by the Prosecution are said to be firmly established in law and to be enough to prevent unwarranted convictions.[776]

371. Brđanin responds that JCE as a mode of liability is prone to overreaching and, therefore, has the potential to lapse into guilt by association.[777] Brđanin argues that the comparison drawn between post-World War II jurisprudence and the current case is inaccurate.[778] Brđanin avers that the *RuSHA* case shows no basis for conviction under JCE, and maintains that each of the convicted defendants in the *Justice* case was actively involved in the charged crimes.[779] Moreover, Brđanin states that even if the *Justice* case had established a precedent of JCE, the Prosecution failed to prove beyond reasonable doubt the elements required by that case, namely (1) that he had knowledge of the offence charged in the indictment and established by evidence and (2) that he was connected with the commission of that offence.[780] Brđanin also cautions the Appeals Chamber that it should not create a "new concept of JCE", but just apply existing law.[781]

372. While accepting that greater responsibility attaches to a position of leadership, Brđanin argues that this fact alone is insufficient to prove criminal responsibility.[782] Brđanin argues that where a subordinate-superior relationship cannot be established, the Tribunal should be hesitant to assign responsibility to an alleged leader who may not know of, or be able to control or affect, criminal activities by the physical perpetrators.[783] Finally, Brđanin suggests that the understanding *inter partes* at trial also prevents Ground 2 from operating, thus in any event barring a conviction under JCE.[784]

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[774] Prosecution Appeal Brief, paras 3.34, 3.38.
[775] Prosecution Appeal Brief, paras 3.10, 3.34-3.40; AT. 7 December 2006, pp. 61-62.
[776] AT. 7 December 2006, pp. 116-119.
[777] Brđanin Response Brief, para. 4.
[778] Brđanin Response Brief, paras 8-14 (in general).
[779] Brđanin Response Brief, paras 9-10.
[780] Brđanin Response Brief, para. 12.
[781] AT. 7 December 2006, pp. 84-85.
[782] Brđanin Response Brief, para. 15.
[783] Brđanin Response Brief, para. 15.
[784] AT. 7 December 2006, pp. 88-89, 103.

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373. The ADC, though challenging in principle the finding of the *Tadić* Appeals Chamber that JCE exists in international customary law, accepts it as a doctrine to be followed as a binding precedent before this Tribunal.[785] Having clarified this, the ADC supports the Trial Chamber's conclusion that, in order to convict Brđanin of a crime committed by another, both he and the physical perpetrator of that crime must be members of a JCE. The ADC argues that such an outcome is "consistent with customary international law, the Appeals Chamber's own precedents and the object and purpose of international criminal justice".[786] The ADC further claims that the issue in question has already been clarified by the Appeals Chamber in *Tadić*.[787]

374. The ADC further contends that post-World War II jurisprudence, domestic case-law, and Tribunal precedents since *Tadić* all consistently reinforce the Trial Chamber's conclusion that the perpetrator must be a member of a JCE.[788] The ADC believes that the Prosecution placed too much weight on the Appeals Chamber's observation in *Rwamakuba* that some of the accused in post-World War II cases were held criminally liable on a basis "equivalent to that of JCE".[789] The ADC asserts that the Prosecution's interpretation of this case is misguided and emphasizes that the post-World War II cases considered by the Appeals Chamber only concerned instances where perpetrator and accused were linked by a "common criminal purpose".[790] The ADC suggests that, in *Tadić*, the possibility that JCE be applied to large-scale cases was undoubtedly considered. Thus, the fact that the *Tadić* Appeals Chamber did not explicitly state that the principal perpetrators need *not* be members of the JCE shows the extent of the doctrine intended by the Appeals Chamber at the time.[791]

375. Furthermore, the ADC states that for the doctrine of "perpetration by means" to apply, the perpetrator must be completely dominated by another.[792] It argues that this doctrine does not apply in the current case, as the perpetrators were "numerous and not under the domination of one person".[793]

376. Finally, the ADC asserts that, were the Appeals Chamber to uphold the Prosecution's arguments, this would undermine the legitimacy of the Tribunal and international criminal law in

[785] Amicus Brief, fn. 73; AT. 7 December 2006, pp. 105-106.
[786] Amicus Brief, para. 5; AT. 7 December 2006, p. 105.
[787] Amicus Brief, paras 4, 13.
[788] Amicus Brief, paras 14, 36-38 and 39-41; AT. 7 December 2006, pp. 107-109.
[789] Amicus Brief, para. 28, referring to *Rwamakuba* Appeal Decision, para. 15.
[790] Amicus Brief, para. 29, referring to *Rwamakuba* Appeal Decision, para. 24.
[791] AT. 7 December 2006, pp. 109-110.
[792] Amicus Brief, para. 43.
[793] Amicus Brief, para. 46.

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general.[794] To convict Brđanin for crimes perpetrated by non-JCE members would actually "undermine the Tribunal's objective of promoting reconciliation."[795]

3. Requirement of an additional understanding or agreement (Ground 2, second part)

377. The Trial Chamber also found that, "in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing the crime and the Accused, there was an understanding or an agreement to commit *that particular crime*."[796] It added that "[a]n agreement between two persons to commit a crime requires a *mutual* understanding or arrangement with each other to commit a crime."[797] When making a finding, it finally stated that a reasonable inference from the evidence at trial was that "the Accused and the Relevant Physical perpetrators, all holding the requisite *mens rea* for a particular crime and driven by the same motive to implement the Strategic Plan, furthered the commission of the same crime, without, however, entering into an *agreement between them* to commit that crime."[798]

378. The Prosecution challenges the narrow definition of JCE given by the Trial Chamber when it found that, in addition to the common plan necessary for a JCE, an additional understanding or agreement must have existed between Brđanin and the physical perpetrators of the acts.[799] According to the Prosecution, there is no support for this additional requirement in either the jurisprudence of the Tribunal or customary international law.[800]

379. In *Krnojelac*, the Appeals Chamber held that, in relation to the second category of JCE, "it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system".[801] The Prosecution argues that the Trial Chamber wrongly interpreted the *Krnojelac* Appeal Judgement on this issue.[802] According to the Prosecution, the Trial Chamber interpreted the above sentence as meaning that, while proof of a formal agreement is not necessary for the second category of JCE, a formal agreement between the accused and the principal offenders is, on the contrary, essential for the first and third categories of

[794] Amicus Brief, para. 51.
[795] Amicus Brief, para. 52.
[796] Trial Judgement, para. 344 (emphasis added).
[797] Trial Judgement, para. 352 (emphasis in original).
[798] Trial Judgement, para. 354 (emphasis added).
[799] Prosecution Appeal Brief, paras 4.18 and 4.25; AT. 7 December 2006, pp. 55.
[800] Prosecution Appeal Brief, para. 4.25.
[801] *Krnojelac* Appeal Judgement, para. 96.
[802] Prosecution Appeal Brief, para. 4.23; AT. 7 December 2006, pp. 54-55.

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JCE.[803] However, in the Prosecution's view, *Krnojelac* only states that the existence of a "formal agreement" may have some evidentiary value.[804]

380. The Prosecution submits that the Trial Chamber, by requiring proof of an "understanding or agreement" in addition to proving the existence of a common purpose, defined the concept of JCE too narrowly.[805] According to the Prosecution, there is no support for this additional requirement in either the jurisprudence of the Tribunal or customary international law.[806] The Prosecution submits that what is required under *Tadić* is proof of a common plan, design, or purpose to commit a crime and that this requirement is met by the members of the JCE espousing the *same* common plan, design, or purpose, without the need for separate "one-to-one" agreements.[807] It recalls that in *Tadić*, the Appeals Chamber did not require any evidence of an additional agreement between Tadić and the other participants. Rather, it found that the existence of a common plan, design, or purpose that included the commission of inhumane acts against non-Serbs was sufficient because: (1) Tadić had knowledge of this plan; and (2) he intentionally contributed to it with the intent to commit crimes in furtherance of this common plan.[808]

381. In support of its contention, the Prosecution recalls the post-World War II *Justice* case.[809] The Prosecution argues that, although most of the crimes in relation to extermination and persecution were carried out by individuals other than the defendants in the case, there was no additional requirement of an agreement – let alone a direct agreement – between the defendants and the physical perpetrators.[810] The Prosecution maintains that the Appeals Chamber in *Tadić* essentially adopted the same approach as the *Justice* case,[811] and that none of the post-World War II cases it considered required the existence of an agreement between the physical perpetrators and the accused.[812]

382. The Prosecution notes that in the *Krstić* case, despite the numerous executioners that must have been involved in the crime, the existence of a common plan and criminal intent was limited to small numbers of high-ranking officials and there was no evidence of a direct agreement with any of the physical perpetrators.[813] Similarly, in the cases of *Obrenović* and *Plavšić*, both respective

[803] Prosecution Appeal Brief, para. 4.23.
[804] Prosecution Appeal Brief, paras 4.23-4.24.
[805] Prosecution Appeal Brief, para. 4.25.
[806] Prosecution Appeal Brief, para. 4.25.
[807] Prosecution Appeal Brief, para. 4.25.
[808] Prosecution Appeal Brief, para. 4.37.
[809] Prosecution Appeal Brief, para. 4.27.
[810] Prosecution Appeal Brief, para. 4.29.
[811] Prosecution Appeal Brief, para. 4.30.
[812] Prosecution Appeal Brief, para. 4.31; the *Tadić* Appeal Judgement refers to the *Ponzano* case, the *Stalag Luft III* case, and two cases referring to the *Kristallnacht* riots.
[813] Prosecution Appeal Brief, para. 4.32; AT. 7 December 2006, p. 56.

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Trial Chambers accepted the guilty pleas of the two accused, despite the fact that neither could have had a direct agreement with each individual member of the JCE.[814] Finally, the Prosecution also referred to the more recent *Stakić* Appeal Judgement, as well as to ICTR case-law, both suggesting that no direct agreement is necessary for a conviction under JCE.[815]

383. Brđanin responds by pointing out the dangers of attaching JCE liability to an individual who is structurally remote from the crime, noting that it increases the possibility of the individual being made guilty by "mere association".[816] Brđanin also highlights the section of the Trial Judgement in which the Trial Chamber stated that seeking to include structurally remote individuals within the JCE, as in this case, creates difficulties in identifying the agreed criminal object of that enterprise.[817] Brđanin further points out that the jurisprudence of the Tribunal regarding JCE only concerns single municipalities (such as Srebrenica, Prijedor, and Bosanski Šamac) and that these areas are small in comparison to the entire territory of the ARK, which is the relevant territory in this case.[818]

384. Brđanin also argues that the Prosecution is erroneously trying to expand JCE beyond the limitations set out under the command responsibility doctrine, as established in U.S. case-law.[819] Brđanin notes that in *Tadić* and post-World War II cases such as *Einsatzgruppen*, each defendant had "hands-on" participation in the commission of the crimes, whereas there was no evidence beyond reasonable doubt at trial that Brđanin had any active participation in the crimes committed in the territory of the ARK.[820] He concludes that extending the JCE doctrine in the way proposed by the Prosecution would mean creating new law, instead of merely applying existing customary international law.[821]

385. The Prosecution replies that Brđanin was unable to rebut its contention that there is nothing to suggest that JCE should be limited to small cases and rejects Brđanin's assertions that all of the enterprises identified by the various Trial Chambers were, in fact, small.[822] The Prosecution agrees that the accused must also contribute to the JCE and that mere knowledge is not enough but disagrees with the definition of "contribution" for the purpose of JCE.[823] The Prosecution rebuts Brđanin's argument that the absence of a direct agreement between the accused and the physical

[814] Prosecution Appeal Brief, paras 4.33 and 4.34.
[815] AT. 7 December 2006, p. 56.
[816] Brđanin Response Brief, para. 18.
[817] Brđanin Response Brief, para. 22.
[818] Brđanin Response Brief, para. 35.
[819] Brđanin Response Brief, para. 37.
[820] Brđanin Response Brief, para. 40.
[821] Brđanin Response Brief, para. 42.
[822] Prosecution Reply Brief, paras 4.6-4.7; AT. 7 December 2006, p. 55.
[823] Prosecution Reply Brief, para. 4.8.

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perpetrators, as evidence of the existence of a common plan, expands the concept of JCE beyond what is supported by post-World War II cases and the existing jurisprudence of the Tribunal.[824]

4. JCE applicable to small cases only (Ground 2, first part)

386. The Trial Chamber also held that the mode of liability of JCE is not appropriate for cases as large as the one at hand since "it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case."[825]

387. In support of its submission that the mode of liability of JCE is not limited to small cases,[826] the Prosecution points to the part of the *Tadić* Appeal Judgement in which the Appeals Chamber stated that a JCE can include "a common, shared intention on the part of the group to forcibly remove members of one ethnicity from ... their ... region".[827] The Prosecution concludes that a JCE of this kind cannot be regarded as small.[828] The Prosecution believes that the cases considered by the Appeals Chamber in *Tadić* show that the Appeals Chamber had large scale enterprises in mind when defining JCE.[829] For example, with regard to the *Einsatzgruppen* case, the Appeals Chamber highlighted the part of the judgement in which the court stated that "the [defendants] cannot escape the fact that they were members of Einsatz units whose express mission, well known to all members, was to carry out a large scale program of murder".[830] Furthermore, the Prosecution argues that the Trial Chamber's finding in *Krstić*, regarding the existence of a JCE to kill Bosnian men following the fall of Srebrenica, whose members included General Mladić and other VRS main staff officers, cannot be considered small.[831] The Prosecution also points out that in *Simić et al.* the Trial Chamber, though holding that the evidence did not reveal the existence of a JCE at the level of Republika Srpska, did not conclude that such a JCE was not possible as a matter of law.[832] The Prosecution further recalls that the Appeals Chamber in *Rwamakuba* rejected a suggestion that the concept of JCE was limited to smaller cases, citing the example of the "national wide government-organized system of cruelty and injustice" found to exist in the *Justice* case.[833]

[824] Prosecution Reply Brief, para. 4.9.
[825] Trial Judgement, para. 355.
[826] Prosecution Appeal Brief, paras 4.4-4.16.
[827] Prosecution Appeal Brief, para. 4.6, quoting *Tadić* Appeal Judgement, para. 204.
[828] Prosecution Appeal Brief, para. 4.6.
[829] Prosecution Appeal Brief, paras 4.8-4.16.
[830] *Tadić* Appeal Judgement, footnote 245 (emphasis omitted).
[831] Prosecution Appeal Brief, para. 4.11; AT. 7 December 2006, p. 56.
[832] *Simić et al.* Trial Judgement, para. 985.
[833] Prosecution Appeal Brief, para. 4.15.

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388. In general, therefore, the Prosecution disputes the Trial Chamber's holding based on the "extraordinarily broad nature" of the case and the fact that the accused was "structurally remote from the commission of the crimes charged in the Indictment".[834]

D. Discussion

1. Introduction

389. The Prosecution's submission that the Trial Chamber erred in law in holding that "the physical perpetrator must be a member of the JCE" does not identify an express finding of the Trial Chamber that this must be so. Rather, the Prosecution points to paragraph 344 of the Trial Judgement.[835] The text of the relevant portion of the Trial Judgement reads as follows:

> The Prosecution did not allege that the Accused physically perpetrated any of the crimes charged in the Indictment. Therefore, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime. In order to hold him responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (in the present case the crimes of deportation and/or forcible transfer) and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon.

This paragraph does not specify whether the agreements mentioned are equivalent, in the Trial Chamber's view, to the common plans required for a JCE. But a footnote to this paragraph further states that "[i]f an Accused entered into an agreement with one person to commit a specific crime and with another person to commit another crime, it would be more appropriate to speak about two separate JCEs."[836] This footnote suggests that the Trial Chamber viewed such "agreements" as equivalent to the common plans at the basis of JCEs. Given this equivalence, it would logically follow that any principal perpetrator who has entered into such an agreement is also a member of a JCE.

390. The Trial Chamber's definition of the notion of common plan is also relevant to the interpretation of the disputed finding. The Trial Chamber initially recalled the finding in the *Tadić* Appeal Judgement that the common plan, design, or purpose "amounts to or involves the commission of a crime provided for in the Statute".[837] However, its further findings are that the common plan pursuant to the first category of JCE "would amount to, or involve, an understanding or an agreement between the members of the JCE to commit a crime"[838] and "necessarily has to

[834] AT. 7 December 2006, pp. 55-56.
[835] Prosecution Appeal Brief, para. 3.1.
[836] Trial Judgement, fn. 880.
[837] Trial Judgement, para. 260, citing *Tadić* Appeal Judgement, para. 227.
[838] Trial Judgement, para. 341.

amount to, or involve, an understanding or an agreement between two or more persons that *they will commit a crime* within the Statute".[839] The Appeals Chamber notes that the Trial Chamber cites no support to this rather significant departure from the definition of the common plan enunciated in *Tadić*. Neither is there any reason to depart from *Tadić*. However, this is the context within which the Trial Chamber made the disputed finding that, in order for the accused to be found responsible for committing a crime under the first category of JCE, there must be an agreement between the accused and the principal perpetrator of that crime. The only source cited by the Trial Chamber as support for this holding is a previous decision in *Brđanin* which itself cites no authority.[840]

391. Accordingly, the Appeals Chamber accepts that the Trial Chamber found that, as far as the first category of JCE is concerned, the Prosecution not only had to establish *an understanding or an agreement* between the person physically committing a crime and Brđanin, but also had to show that the principal perpetrator was a member of the JCE.

392. The Appeals Chamber will review relevant jurisprudence in relation to the issues raised by the Prosecution, Brđanin, and the ADC, namely: (1) whether the person who carried out the *actus reus* of a crime must be a member of the JCE for liability to attach to a member for this crime; (2) whether imposition of liability upon an accused for his participation to further a common criminal purpose requires an understanding or an agreement between the accused and the person who carried out the *actus reus* of that particular crime; and (3) whether JCE liability is a doctrine that applies, or should apply, only to relatively small-scale cases.

2. Principal perpetrator as a member of the JCE

(a) Post-World War II jurisprudence

393. In their respective submissions the parties discuss the import of two Control Council Law No. 10 cases, the *Justice* and *RuSHA* cases.[841] For the reasons that follow, the Appeals Chamber finds that, although these two cases do not use the expression "joint criminal enterprise", the

[839] Trial Judgement, para. 342.
[840] Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 44.
[841] The Appeals Chamber notes that the ICTR Appeals Chamber relied *inter alia* on these same sources to conclude that, as of 1992, customary international law permitted the imposition of criminal liability on a participant in a common plan to commit genocide. *See Rwamakuba* Appeal Decision, paras 14-31, in particular para. 24, according to which "post-World War II materials do not always fit neatly into the so-called 'three categories' of joint criminal enterprise discussed in *Tadić*, in part because the tribunals' judgements did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were 'connected with,' 'concerned in,' 'inculpated in,' or 'implicated in' war crimes and crimes against humanity". This ICTR Appeals Chamber decision cites, *inter alia*: *Justice* Judgement, pp. 1093 ("connected with the commission" of an offence), 1094 ("connected to some extent" with persecution), 1099 ("knowingly was connected" with an offence), 1120 (concluding that the evidence established the "connection of the defendant" to an illegal procedure), 1128 (stating that the Accused Lautz was "criminally implicated" in enforcing the law against Poles and Jews); *RuSHA* Judgement, p. 108 (stating that two Accused "are inculpated in crimes connected with the kidnapping of foreign children").

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discussion of several of the accused in these judgements is particularly apposite for the purpose of analysing the issues raised by the Grounds 1 and 2.

394. The Appeals Chamber finds that these cases provide strong support for the Prosecution's contention that post-World War II jurisprudence: (1) recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and (2) does not require proof that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime.

395. Under Control Council Law No. 10, both the principal perpetrator and a person "connected with plans or enterprises involving" the commission of a crime were considered to have "committed" that crime.[842]

396. In the *Justice* case, the indictment alleged that the "German criminal laws, through a series of expansions and perversions by the Ministry of Justice, finally embraced passive defeatism, petty misdemeanors and trivial private utterances as treasonable for the purpose of exterminating Jews or other nationals of the occupied countries. Indictments, trials and convictions were transparent devices for a system of murderous extermination, and death became the routine penalty ... Non-German nationals were convicted of and executed for 'high treason' allegedly committed against the Reich. The above-described proceedings resulted in the murder, torture, unlawful imprisonment, and ill-treatment of thousands of persons."[843] It also alleged that "German criminal laws through a series of additions, expansions, and perversions by the defendants became a powerful weapon for the subjugation of the German people and for the extermination of certain nationals of the occupied countries. This program resulted in the murder, torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occupied countries."[844] Lautz, Chief Public Prosecutor of the People's Court, Rothaug, former Chief Justice of the Special Court in Nuremberg, and others were charged with responsibility for, and participation in, these crimes.[845]

397. The United States Military Tribunal stated that, pursuant to Article II(2) of Control Council Law No. 10, the prosecution had to show the following for an accused connected with a criminal plan or enterprise to be found liable:

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[842] *See* Control Council Law No. 10, art. II(2), in *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50, according to which "[a]ny person ... is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."
[843] *Justice* Judgement, Indictment, para. 11.
[844] *Justice* Judgement, Indictment, para. 23.
[845] *Justice* Judgement, Indictment, paras 11 and 23.

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> The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law.[846]

It further required that the accused have "knowledge of an offense charged in the indictment and established by the evidence" and "consciously participated in the plan or took a consenting part therein."[847]

398. The Appeals Chamber has considered in particular Judge Bonomy's Separate Opinion in the case *Prosecutor v. Milutinović et al.*[848] and has found his discussion of the *Justice* case to be instructive:

> 18. The Military Tribunal found that the Prosecution had proved the existence of a "pattern and plan of racial [persecution]" to enforce the criminal laws against Poles and Jews.[849] After determining that the accused Lautz, the Chief Public Prosecutor of the People's Court, knew of this plan,[850] the Tribunal found that he had authorised indictments charging a number of Poles with high treason for "leaving their places of work and attempting to escape Germany by crossing the border into Switzerland".[851] The Poles were ultimately sentenced to death and executed. On the basis of this evidence, the Military Tribunal concluded that Lautz had consciously participated in the national plan of racial discrimination "by means of the perversion of the law of high treason",[852] and accordingly convicted him of war crimes and crimes against humanity.[853] The Tribunal concluded in relation to his responsibility:
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> > We have cited a few cases which are typical of the activities of the Prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which were deemed to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.[854]
>
> 19. In similar fashion the Military Tribunal found that Rothaug, the former Chief Justice of the Special Court in Nuremberg, knew of the plan of racial discrimination.[855] The Tribunal convicted Rothaug of crimes against humanity for his role in convicting and sentencing to death three Poles and a Jew "in conformity with the policy of the Nazi State of persecution, torture, and extermination of [the Jewish and Polish] races."[856] The Tribunal opined that Rothaug had consciously participated in the plan in the following terms:
>
> > The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial

[846] *Justice* Judgement, p. 1063.
[847] *Justice* Judgement, pp. 1081, 1093.
[848] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, in particular paras 18-22.
[849] (Fn. 36 in the original) *Justice* Judgement, [p. 1081].
[850] (Fn. 37 in the original) *Ibid.*, [pp. 1118-1128].
[851] (Fn. 38 in the original) *Ibid.*, [pp. 1120-1121].
[852] (Fn. 39 in the original) *Ibid.*, [p. 1123].
[853] (Fn. 40 in the original) *Ibid.*, p. [1128].
[854] (Fn. 41 in the original) *Ibid.*, p. [1128].
[855] (Fn. 42 in the original) *Ibid.*, [pp. 1155-1156].
[856] (Fn. 43 in the original) *Ibid.*, p. 1155.

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> persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.[857]

20. The Military Tribunal appears to have imposed criminal responsibility on both accused for their participation in the common criminal plan although they did not perpetrate the *actus reus* of the crimes of which they were convicted; the *actus reus* was instead perpetrated by executioners simply carrying out the orders of the court. Nowhere did the Tribunal discuss the mental state of the executioners who carried out the death sentences imposed as a result of the actions of Lautz, Rothaug, and their fellow participants in the common plan, or whether such persons even had knowledge that the death sentences formed part of a plan to pervert the law for the purpose of exterminating Jews and other "undesirables".

399. The second case of relevance is the *RuSHA* case. Once again, the Appeals Chamber refers to Judge Bonomy's apt description and analysis of this case:

21. In the *RuSHA* case, the United States Military Tribunal approached the question of the criminal responsibility of the accused Hofmann and Hildebrandt in a similar way [to the *Justice* case]. Several officials of the SS Race and Resettlement Main Office (known by the German acronym "RuSHA") were charged, along with other Nazi leaders, with war crimes and crimes against humanity brought about by means of murder, extermination, enslavement, deportation, imprisonment, torture, and persecutions. Hofmann was the Chief of RuSHA from July 1940 until April 1943. Hildebrandt was Higher SS and Police Leader at Danzig-West Prussia from October 1939 to February 1943, and at the same time Leader of the Administration District Danzig-West Prussia of the Allgemeine SS; thereafter, from 20 April 1943 to the end of the war, he was Chief of RuSHA. The indictment alleged the following common plan—known as the "Germanisation" plan—and steps taken to carry it through:

> The acts, conduct, plans and enterprises charged ... were carried out as part of a systematic Program of genocide, aimed at the destruction of foreign nationals and ethnic groups, ... in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called "Aryan" race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom ... and by the elimination of "undesirable" racial elements. This program was carried out in part by (a) Kidnaping [*sic*] the children of foreign nationals in order to select for Germanization those who were considered of "racial value"; (b) Encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labor and of weakening Eastern nations; (c) Taking away, for the purpose of extermination or Germanization, infants born to Eastern workers in Germany; (d) Executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning the Germans involved; (e) Preventing marriages and hampering reproduction of enemy nationals; ... and (i) Participating in the persecution and extermination of Jews.[858]

22. The Military Tribunal found that the Prosecution had established that there existed among Hitler, Himmler—the leader of the SS—and other Nazi officials a "two-fold objective of

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[857] (Fn. 44 in the original) *Ibid.*, p. 1156.

[858] (Fn. 45 in the original) *United States v. Greifelt, Creutz, Meyer-Hetling, Schwarzenberger, Huebner, Lorenz, Brueckner, Hofmann, Hildebrandt, Schwalm, Sollmann, Ebner, Tesch, and Viermetz*, U.S. Military Tribunal, Judgement, 10 March 1948 ("*RuSHA* Judgement"), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1951), [Volumes IV and V], Indictment, para. 2 (alleging crimes against humanity). *See also ibid.*, Indictment, para. 24 (re-incorporating crimes against humanity provisions for purposes of allegations of war crimes).

weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations."[859] It found additionally that the leadership of RuSHA—and particularly the accused Hofmann and Hildebrandt—adhered to and enthusiastically participated in the execution of this "Germanisation" plan by effecting, through RuSHA agents, abortions on foreigners impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, the slave labour of Poles and other Easterners, the persecution of Jews and Poles, and the kidnapping of foreign children.[860] In response to contentions by the accused that they did not themselves physically perpetrate any crimes, the Tribunal held that

> [i]t is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed.[861]

400. The Appeals Chamber also notes that the Military Tribunal found that Hofmann and Hildebrandt formulated plans of action with respect to the kidnapping programme in response to decrees and memoranda issued by Himmler. In accordance with these plans of action, RuSHA racial examiners determined which Polish children had sufficiently "good" racial characteristics to be "Germanized"; these children were then wrested from their families and sent to Germany to be placed in special institutions.[862] In the words of the Military Tribunal, "[t]hese examiners were working directly at different intervals under the control and supervision of Hofmann and Hildebrandt respectively, who had knowledge of their activities".[863] Based on their participation in the kidnapping programme and their knowledge of the deeds of the RuSHA examiners acting at their direction, the Military Tribunal concluded that Hofmann and Hildebrand bore "full responsibility" for the kidnappings.[864] No mention is made of the examiners' state of mind, or whether they adhered to or were even aware of the broader Germanization plan pursuant to which their conduct occurred, or whether an agreement existed between Hofmann, Hildebrandt, and any of the examiners.

401. Similarly, with respect to the abortions programme, the Military Tribunal found that RuSHA officials, including the accused Hofmann and Hildebrandt, had participated in that programme, and

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[859] (Fn. 46 in the original) *See ibid.*, p. 90. *See also ibid.*, p. 96 (finding that "in the very beginning the Germanization program envisioned certain drastic and oppressive measures, among them: ... the separation of family groups and the kidnapping of children for the purpose of training them in Nazi ideology; ... the destruction of the economic and cultural life of the Polish population; and the hampering of the reproduction of the Polish population.").

[860] (Fn. 47 in the original) *Ibid.*, pp. 101, 160–161.

[861] (Fn. 48 in the original) *Ibid.*, p. 153.

[862] *RuSHA* Judgement, pp. 102, 106.

[863] *RuSHA* Judgement, p. 106.

[864] *RuSHA* Judgement, pp. 106, 160-161. *See also* Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 24.

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that Hofmann and Hildebrandt had issued directives detailing how it was to be put into effect.[865] The Military Tribunal summarized RuSHA's role in the following terms:

> The role played by RuSHA was principally in conducting racial examinations of the pregnant worker as well as the suspected father to determine whether a racially inferior or satisfactory child might be expected; and upon the basis of this examination it was determined whether an abortion should or could be performed—orders being to the effect that no abortion could be performed where a child of good racial characteristics might be expected, and that an abortion should be performed where such a child was improbable.[866]

On the basis of their participation in the programme and their knowledge of the conduct of the RuSHA racial examiners, the Military Tribunal concluded that Hofmann and Hildebrand were responsible for the forcible abortions.[867] Here again, however, the Tribunal did not discuss the examiners' state of mind, or whether they adhered to, or knew of, the broader Germanization plan, or whether an agreement existed between Hofmann, Hildebrandt and any of the racial examiners.[868]

402. The Military Tribunal thus concluded that, "[j]udged by any standard of proof, the record in this case clearly establishes crimes against humanity and war crimes, substantially as alleged in the indictment".[869] It found that "[t]he evidence establishes beyond any reasonable doubt [the accused's] guilt and criminal responsibility for the ... criminal activities", including the kidnapping of children, forcible abortions, child-stealing, punishment for sexual intercourse with Germans, and the hampering of enemy nationals' reproduction.[870]

403. The Appeals Chamber notes that it is clear from the Military Tribunal's discussion of the various aspects of the Germanization plan that Hofmann and Hildebrandt, as the leaders of RuSHA, worked closely and interactively with Himmler, Kaltenbrunner, and other high SS officials in planning the details of how the plan was to be executed, especially with respect to the abortions and abduction programmes. On the basis of their active participation in this plan and their knowledge of the activities carried out pursuant to it, both accused were held responsible for the conduct of the RuSHA agents who carried out the crimes, without any discussion of whether the principal

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[865] *RuSHA* Judgement, pp. 110-111.
[866] *RuSHA* Judgement, p. 110.
[867] *RuSHA* Judgement, pp. 111-112, 160-161. In a secret memorandum, Hildebrandt described the ultimate objective of the abortions programme: "to ... further all valuable racial strains for the strengthening of our people, and to accomplish a complete elimination of everything racially inferior" (quoted text at pp. 111-112).
[868] The evidence with respect to the abortion programme included the decree issued by Himmler in March 1943 based on which the policy of abortions on Eastern workers began. This decree even provided that "[t]he Russian physicians or the Russian Medical Association, which must not be informed of this order, are to be told in individual cases that the pregnancy is being interrupted for reasons of social distress. It must be explained in such a way that no conclusions to the existence of a definite order may be drawn." (*RuSHA* Judgement, p. 109).
[869] *RuSHA* Judgement, pp. 152-153.
[870] *RuSHA* Judgement, p. 160 (findings with respect to Hofmann); *see also* pp. 160-161 (making identical findings with respect to Hildebrand). The Tribunal sentenced both men to 25 years' imprisonment for their conduct. *RuSHA* Judgement, p. 166.

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perpetrators had knowledge that their actions formed part of the Germanization plan, or of whether an agreement existed between the accused and these agents.

404. Both the *Justice* case and the *RuSHA* case thus support the Prosecution's contention that post-World War II jurisprudence: (1) recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and (2) does not require proof that there was an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime. The Appeals Chamber will now turn to the Prosecution's submission as to the Tribunal's jurisprudence.

(b) The Tribunal's jurisprudence

405. The Appeals Chamber in *Tadić* held that participation in a JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia.[871] According to the same judgement, the rationale behind JCE liability is to reflect the exact degree of responsibility of those who in some way made it possible for the perpetrators physically to carry out the criminal acts.[872]

406. Nonetheless, as noted by Judge Bonomy in his Separate Opinion cited above,[873] *Tadić* does not clearly resolve whether the principal perpetrators must have participated in the common purpose. In some places, the Appeals Chamber does not mention a requirement that principal perpetrators belong to the JCE.[874] Elsewhere, however, it uses language – at least as regards the

[871] *Tadić* Appeal Judgement, para. 226; *Vasiljević* Appeal Judgement, para. 95.
[872] *Tadić* Appeal Judgement, para. 192.
[873] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 6.
[874] *Tadić* Appeal Judgement, para. 196, which provides, in its relevant part, as follows: "The objective and subjective prerequisites for [the first category or basic form of JCE] are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result." *See also*: para. 203, which provides that the second category of "cases ... is really a variant of the first category, considered above ... It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates ..."; and para. 227, which provides as follows (emphases in original): "... the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows: (i) *A plurality of persons.* They need not be organised in a military, political or administrative structure ... (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose 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. (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."

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first and third categories – which may imply such a requirement.[875] In this respect, the Appeals Chamber recalls that the factual scenario in *Tadić*, contrary to the one in case at hand, involved a small group of participants operating in one municipality, and that the principal perpetrators were clearly participants in the JCE.[876] It is therefore not surprising that the Appeals Chamber in that case essentially focused on post-World War II cases where this was also the case, even though not every case cited by *Tadić* required participation of the principal perpetrator in the JCE as the *sine qua non* for ascribing of liability to the accused.[877] In light of the above, the Appeals Chamber judgement in *Tadić* cannot be considered conclusive as to whether principal perpetrators must be members of the JCE.

407. While "many subsequent Judgements have employed the *Tadić* language in setting out the elements of JCE, and therefore appear to restrict JCE liability—at least in the third category—to crimes physically perpetrated by JCE participants, in almost all of these Judgements the JCE was, like the enterprise in *Tadić*, relatively small. The fact that some of the physical perpetrators may not have been JCE participants does not appear to have been much of an issue."[878] The Appeals Chamber finds that cases such as the *Vasiljević* Appeal Judgement and the *Krnojelac* Appeal Judgement do not conclusively resolve whether principal perpetrators must be members of the JCE.

408. However, two cases already decided on appeal – *Krstić* and *Stakić* – provide exceptions to this general trend of inconclusiveness. In *Krstić*, the Trial Chamber did not explicitly require

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[875] *Tadić* Appeal Judgement, para. 204 ("The third category [or extended form of JCE] concerns cases involving a common design to pursue one course of conduct *where one of the perpetrators commits an act* which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.") (emphasis added). *See also*: para. 220, providing, in relevant part, as follows (emphases added): "As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in [the first category or basic form of JCE], where all participants in the common design possess the same criminal intent to commit a crime (*and one or more of them actually perpetrate the crime, with intent*). Secondly, in the [second category or systemic form of JCE], where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases [extended form of JCE], it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible *commission by other members of the group* of offences that do not constitute the object of the common criminal purpose"; and para. 228 ("In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, … it was foreseeable that such a crime might be perpetrated by one or other members of the group[.]").

[876] *Tadić* Appeal Judgement, paras 230-232.

[877] *See*, for example, *Tadić* Appeal Judgement, para. 210.

[878] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 8 (footnote omitted, but citing to various cases including: *Vasiljević* Appeal Judgement, para. 101 (quoting *Tadić* Appeal Judgement, para. 228 for the proposition that "responsibility for a crime 'committed pursuant to the third category of JCE' arises 'only if … it was foreseeable that such a crime might be perpetrated by one or other members of the group'") (emphasis omitted); *Krnojelac* Appeal Judgement, para. 32 (quoting *Tadić* Appeal Judgement, para. 228); *Kordić and Čerkez* Trial Judgement, para. 398 (also quoting *Tadić* Appeal Judgement, para. 228)).

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principal perpetrators to be members of the JCE.[879] The Chamber found that there existed two JCEs, one with the objective of "forcibly transfer[ring] the Bosnian Muslim women, children and elderly from Potočari on 12 and 13 July" and "creat[ing] a humanitarian crisis in support of this endeavor",[880] the other with the objective of "killing the military-aged Bosnian Muslim men of Srebrenica".[881] It accordingly found the accused guilty of inhumane acts and persecution as crimes against humanity for his participation in the first JCE[882] and genocide for his participation in the second JCE.[883] The members of these JCEs included only high-ranking Bosnian Serb political and military leaders, not the principal perpetrators. The principal perpetrators, though not mentioned explicitly, were probably privates and other low-ranking members of the Drina Corps of the VRS.[884] In the *Krstić* Appeal Judgement, which predates the *Brđanin* Trial Judgement, the Appeals Chamber decided not to disturb the Trial Chamber's findings regarding the existence of a JCE. It even used the expression "genocidal enterprise".[885]

409. In *Stakić*, the Appeals Chamber, relying on the Trial Chamber's findings, treated a JCE operating in the municipality of Prijedor in 1992 as composed only of the leaders of political bodies, the military and the police.[886] Its common purpose was however clearly carried out by a larger number of individuals, including Bosnian Serb police, military, and paramilitary forces.[887] It is particularly noteworthy that Stakić was convicted of certain crimes (murder and extermination) committed by non-members under the third (also "extended") form of joint criminal enterprise.[888] This is precedent not to be lightly dismissed by the Appeals Chamber.

(c) Conclusion

410. In light of the above discussion of relevant jurisprudence, persuasive as to the ascertainment of the contours of joint criminal enterprise liability in customary international law, the Appeals

[879] *Krstić* Trial Judgement, paras 601, 611, 613. *See also Simić et al.* Trial Judgement, paras 156-160 (setting forth the elements of the first and second categories of JCE but making no mention of a requirement that the physical perpetrator must be a JCE participant).
[880] *Krstić* Trial Judgement, para. 617.
[881] *Krstić* Trial Judgement, para. 644.
[882] *Krstić* Trial Judgement, para. 618.
[883] *Krstić* Trial Judgement, para. 645.
[884] *See also* Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 11.
[885] *Krstić* Appeal Judgement, paras 134, 143-144. Moreover, the Appeals Chamber recalls that, in the *Kvočka et al.* Appeal Judgement, while Zoran Žigić was found not to be "responsible as a participant in this joint criminal enterprise" (para. 599), the Appeals Chamber confirmed the conviction of Miroslav Kvočka under JCE for crimes physically perpetrated by, among others, Žigić (*e.g.* the murder of Bećir Medunjanin, paras 277, 487). This lends further support to the contention of the Prosecution that, under the Tribunal's law, a member of a joint criminal enterprise can be found responsible for crimes perpetrated by a non-member.
[886] *Stakić* Appeal Judgement, paras 68-70.
[887] *Stakić* Appeal Judgement, paras 75, 81, 84, 95-96.
[888] *Stakić* Appeal Judgement, para. 98.

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Chamber is of the view that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.[889] In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE.

411. When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.

412. As the Prosecution recognizes, for it to be possible to hold an accused responsible for the criminal conduct of another person, there must be a link between the accused and the crime as legal basis for the imputation of criminal liability. According to the Prosecution, this link is to be found in the fact that the members of the joint criminal enterprise use the principal perpetrators as "tools" to carry out the crime.[890]

413. Considering the discussion of post-World War II cases and of the Tribunal's jurisprudence above, the Appeals Chamber finds that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal

[889] *See infra*, paras 418-419.
[890] Prosecution Appeal Brief, paras 3.40-3.48.

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perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[891]

414. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that the persons who carried out the *actus reus* of the crimes in question were members of a joint criminal enterprise. Therefore, the Appeals Chamber, Judge Shahabuddeen dissenting, grants Ground 1 of the Prosecution's appeal but emphasizes that, for the reasons set out above, it will not examine the consequences of this finding on the facts of the case.

3. Additional agreement as a requirement of JCE

415. The post-World War II jurisprudence mentioned above, which has been interpreted as a valid source for the ascertainment of the contours of joint criminal enterprise liability in customary international law, also supports the contention that the imposition of liability upon an accused for his participation to further a common criminal purpose does not require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime.[892] The Appeals Chambers turns now to the Prosecution's further submission that there is no support in the jurisprudence of the Tribunal for the requirement, in addition to the existence of a common plan, that an understanding or agreement must have existed between Brđanin and the principal perpetrators.[893]

416. In a footnote to the finding at paragraph 262 of the Trial Judgement that "[a] common plan amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved", the Trial Chamber "interpret[ed] the *Krnojelac* Appeals Judgement (paras 95-97) to requiring [*sic*] an agreement between an accused and the principal offenders for the first and the third category [*sic*] of JCE, while not requiring proof that there was a more or less formal agreement between all the participants in the second category of JCE as long as their involvement in a system of ill-treatment has been established."[894] The language in *Krnojelac* referred to by the Trial Chamber states that "with regard to the crimes considered within a systemic form of joint criminal enterprise [the second category of JCE], the intent of the participants other

[891] The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of "committing" under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still 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.
[892] *See supra*, paras 395-404.
[893] Prosecution Appeal Brief, paras 4.18 and 4.25.
[894] Trial Judgement, fn. 691.

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than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, *it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.*"[895] The Appeals Chamber in *Krnojelac* further considered that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case.[896]

417. It is undeniable that proving the existence of such an agreement may be an appropriate way of establishing that a crime formed part of the common purpose, especially with respect to the basic and extended forms of JCE. By stressing that it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system, the *Krnojelac* Appeals Chamber was merely referring to the fact that the emphasis in such a form of JCE must be put on the knowledge of the concerted system of ill-treatment and on the intent to further it. This finding cannot be interpreted – as the Trial Chamber appears to have done in the instant case – to mean that the criterion set by the Appeals Chamber in the *Tadić* case requires, in addition to the existence of a common purpose amounting to or involving the commission of a crime provided for in the Statute, an agreement between the accused and the principal perpetrator for the first and third category of JCE.

418. The Appeals Chamber understands that the Trial Chamber's disputed finding was reached out of a concern that it is inappropriate to impose liability on an accused where the link between him or her and those who physically perpetrated the crimes for which he or she is charged is too tenuous. The Appeals Chamber shares this concern. However, the Appeals Chamber does not consider that any form of JCE liability requires an additional understanding or agreement to commit that particular crime between the accused and the principal perpetrator of a crime. What JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.[897] The Appeals Chamber recalls that, as far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the*

[895] *Krnojelac* Appeal Judgement, para. 96 (emphasis added).
[896] *Krnojelac* Appeal Judgement, para. 97.
[897] *Tadić* Appeal Judgement, para. 227(ii). *See also Vasiljević* Appeal Judgement, para. 100 and *Kvočka et al.* Appeal Judgement, para. 117.

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common criminal purpose. In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime. In cases where the person who carried out the *actus reus* of the crime is not a member of the JCE, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. This is a matter of evidence.

419. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, *there was an understanding or an agreement* to commit that particular crime. Moreover, the Trial Chamber erred when it required that, in order to hold the Accused responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a specific crime (in this case, the crimes of deportation and/or forcible transfer) and that this same person personally committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon.

4. The application of JCE doctrine to large-scale cases

420. Finally, the Appeals Chamber turns to the issue of whether JCE liability is a doctrine that applies, or should apply, only to relatively small-scale cases.

421. At the outset, the Appeals Chamber rejects the teleological argument by the Prosecution that the Tribunal should endorse the doctrine of joint criminal enterprise because it would allow the Tribunal "to prosecute and punish those who participate in international crimes as leaders and not only as subordinates."[898] Such policy considerations are inapposite as a basis for a theory of individual criminal responsibility.

422. The Appeals Chamber recalls that, in *Tadić*, it explicitly envisaged the possibility of a JCE as large as the one in the present case. When providing an example of a JCE of the third category, where the common purpose is no different from the first category of JCE, it spoke of a "common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or *region*".[899] The reference to the ethnic cleansing of a "region" covers exactly cases like the one at hand, which relates to the ARK. Furthermore, among the cases the Appeals Chamber discussed when defining the first category of JCE, it pointed to the *Einsatzgruppen* case, which,

[898] Prosecution Appeal Brief, para. 3.34.

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given the large mass killings in which the Einsatz units were involved, is based on a common purpose which is far from small.[900]

423. This matter was addressed by the ICTR Appeals Chamber in the *Rwamakuba* case. In response to a challenge that the concept of JCE was limited to smaller cases, the ICTR Appeals Chamber stated that "[o]n the contrary, the *Justice* Case shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a 'nation wide government-organized system of cruelty and injustice.'"[901]

424. Thus, the Appeals Chamber finds that the Trial Chamber's interpretation of *Tadić*, as expressed in paragraph 355 of the Trial Judgement, is incorrect. The Appeals Chamber notes that Brđanin's arguments do not justify disregarding the views expressed by the ICTR Appeals Chamber on this matter. Contrary to what Brđanin alleges, there is no risk that attaching JCE liability to an individual who is structurally remote from the crime increases the possibility of the individual being made guilty by "mere association".[902] This is because responsibility pursuant to JCE does require participation by the accused, which may take the form of assistance in, or contribution to, the execution of the common purpose.[903] The Appeals Chamber is also of the view that, whether or not the Trial Chamber is correct in stating that seeking to include structurally remote individuals within the JCE creates difficulties in identifying the agreed criminal object of that enterprise,[904] this does not as such preclude the application of the JCE theory. The requirement, in such cases, is that the contours of the common criminal purpose have been properly defined in the indictment and are supported by the evidence beyond reasonable doubt. Brđanin's further argument that the Prosecution is erroneously trying to expand the JCE doctrine beyond the limitations set out under

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[899] *Tadić* Appeal Judgement, para. 204 (emphasis added).
[900] *Einsatzgruppen* Case, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IV, pp. 427-433. The Einsatzgruppen is estimated to have been responsible for the deaths of more than one million people across an area of Europe stretching from Estonia to Crimea. At least with respect to accused Franz Six, this judgement details a clear-cut large-scale case where an extended form of "common purpose" responsibility was applied. The tribunal stated, *inter alia*: "Despite the finding that Vorkommando Moscow formed part of Einsatzgruppe B and despite the finding that Six was aware of the criminal purposes of Einsatzgruppe B, the Tribunal cannot conclude with scientific certitude that Six took an active part in the murder program of that organization. It is evident, however, that Six formed part of an organization engaged in atrocities, offenses, and inhumane acts against civilian populations." (*Einsatzgruppen* Judgement, p. 526). Even discounting the fact that knowledge was considered enough for criminal liability to attach in cases dealt with under Control Council Law No. 10, there is therefore precedent for conviction of a person who gave his contribution to a large-scale common criminal purpose, accepting the foreseeable consequence that crimes would be committed by others.
[901] *Rwamakuba* Appeal Decision, para. 25.
[902] Brđanin Response Brief, para. 18.
[903] *Vasiljević* Appeal Judgement, para. 100.
[904] Brđanin Response Brief, para. 22.

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the command responsibility doctrine (as established in U.S. Supreme Court case *Yamashita*)[905] is unsubstantiated and misplaced.

425. Further, the Appeals Chamber finds misplaced Brđanin's argument that the jurisprudence of the Tribunal regarding JCE only concerns single municipalities such as Srebrenica, Prijedor, and Bosanski Šamac.[906] It is true that in several cases of the Tribunal, the mode of liability of JCE was applied to relatively small-sized cases. However, that depended, and the decisions in question did not state otherwise, on the size of the cases themselves and not on the existence of a legal requirement that JCE apply only to small-scale cases. In view of the foregoing, the Appeals Chamber agrees with the Prosecution that the Trial Chamber erred in concluding that the mode of liability of JCE is not appropriate for cases as large as the one at hand.

5. Conclusion

426. The Appeals Chamber is aware that both Brđanin and the ADC have raised concerns regarding the limits of liability under the joint criminal enterprise doctrine.[907] However, the Appeals Chamber is of the view that this doctrine as it stands provides sufficient safeguards against overreaching or lapsing into guilt by association.

427. Although *Tadić* and subsequent Trial and Appeal Judgements make it clear that, to be held responsible for a crime committed pursuant to a JCE, the accused need not have performed any part of the *actus reus* of the perpetrated crime,[908] they also clearly require that the accused have participated in furthering the common purpose at the core of the JCE. The Appeals Chamber considers that not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question,[909] and that the pleading practice of the Prosecution, at least in cases where the Appeals Chamber has had an opportunity to rule on the judgement, has followed this principle.

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[905] Brđanin Response Brief, paras 37 and 40.
[906] Brđanin Response Brief, para. 35.
[907] Brđanin Response Brief, para. 4; Amicus Brief, paras 49-52.
[908] *Kvočka et al.* Appeal Judgement, para. 99 ("A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met."); *Vasiljević* Appeal Judgement, paras 100, 119; *Tadić* Appeal Judgement, paras 196, 227.
[909] *Tadić* Appeal Judgement, para. 192 (considering that it would be wrong to disregard the role of "all those who in some way made it possible" to commit a crime); *Kvočka* Trial Judgement, para. 311 in light of the discussion in *Kvočka* Appeal Judgement, paras 95-98. *See also* the language and examples in *Tadić* Appeal Judgement, para. 191 and in *Vasiljević* Appeal Judgement, para. 119. This was also the view expressed in the case *Trial of Feurstein and others*, by the Judge Advocate who stated that, in order to be found responsible, an accused "must be the cog in the wheel of events leading up to the result which in fact occurred." Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the Tribunal's Library), p. 7.

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428. The Appeals Chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt. In light of the concerns raised by the ADC about the scope of JCE, the Appeals Chamber briefly reiterates these elements here.

429. To begin with, as explained above, the accused must possess the requisite intent.[910] Moreover, a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence.

430. The other requirements for a conviction under the JCE doctrine are no less stringent. A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.[911] Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise;[912] and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial,[913] it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[914]

431. Where all these requirements for JCE liability are met beyond a reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in

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[910] *See supra*, paras 365 and 411.
[911] *See Tadić* Appeal Judgement, para. 227.
[912] *Stakić* Appeal Judgement, para. 69.
[913] *Kvočka et al.* Appeal Judgement, paras 97-98.
[914] *See supra*, para. 427. Moreover, "[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." *Kvočka et al.* Appeal Judgement, para. 97.

customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.[915]

432. The Appeals Chamber recognizes that, in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. However, the Appeals Chamber recalls that any such disparity is adequately dealt with at the sentencing stage.

E. Impact of the Appeals Chamber's Findings

1. Introduction

433. The Prosecution states that, since it is not challenging the Trial Chamber's finding that it did not plead a JCE between Brđanin and the police, armed Serb civilians, and unidentified individuals, Ground 2 has no effect on Brđanin's convictions for aiding and abetting the crimes committed by those perpetrators.[916] Rather, the Prosecution submits that this ground of appeal – if granted – will only concern the JCE between Brđanin and the members of the army and Serb paramilitary forces who carried out crimes, and whom the Trial Chamber identified as "Relevant Physical Perpetrators".[917]

434. The Prosecution maintains that, had the Trial Chamber correctly applied the doctrine of JCE, Brđanin would have been held guilty as a co-perpetrator, via the first category of JCE, for the crimes of deportation, forcible transfer, and persecution (Counts 8, 9 and 3 respectively) committed by the Relevant Physical Perpetrators.[918] Additionally, Brđanin would have been found guilty as a co-perpetrator, via the third category of JCE, for other acts of persecution (Count 3), namely: wilful

[915] *See supra*, paras 410-414.
[916] Prosecution Appeal Brief, para. 4.42.
[917] Prosecution Appeal Brief, para. 4.42, referring to Trial Judgement, para. 347; Prosecution's Response to Appeal Chamber's Questions on JCE, 13 November 2006 ("Prosecution Response on JCE"), para. 2.
[918] Prosecution Appeal Brief, para. 4.43; Prosecution Response on JCE, paras 28-30.

killing (Count 5), torture (Count 7), wanton destruction (Count 11), and destruction of religious institutions (Count 12), all of which were committed by the Relevant Physical Perpetrators.[919]

2. Arguments of the parties

435. In its Order to the Prosecution of 27 October 2006, the Appeals Chamber asked the Prosecution for a written response to the following question:

> If the Prosecution's Second Ground of Appeal was to be granted and Brđanin's responsibility was then to be analysed pursuant to JCE, would the elements of JCE be fulfilled, taking into account the agreement *inter partes* at trial and based on the trial record? If so, and referring to the findings of the Trial Chamber in the Judgement as well as trial record, how would the elements of JCE be met, and according to which form(s) of JCE would Brđanin be responsible for the crimes alleged in the indictment?[920]

436. The "agreement *inter partes*" is a reference to the understanding at trial, mentioned above, that the JCE *in the present case* must include the principal perpetrators and that the parties proceeded to argue their respective cases on this basis.[921] Thus, the Prosecution does not seek a reversal of the Trial Judgement or a revision of the sentence with regard to Ground 1 as it does under Ground 2.

437. On 13 November 2006, the Prosecution filed its Response to the order ("Prosecution Response on JCE"), clarifying its position with respect to JCE in general, and its Ground 2 in particular. The Prosecution submitted that all of the elements of JCE liability are met pursuant to the findings and the evidence considered by the Trial Chamber. For the purposes of this analysis, the Appeals Chamber will not summarize the submissions of the Prosecution with respect to the "plurality of persons", the "common plan, design, or purpose", or the "contribution" requirements of JCE liability, as they are mostly repetitive of previous filings.

438. With regard to Ground 2, pursuant to which the Prosecution seeks reversal of the Trial Chamber's findings, the Prosecution submits that the Trial Chamber's requirement that there be a "one-to-one/direct agreement among JCE members" is wrong in law. As no such agreement is required, the Prosecution avers that the "common purpose" element of JCE is satisfied by the Trial Chamber's finding that Brđanin and the Relevant Physical Perpetrators adopted or espoused the same purpose (the Strategic Plan) and that they worked together in order to implement it.

439. The Prosecution cited several excerpts from the Trial Judgement to show that the Strategic Plan was common to Brđanin and to the so-called Relevant Physical Perpetrators ("RPPs"). This is

[919] Prosecution Appeal Brief, para. 4.43; Prosecution Response on JCE, paras 31-37.
[920] Order to the Prosecution, 27 October 2006, pp. 2-3 (internal footnote omitted).
[921] Trial Judgement, fn. 885; Prosecution Appeal Brief, para. 3.3. *See supra*, para. 361.

a necessary condition for JCE liability to attach to Brđanin in this case since the parties agreed that no reversal of the findings would be sought on the basis that persons outside the JCE carried out the *actus reus* of the crimes with which Brđanin is charged.

440. According to some of the excerpts, for example, "implementation of the common purpose led to the widespread commission of crimes"; crimes "were committed with the aim of implementing the Strategic Plan"; and crimes "occurred as a direct result of the over-arching Strategic Plan".[922] Moreover, according to the Prosecution, the evidence shows that the RPPs knew that the criminal purpose was to remove the non-Serbs from the territory of the ARK.[923] The nature of the RPPs' crimes is evidence that they adopted a discriminatory criminal plan.[924]

441. The Prosecution also relies on other portions of the Trial Judgement to show that not only did Brđanin and the RPPs adopt the *same* criminal purpose, but that they acted together in furtherance of a plan which thus became common. First, the Prosecution argues that the nature of a large and comprehensive plan can only be explained through coordinated cooperation.[925] Second, according to the Prosecution, the RPPs knew that Brđanin was participating together with them in this large coordinated criminal plan.[926] Third, Brđanin allegedly knew that the RPPs were committing the crimes in order to carry out the criminal plan.[927] Thus, the Prosecution contends that the only reasonable conclusion is that Brđanin, knowingly relying on the RPPs, contributed to the common plan in concert with them.[928]

442. The Prosecution also submits that Brđanin and the RPPs shared the intent for persecution, deportation, and forcible transfer – thus fulfilling the requirements of the first category of JCE for these three crimes.[929] Moreover, according to the Prosecution, the requirements for the third category of JCE are satisfied for the other crimes charged in the Indictment, including killings (both during the attacks and in the camps), torture, wanton destruction, destruction of religious institutions, and a range of persecutory acts.[930]

443. Brđanin did not make any written submissions on the matter. At the Appeal Hearing, he mainly reiterated arguments that had been expressed earlier. He also asserted that, since the Trial Chamber expressly stated that the crimes in the territory of the ARK "were *mostly* perpetrated with

[922] *See* Prosecution Response on JCE, para. 12. The Appeals Chamber cites only the most relevant excerpts, but has considered all of the passages submitted by the Prosecution.
[923] Prosecution Response on JCE, paras 14-15, 17.
[924] Prosecution Response on JCE, para. 16.
[925] Prosecution Response on JCE, para. 20; AT. 7 December 2006, p. 125.
[926] Prosecution Response on JCE, para. 21.
[927] Prosecution Response on JCE, para. 22.
[928] Prosecution Response on JCE, paras 23-25; AT. 7 December 2006, pp. 126-127.
[929] Prosecution Response on JCE, paras 28-30.

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a view to implement the Strategic Plan",[931] it could not find beyond reasonable doubt that the RPPs shared the common purpose of the JCE.[932]

3. Discussion

444. At the outset, the Appeals Chamber notes that the Prosecution, in presenting its arguments responding to the hypothetical question posed, appears to have modified its previous stance on two of the requirements of JCE liability applicable to the circumstances of this case. The first is a relatively minor elaboration on the concept of common criminal purpose, based on the recent *Krajišnik* Trial Judgement.[933]

445. The second is the more important assumption underlying the entire Prosecution Response on JCE that all of the Relevant Physical Perpetrators to which the Trial Judgement refers are members of a JCE which also includes Brđanin. This assumption contradicts the approach taken by the Prosecution in its Appeal Brief. There, the Prosecution had stated that "[t]o require the Prosecution to prove that the actors on the ground 'shared the intent' of the JCE leaders would make it difficult if not impossible to ever convict a senior leader of 'committing' persecution, since the only way of proving that the on-the-ground actor acted with the requisite intent would be to identify each individual actor and put on proof of his intent."[934] As mentioned above, this reasoning is the basis for the Prosecution's contention in Ground 1 of its Appeal that, in order to convict a member of the JCE, it is sufficient that another member uses one or more principal perpetrators as tools to commit a crime.[935] In the Prosecution Response on JCE, however, the Prosecution does not "identify each individual [on-the-ground] actor and put on proof of his intent." Instead, it merely asserts that the JCE encompasses the vast category of (unnamed) Relevant Physical Perpetrators. A coherent application of such a notion could make each one of the RPPs, as members of the JCE, responsible for each one of the crimes that the Trial Chamber found were committed throughout the territory of the ARK during the Indictment period.

446. The Appeals Chamber finds that the conclusions of the Trial Judgement cited in the Prosecution Response on JCE do not show that the Trial Chamber found beyond reasonable doubt

[930] Prosecution Response on JCE, paras 31-37.
[931] Trial Judgement, para. 159; *see also* fn. 882 and para. 350.
[932] AT. 7 December 2006, pp. 97-101.
[933] Prosecution Response on JCE, para. 10.
[934] Prosecution Appeal Brief, para. 3.48; *see also* AT. 7 December 2006, pp. 77-78.
[935] *See*, for example, Prosecution Appeal Brief, para. 3.49.

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that each of the RPPs was a member of the same JCE as Brđanin, the pre-requisite to find Brđanin responsible under JCE in this case under the understanding *inter partes*.[936]

447. The Trial Chamber found that "[o]n the basis of the pattern of conduct by which [the] crimes were committed throughout the Bosnian Krajina, the Trial Chamber is satisfied that they were *mostly* perpetrated with a view to implement the Strategic Plan"[937] and that Brđanin "and *many* of the Relevant Physical Perpetrators espoused the Strategic Plan and acted towards its implementation."[938] These findings, one related to the general requirements for Article 5 and the other specifically dealing with JCE, and which summarize other findings made elsewhere in the Trial Judgement, do not show that the Trial Chamber was satisfied that *all* of the crimes committed in the territory of the ARK were committed by the RPPs in furtherance of the Strategic Plan. Also, the Trial Chamber was not able to specify *which* of these crimes had been committed in furtherance of the Strategic Plan, and which ones had not.

448. Significantly, the Prosecution has failed to address in a persuasive manner the concerns expressed by the Trial Chamber (albeit with a wording that suited the erroneous concept of JCE as requiring an additional agreement) that, based on the evidence led at trial, other reasonable inferences could be drawn by a trier of fact. Other inferences include, for example, that Brđanin and some RPPs might have shared a motive in furthering the commission of the same crime but were not members of the same JCE, or that the RPPs committed the crimes in question pursuant to orders and instructions received from their superiors, without themselves actually being members of the same JCE as Brđanin.[939] From a reading of the Prosecution Appeal Brief, it appears that the fact that the RPPs were used as mere "tools" by their superiors was, actually, the most likely explanation for what happened in the territory of the ARK during the indictment period.[940] This was also the underlying reason why the Prosecution asked the Appeals Chamber to clarify the law on this matter.[941]

449. There is no need to consider further whether Brđanin is responsible under JCE for the crimes alleged by the Prosecution, since the Appeals Chamber has found that the evidence considered in the Trial Judgement does not, in any event, allow finding beyond reasonable doubt that the RPPs were members of the same JCE as Brđanin. Such analysis is particularly unnecessary in light of the agreement of the parties on Ground 1 asking the Appeals Chamber not to enter new conviction(s) on the basis of the fact that the persons who carried out the *actus reus* of the crimes

[936] *See supra*, para. 361.
[937] Trial Judgement, para. 159 (emphasis added).
[938] Trial Judgement, para. 350 (emphasis added).
[939] Trial Judgement, para. 354.
[940] Prosecution Appeal Brief, para. 3.47-3.48.

need not be members of the JCE.[942] The arguments relating to the *mens rea* requirements for the first and third forms of JCE in relation to the crimes charged[943] are moot.

450. As a result of these conclusions, the Appeals Chamber will not consider Alleged Errors 2, 7, 12, 15, 17-21, 23, 26, 38, 42-47, 49-53, 56, 81, 123, S1-S5, and S7-S12.[944]

[941] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, para. 3.49.
[942] *See supra*, para. 361.
[943] Prosecution Appeal Brief, paras 4.47-4.59; Prosecution Response on JCE, paras 31-33; Brđanin Response Brief, para. 46; Prosecution Reply Brief, para. 4.14; Prosecution Appeal Brief, paras 4.60-4.70; Prosecution Response on JCE, paras 34-37; Brđanin Response Brief, paras 44-45; Prosecution Reply Brief, paras 4.16-4.21.
[944] *See supra*, para. 21.

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VII. PROSECUTION'S THIRD GROUND OF APPEAL: CHALLENGES RELATED TO AIDING AND ABETTING KILLINGS IN CAMPS AND DETENTION FACILITIES

A. Introduction

451. Count 5 of the Indictment charged Brđanin with wilful killing as a grave breach of the Geneva Conventions of 1949, punishable under Article 2(a) of the Statute.[945] Brđanin was convicted of aiding and abetting the wilful killing of 668 persons during armed attacks on towns, villages, and neighbourhoods. The Trial Chamber acquitted him of wilful killing that occurred in camps and detention facilities.[946] The Prosecution argues that the Trial Chamber should have found Brđanin guilty of the crime of wilful killing in camps and detention facilities for the same reasons for which it convicted Brđanin of torture in these camps and facilities.[947] The Prosecution also points to other findings of the Trial Chamber which, when taken in conjunction with the conviction for torture, would support a conviction for wilful killing in the camps.[948] Finally, it claims that the Trial Chamber erred in finding Brđanin not responsible for the murders committed by the Mićе paramilitary group in Teslić municipality.[949]

B. Responsibility for the killings in the camps and detention facilities

452. The Prosecution submits that the Trial Chamber could not have convicted Brđanin for torture in camps and detention facilities without also convicting him for wilful killing there.[950] The Trial Chamber found that Brđanin's inactivity and openly *laissez-faire* attitude towards the camps and detention facilities, coupled with his failure "to take a stand" against the events in the camps, had a substantial effect on the commission of torture, and, as a result, encouraged and supported the perpetrators of the crime.[951] The Prosecution asserts that this finding of fact equally applies to an assessment of Brđanin's *actus reus* for the crime of aiding and abetting wilful killing in camps and detention facilities.[952] It stresses that no distinction can be drawn between mistreatment resulting in torture and mistreatment resulting in death, since some detainees died as a result of the torture they

[945] Indictment, paras 49-52.
[946] Trial Judgement, paras 471-472, 476. The Prosecution points out that the term "killings in camps and detention facilities" includes killings that occurred during the removal or transport of detainees from such facilities (Prosecution Appeal Brief, para. 5.1, fn. 165), that amounted to "at least 700 additional killings" (Prosecution Appeal Brief, para. 5.1).
[947] Trial Judgement, para. 537.
[948] Prosecution Appeal Brief, paras 5.6, 5.31, 5.40.
[949] Prosecution Appeal Brief, para. 5.5.
[950] Prosecution Appeal Brief, paras 5.3, 5.18.
[951] Prosecution Appeal Brief, paras 5.2-5.3; Trial Judgement, para. 537. The Prosecution (Prosecution Appeal Brief, para. 5.17) also refers to Trial Judgement, para. 1058.
[952] Prosecution Appeal Brief, paras 5.10-5.11; 5.13.

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suffered in the camps and detention facilities.[953] It further notes that the perpetrators of the torture were the same as the perpetrators of the killings.[954] Finally, the Prosecution claims that other findings of the Trial Chamber regarding Brđanin's role in the implementation of the Strategic Plan also demonstrate that Brđanin made a substantial contribution as an aider and abettor to the killings in the camps and detention facilities.[955]

453. Regarding Brđanin's awareness of the killings in the camps and detention facilities, the Prosecution claims that he knew of killings in the same way as he knew of torture in camps and detention facilities.[956] The Prosecution also points to other findings of the Trial Chamber, not related to the Trial Chamber's finding on torture in the camps and detention facilities, which would show that Brđanin was aware of the killings in the camps and detention facilities.[957] Moreover, the Prosecution avers that, according to the findings of the Trial Chamber, Brđanin knew his acts would assist the commission of the killings.[958]

454. Brđanin responds by arguing that it "does not follow at all" that he should be found responsible for the killings in camps and detention facilities on the same basis that he was found responsible for torture.[959] He submits that there is no evidence to conclude that he was aware of the acts of torture committed in the camps and detention facilities.[960] Moreover, Brđanin argues that the Trial Chamber erred in convicting him for aiding and abetting torture in the camps because there is not enough evidence to support that finding.[961] With respect to the other findings referred to by the Prosecution, Brđanin responds that the inference that his propaganda campaign substantially contributed to any killings is unfounded because there is no evidence that the perpetrators were aware of any of Brđanin's statements.[962]

455. The Appeals Chamber notes that the Prosecution's argument that Brđanin should be convicted for the killings in the camps and detention facilities relies on the Trial Chamber's reasoning for convicting Brđanin for aiding and abetting torture in camps and detention facilities.[963] Considering the fact that the Appeals Chamber has concluded that the Trial Chamber erred in

[953] Prosecution Appeal Brief, para. 5.15.
[954] Prosecution Appeal Brief, paras 5.13, 5.15.
[955] Prosecution Appeal Brief, paras 5.34-5.37.
[956] Prosecution Response Brief, paras 5.19-5.29.
[957] Prosecution Response Brief, paras 5.38-5.40.
[958] Prosecution Appeal Brief, paras 5.41, 5.43.
[959] Brđanin Response Brief, para. 47.
[960] Brđanin Response Brief, para. 59. Brđanin also refers to his Appeal Brief, in which he appeals his conviction for aiding and abetting torture (para. 51).
[961] Brđanin Response Brief, paras 47, 59-67.
[962] Brđanin Response Brief, paras 83-93.
[963] Prosecution Appeal Brief, paras 5.3, 5.17.

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finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities, the Prosecution's argument cannot succeed.

456. The Prosecution also argues that there are other findings in the Trial Judgement as well as additional evidence led at trial, which, when read in conjunction with the findings on the conviction for torture in the camps and detention facilities, support the conclusion that Brđanin substantially contributed to and was aware of the killings in the camps and detention facilities.[964] Thus, despite some language possibly suggesting a different view in certain specific areas,[965] the Appeals Chamber notes that the Prosecution does not argue that those other findings and additional evidence *alone* would support Brđanin's conviction for aiding and abetting killings in the camps and detention facilities. Rather, the Prosecution argues that those other findings and additional evidence *in conjunction with* the Trial Chamber's findings regarding torture in the camps and detention facilities demonstrate Brđanin's criminal responsibility for aiding and abetting killings in the camps and detention facilities. As the Appeals Chamber has overturned Brđanin's conviction for aiding and abetting torture in camps and detention facilities, this argument of the Prosecution fails.

457. For the foregoing reasons, and considering the discussion under torture, above, the Appeals Chamber rejects this part of the Prosecution's third ground of appeal.

C. Responsibility for aiding and abetting the killings by one specific paramilitary group

458. The Prosecution submits that the Trial Chamber should have found Brđanin guilty of aiding and abetting the killings in Teslić municipality because the ARK authorities were informed by Teslić authorities of the crimes committed by the Mićе paramilitary group.[966] These authorities requested and received assistance from Brđanin and others in arresting members of the Mićе paramilitary group after they committed the killings.[967] In particular, the Prosecution highlights that the Trial Chamber stated in a footnote that it was "not satisfied that the evidence establishes beyond reasonable doubt that [Brđanin] knew that people were killed inside these camps and detention facilities *except those relating to Teslić Municipality committed by the Mićе group*".[968] Furthermore, the Prosecution relies on its earlier arguments regarding the sufficiency of Brđanin's *mens rea* for killings committed in camps and detention facilities in asserting that Brđanin also had adequate *mens rea* to be convicted for the killings in Teslić municipality.[969]

[964] Prosecution Appeal Brief, paras 5.6, 5.31, 5.40. Prosecution Reply Brief, paras 5.13.
[965] *See*, for example, Prosecution Appeal Brief, para. 5.38.
[966] Prosecution Appeal Brief, para. 5.45.
[967] Prosecution Appeal Brief, para. 5.46.
[968] Trial Judgement, para. 537, fn. 1373 (emphasis added).
[969] Prosecution Appeal Brief, para. 5.47.

459. Brđanin responds by recalling that the murders in Teslić were committed by people beyond Brđanin's control, some of which were eventually arrested with Brđanin's support.[970] Specifically, Brđanin stresses that the Miće paramilitaries, who were responsible for the killings, originated outside of the ARK, took over complete power in Teslić, and acted without ARK approval or support.[971] Moreover, Brđanin contends that he was supportive of the need to arrest the Miće paramilitary group and to hold them responsible for their crimes.[972]

460. The Trial Chamber found that the Miće paramilitary group was a Serbian group who had terrorised non-Serbs in Teslić municipality. Their eventual arrest was arranged in part by Brđanin.[973] The Trial Chamber also found that the guards at the TO warehouse were Bosnian Serb policemen and members of the Miće paramilitary group and that many of the detainees were called out and subsequently killed. It went on to establish that 40 Bosnian Muslim and Bosnian Croat civilians were killed by members of the Miće paramilitary group.[974] In a footnote, the Trial Chamber finally found that Brđanin was aware of the killings committed in Teslić municipality. However, it held that this awareness was not enough, in the circumstances of the case, to render him responsible for aiding and abetting those killings.[975]

461. The Appeals Chamber rejects the Prosecution's claim that the Trial Chamber should have found Brđanin guilty of aiding and abetting the killings in Teslić municipality committed by the Miće paramilitary group. The Appeals Chamber acknowledges that the Trial Chamber's statement in the footnote referred to by the Prosecution *could* mean that the Trial Chamber concluded that Brđanin knew that people were killed by the Miće paramilitary group in Teslić Municipality.[976] However, this statement is ambiguous and may imply that he only knew of this incident after the fact, when he decided to provide his assistance in the arrest of the Miće group.[977] The content of the relevant footnote does at least not contradict the conclusion that Brđanin was not aware of the killings before they occurred. Furthermore, the statement hinting at Brđanin's awareness of the killings in Teslić appears in a footnote concerning Brđanin's responsibility for torture (not killings), is unreasoned, and makes no reference to any evidence.

462. Moreover, the Prosecution does not point to any evidence that Brđanin assisted the Miće paramilitary group in the killings or otherwise aided and abetted those killings. The Appeals

[970] Brđanin Response Brief, paras 52-57.
[971] Brđanin Response Brief, paras 53-55.
[972] Brđanin Response Brief, paras 56-57.
[973] Trial Judgement, para. 1125.
[974] Trial Judgement, para. 463.
[975] Trial Judgement, para. 536, fn. 1373.
[976] Trial Judgement, para. 536, fn. 1373.
[977] Trial Judgement, para. 1125.

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Chamber notes that Brđanin's conviction for torture in the camps and detention facilities is limited to those at the SUP building committed by the police in Teslić and does not include the torture at the TO warehouse building.[978] This could indicate that the Trial Chamber was not convinced that Brđanin's acts fulfil the necessary *actus reus* for aiding and abetting the crimes at the TO warehouse building – either for the crime of torture or wilful killings. In any case, it was for the Prosecution to prove beyond reasonable doubt that Brđanin assisted in the crime of wilful killings committed by the Miće paramilitary group at the TO warehouse building, and that he substantially contributed to those crimes. The Appeals Chamber finds that a reasonable trier of fact could conclude that the Prosecution had failed to do so.

463. The Appeals Chamber concludes that the Prosecution has failed to show that no reasonable trier of fact could have reached the verdict of acquittal with regard to Brđanin's responsibility for aiding and abetting the killings perpetrated by the Miće group in Teslić municipality. This part of the Prosecution's third ground of appeal is accordingly dismissed.

D. Conclusion

464. The Prosecution has not demonstrated that the Trial Chamber should have convicted Brđanin for the killings that occurred in the camps and detention facilities, nor for the killings committed by members of the Miće paramilitary group. For these reasons, the Appeals Chamber dismisses the Prosecution's third ground of appeal.

[978] Trial Judgement, paras 519, 538.

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VIII. PROSECUTION'S FOURTH GROUND OF APPEAL: CHALLENGES RELATED TO EXTERMINATION

A. Introduction

465. The Trial Chamber was satisfied that the killings of 1669 people by Bosnian Serb forces in the territory of the ARK fulfilled the element of massiveness for the crime of extermination.[979] The Trial Chamber did not distinguish between killings occurring in different locations, and instead appeared to refer to the territory of the ARK in general. However, the Trial Chamber was not satisfied beyond reasonable doubt that the Strategic Plan required the commission of extermination.[980] Moreover, it found that the evidence at trial could not establish that Brđanin aided and abetted extermination.[981]

466. The Prosecution submits that the Trial Chamber should have found Brđanin responsible for aiding and abetting the crime of extermination.[982] The Prosecution argues that the Trial Chamber erred in its analysis of the crime of extermination in the territory of the ARK,[983] and further claims that Brđanin aided and abetted this crime and had the requisite *mens rea*.[984]

B. The finding that extermination occurred in the territory of the ARK

467. The Prosecution submits that the only difference between wilful killing and extermination is the element of massiveness.[985] Furthermore, the Prosecution argues that the Trial Chamber's findings show that the *actus reus* of the crime of extermination was established in the territory of the ARK because the Trial Chamber expressly held that the number of killings committed meets the required threshold for massiveness in respect to extermination.[986] The Prosecution points out that this conclusion was based on the finding that the killing of 1669 persons occurred in the territory of the ARK, both during the attacks as well as in the camps and detention facilities.[987] Regarding the *mens rea* of the physical perpetrators, the Prosecution argues that the Trial Chamber's conclusion

[979] Trial Judgement, para. 465.
[980] Trial Judgement, para. 477.
[981] Trial Judgement, paras 478-479.
[982] Prosecution Appeal Brief, para. 6.1.
[983] Prosecution Appeal Brief, paras 6.1, 6.8-6.17. The Prosecution argues that the Trial Chamber erred in concluding that the crimes envisaged in the implementation of the Strategic Plan did not include the crime of extermination (Prosecution Appeal Brief, paras 6.18-6.19).
[984] Prosecution Appeal Brief, paras 6.1, 6.18-6.35.
[985] AT. 7 December 2006, p. 80.
[986] Prosecution Appeal Brief, paras 6.4, 6.9-6.10.
[987] Prosecution Appeal Brief, para. 6.10.

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that extermination was committed in the territory of the ARK is an implicit finding that killings were intended to be carried out on a massive scale.[988]

468. In the alternative, the Prosecution argues that, regardless of whether the Appeals Chamber agrees that the Trial Chamber made a finding on the *mens rea* of the physical perpetrators, the evidence demonstrates that this requirement is met for certain large-scale killings.[989] The specific large-scale incidents which the Prosecution submits individually constitute extermination were: the killing of approximately 140 people in Kozarac; the killing of approximately 300 people in Bišćani; the killing of approximately 68 people in Briševo; the killing of at least 190 men in Room 3 at Keraterm Camp; and the killing of approximately 200 men at Mount Vlasić in Skender Vakuf municipality.[990]

469. The Prosecution also recalls that the Trial Chamber in the *Stakić* Trial Judgement held that the massacres in Room 3 of the Keraterm camp, at Mount Vlasić, and the attack on the village of Briševo in Prijedor Municipality each independently met the required level of massiveness to amount to extermination.[991] The Prosecution further argues that each of the physical perpetrators in this case contributed to the exterminations that occurred in the villages of Kozarac, Bišćani, and Briševo, in Room 3 of the Keraterm Camp, and at Mount Vlasić.[992]

470. Brđanin claims that the Trial Chamber's finding that the Prosecution has failed to prove the crime of extermination beyond a reasonable doubt is correct and deserves deference.[993] He argues further that the Prosecution's assertion that he knew that killings would probably be perpetrated on a massive scale is "wholly illogical",[994] although he does acknowledge that the Trial Chamber found that the killings which took place did fulfil the element of massiveness for the crime of extermination.[995]

1. Massiveness of killings for the purpose of extermination

471. As there is no numerical threshold established with respect to the *actus reus* of extermination,[996] the Appeals Chamber sees no reason to disturb the Trial Chamber's conclusion that the killing of 1669 people by Bosnian Serb forces in the territory of the ARK fulfilled the

[988] Prosecution Appeal Brief, para. 6.11.
[989] Prosecution Appeal Brief, para. 6.12.
[990] Prosecution Appeal Brief, para. 6.13. *See* Prosecution Appeal Brief, paras 6.13-6.17 generally.
[991] Prosecution Appeal Brief, para. 6.16. The Appeals Chamber notes that Brđanin is charged with aiding and abetting the killings in each of these incidents.
[992] Prosecution Appeal Brief, para. 6.17.
[993] Brđanin Response Brief, paras 103-104.
[994] Brđanin Response Brief, para. 107; *see also* the arguments on matters of fact at AT. 7 December 2006, pp. 95-97.
[995] AT. 7 December 2006, p. 94.
[996] *Stakić* Appeal Judgement, para. 260, citing *Ntakirutimana* Appeal Judgement, para. 516.

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element of massiveness for the crime of extermination, particularly in the circumstances of this case.

472. Since the parties do not challenge the Trial Chamber's decision to consider all of the killings in the territory of the ARK as a whole rather than to distinguish them by location and incident, the Appeals Chamber need not consider this issue. Suffice it to say that, with respect to those specific incidents cited by the Prosecution which involved the killing of between 68 and 300 people in each of the five locations,[997] the Appeals Chamber is satisfied that the *actus reus* of the crime of extermination was made out. The Appeals Chamber considers that the scale of the killings, in light of the circumstances in which they occurred, meets the required threshold of massiveness for the purposes of extermination.

473. The Trial Chamber did not err in concluding that killings in the territory of the ARK were sufficiently massive to satisfy the *actus reus* of the crime of extermination.

2. The *mens rea* of the principal perpetrators

(a) The Trial Chamber's finding

474. The Prosecution claims that the Trial Chamber implicitly identified the requisite *mens rea* of the principal perpetrators because the Trial Chamber concluded that extermination was committed in the territory of the ARK.[998] This latter finding of the Trial Chamber was not contested by Brđanin beyond his submission that the Prosecution's assertion "has absolutely no evidentiary support."[999]

475. In its conclusion on the killings committed in the ARK during the time relevant of the Indictment, the Trial Chamber held the following:

> In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgement, at least 1669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants. The Trial Chamber is further satisfied that these killings fulfil the element of massiveness for the crime of extermination. It is also proven that the direct perpetrators had an intention to kill or to inflict serious injury, in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim.[1000]

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[997] Prosecution Appeal Brief, paras 6.12-6.13, 6.17, 6.30-6.31. The five locations are: Kozarac (the killing of approximately 140 people); Bišćani (the killing of approximately 300 people); Briševo (the killing of approximately 68 people); Room 3 at Keraterm Camp (the killing of at least 190 men); and Mount Vlasić in Skender Vakuf municipality (the killing of approximately 200 men).
[998] Prosecution Appeal Brief, para. 6.11.
[999] Brđanin Response Brief, para. 114.
[1000] Trial Judgement, para. 465.

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When considering Brđanin's criminal responsibility, the Trial Chamber went on to conclude that "[t]he Trial Chamber has previously found that the crime of extermination was committed in the ARK during the time relevant to the Indictment."[1001]

476. The Appeals Chamber does not agree with the Prosecution that the holding of the Trial Chamber that extermination was committed in the ARK is an implicit finding that the principal perpetrators had the requisite *mens rea*. The Trial Chamber correctly stated the *mens rea* required for extermination when recalling the law on the crime of extermination.[1002] However, it did not make any finding of fact that the *mens rea* of the principal perpetrators had been established; it limited itself to hold that "extermination was committed in the ARK during the time relevant to the Indictment."[1003] This conclusion is not based on a finding, let alone a discussion of the Trial Chamber as to whether the principal perpetrators had the *mens rea* for extermination.[1004]

477. The Appeals Chamber also notes that the Trial Chamber's finding regarding the element of massiveness of the crime of extermination is followed by a finding that it had been proven that "the direct perpetrators had an intention to kill or to inflict serious injury, in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim".[1005] This finding does not relate to the *mens rea* required for extermination, which is the intent to kill on a massive scale, but only to the *mens rea* of wilful killing.[1006] It therefore appears that the Trial Chamber, though referring to the "crime of extermination" in paragraphs 465 and 477, actually intended to state that the *actus reus* of extermination had been made out.

478. For the foregoing reasons, the Appeals Chamber rejects the Prosecution's claim that the Trial Judgement found that the *mens rea* for the principal perpetrators of the crime of extermination in the territory of the ARK had been established by the Trial Chamber.

(b) The *mens rea* of the principal perpetrators in relation to large-scale killings

479. The Prosecution has argued that, should the Appeals Chamber disagree that the Trial Chamber found the necessary *mens rea* for extermination in the ARK, there is evidence at trial that demonstrates that the *mens rea* requirement for extermination was established for the large-scale killings occurring at five specific locations: Kozarac (the killing of approximately 140 people);

[1001] Trial Judgement, para. 477. The Trial Chamber rejected Brđanin's responsibility, *inter alia*, on the grounds that he did not have the requisite *mens rea* for aiding and abetting, *see* Trial Judgement, para. 478.
[1002] Trial Judgement, para. 395.
[1003] Trial Judgement, para. 477.
[1004] The only reference in the Trial Judgement to the *mens rea* required for extermination is the Trial Chamber's conclusion that it was not satisfied that Brđanin knew that the members of the Bosnian Serb forces intended to commit killings on a massive scale such as to amount to the crime of extermination (Trial Judgement, para. 478).
[1005] Trial Judgement, para. 465.

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Bišćani (the killing of approximately 300 people); Briševo (the killing of approximately 68 people); Room 3 at Keraterm Camp (the killing of at least 190 men); and Mount Vlasić in Skender Vakuf municipality (the killing of approximately 200 men). [1007]

480. The Appeals Chamber has already found that these large-scale killings, considering the circumstances in which they occurred, satisfy the massiveness requirement for the crime of extermination.[1008] Regarding each of these five incidents, and considering its decision of taking into account the killings in the ARK as a whole, the Trial Chamber made no finding that the *mens rea* of the principal perpetrators of extermination was established.[1009] The burden is on the Prosecution to point to the evidence proving beyond reasonable doubt that the principal perpetrators had the necessary *mens rea* for extermination with regard to each of these five incidents.[1010]

481. The Prosecution, however, has not done so. It does not point to any evidence in this regard, but merely claims that "extermination was intentionally committed by the physical perpetrators".[1011] In a footnote, the Prosecution emphasizes that extermination was committed in these five locations by the various individual perpetrators "as a group". Thus, each participant would hypothetically have been liable for the entire relevant "killing incident" under the first form of joint criminal enterprise.[1012] The Prosecution infers from this that the participants acted with a shared intent to commit large-scale killings, even though no one individual committed sufficient murders to be individually responsible for extermination.[1013] However, the Trial Chamber did not find that the principal perpetrators of these particular large-scale killings were acting with the intent of furthering a common plan to exterminate non-Serbs in the ARK.[1014]

482. The Prosecution argues that "the evidence shows that the multiple physical perpetrators of each of these killing incidents acted with the common purpose and shared the intent to commit

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[1006] *Stakić* Appeal Judgement, para. 259; *Ntakirutimana* Appeal Judgement, para. 522.
[1007] Prosecution Appeal Brief, paras 6.12-6.13, 6.17, 6.30-6.31. Some of the findings related to these locations are challenged by Brđanin. *See* Alleged Errors 63 (Kozarac area), 67-69 (Bišćani), 80 (Room 3 at Keraterm camp); Brđanin Appeal Brief, paras 237-243.
[1008] *See supra*, paras 471-473.
[1009] *See* the Trial Chamber's findings with respect to the killing of approximately 140 people in Kozarac (Trial Judgement, paras 402-404); the killing of approximately 300 people in Bišćani (Trial Judgement, paras 407-409); the killing of approximately 68 people in Briševo (Trial Judgement, paras 411-412); the killing of at least 190 men in Room 3 at Keraterm Camp (Trial Judgement, paras 455-456); the killing of approximately 200 men at Mount Vlasić in Skender Vakuf municipality (Trial Judgement, paras 457-460).
[1010] *See supra*, para. 14.
[1011] Prosecution Appeal Brief, para. 6.17.
[1012] Prosecution Appeal Brief, fn. 268 (emphasis in original).
[1013] Prosecution Appeal Brief, fn. 268.
[1014] By contrast, the "Trial Chamber is satisfied that all individuals espousing the Strategic Plan had the requisite *mens rea* for at least the crimes charged in Count 8 (deportation) and Count 9 (forcible transfer), *i.e.*, they intended to wilfully participate in expulsions or other coercive conduct to forcibly deport one or more person to another State without grounds permitted under international law (deportation) and to force persons to leave their territory without ground permitted under international law (forcible transfer)", Trial Judgement, para. 350.

these large scale killings".[1015] Although this not a very precise assertion, the Appeals Chamber considers that the circumstances of some of the killings mentioned above do allow the conclusion beyond reasonable doubt that the principal perpetrators had the required *mens rea* for the crime of extermination. The circumstances of the killings as recounted by the Trial Chamber show that the principal perpetrators could not have been unaware of the massiveness of the killings in at least two cases (the 190 detained persons in Room 3 of the Keraterm camp[1016] and the 200 men at Koričanske Stijene[1017]). Considering the circumstances of these cases, and in particular the time-frame of the killings, the selection of the victims, as well as the manner in which the victims were targeted, the principal perpetrators of the single killings must have intended to contribute to the result of killings on a massive scale. The requisite *mens rea* – the intent to kill on a large scale – is accordingly established beyond reasonable doubt. The Appeals Chamber cannot exclude that a trier of fact, hearing the whole of the evidence, could come to the same conclusion even in cases where a smaller number of people were killed.

(c) Conclusion

483. The Appeals Chamber rejects the Prosecution's claim that the Trial Judgement found that the *mens rea* for the principal perpetrators of extermination had been established. However, the Prosecution has shown that no reasonable trier of fact could have failed to reach the conclusion that the principal perpetrators of the large-scale killings occurring at four of the locations identified by the Prosecution, on the basis of the rest of the Trial Chamber's findings, had the requisite *mens rea* for the crime of extermination.

C. *Mens rea* for aiding and abetting extermination

484. The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider an abettor assist in the commission of the specific crime of the principal.[1018] The aider and abettor must be aware of the essential elements of the crime which was ultimately committed by the principal.[1019]

[1015] Prosecution Appeal Brief, fn. 268.
[1016] Trial Judgement, paras 455-456.
[1017] Trial Judgement, paras 457-460.
[1018] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 45; *Ntagerura et al.* Appeal Judgement, para. 370; *Simić* Appeal Judgement, para. 86.
[1019] *Aleksovski* Appeal Judgement, para. 162; *Simić* Appeal Judgement, para. 86.

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1. Brđanin's awareness that the principal perpetrators would commit extermination

485. The Prosecution submits that, contrary to the Trial Chamber's finding, it was unreasonable to conclude that Brđanin was unaware that the killings would be on a massive scale, since he knew that the attacks on the non-Serb towns would result in killings.[1020] Furthermore, the Prosecution argues that the Trial Chamber should have concluded that Brđanin knew that the perpetrators intended to commit killings on a massive scale from his knowledge of the forthcoming attacks, from his espousal of the Strategic Plan,[1021] and particularly because some of the individual attacks constituted extermination in and of themselves.[1022] The Prosecution also submits that Brđanin knew that extermination would probably occur, and that the perpetrators intended those large-scale killings[1023] because extermination was one of the crimes involved by the implementation of the Strategic Plan.[1024] The Prosecution also argues that since Brđanin knew of the high number of attacks and detention facilities, he also knew that killings on a massive scale would result.[1025]

486. Brđanin responds that there is no evidence that he knew that the physical perpetrators had the intent to kill on a massive scale.[1026] He also avers that it is "wholly illogical" to argue that his *ex post facto* knowledge of the attacks constitutes evidence that he knew that killings were likely to occur beforehand.[1027]

487. The aider and abettor's knowledge of the "essential elements" of the crime of extermination would have required that Brđanin be aware of both the large-scale killings and of the state of mind of the perpetrators of extermination.

488. As for Brđanin's knowledge of the principal perpetrators' acts, the Appeals Chamber clarifies that it is generally irrelevant whether Brđanin became aware of the large-scale killings before, during, or after their commission, as long as he knew that his acts assisted in the commission of the crime.[1028] In this case, however, the conduct Brđanin is alleged to have

[1020] Prosecution Appeal Brief, paras 6.28-6.29, referring to Trial Judgement, paras 473-474.
[1021] Prosecution Appeal Brief, para. 6.31.
[1022] Prosecution Appeal Brief, para. 6.30, referring specifically to the attacks on Kozarac, Bišćani and Briševo.
[1023] Prosecution Appeal Brief, para. 6.18. For the Prosecution, the number of killings committed during the armed attacks alone (which the Trial Chamber calculated to be 668) meets the massiveness threshold requirement for extermination (Prosecution Appeal Brief, paras 6.21-6.22), just as the number of killings that occurred in camps and detention facilities (which the Trial Chamber estimated to be at least 700) also meets the massiveness threshold required for extermination (Prosecution Appeal Brief, para. 6.23).
[1024] Prosecution Appeal Brief, para. 6.20.
[1025] Prosecution Appeal Brief, para. 6.21.
[1026] Brđanin Response Brief, paras 113-114. Brđanin does not directly address the Prosecution's argument regarding his awareness of the elements of the crime (Brđanin Response Brief, paras 108-112; Brđanin's response focuses rather on the nature of the disarmament decisions), except to assert that there is "absolutely no evidence" to show that Brđanin knew that the disarmament decisions would "spawn attacks and killings throughout the ARK", (Brđanin Response Brief, para. 108). *See also* Prosecution Reply Brief, paras 6.4, 6.8-6.9, 6.13.
[1027] Brđanin Response Brief, para. 107.
[1028] *Blaškić* Appeal Judgement, para. 48; *Ntagerura et al.* Appeal Judgement, para. 372.

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undertaken in rendering support to the perpetrators – issuing disarmament orders and diffusing propaganda – by definition preceded the commission of the alleged crime.

489. The Trial Chamber was not satisfied beyond reasonable doubt that the crimes that were intended to be perpetrated with a view to implementing the Strategic Plan in the ARK would necessarily include extermination.[1029] Also, the Trial Chamber was not satisfied that Brđanin knew that Bosnian Serb forces intended to commit killings on a massive scale such as to amount to extermination.[1030]

490. The Prosecution's argument that these findings are erroneous is an appeal to reason. It is based on the reasoning that, as Brđanin knew that killings would or may occur during the attacks, and that the attacks would be numerous, he therefore knew that large-scale killings (massive enough to amount to extermination) would also occur. While this argument is reasonable, it still does not meet the legal requirement of showing that the finding of the Trial Chamber was one which no reasonable trier of fact could have made.

491. The Appeals Chamber is not satisfied that the Trial Chamber erred in concluding that Brđanin was not aware that extermination would be committed in the territory of the ARK.

2. Brđanin's awareness that his acts assisted the commission of extermination

492. The Prosecution submits that the Trial Chamber erred in concluding that Brđanin was not aware that by issuing the ARK Crisis Staff decisions on disarmament, he would be assisting killings on a massive scale such as to amount to extermination.[1031] The Prosecution submits that Brđanin knew that the attacks, which he assisted through his disarmament decisions, would not result in small incidents but large scale killings.[1032]

493. Brđanin responds by supporting the Trial Chamber's finding that there was no evidence to establish beyond reasonable doubt that he was aware that, through the ARK Crisis Staff decisions on disarmament, he would be assisting the commission of killings on a massive scale.[1033] Moreover, he argues that, in order to establish his guilt, the Prosecution must demonstrate that the attacks occurred for the purposes of disarmament and, furthermore, that the attacks were based on Crisis Staff disarmament decisions and not the earlier decisions of Milorad Sajić and the CSB.[1034]

[1029] Trial Judgement, para. 477.
[1030] Trial Judgement, para. 478.
[1031] Prosecution Appeal Brief, para. 6.26.
[1032] Prosecution Appeal Brief, para. 6.29.
[1033] Brđanin Response Brief, para. 106, referring to Trial Judgement, para. 478.
[1034] AT. 7 December 2006, p. 95.

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494. The Appeals Chamber notes that, when addressing Brđanin's *mens rea* for the killings that occurred during and after the attacks on non-Serb towns, the Trial Chamber found that, at the time the disarmament decisions were issued, Brđanin was aware of the pending attacks against non-Serbs and was furthermore aware that, through those decisions, he rendered "practical assistance and a substantial contribution to the Bosnian Serb forces carrying out [the] attacks."[1035] However, the Trial Chamber was not satisfied beyond reasonable doubt that Brđanin was aware that by issuing ARK Crisis Staff decisions on disarmament he would be assisting in the killings on a massive scale such as to amount to the crime of extermination.[1036]

495. As explained above, the Prosecution did not show that the Trial Chamber erred in concluding that Brđanin was not aware that extermination would be committed in the territory of the ARK. Therefore, the Prosecution's claim that Brđanin was aware that his acts assisted the crime of extermination is also without basis.

D. Substantial contribution to the crime of extermination

496. Since the Prosecution has failed to show that Brđanin had the requisite *mens rea* for aiding and abetting this crime, the Prosecution's submission that Brđanin substantially contributed to the perpetration of extermination, through the disarmament decisions[1037] and through his public utterances and propaganda campaign[1038] is moot.

E. Conclusion

497. The Appeals Chamber has considered the Prosecution's fourth ground of appeal against the Trial Chamber's conclusion that Brđanin was not responsible for the crime of extermination pursuant to aiding and abetting. For the foregoing reasons, the Appeals Chamber is not convinced that the arguments of the Prosecution warrant a reversal of Brđanin's acquittal on this count.

[1035] Trial Judgement, para. 473.
[1036] Trial Judgement, para. 478.
[1037] Prosecution Appeal Brief, paras 6.5, 6.33.
[1038] Prosecution Appeal Brief, paras 6.7, 6.32.

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IX. SENTENCING

A. Weight given to aggravating and mitigating circumstances

498. Brđanin contends that no reasonable trier of fact could have convicted him on any charge in the Indictment on the evidence presented in the case, that the sentence should be set aside, and that he should be acquitted of all charges and immediately released (Alleged Error 148).[1039] However, in the event that the Appeals Chamber decides otherwise, he submits that the Trial Chamber gave too much weight to the aggravating circumstances and not enough to the mitigating circumstances when considering his sentence.[1040]

499. The Prosecution responds that Brđanin's claim is a bare assertion and he has failed to provide any argument supporting his claim.[1041]

500. The Trial Chamber has considerable discretion in determining an appropriate sentence,[1042] which includes the weight given to mitigating or aggravating circumstances.[1043] Merely claiming that the Trial Chamber has erred is not a valid argument on appeal; rather, it is for the Appellant to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion, or failed to follow the applicable law.[1044] The 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 error as to the facts upon which it exercised its discretion, or issued a decision so unreasonable or unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[1045]

501. Brđanin has not even attempted to explain how the Trial Chamber erred in the exercise of its discretion and, therefore, his claims are rejected.

[1039] Brđanin Appeal Brief, para. 304.
[1040] Brđanin Appeal Brief, para. 305. In his Notice of Appeal, Brđanin also claims that his sentence was "clearly excessive" (Brđanin Notice of Appeal, para. 150); however, he does not address this claim in his Appeal Brief. Brđanin has failed to substantiate his claim and the Appeals Chamber, therefore, rejects it without further reasoning under category 6, above.
[1041] Prosecution Response Brief, para. 3.5.
[1042] *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8.
[1043] *Blaškić* Appeal Judgement, para. 696; *Deronjić* Sentencing Judgement, para. 155; *Dragan Nikolić* Sentencing Judgement, para. 145.
[1044] *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 8; *Deronjić* Judgement on Sentencing Appeal, para. 8; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680; *Jelisić* Appeal Judgement, para. 99; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22.
[1045] *Momir Nikolić* Judgement on Sentencing Appeal, para. 95; *Babić* Judgement on Sentencing Appeal, para. 44.

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B. Implications of the Appeals Chamber's findings

502. The Appeals Chamber has rejected the arguments put forward by Brđanin against the sentence imposed on him by the Trial Chamber.

503. The Appeals Chamber has overturned Brđanin's conviction for torture as a crime against humanity (Count 6)[1046] and as a grave breach of the Geneva Conventions of 1949 (Count 7), but only insofar as they relate to the camps and detention facilities. In particular, the Appeals Chamber has overturned Brđanin's conviction for aiding and abetting members of the Bosnian Serb forces in the commission of the following crimes: the torture of a number of Bosnian Muslim civilians in the Kozila camp in early July 1992; the torture of a number of Bosnian Muslim women in the Keraterm camp in July 1992; the torture of a number of Bosnian Muslim women in the Trnopolje camp between May and October 1992; the torture of a number of Bosnian Muslim women in the Omarska camp in June 1992; the torture of a number of Bosnian Muslim men in the SUP building in Teslić; and the torture of a number of Bosnian Muslim and Bosnian Croat civilians in the community building in Pribinić in June 1992.[1047] However, the Appeals Chamber has upheld Brđanin's conviction for torture as a crime against humanity and as a grave breach of the Geneva Conventions of 1949, insofar as it relates to the armed attacks by Bosnian Serb forces on non-Serb towns, villages and neighbourhoods after 9 May 1992.[1048] Thus, Brđanin's conviction for aiding and abetting multiple episodes of torture in six different locations in June and July 1992 stands.[1049]

504. The Appeals Chamber has *proprio motu* set aside Brđanin's conviction for aiding and abetting the crime of wanton destruction or devastation not justified by military necessity (Count 11) insofar as it concerns the municipality of Bosanska Krupa.[1050] However, Brđanin's conviction for aiding and abetting the wanton destruction of cities, towns and villages, or devastation not justified by military necessity for ten other municipalities stands.

[1046] The Trial Chamber "incorporated" Count 6 into Count 3, the latter being the crime of persecutions, *see* Trial Judgement, para. 1152. Thus, this portion of Count 3 is also considered overturned.
[1047] *See supra*, paras 288-289; Trial Judgement, para. 538.
[1048] *See* Trial Judgement, paras 534-535.
[1049] These crimes are: the torture of Bosnian Muslim civilians during and after the takeover of Bosanski Petrovac town in early-June 1992; the torture of a number of Bosnian Muslim civilian during and after the armed attack on Kotor Varoš throughout June 1992; the torture of at least 35 Bosnian Muslims in the hamlet of Čermenica near the village of Bišćani on 20 July 1992; the torture of a number of Bosnian Muslim civilians in the village of Čarakovo on 23 July 1992; the torture of a number of Bosnian Muslim men in the area around the village of Bišćani; and the torture of a Bosnian Muslim woman in Teslić in July 1992.
[1050] The Appeals Chamber stresses that Bosanska Krupa is one of 11 municipalities for which the Trial Chamber entered a conviction on this count. *See supra*, paras 327, 330; Trial Judgement, para. 670.

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505. The Appeals Chamber notes that, since the Prosecution's appeals against Brđanin's acquittals were rejected and the Prosecution did not appeal the sentence as such,[1051] its arguments about the increase of sentence are moot.

506. In view of the foregoing, and in particular having considered the relative gravity of the crimes for which Brđanin's convictions have been overturned and that of the crimes for which Brđanin's convictions have been upheld, as well as the relevant aggravating and mitigating circumstances, the Appeals Chamber considers that only a limited reduction of Radoslav Brđanin's sentence is warranted. Therefore, the Appeals Chamber sentences Brđanin to 30 years of imprisonment.

[1051] Prosecution Appeal Brief, para. 8.1. In particular, the Appeals Chamber observes that the Prosecution did not challenge the Trial Chamber's conclusion that "[c]onvictions for charges of torture, deportation and inhumane acts (forcible transfer) brought under Article 5 of the Statute are impermissibly cumulative with convictions for charges of persecution" (Trial Judgement, para. 1085). In the absence of any appeal on this issue, the Appeals Chamber declines to address it.

X. DISPOSITION

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 of the ADC and the arguments they presented at the hearings of 7 and 8 December 2006;

SITTING in open session;

ALLOWS Brđanin's appeal in part, and

REVERSES Brđanin's conviction under Count 3 (persecution as a crime against humanity), insofar as it incorporates torture as a crime against humanity committed in camps and detention facilities (Count 6);

REVERSES Brđanin's conviction under Count 7 (torture as a grave breach of the Geneva Conventions of 1949) with respect to torture committed in camps and detention facilities only;

REVERSES Brđanin's conviction under Count 11 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war) with respect to the municipality of Bosanska Krupa only;

DISMISSES Brđanin's remaining grounds of appeal;

ALLOWS Ground 1, Judge Shahabuddeen dissenting, and Ground 2 of the Prosecution's appeal, but, for the reasons given in the Judgement, does not modify Brđanin's convictions in relation thereto;

DISMISSES Grounds 3 and 4 of the Prosecution's appeal;

NOTES that Ground 5 of the Prosecution's appeal was withdrawn;

IMPOSES a new sentence of 30 years of imprisonment, subject to credit being given under Rule 101 (C) of the Rules for the period Brđanin has already spent in detention;

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

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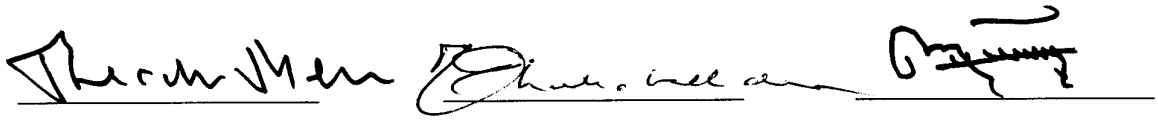
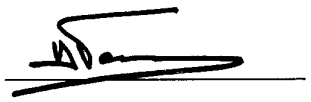
Done in English and French, the English text being authoritative.



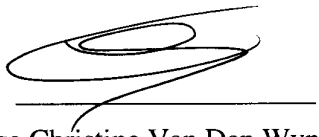
Judge Theodor Meron
Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Güney



Judge Andrésia Vaz



Judge Christine Van Den Wyngaert

Judge Van Den Wyngaert appends a declaration.

Judge Theodor Meron appends a separate opinion.

Judge Mohamed Shahabuddeen appends a partly dissenting opinion.

Dated this 3rd day of April 2007
At The Hague,
The Netherlands

[Seal of the Tribunal]

XI. DECLARATION OF JUDGE VAN DEN WYNGAERT

1. I am in full agreement with the Appeals Chamber's decision to uphold the two first grounds of appeal of the Prosecutor. The Trial Chamber indeed adopted a far too narrow definition of joint criminal enterprise ("JCE") when it required (1) that physical perpetrators need to be JCE members for JCE liability to attach to high-level officials and (2) that there should be a direct agreement between each JCE member regarding the commission of the crimes. It also erred in holding that the mode of liability of JCE is appropriate for "small" cases only.

2. The decision of the Trial Chamber, if it were to become the legal standard, would lead to the following – in my opinion unacceptable – situation.

> A1 (a military commander), A2 (a police commander), and A3 (a civilian leader) enter into a JCE aiming at the ethnic cleansing of a particular area. B1, B2, and B3, subordinates of (respectively) A1, A2, and A3 are called upon to implement the plan. C1, C2, and C3 are the principal perpetrators who execute the plan (deportation, forced transfer, deprivations of liberty, killings, destruction of property, etc.)[1].
>
> If the Trial Chamber's reasoning would be followed, then C1, C2, and C3 should be formal members of the JCE. In addition A1, A2, and A3 would have to enter into individual agreements with C1, C2, and C3 in order to incur criminal responsibility under the JCE doctrine. This is something that would never happen in practice. Why would A1, A2, and A3 have the need to do so if they can act through their direct subordinates (B1, B2, and B3)? If this reasoning were to be followed, higher-up military and political leaders could never be held responsible for crimes under joint criminal enterprise as long as there were middlemen (B1, B2, and B3) between the A-level and the C-level.

3. The Trial Chamber may have acted out of a genuine concern for the potential over-inclusiveness of JCE, but in doing so it restricted JCE in such a way that it risked to become under-inclusive in respect of high-level perpetrators who use their subordinates to commit crimes.

4. The judgment of the Appeals Chamber clearly shows that JCE is not an open ended formula that allows convictions based on guilt by association. I am in full agreement with the conclusions of the Judgement on the doctrine of joint criminal enterprise, where these limits are strictly drawn, based on a careful analysis of customary international law and of the Tribunal's own case law. The link between the accused and the criminal conduct of the principal perpetrator does not follow from the perpetrator's membership of the JCE but from the actual contribution of the accused to the JCE, which must be *significant* (para. 430). The key issue indeed remains that of ascertaining whether the crime in question forms part of the common criminal purpose, which is a matter of evidence (para. 418).

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[1] This example is inspired by H-J Koch, *Comparative analysis of case scenarios*, Part II of the Study of the Max Planck Institut für ausländisches und internationales Strafrecht (Ulrich Sieber and Hans Jurgen Koch, *Participation in crime. Criminal liability of leaders of criminal groups and criminal networks* (Expert opinion commissioned by the United Nations International Criminal Tribunal for the Former Yugoslavia – Office of the Prosecutor), Freiburg -i-B, s.d.).

5. Judge Shahabuddeen disagrees with part of the judgement. He holds the view that principal perpetrators need to be members of the JCE before an accused can be held responsible for crimes committed by those perpetrators. On its face, this proposition considerably limits the concept of JCE. However, Judge Shahabuddeen combines this approach with a very loose standard of "membership" for such principal perpetrators: "a physical perpetrator, who acquiesces in the JCE and perpetrates the crime within its common purpose, thereby becomes a member of the JCE, if he is not already a member". For Judge Shahabuddeen, if I understand him correctly, the link between the will of the accused (member of the JCE) and the principal perpetrator can be made through mere acquiescence: by perpetrating a crime within the common purpose of the JCE and by acquiescing to the JCE, the non-member may be assumed to have become a member of the JCE. This, in my view, would be an overly broad interpretation of the word "agreement". It would have an overly broad "downward" effect.

6. If liability for membership is based on mere acquiescence to the JCE, this would lead to a situation in which not only the mastermind of a JCE, but also his driver and his interpreter could be held responsible for all of the crimes committed in furtherance of the JCE, if they commit at least one crime themselves. I find this conclusion to be very problematic. This would not only allow prosecutors to exercise their discretion in this field even more broadly, but might also send a wrong message to domestic legislators and law-enforcement agencies.

7. For these reasons, I respectfully disagree with the opinion of my learned colleague. I believe that the safeguards enumerated in Chapter VI.D.5 ("Conclusion") of the judgment, together with the assumption that the accused's contribution must have been in some way *significant* to the crimes for him to be responsible (para. 430), are a better protection against an overly broad application of the concept of JCE than the – very loose – membership requirement proposed by Judge Shahabuddeen.

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

Done on the 3rd day of April 2007
At The Hague, The Netherlands.

Christine Van Den Wyngaert
Judge

[Seal of the Tribunal]

XII. SEPARATE OPINION OF JUDGE MERON

1. Today's judgement decides several important issues related to the doctrine of joint criminal enterprise ("JCE"). Given the existing contours of JCE, I agree entirely with the reasoning in the judgement. I write separately to discuss what I view as the appropriate mode of liability for a conviction via JCE where the principal perpetrator is not a JCE member.

2. Whatever the merits of the overall doctrine of JCE, it is now firmly embedded in our jurisprudence. The question before us is not whether *Tadić* was correctly decided, but rather how to apply the principles *Tadić* identified to situations where the principal perpetrators are not proven to belong to the JCE. We have never before directly confronted this question.

3. As today's judgement explains, liability via JCE should attach where a member of a JCE uses a non-member to carry out the criminal purpose at the root of the JCE. Under our existing jurisprudence, if A and B belong to a JCE aimed at unlawfully deporting victims and A personally deports a victim, then B is liable for this deportation via the JCE. The question before us today is whether this result should change where A uses non-member X to commit this same deportation – for example, by ordering X to commit this deportation – rather than personally committing the deportation himself. It would be strange indeed were we to hold that *no* liability can attach to B via the JCE in this situation simply because A ordered another to commit the criminal act rather than doing it himself. In both cases, A is acting in a criminal way to further the common criminal purpose of the JCE. As his fellow JCE member, B should bear criminal responsibility in both situations.

4. A conviction via JCE can thus occur even when the principal perpetrators are not shown to belong to the JCE. This begs a further question, however: how should we characterize such convictions under the modes of liability identified in Article 7(1) in the Statute? Today's judgement does not address this question. But since we have taken up Ground 1 of the Prosecution's Appeal for the sole purpose of clarifying the law, I think it appropriate to discuss my own views on this subject.

5. In the past, we have generally equated a conviction via JCE with the mode of liability of "committing" in Article 7(1).[1] This is a fiction, of course, but one with some sense to it. Where A and B belong to a JCE and A commits a crime that furthers the common criminal purpose, it seems reasonable to view B as also "committing" this crime due to his identification with A via the JCE.

[1] *See, e.g., Blaskić* Appeal Judgement, para. 33; *Vasiljević* Appeal Judgement, paras 95, 102; *but see Čelebići* Appeal Judgement, para. 343 (suggesting that JCE is not necessarily a form of committing).

6. Since we have never before directly considered whether a conviction via JCE can attach where the principal perpetrator is not a member of the JCE, we have also never considered whether "committing" is the proper mode of liability for such convictions.[2] In my view, where a JCE member uses a non-JCE member to carry out a crime in furtherance of the common purpose, then all other JCE members should be liable via the JCE under the same mode of liability that attaches to this JCE member. Thus, where A and B belong to a JCE and A orders non-member X to commit a crime in furtherance of the JCE, then B's conviction for this crime via the JCE should be treated as a form of "ordering" for purposes of Article 7(1) rather than as a form of "committing". Since B's liability for this crime is essentially derivative of A's, he should not be convicted of a higher mode of liability than that which attaches to A's conduct.

7. This approach has several advantages. First and most importantly, it fits the mode of liability to the behavior at issue. Where a crime in furtherance of the common purpose has not been directly "committed" by a JCE member, then the "committing" of this crime cannot fairly be imputed to the other JCE members via the JCE. Instead, these other JCE members can only be held responsible for a crime that furthers the common purpose to the same extent that another JCE member is responsible for this crime.[3] Second, by requiring the Prosecution to prove and the Trial Chamber to find the proper mode of responsibility, this approach will compel a clear identification of the "link" required under today's judgement between the JCE and the crimes on the ground. Finally, the precision required by this approach will prove valuable to the historical record.

8. I have read with great respect the partially dissenting opinion of my learned colleague Judge Shahabuddeen. He suggests that where a JCE member uses a non-member to commit a crime within the common criminal purpose, other members can only share in this member's liability where "the JCE itself gave authority" to this member to use non-members rather than to commit crimes directly himself.[4] He further suggests that such authority must be specifically shown.[5] I do not subscribe to this view. It seems to me enough that the JCE members all share in the goal of advancing the common criminal purpose and act criminally to further this goal. In no case do we require a showing that JCE member B specifically authorizes JCE member A to commit a crime in a

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[2] The Control Council Law No. 10 cases provide no guidance on this point, as their guiding statute treated "committing" as encompassing all forms of responsibility. *See* Control Council Law No. 10, art. II(2), *in Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50.

[3] For ease of analysis, my discussion has focused only on the first category of JCE. Where the third category is concerned, the accused would similarly share the mode of responsibility attributable to another JCE member who acted to further a crime that went beyond the common purpose where it was foreseeable that this would happen and the accused knowingly took the risk. Thus, if a fellow JCE member ordered non-members to carry out murders in the course of executing the common criminal purpose of unlawful deportation, and this was foreseeable to and foreseen by the accused, then the accused would also be liable via the JCE for ordering the murders.

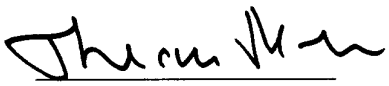
[4] Partially Dissenting Opinion of Judge Shahabuddeen, para. 11.

[5] *See ibid.*

particular manner; and nor should we require a showing that B specifically authorizes A to use non-members to commit the crimes rather than to commit them personally. Accordingly, I consider that where a JCE member uses a non-member to carry out a crime within the common criminal purpose, the other members of the JCE have responsibility for this crime that is derivative of their relationship to this JCE member. I thus would equate their convictions for JCE with regard to that crime with whatever mode of liability reflects the responsibility of the JCE member who used the non-member. In my view, this approach will properly match the convictions to the crimes.

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

Done on the 3rd day of April 2007
At The Hague, The Netherlands.



Theodor Meron
Judge

[Seal of the Tribunal]

XIII. PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgement of the Appeals Chamber, save for this partly dissenting opinion, which relates to the following issue, namely, whether physical perpetrators have to be proved to be members of a joint criminal enterprise ("JCE") before members can be held liable for crimes perpetrated by the physical perpetrators within the common purpose of the JCE. For the valid reasons given by it, the Appeals Chamber has dealt with the matter on the basis that its views will not affect the outcome of the appeals.

A. The issue

2. The issue was marked by a domestic division of opinion – a division of opinion between the prosecution at trial and the prosecution on appeal. Upholding the argument of the prosecution on appeal, the Appeals Chamber expresses "the view that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose. In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances ...".[1] So, the physical perpetrator (the principal perpetrator) can, but need not, be a member of the JCE. My opinion, which has not prospered with the majority, agrees with the opposite submission of the prosecution at trial: the physical perpetrator has to be a member of the JCE.

B. "Intention" as the governing principle of criminal liability

3. Whatever the terminological problems, in a serious case of this kind the governing principle in international humanitarian law is that an accused is punishable only for his own criminal conduct.[2] This means that his criminal conduct must be shown to arise from his "intention",[3] learned disputation as to the qualifications[4] which this concept bears not being pertinent to the circumstances of this case. In my opinion, the liability of an existing member of a JCE for a crime committed by a physical perpetrator can only be demonstrated if the physical perpetrator is a member of the JCE, and therefore within the agreement which the JCE incorporates for each

[1] Judgement of the Appeals Chamber, para. 410; footnote omitted.
[2] *See, e.g., Prosecutor v. Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 124: "A person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible". And see *Čelebići*, IT-96-21-A, 20 February 2001, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 27: "The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct".
[3] It is said that "the voluntarism of an act is a more fundamental element of criminal liability than what we normally think of as *mens rea* – the intention to cause, or foresight of, results of the act and awareness of circumstances". Smith & Hogan, *Criminal Law*, 11th ed. (Oxford, 2005), p. 48. But the narrower term "intention" will do in this opinion.
[4] See the discussion in Smith & Hogan, *Criminal Law*, 11th ed. (Oxford, 2005), pp. 90ff.

member to be liable for crimes committed by fellow members. This is why the prosecution at trial sought to have the physical perpetrator treated as a member of the JCE; it tried to bring the crime perpetrated by the physical perpetrator within the intention of the accused member of the JCE to accept responsibility for certain crimes committed by fellow members of the JCE.

C. Membership of a JCE by a physical perpetrator

4. Having regard to the nature of a JCE agreement as later sought to be explained, I am of opinion that a physical perpetrator, who acquiesces in the JCE and perpetrates a crime within its common purpose, thereby becomes a member of the JCE, if he is not already a member. His acts (including his acquiescence) have of course to be proved beyond reasonable doubt, but there is no need to exaggerate this requirement: from the circumstances, inferences may be drawn compatibly with that standard.

D. The nature of a JCE agreement from the point of view of membership

5. That extended membership formula has difficulties. The chief difficulty is the result of regarding a JCE as in the nature of a contract into which parties "enter". A response is that a JCE is an agreement but that it does not have to be an agreement of a contractual kind.

6. "Although every contract is an agreement, not every agreement is a contract".[5] Also, "[a]lthough often used as synonymous with 'contract', agreement is a broader term; e.g. an agreement might lack an essential element of a contract".[6] In the analogous case of a conspiracy agreement, it was said that "[a]ny number of persons may agree that a course of conduct shall be pursued without undertaking any contractual liability".[7] The last five words are stressed.

7. Thus, "agreement" can have a wide connotation, as distinguished from a narrow one. Persons may be in agreement even though they do not enter into an agreement. To constitute a JCE, there is no necessity for one side to take any specific step in relation the others, as in the case of a contract. Nor is there need for a joint expression of views. Congruent, even if separate, views will do. The prosecution at trial probably had in mind the wider connotation of "agreement" when it said to the Trial Chamber:[8]

> It is necessary to show that there was an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The common

[5] Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed. (Oxford, 1995), p. 40.
[6] *Black's Law Dictionary*, 6th ed. (Minnesota, 1990), p. 67.
[7] *R. v. Anderson*, (1985) Cr. App. R. 253 at 258, HL.
[8] Public Redacted Version of the Prosecution's Final Trial Brief, 17 August 2004, Appendix A: Answers to the Trial Chamber's 26 February and 8 March 2004 Letters Regarding Legal Issues, Question 1, p. 317, para. 2.

> plan or design need not have been previously arranged; the plan may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect the plan; the understanding or agreement need not be express and may be inferred from all the circumstances[9]. (The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.[10])

The prosecution at trial was correct; the flexible language that it employed aptly described the situation.

E. The details of the JCE agreement need not be known to the newcomer

8. Then it may be objected that the newcomer may not know all the details of the JCE; so how can he become a member? An answer is that the details of a criminal scheme as settled by its originators need not be known to the newcomer; it is sufficient that he is aware of the general intendment. Speaking of a "common plan or conspiracy" to wage "aggressive war",[11] the International Military Tribunal at Nuremberg, in a well-known passage, said:

> A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them. ... Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.[12]

9. Without being privy to every point of the project as conceived, and often revised, by the mastermind, the others had knowledge of its "aims"; that was enough to make them "parties to the plan" initiated by the originator and therefore members of it. The level at which the details may be known may vary from case to case; there is no need for the details to be known to everyone in every case. It does not require much mental energy to transfer this thinking to the case of a JCE.

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[9] *Tadić Appeals Judgement*, IT-94-1-A, 15 July 1999, para. 227(ii), and *Simić Trial Judgement*, IT-95-9-T, 17 October 2003, paras. 158 and 987. The inference must be the only reasonable inference available on the basis of the evidence. See *Krnojelac Trial Judgement*, IT-97-25-T, 15 March 2002, para. 83, and *Vasiljević Trial Judgement*, IT-98-32-T, 29 November 2002, para. 68.

[10] *Vasiljević Trial Judgement*, IT-98-32-T, 29 November 2002, para. 66, *Krnojelac Trial Judgement*, IT-97-25-T, 15 March 2002, para. 80, *Tadić Appeals Judgement*, IT-94-1-A, 15 July 1999, para. 227, *Furundžija Appeals Judgement*, IT-95-17/1-A, 21 July 2000, para. 119, and *Simić Trial Judgement*, IT-95-9-T, 17 October 2003, para. 158.

[11] The concept of an "aggressive war" has been much debated. See the useful summary in Antonio Cassese, *International Criminal Law* (Oxford, 2003), pp. 110ff. At p. 113 he reaches the conclusion that "at least some *traditional forms of aggression* are prohibited by customary international law, ...".

[12] *Trial of The Major War Criminals before The International Military Tribunal*, (Nuremberg, 1948), volume 22, judgement of 30 September 1946, pp. 468-469.

F. The argument that a physical perpetrator who is ordered or otherwise used by a member of the JCE does not have to be a member of the JCE for members to be criminally liable for his acts

10. Also, it may be objected that membership of the JCE by the physical perpetrator does not have to be proved where a member gives an order[13] to the physical perpetrator, or otherwise uses him, to perpetrate the crimes; in such a case, members (in addition to the particular ordering or using member) are liable. This, it is argued, shows that in no case does membership of the JCE by the physical perpetrator have to be proved in order to make members liable. In this regard, I appreciate Judge Meron's views, as set out in his separate opinion appended to the judgement of the Appeals Chamber; indeed, I am inclined to agree with the objection in principle, but have some hesitation as to whether it applies here. In support of the objection, it may well be said that the Appeals Chamber can use its power of interpretation to construe a JCE to mean that it always allows a member to give such an order to a physical perpetrator. My hesitation is that it appears to me that the Appeals Chamber's power of interpretation has to be exercised on solid material; solid material is wanting in this case.

11. It is true that article 7(1) of the Statute of the Tribunal imposes individual responsibility on any person who "ordered" another to execute a crime stipulated by the Statute. However, that provision is concerned with the imposition of liability; it is not directed to proof of ordering. Where a crime is executed by a non-member of a JCE on the orders of a particular member, the latter is responsible under the ordinary law; JCE is not relevant. The question which remains is whether other members could be said to have "ordered" the execution of the crime by the non-member. They could only have done so on the basis of JCE. But, being inactive in relation to the execution of the crime, they could only be said to have "ordered" the execution of the crime by the non-member if the JCE itself gave authority to members to issue such orders; it is only in that event that it could be said that the intention of such other members (being parties to the JCE agreement) was to accept responsibility for the crime "ordered" by the particular member. However, there is no finding, because there is no evidence, that the JCE gave authority to members to order non-members to commit crimes. Obviously, the JCE need not be of that kind. It would be an exceptional case in which there was evidence of such authority being given. This is not such an exceptional case; it represents the norm.

[13] Analytically, the order probably acts on the basis of agency. For references to "agency" or to "agent", see *Archbold Criminal Pleading, Evidence and Practice 2000* (London, 2000), paras 18-7, 18-8, 17-30, 17-31, 17-32, 31-130, 31-

12. The case at bar will bear the remark that the fear of the prosecution on appeal seems to have been that prosecutable situations would escape on the view of the prosecution at trial but would be caught on the view of the prosecution on appeal. That difference cannot arise on the flexible meaning of a JCE agreement, as referred to above; a situation which is prosecutable on the second view will be prosecutable on the first. The consequence of that flexibility itself is that the deportation situation, mentioned in paragraph 3 of Judge Meron's separate opinion, would, by virtue of its characteristics, rank as a prosecutable JCE situation. So would similar cases.

13. I may add that the case of a physical perpetrator acting "as a tool"[14] of a member of the JCE does not prove the opposite of what is put forward here. In that case, I am of opinion that the *actus reus* was, in law, perpetrated by the member of the JCE in the same way as if he had used an inanimate instrument to accomplish his will; so the real perpetrator was in any event a member of the JCE.

G. "Closeness"

14. Another objection is this: It may be said that, in so far as it is sought to identify the physical perpetrator with the JCE, the identification is sufficiently proven by showing that he has a close relationship with the JCE; if there is a close relationship, it is not necessary to show that he is a member of the JCE. However, the idea of "closeness" is too nebulous to provide a clear legal basis for the liability of a member of the JCE for the acts of a physical perpetrator – unless the latter's close relationship with the JCE amounts to membership of it, in the sense that he becomes a party to the understanding under which members of the JCE accept liability for crimes committed by fellow members within the common purpose of the JCE. If it amounts to membership of the JCE, then there is no dispute. But it is not my understanding that proponents of the idea of "closeness" contend that it amounts to membership.

H. Examination of the state of mind of the physical perpetrator

15. An objection – the *pièce de résistance* of the view favoured by the majority – is that there have been post-World War II cases in which, without any examination of the state of mind of a physical perpetrator to see if he was a member of a scheme to commit certain crimes, an existing member of the scheme was nevertheless convicted of those crimes when perpetrated by the physical perpetrator. The majority takes the position[15] that this supports the proposition that there is no

151, and *Blackstone's Criminal Practice* (Oxford, 2003), paras. B15.13 and B15.15. The idea of agency is familiar to the civil law, but it is not unknown to the criminal law.

[14] See Prosecution Appeal Brief, para. 3.47, referred to in para. 448 of the Judgement of the Appeals Chamber.

[15] Judgement of the Appeals Chamber, paras. 393-404.

requirement that a physical perpetrator must be a member of a JCE before an existing member of the JCE can be held liable for a crime perpetrated by the physical perpetrator within the common purpose of the JCE.

16. Those post-World War II cases, as exemplified by *Justice* [16] and *RuSHA,* [17] show similarities[18] with the instant one, but not entirely so. In all cases it has to be proved that the intention of the accused encompassed the crimes with which he is charged. In those two cases, the intention of the accused to commit certain crimes was proved by showing that the accused participated in carrying out schemes which purported to require the obedience of physical perpetrators to perpetrate the constitutive acts. Though referred to in the indictments, the schemes were not the legal basis of the liability of the accused; they were merely the factual machinery through which the accused exerted their intention that the impugned acts would be perpetrated by others. It was the ordinary case of one person inducing another to commit a crime. Membership by the physical perpetrators of the schemes through which the inducement was made by the accused was not relevant to the liability of the accused. The crimes of the accused were complete without proof of such membership.

17. That is a sufficient explanation of the circumstance that, in those cases, there was no examination of the state of mind of the physical perpetrators to see if they themselves were members of the schemes: on any view, the facts of those cases did not raise any question as to whether it was necessary to prove such membership, and accordingly there was no discussion of the point. Here, by contrast, that question arises, and the Appeals Chamber has devoted several pages of its judgement to answering it. It happens that I respectfully do not subscribe to the Appeals Chamber's answer. I consider that it is necessary to prove that the physical perpetrator was a member of the JCE, for it is only if he was that the accused is caught by the understanding underlying the JCE that the intention of members (who include the accused) was that they were to be liable for certain crimes committed by fellow members. I do not know of any post-World War II case which sanctions the divorce of liability from intention which the opposite view entails.

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[16] *Alstötter and others ("Justice"),* United States Military Tribunal III, judgement of 4 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10,* Vol. 3 (New York 1997), p. 1081.

[17] *United States v. Greifelt and others ("RuSHA"),* United States Military Tribunal No. 1, judgement of 10 March 1948, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10,* Vols. 4-5 (New York, 1997).

[18] As pointed out in para. 393 of the Judgement of the Appeals Chamber.

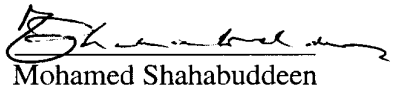
I. Conclusion

18. In paragraph 412 of its judgement, the Appeals Chamber associates itself with the recognition by the prosecution that "for it to be possible to hold an accused responsible for the criminal conduct of another person, there must be a link between the accused and the crime as legal basis for the imputation of criminal liability". With respect, I do not think that the "link" is provided by the circumstance that the crime perpetrated by the other person is within the common purpose of the JCE, for that only shows that the crime so perpetrated falls within a certain category of crimes. To make an accused liable for another's crime merely because the crime is within a certain category is to impose criminal responsibility on the accused irrespective of his will. Where the crime was committed by a physical perpetrator, the "link" between the accused member and the crime can only be provided by showing that the physical perpetrator was himself a member of the JCE and therefore within the intention of the accused member to take responsibility for certain crimes when committed by fellow members. I fear that I have not succeeded in persuading colleagues of the validity of these points. In particular, I note that, in paragraph 4 of her learned Declaration, Judge Van den Wyngaert has been moved to speak of "guilt by association". I should have thought that there was danger of that in the opposing theory.

19. I therefore recognise that my views are not universally approved. If the jurisprudence was settled in the opposite sense, I would not chance my arm. Without going into the cases, it seems to me that they are divided; they leave room for the operation of the governing principle that criminal responsibility flows from intention. I consider that the operation of that principle supports the present analysis. That analysis leads me to agree with the position of the prosecution at trial that a physical perpetrator has to be a member of the JCE for a member of the latter to be criminally responsible for a crime perpetrated by the physical perpetrator within the common purpose of the JCE. By predicating the need for an agreement expressive of the intention of parties, that position respects the essentials of the principle that criminal responsibility is only assigned for one's own conduct; but, by avoiding the rigidities of an agreement in the nature of a contract, it escapes needless technicality.

20. Convictions could be entered on the basis that JCE applied. In all the circumstances of the case, I however agree with the sentence imposed by the Appeals Chamber.

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



Mohamed Shahabuddeen

Dated this 3rd day of April 2007,
The Hague,
The Netherlands **[Seal of the Tribunal]**

XIV. ANNEX A: PROCEDURAL BACKGROUND

A. History of trial proceedings

1. An initial indictment was filed against Brđanin[1] on 14 March 1999.[2] Pursuant to the warrant for his arrest,[3] Brđanin was arrested by SFOR in Banja Luka on 6 July 1999 and transferred to the United Nations Detention Unit in The Hague on the same day. The initial indictment was thereafter amended several times both at the request of the Prosecution and pursuant to objections by the Defence regarding its specificity and the style of its pleading,[4] culminating in the Sixth Amended Indictment being issued on 9 December 2003[5] (following the close of the Prosecution case), which complied with the Trial Chamber's ruling in its Rule 98*bis* Decision.[6]

2. The Appellant consistently pleaded "not guilty" to the charges for which he was indicted. Brđanin's trial began on 23 January 2002 before Judges Carmel Agius (presiding), Ivana Janu, and Chikako Taya. Closing arguments were heard from 19 to 22 April 2004.[7]

3. On 1 September 2004, Trial Chamber II issued the Trial Judgement. The Trial Chamber found Brđanin not guilty of the charges of genocide (Count 1), complicity in genocide (Count 2), extermination (Count 4), and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity as a Grave Breach of the Geneva Conventions (Count 10).[8]

4. The Trial Chamber found Brđanin guilty, pursuant to Article 7(1) of the Statute, of the following charges: persecution (Count 3) (incorporating torture as a crime against humanity (Count 6), deportation as a crime against humanity (Count 8), and inhumane acts (forcible transfer), as a crime against humanity (Count 9)); wilful killing, a Grave Breach of the Geneva Conventions of 1949 (Count 5); torture, a Grave Breach of the Geneva Conventions of 1949 (Count 7); wanton destruction of cities, towns or villages, or devastation not justified by military necessity (Count 11); and destruction or wilful damage done to institutions dedicated to religion (Count 12).[9]

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[1] The initial indictment included charges against General Momir Talić, who died in Belgrade on 28 May 2003. Those proceedings were terminated; *see Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Order Terminating Proceedings Against Momir Talić, 12 June 2003.
[2] Indictment, 14 March 1999. The Indictment was confirmed by Judge Almiro Rodrigues and placed under seal: Order on Review of Indictment Pursuant to Article 19 of the Statute, 14 March 1999 (confidential).
[3] Warrant of Arrest Order for Surrender, 14 March 1999.
[4] *See* Amended Indictment, 20 December 1999; Further Amended Indictment, 12 March 2001; Third Amended Indictment, 16 July 2001; Prosecutor's Fourth Amended Indictment and Request to Leave to Amend, 5 October 2001; Corrected Version of Fourth Amended Indictment, 10 December 2001; Fifth Amended Indictment, 7 October 2002.
[5] Sixth Amended Indictment, 9 December 2003.
[6] Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 28 November 2003.
[7] Trial Judgement, para. 1180.
[8] Trial Judgement, para. 1152.
[9] Trial Judgement, para. 1152.

5. The Trial Chamber sentenced Brđanin to a single sentence of imprisonment for thirty-two years.[10]

B. Corrigendum to Trial Judgement

6. By Order of 10 December 2004, Judge Agius issued a corrigendum to the Trial Judgement,[11] to which Brđanin responded with a motion requesting that the corrigendum be set aside and declared completely null and void.[12] The Prosecution filed a response on 17 December 2005.[13] On 31 January 2005, the Appeals Chamber issued a decision on Brđanin's motion, ordering that the matters sought to be raised in the motion be deferred until the hearing of the appeal, when they would be heard to the extent that their relevance to the appeal can be demonstrated.[14] However, this motion was withdrawn by the Defence filing of 27 November 2006.[15]

C. Filing of Notices of Appeal

7. The Prosecution filed its Notice of Appeal on 30 September 2004, in which it identified five grounds of appeal.[16]

8. Brđanin filed his Notice of Appeal on 1 October 2004, in which he alleged 160 errors of law and fact.[17] On 20 May 2005, Brđanin filed a Motion for Leave to File a Supplemental Notice of Appeal (which included additional grounds of appeal),[18] to which the Prosecution responded on 31 May 2005, not opposing Brđanin's motion, but reserving the right to object to future motions by Brđanin for an extension of time or pages.[19] On 3 June 2005, the Appeals Chamber issued a Decision granting Brđanin's motion for leave to file a supplemental notice of appeal.[20]

D. Composition of the Appeals Chamber

9. On 28 September 2004, the President of the Tribunal, Judge Theodor Meron, issued an order appointing the Appeals Chamber bench hearing the case, to be composed of himself, Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Amin El Mahdi, and Judge Inés Weinberg de Roca.[21] On 4 October 2004, Judge Theodor Meron appointed himself as Pre-Appeal Judge.[22] On 22 October, Judge

[10] Trial Judgement, para. 1153.
[11] Corrigendum to Judgement, 10 December 2004.
[12] Motion to Strike or Otherwise Set Aside "Corrigendum to Judgement", 13 December 2004.
[13] Prosecution's Response to Brđanin's Motion to Strike Corrigendum, 17 December 2004.
[14] Decision on the Appellant's Motion to Strike or Otherwise Set Aside "Corrigendum to Judgement", 31 January 2005.
[15] Withdrawal of Motion to Strike or Otherwise Set Aside "Corrigendum of the Judgement", 27 November 2006.
[16] Prosecution's Notice of Appeal, 30 September 2005.
[17] Decision on Motion for Extension of Time, 4 October 2004; Intent to File Notice of Appeal and Request for Extension of Time to File Notice of Appeal, 22 September 2004; Prosecution's Response to Appellant's Request for Extension of Time to File Notice of Appeal, 23 September 2004; Notice of Appeal, 1 October 2004.
[18] Motion for Leave to File Attached Supplemental Notice of Appeal, 20 May 2005.
[19] Prosecution's Response to Brđanin's Motion for Leave to File Attached Supplemental Notice of Appeal, 31 May 2005.
[20] Decision on Appellant's Motion for Leave to File Attached Supplemental Notice of Appeal, 3 June 2005.
[21] Order Assigning Judges to a Case Before the Appeals Chamber, 28 September 2004.
[22] Order Appointing a Pre-Appeal Judge, 4 October 2004.

Theodor Meron appointed Judge Mohamed Shahabuddeen as Pre-Appeal Judge.[23] On 15 July 2005, Judge Theodor Meron issued an order that Judge Andrésia Vaz replace Judge Inés Weinberg de Roca in the case.[24] On 22 November 2005, following his appointment as President of the Tribunal, Judge Pocar issued an order replacing Judge Amin El Mahdi with Judge Christine Van Den Wyngaert.[25] On 6 December 2005 the Presiding Judge, Judge Theodor Meron, issued an order assigning himself as Pre-Appeal Judge.[26]

E. The Appeal Briefs

1. The Prosecution Appeal

10. The Prosecution filed its Appeal Brief on 28 January 2005 in support of its five grounds of appeal.[27]

11. On 4 March 2005, Brđanin requested *inter alia* an extension of time to file his Brief in Response to the Prosecution's Brief on Appeal[28] which was granted.[29] On 10 May 2005, Brđanin filed his Response Brief, and on 17 May 2005 he filed a Corrigendum to his Response Brief.[30]

12. On 25 May 2005, the Prosecution filed the Confidential and Public versions of its Prosecution's Brief in Reply, and on 25 May 2005 filed the Book of Authorities to its Brief in Reply.[31]

2. Brđanin's Appeal

13. Following Brđanin's motion to extend the time-limit for filing his appeal brief,[32] the Prosecution's response thereto,[33] and the Prosecution's own motion for extension of time for filing its appeal brief and request for an order shortening time,[34] the Pre-Appeal Judge issued a decision on 8 December 2004 granting the motions in part.[35]

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[23] Order Appointing a Pre-Appeal Judge, 22 October 2004.
[24] Order Replacing a Judge in a Case Before the Appeals Chamber, 15 July 2005.
[25] Order Replacing a Judge in a Case Before the Appeals Chamber, 22 November 2005.
[26] Order Assigning a Pre-Appeal Judge, 6 December 2005.
[27] Prosecution's Brief on Appeal, 28 January 2005. The Book of Authorities for the Prosecution's Appeal Brief was filed on the same day, but was followed by an addendum filed on 7 February 2005, and a second addendum on 2 March 2005. A Corrigendum to the annexes to the Appeal Brief and a supplemental Book of Authorities were also filed on 5 December 2006.
[28] Response to the Prosecutor's Motion for Extension of Time to File Response to Motion to Dismiss Ground 1 of Appeal and Request for Extension of Time in which to File Brief in Response to Prosecutor's Brief on Appeal, 4 March 2005.
[29] Decision on Prosecution's Request for an Extension of Time to Respond to Brđanin's Motion to Dismiss Ground 1 of the Prosecution's Appeal, 11 March 2005.
[30] Response to Prosecution's Brief on Appeal, 10 May 2005; Corrigendum to Response Brief, 17 May 2005.
[31] (Public) Prosecution's Reply Brief on Appeal, 25 May 2005; (Confidential) Prosecution's Reply Brief on Appeal, 25 May 2005; Book of Authorities for the Prosecution's Reply Brief, 25 May 2005.
[32] Motion to Extend Time for Filing Appellant's Brief, 18 November 2004.
[33] Prosecution's Response to Motion to Extend Time for Filing Appellant's Brief, 29 November 2004.
[34] Prosecution's Motion for Extension of Time for Filing its Appeal Brief and Request for Order Shortening Time, 7 December 2004.
[35] Decision on Motions for Extension of Time, 9 December 2004.

14. On 5 May 2005, the Pre-Appeal Judge issued the Decision on Motion to Extend Date for filing Brđanin's Brief, granting Brđanin's motion for an extension of time and allowing Brđanin to file his Brief by 27 June 2005.[36]

15. At the status conference held on 6 June 2005, the Defence requested permission to file a consolidated brief encompassing the original notice of appeal and the supplemental notice of appeal, as well as an extension of time for the filing of such brief.[37] The Pre-Appeal Judge suggested that the matter be raised by motion.[38] In that motion of 10 June 2005, Brđanin requested leave to file a brief of maximum 250 pages by 25 July 2005.[39] The Prosecution responded on 15 June 2005,[40] and Brđanin replied on 17 June 2005.[41] On 22 June 2005 the Pre-Appeal Judge issued a decision, granting the extension of time for Brđanin to file his consolidated brief on appeal by 25 July, but denying the request for an extension of the page-limit.[42]

16. On 20 July 2005, the Pre-Appeal Judge issued the Decision on Motion for Extension of Time for the Filing of Prosecution Response Brief, allowing the Prosecution an extension of time to file its Respondent's Brief, as requested.[43]

17. The Appellant filed his Appeal Brief, together with a confidential annex, in support of his grounds of appeal on 25 July 2005.[44]

18. On 3 October 2005, the Prosecution filed its Response Brief confidentially, together with a book of authorities.[45] It filed a public redacted version of the brief on 19 October 2005.[46] On 18 October 2005, Brđanin filed his Reply to the Prosecution's Response Brief, along with Annexes A and B and confidential Annex A.[47]

19. On 24 July 2006, the Appeals Chamber issued an order[48] to Brđanin to file, on or before 21 August 2006, a table indicating the relevant paragraph(s) of the Trial Judgement corresponding to each factual

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[36] Decision on Motion to Extend Date for Filing the Appellant's Brief, 5 May 2005. *See also* Brđanin's Motion to Extend Date for Filing Appellant's Brief, 27 April 2005; Prosecution's Response to Motion to Extend Date for Filing Appellant's Brief, 28 April 2005; and Brđanin's Reply to the Prosecution's Response to Motion to Extend Date for Filing Appellant's Brief, 2 May 2005.
[37] AT. 7 December 2006, p. 11.
[38] AT. 7 December 2006, p. 12.
[39] Motion for Extension of Time to File a Consolidated Brief and for Enlargement of Page Limit, 10 June 2005.
[40] Response to Motion for Extension of Time to file a Consolidated Brief and for Enlargement of Page Limit, 15 June 2005.
[41] Reply to Prosecution Response to Request for Expanded Page Limit, 17 June 2005.
[42] Decision on Appellant's Motion for Extension of Time to File a Consolidated Brief and for Enlargement of Page Limit, 22 June 2005.
[43] Decision on Motion for Extension of Time for the Filing of Prosecution Response Brief, 20 July 2005. *See also* Prosecution's Motion for Extension of Time for the Filing of the Prosecution Response Brief, 27 June 2005 (Brđanin filed no response to this motion).
[44] Appellant Brđanin's Brief on Appeal, 25 July 2005; Confidential Annex to Appellant Brđanin's Brief on Appeal, 25 July 2005.
[45] Prosecution Response Brief (Confidential), 3 October 2005.
[46] Prosecution Response Brief, 19 October 2005.
[47] Brđanin Reply to the Prosecution's Response Brief, 18 October 2005.
[48] Order to File a Table, 24 July 2006.

finding he alleged in his Appeal Brief could not properly have made beyond a reasonable doubt. On 21 August 2006, Brđanin filed his response.[49]

3. Motion to Dismiss Ground 1 of the Prosecution's Appeal

20. On 15 February 2005, Brđanin filed a motion requesting the Appeals Chamber to dismiss the Prosecution's first Ground of Appeal concerning the allegation that the Trial Chamber erred in law by holding that the principal perpetrator of an offence must be a member of the joint criminal enterprise.[50]

21. On 4 March 2005, the Prosecution filed a "Request for an Extension of Time to Respond to Brđanin's Motion to Dismiss Ground 1 of the Prosecution's Appeal",[51] requesting the Appeals Chamber to recognize its Response as validly filed. On 4 March 2005, Brđanin responded, submitting *inter alia* that he had no objection to the Prosecution's request for an extension of time.[52]

22. On 11 March 2005, the Pre-Appeal Judge issued a decision granting the Prosecution's request for extension of time, and instructing the Registry to re-file the Response, to serve a copy on Brđanin, and giving Brđanin five days after a final decision on the motion in which to file his Brief in Response to Prosecution's Appeal Brief.[53] Pursuant to the decision of 11 March 2005, the Registry re-filed the Prosecutor's Response on 18 March 2005.[54] Brđanin did not file a reply.

23. On 5 May 2005, the Appeals Chamber issued a decision denying the motion to dismiss, since the issue "is of considerable significance to the International Tribunal's Jurisprudence, as it affects every case employing a JCE theory".[55]

4. The Amicus Brief

24. On 5 May 2005, the Appeals Chamber also invited the ADC to submit an *amicus curiae* brief addressing the question of whether the membership of a joint criminal enterprise must include the physical perpetrators of the crime.[56]

25. Pursuant to the Appeals Chamber's decision of 5 May 2005, the ADC filed a Motion for Extension of Time on 2 June 2005,[57] which the Pre-Appeal Judge granted in a Decision on 3 June 2005.[58] The ADC filed its brief ("*Amicus* Brief")on 5 July 2005.[59]

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[49] Response to Order of 24 July 2006, 21 August 2006.
[50] Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 15 February 2005.
[51] Prosecution's Request for an Extension of Time to Respond to Brđanin's Motion to Dismiss Ground 1 of the Prosecution's Appeal, 4 March 2005.
[52] Response to the Prosecutor's Motion for Extension of Time to File Response to Motion to Dismiss Ground 1 of Appeal and Request for Extension of Time in which to File Brief in Response to Prosecutor's Brief on Appeal, 4 March 2005.
[53] Decision on Prosecution's Request for an Extension of Time to Respond to Brđanin's Motion to Dismiss Ground 1 of the Prosecution's Appeal, 11 March 2005.
[54] Prosecution Response to Motion to Dismiss Ground 1 of the Prosecutor's Appeal, dated 4 March 2005, filed 18 March 2005.

26. Since the Appeals Chamber's Decision of 5 May 2005 had been rendered prior to the timely filing of the Prosecution's Response,[60] on 9 June 2005 the Appeals Chamber issued an order authorising the Prosecution to file a Brief in Reply to the *Amicus* Brief.[61] On 20 July 2005, the Prosecution filed its Brief in Reply.[62]

27. On 9 September 2005, the ADC filed its Request to Participate in Oral Argument, in which it requested permission to take part in the hearings on the Prosecution's first ground of appeal.[63] The Prosecution responded on 19 September 2005, and opposed the ADC's request in principle.[64] On 7 November 2005, the Appeals Chamber issued a Decision on the ADC's request to participate in oral argument, granting the ADC 15 minutes to make submissions at the Appeal Hearing, and the Prosecution 15 minutes to respond.[65]

5. Withdrawal of Prosecution's Fifth Ground of Appeal

28. On 7 June 2006, the Prosecution withdrew its fifth ground of appeal,[66] which it had raised as a matter of general interest to the jurisprudence of the Tribunal, but which had been settled in the intervening time in the *Stakić* Appeal Judgement.[67]

F. Motions pursuant to Rule 68 of the Rules

29. On 14 October 2004, Brđanin filed a motion seeking an order that the Prosecution comply with its obligations pursuant to Rule 68, and that the Registry provide Brđanin with transcripts in another case before

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[55] Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, pp. 3-5.
[56] Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 5.
[57] Association of Defence Counsel's Motion for Extension of Time, 2 June 2005.
[58] Decision on Association of Defence Counsel's Motion for Extension of Time, 3 June 2005. The Prosecution, in the Prosecution Response to Association of Defence Counsel's Motion for Extension of Time of 3 June 2005, did not oppose ADC's motion.
[59] *Amicus Brief* of Association of Defence Counsel – ICTY, 5 July 2005. The ADC later filed the associated Book of Authorities on 13 July 2005.
[60] Response to Association of Defence Counsel's Motion for Extension of Time, 3 June 2005. The Prosecution's Response did not provide any reason to alter the Decision granting the ADC's motion for an extension, which it did not oppose. However, the Response did enquire whether the Prosecution would be permitted to reply to the ADC's arguments.
[61] Order, 9 June 2005.
[62] Prosecution's Brief in Reply to *Amicus Brief* of Association of Defence Counsel – ICTY, 20 July 2005. A Book of Authorities was filed on the same day.
[63] Request to Participate in Oral Argument by Association of Defence Counsel – ICTY, 9 September 2005.
[64] Prosecution's Response to the Request by the Association of Defence Counsel to Participate in Oral Argument, 19 September 2005. The Prosecution qualified its opposition, accepting the ADC's request to the extent that Brđanin wishes to use the ADC to present his response to the first ground of appeal during the portion of time available to him for his oral arguments, and submitting that - in the absence of such a request by Brđanin - the ADC should be granted leave to present oral argument only if they would provide assistance to the Appeals Chamber which is not otherwise available.
[65] Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005.
[66] Withdrawal of Prosecution's Fifth Ground of Appeal, 7 June 2006.
[67] The subject matter of the Prosecution's fifth ground of appeal concerned the *mens rea* required for deportation and forcible transfer, and whether or not the perpetrator must act with the intent to deport or to forcibly transfer permanently; Prosecution Appeal Brief, para. 7.1.

the Tribunal.[68] The Prosecution responded on 26 October 2004, opposing the motion;[69] Brđanin did not file a reply. On 7 December 2004, the Appeals Chamber rendered its decision, dismissing the motion.[70]

G. Motion pursuant to Rule 115 of the Rules

30. On 17 October 2005, Brđanin filed a motion to admit additional evidence pursuant to Rule 115,[71] which the Prosecution opposed in its response of 26 October 2005.[72] On 3 March 2006, the Appeals Chamber issued its decision dismissing the motion.[73]

H. Other motions relating to evidence

31. On 1 April 2005, the Prosecution filed confidentially the "Prosecution's Application to Vary Protective Measures" in another case before the Tribunal.[74] On 6 April 2005, Brđanin responded, stating that he had no objection to the relief sought by the Prosecution,[75] and, on 21 April 2005, the Appeals Chamber issued a confidential order granting the application to vary the protective measures.[76]

32. On 22 April 2005, the Prosecution filed, *ex parte* and confidentially, an Application for Variation of Protective Measures,[77] and the Registry then filed a submission concerning the Prosecutor's Application on 25 April 2005.[78] In a decision of 13 May 2005, the Appeals Chamber granted the Prosecution's application and varied the protective measures concerned.[79] On 15 July 2005, the Prosecution filed *ex parte* its notification of written undertakings in connection with the Order of 13 May 2005.[80]

33. On 24 August 2005, the Prosecution filed *ex parte* an application for variation of protective measures with confidential annexes.[81] On 12 September 2005, the Appeals Chamber rendered *ex parte* its order granting the application to vary the protective measures.[82]

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[68] Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 14 October 2004.
[69] Prosecution's Response to Appellant's "Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose certain materials", 26 October 2004.
[70] Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004.
[71] Motion to Admit Additional Evidence Pursuant to Rule 115, 17 October 2005.
[72] Prosecution's Response to Brđanin's Motion to Admit Additional Evidence Pursuant to Rule 115, 26 October 2005.
[73] Decision on Defence Motion to Admit Additional Evidence Pursuant to Rule 115, 3 March 2006.
[74] (Confidential) Prosecution's application to Vary Protective Measures, 1 April 2005.
[75] Reply to Prosecution's Application to Vary Protective Measures, 6 April 2005.
[76] (Confidential) Order on Application for Variation of Protective Measures, 21 April 2005.
[77] (*Ex parte* – Confidential) Prosecutor's Application for Variation of Protective Measures, 22 April 2005.
[78] (*Ex parte* – Confidential) Submission by the Deputy Registrar concerning the "Prosecutor's Application for Variation of Protective Measures, Filed *Ex parte* – Confidential, 25 April 2005.
[79] Order to Vary Protective Measures, signed 13 May 2005, filed 17 May 2005.
[80] (*Ex Parte*) Prosecutor's Notification of Written Undertakings Received Pursuant to Appeals Chamber Order of 13 May 2005, 15 July 2005.
[81] (*Ex parte*) Prosecutor's Application for Variation of Protective Measures (Confidential Annexes), signed 23 August 2005, filed 24 August 2005. A Supplement and Corrigendum was filed (*ex parte* and confidential) on 26 August 2005.
[82] (*Ex parte*) Order to Vary Protective Measures, 12 September 2005.

34. On 6 June 2005, another accused before the Tribunal filed a confidential *ex parte* motion to vary protective measures in other proceedings before the Tribunal.[83] In a confidential *ex parte* order of 29 June 2005, the Appeals Chamber granted the motion and varied the protective measures imposed by the Trial Chamber.[84]

35. On 18 October 2005, another accused before the Tribunal filed a confidential *ex parte* motion to vary protective measures in this case.[85] On 7 November 2005, the Appeals Chamber issued an *ex parte* and confidential order varying the protective measures ordered by the Trial Chamber in this case.[86]

36. On 22 November 2006, Mićo Stanišić filed a motion to vary protective measures in the evidence of this case.[87] On 24 January 2007, the Appeals Chamber issued a decision granting the motion in part, and denying it in part.[88]

I. Status Conferences

37. Status Conferences were held in accordance with Rule 65*bis* of the Rules on: 3 February 2005, 6 June 2005, 9 November 2005, 1 March 2006, 28 June 2006, 18 October 2006, and 7 February 2007.

J. Order to the Prosecution

38. Pursuant to Rule 54, on 27 October 2006, the Appeals Chamber *proprio motu* ordered the Prosecution to file a submission stating whether, if the Prosecution's Second Ground of Appeal was to be granted and Brđanin's responsibility was then to be analysed pursuant to the JCE doctrine, the elements of JCE liability would be fulfilled, taking into account the understanding *inter partes* at trial and based on the trial record.[89]

39. On 13 November 2006, the Prosecution filed a Response to the Appeals Chamber's Order of 27 October 2006 regarding the findings of the Trial Chamber that would support a conviction for joint criminal enterprise.[90] Brđanin chose not to file any written reply on the issue. However this matter was addressed both by the Prosecution and Brđanin during the Appeal Hearing.

K. Request for withdrawal of Counsel

40. In a letter of 28 November 2006, Brđanin complained about his Counsel, who allegedly failed to ensure proper communication with him, and requested his withdrawal. On 5 December 2006, the Registry,

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[83] (*Ex parte* – Confidential) Defence Motion to Vary Protective Measures in other Proceedings Before the Tribunal, signed 3 June 2005, filed 6 June 2005.
[84] (*Ex parte* – Confidential) Order to Vary Protective Measures, 29 June 2005.
[85] Defence Motion to Vary Protective Measures in other Proceedings before the Tribunal, 18 October 2005.
[86] (*Ex parte* – Confidential) Order to Vary Protective Measures, 7 November 2005.
[87] Motion by Mićo Stanišić for access to all confidential materials in the *Brđanin* case, 22 November 2006.
[88] Decision on Mićo Stanišić's motion for access to all confidential materials in the *Brđanin* case, 24 January 2007.
[89] Order to the Prosecution, 27 October 2006.
[90] Prosecution's response to Appeals Chamber's question on JCE, 13 November 2006.

exercising its authority in this matter, rejected the request. The issue was mentioned at the Appeal Hearing, when Brđanin stated that he considered the matter solved.[91]

L. Appeal Hearing

41. Pursuant to both the Scheduling Order of 3 October 2006 and the Scheduling Order of 3 November 2006, the hearings on the merits of the appeals ("Appeal Hearing") took place on 7 and 8 December 2006.[92] No additional evidence was presented.

42. As allowed by a Decision issued by the Appeals Chamber on 7 November 2005,[93] the ADC addressed the Appeals Chamber as *amicus curiae* on the matter of the Prosecution's first ground of appeal.

M. Request for provisional release

43. On 7 February 2007, Brđanin filed a Motion for Provisional Release in order to be able to visit relatives, attaching guarantees from the Government of Republika Srpska.[94] The Prosecution responded on 13 February 2007.[95] The Appeals Chamber denied the motion on 23 February 2007.[96]

[91] AT. 7 December 2006, pp. 47-48, AT. 8 December 2006, p. 196.
[92] Scheduling Order for Appeal Hearing, 3 October 2006; Scheduling Order for Preparation of Appeal Hearing, 3 November 2006.
[93] Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005.
[94] Motion for Provisional Release, 7 February 2007; Addendum, 7 February 2007.
[95] Prosecution's Response to Brđanin's Motion for Provisional Release, 13 February 2007; Corrigendum and Amendment to Prosecution's Response to Brđanin's Motion for Provisional Release, 13 February 2007.
[96] Decision on Radoslav Brđanin's Motion for Provisional Release, 23 February 2007.

XV. ANNEX B: GLOSSARY

A. Jurisprudence

1. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").

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-S, Sentencing Judgement, 29 June 2004 ("*Babić* Sentencing Judgement").

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-06-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 ("Decision on Interlocutory Appeal").

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("Trial 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-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

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C. List of Abbreviations, Acronyms, and Short References

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

1st KK	1st Krajina Corps (formerly JNA 5th Krajina Corps)
ADC	ICTY Association of Defence Counsel
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Amicus Brief	*Amicus Brief* of Association of Defence Council – ICTY, filed on 5 July 2005
ARK	*Autonomna Regija Krajina* – Autonomous Region of Krajina
AT.	Transcript hearing on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise
BiH	Republic of Bosnia and Herzegovina
Bosnian Serb Assembly	*See* SerBiH Assembly
Brđanin Appeal Brief	Appellant Brđanin's Brief on Appeal, 25 July 2005
Brđanin Final Brief	(Confidential) Final Brief of the Accused, 5 April 2004 (in the case of *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T)
Brđanin Notice of Appeal	Brđanin's Notice of Appeal, dated 1 October 2004
Brđanin Reply Brief	Brđanin Reply to Prosecution Response Brief, 18 October 2005
Brđanin Response Brief	Radoslav Brđanin's "Response to the Prosecution's Brief on Appeal", dated 10 May 2005
Brđanin Supplemental Notice of Appeal	Brđanin's Supplementary Notice of Appeal, dated 20 May 2005
Convention against Torture	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1948, U.N.T.S Vol. 1465, p.85
CSB	*Centar Službi Bezbjednosti* – Security Services Centre
D	Designates "Defence" for the purpose of identifying exhibits
Defence	Brđanin and/or Brđanin's Counsel at the trial stage
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention of Human Rights), 213 U.N.T.S. 221
ECtHR	European Court of Human Rights
Ex.	Exhibit
FRY	Federal Republic of Yugoslavia
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
HDZ	*Hrvatska Demokratska Zajednica* – Croatian Democratic Union
ICC	International Criminal Court

ICC Statute	Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002
ICCPR	International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, entered into force on 23 March 1976; 999 U.N.T.S. 171
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
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, *also* "Tribunal"
IMT	The Nuremberg International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis, established on 8 August 1945
IMT Judgement	Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946
Indictment	*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36, Sixth Amended Indictment, 9 December 2003
JCE	Joint criminal enterprise
JNA	*Jugoslovenska Narodna Armija* – Yugoslav People's Army
MUP	*Ministarstvo Unutrašnjih Poslova* – Ministry of Internal Affairs
P	Designates "Prosecution" for the purpose of identifying exhibits
Prosecution	The Office of the Prosecutor
Prosecution Appeal Brief	Prosecution's Brief on Appeal, dated 28 January 2005
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, dated 30 September 2004
Prosecution Response Brief	Prosecution Response Brief, filed 19 October 2005 (confidential version filed on 3 October 2005)
Prosecution Reply Brief	Prosecution's Brief in Reply on Appeal, dated 25 May 2005 (confidential version also filed on 25 May 2005)
Prosecution Reply to Amicus	"Prosecution's Brief in Reply to *Amicus Brief* of Association of Defence Council – ICTY", dated 20 July 2005
RPP	Relevant Physical Perpetrator(s)
Rules	Rules of Procedure and Evidence of the Tribunal
SAO	*Srpska Autonomna Oblast* – Serbian Autonomous District
SDA	*Stranka Demokratske Akcije* – Party of Democratic Action (main political party of Bosnian Muslims)
SDS	*Srpska Demokratska Stranka* – Serbian Democratic Party (main political party of Bosnian Serbs)
SerBiH	Serbian Republic of Bosnia-Herzegovina, later renamed Republika Srpska
SerBiH Assembly	Assembly of the Serbian People in Bosnia-Herzegovina, established on 24 October 1991

SFOR	Stabilization Force
SJB	*Stanica Javne Bezbjednosti* – Public Security Station
SOS	*Srpske Odbrambene Snage* – Serbian Defence Forces (paramilitary formation)
Statute	Statute of the Tribunal, as amended
SUP	*Sekretarijat za Unutrašnje Poslove* – 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 specified otherwise
TO	*Teritorijalna Odbrana* – Territorial Defence
Trial Judgement	*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgement, 1 September 2004
Tribunal	*See* ICTY
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VRS	*Vojska Srpske Republike Bosne i Herzegovine*, later *Vojska Republike Srpske* – Army of the SerBiH