UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-56-A

Date: 8 June 2021

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IN THE APPEALS CHAMBER

Before: **Judge Prisca Matimba Nyambe, Presiding**
Judge Aminatta Lois Runeni N'gum
Judge Seymour Panton
Judge Elizabeth Ibanda-Nahamya
Judge Mustapha El Baaj

Registrar: **Mr. Abubacarr Tambadou**

Judgement of: **8 June 2021**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC REDACTED

JUDGEMENT

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy

Counsel for Mr. Ratko Mladić:

Mr. Branko Lukić
Mr. Dragan Ivetić

CONTENTS

I. INTRODUCTION **1**
A. BACKGROUND 1
B. THE APPEALS 3
II. STANDARDS OF APPELLATE REVIEW **4**
III. THE APPEAL OF RATKO MLADIĆ **8**
A. ALLEGED VIOLATIONS OF FAIR TRIAL RIGHTS 8
1. Alleged Errors Concerning the Indictment (Ground 1) 8
2. Alleged Errors Concerning Adjudicated Facts (Ground 2) 15
(a) Alleged Error in the Use of Adjudicated Facts (Ground 2.A) 15
(i) Alleged Error in Taking Judicial Notice of Facts Relating to the Conduct of Subordinates 15
(ii) Alleged Error in Heightening the Standard of the Burden to Produce Rebuttal Evidence 20
(b) Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D) 24
3. Alleged Errors in Failing to Ensure Equality of Arms (Ground 8.A) 25
(a) Variation of the Deadline for the Presentation of Defence Witnesses 26
(b) Closure of the Defence Case 29
4. Alleged Errors in Conducting the Trial to the Detriment of Mladić's Health and in Assessing the Impact of Mladić's Medical Conditions on His Behaviour at Trial (Ground 8.B) 31
(a) Alleged Errors Regarding the Trial Schedule 32
(b) Alleged Errors Regarding the Use of Privileged Communication 38
(c) Conclusion 44
5. Alleged Errors in Permitting and Failing to Remedy Disclosure Violations (Ground 8.D) .. 44
(a) Alleged Errors Related to Belatedly Disclosed Materials 45
(b) Alleged Errors Related to Disclosures Through EDS 47
(c) Conclusion 49
B. ALLEGED ERRORS RELATED TO THE OVERARCHING JCE (GROUND 3) 50
1. Alleged Errors Regarding the Overarching JCE and Mladić's Membership (Ground 3.A) .. 51
(a) Reliance on Adjudicated Facts to Establish the Underlying Crimes of the Overarching JCE 51
(i) Scheduled Incident B.16.2 52
(ii) Scheduled Incident B.10.2 55
(iii) Other Scheduled Incidents 57
(iv) Conclusion 58
(b) Assessment of Exculpatory Evidence of Mladić's Membership in the Overarching JCE 58
(i) Evidence of Care for Non-Serb Civilians 59
(ii) Evidence that Mladić Reported Concerns to Karadžić and the Minister of the Interior ... 65
(iii) Evidence from Mladić's Notebook Entries of Constraints During the War and Assistance Provided to Non-Serbs 68
(iv) Conclusion 72
(c) Alleged Errors Regarding the Scope of and Mladić's Participation in the Overarching JCE 72
(d) Conclusion 75
2. Alleged Errors Regarding Significant Contribution and *Mens Rea* (Ground 3.B) 75
(a) Significant Contribution 76
(i) Command and Control Over Members of the MUP 77
(ii) Command and Control over VRS Soldiers 81
(iii) Knowledge, Investigation, and Punishment of Crimes 86
a. Evidence that Mladić Lacked Knowledge of Crimes 89
b. Evidence that Mladić Took Measures to Investigate and/or Punish Crimes 92

c. Failure to Give Sufficient Weight to Exculpatory Evidence 95
d. Error in Finding Significant Contribution on the Basis of Lack of Evidence 97
e. Limitations on Mladić and an Independent Military Justice System 100
(iv) Conclusion 103
(b) *Mens Rea* 103
(i) Alleged Error in Conflating *Mens Rea* and *Actus Reus* 105
(ii) Alleged Error in Assessment of Evidence 109
(iii) Alleged Error in Selectively Relying on Parts of Assembly Speeches 117
(iv) Conclusion 122
(c) Conclusion 122
C. ALLEGED ERRORS RELATED TO THE SARAJEVO JCE (GROUND 4) 123
1. Alleged Errors Related to the Crime of Terror and Mladić's *Mens Rea* (Ground 4.A) 123
(a) Alleged Errors in the Exercise of Jurisdiction over the Crime of Terror 124
(b) Alleged Error in Failing to Find that Sarajevo was a "Defended City" 130
(c) Alleged Errors Relating to the Existence of a Sarajevo JCE and Mladić's Intent 133
(d) Alleged Errors in the Assessment of Specific Intent for the Crime of Terror 137
(e) Conclusion 139
2. Alleged Errors Related to the Crimes of Murder and Unlawful Attacks on Civilians and that Spreading Terror was the Primary Purpose of the Sarajevo JCE (Ground 4.B) 139
(a) Alleged Errors in Failing to Consider Evidence of Legitimate Military Activity 140
(b) Alleged Errors in Relying on Adjudicated Facts 143
(c) Alleged Error in Failing to Provide a Reasoned Opinion 145
(d) Alleged Errors in Inferring SRK Responsibility from Circumstantial Evidence 147
(e) Conclusion 149
D. ALLEGED ERRORS RELATED TO THE SREBRENICA JCE (GROUND 5) 150
1. Alleged Errors Related to the Common Plan for Forcible Transfer, Genocide, Extermination, and Murder (Ground 5.A) 150
(a) Alleged Errors Concerning the Common Plan for Forcible Removal 151
(b) Alleged Errors Concerning the Common Plan to Commit Genocide, Extermination, and Murder 154
(c) Conclusion 159
2. Alleged Error Regarding Significant Contribution (Ground 5.B) 159
(a) Evidence of Mladić's Absence from Srebrenica 161
(b) Command and Control over Members of the MUP 166
(c) Orders Given by Mladić 169
(d) Intercepts 173
(e) Knowledge, Investigation, and Punishment of Crimes 176
(i) Alleged Failure to Give Sufficient Weight to Probative Evidence 176
(ii) Alleged Error in Relying on Failure to Investigate and Punish Crimes to Determine Significant Contribution 181
(f) Conclusion 182
3. Alleged Errors in Reversing the Burden of Proof and Violating *In Dubio Pro Reo* (Ground 5.D) 183
(a) Statements and Affirmative Actions Taken by Mladić to Adhere to International Law 183
(b) Orders Made by Mladić and His Subordinates 189
(c) Conclusion 190
4. Alleged Errors in Failing to Provide a Reasoned Opinion or Evaluate the Military Status of Victims (Genocide and Extermination in Srebrenica) (Ground 5.E) 191
(a) Alleged Error in Failing to Provide a Reasoned Opinion on the Military Status of the Victims 193
(b) Alleged Error in the Use of Adjudicated Fact 1476 and in Articulating Mladić's Liability 196
(c) Alleged Error in Failing to Consider Rebuttal Evidence 197
(d) Conclusion 198
5. Alleged Error in Relying on Certain Evidence without Corroboration (Ground 5.I) 198

(a) Alleged Error in Relying on Uncorroborated Hearsay 199
(i) Witness Deronjić's Rule 92 *quater* Evidence 200
(ii) Witness Drinić's Rule 92 *bis* Evidence 202
(iii) Witness Orić's Rule 92 *bis* Evidence 204
(b) Alleged Error in Relying on Adjudicated Fact 1612 206
(c) Conclusion 208
E. ALLEGED ERRORS RELATED TO THE HOSTAGE-TAKING JCE (GROUND 6) 209
1. Alleged Error in Applying the Legal Standard to Find that the Detention of UN Personnel Constituted the Crime of Hostage-Taking (Ground 6.A) 210
2. Alleged Error in Conclusions from Assessment of Evidence Relating to the Detention of UN Personnel (Ground 6.B) 218
3. Alleged Errors in Assessing Circumstantial Evidence (Ground 6.C) 219
(a) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's Significant Contribution to the Hostage-Taking JCE 219
(b) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's *Mens Rea* 225
(c) Conclusion 229
F. ALLEGED ERRORS REGARDING MODES OF LIABILITY (GROUND 7) 230
G. ALLEGED SYSTEMATIC UNFAIRNESS OR BIAS THROUGHOUT THE PROCEEDINGS (GROUND 8.E) 233
H. SENTENCING (GROUND 9) 235
1. Abuse of Authority (Ground 9.A) 236
2. Mitigating Circumstances (Grounds 9.B and 9.C) 238
3. Sentencing Practices in the Courts of the Former Yugoslavia (Ground 9.D) 242
IV. THE APPEAL OF THE PROSECUTION 248
A. ALLEGED ERRORS IN FINDING THAT THE COUNT 1 COMMUNITIES DID NOT CONSTITUTE A SUBSTANTIAL PART OF THE PROTECTED GROUP (GROUND 1) 249
B. ALLEGED ERRORS IN FINDING THAT MLADIĆ AND OTHER OVERARCHING JCE MEMBERS DID NOT POSSESS "DESTRUCTIVE INTENT" (GROUND 2) 255
V. DISPOSITION 259
VI. PARTIALLY DISSENTING OPINION OF JUDGE NYAMBE 261
A. GROUND 1 – INDICTMENT AND NOTICE 261
B. GROUND 2 – ADJUDICATED FACTS 264
1. Alleged Error in the Use of Adjudicated Facts (Ground 2.A) 264
(a) Use of Adjudicated Facts Relating to the Conduct of Subordinates 264
(b) Heightening the Standard of the Burden to Produce Rebuttal Evidence 269
2. Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D) 273
C. GROUND 3 – OVERARCHING JCE 273
1. Temporal Geographical Scope of the Overarching JCE 273
2. Use of Circumstantial Evidence 275
3. Control Over Paramilitaries and the MUP 279
(a) Paramilitaries 279
(b) MUP 281
4. Legitimate Military Goals of the VRS 282
5. Conclusion 286
D. GROUND 4 – SARAJEVO JCE 287
E. GROUND 5 – SREBRENICA JCE 290
1. Forcible Transfer 290
2. Genocide, Extermination, and Murders 295
3. Alibi 302
4. Status of Victims 303

5. Conclusion 304
F. GROUND 6 – HOSTAGE-TAKING JCE 304
G. GROUND 8.A – FAILURE TO ENSURE EQUALITY OF ARMS 304
H. GROUND 8.D – DISCLOSURE VIOLATIONS 305
I. GROUND 9 – SENTENCE 305
J. CONCLUSION 306
VII. JOINT PARTIALLY DISSENTING OPINION OF JUDGE N'GUM AND JUDGE PANTON 307
A. GROUND 1 OF THE PROSECUTION'S APPEAL: THE TRIAL CHAMBER'S ERRORS IN FINDING THAT THE BOSNIAN MUSLIM COMMUNITIES IN THE COUNT 1 MUNICIPALITIES DID NOT CONSTITUTE A SUBSTANTIAL PART OF THE BOSNIAN MUSLIM GROUP IN BOSNIA AND HERZEGOVINA 308
B. GROUND 2 OF THE PROSECUTION'S APPEAL: THE TRIAL CHAMBER'S ERRORS IN FINDING THAT MEMBERS OF THE OVERARCHING JCE DID NOT POSSESS "DESTRUCTIVE INTENT" 322
C. MLADIĆ SHOULD BE CONVICTED FOR COMMITTING GENOCIDE IN THE COUNT 1 MUNICIPALITIES 329
VIII. ANNEX A: PROCEDURAL HISTORY 331
A. COMPOSITION OF THE APPEALS CHAMBER 331
B. THE APPEALS 331
C. DECISION ON A MOTION TO VACATE THE TRIAL JUDGEMENT AND TO STAY PROCEEDINGS 332
D. DECISIONS PURSUANT TO RULE 142 OF THE RULES 332
E. STATUS CONFERENCES 333
F. HEARING OF THE APPEALS 333
IX. ANNEX B - CITED MATERIALS AND DEFINED TERMS 335
A. JURISPRUDENCE 335
1. Mechanism 335
2. ICTR 338
3. ICTY 341
4. Other Jurisprudence 350
B. SELECTED CITED FILINGS 350
C. OTHER MATERIALS 354
D. DEFINED TERMS AND ABBREVIATIONS 356

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seized of appeals by Mr. Ratko Mladić ("Mladić") and the Office of the Prosecutor of the Mechanism ("Prosecution") against the Judgement in the case of *Prosecutor v. Ratko Mladić*, rendered on 22 November 2017 ("Trial Judgement") by Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Trial Chamber" and "ICTY", respectively).

I. INTRODUCTION

A. Background

2. Mladić was born on 12 March 1942 in Božanovići, Kalinovik Municipality.[1] From 27 September 1965 until 10 May 1992, he was a member of the Yugoslav People's Army ("JNA") and held various positions in military posts throughout the former Yugoslavia.[2] On 12 May 1992, the Bosnian Serb Assembly appointed Mladić as Commander of the Main Staff of the Army of *Republika Srpska* ("VRS").[3] He remained in command of the VRS Main Staff until at least 8 November 1996.[4]

3. Mladić was indicted on 24 July and 16 November 1995 and, following several amendments, the operative indictment against him was filed on 16 December 2011.[5] The Prosecution charged Mladić with individual criminal responsibility pursuant to Articles 7(1) and 7(3) of the Statute of the ICTY ("ICTY Statute") on 11 counts of genocide, crimes against humanity, and violations of the laws or customs of war under Articles 3, 4, and 5 of the ICTY Statute.[6] The crimes covered by the Indictment were allegedly committed between 12 May 1992 and 30 November 1995 on the territory of Bosnia and Herzegovina.[7]

4. The Trial Chamber acquitted Mladić of genocide under Count 1 of the Indictment[8] and convicted him pursuant to Article 7(1) of the ICTY Statute of genocide, crimes against humanity

[1] Trial Judgement, para. 272.
[2] Trial Judgement, paras. 272-274.
[3] Trial Judgement, paras. 275, 276. Prior to 12 August 1992, *Republika Srpska* was known as the Serbian Republic of Bosnia and Herzegovina. *See* Trial Judgement, p. 13.
[4] Trial Judgement, paras. 275, 276.
[5] Trial Judgement, paras. 1, 5229-5234, *referring to, inter alia, Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, Annex A ("Indictment").
[6] Indictment, paras. 4-86. *See also* Trial Judgement, paras. 2-10.
[7] *See* Indictment, paras. 8, 13, 14, 18, 19, 23, 24, 28, 35-86, Schedules A-G. *See also* Trial Judgement, para. 2.
[8] Trial Judgement, para. 5214.

(persecution, extermination, murder, deportation, and inhumane acts), and violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and taking of hostages).[9] The Trial Chamber found him responsible for committing these crimes through a "leading and grave role" in four joint criminal enterprises.[10]

5. The Trial Chamber found that, from 12 May 1992 until 30 November 1995, Mladić participated in a joint criminal enterprise with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation ("Overarching JCE"),[11] and convicted him of these crimes.[12]

6. The Trial Chamber further found that, between 12 May 1992 and November 1995, Mladić participated in a joint criminal enterprise with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling ("Sarajevo JCE"),[13] and convicted him of the crimes of terror, unlawful attacks on civilians, and murder.[14]

7. The Trial Chamber also found that, from the days immediately preceding 11 July 1995 to at least October 1995, Mladić participated in a joint criminal enterprise with the objective of eliminating the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men ("Srebrenica JCE"),[15] and convicted him of the crimes of genocide, as well as persecution, inhumane acts (forcible transfer), murder, and extermination.[16]

8. Further, the Trial Chamber found that, from approximately 25 May 1995 to approximately 24 June 1995, Mladić participated in a joint criminal enterprise with the objective of capturing

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[9] Trial Judgement, para. 5214. *See also* Trial Judgement, paras. 3065, 3116, 3183, 3206, 3212, 3226, 3286, 3312, 3324, 3359, 3380, 3387, 3405, 3418, 3431, 3555, 4232, 4612, 4688, 4740, 4893, 4921, 4987, 5098, 5128, 5130, 5131, 5141, 5156, 5163, 5168, 5188-5192. Where the Trial Chamber found Mladić guilty of murder and extermination as crimes against humanity based on the same incidents, it only entered convictions for extermination, in line with the law on cumulative convictions. *See* Trial Judgement, para. 5179. *See also* Trial Judgement, paras. 5168-5178.

[10] Trial Judgement, para. 5165. *See also* Trial Judgement, paras. 4232, 4612, 4688, 4740, 4892, 4893, 4921, 4987, 5096-5098, 5128, 5130, 5131, 5141, 5156, 5163, 5188-5193.

[11] Trial Judgement, paras. 4232, 4610, 4612, 4688, 5189. The Trial Chamber determined that the Overarching JCE existed between 1991 and 30 November 1995. *See* Trial Judgement, paras. 4232, 4610.

[12] Trial Judgement, para. 5214. *See also* Trial Judgement, para. 5189.

[13] Trial Judgement, paras. 4740, 4892, 4893, 4921, 5190.

[14] Trial Judgement, paras. 4893, 4921, 5190, 5214.

[15] Trial Judgement, paras. 4987, 4988, 5096-5098, 5128, 5130, 5131. The Trial Chamber determined that in the days immediately preceding 11 July 1995, the objective of the Srebrenica JCE involved the commission of the crimes of persecution and inhumane acts (forcible transfer), but that by the early morning of 12 July 1995, the crimes of genocide, extermination, and murder became part of the means to achieve that objective. *See* Trial Judgement, paras. 4987, 5096, 5108.

[16] Trial Judgement, paras. 5098, 5128, 5130, 5131, 5191, 5214.

United Nations ("UN") personnel deployed in Bosnia and Herzegovina and detaining them in strategic military locations to prevent the North Atlantic Treaty Organization ("NATO") from launching further military air strikes on Bosnian Serb military targets ("Hostage-Taking JCE"),[17] and convicted him of the crime of taking of hostages as a violation of the laws or customs of war.[18]

9. The Trial Chamber sentenced Mladić to life imprisonment.[19]

B. The Appeals

10. Mladić presents nine grounds of appeal challenging his convictions and sentence.[20] Mladić requests that the Appeals Chamber reverse all erroneous findings of the Trial Chamber, quash his convictions, and acquit him.[21] In the alternative, Mladić seeks a retrial,[22] or a reduction in his sentence.[23] The Prosecution responds that Mladić's appeal should be dismissed in its entirety.[24]

11. The Prosecution presents two grounds of appeal challenging certain findings or conclusions of the Trial Chamber pertaining to the Overarching JCE and its acquittal of genocide under Count 1 of the Indictment.[25] The Prosecution requests that the Appeals Chamber correct the Trial Chamber's errors[26] and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first category of joint criminal enterprise, or alternatively, the third category of joint criminal enterprise, or as a superior under Article 7(3) of the ICTY Statute.[27] Mladić responds that the Prosecution's appeal should be dismissed in its entirety.[28]

12. The Appeals Chamber heard oral submissions regarding these appeals on 25 and 26 August 2020.[29]

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[17] Trial Judgement, paras. 5141, 5142, 5156, 5163, 5192.
[18] Trial Judgement, paras. 5192, 5214.
[19] Trial Judgement, para. 5215.
[20] *See* Mladić Notice of Appeal, paras. 5, 7, 12-91; Mladić Appeal Brief, paras. 10-19, 41-958. In his notice of appeal, Mladić raised nine grounds of appeal comprising a total of 40 subgrounds. In his appellant's brief, Mladić withdrew five subgrounds, did not address one subground (Ground 5(J)), and subsumed eight subgrounds into other subgrounds, leaving nine grounds of appeal with a total of 26 subgrounds to be addressed by the Appeals Chamber. *See* Mladić Appeal Brief, paras. 61, 565-569, 644, 678-680, 760, 761, 876.
[21] Mladić Notice of Appeal, para. 10, p. 32; Mladić Appeal Brief, paras. 20, 22, 60, 114, 185, 210, 224, 237, 269, 293, 316, 334, 335, 338, 349, 351, 372, 375, 397, 400, 442, 445, 458, 465, 496, 527, 541, 554, 563, 564, 583, 600, 641, 643, 665, 694, 697, 710, 713, 734, 759, 875, 884, 930, 958, 959, 960.
[22] Mladić Notice of Appeal, para. 10, p. 32; Mladić Appeal Brief, paras. 21, 885, 916, 959.
[23] Mladić Notice of Appeal, para. 11, p. 32; Mladić Appeal Brief, paras. 22, 60, 677, 780, 920, 926, 930, 931, 958, 960.
[24] Prosecution Response Brief, para. 4.
[25] Prosecution Notice of Appeal, paras. 3-9; Prosecution Appeal Brief, paras. 1-3, 5-50.
[26] Prosecution Appeal Brief, paras. 1, 4, 17, 43.
[27] Prosecution Appeal Brief, paras. 1, 4, 18, 44, 47-50.
[28] *See* Mladić Response Brief, paras. 9-343.
[29] T. 25 August 2020 pp. 1-110; T. 26 August 2020 pp. 1-109.

II. STANDARDS OF APPELLATE REVIEW

13. The Mechanism was established pursuant to UN Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY.[30] The Statute and the Rules of Procedure and Evidence of the Mechanism ("Rules") reflect normative continuity with the Statutes and the Rules of Procedure and Evidence of the ICTR and the ICTY ("ICTR Rules" and "ICTY Rules", respectively).[31] The Appeals Chamber considers that it is bound to interpret the Statute and the Rules in a manner consistent with the jurisprudence of the ICTR and the ICTY.[32] Likewise, where the Statute of the ICTR ("ICTR Statute") and the ICTR Rules or the ICTY Statute and its Rules are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.[33]

14. While not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR and the ICTY Appeals Chambers and depart from them only for cogent reasons in the interest of justice, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[34] It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure.[35]

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[30] UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), paras. 1, 4, Annex 1, Statute of the Mechanism ("Statute"), Preamble, Article 1. *See also* Security Council Resolution 1966, Annex 2, Article 2(2); *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6.

[31] *See, e.g.*, *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6. *See also Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case Nos. IT-08-91-A & MICT-13-55, Decision on Karadžić's Motion for Access to Prosecution's Sixth Protective Measures Motion, 28 June 2016, p. 2; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012"), para. 5.

[32] *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[33] *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[34] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *Cf. Munyarugarama* Decision of 5 October 2012, para. 5 (noting the "normative continuity" between the Rules and the Statute and the ICTY Rules and ICTY Statute and that the "parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice").

[35] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968; *Bizimungu* Appeal Judgement, para. 370.

15. Article 23(2) of the Statute stipulates that the Appeals Chamber may affirm, reverse, or revise decisions taken by a trial chamber. An appeal is not a trial *de novo*.[36] The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[37] These criteria are set forth in Article 23 of the Statute and are well established in jurisprudence.[38]

16. 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.[39] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[40] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[41] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[42]

17. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[43] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[44] The Appeals Chamber will not review the entire trial record *de novo*; rather, it will in principle only take into account evidence referred to by the trial chamber in the body of

[36] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12. *See also Stanišić and Župljanin* Appeal Judgement, para. 17.
[37] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[38] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[39] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[40] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19.
[41] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[42] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19.
[43] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.
[44] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.

the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[45]

18. When considering alleged errors of fact, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[46] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[47] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has caused a miscarriage of justice.[48] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[49]

19. The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.[50] The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[51] Nevertheless, considering that, at trial, it is the Prosecution that bears the burden of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction.[52] Whereas a convicted person must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt,[53] the Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated.[54]

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[45] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14. *See also Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.
[46] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[47] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21.
[48] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[49] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[50] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[51] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[52] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[53] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[54] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.

20. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting an intervention of the Appeals Chamber.[55] Arguments which 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.[56]

21. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[57] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[58] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[59]

[55] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also, e.g., Prlić et al.* Appeal Judgement, para. 25; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.
[56] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also, e.g., Prlić et al.* Appeal Judgement, para. 25; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.
[57] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.
[58] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.
[59] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.

III. THE APPEAL OF RATKO MLADIĆ

A. Alleged Violations of Fair Trial Rights

1. Alleged Errors Concerning the Indictment (Ground 1)

22. In addressing challenges to the form of the second amended indictment, the Trial Chamber, in a decision issued on 13 October 2011, observed that Mladić was not charged with personally committing any of the acts in this indictment and that the charges against him covered a vast amount of territory and spanned more than three years.[60] On this basis, the Trial Chamber rejected Mladić's contention that this indictment omitted material facts by failing to plead with sufficient specificity the identity of victims, dates, locations, and perpetrators in relation to several underlying crimes.[61]

23. In its decision issued on 2 December 2011, the Trial Chamber noted the Prosecution's submission that the third amended indictment contained "196 scheduled crimes" and the Prosecution's proposal, pursuant to Rule 73 *bis* (D) of the ICTY Rules, to limit "its presentation of evidence to a selection of 106 crimes" ("Scheduled Incidents").[62] The Trial Chamber, "[i]n the interests of a fair and expeditious trial, [...] fixe[d] the number of crime sites or incidents of the charges in respect of which evidence may be presented by the Prosecution" in accordance with the Prosecution's proposal.[63]

24. Consequently, the Trial Chamber, in its Decision of 2 December 2011, ordered that the Prosecution could not present evidence on crimes other than those it proposed to retain, unless it: (i) considered such evidence necessary to establish an element of any of the counts of the Third Amended Indictment; and (ii) provided prior notice of such evidence "which it has proposed to remove" from this indictment and explained its specific relevance to the Prosecution's case in its filings pursuant to Rule 65 *ter* of the ICTY Rules ("Rule 65 *ter* filings").[64]

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[60] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision on Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 13 October 2011 ("Decision of 13 October 2011"), para. 7, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Prosecution's Second Amended Indictment, 1 June 2011 ("Second Amended Indictment").
[61] Decision of 13 October 2011, paras. 8-10, 13, 14, 16.
[62] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision Pursuant to Rule 73 *bis* (D), 2 December 2011 ("Decision of 2 December 2011"), paras. 2-4, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Third Amended Indictment, 20 October 2011 ("Third Amended Indictment").
[63] Decision of 2 December 2011, para. 14. *See also* Decision of 2 December 2011, para. 15 ("For the foregoing reasons, pursuant to Rule 73 *bis* (D) of the [ICTY] Rules, the [Trial] Chamber ADOPTS the Prosecution's proposals in respect of the reduction of its case and the selection of crimes for each of the charges").
[64] Decision of 2 December 2011, para. 15.

25. The Prosecution filed the operative Indictment on 16 December 2011, attaching Schedules A to G, which enumerated the 106 Scheduled Incidents.[65] Like the Second Amended Indictment that the Trial Chamber found was not defective in light of Mladić's prior notice challenges,[66] the Indictment charged Mladić with 11 counts concerning events spanning over three years,[67] across numerous municipalities in Bosnia and Herzegovina,[68] and with the victims of the alleged crimes numbering in the thousands.[69] In this respect, Mladić's responsibility was principally charged based on his membership in four separate joint criminal enterprises, pursuant to Article 7(1) of the ICTY Statute,[70] and based on his superior liability for crimes committed by Bosnian Serb forces, pursuant to Article 7(3) of the ICTY Statute.[71]

26. On 25 October 2016, after the conclusion of the Defence case, Mladić filed a motion alleging defects in the form of the Indictment.[72] The Trial Chamber dismissed the motion as untimely.[73] In rejecting Mladić's subsequent request to reconsider this decision or certify it for appeal, the Trial Chamber rejected Mladić's argument that the Indictment was limited to the Scheduled Incidents.[74] The Trial Chamber stated that its Decision of 2 December 2011 "fixed the number of *scheduled* incidents but did not affect other incidents within the scope of the Indictment, which remained part of the Indictment as charged".[75]

27. In the Trial Judgement, the Trial Chamber addressed Mladić's contention raised in his final trial brief that the crimes underpinning all counts of the Indictment were confined to the Scheduled Incidents.[76] The Trial Chamber reiterated that the Decision of 2 December 2011 did not limit the scope of the Prosecution's case to the Scheduled Incidents and that other incidents within the scope

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[65] *See supra* para. 3.
[66] Decision of 13 October 2011, para. 16. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Defense Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011.
[67] Indictment, paras. 5, 8, 14, 19, 36, 43-46, 49, 51, 52, 56, 57, 59, 61, 62, 64, 65, 68-74, 76, 78, 84, 85.
[68] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedule of Incidents, 16 December 2011, para. 3; Indictment, paras. 37, 41, 47, 61, 62, 67, 76, 85; Schedules A-G.
[69] Indictment, paras. 39, 46, 55, 59, 64, 65, 71, 72, 78, 80, 81, 85; Schedules A-G.
[70] Indictment, paras. 5-30.
[71] Indictment, paras. 30-34, pp. 18, 21, 27, 30, 33, 35, 37.
[72] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion Alleging Defects in the Form of the Indictment, 25 October 2016. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Alleging Defects in the Form of the Indictment, 30 November 2016 ("Decision of 30 November 2016"), para. 1.
[73] Decision of 30 November 2016, paras. 10-13. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration of or, in the Alternative, Certification to Appeal the Decision on Defence Motion Alleging Defects in the Form of the Indictment, 24 February 2017 ("Decision of 24 February 2017"), para. 12.
[74] Decision of 24 February 2017, paras. 11, 14.
[75] Decision of 24 February 2017, para. 11. *See also* Decision of 2 December 2011, paras. 12, 14, 15.
[76] Trial Judgement, paras. 5265-5270, *referring to, inter alia, Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Corrigendum to Annex A to Notice of Filing Under Objection and with Reservation of Rights, Filed 25 October 2016, 2 November 2016, Annex A (confidential; public redacted version filed on 8 March 2018) ("Mladić Final Trial Brief"). *See also Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Notice of Filing of Public Redacted Final Trial Brief, 8 March 2018.

of the Indictment remained part of the Indictment as charged.[77] The Trial Chamber recalled that the key consideration was whether the relevant material facts were pleaded with sufficiency under the applicable law[78] and noted that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident.[79]

28. On appeal, Mladić contends that the Trial Chamber erred by considering incidents not enumerated in Schedules A to G of the Indictment and/or unscheduled incidents that were not otherwise identified by the Prosecution through its Rule 65 *ter* filings as part of its case against him ("Unnamed Unscheduled Incidents") and relying on them to prove the elements of the crimes whereas he was not put on notice of such incidents, materially impairing his ability to prepare his defence.[80] He submits that the Trial Chamber fixed the number of "crime sites or incidents of the charges" in the Decision of 2 December 2011 to the Scheduled Incidents and to those that the Prosecution identified as unscheduled incidents, which it intended to rely on in its Rule 65 *ter* filings, and which would have provided him with adequate notice.[81] Mladić requests that the Appeals Chamber reverse the findings on the crimes based on the Unnamed Unscheduled Incidents and the convictions entered on Counts 3, 5, 9, and 10 of the Indictment in whole or in part, and reduce his sentence accordingly.[82]

29. The Prosecution responds that the Indictment is not defective as it pleaded the material facts with sufficient specificity.[83] It argues that the Decision of 2 December 2011 struck out a number of scheduled incidents without affecting the scope of its case as it pertained to Mladić's criminal

[77] Trial Judgement, para. 5267.
[78] Trial Judgement, para. 5269.
[79] Trial Judgement, para. 5270.
[80] Mladić Notice of Appeal, paras. 13, 14; Mladić Appeal Brief, paras. 41, 43, 46-59. Mladić further argues that the Trial Chamber erred by *proprio motu* considering the Unnamed Unscheduled Incidents as part of the Prosecution's case and relying upon them as forming part of the Indictment in order to prove the elements of the crimes. *See* Mladić Notice of Appeal, para. 13; Mladić Appeal Brief, paras. 41, 50, 59; T. 25 August 2020 pp. 21, 22, 27; T. 26 August 2020 p. 60.
[81] Mladić Appeal Brief, paras. 46, 47, 49, *referring to* Decision of 2 December 2011; T. 25 August 2020 pp. 21, 23.
[82] Mladić Appeal Brief, para. 60; T. 25 August 2020 p. 28. Mladić contends that he did not waive his right to raise this error on appeal as he only became aware of the Unnamed Unscheduled Incidents when the Trial Judgement was rendered. Mladić Appeal Brief, para. 43; T. 25 August 2020 p. 23. Mladić withdrew his appeal in relation to the following incidents: Srebrenica incident (v) of 18 July 1995, sniping incident (o) of 10 December 1994, and shelling incidents (i) and (k) on Geteova Street of 22 and 28 June 1995. *See* T. 25 August 2020 pp. 22, 23; T. 26 August 2020 pp. 25, 59 (confirming that the Prosecution "is correct that orally those [incidents] have been withdrawn from the Appeals Chamber's consideration").
[83] Prosecution Response Brief, paras. 6-13; T. 26 August 2020 p. 23. In particular, the Prosecution submits that: (i) the Indictment's inclusive language shows that Schedules A to G are not meant to be exhaustive; (ii) the charges include Unnamed Unscheduled Incidents as a number of crimes were pleaded without reference to Schedules A to G or the Scheduled Incidents; (iii) the Trial Chamber expressed consistent views on the Indictment's scope; and (iv) the record demonstrates that Mladić was aware that the Unnamed Unscheduled Incidents formed part of the charges against him. *See* Prosecution Response Brief, paras. 7-13. The Prosecution further submits that he was also put on notice through other pleadings and that any vagueness in the Indictment was cured by this additional information. *See* Prosecution Response Brief, paras 14-18; T. 26 August pp. 24-27.

liability for events not set forth in Schedules A to G of the Indictment.[84] The Prosecution submits that the Decision of 2 December 2011 did not address Unnamed Unscheduled Incidents and that the Trial Chamber rejected Mladić's misreading of this decision and reaffirmed that Unnamed Unscheduled Incidents were within the Indictment's scope.[85] In any event, the Prosecution contends, "Mladić cannot pretend to be surprised that his convictions included [Unnamed] [U]nscheduled [I]ncidents" as he fully defended against them.[86]

30. Mladić replies that the Decision of 2 December 2011 provides guidance on the proper approach to notice.[87] He argues that the Prosecution fails to establish that he received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts in support of his criminal liability based on the various post-Indictment submissions identified by the Prosecution.[88] He further contends that defects in the Indictment were not cured in view of his "general defences" at trial or cross-examination aimed at undermining evidence admitted to prove the legal elements of crimes.[89]

31. The Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber erred in considering the Unnamed Unscheduled Incidents in determining his liability for the crimes charged in the Indictment. In the Decision of 2 December 2011, the Trial Chamber reduced the number of "scheduled incidents" pleaded in support of the counts in the Indictment and instructed the Prosecution to give notice in its Rule 65 *ter* filings "if it intends to present evidence *on the crimes it has proposed to remove from the* [Third Amended] Indictment".[90] The Appeals Chamber observes that it is clear that this decision pertained only to scheduled incidents and that the instruction to the

[84] Prosecution Response Brief, paras. 8-10.
[85] Prosecution Response Brief, paras. 9, 11; T. 26 August 2020 pp. 27, 30, 31.
[86] Prosecution Prosecution Response Brief, paras. 19-23; T. 26 August 2020 pp. 31, 32. The Prosecution further submits that Mladić's challenge to the Indictment is untimely and the burden to show prejudice is on him. *See* Prosecution Response Brief, para. 21; T. 26 August 2020 pp. 27-29, 32. It also submits, in the alternative, that any reversal of the Trial Chamber's findings related to the Unnamed Unscheduled Incidents would not impact Mladić's convictions or sentence as they amount to a fraction of the events for which he was convicted. Prosecution Response Brief, para. 24; T. 26 August 2020 p. 24.
[87] Mladić Reply Brief, para. 10. Mladić further contends that the Prosecution fails to address his submission that it failed to direct the Trial Chamber to enter convictions on the Unnamed Unscheduled Incidents and that the Trial Chamber did so *proprio motu*. Mladić Reply Brief, para. 8.
[88] Mladić Reply Brief, paras. 11, 12, 14; T. 26 August 2020 p. 60. Specifically, Mladić argues that the Prosecution fails to establish that he received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts by: (i) giving notice that a witness would provide evidence related to the Scheduled Incidents; (ii) mentioning Unnamed Unscheduled Incidents in a witness summary or motion or leading evidence of them; and (iii) relying on Unnamed Unscheduled Incidents as adjudicated facts to establish the legal elements of a crime. Mladić Reply Brief, paras. 11, 12, 14; T. 25 August 2020, pp. 22, 23.
[89] Mladić Reply, para. 14; T. 25 August 2020 pp. 24, 27. Mladić argues that the use of inclusive language in the Indictment should not serve to include any accusation made before the Trial Chamber without proper notice and that the Prosecution must identify what case and for which incidents it seeks a conviction. *See* T. 25 August 2020 pp. 22-24; T. 26 August 2020 p. 59. As to prejudice, Mladić submits that "[u]pholding any findings on an erroneous legal basis is unfair and harmful". *See* T. 26 August 2020 pp. 61, 62.

Prosecution on giving notice specifically related to the scheduled incidents which the Trial Chamber approved be struck from the Third Amended Indictment. As the Trial Chamber stated in the Decision of 24 February 2017 and reaffirmed in the Trial Judgement, the Decision of 2 December 2011 did not limit the scope of the Prosecution's case to the 106 Scheduled Incidents; other incidents within the scope of the Indictment remained part of the Indictment as charged.[91]

32. From the time of Mladić's earliest challenge that the Second Amended Indictment was defective because it omitted material facts, the Trial Chamber emphasized that Mladić was not charged with personally committing any of the acts in the Indictment and that the charges against him covered a vast amount of territory and spanned more than three years.[92] In this context, the Trial Chamber rejected Mladić's contention that the Second Amended Indictment omitted material facts by failing to plead with sufficient specificity the identity of victims, dates, locations, and perpetrators.[93] Additionally, even when ordering the Prosecution to provide further specificity with respect to known victims, the Trial Chamber emphasized that the Prosecution was not required to set forth this information specifically in a schedule to this indictment.[94]

33. Furthermore, the Trial Chamber observed that a number of allegations in support of the counts in the Indictment, which was filed after Mladić's challenges to the form of the Indictment were rejected and after the Trial Chamber reduced the number of scheduled incidents, are not linked with any of the 106 Scheduled Incidents.[95] The Appeals Chamber considers that this is consistent with a plain reading of the Indictment, which in no way limits Mladić's criminal liability to the 106 Scheduled Incidents enumerated in Schedules A to G of the Indictment.[96] The Trial Chamber also observed that where the Indictment relied on information in Schedules A to G of the Indictment, it made clear that the 106 Scheduled Incidents listed therein are non-exhaustive or "illustrative"

[90] Decision of 2 December 2011, p. 5 (emphasis added).
[91] Decision of 24 February 2017, para. 11; Trial Judgement, para. 5267.
[92] Decision of 13 October 2011, para. 7.
[93] Decision of 13 October 2011, paras. 8-10, 13, 14, 16.
[94] Decision of 13 October 2011, para. 8 ("The Defence argues that in the *Popović* case, the Prosecution was required to provide identification of known victims of alleged crimes by way of annexes to the Indictments. In the view of the [Trial] Chamber, the fact that the *Popović* Trial Chamber ordered the Prosecution to do so does not stand for the principle that an indictment must have the names of victims attached to it as an Annex or a Schedule. In fact, the Tribunal's jurisprudence has not imposed any formal requirements as to how the relevant notification of information concerning the identity of victims should be made, and the approach to this issue varies from case to case.") (internal citations omitted).
[95] Trial Judgement, para. 5270.
[96] *See, e.g.*, Indictment, paras. 46(b), 59(e), (f), (h), (i), (k), 67-74, 82-86.

examples of criminal conduct in support of the counts.[97] This too is evident from a plain reading of the Indictment.[98]

34. Based on the foregoing, Mladić fails to demonstrate that the Trial Chamber limited the scope of his criminal conduct to the 106 Scheduled Incidents enumerated in Schedules A to G of the Indictment. Rather, the Trial Chamber's decisions as well as a plain reading of the Indictment reflect that the Scheduled Incidents were not a comprehensive list of all the underlying criminal conduct that may be relied upon in support of a particular count charged in the Indictment.

35. The Appeals Chamber also observes that Mladić, largely in his reply brief, contests the Prosecution's arguments that the Indictment sufficiently pleaded material facts related to the Unnamed Unscheduled Incidents or that post-Indictment submissions and the nature of his defence demonstrate that any defects in the Indictment were cured in relation to such incidents.[99] However, Mladić does not demonstrate error in the Trial Chamber's conclusion that, in light of his pre-trial notice challenges, the Indictment was not defective in view of the nature and scope of the case against him or show error in its conclusion in the Trial Judgement that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident whether enumerated by schedule or not.

36. The Appeals Chamber recalls that a trial chamber can only convict an accused of crimes that are charged in the indictment.[100] The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable him or her to prepare a meaningful defence.[101] An indictment need not have the degree of specificity of the evidence underpinning it; the degree of specificity required depends on the nature and scale of the alleged criminal conduct, including the proximity of the accused to the relevant events.[102] As noted above, the charges against Mladić did not implicate him as a physical perpetrator, concerned a vast amount of territory of Bosnia and Herzegovina, and spanned over three years.[103] Relevant jurisprudence dictates that, while an indictment is required to

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[97] Trial Judgement, para. 5270. The Trial Chamber pointed to language in the Indictment such as "including", "illustrative examples", "as well as", and "including but not limited to" as clarifying that the crimes enumerated in Schedules A to G were not exhaustive in nature. *See* Trial Judgement, para. 5270.
[98] *See*, *e.g.*, Indictment, paras. 39(a)-(c), 46(a), 59(a)-(d), (g), (i), 62, 64, 81.
[99] Mladić Reply Brief, paras. 11, 12, 14.
[100] *Karadžić* Appeal Judgement, para. 441; *Ngirabatware* Appeal Judgement, para. 116; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntawukulilyayo.* Appeal Judgement, para. 189.
[101] *Karadžić* Appeal Judgement, para. 441; *Ngirabatware* Appeal Judgement, paras. 32, 115; *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al*. Appeal Judgement, paras. 213, 225, 262.
[102] *Karadžić* Appeal Judgement, para. 441, *citing Ngirabatware* Appeal Judgement, para. 32; *Šainović et al.* Appeal Judgement, paras. 225, 233; *Kvočka et al.* Appeal Judgement, para. 65; *Rutaganda* Appeal Judgement, para. 302.
[103] Decision of 13 October 2011, para. 7.

plead material facts through which the Prosecution seeks to establish an accused's criminal liability, as the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.[104] Indeed, in cases concerning extensive and continuous criminality, specificity with respect to the timing, victims, and location of "representative" incidents of criminality may satisfy the obligation of providing sufficient notice of the nature of the case the accused is required to meet in order to effectively prepare his defence.[105]

37. The burden falls on Mladić to develop arguments to demonstrate an error[106] and, having not even sought to show that the Trial Chamber erred in finding that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident whether enumerated by schedule or not, the Appeals Chamber declines to reassess these findings on its own. With respect to Mladić's contention that the Trial Chamber erred by convicting him *proprio motu*, the Appeals Chamber recalls that trial chambers are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record.[107] Having not demonstrated error in the Trial Chamber's conclusions that the Indictment was not defective for each incident whether enumerated by schedule or not, Mladić does not demonstrate error in this respect either.

38. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 1 of Mladić's appeal.

[104] *Kvočka et al*. Appeal Judgement, para. 65.
[105] *Cf. Galić* Appeal Judgement, paras. 3, 222, 223, nn. 636, 637 (noting that in a case charging an accused with conducting a campaign of shelling and sniping for nearly two years, the Prosecution was bound to provide details about some of the sniping and shelling incidents in the indictment but was under no obligation to list all the specific incidents in order to satisfy its obligation in pleading material facts so as to provide the accused notice of the nature of the case he had to meet).
[106] *See supra* Section II.
[107] *See Nyiramasuhuko et al.* Appeal Judgement, para. 115.

2. Alleged Errors Concerning Adjudicated Facts (Ground 2)

(a) Alleged Error in the Use of Adjudicated Facts (Ground 2.A)

39. Mladić submits that the Trial Chamber erred in law and/or in fact by relying on adjudicated facts in convicting him, and requests that the Appeals Chamber reverse the findings which were affected by the Trial Chamber's error.[108] In particular, he contends that the Trial Chamber erred in: (i) taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates;[109] or, in the alternative, (ii) applying a heightened standard of the burden to produce rebuttal evidence.[110] The Appeals Chamber will address these contentions in turn. Mladić also submits, *inter alia*, that the Trial Chamber: (i) erroneously relied on the "partial consistency" of evidence with adjudicated facts; (ii) relied extensively on adjudicated facts from cases which the Judges of the Trial Chamber had previously presided over, in which there were references to his role and guilt, thereby resulting in a perception of bias; (iii) failed to provide reasons for rejecting evidence in rebuttal of adjudicated facts; and (iv) repeatedly failed to state in the Trial Judgement which adjudicated facts it was taking judicial notice of and/or which it relied on in making findings of fact.[111] The Appeals Chamber notes, however, that Mladić does not develop these submissions in his appellant's brief, and accordingly considers that he has abandoned them. The Appeals Chamber will therefore only address Mladić's allegations of error to the extent that they have been raised in his notice of appeal and sufficiently developed in his appellant's brief.

(i) Alleged Error in Taking Judicial Notice of Facts Relating to the Conduct of Subordinates

40. The Trial Chamber took judicial notice of approximately 2,000 adjudicated facts pursuant to Rule 94(B) of the ICTY Rules.[112] Mladić challenged the taking of judicial notice of adjudicated

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[108] *See* Mladić Notice of Appeal, paras. 21-25; Mladić Appeal Brief, paras. 62-114; T. 25 August 2020 pp. 28-30, 32-40. *See also* Mladić Reply Brief, paras. 15-32; T. 26 August 2020 pp. 62-65.
[109] *See* Mladić Notice of Appeal, para. 21; Mladić Appeal Brief, paras. 62-95; T. 25 August 2020 pp. 28-30, 32-35. *See also* Mladić Reply Brief, paras. 16-19; T. 26 August 2020 pp. 62, 63.
[110] *See* Mladić Notice of Appeal, para. 22; Mladić Appeal Brief, paras. 96-113; T. 25 August 2020 pp. 35-40. *See also* Mladić Reply Brief, paras.20-32; T. 26 August 2020 pp. 63-65.
[111] *See* Mladić Notice of Appeal, paras. 22-27.
[112] *See* Trial Judgement, paras. 16, 5262, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012 ("First Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 March 2012 ("Second Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012 ("Third Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning the Rebuttal Evidence Procedure, 2 May 2012 ("Fourth Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on *Proprio Motu* Taking Judicial Notice of Two Adjudicated Facts, 5 June 2012.

facts, including adjudicated facts relating to the acts or conduct of his alleged subordinates.[113] The ICTY Appeals Chamber in this case reviewed the Trial Chamber's approach and found that it was consistent with the applicable jurisprudence.[114] Relying primarily on a decision in the *Karemera et al*. case, the ICTY Appeals Chamber, on 12 November 2013, held that it is within a trial chamber's discretion to take judicial notice of "facts relating to the existence of a joint criminal enterprise, the conduct of its members other than an accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be criminally responsible".[115]

41. Mladić submits that the Trial Chamber erred in relying on a decision of the ICTR Appeals Chamber in the *Karemera et al*. case when it took judicial notice of adjudicated facts relating to the acts or conduct of his proximate subordinates.[116] He argues that the ICTR Appeals Chamber in the *Karemera et al*. Decision of 16 June 2006 did not consider whether judicial notice could be taken of such facts.[117] Mladić contends that a decision of the ICTY Appeals Chamber in the *Galić* case recognizes the inherent unfairness of admitting written evidence relating to the acts or conduct of proximate subordinates, particularly in cases involving charges of command responsibility, and submits that the *Karemera et al*. Decision of 16 June 2006 should be reviewed in light of this decision in the *Galić* case to determine whether judicial notice of such facts may be taken.[118] He argues that the Trial Chamber's application of the law, although upheld on appeal in this case,[119] occasioned a miscarriage of justice as it relied on judicially noticed facts relating to the acts or conduct of his proximate subordinates to establish his criminal responsibility, thereby creating a rebuttable presumption of his guilt for their crimes.[120] Mladić contends that there are divergent approaches in the jurisprudence and compelling reasons to revisit the *Karemera et al.* Decision of

[113] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Defense Interlocutory Appeal Brief Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 July 2012 ("Defence Interlocutory Appeal Brief of 4 July 2012"), para. 26.
[114] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013 ("Appeal Decision on Adjudicated Facts"), para. 85. *See also* Appeal Decision on Adjudicated Facts, paras. 82-84, 86, 87.
[115] Appeal Decision on Adjudicated Facts, para. 85, *referring to, inter alia, The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al.* Decision of 16 June 2006"), paras. 52, 53. *See also* Appeal Decision on Adjudicated Facts, paras. 81, 83.
[116] *See* Mladić Appeal Brief, paras. 62-94, *referring to Karemera et al*. Decision of 16 June 2006; T. 25 August 2020 pp. 28-30, 32-35.
[117] Mladić Appeal Brief, para. 76; T. 25 August 2020 p. 30. *See also* Mladić Appeal Brief, paras. 80-88; T. 25 August 2020 pp. 29, 30, 32-34; T. 26 August 2020 p. 63, *referring to, inter alia*, Trial Judgement, para. 2210 (Incident of 23 July 1995), *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*D. Milošević* Decision of 26 June 2007"), para. 16.
[118] *See* Mladić Appeal Brief, paras. 64, 65, 68, 69, 72-75, 80, 93, 94, *referring to Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Decision of 7 June 2002"); T. 25 August 2020 pp. 28, 29. *See also* Mladić Reply Brief, paras. 17, 18.
[119] Mladić Appeal Brief, paras. 66, 67, 90, *referring to* Appeal Decision on Adjudicated Facts.
[120] *See* Mladić Appeal Brief, paras. 62-65, 89, 91, 92. *See also* T. 25 August 2020 pp. 32-35.

16 June 2006, namely to provide guidance on the exercise of discretion when taking judicial notice of facts relating to the accused's proximate subordinates and to determine whether such judicially noticed facts can be relied upon in a sole or decisive manner, and requests the Appeals Chamber to review the relevant findings of the Trial Chamber accordingly.[121]

42. The Prosecution responds that Mladić fails to show any cogent reason to reverse well-established jurisprudence on taking judicial notice of adjudicated facts or any abuse of the Trial Chamber's discretion.[122] The Prosecution argues that Mladić misconstrues the ICTY Appeals Chamber's approach in the *Galić* Decision of 7 June 2002, which did not preclude admission of written evidence relating to the acts and conduct of immediately proximate subordinates,[123] and that he raised similar arguments at trial which were rejected on appeal in this case.[124]

43. In reply, Mladić maintains that the Prosecution mischaracterizes his submissions and misunderstands the relevant law.[125]

44. The Appeals Chamber finds that, by challenging on appeal the Trial Chamber's decision to take judicial notice of adjudicated facts relating to the acts or conduct of his alleged subordinates, Mladić is in effect seeking a reconsideration of the Appeal Decision on Adjudicated Facts. The impugned decision was based on an approach which the ICTY Appeals Chamber in this case confirmed as consistent with applicable jurisprudence. The Appeals Chamber recalls that it ordinarily treats prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions in order to prevent parties from endlessly relitigating the same issues and to allow certain issues to be finally resolved before proceedings continue on other issues.[126] The only exception to this principle is that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a

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[121] *See* Mladić Appeal Brief, paras. 65, 68, 69, 81-84, 93-95; Mladić Reply Brief, para. 16; T. 25 August 2020 pp. 28-30, 33-35; T. 26 August 2020 pp. 62, 63.

[122] Prosecution Response Brief, paras. 25-31; T. 26 August 2020 pp. 32-35. The Prosecution highlights that the Appeals Chamber in the *Karadžić* case recently found that the ICTY trial chamber in that case did not commit an error by taking judicial notice of the existence of crimes committed by Karadžić's subordinates. T. 26 August 2020 p. 34. The Prosecution further submits that Mladić fails to demonstrate that the Trial Chamber used any adjudicated fact regarding acts of his proximate subordinates to make findings on his contributions or *mens rea* relevant to the joint criminal enterprises. T. 26 August 2020 p. 35.

[123] Prosecution Response Brief, paras. 27, 28, 30.

[124] Prosecution Response Brief, para. 31.

[125] Mladić Reply Brief, paras. 15-19. *See also* T. 26 August 2020 pp. 62, 63.

[126] *See, e.g.*, *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Public Redacted Version of the "Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release" Filed on 22 May 2018, 8 June 2018 ("Decision of 22 May 2018"), p. 2; *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Prosecutor v. Mladen Naletilić, aka "Tuta", and Vinko Martinović, aka "Štela"*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005 ("*Naletilić and Martinović* Decision of 7 July 2005"), para. 20; *Kajelijeli* Appeal Judgement, para. 202.

clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[127]

45. In examining whether there is a clear error of reasoning in the Appeal Decision on Adjudicated Facts, the Appeals Chamber considers Mladić's argument that the *Karemera et al.* Decision of 16 June 2006 overlooked the relevance of the *Galić* Decision of 7 June 2002 when considering whether to take judicial notice of adjudicated facts relating to the acts or conduct of proximate subordinates.[128] The Appeals Chamber observes that the *Galić* Decision of 7 June 2002 does not preclude admission of written evidence in lieu of oral testimony relating to the acts and conduct of proximate subordinates.[129] Rather, it only precludes the admission of such evidence pertaining to the acts and conduct or mental state of the accused.[130] In that decision, the ICTY Appeals Chamber expressly noted that the ICTY rule on the admission of written statements in lieu of oral testimony did not exclude the admission of such statements going to the acts and conduct of others for which the accused is charged with responsibility.[131] Even with respect to admission of written evidence that is "so pivotal to the prosecution case, and where the person whose acts and conduct […] is so proximate to the accused", the *Galić* Decision of 7 June 2002 recognizes that this is a matter within the discretion of the trial chamber, observing that, in such circumstances, the trial chamber "may decide that it would not be fair to the accused" to permit its admission.[132]

46. A review of the *Karemera et al*. Decision of 16 June 2006 shows that the ICTR Appeals Chamber explicitly considered as applicable in the context of judicial notice of adjudicated facts the ICTY Appeals Chamber's analysis in the *Galić* Decision of 7 June 2002.[133] In particular, the *Karemera et al*. Decision of 16 June 2006 recalled the distinction drawn therein between "'(a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others'",[134] to emphasize that only adjudicated facts going to the latter warrant complete exclusion from judicial notice.[135] With respect to all other adjudicated facts relating to the accused's criminal responsibility, the ICTR Appeals Chamber adopted a cautious approach by declaring that "it is for the [t]rial

[127] *See, e.g*., Decision of 22 May 2018, p. 2, n. 16; *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 203.
[128] *See* Mladić Appeal Brief, paras. 64, 65, 69, 76, 80, 82, 85, 86, 94; T. 25 August 2020 pp. 28-30.
[129] *See Galić* Decision of 7 June 2002, paras. 9, 13-16.
[130] *See Galić* Decision of 7 June 2002, paras. 9-11.
[131] *Galić* Decision of 7 June 2002, para. 10.
[132] *Galić* Decision of 7 June 2002, para. 13.
[133] *See Karemera et al*. Decision of 16 June 2006, para. 52.
[134] *Karemera et al*. Decision of 16 June 2006, para. 52, *quoting Galić* Decision of 7 June 2002, para. 9.
[135] *See Karemera et al.* Decision of 16 June 2006, paras. 50-53.

[c]hambers, *in the careful exercise of their discretion*, to assess each particular fact in order to determine whether taking judicial notice of it – and thus shifting the burden of producing evidence rebutting it to the accused – is consistent with the accused's rights under the circumstances of the case".[136] Upon review of both decisions, the Appeals Chamber considers that the *Karemera et al*. Decision of 16 June 2006 evinces a consistent approach with the *Galić* Decision of 7 June 2002. The Appeals Chamber further considers that Mladić's position fails to recognize that adjudicated facts within the meaning of Rule 94(B) of the ICTR and ICTY Rules are presumptions and are not equivalent to the untested evidence at issue in the *Galić* Decision of 7 June 2002, and that this decision is therefore inapposite when considering what restrictions should be placed on a trial chamber when relying on adjudicated facts under Rule 94(B) of the ICTY Rules.[137] In particular, adjudicated facts under Rule 94(B) of the ICTY Rules are rebuttable presumptions that can only be accepted where, *inter alia*, they have been tested and established in another trial proceeding whereas the reliability and credibility requirements for admission of untested evidence pursuant to Rules 89(C) and 92 *bis* of the ICTY Rules are far less onerous.[138]

47. Moreover, this Appeals Chamber has recently held that a trial chamber may rely on adjudicated facts judicially noticed under Rule 94(B) of the ICTY Rules to establish the underlying crime base when making findings in support of convictions so long as such adjudicated facts do not concern the acts, conduct, or mental state of the accused.[139] In so doing, the Appeals Chamber reaffirmed the position taken in the Appeal Decision on Adjudicated Facts that adjudicated facts may relate to, *inter alia*, the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible, which necessarily include alleged subordinates.[140] In view of the above, Mladić fails to demonstrate that the ICTY Appeals Chamber in the Appeal Decision on Adjudicated Facts erred in relying on the *Karemera et al*. Decision of 16 June 2006 or that it committed any other error.

48. As to whether it is necessary to reconsider the Appeal Decision on Adjudicated Facts to prevent an injustice, the Appeals Chamber notes that, although Mladić contends that "[j]udicial notice of facts […] [relating to the acts or conduct of his immediate subordinates] *contributed* to the Trial Chamber's findings that the Appellant significantly contributed to the [joint criminal enterprises] through his command and control of Serb forces",[141] under this ground of appeal he

[136] *Karemera et al*. Decision of 16 June 2006, para. 52 (emphasis added).
[137] *See Karadžić* Appeal Judgement, para. 452, n. 1189.
[138] *See Karadžić* Appeal Judgement, n. 1189 (citations omitted).
[139] *Karadžić* Appeal Judgement, paras. 452, 453.
[140] *See Karadžić* Appeal Judgement, para. 452; Appeal Decision on Adjudicated Facts, para. 85.
[141] Mladić Appeal Brief, para. 91 (emphasis added). *See also* Mladić Appeal Brief, para. 62.

does not specifically point to any findings in which the Trial Chamber relied on adjudicated facts of this nature in a sole or decisive manner to establish his criminal responsibility.[142] On the contrary, a review of the Trial Judgement shows that the Trial Chamber duly considered the adjudicated facts in connection with other evidence during its deliberations.[143] Mladić therefore fails to demonstrate that the Trial Chamber's application of the relevant law, endorsed in the Appeal Decision on Adjudicated Facts, occasioned a miscarriage of justice.

49. The Appeals Chamber finds, Judge Nyambe dissenting, that having failed to demonstrate the existence of a clear error of reasoning in the Appeal Decision on Adjudicated Facts, or that reconsideration thereof is necessary to prevent an injustice, Mladić fails to demonstrate that the Trial Chamber erred in taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.

(ii) Alleged Error in Heightening the Standard of the Burden to Produce Rebuttal Evidence

50. In articulating its approach to evidence presented in rebuttal to adjudicated facts, the Trial Chamber specified, in part, as follows:

> The Trial Chamber analysed the evidence and considered, as an initial step, whether evidence contradicted the Adjudicated Facts. The Trial Chamber required evidence to be unambiguous in its meaning in order to be termed as 'contradicting the Adjudicated Facts'. For example, evidence suggesting mere possibilities was deemed not to reach that threshold. In other words, merely pointing at the possibility of alternative scenarios was in itself not sufficient ground to reopen the evidentiary debate. A contradiction can exist in either presenting evidence on a specific alternative scenario, as opposed to a mere suggestion of one or more possible alternative scenarios, or in the unambiguous demonstration that the scenario as found in the Adjudicated Fact must reasonably be excluded as true. […] The Trial Chamber was mindful that evidence contradicting adjudicated facts does not automatically rebut the adjudicated fact. The presumption of accuracy of the adjudicated fact is only rebutted by 'reliable and credible' contradictory evidence.[144]

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[142] *Cf. Tolimir* Appeal Judgement, para. 36. With respect to Mladić's submission that, in relation to the Incident of 23 July 1995, the Trial Chamber relied solely on adjudicated facts concerning the identity of the perpetrator which "went to the core of [the] case on his responsibility", (*see* T. 25 August 2020 pp. 32, 33; T. 26 August 2020 p. 63, *referring to* Trial Judgement, para. 2210, n. 9385, Adjudicated Fact 2871), the Appeals Chamber observes that the Trial Chamber already considered and rejected Mladić's argument that the Prosecution had not "led any substantial evidence other than adjudicated facts" in relation to this incident (*see* Trial Judgement, para. 2211) and Mladić demonstrates no error in this regard. In any event, the Trial Chamber noted that where it took judicial notice of adjudicated facts relating to this incident, it received documentary evidence which was consistent with the adjudicated facts (*see* Trial Judgement, para. 2209). Mladić's arguments are therefore dismissed.

[143] *See, e.g.*, Trial Judgement, paras. 16, 17, 33, 41, 51, 68, 71, 91, 108, 165, 187, 221, 298, 314, 349, 361, 378, 459, 479, 520, 577, 581, 590, 633, 657, 669, 675, 686, 709, 713, 727, 739, 760, 776, 785, 792, 800, 821, 833, 840, 854, 862, 870, 895, 920, 947, 976, 986, 1017, 1042, 1054, 1152, 1176, 1182, 1238, 1271, 1327, 1330, 1384, 1411, 1422, 1431, 1477, 1553, 1615, 1617, 1623, 1627, 1639, 1681, 1689, 1744, 1752, 1758, 1774, 1803, 1813, 1816, 1823, 1850, 1892, 1915, 1923, 1931, 1938, 1944, 1954, 1960, 1965, 1970, 1995, 1997, 2001, 2012, 2042, 2058, 2098, 2107, 2115, 2120, 2178, 2184, 2187, 2194, 2209, 2319, 2388, 2479, 2572, 2677, 2685, 2709, 2724, 2733, 2767, 2777, 2792, 2827, 2883, 2895, 2989, 3580, 3678, 3785, 3904, 3919, 4694. *See also* Trial Judgement, paras. 5276, 5277.

[144] Trial Judgement, paras. 5273, 5274 (internal citations omitted).

51. Mladić submits that the Trial Chamber erred in heightening the standard of the burden to produce credible and reliable evidence in rebuttal of adjudicated facts by introducing an additional requirement that such evidence be "unambiguous", and thereby shifting the burden of persuasion onto him by requiring him to disprove the judicially noticed facts beyond reasonable doubt.[145] According to Mladić, as a result of this error, the Trial Chamber relied on adjudicated facts which would have otherwise been rebutted to establish his criminal responsibility, thereby occasioning a miscarriage of justice.[146] Mladić requests the Appeals Chamber to articulate the correct legal standard, review the relevant findings of the Trial Chamber accordingly, and reverse those findings and convictions affected by the error.[147]

52. The Prosecution responds that Mladić fails to show that the Trial Chamber introduced an additional requirement or applied an incorrect legal standard to rebuttal evidence for adjudicated facts.[148] According to the Prosecution, the Trial Chamber correctly explained when evidence could be considered to clearly contradict an adjudicated fact, without requiring Mladić to disprove it beyond reasonable doubt.[149] The Prosecution adds that the incidents that Mladić lists as having been affected by the Trial Chamber's alleged error are inapposite.[150]

53. In reply, Mladić maintains that, had the correct standard been applied, his evidence would have been sufficient to reopen the evidentiary debate and rebut the adjudicated facts in question.[151]

54. The Appeals Chamber recalls that adjudicated facts of which judicial notice is taken are admitted with a presumption of accuracy that may be rebutted by the opposing party through the presentation of evidence at trial.[152] The ICTR Appeals Chamber in the *Karemera et al*. case has clarified that "the effect [of judicially noticing an adjudicated fact] is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into

[145] Mladić Appeal Brief, paras. 96-105, *referring to, inter alia*, Trial Judgement, para. 5273; T. 25 August 2020 pp. 35-40. *See also* Mladić Appeal Brief, para. 110.
[146] Mladić Appeal Brief, paras. 106-113; T. 25 August 2020 pp. 38-40. Mladić contends that, even when the accuracy of an adjudicated fact was challenged through evidence presented by the Prosecution, the Trial Chamber often disregarded such evidence as insufficiently reliable to rebut the adjudicated fact or relied on the adjudicated fact exclusively. *See* Mladić Appeal Brief, para. 110; T. 25 August 2020 p. 39. *See also* Mladić Reply Brief, paras. 31, 32, 34.
[147] Mladić Appeal Brief, para. 114; T. 25 August 2020 p. 40.
[148] *See* Prosecution Response Brief, paras. 32-41; T. 26 August 2020 pp. 33, 36, 37.
[149] *See* Prosecution Response Brief, paras. 32-35. *See also* T. 26 August 2020 pp. 36, 37.
[150] *See* Prosecution Response Brief, paras. 36-41.
[151] *See* Mladić Reply Brief, paras. 20-32, 34.
[152] *See Karadžić* Appeal Judgement, para. 452. *See also* Appeal Decision on Adjudicated Facts, para. 24. *See also Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al*. Decision of 29 May 2009"), para. 13 and references cited therein.

question by introducing reliable and credible evidence to the contrary".[153] In this respect, Mladić contends that "[t]he need for rebuttal evidence to be 'credible and reliable' […] must be read in light of the general standard for the admissibility of evidence",[154] which is "relatively low",[155] and "was never intended to be applied in conjunction with an additional requirement that the evidence be 'unambiguous'".[156] He argues that the Trial Chamber's error in heightening the standard resulted in his evidence being deemed "insufficient to enliven the rebuttal procedure or to rebut the accuracy of the adjudicated fact".[157]

55. In the Appeals Chamber's view, Mladić confuses the standard for the admissibility of evidence with the final evaluation thereof. A reading of the Trial Judgement shows that the Trial Chamber's criterion of unambiguity was not related to the reliability or credibility of evidence, but rather to its contrary nature.[158] In accordance with the standard elucidated by the ICTR Appeals Chamber in the *Karemera et al*. case, in order for evidence presented in rebuttal of an adjudicated fact to be admissible, and thereby bringing the presumption of its accuracy into dispute, such evidence must be contrary to the adjudicated fact and bear sufficient indicia of *prima facie* reliability and credibility.[159] The Appeals Chamber stresses, however, that "adjudicated facts that are judicially noticed […] remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial".[160] As such, the final evaluation of the probative value of rebuttal evidence, which includes a final assessment of its reliability and credibility, as well as the extent to which it is consistent with or contradicts adjudicated facts, "will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it".[161]

56. In light of the above, and considering that, once judicially noticed, an adjudicated fact is presumed to be true, the Appeals Chamber finds no dissonance in the Trial Chamber's requirement

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[153] *Karemera et al*. Decision of 16 June 2006, para. 42. *See also Karadžić* Appeal Judgement, para. 452; *Karemera et al*. Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17; *Karemera et al*. Decision of 16 June 2006, para. 49.
[154] Mladić Appeal Brief, para. 103; T. 25 August 2020 p. 36. *See also* Mladić Appeal Brief, para. 98.
[155] Mladić Appeal Brief, para. 103, *quoting Karemera et al*. Decision of 29 May 2009, para. 15 ("the threshold for admission of this type of rebuttal evidence is relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia"); T. 25 August 2020 p. 36.
[156] Mladić Appeal Brief, para. 104; T. 25 August 2020 pp. 37, 38.
[157] Mladić Appeal Brief, para. 106; T. 25 August 2020 pp. 39, 40. *See also* Mladić Appeal Brief, para. 112; Mladić Reply Brief, para. 27.
[158] *See* Trial Judgement, para. 5273 ("The Trial Chamber required evidence to be unambiguous in its meaning in order to be termed as 'contradicting the Adjudicated Facts'.").
[159] *See Karemera et al*. Decision of 29 May 2009, paras. 13-15. *See also D. Milošević* Decision of 26 June 2007, paras. 16, 17; *Karemera et al*. Decision of 16 June 2006, paras. 42, 49.
[160] *Karemera et al*. Decision of 29 May 2009, para. 21. *See also Karadžić* Appeal Judgement, para. 452.
[161] *Karemera et al*. Decision of 29 May 2009, para. 15. *See also Karadžić* Appeal Judgement, para. 128.

that evidence produced in rebuttal thereof should be "unambiguous in its meaning" – namely that it must either point to "a specific alternative scenario" or "unambiguous[ly] demonstrat[e] that the scenario as found in the Adjudicated Fact must reasonably be excluded as true"[162] – in order to successfully contradict it. Thus, read in context, the Trial Chamber gave guidance as to the type of evidence that amounted to rebuttal evidence in relation to adjudicated facts and did not shift the burden of proof or persuasion, which remained squarely on the Prosecution to prove its case beyond reasonable doubt.[163] Mladić points to no instance in which the Trial Chamber denied the admission of evidence produced in rebuttal of adjudicated facts for failing to be unambiguous, or for any other reason. Rather, a review of the Trial Judgement shows that the Trial Chamber duly considered, *inter alia*, whether the evidence in rebuttal was sufficiently contrary, as well as reliable and credible, to rebut the presumption of accuracy of an adjudicated fact before determining whether it could safely rely on that fact, in whole or in part, in its findings.[164] The fact that, in most instances, the Trial Chamber found that the rebuttal evidence which was admitted did not contradict the adjudicated facts, in the context of all evidence on the record, does not demonstrate error on the part of the Trial Chamber.

57. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred by applying a heightened standard of the burden to produce rebuttal evidence or shifting the burden of persuasion onto him. The Appeals Chamber therefore dismisses the remainder of Mladić's arguments in relation to his request for review of the relevant findings of the Trial Chamber and reversal of those findings and convictions affected by the alleged error.

58. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 2.A of Mladić's appeal.

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[162] Trial Judgement, para. 5273.

[163] *See* Trial Judgement, para. 5272 ("Taking notice of an adjudicated fact does not shift the ultimate burden of persuasion, which remains with the Prosecution."). *See also Karadžić* Appeal Judgement, para. 219; *Karemera et al*. Decision of 16 June 2006, para. 49.

[164] *See*, *e.g*., Trial Judgement, paras. 351, 353, 362, 447, 448, 603, 608, 682, 750, 771, 787, 829, 887, 905, 915, 969, 1050, 1064, 1076, 1089, 1092, 1101, 1113, 1124, 1149, 1156, 1159, 1263, 1264, 1318, 1319, 1378, 1486-1488, 1515, 1589, 1599, 1604, 1611, 1623, 1635, 1639, 1662, 1664, 1668, 1720, 1739, 1767, 1771, 1787-1792, 1912, 1919, 1920, 1929, 1934, 1942, 1950-1952, 1957, 1963, 1968, 1973, 2008, 2010, 2035, 2039, 2042, 2047, 2048, 2051, 2054, 2055, 2085, 2086, 2095, 2096, 2144-2148, 2182, 4734, nn. 4284, 4560, 5424, 5425, 7565. *See also* Trial Judgement, paras. 5273-5277.

(b) Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D)

59. As part of Ground 2 of his appeal, Mladić submits that the Trial Chamber systematically erred in law and in fact throughout the Trial Judgement by: (i) applying an incorrect standard of proof, thereby alleviating the Prosecution's burden to prove his guilt beyond reasonable doubt (Ground 2.B);[165] (ii) failing to address clearly relevant exculpatory evidence in its reasoning, thereby indicating that it either failed to consider such evidence or gave insufficient weight thereto (Ground 2.C);[166] and (iii) relying on untested evidence in a sole or decisive manner (Ground 2.D).[167] In these respects, Mladić contends that the Trial Chamber's errors and their impact, which he elaborates more specifically in Grounds 3 through 7 of his appellant's brief, individually or cumulatively, invalidate the findings on which his convictions rest.[168]

60. The Prosecution addresses Grounds 2.B, 2.C, and 2.D of Mladić's appeal in response to the relevant grounds where he sets forth his substantive arguments.[169]

61. To the extent that Mladić develops his arguments in relation to Grounds 2.B, 2.C, and 2.D of his appeal, the Appeals Chamber will evaluate these grounds in connection with the submissions made in their support.

[165] *See* Mladić Notice of Appeal, paras. 26, 27; Mladić Appeal Brief, paras. 115-125.
[166] *See* Mladić Notice of Appeal, paras. 28-30; Mladić Appeal Brief, paras. 127-140. *See also* Mladić Reply Brief, paras. 33, 34.
[167] *See* Mladić Notice of Appeal, paras. 31, 32; Mladić Appeal Brief, paras. 142, 145-150.
[168] *See* Mladić Appeal Brief, paras. 115, 116, 118-129, 136-144, 148-151.
[169] Prosecution Response Brief, para. 42, n. 226.

3. Alleged Errors in Failing to Ensure Equality of Arms (Ground 8.A)

62. Mladić submits that the Trial Chamber violated his right to a fair trial by failing to ensure equality of arms.[170] He specifically argues that the Trial Chamber: (i) abused its discretion by refusing to extend the deadline for the presentation of witnesses to allow two Defence witnesses to testify;[171] and (ii) erred by closing the Defence case when evidentiary matters were pending.[172] The Appeals Chamber will address these arguments in turn.

63. Before doing so, the Appeals Chamber recalls that the principle of equality of arms provides that each party must have a reasonable opportunity to defend its interests under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.[173] Pursuant to Rule 85 of the ICTY Rules, each party is entitled to call witnesses and present evidence, and according to Rule 87(A) of the ICTY Rules, the hearing shall be closed when "both parties have completed their presentation of the case". The Appeals Chamber further recalls that matters related to the management of trial proceedings fall within the discretion of the trial chamber,[174] and that "every court possesses the inherent power to control the proceedings *during* the course of the trial".[175] This is reflected in Rule 73 *ter* of the ICTY Rules, which states that the trial chamber has the authority to determine the time allocated to the presentation of the defence case and the number of witnesses the defence may call.[176] Rule 54 of the ICTY Rules further provides that a trial chamber may issue orders as may be necessary for the conduct of the trial. In order to successfully challenge a discretionary decision, a

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[170] *See* Mladić Notice of Appeal, paras. 77, 78, 84, 85, p. 27; Mladić Appeal Brief, paras. 781-809, 876, 908.
[171] *See* Mladić Appeal Brief, paras. 781, 792-802, 806; T. 25 August 2020 pp. 85, 86.
[172] *See* Mladić Appeal Brief, paras. 782, 789-791, 803-805, 807.
[173] *See Karadžić* Appeal Judgement, para. 201; *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, 4 September 2008, para. 29. *See also Kalimanzira* Appeal Judgement, para. 34; *Nahimana et al*. Appeal Judgement, para. 173.
[174] *See, e.g., Karadžić* Appeal Judgement, paras. 72, 330; *Prlić et al*. Appeal Judgement, paras. 26, 119; *Šainović et al*. Appeal Judgement, para. 29; *Lukić and Lukić* Appeal Judgement, para. 17; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010 ("*Gotovina et al*. Decision of 1 July 2010"), para. 5; *Prosecutor v. Vujadin Popović et al*., Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008 ("*Popović et al*. Decision of 24 September 2008"), para. 3.
[175] *See Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012 ("*Ngirabatware* Decision of 20 February 2012"), para. 13; *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010 ("*Prlić et al*. Decision of 1 July 2010"), para. 31.
[176] *See* Rule 73 *ter* (C) and (E) of the ICTY Rules. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013 ("*Karadžić* Decision of 29 January 2013"), para. 9; *Prlić et al*. Decision of 1 July 2010, para. 31. The Appeals Chamber also recalls that the Trial Chamber's authority to limit the number of witnesses is always subject to the general requirement that the rights of the accused, pursuant to Article 21 of the ICTY Statute, be respected. Indeed, a trial chamber is required to ensure that the number of witnesses for the defence case is sufficient to allow the accused a fair opportunity to present his or her case. *See Prlić et al*. Decision of 1 July 2010, para. 31.

party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[177] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[178]

(a) Variation of the Deadline for the Presentation of Defence Witnesses

64. On 19 May 2014, Mladić filed a witness list that included [REDACTED].[179] Mladić amended his witness list on 25 March 2015 [REDACTED].[180] On 18 January 2016, Mladić filed motions requesting that the Trial Chamber admit documentary evidence related to, among others, [REDACTED].[181] On 26 April 2016, the Trial Chamber set the week of 30 May 2016 as the deadline for the calling of the remaining three Defence witnesses on the list of witnesses to be called to testify, which did not include [REDACTED].[182] The Trial Chamber denied Mladić's requests to admit documentary evidence related to [REDACTED] on 23 and 30 May 2016, respectively.[183] Subsequently, on 13 July 2016, Mladić requested a variation of the deadline for the presentation of Defence witnesses and notified his provisional intent to call [REDACTED] as *viva voce* witnesses.[184] The Trial Chamber denied these requests on 15 August 2016, finding, *inter alia*, that Mladić had not shown that the anticipated testimonies of [REDACTED] were of such

[177] *See Karadžić* Appeal Judgement, paras. 72, 330; *Nyiramasuhuko et al*. Appeal Judgement, para. 68; *Ndahimana* Appeal Judgement, para. 14; *Lukić and Lukić* Appeal Judgement, para. 17.
[178] *See, e.g.*, *Karadžić* Appeal Judgement, para. 85; *Prlić et al*. Appeal Judgement, para. 26; *Ndahimana* Appeal Judgement, para. 14; Appeal Decision on Adjudicated Facts, para. 9; *Lukić and Lukić* Appeal Judgement, para. 17.
[179] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Supplemental Submission of Preliminary Witness and Exhibit Lists Under Rule 65 *ter* (G), 19 May 2014 (confidential), Annex A, Registry Pagination ("RP"). 78906, 78905, 78834, 78833.
[180] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion to Amend 65 *ter* List to Add Witnesses not Previously on the List and Notice of Intent to Not Adduce Evidence of Certain Witnesses and Modify the Mode of Others, 25 March 2015 (confidential), para. 4, Annex A, Registry Pagination ("RP") 87883, Annex B, RP. 87881.
[181] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Second Motion to Admit Documents from the Bar – Srebrenica, 18 January 2016 (confidential), RP. 95519, 95507; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Fifth Motion to Admit Documents from the Bar – Enemy Actions, 18 January 2016, RP. 95703.
[182] T. 26 April 2016 p. 43703. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 15 August 2016 (confidential) ("Decision of 15 August 2016"), paras. 1, 14, n. 44.
[183] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Second Motion to Admit Documents from the Bar Table, 23 May 2016, paras. 19, 20, p. 9; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 22, p. 15. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Motion for Partial Reconsideration or Certification to Appeal the Decision on Defence's Second Bar Table Motion, 7 July 2016, paras. 11, 12.
[184] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Request to Vary the Time for Witnesses Following the Denial 3 Bar Table Exhibits and, if Granted, Defence Notification of Intent to Call [REDACTED] *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]"), paras. 2, 20; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Pending the Outcome of the Certification to Appeal 65*ter* #1D07014, Defence Advance Motion to Notify of the Intent to Request a Variation of Time for Witnesses and, if Granted, to Call [REDACTED], *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]"), paras. 2, 17.

significance as to weigh in favour of granting the requested variance.[185] On 22 August 2016, Mladić sought reconsideration of or, alternatively, certification to appeal the Decision of 15 August 2016,[186] which the Trial Chamber denied on 26 October 2016.[187]

65. Mladić submits that the Trial Chamber abused its discretion by refusing to extend the deadline for the presentation of Defence witnesses to allow [REDACTED] to testify.[188] He argues that, in determining whether there was "good cause" to extend the deadline, the Trial Chamber failed to consider or gave "insufficient weight" to the relevance, context, and potential impact of the testimonies of [REDACTED][189] and [REDACTED],[190] as well as the interests of justice.[191] According to Mladić, the Trial Chamber's error prejudiced his ability to present his defence case,[192] and invalidates findings made on Srebrenica and Sarajevo in the Trial Judgement to the extent identified in his arguments on appeal.[193]

66. The Prosecution responds that Mladić fails to show any abuse of discretion in the Trial Chamber's decision not to grant additional time to allow [REDACTED] to testify.[194] According to the Prosecution, the Trial Chamber's denial of Mladić's "last-minute request" to vary the deadline for the presentation of witnesses was a "proper and reasonable exercise of its discretion",[195] especially given the "questionable relevance and negligible probative value of [REDACTED]

[185] Decision of 15 August 2016, paras. 16, 17, 19.
[186] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 22 August 2016 (confidential) ("Reconsideration Motion of 22 August 2016"), pp. 2, 18.
[187] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration of or, Alternatively, Certification to Appeal the Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 26 October 2016 (confidential) ("Decision of 26 October 2016"), p. 8.
[188] *See* Mladić Appeal Brief, paras. 781, 792-802; T. 25 August 2020 pp. 85, 86.
[189] Mladić contends that [REDACTED] evidence was directly relevant to the Trial Chamber's assessment of the cause of death of victims in Srebrenica and their military status, and that without this the Defence was left to rely on "piecemeal evidence". Mladić specifically argues that [REDACTED]. *See* Mladić Appeal Brief, paras. 797-799. *See also* Mladić Reply Brief, para. 109; T. 25 August 2020 pp. 85, 86.
[190] Mladić argues that the Trial Chamber rejected the Defence submissions that certain sniping and shelling incidents in Sarajevo were caused by the Army of the Republic of Bosnia and Herzegovina ("ABiH"), and that [REDACTED]. Mladić Appeal Brief, paras. 800-802. *See also* Mladić Reply Brief, para. 111.
[191] Mladić Appeal Brief, paras. 792, 795. *See also* Mladić Appeal Brief, paras. 793, 794.
[192] Mladić Appeal Brief, paras. 795, 808. *See also* Mladić Appeal Brief, paras. 793, 794, 799, 802.
[193] Mladić Appeal Brief, para. 806. Mladić submits that the Trial Chamber's alleged error invalidates the findings made on Srebrenica and Sarajevo "to the extent identified above". Having reviewed his submissions, the Appeals Chamber understands that Mladić refers to paragraphs 796 to 802 of his appellant's brief, where he describes the alleged impact that [REDACTED] evidence would have had on the Trial Chamber's findings concerning the cause of death of the Srebrenica victims and their military or civilian status ([REDACTED]), as well as the origin of fire and perpetrators of sniping and shelling on Sarajevo ([REDACTED]).
[194] *See* Prosecution Response Brief, paras. 328-335; T. 26 August 2020 pp. 39, 40.
[195] Prosecution Response Brief, para. 329.

evidence".[196] The Prosecution additionally submits that Mladić's arguments misrepresent the record and are repetitive of submissions that failed at trial.[197]

67. Mladić replies that, contrary to the Prosecution's response, he demonstrates on appeal that the Trial Chamber abused its discretion.[198]

68. The Appeals Chamber recalls that, according to Rule 73 *ter* (F) of the ICTY Rules, a trial chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. Contextual factors of the case, including the potential importance of a witness's evidence, may be relevant considerations in determining whether to grant additional time for a party to present evidence.[199] When requesting additional time at trial, Mladić argued that hearing the testimonies of [REDACTED] would be in the interests of justice because their evidence was relevant and probative, and that any delay occasioned by hearing their testimonies would be minimal.[200] Mladić specified that [REDACTED],[201] and that [REDACTED].[202]

69. The Appeals Chamber observes that, in the Decision of 15 August 2016, the Trial Chamber considered Mladić's submissions concerning the interests of justice, particularly the "significance" of [REDACTED] evidence.[203] The Trial Chamber noted Mladić's submissions that [REDACTED].[204] The Trial Chamber considered this submission and observed that [REDACTED].[205] The Trial Chamber further noted Mladić's submissions that [REDACTED].[206] The Trial Chamber reasoned that, while relevant, [REDACTED].[207] The Trial Chamber also dismissed Mladić's assertion that [REDACTED].[208] Having concluded that the anticipated

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[196] Prosecution Response Brief, paras. 325, 331-334. The Prosecution further argues that Mladić fails to demonstrate how the evidence from [REDACTED] would have affected the verdict in the Trial Judgement. *See* Prosecution Response Brief, paras. 332, 335. *See also* T. 26 August 2020 pp. 39, 40.
[197] Prosecution Response Brief, paras. 324, 333, 334.
[198] *See* Mladić Reply Brief, paras. 109-111, p. 32.
[199] *Cf. Karadžić* Decision of 29 January 2013, paras. 20, 22; *Haradinaj et al.* Appeal Judgement, paras. 38-40, 43, 49; *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against "*Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge*", 1 July 2008, paras. 20, 21, 25, 27.
[200] Request of 13 July 2016 Concerning [REDACTED], paras. 18, 19; Request of 13 July 2016 Concerning [REDACTED], para. 15.
[201] Request of 13 July 2016 Concerning [REDACTED], para. 18. *See also* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 3, 15, 16.
[202] Request of 13 July 2016 Concerning [REDACTED], paras. 15, 16. *See also* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 3, 13.
[203] *See* Decision of 15 August 2016, paras. 4, 5, 7, 8, 16.
[204] *See* Decision of 15 August 2016, para. 4, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 15, 16, 18.
[205] *See* Decision of 15 August 2016, para. 16, n. 45. *See also* Decision of 15 August 2016, para. 4.
[206] *See* Decision of 15 August 2016, para. 7, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 13-16.
[207] *See* Decision of 15 August 2016, para. 16, n. 46.
[208] *See* Decision of 15 August 2016, para. 16.

testimonies of [REDACTED] were not of such significance as to weigh in favour of varying the deadline for the presentation of the case, the Trial Chamber found that it was not in the interests of justice to do so.[209] The Appeals Chamber notes that the Trial Chamber reiterated its position in the Decision of 26 October 2016 when it denied requests for reconsideration of and certification to appeal the Decision of 15 August 2016.[210]

70. Bearing in mind the Trial Chamber's broad discretion in the management of trial proceedings before it, the Appeals Chamber is not persuaded, given the Trial Chamber's findings on the limited significance of [REDACTED] evidence, that its refusal to grant Mladić additional time amounted to an abuse of discretion. Notably, Mladić has not substantiated his assertions that the Trial Chamber failed to contextualize or give sufficient weight to the relevance of [REDACTED] testimonies, or that it failed to adequately consider the interests of justice.[211] The Appeals Chamber finds that the Trial Chamber duly considered these issues in the Decision of 15 August 2016,[212] and subsequently in the Decision of 26 October 2016.[213] On appeal, Mladić repeats arguments which failed at trial[214] without demonstrating any discernible error. The Appeals Chamber, Judge Nyambe dissenting, accordingly dismisses Mladić's submissions in this regard.

(b) Closure of the Defence Case

71. On 16 August 2016, the Trial Chamber enquired whether the Defence had rested its case.[215] The Defence submitted that it had not, given its pending motion to reconsider two decisions concerning a Prosecution witness and its intention to file a request for certification to appeal the Decision of 15 August 2016.[216] The Trial Chamber considered that "[c]ertification or reconsideration motions do not have a suspensive effect" on the closure of a case and accordingly

[209] Decision of 15 August 2016, para. 17. The Appeals Chamber further observes that Mladić's submissions on appeal ignore the Trial Chamber's considerations concerning the Defence's delay in informing the Trial Chamber and the Prosecution about adding [REDACTED] as witnesses. *See* Decision of 15 August 2016, para. 14, n. 44. In this regard, the Trial Chamber underlined the Defence's discretion in managing its own case as well as the consequences of seeking to tender evidence in late stages of the proceedings. *See* Decision of 15 August 2016, para. 15.
[210] *See* Decision of 26 October 2016, paras. 11, 12, 16.
[211] *See* Mladić Appeal Brief, paras. 792, 795.
[212] *See* Decision of 15 August 2016, paras. 4, 5, 7, 8, 10, 16-18.
[213] *See* Decision of 26 October 2016, paras. 4, 6, 11, 12.
[214] *Compare* Mladić Appeal Brief, paras. 792-795, 797-799, 802 *with* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 2, 15-19 *and* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 2, 13, 15, 16 *and* Reconsideration Motion of 22 August 2016, paras. 2, 3, 6, 18, 19, 23 *and* Decision of 26 October 2016, paras. 4, 6, 11, 12.
[215] T. 16 August 2016 pp. 44313, 44314.
[216] T. 16 August 2016 pp. 44314-44319. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion Requesting to Strike Amor Mašović Charts Due to Clear Error and New Particular Circumstances or, Alternatively, that this Trial Chamber Require the Testimony of Amor Mašović or Exercise its Power Under Rule 98 to Call Amor Mašović to Clarify the Reliabil[i]ty of His Expansive Forensic Assertions, 9 August 2016 (public with confidential and public annexes) ("Motion of 9 August 2016"), paras. 9, 28-31, 40-44.

closed the Defence case on the basis that there were no remaining evidentiary issues.[217] On 18 August 2016, Mladić filed a notice of objection to the closing of the Defence case, arguing, *inter alia*, that the Trial Chamber's decision lacked proper reasoning.[218] The Trial Chamber dismissed the objection on 23 August 2016,[219] and, as discussed above, on 26 October 2016, it denied Mladić's requests for reconsideration of or certification to appeal the Decision of 15 August 2016.[220]

72. Mladić submits that the Trial Chamber erred in closing the Defence case while evidentiary matters were pending.[221] According to Mladić, during the exchange with the Trial Chamber on 16 August 2016, the Defence had notified the Trial Chamber of its intention to seek reconsideration of the Decision of 15 August 2016.[222] Mladić argues that the Trial Chamber erred in law by concluding that a motion for reconsideration of a decision on an evidentiary matter did not constitute a pending evidentiary matter.[223]

73. The Prosecution responds that Mladić fails to demonstrate prejudice from the Trial Chamber's decision to close the Defence case.[224] In this regard, it submits that the Trial Chamber's decision to deny reconsideration or certification to appeal the Decision of 15 August 2016 was unrelated to the closure of the Defence case.[225] According to the Prosecution, Mladić also wrongly submits that he put the Trial Chamber on notice that he would seek reconsideration of the Decision of 15 August 2016.[226]

74. Mladić replies that the Prosecution incorrectly claims that he did not notify the Trial Chamber of his intention to seek reconsideration of the Decision of 15 August 2016.[227]

75. The Appeals Chamber observes that, when the Trial Chamber closed the Defence case on 16 August 2016, the only pending motion for reconsideration concerned a Prosecution witness

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[217] T. 16 August 2016 pp. 44317, 44319.
[218] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Notice of Objection to the Chamber's Closing of its Case, 18 August 2016, paras. 1, 8-11.
[219] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 23 August 2016, paras. 7, 8.
[220] Decision of 26 October 2016, p. 8.
[221] *See* Mladić Appeal Brief, paras. 782, 803-805, 807.
[222] Mladić Appeal Brief, paras. 789, 804.
[223] Mladić Appeal Brief, paras. 803, 805. According to Mladić, a motion for reconsideration would have required the Trial Chamber to review its previous evidentiary decision on the basis that it was erroneous or caused an injustice, or on the basis of a new fact or argument not originally considered. *See* Mladić Appeal Brief, para. 805.
[224] Prosecution Response Brief, para. 336. *See also* T. 26 August 2020 pp. 39, 40.
[225] The Prosecution submits that the Decision of 26 October 2016 reiterated that the nature of [REDACTED] evidence did not weigh in favour of varying the deadline for the presentation of Defence evidence. *See* Prosecution Response Brief, para. 336, *referring to* Decision of 26 October 2016, paras. 10-16.
[226] Prosecution Response Brief, n. 1324.
[227] Mladić Reply Brief, para. 112.

rather than the presentation of Defence evidence, and that the Defence had at that time only declared its intention to challenge the Decision of 15 August 2016.[228] Mladić adduces no authority on appeal to substantiate his assertion that the Trial Chamber was precluded from closing the Defence case following the Defence's statement that it would seek reconsideration or certification to appeal the Decision of 15 August 2016. Given the Trial Chamber's broad discretion in managing trial proceedings,[229] as well as its inherent power to control proceedings during the course of the trial,[230] the Appeals Chamber considers that, in the circumstances at the time, the Trial Chamber acted within the limits of its discretion. Mladić's submissions merely reflect his disagreement with the Trial Chamber's decision to close the Defence case and fail to demonstrate any discernible error amounting to an abuse of discretion.

76. The Appeals Chamber further considers that, beyond asserting that the Trial Chamber failed to guarantee equality of arms between the parties, and that he was not given a fair opportunity to present his case, Mladić does not substantiate his claims.[231] Mladić's submissions regarding equality of arms are therefore dismissed.

77. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.A of Mladić's appeal.

4. Alleged Errors in Conducting the Trial to the Detriment of Mladić's Health and in Assessing the Impact of Mladić's Medical Conditions on His Behaviour at Trial (Ground 8.B)

78. Mladić submits that the Trial Chamber conducted trial proceedings to the detriment of his health and failed to assess the impact of his medical conditions on his behaviour at trial.[232] He specifically contends that the Trial Chamber: (i) abused its discretion in denying his request for a four-day per week trial schedule and by imposing a five-day per week trial schedule for nine months;[233] and (ii) erroneously relied on communication protected by lawyer-client privilege to establish his *mens rea* for the Overarching JCE.[234] Mladić requests that, as a result of the errors, the Appeals Chamber reverse his convictions on all counts, order a retrial, or remit the case in part.[235] Specific to the contention of error related to lawyer-client privilege, Mladić further requests that the

[228] *See* Motion of 9 August 2016, para. 48; T. 16 August 2016 pp. 44314-44319.
[229] *See, e.g., Karadžić* Appeal Judgement, paras. 72, 330; *Lukić and Lukić* Appeal Judgement, para. 17; *Gotovina et al.* Decision of 1 July 2010, para. 5; *Popović et al.* Decision of 24 September 2008, para. 3.
[230] *See, e.g., Ngirabatware* Decision of 20 February 2012, para. 13; *Prlić et al.* Decision of 1 July 2010, para. 31.
[231] *See* Mladić Appeal Brief, paras. 783, 808, 908.
[232] *See* Mladić Notice of Appeal, paras. 79-83; Mladić Appeal Brief, paras. 810-875, 904-907.
[233] *See* Mladić Appeal Brief, paras. 810, 830-840, 904-906.
[234] *See* Mladić Appeal Brief, paras. 842-875, 907. *See also* Mladić Notice of Appeal, para. 81.
[235] Mladić Appeal Brief, paras. 915, 916.

Appeals Chamber articulate the correct legal standard, review the Trial Chamber's factual findings, and reverse findings on all counts, to the extent of the identified error.[236] The Appeals Chamber will address these arguments in turn. The Appeals Chamber notes that, in his notice of appeal, Mladić raises allegations concerning his fitness to stand trial.[237] However, Mladić does not develop this argument in his appellant's brief, and his reply brief clarifies that he is not appealing this issue.[238] Consequently, the Appeals Chamber finds that Mladić has abandoned this argument and will not consider it further.[239]

(a) Alleged Errors Regarding the Trial Schedule

79. On 15 January 2013, during the Prosecution case, Mladić filed a motion to reduce the five-day per week trial schedule due to health concerns, and annexed a medical report recommending, *inter alia*, two sets of four-hour hearing days followed by a day of rest per week.[240] Finding the medical report unpersuasive, the Trial Chamber denied Mladić's motion on 13 March 2013.[241] On 16 April 2013, Mladić again requested a reduction of the trial schedule on the basis of his health concerns,[242] which the Trial Chamber denied on 12 July 2013.[243] The ICTY Appeals Chamber, on 22 October 2013, reversed the Decision of 12 July 2013, ordered the Trial Chamber to adopt a four-day per week sitting schedule for the remainder of the Prosecution case, and directed the Trial Chamber to reassess the matter of the sitting schedule at the beginning of the Defence case.[244]

[236] Mladić Appeal Brief, para. 875.
[237] *See* Mladić Notice of Appeal, paras. 80, 82.
[238] *See* Mladić Reply Brief, para. 113.
[239] *See, e.g.*, *Karadžić* Appeal Judgement, n. 19; *Karemera and Ngirumpatse* Appeal Judgement, nn. 28, 29.
[240] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 15 January 2013 (confidential), p. 8, Annex C, RP. 50952. *See also Prosecutor v. Ratko Mladić*, IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 ("Decision of 22 October 2013"), para. 3.
[241] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Seeking Adjustment of Modalities of Trial, 13 March 2013, paras. 12, 14. *See also* Decision of 22 October 2013, para. 3.
[242] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Second Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 16 April 2013 (confidential), para. 27. *See also* Decision of 22 October 2013, para. 5.
[243] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 12 July 2013 ("Decision of 12 July 2013"), paras. 18, 19. *See also* Trial Judgement, para. 5248; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motions for Reconsideration and Certification to Appeal the Decision on Defence Motion Seeking Adjustment of the Trial Schedule, 22 August 2013, para. 8 (granting certification to appeal the Trial Chamber's Decision of 12 July 2013).
[244] Decision of 22 October 2013, paras. 16, 17. *See also* Trial Judgement, para. 5248.

80. On 15 November 2013, the Trial Chamber ordered the Registry to examine Mladić's health prior to the commencement of the Defence case.[245] The Registry filed medical reports on 24 January 2014.[246] Based on these reports, on 14 March 2014, the Trial Chamber ordered a five-day per week trial schedule for the Defence case, subject to continued monitoring of Mladić's health and "regular appraisals" of the schedule in light of changes, if any, to his health.[247] Following the Registry's filing of additional medical reports on 9 and 24 July 2014, respectively,[248] the Trial Chamber adopted a four-day per week trial schedule on 25 August 2014, with Fridays provisionally designated as the non-sitting days.[249]

81. Mladić submits that, despite medical recommendations for a four-day per week schedule, the Trial Chamber conducted trial proceedings with a five-day per week schedule for nine months – five during the Prosecution case and four during the Defence case.[250] He argues that the five-day per week schedule resulted in chronic fatigue and a deterioration of his health which made it impossible for him to effectively participate in the proceedings and exercise his rights.[251] Mladić specifically challenges the Decision of 14 March 2014, in which, he alleges, the Trial Chamber erroneously reinstated the five-day per week schedule during the Defence case, from 19 May 2014 until August 2014.[252] According to Mladić, the Trial Chamber infringed his right to effective participation in his defence, harmed his health, disregarded medical recommendations, and continued to conduct proceedings with a five-day per week trial schedule for nine months.[253] In his view, the Trial Chamber's enforcement of a five-day per week schedule was prejudicial and occasioned a miscarriage of justice.[254]

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[245] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Order for Medical Examination of the Accused Pursuant to Rule 74 *bis*, 15 November 2013 ("Order of 15 November 2013"), paras. 5, 9. *See also* Trial Judgement, para. 5248.
[246] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Reports, 24 January 2014 (confidential) ("Submission of 24 January 2014").
[247] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Trial Sitting Schedule, 14 March 2014 (confidential; filed publicly on 28 March 2014) ("Decision of 14 March 2014"), paras. 20, 22.
[248] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 9 July 2014 (confidential), Annex A [REDACTED] ("Medical Report of 28 June 2014"); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar's Submission of Medical Report, 24 July 2014 (confidential), Annex B [REDACTED] ("Medical Report of 7 July 2014").
[249] T. 25 August 2014 p. 24701. On 17 September 2014, the Trial Chamber issued written reasons for the reduced schedule. *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Reasons for Decision on the Future Trial Sitting Schedule, 17 September 2014 ("Reasoning of 17 September 2014"), paras. 10-17, 19.
[250] *See* Mladić Appeal Brief, paras. 830-839, 905, 906. Specifically, Mladić contends that the Trial Chamber enforced the five-day per week schedule between 1 June and October 2013 during the Prosecution case, and that the four-day schedule was only implemented after appellate intervention on 22 October 2013. Mladić Appeal Brief, paras. 825, 836, *referring to* Decision of 22 October 2013. *See also* Mladić Appeal Brief, paras. 818-824.
[251] Mladić Appeal Brief, paras. 831, 833-835, 837-840, 906.
[252] Mladić Appeal Brief, paras. 826, 827, 829, 830, 837, *referring to* Decision of 14 March 2014, Reasoning of 17 September 2014.
[253] Mladić Appeal Brief, paras. 831, 839, 840, 906.
[254] Mladić Appeal Brief, paras. 810, 840, 906.

82. The Prosecution responds that, contrary to Mladić's suggestion, he actively participated in his defence when the five-day per week schedule was imposed during the Prosecution and the Defence cases, thus undermining his claim.[255] It further contends that Mladić fails to demonstrate how the Trial Chamber abused its discretion in the Decision of 14 March 2014, in which it ordered the five-day per week schedule during the Defence case,[256] given that it relied upon the reports of two doctors stating that reducing the sitting schedule to four days per week would lengthen the trial to the detriment of Mladić's health.[257] The Prosecution further contends that, in any event, Mladić fails to demonstrate any concrete impact on his fair trial rights as the Decision of 14 March 2014 only resulted in a five-day per week trial schedule "for a total of just six weeks over a three-month period".[258]

83. Mladić replies that the Prosecution's response demonstrates that the Trial Chamber was aware of the detrimental impact of the existing trial schedule and failed to adapt the proceedings accordingly.[259] He reiterates that the Trial Chamber abused its discretion in the Decision of 14 March 2014 by denying his request to change the schedule and by disregarding medical evidence recommending adapting the court proceedings to safeguard his health.[260]

84. The Appeals Chamber recalls that decisions concerning the scheduling of trials and their modalities are discretionary decisions of the trial chamber to which the Appeals Chamber accords deference.[261] The trial chamber's discretion, however, must be exercised in accordance with Articles 20(1) and 21 of the ICTY Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[262]

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[255] Prosecution Response Brief, paras. 344, 345.
[256] Prosecution Response Brief, paras. 338, 346, 347.
[257] Prosecution Response Brief, paras. 338, 346, 347.
[258] Prosecution Response Brief, paras. 338, 348. According to the Prosecution, Mladić fails to show that these six weeks rendered his 239-week-long trial unfair, deprived him of any rights, or diminished his effective participation in the trial. *See* Prosecution Response Brief, para. 348.
[259] Mladić Reply Brief, para. 114.
[260] Mladić Reply Brief, para. 116. *See also* Mladić Reply Brief, para. 115.
[261] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal Against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution Re-Opening, 22 May 2015, para. 6; Decision of 22 October 2013, para. 11. In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party. *See, e.g., Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al*. Appeal Judgement, para. 431, n. 1018 and references cited therein.
[262] *See, e.g., Karadžić* Appeal Judgement, paras. 26, 72; *Ndahimana* Appeal Judgement, para. 14; Decision of 22 October 2013, para. 12; *Galić* Appeal Judgement, para. 18. Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement. *See, e.g., Karadžić* Appeal Judgement, paras. 26, 72; *Nyiramasuhuko et al*. Appeal Judgement, para. 346; *Šainović et al*. Appeal Judgement, para. 29 and references cited therein.

85. With respect to the trial schedule during the Prosecution case, notably from 1 June to October 2013,[263] the Appeals Chamber recalls that the matter was addressed by the ICTY Appeals Chamber in the Decision of 22 October 2013.[264] The ICTY Appeals Chamber concluded that the Trial Chamber failed to attribute sufficient weight to relevant medical reports, abused its discretion in rejecting Mladić's request for a modified schedule, and therefore committed a discernible error.[265] The ICTY Appeals Chamber ordered the Trial Chamber to, *inter alia*, adopt a four-day per week schedule for the remainder of the Prosecution case.[266]

86. As to the trial schedule during the Defence case, the Appeals Chamber observes that, in the Decision of 22 October 2013, the ICTY Appeals Chamber directed the Trial Chamber to "reassess the matter at the beginning of the Defence case".[267] Complying with this direction, the Trial Chamber, on 15 November 2013, ordered the Registry to facilitate further examinations of Mladić's health.[268] The Registry submitted medical reports regarding Mladić's health on 24 January 2014.[269] Following this, the Trial Chamber reinstated the five-day per week schedule on 14 March 2014.[270] In doing so, the Trial Chamber considered, *inter alia*, that: (i) two expert medical reports by [REDACTED], attached to the Registry's Submission of 24 January 2014, concluded that "delaying or protracting the course of the trial would be disadvantageous to [] Mladić's health";[271] (ii) other medical reports filed by the Registry and the UN Detention Unit medical staff showed a preference for a four-day per week schedule due to [REDACTED] or in order to keep Mladić's condition "as good as possible";[272] and (iii) the expert reports of the [REDACTED] should be given more weight, as their opinions fall squarely within their fields of expertise.[273] Based on these considerations, the Trial Chamber found that delaying or protracting the course of the trial would be disadvantageous to Mladić's health given that the likelihood of any further delay would increase [REDACTED] due to the existence of serious risk factors – such as [REDACTED] – as well as his increasing age.[274]

[263] *See* Mladić Appeal Brief, paras. 833-836.
[264] *See* Decision of 22 October 2013, paras. 12-17.
[265] Decision of 22 October 2013, para. 16.
[266] Decision of 22 October 2013, para. 17.
[267] Decision of 22 October 2013, para. 17.
[268] Order of 15 November 2013, paras. 5, 9.
[269] Submission of 24 January 2014, Annexes B, D-F.
[270] Decision of 14 March 2014, para. 22.
[271] Decision of 14 March 2014, para. 15. [REDACTED] *See* Submission of 24 January 2014, Annexes D-F, RP. 76203, 76191, 76188.
[272] Decision of 14 March 2014, paras. 17, 18.
[273] Decision of 14 March 2014, para. 18.
[274] Decision of 14 March 2014, para. 19.

The Trial Chamber also ordered that the same [REDACTED] continue to examine Mladić's health on an ongoing basis at least every four months.[275]

87. The Appeals Chamber notes that, on 13 June 2014, the Defence requested the Trial Chamber to permanently adopt a four-day per week trial schedule with Wednesdays designated as the day of rest.[276] On 9 and 24 July 2014, the Registry filed the Medical Report of 28 June 2014 and the Medical Report of 7 July 2014, respectively.[277] The Medical Report of 28 June 2014, prepared by the [REDACTED], stated, *inter alia*, that: [REDACTED].[278] The Medical Report of 7 July 2014, prepared by the [REDACTED], stated, *inter alia*, that: [REDACTED].[279] [REDACTED].[280] Having considered these medical reports and particularly the recommendation in the Medical Report of 7 July 2014, the Trial Chamber adopted a four-day per week schedule on 25 August 2014, with Fridays as provisional non-sitting days.[281]

88. The Appeals Chamber notes that there is no indication that, during trial proceedings, Mladić sought to appeal or to have the Trial Chamber reconsider the Decision of 14 March 2014, which he now challenges on appeal. In this respect, the Appeals Chamber recalls that, if a party raises no objection to a particular issue before a trial chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to raise the issue on appeal.[282] While Mladić did not challenge the Decision of 14 March 2014 at trial, the Appeals Chamber observes that he repeatedly raised concern with the five-day per week sitting schedule after this decision.[283] In these circumstances, the Appeals Chamber exercises its discretion to examine Mladić's appeal submissions in respect of the Decision of 14 March 2014.

89. Noting the above, the Appeals Chamber is not convinced by Mladić's submissions that the Trial Chamber abused its discretion in the Decision of 14 March 2014, which reinstated the five-day per week schedule between 19 May and 25 August 2014.[284] Rather, the Trial Chamber reassessed the matter of the schedule, in compliance with the ICTY Appeals Chamber's decision,[285]

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[275] Decision of 14 March 2014, paras. 20, 22.
[276] T. 13 June 2014 pp. 22668-22670, 22674, 22675. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Renewed Submissions in Relation to the Future Trial Sitting Schedule, 7 August 2014 (confidential) ("Defence Sitting Schedule Submissions of 7 August 2014"), para. 4.
[277] *See* Medical Report of 28 June 2014; Medical Report of 7 July 2014.
[278] Medical Report of 28 June 2014, RP. 80024, 80023.
[279] Medical Report of 7 July 2014, RP. 80339.
[280] Medical Report of 7 July 2014, RP. 80339.
[281] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-19.
[282] *See, e.g., Karadžić* Appeal Judgement, paras. 25, 312.
[283] *See* T. 12 June 2014 p. 22629; T. 13 June 2014 pp. 22668-22670, 22674, 22675; Defence Sitting Schedule Submissions of 7 August 2014.
[284] *See* Mladić Appeal Brief, para. 830; Decision of 14 March 2014, paras. 20, 22.
[285] *See* Order of 15 November 2013, para. 5; Decision of 14 March 2014, para. 6.

and based its findings on expert medical reports that advised against delaying trial proceedings, which would have resulted from a reduced schedule.[286] The Trial Chamber further ordered regular medical examinations to be performed, and that the examinations "be timed to coincide, where possible, with the hearings for the Defence case, if any, so that [] Mladić is assessed during a period in which the impact of the hearings on his health could be properly gauged".[287] Thereafter, following the filing of two additional expert medical reports on 9 and 24 July 2014, respectively, the Trial Chamber duly noted a clear preference for the four-day per week schedule to reduce the stress on Mladić's health.[288] The Trial Chamber therefore adjusted the schedule to four days a week for the remainder of the trial.[289] The foregoing demonstrates that, during the Defence case, the Trial Chamber was cognizant of and attempted to balance its duty under Article 20(1) of the ICTY Statute to ensure a fair and expeditious trial with Mladić's rights and well-being. The Appeals Chamber notes Mladić's additional submission that the Trial Chamber erred in ignoring medical recommendations to have Wednesdays as rest days rather than Fridays.[290] The Appeals Chamber notes that the Trial Chamber explicitly considered this matter but was unable to identify a medical basis for Wednesdays as rest days in the medical reports. The Trial Chamber also deemed it preferable to sit on consecutive days to avoid interruptions in the presentation of evidence and to allow Mladić longer uninterrupted rest.[291] In the Appeals Chamber's view, Mladić fails to substantiate any error on the part of the Trial Chamber in this respect. As Mladić fails to demonstrate that the Trial Chamber committed a discernible error with respect to the trial schedule during the Defence case, his contention that the Trial Chamber abused its discretion in the Decision of 14 March 2014 is therefore dismissed.

90. The Appeals Chamber is further not convinced by Mladić's arguments about the effect of the combined five-day per week schedule during the Prosecution and Defence cases on his ability to participate in the proceedings and exercise his rights.[292] Recalling that the burden rests on Mladić to demonstrate the errors or violations he alleges, the Appeals Chamber is not persuaded that the five-day per week schedule during limited periods of his trial impeded his ability to effectively

[286] *See* Decision of 14 March 2014, paras. 18, 19.
[287] *See* Decision of 14 March 2014, paras. 20, 22.
[288] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-17, 19.
[289] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-17, 19.
[290] *See* Mladić Appeal Brief, paras. 836, 839.
[291] *See* Reasoning of 17 September 2014, para. 17.
[292] *See, e.g.*, Mladić Appeal Brief, paras. 831, 833, 835, 838-840. The Appeals Chamber notes that a five-day per week sitting schedule was implemented during 19 weeks of the trial. *See* http://www.icty.org/case/mladic/4#trans (accessed on 8 June 2021) (between June and 22 October 2013 – the impugned five months during the Prosecution case – 13 out of the 20 weeks followed the five-day sitting schedule; during the Defence case, between 19 May and 25 August 2014, six out of the 14 weeks followed the five-day sitting schedule). Mladić's argument, that the Trial Chamber conducted

participate in his defence or caused harm to his health in violation of any of the rights enshrined in the ICTY Statute that would require appellate intervention at this stage of the proceedings. In this regard, Mladić simply raises arguments that were remedied by the ICTY Appeals Chamber or considered by the Trial Chamber without demonstrating any error.[293] The Appeals Chamber further notes instances during the relevant periods where Mladić actively participated in his trial.[294] His contention that the Trial Chamber infringed his fair trial rights in this respect is therefore without merit and is rejected.

91. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Mladić's submissions regarding the schedule during the trial proceedings.

(b) Alleged Errors Regarding the Use of Privileged Communication

92. On 18 February 2013, the Prosecution informed the Trial Chamber that Mladić had allegedly uttered some "terribly offensive" statements during recess ("Alleged Utterances"), which had been overheard by members of the Prosecution's staff.[295] At that time, the Prosecution expressed its intention to investigate the matter and its position that the Alleged Utterances could constitute "evidence of *mens rea* and knowledge of the crimes".[296] On 18 March 2013, the Prosecution sought to admit an investigator's report that included statements from two Prosecution staff, Maria Karall and Dora Sokola, who attested to having overheard the Alleged Utterances.[297] On 4 June 2013, the Trial Chamber rejected the Motion of 18 March 2013 on the basis that the Alleged Utterances "have the potential to be *prima facie* relevant to [Mladić's] knowledge of the alleged detention and mistreatment of Muslim women and girls" and would need to be tendered as *viva voce* evidence or pursuant to Rule 92 *ter* of the ICTY Rules.[298] On 22 August 2013, the Trial Chamber granted the Prosecution's request to add Karall and Sokola to its witness list.[299]

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proceedings with a five-day sitting schedule for "nine months", is therefore a misrepresentation of the record. *See* Mladić Appeal Brief, paras. 810, 840, 906.

[293] *See* Mladić Appeal Brief, paras. 831-838.

[294] *See, e.g.*, T. 5 September 2013 p. 16313; T. 26 June 2014 p. 23098.

[295] T. 18 February 2013 pp. 8830, 8831.

[296] T. 18 February 2013 pp. 8830, 8831.

[297] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (confidential), paras. 1, 15.

[298] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Prosecution's Motion for Admission of the Utterances of the Accused, 4 June 2013 ("Decision of 4 June 2013"), paras. 5, 7.

[299] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Prosecution's Motion for Leave to Amend its Rule 65 *ter* Witness List, 22 August 2013 ("Decision of 22 August 2013"), paras. 7-9, 11. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List, 20 June 2013, paras. 1, 10.

93. Prior to Karall's testimony on 12 September 2013, the Defence made two objections, arguing that the Alleged Utterances were subject to lawyer-client privilege and that Karall had a conflict of interest as a member of the Prosecution's staff.[300] The Trial Chamber denied both objections on the basis that: (i) the Defence's privilege argument "ignores that by speaking very loudly, [...] the communication cannot be considered to be confidential any further, and the accused has been warned about that, or at least it has been brought to his attention"; and (ii) there was no conflict of interest as Karall was "witness of fact" and "not here to establish any *mens rea* or things of the kind".[301]

94. During their testimonies, Karall and Sokola each stated that the Prosecution had tasked them with listening to Mladić's statements and that they overheard the Alleged Utterances in the courtroom during recess on 18 February 2013.[302] In noting evidence tendered as to Mladić's *mens rea* with respect to the Overarching JCE in the Trial Judgement, the Trial Chamber referred to the evidence of Karall and Sokola[303] as reflecting that, [REDACTED]:

> [REDACTED][304]

95. Mladić submits that the Trial Chamber erred by admitting and relying on the evidence of Karall and Sokola regarding the Alleged Utterances to establish his *mens rea*, despite its statement to the contrary, occasioning a miscarriage of justice.[305] Mladić argues in this respect that the Trial Chamber: (i) failed to consider Rule 97 of the ICTY Rules to determine whether the Alleged Utterances had been voluntarily disclosed;[306] (ii) disregarded the circumstances in which Karall and Sokola "overheard" the Alleged Utterances and failed to provide a reasoned opinion on how, in the circumstances, the disclosure could have been voluntary;[307] and (iii) erred by failing to consider "idiosyncrasies" in Mladić's speech stemming from his health conditions when determining whether he had voluntarily disclosed the Alleged Utterances or to provide a reasoned opinion on this point.[308]

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[300] T. 12 September 2013 pp. 16585, 16586.
[301] T. 12 September 2013 pp. 16589, 16590. On 21 October 2013, the Trial Chamber rejected a Defence request for certification to appeal the Oral Decision of 12 September 2013. *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Request for Certification to Appeal Oral Decision of 12 September 2013, 21 October 2013 ("Decision of 21 October 2013"), para. 9.
[302] T. 12 September 2013 pp. 16593, 16594, 16595 (private session), 16597-16599, 16601, 16602, 16604; T. 21 October 2013 pp. 18165-18183.
[303] Trial Judgement, paras. 4614, 4643, 5352 (confidential), n. 16380.
[304] Trial Judgement, para. 5352 (confidential).
[305] *See* Mladić Appeal Brief, paras. 842-875, 907. *See also* Mladić Reply Brief, para. 123.
[306] Mladić Appeal Brief, paras. 842, 851, 856-859, 866-868.
[307] *See* Mladić Appeal Brief, paras. 842, 853-858, 860-865, 874, 907. *See also* Mladić Reply Brief, paras. 118-121.
[308] Mladić Appeal Brief, paras. 821, 856, 869-871. *See also* Mladić Reply Brief, para. 122.

96. The Prosecution responds that Mladić fails to demonstrate an error in the Trial Chamber's decision to admit and rely on evidence of the Alleged Utterances, which were relevant, admissible, and not private.[309] The Prosecution submits, *inter alia*, that: (i) Rule 97 of the ICTY Rules does not apply as the Alleged Utterances were not made in a private and confidential space but "within easy earshot of Prosecution staff members who were openly and visibly sitting in the same courtroom";[310] (ii) the Trial Chamber was aware of the circumstances under which the Alleged Utterances were heard by Karall and Sokola;[311] (iii) Mladić fails to demonstrate how the Trial Chamber erred in giving little weight to the impact of his health problems;[312] and (iv) the Trial Chamber properly relied on the Alleged Utterances to establish his *mens rea* for the Overarching JCE.[313]

97. Mladić replies that the Prosecution provides no legal basis for the contention that Rule 97 of the ICTY Rules does not apply in public spaces or that the volume of the utterances absolves or negates the significance of the Prosecution's conduct – instructions to its staff to listen to all his communication – which negates the voluntariness of the disclosure.[314] He further submits that the Trial Chamber ruled that he had waived privilege before hearing the testimonies of Karall and Sokola.[315] According to Mladić, the Prosecution has also failed to undermine his submissions that the Trial Chamber did not to consider the impact of his medical conditions on the volume of his speech or that it explicitly stated that the witnesses would not be relied upon to establish his *mens rea*.[316]

98. The Appeals Chamber recalls that, pursuant to Rule 97 of the ICTY Rules, all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. This privilege is vital to the defence of an accused or appellant by

[309] Prosecution Response Brief, paras. 350-362. The Prosecution further argues that even if the Trial Chamber had excluded the Alleged Utterances, it would find Mladić guilty of crimes related to the Overarching JCE on the basis of other conclusive evidence of his criminal intent. *See* Prosecution Response Brief, paras. 351, 363.
[310] *See* Prosecution Response Brief, paras. 350, 352, 353, 358.
[311] Prosecution Response Brief, paras. 354-357.
[312] Prosecution Response Brief, para. 361.
[313] Prosecution Response Brief, para. 362.
[314] Mladić Reply Brief, paras. 117, 118, 120, 121.
[315] Mladić Reply Brief, para. 119.
[316] Mladić Reply Brief, paras. 122, 123.

allowing for open communication between counsel and client that is necessary for effective legal assistance as guaranteed under Article 21(4)(d) of the ICTY Statute.[317]

99. As a preliminary consideration, the Appeals Chamber notes that Mladić does not appear to dispute the fact that he made the Alleged Utterances or that he spoke them loudly in the courtroom.[318] With respect to the submission that the Trial Chamber failed to refer to Rule 97 of the ICTY Rules and address the issue of privilege,[319] the Appeals Chamber observes that the Trial Chamber took express note that Mladić objected to the admission of the Alleged Utterances on the basis that they violated his right to privileged communications with his counsel.[320] In this context, Mladić does not demonstrate that the Trial Chamber failed to address the matter as one of lawyer-client privilege within the meaning of Rule 97 of the ICTY Rules. As for Mladić's claim that the Trial Chamber erroneously found that privilege had been waived without holding an evidentiary hearing on this issue, the Appeals Chamber observes that Mladić did not seek an evidentiary hearing on the matter and that, on appeal, he makes no attempt to establish that such a hearing was required.[321] In light of the above, Mladić's submissions that the Trial Chamber failed to address the issue of lawyer-client privilege or erred by not holding an evidentiary hearing on this matter are dismissed.

100. The Appeals Chamber is also not convinced by Mladić's contention that the Trial Chamber disregarded the circumstances in which Karall and Sokola "overheard" the Alleged Utterances.[322]

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[317] *See Prosecutor v. Vujadin Popović et al.*, Case No. IT 05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012 (public redacted version) ("*Popović et al.* Decision of 16 July 2012"), para. 7.

[318] *See, e.g.*, Mladić Appeal Brief, paras. 866, 867, 870, 871.

[319] *See* Mladić Appeal Brief, paras. 856, 857.

[320] *See* Decision of 22 August 2013, para. 4; T. 12 September 2013 pp. 16587-16589; Decision of 21 October 2013, para. 7. The Appeals Chamber also recalls that, while trial chambers usually state the law they intend to apply, this is not a formal requirement. *See Šešelj* Appeal Judgement, paras. 57, 160.

[321] *See* T. 12 September 2013 pp. 16585-16589. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response to Prosecution Motion for Admission into Evidence the Utterances of the Accused, 2 April 2013 (confidential); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response to Prosecution Motion to Amend its Rule 65 *ter* Witness List, 4 July 2013. The Appeals Chamber moreover notes that, prior to Karall's testimony, the Trial Chamber gave the Defence the opportunity to argue why Mladić did not waive privilege despite indications that he shouted the Alleged Utterances in the presence of others. *See* T. 12 September 2013 pp. 16587, 16588 (Judge Orie to Defence Counsel: "What is the legal authority that if you shout audible for everyone but not in the presence of the Bench, that [] then suddenly that other rules would apply? And that you would not have given up your privilege if you shout […] or yell in the presence of other persons than the Bench? Is there any legal authority for that? Or could you analyse the waiver of privilege in such a way that it does only apply during court sessions and not if you do it anywhere else?"). The Trial Chamber found the Defence arguments in this regard unpersuasive. To this effect, in the Decision of 21 October 2013, the Trial Chamber considered that the Defence "appeared unable to address the issue of a potential lawyer-client privilege with a sufficient level of legal analysis for the [Trial] Chamber to properly understand the outline of the issue at stake". *See* Decision of 21 October 2013, para. 7.

[322] *See* Mladić Appeal Brief, paras. 856, 860-863, 874. The Appeals Chamber further finds Mladić's submission, suggesting that the Prosecution had clandestinely tasked Karall and Sokola to listen indiscriminately to conversations between Mladić and counsel, to be a misrepresentation of the facts. *See* Mladić Appeal Brief, paras. 861, 862. The Appeals Chamber notes that the Prosecution had, previous to Karall and Sokola hearing the Alleged Utterances, openly

Contrary to his submission, the record shows that the Trial Chamber was aware of and considered the relevant circumstances.[323] In addition, Mladić's argument that the Trial Chamber failed to provide a reasoned opinion in this regard[324] overlooks Judge Orie's statement, in the Oral Decision of 12 September 2013, that the Defence objection to Karall's testimony "about the waiver of privileged communication […] ignores that by speaking very loudly, that communication cannot be considered to be confidential any further, and the accused has been warned about that".[325] In view of the foregoing, Mladić does not demonstrate that the Trial Chamber failed to sufficiently consider that he had not waived privilege with respect to the Alleged Utterances.

101. The Appeals Chamber turns to address Mladić's contention that the Trial Chamber failed to consider that his health condition leads to "loud, curt and rigid" speech and that the Trial Chamber placed undue weight on the volume of his speech to justify its finding of voluntary disclosure.[326] The Appeals Chamber recalls that, in a decision related to the Alleged Utterances, the Trial Chamber explicitly considered and rejected as unsubstantiated the Defence's attempt to link Mladić's health condition with his propensity to speak loudly.[327] The Appeals Chamber further recalls that the Trial Chamber warned Mladić on 23 August 2012 that loud and audible statements would be considered a waiver of lawyer-client privilege.[328] The Trial Chamber recalled the Warning of 23 August 2012 when rejecting Defence claims of privilege related to the Alleged Utterances.[329] The record also reveals that, following the Warning of 23 August 2012, Mladić controlled the volume of his speech when addressing his counsel on numerous occasions.[330]

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stated its intention to "use any inculpatory statements shouted" by Mladić in court, and Mladić had also been warned by the Trial Chamber that loud and audible statements "shouted across a courtroom" are considered a waiver of his lawyer-client privilege. *See* T. 23 August 2012 p. 1481 ("Warning of 23 August 2012").

[323] In rendering the Oral Decision of 12 September 2013, the Trial Chamber considered Defence Counsel's argument that Karall had a conflict of interest as she was a staff member of the Prosecution and that she was in the courtroom on 18 February 2013, listening to Mladić's communication with his counsel outside the official part of the trial. *See* T. 12 September 2013 pp. 16585, 16586, 16589. During the hearing where Karall and Sokola testified, the Trial Chamber also heard evidence that both were tasked to listen to Mladić's outbursts and about circumstances in which they heard the Alleged Utterances. *See, e.g.*, T. 12 September 2013 pp. 16593, 16594, 16595 (private session), 16596; T. 21 October 2013 pp. 18165-18173.

[324] *See* Mladić Appeal Brief, para. 865.

[325] T. 12 September 2013 p. 16589.

[326] *See* Mladić Appeal Brief, paras. 856, 869-871. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision Concerning Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie, 22 January 2014, Annex B, para. 18 (where Judge Orie stated that over the course of the Prosecution's case, Mladić was "perfectly able to control the volume of his speech").

[327] *See* Decision of 21 October 2013, para. 7.

[328] *See* Warning of 23 August 2012.

[329] *See* T. 12 September 2013 p. 16589.

[330] *See, e.g.*, T. 28 August 2012 p. 1825 (where Judge Orie reminded Mladić and counsel to confer with the microphone switched off and in lower voices and this instruction was followed); T. 30 August 2012 pp. 1939, 1940 (where Defence counsel asked to confer with Mladić and Judge Orie granted the request and reminded them to "please take care that he speaks softly", this was followed and Judge Orie indicated that "[t]he Chamber appreciates the way it was done […] that Mr. Mladić indicates he wants to consult with counsel and that the level of the volume of your voices was such that […] it's in line with what we expect you to […] do"); T. 31 August 2012 p. 2051 (where Defence counsel asked to

Considering the foregoing, the Appeals Chamber finds no merit in Mladić's arguments that the Trial Chamber failed to take into account his health conditions or placed undue weight on the volume of his speech in rejecting claims of privilege with respect to the Alleged Utterances.

102. Mladić contends that as a consequence of the alleged errors discussed above, the Trial Chamber admitted the Alleged Utterances and erroneously relied on them to establish his *mens rea*, despite stating in its oral ruling on 12 September 2013 that it would not use Karall's evidence to this effect.[331] The Appeals Chamber recalls that, on 12 September 2013, when rejecting the Defence's objection to Karall's testimony, the Trial Chamber stated that Karall was tasked to recount the events of 18 February 2013 surrounding the Alleged Utterances and "not here to establish any *mens rea* or things of that kind".[332] In the Appeals Chamber's view, the Trial Chamber was simply highlighting that Karall was a witness of fact, tasked to testify about "what she saw, heard or experienced" on 18 February 2013.[333] This statement in no way contradicts the Trial Chamber's ultimate determination to summarize testimony of the Alleged Utterances when noting evidence that was tendered as to Mladić's *mens rea* with respect to the Overarching JCE. Moreover, the Appeals Chamber observes that the Trial Chamber expressed, on more than one occasion, the possibility that the Alleged Utterances could be evidence going to Mladić's acts and conduct as charged in the Indictment. For example, in the Decision of 4 June 2013, the Trial Chamber stated that Karall's and Sokola's evidence regarding the Alleged Utterances must be led *viva voce* or through Rule 92 *ter* of the ICTY Rules because "they concern the Accused's acts and conduct as charged in the Indictment".[334] The Trial Chamber made a similar statement when granting the Prosecution request to add Karall and Sokola to its witness list.[335]

103. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber notes the extensive evidence relied upon by the Trial Chamber in determining Mladić's *mens rea* in relation to the Overarching JCE.[336] In the midst of this body of evidence, the Appeals Chamber observes that, aside from summarizing Karall's and Sokola's testimonies, no express statement in the Trial Judgement indicates that the Trial Chamber relied on the Alleged Utterances in finding Mladić's

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confer with Mladić and appeared to do so in a low voice); T. 16 May 2013 p. 11194 (Judge Orie asked Defence counsel to consult with Mladić and this was done without incident or admonition from the Trial Chamber); T. 12 September 2013 pp. 16601, 16643, 16653 (where Defence counsel consulted with Mladić on several occasions without incident).

[331] *See* Mladić Appeal Brief, paras. 872-874. Arguments related to Mladić's *mens rea* for the Overarching JCE are addressed elsewhere in this Judgement. *See infra* Section III.B.2(b).

[332] *See* T. 12 September 2013 pp. 16589, 16590.

[333] *See* T. 12 September 2013 pp. 16589, 16590.

[334] *See* Decision of 4 June 2013, para. 5.

[335] *See* Decision of 22 August 2013, para. 7.

[336] *See* Trial Judgement, paras. 4613-4688, 5352.

mens rea for the Overarching JCE.[337] Given the *de minimis* relevance and probative value of this evidence in relation to the other evidence relied upon by the Trial Chamber concerning the Overarching JCE, Mladić fails to demonstrate how any error committed by the Trial Chamber's reliance on the Alleged Utterances would have impacted findings in the Trial Judgement.

104. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error warranting appellate intervention in relation to the Alleged Utterances.

(c) Conclusion

105. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.B of Mladić's appeal.

5. Alleged Errors in Permitting and Failing to Remedy Disclosure Violations (Ground 8.D)

106. Mladić submits that the Trial Chamber failed to provide an adequate remedy for the Prosecution's disclosure violations, putting him at an unfair disadvantage and hampering his ability to prepare his defence.[338] Specifically, he challenges the Trial Chamber's refusal to grant sufficient additional time to the Defence before the start of the trial to review materials that the Prosecution had: (i) belatedly disclosed; and (ii) provided through Electronic Disclosure Suite ("EDS") procedures without metadata.[339] The Appeals Chamber will address these arguments in turn.

107. Before doing so, the Appeals Chamber recalls that Article 21(4)(b) of the ICTY Statute provides that the accused shall have adequate time and facilities for the preparation of his defence. Nevertheless, trial chambers have considerable discretion in relation to the management of the proceedings before them.[340] Decisions concerning disclosure violations as well as related remedies concern the general conduct of trial proceedings and therefore fall within the discretion of the trial chamber.[341] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that

[337] *See* Trial Judgement, paras. 4614, 4685-4688, 5352.
[338] *See* Mladić Notice of Appeal, para. 86, p. 30; Mladić Appeal Brief, paras. 877-880, 908; Mladić Reply Brief, para. 125.
[339] Mladić Appeal Brief, paras. 879, 880. *See also* Mladić Reply Brief, para. 125.
[340] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 72, 330; *Prlić et al.* Appeal Judgement, para. 26; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14.
[341] *See, e.g.*, *Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al.* Appeal Judgement, para. 431; *Ndindiliyimana et al.* Appeal Judgement, para. 22; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

party.[342] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[343]

(a) Alleged Errors Related to Belatedly Disclosed Materials

108. The presentation of Prosecution evidence was originally set to commence on 29 May 2012.[344] On 25 April 2012, the Prosecution provided notice that, due to an upload error, a substantial part of materials supposedly disclosed on 11 November 2011, notably the fifth batch ("Batch 5"), had not been disclosed.[345] On 11 May 2012, the Prosecution informed the Defence that portions of batch 4-c of a 3 October 2011 disclosure ("Batch 4-c") had, for technical reasons, also not been disclosed.[346] On 14 May 2012, Mladić filed a motion requesting, *inter alia*, the adjournment of the commencement of the trial for six months.[347] Noting "the Prosecution's significant disclosure errors", on 17 May 2012, the Trial Chamber suspended the start of the presentation of evidence.[348] In a decision issued on 24 May 2012, the Trial Chamber assessed the impact of the Prosecution's disclosure violations regarding Batch 4-c and Batch 5[349] and found that the appropriate remedy was a limited postponement of the presentation of the Prosecution's

[342] *See, e.g., Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al.* Appeal Judgement, para. 431 and references cited therein.
[343] *See, e.g., Karadžić* Appeal Judgement, para. 85; *Prlić et al.* Appeal Judgement, para. 26; *Ndahimana* Appeal Judgement, para. 14; Appeal Decision on Adjudicated Facts, para. 9; *Lukić and Lukić* Appeal Judgement, para. 17.
[344] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Scheduling Order, 15 February 2012 (public with confidential annex), p. 7.
[345] *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012 (confidential) ("Eighth Prosecution Pre-Trial Report"), para. 6, Annex A, RP. 39041; T. 2 May 2012 pp. 404-410 (closed session).
[346] *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution's Submission of Informal Correspondence, 16 May 2012, Annex A, RP. 40193; T. 16 May 2012 p. 400. *See also* Eighth Prosecution Pre-Trial Report, Annex A, RP. 39041.
[347] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Urgent Defence Motion to Adjourn and Continue Trial or in the Alternative Bar the Prosecution from Presenting Any Witnesses or Exhibits That Were Untimely Disclosed, 14 May 2012, para. 4, p. 9. The Appeals Chamber notes that Mladić had previously filed several motions notifying the Trial Chamber of the Prosecution's disclosure violations and requesting a postponement of the start of trial. *See, e.g., Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Notice Pursuant to Chamber Direction of 29 March 2012, and Urgent Motion to Compel, 10 April 2012 (confidential), p. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Defense Response to the Prosecution "Corrigendum" Seeking Addition of Documents to the Rule 65 *ter* Exhibit List, 12 April 2012, paras. 3, 7-10, p. 4; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Report on Disclosure and Motion to Continue Trial, 1 May 2012 (confidential), paras. 3-9, Annexes A, B. *See also* T. 29 March 2012 pp. 243-253. These requests for adjournments were denied by the Trial Chamber on 3 May 2012. *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision on Two Defence Requests for Adjournment of the Start of Trial, 3 May 2012, paras. 1, 3.
[348] T. 17 May 2012 p. 524.
[349] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Urgent Defence Motion of 14 May 2012 and Reasons for Decision on Two Defence Requests for Adjournment of the Start of Trial of 3 May 2012, 24 May 2012 ("Decision of 24 May 2012"), paras. 20-26.

evidence until 25 June 2012.[350] When Mladić requested a further remedy for disclosure violations, the Trial Chamber again postponed the start of trial and instructed the Prosecution to first schedule witnesses least impacted by any disclosure failures.[351] The first Prosecution witness did not testify until 9 July 2012.[352]

109. Mladić submits that he did not have a reasonable opportunity to review the belatedly disclosed material, notably documents in Batch 4-c and Batch 5, before the commencement of trial.[353] In this regard, he contends that the limited adjournment provided by the Trial Chamber was insufficient to cure the cumulative effect of the Prosecution's disclosure failings.[354] He also challenges the Trial Chamber's consideration that preparing a defence is not exclusively done during the pre-trial stage.[355]

110. The Prosecution responds that Mladić fails to show that the Trial Chamber abused its discretion or that he suffered prejudice as the Trial Chamber granted him a substantial adjournment at the start of the proceedings and adopted other measures to ensure adequate preparation time.[356]

111. Mladić replies that the Prosecution incorrectly claims that he has failed to identify any unfairness and unreasonableness in the Trial Chamber's determinations.[357]

112. The Appeals Chamber recalls that suspensions due to extensive disclosure in the midst of proceedings are precisely the remedy that may be necessary to ensure an accused's right to a fair trial.[358] In granting limited postponements of the start of trial from 29 May 2012 until the testimony of the first Prosecution witness on 9 July 2012, the Trial Chamber considered that the Prosecution's disclosure violations had an impact on the Defence's preparations for trial and that additional searches and reviews may have been required.[359] It noted, however, that the impact of the disclosure

[350] Decision of 24 May 2012, paras. 26, 27.
[351] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration, 22 June 2012 ("Decision of 22 June 2012"), p. 2; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012 ("Decision of 29 June 2012"), para. 25. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion to Reconsider Decision of 24 May 2012, 31 May 2012, p. 13; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Supplement to Motion to Reconsider Decision of 24 May 2012, 5 June 2012, para. 16.
[352] T. 9 July 2012 pp. 525, 537. *See also* Decision of 22 June 2012, p. 2; Decision of 29 June 2012, para. 25.
[353] Mladić Appeal Brief, paras. 879, 880.
[354] Mladić Reply Brief, para. 125. *See also* Mladić Appeal Brief, para. 879.
[355] Mladić argues that the Trial Chamber's consideration "fundamentally ignores the importance of establishing a case theory and determining a case strategy in light of the evidence served". Mladić Appeal Brief, para. 880.
[356] *See* Prosecution Response Brief, paras. 325, 364-367.
[357] Mladić Reply Brief, para. 125.
[358] *Karadžić* Appeal Judgement, para. 90.
[359] *See* Decision of 24 May 2012, paras. 2, 25-27; Decision of 29 June 2012, paras. 23-25.

violations was limited.[360] The Trial Chamber further considered that: (i) the Prosecution had facilitated Defence preparations beyond its disclosure obligations; (ii) the preparation for a defence is not exclusively done during the pre-trial stage; and (iii) where warranted, the Defence may request another remedy.[361] Mladić's appeal submissions do not substantiate that the Trial Chamber's foregoing considerations and findings were incorrect, unfair, or unreasonable. In particular, the Appeals Chamber considers Mladić's submission challenging the Trial Chamber's statement that "preparing a Defence is not exclusively done during the pre-trial phase"[362] to be without merit. Mladić ignores that, following the impugned statement, the Trial Chamber considered that "Defence team members will continue to support counsel in the weeks and months following the start of the trial, including with the analysis of evidentiary material the Prosecution will present in relation to specific witnesses".[363] The Trial Chamber's position is consistent with jurisprudence stating that preparation time during the trial phase is a factor in determining whether a defence team has been given sufficient overall time to prepare its case.[364] The Appeals Chamber considers, Judge Nyambe dissenting, that, other than disagreeing with the Trial Chamber's determination to grant a limited postponement to the start of trial and presentation of Prosecution evidence, Mladić fails to demonstrate how the Trial Chamber abused its discretion or hampered his ability to prepare his defence.

(b) Alleged Errors Related to Disclosures Through EDS

113. On 9 February 2012, Mladić filed a motion in which he, *inter alia*: (i) argued that documents disclosed by the Prosecution through EDS lacked metadata; and (ii) requested an order to the Prosecution to re-disclose all previously disclosed material with metadata, and that the trial date be vacated "until a more workable date can be established after the [Prosecution] cures its deficient disclosure".[365] On 26 June 2012, the Trial Chamber denied these requests.[366] Mladić

[360] In relation to Batch 5, the Trial Chamber considered that material related to the first Prosecution witnesses was already disclosed in April 2012 and that affected documents were largely available on the ICTY's public website. *See* Decision of 24 May 2012, para. 22. In relation to Batch 4-c, the Trial Chamber considered that the missing documents were disclosed in May 2012, documents relating to the first Prosecution witnesses were released in e-court between April and May 2012, the disclosure failure related mainly to documents in English while the same documents in Bosnian/Croatian/Serbian had been disclosed to the Defence, and many of the documents that had not been disclosed were photographs or maps. It found that the impact of the belated disclosure was therefore limited. *See* Decision of 24 May 2012, para. 23.
[361] *See* Decision of 24 May 2012, para. 25; Decision of 29 June 2012, paras. 23, 24. *See also* Prosecution Response Brief, para. 365.
[362] *See* Mladić Appeal Brief, para. 880.
[363] Decision of 24 May 2012, para. 25. *See also* Decision of 29 June 2012, para. 23.
[364] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 24.
[365] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Amended Defense Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations, 9 February 2012 (public

appealed this decision on 21 August 2012,[367] and the ICTY Appeals Chamber denied his appeal on 28 November 2013.[368]

114. Mladić submits that the Trial Chamber erroneously refused to grant him additional time to process documents the Prosecution provided to him through EDS without metadata.[369]

115. The Prosecution responds that the ICTY Appeals Chamber already addressed this matter in an interlocutory appeal decision and that Mladić's submissions amount to a request for reconsideration without satisfying the requirements for reconsideration and that he does not demonstrate unfairness.[370]

116. The Appeals Chamber observes that the ICTY Appeals Chamber already considered and rejected Mladić's argument that the Trial Chamber erred in not granting him additional time because of the lack of metadata.[371] Specifically, in its Decision of 28 November 2013, the ICTY Appeals Chamber considered that the Trial Chamber had addressed the difficulties caused by the missing metadata, and found that the unresolved metadata issue "amounted only to an 'inconvenience'" for the Defence rather than a significant burden, and that, therefore, no additional time was warranted.[372] According to the ICTY Appeals Chamber, the Trial Chamber's denial of additional time to process documents without metadata was not unreasonable.[373] Given that the ICTY Appeals Chamber already ruled on this matter, Mladić's submissions on appeal amount to a request for reconsideration.

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with confidential annexes), paras. 9-11, p. 5. *See also*, *e.g.*, T. 23 February 2012 pp. 200-202; T. 29 March 2012 pp. 263-266.

[366] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 26 June 2012 ("Decision of 26 June 2012"), para. 14. The Trial Chamber specifically determined that: (i) Mladić had not shown that the Prosecution was not in compliance with its disclosure obligations; (ii) there was no need to order his requested relief in the interests of justice; and (iii) the Prosecution should continue to assist the Defence in accessing and searching the EDS. *See* Decision of 26 June 2012, paras. 10-13.

[367] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Defense Interlocutory Appeal Brief Against the Trial Chamber Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 21 August 2012, paras. 1, 21-37 (wherein Mladić argued that the Trial Chamber erred in not ordering that metadata be included with all materials disclosed through the EDS, and in not granting him additional time). *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 3 July 2012; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 13 August 2012.

[368] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, 28 November 2013 ("Decision of 28 November 2013"), paras. 45, 46.

[369] Mladić Appeal Brief, para. 879.

[370] *See* Prosecution Response Brief, paras. 325, 368, 369.

[371] Decision of 28 November 2013, paras. 39-46.

[372] Decision of 28 November 2013, paras. 41, 42.

[373] Decision of 28 November 2013, paras. 43, 44.

117. The Appeals Chamber recalls that it ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions.[374] The only exception to this principle is that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[375] The Appeals Chamber observes that Mladić fails to present any argument to demonstrate a clear error of reasoning in the ICTY Appeals Chamber's decision or show that reconsideration of the Decision of 28 November 2013 is necessary to prevent an injustice. Consequently, the Appeals Chamber declines to reconsider the Decision of 28 November 2013.

118. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber committed a discernible error in not granting him further time to review materials that the Prosecution had belatedly disclosed or provided through EDS procedures without metadata. Similarly, he does not show that the Trial Chamber's refusal to do so put him at a disadvantage *vis-à-vis* the Prosecution.

(c) Conclusion

119. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.D of Mladić's appeal.

[374] *See, e.g.*, Decision of 22 May 2018, nn. 15, 16; *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 202.
[375] *See, e.g.*, *Nyiramasuhuko et al*. Appeal Judgement, paras. 56, 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 203.

B. Alleged Errors Related to the Overarching JCE (Ground 3)

120. The Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[376] It concluded that members of the Overarching JCE included Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Nikola Koljević, Bogdan Subotić, Momčilo Mandić, Mićo Stanišić, and Mladić.[377] The Trial Chamber found that members of the Overarching JCE used units from the VRS and the Ministry of Interior of *Republika Srpska* ("MUP"), as well as paramilitary formations, regional and municipal authorities, and territorial defence units subordinated to or working closely with the VRS and the MUP, as "tools to commit the crimes in the Municipalities" in furtherance of the joint criminal enterprise.[378]

121. The Trial Chamber further found that Mladić, as Commander of the VRS Main Staff from 12 May 1992 until at least 8 November 1996,[379] significantly contributed to the Overarching JCE through his acts and omissions.[380] The Trial Chamber also found that Mladić knew crimes were committed against non-Serbs in the Municipalities, and that, through his statements and conduct, by 12 May 1992 at the latest, he shared the intent to achieve the common objective of the Overarching JCE.[381]

122. Mladić submits that the Trial Chamber erred in finding: (i) the existence of and his membership in the Overarching JCE; and (ii) that he significantly contributed to and shared the intent to further the Overarching JCE.[382] The Appeals Chamber will address these contentions in turn.

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[376] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231. The Trial Chamber found that crimes related to the Overarching JCE were committed in the following municipalities: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, and Vlasenica ("Municipalities"). *See* Trial Judgement, paras. 4218, 4225, 4227, 4229-4231. *See also* Trial Judgement, pp. 176-948.
[377] *See*, *e.g.*, Trial Judgement, paras. 4238, 4610, 4612, 4688, 5188, 5189. *See also*, *e.g.*, Trial Judgement, paras. 3578-3742, 3784-3827.
[378] *See*, *e.g.*, Trial Judgement, paras. 4225-4231, 4239. *See also*, *e.g.*, Trial Judgement, paras. 108-271, 3784-3985.
[379] Trial Judgement, paras. 275, 276, 4383.
[380] *See*, *e.g.*, Trial Judgement, paras. 4611, 4612, 4685. *See also* Trial Judgement, paras. 4241-4610.
[381] Trial Judgement, paras. 4685, 4686, 4688.
[382] *See* Mladić Notice of Appeal, paras. 33-38; Mladić Appeal Brief, paras. 13, 152-335; Mladić Reply Brief, paras. 38-66. *See also* T. 25 August 2020 pp. 41-59; T. 26 August 200 pp. 57-59.

1. Alleged Errors Regarding the Overarching JCE and Mladić's Membership (Ground 3.A)

123. As recalled above, the Trial Chamber concluded that between 1991 and 30 November 1995, the Overarching JCE existed with the common objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory[383] and that, by 12 May 1992, Mladić significantly contributed to and shared the intent of the joint criminal enterprise.[384]

124. Mladić submits that the Trial Chamber erred in finding the existence of and his membership in the Overarching JCE by: (i) improperly relying on adjudicated facts to establish the underlying crime base;[385] (ii) according insufficient weight to exculpatory evidence in relation to his participation;[386] and (iii) expanding the scope of the joint criminal enterprise as well as making inconsistent or erroneous findings with respect to his relationship with the Bosnian Serb leadership and his role in the VRS.[387] He contends that, as a consequence of the Trial Chamber's errors, the Appeals Chamber should overturn his convictions in relation to the Overarching JCE, or, in the alternative, reverse findings to the extent of any errors.[388] The Appeals Chamber will consider these arguments in turn.

(a) Reliance on Adjudicated Facts to Establish the Underlying Crimes of the Overarching JCE

125. Mladić submits that, in finding that the Overarching JCE existed, the Trial Chamber erred in its method of using adjudicated facts by: (i) relying solely on adjudicated facts that went to the acts and conduct of his proximate subordinates; and (ii) relying on adjudicated facts that were only corroborated by evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules ("Rule 92 *bis* evidence").[389] He argues that these errors led to a "defective evidentiary approach" in making findings on the crime base for the Overarching JCE.[390] To illustrate the Trial Chamber's erroneous approach, Mladić refers specifically to Scheduled Incidents B.10.2 and B.16.2,[391] and generally to 13 other scheduled incidents of the Indictment and five chapters of the Trial Judgement.[392] Mladić

[383] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[384] *See, e.g.*, Trial Judgement, paras. 4611, 4612, 4685-4688, 5188, 5189.
[385] *See* Mladić Appeal Brief, paras. 118, 156, 158-185, 207. *See also* T. 25 August 2020 p. 46.
[386] *See* Mladić Appeal Brief, paras. 186, 194-202, 208; Mladić Reply Brief, paras. 41, 42.
[387] *See* Mladić Appeal Brief, paras. 203-206.
[388] Mladić Appeal Brief, paras. 184, 185, 209, 210.
[389] Mladić Appeal Brief, paras. 158, 159, 180.
[390] Mladić Appeal Brief, paras. 118, 160, 182.
[391] Mladić Appeal Brief, paras. 161-179.
[392] Mladić Appeal Brief, paras. 160, 182.

submits that, as a result of the Trial Chamber's errors, findings in the Trial Judgement with respect to the existence of the Overarching JCE are invalidated.[393]

126. The Appeals Chamber will address Mladić's contentions of error in turn. Before doing so, the Appeals Chamber recalls that adjudicated facts, within the meaning of Rule 94(B) of the ICTY Rules, are presumptions which, as such, do not require corroboration.[394] Adjudicated facts may relate to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible.[395] In this context, trial chambers, after having reviewed the record as a whole, may rely on adjudicated facts to establish the underlying crime base when making findings in support of convictions.[396]

(i) Scheduled Incident B.16.2

127. With respect to Scheduled Incident B.16.2, the Trial Chamber found that:

> [O]n the evening of 30 September 1992, Serb MUP officers from the [Public Security Station ("SJB")] Vlasenica arrived at Sušica camp and, on the order of Mane Đurić [("Đurić")], removed 140 [to] 150 non-Serb detainees in four trips. Serbs wearing military uniforms were also present when the last group of detainees was removed by the MUP officers. The MUP officers killed all the detainees. Considering that Sušica camp comprised only Bosnian-Muslim detainees, the Trial Chamber finds that those killed were Bosnian Muslims.[397]

In making its findings on this event, the Trial Chamber considered Adjudicated Facts 1266 to 1268 as well as the evidence of Witnesses RM-066 and Ewa Tabeau.[398] It further determined that this incident constituted murder as charged under Counts 5 and 6 of the Indictment.[399]

128. Mladić notes that to reach its findings on Scheduled Incident B.16.2, the Trial Chamber relied on Adjudicated Facts 1266 to 1268 and Prosecution evidence.[400] He argues that the Prosecution evidence was insufficient on its own to establish that MUP officers caused the deaths in Scheduled Incident B.16.2.[401] Mladić further contends that he was unable to challenge Adjudicated Facts 1266 to 1268 through cross-examination because the Prosecution's evidence did not

[393] Mladić Appeal Brief, para. 183, *referring to* Trial Judgement, paras. 4216, 4232. *See also* Mladić Appeal Brief, para. 118.
[394] *See Karadžić* Appeal Judgement, para. 452, n. 1189 and references cited therein.
[395] *Karadžić* Appeal Judgement, para. 452, n. 1193; Appeal Decision on Adjudicated Facts, para. 85; *Karemera et al.* Decision of 16 June 2006, paras. 52, 53.
[396] *Karadžić* Appeal Judgement, para. 452, n. 1194 and references cited therein.
[397] Trial Judgement, para. 1773. *See also* Trial Judgement, paras. 3051 (Schedule B (r)), 4190. According to the Trial Chamber, Đurić was Head of SJB Vlasenica as of 20 May 1992. *See, e.g.*, Trial Judgement, paras. 51, 520.
[398] Trial Judgement, paras. 1771-1773.
[399] Trial Judgement, paras. 3051 (Schedule B (r)), 3065.
[400] Mladić Appeal Brief, para. 164.
[401] Mladić Appeal Brief, paras. 164, 165.

corroborate the facts that proved the elements of the crime.[402] Accordingly, Mladić submits that the Trial Chamber erred by relying exclusively on "unchallengeable" adjudicated facts to make its findings with respect to Scheduled Incident B.16.2.[403] Mladić also refers to his submissions in Ground 2 of his appeal that the standard imposed to rebut adjudicated facts is impermissibly high.[404]

129. The Prosecution responds that the Trial Chamber properly considered the adjudicated facts to establish the crime base of the Overarching JCE and that Mladić demonstrates no error in relation to Scheduled Incident B.16.2.[405] It argues that nothing prevented Mladić from bringing countervailing evidence against the adjudicated facts, and [REDACTED].[406]

130. The Appeals Chamber notes that, in reaching its findings on Scheduled Incident B.16.2, the Trial Chamber considered that: (i) according to Adjudicated Fact 1266, on 30 September 1992, a public burial of more than 20 Serb soldiers killed in an ambush by the ABiH was held in Vlasenica town;[407] (ii) according to Adjudicated Fact 1267, during the night, three MUP officers arrived at the Sušica camp with a bus and the MUP officers removed all 140 to 150 inmates in four loads and killed them;[408] and (iii) according to Adjudicated Fact 1268, the massacre was reported to the Vlasenica Crisis Staff members, who took no action except to order the dismantling of the camp and the concealment of its traces.[409]

131. Pursuant to the evidence of primarily Witness RM-066, the Trial Chamber further noted, *inter alia*, that: (i) after concerns about the safety of detainees of Sušica camp were raised with Đurić following the funeral in Vlasenica on 30 September 1992 and it was recommended to him that the detainees be transferred elsewhere until "things calmed down", Đurić "promised to send vehicles to have the detainees transferred";[410] (ii) the same evening, MUP officers from the SJB Vlasenica – including a man nicknamed "Chetnik", a man called Garić, and Pedrag Bastah – came

[402] Mladić Appeal Brief, para. 167.
[403] Mladić Appeal Brief, paras. 165, 168.
[404] *See* Mladić Appeal Brief, paras. 118, 167, 169.
[405] Prosecution Response Brief, paras. 46, 49, 50.
[406] Prosecution Response Brief, paras. 49, 50. [REDACTED]. Prosecution Response Brief, para. 50, nn. 245, 246, *referring to* Mladić Final Trial Brief, paras. 1669, 1671-1674 (confidential).
[407] Trial Judgement, para. 1772, n. 7431. *See also* First Decision on Adjudicated Facts, para. 51(1); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011 ("Prosecution Motion on Adjudicated Facts"), Annex A, pp. 473, 474.
[408] Trial Judgement, para. 1772, nn. 7433, 7435. *See also* First Decision on Adjudicated Facts, para. 51(1); Prosecution Motion on Adjudicated Facts, Annex A, p. 474.
[409] Trial Judgement, para. 1772, n. 7440. *See also* First Decision on Adjudicated Facts, para. 51(1); Prosecution Motion on Adjudicated Facts, Annex A, p. 474.
[410] Trial Judgement, para. 1772, n. 7432, *referring to* Exhibit P182 (confidential), para. 126.

to Sušica camp with an order from Đurić to remove the detainees as soon as possible;[411] (iii) the last group of detainees, consisting mostly of local Muslims from Vlasenica, was loaded onto a small bus that also carried a number of Serbs wearing military and police uniforms, and the bus was escorted by a police car carrying Chetnik, Bastah, and Garić;[412] (iv) after the police officers removed the last group of detainees, a group of soldiers arrived at Sušica camp demanding to know where the Muslims were;[413] and (v) the massacre was reported to the Vlasenica Crisis Staff members, who took no action except to order the dismantling of the camp and the concealment of its traces.[414]

132. Recalling the statement of the law above,[415] the Appeals Chamber considers that it was within the Trial Chamber's discretion to rely on Adjudicated Facts 1267 and 1268 to make findings concerning the removal and killing of Bosnian Muslim detainees by MUP officers and Mladić fails to show any error in this respect. In addition to the adjudicated facts, the Trial Chamber admitted a statement and heard testimony from Witness RM-066, who stated that [REDACTED].[416] The Appeals Chamber further observes that the Trial Chamber considered Witness Tabeau's evidence as well as documentary and forensic evidence regarding missing persons from Vlasenica Municipality.[417] On this basis, Mladić's submission – that the Prosecution evidence the Trial Chamber relied on is insufficient to create a link between the deaths of 140 to 150 detainees and the perpetrators of the killings – is without merit.

133. The Appeals Chamber also rejects Mladić's argument that, since the Prosecution evidence did not corroborate the adjudicated facts, he was prevented from challenging them through cross-examination.[418] In this respect, the Appeals Chamber notes that [REDACTED].[419]

134. The Appeals Chamber has rejected Mladić's submission that the burden imposed to rebut adjudicated facts is impermissibly high or that the Trial Chamber shifted the burden of proof by taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.[420] The Appeals Chamber recalls that taking judicial notice of an adjudicated fact serves only to relieve the Prosecution of its initial burden to produce evidence on the point, and the defence may then put

[411] Trial Judgement, para. 1772, n. 7434, *referring to* Exhibit P182 (confidential), para. 128, T. 18 September 2012 pp. 2528, 2529 (closed session).
[412] Trial Judgement, para. 1772, nn. 7436-7438, *referring to* Exhibits P182 (confidential), paras. 132, 134, P197.
[413] Trial Judgement, para. 1772, n. 7439, *referring to* Exhibit P182 (confidential), para. 133.
[414] Trial Judgement, para. 1772, n. 7441, *referring to* Exhibit P182 (confidential), paras. 135, 136, T. 17 September 2012 pp. 2430, 2431, 2456 (closed session). *See also* Trial Judgement, para. 4191.
[415] *See supra* para. 126.
[416] *See* Exhibit P182 (confidential), paras. 120, 128-136; T. 17 September 2012 pp. 2428-2432, 2455-2457 (closed session); T. 18 September 2012 pp. 2528, 2529 (closed session).
[417] *See* Trial Judgement, para. 1771, n. 7430.
[418] *See* Mladić Appeal Brief, paras. 166, 167, 181.
[419] *See* T. 17 September 2012 pp. 2455-2457 (closed session); T. 18 September 2012 pp. 2528, 2529 (closed session).

the point into question by introducing reliable and credible evidence to the contrary.[421] Nothing prevented Mladić from bringing evidence to refute Adjudicated Facts 1266 to 1268. Moreover, at trial, Mladić did not appear to dispute the facts pertaining to Scheduled Incident B.16.2 or Witness RM-066's evidence in this regard. Rather, relying on Witness RM-066's evidence, Mladić argued that the killing of 140 to 150 detainees was perpetrated by Serb police, who were not under the effective control of the VRS or under his authority, and could not be attributed to him given the lack of *actus reus* or *mens rea*.[422]

135. In light of the foregoing, Mladić fails to demonstrate that the Trial Chamber erred by relying exclusively on "unchallengeable" adjudicated facts to make findings on Scheduled Incident B.16.2.

(ii) Scheduled Incident B.10.2

136. In relation to Scheduled Incident B.10.2, the Trial Chamber found that:

> [O]n 14 June 1992, at least 52 detainees from the oil cisterns near the Rajlovac barracks were forced onto a bus, driven by a Serb named Žuti, who was Jovan Tintor's driver. There were two persons stationed on the bus as guards, and the Trial Chamber understands from Elvir Jahić's evidence, describing them as members of the "Serb army-police forces", that they were members of the VRS military police. The bus was escorted by four vehicles. Žuti stopped the bus near the village of Sokolina, near Srednje, and he and the two military policemen exited the bus. Immediately after, they attacked the bus with automatic weapons, hand grenades, and "zoljas", and the detainees who tried to escape were shot and killed. After the shooting, some detainees were still alive. A few minutes later, one of the vehicles that had escorted the bus, approached. The driver stepped out, entered the bus, and started firing at the bodies and survivors with an automatic rifle. He threw two hand grenades and left. In all, at least 47 of the detainees were killed, 38 of whom were found in a mass grave. Of them, 26 were found in civilian clothes. Based on the evidence of Witness RM-145 […], the Trial Chamber finds that all 52 detainees were Bosnian Muslims.[423]

In making this finding, the Trial Chamber considered Adjudicated Fact 1229, as well as the evidence of Witnesses Elvir Jahić, RM-145, and Tabeau.[424] It further determined that this incident constituted murder as charged under Counts 5 and 6 of the Indictment.[425]

137. Mladić notes that to reach the finding in respect of Scheduled Incident B.10.2, that at least 47 of the 52 detainees were killed by members of the VRS, the Trial Chamber relied on Adjudicated Fact 1229 which "established part of the elemental requirements".[426] Mladić submits

[420] *See supra* Section III.A.2(a)(ii); Mladić Appeal Brief, paras. 118, 167, 169.
[421] *See Karemera et al.* Decision of 16 June 2006, paras. 42, 49; *Karemera et al.* Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17.
[422] *See* Mladić Final Trial Brief, paras. 61, 122, 123, 125, 130, 1669, 1671-1674, nn. 179, 180, 182, 183, 186, 187, 193, 205-207.
[423] Trial Judgement, para. 974. *See also* Trial Judgement, para. 3051 (Schedule B (i)).
[424] Trial Judgement, paras. 969-974.
[425] Trial Judgement, paras. 3051 (Schedule B (i)), 3065.
[426] Mladić Appeal Brief, para. 171.

that, in respect of this scheduled incident, the Trial Chamber also received the evidence of Witnesses Jahić and RM-145, which he could not challenge because it was admitted pursuant to Rule 92 *bis* of the ICTY Rules.[427] He also reiterates that the burden to rebut adjudicated facts is "impermissibly high".[428] Accordingly, Mladić submits that the Trial Chamber erred by relying on "unchallengeable" adjudicated facts to establish the elements of the crime.[429]

138. The Prosecution responds that the Trial Chamber properly considered the adjudicated facts and Rule 92 *bis* evidence to establish the crime base of the Overarching JCE and that Mladić demonstrates no error in relation to Scheduled Incident B.10.2.[430] The Prosecution submits that it was within the Trial Chamber's discretion to take judicial notice of adjudicated facts that relate to the acts and conduct of an accused's subordinates, proximate or otherwise, and to rely on adjudicated facts alone or in combination with Rule 92 *bis* evidence in making crime-based incident findings.[431] The Prosecution further argues that, in any event, Mladić falsely asserts that he could not challenge or cross-examine evidence supporting Adjudicated Fact 1229, as he cross-examined Witness RM-145, whose evidence was entered through Rule 92 *ter* of the ICTY Rules, on events pertinent to the relevant adjudicated fact.[432]

139. With respect to Mladić's submission that Adjudicated Fact 1229 was "unchallengeable" as he was not able to cross-examine the Rule 92 *bis* evidence led in support of it, the Appeals Chamber, recalling the law on the use of adjudicated facts, considers that it was within the Trial Chamber's discretion to rely on Adjudicated Fact 1229 to find that at least 47 detainees from oil cisterns near Rajlovac barracks in Sokolina were killed by members of the VRS police and Mladić fails to show any error in this respect. The Appeals Chamber further considers that Mladić's argument fails to recognize that adjudicated facts admitted under Rule 94(B) of the ICTY Rules are not the equivalent of untested evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules.[433] Furthermore, the Appeals Chamber presumes that this argument is in reference to the evidence of

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[427] Mladić Appeal Brief, paras. 171, 172. In this regard, Mladić contends that the Trial Chamber abused its discretion by relying solely on untested written Rule 92 *bis* evidence to corroborate Adjudicated Fact 1229 and to establish the conduct of his proximate subordinates. *See* Mladić Appeal Brief, paras. 174-180, *referring to*, *inter alia*, *Galić* Decision of 7 June 2002, paras. 14-16.
[428] Mladić Appeal Brief, paras. 170, 172, 173, 181.
[429] Mladić Appeal Brief, para. 173.
[430] Prosecution Response Brief, paras. 46, 51, 52.
[431] Prosecution Response Brief, paras. 47, 48, 52. The Prosecution asserts that, in any event, the perpetrators at issue were not Mladić's proximate subordinates. Prosecution Response Brief, para. 47.
[432] Prosecution Response Brief, para. 52.
[433] *See Karadžić* Appeal Judgement, para. 452, n. 1189 and references cited therein. Taking judicial notice of adjudicated facts does not render such facts "unchallengeable" and a trial chamber may reasonably rely on adjudicated facts as proof of facts related to, *inter alia*, the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible. *See Karadžić* Appeal Judgement, para. 452, n. 1193; Appeal Decision on Adjudicated Facts, para. 85; *Karemera et al*. Decision of 16 June 2006, paras. 52, 53.

Witness Jahić, whose statement was admitted pursuant to Rule 92 *bis* of the ICTY Rules.[434] However, this submission ignores the fact that Mladić cross-examined Witness RM-145, who also gave supporting evidence about the attack on 14 June 1992 and whose evidence the Trial Chamber considered when making its findings.[435] Additionally, a review of the Mladić Final Trial Brief reflects that Mladić did not dispute the occurrence of the events of 14 June 1992 or the credibility of Witness RM-145's evidence.[436] Rather, Mladić simply argued at trial that the physical perpetrators of this event were not under the VRS's or his command and control.[437]

140. Furthermore, the Appeals Chamber recalls that it has rejected Mladić's submissions that the burden imposed to rebut adjudicated facts is impermissibly high and that the Trial Chamber shifted the burden of proof by taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.[438] The Appeals Chamber reiterates that taking judicial notice of an adjudicated fact serves only to relieve the Prosecution of its initial burden of production, and the defence may introduce reliable and credible evidence to the contrary.[439] As with Scheduled Incident B.16.2, nothing prevented Mladić from bringing evidence to refute Adjudicated Fact 1229 with respect to Scheduled Incident B.10.2. There is no indication that he presented such evidence.

141. Given the foregoing, Mladić fails to demonstrate that the Trial Chamber erred by relying on an "unchallengeable" adjudicated fact in making findings on Scheduled Incident B.10.2.

(iii) Other Scheduled Incidents

142. Mladić submits that, similar to Scheduled Incidents B.10.2 and B.16.2, the Trial Chamber also took a "defective evidentiary approach" in relation to 13 other scheduled incidents and five chapters of the Trial Judgement.[440] According to Mladić, these comprise Scheduled Incidents A.4.4, A.6.4, A.6.6, A.6.7, A.7.2, A.7.4, A.7.5, B.1.1, B.1.2, B.10.1, B.13.3, B.13.4, and C.6.1, as well as Chapters 4.2.4, 4.3.6, 4.5.5, 4.5.6, and 4.8.7 of the Trial Judgement.[441] He contends that this approach occurred systematically in establishing the crime base for the Overarching JCE.[442]

[434] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution's Twenty-Eighth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 2 December 2013, p. 8.
[435] T. 26 September 2012 pp. 3068, 3080-3087.
[436] Mladić Final Trial Brief, paras. 1372-1377.
[437] Mladić Final Trial Brief, paras. 1372, 1377.
[438] *See supra* Section III.A.2(a); Mladić Appeal Brief, paras. 118, 167, 169.
[439] *See Karemera et al.* Decision of 16 June 2006, paras. 42, 49; *Karemera et al.* Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17.
[440] Mladić Appeal Brief, paras. 160, 182.
[441] Mladić Appeal Brief, para. 160.
[442] Mladić Appeal Brief, para. 182.

143. The Prosecution responds that Mladić's challenge to these 13 other incidents, amounting to a single sentence in his appellant's brief, fails to identify any error and should be summarily dismissed.[443]

144. The Appeals Chamber observes that, in this respect, Mladić merely enumerates scheduled incidents of the Indictment and chapters of the Trial Judgement without making any attempt to substantiate his allegation of a "defective evidentiary approach".[444] Consequently, Mladić fails to satisfy his burden on appeal[445] and his submissions in this regard are dismissed.

(iv) Conclusion

145. In light of the foregoing considerations, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić has failed to demonstrate that the Trial Chamber committed any error in its method of relying on adjudicated facts when making findings on the underlying crimes of the Overarching JCE.

(b) Assessment of Exculpatory Evidence of Mladić's Membership in the Overarching JCE

146. Mladić submits that the Trial Chamber erred in finding that he was a member of the Overarching JCE by disregarding or giving insufficient weight to direct and exculpatory evidence that he acted in opposition to the common criminal objective of the joint criminal enterprise.[446] He points to evidence of his "positive attitude and behaviour" towards Bosnian Muslim and Bosnian Croat civilians,[447] including: (i) evidence of his care for non-Serb civilians during the conflict,[448] as well as evidence that they remained in their municipalities during the conflict[449] and were given a choice to leave or remain in their villages;[450] (ii) evidence that he reported concerns to Karadžić and the Minister of the Interior about the commission of crimes by "MUP forces" against non-Serbs, and that he called for affirmative action to be taken;[451] and (iii) excerpts from his military notebooks containing direct evidence of constraints he experienced in the Municipalities and the

[443] Prosecution Response Brief, para. 48.
[444] Mladić Appeal Brief, para. 160, nn. 229-238, 240, 241, 243-248.
[445] *See supra* Section II.
[446] *See* Mladić Appeal Brief, paras. 136, 186, 197-202, 208. *See also* Mladić Reply Brief, para. 42.
[447] Mladić Appeal Brief, para. 198.
[448] Mladić Appeal Brief, paras. 198, 200, nn. 280, 289, 290.
[449] Mladić Appeal Brief, paras. 198, 199, nn. 281, 282, 284, 285.
[450] Mladić Appeal Brief, para. 200, nn. 287, 288, 291.
[451] Mladić Appeal Brief, para. 199, n. 286.

protection he intended to provide to non-Serbs.[452] The Appeals Chamber will consider these arguments in turn.

(i) Evidence of Care for Non-Serb Civilians

147. Mladić submits that the Trial Chamber failed to give sufficient or any weight to evidence of his positive attitude and behaviour toward Bosnian Muslim and Bosnian Croat civilians through his "concerted efforts to take care of civilians" and the measures employed to provide security for Bosnian Muslim villagers during the conflict.[453] In support, he points to minutes of a Pale Municipal Assembly meeting,[454] as well as the evidence of Witnesses Branko Basara,[455] Safet Gagula,[456] RM-802,[457] and Sveto Veselinović.[458]

148. Mladić further submits that the Trial Chamber did not include in its reasoning the evidence of Witnesses Slavko Mijanović,[459] Mile Ujić,[460] and Elvedin Pašić[461] – stating that non-Serbs remained in their municipalities during the conflict.[462] He also contends that the Trial Chamber erroneously found Witness Vinko Nikolić's evidence, that over 8,000 Bosnian Muslims and Bosnian Croats continued to live in Sanski Most Municipality, unreliable and did not give sufficient weight to the witness's clarification during cross-examination that over 4,400 Bosnian Muslims remained.[463] Mladić argues that the Trial Chamber also failed to provide analysis of the probative value of evidence from Witness RM-009 that Bosnian Muslims "left their villages freely",[464] and from Witness Dragiša Masal that Mladić made concerted efforts to give civilians the choice of remaining or leaving municipalities, and to allow unarmed individuals to farm the land and receive

[452] Mladić Appeal Brief, para. 202.
[453] Mladić Appeal Brief, paras. 198, 200.
[454] Mladić Appeal Brief, para. 198, n. 280, *referring to, inter alia*, Trial Judgement, para. 1014, Exhibit P3972.
[455] Mladić Appeal Brief, para. 198, n. 280, *referring to, inter alia*, Trial Judgement, paras. 1619, 1692, Exhibit D1031, para. 48.
[456] Mladić Appeal Brief, para. 198, n. 280, *referring to, inter alia*, Trial Judgement, para. 1753, Exhibit P2525, p. 5.
[457] Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64.
[458] Mladić Appeal Brief, para. 200, n. 290, *referring to* Exhibit D770, paras. 16, 17.
[459] Mladić Appeal Brief, para. 198, n. 281, *referring to, inter alia*, Exhibit D799.
[460] Mladić Appeal Brief, para. 198, n. 281, *referring to, inter alia*, Exhibit D691.
[461] Mladić Appeal Brief, para. 198, n. 281, *referring to, inter alia*, T. 9 July 2012 pp. 555, 556. *See also* Mladić Appeal Brief, para. 198, nn. 282, 283, *referring to, inter alia*, Trial Judgement, paras. 948, 952, 960.
[462] Mladić Appeal Brief, para. 198.
[463] Mladić Appeal Brief, para. 199, nn. 284, 285, *referring to* Exhibit D892, T. 5 February 2015 pp. 31279, 31280, Trial Judgement, paras. 1716, 1720.
[464] Mladić Appeal Brief, para. 200, n. 288, *referring to* Exhibit P843 (under seal), para. 61. *See also* Mladić Appeal Brief, para. 200, n. 287, *referring to* Exhibit P854, p. 5.

humanitarian aid.[465] According to Mladić, the Trial Chamber did not take this evidence into account when making its findings.[466]

149. The Prosecution responds that Mladić did not act to protect non-Serbs, that he repeats arguments that failed at trial without showing any error, and that the Trial Chamber expressly considered the evidence that he points to in his appellant's brief.[467] Regarding the alleged voluntary departure of non-Serbs, the Prosecution responds that Mladić ignores the Trial Chamber's express rejection of this argument at trial, and that those who requested to leave never returned out of fear or because their homes were torched.[468] The Prosecution further submits that the Trial Chamber reasonably concluded that Witness Vinko Nikolić's evidence was not sufficiently reliable to rebut the adjudicated fact that almost all Bosnian Muslims had left Sanski Most by the end of 1992 because the witness admitted that his estimates were without basis.[469] According to the Prosecution, Mladić's mere assertions that the Trial Chamber failed to give sufficient weight to pieces of supposedly "exculpatory evidence" warrant summary dismissal.[470]

150. Mladić replies that the Prosecution does not directly engage with his submissions and fails to undermine his arguments that the Trial Chamber failed to afford certain evidence sufficient weight.[471]

151. Regarding Mladić's claim that he made concerted efforts to take care of non-Serb civilians,[472] the Appeals Chamber observes that the Trial Chamber expressly considered evidence to which Mladić refers on appeal. In particular, the Trial Chamber noted: (i) the relevant Pale Municipal Assembly meeting minutes that the Pale SJB were to guarantee the safety of non-Serb civilians;[473] (ii) Witness Basara's evidence that members of his brigade in the VRS protected civilians in Muslim villages in Sanski Most Municipality;[474] (iii) Witness Gagula's statement that, while Serb representatives in Knežina, Sokolac Municipality indicated that they would protect Muslim civilians, many Muslims left the village in the second half of May 1992 and significantly

[465] Mladić Appeal Brief, para. 200, n. 291, *referring to* Exhibit D942, para. 15.
[466] Mladić Appeal Brief, para. 200, n. 292, *referring to* Trial Judgement, paras. 960, 1720.
[467] *See* Prosecution Response Brief, paras. 54-58. *See also* T. 25 August 2020 pp. 96, 97.
[468] Prosecution Response Brief, para. 60.
[469] Prosecution Response Brief, para. 58, n. 282, *referring to, inter alia*, Trial Judgement, para. 1720.
[470] Prosecution Response Brief, paras. 53, 54. *See also* T. 25 August 2020 pp. 96, 97.
[471] *See* Mladić Reply Brief, paras. 40-42.
[472] *See* Mladić Appeal Brief, paras. 198, 200.
[473] Trial Judgement, paras. 1007, 1014, *referring to* Exhibit P3972. *See also* Mladić Appeal Brief, para. 198, n. 280, *referring to, inter alia*, Trial Judgement, para. 1014, Exhibit P3972.
[474] Trial Judgement, paras. 1617, 1619, 1692, *referring to, inter alia*, Exhibit D1031, paras. 36-38, 48, 49, T. 21 April 2015 pp. 34494-34496, T. 22 April 2015 p. 34562. *See also* Mladić Appeal Brief, para. 198, n. 280, *referring to, inter alia*, Trial Judgement, paras. 1619, 1692, Exhibit D1031, para. 48.

toward the end of June 1992;[475] (iv) Witness RM-802's evidence that Bosnian Serb political authorities made preparations to take care of the Muslim civilian population by lining up buses to transport the women, children, and the elderly out of Večići, Kotor Varoš Municipality;[476] and (v) Witness Veselinović's evidence regarding the treatment of refugees and Bosnian Muslims in Rogatica Municipality.[477]

152. The Trial Chamber nevertheless found that regarding: (i) Pale Municipality, between late June and early July 1992, over 2,000 Bosnian Muslim and Bosnian Croats involuntarily left in convoys escorted by the Pale SJB;[478] (ii) Sanski Most Municipality, Witness Basara's evidence was not credible and unpersuasive in light of a "large amount of reliable evidence" showing that the VRS was involved in transfers and evacuations, and that it carried out attacks and shelling campaigns to "mop up" predominantly Muslim villages and hamlets;[479] (iii) Sokolac Municipality, Bosnian Muslims in, *inter alia*, Knežina fled their homes from 12 May 1992 onwards due to perceived threats of violence and the lack of protection from municipal authorities;[480] (iv) Kotor Varoš Municipality, between June and November 1992, large parts of the non-Serb population were involuntarily moved out, including in Večići, in convoys by, *inter alia*, members of the VRS, MUP, and Kotor Varoš Crisis Staff;[481] and (v) Rogatica Municipality, thousands of Muslims involuntarily left starting in May 1992 as a result of fear generated by threats and violence, and that the perpetrators of these displacements were members of the VRS.[482]

153. The Appeals Chamber further observes that the excerpt of Witness Veselinović's evidence, to which Mladić points, concerned efforts taken by Serb municipal authorities to protect exclusively

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[475] Trial Judgement, para. 1753, *referring to* Exhibit P2525, pp. 2, 3, 5. *See* Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, para. 1753, Exhibit P2525, p. 5.

[476] *See* Trial Judgement, paras. 948, 958, *referring to*, *inter alia*, Exhibit P439 (under seal), paras. 58-60, 64, T. 5 November 2012 p. 4532 (private session), T. 6 November 2012 pp. 4615-4622 (private session), 4627 (private session). *See also* Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64. The Trial Chamber considered that, according to Witness RM-802's evidence, of the 120,000 non-Serbs who walked past a VRS command post, "some were physically forced to leave", "others registered to leave because conditions were unbearable for them to stay", "some were forcibly removed from their houses", and others "were pressured into leaving by hearing only Serb songs on the radio, having only Serb stamps on documents, and managers being dismissed and sent to do cleaning jobs". *See* Trial Judgement, para. 959, *referring to* Exhibit P439 (under seal), para. 32.

[477] Trial Judgement, para. 1560, n. 6605, *referring to* Exhibit D770, para. 16. *See also* Mladić Appeal Brief, para. 200, n. 290, *referring to* Exhibit D770, paras. 16, 17. The Appeals Chamber notes that paragraph 17 of Exhibit D770 concerns the role of the Serb Democratic Party during the war rather than assistance to refugees.

[478] Trial Judgement, para. 1016. *See also* Trial Judgement, paras. 1004-1015.

[479] Trial Judgement, paras. 1625, 1723, n. 7288. *See also*, *e.g.*, Trial Judgement, paras. 1691-1717.

[480] Trial Judgement, para. 1754. *See also* Trial Judgement, paras. 1752, 1753.

[481] Trial Judgement, paras. 959, 960, 3122(g), 3147. *See also*, *e.g.*, Trial Judgement, paras. 948-959. The Appeals Chamber considers that Mladić's selective use of Exhibit P439 ignores aspects substantiating the Trial Chamber's finding that non-Serb civilians in Kotor Varoš Municipality were expelled by Serb forces. *See* Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64. As noted above, Exhibit P439, Witness RM-802's statement, provided that non-Serbs were physically forced or felt pressured to leave due to the unbearable conditions. *See* Trial Judgement, para. 959, *referring to* Exhibit P439 (under seal), para. 32.

Serb refugees,[483] rather than non-Serbs. Having reviewed the foregoing evidence cited by Mladić, the Appeals Chamber notes that none relates to his personal actions or demonstrates his efforts to provide care or security for Bosnian Muslim and Bosnian Croat civilians. The Appeals Chamber therefore finds that Mladić's cursory submissions fail to substantiate his claim that the Trial Chamber erred by giving insufficient weight to evidence of his care for non-Serb civilians.

154. The Appeals Chamber now turns to Mladić's arguments that the Trial Chamber did not include in its reasoning evidence that non-Serbs remained in their municipalities during the conflict and that he made concerted efforts to give civilians the choice to remain or leave.[484] Mladić submits that the Trial Chamber failed to include Exhibit D799, Witness Mijanović's statement, in its analysis on findings related to Ilidža Municipality.[485] A review of the Trial Judgement indicates that the Trial Chamber expressly referred to Exhibit D799 and summarized Witness Mijanović's evidence that, *inter alia*, the Serb authorities in Ilidža Municipality did not expel non-Serbs.[486] The Trial Chamber found that, aside from one specific incident,[487] it did not receive any evidence "indicating that residents [in Ilidža] were forcibly displaced".[488] In view of this finding, the Appeals Chamber considers that there was no need for the Trial Chamber to discuss Exhibit D799 further and Mladić does not show any error in this respect.

155. Regarding the Trial Chamber's alleged failure to discuss in its reasoning Exhibit D691, Witness Ujić's statement that non-Serbs remained in Rogatica Municipality during the conflict,[489] the Appeals Chamber observes that the paragraphs of the Trial Judgement that Mladić challenges in this respect do not concern Rogatica, but other municipalities, namely Ilidža and Kotor Varoš.[490] Mladić identifies no reason why the Trial Chamber should have considered this evidence when addressing crimes in other municipalities and fails to demonstrate any error in this respect. The

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[482] *See*, *e.g.*, Trial Judgement, paras. 1554-1585, 3122(k), 3151, 3183.
[483] A review of the relevant portions of Exhibit D770 reveals, *inter alia*, that: (i) in May 1992, due to growing insecurity in Rogatica Municipality and shooting in the streets, both Serbs and Muslims left town and moved into suburbs and further away; and (ii) Serb municipal authorities organized the transport of Serb families to Serbia to keep them safe, received Serb refugees arriving from other areas, and accommodated the refugees in abandoned Muslim and Serb homes in a controlled and organized manner. *See* Exhibit D770, paras. 15, 16.
[484] Mladić Appeal Brief, paras. 198-200.
[485] *See* Mladić Appeal Brief, para. 198, nn. 281-283, *referring to*, *inter alia*, Exhibit D799, para. 6, Trial Judgement, paras. 746, 748.
[486] Trial Judgement, para. 746, *referring to*, *inter alia*, Exhibit D799, para. 6.
[487] The Trial Chamber ultimately found, based on the evidence of Witness RM-104, that one Bosnian Muslim family left Ilidža Municipality to Sarajevo after a member of the "White Eagles" threatened the family members' lives if they were to refuse to comply with the ultimatum to leave the municipality or to take up arms and become loyal to the Serb authorities. The Trial Chamber found that this one incident in Ilidža Municipality constituted forcible transfer as charged in Count 8 of the Indictment. *See* Trial Judgement, paras. 747-749, 3122(d), 3144, 3183.
[488] Trial Judgement, para. 748.
[489] *See* Mladić Appeal Brief, para. 198, nn. 281, 283, *referring to*, *inter alia*, Exhibit D691, para. 35.
[490] *See* Mladić Appeal Brief, para. 198, n. 283, *referring to* Trial Judgement, paras. 748 (Ilidža Municipality), 960 (Kotor Varoš Municipality).

Appeals Chamber notes that, in any event, the Trial Chamber expressly referred to Witness Ujić's evidence, including Exhibit D691, in relation to events in Rogatica Municipality.[491]

156. The Appeals Chamber is also not convinced by Mladić's submission that the Trial Chamber erred by not including in its analysis Witness Pašić's testimony that non-Serbs remained in the Kotor Varoš Municipality during the conflict.[492] The Appeals Chamber observes that the Trial Chamber explicitly considered relevant portions of Witness Pašić's testimony regarding the flight of 50 to 70 Bosnian Muslims from the village of Hrvaćani in mid-1992 and the fate of those who remained.[493] The Trial Chamber found, based on the totality of evidence, that between June and November 1992, large parts of the non-Serb population in Kotor Varoš Municipality were forcibly displaced by, *inter alios*, members of the VRS, MUP, and Kotor Varoš Crisis Staff.[494] In doing so, the Trial Chamber explicitly recalled Witness Pašić's testimony that a "group of 50 to 70 Muslims" encountered Serb soldiers, who told the group "there was nothing left for them in Hrvaćani and that they should go to Turkey".[495] Mladić simply isolates portions of Witness Pašić's testimony that support his position and ignores the rest of the witness's evidence and the Trial Chamber's findings regarding events in Kotor Varoš Municipality. His arguments therefore fail to establish any error in the Trial Chamber's assessment of Witness Pašić's evidence or in its finding that non-Serbs involuntarily left the municipality.

157. As to Mladić's contention regarding Witness Vinko Nikolić, the Appeals Chamber is not convinced that the Trial Chamber gave insufficient weight to the witness's "clarification" made during cross-examination.[496] In summarizing the evidence concerning Sanski Most Municipality, the Trial Chamber stated that Witness Vinko Nikolić estimated that more than 8,000 Muslims and Croats continued to live in the municipality during the war.[497] During the witness's cross-examination, this number was challenged by the Prosecution, who stated that by February 1995, the

[491] *See*, *e.g.*, Trial Judgement, para. 1555, *referring to* Exhibit D691, para. 35, T. 16 October 2014 pp. 26895, 26896.
[492] *See* Mladić Appeal Brief, para. 198, nn. 281-283, *referring to*, *inter alia*, T. 9 July 2012 pp. 555, 556, Trial Judgement, paras. 948, 952, 960.
[493] The Trial Chamber noted that, according to Witness Pašić: (i) six Bosnian Muslim families remained in Hrvaćani when his family fled in mid-1992; (ii) after leaving Hrvaćani, the witness and his family, along with 50 to 70 people, mainly civilians, returned to Hrvaćani en route to another location and encountered Serb soldiers who called them "*balijas*", and who told the group that there was nothing left for them in Hrvaćani and that they should go to Turkey; and (iii) in their passage through Hrvaćani, "the village was destroyed, houses had been stripped, animals killed, and the elderly who had remained were either shot or burnt". *See* Trial Judgement, para. 952, *referring to* T. 9 July 2012 pp. 550, 551, 553, 555, 556. *See also* Trial Judgement, para. 949.
[494] Trial Judgement, paras. 960, 3122(g), 3147, 3183. *See also* Trial Judgement, paras. 947-959.
[495] Trial Judgement, para. 960.
[496] *See* Mladić Appeal Brief, para. 199, n. 285, *referring to* T. 5 February 2015 pp. 31279, 31280, Trial Judgement, paras. 1716, 1720.
[497] Trial Judgement, para. 1716, n. 7270, *referring to* Exhibit D892, para. 12, T. 5 February 2015 pp. 31279, 31280.

Banja Luka State Security Service estimated around 4,400 non-Serbs remaining in Sanski Most.[498] When asked to clarify his estimate of 8,000, Witness Vinko Nikolić stated that the number included "Muslims and Croats", that it was a "[f]ree estimate", and that he "spontaneously came up with that number".[499] The Appeals Chamber notes that, contrary to Mladić's submission,[500] at no point during the cross-examination did the witness "clarify" his estimate. The Trial Chamber explicitly considered that the witness's estimate of 8,000 had no basis, and that the witness could not justify this figure in light of evidence indicating a "significantly lower" number.[501] It therefore considered the witness's evidence insufficiently reliable.[502] In the view of the Appeals Chamber, Mladić fails to show any error in the Trial Chamber's assessment of Witness Vinko Nikolić's evidence.

158. Turning to Mladić's contention that the Trial Chamber gave insufficient weight to evidence that Bosnian Muslims left their villages freely and submitted requests to return, the Appeals Chamber notes that he relies on Exhibit P843, a statement from Witness RM-009, and Exhibit P854, a December 1992 report from the Kotor Varoš Light Brigade.[503] In Exhibit P843, Witness RM-009 stated that in mid-1992 at least 50 buses full of Bosnian Muslims and Bosnian Croats left Kotor Varoš Municipality.[504] The witness specified that "[t]hey were leaving freely, in the sense that they were not forced in the buses, but the main reason for this was because they were afraid of what would happen to them if they stayed. The non-Serb population was under pressure and I would say that they were persecuted."[505] The witness also noted that thousands of non-Serbs left "[b]ecause of the crimes that were committed against them by either the special unit or the military personnel".[506] The Appeals Chamber notes that the Trial Chamber duly considered this evidence,[507] as well as Exhibit P854, indicating that many Bosnian Muslims were submitting requests to return to their villages.[508] The Trial Chamber considered, however, that according to Witness RM-009's testimony, such requests would have been submitted to and approved by the local war presidency,

[498] T. 5 February 2015 p. 31279.
[499] T. 5 February 2015 pp. 31279, 31280.
[500] *See* Mladić Appeal Brief, para. 199.
[501] Trial Judgement, para. 1720. *See also* Trial Judgement, para. 1716, *referring to, inter alia*, T. 5 February 2015 pp. 31279, 31280.
[502] Trial Judgement, para. 1720.
[503] *See* Mladić Appeal Brief, para. 200, nn. 287, 288, *referring to* Exhibits P843 (under seal), para. 61, P854, p. 5.
[504] *See* Exhibit P843 (under seal), para. 61. *See also* Trial Judgement, para. 953.
[505] Exhibit P843 (under seal), para. 61. *See also* Trial Judgement, para. 955.
[506] Exhibit P843 (under seal), para. 61. The witness also stated that non-Serbs did not have the right of free movement within the municipality, all were fired from their positions, they did not have access to any medical assistance, some of them were put under work obligations without any financial compensation, they were not allowed into shops and could not go to the mosque or the Catholic church to pray. *See* Exhibit P843 (under seal), para. 61; Trial Judgement, para. 955.
[507] *See* Trial Judgement, paras. 953, 955, nn. 3923, 3940, 3941, *referring to, inter alia*, Exhibit P843, paras. 61, 62.
[508] *See* Trial Judgement, para. 955, n. 3943, *referring to* Exhibit P854, p. 5.

"but these people never returned".[509] The Appeals Chamber further observes that, in relation to Kotor Varoš specifically, the Trial Chamber rejected the Defence arguments that people voluntarily made the decision to leave.[510] Recalling its findings that Bosnian Muslims and Bosnian Croats in Kotor Varoš faced, *inter alia*, restrictions on their freedom of movement, limited access to medical care, dismissals from employment, killings, unlawful detention, as well as cruel and inhumane treatment, the Trial Chamber found that non-Serb civilians who left the municipality "did not have a genuine choice but to leave".[511] The Appeals Chamber considers that Mladić relies on an isolated excerpt of Witness RM-009's evidence and ignores the entirety of the evidence, demonstrating that non-Serbs left Kotor Varoš Municipality involuntarily.[512] Mladić therefore does not demonstrate any error in the Trial Chamber's assessment of evidence in this regard.

159. The Appeals Chamber finally turns to Mladić's submission that the Trial Chamber disregarded Exhibit D942, Witness Masal's evidence that Mladić made concerted efforts to give civilians the choice to leave or remain and that he allowed unarmed individuals to farm the land and receive humanitarian aid.[513] The Appeals Chamber observes that the paragraphs of the Trial Judgement Mladić challenges in this respect relate to Kotor Varoš and Sanski Most Municipalities, neither of which is mentioned in the excerpt of Exhibit D942 on which Mladić relies.[514] Mladić makes no argument as to why the Trial Chamber should have considered the evidence he points to when assessing crimes in Kotor Varoš and Sanski Most Municipalities. Mladić therefore fails to identify any error in this respect.

160. Given that Mladić does not demonstrate an error with respect to any of the pieces of evidence to which he points on appeal, the Appeals Chamber dismisses his contention that the Trial Chamber, in assessing his membership in the Overarching JCE, erred in failing to address or give sufficient weight to evidence of his efforts to provide care to non-Serbs or evidence that they remained or voluntarily left their villages during the conflict.

(ii) Evidence that Mladić Reported Concerns to Karadžić and the Minister of the Interior

161. In alleging that the Trial Chamber gave insufficient weight to his actions protecting the non-Serb population who remained in the Municipalities, Mladić refers to Exhibits D1503 and

[509] Trial Judgement, para. 955, n. 3944, *referring to* T. 4 February 2013 pp. 8030, 8031 (closed session).
[510] *See* Trial Judgement, para. 3147.
[511] Trial Judgement, para. 3147. *See also* Trial Judgement, paras. 955, 960.
[512] *See* Exhibit P843 (under seal), para. 61.
[513] *See* Mladić Appeal Brief, para. 200, nn. 291, 292, *referring to*, *inter alia*, Exhibit D942, para. 15.
[514] *See* Mladić Appeal Brief, para. 200, n. 292, *referring to* Trial Judgement, paras. 960 (Kotor Varoš), 1720 (Sanski Most).

P3095 to demonstrate that he reported concerns to Karadžić, the President of *Republika Srpska*, and the Minister of the Interior about the commission of crimes by MUP forces against the non-Serb population and that he called for "affirmative action" to be taken.[515]

162. The Prosecution responds that Mladić exaggerates the exculpatory value of his reports to Karadžić and the Minister of the Interior about crimes committed against non-Serbs.[516] The Prosecution submits that Mladić's reports were about Željko Ražnatović ("Arkan") and his paramilitary unit, which were not found to be part of the Overarching JCE.[517] Additionally, the Prosecution contends that these reports requested action to be taken against Arkan's paramilitary unit only towards the end of the conflict and that they reveal Mladić being "predominantly concerned about [the] abuse of VRS members and looting of army materiel".[518]

163. Mladić replies that the Prosecution does not directly engage with his submissions and fails to undermine his arguments that the Trial Chamber failed to afford certain evidence sufficient weight.[519]

164. The Appeals Chamber notes that Exhibit D1503 is a letter from Mladić to Karadžić, dated 20 October 1995, reporting on the activities of Arkan's paramilitary unit.[520] The Appeals Chamber observes that Mladić's reference to "MUP forces" in relation to Arkan or his paramilitary unit is a misinterpretation of the Trial Judgement. While Mladić argued at trial that Arkan's paramilitary unit was subordinated to the MUP, the Trial Chamber did not make any finding on this matter in light of its findings that there was insufficient evidence to show that Arkan participated in the realization of the Overarching JCE.[521] In the letter, Mladić stated that the "general behaviour and individual acts" of Arkan's paramilitary unit have complicated the situation in the field and "spread fear among the population".[522] He further presented 12 "verified reports" of "extremely inhumane, unscrupulous and ruthless conduct" of Arkan's paramilitary unit towards "the population and VRS members",[523] such as: (i) threatening, arresting, physically abusing, maltreating, beating, using firearms to inflict wounds, and humiliating officers and privates;[524] (ii) seizing military equipment,

[515] Mladić Appeal Brief, paras. 198, 199, n. 286. *See also* Mladić Reply Brief, paras. 40-42.
[516] Prosecution Response Brief, para. 59.
[517] Prosecution Response Brief, para. 59.
[518] Prosecution Response Brief, para. 59.
[519] Mladić Reply Brief, paras. 40-42.
[520] Exhibit D1503, pp. 1, 2.
[521] *See* Trial Judgement, paras. 4238, 4396, n. 15357. *See also* Trial Judgement, para. 4401.
[522] Exhibit D1503, para. 1.
[523] Exhibit D1503, para. 2.
[524] Exhibit D1503, paras. 2, 7.

weapons, documents of VRS officers, and expensive cars from the VRS without authorization;[525] (iii) looting and wantonly destroying abandoned houses;[526] and (iv) murdering 11 non-Serbs in Sanski Most and one member of the VRS near Novi Grad.[527] In the letter, Mladić stated that he had issued orders to remove paramilitary formations that had refused to submit to the VRS, and that he expected Karadžić to prohibit such conduct.[528]

165. The Appeals Chamber observes that, referring to Exhibit D1503, the Trial Chamber discussed the evidence that Mladić had informed Karadžić about crimes committed by Arkan's paramilitary unit, including the murder of 11 non-Serbs in Sanski Most, and that Mladić had expected Karadžić to prohibit the continued presence of this group.[529] While the Trial Chamber did not expressly refer to Exhibit P3095 in the Trial Judgement, such an omission is not erroneous. In this regard, Exhibit P3095 is a letter, dated 24 September 1995, from Mladić to the President and the Minister of the Interior of *Republika Srpska*, complaining that Arkan's paramilitary unit was not under VRS command, was abusing VRS officers and looting VRS material, was causing armed clashes, and was upsetting the population at large by "liquidat[ing] a certain number of loyal Muslim citizens, including family members of some VRS servicemen".[530] In this letter, Mladić also requested that, *inter alia*, Karadžić revoke power given to Arkan and that the MUP take measures against Arkan.[531] Exhibits P3095 and D1503 are therefore similar in nature – both are from autumn 1995, reveal Mladić's strong disapproval of criminal acts committed by Arkan's paramilitary unit, and address Karadžić, stating that action should be taken to prohibit the paramilitary group's operation.[532]

166. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber did consider evidence that Mladić reported concerns to Karadžić and the Minister of the Interior about the commission of crimes against the non-Serb population, and that he called for action to be taken. In assessing his contribution to the Overarching JCE, the Trial Chamber also considered evidence that Mladić noted crimes committed by paramilitary groups and that he ordered their disarmament.[533] Mladić therefore fails to demonstrate that the Trial Chamber disregarded evidence

[525] Exhibit D1503, paras. 3-5.
[526] Exhibit D1503, para. 5.
[527] Exhibit D1503, para. 6.
[528] Exhibit D1503, p. 2.
[529] Trial Judgement, para. 3853.
[530] Exhibit P3095, pp. 1, 2.
[531] Exhibit P3095, pp. 2, 3.
[532] *See* Exhibits D1503, P3095.
[533] *See* Trial Judgement, paras. 4419, 4522.

or gave insufficient weight to his actions protecting the non-Serb population who remained in the Municipalities when determining his participation in the Overarching JCE.

(iii) Evidence from Mladić's Notebook Entries of Constraints During the War and Assistance Provided to Non-Serbs

167. Mladić submits that the Trial Chamber erred by not giving sufficient weight to his military notebook entries that contain direct evidence of the constraints he faced during the war[534] as well as the protection he intended to provide Bosnian Muslims and Bosnian Croats.[535] He states that the Trial Chamber relied on his notebooks "only four times" in its analysis of crimes that occurred in the Municipalities.[536]

168. The Prosecution responds that Mladić fails to demonstrate any error in the Trial Chamber's analysis of his notebook entries or substantiate how his purported intention to protect non-Serbs could impact the findings in the Trial Judgement regarding his contributions to the Overarching JCE.[537]

169. Regarding the alleged constraints he faced, Mladić points to his notebook entries (Exhibits P353 and P356),[538] indicating, *inter alia*, that the VRS had issues with morale and discipline in the army as well as control over paramilitary formations,[539] with the lack of cooperation between civilian and military structures,[540] and with the provision of ammunition and military equipment.[541] The Appeals Chamber notes that the Trial Chamber considered Exhibits P353 and P356 with respect to issues regarding the declining morale in the army,[542] discipline in paramilitary formations,[543] the shortage of ammunition,[544] as well as the provision and financing of soldiers to the VRS.[545] Beyond these specific exhibits, the Trial Chamber considered other evidence

[534] Mladić Appeal Brief, para. 202, n. 293, *referring to* Exhibits P353, pp. 163, 179, 180, 192, 260, 299, P356, pp. 179, 180. *See also* Mladić Reply Brief, paras. 40-42.
[535] Mladić Appeal Brief, para. 202, n. 294, *referring to* Exhibits P353, p. 330, P356, p. 218, D1514, D187. *See also* Mladić Reply Brief, paras. 40-42.
[536] Mladić Appeal Brief, para. 202, n. 295, *referring to* Trial Judgement, paras. 381, 715, 1774, 1786.
[537] *See* Prosecution Response Brief, paras. 61-63. *See also* T. 25 August 2020 pp. 96, 97.
[538] Mladić Appeal Brief, para. 202, n. 293, *referring to* Exhibits P353, pp. 163, 179, 180, 192, 260, 299, P356, pp. 179, 180.
[539] *See* Exhibits P353, pp. 192, 260, 299, P356, pp. 179, 180.
[540] *See* Exhibits P353, p. 299, P356, p. 180.
[541] *See* Exhibit P353, p. 163. A review of pages 179 and 180 of Exhibit P353 to which Mladić refers shows no relevance to the alleged constraints he faced during the war. The Appeals Chamber therefore dismisses any contention of error in this regard without further consideration.
[542] *See, e.g.*, Trial Judgement, para. 4658.
[543] *See, e.g.*, Trial Judgement, para. 3877.
[544] *See, e.g.*, Trial Judgement, paras. 4422, 4423, 4798.
[545] *See, e.g.*, Trial Judgement, paras. 4443-4445. *See also* Trial Judgement, paras. 4446-4448.

concerning the lack of discipline in the VRS,[546] the "imperfect functioning of [the] military and civilian justice branches",[547] as well as plundering and "war profiteering" by members of the VRS as well as paramilitary units.[548] Mladić ignores the Trial Chamber's rejection of Defence arguments regarding the lack of loyalty and obedience to the VRS command. The Trial Chamber found that "occasional indiscipline in the VRS did not undermine Mladić's overall ability to exercise command and control over his subordinates".[549] The Appeals Chamber therefore concludes that the Trial Chamber did consider evidence of the constraints Mladić faced during the war and further finds that, given its broad discretion in evidence assessment,[550] Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to such evidence.

170. With respect to the "protection he intended" to provide to non-Serbs, Mladić refers to his notebook entries (Exhibits P353 and P356) as well as two orders he issued in 1992 and 1994, respectively (Exhibits D1514 and D187).[551] A review of the excerpt of Exhibit P353 to which Mladić points indicates that, in a conversation between Mladić and Colonel Petar Salapura in mid-July 1992, it was raised that the "people of Podžeplje (Muslims) [we]re asking to be given flour supplies".[552] The following text appears immediately after: "Decision:→ provide the basic foodstuffs, flour and oil".[553] While the Trial Chamber did not explicitly refer to this aspect of Exhibit P353, the Appeals Chamber observes that the Trial Chamber considered extensive evidence about the delivery and restriction of humanitarian aid in the territory of *Republika Srpska* between

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[546] *See* Trial Judgement, paras. 4425, 4527, 4528, nn. 15777, 16090, 16094, *referring to* Exhibits P358 (Mladić's notebook, dated 2 April to 24 October 1993), P5059 (an order from the VRS Main Staff regarding discipline in commands, units, and institutions, dated 11 August 1994), P5064 (an order from Mladić regarding military discipline in the VRS, dated 13 March 1995).
[547] *See*, *e.g.*, Trial Judgement, para. 4522.
[548] *See* Trial Judgement, para. 4522, nn. 16072-16075, *referring to* Exhibit P1966 (a VRS Main Staff report from Mladić dated September 1992). *See also*, *e.g.*, Trial Judgement, paras. 3831, 3834, 3838, 3839, 3842, 3844, 3847, 3853-3855. Observing that the relationship between paramilitary formations and the VRS or the MUP differed from group to group, the Trial Chamber found that some operated outside the command of the VRS while others cooperated and coordinated with the VRS while committing crimes in municipalities such as Prijedor, Sanski Most, and Trnovo. *See* Trial Judgement, para. 4419. The Trial Chamber nevertheless found that, since it did not receive evidence indicating that Mladić directed, monitored, or authorized the VRS's cooperation and coordination with paramilitary formations, it did not consider this allegation further. *See* Trial Judgement, para. 4419.
[549] *See* Trial Judgement, para. 4392. *See also*, *e.g.*, Trial Judgement, paras. 4296-4380, 4383-4391.
[550] *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 403, 530; *Šainović et al.* Appeal Judgement, para. 490.
[551] Mladić Appeal Brief, para. 202, n. 294, *referring to* Exhibits P353, p. 330, P356, p. 218, D1514, D187. With respect to Exhibit P356, a review of the excerpt to which Mladić refers shows no relevance to the alleged protection he intended to provide to non-Serbs. *See* Mladić Appeal Brief, para. 202, n. 294, *referring to*, *inter alia*, Exhibit P356, p. 218. The Appeals Chamber, in any event, observes that page 219 of Exhibit P356 contains language to the effect of "[p]rotection in the population/especially in the towns". However, without further submissions from Mladić in relation to this statement, it is unclear how this could demonstrate an error in the Trial Judgement. Given the vague references and obvious deficiencies in Mladić's submissions in this regard, the Appeals Chamber dismisses any contention of error on this basis without further consideration.
[552] Exhibit P353, p. 330.
[553] Exhibit P353, p. 330.

1992 and 1995.[554] This includes evidence that Mladić allowed the provision of aid to civilian populations of the "opposing side".[555] Based on evidence in the record, the Trial Chamber found that, while Mladić initially showed willingness to allow the passage of humanitarian aid through *Republika Srpska* in 1992 and 1993, his orders and conduct became "increasingly obstructive" in 1994 and 1995.[556] It subsequently considered his restrictions on humanitarian aid from 10 April 1994 onwards to be a factor in determining that he significantly contributed to the Overarching JCE.[557] Mladić fails to demonstrate any error in the Trial Chamber's assessment of the evidence in this regard.

171. The Appeals Chamber now turns to allegations of error with respect to Exhibits D1514 and D187. The Appeals Chamber observes that Exhibit D1514 is an order issued by Mladić on 28 November 1992 to the Commander of the VRS Drina Corps, Rogatica Brigade.[558] According to this exhibit, "unknown persons [had] disturbed [the] Muslim population in S. Burati and Vrhbarje" and Mladić ordered the Commander of the Rogatica Brigade to, *inter alia*: (i) immediately take measures to protect the Muslim population in these villages from possible violence, because they expressed loyalty to *Republika Srpska*; and (ii) explain to soldiers and units that "any violence against the people of these villages will be politically harmful for [*Republika Srpska*], its army and the Serbian people in general".[559] The Appeals Chamber notes that the Trial Chamber discussed this exhibit at paragraph 4524 of the Trial Judgement.[560] Mladić's submission that the Trial Chamber failed to consider this evidence is therefore without merit.

172. Exhibit D187 is an order that Mladić issued on 16 April 1994 regarding the treatment of civilians and prisoners of war in Goražde.[561] This exhibit reflects Mladić's statement that:

> [v]ia global media the Muslim propaganda keeps launching disinformation that the members of the VRS started a total annihilation of [the] Muslim population in order to compromise [*Republika Srpska*] and force the UN Security Council to make resolutions which are unfavourable to the Serbs.[562]

On this basis, Mladić ordered, *inter alia*, that: (i) "cruel treatments are severely forbidden, as well as abuse and physical destruction of civil[ian] population, prisoners of war and members of the international organizations"; (ii) all members of the VRS are duty-bound to protect the civilian

[554] *See*, *e.g.*, Trial Judgement, paras. 4548-4600.
[555] *See*, *e.g.*, Trial Judgement, paras. 4552, 4554-4556.
[556] *See* Trial Judgement, paras. 4602-4608.
[557] *See* Trial Judgement, paras. 4611, 4612.
[558] Exhibit D1514, pp. 1, 2.
[559] Exhibit D1514, p. 1.
[560] *See* Trial Judgement, para. 4524, nn. 16080, 16081.
[561] Exhibit D187, pp. 1, 2.
[562] Exhibit D187, p. 1.

population in Goražde by transferring them to more adequate locations; (iii) all prisoners of war "are to be treated in compliance with the international law of war"; and (iv) all members of international organizations are to be sheltered on the territory of *Republika Srpska*.[563] While this exhibit is not explicitly referenced in the Trial Judgement, the Appeals Chamber notes that the Trial Chamber considered evidence of a similar nature, namely evidence concerning the protection of civilians and prisoners of war as well as courteous treatment of foreigners.[564] Given that the Trial Chamber is presumed to have considered all evidence and is not obligated to refer to every piece of evidence on the record,[565] and observing that the Trial Chamber considered evidence of a similar nature, the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to such evidence.

173. The Appeals Chamber observes that, in assessing his significant contribution to the Overarching JCE, the Trial Chamber considered arguments and evidence that Mladić disseminated orders and instructions to subordinates to, *inter alia*: (i) follow the laws and regulations of the VRS, *Republika Srpska*, international humanitarian law, customary laws of war, and other international laws; and (ii) protect the civilian population.[566] The Trial Chamber concluded, however, that despite such orders, the Bosnian Serb military and civilian justice system failed to investigate crimes and arrest or punish perpetrators – members of the VRS or Serb forces – who committed crimes against non-Serbs.[567] Regarding the treatment of prisoners of war, the Trial Chamber considered evidence that Mladić deliberately misled the international community on the conditions in camps, and "attempted to conceal the crimes committed therein by portraying the camp[] conditions in a more favourable light".[568] Given the Trial Chamber's findings and assessment of evidence on the record, Mladić fails to demonstrate that the Trial Chamber erred by not considering or giving sufficient weight to evidence concerning the "protection he intended" to provide to non-Serbs when determining his participation in the Overarching JCE.

[563] Exhibit D187, p. 1.
[564] *See, e.g.*, Trial Judgement, paras. 4518-4520, 4524, 4525.
[565] *See, e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al*. Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864, n. 2527.
[566] *See, e.g.*, Trial Judgement, paras. 4515, 4517-4528, 4545. *See also* Trial Judgement, para. 4687.
[567] Trial Judgement, para. 4545. *See also* Trial Judgement, paras. 4529-4543.
[568] *See, e.g.*, Trial Judgement, paras. 4510-4512, 4546. *See also* Trial Judgement, paras. 4502-4509, 4687.

(iv) Conclusion

174. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred in its assessment of the evidence to which he points and purports to be exculpatory relating to his membership in the Overarching JCE.

(c) Alleged Errors Regarding the Scope of and Mladić's Participation in the Overarching JCE

175. Mladić submits that the Trial Chamber expanded the Overarching JCE to include the entirety of 1991 and included the actions and speeches of politicians from a period during which he was absent, undermining the conclusion that he was part of the common plan of the Overarching JCE.[569] He also contends that the Trial Chamber was "inconsistent" in its interpretation of his interactions with other members of the Overarching JCE – finding that he had "influence" over and "was subject" to the political leadership.[570] Mladić finally argues that the Trial Chamber gave undue weight to his role in establishing the VRS and that he directed military operations in furtherance of the war effort and in compliance with duties delegated to him by Karadžić.[571]

176. The Prosecution responds that Mladić's submissions show no error in the Trial Chamber's analysis of his participation in the Overarching JCE or inconsistency in his influential capacity with respect to the political leadership.[572] According to the Prosecution, the Trial Chamber reasonably found that Mladić contributed to the Overarching JCE through his command and control of the VRS.[573]

177. Turning to Mladić's contention that the Trial Chamber expanded the scope of the Overarching JCE to include 1991, which included actions and speeches from a period during which he was absent, the Appeals Chamber recalls that joint criminal enterprise liability requires: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to, or involves, the

[569] Mladić Appeal Brief, para. 203; T. 25 August 2020 pp. 41, 43-46. Mladić contends that the Trial Chamber never cited evidence that he was aware of the content of these meetings, conversations, as well as speeches and statements from politicians. *See* Mladić Appeal Brief, para. 203.
[570] Mladić Appeal Brief, para. 204; T. 25 August 2020 pp. 55-56.
[571] Mladić Appeal Brief, para. 206; T. 25 August 2020 pp. 57, 58.
[572] Prosecution Response Brief, paras. 64, 65. *See also* T. 25 August 2020 pp. 89-97. The Prosecution submits that Mladić conflates the date that the Overarching JCE came into existence and the date he was found to be a member, and that, therefore, arguments about his lack of involvement in 1991 are irrelevant. *See* Prosecution Response Brief, para. 64; T. 25 August 2020 p. 93.
[573] Prosecution Response Brief, paras. 66, 67. *See also* T. 25 August 2020 pp. 91, 92, 95-97. The Prosecution further asserts that Mladić does not challenge the Trial Chamber's conclusion that he contributed to the Overarching JCE by, *inter alia*, establishing and maintaining the VRS. T. 25 August 2020 p. 98.

commission of a crime; and (iii) the participation of the accused in the common purpose.[574] In this case, prior to its assessment of whether Mladić was part of the Overarching JCE, the Trial Chamber found that the Overarching JCE existed from 1991 until 30 November 1995[575] and that the plurality of persons included members of the Bosnian Serb leadership.[576] The Trial Chamber found that Mladić only contributed and shared the intent to achieve the common objective of the Overarching JCE by 12 May 1992 at the latest.[577] The Trial Chamber's assessment of the existence of the Overarching JCE was therefore independent of its assessment of Mladić's participation. Mladić fails to show that, to determine whether the Overarching JCE existed in 1991, the Trial Chamber erroneously expanded the scope of the joint criminal enterprise or erroneously considered the conduct and speeches of the Bosnian Serb leadership prior to Mladić's participation.[578]

178. The Appeals Chamber is also not convinced that the Trial Chamber erred in its interpretation of Mladić's interactions with other members of the Overarching JCE.[579] Having reviewed the impugned paragraphs in the Trial Judgement, the Appeals Chamber observes that they contain a *summary* of the evidence and findings on, *inter alia*, Mladić's control and authority over the VRS[580] as well as his participation in Bosnian Serb Assembly meetings and relationship with the Bosnian Serb political leadership.[581] In particular, the Trial Chamber recalled evidence and considered arguments that Mladić was not a member of the Supreme Command of the VRS ("Supreme Command")[582] and did not have voting rights within the Bosnian Serb Assembly, but that he was invited to attend meetings between 1992 and 1995 to brief the Supreme Command on the military situation.[583] The Trial Chamber also found that he actively participated in policy discussions in the Bosnian Serb Assembly,[584] often suggested to Bosnian Serb politicians what position they should take during peace negotiations,[585] and addressed policy issues in detail "with the purpose of influencing" the Bosnian Serb political leadership in its decision-making.[586] The

[574] *See, e.g., Stanišić and Simatović* Appeal Judgement, para. 77; *Brđanin* Appeal Judgement, paras. 364; 430; *Stakić* Appeal Judgement, para. 64; *Tadić* Appeal Judgement, para. 227. *See also Nizeyimana* Appeal Judgement, para. 325; *Gotovina and Markač* Appeal Judgement, para. 89.
[575] *See, e.g.*, Trial Judgement, paras. 4232, 4610.
[576] *See* Trial Judgement, paras. 4238, 4610, 4612 (these members included Karadžić, Krajišnik, Plavšić, Koljević, Subotić, Mandić, and Stanišić).
[577] *See, e.g.*, Trial Judgement, paras. 4611, 4685, 4686, 4688.
[578] *See, e.g.*, Trial Judgement, paras. 4218-4221.
[579] *See* Mladić Appeal Brief, para. 204, *referring to* Trial Judgement, paras. 4374-4395, 4466, 4472-4474.
[580] *See* Trial Judgement, paras. 4374-4395.
[581] *See* Trial Judgement, paras. 4466, 4472-4474.
[582] The Trial Chamber found that the Supreme Command was created on 30 November 1992 and that the Commander of the VRS Main Staff, Mladić, was not its member and could attend meetings on invitation only. Trial Judgement, paras. 31, 4476.
[583] Trial Judgement, paras. 4476, 4478.
[584] Trial Judgement, paras. 4477, 4478.
[585] Trial Judgement, para. 4477.
[586] Trial Judgement, para. 4478.

Appeals Chamber considers that, contrary to Mladić's submissions, the Trial Chamber did not make "inconsistent interpretations" of his interactions with the members of the Overarching JCE, but rather clearly found that Mladić actively participated in high-level political discussions with the purpose of influencing political decisions. His contentions in this regard are therefore without merit and fail to identify any error.

179. As to Mladić's submission that the Trial Chamber gave undue weight to his role as Commander of the VRS and that he directed military operations in furtherance of the war effort and in compliance with duties delegated to him by Karadžić, the Appeals Chamber recalls that in order to hold an accused responsible pursuant to joint criminal enterprise liability, it must be established that he or she performed acts that in some way were directed to the furthering of the common plan or purpose of the joint criminal enterprise.[587] These acts need not be criminal *per se* but they may take the form of assistance in, or contribution to, the execution of the common objective or purpose.[588] Moreover, the fact that the participation of the accused amounted to no more than his or her "routine duties" will not exculpate the accused.[589]

180. The Appeals Chamber notes the Trial Chamber's conclusion that between 12 May 1992 and 30 November 1995, members of the VRS committed crimes in furtherance of the Overarching JCE in the Municipalities.[590] In finding that Mladić participated in the Overarching JCE, the Trial Chamber concluded that he, *inter alia*: (i) was the Commander of the VRS Main Staff; (ii) issued orders regarding the establishment and operations of the VRS; (iii) had knowledge of crimes being committed against non-Serbs in the Municipalities by his subordinates; (iv) deliberately misled the media and international community about crimes committed on the ground; (v) had the authority but did not take appropriate or further steps to investigate or punish perpetrators of crimes; (vi)

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[587] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Šainović et al*. Appeal Judgement, para. 1177; *Krajišnik* Appeal Judgement, paras. 695, 696.

[588] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, paras. 1615, 1653; *Šainović et al.* Appeal Judgement, para. 985; *Krajišnik* Appeal Judgement, paras. 215, 695.

[589] *Popović et al*. Appeal Judgement, para. 1615.

[590] *See*, *e.g.*, Trial Judgement, paras. 4224, 4225. The Trial Chamber found that crimes were committed by the VRS in the following municipalities: (i) Banja Luka (*see*, *e.g.*, Trial Judgement, paras. 374, 454-456, 469-472, 487-494, 502); (ii) Bijeljina (*see*, *e.g.*, Trial Judgement, paras. 505, 510, 511, 513, 516, 551-555, 559-567, 582-587); (iii) Foča (*see*, *e.g.*, Trial Judgement, paras. 603-629, 631-655, 657-667, 669-673, 675-684, 686-690, 696, 697, 702, 704, 706-723); (iv) Kalinovik (*see*, *e.g.*, Trial Judgement, paras. 750-752, 760-774, 776-780, 782-784, 790, 791); (v) Ključ (*see*, *e.g.*, Trial Judgement, paras. 800-832, 840-851, 854-859, 883, 884); (vi) Kotor Varoš (*see*, *e.g.*, Trial Judgement, paras. 887-892, 894-902, 905-918, 920-928, 931-934, 937-943, 947-960); (vii) Novi Grad (*see*, *e.g.*, Trial Judgement, paras. 969-974); (viii) Prijedor (*see*, *e.g.*, Trial Judgement, paras. 1017-1040, 1050-1062, 1064-1074, 1076-1087, 1089-1100, 1101-1121 1142, 1159-1170, 1236, 1238-1269, 1271-1325, 1330-1380, 1384-1401, 1403, 1407, 1408, 1411-1413, 1417, 1419, 1420, 1430-1449); (ix) Rogatica (*see*, *e.g.*, Trial Judgement, paras. 1456-1462, 1464-1471, 1490-1506, 1511-1529, 1532, 1533, 1536-1550, 1553-1585); (x) Sanski Most (*see*, *e.g.*, Trial Judgement, paras. 1589-1602, 1604-1625, 1627-1637, 1649, 1650, 1663, 1677-1679, 1681-1686, 1689-1735); (xi) Sokolac (*see*, *e.g.*, Trial Judgement, paras. 1739-1742, 1744-1746, 1752-1756); and (xii) Vlasenica (*see*, *e.g.*, Trial Judgement, paras. 1758, 1760, 1763, 1766, 1774-1795, 1803-1815, 1841-1846).

placed severe restrictions on the delivery of humanitarian aid; and (vii) repeatedly used derogatory terms to refer to Bosnian Muslims and Bosnian Croats as well as introduced and controlled a centralized system of spreading propaganda related to Bosnian Muslims and Bosnian Croats.[591] Given the Trial Chamber's findings on Mladić's acts and conduct furthering the Overarching JCE and in line with the jurisprudence that performing routine duties will not exculpate the accused,[592] the Appeals Chamber considers it inconsequential that Mladić, as Commander of the VRS Main Staff, was acting in accordance with his obligations as delegated to him by Karadžić.[593] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić therefore fails to show that the Trial Chamber committed any error in this regard.

(d) Conclusion

181. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 3.A of Mladić's appeal.

2. Alleged Errors Regarding Significant Contribution and *Mens Rea* (Ground 3.B)

182. As recalled above, the Trial Chamber found that Mladić significantly contributed to achieving the objective of the Overarching JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[594] The Trial Chamber further found that Mladić shared the intent to achieve the common objective of the Overarching JCE through the commission of the above-noted crimes, and that he held this intent by 12 May 1992 at the latest.[595]

183. Mladić submits that the Trial Chamber erred in finding that he significantly contributed to and intended to participate in the Overarching JCE.[596] He requests that the Appeals Chamber reverse his convictions based on the first form of joint criminal enterprise, or that it reverse them to the extent of any error identified.[597] The Appeals Chamber will address his contentions in turn.

[591] *See*, *e.g.*, Trial Judgement, paras. 4383-4390, 4498-4500, 4510-4512, 4544-4546, 4601-4608, 4611, 4612, 4623, 4630-4650, 4666-4675, 4685-4688.
[592] *Popović et al*. Appeal Judgement, para. 1615.
[593] *See* Mladić Appeal Brief, para. 206.
[594] Trial Judgement, para. 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4611, 4615, 4685, 5189.
[595] Trial Judgement, para. 4688. *See also*, *e.g.*, Trial Judgement, paras. 4613-4687.
[596] *See* Mladić Notice of Appeal, paras. 36-38; Mladić Appeal Brief, paras. 211-335. *See also* Mladić Appeal Brief, para. 136.
[597] Mladić Appeal Brief, paras. 224, 237, 335.

(a) Significant Contribution

184. The Trial Chamber found, in Chapters 9.3.2 through 9.3.12 of the Trial Judgement, that Mladić's acts and omissions during the existence of the Overarching JCE were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were, and that, therefore, Mladić significantly contributed to achieving the objective of the Overarching JCE.[598] This conclusion rested on findings that Mladić: (i) between May 1992 and at least October 1995, issued orders regarding the establishment and organization of VRS organs and corps, including assignments and promotions;[599] (ii) from May 1992 until 1995, held daily briefings and occasional meetings with VRS Main Staff officers and corps commanders, regularly visited and inspected VRS units, and issued orders and directives to VRS units and other groups;[600] (iii) tasked brigade commanders of the VRS First Krajina Corps to cooperate with the MUP;[601] (iv) from May 1992 to October 1995, was in direct contact with members of the leadership in Serbia and members of the Yugoslav Army ("VJ") General Staff to ensure the military needs of the VRS were met;[602] (v) addressed the Bosnian Serb Assembly during several of its sessions on issues surrounding the development of policies of the Bosnian Serb political leadership, and often suggested to Bosnian Serb politicians what position they should take during peace negotiations in order to achieve the strategic objectives as initially defined;[603] (vi) between September 1992 and at least March 1995, introduced and maintained a controlled and centralized system of spreading propaganda related to Bosnian Croats and Bosnian Muslims;[604] (vii) made deliberately misleading statements to members of the media and international community in relation to crimes committed on the ground;[605] (viii) did not take appropriate or further steps to investigate or punish perpetrators of crimes;[606] and (ix) placed severe restrictions on the delivery of humanitarian aid from 10 April 1994 onwards.[607]

185. Mladić submits that the Trial Chamber erred in finding that he significantly contributed to the Overarching JCE.[608] Specifically, he challenges the Trial Chamber's findings that: (i) he had command and control over members of the MUP;[609] (ii) he had command and control over VRS

[598] Trial Judgement, paras. 4611, 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4610, 4615, 4685, 5189.
[599] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4242-4291.
[600] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4293-4394, 4396-4404.
[601] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 3817, 4408, 4409, 4414.
[602] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4420-4456.
[603] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4458-4478.
[604] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4480-4500.
[605] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4502-4512.
[606] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4514-4546.
[607] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4548-4608.
[608] *See* Mladić Appeal Brief, paras. 211-267; Mladić Reply Brief, para. 47.
[609] *See* Mladić Appeal Brief, paras. 218-223; T. 25 August 2020 pp. 54, 55.

forces;[610] and (iii) he failed to adequately investigate and/or punish crimes.[611] Mladić submits that, as a consequence of errors in the Trial Judgement, the Trial Chamber's findings on his guilt under the first form of joint criminal enterprise are invalidated as, *inter alia*, the element of *actus reus* cannot be considered to have been proven beyond a reasonable doubt.[612]

186. The Appeals Chamber recalls that for an accused to be found criminally liable on the basis of joint criminal enterprise liability, a trial chamber must be satisfied that the accused acted in furtherance of the common purpose of a joint criminal enterprise in the sense that he significantly contributed to the commission of the crimes involved in the common purpose.[613] An accused's contribution need not be necessary or substantial,[614] it need not involve the commission of a crime,[615] and the law does not foresee specific types of conduct which *per se* could not be considered a contribution to a joint criminal enterprise.[616]

(i) Command and Control Over Members of the MUP

187. The Trial Chamber found that the MUP cooperated closely with the VRS and that, when MUP units were participating in combat operations, from at least 12 May 1992 to 26 September 1995, they were re-subordinated to the command of the VRS while still being under the direct command of MUP officials.[617] It also found that MUP members were involved in a large number of crimes, including murder, unlawful detention, cruel or inhumane treatment, and persecution, committed in 12 municipalities, and that they were either under the operational supervision of the VRS or under the supervision of the MUP.[618] In relation to his significant contribution to the Overarching JCE via control of the MUP, the Trial Chamber considered that Mladić, *inter alia*, issued orders and directives to VRS units as well as "other groups", and tasked brigade commanders of the VRS First Krajina Corps to cooperate with the MUP.[619]

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[610] *See* Mladić Appeal Brief, paras. 227-236.
[611] *See* Mladić Appeal Brief, paras. 238, 244-267.
[612] Mladić Appeal Brief, paras. 212, 268.
[613] *See, e.g., Stanišić and Župljanin* Appeal Judgement, paras. 110, 136; *Popović et al.* Appeal Judgement, para. 1378; *Šainović et al*. Appeal Judgement, para. 987; *Krajišnik* Appeal Judgement, paras. 215, 695.
[614] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 136; *Popović et al.* Appeal Judgement, para. 1378; *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430.
[615] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1378, 1615; *Krajišnik* Appeal Judgement, paras. 215, 695.
[616] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696.
[617] Trial Judgement, paras. 3819, 3824, 3826, 4227. *See also* Trial Judgement, paras. 3793-3818.
[618] Trial Judgement, paras. 3819, 4227, 4239, 4610. The Trial Chamber listed the following as locations where the MUP was involved in crimes: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Pale, Prijedor, Rogatica, Sanski Most, and Vlasenica. *See, e.g.*, Trial Judgement, paras. 3819, 4227.
[619] Trial Judgement, paras. 4611, 4612.

188. Mladić submits that the Trial Chamber relied on adjudicated facts to establish that he had command and control over MUP forces, thereby failing to give sufficient weight to evidence that he lacked *de jure* or *de facto* control over such forces, and conflating coordinated action with re-subordination.[620] In his view, this evidence was sufficient to "enliven the evidentiary debate and rebut the adjudicated facts" relied upon by the Trial Chamber.[621] According to Mladić, effective command and control of the MUP was a "critical component" to the Trial Chamber's consideration of his contribution.[622] He argues that, based on a proper weighing of evidence at trial, no reasonable trier of fact could have concluded that he exercised effective command and control of the MUP to establish a significant contribution to the Overarching JCE.[623]

189. The Prosecution responds that Mladić's arguments are grounded in a misreading of the Trial Judgement.[624] It submits that, in relation to Mladić's contribution to the Overarching JCE, the Trial Chamber's finding concerning the MUP is expressly limited to the MUP forces under the command of the VRS First Krajina Corps at Manjača camp.[625] In addition, the Prosecution submits that Mladić refers to irrelevant evidence, and fails to show any impact of his arguments on the Trial Chamber's conclusion that he significantly contributed to furthering the common purpose.[626] The Prosecution further argues that Mladić's submissions have no bearing on his liability for crimes committed by any MUP forces not re-subordinated to the VRS, as crimes of perpetrators who were subordinated to another member of the Overarching JCE are attributable to him.[627]

190. The Appeals Chamber observes that Mladić challenges the Trial Chamber's reliance on adjudicated facts at paragraph 3794 of the Trial Judgement.[628] The Appeals Chamber notes that, in the impugned paragraph, the Trial Chamber relied on: (i) Adjudicated Fact 1354 to state that, in accordance with the law in effect in the *Republika Srpska*, MUP units could be re-subordinated to the VRS for various purposes, including reinforcement during combat activities;[629] (ii) Adjudicated Fact 1355 to state that, when re-subordinated, MUP forces followed orders from the VRS, and that

[620] Mladić Appeal Brief, paras. 218, 221, *referring to, inter alia*, Trial Judgement, para. 3794. *See also* T. 25 August 2020 pp. 54, 55. Mladić argues that, contrary to the Trial Chamber's findings, MUP forces were not re-subordinated to the VRS, but remained under the command of MUP officials. *See* Mladić Appeal Brief, para. 221. To the extent that Mladić makes similar arguments in Ground 5.B of his appeal regarding the Srebrenica JCE, the Appeals Chamber will evaluate them in connection with submissions made in support of that ground of appeal. *See infra* Section III.D.2(b).
[621] Mladić Appeal Brief, paras. 218, 221, *referring to, inter alia*, T. 10 December 2013 pp. 20615-20617, T. 23 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session), Exhibit P5248, p. 2. *See also* T. 25 August 2020 p. 55.
[622] Mladić Appeal Brief, para. 222.
[623] Mladić Appeal Brief, paras. 221, 223; T. 25 August 2020 pp. 54, 55. *See also* Mladić Reply Brief, para. 47.
[624] Prosecution Response Brief, paras. 70, 71. *See also* T. 25 August 2020 pp. 98, 99.
[625] Prosecution Response Brief, para. 71, n. 324; T. 25 August 2020 p. 99.
[626] Prosecution Response Brief, paras. 72, 73.
[627] Prosecution Response Brief, para. 73; T. 25 August 2020 p. 99.
[628] *See* Mladić Appeal Brief, para. 221, n. 324, *referring to* Trial Judgement, para. 3794; T. 25 August 2020 pp. 54, 55.

the VRS and MUP unit commanders coordinated their work in carrying out the tasks assigned by the VRS;[630] and (iii) Adjudicated Fact 1356 to state that MUP forces were engaged in combat operations for a specific time to carry out a precisely described task and, during their re-subordination, MUP forces retained their formation and could not be disintegrated or separated.[631]

191. The Appeals Chamber notes that paragraph 3794 of the Trial Judgement does not address Mladić's role or contribution. Rather, this paragraph is contained in Chapter 9.2.7 of the Trial Judgement, which discusses the role of the MUP, and is part of the Trial Chamber's analysis regarding the scope of the Overarching JCE as a whole (Chapter 9.2).[632] The Trial Chamber further specified, at the conclusion of Chapter 9.2.7 and Chapter 9.2 generally, that it would only address Mladić's membership in the Overarching JCE and his role with regard to the MUP in Chapter 9.3 of the Trial Judgement.[633]

192. As to Mladić's contribution to the Overarching JCE through his command and control of other Serb forces subordinated to the VRS,[634] the Trial Chamber addressed the MUP in paragraph 4404 of the Trial Judgement and recalled only findings related to Manjača camp in Banja Luka Municipality.[635] According to the Trial Chamber, the VRS First Krajina Corps was in charge of Manjača camp, and the MUP members who committed crimes were operating under the command of the VRS First Krajina Corps.[636] Given that Mladić, as Commander of the VRS Main Staff, issued orders to the VRS First Krajina Corps, the Trial Chamber found that Mladić "commanded and controlled the Manjača camp command, including the subordinated MUP units".[637] In the same paragraph, the Trial Chamber also recalled its finding that, on 3 August 1992, Mladić issued orders to, *inter alios*, the Manjača camp command, units of the VRS First Krajina Corps, and the Prijedor Security Services Centre ("CSB"), an organ of the MUP,[638] to allow reporters and a team of the International Committee of the Red Cross ("ICRC") to visit various detention camps, including Manjača.[639] Finally, when summarizing Mladić's actions relevant to his significant contribution to

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[629] *See* Trial Judgement, para. 3794, n. 14173, *referring to* Adjudicated Fact 1354.
[630] *See* Trial Judgement, para. 3794, nn. 14174, 14175, *referring to* Adjudicated Fact 1355.
[631] *See* Trial Judgement, para. 3794, nn. 14176, 14177, *referring to* Adjudicated Fact 1356.
[632] *See* Trial Judgement, paras. 3573-4240.
[633] *See, e.g.*, Trial Judgement, paras. 3828, 4238.
[634] Trial Judgement, paras. 4396-4405.
[635] *See* Trial Judgement, para. 4404. *See also, e.g.*, Trial Judgement, paras. 361-374, 378-456.
[636] Trial Judgement, para. 4404, *referring to* Trial Judgement, Chapters 4.1.2 and 8.9.2. *See also, e.g.*, Trial Judgement, paras. 374, 454, 455.
[637] Trial Judgement, para. 4404, *referring to* Trial Judgement, Chapter 9.3.3. *See also* Trial Judgement, paras. 4383, 4388.
[638] *See, e.g.*, Trial Judgement, paras. 322, 323, 325, 328, 339, 341, 342, 3823.
[639] Trial Judgement, para. 4404. *See also, e.g.*, Trial Judgement, paras. 1209, 4001, 4002.

the Overarching JCE, the Trial Chamber considered, *inter alia*, that Mladić "controlled VRS units and issued orders to other groups".[640] The Appeals Chamber therefore considers that, contrary to Mladić's submission, the Trial Chamber did not find that he significantly contributed to the Overarching JCE through a general command and control over the MUP. Rather, in determining Mladić's contribution to the Overarching JCE, the Trial Chamber limited its findings of his command and control of the MUP to Manjača camp and to the orders he issued to the Prijedor CSB.[641] These findings, summarized in paragraph 4404 of the Trial Judgement, are based on extensive evidence – including witness testimonies, exhibits, and adjudicated facts – addressed in other sections of the Trial Judgement.[642] Mladić does not challenge these findings, nor does he demonstrate that the Trial Chamber erred by relying on adjudicated facts to find that he had command and control over the MUP forces at Manjača camp or that he issued orders to the Prijedor CSB.

193. Given that the adjudicated facts Mladić seeks to challenge at paragraph 3794 of the Trial Judgement pertain to the general subordination of the MUP to the VRS and not to his specific conduct or contribution to the Overarching JCE, the Appeals Chamber considers that the evidence he points to on appeal, which he presented at trial to rebut these adjudicated facts, is inapposite.[643] Any error in the assessment of this evidence would have no impact on the Trial Chamber's conclusions regarding Mladić's control of Manjača camp or his orders to the Prijedor CSB. At this juncture, the Appeals Chamber further recalls that members of a joint criminal enterprise may be held responsible for crimes carried out by principal perpetrators, provided that the crimes can be imputed to at least one member of the joint criminal enterprise and that the latter – when using the

[640] Trial Judgement, paras. 4611, 4612.
[641] *See* Trial Judgement, paras. 4404, 4405.
[642] *See*, *e.g.*, Trial Judgement, paras. 349-456, 1209, 4001-4004.
[643] The Appeals Chamber observes that, in any event, Mladić refers to the testimonies of Witnesses Reynaud Theunens, Velimir Kevac, and Mitar Kovač, as well as Exhibit P5248, which he asserts prove that coordinated action of MUP forces with the VRS did not involve re-subordination and that command and control remained with the MUP. *See* Mladić Appeal Brief, para. 221, nn. 325, 327, *referring to* T. 10 December 2013 pp. 20615-20617, T. 23 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session), Exhibit P5248, p. 2. A review of Witness Theunens's evidence reveals that it concerns the witness being questioned on re-subordination and coordinated action on a theoretical level, without drawing any connection to events on the ground. *See* T. 10 December 2013 pp. 20615-20617. As to Witness Kevac's testimony, the Trial Chamber considered it at paragraph 3796 of the Trial Judgement and this evidence contains a statement from the witness that, in a coordinated action between the army and the police, an army unit does not necessarily have command authority over a police unit. *See* T. 23 January 2015 pp. 30544, 30545. *See also* Trial Judgement, paras. 3785, 3796. [REDACTED] *See* T. 25 November 2015 p. 41921 (private session). The Appeals Chamber is of the view that these statements do not point to specific instances on the ground and do not contradict the Trial Chamber's finding that, at times, the VRS and the MUP acted in coordination, while at other times, the MUP was subordinated to the VRS. *See* Trial Judgement, paras. 3819, 4227, 4239, 4610. The Appeals Chamber is also of the view that this evidence has no bearing on findings concerning Manjača camp or orders made on 3 August 1992 to the Prijedor CSB. Finally, Exhibit P5248 concerns a VRS Main Staff report containing no information relevant to the issues at hand. Mladić's contention that the Trial Chamber conflated coordination and subordination with respect to the MUP is discussed below in the section addressing Ground 5.B of his appeal. *See infra* Section III.D.2(b).

principal perpetrators – acted in accordance with the common objective.[644] The Appeals Chamber notes the Trial Chamber's findings that MUP units were used as tools to commit the crimes in the Municipalities in furtherance of the common purpose of the Overarching JCE,[645] that Stanišić, as Minister of the Interior, was a member of the Overarching JCE,[646] and that Stanišić had overall command and control over MUP forces.[647] The Appeals Chamber observes that Mladić has not challenged these findings regarding Stanišić and the MUP in relation to the Overarching JCE. Consequently, even if Mladić were to establish that the Trial Chamber erred in regard to his command and control over the MUP, such an error would not impact his liability through his membership in the Overarching JCE.

194. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred in relation to his significant contribution to the Overarching JCE via command and control of MUP forces.

(ii) Command and Control over VRS Soldiers

195. In relation to the Overarching JCE, the Trial Chamber considered that many of the principal perpetrators of crimes in the Municipalities were VRS members, who were under the operational command of one of the corps and ultimately of the VRS Main Staff.[648] It concluded that Mladić significantly contributed to achieving the objective of the Overarching JCE by, *inter alia*, issuing orders regarding the establishment and organization of the VRS and its organs, being closely involved in VRS activities, as evidenced by regular briefings, meetings, and inspections, and commanding and controlling VRS units.[649]

196. The Trial Chamber found, *inter alia*, that Mladić: (i) from 12 May 1992 until at least 8 November 1996, was Commander of the VRS Main Staff; (ii) between May 1992 and April 1995, issued orders and directives to the VRS regarding its establishment, organization, military operations, and combat strategies; (iii) from May 1992 until 1995, was personally kept informed of

[644] *See Stanišić and Župljanin* Appeal Judgement, para. 119; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, para. 413.
[645] *See, e.g.*, Trial Judgement, para. 4239.
[646] *See, e.g.*, Trial Judgement, paras. 4238, 4610.
[647] *See, e.g.*, Trial Judgement, paras. 341, 342, 3824, 3825, 4227.
[648] Trial Judgement, paras. 4239, 4610, 4612. *See also, e.g.*, Trial Judgement, paras. 374, 455, 456, 513, 517, 564, 566, 607, 626, 627, 629, 632, 654, 655, 664-667, 672, 673, 684, 690, 702, 720, 752, 772-774, 778-780, 784, 791, 820, 832, 834, 851, 857, 858, 892, 902, 916-918, 927, 928, 933, 934, 943, 960, 974, 1036-1038, 1040, 1053, 1061, 1062, 1072, 1082-1087, 1100, 1112, 1121, 1142, 1168, 1169, 1180, 1233-1236, 1265-1269, 1322-1325, 1369, 1371-1373, 1375-1378, 1396-1401, 1403, 1406-1408, 1417, 1419, 1420, 1448, 1449, 1462, 1471, 1503-1506, 1512, 1527, 1529, 1536, 1547, 1548, 1580-1585, 1602, 1610, 1616, 1637, 1663, 1679, 1686, 1721, 1723, 1725, 1726, 1728, 1731, 1733, 1735, 1742, 1746, 1754-1756, 1766, 1795, 1806-1808, 1812, 1815, 1844-1846.
[649] Trial Judgement, paras. 4611, 4612. *See also* Trial Judgement, paras. 4242-4291, 4293-4394.

developments on the battlefield through daily reports from corps commanders, and held daily briefings and occasional evening meetings with VRS Main Staff officers and corps commanders; (iv) between May 1992 and May 1995, regularly visited and inspected VRS units or ordered VRS Main Staff officers to conduct such inspections in order to be informed on the units' state of combat readiness and to assist on specific tasks; and (v) from May 1992 to July 1995, issued several orders to various VRS units with detailed instructions regarding combat strategies, military operations, deployment of units, authorization of offensive operations, use of weapons and ammunition, and ceasefire agreements.[650] The Trial Chamber also found that the VRS had a well-functioning communication system, which allowed Mladić to effectively and quickly communicate with his subordinates.[651] In addition, it concluded that Mladić was respected as a leader by his subordinates and possessed a "very high level of command and control over [them]".[652] The Trial Chamber explicitly rejected Defence arguments regarding Mladić's limited influence as well as the lack of subordinate loyalty and obedience to the VRS command, and noted that occasional indiscipline in the VRS did not undermine his overall ability to exercise command and control.[653]

197. Mladić submits that the Trial Chamber failed to give sufficient weight to evidence that the lack of professional or trained subordinates significantly affected his ability to command and control VRS soldiers.[654] He specifies that the Trial Chamber erred by failing to adequately consider: (i) the wider repercussions of the lack of professional subordinates on his ability to instruct subordinates and to ensure that military combat operations were carried out within VRS rules and procedures;[655] and (ii) his efforts to deal with the lack of professional subordinates, namely through visits to VRS commands and units by him and other VRS Main Staff personnel[656] as well as through a meeting with VJ representatives to acquire more trained personnel.[657] Mladić submits as an example that the Trial Chamber failed to include relevant evidence in its assessment of an 8 July 1993 meeting, such as references in his notebook about problems in the VRS and the MUP.[658]

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[650] Trial Judgement, paras. 4383-4389. *See also* Trial Judgement, paras. 246-276, 4242-4291, 4293-4382, 4611.
[651] Trial Judgement, para. 4387. *See also*, *e.g.*, Trial Judgement, paras. 114-120, 152, 159, 160, 164, 181, 186, 193, 199, 200, 203, 205, 213, 214, 218, 263, 4296-4310, 4375, 4380, 4383.
[652] Trial Judgement, paras. 4390, 4391. *See also*, *e.g.*, Trial Judgement, paras. 4375-4380.
[653] Trial Judgement, para. 4392. *See also*, *e.g.*, Trial Judgement, paras. 151, 237.
[654] Mladić Appeal Brief, para. 227. *See also* Mladić Appeal Brief paras. 228-236.
[655] Mladić Appeal Brief, para. 231. Mladić asserts that inadequately trained subordinates led to "organisational disunity" and affected combat operations. Mladić Appeal Brief, para. 231, n. 340, *referring to* Mladić Final Trial Brief, paras. 653, 654, Exhibits P5241, pp. 2-5, 8-10, 12, 14, 15, D566, p. 2, D686, paras. 36, 38, 39, D939, p. 9, P356, p. 180, P346, pp. 140, 141, P338, pp. 21, 22, 73, D559, paras. 31, 32, T. 13 November 2012 p. 5033 (closed session), T. 16 November 2015 pp. 41371, 41372.
[656] Mladić Appeal Brief, para. 232, nn. 341, 342, *referring to* Mladić Final Trial Brief, para. 662, Exhibits P3029, pp. 563, 564, P347, p. 56, Trial Judgement, paras. 4311-4321.
[657] Mladić Appeal Brief, para. 233.
[658] Mladić Appeal Brief, para. 234, nn. 344-347, *referring to*, *inter alia*, Exhibits P358, p. 238, P4583, p. 39, Trial Judgement, paras. 4425, 4440.

Mladić argues that no reasonable trier of fact could have concluded that he exercised effective command and control over VRS subordinates to support a finding that he significantly contributed to the Overarching JCE.[659]

198. The Prosecution responds that the Trial Chamber's conclusions were reasonable and grounded in findings as well as detailed analysis of evidence on the functioning VRS command structures and Mladić's exercise of command and control over them.[660] According to the Prosecution, the Trial Chamber considered evidence of VRS indiscipline and found that occasional lack of discipline did not undermine Mladić's overall ability to exercise command and control over the VRS.[661] In addition, the Prosecution submits that Mladić's generic argument that he lacked professional subordinates does not demonstrate that he lacked effective command and control over VRS subordinates.[662]

199. With regard to Mladić's contention that the Trial Chamber failed to sufficiently consider how the lack of professional or trained subordinates affected his command and control of the VRS, the Appeals Chamber observes that he makes reference to Exhibits P5241, D566, D686, P338, D559, D939, P356, and P346 as well as the testimonies of Witnesses Kovač and RM-511.[663] A review of the Trial Judgement reveals that, in addressing arguments regarding command and control issues in the VRS, the Trial Chamber explicitly considered Exhibits P5241,[664] D566,[665] D686,[666] P338,[667] and D559.[668] The Trial Chamber, however, did not explicitly refer to Exhibits

[659] Mladić Appeal Brief, para. 236. *See also* Mladić Reply Brief, para. 47.
[660] Prosecution Response Brief, para. 74. *See also* T. 25 August 2020 pp. 97, 100.
[661] Prosecution Response Brief, para. 75; T. 25 August 2020 p. 100.
[662] Prosecution Response Brief, paras. 76-78. *See also* T. 25 August 2020 p. 100.
[663] Mladić Appeal Brief, para. 231, n. 340, *referring to*, *inter alia*, Exhibits P5241, pp. 2-5, 8-10, 12, 14, 15, D566, p. 2, D686, paras. 36, 38, 39, P338, pp. 21, 22, 73, D559, paras. 31, 32, D939, p. 9, P356, p. 180, P346, pp. 140, 141, T. 13 November 2012 p. 5033 (closed session), T. 16 November 2015 pp. 41371, 41372.
[664] *See*, *e.g.*, Trial Judgement, paras. 210, 4313, n. 15539 (where the Trial Chamber considered that, on 5 March 1993, Mladić sent an assessment report of the VRS Drina Corps units' state of combat readiness to the Drina Corps command and recommended that it study the report, draw up a plan to eliminate shortcomings, and incorporate the designated assignments into its working plan).
[665] *See*, *e.g.*, Trial Judgement, paras. 233, 237, nn. 894, 897-899 (where the Trial Chamber considered that the VRS Sarajevo Romanija Corps ("SRK") brigades had very few professional officers, were understaffed, only rarely provided training, and faced disciplinary problems, all of which led to problems of indiscipline, disobedience, and inefficient command and control).
[666] *See*, *e.g.*, Trial Judgement, paras. 221, 224, 230, nn. 820, 845, 882-884, 886 (where the Trial Chamber considered, *inter alia*, that 15 to 20 per cent of the SRK were professional soldiers, that there was a lack of discipline in the SRK due to fatigue and the lack of soldiers, and that there was a lack of training).
[667] *See*, *e.g.*, Trial Judgement, paras. 4322, 4473, nn. 15559-15562, 15932 (where the Trial Chamber considered the VRS Main Staff analysis of the combat readiness and activities of the VRS in 1992, and noted, *inter alia*, that the VRS had been under a single command and control structure in 1992, despite being initially composed of a large number of different armies and paramilitary formations, and that the VRS Main Staff was performing the function of the Staff of the VRS Supreme Command and at the same time the function of the superior command for operational and some joint tactical formations).

D939, P356, P346, nor to Witness RM-511's testimony from 13 November 2012 and Witness Kovač's testimony from 16 November 2015 in relation to issues of command and control of the VRS. Notwithstanding, the Appeals Chamber recalls that a trial chamber is not obliged to refer to every piece of evidence on the trial record,[669] and it is to be presumed to have evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[670] In this regard, the Appeals Chamber notes that the portions of Exhibits D939, P356, and P346, as well as the testimonies of Witnesses RM-511 and Kovač, to which Mladić refers, discuss the lack of professional soldiers and the poor level of training in various VRS units.[671] This evidence is similar to extensive evidence the Trial Chamber expressly noted and considered in the Trial Judgement that certain VRS units were untrained or unprofessional.[672] After reviewing such evidence, the Trial Chamber rejected Mladić's claim that VRS units lacked discipline, which included issues such as untrained and unprofessional soldiers.[673] For example, with regard to the VRS First Krajina Corps, the Trial Chamber concluded that, even if there were instances of lack of discipline or organization, any such problems did not affect the VRS First Krajina Corps's overall ability to meaningfully control its subordinate units,[674] and that the chain of command and reporting system "fully functioned between the VRS Main Staff, the VRS

[668] *See*, *e.g.*, Trial Judgement, paras. 221, 233, 236, nn. 818, 894, 899, 921, 922 (where the Trial Chamber considered that the SRK brigades had very few professional officers, faced disciplinary problems, and did not have specially organized sniper units).

[669] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al*. Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864. *See also* Trial Judgement, para. 16 (stating that "[d]ue to the vast quantity of evidence, it was not possible to reference and discuss every piece of evidence in the [Trial] Judgment, even though the Trial Chamber considered all evidence carefully.").

[670] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al*. Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, n. 2527.

[671] *See* Exhibits D939, p. 9, P356, p. 180, P346, pp. 140, 141; T. 13 November 2012 p. 5033 (closed session); T. 16 November 2015 pp. 41371, 41372.

[672] *See*, *e.g.*, Trial Judgement, paras. 108 (where the Trial Chamber considered arguments that the VRS First Krajina Corps units "lacked discipline" and were "untrained and unprofessional"), 144 (where the Trial Chamber considered evidence that the 30th Division of the VRS First Krajina Corps was comprised of soldiers who lacked military rank), 151 (where the Trial Chamber considered and assessed evidence that several brigades of the VRS First Krajina Corps lacked professional personnel and discipline), 187 (where the Trial Chamber considered Defence argument that the Drina Corps squads lacked qualified officers at all command levels and lacked organizational unity), 196 (where the Trial Chamber considered evidence that the Bratunac Brigade of the Drina Corps lacked, *inter alia*, suitably trained officers at all levels), 221 (where the Trial Chamber considered Defence arguments that the SRK lacked appropriately qualified soldiers, officers, and commanders; that orders were not always followed; and that the SRK could not exercise effective command and control), 230 (where the Trial Chamber considered evidence that 15 to 20 per cent of the SRK were professional soldiers, and that there was a lack of discipline and training), 233 (where the Trial Chamber summarized various witness evidence that the SRK brigades had very few professional officers, only rarely provided training, were understaffed, and faced disciplinary problems), 237-239 (where the Trial Chamber considered and assessed evidence about the lack of command and control in the SRK brigades), 800 (where the Trial Chamber considered argument that a battalion of the 17th Light Infantry Brigade of the Second Krajina Corps operating in Ključ Municipality was untrained and ill-disciplined).

[673] Trial Judgement, paras. 151, 152, 237. *See also* Trial Judgement, para. 4392.

[674] Trial Judgement, para. 151.

First Krajina Corps, and its subordinate units".[675] With regard to the SRK,[676] the Trial Chamber addressed evidence that there were many unprofessional men in its brigades, but found that such evidence did not contradict the Trial Chamber's consideration that the SRK was under normal military command, with subordinates being disciplined and following orders.[677] The Trial Chamber also considered extensive evidence suggesting that the lack of professional commanding officers and staff in various SRK brigades affected the quality of command and control and led to problems with indiscipline, disobedience, and inefficient command and control.[678] It found, however, that this evidence was limited to specific incidents or moments in time and therefore found that it did not contradict Adjudicated Facts 1808 and 1864, which state that the SRK generally functioned under normal command and control and that subordinates were very disciplined and followed orders.[679] In light of the foregoing, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber failed to sufficiently consider how the lack of professional or trained subordinates affected his command and control of the VRS.

200. With regard to the argument that the Trial Chamber failed to adequately consider that Mladić and other VRS Main Staff personnel visited commands and units "as a strategy to deal with the lack of professional subordinates", Mladić references Exhibits P3029 and P347 as well as paragraph 662 of the Mladić Final Trial Brief.[680] The Appeals Chamber observes that the Trial Chamber referenced the paragraph of the Mladić Final Trial Brief to which Mladić points on appeal when summarizing his submissions and recalls that a trial chamber has the discretion to select which legal arguments to address.[681] The Appeals Chamber further notes that the Trial Chamber considered Exhibit P3029 to the effect that Mladić and VRS Main Staff inspection teams regularly visited VRS commands, units, and their combat positions, and that this was essential for Mladić to familiarize himself with the situation on the ground, including the implementation of his orders and the activities of his forces, and to exercise authority over his subordinate forces.[682] While the Trial Chamber did not expressly refer to Exhibit P347 in relation to Mladić's inspection of VRS units in

[675] Trial Judgement, para. 152.
[676] Outside of the Sarajevo JCE, the Trial Chamber found that certain SRK units, notably the Rogatica Brigade, committed crimes in relation to the Overarching JCE. *See*, *e.g.*, Trial Judgement, paras. 239, 1462, 1471, 1504, 1512, 1547, 3051 (Schedule B (p), Schedule C (d)), 3287(i), 3325(i), 3360(f), 3381(b), 3388(f), n. 927.
[677] Trial Judgement, para. 237.
[678] Trial Judgement, para. 237.
[679] Trial Judgement, para. 237.
[680] *See* Mladić Appeal Brief, para. 232, n. 341, *referring to* Exhibits P3029, pp. 563, 564, P347, p. 56, Mladić Final Trial Brief, para. 662.
[681] *See* Trial Judgement, para. 4293, n. 15467; *Prlić et al*. Appeal Judgement, para. 989; *Stanišić and Župljanin* Appeal Judgement, para. 101; *Kvočka et al.* Appeal Judgement, para. 23.
[682] *See* Trial Judgement, para. 4378, nn. 15690, 15691, 15693, *referring to*, *inter alia*, Exhibit P3029.

the Trial Judgement,[683] this exhibit is similar to extensive evidence that the Trial Chamber considered in relation to Mladić or other members of the VRS Main Staff visiting units, between 1992 and 1995, for the purposes of inspection.[684] The Trial Chamber considered that, in many of these inspections, Mladić or members of the VRS Main Staff assessed whether units were combat ready,[685] which included issues such as the lack of well-trained or professional officers and soldiers.[686]

201. The Appeals Chamber is also not persuaded by Mladić's submission that, with respect to the 8 July 1993 meeting, the Trial Chamber failed to note several weaknesses he referenced in his notebook, Exhibit P358, such as declining discipline within the VRS and the dismantling of the MUP.[687] The Appeals Chamber observes that the Trial Chamber not only considered this exhibit in the Trial Judgement, but expressly summarized evidence that "Mladić noted that there were several weaknesses, such as that discipline was getting worse within the VRS and that the MUP had been dismantled".[688]

202. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's submissions reflect mere disagreement with the Trial Chamber's assessment of the evidence with respect to his command and control of the VRS. Mladić does not show any error in the Trial Chamber's findings that he was respected as a leader, possessed a "very high level of command and control over his subordinates", and that occasional indiscipline did not undermine his overall ability to exercise command and control.[689] Accordingly, his submissions do not demonstrate error in the Trial Chamber's finding that he significantly contributed to the Overarching JCE through his command and control of the VRS.

(iii) Knowledge, Investigation, and Punishment of Crimes

203. The Trial Chamber found that, as the Commander of the VRS Main Staff, Mladić was under a duty to take adequate steps to prevent, investigate, and/or punish crimes by members of the VRS

[683] The Appeals Chamber observes that Exhibit P347 is Mladić's notebook and the portion to which he refers simply lists visiting VRS units among a series of tasks. *See* Exhibit P347, p. 56.
[684] *See* Trial Judgement, paras. 4311-4321.
[685] *See, e.g.*, Trial Judgement, paras. 4313, 4314, 4316, 4318. *See also* Trial Judgement, paras. 4322-4324. The Appeals Chamber notes that the Trial Chamber also considered evidence of a large-scale inspection of VRS commands and units that Mladić ordered to be carried out between 16 June 1994 and 2 July 1994. The purpose of this inspection was to obtain information on, *inter alia*, the situation in commands and units, and the levels and readiness of VRS units. *See* Trial Judgement, para. 4316.
[686] *See, e.g.*, Exhibits P5241, pp. 3, 5, 6, 8, 9; P338, pp. 10, 44, 79, 134. *See also* Trial Judgement, paras. 4313, 4322, nn. 15539, 15559-15562, *referring to* Exhibits P5241, P338.
[687] *See* Mladić Appeal Brief, para. 234, *referring to*, *inter alia*, Exhibit P358, p. 238 (where Mladić referred to a meeting with Karadžić, Slobodan Milošević, Jovica Stanišić, and Života Panić).
[688] Trial Judgement, para. 4425.

and other Serb forces under his effective control.[690] It considered that, while he issued orders to comply with the laws and regulations of the *Republika Srpska* and the VRS, the Geneva Conventions,[691] customary laws of war, and other international laws,[692] he did not take appropriate or further steps to investigate or punish perpetrators of crimes.[693] On the contrary, the Trial Chamber found that Mladić facilitated the commission of crimes by providing misleading information to representatives of the international community, non-governmental organizations, the media, and the public about crimes against Bosnian Muslims and Bosnian Croats and about the role that Serb forces had played in those crimes.[694] The Trial Chamber concluded that Mladić's misleading statements regarding crimes committed on the ground and inadequate steps to investigate and/or prosecute these crimes constituted part of his significant contribution to achieving the objective of the Overarching JCE.[695]

204. Mladić submits that the Trial Chamber erred by failing to give sufficient weight to and adequately consider certain evidence when finding that he significantly contributed to the Overarching JCE by not taking appropriate steps to investigate and/or punish perpetrators of crimes.[696] Specifically, he argues that the Trial Chamber: (i) erred by not giving sufficient weight to evidence that he could not have known certain crimes had been committed as they were not reported to him;[697] (ii) failed to give sufficient weight to evidence that he ordered investigations and punishment for crimes committed;[698] (iii) failed to give a reasoned opinion on exculpatory evidence listed in Chapter 9.3.10 of the Trial Judgement that he ordered investigations to be carried out and directed subordinates to comply with applicable laws;[699] (iv) erroneously qualified his alleged failure to punish crimes as a significant contribution based on "an absence of evidence";[700] and (v)

[689] Trial Judgement, paras. 4390-4392.
[690] Trial Judgement, para. 4544. *See also* Trial Judgement, paras. 4529-4543.
[691] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 ("Geneva Convention I"); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 ("Geneva Convention II"); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 ("Geneva Convention III"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 ("Geneva Convention IV") (collectively, "Geneva Conventions").
[692] Trial Judgement, para. 4545. *See also* Trial Judgement, paras. 4517-4528.
[693] Trial Judgement, paras. 4546, 4611. *See also* Trial Judgement, paras. 4529-4545.
[694] *See* Trial Judgement, paras. 4510-4512, 4546. *See also* Trial Judgement, paras. 4502-4509
[695] Trial Judgement, paras. 4611, 4612. *See also* Trial Judgement, paras. 4502-4512, 4514-4546.
[696] *See* Mladić Appeal Brief, paras. 238, 244-267.
[697] *See* Mladić Appeal Brief, paras. 244-248.
[698] *See* Mladić Appeal Brief, paras. 249-253.
[699] *See* Mladić Appeal Brief, paras. 254-257, 259.
[700] Mladić Appeal Brief, paras. 244, 258.

gave insufficient weight to institutional issues of the military justice system in a state of crisis[701] and to its independence.[702]

205. The Prosecution responds that the Trial Chamber properly considered the totality of the evidence, including measures Mladić took to investigate and punish crimes, and reasonably concluded that the measures were inadequate.[703] It contends that Mladić's arguments misrepresent the Trial Judgement and the evidence, are irrelevant or consist of mere assertions, and thus should be summarily dismissed.[704] The Prosecution also submits that it is immaterial that Mladić may not have been informed about certain crimes and that his submissions do not support this claim.[705] Furthermore, the Prosecution argues that the Trial Chamber properly found that Mladić failed to take appropriate measures to investigate and punish crimes, and that the examples he provides do not concern him personally.[706] According to the Prosecution, the Trial Chamber provided a reasoned opinion on the "supposed 'exculpatory evidence'" listed in Chapter 9.3.10 of the Trial Judgement[707] and, contrary to Mladić's submissions, the military justice system was functioning for the duration of the war.[708] Regarding Mladić's submission about the independence of the military justice system, the Prosecution responds, *inter alia*, that the Trial Chamber found that, in many instances, decisions to release suspects were made after the VRS exerted pressure to drop cases or release perpetrators of crimes.[709] The Prosecution argues that, even if the Trial Chamber erred in finding that Mladić's failure to investigate or punish crimes significantly contributed to the Overarching JCE, such an error would have no impact on his convictions as this was only one of numerous contributions in relation to this joint criminal enterprise.[710]

206. Mladić replies that the Prosecution has erroneously asserted that evidence of his subordinates ordering prosecutions is irrelevant because this does not involve him personally.[711] He argues that the Prosecution also errs in stating that the Trial Chamber did not find that the military justice system suffered from institutional issues that inhibited its functioning.[712] He further submits that the Prosecution incorrectly claims that he ignored relevant findings and that it also incorrectly

[701] Mladić Appeal Brief, paras. 244, 261-263.
[702] Mladić Appeal Brief, paras. 244, 264.
[703] Prosecution Response Brief, paras. 79-81, 84.
[704] Prosecution Response Brief, para. 80. *See also* T. 25 August 2020 p. 101.
[705] Prosecution Response Brief, paras. 82, 83. In this regard, the Prosecution argues that the Trial Chamber never found that Mladić was informed of every criminal incident in the Municipalities. *See* Prosecution Response Brief, para. 82; T. 25 August 2020 p. 101.
[706] *See* Prosecution Response Brief, paras. 84-86, 89, 94; T. 25 August 2020 p. 101.
[707] Prosecution Response Brief, paras. 87, 88.
[708] *See* Prosecution Response Brief, paras. 91-93.
[709] Prosecution Response Brief, para. 94. *See also* Prosecution Response Brief, para. 95.
[710] Prosecution Response Brief, para. 96. *See also* T. 25 August 2020 p. 98.
[711] Mladić Reply Brief, para. 43.

submits that two isolated incidents of the VRS exerting pressure on military courts to drop cases or release perpetrators are "findings about what actually happened".[713]

a. Evidence that Mladić Lacked Knowledge of Crimes

207. The Trial Chamber found that Mladić knew that the crimes of persecution, murder, extermination, deportation, and inhumane acts (forcible transfer) were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, including in detention facilities.[714] This finding was based on evidence the Trial Chamber reviewed and its determinations on: (i) Mladić's position as Commander of the VRS Main Staff; (ii) receipt of detailed reports by the VRS Main Staff; (iii) Mladić's personal receipt of regular updates; (iv) his involvement in the VRS units' activities; and (v) the fact that the commission of crimes was widely acknowledged, reported on by international media outlets, and commented on by the UN.[715]

208. Mladić submits that the Trial Chamber failed to give sufficient weight to evidence that he could not have known that certain crimes were committed by VRS soldiers against Bosnian Muslims and Bosnian Croats.[716] To support this argument, Mladić points to four instances – relating to incidents in Manjača camp, murders in Zecovi, the VRS First Krajina Corps's false reporting on the number of "Green Berets" killed in Kozarac, and the same unit's false reporting on an incident in Grabovica – where he was misinformed or not informed about certain crimes.[717] In addition, in oral submissions replying to the Prosecution, the Defence raised a new argument that Mladić could not have known about the killings in Keraterm camp (Prijedor Municipality) as the camp was operated by the MUP.[718] The Appeals Chamber considers this argument open for summary dismissal as oral arguments are strictly limited to briefs filed on appeal, unless otherwise authorized.[719] In any event, the Appeals Chamber observes that Mladić's oral submissions are repetitive of those already considered by the Trial Chamber and that they do not undermine the Trial Chamber's finding, based on evidence, that the VRS participated in killings at Keraterm camp referenced at paragraph 1121 of the Trial Judgement.[720]

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[712] Mladić Reply Brief, para. 45.
[713] Mladić Reply Brief, para. 46, n. 81. *See also* Prosecution Response Brief, para. 95, *referring to* Trial Judgement, paras. 4143, 4189, 4196.
[714] Trial Judgement, paras. 4546, 4685.
[715] Trial Judgement, para. 4685. *See also* Trial Judgement paras. 262, 263, 268, 4383-4390, 4623, 4630-4643.
[716] Mladić Appeal Brief, paras. 244-246.
[717] Mladić Appeal Brief, paras. 246-248.
[718] *See* T. 26 August 2020 pp. 57, 58, *referring to* T. 25 August 2020 p. 95, Trial Judgement, para. 1121.
[719] *See* Decision on Defence Submissions, 14 August 2020, p. 4; Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020, para. 18; *Haradinaj et al.* Appeal Judgement, para. 19.
[720] *See* Trial Judgement, paras. 1113-1121.

209. Regarding Manjača camp (Banja Luka Municipality), Mladić submits that a report, dated 8 July 1992, from the operational team of the camp to the VRS First Krajina Corps Command, stated that a prisoner, Husein Delalović, had died of natural causes on 6 July 1992, while Witness RM-709 testified that Delalović had been shot.[721] The Appeals Chamber observes that the Trial Chamber discussed Delalović's death and considered that, according to Witness RM-709, six to seven guards took Delalović away and shot him, while the report of 8 July 1992 stated that Delalović died of natural causes.[722] The Trial Chamber could not, however, determine Delalović's ethnicity and ultimately did not include his killing among the crimes for which Mladić was held liable under Scheduled Incident B.1.4.[723] Given that Delalović's killing does not underpin Mladić's conviction and that any error would have little or no impact on findings in the Trial Judgement, the Appeals Chamber dismisses Mladić's arguments in this regard.[724]

210. As to killings in the village of Zecovi, Prijedor Municipality, Mladić submits that "no one was informed of the crime", and the incident only became known after the perpetrators were arrested and indicted in 2014.[725] The Appeals Chamber observes that the Trial Chamber considered evidence of killings in the Brdo area, comprising the villages of, *inter alia*, Zecovi and Čarakovo.[726] The Trial Chamber found that, although evidence suggested that the number of victims in the Brdo

[721] Mladić Appeal Brief, para. 246.
[722] Trial Judgement, para. 369. *See also* Trial Judgement, para. 374.
[723] Trial Judgement, para. 375. *See also* Trial Judgement, paras. 3051 (Schedule B.1.4), 4116-4123 (where the Trial Chamber, in addressing punishment of perpetrators, recalled earlier findings from Schedule B.1.4 that guards at Manjača camp murdered two Bosnian Muslim detainees, not including Delalović).
[724] The Appeals Chamber recalls that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not be considered on the merits. *See supra* para. 20. *See also, e.g.*, *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. Mladić also refers to exhibits to support his claim that reports he received from Manjača camp did not provide any information about the commission of crimes by the VRS. Mladić Appeal Brief, para. 246, n. 364, *referring to* Exhibits P92, P215 (under seal), P218 (under seal), P219 (under seal), P220 (under seal), P221 (under seal), P222 (under seal), P225 (under seal), P226 (under seal), P227 (under seal), P228, P229 (under seal), P231 (under seal), P233 (under seal), P234 (under seal), P235 (under seal), P237 (under seal), P241 (under seal), D1536, D1827, D2030, D2071. A review of these exhibits reveals that, contrary to Mladić's contention, they explicitly indicate that crimes were committed at or during the prisoners' transportation to Manjača camp. *See* Exhibits P220 (under seal), p. 1 (during transportation from Sanski Most, prisoners of war were "not being treated in line with the Geneva [C]onventions: they [were] maltreated, beaten, and humiliated to the extreme", and 24 prisoners died due to thirst and lack of oxygen) (*see also* Exhibit P227, p. 1 (under seal)), P222 (under seal), pp. 1, 2 (prisoners were beaten, kicked, maltreated, and killed by military police; "Military Police in 'Manjača' camp […] think they can do whatever they want with the prisoners"), P229 (under seal), pp. 1, 2 ("two prisoners who are in isolation today […] have been beaten and […] there is a fresh human blood on the walls of the cell"; "military policemen, together with the Security commander, Staff Sergeant MESAR, just don't understand that prisoners are humans and that they are protected by international regulations while in the camp"; the team leader of the ICRC stated that "they established infliction of multiple injuries to the prisoners created by beating (bruises)"; "it is a fact that the soldiers – policemen are sometimes taking [o]ut prisoners whom they 'don't like' or who they 'like less' by their own will and that they beat them as they please"), P233 (under seal), p. 1 ("eight prisoners died during transportation from 'Omarska' to 'Manjača', three of which have most probably been killed because they bore visible traces of violence"; "behaviour of people who participated in securing transportation of the prisoners [was] very incorrect, inhuman and bullying").
[725] Mladić Appeal Brief, para. 246, *referring to* Mladić Final Trial Brief, para. 940.
[726] *See* Trial Judgement, paras. 1064-1075.

area was much higher, the evidence could establish beyond reasonable doubt only the killing of 21 victims in the village of Čarakovo and on or around Žeger Bridge.[727] A review of the Trial Judgement reveals that the deaths in Zecovi thus did not form part of the crime base supporting Mladić's conviction.[728] The Appeals Chamber accordingly dismisses Mladić's arguments with respect to killings in Zecovi in this regard.

211. With respect to the killing of the "Green Berets", Mladić points to Witness Osman Selak's testimony that during a high-level meeting General Momir Talić ordered that a report to the VRS Main Staff be changed to indicate that only 80 to 100 Green Berets had been killed in Kozarac, whereas the real number was 800.[729] Mladić relies on this to argue that he was never put on notice of the real number of deaths or their nature.[730] The Appeals Chamber observes that the Trial Chamber explicitly discussed Witness Selak's testimony that a meeting occurred on 27 May 1992, that Dragan Marčetić informed those present of 800 people being killed after an attack on Kozarac, Prijedor Municipality, and that Talić ordered that, in reporting to the VRS Main Staff, the number of people killed should be 80.[731] The Trial Chamber further noted that the VRS First Krajina Corps subsequently reported to the VRS Main Staff on 27 May 1992, *inter alia*, that "80 to 100 'Green Berets' were killed".[732] The Appeals Chamber therefore accepts Mladić's submission that he was not informed of the real number of deaths arising from this incident. Nevertheless, the Appeals Chamber notes that Mladić acknowledges that the VRS Main Staff was informed that 80 to 100 Green Berets were killed. The Appeals Chamber therefore considers that this example does not support Mladić's contention that he could not have known that certain crimes were committed.

212. Mladić asserts that, on 4 November 1992, the VRS First Krajina Corps falsely reported killings in Grabovica School in Kotor Varoš Municipality as deaths during combat operations.[733] The Appeals Chamber observes that the Trial Chamber found that the VRS First Krajina Corps tried to conceal the murder of approximately 150 unarmed Bosnian Muslim men at and around Grabovica School from the VRS Main Staff through false reports on 4 and 5 November 1992.[734] Based on the foregoing, the Appeals Chamber accepts Mladić's submission regarding the false

[727] Trial Judgement, paras. 1065, 1066, 1072, 1073.
[728] *See* Trial Judgement, para. 3051, p. 1602 (Scheduled Incident A.6.5).
[729] Mladić Appeal Brief, para. 247, *referring to* Trial Judgement, para. 1024. The Trial Chamber found that Talić was Commander of the VRS First Krajina Corps. *See*, *e.g.*, Trial Judgement, paras. 57, 97, 109, 147.
[730] Mladić Appeal Brief, para. 247.
[731] *See* Trial Judgement, para. 1024, *referring to* T. 25 September 2012 pp. 2988, 2989, Exhibit P253, pp. 1, 2.
[732] Trial Judgement, para. 1024, *referring to* Exhibit P247. The Trial Chamber found that, as a result of the VRS attack on Kozarac from 24 to 27 May 1992, more than 800 inhabitants were killed and that this constituted murder as charged under Counts 5 and 6 of the Indictment. *See* Trial Judgement, paras. 1037, 3051 (Scheduled Incident A.6.1), 3053, 3060, 3065.
[733] Mladić Appeal Brief, para. 248, *referring to* Trial Judgement, para. 4040.

reporting on this incident in Grabovica School. However, despite the false reporting, the Appeals Chamber notes that one of the reports from the VRS First Krajina Corps to the VRS Main Staff stated, as the Trial Chamber observed, that "a *brutal massacre* of the captured members of the Green Berets started because of the wounding of four and the killing of one soldier of the Kotor Varoš Light Infantry Brigade and the burning of wounded soldiers on Gola Planina (Jajce)".[735] As such, the Appeals Chamber considers that the VRS Main Staff was informed of a potential crime, raising the obligation to investigate. The Appeals Chamber therefore finds that this example does not support Mladić's contention that he could not have known that certain crimes were committed.

213. In view of the foregoing, the Appeals Chamber considers that Mladić does not demonstrate that the Trial Chamber erred by failing to give sufficient weight to evidence that he could not have known certain crimes were committed by his subordinates.

b. Evidence that Mladić Took Measures to Investigate and/or Punish Crimes

214. As noted above, the Trial Chamber found, in assessing his significant contribution to the Overarching JCE, that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes.[736]

215. Mladić argues that the Trial Chamber gave insufficient weight to evidence of instances where he learned about crimes committed by VRS subordinates, and where he or his subordinates ordered their investigation and prosecution.[737] To support his submission, Mladić refers to evidence that: (i) according to Basara, a brigade commander in the VRS First Krajina Corps, soldiers who executed a group of Bosnian Muslim men in Kenjari were "handed over for further proceedings";[738] (ii) Mladić launched an investigation after learning that the Commander of the Igman Infantry Brigade failed to report crimes to his superiors;[739] (iii) Basara prevented killings of detainees by ordering them to be taken to a Sanski Most police station;[740] (iv) Stanislav Galić ordered the arrest of VRS soldiers who had killed detainees;[741] and (v) Mladić took measures to improve the

[734] *See* Trial Judgement, paras. 4038, 4040, *referring to, inter alia,* Exhibits P441, P442, P3745.
[735] *See* Trial Judgement, para. 4038 (emphasis added), *referring to, inter alia,* Adjudicated Fact 807; Exhibit P441.
[736] Trial Judgement, paras. 4546, 4611.
[737] Mladić Appeal Brief, para. 249.
[738] Mladić Appeal Brief, para. 250.
[739] Mladić Appeal Brief, para. 251.
[740] Mladić Appeal Brief, para. 252.
[741] Mladić Appeal Brief, para. 252.

conditions in Manjača camp, and "took affirmative action" to punish perpetrators of certain killings in Manjača.[742]

216. Regarding the incident in Kenjari, Sanski Most Municipality, Mladić refers to Basara's evidence that four soldiers executed 17 Muslim men, and that when Lieutenant Ranko Brajić learned about this crime, the four soldiers were arrested and handed over for proceedings.[743] The Appeals Chamber observes that the Trial Chamber explicitly considered this aspect of Basara's evidence about the killings and that Brajić had the perpetrators arrested and "handed over for further proceedings".[744] The Trial Chamber further noted that, according to Basara, he did not know what happened next with the arrested persons.[745] The Trial Chamber addressed this incident when considering the punishment or non-punishment of crimes, stating that it did not receive evidence allowing it to conclude that the four soldiers were not investigated or prosecuted following their arrest, and thus did not consider this incident further.[746] In light of the above, the Appeals Chamber finds that Mladić does not demonstrate an error in the Trial Chamber's assessment of this evidence.

217. Mladić submits that Velimir Dunjić, Commander of the Igman Infantry Brigade, failed to report crimes of his detachment to his superiors, and when Mladić heard about this misconduct, he immediately initiated an investigation.[747] According to Mladić, this resulted in Dunjić's summary dismissal and the arrest and prosecution of anyone suspected to have engaged in criminal activity.[748] The Trial Chamber did not explicitly address this matter in the Trial Judgement. The Appeals Chamber notes that the evidence raised in the Mladić Final Trial Brief does not support the contention that Mladić launched an investigation or that anyone suspected to have engaged in criminal activity was arrested and prosecuted. Rather, the evidence appears to indicate that Dunjić was dismissed by Marčetić, Galić, and/or on the proposal of Colonel Ljuban Kosovac.[749] The evidence reveals that Dunjić's dismissal appears to have been related to disagreements with, *inter alios*, Galić,[750] and his lack of professional discipline rather than his failure to report crimes to his

[742] Mladić Appeal Brief, para. 253.
[743] Mladić Appeal Brief, para. 250, *referring to* Trial Judgement, paras. 1614, 4180. According to the Trial Chamber, Basara was Commander of the 6th Krajina Brigade from 29 October 1991 to mid-December 1992, and Brajić commanded battalions within this brigade. *See, e.g.*, Trial Judgement, paras. 108, 133, 1614.
[744] Trial Judgement, para. 1614, *referring to, inter alia*, Exhibit D1031, paras. 39, 46.
[745] Trial Judgement, paras. 1614, 4180, *referring to, inter alia*, Exhibit D1031, para. 46.
[746] Trial Judgement, paras. 4180, 4181.
[747] Mladić Appeal Brief, para. 251, *referring to* Mladić Final Trial Brief, para. 1305.
[748] Mladić Appeal Brief, para. 251, *referring to* Mladić Final Trial Brief, para. 1305.
[749] *See, e.g.*, T. 28 August 2014 pp. 24955, 24971; Exhibit P6705, p. 3. The Appeals Chamber notes that Marčetić was the Deputy Commander of the SRK in 1993. *See, e.g.* Trial Judgement, paras. 4718, 4853.
[750] According to Dunjić, he was removed from his role as a consequence of a physical confrontation with Galić, his corps commander. *See* T. 28 August 2014 pp. 24956, 24957, 24968.

supervisors.[751] This submission therefore does not demonstrate that the Trial Chamber gave insufficient weight to evidence that Mladić took measures to investigate or punish perpetrators of crimes.

218. Regarding Basara's prevention of deaths in Sanski Most, Mladić refers to paragraph 1202 of the Mladić Final Trial Brief, which points to evidence provided by Witness RM-706.[752] This evidence relates to the killing of at least 28 Bosnian Muslim men on or about 31 May 1992 between the hamlet of Begići and Vrhpolje Bridge in Sanski Most Municipality, and how Basara prevented the killing of 20 others whom he sent to a police station.[753] The Appeals Chamber considers that this example does not relate to investigations or prosecutions and, as such, does not support Mladić's contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes committed by the VRS. Moreover, this example also ignores the Trial Chamber's findings related to crimes committed by members of the VRS under Basara's command.[754]

219. Mladić avers that, on 1 June 1992, Galić ordered the arrest of VRS soldiers who had killed detainees at Velagići School (Ključ Municipality), and refers to paragraph 1273 of the Mladić Final Trial Brief, which cites the evidence of Witness Rajko Kalabić.[755] The Trial Chamber discussed Witness Kalabić's testimony about this incident and, in particular, Galić's reaction – ordering the arrest of the suspected perpetrators when he heard about the killings.[756] The Trial Chamber noted evidence that an investigating judge was subsequently sent to the school and several VRS soldiers were arrested in connection with the killings.[757] However, after being held briefly, these soldiers were released without being tried for their participation in the killings.[758] In considering whether the perpetrators of killings at Velagići School were punished, the Trial Chamber found that, following "a blackmail operation" by members of the Ključ Brigade, the investigating judge ordered the release of the arrested soldiers with the consent of the President of the Supreme Military Court and officers of the VRS Main Staff.[759] The Trial Chamber observed that "[n]o further steps were taken

[751] *See* Exhibit P6705, pp. 2, 3.
[752] Mladić Appeal Brief, para. 252, *referring to* Mladić Final Trial Brief, para. 1202.
[753] *See* Mladić Final Trial Brief, paras. 1195-1202; Trial Judgement, paras. 1589-1602.
[754] *See*, *e.g.*, Trial Judgement, paras. 3497-3502, 3513.
[755] Mladić Appeal Brief, para. 252, n. 378, *referring to* Mladić Final Trial Brief, para. 1273. Based on evidence and findings in the Trial Judgement, in June 1992, Colonel Galić was Commander of the 30th Division, which operated under the VRS First Krajina Corps. *See* Trial Judgement, paras. 145, 148, 150.
[756] Trial Judgement, para. 827, n. 3423, *referring to*, *inter alia*, T. 19 January 2015 pp. 30205, 30206.
[757] Trial Judgement, para. 827, n. 3424, *referring to* Adjudicated Fact 774.
[758] Trial Judgement, para. 827, n. 3427, *referring to* Adjudicated Fact 774.
[759] Trial Judgement, para. 4143. *See also* Trial Judgement, paras. 4135-4142.

to investigate, prosecute, or punish the perpetrators until 1996".[760] This submission therefore does not demonstrate that the Trial Chamber gave insufficient weight to evidence that Mladić took measures to investigate or punish perpetrators of crimes.

220. Mladić submits that, when advised of killings in Manjača camp, he took "affirmative action" to punish the VRS perpetrators, resulting in their suspension and criminal reports being filed.[761] To support his submissions, he refers to paragraphs 366 and 367 of the Trial Judgement.[762] These paragraphs of the Trial Judgement make no mention of any actions taken by Mladić and Mladić does not explain how they support his contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes.[763] Additionally, Mladić ignores the Trial Chamber's findings that perpetrators of killings at Manjača camp were not punished or prosecuted until years after the war.[764]

221. In light of the foregoing, the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber erred by giving insufficient weight to evidence of instances where he learned about crimes committed by VRS subordinates and he or his subordinates ordered their investigation or prosecution.

c. Failure to Give Sufficient Weight to Exculpatory Evidence

222. In finding that Mladić failed to take appropriate or further steps to investigate or punish perpetrators, the Trial Chamber considered, *inter alia*, evidence of his command over the VRS as well as orders he issued to initiate investigations and to comply with domestic and international laws.[765]

[760] Trial Judgement, para. 4143.
[761] Mladić Appeal Brief, para. 253.
[762] Mladić Appeal Brief, para. 253, *referring to* Trial Judgement, paras. 366, 367.
[763] Mladić further submits that he ordered the improvement of conditions in Manjača camp. *See* Mladić Appeal Brief, para. 253, *referring to, inter alia*, Exhibit P2881, p. 1. The Appeals Chamber notes that the Trial Chamber expressly referred to Exhibit P2881, an order from Mladić dated 12 August 1992, and summarized Mladić's orders to improve conditions in the camp. *See* Trial Judgement, para. 395. In the Appeals Chamber's view, not only does Mladić fail to demonstrate that the Trial Chamber failed to give sufficient weight to this evidence, he also ignores findings in the Trial Judgement that the VRS First Krajina Corps, the VRS Main Staff, and the Bosnian Serb leadership made efforts to conceal the unlawful detention and cruel and inhumane treatment of detainees at Manjača camp. *See, e.g.*, Trial Judgement, paras. 3989-4018. The Appeals Chamber further observes that Mladić's orders, issued on 12 August 1992, came after killings had occurred at the camp and after intense international scrutiny. *See, e.g.*, Trial Judgement, paras. 3994, 3996-4000. In any event, Mladić's claim that he ordered the improvement of conditions at the camp does not relate to investigations or prosecutions and, as such, does not support his contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes committed by the VRS.
[764] *See, e.g.*, Trial Judgement, paras. 4116-4123.
[765] Trial Judgement, paras. 4544-4546.

223. Mladić notes that the Trial Chamber found in Chapter 9.3.10 of the Trial Judgement that he ordered investigations on several occasions and issued orders directing subordinates to comply with laws and regulations.[766] He submits that the Trial Chamber nevertheless concluded, based on its findings in Chapter 9.2.12 of the Trial Judgement, that he significantly contributed to furthering the common criminal objective by failing to take adequate steps to prevent or investigate crimes and/or arrest or punish the perpetrators.[767] He argues that the Trial Chamber failed to provide a reasoned opinion by omitting to analyze exculpatory evidence set out in Chapter 9.3.10 of the Trial Judgement, thus indicating that it failed to accord sufficient weight to such evidence.[768]

224. In Chapter 9.2.12 of the Trial Judgement, the Trial Chamber considered evidence concerning the response of the Bosnian Serb military and civilian justice system to crimes committed by members of the VRS and other Serb forces.[769] It found that, between 12 May 1992 and 30 November 1995, the Bosnian Serb military and civilian justice system failed on many occasions to investigate crimes committed by members of the Serb forces in the Municipalities, file criminal reports, and detain, arrest, or punish perpetrators of these crimes.[770] In Chapter 9.3.10, the Trial Chamber considered whether Mladić personally failed to take steps to prevent or investigate crimes committed in the Municipalities and arrest or punish the perpetrators.[771] Recalling its findings in Chapter 9.2.12, conclusions on Mladić's command and control of the VRS and certain Serb forces, as well as determinations that he knew that crimes were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, the Trial Chamber ultimately found in Chapter 9.3.10 that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes.[772] In coming to this conclusion, the Trial Chamber, at paragraph 4545 of the Trial Judgement, explicitly considered what Mladić regards as "exculpatory evidence",[773] namely that he issued orders to comply with laws and regulations, and initiated investigations.[774] There is accordingly no merit in Mladić's argument that the Trial Chamber omitted to analyze "exculpatory evidence" set out in Chapter 9.3.10 of the Trial Judgement and erroneously based its findings on his joint criminal enterprise liability solely on evidence in Chapter 9.2.12.[775] Mladić therefore does not demonstrate that the Trial Chamber erred by failing to give a reasoned opinion or failing to accord sufficient weight to evidence addressed in Chapter 9.3.10.

[766] Mladić Appeal Brief, para. 256.
[767] Mladić Appeal Brief, paras. 255, 257.
[768] Mladić Appeal Brief, para. 254. *See also* Mladić Appeal Brief, para. 259.
[769] Trial Judgement, paras. 4094-4197.
[770] Trial Judgement, paras. 4114, 4195, 4545. *See also* Trial Judgement, paras. 4095-4113, 4116-4194.
[771] Trial Judgement, paras. 4514-4547.
[772] Trial Judgement, paras. 4544-4546.
[773] *See* Mladić Appeal Brief, paras. 254, 256.

d. Error in Finding Significant Contribution on the Basis of Lack of Evidence

225. In finding that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes, the Trial Chamber stated that it "did not receive evidence" to conclude that he ordered any substantial or meaningful investigations, or whether he followed up on the few investigations he may have ordered.[776]

226. Mladić argues that the Trial Chamber found, "due to an absence of evidence", that he failed to order the investigation and prosecution of crimes committed by Bosnian Serbs against Bosnian Muslims or Bosnian Croats.[777] According to Mladić, "[t]hese omissions" formed part of the basis for the Trial Chamber's findings that he significantly contributed to furthering the objective of the Overarching JCE.[778] In his view, proof that crimes occurred and went unpunished is not sufficient to establish the requirements of significant contribution or to sustain a conviction.[779] Relying on the *Kordić and Čerkez* Appeal Judgement, Mladić submits that the Trial Chamber's finding is a "grossly unfair outcome" as he was convicted "despite a lack of evidence on an essential element of the crime".[780] Mladić also references an appeal judgement of the International Criminal Court ("ICC") to argue that "measures taken by a commander cannot be faulted merely because of shortfalls in their execution".[781]

227. For the reasons that follow, the Appeals Chamber is not convinced that the Trial Chamber erred by making findings on Mladić's significant contribution to the Overarching JCE based on an "absence of evidence" – namely the lack of evidence that perpetrators were investigated or punished for their crimes.[782] First, the Trial Chamber's conclusion that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes is based on its assessment of extensive evidence and several key considerations.[783] In this regard, the Trial Chamber considered that Mladić: (i) as Commander of the VRS Main Staff, exercised effective command and control over the VRS and re-subordinated Serb forces, and thus had a duty to take adequate

[774] *See* Trial Judgement, paras. 4517-4528, 4535, 4537.
[775] *See* Mladić Appeal Brief, paras. 254-257.
[776] Trial Judgement, para. 4546.
[777] Mladić Appeal Brief, para. 258.
[778] Mladić Appeal Brief, para. 258.
[779] Mladić Appeal Brief, para. 244.
[780] Mladić Appeal Brief, para. 258, *referring to, inter alia, Kordić and Čerkez* Appeal Judgement, para. 19.
[781] Mladić Appeal Brief, para. 258, *referring to, inter alia, The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute", 8 June 2018 ("*Bemba* Appeal Judgement"), para. 180.
[782] *See* Mladić Appeal Brief, paras. 244, 258-260.
[783] *See* Trial Judgement, para. 4546.

steps to prevent, investigate, and/or punish crimes by subordinates under his command;[784] (ii) possessed the authority to order investigations within the military justice system, but did so primarily for breaches of military discipline and crimes committed against the VRS;[785] (iii) knew crimes were being committed by his subordinates against non-Serbs in the Municipalities;[786] and (iv) "deliberately misled" the international community and non-governmental organizations about conditions in detention facilities and "attempted to conceal the crimes committed therein" by portraying camp conditions in a more favourable light.[787] The Trial Chamber further considered that, despite a functioning military justice system, it did not receive evidence that Bosnian Serbs were prosecuted for war crimes between 12 May 1992 and 30 November 1995.[788] To the contrary, it found, based on a review of extensive evidence in the Municipalities, that: (i) the Bosnian Serb military and civilian justice system failed on many occasions to investigate, arrest, or punish perpetrators who were members of the VRS and other Serb forces; (ii) on multiple occasions where crimes were committed by members of the VRS against non-Serbs, criminal reports were not filed, investigations were not initiated by military prosecutors or investigating judges, suspects were not arrested or detained, and perpetrators were unlawfully released from detention to return to their units; and (iii) in many instances, decisions to release suspects were made after VRS officers exerted pressure on the military courts to drop cases or release perpetrators of crimes and, once released, these individuals were rarely remanded in custody.[789] Given these extensive considerations, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that Mladić failed to take appropriate or further steps to investigate or punish perpetrators.[790]

228. Second, the Appeals Chamber recalls that for an accused to be found criminally liable on the basis of joint criminal enterprise liability, it is sufficient that he acted in furtherance of the common purpose of a joint criminal enterprise in the sense that he significantly contributed to the commission of the crimes involved in the common purpose.[791] Beyond that, the law does not foresee specific types of conduct which *per se* could not be considered a contribution to a joint

[784] Trial Judgement, paras. 4544, 4546. *See also* Trial Judgement, paras. 246-276, 4242-4291, 4293-4394.
[785] Trial Judgement, para. 4545. *See, e.g.*, Trial Judgement, paras. 4529-4533, 4536, 4539-4543. The Trial Chamber considered evidence that Mladić on two specific occasions ordered investigations for crimes committed against non-Serbs or UN personnel. *See* Trial Judgement, paras. 4535, 4537, 4546, 4635. However, there is no further evidence considered by the Trial Chamber that prosecutions resulted from these investigations he ordered. *See, e.g.*, Trial Judgement, paras. 4545, 4546.
[786] *See, e.g.*, Trial Judgement, paras. 4546, 4630-4642, 4685.
[787] Trial Judgement, paras. 4502-4512, 4546. *See also* Trial Judgement, paras. 3986-4093.
[788] Trial Judgement, para. 4545.
[789] Trial Judgement, paras. 4094-4196, 4545.
[790] Trial Judgement, para. 4546.
[791] *See, e.g.*, *Stanišić and Župljanin* Appeal Judgement, paras. 110, 136; *Popović et al.* Appeal Judgement, para. 1378; *Šainović et al*. Appeal Judgement, paras. 987, 1177; *Krajišnik* Appeal Judgement, paras. 215, 695.

criminal enterprise.[792] Within these legal confines, the question of whether a failure to act could be taken into account to establish that the accused significantly contributed to a joint criminal enterprise is a question of fact to be determined on a case-by-case basis.[793] It is also recalled that the relevant failures to act or acts carried out in furtherance of a joint criminal enterprise need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all.[794] That is, an accused's contribution to a joint criminal enterprise need not be in and of itself criminal, as long as the accused performs (or fails to perform) acts that in some way contribute significantly to the furtherance of the common purpose.[795]

229. In the present case, the Trial Chamber considered that, as the Commander of the VRS Main Staff, Mladić was under a duty to take adequate steps to prevent, investigate, and/or punish crimes committed by members of the VRS and other Serb forces under his effective control.[796] On that basis, it considered that his failure to take such steps constituted part of his contribution to the Overarching JCE.[797] The Appeals Chamber observes that, in the jurisprudence of the ICTY, a failure to take effective and genuine measures to discipline, prevent, and/or punish crimes committed by subordinates, despite having knowledge thereof, has been taken into account in assessing, *inter alia*, an accused's *mens rea* and contribution to a joint criminal enterprise where the accused had some power and influence or authority over the perpetrators sufficient to prevent or punish the abuses but failed to exercise such power.[798] Therefore, the Trial Chamber's consideration of Mladić's failure to take adequate steps was consistent with the applicable jurisprudence.

230. Third, the Appeals Chamber finds that Mladić's references to the *Kordić and Čerkez* Appeal Judgement and the *Bemba* Appeal Judgement[799] do not support his submissions. The paragraph to which he cites in the *Kordić and Čerkez* Appeal Judgement recites the law on the standards of appellate review and defines an error causing a miscarriage of justice as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential

[792] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696.
[793] *See Stanišić and Župljanin* Appeal Judgement, para. 110. *See also, e.g., Šainović et al.* Appeal Judgement, paras. 1233, 1242.
[794] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, paras. 1615, 1653; *Krajišnik* Appeal Judgement, paras. 215, 695.
[795] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1615, 1653; *Šainović et al.* Appeal Judgement, para. 985; *Krajišnik* Appeal Judgement, paras. 215, 695.
[796] Trial Judgement, para. 4544.
[797] Trial Judgement, paras. 4546, 4611, 4612.
[798] *Cf. Stanišić and Župljanin* Appeal Judgement, para. 111; *Šainović et al.* Appeal Judgement, paras. 1233, 1242; *Krajišnik* Appeal Judgement, para. 216(e).
[799] *See* Mladić Appeal Brief, para. 258.

element of the crime".[800] As discussed above, the Appeals Chamber considers that Mladić was not convicted based on an absence of evidence on an essential element of a crime. Rather, the Trial Chamber's conclusion that he failed to order investigations and prosecutions is based on an extensive assessment of evidence of his powers and role as Commander of the VRS Main Staff as well as his conduct.[801]

231. With regard to Mladić's reference to the *Bemba* Appeal Judgement from the ICC, the Appeals Chamber notes that Mladić relies on it to argue that "measures taken by a commander cannot be faulted merely because of shortfalls in their execution".[802] The Appeals Chamber recalls that it is not bound by the findings of other courts – domestic, international, or hybrid – and that, even though it may consider such jurisprudence, it may nonetheless come to a different conclusion on a matter than that reached by another judicial body.[803] Furthermore, the Appeals Chamber considers that the circumstances of that case are distinguishable from those in the present case. The accused in the *Bemba* case took measures in reaction to allegations of crimes such as establishing investigative commissions and missions, which ultimately had limited impact.[804] In the present case, the Trial Chamber found that, despite possessing authority to order investigations for war crimes and crimes against humanity, Mladić primarily ordered investigations and punishment for breaches of military discipline and crimes against the VRS.[805] The Trial Chamber further stated that it did not receive evidence on whether Mladić followed up on the "few investigations" he may have ordered regarding war crimes and crimes against humanity.[806]

232. In light of the foregoing, the Appeals Chamber dismisses Mladić's submissions that the Trial Chamber erred in finding that he failed to order investigations or prosecutions of crimes committed by his subordinates based on an "absence of evidence".

e. Limitations on Mladić and an Independent Military Justice System

233. The Trial Chamber found that the military courts in *Republika Srpska* were fully operational by the early autumn of 1992 and had jurisdiction over the crime of armed rebellion, crimes against the state, crimes against humanity, and violations of the Geneva Conventions.[807] According to the

[800] *See Kordić and Čerkez* Appeal Judgement, para. 19.
[801] *See*, *e.g.*, Trial Judgement, paras. 4544-4546.
[802] *See* Mladić Appeal Brief, para. 258, n. 391, *referring to Bemba* Appeal Judgement, para. 180.
[803] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83.
[804] *See*, *e.g.*, *Bemba* Appeal Judgement, paras. 171-182.
[805] *See* Trial Judgement, paras. 4545, 4546.
[806] *See* Trial Judgement, paras. 4545, 4546.
[807] Trial Judgement, para. 4111. *See also* Trial Judgement, paras. 4099, 4101, 4103, 4105, 4107.

Trial Chamber, the jurisdiction of these courts also extended to crimes committed by police officers and paramilitaries subordinated to military units.[808] The Trial Chamber further found that proceedings before the military courts continued throughout the war, despite problems such as shortages of staff and materials, and difficulties locating suspects and witnesses.[809] The Trial Chamber observed that the military courts focused on crimes committed against the VRS[810] and noted that it did not receive any evidence of Bosnian Serbs being prosecuted for war crimes against non-Serbs during this period.[811] The Trial Chamber found that, between 12 May 1992 and 30 November 1995, the Bosnian Serb military and civilian justice system failed on many occasions to investigate crimes committed by members of the VRS and other Serb forces, and to arrest and/or punish perpetrators.[812]

234. Mladić submits that the Trial Chamber "failed to appreciate the limitations" he faced while the military justice system was in a "state of crisis" and the realities that he was unable to submit matters for investigation and prosecution in the conflict situation.[813] He argues that by failing to consider the "restrictive realities of applying justice in conditions of conflict", the Trial Chamber imposed a standard upon him that was impossible to meet.[814] Mladić further submits that the Trial Chamber erred by "simply juxtapos[ing him] with the structure of the military justice system" and that it failed to "provide an appropriate nexus" between him and the decisions made by independent prosecutors or judges.[815] In his view, the independence of the military justice system meant that decisions about prosecutions did not involve him.[816]

[808] Trial Judgement, para. 4111. *See also* Trial Judgement, para. 4101.
[809] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4103, 4105-4107, 4109, 4110.
[810] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4106, 4107, 4110.
[811] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4104 (where the Trial Chamber considered evidence that the atmosphere in 1995 was such that it was not realistic for anyone to file a criminal complaint against a high-ranking VRS officer or for a prosecutor to initiate an investigation against the security organ of the VRS Main Staff as doing so would have risked the safety and lives of his or her family), 4106 (where the Trial Chamber considered evidence that no VRS soldier was prosecuted for killing non-Serbs in Sanski Most where the 6th Krajina Brigade of the VRS First Krajina Corp was based, and that, according to Witness Slobodan Radulj, the Banja Luka Military Prosecutor had received instructions not to bring charges of war crimes for crimes committed by VRS soldiers against non-Serbs), 4107 (where the Trial Chamber considered evidence that, after the Bijeljina Military Court began functioning in August 1992, the justice system was not prosecuting Serbs for committing crimes against non-Serbs, with the exception of a few cases wherein the sentences were not carried out, and that, according to Witness RM-513, there were no prosecutions by the military court of VRS soldiers for crimes committed against non-Serb civilian populations).
[812] Trial Judgement, paras. 4195, 4545. *See also* Trial Judgement, paras. 4106, 4107, 4110, 4123, 4128, 4134, 4143, 4148, 4152, 4165, 4178, 4189, 4194.
[813] Mladić Appeal Brief, paras. 261, 262. *See also* Mladić Reply Brief, para. 45.
[814] Mladić Appeal Brief, para. 263.
[815] Mladić Appeal Brief, para. 264.
[816] Mladić Appeal Brief, para. 244.

235. In support of his argument that the Trial Chamber failed to "appreciate the limitations" he faced, Mladić refers to, *inter alia*, his final trial brief,[817] which discusses the difficulties faced by military courts during the conflict.[818] The Appeals Chamber notes that these submissions do not address difficulties he personally faced. The rest of his argument on appeal in this regard also does not identify any evidence that the Trial Chamber ought to have addressed. In any event, the Appeals Chamber observes that the Trial Chamber explicitly considered difficulties faced by the military courts during the war and found that they reported problems such as shortages of staff and materials and difficulties locating suspects and witnesses.[819] It nevertheless concluded that proceedings before the military courts continued throughout the war.[820] Additionally, Mladić ignores the Trial Chamber's findings that he possessed the authority to order investigations within the military justice system and that he did so on numerous occasions, but primarily with respect to crimes committed against the VRS or breaches of military discipline.[821] The Appeals Chamber therefore finds that Mladić does not demonstrate that the Trial Chamber erred in failing to appreciate the limitations he faced in raising issues for investigation and prosecution during the war.

236. The Appeals Chamber is also not persuaded by Mladić's submission that the Trial Chamber erred by "simply juxtapos[ing]" him with the military justice system in finding that he did not take appropriate steps to investigate or punish perpetrators of crimes.[822] As previously noted, on the

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[817] Mladić Appeal Brief, para. 261, n. 392, *referring to*, *inter alia*, Mladić Final Trial Brief, paras. 732, 733. Mladić also refers to Exhibit P360. *See* Mladić Appeal Brief, para. 261, n. 392, *referring to*, *inter alia*, Exhibit P360, p. 296. The Appeals Chamber notes, however, that the page number indicated in the appellant's brief, page 296, does not exist in Exhibit P360. The Appeals Chamber further notes that Mladić relies on the *Bemba* Appeal Judgement as well as the *Popović et al*. Appeal Judgement to support his submission. *See* Mladić Appeal Brief, paras. 261, 263. With regard to his reliance on the *Bemba* Appeal Judgement, the Appeals Chamber recalls that it is not bound by jurisprudence from other courts. *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83. Furthermore, Mladić's references to the *Bemba* Appeal Judgement do not support his argument as that case concerned different factual circumstances – namely, the Appeals Chamber of the ICC found that the Trial Chamber of the ICC had failed to properly appreciate, *inter alia*, that the accused faced limitations in investigating and prosecuting crimes as a "remote commander sending troops to a foreign country". *See* Mladić Appeal Brief, paras. 261-263, nn. 392, 399, 400, *referring to*, *inter alia*, *Bemba* Appeal Judgement, paras. 138, 144-146, 166-171, 173, 189. *See also Bemba* Appeal Judgement, paras. 171-173, 189. The Appeals Chamber also finds Mladić's references to the *Popović et al*. Appeal Judgement, relating to superior responsibility under Article 7(3) of the ICTY Statute, to be distinguishable from Mladić's case, which involves joint criminal enterprise liability under Article 7(1) of the ICTY Statute. *See* Mladić Appeal Brief, paras. 261, 263, nn. 392, 400, *referring to*, *inter alia*, *Popović et al*. Appeal Judgement, para. 1931.

[818] *See* Mladić Final Trial Brief, paras. 732, 733, *referring to* Exhibits P3560, P1092 (under seal), D1026.

[819] *See* Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4106, 4108.

[820] *See* Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4099, 4101, 4103-4111.

[821] Trial Judgement, para. 4545. *See*, *e.g.*, Trial Judgement, paras. 4529-4533, 4535-4540, 4542, 4543.

[822] *See* Mladić Appeal Brief, para. 264. In this regard, Mladić ignores the Trial Chamber's findings that, while the military judicial system of *Republika Srpska* was formally autonomous and independent, "in many instances, decisions to release suspects were made after VRS officers […] exerted pressure on the military courts to drop cases or release perpetrators of crimes". Trial Judgement, para. 4196. The Appeals Chamber further notes the Trial Chamber's consideration of Witness RM-513's evidence that a military prosecutor "obstructed the work of the Bijeljina military court and put pressure on his subordinates to drop cases involving Bosnian-Serb perpetrators and Bosnian-Muslim victims". *See* Trial Judgement, para. 4132, *referring to* Exhibit P1054 (under seal), paras. 58, 62. The Trial Chamber considered the evidence of Witness RM-016, who stated that the Banja Luka military court released perpetrators of a

basis of extensive evidence, the Trial Chamber concluded that, in practice, on multiple occasions in which crimes had been committed against non-Serbs by members of the VRS or other Serb forces, criminal reports were not filed, investigations were not initiated by military prosecutors or investigating judges, suspects were not arrested or detained, and perpetrators were unlawfully released.[823] Given these findings as well as conclusions that Mladić possessed the authority to order investigations in the military justice system[824] but failed to order any substantial or meaningful investigations into war crimes and crimes against humanity,[825] the Trial Chamber's findings are based on evidence it considered rather than juxtaposing Mladić's conduct with decisions of an allegedly independent military justice system.

(iv) Conclusion

237. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred in finding that he significantly contributed to the common criminal purpose of the Overarching JCE.

(b) *Mens Rea*

238. In assessing Mladić's *mens rea* with respect to the Overarching JCE, the Trial Chamber found that he knew that the crimes of persecution, murder, extermination, deportation, and inhumane acts (forcible transfer) were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, including in detention facilities.[826] It also found that Mladić's statements and

massacre at Velagići School under the pressure of the Ključ Brigade and with the approval of the VRS Main Staff. *See* Trial Judgement, paras. 828, 4139, 4141, *referring to* Exhibit P2375 (under seal). The Trial Chamber also considered evidence that the atmosphere in 1995 was such that, although it was possible for an individual to file a criminal complaint against high-ranking VRS officers, it was not realistic as those who did would have risked the safety and lives of family members, and that, while it was also possible for a prosecutor to initiate investigations against the security organ of the VRS Main Staff, no prosecutor would have done so for the same reason. *See* Trial Judgement, para. 4104, *referring to* Exhibit P3351, pp. 10856, 10861, 10862.

[823] *See* Trial Judgement, paras. 4195, 4545. *See also, e.g.*, Trial Judgement, paras. 4106 (where the Trial Chamber considered evidence showing that: "no VRS soldier was prosecuted for killing non-Serbs in Sanski Most, where the 6th Krajina Brigade was based", "cases concerning non-Serb victims were delayed"; "[p]riority […] was given to cases concerning the evasion of military service by Serbs"); 4107 (where the Trial Chamber considered evidence from Witness RM-513 that "after the Bijeljina Military Court began functioning in August 1992, the justice system, including the court, prosecutors, and police, was not prosecuting Serbs for committing crimes against non-Serbs, with the exception of a few cases, even though it was common knowledge that Serbs were killing non-Serbs in 1992" while "in cases where the victims were Bosnian Serbs, perpetrators were punished according to the law" as "[p]ressure from families influenced the courts"); 4110 (where the Trial Chamber considered evidence that criminal proceedings in the military justice system "were primarily initiated and completed with the aim of assisting the armed struggle and thus contributing to the creation of the new Serbian state").

[824] Trial Judgement, paras. 4544, 4545. *See also* Trial Judgement, paras. 4383-4394, 4529-4543.

[825] Trial Judgement, paras. 4545, 4546.

[826] Trial Judgement, para. 4685. *See also* Trial Judgement, paras. 4623, 4630-4643, 5352 (confidential). In finding that Mladić knew of crimes being committed against non-Serbs in the Municipalities, the Trial Chamber relied on the following considerations: (i) his position as Commander of the VRS Main Staff (*see, e.g.*, Trial Judgement, paras. 4374-4394, 4544, 4611, 4612, 4623, 4685); (ii) the VRS Main Staff's receipt of detailed reports (*see, e.g.*, Trial Judgement,

conduct demonstrated his intent for the crimes to be committed on discriminatory grounds.[827] In reaching this finding, the Trial Chamber considered Mladić's: (i) repeated use of derogatory terms to refer to Bosnian Muslims and Bosnian Croats;[828] (ii) recalling of historical crimes that were allegedly committed against Bosnian Serbs and his references to the threat of "genocide" against the Bosnian Serbs;[829] (iii) statements indicating an intention not to respect the laws of war in Croatia in 1991 and later references to repeating the destruction inflicted during that conflict;[830] and (iv) expressions of commitment to an ethnically homogeneous *Republika Srpska*, even in territories that previously had a large percentage of non-Serb inhabitants.[831] The Trial Chamber further considered that Mladić's orders to respect the Geneva Conventions, his statements to personnel of the UN Protection Force ("UNPROFOR"), and his involvement in peace negotiations were not indicative of his true state of mind.[832] The Trial Chamber concluded that Mladić shared the intent to achieve the common objective of the Overarching JCE through the commission of crimes and that he held this intent by 12 May 1992 at the latest.[833]

239. Mladić submits that the Trial Chamber erred in determining that he possessed and shared the intent to achieve the common objective of the Overarching JCE.[834] Specifically, he argues that the Trial Chamber erred by: (i) applying a "defective method" in determining his *mens rea*;[835] (ii) preferring circumstantial evidence and disregarding or failing to give sufficient weight to clearly relevant direct evidence that contradicts findings in the Trial Judgement of his *mens rea*;[836] and (iii) relying on isolated parts of his speeches at two Bosnian Serb Assembly sessions.[837] Mladić argues that as a consequence of these errors, the Trial Chamber's findings on his *mens rea* are invalid and do not support his liability, and requests that the Appeals Chamber reverse his convictions in

paras. 4297-4299, 4383-4385, 4387, 4631, 4638, 4685); (iii) Mladić's personal receipt of regular updates (*see, e.g.*, Trial Judgement, paras. 4296-4310, 4385, 4685); (iv) his involvement in VRS units' activities (*see, e.g.*, Trial Judgement, paras. 4293-4394, 4611, 4612, 4615, 4685); and (v) the fact that the commission of crimes was widely acknowledged (*see, e.g.*, Trial Judgement, paras. 4632, 4633, 4685).

[827] Trial Judgement, para. 4686.

[828] Trial Judgement, para. 4686. *See also, e.g.*, Trial Judgement, paras. 4332, 4342, 4460, 4461, 4483, 4499, 4644, 4645, 4647, 4650, 4667-4669.

[829] Trial Judgement, para. 4686. *See also, e.g.*, Trial Judgement, paras. 4483, 4486, 4499, 4647-4650, 4667.

[830] Trial Judgement, para. 4686. *See also, e.g.*, Trial Judgement, paras. 4617-4619, 4670, 4671.

[831] Trial Judgement, para. 4686. *See also, e.g.*, Trial Judgement, paras. 4620, 4629.

[832] Trial Judgement, para. 4687. *See also, e.g.*, Trial Judgement, paras. 4503, 4511, 4517-4528, 4545, 4676-4684.

[833] Trial Judgement, para. 4688.

[834] *See* Mladić Notice of Appeal, para. 36; Mladić Appeal Brief, paras. 13, 270-334; Mladić Reply Brief, paras. 48-66.

[835] *See* Mladić Appeal Brief, paras. 270, 281-292; Mladić Reply Brief, paras. 49-63; T. 25 August 2020 pp. 46-52. *See also* T. 26 August 2020 pp. 58, 59.

[836] *See* Mladić Appeal Brief, paras. 294, 299-313; Mladić Reply Brief, paras. 64-66; T. 25 August 2020 pp. 46, 47, 59.

[837] *See* Mladić Appeal Brief, paras. 317, 320-330; T. 25 August 2020 pp. 58, 59.

relation to the Overarching JCE, or, in the alternative, reverse the Trial Chamber's findings to the extent of any errors.[838] The Appeals Chamber will address these submissions in turn.

(i) Alleged Error in Conflating *Mens Rea* and *Actus Reus*

240. Mladić submits that the Trial Chamber employed a "defective method" when determining his *mens rea* that resulted in its erroneous finding that he shared the intent to further the common objective of the Overarching JCE.[839] He contends that the Trial Chamber erred in two respects.[840] First, Mladić argues that the Trial Chamber erroneously made inferences of his *mens rea* in its *actus reus* analysis.[841] To support this argument, he relies on the *Milutinović et al*. Trial Judgement[842] and points to parts of the Trial Judgement that address his significant contribution but contain matters that "should have only been considered in the context of [his] *mens rea*".[843] Second, Mladić submits that the Trial Chamber erred in using its finding on his *mens rea* "to substantiate its *actus reus* findings".[844] In this regard, he refers to parts of the Trial Judgement and relies on the *Stanišić and Simatović* Appeal Judgement to argue that the *mens rea* can only be considered after the *actus reus* has been established.[845] Mladić submits that the "collective consequence of these errors" was that, when the Trial Chamber determined his *mens rea*, "it had already drawn a relevant inference from the evidence".[846] In his view, the evidence analyzed in the *mens rea* section was "indelibly tainted so that it could only lead to the conclusion of guilt".[847]

241. The Prosecution responds that Mladić identifies no error in the Trial Chamber's assessment of his *mens rea*,[848] as he does not point to any instance where the Trial Chamber in fact made inferences on his *mens rea* in its *actus reus* analysis, or that it used findings on his *mens rea* to

[838] *See* Mladić Appeal Brief, paras. 291-293, 314-316, 331-335.
[839] *See* Mladić Appeal Brief, paras. 270, 281-292; T. 25 August 2020 pp. 46-52. *See also* T. 26 August 2020 pp. 58, 59.
[840] *See* Mladić Appeal Brief, paras. 281-290; T. 25 August 2020 pp. 46-52.
[841] *See* Mladić Appeal Brief, paras. 281-285; T. 25 August 2020 pp. 50-52.
[842] Mladić Appeal Brief, paras. 276, 277, 284. *See also* Mladić Reply Brief, paras. 52-54. The Appeals Chamber notes that Mladić erroneously refers to the *Milutinović et al.* Trial Judgement, which concerned Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić, as the "*Šainović* Trial Judgement". In its analysis, the Appeals Chamber will refer to the correct name for this trial judgement.
[843] Mladić Appeal Brief, paras. 282-285, *referring to*, *inter alia*, Trial Judgement, paras. 4459, 4460, 4465, 4468, 4486, 4471-4473, 4477, 4478, 4627, 4629, 4686. *See also* Mladić Reply Brief, paras. 55-57.
[844] *See* Mladić Appeal Brief, paras. 286-290; T. 25 August 2020 pp. 47-50.
[845] Mladić Appeal Brief, para. 286; T. 25 August 2020 pp. 48-50. *See also* Mladić Appeal Brief, para. 273; Mladić Reply Brief, paras. 51, 56.
[846] Mladić Appeal Brief, para. 291; T. 25 August 2020 pp. 50, 51.
[847] Mladić Appeal Brief, para. 291; Mladić Reply Brief, para. 55; T. 25 August 2020 p. 51.
[848] Prosecution Response Brief, paras. 98, 100; T. 25 August 2020 p. 103.

substantiate its *actus reus* findings.[849] In addition, the Prosecution submits that Mladić misconstrues the law, misrepresents the Trial Judgement, and disregards relevant findings.[850]

242. In relation to his first contention that the Trial Chamber erred by assessing his *mens rea* in its significant contribution analysis,[851] Mladić submits that, according to the *Milutinović et al*. Trial Judgement, where the same evidence is used to determine the *actus reus* and the *mens rea*, the "*actus reus* elements" are "very limited, physical, and two-dimensional contributions of the individual", whereas the *mens rea* analysis uses the same evidence as a basis to infer "the three-dimensional aspects" of behaviour, such as the individual's influence, knowledge, and intent behind his words.[852]

243. After reviewing the relevant portions of the *Milutinović et al*. Trial Judgement, the Appeals Chamber observes that the ICTY trial chamber in that case was assessing whether the accused's participation in a meeting met either the significant contribution or the *mens rea* element relevant to his participation in a joint criminal enterprise.[853] In the Appeals Chamber's view, contrary to Mladić's submissions, at no point did the ICTY trial chamber in the *Milutinović et al*. case establish a distinction between "two-dimensional" *actus reus* elements and "three-dimensional" *mens rea* aspects. In any event, the Appeals Chamber recalls that a trial chamber's determinations are not binding on other trial chambers or on the Appeals Chamber.[854] Of even greater significance, there is no legal requirement that a trial chamber's analysis as to an accused's *mens rea* and *actus reus* be done separately and Mladić fails to substantiate that this was required of the Trial Chamber when assessing the *mens rea* and *actus reus* elements pertaining to the Overarching JCE. To the contrary, trial chambers are free to organize their judgements as they see fit so long as they fulfil their obligation to provide a reasoned opinion.[855]

244. As illustrations of the first alleged error, Mladić refers to paragraphs 4459, 4460, 4471, 4472, 4473, 4477, and 4478 of the Trial Judgement.[856] The Appeals Chamber notes that these paragraphs are part of Chapter 9.3.7 of the Trial Judgement where the Trial Chamber addressed

[849] Prosecution Response Brief, paras. 100-103; T. 25 August 2020 pp. 102, 103.
[850] Prosecution Response Brief, para. 98. *See also* T. 25 August 2020 pp. 102, 103.
[851] The Appeals Chamber understands that Mladić's arguments and references to the "*actus reus*" in this portion of the appeal concern his significant contribution, as the Trial Judgement paragraphs referenced in his appellant's brief deal with significant contribution rather than other elements of the *actus reus* of joint criminal enterprise. *See* Mladić Appeal Brief, nn. 419-424, 426, 428, 429, 431, 432.
[852] Mladić Appeal Brief, paras. 276, 277, *referring to Milutinović et al*. Trial Judgement, Vol. 3, paras. 142, 275, 276.
[853] *See Milutinović et al*. Trial Judgement, Vol. 3, paras. 275, 276.
[854] *See Karemera and Ngirumpatse* Appeal Judgement, para. 52; *Lukić and Lukić* Appeal Judgement, para. 260.
[855] *See* Article 23 of the ICTY Statute; Rule 98 *ter* (C) of the ICTY Rules.
[856] Mladić Appeal Brief, paras. 282-284, nn. 419-424.

Mladić's participation in the development of Bosnian Serb governmental policies.[857] The Appeals Chamber further observes that paragraphs 4459, 4460, 4471, 4472, and 4473 of the Trial Judgement contain summaries of evidence rather than analysis of such evidence or inferences drawn from it.[858] As such, the Appeals Chamber considers that these references do not support Mladić's contention that the Trial Chamber was making *mens rea* inferences in its *actus reus* analysis.[859] In paragraphs 4477 and 4478 of the Trial Judgement, the Trial Chamber considered Mladić's arguments that he, *inter alia*, "did not have a tendency to get involved in political matters" and "did not have voting rights within the Bosnian Serb Assembly".[860] It found, however, that he, *inter alia*: (i) attended and actively participated in policy discussions during Bosnian Serb Assembly sessions and meetings with members of the Bosnian Serb government; (ii) discussed these policies at several meetings with high-level political figures and representatives of the international community, and expressed his commitment to the strategic objectives; and (iii) often suggested to Bosnian Serb politicians what position they should take during peace negotiations in order to achieve the strategic objectives as initially defined.[861] It is clear that the findings reflect that the Trial Chamber was addressing Mladić's conduct in the context of a significant contribution assessment rather than his intent. Mladić's contention that the Trial Chamber made inferences on his *mens rea* in its analysis of his significant contribution is therefore incorrect. The Appeals Chamber further notes that Mladić also appears to challenge paragraphs 4465, 4468, 4486, 4627, 4629, and 4686 of the Trial Judgement in that the Trial Chamber was making inferences on his *mens rea* in sections related to his significant contribution.[862] The Appeals Chamber considers that paragraphs 4465, 4468, and 4486 of the Trial Judgement merely contain references to evidence reviewed in Chapter 9.3.13 and brief summaries of that evidence, rather than analysis, while paragraphs 4627 and 4629 contain summaries of evidence, rather than analysis. Therefore, similar to paragraphs 4459, 4460, 4471, 4472, and 4473 of the Trial Judgement discussed above, the Appeals Chamber considers that the Trial Chamber, in summarizing the evidence, was not "making inferences" and thus rejects Mladić's arguments in this regard. Finally, considering that paragraph 4686 of the Trial Judgement is the conclusion of Chapter

[857] *See* Trial Judgement, paras. 4458-4478.
[858] *See* Trial Judgement, paras. 4459 (where the Trial Chamber summarized the evidence of Witness Robert Donia that, *inter alia*, Mladić did not have a right to vote or make proposals at assembly sessions but served as an influential voice and was able to make suggestions, advocate policies, and engage in discussions about such policies), 4460 (where the Trial Chamber summarized the minutes of a Bosnian Serb Assembly session on 12 May 1992, including Mladić's statements), 4471 (where the Trial Chamber summarized the minutes of a Bosnian Serb Assembly session on 15 and 16 April 1995, including Mladić's statements), 4472 (where the Trial Chamber summarized the evidence of Witnesses Michael Rose, Husein Aly Abdel-Razek, and Anthony Banbury on Mladić's authority in relation to Karadžić and others), 4473 (where the Trial Chamber summarized the evidence of Witnesses Rupert Smith and John Wilson on the relationship between military and political structures, and between Mladić and Karadžić).
[859] *See* Mladić Appeal Brief, para. 281.
[860] Trial Judgement, paras. 4477, 4478.
[861] Trial Judgement, paras. 4477, 4478.
[862] *See* Mladić Appeal Brief, para. 285, n. 426.

9.3.13 wherein the Trial Chamber analyzed Mladić's *mens rea*, the Appeals Chamber considers it appropriate for Mladić's intent to be assessed at this point in the judgement. His contention that the Trial Chamber made inferences concerning his *mens rea* in its significant contribution analysis, with respect to paragraphs 4465, 4468, 4486, 4627, 4629, and 4686 of the Trial Judgement, is therefore also dismissed.

245. The Appeals Chamber now turns to Mladić's second alleged error concerning the Trial Chamber's reliance on its *mens rea* findings to substantiate elements of his significant contribution.[863] In support, Mladić references the *Stanišić and Simatović* Appeal Judgement to argue that "the *actus reus* determination must be established first, before considerations of *mens rea* are determined".[864] The Appeals Chamber observes that the ICTY Appeals Chamber in the *Stanišić and Simatović* case considered whether the trial chamber in that case had erred by concluding that the joint criminal enterprise *mens rea* of both accused had not been established, prior to making any findings on the existence of a common criminal purpose that was shared by a plurality of persons.[865] The ICTY Appeals Chamber, by majority, concluded that, in the circumstances of that case, the trial chamber should have determined the existence and scope of a common purpose, and whether the accused's acts contributed to that purpose, before determining whether the accused shared the intent to further that purpose.[866]

246. The Appeals Chamber considers that the circumstances in the *Stanišić and Simatović* case – where the trial chamber had failed to make any findings or to analyze any evidence on the existence of a common criminal purpose[867] – are different from the current case. In the present case, the Trial Chamber established the existence of the Overarching JCE and its membership,[868] assessed Mladić's contribution,[869] and addressed his *mens rea*.[870]

247. The Appeals Chamber is further of the view that the Trial Chamber did not, as Mladić alleges, use its finding of his *mens rea* to substantiate its finding of his significant contribution.[871] Having reviewed Mladić's references to the Trial Judgement, the Appeals Chamber considers that

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[863] *See* Mladić Appeal Brief, paras. 286-290. *See also* T. 25 August 2020 pp. 47-50.
[864] *See* Mladić Appeal Brief, paras. 273, 286, nn. 412, 427, *referring to Stanišić and Simatović* Appeal Judgement, paras. 82, 87; T. 25 August 2020 pp. 48, 50.
[865] *See Stanišić and Simatović* Appeal Judgement, paras. 79-90.
[866] *Stanišić and Simatović* Appeal Judgement, para. 88. *See also Stanišić and Simatović* Appeal Judgement, paras. 81, 82.
[867] *See Stanišić and Simatović* Appeal Judgement, para. 89.
[868] *See* Trial Judgement, paras. 3573-4240.
[869] *See* Trial Judgement, paras. 4241-4612.
[870] *See* Trial Judgement, paras. 4613-4688.
[871] *See* Mladić Appeal Brief, paras. 286-290, *referring to* Trial Judgement, paras. 4298, 4386, 4465, 4477, 4486, 4546, 4611, 4612, 4628. *See also* T. 25 August 2020 pp. 47-50.

these references show nothing more than the Trial Chamber cross-referencing between different sections in the Trial Judgement. Within its extensive assessment of evidence on Mladić's significant contribution, the Trial Chamber at times referred to its summary of evidence or findings of fact in the *mens rea* section.[872] The Appeals Chamber observes that the Trial Chamber used this practice of cross-referencing throughout the Trial Judgement instead of re-summarizing its findings of fact or summaries of evidence.[873] The Appeals Chamber recalls that trial chambers need not unnecessarily repeat considerations reflected elsewhere in the trial judgement.[874] Furthermore, nothing prevents a trial chamber from relying on the same evidence when making findings as to an accused's *actus reus* and *mens rea*. Accordingly, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber used its finding of *mens rea* to substantiate its finding of his significant contribution or committed any error in this respect.

248. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić has failed to demonstrate that the Trial Chamber erred by conflating or otherwise applying a defective method in assessing the *mens rea* and significant contribution elements in relation to the Overarching JCE.

(ii) Alleged Error in Assessment of Evidence

249. Mladić submits that, in assessing his *mens rea*, the Trial Chamber erred by disregarding or failing to give sufficient weight to clearly relevant direct evidence and preferring circumstantial evidence.[875] He submits that the circumstantial evidence the Trial Chamber relied on was "of lower probative value" than other "stronger, more direct, and conflicting evidence".[876] To this effect, Mladić challenges the Trial Chamber's reliance on the following circumstantial evidence to

[872] Mladić alleges that the Trial Chamber erred in paragraphs 4298, 4386, 4465, and 4546 of the Trial Judgement. *See* Mladić Appeal Brief, paras. 287, 289, 290, nn. 428, 432, 433. The Appeals Chamber observes that, in paragraph 4465 of the Trial Judgement, while assessing Mladić's participation in the development of Bosnian Serb governmental policies, the Trial Chamber cross-referenced evidence reviewed in Chapter 9.3.13 (*mens rea*) that Mladić demonstrated his opposition to the Vance-Owen plan. *See* Trial Judgement, paras. 4465, 4628. In paragraph 4298 of the Trial Judgement, when discussing Mladić's command and control of the VRS, the Trial Chamber cross-referenced the evidence of Witness RM-802, which it considered in Chapter 9.3.13 (*mens rea*), that daily reports were sent and that Mladić was a "hands-on" commander. *See* Trial Judgement, paras. 4298, 4631. In paragraph 4386 of the Trial Judgement, the Trial Chamber made findings relevant to Mladić's visits to and inspections of VRS units but did not refer to any evidence or assessment in the *mens rea* section of the Trial Judgement. *See* Trial Judgement, para. 4386. In paragraph 4546 of the Trial Judgement, the Trial Chamber found that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes, referring to, *inter alia*, its findings in Chapter 9.3.13 (*mens rea*) that Mladić knew that crimes were committed. *See* Trial Judgement, paras. 4546, 4623, 4630-4643, 5352 (confidential).
[873] *See*, *e.g.*, Trial Judgement, paras. 3051, 3068, 3122, 3133, 3210, 3217-3220, 3222, 3224-3226, 3230, 3241, 3267, 3287, 3325, 3360, 3381, 3388, 3406, 3419, 3556, 3577, 3665, 3676, 3690, 3691, 3704, 3708, 3722, 4614, 4615, 4623, 4624, 4630, 4631, 4635-4639, 4644, 4646, 4685.
[874] *See Karadžić* Appeal Judgement, para. 721; *Stakić* Appeal Judgement, para. 47.
[875] *See* Mladić Appeal Brief, paras. 294, 299-313; T. 25 August 2020 pp. 46, 47, 59.
[876] Mladić Appeal Brief, para. 299.

establish his *mens rea* for the Overarching JCE: (i) statements he made when posted in Knin with the 9th Corps of the JNA which were used to infer that he had the intent to disrespect the laws of war in Croatia; and (ii) his "passive presence" at two meetings in Pale Municipality ("Pale Meetings").[877] Mladić further argues that the Trial Chamber disregarded and omitted to provide reasoning in its analysis of the following direct and probative evidence: (i) his "anti-paramilitary" orders and conduct, which Mladić argues directly contradict his intent to further the Overarching JCE; (ii) the "genuine warnings in his orders for VRS soldiers to respect the Geneva Conventions"; and (iii) his "direct orders" to observe ceasefire agreements.[878] In his view, had appropriate weight been given to direct evidence, no reasonable trier of fact could have concluded that his *mens rea* in relation to the Overarching JCE was established beyond reasonable doubt.[879]

250. The Prosecution responds that Mladić's arguments are grounded in misconceptions, and his examples demonstrate no error or disregard of evidence.[880] Regarding circumstantial evidence, it submits that Mladić's submissions misrepresent the Trial Judgement and the evidence,[881] and wrongly imply that direct evidence has inherently greater value than circumstantial evidence.[882] According to the Prosecution, Mladić also repeatedly mislabels evidence as either direct or circumstantial and addresses only a fraction of the vast amount of evidence underlying the Trial Chamber's *mens rea* assessment.[883] The Prosecution further responds that Mladić fails to demonstrate that the Trial Chamber disregarded direct evidence, as he misrepresents the law and the Trial Judgement, inflates the probative value of evidence on which he relies, and ignores relevant findings.[884]

251. Mladić replies that the Prosecution has mischaracterized his submissions, as he does not assert that direct evidence is inherently more probative than circumstantial evidence.[885] He clarifies

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[877] Mladić Appeal Brief, paras. 303-307. *See also* T. 25 August 2020 p. 43.
[878] Mladić Appeal Brief, paras. 308-313; T. 25 August 2020 pp. 52-54, 59.
[879] Mladić Appeal Brief, paras. 314, 315. *See also* T. 25 August 2020 p. 59.
[880] *See* Prosecution Response Brief, paras. 98, 104-115; T. 25 August 2020 pp. 103-106.
[881] *See* Prosecution Response Brief, paras. 105, 107-109; T. 25 August 2020 pp. 105, 106.
[882] Prosecution Response Brief, paras. 104, 106; T. 25 August 2020 pp. 103-105.
[883] Prosecution Response Brief, paras. 104, 108, 109. *See also* T. 25 August 2020 p. 105. In response to Mladić's specific examples of where the Trial Chamber erred in relation to circumstantial evidence, the Prosecution submits, *inter alia*, that: (i) he misrepresents the Trial Chamber's findings regarding statements made in Croatia in 1991; and (ii) the evidence of his attendance at both meetings does not simply demonstrate his tacit agreement but rather reflects his explicit agreement with the common purpose of the Overarching JCE. *See* Prosecution Response Brief, paras. 107, 108.
[884] Prosecution Response Brief, paras. 98, 110-115. In response to Mladić's specific examples where the Trial Chamber ignored direct evidence, the Prosecution submits, *inter alia*, that: (i) the Trial Chamber considered his orders regarding paramilitary groups and that Mladić "simply cherry-picks his preferred evidence and ignores the rest"; (ii) Mladić misrepresents findings in the Trial Judgement regarding his orders to follow the Geneva Conventions; and (iii) the Trial Chamber explicitly discussed his orders to observe ceasefire agreements and Mladić fails to explain how these orders constitute direct evidence. *See* Prosecution Response Brief, paras. 113-115; T. 25 August 2020 pp. 105, 106.
[885] Mladić Reply Brief, paras. 64, 65.

that the Trial Chamber relied primarily on circumstantial evidence and did not provide the requisite level of analysis of direct and highly probative evidence in opposition.[886] According to Mladić, this lack of "due consideration resulted in direct evidence being given insufficient weight in the Trial Chamber's considerations".[887]

252. The Appeals Chamber recalls that a trial chamber may rely on direct or circumstantial evidence in reaching its findings.[888] A trial chamber may draw inferences to establish a fact on which a conviction relies based on circumstantial evidence as long as it is the only reasonable conclusion that could be drawn from the evidence presented.[889] The Appeals Chamber further recalls that the requisite *mens rea* for a conviction under the first form of joint criminal enterprise can be inferred from circumstantial evidence, such as a person's knowledge of the common plan or the crimes it involves, combined with his or her continuous participation in the joint criminal enterprise, if this is the only reasonable inference available on the evidence.[890]

253. The Appeals Chamber first turns to Mladić's submissions challenging the Trial Chamber's use of specific circumstantial evidence. Mladić avers that the Trial Chamber relied on statements he made when he was posted in Croatia to infer his intention to disrespect the laws of war in Croatia and "to repeat similar destruction" in the conflict in Bosnia.[891] According to Mladić, statements made prior to his membership in this joint criminal enterprise should not be relied upon to establish his *mens rea*.[892] Mladić further surmises that this was the reason why the Trial Chamber expanded the Overarching JCE from "'at least October 1991' to '1991'".[893] To support his submissions, Mladić refers to paragraph 4686 of the Trial Judgement.[894]

254. The Appeals Chamber observes that, at paragraph 4686 of the Trial Judgement, the Trial Chamber listed, among several other factors, Mladić's "statements indicating an intention not to respect the laws of war in Croatia in 1991, and his later references to repeating the destruction

[886] Mladić Reply Brief, para. 65.
[887] Mladić Reply Brief, para. 65. Mladić further replies that the Prosecution has failed to undermine his submission that statements he made prior to his membership in the Overarching JCE should not have been included as a factor in determining his *mens rea*. *See* Mladić Reply Brief, para. 66.
[888] *See, e.g.*, *Prlić et al*. Appeal Judgement, para. 1709; *Stanišić and Župljanin* Appeal Judgement, para. 172; *Popović et al*. Appeal Judgement, para. 971.
[889] *See, e.g.*, *Karadžić* Appeal Judgement, para. 599; *Šešelj* Appeal Judgement, paras. 63, 118; *Prlić et al.* Appeal Judgement, para. 1709; *Nyiramasuhuko et al*. Appeal Judgement, paras. 650, 1509; *Karemera and Ngirumpatse* Appeal Judgement, paras. 146, 535.
[890] *See, e.g.*, *Karadžić* Appeal Judgement, para. 672; *Prlić et al.* Appeal Judgement, para. 1800; *Stanišić and Simatović* Appeal Judgement, para. 81; *Popović et al*. Appeal Judgement, paras. 1369, 1652; *Đorđević* Appeal Judgement, para. 512.
[891] Mladić Appeal Brief, para. 304, n. 445, *referring to* Trial Judgement, para. 4686. *See also* T. 25 August 2020 p. 43.
[892] *See* Mladić Reply Brief, para. 66. *See also* T. 25 August 2020 pp. 43-45.
[893] Mladić Appeal Brief, para. 304, nn. 446, 447, *referring to* Trial Judgement, paras. 3556, 4232, 4610.
[894] *See* Mladić Appeal Brief, para. 304, n. 445.

inflicted during this conflict", when it found that he possessed discriminatory intent.[895] The Appeals Chamber notes that the Trial Chamber's reference to statements Mladić made in Croatia appears to be based on evidence set out in paragraphs 4617 to 4619 of the Trial Judgement. In these paragraphs, the Trial Chamber reviewed, *inter alia*, an audio recording and video transcripts of Mladić himself making threats to the effect that "if his demands were not met, he would cause destruction of a level […] not yet seen before" in Croatian towns.[896] The Trial Chamber further considered statements of a similar nature from 23 May 1992, during the conflict in Bosnia and Herzegovina, wherein Mladić was recorded to have threatened reprisal attacks if his demands were not met, to have stated that "he would 'order the shelling of entire Bihać […] and it will burn too'", and to have warned that "[t]he whole of Bosnia will burn if I start to 'speak'".[897] The Trial Chamber also noted evidence that, in August 1992, Mladić warned UNPROFOR that "he would use heavy artillery weapons if [Croatian and Bosnian] forces did not cease combat activities in Central Bosnia" and that "he would most likely aim the heavy artillery weapons at densely populated areas".[898] Given evidence of Mladić's express threats to destroy Croatian and Bosnian towns and target civilians, Mladić does not demonstrate that the Trial Chamber erred in considering "his statements indicating an intention not to respect the laws of war in Croatia in 1991, and his later references to repeating the destruction" among several other factors when assessing his *mens rea*.[899] Specifically, while the Trial Chamber found that Mladić held the intent to contribute to the Overarching JCE by "12 May 1992 at the latest",[900] it was not unreasonable for the Trial Chamber to consider his conduct from 1991.[901]

255. The Appeals Chamber is also not convinced by Mladić's submission that the Trial Chamber expanded the Overarching JCE from "'at least October 1991' to '1991'".[902] A review of the Trial Judgement reveals no indication that the Trial Chamber relied on his statements in Croatia in 1991 to expand the temporal scope of the Overarching JCE. As set out at the end of Chapter 9.2 of the Trial Judgement, which assessed the existence of the Overarching JCE, the Trial Chamber expressly noted that it had yet to determine Mladić's membership and participation in the joint

[895] *See* Trial Judgement, para. 4686.
[896] *See* Trial Judgement, paras. 4617-4619, *referring to*, *inter alia*, Exhibits P7639, pp. 1, 2, P7640, p. 1, P1959, pp. 3, 5, 8.
[897] *See* Trial Judgement, para. 4670, *referring to* Exhibit P2750, pp. 3-6.
[898] *See* Trial Judgement, para. 4671, *referring to* Exhibit P2244 (under seal), p. 1.
[899] *See* Trial Judgement, para. 4686.
[900] Trial Judgement, para. 4688. *See also*, *e.g.*, Trial Judgement, paras. 3708, 4222, 4378, 4383, 4477, 4623-4650, 4666-4687. The Trial Chamber found that Mladić was appointed Commander of the VRS Main Staff on 12 May 1992. *See*, *e.g.*, Trial Judgement, paras. 275, 276, 4623.
[901] *See supra* para. 252. *Cf. Nahimana et al.* Appeal Judgement, paras. 560, 561.
[902] *See* Mladić Appeal Brief, para. 304, nn. 446, 447, *referring to* Trial Judgement, paras. 3556, 4232, 4610.

criminal enterprise and would only do so in the subsequent chapter of the judgement.[903] Mladić's arguments in this regard are based on a misreading of the Trial Judgement and do not demonstrate an error.

256. As to his "passive presence" at the two Pale Meetings, Mladić argues that the relevant evidence does not indicate his mental state but rather infers "tacit agreement based solely on his physical presence".[904] He further states that, "[o]f all evidence available to the Trial Chamber, a third person's observation was included in [its] factual basis as the most probative".[905] The Appeals Chamber observes that the Trial Chamber summarized the evidence of Witness Miroslav Deronjić regarding a meeting in Pale on 10 or 11 May 1992.[906] The Trial Chamber noted that, according to Deronjić, Mladić and Karadžić were present at the meeting, and that when Deronjić reported that Glogova had been partially destroyed and that Bosnian Muslims had been evacuated by force, "all present in the room greeted his report with applause".[907] The Trial Chamber also summarized the evidence of Witness Abdel-Razek to the effect that, during a Christmas celebration in Pale on 7 January 1993, Karadžić stated that Muslims would be transferred out of Serb territory as the Serbs and Muslims could not live together anymore.[908] The Trial Chamber further summarized Witness Abdel-Razek's evidence that "Mladić, General Gvero, Krajišnik, and Plavšić all agreed" and that "Krajišnik said that ethnic cleansing was necessary".[909]

257. The Appeals Chamber further notes that the Trial Chamber relied upon a vast amount of evidence concerning Mladić's statements, conduct, and knowledge of crimes to determine his *mens rea* in relation to the Overarching JCE.[910] It explicitly concluded that Mladić shared the intent to achieve the common objective of the Overarching JCE and that this conclusion was based on, *inter alia*, Mladić's repeated use of derogatory terms to refer to Bosnian Muslims and Bosnian Croats,

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[903] *See* Trial Judgement, para. 4238. *See also*, *e.g.*, Trial Judgement, paras. 3828, 4197.
[904] *See* Mladić Appeal Brief, paras. 305-307, *referring to* Trial Judgement, paras. 4621, 4626. The Appeals Chamber observes that the first of the Pale Meetings challenged by Mladić took place on 10 or 11 May 1992, thus occurring before 12 May 1992, the date on which the Trial Chamber found that his shared intention to further the Overarching JCE began. *See* Trial Judgement, paras. 4621, 4688. Nevertheless, given the Trial Chamber's finding that Mladić held the intent to contribute to the Overarching JCE by 12 May 1992 "at the latest" and that this meeting took place immediately before the specified date, the Appeals Chamber will address Mladić's submissions in this regard.
[905] Mladić Appeal Brief, para. 307.
[906] *See* Trial Judgement, para. 4621, *referring to* Chapter 9.2.2. *See also* Trial Judgement, para. 3663, *referring to* Exhibit P3566, para. 106.
[907] Trial Judgement, paras. 3663, 4621, *referring to* Exhibit P3566, para. 106.
[908] Trial Judgement, para. 4626, *referring to* Chapter 9.2.5. *See also* Trial Judgement, para. 3725, *referring to* Exhibit P293, para. 33. Abdel-Razek was the UNPROFOR Sector Sarajevo Commander from 21 August 1992 to 20 February 1993. *See* Trial Judgement, para. 3710.
[909] Trial Judgement, paras. 3725, 4626, *referring to* Exhibit P293, para. 33 (where, according to Abdel-Razek, "[a]ttending and agreeing with Karadžić's words were the Serb military leaders, Generals Mladić and Gvero, Mr. Krajišnik and Ms. Plavšić" and "[t]his view expressed by Mr. Karadžić was shared by other Bosnian Serb leaders").
[910] *See* Trial Judgement, paras. 4613-4688, 5352 (confidential).

his recalling of historical crimes allegedly committed against Bosnian Serbs, his expressions of commitment to an ethnically homogeneous *Republika Srpska*, and his provision of misinformation while knowing about the commission of crimes in the Municipalities.[911] In view of this body of evidence, as well as the Trial Chamber's analysis of such evidence, Mladić provides no support for his claim that the Trial Chamber, outside of summarizing Witnesses Deronjić's and Abdel-Razek's evidence, relied on his presence or participation in these two Pale Meetings "as the most probative" to establish his *mens rea*.[912] Accordingly, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber erred in referring to evidence of his participation in the two Pale Meetings in the context of assessing his *mens rea.*

258. The Appeals Chamber now turns to Mladić's allegations that the Trial Chamber erred in disregarding direct and probative evidence demonstrating that he did not share the intent to further the common criminal purpose of the Overarching JCE.[913] Mladić contends that the Trial Chamber failed to give sufficient weight to, and excluded from its *mens rea* analysis, evidence of his orders and conduct demonstrating his "anti-paramilitary position", which is in contrast to the intent he supposedly shared with other members of the Overarching JCE that the paramilitaries commit crimes to further the joint criminal enterprise.[914] To support his argument, Mladić cites what he asserts is extensive evidence of his orders in relation to paramilitary groups[915] and meetings recorded in his military notebooks in line with his approach.[916] A review of Chapter 9.3.13 of the Trial Judgement reveals that the Trial Chamber did not consider Mladić's orders to disband, arrest, or eliminate paramilitary formations when addressing his *mens rea* pertinent to the Overarching JCE.[917] Recalling that the Trial Judgement is to be considered as a whole,[918] the Appeals Chamber observes that the Trial Chamber reviewed this evidence when assessing Mladić's significant contribution and noted that several orders were attempts to bring paramilitary units under the VRS's unified command.[919] Contrary to his alleged "anti-paramilitary position", the Trial Chamber found

[911] *See* Trial Judgement, paras. 4685-4688.
[912] *See* Mladić Appeal Brief, para. 307. *See also* Trial Judgement, paras. 4614, 4621, 4626, 4685-4688.
[913] *See* Mladić Appeal Brief, paras. 308-313; T. 25 August 2020 pp. 46, 47, 59.
[914] Mladić Appeal Brief, paras. 309, 310; T. 25 August 2020 pp. 52-54.
[915] Mladić Appeal Brief, para. 309, n. 451, *referring to*, *inter alia*, Exhibits P356, P7390, P5113, P5112, P2873, P4038, P5133, P1966, P7208, P5151, P5119, P5248, D99, D891, D921, D792, D1996. *See also* T. 25 August 2020 pp. 52-54.
[916] Mladić Appeal Brief, para. 309, n. 452, *referring to* Exhibits P352, P353, P354, P356, P360.
[917] *See* Trial Judgement, paras. 4613-4688.
[918] *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 563, 702; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[919] The Trial Chamber considered evidence that, on 28 July 1992, Mladić ordered the disarmament of all paramilitary formations, groups, and individuals in the territory of *Republika Srpska* by 15 August 1992 in order to put all armed formations and individuals under the unified command of the VRS. *See* Trial Judgement, paras. 3840, 4419, *referring to* Exhibit P5112, pp. 2-4. The Trial Chamber noted that, according to the order, those who carried out misdeeds or crimes as well as paramilitary formations that refused to be placed under the unified command of the VRS in

that some units operated under VRS command when crimes were committed in the Municipalities.[920] In this regard, the Trial Chamber found that, from at least late June 1992, Mladić commanded and controlled Pero Elez's paramilitary unit, which committed crimes in Kalinovik and Foča Municipalities.[921] It also found that from 3 June 1992 onwards, Mladić commanded and controlled the paramilitary unit under "Ljubiša Savić, a.k.a Mauzer", which committed crimes in Bijeljina Municipality.[922] Therefore, the Appeals Chamber finds that Mladić fails to establish that the Trial Chamber erred in not considering his "anti-paramilitary position" in assessing his *mens rea* for the Overarching JCE. The Appeals Chamber further notes that, of the evidence he references, only a few items are orders from Mladić, or otherwise stemming from Mladić, to disarm paramilitary formations that did not submit to VRS command.[923]

259. Mladić further asserts that the Trial Chamber failed to give sufficient weight to the "genuine warnings in his orders for VRS soldiers to respect the Geneva Conventions" and omitted to provide any reasoning on why this "direct evidence" of his intent did not form part of an evidentiary basis to arrive at another reasonable inference.[924] The Appeals Chamber observes that the Trial Chamber considered extensive evidence of his orders to follow the Geneva Conventions and expressly addressed this evidence in its analysis of his *mens rea* in relation to the Overarching JCE.[925]

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cooperation with the MUP were to be disarmed, arrested, and charged with crimes. *See* Trial Judgement, para. 3840, *referring to* Exhibit P5112, p. 3. The Trial Chamber also summarized evidence of Mladić's further orders, issued on 17 August 1992 and 22 May 1993, regarding the disarmament, elimination, or liquidation of paramilitary formations that refused to submit to VRS command. *See* Trial Judgement, paras. 3847, 3852, *referring to* Exhibits P5116, p. 1, D1499, pp. 1-3.

[920] *See* Trial Judgement, paras. 4228, 4419. *See also* Trial Judgement, paras. 3829-3916.

[921] *See*, *e*, *g*., Trial Judgement, paras. 175, 176, 185, 620, 627, 629, 644, 655, 658, 660, 664, 667, 751, 752, 766, 767, 773, 774, 791, 3051 Schedule B(e)(f), 3287(c)(e), 3388(b), 3460, 3461, 3514, 3515, 3890-3894, 3897, 4228, 4239, 4399, 4402, 4641.

[922] *See*, *e.g*., Trial Judgement, paras. 167, 171, 172, 579, 592, 601, 3122(b), 3154, 3388(a), 3874-3879, 3965, 4228, 4239, 4398, 4403.

[923] *See* Exhibits P5112 (order dated 30 July 1992 and signed by Mladić to bring paramilitary formations under the control of the VRS or to disarm by 15 August 1992); P5113 (order dated 30 July 1992 from the VRS First Krajina Corps Command to subordinate units to bring paramilitary formations under VRS control or to disarm by 15 August 1992 with similar language to Mladić's order from 30 July 1992); P1966, p. 8 (report dated September 1992 from Mladić stating that all self-organizing units should be deployed in VRS units or prosecuted); P5151, pp. 1, 3, 5 (document dated 14 September 1992 from the VRS First Krajina Corps Command summarizing discussions at a military roundtable from 13 September 1992 that was chaired by the VRS Main Staff and Mladić and stating that the use of common military uniforms and insignia was considered as a way to ban paramilitary formations that deviate from the regulations on uniforms); P5119, p. 1 (document dated 19 February 1993 from the VRS Main Staff to all subordinate units to place military units under VRS command or to disband); D99, p. 1 (directive dated 22 July 1992 from Mladić noting that special assistance be given to internal units tasked with discovering, exposing, or breaking up paramilitary units); D792, p. 4 (a report dated 20 August 1992 from the VRS First Krajina Corps Command that by an order of the VRS Main Staff major activities lay ahead to abolish all paramilitary formations so as to establish firm military control and discipline). Other exhibits referenced by Mladić, including his notebooks, only discuss problems with paramilitary formations or actions taken by individuals other than Mladić personally. *See* Exhibits P352, pp. 48, 207, 331, 338; P353, pp. 59, 164, 308; P354, pp. 48, 133; P356, pp. 178, 180, 234; P7390, p. 2; P2873, p. 3; P4038, p. 1; P5133; P7208, p. 3; D891, para. 5; D921, paras. 26, 27; D1996, pp. 1, 2. As to Exhibit P360, the Appeals Chamber has reviewed the page referenced in the Mladić Appeal Brief (p. 150) and observes no discussion on paramilitary units.

[924] Mladić Appeal Brief, para. 311; T. 25 August 2020 p. 59.

[925] *See*, *e.g*., Trial Judgement, paras. 4363, 4515, 4517, 4518, 4520, 4526, 4545, 4555, 4687.

According to the Trial Chamber, evidence of, *inter alia*, his orders to respect the Geneva Conventions "[was] not indicative of his true state of mind" as it was contradicted by "what happened on the ground", his provision of misinformation, and "his other contemporaneous statements".[926] In the Appeals Chamber's view, the Trial Chamber's reasoned assessment, based on the totality of evidence, demonstrates its careful consideration and ultimate rejection of the "genuine" nature of Mladić's orders. Mladić's appeal submissions merely reflect his disagreement with the Trial Chamber's assessment of his orders to respect the Geneva Conventions without demonstrating any error.

260. In a similar vein, the Appeals Chamber is not convinced by Mladić's contention that the Trial Chamber failed to give sufficient weight, if any, to his orders to observe ceasefire agreements.[927] He argues that the Trial Chamber only made findings on this evidence in relation to his *actus reus* and "failed to see its direct evidentiary representation of [his] *mens rea*".[928] The Appeals Chamber notes that the Trial Chamber considered evidence of Mladić's orders to observe ceasefire agreements in various parts of the Trial Judgement, including the section discussing his intent to further the common purpose of the Overarching JCE.[929] As part of its reasoning on his *mens rea* for the Overarching JCE, the Trial Chamber considered that Mladić "appeared on various occasions to pursue peaceful solutions to the conflict, and made statements […] indicating his desire to further the peace process", but that "these actions and statements, sometimes providing misinformation, [were] inconsistent with [his] other conduct and [were] directly contradicted by his other contemporaneous statements".[930] Similar to its assessment of his orders to respect the Geneva Conventions, the Trial Chamber found that Mladić's "involvement in peace negotiations [was] not indicative of his true state of mind".[931] The Appeals Chamber considers that Mladić merely disagrees with the Trial Chamber's findings without demonstrating that the Trial Chamber failed to consider, accord sufficient weight to, or provide a reasoned opinion on his orders to observe ceasefire agreements.

261. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's assessment of direct and circumstantial evidence in relation to his intent to achieve the common objective of the Overarching JCE.

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[926] *See* Trial Judgement, para. 4687.
[927] *See* Mladić Appeal Brief, para. 312. According to Mladić, this evidence indicates that he ordered his soldiers to abide by international humanitarian law rather than further the common criminal purpose of the Overarching JCE. *See* Mladić Appeal Brief, para. 313.
[928] Mladić Appeal Brief, para. 312.
[929] *See*, *e.g.*, Trial Judgement, paras. 4325-4328, 4340, 4388, 4677.
[930] Trial Judgement, para. 4687. *See also* Trial Judgement, paras. 4502-4512, 4546, 4646, 4676-4684.
[931] Trial Judgement, para. 4687.

(iii) Alleged Error in Selectively Relying on Parts of Assembly Speeches

262. The Trial Chamber found that, on 12 May 1992, at the 16th Session of the Bosnian Serb Assembly ("16th Assembly Session"), Karadžić presented six strategic objectives, which most prominently included the demarcation of a Serbian state separate from any Croatian and Muslim state and involved the separation of people along ethnic lines.[932] The Trial Chamber further found that, during the same session, the assembly adopted the six strategic objectives and Mladić, among others present, clarified his understanding of the objectives.[933] Regarding the 24th Session of the Bosnian Serb Assembly ("24th Assembly Session"), held on 8 January 1993, the Trial Chamber considered evidence that the assembly "adopted a unanimous conclusion that Muslims should be taken out of 'Serbism' forever, and that the Muslims, as a nation, were a 'sect' of Turkish provenance; a communist, artificial creation which the Serbs did not accept".[934]

263. Mladić submits that the Trial Chamber erred by relying on "selective" parts of his speeches at the 16th and 24th Assembly Sessions when it assessed his *mens rea* pertinent to the Overarching JCE.[935] With respect to the 16th Assembly Session, he argues that the Trial Chamber gave insufficient weight to statements he made opposing the common criminal objective of the Overarching JCE, and that it "methodically isolated phrases or passages and ascribed a sinister meaning to them".[936] In this regard, Mladić contends that the Trial Chamber referred to his warnings "against genocidal actions" but "confuse[d]" his reference to protecting people with fighting forces in the trenches.[937] Mladić contends that the Trial Chamber also failed to provide a reasoned opinion for preferring certain parts of his statement over others.[938] In his view, the Trial Chamber failed to "properly assess" whether the inference that he only sought military success, as opposed to permanent removal of civilians, was a reasonable alternative conclusion.[939]

264. Mladić further submits that the same error is repeated in relation to the 24th Assembly Session, whereby the Trial Chamber gave no weight to his statements calming other members of the

[932] Trial Judgement, para. 3708. *See also* Trial Judgement, paras. 3694-3702, 3706, 4222, 4460, 4625, *referring to, inter alia*, Exhibit P431.
[933] Trial Judgement, paras. 3703-3706, 3708, 4222, 4460, 4461, 4625, *referring to, inter alia*, Exhibit P431, pp. 31-35, 39, 41.
[934] Trial Judgement, para. 4627, *referring to, inter alia*, Exhibit P6921, pp. 14, 15 (while the Trial Judgement references pages 96 and 97 of recorded minutes of the 24th Assembly Session, the Appeals Chamber notes that these correspond to pages 14 and 15 of Exhibit P6921).
[935] *See* Mladić Appeal Brief, paras. 317, 320-333.
[936] Mladić Appeal Brief, paras. 321-326. *See also* T. 25 August 2020 pp. 58, 59.
[937] Mladić Appeal Brief, para. 322. Mladić argues that, given a contextual reading, his statement describes military combat. *See* Mladić Appeal Brief, paras. 322, 323.
[938] Mladić Appeal Brief, para. 321.
[939] Mladić Appeal Brief, paras. 321, 323, 325-327, n. 476, *referring to, inter alia*, Exhibits D1514, D187, D540, P3483, P794, P358, D962, P5040, D1982 (under seal). *See also* T. 25 August 2020 pp. 58, 59.

assembly and defending UNPROFOR.[940] He contends that, rather than using his own statements, the Trial Chamber chose to use the statements of others to infer his intent.[941] According to Mladić, another reasonable inference exists,[942] namely that he "sought only legitimate military success (not permanent removal of civilians)".[943] He argues that, had the evidence been viewed in its totality, no reasonable trier of fact could have established that he shared the *mens rea* to achieve the objective of the Overarching JCE.[944]

265. The Prosecution responds that Mladić's arguments are based on the erroneous premise that a few fragments of isolated evidence may show error in the conclusions of the Trial Chamber that are based on a "holistic assessment of thousands of pieces of evidence".[945] The Prosecution submits that Mladić makes misleading and unsubstantiated assertions about the evidence without demonstrating any unreasonableness in the Trial Chamber's approach,[946] and that he makes no attempt to show an impact on findings in the Trial Judgement.[947] According to the Prosecution, the Trial Chamber considered Mladić's claim that he sought only legitimate military success but reasonably rejected this on the basis of an overwhelming body of contrary evidence.[948]

266. In relation to Mladić's statements at the 16th Assembly Session, the Appeals Chamber is not convinced by the submission that the Trial Chamber gave insufficient weight to "statements made by [Mladić] in opposition of the supposed aim of the common criminal objective of the O[verarching] JCE".[949] The Appeals Chamber observes that the Trial Chamber considered Mladić's alleged warning "against genocidal actions" and other sections of his speech that appeared contrary to the Bosnian Serb Assembly position.[950] The Trial Chamber also explicitly considered Mladić's claim that he only sought legitimate military success.[951]

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[940] Mladić Appeal Brief, para. 328.
[941] Mladić Appeal Brief, para. 329.
[942] Mladić Appeal Brief, para. 330.
[943] Mladić Appeal Brief, para. 321.
[944] Mladić Appeal Brief, paras. 332, 333.
[945] Prosecution Response Brief, para. 116.
[946] Prosecution Response Brief, paras. 98, 117. According to the Prosecution, the Trial Chamber made no error in relation to, *inter alia*, speeches made at the 16th and 24th Assembly Sessions. *See* Prosecution Response Brief, paras. 119-124.
[947] Prosecution Response Brief, para. 118.
[948] Prosecution Response Brief, para. 117.
[949] *See* Mladić Appeal Brief, para. 321. *See also* Mladić Appeal Brief, 322-326. T. 25 August 2020 pp. 58, 59.
[950] *See*, *e.g.*, Trial Judgement, paras. 3704, 3705, 4460. *See also* Mladić Appeal Brief, paras. 322, 324-326; T. 25 August 2020 pp. 58, 59. For instance, the Trial Chamber considered his statements that, *inter alia*:

> 'There we cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that the Serbs would fall through and the rest leave. Well that is, that will not, I do not know how Mr Krajišnik and Mr Karadžić would explain this to the world. People, that would be genocide. We have to call upon any man who has bowed his forehead to the ground to embrace these areas and

267. However, the Appeals Chamber notes that the Trial Chamber also considered the following statements that Mladić made at the 16th Assembly Session, including:

> '*Ustašas*, I know what kind of people *Ustašas* are. However, we must now see and assess […] who our allies and our enemies are, and which enemy would be easier to handle. On the basis of this we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches.'[952]
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> According to Mladić, the 'thing' that they were doing 'need[ed] to be guarded as [their] deepest secret'. Serb representatives in the media and at political talks and negotiations would have to present the goals in a way that would sound appealing to those who they wanted to win over and the 'Serbian people' would need to know how to read between the lines.[953]
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> Mladić also noted that the enemy, a 'common enemy, regardless whether it is the Muslim hordes or Croatian hordes' had attacked 'with all its might from all directions'. He further said that '[w]hat is important now is either to throw both of them out employing political and other moves, or to organize ourselves and throw out one by force of arms, and we will be able to deal somehow with the other'.[954]

268. In assessing his *mens rea*, the Trial Chamber recalled specific portions of Mladić's statement to the effect that Bosnian Serb leaders needed to guard their "deepest secret", that their objectives needed to be presented in a way that appealed to the Serbian people, and that what Krajišnik and Karadžić wanted would amount to genocide.[955] The Trial Chamber also recalled his statement that "we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches".[956] The Appeals Chamber observes that Mladić's statements, together with his conduct, underpin the Trial Chamber's finding that he possessed the intent for crimes to be committed against Bosnian Muslims and Bosnian Croats on discriminatory grounds,[957]

> the territory of the state we plan to make. He to [*sic*] has his place with us and next to us.' Trial Judgement, para. 3704, n. 13905, *referring to* Exhibit P431, p. 35.
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> 'Fear, might, prays to no God, and God cares not for might. But that does not mean that Muslims have to be expelled or drowned […] both Serbs and Muslims, all must take care of one another […] [b]ut there are ways in which we can neutralise them.' Trial Judgement, para. 3705, n. 13906, *referring to* Exhibit P431, pp. 1, 35.
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> '[F]or any man born in the area of the Serbian Republic of Bosnia and Herzegovina or whose roots reach back to here, there is only the first path, the path I see as the path of honour, glory and survival. However, I do not refer only to Serbs here.' Trial Judgement, para. 4460, n. 15880, *referring to* Exhibit P431, pp. 31, 32, 34.

[951] *See* Trial Judgement, para. 4613, n. 16367, *referring to* Mladić Final Trial Brief, para. 115.
[952] Trial Judgement, para. 4460, n. 15886, *referring to* Exhibit P431, p. 33.
[953] Trial Judgement, paras. 3704, 3708, 4460, *referring to, inter alia*, Exhibit P431, p. 34.
[954] Trial Judgement, para. 4461, n. 15888, *referring to* Exhibit P431, p. 41.
[955] Trial Judgement, para. 4625.
[956] Trial Judgement, para. 4625.
[957] *See* Trial Judgement, para. 4686.

and ultimately its finding that he shared the intent to achieve the common objective of the Overarching JCE.[958]

269. Given the foregoing, the Appeals Chamber is of the view that, contrary to Mladić's submissions, the Trial Chamber did not isolate portions of his statements at the 16th Assembly Session, ascribe a "sinister meaning" to them, or otherwise confuse his references.[959] Rather, as set out above, the Trial Chamber took a balanced account of Mladić's statements in their context and considered them within the totality of evidence of all his statements and conduct pertinent to the Overarching JCE.[960] Mladić therefore fails to demonstrate that the Trial Chamber gave insufficient weight to or failed to refer to sections of his speech that were allegedly in opposition to the common criminal objective of the Overarching JCE. Given the extensive consideration of his statements at the 16th Assembly Session in the Trial Judgement,[961] the Appeals Chamber also rejects Mladić's submission that the Trial Chamber erred by failing to provide a reasoned opinion on why the sections of the assembly transcript that it quoted were allegedly "more important" than others.[962]

270. As to the 24th Assembly Session, Mladić refers to his interventions, contending that the Trial Chamber did not give them sufficient weight.[963] In this regard, Mladić specifically points to: (i) his attempt to calm assembly members and to ask them to not "appear too heated and frightening" in order to "not create more damage to ourselves than necessary";[964] and (ii) his defence of UNPROFOR by stating: "I ask you not to develop such climate towards the UNPROFOR, there are those who work well".[965] The Appeals Chamber observes that the Trial Chamber considered evidence relating to the 24th Assembly Session but did not, in the Trial Judgement, expressly summarize or refer to the statements Mladić points to in his submission.[966] Having reviewed the minutes of the 24th Assembly Session, the Appeals Chamber observes that Mladić appeared to urge assembly members to not "appear too heated and frightening" in relation to combat operations and that "35 aeroplanes took off of the Kennedy plane carrier thirty minutes ago and are flying in an unidentified direction".[967] He further made the statement to not antagonize UNPROFOR in response to an incident where the Vice-President of Bosnia and Herzegovina, travelling in an UNPROFOR vehicle, was killed by a Bosnian Serb soldier when the car was

[958] *See* Trial Judgement, para. 4688.
[959] *See* Mladić Appeal Brief, paras. 321-323.
[960] *See* Trial Judgement, paras. 4685-4688. *See also* Trial Judgement, paras. 4614-4684.
[961] *See* Trial Judgement, paras. 3704, 3705, 3708, 4460, 4461, 4625.
[962] *See* Mladić Appeal Brief, para. 321.
[963] *See* Mladić Appeal Brief, para. 328.
[964] *See* Mladić Appeal Brief, para. 328, n. 480, *referring to* Exhibit P6921, pp. 11, 12.
[965] *See* Mladić Appeal Brief, para. 328, n. 481, *referring to* Exhibit P6921, p. 12.
[966] *See* Trial Judgement, para. 4627.
[967] *See* Exhibit P6921, p. 11.

stopped and searched.[968] Mladić further stated that "I don't know how we are going to return to the Conference in Geneva" because of this incident and that "we must have a very, very sober head" to not "let some individual drive us to disaster".[969] The Appeals Chamber considers that, read in context, these statements reflect self-interest in protecting the image of the Bosnian Serb Assembly rather than protecting non-Serbs or UNPROFOR. Mladić therefore fails to demonstrate that the Trial Chamber erred by not expressly referring to these statements or that these statements would undermine findings in the Trial Judgement regarding his *mens rea*.

271. Mladić further contends that, in relation to the 24th Assembly Session, the Trial Chamber relied on statements of others to infer his intent.[970] Having reviewed the pertinent portions of the Trial Judgement as well as evidence relating to the 24th Assembly Session, the Appeals Chamber considers that the Trial Chamber accurately summarized events at the session to the effect that Mladić was present,[971] and that the assembly unanimously adopted the conclusion that Muslims were a "sect" of Turkish provenance and an artificial creation which the Serbs did not accept.[972] However, the Appeals Chamber notes that there is no indication in the Trial Judgement that the Trial Chamber relied on these statements to infer his intent. Therefore, Mladić fails to demonstrate any error in this respect.

272. The Appeals Chamber now turns to Mladić's submission that another reasonable inference – his legitimate military goals – was available on the basis of his statements at the 16th and 24th Assembly Sessions[973] as well as his orders on the protection of civilians and on ceasefires.[974] The Appeals Chamber recalls that the standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.[975] It is further recalled that a trial chamber does not have to discuss every possible hypothesis or inference it may have considered, as long as it is satisfied that the inference it retained was the only reasonable one.[976]

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[968] *See* Exhibit P6921, p. 12.
[969] *See* Exhibit P6921, p. 12.
[970] *See* Mladić Appeal Brief, para. 329, *referring to* Trial Judgement, para. 4627.
[971] *See* Trial Judgement, para. 4627; Exhibit P6921, p. 11.
[972] *See* Trial Judgement, para. 4627; Exhibit P6921, pp. 14, 15.
[973] *See* Mladić Appeal Brief, paras. 321, 323, 325-327, 330, 332. *See also* T. 25 August 2020 pp. 58, 59.
[974] Mladić distinguishes the exhibits he refers to as those concerning protection of civilians (*see* Mladić Appeal Brief, para. 325, n. 476, *referring to*, *inter alia*, Exhibits D1514, D187, D540, P3483, P794, P358) and those concerning "warnings in combat" or ceasefires (*see* Mladić Appeal Brief, para. 325, n. 476, *referring to*, *inter alia*, Exhibits D962, P5040, D1982 (under seal)). *See also* T. 25 August 2020 p. 59.
[975] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 220.
[976] *See Prlić et al*. Appeal Judgement, para. 967. *See also Karadžić* Appeal Judgement, para. 599; *Mrkšić and Šljivančanin* Appeal Judgement, para. 220.

273. The Appeals Chamber observes that the Trial Chamber considered Mladić's claim that he only sought legitimate military success rather than permanent removal of Bosnian Muslim and Bosnian Croat civilians.[977] As set out above, the Trial Chamber considered Mladić's interventions at the 16th Assembly Session in a balanced manner,[978] and found that the totality of all his statements and conduct demonstrated that he possessed the requisite *mens rea*.[979] Furthermore, the Trial Chamber discussed Mladić's orders to respect the Geneva Conventions and to protect civilians,[980] as well as to respect ceasefires.[981] As noted above, it found that these orders "were not indicative of his true state of mind", as they were inconsistent with his other conduct, and directly contradicted by his other contemporaneous statements.[982] In this regard, the Trial Chamber found that Mladić, *inter alia*, repeatedly used derogatory terms to refer to Bosnian Muslims and Bosnian Croats, made references to historical crimes committed against Bosnian Serbs, and made statements indicating an intention to not respect the laws of war in Croatia in 1991, and it also considered his later references to repeating the destruction inflicted during this conflict.[983] In light of the foregoing evidence and the Trial Chamber's assessment, the Appeals Chamber finds, Judge Nyambe dissenting, that the alternative inference Mladić proposes is not reasonable. Mladić's submissions amount to a disagreement with the Trial Chamber's assessment of evidence and ultimate finding on his *mens rea* without demonstrating any error in its conclusions.

(iv) Conclusion

274. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić demonstrates no error in the Trial Chamber's finding that he shared the intent to achieve the common objective of the Overarching JCE.

(c) Conclusion

275. Consequently, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 3.B of Mladić's appeal.

[977] *See* Trial Judgement, para. 4613, *referring to* Mladić Final Trial Brief, para. 115.
[978] *See* Trial Judgement, paras. 3704, 3705, 3708, 4460, 4461, 4625.
[979] *See* Trial Judgement, paras. 4686, 4688.
[980] *See*, *e.g.*, Trial Judgement, paras. 4517-4520, 4524-4526, 4687.
[981] *See*, *e.g.*, Trial Judgement, paras. 4325-4328, 4340, 4388, 4677, 4687.
[982] Trial Judgement, para. 4687.
[983] *See* Trial Judgement, paras. 4617-4619, 4647-4650, 4666-4675, 4686.

C. Alleged Errors Related to the Sarajevo JCE (Ground 4)

276. The Trial Chamber found that the Sarajevo JCE existed between 12 May 1992 and November 1995, with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling, including through the commission of murder, terror, and unlawful attacks against civilians.[984] It found that members of this joint criminal enterprise included Radovan Karadžić, Stanislav Galić, Dragomir Milošević, Momčilo Krajišnik, Biljana Plavšić, Nikola Koljević, and Mladić.[985] The Trial Chamber determined that Mladić shared the intent to further, and significantly contributed to achieving, the Sarajevo JCE's common purpose.[986] The Trial Chamber concluded that several sniping and shelling incidents in Sarajevo, except in relation to non-civilian victims, constituted murder, terror, and/or unlawful attacks against civilians,[987] and held Mladić guilty of these crimes through his participation in the Sarajevo JCE.[988]

277. Mladić submits that the Trial Chamber committed several errors of law and fact in finding the existence of, and that he participated in, the Sarajevo JCE, and requests that the Appeals Chamber reverse his convictions for the crimes of murder, terror, and unlawful attacks against civilians in Sarajevo.[989]

1. Alleged Errors Related to the Crime of Terror and Mladić's *Mens Rea* (Ground 4.A)

278. Mladić submits that the Trial Chamber erred in holding him responsible for spreading terror among the civilian population through a campaign of sniping and shelling and in finding that he intended to further the Sarajevo JCE.[990] In particular, he argues that the Trial Chamber erred in: (i) exercising jurisdiction over the crime of terror;[991] (ii) failing to find that Sarajevo was a "defended city";[992] (iii) finding the existence of the Sarajevo JCE and that Mladić shared the intent to further the joint criminal enterprise;[993] and (iv) the assessment of specific intent for the crime of terror.[994] The Appeals Chamber will address these contentions in turn.

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[984] Trial Judgement, paras. 4740, 4892.
[985] Trial Judgement, paras. 4740, 4892, 4893, 4921.
[986] Trial Judgement, paras. 4893, 4921.
[987] Trial Judgement, paras. 3065, 3202, 3206, 3212.
[988] Trial Judgement, paras. 4893, 4921, 5190, 5214.
[989] *See* Mladić Notice of Appeal, paras. 39-50; Mladić Appeal Brief, paras. 336-569. *See also* Mladić Reply Brief, paras. 67-77.
[990] *See* Mladić Appeal Brief, paras. 336-458.
[991] *See* Mladić Appeal Brief, paras. 336-372; T. 25 August 2020 pp. 60-64.
[992] *See* Mladić Appeal Brief, paras. 373-397.
[993] *See* Mladić Appeal Brief, paras. 398-442.
[994] *See* Mladić Appeal Brief, paras. 443-458.

(a) Alleged Errors in the Exercise of Jurisdiction over the Crime of Terror

279. The Trial Chamber determined that it had jurisdiction over acts of violence the primary purpose of which was to spread terror among the civilian population as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute ("crime of terror"), as charged under Count 9 of the Indictment.[995] In making this determination, the Trial Chamber recalled that the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases had confirmed that the ICTY had jurisdiction over the crime of terror and found nothing in Mladić's submissions that would lead it to deviate from the established jurisprudence.[996]

280. Mladić submits that the Trial Chamber erred in exercising jurisdiction over the crime of terror and convicting him of this crime, and requests that the Appeals Chamber reverse his conviction under Count 9 of the Indictment.[997] In particular, he argues that the Trial Chamber failed to give sufficient weight to his submissions that there exist cogent reasons to depart from the jurisprudence which holds that the ICTY had jurisdiction over the crime of terror, asserting that the prohibition of spreading terror among the civilian population did not extend to its penalization under customary international law during the period of his Indictment due to insufficient evidence of settled, extensive, or uniform state practice.[998] Mladić further argues that the Trial Chamber was prohibited from exercising jurisdiction over the crime of terror because it was not defined with sufficient specificity to be foreseeable at the time of the Indictment, therefore infringing the principle of *nullum crimen sine lege*.[999]

281. The Prosecution responds that the ICTY had jurisdiction over the crime of terror because it formed part of customary international law at the relevant time and that Mladić fails to show any

[995] Trial Judgement, paras. 3011, 3184, 3185.
[996] Trial Judgement, para. 3185, *referring to Galić* Appeal Judgement, paras. 87-90, *D. Milošević* Appeal Judgement, para. 30.
[997] *See* Mladić Appeal Brief, paras. 336-372; T. 25 August 2020 pp. 60-64. *See also* T. 26 August 2020 pp. 66-68. The Appeals Chamber notes that Mladić does not raise the allegation that the Trial Chamber erred in exercising jurisdiction over the crime of terror in his notice of appeal, thus failing to meet the requirements of Rule 133 of the Rules. However, considering that the Prosecution does not object to Mladić's failure and responds to his arguments, and in light of the importance of the issues raised, the Appeals Chamber chooses to exercise its discretion to consider Mladić's arguments in order to ensure the fairness of the proceedings. *Cf. Bikindi* Appeal Judgement, para. 96; *Simba* Appeal Judgement, para. 12.
[998] *See* Mladić Appeal Brief, paras. 336, 337, 341-347; T. 25 August 2020 pp. 60-64, *referring to, inter alia, Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, *D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision of 2 October 1995"), para. 94. *See also* Mladić Reply Brief, paras. 67-69; T. 26 August 2020 pp. 66, 67. Mladić does not dispute that a prohibition of spreading terror among the civilian population existed under customary international law at the time of his Indictment. *See* Mladić Appeal Brief, para. 341; T. 25 August 2020 p. 60.
[999] *See* Mladić Appeal Brief, paras. 350, 352-371; T. 25 August 2020 p. 64. *See also* Mladić Reply Brief, paras. 70, 71.

cogent reasons to depart from established ICTY jurisprudence in this respect.[1000] The Prosecution further asserts that: (i) at the time of Mladić's crimes, several states on four continents had criminalized terror, and the widespread ratification by 1992 of Additional Protocols I and II to the Geneva Conventions of 1949 ("Additional Protocols") further demonstrates the customary international law status of the crime of terror;[1001] (ii) the principle of *nullum crimen sine lege* does not demand that crimes under customary international law be measured by the standards of specificity required for statutory provisions;[1002] and (iii) the crime of terror was defined with sufficient specificity and was foreseeable to Mladić, particularly since laws of the former Yugoslavia had criminalized terror.[1003]

282. Mladić replies that the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases did not consider the absence of a widespread or representative criminalization of terror, and that, in penalizing terror, the former Yugoslavia did not adopt the language of the Additional Protocols or attempt to define the concept of terror after ratifying the Additional Protocols.[1004]

283. The Appeals Chamber recalls that the ICTY Trial Chamber in the *Galić* case determined, by majority, that the ICTY had subject-matter jurisdiction over the crime of terror under Article 3 of the ICTY Statute.[1005] The ICTY Appeals Chamber in the same case confirmed, by majority, the ICTY's jurisdiction over the crime of terror, clarifying that customary international law imposed individual criminal responsibility for violations of the prohibition of terror against the civilian population at the time of the commission of the crimes for which Galić was convicted.[1006] The ICTY Appeals Chamber in the *D. Milošević* case, by majority, subsequently reaffirmed the ICTY's jurisdiction over the crime of terror.[1007] In light of this jurisprudence, the Appeals Chamber

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[1000] Prosecution Response Brief, paras. 128, 131-133; T. 25 August 2020 pp. 106-109. According to the Prosecution, Mladić simply complains that there was insufficient state practice but he ignores that the *Galić* Appeals Chamber did not rely on national laws. *See* T. 25 August 2020 p. 107.
[1001] Prosecution Response Brief, paras. 134-136. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 ("Additional Protcol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609 ("Additional Protocol II").
[1002] Prosecution Response Brief, para. 137.
[1003] Prosecution Response Brief, paras. 137-139; T. 25 August 2020 pp. 108, 109.
[1004] Mladić Reply Brief, paras. 67-71. *See also* T. 26 August 2020 p. 68.
[1005] *Galić* Trial Judgement, para. 138. *See Galić* Trial Judgement, paras. 63-138. *See also Galić* Trial Judgement, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 108-113.
[1006] *Galić* Appeal Judgement, para. 98. *See Galić* Appeal Judgement, paras. 86-98. *See also Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 2, 4-22, 24.
[1007] *D. Milošević* Appeal Judgement, para. 30. *See also D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 1-13. The Appeals Chamber notes that the ICTY Appeals Chamber in the *Prlić et al*. case, by majority, upheld convictions for the crime of terror. *See Prlić et al*. Appeal Judgement, paras. 424, 562-564, 1774-1789, 2017-2026, 2400-2402, 2406, 2800-2802; *Prlić et al*. Trial Judgement, Volume 3, paras. 1689-1692. *See also Prlić et al*. Appeal Judgement, Partially Dissenting, Dissenting Opinions and Declaration of Judge Liu Daqun, paras. 8-10

considers that the matter of the ICTY's jurisdiction over the crime of terror was settled by the ICTY Appeals Chamber and was therefore binding on the Trial Chamber in the present case.[1008] As it was not open to the Trial Chamber to depart from the existing jurisprudence in this respect, the Appeals Chamber rejects Mladić's contention that the Trial Chamber erred in failing to give sufficient weight to his submissions that there exist cogent reasons to do so.

284. As to whether there exist cogent reasons for the Appeals Chamber to depart from the jurisprudence in this regard, the standards of appellate review require Mladić to demonstrate that the decision to exercise jurisdiction over the crime of terror was made on the basis of a wrong legal principle or was "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[1009] In this respect, Mladić relies chiefly on the dissenting views of Judges Schomburg and Liu in the *Galić* and *D. Milošević* Appeal Judgements, respectively, to argue that the state practice referred to by the majority in the *Galić* Appeal Judgement was not sufficiently extensive, uniform, or representative to give rise to individual criminal responsibility for spreading terror among the civilian population under customary international law at the relevant time.[1010]

285. A review of the *Galić* Appeal Judgement reveals that the judges of the majority applied the same legal principles as Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case in reaching their conclusions, namely that: (i) the ICTY has jurisdiction to prosecute a violation of a rule of international humanitarian law under Article 3 of the ICTY Statute when four conditions are fulfilled, including when "the violation of the rule must entail, under customary international law, the individual criminal responsibility of the person breaching the rule" ("Fourth Condition");[1011] and (ii) the fulfilment of the Fourth Condition may be inferred from, *inter alia*, state practice indicating an intention to criminalize the violation.[1012]

(wherein Judge Liu reiterated his position that the ICTY does not have jurisdiction over the crime of terror and that such convictions should therefore have been vacated because the crime did not exist under customary international law at the relevant time). In addition, despite opposition to the ICTY's jurisdiction over the crime of terror by Karadžić at trial, the ICTY Trial Chamber in the *Karadžić* case reiterated that Article 3 of the ICTY Statute covers the crime of terror, and entered a conviction for it, which was upheld on appeal. *See Karadžić* Appeal Judgement, para. 777; *Karadžić* Trial Judgement, paras. 458, 6008, 6022, 6071; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Karadžić Pre-Trial Brief, 29 June 2009, paras. 24, 25.

[1008] *See Aleksovski* Appeal Judgement, para. 113. *See also Gotovina et al*. Decision of 1 July 2010, para. 24.

[1009] *See supra* para. 14 and references cited therein.

[1010] *See* Mladić Appeal Brief, paras. 341-347; T. 25 August 2020 pp. 61-63; T. 26 August 2020 pp. 66, 67.

[1011] *Galić* Appeal Judgement, para. 91; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 5; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, para. 2. *See also Tadić* Decision of 2 October 1995, para. 94.

[1012] *Galić* Appeal Judgement, para. 92; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 7; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6, 10. *See also Tadić* Decision of 2 October 1995, para. 128.

286. In concluding that the Fourth Condition was fulfilled, the judges of the majority in the *Galić* case considered, *inter alia*, that: (i) references to terror as a war crime could be found in national and multinational documents as early as 1919 and 1945;[1013] (ii) numerous states, including the former Yugoslavia, had criminalized terrorizing civilians as a method of warfare or in a time of war;[1014] and (iii) a court in Croatia had entered a conviction under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II for acts of terror against civilians which occurred between March 1991 and January 1993.[1015] Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case, by contrast, expressed doubt as to whether the evidence referred to by the majority in the *Galić* case was sufficiently extensive and uniform to establish customary international law.[1016]

287. In the Appeals Chamber's view, Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case applied the same legal principles as the majority in the *Galić* case in determining the sufficiency of the evidence of state practice before them and merely disagreed on the result.[1017] Bearing in mind that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable",[1018] the Appeals Chamber finds that Mladić fails to demonstrate that the finding by the ICTY Appeals Chamber that the ICTY had jurisdiction over the crime of terror was made on the basis of a wrong legal principle or was wrongly decided. In the absence of cogent reasons to depart from the controlling jurisprudence, the Appeals Chamber finds no error in the Trial Chamber's determination that the ICTY had jurisdiction over the crime of terror in the present case.

288. As to Mladić's contention that the definition of the crime of terror nonetheless violated the principle of *nullum crimen sine lege* for lack of specificity and foreseeability,[1019] the Appeals Chamber notes that the Trial Chamber set out the elements of the crime in accordance with the ICTY Appeals Chamber's definition in the *Galić* Appeal Judgement, as clarified in the *D. Milošević* Appeal Judgement.[1020] In particular, the Trial Chamber stated that the crime of terror requires proof of, *inter alia*, acts or threats of violence committed with the primary purpose of spreading terror

[1013] *See Galić* Appeal Judgement, para. 93 and references cited therein.
[1014] *See Galić* Appeal Judgement, paras. 94-96 and references cited therein.
[1015] *See Galić* Appeal Judgement, para. 97 and references cited therein.
[1016] *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6-8; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 8-10.
[1017] *See D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6-8; *Galić* Appeal Judgement, paras. 94, 95; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7-11.
[1018] *See Ntawukulilyayo* Appeal Judgement, para. 15 and references cited therein.
[1019] *See* Mladić Appeal Brief, paras. 350, 352-371; T. 25 August 2020 p. 64.
[1020] *See* Trial Judgement, paras. 3186-3188.

among the civilian population and directed against the civilian population or individual civilians not taking direct part in hostilities causing the victims to suffer grave consequences.[1021]

289. Relying on Judge Shahabuddeen's separate opinion in the *Galić* Appeal Judgement stating that "there is neither the required *opinio juris* nor state practice to support the view that customary international law knows of a comprehensive definition [of terror]",[1022] Mladić argues that the ICTY was not in a position to define the elements of the crime.[1023] He further contends that the definition adopted by the ICTY, particularly the requirement that victims suffer "grave consequences" from the acts or threats of violence, did not provide a clear gravity threshold and was improperly determined through a jurisdictional analysis which was developed after the Indictment period.[1024]

290. The Appeals Chamber recalls that the principle of *nullum crimen sine lege* requires that a person may only be found guilty of a crime in respect of acts which constituted a violation of a norm which existed at the time of their commission.[1025] Moreover, the criminal liability in question must have been sufficiently foreseeable and the law providing for such liability must have been sufficiently accessible at the relevant time.[1026] This principle does not, however, prevent a court from interpreting and clarifying the elements of a particular crime, nor does it preclude the progressive development of the law by the court.[1027]

291. The Appeals Chamber notes that Judge Shahabuddeen specified in his separate opinion in the *Galić* Appeal Judgement that: (i) he agreed with the view that terror as charged is a crime known to customary international law;[1028] (ii) the ICTY could recognize that customary international law does know of a core or predominant meaning of "terror" for which there was individual criminal responsibility at the material times;[1029] and (iii) he was satisfied that a serious violation of the laws or customs of war within the meaning of Article 3 of the ICTY Statute,

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[1021] *See* Trial Judgement, para. 3186.
[1022] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 3.
[1023] *See* Mladić Appeal Brief, paras. 354-358.
[1024] *See* Mladić Appeal Brief, paras. 359-370, *referring to, inter alia*, *Tadić* Decision of 2 October 1995, para. 94.
[1025] *See Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Milutinović et al.* Decision of 21 May 2003"), para. 37; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Aleksovski* Contempt Appeal Judgement"), para. 38; *Čelebići* Appeal Judgement, para. 576; *Aleksovski* Appeal Judgement, para. 126. *See also Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Decision of 16 July 2003"), para. 51.
[1026] *Milutinović et al.* Decision of 21 May 2003, paras. 37, 38. In the case of an international tribunal such as the ICTY, accessibility does not exclude reliance being placed on a law which is based on custom. *Hadžihasanović et al.* Decision of 16 July 2003, para. 34.
[1027] *Milutinović et al.* Decision of 21 May 2003, para. 38; *Čelebići* Appeal Judgement, paras. 173, 576; *Aleksovski* Appeal Judgement, paras. 126, 127.
[1028] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 3.
[1029] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 4.

namely, by resorting to the core of terror, gives rise to such responsibility, which existed at the time of the alleged acts of the appellant.[1030] In the view of the Appeals Chamber, the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases merely clarified the elements of the crime of terror, which existed in customary international law, for the purposes of Article 3 of the ICTY Statute.[1031] The Appeals Chamber considers that this is consistent with the principle of *nullum crimen sine lege*, as recalled above. Consequently, Mladić fails to show any error in the Trial Chamber's application of the elements of the crime of terror as clarified by the ICTY Appeals Chamber.[1032]

292. As to foreseeability, the Appeals Chamber recalls that the accused must be able to appreciate that his conduct was criminal in the sense generally understood, without reference to any specific provision.[1033] Although the ICTY did not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction, it had recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the Indictment was prohibited and punishable.[1034]

293. To this end, it is worth noting that the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY" and "Criminal Code of the SFRY", respectively) in force at the time of the Indictment period provided that "[w]hoever, in violation of the rules of international law effective at the time of war, armed conflict, or occupation, orders that the civilian population be subject to […] application of measures of intimidation and terror […] shall be punished by imprisonment for not less than five years or by the death penalty".[1035] In addition, the military manual of the SFRY applicable at the time provided, *inter alia*, that: (i) "serious violations of the laws of war [are considered] as criminal offences";[1036] (ii) "[w]ar crimes and other serious violations of the laws of war include […] the application of measures of intimidation and terror [against a civilian population]";[1037] (iii) "[a]ttacking civilians for the purpose of terrorising them is especially prohibited";[1038] and (iv) "[p]ersons who commit a war crime, or any other grave violation of the laws of war, […] may also answer before an international court, if such a court has been

[1030] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 5.
[1031] *See D. Milošević* Appeal Judgement, paras. 31-37; *Galić* Appeal Judgement, paras. 100-104.
[1032] Trial Judgement, paras. 3186-3188.
[1033] *Hadžihasanović et al.* Decision of 16 July 2003, para. 34.
[1034] *Milutinović et al.* Decision of 21 May 2003, paras. 40, 41.
[1035] *See* Article 142 of the Criminal Code of the SFRY, adopted on 28 September 1976, entered into force on 1 July 1977, and repealed by the Criminal Code of the Republic of Serbia on 1 January 2006. *See also Galić* Appeal Judgement, nn. 302, 303.
[1036] *See* Article 18 of the Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, adopted on 13 April 1988 ("SFRY Military Manual"). *See also Galić* Appeal Judgement, n. 304.
[1037] *See* Article 33(2) of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.

established".[1039] Against this background, the Appeals Chamber considers that Mladić does not demonstrate that the crime of terror was not reasonably foreseeable to him at the time of the events charged in the Indictment.

294. Furthermore, in the Appeals Chamber's view, the specification that, for the purposes of Article 3 of the ICTY Statute, the crime of terror also requires that victims suffered "grave consequences",[1040] in no way detracts from the conclusion that Mladić could reasonably have known that the commission of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was prohibited and punishable.[1041] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić consequently fails to demonstrate that the Trial Chamber erred in exercising jurisdiction over the crime of terror due to lack of specificity and foreseeability in its definition.

(b) Alleged Error in Failing to Find that Sarajevo was a "Defended City"

295. In finding the existence of the Sarajevo JCE, the Trial Chamber considered, *inter alia*, that, about two days after the policy regarding Sarajevo was outlined at the 16th Assembly Session, the SRK commenced its heavy shelling of Sarajevo, which, together with regular and frequent sniping, continued throughout the Indictment period.[1042] The Trial Chamber found that the objective of the joint criminal enterprise involved the commission of, *inter alia*, the crime of terror, and that "the infliction of terror among the civilian population was used to gain strategic military advantages and done out of ethnical vengeance".[1043] In making these determinations, the Trial Chamber rejected Mladić's arguments that Sarajevo was a valid military target that could not be seen as an "undefended city" pursuant to Article 3(c) of the ICTY Statute.[1044]

296. Mladić submits that, in convicting him of the crime of terror, the Trial Chamber erred by misconstruing and failing to give sufficient weight to his submissions regarding Sarajevo as a "defended city" pursuant to Article 3(c) of the ICTY Statute.[1045] In particular, he argues that the

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[1038] *See* Article 67 of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.
[1039] *See* Article 20 of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.
[1040] *See* Trial Judgement, para. 3186. *See also D. Milošević* Appeal Judgement, paras. 32, 33.
[1041] Mladić's contention that the definition of the crime of terror adopted by the ICTY provided an unclear gravity threshold creating "two distinct sets of victims" (*see* Mladić Appeal Brief, paras. 365, 366) also does not demonstrate an error. The "grave consequences" requirement to which Mladić points in this respect is jurisdictional, meaning that the crime of terror victim group remains the same: "the civilian population or individual civilians not taking direct part in hostilities", but that the ICTY could only exercise its jurisdiction over the crime where the grave consequences requirement is met. *See* Trial Judgement, para. 3186. *See also D. Milošević* Appeal Judgement, paras. 31-33.
[1042] Trial Judgement, para. 4740. *See also* Trial Judgement, paras. 1855-1913, 1915-2215, 4734-4739.
[1043] Trial Judgement, para. 4740. *See also* Trial Judgement, paras. 3201, 3202.
[1044] Trial Judgement, paras. 4693, 4733.
[1045] *See* Mladić Appeal Brief, paras. 373-388. *See also* Mladić Appeal Brief, paras. 425, 467, 487.

Trial Chamber "erred by failing to consider Sarajevo as a defended city which constituted a legitimate military objective".[1046] Mladić contends that, had the Trial Chamber understood and considered his submissions in this respect, it could not have concluded that terror was the primary purpose of the campaign in Sarajevo and that he possessed the requisite *mens rea* for this crime.[1047] Accordingly, Mladić requests that the Appeals Chamber reverse his conviction under Count 9 of the Indictment.[1048]

297. The Prosecution responds that Sarajevo as a whole was not a legitimate military target and that the Trial Chamber rightly rejected Mladić's argument about Sarajevo as a "defended city".[1049] It contends that, regardless of the presence of legitimate military targets within Sarajevo, or of the military advantage offered by holding the city, a distinction must be made between civilian and military objectives.[1050] The Prosecution also contends that Mladić was not charged with attacking undefended locales, but with terrorizing, unlawfully attacking, and murdering civilians as violations of the laws or customs of war pursuant to Article 3 of the ICTY Statute.[1051]

298. Mladić replies that he does not contend that Sarajevo in its entirety constituted a valid military target but rather, that Sarajevo, as a defended city, constituted a valid military objective.[1052] Mladić further asserts that he does not contend that categorizing a city as "defended" allows a party to avoid their obligations of distinction, but maintains that the Trial Chamber's conclusion that his primary objective in Sarajevo was to spread terror among the civilian population was not the only reasonable inference available on the evidence.[1053]

299. The Appeals Chamber recalls that Article 3 of the ICTY Statute sets out a non-exhaustive list of punishable violations of the laws or customs of war, including, *inter alia*, under Article 3(c), the "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings" ("crime of attacking undefended locales").[1054] The crime of attacking undefended locales is thus one of the violations of the laws or customs of war within the jurisdiction of the ICTY pursuant to Article 3 of the ICTY Statute, which include, for instance, the crimes of murder, terror, unlawfully attacking civilians, or hostage-taking.[1055] Mladić asserts that "the reference to Article 3

[1046] Mladić Appeal Brief, para. 380.
[1047] *See* Mladić Appeal Brief, paras. 374, 377-395.
[1048] Mladić Appeal Brief, paras. 375, 396, 397.
[1049] *See* Prosecution Response Brief, paras. 140-143.
[1050] Prosecution Response Brief, paras. 140-142.
[1051] Prosecution Response Brief, para. 142.
[1052] Mladić Reply Brief, para. 72.
[1053] Mladić Reply Brief, para. 72.
[1054] Article 3(c) of the ICTY Statute.
[1055] *Cf. Kupreškić et al.* Trial Judgement, paras. 698, 742.

in the [I]ndictment should be understood to *include* a reference to Art[icle] 3(c)".[1056] However, nothing in the Indictment, Prosecution Pre-Trial Brief,[1057] or trial record suggests that Mladić was charged with the crime of attacking undefended locales. Mladić therefore does not demonstrate that the Trial Chamber erred by failing to give sufficient weight to his submissions and consider Sarajevo as a "defended city" pursuant to Article 3(c) of the ICTY Statute.

300. Moreover, Mladić conflates the question of whether Sarajevo was a "defended city" with whether it contained legitimate military objectives.[1058] In this respect, the Appeals Chamber recalls that the principle of distinction requires parties to a conflict to distinguish at all times between the civilian population and combatants, or civilian and military objectives, such that only military objectives may be lawfully attacked and the prohibition on targeting civilians is absolute.[1059] As such, Mladić's general assertion that the strategic military importance, nature, and location of Sarajevo rendered the city and its contents broadly subject to legitimate attack falls to be rejected.[1060]

301. The Appeals Chamber is also not persuaded by Mladić's suggestion that, if the Trial Chamber had recognized Sarajevo's strategic military importance, it could not have concluded that the campaign in Sarajevo was primarily aimed at spreading terror as opposed to gaining military advantage.[1061] The Appeals Chamber observes that the Trial Chamber explicitly recognized that the infliction of terror among the civilian population, as the primary purpose of the sniping and shelling incidents in Sarajevo, was used to gain a strategic military advantage.[1062] In this respect, the Trial Chamber considered evidence showing, *inter alia*, that: (i) many civilians were targeted while carrying out daily activities of a civilian nature or when present at sites that were known as locations where civilians gathered;[1063] (ii) several of the sniping and shelling attacks were carried out during cease-fires or quiet periods, and civilians were more prone to being targeted when

[1056] Mladić Appeal Brief, para. 378.
[1057] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Pre-Trial Brief, 24 February 2012.
[1058] Article 59 of Additional Protocol I, which prohibits parties to a conflict to attack, by any means whatsoever, non-defended localities, defines the concept of a non-defended locality as an "inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse [p]arty". Article 52 of Additional Protocol I, by contrast, prohibits attacks against civilian objects and provides that attacks shall be strictly limited to military objectives, which it defines as "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 neutralization, in the circumstances ruling at the time, offers a definite military advantage".
[1059] *See Karadžić* Appeal Judgement, paras. 486-488; *D. Milošević* Appeal Judgement, paras. 53, 54; *Galić* Appeal Judgement, para. 190; *Blaškić* Appeal Judgement, para. 109.
[1060] *See* Mladić Appeal Brief, paras. 379-386. *See also D. Milošević* Appeal Judgement, para. 54.
[1061] *See* Mladić Appeal Brief, paras. 380, 388.
[1062] *See* Trial Judgement, paras. 3201, 4740.
[1063] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.1, F.3, F.5, F.11, F.12, F.13, F.15, F.16, G.6, G.7, and Unscheduled Sniping Incidents of 31 March 1993, 24 July 1993, 5 August 1993, 9 November 1993, 24 October 1994, 10 December 1994.

circumstances suggested that the shooting or shelling had stopped and it was safe for civilians to continue their daily activities;[1064] (iii) numerous civilians were targeted while they were at home or in neighbourhoods where there was no military activity or military personnel and equipment present in the immediate vicinity;[1065] (iv) the period of sniping and shelling continued, largely unabated, over almost four years;[1066] and (v) civilians in Sarajevo lived in extreme and constant fear of being hit by sniper or artillery fire.[1067]

302. In view of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that no reasonable trier of fact could, in principle, have concluded that terror was the primary purpose of the shelling and sniping campaign in Sarajevo. To the extent that Mladić alleges specific errors in the Trial Chamber's assessment of evidence in this respect, the Appeals Chamber will evaluate such allegations in connection with the supporting submissions.

(c) Alleged Errors Relating to the Existence of a Sarajevo JCE and Mladić's Intent

303. In finding the existence of the Sarajevo JCE and that Mladić shared the common criminal purpose and intended to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the Trial Chamber considered, *inter alia*, that the policy of the Bosnian Serb leadership with regard to Sarajevo was outlined at the 16th Assembly Session, and that Mladić personally directed the SRK to shell Sarajevo and cut its utilities to force inhabitants outside.[1068] The Trial Chamber also noted that some of the evidence received may indicate that the Bosnian Serb leadership was genuinely concerned with the well-being of civilians.[1069] In this respect, the Trial Chamber pointed to statements of assurance by Bosnian Serb officials to international organizations,[1070] including Mladić's assurances that Sarajevo was "under no threat from the VRS",[1071] as well as certain orders prohibiting firing at civilians without approval.[1072] The Trial Chamber concluded, however, that these could not serve as a reliable basis for determining the Bosnian Serb leadership's true state of mind in light of the totality of the evidence.[1073] The Trial Chamber considered, *inter alia*, that Mladić's statements at the 16th Assembly Session, as well as

[1064] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.11, F.13, F.15, G.6.
[1065] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.1, F.4, F.5, F.11, F.12, F.15, F.16, G.6, G.7, G.10, and Incidents of 27 June 1993, 26 September 1993, 11 January 1994.
[1066] *See* Trial Judgement, paras. 3201, 4740.
[1067] *See* Trial Judgement, paras. 1888-1890, 3201.
[1068] *See* Trial Judgement, paras. 4740, 4921.
[1069] Trial Judgement, para. 4737.
[1070] Trial Judgement, para. 4736.
[1071] Trial Judgement, paras. 4736, 4919.
[1072] Trial Judgement, paras. 4737-4739.
[1073] Trial Judgement, paras. 4736-4739, 4919, 4920.

the language of the orders, evinced a lack of genuine concern for the well-being of civilians and the rule of law.[1074]

304. Mladić submits that the Trial Chamber erred in interpreting his statements at the 16th Assembly Session predominantly through the lens of its findings on the Sarajevo crime base[1075] and in disregarding evidence of orders prohibiting the targeting of civilians.[1076] He argues that, as a consequence of these errors, alone or in combination, the Trial Chamber erred in concluding that there was no other inference available on the evidence consistent with his innocence, and thereby erroneously inferred the existence of the Sarajevo JCE and his intention to act in furtherance thereof.[1077] Mladić accordingly requests the Appeals Chamber to reverse his convictions for the crimes of murder, terror, and unlawful attacks on civilians under Counts 5, 9, and 10 of the Indictment, respectively, or, in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.[1078]

305. The Prosecution responds that the Trial Chamber reasonably interpreted Mladić's statements at the 16th Assembly Session[1079] and appropriately discounted Mladić's orders not to fire at civilians.[1080] The Prosecution further submits that the Trial Chamber's findings on the existence and Mladić's shared intent of the common criminal purpose do not hinge on his statements at the 16th Assembly Session as the Trial Chamber relied on a wide range of evidence in reaching its conclusions.[1081]

[1074] Trial Judgement, paras. 4737, 4739. *See also* Trial Judgement, para. 4823.
[1075] *See* Mladić Appeal Brief, paras. 398, 409-420, *referring to* Trial Judgement, paras. 4740, 4897, 4919-4921.
[1076] *See* Mladić Appeal Brief, paras. 398, 429-437, *referring to* Trial Judgement, paras. 4737, 4739, 4919.
[1077] *See* Mladić Appeal Brief, paras. 398, 399, 415-421, 437-439. *See also* Mladić Reply Brief, paras. 73, 74. As part of this sub-ground of appeal, Mladić also asserts that the Trial Chamber erred by relying on evidence of crimes which were not proven beyond reasonable doubt and supports this assertion by referring to submissions made elsewhere in his appellant's brief. *See* Mladić Appeal Brief, paras. 422-428. *See also* Mladić Reply Brief, paras. 75, 76. In particular, he contends that, because Sarajevo was a "defended city", evidence that Sarajevo was bombarded does not, *per se*, prove the commission of a crime. *See* Mladić Appeal Brief, para. 425, *referring to* Mladić Appeal Brief, paras. 373-397. The Appeals Chamber recalls that it has dismissed Mladić's alleged errors in relation to Sarajevo as a "defended city" (*see supra* Section III.C.1(b)), and accordingly, hereby dismisses his allegation of error in this respect. Mladić also contends that the Trial Chamber erroneously drew upon the evidence of Witness RM-511 pursuant to Scheduled Incident G.1 to infer the existence of the Sarajevo JCE and his intent. *See* Mladić Appeal Brief, paras. 422, 423, 426, *referring to* Mladić Appeal Brief, paras. 464-496. The Appeals Chamber recalls that it has already dismissed Mladić's alleged errors in relation to Scheduled Incident G.1 (*see infra* Section III.C.2(a)).
[1078] *See* Mladić Appeal Brief, paras. 400, 421, 440-442.
[1079] *See* Prosecution Response Brief, paras. 146-156.
[1080] *See* Prosecution Response Brief, paras. 165-168.
[1081] *See* Prosecution Response Brief, paras. 157-161. In particular, the Prosecution argues that the Trial Chamber based its common criminal purpose conclusions on international witnesses, insider witnesses, and documentary evidence, and took into account, *inter alia*, the difficult living conditions caused by constant shelling and sniping over a four-year period. *See* Prosecution Response Brief, para. 158. The Prosecution further argues that the Trial Chamber's conclusion on Mladić's shared intent was based on evidence of, *inter alia*, Mladić personally directing the SRK to shell Sarajevo and cut its utilities to force inhabitants outside as well as his contemporaneous statements. *See* Prosecution Response Brief, paras. 159, 160.

306. The Appeals Chamber recalls that explicit manifestations of criminal intent are often rare and that the requisite intent may therefore be inferred from relevant facts and circumstances,[1082] such as, *inter alia*, the accused's words and/or actions, as well as the general context in which they occurred.[1083] Mladić, by contrast, argues that the Trial Chamber should have viewed the statements made at the 16th Assembly Session "independent of the crime base", and refers to an analysis by the ICTY Appeals Chamber in the *Gotovina and Markač* case to support his argument.[1084] In the Appeals Chamber's view, however, Mladić misconstrues the ruling of the ICTY Appeals Chamber in the *Gotovina and Markač* case. In that case, after having overturned the Trial Chamber's findings as to the criminal nature of the context in which certain statements were made, the ICTY Appeals Chamber found that the existence of a joint criminal enterprise could no longer be inferred from those statements.[1085] This does not stand for the proposition that a trial chamber should examine evidence related to intent "independent of the crime base". As recalled above, intent is generally inferred from relevant facts and circumstances which include the accused's conduct and the context in which it took place.

307. Moreover, having carefully reviewed the Trial Judgement, as well as the minutes of the 16th Assembly Session, the Appeals Chamber finds nothing to suggest that the Trial Chamber erred in its assessment of Mladić's specific statements.[1086] The Trial Chamber determined that his statements at the 16th Assembly Session evinced a desire to mislead the public about the truth of the Bosnian Serb leadership's actions in Sarajevo.[1087] Mladić, however, submits that "the warnings that '[t]he thing we are doing needs to be guarded as our deepest secret' and '[o]ur people must know how to read between the lines' could be understood as a warning not to divulge legitimate military strategies needlessly".[1088] The Appeals Chamber considers that Mladić merely proposes alternative interpretations without demonstrating the unreasonableness of the Trial Chamber's interpretation of his statements at the 16th Assembly Session.[1089]

[1082] *See, e.g.*, *Rutaganda* Appeal Judgement, paras. 525, 528; *Kayishema and Ruzindana* Appeal Judgement, paras. 159, 198. *See also Munyakazi* Appeal Judgement, para. 142.
[1083] *See, e.g.*, *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 31; *Jelisić* Appeal Judgement, para. 47. *See also Šainović et al*. Appeal Judgement, paras. 580, 1016; *Nyiramasuhuko et al*. Appeal Judgement, paras. 1029, 1030; *D. Milošević* Appeal Judgement, para. 37; *Krstić* Appeal Judgement, para. 33.
[1084] Mladić Appeal Brief, paras. 413-417, *referring to Gotovina and Markač* Appeal Judgement, paras. 81, 82, 87, 91, 93.
[1085] *See Gotovina and Markač* Appeal Judgement, paras. 77-98.
[1086] *Compare* Trial Judgement, paras. 3704, 4736, 4739, 4897 *with* Exhibit P431, pp. 34-36, 38, 39.
[1087] *See* Trial Judgement, para. 4736, *referring to* Exhibit P431.
[1088] Mladić Appeal Brief, para. 418 (internal citations omitted).
[1089] *See also supra* paras. 269, 273.

308. With respect to Mladić's contention that the Trial Chamber erred by failing to give weight to orders prohibiting the targeting of civilians,[1090] the Appeals Chamber notes that the Trial Chamber explicitly considered and discussed such orders,[1091] but concluded that they evinced a concern with insubordination or wasting of ammunition,[1092] and provided "mere lip-service" to support assurances to the international community and/or give the appearance of a leadership obeying the law.[1093] Mladić takes issue with this assessment, contending that such orders constituted direct evidence of his intent and therefore should have weighed against a finding that he intended to further the Sarajevo JCE.[1094] The Appeals Chamber notes, however, that, in assessing the probative value of orders prohibiting the targeting of civilians, the Trial Chamber did not only consider the language of such orders, but also, *inter alia*, that: (i) such orders were not adhered to and the leadership did not take measures to enforce them;[1095] (ii) the testimonial evidence concerning the existence of standing orders not to target civilians in Sarajevo was given by former members of the SRK who may have had an interest in protecting themselves;[1096] and (iii) Mladić stated at the 16th Assembly Session that Serbian people would need to know how to "read between the lines".[1097] Mladić shows no error in the Trial Chamber's approach.

309. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate error in the Trial Chamber's overall assessment of his intent to commit murder, terror, and unlawful attacks on civilians in relation to the Sarajevo JCE, especially given the totality of the factors relied upon by the Trial Chamber in this respect.[1098]

[1090] *See* Mladić Appeal Brief, paras. 429-437.
[1091] *See* Trial Judgement, paras. 4737-4739, *referring to*, *inter alia*, Exhibits P812, P4424, D66, D726, D2022, D2039, D2045, D2081. *See also* Trial Judgement, paras. 4704, 4714, 4715, 4717, 4718, 4720-4722, 4738.
[1092] Trial Judgement, para. 4737.
[1093] Trial Judgement, para. 4739.
[1094] Mladić Appeal Brief, paras. 429, 433-437.
[1095] *See* Trial Judgement, paras. 4739, 4919. *See also* Trial Judgement, paras. 4718, 4835.
[1096] *See* Trial Judgement, para. 4738. *See also* Trial Judgement, paras. 4714-4732.
[1097] *See* Trial Judgement, para. 4739.
[1098] In particular, in making this finding, the Trial Chamber considered that Mladić:

> (i) […] personally direct[ed] the 28 May 1992 shelling of Sarajevo, select[ed] targets, and direct[ed] fire away from Serb-populated areas; (ii) […] formulat[ed] and issu[ed] directives and command[ed] the SRK; (iii) […] propos[ed] in the spring of 1995 that Sarajevo be bombarded with explicit disregard for the safety of civilians; and (iv) […] ordered the SRK Command to cut utilities supplying Sarajevo on 6 September 1995, thereby forcing the inhabitants of Sarajevo to go outside and be exposed to sniping and shelling […].

Trial Judgement, para. 4921.

(d) Alleged Errors in the Assessment of Specific Intent for the Crime of Terror

310. In finding that the sniping and shelling incidents in Sarajevo constituted the crime of terror,[1099] the Trial Chamber determined, *inter alia*, that: (i) the perpetrators wilfully made civilians not taking direct part in hostilities the object of their sniping and shelling; (ii) the perpetrators intended to spread terror among the civilian population of Sarajevo; and (iii) the infliction of terror was the primary purpose of the sniping and shelling incidents.[1100]

311. Mladić submits that the Trial Chamber erred in applying the same "standard of proof", and relying on the same set of circumstantial factors, to determine the perpetrators' wilful intent to target civilians as it did to determine their specific intent to spread terror, which requires a "higher standard of proof".[1101] He contends that, in the absence of "more precise indicia", no reasonable trier of fact could have concluded "with any certainty" that terror was the primary purpose of the perpetrators of the alleged crimes.[1102] Mladić submits that, as a result of the Trial Chamber's error, he was wrongly held liable for the crime of terror pursuant to a joint criminal enterprise, and accordingly requests the Appeals Chamber to reverse his conviction under Count 9 of the Indictment.[1103]

312. The Prosecution responds that, for Mladić to be held liable as a member of the Sarajevo JCE, the physical perpetrators used as tools by the joint criminal enterprise members need not possess the intent for the crimes,[1104] and that, in any event, the Trial Chamber reasonably concluded that the SRK perpetrators of the sniping and shelling campaign specifically intended to spread terror among Sarajevo's civilian population.[1105]

313. The Appeals Chamber recalls that the *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population.[1106] Such intent may be inferred from the circumstances of the acts or threats of violence, such as, *inter alia*, their nature, manner, timing, and duration.[1107] Nothing precludes a

[1099] Trial Judgement, para. 3202. As a sole exception, the Trial Chamber excluded the Unscheduled Sniping Incident of 9 November 1994 from constituting the crime of terror on the basis that it could not determine beyond a reasonable doubt that the sniping was directed at civilians. *See* Trial Judgement, paras. 3190, 3199, 3200, 3202.
[1100] Trial Judgement, paras. 3200, 3201. *See also* Trial Judgement, paras. 3184-3199, 4740, 4921.
[1101] *See* Mladić Appeal Brief, paras. 443, 446-456. *See also* Mladić Reply Brief, para. 77.
[1102] Mladić Appeal Brief, para. 455.
[1103] Mladić Appeal Brief, paras. 444, 445, 457, 458.
[1104] Prosecution Response Brief, para. 169 and references cited therein.
[1105] Prosecution Response Brief, paras. 170-174.
[1106] *D. Milošević* Appeal Judgement, para. 37, *referring to Galić* Appeal Judgement, para. 104.
[1107] *D. Milošević* Appeal Judgement, para. 37; *Galić* Appeal Judgement, para. 104.

reasonable trier of fact from relying on the same set of circumstances to infer that perpetrators willfully made civilians the object of acts or threats of violence, and, at the same time, that such acts or threats of violence were committed with the primary purpose of spreading terror among the civilian population. Mladić's argument that the Trial Chamber erred in so doing because a finding of specific intent requires a "higher standard of proof"[1108] is accordingly ill-founded.

314. Moreover, in determining that spreading terror was the primary purpose of the sniping and shelling attacks in Sarajevo, the Trial Chamber considered the nature, manner, timing, location, and duration of the attacks, as well as: (i) that many civilians were targeted when carrying out daily activities such as while at the market, standing in line for food, or collecting water or firewood, and while in or around their homes or in parks and hospitals, or when travelling by tram; (ii) that children were also targeted while in school or playing or walking outside their house or on the street; (iii) that civilians were more prone to being targeted when circumstances suggested that the shooting or shelling had stopped and it was safe for them to continue their daily activities; (iv) the challenging living conditions they were subjected to; and (v) the constant and extreme fear they experienced of being hit by sniper or artillery fire.[1109] In this respect, Mladić recalls his submissions that Sarajevo was a legitimate military target,[1110] which the Appeals Chamber has dismissed above.[1111] He further argues that the existence of fear is not an element of the crime of terror, nor does its existence alone substantiate the conclusion that terror was intended,[1112] and that the origin of such fear cannot conclusively be attributed to the SRK in light of evidence of the ABiH sniping and attacking civilians in Sarajevo.[1113]

315. The Appeals Chamber recalls that terror could be defined as "extreme fear",[1114] and that such fear was merely one of several factors from which the Trial Chamber inferred specific intent in this case.[1115] The Appeals Chamber further observes that the Trial Chamber duly considered evidence of the ABiH's involvement in the events in Sarajevo[1116] and considers that such evidence does not detract from the Trial Chamber's findings regarding the SRK's perpetration of sniping and

[1108] *See* Mladić Appeal Brief, para. 448.
[1109] *See* Trial Judgement, para. 3201. *See also supra* para. 301.
[1110] *See* Mladić Appeal Brief, para. 452.
[1111] *See supra* Section III.C.1(b).
[1112] Mladić Appeal Brief, para. 453.
[1113] *See* Mladić Appeal Brief, para. 454, *referring to* Mladić Appeal Brief, para. 548.
[1114] *See Galić* Appeal Judgement, n. 320.
[1115] *See* Trial Judgement, para. 3201.
[1116] *See, e.g.*, Trial Judgement, paras. 1853, 1856, 1861, 1877, 1878, 1887, 1912, 1913, 1917, 1919, 1923, 1932, 1933, 1944, 1948, 1949, 1962, 1965-1969, 1971-1973, 2024, 2033, 2035, 2047, 2066-2068, 2087, 2093, 2100, 2101, 2106, 2117, 2144, 2156, 2162, 2164, 2169, 2181, 2183.

shelling attacks against civilians in Sarajevo and the relevant intent pertinent to such conduct.[1117] Consequently, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show any error in the Trial Chamber's assessment of the SRK perpetrators' specific intent to spread terror among the civilian population in Sarajevo.

(e) Conclusion

316. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 4.A of Mladić's appeal.

2. Alleged Errors Related to the Crimes of Murder and Unlawful Attacks on Civilians and that Spreading Terror was the Primary Purpose of the Sarajevo JCE (Ground 4.B)

317. The Trial Chamber concluded that several sniping and shelling incidents in Sarajevo, except in relation to non-civilian victims, constituted the crimes of murder, terror and/or unlawful attacks on civilians,[1118] and held Mladić responsible for these crimes through his participation in the Sarajevo JCE.[1119]

318. Mladić submits that the Trial Chamber erred in law and in fact in its assessment of the majority of the incidents that it considered to form part of the Sarajevo JCE crime base,[1120] and that the cumulative effect of these errors impacts the Trial Chamber's findings on the existence of the Sarajevo JCE.[1121] He requests the Appeals Chamber to reverse the Trial Chamber's findings on the affected incidents, "remove" the specified incidents from consideration under Counts 5, 9, and 10 of the Indictment, and reconsider the existence of the Sarajevo JCE and his alleged intent to further its common purpose.[1122] In particular, he argues that the Trial Chamber erred in: (i) failing to consider evidence of legitimate military activity;[1123] (ii) relying on adjudicated facts;[1124] (iii) failing to provide a reasoned opinion;[1125] and (iv) inferring the responsibility of the SRK.[1126] The Appeals Chamber will address these contentions in turn.

[1117] *See also infra* Section III.C.2(d).
[1118] Trial Judgement, paras. 3065, 3202, 3206, 3212.
[1119] Trial Judgement, paras. 4740, 4893, 4921, 5214.
[1120] *See* Mladić Notice of Appeal, paras. 40-48; Mladić Appeal Brief, paras. 460-464, 466-495, 497-526, 528, 530-540, 542, 543, 545-553. *See also* Mladić Reply Brief, paras. 78-85.
[1121] *See* Mladić Appeal Brief, paras. 555-562.
[1122] *See* Mladić Appeal Brief, paras. 465, 496, 527, 529, 541, 544, 554, 563, 564.
[1123] *See* Mladić Appeal Brief, paras. 460(a), 464, 466-495.
[1124] *See* Mladić Appeal Brief, paras. 460(b), 497-526.
[1125] *See* Mladić Appeal Brief, paras. 530-540. *See also* Mladić Appeal Brief, para. 460(c).
[1126] *See* Mladić Appeal Brief, paras. 542-553. *See also* Mladić Appeal Brief, para. 460(d).

(a) Alleged Errors in Failing to Consider Evidence of Legitimate Military Activity

319. The Trial Chamber found that, in relation to Scheduled Incident G.1, following an order from Mladić, from 5 p.m. on 28 May 1992 until early the next morning, members of the SRK fired artillery, rockets, and mortars against Sarajevo, injuring Witnesses RM-115 and Fadila Tarčin and causing extensive damage to buildings.[1127] The Trial Chamber determined that Mladić personally directed the attack on Sarajevo, including selecting targets such as the Presidency, the town hall, police headquarters, and the children's embassy and directing the fire away from Serb-populated areas.[1128]

320. Mladić submits that the Trial Chamber erred in finding that Scheduled Incident G.1 satisfied the elements of the crimes of terror and unlawful attacks on civilians.[1129] In particular, he argues that no reasonable trier of fact could have concluded beyond reasonable doubt, on the basis of the hearsay and circumstantial evidence of Witnesses Tarčin and John Wilson, that the SRK was responsible for the shelling attacks which injured Witnesses Tarčin and RM-115 and/or caused other grave consequences.[1130] He further argues that the Trial Chamber misconstrued the evidence of Witness RM-511 and relied on the hearsay evidence of Witness Wilson to erroneously conclude that the attacks were wilfully directed at civilians or civilian targets, in contrast with an assessment of the ICTY Appeals Chamber in the *Gotovina and Markač* case under similar circumstances.[1131]

321. The Prosecution responds that the Trial Chamber reasonably found that Scheduled Incident G.1 formed part of the crimes of terror and unlawful attacks on civilians, and that Mladić fails to show any error in the Trial Chamber's conclusions.[1132] It contends that the Trial Chamber did not base its conclusion regarding the SRK's responsibility solely on the evidence of Witnesses Tarčin and Wilson, but also on a wealth of other circumstantial evidence.[1133] The Prosecution further contends that the Trial Chamber correctly interpreted Witness RM-511's evidence, which was

[1127] Trial Judgement, paras. 2022, 3191(a), 4758. *See also* Indictment, Schedule G.1.
[1128] Trial Judgement, paras. 2022, 4758.
[1129] *See* Mladić Appeal Brief, paras. 464, 466-495.
[1130] *See* Mladić Appeal Brief, paras. 469-475.
[1131] *See* Mladić Appeal Brief, paras. 476-493; Mladić Reply Brief, paras. 78, 79, *referring to*, *inter alia*, *Gotovina and Markač* Appeal Judgement, paras. 62, 63, 65, 70-73, 77, 78, 81. In support of his arguments, Mladić also recalls his submissions regarding Sarajevo as a "defended city" (*see* Mladić Appeal Brief, paras. 467, 473, 487), which the Appeals Chamber has dismissed above. *See supra* Section III.C.1(b). In addition, Mladić contends that "targets of opportunity operated extensively in and around Sarajevo throughout the indictment period", and argues that "[t]he Trial Chamber did not exclude the possibility that shells were fired at these targets of opportunity during the bombardment". Mladić Appeal Brief, para. 489. The Appeals Chamber notes, however, that Mladić does not develop this argument any further, and a review of the evidence to which he points in support of his argument (*see* Mladić Appeal Brief, n. 610) shows that it does not relate to the scope of Scheduled Incident G.1 and/or does not refer to such "targets of opportunity". The Appeals Chamber accordingly dismisses Mladić's argument in this respect.
[1132] *See* Prosecution Response Brief, paras. 176-197.
[1133] *See* Prosecution Response Brief, paras. 180-184.

among several other factors leading the Trial Chamber to reasonably conclude that Mladić and SRK members wilfully directed Scheduled Incident G.1 against civilians, and asserts that Mladić's comparison of his case with the *Gotovina and Markač* case is inapposite.[1134]

322. The Appeals Chamber notes that, in reversing the conclusion of the ICTY Trial Chamber that certain artillery attacks were unlawful, the ICTY Appeals Chamber in the *Gotovina and Markač* case considered, *inter alia*, that there was no evidence that an explicit order was given to commence the unlawful attacks.[1135] By contrast, the Trial Chamber in the present case received evidence of Mladić explicitly ordering the attack on Sarajevo and selecting civilian targets.[1136] The Appeals Chamber therefore considers the *Gotovina and Markač* case to be distinguishable from the circumstances of the present case.

323. The Appeals Chamber recalls that trial chambers have the discretion to rely on hearsay evidence[1137] and may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that could be drawn from the evidence presented.[1138] Mladić's implication that the Trial Chamber could not reasonably rely on hearsay and/or circumstantial evidence to reach its conclusions is accordingly ill-founded. Moreover, the Appeals Chamber notes that the Trial Chamber's findings in relation to Scheduled Incident G.1 were not only based on the evidence of Witnesses Tarčin, Wilson, and RM-511, but also on the testimonies of Witnesses RM-115, Milan Mandivolić, Bakir Nakaš, Nedžib Đozo, as well as documentary evidence.[1139]

324. In particular, in concluding that during Scheduled Incident G.1 shells were fired by the SRK and aimed at civilian targets, the Trial Chamber considered evidence, *inter alia*, that: (i) Witness RM-115 was seriously injured in the night of 28 May 1992 by shrapnel while at a civilian hospital;[1140] (ii) Witness Tarčin was injured in the night of 28 May 1992 by shrapnel while hiding in the cellar of her house in the neighbourhood of Širokača, and learned of the model and calibre of the shell which caused her injuries and the origin of its fire from men in Širokača who had previously served with the JNA;[1141] (iii) the Stari Grad police station logbook recorded that, on 27 and 28 May 1992, VRS artillery shelled neighbourhoods within the vicinity of Širokača;[1142] (iv)

[1134] *See* Prosecution Response Brief, paras. 187-197.
[1135] *Gotovina and Markač* Appeal Judgement, paras. 81-83.
[1136] *See* Trial Judgement, paras. 2020, 2021.
[1137] *See, e.g.*, *Karadžić* Appeal Judgement, para. 598 and references cited therein.
[1138] *See, e.g.*, *Šešelj* Appeal Judgement, para. 63 and references cited therein.
[1139] *See* Trial Judgement, paras. 2016-2022.
[1140] Trial Judgement, paras. 2017, 2018, 2022.
[1141] Trial Judgement, paras. 2019, 2022.
[1142] Trial Judgement, para. 2019, n. 8590, *referring to* Exhibit P549, p. 72.

Mladić was the Commander of the VRS Main Staff,[1143] which comprised the SRK and other corps;[1144] (v) on 29 May 1992, Witness Wilson heard an audiotape of Mladić ordering the attack on Sarajevo, selecting civilian targets while directing fire away from Serb-populated areas and determining the calibre of fire to be used at his direct command only;[1145] and (vi) on 30 May 1992, Mladić admitted his responsibility for the attack on Sarajevo to Witness Wilson.[1146]

325. The Trial Chamber also recalled the evidence of Witness RM-511,[1147] who, according to the Trial Chamber, "testified that Mladić ordered the shelling of Velešići and Pofalići, two neighbourhoods in Sarajevo, and that the civilians in these neighbourhoods be harassed throughout the night so that they could not rest".[1148] In this regard, Mladić submits that "[W]itness RM-511 did not state that the Appellant had directed the bombardment of Sarajevo to harass civilians throughout the night".[1149] A review of the transcript of Witness RM-511's testimony shows that the witness was made to listen to an audiotape of Mladić ordering his subordinates to "[s]hoot at Velešići, and also at Pofalići, there is not much Serb population there […] [a]nd apply artillery reconnaissance, so that they cannot sleep that we roll out their minds".[1150] The witness explained that the expression "roll out their minds" meant "[t]o harass them throughout the night, so that they cannot rest"[1151] and confirmed that Mladić, [REDACTED].[1152] In the Appeals Chamber's view, the Trial Chamber could reasonably have concluded on the basis of such evidence that the shelling of Velešići and Pofalići was wilfully directed at harassing civilians. Mladić therefore fails to demonstrate an error in the Trial Chamber's assessment of Witness RM-511's evidence.

326. Having reviewed the evidence underlying the Trial Chamber's conclusions regarding Scheduled Incident G.1, the Appeals Chamber considers that Mladić shows no error in the Trial Chamber's approach or findings. The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber erred in considering Scheduled Incident G.1 as part of the crimes of terror and unlawful attacks on civilians as well as in its determination of the existence of the Sarajevo JCE and his alleged intent to further its common purpose.

[1143] Trial Judgement, para. 2022. *See also* Trial Judgement, para. 275.
[1144] Trial Judgement, para. 105.
[1145] Trial Judgement, paras. 2020, 2022, nn. 8602-8604.
[1146] Trial Judgement, para. 2021.
[1147] Trial Judgement, para. 2021.
[1148] Trial Judgement, para. 4700, *referring to* T. 13 November 2012 pp. 5049-5054 (closed session).
[1149] Mladić Appeal Brief, para. 477.
[1150] T. 13 November 2012 p. 5050 (closed session).
[1151] T. 13 November 2012 p. 5050 (closed session). Witness RM-511 did not specify, however, whether the purpose of ordering artillery fire into Velešići and Pofalići was to harass the civilian population. *See* T. 13 November 2012 pp. 5050, 5051 (closed session).
[1152] T. 13 November 2012 pp. 5051, 5052 (closed session).

(b) Alleged Errors in Relying on Adjudicated Facts

327. The Trial Chamber found that, in relation to Scheduled Incident F.11, on 8 October 1994 during a series of shootings, an SRK member killed one person, hit two trams and seriously wounded 11 other people.[1153] It further found that, in relation to Scheduled Incident G.8, on 5 February 1994, members of the SRK fired a mortar shell from Mrkovići which hit Markale Market, killing 68 people and injuring over 140 others.[1154]

328. Mladić submits that the Trial Chamber erred by relying on adjudicated facts to reach essential findings, particularly with respect to the SRK's responsibility, in relation to several alleged sniping and shelling incidents underpinning his convictions for the crimes of murder, terror, and/or unlawful attacks on civilians in Sarajevo.[1155] In particular, he contends that the Trial Chamber erred in: (i) failing to find that Adjudicated Fact 2303 was rebutted and then relying on it to conclude that the shots in Scheduled Incident F.11 were fired by a member of the SRK;[1156] and (ii) relying on adjudicated facts to conclude that the shell in Scheduled Incident G.8 originated from SRK territory after acknowledging that the Prosecution's own evidence could not support such a finding.[1157]

329. The Prosecution responds that the Trial Chamber properly relied on adjudicated facts in relation to the events in Sarajevo and that Mladić fails to show any error in the Trial Chamber's approach.[1158]

330. The Appeals Chamber recalls that "adjudicated facts that are judicially noticed […] remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial".[1159] As such, the final evaluation of the probative value of rebuttal evidence, which includes a final assessment of its reliability and credibility, as well as the extent to which it is consistent with or contradicts adjudicated facts, "will

[1153] Trial Judgement, paras. 1953, 3051 (Schedule F and other sniping incidents (b)). *See also* Indictment, Schedule F.11.
[1154] Trial Judgement, paras. 2097, 3051 (Schedule G and other shelling incidents (d)). *See also* Indictment, Schedule G.8.
[1155] *See* Mladić Appeal Brief, paras. 497-526. *See also* Mladić Reply Brief, paras. 80-82. Mladić submits that the Trial Chamber's error in this respect invalidates its findings for Scheduled Incidents F.5, F.11, F.12, F.13, F.15, F.16, G.4, G.7, G.8, and G.18 as well as Unscheduled Sniping Incidents of 24 October 1994, 22 November 1994, and 10 December 1994. Mladić Appeal Brief, para. 526.
[1156] *See* Mladić Appeal Brief, paras. 502-507.
[1157] *See* Mladić Appeal Brief, paras. 512-525.
[1158] *See* Prosecution Response Brief, paras. 198-205. The Prosecution also contends that Mladić's allegations on other incidents are unsupported since he only develops his submissions on Scheduled Incidents F.11 and G.8. Prosecution Response Brief, para. 199.
[1159] *Karemera et al.* Decision of 29 May 2009, para. 21.

only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it".[1160] The Appeals Chamber also recalls that, in order for it to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[1161] The Appeals Chamber notes, however, that Mladić only develops and supports his arguments with precise references to relevant adjudicated facts and/or paragraphs in the Trial Judgement in relation to Scheduled Incidents F.11 and G.8.[1162] The Appeals Chamber will therefore only consider Mladić's arguments in relation to Scheduled Incidents F.11 and G.8, and summarily dismisses his submissions under this sub-ground of appeal in relation to Scheduled Incidents F.5, F.12, F.13, F.15, F.16, G.4, G.7, and G.18 as well as Unscheduled Sniping Incidents of 24 October 1994, 22 November 1994, and 10 December 1994.

331. The Appeals Chamber notes that, in reaching its conclusions in relation to Scheduled Incident F.11, the Trial Chamber considered a number of adjudicated facts, including Adjudicated Fact 2303 according to which the shots in question were fired by an SRK member.[1163] With respect to the origin of the fire, Mladić contends that he presented rebuttal evidence offering a reasonable alternative, which should thus have been considered sufficient to rebut the adjudicated facts and re-open the evidentiary debate.[1164] A review of the Trial Judgement shows, however, that the Trial Chamber duly noted that, "[i]n relation to the origin of the fire, […] the Adjudicated Facts and some of the evidence differ".[1165] The Trial Chamber also thoroughly examined whether such evidence was sufficiently reliable to rebut the presumption of the accuracy of the adjudicated facts before determining that it could safely rely on them in its findings.[1166] In this instance, Mladić does not demonstrate that it was inappropriate for the Trial Chamber to rely on adjudicated facts notwithstanding his presentation of evidence that he argued was inconsistent with them.[1167] He also does not show that the Trial Chamber misapplied the burden of proof when evaluating his evidence presented to rebut the adjudicated facts.

[1160] *Karemera et al*. Decision of 29 May 2009, para. 15. *See also Karadžić* Appeal Judgement, para. 452.
[1161] *See supra* para. 21.
[1162] *See* Mladić Appeal Brief, paras. 503, 513, 521.
[1163] *See* Trial Judgement, paras. 1944, 1945, 1949-1952, *referring to* Adjudicated Facts 2297, 2299, 2300, 2302-2304.
[1164] Mladić Appeal Brief, para. 505. Mladić also recalls his submissions that judicially noticed facts should not be relied upon to establish the acts or conduct of an accused's proximate subordinates. Mladić Appeal Brief, para. 507. The Appeals Chamber has already dismissed Mladić's submissions in this respect. *See supra* Section III.A.2(a)(i).
[1165] Trial Judgement, para. 1949.
[1166] *See* Trial Judgement, paras. 1950-1953.
[1167] *Cf. Nizeyimana* Appeal Judgement, para. 54 (recalling that the mere presentation of alibi evidence does not necessarily raise the reasonable possibility that it is true and that it is within the discretion of the trial chamber to assess it).

332. As to its findings in relation to Scheduled Incident G.8, the Trial Chamber similarly considered a number of adjudicated facts – including Adjudicated Facts 2519 and 2525 according to which the mortar shell was fired from SRK-controlled territory.[1168] Mladić points to the Trial Chamber's finding that evidence of investigations that were inconclusive as to the origin of fire did not contradict the adjudicated facts establishing the matter,[1169] and contends that the Trial Chamber impermissibly entered "into the arena of the parties" and "saved the Prosecution case" by relying on adjudicated facts instead of the Prosecution evidence.[1170] He argues that the fact that the Prosecution evidence was inconclusive as to the origin of fire should have been considered sufficient to rebut the adjudicated facts on this point.[1171]

333. The Appeals Chamber recalls that judicially noticed facts are presumed to be accurate, and therefore do not have to be proven again at trial, but may be challenged subject to that presumption.[1172] As such, the Prosecution was not required to adduce evidence supporting the origin of fire as stated in the adjudicated facts,[1173] even if, according to Mladić, the Prosecution intended to do so.[1174] Moreover, the Appeals Chamber notes that the Trial Chamber duly considered evidence disputing that the SRK fired the shell in Scheduled Incident G.8.[1175] The Trial Chamber also thoroughly examined whether such evidence was sufficiently reliable to rebut the presumption of the accuracy of the adjudicated facts before determining that it could safely rely on them in its findings.[1176] Mladić does not demonstrate that it was inappropriate for the Trial Chamber to rely on adjudicated facts notwithstanding that the record included relevant Prosecution evidence that the Trial Chamber did not rely upon.

334. The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's reliance on adjudicated facts in its assessment of Scheduled Incidents F.11 and G.8.

(c) Alleged Error in Failing to Provide a Reasoned Opinion

335. The Trial Chamber found that, in relation to Scheduled Incident G.6, on 22 January 1994, three mortars were fired by a member or members of the SRK hitting a neighbourhood area where

[1168] *See* Trial Judgement, paras. 2058, 2061-2063, *referring to*, *inter alia*, Adjudicated Facts 2482, 2499, 2504, 2513, 2515, 2517, 2519, 2520, 2522-2525, 2528.
[1169] Mladić Appeal Brief, paras. 513, 521, *referring to* Trial Judgement, para. 2084.
[1170] *See* Mladić Appeal Brief, paras. 520-525.
[1171] *See* Mladić Appeal Brief, paras. 512-525, *referring to*, *inter alia*, Trial Judgement, para. 2084.
[1172] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 452 and references cited therein.
[1173] *See Tolimir* Appeal Judgement, para. 25.
[1174] Mladić Appeal Brief, para. 516.
[1175] *See* Trial Judgement, paras. 2087-2094.

children were playing, killing six children and severely wounding six other civilians, five of whom were children.[1177] It further found that, in relation to Scheduled Incident G.7, on 4 February 1994, three mortar shells were fired by an SRK member on a residential neighbourhood of Dobrinja, killing at least eight civilians and wounding at least eighteen persons who were queuing for humanitarian aid.[1178]

336. Mladić submits that the Trial Chamber erred by failing to provide a reasoned opinion in finding that the perpetrators of the attacks in Scheduled Incidents G.6 and G.7 wilfully intended to target civilians.[1179] In particular, he contends that the Trial Chamber elaborated on a number of specific incidents in reaching its conclusion that the perpetrators wilfully targeted civilians, but that Scheduled Incidents G.6 and G.7 were not included in this analysis.[1180] Mladić further argues that circumstantial evidence such as Adjudicated Fact 2434, on which the Trial Chamber relied to conclude that the attack in Scheduled Incident G.6 was not directed at a legitimate military objective, cannot, by itself, demonstrate the wilful intent of the perpetrator to attack a civilian target.[1181]

337. The Prosecution recalls its submissions that the SRK perpetrators' intent is not required to be proven in order to hold Mladić liable as a member of the Sarajevo JCE, and responds that, in any event, the Trial Chamber's conclusion on the SRK perpetrators' wilful intent for Scheduled Incidents G.6 and G.7 with regard to murder, terror, and unlawful attacks on civilians was reasoned and reasonable.[1182]

338. The Appeals Chamber recalls that the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats may be inferred from the circumstances of the acts or threats of violence, such as, *inter alia*, their nature, manner, timing, and duration.[1183] Mladić's submission that the Trial Chamber erred in relying exclusively on circumstantial evidence such as Adjudicated Fact 2434, according to which an ABiH military unit

[1176] *See* Trial Judgement, paras. 2095-2097.
[1177] Trial Judgement, paras. 2050, 3051 (Schedule G and other shelling incidents (b)). *See also* Indictment, Schedule G.6.
[1178] Trial Judgement, paras. 2057, 3051 (Schedule G and other shelling incidents (c)). *See also* Indictment, Schedule G.7.
[1179] *See* Mladić Appeal Brief, paras. 528-540. *See also* Mladić Reply Brief, paras. 83, 84.
[1180] Mladić Appeal Brief, para. 532.
[1181] *See* Mladić Appeal Brief, paras. 533, 534, 536-538.
[1182] *See* Prosecution Response Brief, paras. 206-211.
[1183] *See supra* para. 313.

was not the intended target of the attack in Scheduled Incident G.6,[1184] to infer the wilful intent to attack civilians is accordingly ill-founded.

339. The Appeals Chamber further recalls that a trial chamber is not required to articulate every step of its reasoning and that a trial judgement must be read as a whole.[1185] In the present case, a reading of the Trial Judgement shows that the Trial Chamber clearly considered Scheduled Incidents G.6 and G.7 among those incidents for which it inferred the intent to target civilians beyond reasonable doubt,[1186] and in respect of which it explicitly "considered a number of factors in determining whether civilians or the civilian population were targeted."[1187] Such factors included, *inter alia*, that the victims were civilians, that they were in residential areas when targeted, and that there were no military targets in their vicinity.[1188]

340. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber failed to provide a reasoned opinion in finding that perpetrators of the attacks in Scheduled Incidents G.6 and G.7 wilfully intended to target civilians.

(d) Alleged Errors in Inferring SRK Responsibility from Circumstantial Evidence

341. The Trial Chamber found that, in relation to Scheduled Incident F.5, on 2 November 1993, a member of the SRK targeted, shot, and injured a Bosnian Muslim civilian in her leg.[1189] It determined that the shot was fired by a member of the SRK on the basis that it originated from SRK-held territory.[1190] The Trial Chamber similarly determined that the SRK was responsible for a number of other incidents on the basis that the fire in those incidents originated from SRK-held territory.[1191]

342. Mladić submits that the Trial Chamber erred in inferring the SRK's responsibility for alleged incidents such as Scheduled Incident F.5 on the sole basis that the fire originated from SRK-held territory.[1192] He contends that the Trial Chamber failed to consider exculpatory evidence such as that the ABiH were, at times, tasked to snipe civilians in Sarajevo to make it appear as

[1184] *See* Mladić Appeal Brief, para. 533; Trial Judgement, para. 2043, n. 2434.
[1185] *See, e.g., Karadžić* Appeal Judgement, paras. 563, 702 and references cited therein.
[1186] *See* Trial Judgement, paras. 3057, 3200, 3211.
[1187] Trial Judgement, para. 3196.
[1188] *See* Trial Judgement, para. 3199. *See also* Trial Judgement, para. 3201, *referring to, inter alia*, Scheduled Incidents G.6 and G.7.
[1189] Trial Judgement, paras. 1937, 3190(c). *See also* Indictment, Schedule F.5.
[1190] Trial Judgement, para. 1937.
[1191] *See, e.g.*, Trial Judgement, paras. 1922, 1943, 1980, 1982, 1984, 1986, 1988, 1992, 1994, 1996, 1998, 2151, 2177.
[1192] *See* Mladić Appeal Brief, paras. 542-552, *referring to, inter alia*, Trial Judgement, para. 1937.

though the SRK were responsible,[1193] and argues that the Trial Chamber's errors in this regard affected a number of other incidents.[1194]

343. The Prosecution responds that the Trial Chamber reasonably found the SRK to be responsible when fire originated from SRK-held territory since this was the only inference available on the evidence.[1195] It also contends that the Trial Chamber did address the possibility that the ABiH fired from SRK-held territory.[1196]

344. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that would be drawn from the evidence presented.[1197] As such, the Trial Chamber's inference that the SRK must have been responsible for fire that originated from SRK-held territory is not *per se* unreasonable, unless the relevant evidence would suggest otherwise. In this respect, the Appeals Chamber notes that Mladić does not support his argument that the ABiH could also have been responsible for firing at civilians from SRK-held territory with references to any evidence underlying any of the specific incidents he contends were affected by the Trial Chamber's alleged error.[1198]

345. Moreover, a review of the Trial Judgement shows that the Trial Chamber explicitly considered and analyzed exculpatory evidence disputing the origin of fire, including evidence of possible ABiH involvement, in respect of certain incidents.[1199] With respect to Scheduled Incident F.5, for example, the Trial Chamber considered the evidence of Witness Mile Poparić, who testified that there was a line of sight from ABiH-held territory to the impact site and that the shot could not

[1193] Mladić Appeal Brief, para. 548.
[1194] Mladić Appeal Brief, para. 553, *referring to* Scheduled Incidents F.2, F.9, G.18, Unscheduled Sniping Incidents of 31 March 1993, 25 June 1993, 27 June 1993, 24 July 1993, 5 August 1993, 26 September 1993, 2 November 1993, 9 November 1993, 11 January 1994, and Unscheduled Shelling Incidents of 6 and 7 September 1994. With respect to Mladić's reference to "Scheduled Incident[] F.2", the Appeals Chamber notes that Schedule F.2 was stricken from the Indictment and therefore not evaluated by the Trial Chamber (*see* Indictment, Schedule F; Trial Judgement, pp. 985-989), and accordingly understands Mladić to be referring to the Trial Chamber's analysis of Schedule F.1. *See* Trial Judgement, para. 1922.
[1195] *See* Prosecution Response Brief, paras. 212-216.
[1196] *See* Prosecution Response Brief, paras. 214-216. The Prosecution also contends that Mladić did not challenge the finding that the fire came from SRK-held territory. Prosecution Response Brief, para. 215. Mladić replies that this does not relieve the Prosecution of its burden to prove its case beyond reasonable doubt. *See* Mladić Reply Brief, para. 85.
[1197] *See, e.g.*, *Šešelj* Appeal Judgement, para. 63 and references cited therein.
[1198] Mladić merely points to the evidence of Witness Edin Garaplija that the Sevé unit of the ABiH shot a French soldier in such a way as to make it appear that the Serbs were responsible for it, and to a newspaper article which significantly predates all of the incidents that Mladić contests. *See* Mladić Appeal Brief, para. 548, *referring to* T. 31 March 2015 p. 33909, Exhibit D1425.
[1199] *See, e.g.*, Trial Judgement, paras. 1917-1921 (Scheduled Incident F.1), 1932-1936 (Scheduled Incident F.5), 1940-1942 (Scheduled Incident F.9), 2121-2139, 2144-2149 (Scheduled Incident G.18).

have come from Serb-held positions.[1200] The Trial Chamber concluded that such evidence was not sufficiently reliable to rebut Adjudicated Facts 2263 and 2266 establishing that the shot was fired from SRK-held territory, and that any remaining contradictory evidence related to marginal aspects of the incident and did not affect the outcome of its finding.[1201] The Trial Chamber further noted that the only evidence to support the Defence's argument that "ABiH units sn[uck] into SRK-held territory and fired from there into the city" was hearsay evidence, which the Trial Chamber determined to be "very vague and insufficiently probative to affect the Trial Chamber's finding in this regard".[1202] In determining SRK responsibility with respect to several other incidents, the Trial Chamber "refer[red] to its considerations […] as set out in its factual finding on Scheduled Incident F.5".[1203] Mladić demonstrates no error in the Trial Chamber's approach. The Appeals Chamber, Judge Nyambe dissenting, accordingly dismisses Mladić's arguments in this respect.

(e) Conclusion

346. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 4.B of Mladić's appeal.[1204]

[1200] Trial Judgement, paras. 1932-1934.
[1201] *See* Trial Judgement, paras. 1933-1937.
[1202] Trial Judgement, n. 8220.
[1203] *See*, *e.g.*, Trial Judgement, nn. 8411, 8428, 8438, 8452, 8472, 8483, 8500, 9313.
[1204] In view of the Appeals Chamber's conclusions that Mladić failed to demonstrate any error in Ground 4.B of his appeal, Mladić's submissions related to the cumulative effect of these alleged errors are dismissed. *See* Mladić Appeal Brief, paras. 555-564.

D. Alleged Errors Related to the Srebrenica JCE (Ground 5)

347. The Trial Chamber found that, between the days immediately preceding 11 July 1995 and at least October 1995, the Srebrenica JCE existed with the primary purpose of eliminating Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men.[1205] The Trial Chamber concluded that the objective of the Srebrenica JCE involved the commission of the crimes of persecution and inhumane acts (forcible transfer) "in the days immediately preceding 11 July 1995".[1206] By the morning of 12 July 1995, and "prior to the first crime being committed", the crimes of genocide, extermination, and murder became part of the means to achieve the objective.[1207] According to the Trial Chamber, members of the Srebrenica JCE included Radovan Karadžić, Radislav Krstić, Vujadin Popović, Zdravko Tolimir, Ljubomir Borovčanin, Svetozar Kosorić, Radivoje Miletić, Radoslav Janković, Ljubiša Beara, Milenko Živanović, Vinko Pandurević, Vidoje Blagojević, and Mladić.[1208]

348. The Trial Chamber found that Mladić contributed significantly to the Srebrenica JCE[1209] and that he shared the intent to achieve its common objective.[1210] As a member of the Srebrenica JCE, the Trial Chamber found him guilty of the crimes of genocide, persecution, inhumane acts (forcible transfer), murder, and extermination.[1211]

349. Mladić submits that the Trial Chamber committed errors of law and fact in finding he participated in, significantly contributed to, and shared the intent for the Srebrenica JCE, and requests that the Appeals Chamber reverse his convictions for the crimes of genocide as well as murder, extermination, persecution, and inhumane acts (forcible transfer) as crimes against humanity.[1212]

1. Alleged Errors Related to the Common Plan for Forcible Transfer, Genocide, Extermination, and Murder (Ground 5.A)

350. Mladić submits that the Trial Chamber erred in its assessment of the evidence in relation to the Srebrenica JCE and in finding that he was part of a common criminal plan to: (i) forcibly

[1205] Trial Judgement, paras. 4987, 5096.
[1206] Trial Judgement, paras. 4987, 5096.
[1207] Trial Judgement, paras. 4987, 5096.
[1208] Trial Judgement, paras. 4988, 5096, 5098, 5131.
[1209] Trial Judgement, paras. 5097, 5098.
[1210] Trial Judgement, paras. 5128, 5130, 5131.
[1211] Trial Judgement, paras. 5098, 5128, 5130, 5191, 5214.
[1212] *See* Mladić Notice of Appeal, paras. 51-66; Mladić Appeal Brief, paras. 570-694; Mladić Reply Brief, paras. 86-99; T. 25 August 2020 pp. 64-74, 78-85; T. 26 August 2020 pp. 44-57. According to Mladić, the Trial Chamber erred by convicting him of crimes in Srebrenica by way of a legal fiction. *See* T. 25 August 2020 pp. 74, 78, 82.

transfer individuals; and (ii) commit genocide, extermination, and murder.[1213] The Appeals Chamber will address these arguments in turn.

(a) Alleged Errors Concerning the Common Plan for Forcible Removal

351. The Trial Chamber found that the VRS began attacking the Srebrenica enclave on 6 July 1995,[1214] and, as a result, thousands of Bosnian Muslims fled to Potočari seeking protection within the UNPROFOR compound.[1215] The Trial Chamber held that the displacement of the Bosnian Muslim civilians gathered in Potočari was organized by the VRS and the MUP and took place, for the first convoy only, under the supervision and escort of UNPROFOR.[1216] In considering the displacements, the Trial Chamber recalled: (i) the circumstances surrounding the movement of population from Srebrenica to Potočari, including the orders by the VRS 10th Sabotage Detachment to Srebrenica Town inhabitants to leave, the shells fired by the VRS at the UNPROFOR Bravo compound in Srebrenica, and the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, where the population sought refuge, namely the shots and shells fired around the compound, the dire living conditions, and the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women, children, and the elderly onto the buses while some were hit by members of the MUP, and that the VRS escorted the buses towards Bosnian Muslim controlled territory.[1217] Based on the above, the Trial Chamber concluded that the approximately 25,000 Bosnian Muslims, mostly women, children, and the elderly who left Potočari to go to Bosnian Muslim controlled territory, did not have a genuine choice but to leave.[1218]

352. With respect to Mladić's role in the transfers, the Trial Chamber found that Mladić gave several orders in relation to the displacement of the Bosnian Muslim civilians from Srebrenica, including the transportation of Bosnian Muslim civilians out of Potočari.[1219] In particular, the Trial Chamber found that Mladić and other VRS officers, a representative of the Serb civilian leadership in Srebrenica, UNPROFOR members, and "representatives" of the Bosnian Muslim population "agreed" on 12 July 1995 that the evacuation of the Bosnian Muslim civilians would be organized

[1213] *See* Mladić Notice of Appeal, paras. 54-56; Mladić Appeal Brief, paras. 570, 575-600; Mladić Reply Brief, paras. 86-92; T. 25 August 2020 pp. 64-71, 73, 74, 79-82; T. 26 August 2020 pp. 44-51. *See also* T. 26 August 2020 pp. 51-57.
[1214] Trial Judgement, paras. 2443, 2968.
[1215] Trial Judgement, paras. 2446, 2968.
[1216] Trial Judgement, para. 3159.
[1217] Trial Judgement, para. 3159.
[1218] Trial Judgement, para. 3159.
[1219] Trial Judgement, paras. 5052, 5067, 5097.

by the VRS and Bosnian Serb police forces, and would take place under the supervision and escort of UNPROFOR.[1220]

353. Mladić submits that the Trial Chamber erred in inferring that he was part of a joint criminal enterprise to eliminate the Bosnian Muslims of Srebrenica through their forcible transfer given that the totality of the evidence allowed for another reasonable inference – namely that he was acting in coordination with high-level Dutch Battalion ("DutchBat")/UNPROFOR officials to evacuate civilians for humanitarian reasons.[1221] He asserts that there was ample evidence that the evacuations were necessary and observes that the Trial Chamber credited evidence that he had given civilians a choice to leave.[1222] In this context, he argues that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations.[1223] Mladić requests that the Appeals Chamber reverse the Trial Chamber's findings of forcible transfer under the first form of joint criminal enterprise or, alternatively, reverse the findings to the extent of the errors identified.[1224]

354. The Prosecution responds that Mladić disagrees with the Trial Chamber's evidentiary assessment without demonstrating error.[1225] It argues that the Trial Chamber considered and rejected Mladić's argument that the evidence suggested that the civilian population was evacuated for humanitarian reasons.[1226]

355. Mladić replies that the Prosecution has taken the Trial Chamber's findings out of context and did not respond to the errors he identified.[1227]

356. The Appeals Chamber observes that Mladić seeks to demonstrate under this ground of appeal that the evacuations were not unlawful. The Appeals Chamber recalls that forcible transfer entails the displacement of persons from the area in which they are lawfully present, without grounds permitted under international law.[1228] The requirement that the displacement be forced is

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[1220] Trial Judgement, paras. 2972, 2982.
[1221] *See* Mladić Appeal Brief, paras. 575, 580-582; T. 25 August 2020 pp. 65-71; T. 26 August 2020 pp. 45, 47-51. Mladić further submits that the Trial Chamber did not abide by ICTY jurisprudence to the effect that the forced character of the displacement is determined by the absence of a genuine choice by the victim in his or her displacement. T. 25 August 2020 pp. 70, 71.
[1222] Mladić Appeal Brief, paras. 578, 579; T. 25 August 2020 pp. 65, 67-70; T. 26 August 2020 pp. 47-51.
[1223] *See* Mladić Appeal Brief, paras. 577-581; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47-51. Mladić argues that the Trial Chamber relied on selective evidence to conclude that his conduct in arranging buses contributed to the common criminal objective. Mladić Appeal Brief, para. 576; T. 25 August 2020, pp. 65, 69.
[1224] Mladić Appeal Brief, para. 583.
[1225] Prosecution Response Brief, paras. 218, 221; T. 26 August 2020 pp. 3, 7-14.
[1226] Prosecution Response Brief, paras. 222, 223; T. 26 August 2020 pp. 7-14.
[1227] Mladić Reply Brief, paras. 87, 88.
[1228] *See Šešelj* Appeal Judgement, para. 150, nn. 538, 541 and references cited therein; *Krajišnik* Appeal Judgement, para. 308.

not limited to physical force but can be met through the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive environment. It is the absence of genuine choice that makes the displacement unlawful. While fear of violence, use of force, or other such circumstances may create an environment where there is no choice but to leave, the determination as to whether a transferred person had a genuine choice is one to be made in the context of a particular case being considered.[1229] Displacement may be permitted by international law in certain limited circumstances,[1230] provided it is temporary in nature[1231] and conducted humanely.[1232] Notably, however, displacement is not permissible where the humanitarian crisis that caused the displacement is the result of the accused's own unlawful activity.[1233] In addition, the participation of a non-governmental organization in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful.[1234]

357. The Appeals Chamber observes that the Trial Chamber considered whether the displacement of the Bosnian Muslim civilians gathered in Potočari on 12 and 13 July 1995 was undertaken pursuant to an evacuation permitted by international law and found that this was not the case.[1235] Mladić contends that the Trial Chamber failed to give sufficient weight to evidence that the transfers were necessary for humanitarian reasons and that he "worked in coordination with" UNPROFOR to evacuate the civilians.[1236] The Appeals Chamber observes that, when addressing the attacks on Srebrenica, the displacement of the Bosnian Muslim civilians, and Mladić's role in the Srebrenica JCE, the Trial Chamber considered the evidence to which Mladić points on appeal.[1237] The Appeals Chamber also observes that the Trial Chamber correctly recalled that "the displacement of persons carried out pursuant to an agreement among political or military leaders or under the auspices of an organization does not necessarily make it voluntary".[1238] While Mladić seeks to emphasize cooperation with international organizations with respect to the relocations of civilians from Srebrenica, he ignores the Trial Chamber's finding that DutchBat soldiers

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[1229] *See Stanišić and Župljanin* Appeal Judgement, para. 918 and references cited therein (internal citations omitted).
[1230] *See Krajišnik* Appeal Judgement, para. 308; *Stakić* Appeal Judgement, para. 284.
[1231] *See Blagojević and Jokić* Trial Judgement, para. 597, *referring to* Article 49(2) of Geneva Convention IV.
[1232] *See Blagojević and Jokić* Trial Judgement, para. 599, *referring to* Article 49(3) of Geneva Convention IV, Article 17(1) of Additional Protocol II.
[1233] *Stakić* Appeal Judgement, para. 287.
[1234] *Simić* Appeal Judgement, para. 180; *Stakić* Appeal Judgement, para. 286.
[1235] Trial Judgement, paras. 3159, 3164. *See also* Trial Judgement, para. 3120.
[1236] Mladić Appeal Brief, para. 578; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47-51.
[1237] *See* Mladić Appeal Brief, paras. 577-579. *See, e.g.*, Trial Judgement, paras. 2388, 2389, 2391, 2393-2396, 2398, 2416, 2419, 2421, 2422, 2424, 2427, 2433, 2437, 2438, 2457, 2461, 2463-2467, 2470, 2473, 2479, 2480, 2492, 2493, 2497, 2500, 2509, 2515, 2516, 2518, 2522-2524, 2526, 2529, 2531, 2535, 2537, 2538, 2546-2548, 2552, 2553, 2572, 2587, 2617, 2618, 4926, 4949, 4992, 4995, 4998, 5003, 5071, 5074, 5087, 5117.
[1238] Trial Judgement, para. 3159.

accompanied only the first convoys on 12 July 1995 but were then stopped by the VRS and that VRS soldiers stole DutchBat jeeps as well as weapons and equipment, rendering further DutchBat escorts impossible.[1239] Mladić does not contest these conclusions.

358. Moreover, Mladić fails to undermine the core findings relied upon by the Trial Chamber to determine that the displacements from Srebrenica were not lawful. Significantly, the Trial Chamber recalled that it was the conduct of the VRS that precipitated the humanitarian crises that preceded the displacements as well as the violent nature in which the VRS effected the displacements.[1240] The Trial Chamber concluded that, in such circumstances, the civilians who left Srebrenica in July 1995 "did not have a genuine choice but to leave".[1241] Furthermore, in assessing displacements cumulatively, which included those related to Srebrenica in July 1995, the Trial Chamber found that the transfers were "not carried out for the security of the persons involved, but rather to transfer them out of certain municipalities" and that no steps were taken to secure the return of those displaced.[1242] On this basis, the Trial Chamber concluded that there "were no circumstances that justified the displacement […] as recognized by international law".[1243]

359. In view of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred with respect to the Srebrenica JCE in finding that the removal of Bosnian Muslim women, young children, and some elderly men from Srebrenica was forcible.

(b) Alleged Errors Concerning the Common Plan to Commit Genocide, Extermination, and Murder

360. The Trial Chamber found that, by the morning of 12 July 1995, the objective of the Srebrenica JCE developed to involve the commission of the crimes of genocide, extermination, and murder.[1244] In reaching this finding, the Trial Chamber specifically considered its findings that Momir Nikolić, Kosorić, and Popović discussed the "killings on the morning of 12 July 1995" as

[1239] Trial Judgement, para. 2984.
[1240] Trial Judgement, para. 3159. *See also* Trial Judgement, paras. 2443-2454, 2556, 2257, 2973-2981, 3164, 5052.
[1241] Trial Judgement, para. 3159. *See also* Trial Judgement, para. 4981. Mladić erroneously submits that the Trial Chamber found that he had given civilians a choice to leave or remain and that evidence of statements made by him supports the inference that he was acting to evacuate the civilians for humanitarian reasons. *See* Mladić Appeal Brief, para. 579, *referring to* Trial Judgement, para. 2472. The Trial Chamber did not accept that Mladić had given civilians such a choice and found that Mladić's statements were "deliberately misleading". *See* Trial Judgement, paras. 4965, 5082, 5083. Mladić fails to demonstrate any error in this assessment.
[1242] Trial Judgement, para. 3164.
[1243] Trial Judgement, para. 3164.
[1244] Trial Judgement, paras. 4987, 5096.

well as findings that Tolimir first ordered that Batković camp be prepared for a large number of detainees and thereafter conveyed that this plan had been given up.[1245]

361. As it concerns Mladić's involvement in the Srebrenica JCE, the Trial Chamber found, *inter alia*, that between at least 11 July and 11 October 1995, Mladić issued several orders to VRS forces, including the Drina Corps, concerning the operation in and around Srebrenica, provided misleading information about the crimes, and failed to take adequate steps to investigate and/or punish the perpetrators.[1246] The Trial Chamber held that Mladić significantly contributed to achieving the objective of the Srebrenica JCE.[1247]

362. The Trial Chamber further determined that Mladić shared the intent to achieve the common objective of the Srebrenica JCE, including genocidal intent, based on his statements and conduct throughout the take-over of the Srebrenica enclave, including: (i) his command and control over VRS and MUP units operating in and around Srebrenica in July 1995; (ii) his role in the Hotel Fontana meetings on 11 and 12 July 1995, including statements that the Bosnian Muslims could either "live or vanish", "survive or disappear", and that only the people who could secure the surrender of weapons would save the Bosnian Muslims from "destruction"; (iii) his presence in a meeting at the Bratunac Command Centre on 13 July 1995 with VRS and MUP officers during which the task of killing 8,000 Muslim males near Konjević Polje was discussed; (iv) his presence during the gathering and separation of Bosnian Muslims in Potočari on 12 and 13 July 1995; (v) his denial of the crimes committed in Srebrenica; and (vi) the measures he took to provide misleading information and prevent the media from knowing what was happening in Srebrenica.[1248]

363. Mladić contends that the Trial Chamber gave insufficient weight to the lack of direct, indirect, or corroborative evidence that a meeting occurred between 11 and 12 July 1995 wherein the criminal objective to commit genocide, extermination, and murder was discussed or agreed upon.[1249] He submits that the Trial Chamber: (i) erroneously relied on hearsay evidence from Witness Momir Nikolić to indirectly conclude that such a meeting occurred;[1250] (ii) failed to take

[1245] Trial Judgement, para. 4987.
[1246] Trial Judgement, paras. 5052, 5066, 5067, 5097.
[1247] Trial Judgement, para. 5098.
[1248] Trial Judgement, paras. 5128, 5130.
[1249] Mladić Appeal Brief, paras. 584, 587, 593; T. 25 August 2020 pp. 78-82.
[1250] Mladić Appeal Brief, paras. 585, 587, 589; T. 25 August 2020 pp. 79-82. Mladić argues that the Trial Chamber erred by relying on Witness Momir Nikolić's evidence because: (i) his evidence of a meeting occurring between 11 and 12 July 1995 did not establish a link with Mladić; and (ii) it failed to account for the evidence of Witness Bruce Bursik, a Prosecution investigator, and its own determination that Witness Momir Nikolić lacked credibility. *See* Mladić Appeal Brief, paras. 585, 587-589, 593, 594; T. 25 August 2020 pp. 79-82. He further argues that the Trial Chamber erred in relying on Exhibit D1228, an unsworn out of court statement of Witness Momir Nikolić as summarized by Witness Bursik, for the truth of its contents to establish the occurrence of this meeting: (i) without having admitted it pursuant to

into account that the evidence demonstrated that Mladić would not have had the opportunity to attend such a meeting;[1251] and (iii) failed to sufficiently account for Prosecution and Defence evidence that the only known meeting including Mladić and his subordinates that occurred at that time involved no discussion of killings or any criminal objective.[1252]

364. Mladić further submits that the Trial Chamber inferred his participation in the common criminal enterprise based on his statements at the Hotel Fontana meetings and command and control over the VRS and the MUP but erred by: (i) giving insufficient weight to the military context in which the statements at the Hotel Fontana meetings were made;[1253] and (ii) placing undue weight on his position and role in the military without sufficiently accounting for the absence of evidence "showing direct orders".[1254]

365. Mladić argues that, in light of the above, another reasonable inference was available and, therefore, the *actus reus* for the Srebrenica JCE supporting his convictions for genocide, extermination, and murder is not established beyond reasonable doubt.[1255] He requests that the Appeals Chamber reverse these convictions or, alternatively, reverse the findings to the extent of the errors identified.[1256]

366. The Prosecution responds that it was not its case at trial, and that the Trial Chamber never found, that there was a specific meeting on the night of 11 to 12 July 1995,[1257] but rather that the plan "must have been discussed and decided upon sometime between the evening of 11 July […] and 10:00 hours on 12 July".[1258] Accordingly, the Prosecution argues that Mladić's challenge to such a non-existent finding should be summarily dismissed.[1259] It further submits that the Trial Chamber specifically considered the argument that there was no evidence of a meeting where

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Rule 92 *bis* or *quater* of the ICTY Rules; (ii) because the statement had not been recorded as required under Rule 43 of the ICTY Rules; and (iii) because the Prosecution did not rely on it in its closing submissions to support the position that a meeting involving Mladić occurred between 11 and 12 July 1995 and concerned a common criminal plan for genocide or extermination. *See* Mladić Appeal Brief, paras. 590-592; T. 25 August 2020 pp. 79, 80.

[1251] Mladić Appeal Brief, para. 593.

[1252] *See* Mladić Appeal Brief, paras. 584, 585, 587, 592-594, *referring to, inter alia*, Trial Judgement, paras. 4932, 4934, 4936, 4937; T. 25 August 2020 pp. 79, 80.

[1253] Mladić Appeal Brief, para. 595; T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.

[1254] Mladić Appeal Brief, para. 596; T. 25 August 2020 pp. 74, 78, 79. *See also* T. 26 August 2020 pp. 51-57. Mladić's arguments regarding the Trial Chamber's alleged errors in relation to his alibi are addressed elsewhere in the Judgement. *See infra* Section III.D.2(a). *See also* T. 25 August 2020 pp. 71, 80, 81, 84; T. 26 August 2020 pp. 44, 56 (where Mladić seeks to distance himself from the crimes in Srebrenica by arguing that the killings were committed by rogue members of the VRS, separate from the normal chain of command).

[1255] Mladić Appeal Brief, paras. 584, 597-599. *See also* T. 25 August 2020 pp. 72, 73, 80-82, 84; T. 26 August 2020 pp. 44, 56, 57.

[1256] Mladić Appeal Brief, para. 600.

[1257] Prosecution Response Brief, paras. 226, 227; T. 26 August 2020 pp. 15, 16.

[1258] Prosecution Response Brief, para. 227, *quoting* Prosecution Final Trial Brief, para. 1175; T. 26 August 2020 pp. 16, 17.

crimes were discussed and that Mladić fails to demonstrate how the Trial Chamber gave insufficient weight to that argument.[1260] The Prosecution argues that the Trial Chamber was entitled to rely upon the evidence as it did and that Mladić identifies no error.[1261] The Prosecution further contends that Mladić's submissions that the Trial Chamber placed undue weight on his position and role in the military and gave insufficient weight to a lack of direct orders are unsupported.[1262]

367. Mladić replies that the Prosecution fails to engage with or undermine the legal or factual bases of his submissions.[1263] He contends that the Prosecution submissions misrepresent his arguments and that the Prosecution incorrectly relies on inapplicable evidence.[1264]

368. The Appeals Chamber observes that, contrary to Mladić's submissions, the Trial Chamber made no finding that a meeting attended by Mladić and his subordinates occurred between 11 and 12 July 1995 wherein the common criminal plan to commit genocide, extermination, and murder was discussed or formulated. In this respect, Mladić simply points to evidence summarized by the Trial Chamber or arguments made by the Prosecution rather than any finding made by the Trial Chamber.[1265] Consequently, Mladić's arguments that the Trial Chamber erroneously relied on Witness Momir Nikolić's hearsay evidence to reach such a conclusion as well as his contentions that the evidence on the record would not have permitted Mladić to attend such a meeting are without merit and are dismissed. In light of this conclusion, the Appeals Chamber further dismisses as moot Mladić's arguments that the Trial Chamber erred by relying on Witness Momir Nikolić's evidence because: (i) his evidence of a meeting occurring between 11 and 12 July 1995 did not establish a link with Mladić; (ii) it failed to account for Witness Bursik's evidence and its own determination that Witness Momir Nikolić lacked credibility; and (iii) it relied upon Exhibit D1228 for the truth of its contents to establish the occurrence of this meeting contrary to Rules 43, 92 *bis*

[1259] Prosecution Response Brief, para. 226.
[1260] Prosecution Response Brief, para. 229.
[1261] *See* Prosecution Response Brief, paras. 227-234. T. 26 August 2020 pp. 15-20. The Prosecution submits that Mladić identifies no error in relying upon Witness Momir Nikolić's evidence because the Trial Chamber assessed Witness Momir Nikolić's evidence in light of Witness Bursik's testimony, including that Witness Momir Nikolić "did not tell everything in its entirety". *See* Prosecution Response Brief, para. 233, *referring to* Trial Judgement, para. 5304; T. 26 August 2020 pp. 19, 20. The Prosecution further argues that, in relation to Exhibit D1228, the Trial Chamber committed no error because: (i) Mladić tendered Exhibit D1228 pursuant to Rule 89(C) of the ICTY Rules and without limitation or conditions under Rules 92 *bis* or *quater* of the ICTY Rules, and; (ii) Mladić relied upon the exhibit for the truth of its contents at trial and on appeal and, therefore, cannot criticise the Trial Chamber for also doing so. *See* Prosecution Response Brief, paras. 231, 232; T. 26 August 2020 p. 20. The Prosecution further argues that Mladić does not refer to any factual findings based on Exhibit D1228. *See* Prosecution Response Brief, para. 234; T. 26 August 2020 p. 20.
[1262] Prosecution Response Brief, para. 235. *See also* T. 26 August 2020 pp. 14-23.
[1263] Mladić Reply Brief, paras. 86, 92; T. 26 August 2020 p. 44. *See also* T. 26 August 2020 pp. 46, 47.
[1264] *See* Mladić Reply Brief, paras. 89-91.
[1265] *See* Mladić Appeal Brief, paras. 586-589; T. 26 August 2020 pp. 46, 47, *referring to, inter alia*, Prosecution Response Brief, paras. 226, 229, Prosecution Final Trial Brief, paras. 1063, 1105.

or 92 *quater* of the ICTY Rules and because the Prosecution did not rely on it in its closing submissions for this purpose.[1266]

369. Furthermore, Mladić does not show that the Trial Chamber failed to sufficiently account for evidence of his participation in a meeting in which no discussion of killings or any criminal act took place. Mladić's arguments are premised on the Trial Chamber's summaries of evidence of a meeting at the Bratunac Brigade headquarters on 11 or 12 July 1995,[1267] which the Trial Chamber clearly considered and made findings on.[1268] Mladić has not shown that the Trial Chamber disregarded this evidence or that it is inconsistent with its conclusion that the crimes of genocide, extermination, and murder became part of the means to achieve the elimination of Bosnian Muslims in Srebrenica by the early morning of 12 July 1995, prior to the first crime being committed.[1269] Notably, in reaching this conclusion, the Trial Chamber specifically considered its findings that: (i) the VRS intended to empty the enclave; (ii) the crimes of persecution and inhumane acts (forcible transfer) were committed following the attack, noting that the crimes of genocide, extermination, and murder became part of the means to achieve the objective by early 12 July 1995; (iii) Momir Nikolić, Kosorić, and Popović discussed the killings on the morning of 12 July 1995; and (iv) Tolimir first ordered that Batković camp be prepared for a large number of detainees and thereafter conveyed that this plan had been given up.[1270]

370. Turning to Mladić's argument that the Trial Chamber failed to give sufficient weight to the military context in which his statements at the second Hotel Fontana meeting were made, the Appeals Chamber finds that the evidence cited by him does not support this argument.[1271] The Trial Chamber found that Mladić intended to commit genocide based in part on statements made at the second Hotel Fontana meeting wherein he stated that the Bosnian Muslims could either "live or vanish" and "survive or disappear".[1272] Mladić points to the evidence of Witnesses Richard Butler and Kovač in support of his argument.[1273] However, Witness Butler expressly declined to interpret Mladić's statements quoted above,[1274] while Witness Kovač's evidence cited by Mladić relates only

[1266] *See* Mladić Appeal Brief, paras. 585, 587-594; T. 25 August 2020 pp. 79-82.
[1267] *See*, *e.g.*, Mladić Appeal Brief, para. 594, *referring to*, *inter alia*, Trial Judgement, paras. 4932, 4934, 4936, 4937.
[1268] Trial Judgement, paras. 4953, 4956, 4980. The Trial Chamber considered Mladić's submission that there was no evidence of a meeting where the crimes were discussed. *See* Trial Judgement, para. 4972.
[1269] Trial Judgement, para. 4987.
[1270] Trial Judgement, para. 4987.
[1271] Mladić Appeal Brief, para. 595, *referring to* T. 16 September 2013 p. 16831, T. 16 November 2015 p. 41395. *See also* T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1272] Trial Judgement, paras. 5128, 5130.
[1273] Mladić Appeal Brief, para. 595, n. 705; T. 25 August 2020 p. 72; T. 26 August 2020 pp. 45, 46, *referring to*, *inter alia*, T. 12 September 2013 p. 16653.
[1274] T. 16 September 2013 pp. 16832, 16833. Specifically, Witness Butler only testified that it was "technically proper" from a military standpoint for Mladić to seek the surrender of the 28th Division of the ABiH following the capture of the

to the question of the surrender of the 28th Division of the ABiH, not the statements in question.[1275] The Appeals Chamber finds that this evidence does not substantiate Mladić's submission that the Trial Chamber failed to sufficiently consider the military context in which his statements were made and he has identified no error in this respect.

371. As to Mladić's contention that the Trial Chamber placed undue weight on his position and role in the military without sufficiently accounting for the absence of evidence showing his direct orders, the Appeals Chamber observes that Mladić refers to paragraphs of the Trial Judgement assessing his contributions and his *mens rea* with respect to the Srebrenica JCE in isolation.[1276] His undeveloped arguments do not demonstrate any errors in the conclusions reached in those paragraphs and, notably, ignore several findings of the Trial Chamber that he issued orders in relation to the Srebrenica operations.[1277] Consequently, the Appeals Chamber dismisses these contentions.

372. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not show that the Trial Chamber erred in relation to his participation in the Srebrenica JCE as it pertains to his convictions for genocide, extermination, and murder.

(c) Conclusion

373. In light of the above, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.A of Mladić's appeal.

2. Alleged Error Regarding Significant Contribution (Ground 5.B)

374. In concluding that Mladić significantly contributed to the Srebrenica JCE, the Trial Chamber considered his acts *vis-à-vis* the VRS and subordinated MUP units, given that all of the principal perpetrators of the crimes forming part of the Srebrenica JCE were VRS or MUP

Srebrenica enclave and to make arrangements to negotiate such surrender. T. 16 September 2013 pp. 16829-16831. *See also* T. 12 September 2013 p. 16653.

[1275] T. 16 November 2015 pp. 41395, 41396.

[1276] Mladić Appeal Brief, para. 596, *referring to* Trial Judgement, paras. 5098, 5088, 5129-5131. *See also* T. 25 August 2020 pp. 74, 78.

[1277] Trial Judgement, paras. 5052, 5066, 5067, 5097. The Trial Chamber found, *inter alia*, that Mladić ordered the mobilization of buses and the transportation of Bosnian Muslim civilians out of Potočari. *See* Trial Judgement, para. 5052. On 11 July 1995, he ordered Borovčanin to launch an attack in the early morning of 12 July 1995. *See* Trial Judgement, para. 5066. On 12 July 1995, he then ordered that part of Borovčanin's unit provide security for the transport of the civilians, while the other part was to go to Zvornik. *See* Trial Judgement, para. 5067. Between at least 11 July and 11 October 1995, Mladić issued several orders concerning the operation in and around Srebrenica. *See* Trial Judgement, para. 5097.

members.[1278] In this respect, the Trial Chamber found, *inter alia*, that: (i) Mladić exercised command and control over the VRS and the MUP forces deployed during the entire Srebrenica operation and its aftermath;[1279] (ii) Mladić failed to take adequate steps to investigate crimes and/or punish members of the VRS and other Serb forces under his effective control who committed crimes in Srebrenica;[1280] and (iii) Mladić's acts were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1281]

375. Mladić submits that the Trial Chamber erred by giving insufficient, if any, weight to exculpatory evidence of the *actus reus* of the Srebrenica JCE and failing to provide a reasoned opinion on probative evidence.[1282] In particular, Mladić argues that the Trial Chamber failed to give sufficient weight to: (i) evidence regarding his absence from Srebrenica when the crimes were committed, including the content of four orders issued between 14 and 16 July 1995 (collectively, the "Four Orders") and the change in the command structure of the VRS during his absence;[1283] (ii) evidence that the MUP was not under his effective control;[1284] (iii) the military context and content of orders he gave in Srebrenica;[1285] (iv) evidence undermining the authenticity and reliability of certain intercept communications;[1286] and (v) evidence that he had no knowledge of crimes, and/or he was unable to prevent or punish them, and that he or his subordinates did prosecute or investigate certain crimes.[1287] According to Mladić, had the Trial Chamber given sufficient weight to this evidence, it would not have concluded beyond reasonable doubt that he significantly contributed to furthering the objective of the Srebrenica JCE.[1288] Mladić therefore requests that the Appeals Chamber reverse his convictions under the Srebrenica JCE or, alternatively, reverse the findings to the extent of any errors.[1289] The Appeals Chamber will address each of Mladić's arguments in turn.

[1278] Trial Judgement, paras. 5096, 5098. *See also* Trial Judgement, paras. 2676, 2684, 2707, 2723, 2732, 2759, 2766, 2776, 2791, 2820, 2825, 2859, 2861, 2862, 2876, 2882, 2886, 2894, 2917, 2920, 2921, 2924, 2926, 2935, 3051, 4984, 4986.
[1279] Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5046-5053, 5066-5069.
[1280] Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5091-5094.
[1281] Trial Judgement, para. 5098.
[1282] *See* Mladić Notice of Appeal, p. 21, para. 57; Mladić Appeal Brief, paras. 601, 606-641; Mladić Reply Brief, paras. 94-98.
[1283] *See* Mladić Appeal Brief, paras. 607-615; Mladić Reply Brief, para. 94; T. 25 August 2020 pp. 83, 84. *See also* T. 25 August 2020 pp. 71, 74.
[1284] *See* Mladić Appeal Brief, paras. 616-619; Mladić Reply Brief, para. 98. *See also* T. 26 August 2020 pp. 44, 51-56.
[1285] *See* Mladić Appeal Brief, paras. 620-623; Mladić Reply Brief, paras. 95, 96. *See also* T. 25 August 2020 pp. 71, 72.
[1286] *See* Mladić Appeal Brief, paras. 624-628.
[1287] *See* Mladić Appeal Brief, paras. 630-641; Mladić Reply Brief, para. 97. *See also* T. 25 August 2020 p. 71; T. 26 August 2020 p. 56.
[1288] Mladić Appeal Brief, paras. 601, 641, 642. *See also* T. 25 August 2020 pp. 71, 72, 74, 83, 84; T. 26 August 2020 pp. 44, 56.
[1289] Mladić Notice of Appeal, paras. 57, 58, 63-65; Mladić Appeal Brief, paras. 641-643.

(a) Evidence of Mladić's Absence from Srebrenica

376. Mladić submits that, had sufficient weight been given to the evidence of his absence from Srebrenica at the time the crimes were committed, a reasonable trier of fact would not have concluded that he exercised command and control over VRS and MUP forces during that time period.[1290] In this respect, Mladić argues that in relying on four orders issued between 14 and 16 July 1995 to illustrate his command and control while he was away in Belgrade,[1291] the Trial Chamber failed to provide a reasoned opinion on how the Four Orders could be attributed to him.[1292] In particular, he submits that the Trial Chamber failed to give sufficient weight to the content of the Four Orders, specifically that they: (i) relate to the day-to-day running of the army, and not to, *inter alia*, military operations and Srebrenica;[1293] (ii) were not sent to units in Srebrenica or to any MUP forces;[1294] and (iii) had unique identification numbers, which indicates that the Four Orders emanated from the General Staff of the VRS.[1295] He also contends that while the Trial Chamber accepted Witness Stevanović's evidence that "s.r./signed" on a document did not always mean that the individual whose signature appeared on the document was aware of it or had actually signed it, the Trial Chamber did not consider this in respect of the Four Orders.[1296]

377. Mladić further submits that the Trial Chamber failed to give sufficient weight to evidence of the change in the command structure while he was in Belgrade in July 1995, in particular that the then VRS Chief of Staff, Manojlo Milovanović, replaced him as *de jure* and *de facto* Commander of the VRS.[1297] He contends that the Trial Chamber placed undue weight on four intercept

[1290] *See* Mladić Appeal Brief, paras. 607-615; Mladić Reply Brief, para. 94; T. 25 August 2020 pp. 83, 84. *See also* T. 25 August 2020 pp. 71, 74.
[1291] Mladić Appeal Brief, para. 610, *referring to* Exhibits P2122 (concerning an order dated 14 July 1995 from Mladić to the Supreme Commander, the VJ General Staff, the Serbian Army of Krajina Main Staff, and various VRS Corps instructing that any information the recipients had for the VRS Main Staff should be prepared and exchanged during certain hours), P2123 (concerning an order from the VRS Main Staff to the Command of the Drina Corps, dated 14 July 1995 and signed by Mladić, pertaining to the transport of DutchBat members), P2124 (concerning an order from the VRS Main Staff to the Command of the SRK and the Drina Corps, dated 14 July 1995 and signed by Mladić, with respect to the passage of UNPROFOR Commander Rupert Smith), and P2125 (concerning an order from the VRS Main Staff to the Command of the VRS East Bosnia Corps, dated 15 July 1995 and signed by Mladić, to maintain duty service for the Forward Command Post-2 communications system).
[1292] *See* Mladić Appeal Brief, paras. 609-612; T. 25 August 2020 pp. 83, 84.
[1293] Mladić Appeal Brief, para. 611, nn. 722, 724 (wherein Mladić submits that the Trial Chamber did not give sufficient weight to the evidence of Witness Tihomir Stevanović who testified that the "operative centre" of the VRS did not request approval from Mladić to draft and issue orders that concerned the general day-to-day workings of the army or to send telegrams directly relevant to this issue in his name); T. 25 August 2020 pp. 83, 84.
[1294] Mladić Appeal Brief, para. 611.
[1295] Mladić Appeal Brief, para. 611.
[1296] Mladić Appeal Brief, paras. 610, 612, *referring to* Trial Judgement, para. 4997.
[1297] Mladić Appeal Brief, para. 613, *referring to* T. 18 September 2013 pp. 16964-16977, T. 7 May 2015 p. 35265; T. 25 August 2020 p. 84.

communications between 14 and 16 July 1995,[1298] and that, even if authentic,[1299] they provided insufficient evidence for a reasonable trier of fact to conclude that Mladić continued to exercise command and control of the VRS while he was away.[1300]

378. The Prosecution responds that the Trial Chamber reasonably found that Mladić exercised command and control during the entire Srebrenica operation, including between 14 and 16 July 1995 when he was in Belgrade.[1301] Specifically, it argues that the Trial Chamber considered the Four Orders in their context to find that Mladić issued them, and that they, along with other mutually corroborating evidence, demonstrate his exercise of command and control from Belgrade.[1302] The Prosecution further contends that Mladić's undeveloped argument that Milovanović replaced him as Commander of the VRS while he was in Belgrade should be summarily dismissed,[1303] and that the Trial Chamber reasonably concluded that intercepted communications between 14 and 16 July 1995 demonstrate Mladić's continued command and control over the VRS from Belgrade.[1304]

379. The Appeals Chamber notes that the Trial Chamber found that irrespective of whether Mladić was in Srebrenica or in Belgrade in July 1995, he remained the Commander of the VRS

[1298] With respect to the four intercept communications, Mladić submits that: (i) Exhibit P1298 merely confirms his intention to leave the front line and that he did not issue any order to be implemented in his absence; (ii) Exhibit P1655 (under seal) demonstrates that he was informed that Karadžić was issuing orders and that Pandurević had made arrangements for Muslims to pass through Tuzla, but was not provided with any further information about what was occurring on the ground; (iii) Exhibit P1656 (under seal) demonstrates that, where the conversation extended to him informing a man that he would see him that night, no orders were given, and there is no evidence of who the man was, or his rank or role; and (iv) Exhibit P1657 (under seal) demonstrates that he spoke to Milovanović briefly, but did not give any orders or mention Srebrenica. *See* Mladić Appeal Brief, para. 614.

[1299] Mladić Appeal Brief, para. 615, *referring to* Mladić Appeal Brief, paras. 624-628. The Appeals Chamber will address Mladić's arguments in relation to the authenticity of the intercepts in Section III.D.2(d).

[1300] *See* Mladić Appeal Brief, paras. 613-615.

[1301] Prosecution Response Brief, para. 236; T. 26 August 2020 pp. 18, 19. The Prosecution adds that Mladić's responsibility for the crimes in Srebrenica was not premised on his presence at the crime site. *See* T. 26 August 2020 p. 19.

[1302] Prosecution Response Brief, paras. 236-238, *referring to*, *inter alia*, Trial Judgement, para. 5053; T. 26 August 2020 p. 19. Specifically, the Prosecution argues that: (i) Witness Stevanović's evidence, which comprises only one piece of the evidentiary record considered by the Trial Chamber, does not undercut the Trial Chamber's finding that orders bearing Mladić's name, with or without "s.r.", are attributable to him; (ii) the Four Orders pertaining to the "day-to-day operation of the army" support rather than undermine the Trial Chamber's conclusion that Mladić exercised command while in Belgrade; (iii) the Four Orders relate to the Srebrenica operation or are evidence of Mladić's continued command on 14 and 15 July 1995; and (iv) Mladić fails to show any error in the Trial Chamber's reliance on orders numerically designated "04/" or "06/", especially since the Defence tendered documents it attributed to Mladić bearing the numerical designation "06/" and other numerical designations. *See* Prosecution Response Brief, paras. 237, 238.

[1303] Prosecution Response Brief, para. 239, *referring to*, *inter alia*, Mladić Final Trial Brief, paras. 670, 3299, Trial Judgement, para. 5046. The Prosecution further argues that Mladić merely repeats his unsuccessful submissions at trial claiming communication problems. *See* Prosecution Response Brief, para. 239.

[1304] Prosecution Response Brief, para. 240. The Prosecution argues that Mladić's alternative interpretation of Exhibits P1655 (under seal) and P1657 (under seal) fails to show any error and that the totality of the evidence, which shows his familiarity with on-going operations and his issuance of related orders, supports the Trial Chamber's finding that

Main Staff.[1305] In reaching this finding, the Trial Chamber considered that, throughout July 1995, including during his travel to Belgrade, Mladić: (i) was in contact with the VRS Main Staff and maintained command and control; (ii) gave orders to VRS units which were implemented; (iii) took measures to ensure the implementation of his orders, including when he was not present on the ground; and (iv) communicated over the phone with Milovanović on a regular basis.[1306] In particular, the Trial Chamber addressed in detail communications and orders by Mladić, as well as conversations between Mladić and other members of the Bosnian Serb leadership, including Milovanović, during his absence from Srebrenica.[1307] In light of the above, the Appeals Chamber finds that Mladić's submission in relation to the Trial Chamber's weighing of evidence relating to his absence from Srebrenica reflects mere disagreement with the Trial Chamber's assessment of evidence without demonstrating any error. The Appeals Chamber recalls that the mere assertion that a trial chamber failed to give proper weight to evidence is liable to be summarily dismissed.[1308]

380. With respect to the alleged failure to provide a reasoned opinion on how the Four Orders could be attributed to Mladić, the Appeals Chamber recalls that, in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1309] In this regard, the Appeals Chamber considers that Mladić does not demonstrate that the Trial Chamber failed to provide a reasoned opinion with respect to the Four

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Mladić exercised command and control of the VRS while in Belgrade. *See* Prosecution Response Brief, para. 240. *See also* T. 26 August 2020 p. 19.

[1305] *See* Trial Judgement, para. 5053.

[1306] *See* Trial Judgement, para. 5053. *See also* Trial Judgement, paras. 5046-5052, *referring to, inter alia*, Trial Judgement, Chapters 3.1.4, 7.1.2, and 9.3.3. In Chapter 3.1.4, the Trial Chamber found that from his initial appointment as Commander on 12 May 1992 until at least 8 November 1996, Mladić remained in command of the VRS Main Staff. *See* Trial Judgement, para. 276. In Chapter 7.1.2, the Trial Chamber found that Mladić effectively issued orders to VRS forces to implement Directives no. 7 and no. 7/1, which were created in March 1995 in relation to the priorities of the VRS ("Directive 7" and "Directive 7/1", respectively"). *See* Trial Judgement, paras. 2382-2386. *See also* Trial Judgement, paras. 2379-2381. In Chapter 9.3.3, the Trial Chamber found that Mladić issued several orders and directives to VRS units, was respected as a leader by his subordinates, and possessed a very high level of command and control over them in spite of the lack of a declared state of war and occasional indiscipline in the VRS. *See* Trial Judgement, paras. 4388-4391. Furthermore, the Trial Chamber found that the VRS had a well-functioning communication system, which allowed Mladić to effectively and quickly communicate with his subordinates. *See* Trial Judgement, para. 4387. The Trial Chamber also found that from May 1992 until 1995, Mladić was stationed at the VRS Main Staff command post from where he had daily telephone communication with corps commanders, usually in the mornings and in the evenings, and that Mladić was kept up to date on the main issues by Milovanović. *See* Trial Judgement, para. 4385.

[1307] In Chapter 9.7.2 of the Trial Judgement, entitled "Commanding and Controlling the VRS", the Trial Chamber considered: (i) communication and orders by Mladić on 14 July 1995 (*see* Trial Judgement, paras. 5022-5024); and (ii) communication and orders by Mladić on 15 and 16 July 1995 (*see* Trial Judgement, paras. 5025-5032, 5046-5050, *referring to* Trial Judgement, Chapter 9.3.3). In Chapter 9.7.3, entitled "Commanding and Controlling Elements of the Serb Forces Integrated into, or Subordinated to, the VRS", the Trial Chamber recalled its finding in Chapter 9.7.2 about Mladić's command and control of VRS forces in the Srebrenica operation (*see* Trial Judgement, para. 5066).

[1308] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

Orders,[1310] given that it specifically described the content of each individual order in the Trial Judgement, considered the addressees, and noted that the Four Orders were either signed by or came from Mladić.[1311] Further, and contrary to the arguments raised by Mladić, the Four Orders do relate to the Srebrenica operations and/or Mladić's continued command over the VRS and the MUP during his time in Belgrade, and they are addressed to the Drina Crops or other units in Srebrenica.[1312] Mladić also fails to demonstrate how the unique identification numbers associated with the Four Orders would undermine the Trial Chamber's finding that he issued the Four Orders.[1313] Similarly, while the Trial Chamber did not expressly address, when assessing Mladić's role in issuing the Four Orders, Witness Stevanović's evidence that "s.r./signed" did not always mean that the individual whose signature appeared on the document was aware of it or had signed it, the Trial Chamber recalled this evidence when examining his role in issuing another order signed in this manner in respect of which it concluded that the order was issued by Mladić.[1314] Recalling that a trial judgement is to be considered as a whole,[1315] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to this evidence or that it undermines the reasonableness of its findings relating to the Four Orders.

381. In relation to Mladić's contention regarding the change in the command structure, the Appeals Chamber observes that he merely repeats his submissions at trial that Milovanović replaced him as *de jure* and *de facto* Commander of the VRS while he was away in Belgrade.[1316]

[1309] *Karadžić* Appeal Judgement, para. 702; *Šešelj* Appeal Judgement, para. 49; *Prlić et al*. Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.

[1310] *See* Mladić Appeal Brief, para. 611; T. 25 August 2020 p. 83.

[1311] *See* Trial Judgement, paras. 4310, 5022, 5024, 5025. The Trial Chamber noted that: (i) in one order given by Mladić on 14 July 1995, admitted as Exhibit P2122, Mladić informed, *inter alios*, the Supreme Commander, the VJ General Staff, the Serbian Army of Krajina Main Staff, and various VRS Corps that due to failure of the power supply during the Srebrenica operation, the VRS Main Staff communications centre would operate only during limited hours the next day (*see* Trial Judgement, para. 5024); (ii) two orders from the VRS Main Staff to the Command of the Drina Corps and the SRK signed by Mladić and given on 14 July 1995, admitted as Exhibits P2123 and P2124, respectively, concerned the transfer of Dutch soldiers from Bratunac (*see* Trial Judgement, para. 5022); and (iii) one order from the VRS Main Staff to the VRS East Bosnia Corps Command and the VRS Main Staff Forward Command Post dated 15 July 1995 and signed by Mladić, admitted as Exhibit P2125, instructed the VRS East Bosnia Corps to send an officer to the Forward Command Post to report to Milovanović (s*ee* Trial Judgement, para. 5025).

[1312] *See* Exhibits P2122, P2123, P2124, and P2125. *See also* Trial Judgement, paras. 4310, 5022, 5024, 5025.

[1313] In this respect, the Appeals Chamber notes that at trial the Defence tendered documents it attributed to Mladić bearing the same designation, namely "06/" (or "6/"), that Mladić now argues is not attributable to him. *See*, *e.g.*, Exhibits D140, D1471, D1501, D1616, D1665, D1753, and D2167.

[1314] *See* Trial Judgement, paras. 4992, 4997, 5049. In relation to the VRS Main Staff Order of 11 July 1995, the Trial Chamber explicitly considered Witness Stevanović's evidence that "s.r./signed" on a document did not always mean that the individual whose signature appeared on the document was aware of it or had actually signed it. *See* Trial Judgement, para. 4997.

[1315] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.

[1316] *See* Mladić Appeal Brief, para. 613; T. 25 August 2020 p. 84. *See also* Mladić Final Trial Brief, para. 670 (wherein Mladić argued that, while in Belgrade, he was not in command of the army in accordance with VRS regulations and that he could not exercise command of the VRS as he was unable to communicate with them). In this respect, the Appeals Chamber recalls that the Trial Chamber found that the VRS had a well-functioning communication system

The Appeals Chamber recalls that on appeal a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[1317] While Mladić refers to the evidence of Witnesses Milovanović and Stevanović to support his argument,[1318] the Appeals Chamber observes that Witness Milovanović's evidence that, when the command and control structure did not function as intended, he always sought Mladić's approval before he proceeded, supports rather than undermines the Trial Chamber's finding in question.[1319] Furthermore, Witness Stevanović's testimony only shows that VRS Chief of Staff, Milovanović, might replace Mladić as *de jure* Commander of the VRS during his absence.[1320] Mladić does not demonstrate how this evidence could undermine the Trial Chamber's finding, based on the totality of the evidence, that he remained the Commander of the VRS Main Staff during his absence from Srebrenica.[1321] The Appeals Chamber therefore finds that, apart from repeating his submissions at trial, Mladić fails to demonstrate that the Trial Chamber's rejection of those arguments constituted an error, thereby failing to satisfy his burden on appeal.

382. The Appeals Chamber will now turn to Mladić's submission that the Trial Chamber placed undue weight on four intercept communications as evidence of his command and control over the VRS during his absence from Srebrenica. The Appeals Chamber observes that, when considering communications and orders issued by Mladić between 14 and 16 July 1995,[1322] the Trial Chamber examined the content of the four intercept communications, which showed, *inter alia*, the briefings he received and instructions he issued regarding the operations in the Zvornik area.[1323] Mladić's alternative interpretation that the four intercept communications do not contain any orders fails to

which allowed Mladić to effectively and quickly communicate with his subordinates. *See* Trial Judgement, paras. 4383, 4387. The Trial Chamber noted that Witness Milovanović testified that he always sought Mladić's approval before proceeding. *See* Trial Judgement, para. 4297.

[1317] *See Karadžić* Appeal Judgement, paras. 19, 305, 598; *Šešelj* Appeal Judgement, paras. 17, 28; *Prlić et al.* Appeal Judgement, paras. 25, 128; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đordević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27.

[1318] *See* Mladić Appeal Brief, para. 613, n. 728, *referring to* T. 18 September 2013 pp. 16964-16977, T. 7 May 2015 p. 35265. *See also* T. 25 August 2020 p. 84.

[1319] *See* T. 18 September 2013 pp. 16972, 16973. *See also* Trial Judgement, para. 4297.

[1320] *See* T. 7 May 2015 p. 35265.

[1321] *See supra* para. 379.

[1322] *See* Trial Judgement, paras. 5022-5032.

[1323] Exhibit P1298 (concerning Intercept of Mladić and a man, 14 July 1995 at 8.05 a.m.) reflects that the man told Mladić that he was just "here" with a narrow circle of friends and that now something would depend on Mladić. *See* Trial Judgement, para. 5023. Exhibit P1655 (concerning Intercept no. 664, 16 July 1995) (under seal) shows that [REDACTED]. *See* Trial Judgement, paras. 5028, 5112, n. 17684. Exhibit P1656 (concerning Intercept no. 648, 16 July 1995) (under seal) indicates that [REDACTED]. *See* Trial Judgement, para. 5027. Exhibit P1657 (concerning Intercepts no. 671 and no. 672, 16 July 1995) (under seal) shows that [REDACTED]. *See* Trial Judgement, paras. 5032, 5113, n. 17688.

show that the Trial Chamber's conclusion was unreasonable.[1324] In this respect, the Trial Chamber noted that certain of the intercepts do contain orders or instructions,[1325] and in any event, the Appeals Chamber considers that the absence of orders from the four intercept communications would not, in itself, undermine the Trial Chamber's finding that Mladić remained the Commander of the VRS Main Staff during his absence from Srebrenica.[1326] The Appeals Chamber therefore finds that Mladić's arguments in this respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. The Appeals Chamber reiterates that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1327]

383. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not show an error in the Trial Chamber's conclusion that he exercised command and control over VRS and MUP forces during his absence from Srebrenica.

(b) Command and Control over Members of the MUP

384. Mladić submits that, with a proper weighing of evidence, no reasonable trier of fact could have concluded that he exercised command and control over MUP forces.[1328] In this respect, he argues that the Trial Chamber gave undue weight to the joint elements of the MUP's cooperation with the VRS and insufficient weight to evidence that the MUP was acting as a separate entity.[1329] Mladić therefore contends that the Trial Chamber conflated "cooperation and coordinated action" with "re-subordination"[1330] and failed to consider the totality of the evidence demonstrating the MUP's coordination with the VRS, as opposed to re-subordination.[1331]

385. The Prosecution responds that Mladić fails to show any error in the Trial Chamber's conclusion that, from 11 until at least 17 July 1995, MUP units under Borovčanin's command

[1324] *See* Mladić Appeal Brief, para. 614.
[1325] For instance, Exhibit P1657 (concerning Intercepts no. 671 and no. 672, 16 July 1995) (under seal) wherein [REDACTED]. *See* Trial Judgement, paras. 5032, 5113, n. 17688.
[1326] *See supra* para. 379.
[1327] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1328] Mladić Appeal Brief, para. 619. *See also* T. 26 August 2020 pp. 44, 51-56.
[1329] *See* Mladić Appeal Brief, paras. 616, 617, 619, *referring to, inter alia*, T. 10 December 2013 pp. 20615-20625, T. 22 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session). *See also* Mladić Appeal Brief, para. 617 (in which Mladić argues that his 13 July 1995 order relating to the combat zone was not sent to any MUP units and that a report from Borovčanin, which contained information on VRS orders of 13 July 1995, did not mention MUP forces being sent to Žepa); T. 26 August 2020 p. 56.
[1330] *See* Mladić Appeal Brief, paras. 616-618, *referring to* Trial Judgement, paras. 2878, 2882, 4989, T. 5 September 2013 pp. 16285-16288, 16290. To the extent that Mladić refers to paragraphs 218 to 224 of his appellant's brief, the Appeals Chamber has addressed his arguments in this regard. *See supra* Section III.B.2(a)(i).
[1331] Mladić Appeal Brief, para. 618.

deployed in the area of Srebrenica were under VRS command and that the Trial Chamber properly distinguished cooperation and coordination from re-subordination.[1332] The Prosecution further contends that the evidence referenced by Mladić either supports the conclusions of the Trial Chamber or is irrelevant.[1333]

386. The Appeals Chamber observes that the Trial Chamber found that from 11 until at least 17 July 1995 the MUP forces deployed in the sector of Srebrenica under Borovčanin were under the command of the VRS.[1334] In reaching this finding, the Trial Chamber specifically addressed Mladić's submission and related evidence that MUP forces were operating under their own command under Borovčanin as of 12 or 13 July 1995.[1335] The Trial Chamber further addressed in detail other evidence demonstrating: (i) the involvement of MUP forces in the Srebrenica operation and in Potočari pursuant to an order from the VRS Supreme Commander;[1336] (ii) the direct orders Borovčanin and his forces received from Mladić and other VRS officers about their deployment and military actions;[1337] and (iii) the reporting of MUP activities to the VRS Bratunac Brigade.[1338]

387. Against this background, and recalling that trial chambers have broad discretion in weighing evidence,[1339] the Appeals Chamber finds Mladić's contention – that the Trial Chamber gave undue weight to the joint elements of the MUP's cooperation with the VRS and insufficient weight to evidence that the MUP was acting as a separate entity[1340] – to reflect mere disagreement with the Trial Chamber's assessment of the evidence without showing any error.

388. Moreover, contrary to Mladić's assertion,[1341] the Trial Chamber clearly distinguished coordination and re-subordination of military units.[1342] In particular, the Trial Chamber pointed out

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[1332] Prosecution Response Brief, paras. 241, 242, *referring to* Trial Judgement, paras. 2443, 2642, 4957, 5059, 5067. According to the Prosecution, Mladić's arguments that the Trial Chamber placed insufficient weight on certain pieces of evidence should be summarily dismissed. *See* Prosecution Response Brief, para. 241.
[1333] *See* Prosecution Response Brief, paras. 243-245.
[1334] *See* Trial Judgement, para. 4957.
[1335] *See* Trial Judgement, para. 4957, *referring to* Mladić Final Trial Brief, para. 2977 (*referring to* Exhibits D129, p. 1, P2118, P2119, p. 2, P1786, p. 3, T. 5 September 2013 pp. 16287, 16288).
[1336] *See* Trial Judgement, paras. 2443, 5059. *See also* Trial Judgement, para. 4957, *referring to* Chapters 7.1.6 (The Column), 7.2 (Jadar River (Schedule E.1.1)), 7.4 (Kravica Warehouse (Schedule E.3.1)), 7.5 (Sandići Meadow (Schedule E.4.1)), 7.14 (Bratunac Town (Schedule E.15)), 7.17 (Forcible Transfer and Deportation); and 8 (Legal Findings on Crimes) of the Trial Judgement.
[1337] *See* Trial Judgement, paras. 2642, 4957, 5059, 5066, 5067. *See also* Exhibit P724, pp. 2, 3; Exhibit P2117.
[1338] *See* Trial Judgement, para. 4957.
[1339] *Karadžić* Appeal Judgement, paras. 363, 530; *Šainović et al.* Appeal Judgement, para. 490. *See also Ngirabatware* Appeal Judgement, para. 69.
[1340] *See* Mladić Appeal Brief, paras. 616, 617, 619. *See also* T. 26 August 2020 p. 56.
[1341] *See* Mladić Appeal Brief, para. 617.
[1342] *Compare* Trial Judgement, paras. 2882, 3863 ("[Between mid-July and mid-August 1995,] the Skorpions worked in coordination with VRS units in an area under the responsibility of the SRK") *with* Trial Judgement, para. 4989 ("With regard to Scheduled Incident E.13.1 and the ill-treatment of the Trnovo victims prior to them being killed, there is insufficient evidence to suggest that members of the Skorpions unit were members of the Srebrenica JCE. Further, the

that "[w]hen re-subordinated, the MUP forces followed orders issued by the VRS. The Commander of the VRS unit to which the MUP unit was re-subordinated and the Commander of the MUP unit coordinated their work in carrying out the tasks assigned by the VRS".[1343] On the basis of this and other supporting evidence, the Trial Chamber explicitly found that when MUP units were participating in combat operations from at least 12 May 1992 until at least 26 September 1995, they were re-subordinated to the command of the VRS, meaning that they were tasked by the VRS and followed orders issued by the VRS.[1344] The Appeals Chamber further considers that evidence of joint operations of the MUP and the VRS does not, on its own, negate evidence of the MUP's subordination to the VRS at the time in question, and that evidence that distinguishes between coordination and re-subordination is consistent with the Trial Chamber's findings.[1345] Considering the Trial Chamber's detailed analysis of evidence demonstrating the re-subordination of the MUP to the VRS, as well as the MUP's coordination with the VRS,[1346] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber systematically adopted a selective approach to the evidence in its analysis in this respect. The Appeals Chamber also notes that Mladić selectively relies on certain portions of Witness Momir Nikolić's testimony to prove this alleged cooperation and coordinated action, disregards Witness Momir Nikolić's testimony that Borovčanin received orders from Mladić, and ignores other evidence establishing that MUP units were re-subordinated to the VRS and to Mladić.[1347] Furthermore, Mladić's claim that the fact that the VRS order of 13 July 1995, namely that "forces of the [VRS] mostly regrouped in order to go to Žepa", did not mention the MUP does not undermine the Trial Chamber's finding that MUP units were re-subordinated to the VRS.[1348] In fact, the Trial Chamber found that on 13 July 1995, Mladić tasked the MUP units with "organizing the evacuation of approximately 15,000 civilians from Srebrenica to Kladanj" and "[k]illing of about 8,000 Muslim soldiers".[1349]

Trial Chamber found that members of the Skorpions unit committed the killings set out in Scheduled Incident E.13.1 in coordination with VRS units. There is insufficient evidence to suggest that the Skorpions unit was subordinated to the VRS or that JCE members had other ways to use them as tools"). *See also* Trial Judgement, paras. 3794, 3796, 3826.

[1343] *See* Trial Judgement, para. 3794. *See also* Trial Judgement, para. 3826.

[1344] *See* Trial Judgement, para. 3826. *See also* Trial Judgement, paras. 3784-3819, 3824, 3825.

[1345] The definition provided by Witness Theunens was that the Commander of an MUP unit re-subordinated to the VRS receives operational orders from the VRS Commander and not from his MUP Commander, which is consistent with the Trial Chamber's analysis. Similarly, neither Witness Velimir Kevac's nor Witness Kovac's definition of re-subordination and coordination undercuts the Trial Chamber's finding. In particular, Witness Kovac testified that re-subordination means taking over command and jurisdiction, whereas coordinated action is between two neighbors, and the chains of command are separate. *See* Trial Judgement, paras. 3794, 3796, 3824, 3826; T. 10 December 2013 pp. 20620, 20621; T. 22 January 2015 pp. 30497, 30498; T. 23 January 2015 pp. 30510, 30545; T. 25 November 2015 p. 41921 (private session).

[1346] *See* Trial Judgement, paras. 3784-3819, 3824-3826.

[1347] *See* Mladić Appeal Brief, para. 617, *referring to* T. 4 June 2013 p. 12093; T. 4 June 2013 p. 12094; T. 5 June 2013 pp. 12164-12166; Trial Judgement, paras. 3784-3819, 3824-3826.

[1348] *See* Mladić Appeal Brief, para. 617, *referring to* Exhibit P724, p. 3.

[1349] *See* Trial Judgement, para. 5068.

389. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's finding that, from 11 until at least 17 July 1995, the MUP forces deployed in the sector of Srebrenica under Borovčanin were under VRS command and its dismissal of the argument that the MUP forces were operating under their own command in Srebrenica as of 12 or 13 July 1995.

(c) Orders Given by Mladić

390. Mladić submits that, in its analysis of his significant contribution to the Srebrenica JCE, the Trial Chamber failed to give sufficient weight to the military context and contents of legitimate military orders he issued in Srebrenica, and erroneously concluded that the only reasonable inference to be drawn from the orders was that he significantly contributed to the common criminal objective.[1350] Mladić contends that, in finding that Directive 7/1 did not rescind Directive 7, the Trial Chamber placed undue weight on the language of Directive 7,[1351] and, without providing a reasoned opinion, insufficient weight on the evidence of Witness Butler that operation Krivaja-95 ("Krivaja-95") was a legitimate military operation.[1352] Mladić further submits that, in finding that his order of 13 July 1995 was intended to mislead the media and the international community about the events in Srebrenica, the Trial Chamber did not properly consider the language of the order and the context in which it was given, while placing insufficient weight on similar orders aimed at preventing classified military information from being leaked.[1353]

391. The Prosecution responds that Mladić fails to show error in the Trial Chamber's conclusion that he significantly contributed to the common purpose by issuing orders concerning the Srebrenica operation to VRS and MUP forces.[1354] In this respect, the Prosecution argues that Mladić: (i) ignores that his contribution to the common purpose need not be *per se* criminal;[1355] (ii)

[1350] Mladić Appeal Brief, paras. 620, 623, *referring to*, *inter alia*, Trial Judgement, paras. 2323, 2374, 2376-2378, 2380, 2578, 2616, 2775, 2896, 2929, 2992. Mladić cites the following examples: (i) Directive no. 4 ("Directive 4"), which he argues ordered the adherence to the laws of war, including the Geneva Conventions (*see* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 2323, 2359, 5100); (ii) "a series of other orders issued up to 1995, including those to the Drina Corps" (*see* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 4329-4371); and (iii) other orders he argues required civilians to be removed from combat zones and harm (*see* Mladić Appeal Brief, para. 620, *referring to* Exhibits D302, D303). *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1351] Mladić Appeal Brief, para. 621. *See also* T. 25 August 2020 p. 72.
[1352] Mladić Appeal Brief, para. 621, *referring to* Trial Judgement, paras. 2364-2386, T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 p. 72; T. 26 August 2020 p. 46.
[1353] Mladić Appeal Brief, para. 622, *referring to* Trial Judgement, paras. 5081, 5082, 5117, 5128.
[1354] Prosecution Response Brief, paras. 246, 247, *referring to*, *inter alia*, Trial Judgement, paras. 5097, 5098.
[1355] Prosecution Response Brief, para. 246.

merely seeks to substitute his interpretation of orders regarding Directive 4,[1356] Krivaja-95,[1357] and Directive 7;[1358] and (iii) fails to demonstrate that the Trial Chamber acted unreasonably in considering his orders concerning the Srebrenica operation.[1359] The Prosecution further responds that, given that none of the allegedly "similar orders" Mladić cites is comparable, the Trial Chamber reasonably concluded that the 13 July 1995 order limiting access for local and foreign journalists to the Srebrenica area and banning the provision of information on prisoners of war, evacuated civilians, and escapees was intended to keep the international community from learning what was happening in Srebrenica.[1360]

392. The Appeals Chamber notes that the Trial Chamber found that Mladić significantly contributed to achieving the common objective by, *inter alia*: (i) issuing several orders to VRS forces, including the Drina Corps, concerning the operation in and around Srebrenica between at least 11 July and 11 October 1995; and (ii) giving orders to MUP Commander Borovčanin and his units on 11 and 12 July 1995.[1361] In reaching these findings, the Trial Chamber conducted a comprehensive assessment of orders issued by Mladić concerning the Srebrenica operation,[1362] and considered that these orders were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1363] The Appeals Chamber thus considers

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[1356] *See* Prosecution Response Brief, paras. 246, 248 (wherein the Prosecution contends that Directive 4 is an illegal order to expel the ABiH and "the Muslim population" from Srebrenica and other areas). *See also* T. 26 August 2020 p. 8.

[1357] *See* Prosecution Response Brief, paras. 246, 250 (wherein the Prosecution argues that the language of Directive Krivaja-95 calling for adherence to the Geneva Conventions does not negate its illegal objective to forcibly remove the population and that the VRS did not act in accordance with the Geneva Conventions). *See also* T. 26 August 2020 pp. 9, 10.

[1358] *See* Prosecution Response Brief, paras. 246, 251 (wherein the Prosecution contends that the Trial Chamber carefully analyzed the content and context of Directive 7 and that, while the Trial Chamber did not refer to Krivaja-95 in concluding that Directive 7/1 did not rescind Directive 7, Krivaja-95 supports that conclusion, and that Mladić erroneously relied on Witness Butler's evidence in that regard). *See also* T. 26 August 2020 pp. 9, 10.

[1359] Prosecution Response Brief, para. 247.

[1360] Prosecution Response Brief, para. 252. *See also* T. 26 August 2020 pp. 6, 17, 18, 22.

[1361] *See* Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5048, 5049, 5052, 5053, 5066, 5067.

[1362] Between 11 July and 11 October 1995, Mladić issued a number of orders in relation to the Srebrenica operation, including: (i) on 11 July 1995, ordering Borovčanin to go to Potočari and Milačevići with all available manpower and equipment to launch an attack in the early morning of 12 July 1995 (*see* Trial Judgement, paras. 5059, 5066, 5115); (ii) on the evening of 11 July 1995, ordering Petar Škrbić to mobilize buses and by 12 July 1995, ordering the transportation of Bosnian Muslims out of Potočari (*see* Trial Judgement, para. 5052); (iii) ordering the separation of Bosnian Muslim men from women, children and elderly in Potočari from 12 to 14 July 1995 (*see* Trial Judgement, paras. 5052, 5059, 5130); (iv) around 12 July 1995, ordering VRS units and MUP units to block the area and fight the column of Muslim men around the Konjević Polje-Cerska axis (*see* Trial Judgement, paras. 2641, 2642); (v) on 13 July 1995, ordering Zoran Marlinić and Bojan Subotić to secure the transfer of detainees to the Vuk Karadžić Elementary School in Bratunac (*see* Trial Judgement, para. 5052); (vi) before 15 July 1995, ordering Radomir Furtula to provide Beara with troops to carry out his work in Srebrenica (*see* Trial Judgement, paras. 4945, 5001, 5002, 5049); (vii) on 17 July 1995, ordering military units to comb the Bratunac-Drinjača-Milići-Bešići area to find and destroy Muslim groups (*see* Trial Judgement, para. 5033, *referring to* Exhibit P1579); (viii) in late July 1995, ordering to kill ten detainees held at the Standard Barracks at the Zvornik Brigade (*see* Trial Judgement paras. 2929, 5039, *referring to* Exhibit P1494 (under seal)); and (ix) on 11 October 1995, ordering, *inter alia*, the Corps Commands and the MUP to carry out combat security "as per Directive no. 7" (*see* Trial Judgement, para. 5043).

[1363] *See* Trial Judgement, paras. 5097, 5098.

that the Trial Chamber reasonably concluded that Mladić significantly contributed to achieving the common objective by issuing orders concerning the Srebrenica operation to VRS and MUP forces.

393. Turning to the Trial Chamber's alleged failure to give sufficient weight to the context and contents of orders that, according to Mladić, were legitimate military orders issued in Srebrenica, the Appeals Chamber recalls that an accused's contribution to a joint criminal enterprise need not be in and of itself criminal, as long as he or she performs acts that in some way contribute to the furtherance of the common purpose.[1364] Thus, in the Appeals Chamber's view, whether Mladić's orders were legitimate in the military context is not relevant to determining his significant contribution to the common purpose. What matters is that the accused significantly contributed to the commission of the crimes involved in the joint criminal enterprise.[1365] Considering the above, Mladić's assertion that his orders were consistent with legitimate military operations in light of the military context of Srebrenica[1366] cannot serve to demonstrate an error in the Trial Chamber's conclusion that Mladić significantly contributed to achieving the common objective.[1367]

394. In any event, the Appeals Chamber finds that Mladić fails to substantiate his claim that the Trial Chamber did not properly weigh the evidence pertaining to his orders in Srebrenica. In relation to Mladić's contention that Directive 4 ordered adherence to the laws of war, including the Geneva Conventions,[1368] the Appeals Chamber observes that this directive does not contain any reference to the laws of war, including the Geneva Conventions, and does not explicitly mandate respect for the laws of war.[1369] In fact, the Trial Chamber found that Directive 4 ordered the Drina Corps to inflict the heaviest possible losses on the ABiH and to force them to leave the Birač, Žepa, and Goražde areas with the Muslim population.[1370] Further, the Trial Chamber considered evidence that Mladić gave orders to respect the Geneva Conventions, but found that these orders were not indicative of his true state of mind.[1371] The Appeals Chamber thus finds that Mladić fails to demonstrate that the Trial Chamber erred in its assessment of Directive 4.

[1364] *See, e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, para. 1653; *Krajišnik* Appeal Judgement, para. 695.
[1365] *See, e.g.*, *Krajišnik* Appeal Judgement, para. 696; *Brđanin* Appeal Judgement, paras. 430, 431.
[1366] *See* Mladić Appeal Brief, para. 623. *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1367] *See Popović et al*. Appeal Judgement, para. 1615 (in which the ICTY Appeals Chamber held that the fact that the participation of an accused amounted to no more than his or her "routine duties" will not exculpate the accused).
[1368] *See* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 2323, 2359, 5100. *See also* T. 25 August 2020 pp. 82, 83.
[1369] *See* Exhibit P1968. It merely calls for providing the best possible living conditions for the army and civilian population during the winter and commanding the soldiers to try to disarm enemy groups and resort to killing them only if they refuse. *See* Exhibit P1968, pp. 4, 5.
[1370] *See* Trial Judgement, para. 5100. *See also* Trial Judgement, paras. 2323, 2359.
[1371] *See* Trial Judgement, para. 4687.

395. The Appeals Chamber now turns to Mladić's argument that the Trial Chamber placed undue weight on the language of Directive 7,[1372] and, without providing a reasoned opinion, insufficient weight on Witness Butler's evidence that Krivaja-95 was a legitimate military operation.[1373] The Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1374] Furthermore, as explained above, whether a military operation is legitimate is irrelevant to determining Mladić's significant contribution to the common purpose.[1375] In any event, the Appeals Chamber observes that the Trial Chamber carefully analyzed the context and content of both Directive 7[1376] and Directive 7/1,[1377] and considered evidence from Witnesses Ljubomir Obradović and Milovanović, as well as other documentary evidence, in reaching its finding that Directive 7/1 did not rescind or amend the content of Directive 7.[1378] Furthermore, while Mladić selectively relies on Witness Butler's evidence that "the VRS had the military legitimate right to attack the 28th Division" of the ABiH,[1379] he disregards this witness's consistent statement that Directive 7/1 did not supersede but rather supplemented Directive 7 with additional technical information.[1380] The Appeals Chamber thus finds that Mladić fails to demonstrate that the Trial Chamber erred in its assessment of Directive 7.

396. The Appeals Chamber also finds no merit in Mladić's contention that the Trial Chamber did not properly consider the language and context of his order of 13 July 1995, which prevented the

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[1372] *See* Mladić Appeal Brief, para. 621. *See also* T. 25 August 2020 p. 72.
[1373] *See* Mladić Appeal Brief, para. 621, *referring to* Trial Judgement, paras. 2364-2386, T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 pp. 71, 72; T. 26 August 2020 p. 46.
[1374] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1375] *See supra* para. 393.
[1376] The Trial Chamber found that, in March 1995, Radivoje Miletić and the VRS Main Staff drafted Directive 7, which was signed by Karadžić, Supreme Commander of the VRS, on 8 March 1995. In Directive 7, Karadžić outlined the four main priorities of the VRS: (i) through resolute offensive and defensive military operations, impose a military situation which the international community would be compelled to accept; (ii) improve the operational and strategic position of the VRS; (iii) reduce the front-line and create conditions for the economic revival of *Republika Srpska* by sending a number of military conscripts home; and (iv) create the conditions for the state and political leadership to negotiate a peace agreement and accomplish the strategic objectives of the war. *See* Trial Judgement, paras. 2382, 2383.
[1377] *See* Trial Judgement, paras. 2364-2386. The Trial Chamber found that, on 31 March 1995, the VRS Main Staff issued Directive 7/1, which was signed by Mladić, and wherein he repeated most of the tasks of the VRS outlined in Directive 7 and stated that he had decided to conduct, with the VRS main forces, a strategic operation under the code-name *Sadejstvo 95*. *See* Trial Judgement, para. 2384.
[1378] *See* Trial Judgement, paras. 2385, 2386, *referring to*, *inter alia*, Exhibits P345, P803, P4317, P5048. The Trial Chamber considered Witness Obradović's testimony that Directive 7 remained in force with respect to the VRS Second Krajina Corps, the SRK, and the VRS Herzegovina Corps, as stated in Directive 7/1, but that the main body of the force consisting of the VRS First Krajina Corps, the VRS East Bosnia Corps, and the Drina Corps, were tasked with what was set out in Directive 7/1. The Trial Chamber further considered Witness Milovanović's evidence that there is nothing in Directive 7/1 explicitly rescinding the controversial parts of Directive 7 and that in order to fully implement Directive 7/1 one would have to look at Directive 7.
[1379] *See* Mladić Appeal Brief, para. 621, *referring to* T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 pp. 71, 72; T. 26 August 2020 p. 46.
[1380] *See* T. 3 September 2013 pp. 16158, 16159; T. 4 September 2013 p. 16192.

entry of local and foreign journalists into the Srebrenica area and banned the provision of information on prisoners of war, evacuated civilians, and escapees.[1381] In this regard, the Appeals Chamber notes that the Trial Chamber's finding in question was based on the totality of the evidence, and particularly on the language of the order in its context.[1382] Further, the orders referenced by Mladić in support of his argument on appeal were issued to prevent classified military information from being leaked, and are thus different from his 13 July 1995 order, which was issued to restrict the international community's access to information in the midst of a mass murder operation.[1383] Accordingly, the Appeals Chamber finds that Mladić's contention in relation to his 13 July 1995 order reflects mere disagreement with the Trial Chamber's evaluation and interpretation of relevant evidence without demonstrating error. In this respect, the Appeals Chamber again recalls that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1384]

397. On the basis of the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Mladić's submission that the Trial Chamber erroneously concluded that he significantly contributed to the common criminal objective by issuing orders concerning the Srebrenica operation to VRS and MUP forces.

(d) Intercepts

398. Mladić submits that, although the Trial Chamber relied on certain intercepts to find that VRS forces committed crimes in Srebrenica and that he was complicit in those crimes, with a proper weighing of evidence, no reasonable trier of fact could have concluded that the intercepts

[1381] *See* Mladić Appeal Brief, para. 622, *referring to* Trial Judgement, paras. 5081, 5082, 5117, 5128.
[1382] *See* Trial Judgement, paras. 5071-5084. *See also* Exhibit P2120. Indeed, the Trial Chamber found that, between 11 July and 22 August 1995, Mladić was deliberately misleading the international community by: (i) claiming that the civilians in Srebrenica were free to stay or go; (ii) ordering the selling of the videotape of the distribution of food and water to foreign agencies; and (iii) denying alleged atrocities committed after the fall of Srebrenica and that executions had taken place. *See* Trial Judgement, paras. 5082-5084.
[1383] In this regard: (i) Exhibits P4332, P4383, P5161, P5173, P6549, and P6641 include general instructions to keep military operations confidential (*see* Exhibit P4332, p. 5; Exhibit P4383, p. 12; Exhibit P5161, p. 8; Exhibit P5173, p. 6; Exhibit P6549, p. 8; Exhibit P6641, p. 3); (ii) Exhibits P5068, P5069 relate to reporting within the chain of command (*see* Exhibit P5068, p. 1; Exhibit P5069, p. 1); (iii) Exhibit P5224 includes Mladić's 13 April 1994 order to isolate and restrict the movement of, *inter alia*, UNPROFOR, UN Military Observers ("UNMOs"), and foreign journalists, which the Trial Chamber found was issued in retaliation to NATO providing air support to UN safe areas (*see* Exhibit P5224, pp. 2, 3; *see also* Trial Judgement, para. 4604); and (iv) in relation to Exhibit P6646, a 19 November 1994 order from the VRS Main Staff's Sector for Moral Guidance, Religious and Legal Affairs on directions on some current issues regarding public information, the Trial Chamber found it to be one measure taken by that sector implementing Mladić's order "to conceal the real intent of the VRS forces and to gain support for their actions" (*see* Trial Judgement, paras. 4488, 4494, 4497-4500, *referring to* Exhibit P6646, pp. 1, 2).
[1384] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

were reliable and authentic.[1385] In this respect, he argues that the Trial Chamber erroneously disregarded evidence of Witness RM-316's partisanship and limited training, while relying on this witness to conclude that there was no evidence that the Intercepts were forgeries.[1386] Furthermore, according to Mladić, the Trial Chamber failed to give sufficient weight to: (i) the fact that [REDACTED];[1387] (ii) the lack of continuity or chain of custody in providing the intercepts to the ICTY;[1388] (iii) the incorrect identification of VRS relay routes and frequencies;[1389] and (iv) the scepticism Witness Butler expressed regarding the reliability of the Intercepts.[1390] In addition, Mladić submits that the Trial Chamber failed to adequately address inconsistencies within the Intercepts.[1391]

399. The Prosecution responds that Mladić fails to show that the Trial Chamber's assessment of the Intercepts was unreasonable in light of the totality of the evidence.[1392] It thus submits that Mladić's mere assertion that the Trial Chamber disregarded or failed to give sufficient weight to certain evidence should be summarily dismissed.[1393] The Prosecution further argues that the alleged inconsistencies Mladić raises are not supported by the evidence.[1394]

400. The Appeals Chamber notes that the Trial Chamber found the Intercepts to be genuine contemporaneous reports of intercepted VRS communications, and did not accept the argument that they were forged or manipulated.[1395] In reaching these findings, the Trial Chamber assessed the

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[1385] *See* Mladić Appeal Brief, paras. 624-628. In support of his submission, Mladić references specific paragraphs of the Trial Judgement where the Trial Chamber addressed the following intercepts: (i) Exhibit P1235 [REDACTED] (under seal), *see* Trial Judgement, para. 2480; (ii) Exhibit P4222 (concerning an intercept of Božidar Popović and Niđo Mihalić, 22 September 1995 at 6.44 p.m.) and Exhibit P4223 [REDACTED] (under seal), *see* Trial Judgement, paras. 2992, 2996; (iii) Exhibit P2126 [REDACTED] (under seal) and Exhibit P1322 (concerning an intercept of conversation between Beara and Krstić), *see* Trial Judgement, para. 4945; (iv) Exhibit P7397 [REDACTED] (under seal), p. 1, *see* Trial Judgement, para. 4950; (v) Exhibit P1320 [REDACTED] (under seal), p. 1, and Exhibit P1321 [REDACTED] (under seal), p. 1, *see* Trial Judgement, para. 5001; (vi) Exhibit P2126 [REDACTED] (under seal), *see* Trial Judgement, para. 5002; (vii) Exhibit P1297 [REDACTED] (under seal), *see* Trial Judgement, para. 5008; (viii) Exhibits P1338 and P1655 [REDACTED] (under seal), *see* Trial Judgement, paras. 5028, 5112; (ix) Exhibits P1657 and P1658 [REDACTED] (under seal), *see* Trial Judgement, paras. 5032, 5114 (collectively, "Intercepts").
[1386] Mladić Appeal Brief, para. 625, *referring to* Trial Judgement, para. 5046.
[1387] Mladić Appeal Brief, para. 626, *referring to* T. 28 June 2013 pp. 13575, 13576 (private session), Exhibit D316 (under seal).
[1388] Mladić Appeal Brief, para. 626, *referring to* T. 13 September 2013 pp. 16701, 16702, T. 1 November 2013 pp. 18643, 18644 (closed session).
[1389] Mladić Appeal Brief, para. 626, *referring to, inter alia*, Exhibits P1625, D879, D909, T. 25 June 2013 pp. 13338-13340, T. 18 February 2015 pp. 31900-31920, 31935-31937.
[1390] Mladić Appeal Brief, para. 626, *referring to* T. 3 September 2013 pp. 16115-16117.
[1391] Mladić Appeal Brief, para. 627, *referring to* Trial Judgement, paras. 4945, 5001, 5002, 5032, 5114, Exhibits P1320/P1321 (under seal), P2126 (under seal), P1332 (under seal), P1645/P1657 (under seal).
[1392] *See* Prosecution Response Brief, paras. 253-255, *referring to, inter alia*, Trial Judgement, paras. 5046, 5305-5308.
[1393] Prosecution Response Brief, para. 255, *referring to, inter alia*, Trial Judgement, paras. 5305-5308, nn. 18087, 18089.
[1394] *See* Prosecution Response Brief, paras. 256-258, *referring to, inter alia*, Trial Judgement, paras. 2792-2863, 4945, 5001, 5002, 5032, 5049, 5114.
[1395] *See* Trial Judgement, paras. 5046, 5307.

Intercepts in the context of the entire trial record, treated them with caution, and considered whether there was corroboration or further detail provided by other sources of evidence.[1396] In particular, the Trial Chamber considered the evidence of Witness RM-316[1397] as well as other evidence on the record, including evidence that the Intercepts were allegedly forgeries.[1398] In this context, Mladić's argument that the Trial Chamber failed to give sufficient weight to certain evidence reflects mere disagreement with the Trial Chamber's assessment of evidence without demonstrating any error.

401. Moreover, with respect to his submission regarding the Trial Chamber's assessment of the reliability and authenticity of the Intercepts, the Appeals Chamber considers that Mladić merely repeats his submissions at trial without demonstrating any error.[1399] A party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1400] Furthermore, although Mladić refers to Witness Butler's initial scepticism about the reliability of the Intercepts, this witness testified that he ultimately was "able to corroborate much of the information that was contained in those [I]ntercepts".[1401]

402. Turning to Mladić's submission that the Trial Chamber did not adequately address inconsistencies in the Intercepts, the Appeals Chamber recalls that it is within a trial chamber's discretion to assess inconsistencies and determine whether the evidence as a whole is reliable and credible.[1402] In this case, the Appeals Chamber is not convinced that the alleged inconsistencies Mladić refers to are supported by the evidence. For example, although Mladić argues that Exhibits P1320, P1321, and P2126 are inconsistent with Exhibit P1332,[1403] the Appeals Chamber observes that Exhibit P1332 is unrelated to the other three Intercepts, which pertain to the same conversation

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[1396] *See* Trial Judgement, paras. 5046, 5307, 5308. In considering the Intercepts, the Trial Chamber assessed their reliability as well as evidence supporting the identification of Mladić as a participant in the conversations. *See* Trial Judgement, para. 5046.

[1397] *See* Trial Judgement, para. 5046. The Trial Chamber considered Witness RM-316's evidence and was satisfied that Mladić would not have been identified unless the operators were certain that it was Mladić speaking in the intercept. *See also* Trial Judgement, para. 5028.

[1398] *See* Trial Judgement, paras. 5305-5308. *See also* Trial Judgement, paras. 5026-5030, 5032, 5046.

[1399] *See* Trial Judgement, para. 5305, *referring to, inter alia*, Mladić Final Trial Brief, para. 2620. With respect to the limited training of Witness RM-316, Mladić repeats his argument in paragraph 2620 of the Mladić Final Trial Brief. In relation to Witness RM-275, Mladić repeats his argument in paragraph 2618 of the Mladić Final Trial Brief. Regarding the lack of continuity or chain of custody, Mladić repeats his arguments in paragraphs 2595 and 2596 of the Mladić Final Trial Brief. As to radio-relay routes and frequencies, Mladić repeats his arguments in paragraphs 2619 to 2622, 2649, 2650, 2652 to 2654, 2656, and 2657 of the Mladić Final Trial Brief. All of the above-mentioned paragraphs were explicitly referenced by the Trial Chamber. *See* Trial Judgement, nn. 18087, 18089, *referring to, inter alia*, Mladić Final Trial Brief, paras. 2595, 2596, 2618-2622, 2649, 2650, 2652-2654, 2656, 2657.

[1400] *Karadžić* Appeal Judgement, paras. 19, 305, 598 and references cited therein.

[1401] *See* T. 3 September 2013 pp. 16115-16117.

[1402] *See Karadžić* Appeal Judgement, para. 363; *Prlić et al*. Appeal Judgement, para. 201; *Ntawukulilyayo* Appeal Judgement, para. 73 and references cited therein.

[1403] *See* Mladić Appeal Brief, para. 627, n. 763.

and are, in fact, consistent with each other, as they concern the same operation.[1404] Furthermore, although Mladić argues that Exhibits P1645 and P1657 are inconsistent with each other, the Appeals Chamber observes that Exhibit P1645 is not an intercept but a handwritten note and that Mladić's claims about the contents of Exhibit P1657 are incorrect because, contrary to his submission, [REDACTED].[1405]

403. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate error in the Trial Chamber's assessment of or reliance on the Intercepts.

(e) Knowledge, Investigation, and Punishment of Crimes

(i) Alleged Failure to Give Sufficient Weight to Probative Evidence

404. Mladić submits that, in finding that he failed to take adequate steps to investigate crimes and/or punish perpetrators, the Trial Chamber disregarded or failed to give sufficient weight to probative evidence that: (i) he had no knowledge of crimes and/or was unable to prevent or punish them; and (ii) he or his subordinates did investigate and prosecute certain crimes.[1406] With respect to the evidence that he had no knowledge of crimes, Mladić contends that the Zvornik Brigade[1407] daily combat report, dated 14 July 1995 ("Zvornik Brigade Report"), does not mention the commission of crimes,[1408] and that, to establish that crimes were reported, the Trial Chamber placed undue emphasis on Witness Ljubomir Bojanović's evidence that such information would be reported up the chain of command.[1409] According to Mladić, Witness Momir Nikolić confirmed that he concealed the killings from his commanders and provided misleading information about "asanacija/sanitisation" to cover up reburials.[1410] Mladić additionally argues that the Trial Chamber

[1404] *Compare* Exhibits P1320/P1321 (under seal) [REDACTED] *and* P2126 (under seal) [REDACTED] *with* Exhibit P1332 (under seal) [REDACTED].
[1405] *See* Mladić Appeal Brief, n. 763; Exhibit P1645 (concerning a handwritten note dated 7 August 1995); Exhibit P1657 (under seal).
[1406] *See* Mladić Appeal Brief, paras. 629-639, 641. *See also* T. 25 August 2020 p. 71; T. 26 August 2020 p. 56. Mladić further submits that, outside of his knowledge and unrelated to him, individuals from local areas, the MUP as well as Nikolić, and other "rogue members of the VRS security professional line of command", including Popović, took it upon themselves to conduct acts of revenge and killings in Srebrenica. *See* T. 25 August 2020 pp. 71, 80, 81, 84; T. 26 August 2020 pp. 44, 56.
[1407] The Zvornik Brigade was a VRS unit subordinate to the Drina Corps. *See* Trial Judgement, paras. 212, 215-218.
[1408] Mladić Appeal Brief, para. 632, *referring to*, *inter alia*, Trial Judgement, paras. 4961, 4966. According to Mladić, the Zvornik Brigade Report stated that there were "no unexpected events", although the Trial Chamber accepted that members of the Zvornik Brigade were falsifying records to conceal their involvement in the crimes. Mladić Appeal Brief, para. 632, n. 770, *referring to* Trial Judgement, para. 4966.
[1409] Mladić Appeal Brief, para. 632, *referring to* Trial Judgement, para. 4961.
[1410] Mladić Appeal Brief, para. 632, *referring to* Exhibits D1228, p. 3, P1494 (under seal), P1515, P1516, T. 28 May 2013 p. 11661 (closed session), T. 3 June 2013 pp. 11965, 11966; T. 25 August 2020 pp. 80, 81. Mladić argues that Witness Nikolić's report to the VRS Main Staff supports his statement that he concealed the crimes as it only contained information that wounded Muslim prisoners and Muslim UN staff were being evacuated. *See* Mladić Appeal Brief, para. 632, n. 773, *referring to* Exhibit P1515.

relied on a fuel order he signed to establish his knowledge of the crimes and the reburial operation, but failed to give sufficient weight to the fact that the unique identification number appearing on the fuel order was not his.[1411]

405. Mladić further argues that the Trial Chamber failed to give sufficient weight to evidence of: (i) parallel reporting and investigation processes; (ii) the institutional limitations of the military justice system; and (iii) conflicts with the civilian authorities, which led to his inability to prevent crimes and punish MUP perpetrators.[1412] With respect to evidence that he or his subordinates investigated and prosecuted crimes, Mladić points to: (i) ultimatums he issued on 23 September 1995 and 20 October 1995 stating that the MUP Command should prevent crimes and punish MUP perpetrators, or else face military action from the VRS;[1413] and (ii) a meeting on 26 March 1996 to form a joint investigation commission between the MUP and the VRS to investigate crimes committed in Srebrenica.[1414] Mladić argues that the Trial Chamber disregarded this evidence, ultimately leading to the impermissible inference that he failed to investigate crimes.[1415]

406. The Prosecution responds that Mladić's argument that the Trial Chamber disregarded and improperly weighed probative evidence should be dismissed.[1416] Specifically, it argues that the Trial Chamber reasonably found that Mladić was aware of the crimes[1417] and that he does not show

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[1411] Mladić Appeal Brief, para. 633, *referring to* Trial Judgement, paras. 3002-3005. To the extent that Mladić refers to paragraphs 611 and 612 of his appellant's brief, the Appeals Chamber recalls that it has rejected his arguments in this regard. *See supra* para. 380.

[1412] Mladić Appeal Brief, paras. 635-639, 641, *referring to* Trial Judgement, paras. 5086, 5094, 5098. *See also* T. 26 August 2020 p. 56. Mladić also takes issue with the Trial Chamber's reliance on Witness Predrag Drinić in finding that no investigations were conducted by Bosnian Serb military or civilian organs. To the extent that Mladić develops this argument in Ground 5.I of his appeal, it will be evaluated in connection with the submissions made in support of that sub-ground of appeal. *See* Mladić Appeal Brief, para. 634, *referring to* Trial Judgement, para. 4963.

[1413] Mladić Appeal Brief, para. 637. Mladić alleges that, following this, his key subordinates were removed in October 1995 and subsequently replaced. *See* Mladić Appeal Brief, para. 637.

[1414] Mladić Appeal Brief, para. 637, *referring to* Trial Judgement, para. 4963, Exhibit P3353 (under seal).

[1415] Mladić Appeal Brief, paras. 637, 639.

[1416] Prosecution Response Brief, para. 259, *referring to* Trial Judgement, paras. 4987, 5093, 5094, 5097, 5098. *See also* T. 26 August 2020 pp. 19-22. The Prosecution further submits that the Defence's alleged "hypothetical conspiracy", involving a breakdown of command and rogue elements of the VRS and civilian police without Mladić's knowledge, cannot explain: (i) the extensive and coordinated involvement of many different military units and resources under Mladić's overall command, (ii) that Mladić did nothing to punish direct perpetrators and their superiors who, under his control, conducted the operation, and (iii) his praise for his soldiers in the conduct of the operation in Srebrenica. *See* T. 26 August 2020 pp. 21, 22.

[1417] Prosecution Response Brief, para. 260, *referring to, inter alia*, Trial Judgement, paras. 213, 2992, 3002, 4989, 5042, 5050, 5052, 5053, 5069, 5080, 5092, 5093, 5096, 5098, Exhibit P1500. *See also* T. 26 August 2020 pp. 21, 22. The Prosecution argues that: (i) Mladić fails to explain how the Trial Chamber placed undue emphasis on Witness Bojanović's evidence that the crimes would have been reported up the chain of command in the Zvornik Brigade Report when the Trial Chamber expressly stated that it did not rely on this aspect of his evidence (*see* Prosecution Response Brief, para. 261, *referring to, inter alia*, Trial Judgement, n. 12063); (ii) Mladić fails to show how the absence of explicit mention of crimes in the Zvornik Brigade Report undercuts the Trial Chamber's finding that VRS officers, including Mladić, were aware of the killings (*see* Prosecution Response Brief, para. 262, *referring to, inter alia*, Trial Judgement, paras. 4961, 5093); and (iii) Witness Momir Nikolić's evidence confirms Mladić's active participation in

that the Trial Chamber erred in concluding that he failed to take adequate steps to investigate the crimes and punish the perpetrators.[1418]

407. The Appeals Chamber observes that, in reaching its finding that Mladić was aware of crimes committed in Srebrenica in July 1995 by members of the VRS and the MUP but failed to take adequate steps to investigate crimes and punish perpetrators,[1419] the Trial Chamber recalled its previous findings, *inter alia*, that: (i) in 1995, the Drina Corps maintained an effective command and control structure with a strong reporting chain and there was a fully functioning communication system in place at the time;[1420] and (ii) VRS officers were aware of the killings of Bosnian Muslims in Srebrenica and the Zvornik area, but there were no investigations or prosecutions with respect to the July 1995 killings in Srebrenica.[1421] The Appeals Chamber further observes that the Trial Chamber explicitly pointed out that it "did not receive evidence to conclude that Mladić ordered any substantial or meaningful investigations into war crimes or crimes against humanity".[1422] Moreover, the Trial Chamber relied on its previous findings, based on extensive evidence, that Mladić: (i) possessed the authority to order investigations within the military justice system;[1423] (ii) was under a duty to take adequate steps to investigate and/or punish the crimes;[1424] (iii) was aware of crimes committed in Srebrenica in July 1995 by members of the VRS and the MUP;[1425] and (iv) engaged in actions that were deliberately misleading.[1426]

408. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber is not convinced that the Trial Chamber gave insufficient weight to evidence showing that Mladić had no knowledge of the crimes committed in Srebrenica.[1427] In relation to the Zvornik Brigade Report, the Appeals Chamber fails to see how the absence of explicit reference to the commission of crimes in the report, which is only pertinent to 14 July 1995 and to the Zvornik Brigade's area of responsibility, would undercut the Trial Chamber's finding that Mladić was aware of crimes committed in Srebrenica as a whole.[1428] With respect to Witness Bojanović's evidence that the mass

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and knowledge of the murder operation (*see* Prosecution Response Brief, para. 263; *see also* T. 26 August 2020 pp. 19, 20).

[1418] *See* Prosecution Response Brief, paras. 265-271. *See also* T. 26 August 2020 p. 22.

[1419] *See* Trial Judgement, paras. 5093, 5094.

[1420] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213.

[1421] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, para. 4968.

[1422] *See* Trial Judgement, para. 5094. *See also* Trial Judgement, para. 4545.

[1423] *See* Trial Judgement, para. 5091, *referring to* Trial Judgement, paras. 4516-4543, 4545.

[1424] *See* Trial Judgement, para. 5092, *referring to* Trial Judgement, paras. 2443-2448, 2676, 2684, 2706-2708, 2723, 2732, 2759, 2766, 2776, 2791, 2820, 2825, 2859, 2861, 2862, 2876, 2882, 2886, 2894, 2917, 2920, 2921, 2924, 2926, 2935, 3051, 4952-4958, 5046-5053, 5066-5069.

[1425] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 210-213, 2457-2478, 4959-4968.

[1426] *See* Trial Judgement, para. 5094, *referring to* Trial Judgement, paras. 5071-5084.

[1427] *See* Mladić Appeal Brief, paras. 630-633. *See also* T. 25 August 2020 pp. 71, 80, 81; T. 26 August 2020 p. 56.

[1428] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213, 4968.

execution of detainees in the Zvornik Brigade's area of responsibility would have been reflected in the daily combat report, the Trial Chamber explicitly considered this evidence in determining the concealment of crimes, but did not rely on it, on the basis that Witness Bojanović was not involved in the drafting of the report and accordingly found his comments speculative.[1429] Regarding evidence concerning Witness Momir Nikolić, the Appeals Chamber observes that Mladić misinterprets Exhibit D1228, which shows that Witness Momir Nikolić discussed the killing of captured Muslims with his commander, Blagojević, on 12 and 13 July 1995, rather than concealed the killings from his commanders.[1430] Furthermore, Mladić merely offers an alternative interpretation of Witness Momir Nikolić's evidence without demonstrating the unreasonableness of the Trial Chamber's finding that the reburial operation was reported.[1431] Turning to the fuel order, contrary to Mladić's assertion,[1432] the Trial Chamber did not rely on it to determine his knowledge of the crimes or the reburial operation.[1433] In this respect, Mladić merely disagrees with the Trial Chamber's assessment of the unique identification number appearing on the fuel order without demonstrating an error.

409. With respect to Mladić's alleged inability to investigate crimes given the parallel reporting and investigation processes,[1434] he merely repeats his submissions at trial, arguing, *inter alia*, that "probative evidence showed that the crimes were reported to the civilian authorities".[1435] The Trial Chamber explicitly rejected this argument and found that "merely reporting the crimes to the MUP

[1429] *See* Trial Judgement, para. 2776, n. 12063. *See also* Trial Judgement, paras. 4961, 4966. Contrary to Mladić's assertion, the Trial Chamber did not rely on Witness Bojanović's evidence to find that the crimes were reported, but instead considered this evidence in reaching its finding that the crimes were concealed. *See* Mladić Appeal Brief, paras. 631, 632.

[1430] *See* Trial Judgement, para. 4939, *referring to* Exhibit D1228, p. 8. In addition, Exhibit D1228 shows that Witness Momir Nikolić only mentioned the killings in his verbal report and not in his written report, rather than that "he had never seen a written report about the killings". *See* Trial Judgement, para. 4939, *referring to* Exhibit D1228, p. 3. *See also* Mladić Appeal Brief, para. 632; Exhibit D1228, pp. 3, 8.

[1431] *See* Trial Judgement, para. 3004 (wherein the Trial Chamber found that "[o]n 16 October 1995, Momir Nikolić met with Blagojević, the command staff, and battalion commanders or their deputies, and reported that members of the Brigade were engaged in a reburial operation conducted under the name 'asanacija[',] or hygiene and sanitation measures, which had been ordered by the VRS Main Staff"). In reaching this finding, the Trial Chamber considered, *inter alia*, the evidence of Witnesses Momir Nikolić and RM-322. *See* Trial Judgement, paras. 2995, 2997, 2999, 5344, *referring to*, *inter alia*, T. 28 May 2013 p. 11661 (closed session), T. 3 June 2013 pp. 11963-11967, 11969, 11970, Exhibits D300, P1494 (under seal), P1516.

[1432] *See* Mladić Appeal Brief, para. 633, *referring to* Trial Judgement, paras. 3002-3005.

[1433] The Appeals Chamber has previously examined the Trial Chamber's determination of Mladić's knowledge of the crimes. *See supra* paras. 407, 408. *See also* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213, 4968. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber observes that the Trial Chamber did not make a specific finding about Mladić's knowledge of the reburial operation. *See* Trial Judgement, paras. 2989-3007, 4959-4969, 5086-5095.

[1434] With respect to evidence of the institutional limitations of the military justice system, Mladić recalls his arguments in relation to Ground 3 of his appeal. To the extent that Mladić develops these arguments in Ground 3, they are evaluated in connection with the submissions made in support of that ground. *See* Mladić Appeal Brief, para. 638. *See supra* Section III.B.2(a)(iii)e.

[1435] *See* Mladić Appeal Brief, para. 635, *referring to* Trial Judgement, para. 5086, Mladić Final Trial Brief, paras. 3273-3292.

Commander would not satisfy [Mladić's] duties as commander".[1436] In addition, while Mladić refers to portions of Witness Theunens's testimony to support his contention that he could not take direct steps to investigate crimes perpetrated by MUP officers,[1437] nothing in those portions of the testimony supports this contention.[1438] On the contrary, Witness Theunens stated, without reference to any particular situation, that when the MUP units were conducting operations under military command, the VRS Commander in the area had the duty to investigate alleged crimes.[1439] In relation to evidence of conflicts with the civilian authorities, the Appeals Chamber notes that Mladić simply repeats his submissions presented at trial,[1440] where the Trial Chamber found that Mladić possessed the authority to order investigations within the military justice system,[1441] without identifying any error on the part of the Trial Chamber. The Appeals Chamber reiterates that a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1442]

410. Finally, with respect to Mladić's submission regarding evidence that he or his subordinates prosecuted or investigated crimes, the Appeals Chamber observes that the ultimatums issued by Mladić, to which he points on appeal, did not concern Srebrenica crimes.[1443] As such, these ultimatums were not relevant to the Trial Chamber's assessment of Mladić's contribution to the Srebrenica JCE. As to the meeting to form the joint investigation commission, the Appeals Chamber notes that the Trial Chamber considered evidence in this respect[1444] in finding that "on 23 March 1996, Karadžić ordered the VRS and MUP to immediately form a mixed commission to investigate the alleged discovery of two decomposed bodies in the Pilica area", however, it explicitly noted that the proposal to initiate such investigation by Drinić was never addressed.[1445]

[1436] *See* Trial Judgement, paras. 5086, 5091.
[1437] *See* Mladić Appeal Brief, para. 635, *referring to* T. 10 December 2013 pp. 20618-20625.
[1438] *See* T. 10 December 2013 pp. 20618-20625. Witness Theunens further testified that Mladić had the authority to order investigations within the military justice system, but only used it selectively, focusing on acts which had a negative impact on the combat readiness of the VRS. *See* Trial Judgement, para. 4531, *referring to* T. 6 December 2013 pp. 20388-20392. *See also* T. 6 December 2013 p. 20388.
[1439] T. 10 December 2013 p. 20623.
[1440] *Compare* Mladić Appeal Brief, paras. 636, 637 *with* Mladić Final Trial Brief, paras. 3284-3289.
[1441] *See* Trial Judgement, para. 5091, *referring to* Trial Judgement, para. 4545.
[1442] *See Karadžić* Appeal Judgement, paras. 19, 305, 598 and references cited therein.
[1443] The ultimatums instead relate to activities of Arkan's paramilitary unit in Sanski Most Municipality. *See* Exhibits D1503, P3095. Mladić's submissions regarding Exhibits D1503 and P3095 have been dismissed above in relation to the Overarching JCE. *See supra* Section III.B.1(b)(ii).
[1444] *See* Trial Judgement, para. 4963 (wherein Witness Drinić stated that he attended a meeting on 25 or 26 March 1996 to discuss an order from Karadžić of 23 March 1996 requesting the VRS and MUP to immediately form a mixed expert commission to investigate the alleged discovery of two decomposed bodies in the Pilica area in Zvornik Municipality). *See also* Exhibit P3351, pp. 10879, 10880; Exhibit P3353 (under seal), pp. 3, 6, 8.
[1445] *See* Trial Judgement, paras. 4963, 4968.

411. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber committed an error in evaluating evidence regarding his knowledge of the crimes, his inability to punish crimes, and that he or his subordinates prosecuted or investigated crimes. In addition, recalling the finding that, *inter alia*, Mladić has failed to show an error in the Trial Chamber's findings that he exercised command and control over VRS and MUP forces, which were under VRS command from 11 until 17 July 1995, even during his absence from Srebrenica, the Appeals Chamber, Judge Nyambe dissenting, finds Mladić's claim of Momir Nikolić, the MUP, and other rogue members of the VRS committing revenge killings in Srebrenica without his knowledge to be speculative and unconvincing.[1446] His submissions in this regard are therefore summarily dismissed.

(ii) Alleged Error in Relying on Failure to Investigate and Punish Crimes to Determine Significant Contribution

412. Noting that the Trial Chamber relied on his failure to investigate and prosecute crimes committed in Srebrenica to determine his significant contribution to the Srebrenica JCE, Mladić submits that such omissions are insufficient evidence of his significant contribution.[1447] He argues that, as the ICC Appeals Chamber in *Bemba* confirmed, the measures taken by a commander cannot be faulted merely because of shortfalls in their execution.[1448]

413. The Prosecution responds that Mladić's reliance on the *Bemba* Appeal Judgement, which addressed measures that had been taken to prosecute and investigate crimes, is inapposite to these circumstances where no measures were taken.[1449]

414. The Appeals Chamber recalls that the law does not foresee specific types of conduct which *per se* cannot be considered a contribution to the common purpose of a joint criminal enterprise.[1450] What matters is that the accused performs acts that in some way contribute to the furtherance of the common purpose.[1451] Within these legal confines, the question of whether a failure to act could be taken into account to establish that the accused significantly contributed to a joint criminal

[1446] *See supra* paras. 383, 389.
[1447] Mladić Appeal Brief, paras. 636, 640.
[1448] Mladić Appeal Brief, para. 636, *referring to Bemba* Appeal Judgement, para. 180.
[1449] Prosecution Response Brief, para. 270.
[1450] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696. In relation to Mladić's reliance on the *Bemba* Appeal Judgement, the Appeals Chamber reiterates that it is not bound by the findings of other courts – domestic, international, or hybrid – and that, even though it may consider such jurisprudence, it may nonetheless come to a different conclusion on a matter than that reached by another judicial body. *See, e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674. *See also Đorđević* Appeal Judgement, para. 83.

enterprise is a question of fact to be determined on a case-by-case basis.[1452] Furthermore, the Appeals Chamber recalls that failures to act or acts carried out in furtherance of a joint criminal enterprise need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all.[1453]

415. In the present case, as part of the factual determination of Mladić's significant contribution to the Srebrenica JCE, the Trial Chamber considered, together with his other actions,[1454] that: (i) Mladić commanded and controlled VRS and MUP units during the Srebrenica operation and its aftermath;[1455] and (ii) Mladić failed to take adequate steps to investigate crimes and/or punish members of the VRS and other elements of the Serb forces under his effective control who committed such crimes,[1456] despite his duty and ability to do so and his awareness of the crimes.[1457] The Trial Chamber further considered that the above-mentioned acts were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1458] The Appeals Chamber recalls that a failure to intervene to prevent the recurrence of crimes or to halt abuses has been taken into account in assessing an accused's contribution to a joint criminal enterprise as well as his intent, where the accused had some power, influence, or authority over the perpetrators that was sufficient to prevent or halt the abuses but failed to exercise such power.[1459] Therefore, Mladić fails to show that the Trial Chamber erred in considering his failure to take adequate steps to investigate crimes and/or punish perpetrators in determining whether he significantly contributed to the Srebrenica JCE.

416. In light of the above, the Appeals Chamber, Judge Nyambe dissenting, rejects Mladić's contention that his failure to punish crimes is insufficient evidence of his significant contribution to the Srebrenica JCE.

(f) Conclusion

417. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.B of Mladić's appeal.

[1451] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, para. 1653; *Krajišnik* Appeal Judgement, para. 695. *See also Brđanin* Appeal Judgement, para. 427.
[1452] *Stanišić and Župljanin* Appeal Judgement, para. 110. *See also Šainović et al.* Appeal Judgement, paras. 1233, 1242.
[1453] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 427.
[1454] *See* Trial Judgement, paras. 5097, 5098.
[1455] *See* Trial Judgement, para. 5098.
[1456] *See* Trial Judgement, paras. 5097, 5098.
[1457] *See* Trial Judgement, paras. 5091-5093.
[1458] *See* Trial Judgement, para. 5098.

3. Alleged Errors in Reversing the Burden of Proof and Violating *In Dubio Pro Reo* (Ground 5.D)

418. In finding that Mladić shared the intent to achieve the common objective of the Srebrenica JCE, the Trial Chamber rejected Mladić's argument that his personal actions and behaviour did not support his criminal intent.[1460] In this respect, the Trial Chamber found that the only reasonable inference was that Mladić had the specific intent to commit genocide and that he intended to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men.[1461]

419. Mladić submits that the Trial Chamber relied on statements he made at the Hotel Fontana meetings, statements he made to the media, and his knowledge of crimes to establish that he shared a common state of mind with other members of the Srebrenica JCE.[1462] Mladić contends that the Trial Chamber erred in giving insufficient weight to exculpatory evidence, thereby incorrectly finding the requisite *mens rea* beyond a reasonable doubt and violating the principle of *in dubio pro reo*.[1463] In particular, Mladić submits that the Trial Chamber failed to give sufficient weight to: (i) his statements and actions to adhere to international law by evacuating civilians and ensuring the welfare of prisoners of war;[1464] and (ii) the orders he and his subordinates gave in Srebrenica.[1465] According to Mladić, had the Trial Chamber given sufficient weight to this evidence and viewed it in its totality, it would not have concluded beyond a reasonable doubt that he shared the necessary *mens rea* to achieve the common objective of the Srebrenica JCE and the specific intent to kill Bosnian Muslim men and boys.[1466] Mladić therefore requests that the Appeals Chamber reverse his conviction for the crimes committed under the Srebrenica JCE or, alternatively, reverse the findings to the extent of any errors.[1467]

(a) Statements and Affirmative Actions Taken by Mladić to Adhere to International Law

420. Mladić submits that the Trial Chamber erred in relying on statements that he made during the Hotel Fontana meetings on 11 and 12 July 1995 to establish that he shared the criminal intent

[1459] *Stanišić and Župljanin* Appeal Judgement, para. 111, n. 383; *Krajišnik* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, paras. 195, 196.
[1460] Trial Judgement, para. 5131.
[1461] Trial Judgement, para. 5130.
[1462] *See* Mladić Appeal Brief, para. 651, *referring to* Trial Judgement, paras. 5088, 5128, 5085, 5093, 5099-5131.
[1463] Mladić Notice of Appeal, paras. 59, 60. Mladić Appeal Brief, paras. 645, 652, 663.
[1464] *See* Mladić Appeal Brief, paras. 653-658. *See also* T. 25 August 2020 pp. 65-70, 72, 82-84; T. 26 August 2020 pp. 45-48.
[1465] *See* Mladić Appeal Brief, paras. 659-661. *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1466] *See* Mladić Appeal Brief, paras. 662-664.
[1467] Mladić Appeal Brief, para. 665.

for both objectives of the Srebrenica JCE.[1468] In particular, he argues that the Trial Chamber placed insufficient weight on the context in which these statements were made and contends that the language used in these statements was consistent with legitimate military language.[1469] He further submits that the Trial Chamber failed to give sufficient, if any, weight to his subsequent statements and actions, including: (i) his involvement with the UN in coordinating humanitarian evacuations; (ii) his statements that civilians had a choice to leave for Yugoslavia or the Federation or stay in *Republika Srpska*; (iii) his assurances to captured prisoners of war that they would be treated in accordance with the law; and (iv) his cooperation during the Belgrade discussions on 14 and 15 July 1995 with the UN, European Union, and UNPROFOR ("Belgrade Discussions"), which culminated in a signed assurance that the ICRC would be granted access to prisoners of war and that the Geneva Conventions would be adhered to.[1470] Finally, in relation to the Trial Chamber's consideration that he misled the media about the conditions in Srebrenica, Mladić contends that the Trial Chamber failed to give sufficient weight to information that was reported to him, to his reliance on the information available to him at the time, and the fact that he repeated it to the media.[1471]

421. The Prosecution responds that the Trial Chamber reasonably found that Mladić shared the intent to further the common purpose of the Srebrenica JCE.[1472] It contends that Mladić fails to identify any relevant evidence which the Trial Chamber disregarded and that his challenges reflect mere disagreement with the weighing of the evidence, without showing error.[1473] The Prosecution argues that Mladić fails to explain how the Trial Chamber gave insufficient weight to the context of his statements[1474] and submits that: (i) Mladić improperly extrapolates the testimony of two expert witnesses commenting on a certain order to claim that his statements at the second Hotel Fontana meeting were also legitimate;[1475] (ii) Mladić fails to explain how some of his statements could have been interpreted positively,[1476] or as legitimate military language,[1477] or how they were taken out of

[1468] Mladić Appeal Brief, paras. 651, 653, 654.
[1469] Mladić Appeal Brief, paras. 595, 655; T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1470] Mladić Appeal Brief, paras. 655, 656; T. 25 August 2020 pp. 65-70, 72, 82-84; T. 26 August 2020 pp. 47, 48.
[1471] Mladić Appeal Brief, para. 657.
[1472] Prosecution Response Brief, para. 272. *See also* T. 26 August 2020 p. 3.
[1473] *See* Prosecution Response Brief, paras. 272, 277, 278.
[1474] Prosecution Response Brief, para. 273. The Prosecution contends that the statements made by Mladić were correctly assessed by the Trial Chamber in their context, which included the plan to remove the Bosnian Muslim population from Eastern Bosnia and the systematic forcible transfer and murder of the Bosnian Muslim population in Srebrenica by Mladić's forces. *See* Prosecution Response Brief, para. 273, *referring to, inter alia*, Trial Judgement, paras. 2358-2362, 5096-5098.
[1475] Prosecution Response Brief, para. 274, *referring to, inter alia*, T. 16 September 2013 p. 16831, T. 16 November 2015 pp. 41395, 41396.
[1476] Prosecution Response Brief, para. 274, *referring to, inter alia*, Trial Judgement, paras. 2467, 2477, 5130; Exhibit P1147, pp. 41, 42.
[1477] Prosecution Response Brief, para. 274, *referring to, inter alia*, Trial Judgement, para. 5106.

context;[1478] and (iii) Mladić's subsequent conduct does not refute the criminal meaning of his statements and, on the contrary, his preferred alternative inference ignores findings clearly showing otherwise.[1479] The Prosecution further submits that Mladić's claim that the Trial Chamber failed to consider the totality of the evidence ignores a multitude of statements and acts it relied on to conclude that he shared the intent for the Srebrenica JCE,[1480] and that his claim that the Trial Chamber gave insufficient weight to his reliance on information available to him when talking to the media reflects mere disagreement with the Trial Chamber's assessment of the evidence.[1481]

422. With respect to Mladić's argument that the language used in his statements at the Hotel Fontana meetings was consistent with "legitimate military language",[1482] the Appeals Chamber recalls that it has already addressed and dismissed this argument.[1483] Furthermore, the Trial Chamber's finding that Mladić shared the intent to achieve the common objective of the Srebrenica JCE is only partly based on his statements calling for revenge on the Bosnian Muslims from Srebrenica,[1484] and, in any event, Mladić does not show that the Trial Chamber erred in assessing these statements.

423. Turning to Mladić's argument that the Trial Chamber failed to give sufficient weight to his speeches and actions after his statements at the Hotel Fontana meetings, the Appeals Chamber recalls that, as a result of the VRS attack on the Srebrenica enclave in July 1995, thousands of Bosnian Muslims fled to Potočari seeking refuge within the UNPROFOR compound before being transferred to Bosnian controlled territory under the auspices of the VRS and the MUP and, for the first convoy only, under the supervision and escort of UNPROFOR.[1485] The Appeals Chamber further notes that the Trial Chamber found that the Bosnian Muslims who left Potočari to go to

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[1478] Prosecution Response Brief, para. 274, *referring to, inter alia*, Trial Judgement, para. 2476, Mladić Appeal Brief, para. 658, n. 800.
[1479] Prosecution Response Brief, para. 275, *referring to, inter alia*, Trial Judgement, paras. 2557, 2559, 2562, 2724-2732, 3159. Similarly, the Prosecution submits that the Trial Chamber found Mladić's statements to captured prisoners of war to be "misleading assurances", and that he also fails to show that his promises that the ICRC would be granted access to prisoners are different from his other misleading assurances. The Prosecution argues that Mladić points to no evidence that the ICRC was ever granted access to register the prisoners in Srebrenica, Bratunac, and Zvornik, which is consistent with Mladić's measures to conceal the ongoing murder and burial of thousands of Bosnian Muslim prisoners. *See* Prosecution Response Brief, para. 276, *referring to, inter alia*, Trial Judgement, paras. 5081, 5128, 5130, Exhibit D410, p. 2. *See also* T. 26 August 2020 p. 7 (where the Prosecution discussed Mladić's efforts to conceal the killings from the international community).
[1480] Prosecution Response Brief, para. 277, *referring to, inter alia*, Trial Judgement, paras. 2480, 5104, 5105, 5110, 5128, 5130, Exhibit P1147, p. 117, Exhibit P1235.
[1481] Prosecution Response Brief, paras. 272, 278.
[1482] Mladić Appeal Brief, paras. 595, 655, *referring to* Trial Judgement, paras. 5052, 5129, T. 16 September 2013 p. 16831, T. 16 November 2015 p. 41395. *See also* T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1483] *See supra* para. 370 (finding that the evidence cited by Mladić did not substantiate his submission that the Trial Chamber failed to sufficiently consider the military context in which his statements at the Hotel Fontana were made and that Mladić fails to identify any error in this respect).
[1484] *See* Trial Judgement, paras. 5106, 5126, 5128.

Bosnian Muslim controlled territory "did not have a genuine choice but to leave".[1486] Against this background, Mladić submits that the Trial Chamber gave insufficient weight to evidence that he and the UN coordinated humanitarian evacuations[1487] and to statements where he made it clear that civilians in Potočari had a choice to stay or leave.[1488] The Appeals Chamber recalls that it has already considered and rejected Mladić's submissions that he was "acting in coordination with high-level DutchBat/UNPROFOR officials to evacuate civilians" for humanitarian reasons and that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations.[1489] The Appeals Chamber has also already determined that Mladić's submission that he gave civilians a choice to stay or leave and that he was acting to evacuate civilians for humanitarian reasons was unconvincing, especially since the Trial Chamber found such statements to be "deliberately misleading".[1490] In this respect, the Appeals Chamber notes that the Trial Chamber considered the evidence to which Mladić points on appeal, in particular his statement in Potočari that everyone who wanted to leave had been evacuated safely.[1491] Specifically, the Trial Chamber considered the evidence of Witness Milovan Milutinović that "Mladić gave the Muslim delegation his word that everyone gathered at Potočari who had surrendered their weapons could cho[o]se whether to go to 'Yugoslavia, the Federation' or to stay in the Bosnian-Serb Republic, and guaranteed them full rights and freedoms".[1492] While the Trial Chamber did not discuss Exhibit P1147 when assessing Mladić's criminal intent, it addressed this evidence elsewhere in the Trial Judgement. In particular, the Trial Chamber considered that while in Potočari, Mladić said that Bosnian Serb authority had been established in Srebrenica and the entire enclave was under the control of the VRS and everyone who wanted to leave had been evacuated safely.[1493] In this respect, the Appeals Chamber recalls that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence.[1494] Mladić

[1485] Trial Judgement, paras. 2443, 2968, 3159.
[1486] Trial Judgement, para. 3159.
[1487] *See* Mladić Appeal Brief, paras. 595, 655, 658, *referring to* Trial Judgement, para. 2472, Exhibit P1147, pp. 26-42, 47-51, 55, 56; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47, 48.
[1488] Mladić Appeal Brief, paras. 579, 656. *See also* T. 25 August 2020 pp. 66, 67, 69.
[1489] *See supra* paras. 357, 358 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave no or insufficient weight to evidence that the transfers were necessary for humanitarian reasons).
[1490] *See supra* paras. 357, 358 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations).
[1491] Mladić Appeal Brief, para. 579, *referring to* Trial Judgement, para. 2472, Exhibit P1147, p. 55. *See also* T. 25 August 2020 pp. 66, 67.
[1492] *See* Trial Judgement, para. 2472.
[1493] *See* Trial Judgement, para. 5009.
[1494] *See Karadžić* Appeal Judgement, paras. 563, 702, 744 and references cited therein.

ignores the Trial Chamber's extensive review of the evidence in support of its finding that the Bosnian Muslims who left Potočari to go to Bosnian Muslim controlled territory did not have a genuine choice but to leave.[1495] Mladić's argument that the Trial Chamber afforded insufficient weight to evidence that he gave civilians a choice to stay or leave is therefore without merit.

424. In relation to Mladić's contention that the Trial Chamber failed to give sufficient, if any, weight to statements he made to prisoners of war, Mladić refers to evidence of Witnesses RM-292, RM-253, and RM-364, that, while they were being held prisoner, Mladić assured them that they would be exchanged and returned to their families.[1496] While the Trial Chamber did not expressly discuss this particular evidence in the Trial Judgement, it considered and made findings on other evidence that Mladić addressed Bosnian Muslim soldiers and assured them that they would be exchanged.[1497] The Appeals Chamber notes, however, that the Trial Chamber ultimately found such statements to be "misleading assurances".[1498] The Appeals Chamber therefore finds that Mladić's arguments in this respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. In this regard, the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1499]

[1495] Trial Judgement, para. 3159 (wherein the Trial Chamber considered: (i) the circumstances of the movement of population from Srebrenica to Potočari, including the orders to leave, the shells fired by the VRS at the UNPROFOR compound, the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, in particular the shots and shells fired around the compound, the dire living conditions, the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women, children, and the elderly onto the buses while some were hit by members of the MUP, and escorted the buses towards Bosnian-Muslim controlled territory).

[1496] T. 13 June 2013 pp. 12659, 12662 (wherein Mladić told prisoners that "[they] do not need to be afraid because they would return to their houses and be exchanged", after which "he was applauded by the prisoners"); T. 11 June 2013 p. 12532 (wherein Mladić told prisoners "[y]ou do not have to worry. You will be exchanged and join your families in Tuzla. Now you'll be transported by trucks to Bratunac or Kravica where you will spend the night and get some food."); Exhibit P1118, p. 3024 (wherein Mladić told prisoners "that [they] would all be exchanged and that they were not criminals."). *See also* T. 25 August 2020 pp. 82, 83.

[1497] Trial Judgement, paras. 5052, 5130.

[1498] In finding Mladić's intent for genocide, the Trial Chamber considered, in part, Mladić's presence at Nova Kasaba football field and Sandići Meadow on 13 July 1995, where several thousand Bosnian Muslim males were detained, and his misleading assurances that they would be taken to Bratunac to be exchanged. The Trial Chamber further considered Mladić's command and control over VRS and MUP units operating in and around Srebrenica from at least 11 July to 11 October 1995, his orders to separate the Bosnian Muslim men from the women, children, and elderly in Potočari from 12 July 1995, his statements and speeches between 11 July and August 1995, in which he articulated that it was time to take revenge, and threatened that the Bosnian Muslims of Srebrenica could either "live or vanish", "survive or disappear", that only the people who could secure the surrender of weapons would save the Bosnian Muslims from "destruction" as well as his presence at a meeting on 13 July 1995 with MUP and VRS officers during which the VRS tasked the MUP with the killing of about 8,000 Bosnian Muslim males near Konjević Polje. Trial Judgement, paras. 5052, 5130.

[1499] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

425. In support of his argument that the Trial Chamber did not give sufficient weight to evidence demonstrating his cooperation during the Belgrade Discussions, Mladić points to one exhibit about an informal agreement to allow the ICRC access to assess the welfare of prisoners of war and register them in accordance with the Geneva Conventions.[1500] Mladić ignores that the Trial Chamber considered and made findings on similar orders he gave to the VRS and other subordinated forces, in relation to the Overarching JCE, to grant freedom of movement to international humanitarian organizations and to respect the Geneva Conventions.[1501] The Appeals Chamber observes that the Trial Chamber found this evidence inconsistent with Mladić's other conduct and directly contradicted by his other contemporaneous statements.[1502] In particular, the Trial Chamber found, in its assessment of the Overarching JCE, that Mladić's orders to respect the Geneva Conventions were not indicative of his true state of mind.[1503] Recalling that the Trial Judgement must be read as a whole,[1504] the Appeals Chamber therefore finds that Mladić fails to demonstrate how the exhibit he points to on appeal could undermine the Trial Chamber's finding in this respect.

426. Mladić also submits that, in finding that he misled the media about the conditions in Srebrenica, the Trial Chamber failed to give sufficient weight to information that was reported to him, to his reliance on the information available to him at the time, and to the fact that he repeated this information to the media.[1505] Mladić, however, provides no support for any of these contentions, and the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1506] Moreover, the Appeals Chamber notes that the Trial Chamber's findings are based on the totality of the evidence, including on the actions Mladić took to prevent the media and public from knowing what was happening in Srebrenica.[1507] The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić's unsupported arguments in this

[1500] Mladić Appeal Brief, para. 656, *referring to* Exhibit D410. *See also* T. 25 August 2020 p. 84.
[1501] *See* Trial Judgement, para. 4687. *See also, e.g.*, Trial Judgement, paras. 4555, 4556, *referring to* Exhibits D726 (wherein Mladić orders all the brigades, the Skelani Independent Battalion, and the Višegrad Tactical Group to enable the unhindered passage of humanitarian aid and observe in all respects the Geneva Conventions and other provisions of international laws of war), P5219 (wherein Mladić ordered that Commands at all levels were to ensure the delivery of humanitarian aid, and grant freedom of movement to all international humanitarian organizations).
[1502] Trial Judgement, para. 4687. *See also supra* paras. 259, 260.
[1503] Trial Judgement, para. 4687. *See also supra* paras. 259, 260.
[1504] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 563, 702, 744; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[1505] Mladić Appeal Brief, para. 657.
[1506] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1507] *See* Trial Judgement, paras. 5080-5084, 5117, 5128.

respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error.

(b) Orders Made by Mladić and His Subordinates

427. Mladić submits that the Trial Chamber erred in its assessment of the Krivaja-95 operation and other related orders, and that it gave insufficient weight to the military context of these orders.[1508] Mladić further submits that the Trial Chamber did not afford sufficient weight to the language of his 13 July 1995 order preventing the media from entering the combat zone in the general sector of Srebrenica and Žepa, which he argues were prohibitions consistent with combat operations, as shown by other orders in other areas.[1509]

428. The Prosecution responds that Mladić repeats arguments made under another subsection regarding the Krivaja-95 operation while showing no error.[1510] The Prosecution further submits that Mladić fails to show any error in the Trial Chamber's finding that his 13 July 1995 order was intended to keep the media and international community from knowing what was happening in Srebrenica.[1511] In this regard, the Prosecution submits that Mladić ignores relevant evidence,[1512] and that, contrary to his claim, the language in other orders does not make the Trial Chamber's assessment of the 13 July 1995 order unreasonable.[1513]

429. The Appeals Chamber recalls that it has already rejected Mladić's argument that his orders were consistent with legitimate military operations in light of the military context of Srebrenica and found that they cannot serve to demonstrate any error in the Trial Chamber's conclusion that Mladić significantly contributed to achieving the common objective.[1514] The Appeals Chamber therefore finds no merit in Mladić's contention that the Trial Chamber failed to give sufficient

[1508] Mladić Notice of Appeal, para. 59; Mladić Appeal Brief, para. 659. *See also* T. 25 August 2020 pp. 71, 72, 82-84; T. 26 August 2020 pp. 45, 46.
[1509] Mladić Appeal Brief, paras. 660, 661. *See also* T. 26 August 2020 p. 45.
[1510] Prosecution Response Brief, para. 279. According to the Prosecution, while the Krivaja-95 operation had legitimate purposes, it also had a criminal objective, namely to create conditions for the elimination of the enclaves by targeting the civilian population, and legitimate military objectives do not negate criminal ones. *See* Prosecution Response Brief, para. 279; T. 26 August 2020 pp. 9, 10.
[1511] Prosecution Response Brief, para. 280. *See also* T. 26 August 2020 pp. 6, 17, 18, 22.
[1512] Prosecution Response Brief, para. 280. Specifically, the Prosecution argues that Mladić ignores that: (i) journalists from the VRS Main Staff were allowed entry; (ii) the take-over of Srebrenica and the removal of the Bosnian Muslims was complete before Mladić issued the 13 July 1995 order; (iii) he had previously proposed misleading the international public about the truth; and (iv) on 13 July 1995, hundreds of Bosnian Muslim men had been executed with thousands more in VRS custody awaiting transfer to Zvornik for execution. *See* Prosecution Response Brief, para. 280, *referring to* Trial Judgement, para. 5080.
[1513] Prosecution Response Brief, para. 280.
[1514] *See supra* paras. 393, 395 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave insufficient weight to evidence that Krivaja-95 was a legitimate military operation).

weight to the military context of his orders in Srebrenica when finding his *mens rea* for the Srebrenica JCE.

430. Turning to the 13 July 1995 order, the Trial Chamber found that Mladić gave this order, which called for the prevention of the entry of local and foreign journalists into the zones of combat operations in Srebrenica and Žepa, as well as a ban on giving any information to the media about operations in Srebrenica, particularly on prisoners of war, evacuated civilians, and escapees.[1515] The Trial Chamber further found that Mladić's aim was to keep the media and international community from knowing what was happening in Srebrenica.[1516] The Appeals Chamber recalls that it previously found no merit in Mladić's argument that the Trial Chamber did not properly consider the language and context of the 13 July 1995 order.[1517] Furthermore, the Appeals Chamber notes that while Mladić attempts to show that this order was aimed at prohibiting access to Srebrenica for the media's own protection and to prevent the spreading of rumours,[1518] he ignores that the Trial Chamber's finding is based on a number of other findings regarding Mladić's position,[1519] his presence on the ground in Potočari and involvement in the Hotel Fontana meetings,[1520] his proposal to mislead the international public about the truth at the 16th Assembly Session,[1521] and the reburials of the Bosnian Muslim men and boys murdered in Srebrenica.[1522] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić therefore fails to demonstrate that the Trial Chamber gave insufficient weight to his arguments regarding the Krivaja-95 operation and other orders as well as to the language of his 13 July 1995 order.

(c) Conclusion

431. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.D of Mladić's appeal.

[1515] Trial Judgement, para. 5081.
[1516] Trial Judgement, para. 5081.
[1517] *See supra* para. 396 (wherein the Appeals Chamber rejects Mladić's argument that, in finding that his order of 13 July 1995 was intended to mislead the media and the international community about the events in Srebrenica, the Trial Chamber did not properly consider the language of the order and the context in which it was given, while placing insufficient weight on similar orders aimed at preventing classified military information from being leaked).
[1518] Mladić Appeal Brief, para. 660, *referring to* T. 27 November 2014 pp. 29013, 29014 (private session).
[1519] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 3.1.3.
[1520] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapters 7.1.3-7.1.5.
[1521] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 9.4.3.
[1522] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 7.18.

4. Alleged Errors in Failing to Provide a Reasoned Opinion or Evaluate the Military Status of Victims (Genocide and Extermination in Srebrenica) (Ground 5.E)

432. The Trial Chamber found that in relation to scheduled and unscheduled incidents concerning Srebrenica, the victims of the killings were either civilians or "at least detained at the time of killing" and thus *hors de combat*, and concluded that "in all Srebrenica incidents, the victims were not actively participating in the hostilities at the time of the killings".[1523] With respect to the number of victims and the overall situation in the Srebrenica enclave, the Trial Chamber took judicial notice of Adjudicated Fact 1476 stating that between 7,000 and 8,000 Bosnian Muslim men were systematically murdered.[1524]

433. Mladić submits that the Trial Chamber failed to provide a reasoned opinion on the use of Adjudicated Fact 1476 in its findings and to consider the potential military status of the victims and/or the extent of combat casualties.[1525] He argues that "as a consequence of the error, [he] is unable to determine the extent to which the Trial Chamber relied upon the adjudicated fact and the impact this may have had [on] his conviction".[1526] Mladić specifically argues that the Trial Chamber failed to give a reasoned opinion that, based on Adjudicated Fact 1476, "*all* of the 7,000-8,000 victims of the killings in Srebrenica were not actively taking part in the hostilities".[1527] He contends that the Trial Chamber did not consider whether the men killed in Srebrenica were civilians or combatants and that this omission impacts the basis for its findings and his convictions.[1528] Mladić further submits that, at a minimum, the Trial Chamber erroneously considered Adjudicated Fact 1476 as evidence of his intent to further the Srebrenica JCE.[1529] In addition, Mladić submits that the Trial Chamber erred in applying a heightened standard to his disproving Adjudicated Fact 1476.[1530] According to Mladić, the Trial Chamber failed to consider any of the evidence he presented to rebut this fact,[1531] and this evidence was sufficient to rebut

[1523] *See* Trial Judgement, paras. 3051 (Schedule E and other incidents), 3062, 3115, 3546.
[1524] Trial Judgement, paras. 3007, 3042.
[1525] *See* Mladić Notice of Appeal, p. 23, para. 61; Mladić Appeal Brief, paras. 666, 669-677; Mladić Reply Brief, paras. 33-37, 99; T. 25 August 2020 pp. 84, 85; T. 26 August 2020 p. 64.
[1526] Mladić Appeal Brief, para. 676.
[1527] Mladić Reply Brief, para. 33; T. 25 August 2020 p. 85. *See also* Mladić Appeal Brief, paras. 670, 671. According to Mladić, the Trial Chamber's finding in this regard "effectively removed the possibility of any legitimate combat casualties". *See* Mladić Appeal Brief, para. 669.
[1528] Mladić Appeal Brief, para. 672; T. 25 August 2020 pp. 84, 85.
[1529] Mladić Appeal Brief, para. 676.
[1530] Mladić Appeal Brief, paras. 673, 674.
[1531] Mladić Appeal Brief, para. 674; T. 25 August 2020 p. 85. In this regard, Mladić points to: (i) evidence that bodies in the mass graves were killed at other times in combat; (ii) combat casualties from "kamikaze" attacks and combat in Zvornik; (iii) alternative explanations for deaths in the column other than VRS criminal activity; and (iv) forensic expert evidence relating to the alleged blindfolds on bodies potentially being bandannas worn by combatants. *See* Mladić Appeal Brief, para. 674, nn. 825-829, *referring to* Trial Judgement, paras. 3007, 5309, Mladić Final Trial Brief,

Adjudicated Fact 1476 on the military status of the victims.[1532] Accordingly, Mladić requests the Appeals Chamber to articulate the basis of his liability and, to the extent of any error, review the sentence imposed on him.[1533]

434. The Prosecution responds that the Trial Chamber did not rely on Adjudicated Fact 1476 to determine the circumstances of the victims' deaths, nor did it find that all victims were civilians, and submits that Mladić's attempt to appeal a non-existent finding should be summarily dismissed.[1534] The Prosecution further responds that the Trial Chamber: (i) gave a reasoned opinion regarding the status of victims through an incident-by-incident analysis, which Mladić has ignored in his submissions;[1535] (ii) clearly articulated the basis of his liability;[1536] and (iii) applied the correct legal standard to rebuttal evidence and considered the evidence that Mladić has relied on to rebut Adjudicated Fact 1476.[1537]

435. Mladić replies, *inter alia*, that the Appeals Chamber should reject the Prosecution's contention that the Trial Chamber limited its analysis of his responsibility to the victims established on the basis of the Prosecution's evidence.[1538] According to Mladić, contrary to the Prosecution's submission, the Trial Chamber relied on the number of victims contained in Adjudicated Fact 1476 to determine, among others, his intent to achieve the common purpose of the Srebrenica JCE, his specific intent to commit genocide, his significant contribution to the Srebrenica JCE, and his sentence.[1539] He further replies that the Prosecution does not engage with his argument regarding

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paras. 2689-2698, 2707, 2708, 2738-2751, T. 23 July 2014 pp. 24601, 24602, T. 31 May 2013 pp. 11896-11899 (closed session). *See also* T. 25 August 2020 p. 85.

[1532] Mladić Appeal Brief, para. 675; Mladić Reply Brief, para. 34. *See also* T. 25 August 2020 p. 85.

[1533] Mladić Appeal Brief, para. 677.

[1534] Prosecution Response Brief, para. 281; T. 26 August 2020 pp. 20, 21.

[1535] Prosecution Response Brief, paras. 282, 283; T. 26 August 2020 pp. 21, 38.

[1536] Prosecution Response Brief, paras. 285, 286. In the Prosecution's view, Mladić's claim that he is unable to determine the extent to which the Trial Chamber relied on Adjudicated Fact 1476 ignores the clear articulation in the Trial Judgement of the basis of his liability. *See* Prosecution Response Brief, para. 285. The Prosecution argues that the conclusions on Mladić's intent, significant contribution to the Srebrenica JCE, and sentence are all based on factual and legal findings in Chapters 7 and 8 of the Trial Judgement, in which the Trial Chamber listed the numbers of victims per incident. *See* Prosecution Response Brief, para. 286. The Prosecution adds that the Trial Chamber did not rely on Adjudicated Fact 1476 to find Mladić's criminal responsibility for killings in Srebrenica or in determining his sentence. *See* T. 26 August 2020 pp. 38, 39.

[1537] Prosecution Response Brief, para. 284. The Prosecution argues that the Trial Chamber considered evidence that some victims who died in Srebrenica were not victims of executions, and that where the manner of death or the victims' status was unclear, it did not count them in the total number of victims of killings. Additionally, the Prosecution contends that the Trial Chamber considered and rejected the alternative explanation that blindfolds on victims could have been bandannas worn by fighters. *See* Prosecution Response Brief, para. 283. The Prosecution reiterates that the Trial Chamber relied on Adjudicated Fact 1476 for a general finding and did not rely on this fact to determine the number and status of victims for whose killing Mladić was ultimately found responsible. *See* Prosecution Response Brief, para. 284.

[1538] Mladić Reply Brief, para. 37. *See also* T. 26 August 2020 p. 64.

[1539] Mladić Reply Brief, paras. 35, 36, nn. 62, 65, 67, *referring to* Trial Judgement, paras. 3007, 5191, Chapter 9.7. *See also* T. 26 August 2020 p. 64.

the Trial Chamber's failure to provide a reasoned opinion on the status of the victims, and that Adjudicated Fact 1476 should have been rebutted.[1540]

436. The Appeals Chamber will address in turn whether the Trial Chamber erred in: (i) failing to provide a reasoned opinion on the military status of the victims; (ii) articulating the basis of Mladić's liability, namely its alleged use of Adjudicated Fact 1476 to determine his *mens rea* and significant contribution to the Srebrenica JCE as well as his sentence; and (iii) failing to consider evidence presented by Mladić to rebut Adjudicated Fact 1476.

(a) Alleged Error in Failing to Provide a Reasoned Opinion on the Military Status of the Victims

437. The Appeals Chamber recalls that trial chambers are required to provide a reasoned opinion pursuant to Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.[1541] A reasoned opinion in the trial judgement is essential to ensuring that adjudications are fair; it, *inter alia*, allows for a meaningful exercise of the right of appeal by the parties, and enables the Appeals Chamber to understand and review the findings.[1542] Accordingly, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused.[1543] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1544]

438. The Appeals Chamber further recalls that in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1545] The Appeals Chamber understands that, at the core, Mladić submits that the Trial Chamber failed to provide a reasoned opinion that, based on Adjudicated Fact 1476, all of the 7,000 to 8,000 victims of the killings in Srebrenica were not actively taking part in hostilities.[1546]

439. The Appeals Chamber notes that the Trial Chamber took judicial notice of Adjudicated Fact 1476 stating that "between 7,000 and 8,000 Bosnian-Muslim men were systematically

[1540] Mladić Reply Brief, paras. 33, 34. *See also* T. 26 August 2020 p. 64.
[1541] *Karadžić* Appeal Judgement, para. 700; *Prlić et al*. Appeal Judgement, paras. 187, 990, 1778, 3099; *Stanišić and Župljanin* Appeal Judgement, para. 137. *See also Nyiramasuhuko et al*. Appeal Judgement, paras. 729, 1954; *Bizimungu* Appeal Judgement, para. 18.
[1542] *Prlić et al*. Appeal Judgement, para. 3099; *Bizimungu* Appeal Judgement, para. 18; *Hadžihasanović and Kubura* Appeal Judgement, para. 13.
[1543] *Karadžić* Appeal Judgement, para. 700; *Prlić et al*. Appeal Judgement, para. 3099, n. 423; *Bizimungu* Appeal Judgement, para. 18.
[1544] *Karadžić* Appeal Judgement, para. 700; *Ndindiliyimana et al*. Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320. *See also Prlić et al*. Appeal Judgement, para. 1778.
[1545] *Karadžić* Appeal Judgement, para. 702; *Šešelj* Appeal Judgement, para. 49; *Prlić et al*. Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.

murdered".[1547] On the one hand, the Trial Chamber explicitly referenced this adjudicated fact in sections of the Trial Judgement regarding burial operations and the *chapeau* elements of crimes against humanity, where it considered the number of victims and the overall situation in Srebrenica.[1548] On the other hand, the Trial Chamber found that "at least 3,720 Bosnian-Muslim males were killed" in relation to incidents in Srebrenica.[1549] The Appeals Chamber observes that this finding is based on an incident-by-incident analysis in Chapters 7 and 8.3.2 of the Trial Judgement regarding "Schedule E and other incidents",[1550] rather than on Adjudicated Fact 1476.

440. Having reviewed the relevant portions of the Trial Judgement, the Appeals Chamber finds Mladić's submission – "that the Trial Chamber failed to give a reasoned opinion that, based on [Adjudicated Fact] 1476, *all* of the 7,000-8,000 victims of the killings in Srebrenica were not actively taking part in hostilities"[1551] – to be based on a misinterpretation of the Trial Judgement. The Trial Chamber's finding that "all of the victims of the killings in Srebrenica were not actively participating in the hostilities at the time of the killings" is explicitly qualified by its findings in Chapter 8.3.2 of the Trial Judgement.[1552] Chapter 8.3.2, as elaborated below, sets out an incident-by-incident account of the killings in Srebrenica.[1553] Recalling that the Trial Judgement must be read as a whole,[1554] the Appeals Chamber considers that the Trial Chamber's statement about "all of the victims of the killings in Srebrenica" was a reference to those identified in the specific scheduled and unscheduled incidents.[1555] Contrary to Mladić's submission, there is no indication that the Trial Chamber made a finding, on the basis of Adjudicated Fact 1476, that *all* of the 7,000 to 8,000 victims of the killings in Srebrenica were not actively taking part in hostilities. Accordingly, Mladić's submission in this respect is dismissed.

441. The Appeals Chamber also finds no merit in Mladić's contention that the Trial Chamber failed to evaluate the military status of the victims in Srebrenica.[1556] The Appeals Chamber notes that the Trial Chamber conducted a detailed incident-by-incident analysis in Chapters 7 and 8.3.2 of

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[1546] *See* Mladić Appeal Brief, paras. 666, 669-672; Mladić Reply Brief, para. 33. *See also* T. 25 August 2020 pp. 84, 85.
[1547] Trial Judgement, paras. 3007, 3042; Second Decision on Adjudicated Facts, para. 36. *See also* Prosecution Motion on Adjudicated Facts, Annex B, RP. 31130.
[1548] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.
[1549] *See* Trial Judgement, para. 5129.
[1550] *See* Trial Judgement, paras. 2662-2935, 3051, pp. 1608-1610.
[1551] *See* Mladić Reply Brief, para. 33. *See also* Mladić Appeal Brief, paras. 669-672; T. 25 August 2020 pp. 84, 85.
[1552] Trial Judgement, paras. 3115, 3546.
[1553] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1554] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 563, 702, 744; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[1555] Trial Judgement, paras. 3051, 3062, 3115, 3546.
[1556] *See* Mladić Appeal Brief, para. 672.

the Trial Judgement and evaluated the status of the victims for each incident.[1557] Contrary to Mladić's assertion that the Trial Chamber found that "*all* of the victims were civilians",[1558] the Trial Chamber rather concluded that "a number of the victims were civilians".[1559] The Trial Chamber further specified that: "For many incidents, […] it remained unclear whether the victims were civilians or combatants. However, those people were at least detained at the time of killing, thus *hors de combat*".[1560] Based on these considerations, the Trial Chamber found that the victims were not actively participating in the hostilities at the time of the killings.[1561] Such a detailed and comprehensive assessment of the status of the victims in the Srebrenica incidents satisfies, in the Appeals Chamber's view, the Trial Chamber's obligation to provide a reasoned opinion.

[1557] Trial Judgement, paras. 2662-2935, 3051, 3062. Of the incidents that supported Mladić's liability in relation to the Srebrenica JCE, the Trial Chamber found that, between 12 and 23 July 1995, the following people, almost all of whom were Bosnian Muslim men, were killed: (a) 15 male detainees, including a 14-year-old boy and one man wearing civilian clothing (Scheduled Incident E.1.1) (*see* Trial Judgement, paras. 2676, 3051); (b) approximately 150 non-Serb males, including minors, 147 of whom were wearing civilian clothes (Scheduled Incident E.2.1) (*see* Trial Judgement, paras. 2682, 2684, 3051); (c) approximately 1,000 male detainees (Scheduled Incident E.3.1) (*see* Trial Judgement, paras. 2707, 3051); (d) 10 to 15 unarmed men, who had surrendered, and one wounded man (Scheduled Incident E.4.1) (*see* Trial Judgement, paras. 2723, 3051); (e) approximately 21 male detainees dressed in civilian clothes (Scheduled Incident E.5.1) (*see* Trial Judgement, paras. 2732, 3051); (f) two male detainees (Scheduled Incident E.6.1) (*see* Trial Judgement, paras. 2759, 3051); (g) at least 819 male detainees, many of whom were dressed in civilian clothing (Scheduled Incident Scheduled Incident E.6.2) (*see* Trial Judgement, paras. 2766, 3051); (h) about 20 male detainees (Scheduled Incident E.7.1) (*see* Trial Judgement, paras. 2776, 3051); (i) about 401 male detainees, including minors (Scheduled Incident E.7.2) (*see* Trial Judgement, paras. 2791, 3051); (j) at least 12 male detainees (Scheduled Incident E.8.1) (*see* Trial Judgement, paras. 2820, 3051); (k) at least 575 male detainees (Scheduled Incident E.8.2) (*see* Trial Judgement, paras. 2825, 3051); (l) at least eight men who wore civilian clothing (Scheduled Incident E.9.1) (*see* Trial Judgement, paras. 2859, 3051); (m) between 1,000 and 1,200 male detainees (Scheduled Incident E.9.2) (*see* Trial Judgement, paras. 2861, 3051); (n) approximately 500 men and two women, some of whom were wearing civilian clothes (Scheduled Incident E.10.1) (*see* Trial Judgement, paras. 2862, 3051); (o) 39 detained men and boys (Scheduled Incident E.12.1) (*see* Trial Judgement, paras. 2864-2876, 3051); (q) nine men who were wearing civilian clothes (Scheduled Incident E.14.1) (*see* Trial Judgement, paras. 2886, 3051); (r) an unarmed man wearing civilian clothing (Scheduled Incident E.14.2) (*see* Trial Judgement, paras. 2894, 3051); (s) more than 50 male detainees (Scheduled Incident E.15.1) (*see* Trial Judgement, paras. 2917, 3051); (t) an unarmed man (Scheduled Incident E.15.3) (*see* Trial Judgement, paras. 2920, 2921, 3051); (u) 15 detainees (unscheduled) (*see* Trial Judgement, paras. 2924, 3051); (v) four captured people, including a 15-year-old boy (unscheduled) (*see* Trial Judgement, paras. 2926, 3051); and (w) ten injured detainees (unscheduled) (*see* Trial Judgement, paras. 2935, 3051). The Trial Chamber, in Chapters 7 and 8.3.2 of the Trial Judgement, also found that, between mid-July and mid-August 1995, members of the Skorpions Unit killed six Bosnian Muslim men and boys from Srebrenica near the town of Trnovo (Scheduled Incident E.13.1 listed under letter "(p)"). *See* Trial Judgement, paras. 2882, 3051. The Trial Chamber found, however, that this scheduled incident was not part of Mladić's ultimate responsibility as the perpetrators were not considered members of the Srebrenica JCE, or subordinated to the VRS, or otherwise used as tools of members of this joint criminal enterprise. *See* Trial Judgement, para. 4989.

[1558] Mladić Appeal Brief, para. 672. *See also* T. 25 August 2020 p. 85.

[1559] Trial Judgement, para. 3062.

[1560] Trial Judgement, para. 3062, *referring to* Scheduled Incidents E.1.1, E.2.1, E.4.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.2, E.10.1, E.12.1, E.13.1, E.15.1. While the *chapeau* elements of crimes against humanity require the attack to be committed against a civilian population, it is well-established jurisprudence that victims of the underlying acts of crimes against humanity need not be civilians and can be individuals *hors de combat*. *See Tolimir* Appeal Judgement, paras. 141, 142; *Popović et al*. Appeal Judgement, para. 569; *Mrkšić and Šljivančanin* Appeal Judgement, para. 29; *Martić* Appeal Judgement, para. 307. Incidents of murder were considered by the Trial Chamber to fall under crimes against humanity as well as violations of the laws or customs of war pursuant to Counts 5 and 6 of the Indictment. *See* Trial Judgement, para. 3065; Indictment, para. 66.

[1561] Trial Judgement, para. 3062. *See also* Trial Judgement, paras. 3051, 3115, 3546.

442. The Appeals Chamber, Judge Nyambe dissenting, accordingly rejects Mladić's claim that the Trial Chamber failed to provide a reasoned opinion on the military status of the victims or that it erred in this respect in relation to Adjudicated Fact 1476.

(b) Alleged Error in the Use of Adjudicated Fact 1476 and in Articulating Mladić's Liability

443. The Appeals Chamber now turns to Mladić's allegation that the Trial Chamber erroneously relied on "the number of victims contained in [Adjudicated Fact] 1476" to make findings on his *mens rea* and significant contribution to the Srebrenica JCE as well as to determine his sentence.[1562] As noted above, the Trial Chamber referred to Adjudicated Fact 1476 only with respect to the burial operations and the *chapeau* elements of crimes against humanity in Srebrenica.[1563] This adjudicated fact is thus pertinent in this case to the overall situation in Srebrenica and not to Mladić's acts, conduct, and mental state. This is further supported by the fact that, as previously elaborated, the Trial Chamber did not rely on Adjudicated Fact 1476 to determine the number of killings for which Mladić was ultimately found responsible in relation to the Srebrenica JCE.[1564] Rather, that determination was based on a detailed incident-by-incident analysis of Schedule E incidents and unscheduled events in Chapters 7 and 8.3.2 of the Trial Judgement.[1565]

444. Regarding his intent to participate in the Srebrenica JCE and his genocidal intent, Mladić points to the Trial Chamber's consideration of his presence at a meeting on 13 July 1995 with the VRS and the MUP during which the task of killing 8,000 Muslim males was discussed.[1566] In the Appeals Chamber's view, Mladić has conflated Adjudicated Fact 1476 with Exhibit P2118, which states that he was present at a meeting that discussed the "[k]illing of about 8,000 Muslim soldiers whom [they] blocked in the woods near Konjević Polje […] [t]his job is being done solely by MUP units".[1567] There is no indication that Exhibit P2118 or the Trial Chamber's findings regarding his *mens rea* to participate in the Srebrenica JCE or to commit genocide were in any way based on Adjudicated Fact 1476. Having reviewed the Trial Chamber's analysis on Mladić's significant

[1562] Mladić Appeal Brief, para. 676; Mladić Reply Brief, paras. 35, 36.
[1563] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.
[1564] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1565] *See* Trial Judgement, paras. 2662-2935, 3051, pp. 1608-1610. Additionally, the Trial Chamber relied upon extensive evidence to make findings on Mladić's *mens rea* and significant contribution to the Srebrenica JCE. *See, e.g.*, Trial Judgement, paras. 4990-5131.
[1566] Mladić Reply Brief, para. 35, nn. 63, 64, *referring to* Trial Judgement, paras. 5128, 5130 (*referring to, inter alia*, Exhibit P2118).
[1567] *See* Exhibit P2118, para. 2; Trial Judgement, paras. 5063, 5128, nn. 17623, 17706.

contribution to the Srebrenica JCE,[1568] the Appeals Chamber finds that the same holds true – there is no indication that the Trial Chamber relied on Adjudicated Fact 1476 in this respect.

445. In relation to his sentence, Mladić argues that "the Trial Chamber relied on its findings in Chapters 7 and 8 where it established that 7,000-8,000 Bosnian-Muslim men were systematically murdered on the basis of [Adjudicated Fact] 1476".[1569] The Appeals Chamber observes that, when assessing the gravity of Mladić's offences, the Trial Chamber referred to its findings on the crimes in Chapters 7 and 8 as well as his significant contribution to the Srebrenica JCE in Chapter 9.7.[1570] As addressed above, there is no indication in the Trial Judgement that the Trial Chamber relied on Adjudicated Fact 1476 to determine his liability in those sections of the Trial Judgement.[1571] Thus, Mladić does not demonstrate that the Trial Chamber determined his sentence for crimes committed in Srebrenica on the basis of Adjudicated Fact 1476.

446. Based on the foregoing, the Appeals Chamber rejects, Judge Nyambe dissenting, Mladić's submissions that the Trial Chamber erred in using Adjudicated Fact 1476 as a basis for determining his liability or sentence with respect to the Srebrenica JCE.

(c) Alleged Error in Failing to Consider Rebuttal Evidence

447. With respect to Mladić's submissions regarding rebuttal evidence, the Appeals Chamber recalls that it has already rejected his blanket submission that the Trial Chamber erred by applying a heightened standard on the burden to rebut adjudicated facts.[1572] Mladić's bare statement to this effect in this part of the appeal[1573] is also rejected.

448. With respect to the alleged error in failing to consider evidence presented by Mladić to rebut Adjudicated Fact 1476, the Appeals Chambers recalls that the Trial Chamber only referenced this fact in sections of the Trial Judgement regarding burial operations and the *chapeau* elements of crimes against humanity, where it considered the number of victims and the overall situation in Srebrenica.[1574] Moreover, as already discussed, Mladić's responsibility for crimes committed in Srebrenica was based on a detailed incident-by-incident analysis of killings in Chapter 8.3.2 of the

[1568] *See* Trial Judgement, paras. 4990-5098. In assessing Mladić's significant contribution, the Trial Chamber similarly referred to Exhibit P2118. *See* Trial Judgement, para. 5068.
[1569] Mladić Reply Brief, para. 36.
[1570] Trial Judgement, para. 5191.
[1571] *See supra* paras. 443, 444.
[1572] *See supra* Section III.A.2(a)(ii).
[1573] *See* Mladić Appeal Brief, para. 673. *See also* T. 25 August 2020 p. 85.
[1574] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.

Trial Judgement[1575] as well as extensive evidence of his participation in the Srebrenica JCE,[1576] rather than on Adjudicated Fact 1476. Given that the Trial Chamber did not use Adjudicated Fact 1476 to determine Mladić's acts, conduct, and mental state, and thus his liability for the Srebrenica JCE, the Appeals Chamber considers that any error on the Trial Chamber's part regarding the assessment of rebuttal evidence would have little, if any, impact on its findings in the Trial Judgement. The Appeals Chamber recalls that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not be considered on the merits.[1577] As such, the Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Mladić's argument that the Trial Chamber failed to address evidence rebutting Adjudicated Fact 1476.

(d) Conclusion

449. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.E of Mladić's appeal.

5. Alleged Error in Relying on Certain Evidence without Corroboration (Ground 5.I)

450. Mladić submits that, in reaching its findings in support of his Srebrenica JCE convictions under Counts 2 to 8 of the Indictment, the Trial Chamber erred by giving undue weight to "decisive hearsay" and adjudicated facts.[1578] In particular, he argues that the Trial Chamber erred by relying on: (i) uncorroborated hearsay to make findings linked to his significant contribution and intent;[1579] and (ii) adjudicated facts to prove the elemental requirements of the crime base.[1580] Mladić therefore requests that the Appeals Chamber reverse, to the extent of any error, the findings and the basis of his Srebrenica JCE convictions.[1581] The Appeals Chamber will address these contentions in turn.

[1575] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1576] *See* Trial Judgement, paras. 4990-5131.
[1577] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11.
[1578] *See* Mladić Appeal Brief, paras. 681, 694.
[1579] *See* Mladić Appeal Brief, paras. 684, 686-690.
[1580] *See* Mladić Appeal Brief, paras. 685, 691-693.
[1581] Mladić Appeal Brief, para. 694.

(a) Alleged Error in Relying on Uncorroborated Hearsay

451. The Trial Chamber admitted into evidence excerpts of Witness Deronjić's testimony in the *Blagojević and Jokić* case pursuant to Rule 92 *quater* of the ICTY Rules,[1582] excerpts of the testimony of Witness Drinić in the *Blagojević and Jokić* case,[1583] as well as excerpts of Witness Mevludin Orić's testimony in the *Popović et al*. case pursuant to Rule 92 *bis* of the ICTY Rules.[1584] Mladić submits that the Trial Chamber erred in law by relying on this untested evidence to make findings related to his significant contribution to and intent for the Srebrenica JCE.[1585] According to Mladić, without the Trial Chamber's erroneous reliance on this evidence, it would not have established the elements of Scheduled Incident E.15, nor the essential elements of the existence of the Srebrenica JCE and his participation in them.[1586]

452. The Prosecution responds that Mladić fails to show that the Trial Chamber erred by giving "undue weight to" or "relying on" three witnesses whom he did not cross-examine.[1587] In the Prosecution's view, the Trial Chamber properly relied on the evidence of Witnesses Deronjić, Drinić, and Orić.[1588] The Prosecution argues that Mladić's convictions under Counts 2 to 8 of the Indictment in relation to the Srebrenica JCE rest on numerous sources of evidence and findings set out over two volumes of the Trial Judgement and that his assertion that any of his convictions are based solely or in a decisive manner on "untested" evidence is incorrect.[1589]

453. The Appeals Chamber recalls that under Article 21(4)(e) of the ICTY Statute an accused has the right to examine, or have examined, the witnesses against him. In relation to the challenges to a trial chamber's reliance on evidence admitted pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules when the defendant did not have an opportunity to cross-examine the witness, the Appeals Chamber has adopted the following statement of the law:

[1582] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Admit the Evidence of Ljubomir Bojanović and Miroslav Deronjić Pursuant to Rule 92 *quater*, 13 January 2014 ("Decision of 13 January 2014"), para. 13. *See also* Exhibit P3567.

[1583] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 20 December 2013 ("Decision of 20 December 2013"), para. 19. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica (Various), 3 April 2013 (confidential) ("Motion of 3 April 2013"). *See also* Exhibit P3351.

[1584] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Admit Evidence of Mevludin Orić Pursuant to Rule 92 *bis*, 8 July 2013 ("Decision of 8 July 2013"), para. 10. *See* Exhibit P1757.

[1585] Mladić Appeal Brief, paras. 684, 690. *See also* Mladić Appeal Brief, paras. 686-688.

[1586] Mladić Appeal Brief, para. 690. While Mladić points to Scheduled Incident E.15 in his appellant's brief, the Appeals Chamber notes that, in support of his argument, he refers to paragraph 2921 of the Trial Judgement, which is only pertinent to Scheduled Incident E.15.3. *See* Mladić Appeal Brief, para. 688, n. 835.

[1587] Prosecution Response Brief, para. 287.

[1588] Prosecution Response Brief, paras. 288-293.

[1589] Prosecution Response Brief, para. 287, *referring to* Trial Judgement, Chapters 7, 8, 9.6, 9.7.

> [A] conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run counter to the principles of fairness […] to allow a conviction based on evidence of this kind without sufficient corroboration".[1590]

(i) Witness Deronjić's Rule 92 *quater* Evidence

454. In finding the existence of the Srebrenica JCE and Mladić's significant contribution to it, the Trial Chamber considered an excerpt of Witness Deronjić's testimony admitted pursuant to Rule 92 *quater* of the ICTY Rules,[1591] in which he stated that Beara told him that he was about to kill all detainees in Bratunac and that he would do so based on "orders from the top".[1592] Further, with regard to the alleged concealment of crimes during the transportation of Bosnian Muslim civilians out of Potočari, the Trial Chamber, relying on the evidence of Witnesses RM-294 and Deronjić, found that a declaration signed by the DutchBat Deputy Commander Major Robert Franken, Deronjić, and Nesib Mandžić on 17 July 1995 did not reflect the reality with regard to options the population would have had, as no one was given a choice to remain or be evacuated.[1593]

455. Mladić submits that the Trial Chamber erroneously relied on Witness Deronjić's sole evidence linking Mladić's subordinate, Beara, to the statement that the orders to kill "came from the top", as evidence of Mladić's guilt.[1594] In his submission, the Trial Chamber also erred by considering that a declaration, signed by Witness Deronjić regarding the evacuations, concealed that the civilian departures were not voluntary in nature,[1595] and it relied on this evidence to find that Mladić was a member of and participated in the Srebrenica JCE and intended to conceal crimes.[1596]

456. The Prosecution responds that no conviction rests on Witness Deronjić's evidence alone.[1597] It contends that Witness Deronjić's testimony that Beara told him that the orders to kill came "from the top" was only a fraction of the evidence considered by the Trial Chamber in finding the

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[1590] *Karadžić* Appeal Judgement, para. 449, *referring to Popović et al*. Appeal Judgement, para. 96 (internal references omitted). *See also Prlić et al*. Appeal Judgement, para. 137; *Martić* Appeal Judgement, paras. 192, 193, n. 486.
[1591] *See* Decision of 13 January 2014, para. 13. *See also* Exhibit P3567.
[1592] *See* Trial Judgement, paras. 4940, 4973, 4987, 4992, 5096-5098.
[1593] Trial Judgement, paras. 4962, 4967, 4981. *See also* Trial Judgement, paras. 2549 (wherein the Trial Chamber noted that "Witness RM-294 testified that the declaration did not reflect the reality in that no one was given a choice either to remain or be evacuated"), 2550 (wherein the Trial Chamber noted that "[Witness] Deronjić stated that certain portions of the declaration were not a truthful reflection of the situation on the ground between 12 and 17 July 1995"), *referring to* Exhibit P3567, pp. 6216, 6217, 6219.
[1594] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, para. 4940.
[1595] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, para. 4967.
[1596] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, paras. 4968, 4969, 5092, 5094.
[1597] Prosecution Response Brief, para. 289.

existence of the Srebrenica JCE and Mladić's participation in it.[1598] The Prosecution also submits that the Trial Chamber reasonably relied on Witness Deronjić's evidence that the 17 July 1995 declaration he signed concealed the involuntary nature of the transfers.[1599]

457. The Appeals Chamber will now examine whether Mladić's convictions rest solely, or in a decisive manner, on the untested evidence of Witness Deronjić. In this regard, the Appeals Chamber observes that, in admitting Witness Deronjić's testimony pursuant to Rule 92 *quater* of the ICTY Rules, including its "limited references" to matters that go to the proof of Mladić's acts and conduct as charged in the Indictment, the Trial Chamber considered that this evidence is cumulative of other evidence and emphasized that "it cannot possibly enter a conviction [based] solely on Deronjić's evidence without other evidence to corroborate it".[1600]

458. In finding the existence of the Srebrenica JCE and Mladić's participation in it, although the Trial Chamber considered Witness Deronjić's testimony regarding the orders to kill,[1601] the Appeals Chamber observes that the Trial Chamber essentially relied on its other findings, based on extensive evidence, in relation to: (i) the take-over of the Srebrenica enclave;[1602] (ii) the crimes committed in the aftermath of the take-over, including murder, extermination, inhumane acts (forcible transfer), persecution, and genocide;[1603] and (iii) the various statements, acts, and meetings of Bosnian Serb individuals around the time of the take-over of the enclave.[1604] The Appeals Chamber thus considers that Witness Deronjić's testimony represents only a small fraction of the evidence considered by the Trial Chamber and Mladić's convictions would stand even without it. Accordingly, the Appeals Chamber finds that Witness Deronjić's testimony regarding the orders to kill cannot be classified as evidence which formed the sole or even a decisive basis for any of Mladić's convictions.

459. Furthermore, the Appeals Chamber notes that Mladić's characterization of the excerpt of Witness Deronjić's testimony regarding the orders to kill as hearsay evidence is correct to the extent that the content of the evidence is what Beara told him. The Appeals Chamber recalls that a trial chamber has the discretion to rely on hearsay evidence,[1605] and, accordingly, it is for Mladić to show that no reasonable trier of fact would have taken this evidence into account. However,

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[1598] Prosecution Response Brief, para. 289.
[1599] Prosecution Response Brief, para. 290, *referring to* Trial Judgement, paras. 2559, 4967.
[1600] *See* Decision of 13 January 2014, para. 8.
[1601] *See* Trial Judgement, paras. 4940, 4973, 4987, 4992, 5096-5098.
[1602] *See* Trial Judgement, paras. 2319-2661, 4973-4983.
[1603] *See* Trial Judgement, paras. 2662-2986, 3049-3183, 3227-3555, 4973, 4984-4986.
[1604] *See* Trial Judgement, paras. 4926-4968, 4973.
[1605] *Karadžić* Appeal Judgement, para. 598; *Prlić et al.* Appeal Judgement, para. 1601; *Nyiramasuhuko et al*. Appeal Judgement, para. 1616; *Popović et al.* Appeal Judgement, para. 1307.

Mladić's general contentions concerning the Trial Chamber's use of this evidence fail to demonstrate that the Trial Chamber erred in this regard.

460. Turning to the excerpt of Witness Deronjić's testimony regarding the involuntary nature of the transfers, the Appeals Chamber notes that this evidence was corroborated by the evidence of Witnesses Robert Franken[1606] and RM-294,[1607] which demonstrated that the declaration did not reflect the reality because no one was given a genuine choice whether to stay or to be evacuated.[1608] Further, the Appeals Chamber observes that, in reaching its finding that approximately 25,000 Bosnian Muslims who left Potočari to go to Bosnian Muslim controlled territory did not have a genuine choice but to leave, the Trial Chamber did not only rely on evidence concerning the declaration.[1609] The Trial Chamber also recalled:

> (i) the circumstances surrounding the movement of population from Srebrenica to Potočari, including the orders by the 10th Sabotage Detachment to Srebrenica Town inhabitant[s] to leave, the shells fired by the VRS at the UNPROFOR Bravo compound in Srebrenica, the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, where the population sough[t] refuge, namely the shots and shell[s] fired around the compound, the dire living conditions, the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women[,] children and elderly onto the buses while some were hit by members of the MUP, and escorted the buses towards Bosnian-Muslim controlled territory.[1610]

461. Therefore, the Appeals Chamber considers that Witness Deronjić's testimony regarding the involuntary nature of the transfers was corroborated and that the Trial Chamber did not rely solely, or in a decisive manner, on his evidence in support of Mladić's convictions related to the Srebrenica JCE. Accordingly, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show any error in the Trial Chamber's reliance on Witness Deronjić's evidence.

(ii) Witness Drinić's Rule 92 *bis* Evidence

462. Relying in part on Witness Drinić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules,[1611] the Trial Chamber found that no investigations were conducted by any Bosnian Serb military or civilian authority in relation to crimes committed in Srebrenica in 1995.[1612] Mladić

[1606] *See* Trial Judgement, para. 2548, *referring to* T. 7 May 2013 pp. 10743, 10744, Exhibit P1417, para. 105.
[1607] *See* Trial Judgement, para. 2549, *referring to* T. 16 April 2013 pp. 9897, 9899-9903 (closed session), T. 17 April 2013 pp. 9962, 9965 (closed session).
[1608] *See* Trial Judgement, paras. 2548, 2549, 4962.
[1609] *See* Trial Judgement, para. 3159.
[1610] Trial Judgement, para. 3159.
[1611] *See* Decision of 20 December 2013, para. 19, *referring to* Motion of 3 April 2013, Annex A. *See also* Exhibit P3351.
[1612] Trial Judgement, paras. 4963 (wherein the Trial Chamber noted that "[a]ccording to [Witness Drinić], no investigations were conducted by any Bosnian-Serb military or civilian authority regarding crimes committed in Srebrenica in 1995"), 4968.

submits that the Trial Chamber erred in law by relying on Witness Drinić's untested testimony in a decisive manner to make this finding,[1613] and that, although he sought to recall Witness Drinić and cross-examine him, the Trial Chamber denied this request.[1614]

463. The Prosecution responds that the Trial Chamber properly relied on Witness Drinić's evidence to find that no investigations were conducted by Bosnian Serb military or civilian organs.[1615] The Prosecution argues that the Rule 92 *bis* evidence provided by Witness Drinić does not relate to Mladić's acts or conduct and is cumulative of Witness RM-513's testimony.[1616] It further submits that Mladić did not oppose admission of this evidence at trial[1617] or seek to recall Witness Drinić to cross-examine him on the basis of this evidence.[1618] The Prosecution further contends that, in any event, the Trial Chamber did not rely solely on this evidence to find that no investigations were conducted.[1619]

464. While it is undisputed that Mladić did not cross-examine Witness Drinić, the Appeals Chamber is not convinced by Mladić's submission that the Trial Chamber relied on Witness Drinić's evidence in a decisive manner to find that there were no investigations or prosecutions with regard to the Srebrenica killings.[1620] The Appeals Chamber notes that, in reaching its finding, the Trial Chamber relied on, in addition to Witness Drinić's evidence, the witness statement and testimony of Witness RM-513 showing that there were no investigations or prosecutions with

[1613] *See* Mladić Appeal Brief, paras. 634, 681, 687, 690, *referring to* Trial Judgement, para. 4963. In identifying the Trial Chamber's finding in question, Mladić makes a broader statement that "no investigations were conducted by Bosnian Serb military or civilian organs". Mladić supports this statement with reference to paragraph 4963 of the Trial Judgement, which addresses evidence pertinent to the investigation and punishment of the perpetrators of the Srebrenica killings and that he makes this statement in the context of Srebrenica JCE. *See* Mladić Appeal Brief, paras. 634, 687, *referring to* Trial Judgement, para. 4963.
[1614] Mladić Appeal Brief, para. 634, *referring to* T. 18 September 2014 p. 25771. *See also* Mladić Reply Brief, para. 97.
[1615] Prosecution Response Brief, paras. 265, 291, *referring to* Trial Judgement, paras. 4963, 4968, 4985, 5093.
[1616] Prosecution Response Brief, para. 291, *referring to* Decision of 20 December 2013, paras. 11, 15.
[1617] Prosecution Response Brief, para. 291, *referring to* Decision of 20 December 2013, para. 2.
[1618] Prosecution Response Brief, para. 266. The Prosecution contends that, contrary to Mladić's assertion, he sought to reintroduce Witness Drinić's evidence pursuant to Rule 92 *ter* of the ICTY Rules and proposed a statement that confirmed Witness Drinić's evidence that Mladić now challenges, namely that no investigation of war crimes committed by members of the VRS was conducted. *See* Prosecution Response Brief, para. 266, *referring to* T. 18 September 2014 p. 25771, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion to Amend Witness List, 10 July 2014 (confidential with confidential Annexes A, B, and C).
[1619] Prosecution Response Brief, paras. 265, 291.
[1620] *See* Mladić Appeal Brief, paras. 634, 681, 687, 690. Although evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules must not relate to the acts and conduct of the accused as charged in the indictment, Mladić does not argue on appeal that Witness Drinić's Rule 92 *bis* evidence went to his acts or conduct as charged in the Indictment. In view of the analysis and conclusion in this subsection, the Appeals Chamber will not examine this matter *proprio motu* as it could not impact the outcome.

regard to the killings of Muslims in Srebrenica or the Zvornik area by members of the Drina Corps, even though information of mass killings was discussed by VRS officers.[1621]

465. Further, the Appeals Chamber considers that the Trial Chamber's impugned finding could stand even without Witness Drinić's untested testimony. Indeed, the witness statement and testimony of Witness RM-513 suffice to support the Trial Chamber's finding in question. The Appeals Chamber notes that Mladić does not contest the Trial Chamber's reliance on or evaluation of the evidence of Witness RM-513 on appeal. The Appeals Chamber further recalls that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony.[1622] The Appeals Chamber observes that Mladić was given an opportunity to cross-examine Witness RM-513. However, he did not contest the reliability and credibility of the testimony of Witness RM-513 that there were no investigations or prosecutions with regard to the Srebrenica killings.[1623]

466. Accordingly, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber relied decisively on Witness Drinić's untested testimony in reaching its finding that there were no civilian or military investigations regarding crimes committed in Srebrenica and dismisses Mladić's submission in this regard.

(iii) Witness Orić's Rule 92 *bis* Evidence

467. Relying in part on Witness Orić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules,[1624] the Trial Chamber found that, in relation to Scheduled Incident E.15.3, on the night of 13 July 1995, VRS military policemen killed a Bosnian Muslim man who was forced off a bus parked in front of Vuk Karadžić Elementary School.[1625]

468. Mladić submits that the Trial Chamber erred in law by relying on Witness Orić's Rule 92 *bis* evidence to establish the crime of murder in Scheduled Incident E.15.3.[1626] Mladić argues that Witness Orić's testimony was uncorroborated by any other evidence and that he was unable to challenge it.[1627] Mladić further submits that without erroneously relying on Witness Orić's Rule 92

[1621] *See* Trial Judgement, paras. 4963, 4968, *referring to*, *inter alia*, Exhibits P1054 (under seal), paras. 82, 83, P3351, P3354, T. 27 February 2013 pp. 9267, 9268 (closed session).
[1622] *See Čelebići* Appeal Judgement, para. 506.
[1623] *See* T. 27 February 2013 pp. 9267, 9268 (closed session).
[1624] *See* Decision of 8 July 2013, para. 10. *See also* Exhibit P1757.
[1625] Trial Judgement, paras. 2918-2921, *referring to* Exhibit P1757.
[1626] Mladić Appeal Brief, paras. 688, 690, *referring to* Trial Judgement, para. 2921.
[1627] Mladić Appeal Brief, para. 688.

bis evidence, the Trial Chamber would not have been able to establish the elements of Scheduled Incident E.15.3, nor the essential elements of the existence of the Srebrenica JCE and his participation in it.[1628]

469. The Prosecution responds that Mladić fails to identify an error with respect to the Trial Chamber's reliance on Witness Orić's evidence in relation to Scheduled Incident E.15.3.[1629] According to the Prosecution, while corroboration was not required, Witness Orić's evidence was, in fact, corroborated by adjudicated facts considered by the Trial Chamber which demonstrated a pattern of conduct.[1630] The Prosecution further contends that Mladić's convictions under Counts 2 to 8 do not rest solely or decisively on Witness Orić's "untested evidence" because Scheduled Incident E.15.3 is one of many killings underlying Mladić's conviction for murder and genocide which would stand without the finding that Scheduled Incident E.15.3 took place.[1631]

470. The Appeals Chamber notes that Witness Orić's evidence was corroborated. In reaching its finding on the killing of one Bosnian Muslim man on 13 July 1995, the Trial Chamber also considered, *inter alia*, Adjudicated Facts 1502, 1503, 1505, 1506, 1518, and 1519, which demonstrate a pattern of conduct relating to the detention and killing of Bosnian Muslim men in and around the Vuk Karadžić Elementary School between 12 and 14 July 1995.[1632] In this respect, the Appeals Chamber recalls that evidence demonstrating a pattern of conduct relevant to serious violations of international humanitarian law may be used as corroborative evidence.[1633] There is also no indication that Mladić rebutted these adjudicated facts by introducing reliable and credible evidence to the contrary. Accordingly, the Appeals Chamber, Judge Nyambe dissenting, rejects

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[1628] Mladić Appeal Brief, para. 690.
[1629] Prosecution Response Brief, para. 292, *referring to* Trial Judgement, paras. 2918-2921.
[1630] Prosecution Response Brief, para. 292, *referring to* Trial Judgement, para. 2918.
[1631] Prosecution Response Brief, para. 293, *referring to* Trial Judgement, paras. 3065, 3555, 5128, 5130. In addition, the Prosecution argues that Mladić cannot now complain that he was unable to challenge Witness Orić's evidence as he did not oppose the Prosecution's request to have Witness Orić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules. *See* Prosecution Response Brief, para. 292, *referring to* Decision of 8 July 2013, para. 1.
[1632] *See* Trial Judgement, paras. 2918-2921. Adjudicated Fact 1502 shows that members of the Bratunac Brigade Military Police participated in guarding hundreds of Bosnian Muslim men detained in the Vuk Karadžić School complex and the buses parked around Bratunac town on the night of 12 and 13 July 1995; Adjudicated Fact 1503 indicates that from 12 to 14 July 1995, several thousand Bosnian Muslim men were detained without adequate food and water in and around the Vuk Karadžić School and on board the between 80 to 120 buses lining the streets of Bratunac town; Adjudicated Fact 1505 shows that men detained in Bratunac between 12 and 14 July 1995 were executed at night opportunistically; Adjudicated Fact 1506 shows that the Vuk Karadžić School and the various buildings surrounding it were secured by several units of the *Republika Srpska* armed forces, including by members of the Bratunac Brigade Military Police Platoon, the special police, and the civilian police of the MUP, as well as by members of the Drina Wolves and paramilitary formations; Adjudicated Fact 1518 indicates that groups of men were taken from the buses to the school all through the night and did not return; and Adjudicated Fact 1519 shows that between 12 and 14 July 1995, more than 50 Bosnian Muslim men were summarily executed in and around the Vuk Karadžić School. *See* Adjudicated Facts 1502, 1503, 1505, 1506, 1518, 1519.
[1633] *Karadžić* Appeal Judgement, para. 457, n. 1203; *Popović et al*. Appeal Judgement, para. 104; *Kupreškić et al*. Appeal Judgement, para. 321.

Mladić's submission that the Trial Chamber erred in law by relying on Witness Orić's Rule 92 *bis* evidence when making its finding on Scheduled Incident E.15.3.[1634]

(b) Alleged Error in Relying on Adjudicated Fact 1612

471. Pursuant to Rule 94 of the ICTY Rules, the Trial Chamber took judicial notice of Adjudicated Fact 1612 which states that "[b]etween 1,000 and 1,200 men were killed in the course of [16 July 1995] at [the Branjevo Military Farm]".[1635] In relation to Scheduled Incident E.9.2, the Trial Chamber relied in part on Adjudicated Fact 1612 to determine that between 1,000 and 1,200 male Bosnian Muslim detainees were killed by VRS soldiers at the Branjevo Military Farm on 16 July 1995.[1636] The Trial Chamber also found that the victims of this incident were buried at the Branjevo Military Farm mass grave, and that bodies from this mass grave were subsequently reburied in the Čančari Road 4, 8, 9, 11, and 12 mass graves.[1637]

472. Mladić submits that the Trial Chamber erred in relying on Adjudicated Fact 1612 to find that the number of victims in relation to Scheduled Incident E.9.2 was between 1,000 and 1,200.[1638] Mladić argues that the Trial Chamber preferred Adjudicated Fact 1612 while it was rebutted by the Prosecution's forensic evidence, namely by the evidence of Witness William Haglund and former ICTY Prosecution Investigator Dušan Janc, showing that the number of victims was limited to 132 bodies at the primary burial site and 43 DNA matches to a secondary site.[1639]

473. The Prosecution responds that the Trial Chamber properly relied on Adjudicated Fact 1612.[1640] Specifically, it argues that: (i) the Trial Chamber correctly concluded that the forensic evidence did not contradict Adjudicated Fact 1612;[1641] (ii) Mladić fails to identify an error in the Trial Chamber's finding that the evidence of Witnesses Haglund and Janc does not contradict the

[1634] *See* Mladić Appeal Brief, paras. 688, 690.
[1635] Trial Judgement, paras. 2843, 2860, n. 12494; Second Decision on Adjudicated Facts, para. 36. *See also* Adjudicated Fact 1612.
[1636] Trial Judgement, paras. 2843, 2860, 2861, n. 12494.
[1637] Trial Judgement, para. 2861.
[1638] *See* Mladić Appeal Brief, paras. 681, 685, 692, 693, *referring to* Trial Judgement, paras. 2843, 2846, 2849, 2861.
[1639] Mladić Appeal Brief, para. 692, *referring to* Trial Judgement, paras. 2846, 2849. Mladić additionally recalls his previous submission that the Trial Chamber erred in: (i) taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates (*see* Mladić Notice of Appeal, para. 21; Mladić Appeal Brief, paras. 62-95, 691); and (ii) applying a heightened standard of the burden to produce rebuttal evidence (*see* Mladić Notice of Appeal, para. 26; Mladić Appeal Brief, paras. 96-113, 691), and consequently submits that the Trial Chamber's error of law resulted in a defective evidentiary approach to the adjudicated facts (*see* Mladić Appeal Brief, para. 693). The Appeals Chamber has already rejected Mladić's blanket submission that the Trial Chamber erred in taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates, and applying a heightened standard of the burden to produce rebuttal evidence (*see supra* Section III.A.2(a)(ii)). Considering the foregoing, Mladić's statement to this effect in this part of the appeal (*see* Mladić Appeal Brief, para. 691) is also rejected.
[1640] *See* Prosecution Response Brief, paras. 287, 294.
[1641] Prosecution Response Brief, para. 294, *referring to* Trial Judgement, para. 2860.

total number of victims established through Adjudicated Fact 1612;[1642] and (iii) the Trial Chamber properly exercised its discretion in taking judicial notice of adjudicated facts.[1643]

474. The Appeals Chamber recalls that by taking judicial notice of an adjudicated fact, a trial chamber recognizes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial.[1644] It is well-established that facts judicially noticed pursuant to Rule 94(B) of the ICTY Rules are presumptions that may be rebutted with evidence at trial,[1645] and that their use does not shift the ultimate burden of proof or persuasion, which remains on the Prosecution.[1646] An accused may rebut the presumption by introducing "reliable and credible" evidence to the contrary.[1647] The final evaluation of the reliability and credibility, and hence the probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.[1648]

475. The Appeals Chamber notes that, although Mladić challenged Adjudicated Fact 1612 at trial, he did not present any evidence to explicitly rebut it.[1649] Moreover, it is for a trial chamber to determine what conclusions, if any, are to be drawn from adjudicated facts when considered together with all of the evidence brought at trial.[1650] In determining the number of victims in Scheduled Incident E.9.2, the Trial Chamber considered, *inter alia*: (i) the evidence of Witness Haglund showing that the Pilica grave site, also referred to as the Branjevo Military Farm grave site, contained the remains of at least 132 men;[1651] and (ii) Janc's report on the Srebrenica investigation identifying 43 DNA connections between the remains identified at the Branjevo Military Farm primary mass grave, and the remains identified in the Čančari Road 4, 8, 9, 11, and 12 secondary mass graves.[1652] The Trial Chamber considered that this evidence did not establish the total number of victims in relation to Scheduled Incident E.9.2 because the Branjevo Military Farm

[1642] Prosecution Response Brief, para. 294, *referring to* Trial Judgement, paras. 2846, 2849, 5300.
[1643] Prosecution Response Brief, para. 294.
[1644] *Karadžić* Appeal Judgement, para. 452; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 7 and references cited therein.
[1645] *Karadžić* Appeal Judgement, paras. 120, 128, 219 and references cited therein.
[1646] *Karadžić* Appeal Judgement, paras. 120, 219 and references cited therein.
[1647] *Karadžić* Appeal Judgement, para. 128 and references cited therein.
[1648] *Karadžić* Appeal Judgement, para. 128 and references cited therein.
[1649] *See* Defense Interlocutory Appeal Brief of 4 July 2012, Annex B, RP. 1013 (wherein Mladić challenged Adjudicated Fact 1612 at trial on the grounds that: (i) the interests of justice and right to a fair and public trial support leading evidence on the fact; (ii) the proposed fact goes directly or indirectly towards acts and conduct or responsibility of the Accused or to alleged acts/convictions of alleged subordinates of the Accused; and (iii) the proposed fact bears upon the responsibility of the Accused or relates to the objective and members of the joint criminal enterprise, as well as to facts relating to a fundamental issue raised in the operative indictment).
[1650] *Karemera et al*. Decision of 29 May 2009, para. 21.
[1651] *See* Trial Judgement, para. 2846, *referring to* Exhibits P1828, pp. 3751, 3752, 3754, P1833, pp. 10, 11, 17, 55.
[1652] *See* Trial Judgement, para. 2849, *referring to* Exhibit P1987.

and Čančari Road mass graves contained bodies from multiple incidents.[1653] It thus found that this evidence did not contradict Adjudicated Fact 1612 with respect to the total number of victims.[1654]

476. Having reviewed the relevant portions of the Trial Judgement, the Appeals Chamber finds no merit in Mladić's contention that Adjudicated Fact 1612 is contradicted by the Prosecution evidence with respect to the number of victims. In the Appeals Chamber's view, Mladić misinterprets the evidence of Witness Haglund and the report of Janc by asserting that this evidence limits the victims to "132 bodies at the primary burial site and 43 DNA matches to a secondary site".[1655] Moreover, in determining whether evidence contradicts an adjudicated fact, the Appeals Chamber recalls that it previously upheld the Trial Chamber's analysis that considered whether the evidence was "unambiguous in its meaning", namely that it must either point to "a specific alternative scenario" or "unambiguous[ly] demonstrat[e] that the scenario as found in the Adjudicated Fact must reasonably be excluded as true".[1656] In respect of Adjudicated Fact 1612, the Prosecution evidence that Mladić refers to on appeal does not point to a specific alternative scenario nor does it unambiguously demonstrate that the scenario as found in Adjudicated Fact 1612, namely that between 1,000 and 1,200 men were killed in the course of 16 July 1995 at the Branjevo Military Farm,[1657] must be reasonably excluded as true.[1658] Accordingly, the Appeals Chamber finds that Mladić fails to identify any error in the Trial Chamber's finding that the evidence of Witness Haglund and the report of Janc do not contradict Adjudicated Fact 1612 with respect to the total number of victims in relation to Scheduled Incident E.9.2.

477. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber erred in relying on Adjudicated Fact 1612 to find that the number of victims in relation to Scheduled Incident E.9.2 was between 1,000 and 1,200.

(c) Conclusion

478. In light of the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.I of Mladić's appeal.

[1653] *See* Trial Judgement, para. 2860.
[1654] *See* Trial Judgement, para. 2860.
[1655] *See* Mladić Appeal Brief, para. 692, n. 838, *referring to* Trial Judgement, paras. 2846, 2849.
[1656] *See supra* para. 56. *See also* Trial Judgement, para. 5273.
[1657] *See* Adjudicated Facts 1612. *See also* Trial Judgement, paras. 2843, 2860, n. 12494.
[1658] *See* Trial Judgement, paras. 2860, 5273.

E. Alleged Errors Related to the Hostage-Taking JCE (Ground 6)

479. The Trial Chamber found that, between 25 May and 24 June 1995, VRS soldiers and officers, including members of the military police, and Bosnian Serb police officers and others, detained UNPROFOR and UNMO personnel ("UN Personnel") in Pale, Banja Luka, Goražde, and in and around Sarajevo, held some of them in strategic military locations which were potential targets of NATO air strikes, and threatened to kill them in order to exert leverage over NATO to end air strikes against Bosnian Serb military targets, recover Serb weapons under UNPROFOR control, and compel UNPROFOR forces to surrender or exchange prisoners.[1659] The Trial Chamber found that these acts constituted the crime of taking of hostages as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute.[1660]

480. The Trial Chamber further concluded that, from around 25 May 1995, when NATO air strikes commenced, until approximately 24 June 1995, when the last of the detained UN Personnel was released, the Hostage-Taking JCE existed with the common objective of capturing UN Personnel deployed in various parts of Bosnia and Herzegovina and detaining them at strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets.[1661] The Trial Chamber found that members of the Hostage-Taking JCE, which included Radovan Karadžić, Nikola Koljević, as well as members of the VRS Main Staff and corps commands, implemented the common objective themselves or by using VRS members.[1662] The Trial Chamber further found that Mladić, Commander of the VRS Main Staff, was "closely involved […] throughout every stage of the hostage-taking" and significantly contributed to the Hostage-Taking JCE.[1663] It also found that Mladić, as well as other members of the Hostage-Taking JCE, shared the intent to achieve the common objective of the joint criminal enterprise.[1664] The Trial Chamber convicted Mladić under Count 11 of the Indictment for the crime of taking of hostages as a violation of the laws or customs of war on the basis of his participation in the Hostage-Taking JCE.[1665]

481. Mladić submits that the Trial Chamber erred in finding that he intended the objective of the Hostage-Taking JCE and that he committed the *actus reus* and shared the requisite intent for the crime of hostage-taking. In particular, he submits that the Trial Chamber: (i) applied a wrong legal

[1659] Trial Judgement, paras. 2315, 2316. *See also* Trial Judgement, paras. 3218-3220, 5136.
[1660] Trial Judgement, paras. 3221, 3226. *See also* Trial Judgement, paras. 3215-3220, 3222-3225.
[1661] Trial Judgement, para. 5141.
[1662] Trial Judgement, para. 5142.
[1663] Trial Judgement, paras. 5146, 5156. *See also* Trial Judgement, paras. 5147-5155, 5157.
[1664] Trial Judgement, paras. 5142, 5163. *See also* Trial Judgement, paras. 5157-5162.
[1665] Trial Judgement, para. 5214. *See also* Trial Judgement, paras. 3226, 5141, 5142, 5156, 5163, 5168.

standard in finding that the detention of UN Personnel constituted the crime of hostage-taking; (ii) made incorrect conclusions from its assessment of evidence relating to the detention of UN Personnel; and (iii) erred by assessing circumstantial evidence in a manner that violated the principle of *in dubio pro reo*.[1666] The Appeals Chamber will address these contentions in turn.

1. Alleged Error in Applying the Legal Standard to Find that the Detention of UN Personnel Constituted the Crime of Hostage-Taking (Ground 6.A)

482. In concluding that the events between 25 May and 24 June 1995 constituted the crime of hostage-taking as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute, the Trial Chamber found that it had jurisdiction over the alleged violation and that the captured UN Personnel fell within the protection guaranteed by Common Article 3 to the four Geneva Conventions ("Common Article 3").[1667] The Trial Chamber held that violations of Common Article 3 fall within the ambit of Article 3 of the ICTY Statute,[1668] and that the charge of hostage-taking under Common Article 3(1)(b) meets the jurisdictional requirements and general conditions of Article 3 of the ICTY Statute.[1669] In this regard, the Trial Chamber, relying on ICTY Appeals Chamber jurisprudence, held, *inter alia*, that the rules in Common Article 3 are part of customary international law in international and non-international armed conflicts and that violations of such rules entail individual criminal responsibility.[1670] The Trial Chamber also recalled that the protection of Common Article 3 applies to any person taking no active part in the hostilities including combatants placed *hors de combat* at the time the offence was committed.[1671]

483. Mladić submits that his conviction under Count 11 of the Indictment should be reversed as the Trial Chamber erroneously convicted him for acts which did not constitute a crime under customary international law during the Indictment period.[1672] Mladić asserts that the ICTY's jurisdiction is limited to the ICTY Statute and only the Security Council may "revise and reinterpret the Statute".[1673] He submits that the Trial Chamber in this case erroneously relied on a decision of the ICTY Appeals Chamber in the *Tadić* case in finding that violations of Common Article 3 fall

[1666] *See* Mladić Notice of Appeal, paras. 67-69; Mladić Appeal Brief, paras. 695-759.
[1667] Trial Judgement, paras. 3010, 3224.
[1668] Trial Judgement, para. 3010, *referring to Mrkšić and Šljivančanin* Appeal Judgement, para. 70, *Kunarac et al.* Appeal Judgement, para. 68, *Čelebići* Appeal Judgement, paras. 125, 133-136, *Tadić* Decision of 2 October 1995, para. 89.
[1669] *See* Trial Judgement, paras. 3009, 3010, 3012, 3020, 3222-3226. *See also* Trial Judgement, paras. 3013-3017.
[1670] Trial Judgement, para. 3010, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("*Karadžić* Decision of 9 July 2009"), paras. 23, 25-26, *Čelebići* Appeal Judgement, paras. 138, 139, 143, 147, 167, 173, 174, *Tadić* Decision of 2 October 1995, paras. 89, 98, 134.
[1671] Trial Judgement, paras. 3012, 3017, 3224.
[1672] *See* Mladić Appeal Brief, paras. 695-697, 702-710.

within the ambit of Article 3 of the ICTY Statute.[1674] He contends that the Trial Chamber failed to conduct an analysis of its jurisdiction, and that, had it done so, it would have found cogent reasons to depart from the *Tadić* Decision of 2 October 1995.[1675] Mladić submits that, by relying on the *Tadić* Decision of 2 October 1995, the Trial Chamber violated the principle of *nullum crimen, nulla poena sine praevia lege*, which, according to him, "requires a trier of fact to exercise great caution in finding that an alleged act, not regulated in [Article 3] of the [ICTY] Statute, forms part of a crime."[1676]

484. Mladić argues that, in May and June 1995, the taking of combatants as hostages entailed only state responsibility and not individual criminal responsibility under customary international law.[1677] He contends that the prohibition against taking non-civilians hostage was introduced as a war crime in 2002 with the entry into force of the Statute of the ICC ("ICC Statute") and that, during the Indictment period, only the killing of hostages was criminalized.[1678] Mladić adds that, during the events, individual criminal responsibility extended only to the hostage-taking of civilians and that the UN Personnel could not be considered civilians.[1679]

485. The Prosecution responds that hostage-taking of any detainee was criminalized under customary international law in 1995 and that the ICTY had jurisdiction over this crime.[1680] The Prosecution contends that Mladić fails to provide cogent reasons to depart from the well-established jurisprudence that Common Article 3 formed part of customary international law during the

[1673] Mladić Appeal Brief, para. 701.
[1674] *See* Mladić Appeal Brief, paras. 698-701, *referring to, inter alia*, *Tadić* Decision of 2 October 1995.
[1675] Mladić Appeal Brief, para. 699.
[1676] Mladić Appeal Brief, para. 700.
[1677] Mladić Appeal Brief, paras. 702, 704-708.
[1678] Mladić Appeal Brief, paras. 704-708, *referring to, inter alia*, Article 8 of the ICC Statute, 17 July 1998, 2187 U.N.T.S. 3, Article 6(b) of the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279, Principle VI(b) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Article 2(1)(b) of Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55, Sections 625, 626 of the United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, The War Office, HMSO, 1958 ("United Kingdom Military Manual"), United States Field Manual (1956), as amended by Change No. 1, 1976 ("United States Military Manual"), Criminal Code of the SFRY.
[1679] Mladić Appeal Brief, paras. 702, 703, *referring to* Article 147 of Geneva Convention IV. Mladić asserts that the prohibition against hostage-taking is not evinced in the 1899 and 1907 Hague Regulations or the "grave breaches provisions" of the three Geneva Conventions and Additional Protocol I. Mladić Appeal Brief, para. 704, *referring to* Geneva Convention I, Geneva Convention II, Geneva Convention III. He further claims that reference to hostage-taking in the first draft of Article 3 of the ICTY Statute was not carried through to the final version endorsed by the UN Secretary General to the Security Council in 1993. Mladić Appeal Brief, para. 704.
[1680] *See* Prosecution Response Brief, paras. 298, 304-306, *referring to, inter alia*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012 ("*Karadžić* Decision of 11 December 2012"), para. 21, *Karadžić* Decision of 9 July 2009, paras. 6, 22, 28, 29.

relevant events and that its breaches entailed individual criminal responsibility.[1681] It asserts that in light of the "clear ICTY case law", and since Mladić never raised the jurisdictional argument at trial, the Trial Chamber was not required to provide a detailed analysis for hostage-taking as a serious violation of Common Article 3.[1682]

486. Mladić replies that the Prosecution fails to address his submissions and that its reliance on the *Karadžić* Decision of 11 December 2012 is misguided as the decision does not deal with the issues challenged in his appeal.[1683]

487. The Appeals Chamber observes that Mladić did not raise the issue regarding the Trial Chamber's alleged lack of jurisdiction over the crime of hostage-taking at trial.[1684] The Appeals Chamber recalls that if a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[1685] The Appeals Chamber notes, however, that as discussed below, the matter of the ICTY's jurisdiction over violations of Common Article 3 and, in particular, the crime of hostage-taking was settled by the ICTY Appeals Chamber and was therefore binding on the Trial Chamber in the present case.[1686] Consequently, even if Mladić had raised this jurisdictional challenge at trial, it would not have been open to the Trial Chamber in this case to depart from the jurisprudence of the ICTY Appeals Chamber. In these circumstances, the Appeals Chamber exercises its discretion to examine Mladić's submissions on appeal in respect of the ICTY's alleged lack of jurisdiction over the crime of hostage-taking.

488. As to whether cogent reasons exist for the Appeals Chamber to depart from the jurisprudence in this regard, the standards of appellate review require Mladić to demonstrate that

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[1681] Prosecution Response Brief, para. 304, *referring to*, *inter alia*, *Čelebići* Appeal Judgement, paras. 167, 173, 174, *Tadić* Decision of 2 October 1995, para. 134. The Prosecution adds that the lack of express mention of hostage-taking in Article 3 of the ICTY Statute and the grave breaches system of the Geneva Conventions is of "no significance" and does not imply that it attracts no criminal responsibility. It further contends that Mladić's reliance on the Hague Regulations and the norms applicable during the Nuremberg trials ignores subsequent developments in customary international law. *See* Prosecution Response Brief, para. 305.
[1682] Prosecution Response Brief, para. 306.
[1683] Mladić Reply Brief, para. 101.
[1684] *See* Mladić Pre-Trial Brief, paras. 107-111; Mladić Final Trial Brief, paras. 165-181, 3308-3386; T. 9 December 2016 pp. 44609, 44610; T. 13 December 2016 pp. 44808-44810, 44812-44818. The Appeals Chamber observes that in the decision concerning Mladić's request for acquittal pursuant to Rule 98 *bis* of the ICTY Rules, the Trial Chamber noted that Mladić did not specifically challenge Count 11 of the Indictment or the general elements and jurisdictional requirements that must be proven under Article 3 of the ICTY Statute. *See* T. 15 April 2014 p. 20955.
[1685] *Karadžić* Appeal Judgement, para. 312; *Prlić et al*. Appeal Judgement, para. 165; *Nyiramasuhuko et al*. Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 127.
[1686] *See infra* paras. 488-494; *Aleksovski* Appeal Judgement, para. 113. *See also Gotovina et al*. Decision of 1 July 2010, para. 24.

the decision to exercise jurisdiction over the crime of hostage-taking was made on the basis of a wrong legal principle or was "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[1687] The Appeals Chamber recalls ICTY Appeals Chamber jurisprudence holding that Article 3 of the ICTY Statute is a general and residual clause which refers to a broad category of offences, namely all "violations of the laws or customs of war", not limited to the list of violations enumerated therein.[1688] The ICTY Appeals Chamber has consistently held that Article 3 of the ICTY Statute may cover all violations of international humanitarian law not falling under Articles 2, 4, or 5 of the ICTY Statute, including violations of Common Article 3,[1689] which contains a prohibition of hostage-taking.[1690] The Appeals Chamber further recalls that the ICTY Appeals Chamber in the *Tadić* case examined, *inter alia*, findings of the International Military Tribunal at Nuremberg, domestic prosecutions, military manuals and legislation – including the law of the former Yugoslavia – and Security Council resolutions, and confirmed the formation of *opinio juris* to the effect that customary international law imposes criminal liability for those who commit serious violations of Common Article 3.[1691] Furthermore, the ICTY Appeals Chamber has previously rejected arguments that there are cogent reasons to depart from the *Tadić* jurisprudence on the questions of whether Common Article 3 is included in the scope of Article 3 of the ICTY Statute[1692] and whether breaches of its provisions give rise to individual criminal

[1687] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968; *Ngirabatware* Appeal Judgement, para. 6; *Bizimungu* Appeal Judgement, para. 370; *Munyarugarama* Decision of 5 October 2012, para. 6.

[1688] *Kunarac et al*. Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, para. 125; *Tadić* Decision of 2 October 1995, paras. 87, 89. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 47.

[1689] *Kunarac et al*. Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, paras. 125, 136; *Tadić* Decision of 2 October 1995, paras. 87, 89, 91. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 47.

[1690] Common Article 3 provides, in relevant part, that:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) […]
> (b) taking of hostages; […]

[1691] *See Tadić* Decision of 2 October 1995, paras. 128-136. *See also Čelebići* Appeal Judgement, paras. 153-156, 160, 162-168, 174.

[1692] *See Čelebići* Appeal Judgement, paras. 129-136. The ICTY Appeals Chamber rejected the submissions that violations of Common Article 3 are not within the jurisdiction of the ICTY on the basis, *inter alia*, that: (i) the Security Council never intended to permit prosecutions under Article 3 of the ICTY Statute for violations of Common Article 3; (ii) Article 3 of the ICTY Statute is limited to the "Hague law"; and (iii) unlike the ICTR Statute, the ICTY Statute does not explicitly include Common Article 3. *See Čelebići* Appeal Judgement, paras. 130-133, 136, 178.

responsibility.[1693] The ICTY Appeals Chamber has stated that the acts enumerated in Common Article 3 were intended to be criminalized within the international legal order as early as 1949.[1694]

489. Furthermore, the ICTY has exercised its jurisdiction under Article 3 of the ICTY Statute to try individuals for violations of Common Article 3,[1695] including on the basis of hostage-taking.[1696] In this respect, the ICTY Appeals Chamber in the *Karadžić* case upheld the ICTY Trial Chamber's determination that the ICTY had jurisdiction over the crime of hostage-taking under Article 3 of the ICTY Statute.[1697] The ICTY Appeals Chamber has held that, under Common Article 3, there is an absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention.[1698] It has also rejected the submission that the crime of hostage-taking is limited under customary international law to the taking of civilians hostage.[1699] In light of this jurisprudence, the Appeals Chamber considers that the matter of the ICTY's jurisdiction over the crime of hostage-taking was settled by the ICTY Appeals Chamber.

[1693] *See Čelebići* Appeal Judgement, paras. 157-174. The ICTY Appeals Chamber rejected, *inter alia*, the submissions that: (i) the evidence presented in the *Tadić* Decision of 2 October 1995 did not establish that Common Article 3 is customary international law that creates individual criminal responsibility on the basis that there is no showing of state practice and *opinio juris*; (ii) the exclusion of Common Article 3 from the Geneva Conventions grave breaches system demonstrates that it entails no individual criminal responsibility; (iii) Common Article 3 imposes duties on states only and is meant to be enforced by domestic legal systems; and (iv) there is evidence demonstrating that Common Article 3 is not a rule of customary law which imposes liability on individuals. *See Čelebići* Appeal Judgement, paras. 157, 158, 163, 167-170, 174. Similarly, the Appeals Chamber finds that Mladić's assertion that the lack of mention of the prohibition against hostage-taking in the ICTY Statute, the 1899 and 1907 Hague Regulations, and the "grave breaches provisions" of the three 1949 Geneva Conventions and Additional Protocol I does not undermine that hostage-taking entailed individual criminal responsibility in customary international law at the time of the events in question. As discussed by the ICTY Appeals Chamber in the *Čelebići* case, the Geneva Conventions impose an obligation on State Parties to implement the conventions in their domestic legislation, including by taking measures necessary for the suppression of *all* breaches of the Geneva Conventions, including those outside the grave breaches provisions. *See* Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III, Article 146 of Geneva Convention IV ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."). *See also* ICRC, Commentary of 1958 on Article 146(3) of Geneva Convention IV, p. 594 ("[…]This shows that all breaches of the Convention should be repressed by national legislation. […] [T]he authorities of the Contracting Parties […] should institute judicial or disciplinary punishment for breaches of the Convention."). *See Čelebići* Appeal Judgement, paras. 164-166.

[1694] *Čelebići* Appeal Judgement, para. 163.

[1695] *See, e.g., Strugar* Appeal Judgement, paras. 164, 171-179, p. 146; *Boškoski and Tarčulovski* Appeal Judgement, paras. 38, 47, 53; *Kunarac et al*. Appeal Judgement, paras. 51, 66-70.

[1696] *See, e.g., Karadžić* Trial Judgement, paras. 5951, 5993, 6010. *See also Karadžić* Appeal Judgement, paras. 654, 659-661, 775, 777.

[1697] *See Karadžić* Decision of 9 July 2009, paras. 2-4, 6, 22-27, 29. *See also Karadžić* Appeal Judgement, para. 777; *Karadžić* Trial Judgement, paras. 467, 468.

[1698] *Karadžić* Decision of 11 December 2012, paras. 16, 21; *Karadžić* Decision of 9 July 2009, para. 22. *See also Karadžić* Appeal Judgement, para. 659; *Popović et al*. Appeal Judgement, para. 794; *Đorđević* Appeal Judgement, para. 747; *Strugar* Appeal Judgement, n. 460.

[1699] *Karadžić* Decision of 9 July 2009, paras. 3, 6, 22, 27. *See also Karadžić* Appeal Judgement, para. 659; *Karadžić* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21.

490. In attempting to demonstrate that there are cogent reasons to depart from this well established jurisprudence, Mladić submits that during the Indictment period, with the exception of the killing of hostages or the taking of civilians hostage, the taking of "non-civilians" hostage was not prohibited and did not entail individual criminal responsibility under customary international law. Mladić's argument that the laws and norms applicable to the International Military Tribunal at Nuremberg only apply to the killing of hostages[1700] does not undermine the fact that the prohibition of hostage-taking of any person taking no active part in the hostilities was nevertheless well established in customary international law during the period covered by the Indictment and entailed individual criminal responsibility. The Appeals Chamber recalls that Article 4 of the ICTR Statute, which was adopted in 1994, expressly prohibits hostage-taking as a violation of Common Article 3 and Additional Protocol II. The ICTY Appeals Chamber has stated that the ICTR applies *existing* customary international law and that it was established to prosecute crimes which were already the subject of individual criminal responsibility.[1701] Furthermore, an analysis of state practice confirms the formation of *opinio juris* that customary international law imposes individual criminal responsibility for violations of Common Article 3 and Additional Protocol II during the Indictment period. For example, legislation and military manuals of a number of states prohibited such violations,[1702] and Additional Protocol II, which specifically contains the prohibition against hostage-taking of "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted", was adopted in 1977 by consensus and had been ratified by over 120 states at the time of the events included in the Indictment.[1703]

491. Against this background, the Appeals Chamber finds that Mladić's reliance on two domestic military manuals in support of his arguments is unpersuasive and fails to undermine well-established law on the prohibition of hostage-taking. In this respect, Mladić's submission that the military manual of the United States only prohibits the taking of civilians hostage neglects that the same manual restates Common Article 3 and criminalizes "every violation of the law of war" as a

[1700] Mladić Appeal Brief, para. 704.
[1701] *See Čelebići* Appeal Judgement, paras. 170, 178.
[1702] *See, e.g.*, Ireland, Geneva Conventions Act as amended (1962), Sections 4(1) and 4(4) (providing that, in addition to grave breaches, any "minor breaches" of the 1949 Geneva Conventions, including violations of Common Article 3, are punishable offences); Belgium, *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions* (1993), Article 1(7) (implementing the 1949 Geneva Conventions and the two Additional Protocols and providing that Belgian courts have jurisdiction to adjudicate crimes under international law such as hostage-taking); France, *Décret n°75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées* (1975), as amended in 1982, Article 9(1) (prohibiting hostage-taking of persons placed *hors de combat* and providing that they be treated humanely); Germany, Humanitarian Law in Armed Conflicts – Manual (1992), para. 1209 (qualifying as an "indictable offence" hostage-taking of persons protected by Common Article 3); The Netherlands, Military Manual (1993), pp. VIII-3, XI-1, XI-4 (restating the prohibition of hostage-taking found in Common Article 3 and Article 4 of Additional Protocol II).

war crime.[1704] Similarly, his contention that the military manual of the United Kingdom only prohibits the killing of civilian hostages omits that the same section of the manual provides a non-exhaustive list of acts amounting to war crimes and criminalizes "all other violations of the [Geneva] Conventions".[1705]

492. With respect to Mladić's assertion that hostage-taking did not form part of Article 144 of the Criminal Code of the SFRY,[1706] it is worth noting that: (i) Article 142(1) of the same criminal code entitled "War crimes against the civilian population" forbids an attack against persons *hors de combat* and includes a prohibition against hostage-taking;[1707] and (ii) as previously noted by the ICTY Appeals Chamber, the SFRY Parliament enacted a law in 1978 to implement the two Additional Protocols of the Geneva Conventions, which contain the prohibition against hostage-taking, rendering them "directly applicable to the courts of former Yugoslavia".[1708]

493. In light of the above considerations, the Appeals Chamber finds that Mladić fails to demonstrate that the decision to exercise jurisdiction over the crime of hostage-taking was made on the basis of a wrong legal principle or has been wrongly decided and that, therefore, there are cogent reasons to depart from well-settled jurisprudence in this respect.

494. The Appeals Chamber notes that in finding that it had jurisdiction over the crime of hostage-taking, the Trial Chamber recalled the four conditions set out in the *Tadić* Decision of 2 October 1995 to satisfy Article 3 of the ICTY Statute's "residual jurisdiction", namely that: (i) the offence charged must violate a rule of international humanitarian law; (ii) the rule must bind the parties at the time of the alleged offence; (iii) the rule must protect important values and its

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[1703] Additional Protocol II, Articles 4(1), 4(2)(c). *See also* ICRC, Commentary of 1987 on Additional Protocol II, paras. 4417, 4418 ("[…] Protocol II was adopted as a whole by consensus on 8 June 1977.").
[1704] Sections 11, 499 of the United States Military Manual. *See also Tadić* Decision of 2 October 1995, para. 131.
[1705] Section 626 of the United Kingdom Military Manual. *See also Tadić* Decision of 2 October 1995, para. 131.
[1706] Mladić Appeal Brief, para. 706.
[1707] Article 142(1) of the Criminal Code of the SFRY ("Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack on the civilian population, settlement, individual civilians or persons *hors de combat*, which results in death or serious injury to body or health; […] use of measures of intimidation and terror, taking of hostages, collective punishment, unlawful taking to concentration camps and other unlawful confinements, deprivation of rights to a fair and impartial trial; […] shall be punished by no less than five years in prison, or by the death penalty.").
[1708] *Tadić* Decision of 2 October 1995, para. 132, *referring to* the SFRY Law on the Ratification of the Additional Protocol to the Geneva Convention from 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol I) and the Additional Protocol with the Geneva Convention of 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol II), 26 December 1978, Article 210 of the Constitution of SFRY, 1974. *See also* Additional Protocol I, Article 75(1) ("[…] [P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article […]"), Article 75(2)(c) ("The following acts are and shall remain prohibited at any time and in any place whatsoever […] the taking of hostages"); Additional Protocol II. *See also* SFRY Military Manual, Article 17 (recognizing applicable "basic rules of

violation must have grave consequences for the victim; and (iv) that such a violation must entail the individual criminal responsibility of the perpetrator.[1709] The Trial Chamber relied, *inter alia*, on the ICTY Appeals Chamber jurisprudence in the *Tadić*, *Čelebići*, and *Karadžić* cases and concluded that hostage-taking under Article 3(1)(b) common to the Geneva Conventions met these conditions as the rules in Common Article 3 are part of customary international law in international and non-international armed conflicts, the acts prohibited by Common Article 3 breach rules protecting important values and involve grave consequences for the victims, and violations of such rules entail individual criminal responsibility.[1710] In light of the established jurisprudence on this matter, the Appeals Chamber finds that the Trial Chamber correctly relied on the *Tadić* Decision of 2 October 1995 and other consistent ICTY Appeals Chamber jurisprudence in the exercise of its jurisdiction over the crime of hostage-taking and, contrary to Mladić's argument, it was not required to conduct a more detailed analysis in this respect.[1711]

495. With respect to Mladić's submission that the Trial Chamber violated the principle of *nullum crimen sine lege*, the Appeals Chamber recalls that this principle prescribes that a person may only be found guilty of a crime in respect of acts which constituted a violation of a norm which existed at the time of their commission.[1712] In light of the well-established jurisprudence that hostage-taking was a crime under customary international law during the period covered by the Indictment, the Appeals Chamber rejects Mladić's contention that, by relying on the *Tadić* Decision of 2 October 1995, the Trial Chamber breached the principle of *nullum crimen sine lege*.

496. Mladić therefore fails to demonstrate that the Trial Chamber erred in finding that it had jurisdiction over the hostage-taking of the UN Personnel or that there are cogent reasons to depart from well-established jurisprudence on this matter. Based on the foregoing, the Appeals Chamber dismisses Ground 6.A of Mladić's appeal.

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humanity" contained in Common Article 3), Article 31 (prohibiting the taking hostage of, *inter alia*, civilians and prisoners of war "even as a reprisal").

[1709] Trial Judgement, para. 3009, *referring to Tadić* Decision of 2 October 1995, paras. 94, 143.

[1710] Trial Judgement, para. 3010, *referring to, inter alia, Karadžić* Decision of 9 July 2009, paras. 23, 25, 26, *Čelebići* Appeal Judgement, paras. 138, 139, 143, 147, 167, 173, 174, *Tadić* Decision of 2 October 1995, paras. 89, 98, 134.

[1711] The Appeals Chamber finds without merit Mladić's argument that the ICTY Appeals Chamber in the *Čelebići* and *Kunarac et al*. cases "implicitly" affirmed the need for a trial chamber to conduct a detailed analysis of its jurisdiction where jurisdiction may be in issue. *See Mladić* Appeal Brief, para. 699, *referring to Kunarac et al*. Appeal Judgement, paras. 67, 68, *Čelebići* Appeal Judgement, paras. 167, 168. The relevant jurisprudence to which he refers shows that the ICTY Appeals Chamber relied on the *Tadić* jurisprudence and reaffirmed that Article 3 of the ICTY Statute encompasses violations of Common Article 3. *See Kunarac et al*. Appeal Judgement, para. 68, nn. 60-62; *Čelebići* Appeal Judgement, paras. 168, 169.

[1712] *See Milutinović et al.* Decision of 21 May 2003, para. 37; *Aleksovski* Contempt Appeal Judgement, para. 38; *Čelebići* Appeal Judgement, para. 576; *Aleksovski* Appeal Judgement, para. 126. *See also Hadžihasanović et al.* Decision of 16 July 2003, para. 51.

2. Alleged Error in Conclusions from Assessment of Evidence Relating to the Detention of UN Personnel (Ground 6.B)

497. Upon considering Mladić's argument that the UN Personnel were combatants and not entitled to the protection of Common Article 3, the Trial Chamber found their status as combatants or civilians to be irrelevant since the protection of Common Article 3 applies to any person taking no active part in the hostilities at the time the offence was committed, including combatants rendered *hors de combat* by detention.[1713] The Trial Chamber concluded that the captured UN Personnel fell within the protection guaranteed by Common Article 3.[1714]

498. Mladić submits that the Trial Chamber erred by failing to make a determination of the status of the UN Personnel and in finding that their status as combatants or civilians was irrelevant.[1715] He contends that the UN Personnel were combatants and that the detention of combatants as prisoners of war, who become *hors de combat*, does not entail any criminal responsibility.[1716] Consequently, Mladić submits, the Trial Chamber did not have jurisdiction over the alleged crime of taking the UN Personnel hostage.[1717]

499. The Prosecution responds that the UN Personnel were rendered *hors de combat* by their detention and, as such, were protected under Common Article 3 regardless of their status prior to detention.[1718] It submits that the ICTY had jurisdiction over the crime of hostage-taking relating to all detained individuals and that the determination of the status of the UN Personnel prior to detention was unnecessary.[1719]

500. Mladić replies that the Prosecution does not engage directly with his submission that the status of the UN Personnel was relevant to whether the Trial Chamber had jurisdiction over the alleged crimes.[1720]

501. As discussed above, the Trial Chamber correctly found that the protection of Common Article 3 applies to any person taking no active part in the hostilities including combatants placed *hors de combat* at the time the offence was committed.[1721] The prohibition against hostage-taking in

[1713] Trial Judgement, para. 3224.
[1714] Trial Judgement, para. 3224.
[1715] Mladić Appeal Brief, paras. 711, 722, 724, 731. *See also* Mladić Appeal Brief, paras. 712, 713.
[1716] Mladić Appeal Brief, paras. 723, 725-730, 732. *See also* Mladić Appeal Brief, paras. 715-719.
[1717] Mladić Appeal Brief, paras. 732, 733. *See also* Mladić Appeal Brief, paras. 712, 713, 734.
[1718] Prosecution Response Brief, paras. 300, 303.
[1719] Prosecution Response Brief, paras. 298-303, *referring to Karadžić* Decision of 11 December 2012, paras. 8, 15, 16, 21, *Karadžić* Decision of 9 July 2009, paras. 6, 22, 26, 28.
[1720] Mladić Reply Brief, para. 102.
[1721] *See supra* Section III.E.1.

Common Article 3 applies to all detained individuals irrespective of their status prior to detention.[1722] Accordingly, the Appeals Chambers of the ICTY and the Mechanism have affirmed that the UN Personnel were entitled to protection under Common Article 3.[1723] Mladić therefore fails to demonstrate that the Trial Chamber erred in finding that the status of the UN Personnel, as combatants or civilians, was irrelevant to determining whether they were entitled to the protection against hostage-taking in Common Article 3.

502. Based on the foregoing, the Appeals Chamber dismisses Ground 6.B of Mladić's appeal.

3. Alleged Errors in Assessing Circumstantial Evidence (Ground 6.C)

503. As recalled above, the Trial Chamber concluded that, from around 25 May 1995 until approximately 24 June 1995, the Hostage-Taking JCE existed with the common objective of capturing the UN Personnel deployed in various parts of Bosnia and Herzegovina and detaining them at strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets.[1724] The Trial Chamber also found that Mladić significantly contributed to and, along with other members of the Hostage-Taking JCE, shared the intent to achieve the common objective of this joint criminal enterprise.[1725]

504. Mladić submits that the Trial Chamber gave insufficient weight to exculpatory evidence in relation to the Hostage-Taking JCE, leading it to err in finding that his significant contribution[1726] and *mens rea*[1727] were established beyond reasonable doubt.[1728] The Appeals Chamber will address these contentions in turn.

(a) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's Significant Contribution to the Hostage-Taking JCE

505. In concluding that Mladić significantly contributed to the Hostage-Taking JCE, the Trial Chamber considered its findings that, *inter alia*, Mladić ordered VRS units to detain the UN Personnel and to place them at potential NATO air strike targets and, when requested to release

[1722] *Karadžić* Appeal Judgement, para. 659; *Karadžić* Decision of 11 December 2012, paras. 16, 21; *Karadžić* Decision of 9 July 2009, para. 22. *See also Popović et al.* Appeal Judgement, para. 794; *Đorđević* Appeal Judgement, para. 747; *Strugar* Appeal Judgement, n. 460.
[1723] *Cf. Karadžić* Appeal Judgement, paras. 659, 660; *Karadžić* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21.
[1724] Trial Judgement, para. 5141.
[1725] Trial Judgement, paras. 5142, 5156, 5163. *See also* Trial Judgement, paras. 5146-5155, 5157-5162.
[1726] Mladić Appeal Brief, paras. 741, 751.
[1727] Mladić Appeal Brief, paras. 752, 758.
[1728] Mladić Notice of Appeal, para. 69; Mladić Appeal Brief, paras. 751, 758.

them, informed the UNPROFOR Commander that the detainees' release was contingent on the cessation of air strikes.[1729]

506. Mladić submits that the Trial Chamber erred in fact in making findings on his significant contribution to the Hostage-Taking JCE, namely by: (i) relying on orders not issued by him; (ii) failing to give sufficient weight to other orders issued by him to treat the UN Personnel as prisoners of war in accordance with the Geneva Conventions; and (iii) failing to correctly assess evidence relating to the filming of the UN Personnel.[1730]

507. Specifically, Mladić submits that, in finding that he ordered the placement of the UN Personnel at potential NATO air strike targets and that he significantly contributed to the Hostage-Taking JCE, the Trial Chamber failed to give sufficient weight to the fact that two orders on which it relied in making this finding were not issued by him.[1731] He argues that the order dated 27 May 1995 was not signed by him and originated from the "Supreme Defence Counsel" headed by Karadžić.[1732] In addition, he contends that this order and another order, dated 30 May 1995, on which the Trial Chamber relied did not contain his "unique identification number", and that both were "inconsistent with [his] military notebooks" and orders to his subordinates.[1733]

508. Mladić further submits that, in finding that his subordinates made threats against the UN Personnel and that his orders to detain them illustrate his significant contribution to the Hostage-Taking JCE, the Trial Chamber failed to give sufficient weight to orders he gave to subordinates to treat detainees as prisoners of war in accordance with the Geneva Conventions, which were followed.[1734] Mladić asserts that his orders to detain and disarm the UN Personnel were lawful under international humanitarian law.[1735]

509. Mladić also submits that, in finding that he visited the detainees between 2 and 4 June 1995 and ordered their filming, the Trial Chamber relied on Witness Janusz Kalbarczyk whose evidence was inconsistent and differed from testimonies of other detained UN Personnel who did not confirm

[1729] Trial Judgement, para. 5156. *See also* Trial Judgement, para. 5157.
[1730] Mladić Appeal Brief, paras. 741, 751. *See also* Mladić Appeal Brief, paras. 742-750.
[1731] Mladić Appeal Brief, paras. 743, 744, *referring to* Exhibits P789, P5230.
[1732] Mladić Appeal Brief, para. 744.
[1733] *See* Mladić Appeal Brief, paras. 743-745, *referring to, inter alia*, Exhibit P5230.
[1734] Mladić Appeal Brief, paras. 746, 750.
[1735] Mladić Appeal Brief, para. 749, *referring to* Exhibits P6611, para. 68, P2558, para. 3. Mladić adds that orders forbidding leakage of information regarding the detention and contact with the detainees were legitimate to ensure the security of VRS soldiers and the detainees in the eventuality of rescue operations. *See* Mladić Appeal Brief, para. 749, *referring to* Exhibits P6716, paras. 7-11, P5230, p. 1.

seeing Mladić.[1736] Mladić asserts that the Trial Chamber found that he ordered the filming of the detainees without referring to evidence.[1737] He contends that the Trial Chamber relied on the hearsay evidence of Witness Patrick Rechner that Mladić had ordered the transport of the detainees to be filmed on different dates and locations, and that this evidence was not corroborated by "other UN prisoners present there".[1738] He argues that this evidence was inconsistent with: (i) Witness Kalbarczyk's testimony affirming Mladić's absence during the filming on 2 and 3 June 1995 and that the filming was done by a civilian journalist;[1739] (ii) the lack of mention of the filming between 2 and 4 June 1995 by Witness Griffiths Evans;[1740] and (iii) the evidence of Witness Snježan Lalović, the journalist who conducted the filming, that he was not ordered to film by anyone in the military but by his editors and "who denies any mention of [Mladić]" during the transportation of the detainees on 26 May 1995.[1741]

510. The Prosecution responds that none of the evidence cited by Mladić undermines the Trial Chamber's findings and that he ignores critical evidence establishing his central involvement in the implementation of the common purpose.[1742] Specifically, the Prosecution contends that the Trial Chamber did not attribute the order dated 27 May 1995 to Mladić or rely on it in finding that he ordered the placement of the UN Personnel at potential air strike targets.[1743] The Prosecution submits that the Trial Chamber did not fail to give sufficient weight to orders to treat detainees as prisoners of war, but points out that those same orders also include instructions to take the UN Personnel as hostages.[1744] Consequently, in its submission, the Trial Chamber properly relied on such orders in making its finding that Mladić and the other members of the joint criminal enterprise issued them in furtherance of the common objective of the Hostage-Taking JCE.[1745] The Prosecution further submits that the Trial Chamber reviewed the evidence to which Mladić refers

[1736] Mladić Appeal Brief, para. 742, *referring to* Exhibits P396, p. 9, P397, p. 8, D393, pp. 12, 13. Mladić also asserts that Witness Kalbarczyk's evidence had "a number of inconsistencies" and was inconsistent with his military notebooks. *See* Mladić Appeal Brief, para. 742.
[1737] Mladić Appeal Brief, para. 747, *referring to* Trial Judgement, para. 5153.
[1738] Mladić Appeal Brief, para. 748, *referring to* Trial Judgement, para. 2238, Exhibit P2554, para. 52, T. 29 October 2013 pp. 18494, 18528, 18529. The Appeals Chamber notes that Mladić's reference to "other UN prisoners present there" pertains to the evidence of one witness, Witness Kalbarczyk. *See* Mladić Appeal Brief, para. 748, *referring to* T. 14 November 2013 pp. 19352, 19353.
[1739] Mladić Appeal Brief, para. 747, *referring to* Exhibit P2801, p. 5.
[1740] Mladić Appeal Brief, para. 747, *referring to* Exhibit P396, p. 9.
[1741] Mladić Appeal Brief, paras. 747, 748, *referring to* Exhibit D858, paras. 3, 15, T. 16 December 2014 p. 29887.
[1742] Prosecution Response Brief, para. 308.
[1743] Prosecution Response Brief, para. 310, *referring to* Trial Judgement, paras. 5137, 5141, 5142. The Prosecution adds that the Trial Chamber reasonably attributed the order dated 30 May 1995 to Mladić as the order contains his signature and, at trial, he did not challenge its admissibility or deny that he signed this order, and tendered other documents with different identification numbers as "his". *See* Prosecution Response Brief, para. 309.
[1744] Prosecution Response Brief, para. 311. The Prosecution adds that the argument that the orders to block, detain, and disarm the UN Personnel were lawful does not undermine the finding that Mladić significantly contributed to the Hostage-Taking JCE. *See* Prosecution Response Brief, para. 314.
[1745] Prosecution Response Brief, para. 311.

with respect to the filming of the detainees and submits that the Trial Chamber reasonably concluded that he ordered the filming.[1746] The Prosecution adds that, in any event, the Trial Chamber's finding of Mladić's significant contribution does not depend on any finding concerning the filming of the detainees, in light of Mladić's orders to detain the UN Personnel and place them at potential NATO air strike targets as well as his negotiating about their release.[1747]

511. Mladić replies that he demonstrated that the Trial Chamber erred by relying on inconsistent evidence and failing to give sufficient weight to exculpatory evidence regarding his participation in the Hostage-Taking JCE.[1748]

512. Mladić contends that the Trial Chamber relied on two orders not issued by him, pointing to orders dated 27 May 1995 and 30 May 1995.[1749] With respect to the order dated 27 May 1995, the Appeals Chamber recalls that the Trial Chamber found that it contained an order to various VRS corps and units to place captured and disarmed UNPROFOR forces at potential NATO air strike targets ("Order of 27 May 1995").[1750] With respect to the order dated 30 May 1995, the Trial Chamber found that Mladić informed VRS corps commands and units that NATO was preparing an operation to free the captured UN Personnel and ordered: (i) all units to open fire on the area of airborne assault and of the deployment of UNPROFOR troops in the event NATO launched such an operation; and (ii) the SRK Command to complete the disarming of the detainees and deploy them to potential NATO strike targets ("Order of 30 May 1995").[1751] The Appeals Chamber observes that the Trial Chamber explicitly noted that the Order of 27 May 1995 was signed by Milovanović who was the Chief of Staff and Deputy Commander of the VRS Main Staff.[1752] The Trial Chamber therefore did not attribute this order to Mladić personally, but rather to the VRS Main Staff.[1753] To the extent that Mladić argues that the Trial Chamber erred in attributing the Order of 30 May 1995 to him, the Appeals Chamber finds this to be without merit as this order bears his signature and Mladić did not claim at trial that the order was not attributable to him.[1754] In addition, the Appeals Chamber summarily dismisses Mladić's undeveloped submissions that the two orders were

[1746] Prosecution Response Brief, paras. 312, 313.
[1747] Prosecution Response Brief, para. 313, *referring to* Trial Judgement, para. 5156.
[1748] Mladić Reply Brief, para. 103.
[1749] Mladić Appeal Brief, paras. 743, 744, *referring to* Exhibits P789, P5230.
[1750] Trial Judgement, paras. 2219, 5137, *referring to* Exhibit P789.
[1751] Trial Judgement, paras. 2223, 5151, 5152.
[1752] Trial Judgement, para. 2219. *See also* Trial Judgement, para. 240.
[1753] Mladić's argument that the Order of 27 May 1995 was not signed by him and did not contain his "unique identification number" does not identify any error on the part of the Trial Chamber. *See* Mladić Appeal Brief, para. 744.
[1754] *See* Exhibit P5230; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Motion to Admit Evidence From the Bar Table, 31 October 2013 (public with confidential annexes), Annex A (confidential), p. 210 (item 382); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response in Opposition to "Prosecution Motion to Admit

inconsistent with his military notebooks and orders to his subordinates. The Appeals Chamber finds that Mladić fails to demonstrate error in the Trial Chamber's assessment related to the Order of 27 May 1995 and the Order of 30 May 1995.

513. The Appeals Chamber turns to Mladić's submission that the Trial Chamber failed to give sufficient weight to his orders to subordinates to treat detainees as prisoners of war in accordance with the Geneva Conventions. The Appeals Chamber observes that in support of this argument Mladić refers to paragraphs of the Trial Judgement without pointing to any specific orders or evidence on the record.[1755] A review of the Trial Judgement reveals that in some of the paragraphs which Mladić cites, the Trial Chamber discussed evidence concerning orders regarding the treatment of detainees[1756] or their actual treatment.[1757] In reviewing some of the evidence which Mladić claims concerns the treatment of the detainees as prisoners of war in accordance with the Geneva Conventions, the Trial Chamber also considered that: (i) the detainees were beaten, abused, and handcuffed to flagpoles; (ii) Mladić and VRS members issued threats to the UN Personnel or

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Evidence From the Bar Table", 30 December 2013, pp. 2-18. *See also* Mladić Final Trial Brief, pp. 2-916; T. 9 December 2016 pp. 44579-44661; T. 12 December 2016 pp. 44662-44739; T. 13 December 2016 pp. 44740-44834.

[1755] *See* Mladić Appeal Brief, paras. 746, 750, *referring to, inter alia*, Trial Judgement, paras. 2219, 2220, 2227, 2228, 2235, 2240, 2241, 2253, 2256, 2262, 2268, 2279, 2316.

[1756] *See* Trial Judgement, para. 2219 ("[O]n 25 May 1995, Mladić […] ordered the Ilidža Brigade to block and disarm the UNPROFOR members and put them under its control as [prisoners of war]. On 27 May 1995, Mano[jl]o Milovanović ordered […] UN [P]ersonnel were to be treated with military respect and as [prisoners of war]"), *referring to* Exhibits P6611, para. 68, P789, pp. 1, 2, P1849, T. 26 June 2014 pp. 23056, 23057, 23069, 23070. *See* Trial Judgement, para. 2220 ("Milenko Indić […] received an order from the VRS Main Staff to place under control, disarm, and seize the communication devices of UNPROFOR members in the SRK territory, but not to harm them in any manner."), *referring to* Exhibit D614, para. 27, T. 2 September 2014 pp. 25112, 25113. *See* Trial Judgement, para. 2253 ("Milorad Šehovac testified that […] the SRK 2nd Sarajevo Light Infantry Brigade declared five to seven UNMOs […] as [prisoners of war]. […] The SRK unit acted in execution of an order from the SRK to capture 'everything' in their defence zone and treat them as [prisoners of war]. […] [T]he SRK unit did not mistreat the detainees nor used any kind of restraint or force against them. The UNMOs were allowed to make phone calls, provided three meals per day, and allowed to see a doctor."), *referring to* T. 15 July 2014 pp. 24052, 24053. *See* Trial Judgement, para. 2316 ("Živanović ordered that the UNPROFOR soldiers […] be treated as [prisoners of war]."). *See also* Trial Judgement, para. 2283 ("Živanović ordered that the UN soldiers be treated as [prisoners of war] in a correct manner throughout their capture and detention."), *referring to* Exhibit P2545, para. 5.

[1757] *See* Trial Judgement, para. 2227 (stating that on 25 May 1995, two soldiers arrested Gunnar Westlund and his team and "[…] allowed [them] to keep their IDs, wallets and cigarettes."), *referring to* Exhibit P400, pp. 3, 4. *See* Trial Judgement, para. 2236 (stating that VRS soldiers were threatening detained UNMOs and that "[…] Captain Vojvodić, sent back these soldiers."), *referring to* Exhibit P397, p. 4. *See* Trial Judgement, para. 2240 (stating that on 26 May 1995 "Kozusnik was selected to leave and collect some personal items for the team."), *referring to* Exhibit P396, p. 4. *See* Trial Judgement, para. 2241 (stating that on 26 May 1995, UNMO personnel put under house arrest were told "[…] that it was for their own safety, as NATO air strikes had hit a school and a hospital."), *referring to* Exhibit P3581, p. 2. *See* Trial Judgement, para. 2256 (stating that on 27 May 1995, the Serb military police declared the detainees prisoners of war), *referring to* Exhibit P399, p. 3. *See* Trial Judgement, para. 2268 (stating that on 26 May 1995, Indić informed UNPROFOR personnel that they were VRS prisoners of war), *referring to* Exhibits P3586, paras. 28, 30, 31, P5234, p. 2. The Appeals Chamber observes that the remaining paragraphs of the Trial Judgement to which Mladić refers do not contain any order or evidence relevant to the alleged humane treatment of the detainees as prisoners of war. *See* Trial Judgement, paras. 2228, 2235, 2262, 2279. To the contrary, some of these paragraphs reveal that the UN Personnel were mistreated. *See, e.g.*, Trial Judgement paras. 2262 ("Several of the UNPROFOR soldiers were kicked and punched by Serb soldiers to speed up their surrender."), 2279 ("A man […] struck the head of [a French soldier] on the temple with his dagger, and kicked the other French soldier who was in the room in the face."). The Appeals Chamber will therefore not examine further Mladić's allegation of error pertaining to these paragraphs of the Trial Judgement.

UNPROFOR headquarters on the fate of the detainees with the aim of stopping the air strikes; and (iii) UN Personnel were used as "human shields".[1758] In these circumstances, Mladić does not demonstrate an error on the part of the Trial Chamber in assessing or weighing the evidence.

514. The Appeals Chamber also observes that, in discussing Mladić's contribution to the Hostage-Taking JCE, the Trial Chamber specifically recalled some of the evidence concerning the alleged treatment of the detained UN Personnel as prisoners of war[1759] and found that he: (i) ordered VRS units to detain the UN Personnel and to place them at potential NATO air strike targets; (ii) when requested to release the detained UN Personnel, informed an UNPROFOR representative that such release was contingent on the cessation of air strikes; and (iii) was closely involved throughout every stage of the hostage-taking, including as a negotiator with UNPROFOR representatives.[1760] In light of such evidence and findings, Mladić does not show how selective orders to treat the detained UN Personnel as prisoners of war or examples of alleged favourable treatment of the detainees who were threatened, abused, and used as "human shields", could undermine the Trial Chamber's conclusion that he significantly contributed to the Hostage-Taking JCE. Similarly, in light of these considerations, the Appeals Chamber finds that Mladić's arguments that his orders to detain and disarm the UN Personnel, as well as orders forbidding leakage of information regarding the detention and contact with the detainees were lawful, fail to identify any error or undermine the Trial Chamber's finding that he significantly contributed to the Hostage-Taking JCE.

[1758] *See* Trial Judgement, para. 2227 ("[…] [a VRS soldier] ordered the witness to contact UNMO headquarters and tell them that the team would be shot one by one unless the NATO air strikes stopped. […] [D]runken VRS soldiers beat and abused the Nigerian and the Pakistani UNMOs by hitting them with the butts of their rifles."), *referring to* Exhibit P400, pp. 3, 4. *See* Trial Judgement, para. 2236 ("Gelissen testified that [UNMO personnel] Golubev was also handcuffed to a flagpole in front of the barracks.[…] [O]ne VRS soldier was making gestures of shooting the [NATO] plane and cutting throats towards the UNMOs while others were shouting."), *referring to* Exhibit P397, pp. 2-4. *See* Trial Judgement, para. 2236 ("After 4 p.m., two UNMOs, Alves and Gelissen, were brought to join [Romero and Evans] and were handcuffed to another flagpole for approximately four hours"), *referring to* Exhibit P396, p. 3. *See* Trial Judgement, para. 2241 ("A young Bosnian-Serb soldier told the witness's group that they were VRS hostages and that they would be taken to the Jahorina radar station and used as 'human shields'."), *referring to, inter alia*, Exhibit P3581, p. 2. *See* Trial Judgement, para. 2256 ("The conditions at the compound in Banja Luka were bad: the detainees barely received any food, the mattresses were unusable, and there was no soap, bed linen, or hot water. One of the military police commanders in Banja Luka explained that the purpose of splitting them into groups was to stop NATO air strikes by using them as 'human shields' at particularly important facilities which were possible targets of NATO attacks."), *referring to* Exhibit P399, p. 3. *See also* Trial Judgement, paras. 2264 ("The soldiers transported to Doboj were then held at various positions and 'very likely' used as 'human shields' against eventual air attacks."), 2266 ("The second group composed of UNMO and UNPROFOR personnel was […] split up and detained at different military positions."), 2270 ("Serb soldiers threatened and beat the [French Battalion] Commander during his detention."), 2274 ("[A French platoon leader] was then compelled at gunpoint to assemble his soldiers and forced to kneel and used as a 'human shield'"), 2305 ("They further heard that they had all been held at military sites, including hospitals, command posts, artillery firing positions, and ammunition depots."), *referring to, inter alia*, Exhibit P5234, p. 1; Exhibit P3586, paras. 35, 36 ("the captain said that we were not prisoners of war but hostages.").

[1759] *See, e.g.*, Trial Judgement, paras. 5148-5150.

[1760] *See* Trial Judgement, para. 5156.

515. With respect to Mladić's contention that the Trial Chamber erred in relying on inconsistent evidence in finding that he visited some of the detainees between 2 and 4 June 1995 and ordered to film them, the Appeals Chamber observes that the Trial Chamber did not rely on this evidence in making a finding on Mladić's significant contribution to the Hostage-Taking JCE.[1761] The Trial Chamber mainly relied on the evidence and findings that Mladić ordered VRS units to detain the UN Personnel and place them at potential NATO air strike targets, informed an UNPROFOR representative that their release was contingent on the cessation of air strikes, ordered such release, and was closely involved throughout every stage of the hostage-taking including as a negotiator with UNPROFOR representatives.[1762] Therefore, any error on the part of the Trial Chamber relating to Mladić's visit and order to film the detainees between 2 and 4 June 1995 would not disturb the Trial Chamber's conclusion that he significantly contributed to the Hostage-Taking JCE. Consequently, as Mladić's submissions on this point do not have the potential to demonstrate a miscarriage of justice or cause the Trial Judgement to be reversed or revised, the Appeals Chamber dismisses them without further consideration in accordance with the applicable standard of review.[1763]

516. The Appeals Chamber finds that Mladić therefore fails to demonstrate that the Trial Chamber erred in assessing the evidence concerning his contribution to the Hostage-Taking JCE.

(b) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's *Mens Rea*

517. In concluding that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE, the Trial Chamber found that he intended to capture the UN Personnel and detain them in strategic military locations in order to prevent NATO from launching further air strikes on Bosnian Serb military targets.[1764] The Trial Chamber particularly considered Mladić's statements and conduct including: (i) his orders to detain the UN Personnel and place them at potential NATO air strike locations; (ii) his statements on the fate of the UN Personnel; (iii) evidence that he communicated to UNPROFOR that the release of the detainees was contingent on the cessation of

[1761] *See* Trial Judgement, para. 5156.
[1762] Trial Judgement, para. 5156.
[1763] *See supra* Section II. *See also Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[1764] Trial Judgement, para. 5163.

air strikes; and (iv) evidence that his subordinates threatened the UN Personnel with the aim of stopping the air strikes.[1765]

518. Mladić submits that in finding that he possessed the *mens rea* for the Hostage-Taking JCE, the Trial Chamber erred by giving insufficient weight to his "proactive actions and conduct", which reflected his intent "to bring a peaceful end to the situation".[1766] Mladić namely points to his attempt to open "direct and more efficient" channels of communication and prompt action to end the crisis by: (i) negotiating a possible termination of hostilities to end the captivity of the UN Personnel despite the fact that they "can be detained until the definitive termination of hostilities";[1767] and (ii) instructing his subordinates to release the UN Personnel immediately after such decision was made by the political leadership.[1768] Mladić further submits that the Trial Chamber gave insufficient, if any, weight to the evidence of Witness Radoje Vojvodić who, on the orders of the VRS Main Staff, removed the UN Personnel from risk and harm inflicted by others and treated them in accordance with international humanitarian law.[1769]

519. The Prosecution responds that the evidence cited by Mladić incriminates, rather than exculpates him, and does not undermine the fact that the UN Personnel were taken hostage on his orders.[1770] It contends that Mladić's argument that prisoners of war can be detained until the termination of hostilities is "beside the point" given his role in conditioning their release on the cessation of hostilities which amounts to a gross violation of international humanitarian law.[1771] The Prosecution submits that Mladić played a central role in the implementation of the Hostage-Taking JCE and fails to show error in the Trial Chamber's findings in relation to his *mens rea*.[1772]

520. Mladić replies that the Prosecution mischaracterizes and fails to respond to his submissions that he took proactive actions in order to bring an end to the crisis.[1773]

521. With respect to the alleged failure to give sufficient weight to Mladić's negotiating a possible termination of hostilities,[1774] the Appeals Chamber notes that the Trial Chamber took

[1765] Trial Judgement, para. 5163.
[1766] Mladić Appeal Brief, paras. 752, 753, 758.
[1767] Mladić Appeal Brief, para. 756, *referring to* Exhibits P2196, P2198, Article 118 of Geneva Convention III.
[1768] Mladić Appeal Brief, para. 754, *referring to*, *inter alia*, Exhibits P2480, P2481. Mladić adds that, after liberating 231 of the detained UN Personnel, he continued his diplomatic efforts with UNPROFOR to negotiate the release of four VRS prisoners. *See* Mladić Appeal Brief, para. 754.
[1769] Mladić Appeal Brief, para. 755, *referring to* Exhibit D1224, paras. 5-16, T. 8 September 2015 pp. 38790-38801. Mladić adds that Witness Vojvodić's testimony was corroborated by a report from the ICRC which confirms adequate accommodation, meals, and medical attention. *See* Mladić Appeal Brief, para. 755, *referring to* Exhibits D1224, para. 12, D1226, D1227.
[1770] Prosecution Response Brief, para. 316. *See also* Prosecution Response Brief, para. 318.
[1771] Prosecution Response Brief, para. 317.
[1772] Prosecution Response Brief, para. 318. *See also* Prosecution Response Brief, para. 316.

express note of and discussed the evidence cited by Mladić of conversations between him and UNPROFOR Commander General Bernard Janvier concerning such negotiations.[1775] The Trial Chamber found that when requested to release the UN Personnel, Mladić informed Commander Janvier that their release was contingent on a guarantee that the air strikes would cease.[1776] The Trial Chamber took this evidence into account, among other evidence of Mladić's acts and conduct, in concluding that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE.[1777] The Appeals Chamber finds that Mladić does not demonstrate error in the Trial Chamber's assessment of his negotiating efforts.

522. With respect to the alleged failure to give sufficient weight to his instructions to release the UN Personnel immediately upon the decision of the political leadership to do so,[1778] the Trial Chamber reviewed the evidence to which Mladić refers that, on 2 and 6 June 1995, in compliance with the orders from Karadžić, Mladić ordered various VRS units to release 215 of the detained UN Personnel.[1779] While the Trial Chamber did not expressly discuss this evidence in assessing Mladić's intent to achieve the common objective of the Hostage-Taking JCE, in light of the evidence and the Trial Chamber's findings that he had ordered their initial detention and placement at potential NATO air strike locations,[1780] Mladić does not demonstrate how the fact that he implemented orders by his superior to release some of the detained UN Personnel could undermine the Trial Chamber's conclusion that he shared the intent to achieve the common objective of the Hostage-Taking JCE.[1781]

[1773] Mladić Reply Brief, para. 104.
[1774] Mladić Appeal Brief, para. 756, *referring to, inter alia*, Exhibits P2196, P2198.
[1775] *See* Trial Judgement, para. 2297 ("In a meeting held on 4 June 1995, General Janvier informed Mladić that all UN personnel held as 'hostages' by the VRS should be liberated immediately […] [i]n response, Mladić stated that the liberation of the [prisoners of war] was directly linked to a guarantee that air strikes will not take place again in the future. Mladić requested the immediate ratification of an agreement with UNPROFOR stating that (i) the VRS would no longer threaten the life and security of UNPROFOR members; (ii) UNPROFOR would not engage any of its forces or air strikes against Serb objectives or territory; and (iii) upon signing of the agreement, all [prisoners of war] would be liberated."), *referring to* Exhibit P2196 (concerning a meeting between Mladić and Commander Janvier on 4 June 1995). *See also* Trial Judgement, paras. 2302, *referring to* Exhibit P2198 (concerning a meeting between Mladić and Commander Janvier on 17 June 1995), 5160, 5163.
[1776] Trial Judgement, para. 5160.
[1777] Trial Judgement, para. 5163.
[1778] Mladić Appeal Brief, para. 754, *referring to* Exhibits P2480, P2481.
[1779] *See* Trial Judgement, para. 2296, n. 9797, *referring to* Exhibits P2480, P2481. The Trial Chamber also stated that Mladić further ordered the VRS to not divulge any information on the remaining captured UN Personnel. *See* Trial Judgement, para. 2296.
[1780] *See* Trial Judgement, paras. 5157, 5163.
[1781] Similarly, to the extent that Mladić is alleging that the Trial Chamber erred in assessing the evidence concerning his continuing diplomatic efforts to negotiate the release of VRS prisoners after the release of some of the detained UN Personnel, Mladić does not demonstrate how such evidence could undermine the conclusion that he shared the intent to achieve the common objective of the Hostage-Taking JCE.

523. The Appeals Chamber turns to the alleged failure to give sufficient weight to the evidence of Witness Vojvodić, a VRS officer in charge of the Koran military barracks in Pale,[1782] who Mladić claims removed the detained UN Personnel from harm and treated them in accordance with international humanitarian law.[1783] Although the Trial Chamber did not expressly consider this evidence in the section of the Trial Judgement concerning Mladić's *mens rea* for the Hostage-Taking JCE, the Trial Chamber discussed Witness Vojvodić's treatment of the detainees in Chapter 6 of the Trial Judgement, which sets out the evidence relating to hostage-taking.[1784] The Trial Chamber considered, for example, that on one occasion Witness Vojvodić sent back soldiers who had made threats to the life of UN Personnel detained at the Koran military barracks.[1785] However, the Trial Chamber also reviewed evidence that: (i) on 26 May 1995, Bosnian Serb soldiers drove two of the detained UN Personnel to the Koran headquarters and handcuffed them to flagpoles in front of the building;[1786] (ii) on the same day, a VRS commander told detained UN Personnel that they would be chained to strategic places if NATO strikes were to continue;[1787] and (iii) on 27 May 1995, following a visit of Witness Vojvodić, detained UN Personnel were moved to another building so that they could be chained more quickly to NATO's potential targets.[1788] In light of this evidence considered by the Trial Chamber, Mladić fails to demonstrate that the alleged selective favourable treatment of the detained UN Personnel by one VRS officer could undermine the Trial Chamber's conclusion that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE.

524. In light of the evidence and the Trial Chamber's findings that Mladić issued orders to detain the UN Personnel and place them at potential NATO air strike locations, made statements on the

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[1782] Trial Judgement, para. 2240.
[1783] Mladić Appeal Brief, para. 755, *referring to* Exhibit D1224, paras. 5-16, T. 8 September 2015 pp. 38790-38801. Witness Vojvodić testified that the detainees were not abused, were fed, and were allowed to contact relatives, to go out, as well as be visited by a medical team and the ICRC. He also claimed that one detainee was released for medical reasons. *See* Exhibit D1224, paras. 9, 10, 12; T. 8 September 2015 pp. 38799-38801.
[1784] *See, e.g.*, Trial Judgement, paras. 2236 ("[O]ne VRS soldier was making gestures of shooting the plane and cutting throats towards the UNMOs while others were shouting. One commander, […] Captain Vojvodić, sent back these soldiers."), 2247 ("[T]he detainees were held in a room for 24 hours a day, under constant guard. They had no radio and food was brought to them. Vojvodić visited them daily and Evans and his team would request medical attention due to the unsatisfactory hygiene conditions. Their demands were not met until later. The UNMOs requested to know their status and Vojvodić answered that they were detained as [prisoners of war]. The UNMOs then requested to have the same rights as [prisoners of war]. Vojvodić responded that he would contact Major Batinić but the UNMOs never heard anything from him."), 2309 ("Later on, Captain Vojvodić drove the detainees to their respective accommodations and offices so that they could retrieve some of their belongings and call their relatives. […] [A]t the Koran Military Barracks, the detained UNMOs were provided food and water, but not permitted to meet with a doctor until 5 June 1995; on 8 June 1995 the UNMOs were finally visited by delegates of the ICRC, following which they received clothing and toiletry, and on 10 June they could call home. […] [T]hey were also allowed to write messages, which were checked by Vojvodić's superiors, to their next of kin.").
[1785] Trial Judgement, paras. 2236, 2315.
[1786] Trial Judgement, para. 2236.
[1787] Trial Judgement, para. 2240.
[1788] Trial Judgement, para. 2244.

fate of the detainees, informed UNPROFOR that their release was contingent on the cessation of air strikes, and that his subordinates threatened the UN Personnel with the aim of stopping the air strikes,[1789] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber insufficiently considered his "proactive actions and conduct" or that the Trial Chamber assessed the evidence in an unreasonable manner in finding that he shared the intent to achieve the common purpose of the Hostage-Taking JCE.

(c) Conclusion

525. Based on the foregoing, the Appeals Chamber dismisses Ground 6.C of Mladić's appeal.

[1789] *See* Trial Judgement, para. 5163.

F. Alleged Errors Regarding Modes of Liability (Ground 7)

526. The Trial Chamber convicted Mladić under Article 7(1) of the ICTY Statute for his commission of crimes through his participation in four joint criminal enterprises.[1790] In doing so, it recalled jurisprudence that where both individual responsibility under Article 7(1) and superior responsibility under Article 7(3) of the ICTY Statute are alleged under the same count and the elements of both modes of liability are satisfied, a trial chamber should enter a conviction on the basis of Article 7(1) of the ICTY Statute only, and consider the accused's superior position as an aggravating factor in sentencing.[1791] Following this elucidation of the law, the Trial Chamber explicitly stated that Mladić's "conduct and superior position is encapsulated within the conduct relied upon to establish his participation in the four" joint criminal enterprises.[1792] Accordingly, when determining Mladić's sentence, the Trial Chamber took into account his participation in the four joint criminal enterprises in his official capacity as Commander of the VRS Main Staff, finding that it amounted to an abuse of his superior position.[1793]

527. Mladić submits that the Trial Chamber erred by failing to provide a reasoned opinion in its findings on his superior responsibility and to establish his liability under Article 7(3) of the ICTY Statute beyond reasonable doubt.[1794] Specifically, he argues that the Trial Chamber failed to: (i) set out its analysis of relevant evidence;[1795] and (ii) establish that all elements of Article 7(3) of the ICTY Statute were proven beyond reasonable doubt, in particular whether he took all the necessary and reasonable measures to prevent the commission of crimes and punish perpetrators.[1796] Mladić asserts that, while the Trial Chamber did not convict him under Article 7(3) of the ICTY Statute, it should have satisfied itself that all the elements under this provision were proven beyond reasonable doubt in order to consider the mode of superior responsibility as an aggravating factor in sentencing.[1797] He argues that, as a result of the Trial Chamber's errors, his superior responsibility

[1790] Trial Judgement, paras. 5214, 5166. *See also*, *e.g.*, Trial Judgement, paras. 4232, 4238, 4612, 4685, 4688, 4740, 4893, 4921, 4987, 4988, 5098, 5128, 5130, 5131, 5141, 5142, 5156, 5163.
[1791] *See* Trial Judgement, para. 5166, *referring to Đorđević* Appeal Judgement, para. 939, *Jokić* Sentencing Appeal Judgement, para. 23, *Kordić and Čerkez* Appeal Judgement, para. 34, *Blaškić* Appeal Judgement, paras. 91, 92, *Čelebići* Appeal Judgement, para. 745, *Aleksovski* Appeal Judgement, para. 183.
[1792] Trial Judgement, para. 5166.
[1793] *See* Trial Judgement, para. 5193. *See also infra* Section III.H.
[1794] *See* Mladić Notice of Appeal, paras. 72-76; Mladić Appeal Brief, paras. 762, 772.
[1795] Mladić Appeal Brief, para. 773. *See also* Mladić Appeal Brief, paras. 775, 779 (wherein Mladić submits that the Trial Chamber omitted to conduct the relevant analysis in relation to the four joint criminal enterprises).
[1796] Mladić Appeal Brief, paras. 774, 778. *See also* Mladić Reply Brief, paras. 105, 107.
[1797] *See* Mladić Appeal Brief, paras. 764, 774, 778, *referring to Strugar* Appeal Judgement, paras. 252-262, *D. Milošević* Appeal Judgement, para. 281. *See also* Mladić Appeal Brief, paras. 762, 763, 765-773, 775-780; Mladić Reply Brief, paras. 105, 107.

was not proven beyond reasonable doubt and thus could not have been considered in sentencing.[1798] He requests that the Appeals Chamber revise his sentence accordingly.[1799]

528. The Prosecution responds that the Trial Chamber was not required to make findings on the elements of superior responsibility under Article 7(3) of the ICTY Statute because abuse of authority is a distinct aggravating factor that is not dependent upon a finding of superior responsibility under Article 7(3) of the ICTY Statute.[1800] The Prosecution submits that the Trial Chamber made all necessary findings on abuse of authority as an aggravating factor.[1801]

529. In convicting and sentencing Mladić for crimes under Article 7(1) of the ICTY Statute, the Trial Chamber stated that his superior responsibility was "encapsulated" within his joint criminal enterprise liability.[1802] The Appeals Chamber considers that this statement on Mladić's superior responsibility falls short of a reasoned opinion.[1803] The Appeals Chamber recalls that a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused. In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1804] Notwithstanding, the Appeals Chamber considers that Mladić confuses superior responsibility under Article 7(3) of the ICTY Statute with abuse of authority as an aggravating factor in sentencing. These two issues are distinct and the consideration of abuse of an accused's position of authority as an aggravating factor in sentencing does not require a finding of superior responsibility.[1805] The Appeals Chamber therefore dismisses Mladić's argument that the Trial Chamber should have made findings on the elements of Article 7(3) of the ICTY Statute in order to consider his abuse of authority as an aggravating factor in sentencing.[1806]

[1798] *See* Mladić Appeal Brief, paras. 775-778.
[1799] Mladić Appeal Brief, paras. 778, 780; Mladić Reply Brief, paras. 105, 107. *See also infra*, paras. 542-548.
[1800] Prosecution Response, para. 321. *See also* Prosecution Response, paras. 319, 320, 322, 323.
[1801] Prosecution Response, para. 321.
[1802] *See* Trial Judgement, para. 5166.
[1803] *See* Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.
[1804] *See Karadžić* Appeal Judgement, para. 700; *Ndindiliyimana et al.* Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320. *See also Prlić et al*. Appeal Judgement, para. 1778.
[1805] *Cf. Munyakazi* Appeal Judgement, para. 170; *Kamuhanda* Appeal Judgement, paras. 347, 348; *Babić* Sentencing Appeal Judgement, paras. 80, 81; *Semanza* Appeal Judgement, para. 336. According to the ICTR Appeals Chamber, "[t]he question of criminal responsibility as a superior is analytically distinct from the question of whether an accused's prominent status should affect his or her sentence". *See Semanza* Appeal Judgement, para. 336. Indeed, while an accused's superior position *per se* does not constitute an aggravating factor for sentencing purposes, the abuse of authority may. *See Prlić et al.* Appeal Judgement, para. 3264; *D. Milošević* Appeal Judgement, para. 302; *Stakić* Appeal Judgement, para. 411. *See also Kamuhanda* Appeal Judgement, para. 347.
[1806] The paragraph of the *D. Milošević* Appeal Judgement to which Mladić refers is inapposite as it concerns the ICTY Appeals Chamber's assessment that the trial chamber in that case made the necessary findings for establishing Dragomir Milošević's responsibility under Article 7(3) of the ICTY Statute. *See* Mladić Appeal Brief, para. 764, *referring to D. Milošević* Appeal Judgement, para. 281. Similarly, the part of the *Strugar* Appeal Judgement Mladić

530. Consequently, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred by not providing a reasoned opinion on his superior responsibility under Article 7(3) of the ICTY Statute.[1807] The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 7 of Mladić's appeal.

references does not support his argument as it concerns the ICTY Appeal Chamber's analysis of a superior's effective control as well as ability to prevent crimes and punish perpetrators in assessing the legal requirements and application of Article 7(3) of the ICTY Statute. *See* Mladić Appeal Brief, paras. 764, 774, *referring to Strugar* Appeal Judgement, paras. 252-262. However, the jurisprudence to which Mladić points reflects no indication that when a trial chamber considers an accused's abuse of authority as an aggravating factor, it must establish that the elements of superior responsibility under Article 7(3) of the ICTY Statute are satisfied. Mladić's submission that the Trial Chamber was required to establish that the elements of Article 7(3) of the ICTY Statute were fulfilled in considering his abuse of authority as an aggravating factor in sentencing will be further addressed under Ground 9.A of Mladić's appeal.

[1807] Mladić's submission that the Trial Chamber failed to enter findings on whether he took, and was able to take in the circumstances of the conflict, all necessary and reasonable measures to prevent the commission of crimes and punish their perpetrators is further addressed, in the context of the Overarching JCE, under Ground 3.B of Mladić's appeal.

G. Alleged Systematic Unfairness or Bias Throughout the Proceedings (Ground 8.E)

531. Mladić submits that the cumulative effect of the errors he has identified in Grounds 1 to 8(A-D) of his appeal would require the Appeals Chamber to conduct a trial *de novo* to properly adjudicate the extent and effect of the Trial Chamber's errors.[1808] Mladić argues that, in light of the need for the Appeals Chamber to review the full trial record,[1809] an alternative remedy to reversing his convictions would be for the Appeals Chamber to order a retrial or remittance pursuant to Rule 144(C) of the Rules.[1810] Cross-referencing earlier parts of his appellant's brief, Mladić enumerates "five categories" of errors he alleges the Trial Chamber committed in Grounds 1 to 8(A-D).[1811]

532. The Prosecution responds that Mladić was properly convicted of genocide, crimes against humanity, as well as violations of the laws or customs of war, and that his convictions and life sentence should be affirmed.[1812] According to the Prosecution, since Mladić has failed to identify any individual errors in the Trial Judgement, he is not entitled to any remedy based on the purported "cumulative effect" of these alleged errors.[1813] It further responds that the "exceptional" remedies he seeks, namely a retrial or remittance, are disproportionate, unreasonable, and impractical.[1814]

533. Mladić replies that he reaffirms the arguments in his appellant's brief and that the remedy he seeks is not impractical.[1815]

534. Pursuant to Article 23(2) of the Statute, the Appeals Chamber may affirm, reverse, or revise the decisions taken by a Single Judge or Trial Chamber. Rule 144(C) of the Rules provides that in appropriate circumstances the Appeals Chamber may order a retrial.

[1808] *See* Mladić Notice of Appeal, para. 87; Mladić Appeal Brief, paras. 882-915; Mladić Reply Brief, para. 126.
[1809] *See* Mladić Appeal Brief, paras. 891, 893, 895, 896, 898-901, 913. Mladić submits that, considering the extent to which the Appeals Chamber is called to review the trial record to properly adjudicate the Trial Chamber's errors, "regard must be had to whether the Appeals Chamber would be able to fairly and accurately determine his criminal responsibility without having directly heard the witnesses or the evidence". Mladić Appeal Brief, para. 909.
[1810] Mladić Appeal Brief, paras. 883, 885, 911, 916, 959(b).
[1811] Mladić argues that the Trial Chamber: (i) failed to apply the proper legal standard in Grounds 3 to 7 of his appeal, whereby the Prosecution's burden of proof was lowered (*see* Mladić Appeal Brief, paras. 889-891, *referring to* Mladić Appeal Brief, paras. 162-169, 180-185, 261-263, 267, 422-428, 443-458, 498-529, 585-600, 669-676, 711-733, 741-751, 771-779); (ii) failed to give a reasoned opinion in relation to all four joint criminal enterprises (*see* Mladić Appeal Brief, paras. 889, 892, 893, *referring to* Mladić Appeal Brief, paras. 186-269, 294-335, 542-554, 570-643, 645-665, 735-759); (iii) erred in relation to the Overarching JCE as well as the Saravejo JCE in assessing his *mens rea* and *actus reus* (*see* Mladić Appeal Brief, paras. 889, 894-896, *referring to* Mladić Appeal Brief, paras. 281-291, 409-456); (iv) erred in relation to the use of adjudicated facts regarding his "proximate subordinates", the heightened standard on rebuttal evidence, and crime-base findings (*see* Mladić Appeal Brief, paras. 889, 897-900, *referring to* Mladić Appeal Brief, paras. 107, 108, 158-183, 498-527, 669-676); and (v) in its conduct of proceedings, violated his fair trial rights regarding his effective participation, the Prosecution's conduct, and equality of arms (*see* Mladić Appeal Brief, paras. 889, 903-908, *referring to*, *inter alia*, Mladić Appeal Brief, paras. 783, 784, 796-808, 811-815, 833-841, 879, 880).
[1812] Prosecution Response Brief, para. 371.
[1813] Prosecution Response Brief, paras. 370, 372, 373.
[1814] Prosecution Response Brief, paras. 371, 374, 375.
[1815] Mladić Reply Brief, paras. 126, 127.

535. The Appeals Chamber recalls that it has dismissed Grounds 1 to 8(A-D) of Mladić's appeal. Furthermore, regarding the "five categories" of error, the Appeals Chamber has reviewed every portion of Mladić's appellant's brief that he cross-references under this ground, and recalls that it has already dismissed all individual allegations of error.[1816] Given that Mladić has failed to establish any error warranting the Appeals Chamber's intervention in Grounds 1 to 8(A-D) of his appeal, his request for a retrial or remittance to remedy "cumulative" errors in the Trial Judgement is without merit.

536. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 8.E of Mladić's appeal.

[1816] In this regard, the Appeals Chamber has dismissed Mladić's arguments regarding the Trial Chamber's alleged: (i) application of an erroneous legal standard (*see*, *e.g.*, Ground 6.A); (ii) failure to provide a reasoned opinion (*see*, *e.g.*, Grounds 4.B, 5.E, 7, 8.B); (iii) error in assessing his *mens rea* and *actus reus* in relation to the Overarching JCE and the Sarajevo JCE (*see*, *e.g.*, Grounds 3.B, 4.A); (iv) errors in its use of adjudicated facts, namely the issues of his proximate subordinates (*see*, *e.g.*, Grounds 2.A, 3.A), a heightened standard for rebuttal evidence (*see* Grounds 2.A, 3.A, 5.E), and the conclusions on crime-based evidence (*see* Grounds 3.A, 5.I); and (v) violation of his fair trial rights regarding his effective participation (*see*, *e.g.*, Ground 8.B), the Prosecution's use of communication protected by lawyer-client privilege (*see*, *e.g.*, Ground 8.B), and equality of arms (*see*, *e.g.*, Grounds 8.A, 8.D).

H. Sentencing (Ground 9)

537. The Trial Chamber sentenced Mladić to a single sentence of life imprisonment for genocide, crimes against humanity (persecution, extermination, murder, deportation, and inhumane acts), and violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and taking of hostages).[1817] In determining his sentence, the Trial Chamber considered, *inter alia*, the gravity of Mladić's offences and the totality of his culpable conduct, his individual circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[1818]

538. Pursuant to Article 24 of the ICTY Statute and Rule 101(B) of the ICTY Rules, trial chambers of the ICTY were required to take into account the following factors in sentencing: (i) the gravity of the offence or totality of the culpable conduct; (ii) the individual circumstances of the convicted person; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; and (iv) aggravating and mitigating circumstances.[1819]

539. The Appeals Chamber recalls that appeals against a sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[1820] Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime.[1821] As a general rule, the Appeals Chamber will not revise a sentence unless the trial chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.[1822] It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence.[1823] To show that the trial chamber committed a discernible error in exercising its discretion, an appellant must 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

[1817] Trial Judgement, paras. 5213-5215.
[1818] Trial Judgement, paras. 5184-5212.
[1819] *Karadžić* Appeal Judgement, para. 748; *Prlić et al.* Appeal Judgement, para. 3203; *Stanišić and Župljanin* Appeal Judgement, para. 1099; *Tolimir* Appeal Judgement, para. 626. *See also Šešelj* Appeal Judgement, para. 179.
[1820] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.
[1821] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1961.
[1822] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.
[1823] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.

exercised its discretion, or that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion.[1824]

540. Mladić appeals against the sentence of life imprisonment imposed by the Trial Chamber.[1825] He challenges the Trial Chamber's consideration of: (i) his abuse of authority;[1826] (ii) his mitigating circumstances;[1827] and (iii) the sentencing practices and laws in the former Yugoslavia.[1828] The Appeals Chamber will address these submissions in turn.

1. Abuse of Authority (Ground 9.A)

541. As part of its assessment on the gravity of the offences and the totality of the culpable conduct, the Trial Chamber considered that Mladić's participation in all four joint criminal enterprises was undertaken in his official capacity as Commander of the VRS Main Staff, a position which he held throughout the entire Indictment period.[1829] The Trial Chamber found that Mladić abused this position and that, *inter alia*, this "abuse of his superior position" added to the gravity of the offences.[1830]

542. Mladić submits that the Trial Chamber did not prove the elements of superior responsibility under Article 7(3) of the ICTY Statute beyond reasonable doubt and thus erred by "aggravating [his] sentence with superior responsibility".[1831] Mladić requests the Appeals Chamber to revise the sentence accordingly.[1832]

543. The Prosecution responds that Mladić's sentence should stand, as life imprisonment is the only sentence that reflects both the gravity of his crimes and the form and degree of his participation in them and any other sentence would be "unreasonable and plainly unjust".[1833] The

[1824] *Karadžić* Appeal Judgement, para. 749; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1962; *Ngirabatware* Appeal Judgement, para. 255.
[1825] *See* Mladić Notice of Appeal, pp. 30, 31, paras. 88-91; Mladić Appeal Brief, paras. 917-958; Mladić Reply Brief, paras. 128-135.
[1826] *See* Mladić Appeal Brief, paras. 917-920.
[1827] *See* Mladić Appeal Brief, paras. 921-931. *See also* Mladić Reply Brief, paras. 130, 131.
[1828] *See* Mladić Appeal Brief, paras. 932-958. *See also* Mladić Reply Brief, paras. 132, 133, 135.
[1829] Trial Judgement, para. 5193.
[1830] Trial Judgement, para. 5193.
[1831] Mladić Appeal Brief, paras. 917, 919; Mladić Reply Brief, para. 129. Mladić recalls his arguments set forth in paragraphs 771 to 780 (Ground 7) of his appellant's brief. *See* Mladić Appeal Brief, para. 919.
[1832] Mladić Appeal Brief, para. 920.
[1833] Prosecution Response Brief, para. 376; T. 26 August 2020 pp. 40-42. The Prosecution contends that the crimes committed in this case are some of the gravest and the crime base is one of the largest attributed to an accused at the ICTY, comparable with the *Karadžić* case where the Appeals Chamber of the Mechanism found that a 40-year sentence was so unreasonable and plainly unjust that it constituted an abuse of the Trial Chamber's discretion and increased Karadžić's sentence to life imprisonment. *See* T. 26 August 2020 pp. 41, 42, *referring to Karadžić* Appeal Judgement, paras. 773, 776. The Prosecution adds that other cases involving Mladić's subordinates, such as Popović, Beara,

Prosecution submits that the Trial Chamber appropriately considered Mladić's abuse of authority as an aggravating factor, which did not require a finding of superior responsibility.[1834]

544. Mladić replies that the Prosecution fails to undermine the legal and factual grounds of appeal under Ground 9.[1835]

545. The Appeals Chamber recalls that the primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.[1836] While gravity of the offence is the primary factor in sentencing, the inherent gravity must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime.[1837] In this regard, the Appeals Chamber recalls that while a position of influence or authority, even at a high level, does not automatically warrant a harsher sentence, its abuse may constitute an aggravating factor.[1838]

546. The Appeals Chamber notes that, in assessing his liability, the Trial Chamber stated that "Mladić's conduct and superior position [were] encapsulated within the conduct relied upon to establish his participation in the four [joint criminal enterprises]".[1839] The Trial Chamber did not enter convictions pursuant to superior responsibility under Article 7(3) of the ICTY Statute but indicated that it would consider Mladić's superior position for the purposes of sentencing.[1840] The Appeals Chamber is of the view that this legal approach is consistent with settled jurisprudence.[1841] In the sentencing portion of the Trial Judgement, the Trial Chamber considered that Mladić's participation in all four joint criminal enterprises "was undertaken in his official capacity as Commander of the VRS Main Staff", and that he held this position throughout the entire Indictment

Tolimir, and Galić, whose conduct was attributable to Mladić and which dealt with only parts of the crime base for which Mladić is responsible, have also resulted in life sentences. *See* T. 26 August 2020 p. 42.

[1834] Prosecution Response Brief, para. 378.

[1835] Mladić Reply Brief, para. 128. *See also* T. 26 August 2020 p. 68.

[1836] *See Martić* Appeal Judgement, para. 350; *Čelebići* Appeal Judgement, para. 430.

[1837] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 3431; *Šainović et al.* Appeal Judgement, para. 1837; *Martić* Appeal Judgement, para. 350; *Galić* Appeal Judgement, para. 442.

[1838] *See, e.g., Prlić et al.* Appeal Judgement, para. 3264; *Nzabonimana* Appeal Judgement, para. 464; *Munyakazi* Appeal Judgement, para. 170; *Rukundo* Appeal Judgement, para. 250; *D. Milošević* Appeal Judgement, para. 302; *Babić* Sentencing Appeal Judgement, para. 80.

[1839] Trial Judgement, para. 5166.

[1840] Trial Judgement, para. 5166.

[1841] Where liability under both Articles 7(1) and 7(3) of the ICTY Statute is alleged, and where the legal requirements for both are met, a trial chamber should enter a conviction on the basis of Article 7(1) of the ICTY Statute alone and consider the superior position in sentencing. *See, mutatis mutandis*, Articles 6(1) and 6(3) of the ICTR Statute. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3359; *Đorđević* Appeal Judgement, para. 939; *Setako* Appeal Judgement, para. 266; *Kordić and Čerkez* Appeal Judgement, para. 34. The Trial Chamber correctly recalled this principle. *See* Trial Judgement, para. 5166.

period.[1842] The Trial Chamber then concluded that he therefore "abused his position" and found that "Mladić's abuse of his superior position" added to the gravity of the offences.[1843]

547. Contrary to Mladić's contention, the Appeals Chamber finds no indication that the Trial Chamber aggravated his sentence with superior responsibility under Article 7(3) of the ICTY Statute.[1844] Rather, according to the Trial Chamber, it was the abuse of his position as Commander of the VRS Main Staff that aggravated the gravity of his offences.[1845] The Appeals Chamber notes the Trial Chamber's conclusion that Mladić was "responsible for having committed a wide range of criminal acts through his participation in four [joint criminal enterprises]",[1846] and that he did so while, *inter alia*: (i) commanding and controlling VRS units and other groups subordinated to the VRS; (ii) having knowledge of crimes committed by those under his command; (iii) placing severe restrictions on humanitarian aid; (iv) providing misleading information about crimes to representatives of the international community; and (v) failing to investigate crimes and/or punish perpetrators of the crimes.[1847] Given the totality of the Trial Chamber's findings on Mladić's responsibility, the Appeals Chamber finds no discernible error in the Trial Chamber's conclusion that Mladić abused his position of authority and that this added to the gravity of the crimes. The Appeals Chamber notes that Mladić appears to also argue that the Trial Chamber "double count[ed]" his superior responsibility.[1848] Given that he provides no argument or other basis to support this submission, his contention in this regard is dismissed.

548. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's conclusion in determining his sentence that the abuse of his superior position added to the gravity of the offences. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 9.A of Mladić's appeal.

2. Mitigating Circumstances (Grounds 9.B and 9.C)

549. In determining Mladić's sentence, the Trial Chamber considered whether, *inter alia*, his benevolent treatment of and assistance to victims, diminished mental capacity, poor physical health, and advanced age amounted to mitigating circumstances.[1849] Owing to the gravity of the offences,

[1842] Trial Judgement, para. 5193.
[1843] Trial Judgement, para. 5193.
[1844] *See* Mladić Appeal Brief, paras. 917, 919.
[1845] *See* Trial Judgement, para. 5193.
[1846] Trial Judgement, paras. 5188-5192. *See also*, *e.g.*, Trial Judgement, paras. 4612, 4688, 4893, 4921, 5098, 5131, 5156, 5163.
[1847] *See*, *e.g.*, Trial Judgement, paras. 4612, 4893, 5097, 5098, 5146, 5156.
[1848] *See* Mladić Notice of Appeal, p. 30.
[1849] Trial Judgement, paras. 5195-5204.

the Trial Chamber did not consider his sporadic benevolent acts in mitigation.[1850] It also observed that the evidence the Defence relied on did not establish that Mladić suffered from diminished mental capacity.[1851] The Trial Chamber also noted that Mladić suffered from certain health problems, but found that these were not such as to warrant mitigation, and further noted that his general condition was stable, concluding that it would not consider Mladić's health as a factor in mitigation.[1852] Finally, the Trial Chamber stated that it gave due consideration to Mladić's age in sentencing.[1853]

550. Mladić submits that the Trial Chamber erred in failing to give sufficient weight to the following mitigating circumstances: (i) his ill health combined with his age; (ii) his daughter's death; and (iii) his benevolent treatment of and assistance to victims.[1854] According to Mladić, the Trial Chamber, in noting that his general condition was stable, failed to give sufficient weight to the totality of the medical evidence and his medical history.[1855] In relation to his daughter's death, he argues that the Trial Chamber presented it under the heading of diminished mental capacity but did not give weight to this as part of his "family circumstances".[1856] As to evidence of his benevolent treatment of and assistance to victims, he challenges the Trial Chamber's conclusion that his benevolent acts were "sporadic".[1857] Mladić asks that the Appeals Chamber give these factors due weight and revise the sentence accordingly.[1858]

551. The Prosecution responds that the Trial Chamber considered each of the mitigating factors Mladić presented at trial,[1859] and that he fails on appeal to show how the Trial Chamber abused its discretion by either not considering certain factors or by giving them insufficient weight.[1860] The Prosecution contends that the Trial Chamber expressly considered Mladić's age, health, and benevolent acts in mitigation.[1861] The Prosecution further argues that Mladić only raised his daughter's death at trial in relation to his diminished mental capacity and not in relation to his family circumstances, and cannot raise this argument for the first time on appeal.[1862] The Prosecution argues that, in any event, none of the factors relied on by Mladić, either individually or

[1850] Trial Judgement, para. 5198.
[1851] Trial Judgement, paras. 5200, 5201.
[1852] Trial Judgement, para. 5203.
[1853] Trial Judgement, para. 5204.
[1854] *See* Mladić Appeal Brief, paras. 921, 923-925, 927, 929. *See also* Mladić Reply Brief, paras. 130, 131.
[1855] Mladić Appeal Brief, paras. 923, 925.
[1856] Mladić Appeal Brief, paras. 924, 925.
[1857] Mladić Appeal Brief, paras. 927, 929.
[1858] Mladić Appeal Brief, paras. 926, 930, 931.
[1859] Prosecution Response Brief, para. 379.
[1860] *See* Prosecution Response Brief, paras. 379-385.
[1861] Prosecution Response Brief, paras. 380-383.
[1862] Prosecution Response Brief, paras. 384, 385.

cumulatively, could outweigh the gravity of the crimes for which he has been convicted to justify a sentence below life imprisonment.[1863]

552. Mladić replies that the Appeals Chamber should reject the Prosecution's submission that the mitigating factors are insufficient to reduce his life sentence.[1864]

553. The Appeals Chamber recalls that a trial chamber is required to consider any mitigating circumstance when determining the appropriate sentence, and that it enjoys considerable discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to the factors identified.[1865] Furthermore, the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.[1866]

554. In relation to Mladić's health and age, the Appeals Chamber recalls that the age of the accused may be a mitigating factor[1867] and that poor health is accepted as a mitigating factor in exceptional cases only.[1868] The Appeals Chamber notes that the Trial Chamber expressly stated that it gave due consideration to Mladić's age in sentencing.[1869] The Trial Chamber further noted that Mladić suffered from certain health problems and that his general condition was stable.[1870] It decided not to consider his health as a factor in mitigation.[1871] In assessing his health, the Trial Chamber referred to, *inter alia*, five medical reports, showing his general condition as stable.[1872] Mladić has not identified any evidence that would support a conclusion that his health condition was exceptional and warranted consideration in mitigation. The Appeals Chamber therefore finds

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[1863] Prosecution Response Brief, para. 386.
[1864] Mladić Reply Brief, para. 131. *See also* Mladić Reply Brief, para. 128.
[1865] *See, e.g., Karadžić* Appeal Judgement, para. 753; *Stanišić and Župljanin* Appeal Judgement, para. 1130; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265.
[1866] *See, e.g., Karadžić* Appeal Judgement, para. 753; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265 and references cited therein.
[1867] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 1170; *Đorđević* Appeal Judgement, paras. 974, 980; *Babić* Sentencing Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 696. The ICTY Appeals Chamber has noted the limited weight given to advanced age as a mitigating factor in the jurisprudence of the ICTY. *See Stanišić and Župljanin* Appeal Judgement, para. 1170, n. 3847 and references cited therein.
[1868] *See, e.g., Prlić et al.* Appeal Judgement, para. 3315; *Šainović et al.* Appeal Judgement, para. 1827; *Galić* Appeal Judgement, para. 436; *Blaškić* Appeal Judgement, para. 696.
[1869] Trial Judgement, para. 5204.
[1870] Trial Judgement, paras. 5202, 5203. The Appeals Chamber observes that the Trial Chamber cited and considered regular medical reports submitted by the Deputy Registrar. *See* Trial Judgement, para. 5203, n. 17806.
[1871] Trial Judgement, para. 5203.
[1872] Trial Judgement, n. 17806, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 7 April 2017 (confidential), Annex B, RP. 110644, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 13 April 2017 (confidential), Annex, RP. 110669, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 10 October 2017 (confidential), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 12 October 2017 (confidential), Annex, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Second Registry Submission in Relation to Defence Motion on the Provision of Medical Records, 3 November 2017 (public with confidential annex), Annex.

that Mladić does not demonstrate any error in the Trial Chamber's assessment of his age and health as mitigating circumstances.

555. The Appeals Chamber now turns to Mladić's submission that the Trial Chamber erred in failing to consider the death of his daughter as part of his "family circumstances".[1873] According to Article 24(2) of the ICTY Statute, the Trial Chamber was required to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. The Appeals Chamber recalls that such circumstances could include family circumstances but that little weight is afforded to this factor in the absence of exceptional family circumstances.[1874] The Appeals Chamber notes that, at trial, Mladić did not rely upon the death of his daughter in relation to family circumstances as a mitigating factor, but rather pointed to his daughter's death only in relation to his "diminished mental responsibility",[1875] which the Trial Chamber explicitly considered.[1876] The Appeals Chamber recalls that it is an accused's prerogative to identify any mitigating circumstances before the trial chamber,[1877] and if he fails to specifically refer in his final brief or closing arguments to a mitigating circumstance, he cannot raise it for the first time on appeal.[1878] In light of this standard, the Appeals Chamber does not consider further Mladić's submission that the Trial Chamber failed to consider the death of his daughter as "evidence of his family circumstances".

556. Regarding Mladić's submission on his benevolent treatment of and assistance to victims, the Appeals Chamber recalls that an accused's assistance to victims or detainees can be considered in mitigation of his or her sentence.[1879] However, such acts must be weighed against the gravity of the offences.[1880] The Trial Chamber considered the Defence's submissions that Mladić took steps to minimize the number of victims and their suffering to the best of his ability through, *inter alia*, a demilitarization agreement, ordering troops to protect persons of Bosnian Serb and other nationalities alike, ordering a ceasefire to allow civilians to safely withdraw, insisting that patients

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[1873] *See* Mladić Appeal Brief, paras. 924, 925.
[1874] *See, e.g., Prlić et al*. Appeal Judgement, para. 3309; *Ntabakuze* Appeal Judgement, para. 284; *Krajišnik* Appeal Judgement, para. 816; *Blaškić* Appeal Judgement, para. 696.
[1875] *See* Mladić Final Trial Brief, paras. 3403-3406.
[1876] Trial Judgement, paras. 5200, 5201.
[1877] *See* Rule 86(C) of the ICTY Rules; *Tolimir* Appeal Judgement, para. 644; *Đorđević* Appeal Judgement, para. 945. *See, mutatis mutandis*, Rule 86(C) of the ICTR Rules; *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165.
[1878] *See, e.g., Prlić et al*. Appeal Judgement, paras. 3296, 3302; *Stanišić and Župljanin* Appeal Judgement, paras. 1133, 1170; *Popović et al*. Appeal Judgement, para. 2060; *Nzabonimana* Appeal Judgement, para. 459; *Bizimungu* Appeal Judgement, para. 389; *Đorđević* Appeal Judgement, para. 945.
[1879] *See, e.g., Prlić et al.* Appeal Judgement, paras. 3301, 3302; *Krajišnik* Appeal Judgement, para. 817; *Babić* Sentencing Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 696; *Čelebići* Appeal Judgement, para. 776.
[1880] *See Prlić et al*. Appeal Judgement, paras. 3296, 3302; *Krajišnik* Appeal Judgement, para. 817; *Niyitegeka* Appeal Judgement, para. 266; *Čelebići* Appeal Judgement, para. 776.

not be discriminated against at a military hospital, assisting the daughter of a Bosnian Muslim, and providing kindness and sweets to children throughout the conflict.[1881] In relation to the order that troops should protect Bosnian Serb and other nationalities, the Trial Chamber noted that "the order only concerned 'honest' members of other nationalities".[1882] The Trial Chamber also noted that the ceasefire ordered for civilians to withdraw related to only the Jewish population in Sarajevo, and did not constitute benevolent treatment of or assistance to Bosnian Muslims or Bosnian Croats.[1883] The Trial Chamber concluded that while some of the acts cited by Mladić may have shown "at best some kindness" towards individual Bosnian Muslims and Bosnian Croats, they did not affect the achievement of the common objective of the Overarching JCE.[1884] It considered that, bearing in mind the gravity of Mladić's crimes, the assistance he provided "was sporadic".[1885] Noting the central position Mladić held within the leadership of the VRS, the Trial Chamber was of the view that he "had the power to provide assistance to the victimized population on a large scale, had he wished to do so".[1886] The Trial Chamber recalled that "sporadic benevolent acts or ineffective assistance may be disregarded", and therefore did not consider this factor in mitigation of Mladić's sentence.[1887] The Appeals Chamber considers that in light of the gravity of the offences committed by Mladić and the noted sporadic nature of the benevolent treatment and assistance undertaken by Mladić, he does not demonstrate a discernible error in the Trial Chamber's assessment of his assistance as a mitigating circumstance.

557. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Grounds 9.B and 9.C of Mladić's appeal.

3. Sentencing Practices in the Courts of the Former Yugoslavia (Ground 9.D)

558. The Trial Chamber noted that it was required to consider the general practice regarding the prison sentences in the courts of the former Yugoslavia, but recalled that it was not "obliged to conform to that practice".[1888] The Trial Chamber considered the relevant sentencing provisions and practices of the former Yugoslavia during the Indictment period,[1889] and noted that the maximum term of imprisonment at the time was 15 years, but that for the most serious crimes the death

[1881] Trial Judgement, para. 5196, nn. 17793, 17794, *referring to* Mladić Final Trial Brief, paras. 3393-3397.
[1882] Trial Judgement, para. 5197, n. 17795, *referring to* Exhibit P3032, p. 1.
[1883] Trial Judgement, para. 5197, n. 17796, *referring to* Exhibit P4264, paras. 1, 2.
[1884] Trial Judgement, para. 5198.
[1885] Trial Judgement, para. 5198.
[1886] Trial Judgement, para. 5198.
[1887] Trial Judgement, para. 5198, n. 17797, *citing Krajišnik* Appeal Judgement, para. 817, *Čelebići* Appeal Judgement, para. 776.
[1888] Trial Judgement, para. 5205. *See also* Trial Judgement, paras. 5206-5209.
[1889] Trial Judgement, paras. 5206-5209.

penalty or a prison sentence of 20 years could have been imposed instead.[1890] The Trial Chamber further considered that the ICTY Appeals Chamber had previously upheld sentences of more than 20 years of imprisonment as not infringing the principle of *nulla poena sine lege*.[1891]

559. Mladić submits that the Trial Chamber erred in sentencing him to life imprisonment based on "oversights in the jurisprudence".[1892] He argues that the jurisprudence of the ICTY has "overlooked the distinction" between Article 24 of the ICTY Statute and Rule 101(A) of the ICTY Rules.[1893] To support this argument, Mladić asserts that Article 24 of the ICTY Statute, adopted in 1993, "imported" into the ICTY the domestic sentencing practice of the former Yugoslavia, which had a maximum sentence of 20 years' imprisonment at the time the crimes were committed.[1894] He argues that the "subsequent adoption" of Rule 101(A) of the ICTY Rules in February 1994 "create[d] another penal law" within the same jurisdiction in contradistinction to Article 24 of the ICTY Statute, and "retroactively" established life imprisonment.[1895] He contends that life imprisonment was thus not accessible or foreseeable to an accused, including himself, at the ICTY.[1896] Relying on a judgement from the ECtHR,[1897] Mladić contends that the Trial Chamber's imposition of a life sentence according to Rule 101(A) of the ICTY Rules therefore breached the principles of *nulla poena sine lege* and *lex mitior*.[1898] Mladić requests that the Appeals Chamber articulate the correct legal standard, review the factual findings of the Trial Chamber, reverse the life sentence imposed by the Trial Chamber, and impose a sentence of 20 years' imprisonment.[1899]

560. The Prosecution responds, *inter alia*, that pursuant to Article 24 of the ICTY Statute, the Trial Chamber was not bound by the sentencing practices of the former Yugoslavia but need only

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[1890] Trial Judgement, para. 5208.
[1891] Trial Judgement, para. 5208, n. 17821, *referring to Stakić* Appeal Judgement, para. 398.
[1892] Mladić Appeal Brief, paras. 932, 933, 955, 957.
[1893] Mladić Appeal Brief, para. 955.
[1894] *See* Mladić Appeal Brief, paras. 937, 946, 951-953, 955, 956; Mladić Reply Brief, paras. 133, 135.
[1895] *See* Mladić Appeal Brief, paras. 932, 938, 945, 946, 952, 954; Mladić Reply Brief, para. 133. Mladić further submits that the ICTY Appeals Chamber in the *Čelebići* case erred by reasoning that an accused must have been aware that the most serious violations of humanitarian law were punishable by the most severe penalties, including life imprisonment. *See* Mladić Appeal Brief, paras. 947-949; Mladić Reply Brief, para. 135. In this regard, Mladić contends that the ICTY Appeals Chamber in the *Čelebići* case, relying on case law from the European Court of Human Rights ("ECtHR"), conflated "the accessibility and foreseeability of a conviction with the accessibility and foreseeability of a sentence". *See* Mladić Appeal Brief, paras. 947-949, *referring to Čelebići* Appeal Judgement, para. 817, nn. 1399, 1400, *In the Case of S.W. v. The United Kingdom*, Application No. 20166/92, Judgment, 22 November 1995.
[1896] According to Mladić, given that Article 24 of the ICTY Statute imported the domestic sentencing law of the former Yugoslavia, life imprisonment was not "accessible and foreseeable" to an accused, and the only foreseeable and accessible penalty was a maximum of 20 years of imprisonment. *See* Mladić Appeal Brief, paras. 951, 953, 956.
[1897] Mladić Appeal Brief, paras. 932, 934, 939-943, 956; Mladić Reply Brief, para. 132, *referring to, inter alia, Case of Maktouf and Damjanović v. Bosnia and Herzegovina*, Application Nos. 2312/08 and 34179/08, Judgement, 18 July 2013 ("*Maktouf and Damjanović* Judgement"). Regarding the principle of *lex mitior*, Mladić also relies on the *D. Nikolić* Sentencing Appeal Judgement. *See* Mladić Appeal Brief, para. 952, n. 1238, *referring to D. Nikolić* Sentencing Appeal Judgement, para. 81.
[1898] Mladić Appeal Brief, paras. 956, 957; Mladić Reply Brief, para. 133. *See also* Mladić Appeal Brief, para. 952.

have "recourse" to them, and that in such circumstances the Trial Chamber's imposition of life imprisonment did not violate the principles of *nulla poena sine lege* and *lex mitior*.[1900] It also argues that the *Maktouf and Damjanović* Judgement can be distinguished from the present case, as it related to changes in sentencing laws within the same jurisdiction, whereas Mladić was sentenced "under a unified penal scheme with a maximum sentence that was solidly rooted in customary international law in 1992".[1901]

561. Mladić replies, *inter alia*, that the Prosecution misunderstands his submissions regarding the legality of imposing a life sentence, and fails to address his argument that the maximum sentence of imprisonment available in the former Yugoslavia was 20 years' imprisonment.[1902]

562. The Appeals Chamber recalls that, pursuant to Article 24(1) of the ICTY Statute, trial chambers "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[1903] Furthermore, according to Rule 101(A) of the ICTY Rules, a "convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life".[1904] The Appeals Chamber also recalls that the principle of *nulla poena sine lege* prohibits retroactive punishment.[1905] The principle of *lex mitior* prescribes that if the law relevant to the offence of the accused has been amended, the less severe law should be applied;[1906] however, the relevant law must be binding upon the court.[1907]

563. The Appeals Chamber considers that Mladić's submission regarding "oversights in the jurisprudence" is based on the erroneous foundation that, having "recourse" to the sentencing practices of the former Yugoslavia meant that Article 24 of the ICTY Statute "incorporated" or "import[ed]" domestic sentencing practices into international law and the sentencing practice of the

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[1899] Mladić Appeal Brief, para. 958.
[1900] *See* Prosecution Response Brief, paras. 387-390. The Prosecution contends that owing to the sentences ordered by international tribunals preceding the ICTY, the imposition of a life sentence for the most serious violations of international humanitarian law was foreseeable to Mladić. *See* Prosecution Response Brief, paras. 387, 392, 393.
[1901] Prosecution Response Brief, para. 391.
[1902] *See* Mladić Reply Brief, paras. 132-135. *See also* Mladić Reply Brief, para. 128.
[1903] *See also* Rule 101(B)(iii) of the ICTY Rules. There are almost identical provisions in the Statute and Rules of the Mechanism. *See* Article 22(2) of the Statute; Rule 125(B)(iii) of the Rules.
[1904] There is an almost identical provision in the Rules of the Mechanism. *See* Rule 125(A) of the Rules.
[1905] *See Čelebići* Appeal Judgement, n. 1382, *referring to, inter alia*, Article 15 of the International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, 999 U.N.T.S. 171 ("ICCPR"). Article 15(1) of the ICCPR stipulates, *inter alia*, that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed. *See also Krajišnik* Appeal Judgement, para. 750; *Stakić* Appeal Judgement, para. 398.
[1906] *See Deronjić* Sentencing Appeal Judgement, para. 96; *D. Nikolić* Sentencing Appeal Judgement, para. 81. Article 15(1) of the ICCPR states, in part, that if, subsequent to the commission of the offence, a provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
[1907] *See Galić* Appeal Judgement, para. 398, n. 1201; *Deronjić* Sentencing Appeal Judgement, para. 97; *D. Nikolić* Sentencing Appeal Judgement, paras. 81, 84, 85.

ICTY.[1908] It is settled jurisprudence that the ICTY was not in any way bound by the laws or sentencing practices of the former Yugoslavia; rather, trial chambers were only obliged to take such practice into consideration.[1909]

564. There is also no merit in Mladić's submissions that the introduction of Rule 101(A) of the ICTY Rules created another sentencing regime within the jurisdiction of the ICTY and "retroactively" provided for life imprisonment,[1910] or that life imprisonment was not "accessible or foreseeable" to accused, including himself, at the ICTY.[1911] His contention that Rule 101(A) of the ICTY Rules, which was adopted subsequent to the ICTY Statute, established a different sentencing regime is misguided. The Appeals Chamber recalls that judicial power to adopt rules of procedure and evidence at the ICTY was subject to the principles and parameters set out in the ICTY Statute and international law.[1912] Given that Article 24 of the ICTY Statute does not adopt or incorporate the sentencing practices of the former Yugoslavia into the ICTY's sentencing practices, Mladić fails to establish that the creation of Rule 101(A) of the ICTY Rules deviates from the principle set out in the ICTY Statute.[1913] Regarding the foreseeability of life imprisonment, Mladić ignores jurisprudence that the imposition of life imprisonment has been available for the most serious violations of international humanitarian law since at least the tribunals established after World War II.[1914] Additionally, the Appeals Chamber finds no merit in Mladić's submission that the ICTY Appeals Chamber in the *Čelebići* case conflated issues of liability (*nullem crimen sine lege*) and punishment (*nulla poena sine lege*).[1915] The ICTY Appeals Chamber specifically considered the question of penalty independent of liability, concluding that there could be no doubt that the accused must have been aware that the crimes for which they were indicted were the most serious violations of international humanitarian law, punishable by the most severe penalties.[1916] Furthermore, since the establishment of the ICTY, convicted persons before it have received

[1908] *See* Mladić Appeal Brief, paras. 951, 953, 955; Mladić Reply Brief, para. 133.
[1909] *See, e.g.*, *Prlić et al.* Appeal Judgement, n. 11069; *Popović et al.* Appeal Judgement, para. 2087; *Šainović et al.* Appeal Judgement, para. 1830; *Stakić* Appeal Judgement, para. 398; *D. Nikolić* Sentencing Appeal Judgement, paras. 69, 84.
[1910] *See* Mladić Appeal Brief, paras. 932, 938, 945, 946, 952, 954; Mladić Reply Brief, para. 133.
[1911] *See* Mladić Appeal Brief, paras. 951, 953, 956.
[1912] *See* Article 15 of the ICTY Statute; *Prosecutor v. Vidoje Blagojević et al.*, Case Nos. IT-02-60-AR73, IT-02-60-AR73.2 & IT-02-60-AR73.3, Decision, 8 April 2003, para. 15.
[1913] *See also D. Nikolić* Sentencing Appeal Judgement, para. 82.
[1914] *Čelebići* Appeal Judgement, para. 817, n. 1401 (where the ICTY Appeals Chamber noted that judgements rendered at Nuremberg, Tokyo, and other successor tribunals provide clear authority for custodial sentences up to and including life imprisonment, and that individuals convicted before the Nuremberg Tribunal were given life sentences). *See also Čelebići* Appeal Judgement, n. 1382, *referring to, inter alia*, Article 15(2) of the ICCPR (stating that "[n]othing in [Article 15] shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations").
[1915] *See* Mladić Appeal Brief, paras. 947-949.
[1916] *See Čelebići* Appeal Judgement, para. 817.

sentences of life imprisonment pursuant to the ICTY Statute and Rules.[1917] Most recently, the Appeals Chamber imposed a sentence of life imprisonment in the *Karadžić* case before the Mechanism.[1918] The Appeals Chamber thus finds that Rule 101(A) of the ICTY Rules did not create another sentencing regime inconsistent with Article 24(1) of the ICTY Statute,[1919] and Mladić fails to demonstrate that life imprisonment was not an accessible or foreseeable punishment.

565. In light of the foregoing, and recalling that determinations of other courts – domestic, international, or hybrid – are not binding upon it,[1920] the Appeals Chamber further considers that Mladić's reliance on the *Maktouf and Damjanović* Judgement is misguided. The ECtHR in the *Maktouf and Damjanović* Judgement held, *inter alia*, that a retrospective change to the domestic sentencing frameworks of the former Yugoslavia in relation to war crime offences violated Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[1921] As discussed above, given that there was no change in the ICTY's sentencing regime, such analysis is not applicable to the ICTY.

566. Turning to the circumstances in this case, the Appeals Chamber observes that the Trial Chamber set out the applicable ICTY law and reviewed the pertinent sentencing provisions in the former Yugoslavia, noting that the range of penalties included fines, confiscation of property, imprisonment, and the death penalty.[1922] The Trial Chamber considered, *inter alia*, that, at the time of the crimes, the maximum sentence applicable in the former Yugoslavia had been 15 years of imprisonment and that, for the most serious crimes, the death penalty or a prison sentence of 20 years could be imposed in lieu.[1923] Given the foregoing, the Appeals Chamber considers that the Trial Chamber properly took into account the general sentencing practice in the former Yugoslavia, and correctly stated that sentences imposed by the ICTY can exceed those in the former Yugoslavia.[1924] Mladić's submissions that the principles of *nulla poena sine lege* and *lex mitior* were violated are thus without merit.

[1917] *See D. Nikolić* Sentencing Appeal Judgement, para. 83. *See, e.g.*, *Tolimir* Appeal Judgement, paras. 648, 649; *Popović et al.* Appeal Judgement, paras. 2110, 2111, 2117; *Galić* Appeal Judgement, p. 185.
[1918] *See Karadžić* Appeal Judgement, paras. 776, 777.
[1919] *See D. Nikolić* Sentencing Appeal Judgement, para. 82.
[1920] *See, e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83.
[1921] *Maktouf and Damjanović* Judgement, paras. 68, 74-76. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.
[1922] Trial Judgement, paras. 5180, 5205-5209.
[1923] Trial Judgement, paras. 5206, 5208. The Trial Chamber further noted that, following amendments in Bosnia and Herzegovina, the maximum sentence that may currently be imposed in Bosnia and Herzegovina and in *Republika Srpska* is 45 years' imprisonment for the gravest forms of serious criminal offences perpetrated with intent. *See* Trial Judgement, para. 5208.
[1924] *See* Trial Judgement, para. 5205.

567. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred in imposing a life sentence. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 9.D of Mladić's appeal.

IV. THE APPEAL OF THE PROSECUTION

568. Under Count 1 of the Indictment, the Prosecution alleged that, between 31 March 1992 and 31 December 1992, Mladić committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat groups, as such, in some municipalities of Bosnia and Herzegovina, particularly Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica.[1925]

569. The Trial Chamber found that a large number of Bosnian Muslims and/or Bosnian Croats in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica were the victims of prohibited acts, such as killings or serious bodily or mental harm, which contributed to the destruction of their groups.[1926] The Trial Chamber further found, by majority, that certain physical perpetrators of these prohibited acts had the intent to destroy a part of the Bosnian Muslim group when carrying out the prohibited acts, except in relation to Bosnian Muslims in Ključ.[1927] The Trial Chamber was not, however, convinced beyond reasonable doubt that those perpetrators intended to destroy the Bosnian Muslims in Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica ("Count 1 Municipalities") "as a *substantial* part of the protected group".[1928] The Trial Chamber was also not convinced beyond reasonable doubt that the Bosnian Serb leadership possessed genocidal intent or that the crime of genocide formed part of the objective of the Overarching JCE.[1929] The Trial Chamber accordingly acquitted Mladić of genocide under Count 1 of the Indictment.[1930]

570. The Prosecution submits that the Trial Chamber erred in finding that: (i) the Bosnian Muslim communities of the Count 1 Municipalities ("Count 1 Communities") did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina (Ground 1);[1931] and (ii) Mladić and other members of the Overarching JCE did not possess "destructive

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[1925] Indictment, paras. 35-39.

[1926] Trial Judgement, paras. 3446, 3451. In particular, the Trial Chamber determined that a large number of Bosnian Muslims in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica, as well as Bosnian Croats in Prijedor and Sanski Most, were murdered, and that Bosnian Muslims in Foča, Prijedor, and Vlasenica, as well as Bosnian Croats in Prijedor, were subjected to serious bodily or mental harm which contributed to the destruction of their groups. *See also* Trial Judgement, paras. 3458, 3464, 3469, 3473, 3479, 3496, 3502, 3503. The Trial Chamber also determined that Bosnian Muslims and Bosnian Croats are protected groups within the meaning of Article 4 of the ICTY Statute. *See* Trial Judgement, para. 3442.

[1927] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236. The Trial Chamber considered that, for Bosnian Muslims in Ključ, and for Bosnian Croats in Prijedor and Sanski Most, the evidence did not allow an inference that the physical perpetrators of murders and/or serious bodily or mental harm shared the intent to destroy, in part, their respective groups. *See* Trial Judgement, para. 3504.

[1928] Trial Judgement, para. 3535 (emphasis added). *See also* Trial Judgement, para. 3536.

[1929] Trial Judgement, paras. 4236, 4237.

[1930] Trial Judgement, para. 5214.

[1931] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16; Prosecution Reply Brief, para. 1; T. 26 August 2020 pp. 74, 82-85, 99-101.

intent" (Ground 2).[1932] The Prosecution requests that the Appeals Chamber correct these errors and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first, or alternatively the third, category of joint criminal enterprise, or alternatively, as a superior under Article 7(3) of the ICTY Statute.[1933]

571. Mladić responds that the Prosecution demonstrates no error in the Trial Chamber's findings and invites the Appeals Chamber to dismiss Grounds 1 and 2 of the Prosecution's appeal.[1934]

A. Alleged Errors in Finding that the Count 1 Communities Did Not Constitute a Substantial Part of the Protected Group (Ground 1)

572. In concluding that it could not find that the physical perpetrators intended to destroy each of the Count 1 Communities "as a *substantial* part of the protected group",[1935] the Trial Chamber found that: (i) the physical perpetrators had limited geographical control or authority to carry out activities;[1936] (ii) the Bosnian Muslims targeted in each of the Count 1 Municipalities formed a relatively small part of the Bosnian Muslim population in the Bosnian Serb-claimed territory or in Bosnia and Herzegovina as a whole;[1937] and (iii) there was insufficient evidence indicating why the Count 1 Communities or the Count 1 Municipalities had a special significance or were emblematic in relation to the Bosnian Muslim group as a whole.[1938]

573. The Prosecution submits that the Trial Chamber erroneously concluded that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group.[1939] Drawing parallels with findings in relation to the Bosnian Muslims of Srebrenica,[1940] the Prosecution argues that each of the Count 1 Communities was substantial not only in size, consisting of many thousands of Bosnian Muslims,[1941] but also in nature, with a unique historic and cultural identity

[1932] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 1, 3, 19-41; Prosecution Reply Brief, paras. 1, 19; T. 26 August 2020 pp. 74-82, 101-103.
[1933] Prosecution Notice of Appeal, paras. 4, 9; Prosecution Appeal Brief, paras. 1, 4, 17, 18, 42-50. *See also* T. 26 August 2020 pp. 74, 85, 102, 103.
[1934] *See* Mladić Response Brief, paras. 9-343; T. 26 August 2020 pp. 86-97.
[1935] Trial Judgement, para. 3535 (emphasis added). *See also* Trial Judgement, para. 3536.
[1936] Trial Judgement, para. 3535. *See also* Trial Judgement, paras. 3530-3534.
[1937] Trial Judgement, paras. 3530-3534.
[1938] Trial Judgement, paras. 3530-3535.
[1939] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16; T. 26 August 2020 pp. 74, 82-85.
[1940] Prosecution Appeal Brief, paras. 7, 9, 11-15.
[1941] Prosecution Appeal Brief, paras. 2, 6-10; T. 26 August 2020 pp. 84, 85, 99, 100, 102. The Prosecution contends that the evaluation of substantiality is only about intention rather than about how many people were harmed by the genocidal acts in each place. It states that the smallest numeric size of the targeted group in Kotor Varoš consisted of 11,000 group members and the largest, in Prijedor, consisted of 50,000 group members. Furthermore, it adds that Mladić's subordinates and other "tools of the joint criminal enterprise" targeted over 128,000 men, women, and children on the basis of their ethnic characteristics and group identity across all five municipalities. This included

that made them prominent and emblematic of the Bosnian Muslim group as a whole.[1942] The Prosecution also argues that the Count 1 Municipalities held immense strategic importance for the Bosnian Serb leadership[1943] and that the territories of the Count 1 Municipalities represented the full extent of the perpetrators' respective areas of activity and control.[1944] The Prosecution contends that, in light of these factors, no reasonable trier of fact could have failed to conclude that the destruction of the Count 1 Communities would in each case have been significant enough to have an impact on the Bosnian Muslim group as a whole.[1945]

574. Mladić responds that the Prosecution repeats arguments made at trial and fails to demonstrate that the evidence was so unambiguous that a reasonable trial chamber was obliged to infer that each of the Count 1 Communities constituted a substantial part of the overall Bosnian Muslim group.[1946] He contends that the Trial Chamber correctly concluded that the numerical size of the targeted part of the Bosnian Muslim group, when considered with the physical perpetrators' control in each of the Count 1 Municipalities, was not substantial.[1947] He further argues that the Prosecution's claims that the Count 1 Municipalities held immense strategic importance for the Bosnian Serb leadership and that the Count 1 Communities had a unique historic and cultural identity to evidence their prominence and emblematic nature, including through the eyes of the Bosnian Muslim group as a whole, are unsubstantiated.[1948] Mladić also submits that none of the Count 1 Communities is comparable to Srebrenica in size[1949] or in qualitative importance.[1950]

Colonel Basara, one of Mladić's VRS subordinates, who targeted close to 80,000 group members across two municipalities. *See* T. 26 August 2020 pp. 84, 85, 99, 100.

[1942] Prosecution Appeal Brief, paras. 2, 11-15. *See also* Prosecution Reply Brief, para. 16.

[1943] Prosecution Appeal Brief, para. 14.

[1944] Prosecution Appeal Brief, paras. 2, 6, 10.

[1945] Prosecution Appeal Brief, para. 16; T. 26 August 2020 pp. 99-101. The Prosecution adds that, while the purpose of the substantiality requirement was to ensure that the label of genocide not be "imposed lightly" or applied to crimes that are too small, genocide is not limited to crimes on the horrific scale of the Holocaust or the Rwandan genocide. According to the Prosecution, as with respect of many cases concerning Srebrenica, genocide could be committed in a single municipality. It contends that, in this case, the targeting of tens of thousands of Bosnian Muslims across five municipalities, involving a pattern of crimes aiming at the very existence of the Bosnian Muslim group as such "falls squarely within the definition of genocide on the numbers alone". The Prosecution submits that recognizing this would not be applying the term genocide "lightly". *See* T. 26 August 2020 pp. 83-85, *referring to, inter alia, Krstić* Appeal Judgement, para. 37.

[1946] Mladić Response Brief, paras. 15-86; T. 26 August 2020 pp. 86-90.

[1947] Mladić Response Brief, paras. 49-53; T. 26 August 2020 pp. 87, 88.

[1948] Mladić Response Brief, paras. 61-72, 82-85; T. 26 August 2020 pp. 88-90.

[1949] Mladić Response Brief, paras. 49, 55-58. In this respect, Mladić submits that, unlike in respect of the Count 1 Municipalities, the Trial Chamber found that the physical perpetrators possessed exclusive and total geographical control and authority to carry out activities in Srebrenica. *See* Mladić Response Brief, para. 57.

[1950] Mladić Response Brief, paras. 60, 73-81. In this respect, Mladić submits that, unlike in respect of the Count 1 Municipalities, the Trial Chamber found that Srebrenica: (i) was one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*; (ii) had become a refuge for Bosnian Muslims from across Bosnia and Herzegovina; (iii) was a designated UN safe area; (iv) suffered other simultaneous crimes in the area; and (v) had symbolic impact given the extent of Bosnian Serb control over the area. *See* Mladić Response Brief, para. 75.

575. The Prosecution replies that Mladić misconstrues the Trial Chamber's findings on the numeric size of the targeted parts in that his arguments are premised on the misconception that the parts of the Bosnian Muslim group targeted for destruction comprised subsets of the Bosnian Muslim population within each of the Count 1 Municipalities.[1951] The Prosecution also argues that Mladić's arguments on the prominent and emblematic nature of the Count 1 Communities are permeated by a false theory that this factor must be assessed solely "through the eyes" of the protected group, and that his remaining arguments mischaracterize the Prosecution's submissions.[1952]

576. The Appeals Chamber recalls that, where a conviction for genocide relies on the intent to destroy a protected group "in part", the targeted part must be a substantial part of that group.[1953] The ICTY Appeals Chamber in the *Krstić* case identified the following non-exhaustive and non-dispositive guidelines that may be considered when determining whether the part of the group targeted is substantial enough to meet this requirement: (i) the numeric size of the targeted part as the necessary starting point, evaluated not only in absolute terms, but also in relation to the overall size of the entire group; (ii) the targeted part's prominence within the group; (iii) whether the targeted part is emblematic of the overall group or essential to its survival; and/or (iv) the perpetrators' areas of activity and control, as well as the possible extent of their reach.[1954] The applicability of these factors, together with their relative weight, will vary depending on the circumstances of the particular case.[1955]

577. In relation to the numeric size of the targeted part, the Trial Chamber noted that the population of Bosnia and Herzegovina in 1991 was approximately 4.4 million people, 43.7 per cent of whom were Bosnian Muslims.[1956] The Prosecution argues that the Count 1 Communities, which the Trial Chamber noted ranged from 11,090 people in Kotor Varoš to 49,700 people in Prijedor,[1957]

[1951] Prosecution Reply Brief, paras. 1, 3-12.
[1952] Prosecution Reply Brief, paras. 13-18.
[1953] *See Krstić* Appeal Judgement, para. 8. *See also* 18 U.S.C. § 1093(8) (2006) ("the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part").
[1954] *See Krstić* Appeal Judgement, paras. 12-14. *See also Karadžić* Appeal Judgement, para. 727 and references cited therein; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker U.N. Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, para. 29 ("'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership.").
[1955] *See Krstić* Appeal Judgement, para. 14. The ICTY Appeals Chamber in the *Popović et al*. case noted that "it is the objective, contextual characteristics of the targeted part of the group, […] that form the basis for determining whether the targeted part of the group is substantial". *Popović et al.* Appeal Judgement, para. 422.
[1956] Trial Judgement, para. 3529. The overall size of the Bosnian Muslim group in Bosnia and Herzegovina in 1991 was therefore approximately 1.9 million people, noting that 43.7 per cent of 4.4 million is 1,922,800.
[1957] Trial Judgement, paras. 3530-3534.

were sufficiently sizeable to satisfy the substantiality requirement.[1958] Considering, however, that the Count 1 Communities effectively comprised between approximately 0.6 and 2.6 per cent of the overall Bosnian Muslim group in Bosnia and Herzegovina,[1959] the Appeals Chamber finds that the Prosecution does not demonstrate error in the Trial Chamber's conclusion that the Count 1 Communities each formed "a relatively small part" of the group.[1960]

578. The Appeals Chamber recalls that, because the intent to destroy formed by perpetrators of genocide will always be limited by the opportunity presented to them, the perpetrators' areas of activity and control, as well as the possible extent of their reach, should be considered when determining whether the part of the protected group they intended to destroy was substantial.[1961] In this respect, the Trial Chamber determined that, from the perspective of the physical perpetrators, the Count 1 Communities were the only parts of the Bosnian Muslim group within their respective areas of control, and that the perpetrators' authority did not extend beyond each of the Count 1 Municipalities in which they committed prohibited acts.[1962] The Appeals Chamber considers that these conclusions, when viewed in the light of the Trial Chamber's finding that the perpetrators intended to destroy the Count 1 Communities,[1963] evince that the perpetrators targeted as substantial a part of the overall Bosnian Muslim group for destruction as they could. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.[1964] The Trial Chamber in the present case considered this factor, among others, in its analysis concluding that the physical perpetrators did not have the intent to destroy the Count 1 Communities as a substantial part of the Bosnian Muslim group.[1965]

579. The Trial Chamber also considered that it had "received insufficient evidence indicating why […] [each of the Count 1 Communities or the Count 1 Municipalities] themselves had a special significance or were emblematic in relation to the protected group as a whole".[1966] However,

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[1958] Prosecution Appeal Brief, paras. 2, 6-10.
[1959] *See* Trial Judgement, paras. 3530-3534. The Prosecution points out that the Trial Chamber incorrectly found that the Bosnian Muslims of Prijedor comprised 2.2 per cent, rather than approximately 2.6 per cent, of the overall Bosnian Muslim group. *See* Prosecution Appeal Brief, n. 14, *referring to* Trial Judgement, paras. 3529, 3534. The Appeals Chamber does not consider that the Trial Chamber's mathematical error in this respect impacted its decision.
[1960] *See* Trial Judgement, para. 3535.
[1961] *See Krstić* Appeal Judgement, para. 13.
[1962] *See* Trial Judgement, paras. 3530-3534. *See also* Trial Judgement, para. 3535.
[1963] Trial Judgement, para. 3526.
[1964] *See Krstić* Appeal Judgement, para. 13. In this respect, the Appeals Chamber notes that a relevant factor in the determination of the ICTY Appeals Chamber in the *Krstić* case that the Bosnian Muslims of Srebrenica formed a substantial part of the Bosnian Muslim group was that the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region, and that the Bosnian Muslims of Srebrenica were the only part of the Bosnian Muslim group within the perpetrators' area of control. *See Krstić* Appeal Judgement, para. 17.
[1965] Trial Judgement, para. 3535.
[1966] Trial Judgement, para. 3535.

the Appeals Chamber notes that the Trial Chamber identified several factors which reflected the strategic and/or symbolic importance of the Count 1 Municipalities to Bosnian Serbs and/or Bosnian Muslims.[1967] The Appeals Chamber further notes that such factors were considered to support findings that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group, not only in previous cases,[1968] but also by the Trial Chamber in the present case.[1969] The core of the Prosecution's argument is that the similarities in the Trial Chamber's predicate findings about the importance of the Count 1 Communities and the Bosnian Muslims of Srebrenica underscore the unreasonableness of its contradictory conclusions about their substantiality.[1970] The Prosecution contends that the Trial Chamber was therefore obliged to infer that the destruction of the Count 1 Communities, like that of the Bosnian Muslims of Srebrenica, would in each case have been significant enough "to have an impact on the Bosnian Muslim [g]roup as a whole".[1971]

580. The Appeals Chamber recalls that it is not just *any* impact on a protected group that supports a finding of genocidal intent; rather, it is the impact that the destruction of the targeted part will have on the overall *survival* of that group which indicates whether there is intent to destroy a

[1967] *See* Trial Judgement, paras. 3530-3534. In particular, the Trial Chamber noted, *inter alia*, that: (i) Karadžić and Krajišnik stressed the strategic significance of Sanski Most and the need to retain it (*see* Trial Judgement, para. 3530); (ii) Mladić was informed that "Foča 'was supposed to be the Second Islamic Centre for Muslims in Europe' but was now 99 per cent Serb", and Karadžić explained that "Foča 'is extremely important to' the Muslims, 'but it will never be theirs again'" (*see* Trial Judgement, para. 3531); (iii) Kotor Varoš was strategically important as it was located "almost on the border of the Federation and Republika Srpska" (*see* Trial Judgement, para. 3532); (iv) Mladić noted that "'whoever controls Vlasenica, controls eastern Bosnia'" (*see* Trial Judgement, para. 3533); and (v) Prijedor was "significant to the Bosnian Serbs because of its location as part of the land corridor that linked the Serb-dominated area in the Croatian Krajina in the west with Serbia and Montenegro in the east and south, […] [and] a symbol throughout the region of Yugoslavia of 'brotherhood and unity', to the extent that Bosnian Muslims thought it was 'the last town where ethnic conflict was possible'" (*see* Trial Judgement, para. 3534).

[1968] *See, e.g.*, *Popović et al.* Appeal Judgement, para. 422 (affirming that the strategic importance of Srebrenica is a relevant factor in determining whether the substantiality requirement is met); *Krstić* Appeal Judgement, paras. 15 ("Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted."), 16 ("In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. […] In its resolution declaring Srebrenica a safe area, the Security Council announced that it 'should be free from armed attack or any other hostile act.'"). *See also, inter alia*, *Karadžić* Trial Judgement, para. 5672; *Popović et al.* Trial Judgement, para. 865.

[1969] *See* Trial Judgement, para. 3554 ("[T]he Trial Chamber finds that the enclave of Srebrenica was of significant strategic importance to the Bosnian-Serb leadership during the conflict because the majority Bosnian-Muslim population of this region made it difficult for them to claim the land as inherently Serb. The Bosnian-Serb leadership, in particular, accorded Srebrenica importance as it was in close geographical proximity to Serbia and, therefore, was required for maintaining a Serb-populated border area contiguous with Serbia. During the war, Srebrenica also became a refuge to Bosnian Muslims from the region especially when it was designated a UN safe area. The Trial Chamber is, therefore, satisfied that the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian Muslim population of Bosnia-Herzegovina.").

[1970] *See* Prosecution Appeal Brief, paras. 7, 11-15.

[1971] Prosecution Appeal Brief, para. 16. *See also* Prosecution Appeal Brief, paras. 5, 6, 8, 46; Prosecution Reply Brief, paras. 4, 39.

substantial part thereof.[1972] In this respect, the Appeals Chamber notes that, in upholding the conclusion that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group, the ICTY Appeals Chamber in the *Krstić* case considered, *inter alia*, that: (i) "[t]he capture and ethnic purification of Srebrenica would […] severely undermine the military efforts of the Bosnian Muslim state to ensure its viability";[1973] (ii) "[c]ontrol over the Srebrenica region was consequently essential to […] the continued survival of the Bosnian Muslim people";[1974] (iii) "[b]ecause most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population";[1975] and (iv) "[t]he elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces".[1976] In reaching the same conclusion, the Trial Chamber in the present case similarly considered such factors as, *inter alia*: (i) Srebrenica having become a refuge to Bosnian Muslims in the region;[1977] (ii) the symbolic impact of the murder of Bosnian Muslims in a designated UN safe area;[1978] and (iii) Srebrenica being one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*.[1979]

581. With respect to the Count 1 Communities, however, neither the Trial Chamber's findings nor the evidence referred to by the Prosecution reflects a similar threat to the viability or survival of the Bosnian Muslim group. In addition, the Appeals Chamber notes that the events in the Count 1 Municipalities occurred in 1992, closer to the outset of the war.[1980] By contrast, the events in Srebrenica took place three years later in July 1995, by which time tens of thousands of Bosnian Muslims seeking refuge, many of whom were "injured […] exhausted, lethargic, and frightened",[1981] and only "five percent of whom were able-bodied men",[1982] had gathered in Srebrenica in dire living conditions.[1983] Thus, although the destruction directed against each of the Count 1 Communities may have "represented powerful, early steps in the Bosnian Serb campaign

[1972] *See Krstić* Appeal Judgement, para. 8 ("the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group"). *See also Tolimir* Appeal Judgement, para. 261 and references cited therein.
[1973] *Krstić* Appeal Judgement, para. 15.
[1974] *Krstić* Appeal Judgement, para. 15.
[1975] *Krstić* Appeal Judgement, para. 15.
[1976] *Krstić* Appeal Judgement, para. 16.
[1977] Trial Judgement, para. 3554.
[1978] Trial Judgement, paras. 3553, 3554.
[1979] Trial Judgement, para. 3553.
[1980] *See, e.g.*, Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3513-3523, 3525.
[1981] Trial Judgement, para. 2450.
[1982] Trial Judgement, para. 2453.

towards an ethnically homogeneous state",[1984] it was open to the Trial Chamber to infer that such destruction was not significant enough to have an impact on the overall survival of the Bosnian Muslim group at the relevant time.

582. In light of the foregoing, the Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber erred in concluding that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina.

583. The Appeals Chamber, Judges N'gum and Panton dissenting, therefore dismisses Ground 1 of the Prosecution's appeal.

B. Alleged Errors in Finding that Mladić and Other Overarching JCE Members Did Not Possess "Destructive Intent" (Ground 2)

584. In determining that the crime of genocide did not form part of the objective of the Overarching JCE,[1985] the Trial Chamber recalled its finding that the physical perpetrators in the Count 1 Municipalities did not have the intent to destroy a substantial part of the Bosnian Muslim group.[1986] The Trial Chamber considered that, while the speeches and statements of Mladić and other Overarching JCE members were inflammatory, caused fear, and incited hatred, they "could have been directed to the military enemy and have been used as propaganda, rather than to demonstrate an expression of a genocidal intent."[1987] The Trial Chamber also considered that "frequent references to 'ethnic cleansing' and other similar expressions […] do not necessarily indicate intent to physically destroy the protected group",[1988] and that "[t]he rhetorical speeches and statements assisted in the task of ethnic separation and division rather than the physical destruction of the protected groups."[1989]

585. In addition, the Trial Chamber recalled the majority's finding that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group, but considered that "[a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 [M]unicipalities through the use of a number of physical perpetrators as tools requires more."[1990] The Trial Chamber concluded that, "[i]n the absence of other evidence which would unambiguously

[1983] *See, e.g.*, Trial Judgement, paras. 2445-2454.
[1984] Prosecution Appeal Brief, para. 15.
[1985] Trial Judgement, para. 4237.
[1986] Trial Judgement, para. 4234. *See also* Trial Judgement, paras. 3535, 3536.
[1987] Trial Judgement, para. 4235.
[1988] Trial Judgement, para. 4235.
[1989] Trial Judgement, para. 4235.
[1990] Trial Judgement, para. 4236.

support a finding of genocidal intent, drawing an inference on the basis of prohibited acts of physical perpetrators alone is insufficient."[1991]

586. The Prosecution submits that the Trial Chamber erred in concluding that genocide did not form part of the common purpose of the Overarching JCE by failing to infer the "destructive intent" of Mladić and other Overarching JCE members, and by applying a heightened evidentiary threshold in its assessment thereof.[1992] It contends that no reasonable trier of fact could have found, on the one hand, that the local perpetrators in the Count 1 Municipalities intended to destroy a part of the Bosnian Muslim group, while, on the other hand, that Mladić and other Overarching JCE members, who orchestrated and controlled the overall criminal campaign, and exercised greater authority than any of the local perpetrators they used as tools, did not.[1993] The Prosecution further contends that Mladić and other Overarching JCE members made public statements reflecting an intent to destroy the Bosnian Muslim group, and that the Trial Chamber unreasonably concluded that such statements were aimed only at ethnic separation and division.[1994] The Prosecution argues that, in contrast to local perpetrators found to have "destructive intent" in their respective municipalities, Mladić and other Overarching JCE members intended to destroy all five Count 1 Communities, which cumulatively formed a substantial part of the Bosnian Muslim group.[1995] It requests that the Appeals Chamber find that Mladić and other Overarching JCE members possessed and shared genocidal intent in relation to the Count 1 Communities, conclude that genocide formed part of the Overarching JCE's common purpose, and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first category of joint criminal enterprise.[1996]

[1991] Trial Judgement, para. 4236.

[1992] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 19-41; T. 26 August 2020 pp. 74-82, 101-103. *See also* Prosecution Reply Brief, paras. 28-38.

[1993] Prosecution Appeal Brief, paras. 19, 22-36; T. 26 August 2020 pp. 74-80, 102. *See also* Prosecution Reply Brief, paras. 19-27. The Prosecution argues that the Trial Chamber "appeared to justify its differential treatment of intent in relation to local perpetrators versus [joint criminal enterprise] members on the basis that the former group physically participated in genocidal and other culpable acts, while the latter did not", and reiterates that "[t]his is not only flawed in principle, it is also misconceived in that some of these so-called physical perpetrators were mid- and low- level commanders who did not physically commit any crimes". *See* Prosecution Appeal Brief, para. 31 (internal citations omitted). *See also* Prosecution Appeal Brief, para. 25; T. 26 August 2020 pp. 77, 78.

[1994] Prosecution Appeal Brief, paras. 37-41; T. 26 August 2020 pp. 76, 80-82. *See also* Prosecution Reply Brief, paras. 35-38.

[1995] Prosecution Appeal Brief, paras. 45, 46; Prosecution Reply Brief, para. 39. The Prosecution argues cumulative substantiality in the alternative to its contention, as elaborated under Ground 1 of its appeal, that each of the Count 1 Communities individually formed a substantial part of the Bosnian Muslim group. *See* Prosecution Notice of Appeal, para. 9(c); Prosecution Appeal Brief, paras. 44, 45. *See also* T. 26 August 2020 pp. 84, 85. The Appeals Chamber has dismissed Ground 1 of the Prosecution's appeal (*see supra* Section IV.A), and will accordingly only consider the Prosecution's alternative argument in this regard.

[1996] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, paras. 42-44, 47; T. 26 August 2020 pp. 74, 82, 85, 102, 103. The Prosecution alternatively requests the Appeals Chamber to convict Mladić of genocide pursuant to the third category of joint criminal enterprise or as a superior pursuant to Article 7(3) of the ICTY Statute as a consequence of correcting the errors alleged under Ground 1 of its appeal. *See* Prosecution Appeal Brief, paras. 48-50.

587. Mladić responds that the Trial Chamber applied the correct evidentiary standard to conclude that it could not be satisfied that the only reasonable conclusion that could be drawn from the evidence was that he and other Overarching JCE members possessed the requisite intent and that genocide formed part of the common plan.[1997] He submits that the Prosecution fails to demonstrate that the evidence of his and other Overarching JCE members' intent is such that a reasonable trier of fact was obliged to infer that all reasonable doubt of their guilt had been eliminated, thereby failing to meet the appellate standard.[1998] Mladić accordingly requests that the Appeals Chamber dismiss the Prosecution's appeal and requested remedies entirely.[1999]

588. As recalled above, where a conviction for genocide relies on the intent to destroy a protected group "in part", the targeted part must be a substantial part of that group.[2000] As such, the Prosecution's contention that the Trial Chamber was compelled to find that Mladić intended to destroy the Count 1 Communities has no potential to invalidate its decision to acquit him of genocide unless the Prosecution demonstrates that the Trial Chamber was also compelled to find that the Count 1 Communities formed a substantial part of the Bosnian Muslim group. In this respect, the Prosecution submits that, when aggregating the Count 1 Communities, "the correspondingly larger numerical part of the Bosnian Muslim [g]roup unquestionably comprised a substantial part [thereof]",[2001] and reiterates that the key consideration in assessing substantiality is whether the part is significant enough "to have an impact on the group as a whole".[2002]

589. The Appeals Chamber recalls, however, that a substantiality assessment considers the impact that the destruction of the targeted part will have on the overall survival of that group.[2003] Noting that the Count 1 Communities collectively comprised approximately 6.7 per cent of the Bosnian Muslim group,[2004] the Appeals Chamber considers that a reasonable trier of fact could reasonably have concluded that the Count 1 Communities, individually as well as cumulatively,

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See also Mladić Response Brief, paras. 202-342; Prosecution Reply Brief, paras. 40-57; T. 26 August 2020 pp. 94-99. The Appeals Chamber recalls that it has dismissed Ground 1 of the Prosecution's appeal (*see supra* Section IV.A), and accordingly dismisses the Prosecution's requested alternative remedy in this regard.

[1997] Mladić Response Brief, paras. 88-142; T. 26 August 2020 pp. 90-93.

[1998] Mladić Response Brief, paras. 144-186; T. 26 August 2020 pp. 93, 94.

[1999] Mladić Response Brief, paras. 143, 187-201, 343; T. 26 August 2020 p. 94.

[2000] *See supra* para. 576, *referring to Krstić* Appeal Judgement, para. 8.

[2001] Prosecution Appeal Brief, para. 45.

[2002] Prosecution Appeal Brief, para. 46. *See also* Prosecution Appeal Brief, paras. 5, 6, 8, 16; Prosecution Reply Brief, paras. 4, 39.

[2003] *See supra* para. 580, *referring to, inter alia, Krstić* Appeal Judgement, para. 8 ("the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group").

[2004] The Count 1 Communities collectively comprised 128,443 Bosnian Muslims, whereas the overall size of the Bosnian Muslim group in 1991 was approximately 1.9 million people, noting that 43.7 per cent of 4.4 million is 1,922,800. *See* Trial Judgement, paras. 3529-3534. *See also supra* para. 577; Prosecution Appeal Brief, n. 122.

formed "a relatively small part" thereof.[2005] The Appeals Chamber therefore concludes that a reasonable trier of fact could also have found that the destruction of the Count 1 Communities, individually as well as cumulatively, was not sufficiently substantial to have an impact on the group's overall survival at the relevant time.[2006]

590. Recalling that the Appeals Chamber will only review alleged errors that have the potential to affect the outcome of an appeal,[2007] the Appeals Chamber need not address the Prosecution's remaining arguments and remedial requests in relation to the Trial Chamber's alleged failure to infer Mladić's "destructive intent" and convict him of genocide under Count 1 of the Indictment.

591. Based on the foregoing, the Appeals Chamber, Judges N'gum and Panton dissenting, dismisses Ground 2 of the Prosecution's appeal.

[2005] *See* Trial Judgement, para. 3535. *See also supra* para. 577.
[2006] *See supra* Section IV.A.
[2007] *See supra* Section II.

V. DISPOSITION

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

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 25 and 26 August 2020;

SITTING in open session;

DISMISSES Mladić's appeal in its entirety, Judge Nyambe dissenting as to Grounds 1, 2, 3, 4, 5, 7, 8, and 9 of Mladić's appeal;

DISMISSES, Judges N'gum and Panton dissenting, the Prosecution's appeal in its entirety;

AFFIRMS, Judges N'gum and Panton dissenting, the disposition of the Trial Chamber finding Mladić not guilty of genocide under Count 1 of the Indictment;

AFFIRMS the disposition of the Trial Chamber finding Mladić guilty of taking of hostages as a violation of the laws or customs of war under Count 11 of the Indictment, pursuant to Article 7(1) of the ICTY Statute, and **FURTHER AFFIRMS**, Judge Nyambe dissenting, the disposition of the Trial Chamber finding Mladić guilty of genocide under Count 2 of the Indictment, persecution as a crime against humanity under Count 3 of the Indictment, extermination as a crime against humanity under Count 4 of the Indictment, murder as a crime against humanity under Count 5 of the Indictment, murder as a violation of the laws or customs of war under Count 6 of the Indictment, deportation as a crime against humanity under Count 7 of the Indictment, inhumane acts (forcible transfer) as a crime against humanity under Count 8 of the Indictment, terror as a violation of the laws or customs of war under Count 9 of the Indictment, and unlawful attacks on civilians as a violation of the laws or customs of war under Count 10 of the Indictment, pursuant to Article 7(1) of the ICTY Statute;

AFFIRMS, Judge Nyambe dissenting, the sentence of life imprisonment imposed on Mladić by the Trial Chamber;

RULES that this Judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules; and

ORDERS that, in accordance with Rules 127(C) and 131 of the Rules, Mladić shall remain in the custody of the Mechanism pending the finalization of the arrangements for his transfer to the State where he will serve his sentence.

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

Judge Prisca Matimba Nyambe, Presiding

Judge Aminatta Lois Runeni N'gum

Judge Seymour Panton

Judge Elizabeth Ibanda-Nahamya

Judge Mustapha El Baaj

Judge Prisca Matimba Nyambe, Judge Aminatta Lois Runeni N'gum, and Judge Seymour Panton append partially dissenting opinions.

Done this 8th day of June 2021 at The Hague, the Netherlands.

[Seal of the Mechanism]

VI. PARTIALLY DISSENTING OPINION OF JUDGE NYAMBE

593. I respectfully disagree with the Majority's determination to dismiss all grounds of Mr. Mladić's appeal. I am of the view that Mr. Mladić's appeal should have been granted on all grounds except Ground 6.[2008] My position is based on the reasons that follow. Given the complexity and size of the case file and the appeal, and constrained by the requirements to proceed expeditiously and work remotely, I address only errors made by the Trial Chamber that I deem most egregious.[2009]

A. Ground 1 – Indictment and Notice

594. Mr. Mladić submits that the Trial Chamber erred by holding him criminally liable or responsible for "unnamed unscheduled incidents".[2010] By definition, scheduled incidents are incidents that are identified in a schedule attached to the Indictment.[2011] They are numbered, named, and listed.[2012] Notice is given that they form part of the allegations against the accused by the very fact that they are annexed to the Indictment.[2013] Unscheduled incidents are incidents that can be relied on by the Prosecution to prove material elements of the crime, for example, a course of conduct.[2014] Notice of these is given in, for example, the Rule 65 *ter* witness list in which the Prosecution explicitly states that a witness will be called to give evidence on an "unscheduled incident".[2015]

595. Unnamed unscheduled incidents are incidents that do not fall in either of the aforementioned.[2016] They are incidents that witnesses made accusations about at trial in the course of their evidence on scheduled incidents or other defined subjects but about which no notice was provided to the Defence that they are in fact incidents, either scheduled or unscheduled, for which Mr. Mladić could be held responsible.[2017] These are not charged. A trier of fact cannot enter a conviction on these other accusations. The Prosecution would have to put the Defence on notice that it sought to add them to the Indictment before any convictions could be entered. Before

[2008] Ground 6 concerns alleged errors related to the Hostage-Taking JCE.
[2009] Before going into the substance, I wish to remark that I do not agree with the Majority's statement in the Standards of Appellate Review section that the Mechanism is "not bound by the jurisprudence of the ICTR or the ICTY", considering that throughout the Trial Judgement and indeed this Appeal Judgement references are made to the jurisprudence and specific cases decided by the ICTR and ICTY. *See* Appeal Judgement, para. 14.
[2010] *See* Mladić Appeal Brief, paras. 41-60; Mladić Reply Brief, paras. 8-14; T. 25 August 2020 pp. 20-24, 27, 28; T. 26 August 2020 pp. 59-62.
[2011] *See* T. 25 August 2020 p. 21.
[2012] *See* T. 25 August 2020 p. 21.
[2013] *See* T. 25 August 2020 p. 21.
[2014] *See* T. 25 August 2020 p. 21.
[2015] *See* T. 25 August 2020 p. 21.
[2016] *See* T. 25 August 2020 p. 21.
[2017] *See* T. 25 August 2020 pp. 21, 22.

convictions can be entered, notice must be given to the Defence.[2018] Mr. Mladić only became aware of these incidents when the Trial Judgement was rendered, and thus he did not waive his right to raise this error on appeal.[2019]

596. I respectfully disagree with the Majority's conclusions on this Ground. I agree with Mr. Mladić's arguments that by *proprio motu* considering incidents not enumerated in Schedules A to G of the Indictment and/or unscheduled incidents that were not otherwise identified by the Prosecution through its Rule 65 *ter* filings as part of its case against him ("Unnamed Unscheduled Incidents") and relying on them to prove the elements of the crimes, whereas he was not put on notice of such incidents, the Trial Chamber materially impaired his ability to prepare his defence. The Prosecution failed to address Mr. Mladić's submission that it failed to direct the Trial Chamber to enter convictions on the Unnamed Unscheduled Incidents and that the Trial Chamber did so *proprio motu*.[2020] This is the Trial Chamber's error. It convicted Mr. Mladić of such accusations that were never identified as scheduled or unscheduled incidents.[2021]

597. I note, by way of example, the incidents identified in paragraph 48 of the Mladić Appeal Brief: (i) Srebrenica incident (u) opportunistic killings, 13 to 14 July 1995; (ii) sniping incident (e) 31 March 1993; (iii) Srebrenica incident (w) 23 July 1995; (iv) sniping incident (k) 9 November 1993; (v) shelling incident (d) 14 May 1992; (vi) cruel and inhumane treatment incident (j)(ii) 31 May - 8 June 1992; and (vii) unlawful detention incident (e)(iii).[2022]

598. For each of these, the Rule 65 *ter* list did not make any reference to these accusations as unscheduled incidents in the summary.[2023] It was the Trial Chamber that referred and identified them as unscheduled incidents, not the Prosecution. The Prosecution fails to establish that Mr. Mladić received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts by: (i) giving notice that a witness would provide evidence related to the Scheduled Incidents; (ii) mentioning Unnamed Unscheduled Incidents in a witness summary or motion or leading evidence on them; and (iii) relying on the Unnamed Unscheduled Incidents as adjudicated facts to establish the legal elements of a crime.[2024] Contrary to the Prosecution's contention,[2025] the use of inclusive language in the Indictment should not serve to include any

[2018] *See* T. 25 August 2020 p. 22.
[2019] *See* Mladić Appeal Brief, para. 43; T. 25 August 2020 p. 23.
[2020] *See* Mladić Reply Brief, para. 8.
[2021] *See* T. 25 August 2020 p. 22; Mladić Appeal Brief, paras. 41-58.
[2022] *See* Mladić Appeal Brief, para. 48; T. 25 August 2020 p. 23.
[2023] *See* T. 25 August 2020 p. 23.
[2024] *See* Mladić Reply Brief, paras. 11, 12, 14; T. 25 August 2020, pp. 22, 23.
[2025] *See* Appeal Judgement, n. 83.

accusations made before the Trial Chamber without proper notice and the Prosecution must identify what case and for which incidents it seeks conviction. The first time that the Defence was made aware that these accusations were being treated as unscheduled incidents was when the Trial Judgement was rendered.[2026]

599. In the absence of notice that these accusations were being treated by the Prosecution as unscheduled incidents, the Trial Chamber erred by treating them as such.[2027] Absent notice and specifically of the crimes alleged, the Defence could only put forward a general defence. A general defence cannot counter a specific accusation or incident.[2028]

600. As stated in the Karadžić Appeal Judgement:

> [A] trial chamber can only convict an accused of crimes that are charged in the indictment. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable him or her to prepare a meaningful defence.[2029]

601. The above indicates that the Indictment lacked sufficient detailed material facts to enable Mr. Mladić to prepare a meaningful defence.

602. In relation to cross-examination, this can be deployed to undermine the Prosecution's case when the Defence knows in precise terms what case it has to meet and the incident which the Prosecutions seeks a conviction on.[2030]

603. In my view, the impact of this error is as follows. As a result of the Trial Chamber's error, Mr. Mladić was held criminally responsible for these Unnamed Unscheduled Incidents, which constituted crimes against humanity, terror, unlawful acts, and persecution.[2031] The Trial Chamber then took these into account when determining the ambits of the count on the Indictment and the extent of Mr. Mladić's criminal responsibility.[2032]

604. Upholding any findings in this regard would be unfair, and prejudicial to Mr. Mladić's fair trial rights as enshrined in the Statute and Rules of Procedure and Evidence. For the foregoing reasons, I would conclude that the Trial Chamber's findings based on the Unnamed Unscheduled

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[2026] *See* T. 25 August 2020 p. 23.
[2027] *See* T. 25 August 2020 p. 23.
[2028] *See* T. 25 August 2020 p. 27.
[2029] *Karadžić* Appeal Judgement, para. 441.
[2030] *See* T. 25 August 2020 p. 27.
[2031] *See* T. 25 August 2020 p. 27.
[2032] *See* T. 25 August 2020 pp. 27, 28.

Incidents and the convictions on Counts 3, 5, 9 and 10 of the Indictment, as are identified in paragraphs 51 to 58 of the Mladić Appeal Brief, are invalidated, and grant Ground 1.

B. Ground 2 – Adjudicated Facts

1. Alleged Error in the Use of Adjudicated Facts (Ground 2.A)

605. Mr. Mladić submits that: (i) there are compelling reasons for the Appeals Chamber to revisit the *Karemera et al*. Decision of 16 June 2006 to determine whether the Trial Chamber erred by taking judicial notice of facts relating to Mr. Mladić's proximate subordinates under Rule 94(B) of the ICTY Rules; and (ii) the Trial Chamber erred by applying a heightened standard to rebuttal evidence.[2033]

(a) Use of Adjudicated Facts Relating to the Conduct of Subordinates

606. The ICTR Appeals Chamber held in the *Karemera et al*. Decision of 16 June 2006 that facts relating to the conduct of the physical perpetrators of crimes for which an accused is alleged to be criminally responsible may be subject to judicial notice.[2034] The relevance of the ICTY Appeals Chamber's findings in the *Galić* Decision of 7 June 2002 and the *D. Milošević* Decision of 26 June 2007 lies in the further guidance they issued about the circumstances in which trial chambers should withhold their discretion in this specific context.[2035]

607. In the *Galić* Decision of 7 June 2002, the ICTY Appeals Chamber held that "[w]here the evidence is [...] pivotal to the Prosecution case, and where the person whose acts and conduct the written statement describes is [...] proximate to the accused, the [t]rial [c]hamber *may decide that it would not be fair to the accused* to permit the evidence to be given in written form. An easy example of where the exercise of that discretion would lead to the rejection of a written statement could be where the acts and conduct of a person other than the accused described in the written statement occurred in the presence of the accused."[2036] Furthermore, in the *D. Milošević* Decision of 26 June 2007, the ICTY Appeals Chamber reiterated the holding from the *Karemera et al*. Decision of 16 June 2006 that "it is prohibited to take judicial notice of 'adjudicated facts relating to the acts, conduct, and mental state of the accused'".[2037]

[2033] *See* Mladić Appeal Brief, paras. 62-114; Mladić Reply Brief, paras. 16-32; T. 25 August 2020 pp. 28-40; T. 26 August 2020 pp. 62-64.
[2034] *See Karemera et al*. Decision of 16 June 2006, para. 50; T. 25 August 2020 p. 28.
[2035] *See* T. 25 August 2020 p. 28.
[2036] *See Galić* Decision of 7 June 2002, para. 13 (emphasis added).
[2037] *See D. Milošević* Decision of 26 June 2007, para. 16.

608. The *Galić* Decision of 7 June 2002 considered that admitting Rule 92 *bis* evidence that went to the conduct of the "immediately proximate subordinates" of an accused was inherently unfair when they were charged under Article 7(3) of the ICTY Statute or the evidence goes to elements of Article 7(1) of the ICTY Statute.[2038] The ICTY Appeals Chamber decided this on the basis of what it considered to be a "short step" from a finding that crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that these crimes were about to be or had been committed.[2039] The ICTY Appeals Chamber said that careful consideration should always be given by trial chambers to the exercise of their discretion in these "special and sensitive" situations.[2040]

609. The ICTY Appeals Chamber in the *Galić* Decision of 7 June 2002 did not define "immediate proximate subordinates" with reference to the rank of an accused, but rather whether their conduct was so widespread that the inference would be drawn that "there is no way that the accused could not have known about it" or "the accused had to be aware" of the objectives of his subordinates.[2041] It considered that where this link became sufficiently pivotal to the Prosecution's case on responsibility "it may not be fair to the accused" to permit this evidence in written form as it could not be challenged by the Defence.[2042]

610. In the same vein, but specifically in the context of adjudicated facts, the ICTY Appeals Chamber in the *D. Milošević* Decision of 26 June 2007 held that "while it is possible to take judicial notice of adjudicated facts regarding the existence of such crimes, the *actus reus* and the *mens rea* supporting the responsibility of the accused for the crimes in question must be proven by other means than judicial notice."[2043] It distinguished this from adjudicated facts that provided evidence as to the existence of crimes committed by others which the accused was not charged with.[2044]

611. Therefore, both ICTY Appeals Chambers considered that if the link between the accused and the crime committed was such that the responsibility of an accused could be easily inferred from the untested witness statement or adjudicated fact, then the Prosecution would have to establish this by calling evidence that could be confronted by the Defence.[2045] This, Mr. Mladić argues, is the conceptual difference that was overlooked by the ICTR Appeals Chamber in the

[2038] *See Galić* Decision of 7 June 2002, paras. 16, 19; T. 25 August 2020 pp. 28, 29.
[2039] *See Galić* Decision of 7 June 2002, para. 14; T. 25 August 2020 p. 29.
[2040] *See Galić* Decision of 7 June 2002, para. 19; T. 25 August 2020 p. 29.
[2041] *See Galić* Decision of 7 June 2002, para. 14; T. 25 August 2020 p. 29.
[2042] *See Galić* Decision of 7 June 2002, para. 15; T. 25 August 2020 p. 29.
[2043] *See D. Milošević* Decision of 26 June 2007, para. 16; T. 25 August 2020 pp. 29, 30.
[2044] *See D. Milošević* Decision of 26 June 2007, para. 16; T. 25 August 2020 p. 30.
[2045] *See* T. 25 August 2020 p. 30.

Karemera et al. Decision of 16 June 2006 and why the Trial Chamber's reliance on it led it into discernible error.[2046]

612. By way of example, I refer to the Incident of 23 July 1995, at paragraph 2210 of the Trial Judgement.[2047] The Trial Chamber took judicial notice of a number of adjudicated facts in relation to the SRK's possession of modified air bombs between August 1994 and November 1995 and relating to a shelling incident on this day.[2048] It specifically took judicial notice of the fact that the "modified air bomb was fired from a north-westerly direction from SRK-held territory".[2049] On the basis of a judicial fact alone, no Prosecution evidence, the Trial Chamber concluded that "a member or members of the SRK launched a modified air bomb" on that day and killed two civilians, seriously injuring others.[2050]

613. The Prosecution's case was that Mr. Mladić was the most senior officer in the VRS and that he significantly contributed to achieving the objectives of the joint criminal enterprises primarily through the use of VRS forces.[2051] These specifically included the SRK, which the Prosecution said "implemented" Mr. Mladić's orders through ethnically cleansing municipalities and terrorising Sarajevo's civilians through a campaign of shelling and sniping.[2052] In light of this, the adjudicated fact established that the crimes charged were committed by Mr. Mladić's alleged subordinates.[2053] Given that the Prosecution's case was that the SRK was implementing Mr. Mladić's orders and they were used as tools to achieve the objectives of the joint criminal enterprises, the adjudicated fact on the identity of the perpetrators went to the core of its case on his responsibility.[2054] Despite this, the Trial Chamber took judicial notice of this fact in the absence of any Prosecution evidence that could establish the SRK's responsibility for this incident.[2055]

614. This example demonstrates the error with the Trial Chamber's reliance on the approach in the *Karemera et al*. Decision of 16 June 2006.[2056] The Trial Chamber considered that there were no limitations on which adjudicated facts judicial notice could be taken of in the context of the conduct of other members of the joint criminal enterprise or the physical perpetrators.[2057] I note other

[2046] *See* T. 25 August 2020 p. 30.
[2047] *See also* T. 25 August 2020 p. 32.
[2048] *See* Trial Judgement, para. 2209. *See also* T. 25 August 2020 p. 32.
[2049] *See* Trial Judgement, para. 2210, n. 9385, Adjudicated Fact 2871; T. 25 August 2020 p. 32.
[2050] *See* Trial Judgement, para. 2212; T. 25 August 2020 p. 32.
[2051] *See* Indictment, para. 13; T. 25 August 2020 p. 32.
[2052] *See* Prosecution Final Trial Brief, paras. 102, 103; T. 25 August 2020 p. 32.
[2053] *See* T. 25 August 2020 p. 32.
[2054] *See* T. 25 August 2020 p. 33.
[2055] *See* T. 25 August 2020 p. 33.
[2056] *See* T. 25 August 2020 p. 33.
[2057] *See* T. 25 August 2020 p. 33.

examples as set out at paragraphs 107 and 108 of the Mladić Appeal Brief, as well as instances of how other trial chambers have exercised their discretion to highlight a divergence in practice.[2058]

615. There are broadly two approaches that can be seen from the jurisprudence: the *Karemera et al*. approach and the *D. Milošević* approach.[2059] An example of the latter approach was taken by the ICTY Trial Chamber in the *Stanišić and Župljanin* case. The Judges held that:

> Where the proposed fact goes to the core of the Prosecution's case and relates to the conduct of others for whose criminal acts and omissions the accused is alleged to be responsible, the Trial Chamber will nevertheless exercise its discretion to withhold judicial notice if it considers that doing so would be in the interests of justice.[2060]

616. In light of the Prosecution's case against Mićo Stanišić and Stojan Župljanin, namely, that in their roles as the Minister of the *Republika Srpska* MUP and Chief Regional Security Services Centre of Banja Luka respectively, they committed crimes through the police, the ICTY Trial Chamber in that case concluded that "where a proposed fact refers to the criminal activities conducted by the police within an [Autonomous Region of Krajina] municipality, the fact is considered to go to the core of the case".[2061] For that reason, it withheld judicial notice of such facts in the interests of justice.

617. Importantly, the Trial Chamber in this case did not limit which members of the police this would apply to by, for example, rank. It considered that all members of the police could constitute the accused's "immediately proximate subordinates".[2062] Had the *Mladić* Trial Chamber taken the approach of the *Stanišić and Župljanin* Trial Chamber, it would have withheld its discretion and declined to take judicial notice of facts that related to the criminal activities conducted by those the Prosecution alleged were Mr. Mladić's subordinates in the interests of justice.[2063]

618. The fact that there is such a divergence in the approach taken in the jurisprudence gives further impetus to revisit the ICTR Appeals Chamber's determination in the *Karemera et al*. Decision of 16 June 2006 and articulate the correct legal standard.[2064]

619. The Trial Chamber fell into error when it admitted a specific category of facts; namely, those that related to the criminal activities conducted by those the Prosecution alleged were Mr.

[2058] *See* Mladić Appeal Brief, para. 69, nn. 97, 98 and references cited therein; T. 25 August 2020 p. 33.
[2059] *See D. Milošević* Decision of 26 June 2007; *Karemera et al*. Decision of 16 June 2006; T. 25 August 2020 p. 33.
[2060] *See Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010 ("*Stanišić and Župljanin* Decision of 1 April 2010"), para. 41; T. 25 August 2020 pp. 33, 34.
[2061] *See Stanišić and Župljanin* Decision of 1 April 2010, para. 46; T. 25 August 2020 p. 34.
[2062] *See* T. 25 August 2020 p. 34.
[2063] *See* T. 25 August 2020 pp. 34, 35.
[2064] *See* T. 25 August 2020 p. 35.

Mladić's subordinates acting under his orders. These were sufficiently pivotal to the Prosecution's case on his responsibility for the alleged conduct. Therefore, it should have presented evidence itself in this regard.[2065]

620. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. The *Galić* Decision of 7 June 2002 recognized that it was a matter within the discretion of the trial chamber, observing that in such circumstances, the trial chamber "*may decide that it would not be fair to the accused*" to permit the admission.[2066] As articulated in the *Karemera et al*. Decision of 16 June 2006, paragraph 52, "it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it - and thus shifting the burden of producing evidence rebutting it to the accused - is consistent with the accused's rights under the circumstances of the case".[2067] In my view I would adopt a cautious approach as outlined above because it is consistent with Mr. Mladić's fair trial rights. Therefore, contrary to the Majority disposition, it is necessary to reconsider the Appeal Decision on Adjudicated Facts to prevent an injustice. It is not sufficient to state that the Trial Chamber only considered the adjudicated facts in connection with "other evidence during its deliberations" without specifically pointing to the actual evidence.[2068]

621. Furthermore, the Trial Chamber erroneously failed to provide reasons for rejecting evidence in rebuttal of adjudicated facts and repeatedly failed to state in the Trial Judgement which adjudicated facts it was taking judicial notice of and/or which it relied on in making findings of fact, and also relied on adjudicated facts from cases which the judges of the Trial Chamber had previously presided over in which there were references to Mr. Mladić's role and guilt, thereby resulting in a perception of bias.[2069]

622. In my view, the Trial Chamber erred in exercising its discretion, invalidating the findings affected by this approach, identified, for example, in paragraphs 107 and 108 of the Mladić Appeal Brief.[2070]

[2065] *See* T. 25 August 2020 p. 35.
[2066] *See Galić* Decision of 7 June 2002, para. 13 (emphasis added).
[2067] *Karemera et al*. Decision of 16 June 2006, para. 52.
[2068] *See* Appeal Judgement, para. 48.
[2069] *See* Appeal Judgement, para. 39.
[2070] *See* T. 25 August 2020 p. 35.

(b) Heightening the Standard of the Burden to Produce Rebuttal Evidence

623. Mr. Mladić submits that the Trial Chamber erred by applying a heightened standard to rebuttal evidence.[2071] For the reasons that follow, I am inclined to agree with his submissions and would reverse the Trial Chamber's findings to the extent of the error identified by the Defence.

624. Taking judicial notice under Rule 94(B) of the ICTY Rules creates a rebuttable presumption of accuracy of that fact. However, as the Trial Chamber acknowledged at paragraph 5272 of the Trial Judgement, the ultimate burden of persuasion remains with the Prosecution. Nevertheless, the standard applied to the Defence rebuttal evidence was heightened. As a result, the Defence was deprived of its opportunity to enliven the debate and from that rebut the adjudicated fact.[2072]

625. The jurisprudence states that the Defence bears the burden to produce credible and reliable evidence sufficient to bring the accuracy of the adjudicated fact into dispute. The threshold of credible and reliable rebuttal evidence, as the ICTR Appeals Chamber *Karemera et al*. Decision of 29 May 2009 states, is "relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia".[2073] The Trial Chamber itself recognised, in a decision it issued on 2 May 2012 regarding adjudicated facts, that the accuracy of facts could, for example, be challenged through the cross-examination of Prosecution witnesses or the presentation of Defence evidence to meet this threshold.[2074]

626. Therefore, contrary to the Prosecution's assertion at paragraph 37 of the Prosecution Response Brief, the Defence was not required necessarily to present rebuttal evidence as part of its case to bring the accuracy of the adjudicated fact into dispute. It was, as the Trial Chamber acknowledged in that decision, able to do so by confronting the Prosecution evidence and eliciting inconsistencies and weaknesses therein.[2075] Despite this, the Trial Chamber imposed an erroneous additional requirement on the evidence presented by the Defence. The Trial Chamber required the evidence to be "unambiguous".[2076]

627. The Trial Chamber explained, at paragraph 5273 of the Trial Judgement, how the Defence could enliven the evidentiary debate:

[2071] *See* Mladić Appeal Brief, paras. 96-114; Mladić Reply Brief, paras. 20-37; T. 25 August 2020 pp. 35-40; T. 26 August 2020 pp. 63, 64.
[2072] *See* T. 25 August 2020 pp. 35, 36.
[2073] *See Karemera et al*. Decision of 29 May 2009, para. 15; T. 25 August 2020 p. 36.
[2074] *See* Fourth Decision on Adjudicated Facts, para. 19; T. 25 August 2020 p. 36.
[2075] *See* T. 25 August 2020 p. 36.
[2076] *See* T. 25 August 2020 p. 37.

> in either presenting evidence on a specific alternative scenario, as opposed to a mere suggestion of one or more possible alternative scenarios, or in the unambiguous demonstration that a scenario as found in the [a]djudicated [f]act must reasonably be excluded as true.[2077]

628. To further explain what it meant by a "specific alternative scenario", the Trial Chamber gave an example in the only footnote within that paragraph.[2078] It reads: "if an adjudicated fact stated that 'B killed C', and the Trial Chamber received evidence that 'C was possibly/likely killed by A'", the Trial Chamber said that this would be deemed insufficient to reach the threshold of "unambiguous" evidence.[2079]

629. If something is possible or likely, then there is doubt. Where there is doubt, it is trite in criminal law that that doubt must be resolved in favour of the accused.[2080] To expect the Defence to present evidence that is without doubt is to reverse the burden of proof and impose a heightened standard – that of beyond reasonable doubt.[2081] It follows then that eliciting doubt through cross-examination of Prosecution witnesses, such that inconsistencies or weaknesses could be pointed out, would not be sufficient.[2082]

630. Therefore, following the Trial Chamber's example, to challenge the accuracy of the adjudicated fact on the basis of its standard, the Defence would have had to have proved beyond reasonable doubt that C was killed by A.[2083] The Defence would have had to have done so by presenting evidence in this regard. There is no legal basis for this standard. The fact that the Trial Chamber does not cite a single authority for it in paragraph 5273 of the Trial Judgement is perhaps indicative of this.[2084]

631. At paragraph 5274 of the Trial Judgement, the Trial Chamber stated that it is "*mindful that evidence contradicting adjudicated facts does not automatically rebut the adjudicated fact*".[2085] The Defence also had to show that the evidence that was brought was reliable and credible.[2086] The reliability and credibility test was a secondary consideration.[2087] As such, the Trial Chamber

[2077] *See* T. 25 August 2020 p. 37.
[2078] *See* Trial Judgement, para. 5273, n. 18018; T. 25 August 2020 p. 37.
[2079] *See* Trial Judgement, para. 5273, n. 18018; T. 25 August 2020 p. 37.
[2080] *See* T. 25 August 2020 p. 37.
[2081] *See* T. 25 August 2020 p. 37.
[2082] *See* T. 25 August 2020 pp. 37. 38.
[2083] *See* T. 25 August 2020 p. 38.
[2084] *See* T. 25 August 2020 p. 38.
[2085] *See* T. 25 August 2020 p. 38 (emphasis added).
[2086] *See* T. 25 August 2020 p. 38.
[2087] *See* T. 25 August 2020 p. 38.

imposed an additional hurdle that the Defence had to overcome before it could reach the accepted standard required by the jurisprudence to enliven the evidentiary debate.[2088]

632. In light of the Trial Chamber's explanation of its methodology, I am satisfied that the Trial Chamber applied a heightened standard. The consequences of this error are identified by the Defence at paragraphs 106 to 113 of the Mladić Appeal Brief and paragraphs 22 to 37 of the Mladić Reply Brief.[2089] In this regard, as a result of the heightened standard applied, the Trial Chamber found that the evidence presented by the Defence was insufficient to enliven the evidentiary debate or to rebut the accuracy of the adjudicated fact. Its evaluation of the evidence was erroneous, as the Trial Chamber relied on unrebutted adjudicated facts to substantiate the evidentiary basis for Mr. Mladić's responsibility under the Overarching JCE. For example, the Trial Chamber relied on Adjudicated Fact 1476 to establish Mr. Mladić's criminal responsibility for the killing of all of the 7,000-8,000 victims who were not actively taking part in hostilities in Srebrenica.[2090] Even when the accuracy of the adjudicated facts was challenged through evidence presented by the Prosecution, the Trial Chamber's approach prevented Mr. Mladić from enlivening the evidentiary debate through cross-examination. In light of the heightened standard applied, the only way Mr. Mladić could rebut the adjudicated fact was to disprove it beyond reasonable doubt. Mr. Mladić's inability to rebut the adjudicated facts facilitated the discharge of the Prosecution's legal burden to prove his guilt beyond reasonable doubt. No reasonable trier of fact would have applied the heightened standard used by the Trial Chamber. Had the proper legal standard been applied, the rebuttal evidence derived from cross-examination or presented by the Defence would have enlivened the debate and the adjudicated facts would have been rebutted. As the Prosecution's evidence was insufficiently reliable to establish criminal responsibility, the Trial Chamber would have reached a different conclusion had the correct standard been applied to the adjudicated facts. Therefore, the Trial Chamber's reliance on the judicially noticed facts to find Mr. Mladić responsible for the crimes constituted an error that occasioned a miscarriage of justice.[2091]

633. Another example of the Trial Chamber's erroneous approach relates to the unscheduled Incident of 24 October 1994 at paragraphs 2001 to 2003 of the Trial Judgement.[2092]

634. The Trial Chamber sought to rely on adjudicated facts that said that the shot came from a known sniper location of the SRK and that the shots were fired by a member of the SRK.[2093] The

[2088] *See* T. 25 August 2020 p. 38.
[2089] *See also* T. 25 August 2020 p. 38.
[2090] *See* Mladić Reply Brief, paras. 33-37.
[2091] Mladić Appeal Brief, paras. 106-113; Mladić Reply Brief, paras. 22-37.
[2092] *See* T. 25 August 2020 p. 39.

Defence argued that the Prosecution's expert evidence from Witness Patrick van der Weijden, that there was a direct line of sight between the sniper location and the victim, was defective, as there was no clear visibility.[2094] It also produced a Defence expert testimony in which it was said that the trees were likely to have blocked the line of sight.[2095] The Trial Chamber held that that was likely not enough to contradict the relevant adjudicated fact.[2096] Further, it did not have to address the Defence's submissions on the deficiencies within the Prosecution evidence because it relied on the unrebutted adjudicated fact "instead".[2097] Therefore, even when the Defence could introduce doubt through an expert and also point to weaknesses in the Prosecution's evidence, this was insufficient to bring the accuracy of the adjudicated fact into dispute.[2098] Had the debate been enlivened, the Prosecution's evidence would not have been sufficient to re-establish the accuracy of the fact as to the clear line of sight, as it would not have been able to overcome the lingering doubt created by the Defence expert and the weaknesses in its own evidence.[2099]

635. I agree with Mr. Mladić's argument that the Trial Chamber's error in heightening the standard of rebuttal evidence resulted in his evidence being deemed "insufficient" to enliven the rebuttal procedure or to rebut the accuracy of the adjudicated fact. As argued by the Defence, the standard applied by the Trial Chamber to rebuttal evidence was erroneous.[2100] As a result, its approach to evidence tendered by the Defence or reliance on inconsistencies or weaknesses in the Prosecution's case to enliven the evidentiary debate was flawed.[2101] This infected the Trial Chamber's approach to adjudicated facts throughout the judgement.[2102] The examples provided in the Mladić Appeal Brief demonstrate the existence of this systematic error such that the Trial Chamber's approach to every single adjudicated fact is called into question.[2103] As Mr. Mladić asserts, I am satisfied that the Trial Chamber fell into discernible error and applied a standard that no reasonable Trial Chamber would and, in fact, ever has applied.[2104]

636. In light of the above I find that the Trial Chamber erred by applying a heightened standard of the burden to produce rebuttal evidence or shifting the burden of persuasion onto Mr. Mladić. In

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[2093] *See* Trial Judgement, para. 2001, nn. 8506, 8507, *referring to*, Adjudicated Facts 2752, 2753; T. 25 August 2020 p. 39.
[2094] *See* Trial Judgement, para. 2001; T. 25 August 2020 p. 39; Mladić Final Trial Brief, paras. 2234-2239.
[2095] *See* Trial Judgement, para. 2001; T. 25 August 2020 p. 39.
[2096] *See* Trial Judgement, para. 2002; T. 25 August 2020 p. 39.
[2097] *See* Trial Judgement, para. 2002; T. 25 August 2020 p. 39.
[2098] *See* T. 25 August 2020 p. 39.
[2099] *See* T. 25 August 2020 p. 39.
[2100] *See* T. 25 August 2020 p. 39.
[2101] *See* T. 25 August 2020 pp. 39, 40.
[2102] *See* T. 25 August 2020 p. 40.
[2103] *See* T. 25 August 2020 p. 40.
[2104] *See* T. 25 August 2020 p. 40.

conjunction with my conclusions on the Trial Chamber's erroneous use of adjudicated facts relating to the conduct of subordinates, this means I would grant Ground 2.A.

2. Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D)

637. Mr. Mladić submits that the Trial Chamber systematically erred in law and in fact throughout the Trial Judgement by:

i. Applying an incorrect standard of proof, thereby alleviating the Prosecution's burden to prove his guilt beyond reasonable doubt;

ii. Failing to address clearly relevant exculpatory evidence in its reasoning, thereby indicating that it either failed to consider such evidence or gave insufficient weight thereto; and

iii. Relying on untested evidence in a sole or decisive manner.

638. The Prosecution did not undermine these submissions. In doing so the Trial Chamber committed a discernible error resulting in considerable prejudice to Mr. Mladić systematically throughout the Trial Judgement. The Trial Chamber's errors and their impact, which Mr. Mladić elaborates more specifically in Grounds 3 to 7 of his Appellant's brief, individually or cumulatively, invalidate the findings on which his convictions rest. I would therefore grant Grounds 2.B, 2.C, and 2.D of Mr. Mladić's Appeal.

C. Ground 3 – Overarching JCE

1. Temporal Geographical Scope of the Overarching JCE

639. The Overarching JCE is defined as lasting from 1991 to 30 November 1995, and is limited to the geographic scope of Bosnia and Herzegovina.[2105] It is a fundamental principle of criminal law that there be a temporal co-existence of the *actus reus* and the *mens rea* of the prescribed conduct.[2106] According to the *Nahimana et al*. Appeal Judgement:

> the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present. […] The acts and omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and 6(3) of the [ICTR] Statute occurred in 1994, and at the time of such acts or omissions the

[2105] *See* Trial Judgement, paras. 4232, 4610; T. 25 August 2020 p. 41.
[2106] *See* T. 25 August 2020 p. 41.

> accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question.[2107]

640. According to the *Simba* Appeal Judgement:

> [t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.[2108]

641. The ICTY Appeals Chamber in the *Naletilić and Martinović* Appeal Judgement followed this same approach:

> The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[2109]

642. Judge Tuzmukhamedov supported this approach in his dissent to the *Šainović et al*. Appeal Judgement, where he stated that neither conduct prior to the period of the joint criminal enterprise nor any actions on the part of the accused thereafter could have reasonably amounted to a significant contribution to the joint criminal enterprise.[2110]

643. The Trial Chamber erred in its approach, especially insofar as to infer Mr. Mladić's *mens rea* from statements beyond the scope of the Overarching JCE made in 1991 in Croatia, not in Bosnia and Herzegovina.[2111]

644. The Indictment alleged that Mr. Mladić was not considered part of the Overarching JCE until 12 May 1992 when he was appointed Chief of the VRS Main Staff.[2112] Prior to that month, he neither was on the territory of Bosnia and Herzegovina nor within the command structure of the VRS since he was in Croatia and in the JNA at that time.[2113] In my view, the first error of the Trial Chamber is that it violated the aforementioned jurisprudence by trying to attribute Mr. Mladić's speeches to Bosnia and Herzegovina in 1991, when he was neither temporally nor geographically linked to those events.[2114] At this time, Mr. Mladić was not in the chain of command for receiving

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[2107] *See Nahimana et al*. Appeal Judgement, para. 313; T. 25 August 2020 pp. 41, 42.
[2108] *See Simba* Appeal Judgement, para. 266; T. 25 August 2020 p. 42.
[2109] *See Naletilić and Martinović* Appeal Judgement, para. 114; T. 25 August 2020 p. 42.
[2110] *See Šainović et al*. Appeal Judgement, Dissenting Opinion of Judge Tuzmukhamedov, para. 8; T. 25 August 2020 pp. 42, 43.
[2111] *See* Mladić Appeal Brief, para. 304; T. 25 August 2020 p. 43.
[2112] *See* Indictment, para. 5; T. 25 August 2020 p. 43.
[2113] *See* Mladić Appeal Brief, para. 203; T. 25 August 2020 p. 43.
[2114] *See* Mladić Appeal Brief, para. 203; T. 25 August 2020 p. 43.

reports about events, and certainly could not send commands to persons outside of his chain of command either to commit these crimes or to punish perpetrators.[2115]

645. The second error was that the Trial Judgement performs an analysis of what others, such as politicians, the police, or other armed groups said or did in the same time period prior to Mr. Mladić coming to Bosnia and Herzegovina.[2116] Many of the crimes underpinning the Overarching JCE come in this time period before Mr. Mladić was in Bosnia and Herzegovina and before the VRS.[2117] In my view, this violates the above jurisprudence as the Trial Chamber utilised events that pre-date Mr. Mladić's appointment and geographic position to establish his *mens rea* and contribution to a joint criminal enterprise where the *actus reus* was before his physical and temporal presence.[2118] The Trial Judgement's analysis as to the Overarching JCE relies heavily on adjudicated facts.[2119] Crimes that took place before Mr. Mladić and his VRS had hierarchy and military command and control in all regions of Bosnia and Herzegovina cannot be used to establish his *mens rea*, even if the *actus reus* is shown to be perpetrated by others.[2120]

2. Use of Circumstantial Evidence

646. The Defence argues, and I am in agreement, that the Trial Chamber erred in almost exclusively basing its analysis of Mr. Mladić's purported contribution to the Overarching JCE on circumstantial evidence.[2121] In using this modus, these conclusions had to be the only reasonable inferences available. According to the *Lukić and Lukić* Appeal Judgement, the ICTY Appeals Chamber recalled that:

> in order to successfully challenge the trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.[2122]

647. The ICTY Appeals Chamber in the *Boškoski and Tarčulovski* Appeal Judgement similarly noted that where a conviction is based on circumstantial evidence, the conclusion arrived at must be the "*only* reasonable conclusion".[2123]

[2115] *See* T. 25 August 2020 p. 43.
[2116] *See* T. 25 August 2020 pp. 43-45.
[2117] *See* T. 25 August 2020 p. 45.
[2118] *See* T. 25 August 2020 p. 45.
[2119] *See* T. 25 August 2020 p. 46.
[2120] *See* T. 25 August 2020 p. 46.
[2121] *See*, *e.g.*, T. 25 August 2020 p. 46.
[2122] *See Lukić and Lukić* Appeal Judgement, para. 149; T. 25 August 2020 p. 46.
[2123] *See Boškoski and Tarčulovski* Appeal Judgement, para. 99; T. 25 August 2020 p. 46.

648. There was direct evidence that Mr. Mladić did not share a criminal intent in accordance with the Overarching JCE, namely his orders to the VRS to respect the Geneva Conventions and ceasefire agreements, as well as his notebooks,[2124] the contents of which will be elaborated where relevant in the analysis below. This was not accepted by the Trial Chamber because it felt it had more circumstantial evidence to the contrary.[2125] This disregard of direct evidence in favour of circumstantial evidence is a discernible error.[2126] It violates the above jurisprudence and the principle of *in dubio pro reo*, which states that, where any doubt exists, it should be resolved in favour of the defendant.[2127]

649. Having conceded that direct evidence exists showing a lack of criminal intent or *mens rea* as to Mr. Mladić, and if indeed this direct evidence is corroborated by other circumstantial evidence, as set out in the Mladić Appeal Brief,[2128] then no reasonable trier of fact can choose to ignore this direct evidence and go with "more" circumstantial evidence to say that the "only" available inference is one indicative of guilt.[2129] Circumstantial evidence cannot outweigh direct evidence. I further note that much of the direct evidence that was available to the Trial Chamber and which was disregarded included the notebooks that the Trial Chamber asserted as being authored by Mr. Mladić himself. I take note of the examples as set out in paragraphs 202, 234, and 309 of the Mladić Appeal Brief.[2130] In this regard, Mr. Mladić's notebooks contained direct evidence of the constraints he experienced when operating in the municipalities as well as of how he intended to protect Bosnian Muslims and Bosnian Croats,[2131] of declining discipline within the VRS and the dismantling of the MUP,[2132] and of his efforts to stop crimes from being committed by rebel military formations.[2133] For example, Mr. Mladić:

i. wrote in his notebook about problems with paramilitaries and crimes that were being committed;[2134]

[2124] *See* Mladić Appeal Brief, paras. 202, 234, 309, 311, 312, *referring to, inter alia*, Exhibits P352, P354, P356, P358, P474, D451; T. 25 August 2020 pp. 46, 47.
[2125] *See* T. 25 August 2020 pp. 46, 47.
[2126] *See* T. 25 August 2020 p. 47.
[2127] *See* T. 25 August 2020 p. 47; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 16 October 1998 ("*Tadić* Decision of 16 October 1998"), para. 73.
[2128] *See* Mladić Appeal Brief, para. 312, n. 463; T. 25 August 2020 p. 47.
[2129] *See* T. 25 August 2020 p. 47.
[2130] *See* T. 25 August 2020 p. 47.
[2131] *See* Exhibits P356, pp. 179, 180, 218; D1514; D187.
[2132] *See* Exhibit P358, p. 242.
[2133] *See* Exhibits P352, pp. 331, 338; P354, pp. 48.
[2134] *See* Exhibit P356, pp. 179, 180.

ii. issued an order to protect the Muslim population in certain villages from possible violence from individuals, because they expressed loyalty to *Republika Srpska*;[2135] and

iii. issued an order, *inter alia*, forbidding the cruel treatment and abuse of civilians, prisoners of war and members of international organizations, and mandating that all prisoners of war should be treated in accordance with the international law of war.[2136]

650. In my view, the Trial Chamber erred in law by employing this defective method that resulted in a finding of Mr. Mladić's *mens rea* being satisfied beyond reasonable doubt on the basis of circumstantial evidence and disregarding direct evidence, and I find that he has satisfied his burden on appeal in this regard.[2137]

651. The first error was that the Trial Chamber made findings of Mr. Mladić's *mens rea* before the *actus reus* was established.[2138] To establish the *actus reus* element of a joint criminal enterprise, the Trial Chamber must determine the existence and scope of a common criminal purpose shared by a plurality of persons. This is a necessary prerequisite in determining whether the acts performed by the Appellant were related and contributed to the participation in the common criminal objective.[2139]

652. The doctrine of joint criminal enterprise demands that Mr. Mladić made a significant contribution to the crimes for which he was convicted.[2140] This requires the trier of fact to characterise Mr. Mladić's contribution to the common criminal purpose.[2141]

653. The Trial Chamber made assumptions and drew inferences to circumstantially link Mr. Mladić to crimes based on his position in the VRS and the evidence of the behaviour of alleged subordinates to satisfy the guilt of Mr. Mladić by this mode of liability.[2142] The Trial Chamber also relied on circumstantial "links" rather than finding actual understanding or agreement by Mr. Mladić to support any aspect of the Overarching JCE.[2143]

654. According to Judge Tuzmukhamedov's dissent in the *Šainović et al.* Appeal Judgement:

[2135] *See* Exhibit D1514, p. 1.
[2136] *See* Exhibit D187, p. 1.
[2137] *See* T. 25 August 2020 p. 47.
[2138] *See* T. 25 August 2020 p. 47.
[2139] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 p. 48, *referring to, inter alia*, Mladić Appeal Brief, paras. 271-285.
[2140] *See Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 48.
[2141] *See Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 48.
[2142] *See* T. 25 August 2020 p. 48, *referring to, inter alia*, Trial Judgement, paras. 3561, 4218-4239.
[2143] *See* T. 25 August 2020 p. 49.

> no one incurs criminal liability merely by virtue of being a person of authority or capable of issuing instructions. Responsibility justifying a criminal conviction may attach only to individuals who actually put their powers into use for the commission of crimes or culpably fail to exert their influence over perpetrators. This is what the Prosecution should prove beyond reasonable doubt and the trier of fact should find, based on a reasoned opinion in the judgement.[2144]

655. Once the *actus reus* is established, the Trial Chamber is then required to examine whether Mr. Mladić's shared intent to further the common criminal objective could be inferred from his knowledge, acts, words, and interactions with others.[2145] The Trial Chamber is required to determine the objective *actus reus* elements of the joint criminal enterprise first before the subjective *mens rea* element can be considered.[2146]

656. The second error in the Trial Chamber's analysis was when it made *mens rea* findings while doing the *actus reus* consideration.[2147]

657. The consequence of this is that if *mens rea* inferences are drawn prior to the *actus reus* being established, not only does this contravene the established method explained in the first error, but how can the Trial Chamber then, moving into the *mens rea* consideration, remain objective when they have already made findings about and against Mr. Mladić's mental state?[2148] Reliance on conclusions already drawn about Mr. Mladić's guilt does not provide an objective or balanced analysis of his *mens rea*.[2149] Instead, the Trial Chamber automatically applied these findings to conclude Mr. Mladić's guilt, thereby indelibly tainting its findings.[2150]

658. In light of the foregoing, I consider that the method used by the Trial Chamber to establish the different elements of the Overarching JCE is flawed, which invalidates the findings for this joint criminal enterprise.[2151] Such a piecemeal approach deprived Mr. Mladić of his rights under the principle of *in dubio pro reo*, which states that, where any doubt exists, it should be resolved in favour of the defendant,[2152] and trial fairness.[2153] I am further of the view that the Trial Chamber has not been able to articulate by what measure Mr. Mladić was involved in crimes or furthered the common criminal purpose.[2154] The Trial Judgement failed to properly characterise through which specific conduct Mr. Mladić contributed to the Overarching JCE during the relevant time period he

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[2144] *See Šainović et al*. Appeal Judgement, Dissenting Opinion of Judge Tuzmukhamedov, para. 34; T. 25 August 2020 p. 49.
[2145] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 pp. 49, 50.
[2146] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 p. 50.
[2147] *See* Mladić Appeal Brief, paras. 262-290; T. 25 August 2020 p. 50.
[2148] *See* T. 25 August 2020 pp. 50, 51.
[2149] *See* T. 25 August 2020 p. 51.
[2150] *See* Mladić Appeal Brief, para. 291; Mladić Reply Brief, para. 55; T. 25 August 2020 p. 51.
[2151] *See* T. 25 August 2020 p. 51.
[2152] *See Tadić* Decision of 16 October 1998, para. 73.
[2153] *See* T. 25 August 2020 p. 51.

was in Bosnia and Herzegovina and in the VRS.[2155] By using such a nebulous and blurred analysis, muddling the *actus reus* analysis and the *mens rea* analysis, the Trial Chamber ultimately left open whether it held Mr. Mladić responsible for active conduct, omission, or both.[2156]

3. Control Over Paramilitaries and the MUP

(a) Paramilitaries

659. The Trial Chamber identified approximately 60 paramilitary groups on the territory of the Bosnian Serb Republic, totaling between four and five thousand men as of July 1992.[2157] It also conceded Mr. Mladić's efforts to disarm and disband those units and groups, stating that:

> [o]n 28 July 1992, Mladić ordered the disarmament of all paramilitary formations, groups, and individuals in the territory of the Bosnian-Serb Republic by 15 August 1992 in order to put all armed formations and individuals under the unified command of the VRS.[2158]

660. No reasonable trier of fact would ignore the constant attempts of Mr. Mladić and his VRS to eradicate paramilitaries, while including acts that were alleged to be committed by these same paramilitaries, naming them as participants in the Overarching JCE.[2159] Mr. Mladić cannot have been fighting to eradicate Serbian paramilitaries while at the same time contributing to their actions and thus significantly contributing to the alleged common objective through these paramilitaries.[2160] I agree with the Defence that the Trial Chamber failed to give sufficient weight to Mr. Mladić's many orders to subordinates to break up, disarm, and liquidate Serbian paramilitary groups and arrest them if they had committed crimes.[2161] For example:

i. In his order of 30 July 1992, Mr. Mladić *ordered that all paramilitaries with honourable intentions should be offered to join the VRS, and those who refused or "carried out misdeeds, robberies or other crimes", should be "disarmed, arrested and prosecuted"*;[2162]

[2154] *See* T. 25 August 2020 p. 51.
[2155] *See* T. 25 August 2020 p. 51.
[2156] *See* T. 25 August 2020 pp. 51, 52.
[2157] *See* Trial Judgement, para. 3855; T. 25 August 2020 p. 52.
[2158] *See* Trial Judgement, para. 3855; T. 25 August 2020 p. 52.
[2159] *See* T. 25 August 2020 p. 52.
[2160] *See* T. 25 August 2020 p. 52.
[2161] *See* Mladić Appeal Brief, paras. 309, 310; Trial Judgement, paras. 3840, 3847, 3852, 4419, *referring to* Exhibits P5112 (Order by Mladić to disarm all paramilitary formations, 28 July 1992), P5116 (Order by Mladić on reports of disarmament of paramilitary formations, 17 August 1992), D1499 (Order from Mladić to the VRS Corps Commands Regarding Discipline, 22 May 1993); T. 25 August 2020 p. 52.
[2162] *See* Exhibit P5112, p. 3 (emphasis added).

ii. In his order of 17 August 1992, Mr. Mladić *ordered various VRS corps that reports should be submitted on the disarmament of paramilitary formations in their zones of responsibility*;[2163]

iii. In his order of 22 May 1993, Mr. Mladić *ordered disciplinary measures for misconduct and that paramilitary groups "shall be arrested and eliminated, and in the case of resistance, physically liquidated"*.[2164]

661. Mr. Mladić's approach to not tolerate any actions or existence of paramilitary groups is supported by various meetings evidenced in the notebooks attributed to him.[2165] Mr. Mladić's opposition to the existence and activities of paramilitary groups is evidenced and documented from the entire period from when he came to Bosnia and Herzegovina in 1992 through the end of the alleged Overarching JCE in 1995.[2166]

662. Instead of reaching conclusions in favour of Mr. Mladić under the direct evidence of his opposition to paramilitaries, the Trial Chamber attempted to somehow portray non-existing connections and the impression of joint furtherance of common objectives with the VRS through ambiguous terminology based on circumstantial evidence and unacceptable for proper analysis under Article 7(3) of the ICTY Statute, using words like "operated in cooperation", "worked in coordination", and "worked in cooperation" with VRS units.[2167]

663. However, direct evidence shows otherwise. For example, an elite VRS unit directly subordinated under Mr. Mladić, the 65th Protection Regiment, was personally sent by him to Ilidža and engaged to deal with a paramilitary group. This is based on the testimony of Witness Vladimir Radojčić, wherein he stated that that pertinent paramilitary group outnumbered the military police available to that brigade commander who asked for Mr. Mladić's help to deal with this group.[2168]

664. Many orders were issued to disarm and arrest them, including Exhibits P5112, P5116, and D1499, as cited in the Trial Judgement and as described in paragraph 660 above.[2169] Only those who had not committed crimes were allowed to submit to the rules of war and submit to army

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[2163] *See* Exhibit P5116.
[2164] *See* Exhibit D1499, p. 2 (emphasis added).
[2165] *See* Mladić Appeal Brief, para. 309, n. 452 and references cited therein; T. 25 August 2020 p. 52.
[2166] *See* Mladić Appeal Brief, para. 310; T. 25 August 2020 pp. 52, 53.
[2167] *See* Trial Judgement, paras. 3859, 3863, 3866, 3873; T. 25 August 2020 p. 53.
[2168] *See* T. 26 June 2014 p. 23055; T. 25 August 2020 p. 53.
[2169] *See* Mladić Appeal Brief, paras. 309, 310; Trial Judgement, paras. 3840, 3847, 3852, 4419, *referring to* Exhibits P5112 (Order by Mladić to disarm all paramilitary formations, 28 July 1992), P5116 (Order by Mladić on reports of disarmament of paramilitary formations, 17 August 1992), D1499 (Order from Mladić to the VRS Corps Commands Regarding Discipline, 22 May 1993); T. 25 August 2020 p. 53.

induction, and they were separated, assigned to different units so as not to work together.[2170] The VRS's and Mr. Mladić's position as to paramilitaries is "*that the patriotic motives of the above-mentioned individuals are secondary, and unlawful enrichment and looting is the only reason for their presence in this area*".[2171]

(b) MUP

665. The Trial Chamber's flawed approach is most evident in its use of adjudicated facts and flawed logic to establish that Mr. Mladić had command and control over the MUP.[2172] This error is best illustrated in the Trial Judgement where the Trial Chamber concedes it cannot distinguish between actions and crimes committed by the VRS or members of the MUP and others but rather blends them together for purposes of the Overarching JCE.[2173] For example, at paragraph 4239 of the Trial Judgement, the Trial Chamber stated that:

> [m]any of the charged crimes were committed by members of the VRS, who were under the operational command of one of the corps, and ultimately of the VRS Main Staff. Many other crimes were committed by MUP members, either under the operational supervision of the VRS or under the supervision of the MUP. Some crimes were committed by [Territorial Defence] members, under the supervision of the Bosnian Serb [Ministry of Defence]. Crimes were also committed by paramilitary groups subordinated to the VRS or MUP.[2174]

666. The Trial Chamber invented a brand new mode of liability in command and control jurisprudence – "operational supervision".[2175] Upon what basis in the law and jurisprudence does it arise? The Trial Chamber is silent on this point.[2176] Evidence to the contrary is not silent.[2177]

667. First of all, I note that evidence was submitted to rebut the adjudicated facts as to command and control.[2178] Secondly, the record is replete with reliable and credible evidence that coordinated action of the MUP with the VRS did not lead to re-subordination under the army's command.[2179] This includes testimonial evidence from the Prosecution's own expert, Witness Theunens.[2180] Witness Theunens testified that:

[2170] *See* T. 25 August 2020 p. 53.
[2171] *See* T. 25 August 2020 p. 54 (emphasis added).
[2172] *Compare* Mladić Appeal Brief, paras 218-221 *with* Trial Judgement, para. 3794. *See* T. 25 August 2020 p. 54.
[2173] *See* T. 25 August 2020 p. 54.
[2174] *See also* T. 25 August 2020 p. 54.
[2175] *See* T. 25 August 2020 p. 55.
[2176] *See* T. 25 August 2020 p. 55.
[2177] *See* T. 25 August 2020 p. 55.
[2178] *See* Mladić Appeal Brief, para. 218; T. 25 August 2020 p. 55.
[2179] *See* Mladić Appeal Brief, para. 221; T. 25 August 2020 p. 55.
[2180] *See* T. 10 December 2013 pp. 20615-20617; T. 25 August 2020 p. 55.

> when unit A and unit B have to co-ordinate their operations, there is no subordination relation between unit A and unit B. However, above these two units there is, of course, a commander who orders and instructs how these two units are to co-ordinate their operations.[2181]

668. The evidence showed that at all times the effective control, reporting, and discipline of MUP units remained with the MUP commander and MUP Ministry.[2182]

669. Based on this evidence as to the MUP, and in accordance with the requirements of the principle of *in dubio pro reo*, it was unreasonable and therefore an error for the Trial Chamber to find that Mr. Mladić shared the intent of the MUP or that he contributed towards the common criminal purpose of the Overarching JCE via the actions of the MUP.[2183]

4. Legitimate Military Goals of the VRS

670. The Trial Chamber erred in its conclusions linking Mr. Mladić's legitimate activities to political goals of politicians.[2184] The Trial Chamber found that Mr. Mladić could influence the political leadership.[2185] Nevertheless, at the same time, it referred to evidence that Mr. Mladić was continually subject to the political leadership.[2186] The Trial Chamber chose selectively the statements of UN outsiders interpreting the behaviour of Mr. Mladić that were often contradictory to one another.[2187]

671. For example, contrary to the Trial Chamber's reliance on Witness Wilson,[2188] and its use and oversimplification elsewhere in the Trial Judgement as to the existence of the Supreme Command for all tasks and objectives of the armed struggle, the same document used throughout the Trial Judgement, Exhibit P338, plainly set forth that Mr. Mladić's VRS Main Staff was formulating its own military tasks, i.e., seven overall military goals, instead of six strategic objectives as formulated by politicians.[2189] The seven overall military goals were:

i. the "defence of the Serbian people against genocide at the hands of the Muslim-Croat forces";

ii. the "protection of the property and cultural heritage of the Serbian people";

[2181] T. 10 December 2013 p. 20616.
[2182] *See* Mladić Appeal Brief, para. 221, n. 327 and references cited therein; T. 25 August 2020 p. 55.
[2183] *See* T. 25 August 2020 p. 55.
[2184] *See* T. 25 August 2020 pp. 55, 56.
[2185] *See* Trial Judgement, para. 4474; Mladić Appeal Brief, para. 204; T. 25 August 2020 p. 56.
[2186] *See* Trial Judgement, para. 4466, 4472-4474; T. 25 August 2020 p. 56.
[2187] *See* Mladić Appeal Brief, para. 204; T. 25 August 2020 p. 56.
[2188] *See* Trial Judgement, para. 4473; T. 25 August 2020 p. 56.
[2189] *See* Exhibit P338 (Report on analysis of the combat readiness and activities of the VRS in 1992, 5 April 1993), p. 159; T. 25 August 2020 p. 56.

iii. the "liberation of territories which are ours and belong to [the Serbian people] by historical birth right";

iv. the "infliction of the greatest possible losses on the Muslim-Croat forces", by "neutralising and destroying their personnel and combat ordnance";

v. the "neutralising of facilities in enemy territory, or their destruction";

vi. the "spreading of the enemy forces over a broad area on all the battlefields of former Bosnia and Herzegovina"; and

vii. the "gradual erosion of the enemy's offensive power, i.e. the shattering of his forces, and the seizing of the initiative and creating conditions for resolute offensive operations in order to defeat his forces and expel them from areas that have always belonged to [the Serbian people], while at the same time preventing extensive losses in [Serb] ranks".[2190]

672. There was no malicious meaning attached to them.[2191] They simply provided for formulating legitimate military tasks.[2192]

673. The Trial Judgement, besides speculative narratives, does not contain conclusions nor important analysis as to whether even the political strategic objectives, nor the A/B variant document, were criminal *per se*.[2193] The *Perišić* Appeal Judgement guides us that the implementation of the *Republika Srpska* strategic objectives did not entail the systematic commission of crimes.[2194]

674. Merely citing and speculating on objectives of a political nature do not satisfy the standard of evidence sufficient to establish the existence of a common criminal plan.[2195] According to the *Martić* Appeal Judgement, political intentions are not sufficient to establish a joint criminal enterprise.[2196]

[2190] *See* Exhibit P338 (Report on analysis of the combat readiness and activities of the VRS in 1992, 5 April 1993), p. 159.
[2191] *See* T. 25 August 2020 p. 56.
[2192] *See* T. 25 August 2020 p. 56.
[2193] *See* T. 25 August 2020 pp. 56, 57.
[2194] *See Perišić* Appeal Judgement, paras. 100-102; Mladić Appeal Brief, para. 243; T. 25 August 2020 p. 57.
[2195] *See* T. 25 August 2020 p. 57.
[2196] *See Martić* Appeal Judgement, paras. 123, 124; T. 25 August 2020 p. 57.

675. The absence of any correlation or identical agenda between Mr. Mladić and the VRS on the one side and political authorities on the other, let alone a common criminal objective, is seen in paragraph 3707 of the Trial Judgement.[2197] The Trial Chamber stated:

> In a 8 November 1992 meeting with *inter alios* Karadžić, Krajišnik, and corps commanders, Mladić noted Krajišnik as having stated that '[w]e have a disproportionate engagement of the army in relation to the strategic objectives. We have not achieved: The Neretva, the sea, and the Podrinje area. We have achieved: The corridor and separation with the Muslims'.[2198]

676. Instead of analysing the clear divergence between political and military goals, the Trial Judgement lacks proper analysis and application of the principle of *in dubio pro reo*.[2199]

677. Performing routine duties in isolation is insufficient to establish indication of guilt and cannot substitute the requisite *actus reus* or *mens rea* as to the Overarching JCE.[2200] The Trial Chamber failed to explain how the performance of routine military duties of Mr. Mladić had an actual effect on and substantially contributed to the activities of perpetrators in the course of crimes in furtherance of the common objective.[2201] Without such analysis, the Trial Chamber has not been able to articulate by what measure Mr. Mladić was involved in crimes committed in furtherance of the alleged common objective.[2202] I consider that there was a clear error in reasoning in the Trial Chamber's conclusion that Mr. Mladić made a significant contribution to the Overarching JCE.[2203] I further note that, according to the *Perišić* Appeal Judgement, the VRS was confirmed to be an organization that was not criminal itself and which undertook lawful combat activities.[2204] In this regard, the ICTY Appeals Chamber in the *Perišić* case "underscore[d] that the VRS was participating in lawful combat activities and was not a purely criminal organisation".[2205]

678. Even the highly controversial doctrine of joint criminal enterprise demands that Mr. Mladić made a significant contribution to the crimes, which requires the accused's contribution to the common objective.[2206] How the acts and conduct of Mr. Mladić performing his routine duties as a

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[2197] *See* T. 25 August 2020 p. 57.
[2198] Trial Judgement, para. 3707.
[2199] *See* T. 25 August 2020 p. 57.
[2200] *See* T. 25 August 2020 pp. 57, 58.
[2201] *See* T. 25 August 2020 p. 58.
[2202] *See* T. 25 August 2020 p. 58.
[2203] *See* T. 25 August 2020 p. 58.
[2204] *See* Mladić Appeal Brief, para. 206, n. 308, *referring to Perišić* Appeal Judgement, paras. 57-69; T. 25 August 2020 p. 58.
[2205] *Perišić* Appeal Judgement, para. 57.
[2206] *See Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 58.

military commander had any tangible effect on crimes which were committed in furtherance of a common objective remains completely unanswered.[2207] This is an error.[2208]

679. The Trial Chamber ignored the reasonable inference of Mr. Mladić's comments and speech at the 16th Assembly Session when he first assumed his title in the VRS, wherein he stated: "*we do not want a war against the Muslims as a people, or against the Croats as a people*".[2209] This was said after Karadžić proclaimed the six strategic objectives, and its plain interpretation is *to only engage in war when attacked and against combatants, not civilians*, which is a legitimate stance.[2210]

680. Orders from the VRS Main Staff in evidence, particularly those from Mr. Mladić, were entirely lawful and legitimate.[2211] They were specific to the extent that can be interpreted as of a military nature.[2212] Their purpose cannot in any way be connected to any criminal plan or objective.[2213] For example:

i. In the VRS Main Staff Directive of 6 June 1992, Mr. Mladić provided updates on military and political developments, gave instructions on further military action to be taken, and indicated, *inter alia*, the goal to ensure the safety of aircrafts bringing in humanitarian aid and the normal supply of food and medications to the civilian population;[2214]

ii. On 23 June 1992, Mr. Mladić issued a VRS Main Staff Directive concerning the expansion of the corridor between Romanija and Semberija and the liberation of roads in the central watercourse of the Drina River;[2215]

iii. A VRS Main Staff letter of 17 October 1993, signed by Mr. Mladić, concerned the lack of control by Serbian forces in the illegal transfer of persons and goods, including the crossing of the frontline by refugees coming from enemy-controlled territory and enabling them and persons of mixed marriages to travel through *Republika Srpska*;[2216]

iv. On 16 April 1994, Mr. Mladić, noting global media attention, ordered that civilians and prisoners of war in Goražde be treated better, that "cruel treatments are severely forbidden,

[2207] *See* T. 25 August 2020 p. 58.
[2208] *See* Mladić Appeal Brief, para. 235; T. 25 August 2020 p. 58.
[2209] *See* Mladić Appeal Brief, para. 325, n. 475, *referring to* Exhibit P431, p. 33 (emphasis added); T. 25 August 2020 pp. 58, 59.
[2210] *See* Mladić Appeal Brief, para. 326; T. 25 August 2020 p. 59.
[2211] *See, e.g.*, Exhibits P474; P3673; P4145; D187; D726; D1514; T. 25 August 2020 p. 59.
[2212] *See* T. 25 August 2020 p. 59.
[2213] *See* T. 25 August 2020 p. 59.
[2214] *See* Exhibit P474.
[2215] *See* Exhibit P3673.
[2216] *See* Exhibit P4145.

as well as abuse and physical destruction of civilian population, prisoners of war and members of the international organizations", and that "[a]ll prisoners of war are to be treated in compliance with the international law of war";[2217]

v. In the VRS Main Staff Order of 14 May 1993, Mr. Mladić ordered, *inter alia*, the unhindered passage of humanitarian aid, and compliance with international humanitarian law, including the Geneva Conventions;[2218]

vi. In the VRS Main Staff Order of 16 June 1993, Mr. Mladić ordered that Commands at all levels were to ensure the delivery of humanitarian aid, and grant freedom of movement to all international humanitarian organizations;[2219] and

vii. In the VRS Main Staff Order of 28 November 1992, Mr. Mladić ordered, *inter alia*, that the Muslim population in specific villages should be protected from violence because they expressed loyalty to *Republika Srpska*.[2220]

681. Starting with a directive issued on 6 June 1992 where, upon assuming command of the VRS, Mr. Mladić consistently urged adherence to the Geneva Conventions and proper treatment of civilians and prisoners of war.[2221] These orders indicate that Mr. Mladić ordered his subordinates to abide by international law and did not order them to further the objectives of any common criminal objective.[2222]

682. Given the Trial Chamber's complete disregard of this direct evidence of lawful orders from Mr. Mladić, it is incumbent upon the Appeals Chamber to intervene in the Trial Chamber's *mens rea* analysis where this direct evidence of probative value has not been given sufficient weight.[2223]

5. Conclusion

683. For these reasons, I would vacate the Trial Chamber's convictions based on the Overarching JCE and grant Ground 3 of Mr. Mladić's appeal.

[2217] *See* Exhibit D187.
[2218] *See* Exhibit D726.
[2219] *See* Exhibit P5219.
[2220] *See* Exhibit D1514.
[2221] *See* Mladić Appeal Brief, paras. 311, 312, *referring to, inter alia*, Exhibit P474; T. 25 August 2020 p. 59.
[2222] *See* T. 25 August 2020 p. 59.
[2223] *See* T. 25 August 2020 p. 59.

D. Ground 4 – Sarajevo JCE

684. Mr. Mladić submits, *inter alia*, that the Trial Chamber erred in law by finding that the Tribunal has jurisdiction over the crime of terror.[2224] I note that, from the outset, Mr. Mladić's argument is focused on the fact that the criminalisation of terror could not be considered to have formed part of customary international law during the indictment period. He does not challenge the finding that there existed a custom on the prohibition against terror.[2225]

685. The legal basis upon which the Trial Chamber relied to the effect that it had jurisdiction on the crime of terror is found at paragraph 3185 of the Trial Judgement, where it held that "[t]he [ICTY] Appeals Chamber has confirmed that the Tribunal has jurisdiction over this crime" and cited two cases supporting this conclusion – the *Galić* Appeal Judgement and the *D. Milošević* Appeal Judgement.[2226]

686. The *Galić* Appeals Chamber, in the first instance, acknowledged *the UN* Secretary-General's remarks that "*the International Tribunal was expected to apply 'rules of international humanitarian law which are beyond any doubt part of customary law'*."[2227] The ICTY Appeals Chamber then went on to explain the importance of forensically analysing the jurisprudence to avoid confusing a custom prohibiting certain conduct with a custom that criminalises it.[2228] This was because "in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise".[2229]

687. After considering domestic practice to determine whether or not there was sufficient state practice to evidence a norm of customary international law for the criminalisation of terror, the ICTY Appeals Chamber in the *Galić* case found that individual criminal responsibility could be inferred from state practice.[2230] It pointed to six states to evidence state practice: the Ivory Coast, Czechoslovakia, Ethiopia, the Netherlands, Norway, and Switzerland.[2231] The other states it pointed to – Ireland, Bangladesh, the United States, China, and the Former Yugoslavia – on closer inspection did not, in fact, criminalise terror so cannot be said to constitute evidence of state

[2224] *See* Mladić Appeal Brief, paras. 336-349; Mladić Reply Brief, paras. 67-69; T. 25 August 2020 pp. 60-64; T. 26 August 2020 pp. 66-68.
[2225] *See* Mladić Appeal Brief, para. 341; T. 25 August 2020 p. 60.
[2226] *See* Trial Judgement, para. 3185, n. 13183, *referring to Galić* Appeal Judgement, paras. 87-90, *D. Milošević* Appeal Judgement, para. 30; T. 25 August 2020 p. 60.
[2227] *See Galić* Appeal Judgement, para. 81 (emphasis added); T. 25 August 2020 p. 61.
[2228] *See Galić* Appeal Judgement, para. 83; T. 25 August 2020 p. 61.
[2229] *See Galić* Appeal Judgement, para. 83; T. 25 August 2020 p. 61.
[2230] *See Galić* Appeal Judgement, para. 92; T. 25 August 2020 p. 61.

practice in this regard.[2232] Therefore, on the basis of six, or at best 12 states, the ICTY Appeals Chamber in the *Galić* case concluded beyond any doubt that a breach of the prohibition against terror in a manner corresponding to the additional protocols of the Geneva Conventions gave rise to individual criminal responsibility under customary international law.[2233] Judge Schomburg dissented,[2234] concluding that, while the *prohibition* of the crime of terror was indisputably part of international criminal law,[2235] its *penalization* was not supported by sufficient state practice at the time when Galić committed his crimes, and therefore individual criminal responsibility could not be attached to Galić on this basis.[2236]

688. The ICTY Appeals Chamber in the *D. Milošević* case relied on the *Galić* Appeal Judgement to conclude that the Tribunal had jurisdiction over the crime of terror because its criminalisation was part of customary international law.[2237] Judge Liu dissented in the *D. Milošević* Appeal Judgement.[2238] He endorsed Judge Schomburg's dissenting analysis in the *Galić* Appeal Judgement and concluded that a custom criminalising terror could not be established due to the absence of sufficient state practice.[2239] I endorse Judge Liu's and Judge Schomburg's analysis and join them in concluding that a custom criminalising terror cannot be established due to the absence of sufficient state practice at the time relevant to the Indictment.

689. It is important and instructive to consider the *Galić* Appeals Chamber's approach to state practice in light of the judgement in the *North Sea Continental Shelf* case.[2240] In this case, the International Court of Justice found that state practice could only evidence a custom where it was "both extensive and virtually uniform".[2241] Accordingly, where state practice is inconclusive, a custom cannot be established.[2242]

690. Of the six states that the *Galić* Appeals Chamber pointed to that did actually criminalise terror, there is not a single state from the Permanent Five Members of the UN Security Council at

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[2231] *See Galić* Appeal Judgement, paras. 94, 95; T. 25 August 2020 p. 61.
[2232] *See Galić* Appeal Judgement, paras. 94-96; T. 25 August 2020 p. 61.
[2233] *See Galić* Appeal Judgement, para. 96; T. 25 August 2020 p. 62.
[2234] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 9-13; Mladić Reply Brief, para. 68; T. 25 August 2020 p. 61.
[2235] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7, 19.
[2236] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 2, 4-24.
[2237] *See D. Milošević* Appeal Judgement, para. 30; T. 25 August 2020 p. 62.
[2238] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, paras. 1-13; T. 25 August 2020 p. 62.
[2239] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, paras. 1-13; T. 25 August 2020 p. 62.
[2240] *See North Sea Continental Shelf*, Judgement, 20 February 1969, ICJ Reports 1969, p. 3 ("*North Sea Continental Shelf* Judgement"); T. 25 August 2020 p. 62.
[2241] *See North Sea Continental Shelf* Judgement, para. 74; T. 25 August 2020 p. 62.
[2242] *See* T. 25 August 2020 p. 62.

the time, not a single one located in Asia, the Americas, or Oceania.[2243] There are no common law or other legal systems represented.[2244] The state practice that the *Galić* Appeal Judgement purported to find from these six states is insufficient evidence of settled practice, extensive practice, or virtually uniform practice as required by the *North Sea Continental Shelf* Judgement.[2245] In my view, the conclusion in the *Galić* Appeal Judgement falls demonstrably short of what was required to show beyond any doubt that the criminalisation of terror was part of customary international law at the material time.[2246]

691. The Fourth Condition, as set out by the ICTY Appeals Chamber in the *Tadić* Decision of 2 October 1995, reads: "the violation of the rule must entail, under customary international law, the individual criminal responsibility of the person breaching the rule" – a condition which was referenced by Judges Schomburg and Liu in their respective dissents in the *Galić* Appeal Judgement and the *D. Milošević* Appeal Judgement.[2247] Mr. Mladić submits that the *Galić* Appeal Judgement failed to establish such a custom.[2248] I agree. This is supported by Judge Schomburg's dissenting position in the *Galić* Appeal Judgement, as I have summarized in paragraph 687 above, as well as Judge Liu's dissent in the *D. Milošević* Appeal Judgement, where he stated that, in his view, "there is no basis to find that [the] prohibition [on the crime of terror] was criminalised beyond any doubt under customary international law at the time relevant to the Indictment".[2249] As a result, I find cogent reasons to depart from the *Galić* Appeal Judgement in this regard.

692. I now turn to the impact that the Trial Chamber's deference to the *Galić* Appeal Judgement had on Mr. Mladić's case. As demonstrated by paragraph 3185 of the Trial Judgement, the Trial Chamber relied on and recycled the erroneous legal basis proffered by the *Galić* Appeal Judgement for the criminalisation of terror.[2250] The error in the *Galić* Appeal Judgement was pointed out by the Defence at trial, but the Trial Chamber failed to engage with the issue and concluded that there was "nothing in the Defence's submissions which would lead it to deviate from the established case law".[2251] Had the Trial Chamber conducted any form of legal analysis, it could not have satisfied

[2243] *See Galić* Appeal Judgement, paras. 94-97; T. 25 August 2020 p. 62.
[2244] *See* T. 25 August 2020 p. 62.
[2245] *See* T. 25 August 2020 pp. 62, 63.
[2246] *See* T. 25 August 2020 p. 63.
[2247] *See Galić* Appeal Judgement, para. 91; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 5; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, para. 2; *Tadić* Decision of 2 October 1995, para. 94; T. 25 August 2020 p. 63.
[2248] T. 25 August 2020 p. 63.
[2249] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, para. 1.
[2250] *See* T. 25 August 2020 p. 63.
[2251] *See* Trial Judgement, para. 3185; T. 25 August 2020 p. 63.

itself beyond any doubt that the criminalisation of terror was part of customary international law during Mr. Mladić's indictment period.[2252]

693. The UN Secretary-General made it clear that the principle of *nullum crimen sine lege* required the Tribunal to apply rules that were beyond any doubt part of customary law at the time of the relevant offence.[2253] The criminalisation of terror does not meet this threshold.[2254] I am therefore of the view that the Trial Chamber fell into error when it relied on the *Galić* Appeal Judgement's findings that it could exercise jurisdiction over the crime of terror under Article 3 of the ICTY Statute.

694. For the foregoing reasons, I would grant Ground 4. Considerations on the crime of terror should not have been part of the analysis pertinent to the Sarajevo JCE.

E. Ground 5 – Srebrenica JCE

1. Forcible Transfer

695. As to forcible transfer, the Defence submits that the Trial Chamber selectively relied upon evidence, including from Witness Franken, a DutchBat officer, only when it supported its erroneous conclusion, but disregarded this witness's evidence that the forcible transfer was a humanitarian evacuation ordered, and indeed organised, at the highest levels of the UN, and that the UN asked Mr. Mladić to assist with this humanitarian evacuation.[2255] In these paragraphs alone, Witness Franken is selectively cited out of context no fewer than 61 times, and Witness Momir Nikolić is referred to 35 times in these same paragraphs.[2256] Witness Momir Nikolić is identified by the DutchBat and other witnesses as the main instigator of abuses relating to the buses, not Mr. Mladić.[2257] For example, the Defence submitted during trial that while Witness Momir Nikolić downplayed his role in the Hotel Fontana meetings, Witness Pieter Boering's evidence indicated that Witness Momir Nikolić was "in charge of everything at that point".[2258] The Trial Chamber also relied on other even lower-level DutchBat officers who may not have known of the evacuation

[2252] *See* T. 25 August 2020 pp. 63, 64.
[2253] *See Galić* Appeal Judgement, para. 81; T. 25 August 2020 p. 64.
[2254] *See* T. 25 August 2020 p. 64.
[2255] *See* Mladić Appeal Brief, paras. 575-583; Mladić Reply Brief, paras. 87, 88; T. 25 August 2020 pp. 64-71; Trial Judgement, paras. 2474-2478, 2480-2559.
[2256] *See* T. 25 August 2020 p. 65.
[2257] *See* T. 25 August 2020 p. 65.
[2258] *See* Trial Judgement, para. 2475; Mladić Final Trial Brief, para. 2567; Exhibit P1139, pp. 1878, 1879.

agreement that the UN presented to Mr. Mladić at his first meeting with Colonel Thom Karremans.[2259]

696. The Prosecution, in its response at paragraph 224, recalls that the Trial Chamber also relied upon the evidence of Witness Eelco Koster, an even lower-level subordinate who had a direct encounter with Mr. Mladić, relying on Witness Koster's testimony but not on the video of their encounter.[2260] The entire exchange is video recorded. Witness Koster has memorised events according to an incorrect contemporaneous interpretation he received on the ground that was not corrected until many years later by the translation services of the ICTY after a review of this video.[2261]

697. In the video clip:

> UNPROFOR member: Hmm ... Roger, I will inform my commander.
>
> Interpreter: He says that all of the people will get the buses –
>
> Mladić: Anyone who wishes to be transported will be transported, be the person small, big, old or young. Don't be afraid. Slowly, slowly, let the women and children go first. 30 buses will arrive and will transport you towards Kladanj. From here, you will pass onto the territory controlled by Alija's forces. Just don't panic. Let the children and the women go first. Be careful not to lose a child. Don't be afraid. Nobody will harm you.
>
> Man from the crowd: May you live long.[2262]

698. The Serbian words uttered by Mr. Mladić were mistranslated into something much worse to Witness Koster, who identified himself as the DutchBat soldier in the blue helmet speaking to Mr. Mladić via interpreter when shown this video during his testimony at trial.[2263] His commander on the radio is Witness Franken.[2264]

699. To demonstrate the veracity of Mr. Mladić's intent to engage in a humanitarian and voluntary evacuation, Mr. Mladić is seen in the video repeating to civilians that if they want to go, buses will be made available.[2265] As noted in the video clip referenced above, Mr. Mladić was thanked and praised by the crowd of Bosnian Muslim civilians.[2266] Later on in the same video, Mr. Mladić talks to another gathering of civilians explicitly telling them that those who want to stay and

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[2259] *See* Mladić Appeal Brief, para. 578; T. 25 August 2020 p. 65.
[2260] *See* Prosecution Response Brief, para. 224, n. 802, *referring to* Trial Judgement, para. 5118; T. 25 August 2020 p. 65.
[2261] *See* Mladić Reply Brief, para. 88; T. 25 August 2020 p. 66; Exhibit P1147.
[2262] *See* Exhibit P1147; T. 25 August 2020 p. 66.
[2263] *See* T. 20 July 2012 pp. 1229, 1230; T. 25 August 2020 pp. 66, 67.
[2264] *See* T. 25 August 2020 p. 67.
[2265] *See* Exhibit P1147; T. 25 August 2020 p. 67.
[2266] *See* Exhibit P1147; T. 25 August 2020 p. 67.

return to their homes may do so.[2267] Mr. Mladić's words and deeds in Potočari, spoken in the same language as that understood by the Bosnian Muslims, do not accord to the DutchBat lower level officer's understanding of the same.[2268]

700. First, what transpired before Mr. Mladić's appearance in Potočari, predating the arrival of the buses, is that the highest leadership of the UN had determined an evacuation was necessary for humanitarian reasons from Potočari.[2269] The Defence cited ample evidence in this regard at paragraph 578 of the Mladić Appeal Brief, including the evidence of Witnesses Cornelis Nicolai (UNPROFOR Chief of Staff in Bosnia and Herzegovina from 28 February to 2 September 1995), Pieter Boering (DutchBat Major from 3 January to July 1995), and Joseph Kingori (a Kenyan UNMO present in Srebrenica from March 1995 to around 20 July 1995).[2270]

701. Second, Witness Nicolai provided evidence that he had obtained the agreement of the Dutch Minister of Defence to issue an order to Colonel Karremans (the DutchBat Commander in Srebrenica) to obtain Mr. Mladić's help, to ask for it, for an urgent humanitarian evacuation from Potočari.[2271] This was before any of the meetings at the Hotel Fontana with Mr. Mladić.[2272]

702. Third, at the first Hotel Fontana meeting, the video shows that Colonel Karremans expressed that the Bosnian Muslim civilian leadership had asked to leave and conveyed the UN's request for assistance in a humanitarian evacuation to Mr. Mladić.[2273] This is confirmed by the Prosecution's military expert Witness Richard Butler, who stated that, based on his research, the "refugees wanted to leave" but that the circumstances under which they wanted to do so was "a matter of debate".[2274] Furthermore, Colonel Karremans's own deputy commander, Witness Boering, who was physically present, testified at trial that the UN did not have enough buses to do this evacuation on its own.[2275] Indeed, according to the evidence of Witness RM-253, the Muslim civilian leaders had already ordered their own people to leave, women and children and elderly to Potočari and fighters to Šušnjari.[2276]

[2267] *See* Exhibit P1147; T. 25 August 2020 p. 67.
[2268] *See* T. 25 August 2020 p. 67.
[2269] *See* Mladić Appeal Brief, para. 578; T. 25 August 2020 p. 67.
[2270] *See* Mladić Appeal Brief, para. 578, n. 659 and references cited therein; Trial Judgement, para. 4548; T. 25 August 2020 p. 67.
[2271] *See* Mladić Appeal Brief, para. 578, n. 661 and references cited therein; T. 25 August 2020 pp. 67, 68.
[2272] *See* T. 25 August 2020 p. 68.
[2273] *See* Exhibit P1147; Mladić Appeal Brief, para. 578, n. 663 and references cited therein; T. 25 August 2020 p. 68.
[2274] *See* Mladić Appeal Brief, para. 578, n. 662; T. 16 September 2013 p. 16825; T. 25 August 2020 p. 68.
[2275] *See* Mladić Appeal Brief, para. 578, nn. 663, 664 and references cited therein; T. 25 August 2020 p. 68.
[2276] *See* Exhibit P1547, para. 2; T. 11 June 2013 pp. 12516, 12517; T. 25 August 2020 p. 68.

703. These high level UN meetings and discussions involved UNPROFOR Commander General Rupert Smith, Ambassador Yasushi Akashi, and then-Under Secretary-General of the UN Kofi Annan.[2277] In my view, the sum total of all these meetings and discussions was that the UN asked for Mr. Mladić to help evacuate civilians out of Potočari.

704. In all three Hotel Fontana meetings, as demonstrated in video Exhibit P1147, Mr. Mladić is seen welcoming, offering comforts to attendees, including cigarettes, beer, and sandwiches for lunch.[2278] This pattern of behaviour is similarly demonstrated in the third Hotel Fontana meeting with Bosnian Muslim civilian attendees, including Mr. Mladić offering his own vehicle to safely escort a female participant, Ćamila Omanović, her daughter, grandchild, and mother during the evacuation.[2279] Prosecution Witness Richard Butler could not identify anything criminal said in these meetings by Mr. Mladić.[2280] In this regard, the witness testified that:

> in the technical sense that Srebrenica has just been captured, General Mladić is seeking the surrender of the 28th Division rather than to continue to engage them in battle, the fact that he would offer a cease-fire and the fact that he would make the necessary provisions to allow for those individuals to travel to, in this case the Hotel Fontana, to negotiate that surrender, I mean, that's all technically proper.[2281]

705. Demonstrative of its error, the Trial Chamber disregarded its own finding which accepted that during the Hotel Fontana meetings, Mr. Mladić offered civilians a choice to leave for Yugoslavia or the Federation or to stay in *Republika Srpska*.[2282] Witness Milovan Milutinović gave evidence that:

> Mladić gave the Muslim delegation his word that everyone gathered at Potočari who had surrendered their weapons could cho[o]se whether to go to 'Yugoslavia, the Federation' or to stay in the Bosnian-Serb Republic, and guaranteed them full rights and freedoms.[2283]

706. Returning to DutchBat officer Witness Franken, who is among the primary lower-level officers selectively relied upon to convert this humanitarian evacuation into the crime of forcible transfer, the Trial Chamber focused on Witness Franken's evidence to find "that the transportation of Bosnian Muslims out of Potočari to Kladanj was not a decision made by the Muslim delegation but rather ordered by Mladić".[2284] It is puzzling and a discernible error that the Trial Chamber

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[2277] *See* Exhibit D1479; T. 25 August 2020 p. 68.
[2278] *See* Exhibit P1147, p. 31; T. 25 August 2020 p. 69.
[2279] *See* Exhibit P1147, p. 50; T. 25 August 2020 p. 69.
[2280] *See* T. 25 August 2020 p. 69.
[2281] *See* T. 16 September 2013 p. 16831; T. 25 August 2020 p. 72.
[2282] *See* Trial Judgement, para. 2472; Mladić Appeal Brief, para. 579, n. 668 and references cited therein; T. 25 August 2020 p. 69.
[2283] *See* Trial Judgement, para. 2472.
[2284] *See* Trial Judgement, para. 5004; T. 25 August 2020 p. 69.

disregarded this witness's own testimony to the contrary, in violation of the principle of *in dubio pro reo*.[2285]

707. In this regard, Witness Franken acknowledged that his commander, Colonel Karremans, ordered the witness to assist the VRS with the humanitarian evacuation and that Franken later found that General Rupert Smith and other high-ranking UN officials had asked Mr. Mladić for the evacuation, and that separation of men was proper according to the laws of war to see if they were combatants.[2286] Most importantly, the Trial Chamber disregarded that Witness Franken had not viewed the entire Hotel Fontana video before.[2287] Against this backdrop, it was an error on the part of the Trial Chamber to rely selectively on the other evidence of Witnesses Franken, Koster, and other lower-level DutchBat officers in light of the overwhelming evidence, even from Witness Franken, and especially higher-level DutchBat and UN officials that demonstrate the UN, not Mr. Mladić, ordered this evacuation for humanitarian purposes, and that Mr. Mladić agreed with the UN to help.[2288] I support my views with the submissions of the former UNPROFOR Commander, General Sir Michael Rose, before the United Kingdom House of Lords on 6 September 2017, which Mr. Mladić sought to admit as additional evidence on appeal.[2289] According to General Sir Michael Rose's statement, "*the UN was succeeding remarkably well in […] delivering humanitarian aid [and] Bosnia remains one of the few major conflicts of our time where no one died, or very few people died, either of cold or hunger*".[2290] At this juncture, I mention that admission of this statement was rejected by the Majority of this Appeals Chamber.[2291] I dissented as I find that General Sir Michael Rose's statement is relevant, credible, exculpatory, and containing new evidence, which, if admitted, could have been a decisive factor in reaching the decision at trial and ought to have been admitted on appeal as additional new evidence, particularly because of the high position in the UN system that General Sir Rose held. He was involved in the negotiations and was actually on the ground. It should have been admitted pursuant to Rule 142(C) of the Rules, which provides:

> If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final

[2285] *See* T. 25 August 2020 p. 69.
[2286] *See* T. 8 May 2013 pp. 10804, 10807, 10817-10823, 10824, 10825; Exhibit D280, p. 6; T. 25 August 2020 p. 70.
[2287] *See* T. 8 May 2013 pp. 10803-10807; T. 25 August 2020 p. 70.
[2288] *See* T. 25 August 2020 p. 70.
[2289] Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with confidential Annex A and public Annex B) ("Motion of 31 December 2018").
[2290] Motion of 31 December 2018, Annex B, RP. 8772 (emphasis added).
[2291] Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), paras. 23, 117.

> judgement in accordance with Rule 144. Where the Appeals Chamber finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice.[2292]

708. This evidence impacts the Trial Chamber's assessment of Mr. Mladić's responsibility and convictions.[2293] I further note that the Prosecution, in its response to Mr. Mladić's motion to admit this additional evidence on appeal, submitted, *inter alia*, that:

> [s]hould the Appeals Chamber be minded to consider the [proposed additional evidence], [General Sir Michael Rose] should appear for cross-examination to allow the Prosecution to test [his] credibility and the reliability of [his] evidence.[2294]

709. In view of the above, I find that there was no forcible transfer of Bosnian Muslims from Srebrenica, nor was there a common objective for the alleged joint criminal enterprise under a correct view of the above evidence and under the appropriate standard.[2295] The requisite elements of establishing the crime of forcible transfer must include expulsion or other forms of coercion as to carrying out forced displacement of persons.[2296] The forced character of the displacement is determined by the absence of a genuine choice by the victim in his or her displacement.[2297] In all this, it must be established with proper application of the principle of *in dubio pro reo*.[2298] It is clear that in the Trial Judgement the Trial Chamber did not abide by this jurisprudence, nor by this standard, and thus committed a discernible error in convicting Mr. Mladić of forcible transfer.[2299]

2. Genocide, Extermination, and Murders

710. It is not disputed that, in addition to legitimate combat casualties, some individuals, including individuals from the local area, the MUP, and even Momir Nikolić and other rogue members of the VRS security professional line of command, took it upon themselves to conduct acts of revenge and killings of prisoners of war, but did so during the time-period when Mr. Mladić was not in the area and contrary to any orders of Mr. Mladić, or his knowledge at that time.[2300] The

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[2292] Rule 142(C) of the Rules.
[2293] Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), paras. 8-14.
[2294] Prosecution Response to Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 24 May 2019 (confidential; public redacted version filed on 6 June 2019), para. 32.
[2295] *See* T. 25 August 2020 p. 70.
[2296] *See* T. 25 August 2020 p. 70.
[2297] *See Stakić* Appeal Judgement, para. 279; *Krnojelac* Appeal Judgement, paras. 229, 233; T. 25 August 2020 pp. 70, 71.
[2298] *See* T. 25 August 2020 p. 71.
[2299] *See* T. 25 August 2020 p. 71.
[2300] *See* T. 25 August 2020 p. 71. Regarding orders from Mr. Mladić, *see* Mladić Appeal Brief, para. 620, *referring to, inter alia*, Trial Judgement, paras. 2323, 2359, 4329-4371, Exhibits D302, D303.

VRS security line had its own parallel chain of command, separate and apart from the normal chain of command, such that it could exclude Mr. Mladić.[2301]

711. It is noteworthy that the Krivaja-95 Military Operation was conceded to be a legitimate military operation due to the failure to demilitarise the Srebrenica "safe area". Lead Prosecution Counsel for this part of the case, Peter McCloskey, explicitly stated *during trial that Krivaja-95 had the objective to attack the Bosnia and Herzegovina forces, cut them off from the Žepa enclave, separate the two enclaves from supporting each other, which was a "legitimate military objective" to stop ABiH army activity*.[2302] The Prosecution's chief expert on Srebrenica, Witness Richard Butler, confirmed this during his testimony, stating that "*the VRS had the military legitimate right to attack the 28th Division" of the ABiH*.[2303] Further, Directive 7.1, issued by Mr. Mladić, replaced Directive 7, which was issued by President Karadžić, and both Directive 7.1 and the Krivaja-95 Order of the Drina Corps, by their wording, directed that civilians not be targeted and that the laws of war be followed including the Geneva Conventions.[2304] To this effect, the Krivaja-95 Order stated: "*In all dealings with prisoners of war and the civilian population abide by the Geneva Conventions*".[2305] Directive 7.1 stated that "*[a]ll forms of inappropriate behaviour [...] should be promptly and effectively punished*".[2306] The column of men and boys set out from Srebrenica in combat formation and armed, and engaged in ambushes, combat, suicides, infighting, minefields, and deaths in "kamikaze" style attacks.[2307] Unfortunately, we will never know the true number of actual legitimate casualties and those related to acts of the crime of murder.[2308]

712. Recall that at the Hotel Fontana meetings the language used by Mr. Mladić had been declared legitimate military language and non-criminal by Witness Richard Butler during his testimony. While already summarized above, I find it important to reiterate this Witness Butler's testimony that:

> General Mladić [wa]s seeking the surrender of the 28th Division [of the ABiH] rather than to continue to engage them in battle, the fact that he would offer a cease-fire and the fact that he would make the necessary provisions to allow for those individuals to travel to, in this case the Hotel Fontana, to negotiate that surrender, I mean, that's all technically proper.[2309]

[2301] *See* Trial Judgement, para. 4293; T. 25 August 2020 p. 71.
[2302] *See* T. 17 May 2012 p. 486 (emphasis added); T. 25 August 2020 pp. 71, 72.
[2303] *See* T. 11 September 2013 pp. 16498, 16499 (emphasis added); T. 25 August 2020 p. 72.
[2304] *See* Exhibits P1470 (Directive 7.1); D302 (Krivaja-95); T. 25 August 2020 p. 72.
[2305] Exhibit D302, p. 5 (emphasis added).
[2306] Exhibit P1470, p. 6 (emphasis added).
[2307] *See* Mladić Appeal Brief, para. 674 and references cited therein; T. 25 August 2020 p. 72.
[2308] *See* T. 25 August 2020 p. 72.
[2309] *See* T. 16 September 2013 p. 16831; T. 25 August 2020 p. 72.

713. Therefore, the Trial Chamber's conclusion that Krivaja-95 intended the ethnic cleansing of Bosnian Muslims from Srebrenica is an impermissible inference, unsupported by the evidence. This error was already addressed above in relation to forcible transfers.

714. In order to establish joint criminal enterprise liability for Mr. Mladić for genocide and killings in Srebrenica, the evidentiary bar was supposed to be set at a high level.[2310] As per the jurisprudence, for example, the *Milutinović et al*. Trial Judgement, the standard of proof is beyond a reasonable doubt, which presents a high hurdle for the Prosecution to overcome.[2311] The ICTY Trial Chamber stated that:

> [i]n order for an accused to be found guilty of a crime charged in an indictment, the Prosecution must prove beyond a reasonable doubt (a) each element of the statutory crime (including the *mens rea* and *actus reus* of the underlying offence and the general requirements for the statutory crime) and (b) the mental and physical elements of at least one of the forms of responsibility with which the accused is charged.[2312]

715. As articulated in the *Martić* Appeal Judgement, the standard of proof must meet more than "a high degree of probability".[2313] Furthermore, as set forth in the *Čelebići* Appeal Judgement, a trial chamber's finding must be the only available conclusion under law and fact, as existence of any alternative conclusion mandates acquittal.[2314] The ICTY Appeals Chamber stated, about concluding on the guilt of an accused in a circumstantial case, that:

> [s]uch a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[2315]

716. Additionally, since the charge is genocide, the evidence must, in accordance with stated high standards, establish specific intent, *dolus specialis*, for genocide.[2316] Since the mode of liability at issue is joint criminal enterprise, Mr. Mladić must be shown to have agreed to a common criminal purpose and significantly contributed to the same.[2317]

717. There are numerous instances where the Trial Chamber erred in respect of applying the jurisprudence to the facts.[2318] Per the Prosecution's submissions and the Trial Judgement, the joint criminal enterprise to kill and commit genocide in Srebrenica did not even exist prior to the night

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[2310] *See* T. 25 August 2020 p. 72.
[2311] *See Milutinović et al*. Trial Judgement, Vol. 1, para. 62; T. 25 August 2020 pp. 72, 73.
[2312] *Milutinović et al*. Trial Judgement, Vol. 1, para. 62.
[2313] *See Martić* Appeal Judgement, para. 57; T. 25 August 2020 p. 73.
[2314] *See Čelebići* Appeal Judgement, para. 458; T. 25 August 2020 p. 73.
[2315] *Čelibići* Appeal Judgement, para. 458.
[2316] *See Munyakazi* Appeal Judgement, para. 141; T. 25 August 2020 p. 73.
[2317] *See Stanišić and Župljanin* Appeal Judgement, paras. 110, 136, 917; T. 25 August 2020 p. 73.
[2318] *See* T. 25 August 2020 p. 73.

between 11 and 12 July 1995.[2319] As discussed above, under the jurisprudence, conduct and statements before the pertinent joint criminal enterprise and outside its temporal scope cannot be used to prove Mr. Mladić was part of that joint criminal enterprise. However, as to the Srebrenica JCE, the Trial Chamber does precisely erroneously rely on that type of evidence and so does the Prosecution.[2320] As elaborated below regarding the evidence of Witness Momir Nikolić, the Trial Chamber and the Prosecution also relied on circumstantial evidence and hearsay to establish Mr. Mladić's agreement to a criminal plan requiring specific intent to commit genocide in addition to murder.[2321] It is noteworthy that the Prosecution agrees that Mr. Mladić was not in Srebrenica, but far away in Belgrade when the killings started.[2322]

718. Again, as to the Hotel Fontana meetings that are on video, both Prosecution and Defence military experts say the language used was appropriate as it was aimed in the context of the armed 28th Division of the ABiH still on the loose in the area of Srebrenica.[2323] Without any direct orders, without any direct evidence linking Mr. Mladić to any killings, the Trial Chamber committed its gravest error.

719. The key insider witness relied upon by the Chamber is Witness Momir Nikolić.[2324] In fact, it was not Witness Momir Nikolić himself but primarily hearsay evidence, including Exhibit D1228, which encompasses hearsay notes of an interview taken by Prosecution investigator Bruce Bursik for the purposes of litigation that is among the main sources cited.[2325] It should be noted that Exhibit D1228 was not presented for the truth of the matters asserted in it but was only presented to Witness Momir Nikolić by the Prosecution to confirm an illusionary hand gesture from an unclear location from a purported meeting with Mr. Mladić.[2326] The Trial Chamber rejected that as being unreliable evidence.[2327] Exhibit D1228 was only used in cross-examination of Witness Bursik to establish that Witness Momir Nikolić lacked credibility and was evasive.[2328] Witness Bursik could not corroborate Witness Momir Nikolić as to any encounter with Mr. Mladić.[2329] Exhibit D1228

[2319] *See* Prosecution Final Trial Brief, para. 1063; Trial Judgement, para. 4926; Mladić Appeal Brief, para. 586; T. 25 August 2020 p. 73.
[2320] *See* Prosecution Response Brief, paras. 270-278; Trial Judgement, paras. 2358-2362; T. 25 August 2020 pp. 73, 74.
[2321] *See* T. 25 August 2020 p. 74.
[2322] *See* T. 25 August 2020 p. 74.
[2323] *See* Mladić Appeal Brief, para. 595 and references cited therein; T. 25 August 2020 p. 74.
[2324] *See* Mladić Appeal Brief, para. 587, n. 678 and references cited therein; Trial Judgement, paras. 4926, 4927, 4970, 5096, 5097, 5128; T. 25 August 2020 p. 79.
[2325] *See* Exhibit D1228; T. 25 August 2020 p. 79.
[2326] *See* Trial Judgement, para. 5127; T. 25 August 2020 p. 79.
[2327] *See* Trial Judgement, para. 5127; T. 25 August 2020 p. 79.
[2328] *See* Mladić Appeal Brief, paras. 588-592; T. 25 August 2020 p. 79.
[2329] *See* Mladić Appeal Brief, paras. 588-592; T. 25 August 2020 pp. 79, 80.

could not be relied upon as to the truth of the hearsay comments of Witness Momir Nikolić as it would be in violation of the *lex specialis* of then Rules 92 *bis* and *ter* of the ICTY Rules.[2330]

720. Witness Momir Nikolić is someone who appears everywhere – everywhere that there are killings, either directing them or as an accomplice. He admitted to hiding crimes from superiors, including the VRS Main Staff.[2331] In this regard, I note and accept the Defence submission that Witness Momir Nikolić confirmed that he concealed the killings from his commanders and provided misleading information about "asanacija/sanitisation" to cover up reburials.[2332] The Trial Chamber further erred in relying upon Witness Momir Nikolić's evidence despite another insider, Witness RM-265, who testified as to opportunistic revenge killings that they witnessed in the presence of Witness Momir Nikolić, and that prisoners of war taken to schools in Zvornik were undertaken under the orders of Witness Momir Nikolić and his superior within the security chain of command in the brigade, Lieutenant-Colonel Popović.[2333] Witness RM-265 did not implicate Mr. Mladić in any of Witness Momir Nikolić's or Popović's illegal and criminal activities.[2334]

721. It is noteworthy that Witness Momir Nikolić's security chain of command superior, Popović, was implicated by another Prosecution insider witness from the VRS, a high-ranking officer, Witness RM-376, who also does not implicate Mr. Mladić in any of the events relating to revenge killings, but does identify that the very same Popović of the security chain of command asked for volunteers outside the army, i.e., civilians, to execute Bosnian Muslim prisoners, which this VRS officer refused.[2335]

722. This begs the question – if Mr. Mladić, Commander of the VRS Main Staff, had hypothetically or implicitly agreed to significantly contribute to genocide, why would security officers aligned with Witness Momir Nikolić, not even in the direct chain of command to Mr. Mladić, be in charge of the killings, and why would they be asking for non-army volunteers to do the killing while actual VRS officers and subordinates under Mr. Mladić refused such requests and never received them from Mr. Mladić through the normal chain of command?[2336]

[2330] *See* Mladić Appeal Brief, para. 590, n. 691 and references cited therein; T. 25 August 2020 p. 80.
[2331] *See* T. 3 June 2013 pp. 11965, 11966; Exhibit D301, p. 7; T. 25 August 2020 p. 80.
[2332] T. 3 June 2013 pp. 11965, 11966, 11969. *See also* Mladić Appeal Brief, para. 632; T. 25 August 2020 pp. 80, 81. According to the Defence, Witness Momir Nikolić's report to the VRS Main Staff supports his statement that he concealed the crimes as it only contained information that wounded Muslim prisoners and Muslim UN staff were being evacuated. *See* Mladić Appeal Brief, para. 632, n. 773, *referring to* Exhibit P1515.
[2333] *See* Exhibit P2540, pp. 40, 41; T. 25 August 2020 p. 80.
[2334] *See* T. 25 August 2020 p. 80.
[2335] *See* Exhibit P1594, pp. 31-42; T. 25 August 2020 pp. 80, 81.
[2336] *See* T. 25 August 2020 p. 81.

723. In my view, this demonstrates an error in the Trial Chamber's implied reasoning linking Mr. Mladić to these crimes.

724. Witness Momir Nikolić pleaded guilty to try to get a better deal for himself, despite having his arms soaked in blood.[2337] Further, this witness confirmed he destroyed documentary evidence which could have compromised him in relation to Srebrenica crimes.[2338] Regarding this alleged meeting, at an unclear location, Witness Momir Nikolić could not be relied upon by the Trial Chamber as to this meeting because even he did not have direct evidence about it.[2339]

725. No fewer than five insider witnesses, three from the Defence, two from the Prosecution, gave direct evidence that the only meeting during this critical time period was related to Žepa and contained only legitimate military instructions.[2340] By disregarding this evidence in favour of the impermissible hearsay of Witness Momir Nikolić, the Trial Chamber erred. This is particularly true given the jurisprudence that accomplice evidence is to be treated with caution.[2341] The ICTR Appeals Chamber in the *Setako* Appeal Judgement highlighted such concerns and indicated that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[2342] Momir Nikolić had a HUGE incentive to lie as evidenced by the Plea Agreement between him and the Prosecution whereby genocide was dropped from his indictment in consideration of him testifying against others, including Mr. Mladić.[2343] It paid well as evidenced by the fact that Momir Nikolić was eventually sentenced to 20 years only[2344] for an offence carrying a life sentence, if the charge of genocide had not been dropped. According to the *Setako* Appeal Judgement, "when weighing the probative value of [the evidence of accomplice witnesses], the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered".[2345]

726. In the instant case as to Witness Momir Nikolić, the Trial Chamber erred, and in doing so, tried to make this witness the illusory link to Mr. Mladić with the joint criminal enterprise that

[2337] *See* T. 25 August 2020 p. 81.
[2338] *See* Exhibit D301, p. 7; T. 25 August 2020 p. 81.
[2339] *See* Trial Judgement, para. 4953; Mladić Appeal Brief, para. 587; T. 25 August 2020 p. 81.
[2340] *See* Mladić Appeal Brief, para. 594; T. 25 August 2020 p. 82.
[2341] *See* T. 25 August 2020 p. 82.
[2342] *See Setako* Appeal Judgement, para. 143; T. 25 August 2020 p. 82.
[2343] *See M. Nikolić* Sentencing Trial Judgement, paras. 13, 16-19.
[2344] *See M. Nikolić* Sentencing Appeal Judgement, para. 135, p. 48.
[2345] *See Setako* Appeal Judgement, para. 143; T. 25 August 2020 p. 82.

could not be proven in accordance with the prevailing legal jurisprudence and thus resorted to the legal fiction of guilt by implication.[2346]

727. Further evidence by several Prosecution and Defence witnesses attests to the fact that Mr. Mladić made similar non-criminal statements to captured or surrendered members of the 28th Division of the ABiH column, where he tells them they will be fed and then transported and exchanged with the other side's forces.[2347] For example:

i. Witness Zoran Malinic testified that "prisoners [did] not need to be afraid because they would return to their houses and be exchanged";[2348]

ii. Witness RM-253 testified that Mr. Mladić said to the prisoners: "You do not have to worry. You will be exchanged and join your families in Tuzla. Now you'll be transported by trucks to Bratunac or Kravica where you will spend the night and get some food";[2349] and

iii. Witness Bojan Subotić testified that Mr. Mladić "went in among [the prisoners and] shook hands with some of them. [...] He talked with them [...] and they stood up and applauded. And he told them that they would be exchanged, [...] and he told us strictly to take care of the prisoners, that some buses would be arriving within an hour, that the men should [...] all board the bus and deliver it to the civilian police in Bratunac".[2350]

728. This evidence also shows us that Mr. Mladić's direct orders to subordinates were consistent with protecting these prisoners during transportation and medical aid and water were provided to them in accordance with these orders.[2351] As set out before in paragraphs 680, 681, and 711, Mr. Mladić issued orders that prisoners of war should be treated well and in accordance with international law.

729. In light of the foregoing, I am not persuaded that such actions could be considered a significant contribution to the implied joint criminal enterprise related to killings in Srebrenica that

[2346] *See* T. 25 August 2020 p. 82.
[2347] These include, *inter alia*, Witnesses RM-253, Zoran Malinić, Bojan Subotić. *See* T. 13 June 2013 pp. 12659-12662; T. 11 June 2013 p. 12532; T. 9 March 2015 pp. 32826, 32827; T. 25 August 2020 pp. 82, 83.
[2348] *See* T. 13 June 2013 p. 12659.
[2349] *See* T. 11 June 2013 p. 12532.
[2350] *See* T. 9 March 2015 pp. 32826, 32827.
[2351] *See* T. 9 March 2015 pp. 32826, 32827; Exhibit D926, paras. 30-34; T. 25 August 2020 p. 83.

the Trial Chamber concluded.[2352] The Trial Chamber's findings do not accord with the principle of *in dubio pro reo*.[2353]

3. Alibi

730. While Mr. Mladić was far from Srebrenica attending to a secret peace meeting with the international community, in Belgrade at a wedding, and at a hospital, he could not have effective control, nor information from Bosnia and Herzegovina, let alone exercise command.[2354] His absence was not contested by the Prosecution at trial.[2355] The Trial Chamber's failure to give a reasoned opinion as to four routine orders issued in this time, between 14 and 16 July 1995, when Mr. Mladić was away, by others under Mr. Mladić's name, is set forth in paragraphs 610 to 612 of the Mladić Appeal Brief, including errors as to an inference that Mr. Mladić personally signed such orders from another country, and failure to analyse and give weight to their content because none of them related to Srebrenica, and each had log entries showing they did not come from Mr. Mladić's office.[2356]

731. The Trial Chamber's conclusion that Mr. Mladić issued the orders and was in command and control while he was physically and geographically absent from Srebrenica in another country is contrary to evidence and is therefore a discernible error.[2357] It disregarded and contradicted itself in the Trial Judgement at paragraph 4299 in stating that "[i]n Mladić's absence, reports were to be submitted to Milovanović".[2358] Witness Milovanović, VRS Chief of Staff, and other military witnesses confirmed that during this time period when Mr. Mladić was gone in July of 1995 Milovanović was in charge as deputy commander to Mr. Mladić.[2359]

732. As set out in paragraph 605 of the Mladić Appeal Brief, Mr. Mladić attended a meeting where a plan was signed to allow the ICRC access to Srebrenica prisoners of war and that they were to be exchanged "all for all" with the other side for Serb detainees.[2360] Also, a lasting and

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[2352] *See* T. 25 August 2020 p. 83.
[2353] *See* T. 25 August 2020 p. 83.
[2354] *See* Mladić Appeal Brief, para. 605; T. 25 August 2020 p. 83.
[2355] *See* Mladić Appeal Brief, para. 605 and references cited therein; T. 25 August 2020 p. 83.
[2356] *See* Mladić Appeal Brief, paras. 610-612 and references cited therein; T. 25 August 2020 p. 83. The four orders from the VRS Main Staff concerned (i) hours of operation of a communications centre; (ii) the transport of DutchBat members; (iii) the passage of a UNPROFOR commander; and (iv) the maintenance of round-the-clock communication duty shifts. *See* Exhibits P2122, P2123, P2124, and P2125.
[2357] *See* T. 25 August 2020 pp. 83, 84.
[2358] *See* T. 25 August 2020 p. 84.
[2359] This includes evidence from Witnesses Milovanović and Stevanović. *See* T. 18 September 2013 pp. 16950, 16987; T. 7 May 2015 p. 35265; T. 25 August 2020 p. 84.
[2360] *See* Mladić Appeal Brief, para. 605; Trial Judgement, para. 5016; T. 25 August 2020 p. 84.

permanent cease-fire was negotiated to try to end the war.[2361] No reasonable trier of fact could conclude that Mr. Mladić could engage in complex peace negotiations with high officials in Dobanovci, Serbia, with UN officials, while exercising effective control in Srebrenica.[2362] Such conduct, agreeing to allow the ICRC access to Srebrenica prisoners of war before exchanging them, cannot be used to support knowledge of, nor a purported contribution to, any joint criminal enterprise to exterminate, let alone commit genocide against these same persons.[2363]

4. Status of Victims

733. It must be emphasized that any illegal killings in Srebrenica that were outside of combat are reprehensible, but they are not tied to Mr. Mladić.[2364] The Trial Chamber erred in not performing any analysis to determine which were victims of murder and which were deaths that resulted from alternate legitimate reasons.[2365] The Trial Chamber relied upon adjudicated facts to establish all were victims of crimes and all were civilians.[2366] In doing so, the Trial Chamber disregarded its own finding that armed elements of the column of men in Srebrenica had casualties.[2367]

734. The Trial Chamber further disregarded the Prosecution's own demography expert, Witness Ewa Tabeau, whose evidence indicated that 70 per cent of the victims were registered as soldiers of the ABiH.[2368] It also disregarded evidence rebutting Adjudicated Fact 1476 and showing that bodies in the mass graves came from different events in different years and included legitimate casualties of combat, such as suicides, minefields, "kamikaze" attacks, etc.[2369] Both Defence and Prosecution forensic experts relating to the alleged blindfolds said they could have been bandanas dropped over the eyes as bodies decayed, bandanas as seen in the footage of the ABiH fighters that arrived in Tuzla from Srebrenica.[2370]

735. The lack of analysis by the Trial Chamber therefore failed to establish the number of victims and their relation to any crime, let alone genocide.[2371]

[2361] *See* T. 25 August 2020 p. 84.
[2362] *See* T. 25 August 2020 p. 84.
[2363] *See* T. 25 August 2020 p. 84.
[2364] *See* T. 25 August 2020 p. 84.
[2365] *See* T. 25 August 2020 pp. 84, 85.
[2366] *See* Mladić Appeal Brief, paras. 669-672; Trial Judgement, paras. 3062, 3546; T. 25 August 2020 p. 85.
[2367] *See* Mladić Appeal Brief, para. 671; Trial Judgement, paras. 2395, 2444, 2446, 2573-2586, 2615-2645; T. 25 August 2020 p. 85.
[2368] *See* Mladić Appeal Brief, para. 671 and references cited therein; T. 25 August 2020 p. 85.
[2369] *See* Mladić Appeal Brief, para. 674 and references cited therein; T. 25 August 2020 p. 85.
[2370] *See* Mladić Appeal Brief, para. 674, n. 829 and references cited therein; T. 25 August 2020 p. 85.
[2371] *See* T. 25 August 2020 p. 85.

5. Conclusion

736. In light of the foregoing, I find that the Trial Chamber erred in convicting Mr. Mladić for the crimes related to the Srebrenica JCE, including genocide. I would thus grant Ground 5 of his appeal in its entirety.

F. Ground 6 – Hostage-Taking JCE

737. I agree with the Majority disposition regarding the alleged errors related to the Hostage-Taking JCE.

G. Ground 8.A – Failure to Ensure Equality of Arms

738. The principle of equality of arms provides that each party must have a reasonable opportunity to defend its interests under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.

739. Rule 85 of the ICTY Rules provides that each party is entitled to call witnesses and present evidence and according to Rule 87(A) of the ICTY Rules the hearing shall be closed when "both parties have completed their presentation of the case".

740. As stated elsewhere herein, Trial Chambers may use their discretionary powers in the interests of justice. According to Rule 73 *ter* (F) of the ICTY Rules, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. Contextual factors of the case, including the potential importance of a witness's evidence, may be relevant considerations in determining whether to grant additional time for a party to present evidence.

741. Mr. Mladić contends that [REDACTED]. Specifically, he contends that [REDACTED]. By denying these requests the Trial Chamber failed to consider or gave insufficient weight to the relevance, context and potential impact of the testimonies of [REDACTED], as well as the interests of justice. The Trial Chamber's summary denial of evidence was an unreasonable exercise of its discretion. The "questionable relevance" and "negligible probative value" could only be determined if the witnesses had been heard, and cross-examined by the Prosecution.

742. The Trial Chamber noted that [REDACTED] would provide first-hand experience [REDACTED][2372] and found it relevant and concluded that the anticipated testimonies of [REDACTED] were not significant as to weigh in favour of varying the deadline for presentation of the Defence case. This was a discernible error and the Trial Chamber's error invalidates the findings made on Srebrenica and Sarajevo to the extent of the error identified.

743. By denying these two defence witnesses the Trial Chamber violated the principle of equality of arms, which requires that each party must have a reasonable opportunity to defend its interests and also that each party is entitled to call witnesses and present evidence and that the hearing shall be closed when both parties have completed their presentation of the case. The Trial Chamber committed a discernible error by summarily denying the requests for their testimony to be heard resulting in considerable prejudice to the Defence case. The decision is so unfair and unreasonable as to constitute an abuse of the Trial Chamber's discretion.

744. In reference to paragraphs 787 and 793 of the Mladić Appeal Brief, I note that the Trial Chamber erroneously did not allow the Defence to call one witness who was a member of the Srebrenica column of Bosnian Muslim men.[2373] It was submitted that since trial, they have died, thus increasing the gravity of this refusal and this error.[2374]

H. Ground 8.D – Disclosure Violations

745. Mr. Mladić submits that the Trial Chamber failed to provide an adequate remedy for the Prosecution's disclosure violations. I agree with Mr. Mladić that, as a consequence of the Prosecution's late disclosures and failure to provide metadata with disclosure through Electronic Disclosure Suite, he was left at an unfair disadvantage and his ability to prepare his defence was impaired. The Trial Chamber's failure to remedy this constituted an error, and thus Ground 8.D must be granted.

I. Ground 9 – Sentence

746. As concluded by the majority, the principle of *nulla poene sine lege* prohibits retroactive punishment. Further, Article 15 of the International Covenant on Civil and Political Rights stipulates *inter alia* that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed. Additionally, at the time of commission of the

[2372] *See* Decision of 15 August 2016, para. 7, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 13-16.
[2373] *See* Mladić Appeal Brief, paras. 787, 793 and references cited therein; T. 25 August 2020 pp. 85, 86.
[2374] *See* T. 25 August 2020 p. 86.

crimes charged, the domestic sentencing practice of the former Yugoslavia had a maximum sentence of 20 years.

747. The health of the Appellant is also a factor. He was already of ill health by the time he was incarcerated at the United Nations Detention Unit. Numerous medical reports indicate how his health deteriorated further while in detention awaiting his appeal. He was hospitalised leading to an operation. Taking into account all the above factors and giving them sufficient weight, I would have imposed a sentence of 20 years imprisonment.

J. Conclusion

748. As set out above, having considered the Indictment, the Trial Judgement, the jurisprudence and authorities cited herein, as well as the written and oral submissions of the parties, I reiterate my disagreement with the Majority's determination to dismiss all grounds of Mr. Mladić's appeal. I am of the view that Mr. Mladić has satisfied the high standard set out on appeal and would thus grant Grounds 1 to 5 and 7 to 9 of his appeal in their entirety.

749. The Trial Chamber's errors and their impact as elaborated elsewhere, but more specifically in Grounds 3 through to 5, and 7 to 9 of Mr. Mladić's Appellant's Brief individually or cumulatively invalidate the Trial Chamber's findings on which his convictions rest.

750. In view of all the above, taking into account the nature and scale of the errors of law identified in this case, pursuant to Rule 144(C) of the Rules, I would order that Mr. Mladić be retried before another trial chamber on all counts excluding Ground 6 concerning the Hostage-Taking JCE.

751. As stated above, given the complexity of the case and the size of the case file and the appeal and constrained by the requirements to proceed expeditiously and work remotely, I have only addressed errors on the Trial Chamber's part that I deem most egregious.

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

Done this 8th day of June 2021, at The Hague, The Netherlands

Judge Prisca Matimba Nyambe

[Seal of the Mechanism]

VII. JOINT PARTIALLY DISSENTING OPINION OF JUDGE N'GUM AND JUDGE PANTON

752. After considering the Indictment, the Trial Judgement, as well as the written and oral submissions of the parties on appeal, we respectfully disagree with the Majority's decision to dismiss Grounds 1 and 2 of the Prosecution's appeal. It is our considered opinion that the Prosecution has demonstrated that the Trial Chamber erred in acquitting Mladić of genocide under Count 1 of the Indictment. In this opinion, we elaborate on our reasons for reaching such a decision.

753. Under Count 1 of the Indictment, the Prosecution alleged that between 31 March 1992 and 31 December 1992, Mladić committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat groups, as such, in some municipalities of Bosnia and Herzegovina, particularly Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica.[2375]

754. The Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[2376] However, the Trial Chamber was not convinced that the crime of genocide formed part of the objective of the Overarching JCE.[2377] In this regard, the Trial Chamber found that Bosnian Muslims and Bosnian Croats are protected groups within the meaning of Article 4 of the ICTY Statute[2378] and that a large number of Bosnian Muslims and/or Bosnian Croats in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica municipalities were the victims of prohibited acts of genocide, such as killings and acts causing serious bodily or mental harm which contributed to the destruction of their groups.[2379] The majority of the Trial Chamber further found that with respect to the municipalities of Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica, or the "Count 1 Municipalities", certain physical perpetrators of the prohibited acts had the intent to destroy a part of the Bosnian Muslim group when carrying out these acts.[2380] Nevertheless, the Trial Chamber was not convinced beyond reasonable doubt that those perpetrators intended to destroy the Bosnian Muslims in these

[2375] *See* Indictment, paras. 35-39.
[2376] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[2377] Trial Judgement, para. 4237. *See also* Trial Judgement, paras. 4234-4236.
[2378] Trial Judgement, para. 3442.
[2379] Trial Judgement, paras. 3446, 3451.

municipalities "as a *substantial* part of the protected group".[2381] The Trial Chamber was also not convinced beyond reasonable doubt that the Bosnian Serb leadership possessed genocidal intent.[2382] The Trial Chamber accordingly acquitted Mladić of genocide under Count 1 of the Indictment.[2383]

755. For the reasons explained below, we are in agreement with the Prosecution's submission that the Trial Chamber committed an error in finding that: (i) the Bosnian Muslim communities in the Count 1 Municipalities, or the "Count 1 Communities", did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina (Ground 1 of the Prosecution's Appeal);[2384] and (ii) Mladić and other members of the Overarching JCE did not possess "destructive intent" (Ground 2 of the Prosecution's Appeal).[2385] We respectfully disagree with the Majority's decision to dismiss the Prosecution's Appeal and find that the Appeals Chamber should have granted the Prosecution's request to convict Mladić of genocide under Count 1 of the Indictment pursuant to the first form of joint criminal enterprise.[2386]

A. Ground 1 of the Prosecution's Appeal: The Trial Chamber's Errors in Finding that the Bosnian Muslim Communities in the Count 1 Municipalities Did Not Constitute a Substantial Part of the Bosnian Muslim Group in Bosnia and Herzegovina

756. In concluding that it could not find that the physical perpetrators of the prohibited acts of genocide intended to destroy the Count 1 Communities "as a *substantial* part of the protected group", the Trial Chamber found that: (i) the physical perpetrators had limited geographical control or authority to carry out activities; (ii) the Bosnian Muslims targeted in each of the Count 1 Municipalities formed a relatively small part of the Bosnian Muslim population in the Bosnian Serb-claimed territory or in Bosnia and Herzegovina as a whole; and (iii) there was insufficient evidence indicating why the Count 1 Municipalities or Count 1 Communities had a special significance or were emblematic in relation to the Bosnian Muslim group as a whole.[2387]

757. We note the Prosecution's submission that the Trial Chamber erroneously concluded that the Count 1 Communities did not constitute a substantial part of the Bosnian Muslim group as: (i) the Count 1 Communities consisted of many thousands of Bosnian Muslims, had a unique historic

[2380] Trial Judgement, paras. 3511, 3513, 3515, 3519, 3524, 3526, 4236.
[2381] Trial Judgement, paras. 3535, 3536 (emphasis added).
[2382] *See* Trial Judgement, paras. 4236, 4237.
[2383] Trial Judgement, para. 5214.
[2384] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16, 45, 46; Prosecution Reply Brief, paras. 1, 3-18.
[2385] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 1, 3, 19-41; Prosecution Reply Brief, paras. 1, 19-38.
[2386] *See* Prosecution Notice of Appeal, paras. 4, 9; Prosecution Appeal Brief, paras. 1, 4, 17, 18, 42-47.

and cultural identity that made them prominent and emblematic of the Bosnian Muslim group as a whole, and held immense strategic importance for the Bosnian Serb leadership; and (ii) the territories of the Count 1 Municipalities represented the full extent of the perpetrators' respective areas of activity and control.[2388]

758. We recall that Article 4(2) of the ICTY Statute defines genocide to encompass certain prohibited acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, including: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; and (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. As correctly recalled by the Trial Chamber, the *mens rea* required for genocide is a specific intent to destroy, in whole or in part, a protected group.[2389] The ICTY Appeals Chamber in the *Krstić* case held that where only part of a protected group is targeted, that part must constitute a substantial part of that group such that it is significant enough to have an impact on the group as a whole.[2390] It further held that the determination of when the targeted part is substantial enough to meet this requirement may be guided by a number of "non-exhaustive and non-dispositive" considerations, such as: (i) the numeric size of the targeted part of the group in both absolute terms as well as in relation to the overall size of the entire group; (ii) its prominence within the group and whether it is emblematic of the overall group or essential to its survival; and (iii) the area of the perpetrators' activity and control and the possible extent of their reach.[2391] Based on a review of the Trial Chamber's findings concerning these factors, it is our considered opinion that the only reasonable inference from the evidence is that the perpetrators intended to destroy the Bosnian Muslims in the Count 1 Municipalities as a substantial part of the Bosnian Muslims in Bosnia and Herzegovina.

759. Firstly, with respect to the numeric size of the targeted group, the Trial Chamber noted that in April 1991, there were approximately 1.9 million Bosnian Muslims, comprising 43.7 per cent of the population of Bosnia and Herzegovina.[2392] In relation to the Count 1 Communities, the Trial Chamber noted that Bosnian Muslims constituted 47 per cent of the population in Sanski Most (amounting to 28,136 people), 51 per cent of the population in Foča (amounting to 20,790 people),

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[2387] Trial Judgement, paras. 3535, 3536 (emphasis added). *See also* Trial Judgement, paras. 3530-3534.
[2388] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16, 45, 46; T. 26 August 2020 pp. 74, 82-85, 99-101.
[2389] *See* Trial Judgement, paras. 3433, 3435; Article 4(2) of the ICTY Statute.
[2390] *See* Trial Judgement, para. 3437, *referring to Krstić* Appeal Judgement, para. 8. *See also Popović et al.* Appeal Judgement, para. 419.
[2391] *Krstić* Appeal Judgement, paras. 12-14. *See* Trial Judgement, paras. 3437, 3528. *See also Karadžić* Appeal Judgement, para. 727; *Tolimir* Appeal Judgement, para. 261; *Popović et al.* Appeal Judgement, para. 422.
[2392] *See* Trial Judgement, para. 3529.

30 per cent of the population of Kotor Varoš (amounting to 11,090 people), 55 per cent of the population in Vlasenica (amounting to 18,727 people), and 44 per cent of the population in Prijedor (amounting to 49,700 people).[2393] While the Trial Chamber found that the number of Bosnian Muslims in each of the Count 1 Municipalities would have formed a larger proportion of the population of Bosnian Muslims in the Bosnian Serb-claimed territory than they did of Bosnia and Herzegovina as a whole, it concluded that they were still a relatively small part of the population under Bosnian Serb activity and control.[2394] In our considered opinion, while the Bosnian Muslim group in each of the Count 1 Municipalities ranged between approximately 0.57 and 2.6 per cent of the entire Bosnian Muslim group in Bosnia and Herzegovina, this size is nevertheless substantial as it translates into the targeting of tens of thousands of Bosnian Muslims in these municipalities. Significantly, the Bosnian Muslim group in Prijedor Municipality formed approximately 2.6 per cent of the Bosnian Muslim population in Bosnia and Herzegovina. The Bosnian Muslim group targeted by the VRS 6th Krajina Brigade under the command of Basara charged with the take-over of Sanski Most and Prijedor Municipalities formed approximately 4.1 per cent of the Bosnian Muslim population in Bosnia and Herzegovina.[2395] Consequently, we consider that the mass scale targeting of 49,700 Bosnian Muslims in one municipality and 77,836 Bosnian Muslims in two municipalities, on its own and in the context of an overall limited size of the Bosnian Muslim population of 1.9 million, is substantial in size. To put this into perspective, the Bosnian Muslim group in Srebrenica, which the Trial Chamber had found to constitute a substantial part of the Bosnian Muslim population, formed less than two per cent of the overall Bosnian Muslim group.[2396] The numeric size of the Bosnian Muslim group in the Count 1 Municipalities is even more significant when considered cumulatively in relation to the overall size of the Bosnian Muslim group as a whole. In this regard, we find it unreasonable that the Trial Chamber concluded that 6.7 per cent of the Bosnian Muslim group, comprising 128,443 Bosnian Muslims in all Count 1 Municipalities, formed "a relatively small part" of the overall size of approximately 1.9 million Bosnian Muslims.[2397]

[2393] *See* Trial Judgement, paras. 3530-3534.

[2394] *See* Trial Judgement, paras. 3530-3534. The Trial Chamber noted that the Bosnian Muslims in: Sanski Most formed approximately 1.5 per cent; Foča formed approximately 1.08 per cent; Kotor Varoš formed approximately 0.57 per cent; and Vlasenica formed approximately 0.97 per cent of the Bosnian Muslim population in Bosnia and Herzegovina. *See* Trial Judgement, paras. 3530-3533. With respect to Prijedor, the Trial Chamber incorrectly found that the Bosnian Muslims of Prijedor comprised 2.2 per cent, rather than approximately 2.6 per cent, of the overall Bosnian Muslim group in Bosnia and Herzegovina. *See* Trial Judgement, paras. 3529, 3534; Prosecution Appeal Brief, para. 9, n. 14.

[2395] *See* Trial Judgement, paras. 3530, 3534.

[2396] Trial Judgement, para. 3551.

[2397] *See* Trial Judgement, paras. 3529-3535. *Cf. Brđanin* Trial Judgement, para. 967, n. 2440 (where the Trial Chamber found that 10.78 per cent of Bosnian Muslims – amounting to 233,128 out of 2,162,426 – and 7.96 per cent of Bosnian Croats – amounting to 63,314 out of 795,745 – living in certain municipalities constituted a substantial part of the protected groups, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in Bosnia

760. Secondly, as correctly recalled by the Trial Chamber, in determining whether the targeted part of the protected group is substantial, consideration must be given, *inter alia*, to the physical perpetrators' activity, control, and reach.[2398] In this regard, the Trial Chamber found that the authority of the following Bosnian Serb forces charged with the take-over of each of the Count 1 Municipalities did not extend beyond those municipalities from early to mid-1992 onwards: (i) the VRS 6th Krajina Brigade under the command of Basara charged with the take-over of Sanski Most and Prijedor Municipalities; (ii) the VRS Foča Tactical Brigade under the command of Marko Kovač charged with the take-over of Foča Municipality; (iii) the VRS 1st Kotor Varoš Brigade and VRS 22nd Brigade under the command of Janko Trivić charged with the take-over of Kotor Varoš Municipality; (iv) the Vlasenica SJB under the command of Mane Đurić charged with the take-over of Vlasenica Municipality; and (v) the 43rd Motorized Brigade charged with the take-over of Prijedor Municipality.[2399] The Trial Chamber further found that from the perspective of the physical perpetrators belonging to those forces, the Bosnian Muslims in each municipality were the only part of the Bosnian Muslim group within their area of control.[2400] As noted by the Trial Chamber, the perpetrators committed the prohibited acts of genocide and other culpable acts in each of the Count 1 Municipalities within their geographical control, on a mass scale, and in a short period of time.[2401] Within the span of only a few months, very few Bosnian Muslims were left in the Count 1 Municipalities.[2402] Moreover, considering that the intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him,[2403] the perpetrators in this case targeted the destruction of the Bosnian Muslim group in their respective municipalities to the possible extent of their reach and the opportunity presented to them, within their "limited geographical control or authority to carry out activities".[2404] These considerations, in our view, reinforce rather than preclude the inference that the perpetrators intended to destroy a substantial part of the Bosnian Muslim group.

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and Herzegovina, and considered it unnecessary to inquire further into other relevant factors to determine substantiality). *See also* T. 26 August 2020 pp. 84, 85, 100-102.

[2398] Trial Judgement, para. 3528, *referring to Krstić* Appeal Judgement, paras. 13, 14.

[2399] *See* Trial Judgement, paras. 3530-3534.

[2400] *See* Trial Judgement, paras. 3530-3535.

[2401] *See* Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535.

[2402] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.

[2403] *Krstić* Appeal Judgement, para. 13 ("The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis."). *See also Karadžić* Appeal Judgement, para. 727.

[2404] *See* Trial Judgement, para. 3535.

761. Thirdly, the Trial Chamber's findings on the importance of the Count 1 Municipalities and Count 1 Communities further supports the conclusion that the targeting of Bosnian Muslims in these municipalities is significant enough to have an impact on the Bosnian Muslim group as a whole. A case in point is that, in assessing the importance of Sanski Most, the Trial Chamber considered that Karadžić and Krajišnik stressed the strategic significance of this municipality and the need to retain it.[2405] It further considered Krajišnik's statement at the 50th session of the Bosnian Serb Assembly that "[t]he fact that we have organised this jubilee session in Sanski Most, a beautiful town in Krajina, is symbolical. Our presence here is a guarantee that Sanski Most was Serbian and will remain such, regardless of map-drawing and those engaged in such futile efforts".[2406]

762. Additionally, in assessing the importance of Foča Municipality, the Trial Chamber considered that in September 1992, the Crisis Staff and War Commission President Miroslav Stanić informed Mladić that Foča "was supposed to be the second Islamic Centre for Muslims in Europe" but was now 99 per cent Serb.[2407] It further noted that during the war, Bosnian Serb authorities renamed Foča "Srbinje" or "town of the Serbs" and that in January 1994, Karadžić explained that Foča "is extremely important to" the Muslims, "but it will never be theirs again".[2408] The Trial Chamber noted that Vojislav Maksimović, the Bosnian Serb Republic Commissioner for Foča, promoted a "firm attitude that the Muslims and the Croats will not be allowed to return to the areas under our rule" and that "any thought about having 500 or more Muslims within our future country is out of the question".[2409] The Trial Chamber also noted that in August 1994, Krajišnik praised Bosnian Serbs in Foča for having created "a true Serbian town" and preventing Foča from becoming "another Mecca".[2410]

763. Moreover, with respect to Kotor Varoš Municipality, the Trial Chamber considered that it was, marginally, a majority Serb municipality and such municipalities with a majority Serbian population were targeted to become a part of the *Republika Srpska*.[2411] It found that being located almost on the border of the Federation and *Republika Srpska* made Kotor Varoš strategically important.[2412]

[2405] Trial Judgement, para. 3530.
[2406] Trial Judgement, para. 3530.
[2407] Trial Judgement, para. 3531.
[2408] Trial Judgement, para. 3531.
[2409] Trial Judgement, para. 3531.
[2410] Trial Judgement, para. 3531.
[2411] Trial Judgement, para. 3532.
[2412] Trial Judgement, para. 3532.

764. Furthermore, in assessing the importance of Vlasenica Municipality, the Trial Chamber found that it was understood that controlling Vlasenica would have allowed the advancement of the first and third strategic objectives and that forcing the Muslim population to leave Vlasenica would have created access to Eastern Herzegovina.[2413] In this regard, the Trial Chamber noted Mladić's statement that "whoever controls Vlasenica, controls eastern Bosnia".[2414]

765. Additionally, with respect to Prijedor Municipality, the Trial Chamber found that this municipality was significant to the Bosnian Serbs because of its location as part of the land corridor that linked the Serb-dominated area in the Croatian Krajina in the west with Serbia and Montenegro in the east and south, which was said to be essential for supplying units of the VRS as it was the only land connection between western Bosnia and Herzegovina and Serbia.[2415] The Trial Chamber considered that senior figures in the Bosnian Serb-claimed territory emphasised that Prijedor and the Bosnian Muslim and Bosnian Croat communities living there symbolised World War II throughout the region.[2416] The Trial Chamber further considered that *Republika Srpska* Prime Minister Vladimir Lukić said in a speech that Prijedor had to be Serb because it had been Serb-majority before "the slaughter", referring to World War II.[2417] The Trial Chamber noted that in 1994, Karadžić continued to emphasise the need for continuing Serb control over Prijedor.[2418] It found that Prijedor, as a multi-ethnic area, was a symbol throughout the region of Yugoslavia of "brotherhood and unity", to the extent that Bosnian Muslims thought it was "the last town where ethnic conflict was possible".[2419] The Trial Chamber recalled its findings that after the Serbian Democratic Party's take-over of Prijedor Town with the aid of the military and police forces on 30 April 1992, a Serbian flag was raised over the Municipal Assembly building and VRS soldiers changed the name of the town to "Serbian Prijedor" and occupied all of the prominent institutions such as the radio station, medical centre, and bank.[2420] It further recalled its finding that sometime before the attack on Prijedor, the President of the Autonomous Region of Krajina Crisis Staff,

[2413] Trial Judgement, para. 3533. The Trial Chamber found that, on 12 May 1992, the Bosnian Serb Assembly adopted the six strategic objectives presented by Karadžić, which included the demarcation of a Serbian state separate from any Croatian and Muslim state and involved the separation of people along ethnic lines. *See* Trial Judgement, paras. 3694-3702, 3708, 4222, 4460, 4625, *referring to, inter alia*, Exhibit P431.
[2414] Trial Judgement, para. 3533.
[2415] Trial Judgement, para. 3534.
[2416] Trial Judgement, para. 3534.
[2417] Trial Judgement, para. 3534.
[2418] Trial Judgement, para. 3534.
[2419] Trial Judgement, para. 3534.
[2420] Trial Judgement, para. 3534.

Radoslav Brđanin, said on television that "non-Serbs would not need wood for the winter", which among the non-Serb population was understood as a concealed threat and caused fear and panic.[2421]

766. Consequently, after taking into consideration the Trial Chamber's findings above and the abundance of evidence concerning the importance of the Count 1 Municipalities and Count 1 Communities, we find it unreasonable that the Trial Chamber concluded that it "received insufficient evidence indicating why the Bosnian Muslims [in these municipalities] had a special significance or were emblematic in relation to the protected group as a whole".[2422] To the contrary, these findings, in our opinion, clearly indicate the prominence and emblematic nature of the Bosnian Muslim group in each Count 1 Municipality in relation to the protected group in Bosnia and Herzegovina. To put this into perspective, similar factors have been considered by the Trial Chamber and other chambers of the ICTY to support findings that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group.[2423] For example, the Trial Chamber considered Mladić's statement that Srebrenica was a large "Islamic and Turkish" stronghold until the war started, that "although they had been the majority population there, the heritage did not belong to the 'Turks'", and that the Drina was a synonym of domination over the Serbs, dating from the time of the powerful Turkish empire.[2424] The Trial Chamber found that the enclave of Srebrenica was of significant strategic importance to the Bosnian Serb leadership during the conflict because the majority Bosnian Muslim population of this region made it difficult for them to claim the land as inherently Serb, Srebrenica was in close geographical proximity to Serbia and therefore was required for maintaining a Serb-populated border area contiguous with Serbia, and during the war, Srebrenica also became a refuge to Bosnian Muslims from the region especially when it was designated a UN safe area.[2425]

767. Furthermore, we disagree with the Majority's determination that the Trial Chamber's findings and evidence referred to by the Prosecution concerning the Count 1 Communities do not reflect a similar threat to the viability or survival of the Bosnian Muslim group as it did with respect

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[2421] Trial Judgement, para. 3534.
[2422] *See* Trial Judgement, para. 3535.
[2423] *See* Trial Judgement, paras. 3552, 3554. *See, e.g.*, *Popović et al*. Appeal Judgement, para. 422 (affirming that the strategic importance of Srebrenica is a relevant factor in determining whether the substantiality requirement is met); *Krstić* Appeal Judgement, paras. 15 ("Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted."), 16 ("In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. […] In its resolution declaring Srebrenica a safe area, the Security Council announced that it 'should be free from armed attack or any other hostile act.'"). *See also Karadžić* Trial Judgement, para. 5672; *Tolimir* Appeal Judgement, paras. 186-188; *Popović et al.* Appeal Judgement, paras. 420-426; *Tolimir* Trial Judgement, para. 774; *Popović et al.* Trial Judgement, para. 865.
[2424] Trial Judgement, para. 3552.

to Srebrenica.[2426] In our opinion, while the events in Srebrenica took place three years after the events in the Count 1 Municipalities, the elimination of Bosnian Muslims in Srebrenica is not completely independent from the destruction of the Count 1 Communities. As acknowledged by the Majority, the destruction directed against each of the Count 1 Communities may have "represented powerful, early steps in the Bosnian Serb campaign towards an ethnically homogeneous state".[2427] Consequently, it is our considered opinion that the only reasonable inference based on the evidence is that the destruction of the Bosnian Muslims in Bosnia and Herzegovina started with the destruction of Bosnian Muslims in certain municipalities, including the Count 1 Communities, and culminated in the destruction of Bosnian Muslims in Srebrenica. In this regard, the killings and cruel and inhumane treatment of thousands of Bosnian Muslims in the Count 1 Municipalities in 1992, in the context of other crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation committed throughout Bosnia and Herzegovina between 1991 and 30 November 1995, could not *but* have threatened the ultimate survival of the Bosnian Muslim group in Bosnia and Herzegovina.[2428]

768. As a case in point, in Prijedor alone, the Trial Chamber found that at least 993 Bosnian Muslims were killed, where they were slaughtered by the hundreds.[2429] In this regard, with respect to Scheduled Incident A.6.1, from 24 until around 26 May 1992, over 800 inhabitants of the predominantly Bosnian Muslim town of Kozarac were killed during the shelling of the town and its surrounding villages. The shelling was followed by the advance of tanks and infantry, during which houses were set on fire and civilians and policemen were killed. When a doctor tried to negotiate safe passage of a severely injured boy to a hospital, the perpetrators responded that they would kill the Muslims anyway.[2430] In relation to Scheduled Incident B.13.1, the killing of between 190 and 220 Bosnian Muslim and/or Bosnian Croat detainees at Keraterm camp on or around 25 July 1992, occurred by corralling them into a single room, using some form of chemical gas to cause the

[2425] Trial Judgement, para. 3554.
[2426] *See supra* para. 581.
[2427] *See supra* para. 581.
[2428] *See* Trial Judgement, paras. 3446, 3451, 4224-4232, 4610. The Trial Chamber found that in relation to Foča Municipality, 46 Bosnian Muslims as well as hundreds of predominantly Bosnian-Muslim detainees at KP Dom Foča were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.2.1, B.5.1. In relation to Kotor Varoš Municipality, the Trial Chamber found that at least 185 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incident A.4.4, Unscheduled Incidents of 13 June 1992 and 2 July 1992. In relation to Prijedor Municipality, the Trial Chamber found that at least 993 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.6.1, A.6.2, A.6.3, A.6.4, A.6.5, A.6.6, A.6.7, A.6.8, A.6.9, B.13.1, B.13.2, B.13.3, B.13.4, B.13.5, C.15.3, C.15.5. In relation to Sanski Most Municipality, the Trial Chamber found that at least 94 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.7.1, A.7.2, A.7.3, A.7.4, A.7.5. In Vlasenica Municipality, the Trial Chamber found that at least 169 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.9.1, B.16.1, B.16.2.
[2429] *See* Trial Judgement, para. 3446.
[2430] *See* Trial Judgement, paras. 1036-1041, 3051, 3053, 3073, p. 1602.

detainees to panic, and then using a machine gun aimed at the entrance of the room to shoot the detainees as they exited. The soldiers and guards proceeded to shoot detainees inside the room, including some who were trying to hide in the toilets. There was intermittent singing by the Serb guards while the shooting occurred as well as singing long into the night following the killings.[2431]

769. The Trial Chamber also found that thousands of Bosnian Muslims detained in Foča, Prijedor, and Vlasenica Municipalities were subjected to serious bodily or mental harm and that this harm contributed to the destruction of the protected group. The Trial Chamber considered that the brutality of the harm had a long-lasting, devastating, physical, and mental impact on the victims who survived, which gravely affected their ability to lead normal and constructive lives. Other victims, who were later killed, suffered before facing their deaths.[2432] In this regard, Bosnian Muslim detainees, including civilian men, women, and children were subjected to severe mistreatment such as beatings, torture, rape, sexual violence, starvation, and lack of medical care in a discriminatory manner.[2433]

770. For example, in relation to Scheduled Incident C.6.1, between 12 May 1992 and October 1994, non-Serb civilian men, mostly of Bosnian Muslim ethnicity, between the ages of 15 and 80 years, were detained from four months to more than two and a half years at KP Dom and referred to by the derogatory term "*balija*". In the summer of 1992, there were about 500 to 600 detainees crowded into a small number of rooms. Many of them were stabbed, blindfolded, made to stand spread-eagled against a wall, chained to a wall, and regularly beaten with batons, a thick wire, or sticks.[2434]

771. In relation to Scheduled Incidents C.6.2, C.6.3, C.6.4, and C.6.5, Bosnian Muslim civilian detainees lived in an atmosphere of intimidation and were held in unhygienic conditions and not provided with sufficient food, hot water, or medical care. During July and August 1992, several groups of Bosnian Muslim women and girls as young as 12 years old were "kept" and repeatedly raped by many soldiers simultaneously and consecutively and forced to have sexual intercourse with the men they were "assigned to". The women and girls were held in the house and were forced to cook, clean, and wash uniforms for the soldiers. They were severely beaten if they refused to obey orders. Some women were burnt with cigarettes.[2435]

[2431] *See* Trial Judgement, paras. 1121, 1122, 3051, 3092, pp. 1605, 1606.
[2432] Trial Judgement, para. 3451.
[2433] *See* Trial Judgement, para. 3451, *referring to*, *inter alia*, Scheduled Incidents C.6.1, C.6.2, C.6.3, C.6.4, C.6.5 , C.15.2, C.15.3, C.15.4, C.15.5, C.19.3, and Unscheduled Incident at Vlasenica Secondary School.
[2434] *See* Trial Judgement, paras. 652-655.
[2435] *See* Trial Judgement, paras. 664-666, 673, 683, 684, 689, 690.

772. In relation to Scheduled Incident C.15.2, the Trial Chamber found that between 27 May and 16 August 1992, approximately 3,300 Bosnian Muslims and Bosnian Croats were detained at Omarska camp. The detainees included the elderly, women, and children, including impaired and sick people. The detainees also included politicians and religious leaders who were earmarked for elimination as well as persons who associated themselves with those leaders. The detainees were fed starvation rations of usually spoiled food. Drinking water was often denied to the detainees for long periods and, when it was provided, it was unfit for human consumption such that it caused intestinal problems. There were acute cases of diarrhea and dysentery. Some detainees lost 20 to 30 kilograms, or considerably more, in body weight. There was very little in the way of lavatory provision with detainees having to wait for hours to use them and often forced to excrete and urinate in their rooms. With no effective washing facilities, detainees and their clothes quickly became filthy in the summer heat and skin diseases were prevalent. Often guards refused to open windows in crowded rooms or demanded the handing over of possessions in return for an open window or a plastic jar of water. As many as 600 prisoners were made to sit or lie prone outdoors on the *pista*, regardless of the weather, for many days and nights on end with machine guns trained on them. The detainees were not provided with any medical care and were frequently and severely beaten. During interrogations detainees were knocked off chairs, hit, kicked, trodden, and jumped upon while interrogators looked on. After their interrogation, in some instances, detainees were made to sign false statements regarding their involvement in acts against Serbs. Detainees were called out from their rooms and attacked with a variety of sticks, iron bars, or lengths of heavy electric cable. Other forms of beatings inflicted on detainees included throwing detainees onto burning tires, strikes to a detainee's mouth resulting in broken teeth, beatings of detainees with metal and other implements sometimes resulting in broken bones, placing a knife against a detainee's throat to obtain money, forcing a man to drink motor oil, and forcing detainees to walk on broken glass. Detainees were humiliated: they were regularly forced to sing Serb songs, one detainee was forced to hit his head against a wall, one detainee was forced to beat another, at least one detainee was forced to lick his own blood, another was forced to cross the *pista* naked whilst pursued by a guard with a whip. Both male and female detainees were regularly threatened with death and subjected to derogatory ethnic remarks and insults which included phrases like "Fuck your *balija* mothers, your *Ustaša* mothers. You all need to be killed". On religious holidays or if the relative of a guard was killed in the battlefield, beatings intensified. Female detainees were raped and sexually assaulted. One detainee was ordered by Serb guards to strip naked together with a female detainee and was forced to rape her. Other detainees could hear those being raped screaming

and crying for help and could identify bruises and marks on their faces and arms and other signs of abuse and beatings.[2436]

773. In relation to Scheduled Incident C.15.3, the Trial Chamber found that Keraterm camp held approximately 4,000 male and female detainees, including civilians and primarily Bosnian Muslim and Bosnian Croat men. Detainees were locked in a number of unlit, intensely hot, and insufficiently ventilated rooms for days on end. There was barely enough space for them to lie down on the concrete floors. The conditions at the camp were unsanitary. Detainees had access to only one toilet, which they could use once per day. After it became blocked, they were provided with barrels that leaked. There were infestations of lice and dysentery. Detainees were provided with insufficient food and water and suffered from malnutrition and starvation. No medical care for illnesses was provided at the camp. Guards called detainees out of their cells and beat them on a nightly basis, in some instances with rifle butts, brass knuckles, iron bars, and other implements. On one occasion, detainees were beaten for two to three hours. On another occasion, guards ordered arriving detainees to lie face down on hot asphalt with their hands behind their necks and, when a detainee tried to avoid contact with the asphalt, a guard kicked him in the head. A detainee was shot in the palm and a guard called him an "*Ustaša*" or "*balija*" for asking permission to use the toilet. In another instance, two detainees were shot for fidgeting and their Croat and Muslim mothers were cursed. Detainees were also beaten if they did not eat their bread rations quickly enough and they were forced to lean against the wall on three fingers and sing "Chetnik" songs. Guards, members of paramilitary units, or civilians raped female detainees at the camp. In one instance in mid-July 1992, a number of guards raped a female detainee until she lost consciousness and awoke the next morning lying in a pool of blood. A guard then ordered her to clean herself up, took her to the yard, and made her sit on a rock for several hours.[2437]

774. In relation to Scheduled Incident C.15.4, the Trial Chamber found that Trnopolje camp was in operation from at least 26 May 1992 until the end of September 1992. From late May to early June 1992, there were approximately 8,000 detainees and by late August 1992, up to 4,000 people were detained at the camp. The detainees were Bosnian Muslim and Bosnian Croat civilians, including women and children. The buildings at Trnopolje were insufficient to house all the detainees, causing many of them to camp outdoors with little or no shelter. There was no electricity, nor were there beds, blankets, or bathing facilities in the camp. There was no running water and the little drinking water that was available was dirty and contaminated. There were very limited

[2436] *See* Trial Judgement, paras. 1231-1236.
[2437] *See* Trial Judgement, paras. 1265-1269.

lavatory facilities and the camp authorities supplied an insufficient amount of food to the detainees. In some cases, food was distributed only to those who could pay for it. Because of the lack of sufficient food as well as the unsanitary and crowded conditions, lice and scabies were rampant and the majority of detainees suffered from dysentery. The detainees also suffered from a wide range of ailments including hepatitis, chronic diarrhea, and high fevers. Several detainees had their teeth removed with pliers without the use of anesthetic. Some of the wounded detainees had maggots in their wounds. Camp guards frequently and severely beat detainees with baseball bats, iron bars, rifle butts, their hands and feet, or whatever they had at their disposal. In August 1992, a Serb guard who came from Keraterm camp, greeted newly arriving detainees by saying "[g]od help you Turks" and beat a detainee severely and began kicking him and jumping on him after the detainee had fallen down. The guards beat some detainees to death. A Bosnian woman who had been detained along with her children and registered as a "Hambarine extremist" upon arrival, was accused by camp guards of buying and storing arms. The guards called her a "*balija*" and beat her in the presence of her children whom the guards also threatened. Camp guards and others, including VRS soldiers from outside the camp, raped many women and girls in and around the camp. These guards and soldiers were allowed in the camp to select their victims, the youngest of whom was 12 years old. A Bosnian Muslim woman was raped nearly every night for approximately a month. She was also threatened, beaten, and stabbed on multiple occasions when she resisted and was threatened that other soldiers would be brought in to rape her. During these rapes she was told: "let's see how Muslim women fuck", "your Muslims are raping our Serbian sisters, so now it is your turn to see how it is", and "Muslim women must have Serbian children".[2438]

775. In relation to Scheduled Incident C.15.5, the Trial Chamber found that from around 21 July 1992, 114 predominantly Bosnian Muslim and Bosnian Croat unarmed men were detained at Miška Glava Dom, in a small café in hot conditions for several days. One of the men was separated from the group when he said that his mother was a Serb and the rest were ill-treated while forced to sing songs about Greater Serbia. The detainees were provided with a single loaf of bread and a packet of sweets to share for three days and they had to sing songs about Greater Serbia in order to obtain water. The detainees were regularly beaten with fists and rifle butts.[2439]

776. In relation to Scheduled Incident C.19.3, the Trial Chamber found that between 2,000 and 2,500 Bosnian Muslims of both genders and all ages, including civilians, were detained at Sušica camp. In June and July 1992, approximately half of the detainees were women. The detainees were

[2438] *See* Trial Judgement, paras. 1322-1325.
[2439] *See* Trial Judgement, para. 1329.

held in unhygienic conditions and not provided with sufficient food, water, or medical care. They were frequently and severely beaten and referred to as "*balija*'s mother". The guards also subjected them to mistreatment, such as scaring them by putting a knife in their mouths if they asked questions, tying their thumbs together behind their backs with wire and then tying them to rain spouts at the warehouse entrance, forcing them to remain in a kneeling position all day, and stabbing them in the mouth. The guards and people coming from outside the camp also raped female detainees.[2440]

777. In relation to the Unscheduled Incident at Vlasenica Secondary School, the Trial Chamber found that between 31 May 1992 and 8 June 1992, about 160 men were detained in Vlasenica secondary school including Bosnian Muslim men aged between 13 and 87. During their detention, the detainees were not allowed to maintain personal hygiene, with no functioning lavatories provided in the building. They were fed a small slice of bread and a small portion of egg each day. There were two liters of water for 160 people each day. They were severely beaten, including when they refused to sing songs identified as "Chetnik" songs. The guards put out cigarettes on the hands of a detainee and said to another detainee "if you don't lick this blood by the time I return, I will cut your throats".[2441]

778. Furthermore, as discussed above, these prohibited acts of genocide, along with other culpable acts of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation committed within the scope of the Overarching JCE, were committed on a large scale and were of a systematic, organized, and discriminatory nature.[2442] Within the span of only a few months, there were only very few Bosnian Muslims left in the Count 1 Municipalities.[2443] For example, in considering the forced displacement in Kotor Varoš Municipality, the Trial Chamber noted Witness Pašić's evidence that: (i) six Bosnian Muslim families remained in Hrvaćani when his family fled in mid-1992; (ii) after leaving Hrvaćani, the witness and his family, along with 50 to 70 people, mainly civilians, returned to Hrvaćani en route to another location and encountered Serb soldiers who called them "*balijas*" and who told the group that there was nothing left for them in Hrvaćani and that they should go to Turkey; and (iii) in their passage through Hrvaćani, "the village

[2440] *See* Trial Judgement, paras. 1794-1796.
[2441] *See* Trial Judgement, para. 1802.
[2442] *See*, *e.g.*, Trial Judgement, paras. 3446, 3451, 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535, 4224-4232, 4610.
[2443] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.

was destroyed, houses had been stripped, animals killed, and the elderly who had remained were either shot or burnt".[2444]

779. After the continuous attacks against the Bosnian Muslims in the municipalities in Bosnia and Herzegovina, including the Count 1 Municipalities, the process of the destruction of the Bosnian Muslim group culminated in Srebrenica in 1995, which became one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*. Therefore, based on the Trial Chamber's findings and evidence discussed above, we are convinced that the destruction of the Count 1 Communities, as with respect to the Bosnian Muslims in Srebrenica, similarly threatened the viability or survival of the Bosnian Muslim group as a whole.

780. As correctly put by the Prosecution, "the only consideration that stood in the way of the [Trial] Chamber's finding that genocide was committed by the local perpetrators [was 'substantiality']".[2445] We take note of the Prosecution's submission that the concern behind the statement "[i]f only a part of the group is targeted for destruction, it must be a substantial part to be considered genocide" was to ensure that the label of genocide is not imposed "lightly" or applied to crimes that are too small.[2446] However, in light of the above considerations concerning the size of the targeted group, the area of the perpetrators' activity and control, the prominence and emblematic nature of the Count 1 Municipalities and Count 1 Communities, the patterns of heinous crimes, as well as the threat or impact on the viability and survival of the Bosnian Muslim group in Bosnia and Herzegovina, finding that the Count 1 Communities constituted a substantial part of the group would be anything but applying the term genocide "lightly". Similarly, based on these considerations, we are of the view that the Prosecution has shown that all reasonable doubt of guilt has been eliminated and that no reasonable trial chamber could have found that the perpetrators did not intend to destroy the Bosnian Muslims in the Count 1 Municipalities as a *substantial* part of the protected group in Bosnia and Herzegovina. We therefore respectfully disagree with the Majority's finding that the Prosecution has failed to demonstrate that the Trial Chamber erred in concluding that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina. We find that the Appeals Chamber should have granted Ground 1 of the Prosecution's Appeal.

[2444] Trial Judgement, paras. 949, 952, *referring to* T. 9 July 2012 pp. 550, 551, 553, 555, 556.
[2445] T. 26 August 2020 p. 82.
[2446] T. 26 August 2020 p. 83, *referring to Krstić* Appeal Judgement, para. 37 ("[The] proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.").

B. Ground 2 of the Prosecution's Appeal: The Trial Chamber's Errors in Finding that Members of the Overarching JCE Did Not Possess "Destructive Intent"

781. As recalled above, the Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[2447] The Trial Chamber found that crimes related to the Overarching JCE were committed throughout the following "Municipalities" in Bosnia and Herzegovina, including in the Count 1 Municipalities: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, and Vlasenica.[2448] It concluded that members of the Overarching JCE included Karadžić, Krajišnik, Plavšić, Koljević, Subotić, Mandić, Stanišić, and Mladić,[2449] who used "tools", which included VRS and MUP members, to commit these crimes.[2450]

782. With respect to the Count 1 Municipalities, the Trial Chamber found that a large number of Bosnian Muslims in these municipalities were the victims of prohibited acts of genocide, such as killings and acts causing serious bodily or mental harm which contributed to the destruction of their groups.[2451] In particular, the Trial Chamber determined that a large number of Bosnian Muslims in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica were murdered and that Bosnian Muslims in Foča, Prijedor, and Vlasenica were subjected to serious bodily or mental harm which contributed to the destruction of their groups.[2452] The Trial Chamber further found, by majority, that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group when carrying out the prohibited acts.[2453] The Trial Chamber also reviewed "inflammatory" statements made by Mladić and other members of the Overarching JCE.[2454] Nevertheless, the Trial Chamber concluded that it was not satisfied that genocide formed part of the objective of the Overarching JCE or that members of the Overarching JCE possessed genocidal intent.[2455]

783. We note the Prosecution's submission that the Trial Chamber erred in concluding that genocide did not form part of the common purpose of the Overarching JCE by: (i) applying a

[2447] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[2448] *See* Trial Judgement, paras. 4218, 4225, 4227, 4229-4231. *See also* Trial Judgement, pp. 176-948.
[2449] *See, e.g.*, Trial Judgement, paras. 4238, 4610, 4612, 4688, 5188, 5189. *See also, e.g.*, Trial Judgement, paras. 3578-3741, 3784-3827.
[2450] *See, e.g.*, Trial Judgement, paras. 4225-4231, 4239. *See also, e.g.*, Trial Judgement, paras. 108-271, 3784-3985.
[2451] Trial Judgement, paras. 3446, 3451.
[2452] Trial Judgement, paras. 3446, 3451. *See also* Trial Judgement, paras. 3458, 3464, 3469, 3473, 3479, 3496, 3502, 3503.
[2453] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236.
[2454] Trial Judgement, para. 4235.

heightened evidentiary threshold in determining the "destructive intent" of Mladić and other Overarching JCE members; (ii) unreasonably finding that Mladić and other Overarching JCE members, who orchestrated and controlled the overall criminal campaign and exercised greater authority than any of the perpetrators they used as tools, did not intend to destroy the Bosnian Muslim group while the perpetrators did; and (iii) unreasonably concluding that statements by Mladić and other Overarching JCE members did not reflect an intent to destroy the Bosnian Muslim group.[2456]

784. For the reasons discussed below, we find the Trial Chamber's conclusion that genocide did not form part of the objective of the Overarching JCE and that members of the Overarching JCE did not possess genocidal intent to be erroneous and unreasonable. In reaching this conclusion, the Trial Chamber recalled, *inter alia*, its finding that the physical perpetrators in the Count 1 Municipalities did not have the intent to destroy a *substantial* part of the Bosnian Muslim group.[2457] As discussed above with respect to Ground 1 of the Prosecution's Appeal, we have found the Trial Chamber's finding unreasonable in this respect.

785. The Trial Chamber further recalled the majority's finding that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group, but considered that:

> [a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 [M]unicipalities through the use of a number of physical perpetrators as tools requires more. In the absence of other evidence which would unambiguously support a finding of genocidal intent, drawing an inference on the basis of prohibited acts of physical perpetrators alone is insufficient.[2458]

We find that the Trial Chamber's above-quoted statement is unsupported and amounts to an error of law. We recall that the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" may be inferred from, *inter alia*, the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, the repetition of destructive and discriminatory acts, as well as the existence of a plan or policy.[2459] In our opinion, as a matter of law, the jurisprudence does not restrict a trial chamber

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[2455] Trial Judgement, paras. 4236, 4237.
[2456] *See* Prosecution Appeal Brief, paras. 19-41. *See also* Prosecution Reply Brief, paras. 19-38; T. 26 August 2020 pp. 74-82, 101-103.
[2457] Trial Judgement, para. 4234 (emphasis added).
[2458] Trial Judgement, para. 4236.
[2459] *Rutaganda* Appeal Judgement, paras. 525, 528 (stating that inferring specific intent from other facts, such as the general context and the perpetration of other acts systematically directed against a given group does not imply that the guilt of an accused may be inferred only from his affiliation with "a guilty organization"); *Jelisić* Appeal Judgement, para. 47. *See also Karadžić* Appeal Judgement, para. 727, *referring to, inter alia, Tolimir* Appeal Judgement, para. 246,

from inferring the genocidal intent of members of a joint criminal enterprise solely on the basis of prohibited acts of physical perpetrators who are acting as their tools. We recall that explicit manifestations of criminal intent are often rare in the context of criminal trials and in the absence of explicit direct proof, specific intent may be inferred from relevant facts and circumstances, in order to prevent perpetrators from escaping convictions simply because such manifestations are absent.[2460] In this regard, we take note of the Prosecution's submission that "the effect of the [Trial] Chamber's legal error is that it will only be possible to convict leadership accused in those rare situations where they unambiguously state their genocidal intent, because according to [the] Trial Chamber, without […] other unambiguous evidence, the entire pattern of crimes that a leader unleashes on a population is legally insufficient to prove genocidal intent".[2461]

786. With respect to the Trial Chamber's factual assessment, we are of the view that, based on the Trial Chamber's findings on the prohibited acts committed by the perpetrators, the statements and conduct of Mladić and other members of the Overarching JCE, and Mladić's knowledge of the crimes committed on the ground, the only reasonable inference is that genocide formed part of the Overarching JCE and that Mladić and other members of the joint criminal enterprise shared the intent to destroy a substantial part of the Bosnian Muslim group.

787. In this regard, we recall the Trial Chamber's findings that the perpetrators committed the prohibited acts of murder and causing serious bodily or mental harm, as well as other culpable acts, on a large scale and in a systematic, organized, and discriminatory manner.[2462] Significantly, as discussed above in relation to our opinion concerning Ground 1 of the Prosecution's Appeal, in Prijedor Municipality, for example, the Trial Chamber found that at least 993 Bosnian Muslims were killed.[2463] The Trial Chamber also found that the brutality of the harm suffered by thousands of Bosnian Muslims detained in Foča, Prijedor, and Vlasenica Municipalities had a long-lasting, devastating, physical and mental impact on the victims who survived, which gravely affected their ability to lead normal and constructive lives, and that this contributed to the destruction of the protected groups. The Trial Chamber further found that other victims, who were later killed, suffered before facing their deaths.[2464] Within the span of only a few months, there were only very

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Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR98*bis*.l, Judgement, 11 July 2013, para. 80, *Stakić* Appeal Judgement, para. 42.

[2460] *See Rutaganda* Appeal Judgement, para. 525, *referring to Kayishema and Ruzindana* Appeal Judgement, para. 159.

[2461] T. 26 August 2020 p. 78.

[2462] *See, e.g.*, Trial Judgement, paras. 3446, 3451, 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535, 4224-4232, 4610.

[2463] *See* Trial Judgement, para. 3446.

[2464] *See* Trial Judgement, para. 3451, *referring to* Scheduled Incidents C.6.1, C.6.2, C.6.3, C.6.4, C.6.5 , C.15.2, C.15.3, C.15.4, C.15.5, C.19.3, Unscheduled Incident at Vlasenica Secondary School, and Unscheduled Incident at Sitnica School. *See also supra* paras. 738-746.

few Bosnian Muslims left in the Count 1 Municipalities.[2465] The Trial Chamber also found that certain physical perpetrators – who were members of the Bosnian Serb forces acting as tools of the members of the Overarching JCE – had the intent to destroy a part of the Bosnian Muslim group.[2466] In light of these findings, we are convinced that the only reasonable inference based on the acts of the physical perpetrators is that genocide formed part of the Overarching JCE.

788. Additionally, contrary to the Trial Chamber's view that "there is an absence of other evidence which would unambiguously support a finding of genocidal intent" of the members of the Overarching JCE,[2467] we find that there is an abundance of evidence supporting a finding of such intent, such as the statements and conduct of Mladić and other members of the Overarching JCE in the preparation and implementation of the criminal campaign committed in municipalities throughout Bosnia and Herzegovina, including the Count 1 Municipalities. As discussed below, such evidence points to the only reasonable inference that the members of the Overarching JCE sought to destroy the Bosnian Muslim group in the Count 1 Municipalities.

789. In this regard, we recall the Trial Chamber's finding that the Bosnian Serb leadership advocated threats of violence, extinction, and transfers of populations in preparing for the take-over of Serb-claimed territory from at least July 1991 to May 1992.[2468] The Bosnian Serb leadership also adopted policies and strategies, such as the Variant A/B Instructions, and created Bosnian Serb political, military, and police structures throughout the municipalities to implement their ethnic division objective.[2469] On 12 May 1992, the Bosnian Serb leadership adopted Karadžić's "six strategic objectives", which included the demarcation of a Serb state involving the separation of people along ethnic lines, and emphasised that such separation should be achieved by "whatever means".[2470] As of May 1992, over the course of a few months, a similar pattern of widespread and systematic attacks against Bosnian Muslims was perpetrated by Serbian forces, including VRS forces, MUP units, and regional and municipal authorities, in certain municipalities throughout Bosnia and Herzegovina, including in the Count 1 Municipalities.[2471]

790. We further recall the Trial Chamber's findings, *inter alia*, that: (i) the Overarching JCE members controlled the Bosnian Serb forces, including that Mladić exercised a "very high level of

[2465] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.
[2466] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236. *See, e.g.*, Trial Judgement, paras. 4225-4231, 4239.
[2467] Trial Judgement, para. 4236.
[2468] *See* Trial Judgement, paras. 3669, 4220.
[2469] *See* Trial Judgement, paras. 87-89, 3668, 3674, 3675, 3689, 3690, 3708, 3979, 4219, 4221.
[2470] *See* Trial Judgement, para. 3708.
[2471] *See* Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3511, 3513-3524. *See also* Trial Judgement, paras. 3036-3039, 3041, 3045, 3459-3463, 3470-3472, 3474-3478, 3480-3495, 3497-3501, 3819, 3824, 3982, 3983.

command and control over VRS subordinates", was respected by his subordinates as a leader, demanded "absolute obedience" in the VRS, closely monitored the implementation of his orders, and communicated regularly with his subordinates;[2472] that Karadžić controlled the *Republika Srpska* military and political structure;[2473] and that Mićo Stanišić exercised "exclusive authority" over the MUP's security-related operations;[2474] (ii) Mladić's acts and omissions during the existence of the Overarching JCE were so instrumental to the commission of the crimes that without them crimes would not have been committed;[2475] (iii) Mladić knew crimes were committed against non-Serbs in the Municipalities; [2476] and (iv) Mladić failed to investigate and punish crimes committed by the Bosnian Serb forces.[2477]

791. We also recall the numerous statements by Mladić and other members of the Overarching JCE calling for the disappearance and destruction of Bosnian Muslims. Upon reviewing these statements, we find the Trial Chamber's conclusion that they do not indicate genocidal intent on the part of the members of the Overarching JCE to be unreasonable. In particular, the Trial Chamber found that in conversations, meetings, and speeches that took place from at least July 1991 to May 1992, members of the Bosnian Serb political leadership, in particular Karadžić, threatened violence and extinction should Bosnian Muslims attempt to create a sovereign state, described Muslims and Croats as enemies with whom the Bosnian Serbs could not coexist and threatening violence against those groups, and advocated the transfers of populations.[2478] The Trial Chamber found that, in doing so, Karadžić repeatedly referred to, *inter alia*, the "expulsion", "disappearance", and "extinction" of the Bosnian Muslims.[2479] The Trial Chamber also considered evidence that on 12 May 1992 at the 16th Assembly Session, Mladić stated that "we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches".[2480] Furthermore, during the 17th Session of the Bosnian Serb Assembly held from 24 to 26 July 1992, Karadžić stated that "this conflict was roused in order to eliminate the Muslims", and "[t]hey think that they are being nationally established, but in fact they are vanishing."[2481] The Trial Chamber also considered that Mladić stated at the session of the Bosnian Serb Assembly on 10 January 1994 that

[2472] Trial Judgement, paras. 4390-4393.
[2473] *See* Trial Judgement, paras. 18-31, 104, 265, 341.
[2474] Trial Judgement, paras. 338, 341.
[2475] Trial Judgement, paras. 4611, 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4610, 4615, 4685, 4686, 5189.
[2476] *See*, *e.g.*, Trial Judgement, paras. 4546, 4630-4643, 4685.
[2477] Trial Judgement, paras. 4546, 4611. *See also* Trial Judgement, paras. 4529-4545.
[2478] Trial Judgement, para. 3669.
[2479] Trial Judgement, para. 3669.
[2480] Trial Judgement, paras. 4460, 4625. *referring to* Exhibit P341, p. 33.
[2481] Exhibit P4581, p. 86.

"[t]he enemy that we are facing is getting stronger every day […] determined to fight until the last one of us lives […] My concern is to have them vanish completely."[2482]

792. When viewing these statements in the context of the prohibited acts of genocide committed on a mass scale by perpetrators who are tools of the members of the joint criminal enterprise, along with other statements containing propaganda and derogatory language against Bosnian Muslims,[2483] painting Bosnian Muslims as genocidal enemies,[2484] and calling for the "extermination, destruction, disappearance, and extinction" of Bosnian Muslims in the context of their attempts to create a sovereign state,[2485] we are of the opinion that it was unreasonable for the Trial Chamber to consider these statements as merely "rhetorical speeches" for ethnic separation and division or as propaganda directed to the military enemy, rather than demonstrating genocidal intent.[2486]

793. In this regard, with respect to statements containing propaganda and derogatory language against Bosnian Muslims, we note that the Trial Chamber found that, between September 1992 and at least March 1995, Mladić participated in establishing and using the machinery for the dissemination of anti-Muslim propaganda, either through his subordinates or personally, in order to engender in Bosnian Serbs fear and hatred of Bosnian Muslims.[2487] The Trial Chamber found that, in media interviews, Mladić used derogatory language towards Bosnian Muslims such as "the Muslims were the worst scum", claimed the historical territorial rights of the Serbs, and recalled the narratives about genocide and crimes committed against Serbs by Bosnian Croats and Bosnian Muslims.[2488]

794. With respect to statements painting Bosnian Muslims as genocidal enemies, we note the Trial Chamber's findings that: (i) in an interview with the VRS magazine *Srpska Vojska* of 18 November 1992, Mladić noted that the Muslims thought that they would easily "clear the Serbian people out of the territory of Bosnia and Herzegovina";[2489] (ii) according to the magazine *Srpska Vojska*, during a meeting in the beginning of April 1993 attended by, *inter alia*, Mladić, Karadžić, Krajišnik, and representatives of state and political organs of the Bosnian Serb Republic, Mladić stated that the "strategic-operative conditions were created to prevent the greatest genocide and total annihilation of the Serbian people" west of the Drina River;[2490] and (iii) during an interview

[2482] *See* Trial Judgement, paras. 4468, 4629, *referring to* Exhibit P3076, p. 20.
[2483] *See* Trial Judgement, paras. 4499, 4500.
[2484] *See*, *e.g.*, Trial Judgement, paras. 4482-4484, 4486, 4499, 4648, 4649.
[2485] *See*, *e.g.*, Trial Judgement, paras. 3603, 3609, 3610, 3670.
[2486] *See* Trial Judgement, para. 4235.
[2487] *See* Trial Judgement, para. 4500.
[2488] *See* Trial Judgement, para. 4499.
[2489] *See* Trial Judgement, paras. 4482, 4499, *referring to* Exhibit P7391, p. 4.
[2490] *See* Trial Judgement, paras. 4483, 4499, *referring to* Exhibit P3918, p. 2.

published on 25 June 1993, Mladić stated that "[t]he Muslims had betrayed the Serb people and repressed them for 500 years".[2491] The Trial Chamber also received evidence that Mladić stated: (i) in an edition of the *Oslobođenje* newspaper dated 8 November 1994, that Serbs would "return the territories that the Muslims took" during World War II "and as punishment, even more than that";[2492] and (ii) in a video clip dated 26 June 1995, that the Serb people organised for defence, protected the majority of Serb historical territories, and prevented "the planned and prepared […] genocide".[2493] Furthermore, we note that a VRS Main Staff report from September 1992 signed by Mladić read that "[w]e had to take all measures available to defend ourselves from genocidal intentions and actions of our enemies".[2494]

795. Specifically, with respect to statements calling for the extermination of Bosnian Muslims in the context of the attempts by Bosnian Muslims to create a sovereign state, the Trial Chamber found that Karadžić: (i) stated, on 12 October 1991 in a telephone conversation, that such attempt would result in "bloodshed", that should Bosnian Muslims "rise up against the Serbs", they would "disappear", that "300,000 Muslims [would] die" in Sarajevo, and that "the Muslim people would be exterminated";[2495] and (ii) on 15 October 1991, in a speech before the 8th Joint Session of the Assembly of the Socialist Republic of Bosnia and Herzegovina, described the Bosnian Muslims' pursuit of an independent state as a "highway of hell and suffering" and, in a telephone conversation, elaborated that the Serbs would "destroy them completely" in a "war until their extinction".[2496] We further note Karadžić's statement that "the Muslims know […] it is hell in which five-six hundreds of thousands of them will disappear".[2497]

796. In our considered opinion, the only reasonable inference based on the totality of evidence, is that these statements indicate intent to physically destroy the Bosnian Muslim group.

797. For the reasons set out above, considering: (i) the control the Overarching JCE members had over the Bosnian Serb forces; (ii) their participation in the planning and execution of crimes committed in the Municipalities; (iii) their numerous statements calling for the disappearance and destruction of Bosnian Muslims; (iv) Mladić's knowledge of the crimes committed on the ground; (v) the Trial Chamber's finding that certain members of the Serbian forces, who were acting as

[2491] *See* Trial Judgement, paras. 4484, 4499, *referring to* Exhibit P7719, p. 4.
[2492] *See* Trial Judgement, paras. 4486, 4648, *referring to* Exhibit P1975, p. 1.
[2493] *See* Trial Judgement, paras. 4486, 4649, *referring to* Exhibit P1976, p. 1.
[2494] *See* Exhibit P1966, p. 3.
[2495] *See* Trial Judgement, paras. 3603, 3670, *referring to* Exhibit P4109, pp. 7-9, 16, 18, 21-23.
[2496] *See* Trial Judgement, paras. 3609, 3610, 3670, *referring to* Exhibit P108, pp. 5, 6, Exhibit P2004, pp. 2-4, Exhibit P2654, p. 6.
[2497] *See* Exhibit P4110, p. 3.

tools for the Overarching JCE members, committed prohibited acts of genocide with the intent to destroy a part of the Bosnian Muslim group; and (vi) its finding that within the span of only a few months, there were only very few Bosnian Muslims left in the Count 1 Municipalities, we find it unreasonable that the Trial Chamber found that genocide did not form part of the objective of the Overarching JCE. Against this background, we find it absurd that the Trial Chamber found that certain perpetrators possessed the intent to destroy a part of the Bosnian Muslim group whereas Mladić and other members of the Overarching JCE, who were using these perpetrators as tools to commit crimes in the Municipalities in furtherance of the Overarching JCE, did not themselves possess such intent.

798. In light of these considerations, we find that the Trial Chamber committed an error of law and an error of fact in failing to find that genocide formed part of the objective of the Overarching JCE or that members of the Overarching JCE possessed genocidal intent. We find that the Prosecution has shown that all reasonable doubt of guilt has been eliminated. We respectfully disagree with the Majority's decision to dismiss the Prosecution's submissions in this respect and find that the Appeals Chamber should have granted Ground 2 of the Prosecution's Appeal.

C. Mladić Should be Convicted for Committing Genocide in the Count 1 Municipalities

799. Having found that the Trial Chamber erred in finding that: (i) the Bosnian Muslims in the Count 1 Municipalities did not constitute a substantial part of the protected group in Bosnia and Herzegovina; and (ii) genocide did not form part of the objective of the Overarching JCE or that members of the Overarching JCE did not possess genocidal intent, we therefore find that Mladić should be convicted of genocide under the first form of joint criminal enterprise.

800. We recall that liability under the first form of joint criminal enterprise consists of: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to or involves the commission of a crime; and (iii) the participation and shared intent of the accused in the common purpose.[2498] Considering: (i) the Trial Chamber's finding that from 12 May 1992 until 30 November 1995, Mladić participated in the Overarching JCE, which involved a plurality of persons including members of the Bosnian Serb leadership, with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and

[2498] *See, e.g., Stanišić and Simatović* Appeal Judgement, para. 77; *Brđanin* Appeal Judgement, paras. 364, 365, 430; *Stakić* Appeal Judgement, paras. 64, 65; *Krajišnik* Appeal Judgement, paras. 200-208, 707; *Tadić* Appeal Judgement, paras. 227, 228. *See also Nizeyimana* Appeal Judgement, para. 325; *Gotovina and Markač* Appeal Judgement, para. 89.

deportation;[2499] and (ii) our finding that genocide formed part of the objective of the Overarching JCE and that Mladić and other members of the Overarching JCE shared the genocidal intent of the perpetrators of crimes acting as their tools, we respectfully disagree with the Majority's decision to affirm Mladić's acquittal of genocide under Count 1 of the Indictment. We find that the Appeals Chamber should have granted the Prosecution's request to convict Mladić of genocide for the crimes committed in the Count 1 Municipalities pursuant to the first form of joint criminal enterprise.

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

Done this 8th day of June 2021, at The Hague, The Netherlands

Judge Aminatta Lois Runeni N'gum

Judge Seymour Panton

[Seal of the Mechanism]

[2499] *See*, *e.g.*, Trial Judgement, paras. 4232, 4238, 4610-4612, 4685, 4686, 4688, 5189.

VIII. ANNEX A: PROCEDURAL HISTORY

801. The main aspects of the appeal proceedings are summarized below.

A. Composition of the Appeals Chamber

802. On 19 December 2017, the President of the Mechanism ordered that the Bench in the present case be composed of Judges Theodor Meron (presiding), Carmel Agius, Liu Daqun, Prisca Matimba Nyambe, and Seymour Panton.[2500] On 20 December 2017, Judge Meron designated himself as the Pre-Appeal Judge in this case.[2501] On 3 September 2018, Judge Jean-Claude Antonetti granted Mladić's requests to disqualify Judges Meron, Agius, and Liu for reason of apparent bias.[2502] On 4 September 2018, Judge Antonetti assigned Judges Mparany Mamy Richard Rajohnson, Gberdao Gustave Kam, and Elizabeth Ibanda-Nahamya to the Bench.[2503] Judge Nyambe was elected as the Presiding Judge in this case and, on 12 September 2018, assigned herself as the Pre-Appeal Judge.[2504] Judge Rajohnson was replaced by Judge Aminatta Lois Runeni N'gum on 14 September 2018.[2505] Judge Kam was replaced by Judge Mustapha El Baaj on 18 February 2021.[2506]

B. The Appeals

803. Following the Pre-Appeal Judge's decisions granting Mladić and the Prosecution an extension of 90 days to file their notices of appeal,[2507] both parties filed their respective notices of appeal on 22 March 2018.[2508]

[2500] Order Assigning Judges to a Case Before the Appeals Chamber, 19 December 2017, p. 1.
[2501] Order Assigning a Pre-Appeal Judge, 20 December 2017, p. 1.
[2502] Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 (originally filed in French, English translation filed on 20 September 2018), paras. 81-87.
See also Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias, 18 June 2018, paras. 1, 21-23, p. 9; Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias, 18 June 2018, paras. 1, 22-24, p. 10; Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias, 18 June 2018, paras. 1, 18-20, p. 8.
[2503] Order Assigning Three Judges Pursuant to Rule 18 of the Rules, 4 September 2018 (originally filed in French, English translation filed on 5 September 2018), p. 1.
[2504] Order Assigning a Pre-Appeal Judge, 12 September 2018, p. 1.
[2505] Order Replacing a Judge, 14 September 2018 (originally filed in French, English translation filed on 27 February 2019), p. 1.
[2506] Order Replacing a Judge in a Case before the Appeals Chamber, 18 February 2021, p. 1.
[2507] Decision on Motion for Extension of Time to File Notice of Appeal, 21 December 2017, p. 2.
See also Decision on a Further Motion for an Extension of Time to File a Notice of Appeal, 9 March 2018, p. 2; Decision on Ratko Mladić's Motions for Reconsideration, 16 March 2018, pp. 3, 4.
[2508] Notice of Appeal of Ratko Mladić, 22 March 2018 (public with public and confidential annexes); Prosecution's Notice of Appeal, 22 March 2018.

804. On 22 May 2018, the Pre-Appeal Judge granted Mladić and the Prosecution extensions of 60 days for filing their respective appellant's and respondent's briefs.[2509] In the same decision, the Pre-Appeal Judge also granted Mladić an extension of the word limit for his appellant's brief, authorizing him to file a brief not exceeding 75,000 words, and granted the Prosecution an equivalent extension of the word limit for its respondent's brief.[2510]

805. On 6 August 2018, Mladić and the Prosecution filed their respective appellant's briefs.[2511] Both parties subsequently filed their respective respondent's briefs on 14 November 2018,[2512] and their respective reply briefs on 29 November 2018.[2513]

C. Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings

806. On 30 April 2018, the Appeals Chamber dismissed Mladić's motion seeking to stay appeal proceedings and to vacate the Trial Judgement on the basis of his alleged [REDACTED] fitness.[2514]

D. Decisions Pursuant to Rule 142 of the Rules

807. On 31 December 2018, Mladić filed five motions requesting the admission of additional evidence on appeal.[2515] On 11 March 2020, the Appeals Chamber, by majority, denied all five of Mladić's motions to admit additional evidence on appeal.[2516]

[2509] Decision on Ratko Mladić's Motion for Extensions of Time and Word Limits, 22 May 2018 ("Extension Decision of 22 May 2018"), pp. 3, 4.
[2510] Extension Decision of 22 May 2018, p. 4.
[2511] Appeal Brief on Behalf of Ratko Mladić, 6 August 2018 (confidential); Notice of Filing of Corrigendum to: Appeal Brief on Behalf of Ratko Mladić, 16 August 2018 (confidential; public redacted version filed on 11 September 2018); Prosecution Appeal Brief, 6 August 2018 (confidential; public redacted version filed on 7 August 2018).
[2512] Prosecution Response Brief, 14 November 2018 (confidential; public redacted version filed on 1 February 2019); Response to Prosecution's Appeal Brief on Behalf of Ratko Mladić, 14 November 2018.
[2513] Reply to Prosecution's Response Brief on Behalf of Ratko Mladić, 29 November 2018 (confidential; public redacted version filed on the same date); Prosecution Reply Brief, 29 November 2018 (confidential; public redacted version filed on 21 January 2019).
[2514] Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings, 30 April 2018 (confidential; public redacted version filed on 8 June 2018), pp. 1, 4, 5; Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Motion to Vacate the Trial Judgement and Stay the Proceedings, 26 June 2018 (confidential; public redacted version filed on the same date), pp. 1, 3, 4. *See also* Defence Motion to Vacate Judgment and Impose Stay of Proceedings, 31 January 2018 (confidential with public and confidential annexes; public redacted version filed on the same date).
[2515] Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with confidential Annex A and public Annex B); Notice of Filing of as to: Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 1 February 2019 (public with confidential Annex A3 and public Annex B); Second Notice of Filing of Translations Relating to: Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 8 March 2019 (confidential); Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 31 December 2018 (public with confidential annexes); Corrigendum to Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 10 January 2019 (public with confidential annexes); Ratko Mladić's Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America,
31 December 2018; Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment,

E. Status Conferences

808. In accordance with Rule 69 of the Rules, Status Conferences were held on 10 July 2018,[2517] 6 November 2018,[2518] 18 February 2019,[2519] 13 June 2019,[2520] 3 October 2019,[2521] 30 January 2020,[2522] and 24 July 2020.[2523] A Status Conference was scheduled for 19 November 2020 but was postponed at Mladić's request until a time when counsel would be available to appear with him in court.[2524]

F. Hearing of the Appeals

809. On 16 December 2019, the Appeals Chamber scheduled the hearing of the appeals to take place on 17 and 18 March 2020.[2525] On 6 March 2020, the Appeals Chamber stayed the hearing on the basis of Mladić's then-upcoming surgery, and requested weekly reports from the Registrar on the scheduling of Mladić's surgery and his recovery therefrom in order to facilitate the expeditious rescheduling of the hearing.[2526] On 1 May 2020, noting Mladić's progress in recovering from the surgery, the Appeals Chamber rescheduled the appeal hearing to take place on 16 and 17 June 2020, "subject to change should coronavirus pandemic-related restrictions inhibit the necessary travel or the holding of the hearing for other reasons".[2527] On 28 May 2020, based on submissions from the Registrar and the Defence, the Appeals Chamber, *inter alia*, found it not feasible to hold the appeal hearing on 16 and 17 June 2020 and stayed the hearing until further notice.[2528] On 17 July 2020, the

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31 December 2018; Notice of Filing of as to: Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 1 February 2019; Ratko Mladić's Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 31 December 2018; Notice of Filing of Translations Relating to: Ratko Mladić's Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 1 February 2019. *See also* Decision on Prosecution's Motion to Strike Mladić's Motions to Admit Additional Evidence, 22 January 2019.

[2516] Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), para. 117. *See also* Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decisions on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date).

[2517] T. 10 July 2018 pp. 1-20. *See also* Order Scheduling a Status Conference, 19 June 2018, p. 1.

[2518] T. 6 November 2018 pp. 1-6. *See also* Order Scheduling a Status Conference, 5 October 2018, p. 1.

[2519] T. 18 February 2019 pp. 1-10. *See also* Order Scheduling a Status Conference, 3 January 2019, p. 1.

[2520] T. 13 June 2019 pp. 1-6. *See also* Order Scheduling a Status Conference, 5 April 2019, p. 2.

[2521] T. 3 October 2019 pp. 1-8. *See also* Order Scheduling a Status Conference, 29 August 2019, p. 2.

[2522] T. 30 January 2020 pp. 1-11. *See also* Order Scheduling a Status Conference, 17 October 2019, p. 2.

[2523] T. 24 July 2020 pp. 1-26. *See also* Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020 ("Decision of 17 July 2020"), p. 10; Order Concerning the Status Conference and Medical Reporting by the Registrar, 22 May 2020; Order Relating to the Status Conference, 20 May 2020; Order Scheduling a Status Conference, 11 May 2020.

[2524] *See* Order on the Scheduling of a Status Conference, 10 November 2020, pp 1, 2. *See also* Order Scheduling a Status Conference, 28 October 2020, p. 2.

[2525] Scheduling Order for the Hearing of the Appeals, 16 December 2019, p. 1.

[2526] Decision on a Motion to Stay the Appeal Hearing, 6 March 2020 (confidential; public redacted version filed on 11 March 2020), p. 4. *See also* Decision on a Motion to Reconsider the Decision Staying the Appeal Hearing, 11 March 2020 (confidential; public redacted version filed on the same date).

[2527] Second Order Scheduling the Hearing of the Appeals, 1 May 2020, p. 2.

[2528] Order Regarding the Hearing of the Appeals, 28 May 2020, pp. 3-5.

Appeals Chamber rescheduled the appeal hearing to take place on 25 and 26 August 2020 in The Hague, The Netherlands and provided for the remote participation of judges and the parties at the hearing given the circumstances of the coronavirus pandemic-related restrictions, should they so wish.[2529] On 14 August 2020, the Appeals Chamber denied the Defence requests to, *inter alia*, vacate the dates of the rescheduled appeal hearing, adjourn the proceedings until the coronavirus pandemic-related restrictions are eased so as to allow Mladić to be examined by medical professionals, and order a competency review process to determine Mladić's capacity for legal proceedings.[2530]

810. The Appeals Chamber heard the parties' oral arguments at the appeal hearing held in The Hague, The Netherlands on 25 and 26 August 2020.[2531] During the hearing, Judge Ibanda-Nahamya was present in the courtroom in person, while Judges Nyambe (presiding), N'gum, Kam, and Panton participated via videoconference-link.

[2529] *See* Decision of 17 July 2020, paras. 3-5, 14, 19, 20, pp. 10, 11.
[2530] Decision on Defence Submissions, 14 August 2020 ("Decision of 14 August 2020"), pp. 2, 6; Dissenting Opinion of Judge Prisca Matimba Nyambe to the "Decision on Defence Submissions" Filed on 14 August 2020, 14 August 2020. On 20 August 2020, the Appeals Chamber denied the Defence request to reconsider the Decision of 14 August 2020. *See* Decision on a Defence Motion to Reconsider the "Decision on Defence Submissions", 20 August 2020.
[2531] T. 25 August 2020 pp. 1-110; T. 26 August 2020 pp. 1-109.

IX. ANNEX B - CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Mechanism

MLADIĆ, Ratko

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Replacing a Judge in a Case before the Appeals Chamber, 18 February 2021

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order on the Scheduling of a Status Conference, 10 November 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 28 October 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Defence Motion to Reconsider the "Decision on Defence Submissions", 20 August 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Defence Submissions, 14 August 2020 ("Decision of 14 August 2020")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Dissenting Opinion of Judge Prisca Matimba Nyambe to the "Decision on Defence Submissions" Filed on 14 August 2020, 14 August 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020 ("Decision of 17 July 2020")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Regarding the Hearing of the Appeals, 28 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Concerning the Status Conference and Medical Reporting by the Registrar, 22 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Relating to the Status Conference, 20 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 11 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Second Order Scheduling the Hearing of the Appeals, 1 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decisions on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Reconsider the Decision Staying the Appeal Hearing, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Stay the Appeal Hearing, 6 March 2020 (confidential; public redacted version filed on 11 March 2020)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Scheduling Order for the Hearing of the Appeals, 16 December 2019

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 17 October 2019

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 5 April 2019

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Prosecution's Motion to Strike Mladić's Motions to Admit Additional Evidence, 22 January 2019

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 3 January 2019

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Replacing a Judge, 14 September 2018 (originally filed in French, English translation filed on 27 February 2019)

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings, 30 April 2018 (confidential; public redacted version filed on 8 June 2018)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Ratko Mladić's Motions for Reconsideration, 16 March 2018

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2. ICTR

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Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera v. The Prosecutor, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al*. Decision of 29 May 2009")

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Corrigendum to Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 10 January 2019 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with confidential Annex A and public Annex B) ("Motion of 31 December 2018")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 31 December 2018 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Ratko Mladić's Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America, 31 December 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 31 December 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Ratko Mladić's Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 31 December 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias, 18 June 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias, 18 June 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias, 18 June 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Notice of Filing of Public Redacted Final Trial Brief, 8 March 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Defence Motion to Vacate Judgment and Impose Stay of Proceedings, 31 January 2018 (confidential with public and confidential annexes; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Second Registry Submission in Relation to Defence Motion on the Provision of Medical Records, 3 November 2017 (public with confidential annex)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 12 October 2017 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 10 October 2017 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 13 April 2017 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 7 April 2017 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Motion Alleging Defects in the Form of the Indictment, 25 October 2016

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 22 August 2016 (confidential) ("Reconsideration Motion of 22 August 2016")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Notice of Objection to the Chamber's Closing of its Case, 18 August 2016

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion Requesting to Strike Amor Mašović Charts due to Clear Error and New Particular Circumstances or, Alternatively, that this Trial Chamber Require the Testimony of Amor Mašović or Exercise its Power Under Rule 98 to Call Amor Mašović to Clarify the Reliabil[i]ty of his Expansive Forensic Assertions, 9 August 2016 (public with confidential and public annexes) ("Motion of 9 August 2016")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Request to Vary the Time for Witnesses Following the Denial 3 Bar Table Exhibits and, if Granted, Defence Notification of Intent to Call [REDACTED] *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Pending the Outcome of the Certification to Appeal 65 *ter* #1D07014, Defence Advance Motion to Notify of the Intent to Request a Variation of Time for Witnesses and, if Granted, to Call [REDACTED], *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defense Second Motion to Admit Documents from the Bar – Srebrenica, 18 January 2016 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defense Fifth Motion to Admit Documents from the Bar – Enemy Actions, 18 January 2016

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion to Amend 65 *ter* List to Add Witnesses not Previously on the List and Notice of Intent to Not Adduce Evidence of Certain Witnesses and Modify the Mode of Others, 25 March 2015 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defense Renewed Submissions in Relation to the Future Trial Sitting Schedule, 7 August 2014 (confidential) ("Defence Sitting Schedule Submissions of 7 August 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion to Amend Witness List, 10 July 2014 (confidential with confidential Annexes A and B and C)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Registrar's Submission of Medical Report, 24 July 2014 (confidential), Annex B ([REDACTED] of 7 July 2014) ("Medical Report of 7 July 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 9 July 2014 (confidential), Annex A ([REDACTED] of 28 June 2014) ("Medical Report of 28 June 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Supplemental Submission of Preliminary Witness and Exhibit List Under Rule 65 *ter* (G), 19 May 2014 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Reports, 24 January 2014 (confidential) ("Submission of 24 January 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response in Opposition to "Prosecution Motion to Admit Evidence From the Bar Table", 30 December 2013

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution Motion to Admit Evidence From the Bar Table, 31 October 2013 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response to Prosecution Motion to Amend its Rule 65 *ter* Witness List, 4 July 2013

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Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Second Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 16 April 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica (Various), 3 April 2013 (confidential) ("Motion of 3 April 2013")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response to Prosecution Motion for Admission into Evidence the Utterances of the Accused, 2 April 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (confidential) ("Motion of 18 March 2013")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 15 January 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-AR73.2, Defense Interlocutory Appeal Brief Against the Trial Chamber Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 21 August 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-AR73.1, Defense Interlocutory Appeal Brief Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 July 2012 ("Defense Interlocutory Appeal Brief of 4 July 2012")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 3 July 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Supplement to Motion to Reconsider Decision of 24 May 2012, 5 June 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Motion to Reconsider Decision of 24 May 2012, 31 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution's Submission of Informal Correspondence, 16 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Urgent Defence Motion to Adjourn and Continue Trial or in the Alternative Bar the Prosecution from Presenting any Witnesses or Exhibits that were Untimely Disclosed, 14 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012 (confidential) ("Eighth Prosecution Pre-Trial Report")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Report on Disclosure and Motion to Continue Trial, 1 May 2012 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Defense Response to the Prosecution "Corrigendum" Seeking Addition of Documents to the Rule 65 *ter* Exhibit List, 12 April 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Notice Pursuant to Chamber Direction of 29 March 2012, and Urgent Motion to Compel, 10 April 2012 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Pre-Trial Brief, 24 February 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Amended Defense Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations, 9 February 2012 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedule of Incidents, 16 December 2011

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011 ("Prosecution Motion on Adjudicated Facts")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Defense Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011

Prosecutor v. Radovan Karadžić, Case No. IT-95-05/18-PT, Karadžić Pre-Trial Brief, 29 June 2009

C. Other Materials

Belgium, *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions*, 5 August 1993

Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279

Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted on 28 September 1976, entered into force on 1 July 1977, and repealed by the Criminal Code of the Republic of Serbia on 1 January 2006

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55.
Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221

France, *Décret n°75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées (1975)*, as amended in 1982

Germany, Humanitarian Law in Armed Conflicts – Manual, Federal Ministry of Defence, Federal Republic of Germany, 1992

International Committee of the Red Cross, Commentary of 1958 on Article 146(3) of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949

International Committee of the Red Cross, Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Ireland, Geneva Conventions Act No.11 of 21 April 1962

Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, adopted on 13 April 1988 ("SFRY Military Manual")

Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker U.N. Doc. E/CN.4/Sub.2/1985/6, 2 July 1985

The Constitution of the Socialist Federal Republic of Yugoslavia, Belgrade, 1974

The Netherlands, Military Manual, 1993

The SFRY Law on the Ratification of the Additional Protocol to the Geneva Convention from 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol I) and the Additional Protocol with the Geneva Convention of 12 August 1949 on the Protection of victims of International Organized Conflicts (Protocol II), 26 December 1978

United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, The War Office, HMSO, 1958 ("United Kingdom Military Manual")

United States, Field Manual, US Department of the Army, 18 July 1956, as amended by Change No. 1, 1976 ("United States Military Manual")

United States, United States Code, 2006 Edition, Supplement 5, Title 18, Crimes and Criminal Procedure ("18 U.S.C. § 1093(8) (2006)")

D. Defined Terms and Abbreviations

16th Assembly Session

The 16th Session of the Bosnian Serb Assembly held on 12 May 1992

24th Assembly Session

The 24th Session of the Bosnian Serb Assembly held on 8 January 1993

Additional Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3

Additional Protocol II

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609

Additional Protocols

Additional Protocols I and II, collectively

ABiH

Army of the Republic of Bosnia and Herzegovina (*Armija Bosne i Hercegovine*)

Alleged Utterances

Statements uttered by Ratko Mladić during recess on 18 February 2013

Appeals Chamber

Appeals Chamber of the Mechanism

Arkan

Željko Ražnatović

Batch 4-c

Portions of the Prosecution's disclosure to the Defence on 3 October 2011 that had, for technical reasons, not been properly disclosed

Batch 5

Portions of the Prosecution's disclosure to the Defence on 11 November 2011 that had, for technical reasons, not been properly disclosed

Belgrade Discussions

Discussions in Belgrade that took place on 14 and 15 July 1995 between, *inter alia*, Mladić, the UN, European Union, and UNPROFOR

Common Article 3

Common Article 3 to the Geneva Conventions of 1949

Count 1 Communities

Bosnian Muslim communities within the Count 1 Municipalities

Count 1 Municipalities

Municipalities of Bosnia and Herzegovina referred to in paragraph 37 of the Indictment, including: Foča, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica

Crime of attacking undefended locales

Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings as a violation of the laws or customs of war pursuant to Article 3(c) of the ICTY Statute

Crime of terror

Acts of violence the primary purpose of which is to spread terror among the civilian population as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute

CSB

Security Services Centre (*Centar službi bezbjednosti*)

DutchBat

Dutch Battalion of UNPROFOR

Directive 4

A directive issued by Ratko Mladić to the VRS on 19 November 1992 that relates to, *inter alia*, the treatment of Muslim and Croatian forces

Directive 7

A directive signed by Radovan Karadžić on 8 March 1995 that outlined the four priorities of the VRS: (i) through resolute offensive and defensive military operations, imposing a military situation which the international community would be compelled to accept; (ii) improving the operational and strategic position of the VRS; (iii) reducing the front-line, and creating conditions for the economic revival of *Republika Srpska* by sending a number of military conscripts home; and (iv) creating the conditions for the state and political leadership to negotiate a peace agreement and accomplishing the strategic objectives of the war

Directive 7/1

A directive signed by Ratko Mladić on 31 March 1995 that repeated most of the tasks of the VRS as outlined in Directive 7 and translated Directive 7 into operational military tasks

ECtHR

European Court of Human Rights

EDS

Electronic Disclosure Suite

Four Orders

Four orders issued by Mladić or the VRS Main Staff between 14 and 16 July 1995

Fourth Condition

The last of four conditions, set out by the ICTY Appeals Chamber in the *Tadić* Decision of 2 October 1995, to satisfy Article 3 of the ICTY Statute's residual jurisdiction, namely that the violation of the rule must entail, under customary international law, individual criminal responsibility of the person breaching the rule

Geneva Convention I

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31

Geneva Convention II

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85

Geneva Convention III

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135

Geneva Convention IV

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287

Geneva Conventions

Geneva Convention I, Geneva Convention II, Geneva Convention III and Geneva Convention IV, collectively

Hostage-Taking JCE

Joint criminal enterprise that existed between approximately 25 May 1995 and approximately 24 June 1995 with the objective to capture UN Personnel deployed in Bosnia and Herzegovina and detain them in strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets

ICC

International Criminal Court

ICC Statute

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3

ICCPR

International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, 999 U.N.T.S. 171

ICRC

International Committee of the Red Cross

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTR Rules

ICTR Rules of Procedure and Evidence

ICTR Statute

Statute of the ICTR

ICTY

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

ICTY Rules

ICTY Rules of Procedure and Evidence

ICTY Statute

Statute of the ICTY

Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, Annex A

Intercepts

Exhibits P1235, P1297, P1320, P1321, P1322, P1338, P1655, P1657, P1658, P2126, P4222, P4223, and P7397 concerning intercepts dated between 12 July 1995 and 22 September 1995

JNA

Yugoslav People's Army (*Jugoslavenska Narodna Armija*)

Krivaja-95

A code-named operation based on two orders signed by Drina Corps Commander General Major Milenko Živanović on 2 July 1995, laying out plans for an attack on the Srebrenica enclave and ordering various Drina Corps units to ready themselves for combat

Mechanism

International Residual Mechanism for Criminal Tribunals

Mladić Appeal Brief

Appeal Brief on Behalf of Ratko Mladić, 6 August 2018 (confidential); Notice of Filing of Corrigendum to: Appeal Brief on Behalf of Ratko Mladić, 16 August 2018, Annex C (confidential; public redacted version filed on 11 September 2018)

Mladić Final Trial Brief

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Corrigendum to Annex A to Notice of Filing Under Objection and with Reservation of Rights, Filed 25 October 2016, 2 November 2016, Annex A (confidential; public redacted version filed on 8 March 2018)

Mladić Notice of Appeal

Notice of Appeal of Ratko Mladić, 22 March 2018 (public and confidential annexes)

Mladić Pre-Trial Brief

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defense Pre-Trial Brief, 3 April 2012

Mladić Reply Brief

Reply to Prosecution's Response Brief on Behalf of Ratko Mladić, 29 November 2018 (confidential; public redacted version filed on the same date)

Mladić Response Brief

Response to Prosecution's Appeal Brief on Behalf of Ratko Mladić, 14 November 2018

Municipalities

Municipalities of Bosnia and Herzegovina where crimes related to the Overarching JCE were committed, including: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, and Vlasenica

MUP

Ministry of Interior (*Ministarstvo Unutrašnjih Poslova*) of *Republika Srpska*

n. (nn.)

footnote (footnotes)

NATO

North Atlantic Treaty Organization

Order of 27 May 1995

An order issued by the VRS Main Staff on 27 May 1995 to various VRS corps and units to place captured and disarmed UNPROFOR forces at potential NATO air strike targets

Order of 30 May 1995

An order issued by Mladić on 30 May 1995 informing VRS corps commands and units that NATO was preparing an operation to free the captured UN Personnel and ordering: (i) all units to open fire on the area of airborne assault and of the deployment of UNPROFOR troops in the event NATO launched such an operation; and (ii) the SRK Command to complete the disarming of the detainees and deploy them to potential NATO strike targets

Overarching JCE

Joint criminal enterprise that existed from 12 May 1992 until 30 November 1995 with the objective to permanently remove the Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina

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para. (paras.)

paragraph (paragraphs)

Pale Meetings

Two meetings in Pale Municipality taking place in May 1992 and January 1993, respectively

Prosecution

Office of the Prosecutor of the ICTY or the Mechanism

Prosecution Appeal Brief

Prosecution Appeal Brief, 6 August 2018 (confidential; public redacted version filed on 7 August 2018)

Prosecution Final Trial Brief

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution's Submission of Final Trial Brief, 25 October 2016 (confidential)

Prosecution Notice of Appeal

Prosecution's Notice of Appeal, 22 March 2018

Prosecution Reply Brief

Prosecution Rep[l]y Brief, 29 November 2018 (confidential; public redacted version filed on 21 January 2019)

Prosecution Response Brief

Prosecution Response Brief, 14 November 2018 (confidential; public redacted version filed on 1 February 2019)

Registry

Office of the Registrar of the ICTY or the Mechanism

RP.

Registry Pagination

Rule 65 *ter* filings

Filings pursuant to Rule 65 *ter* of the ICTY Rules

Rule 92 *bis* Evidence

Evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules

Rules

Rules of Procedure and Evidence of the Mechanism

Sarajevo JCE

Joint criminal enterprise that existed between 12 May 1992 and November 1995 with the objective to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling, including through the commission of murder, terror, and unlawful attacks against civilians

Scheduled Incidents

The 106 incidents enumerated in Schedules A to G of the Indictment

Second Amended Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-I, Prosecution's Second Amended Indictment, 1 June 2011

Security Council Resolution 1966

UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010

SFRY

Socialist Federal Republic of Yugoslavia

SJB

Public Security Station (*Stanica Javne Bezbjednosti*)

Srebrenica JCE

Joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men from the days immediately preceding 11 July 1995 to at least October 1995

SRK

Sarajevo Romanija Corps of the VRS (*Sarajevo Romanija Korpus*)

Statute

Statute of the Mechanism

Supreme Command

Supreme Command of the VRS

Third Amended Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Third Amended Indictment, 20 October 2011

Trial Chamber

Trial Chamber of the ICTY seized of the case of *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T

Trial Judgement

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Judgment, 22 November 2017 (confidential; public redacted version filed on the same date)

UN

United Nations

UNMO(s)

United Nations Military Observer(s)

UN Personnel

UNPROFOR and UNMO personnel detained by VRS soldiers and officers between 25 May and 24 June 1995 in relation to the Hostage-Taking JCE

UNPROFOR

United Nations Protection Force

Unscheduled Incidents

Incidents that the Trial Chamber considered and made findings on, but were not enumerated in Schedules A to G of the Indictment

VRS

Army of *Republika Srpska* (*Vojska Republike Srpske*)

VJ

Yugoslav Army (*Vojska Jugoslavije*)

Warning of 23 August 2012

The warning given by the Trial Chamber to Mladić on 23 August 2012 that loud and audible statements "shouted across a courtroom" are considered a waiver of his lawyer-client privilege

Zvornik Brigade Report

A daily combat report issued by the Zvornik Brigade Command on 14 July 1995 to the Drina Corps Command