UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-9-A
		Date:	28 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **28 November 2006**

PROSECUTOR

v.

BLAGOJE SIMI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Barbara Goy
Mr. Steffen Wirth

Counsel for the Appellant:

Mr. Igor Panteli}
Mr. Peter Murphy

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seised of an appeal from the judgement rendered by Trial Chamber II on 17 October 2003, in the case *Prosecutor v. Blagoje Simi}, Miroslav Tadi} and Simo Zari}*, Case No. IT-95-9-T.[1]

2. This appeal deals with events that took place from about September 1991 until about 31 December 1993.[2] During this period the "Serbian Municipality of Bosanski [amac Crisis Staff" ("Crisis Staff"), eventually renamed the War Presidency,[3] was established as the highest civilian authority in the Municipality of Bosanski [amac,[4] located in the north eastern part of the then Republic of Bosnia and Herzegovina.[5] The events relate to the forcible takeover by members of the Serb police and paramilitaries of the Municipality of Bosanski [amac on 17 April 1992.[6] The Trial Chamber found that, following the forcible takeover of the Municipality, non-Serb civilians were subject to persecutions perpetrated through the following means: unlawful arrest and detention,[7] cruel and inhumane treatment,[8] and forcible transfer and deportation.[9] The Trial Chamber inferred from all the circumstances the existence of a common plan to persecute non-Serb civilians in the Municipality of Bosanski [amac.[10]

3. Blagoje Simi} ("Appellant") was born in 1960 in Kru{kovo Polje, in the Municipality of Bosanski [amac. A physician by profession, the Appellant became a member of the Serbian

[1] On 29 October 2003, given that the judgement rendered on 17 October 2003 contained clerical errors which did not affect in any way its content, Judge Mumba issued an order recalling the said judgement and issued in its place the judgement accompanying the order to recall. *See* Order Recalling Judgement and Substituting New Judgement, 29 October 2003. The Appeals Chamber will refer to the judgement filed on 29 October 2003 with the order to recall as the "Trial Judgement".
[2] Fifth Amended Indictment, paras 5, 11, 33. *See* also Trial Judgement, paras 5-11.
[3] Trial Judgement, paras 332, 391.
[4] Trial Judgement, para. 390.
[5] Trial Judgement, para. 174.
[6] Trial Judgement, para. 442.
[7] Trial Judgement, paras 654-658, 661, 685.
[8] Trial Judgement, paras 770-773, 775.
[9] Trial Judgement, paras 967-977, 991.
[10] Trial Judgement, paras 984, 987. The Appeals Chamber notes that Judge Lindholm rendered a separate and partially dissenting opinion whereby he dissociated himself "from the concept or doctrine of joint criminal enterprise in this case as well as generally"; agreed with the majority's decision to convict the Appellant on Count 1 (persecutions); dissented from the majority's decision to impose a sentence of seventeen years of imprisonment, and found that the Appellant should be sentenced to seven years of imprisonment. Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm ("Judge Lindholm's Partly Dissenting Opinion"), para. 2 and Disposition. However, when reference is made to the views expressed by the majority in the Trial Judgement, for the purposes of the present judgement, the Appeals Chamber will use the term "Trial Chamber."

Democratic Party ("SDS") in 1990. He was President of the SDS Municipal Board in Bosanski [amac from 1991 to 1995[11] and was nominated President of the Crisis Staff on 17 April 1992.[12] The Trial Chamber found that the common plan to commit the acts of persecution against non-Serbs could not have been achieved without the joint action of the Serb police, paramilitaries, 17th Tactical Group of the Yugoslav People's Army ("JNA") and the Crisis Staff.[13] It further found that the Appellant as President of the Crisis Staff was "the highest-ranking civilian in the Bosanski [amac Municipality" and was at the "apex" of the joint criminal enterprise at the municipal level.[14]

4. The Trial Chamber entered a conviction against the Appellant, pursuant to Article 7(1) of the Statute, "for Count 1 – Crime against humanity for persecutions based upon [the] unlawful arrest and detention of Bosnian Muslim and Bosnian Croat civilians, cruel and inhumane treatment including beatings, torture, forced labour assignments, and confinement under inhumane conditions, and deportation and forcible transfer".[15] No conviction was entered against the Appellant for deportation as a crime against humanity pursuant to Article 5(d) of the Statute (Count 2) because it was found to be impermissibly cumulative with Count 1.[16] Count 3 against the Appellant (unlawful deportation or transfer as a grave breach of the Geneva Conventions of 1949 pursuant to Article 2(g) of the Statute) was dismissed due to defects in the Fifth Amended Indictment.[17] The Appellant was sentenced by a majority of the Trial Chamber, Judge Lindholm dissenting, to a single term of 17 years of imprisonment.[18]

5. The Appellant has appealed both his conviction and the sentence received. Whilst the Notice of Appeal initially set forth 18 grounds of appeal, subsequently the Appellant abandoned the fifteenth and seventeenth grounds of appeal.[19]

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[11] Trial Judgement, para. 13.
[12] Trial Judgement, para. 386.
[13] Trial Judgement, para. 991
[14] Trial Judgement, para. 992.
[15] Trial Judgement, para. 1115.
[16] Trial Judgement, para. 1116.
[17] Trial Judgement, para. 1117.
[18] Trial Judgement, para. 1118. The Appellant was convicted along with two other accused. Miroslav Tadi} was convicted of persecutions for the underlying acts of deportation and forcible transfer pursuant to Articles 5(h) and 7(1) of the Statute. He received a sentence of eight years of imprisonment. Simo Zari} was convicted of persecutions for the underlying acts of cruel and inhumane treatment including beatings, torture, and confinement under inhumane conditions, pursuant to Articles 5(h) and 7(1) of the Statute. He received a sentence of six years of imprisonment. Neither appealed their convictions, and both have now finished serving their sentences.
[19] Appeal Brief, para. 5. The fifteenth ground of appeal concerned the weight ascribed by the Trial Chamber to the evidence of Stevan Todorovi}, *see* Amended Notice of Appeal, para. 17. The seventeenth ground of appeal concerned the Trial Chamber's refusal to admit expert evidence tendered on behalf of the Appellant, *see* Amended Notice of Appeal, para. 19.

6. The Appeals Chamber heard oral submissions regarding this appeal on 2 June 2006. Having considered the written and oral submissions of the Appellant and the Prosecution, the Appeals Chamber hereby renders its Judgement.

II. STANDARD OF REVIEW

7. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[20] and the 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").[21] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the jurisprudence of the International Tribunal.[22]

8. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[23] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[24]

9. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[25] Where the Appeals Chamber finds an error of law in the Trial Judgement

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[20] *Kvo~ka* Appeal Judgement, paras 14-20; *Vasiljevi}* Appeal Judgement, paras 4-12; *Kunarac* Appeal Judgement, paras 35-48; *Kupre{ki} et al.* Appeal Judgement, paras 21-41; *^elebi}i* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadi}* Appeal Judgement, para. 64.

[21] *Kajelijeli* Appeal Judgement, paras 5-8; *Semanza* Appeal Judgement, paras 7-10; *Musema* Appeal Judgement, paras 12-21; *Akayesu* Appeal Judgement, paras 177-179; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[22] *Staki}* Appeal Judgement, para, 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247. The Appeals Chamber notes that the "general significance" exception was further qualified in the *Akayesu* case where the ICTR Appeals Chamber stated that "the Appeals Chamber will not consider all issues of general significance[;] [i]ndeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand." *Akayesu* Appeal Judgement, para. 24; *see* also *Krnojelac* Appeal Judgement, para. 8.

[23] *Kvo~ka* Appeal Judgement para. 16; *Krnojelac* Appeal Judgement, para. 10.

[24] *Kvo~ka* Appeal Judgement, para. 16; *Kordi}* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.; *Kupre{ki} et al.* Appeal Judgement, para. 26. *See* also *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

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

arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[26] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appealing party before that finding is confirmed on appeal.[27]

10. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[28] The Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but only one which has caused a miscarriage of justice, which has been defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[29]

11. The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber's finding was reasonable, it will not lightly disturb findings of fact by a Trial Chamber.[30] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupre{ki} et al.*, wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[31]

12. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of those arguments constituted an error

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[26] *Staki}* Appeal Judgement, para. 9; *Kvo~ka* Appeal Judgement, para. 17; *Kordi}* Appeal Judgement, para. 17; *Blaški}* Appeal Judgement, para. 15.
[27] *Staki}* Appeal Judgement, para. 9; *Kvo~ka* Appeal Judgement, para. 17; *Kordi}* Appeal Judgement, para. 17. *Blaški}* Appeal Judgement, para. 15.
[28] *Staki}* Appeal Judgement, para. 10; *Kvo~ka* Appeal Judgement, para. 18; *Kordi}* Appeal Judgement, para. 18; *Blaški}* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furund`ija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadi}* Appeal Judgement, para. 64.
[29] *Kunarac et al.* Appeal Judgement, para. 39; *Kupre{ki} et al.* Appeal Judgement, para. 29; *Furund`ija* Appeal Judgement, para. 37.
[30] *Krnojelac* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18; *Aleksovski* Appeal Judgement, para. 63; *Furund`ija* Appeal Judgement, para. 37, referring to *Tadi}* Appeal Judgement, para. 64.
[31] *Kupre{ki} et al.* Appeal Judgement, para. 30; *see* also *Staki}* Appeal Judgement, para. 10; *Kvo~ka* Appeal Judgement, para. 19; *Blaski}* Appeal Judgement, para. 17.

warranting the intervention of the Appeals Chamber.[32] 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 as being misconceived and need not be considered on the merits.[33]

13. The Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In a primarily adversarial system, like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner.[34] In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenges are being made.[35] Further, when a party's submissions are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies, the Appeals Chamber will not consider those submissions.[36]

14. Finally, the Appeals Chamber exercises its inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[37] In principle, therefore, objections will be dismissed without detailed reasoning where: the argument advanced by the appealing party is clearly irrelevant; it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appealing party; or the appealing party's argument unacceptably seeks to substitute its own evaluation of the evidence for that of the Trial Chamber.[38]

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[32] *Gacumbitsi* Appeal Judgement, para. 9; *Staki}* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18; *Kamuhanda* Appeal Judgement, para. 8.
[33] *Gacumbitsi* Appeal Judgement, para. 9; *Staki}* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 6; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18; *Kupre{kic et al.* Appeal Judgement, para. 23.
[34] *Kunarac* Appeal Judgement, para. 43 (footnotes ommitted).
[35] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002, paras 1(c)(iii), 1(c)(iv), and 4(b)(ii). *See* also: *Gacumbitsi* Appeal Judgement, para. 10; *Staki}* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[36] *Gacumbitsi* Appeal Judgement, para. 10; *Staki}* Appeal Judgement, para. 12; *Kamuhanda* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, para. 12; *Kunarac* Appeal Judgement, para. 43.
[37] *Gacumbitsi* Appeal Judgement, para. 10; *Staki}* Appeal Judgement, para. 13; *Kamuhanda* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 8, *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 11; *Vasiljević* Appeal Judgement, para. 12; *Rutaganda* Appeal Judgement, para. 19; *Kunarac* Appeal Judgement, para. 47.
[38] *Kunarac* Appeal Judgement, para. 48.

III. DEFECTIVE INDICTMENT: FIRST AND SECOND GROUNDS OF APPEAL

15. Under his first and second grounds of appeal, the Appellant contends that the Trial Chamber erred in law by convicting him for a form of responsibility – participation in a joint criminal enterprise – which was not pleaded in any of the indictments and of which he therefore lacked notice, in violation of Articles 21(2), 21(4)(a) and 21(4)(b) of the Statute and of Rule 47(C) of the Rules.[39] The Appellant submits that, as a result, he was fundamentally prejudiced in the preparation and conduct of his defence, thereby invalidating his conviction.[40] The Appellant requests accordingly that his conviction be reversed and a judgement of acquittal entered, that the Appeals Chamber substitutes for his conviction one which is based solely on responsibility as an aider and abettor, or that he be granted a new trial.[41]

A. Findings of the Trial Chamber

16. After "[h]aving reviewed the evidence", the Trial Chamber was of the view "that the following heads of responsibility could apply to the acts charged in the [i]ndictment: 'committing', including 'joint criminal enterprise', and 'aiding and abetting'".[42] The Trial Chamber addressed whether the Appellant was properly notified that the indictment against him included the allegation of his participation in a joint criminal enterprise.[43]

17. The Trial Chamber identified the issue with which it was faced as being "whether, in the absence of any details as to the form of joint criminal enterprise that the Prosecution seeks to rely upon in the Ƒiǧndictment, the Trial Chamber may find the Accused guilty of any of the crimes alleged on this basis".[44] This, according to the Trial Chamber, turned "on whether the [Fifth] Amended Indictment may be considered as having put the Defence on notice of the case it had to meet and whether the Defence was in a position to prepare adequately for trial".[45] As part of this inquiry, the Trial Chamber turned "to the issue of whether the accused were properly notified that the [Fifth] Amended Indictment against them include[d] forms of participation in a joint criminal

[39] Amended Notice of Appeal, para. 4A, pp. 3-4. Each version of the indictment will be indicated by its chronological designation (Initial, First, Second, Third and so on), whilst "indictment" or "indictment against the Appellant" will be used to refer to all six versions taken together.
[40] Appeal Brief, para. 8.
[41] Appeal Brief, para. 26.
[42] Trial Judgement, para. 136 (footnote omitted).
[43] Trial Judgement, paras 148-155.
[44] Trial Judgement, para. 143 (footnote omitted).

enterprise enabling them to adequately prepare their defence."[46] It sought to determine whether "acting in concert together and with others" refers to joint criminal enterprise.[47] With regard to "common purpose", the Trial Chamber recalled the Appeals Chamber's decision in the case of *Ojdani} et al.*, which stated that the common purpose doctrine or liability refers to the same form of liability as joint criminal enterprise.[48] As for "acting in concert together", the Trial Chamber concluded that:

> "Fağcting in concert together" plainly means acting jointly, and on the face of it in a criminal context, would refer to co-perpetratorship. It is commonly accepted that a reference to "acting in concert together" means acting pursuant to a joint criminal enterprise.[49]

It then considered when and how the indictment was amended to include the words "acting in concert together".[50] The Trial Chamber considered the different versions of the indictment in this case and, based on the equivalence mentioned above, found that the fact "[t]hat the Prosecution intended to rely on the theory of joint criminal enterprise was further confirmed at the time of the third amendment to the [i]ndictment."[51] As to the relevant material facts, the Trial Chamber was "satisfied that the [Fifth] Amended Indictment, together with the Prosecution Pre-Trial Brief, provide[d] sufficient notice of the nature or purpose of the common plan."[52] It held as follows:

> Although it is generally expected that the Prosecution case should be made clear to a defendant before his trial starts, the relevant test, regarding whether a defendant was properly notified of the nature of the case against him, is whether the preparation of his defence was materially impaired. Although the Prosecution did not include the words "joint criminal enterprise" in the Fourth Amended Indictment, reference by the Prosecution to a joint criminal enterprise was explicitly clarified at the time of the third amendment of the [i]ndictment in December 2001.[53]

18. As a result, the Trial Chamber was satisfied that, "although the Prosecution Fdidğ not appear to have exercised the diligence which could have been expected on this matter, the ability of the Accused to prepare their defence was not materially impaired."[54]

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[45] Trial Judgement, para. 143.
[46] Trial Judgement, para. 147.
[47] Trial Judgement, paras 148-149.
[48] Trial Judgement, para. 149, referring to *Ojdani}* Decision on Joint Criminal Enterprise, para. 36.
[49] Trial Judgement, para. 149 (footnote omitted).
[50] Trial Judgement, para. 150.
[51] Trial Judgement, para. 153. When the Trial Chamber referred to the "third amendment to the Fiğndictment" in this paragraph of the Trial Judgement, it was referring to the amendment which led to the Fourth Amended Indictment, as corroborated by its reference to the Decision to Amend the Third Amended Indictment. This is also the case with respect to the reference to the "third amendment to the Fiğndictment" at Trial Judgement, para. 154.
[52] Trial Judgement, para. 153.
[53] Trial Judgement, para. 154.
[54] Trial Judgement, para. 155.

19. The Trial Chamber then found that a joint criminal enterprise existed in the Municipality of Bosanski [amac in which the participants were members of the Crisis Staff, the Serb police, Serb paramilitaries and the 17th Tactical Group of the JNA.[55] It was satisfied that the "participants in the joint criminal enterprise acted in unison to execute a plan that included the forcible takeover of the town of Bosanski [amac, taking over of vital facilities and institutions in the town, and persecuting non-Serb civilians in the Municipality of Bosanski [amac, within the period set forth in the [Fifth] Amended Indictment".[56] According to the Trial Chamber, the common plan "was aimed at committing persecution against non-Serbs, including acts of unlawful arrest, detention or confinement, cruel and inhumane treatment, deportation and forcible transfer, and the issuance of orders, policies and decisions that violated fundamental rights of non-Serb civilians".[57] It found that the Appellant, as the President of the Crisis Staff, was at the "apex" of the joint criminal enterprise and that he "knew that his role and authority were essential for the accomplishment of the common goal of persecution".[58] The Trial Chamber was satisfied that the Appellant shared the intent to persecute the non-Serbs with the other participants in the joint criminal enterprise.[59] The Appellant was convicted pursuant to Article 7(1) of the Statute for his participation in a first category joint criminal enterprise, or basic form of joint criminal enterprise, to persecute the non-Serb population in the Municipality of Bosanski [amac.[60]

B. Applicable Law

20. In accordance with Article 21(4)(a) of the Statute, an accused has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". Articles 18(4), 21(2), 21(4)(a) and 21(4)(b) of the Statute and Rule 47(C) of the Rules require the Prosecution to plead in an indictment all the material facts underpinning the charges in an indictment, but not the evidence by which the material facts are to be proven.[61] Whether an indictment is pleaded with sufficient particularity depends on whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that the accused may prepare his defence.[62]

[55] Trial Judgement, para. 984.
[56] Trial Judgement, para. 987.
[57] Trial Judgement, para. 987.
[58] Trial Judgement, para. 992.
[59] Trial Judgement, para. 992.
[60] Trial Judgement, paras 992, 1115. *See* also *ibid.*, para. 155.
[61] *Naletilić and Martinović* Appeal Judgement, para. 23; *Kvočka et al.* Appeal Judgement, para. 27; *Kupre{ki} et al.* Appeal Judgement, para. 88.
[62] *Kupre{ki} et al.* Appeal Judgement, para. 88.

21. The practice of both the International Tribunal and the ICTR requires that the Prosecution plead the specific mode or modes of liability for which the accused is being charged.[63] The Prosecution has repeatedly been discouraged from the practice of simply restating Article 7(1) of the Statute unless it intends to rely on all of the modes of liability contained therein, because of the ambiguity that this causes.[64] When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective.[65] The Appeals Chamber further reaffirms that the Prosecution should only plead the modes of responsibility on which it intends to rely,[66] and considers that the alleged mode(s) of liability of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in the indictment.[67]

22. Similarly, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the said term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both.[68] It is not enough for the generic language of an indictment to "encompass" the possibility that joint criminal enterprise is being charged.[69] The Appeals Chamber reiterates that joint criminal enterprise must be specifically pleaded in an indictment.[70] Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute; such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility.[71] Also, if the Prosecution relies on this specific mode of liability, it must plead the following material facts: the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise.[72] In order for an accused charged with joint criminal enterprise to fully understand the acts he is allegedly responsible for, the indictment should also clearly indicate

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[63] *Bla{ki}* Appeal Judgement, para. 215; *Semanza* Appeal Judgement, para. 357. *See also Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, para. 171, fn. 319; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the form of the Amended Indictment, 20 February 2001, para. 10; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60.
[64] *Semanza* Appeal Judgement, para. 357; *see* also *Ntakirutimana* Appeal Judgement, para. 473; *Blaskić* Appeal Judgement, para. 228; *Krnojelac* Appeal Judgement, para. 138.
[65] *Kvočka et al.* Appeal Judgement, para. 29.
[66] *Kvo~ka et al.* Appeal Judgement, para. 41.
[67] *Bla{ki}* Appeal Judgement, para. 215.
[68] *Krnojelac* Appeal Judgement, para. 138.
[69] *Gacumbitsi* Appeal Judgement, para. 167.
[70] *Gacumbitsi* Appeal Judgement, paras 163 and 167; *Ntagerura et al.* Appeal Judgement, para. 24 ; *Kvo~ka et al.* Appeal Judgement, para. 42.
[71] *Kvo~ka et al.* Appeal Judgement, para. 42.
[72] *Ntagerura et al.* Appeal Judgement, para. 24; *Kvočka et al.* Appeal Judgement, para. 28.

which form of joint criminal enterprise is being alleged.[73] The Appeals Chamber considers that failure to specifically plead joint criminal enterprise in the indictment in a case where the Prosecution intends to rely on this mode of liability will result in a defective indictment.[74]

23. When challenges to an indictment are raised on appeal, the indictment can no longer be amended; the Appeals Chamber must thus determine whether the error of having tried the accused on a defective indictment "invalidatFedğ the decision."[75] In making this determination, the Appeals Chamber does not exclude the possibility that, in certain instances, the prejudicial effect of a defective indictment may be "remedied" if the Prosecution provided the accused with clear, timely and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges.[76] Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the International Tribunal, there can only be a limited number of cases that fall within this category.[77]

24. Whether the Prosecution has cured a defect in an indictment and whether the defect has caused any prejudice to the accused are questions aimed at assessing whether the trial was rendered unfair.[78] In this regard, the Appeals Chamber reiterates that a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused. The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[79] The Appeals Chamber has previously considered whether notice was sufficiently communicated to the Defence through the information provided in the Prosecution's pre-trial brief or its opening statement.[80] The Appeals Chamber has held that in considering such notice, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case are relevant.[81] The Appeals Chamber recalls that the mere service of witness statements or of

[73] *Ntagerura et al.* Appeal Judgement, para. 24; *Kvo~ka et al.* Appeal Judgement, para. 28, referring to *Krnojelac* Appeal Judgement, para. 138.
[74] *Gacumbitsi* Appeal Judgement, paras 162-163; *Ntagerura et al.* Appeal Judgement, para. 24; s*ee Kvo~ka et al.* Appeal Judgement, para. 42.
[75] *Kvo~ka et al.* Appeal Judgement, para. 34, referring to Article 25(1)(a) of the Statute.
[76] *Gacumbitsi* Appeal Judgement, para. 163; *Ntagerura et al.* Appeal Judgement, para. 29; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvo~ka et al.* Appeal Judgement, para. 33; s*ee Kupre{ki} et al.* Appeal Judgement, para. 114.
[77] *Kupre{ki} et al*. Appeal Judgement, para. 114. *See* also *Ntakirutimana* Appeal Judgement, para. 472.
[78] *See Ntagerura et al.* Appeal Judgement, para. 30.
[79] *Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58; *Kupre{ki} et al.* Appeal Judgement, para. 122.
[80] *See e.g. Kordić and Čerkez* Appeal Judgement, para. 169; *Bla{ki}* Appeal Judgement, para. 242; *Kupreškić et al.* Appeal Judgement, paras 117-118.
[81] *Ntakirutimana* Appeal Judgement, paras 27-28; s*ee Kupre{ki} et al*. Appeal Judgement, paras 119-121.

potential exhibits by the Prosecution pursuant to the disclosure requirements of the Rules does not, however, suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[82] Finally, an accused's submissions at trial, for example the motion for judgement of acquittal, the final trial brief or the closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[83]

25. In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter.[84] In general, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party. Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver.[85] However, the importance of the right of an accused to be informed of the charges against him and the possibility that he will incur serious prejudice if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal.[86] Where, in such circumstances, an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired.[87] On the other hand, when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.[88]

C. Whether the indictment was defective

26. The Appellant submits that the Prosecution failed, until after the close of the Prosecution's case, to specify the nature of its case with respect to the alleged basis of individual criminal responsibility under Article 7(1) of the Statute.[89] He recalls that the expression "joint criminal

[82] *Naletilić and Martinović* Appeal Judgement, para. 27; *Ntakirutimana* Appeal Judgement, para. 27 referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[83] *Naletilić and Martinović* Appeal Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras 52, 53; *Kordić and Čerkez* Appeal Judgement, para. 148.
[84] *Niyitegeka* Appeal Judgement, para. 198.
[85] *Niyitegeka* Appeal Judgement, para. 199 referring to *Kayishema and Ruzindana* Appeal Judgement, para. 91.
[86] *Niyitegeka* Appeal Judgement, para. 200.
[87] *Ntagerura et al.* Appeal Judgement, para. 31; *Kvo~ka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[88] *Ntagerura et al.* Appeal Judgement, para. 31; *Kvo~ka et al.* Appeal Judgement, para. 35, *Niyitegeka* Appeal Judgement, para. 200.
[89] Appeal Brief, paras 8, 13, 20.

enterprise" was never employed in any one of the six versions of the indictment against him[90] and argues that the Prosecution's intention to base its case on allegations of joint criminal enterprise was not revealed in its Pre-Trial Brief, during the Pre-Trial Conference or during the Prosecution's Opening Statement at trial.[91] He notes that, in fact, the Prosecution employed the expression "joint criminal enterprise" for the first time in its Rule 98*bis* Response, and that it was in its closing argument that the Prosecution for the first time specifically suggested that the Appellant was at the "apex" of the joint criminal enterprise alleged.[92] The Appellant argues that throughout the Prosecution's case it appeared that the Prosecution was basing its case on a theory of aiding and abetting.[93]

27. The Appellant further argues that the Trial Chamber's finding that the reference by the Prosecution to a joint criminal enterprise was explicitly clarified at the time of the third amendment to the indictment is incorrect.[94] He submits that the Trial Chamber set a lower standard than the one set in the *Kupre{ki} et al.* Appeal Judgement regarding what amounts to clear information when it concluded that "acting in concert together" is an acceptable synonym for "joint criminal enterprise."[95] The Appellant notes that the phrase "acting in concert together" was not used in the charging paragraphs until the fourth amendment to the indictment in December 2001, and that such term only appeared once in the *chapeau* to Count 1 (persecutions). Moreover, he adds, "whether or not 'common purpose' means the same thing as 'joint criminal enterprise' it does not follow that 'acting in concert' and 'common purpose' or 'joint criminal enterprise' mean the same thing; indeed, on the face of it, they clearly do not".[96] The Appellant stresses that his basic rights have been compromised while, in fact, "[a]ll the Prosecution had to do, at sometime between 1995 and the start of the trial in September 2001, was to write the words 'joint criminal enterprise' in the Fiğndictment."[97] At the Appeal Hearing, while conceding that "it would be perhaps possible to plead an indictment with sufficient particularity without using those exact words Fjoint criminal enterprise]", the Appellant argued that what is necessary is "for the Defence to be left in no doubt as

[90] Appeal Brief, para. 10.
[91] Appeal Brief, para. 14, referring to Trial Judgement, para. 152. *See* also Appeal Brief, para. 19.
[92] Appeal Brief, para. 14, referring to Trial Judgement para. 992 and to Rule 98*bis* Response. *See* also Reply Brief, para. 10.
[93] Appeal Brief, para. 11.
[94] Appeal Brief, para. 18.
[95] Appeal Brief, paras 22-23, referring to *Kupre{ki} et al.* Appeal Judgement, para. 88.
[96] Appeal Brief, para. 24. *See* also Appeal Brief para. 23, referring to *Ojdani}* Decision on Joint Criminal Enterprise, para. 36 and to Trial Judgement, para. 149.
[97] Appeal Brief, para. 25.

[to] the substance of the allegations".[98] This could be done, according to the Appellant, "as long as the indictment made clear, however, what the elements were that the Prosecution alleged".[99]

28. The Prosecution responds that the pleading was not defective.[100] It contends that the Third Amended Indictment, filed before the start of the trial, sufficiently warned the Appellant that he was being charged for persecutions using the mode of liability of joint criminal enterprise.[101] The Prosecution argues that the terms "common purpose" and "acting in concert" used in the Third Amended Indictment have been used synonymously with joint criminal enterprise or design.[102] It further asserts that the Third Amended Indictment and all subsequent indictments charged the Appellant, *inter alia*, with committing while acting in concert together with others, and submits that the only forms of commission where several persons act in concert together are modes of co-perpetration, from which the Trial Chamber selected the basic form of joint criminal enterprise.[103] The Prosecution also submits that the Third Amended Indictment pleaded all material elements required for charging joint criminal enterprise, *i.e.* the nature and purpose of the joint criminal enterprise,[104] its timeframe,[105] its members,[106] and the nature of the participation of the Appellant.[107] According to the Prosecution, the words "acting in concert with others" were on their own sufficient to notify the Appellant that he was charged under the theory of joint criminal enterprise, and more so when these words are read together with other passages from the Third Amended Indictment such as "plan for ethnic cleansing", "common purpose" and "persecutory campaign".[108]

29. In reply, the Appellant recalls that the Motion to Amend the Second Amended Indictment (which resulted in the Third Amended Indictment) stated that "Ftğhe charges against Blagoje Simi}, Miroslav Tadi} and Simo Zari} remain the same as those alleged in the Second Amended Indictment".[109] He contends that the Prosecution did not bring the addition of the words "acting in

[98] AT. 58; *see* also AT. 141.
[99] AT. 58.
[100] Response Brief, para. 2.3
[101] Response Brief, para. 2.6. *See* also AT. 88.
[102] Response Brief, paras 2.6-2.8, referring to *Tadi}* Appeal Judgement, paras 220, 229(iv); *Aleksovski* Appeal Judgement, para. 163; *Kayishema and Ruzindana* Appeal Judgement, paras 191-194; *Ojdanić* Decision on Joint Criminal Enterprise, paras 16-17; *Krnojelac* Trial Judgement, para. 84; *Deronjić* Sentencing Judgement, paras 126-128.
[103] Response Brief, para. 2.9.
[104] Response Brief, para. 2.10 referring to Third Amended Indictment, paras 13, 38, 40 and to Fifth Amended Indictment, paras 11, 31, 33.
[105] Response Brief, para. 2.10, referring to Third Amended Indictment, para. 40 and to Fifth Amended Indictment, para. 33.
[106] Response Brief, para. 2.10, referring to Third Amended Indictment, paras 13, 40 and to Fifth Amended Indictment, paras 11, 33.
[107] Response Brief, para. 2.10, referring to Third Amended Indictment, para. 13 and to Fifth Amended Indictment, para. 11.
[108] Response Brief, paras 2.7 and 2.11, referring to Third Amended Indictment, paras 38, 40 and to Fifth Amended Indictment, paras 31, 33.
[109] Reply Brief, para. 14, referring to Motion to Amend the Second Amended Indictment, para. 5.

concert together" in paragraph 13 of the Third Amended Indictment to the attention of the Pre-Trial Chamber and that, as a result, this addition was made without leave in violation of Rule 50(A)(i)(b), thus depriving the Appellant of his rights under Rule 50(B) and (C). The Appellant argues that the said violation invalidates the Prosecution's criticism that he did not object to the form of the indictment by way of preliminary motion.[110] The Appellant points out that the amendment to the Third Amended Indictment (which resulted in the Fourth Amended Indictment) to include the term "acting in concert together and with [others]" in various paragraphs other than paragraph 13, was granted on 20 December 2001, some three months after the start of the trial "with the Trial Chamber making the assumption that the words 'acting in concert' had been included in paragraph 13 of the Third Amended Indictment".[111] The Appellant argues that had the Third Amended Indictment not included those words it is possible that the Trial Chamber would have taken a different view.[112]

30. The Appellant does not accept that the words "acting in concert", without more, are necessarily sufficient as a matter of pleading to put an accused on notice of an allegation of joint criminal enterprise.[113] He argues also that there can be forms of co-perpetration that do not amount to a joint criminal enterprise.[114] In addition, the Appellant submits that, because the *Krnojelac* Trial Judgement was rendered on 15 March 2002, some six months after the start of trial in the present case, it cannot be taken as having provided notice of any procedural equivalence of "acting in concert" and joint criminal enterprise prior to the date it was rendered.[115]

31. As stated earlier, failure to specifically plead joint criminal enterprise in an indictment in a case where the Prosecution intends to rely on this mode of liability will result in a defective indictment.[116] Against this backdrop, the Appeals Chamber turns to discuss whether, in the circumstances of the present case, the Trial Chamber erred by concluding that the indictment against the Appellant put him on notice that he was charged with participating in a joint criminal enterprise.

[110] Reply Brief, para. 15.
[111] Reply Brief, para. 16.
[112] Reply Brief, para. 16.
[113] Reply Brief, para. 17.
[114] Reply Brief, para. 17, referring to *Staki}* Trial Judgement, paras 439-441.
[115] Reply Brief, para. 18.
[116] *Gacumbitsi* Appeal Judgement, para. 163; *Ntagerura et al.* Appeal Judgement, para. 24; *Kvocka et al.* Appeal Judgement, para. 42.

32. The Appeals Chamber recalls that in the present case, the indictment was amended five times, resulting in six versions of the indictment.[117] The expression "joint criminal enterprise" was not contained in the Initial Indictment against the Appellant or in any of the subsequent amendments to it. This absence does not in and of itself indicate a defect given that it is possible that other phrasings might effectively convey the same concept.[118] As the ICTR Appeals Chamber has previously held, "Ftğhe question is not whether particular words have been used, but whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[119]

1. Initial Indictment and First Amended Indictment

33. The Initial Indictment against the Appellant was confirmed on 21 July 1995[120] and charged the Appellant pursuant to Article 7(3) of the Statute as the superior of Stevan Todorovi}.[121] The First Amended Indictment, which did not include the Appellant, was confirmed on 25 August 1998.[122]

2. Second Amended Indictment

34. The Second Amended Indictment, confirmed on 11 December 1998 charged the Appellant pursuant to Article 7(1) of the Statute for "committing or aiding and abetting" persecutions, as well as pursuant to Article 7(3).[123] It used the words "along with various individuals" in the section entitled "Background" and the words "together with other[s]" in Count 1 (persecutions).[124] These phrases, even when read together with the reference to the Serb authorities' plan for "ethnic cleansing", in accordance with which life was made impossible and oppressive to non-Serb

[117] The Appeals Chamber notes that the Trial Judgement contains inaccuracies regarding the different versions of the indictment against the Appellant. For example, the Initial Indictment was amended five times, instead of the four maintained by the Trial Chamber: *see* Trial Judgement, para. 151.
[118] *Gacumbitsi* Appeal Judgement, para. 165, referring to *Ntakirutimana* Appeal Judgement, fn. 783.
[119] *Gacumbitsi* Appeal Judgement, para. 165, referring to *Ntakirutimana* Appeal Judgement, para. 470. However, mindful of the jurisprudence set out in paras 21 and 22 *supra* the Appeals Chamber endorses the following statement made in footnote 380 of the *Gacumbitsi* Appeal Judgement: "because today ICTY and ICTR cases routinely employ the phrase 'joint criminal enterprise', that phrase should for the sake of maximum clarity preferably be included in future indictments where Fjoint criminal enterpriseğ is being charged."
[120] The Initial Indictment is incorrectly referred to as "First Indictment" at Trial Judgement, para. 151.
[121] Initial Indictment, Counts 42-56.
[122] The First Amended Indictment is incorrectly referred to as the First Indictment at Trial Judgement, fn. 270. The First Amended Indictment was confirmed after three of the initial accused, namely Milan Simi}, Miroslav Tadi} and Simo Zari}, surrendered to the custody of the International Tribunal. The charges against the Appellant were reinstated in the Second Amended Indictment.
[123] On 25 March 1999, following a motion from Stevan Todorovi}, the Second Amended Indictment was filed after the aliases of the accused had been expunged from it: *see* Redaction of Second Amended Indictment. *See* Second Amended Indictment, para. 31.
[124] Second Amended Indictment, paras 13, 29.

residents of the Municipality of Bosanski [amac,[125] are grossly insufficient to imply an allegation of joint criminal enterprise. The Second Amended Indictment repeated *verbatim* the statutory formulation of Article 7(1) in the "Background" and "General Allegations" sections.[126] The "General Allegations" section "also, or alternatively" charged the Appellant as a superior for the acts of his subordinates pursuant to Article 7(3) of the Statute.[127] Under Counts 1 and 2, the Appellant was alleged to have "committed and aided and abetted the commission" of persecutions through his "participation" in a series of acts and omissions[128] and to have "planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of" unlawful deportation or forcible transfer of hundreds of Bosnian Croat, Bosnian Muslim and other non-Serb civilians.[129]

35. Accordingly, the Appeals Chamber finds that the Second Amended Indictment did not put the Appellant on notice that he was charged as a participant in a joint criminal enterprise.

3. Third Amended Indictment

36. On 24 April 2001, following the co-accused Stevan Todorovi}'s guilty plea, the Prosecution filed a motion requesting leave to amend the Second Amended Indictment in order to remove, *inter alia,* the charges against the Appellant under Article 7(3) of the Statute and attached the Third Amended Indictment to that motion.[130] It submitted that the "charges against [the Appellant] remain the same as those alleged in the *Second Amended Indictment*",[131] and that "the only changes to the [Second Amended] [I]ndictment are the dismissal of counts [against Stevan Todorovi} and another co-accused] and the 7(3) responsibility of [the Appellant]".[132] On 15 May 2001, the Pre-Trial Chamber granted the motion, considering that "the amendments relate solely to the dismissal of counts and the deletion of charges of responsibility", and accepted the filing of the Third Amended Indictment.[133]

37. The Appeals Chamber notes that the Third Amended Indictment did stop short of merely deleting counts and charges of responsibility. First, it replaced the words "together with other[s]"

[125] Second Amended Indictment, para. 11.
[126] Second Amended Indictment, paras 13, 25.
[127] Second Amended Indictment, para. 26.
[128] Second Amended Indictment, para. 31.
[129] Second Amended Indictment, para. 36.
[130] Motion to Amend Second Amended Indictment, paras 4, 6. This happened more than a month after the Appellant's initial appearance and plea, and only some four and a half months before the commencement of the trial.
[131] Motion to Amend Second Amended Indictment, para. 5 (emphasis in original).
[132] Motion to Amend Second Amended Indictment, para. 8.
[133] Decision Granting Leave to Amend Indictment, p. 2 (emphasis added).

used in the Second Amended Indictment with the terms "acting in concert together"[134] in the *chapeau* to Count 1 (persecutions). Secondly, in addition to the terms "along with various individuals" and "a campaign of persecutions" used in the closing paragraph of the "Background" section of the Second Amended Indictment, the Third Amended Indictment employed the words "common purpose" and "in furtherance of the campaign" in the "Additional Factual Allegations" section.[135] It is on these terms contained in the Third Amended Indictment – "acting in concert together" and "common purpose" – that the Prosecution relies for its argument that the Appellant was put on notice that he was charged with participation in a joint criminal enterprise.[136]

38. The Appellant contends that these additions were made without leave and therefore did not put him on notice of an allegation of joint criminal enterprise.[137] The Prosecution argues that, notwithstanding whether the form of the Third Amended Indictment was in doubt, it still provided notice of its contents. Moreover, it submits that the Appellant did not avail himself of the ample opportunity he had to challenge this alleged defect in the Third Amended Indictment, and that he does not and cannot claim that, had the Trial Chamber been fully informed that the words "acting in concert together" and "common purpose" had been inserted, it should not have granted leave to file the Third Amended Indictment.[138]

39. Although the terms "joint criminal enterprise" have previously been used interchangeably with the terms "common purpose",[139] by adding the words "common purpose" in the section entitled "Additional Factual Allegations" – and not in the charging paragraphs – of the Third

[134] Third Amended Indictment, para. 13.
[135] Third Amended Indictment, para. 40. Para. 13 of the Second Amended Indictment read: "Ffğrom approximately 1 September 1991 through 31 December 1993, Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Stevan Todorovi}, and Simo Zari}, along with various individuals on the Serb Crisis Staff and other political, municipal and administrative bodies, the police force, and the army, committed, planned, instigated, ordered or otherwise aided and abetted a campaign of persecutions and 'ethnic cleansing' and committed other serious violations of international humanitarian law directed against the Bosnian Croat, Bosnian Muslim and other non-Serb civilians residing in the Bosanski [amac and Od'ak municipalities in the territory of Bosnia and Herzegovina." Para. 40 of the Third Amended Indictment read: "Ffğrom approximately 1 September 1991 through 31 December 1993, Blagoje Simi}, Milan Simi}, Miroslav Tadi}, and Simo Zari}, along with various individuals on the Serb Crisis Staff and other political, municipal and administrative bodies, the police force, and the army, committed, planned instigated, ordered or otherwise aided and abetted a campaign of persecutions for the common purpose of ridding the Bosanski [amac and Od'ak municipalities of all non-Serbs and in furtherance of the campaign committed other serious violations of international humanitarian law directed against the Bosnian Croat, Bosnian Muslim and other non-Serb civilians residing in the Bosanski [amac and Od'ak municipalities in the territory of Bosnia and Herzegovina."
[136] Response Brief, para. 2.7; AT. 86-90.
[137] Reply Brief, para. 15. In addition, the Appellant submits that the Third Amended Indictment as it appears on the International Tribunal's public website does not include these additions, which is why two versions may have been in circulation: AT. 45-46. The Appeals Chamber fails to see the relevance of this submission, given that the Third Amended Indictment as filed on the record includes the additions in question and that the documents posted on the International Tribunal's public website are not official documents.
[138] AT. 91-92.

Amended Indictment, the Prosecution did not meet the requirements for a proper pleading of a charge based on participation in a joint criminal enterprise. The addition of the terms "acting in concert together" in the *chapeau* paragraph to the persecutions count did not *per se* serve to dispel this vagueness, given the absence of a direct equivalence in meaning between those terms and "joint criminal enterprise."[140] Even when read together with other passages from the Third Amended Indictment such as "plan for ethnic cleansing", "persecutory campaign" and even "common purpose", these terms were not sufficient in this particular case to notify the Appellant that he was alleged to be responsible under the theory of joint criminal enterprise, given that the Prosecution had submitted to the Pre-Trial Chamber that the only change relevant to the Appellant was the removal of his alleged responsibility under Article 7(3) of the Statute, and that the charges against him remained the same as those alleged in the Second Amended Indictment. The Appeals Chamber has already found that the Second Amended Indictment did not put the Appellant on notice of an allegation of that mode of liability. In addition, no mention was made of which form of joint criminal enterprise was being alleged, which acts were alleged to fall within its purpose, or the Appellant's *mens rea* in relation thereto.

40. The Appeals Chamber recalls that the Second Amended Indictment, which charged the Appellant with having "committed and aided and abetted" the commission of the crime of persecutions, did not provide notice of an allegation of joint criminal enterprise.[141] If indeed it was the Prosecution's intention to alter its case through the Third Amended Indictment to include an allegation of joint criminal enterprise, then pursuant to the Appellant's entitlement under Article 21(4)(a) of the Statute, the Prosecution had the corresponding obligation to make that intention expressly clear to the Appellant and the Trial Chamber. Instead of doing so, the Prosecution requested leave to file the Third Amended Indictment on the basis that the *only* change relevant to the Appellant was the removal of his alleged responsibility under Article 7(3) of the Statute,[142] and stated that "Ftğhe charges against Fthe Appellantğ remainFedğ the same as those alleged in the *Second Amended Indictment*."[143] Moreover, as previously noted, in granting leave to amend the Second Amended Indictment the Pre-Trial Chamber considered that the amendments "relate[d]

[139] *Gacumbitsi* Appeal Judgement, para. 165; *Ojdani}* Decision on Joint Criminal Enterprise, para. 36; *Tadi}* Appeal Judgement, paras 185-227; s*ee* also *Prosecutor v. Radoslav Br|anin and Momir Tali}*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24.
[140] *See Gacumbitsi* Appeal Judgement, para. 171 and footnote 385 for examples of the practice of the International Tribunal concerning instances where the phrase "acting in concert" has been considered insufficient to imply, without more, an allegation of joint criminal enterprise.
[141] Second Amended Indictment, para. 31. *See* para. 35 *supra*.
[142] *See* Motion to Amend Second Amended Indictment, para. 8.
[143] Motion to Amend Second Amended Indictment, para. 5 (emphasis in original).

solely to the dismissal of counts and the deletion of charges of responsibility".[144] Accordingly, the Appeals Chamber considers that notwithstanding the Trial Chamber's statement that the fact "that the Prosecution intended to rely on the theory of joint criminal enterprise was further confirmed at the time of the Ffourthğ amendment to the [i]ndictment"[145] – when the Pre-Trial Chamber decided to grant leave to amend the Second Amended Indictment and accepted the filing of the Third Amended Indictment – the Pre-Trial Chamber was not properly informed of whether the charges against the Appellant thereby included an allegation of joint criminal enterprise.[146]

41. Given the ambiguity of the terms used by the Prosecution and the circumstances surrounding the amendments to the indictment, the Appeals Chamber finds that the Third Amended Indictment did not put the Appellant on notice that he was charged as a participant in a joint criminal enterprise.

4. Fourth Amended Indictment

42. The trial against the Appellant commenced on 10 September 2001.[147] On 5 December 2001, the Prosecution filed the Motion to Amend the Third Amended Indictment.[148] The Appellant, jointly with the other co-accused, opposed the Prosecution's Motion to Amend the Third Amended Indictment and requested an adjournment of the trial.[149] On 20 December 2001, the Trial Chamber granted the Prosecution's Motion to Amend the Third Amended Indictment.[150] In the Fourth Amended Indictment, which was filed on 9 January 2002 the terms "acting in concert with others" were for the first time specifically pleaded in the paragraphs charging each of the accused individually.[151] In its Decision to Amend the Third Amended Indictment the Trial Chamber held that, since the words "acting in concert together" were included in paragraph 13 – an introductory paragraph to the charge of persecutions – adding those words to the paragraphs under Count 1 which referred to each individual accused and to the final paragraph under Count 1, "dFidğ not

[144] Decision Granting Leave to Amend Indictment, p. 2.
[145] Trial Judgement, para. 153. When the Trial Chamber referred to the "third amendment to the Fiğndictment" it was in fact referring to the amendment which led to the Fourth Amended Indictment, as corroborated by its reference to its Decision to Amend the Third Amended Indictment.
[146] The Appeals Chamber notes the Appellant's submissions in this regard:"And so the question arises, among many other things, what would the Trial Chamber have done had they known -- whether they did know or not -- what the state of their knowledge is we don't know, but what would the Trial Chamber have done in regard to that motion to amend if they had known that the Pre-Trial Chamber thought it was approving a third amended indictment whose only [significance] was that it deleted charges against the accused?". AT. 47.
[147] Trial Judgement, para. 1137.
[148] Prosecution's Motion for Leave to Amend the Indictment, 5 December 2001 ("Prosecution's Motion to Amend the Third Amended Indictment").
[149] Joint Defense Response of 11 December 2001.
[150] Decision to Amend the Third Amended Indictment.
[151] Fourth Amended Indictment, paras 15, 16, 17, 18, 19 (the relevant part of para 19. reads: "acting in concert together and with others").

amount to adding any new forms of responsibility but amountFedğ to no more than harmonising the language in the various paragraphs under Count 1".[152] The Trial Chamber also allowed the addition of the words "acting in concert together" to the final paragraph of the indictment,[153] which appeared under the section entitled "Additional Factual Allegations" and which, according to the Trial Chamber, "servFedğ to some extent, to summarise the Prosecution's case."[154] Finally, the Trial Chamber allowed the substitution of the words "committed and aided and abetted the commission" with the statutory formulation of Article 7(1) in the paragraphs referring to each individual accused under Count 1.[155] On the grounds that (1) the introductory paragraph to Count 1 (persecutions)[156] already included all forms of individual criminal responsibility under Article 7(1) of the Statute, and (2) paragraph five of the Fourth Amended Indictment repeated *verbatim* the statutory formulation in Article 7(1), the Trial Chamber considered the amendments which resulted in the "harmonisation" of paragraphs 19 and 13 with paragraphs 15 to 18 of the Fourth Amended Indictment, "to be no more than 'cleaning up' the inconsistencies of language"[157] and found that no prejudice was caused to the accused through said amendments.[158] The Trial Chamber concluded that "the amendments granted [did] not constitute new charges, but rather, particulars for Count 1", and on that basis it denied the Defence's joint request for an adjournment in view of the amendments to the Third Amended Indictment.[159]

43. In the Trial Judgement, the Trial Chamber stated that these amendments "explicitly clarified" the Prosecution's intention to rely on a theory of joint criminal enterprise.[160] Given that the amendments to the Third Amended Indictment – granted by a differently-composed Trial Chamber than the Pre-Trial Chamber which granted leave to amend the Second Amended Indictment – did not, as submitted by the Prosecution, add any new forms of responsibility or any new charges, and that the Appeals Chamber has found that the Third Amended Indictment did not put the Appellant on notice that he was charged as a participant in a joint criminal enterprise, the

[152] Decision to Amend the Third Amended Indictment, para. 22. *See* also Fourth Amended Indictment, para. 13. The Trial Chamber did not allow similar amendments to Count 2 (deportation) and Count 3 (unlawful deportation or transfer) because the expression "acting in concert together" did not appear in the introductory paragraphs to these counts, and thus the Trial Chamber did not "see any basis upon which to find that the accused had any notice that their responsibility included the words "acting in concert together", and considered that the granting of such an amendment "would prejudice the accused": Decision to Amend the Third Amended Indictment, para. 24.
[153] Fourth Amended Indictment, para. 40.
[154] Because the Trial Chamber had stated that it would allow amendments "only when prior notice of those words was present under the respective count", it allowed this amendment to the final paragraph under the section entitled "Additional Factual Allegations" with the caveat that it was restricted to Count 1 (persecutions). *See* Decision to Amend the Third Amended Indictment, para. 25.
[155] Fourth Amended Indictment, paras 15, 16, 17, 18.
[156] *See* Fourth Amended Indictment, para. 13.
[157] Decision to Amend the Third Amended Indictment, para. 20.
[158] Decision to Amend the Third Amended Indictment, para. 23.
[159] Decision to Amend the Third Amended Indictment, para. 30.

Appeals Chamber considers that this statement is erroneous. The amendments made to the Third Amended Indictment and the circumstances surrounding them did not serve to dispel the ambiguity that had been carried over from the time when the amendments to the Second Amended Indictment were made. For the foregoing reasons, the Appeals Chamber finds that the Fourth Amended Indictment did not put the Appellant on notice that he was charged as a participant in a joint criminal enterprise.[161]

44. If indeed the Trial Chamber had considered at the time of the amendments to the Third Amended Indictment that they amounted to a pleading of joint criminal enterprise, it was under an obligation to ensure that the Appellant's right to a fair trial was not thereby violated, in particular given the fact that these amendments were introduced some three months after the start of the trial.[162] It should have considered whether the Prosecution had provided the Appellant with clear and timely notice of this allegation such that he had a fair opportunity to conduct investigations and to prepare his defence.[163] The Trial Chamber did none of the above; in fact, as noted earlier, it denied the Appellant's request for an adjournment[164] in view of the amendments to the Third Amended Indictment.[165]

5. Fifth Amended Indictment

45. The Fifth Amended Indictment, removing charges against Milan Simi}, who had pleaded guilty in the course of trial, was filed on 30 May 2002. In all other respects, it remained identical to the Fourth Amended Indictment and consequently did not put the Appellant on notice that he was charged as a participant in a joint criminal enterprise. This last version of the indictment was considered as the operative indictment by the Trial Chamber.[166]

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[160] Trial Judgement, para. 154.
[161] The Appeals Chamber notes that, while in his Appeal Brief the Appellant submits that he was not given notice of joint criminal enterprise until the close of the Prosecution's case (*see* Appeal Brief, paras 8, 13, 20), he submitted during the Appeal Hearing that "the only amendment that [the] Appeals Chamber can really rely upon as stating the case is the fourth amended indictment": AT. 52. However, the Appeals Chamber notes that the latter statement was made to rebut the Prosecution's argument that the Third Amended Indictment pleaded joint criminal enterprise. As such, said statement cannot be understood as a concession that the Fourth Amended Indictment put the Appellant on notice that he was charged as a participant in a joint criminal enterprise. This conclusion is further borne out by the Appellant's persistent arguments in the Appeal Brief and during oral argument that he was not put on notice until the close of the Prosecution's case. *See* AT. 143. *See* also Appeal Brief, para. 20.
[162] *See Kvo~ka et al.* Appeal Judgement, paras 32-33.
[163] *See Kvo~ka et al.* Appeal Judgement, para. 32.
[164] *See* Joint Defense Response to the Prosecution's Motion for Leave to Amend the Indictment, 11 December 2001.
[165] Decision to Amend the Third Amended Indictment, para. 30.
[166] *See* Trial Judgement, para. 1. Throughout the Trial Judgement the Fifth Amended Indictment is referred to as "Amended Indictment". *See* also Trial Judgement, XX. Annex 1- Glossary, p. 327.

D. Conclusion

46. For the foregoing reasons, the Appeals Chamber finds that none of the different versions of the indictment put the Appellant on adequate and timely notice that he was charged as a participant in a joint criminal enterprise.

E. Whether the trial was rendered unfair

47. Having concluded that the indictment against the Appellant was defective, the Appeals Chamber now turns to the question as to whether the defect rendered the trial unfair, in other words, whether the defect was timely and sufficiently cured and, if not, whether the Appellant's ability to prepare his defence was materially impaired.

1. Was the defect cured?

48. The Appellant contends that the Prosecution revealed its intention to rely on a joint criminal enterprise theory for the first time in its Rule 98*bis* Response, at the end of the Prosecution case, when it employed the expression "joint criminal enterprise", which he submits was far too late.[167] He notes that, whilst there have been other cases before the International Tribunal in which a late amendment to the indictment was permitted to allege joint criminal enterprise, and in which it was held nonetheless that the accused were not prejudiced, the Prosecution's intention to make such allegation in those cases was clarified either in its pre-trial brief,[168] at the pre-trial conference,[169] or at the latest during the Prosecution's opening statement.[170] The Appellant argues that such was not the case here and that this case appears to be the first time in which the Prosecution's intention was not announced prior to the end of the presentation of its case.[171]

49. The Prosecution does not argue that the defect of failing to plead joint criminal enterprise in the different indictments was cured. Rather, it contends that the Appellant has not, and cannot, show that he suffered any prejudice from this defect.[172]

[167] Appeal Brief, para. 14, referring to Trial Judgement para. 992. *See* also Reply Brief, para. 10.
[168] Appeal Brief, para. 19; Reply Brief, para. 23, referring to *Krstić* Trial Judgement, para. 602 and to *Kvočka et al.* Trial Judgement, para. 246.
[169] Appeal Brief, para. 19, referring to the *Vasiljević* case; Reply Brief, para. 23, referring to *Vasiljević* Trial Judgement, para. 63.
[170] Reply Brief, para. 23, referring to *Bla{ki}* Appeal Judgement, para. 242.
[171] Appeal Brief, para. 19. *See* also Reply Brief, para. 23.
[172] Response Brief, para. 2.47: "even if the pleading in the Fiğndictment was defective, no prejudice ensued to the Appellant." *See* also 2.48- 2.54; AT. 97.

50. The Trial Chamber found that the Appellant was not provided with notice that he was charged as a participant in a joint criminal enterprise through the Prosecution's Pre-Trial Brief, the Pre-Trial Conference or the Prosecution's Opening Statement. It held that:

> [t]he Prosecution in its Pre-Trial Brief did not refer specifically to a joint criminal enterprise or any of its possible scenarios, or to any of the material facts upon which it is based. While it does contain some mention of the role of the Accused, the information is very general and largely a repetition of what is in the ŦFifthğ Amended Indictment. *The Prosecution Pre-Trial Brief seemed rather to be directed at a discussion of the elements of aiding and abetting.* The matter was not clarified at the Pre-Trial Conference. Neither did the Prosecution refer in its Opening Statement to any form of joint criminal enterprise.[173]

51. This notwithstanding, the Trial Chamber went on to find that "the [Fifth] Amended Indictment, together with the Prosecution Pre-Trial Brief, provide[d] sufficient notice of the nature or purpose of the common plan".[174] For the reasons that follow, the Appeals Chamber considers that this statement is erroneous.

52. The Appeals Chamber has already found that the Fifth Amended Indictment did not put the Appellant on notice of an allegation of joint criminal enterprise.[175] The Prosecution Pre-Trial Brief generally stated that "Ŧtğhe accused haŦdğ been put on sufficient notice, through the specific language of the indictment, that any one of the theories of responsibility under Article 7(1) could apply",[176] and that "when the evidence establishes that there was a pre-arranged scheme or plan to engage in the criminal conduct, anyone who knowingly participated may be held criminally responsible under Article 7(1) of the Statute".[177] Aside from these general statements, the Prosecution vaguely alleged that the accused "directly participated in some manner", and "were directly involved or aided and abetted" the crimes.[178] As regards the Appellant, the Prosecution merely claimed that he "was directly involved in the crimes committed in Bosanski [amac."[179] The Prosecution Pre-Trial Brief therefore did not provide clear and consistent notice that the Appellant's participation in a joint criminal enterprise was being alleged.

[173] Trial Judgement, para. 152 (footnotes omitted) (emphasis added).
[174] Trial Judgement, para. 153.
[175] *See* para. 45 *supra*.
[176] Prosecution Pre-Trial Brief, para. 31.
[177] Prosecution Pre-Trial Brief, para. 33.
[178] Prosecution Pre-Trial Brief, paras 32, 33.
[179] Prosecution Pre-Trial Brief, para. 34.

53. At the Pre-Trial Conference, there was no mention of a "joint criminal enterprise".[180] The Prosecution's Opening Statement was not any more specific than its Pre-Trial Brief,[181] and its submissions pursuant to Rule 65*ter* did not bring to light a theory of joint criminal enterprise.[182]

54. The Prosecution submitted at the Appeal Hearing that its response to the Appellant's pre-trial motion[183] to exclude evidence relating to acts committed by Stevan Todorovi}[184] as well as the Decision to Amend the Third Amended Indictment confirm that the Appellant knew that he was charged with joint criminal enterprise liability.[185]

55. The Appeals Chamber does not consider that the Decision to Amend the Third Amended Indictment put the Appellant on notice that he was so charged, and refers to its earlier discussion.[186] The Response to Motion to Exclude Evidence stated that "Count 1 of the [Third Amended] Indictment alleges that all defendants acted in 'in concert together, and with other Serb civilian and military officials'. It is therefore submitted that the relevance of acts committed by an official such as Stevan Todorovi} is directly relevant to an issue in the [Third Amended] Indictment'".[187] These submissions added nothing to the language of the Third Amended Indictment. Moreover, the fact that the evidence of Stevan Todorovi}'s acts was alleged to be relevant on the basis that the accused "acted in concert together, and with other Serb civilian and military officials" does not necessarily imply that it would go to prove the existence of a joint criminal enterprise, as it could have been equally relevant to other material facts which, in contrast to joint criminal enterprise, were pleaded in the Third Amended Indictment. For instance, the Prosecution itself stated that the evidence of Stevan Todorović was "relevant to issues of the [Appellant's] knowledge of matters pertaining to, *inter alia*, Count 1 (persecutions), the widespread nature of the attack on a civilian population, the relationship between the Crisis Staff and the defendants, the acts of paramilitaries, and the issue of international armed conflict".[188] This conclusion is corroborated by the Trial Chamber's Decision on the Motion to Exclude Evidence, wherein it summarised the Prosecution's submission as being that the evidence was relevant "in that all accused are charged with count 1, persecutions, to which

[180] Pre-Trial Conference, 26 June 2001, T. 856-881. *See* also Status Conference, 10 September 2001, T. 1000-1017.
[181] Prosecution's Opening Statement, 10 September 2001, T. 924-961. "The Prosecution contends that each of these defendants acted in concert together, and with other Serb civilian and military officials, planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, and the execution of crimes which ultimately resulted in the ethnic cleaning of Bosanski [amac": Prosecution's Opening Statement, 10 September 2001, T. 925.
[182] *See* Prosecution Witness List and Exhibit List.
[183] Motion of Blagoje Simi} to Exclude Evidence Relating to Acts Committed by Stevan Todorovi}, 3 September 2001 ("Motion to Exclude Evidence").
[184] Prosecutor's Response to the Motion of Defendant Blagoje Simi} to Exclude Evidence Relating to Acts Committed by Stevan Todorovi}, 6 September 2001 ("Response to Motion to Exclude Evidence").
[185] AT. 94-95.
[186] *See* paras 42-44 *supra*.
[187] Response to Motion to Exclude Evidence, para. 7 (footnote ommited).

[Stevan] Todorović pleaded guilty".[189] The Appeals Chamber is therefore not satisfied that the Response to Motion to Exclude Evidence provided clear and consistent information that the Prosecution intended to pursue a case based on joint criminal enterprise.

56. In its Rule 98*bis* Response, the Prosecution stated for the first time that "the Prosecution case is one of a common purpose or joint criminal enterprise to persecute the non-Serbs".[190] Thus, it was only at the end of its case that the Prosecution revealed that it was pursuing a case of joint criminal enterprise. While it can be considered as clear notice, this cannot be considered timely. The Appeals Chamber recalls that "a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity."[191] Such ambiguity should be avoided and "where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial."[192]

57. The Appeals Chamber recalls that a vague indictment, not cured by clear, consistent and timely notice, leads to prejudice to the accused.[193] A defect in an indictment may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[194]

2. Issue of waiver and burden of proof

58. The Prosecution contends that the Appellant has waived his right to raise the issue on appeal and consequently bears the burden of demonstrating that his ability to prepare a defence was materially impaired.[195] It argues that although the Appellant challenged the pleading of several modes of liability, he did so at a very late stage of the proceedings.[196] The Prosecution concedes that the Appellant did raise an objection to the amendments to the Third Amended Indictment; however, it argues that he did so in relation to a different issue, namely the reference to destruction of property and plunder.[197] The Prosecution stresses that the Trial Chamber pointed out that the Appellant had advanced "no substantive legal arguments" against the insertion of the words "acting in concert together".[198] It asserts that the Appellant failed to bring to the attention of the Trial

[188] Response to Motion to Exclude Evidence, para. 8.
[189] Decision on Motion to Exclude Evidence, p. 2.
[190] Rule 98*bis* Response, para. 13.
[191] *Krnojelac* Appeal Judgement, para. 138.
[192] *Krnojelac* Appeal Judgement, para. 138.
[193] *See Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58.
[194] *See Kupre{ki} et al.* Appeal Judgement, para. 122.
[195] Response Brief, paras 2.24, 2.25, 2.46. *See* also paras 2.34-2.36.
[196] Response Brief, paras 2.25, 2.37.
[197] Response Brief, para. 2.32, referring to Joint Defense Response of 11 December 2001, paras 8 *et seq*.
[198] Response Brief, para. 2.32, referring to Decision to Amend the Third Amended Indictment, para. 16.

Chamber at the appropriate time the fact that he had insufficient notice of the mode of liability he was charged with, and that he did not do so even after he allegedly learned in the Rule 98*bis* Response that he was charged with participation in a joint criminal enterprise.[199]

59. The Appellant submits in reply that the Trial Judgement reflected that he did in fact object to the proposed amendments to the Third Amended Indictment.[200] In addition, he notes that the Trial Chamber elected not to rule on his objection to the form of the Fifth Amended Indictment in his Rule 98*bis* Motion because it was not made pursuant to Rule 72(A)(ii) and postponed such ruling until the time of the final Judgement.[201] The Appellant submits that "Ғağfter the Trial Chamber's ruling that the objection to the form of the [i]ndictment would not be considered until the time of the final Judgement, there was no point in the Appellant's seeking to object further before the stage of final argument".[202] In this regard, the Appellant recalls the finding in the *Bla{ki}* Appeal Judgement that where an accused raises an objection with the Trial Chamber and receives an assurance that it will be dealt with, he is not obliged to repeat the objection. He emphasises that he did raise "the objection in specific terms in his final brief".[203]

60. In the Trial Judgement, the Trial Chamber observed that "the Ғağccused did not make any complaint *prior to trial* that they did not know the case they had to meet"[204] and, further, that "the Defence never raised any challenge to the form of any of the [different versions of the indictment], including the inclusion of 'acting in concert', and 'common purpose' in [the Third Amended Indictment]".[205] In view of the circumstances surrounding the amendments to the subsequent versions of the indictment, which have been considered above,[206] the Appeals Chamber fails to see how the Appellant would have been required to have done so.

61. Moreover, the Appellant did raise objections to the Fourth and Fifth Amended Indictments. In his Rule 98*bis* Motion, after recalling the forms of individual criminal responsibility expressly relied upon by the Prosecution, the Appellant alleged that the "broad definition of the forms of the individual criminal responsibility of the Defendant makes the position of the Defendant totally

[199] Response Brief, paras 2.34-2.36. *See* also AT. 98-99.
[200] Reply Brief, para. 19, referring to Trial Judgement, para. 1137, and Decision to Amend the Third Amended Indictment, para. 16.
[201] Reply Brief, para. 19, referring to Rule 98*bis* Motion; Rule 98*bis* Decision, para. 3, and Trial Judgement, para. 155.
[202] Reply Brief, para. 20.
[203] Reply Brief, para. 20, referring to *Blaški}* Appeal Judgement, paras 223-224 and to Defence Final Trial Brief, pp. 222, 225-226.
[204] Trial Judgement, para. 136 (emphasis added).
[205] Trial Judgement, para. 152.
[206] *See* paras 32-45 *supra*.

unfair"[207] and argued that the Prosecution had failed to provide sufficient details regarding "which particular form of individual criminal responsibility for each particular crime, Ŧcouldğ be ascribed to him".[208] In its Rule 98*bis* Decision, the Trial Chamber held that it would consider this matter "at the time of Judgement, that is, after all the evidence has been adduced."[209] It further stated that "[t]he common purpose theory of liability put forward by the Prosecution will not be discussed substantially by the Trial Chamber at this stage. However, the Trial Chamber finds that sufficient evidence exists, if accepted, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt that Blagoje Simi}, Miroslav Tadi} and Simo Zari} acted in concert with others in relation to the crime of persecution in Count 1".[210] Accordingly, after having been warned by the Trial Chamber that the latter would not consider his objection before rendering its Judgement, the Appellant reiterated his concerns at the end of the trial. Hence, the Appellant denounced in his Final Trial Brief "the absence of clear and precise allegations of individual responsibility of Dr. Simić"[211] and argued at length that the Prosecution had failed to explicitly plead in the indictment a joint criminal enterprise and its material facts.[212] As noted earlier in the present judgement, the Trial Chamber considered this allegation in paragraphs 139 to 155 of the Trial Judgement.

3. Conclusion

62. The Appeals Chamber therefore considers that the Appellant did not waive his right to raise the issue of failure to plead joint criminal enterprise in the indictment on appeal and, as a result, concludes that the Prosecution has the burden of proving that the Appellant's ability to prepare his defence was not materially impaired.

4. Was the Appellant's ability to prepare his defence materially impaired?

63. The Appellant argues that the Trial Chamber erred when it concluded that his ability to prepare his defence was not materially impaired.[213] He contends that as a result of the Prosecution's failure to correctly plead joint criminal enterprise, he was fundamentally prejudiced in the preparation and conduct of his defence because, by the time he found out the Prosecution's "true case", it was too late.[214] He submits that many vital alleged participants in the joint criminal enterprise were not called as witnesses, and that those witnesses who were called, including vital

[207] Rule 98*bis* Motion, para. 23.
[208] Rule 98*bis* Motion, para. 25. *See* also paras 3-6, and 26.
[209] Rule 98*bis* Decision, para. 3.
[210] Rule 98*bis* Decision, para. 41.
[211] Defence Final Trial Brief, para. 136.
[212] Defence Final Trial Brief, paras 650-659.
[213] Appeal Brief, para. 15.
[214] Appeal Brief, para. 20. *See* also AT. 51.

witnesses such as Stevan Todorovi}, were not presented to the Trial Chamber or to the Defence as participants in the joint criminal enterprise alleged.[215] The Appellant argues that, as a result, he was afforded a very limited opportunity to conduct any meaningful cross-examination on the issue of any alleged joint criminal enterprise or as to his alleged participation therein.[216] He claims that, had he known the Prosecution's true case, his entire defence strategy would have changed.[217] He points out that the Defence, until the Prosecution filed its Rule 98*bis* Response, had been defending against the Prosecution's apparent case, which was based on a theory of aiding and abetting.[218]

64. The Prosecution contends that the Appellant has not suffered any prejudice from the defect identified.[219] Concerning the argument to the effect that many vital alleged participants in the joint criminal enterprise were not called as witnesses, the Prosecution points out that the Appellant could not have chosen the witnesses that were to be called in the Prosecution case, and thus the question of when he became aware that the case against him was based on joint criminal enterprise could not in any way have had an impact upon the witnesses called in the Prosecution case.[220] The Prosecution submits that the Appellant was free to call any witnesses he wished during his defence case and, had he found the time between his alleged new understanding of the case against him and the beginning of the Defence case insufficient, he could have asked to postpone the beginning of the Defence case.[221] It also argues that the Appellant's failure to ask to recall Prosecution witnesses, particularly Stevan Todorovi}, whom the Prosecution expressly referred to in its Rule 98*bis* Response as a member of the joint criminal enterprise, is, in relation to his alleged lack of opportunity to cross-examine witnesses, a clear indication that he did not feel prejudiced.[222] The Appellant's silence after the filing of the Rule 98*bis* Response, the Prosecution adds, "is incompatible with having just learned that he had spent the whole Prosecution case defending against the wrong allegations".[223] According to it, the Appellant's lack of reaction to the

[215] Appeal Brief, para. 20, referring to Trial Judgement para. 1081.
[216] Appeal Brief, para. 20.
[217] Appeal Brief, para. 21. *See* also Reply Brief, para. 22.
[218] Appeal Brief, para. 20.
[219] Response Brief, paras 2.47-2.54; AT. 97:"There are no details about the prejudice suffered [in the Defence Final Trial Brief]. There are not even the very general allegations that Simi} now makes in his appeal brief. There's nothing about a different focus of cross-examination and the radically different strategy which he would have taken. And even today, even [in] the appeal, apart from general allegations Simi} cannot specify the different questions he would have asked in cross-examination or the way, the concrete way in which his strategy would have differed and Your Honours have asked a few questions to that effect this morning."
[220] Response Brief, para. 2.49.
[221] Response Brief, para. 2.50. *See* also AT. 96.
[222] Response Brief, paras 2.51-2.52.
[223] AT. 96.

Prosecution's filings and submissions at trial demonstrate that he knew that he was charged with joint criminal enterprise liability.[224]

65. The Appellant replies that the Prosecution's arguments in support of the assertion that his ability to conduct his defence was not materially impaired are naïve. He also submits that he did in fact request more time to prepare his case, but that such request was denied.[225] In addition, he maintains that by the time the true nature of the case against him had become clear, the Prosecution had closed its case, and he had accordingly committed himself to a theory of defence, including lines of cross-examination, appropriate to the apparent case.[226] The Appellant argues that the point was not that he would simply have wished to put further questions to the witnesses whom the Prosecution suggests could have been recalled for further cross-examination or called again as the Appellant's witnesses, but that his entire defence strategy would have changed.[227]

66. First, the Appeals Chamber notes that the Prosecution does not point to any relevant filings or submissions made before its Rule 98*bis* Response that would have allowed the Appellant to clearly understand that he was charged for participation in a joint criminal enterprise, and that would consequently have enabled him to "react".[228]

67. While the Appeals Chamber recognises that the Appellant could not have selected the Prosecution witnesses, it considers that the question of when the Appellant became aware that the case against him was based on a theory of joint criminal enterprise is decisive. Having only been clearly informed at the end of the Prosecution case, the Appellant was not afforded the possibility of conducting cross-examinations on the issue of joint criminal enterprise. Had the Appellant known that he was defending himself against an allegation of participation in a joint criminal enterprise, he could have crafted his cross-examinations eliciting information from the Prosecution witnesses on this specific issue, and tried to demonstrate that the requirements for this mode of liability were not met. The Appeals Chamber cannot but conclude that the Appellant's ability to conduct proper cross-examinations was materially impaired.

68. The Prosecution contends that the Appellant could have recalled its witnesses and requested an adjournment of the proceedings after having found that the Prosecution intended to rely on the mode of liability of joint criminal enterprise. According to it, the failure to do so indicates that the

[224] AT. 96-97.
[225] Reply Brief, para. 21, referring to Response Brief, paras 2.47-2.54 and to Decision to Amend the Third Amended Indictment, para. 30.
[226] Reply Brief, para. 22.
[227] Reply Brief, para. 22.
[228] *See* paras 54-56 *supra*.

Appellant did not feel prejudiced. The Appeals Chamber is of the view that recalling witnesses at that juncture – only a month and a half before the start of the Defence case – would have been impracticable for the Defence. It would also have been necessary for the Appellant to conduct new investigations and contact new witnesses to redefine an appropriate line of defence. Being given notice so late in the course of the proceedings would not, in any event, have enabled the Appellant to mount a proper defence with respect to joint criminal enterprise. In this respect, the Appeals Chamber recalls that, pursuant to Article 21(4)(b) of the Statute, the accused shall be entitled to have adequate time and facilities to prepare his defence.

69. The Appeals Chamber further recalls that, having raised objections to the indictment regarding the form of individual criminal responsibility in his Rule 98*bis* Motion,[229] the Appellant was informed by the Trial Chamber that the matter would be considered "at the time of Judgement, that is, after all the evidence has been adduced" on the ground that "motions alleging defects in the form of the indictment are to be raised pursuant to Rule 72(A)(ii) of the Rules as a preliminary motion, or in the case of new charges arising from the amendment of an indictment, within thirty days of such amendment, pursuant to Rule 50(C) of the Rules".[230] The Appeals Chamber reiterates that, in view of the circumstances surrounding the amendments to the indictment, the Appellant was not in a position to understand that new allegations concerning his responsibility arose from the amendments to any version of the indictment and, consequently, he could not have been required to object at this time. With respect to the Trial Chamber's holding in its Rule 98*bis* Decision to the effect that "sufficient evidence exists, if accepted, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt that Blagoje Simi}, Miroslav Tadi} and Simo Zari} acted in concert with others in relation to the crime of persecution in Count 1"[231], the Appeals Chamber considers that it did not require the Appellant to undertake all precautionary measures necessary to avoid the prejudice he would suffer in case the Trial Chamber decided to reject his objection and convict him under a mode of liability that had not been properly pleaded by the Prosecution. The Appeals Chambers reaches this conclusion on the basis of the particularly late stage at which the Prosecution's intention to rely on a joint criminal enterprise theory became clear to the Appellant who raised an objection before the Trial Chamber and was told that the matter would be considered at the time of Judgement.

70. Likewise, the fact that the Appellant did not request an adjournment of the proceedings after having understood that the Prosecution intended to rely on the mode of liability of joint criminal

[229] Rule 98bis Motion, paras 23, 25-26. *See* also *ibid.,* paras 3-6. *See* para. 61 *supra.*
[230] Rule 98*bis* Decision, para. 3.
[231] Rule 98*bis* Decision, para. 41.

enterprise in no way demonstrates that the Appellant was not or did not feel prejudiced given the Trial Chamber's assurance that the objection to the indictment would be considered at the time of Judgement. The Appellant had good grounds for not doing so. In the Appeals Chamber's opinion, the Appellant's "silence" after the filing of the Rule 98*bis* Response, denounced by the Prosecution during the Appeal Hearing, cannot be held against him.

71. The Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial.[232] An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear. Furthermore, the Appeals Chamber reiterates that if indeed it became clear to the Trial Chamber that this was a case of joint criminal enterprise at the time of the third amendment to the indictment in December 2001,[233] when seised of the Appellant's objection to the Prosecution's Motion to Amend the Third Amended Indictment[234] the Trial Chamber was under the obligation to ensure that the Appellant was sufficiently informed of the exact charges against him such that he had an opportunity to conduct investigations and prepare his defence.[235] Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated.

72. The Appeals Chamber considers that the fact that the Appellant did not seek to recall Prosecution witnesses or ask for an adjournment does not demonstrate that he did not suffer prejudice.

73. Therefore, the Appeals Chamber finds that the Prosecution has not discharged the burden of demonstrating that the Appellant's ability to prepare his defence was not materially impaired by its failure to plead the Appellant's participation in a joint criminal enterprise.

F. Conclusion

74. The Appeals Chamber emphasises that the defect of the indictment in the present case is not a minor one, but rather lies at the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case against him. The Prosecution should have specifically pleaded participation in a joint criminal enterprise in the indictment so as to

[232] *Naletili} and Martinovi}* Appeal Judgement, para. 25; *Kvo~ka et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 26; *Niyitegeka* Appeal Judgement, para. 194; *Krnojelac et al.* Appeal Judgement, para. 132 referring to *Kupre{ki} et al.* Appeal Judgement, para. 92; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[233] Trial Judgement, para. 154.
[234] *See* Joint Defense Response of 11 December 2001, paras 10 -24.
[235] *See* para. 44 *supra.*

properly inform the Appellant of the charges against him. If such a fundamental defect can be held to be harmless in certain circumstances, it would only be through demonstrating that the accused's ability to prepare his defence was not materially impaired.[236] In the absence of such a showing here, the Appeals Chamber concludes that the trial was rendered unfair. Accordingly, the Appeals Chamber allows the Appellant's first and second grounds of appeal and sets aside the Appellant's conviction under Article 7(1) of the Statute for committing persecutions by way of his participation in a joint criminal enterprise under Count 1 of the Fifth Amended Indictment.

[236] *Kupre{ki} et al.* Appeal Judgement, para. 122.

IV. THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE APPELLANT: THIRD TO FOURTEENTH GROUNDS OF APPEAL

A. Proper characterisation of the Appellant's criminal responsibility

75. The Appeals Chamber has allowed the Appellant's first and second grounds of appeal and set aside the Appellant's conviction under Article 7(1) of the Statute for his participation in a joint criminal enterprise. Consequently, the question arises as to whether the Trial Chamber's findings support his responsibility under a different mode of liability pleaded in the Fifth Amended Indictment. To this end, the parties were requested to respond, *inter alia,* to the following questions during their oral submissions at the Appeal Hearing: (1) "In case the Appeals Chamber were to find that the Appellant was not put on notice that he was charged with participating in a joint criminal enterprise, is the Appellant's responsibility best characterized by a different mode of liability pleaded in the Fifth Amended Indictment, and, if so, which one and on what basis?", and (2) "If the Appellant's responsibility were to be analysed in terms of a different mode of liability as argued by the parties upon the Appeals Chamber's request [in the previous question], would the elements of such mode of liability be fulfilled based on the findings in the Trial Judgement?".[237]

76. In his Appeal Brief, the Appellant submits that throughout the Prosecution's case he presented a defence against a case based on aiding and abetting and that, as the true nature of the Prosecution's case did not become apparent until after its case had been closed, it was too late for him to defend against the Prosecution's true case.[238] During his oral argument, the Appellant's main argument was "that the evidence does not support a finding of liability;"[239] nonetheless in the event that the Appeals Chamber found that the evidence supported a finding of criminal responsibility, he conceded that he was put on notice of a theory of aiding and abetting, and that this mode of liability would be appropriate to deal with his criminal responsibility.[240] However, referring to his fourth ground of appeal, he claimed that the Trial Chamber's findings do not support any form of liability under the Statute,[241] including aiding and abetting.[242]

[237] Order Re-scheduling Appeal Hearing, p. 3 paras 4-5.
[238] Appeal Brief, para. 20. *See also*, *ibid.*, para. 26.
[239] AT. 138: "Mr. Kremer said that I had conceded that aiding and abetted was an appropriate form – mode of liability, and I hope the Appeals Chamber will recall that I made that concession after first saying that it was my primary contention that the evidence did not support a finding of liability."
[240] AT. 77.
[241] AT. 72-77.
[242] AT. 78.

77. The Prosecution submitted that the Appellant's criminal responsibility can be justified as that of an aider and abettor, based on the same findings that the Trial Chamber relied upon to convict him as a participant in a joint criminal enterprise.[243]

78. As a preliminary matter, the Appeals Chamber considers it necessary to address the Appellant's fourth ground of appeal, under which he argues that, even if accepted, the Trial Chamber's findings do not support any form of criminal liability under the Statute as a matter of law.[244]

1. Lack of individual criminal responsibility (Fourth ground of appeal)

79. Under his fourth ground of appeal the Appellant submits that the Trial Chamber erred in law by finding him responsible for the acts of others and for his alleged failure to prevent or punish the acts of others, despite the fact that he was charged under Article 7(1) and not under Article 7(3) of the Statute.[245]

80. The Appellant argues that an analysis of the findings in the Trial Judgement shows that the factual basis underlying his conviction essentially comprises three propositions: (1) he was the highest ranking civilian official in the Bosanski [amac Municipality; (2) he failed to prevent the commission of crimes by the police, military, paramilitaries and the other alleged participants in the joint criminal enterprise; and (3) he had no authority over the police, military, paramilitaries and the other alleged participants in the joint criminal enterprise.[246] The Appellant contends that, by relying on this combination of findings, the Trial Chamber purported to hold him responsible for an omission to act.[247] However, he argues, only where there is a clear duty to act may criminal responsibility be imposed for an omission to act; in the present case there was no showing that he had either a duty or an ability to act.[248] In addition, he notes that he was not charged under Article 7(3) of the Statute.[249] On this basis, he submits that the Trial Chamber sought to create "a hybrid theory of responsibility" which does not correspond with the requirements for criminal

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[243] AT. 119-120, 126.
[244] Appeal Brief, para. 36 *et seq*.; AT. 76-77.
[245] Amended Notice of Appeal, para. 6.
[246] Appeal Brief, paras 41-42 (citing Trial Judgement, paras 395, 396, 994-997, 1003-1011, 1021, 1022, 1027, 1029, 1034-1038); AT. 72.
[247] Appeal Brief, para. 44. While the Appellant acknowledges that the Trial Chamber relied also on his positive acts, he submits that "it should be borne in mind that the alleged active involvement of the Appellant, taken at its highest, was never more than on the fringe of the Trial Chamber's findings. […] The clear essence of the Trial Chamber's findings, without which they would collapse into nothing, is the alleged failure to act": Reply Brief, para. 30.
[248] Appeal Brief, paras 44-46 (citing *Aleksovski* Trial Judgement, para. 129; *Aleksovski* Appeal Judgement, para. 169). *See* also Reply Brief, paras 33, 36.
[249] Appeal Brief, para. 38.

responsibility under either Article 7(1) or 7(3),[250] and that, even if accepted, the Trial Chamber's findings do not support any form of criminal liability under the Statute as a matter of law.[251]

81. The Prosecution responds that the Appellant mischaracterises the position of the Trial Chamber, which, although relying on his conduct as a whole, focused on his active participation.[252] In the alternative, the Prosecution submits that even if the Trial Chamber based the Appellant's conviction on both acts and omissions, it did not err in law.[253]

82. The Appeals Chamber considers that the factual analysis of the Trial Judgement relied upon by the Appellant under his fourth ground of appeal is incorrect and incomplete. The Trial Chamber's findings relating to the Appellant's responsibility are not limited to the three propositions he refers to. The Trial Chamber made numerous findings establishing his active participation in the crime of persecutions.[254] Accordingly, there is no merit to the Appellant's argument that the findings of the Trial Chamber, even if accepted, do not support any form of responsibility under the Statute. The Appeals Chamber therefore finds that the Appellant has failed to show that the Trial Chamber erred in law by purporting to create a "hybrid theory of responsibility" which does not fulfil the requirements for criminal responsibility set out either in Article 7(1) or Article 7(3) of the Statute.

83. For these reasons, the Appellant's fourth ground of appeal is dismissed in its entirety.

2. Conclusion

84. Having dismissed the allegation that the Trial Chamber's findings do not support any form of criminal responsibility under the Statute, the Appeals Chamber notes that there is common ground between the parties that the Appellant's responsibility could be addressed under a theory of aiding and abetting. The Appeals Chamber further notes that the Fifth Amended Indictment charged the Appellant with aiding and abetting persecutions,[255] that the Trial Chamber was of the view that

[250] Appeal Brief, paras 36, 43.
[251] Appeal Brief, para. 36 *et seq*.; AT. 76-77.
[252] Response Brief, paras 4.7-4.14; AT. 100-112.
[253] AT. 100-101, 113-114, 118.
[254] *See e.g.* Trial Judgement, paras 840, 1022 (stating that the Appellant appointed and dismissed the head of the Municipal Department for Defence, the body managing the forced labour programme and that the Crisis staff gave its general consent to forced labour assignments); 996 (stating that the police, paramilitaries, Crisis Staff and JNA worked together to maintain the system of arrests and detention); 1007 (stating that the Appellant deliberately denied detainees adequate medical care); 1037 (stating that the Appellant appointed the civilian Exchange Committee and participated in forcible displacements).
[255] Fifth Amended Indictment, paras 4, 16.

aiding and abetting could apply to the charges against the accused,[256] and that the Appellant acknowledges that he presented a defence against an allegation of aiding and abetting.[257] In addition, the question of whether the Appellant's responsibility could be characterized as that of an aider and abettor was extensively litigated on appeal.[258] For these reasons, the Appeals Chamber finds it appropriate to ascertain whether the Trial Chamber's findings support the Appellant's responsibility for persecutions under Count 1 of the Fifth Amended Indictment as that of an aider and abettor pursuant to Article 7(1) of the Statute.

B. Applicable Law

85. The Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and which have a substantial effect upon the perpetration of the crime.[259] It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime.[260] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[261]

86. The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator.[262] The aider and abettor must be aware of the essential elements of the crime which was ultimately committed by the principal.[263] In relation to the crime of persecutions, an offence with a specific intent, he must thus be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.[264] However, it is not necessary

[256] Trial Judgement, para. 136. Having found the Appellant responsible as a participant in a joint criminal enterprise, the Trial Chamber did not consider whether his individual criminal responsibility as an aider and abettor had been established.
[257] Appeal Brief, para. 20. *See* also, *ibid*., para. 26.
[258] *See* Order Re-scheduling Appeal Hearing, p. 3 paras 4-5; AT. 77-78, 119-126, 138.
[259] *Bla{ki}* Appeal Judgement, para. 48; *Vasiljevi}* Appeal Judgement, para. 102; *^elebi}i* Appeal Judgement, para. 352; *Tadi}* Appeal Judgement, para. 229. In the *Bla{ki}* case the Appeals Chamber left "open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting": *Bla{ki}* Appeal Judgement, para. 47.
[260] *Blaškić* Appeal Judgment, para. 48.
[261] *Blaškić* Appeal Judgment, para. 48.
[262] *Vasiljevi}* Appeal Judgement, para. 102; *Blaškić* Appeal Judgment, para. 45.
[263] *Aleksovski* Appeal Judgement, para. 162.
[264] *Krnojelac* Appeal Judgement, para. 52; *Aleksovski* Appeal Judgement, para. 162.

that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[265]

C. The Appellant's responsibility as an aider and abettor for persecutions (Count 1)

87. Under Count 1, the Trial Chamber convicted the Appellant of persecutions – as a participant in a joint criminal enterprise – based on the following underlying acts:[266] (1) unlawful arrests and detention;[267] (2) cruel and inhumane treatment, including beatings, torture and confinement under inhumane conditions;[268] (3) forced labour;[269] and (4) deportation and forcible transfer.[270]

88. On the basis of the same acts of deportation underlying the persecutions conviction, the Trial Chamber also found the Appellant responsible for deportation as a crime against humanity pursuant to Article 5(d) of the Statute under Count 2.[271] However, finding that a conviction for deportation as a crime against humanity is impermissibly cumulative with a conviction for persecutions through deportation, the Trial Chamber did not enter a conviction for deportation as a crime against humanity under Count 2.[272]

1. Preliminary issues

89. At the outset, the Appeals Chamber will address the Appellant's third, fifth, sixth and seventh grounds of appeal, as they all raise issues of general significance to the Trial Chamber's findings.

(a) The Trial Chamber's findings relating to joint criminal enterprise (Third ground of appeal)

90. The Appellant submits that the Trial Chamber erred in fact in inferring from the evidence that there was a common plan to persecute the non-Serb population of the Municipality of Bosanski

[265] *Blaškić* Appeal Judgment, para. 50.
[266] Trial Judgement, para. 1115.
[267] Trial Judgement, para. 997.
[268] Trial Judgement, para. 1010. The Trial Chamber was not satisfied that the Appellant was aware of the cruel and inhumane treatment of non-Serb prisoners in the detention facilities in Crkvina, Br~ko and Bijeljina: Trial Judgement, para. 1011.
[269] Trial Judgement, paras 1021-1022.
[270] Trial Judgement, paras 968, 972, 1036-1038.
[271] Trial Judgement, para. 1051.
[272] Trial Judgement, paras 1058, 1116.

[amac and that he was involved therein.[273] He argues that Judge Lindholm's Dissenting Opinion presents another reasonable inference which is consistent with his innocence.[274] He submits that "[a]t most, the Trial Chamber should have convicted [him] only on the basis of aiding and abetting."[275] The Prosecution responds that the Appellant fails to show that no reasonable trier of fact could have concluded that a common plan existed.[276] In addition, it submits that a determination by the Appeals Chamber that "the indictment was defective in pleading a joint criminal enterprise […] would not undermine the [Trial Chamber's] finding that a joint criminal enterprise existed and that [the Appellant's] active contribution supported its participants".[277]

91. The Appeals Chamber finds that, insofar as the Appellant challenges the Trial Chamber's finding that he participated in a joint criminal enterprise to persecute the non-Serb population of the Municipality of Bosanski [amac, his third ground of appeal has been rendered moot as a result of the fact that the Appeals Chamber has upheld his first and second grounds of appeal.

92. With respect to the remaining arguments advanced under the Appellant's third ground of appeal, concerning the allegation that the finding that there existed a common plan or purpose to persecute the non-Serb population of Bosanski [amac was not the only reasonable inference available from the evidence,[278] the Appeals Chamber considers that, in principle, the setting aside of the Appellant's conviction as a participant in a joint criminal enterprise does not necessarily render the Trial Chamber's finding that such joint criminal enterprise existed, unsafe. The Appeals Chamber is mindful of the fact that the Trial Chamber's inference that a joint criminal enterprise existed is interconnected with its findings on the Appellant's participation therein. This is so because the Trial Chamber relied on the actions of the Crisis Staff and of the Appellant in drawing the inference that a joint criminal enterprise existed.[279] The Appeals Chamber turns to address whether such finding may be considered in determining the Appellant's responsibility as an aider and abettor.[280]

[273] Amended Notice of Appeal, para. 5; Appeal Brief, para. 27.
[274] Appeal Brief, paras 27, 28.
[275] Appeal Brief, para. 35. *See* also *ibid.,* paras 11, 26, and AT. 77.
[276] Response Brief, para. 3.77.
[277] AT. 122.
[278] Appeal Brief, paras 27-33.
[279] Trial Judgement, paras 984, 987, 991.
[280] The Appeals Chamber notes that the Prosecution's position is that "the contribution that was found by the Trial Chamber is sufficient to support a finding of contribution of aiding and abetting the perpetrators of the joint criminal enterprise in persecutions of the non-Serb population of Bosanski [amac". AT. 119-120.

93. The existence of the joint criminal enterprise in Bosanski [amac Municipality, which was not part of a wider joint criminal enterprise,[281] was inferred by the Trial Chamber from the united actions of its participants.[282] To this effect, the Trial Chamber made several findings on the role of the Appellant and his interaction with the other participants in the joint criminal enterprise in the events prior to and during the takeover of the town of Bosanski [amac on 17 April 1992.[283] Following the takeover, the Trial Chamber found that non-Serbs were subject to acts of persecutions.[284] The actions of the Crisis Staff and the Appellant in this regard appear to have been particularly important for the Trial Chamber's inference that a joint criminal enterprise existed. It held as follows:

> The common goal to commit these acts of persecutions could not have been achieved without the joint actions of the police, paramilitaries, 17th Tactical Group of the JNA and Crisis Staff: *No participant could have achieved the common goal on their own*. The Crisis Staff was responsible for coordinating the administration of the Municipality with the civilian police. The Crisis Staff implemented orders and decisions throughout its term that supported the system of persecution of non-Serbs.[285]
>
> [The Appellant], as President of the Crisis Staff, was at the apex of the joint criminal enterprise at the municipal level. [He] knew that *his role and authority were essential for the accomplishment of the common goal of persecution*. […] [T]he decisions and orders of the Crisis Staff provided for the legal, political, and social framework in which the other participants of the joint criminal enterprise worked and from which they profited.[286]

94. It follows from the foregoing that the Trial Chamber's finding that a joint criminal enterprise existed depended on its findings that the Appellant as the President of the Crisis Staff participated therein. It would therefore be inconsistent to hold that the Appellant cannot be found responsible as a participant in the joint criminal enterprise, and at the same time take into

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[281] The Trial Chamber found that the joint criminal enterprise in Bosanski [amac did not prompt from the political leadership of Republika Srpska: Trial Judgement, para. 985. Rather, it was satisfied that, "on a horizontal level, the participants in the joint criminal enterprise acted pursuant to a common plan to set up institutions and authorities to persecute non-Serb civilians in Bosanski [amac Municipality": Trial Judgement, para. 986. Absent any findings linking this joint criminal enterprise to a greater criminal scheme, the Appeals Chamber considers that it must be understood to have existed in isolation.

[282] Trial Judgement, para. 987.

[283] The Trial Chamber held that on 12 April, a meeting was held in Donji @abar at which the Appellant, Stevan Nikoli}, Stevan Todorovi}, Mico Ivanovi}, Simo Jovanovi}, "Crni" and "Debeli" were present to discuss the arrival of the paramilitaries: Trial Judgement, para. 988. Apart from the Appellant, Stevan Todorovi}, "Debeli" and "Crni" were found to have been members of the joint criminal enterprise: Trial Judgement, para. 984. Further, at a meeting of the Municipal Assembly on 15 April 1992, the Appellant informed the attendees that Lt. Col. Stevan Nikoli} had informed him that he would prevent an impending attack by Croat and Muslim forces from Croatia and local Croat and Muslim units from Bosanski [amac: Trial Judgement, para. 989. Then, on the morning of the day of the takeover, the Appellant telephoned Lt. Col. Stevan Nikoli} to inform him that the Crisis Staff had been established and had occupied the most important facilities in town in order to takeover authority. After this telephone conversation, Lt. Col. Stevan Nikoli} ordered the 4th Detachment at 6.00 a.m. to be in a state of combat readiness, and to participate in the collection of weapons: Trial Judgement, para. 990.

[284] Trial Judgement, para. 991.

[285] Trial Judgement, para. 991 (emphasis added).

[286] Trial Judgement, para. 992 (emphasis added).

consideration the joint criminal enterprise – the existence of which was dependent upon his participation – as a basis for his responsibility as an aider and abettor.

95. As such, the Appeals Chamber will not consider the Trial Chamber's conclusion that there existed a joint criminal enterprise in Bosanski [amac with the common purpose of persecuting non-Serbs[287] in determining whether the Trial Chamber's findings support the Appellant's responsibility as an aider and abettor. As a result, the Appellant's third ground of appeal is moot insofar as it alleges that "[t]here was no evidence from which a reasonable fact finder could have concluded that there was a common plan or purpose to persecute the non-Serb population of Bosanski [amac".[288]

96. For these reasons, the Appellant's third ground of appeal is dismissed in its entirety. The Appeals Chamber notes, however, that the underlying factual findings of the Trial Chamber, which provided the basis for its determination that a joint criminal enterprise existed, may be considered in determining the Appellant's responsibility as an aider and abettor.

(b) The Appellant's active role in the crimes (Fifth ground of appeal)

97. Under his fifth ground of appeal the Appellant submits that the Trial Chamber erred in fact by finding him responsible for the acts of others and for his alleged failure to prevent or punish the acts of others, despite the Trial Chamber's own findings to the contrary and "the overwhelming weight of the evidence."[289] By reference to arguments presented under his third and fourth grounds of appeal, he argues that the evidence does not show the he played any active role in the crimes committed in the Municipality of Bosanski [amac.[290]

98. Under his third, fourth, and fifth grounds of appeal, the Appellant alleges that the Trial Chamber erred in finding him criminally responsible for the acts of others, and for his failure to prevent or punish the acts of others.[291] Given that under his fifth ground of appeal the Appellant merely "repeats the facts and arguments relied upon in support of the third and fourth grounds of appeal"[292] and that the Appellant's third and fourth grounds of appeal have been dismissed, the Appeals Chamber finds that there remains no basis for the Appellant's fifth ground of appeal. As a result, the fifth ground of appeal is dismissed.

[287] *See* Trial Judgement, para. 984, 987.
[288] Appeal Brief, para. 27. *See* also paras 28-33.
[289] Amended Notice of Appeal, para. 7.
[290] Appeal Brief, para. 57.
[291] Amended Notice of Appeal, paras 5-7.
[292] Appeal Brief, para. 57.

(c) The Appellant's discriminatory intent (Sixth ground of appeal)

99. The Appellant submits that the Trial Chamber erred in law and in fact by finding, based on the evidence and its own factual findings which fail to establish as much, that he had the discriminatory intent required for the underlying acts of persecutions.[293] Referring to the Trial Chamber's findings on his acts to ensure the protection and well-being of all civilians in the Municipality of Bosanski [amac regardless of ethnic considerations, he contends that the finding that he possessed the intent to discriminate towards the non-Serb citizens of Bosanski [amac was not the only reasonable inference available from the evidence.[294]

100. The Prosecution responds that the Appellant fails to mention all the evidence plainly indicating that he did have discriminatory intent.[295] It further argues that a number of the Trial Chamber's findings referred to by the Appellant do not constitute "positive evidence of a non-discriminatory approach" by the Appellant.[296] Finally, it contends that benevolent acts of a non-discriminatory nature do not render it impossible that the Appellant had discriminatory intent with respect to other acts.[297] The Appellant replies that the relevant test is whether the evidence excludes any reasonable possibility of an innocent state of mind.[298]

101. The Appeals Chamber notes that an aider and abettor of the crime of persecutions need not share the discriminatory intent of the perpetrator.[299] While the Appeals Chamber does not exclude the possibility that a Trial Chamber's findings as to whether an appellant shared the discriminatory intent of the perpetrators may be relevant in assessing his *mens rea* for aiding and abetting, it notes that in this case they are not. For reasons set out below, the Appeals Chamber finds, where applicable, that the Trial Chamber's findings suffice to establish the Appellant's *mens rea*, regardless of whether he shared the discriminatory intent of the perpetrators.[300] As a result, the Appeals Chamber dismisses the Appellant's sixth ground of appeal.

(d) The Appellant's position as a basis for his conviction (Seventh ground of appeal)

102. The Appellant submits that the Trial Chamber erred in law and in fact in convicting him by virtue of his position as the highest ranking civilian official in Bosanski [amac Municipality, despite

[293] Amended Notice of Appeal, para. 8; Appeal Brief, para. 58.
[294] Appeal Brief, paras 58, 60-64. *See* also *ibid.*, para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).
[295] Response Brief, paras 5.2-5.6.
[296] Response Brief, paras 5.7-5.13.
[297] Response Brief, para. 5.15.
[298] Reply Brief, para. 42.
[299] *Krnojelac* Appeal Judgement, para. 52; *Aleksovksi* Appeal Judgement, para. 162.
[300] *See* paras 117, 135-137, 156-158, 186-187 *infra*.

its own findings that he had no power to control those who committed the offences. According to the Appellant, this conclusion is inconsistent with Article 7(1) of the Statute and the finding is one which no reasonable finder of fact could have made based on the evidence presented.[301] The legal error, he contends, is that "international law provides that in times of war or armed conflict, it is the military commander for the region, and not the civilian politicians who are responsible for the maintenance of law and order, including the prevention of offences against the Geneva Conventions and other offences against international criminal law".[302] He argues in this connection that the Trial Chamber found that he failed to prevent the commission of crimes by members of the police, the military and the paramilitary units, despite the fact that he had no actual authority over these perpetrators.[303] As to the alleged factual error, the Appellant refers to arguments presented under his third and fourth grounds of appeal in support of the assertion that the evidence failed to establish that he played any active role in the crimes committed in Bosanski [amac Municipality.[304]

103. Given that the Appellant's conviction has been set aside, the Appeals Chamber need not consider whether the Trial Chamber erred in law in convicting him as it did by virtue of his position, as alleged by the Appellant. Furthermore, for the purpose of addressing the Appellant's responsibility as an aider and abettor, it is not necessary as a matter of law to establish whether he had any power to control those who committed the offences. Turning to the alleged error of fact, the Appeals Chamber notes that it is based on arguments presented under the Appellant's third and fourth grounds of appeal, which have been dismissed elsewhere.

104. For these reasons, the Appeals Chamber dismisses the Appellant's seventh ground of appeal as moot.

105. The Appeals Chamber now turns to consider whether the findings of the Trial Chamber support the Appellant's responsibility for persecutions under Count 1 as that of an aider and abettor pursuant to Article 7(1) of the Statute.

2. Unlawful arrests and detention

(a) Findings of the Trial Chamber

106. The Trial Chamber found that the forcible takeover in Bosanski Šamac on 17 April 1992, was followed by acts of systematic persecution against non-Serb civilians, which included, *inter*

[301] Amended Notice of Appeal, para. 9.
[302] Appeal Brief, para. 66. *See* also *ibid*., paras 67-68.
[303] Appeal Brief, para. 66.
[304] Appeal Brief, para. 70.

alia, arbitrary arrests and unlawful detention of non-Serb civilians in various facilities in Bosanski [amac, Zasavica and Crkvina.[305] It held that the police, paramilitaries, Crisis Staff and JNA worked together to maintain the system of arrests and detention.[306]

107. The Trial Chamber further found that the Appellant, as President of the SDS Municipal Board and of the Crisis Staff, was the highest ranking civilian official in the Municipality of Bosanski [amac.[307] He oversaw the key objectives of the Crisis Staff that included consolidating Serb institutions and coordinating the functions of the authorities in Bosanski [amac.[308] It concluded that although he did not have authority over the police, he was in a position of strong influence and control as the President of the Crisis Staff, and he was in a position to express persuasive opinions.[309]

108. The Trial Chamber found that the Appellant was informed and aware of the situation of arrests and detention in Bosanski [amac Municipality.[310] It found that the fact that Simo Zarić and Lt. Col. Stevan Nikolić contacted the Appellant about the release of some detainees demonstrated that he had an important influence on the arrests and detentions.[311] Simo Zari} stated in this regard that he could not release Sulejman Tihi} without the Appellant's approval.[312] In addition, the Trial Chamber considered that the Crisis Staff had the responsibility to ensure the safety of the population in the Municipality of Bosanski [amac[313] and found that, as the President of the Crisis Staff, the Appellant was obliged to try every possible measure to prevent non-Serb citizens from being persecuted.[314] It further heard evidence that the detention centres could only have been established by the Serb authorities in conjunction with Stevan Todorovi}.[315]

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[305] Trial Judgment, paras 654, 661, 979.
[306] Trial Judgement, para. 996.
[307] Trial Judgement, para. 994.
[308] Trial Judgement, para. 994.
[309] Trial Judgement, paras 994, 995.
[310] Trial Judgement, paras 994-996. The Trial Chamber referred in this regard to the Appellant's testimony that, during meetings of the Crisis Staff, the Chief of Police Stevan Todorovi} reported on the situation of arrests and detention in Bosanski [amac: Trial Judgement, para. 994 (citing Blagoje Simi}, T. 12571). It further referred to Exhibit P 127, a Report of the Command of the 2nd Posavina Infantry Brigade dated 1 December 1992, which was disclosed to the Appellant and discussed at a meeting in Pelagi}evo that he attended. The Report recorded that "[t]he massive arrests and isolation of Croats and Muslims followed, without any criteria": Trial Judgement, para. 995 (citing Exhibit P 127; Simo Zari}, T. 19561, 19564). The Trial Chamber was satisfied that the Appellant was informed of the continued arrests and detention of non-Serbs during the conflict: Trial Judgement, para. 995.
[311] Trial Judgment, para. 995 (citing Sulejman Tihić, T. 1408; Simo Zarić, T. 18773-18774).
[312] Trial Judgement, para. 1006.
[313] Trial Judgement, paras 994 (citing Exhibit P128, para. 3), 1004 (citing Bo`o Ninkovi}, T. 13578-13581). *See* also *ibid*., para. 390.
[314] Trial Judgement, para. 994.
[315] Trial Judgement, para. 604 (citing Vladimir [arkanovi}, T. 16592).

109. The Trial Chamber found that the Appellant's complaint to the Ministry of Interior about Stevan Todorović not being worthy of his job, and his written request to the Ministry of Defence to demobilise judges and establish courts were insufficient measures taken for someone in his position.[316] Rather, the Trial Chamber found that the Appellant took no significant steps in his position to prevent the continued arrests and detentions.[317] For example, it held, he could have turned to the Prime Minister of Republika Srpska to state that he could not ensure the safety of all citizens or, as a last resort, he could have resigned.[318] Instead, he accepted the continued arrests and detention of non-Serbs civilians in his key position in the Municipality. The Trial Chamber held that the only reasonable conclusion that could be drawn from its aforementioned findings is that he did so with discriminatory intent.[319]

(b) Challenges to the Trial Chamber's findings (Eighth ground of appeal)

110. The Appellant submits that "[t]he Trial Chamber erred in law and in fact by finding that [he] was guilty of Persecution in the form of Unlawful Arrests and Detention; [the Appellant] was convicted on the basis of erroneous inferences, his alleged responsibility for the acts of others, and the alleged failure to prevent or punish the actions of others."[320] The Appellant argues that "[a]ccepting the [Trial Chamber's] findings as they stand, they do not disclose any sufficient basis of evidence for linking [him] with the acts in any way."[321] He contends that the Trial Chamber relied solely on his status as President of the Crisis Staff and his alleged failure to prevent the commission of crimes by those over whom he had no authority. In the Appellant's view, an association between him and the underlying acts is not the only possible reasonable conclusion.[322]

111. In relation to the Trial Chamber's conclusion that he "accepted" the arrests and detention, the Appellant submits that it is unsubstantiated in the evidence and does not follow from the Trial Chamber's factual findings. Given that the arrests and detention were within the jurisdiction of the Chief of Police and that he had no authority over the police, he argues that this conclusion is an unwarranted inference from his alleged inaction.[323] He further contends that the evidence did not establish his participation or his discriminatory intent.[324]

[316] Trial Judgement, para. 994.
[317] Trial Judgement, para. 994.
[318] Trial Judgement, paras 994, 996.
[319] Trial Judgement, para. 997.
[320] Amended Notice of Appeal, para. 10.
[321] Appeal Brief, para. 71.
[322] Appeal Brief, para. 71. *See* also *ibid*., para. 72.
[323] Appeal Brief, para. 72.
[324] Appeal Brief, paras 58, 60-64, 72.

112. With respect to the Trial Chamber's suggestion that he could have resigned from his position as President of the Crisis Staff, the Appellant argues that, given the Trial Chamber's findings regarding his efforts to promote the safety and welfare of the citizens of Bosanski [amac, his resignation could only have worsened the situation.[325] He challenges the Prosecution's assertion that he could have turned to the Prime Minister of Republika Srpska for assistance, recalling that the Prime Minister himself was, according to the Prosecution's theory of the case, a member of a criminal organisation devoted to the establishment of a Greater Serbia.[326] Moreover, he submits, in light of the pressure exerted by Stevan Todorovi} and others such as "Lugar" and the likelihood of their engaging in acts of reprisal against the Appellant, it might have been fairer for the Trial Chamber to have credited him for carrying out his tasks under adverse circumstances.[327]

113. The Prosecution responds that the Appellant ignores the Trial Chamber's findings regarding his "position of strong influence and control"[328] as the highest ranking civilian official in Bosanski [amac and that he could have brought his influence and control to bear on the process of continued arrests and detentions by resorting to the Prime Minister of Republika Srpska but did not do so.[329] According to the Prosecution, the Trial Chamber simply found that the "Appellant's role was not to determine who was to be arrested, not that he lacked authority or strong influence over the arrest of individuals."[330] It further submits that the Appellant fails to address the findings of the Trial Chamber that: (1) it was the responsibility of the Crisis Staff to ensure the safety of the population; (2) the Appellant was involved in and knew of the arrests and detentions; and (3) the Crisis Staff, military and police worked together to maintain the system of arrests and detention.[331] The Prosecution argues that these findings sustain the Trial Chamber's conclusion that the Appellant accepted the continued arrests and detention of non-Serb civilians and that he had discriminatory intent.[332] Finally, the Prosecution argues that the Trial Chamber raised the possibility of the Appellant resigning as part of its discussion of the options that were open to the Appellant. As the Trial Chamber found that the Crisis Staff, police, paramilitaries and military worked together to maintain the system of arrests and detention, the Prosecution argues, the Appellant's continued

[325] Appeal Brief, para. 73. *See* also AT. 75.
[326] AT. 136.
[327] Appeal Brief, para. 73, referring to Judge Lindholm's Partly Dissenting Opinion, para. 37.
[328] Response Brief, para. 7.5, referring to Trial Judgement, para. 994.
[329] Response Brief, para. 7.5, referring to Trial Judgement, para. 994. *See* also *ibid.*, paras 7.6-7.9.
[330] Response Brief, para. 7.10, referring to Trial Judgement, para. 995.
[331] Response Brief, para. 7.10, referring to Trial Judgement, paras 994, 995, 996.
[332] Response Brief, para. 7.10, referring to Trial Judgement, para. 997. *See* also *ibid.*, para. 7.11.

work as President of the Crisis Staff sustained this system.[333] The Appellant offers no arguments in reply.[334]

(c) Discussion

(i) *Actus reus*

114. The Appeals Chamber finds that the Appellant has failed to show that no reasonable tribunal could have found that the only reasonable inference available on the evidence was that he was "linked" to the unlawful arrests and detention of individuals. The Trial Chamber's findings that "[t]he police, paramilitaries, Crisis Staff and JNA worked together to maintain the system of arrests and detention", that the Appellant was the President of the Crisis Staff, and that he was informed of and had a strong influence over the unlawful arrests and detention[335] are tantamount to a finding that he lent positive assistance to these acts. This is not inconsistent with the fact that it was the role of the chief of police to determine the release of prisoners and that the Appellant had no authority over the police.[336] Further, in light of these findings, it is clear that the Appellant accepted the unlawful arrests and detention of individuals.

115. With respect to the Appellant's potential resignation and whether he could have turned to the Prime Minister of Republika Srpska, the Appeals Chamber notes that the Trial Chamber raised these possibilities as part of its discussion of the options that were open to him, and considers that, in any event, they do not detract from the fact that he assisted in the unlawful arrests and detentions.

116. The Appeals Chamber finds that a reasonable trier of fact would be satisfied beyond reasonable doubt that the fact that the Appellant, as President of the Crisis Staff, worked together with the police, paramilitaries, and JNA to maintain the system of arrests and detention of non-Serb civilians, and that he had an important influence on the unlawful arrests and detention, show that the Appellant lent substantial assistance to the perpetration of these underlying acts of persecutions. This conclusion is corroborated by the fact that the Appellant did not heed his responsibility, as the

[333] Response Brief, para. 7.12, referring to Trial Judgement, para. 994.
[334] Reply Brief, para. 43.
[335] Trial Judgement, paras 994-996. While the Appellant, under his third and eight grounds of appeal, challenges the inferences that the Trial Chamber drew from these findings, he does not dispute the findings as such: *see* Appeal Brief, paras 32-34, 72.
[336] Trial Judgement, paras 994, 995.

President of the Crisis Staff, to ensure the safety of the population in Bosanski [amac Municipality, which responsibility the Appellant does not dispute as such.[337]

(ii) *Mens rea*

117. It is undisputed that the Appellant was informed and aware of the situation of arrests and detention of non-Serb civilians being carried out in the Municipality of Bosanski [amac.[338] Although the Trial Chamber made no explicit finding that the Appellant was aware of the discriminatory intent of the perpetrators it inferred from its findings relating to the unlawful arrests and detention that he shared their discriminatory intent in relation to the arrest and detention of non-Serb civilians. It held that the Appellant could not have accepted the continued arrests and detention of non-Serb civilians in his key position in the Municipality without exercising discriminatory intent.[339] He was furthermore in a position of strong influence over the arrests and detention, and he lent substantial assistance to these acts.[340] The Appeals Chamber finds that the only reasonable inference that can be drawn from these circumstances is that the Appellant was aware of the discriminatory context in which the unlawful arrests and detention were carried out and that he knew that his assistance had a substantial effect on the perpetration of these acts.

(iii) Conclusion

118. The Appeals Chamber dismisses the Appellant's eighth ground of appeal in its entirety, and finds the Appellant responsible as an aider and abettor of persecutions for the unlawful arrests and detention of non-Serb civilians.

3. Cruel and inhumane treatment (beatings, torture and confinement under inhumane conditions)

(a) Findings of the Trial Chamber

119. The Trial Chamber found that a large number of non-Serb civilians were beaten day and night on discriminatory grounds in the detention facilities in Bosanski Šamac, Crkvina, Br~ko and

[337] Under his fourth ground of appeal, the Appellant states that the Trial Chamber did not establish that "he had either a duty to act or any ability to act": Appeal Brief, para. 44. This statement, however, is made in relation to his argument that the Trial Chamber impermissibly based his conviction on omissions, which argument has been rendered moot as a result of the setting aside of the Trial Chamber's conviction. Furthermore, it appears that the Appellant does not take issue with the finding of the Trial Chamber regarding his responsibility to ensure the safety of the population (Trial Judgement, para. 994). Rather, his fourth ground of appeal and his eighth ground of appeal are based on an acceptance the Trial Chamber's factual findings as they stand: Appeal Brief, paras 41, 71.
[338] Trial Judgement, paras 994, 995.
[339] Trial Judgement, para. 997.
[340] Trial Judgement, paras 994-996. *See* para. 108 *supra* and footnotes 310 and 311.

Bijeljina by members of paramilitary forces from Serbia, local policemen, and a few members of the JNA.[341]

120. The Trial Chamber further found that the detainees were subjected to torture. It held that the acts of sexual assaults, the extraction of teeth, and the threat of execution inflicted on the detainees caused them severe physical and mental pain and suffering, and were carried out in order to discriminate on ethnic grounds against the victims.[342]

121. Finally, the Trial Chamber found that the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation, and they did not have sufficient space, food or water. In addition, they suffered from unhygienic conditions and did not have appropriate access to medical care. The detainees were subjected to these conditions because of their non-Serb ethnicity.[343]

122. The Trial Chamber found that the responsibility of the Crisis Staff, the War Presidency and the Municipal Assembly in succession, all presided over by the Appellant, included protecting the health, safety, and welfare of the non-Serb citizens who were imprisoned in the detention facilities in Bosanski [amac.[344] Accordingly, although the primary responsibility for the detention centres lay with the police, the Appellant as President of the Crisis Staff and its successor bodies had an obligation to provide for appropriate detention facilities in order to prevent the non-Serb citizens from being treated in a cruel and inhumane manner.[345] The Trial Chamber found that the Appellant's involvement in detention matters was further demonstrated by the fact that Simo Zari} stated that he could not release Sulejman Tihi} without the Appellant's approval.[346]

123. The Trial Chamber was not satisfied that the Appellant "undertook sufficient measures to prevent the persecutory acts against non-Serb civilians."[347] It held that, although he was not directly responsible for the police or the military, "his position as the highest-ranking civilian in Bosanski [amac Municipality gave him the opportunity and responsibility to take measures to protect the non-Serb civilian population."[348] The Trial Chamber further inferred that, as the Appellant worked hard to get medical supplies as required in the Municipality, the detainees were deliberately denied adequate medical care. This, it held, contributed to the unacceptable conditions deliberately created

[341] Trial Judgment, paras 770-771.
[342] Trial Judgement, para. 772.
[343] Trial Judgment, para. 773.
[344] Trial Judgement, paras 1004-1006.
[345] Trial Judgement, paras 1004, 1006.
[346] Trial Judgement, para. 1006.
[347] Trial Judgement, para. 1005.
[348] Trial Judgement, para. 1005.

to force the non-Serb detainees to leave the Municipality.[349] It accepted the evidence of Dr. Ozren Stanimirovi} that he had the ability to transfer those detainees who needed hospital care to the hospital, but that no such cases were referred to him.[350] The Trial Chamber concluded that the Appellant "failed to act according to his responsibility by not taking sufficient steps to avoid the cruel and inhumane treatment of non-Serb prisoners in the detention facilities in Bosanski [amac."[351]

124. Although not convinced that the Appellant ever visited any of the detention facilities, the Trial Chamber held that Stevan Todorovi}, the Chief of Police, informed him in the first days after the takeover about detainees who had been beaten and abused in the SUP, that Bosanski [amac is a small town, that the mistreatment of the detainees was extensive and took place over several months, and that the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres.[352] The Trial Chamber was satisfied that the Appellant knew about the cruel and inhumane treatment, including the beatings, torture and confinement under inhumane conditions, of the non-Serb prisoners in the detention facilities in Bosanski [amac.[353]

125. The Trial Chamber was further satisfied that the Appellant not only was aware of the discriminatory intent of the perpetrators of the beatings, torture and confinement under inhumane conditions, but also that he shared this discriminatory intent.[354] In this context, the Trial Chamber considered the testimony of Sulejman Tihić and Izet Izetbegović on statements made by the Appellant at a meeting in the Municipal Assembly building in Bosanski [amac. Sulejman Tihić testified that the Appellant referred to the partition of municipalities along ethnic lines by saying, "if you don't decide, the Serbs will know what to do".[355] Izet Izetbegović gave evidence that the Appellant said at the same meeting, that if the non-Serbs would not agree to the re-organisation of the municipalities, "the Serbs would use force".[356] The Trial Chamber held that the only reasonable inference that could be drawn from this evidence and from the fact that the Appellant continued to act as the highest-ranking civilian during the relevant period was that he shared the discriminatory

[349] Trial Judgement, para. 1007.
[350] Trial Judgement, para. 1007 (citing Dr. Ozren Stanimirović, T. 13904-13905).
[351] Trial Judgement, para. 1007.
[352] Trial Judgement, para. 1008.
[353] Trial Judgement, para. 1008.
[354] Trial Judgement, para. 1009.
[355] Trial Judgement, para. 1009. *See* also *ibid.,* para. 912 (citing Sulejman Tihi}, T. 1346-1347).
[356] Trial Judgement, para. 1009. *See* also *ibid.,* para. 913 (citing Izet Izetbegović, T. 2244-2245).

intent to persecute the non-Serb population of Bosanski [amac Municipality through cruel and inhumane treatment, including beatings, torture and confinement under inhumane conditions.[357]

(b) Challenges to the Trial Chamber's findings (Ninth, Tenth and Twelfth grounds of appeal)

126. Under his ninth, tenth and twelfth grounds of appeal, the Appellant submits that the Trial Chamber erred in law and in fact by finding him guilty of cruel and inhumane treatment in the form of beatings (ninth ground of appeal), torture (tenth ground of appeal) and confinement under inhumane conditions (twelfth ground of appeal). He argues that "[he] was convicted on the basis of erroneous inferences, his alleged responsibility for the acts of others, and for his alleged failure to prevent or punish the actions of others."[358]

127. In support of each of these grounds of appeal, the Appellant argues that "[a]ccepting the [Trial Chamber's] findings as they stand, they do not disclose any sufficient basis of evidence for linking [him] with the acts in any way."[359] He contends that the Trial Chamber relied solely on his status as President of the Crisis Staff and his alleged failure to prevent the commission of crimes by those over whom he had no authority. In the Appellant's view, an association between him and the underlying acts is not the only possible reasonable conclusion.[360]

128. In relation to the Trial Chamber's inference that the detainees were deliberately denied medical care, the Appellant argues that this is "a complete *non-sequitur*".[361] He also challenges the Trial Chamber's reliance on the statements he made at the meeting in the Municipal Assembly building in Bosanski [amac, as referred to by Sulejman Tihić and Izet Izetbegović. These statements, he argues, referred to events before the takeover of Bosanski [amac and are relevant to the takeover itself, which the Trial Chamber found was not unlawful and did not amount to persecutions. Moreover, he argues that the finding that he must have known of the mistreatment of non-Serb detainees because Bosanski [amac is a small town and because the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres is "no more than rank speculation and supposition."[362] He contends that, even if these conclusions were justified, they could only have established knowledge on his part that something was going on, and not discriminatory intent.[363] In addition, in support of his

[357] Trial Judgement, para. 1010.
[358] Amended Notice of Appeal, paras 11, 12, 14.
[359] Appeal Brief, para. 71.
[360] Appeal Brief, para. 71.
[361] Appeal Brief, para. 74.
[362] Appeal Brief, para. 74.
[363] Appeal Brief, para. 74.

challenges to the Trial Chamber's findings regarding the confinement under inhumane conditions, the Appellant also refers to the arguments presented under his eighth ground of appeal.[364]

129. The Prosecution responds that the Trial Chamber's finding that the detainees were deliberately denied medical care was justified on the evidence.[365] It argues that the evidence on the Appellant's efforts to provide medical care in Bosanski [amac Municipality stands in contrast to the evidence of absence of medicine in the prisons.[366] Given the regime of mistreatment in the prisons, it argues that there must have been a demand for medicines and the absence of medicines can only have occurred by design.[367] With respect to the Appellant's statements in the Municipal Assembly building, the Prosecution argues that the evidence of Sulejman Tihić and Izet Izetbegović clearly spelt out the Appellant's insistence on ethnic separation backed by the use of force as a threat.[368] Given that the Appellant held the highest ranking civilian position in the Municipality throughout the indictment period, that he knew about the cruel and inhumane treatment, and that the victims were of non-Serb ethnicity, the Prosecution contends that the use of this evidence of pre-takeover statements was justified.[369] With respect to the Appellant's submission regarding the Trial Chamber's conclusion that the he must have known of the mistreatment of non-Serbs detainees because Bosanski [amac is a small town and because the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres, the Prosecution states that it "flies in the face of the evidence".[370] Finally, it submits that the Trial Chamber's conclusion was wholly justified on the evidence.[371] The Appellant offers no arguments in reply.[372]

(c) Discussion

(i) *Actus reus*

[364] Appeal Brief, para. 87.
[365] Response Brief, para. 7.15.
[366] Response Brief, paras 7.15-7.16.
[367] Response Brief, para. 7.16.
[368] Response Brief, para. 7.20.
[369] Response Brief, para. 7.20.
[370] Response Brief, paras 7.21-7.22. The Prosecution refers to the "extremely well-known fact in Bosanski [amac that 16 non-Serbs who had been prisoners were slaughtered by Paramilitaries", and the "uncontested evidence" that Stevan Todorovi} murdered prisoners and reported to the Crisis Staff about one of his murders. It further refers to other murders made known to the Crisis Staff and to evidence that the Appellant was present at a factory where a group of prisoners, bloodied as a result of mistreatment, was taken to eat. Response Brief, para. 7.22.
[371] Response Brief, para. 7.23.
[372] Reply Brief, para. 43.

130. The Appeals Chamber notes that the Appellant was responsible "for the health, safety and welfare of all citizens in the area [administered by the Crisis Staff], regardless of ethnicity"[373], and recalls that he aided and abetted the unlawful arrests and detention in Bosanski [amac Municipality. The Appeals Chamber does not exclude the possibility that the Appellant's failure to take sufficient measures in accordance with his responsibility to avoid the cruel and inhumane treatment of detainees might have, to a certain extent, been perceived as a tacit encouragement of the beatings of non-Serbs in the detention centres in Bosanski [amac Municipality.[374] However, it is not satisfied that the only reasonable inference that can be drawn from these findings is that the Appellant lent substantial assistance to the beatings. The Appeals Chamber emphasises that the Trial Chamber's findings do not allow for a clear inference as to how the Appellant's conduct was construed by the principal perpetrators committing the beatings, or as to what effect his conduct may have had on their acts. The Prosecution does not refer to other evidence on the record to this effect which would assist in drawing such an inference. The Appeals Chamber further notes in this regard that it was not established that the Appellant ever visited any of the detention centres, and recalls that it was accepted that the principal perpetrators of the beatings – members of paramilitary forces from Serbia, local policemen, and a few members of the JNA[375] – were not under his authority.[376] For the same reasons, the Appeals Chamber considers that the Trial Chamber's findings would not allow a reasonable trier of fact to reach any conclusion beyond reasonable doubt concerning the effect of the Appellant's conduct upon the different acts of torture perpetrated in the detention facilities in Bosanski [amac.

131. For the foregoing reasons, the Appeals Chamber finds that no reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant lent substantial assistance to the cruel and inhumane treatment in the form of beatings and torture of Bosnian Croat, Bosnian Muslim, and non-Serb civilian detainees as underlying acts of persecutions. As a result, the Appeals Chamber grants the Appellant's ninth and tenth grounds of appeal insofar as he suggests therein that the Trial

[373] Trial Judgement, para. 1004 (citing Bo`o Ninkovi}, T. 13578-13581; Exhibit P 85, Order on the Implementation of the Decision of the Crisis Staff on Temporary Housing of Exchanged Persons from the Territory of Odžak Municipality, 9 June 1992; Exhibit P 93, Order Prohibiting Sale of Alcoholic Drinks, 28 April 1992; Exhibit D 71/1, Crisis Staff Decision to provide 21 tons of livestock feed to Croat farmers from Zasavica, 13 May 1992; Exhibit D 150/1, War Presidency Decision on the Assignment of Residential and Other Space for Temporary Use, 16 September 1992).
[374] *Cf. Kayishema and Ruzindana* Appeal Judgement, paras 201-202.
[375] Trial Judgment, para. 770.
[376] Trial Judgment, paras 395-396, 1005.

Chamber's findings do not disclose a sufficient basis for convicting him as an aider and abettor for these acts.[377]

132. With respect to the confinement under inhumane conditions, the Appeals Chamber notes the Trial Chamber's findings to the effect that the Appellant, as President of the Crisis Staff, was responsible for the health, safety and welfare of all citizens in the area administered by the Crisis Staff[378] and that he had an obligation to provide for appropriate detention facilities.[379] The Trial Chamber found that he worked hard to get medical supplies as required in the Municipality,[380] but that the detainees did not have appropriate access to medical care.[381] The Appellant does not dispute these findings,[382] but argues that the inference the Trial Chamber drew from them, namely, that the detainees were deliberately denied adequate medical care, is an inference that does not logically follow.[383] However, he does not refer to any evidence in support of this argument, nor does he attempt to explain why it was unreasonable for the Trial Chamber to exclude another inference consistent with his innocence.[384]

133. The Appeals Chamber recalls that evidence was given at trial concening: (1) the fact that health care was one of the most important fields during the war for the civilian population, and thus the Appellant tried to provide such care as an official of the Municipality and as a human being;[385] (2) the Appellant's efforts to coordinate the regular supply of vaccines and ensure that the necessary medical facilities were working,[386] and (3) the support provided by the Appellant and the Municipality to the dialysis ward at the medical centre in Bosanski [amac, as recalled by the coordinator of the medical center who testified that the medical centre had a lot of equipment and medical supplies.[387] Having heard this evidence, and being satisfied that the detainees were denied medical care,[388] it was not unreasonable for the Trial Chamber to infer that the detainees were

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[377] The Appellant argues that, "[a]ccepting the [Trial Chamber's] findings as they stand, they do not disclose any sufficient basis of evidence for linking [him] with the acts in any way", and that "an association between [him] and the underlying acts [is] not the only possible reasonable conclusion": Appeal Brief, para. 71. During the Appeal Hearing the Defence argued that the elements for the mode of liability of aiding and abetting could not be fulfilled on the basis of the Trial Chamber's findings and stated that "we have dealt with that at some length in the brief [and] will not trouble Your Honours by going through that again." *See* AT. 77-78.
[378] Trial Judgement, para. 1004.
[379] Trial Judgement, para. 1006.
[380] Trial Judgement, para. 1007.
[381] Trial Judgment, para. 773.
[382] *See* Appeal Brief, para. 74.
[383] Appeal Brief, para. 74 referring to Trial Judgement, para. 1007.
[384] Appeal Brief, paras 74, 87.
[385] Blagoje Simi}, T. 12274-12275.
[386] Blagoje Simi}, T. 12278-12279.
[387] Ozren Stanimirovi}, T. 13894, 13896-13897.
[388] Trial Judgement, para. 514 footnote 1039 referring to Hajrija Drljači}, T. 8086-87; Ned`vija Avdi}, Rule 92*bis* Statement, para. 9; Amir Nuki}, Rule 92*bis* Statement, para. 9; Mithat Ibrali}, Rule 92*bis* Statement, para. 13; Desanka

deliberately denied adequate medical care.[389] The Appeals Chamber therefore finds that the Appellant fails to demonstrate that the Trial Chamber erred in finding that the detainees were deliberately denied adequate medical care.

134. The Trial Chamber further found that the deliberate denial of adequate medical care to the detainees contributed to the unacceptable conditions deliberately created to force the non-Serb detainees to leave the Municipality.[390] In light of this finding, coupled with the Trial Chamber's findings supporting the Appellant's responsibility as an aider and abettor of persecutions for the unlawful arrests and the detention in various facilities in the Municipality of Bosanski [amac, the Appeals Chamber finds that a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant's deliberate denial of adequate medical care to the detainees in these detention facilities lent substantial assistance to the confinement under inhumane conditions prevailing therein.

(ii) *Mens rea*

135. The Appellant challenges the Trial Chamber's finding that he must have known of the mistreatment of non-Serb detainees, including the confinement under inhumane conditions, because Bosanski [amac is a small town and because the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres. As pointed out by the Prosecution, the Trial Chamber was presented with evidence supporting these findings.[391] The Appellant has not pointed to any evidence in support of his arguments. Arguing simply that the Trial Chamber's findings are "no more than rank speculation and supposition" [392] does not suffice, thus the Appellant fails to demonstrate an error on behalf of the Trial Chamber.

136. The Trial Chamber further found that the Appellant was aware of the discriminatory intent of the principal perpetrators of the confinement under inhumane conditions.[393] The Appellant does not appear to take issue with this finding as such.[394] The Appeals Chamber recalls that the

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Cvijeti}, Rule 92*bis* Statement, para. 10; ^edomir Simi}, Rule 92*bis* Statement, para. 11, T. 18825; Blagoje Simi}, T. 12274-79; Jovo Laki}, Rule 92*bis* Statement, para. 8, and Mirko Luki}, T. 12804-05.

[389] Trial Judgement, para. 1007.

[390] Trial Judgement, para. 1007.

[391] Witness L, T. 4338-4341; Mirko Luki}, T. 12831-12833, 12849-12852; Exhibit D35/4, para. 28, statement of Petar Karlovi} referred to at Response Brief, para. 7.23 footnote 449. It is apparent from the Trial Chamber's reliance upon the evidence of Mirko Luki} and Witness L in the Trial Judgement that the Trial Chamber found them to be credible and reliable witnesses.

[392] Appeal Brief, para. 74.

[393] Trial Judgement, para. 1009.

[394] As noted earlier, the Appellant submits that even if the conclusions in paragraphs 1003-1011 of the Trial Judgement were justified, they could establish only knowledge on his part that "something was going on" but not discriminatory intent. *See* Appeal Brief, para. 74.

Appellant was aware of the discriminatory context in which the unlawful arrests and detention in Bosanski [amac Municipality were carried out and that he knew that his assistance to these acts had a substantial effect on the perpetration thereof. He further lent substantial assistance to the inhumane conditions prevailing in these detention centres by deliberately denying the detainees adequate medical care. On the basis of these findings, the Appeals Chamber finds that the only reasonable inference available on the evidence is that the Appellant was aware that his assistance to the confinement under inhumane conditions as an underlying act of persecutions had a substantial effect on the perpetration of this crime.

137. As the Appellant's *mens rea* for aiding and abetting persecutions through the confinement under inhumane conditions has thus been established, it is not necessary for the Appeals Chamber to consider the Appellant's challenges to the Trial Chamber's finding that he shared the discriminatory intent of the perpetrators of these acts.[395]

(iii) Conclusion

138. The Appeals Chamber finds that on the basis of the Trial Chamber's findings a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible as an aider and abettor of persecutions for the confinement under inhumane conditions of non-Serb prisoners. The Appeals Chamber further finds that on the basis of the Trial Chamber's findings no reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible as an aider and abettor of persecutions for the cruel and inhumane treatment in the form of beatings and torture of Bosnian Croat, Bosnian Muslim and other non-Serb civilian detainees. Accordingly, the Appeals Chamber grants in part the Appellant's ninth and tenth grounds of appeal, and dismisses his twelfth ground of appeal in its entirety.

4. Forced labour

(a) Findings of the Trial Chamber

139. The Trial Chamber found that civilians who had to report every day in front of the Pensioner's Home, as well as civilians who were detained, were, on a discriminatory basis, forced to dig trenches, build bunkers, carry sandbags or railway sleepers for the construction of trenches, and build fortifications on the front line, and that they were under the supervision of armed guards, who beat or fired at those who tried to escape.[396] It also found that non-Serb civilians were

[395] Appeal Brief, para. 74. *See* also the Appellant's sixth ground of appeal: Appeal Brief, paras 58, 60-64.
[396] Trial Judgement, para. 834.

subjected to humiliating forced labour,[397] including forcing them to loot houses of people they knew well and highly respected.[398]

140. The Trial Chamber accepted that the Bosanski [amac Secretariat for National Defence was responsible for administering the forced labour programme and for assigning civilians to forced labour. However, it found that this Secretariat was accountable to the Crisis Staff. It held that the Crisis Staff appointed and dismissed the head of the Secretariat; that the head of the Secretariat was an *ex officio* member of the Crisis Staff; that the Secretariat occasionally provided reports to the Crisis Staff, and that, in principle, the Crisis Staff gave its general consent to the requests for forced labour assignments.[399] The Trial Chamber noted the testimony of Bo`o Ninkovi}, who said that the commander of the military unit was responsible for the safety of the people in his unit, and of Commander Anti}, who said that he felt morally responsible for the safety of the people digging trenches, but not as part of his military responsibilities.[400] However, it held that "the ultimate responsibility for sending people to work in dangerous conditions lay with those who made the decision to send civilians to the frontline and not with those who were in charge of the specific military operation".[401] It found that, through the Municipal Department for Defence, "the Crisis Staff was ultimately responsible for managing the forced labour program and sending civilians to work in dangerous or humiliating conditions."[402]

141. The Trial Chamber was satisfied that the Appellant, as the head of the *de facto* government, concerned with the welfare and the safety of citizens, was aware of the existence of the forced labour programme and knew that Bosnian Muslims and Bosnian Croats were forced to perform dangerous or humiliating work.[403] It accepted evidence that he was seen at various locations where civilians performed forced labour.[404] The Trial Chamber further found that the Appellant intended to subject Bosnian Muslims and Bosnian Croats to dangerous or humiliating work. While being aware of the overall situation in the Municipality, that civilians were used for dangerous assignments, and that Bosnian Muslims and Bosnian Croats in detention were subjected to

[397] Trial Judgement, para. 837.
[398] Trial Judgement, para. 838. However, the Trial Chamber did not find that the Crisis Staff's participation in forcing civilians to loot through the forced labour programme was established beyond reasonable doubt: Trial Judgement, para. 838.
[399] Trial Judgement, para. 840.
[400] Trial Judgement, para. 841.
[401] Trial Judgement, para. 841.
[402] Trial Judgement, para. 841.
[403] Trial Judgement, para. 1021.
[404] Trial Judgement, para. 1021. The Appeals Chamber notes that even though the Trial Chamber did not specify which evidence it relied on, it is apparent from the Trial Judgement that it relied on the testimony of Witnesses K, M, Esad Dagovi}, Nusret Had`ijusufoci} and Ediba Bobi} that they saw the Appellant while performing forced labour: Trial Judgement, para. 817.

humiliating assignments, he did not take sufficient action within his authority to stop this practice.[405] Noting the fact that only Bosnian Muslims and Bosnian Croats were subjected to these assignments, the Trial Chamber found that, through his role in the appointment of the head of the department administering the forced labour programme,[406] as President of the Crisis Staff, and by his failure to take measures preventing the said acts from taking place, the Appellant participated in the forced labour programme with discriminatory intent.[407]

(b) Challenges to the Trial Chamber's findings (Eleventh ground of appeal)

142. The Appellant submits that the Trial Chamber erred in law and in fact by finding him guilty of forced labour as an underlying act of persecutions. He contends that "the Trial Chamber misinterpreted and misapplied international criminal law and the law of Republika Srpska, and, moreover, it erred in fact by finding that [he] was in a position to prevent the acts of others".[408]

143. In the first place, the Appellant argues that the Trial Chamber primarily based its finding of guilt on the theory that the Crisis Staff controlled the appointment and dismissal of the head of the Municipal Department of Defence, Bo`o Ninkovi}, and therefore was responsible for the actions of that official. Relying on the testimony of Bo`o Ninkovi} and certain provisions of the law of the Republika Srpska, he argues that although the Crisis Staff made a recommendation thereto, the appointment of the head of the Municipal Department of Defence and its tenure was the responsibility of the Ministry of Defence of Republika Srpska, not of the Crisis Staff or the Appellant.[409] This, he contends, is further supported by the testimony of Stevan Todorovi} that the Crisis Staff was subordinate to the Municipal Department of Defence in this respect, and by evidence presented by the Defence that the Crisis Staff was not responsible for work assignments.[410] The Appellant also submits that the Trial Chamber was presented with evidence

[405] Trial Judgement, para. 1022.
[406] The Appeals Chamber considers that "the Municipal Department for Defence" and "the Bosanski [amac Secretariat for National Defence" are referred to interchangeably in paragraphs 840-841 and paragraph 1022 of the Trial Judgement. The Appeals Chamber will employ the terms "Municipal Department of Defence" when referring to this body.
[407] Trial Judgement, para. 1022.
[408] Amended Notice of Appeal, para. 13.
[409] Appeal Brief, paras 77, 79, 80, 81 (citing Bo`o Ninkovi}, T. 13384-13385; Exhibit D79/3 (extract from the Official Gazette of the Serbian People in Bosnia and Herzegovina, 1 June 1992—Defence Act); Exhibit D11/2 (extract from the Official Gazette of the Serbian People in Bosnia and Herzegovina, 8 June 1992—Article 12 of the Decree on Organizing and Implementing the Work Obligation for Defence Requirements)).
[410] Appeal Brief, para. 80 (citing testimony of Stevan Todorovi} at Trial Judgement, para. 810; Trial Judgement, paras 811-813; Bo`o Ninkovi}, T. 13387).

that "in time of armed conflict, the military commander on the ground, and not the civilian authority, is responsible for the conduct of civilian labour programmes".[411]

144. Second, the Appellant submits that he could not have prevented or controlled the practice of forced labour because the requests for forced labour emanated from the military commander, and not from the Crisis Staff.[412] Although there was some evidence that the Crisis Staff was mentioned in papers relating to work assignments, he argues that the "clear tenor of the evidence was that the Crisis Staff neither originated nor approved the requests".[413]

145. Finally, the Appellant argues that no reasonable trier of fact could have found that he was involved in the operation of the forced labour programme. The evidence allegedly establishing a connection between him and the work assignments, he argues, was "virtually non-existent" and consisted of two disputed sightings of him in work places. He contends that, even if he had been present, the evidence did not show that he was associated with the forced labour programme, responsible for what was happening or aware of the ethnicity of the workers and the conditions under which they worked.[414] The Appellant repeats the arguments put forth under his eighth, ninth and tenth grounds of appeal and reiterates that the Trial Chamber relied on his position as President of the Crisis Staff and his failure to prevent crimes committed by persons over whom he had no control.[415]

146. The Prosecution responds that the decisions appointing Bo`o Ninkovi} to the post of Secretary of the Municipal Department of Defence, and dismissing his predecessor, were issued by the Crisis Staff and signed by the Appellant.[416] Given that these documents were addressed to the addressees themselves and that nothing therein indicates that their content was made known to the Ministry of Defence of Republika Srpska, the Prosecution argues that it was open to the Trial Chamber to disregard the evidence of Bo`o Ninkovi} that the Crisis Staff merely made a recommendation regarding his appointment.[417] The Prosecution further submits that the Appellant fails to address the evidence considered by the Trial Chamber in drawing its conclusions regarding the relationship between the Crisis Staff and the Municipal Department of Defence.[418]

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[411] Appeal Brief, para. 82 (citing Trial Judgement, para. 815; Bo`o Ninkovi}, T. 13398).
[412] Appeal Brief, para. 77.
[413] Appeal Brief, para. 83 (citing Trial Judgement, paras 778, 810-816; Bo`o Ninkovi}, T. 13397-13398).
[414] Appeal Brief, paras 84-85.
[415] Appeal Brief, para. 85.
[416] Response Brief, para. 7.25 (citing Exhibits P 86/1, P 87/1).
[417] Response Brief, para. 7.26.
[418] Response Brief, para. 7.27 (citing Trial Judgement, paras 840-841).

147. Next, the Prosecution argues that the Appellant's submission that the evidence linking him to the forced labour was almost non-existent fails to address a number of the Trial Chamber's findings and the evidence. First, the Prosecution contends that the Appellant fails to deal with the Trial Chamber's findings that he knew of the system of forced labour, appointed and dismissed officials in the body administering that system, and knew that only Croats and Muslims were subjected to it.[419] Second, it refers to evidence that the two successive heads of the Municipal Department for National Defence, Milo{ Bogdanovi} and Bo`o Ninkovi}, were Crisis Staff members while holding this position, that they provided reports on their work to the Crisis Staff, and that Stevan Todorovi} testified that the Crisis Staff gave its consent in general terms to mobilisation of people into labour units.[420] Finally, the Prosecution argues that the Appellant fails to deal with evidence that the Crisis Staff itself entertained requests for labourers[421] and that requests for specialist workers were expressly made known to it.[422] The Appellant offers no arguments in reply.[423]

(c) Discussion

(i) *Actus reus*

148. The Trial Chamber primarily relied on Exhibit P 86 for its finding that the Crisis Staff appointed and dismissed the head of the Municipal Department of Defence.[424] Exhibit P 86 is a document entitled "Decision on the Appointment of a Secretary for the Municipal Secretariat for National Defence", appointing Bo`o Ninkovi} as Secretary of that body, dated 8 June 1992, and signed by the Appellant in his capacity as President of the Crisis Staff.[425] As referred to by the Prosecution, the Appeals Chamber further takes note of Exhibit P 87, a document entitled "Decision on Relieving of his Duty the Secretary of the Municipal Secretariat for National Defence", relieving

[419] Response Brief, para. 7.29 (citing Trial Judgement, paras 1021-1022).
[420] Response Brief, para. 7.30 (citing Stevan Todorovi}, T. 9175, 9177, 10256).
[421] The Prosecution submits that "[f]ollowing the takeover of Od`ak, Savo Popovi}, a Crisis Staff member, was sent to Od`ak. He would go to the Crisis Staff and make requests for labourers and the Crisis Staff 'usually responded positively and referred Mr. Popovi} to the Municipal Secretariat for National Defence where he would be assigned a number of workers'": Response Brief, para. 7.31 (citing Stevan Todorovi}, T. 9178-9181).
[422] Response Brief, para. 7.31 (citing Stevan Todorovi}, T. 9181).
[423] Reply Brief, para. 43.
[424] Trial Judgement, para. 840, fn. 1955. The Trial Chamber also relied on the testimony of Stevan Todorovi} for this finding: *ibid.*, (citing Stevan Todorovi}, T. 9174-9175). The Appeals Chamber notes that Stevan Todorovi} gave evidence that the signature on Exhibit P 86 was that of the Appellant and that Bo`o Ninkovi} and his predecessor were members of the Crisis Staff: Stevan Todorovi}, T. 9174-9175.
[425] The translation of the decision, in the section designating its addressee, reads: "/first name illegible, possibly Bo`o/ /first letter illegible/IVKOVI]". The Appeals Chamber notes that it is not disputed that this decision was addressed to Bo`o Ninkovi}.

Milo{ Bogdanovi} from the position of Secretary of that body, dated 14 June 1992, and signed by the Appellant as President of the Crisis Staff.[426]

149. The Appellant refers to the testimony of Bo`o Ninkovi} that his appointment "should be understood in the following way: The Crisis Staff made a proposal, because it [was] the [M]inister who ma[d]e the actual appointments. So practically, this was a proposal, a nomination."[427] The Appellant further refers to Article 8(3) of the Republika Srpska Law on Defence, adopted on 1 June 1992, which stipulates that "the Government shall […] adopt enactments on the introduction and implementation of the material obligation, work obligation and other obligations of citizens, enterprises and other organisations", and to Article 13 of the same law, which states that "[p]ursuant to a decree issued by the Government, the Ministry of Defence shall order that activities and tasks that constitute the work obligation for defence needs be carried out."[428] Finally, he refers to Article 12 of the Decree on Organising and Implementing the Work Obligation for Defence Requirements, issued on 8 June 1992, which reads as follows:

> The Ministry of Defence and the pertinent ministries of the Government of the Serbian Republic of Bosnia and Herzegovina shall within their competence oversee the implementation of the work obligation through inspections in accordance with the provisions of the Decree.[429]

150. The Appeals Chamber notes that none of these provisions are inconsistent with the finding that the Crisis Staff appointed the head of the Municipal Department of Defence, especially in light of the fact that the Decree on Organising and Implementing the Work Obligation for Defence Requirements was issued on 8 June 1992, the same day that the Crisis Staff appointed Bo`o Ninkovi} as head of the Municipal Department of Defence. The Appellant refers to the testimony of Bo`o Ninkovi} that the Ministry of Defence appointed him on 16 July 1992, and that "[o]n that day [he] started [making proposals to the Minister as to] employing persons who would be employed in this particular agency",[430] but omits to mention that in the same passage Bo`o Ninkovi} also gave evidence that, during the period between the Crisis Staff's "proposal" of his appointment until his "actual appointment", he "was slowly taking over these jobs that [he] had been envisaged for, so this was a transition period, so to speak."[431] Furthermore, as pointed out by the Prosecution, neither Exhibit P 86 nor Exhibit P 87 indicates that their content was made known to the Ministry of

[426] Although not referring explicitly to this exhibit in its findings on the forced labour, the Trial Chamber referred to it in the section of the Trial Judgement summarizing the evidence relating to forced labour, under the heading entitled "Evidence on the role of the Crisis Staff": Trial Judgement, para. 809, fn. 1881.
[427] Bo`o Ninkovi}, T. 13384-13385.
[428] Exhibit D 79/3.
[429] Exhibit D 11/2.
[430] Appeal Brief, para. 79 (citing Bo`o Ninkovi}, T. 13384).
[431] Bo`o Ninkovi}, T. 13385.

Defence of Republika Srpska.[432] In fact, Exhibit P 86 states that Bo`o Ninkovi} "shall take up his duty immediately or within 24 hours at the latest from receipt of this Decision." Accordingly, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber misinterpreted international criminal law and the law of Republika Srpska.

151. The Appellant submits that Stevan Todorovi} testified that the Crisis Staff was subordinate to the Ministry of Defence with regard to the forced labour programme.[433] Bo`o Ninkovi} testified that the Crisis Staff could not interfere with the work of the Municipal Department of Defence or give orders to it;[434] the Defence provided the Trial Chamber with substantial evidence that the Crisis Staff was not responsible for work assignments;[435] and the Trial Chamber was presented with evidence that "in time of armed conflict, the military commander on the ground, and not the civilian authority, is responsible for the conduct of civilian labour programmes."[436] The Appeals Chamber notes that this evidence, which clearly was not ignored by the Trial Chamber – as the Appellant contends – is not inconsistent with the Trial Chamber's findings challenged by the Appellant.

152. The Appeals Chamber recalls the Trial Chamber's reasoning. First, the Trial Chamber took into account Bo`o Ninkovi}'s testimony that "the commander of the military unit was responsible for the people in his unit" and the testimony of Commander Anti} that "he felt himself personally responsible for the safety of the people digging trenches, not as part of his military responsibilities, but as his obligation as a human being."[437] However, the Trial Chamber explained that "the ultimate responsibility for sending people to work in dangerous conditions lay with those who made the decision to send civilians to the frontline and not with those who were in charge of the specific military operation".[438] The Appellant's arguments fail to show that this finding is unreasonable.

153. Second, noting the evidence presented by the Defence, including the testimony of Bo`o Ninkovi}, the Trial Chamber accepted that the Municipal Department of Defence was responsible for administering the forced labour programme and for assigning civilians to forced labour.[439] Nonetheless, the Trial Chamber concluded that the Crisis Staff, through the Municipal Department of Defence, was ultimately responsible for managing the forced labour programme. In so doing, it noted the testimony of Stevan Todorovi} that although the Crisis Staff could not issue orders for

[432] Response Brief, para. 7.26.
[433] Appeal Brief, para. 80 (citing Trial Judgement, para. 810).
[434] Appeal Brief, para. 80 (citing Bo`o Ninkovi}, T. 13387).
[435] Appeal Brief, para. 80 (citing Trial Judgement, para. 811-813).
[436] Appeal Brief, para. 82 (citing Trial Judgement, para. 815; Bo`o Ninkovi}, T. 13398). The Appeals Chamber notes that paragraph 815 of the Trial Judgement refers to the testimony of both Commander Anti} and Bo`o Ninkovi}.
[437] Trial Judgement, para. 841 (citing Bo`o Ninkovi}, T. 13397-13398; Radovan Anti}, T. 16803-16804).
[438] Trial Judgement, para. 841.
[439] Trial Judgement, paras 811-813 (citing, *inter alia*, Bo`o Ninkovi}, T. 13387-13388). *See* also *ibid.,* para. 840.

work duty, "companies in need of labour would apply through the Crisis Staff to the Ministry of the Defence", and that "[m]ost often the Crisis Staff would issue its consent to these requests."[440] It further held that the Crisis Staff appointed and dismissed the head of the Municipal Department of Defence, who was also an *ex officio* member of the Crisis Staff, and that the Municipal Department of Defence occasionally provided reports to the Crisis Staff. Additionally, it found that, in principle, the Crisis Staff gave its general consent to the requests for forced labour assignments.[441] In light of the aforesaid reasoning, the Appeals Chamber considers that the Appellant's argument that the "clear tenor of the evidence was that the Crisis Staff neither originated nor approved the requests"[442] fails to show that it was unreasonable for the Trial Chamber to rely on the evidence as it did in order to reach its finding.

154. For the foregoing reasons, the Appeals Chamber finds that the Appellant fails to show that the Trial Chamber erred in concluding that the Crisis Staff appointed and dismissed the head of the Municipal Department of Defence and that the Crisis Staff was ultimately responsible for managing the forced labour programme and sending civilians to work in dangerous or humiliating conditions, and that this finding "was one which was contrary to the law"[443].

155. Insofar as the Appellant refers to the argument that the Trial Chamber relied on his position as President of the Crisis Staff and his failure to prevent crimes committed by persons over whom he had no control,[444] the Appeals Chamber recalls that the eighth, ninth and tenth grounds of appeal have been dismissed in relevant parts elsewhere in the present judgement.[445] As to the arguments regarding his involvement in the forced labour programme,[446] the Appeals Chamber notes that the Appellant had the power to dismiss the head of the Municipal Department of Defence, which body administered and assigned the forced labour programme. Instead of using his authority to impede the continuation of this practice, after he had dismissed Milo{ Bogdanovi} as its Secretary, the Appellant himself contributed to the continuation of the forced labour programme by assigning Bo`o Ninkovi} as the new head of the Municipal Department of Defence. The Appeals Chamber finds that a reasonable trier of fact would be satisfied beyond reasonable doubt that through this

[440] Trial Judgement, para. 810 (citing Stevan Todorovi}, T. 10088, 10256).
[441] Trial Judgement, para. 840 (citing Stevan Todorovi}, T. 9177, 10256; Exhibit D124/1).
[442] Appeal Brief, para. 83 (citing Trial Judgement, paras 778, 810-816; Bo`o Ninkovi}, T. 13397-13398).
[443] Appeal Brief, para. 82.
[444] Appeal Brief, para. 85.
[445] The Appeals Chamber notes that it has granted the Appellant's ninth and tenth grounds of appeal insofar as he suggests therein that the Trial Chamber's findings on the beatings and torture of detainess are not a sufficient basis for convicting him as an aider and abettor for these acts. *See* para, 131 *supra*.
[446] Appeal Brief, paras 84-85. The Appellant argues that no reasonable trier of fact could have found that he was involved in the operation of the forced labour programme, and that the evidence allegedly establishing a connection between him and the work assignments consisted of two disputed sightings of him in work places.

conduct the Appellant lent substantial assistance to the forced labour of Bosnian Croat and Bosnian Muslim civilians as an underlying act of persecutions. This conclusion is corroborated by the fact that the Crisis Staff was ultimately responsible for managing the forced labour programme and the Appellant did not take any measures within his authority to stop the dangerous work assignments.[447]

(ii) *Mens rea*

156. The Appellant argues that the Trial Chamber relied on his presence on two occasions at locations where work was being performed, but that it "is unable to point at any evidence showing that […] he had knowledge of any illegal activity, for example knowledge of the ethnic background of those working, or the circumstances in which they were working."[448]

157. The Appeals Chamber notes that this assertion is incorrect. While the Trial Chamber accepted evidence that the Appellant was seen at various locations where civilians performed forced labour,[449] it also relied on the fact that he was the head of the *de facto* government, which was concerned with the welfare and the safety of the citizens, for its finding that he was aware of the existence of the forced labour programme and knew that Bosnian Muslims and Bosnian Croats were forced to perform dangerous or humiliating work.[450] Moreover, the Trial Chamber accepted evidence that civilians had to report for work and were given assignments to perform labour under dangerous conditions from as early as mid-April or May 1992,[451] and it held that only Bosnian Muslims and Bosnian Croats were subjected to the work assignments in question.[452] Further, both Bo`o Ninkovi} and his predecessor as the head of the Municipal Department of Defence, Milo{ Bogdanovi}, were members of the Crisis Staff during the time they served in this position, and both occasionally provided reports on behalf of the Municipal Department of Defence to the Crisis Staff.[453] Additionally, the Trial Chamber held that the Appellant was aware of the overall situation in Bosanski [amac Municipality.[454]

[447] Trial Judgement, para. 1022.
[448] Appeal Brief, para. 85.
[449] Trial Judgement, para. 1021. As previously noted, even though the Trial Chamber did not specify which evidence it relied on, it is apparent from the Trial Judgement that the Trial Chamber relied on the testimony of Witnesses K, M, Esad Dagovi}, Nusret Had`ijusufoci} and Ediba Bobi} that they saw the Appellant while performing forced labour: Trial Judgement, para. 817.
[450] Trial Judgement, para. 1021.
[451] Trial Judgement, paras 778, 834-835.
[452] Trial Judgement, para. 1022.
[453] Trial Judgement, paras 809, 840 (citing Stevan Todorovi}, T. 9175, 9177).
[454] Trial Judgement, para. 1022.

158. The Appeals Chamber finds that the only reasonable inference available on the evidence is that the Appellant was aware of the discriminatory context in which the forced labour was committed and that he knew that his support had a substantial effect on its perpetration.

(iii) Conclusion

159. For the foregoing reasons, the Appeals Chamber finds that on the basis of the Trial Chamber's findings a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible as an aider and abettor of persecutions for forced labour. The Appeals Chamber dismisses the Appellant's eleventh ground of appeal in its entirety.

5. Deportation and forcible transfer

(a) Findings of the Trial Chamber

160. The Trial Chamber found that the following sixteen non-Serb civilians were unlawfully deported through exchanges from Bosanski [amac to Croatia:[455] (1) Witness A, Hasan Bi~i} and Witness O were exchanged to Lipovac on 4/5 July 1992;[456] (2) Dragan Lukač, Dragan Delić, Muhamed Bičić, Snjezana Delić and Witness Q were exchanged to Dragali} on 4 September 1992;[457] (3) Esad Dagović, Witness K and Jelena Kapetanović were exchanged to Dragali} on 5 November 1992;[458] (4) Witness C was exchanged to Dragali} on 24 December 1992;[459] (5) Nusret Hadžijusufović was exchanged to Lipovac on 30 January 1993;[460] (6) Ibrahim Salkić was exchanged to Dragali} on 15/16 June 1993;[461] and (7) Edida Bobić and Hajrija Drljačić were exchanged to Dragali} on 24 December 1993.[462] The Trial Chamber further found that Osman Jašarević, a non-Serb civilian, was forcibly transferred from Bosanski [amac to Dubica, within the territory of Bosnia and Herzegovina, on 25/26 May 1992.[463] The Trial Chamber found that the detention and living conditions of these victims constituted a coercive environment which left them without a real choice as to whether to voluntarily agree to be exchanged,[464] that the only reasonable

[455] Trial Judgement, paras 968, 1037, 1038.
[456] Trial Judgement, paras 878-880, 968.
[457] Trial Judgement, paras 881-882, 968.
[458] Trial Judgement, paras 883-885, 968.
[459] Trial Judgement, paras 886, 968.
[460] Trial Judgement, paras 887, 968.
[461] Trial Judgement, paras 888, 968.
[462] Trial Judgement, paras 889-890, 968, 1037-1038.
[463] Trial Judgment, paras 894, 972, 1036-1037.
[464] Trial Judgement, paras 967-968 (citing evidence referred to in paras 878-893), 972, 894 (citing Osman Ja{arevi}, Rule 92*bis* Statement, paras 119-120; Osman Ja{arevi}, T. 10532-10533, 10537, 10572-10575).

inference from the extensive and continuing mistreatment of non-Serb civilians and their subsequent displacement is that the perpetrators intended that the victims should not return,[465] and that these displacements were carried out on discriminatory grounds.[466]

161. The Trial Chamber did not specify who physically carried out these unlawful displacements. It held, however, that the Committee for Exchange of Prisoners, established by a decision of the War Presidency on 2 October 1992, was in charge of the exchanges, and that Miroslav Tadi} was one of its members.[467] Prior to the establishment of this Committee, Miroslav Tadi} perceived himself as being in charge of the exchanges, and the Trial Chamber found him responsible for aiding and abetting the unlawful displacements of the abovementioned persons as underlying acts of persecutions.[468]

162. With respect to the forcible transfer of Osman Jašarević on 25/26 May 1992, the Trial Chamber found that the Appellant was informed by Simo Zari} about the negotiations the latter had with the Od`ak side prior to this exchange. After Simo Zari} had informed the Appellant about the proposed exchange, the Appellant had nothing against an "all-for-all"-exchange.[469] The Appellant testified that the Crisis Staff proposed to the Republic Exchange Commission to participate in the exchange.[470] The Trial Chamber accepted that the Crisis Staff ordered Miroslav Tadi}, Simo Zari} and Bo`o Ninkovi} to compile lists of Serbs who were detained in Od`ak prior to this exchange.[471]

163. The Trial Chamber was further satisfied that Miroslav Tadi} regularly informed the Crisis Staff about the exchanges, and that on 2 October 1992, the Appellant appointed the civilian Exchange Committee, which reported on its activities on a monthly basis to the War Presidency.[472] The Trial Chamber found that the system of exchanges took place over a period of about one and a

[465] Trial Judgement, para. 1038.
[466] In light of the fact that the Trial Chamber considered these displacements as underlying acts of persecutions and that they formed part of the common purpose of the "participants in the joint criminal enterprise to persecute [the non-Serb civilians]" it is apparent that the Trial Chamber found these persons to have been unlawfully displaced on discriminatory grounds: Trial Judgement, para. 1038.
[467] Trial Judgement, para. 394 (citing Exhibit P 83 (Decision on the Appointment of a Commission for the Exchange of Prisoners and Other persons, dated 2 October 1992); Stevan Todorovi}, T. 9167-9168).
[468] The Trial Chamber found that Miroslav Tadi} participated in the unlawful displacement of the abovementioned persons and accepted his statement that prior to 2 October 1992, when no exchange committee had been formally established, "[…] I did the most work on these tasks, I seemed to be the President of the commission": Trial Judgement, paras 1042-1043, 923 (citing Miroslav Tadi}, T. 15399). *See* also *ibid.*, paras 922, 924-926.
[469] Trial Judgement, paras 1036, 957 (citing Zari} Prosecution Interview II, pp. 690663-690664).
[470] Trial Judgement, paras 1036, 920 (citing Blagoje Simi}, T. 12599-12600).
[471] Trial Judgement, para. 1036.
[472] Trial Judgement, para. 1037 (citing Exhibit P 83). The Crisis Staff was renamed the War Presidency on 21 July 1992: Trial Judgement, para. 391. The Appellant remained as President also of the War Presidency: Trial Judgement, para. 1004.

half years, and that the Appellant did not take sufficient measures to prevent non-Serbs from being unlawfully displaced.[473]

164. The Trial Chamber accepted evidence that during a meeting in the Municipal Assembly building in Bosanski [amac just prior to the takeover, the Appellant referred to the partition of municipalities along ethnic lines by stating that "if you don't decide, the Serbs will know what to do".[474] At the same meeting, the Appellant said that, if the non-Serbs would not agree on the re-organisation of the municipalities, "the Serbs would use force".[475] The Trial Chamber found that the Appellant was aware of the non-Serb ethnicity of the abovementioned persons who were unlawfully displaced, that he participated in the exchange procedure with discriminatory intent, and that he was informed about it over a period of many months.[476]

(b) Challenges to the Trial Chamber's findings (Thirteenth and Fourteenth grounds of appeal)

165. Under his thirteenth ground of appeal, the Appellant submits that the Trial Chamber erred in law and in fact by finding him responsible for deportation as a crime against humanity and as an underlying act of persecutions.[477] He argues that "the objective requirement of forced displacement across a national boundary without lawful grounds"[478] was not satisfied because the sixteen individuals were transferred to an UNPA located at Dragali}, Western Slavonia, an area which although situated in Croatia, was under the temporary jurisdiction of the United Nations.[479] He also argues that on the evidence presented, "no reasonable fact finder could have found that the persons concerned were transported across a national border".[480] Furthermore, the Appellant argues that there was no evidence linking him to the acts of deportation and forcible transfer. He repeats the arguments put forth under his eighth, ninth, tenth and twelfth grounds of appeal and reiterates that the Trial Chamber relied on his position as President of the Crisis Staff and his failure to prevent crimes committed by persons over whom he had no control.[481] In relation to the Trial Chamber's finding that the Appellant had nothing against an "all-for-all"-exchange, he argues that, at most, the

[473] Trial Judgement, para. 1037.
[474] Trial Judgement, paras 1038, 912 (citing Sulejman Tihi}, T. 1346-1347).
[475] Trial Judgement, paras 1038, 913 (citing Izet Izetbegovi}, T. 2244-2245).
[476] Trial Judgement, para. 1038.
[477] Amended Notice of Appeal, para. 15.
[478] Amended Notice of Appeal, para. 15.
[479] Appeal Brief, paras 88-89.
[480] Appeal Brief, para. 88.
[481] Appeal Brief, para. 90.

evidence showed that he was involved in ensuring that the sixteen individuals reached a place of safety.[482]

166. The Prosecution responds that it is irrelevant for the crime of deportation whether the victims are transferred from the "jurisdiction" of one state to that of another. Since the Appellant does not dispute that the sixteen individuals were transferred across the border of Bosnia and Herzegovina, it argues that his first submission must fail.[483] In response to the Appellant's second argument, the Prosecution refers to its arguments related to the third, fourth and fifth grounds of appeal,[484] according to which the Crisis Staff, including the Appellant, was deeply involved in the exchanges.[485] The Appellant offers no arguments in reply.[486]

167. Under his fourteenth ground of appeal, the Appellant submits that the Trial Chamber erred in law and in fact by finding him guilty of forcible transfer as an underlying act of persecutions.[487] In the first place, he argues that the evidence showed that the underlying acts did not reach the same level of gravity as other acts listed in Article 5 of the Statute and that "the Trial Chamber found that the expert demographic evidence […] was insufficient to draw conclusions regarding ethnic cleansing or the forcible displacement of people".[488] He further contends that the sixteen individuals were "apparently exchanged by being taken to a place of safety", and that "the exchanges took place at an UNPA in the presence of representatives of UNPROFOR and the ICRC."[489] Moreover, he argues, they represent a small portion of the population of Bosanski [amac and Od`ak. He submits that, "[a]ssuming *arguendo,* that they were denied a human right, the Trial Chamber should have held as a matter of law or fact that their transfer did not rise to the level of persecution."[490] Additionally, he submits that in light of the fact that the allegations of deportation and forcible transfer were closely linked to the issue of ethnic cleansing, and that the Prosecution failed to prove

[482] Appeal Brief, para. 90.
[483] Response Brief, paras 8.5-8.6.
[484] Response Brief, para. 8.7, fn. 476 (citing *ibid.*, paras 3.42, 4.33).
[485] Response Brief, para. 3.42.
[486] Reply Brief, para. 43.
[487] Amended Notice of Appeal, para. 16. The Appeals Chamber notes that in his Notice of Appeal, the Appellant challenges his conviction for "Forcible Transfer, a *Crime Against Humanity*", but refers to paragraphs 1035-1038 of the Trial Judgement (which concern his conviction for forcible transfer and deportation as an underlying act of persecutions) as well as paragraph 1051 (which concerns his responsibility for deportation as a crime against humanity): Amended Notice of Appeal, para. 16 (emphasis added). The Appeals Chamber notes that the Trial Chamber did not enter a separate conviction against the Appellant for forcible transfer as a crime against humanity, but, rather, convicted him only for forcible transfer as an underlying act of persecutions as a crime against humanity: *see* Trial Judgement, paras 1035-1038, 1051. The Appeals Chamber therefore understands the Appellant to be challenging only his conviction for forcible transfer as an underlying act of persecutions.
[488] Amended Notice of Appeal, para. 16.
[489] Appeal Brief, para. 95.
[490] Appeal Brief, para. 95.

the occurrence of ethnic cleansing in Bosanski [amac, "[i]t seems doubtful" whether, […] any finding should have been made in relation to the sixteen individuals.[491]

168. Second, the Appellant submits that, in any event, the evidence against him was insufficient. He argues that the exchanges were not within the competence of the Crisis Staff, the latter never discussed or passed decisions on the forced removal of non-Serb civilians, and the policy of exchanges of civilians was under the control of the Ministry of Justice and the security services in the field, both military and police.[492] In relation to the statements he made in the Municipal Assembly building in Bosanski [amac, the Appellant argues that they are ambiguous, and contradicted by evidence that he never advocated the forced removal of non-Serb civilians as well as by the Trial Chamber's findings regarding the non-discriminatory practices of the Appellant and the Crisis Staff that he invokes under his sixth ground of appeal.[493] Finally, the Appellant contends that there was no evidence that he or the Crisis Staff were responsible for any lack of voluntariness in the relocation of the sixteen individuals, and that to the extent they had been detained before being exchanged, that was not a matter over which he had control.[494]

169. Relying on jurisprudence of the International Tribunal, the Prosecution responds that there is no requirement that there be a numerical threshold for the victims of deportation or persecutions as crimes against humanity before an accused may be convicted for such crimes.[495] It also argues that ethnic cleansing is not a legal element of the crimes in question.[496] It further contends that, when determining the gravity of the acts in question, they should be considered in their context by looking at their cumulative effect.[497] The Prosecution submits that the Trial Chamber's finding that the cumulative effect of the underlying acts of persecutions for which the Appellant was found responsible – deportation, unlawful arrest and detention, cruel and inhumane treatment, forced labour and forcible transfers – is of sufficient gravity to amount to a crime of persecutions has not been challenged by the Appellant as constituting an error of law.[498]

170. Next, the Prosecution submits that the Appellant's submissions that the exchanges were not within the competence of the Crisis Staff and that the policy of exchanges of civilians was under the control of the Ministry of Justice and others are irrelevant. It argues that, even if he could support

[491] Appeal Brief, paras 96, 94 (citing Trial Judgement, paras 33, 34, 133).
[492] Appeal Brief, para. 97 (citing Trial Judgement, paras 907-910, 916; Mirko Luki}, T. 12938-12939).
[493] Appeal Brief, para. 97 (citing Trial Judgement, paras 914, 918 and Appeal Brief, para. 61).
[494] Appeal Brief, paras 95, 98.
[495] Response Brief, para. 8.10, referring to *Stakić*, *Krstić* and *Kayishema and Ruzindana* Trial Judgements.
[496] Response Brief, para. 8.11.
[497] Response Brief, paras 8.12-8.15 (citing Trial Judgement, paras 47-48; *Krnojelac* Appeal Judgement, paras 212-215 and Separate Opinion of Judge Shahabuddeen, Part B).
[498] Response Brief, para. 8.16.

these allegations with evidence, they are entirely consistent with the copious evidence upon which the Trial Chamber could base its finding that the Appellant contributed to the forcible transfers.[499] The Prosecution further submits that the Appellant does not attempt to demonstrate why the Trial Chamber erred in rejecting the evidence, unreferenced by the Appellant, that the Crisis Staff never issued or discussed decisions on the forced removal of non-Serbs.[500] Finally, the Prosecution submits that the Appellant's argument that there was no evidence that he was responsible for any lack of voluntariness in the relocation of the sixteen individuals must fail. It argues that the Appellant knew of and participated in the creation of the extremely coercive environment created by the inhumane detention conditions, the torture, the beatings and the other crimes, which made it impossible for the victims of forcible transfer to express their free will.[501]

171. The Appellant replies that the case-law relied on by the Prosecution regarding numerical thresholds is misconceived, misplaced, or irrelevant to the present case, where the transfers of the detainees resulted in their being taken to a place of safety and out of detention.[502] The Appellant further contends that it is highly relevant that the Prosecution case started out as an allegation of ethnic cleansing on a massive scale and collapsed into a finding that sixteen individuals were transferred, albeit involuntarily, to a place of safety.[503]

(c) Discussion

(i) Cross-border requirement of the crime of deportation

172. As a preliminary matter the Appeals Chamber notes that the Trial Chamber distinguished between "forcible transfer" and "unlawful deportation" as underlying acts of persecutions.[504] The Appeals Chamber recalls that for the purposes of a persecutions conviction, it is not necessary to distinguish between the underlying acts of "deportation" and "forcible transfer" because the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement.[505] Accordingly, in this part of the present judgement, the Appeals Chamber will employ the terms "forcible displacement" to designate acts referred to by the Trial Chamber as "forcible transfer" and "unlawful deportation".

[499] Response Brief, para. 8.21 (citing *ibid.*, para. 3.42).
[500] Response Brief, para. 8.22.
[501] Response Brief, para. 8.23.
[502] Reply Brief, para. 44 (citing *Stakić* Trial Judgement, para. 522; *Krstić* Trial Judgement, para. 501; *Krnojelac* Appeal Judgement, paras 189-196).
[503] The Appellant also contends that the Prosecution's reference to the Separate Opinion of Judge Shahabuddeen in the *Krnojelac* Appeal Judgement misconstrues the Judge's statement: Reply Brief, para. 45.
[504] *See* Trial Judgement, paras 1036, 1037.
[505] *Naletili} and Martinovi}* Appeal Judgement, para. 154.

173. The Appeals Chamber recalls that having found the Appellant guilty of persecutions, for, *inter alia,* deportation, the Trial Chamber found that a conviction for deportation as a crime against humanity under Article 5(d) of the Statute, on the basis of the same conduct, was impermissibly cumulative with a conviction for persecutions under Article 5(h) of the Statute for the underlying act of deportation. For this reason, it did not enter a conviction for deportation as a crime against humanity under Count 2.[506] This finding has not been challenged on appeal.

174. As a result, the legal and factual errors alleged by the Appellant under his thirteenth ground of appeal relating to the cross-border requirement of the crime of deportation under Article 5(d) of the Statute could neither invalidate the verdict nor lead to a miscarriage of justice.[507] Insofar as the Appellant implies under his thirteenth ground of appeal that "deportation" as an underlying act of persecutions requires that the victims are transferred across a national border, the Appeals Chamber notes that this question is irrelevant for the purposes of liability under Article 5(h) of the Statute because acts of forcible displacement are equally punishable as underlying acts of persecutions whether or not a border is crossed.[508]

175. The Appeals Chamber therefore dismisses this aspect of the Appellant's thirteenth ground of appeal.

(ii) Gravity of the underlying acts

176. The Appellant challenges the gravity of acts constituting forcible transfer as an underlying act of persecutions under his fourteenth ground of appeal.[509] As a preliminary matter, the Appeals Chamber notes that, while in the Amended Notice of Appeal, the fourteenth ground of appeal is limited to the Trial Chamber's findings on "forcible transfer",[510] in his Appeal Brief, the Appellant challenges the gravity of the acts constituting both "forcible transfer" and "deportation" as underlying acts of persecutions.[511] Because the Appellant puts forward challenges to the gravity of the acts constituting deportation as an underlying act of persecutions, which are not included in his Amended Notice of Appeal, he should have sought leave to amend his Amended Notice of Appeal pursuant to Rule 108 as soon as possible after identifying this new allegation, but he failed to do so.[512] However, as has been already noted, for the purposes of a persecutions conviction, it was not

[506] Trial Judgement, paras 1058, 1116.
[507] Appeal Brief, paras 88-89.
[508] *Naletili} and Martinovi}* Appeal Judgement, para. 154; *Krnojelac* Appeal Judgement, para. 218.
[509] Amended Notice of Appeal, para. 16(A).
[510] Amended Notice of Appeal, para. 16.
[511] *See* Appeal Brief, paras 95-96.
[512] *Cf. Naletili} and Martinovi}* Appeal Judgement, para. 17.

necessary for the Trial Chamber to distinguish between the underlying acts of "deportation" and "forcible transfer".[513] In addition, the Appeals Chamber notes that the Prosecution has responded to Appellant's fourteenth ground of appeal in full.[514] For these reasons, the Appeals Chamber turns to consider the Appellant's challenges as encompassing the gravity of all forcible displacements, including acts referred to by the Trial Chamber as "forcible transfer" as well as "deportation".

177. The Appeals Chamber recalls that the *actus reus* of persecutions, a crime against humanity, is defined as an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law.[515] The underlying acts pleaded as persecutions, whether considered in isolation or in conjunction with other acts, must constitute conduct of gravity equal to the crimes listed in Article 5 of the Statute.[516] Only when it is determined that this level of gravity has been attained do the underlying acts – all other criteria having been met – amount to persecutions.

178. The Prosecution is not required to prove the occurrence of "ethnic cleansing" in order to demonstrate that the acts underlying persecutions amount to the requisite gravity, or for any other purpose in proving the crime of persecutions. Similarly, while the number of victims may be relevant to determining the gravity of the underlying acts, there is no legal requirement that a certain numeric threshold be met. Indeed, although the crime of persecutions often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds, namely, race, religion or politics.[517] The Appeals Chamber therefore dismisses the Appellant's argument regarding the pleading and the existence of ethnic cleansing in Bosanski [amac Municipality as well as his argument that the victims represent a small portion of the population of Bosanski [amac and Od`ak.

179. The Appellant further submits that the sixteen individuals were "apparently exchanged by being taken to a place of safety", and that "the exchanges took place at an UNPA, in the presence of representatives of UNPROFOR and the ICRC."[518] The Trial Chamber accepted evidence suggesting that representatives of the UNPROFOR and the ICRC were present during some of the

[513] *Naletili} and Martinovi}* Appeal Judgement, para. 154.
[514] *See* Response Brief, paras 8.8-8.19. *See* in particular *ibid.*, para. 8.18, where the Prosecution submits that "the Trial Chamber was not in error to find that individual acts of deportation satisfy the gravity threshold".
[515] *Krnojelac* Appeal Judgement, para. 185.
[516] *See Bla{ki}* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras 199, 221.
[517] *Bla{ki}* Appeal Judgement, para. 135; *Vasiljevi}* Appeal Judgement, para. 113.
[518] Appeal Brief, para. 95.

exchanges,[519] but it did not indicate whether the victims were taken to an UNPA. In support of the assertion that they were, the Appellant refers to the testimony of Milutin Grujici}, the "President of the Commission for Military Exchanges", and Exhibit P 2M, "a map showing the location of the Dragali} UNPA."[520] However, as pointed out by the Prosecution, it is not evident from the invoked part of Milutin Grujici}'s testimony whether the transferred persons generally ended up at UNPAs or whether the forcibly displaced individuals referred to in the Trial Judgement were transferred to an UNPA.[521] On its own, Exhibit P 2M does not serve to clarify the matter. The Appellant therefore fails to demonstrate that the forcibly transferred people were taken to an UNPA, and his argument that they were taken "to a place of safety" is dismissed.

180. The Appeals Chamber further considers that fourteen of the seventeen forcibly displaced non-Serb civilians mentioned in the Trial Judgement were in detention at the time of their transfer, and that their detention conditions constituted a coercive environment that left them without a real choice as to whether they wanted to be exchanged.[522] The remaining three were forced to be exchanged due to the living conditions imposed upon them, including the forced work assignments[523] and the unlawful arrests,[524] in Bosanski [amac Municipality. The gravity of the forcible displacements must thus be considered in conjunction with the underlying acts of unlawful arrests and detention and forced labour, the gravity of which is not being challenged on appeal. Against this backdrop, the Appeals Chamber finds that the presence of representatives from the UNPROFOR and the ICRC during some of the exchanges does not render the displacements lawful, nor does it lead to the conclusion that the forcible displacements were of insufficient gravity to rise to the level of persecutions.[525]

181. For these reasons, the Appeals Chamber dismisses the Appellant's submission that the gravity requirement was not fulfilled in this case.

(iii) *Actus reus*

[519] Trial Judgement, paras 882, 884, 885, 892, 894.
[520] Appeal Brief, para. 89, footnote 38 (citing Milutin Grujici}, T. 16098-16100; Exhibit P2M). *See* also *ibid.*, para. 95.
[521] Milutin Grujici}, T. 16098-16100; Response Brief, fn. 475.
[522] Trial Judgement, paras 968, 972. The individuals in detention at the time of their transfer were: Witness A, Hasan Biči}, Witness O, Dragan Lukač, Dragan Delić, Muhamed Bičić, Witness Q, Esad Dagović, Witness K, Jelena Kapetanović, Witness C, Nusret Hadžijusufović, Ibrahim Salkić, and Osman Jašarević.
[523] *See* Trial Judgement, para. 889.
[524] *See* Trial Judgement, para. 890.
[525] *See Staki}* Appeal Judgement, para. 286.

182. The Appeals Chamber finds that the Appellant has failed to show that the evidence did not "link" him to the forcible displacements.[526] The Trial Chamber found that the Appellant was informed by Simo Zari} about the negotiations the latter had with the Od`ak side prior to the exchange that took place on 25/26 May 1992. After Simo Zari} had informed the Appellant about the proposed exchange, the Appellant had nothing against an "all-for-all"-exchange.[527] The Trial Chamber further accepted that the Crisis Staff ordered Miroslav Tadi}, Simo Zari} and Bo`o Ninkovi} to compile lists of Serbs who were detained in Od`ak prior to this exchange.[528] The Appellant does not dispute these findings.[529] In fact, the Appellant himself testified that the Crisis Staff proposed to the Republic Exchange Commission to participate in the exchange.[530] Furthermore, the Appellant was informed regularly about the exchanges by Miroslav Tadi} who, prior to the establishment of the civilian Exchange Committee, "did the most work on these tasks", and perceived himself as "the President of the commission".[531] Subsequently, the Appellant himself appointed the civilian Exchange Committee, which regularly reported to the War Presidency over which he presided.[532]

183. The Appellant argues that the exchanges were not within the competence of the Crisis Staff, that the latter never discussed or passed decisions on the forced removal of non-Serb civilians, and that the policy of exchanges of civilians was under the control of the Ministry of Justice and the security services in the field.[533] The Appeals Chamber notes that in support of these arguments the Appellant merely repeats evidence noted by the Trial Chamber, and fails to explain why it was unreasonable for the Trial Chamber to evaluate this evidence as it did. In particular, he does not demonstrate how the testimony of Mirko Luki} that a "republican commission" was at a higher level than the municipal civilian Exchange Committee[534] is inconsistent with the abovementioned findings of the Trial Chamber, especially the undisputed finding that the Appellant appointed the civilian Exchange Committee, and the findings to the effect that he was regularly informed about the exchanges and was consulted in relation thereto.[535] In addition, the Appeals Chamber notes that Mirko Luki} also gave evidence that the Crisis Staff had the power to exchange people who were in detention.[536] Here, the Appellant does not attempt to demonstrate how the findings of fact

[526] Appeal Brief, para. 90; *see* also *ibid*., para. 71.
[527] Trial Judgement, paras 1036, 957 (citing Simo Zari} Prosecution Interview II, pp. 690663-690664).
[528] Trial Judgement, paras 929, 952, 1036.
[529] *See* Appeal Brief, para. 90.
[530] Trial Judgement, paras 1036, 920 (citing Blagoje Simi}, T. 12599-12600).
[531] Trial Judgement, paras 923 (citing Miroslav Tadi}, T. 15399), 1037, 1042.
[532] Trial Judgement, para. 1037 (citing Exhibit P 83).
[533] Appeal Brief, para. 97 (citing Trial Judgement, paras 907-910, 916; Mirko Luki}, T. 12938-12939).
[534] Appeal Brief, para. 97 (citing Mirko Luki}, T. 12938-12939).
[535] Trial Judgement, para. 1036.
[536] Trial Judgement, para. 907 (citing Mirko Luki}, T. 12919).

summarised above were unreasonable and, for this reason, the Appeals Chamber dismisses the arguments put forward.

184. Finally, the Appellant argues that there was no evidence that he or the Crisis Staff were responsible for any lack of voluntariness in the relocation of the sixteen individuals, and that to the extent that they had been detained before being exchanged, that was not a matter over which he had control.[537] This argument is without merit. The seventeen forcibly displaced individuals were forced to leave either because the conditions under which they were detained constituted a coercive environment, or because the conditions under which they had to live, including forced work assignments and unlawful arrests, did not provide them with a free choice.[538] The criminal responsibility of the Appellant and the involvement of the Crisis Staff with regard to the unlawful arrests and detention, the confinement under inhumane conditions, and the forced labour have been established above.

185. In addition to his contribution to the forcible displacements through these underlying acts, the Appellant further appointed the civilian Exchange Committee and, prior to its establishment, he participated in the exchange procedures and was in a position to express authoritative opinions in relation thereto. The Appeals Chamber finds that a reasonable trier of fact would be satisfied beyond reasonable doubt that through his conduct as established by the Trial Chamber, the Appellant lent substantial assistance to the forcible displacements of the seventeen individuals as underlying acts of persecutions.

(iv) *Mens rea*

186. The Trial Chamber found that the Appellant was aware of the non-Serb ethnicity of the forcibly displaced persons and that he participated in the exchange procedure and was informed about it over a period of many months.[539] He was furthermore consulted and expressed an authoritative opinion in relation to the exchange that took place on 25/26 May 1992, and, subsequently, he appointed the civilian Exchange Committee. In addition, the Appellant aided and abetted the unlawful arrests and detention, the confinement under inhumane conditions, and the forced labour, all of which contributed to the coercive environment forcing non-Serb civilians to leave their homes in Bosanski [amac Municipality.[540] The Appeals Chamber finds that the only reasonable inference available on the evidence is that the Appellant was aware of the discriminatory

[537] Appeal Brief, paras 95, 98.
[538] Trial Judgement, paras 889, 890, 968.
[539] Trial Judgement, para. 1038.
[540] *See* paras 118, 138, 159 *supra.*

context in which the forcible displacements were committed and that he knew that his support had a substantial effect on their perpetration.

187. Having thus established the Appellant's *mens rea* for aiding and abetting persecutions through the forcible displacements, it is unnecessary for the Appeals Chamber to consider the Appellant's arguments regarding the statements that he made in the Municipal Assembly building in Bosanski [amac,[541] statements upon which the Trial Chamber relied for its analysis as to whether he possessed discriminatory intent.[542]

(v) Conclusion

188. For the foregoing reasons, the Appeals Chamber finds that on the basis of the Trial Chamber's findings a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible as an aider and abettor of persecutions for the forcible displacement of the seventeen non-Serb civilians. The Appeals Chamber dismisses the Appellant's thirteenth and fourteenth grounds of appeal in their entirety.

D. Conclusion

189. The Appeals Chamber finds that on the basis of the Trial Chamber's findings a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible for aiding and abetting the crime of persecutions through the unlawful arrests and detention of non-Serb civilians, the confinement under inhumane conditions of non-Serb prisoners, the forced labour of Bosnian Croat and Bosnian Muslim civilians, and the forcible displacements of non-Serb civilians. As a result, the Appeals Chamber affirms the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment insofar as the conduct underlying this conviction encompasses these acts, and holds that his responsibility is appropriately characterized as that of an aider and abettor.

190. The Appeals Chamber finds that on the basis of the Trial Chamber's findings no reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible as an aider and abettor of the crime of persecutions for the cruel and inhumane treatment in the form of beatings and torture of Bosnian Croat, Bosnian Muslim, and non-Serb civilian detainees. As a result, the Appeals Chamber sets aside the Appellant's conviction for persecutions under Count 1 of

[541] Appeal Brief, para. 97 (citing Trial Judgement, paras 914, 918 and Appeal Brief, para. 61).
[542] *See* Trial Judgement, para. 1038. *See* also Trial Judgement, paras 1009-1010 where the Trial Chamber relied on said statements to infer the Appellant's discriminatory intent in relation to the cruel and inhumane treatment.

the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses these acts.

191. Any effect of the previous findings upon the Appellant's sentence will be considered in section VI of this Judgement dealing with the appeal from sentence.

V. ORAL MOTION FOR ACCESS TO CONFIDENTIAL MATERIAL: SIXTEENTH GROUND OF APPEAL

192. Under his sixteenth ground of appeal, the Appellant submits that "the Trial Chamber erred in law by denying [the Appellant's] motion for disclosure of Prosecution witness Stevan Todorovi}'s medical records, which may have contained information that substantially affected the credibility of the witness or have resulted in the exclusion of his evidence altogether, thereby denying [the Appellant] his right to examine the witnesses against him as provided for by Article [21(4)(e)] of the Statute".[543]

A. Procedural Background

193. Stevan Todorovi} ("Todorovi}") was initially a co-accused of the Appellant until he pleaded guilty and was sentenced in separate proceedings before a different Trial Chamber ("*Todorovi}* Trial Chamber").[544] During the sentencing proceedings against him, Todorovi} notified the *Todorovi}* Trial Chamber that he intended to raise the question of diminished responsibility in mitigation of his sentence and thus requested a medical examination.[545] Pursuant to an order by the *Todorovi}* Trial Chamber, the examination was performed by two experts who wrote the "*Soyka Report*" and the "*Lecić-Tosevski Report*" ("Medical Reports").[546] Todorovi} gave evidence in the case against the Appellant as a witness for the Prosecution between 6 and 28 June 2002.[547]

194. On 3 September 2002, the Appellant made an oral motion to "lift the confidentiality of the medical report" concerning Todorovi}'s psychiatric condition submitted in the *Todorovi}* sentencing proceedings in order to have it evaluated and verified by a Defence expert ("Oral Motion").[548] The Prosecution opposed the Oral Motion.[549] The Trial Chamber dismissed the Oral Motion on the same day.[550]

195. On 25 June 2004, the Appellant requested the Appeals Chamber to (1) obtain and review the Medical Reports on a confidential basis, and (2) if satisfied that Stevan Todorovi}'s medical condition may have adversely affected his reliability or credibility as a witness, refer the Medical

[543] Amended Notice of Appeal, para. 18; Appeal Brief, para. 100 *et seq.*
[544] Trial Judgement, para. 21.
[545] *Todorović* Sentencing Judgement, para. 94.
[546] *Todorović* Sentencing Judgement, para. 94, fns 97-98. The Medical Reports were filed confidentially, however, they are referred to in the *Todorović* Sentencing Judgement.
[547] T. 8999-9630, 9637-10271.
[548] T. 11981, lines 13-15, 22-24; 11982; 11983, lines 11-14 (private session).
[549] T. 11983, line 17- 11985, line 15 (private session).
[550] Oral Decision, T. 11985 line 17-11986 (private session).

Reports to a panel of qualified practitioners and provide the Medical Reports to the Appellant.[551] The Motion for Disclosure was denied on the grounds, *inter alia,* that the request made to the Appeals Chamber to obtain for itself the said reports and examine them in order to assess the merits of his sixteenth ground of appeal, did not fall within the Appeals Chamber's role.[552] Subsequently, the Appeals Chamber decided *proprio motu* to grant the Appellant access to the Medical Reports subject to certain conditions.[553] The Appeals Chamber considered that out of an abundance of caution and for the purpose of being able to fully assess the merits of the Appellant's sixteenth ground of appeal in the event that it were to find that the Trial Chamber erred in denying the Appellant access to the Medical Reports, it was necessary that the Appellant be provided with access to the Medical Reports. The Appeals Chamber further found that the Medical Reports were likely to be of material assistance in the preparation of the Appellant's case.[554] Accordingly, on 22 February 2006, a redacted version of the Medical Reports was disclosed to the Appellant.[555]

196. On 27 February 2006, the Appellant filed a confidential motion before the Appeals Chamber, in which he requested, *inter alia*, leave to disclose the Medical Reports to an expert in order to obtain an expert opinion which would assist the Appeals Chamber and his Counsel in evaluating the sixteenth ground of appeal.[556] On 15 March 2006, the Appeals Chamber rendered a decision whereby it considered that the Appellant had sufficiently demonstrated that the disclosure of the redacted Medical Reports was necessary for the preparation of his defence, granted the Appellant leave to disclose the confidential redacted Medical Reports to an expert, and ordered that the Appellant's additional submissions be filed no later than 5 April 2006.[557]

197. On 5 April 2006, the Appellant filed his Further Submissions on the Sixteenth Ground of Appeal and attached thereto, as Annex 3, a report written by Dr. Seth W. Silverman, the forensic psychiatric expert to whom the Medical Reports had been disclosed ("*Silverman Report*"). The

[551] Motion for Disclosure, para. 10.
[552] Decision on Motion for Disclosure, pp 3, 4.
[553] *Proprio Motu* Order, pp 3-4.
[554] *Proprio Motu* Order, p. 2.
[555] Decision on Application of Stevan Todorovi} for Additional Protective Measures, Confidential Annex 1, 22 February 2006.
[556] Motion of Blagoje Simić (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 February and 17 February 2006, Confidential, 27 February 2006, paras 2(2) and 9(2).
[557] Decision on Blagoje Simić's Motion (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 February and 17 February 2006, Public Redacted Version, 17 March 2006, pp. 5, 7,

Prosecution filed its response on 18 April 2006,[558] and the Appellant filed his reply on 24 April 2006.[559]

198. On 5 April 2006, the Appellant also filed a motion requesting the Appeals Chamber to admit as additional evidence on appeal pursuant to Rule 115 of the Rules both the Medical Reports and the *Silverman Report*, and take judicial notice of the Medical Reports and the *Silverman Report* pursuant to Rule 94(A).[560] The Appeals Chamber dismissed the Motion pursuant to Rules 115 and 94(A) in its entirety on 1 June 2006.[561]

B. Alleged errors of the Trial Chamber

199. The Appellant submits that during the course of Todorovi}'s testimony it emerged that he was taking a significant amount of medication,[562] and the question arose as to whether this might have affected the reliability of his testimony by impairing his ability to testify truthfully and accurately.[563] Accordingly, in his Oral Motion, he requested that Todorovi}'s medical records be made available, so that the Trial Chamber might have the opportunity to assess whether any such difficulty existed.[564] He argues that the fact that Todorovi}'s medical records revealed that he was suffering from post-traumatic stress disorder ("PTSD"), and had abused alcohol during the war,[565] "should have caused the Trial Chamber to be alerted to the possibility of a lack of reliability in Todorovi}'s testimony".[566] Since the Trial Chamber denied the Oral Motion, it erred in law by (1) failing to consult Todorovi}'s medical records in order to determine whether the medication taken by Todorovi} was capable of influencing the reliability of his testimony, and (2) denying the Appellant the opportunity to cross-examine Todorovi} about matters affecting his credibility, or to introduce evidence to show his unreliability, since the Appellant could not have cross-examined him without access to the relevant information.[567] The Appellant further submits that in preventing him from challenging the reliability of a witness by pursuing relevant lines of cross-examination, the Trial Chamber violated his right to a fair trial, including the right to examine or have examined

[558] Prosecution's Response to the Further Submissions on the Sixteenth Ground of Appeal.
[559] Reply to Prosecution's Response to Further Submissions on the Sixteenth Ground of Appeal.
[560] Motion of Blagoje Simi} for Admission of Additional Evidence, Alternatively for Taking Judicial Notice, 5 April 2006, Confidential, ("Motion pursuant to Rules 115 and 94(A)").
[561] Decision on Motion pursuant to Rules 115 and 94(A).
[562] The Appeals Chamber notes that the fact that Todorovi} was taking medication was mentioned by the Presiding Judge in open session. *See* T. 9202.
[563] Appeal Brief, para. 104.
[564] Appeal Brief, para. 104.
[565] *Todorovi}* Sentencing Judgement, para. 94.
[566] Appeal Brief, para. 104.
[567] Appeal Brief, para. 105.

witnesses against him.[568] The Appellant therefore requests that his conviction be reversed, and alternatively that he be granted a new trial.[569]

200. The Appellant submits that Todorovi} was an extremely important witness, who gave evidence on almost every aspect of the case.[570] In his view Todorovi} was also "a witness to be treated with extreme caution"[571] because: (1) Todorovi} had undertaken to testify against the Appellant as part of a plea agreement with the Prosecution, and had good reason to please the Prosecution since he had only received a ten year prison sentence,[572] and (2) there were personal and professional hostilities between the Appellant and Todorovi}, making it more likely in the Appellant's mind that Todorovi} might seek revenge from the witness box.[573] In light of the foregoing, and given that the Trial Chamber acknowledged the problems associated with Todorovi}'s testimony, the Appellant asserts that "it was essential for the Trial Chamber to be alert to any possibility that Todorovi} might be unreliable as a witness, even if that unreliability might spring from a source other than his criminality, his motive to favour the Prosecution, and his hostility towards Ðthe Appellantğ".[574]

201. The Appellant submits that pursuant to Rule 90(H) of the Rules he was entitled to cross-examination about any matter affecting Todorovi}'s credibility including any medical issue.[575] Relying on the *Furund`ija* Trial Judgement, the Appellant argues that, where the Defence is denied access to evidence that the credibility of a Prosecution witness may be adversely affected by PTSD, the accused's right to cross-examine the witness is infringed.[576] In addition, he submits that the *Lecić-Tosevski Report* sufficed to "put the Trial Chamber on notice" – amongst other evidence available – that the credibility of Todorovi} may have beeen potentially compromised by PTSD.[577] The Appellant contends that whether the Trial Chamber would have ultimately concluded that Todorovi}'s credibility was compromised by PSTD is irrelevant to his sixteenth ground of appeal. The point, he argues, is that the Trial Chamber had every reason to know that Todorovi}'s credibility may have been compromised and that the Appellant was denied the right to cross-

[568] Appeal Brief, paras 100, 109; Amended Notice of Appeal, para. 18.
[569] Amended Notice of Appeal, para. 18.
[570] Appeal Brief, para. 101.
[571] Appeal Brief, para. 102.
[572] Appeal Brief, para. 102.
[573] Appeal Brief, para. 102. The Appellant makes reference to the fact that the Trial Chamber heard evidence about the attempts he made to remove Todorovi} from his position as Chief of Police, and how he generally tried to restrain Todorovi}'s conduct while in office.
[574] Appeal Brief, para. 104.
[575] Appeal Brief, para. 105. While the Appeal Brief refers to Rule 89(H), the Appeals Chamber understands that the Appellant intended to refer to Rule 90(H).
[576] Further Submissions on the Sixteenth Ground of Appeal, para. 3 (referring to the *Furund`ija* Trial Judgement).
[577] Further Submissions on the Sixteenth Ground of Appeal, para. 7.

examine a vital witness on the basis of full information, which denial in this case invalidated his conviction.[578]

202. The Prosecution responds that in the Appeal Brief the Appellant implies that the reason for his Oral Motion was the indication that Todorovi} had to take prescribed medication;[579] however, the Oral Motion sought access to a confidential medical report from the *Todorovi}* sentencing proceedings in order to have it examined by a defence medical expert or possibly by a team of medical experts.[580] Thus, the Oral Motion did not request access to records regarding the medical prescriptions that Todorovi} might have been taking during his testimony, and in the Prosecution's view these records were never requested.[581] The Prosecution further submits that despite the fact that Todorovi} had already informed the Trial Chamber during his testimony that he was taking medication, the Appellant never raised this issue in his Oral Motion nor did the Defence ever question him about it during cross-examination.[582] In the Prosecution's view, this demonstrates that the Appellant did not feel prejudiced and that he has waived his right to raise on appeal the issue of Todorovi}'s medication.[583]

203. The Prosecution submits that the Oral Motion concerned only the *Leci}-Tosevski Report,* – one of the two expert reports which the *Todorovi}* Trial Chamber ordered on the question of whether Todorovi} had diminished mental capacity – which concluded that Todorovi} suffered from PTSD.[584] It further submits that the Trial Chamber did not err in denying the Oral Motion since it was open to the Trial Chamber to exercise its discretion as it did, considering the timing and ambiguous nature of the Appellant's submissions in relation to the purpose of the Oral Motion.[585] First, the Prosecution asserts that the purpose of the Oral Motion was unclear, and changed throughout the Appellant's submissions,[586] and that the Appellant therefore failed to make sufficient submissions on what the legitimate forensic purpose was for the Oral Motion.[587] It adds that the lack of clarity of the Oral Motion's purpose is further illustrated by the Appellant's submission on appeal that the said motion was intended to enable the Appellant to cross-examine Todorovi} on the

[578] Further Submissions on the Sixteenth Ground of Appeal, para. 10.
[579] Response Brief, paras 9.9-9.10.
[580] Confidential Response Brief, para. 9.2.
[581] Confidential Response Brief, para. 9.3.
[582] Confidential Response Brief, para. 9.12-9.14.
[583] Confidential Response Brief, paras 9.14.
[584] Response Brief, para. 9.8.
[585] Response Brief, para. 9.22.
[586] Confidential Response Brief, paras 9.23- 9.25, *see also* Response Brief, para. 9.28.
[587] Response Brief, para. 9.30.

basis of the *Leci}-Tosevski Report*, and states that this argument was never put before the Trial Chamber.[588]

204. Second, the Prosecution recalls that since the Oral Motion was brought over two months after Todorovi} had completed his testimony, including cross-examination,[589] it was apparent that the Oral Motion was not for the purpose of cross-examining him.[590] And, this was clearly not stated in his Oral Motion.[591] In addition, the Prosecution alleges, the Trial Chamber had no basis on which to assume that the Appellant had only recently learned of the *Leci}-Tosevski Report* because information about it and its conclusions regarding PTSD was available in paragraph 94 of the *Todorovi}* Sentencing Judgement since 31 July 2001,[592] as well as in the public testimony of Dr. Leci}-Tosevski in the *Todorovi}* sentencing proceedings.[593] For the same reason, the Prosecution contends that the Appellant's reliance on the *Furund`ija* Trial Judgement is unwarranted because, in contrast to the situation in that case, the information that Todorovi} was diagnosed with PTSD was available to the Appellant before Todorovi} gave evidence against him.[594]

205. The Prosecution submits that since none of the Counsel for the accused who cross-examined Todorovi} – including the Appellant's counsel – ever questioned him about PTSD or his ability to recollect events during the conflict,[595] the Appellant's argument "that the Trial Chamber erred because it 'denied' him the opportunity to cross-examine must be rejected".[596] In addition, the Prosecution states that "the Trial Chamber was aware of the fact that such a report existed and that it was in a position to assess the testimony of the witness based on any submissions by the parties as to the trauma suffered".[597] The Prosecution further submits that the Trial Chamber's decision was correct because, as the Appellant had "failed to present a legitimate purpose for access, any interest in access to the report would be outweighed by Todorovi}'s privacy interest".[598]

206. Finally, the Prosecution submits that the Appellant has not made any submissions as to how the alleged error invalidated the Trial Judgement and has not pointed to any finding of the Trial Chamber that was affected by an erroneous reliance upon evidence given by Todorovi}.[599] The

[588] Response Brief, para. 9.29.
[589] Response Brief, para. 9.31.
[590] Response Brief, para. 9.32.
[591] Response Brief, para. 9.40.
[592] Response Brief, para. 9.37.
[593] Prosecution's Response to the Further Submissions on the Sixteenth Ground of Appeal, paras 10-15.
[594] Prosecution's Response to the Further Submissions on the Sixteenth Ground of Appeal, paras 59-61.
[595] Response Brief, para. 9.39.
[596] Response Brief, para. 9.41.
[597] Response Brief, para. 9.43.
[598] Response Brief, para. 9.45.
[599] Response Brief, para. 9.46.

Prosecution argues in the alternative that, if the Appeals Chamber were to find that the Trial Chamber did err in the exercise of its discretion, the Appeals Chamber may consider seeking submissions from the parties as to the impact of this error by reference to the report.[600]

207. The Appellant replies that the Oral Motion was made after Appellant's Counsel had conducted some preliminary research into the effects of PTSD to determine whether further steps were justified.[601] The Appellant submits that "[w]hile no specific reference was made to the medication Todorovi} was taking during his testimony, it is an obvious inference that this was in [Defence] Counsel's mind, and must have been in the Trial Chamber's mind, as part of the overall picture, because it was likely that at least some of the medication was directed to treating the PTSD".[602]

208. The Appellant adds that the information in the Medical Reports was not available to him at trial, and could not have been deduced from Todorovi}'s public testimony, as only on the basis of full disclosure could he have (1) properly known and understood Todorovi}'s condition; (2) mounted a proper defence; and (3) addressed the Trial Chamber on the admissibility and weight of Todorovi}'s evidence.[603]

C. Trial Chamber's findings

209. The Trial Chamber dismissed the Oral Motion on the grounds that no basis for it had been established.[604] In the Trial Judgement the Trial Chamber acknowledged "the problems that may be associated with [Todorovi}'s] testimony"[605] and noted in particular the incentive for Todorovi} "to testify in a manner favourable to the Prosecution case and the hostile relations between him and his former co-Accused".[606] The Trial Chamber did not, however, consider that Todorovi}'s testimony was inherently unreliable. It also stated that "Ŧwğhen assessing the probative value and reliability of Stevan Todorovi}'s evidence, the Trial Chamber viewed in his favour the fact that he was sentenced prior to giving his oral testimony".[607]

[600] Response Brief, para. 9.47.
[601] Reply Brief, para. 46 (confidential).
[602] Reply Brief, para. 46 (confidential).
[603] Reply to Prosecution's Response to Further Submissions on the Sixteenth Ground of Appeal, para. 3.
[604] Oral Decision, T. 11985-11986 (private session).
[605] Trial Judgement, para. 21.
[606] Trial Judgement, para. 21.
[607] Trial Judgement, para. 21.

1. Preliminary issues

210. As a preliminary issue, it is necessary to determine whether as submitted by the Prosecution,[608] the Appellant has waived his right to argue on appeal the issue of Todorović's medication in light of the fact that despite being aware of this issue it was not raised in the Oral Motion or during Todorovi}'s cross-examination.

211. The Appeals Chamber notes that during his testimony and prior to being cross-examined, Todorovi} raised concerns about the medication he was taking before the Trial Chamber.[609] The Appellant does not dispute that his Counsel did not cross-examine Todorovi} on this issue, but submits that "it was an obvious inference that this was in [Defence] Counsel's mind, and must have been in the Trial Chamber's mind" when the Oral Motion was made.[610] The Appeals Chamber does not accept that this inference was obvious as asserted by the Appellant. The Oral Motion was confined to the issue of Todorovi}'s mental health as indicated by the results of the psychiatric examination conducted in the course of the sentencing proceedings against him, and specifically the PTSD he was allegedly suffering from.[611]

212. 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 bring the issue as a valid ground of appeal.[612] The Appellant has not sought to demonstrate that such special circumstances exist in this case. For these reasons, the Appeals Chamber finds that the Appellant has waived his right to raise on appeal the issue of Todorovi}'s medication. Accordingly, the Appellant's sixteenth ground of appeal will only be addressed insofar as it relates to the request made in the Oral Motion for access to the results of Todorovi}'s psychiatric examination which was ordered in the course of the sentencing proceedings against him with regard to his alleged PTSD. In this regard, the Appeals Chamber understands that the subject of the Appellant's sixteenth ground of appeal is the Medical Reports.[613]

[608] Confidential Response Brief, para. 9.14.
[609] T. 9196-9197 (private session). The Appeals Chamber notes that the fact that Todorovi} was taking medication was mentioned by the Presiding Judge in open session. *See* T. 9202.
[610] Reply Brief, para. 46.
[611] T. 11981-11983 (private session).
[612] *Naletili} and Martinovi}* Appeal Judgement, para. 21; *Bla{ki}* Appeal Judgement, para. 222; *Akayesu* Appeal Judgement, para. 361.
[613] Appeal Brief, paras 100, 104. *See* also Decision on Motion for Disclosure, p. 3.

213. As a second preliminary issue, the Appeals Chamber recalls that the Appellant alleges that the Trial Chamber erred by failing to consult the Medical Reports.[614] In support of this allegation he submits that the Trial Chamber should have been "alerted to the possibility of a lack of reliability in Todorovi}'s testimony"[615] due to the fact that, when Todorovi} requested to be medically examined during his sentencing proceedings, the resulting report revealed that he was suffering from PTSD and had abused alcohol during the war.[616] The Appeals Chamber considers that the contention that the Trial Chamber should have considered the Medical Reports *proprio motu* amounts to a new allegation of an error of law which is separate from the allegation that the Trial Chamber erred in denying the Oral Motion. Therefore, pursuant to Rule 108 of the Rules and paragraph two of Practice Direction IT/201 the Appellant was required to seek leave to amend his Amended Notice of Appeal to include this additional allegation. The Appellant has failed to do so. As a result, the Appeals Chamber declines to consider the allegation that the Trial Chamber should have considered the Medical Reports *proprio motu.*

2. Whether the Trial Chamber erred in denying the Oral Motion

214. The Appeals Chamber recalls that a party is always entitled to seek material from any source, including confidential material from another case before the International Tribunal.[617] The test for granting access to such material is whether the party seeking access has identified or described it by general nature and has established that it may be of material assistance to its case or that there is at least a good chance that it would – namely, whether a legitimate forensic purpose for such access has been shown.[618] This standard is met by showing the existence of a nexus between the applicant's case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time.[619]

[614] Appeal Brief, para. 105.
[615] Appeal Brief, para. 104.
[616] Appeal Brief, para. 104.
[617] *Bla{ki}* 16 May 2002 Decision, para. 14; *Had`ihasanovi}* 10 October 2001 Decision, para. 10.
[618] *B. Simi}* 13 April 2005 Decision, p. 3; *Prosecutor v. Miroslav Kvo~ka et al.,* Case No. IT-98-30/1-A, Decision on Mom~ilo Gruban's Motion for Access to Material, 13 January 2003, para. 5; *Bla{ki}* 16 May 2002 Decision, para. 14; *Prosecutor v Tihomir Bla{ki}*, Case No. IT-95-14-A, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002, p. 3; *Had`ihasanovi}* 10 October 2001 Decision, para. 10.
[619] *Prosecutor v. Vidoje Blagojevi} and Dragan Joki},* Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 8; *Prosecutor v. Vidoje Blagojevi} and Dragan Joki},* Case No. IT-02-60-A, Decision on Motion by Radivoje Mileti} for Access to Confidential Information, 9 September 2005, p. 4; *Prosecutor v. Mladen Naletili} and Vinko Martinovi},* Case No. IT 98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletili} and Martinovi}*" and "Jadranko Prli}'s Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 6; *Bla{ki}* 16 May 2002 Decision, para. 15.

215. The Prosecution submits that the Trial Chamber did not err in denying the Oral Motion because the Appellant had failed to make sufficient submissions on what the legitimate forensic purpose was for the Oral Motion.[620] In support of this assertion the Prosecution relies, *inter alia,* on the timing of the Oral Motion and the alleged ambiguous nature of its purpose.[621]

(a) Ambiguous nature of the Oral Motion

216. At the outset, the Appeals Chamber considers that the purpose of the Oral Motion and the relief sought was clear. Counsel for the Appellant requested access to the Medical Reports filed confidentially before the *Todorovi}* Trial Chamber.[622] Counsel for the Appellant made it clear that the purpose for which he sought access to the said reports was for the Trial Chamber to be in a position to properly evaluate Todorovi}'s testimony and the weight to be ascribed to it.[623] Yet, the Trial Chamber denied the Oral Motion on the grounds that "no basis ha[d] been established for such a motion to succeed".[624] For the sake of clarity the Appeals Chamber recalls the Oral Motion:

> Mr. Panteli}: Your Honours, it's also a motion on behalf of all three Defence teams. Given the fact that the normal and common proceedings within this Tribunal, and also in other jurisdictions, is prior to conviction and prior to final sentencing of the accused, *inter alia* are also some kind of psychological or psychiatric evaluation by the experts. The same case was done, I believe, in the sentencing proceedings against Mr. Stevan Todorovi}, who was here as the Prosecution witness. We have, well, reason to believe that a certain level of his mental state or, I would say, mental health, might to some extent have certain impact on the value of his testimony, and therefore Defence respectfully move this Trial Chamber with the following proposition: We would like to establish first of all - it depends on the final decision of the Trial Chamber - we would like to have first of all opportunity to lift the confidentiality of the medical report of Mr. Stevan Todorovi} in our previous proceedings, but –
>
> Judge Mumba: Which medical report is this?
>
> Mr. Panteli}: It's a medical report about his mental state.
>
> Judge Mumba: Which was exhibited in his -- in the proceedings --
>
> Mr. Panteli}: Yes.
>
> Judge Mumba: -- before another Trial Chamber?

[620] Response Brief, para. 9.30.
[621] Response Brief, para. 9.22, 9.28, 9.31, 9.32, 9.35, and 9.43. *See also* Confidential Response Brief, paras 9.23- 9.25.
[622] T. 11981, lines 13-15 (private session). Counsel for the Appellant stated that the medical report was exhibited before another Trial Chamber, but that it belonged to this case formally. T. 11981, lines 18-22 (private session). In the course of the Oral Motion it became apparent that the "previous proceedings" referred to by Counsel for the Appellant were Todorović's sentencing proceedings. T. 11982 (private session). Counsel for the Appellant concluded that the Defence was seeking to lift the confidentiality of the "medical report" so that the Defence medical expert could examine it, subject to limits and protective measures. T. 11983, lines 11-14 (private session). The Appeals Chamber notes that, while Counsel for the Appellant referred to "the medical report" in singular, it is apparent from the fact that the request concerned the *Todorovi}* sentencing proceedings that the Oral Motion in fact sought access to the Medical Reports.
[623] T. 11982, lines 3-12 (private session).
[624] T. 11985, lines 17-20 (private session).

> Mr. Panteli}: Before another Trial Chamber, but in this case, in fact. It belongs to this case formally. We would like to -- that our expert, our expert, will evaluate and verify that, of course, subject to all protective measures.
>
> Judge Mumba: I don't think I understand what you're saying. You wanted your experts to have the medical report which was produced in the proceedings -- the medical report on Mr. Todorovi}.
>
> Mr. Panteli}: Mr. Todorovi}, to see if there are any grounds to establish a certain, I would say, scientific or forensic ground for evaluation of Mr. Todorovi} which might be organised by a panel of experts, designate -- one member could be designated by the Registry, the other by the Prosecution, and the third by the Defence, which was a common, I would say, situation in some other cases here within the jurisdiction of this Tribunal. And then the -- according to the results and according to the conclusions of these experts, this Trial Chamber will evaluate Mr. Stevan Todorovi}'s testimony and be maybe in better position to give certain weight to this evidence. Because it's, I would say, unofficial, unofficial -- it's unofficial, I would say, information, so I cannot comment in details. I do believe that years ago, when this proceedings, sentencing proceedings for Mr. Stevan Todorovi}, were actual -- maybe his counsel or one of his associates - I'm not so sure said that certain post-war traumatic syndrome was - I don't know – found or existed with Mr. Stevan Todorovi}. During the summer break, I try, in order to clarify that matter with the psychiatric experts, I tried to, just in general terms, without mentioning any name and just within academic approach to see what possible consequences or behaviour of a person suffered by post-war traumatic syndrome or something like that might be in relation to the value or his capability to have a memory or to express his memory of the events, of the past events, et cetera. And I was informed that a certain significant impact of this syndrome might be to the, in general terms, value of person -- of, I would say, testimony or explanations of person in question. So it's very, very, very general that I'm now in possession of this information.
>
> So I think the proper approach might be, first of all, to give the opportunity to the expert to check the medical report, and then, if the conclusion of that expert would be that, I would say, bigger team or larger team of experts will proceed with the examination, then probably we should apply with a next motion in spirit of the previous practice of this Tribunal to have a panel of experts, and then probably see what would be the further steps in that issue. So basically, at this moment we would like just to have an opportunity to this medical report -- the confidentiality should be lifted and our expert, medical expert, will have access, of course, subject to all limits and protective measures. Thank you, Your Honours.[625]

217. The Appeals Chamber finds that the Oral Motion met the legal standard for access to confidential material. First, the material sought by the Appellant had been identified by him.[626] Second, regarding the nexus between his case and the Medical Reports, the Appeals Chamber recalls that mere geographical and temporal overlap between two cases is not necessarily sufficient to conclude that there is a legitimate forensic purpose.[627] In the instant case, though, there is more than a mere temporal and geographical overlap. Not only do the Appellant's and Todorović's cases stem from events that occurred in the same geographical area at the same time,[628] but in fact they were formerly co-accused for the same transaction.[629] The legitimate forensic purpose for which access to the Medical Reports was sought, was identified in the Oral Motion. As previously noted, Counsel for the Appellant made it clear that access was sought so that the Trial Chamber could be

[625] T. 11981-11983 (private session).
[626] *See* T. 11981, lines 13-15 (private session).
[627] *Bla{ki}* 16 May 2002 Decision, para. 16.
[628] *Todorović* Sentencing Judgement, paras 1, 3, 9, 12; Fifth Amended Indictment, paras 1, 11-13, 33; Trial Judgement, paras 2, 3, 8.
[629] Initial Indictment, paras 1-5, 7, 10, 33.

in a position to properly evaluate Todorovi}'s testimony and the weight to be ascribed to it.[630] Considering that they concerned the psychiatric condition of a witness that gave evidence against him and who happened to be his former co-accused, it was thus likely that if the Medical Reports had been produced to the Appellant, they would have assisted his case materially. Accordingly, given that the Appeals Chamber has found that there was a legitimate forensic purpose for the Oral Motion, the Prosecution's argument that "as the [Appellant] failed to present a legitimate purpose for access, any interest in access to the report would be outweighed by Todorovi}'s privacy interest" is without merit.[631]

(b) Timing of the Oral Motion

218. The Appeals Chamber considers that even though the issue of the Medical Reports was not raised during Todorovi}'s cross-examination it was clear from the Oral Motion that access was sought in order to ultimately enable the Trial Chamber to properly evaluate Todorovi}'s testimony and the weight to be ascribed to it, in light of the information contained in said reports.[632] The fact that the Oral Motion was made after Counsel for the Appellant had finished cross-examining Todorovi} is not relevant as to whether the Appellant had a legitimate forensic purpose justifying disclosure of the Medical Reports, as there was at least a good chance that access to them was likely to assist his case.

219. In light of the foregoing, it is clear that the Trial Chamber misdirected itself as to the applicable law on access to confidential material. The Trial Chamber was rightly mindful of its discretion to evaluate the credibility of the evidence before it; however, for the purposes of deciding whether to grant the relief sought in the Oral Motion, the Trial Chamber was required to first determine whether the material sought by the Appellant was likely to assist his case materially. Accordingly, the Appeals Chamber finds that the Trial Chamber failed to apply the relevant law when denying the relief sought in the Oral Motion, thereby committing an error of law.

3. Whether the Trial Chamber's error invalidated the verdict

220. The Appellant explains that "[b]ecause the Trial Chamber erred in closing this possible avenue of challenging the reliability of a crucial witness, it violated the Appellant's right to a fair trial, including the right to examine or have examined the witnesses against him, thereby

[630] T. 11982, lines 3-12 (private session).
[631] Response Brief, para. 9.45.
[632] T. 11982, lines 3-12 (private session).

invalidating the decision to convict the Appellant".[633] In the Further Submissions on the Sixteenth Ground of Appeal, the Appellant reiterates the same argument.[634]

221. The Appeals Chamber considers that some of the information offered in the Medical Reports could have easily been obtained during trial before Todorovi} testified against the Appellant.[635] To the extent that the totality of the information contained in the Medical Reports was not available to the Appellant,[636] the Appeals Chamber recognises that the Trial Chamber's error hampered the Defence's ability to obtain full information relevant to Todorovi}'s psychiatric condition. Contrary to the Appellant's assertion, however, this error did not infringe upon his right to examine the witnesses against him, thus invalidating the verdict.[637] Insofar as there was information concerning Todorovi}'s psychiatric condition available to the Appellant prior to Todorovi} giving evidence against him – for instance through the *Todorovi}* Sentencing Judgement and Dr. Leci}-Tosevski's public testimony in the *Todorovi}* proceedings – the Appeals Chamber finds that the Appellant's right to examine the witnesses against him was not infringed. He effectively exercised this right and the possibility was open to the Defence to elicit from Todorovi} any matters affecting his credibility on the basis of the information publicly available concerning the witness's psychiatric condition.[638]

222. In light of the fact that, despite the information publicly available regarding Todorovi}'s psychiatric condition, the Defence failed to avail itself of the opportunity to raise the matter at issue during Todorovi}'s cross-examination, the Appeals Chamber does not accept that "[t]he similarities between *Furund`ija* and the present case are compelling, and warrant the conclusion that [the Appellant's] right to cross-examine Stevan Todorovi} was infringed for analogous reasons"[639] as submitted by the Appellant.

223. In light of the foregoing, the Appeals Chamber finds that the Appellant's right to a fair trial, including the right to examine or have examined the witnesses against him, was not infringed as a result of the Trial Chamber's error in denying him access to the Medical Reports. The Appellant thus has failed to demonstrate that the Trial Chamber's error invalidated the verdict.

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[633] Appeal Brief, para. 109.
[634] "The denial of the right of cross-examination in violation of Article 21(4)(e) of the Statute in the case of this vital witness invalidated the Decision of the Trial Chamber to convict [the Appellant]": Further Submissions on the Sixteenth Ground of Appeal, para. 10.
[635] *See* Decision on Motion pursuant to Rules 115 and 94(A), para 17.
[636] *See* Decision on Motion pursuant to Rules 115 and 94(A), para 17, fn. 40
[637] Amended Notice of Appeal, para. 18.
[638] *See* Decision on Motion pursuant to Rules 115 and 94(A), para. 17.
[639] Further Submissions on the Sixteenth Ground of Appeal, para. 5.

224. Given that this is the only argument advanced in support of the allegation that the Trial Chamber's error invalidated the decision to convict the Appellant, arguably, the sixteenth ground of appeal could be dismissed at this juncture. However, the Appeals Chamber recalls that "out of an abundance of caution and for the purpose of being able to fully assess the merits of the sixteenth ground of appeal in the event that the Appeals Chamber were to find that the Trial Chamber erred in denying the Appellant access to the Medical Reports"[640], the Appeals Chamber found that it was necessary to provide the Appellant with access to the Medical Reports. Accordingly, a redacted version of the Medical Reports was disclosed to the Appellant. Subsequently, leave to disclose the Medical Reports to an expert was granted and the filing of additional submissions was authorised.[641] Consequently, the Appellant filed his Motion pursuant to Rules 115 and 94(A).

225. In its Decision on Motion pursuant to Rules 115 and 94(A), the Appeals Chamber found that the Medical Reports and the *Silverman Report* are credible and relevant to the issues raised by the Appellant's sixteenth ground of appeal. However, it dismissed the Appellant's request to admit them as additional evidence on appeal pursuant to Rule 115 of the Rules, because it was not satisfied that, had the Medical Reports and the *Silverman Report* been adduced at trial, they could have had an impact on the verdict.[642] The Appeals Chamber held that "[b]ecause some of the arguments raised by the parties in this regard are closely inter-related with some of the issues raised in the Appellant's sixteenth ground of appeal, the Appeals Chamber reserves its reasons motivating its conclusion in the present decision. The Appeals Chamber's reasoned opinion will be disclosed to the parties in the final appeal judgement".[643] Accordingly, the Appeals Chamber hereby provides its reasons.

226. If the Appeals Chamber finds, as it did in this case, that the additional evidence submitted on appeal was not available at trial and is relevant and credible, it must determine if it could have been a decisive factor in reaching the decision at trial.[644] In order to fulfil this requirement, the additional evidence must be such that it could have had an impact on the verdict.[645] In other words, the evidence must be such that, it could demonstrate that the conviction was unsafe.[646] In making

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[640] *Proprio Motu* Order, p. 2.
[641] *See Proprio Motu* Order; Decision on Application of Stevan Todorovi} for Additional Protective Measures, 22 February 2006; Decision on Blagoje Simić's Motion (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 February and 17 February 2006, Confidential, 15 March 2006, public redacted version filed on 17 March 2006.
[642] Decision on Motion pursuant to Rules 115 and 94(A), paras 19-20.
[643] Decision on Motion pursuant to Rules 115 and 94(A), para. 19.
[644] Rule 115(B).
[645] *See Kupre{ki} et al.* Appeal Judgement, para. 68.
[646] *Prosecutor v. Stanislav Gali},* Case No. IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005, para. 14; *Juvénal Kajelijeli v. Prosecutor,* Case No. ICTR-98-44A-A, Decision

this determination, the Appeals Chamber has had to ascertain whether – considered in the context of the evidence which was given at the Appellant's trial and not in isolation[647] – there is a realistic possibility that the verdict might have been different if the additional evidence had been before the Trial Chamber.[648] The Appeals Chamber has found that no such possibility exists in the present case, for the following reasons.

227. The Appeals Chamber notes that, while both the *Soyka Report* and the *Lecić-Tosevski Report* conclude that Todorovi} was not suffering from a personality disorder, they differ in their conclusions as to whether he suffered from PTSD.[649] The conclusion in the *Soyka Report* is that there was no evidence of a major mental disorder or any other psychiatric disorder for the relevant period and that there was no evidence of diminished capacity or responsibility. The *Lecić-Tosevski Report* concluded that Todorovi} had no personality disorder as such, but that he suffered from PSTD and abused alcohol during the war.[650] The *Silverman Report* states that, if the basis for the conclusion in the *Lecić-Tosevski Report* is correct, Todorovi} suffered from PTSD.[651] It goes on to provide general comments concerning PTSD, including the negative impact of PTSD on a patient's ability to recollect accurately the stressful events from which the PTSD stems. The report concludes that, if the *Lecić-Tosevski Report* is correct, it is medically possible that Todorovi}'s symptoms of PTSD might have been relived during his testimony against the Appellant, which might have possibly compromised the credibility of the witness.[652]

228. While the *Silverman Report* confirms and elaborates upon the conclusions of the *Lecić-Tosevski Report*, its own conclusions hinge on the presumption that the basis for the conclusions in the *Lecić-Tosevski Report* is accurate, and it does not inquire as to why the *Soyka Report* came to a different conclusion with respect to whether Todorovi} suffered from PTSD. Hence, that Todorovi} suffered from PTSD could not have been considered by the Trial Chamber as an uncontested conclusion on the basis of the Medical Reports and the *Silverman Report*.

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on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004, para. 10; *Naletili} and Martinovi}* October 2004 Rule 115 Decision, para. 11; *Bla{ki}* Rule 115 Decision, p. 3; *Krsti}* Rule 115 Decision, p. 3.

[647] *See Kupre{ki} et al.* Appeal Judgement, paras 66, 75; *Naletili} and Martinovi}* October 2004 Rule 115 Decision, para. 11; *Bla{ki}* Rule 115 Decision, p. 3; *Krsti}* Rule 115 Decision, p. 4; *Prosecutor v. Zoran Kupreškić et al.*, Case No.: IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001, Confidential, para. 8.

[648] *Prosecutor v. @eljko Mejaki} et al.,* Case No.: IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber pursuant to Rule 115, 16 November 2005, para. 10. *Prosecutor v. Milomir Staki},* Case No.: IT-97-24-A, Confidential Decision on Staki}'s Rule 115 Motion to Admit Additional Evidence on Appeal, 25 January 2005, para. 6.

[649] *See* also *Todorovi}* Sentencing Judgement, para. 95.

[650] *Todorovi}* Sentencing Judgement, para. 94.

[651] *Silverman Report* attached as Annex 3 to the Further Submissions on the Sixteenth Ground of Appeal, at p. 4.

[652] *Silverman Report* attached as Annex 3 to the Further Submissions on the Sixteenth Ground of Appeal, at pp 4-6.

229. The Appeals Chamber recalls that an individual suffering from PTSD may, nonetheless, be a perfectly credible witness.[653] Bearing this in mind, the Appeals Chamber considers that there is no indication that the Trial Chamber was not alert to the possibility of Todorovi} suffering from PTSD in its assessment of his testimony. Having heard Todorovi} give evidence during an extended period of time,[654] the Trial Chamber had ample opportunity to properly asses his credibility as a witness. As is clear from its decision dismissing the Oral Motion, the Trial Chamber had been alerted by the Defence to the possibility of PTSD affecting Todorovi}'s testimony.[655] Against this backdrop, and mindful of its duty to assess the evidence given by all the Prosecution witnesses and to determine whether or not it should be accepted as reliable,[656] the Trial Chamber observed that Todorovi} was not the only witness that had gone through the war and held that "[t]he majority of the Prosecution witnesses did go through the war, and some of them *may or may not have suffered post-traumatic stress* as a result of the war".[657] Moreover, in the Trial Judgement, the Trial Chamber "acknowledge[d] the problems that may be associated with [Todorovi}'s] testimony".[658]

230. In light of the foregoing, the Appeals Chamber holds that the Medical Reports and the *Silverman Report* do not constitute evidence which could demonstrate that the conviction was unsafe. Considered in the context of the evidence which was given at trial, had those documents been before the Trial Chamber they could not have had an impact on the verdict.

D. Conclusion

231. For the foregoing reasons, the Appeals Chamber dismisses the Appellant's sixteenth ground of appeal in its entirety.

[653] *Kupre{ki} et al.,* Appeal Judgement, para. 171; *Furund`ija* Trial Judgement, para. 109.
[654] Todorovi} gave evidence from 6 to 28 June 2002: T. 8999-9630, 9637-10271.
[655] *See* Oral Motion, T. 11981-11983 (private session).
[656] T. 11985, line 24 to 11986, line 3 (private session).
[657] T. 11985, lines 21-24 (private session) (emphasis added).
[658] Trial Judgement, para. 21.

VI. SENTENCING: EIGHTEENTH GROUND OF APPEAL

232. The Trial Chamber imposed a single sentence of seventeen years' imprisonment on the Appellant.[659] Under his eighteenth ground of appeal, the Appellant submits that the Trial Chamber erred in passing a sentence that is excessive and disproportionate to the totality of his alleged conduct, its own findings of fact, and the sentences passed on other accused in this and other cases of similar nature, resulting in a miscarriage of justice.[660] He requests the Appeals Chamber to reverse the Trial Chamber's decision and substitute his sentence for one not greater than the sentence recommended by Judge Lindholm in his Partly Dissenting Opinion.[661] In the alternative, he requests the Appeals Chamber to sentence him as an aider and abettor, or that he be granted a retrial on the issue of sentence.[662]

233. The Appeals Chamber has set aside the Appellant's conviction as a participant in a joint criminal enterprise to commit persecutions, and has found that the Appellant aided and abetted the crime of persecutions. In addition, the Appeals Chamber has set aside the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture. These findings raise a question as to whether an adjustment of the sentence is necessary. This matter does not warrant a complete rehearing on the issue of sentence. However, it is appropriate that the Appeals Chamber first considers and resolves the issues relating to sentencing raised on appeal before considering what, if any, adjustment to the sentence should be made.[663]

A. Applicable law

234. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Trial Chambers are obliged to take these provisions into account when determining a sentence.[664] However, they do not amount to "binding limitations on a Chamber's

[659] Trial Judgement, para. 1118.
[660] Amended Notice of Appeal, para. 20.
[661] Appeal Brief, para. 121.
[662] Appeal Brief, para. 121.
[663] *See Krsti}* Appeal Judgement, para. 240; *Vasiljevi}* Appeal Judgement, para. 149.
[664] *Kvo~ka et al.* Appeal Judgement, para. 668; *Bla{ki}* Appeal Judgment, para. 678; *Krsti}* Appeal Judgement, para. 241; *^elibi}i* Appeal Judgement, para. 716.

discretion to impose a sentence".[665] While emphasizing again that it is inappropriate to set down a definitive list of sentencing guidelines,[666] the Appeals Chamber recalls that

> [t]he combined effect of Article 24 of the Statute and Rule 101 of the Rules is that, in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offences or totality of the conduct; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal; and (v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[667]

235. Trial Chambers are vested with a considerable amount of discretion in determining the appropriate sentence largely because of their obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.[668] As a general rule, the Appeals Chamber will not substitute its own sentence for that of a Trial Chamber unless it can be shown that the Trial Chamber has committed a discernible error in exercising its discretion, or has failed to follow the applicable law.[669] If, however, the Appeals Chamber overturns one or more convictions on which a Trial Chamber had based a single sentence, the Appeals Chamber is competent to impose a single sentence – or concurrent sentences – for the remaining convictions. In doing so, the Appeals Chamber revises the sentence meted out by the Trial Chamber, although the latter did not necessarily commit a discernible error in the exercise of its sentencing discretion.[670]

B. Alleged errors of the Trial Chamber

1. Comparison with the *Todorovi}* case

236. The Appellant submits that his sentence was excessive and disproportionate to his criminal conduct.[671] While acknowledging that "comparisons of sentences as between co-accused are not necessarily of assistance to the Appeals Chamber, or to a Trial Chamber, in all cases"[672] he relies upon Judge Lindholm's dissenting opinion – wherein, while concurring with the majority on the aggravating and mitigating circumstances taken into consideration, Judge Lindholm concluded that

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[665] *Kvo~ka et al.* Appeal Judgement, para. 668; *Krsti}* Appeal Judgement, para. 241 referring to *^elibi}i* Appeal Judgement, para. 780 and *Kambanda* Appeal Judgement, para. 124.
[666] *Kvocka et al.* Appeal Judgement, para. 668; *Bla{ki}* Appeal Judgement, para. 680; *Krsti}* Appeal Judgement, para. 242; *Čelebići* Appeal Judgement, para. 715; *Furundžija* Appeal Judgement, para. 238.
[667] *Bla{ki}* Appeal Judgment, para. 679 (footnotes omitted); *Naletili} and Martinovi}* Appeal Judgement, para. 592; *Kvo~ka et al.* Appeal Judgement, para. 668.
[668] *^elibi}i* Appeal Judgement, para. 717.
[669] *Naletili} and Martinovi}* Appeal Judgement, para. 593; *Bla{kić* Appeal Judgement, para. 680; *Krsti}* Appeal Judgement, para. 242; *Kupre{ki} et al.* Appeal Judgement, para. 408; *Čelebići* Appeal Judgement, para. 725; *Furund`ija* Appeal Judgement, para. 239; *Jelisi}* Appeal Judgement, para. 99; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22.
[670] *Bla{ki}* Appeal Judgement, para. 680.
[671] Appeal Brief, para. 110.
[672] Appeal Brief, para. 113.

in view of, *inter alia,* the sentence of 10 years' imprisonment imposed on former co-accused Stevan Todorovi},[673] seven years imprisonment was a "proportionate and reasonable penalty for Ŧthe Appellantğ",[674] – and asserts that "in the present case, Judge Lindholm was correct to make the comparison".[675] The Appellant argues that, while Todorovi} abused his position to kill, rape, torture, beat and coerce people to sign false statements, the evidence supports the conclusion that the Appellant "disliked and distrusted" Todorovi}, tried to prevent Todorovi}'s appointment as Chief of Police, tried to have him removed from his post, and generally opposed him whenever he could.[676] Therefore, "even allowing for the fact that Todorovi} […] pleaded guilty and testified for the Prosecution"[677], the Appellant asserts that it would be wrong to impose on him a sentence almost twice as long as the sentence imposed on Todorovi}, and submits that "Judge Lindholm was correct in [his] view".[678]

237. The Prosecution responds, *inter alia,* that (1) the Appellant's sentence is neither excessive nor disproportionate to the gravity of the offence;[679] (2) a Trial Chamber is not obliged to expressly compare sentences;[680] (3) the Appellant's sentence is not comparable to Todorovi}'s sentence,[681] and (4) the Appellant does not demonstrate any discernible error.[682]

238. The Appeals Chamber reiterates that, while sentences of like individuals in like cases should be comparable,[683] a Trial Chamber has an "over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime".[684] In most instances comparison of sentences imposed in other cases provides limited assistance because often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.[685] Against this background, the Appeals Chamber recalls that an appeal is not an opportunity for the parties to reargue their cases, and notes that in his final submissions

[673] Stevan Todorovi} ("Todorovi}") as designated in Section V. "Oral Motion for Access: Sixteenth Ground of Appeal".
[674] Appeal Brief, paras 111-113 (citing Judge Lindholm's Partly Dissenting Opinion, paras 38-39; Trial Judgement, paras 1082-1084, 1088-1091).
[675] Appeal Brief, para. 113.
[676] Appeal Brief, para. 113.
[677] Appeal Brief, para. 113.
[678] Appeal Brief, para. 113.
[679] Response Brief, para. 10.5.
[680] Response Brief, para. 10.4.
[681] Response Brief, para. 10.6.
[682] Response Brief, paras 10.7.
[683] *Kvo~ka et al.* Appeal Judgement, para. 681.
[684] *^elebi}i* Appeal Judgement, para. 717.
[685] *Babi}* Judgement on Sentencing Appeal, para. 33; *Kvo~ka at el.* Appeal Judgement, para. 681; *D. Nikolić* Sentencing Appeal Judgement, para. 15; *^elebi}i* Appeal Judgement, para. 719.

before the Trial Chamber the Appellant had drawn a comparison, *inter alia*, with the *Todorovi}* case, "as a tool for use in the quest for a proportionate sentence in this case".[686]

239. The Appeals Chamber further notes that the Trial Chamber did consider the Appellant's attitude towards Todorovi}, under the heading entitled "Gravity of the offence and manner in which the crimes were committed".[687] The Trial Chamber took his association with Todorovi} into account as one of the elements that led it to consider the Appellant "as one of the principal participants in the campaign of persecution which befell non-Serbs in the Municipality of Bosanski [amac".[688] This express reference in the Trial Judgement demonstrates that the Trial Chamber was cognisant of these circumstances and took them into account. The Appellant's arguments on appeal fail to demonstrate that the Trial Chamber committed a discernable error in weighing his attitude against Todorovi} as it did in imposing the sentence.[689]

240. The Appeals Chamber considers that the circumstances taken into consideration for sentencing purposes in each of these cases differ in significant ways. The *Todorovi}* Trial Chamber[690] recognised the considerable contribution of Todorovi}'s guilty plea to the efficiency of the work of the International Tribunal and to its search for the truth.[691] The *Todorovi}* Trial Chamber was of the view that whether Todorovi} had gained or might have gained something pursuant to his agreement with the Prosecution did not preclude the *Todorovi}* Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing.[692] Given that the Prosecution had acknowledged that Todorović had cooperated with its Office in an open and forthright manner, and that, the quantity and quality of the information he provided had met the Prosecution's expectations, the *Todorovi}* Trial Chamber concluded that Todorović's co-operation with the Prosecution had been substantial.[693] The *Todorovi}* Trial Chamber held that Todorovi}'s

[686] Defence Final Trial Brief, paras 693, 701. Comparison with, *inter alia,* the *Todorovi}* case was made in support of the argument that "Dr. Simi}'s role as a municipal functionary places him on a scale of culpability much lower than many of those already sentenced by this tribunal:" *ibid.,* p. 236 heading II(1).
[687] *See* Trial Judgement, para. 1081.
[688] Trial Judgement, para. 1081.
[689] The Appeals Chamber notes that the Trial Chamber held that although the Appellant "had strong disagreements with Stevan Todorovi}, and generally disapprovFedğ of his behaviour, [the Appellant] chose to be involved with [Todorovi}] as a member of the same joint criminal enterprise": Trial Judgement, para. 1081. The Trial Chamber took this association into account as one of the elements that led it to consider the Appellant "as one of the principal participants in the campaign of persecution which befell non-Serbs in the Municipality of Bosanski [amac": *ibid.* In this regard, the Appeals Chamber notes that the question of whether the Appellant's sentence needs to be adjusted in light of his conviction under a new form of responsibility, namely aiding and abetting, is distinct from the issue of whether the Trial Chamber erred in imposing the sentence it did, and, as such, the former question will be discussed in a separate section below.
[690] As designated in Section V. "Oral Motion for Access: Sixteenth Ground of Appeal".
[691] *Todorovi}* Sentencing Judgement, para. 82.
[692] *Todorovi}* Sentencing Judgement, para. 86.
[693] *Todorovi}* Sentencing Judgement, paras 87-88.

"timely plea of guilt and his substantial cooperation with the Prosecutor are of primary importance as mitigating factors in this case. Indeed, had it not been for these factors, ŦTodorovi}ğ would have received a much longer sentence".[694] The *Todorovi}* Trial Chamber also considered Todorovi}'s genuine expression of remorse in mitigation of sentence.[695] By contrast, in the case of the Appellant, which went on to trial, it was not submitted that he had cooperated substantively with the Prosecution; hence, the Trial Chamber did not make any finding in this respect. In addition, the Trial Chamber was not satisfied that the Appellant had demonstrated genuine remorse.[696]

241. The Appeals Chamber therefore finds that the circumstances in each of these cases differ in significant ways such that the comparison with the sentence handed down against Todorovi} does not prove instructive. Moreover, the Appeals Chamber considers that, as submitted by the Prosecution,[697] the fact that Judge Lindholm reached a different conclusion with respect to the Appellant's sentence does not, in itself, show a discernible error on behalf of the Trial Chamber.

242. For the foregoing reasons, this part of the eighteenth ground of appeal is dismissed.

2. It was unfair to sentence the Appellant as a participant in a joint criminal enterprise

243. The Appellant submits that it was unfair to sentence him as a participant in the joint criminal enterprise, while those co-accused who pleaded guilty at an earlier stage were sentenced on a different basis of responsibility.[698] He argues that he should have been sentenced as an aider and abettor rather than as a co-perpetrator.[699] Having set aside the Appellant's conviction as a participant in a joint criminal enterprise, and having instead found him liable as an aider and abettor, the Appeals Chamber finds that this argument has become moot.

3. Failure to give proper weight to the mitigating circumstances

244. The Trial Chamber considered the following factors in mitigation: (1) the Appellant's personal circumstances, *i.e.,* his age at the time he committed the offences and the fact that he was married and had three young children;[700] (2) the fact that he had no prior criminal convictions;[701]

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[694] *Todorovi}* Sentencing Judgement, para. 114; *see* also *ibid.*, para. 4 (footnote omitted): "a joint motion was filed on ŦTodorovi}'sğ behalf with the Office of the Prosecutor Ŧ…ğ informing the Trial Chamber of an agreement reached between them as to the entry of a guilty plea by ŦTodorovi}ğ to Count 1 of the Indictment (persecution) and the withdrawal of all other counts against him".
[695] *Todorovi}* Sentencing Judgement, paras 90-92. *See* also *ibid.,* para. 114.
[696] Trial Judgement, para. 1087.
[697] Response Brief, para. 10.7.
[698] Appeal Brief, para. 115.
[699] Appeal Brief, paras 110, 115.
[700] Trial Judement, para. 1088.
[701] Trial Judgement, para. 1089.

(3) his good conduct while in the UNDU;[702] (4) the fact that he chose to testify at the beginning of the Defence case; and (5) the fact that he consented that a new Judge be appointed to the Trial Chamber pursuant to Rule 15*bis* of the Rules.[703]

245. The Appeals Chamber recalls that when determining the appropriate sentence, Trial Chambers must take mitigating circumstances into account.[704] Neither the Statue nor the Rules exhaustively defines the factors which may be taken into account by a Trial Chamber in mitigation of a sentence. The only mitigating circumstance explicitly envisaged in Rule 101(B)(ii) of the Rules is "substantial cooperation with the Prosecutor".[705] Trial Chambers are "endowed with a considerable degree of discretion"[706] in deciding what other factors may be considered in mitigation, and the weight to be attached to those factors lies within their discretion.[707] Failure to list in a judgement every mitigating circumstance placed before the Trial Chamber and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question.[708] An appellant challenging the weight given by a Trial Chamber to a particular mitigating factor thus bears "the burden of demonstrating that the Trial Chamber abused its discretion".[709]

246. The Appellant generally submits that the Trial Chamber "failed to give appropriate weight to the significant mitigating factors advanced in [his] favour,"[710] in particular, his positive contribution to the municipality, his voluntary surrender, and the pressures and reprisals against him.[711]

(a) The Appellant's contribution to the Municipality

247. The Appellant submits that the Trial Chamber found that he had made a positive contribution to the Municipality by ensuring that medical treatment and supplies continued to be available to all citizens without regard to ethnicity, and that the Crisis Staff, himself included, protected and promoted in various ways the welfare of the citizens of the Municipality regardless of ethnicity.[712] The Appellant argues that he "should have been given substantial credit for his tenacity

[702] Trial Judgement, para. 1091.
[703] Trial Judgement, para. 1090.
[704] Rule 101(B)(ii); *Serushago* Appeal Judgement, para. 22; *Joki}* Sentencing Appeal Judgement, para. 47.
[705] Rule 101(B)(ii).
[706] *See ^elebi}i* Appeal Judgement, para. 780.
[707] *Joki}* Sentencing Appeal Judgement, para. 57; *Musema* Appeal Judgement, para. 396; *Kupre{ki} et al.* Appeal Judgement, para. 430; *^elebi}i* Appeal Judgement., para. 777; *Kambanda* Appeal Judgement, para. 124.
[708] *Babi}* Judgement on Sentencing Appeal, para. 43; *Kupreškić et al.* Appeal Judgement, para. 458.
[709] *Babi}* Judgement on Sentencing Appeal, para. 44; *Niyitegeka* Appeal Judgement, para. 266; *Kayishema and Ruzindana* Appeal Judgement, para. 366.
[710] Appeal Brief, para. 116.
[711] Appeal Brief, paras 117-120.
[712] Appeal Brief, paras 117, 120.

and courage and commitment to the people he was elected to serve".[713] He adds that, although the Trial Chamber held against him that he did not resign as President of the Crisis Staff in response to the events that took place, contrary to the Trial Chamber's suggestion, his resignation would probably have caused the situation in the Municipality of Bosanski [amac to deteriorate.[714]

248. The Prosecution responds that the Appellant's argument is without merit, since in convicting him the Trial Chamber found that his position as President of the Crisis Staff constituted an aggravating factor.[715]

249. As correctly noted by the Prosecution, while the Trial Chamber accepted that the Appellant through the Crisis Staff helped to improve the daily life of some inhabitants of Bosanski [amac regardless of their ethnicity, it held that this did not detract from the fact that he was at the same time actively participating in the persecution of Bosnian Muslims and Croats.[716] The Appellant submits that the Trial Chamber's evaluation of these circumstances in the context of sentencing should be substituted by his own, but fails to demonstrate a discernible error on behalf of the Trial Chamber. In this regard, the Appeals Chamber emphasises that mere recital of mitigating factors without more does not suffice to discharge the burden of demonstrating that the Trial Chamber abused its discretion.[717] With respect to the Appellant's argument that his resignation would have made matters in the Municipality of Bosanski [amac worse, the Appeals Chambers notes that it has been addressed and dismissed elsewhere.[718]

250. For the foregoing reasons, the Appeals Chamber dismisses this part of the Appellant's eighteenth ground of appeal.

(b) Pressure and threats of reprisal against the Appellant

251. The Appellant submits that the Trial Chamber failed to consider the pressure and threats of reprisal against him and his family by Todorovi} and others.[719] He relies on Judge Lindholm's Partly Dissenting Opinion where he noted that the Appellant was "subjected to heavy pressure by such ruthless persons as Stevan Todorovi} and 'Lugar'",[720] and referred to the testimony of Bo`o

[713] Appeal Brief, para. 117, referring to Trial Judgement, paras 1085-1092.
[714] Appeal Brief, para. 120.
[715] Response Brief, para. 10.15, referring to Trial Judgement, para. 1082.
[716] Trial Judgement, para. 1080. *See* Response Brief, para. 10.16.
[717] *Kvo~ka* Appeal Judgement, para. 675.
[718] *See* para. 115 *supra*.
[719] Appeal Brief, para. 119.
[720] Appeal Brief, para. 119 (citing Judge Lindholm's Partly Dissenting Opinion, para. 37).

Ninkovi} that Lugar would have carried out an act of reprisal against the Appellant if he had informed the higher authorities.[721]

252. The Prosecution responds that (1) it has been unable to ascertain whether the Appellant had raised this argument about reprisals at trial;[722] (2) the Appellant's reliance on duress is misconceived;[723] (3) the Trial Chamber considered that the circumstances of "great uncertainty" did not account for the Appellant's deliberate participation in the persecutions;[724] and (4) the Trial Chamber considered that despite his disagreements with Todorovi}, the Appellant chose to be involved with him in the joint criminal enterprise and that he did not distance himself from it.[725]

253. The Appeals Chamber notes that the Trial Chamber did refer to the evidence given by Bo'o Ninkovi} that "Lugar" would have carried out an act of reprisal against the Appellant had the latter informed higher authorities about the paramilitaries' conduct,[726] in section IX of the Trial Judgment entitled: "Establishment of the Serbian Municipality of Bosanski [amac and of its Crisis Staff", wherein it summarised the evidence on "Relations between the Crisis Staff, War Presidency and the Paramilitaries".[727] The Trial Chamber did not make any finding as to whether or not it accepted this evidence,[728] and thus it did not consider this evidence in mitigation. However, the Appeals Chamber considers that the Appellant cannot claim that the Trial Chamber failed to address a matter which was not brought before it, thereby committing an error of law or fact. As correctly noted by the Prosecution, the Appellant did not include the threat of reprisals in his Defence Final Trial Brief, as a factor to be considered in mitigation by the Trial Chamber.[729] Thus, the Trial Chamber did not err by failing to "consider that, throughout the period of conflict, [the Appellant] had good reason to fear reprisals against him and his family by Stevan Todorovi}"[730] as a factor in mitigation.

254. Accordingly, the Appeals Chamber finds that the Trial Chamber committed no error by not considering this evidence as a mitigating factor, and emphasises that the Appeals Chamber is not

[721] Appeal Brief, para. 119 (citing Judge Lindholm's Partly Dissenting Opinion, para. 37).
[722] Response Brief, para. 10.24, referring to Defence Final Trial Brief, paras 662-714.
[723] Response Brief, para. 10.25, referring to *Erdemovi}* 1998 Sentencing Judgement, para. 17; *Mrđa* Sentencing Judgement, paras 59-68; *Česi}* Sentencing Judgement, paras 95-97; *Bla{ki}* Trial Judgement, para. 769.
[724] Response Brief, para. 10.26.
[725] Response Brief, para. 10.26.
[726] Trial Judgement, para. 347, referring to Bo'o Ninkovi}, T. 13619-13620. Witness Bo`o Ninkovi} gave evidence that "[the Appellant] could have been killed by those men who had committed this crime if they were to find out that he had complained to someone": T. 13608-13609. "It is certain that that man [Lugar] would carry out an act of reprisal against [the Appellant] had [the Appellant] informed higher authorities": T. 13620.
[727] *See* Trial Judgement, p. 99, heading number four under the subsection entitled: "C. Relations between the Crisis Staff, War presidency and other Actors".
[728] *See* Trial Judgement, paras 392-397.
[729] Defence Final Trial Brief, paras 662-714. *See* Response Brief, para. 10.24.
[730] Appeal Brief, para. 119.

the appropriate forum at which to raise for the first time evidence of an additional mitigating circumstance that was available, but not introduced at trial.[731]

255. For the foregoing reasons, this part of the Appellant's eighteenth ground of appeal is dismissed.

(c) Voluntary surrender

256. The Appellant submits that the Trial Chamber failed to give appropriate weight to his voluntary surrender as a mitigating factor.[732] He argues that he surrendered at an appropriate time, taking into account his responsibilities to his young family, his co-accused's provisional release and the date the trial was likely to start.[733] He also notes that after his arrival in The Hague, he worked diligently with his Counsel and cooperated in ensuring that the trial could begin as soon as possible, which it did, a remarkably short time after the Appellant's surrender.[734] He submits that there is no suggestion that he tried to evade the jurisdiction of the International Tribunal.[735]

257. The Prosecution responds, *inter alia,* that (1) the appropriate time for an accused to surrender is the "confirmation and notification of an indictment and/or arrest warrant";[736] (2) the Appellant's failure to surrender for nearly six years was effectively an evasion of the jurisdiction of the International Tribunal,[737] and (3) the "likely" start date of the trial could only have been based on pure speculation and did not facilitate the Trial Chamber's process in any way.[738]

258. The Appeals Chamber recalls that, upon finding that mitigating circumstances have been established, a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber.[739] The Trial Chamber accepted the Appellant's voluntary surrender as a mitigating circumstance in itself.[740] The Trial Chamber noted, however, that the Appellant surrendered approximately three years after his co-accused, who also lived in Bosanski [amac up until their surrender, and found that the Appellant's voluntary surrender should not be given significant

[731] *Babi}* Judgement on Sentencing Appeal, para. 62; *Kvočka et al.* Appeal Judgement, para. 674; *see* also *Kupre{kić et al.* Appeal Judgement, para. 414.
[732] Appeal Brief, paras 116, 118, referring to Trial Judgement, para. 1086.
[733] Appeal Brief, para. 118.
[734] Appeal Brief, para. 118.
[735] Appeal Brief, para. 118.
[736] Response Brief, para. 10.21.
[737] Response Brief, para. 10.21.
[738] Response Brief, para. 10.21.
[739] *Joki}* Sentencing Appeal Judgement, para. 57; *Musema* Appeal Judgement, para. 396; *^elebi}i* Appeal Judgement, para. 777; *Kambanda* Appeal Judgement, para. 124.
[740] Trial Judgement, para. 1086.

weight.[741] The Appeals Chamber considers that the Appellant's alleged facilitation of the proceedings after his surrender is not relevant to the Trial Chamber's evaluation of his voluntary surrender in mitigation. Further, the Appeals Chamber notes that the Trial Chamber did consider the fact that he was married and had three young children as part of his personal circumstances in mitigation of the sentence.[742] While the Appellant's responsibility towards his young family no doubt was an important factor in his decision to surrender, the Trial Chamber was entitled to disregard the argument that the Appellant "acted responsibly in balancing the needs of his wife and young children with his responsibility to appear before the [International] Tribunal,"[743] when weighing his voluntary surrender as a mitigating factor, in particular given that he surrendered nearly six years after the confirmation of the indictment against him.[744]

259. The Appeals Chamber dismisses the Appellant's argument that the Trial Chamber erred by failing to give appropriate weight to his voluntary surrender as a mitigating factor.

260. For the foregoing reasons, the Appeals Chamber finds that the Appellant has failed to demonstrate a discernible error in the exercise of the Trial Chamber's discretion in identifying and weighing the factors in mitigation of his sentence.

4. Conclusion

261. The Appeals Chamber dismisses the Appellant's eighteenth ground of appeal in its entirety.

C. Appeals Chamber's considerations

1. Effect of the re-qualification of the Appellant's criminal responsibility

262. The Appellant submits that the re-qualification of his mode of criminal responsibility would clearly have an effect on the sentence, and argues that a sentence of seven years' imprisonment would be just, as found by in Judge Lindholm's Partly Dissenting Opinion.[745] The Prosecution submits that there is no absolute rule in the International Tribunal that an aider and abettor should be subject to a lower sentence than a participant in a joint criminal enterprise. It argues that the

[741] Trial Judgement, para. 1086.
[742] Trial Judgement, para. 1088.
[743] Appeal Brief, para. 118.
[744] As correctly pointed out by the Prosecution in its Response Brief, at para. 10.21. The Initial Indictment was confirmed on 21 July 1995: Trial Judgement, para. 1130. The Appellant surrendered voluntarily on 12 March 2001: Trial Judgement, para. 1086.
[745] AT. 78-79. *See* Order Re-scheduling Appeal Hearing, p. 3, para. 6.

gravity of the offence and the Appellant's participation therein remain essentially the same, because he "would be an aider and abettor with specific intent rather than possessing mere knowledge".[746]

263. Having resolved the issues raised regarding sentencing, the Appeals Chamber turns to consider if any adjustment to the Appellant's sentence needs to be made in light of its findings with respect to the Appellant's individual criminal responsibility.[747] In doing so, the Appeals Chamber considers those factors set out above and enshrined in Article 24 of the Statute.[748]

2. Sentencing factors

(a) General practice regarding prison sentences in the courts of the former Yugoslavia

264. Concerning the general practice regarding prison sentences in the courts of the former Yugoslavia, the Appeals Chamber takes into account the relevant criminal provisions in effect in the former Yugoslavia at the time the offences for which the Appellant was convicted were committed, as considered by the Trial Chamber.[749] In this regard, the Appeals Chamber recalls that the International Tribunal may, if the interests of justice so merit, impose a greater or lesser sentence than would have been applicable under the relevant law in the former Yugoslavia.[750]

(b) Gravity of the offence

265. Regarding the gravity of the offence, the Appeals Chamber recalls that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a participant in a joint criminal enterprise.[751] Thus, in assessing the gravity of the offence, the Appeals Chamber takes into consideration that it has set aside the Appellant's conviction under Article 7(1) of the Statute for his participation in a joint criminal enterprise, and has found him responsible for aiding and abetting the crime of persecutions through the unlawful arrests and detention of non-Serb civilians,[752] the confinement under inhumane conditions of non-Serb prisoners,[753] the forced labour of Bosnian Croat and Bosnian Muslim civilians,[754] and the

[746] AT. 127; *see* also *ibid.,* 126, 128. If warranted at all, the Prosecution submits that a reduction of no more than ten percent should be considered: AT. 129.
[747] *See* para. 233 *supra.*
[748] *See* para. 234 *supra.*
[749] Trial Judgement, paras 1068-1074.
[750] *See Bla{ki}* Appeal Judgement, para. 681; *Krsti}* Appeal Judgement, para. 270.
[751] *See Krsti}* Appeal Judgement, para. 268; *Vasiljevi}* Appeal Judgement, para. 182, *see* also *ibid.,* para, 181.
[752] *See* para. 118 *supra.*
[753] *See* para. 138 *supra.*
[754] *See* para. 159 *supra.*

forcible displacements of non-Serb civilians,[755] under Count 1 of the Fifth Amended Indictment. Moreover, it bears in mind that in re-qualifying the Appellant's individual criminal responsibility, the Appeals Chamber has set aside his conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture.[756]

(c) Mitigating circumstances

266. Concerning the mitigating circumstances, as previously noted, the Trial Chamber considered the following factors: (1) the Appellant's personal circumstances, *i.e.,* his age at the time he committed the offences and the fact that he was married and had three young children;[757] (2) the fact that he had no prior criminal convictions;[758] (3) his good conduct while in the UNDU;[759] (4) the fact that he chose to testify at the beginning of the Defence case; and (5) the fact that he consented that a new Judge be appointed to the Trial Chamber pursuant to Rule 15*bis* of the Rules.[760] The Appellant has failed to demonstrate a discernible error in the exercise of the Trial Chamber's discretion in identifying and weighing these factors in mitigation of his sentence.[761] Thus, the Appeals Chamber adopts the Trial Chamber's findings as to these factors.[762]

(d) Aggravating circumstances

267. With respect to the aggravating circumstances considered by the Trial Chamber, the Appeals Chamber notes that the Trial Judgement lists the following factors under the sub-heading entitled "Aggravating circumstances": (1) the gravity of the offence and manner in which the crimes were committed; (2) the Appellant's position as the President of the Crisis Staff; (3) the status of the victims and effects of the offences on the victims, and (4) the Appellant's "education".[763]

(i) Appellant's position

268. Considering the Appellant as the most important civilian leader within the Municipality,[764] the Trial Chamber took into account his position as President of the Crisis Staff, not only as part of its determination of the "[g]ravity of the offence and manner in which the crimes were

[755] *See* para. 188 *supra*.
[756] *See* para. 190 *supra*.
[757] Trial Judement, para. 1088.
[758] Trial Judgement, para. 1089.
[759] Trial Judgement, para. 1091.
[760] Trial Judgement, para. 1090.
[761] *See* para. 260 *supra*.
[762] *Cf. Krsti}* Appeal Judgement, para. 271.
[763] Trial Judgement, paras 1078- 1084.

committed,"[765] but also as a separate aggravating factor.[766] While a Trial Chamber has the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute,[767] the Appeals Chamber recalls that it is settled in the jurisprudence of the International Tribunal and the ICTR that a superior position does not in itself constitute an aggravating factor. Rather it is the abuse of such position which may be considered an aggravating factor.[768] Against this backdrop, the Appeals Chamber considers that the Trial Chamber's consideration of the Appellant's position of authority as a separate aggravating factor was inappropriate for the following reasons.

269. Within its determination of the gravity of the offence for sentencing purposes, the Trial Chamber considered the Appellant's role in the crimes as the most prominent representative of the civilian authorities, relying on the position he held.[769] In addition, the Trial Chamber concluded that the Appellant's position as President of the Crisis Staff should be considered as an aggravating factor, in particular as he headed these institutions throughout their entire existence.[770] Thus, the Appeals Chamber considers that the Trial Chamber engaged in double-counting,[771] and finds *proprio motu* that the Trial Chamber erred in the exercise of its discretion in considering the Appellant's position of authority as an aggravating circumstance. Since the Appeals Chamber has relied, *inter alia,* upon the Appellant's position as President of the Crisis Staff when determining his participation in the underlying acts of persecutions as an aider and abettor, the Appellant's position of authority will not be considered as an aggravating factor.

(ii) Appellant's educational background

270. The Trial Chamber found that the fact that the Appellant is "intelligent, educated and a member of the medical profession constitute[d] an aggravating circumstance."[772] The Trial

[764] Trial Judgement, para. 1082.
[765] Trial Judgement, paras 1078-1081.
[766] Trial Judgement, para. 1082.
[767] *Babi}* Judgement on Sentencing Appeal, para. 80.
[768] *Staki}* Appeal Judgement, para. 411; *Kamuhanda* Appeal Judgement, para. 347; *Babi}* Judgement on Sentencing Appeal, para. 80; *Ntakirutimana* Appeal Judgement, para. 563; *Kayishema and Ruzindana* Appeal Judgement, paras 358–359; *see Aleksovski* Appeal Judgement, para. 183. *See* also *Br|anin* Trial Judgement, para. 1099. Having found that a joint criminal enterprise was not an appropriate mode of liability to describe the individual criminal responsibility of Radoslav Br|anin, the Trial Chamber found that his position of authority at the highest level of the political hierarchy and the abuse of such authority constituted an aggravating factor of considerable weight. The Appeals Chamber notes that the *Br|anin* Trial Chamber did not consider Radoslav Br|anin's position as the President of the Crisis Staff of the Autonomous Region of Krajina within its assessment of the gravity of the offence, *see ibid.,* para. 1095.
[769] Trial Judgement, paras 1078-1081.
[770] Trial Judgement, para. 1082.
[771] *Cf. Staki}* Appeal Judgement, para. 411; *Joki}* Sentencing Appeal Judgement, para. 30.
[772] Trial Judgement, para. 1084.

Chamber substantiated this finding by reference to: (1) "the fact that the systematic brutal mistreatment of Bosnian Muslim and Bosnian Croat detainees was brought to [the Appellant's] attention, and he appears to have done nothing to alleviate their hardship,"[773] and (2) the approach taken in the *Staki}, Kayishema and Ruzindana,* and *Ntakirutimana* cases.[774]

271. Regarding the Trial Chamber's statement concerning the "brutal mistreatment" of the detainees, at the outset the Appeals Chamber notes that the Trial Chamber provided no reference to any evidence or other relevant findings in support. Moreover, the Trial Chamber's reliance on the "brutal mistreatment" of the detainees must be qualified in light of the fact that the Appeals Chamber has set aside the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture.[775]

272. With respect to the cases relied upon by the Trial Chamber in support of its finding, the Appeals Chamber observes the following. The Trial Chamber stated that it agreed "with the approach taken in cases before the ICTR, and in *Staki}* that the professional background of Blagoje Simi} as a medical doctor is an aggravating factor, although not a significant one."[776] The Trial Chamber itself did not make any reference to the ICTR cases in question; it simply referred to footnotes 1626 and 1627 at paragraph 915 of the *Staki}* Trial Judgement.[777] Footnote 1626 of the *Staki}* Trial Judgement refers to the *Ntakirutimana* case, where the Trial Chamber held that it was particularly egregious that Gérard Ntakirutimana – a medical doctor – had taken lives instead of saving them, and had abused the trust placed in him in committing the crimes of which he was found guilty.[778] This holding was made in a context which is completely different from that of the instant case.[779] Thus, while in that context the conclusion of the *Ntakirutimana* Trial Chamber may well be persuasive, the same is not true with respect to the case of the Appellant.[780] Footnote 1627 of the *Staki}* Trial Judgement refers to the *Kayishema and Ruzindana* case, where the Trial Chamber simply stated that as a medical doctor, Clément Kayishema owed a duty to the community and that this constituted an aggravating factor but did not give any explanation as to the legal basis

[773] Trial Judgement, para. 1084.
[774] Trial Judgement, para. 1084 (citing *Staki}* Trial Judgement, para. 915, footnotes 1626 and 1627).
[775] *See* para. 190 *supra.*
[776] Trial Judgement, para. 1084.
[777] Trial Judgement, para. 1084 footnote 2345.
[778] *Ntakirutimana* Trial Judgement and Sentence, para. 910.
[779] *See Ntakirutimana* Trial Judgement and Sentence, para. 153.
[780] *Cf. Staki}* Appeal Judgement, para. 416.

for its conclusion.[781] Accordingly, the Appeals Chamber does not find that the ICTR cases relied upon by the Trial Chamber are persuasive precedents for the instant case.[782]

273. The relevant paragraph of the *Staki}* Trial Judgement reads as follows: "The Trial Chamber follows the approach taken by the Rwanda Tribunal in considering the professional background of Dr. Milomir Stakić as a physician to be an aggravating factor, albeit not a significant one."[783] Concerning this statement by the *Staki}* Trial Chamber and its reliance on the *Ntakirutimana* and the *Kayishema and Ruzindana* and cases, the Appeals Chamber has held,

> Caution is needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different. The Appeals Chamber considers that these statements by themselves provide too tenuous a basis for holding that the previous background of the Accused, and the ethical duties stemming from it, are an aggravating factor in international criminal law. While the Trial Chamber has discretion in determining factors in aggravation, the Trial Chamber must provide convincing reasons for its choice of factors. As the basis on which the Trial Chamber found the existence of this aggravating factor is rather tenuous, the Appeals Chamber finds that the Trial Chamber committed a discernible error in identifying the professional background of the Appellant as an aggravating factor.[784]

274. For the foregoing reasons, and considering that in the present case the Trial Chamber did not provide convincing reasons for its conclusion, the Appeals Chamber finds *proprio motu* that the Trial Chamber erred in the exercise of its discretion in finding that the Appellant's professional background as a medical doctor constituted an aggravating circumstance. Accordingly, the fact that the Appellant is a member of the medical profession will not be taken into account by the Appeals Chamber as an aggravating circumstance.

(iii) Appellant's discriminatory intent

275. The Trial Chamber found that the Appellant acted with discriminatory intent in relation to all the relevant underlying acts of persecutions. The Appellant's conviction under Article 7(1) of the Statute for his participation in a joint criminal enterprise has been set aside, and he has been found to be responsible for aiding and abetting the crime of persecutions under Count 1 of the Fifth Amended Indictment. As previously recalled, in relation to the crime of persecutions, the aider and abettor must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. However, he need not share the said intent.[785] Because discriminatory intent can constitute an aggravating factor when such a state of mind is not

[781] *Kayishema and Ruzindana* Sentence, para. 26; *see* also *Staki}* Appeal Judgement, para. 416.
[782] *Cf. Staki}* Appeal Judgement, para. 416.
[783] *Staki}* Trial Judgement, para. 915.
[784] *Staki}* Appeal Judgement, para. 416.
[785] *Krnojelac* Appeal Judgement, para. 52.

an element or ingredient of the crime under consideration,[786] whether the Appellant shared the discriminatory intent of the perpetrators is relevant for the purposes of determining his sentence. Accordingly, prior to reaching any conclusion as to the implications of the Appeals Chamber's findings on the Appellant's sentence, it is appropriate to consider his arguments in support of the allegation that the Trial Chamber erred in finding that he possessed discriminatory intent.[787]

a. Unlawful arrests and detention

276. The Trial Chamber inferred from its findings relating to the unlawful arrests and detention that the Appellant shared the principal perpetrators' discriminatory intent in relation to the unlawful arrests and detention of non-Serb civilians. It held that the Appellant could not have accepted the continued arrests and detention of non-Serb civilians, in his key position in the Municipality, without exercising discriminatory intent.[788]

277. Under his sixth ground of appeal, the Appellant argues that the finding that he possessed the intent to discriminate towards the non-Serb citizens of Bosanski [amac,[789] was not the only reasonable inference available from the evidence. He refers to the Trial Chamber's findings which he claims establish his acts to ensure the protection and well-being of all citizens in the Municipality of Bosanski [amac regardless of ethnic considerations. Four of these findings concern positive, non-discriminatory acts: (1) as the decisions by the Crisis Staff aimed at restricting the consumption of alcohol and to save fuel during the conflict affected not only non-Serb civilians, the Trial Chamber found that "the Crisis Staff was concerned with the welfare of all citizens, regardless of their ethnic background";[790] (2) the Crisis Staff, the Executive Board and the Municipal Red Cross "tried to assist the civilian population by distributing basic foodstuffs to all civilians, regardless of their ethnicity", and "the civilians were provided with medical care, regardless of their ethnicity, with the exception of the detainees who were deliberately denied adequate medical care";[791] (3) the Crisis Staff took some measures aimed at limiting the looting of property;[792] and (4) the Trial Chamber accepted that the Appellant, "through his activities with the Crisis Staff,

[786] *Bla{ki}* Appeal Judgement, para. 686. *See* also *Vasiljevi}* Appeal Judgement, para. 172.
[787] Given that the some of the arguments advanced by the Appellant concern the same findings, in the following paragraphs the Appeals Chamber will address those findings and the evidence relied upon for the purposes of its analysis of each of the underlying acts of persecutions. Thus, this will result in some repetition.
[788] Trial Judgement, para. 997.
[789] Appeal Brief, paras 58, 60-64. *See* also Appeal Brief, para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).
[790] Appeal Brief, para. 61(vii) (citing Trial Judgement, para. 512).
[791] Appeal Brief, para. 61(ix) (citing Trial Judgement, para. 514).
[792] Appeal Brief, para. 61(xv) (citing Trial Judgement, para. 876). The Appeals Chamber notes that the Trial Chamber was not satisfied that the widespread looting and plundering of Bosnian Muslims and Croats was part of the common

helped to improve the daily life conditions of some inhabitants of Bosanski [amac, regardless of their ethnicity".[793] The Appellant also refers to the conclusion of the Trial Chamber that the Crisis Staff issued some discriminatory decisions, but that they did not rise to the gravity required for persecutions.[794] The remaining findings referred to by the Appellant relate to conduct which the Trial Chamber found was not discriminatory, or not established at all.[795]

278. The Appeals Chamber considers that the finding that certain discriminatory decisions issued by the Crisis Staff did not rise to the gravity required for persecutions is not incompatible with the Trial Chamber's conclusion that the Appellant shared the discriminatory intent; if anything, this finding supports the Trial Chamber's conclusion. The Appeals Chamber further considers that the findings relating to conduct which the Trial Chamber found was not discriminatory do not detract from the circumstances it relied upon to reach its findings that the Appellant *did* possess discriminatory intent. Those circumstances include the following facts: that he was aware that the non-Serb civilians were detained; that he was in a position of strong influence over the arrests and detention; that he, in his key position in the Municipality, accepted the continued arrests and detention, and that he took no measures to impede this system. In addition, the Appeals Chamber recalls that the Appellant in fact lent substantial assistance thereto.

279. The Appeals Chamber accepts that the Trial Chamber's finding that "the Crisis Staff was concerned with the welfare of all citizens, regardless of their ethnic background",[796] which was not based solely on its consideration of the decisions to restrict alcohol and fuel consumption,[797] indicates that the Appellant did not posses discriminatory intent vis-à-vis all non-Serbs of Bosanski [amac. The same holds true for the Trial Chamber's finding that the Crisis Staff, the Executive

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plan to persecute non-Serb civilians, and that it was also not satisfied that the Appellant's intentional participation in any form had been proven beyond reasonable doubt: Trial Judgement, para. 1027.

[793] Appeal Brief, para. 61(xvi) (citing Trial Judgement, para. 1080).

[794] Appeal Brief, para. 61(x), (xi) (citing Trial Judgement, paras 515-516).

[795] Appeal Brief, para. 61(i)-(vi), (viii), (xii)-(xiv) (citing Trial Judgement, paras 504, 505, 507, 509-511, 513, 838, 874, 875).

[796] Trial Judgement, para. 512.

[797] The finding appears in the Trial Judgement under the section entitled XI. "Orders, Policies, Decisions, and Other Regulations in the name of the Serb Crisis Staff and War Presidency Violating the Rights of Non-Serb Civilians to Equal Treatment and Infringing upon Their Enjoyment of Basic and Fundamental Rights". Under the sub-heading entitled B."Findings", the Trial Chamber first, in paragraphs 505-512, considered several decisions and orders issued by the Crisis Staff, including the ones regarding the restriction on alcohol and fuel consumption, and found that they were not discriminatory. At the end of paragraph 512, the Trial Chamber then concluded that "[i]n view of the above, the Trial Chamber is satisfied that the Crisis Staff was concerned with the welfare of all citizens, regardless of their ethnic background". In the remaining paragraphs of this section of the Trial Judgement, the Trial Chamber found that not only non-Serbs were affected by the shortages of electricity and water, and was satisfied that the civilians were provided with medical care regardless of ethnicity. However, it further found that the Crisis Staff's decisions to make the date of the forcible takeover a public holiday and to change the symbol of the coat of arms and the street names to depict Serb symbols and personalities only, were discriminatory. These decisions, however, were not deemed to be of sufficient gravity to constitute persecutions: Trial Judgement, paras 513-516.

Board and the Municipal Red Cross "tried to assist the civilian population by distributing basic foodstuffs to all civilians, regardless of their ethnicity",[798] and its statement that the Appellant, "through his activities with the Crisis Staff, helped to improve the daily life conditions of some inhabitants of Bosanski [amac, regardless of their ethnicity".[799] In addition, the Trial Chamber's finding that the Crisis Staff took some measures to protect property left behind by individual non-Serb families[800] weighs against the inference that the Appellant had such general discriminatory intent.

280. While the Appeals Chamber recognises that these findings of the Trial Chamber are incompatible with an inference that the Appellant possessed a general intent to discriminate against the non-Serb civilian population of the Municipality of Bosanski [amac, it notes that the Trial Chamber did not make a finding that he possessed said general discriminatory intent. Rather, it concluded that the Appellant shared the discriminatory intent of the perpetrators of the unlawful arrests and detention.[801] In this respect, the Appeals Chamber notes the Trial Chamber's findings that while "the civilians were provided with medical care, regardless of their ethnicity", this was not the case for the detainees "who were deliberately denied adequate medical care",[802] and that, although the Appellant "helped to improve the daily life conditions of some inhabitants of Bosanski [amac, regardless of their ethnicity", this "does not detract from the fact that he was actively participating in the persecution of Bosnian Muslims and Croats at the same time".[803] The Trial Chamber further found that although the Appellant was in a position of strong influence over the unlawful arrests and detention, he accepted this system and took no measures to impede its functioning.[804] In this connection, the Trial Chamber specifically noted that the Appellant ignored the request made to him by Sulejman Tihi}, a Bosnian Muslim political leader, to be released.[805]

281. In light of the foregoing, the Appeals Chamber is satisfied that it was open to a reasonable trier of fact to exclude the inference that the Appellant did not possess discriminatory intent with respect to the unlawful arrests and detention of non-Serb civilians as underlying acts of persecutions.

b. Cruel and inhumane treatment

[798] Trial Judgement, para. 514.
[799] Trial Judgement, para. 1080.
[800] Trial Judgement, paras 873, 876. *See* also footnote 2081.
[801] Trial Judgement, para. 997.
[802] Trial Judgement, paras 514, 1007.
[803] Trial Judgement, para. 1080.
[804] Trial Judgement, paras 995, 996, 997.
[805] Trial Judgement, para. 1080.

282. Although not convinced that the Appellant ever visited any of the detention facilities, the Trial Chamber held that Todorovi}, the Chief of Police, informed him in the first days after the takeover about detainees who had been beaten and abused in the SUP, that Bosanski [amac is a small town, that the mistreatment of the detainees was extensive and took place over several months, and that the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres.[806] The Trial Chamber was satisfied that the Appellant knew about the cruel and inhumane treatment, including the beatings, torture and confinement under inhumane conditions of the non-Serb prisoners in the detention facilities in Bosanski [amac.[807]

283. The Trial Chamber was further satisfied that not only was the Appellant aware of the discriminatory intent of the perpetrators of cruel and inhumane treatment, including beatings, torture and confinement under inhumane conditions, but that he shared this discriminatory intent.[808] In this context, the Trial Chamber considered the testimony of Sulejman Tihić and Izet Izetbegović on statements made by the Appellant at a meeting in the Municipal Assembly building in Bosanski [amac. Sulejman Tihić testified that the Appellant referred to the partition of municipalities along ethnic lines by saying, "if you don't decide, the Serbs will know what to do".[809] Izet Izetbegović gave evidence that the Appellant said at the same meeting, that if the non-Serbs would not agree to the re-organisation of the municipalities, "the Serbs would use force".[810] The Trial Chamber held that the only reasonable inference that could be drawn from this evidence and from the fact that the Appellant continued to act as the highest-ranking civilian during the relevant period was that he shared the discriminatory intent to persecute the non-Serb population of Bosanski [amac Municipality through cruel and inhuman treatment, including beatings, torture and confinement under inhumane conditions.[811]

284. Under his sixth, ninth, tenth and twelfth grounds of appeal, the Appellant challenges the Trial Chamber's finding that he possessed discriminatory intent with respect to the cruel and inhumane treatment.[812] As a preliminary matter, the Appeals Chamber notes that, having set aside the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture, it is unnecessary to consider whether the Trial Chamber erred in finding

[806] Trial Judgement, para. 1008.
[807] Trial Judgement, para. 1008.
[808] Trial Judgement, para. 1009.
[809] Trial Judgement, para. 1009. *See* also *ibid.*, para. 912 (citing Sulejman Tihi}, T. 1346-1347).
[810] Trial Judgement, para. 1009. *See* also *ibid.*, para. 913 (citing Izet Izetbegović, T. 2244-2245).
[811] Trial Judgement, para. 1010.

that the Appellant shared the discriminatory intent of the perpetrators of these underlying acts. The Appeals Chamber will therefore limit its analysis to the Appellant's discriminatory intent with respect to the confinement under inhumane conditions.

285. The Appellant argues, in the first place, that the finding that he must have known of the mistreatment of non-Serb detainees because Bosanski [amac is a small town and because the cries and moans of prisoners in Bosanski [amac and their forced singing of Serb nationalistic songs could be heard outside the detention centres, even if justified, does not establish discriminatory intent.[813] The Appeals Chamber notes that the Trial Chamber did not rely on this finding alone to establish the Appellant's discriminatory intent. It also relied on the fact that he continued to act as the highest-ranking civilian during the relevant period, and on the statements he made at the meeting in the Municipal Assembly building in Bosanski [amac, as referred to by Sulejman Tihić and Izet Izetbegović.[814] The Appellant argues that these statements referred to events before the takeover of Bosanski [amac and are relevant to the takeover itself, which the Trial Chamber found was not unlawful and did not amount to persecutions.[815]

286. The Appeals Chamber considers that the statements made by the Appellant at the meeting in the Municipal Assembly building in Bosanski [amac – although compatible with the inference that he shared the discriminatory intent of the perpetrators of the confinement under inhumane conditions as underlying acts of persecutions – in and of themselves are ambiguous and not sufficient to establish that the Appellant possessed discriminatory intent in relation to the confinement under inhumane conditions as underlying acts of persecutions. In particular, they do not exclude the possibility that the Appellant's discriminatory intent was limited to the establishment of Serb-only institutions and to the execution of the forcible takeover, which the Trial Chamber found did not, as such, constitute persecutions.[816] This conclusion is further borne out by the Trial Chamber's findings on the positive, non-discriminatory acts of the Appellant and the Crisis Staff which the Appellant refers to under his sixth ground of appeal.[817]

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[812] Appeal Brief, paras 58, 60-64, 74, 87. *See* also *ibid.*, para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).
[813] Appeal Brief, para. 74.
[814] Trial Judgement, paras 1009-1010.
[815] Appeal Brief, para. 74.
[816] The Trial Chamber found that the forcible takeover of Bosanski [amac Municipality did not reach the level of gravity to constitute persecutions. Trial Judgement, para. 456. The Appeals Chamber notes that the Trial Chamber did not make any findings as to whether the takeover was discriminatory in nature.
[817] The Appellant relies on the following findings in this regard: (1) "the Crisis Staff was concerned with the welfare of all citizens, regardless of their ethnic background": Trial Judgement, para. 512; (2) the Crisis Staff, the Executive Board and the Municipal Red Cross "tried to assist the civilian population by distributing basic foodstuffs to all civilians, regardless of their ethnicity", and "the civilians were provided with medical care, regardless of their ethnicity, with the exception of the detainees who were deliberately denied adequate medical care": Trial Judgement, para. 514; the Crisis

287. Nevertheless, the Trial Chamber did not rely on these statements in isolation. The Appeals Chamber recalls that, notwithstanding its findings on the positive, non-discriminatory acts of the Appellant and the Crisis Staff, the Trial Chamber did not err in finding that the Appellant shared the discriminatory intent of the perpetrators of the unlawful arrests and detention as underlying acts of persecutions. The Trial Chamber's findings make clear that, whether or not the Appellant possessed a general intent to discriminate against the non-Serb civilian population of Bosanski [amac, he did possess such intent with respect to the unlawful arrests and detention. Similarly, as concerns the inhumane conditions under which those unlawfully arrested and detained were confined, the Trial Chamber found that the Appellant deliberately denied them adequate medical care. In addition, it found that he continued to act as the highest-ranking civilian during the relevant period.

288. The Appeals Chamber finds that the Appellant has failed to demonstrate that no reasonable trier of fact could have found that the inference drawn by the Trial Chamber that the Appellant shared the discriminatory intent of the perpetrators of the confinement under inhumane conditions was the only reasonable inference that could have been drawn from the evidence.

c. Forced labour

289. The Trial Chamber, noted that only Bosnian Muslims and Bosnian Croats were subjected to the forced labour assignments, and was satisfied that the Appellant through his role in the appointment of the head of the Department administering the forced labour programme, and by his failure to take measures preventing said acts from taking place, participated in the forced labour programme with discriminatory intent.[818]

290. Under his sixth ground of appeal, the Appellant argues that the finding that he possessed the intent to discriminate towards the non-Serb citizens of Bosanski [amac was not the only reasonable inference available from the evidence.[819]

291. The Appeals Chamber recalls that, notwithstanding its findings on the positive, non-discriminatory acts of the Appellant and the Crisis Staff, the Trial Chamber did not err in finding

Staff took some measures aimed at limiting the looting of property: Trial Judgement, para. 876; the Trial Chamber accepted that the Appellant, "through his activities with the Crisis Staff, helped to improve the daily life conditions of some inhabitants of Bosanski [amac, regardless of their ethnicity.": Trial Judgement, para. 1080. *See* Appeal Brief, paras 58, 60-64. *See* also *ibid*., para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).

[818] Trial Judgement, para. 1022.

[819] Appeal Brief, paras 58, 60-64. *See* also *ibid.*, para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).

that he possessed discriminatory intent in relation to the unlawful arrests and detention and the confinement under inhumane conditions as underlying acts of persecutions. This is so because the Trial Chamber qualified its findings on the general benevolence of the Appellant and the Crisis Staff in the context of the unlawful arrests and detention and the confinement under inhumane conditions. For example, it held that he deliberately denied the detainees adequate medical care, and that he accepted the continued system of arrests and detention in his position of strong influence over that system.

292. Similarly, with respect to the forced labour, the Trial Chamber found that only Bosnian Croats and Bosnian Muslims were subjected to dangerous and humiliating assignments.[820] The Appellant was aware that Bosnian Croats and Bosnian Muslims were forced to perform dangerous or humiliating work and he did not take sufficient measures to prevent these incidents from happening, although the Crisis Staff was ultimately responsible for managing the forced labour programme.[821] While having the power to appoint and dismiss the head of the body administering the forced labour programme, instead of using his power to impede the continuation of this practice, the Appellant contributed to its continuation by assigning Bo`o Ninkovi} as the new head of that body.[822] In addition, the Appeals Chamber is of the view that the Appellant's intent in relation to the forced labour must be assessed in light of the underlying acts of unlawful arrests and detention and confinement under inhumane conditions, given that he was aware that Bosnian Croats and Bosnian Muslims in detention were subjected to dangerous and humiliating forced labour assignments. In this regard, the Appeals Chamber recalls that the Appellant possessed discriminatory intent for both the underlying acts of unlawful arrests and detention, and confinement under inhumane conditions.

293. The Appeals Chamber finds that the Appellant has failed to demonstrate that no reasonable trier of fact could have found that the inference drawn by the Trial Chamber that the Appellant possessed discriminatory intent in relation to the forced labour as an underlying act of persecutions was the only reasonable inference that could have been drawn from the evidence.

d. Forcible displacements

[820] Trial Judgement, para. 1022.
[821] Trial Judgement, paras 841, 1021-1022.
[822] *See* Trial Judgement, paras 809, 840-841, 1022.

294. The Trial Chamber relied on evidence of the statements made by the Appellant during a meeting in the Municipal Assembly building in Bosanski [amac just prior to the takeover.[823] The Trial Chamber further found that the Appellant was aware of the non-Serb ethnicity of the seventeen forcibly displaced individuals and that he participated in the exchange procedure and was informed about it over a period of many months. On this basis, the Trial Chamber was satisfied that the Appellant had a discriminatory intent with regard to the forcible displacement of these people.[824]

295. Under his sixth and fourteenth grounds of appeal, the Appellant challenges the Trial Chamber's finding that he possessed discriminatory intent with respect to the forcible displacements.[825] He argues that the statements relied upon by the Trial Chamber are ambiguous, and contradicted by evidence that he never advocated the forced removal of non-Serb civilians as well as by the Trial Chamber's findings regarding the non-discriminatory practice of the Appellant and the Crisis Staff that he invokes under his sixth ground of appeal.[826]

296. The Appeals Chamber considers that the statements made by the Appellant at the meeting in the Municipal Assembly building in Bosanski [amac – although compatible with the inference that he shared the discriminatory intent of the perpetrators of forcible displacements as underlying acts of persecutions – in and of themselves are, ambiguous and not sufficient to establish that the Appellant possessed discriminatory intent in relation to the forcible displacements as underlying acts of persecutions. These statements do not exclude the possibility that the Appellant's discriminatory intent was limited to the establishment of Serb-only institutions and to the execution of the forcible takeover, which the Trial Chamber found did not, as such, constitute persecutions.[827] This conclusion is corroborated by the Trial Chamber's findings on the positive, non-discriminatory acts of the Appellant and the Crisis Staff that he refers to under his sixth ground of appeal,[828] as

[823] The Appellant referred to the partition of municipalities along ethnic lines, by stating that "if you don't decide, the Serbs will know what to do". Trial Judgement, paras 1038, 912 (citing Sulejman Tihi}, T. 1346-1347). At the same meeting, the Appellant said that, if the non-Serbs would not agree on the re-organisation of the municipalities, "the Serbs would use force". Trial Judgement, paras 1038, 913 (citing Izet Izetbegovi}, T. 2244-2245).
[824] Trial Judgement, para. 1038.
[825] Appeal Brief, paras 58, 60-64, 97. *See* also *ibid.*, para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).
[826] Appeal Brief, para. 97 (citing Trial Judgement, paras 914, 918 and Appeal Brief, para. 61).
[827] The Trial Chamber found that the forcible takeover of Bosanski [amac Municipality did not reach the level of gravity to constitute persecutions: Trial Judgement, para. 456. The Appeals Chamber notes that the Trial Chamber did not make any findings as to whether the takeover was discriminatory in nature.
[828] The Appellant relies on the following findings in this regard: (1) "the Crisis Staff was concerned with the welfare of all citizens, regardless of their ethnic background": Trial Judgement, para. 512; (2) the Crisis Staff, the Executive Board and the Municipal Red Cross "tried to assist the civilian population by distributing basic foodstuffs to all civilians, regardless of their ethnicity", and "the civilians were provided with medical care, regardless of their ethnicity, with the exception of the detainees who were deliberately denied adequate medical care": Trial Judgement, para. 514; the Crisis Staff took some measures aimed at limiting the looting of property: Trial Judgement, para. 876; the Trial Chamber accepted that the Appellant, "through his activities with the Crisis Staff, helped to improve the daily life conditions of

well as the evidence by Simeon Simi} that the Appellant never advocated the forced removal of non-Serb citizens from their apartments in [amac.[829]

297. However, the Trial Chamber did not rely on these statements in isolation. The Appeals Chamber recalls that, notwithstanding its findings on the positive, non-discriminatory acts of the Appellant and the Crisis Staff, the Trial Chamber did not err in finding that the Appellant shared the discriminatory intent of the perpetrators of the unlawful arrests and detention, the confinement under inhumane conditions, and forced labour as underlying acts of persecutions. The Appellant aided and abetted all of these underlying acts, which contributed to the coercive environment forcing non-Serb civilians to leave their homes in Bosanski [amac Municipality. He was further aware of the non-Serb ethnicity of the seventeen forcibly displaced individuals and he participated in the exchange procedure and was informed about it over a period of many months.

298. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to disregard the testimony of Simeon Simi} referred to by the Appellant and to rely on the statements in question for its inference that the Appellant possessed discriminatory intent in relation to the forcible displacements. Accordingly, the Appeals Chamber finds that the Appellant has failed to demonstrate that no reasonable trier of fact could have found that the inference drawn by the Trial Chamber that the Appellant possessed discriminatory intent in relation to the forcible displacements was the only reasonable inference that could have been drawn from the evidence.

some inhabitants of Bosanski [amac, regardless of their ethnicity.": Trial Judgement, para. 1080. *See* Appeal Brief, paras 58, 60-64. *See* also *ibid*., para. 28 (citing *^elebi}i* Appeal Judgement, para. 458).
[829] Trial Judgement, para. 918 (citing Simeon Simi}, T. 13119).

e. Conclusion

299. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in finding that he possessed discriminatory intent in relation to the relevant underlying acts of persecutions. The Appeals Chamber dismisses the Appellant's sixth ground of appeal in its entirety and his ninth, tenth, twelfth and fourteenth grounds of appeal in part, insofar as they challenge the Trial Chamber's findings on his discriminatory intent.[830] Accordingly, the Appeals Chamber finds that the fact that the Appellant acted with discriminatory intent in aiding and abetting persecutions through the relevant underlying acts, constitutes a relevant aggravating circumstance.[831]

3. Determination of sentence

300. In imposing the appropriate sentence, the Appeals Chamber recalls that, in addition to having re-qualified the Appellant's individual criminal responsibility as that of an aider and abettor, it has set aside his conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture. The Appeals Chamber finds that this warrants an adjustment of the Appellant's sentence, and considers that it has the mandate to revise the sentence itself, without remitting it to the Trial Chamber.[832] Taking into account the particular circumstances of this case, mitigating and aggravating, as well as the form and degree of the participation of the Appellant in the crimes, the Appeals Chamber finds that a sentence of fifteen years is appropriate.

[830] The remainder of the arguments advanced under these grounds of appeal (with the exception of the ninth and tenth grounds of appeal which have been granted in part) has been dismissed elsewhere in the present judgement. *See* Section IV entitled: "The Individual Criminal Responsibility of the Appellant: Third to Fourteenth Grounds of Appeal."
[831] The Appeals Chamber recalls that it has set aside the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment for cruel and inhumane treatment insofar as the conduct underlying this conviction encompasses the acts of beatings and torture. Thus, the Trial Chamber's findings on whether the Appellant shared the discriminatory intent of the perpetrators of these underlying acts have not been considered.
[832] *See Krsti}* Appeal Judgement, para. 266; *Vasiljevi}* Appeal Judgement, para. 181; *Krnojelac* Appeal Judgement, paras 263-264.

VII. DISPOSITION

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

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

NOTING the written submissions of the parties and the arguments they presented at the hearing held on 2 June 2006;

SITTING in open session;

ALLOWS, Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg dissenting, the Appellant's first and second grounds appeal;

SETS ASIDE, Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg dissenting, the Appellant's conviction under Article 7(1) of the Statute for committing persecutions by way of his participation in a joint criminal enterprise under Count 1 of the Fifth Amended Indictment;

FINDS, Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg dissenting, the Appellant guilty under Article 7(1) of the Statute for aiding and abetting persecutions through the unlawful arrests and detention, the confinement under inhumane conditions, the forced labour and the forcible displacements of Bosnian Croat, Bosnian Muslim and non-Serb civilians, under Count 1 of the Fifth Amended Indictment;

ALLOWS in part, Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg dissenting, the Appellant's ninth and tenth grounds of appeal insofar as he suggests therein that the Trial Chamber's findings do not disclose a sufficient basis for convicting him as an aider and abettor of persecutions for the underlying acts of beatings and torture of non-Serb civilian detainees;

SETS ASIDE, Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg dissenting, the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment for the cruel and inhumane treatment of Bosnian Croat, Bosnian Muslim and non-Serb civilian detainees insofar as the conduct underlying this conviction encompasses the acts of beatings and torture;

DISMISSES entirely the Appellant's remaining grounds of appeal against conviction and sentence;

IMPOSES a sentence of fifteen years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention, and

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Judge Mehmet Güney Presiding	Judge Mohamed Shahabuddeen	Judge Liu Daqun
Judge Andrésia Vaz		Judge Wolfgang Schomburg

Judge Mohamed Shahabuddeen appends a dissenting opinion.

Judge Wolfgang Schomburg appends a dissenting opinion.

Judge Liu Daqun appends a partially dissenting opinion.

Dated this twenty eighth day of November 2006,
At The Hague
The Netherlands

[Seal of the International Tribunal]

VIII. DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. This dissent is not due to a view that the appellant is not guilty of any crime; rather, it is due to a view that he merits higher convictions than those assigned to him by the judgement of the Appeals Chamber. Therefore, in any event I would support the sentence of the Appeals Chamber. The reason why I consider that the convictions should have been of a higher order is that, contrary to the holding of the majority, I am not able to agree that the appellant did not have adequate notice that the charge was based on joint criminal enterprise ("JCE").

A. The appellant at all material times knew that he was being prosecuted on the basis of JCE

2. The appellant has not raised an issue as to whether JCE is part of the law of the Tribunal, or as to whether he was given any notice that the charge against him was based on JCE. The appellant accepts that JCE forms part of the law of the Tribunal and that the prosecution in fact gave notice that the charge was based on that doctrine. The question is whether the notice so given by the prosecution was adequate.

3. The appellant correctly points out that the various indictments against him did not use the words "joint criminal enterprise".[1] As the Trial Chamber indicated in paragraph 151 of its judgement, the "jurisprudence of the Tribunal on the form of Indictment had not yet developed" when the first indictment issued in 1995. But this did not affect the substantive position; that position did not depend on a mere use of terms.

4. The Appeals Chamber states (footnotes omitted):

> This absence [of the words "joint criminal enterprise" from an indictment] does not in and of itself indicate a defect given that it is possible that other phrasings might effectively convey the same concept. As the ICTR Appeals Chamber has previously held, "Ŧtğhe question is not whether particular words have been used, but whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[2]

5. Thus, the Tribunal recognises that the matter does not depend on the use of sacramental words. But where it is possible that a crime may be "committed" in more ways than one, the prosecution must indicate which is the particular way that is being alleged. JCE is one of possible ways of "committing" a crime. Where that particular way is being alleged, it is fair that the

[1] Appeal Brief, para. 10.
[2] Appeal Judgement, para. 32, quoting *Gacumbitsi* Appeal Judgement, para. 165.

prosecution must give due notice of it. The prosecution may well be relying on a legal theory; however, the object is not to require the prosecution to declare its legal theory, but to require it to inform the accused of what is being alleged. The case law of the Tribunal can be construed to mean that the Tribunal recognises that certain words used in an indictment are apt to give the required information; but conceivably other words may do.

6. With the benefit of the cited guidance of the ICTR Appeals Chamber, one can go through the indictments to show that, beginning well before the start of the trial, the appellant knew that the indictments involved an allegation of joint criminality which was consistent with JCE – an idea which, as was pointed out in *Tadić*,[3] dates back in international law to the cases following the conclusion of World War II.

7. The Second Amended Indictment was confirmed on 11 December 1998[4] – nearly three years before the trial commenced on 10 September 2001. Paragraph 13 of that indictment alleged that the accused "along with various individuals on the Serb Crisis Staff and other political, municipal and administrative bodies, the police force and the army, committed, planned[,] instigated, ordered or otherwise aided and abetted a campaign of persecutions and 'ethnic cleansing' and committed other serious violations of international humanitarian law …". Paragraph 29 alleged that the accused "together with other Serb civilian and military officials planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution" of persecutions as a crime against humanity. Paragraph 31 alleged that the appellant, both prior to and while serving as President of the Bosanksi Šamac Serb Crisis Staff and as President of the War Presidency, "committed and aided and abetted the commission of the crime of persecutions … through his participation in", among other things, "the forcible take-over of the municipality of Bosanksi Šamac by Serb forces,"[5] the "issuance of orders, policies, decisions and other regulations in the name of the Serb Crisis Staff and War Presidency and the authorisation of other official actions" which violated the basic and fundamental rights of non-Serb civilians,[6] "the unlawful arrest, detention or confinement" of civilians,[7] and "beatings, torture, forced labour assignments and confinement under inhumane conditions" of civilians.[8]

[3] *Tadić* Appeal Judgement, para. 195.
[4] Order Granting Leave to File a Second Amended Indictment and Confirming the Second Amended Indictment, 11 December 1998.
[5] Second Amended Indictment, para. 31(a).
[6] *Ibid.*, para. 31(b).
[7] *Ibid.*, para. 31(c).

8. Thus, according to the Second Amended Indictment, the appellant was not acting single-handedly: he was acting as a member of a like-minded group; he was acting "together with" other members of the group; "along with" them he was carrying out a "campaign"; he "participatFedğ" with them in carrying it out; as head of the Serb Crisis Staff and War Presidency, he participated in issuing orders, policies and decisions of the organisations. The allegations conveyed that the appellant was acting in association with others in a criminal system; that pointed to JCE. The appellant should have understood that. A minute parsing of the terms of the indictment to show the contrary is more meretricious than meritorious.

9. The substance of the idea of JCE was spelt out in the Third Amended Indictment, which was accepted by the Trial Chamber on 15 May 2001,[9] some four months before the trial commenced on 10 September 2001. That indictment spoke, in the chapeau to count 1, of "acting in concert together" with others and, in paragraph 40, of "the common purpose".[10] It has to be assumed that the words were noticed by the Trial Chamber to which they were addressed; it is not arguable that they were not.

10. The words "acting in concert together" were certainly noticed by the Trial Chamber when it gave leave for the filing of the Fourth Amended Indictment. In granting that leave, the Trial Chamber held that, because those words already appeared in the chapeau of count 1 (concerning persecutions) in the Third Amended Indictment, the addition of the words to the individual paragraphs under count 1 did "not amount to adding any new forms of responsibility but amountFedğ to no more than harmonising the language in the various paragraphs under Count 1".[11] Paragraph 40 of the Fourth Amended Indictment retained the words "the common purpose" which formed part of paragraph 40 of the Third Amended Indictment.

11. It is true that it was after the trial started that the Trial Chamber made its statements on the occasion of granting leave for the filing of the Fourth Amended Indictment, but those statements remained relevant to the question whether the words were known to the Trial Chamber when they were first introduced in the Third Amended Indictment which had been filed before the trial commenced: when granting leave for the filing of the Fourth Amended Indictment, the Trial Chamber did not react on the basis of recent discovery of a surprising past fact. It was because the

[8] *Ibid*., para. 31(d).
[9] Decision Granting Leave to Amend Indictment, 15 May 2001.
[10] Third Amended Indictment, paras 13, 40.
[11] Decision to Amend the Third Amended Indictment, para. 22.

amendments contained in the Fourth Amended Indictment effected no substantive changes that the Trial Chamber refused a request for an adjournment in respect of those amendments: the Trial Chamber said that the defence was not entitled to an adjournment because the "amendments granted do not constitute new charges, but rather, particulars for Count 1".[12]

12. Also, in its Pre-Trial Brief the prosecution said that "when the evidence establishes that there was a pre-arranged scheme or plan to engage in criminal conduct, anyone who knowingly participated may be held criminally responsible under Article 7(1) of the Statute".[13] That, taken together with the Third Amended Indictment, gave notice that the substance of joint criminal enterprise was being relied upon, as indeed the Trial Chamber found at paragraph 153 of its judgement. I am unpersuaded that the language in which these two documents (the prosecution's Pre-Trial Brief and the Third Amended Indictment) were cast is not to be given its ordinary meaning. They were both filed before the commencement of the trial.

13. This conclusion is consistent with the appellant's position at the time of his Rule 98*bis* motion for acquittal (a "no-case" submission). See his reference in paragraph 7 of the motion to the "so-called 'umbrella' crime", and his reference in paragraph 22 to the prosecution contention that he was "acting in concert together, and with other Serb civilian and military officials". In paragraph 24, he said that "the Defense may, to some extent, express its agreement with such approach of the Prosecution at the pre-trial fase Ŧ*sic*ğ, more precisely, in the indictment". It is reasonable to infer that he not only knew that the prosecution had been relying on JCE but that he had also agreed with that approach.

14. What the appellant went on, in paragraph 24 of his Rule 98*bis* motion, to explain was that "such broad approach at the mid-way stage of the proceedings, is contradictory to the principle of legality".[14] So he drew a distinction between the position at the pre-trial stage and the position at the mid-way stage. He had no objections to the position at the pre-trial stage. However, he considered that at the mid-way stage the approach so far taken by the prosecution no longer sufficed; it was too broad and had to be clarified to enable the appellant to conduct his defence properly. In this respect, he said that "Ŧiğn order to adequately prepare his defence, after the closing of the Prosecution case, an accused must be entitled to know with sufficient details, which particular form of individual

[12] Decision to Amend the Third Amended Indictment, para. 30.
[13] *See* Prosecution Pre-Trial Brief, para. 33, cited in footnote 276 of the Trial Judgement.
[14] Rule 98*bis* Motion, para. 24.

criminal responsibility for each particular crime, can be ascribed to him."[15] He was not complaining of the position before "the closing of the Prosecution case"; the additional information which he said he needed was to enable him thereafter to present his defence.

15. In the system of the Tribunal, if the nature of the prosecution's case was clear at the beginning, I do not know that it needs clarification later. Defence counsel cannot be heard to say that he knowingly accepted that the trial was begun on the basis of a vague charge, provided that it was later refined; if he does that, he is simply not serving his client's interest. In any case, the prosecution responded to the appellant's motion for acquittal by *inter alia* referring to its JCE theory by name. In paragraph 13 of its response to the appellant's motion, the prosecution explicitly stated: "The Prosecution case is one of a common purpose or joint criminal enterprise to persecute non-Serbs. The Accused participated either as principals or co-perpetrators, or with the intention of participating in and contributing to the joint criminal enterprise".

16. Thus, (if they were needed) the magic words "joint criminal enterprise" were now used – twice. But the effect of what was so conveyed was not new: the prosecution was stating what its case had been all along, as the natural flow of its language indicated. The appellant was content; he did not file a reply, leaving the impression that he was now able to conduct his defence. And he did conduct his defence – at some length, as will be seen in the following section.

17. In paragraph 38 of its Written Reasons for Decision on Motions for Acquittal, dated 11 October 2002, the Trial Chamber referred to "Acting in Concert with Others" and stated that "the Simić Motion does not raise the matter",[16] although it observed that the motions of his co-accused did. It is true that the Trial Chamber also noted in paragraph 3 that the appellant "challenged the form of the Indictment" and said that it would "consider this matter at the time of the Judgement, that is, after all the evidence has been adduced". What the Trial Chamber so deferred was not the question of adequacy of notice but the question, raised by the appellant, of his right to further details of the prosecution's case at the close of that case, the appellant's assumption being that those details were not needed at the commencement of the trial. And accordingly, in its judgement, the Trial Chamber did not refer to the question of adequacy of notice of JCE.

18. It remains to note two matters. First, paragraph 39 of the judgement of the Appeals Chamber finds that an unacceptable degree of vagueness resulted from the circumstance that, whereas the words "acting in concert together" occurred in the chapeau of paragraph 13 of the Third Amended

[15] *Ibid.*, para. 25, emphasis added.

Indictment setting out count 1 relating to "persecutions", the words "common purpose" occurred in paragraph 40 of the section entitled "Additional Factual Allegations"; in other words, the two references were not sufficiently closely related. But paragraph 40 was a general provision which applied to all the earlier provisions. The indictment had to be read as a whole.

19. Second, the main reason why the Appeals Chamber has declined to hold that the appellant had notice that the prosecution was relying on JCE was the fact "that the Prosecution had submitted to the Pre-Trial Chamber that the only change relevant to the Appellant was the removal of his alleged responsibility under Article 7(3) of the Statute, and that the charges against him remained the same as those alleged in the Second Amended Indictment."[17] The fact that the prosecution said that the charges remained the same as those alleged in the Second Amended Indictment[18] did not mean that the charges did not rely on JCE: as sought to be shown above, they did – from the confirmation of the Second Amended Indictment through the conclusion of the case.

20. The defence is entitled to know exactly what it is charged with. But that does not mean that the barrel should be scraped to unearth an unbelievable case of ignorance; the indictment should be read as it would be by the average reader. The facts alleged in the indictment showed that the appellant, President of the War Presidency of his area and the holder of several other high positions, was acting together with and through other persons on whom he depended; in fact, he could not have acted save through the organisation which surrounded him. It is implausible to claim that he did not know the meaning of the fact that he was charged with responsibility for "acting in concert together" with others in pursuance of a "common purpose". These things were expressly stated in the Third Amended Indictment, and were in substance mentioned in the prosecution's Pre-Trial Brief. Both documents were filed before the trial began. The references which they contained amounted to a plea of JCE. The appellant knew from the beginning of the trial that he was charged on that basis; he had adequate notice of that fact.

21. Account has to be taken of a Separate and Partly Dissenting Opinion which was appended by Judge Per-Johan Lindholm to the trial judgement. Although making some interesting remarks[19] on the concept of JCE, the dissenting judge did not recognise that there was any issue as to

[16] Emphasis added.
[17] Appeal Judgement, para. 39.
[18] *See* Motion to Amend the Second Amended Indictment, para. 5.
[19] Speaking of joint criminal enterprise, the learned Judge said: "The concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international

adequacy of notice that the prosecution was relying on that concept insofar as it concerned the basic form of JCE, for which the appellant was convicted.[20] Further, in the *operative* part of the opinion (the "Disposition") he stated: "In agreement with the considerations of the Trial Chamber with regard to cumulative convictions, I agree with the Majority's conviction of Blagoje Simić upon Count 1: persecutions as a crime against humanity".[21] Therefore, the conviction on that count was unanimous; it was not "the Majority's conviction". The difference which the learned dissenting judge saw related to the basis of the conviction: he would put it on the doctrine of co-perpetration, and not on the doctrine of JCE. Both doctrines concerned the individual's responsibility for participating in group criminality. It is therefore important to note that the judge was not aware of any issue as to adequacy of notice of the basis of the prosecution.

B. Alternatively, the appellant waived any objection to lack of adequate notice of JCE

22. This opinion now proceeds on the alternative basis that, though the appellant was given notice that the case against him was based on JCE, he was not given adequate notice. If so, the appellant at trial waived any objection to inadequacy of notice and failed on appeal to carry the burden of proving that his ability to defend himself was in consequence materially impaired so as to be entitled to raise the objection on appeal.

23. It is true that the appellant had objected on the occasion of granting leave for the filing of the Fourth Amended Indictment, but that objection had nothing to do with JCE, for, if he is to be believed, he knew only afterwards that the prosecution was relying on JCE, this being on the occasion of the filing of the prosecution's response to the appellant's "no-case" submission.[22]

24. Although the appellant knew at least at the close of the case for the prosecution that the prosecution was relying on JCE, the Appeals Chamber, while considering that this did not prejudice the appellant, stated as a "fact that the Appellant did not seek to recall Prosecution witnesses or ask

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criminal law". Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm ("Judge Lindholm's Partly Dissenting Opinion"), para. 5.

[20] The Trial Chamber considered that only the basic form of JCE formed a proper part of the prosecution's case under count 1. *See* Trial Judgement, para. 155.

[21] Judge Lindholm's Partly Dissenting Opinion, disposition, p. 326.

[22] In his closing argument in the Trial Chamber, counsel for Mr Simić argued that the concept of joint criminal enterprise was raised for the first time in the prosecution's *closing argument* or alternatively in its final trial brief. *See* Defence Closing Statement, 1 July 2003, Tr. 20442, 20444; *see also* Tr. 20437. However, this was in contradiction of his submissions in the final trial brief and the submissions of counsel for Mr Simić's co-accused, as well as the position of the appellant on appeal. Defence Closing Statement, 1 July 2003, Tr. 20511; IT-95-9-T, Defence Final Trial Brief, 7 July 2003, para. 658; Amended Notice of Appeal, pp 3-4; Appeal Brief, paras 8, 13, 20.

for an adjournment".[23] As has already been mentioned, he did not file a reply to the prosecution's response to his "no-case" motion. Instead, he proceeded to present his defence, with full knowledge that he was defending against a charge based on JCE.

25. The appellant called 29 witnesses in defence.[24] His defence team tendered 183 exhibits.[25] The joint defence produced five expert witnesses, three of whom testified live before the Trial Chamber.[26] Together with the defence of the other two co-accused, the appellant's defence lasted nearly seven months.[27] It was in the appellant's interest to show that at some stage during the testimony of these witnesses he did mention an objection to JCE or recall that he had made one. He did not show that. So the inference is warranted that, during all of this time, the defence was defending a case which it knew had been brought by the prosecution on the basis that the indictment charged the appellant with a JCE crime.

26. It is true that the appellant raised an objection to adequacy of notice of JCE in his final trial brief.[28] However, the brief was filed only after the appellant had presented his evidence. By then it is reasonable to conclude that he had waived his right to object.

27. For these reasons, I am of the view that, at trial, the appellant did not raise a timely objection to the adequacy of the notice given to him by the prosecution that it was relying on JCE. Therefore, if he is to be allowed to raise such an objection on appeal, he bears the burden, in the Appeals Chamber, of first proving prejudice in that his ability to defend himself in the Trial Chamber was substantially impaired. Has he carried this burden?

28. There could be no prejudice as regards defence witnesses because the appellant accepts that the prosecution did say, at the close of its case and therefore before they testified, that it was relying on JCE. As regards prosecution witnesses, in his appeal brief the appellant argued that, if he had known the case he had to meet, "his cross-examination of the witnesses with whom he was confronted would have had a very different focus" and "his whole strategy in defending himself would have been radically different."[29] This is an after-thought: as indicated above, he made no request to the Trial Chamber for prosecution witnesses to be recalled for further cross-examination

[23] *See* Judgement of the Appeals Chamber, para. 72.
[24] Trial Judgement, para. 1165.
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*, para. 1164.
[28] Defence Final Trial Brief, para. 659.

or any request for an adjournment to consider any new charge. He made neither request because of the position which he took, which was, as I understand it, that he was content with the position up to the close of the case for the prosecution and required details only for the purpose of presenting his defence.

29. Generally, the appellant did not satisfactorily explain what the defence would have done differently in its cross-examination, in its over-all strategy, or in any other regard. When asked at the appeal hearing how JCE disturbed the defence strategy, defence counsel responded that the "Defence was not disturbed at all with the position of the Prosecution because it was too late for them to shift the Ŧ*sic*ğ and to change the theory".[30] The response was weak. The defence case on prejudice was speculative.

30. In consequence, I hold that the appellant, in the Trial Chamber, waived his right to make an objection to the adequacy of the notice given to him by the prosecution that it was relying on JCE. Moreover, I find that the appellant has failed on appeal to demonstrate that his ability to prepare his defence was materially impaired. In all the circumstances, the challenge to his conviction for participating in a joint criminal enterprise falls to be dismissed as artificial.

C. Co-perpetratorship

31. A question has been raised as to whether the Tribunal should adopt the concept of co-perpetratorship. In his stimulatingly composed Separate and Partly Dissenting Opinion appended to the Trial Judgement, Judge Lindholm expressed the view that the "so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration."[31] That means that JCE (at least in its basic form as used in this case) and co-perpetratorship are in substance the same, the difference being a matter of labels. So when the learned judge placed the conviction on the basis of co-perpetratorship, he was in substance also placing it on the basis of JCE.

32. With much respect, I however consider that there are differences. The principal difference arises from the element of control in co-perpetratorship. That element is missing from JCE. Thus,

[29] Appeal Brief, para. 21.
[30] AT. 67.
[31] Judge Lindholm's Partly Dissenting Opinion, para. 2.

while in most cases the same result is produced, a position can be reached in which there could be guilt under JCE but innocence under co-perpetratorship.[32] But, *in this case*, it is not said that, if JCE applies, a result is reached that is different from that yielded by co-perpetratorship; Judge Lindholm himself shows that there is no difference in result. This being so, I am not persuaded that the Appeals Chamber is called upon to review its existing jurisprudence on the subject. As a matter of judicial discipline, it can only follow the answer which it has previously given: it applies JCE.[33]

D. Conclusion

33. Before concluding I would like, in the light of paragraph 172 of the judgement of the Appeals Chamber and for the record, to save the position which I took in *Stakić*[34] to the effect that the crossing of a state border is not required to establish deportation.

34. On the matter in issue, I am of opinion that the appellant had adequate notice that the charges against him were based on the theory of joint criminal enterprise. If he had not, in the Trial Chamber he waived his right to object, and, not having demonstrated prejudice, he is not entitled to raise an objection on appeal. His appeal on the point should be dismissed; the convictions and sentence entered by the Trial Chamber should be affirmed. However, on the basis of the different findings made by the majority, I agree that the sentence should be as determined in the judgement of the Appeals Chamber.

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

_____
Mohamed Shahabuddeen

28 November 2006
The Hague
The Netherlands

[Seal of the Tribunal]

[32] I have referred to this in para. 50 of my separate opinion in the *Gacumbitsi* Appeal Judgement.
[33] *Stakić* Appeal Judgement, para. 62, referring to the holding in *Tadić* Appeal Judgement, para. 220.
[34] *Stakić* Appeal Judgement, Partly Dissenting Opinion, section "C".

IX. DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

1. I am in general agreement with the outcome of the Judgement. However, I wish to offer some remarks on the correct pleading of the mode of liability in an indictment which deviate from the opinion of the majority of my distinguished colleagues. Moreover, I wish to point out that there was no error of law invalidating the decision of the Trial Chamber that the Appellant was guilty of committing persecutions and that there was no error in sentencing allowing for an intervention of the Appeals Chamber.[1] Finally, in light of paragraph 172 of the Judgement, there is no reason to depart from my position, as developed in prior cases,[2] which is that the crossing of an internationally recognized state border is not an element of the crime of deportation pursuant to Article 5(d) of the Statute.

B. The Correct Pleading of the Mode of Liability

2. The Third Amended Indictment, confirmed on 15 May 2001, four months before the commencement of the trial, charged the Appellant *inter alia* with "committing", "acting in concert together"[3], "in furtherance of the campaign"[4] Ғof persecutionsğ "for the common purpose of ridding the Bosanski Šamac and Odžak municipalities of all non-Serbs".[5] The Fourth and Fifth Amended Indictments used the same language.[6] Indeed, the Trial Chamber subsequently convicted the Appellant for committing persecutions as a member of a joint criminal enterprise. This conviction for committing was unanimous. The majority applied the theory of joint criminal enterprise[7] to "committing" under Article 7(1) of the Statute of the International Tribunal, whereas Judge Lindholm in his Separate and Partly Dissenting Opinion appended to the Trial Judgement employed the concept of "committing" by way of co-perpetration.[8] The Appeals Chamber now comes to the conclusion that the Indictment was fundamentally defective as – in the view of the majority – it did

[1] Nevertheless, I am in agreement with the sentence as determined by the Appeals Chamber.
[2] This was the unanimous finding of the *Stakić* Trial Judgement, paras. 662-724. *See* further my Separate Opinion in the *Krnojelac* Appeal Judgement, and my Separate and Partly Dissenting Opinion in the *Naletilić and Martinović* Appeal Judgement. This proposition is in principle supported and further developed by Judge Shahabuddeen in his Dissenting Opinion appended to the *Stakić* Appeal Judgement. *See Stakić* Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen
[3] Third Amended Indictment of 24 April 2001, para. 13.
[4] *Ibid*., para. 40.
[5] *Ibid*.
[6] Fourth Amended Indictment of 9 January 2002, paras 13, 40: "acting in concert together", "committed"…"a campaign of persecutions for the common purpose…"; Fifth Amended Indictment of 30 May 2002, paras 11, 33.
[7] Trial Judgement, para. 992, p. 279.
[8] Trial Judgement, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 2: "[The so-called basic form of joint criminal enterpriseğ is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration."

not put the Appellant on adequate and timely notice that he was charged as a participant in a joint criminal enterprise, and thus sets aside his conviction for committing. With all due respect, this holding of the Appeals Chamber is erroneous.

3. The wording of the Statute ultimately limits its interpretation. It follows that the only crimes or modes of liability are those foreseen in the Statute. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law.[9] Therefore, it is necessary and at the same time sufficient to plead a specific crime and a specific mode of participation as set out in the explicit provisions of the Statute. The Prosecution is consequently not required to plead any legal interpretation or legal theory concerning a mode of participation that does not appear in the Statute, such as joint criminal enterprise, in particular as the Appeals Chamber has held that joint criminal enterprise is to be regarded as a form of "committing".[10]

4. Consequently, an indictment containing the charge of committing persecutions (by concrete criminal conduct constituting the crimes listed under Art. 5 or crimes of equal gravity) puts the accused on notice of the legal nature of the allegations against him. According to established case law of the International Tribunal, the Prosecution has to plead in the indictment all material facts underpinning such a charge, but not the evidence by which the material facts are to be proven.[11] Among others, this includes facts which establish whether the accused individually committed the alleged crime or whether it was committed by several persons (including the accused) acting together. It must be emphasized once more that the Prosecution is not required to plead a legal theory to be applied to these facts, such as joint criminal enterprise. However, it has to be noted that indeed the Prosecution pleaded more than was required by using the underlying specific terms forming the basis of joint criminal enterprise.

5. In the instant case, the Indictment fulfilled its main functions in that it provided the Appellant with sufficient information about the nature of the charges against him and limited the personal and factual scope of the Prosecution's case. The crime charged was "persecutions"; "committing or aiding and abetting" were the charged modes of participation. Thus, the Appellant was put on notice of these charges and the material facts underpinning them. In contrast to what the majority of the Appeals Chamber holds, it was not necessary for the Prosecution to plead either joint criminal enterprise or even one of its specific categories.

[9] *See* Report of the Secretary-General, U.N. Doc. S/25704, para. 34.
[10] As to this, *see Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 8 and para. 5; *Odjanić* Decision Joint Criminal Enterprise, para. 20.

6. Moreover, the obligation to specify the legal theory is contradictory to other judgements of the ICTY and ICTR where the Appeals Chamber, albeit reluctantly, accepted - even in 2005, in the *Semanza* Appeal Judgement[12] - that it had been the practice of the Prosecution to merely quote the provisions of Article 7(1) of the ICTY Statute or Article 6(1) of the ICTR Statute, respectively. Although the Prosecution had been repeatedly discouraged from the practice of simply restating the wording of the Statute - unless it intends to rely on all modes of liability contained therein - the Appeals Chamber held that the indictment had not been defective.

7. A holistic interpretation of this jurisprudence would ultimately lead to the conclusion that, while it is acceptable not to plead a specific mode of liability expressly stated in the Statute (such as committing or aiding and abetting), an indictment can be ruled to be defective for merely failing to provide an interpretation of the mode of liability, here the participation in a joint criminal enterprise, and even in a particular category of joint criminal enterprise.[13]

8. In my opinion, it must be expected in the future that the Prosecution determines, at least before the close of its case, its position also with respect to the mode of liability. In case the Prosecution believes that based on the evidence admitted before the end of the trial there is a need to re-determine the mode of liability from its perspective, it has the right and the obligation to do so, e.g. by giving a judicial hint or requesting the admission of an amended indictment. It might render the trial unfair if an accused has to defend himself against all the modes of liability foreseen in the Statute, which sometimes overlap if not conflict. Such a re-qualification by the Prosecution normally warrants granting the Defense additional time to react to such an amendment, if it so wishes.

C. The Criminal Responsibility of the Appellant

9. The Appeals Chamber correctly reaffirms the unanimous factual findings of the Trial Chamber[14] in relation to the Appellant's link to the unlawful arrest and detention of non-Serb civilians, the confinement under inhumane conditions of non-Serb prisoners, the forced labour of

[11] *See* this Judgement, para. 20. *See also Naletilić and Martinović* Appeal Judgement, para. 23. This also applies to the ICTR jurisprudence. *See Gacumbitsi* Appeal Judgement, para. 49.
[12] *Semanza* Appeal Judgement, para. 358.
[13] Apart from these main observations, related to the concrete case before us, this view is further supported by the fact that the specific manner in which the Appeals Chamber requests the Prosecution to plead a crime was only set out in the *Krnojelac* Appeal Judgement in 2003, para. 138, whereas the Trial in the instant case already had started in 2001. It is difficult to see how the Prosecution was supposed to comply with requirements that were not even specified at the time in question.
[14] Judge Lindholm disagreed with the majority only with regard to the legal concept of joint criminal enterprise. *See* Trial Judgement, Separate und Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 2.

Bosnian Croat and Bosnian Muslim civilians and the forcible displacement of non-Serb civilians.[15] The Appeals Chamber, however, instead of upholding the conviction for committing persecutions, convicts the Appellant for only aiding and abetting persecutions. There was no error of law invalidating the decision in the Trial Chamber's holding that the Appellant was guilty of committing persecutions.[16] The Appeals Chamber is therefore not in a position to set aside this conviction and should have upheld the Appellant's conviction for "committing" persecutions.

10. I also do not agree with the way the theory of joint criminal enterprise was applied by the majority of the Trial Chamber:

11. On a more general note, I wish to point out that it would have been possible to interpret Article 7(1) of the Statute[17] as a monistic model of perpetration (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation.[18] Such an approach would have allowed the Prosecution to plead Article 7(1) of the Statute in its entirety without having to choose a particular mode of participation. In that case, the Judges would have been able to assess the significance of an accused's contribution to a crime under the Statute at the sentencing stage, thereby saving the Tribunal the trouble of developing an unnecessary participation doctrine. Unfortunately, the Tribunal's jurisprudence has come to distinguish on a case-by-case basis between the different modes of liability.

[15] Judgement, para. 301.

[16] On a different note, it has to be emphasized that the Trial Chamber was also correct in convicting the Appellant for persecutions only (Trial Judgement, paras. 1056-1058). According to the Appeals Chamber's jurisprudence at that time, a cumulative conviction was clearly not possible. Cumulative convictions, *i.e.* convictions for different crimes under the Statute, are permissible only if each crime involved has a materially distinct element not contained in the other (*Čelebići* Appeal Judgement, paras. 412-413). As the Trial Chamber found correctly, the crime of deportation does not contain an element which was materially distinct from the crime of persecutions. (See *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions; *Stakić* Appeal Judgement, Opinion Dissidente de Juge Güney sur le Cumul de Déclarations de Culpabilité; *Naletelić and Martinović* Appeal Judgement, Opinion Dissidente Conjointe des Juges Güney et Schomburg sur le Cumul de Déclarations de Culpabilité).

[17] *See* ICTY Statute, Art. 7(1): A person who planned, instigated, ordered, committed or *otherwise* aided and abetted […] *(*emphasis added). Art. 6(1) of the ICTR Statute is identical to this provision. My views therefore also apply to the ICTR Statute as stated in *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 6.

[18] *See*, for example, *Strafgesetzbuch* (Austria), Sec. 12: "Treatment of all participants as perpetrators"; for further details, *see W. Schöberl*, Die Einheitstäterschaft als europäisches Modell (2006), pp. 50-65; 197-227. *See* also *Straffeloven* (Denmark), Sec. 23(1), reprinted in Danish and in German translation in *K. Cornils* and *V. Greve*, Das Dänische Strafgesetz, 2nd edn. (2001); for further details, *see K. Cornils*, *ibid.*, p. 9. *See also Straffelov* (Norway), Sec. 58; for further details regarding Norway, *see W. Schöberl*, Die Einheitstäterschaft als europäisches Modell (2006), pp. 67-102; 192-227.

12. In the case at hand, the Trial Chamber applied the theory of joint criminal enterprise. However, this concept is not expressly included in the Statute and is only one possible interpretation of "committing" in relation to the crimes under the Statute.[19]

13. Indeed, the laws of the former Yugoslavia and the laws of the successor States on the territory of the former Yugoslavia all include the concept of co-perpetratorship:

State	Relevant Provision (in part as an unofficial translation)
Former Yugoslavia *(Krivični Zakon*, 1990*)*	Art. 22: "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."
Bosnia and Herzegovina (*Krivični Zakon Federacije Bosne i Hercegovine*, 2003)	Art. 29: "If several persons, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, jointly perpetrated a criminal offence, each shall be punished as prescribed for the criminal offence."
Croatia (*Kazneni Zakon*, 1999)	Article 35 (3): "Co-principals of a criminal offence are two or more persons who, on the basis of a joint decision, commit a criminal offence in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offence."
The former Yugoslav Republic of Macedonia *(Krivicen Zakonik*, 2004)	Art. 22: "If two or more persons, with their participation or any other special contribution to the perpetration of the crime, jointly commit a crime, each of them shall be punished with the sentence prescribed for that crime."
Montenegro *(Krivični Zakonik*, 2004)	Art. 23: "If several persons who, by participating in the perpetration of a criminal offence or by carrying out some other act, have jointly perpetrated a criminal offence, each shall be punished with the penalty prescribed for the criminal offence."
Serbia *(Krivični Zakon Republike Srbije*, 2005)	Art. 33: "Co-perpetrators: If several persons who, by participating in the perpetration of a criminal offence, have jointly perpetrated a criminal offence, or jointly perpetrated a criminal offence out of negligence, or in the course of the realization of a joint decision decisively contributed to the commission of the offence with some other act, each person shall be punished by the penalty prescribed for the criminal offence."
Slovenia *(Kazenski zakonik,* 1995)	Art. 25: "If two or more persons are engaged jointly in the committing of a criminal offence by collaborating in the execution thereof or by performance of any act representing a decisive part of the committing of the offence in question, each of these persons shall be punished according to the limits set down in the statutes for the offence in question."

The Statute of the Tribunal in Article 24(1) explicitly only provides for the Tribunal to have recourse to the general practice regarding prison sentences in the former Yugoslavia. However, this does not exclude the possibility that the Tribunal should also, by the same token, and (at least) as a matter of judicial fairness and courtesy have recourse to the relevant substantive laws applicable on the territory of the former Yugoslavia.

[19] *See in particular* **Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor**- Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany ("Expert Opinion").

14. Moreover, in many other legal systems, committing is interpreted differently from the jurisprudence of the Tribunal. Since Nuremberg and Tokyo, both national and international criminal law have come to accept, in particular, co-perpetratorship as a form of committing[20]. For example, the recent Comparative Analysis of Legal Systems, carried out by the Max-Planck-Institute, Freiburg, Germany, illustrates that, *inter alia*, the following States include co-perpetratorship in their criminal codes[21]:

State	Relevant Provision (in part as an unofficial translation)
Cameroon (*Livre I du Code pénal*)	Art. 96: "Est coautor celui qui participle avec autrui et en accord avec lui à la commission de l'infraction."
Chile *(Código Penal)*	Art. 15: "Se consideran autores: 3˚ Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo presencian sin tomar parte immediate en él."
Czech Republic *(Trestní zákon)*	Sec. 9(2): "If a crime is committed by the joint conduct of two or more persons, each of them shall be criminally liable as if he alone had committed the crime (accomplice)".
Germany *(Strafgesetzbuch)*	Sec. 25(2): "If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator)."
Greece *(Poinikos Kodikas)*	Art. 45: "Co-Perpetrators: If two or more persons commit a criminal offence jointly, each of them shall be punished as a perpetrator."
Hungary *(1978. évi IV. Törvény a Büntetö Törvénykönyvröl)*	Art. 20(2): "Co-principals are the persons who jointly realize the legal facts of an intentional crime in awareness of each other's activities."
Israel (חוק העונשין)	Section 29(b): "Participants in the commission of an offence, who perform acts for its commission are joint perpetrators, and it is immaterial whether all acts were performed jointly or some were performed by one person and some by another."
Japan *(.. Keihō)*	Art. 60: "(Co-principals): Two or more persons who jointly commit a criminal act shall all be dealt with as principals."
Mexico *(Código Penal)*	Art. 13(3): "Son autores o partícipes del delito: Los que lo realicen conjuntamente."
Netherlands *(Wetboek van Strafrecht)*	Art. 47(1): "As perpetrators of a criminal offence will be punished: Those who commit a criminal offence, who cause a criminal offence to be committed or who jointly commit a criminal offence."
Poland *(Kodeks Karny)*	Art. 18 §1 "Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration."
Portugal *(Código Penal)*	Art. 26: "É punível como autor quem executar o facto, por si mesmo ou por intermédio de outrem, ou tomar parte directa na sua execução, por acordo ou juntamente com outro ou outros, e ainda quem, dolosamente, determiner outra pessoa à prática do facto, desde que haja execução ou começo de execução."
Republic of Korea *(Hyeong-beop)*	§ 30: "Co-perpetratorship: If two or more persons commit a criminal offence jointly, each shall be punished as a perpetrator."
Spain *(Código Penal)*	Art. 28: "Son autores quienes realizan el hecho por sí solos, conjuntamente o por medio de otro del que se sirven como instrumento."

In addition, the following States have accepted the concept of co-perpetratorship:

[20] With all due respect, I maintain my position that co-perpetratorship is firmly entrenched in customary international law. Unfortunately, when the *Stakić* Trial Judgement was rendered, the Trial Chamber – solely composed of civil law judges – took it for granted that the notion of co-perpetratorship need not be academically supported by reference to State practice. With the availability of the Expert Opinion, supra *note* 19. such an empirical basis can now be delivered.

[21] *See* Expert Opinion, *supra* note 19. Moreover, this research illustrates that even States which do not codify co-perpetratorship in their criminal codes recognize this concept, as demonstrated by settled jurisprudence. This includes Sweden (Expert Opinion, Report on Sweden, p. 10) and France (Expert Opinion, Report on France, p. 6). Although not

State	Relevant Provision (in part as an unofficial translation)
Colombia *(Código Penal)*	Art. 29: "Son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte."
Finland *(Rikoslaki)*	Chapt. 5, Sec. 3: "If two or more persons have committed an intentional offence together, each is punishable as an offender."
Paraguay *(Código Penal)*	Art. 29(2): "También será castigado como autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización."

15. Co-perpetratorship in general requires "*joint functional* control over a crime".[22] Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.[23] The internationally renowned scholar, *Claus Roxin*, provides the following example typical of the conduct of alleged main perpetrators before both international *ad-hoc* tribunals:

> If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.[24]

16. Co-perpetratorship suits the needs of international criminal law particularly well. This was recognized upon the establishment of the International Criminal Court whose Statute, in Article 25(3)(a), includes the notion of co-perpetratorship:

> [Ağ person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, *jointly with another* or through another person, regardless of whether that other person is criminally responsible; Ғ…ğ[25]

Given the ample acknowledgement of co-perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law at least since the point in time when both *ad-hoc* Tribunals were vested with jurisdiction *ratione temporis* (ICTY: since 1991; ICTR: for 1994).

17. As an *international* criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law and to show open-mindedness, respect and tolerance – unalienable prerequisites to all kinds of supranational or international cooperation in criminal matters – by accepting internationally recognized legal interpretations and theories such as the notion of co-perpetratorship. Co-perpetratorship differs slightly from joint criminal enterprise with

included in the legal analysis of the Expert Opinion, Switzerland's courts have also developed a similar approach: *see M. A. Niggli* and *H. Wiprächtiger* (eds.), Basler Kommentar – Strafgesetzbuch I, Vor Art. 24 marginal number 7 et seq.

[22] *See Héctor Olásolo* and *Ana Pérez Cepeda*, 4 ICLR (2004), pp. 475-526.
[23] *See C. Roxin*, Täterschaft und Tatherrschaft, 8th edn. (2006), pp. 275-305. *See* also *K. Ambos*, in*: O. Triffterer* (ed.), Commentary on the Rome Statute of the International Criminal Court (1999), Art. 25 marginal no. 8.
[24] *See C. Roxin,* Täterschaft und Tatherrschaft, 8th edn. (2006), p. 279.
[25] Emphasis added.

respect to the key element of attribution.[26] However, both approaches widely overlap and have therefore to be harmonized in the jurisprudence of both *ad hoc* Tribunals. Such harmonization could at the same time provide all categories of joint criminal enterprise with sharper contours by combining objective and subjective components in an adequate way. As pointed out by the Appeals Chamber in the *Kunarac* Appeal Judgement, "the laws of war 'are not static, but by continual adaptation follow the needs of a changing world.'"[27] In general, harmonization will lead to greater acceptance of the Tribunal's jurisprudence by international criminal courts in the future and in national systems, which understand imputed criminal responsibility for "committing" to include co-perpetratorship. It is important to note that neither the law of Rwanda nor the law of the former Yugoslavia nor the law of the States on the territory of the former Yugoslavia employs the theory of joint criminal enterprise.

18. In my opinion, this approach towards interpreting committing is clearly reconcilable with the *Tadić* Appeal Judgement, which introduced joint criminal enterprise into ICTY jurisprudence. However, the *Tadić* Appeal Judgement does not only refer to "common (criminal) design", but also speaks expressly of "co-perpetrators".[28] Furthermore, the *Tadić* Appeals Chamber noted that in many post-World War II trials, courts "did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration."[29]

19. Finally, beyond the case before us, I regard it as my duty to point out that the concept of indirect perpetratorship ("perpetratorship by means") is a further internationally recognized form of committing. The fundamental difference between this concept and joint criminal enterprise becomes apparent when looking at the third category of joint criminal enterprise.[30] Indirect perpetration requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, i.e. the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.

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[26] While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship also depends on whether the perpetrator exercises control over the criminal act (objective criterion).
[27] *Kunarac* Appeal Judgement, para. 67, quoting the International Military Tribunal at Nuremberg.
[28] *See Tadić* Appeal Judgement, paras. 192, 220.
[29] *See Tadić* Appeal Judgement, para. 201, with further references.
[30] *Tadić* Appeal Judgement, para. 204: "The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. Ғ…ğ Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."

20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator").[31] This is especially relevant if crimes are committed through an organized structure of power. Since the identity of the direct and physical perpetrator(s) is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.[32] These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not.

21. For these reasons, the notion of indirect perpetratorship suits the needs of international criminal law particularly well.[33] It bridges any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed. The clear-cut subjective and objective requirements of indirect perpetratorship would enable the Tribunal to deal with cases currently subsumed under the third

[31] For a detailed analysis and references, *see Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide; *see also C. Roxin*, Täterschaft und Tatherrschaft, 8th edn. (2006), pp. 141-274; *see also Héctor Olásolo* and *Ana Pérez Cepeda*, 4 ICLR (2004), pp. 475-526.

[32] In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards (German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt.*. 40, pp. 218-240); Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetratorship (*See* Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, *see* 26 ILM (1987), pp. 317-372. The Argentine National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentine Code of Military Justice and in Art. 45 of the Argentine Penal Code. The Argentine Supreme Court upheld this judgement on 30 December 1986). The Expert Opinion gives further examples: In Portugal a law was enacted to address the crimes during the *Estado Novo* which made it possible to convict those organising the crimes "behind the scenes" by relying only on their function and power within the organisational system: Lei n.° 8/75 de 25 Julho de 1975, published in Boletim do Ministério da Justiça N° 249 de Outubro de 1975, p. 684 *et seq*. (cited in Report on Portugal, p. 15). The Spanish Tribunal Supremo employed the notion of "perpetrator behind the perpetrator" in a case dating from 1994: Sentencia Tribunal Supremo núm. 1360/1994 (cited in Report on Spain, p. 15). On a more general note *see C. Roxin*, Täterschaft und Tatherrschaft, 8th edn. (2006), pp. 242 - 252.

[33] This appears to be acknowledged also by Pre-Trial Chamber I of the International Criminal Court, who stated in a recent decision:

> In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, *the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime* referred to in the Prosecution's Application, *is provided for in article 25(3) of the Statute*, could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application.

Prosecutor v. Thomas Lubanga Dyilo, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, para. 96 (emphasis added, footnotes omitted).

category of joint criminal enterprise without having to create a new mode of liability not foreseen in the Statute.[34]

[34] For a critical analysis of the third category of joint criminal enterprise *see M. E. Badar*, "Just Convict Everyone!"*(...)*, 6 ICLR (2006), p. 293-302, specifically note 47: "The term "**j**ust **c**onvict **e**veryone" [emphasis added] was used by Professor *William Schabas* as an alternative to the third category of JCE during a lecture at the 5th Annual 'International Criminal Court-Summer Course' Galway, 2005.

D. Conclusion

22. If an accused is alleged to have been a perpetrator of a crime under the Statute by way of acting together with others, it is sufficient for the indictment to charge "committing" as the relevant mode of participation. The underlying material facts pleaded in the indictment have to reveal that the accused acted, at least based on *dolus eventualis,* together with others to commit the alleged crime.

23. Co-perpetratorship is an internationally recognized and accepted concept relating to the commission of a crime by two or more individuals acting together. It is reconcilable to a large extent with the established jurisprudence of this Tribunal and has the advantage of providing exact requirements when determining individual criminal responsibility under Article 7(1) of the Tribunal's Statute, without endangering any previous judgement. It is thus the noble obligation of this Tribunal to acknowledge these facts and abandon its current disregard of co-perpetratorship, which is an established criminal concept of liability.

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

Dated this 28th day of November 2006,
At the Hague,
The Netherlands.

_____
Wolfgang Schomburg
Judge

[Seal of the Tribunalğ

X. PARTIALLY DISSENTING OPINION OF JUDGE LIU

1. I support all of the Appeals Chamber's conclusions of fact and law, with the exception of the final sentence. Having taken into account the many factors discussed in the Judgement, I must respectfully find that, in my view, the reduction in the Appellant's sentence does not fully reflect the Appeals Chamber's findings on appeal.

2. While the Appellant's crimes are undoubtedly grave, I am of the view that, considering the degree to which the Appeals Chamber's findings differ from those of the Trial Chamber, a more considerable reduction in sentence is warranted. Before submitting my views on this, however, I believe it is helpful to briefly restate the relevant conclusions of the Appeals Chamber:

> a) The Appellant's criminal responsibility for persecutions was re-qualified from that of co-perpetration in a joint criminal enterprise to that of aiding and abetting.[1]
> b) The Trial Chamber's findings were insufficient to support the Appellant's conviction for cruel and inhumane treatment for the beating and torture of detainees as an underlying act of persecutions.[2]
> c) The Trial Chamber impermissibly double-counted the Appellant's authority as President of the Crisis Staff/War Presidency as an aggravating factor for sentencing purposes.[3]
> d) The Trial Chamber impermissibly treated the fact that the Appellant was a member of the medical profession as an aggravating factor.[4] Findings c) and d) reduce the number of aggravating factors by half, from four to two.[5]

3. It is a general sentencing principle in this Tribunal that "the gravity of the offence is the primary consideration when imposing a sentence and is the 'litmus test' for determining an appropriate sentence."[6] The Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the Appellant's conduct, but the 2 year reduction in his sentence is not in

[1] Appeal Judgement, paras 74, 189, 300.
[2] Appeal Judgement, paras 131, 138.
[3] Appeal Judgement, para. 268-269.
[4] Appeal Judgement, paras 270-274.
[5] Appeal Judgement, para. 267; See also Trial Judgement, paras 1078-1084.
[6] *Momir Nikolić* Sentencing Appeal Judgement, para. 11; *Čelebići* Appeal Judgement, para. 731; *Krstić* Appeal Judgement, fn. 431; *Kupreškić et al*. Appeal Judgement, para. 442.

proportion to the considerable reduction in the gravity of his crimes that is reflected in the four findings above.[7]

4. While it is within the discretion of the Appeals Chamber to adjust a Trial Chamber's sentencing decision on appeal,[8] we remain bound by certain guidelines in the exercise of this function. One of these guidelines is that, in determining the gravity of the offence, the sentencing Chamber must consider the "form and degree of participation of the accused in the crime."[9] The majority of the Appeals Chamber significantly reduced the degree to which the Appellant is found to have participated in the persecutions for which he was convicted. It also changed the form of his participation from co-perpetration in a joint criminal enterprise to an aider and abettor. In the exercise of the Appeals Chamber's discretion, these two facts must be taken into account and given appropriate weight in the computation of a fitting sentence for him. Having considered them and the overall circumstances of this case, I am persuaded that the Appellant's sentence should have been reduced by more than 2 years.

5. Furthermore, according to the jurisprudence of this International Tribunal, aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate for responsibility as a co-perpetrator in a joint criminal enterprise.[10] A conviction that is reduced from co-perpetration in a joint criminal enterprise to aiding and abetting therefore "merits a considerable reduction" in sentence.[11] In the *Vasiljević* Appeal Judgement, a re-qualification of the Appellant's responsibility from co-perpetrator in a joint criminal enterprise to aider and abettor resulted in his sentence being reduced from twenty years to fifteen years.[12] Similarly, in the *Krstić* Appeal Judgement, despite the fact that only a fraction of the Appellant's convictions were reduced from co-perpetration in a joint criminal enterprise to aiding and abetting, and that the Appeals Chamber added a new conviction, his sentence was reduced from forty-six to thirty-five years.[13]

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[7] *See Krstić* Appeal Judgment, para. 268: "[T]he revision of Krstić's conviction to aiding and abetting… merits a considerable reduction of his sentence."
[8] *See* Appeal Judgement, para. 300. *See* also *Krstić* Appeal Judgement, para. 266; *Vasiljević* Appeal Judgement, para. 181; *Krnojelac* Appeal Judgement, paras 263-264.
[9] *Vasiljević* Appeal Judgement, para. 156. *Furundžija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182, referring to *Kupreškić* Trial Judgement, para. 852.
[10] *Vasiljević* Appeal Judgement, para. 182, n.291; *Krstić* Appeal Judgement, para. 268.
[11] *Krstić* Appeal Judgement, para. 268.
[12] *Vasiljević* Appeal Judgement, para. 182; *Vasiljević* Trial Judgement, para. 309.
[13] *Krstić* Appeal Judgement, para. 275; *Krstić* Trial Judgement, para 726.

6. Unlike the *Vasiljević* and *Krstić* Appeal Judgements, this Judgement set aside a conviction and absolved two aggravating factors.[14] The cumulative weight of these findings merits a further reduction in sentence. Instead, the Appellant received a lesser reduction in his sentence.[15]

7. I emphasize that I do not promote establishing a practice whereby a reduction in liability from that of co-perpetration in a joint criminal enterprise to that of aider and abettor warrants a fixed reduction in sentence. I agree with the majority that penalties must be individualized to fit the individual circumstances of each case, and comparison of sentences provides only limited assistance because "often the differences are more significant than the similarities".[16] However, while comparing cases is often of limited assistance, it is of some assistance.[17] The differences and similarities between these three cases are more favourable to the Appellant in this case. Accordingly, his sentence should be considerably reduced.

8. In this regard, I am also mindful of the statement in the *Čelibići* Appeal Judgement that "two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences".[18] If this is true, then it must also be true that two accused whose criminal responsibilities have been similarly re-qualified should not in practice receive disproportionate reductions in their sentences.

9. Finally, other than the gravity of the Appellant's offence, a sentencing Chamber must also take into account mitigating and aggravating circumstances. In this case, two of the four aggravating circumstances that were found by the Trial Chamber were rejected by the Appeals Chamber.[19] With regard to the Appellant's position as President of the Crisis Staff/War Presidency, the Trial Chamber found that, "[a]s noted in Stakić, the 'commission of offences by a person in such a prominent position aggravates the sentence *substantially*.'"[20] Because the Appeals Chamber rejected consideration of this factor, the sentence imposed should, accordingly, enjoy a *substantial* reduction to reverse the effect of the original substantial aggravation.

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[14] Appeal Judgement, paras 131, 138, 268-274.
[15] The Appellant's sentence was reduced from 17 to 15 years.
[16] *See* Appeal Judgement, para. 238; *Čelibići* Appeal Judgement, para. 719.
[17] *Čelibići* Appeal Judgement, para. 719: "[Similar circumstances] are therefore not reliable as the *sole* basis for sentencing an individual." (Emphasis in original).
[18] *Čelibići* Appeal Judgement, para. 719.
[19] Appeal Judgement, paras 267-274. I note that the Appeals Chamber has also confirmed the Trial Chamber's finding that the Appellant possessed discriminatory intent as an aggravating factor; however, because discriminatory intent was already taken into account (as an element of co-perpetration in a joint criminal enterprise) when the Trial Chamber arrived at 17 years as the appropriate sentence, it should not be reconsidered on Appeal. *See* Appeal Judgement, para. 275.
[20] Trial Judgement, para. 1082, referring to *Stakić* Trial Judgement, para. 913 (Emphasis added).

10. In summary, the Appellant's sentence is disproportionate in two respects. First, it is disproportionate to the Appeal Chamber's findings on appeal; and second, it is disproportionate to the sentence reductions that were granted in prior Judgements where the Appeals Chamber decreased the Appellant's responsibility from that of a co-perpetrator in a joint criminal enterprise to that of an aider and abettor. It is because of these two imbalances that I must regretfully depart from the Majority in its assessment of the appropriate sentence, and offer this Partial Dissent.

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

Dated this 28th day of November 2006,
At the Hague,
The Netherlands.

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Judge Liu Daqun

[Seal of the Tribunalğ

XI. ANNEX A – PROCEDURAL HISTORY

A. Notice of Appeal and Briefs

1. On 17 November 2003, in accordance with Rule 108 of the Rules, the Appellant filed his Notice of Appeal against the Trial Judgement.

2. On 13 January 2004, the Appellant filed a motion seeking an extension of time to file his Appeal Brief thirty days from the day that the Trial Judgement would become available in BCS.[1] The Prosecution did not object to the Appellant's request.[2] On 19 January 2004, the Pre-Appeal Judge granted the requested extension.[3] Accordingly, the Appellant filed his Appeal Brief on 17 June 2004. The Prosecution filed its Confidential Response Brief on 27 July 2004, and the Appellant filed his Reply Brief on 10 August 2004. Pursuant to an order issued by the Pre-Appeal Judge[4] the Prosecution filed a public redacted version of its Confidential Response Brief on 19 October 2004.[5]

3. On 10 August 2004, the Appellant filed a motion to amend his Notice of Appeal, requesting leave to add an alternative formulation, to the existing second ground of appeal.[6] The Prosecution did not oppose the motion but submitted that the Appellant should only be allowed to amend his Notice of Appeal to match the language found in paragraph eight of his Appellant's Brief.[7] In his reply the Appellant agreed to modify his motion to comply with the Prosecution's suggestion.[8] On 16 September 2004, the Appeals Chamber granted the Appellant's motion.[9] The Appellant filed the Amended Notice of Appeal on 22 September 2004.

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[1] Motion of Blagoje Simi} for Extension of Time to file Appellate Brief and Request for Expedited Decision, 13 January 2004.
[2] Prosecution Response to "Motion of Blagoje Simi} for Extension of Time to file Appellate Brief and Request for Expedited Decision", 14 January 2004.
[3] Decision on Motion of Blagoje Simi} for Extension of Time to File Appellate Brief and Request for Expedited Decision, 19 January 2004.
[4] Order, 20 September 2004.
[5] Referred to in the present judgement as: "Response Brief".
[6] Motion of Blagoje Simi} to Amend Notice of Appeal to Add Alternative Ground, 10 August 2004.
[7] Prosecution's Response to Motion to Amend Notice of Appeal, 20 August 2004.
[8] Reply of Blagoje Simić to Prosecution's Response to Motion to Amend Notice of Appeal, 27 August 2004.
[9] Decision on Motion to Amend Notice of Appeal.

4. On 20 August 2004, the Prosecution filed a motion whereby it requested the Appeals Chamber to strike paragraphs 14-16 of the Reply Brief.[10] In his response filed on 27 August 2004, the Appellant opposed the motion and contended that the paragraphs in question concerned a factual statement made in the Response Brief.[11] The Prosecution filed its reply on 30 August 2004.[12] On 27 September 2004, the Appeals Chamber dismissed the Prosecution's motion to strike and found that paragraphs 14-16 of the Reply Brief fell within the scope of a brief in reply.[13]

B. Assignment of Judges

5. On 15 December 2003, Judge Theodor Meron, then President of the International Tribunal, assigned Judge Fausto Pocar, Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Wolfgang Schomburg and Judge Inés Mónica Weinberg de Roca to hear the present appeal. On 19 January 2004, having been elected as Presiding Judge in the present appeal pursuant to Rule 22(B) of the Rules, Judge Mehmet Güney issued an order designating himself as the Pre-Appeal Judge with responsibility for all pre-appeal proceedings in this case.[14] On 15 July 2005, Judge Theodor Meron, then President of the International Tribunal, issued an order assigning Judge Andrésia Vaz to replace Judge Inés Mónica Weinberg de Roca.[15] On 24 November 2005, Judge Fausto Pocar, President of the International Tribunal, issued an order assigning Judge Liu Daqun to replace him.[16]

C. Disclosure of Evidence

6. On 25 June 2004, the Appellant filed a motion for disclosure of evidence, wherein he requested the Appeals Chamber to obtain and review medical records concerning the psychiatric condition of Stevan Todorovi} for the purpose of adjudicating his sixteenth ground of appeal.[17] Pursuant to an order granting an extension of time,[18] the Prosecution filed a response on 12 July 2004, opposing the Appellant's motion.[19] The Appellant replied on 16 July 2004.[20] On 23 September 2004, the Appeals Chamber dismissed the motion for disclosure of evidence in its entirety.[21]

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[10] Prosecution's Motion to Strike, 20 August 2004.
[11] Response of Blagoje Simi} to Prosecution's Motion to Strike, 27 August 2004.
[12] Prosecution's Reply to Response of Blagoje Simi} to Prosecution's Motion to Strike, 30 August 2004.
[13] Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004.
[14] Order Designating a Pre-Appeal Judge, 19 January 2004.
[15] Order Replacing a Judge in a Case before the Appeals Chamber, 15 July 2005.
[16] Order Replacing a Judge in a Case before the Appeals Chamber, 24 November 2005.
[17] Motion of Blagoje Simi} for Disclosure of Evidence, 25 June 2004.
[18] Decision on Motion for Extension of Time Limit, 6 July 2004. *See* Motion for Extension of Time Limit, 2 July 2004.
[19] Prosecution's Response to Motion for Disclosure of Evidence with Confidential and *Ex-Parte* Annex A, 12 July 2004.
[20] Reply of Blagoje Simi} to Prosecution's Response to Motion for Disclosure of Evidence, 16 July 2004.
[21] Decision on Motion for Disclosure.

7. On 3 February 2006, the Appeals Chamber, *proprio motu,* granted the Appellant and his Defence access, subject to certain conditions, to two medical reports filed confidentially in the sentencing proceedings against Stevan Todorovi}.[22] These medical reports were provided to the Appellant with redactions ordered by the Appeals Chamber following Stevan Todorovi}'s application for additional protective measures.[23]

8. On 27 February 2006, the Appellant filed a motion requesting: access to the medical records of Stevan Todorović pertaining to the period when he gave evidence in the present case; leave to disclose the medical records in question – as well as those medical reports which had been previously disclosed to the Appellant – to an expert; an extension of time for the filing of additional submissions in relation to his sixteenth ground of appeal, and the postponement of the appeal hearing.[24] On 28 February 2006, the Prosecution filed a response opposing the motion in its entirety.[25] On 1 March 2006, the Appellant filed his reply.[26] On 15 March 2006, the Appeals Chamber issued a decision whereby it granted the motion in part, granted the request for variation of time-limit and postponement of the date of the appeal hearing, and set out a schedule for the filing of the additional submissions regarding the sixteenth ground of appeal.[27]

D. Further submissions

9. Pursuant to the Appeals Chamber decision of 15 March 2006, the Appellant filed his Further Submissions on the Sixteenth Ground of Appeal on 5 April 2006. The Prosecution filed its response on 18 April 2006, and the Appellant filed his reply on 24 April 2006.

E. Additional Evidence

10. On 5 April 2006, the Appellant filed a motion whereby he requested the Appeals Chamber to admit as additional evidence pursuant to Rule 115 of the Rules, the medical reports pertaining to Stevan Todorovi} attached as annexes to the Further Submissions on the Sixteenth Ground of

[22] *Proprio Motu* Order.
[23] Decision on Application of Stevan Todorovi} for Additional Protective Measures, Partly Confidential, 22 February 2006.
[24] Motion of Blagoje Simić (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to vary Scheduling Provisions of Orders of 3 February and 17 February 2006, Confidential, 27 February 2006.
[25] Prosecution's Response to Urgent Motion Filed 27 February 2006, Confidential, 28 February 2006.
[26] Reply of Blagoje Simić to Prosecution Response to Urgent Motion Filed on 27 February 2006, Confidential, 1 March 2006.
[27] Decision on Blagoje Simić's Motion (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to vary Scheduling Provisions of Orders of 3 February and 17 February 2006, Confidential, 15 March 2006, Public Redacted Version filed on 17 March 2006.

Appeal, or alternatively, take judicial notice of the said medical reports.[28] The Prosecution filed a response opposing the motion on 18 April 2006.[29] The Appellant filed his reply on 24 April 2006.[30] On 1 June 2006, the Appeals Chamber issued a decision whereby it dismissed the Appellant's motion in its entirety.[31]

F. Provisional Release

11. On 29 September 2004, the Appellant filed a motion seeking provisional release for a fixed period – from 4 to 9 November 2004 – in order to attend memorial services for his late father in [amac, Republika Srpska.[32] The Prosecution opposed the motion for provisional release, *inter alia,* on the grounds that the Appellant was already convicted, that there was a risk he would abscond from custody, and that the guarantee provided by the Government of the Republika Srpska should not be relied upon.[33] The Appellant filed his reply on 8 October 2004.[34] On 21 October 2004, the Appeals Chamber granted the motion in part, and ordered that the Appellant be provisionally released from 4 to 7 November 2004, under certain terms and conditions.[35]

12. On 2 May 2006, the Appellant filed an urgent motion whereby he requested to be provisionally released from 10 to 25 May 2006 in order to attend memorial services for his late mother in the Municipality of Šamac, Republika Srpska, organize a number of Orthodox religious services, and deal with legal formalities related to the death of his parents.[36] The Prosecution did not oppose the Appellant's provisional release for the necessary period to attend the memorial service, but opposed the motion to the extent that additional time was requested to deal with legal formalities.[37] On 5 May 2006, prior to the expiration of the time-limit for the Appellant to file a reply, the Appeals

[28] Motion of Blagoje Simić for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice, Confidential, 5 April 2006.
[29] Prosecution's Consolidated Response to Simić's Additional Evidence Motion and to his Further Submissions of 5 April 2006, Partly Confidential, 18 April 2006.
[30] Reply of Blagoje Simić to Prosecution's Consolidated Response to Further Submissions on 16th Ground of Appeal and Motion for Admission of Additional Evidence or Taking of Judicial Notice, Confidential, 24 April 2006.
[31] Decision on Motion pursuant to Rules 115 and 94(A).
[32] Motion of Blagoje Simi} Pursuant to Rule 65(I) of the Rules of Procedure and Evidence for Provisional Release for A Fixed Period to Attend Memorial Services for his Father, 29 September 2004.
[33] Prosecution's Response to Blagoje Simi}'s Motion for Provisional Release for Fixed Period to Attend Memorial Services for his Father, Confidential, 5 October 2004.
[34] Reply of Blagoje Simi} to Response of Prosecution to Motion of Ŧsicğ Pursuant to Rule 65(I) of the Rules of Procedure and Evidence for Provisional Release for A Fixed Period to Attend Memorial Services for his Father, 8 October 2004.
[35] Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004. *See* Corrigendum, 22 October 2004.
[36] Motion of Blagoje Simi} for Short Fixed Period of Provisional Release to Attend Memorial Services for his Mother, 2 May 2006. *See Corrigendum to* Motion of Blagoje Simi} for Short Fixed Period of Provisional Release to Attend Memorial Services for his Mother, 3 May 2006.
[37] Prosecution's Response to Blagoje Simi}'s Urgent Motion for Provisional Release to Attend Memorial Service for his Mother, 3 May 2006.

Chamber granted the motion and ordered that the Appellant be provisionally released for a fixed period from 10 May 2006 to 25 May 2006, under certain terms and conditions.[38]

G. Status Conferences

13. Status Conferences were held in accordance with Rule 65*bis*(B) of the Rules on 5 March 2004,[39] 17 June 2004,[40] 20 October 2004,[41] 17 February 2005,[42] 15 June 2005, [43] 13 October 2005,[44] 17 February 2006,[45] 2 June 2006,[46] and 2 October 2006.[47]

H. Appeal Hearing

14. In preparation for the Appeal Hearing, the parties jointly requested the Appeals Chamber to indicate the issues and questions arising from the grounds of appeal and the briefs in which the Chamber was particularly interested.[48] On 17 February 2006, pursuant to Rule 114 of the Rules, the Appeals Chamber issued an order scheduling the hearing in the present appeal on 20 March 2006.[49]

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[38] Decision on Motion of Blagoje Simi} for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother, 5 May 2006.
[39] Scheduling Order, 5 February 2004.
[40] Scheduling Order, 9 June 2004.
[41] Scheduling Order, 23 September 2004.
[42] Scheduling Order, 26 January 2005.
[43] Scheduling Order, 13 May 2005.
[44] Scheduling Order, 16 September 2005.
[45] Scheduling Order, 20 January, 2006.
[46] At the conclusion of the Appeal Hearing, the Pre-Appeal Judge asked the Appellant whether he had any questions to raise pursuant to Rule 65*bis* of the Rules. The Appellant did not taise any issues. AT. 151.
[47] Scheduling Order, 7 September 2006.
[48] Joint Request in Relation to the Appeals Hearing, 19 January 2006.
[49] Scheduling Order for Appeal Hearing, 17 February 2006.

However, such order was vacated and the hearing was postponed pursuant to the request of the Appellant's Counsel.[50] The Appeal Hearing took place on 2 June 2006.[51]

XII. ANNEX B: GLOSSARY OF TERMS

A. List of Court Decisions

1. ICTY

ALEKSOVSKI Zlatko
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").

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

BABI] Milan
Prosecutor v. Milan Babi}, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babi}* Judgement on Sentencing Appeal").

BLAGOJEVI] Vidoje and JOKI] Dragan
Prosecutor v. Vidoje Blagojevi} and Dragan Joki}, Case No. IT-02-60-A, Decision on Motion by Radivoje Mileti} for Access to Confidential Information, 9 September 2005.

Prosecutor v. Vidoje Blagojevi} and Dragan Joki}, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005.

BLA[KI] Tihomir

[50] Decision on Blagoje Simić's Motion (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 and 17 February 2006, Public Redacted Version, 17 March 2006, p. 7.
[51] Order Re-Scheduling Appeal Hearing, 5 May 2006.

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v Tihomir Bla{ki}, Case No. IT-95-14-A, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002.

Prosecutor v. Tihomir Bla{ki}, Case No. IT-95-14-A, Decision on Appellants Dario Kordi} and Mario ^erkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Tihomir Bla{ki}*, 16 May 2002 ("*Bla{ki}* 16 May 2002 Decision").

Prosecutor v. Tihomir Bla{ki}, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Bla{ki}* Rule 115 Decision").
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN Radoslav
Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001.

Prosecutor v. Radoslav Br|anin and Momir Tali}, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement).

"ČELEBIĆI" (A)
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

^E[I] Ranko
Prosecutor v. Ranko ^e{i}, Case No. IT-95-10/1, Sentencing Judgement, 11 March 2004 ("*^e{i}* Sentencing Judgement").

DERONJIĆ Miroslav
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004 ("*Deronjić* Sentencing Judgement").

ERDEMOVI] Dra`en
Prosecutor v. Dražen Erdemovi}, Case No. IT-96-22-T *bis*, Sentencing Judgement, 5 March 1998 ("*Erdemovi}* 1998 Sentencing Judgement").

FURUNDŽIJA Anto
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GALIĆ Stanislav
Prosecutor v. Stanislav Gali}, Case No. IT-98-29-A, Decision on Defence Second Motion for

Additional Evidence Pursuant to Rule 115, 21 March 2005.

HAD@IHASANOVI] AND KUBURA
Prosecutor v. Enver Had`ihasanovi}, Mehmed Alagi} and Amir Kubura,* Case No. IT-01-47-PT, Decision on Motion by Mario ^erkez for Access to Confidential Supporting Material, 10 October 2001 ("*Had`ihasanovi} 10 October 2001 Decision").

JELISIĆ Goran
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ Miodrag
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Sentencing Appeal Judgement").

KORDIĆ Dario and ČERKEZ Mario
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement").

KRNOJELAC Milorad
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60.

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement").

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, signed on 17 September 2003, filed on 5 November 2003 ("*Krnojelac* Appeal Judgement").
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Separate Opinion of Judge Shahabuddeen, 17 September 2003 ("*Krnojelac* Separate Opinion of Judge Shahabuddeen").

KRSTI] Radislav
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").

Prosecutor v. Radislav Krsti}, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krsti}* Rule 115 Decision").

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC et al.
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

KUPREŠKIĆ et al.
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santi}, Case No.: IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, Confidential, 11 April 2001.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santi}, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal

Judgement").

KVOČKA et al.
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Prosecutor v. Mladen Naletili} and Vinko Martinovi}, Case No. IT-98-34-A, Decision on Naletili}'s Consolidated Motion to Present Additional Evidence, 20 October 2004 ("*Naletili} and Martinovi}* October 2004 Rule 115 Decision").

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Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*D. Nikolić* Sentencing Appeal Judgement").

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Amended Indictment").

Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari}, Case No. IT-95-9-T, Decision on the Prosecution's Motion for Leave to Amend the Indictment, 20 December 2001 ("Decision to Amend the Third Amended Indictment").

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Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari}, Case No. IT-95-9-T, Written Reasons for Decision on Motions for Acquittal, 11 October 2002 ("Rule 98*bis* Decision").

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Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004 ("Decision on Motion to Amend Notice of Appeal").

Prosecutor v. Simi}, Case No. IT-95-9-A, Decision on Motion of Blagoje Simi} for Disclosure of Evidence, 23 September 2004 ("Decision on Motion for Disclosure").

Prosecutor v. Simi}, Case No. IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004.

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June 2006, ("Decision on Motion pursuant to Rules 115 and 94(A)").

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VASILJEVIĆ Mitar
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

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Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004.

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Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-1-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement").

KAYISHEMA Clément and RUZINDANA Obed
The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement and Sentence").

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NIYITEGEKA Eliézer
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NTAGERURA et al. ("CYANGUGU")
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-Arrêt, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

NTAKIRUTIMANA Elizaphan and Gérard
Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement and Sentence").

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SEMANZA Laurent
Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SERUSHAGO Omar
Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgment, 6 April 2000 ("*Serushago* Appeal Judgement").

B. List of Other Legal Authorities

Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction IT/201").

C. List of Designated Terms and Abbreviations

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

Amended Notice of Appeal	*Prosecutor v. Blagoje Simi},* Case No. IT-95-9-A, Appellant Blagoje Simi}'s *Amended* Notice of Appeal Filed pursuant to the Decision of the Presiding Judge of 16 September 2004, 22 September 2004
Appeal Brief	*Prosecutor v. Blagoje Simi},* Case No. IT-95-9-A, Appellate Brief of Blagoje Simi}, 17 June 2004
Appellant	Blagoje Simi}
AT.	Transcript page from the Appeal Hearing in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
BCS	Bosnian Croatian Serbian language
Confidential Response Brief	*Prosecutor v. Blagoje Simi},* Case No. IT-95-9-A, Prosecution's Response Brief (Confidential), 27 July 2004
Corrigendum to Third Amended Indictment	*Prosecutor v. Milan Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-PT, Corrigendum to Third Amended Indictment, 27 April 2001
Crisis Staff	Serbian Municipality of Bosanski [amac Crisis Staff
Defence Final Trial Brief	*Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-T, Dr. Blagoje Simi}'s Public (Redacted & Corrected) Final Trial Brief, 7 July 2003
First Amended Indictment	*Prosecutor v. Milan Simi}, Miroslav Tadi} a.k.a. "Miro Brko", Simo Zari} a.k.a. "[olaja"*, Case No. IT-95-9-I, First Amended Indictment, 24 June 1998
Fifth Amended Indictment	*Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-T, Fifth Amended Indictment, 30 May 2002
Fourth Amended Indictment	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-T, Fourth Amended Indictment, 9 January 2002
Further Submissions on the Sixteenth Ground of Appeal	*Prosecutor v. Blagoje Simi}*, Case No. IT-95-9-A, Further Submissions of Blagoje Simi} Relating to Sixteenth Ground of Appeal (Confidential), 5 April 2006
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
International Tribunal	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
ICTY	*See* International Tribunal
indictment/ indictment against the Appellant	All versions of the indictment
Initial Indictment	*Prosecutor v. Slobodan Miljkovi} a.k.a. "Lugar", Blagoje Simi}, Milan Simi}, Miroslav Tadi} a.k.a. "Miro Brko", Stevan Todorovi} a.k.a. "Stiv", "Stevo", "Monstrum", Simo Zari} a.k.a. "[olaja"*, Case No. IT-95-9-I, Indictment, 29 June 1995
Joint Defence Response of 11 December 2001	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi} and Simo Zari},* Case No. IT-95-9-T, Joint Defense Response to the Prosecution's Motion for Leave to Amend the Indictment, 11 December 2001
Motion to Amend the Second Amended Indictment	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari},* Case No. IT-95-9-PT, Prosecutor's Motion for Leave to Amend Indictment (Confidential), 24 April 2001
Motion to Amend the Third Amended Indictment	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-T, Prosecution's Motion for Leave to Amend the Indictment, 5 December 2001
Motion for Disclosure	*Prosecutor v. Blagoje Simi}*, Case No. IT-95-9-A, Motion of Blagoje Simić for Disclosure of Evidence, 25 June 2004
Notice of Appeal	*Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari},* Case No. IT-95-9-A, Appellant Blagoje Simi}"s Notice of Appeal, 17 November 2003
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Prosecution Pre-Trial Brief	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari},* Case No. IT-95-9-PT, Prosecutor's Pre-Trial Brief pursuant to Rule 65*ter*(E)(i), 9 April 2001

Prosecution Witness List and Exhibit List	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari},* Case No. IT-95-9-PT, Prosecution Witness List and Exhibit List (Confidential), 9 April 2001
Prosecution's Response to the Further Submissions on the Sixteenth Ground of Appeal	*Prosecutor v. Blagoje Simi}*, Case No. IT-95-9-A, Prosecution's Consolidated Response to Simi}'s Additional Evidence Motion and to his Further Submissions of 5 April 2006 (Partly Confidential), 18 April 2006
Redaction of Second Amended Indictment	*Prosecutor v Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Stevan Todorovi}, Simo Zari}*, Case No. IT-95-9-PT, Redaction of Second Amended Indictment, 25 March 1999
Response Brief	*Prosecutor v. Blagoje Simi},* Case No. IT-95-9-A, Public Redacted Version of Prosecution's Response Brief of 27 July 2004, 19 October 2004
Reply Brief	*Prosecutor v. Blagoje Simi},* Case No. IT-95-9-A, Reply Brief of Blagoje Simi} (Partly Confidential), 10 August 2004
Reply to Prosecution's Response to Further Submissions on the Sixteenth Ground of Appeal	*Prosecutor v. Blagoje Simi}*, Case No. IT-95-9-A, Reply of Blagoje Simi} to Prosecution's Consolidated Response to Further Submissions on 16th Ground of Appeal and Motion for Admission of Additional Evidence or Taking of Judicial Notice, 24 April 2006
Rule 98*bis* Motion	*Prosecutor v.Blagoje Simi}*, *Miroslav Tadi}, Simo Zari},* Case No. IT-95-9-T, Defendant Blagoje Simi}'s Motion for Judgment of Acquittal, 13 September 2002
Rule 98*bis* Response	*Prosecutor v. Blagoje Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-T, Motion pursuant to Rule 127(A)(ii) to File Public Redacted Version of the Prosecutor's Response to the Accused's Motions for Acquittal pursuant to Rule 98*bis* and Corrigendum to the Confidential Prosecutor's Response to the Motions for Judgement of Acquittal Made by the Accused pursuant Rule 98*bis* and Filed on the 27th September 2002, 30 September 2002
Rules	Rules of Procedure and Evidence of the International Tribunal unless reliance on earlier version is indicated in text: IT/32/Rev. 38, 13 June 2006.
SDS	Serbian Democratic Party
Second Amended Indictment	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Stevan Todorovi}, Simo Zari}*, Case No. IT-95-9-PT, Second Amended Indictment, 25 March 1999
SUP	Secretariat of the Interior (also referred to in the Trial Judgement as MUP), police station, public security station

T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
Third Amended Indictment	*Prosecutor v. Blagoje Simi}, Milan Simi}, Miroslav Tadi}, Simo Zari}*, Case No. IT-95-9-PT, Third Amended Indictment, 24 April 2001
Trial Chamber	The Trial Chamber of the International Tribunal composed by Judges Florence Ndepele Mwachande Mumba, Sharon A. Williams, and Per-Johan Lindholm
PTSD	Post traumatic stress disorder
UNPA	United Nations Protection Area
UNPROFOR	United Nations Protection Forces