INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88-T

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle - Reserve Judge

Acting Registrar: Mr. John Hocking

Date Filed: 30 July 2010

THE PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

PUBLIC REDACTED VERSION OF THE FINAL TRIAL BRIEF ON BEHALF OF DRAGO NIKOLIĆ

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Dragan Krgović and David Josse for Milan Gvero
Peter Haynes and Simon Davis for Vinko Pandurević

PROSECUTOR v. POPOVIĆ *ET ALS.*

CASE No. IT-05-88-T

FINAL TRIAL BRIEF ON BEHALF OF DRAGO NIKOLIĆ

OUTLINE

STRUCTURE OF THE FINAL BRIEF ON BEHALF OF DRAGO NIKOLIĆ

STRUCTURE OF THE FINAL BRIEF

1. This Final Trial Brief Submitted on Behalf of Drago Nikolić (the "Nikolić Brief") comprises ten parts as illustrated in the outline on page 1. A detailed **TABLE OF CONTENTS** is also enclosed in Annex A with a view to assisting the Trial Chamber in understanding the exact contents of each part.
2. Parts One to Ten of this Nikolić Brief, each have a specific purpose as follows.
3. **PART ONE** sets out in general terms, without the benefit of detailed references, the Prosecution's case as well as the case for the Defence. It also serves the purpose of an executive summary: (a) giving a general overview of the foundation and basic submission on which the case for the Defence was built and presented; (b) providing a summary of what the evidence reveals concerning the duties and responsabilities as well as the whereabouts of Drago Nikolić at the relevant times; and (c) setting out the submissions of the Defence regarding all allegations which the Prosecution has failed to prove beyond a reasonable doubt;
4. **PART TWO** sets out the legal submissions of the Defence relevant to this case, including the discussion of specific legal issues arising from the Indictment as well as an overview of the essential elements related to the modes of liability and the crimes alleged in the Indictment;
5. **PART THREE** provides all information concerning Drago Nikolić including the duties and responsibilities of the Accused in his capacity as Assistant Commander for Security as well as his character;
6. **PART FOUR** sets out the arguments of the Defence as well as the detailed reasons concerning seven Prosecution witnesses and one Chamber witness as to why the evidence they provided can be attributed little or no probative value;
7. **PART FIVE** provides the submissions of the Defence concerning the first Joint Criminal Enterprise alleged by the Prosecution – the forcible transfer of the Muslim population from the Srebrenica and Žepa enclaves - as well as the justifications as to why Drago Nikolić was not a member thereof. Consequently, other modes of liability are addressed concerning the events related to this Joint Criminal Enterprise. This part relates more specifically to Counts 7 and 8.
8. **PART SIX** provides the submissions of the Defence concerning the second Joint Criminal Enterprise alleged by the Prosecution – the execution of all able-bodied men

from Srebrenica - as well as the justifications as to why Drago Nikolić was not a member thereof. Consequently, other modes of liability are addressed concerning the events related to this Joint Criminal Enterprise. This part relates more specifically to counts 3, 4 and 5.

9. **PART SEVEN** sets out the arguments of the Defence supporting the conclusion that no genocide took place in Srebrenica in July 1995 as well as the detailed submissions as to why - even if the Trial Chamber finds that a genocide did take place - Drago Nikolić incurs no individual criminal liability for this crime;

10. **PART EIGHT** sets out the arguments of the Defence supporting the conclusion that no conspiracy to commit genocide took place in Srebrenica in July 1995 as well as the detailed submissions as to why - even if the Trial Chamber finds that a conspiracy to commit genocide did take place - Drago Nikolić incurs no individual criminal liability for this crime;

11. **PART NINE** addresses the arguments of the Defence as to why Drago Nikolić never committed illegal acts towards the Muslim population with the required discriminatory intent;

12. **PART TEN** finally provides the submissions of the Defence regarding the adjudication of the charges led against the Accused.

PART ONE - PRELIMINARY SUBMISSIONS

A. PROCEDURAL BACKGROUND

13. Drago Nikolić was initially indicted on 6 September 2002 in Case no. IT-08-63.

14. On 15 March 2005, he surrendered voluntarily and was subsequently transferred in the custody of the International Tribunal on 17 March 2005.

15. On 20 April 2005, he pleaded not guilty to all charges laid against him.

16. On 21 September 2005, the Indictment against Drago Nikolić was joined to that of seven other accused in *The Prosecutor v. Popovic et als*., Case No. IT-05-88-PT.

17. On 4 April 2006, during his further appearance as a result of the joinder, Drago Nikolić again pleaded not guilty to all charges.

18. On 26 June 2006, Milorad Trbić was severed from the Indictment, leaving seven co-accused in Case No. IT-05-88-PT.

19. Trial proceedings began on 14 July 2006 and the last witness testified *viva voce* before the Trial Chamber on 15 July 2009, exactly 3 years and one day later.

20. Pursuant to the Trial Chamber`s Order from 27 March 2009, as modified orally by the Trial Chamber on 2 July 2009, Counsel for the Defence of Drago Nikolić (the "Accused" or the "Defence") hereby file this Nikolić Brief pursuant to Rule 86(B).

21. On 2 July 2009, the Trial Chamber granted the Defence leave to submit a final brief not exceeding 350 pages.

B. THE BURDEN OF PROOF

22. Pursuant to Rule 87(A), a finding of guilt may be reached against the Accused only if a majority of the Trial Chamber is satisfied that his guilt has been proved beyond reasonable doubt for any of the counts in the Indictment.

23. The Defence insists on the fact that the burden to prove the guilt of the Accused beyond a reasonable doubt rests firmly on the Prosecution. Moreover, in application of this universal standard which governs all criminal proceedings, the Accused has no burden of proof.

24. Furthermore, in a case of this magnitude, involving seven co-accused and during which the evidence of more than 250 witnesses has been adduced - either *viva voce* or pursuant to Rules 92*bis*, 92*ter*, 92*quater* and 94*bis* - and more than 7,000 exhibits have been admitted, the Defence respectfully submits that it is all the more important to scrupulously adhere to the standard of *"proof beyond reasonable doubt"*.

C. THE PROSECUTION'S CASE AGAINST DRAGO NIKOLIC

25. The Prosecution has charged the Accused with eight counts, including: Genocide - Count 1; Conspiracy to commit genocide - Count 2; Extermination - Count 3; Murder as Crime against Humanity – Count 4; Murder as Violation of the Laws and Customs of War – Count 5; Persecutions – Count 6; Forcible Transfer – Count 7; and Deportation – Count 8.

26. It is highly significant, as will be argued in this Nikolić Brief, that two of the Co-accused in this case – Radivoje Miletić and Milan Gvero – have not been charged with genocide, conspiracy to commit genocide and persecution.

I. GENERAL ALLEGATIONS IN THE INDICTMENT

27. The Prosecution`s case against the Accused includes four main components.

28. Firstly, the Prosecution alleges that Drago Nikolić was a member of a joint criminal enterprise of the first category, the common purpose of which was to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS, amounting to or involving the crimes of forcible transfer and deportation.

29. Secondly, the Prosecution alleges that Drago Nikolić was a member of a joint criminal enterprise of the first category, the common purpose of which was to summarily execute and burry all the able-bodied men from Srebrenica, amounting to or involving the crimes of extermination and murder, either as a crime against humanity or as a violation of the laws and customs of war.

30. Thirdly, the Prosecution alleges that the Accused committed the crimes of conspiracy to commit genocide and genocide, involving four components as described in the Indictment and discussed in this Nikolić Brief.

31. Fourthly, the Prosecution alleges that Drago Nikolić incurs individual criminal responsibility for persecutions as a crime against humanity, including murder, cruel and inhumane treatment, terrorizing the civilian population, destruction of personal property and forcible transfer.

32. Furthermore, the Prosecution also alleges that certain opportunistic killings and persecutions were the natural and foreseeable consequence of the two joint criminal enterprises advanced in the Indictment for which Drago Nikolić incurs individual criminal responsibility pursuant to the JCE category three mode of liability.

II. SPECIFIC ALLEGATIONS RELATED TO THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF DRAGO NIKOLIĆ

33. The Indictment includes many specific allegations concerning the acts and conduct of Drago Nikolić, the most important ones being that: (a) with intent to destroy in part a national, ethnical, racial or religious group as such, he (i) entered into an agreement to kill all able bodied men from Srebrenica and remove the remaining Muslim population of Srebrenica and Žepa from the RS and (ii) killed members of the group by summary execution, including planned and opportunistic executions and caused bodily or mental harm through the separation of able bodied man from their families and the forced

movement of the population from their homes to areas outside the RS; (b) with full knowledge of the plan to summarily execute all able-bodied men from Srebrenica, he (i) supervised, facilitated and oversaw the transportation of Muslim men from Bratunac to detention areas in the Zvornik area including the schools in Orahovac, Petkovci, Ročević, Kula and the Pilica cultural centre, from 13 through 16 July; (ii) oversaw and supervised their summary execution; and (iii) as Chief of Security of ZBde he had the responsibility for the handling of all Bosnian Muslim prisoners on the ZBde zone of responsibility and to ensure their safety and welfare, which he failed to do; (c) with full knowledge of the plan to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS, he: (i) assisted in the planning, organizing and supervising of the transportation from Bratunac from 13 through about 16 July; (ii) same as (b)(i) above; and (iii) same as (b)(ii) above; and (d) it was foreseeable to him that opportunistic killings and persecutory acts would be carried out by Serb forces during the joint criminal enterprise to forcibly transport and deport the Muslim population from the Srebrenica and Žepa enclaves.

34. Notably, the above allegations derived from the Indictment, were expanded upon and translated into much more specific allegations in the Prosecution Pre-Trial Brief, filed on 28 April 2006.

35. All the above allegations will be addressed in this Nikolić Brief.

D. THE CASE FOR THE DEFENCE OF DRAGO NIKOLIĆ

36. From the beginning, the position of the Accused has been that: (a) even though Drago Nikolić was a member of the ZBde and although he was present in the area of Zvornik when these crimes were allegedly committed, there is no basis for charging him with Counts 1, 2, 5, 6, 7, and 8; (b) as the Security Organ of the ZBde, Drago Nikolić did not use his power and authority to ensure that prisoners within his control were efficiently detained, transported and executed; (c) Drago Nikolić was not involved in covering up the execution of prisoners through the reburial of victims; and (d) the facts of this case do not support the conclusion that a genocide was committed in Srebrenica as alleged by the Prosecution.Moreover, if a genocide was committed, Drago Nikolić incurs no liability for this crime.

37. Throughout the trial proceedings, the position of the Defence, expanded upon in the Defence Pre Trial Brief[1], has not changed.

I. GENERAL OVERVIEW

38. The case for the Defence of Drago Nikolić rests first and foremost on the submission that the Prosecution, in accordance with the shotgun approach, has overcharged the Accused without any basis.

39. Secondly, the case of the Defence rests on the premise that the Prosecution's main witnesses supporting its case against Drago Nikolić, lied under oath and that little or no probative value can be attributed to the evidence they provided.

40. Thirdly, despite the magnitude of the trial record - including the number of witnesses heard and the number of exhibits admitted - highly relevant evidence which would have been of significant assistance in establishing the truth and placing the acts and conduct of the Accused in their proper context, was not been adduced by the Prosecution either voluntarily or because it was not available.

41. Fourthly, in his capacity of ZBde Security Organ, Drago Nikolić was not "amongst the most powerful individuals" and his duties and responsibilities were in fact very different from what is alleged in the Indictment.

42. Lastly, the acts and conduct of Drago Nikolić at the times relevant to the Indictment reveal a completely different picture from what the Prosecution suggested in the Indictment as well as in its Pre Trial Brief and Opening Statement[2].

II. THE LACK OF CREDIBILITY OF PROSECUTION WITNESSES

43. The Defence posits that the Prosecution failed to prove most of its allegations against Drago Nikolić because no probative value can be attributed to the evidence provided by its most important witnesses, who were not credible, did not tell the truth under oath and fabricated evidence which cannot be accepted. This includes but is not limited to: (a) PW-168, REDACTED; (b) Sreco Aćimović, who did not tell the truth with the aim of evading and/or minimizing his individual criminal liability; (c) PW-101, REDACTED; (d) PW-108, REDACTED; and (e) PW-102 who lied under oath and

[1] Pre Trial Brief on Behalf of Drago Nikolić Pursuant Rule 65*ter*(F), 12 July 2006.
[2] T.373,L.22-T.531,L.22.

provided evidence coming out of nowhere, which the Defence did not have the possibility to challenge.

III. MISSING EVIDENCE

44. In addition, the Defence submits that the Prosecution Case was irreparably affected by the evidence which was not adduced. For example, the Prosecution did not call any of the ZBde Officers who acted as ZBde Operations Duty Officer for the period of 12-16 July, including: (a) Milan Marić whose evidence was admitted pursuant Rule 92*quater*; (b) Sreten Milošević who was withdrawn; (c) Dragan Jokić who refused to testify; (d) Drago Nikolić, the Accused who did not testified; and (e) Milorad Trbić who was severed from this case and is now tried in Sarajevo.

45. Regarding Sreten Milošević, it is significant that in the end he was called by the Defence. Indeed, in cross examination, while the Prosecution attempted to challenge his credibility, it failed to do so and did not engage him on most material aspects of his evidence in chief. Milošević provided highly valuable and helpful evidence on many issues relevant to this case.

46. The Prosecution also decided not to call certain key available witnesses such as *inter alia*: (a) M. Jasikovac; (b) R. Krstić; (c) M. Živanović; (d) D.Vasić; (e) P. Golić; and (f) M. Jolović. In these circumstances, the Defence submits that where the evidence which could have been provided by these witnesses, is such that it could have made a difference in the Trial Chamber assessment of a given situation, the absence thereof must play in favor of the Accused.

47. As for Momir Nikolić, even though in the end he was called by the Trial Chamber, the fact that he was withdrawn by the Prosecution and the reasons for this withdrawal, are revealing.

48. The Defence recalls that the Prosecution negotiated a plea agreement with Momir Nikolić who provided a statement of facts, which marked a significant change in the Prosecution case against the Accused. Yet, the Prosecution was willing *not* to rely on the evidence which could be provided by Momir Nikolić because they considered him to be adverse and not credible.

49. In the category of documentary evidence, it is also noteworthy that many documents, which could have been of significant assistance to establish the truth, have not been adduced by the Prosecution.

50. Over and above the fact that the Prosecution has been authorized by the Trial Chamber to almost double its documentary case during this Trial[3] – which created a significant burden for all co-accused who were constantly kept off balance by the Prosecution's strategy and were never informed of the case they had to meet – many important documents are still not available to the Trial Chamber for the purpose of adjudicating this case.

51. The type of documents which the Prosecution did not adduce include *inter alia*: (a) the ZBde MP Company's daily journal; (b) all documents produced at the Battalion level; (c) the ZBde list of Operations Duty Officers; as well as (d) a number of telegrams exchanged between the ZBde and either the DrinaK or the Main Staff.

52. REDACTED

53. REDACTED

IV. THE DUTIES AND RESPONSIBILITIES OF DRAGO NIKOLIĆ

54. Drago Nikolic was the Security Organ of the ZBde. In this capacity, the focus of his work in July 1995, should have been counter-intelligence. However he was involved in other activities such as brigade or IKM Operations Duty Officer.

55. As for his relationship with the ZBde MP company, Drago Nikolić was responsible for the professional management of the members of that company but he had no command authority over them. The commander of the MP company was Miomir Jasikovac and his immediate superior, who also exercised command over the company, was Vinko Pandurević in his capacity as ZBde Commander.

56. What is more, Drago Nikolić was not involved in any command decision regarding the deployment in the field of MP resources.

57. Regarding prisoners captured as a result of combat activities, Drago Nikolić as ZBde Security Organ did not have any specific responsibility regarding their handling and

[3] By the end of the trial,the Prosecution had adduced more than 3,000 exhibits whereas its original 65ter List of Porposed Exhibist comprised 2,100 documents.

their security. The interrogation of prisoners was also not part of his duties; this was an intelligence matter.

58. In this regard, although Drago Nikolić was the Assistant Commander for Security and Intelligence of the ZBde until January 1995, from that moment on, he was solely the ZBde Security Organ. Duško Vukotić was the Chief of Intelligence REDACTED and his assistant was Mico Petković.

59. Consequently, Drago Nikolić had very little information, if any, regarding the operational matters, the ZBde was involved in.

60. Lastly, the evidence reveals that Drago Nikolic was not involved - even though he was the ZBde Security Organ - in coordinating with the MUP.

V. THE WHEREABOUTS OF DRAGO NIKOLIĆ

61. The Defence submits that the evidence concerning the whereabouts of Drago Nikolić during the period of 11-17 July 1995, reveals a completely different picture from what the Prosecution suggested in the Indictment and in its Pre Trial Brief.

62. For 11 July, there is no evidence concerning the acts and conduct of Drago Nikolić on that day.

63. For 12 July, the evidence establishes that Drago Nikolić was off duty and there is no evidence as to what he did or where he was on that day.

64. For 13 July, it is established that Drago Nikolic was Operations Duty Officer at the IKM and the evidence reveals *infra* that he did not leave the IKM during the night of 13-14 July.

65. For 14 July, the evidence reveals that Drago Nikolić was picked up at the IKM in the morning. He returned to the ZBde Command for a meeting, following which he travelled to the Vidikovac Motel, where buses transporting prisoners arrived. He was then present at the school in Orahovac shortly after the prisoners arrived there. He was later seen at the intersection close to the school in Petkovci towards the end of the afternoon. He then returned to the school in Orahovac from where he drove to the ZBde IKM - to pick up his personal effects - and back, to Standard Barracks, arriving at night fall.

66. For 15 July, the evidence establishes that in the morning, he was present in front of the Command building in Standard Barracks. At 11h45 at the latest, he began his shift as

ZBde Operations Duty Officer and remained at Standard Barracks until 16 July in the morning.

67. For 16 July, the evidence reveals that in the morning he was either at Standard Barracks, in the immediate area of Zvornik or at his home in Zvornik, celebrating his wife's birthday. For the rest of the day, he was involved in the preparation of his cousin's funeral.

68. For 17 July, it is established that he was involved all day with his cousin's funeral.

69. Lastly, in September 1995 when the reburial operation allegedly took place, Drago Nikolić was away from the area of Zvornik.

E. DEFENCE SUBMISSIONS

70. In light of the basics of the case for the Defence set out above, the Defence posits, as demonstrated and argued in this Nikolić Brief, that the Prosecution did not succeed in proving most of its case against Drago Nikolić.

71. More specifically, the Defence submits that the Prosecution failed to prove beyond a reasonable doubt, *all* of the following allegations derived from the Indictment, from its Pre-Trial Brief or from its Opening Statement:

- That Drago Nikolić was ever informed or had knowledge of the evacuation of the Muslim population from Srebrenica - including the women, children and elderly from Potocari - to areas outside the control of the VRS;
- That Drago Nikolić was present in the area of Srebrenica, Potocari or Bratunac during the period from 10 to 13 July 1995;
- That Drago Nikolić was ever made aware or had knowledge of the evacuation of the Muslim population from Žepa to areas outside the control of the VRS**;**
- That Drago Nikolić was present in Žepa**,** during the period from 7 to 25 July 1995;
- That Drago Nikolić was made aware or had knowledge of Directives 4, 7 and 7.1[4];
- That Drago Nikolić was informed or had knowledge that a genocide was taking place in Srebrenica in July 1995;
- That Drago Nikolić entered into an agreement with other VRS officers to commit genocide;

[4] P29,P5.

- That Drago Nikolić had the intent to destroy, in whole or in part, the Bosnian Muslim group as such;
- That Drago Nikolić committed illegal acts with discriminatory intent against Bosnian Muslims;
- That Drago Nikolić was contacted by Vujadin Popović at the IKM, by telephone and informed of the impending arrival of Muslim prisoners in the area of Zvornik, in the early evening of 13 July 1995;
- REDACTED
- REDACTED
- That Drago Nikolić was informed or gained knowledge of the existence of a plan to execute all able-bodied men from Srebrenica;
- REDACTED
- That Drago Nikolić left the IKM and was replaced by Major Galić as ZBde IKM Operations Duty Officer in the evening of 13 July 1995;
- That Drago Nikolić ordered members of the MP Company to go to the school in Orahovac to provide security for Muslim prisoners who would be arriving and held there, until their exchange in the evening of 13 July 1995;
- That Drago Nikolić was present at the school in Orahovac during the night of 13 to 14 July 1995;
- That Momir Nikolić was present at the ZBde Command, asking for Drago Nikolić, in the evening of 13 July 1995;
- That Momir Nikolić subsequently travelled to the ZBde IKM where he would have had a conversation with Drago Nikolić, providing him with information coming from Ljubiša Beara;
- That Drago Nikolić was involved in the killing of prisoners at Orahovac REDACTED;
- That Drago Nikolić, on 14 July 1995, insisted on Lazar Ristić leaving his men behind at the school in Orahovac, in exchange for new uniforms;
- That Drago Nikolić had a conversation with PW-108 and PW-102 at the ZBde Command building, in Standard Barracks, at which time he would have mentioned the infamous words attributed to him;
- That Drago Nikolić was ever present at the execution site (Lažete 1 and 2) close to the school in Orahovac;

- That, although he was present at the school in Orahovac on two occasions on 14 July 1995, Drago Nikolić had any role in directing, supervising or assisting the preparations and/or the organization of the execution of prisoners held there;
- That Drago Nikolić was present at the school in Orahovac on 14 July, when the prisoners were being loaded on trucks;
- That, although he was present on the road leading to Petkovci school, some 500 meters before the school, in the late afternoon early evening of 14 July 1995, Drago Nikolić had any role in directing, supervising or assisting the preparations and/or the organization of the execution of prisoners held there;
- That Drago Nikolić was present at the school in Rocević during the period from 14 to 15 July 1995, when prisoners were held there;
- That Drago Nikolić was present in Kozluk when the prisoners initially held in the school at Rocević were executed;
- That coded telegrams were sent from the ZBe Command to Sreco Acimović at the 2nd Battalion Command, during the night of 14-15 July 1995, requesting him to provide soldiers to participate in the execution of prisoners;
- That Drago Nikolić called Sreco Aćimović by telephone during the night of 14-15 July 1995 and exerted pressure on him to provide soldiers to participate in the execution of prisoners;
- That Drago Nikolić was present at the school in Kula during the period from 14 to 16 July 1995;
- That Drago Nikolić was present at the Pilica Cultural center during the period from 14 to 16 July 1995;
- That Drago Nikolić was present at the Branjevo Farm during the period from 14 to 16 July 1995;
- That, even though in the morning of 14 July 1995, Drago Nikolić had a telephone conversation with Slavko Perić from the 1st Battalion, during which he provided him with information concerning the arrival of prisoners at the school in Kula, Drago Nikolić was informed or had knowledge at that time that these prisoners would be killed;
- That Drago Nikolić was involved in the reburial of prisoners from primary mass graves to secondary grave sites;

- That during the period from 13 to 14 July 1995, until he went to the ZBde IKM that night, that the Muslim prisoners about to arrive or who had arrived in the area of Zvornik would be killed;
- That Drago Nikolić was involved in the alleged execution of four Branjevo Farm Survivors on or about 19 July 1995;
- That Drago Nikolić was involved in the execution of wounded Muslims prisoners transferred from the Milici Hospital to the ZBde Command during the period from 13 to 15 July 1995.

F. SENTENCING CONSIDERATIONS

72. As acknowledged in this Part ONE and even though the Prosecution failed to prove beyond a reasonable doubt most of the allegations involving Drago Nikolić found in the Indictment and its Pre-trial Brief, the Defence respectfully submits that Drago Nikolić may incur individual responsibility solely on the basis of his presence at the school in Orahovac, on 14 July 1995.

73. Nevertheless, this Nikolić Brief will not address sentencing considerations at this stage.

74. Sentencing considerations will be addressed, in accordance with Rule 86(C), during closing arguments.

PART TWO – LEGAL SUBMISSIONS

75. This part of the Final Brief contains the legal submissions of the Defence and is divided into three chief sections: (i) specific legal issues raised by the Indictment; (ii) the essential elements of the modes of liability alleged in the Indictment; and (iii) the essential elements of the crimes alleged in the Indictment.

A. LEGAL ISSUES ARISING FROM THE INDICTMENT

76. In this section, the following issues arising from the Indictment are discussed: (i) State policy as an element of genocide; (ii) the crime of genocide as charged in the Indictment; (iii) the legal status of the members of the column; (iv) the conflation between conspiracy to commit genocide and JCE; (v) cumulative convictions for genocide and conspiracy to commit genocide; (vi) the *chapeau* requirements of Article

5; (vii) the victim group of forcible transfer; (viii) the *mens rea* applicable to deportation; and (ix) the legal qualification of the alleged reburial operation.

I. STATE POLICY AS AN ELEMENT OF GENOCIDE

77. The Defence respectfully submits that State policy to commit genocide is an element of the crime of genocide.

78. Although the Defence's submission ostensibly appears to constitute a departure from the jurisprudence of the ICTY and the ICTR, the Defence's submission, in actual fact, conforms to the state of international customary law concerning genocide.

79. The report submitted by Professor Schabas forms the basis of the Defence's submission and is set out *infra* in abbreviated form.

(A) The Lone *Génocidaire* Theory

80. Firstly, Professor Schabas argues that the theoretical possibility of a person committing genocide without the support of an overarching State policy, as recognized by the ICTY, is erroneous.[5] In his view, this conclusion was *"reached rather hastily, and the discussion is much too superficial for such a crucial issue."*[6]

81. The ICTY Trial Chamber supported its view by holding that *"the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide"* and *"[i]t ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime."*[7]

82. Professor Schabas contends that *"this is an extravagant interpretation of the Convention, a misunderstanding of its context and to a large extent a misreading of the intent of its drafters."*[8] He is unaware of the fact *"that the drafters of the Convention ever directly addressed the issue of State policy as an element of the crime of genocide"* and, in his opinion, this omission stems most likely from the fact that *"they believed the*

[5] Jelisić,TJ,para.99-100.
[6] Schabas,p.11.
[7] Jelisic,TJ,para.100.
[8] Schabas,p.12.

matter to be self-evident."[9] Moreover, according to Professor Schabas, the Trial Chamber's reasoning is not accompanied by persuasive sources.[10]

83. In addition, the Appeals Chamber's endorsement of the Trial Chamber's finding *"did not provide any more substantial analysis or insight into the question."*[11] The Appeals Chamber's endorsement, confined to a footnote,[12] is supported by an oral decision of the ICTR Appeals Chamber in Kayishema. However, the decision in question notes the Trial Chamber's determination that *"the massacres of the Tutsi population indeed were 'meticulously planned and systematically co-ordinated' by top-level Hutu extremists in the former Rwandan government."*[13] Consequently, Professor Schabas is inclined to treat *"Kayishema as supportive of the importance of a State Policy in a judicial inquiry into genocide, rather than authority that it is not an 'element'."*[14]

84. Finally, Professor Schabas indicates that the lone *génocidaire* theory led the negotiators to include the following element in the Elements of Crimes of the ICC: *"[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."*[15] He argues that *"[e]ven if the Elements do not explicitly provide support for a State policy element, they clearly reject the 'lone génocidaire' approach."*[16]

(B) State Policy for Crimes against Humanity

85. Secondly, Professor Schabas discusses the Appeals Chamber's holding that in the context of crimes against humanity, *"neither the attack for the acts of the accused needs to be supported by any form of 'policy' or 'plan'"*[17] Professor Schabas deems that *"it is clear that there is a symbiosis between the requirement of State policy for crimes against humanity and for genocide."*[18]

86. The Appeals Chamber's holding is, once again, confined to a footnote and a detailed explanation is not provided. Several authorities are cited by the Appeals Chamber in

[9] Schabas,p.11-12.
[10] Schabas,p.11.
[11] Schabas,p.13.
[12] Jelisić,AJ,para.48.
[13] Kayishema,AJ,para.138.
[14] Schabas,p.14.
[15] Elements of Crimes,p.2-4.
[16] Schabas,p.15.
[17] Kunarac,AJ,para.98.
[18] Schabas,p.17.

support of its finding but, in the view of Professor Schabas, *"it is not very clear how and why these references buttress the court's position."*[19]

87. Furthermore, the Appeals Chamber fails to consider several sources - statutory, doctrinal and jurisprudential – flying in the face of the Appeals Chamber's position.[20] For instance, article 7(2)(a) of the Rome Statute defines an "attack directed against any civilian population" as a *"course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population,* ***pursuant to or in furtherance of a State or organizational policy*** *to commit such attack."*

(C) State Policy in the State Responsibility Debate

88. Thirdly, Professor Schabas indicates that both the 2005 Darfur Report and the 2007 ICJ Judgment in the Genocide Case *"involved an inquiry into the existence of State policy rather than a search for the lone individual with genocidal intent."*[21]

89. The former concluded that *"the Government of Sudan has not pursued a* ***policy*** *of genocide"*[22] while the latter ruled that Bosnia and Herzegovina has not *"established the existence of that [specific] intent on the part of the Respondent, either* ***on the basis of a concerted plan****, or on the basis that the events reviewed above reveal* ***a consistent pattern of conduct*** *which could only point to the existence of such intent."*[23]

90. Professor Schabas concludes that *"[i]f the Darfur Commission and the International Court of Justice had actually accepted the theory by which genocide does not require a State policy, and by which it can be committed by a lone perpetrator, they would have looked for evidence that a single individual whose acts were attributable to Sudan or to Serbia had killed a member of a targeted group with the intent to destroy it in whole or in part."*[24]

(D) Specific Intent

91. Fourthly, Professor Schabas notes that the crime of genocide is described as a crime of "specific intent" although this term does not appear in Article II of the Genocide

[19] Schabas,p.17.
[20] Schabas,p.20-21.
[21] Schabas,p.23.
[22] Darfur Report,para.518(emphasis added).
[23] ICJ, Genocide Convention, para.376(emphasis added).
[24] Schabas,p.25.

Convention at all.[25] Indeed, according to Professor Schabas, the term "specific intent" has been employed, in point of fact, as a reference to State policy as opposed to individual criminal responsibility in different circumstances after the adoption of the Genocide Convention in 1948.[26]

92. However, the Akayesu Judgment, firmly establishing the term "specific intent" in genocide law without providing any authority,[27] *"marks the beginning of a focus on individual intent rather than State policy, using technical terms drawn from national criminal law that have previously been confined to the context of ordinary crimes."*[28] In Professor Schabas' view *"the term [specific intent] has been used only occasionally in common law, essentially in order to distinguish offences for which voluntary intoxication might be a full defence."*[29]

(E) A Knowledge-Based Approach to Genocidal Intent

93. Professor Schabas opines that the current approach, emphasising individual intent to commit genocide, ought to be shifted to a knowledge-based approach to the crime of genocide:

> *"[w]here there is a State policy to commit genocide, and where the accused has knowledge of the policy and commits punishable acts in furtherance of the policy, then the crime of genocide is committed. Where there is no State policy, it is irrelevant whether an individual harbours some 'specific intent' to physically destroy a protected group."*[30]

94. Professor Schabas considers that individual offenders need not participate in devising the policy and that the knowledge requirement is met if they commit acts of genocide with knowledge of the policy.[31] Furthermore, knowledge of a genocidal policy does not require knowledge that the policy satisfies the definition of genocide as a matter of law.[32] Finally, *"[t]he accused must also have knowledge of the consequences of his or her act in the ordinary course of events."*[33]

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[25] Schabas,p.28.
[26] Schabas,p.28-30.
[27] Akayesu,TJ,paras.496-497.
[28] Schabas,p.30.
[29] Schabas,p.31.
[30] Schabas,p.9.
[31] Schabas,p.35.
[32] Schabas,p.36.
[33] Schabas,p.36.

95. The approach suggested by Professor Schabas would resolve *"the potential for different results in terms of State responsibility and individual criminal liability."*[34] In addition, the knowledge-based approach would also address the problem of adjudicating complicity in genocide which has hitherto been solved by convicting those assisting the perpetration of genocide to the extent that the accomplice knows the intent of the perpetrator. Professor Schabas deems that *"it is not really very realistic to expect an individual to know the intent of another, especially when it is specific intent that is being considered."*[35]

(F) Conclusion

96. In conclusion, the Defence submits that the existence of a State policy to commit genocide is one of the essential elements which the Prosecution must prove beyond a reasonable doubt in order to secure a conviction for genocide.

97. As demonstrated in more detail below, the Prosecution's case falls desperately short in respect of this element. The record does not even contain a hint of the existence of a State policy to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

98. Consequently, an acquittal for the Count One Genocide is warranted.

99. Nevertheless, should the Trial Chamber find that the existence of a State policy to commit genocide is not one of the essential element which must be proved by the Prosecution, the Defence submits that the Prosecution still failed to prove that a genocide took place in Srebrenica in July 1995, on the basis of the essential elements of the crime of genocide.

II. THE CRIME OF GENOCIDE AS CHARGED IN THE INDICTMENT

100. The Defence notes that the charge of genocide contains four subheadings.[36] Therefore, the Prosecution's case is that the alleged genocide is comprised of four components: (i) the joint criminal enterprise to murder the able-bodied Muslim men; (ii) opportunistic killings; (iii) reburial of victims; and (iv) the destruction of the women and children.

[34] Schabas,p.28.
[35] Schabas,p.28.
[36] Indictment,paras.27-33.

101. In the Defence's submission, if the Prosecution fails to prove one or more of the components of the alleged genocide, the charge of genocide must be considered not to be proved beyond a reasonable doubt. Considering that three out of four components are not compatible with the definition of genocide, the charge must be dismissed.

(A) The Prosecution Erroneously Articulates the *Actus Reus* of Genocide

102. The Krstić Appeals Chamber deemed that the alleged forcible transfer was a factor supporting the conclusion that some VRS Main Staff officers harboured genocidal intent. More specifically, the Appeals Chamber held that: *"[t]he fact that the forcible transfer **does not constitute in and of itself a genocidal act** does not preclude a Trial Chamber from relying on it **as evidence of the intentions** of members of the VRS Main Staff."*[37]

103. However, the Indictment departs significantly from this conclusion and treats the alleged forcible transfer as amounting to two acts making up the *actus reus* of genocide. It is namely said that the alleged forcible transfer: (a) *"caused serious bodily or mental harm"*;[38] and/or (b) *"created conditions known to the Accused that would contribute to the destruction of the entire Muslim population of Eastern Bosnia."*[39] These allegations correspond to the definition of the underlying acts of genocide of: (a) *"causing serious bodily or mental harm to members of the group"*;[40] and/or (b) *"deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"*.[41]

104. It is the Defence's submission that the Prosecution erred in describing the alleged forcible transfer as constituting the *actus reus* of genocide. In accordance with the Appeals Chamber's decision, the alleged forcible transfer may only be employed as evidence of genocidal intent.

105. Genocide is limited to the physical or biological destruction of the protected group.[42] Assuredly, the alleged forcible transfer does not amount to physical or biological destruction, as acknowledged by the Appeals Chamber.[43]

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[37] Krstić,AJ,para.33(emphases added).
[38] Indictment,para.26(b).
[39] Indictment,para.33.
[40] Statute,art.4(b).
[41] Statute,art.4(c).
[42] Krstić,AJ,para.25.

106. Consequently, the alleged forcible transfer must be excluded from the Trial Chamber's assessment concerning the *actus reus* of the alleged genocide.

(B) Two of the Alleged Components Do Not Correspond to the Definition of Genocide

107. Two of the components of the alleged genocide do not correspond to the definition of genocide *per se.*

108. Firstly, the alleged "opportunistic killings" intrinsically target isolated individuals. Those responsible for the alleged "opportunistic killings" necessarily lack the requisite *mens rea* for genocide as they do not intend the destruction, in whole or in part, of the protected group as such. Indeed, the Appeals Chamber held that *"'opportunistic killings' by their very nature provide a very limited basis for inferring genocidal intent."*[44]

109. Secondly, the alleged "reburial operation" does not tally with the acts making up the *actus reus* of genocide. An operation of such a nature, in and of itself, is not a form of physical destruction. In addition, the alleged reburial operation is completely devoid of the *dolus specialis* required for genocide. Reburying victims does not display an intent to destroy, in whole or in part, the protected group as such.

110. The Blagojević and Jokić Trial Chamber characterized the alleged reburial operation as *"ex post facto aiding and abetting in the planning, preparation or execution of the murder operation."*[45] It is significant to note that the reburial operation was not treated as a component of the alleged genocide.

(C) Forcible Transfer *Vis-à-Vis* Genocide

111. What is more, the Defence takes note of the fact that two Accused are exempt from the allegation concerning genocide, i.e. Miletić and Gvero. The individual criminal responsibility of these two VRS Main Staff officers supposedly extends merely to the JCE to force the Muslim Population out of Srebrenica and Žepa.

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[43] Krstić,AJ,para.33.
[44] Blagojević,AJ,para.123.
[45] Blagojević,TJ,para.730.

112. However, the Indictment alleges that the fourth element of the alleged genocide – the destruction of the women and children – consists of *"the forcible transfer of the women and children from Srebrenica and Žepa."*[46]

113. The Prosecution can not have it both ways. It is inherently contradictory to allege that Miletić and Gvero participated in the JCE to forcibly remove the population lacking the *dolus specialis* for genocide whereas the act of forcible transfer itself allegedly constitutes a component of the alleged genocide.

114. Consequently, the Prosecution itself acknowledges that the alleged members of the JCE to forcibly transfer acted without the *dolus specialis* required for genocide. This component of the genocide must thus be considered to be unsupplied with the *dolus specialis* for genocide.

(D) Conclusion

115. The four-legged charge of genocide is inherently contradictory and constitutes a factual and legal hodgepodge. The Defence posits that the alleged genocide can not be proved as three of the four components of the alleged genocide are not consistent with the definition of genocide *per se*. A dismissal of Count 1 is thus warranted.

116. Should the Trial Chamber take the view that the first component alone suffices to establish the alleged genocide, the Defence submits, as demonstrated below, that the Prosecution failed to discharge its burden of proving that the alleged killings were carried out with the required *dolus specialis* for genocide.

III. THE LEGAL STATUS OF MEMBERS OF THE COLUMN

117. The legal status of members of the column leaving Srebrenica on 10 and 11 July 1995 is significant in at least four respects: (i) the lawfulness of the hostilities between the VRS and the column; (ii) the *actus reus* of the alleged genocide; (iii) the *mens rea* of the alleged genocide; and (iv) the alleged widespread and systematic attack against the civilian population.

118. As a preliminary matter, the Defence notes that the conflict in Bosnia and Herzegovina at the time relevant to the Indictment was fully governed by the law relative to non-international armed conflict.

[46] Indictment,para.33.

(A) The Column Was Composed of ABiH Military Personnel and Civilians

119. The Prosecution distinguishes three components making up the column that fled Srebrenica on 10 and 11 July 1995: (i) armed Bosnian Muslim military personnel; (ii) unarmed Bosnian Muslim military personnel; and (iii) civilians.[47]

120. The Defence posits that this distinction does not hold and that, in terms of IHL, the column must be considered to have consisted of two components only: (i) Bosnian Muslim military personnel, whether armed or unarmed; and (ii) civilians.

121. The Appeals Chamber found that, if a person is a member of an armed organization, *"the fact that he is not armed or in combat at the time of the commission of the crimes, does not accord him civilian status"*.[48]

122. The Prosecution's distinction between armed and unarmed Bosnian Muslim military personnel in the column is thus irrelevant and the Bosnian Muslim military personnel in the column, whether armed or unarmed, are thus not to be considered civilians.

(B) The Civilians in the Column Directly Participated in Hostilities

123. In respect of the civilians accompanying the Bosnian Muslim military personnel in the column, it must be determined whether they were directly participating in hostilities during the time the column engaged the VRS.

124. Common Article 3 only protects *"[p]ersons taking* ***no active part in the hostilities****"* *while article 13(3) of APII provides that "[c]ivilians shall enjoy the protection afforded by this part,* ***unless and for such time as they take a direct part in hostilities.****"* Consequently, like combatants, civilians directly participating in hostilities could have been lawfully attacked for the duration of their direct participation in hostilities.

125. The ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities (the "ICRC Guidance") indicates that *"[a]cts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and*

[47] Indictment,para.56.
[48] Blaškić,AJ,para.114.

the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict"[49]

126. In respect of the first criterion, the ICRC Guidance notes that *"a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."*[50] Military harm encompasses *"essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict."*[51] In addition, *"[t]he qualification of an act as direct participation does not require the materialization of harm reaching the threshold but merely the objective likelihood that the act will result in such harm."*[52]

127. The second requirement is satisfied if *"either the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold."*[53]

128. The third requirement entails that *"an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another."*[54]

129. The Defence submits that the civilians' accompaniment of the military personnel in the column qualifies as direct participation in hostilities. All three requirements identified above have been met.

130. Firstly, the civilians' accompaniment of the military personnel in the column adversely affected the military operations of the VRS and caused military harm. It was namely to be expected that the civilians' presence would strengthen the column increasing the threat posed to Zvornik and adversely affecting the strategic operations of the VRS. In addition, the presence of the civilians prevented the VRS from establishing control over the military personnel in the column which could lawfully be detained.

131. Secondly, the civilians' accompaniment of the military personnel in the column directly caused the military harm to the VRS. The column's departure from Srebrenica formed part of the military operation of linking up with the ABiH's 2nd Corps. The inclusion of

[49] ICRC Guidance,p.46.
[50] ICRC Guidance,p.47.
[51] ICRC Guidance,p.47.
[52] ICRC Guidance,p.47.
[53] ICRC Guidance,p.58.
[54] ICRC Guidance,p.64.

civilians into the column formed part of the same military operation and thus directly caused military harm to the VRS.

132. Finally, the civilians' accompaniment of the military personnel in the column was specifically designed to support the ABiH. If the civilians had merely wanted to leave Srebrenica, they would have left to Potočari. Accompanying a military force must be considered to have been specifically designed to cause harm to the VRS in support of the ABiH.

(C) The Column Was a Legitimate Military Objective

133. In any event, whether the civilians in the column directly participated in hostilities or not, this does not detract from the fact that the column could have been lawfully attacked by the VRS.

134. In the Defence´s submission, the column constituted a legitimate military objective in its entirety as it was impossible to discriminate between military personnel and those not directly participating in hostilities. Indeed, the Prosecution's military expert also considers the column a military objective.[55] International customary law provides that, in international and non-international armed conflicts, *"[a]ttacks may only be directed against military objectives"*[56] rendering attacks against such objects lawful.

135. In the alternative, the military personnel in the column could undoubtedly have been lawfully attacked by the VRS. International customary law holds that, in international as well as in non-international armed conflicts: *"[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be* ***excessive*** *in relation to* ***the concrete and direct military advantage anticipated****, is prohibited."*[57]

136. The death of any civilians resulting from hostilities between the VRS and the column is not excessive to the concrete and direct military advantage anticipated by the VRS. Firstly, the proportionality assessment must be informed by the Prosecution's admission that the column consisted of one-third armed military personnel whereas unarmed Bosnian Muslim military personnel constituted an undefined portion of the remaining

[55] T.20246.
[56] ICRC Customary Law Study,Rule7.
[57] ICRC Customary Law Study,Rule14(emphasis added).

two-thirds of the column.[58] As indicated above, the distinction between armed and unarmed Bosnian Muslim military personnel is irrelevant in terms of IHL and the only logical conclusion to be drawn is that a the column consisted for a large part, or perhaps in majority, of Bosnian Muslim military personnel. Secondly, the concrete and direct military advantage expected to be gained from engaging the column was enormous considering: (a) the threat posed to Zvornik; and (b) the 28th Division's aim to link up with the 2nd Corps of the ABiH. Therefore, any incidental loss of life or injury to civilians caused is in line with the proportionality assessment.

(D) Conclusion

137. Consequently, the Defence posits that the members of ABiH in the column were military personnel, whether armed or unarmed. In addition, the civilians in the column directly participated in hostilities. Be that as it may, the column in its entirety or, at least the military personnel in the column, could have been lawfully attacked by the VRS. Any incidental loss of civilian life was not excessive to the anticipated military advantage gained by the VRS.

138. The legal status of the members of the column is crucial in respect of the allegation that genocide was committed.

139. Firstly, the deaths of the civilians and military personnel arising out of hostilities between the VRS and the column must be excluded from the *actus reus* of genocide. IHL must be considered the applicable *lex specialis* as it regulates situations of armed conflict in detail. These deaths must thus be considered lawful insofar they are a result of hostilities conducted in full respect of the applicable IHL. Considering that the underlying act of genocide of "killing" relates to "murder", lawful deaths must thus not be taken into account in determining the *actus reus* of genocide.

140. Secondly, as will be demonstrated in detail below,[59] the hostilities between the VRS and the column, in conjunction with the decision allowing the column to pass through VRS defence lines, constitute strong indications as to the lack of *dolus specialis* required for genocide. The column was a legitimate military objective and could have been lawfully attacked. A legal basis for attacking the column necessarily negates the

[58] Indictment,para.56.
[59] PartVIII : "THE *MENS REA* APPLICABLE TO THE CRIME OF DEPORTATION".

mens rea required for genocide. In addition, if the intent had been to destroy, in whole or in part, the protected group as such, the column would not have been allowed to pass.

IV. THE PROSECUTION CONFLATES JCE WITH CONSPIRACY TO COMMIT GENOCIDE

141. In the Defence's submission, the Prosecution entirely misapprehends and misapplies the notions of JCE and conspiracy to commit genocide.

142. The Prosecution's conflation of conspiracy to commit genocide and JCE results in a failure to allege the substantial elements of conspiracy to commit genocide. The Defence, therefore, submits that Count 2 should be dismissed in its entirety.

(A) JCE and Conspiracy to Commit Genocide Are Distinct as Such

143. Firstly, the Defence posits that the Prosecution wholly disregards the legal nature of conspiracy to commit genocide and JCE.

144. The Prosecution avers that *"the underlying facts and agreement of the Conspiracy to commit genocide are **identical** to the facts and agreement identified in the Joint Criminal Enterprise."*[60] This amounts to a conflation between JCE and conspiracy to commit genocide.

145. In the Defence's submission, JCE and conspiracy to commit genocide, by their very nature, differ fundamentally. Conspiracy to commit genocide is an inchoate crime whereas JCE is a mode of liability falling within the ambit of "committing" pursuant to Article 7(1). The Appeals Chamber confirmed that JCE *"is simply a means of committing a crime; it is not a crime in itself."*[61]

146. In respect of the charge of genocide, the burden of proof requires the Prosecution to prove: (i) that the acts in Eastern Bosnia in July 1995 constitute genocide; and (ii) that the Accused incurs individual criminal responsibility for genocide. The Prosecution carries the same burden in respect of the charge of conspiracy to commit genocide as it must prove: (i) that there was a conspiracy to commit genocide in Eastern Bosnia in July 1995; and (ii) that the Accused is individually criminally responsible for conspiracy to commit genocide.

[60] Indictment,para.34.
[61] Kvočka,AJ,para.91.

147. The Prosecution asserts, in essence, that the second part of the analysis relating to genocide also establishes the first part of the analysis relating to conspiracy to commit genocide. In other words, the Prosecution argues that the individual criminal responsibility of the Accused for genocide equals the existence of a conspiracy to commit genocide.

148. The Defence submits that these issues are wholly separate. Establishing individual criminal responsibility for genocide can not be equated with establishing the *actus reus* of conspiracy to commit genocide. The JCE to murder the able-bodied Muslim men is a form of individual criminal responsibility for genocide which can not substitute any of the essential elements of the inchoate crime of conspiracy to commit genocide. Similarly, the Stakić Trial Chamber held in respect of genocide and the third category of JCE that *"the application of a mode of liability can not replace a core element of a crime"*.[62]

149. Consequently, the nature of JCE – a mode of liability – and conspiracy to commit genocide – an inchoate crime – precludes an equation. The Prosecution must not be allowed to blur the distinction between modes of liability and substantive crimes.

(B) The Elements of JCE and Conspiracy to Commit Genocide Are Distinct

150. Secondly, over and above the fact that JCE and conspiracy to commit genocide constitute are entirely different in nature, the Prosecution errs in equating the constitutive elements of conspiracy to commit genocide and JCE.

(I) "Agreement" and "Common Plan, Design or Purpose"

151. The Prosecution maintains that the *"underlying ... agreement of the Conspiracy to commit genocide [is]* ***identical*** *to the ... agreement identified in the Joint Criminal Enterprise."*[63]

152. As set out in more detail below, the *actus reus* of conspiracy to commit genocide requires *"a concerted agreement to act for the purpose of committing genocide"*.[64] On

[62] Stakić,TJ,para.530.
[63] Indictment,para.34(emphasis added).
[64] Nahimana,AJ,para.896.

the other hand, the *actus reus* of JCE necessitates a *"common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."*[65]

153. The Defence submits that, as a matter of law, the requirement of an "agreement" for conspiracy to commit genocide is entirely distinct from the "common plan, design or purpose" required for JCE.

154. Firstly, the agreement required for conspiracy to commit genocide is aimed at a specific crime, i.e. genocide. The goal of the conspiracy must thus exactly be agreed upon in advance by the conspirators. In addition, their mindset must specifically be geared towards the commission of genocide. In contrast, the "common plan, design or purpose" required for JCE need not seek the commission of a specific crime. The only requirement is that the "common plan, design or purpose" *"amounts to or involves the commission of **a crime** provided for in the Statute."*[66]

155. Secondly, in the jurisprudence of the International Tribunal, a so-called "fluid" JCE has been recognized which allows for the possibility of adding expanded crimes to the JCE in addition to the crimes originally agreed upon.[67] Conversely, conspiracy to commit genocide must specifically and exclusively relate to genocide and does not allow for the possibility of adding additional crimes to the agreement to commit genocide.

156. Thirdly, this conclusion is supported by the plain meaning of the terms "agreement", "plan", "design" and "purpose". Webster's defines agreement as *"harmony of ... action"*[68] indicating that all participants must be fully and unreservedly engaged towards the achievement of the final goal, i.e. genocide. In contrast, the definitions of "plan", "design" or "purpose" omit any reference to a "harmony" of action.[69] The absence such a requirement in respect of "plan", "design" and "purpose" suggests that their plain meaning denotes that less stringent requirements attach to these terms.

157. In conclusion, it is evident that the "agreement" required for conspiracy to commit genocide and the "common plan, design or purpose" can not be identical. They are completely distinct.

(II) Contribution to JCE and Conspiracy to Commit Genocide

[65] Tadić,AJ,para.227.
[66] Tadić,AJ,para.227(emphasis added).
[67] Krajišnik,AJ,para.170-171.
[68] Webster's,p.65.
[69] Webster's,pages:898;343;957.

158. The Prosecution avers that *"DRAGO NIKOLIĆ committed acts in furtherance of the Joint Criminal Enterprise and Conspiracy as described in paragraphs 30.6-30.12, 30.14, 30.15, 31.4, 32 and 34-37 of the Indictment."*[70] In essence, the Prosecution's allegations imply that the alleged acts and conduct of the Accused amount to both a contribution to the JCE and the conspiracy to commit genocide.

159. The Defence submits that, as a matter of law, a contribution to a JCE may not be equated with a contribution to a conspiracy to commit genocide. JCE and conspiracy to commit genocide envisage wholly different contributions.

160. The jurisprudence of the International Tribunal has established that the contribution to a JCE *"may take the form of assistance in, or contribution to, the execution of the common plan or purpose."*[71] On the other hand, the contribution required for conspiracy to commit genocide must be aimed at the *actus reus* of the crime of conspiracy to commit genocide, i.e. the agreement to commit genocide.

161. A contribution to a conspiracy to commit genocide must thus be geared towards the **establishment of an agreement** to commit genocide whereas a contribution to a JCE focuses on the **execution** of the "common plan, design or purpose".

162. A contribution to a conspiracy to commit genocide can not be aimed at the execution of the genocide because it falls outside the scope of conspiracy to commit genocide. The *actus reus* of conspiracy to commit genocide is namely limited to an agreement to commit genocide and does not encompass the actual commission of the genocide.

163. Consequently, in legal terms, the alleged acts and conduct of Drago Nikolić can not concurrently constitute a contribution to the alleged JCE and a contribution to the alleged conspiracy to commit genocide.

(C) The Scope of JCE and Conspiracy to Commit Genocide

164. Thirdly, the Prosecution fails to appreciate the difference pertaining to the temporal and legal scope of conspiracy to commit genocide and JCE.

(I) The Temporal Scope of JCE and Conspiracy to Commit Genocide vary

[70] Indictment,para.42(emphasis added).
[71] Tadić,AJ,para.227.

165. The Defence submits that conspiracy to commit genocide and JCE can not co-exist as they pertain to differing temporal stages pertaining to the relevant facts identified in the Indictment.

166. Conspiracy to commit genocide differs from the other crimes within the jurisdiction of the International Tribunal. As an inchoate crime, the crime of conspiracy to commit genocide need not culminate in the actual commission of genocide. The agreement to commit genocide is punishable *per se*.[72]

167. It logically ensues that the agreement to commit genocide must necessarily be concluded prior to the actual execution of the crime of genocide. Once the agreement is concluded, conspiracy to commit genocide has been executed and ceases to exist in legal terms.[73] In this regard, the Zigiranyirazo Trial Chamber considered that *"[t]he crime of conspiracy to commit genocide is* ***complete at the moment of agreement*** *regardless of whether the common objective is ultimately achieved."*[74]

168. In the submission of the Prosecution, the JCE doctrine is only relevant for the commission of the genocide and not to the inchoate crime of conspiracy to commit genocide. The Prosecution, namely, argues that the alleged genocide was, *inter alia,* executed through a JCE to murder the able-bodied Muslim men.[75] Conversely, the Indictment does not allege that the inchoate crime of conspiracy to commit genocide was carried out through a JCE. This omission implies that JCE, as a mode of liability, is irrelevant to conspiracy to commit genocide.

169. It is thus the Prosecution's case that the JCE and conspiracy to commit genocide are applicable to different temporal stages of the facts underlying genocide. JCE is applicable to the commission of genocide whereas conspiracy to commit genocide is applicable to the preceding, preparatory phase concerning the agreement to commit genocide. However, subsequently, the Prosecution maintains that the facts and agreement underlying the JCE are identical to the facts underlying the agreement for conspiracy to commit genocide.[76]

170. This is inherently paradoxical. The Prosecution can not recycle the facts relating to the commission of genocide through JCE to establish conspiracy to commit genocide if it

[72] Niyitegeka,TJ,para.423.
[73] Zigiranyirazo,TJ,para.389.
[74] Zigiranyirazo,TJ,para.389(emphasis added).
[75] Indictment,paras.27-30.
[76] Indictment,para.34.

wishes to charge a crime that takes place prior to the commission of genocide. This constitutes further evidence that the Prosecution commingles JCE and conspiracy to commit genocide.

(II) The Legal Scope of JCE and Conspiracy to Commit Genocide differ

171. The Prosecution claims that the Accused *"were members of and knowingly participated in a Conspiracy and Joint Criminal Enterprise, the common purpose of which was **to summarily execute and bury** thousands of Muslim men and boys aged 16 to 60 captured from the Srebrenica enclave from 12 July 1995 until about 19 July 1995."*[77]

172. The Defence submits that the allegation, formulated in this manner, is erroneous as it fails to take account of the differing legal scopes of JCE and conspiracy to commit genocide. JCE is applicable to all Statutory crimes whereas conspiracy to commit genocide is exclusively related to genocide.

173. The alleged common purpose of the JCE of executing and burying thousands of Muslim men and boys need not necessarily qualify as genocide. For instance, if the *dolus specialis* for genocide can not be proved, the alleged killing operation might be characterized as a crime against humanity, provided all remaining conditions have been met. This is, in fact, the approach adopted by the Prosecution because the alleged killing operation is alternatively typified as extermination, murder and persecutions in Counts three through six of the Indictment, respectively.

174. The *actus reus* of conspiracy to commit genocide, however, specifically requires *"an agreement to act for the purpose of committing **genocide**"*. A common purpose falling short of genocide does not satisfy the *actus reus* of the conspiracy to commit genocide.

175. It is the Defence's submission that this imprecision further indicates the conflation of JCE and conspiracy to commit genocide. Had the Prosecution accurately recognized the distinction between the notions, it would not have employed the common purpose pertaining to the JCE to execute the Muslim men and boys as the basis for its charge relative to conspiracy to commit genocide as it need not amount to genocide.

(D) "Foreseeable Crimes" are Irrelevant to Conspiracy

[77] Indictment,para.36(emphasis added).

176. Fourthly, the Prosecution mistakenly argues that foreseeable crimes may arise out of a conspiracy to commit genocide.

177. The Prosecution contends that *"[a]lthough the **Conspiracy and Joint Criminal Enterprise** contemplated organised and systematic executions, it was **foreseeable** ... that **individual opportunistic killings** and **persecutory acts** ... would be carried out by VRS and MUP forces during and after the Joint Criminal Enterprise."*[78]

178. Even though the third category of JCE envisages foreseeable crimes other than the one agreed upon in the "common plan, design or purpose",[79] the law concerning conspiracy to commit genocide does not recognize such a category. Conspiracy to commit genocide exclusively relates to genocide and not to other crimes that could be a foreseeable consequence of genocide. The Prosecution cites absolutely no authority for its novel interpretation of the law on conspiracy to commit genocide.

179. The introduction of foreseeable crimes into the definition of conspiracy to commit genocide provides further evidence of the Prosecution's misinterpretation of the notions of conspiracy to commit genocide – an inchoate crime - and JCE – a mode of liability.

(E) References to Conspiracy to Commit Genocide Are Omitted

180. Finally, the Defence takes note of the fact that the Indictment conspicuously omits crucial references to conspiracy to commit genocide in Count 2. These omissions demonstrate that the Prosecution relies entirely on JCE and fails to allege the constitutive elements of conspiracy to commit genocide.

181. Paragraph 34 speaks of *"an agreement ... to kill the able-bodied Muslim men from Srebrenica"* instead of an *"an agreement to act for the purpose of committing genocide"*, which is the correct legal standard relative to conspiracy to commit genocide.

182. In addition, paragraph 36 speaks of the common purpose of the conspiracy and JCE ignoring thereby the required agreement as the essential element of conspiracy to commit genocide.

[78] Indictment,para.37(emphasis added).
[79] Tadić,AJ,para.227.

183. Furthermore, except for an introductory reference, paragraph 37 completely leaves out any mention of conspiracy to commit genocide focusing entirely on the third category of JCE.

184. Finally, paragraphs 34 and 36 contain references to Attachment A supposedly containing a list of members of the JCE and the conspiracy. However, on closer scrutiny, Attachment A does not advance any reference to members of the alleged conspiracy to commit genocide whatsoever.[80]

(F) Conclusion

185. In conclusion, the errors identified above reveal that the charge of conspiracy to commit genocide can not stand.

186. Even if the Prosecution would succeed in proving that the Co-Accused, or only some of them, committed a Statutory crime through a JCE, it will have proved the individual criminal responsibility of some or all of the Co-Accused. However, it will not have proved, by the same token, that the crime of conspiracy to commit genocide was committed as the burden of proof requires that entirely distinct elements, objective and subjective, are proved.

187. The Prosecution must not be permitted to extend its allegation in respect of the Co-Accused's supposed membership in the alleged JCE to include a charge on conspiracy to commit genocide without a proper legal and factual foundation.

V. CUMULATIVE CONVICTIONS FOR GENOCIDE AND CONSPIRACY TO COMMIT GENOCIDE

188. In its Pre-Trial Brief, the Prosecution contends that *"[c]onvictions for genocide and conspiracy to commit genocide can co-exist* ***on the basis of the same acts and omissions in this case.*** *"*[81]

189. In the Defence's submission, the Prosecution's assertion must be rejected as the same acts and omissions can not give rise to individual criminal responsibility for conspiracy to commit genocide and genocide. In Musema, such an approach was rejected by the

[80] Indictment,paras.96-98.
[81] Prosecution Pre-Trial Brief,para.396(emphasis added).

ICTR and, in addition, the requirements for multiple convictions have not been met in respect of conspiracy to commit genocide and genocide.

(A) The Definition Most Favourable to the Accused Must be Adopted

190. In Musema, the following holding was adopted:

> *"the Chamber has adopted the definition of conspiracy most favourable to Musema, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide* ***on the basis of the same acts****. Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the 'Travaux Préparatoires' show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts."*[82]

191. The Defence respectfully submits that the holding of the Musema Trial Chamber must be applied *mutatis mutandis* to this case in respect of cumulative convictions for genocide and conspiracy to commit genocide.

(B) The Requirements for Multiple Convictions Have Not Been Met

192. The Appeals Chamber identified the following test for multiple convictions:

> *"[m]ultiple criminal convictions entered under different statutory provisions but* ***based on the same conduct*** *are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus,* ***if a set of facts is regulated by two provisions****, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision."*[83]

193. The Defence notes that the relevant test is preceded by a preliminary test requiring that *"a set of facts [be] regulated by two provisions"*.

194. As indicated *supra,* conspiracy to commit genocide is an inchoate crime preliminary to the crime of genocide and is to be distinguished from the actual commission of genocide. Recently, the Zigiranyirazo Trial Chamber considered that *"[t]he crime of*

[82] Musema,TJ,para.198(left undisturbed on Appeal).
[83] Čelibići,AJ,paras.412-413(emphasis added).

conspiracy to commit genocide is ***complete at the moment of agreement*** *regardless of whether the common objective is ultimately achieved."*[84]

195. If the crime of conspiracy to commit genocide is complete at the moment of the agreement, which must necessarily precede the commission of the crime of genocide, the same acts and/or omissions can not entail criminal responsibility for genocide as well as conspiracy to commit genocide. The scope of the Article 4(3)(b) is thus limited to the set of facts pertaining to the stage preceding the commission of genocide and its legal significance ceases to exist once the agreement to commit genocide has been concluded. The ensuing set of facts, relative to the actual commission of genocide, is regulated by Articles (4)(2)(a) and (4)(3)(a).

(C) Conclusion

196. The possibility of multiple convictions for genocide and conspiracy to commit genocide must thus be discarded as: (a) the definition most favourable to the Accused necessarily requires a dismissal of Count 2; and (b) the nature of the crimes of genocide and conspiracy to commit genocide necessarily excludes the possibility that the same set of facts could be regulated by the two relevant provisions.

VI. THE *CHAPEAU* REQUIREMENTS OF ARTICLE 5

197. For any of the acts enumerated in Article 5 to rise to the level of a crime against humanity, the *chapeau* requirements of Article 5 must be fulfilled. These acts become crimes against humanity *"when committed in armed conflict ... and directed against any civilian population."*

(A) Armed Conflict

198. The Appeals Chamber held that *"an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[85]

(B) Directed Against Any Civilian Population

[84] Zigiranyirazo,TJ,para.389(emphasis added).
[85] Tadić,Appeals Decision on Jurisdiction,para.70.

199. The phrase "*directed against any civilian population"* encompasses five elements: *"(i) [t]here must be an attack; (ii) [t]he acts of the perpetrator must be part of the attack; (iii) [t]he attack must be directed against any civilian population; (iv) [t]he attack must be widespread or systematic; (v) [t]he perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern."*[86]

(I) Definition of "Attack"

200. As regards the first element, the Appeals Chamber held that *"the phrase 'attack' is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population."*[87] In addition, the concepts of "attack" and "armed conflict" must be distinguished: *"[t]he attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it."*[88]

(II) Acts Forming Part of the Attack

201. Concerning the second element, Chamber, the nexus between the acts of the accused and the attack consists of *"(i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof."*[89]

202. Consequently, an isolated act does not constitute a crime against humanity.[90] This is so when the act *"is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack."*[91]

203. For instance, in Mrkšić et al., the Appeals Chamber found that the *chapeau* requirements for Article 5 had not been met because no nexus could be established between the acts of the Accused and the attack as:

[86] Kunarac,AJ,para.85.
[87] Kunarac,AJ,para.86.
[88] Kunarac,AJ,para.86.
[89] Kunarac,AJ,para.99.
[90] Kunarac,AJ,para.100.
[91] Kunarac,AJ,para.100.

"the perpetrators of the crimes in Ovčara acted in the understanding that their acts were directed against members of the Croatian armed forces. The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population of Vukovar and renders their acts so removed from the attack that no nexus can be established."[92]

(III) Directed Against Any Civilian Population

204. In respect of the third element, the phrase "directed against" requires that the civilian population must be the primary object of the attack.[93] Whether that is so may be determined on the basis of the following non-exhaustive list of indicia:

"the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[94]

205. The law requires that *"enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population.'"*[95] Accordingly, an attack *"against a limited and randomly selected number of individuals"* falls short of the requirements for crimes against humanity.[96]

206. The definition of "civilians" may be found in article 50(1) of API[97]: *"[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."*

207. However, the Appeals Chamber confirmed that individual victims of crimes against humanity need not be civilians.[98] Be that as it may, *"the status of the victims is one of the factors that can be assessed in determining whether the jurisdictional requirement that the civilian population be the primary target of an attack has been fulfilled."*[99]

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[92] Mrkšić,AJ,para.42.
[93] Kunarac,AJ,para.91.
[94] Kunarac,AJ,para.91.
[95] Kunarac,AJ,para.90.
[96] Kunarac,AJ,para.90.
[97] Martić,AJ,para.302.
[98] Martić,AJ,para.307.
[99] Mrkšić,AJ,para.30.

(IV) Widespread or Systematic

208. Vis-à-vis the fourth element, an attack must be either "widespread or "systematic". As has been held by the Appeals Chamber, *"the phrase 'widespread' refers to the large-scale nature of the attack and the number of victims, while the phrase 'systematic' refers to 'the organised nature of the acts of violence and the improbability of their random occurrence'"*.[100] Whether an attack is "widespread" or "systematic" must be assessed *"in light of the means, methods, resources and result of the attack upon the population."*[101]

(V) *Mens rea*

209. Regarding the fifth element, the *mens rea* for crimes against humanity requires a showing that the accused *"the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known 'that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack'"*.[102]

VII. THE VICTIM GROUPS OF FORCIBLE TRANSFER AND DEPORTATION

210. In its Rule 98 *bis* Decision, the Trial Chamber held that *"what constitutes forcible transfer both legally and factually in this case and particularly which persons are included in it"* is best left to be determined at the final stage of the trial.[103]

211. In the Defence's submission, the law and the evidence require that the alleged victims of the crime of forcible transfer must be divided into five groups. In law and in fact, the alleged crime of deportation can exclusively pertain to two groups, as set out below. The remaining three groups must be excluded for the purposes of this allegation.

(A) <u>The Group from Srebrenica</u>

212. As regards the victim group of the alleged crime of forcible transfer in Srebrenica, the Defence respectfully posits that three groups should be distinguished.

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[100] Kunarac,AJ,para.94.
[101] Kunarac,AJ,para.95.
[102] Kunarac,AJ,para.102.
[103] T.21468.

213. The first group consists of the women, children and elderly who allegedly went from Srebrenica to Potočari before being transported by bus to Kladanj. The second group is made up of the able-bodied men who were separated from the group that made its way from Srebrenica to Potočari before being allegedly transported to and detained in Bratunac. The third group is comprised of the members of the 28th Division, and any other persons accompanying them, who decided to leave Srebrenica with a view to reaching the territory under the control of the 2nd Corps of the ABiH in Tuzla.

214. The Indictment, in effect, proffers the same distinction. Three categories of people are identified: the *"Bosnian Muslim women, children and elderly men"*[104]; *"able-bodied men from the crowd in Potočari"*[105]; and *"Bosnian Muslim men from the column of men escaping from the Srebrenica enclave."*[106]

215. In the Defence's submission, the alleged crime of forcible transfer can only potentially pertain to the "Bosnian Muslim women, children and elderly men" provided the Prosecution discharges its burden of proof. The remaining two groups – the *"able-bodied men from the crowd in Potočari"* and the *"Bosnian Muslim men from the column of men escaping from the Srebrenica enclave"* - should be excluded from the purview of the allegation related to forcible transfer.

(I) The Able-bodied Men from the Crowd in Potočari

216. It is the Defence's submission, the *"able-bodied men from the crowd in Potočari"* could not have been victims of forcible transfer.

217. First and foremost, in law, the crime of forcible transfer can not be committed against detainees in non-international armed conflict.

218. Whereas the Defence is aware of the non-existence of the notion of "combatants" and "prisoners of war" in non-international armed conflict, it is appropriate to review the law relative to international armed conflict in this respect. In effect, the situation of "detainees" in non-international armed conflict may be compared to the situation of "prisoners of war" in international armed conflict concerning forcible transfer.

219. Article 49 of Geneva Convention IV, relative to persons protected by Geneva Convention IV in occupied territory, outlaws the *"[i]ndividual or mass forcible*

[104] Indictment,para.61.
[105] Indictment,para.62.
[106] Indictment,para.63.

transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not … regardless of their motive" even though the partial or total evacuation of a given area may be undertaken by an Occupying Power *"if the security of the population or imperative military reasons so demand."* Conversely, article 46 of Geneva Convention III specifically provides for the transfer of prisoners of war listing minimum guarantees to be respected during the transfer. If prisoners of war may be transferred, they can not become victims of the crime of forcible transfer.

220. Moreover, while article 147 of Geneva Convention IV lists *"unlawful deportation or transfer or unlawful confinement of a protected person"* as a grave breach, the corresponding provision on grave breaches in Geneva Convention III,[107] relative to prisoners of war, omits unlawful deportation or transfer from its list of grave breaches. Persons protected by Geneva Convention IV are defined as *"those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals"* while prisoners of war can not be considered protected persons for the purpose of Geneva Convention IV.[108]

221. Concerning the law relative to non-international armed conflict, Article 5 of APII provides minimum safeguards for *"persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"* implying that IHL, the applicable *lex specialis*, offers no judgment on the legality or illegality of such detention. The commentary to this Article provides that *"[t]he expression 'persons whose liberty has been restricted' was chosen in preference to more specific words such a 'prisoners' or 'detainees' to take into account the full extent of the article's scope of application, which covers all detainees and persons whose liberty has been restricted for reasons related to the conflict, without granting them a special status"*.[109]

222. Consequently, the Defence submits that, considering that detention in non-international armed conflict is not illegal as such, a parallel needs to be drawn with the law relating to international armed conflict in respect of forcible transfer. Accordingly, detainees justifiably detained for reasons related to the armed conflict in non-international armed

[107] Geneva Convention III, art. 130.
[108] Geneva Convention IV, art.4.
[109] ICRC Commentary APII, p.1384.

conflict can not be considered victims of forcible transfer if they are moved between detention facilities, alike prisoners of war in international armed conflict. Only civilians can be victims of forcible transfer in non-international armed conflicts.

223. The Defence submits that the detention of the *"able-bodied men from the crowd in Potočari"*, as such, was justified for reasons related to the conflict. These persons could be detained in order to: (a) verify whether they were members of the ABiH; (b) screen them for war criminals; or (c) to prevent them from linking up with the ABiH to continue the conflict against the VRS. Consequently, their subsequent transport constituted a part of their detention and is thus unconnected to the alleged forcible transfer.

224. Secondly, the Indictment alleges that these men were transported to *"temporary detention sites in Bratunac"*.[110] Count 7, however, alleges that the common purpose of the alleged Joint Criminal Enterprise was to *"force the Muslim Population out of the Srebrenica and Žepa enclaves to* ***areas outside the control of the RS****."*[111] Considering that Bratunac is situated in the RS, transporting the *"able-bodied men from the crowd in Potočari"* is not forcing them out to areas outside the control of the RS.

225. Finally, the transport of the *"able-bodied men from the crowd in Potočari"* to Bratunac and on to the Zvornik area can not amount to forcible transfer considering that it was related to their detention, and not to their expulsion to areas outside the control of the RS. The Prosecution's case is, in fact, that this matter raises detention issues as the "*able-bodied men from the crowd in Potočari"* were allegedly "*held temporarily in buildings and vehicles through 14 and 15 July"*.[112] The detention of the *"able-bodied men from the crowd in Potočari"* ended or precluded their forcible transfer and any crimes allegedly committed against them were committed against them in their capacity as "detainees".

(II) The Bosnian Muslim Men from the Column Escaping from Srebrenica

226. The Defence, in addition, posits that the *"Bosnian Muslim men from the column of men escaping from the Srebrenica enclave"*, also could not have been the victims of forcible transfer.

[110] Indictment,para.62.
[111] Indictment,para.49(emphasis added).
[112] Indictment,para.28.

227. First and foremost, the factual basis underlying this allegation does not correspond to the requirements of forcible transfer. As acknowledged in the Indictment, on 10 and 11 July 1995, *"approximately 15,000 Bosnian Muslim men from the enclave ... gathered at the villages of Šušnjari and Jaglići and fled on 11 July in a huge column through the woods towards Tuzla."*[113]

228. Even if the Trial Chamber would conclude that the members of the 28th Division, along with the able-bodied men who accompanied them as part of the "column", are included in the group labelled as "Muslim population", the evidence establishes that these persons were not forced out of Srebrenica. They left voluntarily. As a matter of fact, they began their journey towards Tuzla even before the alleged plan to forcibly displace the Muslim population from Srebrenica and Žepa was developed. The departure of the column from Srebrenica, organized by and ordered by the leadership of the 28th Division for a specific purpose, does not amount to the *actus reus* of forcible transfer.

229. Significant testimonial evidence exists in this regard. Bećirović stated that, on 11 July 1995, several ABiH officers together with the Chief and the President of the Municipality took the decision to attempt a breakthrough to Tuzla.[114] Orić testified that, he was in the column that departed from Sušnjari, and that he, together with the other ABiH soldiers, set off towards Tuzla on the orders of Bećirović.[115] PW-113 said that he heard of this order and added that nobody except for the ABiH could have ordered the able-bodied men to go towards Tuzla.[116] According to the expert testimony of Kosovac, the 28th Division left Srebrenica voluntarily as it "prepared carefully for the breakout from encirclement starting from February and March 1995 by stepping up terrorist activities."[117]

230. Pandurević explained the manner in which the 28th Division progressively disengaged from combat with the advancing Tactical Group from the Drina Corps - leading him to believe that the VRS forces were lured into an area surrounded by high grounds where it would be easier to destroy them[118] – only to take to the woods as a fighting force heading towards Tuzla.

[113] Indictment,para.56.
[114] 4D2,p.13-14.
[115] T.990-991.
[116] T.3357.
[117] T.30214.
[118] T.30875.

231. Secondly, the Defence submits that the same arguments identified above in respect of the *"able-bodied men from the crowd in Potočari"* pertain to the *"Bosnian Muslim men from the column of men escaping from the Srebrenica enclave"*: (a) in law, detainees can not be victims of forcible transfer; (b) the detention of these men was, as such, justified and their transport does not amount to forcible transfer; (c) Bratunac and the Zvornik area are not areas outside the control of the RS; and (d) the crimes allegedly committed against these men were committed against detainees and are delinked from the allegation pertaining to forcible transfer.

(B) The Group from Žepa

232. A similar distinction pertains to the allegations of forcible transfer and deportation in Žepa.

233. The Muslim population residing in Žepa at the time relevant to the indictment must be divided into two categories. The first group consists of the women and children allegedly evacuated out Žepa. The second group is comprised of the able-bodied men allegedly fleeing to Serbia across the Drina River. The Indictment also distinguishes between *"the women and children"*[119] and *"able-bodied Muslim men"*.[120]

234. The Defence submits that the crime of forcible transfer can only pertain to *"the women and children"* contingent upon the Prosecution proving all objective and subjective elements of the crime.

235. The Prosecution deems that the crossing of the *"able-bodied Muslim men"* from Žepa to Serbia constitutes forcible transfer. However, as will be demonstrated in more detail below, the Prosecution appends the erroneous legal qualification to these facts.

236. If it is the Prosecution's case that the *"able-bodied Muslim men"* were forced to cross an international border, such an allegation can only amount to deportation. Forcible transfer relates exclusively to displacement within national borders and not to cross-border displacement.

237. Consequently, this category of persons must be excluded from the purview of the allegation relating to forcible transfer and can only be considered in respect of the allegation of deportation.

[119] Indictment,para.71.
[120] Indictment,para.71.

(C) Conclusion

238. A similar distinction pertains to the allegations of forcible transfer and deportation in Žepa.

239. The Muslim population residing in Žepa at the time relevant to the indictment must be divided into two categories. The first group consists of the women and children allegedly evacuated out Žepa. The second group is comprised of the able-bodied men allegedly fleeing to Serbia across the Drina River. The Indictment also distinguishes between *"the women and children"*[121] and *"able-bodied Muslim men"*.[122]

240. The Defence submits that the crime of forcible transfer can only pertain to *"the women and children"* contingent upon the Prosecution proving all objective and subjective elements of the crime.

241. Similar to the arguments raised in respect of the *"able-bodied men from the crowd in Potočari"* and the *"Bosnian Muslim men from the column of men escaping from the Srebrenica enclave"*, it is the submission of the Defence that the able-bodied men can not be considered victims of deportation insofar they were members of the ABiH or they participated directly in hostilities.

242. In actual fact, the Mrkšić Trial Chamber confirmed that *"deportation under Article 5(d) cannot be committed against prisoners of war."*[123]

VIII. THE *MENS REA* APPLICABLE TO THE CRIME OF DEPORTATION

243. The Prosecution misstates and misapplies the *mens rea* for the crime of deportation.

244. The Defence respectfully submits that Count 8 must be discounted as the Prosecution failed to establish the fundamental element of cross-border displacement of the Muslim population.

(A) The Prosecution Misconstrues the *Mens Rea* for Deportation

245. The Prosecution maintains that the *mens rea* for deportation is the intent "that the removal of the person or persons be permanent."[124]

[121] Indictment,para.71.
[122] Indictment,para.71.
[123] Mrkšić,TJ,para.458.

246. However, the Appeals Chamber has confirmed that the *mens rea* of the deportation relates to cross-border displacement and not to intra-state displacement.[125]

247. The Defence submits that the burden of proof imposed on the Prosecution necessitates a clear and unequivocal requirement that the Prosecution establish that the Accused acted with the intent to displace the *"able-bodied Muslim men"* from Žepa across the border to Serbia.

(B) The Prosecution Misapplies the *Mens Rea* for Deportation

248. The Prosecution alleges that Drago Nikolić was a member of and knowingly participated in a JCE, *"the common purpose of which was to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS."*[126] According to the Prosecution, the common purpose of the JCE amounts to two specific crimes: forcible transfer; and deportation.

249. As noted above, cross-border displacement is an essential element of the crime of deportation. The alleged common purpose is limited to displacement to areas outside the control of the RS and does not include cross-border displacement. The crime of deportation thus falls outside the alleged common purpose.

250. In addition, in the Defence's submission, the alleged destination of the displacement can not be interpreted to include cross-border displacement even though it could be argued that Serbia, the alleged destination of the deportation, constitutes an area outside the control of the RS. The element of cross-border displacement is the key distinguishing factor between the crimes of forcible transfer and deportation. Bearing in mind the fundamental right of the Accused to know the case he has to meet, the Indictment must be lucid in this regard. All requisite elements of the alleged crimes and modes of liability must thus be set forth unambiguously.

251. The Defence submits that the alleged common purpose is inflated by the Prosecution beyond acceptance to cover a charge of deportation. Considering that cross-border displacement is not even alleged, the JCE can not amount to deportation.

252. Furthermore, the alleged deportation is not charged pursuant to JCE III liability. The Prosecution alleges that "opportunistic killings" and "persecutory acts" were

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[124] Indictment,para.120.
[125] Stakić,AJ,para.300.
[126] Indictment,para.49.

foreseeable consequences of the JCE to deport the Muslim population.[127] The third form of JCE, therefore, does not qualify the flight of Muslim men across the border to Serbia as a reasonably foreseeable consequence of the alleged JCE to force the Muslim population out of Srebrenica and Žepa.

(C) The Prosecution Must Prove the *Mens Rea* for Forcible Transfer and Deportation

253. In the alternative, should the Trial Chamber deem that the alleged JCE to force the Muslim population out of Srebrenica and Žepa does include the crime of deportation, the Defence posits that the Prosecution must prove the *mens rea* applicable to both crimes.

254. The *mens rea* for JCE I, as a mode of liability, is the intention, shared by all co-perpetrators, to commit the crime at hand.[128] However, as alluded to above, the common purpose of the alleged JCE entails two distinct crimes: forcible transfer and deportation. Consequently, the burden of proof resting upon the Prosecution requires the establishment of all elements pertaining to these crimes, including the requisite *mens rea*.

255. It follows that, if the Prosecution fails to discharge its burden of proof in respect of one of these crimes, the JCE can not be proved in its entirety. The JCE to force the Muslim population out of Srebrenica and Žepa, namely, simultaneously constitutes forcible transfer as well as deportation, according to the Prosecution. Consequently, if one of these crimes is not proved, the entire JCE must be considered non-existent.

(D) Conclusion

256. It is the Defence's submission that the alleged JCE to force the Muslim population out of Srebrenica and Žepa does not amount to deportation as the alleged common purpose does not include cross-border displacement.

257. In the alternative, should the Trial Chamber not accept this submission, the Defence posits that the *mens rea* for deportation is not present, warranting a dismissal of Count 8 in general or, at least, in respect of Drago Nikolić.

[127] Indictment,para.83.
[128] Tadić,AJ,para.228.

258. As will be established in more detail below, the evidence does not support a conclusion beyond reasonable doubt that an intention existed on the part of the alleged members of the JCE to force the Muslim men across the BiH-FRY border. Consequently, the alleged JCE to force the Muslim population out of Srebrenica and Žepa can not be proved in its entirety considering that an essential component can not be proved beyond a reasonable doubt.

259. Insofar the Trial Chamber would consider that the JCE is separable into different crimes, the Defence submits that the Prosecution utterly failed to establish that Drago Nikolić entertained the intent to displace the Žepa men to Serbia. As will be addressed more fully below, evidence as to such a *mens rea* on the part of Drago Nikolić is plainly non-existent.

IX. THE ALLEGED REBURIAL OPERATION HAS NO PURPOSE

260. In the Defence's submission, the purpose of including the alleged reburial operation into the Indictment is unclear and unsupported by a sound legal or factual basis.

(A) The Alleged Reburial Operation Is Not a Component of the Alleged Genocide

261. As noted above, the Defence submits that the reburial operation is not to be treated as a component of the alleged genocide as it: (a) is not a form of physical destruction; and (b) does not display the *mens rea* required for genocide.

(B) The Alleged Reburial Operation Was Not a Natural and Foreseeable Consequence

262. The Prosecution alleges that the *"reburial operation was a natural and foreseeable consequence of the execution and original burial plan conceived by the Joint Criminal Enterprise."*[129]

263. However, the Blagojević and Jokić Trial Chamber clearly found that *"no reasonable trier of fact could reach the conclusions [sic] that the reburials, conducted a few*

[129] Indictment,para.32.

months after the executions, was [sic] foreseeable at the time the executions were carried out."[130]

264. The Judgment in the Blagojević and Jokić case was rendered on 17 January 2005 confirming the Rule 98 Decision in regard of the alleged reburial operation issued on 5 April 2004.[131] It is striking that the Prosecution has been aware of the position of the Blagojević and Jokić Trial Chamber more than two years before the Indictment was issued on 4 August 2006 but nevertheless opted to charge the reburial operation pursuant to JCE III liability.

265. The Defence respectfully submits that the decision of the Blagojević and Jokić Trial Chamber in respect of the alleged reburial operation must be upheld by this Trial Chamber. At the time of the alleged executions, the alleged reburial operation could not have been a reasonably foreseeable consequence.

(C) The Alleged Reburial Operation Is Not Charged as a Crime

266. The Defence submits that the Prosecution does not allege that the reburial operation is a crime in and of itself to which individual criminal responsibility attaches.

267. If the Prosecution had intended to seek a conviction for the alleged reburial operation itself, a separate count would have been necessary charging the alleged reburial operation as one of the crimes the International Tribunal exercises jurisdiction over.

268. Moreover, the Indictment fails to allege what Statutory crime the purported reburial operation, charged as JCE category III, involved or amounted to. Conversely, the alleged opportunistic killings, also charged as JCE category III, are specifically charged as either: extermination; murder as a crime against humanity; or murder as a violation of the laws or customs of war.[132]

(D) The Alleged Reburial Operation Is Not Charged as Aiding and Abetting

269. The Blagojević and Jokić Trial Chamber held that *"the efforts to conceal the crimes a few months after their commission could only be characterised by a reasonable trier of*

[130] Blagojević,TJ,para.730.
[131] Blagojević,Judgment on Motions for Acquittal,para.51.
[132] Indictment,paras.45-47.

fact as ex post facto *aiding and abetting in the planning, preparation or execution of the murder operation"*.[133]

270. However, the Defence understands that the Prosecution does not charge the Accused with *ex post facto* aiding and abetting the alleged murder operation. If this were so, the Defence posits, the Indictment would or should have charged the Accused specifically in this regard.

271. Even if the Trial Chamber finds that the allegation concerning the reburial operation includes a charge of *ex post facto* aiding and abetting the alleged murder operation, the Defence considers that the requirements for this mode of responsibility have not been met.

272. The Defence recalls that the Blagojević and Jokić Trial Chamber held that *"the evidence does not support a conclusion that the reburial operation itself was agreed upon at the time of the planning, preparation or execution of the crimes"* and that, therefore, the conditions for *ex post facto* aiding and abetting had not been met.[134]

273. The Defence respectfully invites the Trial Chamber to endorse the finding of the Blagojević and Jokić Trial Chamber in this regard.

(E) Conclusion

274. For all intents and purposes, the inclusion of the alleged reburial operation into the Indictment serves no apparent goal. The Defence submits that the Trial Chamber must disregard it as either: (a) a component of the alleged genocide; (b) reasonably foreseeable consequence of the alleged murder operation; (c) a crime in and of itself; and (d) *ex post facto* aiding and abetting the alleged murder operation.

B. THE MODES OF LIABILITY ALLEGED IN THE INDICTMENT

275. This section deals with the essential components of the modes of liability alleged in the Indictment.

I. COMMIT

[133] Blagojević,TJ,para.730.
[134] Blagojević,TJ,para.731(emphasis added).

1. The Accused participated through positive acts or omissions, physically or otherwise directly, in the material elements of a Statutory crime, whether individually or jointly with others
2. The Accused acted with (i) intent to commit the crime or in the reasonable knowledge that the crime would occur as a result of his conduct or (ii) with awareness of the substantial likelihood that the crime may occur as a consequence of his conduct

276. Article 7(1) *"covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law"*.[135]

277. The *actus reus* of "committing" is participating *"physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions, whether individually or jointly with others"*.[136] The *mens rea* of "committing" is acting *"with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct"*.[137]

II. JOINT CRIMINAL ENTERPRISE

278. The notion of JCE constitutes a form of commission falling within the ambit of Article 7(1).[138] Three distinct categories of JCE exist of which the first and third are relevant to the charges contained in the Indictment.

(A) JCE - Category I

[135] Tadić,AJ,para.188.
[136] Limaj,TJ,para.509.
[137] Limaj,TJ,para.509.
[138] Tadić,AJ,para.190.

1. A plurality of persons are involved in a common plan, design or purpose involving or amounting to a Statutory crime or crimes
2. The Accused, through positive acts or omissions, furthered the common plan, design or purpose
3. The Accused (i) with knowledge of the common plan, design or purpose, voluntarily participated therein; (ii) intended to further the common plan, design or purpose; and (iii) acted with the intent, shared by all co-perpetrators, to commit the crime(s) the common plan, design or purpose involved or amounted to

279. Three conditions, common to the *actus reus* of all three categories of JCE, have been identified by the Appeals Chamber.

280. Firstly, the existence of a plurality of persons must be established by the Prosecution.[139] It is not necessary for these persons to *"be organised in a military, political or administrative structure."*[140]

281. Secondly, the Prosecution must prove the existence of *"a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."*[141] The common plan, design or purpose need not have been *"previously arranged or formulated."*[142]

282. Thirdly, the Prosecution has the burden of demonstrating the participation of the accused in the common design.[143] Such participation need not involve the commission of a specific crime *"but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."*[144] The Appeals Chamber has noted that *"there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise"* although specific cases might require *"a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise"*.[145]

[139] Tadić,AJ,para.227.
[140] Tadić,AJ,para.227.
[141] Tadić,AJ,para.227.
[142] Tadić,AJ,para.227.
[143] Tadić,AJ,para.227.
[144] Tadić,AJ,para.227.
[145] Kvočka,AJ,para.97.

283. The first category of JCE requires the intent, shared by all co-perpetrators, to commit a certain crime.[146] It must be established that the Accused participated voluntarily and intended the criminal result.[147]

284. In addition, additional *mens rea* requirements imposed by specific crimes must also be established. For instance, in respect of a JCE involving persecutions, it must be established that the alleged JCE member shared the intent to discriminate on political, racial or religious grounds.[148] Similarly, in respect of an accusation entailing a JCE amounting to genocide, it must be proved that the alleged JCE member entertained the intent to *"to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*[149]

(B) JCE – Category III

1. The Accused was a member of a JCE category I
2. A Statutory crime other than the one the common plan, design or purpose involved or amounted to was perpetrated
3. It was: (i) foreseeable to all members of the JCE that the implementation of the common plan, design or purpose would most likely lead to such a Statutory crime; and (ii) the members of the JCE willingly took that risk

285. In addition, in case the Accused is a member of a JCE, he or she may incur responsibility, under certain circumstances, for a Statutory crime the common plan, design or purpose does not involve or amount to.

286. Individual criminal responsibility pursuant to the third category of JCE may arise if *"(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."*[150] It must be shown that the crime was foreseeable to the Accused in particular.[151]

[146] Tadić,AJ,para.228.
[147] Tadić,AJ,para.196.
[148] Kvočka,AJ,para.110.
[149] Brđanin,TJ,para.708.
[150] Tadić,AJ,para.228.
[151] Stakić,AJ,para.65.

(C) Consequences of JCE Membership

287. According to the jurisprudence of the International Tribunal, if all relevant criteria pertaining to JCE are proved beyond a reasonable doubt, an Accused may be *"held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with dolus eventualis (third category of JCE)."*[152]

288. The Appeals Chamber justifiably expressed its concern that, *"in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great."*[153] However, any such disparity must be repaired at the sentencing stage.[154]

289. It follows, *a contrario,* that, if an Accused can not be deemed a JCE member, he will not be responsible for the actions of the JCE members (first JCE category) nor for any crimes that are reasonably foreseeable consequences of the common purpose (third JCE category).

290. In these circumstances, the specific acts of the Accused must be assessed in isolation to determine whether they might give rise to individual criminal responsibility for any of the Statutory crimes on the basis of any of the other modes of responsibility contained in Article 7(1).

III. PLANNING / INSTIGATING / ORDERING

[152] Brđanin,AJ,para.431.
[153] Brđanin,AJ,para.431.
[154] Brđanin,AJ,para.431.

1. The Accused: (i) planned the commission of a Statutory crime that was later perpetrated; or (ii) ordered, while in position of authority, the commission of a Statutory crime that was later perpetrated; or (iii) prompted another person(s) to commit a Statutory crime that was later perpetrated
2. The Accused either (i) intended the Statutory crime to be committed; or (ii) acted with awareness of the substantial likelihood that the Statutory crime would result from the implementation of his plan, the execution of his order or his prompting the other person(s)

291. The *actus reus* of planning *"requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated."*[155] The planning must be *"a factor substantially contributing to such criminal conduct."*[156]

292. The *actus reus* of instigating consists of prompting *"another person to commit an offence."*[157] The instigation must be *"a factor substantially contributing to the conduct of another person committing the crime"* but *"it is not necessary to prove that the crime would not have been perpetrated without the involvement"* of the instigator.[158]

293. The *actus reus* of ordering necessitates that *"a person in a position of authority instructs another person to commit an offence."*[159] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[160]

294. The *mens rea* of planning, instigating or ordering may be established in two manners.

295. Firstly, *"[t]he mens rea for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering."*[161]

296. Secondly, the Appeals Chamber held that planning, instigating or ordering *"an act or omission with the awareness of the substantial likelihood that a crime will be committed*

[155] Kordić,AJ,para.26.
[156] Kordić,AJ,para.26.
[157] Kordić,AJ,para.27.
[158] Kordić,AJ,para.27.
[159] Kordić,AJ,para.28.
[160] Kordić,AJ,para.28.
[161] Kordić,AJ,para.29.

in the execution of that" plan, instigation or order satisfies *"the requisite mens rea for establishing responsibility under Article 7(1)"*[162]

IV. AIDING AND ABETTING

1. The Accused (i) committed acts specifically directed to assist, encourage or lend moral support to the perpetration of a Statutory crime and (ii) this support had a substantial effect upon the perpetration of the Statutory crime
2. The Accused knew that his acts assisted the commission of a Statutory crime perpetrated by the perpetrator

297. The *actus reus* of aiding and abetting, comprises *"acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime and this support has a substantial effect upon the perpetration of the crime."*[163]

298. The requisite mental element for aiding and abetting is *"knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."*[164] In addition, it must be shown that *"that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."*[165]

299. With regard to aiding and abetting a crime involving an additional mental element, such as genocide or persecutions, the aider and abettor may be held responsible for assisting *"the commission of the crime knowing the intent behind the crime."*[166]

C. THE VIOLATIONS ALLEGED IN THE INDICTMENT

300. This section deals with the essential elements of the crimes alleged in the Indictment.

I. GENOCIDE

[162] Kordić,AJ,paras.30-32.
[163] Vasiljević,AJ,para.102.
[164] Vasiljević,AJ,para.102.
[165] Aleksovski,AJ,para.162.
[166] Krstić,AJ,para.140.

1. A State or organizational policy to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, existed
2. One or more of the following violations were committed
   a. killing members of a national, ethnical, racial or religious group;
   b. causing serious bodily or mental harm to members of a national, ethnical, racial or religious group;
   c. deliberately inflicting conditions of life on a national, ethnical, racial or religious group calculated to bring about its physical destruction in whole or in part;
   d. imposing measures intended to prevent births within a national, ethnical, racial or religious group; and/or
   e. forcibly transferring children of a national, ethnical, racial or religious group to another group
3. The Accused is individually criminally responsible for one or more of these acts

The Accused (i) knew of the State or organizational policy to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; and (ii) intentionally contributed to the furtherance of that policy

(A) The *Actus Reus*

301. Article 4(2) of the Statute enumerates the offences underlying the crime of genocide. Three of these offences are alleged by the Prosecution in this case.

302. Firstly, *"killing members of the group"* is alleged by the Prosecution.[167] The jurisprudence has established that "killing" is to be interpreted as *"intentional but not necessarily premeditated murder"*.[168]

303. Secondly, the Prosecution claims that *"causing serious bodily or mental harm to members of the group"*.[169] This offence may be defined as:

> *"an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. ... [S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be*

[167] Indictment,para.26(a).
[168] Kayishema,AJ,para.151.
[169] Indictment,para.26(b).

harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life."[170]

304. Finally, the Prosecution argues that *"deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"* is relevant to its case.[171] This offence is to be construed as *"the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction"*.[172]

(B) The *Mens Rea* Required

305. The *"dolus specialis"* or "specific intent" required for genocide is the chief factor distinguishing genocide from other crimes falling within the jurisdiction of the International Tribunal.

306. Article 4 reads that the above-mentioned underlying offences must be committed *"with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."* The specific intent for the crime of genocide must be *"to destroy the group as a separate and distinct entity."*[173]

307. In cases of joint participation, *"the individual intent of the accused and the intent involved in the conception and commission of the crime"*[174] must be distinguished. The intent to destroy, in whole or in part, a group as such must be: (i) discernable in the criminal act itself, apart from the intent of particular perpetrators; and (ii) shared by the accused.[175]

(C) A National, Ethnical, Racial or Religious Group as Such

308. Article 4 shields *"national, ethnical, racial or religious"* groups from genocide being committed against them. However, not all types of human groups are protected by the prohibition to commit genocide. For instance, political groups are excluded from the purview of Article 4.[176]

[170] Krstić,TJ,para.513.
[171] Indictment,para.33.
[172] Akayeshu,TJ,paras.505.
[173] Jelisić,AJ,para.46.
[174] Krstić,TJ,para.549.
[175] Krstić,TJ,para.549.
[176] Jelisić,TJ,para.69.

309. The requirement that *"national, ethnical, racial or religious"* be targeted *"as such"* denotes that the group must be the object of attack as opposed to an attack on certain individuals because of their membership in a particular group.[177]

(D) Destruction in Whole or in Part

310. The Appeals Chamber has confirmed that the *"Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group."*[178]

311. A protected group must be targeted for destruction *"in whole or in part"*. As regards destruction in part, the portion of the group targeted for destruction must be *"a substantial part of that group."*[179] Factors that may be taken into account in determining whether this threshold has been met include: the numeric size of the targeted part of the group; the prominence of the targeted portion within the group; and the area of the perpetrators' activity and control as well as the possible extent of their reach.[180]

II. CONSPIRACY TO COMMIT GENOCIDE

1. The Accused entered into an agreement with others to destroy, in whole or in part, a national, ethnical, racial or religious group, as such
2. The Accused: (a) intended to enter into this agreement (b) with the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

312. Conspiracy to commit genocide has never been charged at the International Tribunal before. Notwithstanding the Defence's challenge to the count relative to conspiracy to commit genocide as set out above, the following paragraphs will deal with the elements of this inchoate crime, as developed in the jurisprudence of the ICTR.

[177] Jelisić,TJ,para.79.
[178] Krstić,AJ,para.25.
[179] Krstić,AJ,para.8.
[180] Krstić,AJ,para.12-13.

(A) The Constitutive Elements of Conspiracy to Commit Genocide

313. The *actus reus* of conspiracy to commit genocide requires *"a concerted agreement to act for the purpose of committing genocide"*.[181]

314. A formal agreement to commit genocide is not required and the agreement may be of a tacit nature.[182] However, *"a concerted agreement to act and not mere similar conduct"* must be proved.[183]

315. The agreement need not be proved by the Prosecution in a particular manner.[184] Such an agreement may be inferred from circumstantial evidence provided it is the only reasonable conclusion available based on the totality of the evidence.[185] For instance, the *Nahimana* Appeals Chamber held that *"the concerted or coordinated action of a group of individuals can constitute evidence of an agreement"*.[186] It went on to consider that *"[t]he qualifiers 'concerted or coordinated' are important: as the Trial Chamber recognized, these words are 'the central element that distinguishes conspiracy from 'conscious parallelism'",* which may be defined as *"association or […] similarity of […] conduct"*.[187]

316. The *mens rea* for conspiracy to commit genocide is *"ipso facto, the intent required for the crime of genocide"*,[188] i.e. the *"intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."* Furthermore, it is implicit that the Accused must have intended to enter the agreement.

(B) Conspiracy to Commit Genocide is an Inchoate Crime

317. Conspiracy to commit genocide is an inchoate crime as such and must be distinguished from the crime of genocide.

318. In general, inchoate crimes are crimes that: *"(i) are preparatory to prohibited offences; (ii) have not been completed, therefore have not yet caused any harm; and (iii) are*

[181] Nahimana,AJ,para.896.
[182] Nahimana,AJ,para.898.
[183] Nahimana,AJ,para.898.
[184] Kajelijli,TJ,para.787.
[185] Nahimana,AJ,para.896.
[186] Nahimana,TJ,para.897.
[187] Nahimana,TJ,para.897.
[188] Musema,TJ,para.192.

punished on their own; that is, in spite of the fact that they have not led to a completed offence."[189]

319. The drafting history of the Genocide Convention lends support to this interpretation. On the municipal level, two main approaches to conspiracy exist. The Common Law deems conspiracy is committed *"once two or more persons agree to commit a crime, whether or not the crime itself is committed" meaning that it is "an inchoate offence."*[190] In contrast, the Romano-Germanic law treats conspiracy as a *"form of participation in the crime itself, and is only punishable to the extent that the underlying crime is also committed"*.[191] The *travaux préparatoires* of the Genocide Convention demonstrate that the Common Law approach was adopted for conspiracy to commit genocide[192] strengthening the conclusion that conspiracy to commit genocide is an inchoate crime.

320. In addition, the jurisprudence of the ICTR establishes that conspiracy to commit genocide must be treated as an inchoate offence. For instance, the Niyitegeka Trial Chamber held that *"[a]s it is an inchoate offence, the act of conspiracy itself is punishable, even if the substantive offence has not actually been perpetrated."*[193]

321. The Prosecution appears to share this view as the Indictment includes a separate count on conspiracy to commit genocide as opposed to an allegation indicating, within the count relating to genocide, that genocide was committed through conspiracy. In addition, in its Pre-Trial Brief, the Prosecution submitted that *"conspiracy to commit genocide is a separate, inchoate offense and punishable, even if the underlying genocide is never perpetrated."*[194]

(C) Conspiracy to Commit Genocide is Not a Continuing Crime

322. The ICTR Appeals Chamber, citing Black's Law Dictionary, held that a continuing crime *"implies an ongoing criminal activity"*.[195] Whether the crime of conspiracy to commit genocide may be qualified as a continuing crime has not been addressed in the jurisprudence hitherto.

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[189] Cassese, International Criminal Law,p.219.
[190] Schabas, Genocide in International Law,p.260.
[191] Schabas, Genocide in International Law,p.259-260.
[192] Musema,TJ,para.187.
[193] Niyitegeka,TJ,para.423.
[194] Prosecution Pre-Trial Brief,para.392.
[195] Nahimana,AJ,para.721.

323. However, in the submission of the Defence, conspiracy to commit genocide may not be considered a continuing crime. A parallel drawn with another inchoate crime, i.e. incitement to commit genocide, clearly indicates that conspiracy to commit genocide does not imply ongoing criminal activity.

324. The ICTR Appeals Chamber, reversing the finding of the Nahimana Trial Chamber, considered that

> *"the Trial Chamber erred in considering that incitement to commit genocide continues in time 'until the completion of the acts contemplated'. The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time".*[196]

325. Similarly, conspiracy to commit genocide is also completed at the time of the agreement to commit genocide is concluded, irrespective of the fact whether the ensuing genocide takes place or not.[197] The key element of this crime, i.e. the agreement to commit genocide, can not constitute ongoing criminal activity. Once it is concluded, in conjunction with the required *mens rea,* the elements for the crime of conspiracy to commit genocide have been fulfilled. A possibly ensuing genocide is encapsulated by the crime of genocide and not by conspiracy to commit genocide.

III. EXTERMINATION

1. *In* an armed conflict, there was a widespread or systematic attack directed against any civilian population
2. The Accused contributed, directly or indirectly, to the unlawful killing of a massive number of individuals
3. The Accused intended to unlawfully kill individuals on a massive scale
4. The Accused knew (i) of the widespread or systematic attack directed against a civilian population and (ii) that his conduct was part of that attack or he took the risk that his conduct was part thereof

[196] Nahimana,AJ,para.723 (citation omitted).
[197] Zigiranyirazo,TJ,para.389;Musema,TJ,para.194.

326. The *actus reus* of extermination consists of *"any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals."*[198]

327. As regards the *mens rea* required for extermination, it must be established that the *"accused had the intention to kill persons on a massive scale or to create conditions of life that led to the death of a large number of people."*[199]

IV. MURDER AS A CRIME AGAINST HUMANITY

1. *In* an armed conflict, there was a widespread or systematic attack directed against anycivilian population
2. The Accused contributed, directly or indirectly, to the unlawful killing of [a] person(s)
3. The Accused knew (i) of the widespread or systematic attack directed against a civilianpopulation and (ii) that his conduct was part of that attack or he took the risk that hisconduct was part thereof

328. Murder as a crime against humanity requires: (a) the death of the victim; (b) caused by an act or omission of the accused, or a person for whose acts or omissions the accused bears criminal responsibility; (c) with an intent to kill or to cause grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[200]

329. In addition, as set out above, for the offence of murder to be considered a crime against humanity, the *chapeau* requirements of Article 5 must be met.

V. MURDER AS A VIOLATION OF THE LAWS OR CUSTOMS OF WAR

[198] Brđanin,TJ,para.388.
[199] Brđanin,TJ,para.395.
[200] Brđanin,TJ,para.381.

1. The Accused contributed, directly or indirectly, to the unlawful killing of [a] person(s) not taking a direct part in hostilities
2. The Accused intended (i) to unlawfully kill or (ii) to cause grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission is likely to cause death
3. There is a nexus between the conduct of the Accused and an armed conflict

330. The elements of murder as a violation of the laws or customs of war are identical the elements of murder as a crime against humanity with the difference that the victim must not have taken a direct part in hostilities.[201]

331. In addition, for murder to be considered a violation of the laws or customs of war, the general requirements of Article 3 must be fulfilled. Firstly, *"[t]here must be an armed conflict, whether international or internal at the time material to the Indictment."*[202] Secondly, *"the acts of the accused must be closely related to this armed conflict."*[203]

VI. PERSECUTIONS

1. *In* an armed conflict, there was a widespread or systematic attack directed against any civilian population
2. The Accused participated, directly or indirectly, in the denial or infringement upon a fundamental right of [an] individual(s) laid down in international customary or treaty law, which in fact discriminates
3. The Accused intended (i) to deny or infringe upon a fundamental right of [an] individual(s) laid down in international customary or treaty law and (ii) to discriminate against that or those individual(s), on political, racial and/or religious grounds
4. The Accused knew (i) of the widespread or systematic attack directed against a civilian population and (ii) that his conduct was part of that attack or he took the risk that his conduct was part thereof

[201] Kvočka,AJ,para.261.
[202] Kunarac,AJ,para.55.
[203] Kunarac,AJ,para.55.

332. The *actus reus* of the crime of persecutions consists of 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."*[204]

333. The *mens rea* of the crime of persecutions requires that the act or omission be *"carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics"*.[205] The discriminatory intent required for this crime sets it apart from the other crimes against humanity in Article 5.

334. The Prosecution must establish that the Accused consciously intended to discriminate as it is not sufficient that he *"was merely aware that he is in fact acting in a discriminatory way."*[206] In addition, it must be shown that that act or omission, in fact, has discriminatory consequences.[207]

335. In addition, as set out above, for the crime of persecutions to be considered a crime against humanity, the *chapeau* requirements of Article 5 must be met.

VII. FORCIBLE TRANSFER

1. *In* an armed conflict, there was a widespread or systematic attack directed against any civilian population
2. The Accused participated, directly or indirectly, in the forcible displacement of individuals from the area in which they were lawfully present, within national borders, without grounds permitted under international law
3. The Accused intended to forcibly displace the individuals within national borders, whether permanently or otherwise
4. The Accused knew (i) of the widespread or systematic attack directed against a civilian population and (ii) that his conduct was part of that attack or he took the risk that his conduct was part thereof

[204] Kvočka,AJ,para.320.
[205] Kvočka,AJ,para.320.
[206] Vasiljević,TJ,para.248.
[207] Vasiljević,TJ,para.245.

336. The *actus reus* of crime of forcible transfer relates to "*the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law.*"[208] Forcible transfer concerns forced displacements within national boundaries.[209]

337. The Appeals Chamber has held that *"it is the absence of genuine choice that makes displacement unlawful"*.[210] Furthermore, a genuine choice can not be inferred from the fact that consent was expressed where the circumstances deprive the consent of any value.[211] The determination as to whether a transferred person had a "real choice" to remain in the area where he or she was present *"has to be made in the context of all relevant circumstances on a case by case basis."*[212]

338. International law provides for justifications for the transfer of civilians. Article 17(1) of Additional Protocol II reads as follows: *"[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand."* In addition, the forcible displacement of the civilian population may be lawfully carried out for humanitarian reasons.[213]

339. The *mens rea* for the forcible transfer is *"the intent to displace, permanently or otherwise, the victims within the relevant national border."*[214]

340. In addition, as set out above, for the offence of forcible transfer to be considered a crime against humanity, the *chapeau* requirements of Article 5 must be met.

VIII. DEPORTATION

[208] Milutinović,TJ,Vol.1,para.164.
[209] Milutinović,TJ,Vol.1,para.164.
[210] Krnojelac,AJ,para.229.
[211] Krnojelac,AJ,para.229.
[212] Naletelić,TJ,para.519.
[213] Blagojević,TJ,para.600.
[214] Milutinović,TJ,Vol.2,para.164.

1. *In* an armed conflict, there was a widespread or systematic attack directed against any civilian population
2. The Accused participated, directly or indirectly, in the forcible displacement of individuals from the area in which they were lawfully present, across a State border, without grounds permitted under international law
3. The Accused intended to forcibly displace the individuals across a State border, whether permanently or otherwise
4. The Accused knew (i) of the widespread or systematic attack directed against a civilian population and (ii) that his conduct was part of that attack or he took the risk that his conduct was part thereof

341. Akin to the crime of forced displacement, the *actus reus* of the crime of deportation requires *"[t]he forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present ... without grounds permitted under international law."*[215]

342. Unlike forcible transfer, however, the crime of deportation requires displacing persons across a *de jure* State border although displacement across a *de facto* border may, under certain circumstances, also amount to deportation.[216] Whether displacement across a particular *de facto* border is sufficient for the purposes of the crime of deportation *"should be examined on a case by case basis in light of customary international law."*[217]

343. The *mens rea* for deportation is *"the intent to displace, permanently or otherwise, the victims ... across the relevant national border"*.[218]

344. In addition, as set out above, for the offence of deportation to be considered a crime against humanity, the *chapeau* requirements of Article 5 must be met.

PART THREE - THE ACCUSED DRAGO NIKOLIĆ

[215] Stakić,AJ,para.278.
[216] Stakić,AJ,para.300.
[217] Stakić,AJ,para.300.
[218] Milutinović,TJ,Vol.2,para.164.

345. This part of the Nikolić Brief addresses the Accused, Drago Nikolić. It sets out: his personal background; his military career; his military performance; as well as his good character.

A. PERSONAL HISTORY AND BACKGROUND OF DRAGO NIKOLIĆ

346. Drago Nikolić was born in the village of Brana Bačići in Bratunac municipality on 9 November 1957 into an impoverished rural family.[219] Drago Nikolić's parents worked a small piece of land and, in the summer months, his father would work as a construction worker.[220] Sadly, Drago Nikolić's father, Predrag Nikolić, passed away in 2008.

347. Drago Nikolić is the second eldest of four brothers: Dragan, Milisav and Borislav. The brothers have a close relationship and, in case of particular needs, they come to one another's aid.[221] For instance, Milisav Nikolić testified that all three brothers helped Borislav Nikolić finance the purchase of his apartment.[222] Similarly, Dragan Nikolić lent money[223] to Drago Nikolić for the purpose of purchasing a house and for the wedding of his daughters.[224] Unfortunately, Drago Nikolić's youngest brother Borislav passed away sometime after the war.[225]

348. Before the death of Drago Nikolić's father, both his mother and father had not been able to provide for themselves due to their dire health situation.[226] Together with his siblings, Drago Nikolić would help his parents make ends meet by assisting them financially and in other manners.[227]

349. Together with his wife Milena, Drago Nikolić has two daughters: Dragana and Vida. Both of his daughters are married and he is the grandfather of three grandchildren: Milica, Katarina and Ognjen.[228]

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[219] T.25904.
[220] T.25904.
[221] T.25907-25908.
[222] T.25908.
[223] REDACTED
[224] T.25908.
[225] T.25905.
[226] T.25904-25905.
[227] T.25905.
[228] T.25907.

350. Besides his two daughters, Drago Nikolić also had a son, Dragiša, who tragically passed away at the age of eight on 21 May 1990.[229] The death of Dragiša Nikolić was a sad event for the Nikolić family.[230] The death of his only son even had physical repercussions for Drago Nikolić as his hair turned completely white.[231] After the death of Dragiša Nikolić, the Nikolić family became very close and their bond grew tighter.[232]

351. At the outset of the civil war in Yugoslavia, Drago Nikolić was residing in Sarajevo with his family.[233] Due to the precarious situation in Sarajevo, Drago Nikolić decided to send his daughters, aged 11 and 13 at the time, to his brother in Novi Sad in Serbia.[234] It was very difficult for the girls to be separated from their parents at such a young age.[235] In June 1992, the Nikolić family was finally reunited.[236]

352. During the war, Drago Nikolić lost another member of his immediate family. On 16 July 1995, Dušan Nikolić, Drago Nikolić's cousin, was killed in combat at Baljkovica.[237] Considering that they had been inseparable since childhood, Dušan Nikolić's tragic death deeply upset Drago Nikolić.[238]

353. Drago Nikolić surrendered voluntarily and left for the Hague on 17 March 2005.[239] In the fall of 2002, when the Indictment against him was made public, Drago Nikolić was living with his family in their house in Banja Koviljača.[240] Drago Nikolić was not in hiding, he continued his life as usual.[241] However, the circumstances and the difficult family situation led him not to instantaneously surrender. Due to the exceptionally close relationship he had with his family, concern for his wife's illness and the fact that his children were not provided for financially, Drago Nikolić delayed his surrender for the time being in order to look after their well-being and future.[242] Another factor which influenced his decision, was the constant media campaigns against surrendering and the

[229] 3D382.
[230] T.25907.
[231] T.25907.
[232] T.25907.
[233] T.25905.
[234] T.25911-25912.
[235] T.25936.
[236] T.25913.
[237] 3D378; 3D462; 3D475; T.25940-25941; 3D474; T.25953-25954; T.25965-25966.
[238] T.25934; T.25941.
[239] T.25920.
[240] T.25919.
[241] T.25918.
[242] T.25919.

fact that high ranking officers had not yet surrendered.[243] As others started to surrender, on 14 March 2005 Drago Nikolić surrendered voluntarily to the competent authorities.[244]

354. Drago Nikolić's request for provisional release during the Pre-trial phase was denied.[245] However, he was granted provisional releasing from 1 to 4 August 2008[246] to attend the memorial service for his father. The report from the Republika Srpska Government attests that during the period he was provisionally released, Drago Nikolić complied in full with the conditions imposed by the Trial Chamber.[247]

B. THE DUTIES AND RESPONSIBILITIES OF DRAGO NIKOLIĆ

I. AS SECURITY ORGAN OF THE ZBDE

355. Drago Nikolić's duties as Security Organ of the ZBde are unambiguously defined in the applicable rules and regulations.

356. Regulations of the former JNA and SFRY were fully applied in the field of defence security in the VRS, in accordance with the situation in the RS.[248] The competences and tasks as well as the powers and obligations of security organs in all its aspects, including the issue of prisoners of war, are regulated in the Rules of Service of Security Organs in the Armed Forces of the SFRY ("Rules of Service")[249]. Article 6 of the Rules of Service sets out the tasks attributed to security organs, which are mainly counterintelligence work and the security within the unit. The instruction from the Main Staff issued in October 1994[250] did not prescribe any exceptional authorization nor did it change the relationship between the Commander and his Security Organ.[251] By this instruction, the Main Staff merely restated – for the benefit of young commanders who

[243] T.25919.
[244] T.25920.
[245] Pros v. Popović *et al*, Case No. IT-05-88-T, Decision on Drago Nikolić's Request for Provisional Release, 09 November 2005.
[246] Decision on Nikolić Motion for Provisional Release, 21 July 2008; Decision on Nikolić's Motion Seeking a Variation of the Conditions of his Provisional Release, 30 July 2008.
[247] Report on Nikolić Provisional Release, 11 August 2008.
[248] 3D396 p.7,47 P407;T.19589 -19595.
[249] P407. The Rules of Service entered into force on 21 March 1984.
[250] P2741.
[251] T.28637,L.5-14.

were unskillful in the supervision and command over their security organ – the existing position pursuant to the applicable JNA regulations.[252]

357. Drago Nikolić's duties as ZBde Security Organ, as provided for in the applicable Brigade Rules, were comprehensively explained by Defence expert witness Petar Vuga ("Vuga"). In keeping with the Rules, the duties for which Drago Nikolić was responsible in his capacity as security organ consisted of counterintelligence in accordance, to the Rules of Service and the Instructions On the Methods and Means of work.[253]

358. More specifically, the task of the security organ was to detect and prevent threatening activities that are directed against the security of the Army and the defence of the RS (instigators, accomplices, organizers and perpetrators and those responsible for them).[254] In the performance of their work, Security Organs relied on security entities and provided specialist assistance to these entities.[255] Security Organs applied the prescribed methods and means of work when performing tasks within their prescribed scope of work and established cooperation with services and organs in the RS performing state security duties.[256]

359. In his daily activities, 2Lt Drago Nikolić was under the direct command of the ZBde Commander, Vinko Pandurević, who was his immediate superior officer.[257] Drago Nikolić always followed all orders from Pandurević and carried out his regular tasks. The Commander was familiar with the work of his Security Organ and that of Drago Nikolić specifically. This is evident from the Work Plans for January and June as well as from the Annual Work Evaluation.[258] However, in disregard of the work performed by Drago Nikolić and in clear violation of the October 1994 Main Staff Instruction, Pandurević assigned Drago Nikolić as Operations Duty Officer.[259] This led to the issuance of a new instruction by the Main Staff on 23 December 1994.[260]

360. Until January 1995, Drago Nikolić was the Assistant Commander for Intelligence and Security. Pursuant to an order issued in January 1995, the Security Organ was separated

[252] T.28637,L.5-14.
[253] T.23284;3D396,p,9,para.2.42.
[254] 3D396,p.9,para.2.38.
[255] 3D396,p.9,para. 2.39.
[256] 3D396.p.9,para.2.40-2.41;P2741;T23283 .
[257] T.23281.
[258] T 31343.31344.3D529,3D551.
[259] T.31652-31654.
[260] 3D544; T.31652-31654.

from the Intelligence Organ.[261] The sole domain of work of the Security Organ in which the Commander had no insight, was counter-intelligence work and methods of work, because those were confidential. In this regard, the ZBde Commander Pandurević did not have the right to verify the application of the methods and means of work of his Security Organ, nor to control the counter intelligence work performed by his Security Organ, that is, 2Lt Drago Nikolić.[262] It was the DrinaK Chief of Security, Lcol Vujadin Popović who exercised specialist management over the work of 2Lt Drago Nikolić in the field of counter-intelligence work, the application of the methods and means of work, and the application of the law, in the work of the Security Organ.[263]

361. Other duties for which command organs were responsible and in which security organs participated included the following: (a) staff security tasks; (b) specialist control of the military police in professional terms; and (c) tasks in pre-criminal procedure arising from the Law on Criminal Procedure.[264]

II. TOWARDS MEMBERS OF THE ZBDE MP COMPANY

362. Paragraph 16 of the Indictment alleges that Drago Nikolić *"was, inter alia, responsible for managing the Zvornik Brigade Military Police Company, and for proposing ways to utilise the Zvornik Brigade Military Police Company."*.

363. The Defence submits that, insofar as the Prosecution is arguing that Drago Nikolić's responsibilities for management included the authority to issue orders, this proposition must be rejected. As demonstrated *infra,* the evidence does not support this assertion.

364. Firstly, the legal framework prevailing at the relevant time undoubtedly indicates that the Chief of Security merely had an advisory role to the Commander in respect of the MP.

365. Article 12 of the 1985 SFRJ Service Regulations of the MP mentions that *"[t]he officer in charge of the military unit and institution within whose establishment the military police is placed … commands and controls the military police."*[265] The MP Commander exercises command over the MP unit, is responsible for its condition and performance

[261] 3D519.
[262] 3D396;T.23283 23284.
[263] 3D396.p.53; T.31663-31664.
[264] T.23284 ;3D396,p,9,paras.2.43-2.45 and p.11,paras.2.54-2.55.
[265] P707,p.10;3D396,p.15.

of its tasks.[266] Instructions on the Use of the Service Regulations of the MP prescribe that "*the officer of the military police unit, directly or through the security organ of the command, staff, unit or institution in which the military police unit is placed, proposes to the superior military officer the use of the military police for carrying out duties and tasks within its scope of work...*".[267]

366. Article 13 of the same 1985 SFRJ Service regulations of the MP holds that "with regard to speciality, the officer in charge of the security body of the unit or institution within whose establishment the military police is placed … controls the military police."[268] This means that the officer in charge of the security body "makes suggestions to the officer in charge of the military unit or institution on the use of military police units and is responsible for the combat readiness of the military police unit and the performance of their tasks."[269]

367. It ensues that, if the MP unit is commanded and controlled by the officer in charge of the military unit, the specialist control exercised by the security organ necessarily excludes the possibility of the officer in charge of the security organ issuing orders to the MP. The principle of "singleness of command", prevailing in the VRS at the relevant time,[270] prevented two officers being in command of the same unit. Several decisions of the ZBde, in fact, attest to such a division of responsibilities.[271]

368. Secondly, the expert Witnesses called by the Defence and the Prosecution confirmed the absence of command authority of the Security Organ of the ZBde over the MP company.[272]

369. Vuga testified that the *"[a] military police company is commanded by the commander of the military police company"*[273] who is, in turn, subordinated to the Brigade Commander.[274] In the expert opinion of Vuga, *"[t]he overall nature of [the] relationship between the security organ and the military police is purely professional."*.[275] He said, in addition, that *"a security organ does not have the*

[266] T.23317.
[267] 3D276,item 18.
[268] P707,p.10;3D396,p.16 and 17.
[269] P707,p.10;3D396,p.16 and17;T.23317.
[270] T.30726.
[271] REDACTED
[272] 3D396,p.17;T.19636-19637.
[273] T.23315.
[274] T.23315-23316.
[275] T.23317.

competence and authority to issue any instructions which are outside the orders issued by the commander because that would mean an expansion of his own authority" which means that instructions to the Commander of a MP company can not be issued outside the framework of the Commander's orders. [276] More specifically, the Security Organ does not play a role in the engagement of the MP in combat as this decision falls outside the remit of the Security Organ's tasks.[277]

370. The Security Organ controls/provides specialist management for the MP unit.[278] Control may not be mistaken for commanding a unit. Drago Nikolić, as ZBde Security Organ, did not have any units subordinated to him. The Security Organ only provides specialist supervision and specialist advice and recommendations on the use of the MP unit.[279]

371. Butler confirmed Vuga's conclusions. He testified that Drago Nikolić did not exercise command over the MP.[280] In his view, the relationship between the Security Organ of the Zvornik Brigade and the ZBde MP amounted to specialised management.[281] This entails advising the ZBde Commander on the use of the MP[282] and seeing to the combat readiness of the MP in the sense which does not include combat *per se.*[283] Butler also opined that the decision on the use of the MP in combat remained within the sole discretion of the ZBde Commander and Drago Nikolić could merely advise his Commander as to the appropriateness of devoting MP resources to combat rather than to their traditional role.[284] The Security Organ, as a specialist organ within the Brigade Command for security affairs, could propose recommendations, which his Commander was under no terms obliged to follow.[285]

372. Thirdly, witnesses testified that the situation was identical at higher levels in the VRS as well as in the Bratunac Brigade.

373. For instance, Savčić said, in respect of the situation within the VRS Main Staff, that *"the [MP] battalion was commanded by the Commander of the Regiment, through the*

[276] T.23457.
[277] T.23453.3D396,p.12,para.2.70.
[278] P407,p.11,Article 23;P707,p.10-11,p.13 and 14;T.23284.
[279] 3D396,p.12,para.2.70.
[280] T.19637;T.20334.
[281] T.20334-20335.
[282] T.20335.
[283] T.20335-20336.
[284] T.20336;3D396,p.17.
[285] 3D396,p.12,para.2.70.

Commander of the MP Battalion."[286] Lazić considered, as regards the situation at the Corps level, that *"the Commander of the military police is subordinated to the Corps Commander."*[287] Momir Nikolić testified that, within the Bratunac Brigade, he did not command the MP Platoon and he did not issue orders directly to the MP Commander.[288] According to Momir Nikolić, *"[t]he Commander of the unit within which the MP unit is contained is … the only officer who can issue orders to the MP through their MP platoon commander, and to military policemen directly."*[289]

374. Fourthly, and more importantly, witnesses who were members of the ZBde MPcompany at the relevant time confirmed the Defence's position.

375. Kostić testified: *"Drago [Nikolić] did not issue orders to us, Jasikovac did."*[290] 3DPW-29 testified that *"[i]n professional work, the security branch controls the MP, but any use of the MP must be approved by the Commander."*[291] PW-165 said that the MP Commander received orders from his Security Officer while the Security Officer received orders from the main Commander.[292] REDACTED[293] Stojanović claimed that Jasikovac was her immediate Commander and that Jasikovac reported to Nikolić who, in turn, reported to the Brigade Commander.[294]

376. Finally, Pandurević admitted that he commanded the MP company through Drago Nikolić.[295] It may thus be concluded, that Drago Nikolić did not have command authority in respect of the MP company. The Commander bears exclusive competence to decide on the use of the MP and assign tasks to the officer of the MP.[296]

III. TOWARDS THE MUP

377. It is also alleged in paragraph 16 of the Indictment that Drago Nikolić *"was also responsible, in general, for co-ordinating with the bodies of the MUP within the Zvornik Brigade zone of responsibility."*

[286] T.15239.
[287] T.21742.
[288] T.33215.
[289] T.33215.
[290] T.25989-25990.
[291] T.26424-26425.
[292] T.10012.
[293] REDACTED
[294] 3D511,p.5-6.
[295] T.31689;3D396,p.54.
[296] 3D396,p.16,para.2.92;T.23315,L.18-T.23316,L.2.

378. Rule 73 of the Rules of Service of Security Organs in the JNA provides that *"[i]n conducting work within their competence, security organs collaborate with organs of the Interior"*[297] on a number of issues.

379. Nevertheless, the exact scope of this collaboration was explained by Vuga. He considered that *"[c]oordination ... of the actions of police units and VRS units is in the area of competence of command organs" and "security organs may be engaged in their commands as participants in staff security duties, i.e. as specialist organs for security duties, on orders from the superior commander and in accordance with the plan of the command."*[298]

380. Specific documents corroborate this interpretation. For instance, in a 15 January 1994 order, concerning the intake of conscripts, the ZBde Commander ordered Drago Nikolić to *"establish contacts ... with the MUP ... and, in cooperation with them, organise the collection of weapons possessed by v/o which are not standard issue."*[299]

381. More importantly, however, the Prosecution failed to produce any evidence in respect of co-ordination efforts allegedly carried out by Drago Nikolić during the times relevant to the Indictment. In the Defence's submission, the absence of evidence to this effect, in conjunction with other relevant indicators, establishes that, in actual fact, no such co-ordination was undertaken by Drago Nikolić during this period.[300]

382. Firstly, the order of the MUP Staff Commander of 10 July 1995, pursuant to which MUP forces were sent to the Srebrenica sector, indicated that *"the unit commander is obliged to make contact with the Corps Chief of Staff, General KRSTIĆ."* [301] No role had been reserved for relevant security organ although the reception of MUP forces arguably is a task of a coordinative nature.[302]

383. Secondly, Drago Nikolić was not included in the list of recipients of Zvornik CJB information dispatches in the relevant time period. These information dispatches invariably excluded the ZBde in general from the information circulated by the Zvornik CJB.[303] If Drago Nikolić had co-ordinated with MUP bodies during this period, he would necessarily have had to be notified of the activities of the Zvornik CJB.

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[297] P407,p.27.
[298] 3D396,p.33.
[299] 3D522,p.2.
[300] 3D396,p.53.
[301] P00057.
[302] P2852;P2853.
[303] P00059; P00060; P00062.

384. Finally, Drago Nikolić did not participate in the meeting held at the ZBde Command on 15 July 1995 between representatives of the ZBde and the MUP. Drago Nikolić continued his normal duties and his shift as Operations Duty Officer. Drago Nikolić's absence from this meeting militates strongly in favour of the proposition that he did not play any role in co-ordination efforts between the ZBde and the MUP.[304]

IV. TOWARDS PRISONERS OF WAR

385. It is indisputable that "*In the duties and tasks for which the OB* [Security Organ] *are responsible, **there are no directly or indirectly prescribed obligations of the OB with regard to prisoners of war**".*[305] This has also been confirmed by Prosecution expert witness Richard Butler.[306]

386. As prescribed by Article 4, paragraph 1 of the Instructions on the Treatment of Captured Persons, the company commander or a person holding an equal or higher position is responsible for the prisoners.[307] Accordingly, up to the company level, the battalions bore the *de jure* and the *de facto* obligation and the responsibility for the detention of the prisoners of war.[308]

387. The Instructions on the Use of the Service Regulations of the MP provide that the MP may provide security and escort only certain categories of prisoners of war and only when this is ordered by a special order.[309] This is not regular duty of the MP, but rather a special duty in the case of important prisoners of war.[310]

388. In cases where the military police is performing tasks in relation to prisoners of war, it must be emphasized that the engagement of the security organ is limited to *providing information on the security situation and proposing measures for preventing threats* to the safe execution of the task, but only when the security organ has information on expected threats and those responsible for them.[311] Escorting prisoners of war falls within the purview and competence of the MP and thus the command.[312]

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[304] T.30959.
[305] 3D396,p.11,para.2.56;P407;REDACTED
[306] T.20049,L.21-24.
[307] 3D315,p.1.
[308] See also T.19637.
[309] 3D276,items 129,255-261.
[310] 3D396,p.20,para.2.117.
[311] 3D396,p.23,para.2.136;T.23317.
[312] 3D396,p.23,para.2.136.

389. In fact, an order from the Drina Corps dated 15 April 1995 clearly makes a distinction between the prisoners of war, which are the responsibility of the MP and the other prisoners, i.e. VRS members, citizens of the RS and VRS volunteers who committed criminal offences and came within the competence of the Security Organ.[313]

390. The fact that Drago Nikolić did not have any *de jure* or *de facto* responsibility for the Muslim prisoners of war in July 1995 is further evidenced in additional orders from the relevant time. The order from the DrinaK, dated 2 July 1995 orders active combat operations and specifies tasks with regard to the formation of Tactical Group 1 of the ZBde to carry out tasks outside its zone of defence. Meanwhile Drago Nikolić, the ZBde Security Organ, remained in the zone of the ZBde performing his regular duties.[314]

391. With a part of the forces from the ZBde carrying out tasks outside the brigade's zone of defence, increased involvement of the Security Organ in counter-intelligence security of the territory was necessary.[315]

392. The situation in the territory of Zvornik on 13 and 14 July due to the presence of large number of prisoners, led to what can be defined as a total threat for the security of the Brigade Command and other facilities in the area.[316] As Vuga explained, the fact that prisoners were accommodated in the area of Zvornik, despite the poor security situation, represented an additional security threat, which the Security Organ had to take into account. Indeed, it posed a major security threat for the Brigade Command and its its units.

393. Given the threat posed by the prisoners, in his capacity as ZBde Security Organ and pursuant to his duties, it was normal for Drago Nikolić to visit the locations where the prisoners were detained in order to assess the security situation. Drago Nikolić was however not responsible for deciding the fate of the prisoners. 2Lt Drago Nikolić did not have any forces under his command allowing him to take measures in respect of the prisoners.[317]

[313] P196,para.4.
[314] P107;T.23300,L.18-25.
[315] 3D396,p.33,para.3.2.5;T.23299-T.23301.
[316] T.23303,L.20-25.
[317] 3D396,P.54; REDACTED

394. There are no grounds to conclude that in carrying out duties and tasks within his functional duty, Drago Nikolić deviated from the regulations defining the place, role, scope of work, tasks, powers and jurisdiction of security organs of the VRS.

395. Moreover, it is evident that Drago Nikolić was not in a position to decide or even participate in any decision regarding the prisoners. Neither in his capacity as ZBde Security Organ nor in his capacity as Operations Duty Officer, did he have a responsibility towards the prisoners or the competence to decide on their accommodation or their fate.

C. CHARACTER EVIDENCE

I. MILITARY DUTIES AND PERFORMANCE

396. 2Lt Drago Nikolić spent the majority of his life in the army: first as a student and later as an officer until the time he retired. Before the demise of Yugoslavia, he served in the JNA whereas the civil war necessitated him to transfer to the VRS.

397. At the age of 14, Drago Nikolić enrolled in military high school in Sarajevo. His father lacked the financial means to educate all his children and he decided to send Drago Nikolić to Sarajevo as this type of education was provided by the State free of charge.[318] Drago Nikolić fulfilled all preconditions for enrolment - the Nikolić family was loyal to the then communist system, no member of the Nikolić family had a criminal file and Drago Nikolić had obtained good grades in school.[319]

398. Upon completing military high school in 1976 with excellent results, Drago Nikolić remained in Sarajevo and he was assigned to his first post as a member of the Military Police Platoon in Sarajevo.[320] Drago Nikolić did not attend any military education apart from military high school.[321] Thereafter, Drago Nikolić held various positions in the JNA and, prior to leaving Sarajevo in 1992, he worked in the Administration of the Military District which was professionally related to the Republic Secretariat for National Defence.[322]

[318] T.25906.
[319] T.25906.
[320] 3D233,p.2; 3D465,p.2.
[321] P373.
[322] 3D465,p.2.

399. Subsequent to the outbreak of the war, Drago Nikolić took up a post in Šekovići. In January 1993, Drago Nikolić was transferred to the ZBde and in March 1993, he was appointed Chief of Security, a position he occupied throughout the war.[323]

400. On 29 May 1998, Drago Nikolić was diagnosed with endo-reactive depression with additional paranoia and a chronic post-traumatic stress disorder rendering him permanently unfit for military service.[324] Accordingly, Drago Nikolić's professional military service was terminated on 13 November 1998 and he retired from the VRS as an Infantry Warrant Officer 2nd Class.[325]

401. The rank Infantry Warrant Officer 2nd Class was in fact the effective rank of Drago Nikolić the entire time. It is clear from all the foregoing that the rank of 2Lt was attributed to Drago Nikolić due to the extraordinary situation of war and only for the time this situation lasted. Drago Nikolić retired as a non-commissioned officer.

402. Drago Nikolić's superiors and colleagues spoke very highly of his military performance and professional capabilities.

403. Atlagić, who has known Drago Nikolić since 1976, suggested and requested Drago Nikolić's transfer to the Security Organ within the Military District in Sarajevo from the Administration of the Military District in Sarajevo.[326] Atlagić did so as Drago Nikolić was a "mature and responsible officer" who "believed in Yugoslavia" and who was "extremely conscious in carrying out his duties and tasks".[327]

404. Milidrag, Drago Nikolić's superior from 1989 until 1992, described him as "a hard worker, as well as an honest and dedicated non-commissioned officer."[328]

405. General N. Simić, who was in the MP Battalion in Sarajevo between 1978 and 1980, testified that Drago Nikolić was one of the best platoon commanders at the time.[329]

406. REDACTED[330]

[323] P373;REDACTED
[324] 3D469.
[325] 3D468.
[326] 3D465,p.2.
[327] 3D465,p.2-3.
[328] 3D467,p.2.
[329] T.28574.
[330] REDACTED

407. Pandurević said that "Drago Nikolić is a disciplined officer" and "he conducted himself in a civilised manner and in accordance with the rules."[331]

408. Drago Nikolić was very loyal towards the ZBde. In the course of 1994, General N. Simić offered Drago Nikolić to join the East-Bosnia Corps, where he would hold the rank of Captain. However, Drago Nikolić refused as he felt it would be unfair towards other members of the ZBde.[332]

409. In addition, the official assessments Drago Nikolić received confirm the positive opinion of his superiors and colleagues.

410. For the period of June 1989 until June 1993, Drago Nikolić received, on average, a grade of 4,73 out of a maximum of 5 which was considered an *"exceptional performance."*[333] Those grades are always granted by the Commander.[334]

411. Thereafter, from March 1993 until June 1996, it was deemed that Drago Nikolić *"in a short time improved the work of the organ and significantly contributed to the improvement of the general conditions in the unit."*[335] It was said that he *"approached work and tasks with great responsibility"* and that he was *"very appreciated by the group of senior officers."*[336]

412. Drago Nikolić, despite his excellent achievements as Chief of Security of the ZBde Brigade, remained a non-commissioned officer and he did not advance in the military hierarchy.

413. For instance, General N. Simić, who had served with Drago Nikolić in Sarajevo, was surprised to learn that, in 1994, Drago Nikolić was without a rank at the ZBde.[337]

414. REDACTED[338] [339] [340]

415. Vinko Pandurević wrote that 2Lt, the rank held by Drago Nikolić at the relevant time, were classified as lower officers.[341] The group of lower officers, as opposed to the

[331] T.30780.
[332] T.28574-28575.
[333] 3D233,p.4.
[334] See e.g. 3D233, p.8.
[335] 3D233,p.5.
[336] 3D233,p.5.
[337] T.28574.
[338] REDACTED
[339] REDACTED
[340] REDACTED

group of higher officers such as majors, lieutenant-colonels and colonels, wield a lower amount of power.[342]

II. PERSONAL CHARACTER OF DRAGO NIKOLIĆ

416. Before leaving to Sarajevo at the age of 14, Drago Nikolić was of a merry spirit.[343] During his studies in Sarajevo, however, Drago Nikolić grew more serious and introvert as he found it difficult to be separated from his family.[344] In his family circle as well as in his broader community, Drago Nikolić was well-liked and respected.[345] Drago Nikolić is a hard-working man and willing to assist anyone.[346]

417. According to Vida Vasić, Drago Nikolić's youngest daughter, Drago Nikolić is completely devoted to his family. She testified that he never raised his voice at his daughters and the family would resolve everything by talking.[347] He took his daughters' education at heart helping them and attending all parent/teacher conferences.[348] All of his free time would be dedicated to his family.[349]

418. A Yugoslav by orientation, Drago Nikolić never expressed any religious or national intolerance.[350] He got on well with people of different religious and ethnic background within his own family as well as in his professional environment.[351]

419. For instance, Drago Nikolić held his sister-in-law, who is a Croat by ethnicity and a Catholic by religion,[352] in high esteem. During especially difficult times for his family, Drago Nikolić entrusted his children to her.[353] Their families were very close[354] and Drago Nikolić always showed the greatest respect for his sister-in-law and her

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[341] 3D549.
[342] 3D549.
[343] T.25913.
[344] T.25913-25914.
[345] T.25921; T.25941.
[346] T.25921.
[347] T.25936.
[348] T.25936-25937.
[349] T.25937.
[350] T.25921; T.14125.
[351] T.25921.
[352] 3D383; 3D466,p.2-3.
[353] T.25913.
[354] 3D466, p.2.

parents[355]. He would visit them often and celebrate with them their family and religious holidays and otherwise call to convey his best wishes or just to inform about the family.[356]

420. In addition, working in multi-cultural Sarajevo, Drago Nikolić came in touch with persons from different religious and ethnic origins. Milidrag stated that *"in performance of his duties, Drago Nikolić never displayed any intolerance or ethnic/religious bias."*[357] In addition, Drago Nikolić's colleagues of Muslim and Croat ethnicity held him in high esteem.[358] Atlagić stated that Drago Nikolić *"worked with Croats, Muslims and Serbs, and there was no conflict between them."*[359] In addition, Drago Nikolić frequently socialized with persons of non-Serb ethnicity.[360]

421. Finally, demonstrative of Drago Nikolić's character is moreover the UNDU Behaviour Report of Drago Nikolić Whilst in Custody[361], which states *inter alia* that Drago Nikolić has shown good respect for the management and staff of the unit, the Rules of Detention as well as instructions issues by the guards. It is further said that Drago Nikolić has consistently cordial relations with fellow detainees and has had a positive input to the dynamic on his residential wing.

PART FOUR - TESTIMONIAL EVIDENCE WHICH CAN BE ATTRIBUTED LITTLE OR NO PROBATIVE

422. This section addresses the incriminating evidence provided by eight specific witnesses against Drago Nikolić, namely PW 168, Momir Nikolić, Mihajlo Galić, PW 102, PW 108, PW 101, Sreten Acimović and Vinko Pandurević.

423. It is the submission of the Defence that the evidence provided by these eight witnesses can be attributed little or no probative value.

424. More specifically, the Defence posits that its cross examination of these witnesses[362] revealed numerous internal inconsistencies, contradictions with the evidence provided

[355] 3D466, p.2-3; T.25951.
[356] 3D466, p.2-3.
[357] 3D467,p.3.
[358] 3D467,p.4.
[359] 3D465,p.3.
[360] 3D465,p.3.
[361] Annex D.
[362] The evidence provided by PW-102 was admitted pursuant rule 92*quater*, accordingly, as underscored *infra*, the Defence did not have the opportunity to cross examine this witness.

by other witnesses and impossibilities in light of the totality of the evidence on the record, which render their evidence not worthy of belief.

A. WITNESS PW-168

425. REDACTED.[363] the Trial Chamber conducted its own inquiry into the matter and ordered that his testimony be heard in closed session. Even before addressing the evidence provided by PW-168, the Defence submits that the Trial Chamber's decision provided a further opportunity for PW-168 not to tell the truth, which is an important factor to bear in mind.

426. REDACTED. The Prosecution's strategy in this regard backfired. As announced in the Defence opening statement and for all the reasons elaborated upon in this section, the Defence submits that PW-168, even though he testified for more than one month, is a witness not worthy of belief.

427. More specifically and as demonstrated below, PW-168 is a witness: (a) whose total lack of credibility was highlighted in cross examination; (b) who had many reasons not to tell the truth and to provide false incriminating evidence against, *inter alia*, Drago Nikolić; and (c) whose evidence cannot, for the most part, be attributed any probative value because it is not corroborated, contradicted by other evidence as well as incredible and implausible as demonstrated by the Defence military expert witness.

428. REDACTED As such, *some* of the evidence he provided may be of assistance in understanding what happened, albeit in a very limited manner.

429. However, the Defence posits that any evidence provided by PW-168 which: (a) is contaminated for the above mentioned reasons; (b) has a bearing on his own individual criminal liability; and (c) has an incriminating effect on Drago Nikolić, cannot be attributed any probative value whatsoever.

430. REDACTED

431. This, as mentioned above, is but a minimum. In addition, as underscored below, much of the evidence provided by PW-168 regarding other issues is also not true and must not be accorded probative value.

[363] REDACTED

I. PRELIMINARY CONSIDERATION

432. REDACTED

433. REDACTED

434. REDACTED[364] [365] [366] [367]

435. REDACTED

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437. REDACTED

438. REDACTED

439. REDACTED

II. PW-168 IS A WITNESS NOT WORTHY OF BELIEF

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443. REDACTED[368] [369]

444. REDACTED[370] [371] [372]

445. REDACTED[373] [374] [375]

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447. REDACTED[376] [377] [378]

448. REDACTED[379]

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463. REDACTED [417] [418] [419]

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465. REDACTED [420] [421] [422] [423] [424] [425]

466. REDACTED [426]

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471. REDACTED

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483. REDACTED [448] [449] [450] [451] [452] [453] [454] [455] [456] [457] [458] [459] [460] [461] [462]

484. REDACTED

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IV. AS A MINIMUM THE FOLLOWING EVIDENCE PROVIDED BY PW-168 CANNOT BE ATTRIBUTED ANY PROBATIVE VALUE

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(A) REDACTED

524. REDACTED [494] [495] [496] [497] [498] [499] [500]

525. REDACTED

526. REDACTED [501] [502] [503] [504] [505] *[506]*

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576. REDACTED [618] [619]

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581. REDACTED [629] [630]

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B. MOMIR NIKOLIĆ

589. Momir Nikolić was ordered to appear as a witness in this case, pursuant to Rule 98.[639] He testified as a Chamber witness from 21 to 28 April 2009.[640]

I. PRELIMINARY CONSIDERATION

590. REDACTED [641]

II. THE LACK OF CREDIBILITY OF MOMIR NIKOLIĆ

591. The lack of credibility of Momir Nikolić can be demonstrated in many ways.

592. Firstly, as mentioned earlier[642] Momir Nikolić negotiated an advantageous guilty plea with the Prosecution in exchange for *inter alia* his testimony in the Blagojević Trial as well as in all subsequent Srebrenica related trials, including this case.[643] REDACTED[644] It is also noteworthy that the negotiations between the Prosecution and Momir Nikolić

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[630] REDACTED
[631] REDACTED
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[633] REDACTED
[634] REDACTED
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[638] REDACTED
[639] *Prosecutor v. Popović et al.*,Case No.IT-05-88-T,Order to Summon Momir Nikolić,10 March 2009.
[640] T.32894-33394.
[641] REDACTED
[642] PARY FIVE A: " THE COMMON PURPOSE OF THE FIRST ALLEGED JCE AND THE PROSECUTION'S BURDEN OF PROOF".
[643] *Prosecutor v. Momir Nikolić*,Case No.IT-02-60-PT,Annex A to the Joint Motion for Consideration of Plea Agreement Between Momir Nikolić and the Office of the Prosecutor,para.9.
[644] REDACTED

were conducted pursuant to a proffer agreement, resulting in the Defence being deprived of any information regarding the substance of the negotiations and the drafting of Momir Nikolić's Statement of Facts.

593. This, in itself raises serious concerns regarding the credibility of Momir Nikolić and the probative value which can be attached to his evidence.

594. Secondly, it is highly significant that as a result of the guilty plea he negotiated with the Prosecution, Momir Nikolić was initially included on the Prosecution Rule 65*ter* List of Witnesses.[645] However, he was later withdrawn by the Prosecution itself, which informed the Trial Chamber that:

> "*Mr. President, as you are, I think, aware, about two weeks ago we had a proofing session with Momir Nikolić. Julian Nicholls met with him. And from that proofing session it has arisen that Momir Nikolić* ***has become adverse to the Prosecution's case****. He* ***made statements at that proofing session that we don't believe are credible*** *and in reviewing his overall situation we have decided on balance to withdraw him as a witness.".*[646]

595. What is even more important in this regard is that until Momir Nikolić was ordered to appear as a witness by the Trial Chamber, his Statement of Facts which was part of his guilty plea in the context of the Blagojević Trial, had not been admitted in this case other than for the sole purpose of assessing the credibility of other witnesses.[647]

596. Hence, the Prosecution's decision to withdraw Momir Nikolić as a witness had an important effect on the case for the Defence of Drago Nikolić. Indeed, without the testimony of Momir Nikolić and without his Statement of Facts having been admitted, there was no evidence on the record of anyone who would have travelled to the ZBde IKM late in the evening of 13 July 1995, to inform Drago Nikolić of the arrival of thousands of prisoners.[648]

597. Consequently, it must be underscored that the Prosecution abandoned this evidence against Drago Nikolić for the purpose of avoiding calling Momir Nikolić as a witness because he had become adverse to its own case and because the Prosecution considered Momir Nikolić to have no credibility.[649]

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[645] *Prosecutor v. Popović et al.*, Case No.IT-05-88-T,Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65*ter* and List of Exhibits Pursuant to Rule 65*ter*(E)(v),Annex A, Prosecution Witness n° 112,p.4.
[646] T.17398,l.15-20.
[647] *Prosecutor v. Popović et al.*,Case No.IT-05-88-T,Decision on Defence Motion for Removal from Evidence of Momir Nikolic's Statement of Facts,6 February 2008,para. 22.
[648] REDACTED
[649] T.17398, l.15-20.

598. This clearly demonstrates both the lack of credibility of Momir Nikolić as well as the fact that the Prosecution itself, does not believe that Momir Nikolić really travelled to the ZBde IKM in the evening 13 July 1995 to meet with Drago Nikolić.

599. Thirdly, it is noteworthy that Momir Nikolić admitted having told lies to the Prosecution when confessing to crimes he had not committed, a fact which is undisputed regardless of the fact that Momir Nikolić later apologized and corrected his statement.[650] This also seriously impacts on his credibility.

600. Fourthly, it is highly significant that this is by far not the first time that the credibility of Momir Nikolić is called into question.

601. Indeed, in its Sentencing Judgment further to the plea agreement negotiated between the Prosecution and Momir Nikolić, the Trial Chamber held that:

> *"However, it is for the Trial Chamber to make an assessment of the credibility of Momir Nikolić, which ultimately impacts upon the value of such co-operation. Of primary importance to the Trial Chamber is the truthfulness and veracity of the testimony of Momir Nikolić in the Blagojević Trial, as well as how forthcoming the information was. The Trial Chamber takes into consideration* ***numerous instances where the testimony of Momir Nikolić was evasive and finds this to be an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge****."*.[651]

602. While the Appeals Chamber later held that the Trial Chamber committed a discernible error in this regard[652] and lowered Momir Nikolić's sentence in part for this reason, the holding of the Trial Chamber in Blagojević TJ regarding the probative value which can be attributed to the testimony of Momir Nikolić in that case is nonetheless highly relevant and very important. The Trial Chamber held that:

> *"The Trial Chamber confirms, in this context****, its finding that Momir Nikolić cannot be considered a wholly credible or reliable witness and that on matters that bear directly on the knowledge of the Accused,*** *such as what he reported to Colonel Blagojević during those meetings or was told to do,* ***it must require corroboration for such evidence, in order to enter a finding against the Accused****."*.[653]

603. Fifthly, the lack of credibility of Momir Nikolić was also highlighted on numerous occasions when he testified in this case.

604. For example, when questioned by Counsel for Vujadin Popović regarding handwritten notes appearing on exhibit 1D382, Momir Nikolić expressly denied being the author of

[650] *Prosecutor v. Momir Nikolić*,Case No. IT-02-60/1-A,Judgment on Sentencing Appeal ,8 March 2006,para.107.
[651] *Prosecutor v. Momir Nikolić*,Case No. IT-02-60/1-S,Sentencing Judgment,2 December 2003,para.156.
[652] *Prosecutor v. Momir Nikolić*,Case No. IT-02-60/1-A,Judgment on Sentencing Appeal ,8 March 2006,para.103.
[653] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*,Case No. IT-02-60-T,Judgment,17 January 2005,para.472.

these notes despite being informed that witness Trisić[654] had recognized his handwriting on this document.[655] The expert report prepared by Professor Gogić and admitted as exhibit 3D583 further confirms that Momir Nikolić is the author of the handwritten notes on this exhibit. Moreover, the fact that the Prosecution accepted Professor Gogić's report without cross examination is also significant in this regard.[656]

605. Considering the nature of exhibit 1D382 and the possible negative inferences going to Momir Nikolić's individual criminal responsibility, which can possibly be drawn if indeed he is the author of these handwritten notes, Momir Nikolić's straightforward lie in this respect, underscores his irreparable lack of credibility.

606. REDACTED [657] *[658]* [659] [660]

607. REDACTED [661] [662]

608. REDACTED [663] [664]

609. Finally, the lack of credibility of Momir Nikolić is also highlighted by the Supplementary Statement he provided at the request of the Trial Chamber before testifying in this case.[665] REDACTED *[666]* [667]

610. In light of the above the Defence submits that Momir Nikolić simply can not be considered to be a reliable or credible witness.

611. Consequently it is the submission of the Defence that no probative value can be attached to the evidence provided by Momir Nikolić – including both his testimony in this case as well as his statement of facts – unless it is both corroborated by independent evidence having high probative value and not contradicted by evidence provided by other witnesses.

612. In this regard the Defence posits that only his recollection of the general situation at the time – as long as it is not linked in any way to his own individual criminal

[654] T.27051,l. 14-16,T.27054, l. 13-19,T.27099.
[655] T.33078-33079.
[656] *Prosecutor v. Popović et al.*,Case No.IT-05-88-T,Prosecution Response to Joint Defence Motion Seeking Admission of the Expert Report Prepared by Professor Ljubomir Gogić,13 May 2009,p. 2.
[657] REDACTED
[658] REDACTED
[659] REDACTED
[660] REDACTED
[661] REDACTED
[662] REDACTED
[663] REDACTED
[664] REDACTED
[665] C2.
[666] REDACTED
[667] REDACTED

responsibility - can be accorded probative value without corroboration. In other words, no weight can be attributed to the testimony of Momir Nikolić where he seeks to evade his own responsibility either by steering clear from certain events or by providing incriminating evidence against others.

613. Furthermore, the Defence asserts that the Trial Chamber should not attribute probative value to the evidence provided by Momir Nikolić for the sole reason that it does not appear to have been in his interest to say certain things.[668] The reason for this is obvious, Momir Nikolić decided to and actually negotiated a plea agreement with the Prosecution, which necessarily implied that he had to make certain choices as to what to admit and what not to reveal.

III. MOMIR NIKOLIĆ DID NOT TRAVEL TO ZBDE IKM ON 13 JULY

614. In his statement of facts as well as during his testimony in this case, Momir Nikolić provided evidence that on the evening of 13 July 1995, he *inter alia*: (a) was told to report to Ljubiša Beara in the center of Bratunac; (b) was ordered by Beara to travel to the ZBde and inform Drago Nikolić that thousands of Muslim prisoners held in Bratunac would be sent to Zvornik that evening and that they should be detained there; (c) drove from Bratunac to Zvornik and arrived at the ZBde Command around 21.45; (d) went to the Duty Officer desk and requested to see Drago Nikolić; (e) met with an other officer he believed was from the intelligence branch and explain to him that he needed to see Drago Nikolić; (f) was informed that Drago Nikolić was at the ZBde IKM and was provided with a MP escort to go there; (g) left the ZBde Command and travelled with the MP to the ZBde IKM; (h) met with Drago Nikolić and explained to him what Beara told him; (i) was informed by Drago Nikolić, who was very surprised[669] that he would have to inform his command; (j) spent less than 10 minutes at the ZBde IKM and drove back to the ZBde Command where he dropped off the MP at the gate; (k) drove back to Bratunac *via* Konjević Polje, passing buses containing prisoners travelling towards Zvornik; (m) arrived in Bratunac around midnight and

[668] See for example *inter alia*;*Prosecutor v. Vidoje Blagojević and Dragan Jokić*,Case No.IT-02-60-T,Judgment,17 January 2005,para.212.
[669] T.33211,l.16 – T.33212, l.4.

reported to Beara at Hotel Fontana, and told him that he had passed on his orders to Drago Nikolić.[670]

615. The Defence submits that for the following reasons, taking into consideration the lack of credibility of Momir Nikolić, no probative value whatsoever can be attributed to his narrative concerning the trip he supposedly made to the ZBde Command and IKM on 13 July 1995. Firstly, Momir Nikolić provided this evidence, which is not corroborated in any way, in the context of his plea negotiation with the Prosecution. Secondly, Momir Nikolić's narrative is contradicted by numerous witnesses. Thirdly, Momir Nikolić's evidence is replete with numerous impossibilities in light of the sum of evidence on the record. And lastly, Momir Nikolić's account regarding the trip he supposedly made to Zvornik on the evening of 13 July 1995 comprised several inconsistencies.

616. Notwithstanding the above submissions, the Defence submits that one portion of the evidence provided by Momir Nikolić should and must be accorded high probative value. This portion refers specifically to Momir Nikolić's account of the chaos, the lack of organization and the improvisation which he witnessed, as a minimum, in Bratunac on 13 July 1995.[671]

617. The Defence posits that such chaos, lack of organization and improvisation is highly significant as well as in complete contradiction with the Prosecution's allegations of genocide and implementation of two concurrent joint criminal enterprises.

(A) The Absence of Any Corroboration

618. No probative value can be attached to the evidence provided by Momir Nikolić regarding the trip he supposedly made from Bratunac to the ZBde Command and IKM on 13 July 1995 because his narrative, which is the direct result of his plea negotiation with the Prosecution, is not corroborated in any way. There is simply no independent evidence whatsoever, direct or circumstantial, which may allow a reasonable trier of fact to infer that Momir Nikolić ever made this trip. In fact Momir Nikolić was not able to provide the name or any useful description of any person who could provide any information concerning his supposed trip to Zvornik, at any stage, including at the

[670] C1,para.10.
[671] T.33180,T.33184, T.33185 and T.33233-T.33234.

Bratunac Brigade Command, in the center of Bratunac, on the road to Zvornik including at the Konjević Polje intersection[672], at the ZBde Command[673] and at the ZBde IKM.[674]

619. REDACTED [675] [676] [677]

620. The testimony of Mihaljo Galić does not corroborate the evidence of Momir Nikolić because *inter alia*: (a) Galić is not a credible witness as demonstrated *infra*[678]; (b) the evidence provided by Galić reveals that he was never asked to replace Drago Nikolić as ZBde IKM operations duty officer and that he never went to the IKM that night; (c) even if the Trial Chamber would find – contrary to the arguments put by the Defence – that Galić went to the ZBde IKM that night, based on the timing provided by both witnesses, he would necessarily have seen or as a minimum encountered Momir Nikolić during his supposed trip there[679]; and (d) according to this scenario contested by the Defence the fact that nobody was at the IKM when Galić would have arrived[680], does not give anymore weight to the allegation that Momir Nikolić did travel to the IKM that night.

621. Lastly, the ZBde Operations Duty Officer Notebook[681] does not corroborate Momir Nikolić's narrative as no mention of his visit can be found therein.

(B) Momir Nikolić's Narrative Is Contradicted by Many Witnesses

622. Considering that his narrative is contradicted by many witnesses, no probative value can be attached to the evidence provided by Momir Nikolić regarding the trip he supposedly made from Bratunac to the ZBde Command and IKM on 13 July 1995.

623. Firstly, Janjic expressly testified that while he was guarding, with other Bratunac Brigade military policemen, the buses in Bratunac in the evening of 13 July 1995, Momir Nikolić came by, between about 10.00 pm to midnight, and told them to

[672] T.33220,l.23 – T.33221,l.1.
[673] T.33239,l.12-14.
[674] T.33264,l.10-16.
[675] REDACTED
[676] REDACTED
[677] REDACTED
[678] REDACTED
[679] Purported conversation between Drago Nikolić and Momir Nikolić between 22.45 and 23.15 (T. 33255).Purported replacement of Drago Nikolić at the IKM by Mihaljo Galić around 23.00 (T.10495, P347 p. 00842275).
[680] T.10498.
[681] P377.

continue working.[682] This makes invalid the evidence provided by Momir Nikolić regarding the trip he supposedly made from Bratunac to the ZBde Command and IKM on 13 July 1995[683].

624. Secondly, Momir Nikolić's evidence is contradicted by Witness Nebojsa Jeremić in many ways. Witness Jeremić who provided evidence on three different occasions[684] confirmed that he was the ZBde military policeman on duty at the gate of Standard Barracks for some 24 hours, from 13 to 14 July 1995.[685] He specified that he was exceptionally alone on duty at the gate during this period.[686] He clearly explained the procedure to be followed regarding incoming visitors[687] and that he stated that he did not call the duty officer to announce any visitor nor did he accompany any visitor to the Command building that night.[688]

625. Strikingly, Momir Nikolić testified precisely that he: (a) parked his car outside the gate[689]; (b) came in on foot through the pedestrian gate[690]; (c) saw a group of persons at the gate[691]; (d) provided his ID and identified himself as the security organ of the Bratunac Brigade[692]; (e) specifically requested to see Drago Nikolić[693]; and (f) was accompanied to the ZBde Command by one of the person at the gate[694], all of which is expressly contradicted by witness Jeremić.[695]

626. Thirdly, Momir Nikolić's evidence is also contradicted by witness Stevo Kostić who corroborated the evidence provided by Jeremić in many ways, confirming that there were only two military policemen remaining at the Standard Barracks during this

[682] T.17931,l.18-24.
[683] Momir Nikolić supposedly left Bratunac around 20.30 (T.32903, 33219) and came back at the earliest at 24.00 if as he testified, his purported conversation with Drago Nikolić at the IKM took place between 22.45 and 23.15 (T.33255). In fact he had needed 45mn to drive back to the Standard Barracks where he left his escort and at least one hour to drive back to Bratunac (T.33220).
[684] As a Prosecution Witness he testified on 24-25 July 2007, as Nikolic Defence Witness he testified on 23 September 2008 and he gave a Witness Statement on 8 May 2009 (3D587).
[685] T.10455
[686] 3D587,para.5.
[687] T.26090-26091.
[688] 3D587,para.5.
[689] T.33222,l.20-25.
[690] 3DIC244,T.33239.
[691] T.33224, l.5.
[692] T.33223-T.33224.
[693] T.33237,l.19.
[694] T.33224.
[695] 3D587.

period[696] and that Jeremić was alone on duty at the gate that night.[697] Kostić also confirmed the procedure to be followed for incoming visitors.[698]

627. Momir Nikolić's evidence is contradicted by witness Sreten Milošević. Milošević was the ZBde Operations Duty Officer during the evening 13 July 1995, at least until midnight.[699] Contrary to Momir Nikolić who stated that he met the ZBde Operations Duty Officer before midnight on 13 July 1995[700], Milošević testified unequivocally that he knows who Momir Nikolić[701] is and that he is sure that on the evening of 13 July 1995 Momir Nikolić did not come to the ZBde Command[702] asking for Drago Nikolić.[703] Milošević added that if Momir Nikolić had visited the ZBde Command that night, he would have written this information in the ZBde Operation Duty Officer Notebook, which is not the case.[704]

628. Momir Nikolić's evidence is also contradicted by witness Dragan Stojkic. Stojkic was the communicator on duty at the ZBde IKM with Drago Nikolić, in the evening of 13 July 1995. Contrary to Momir Nikolić's narrative, he testified that no one visited Drago Nikolić at the IKM that evening or night.[705]

(C) The Impossibilities Associated With Momir Nikolić's Narrative

629. Considering the amazing impossibilities which arise from Momir Nikolić's narrative, no probative value can be attached to his testimony regarding the trip he supposedly made from Bratunac to the ZBde Command and IKM on 13 July 1995.

630. REDACTED [706]

631. Secondly, considering Momir Nikolić's own testimony that during the conversation between Beara and Deronjic he supposedly heard, Beara would have told Deronjic that he *"had instructions for the prisoners to stay in Bratunac"*[707], renders not credible if not impossible that Beara would have, hours earlier, ordered Momir Nikolić to travel to

[696] T.26006.
[697] T.26007,l. 17-18.
[698] T.26009, T.25996-T.25999, 3DIC221.
[699] T.33969,l.8-10, T.33963,l. 18-24, T.33973,l.13-16.
[700] T.33245, T.33248-T.33249, T.34037,l.21.
[701] T. 33969,l.25,T.33970
[702] T. 33971,l.4-17.
[703] T.33971,l.25-33972,l.2.
[704] T.33971,l.11-14, T. 34027,l.1-14.
[705] T.21975.
[706] REDACTED
[707] T.33183,l.23-33184,l.9.

the ZBde and inform Drago Nikolić of the impending arrival of thousand of prisoners there.[708]

632. Thirdly, bearing in mind the testimony of Jeremić and Kostić that they were the only two military policemen remaining in Standard Barracks and that Jeremić was alone on duty at the gate during the evening and night of 13 July 1995[709], it is simply not possible for Momir Nikolić to have seen a group of persons at the gate of Standard Barracks, as he testified.[710]

633. Fourtly, taking into consideration that Jeremić was alone on duty at the gate of Standard Barracks during the evening and night of 13 July 1995[711], it is not possible that Momir Nikolić was accompanied from the gate to the Command building by one of the person on duty at the gate. Jeremić would not have left his post for the purpose of taking Momir Nikolić to the Command building, let alone to stay with him for the duration of his conversation with the Operation Duty officer, as Momir Nikolić testified.[712]

634. Fifthly, considering that Momir Nikolić was not an officer from the ZBde, it is not possible – if he would have encountered the ZBde Operations Duty Officer during the evening of 13 July 1995 – that the Duty Officer would not have identified himself and requested Momir Nikolić to also provide his identify.[713]

635. Sixthly, bearing in mind the number of military policeman present at Standard Barracks in the evening of 13 July 1995, as well as the testimonies of Jeremić and Kostić of what they did that night[714], it is not possible that Momir Nikolić would have been provided with a military police escort to travel the ZBde IKM. In this regard, it is noteworthy that Milosevic – who was informed by the Defence of MOmir Nikolic's claim that he asked for someone to take him to the IKM – maintained his testimony that he did not see him at the ZBde command that night.[715]

636. Seventhly, considering the very limited space on the dirt road in front of the ZBde IKM[716] – as witnesses by all those who took part to the site visit at the beginning of the

[708] C1,para.10.
[709] 3D587,para. 5,T.26006, T.26007,l.17-18.
[710] T.33223,l.24–T.33224,l. 7, T.33240,l.23–T.33241,l.1-6.
[711] 3D587,para.5,T.26006,T.26007,l.17-18.
[712] T.33224,l.21-24,T.33021, l.23-25,T.33245,l.22–33246,l.1.
[713] T.33261-T.33263.
[714] 3D587,para.5,T.26006, T.26007,l.17-18, T.26004,l.15-24.
[715] T.33991,L.24-T.33992,L.6.
[716] T.33249,l.13-16.

Trial – it is not possible that Momir Nikolić would have made a U-turn with his car at that place.

637. Lastly, Momir Nikolić testified that he was escorted by a person to the Command building[717], that this person remained at the Command during his encounter with the Duty Officer[718] and that he then travelled to and from the IKM in his car with the same person[719], bearing in mind that Momir Nikolić would thus have spent more than one hour and half with this person[720], it is not possible that he would not be able to remember the name of that person or provide a physical description of him.[721]

638. These are but some of the impossibilities which render Momir Nikolić's narrative simply not credible.

(D) Momir Nikolić'Narrative Comprises Several Inconsistencies

639. No probative value can be attached to the evidence provided by Momir Nikolić regarding the trip he supposedly made from Bratunac to the ZBde Command and IKM on 13 July 1995 because his narrative comprises several inconsistencies.

640. For example, Momir Nikolić was not able to confirm whether the person on duty who supposedly accompanied him from the gate to the Command building was a military policeman.[722] Considering that he was the Bratunac Brigade Security Organ, this is surprising to say the least. Momir Nikolić went on to say that the escort he was given to take him to the IKM was a military policeman.[723] The fact that he was suddenly able to tell that this person is a military policeman is amazing. What is more striking however is when Momir Nikolić's stated that the same person who accompanied him from the gate to the Command building, then escorted him to the IKM, which is totally inconsistent.[724]

641. Another revealing example is the testimony of Momir Nikolić regarding the purported conversation he had with Drago Nikolić at the IKM. Contrary to his testimony in the

[717] T.33224,l.21-24.
[718] T.33021,l.23-25.
[719] T.33248,l.1-5.
[720] One way is 45 minutes,T. 33250.
[721] T.33224,T.33239.
[722] T.33224,T.33239.
[723] C1,para.10,T.33245,l.24–T.33246,l.1.
[724] T.33248,l.2-5.

Blagojevic case[725] and for the first time ever, Momir Nikolić suddenly testified that he did not go inside the ZBde IKM for the purpose to talk to Drago Nikolić.[726] This major inconsistency can only be attributed to his willingness to evade and avoid contradicting himself regarding questions put to him in relation the presence of a communicator on duty at the IKM as well as to the description of the interior of the IKM.

642. Furthermore it is evident from the testimony of Momir Nikolić in this case that he has become a professional witness in the sense of having the propensity and ability to provide vague and very general descriptions of anything he saw or any person he met as well to refrain from providing any specific detail on which he can be impeached.[727] When compared with the details he provided regarding what he remembers was said by Beara, the ZBde Operations Duty Officer and Drago Nikolić as well as to what he told these persons[728] – details which are necessarily for his narrative – the absence of any precise physical description from his testimony is clearly inconsistent.

643. In light of the lack of credibility of Momir Nikolić as demonstrated above and taking into consideration: (a) the absence of corroboration for his evidence; (b) the fact that his evidence is contradicted by many witnesses; (c) the amazing impossibilities associated with his testimony; and (d) the striking inconsistencies affecting his evidence, the Defence submits that no probative value whatsoever can be attributed to the evidence he provided concerning the visit he supposedly made to the ZBde Command and IKM as well as to his conversation with Drago Nikolić in the evening of 13 July 1995.

644. That being said should the Trial Chamber find - contrary to all the above arguments- that Momir Nikolić did travel to the ZBde Command and IKM and did have a conversation there with Drago Nikolić in the evening of 13 July 1995, the Defence respectfully submits that the Trial Chamber would necessarily have to attach weight to the content of his purported conversation with Drago Nikolić as reported by him.[729]

645. It is for this reason that the Defence tragically chose to conduct his cross examination of Momir Nikolić by confirming what exactly would have been said during this conversation.[730]

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[725] T.33251,l.8-25(referring to Blagojević).
[726] T.33251,l.13-15,T.33525,l.1-18.
[727] T.33255,l.1-10,T.33199,l.17–T.33200,l.2,T.33237,l.13–T.33238,l. 8,T.33249,l.8-11,T.33252,l.12-18.
[728] C1,para.10,T.33224,l.14-20,T.33211,l.7–T.33213,l.2.
[729] T.33211,l.24–T.33212,l.25,T.33214,l.1-8.
[730] T.33211,l.24–T.33212,l.25,T.33214,l.1-8.

646. Consequently, the Trial Chamber would have to accord probative value, as a minimum, to the following: (a) Drago Nikolić was beside himself and surprise when informed of prisoners[731]; (b) Drago Nikolić never mentioned that he was earlier provided with any information by Vujadin Popović; (c) REDACTED; (d) that Momir Nikolić believes he was the first one to inform Drago Nikolić about prisoners[732]; (e) that Drago Nikolić would have said that he had to inform his command[733]; (f) REDACTED[734]; (g) that Momir Nikolić's knowledge that the prisoners would be executed was his own and not part of the information he was order by Beara to convey to Drago Nikolić[735]; (h) and that there was no order or no mention given that the ZBde would be responsible to execute the PWs.[736]

C. MIHAJLO GALIĆ

647. Mihajlo Galić testified *viva voce*, as a Prosecution witness, from 25 to 27 April 2007.[737]

648. Galić testified *inter alia* that: (a) around 22h00 or 23h00, on 13 July 1995, he was resting as the ZBde Command[738]; (b) he was tasked to go to the ZBde Forward Command Post (IKM) in Kitovnice to replace Lieutenant Nikolić as ZBde IKM Operations Duty Officer (IKM Duty Officer)[739]; (c) he was on duty at the IKM until 15 July in the morning, at 07h00 when the next officer came to replace him[740]; and (d) he was on duty again at the ZBde IKM on 22 July[741].

649. As a result of the numerous inconsistencies, contradictions and impossibilities associated with the evidence he provided, the Defence submits that no probative value can be attributed to the testimony of Galić that he replaced Drago Nikolić at the ZBde IKM at 23h00 on 13 July.

650. While the Prosecution relies on the ZBde IKM Operations Duty Officer Logbook (IKM Logbook)[742], to corroborate the evidence provided by Galić, the Defence submits that

[731] T.33211,l.24–T.33212,l.2.
[732] T.33212,l.5-20.
[733] C1,para.10,T.33213,l.9-14.
[734] REDACTED
[735] T.32938,l.4-6,T.33211,l.16–T.33212,l.4.
[736] T.33214,l.1-8.
[737] T.10491-10672.
[738] T.10495.
[739] T.10495.
[740] T. 10498-10499.
[741] T.10626.
[742] P347.

there is evidence that the IKM Logbook was tempered with, such that it can be attributed no weight for this purpose.

I. DRAGO NIKOLIĆ WAS AT THE IKM DURING THE NIGHT OF 13-14 JULY

651. The Prosecution concedes that Drago Nikolić was at the IKM on 13 July.[743]

652. Lazar Ristić testified that in the evening of 13 July, around 21h00 or 21h30, he had a telephone conversation with Drago Nikolić who was on duty there.[744]

653. Dragan Stojkić, who was employed as communicator at the IKM, testified that from 13 to 14 July[745], he was on duty at the IKM with Drago Nikolić. He stated that: (a) throughout his shift, he was in the same room as Drago Nikolić[746]; (b) he did not sleep that night[747]; and (c) Drago Nikolić did not leave the IKM that evening and night.[748] Stojkić further stated that there was no visitor at the IKM that evening and night, other than for one of the neighbours - the young Mica, the son of Milca Jerkić - who came by in the early evening.[749] Stojkić also confirmed that he knew Galić at that time and that Galić did not come to the IKM to replace Drago Nikolić.[750] Stojkić further stated that Drago Nikolić was never contacted that evening and night by anyone claiming to be Vujadin Popović.[751] Stojkić added that during that shift, there was a second communicator on duty, a signalman from one of the Battalions, along with Drago Nikolić and him.[752] Stojkić finally testified that in the morning of 14 July, around 08h00 or 08h30, both Drago Nikolić and him, left the IKM by car. It is not clear from his testimony whether or not they left in the same car.[753]

654. The Prosecution attempted to challenge the credibility of Stojkić on the basis that he could not have been at the IKM that night, since on that day he would have been with the ZBde Tactical Group, away from the Zvornik area.[754] However, Stojkić explained

[743] Butler's Narrative Report (P686) para 7.9,10.9,10.15.
[744] T.10111;10171.
[745] T.21981;T.21976.
[746] T.21975.
[747] T.21988.
[748] T.21988;T.21975.
[749] T.21989.
[750] T.21977.
[751] T.21975.
[752] T.21973-21974;T.22016.
[753] T.21976.
[754] P3396

that he returned on 13 July, and explained his involvement with the ZBde Tactical Group from 11 to 13 July in the morning, when he set out for Zvornik with his company.[755] Significantly, his testimony is corroborated by Pandurević who stated that one of his tank company returned to Zvornik on 13 July.[756]

655. Notably, Milorad Bircaković testified that in the morning of 14 July he was ordered by Trbić to drive to the IKM to pick up Drago Nikolić. He did so, and *"they went back to Standard at 7.30 or 8 am, around half an hour later"*.[757] In response to a question put to him by Judge Prost - whether he saw anyone else when he picked up Mister Nikolić - Bircaković responded that he did not find anybody there, that Drago Nikolić got into the car and that they drove off.[758] In the submission of the Defence, this answer does not exclude the possibility that Bircacković picked up Stojkić with Drago Nikolić and that he did not see anybody else at the IKM.

656. Lastly, the Prosecution has not adduced any evidence concerning the whereabouts of Drago Nikolić from 13 to 14 July, which could support an inference that he was replaced by Galić and left the IKM that night. As mentioned *infra*[759], the evidence reveals that Drago Nikolić was not present at the school in Orahovac during the evening or night of 13 July.

657. In light of the above, the Defence submits that there is ample evidence which establishes that Drago Nikolić was at the IKM at all times during the night of 13-14 July.

II. GALIĆ DID NOT REPLACE DRAGO NIKOLIĆ AS IKM DUTY OFFICER ON 13 JULY

658. The testimony of Galić that he replaced Drago Nikolić at the IKM in the evening of 13 July is not worthy of belief.

659. Firstly, the credibility of Galić is seriously damaged by the fact that in his first statement given to the Prosecution on 21 September 2001[760], he said that during the period of 10-20 July 1995, he was generally in the ZBde Command all the time, with the possibility that he went to the Ministry of Defence in Zvornik, in relation to the

[755] T.22011.
[756] T.31722,L.18-T.31723,L.4.
[757] T.11014.
[758] T.11173.
[759] Section PW 101.
[760] 3D115.

recruitment matters.[761] More importantly on this occasion, he did not mention that he would have been waken up at 22h00 or 23h00 on 13 July and asked to go replace someone at the IKM.[762] He also said at that time that he did not recall exactly whether he was Operations Duty Officer in July 1995, that he might have been, but not during the period of Srebrenica events.[763]

660. The credibility of Galić is also seriously undermined by the fact that on one occasion – which can only be after the filing of the Defence Rule 65*ter* List of Witnesses on 1 May 2008 and before the testimony of Stojkić[764] – Galić visited Stojkić and attempted to convince him that he should remember that they were on duty together at the IKM during the night of 13-14 July 1995. On that occasion, Stojkić told Galić that he was an old man and a liar.[765] More importantly, it is amazing that Galić would suddenly remember that Stojkić was on duty with him on 13 July 1995, whereas during his testimony, he did not remember who would have been with him that night.[766]

661. The credibility is also damaged by his testimony that the IKM Logbook is the basis for his recollection that he was on duty on 13 July - along with discussions he had with colleagues who showed him that document - since without it, he would not have remembered anything.[767] REDACTED [768] [769]

662. A final remark on Galić's credibility *per se*, is the fact that throughout his testimony he claimed that during the war he was not involved in operational matters and that he was just an office worker, which is contradicted by the evidence.[770]

663. Secondly, the reliability of Galić's testimony is seriously spoiled by the fact that he remembered that he was asked to replace Drago Nikolić on 13 July and that he was supposed to begin his regular shift at the IKM on 14 July in the morning but amazingly does not remember anything else.

664. Significantly, Galić testified that he does not remember *inter alia*: (a) who woke him up, either by name or by position[771]; (b) the name of the duty officer who ordered him

[761] T.10536.
[762] T.10626-10627.
[763] T.10526-10527.
[764] He testified on 9 June 2008.T.21962-22024.
[765] T.22000.
[766] T.21999-22000;T.10550.
[767] T.10546.
[768] REDACTED
[769] REDACTED
[770] T.10515.See *inter alia* Dragutinović;T.12784-12786.

to go to the IKM[772]; (c) the name of the driver who took him to the IKM[773]; (d) the type of car in which in drove[774]; (e) the name of the communicators on duty with him; (f) many details about the IKM itself[775]; and (g) the large fire lit by the Muslim forces near Nezuk[776]. Galić also does not remember the Jerkić family, neighbours of the IKM, who would regularly bring some food to those on duty at the IKM. Both Acimovic and Stojkić testified that it is not possible for someone who was on duty at the IKM not to know who the Jerkic family was.[777]

665. It is also noteworthy that Galić testified that there was no visitor at the IKM while he was there during the period from 13-15 July.[778] This is contradicted by an entry in the Operations Duty Officer Notebook (P377 page ERN5748), that one of the security officers called the ZBde Operations Duty Officer from the IKM, between 10h24 and 15h03. This was confirmed by many witnesses.[779]

666. This is also contradicted by Bircaković who testified that in the evening of 14 July, just before night fall, he drove Drago Nikolić to the IKM for the purpose of picking up his personal affairs.[780]

667. Another important issue is the fact that Galić was responsible for mobilization matters, that there were many mobilization issues which happened during the period of 13-15 July 1995 and that Galić denied being involved in any of them.[781]

668. Furthermore, Galić stated that he would have been in serious trouble if he had either refused to go to the IKM or left the IKM on his own accord on 13 July.[782] Strangely, when Galić would have arrived at the IKM in the evening of 13 July and Drago Nikolić was not there, he did not look for Drago Nikolić nor try to find out what happened to him.[783] Then, the evidence reveals that he would have left the IKM on 15 July, without being replaced[784], which is not plausible.

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[771] T.10549.
[772] T.10549.
[773] T.10495;10549.
[774] T.10550.
[775] T.10552-10554.
[776] T.10550.
[777] T.10552.Acimović;T.22049;Stojkić;T.21989.
[778] T.10555.
[779] Stojkić;T.21998-21999.T.12773,L.3-14.
[780] T.11043.
[781] 7D99;T.10506-10507;T.10509-10514.
[782] T.10659-10660.
[783] T.10498;10502.
[784] T.10620,L.23-T.10621,L.22.

669. In addition, it is of the utmost importance *infra* that Galić made a number of irregular entries in the IKM Logbook.[785] In this regard, the fact that Galić testified having made the entries in the IKM Logbook on ERN page 0275 in the morning of 14 July[786], completes the demonstration that he did not replace Drago Nikolić at the IKM on 13 July.

670. Lastly, the fact that Milosević was not informed of a change of Duty Officer at the IKM in the evening of 13 July[787] is also strong evidence that Galić did not replace Drago Nikolić that night. In this regard, the Defence recalls the testimony of Kosovac who stated that it would be very important to inform the Operations Duty Officer of such a change.[788]

III. REDACTED

671. REDACTED [789]

672. REDACTED

673. REDACTED [790] [791] [792]

674. REDACTED [793]

675. REDACTED [794]

676. REDACTED [795] [796].

677. REDACTED [797] [798]

678. REDACTED [799] [800]

679. REDACTED [801]

[785] See section below dealing with the IKM Logbook.
[786] T.10501,L.19-T.10502,L.3.
[787] T.33972,L.25-T.33973,L.3.
[788] T.30228.
[789] REDACTED
[790] REDACTED
[791] REDACTED
[792] REDACTED
[793] REDACTED
[794] REDACTED
[795] REDACTED
[796] REDACTED
[797] REDACTED
[798] REDACTED
[799] REDACTED
[800] REDACTED
[801] REDACTED

IV. THE IKM LOGBOOK WAS TEMPERED WITH

680. There is evidence that the IKM Logbook was tempered with, sufficient for casting serious doubt concerning, as a minimum, the entries found therein for the period from 13 to 22 July 1995.[802]

681. Consequently, the Defence submits that no probative value can be attributed to the IKM Logbook, such that it could corroborate the testimony of Galić REDACTED.

682. Firstly, it is necessary to understand the arguments set out below to look at the original IKM Logbook since the English translation does not reproduce many details which are highly relevant, such as changes of format, colour of the pen/ink used, various lines added and most importantly signatures.

683. Secondly, the manner in which the IKM Logbook was obtained by the Prosecution constitutes a serious indicia that it was tempered with. Indeed, the evidence reveals that the IKM Logbook is the only book of its type which was not transferred to the 3th Corps in April 1996.[803] Conversely, the Duty Officer Notebooks[804], the Duty Officer Logbook[805], the ZBde War Diary No. 5[806] and the Barracks Duty Officer Logbook[807] were all transferred to the 5th Corps in May 1997, which means that they were removed from the ZBde premises before the Prosecution conducted its search there on 6 March 1998. REDACTED [808]

684. REDACTED [809]

685. It follows that, the IKM Logbook would have been modified during the period from 22 July 1995 until 6 March 1998.

686. Thirdly, it is significant that during the period from 13 to 22 July 1995, only two officers would have made entries in the IKM Logbook, Galić at the beginning and end of this period as well as an unknown officer, on 21 July.

687. Regarding the entries for 21 July, it is significant that Kathrine Barr, the Prosecution handwriting expert, could not attribute them to Trbić, nor could she exclude that they were made by someone else. She also concluded that the signature on ERN page 0276,

[802] P347,ERN p.0275-0277.
[803] Blaszcik,T.1806-18107; REDACTED.
[804] P377,P379.
[805] P.378.
[806] P384.
[807] P383.
[808] P2967.
[809] REDACTED

did not match the regular signature of Milorad Trbić.[810] As for Galić, although the first entry for 22 July mentions that he would have replaced Trbić on that day[811], it is noteworthy that he did not recognize the signature found in the "handing over" column for 21 July.[812]

688. More importantly, it is decisive in this regard that Galić, using the pen he was writing with on 22 July, signed in the "taking over" column for 15 July.[813] This would have been the proper procedure if there were no entry for 21 July, with the result that Galić would have been the only officer who would have made entries in this Logbook during the period from 13 to 22 July.[814] This is supported by the fact that Galić appears to have used the same pen – the one he was using on 22 July – to draw the line after his own entry of 15 July.[815] The fact that Major Galić signed in the taking "over column" for 15 July, cannot have been an oversight. It strongly suggests that the IKM Logbook was tempered with, including the possibility that pages were removed from the IKM Logbook, which seriously affects its reliability.

689. During the cross examination conducted by the Defence, Galić could not explain why he did this. It is also noteworthy that Galić could not explain why he changed the format of the IKM Logbook – removing the column previously used to number the entries[816] – which suggests that it was tempered with.

690. It is also significant in this regard, looking at the IKM Logbook, ERN pages 0274 and 0275, that the entries for 12 July appear to have been made by two different persons, the first at the bottom of page ERN 0274 and the second at the top of page ERN 0275. This suggests that pages were removed in between these two pages. Notably, this would be the page(s) where Drago Nikolić would have necessarily made entries on 13 July when he was IKM Duty Officer. This is supported by entries made by Drago Nikolić both in the IKM Logbook[817] and other books of the same type[818], which illustrate that he was very meticulous. What is more, it is established that Drago Nikolić was on duty at the

[810] Kathrine Barr's Reports,P2844,para 5.7;P2845,para 8.6-8.9 5.7.T.13263-13265.
[811] IKM Logbook ERN p.0277.
[812] T.10623,L.15-23.
[813] IKM Logbook ERN p.0276-0277.
[814] IKM Logbook ERN p.0275-0277.
[815] IKM Logbook ERN p.0276.
[816] T.10611-10615.
[817] P347,ERN p.0278-0279.
[818] P377,ERN p.5748-5762;P378,ERN p.6690.

IKM on 13 July[819] and there is no reason why he would not have made *any* entries in the IKM Logbook when he was there on that day. This is also supported by the fact that there is no entry after 18h20 at the top of page ERN 0275 until the first entry apparently made by Galić at 23h00 on 13 July. This would also explain why Galić, who was an experienced officer despite his testimony to the contrary,[820] signed at the bottom of the entries he would have made during the period of 13-15 July[821] instead of signing in the "handing over" column, as he did on 22 July.[822]

691. Another related indicia of tempering in the IKM Logbook is the fact that Major Galić did not sign in the "handing over" column on page ERN 0276, contrary to his testimony that he was replaced at the IKM on that day by Major Bojanović.[823] As mentioned previously, he is contradicted on this by Major Bojanović who testified that he arrived at the IKM around 17h00 when Pandurević was already there.[824] What is more, Galić only remembered that he was replaced by Bojanović on the basis of the interim combat report drafted by Bojanović, which he would have been shown.[825]

692. If Galić had been at the IKM on 15 July in the morning, and had been replaced by another officer, surely he would have signed in the outgoing column as he did on 22 July.[826]

693. Moreover, the nature of the entries supposedly made by Galić for the period 13-15 July, include information which would not have been accessible to him as IKM Duty Officer. For example, both Stojkić[827] and Acimović[828] confirmed that the entry made by Galić *"enemy forces are very active over the communication lines and are preparing to attack our forces"* does not constitute information normally forwarded to the IKM nor accessible to the IKM Duty Officer. In addition, comparing the entries supposedly made by Galić with the entries in the ZBde Operations Duty Officer Notebook for the same period[829], it is evident that there was no contact between the two Duty Officers during this period. In fact, the entries made by Galić for this period appeared to have been

[819] See section above,Presence of Drago Nikolić at the IKM.
[820] T.10610.
[821] IKM Logbook ERN p.0275-0276.
[822] IKM Logbook ERN p.0277.
[823] T.10621.
[824] P3135a,Blagojević,T.11720-11722,EC.53-55.
[825] T.10499-10503;T.10542.OTP Interview,3D115,21 September 2001.
[826] IKM Logbook ERN p.0276-0277.
[827] T.21994.
[828] T.22044-22048.
[829] P377,p.5741-5743.

drawn from combat reports submitted by the ZBde during the same period[830], whereas the opposite should be the norm.

694. Lastly, another very important indicia that the IKM Logbook was tempered with is that even though the book appears to be coming apart - as demonstrated by the Prosecution, especially with respect to the pages for the period of 12-22 July[831] – it is perfect, in that not a single pages is missing. This is unusual whereas pages are missing in other books of the same type, including the Barrack Duty Officer Logbook[832] and the ZBde Duty Officer Logbook[833], which is not abnormal.

695. This is further evidenced by the fact that the IKM Logbook is the only one which comprises a certification that it contains 100 pages, REDACTED. This is suspicious to say the least. This is supported by the fact that the pages in the other books of the same type are not numbered.[834]

696. This strongly suggests that the page numbers, starting at "1" on ERN page 0271 to "100" on the recto of page ERN 0316, would have been added after the fact. The manner in which the pages are numbered is also very odd.

697. In light of the above, the Defence posits that this is more than sufficient to cast a doubt on the possibility that the IKM Logbook was tempered with and in any event on its reliability.

698. In conclusion, taking into consideration the above arguments and submissions, the Defence submits that no probative value can be attached to the testimony of Galić that he replaced Drago Nikolić at the IKM on 13 July.

D. PW-108 AND PW-102

699. REDACTED[835]. In the submission of the Defence the cross examination of the witness demonstrated that no probative value can be attributed to the evidence he provided. As for witness PW-102 his evidence was admitted pursuant to Rule 92*quater*[836] despite the objection put forward by the Defence.[837] As mentioned earlier, the mere admission of

[830] ZBde Combat Reports 12-14 July 1995,P114,P322,7DP326.
[831] T.10616,L.18-T.10617,L.15.
[832] P383,page 2 missing (7-8 July)
[833] P378, 13-14/16/20 July missing.
[834] P377,P379,P378.
[835] REDACTED
[836] REDACTED
[837] REDACTED

the evidence provided by PW-102 in the course of the trial has no bearing on the weight to be attached to it at this stage.[838] In fact, the Defence summits that no probative value can be attributed to the evidence provided by PW-102.

700. This section underscores the reasons why the evidence provided by PW-108 and PW-102 can be attributed no probative value. These include *inter alia* the lack of credibility of both witnesses, the internal inconsistencies found in their respective evidence, the impossibilities which stem from their evidence and the contradictions when comparing their respective evidence.

701. Considering that the evidence provided by PW-108 and PW-102 relates to a single event for which the totality of the incriminating evidence adduced by the Prosecution is limited to the testimony of PW-108 and to the statements and testimony of PW-102, it must be assessed as a whole. Accordingly, this section addressed simultaneously the absence of probative value of the evidence provided by PW-108 and PW-102.

702. REDACTED

703. REDACTED

704. REDACTED

705. REDACTED

I. THE MOTIVATION OF PW-108 AND PW-102 TO LIE

706. REDACTED [839]

707. REDACTED

708. REDACTED

709. REDACTED [840] [841] [842] [843]

710. REDACTED [844] [845] [846]

711. REDACTED [847]

712. REDACTED [848] [849] [850]

[838] REDACTED
[839] REDACTED
[840] REDACTED
[841] REDACTED
[842] REDACTED
[843] REDACTED
[844] REDACTED
[845] REDACTED
[846] REDACTED
[847] REDACTED

713. REDACTED [851]

714. REDACTED [852]

II. THE LACK OF CREDIBILITY OF PW-108 AND PW-102

715. REDACTED

716. REDACTED

717. REDACTED

(A) PW-108

718. REDACTED [853] [854] [855]

719. REDACTED

720. REDACTED [856] [857] [858] [859] [860]

721. REDACTED [861] [862]

722. REDACTED [863] [864]

723. REDACTED [865] [866] [867]

724. REDACTED [868] [869]

725. REDACTED [870]

726. REDACTED [871] [872] [873]

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[848] REDACTED
[849] REDACTED
[850] REDACTED
[851] REDACTED
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[868] REDACTED
[869] REDACTED
[870] REDACTED
[871] REDACTED

727. REDACTED [874]

728. REDACTED [875] [876]

729. REDACTED [877] [878]

730. REDACTED [879] [880]

731. REDACTED [881] [882]

732. REDACTED [883] [884]

733. REDACTED [885] [886]

734. REDACTED [887] [888]

735. REDACTED [889] [890] [891]

736. REDACTED [892] [893]

737. REDACTED [894] [895] [896]

738. REDACTED [897] [898]

739. REDACTED

740. REDACTED

(B) PW-102

741. REDACTED

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[872] REDACTED
[873] REDACTED
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[897] REDACTED
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742. REDACTED [899] [900]

743. REDACTED [901] [902] [903]

744. REDACTED

745. REDACTED

746. REDACTED [904]

747. REDACTED [905]

748. REDACTED [906] [907]

749. REDACTED [908] [909]

750. REDACTED [910]

751. REDACTED

752. REDACTED

753. REDACTED [911] [912]

754. REDACTED [913] [914] [915]

755. REDACTED [916] [917] [918]

756. REDACTED [919] [920]

757. REDACTED [921]

758. REDACTED [922] [923]

759. REDACTED [924]

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[899] REDACTED
[900] REDACTED
[901] REDACTED
[902] REDACTED
[903] REDACTED
[904] REDACTED
[905] REDACTED
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[911] REDACTED
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[913] REDACTED
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[919] REDACTED
[920] REDACTED
[921] REDACTED
[922] REDACTED
[923] REDACTED

760. REDACTED

761. REDACTED

762. REDACTED[925] [926]

763. REDACTED [927]

764. REDACTED

765. REDACTED

766. REDACTED

III. INCONSISTENCIES, IMPOSSIBILITIES AND CONTRADICTIONS

767. REDACTED

768. REDACTED

(A) REDACTED

769. REDACTED

770. REDACTED [928] [929] [930] [931] [932] [933]

771. REDACTED [934] [935] [936]

772. REDACTED [937] [938] [939]

773. REDACTED [940] [941]

774. REDACTED

775. REDACTED

776. REDACTED

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[924] REDACTED
[925] REDACTED
[926] REDACTED
[927] REDACTED
[928] REDACTED
[929] REDACTED
[930] REDACTED
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[936] REDACTED
[937] REDACTED
[938] REDACTED
[939] REDACTED
[940] REDACTED
[941] REDACTED

777. REDACTED

778. REDACTED [942] [943] [944] [945]

779. REDACTED [946] [947]

780. REDACTED [948]

781. REDACTED

782. REDACTED [949]

783. REDACTED [950] [951]

784. REDACTED [952] [953] [954] [955] [956] [957]

(B) REDACTED

785. REDACTED

786. REDACTED [958] [959]

787. REDACTED [960] [961]

788. REDACTED

789. REDACTED [962] [963] [964] [965] [966] [967] [968] *[969]* [970] *[971]* [972] *[973]* [974] [975].

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[942] REDACTED
[943] REDACTED
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[970] REDACTED
[971] REDACTED

790. REDACTED [976] [977] [978]

791. REDACTED [979] [980]

792. REDACTED [981] [982] [983] [984] [985] [986].

793. REDACTED [987].

(C) REDACTED

794. REDACTED [988] [989]

795. REDACTED [990] [991] [992] [993] [994] [995]

796. REDACTED [996] [997] [998]

797. REDACTED [999] [1000] [1001] [1002] [1003] [1004] [1005] [1006]

798. REDACTED [1007] [1008] [1009]

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[972] REDACTED
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799. REDACTED [1010]

800. REDACTED [1011] [1012] [1013] [1014]

801. REDACTED

802. REDACTED [1015] [1016]

803. REDACTED [1017] [1018] [1019]

804. REDACTED [1020] [1021] [1022]

805. REDACTED [1023] [1024] [1025]

806. REDACTED [1026] [1027]

807. REDACTED [1028] [1029] [1030] [1031] [1032]

(D) REDACTED

808. REDACTED

809. REDACTED [1033] [1034]

810. REDACTED [1035] [1036]

811. REDACTED [1037] [1038] [1039] [1040]

[1009] REDACTED
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[1037] REDACTED
[1038] REDACTED

812. REDACTED [1041] [1042] [1043]

813. REDACTED [*1044*] 1045 [*1046*] 1047 1048

814. REDACTED [1049] [1050] [1051] [1052]

815. REDACTED

816. REDACTED [1053]

817. REDACTED [1054] [1055] [1056]

818. REDACTED

819. REDACTED [1057]

820. REDACTED [1058] [1059] [1060]

821. REDACTED [1061] [1062] [1063]

822. REDACTED [1064] [1065]

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826. REDACTED [1066] [1067] [1068] [1069] [1070]

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827. REDACTED [1071] [1072]

828. REDACTED [1073] [1074] [1075] [1076] [1077]

829. REDACTED [1078] [1079] [1080]

830. REDACTED [1081]

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833. REDACTED [1082] [1083] [1084] [1085] [1086]

834. REDACTED [1087].

835. REDACTED [1088] [1089] [1090] [1091]

(E) REDACTED

836. REDACTED

837. REDACTED [1092] [1093] [1094] [1095] [1096]

838. REDACTED [1097]

839. REDACTED

[1069] REDACTED
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840. REDACTED [1098]

841. REDACTED

842. REDACTED [1099]

843. REDACTED [1100] [1101]

844. REDACTED

E. PW-101

845. Witness PW 101 testified *viva voce* on 22-23 February 2007.[1102] Further to the cross examination conducted by the Defence irreparably impeaching his credibility, it is the submission of the Defence that no probative value can be attached to most of his testimony.[1103]

846. In chief, PW-101 testified that: (a) he saw buses with prisoners inside Standard barracks as well as prisoners taken to the WC[1104]; (b) on 14 July he was sent to the school in Orahovac to deliver various food supplies[1105]; (c) in Orahovac he saw prisoners being loaded on trucks[1106]; (d) he saw a prisoner trying to escape who would have been killed[1107]; (e) he saw Drago Nikolić in Orahovac[1108]; (f) REDACTED[1109]; (g) he saw Drago Nikolić at the killing site along with a senior officer[1110]; (h) at the killing site, he picked up a young boy, whom he transported in his van directly to the Zvornik hospital, alone, without stopping anywhere on the way[1111]; (i) REDACTED [1112].

847. Taking into consideration the internal inconsistencies, the impossibilities and the contradictions with other witnesses associated with his testimony, the Defence posits

[1098] REDACTED
[1099] REDACTED
[1100] REDACTED
[1101] REDACTED
[1102] T.7547-7624,7635-7726.
[1103] The Defence does not dispute that PW-101 was sent to Orahovac in the evening of 14 July and that along with other members of the ZBde,he drove a young boy first to ZBde Command and then to the Zvornik hospital.The Defence also accepts the evidence provided by PW-101 concerning the good character of Drago Nikolić.
[1104] T.7556,7712.
[1105] T.7564.
[1106] T.7578.
[1107] T.7572.
[1108] T.7573.
[1109] REDACTED
[1110] T.7589-7590.
[1111] T.7583,7585.
[1112] REDACTED

that the testimony of PW-101 is but a fabrication based on information he gathered and rumors he heard at the time.

848. Moreover, the Defence submits that PW-101 had a reason to construct his narrative, REDACTED.

I. PW-101 WAS NEVER AT THE KILLING SITE

849. The evidence establishes that PW-101 was never present at the site where prisoners taken from the Orahovac school were killed. Consequently, no probative value can be attached to his testimony that he saw Drago Nikolić at that location.

850. Firstly, Milošević testified that from a house located in front of the school in Orahovac, he called the ZBde Command, and requested that a vehicle be dispatched to bring him back to Standard. Some time later, Milošević was informed that a vehicle had arrived, he got out of the house and into the vehicle and they left in the direction of Zvornik.[1113] Significantly, although Milošević did not identify PW-101 as being the driver[1114], he confirmed that prior to that moment, he had never seen this vehicle in Orahovac.[1115] In the submission of the Defence, picking up Milošević is the reason why PW-101 was sent to Orahovac on 14 July and accordingly, he was there for a very short period of time, just before dark.

851. REDACTED [1116] [1117] [1118] [1119] [1120] [1121]

852. REDACTED [1122] [1123]

853. Notably, 3DPW-10 who did five or six trips between the Orahovac school and the killing site[1124], did not see any other vehicle next to the water point or on the other side of the underpass.[1125] [1126]

854. More importantly, 3DPW-10 did not see Drago Nikolić at the killing site.[1127]

[1113] T.33979,L.15-T.33980,L.2.
[1114] T.33983,L.22-25.
[1115] T.33983.
[1116] T.7656,L.7-T.7657,L.15.
[1117] REDACTED
[1118] REDACTED
[1119] REDACTED
[1120] REDACTED
[1121] REDACTED
[1122] REDACTED
[1123] REDACTED
[1124] T.25671.
[1125] T.25674.
[1126] REDACTED

855. REDACTED [1128] [1129] [1130] [1131] [1132] [1133]

856. REDACTED [1134] [1135]

857. Fourthly, PW-101 testified that he did not see any heavy machinery, not even a small loader, at the killing site.[1136] This is not surprising because he was not there. On the contrary, 3DPW-10 testified that there was an orange digger across the railway tracks.[1137] Cvijetin Ristanović testified that along with a colleague, they were digging with machinery all afternoon next to the railway and that they left the place when it started to be dark.[1138] More importantly, Mevludin Orić, one of the Orahovac victims, testified that when Hurem Suljić and he left the meadow, after the soldiers left the execution site, they saw the excavator and the loader, both probably yellow.[1139]

858. REDACTED[1140] [1141]

859. In conclusion, it is evident that PW-101 was never at the killing site. Consequently, no probative value can be attached to his testimony that he saw Drago Nikolić there. This conclusion is supported by the evidence provided by Birčaković, Drago Nikolić's driver. He testified that while he was at the school in Orahovac, he was ordered by Jasikovac to follow the trucks transporting the prisoners to the water point, something he did four to six times.[1142] Birčaković was adamant however, that he never draw Drago Nikolić to the killing site on that day.[1143]

II. PW-101 DID NOT SEE THE LOADING OF PRISONERS IN ORAHOVAC

860. From the description of the loading of prisoners at the Orahovac school, provided by PW-101, it is evident that he never saw prisoners being loaded on trucks at that location

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[1127] T.25680,L.18-21..
[1128] REDACTED
[1129] T33983-T.33984.
[1130] REDACTED
[1131] REDACTED
[1132] REDACTED
[1133] REDACTED
[1134] REDACTED
[1135] REDACTED.
[1136] T.7690-7691.
[1137] T.25674.
[1138] T.13621-13622.
[1139] T.964, 967.
[1140] REDACTED
[1141] REDACTED
[1142] T.11027.
[1143] T.11127

on 14 July. Consequently no probative value can be attached to his testimony that he saw Drago Nikolić issuing orders - real or not real[1144] - during the loading of prisoners on trucks.[1145] His testimony that he saw two prisoners who tried to escape while the loading was going on and who would have been killed[1146], can also not be attributed any weight.

(A) PW-101 Did Not See the Loading of Prisoners

861. Firstly, according to PW-101, he was ordered by Pantić to deliver food and juices to Orahovac at 20h30.[1147] PW-101 was not asked nor did he say at what time he arrived in Orahovac. REDACTED [1148] [1149] This also matches the testimony of Sreten Milošević. Upon being informed that the vehicle - driven by PW-101 - had arrived, he got out of the house and into the vehicle and they left in the direction of ZBde[1150], where they arrived when darkness starts, around 22h00 or 23h00.[1151] It follows that PW-101 cannot have seen the loading of the prisoners.

862. Secondly, the manner in which the prisoners were loaded on trucks according to PW-101 does not correspond to what happened. PW-101 explained that soldiers formed a corridor through which 20 to 25 prisoners blindfolded, with their hands tied, got in the trucks and that there was a ladder to help the prisoners climb on to the truck. [1152] PW-101 actually made a sketch of what he would have seen at the time.[1153] Quite to the contrary, 3DPW-10 testified that he backed up his truck against the door of the hall of the school, that he did not get out from his vehicle and that he felt the motion of the truck rocking as they were loading the prisoners directly from the school to his truck.[1154] 3DPW-10 confirmed that the prisoners were always loaded in the same manner in his truck and that the other trucks, which did trips between the school and the killing site, were also always loaded at the same place as his.[1155]

[1144] T.7573,L.18-T.7574,L.7.
[1145] T.7573-7574.
[1146] T.7572.
[1147] T.7624.
[1148] REDACTED
[1149] REDACTED
[1150] T.33979-T.33980;T.33983-T.33984.
[1151] T.33984.
[1152] T.7571.
[1153] 3DIC00071.
[1154] T.25664.
[1155] T.25672.

863. PW-142's description of the loading of prisoners on the trucks is similar to the testimony of 3DPW-10. He never mentioned that the soldiers formed a corridor when loading the prisoners from the school onto the trucks.[1156] Moreover, it is obvious that the forming of such a corridor would have required many soldiers and created a risk of flight for the prisoners. However, PW-142 did testify about a corridor which was formed between the buses and the entry to the school – which is different from the place the prisoners were later taken out of the school – when the prisoners arrived in Orahovac. Wire was actually used to make this corridor.[1157] Obviously, PW-101 may have heard about this corridor and mistakenly included it in his fabricated narrative. Significantly, when challenged about the loading procedure and the corridor he described, PW-101 attempted to modify his testimony.[1158]

864. Survivors also explained how they were loaded on trucks at Orahovac. Their testimony matches the description provided by 3DPW-10 and PW-142. For example, Mevludin Orić said that they were taken from the sports hall to a small locker room, where they were blindfolded, and onto the truck.[1159] REDACTED [1160]

865. Moreover, the loading of prisoners was done in the same way at the school in Rocević. As explained by Veljko Ivanović, he drove his truck in reverse and as he approached near the door of the building, he stopped and came out of his truck. The back doors were opened, the ammunition was unloaded, they placed two planks, two boards, and since the Mercedes was quite tall and the stairs were quite low, they placed it as a sort of ramp and they started loading people.[1161]

866. In light of the above, it is evident that PW-101 never saw prisoners being loaded on trucks at the school in Orahovac.

(B) PW-101 Did Not See Prisoners Being Shot

867. The testimony of PW-101 that he saw prisoners attempting to escape and being shot[1162] is also a lie.

[1156] T.6454.
[1157] T.6446.
[1158] T.7682-7683.
[1159] T.949,L.20-25;T.953,L.19-25.
[1160] REDACTED
[1161] T.18177.
[1162] T.7677,L.20-T.7678, L.1.

868. Of course, if PW-101 did not see the prisoners being loaded on the trucks, he could not have seen the prisoners who escaped and were shot. Moreover, as testified by Milošević[1163] - who was present when the prisoners attempted to escape and were killed - and Tanić - who saw two bodies near the school on one of the occasions he approached the school yard[1164] - this happened before PW-101 arrived at the school in Orahovac.

869. The sketch[1165] drawn by PW-101 concerning the location where the prisoners would have escaped and would have been shot[1166] is also contradicted by the evidence.

(C) PW-101 Did Not See Drago Nikolić Issuing Orders

870. During his testimony, PW-101 stated that he saw Drago Nikolić at the Orahovac school issuing orders during the loading of the prisoners.[1167] REDACTED [1168]

871. It is highly significant that when PW-101 was challenged by the Defence in this regard, he could not explain why he mentioned for the first time in December 2006 - in a supplemental information sheet - that he saw Drago Nikolić issuing orders at the Orahovac school.[1169]

872. In light of the above, it is evident that PW-101 did not see the loading of prisoners in Orahovac and did not see prisoners attempting to escape who would have been shot. Consequently, no weight can be attached to his testimony that he saw Drago Nikolić issuing orders when the prisoners were being loaded on trucks at the school in Orahovac.

III. REDACTED

873. REDACTED [1170]

874. REDACTED[1171] [1172]

875. REDACTED [1173]

[1163] T.33978,l.2-19;T.33982,l.10-15.
[1164] T.10329,10384.
[1165] 3DIC00071.
[1166] T.25664.
[1167] T.7573,L.4-10;T.7573,L.24-T.7574,L.4.
[1168] REDACTED
[1169] T.7686-7687.
[1170] REDACTED
[1171] REDACTED
[1172] REDACTED

876. REDACTED [1174]

877. REDACTED[1175] [1176]

IV. THE TESTIMONY OF PW-101 COMPRISES MANY ADDITIONAL INCONSISTENCIES

878. In addition to the core issues covered above, the Defence submits that the testimony of PW-101 is replete with inconsistencies and contradictions, which further demonstrate that he did not tell the truth, when testifying *viva voce* before the Trial Chamber.

879. Firstly, when asked about the location where he supposedly found the child, PW-101 provided a number of different answers. His multiple answers illustrate PW-101's confusion on this issue, which supports the conclusion that no weight can be attached to his evidence in general.[1177]

880. Secondly, PW-101 was totally confused concerning the identity of the person who would have ordered him to go to Orahovac, the identity of the person he met when he returned his vehicle to the ZBde at 01h00 on 15 July and the fact that he would have been authorized to take four days off.[1178] It was put to the witness that Pantić could not have issued the order or authorized the days off because he was away at his mother funeral.[1179] Mirko Sakotić confirmed that Pantić was away at the relevant time and that neither him nor Mićo Pavičević had the authority to authorize PW-101 to take time off.[1180] Many questions were put to the witness on this issue, some of which by the Presiding Judge.[1181] The witness either could not answer or contradicted himself. The inconsistencies and contradictions in the testimony of PW-101 further demonstrate that his narrative regarding the events of 14 July is not worthy of belief.

881. Thirdly, the testimony of PW-101 that he had delivered food supplies at Orahovac in the evening of 14 July[1182], is also contradicted by many witnesses. Sreten Milošević testified that he did not make any arrangements for food or juice to be delivered at

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[1173] REDACTED
[1174] REDACTED
[1175] REDACTED
[1176] REDACTED
[1177] T.7582-7583, REDACTED,T.7656, REDACTED T.7657; REDACTED.
[1178]T.7625,L.24-T.7628,L.25.
[1179] T.7626,L.12-22;T.7629,L.8-14.
[1180] T.25759-25760.
[1181] T.7641.
[1182]T.7563,L.25-T.7565,L.15.

Orahovac on 14 July, neither was he asked for this nor did he see any food there on that day. Moreover, no pastries or juice were at the disposal of the ZBde to be delivered to Orahovac.[1183] Cvijetin Ristanović testified that during the time he spent in Orahovac on 14 July, nobody came from the barracks to bring him any food, refreshment or juice.[1184] Dragoje Ivanović testified that nobody brought any food during the night he spent in Orahovac.[1185] Stanoje Bircaković testified that nobody brought him any food while he was in Orahovac.[1186] PW-142 testified that he does not remember if he was brought any food when he was in Orahovac.[1187] As for PW-143, who constantly provided nebulous answers, he testified that he got a little bit of food when he was in Orahovac but he never mentioned any doughnuts, juices or even meat as PW-101 testified himself.[1188]

882. While PW-101 maintained that he delivered fruit juices, at one point during his cross examination, he suddenly added that he also delivered 200 to 500 kilos of meat to the soldiers[1189] which is simply ludicrous. It follows that once again, the testimony of PW-101 regarding the reason for his presence at Orahovac on 14 July can not be attributed any probative value.

883. Lastly, it is not possible that PW-101 saw three buses, parked in the Barracks compound with prisoners on buses, blindfolded and with ligature on their hands for the purpose of allowing them to go to the WC.[1190] To begin with, he said in his testimony that he saw these buses before the events in Orahovac.[1191] Moreover, the evidence reveals that all buses transporting prisoners drove to the area of Zvornik as part of one long column[1192], which is inconsistent with the evidence provided by PW-101. Sreten Milošević, who saw the buses driving in front of Standard Barracks[1193], testified that he never heard any rumour about any bus which would have stopped at the Standard Barracks; neither can he remember such visible event.[1194] Furthermore, whereas the

[1183] T.33986,L.25-T.33987,L.14.
[1184] T.13622-13623.
[1185] T.14565.
[1186] T.10771.
[1187] T.6486.
[1188] T.6594.
[1189] T.7633.
[1190] T.7556-7557.
[1191] T.7563.
[1192] REDACTED
[1193] T.33974,L.4-16.
[1194] T.33975,l.18-23.

Barracks duty officer logbook[1195] refers to one bus which would have remained at Standard Barracks during the night of 14 to 15 July, this evidence does not correspond to that of PW-101. What is more, this evidence is contradicted by many witnesses, who testified that they did not see any bus parked inside the Barracks during that night.[1196]

V. REDACTED

884. REDACTED [1197]

885. REDACTED [1198] [1199] [1200]

886. REDACTED [1201]

887. REDACTED [1202]

888. REDACTED [1203]

889. In light of the above submissions and arguments, the Defence respectfully submits that no probative value can be attached to the evidence provided by PW-101.

890. It is undisputed that PW-101 was a member of the ZBde in July 1995 and that he did travel to Orahovac late on 14 July, for a very short time, for the purpose of picking up members of the Brigade who were there.

891. However, it is evident that the vast majority of his testimony was fabricated from information he gathered and rumors he heard about, REDACTED

F. SRETEN AĆIMOVIĆ

892. Witness Sreten Aćimović ("PW-128" or "Srećo Aćimović" or "Aćimović") testified *viva voce* from 20 to 22 June 2007.[1204] The Defence summits that no probative value whatsoever can be attributed to his testimony, in particular with regards to the evidence he provided implicating the Accused in the events which took place in Ročević.

893. Even though during his testimony Srećo Aćimović initially attempted to hide, and in any event, to downplay and lessen his personal involvement in the criminal activities

[1195] P383,p.6.
[1196] S.Bircaković;T.10775.
[1197] REDACTED
[1198] REDACTED
[1199] REDACTED
[1200] REDACTED
[1201] REDACTED
[1202] REDACTED.
[1203] REDACTED
[1204] T.12928-13159

which took place in Ročević and Kozluk on 14-15 July 1995, the cross examination conducted by the Defence - as well as the testimony of additional witnesses called by the Prosecution[1205] as a direct result of it - revealed that Aćimović, in fact, was deeply involved in these events. This in itself renders his evidence not worthy of belief and suffices to conclude that no weight can be attached to his narrative.

894. Moreover, Aćimović's lack of credibility which came to light when the Defence explored with him the numerous inconsistencies and outright changes in the statements he provided to the Prosecution, as well as between these statements and his testimony, also leads to the conclusion that no probative value can be attributed to his evidence.

895. Furthermore, as highlighted by the multiple contradictions, inconsistencies and impossibilities which arise from his evidence and that of other witnesses called to testify in relation to the same events, the Defence posits that the incriminating evidence provided by Aćimović implicating Drago Nikolić is both not credible and not possible.

896. It follows, as a minimum, that the Trial Chamber cannot attach any probative value to Aćimović's testimony that during the night of 14 to 15 July 1995, Drago Nikolić contacted him by telephone twice to insist that the order he supposedly received by *coded* telegram – to provide soldiers from his Battalion to participate in the execution of prisoners - be implemented.

I. AĆIMOVIĆ WAS PERSONALLY INVOLVED IN CRIMINAL EVENTS AT THE SCHOOL IN ROČEVIĆ

897. On the basis of information Aćimović provided to the Prosecution for the first time - REDACTED [1206] - the true involvement of Aimović in the events which took place in Ročević and Kozluk on 14-15 July as well as his straightforward lies during his examination in chief were revealed. Aćimović's actual involvement in these events was further confirmed during the testimony of witnesses Dragan Jović, Veljko Ivanović and PW-174.

898. As a minimum, this evidence allows to determine that Aćimović, *inter alia*: (a) did not travel alone to Ročević in the morning of 15 July;[1207] (b) was involved in obtaining

[1205] Dragan Jović,T.18045-18093;Veljko Ivanović,T.18167-18236;PW-174,T.32695-32775
[1206] REDACTED
[1207] Dragan Jović,T.18051,L.13-T.18052,L.8

transport resources used for the transfer of prisoners from Ročević to Kozluk;[1208] (c) was involved in obtaining ammunition taken to Kozluk where the prisoners were executed;[1209] (d) was involved in the loading of prisoners held in Ročević on trucks;[1210] (e) was involved in gathering volunteers to participate in executions;[1211] (f) REDACTED [1212] (g) was involved in dispatching trucks transporting prisoners – driven by members of his Battalion - to Kozluk;[1213] and (h) REDACTED [1214] [1215]

899. Considering the personal involvement of Aćimović in these criminal activities and his evident attempt to hide, downplay and evade responsibility for the same, the Defence submits that no weight can be attributed to Aćimović's narrative to the contrary.

900. More specifically, and as demonstrated below, Aćimović's account that: (a) he learned of the presence of prisoners at the Ročević school by accident; (b) he received two *coded* telegrams ordering him to provide soldiers from his Battalion to participate in the execution of prisoners; (c) he, along with members of his Battalion including company commanders, refused to obey these orders, sending telegrams to that effect; (d) he was contacted by Drago Nikolić who would have insisted that these orders had to be implemented; and (e) he tried on numerous occasions to report the matter to his superiors in the ZBde, is not worthy of belief and can be accorded no probative value.

II. THE LACK OF CREDIBILITY OF AĆIMOVIĆ

901. Aćimović's the lack of credibility further came to light when the Defence explored with him the numerous inconsistencies and outright changes in the statements he provided to the Prosecution, as well as between these statements and his testimony.

902. The Prosecution interviewed Aćimović on at least three occasions before his travel to The Hague to testify in the present case.[1216] Aćimović met one more time with the Prosecution on 17 June 2007 before the beginning of his testimony three days later.

[1208] Dragan Jović,T.18060,L.13-T.18062,L.4,T.18083,L.15-21
[1209] Veljko Ivanović,T.18176,L.13-T.18177,L.17,REDACTED
[1210] Veljko Ivanović,T.18177,L.11-T.18178,L.7
[1211] Dragan Jović,T.18056,L.18-18057,L.9,T.18092,L.7-21
[1212] REDACTED
[1213] Veljko Ivanović,T.18177,L.21-T.18178,L.3,REDACTED;Dragan Jović,T.18058,L.18-T.18059,L.1,T.18082,L.14-22
[1214] REDACTED
[1215] REDACTED
[1216] T.12997,L.18-20,T.13078,L.19-24

903. In cross examination, the Defence established Aćimović's lack of credibility by highlighting that on each of these occasions, Aćimović provided different and additional information, including new incriminating details.

904. With respect to his first interview with the Prosecution, Aćimović confirmed that he did not mention, *inter alia*: (a) the supposed first[1217] or second[1218] *coded* telegrams ordering him to provide members of his Battalion to participate in the executions; (b) the phone calls he allegedly received from Drago Nikolić;[1219] and (c) going to Ročević on 15th July 1995 and meeting with Vujadin Popović.[1220] When suggested that he would have remembered these details, Aćimović amazingly replied that he could not recall how much he exactly remembered at the time.[1221]

905. Moreover, Aćimović agreed with the proposition that he provided the following information for the first time during his proofing session with the Prosecution - on the Sunday preceding his testimony - including *inter alia* that: (a) Popović would have ordered him to find volunteers to participate in the executions;[1222] (b) one of the soldiers guarding the prisoners would have arrived with a volunteer to participate in the executions;[1223] (c) a soldier would have come in the office were he was and informed Popović that one truck had arrived from the Brigade;[1224] (d) REDACTED;[1225] (e) REDACTED;[1226] (f) REDACTED[1227] (g) REDACTED;[1228] (h) REDACTED;[1229] (i) a young man from Ročević would have volunteered to participate in the executions;[1230] and, more importantly, (j) REDACTED.[1231]

906. Furthermore, Aćimović accepted the suggestion that he mentioned for the first time during his testimony, that *inter alia*: (a) that he would have been asked by Popović for a list of trucks;[1232] (b) that Popović would have asked him to call drivers to come to the

[1217] T.13079,L.5-18
[1218] T.13080,L.2-4
[1219] T.13080,L.5-8
[1220] T.13080,L.9-13081,L.19
[1221] T.13082,L.7-T.13083,L.16
[1222] T.13093,L.3-T.13094,L.3
[1223] T.13093,L.19-T.13094,L.3
[1224] T.13094,L.4-9
[1225] REDACTED
[1226] REDACTED
[1227] REDACTED
[1228] REDACTED
[1229] REDACTED
[1230] T.13097,L.5-20
[1231] REDACTED
[1232] T.13104,L.3-12

Ročević school;[1233] (c) that he would have pretended to make calls to the drivers;[1234] and (d) he would have shouted at Popović.[1235]

907. Aćimović's propensity to modify his story and provide additional information over time, including new incriminating details against others - offered at the eleventh hour – for the purpose of hiding and minimizing his involvement in the Ročević/Kozluk events, until he could no longer do so, reveals his lack of credibility.

908. Regarding the supposed existence of *coded* telegrams and alleged phone calls from Drago Nikolić – not mentioned in his first interview – Aćimović was asked whether he had decided to provide this information before his second interview or whether he suddenly remembered these events when prompted by the Prosecution. Strikingly, his answer, which underscores his lack of credibility, was: "*I really can't remember. I think that I remembered at that moment because of the question*".[1236]

909. REDACTED [1237] [1238] Strangely, he later further contradicted himself by saying that he did not know precisely whether he had not given these names earlier because of safety reasons or because he couldn't remember.[1239]

910. REDACTED [1240] [1241]

911. In light of the above it can only be concluded that Sreten Aćimović is absolutely not a credible witness.

III. THE EVIDENCE PROVIDED BY AĆIMOVIĆ IS CONTRADICTED, NOT CREDIBLE AND NOT POSSIBLE

912. In addition to the fact that Sreten Aćimović is a witness who lacks credibility and who had every reason to fabricate a narrative with the aim of evading responsibility for the criminal events which took place in Ročević and Kozluk in 14-15 July 1995, the evidence he provided is replete with inconsistencies, contradicted by other witnesses called to testified about the same events and is in many respects not possible.

[1233] T.13104,L.13-18
[1234] T.13104,L.19-25
[1235] T.13108,L.3-10
[1236] T.13086-13087
[1237] REDACTED
[1238] REDACTED
[1239] T.13092,L.8-12
[1240] REDACTED
[1241] REDACTED

(A) Aćimović Did Not Learn About the Presence of Prisoners at the Ročević School by Coincidence

913. Aćimović testified that he was informed of the presence of prisoners in the Ročević school in the evening of 14 July when he went home to take a bath and was visited by the Priest and the President of the Ročević local commune.[1242]

914. On this, he is contradicted by witness Mitar Lazarević – startlingly called by the Prosecution for the sole purpose of corroborating the evidence of Aćimović – who testified that Aćimović learned of the presence of prisoners in Ročević by his parents[1243], in the afternoon.[1244] Lazarević added that when Aćimović came back to the Command in the afternoon[1245] and not in the evening, Aćimović explained what was happening at the Ročević school.[1246] Lazarević is sure that there were people at the Command at that time but did not remember who was present.[1247] He also said the information about the prisoners came as a surprise.[1248]

915. As for Dragan Jović, he testified that a young soldier from the 2nd Battalion came to the reception at dusk, just before nightfall[1249] and said that Muslims had been brought to the gym of the Ročević school,[1250] which is denied by Aćimović[1251] and not mentioned by Lazarević.

916. Considering the manner in which information concerning the presence of prisoners in various schools in the area of Zvornik was reported to the ZBde Command and other ZBde battalions, the Defence posits that it is not possible that the 2nd Battalion Command was not informed at the same time and in the same way. Indeed, the evidence reveals that: (a) the 6th Battalion Command – the battalion closest to Petkovci school – was informed by the ZBde Duty Officer, between 1000 and 1200 hours on 14 July 1995, of the impending arrival of prisoners at Petkovci school;[1252] (b) the 1st Battalion Command – the battalion closest to Kula school - was informed by the ZBde Duty Officer, by telegram and by phone, early in the morning of 14 July 1995 of the

[1242] T.12934,L.16-T.12935,L.5,T.13006,L.2-T.13007,L.8,T.13068,6-12
[1243] T.13366,L.6-11,T.13389,L.16-24
[1244] T.13366,L.12-14,T.13389,L.16-24
[1245] T.13372,l.13-17
[1246] T.13366-T.13373
[1247] T.13372,L.9-12
[1248] T.13385,L.19-T.13386,L.6
[1249] T.18072,L.16-21
[1250] T.18049,L.9-20
[1251] T.13146,L.9-15
[1252] Marko Milošević,T.13300,L.13-T.13301,L.14

imminent arrival of prisoners at the school near Kula;[1253] and (c) at the ZBde Command, Jasikovać, the Commander of the ZBde MP Company, knowing that prisoners would arrive at the Orahovac school in the evening of the 13 July 1995,[1254] dispatched members of his Company to provide security at that location.[1255] Moreover, when problems with the prisoners at Orahovac school arose on 14 July 1995, the 4th Battalion Command – the battalion closest to Orahovac school – was informed and requested to send soldiers to provide additional security there.[1256]

917. Consequently, it is highly probable to say the least, that the 2nd Battalion Command – the battalion closest to Ročević school - and by the same token Aćimović, was informed by the ZBde Command, much earlier on 14 July 1995, that prisoners would arrive at the Ročević school.

918. In this regard, the fact that both Aćimović[1257] and Lazarević[1258] who worked on a permanent basis in the Command of the 2nd Battalion, testified that the presence of prisoners at Ročević school came as a surprise, is significant as it establishes the collusion between the two.

919. Moreover, the fact that the 1st Battalion would have been informed of the arrival of prisoners by an un-coded telegram received from the ZBde Command is also significant as this is likely the source of Aćimović's fabrication concerning the *coded* telegrams he supposedly received during the night from 14 to 15 July.

(B) Aćimović Did Not Receive Two *Coded* Telegrams

920. It stems from the evidence as a whole that Aćimović's narrative concerning the reception of two *coded* telegrams during the night of 14 to 15 July 1995 is nothing but a fabrication. Secure lines of communication existed, there was no need for the use of codes and *coded* telegrams were not used by the ZBde Command to communicate with its battalions. There is no evidence of any telegram received at the 2nd Battalion Command, at any time, requesting Aćimović to provide soldiers for the execution of prisoners. If any *coded* telegrams were ever received at the 2nd Battalion Command

[1253] Slavko Perić,T.11375,L.15-11376,L.4,T.11441,L.10-18,T.11442,L.12-20,T.11469,L.13-23
[1254] The evidence is silent as to how Jasikovać obtained that information or from whom he obtained it.
[1255] Stevo Kostić,T.26003;Stanoje Bircaković,T.10742-10743;Dragoje Ivanović,T.14539-14540
[1256] Lazar Ristić,T.10062,L.12-19;T.10067,L.25-T.10068,L.22
[1257] T.12934,L.18-T.12935,L.5,T.13152,L.24-T.13153,L.9
[1258] T.13385,L.19-T.13386,L.6

during the war, this would have happened only once and certainly not during the night of 14 to 15 July. Moreover, Mitar Lazarević, the only witness who provided any evidence which could possibly support Aćimović's story, contradicted him on significant material aspects of his testimony.

921. It is manifest that both Aćimović and witness Lazarević did not tell the truth and that they had a reason for lying. Aćimović needed to justify his presence in Ročević as well as his personal involvement in the criminal activities which took place there on 15 July. As for witness Lazarević, his testimony was aimed at protecting his Commander - with whom he worked closely during the war[1259] - and supporting the person with whom he was involved in cigarettes smuggling.[1260]

922. Firstly, it must be noted that a telegram, as referred to by Aćimović, was no more than an official message communicated orally and noted down by hand, both at the point of origin and at the receiving end.[1261]

923. Moreover, it was established by many witnesses that secure lines of communication existed between the ZBde Command and the 2nd Battalion Command, both by military 'induction' field phone[1262] as well as by civilian phone[1263]. The only way to intercept oral conversations over these means between the ZBde Command and the 2nd Battalion Command was to tap in the hard wire lines.[1264] This was at best a remote possibility since both commands were located in friendly territory.[1265] Consequently, there was no need for the use of codes when the ZBde Command forwarded a telegram to the 2nd Battalion Command via hard wire communication means.[1266]

924. This is supported by witnesses who provided evidence involving communications between the ZBde Command and the other battalion commands.[1267] No witness ever

[1259] REDACTED
[1260] REDACTED
[1261] Sreten Aćimović,T.13124-13126;Milisav Cvijetinović,T.25832-25834
[1262] Sreten Aćimović,T.13071-13072;Mitar Lazarević,T.13394-13395;Dragan Stevanović,T.32850-32851; Milisav Cvijetinović,T.12950,T.25828;Petko Tomić,T.26178-26179;Milan Radić,T.26147-26148
[1263] Sreten Aćimović,T.13075;Mitar Lazarević,T.13394,L.17-20;Dragan Stevanović,T.32852-32853
[1264] Sreten Aćimović,T.13071-13072;Mitar Lazarević,T.13394; Dragan Stevanović,T.32851-32852,T.32854; Milisav Cvijetinović ,T.25831
[1265] Milisav Cvijetinović,T.25831,T.25860-25862
[1266] Dragan Stevanović,T.32852,L.18-22;Milenko Jevdjević,T.29661,L.24-T.29662,L.10
[1267] Slavko Perić,T.11375,L.22-T11376,L.18;Rajko Babić,T.10215,L.24-T.10217,L.5

mentioned sending or receiving a *coded* telegram to or from the ZBde Command through hard wire communication means.[1268]

925. In fact only Aćimović and witness Lazarević testified about the use of *coded* telegrams, although even they said that this was exceptional.[1269]

926. As for Dragan Stevanović - called by the Prosecution as a rebuttal witness for the specific purpose of establishing whether *coded* telegrams were used to communicate between the ZBde and its battalions[1270] - he testified about a single instance, when a *coded* telegram would have been received at the 2nd Battalion Command[1271], no later than 13 July 1995[1272]. Thus, even if the Trial Chamber was to accept his evidence, on this unique occasion Stevanović would not have been not able to decipher the telegram because the 2nd Battalion did not have one of the two 'instructions books' necessary for this purpose.[1273] It is significant in this regard that witness Stevanović does not know how the *coded* telegram he would have been shown that night was received;[1274] whereas it may have been delivered by courier.[1275]

927. Moreover Stevanović confirmed that the 'code of conversations' he would have attempted to use, the '*Razgovornik'*, was designed for use during radio communications when units were out in the field.[1276] He also mentioned two instances, in November and December 1993 as well as in April 1995, when codes were used for this purpose during active combat activities.[1277] He also agreed with the proposition that radio communications are entirely different from conversations over hard wire means because the former can be intercepted.[1278] He acknowledged that there was no radio in the 2nd Battalion Command[1279] and that the RUP-12 radio which was the communications

[1268] Zoran Aćimović,T.22043,L.20-24;Milenko Jevdjević,T.29661,L.24-T.29662,L.10;Milisav Cvijetinović,T.25834,L.12-14,T.25853,L.25-T.25856,L.2;REDACTED;Marko Milošević,T.13351,L.13351,L.15-13352,L.19.
[1269] Sreten Aćimović,T.13021,L.16-20,T.13128,L.20-T.13129,L.2;Mitar Lazarević,T.13399,L.14-18
[1270] Prosecution Motion for Rebuttal,para.22-29
[1271] T.32878,L.17-21
[1272] It was established that Stevanović was not present at the 2nd battalion Command on 14 July 1995 (T.32830,L.21-T.32842,L.7,T.32845,L.2-9;P312)
[1273] T.32820,L.24-T.32822,L.2
[1274] T.32857,L.20-T.32858,L.9
[1275] T.32858,L.4-9
[1276] T.32808,L.2-T.32812,L.12-T.32813,L.4,T.32854,L.23-T.32856,L.7,T.32869,L.17-21,T.32872,L.19-T.32873,L.2;3D567,p.2,L.9-14;This is confirmed by Sreten Aćimović himself(T.13128,L.22-T.13129,L.2)
[1277] T.32856,L.8-17
[1278] T.32854,L.23-T.32855,L.8
[1279] T.32855,L.12-14

center was never used other than for radio checks.[1280] The reason for this, he agreed, is that it was much easier to use the induction field phone *because you can speak in clear without using codes*.[1281] Stevanović also agreed that the sole reason for using codes in war time is to prevent the enemy from intercepting communications, [1282] which further supports the conclusion that there was absolutely no requirement to use codes to communicate between the ZBde Command and the 2nd Battalion during the night of 14 to 15 July 1995.

928. Furthermore, asked whether codes were ever used while he was a member of the 2nd Battalion other that for the above occasions, witness Stevanović was categorical: "*Codes were not used. The Razgovornik was not used. And as for the code table, we didn't have any*"[1283]. It is noteworthy that witness Jevdjević, the Commander of Drina Corps Communications Battalion,[1284] entirely corroborates the testimony of Stevanović in this regard.[1285]

929. What is more, it was clearly established that the *coded* telegram Stevanović would have been asked to decipher, would have been received at the 2nd Battalion Command at least two days earlier[1286] than the two *coded* telegrams supposedly received by Aćimović, which obviously never existed. This conclusion is also supported by Stevanović's account as to what happened the night he was supposedly asked to decode a telegram. His testimony simply does not match the evidence provided by Aćimović and witness Lazarević concerning what would have happened during the night of 14 to 15 July. Consequently whether the Trial Chamber attaches any weight to the testimony of Stevanović concerning the unique telegram he would have been asked to decipher at the 2nd Battalion Command, this does not change the fact that Aćimović and Lazarević lied as to what happened during the night of 14 to 15 July.

930. What is even more significant on this issue is that all the witnesses who provided evidence as to what happened within the 2nd Battalion from 14 July 1995 onwards, none of them – excluding of course Aćimović and witness Lazarević - have any knowledge of any telegram which would have been received at the 2nd Battalion Command,

[1280] T.32855,L.20-23
[1281] T.32855,L.24-T.32856,L.2
[1282] T.32856,L.3-7
[1283] T.32856,L.21-22
[1284] T.29479,L.11-16,T.29480,L.13-17
[1285] T.29661,L.24-T.29664,L.14
[1286] T.32830,L.21-T.32842,L.7,T.32845,L.2-9

ordering Aćimović to provide soldiers from the 2nd Battalion to participate in the execution of prisoners. This includes witnesses: (a) Milislav Cvijetinović[1287], the communicator on duty at the 2nd Battalion communications center during the night of 14 to 15 July[1288]; (b) Dragan Stevanović[1289], the Commander of the 2nd Battalion communications squad[1290]; (c) Dragan Jović[1291], Aćimović's driver[1292]; (d) Milan Radić[1293], the 2nd Battalion 3rd Company Commander[1294]; and (e) Petko Tomić[1295], the 2nd Battalion 3rd Company Deputy Commander[1296].

931. REDACTED [1297]

932. Lastly, the inexistence of the two *coded* telegrams which Aćimović testified were received during the night of 14 to 15 July is strongly corroborated by witness Lazarević who is aware of only one telegram being received that night![1298]

(C) The 2nd Battalion Company Commanders Were Not Consulted and No Telegrams were Sent to Them Aćimović Did Not Receive Two *Coded* Telegrams

933. Obviously if no *coded* telegrams were received at the 2nd Battalion Command during the night of 14 to 15 July 1995, Aćimović's evidence that two *coded* telegrams were returned from the 2nd Battalion to the ZBde Command is also a fabrication. The same goes for Aćimović's supposed consultation with his company commanders.

934. The contradictions, impossibilities and inconsistencies regarding Aćimović's evidence in this regard are both significant and revealing. For example, Aćimović testified that two *coded* telegrams were received from the ZBde Command and that two *coded* telegrams were sent back in response. [1299] He also stated that after receiving the *second* telegram, he *again* consulted with Vujo Lazarević and Mitar Lazarević and that *they*

[1287] T.25836,L.15-T.25839,L.4,T.25891,L.12-25
[1288] T.25826,L.21-T.25827,24,T.215869,L.20-T.25870,L.22;P312
[1289] T.32848,L.21-T.32849,L.12
[1290] T.32807,L.22-24,T.32819,L.8-16
[1291] T.18085,L.15-T.18086,L.2
[1292] T.18047,L.2-3
[1293] 3D477;T.26150,L.12-T.26151,L.7
[1294] 3D477;3D478
[1295] 3D478
[1296] 3D477;3D478
[1297] REDACTED
[1298] T.13378,L.23-25,T.13405,L.17-23
[1299] T.13129,L.22-23

decided what they would do.[1300] Quite to the opposite, witness Lazarević testified that only one telegram was received[1301], that one telegram was sent back[1302] and that he could not even tell if the single telegram returned was coded or not[1303].

935. Regarding the supposed consultation with the company commanders, Aćimović testified that the second telegram indicated explicitly that he should personally inform the company commanders of its content. According to Aćimović the second telegram was sent to the company commanders and he spoke to them over a military *secure line*[1304].

936. Quite to the contrary, witness Lazarević testified that no copy of the telegram was sent to the company commanders because they were there[1305], in addition to all members of the Command, when the telegram was discussed.[1306] According to Lazarević, the company commanders were summoned and came to the Battalion Command.[1307]

937. Strikingly, both Milan Radić[1308], Commander of the 3rd Company, and his Deputy, Petko Tomić[1309], testified that the 3rd Company was not contacted during the night of 14 to 15 July concerning the reception of any *coded* telegram. More importantly, they never heard about any telegram received ordering Aćimović to provide soldiers from the 2nd Battalion to participate in the execution of prisoners.[1310] Tomić, who was on duty in the Command of the 3rd Company during the night from 14 to 15 July did not travel to the 2nd Battalion Command that night.[1311]

938. While the Prosecution attempted to undermine the credibility of Tomić[1312] and Radić[1313] - REDACTED [1314] [1315]

939. Moreover, Aćimović stated regarding the second telegram, that he thought the communications section had already forwarded this telegram to the company

[1300] T.12948,L.1-22
[1301] T.13378,L.23-25,T.13405,L.17-19
[1302] T.13405,L.20-23
[1303] T.13406,L.24-T.13407,L.6
[1304] T.12947,L.15-T.12949,L.13,T.13141,L.4-T.13142,L.5
[1305] T.13375,L.25-T.13376,L.1,T.13405,L24-T.13406,L.18
[1306] T.13387,L.2-15,T.13405,L.13-16
[1307] T.13406,L.13-18
[1308] 3D477
[1309] 3D477;T.26180,L.7-10,T.26181,L.14-20
[1310] Milan Radić see 3D477;T.26150,L.12-T.26151,L.7;Petko Tomić see 3D478
[1311] T.26181,L.14-20
[1312] T.26164,L.14-T.26166,L.5,T.26169,L.16-T.26170,L.22
[1313] T.26190,L.17-T.26191,L.14
[1314] REDACTED
[1315] REDACTED

commanders and that when he got in touch with the them, the company commanders confirmed having received the telegram.[1316]

940. Strikingly, it was established that witness Cvijetinović was the communicator on duty at the 2nd Battalion during the night of 14 to 15 July and he testified having no knowledge, *in the days following the fall of Srebrenica*, of any telegram received concerning a request *for soldiers to participate in the execution of prisoners*.[1317] This necessarily implies that he was never involved in sending such telegram to the companies. Cvijetinović also never said anything about company commanders coming to the Battalion Command.[1318]

941. Aćimović's testimony that after receiving the second telegram, he spoke to his company commanders by *military secure line*[1319] is also amazing at it confirms that there was absolutely no reason to use coded telegrams that night.

942. As for witness Stevanović, he is of no assistance on this issue, since the events he testified about would have happened at least two days earlier.[1320] In any event, he never stated having sent any telegram to the company commanders[1321] and he would not have listened to the conversation which Aćimović supposedly had with them[1322].

943. Lastly, the Brigade Operation Duty Officer Note Book includes no indication that any telegrams would have been received from the 2nd Battalion during the night of 14 to 15 July.[1323]

(D) Drago Nikolić Did Not Call to Exert Pressure on Aćimović

944. Clearly if no *coded* telegrams were received at the 2nd Battalion Command, no *coded* telegrams sent back to the ZBde Command and if the company commanders were neither informed of the coded telegrams supposedly received nor summoned to report to the 2nd Battalion Command Aćimović's testimony that he was called by Drago Nikolić during the night of 14 to 15 July 1995 is also a fabrication.

[1316] T.12948,L.1-17
[1317] T.25836,L.15-19
[1318] T.25826,L.21-T.25827,L.24,T.25836,L.15-T.25839,L.4
[1319] T.13142,L.2-5
[1320] T.32830,L.21-T.32842,L.7,T.32845,L.2-9
[1321] T.32866,L.3-15
[1322] T.32864,L.25-T.32865,L.4
[1323] P377

945. Firstly, according to Aćimović, Drago Nikolić would have called him on the civilian phone in the 2nd Battalion Command and would have spoken in clear, *i.e.* without codes.[1324] Considering that the civilian phone in the 2nd Battalion Command is a secure hard wire means of communication – not prone to interception – this confirms yet again that there was absolutely no need for the use of coded telegrams that night.

946. Secondly, Aćimović testified that Drago Nikolić would have called him twice, around 02h30[1325] and 07h00-08h00[1326], in the presence of Vujo Lazarević and Mitar Lazarević[1327], with whom he would have discussed on both occasion what should be done.[1328] Strikingly, according to the evidence provided by Mitar Lazarević: (a) he is aware of only one conversation;[1329] (b) he does not know and was not informed who was speaking to his Commander[1330]; and (c) he was not informed of the content of the conversation.[1331] The two versions simply can not be reconciled. Moreover, Mitar Lazarević's testimony that his Commander was a man of few words who did not volunteered information[1332] is simply not credible in the circumstances.

947. Thirdly, the contents of the conversations mentioned by Aćimović is also revealing in that there is no evidence of any attack which was expected on the 2nd or 3rd Battalion or from the rear in the direction of Klisa or Bosković on 14 July as well as no evidence of any telegrams addressed to the 2nd Battalion that night in this respect.[1333]

948. Fourthly, there would have been no reason for Drago Nikolić to tell Aćimović that he should personally wait for him at the Ročević school at 09h00 or 10h00 in the morning considering that: (a) Drago Nikolić was never at the Ročević school on 14-15 July;[1334] (b) Aćimović would have met with Popović when he travelled to the Ročević school;[1335] and (c) Drago Nikolić either had or was about to begin his shift as Brigade Operations Duty Officer[1336].

[1324] T.12949,L.23-T.12950,L.3,T.13046,L.10-16
[1325] T.12950,L.4-11
[1326] T.12951,L.21-T.12952,L.1
[1327] T.13123,L.1-3
[1328] T.12956,L.20-T.12957,L.3
[1329] T.13377,L.18-T.13378,L.22
[1330] T.13377,L.18-T.13378,L.18,T.13387,L.23-T.13388,L.10,T.13392,L.14-T.13393,L.1
[1331] T.13377,L.18-T.13378,L.1
[1332] T.13377,L.22-24,T.13388,L.3-5,T.13392,L.17-18
[1333] T.12953,L.14-T.12954,L.10
[1334] Sreten Aćimović,T.12957,L.22-T.12958,L.1,T.13050,L.10-13;Dragan Jović,T.18085,L.6-19;REDACTED
[1335] T.12957,L.22-T.12958,L.1,REDACTED
[1336] P377,p.140

949. Lastly, Aćimović could not speak to Drago Nikolić at around 07h00-08h00 in the morning considering that in the same time frame Drago Nikolić was close to the Command building in Standard Barracks, having conversation with members of the Bratunac Brigade who happened to be there along with witnesses Mico Gavrić[1337] and Todor Gavrić[1338].

(E) Aćimović Did Not Try on Numerous Occasions to Report the Matter to His Superiors in the ZBde

950. As for the supposed *coded* telegrams received, the *coded* telegrams sent in response, the consultation with his company commanders and the conversations with Drago Nikolić, Aćimović's attempts to report the matter to his superiors within the ZBde are but the fruit of his imagination and a further attempt to justify his personnal involvement in the criminal activities which took place at Ročević/Kozluk on 14-15 July 1995.

951. According to the evidence provided by Aćimović he would have : (a) called the ZBde Operations Duty Officer from Kozluk and spoken to Popović after being informed of and having seen the situation at the Ročević school;[1339] (b) left a first message with the ZBde Operations Duty Officer asking the Commander or the Chief of Staff to call him back when they would returned;[1340] (c) later called once again the ZBde Operations Duty Officer from the 2nd Battalion Command after informing Mitar Lazarević and others of the situation at the Ročević school;[1341] (d) left a second message asking the ZBde Operations Duty Officer to notify him if he can get in touch with the Commander or the Chief of Staff;[1342] (e) called the ZBde Operations Duty Officer after the conversation he supposedly had with Drago Nikolić with the aim to speaking to the Commander or the Chief of Staff;[1343] and (f) called once again the ZBde Operations Duty Officer upon supposedly having escaped from the situation at the Ročević school at around noon.[1344]

[1337] T.26484,L.18-20
[1338] T.26452,L.23-T.26453,L.1
[1339] T.12937,L.10-T.12940,L.20,T.10-T.13009,L.13
[1340] T.12939,l.6-14
[1341] T.12943,L.16-25
[1342] T.12943,L.16-25
[1343] T.12956,L.20-T.12957,L.21
[1344] T.12989,L.21-T.12990,L.11

952. Fisrtly, there is no trace of any of these calls or messages in the Zvornik Brigade Operations Duty Officer Note Book.[1345]

953. Secondly, it is established that the ZBde Operations Duty Officer could reach REDACTED, where ever he was deployed on 14-15 July.[1346] There is also plenty of evidence that REDACTED was present at the ZBde Command in Standard Barracks on many occasions on 14 July, during the night of 14 to 15 July, as well as on the morning of the 15 July.[1347] More specifically, at the time of Aćimović's last phone call, at around noon, the evidence reveals that both Pandurević and REDACTED were present at the ZBde Command.[1348]

954. Lastly, according to Aćimović during the phone call he made after returning of Ročević the 15 July at around noon, he spoke with the ZBde Operations Duty Officer[1349] but did not speak with Drago Nikolić[1350]. Considering that it is established Drago Nikolić had began his shift as Brigade Operations Duty Officer at the latest at 11h45 on that day[1351], this is not possible.

955. In light of the above, the Defence summits that no probative value whatsoever can be attached to the testimony of Srećo Aćimović.

G. VINKO PANDUREVIĆ

956. Vinko Pandurević is one of the co-accused in this case. He testified *viva voce* from 27 January to 9 March 2009. Significantly, he was one of the last witnesses to testify, after having heard the evidence provided by almost all other witnesses.

957. REDACTED [1352]

958. REDACTED

959. REDACTED [1353]

960. REDACTED[1354]

961. REDACTED

[1345] P377,p.126-144
[1346] REDACTED
[1347] REDACTED
[1348] REDACTED
[1349] T.13140,L.6-T.13141,L.3
[1350] T.13050,L.2-9,T.13140,L.17-21
[1351] P377,p.140
[1352] REDACTED
[1353] REDACTED
[1354] REDACTED

962. The Defence submits that Vinko Pandurević is a witness who: (a) is not credible, as established by the cross examination conducted by the Prosecution; (b) had many reasons and was motivated not to tell the truth - with the aim of minimizing his personal involvement in these events - and to provide false incriminating evidence against the security branch, including *inter alia* Drago Nikolić; and (c) whose evidence, at least with regards to his acts and conduct during the period from 15 to 17 July, cannot be given any weight because it is contradicted by other evidence as well as incredible and not possible.

963. REDACTED [1355]

964. Nonetheless, Vinko Pandurević in his capacity as Commander of the ZBde remains one of the main characters involved in the events which took place in July 1995. As such, *some* of the evidence he provided may be of assistance in understanding what happened during this period, albeit to a limited extent.

I. THE LACK OF CREDIBILITY OF PANDUREVIĆ

965. Regarding the credibility of Pandurević, the Defence defers to the cross examination conducted by the Prosecution during which, it established on several occasions that Pandurević did not tell the truth.[1356]

966. The Defence posits that Pandurević's lack of credibility is a major factor which must be borne in mind by the Trial Chamber when assessing the weight, which can be attributed to his evidence.

967. More importantly, it is highly significant that before testifying as one of the very last witnesses in this case, Pandurević: (a) was privy to all of the testimony heard and admitted in this trial; (b) had access to the totality of the documents disclosed and adduced by all parties; and (c) was well aware of the defence strategy of the other co-accused.

968. REDACTED. In fact, the Defence submits that Pandurević's testimony reveals that he used all of the information available to him with the aim of exonerating himself and shifting the blame to others.

[1355] REDACTED
[1356] T.32005,L.22-T.32338,L.25.

II. PANDUREVIĆ HAD REASONS AND WAS MOTIVATED NOT TO TELL THE TRUTH

969. As previously mentioned, no burden rests on the Defence to show why a witness provided false testimony under oath. Nonetheless, the Defence submits that Pandurević's motivation to evade his own criminal responsibility, to provide false evidence and/or to blame others, can be of assistance in determining what weight can be attached to his evidence.

970. The motivation of Pandurević as well as his reasons not to tell the truth can be presented under three leadings namely: (a) minimizing his personal involvement; (b) blaming the security branch; and (c) blaming his subordinate Drago Nikolić, who constituted an easy target.

(A) Pandurević Was Motivated to Minimize his Personal Involvement

971. Along with six other co-accused, Pandurević is charged with some of the most serious violations in the Statute, including genocide. This in itself is a good reason not to tell the truth.

972. Moreover, while the evidence reveals that Pandurević knew about the presence of Muslim prisoners in the ZBde area of operations before he returned to Standard Barracks on 15 July, he nevertheless had a motivation to delay as much as possible the moment, which will be determined as being the time he was first informed of the execution of prisoners. Indeed, as Commander of the ZBde resuming command over his brigade, the extent of his liability for what happened depends on the moment he was first informed of the prisoners' execution. The later he was informed the lesser his responsibility is likely to be, especially if, in accordance with his defence strategy, the executions were over by the time he was informed.[1357]

(B) Pandurević Was Motivated to Shift the Blame on the Security Branch

973. The cross examination conducted by the Defence shed light on Pandurević's visceral hatred for the security service, which was his motivation for attempting to blame this service throughout the trial.[1358] For example, Pandurević severely criticized

[1357] T.31598,L.10-12;T.31600,L.11-15.
[1358] T.31607;T.31621,L.2-7.

investigations conducted by security officers into the private lives of individuals, making a parallel with the Chief of the KGB in the Staline era who would have stated *"Give me a name and I'll find a crime to attach to the name"*[1359]. He also made comments such as *inter alia*[1360]:

> *"They would never report to the commander to allow him to react on time and prevent the further decay of that person. They want to keep that for themselves and then gloat in how clever they were: For example this would be like looking at the person drowning and while he is drowning, the two of them are discussing whether the person can swim or rather whether he cannot swim and while this discussion is going on, the man drowns. So this was the whole purpose of the – of that service in the army.".*[1361]

974. In addition, Pandurević had a further motivation to shift the blame on the security branch, which was to minimize his personal criminal liability. Pandurević thus had a reason for attempting to show that the transportation of Muslim prisoners to the Zvornik area and their execution in various locations, within or close to the ZBde area of operations, were organized by members of the security service, over whom he had no control.[1362]

(C) Pandurević Had Personal Reasons to Blame Drago Nikolić

975. Pandurević also had personal reasons for blaming his security organ, Drago Nikolić. He hated Drago Nikolić for the reports he filed about him along the security chain and he disliked Drago Nikolić as a person not worthy of being an officer.[1363]

976. REDACTED [1364] [1365]

977. While Pandurević testified that this meeting was not triggered by reports concerning him, which would have been sent by Drago Nikolić to the DrinaK security organ.[1366] He nonetheless acknowledged that the girl he lived with when he was Commander of the ZBde, was suspected by the security service and that, as a result, he was in a very unfavorable position,

[1359] T.31626.
[1360] T.31628,L.9-14;T.31640,L.12-23.
[1361] T.31624.
[1362] T.31425,L.18-T.31426,L.11.
[1363] REDACTED,T.31620-31621.
[1364] REDACTED
[1365] REDACTED
[1366] T.31640-31641.

whereby everybody suspected him.[1367] He also testified that when he was Deputy Chief of the General Staff, he had a chance to see all the reports sent by Drago Nikolić.[1368]

978. It is thus evident that Pandurević had personal reasons for blaming Drago Nikolić, which have nothing to do with his performance in general as Assistant Commander for Security of the ZBde.[1369]

979. Pandurević also profoundly despised Drago Nikolić as a person and thus had additional reasons to shift the blame on him. Pandurević acknowledged that Drago Nikolić never attended Military Academy and expressed the view that: (a) he only obtained the status of officer because of the war[1370]; (b) he held the lowest rank an officer can have in the army[1371]; and (c) based on his rank and education, *"the cloak of the security service that he put on, he -- was much too big size for him"*.[1372]

980. Consequently, Drago Nikolić, who was Pandurević's immediate subordinate, was clearly Pandurević's ideal scapegoat.

III. REDACTED

981. REDACTED [1373] [1374] [1375] [1376] [1377] [1378] [1379] *[1380]* [1381]

982. REDACTED [1382]

983. REDACTED

984. REDACTED [1383] [1384]

985. REDACTED

[1367] T.31625-31626.
[1368] T.31639-31640.
[1369] 3D340,3D341,3D350,3D522,3D529,3D232,3D233,3D541,3D542,3D543,3D551.
[1370] T.31341,T.31342.
[1371] T.31341.
[1372] T.31343.
[1373] REDACTED
[1374] REDACTED
[1375] REDACTED
[1376] REDACTED
[1377] REDACTED
[1378] REDACTED
[1379] REDACTED
[1380] REDACTED
[1381] REDACTED
[1382] REDACTED
[1383] REDACTED
[1384] REDACTED

IV. THE TESTIMONY OF PANDUREVIĆ CONCERNING HIS ACTS AND CONDUCT FROM 15 TO 17 JULY

986. According to the testimony of Pandurević concerning the period from 15 to 17 July: (a) he returned to the ZBde Command around noon of 15 July[1385]; (b) before arriving he had no information whatsoever concerning the presence of Muslim prisoners in the area of Zvornik[1386]; (c) REDACTED [1387]; (d) REDACTED [1388]; (e) before leaving Standard Barracks, he did not attempt to speak to the Operations Duty Officer nor to anyone in the operations department[1389]; (f) when he arrived at the IKM the situation was calm[1390]; (g) he was visited at the IKM by Branko Grujić, who informed him about the presence of prisoners in schools in Petkovci and Pilica[1391]; (h) other than for asking Bojanović who showed up later and had very little information, he did not attempt to verify or confirm this information and did not take any measures in this regard[1392]; (i) in the early evening, he sent an interim combat report with the assistance of Bojanović, in which he mentioned *"a large number of prisoners distributed in some schools in the territory of Zvornik"* as being an additional burden[1393]; (j) in the afternoon of 16 July, he sent a combat report with the assistance of Petković, in which he lied about the real combat situation at the time[1394]; (k) REDACTED [1395]; (l) REDACTED [1396]; (m) REDACTED [1397]; (n) a little later, Pandurević spoke to General Krstić but did not tell him anything about the presence of prisoners or about the executions[1398]; (o) on that day, he did not take any further action to verify what he had been told nor did he take any measures in this regard[1399]; and (p) he met with three Generals from the Main Staff who were there to investigate his decision to let the column pass, but did not tell them anything in relation to the prisoners.[1400]

[1385] T.30955,L.2-12.
[1386] T.30922,l.23-T.30923,L.2;T.30936,L.2-23.
[1387] REDACTED
[1388] REDACTED
[1389] T.31513,L.22-T.31514,L.2.
[1390] T.31564,L.3;T.30968,L.24-T.30969,L.1.
[1391] T.31521,L.8-12.
[1392] T.30984,L.11-T.30985,L.3.
[1393] P329;T.30985,L.23-T.30986,L.19.
[1394] 7DP330;T.31377,L.12-15.
[1395] REDACTED
[1396] REDACTED
[1397] REDACTED
[1398] T.31088,L.3-5.
[1399] T.31499,L.11-16.
[1400] T.31090,L.22-T.31092,L.16.

987. Based on the totality of the evidence on the record, the Defence submits that Pandurević's testimony concerning his acts and conduct during the period from 15 to 17 July cannot be attributed any weight. It is simply impossible that the events unfolded as explained by Pandurević.

(A) Pandurević Knew About the Prisoners Before Returning to Zvornik

988. Pandurević testified that he had information on 12 July that there were about 6000 members of the 28th Division moving towards Kladanj and Tuzla.[1401] It is established that the DrinaK knew that many prisoners had been captured and Pandurević admitted that Krstić knew about the prisoners.[1402]

989. Very early on 15 July, General Krstić ordered Pandurević to return to Zvornik with his tactical group, with the aim of preventing the 28th Division from reaching Tuzla.[1403] REDACTED.[1404]

990. In these circumstances and as revealed by the evidence, it is simply not possible that Krstić would have ordered Pandurević to return to Zvornik without at least informing him about the prisoners who would have been sent there.

(B) Pandurević Was Informed About the Prisoners at the ZBde Command on 15 July

991. Whether or not Pandurević knew about the presence of Muslim prisoners in the ZBde area of operations when he returned to Zvornik on 15 July, he did not tell the truth when he testified that he was not informed of the prisoner situation by anyone at the ZBde Command on 15 July.[1405]

992. REDACTED [1406] [1407] [1408]

993. REDACTED [1409]

[1401] T.31451-31452.
[1402] 7DP132;4D81;T.31477,L.1-4;T.31106.L.31485.L.2-9..
[1403] T.30952,L.12-21;T.30961,L.1-7.
[1404] REDACTED
[1405] T.31486mL.4-22.
[1406] REDACTED
[1407] REDACTED
[1408] REDACTED
[1409] REDACTED

994. It also not plausible – both from a military perspective[1410] and considering the evidence about the type of Commander Pandurević was[1411] – that before leaving the ZBde Command, Pandurević did not even attempt to see or to speak as a strict minimum, to the Operations Duty officer[1412] or to anyone in the operations department.[1413] The presence of a large number of prisoners in the area of Zvornik and possibly their execution was widely known by then.[1414] Unless Pandurević did not speak to anyone at the ZBde Command, it is not possible that he was not informed of what was going on.

(C) Pandurević Was Informed About the Prisoners And the Executions by REDACTED at the IKM on 15 July

995. During his testimony, Pandurević admitted that the presence of a large number of prisoners in schools located in the vicinity of areas where the families of members of the ZBde lived, could possibly have a serious negative effect on the ability of the ZBde to fight the 28th Division.[1415] This was confirmed by many witnesses.[1416]

996. Consequently, when Grujić informed Pandurević about the presence of prisoners in schools near Petkovci and Pilica[1417], it is inconceivable that Pandurević would not have attempted to verify or confirm this information, beyond asking Bojanović, who in any event, had very little information[1418]. Pandurević would have necessarily contacted as a minimum, the ZBde Operations Duty Officer[1419] REDACTED [1420] [1421] The operational situation did not prevent Pandurević from placing these calls.[1422] In fact Pandurević was in contact with his Battalions[1423] and it is not plausible that he did not contact the 1st Battalion – close to Pilica – and the 6th Battalion – close to Petkovci.[1424]

997. REDACTED [1425] [1426] [1427] [1428] [1429] [1430]

[1410] Kosovac,T.30234,L.20-T.30235,L.8.
[1411] T.31399,L.21-T.31404,L.13;T.11576,T.12639-12640;T.10444.
[1412] T.31513,L.1-25.
[1413] T.31514,L.24-T.31515,L.9.
[1414] T.34028;T.11038-11039;T.10345;T.10389-10390.
[1415] T.31385,L.20-T.31386,L.3.
[1416]T.10196;T.20137-T.20138;T.20710;T.21736-T.21737;T.22533;T.23303;T.33968.
[1417] T.30983,L.10-21.
[1418] T.30984,L.5-16.
[1419]T.31568,L.20-T.31570,L.2;T.31573,L.18-T.31574,L.16.
[1420] REDACTED
[1421] REDACTED
[1422] T.30968,L.19-T.30969,L.1.
[1423] T.31565,L.5-24.
[1424] T.315656,L.5-24.
[1425] REDACTED

998. While the evidence provided by Bojanović was admitted pursuant to Rule 92*quater*[1431], even though it refers to the acts and conduct of Pandurević, it is very important to note that Pandurević listened to the testimony of Bojanović and did not oppose the Prosecution's motion to have his evidence admitted pursuant to Rule 92*quater*.[1432]

999. Furthermore, the interim combat report Pandurević forwarded to the DrinaK Command[1433], strongly suggests that Pandurević had much more information about the prisoner situation than what Grujić would have told him. The phrase *"[a]n additional burden for us is the large number of prisoners distributed throughout schools in the brigade area (...)"* taken from this report[1434] is revealing in this regard. According to the testimony of Pandurević, Grujić did not tell him about a large number of prisoners distributed throughout schools in the Brigade area, which implies a higher number of schools as well as a much more important problem.[1435] What is more, the presence of prisoners mentioned by Grujić was never referred to by him as *a burden for the Brigade*, in the sense of a task the Brigade was responsible for. The next phrase in the report[1436] is also significant in this respect as Pandurević acknowledges that the ZBde cannot take care of *these problems* any longer. This implies that the ZBde would have somehow been asked to do something concerning the prisoners.[1437] This is not information that Pandurević would have had based on his testimony. It is also note worthy that Pandurević would have decided to inform the DrinaK Command, even though according to his testimony, he did not know yet, that the DrinaK was involved in the transfer of prisoners to Zvornik.

1000. REDACTED

1001. Lastly, Pandurević testified that he did not speak to Drago Nikolić, who was the ZBde Operations Duty Officer, during the evening and night of 15 to 16 July.[1438] He also sent

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[1426] REDACTED
[1427] REDACTED
[1428] REDACTED
[1429] REDACTED
[1430] REDACTED
[1431] Decision on Prosecution Motion to Admit Evidence Pursuant to Rule 92*quater,* filed on 21 April 2008.
[1432] REDACTED
[1433] P329.
[1434] P329.
[1435] T.31521,L.8-12.
[1436] P329.
[1437] P329.
[1438] T.31539,L.23-T.31540,L.1.

his interim combat report without involving Drago Nikolić in the process.[1439] This is highly significant, as it demonstrates that the involvement of Drago Nikolić in the events which took place from 13 to 17 July, is nowhere close to the allegations including in the Indictment.

1002. Indeed, if Drago Nikolić had been involved to the extent suggested by the Indictment, certainly, Pandurević who was fully informed of the prisoner situation by then, would have known, and both Pandurević and REDACTED would have addressed Drago Nikolić about these events, whether at the ZBde Command in the morning of 15 July or at the IKM where they were in the afternoon.

(D) REDACTED

1003. REDACTED [1440] [1441] [1442]

1004. REDACTED [1443]

1005. REDACTED [1444] [1445] [1446] [1447]

1006. REDACTED [1448] [1449] [1450] [1451] [1452] [1453]

1007. REDACTED

1008. REDACTED [1454] [1455] [1456]

1009. REDACTED *[1457]*

1010. REDACTED [1458]

1011. REDACTED [1459] [1460] [1461] [1462]

[1439] T.31585,L.19-T.31586,L.2.
[1440] REDACTED
[1441] REDACTED
[1442] REDACTED
[1443] REDACTED
[1444] REDACTED
[1445] REDACTED
[1446] REDACTED
[1447] REDACTED
[1448] REDACTED
[1449] REDACTED
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[1452] REDACTED
[1453] REDACTED
[1454] REDACTED
[1455] REDACTED
[1456] REDACTED
[1457] REDACTED
[1458] REDACTED
[1459] REDACTED

1012. REDACTED [1463] [1464] [1465]

1013. REDACTED [1466]

1014. REDACTED

1015. REDACTED

PART FIVE - ARGUMENTS RELATED TO THE FIRST ALLEGED JOINT CRIMINAL ENTERPRISE AND COUNTS 7 AND 8 OF THE INDICTMENT

A. THE COMMON PURPOSE OF THE FIRST ALLEGED JCE AND THE PROSECUTION'S BURDEN OF PROOF

1016. The Indictment charges Drago Nikolić with forcible transfer (Count 7) and deportation (count 8) of the Muslim population out of the Srebrenica and Žepa enclaves. According to the Prosecution, Drago Nikolić would have committed these crimes as a member of a JCE Category One.

1017. Drago Nikolić was at no time informed or aware of, *nor* did he intend to further, the common plan, design or purpose to forcibly transfer or deport the Muslim population out of the Srebrenica and Žepa enclaves. Moreover, Drago Nikolić did not have the *mens rea* shared by all co-perpetrators to commit these crimes. He was thus not a member of the alleged JCE. In any event, Drago Nikolić did not further the common plan, design or purpose in any manner whatsoever.

1018. As mentioned earlier, these submissions rest first and foremost on the premise that the victim group of the alleged forcible transfer comprises solely the women, children and elderly men from Srebrenica and the women and children from Žepa.[1467] Nonetheless, even if the Trial Chamber would hold that the victim group comprises also the able-bodied men from the crowd in Potočari, the able-bodied men from the column who voluntarily left Srebrenica to reach Tuzla and the able-bodied men fleeing from Žepa to

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[1460] REDACTED
[1461] REDACTED
[1462] REDACTED
[1463] REDACTED
[1464] REDACTED
[1465] REDACTED
[1466] REDACTED
[1467] Part Two,B,VII.

the then FRY, the outcome remains identical. Drago Nikolić is not responsible for the forcible transfer or deportation of these persons through participation in a JCE either.

1019. The fact that Drago Nikolić is not a member of the JCE to forcibly displace the Muslim population from Srebrenica and Žepa is significant. In conjunction with his low rank and the fact that he was never even close to those who supposedly developed both JCE's alleged in this case, his non-membership diminishes his overall responsibility and places him in a category of his own; a junior officer drawn into overwhelming events after criminal activity had already been set into motion.

1020. In addition, the fact that Drago Nikolić was not a member of the alleged JCE is also highly significant with regard to the charges of genocide and conspiracy to commit genocide. As will be addressed in detail below,[1468] it is untenable to argue that Drago Nikolić was aware that a genocide, as alleged in the Indictment, was taking place in July 1995 if he was not a member of the JCE to forcibly transfer or deport the Muslim population out of Srebrenica and Žepa.

B. DRAGO NIKOLIĆ DID NOT SHARE THE *MENS REA* OF THE FIRST ALLEGED JCE

1021. Pursuant to the Indictment, the common purpose, plan or design of the first alleged JCE is to *"force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS from about 8 March 1995 through the end of August 1995."*[1469] In the Prosecution's submission, the events that allegedly took place in Srebrenica and Žepa thus pertain to the same common plan, design or purpose. If it were otherwise, the Prosecution should have alleged two separate JCE's in respect of the alleged forcible displacement of the Muslim population from Srebrenica and the alleged forcible displacement of the Muslim population of Žepa.

1022. The Indictment specifies in this regard that the common plan, design or purpose involved or amounted to the crimes of forcible transfer and deportation. The elements of these crimes have been set out above.[1470]

1023. It is important to note in this regard that the Prosecution's case is that the victims of the crimes of forcible transfer and deportation were forcibly displaced *"to areas outside the*

[1468] Part SEVEN.
[1469] Indictment,para.49.
[1470] Part Two,D,G-H.

control of the RS". Nonetheless, in respect of the displacement *"to areas outside the control of the RS"*, the Prosecution claimed during its Rule 98*bis* submissions that *"it does not define either the purpose or the goal of that crime* [of forcible transfer]" and that *"[i]t is not a necessary element of the crime of forcible transfer"*.[1471]

1024. The Defence is staggered by the Prosecution's attempt to rescind an allegation unmistakably included in the Indictment. The Prosecution, as the carrier of the burden of proof, must prove all allegations contained in the Indictment. It is intolerable to allow the Prosecution to annul parts of the Indictment merely because it is faced with a lack of evidence.

1025. Therefore, in order to secure a conviction, the Prosecution must prove beyond a reasonable doubt that the victims were displaced *"to areas outside the control of the RS"* because it constitutes part and parcel of the Prosecution's case regarding the alleged forcible transfer and deportation of the Muslim population from Srebrenica and Žepa.

1026. The *mens rea* applicable to the crimes of forcible transfer and deportation has been set out in full above.[1472] In summary, in order to secure a conviction, the burden incumbent upon the Prosecution requires the establishment beyond a reasonable doubt that Drago Nikolić: (a) knew of the common plan, design or purpose to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS; (b) intended to further the common plan, design or purpose; and (c) intended to forcibly displace the Muslim population out of the Srebrenica and Žepa enclaves within national borders and across State borders.

I. DRAGO NIKOLIĆ DID NOT KNOW OF THE COMMON PLAN, DESIGN OR PURPOSE

1027. The Indictment alleges that *"[d]uring the evening of 11 July 1995 and into the early morning of 12 July 1995, the plan to transport the Srebrenica Muslims from Potočari was developed by General Mladić and others."*[1473] However, the evidence clearly establishes that Drago Nikolić had no knowledge of the existence of such a common plan, design or purpose.

[1471] T.21432.
[1472] Part Two,D.
[1473] Indictment,para.58.

(A) Drago Nikolić is Not Alleged to Have Been Present During the Supposed Development of the Plan to Forcibly Displace

1028. The Indictment does not allege that Drago Nikolić was present during the purported development of the alleged common plan, design or purpose by Mladić and others. The allegations in respect of Drago Nikolić concern his alleged acts as of the evening hours of 13 July 1995.[1474]

1029. Therefore, Drago Nikolić could not have had any direct knowledge of the alleged common plan, design or purpose.

(B) Drago Nikolić Did Not Know *nor* Was he Informed of the Common Plan

1030. In addition, the available circumstantial evidence does not allow for an inference that Drago Nikolić knew or was informed of the alleged common plan, design or purpose.

(I) The Zvornik Brigade Was Unaware of the Alleged Forcible Transfer

1031. In any event, the evidence indicates that the Zvornik Brigade as a whole was unaware of the alleged forcible transfer of the Muslim population out of Srebrenica.

1032. REDACTED [1475] The Defence stresses that the Zvornik Brigade was informed of an *"evacuation"*, which is very much a legitimate measure under IHL,[1476] and not of forcible transfer, an illegal act under both IHL and International Criminal Law. REDACTED [1477] Sreten Milošević also said that he did not know what happened to the women, children and elderly from Srebrenica and he was not aware of buses from the Zvornik Brigade going there.[1478]

1033. Moreover, the relevant combat reports and orders for the period of 11 to 13 July, related to or involving the Zvornik Brigade, do not indicate in any manner whatsoever that the Muslim population was forcibly transferred out of Srebrenica.[1479]

[1474] Indictment,para.30.6.
[1475] REDACTED
[1476] APII, art.17(1).
[1477] REDACTED
[1478] T.33975.
[1479] 7DP00321; 7DP00438; 4DP00111; P00323; P00149; P00114; 7DP00325; P00117; P00153; P00045; P00115; 5DP00035; P01059.

1034. In addition, Exhibit P110 - the request for the provision of buses and mini-buses for the use of the Drina Corps Command – and Exhibit P157 - a Drina Corps order to the Zvornik Brigade concerning the assignment of a motorised patrol of the Military Traffic Police to regulate traffic at the Konjević Polje junction – also do not contain any references to the forcible transfer of the Muslim population

1035. Butler testified, in respect of Exhibit P110, that it could not be concluded in any way that *"that there was any understanding that sending buses was part of any illegal activity."*[1480] Similarly, he said that Exhibit P157 is a standard military order and that there is nothing improper about it.[1481]

1036. Also, the Zvornik Brigade regular combat report of 12 July 1995, while mentioning that buses were sent to Bratunac and a that Military Police detachment was away in Konjević Polje pursuant to Exhibits P110 and P157, omits any indication concerning a possible contribution provided by the Zvornik Brigade to the alleged forcible transfer or any other illegal purpose for that matter.[1482]

1037. In any event, the Zvornik Brigade was not in control of the buses or the Military Traffic Police patrol. According to Butler, the drivers were under the command and control of the Drina Corps once they left the Zvornik Brigade.[1483] REDACTED [1484] Indeed, Momir Nikolić testified that people from Bratunac were manning the checkpoint in Konjević Polje.[1485]

(II) Drago Nikolić Was Unaware of the Alleged Forcible Transfer

1038. More specifically, the Prosecution simply failed to establish whether Drago Nikolić learned of the alleged common plan, design or purpose or any of the orders supposedly pertaining thereto. At most, although there is no evidence tot this effect, Drago Nikolić could have been aware that Srebrenica had fallen and that an evacuation agreed to by the population had been carried out, as appears from the evidence set out below, but not of a common plan, design or purpose of the nature alleged by the Prosecution.

[1480] T.20389.
[1481] T.20392.
[1482] P00322.
[1483] T.20398.
[1484] REDACTED
[1485] T.33220-33221.

1039. Firstly, the evidence establishes that, on 12 July 1995, Drago Nikolić was on leave. The relevant duty roster unambiguously indicates that Drago Nikolić was off duty together with, *inter alia,* Dragan Jokić, Mihajlo Galić and Radislav Pantić.[1486] Indeed, during his *viva voce* testimony, Galić confirmed that he himself was on leave.[1487] REDACTED [1488]

1040. In addition, Butler testified that Exhibit 3DP311 is an indicator of the absence of Drago Nikolić on 12 July 1995.[1489] While Butler nevertheless deemed it unlikely for the Chief of Security to be on leave on this day, Defence Expert Witness on Security, Vuga, testified that there was nothing unusual about this situation if the day had been organised in such a manner and if the situation provided for the absence of the Security Organ.[1490]

1041. What is more, the evidence demonstrates that high-ranking officers, including Živanović, were present at a well-attended religious celebration on 12 July 1995, indicating that they were also off duty.[1491]

1042. Secondly, it is most significant in this regard that, on 13 July 1995, Drago Nikolić was on duty at the IKM.[1492] There is no evidence on the record whatsoever concerning his alleged acts during the day of 13 July 1995. As a matter of fact, the allegations against Drago Nikolić commence as of the evening hours of 13 July 1995.[1493]

1043. Finally, even if the Trial Chamber would find that Drago Nikolić learned of Exhibits P110 and P157 at a certain point in time, they can not constitute evidence as to his knowledge concerning the alleged common plan, design or purpose, considering that the evidence establishes that the Zvornik Brigade was not informed of any alleged illegal purpose pertaining to these two orders.

II. DRAGO NIKOLIĆ DID NOT INTEND TO FURTHER THE COMMON PLAN, DESIGN OR PURPOSE

1044. Furthermore, in respect of Drago Nikolić's alleged intention to further the alleged common plan, design or purpose, the record is completely silent. In addition, it can not

[1486] 3DP311.
[1487] T.10538-10539; T.10662-10663.
[1488] REDACTED
[1489] T.20338-20339.
[1490] T.23302-23303.
[1491] P04535.
[1492] T.10111.
[1493] Indictment,para.30.6.

be concluded on the basis of circumstantial evidence that Drago Nikolić possessed the intent to further the alleged common plan, design or purpose. The fact that Drago Nikolić had no knowledge of the alleged common plan, design or purpose necessarily negates the possibility of Drago Nikolić intending to further it.

1045. However, even if the Trial Chamber would find that there is *some* circumstantial evidence indicating the possibility that Drago Nikolić intended to further the common plan, design or purpose, the Defence submits that this is not the only reasonable conclusion arising from the totality of the evidence on the record. As elaborated upon above,[1494] it is the Defence's submission that the knowledge of the Zvornik Brigade concerning the departure of civilians from Srebrenica was limited to knowledge concerning a consensual evacuation operation and not to forcible transfer.

1046. Therefore, an equally reasonable explanation available from the evidence is that Drago Nikolić's acts in this respect – if the Trial Chamber were to find that such acts indeed existed - were committed with an intention to contribute to the evacuation of women, children and elderly men from Srebrenica and not to their forcible transfer.

III. DRAGO NIKOLIĆ DID NOT INTEND TO FORCIBLY TRANSFER THE MUSLIM POPULATION

1047. The Indictment alleges that Drago Nikolić purportedly contributed to the JCE *"**knowing** that forcing the Muslims out of the enclaves was unlawful."*[1495]

1048. However, there is not a shred of evidence, direct or circumstantial, on the basis of which it can be concluded that Drago Nikolić intended to forcibly displace the women, children and elderly men from Srebrenica and the women and children from Žepa within national borders to an area outside the control of the RS. The same is true in respect of Drago Nikolić's alleged intention to deport the able-bodied men from Žepa across State borders to the then FRY.

1049. It is the Defence's submission that the absence of evidence in respect of Drago Nikolić's *mens rea* for any of these crimes necessarily negates the possibility of Drago Nikolić being a member of the alleged JCE. Members of the JCE must have the requisite *mens rea* for both crimes the alleged common plan, design or purpose involves or amounts to – i.e. forcible transfer and deportation.

[1494] Part FIVE,C,I,(B),(I).
[1495] Indictment,para.80 (emphasis added).

1050. Moreover, even if the Trial Chamber would hold that it suffices that the *mens rea* of only one of the crimes the alleged common plan, design or purpose involves or amounts to is established, the conclusion would remain unaltered. There is simply no direct or circumstantial evidence indicating that Drago Nikolić had the *mens rea* for either forcible transfer or deportation.

1051. In conclusion, Drago Nikolić was a not a member of the alleged JCE as he: (a) did not know of the alleged common plan, design or purpose; (b) lacked the intent to further the common plan, design or purpose; and (c) did not have the requisite *mens rea* for the crimes of forcible transfer and deportation. He can thus not be held responsible for the acts of other alleged members of the JCE *nor* for any reasonably foreseeable consequences arising out of the implementation of the JCE.

1052. It follows that, Drago Nikolić's individual criminal responsibility for his acts in relation to the alleged forcible displacement of the Muslim population from Srebrenica and Žepa, if any, must be assessed exclusively on the basis of the remaining modes of liability identified in Article 7(1) of the Statute. However, in view of the complete lack of evidence in respect of Drago Nikolić's *mens rea*, he can not incur individual criminal responsibility pursuant to planning, instigating, ordering, committing or aiding and abetting for the alleged forcible displacement of the Muslim population from Srebrenica and Žepa either.

C. DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE FORCIBLE TRANSFER OF THE WOMEN, CHILDREN AND ELDERLY MEN FROM SREBRENICA

1053. Drago Nikolić was not involved in the events leading up to the alleged forcible transfer of the women, children and elderly men from Srebrenica and Žepa *nor* in the *actus reus* of the alleged crime of forcible transfer.

I. DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE ATTACK ON SREBRENICA

1054. The Prosecution situates the attack on Srebrenica, including alleged preparatory orders such as Operational Directive 7[1496] and Živanović's order of 2 July 1995,[1497] within the section describing the alleged JCE to forcibly remove the Muslim population from

[1496] P00006.
[1497] 5DP00106.

Srebrenica and Žepa.[1498] In the Prosecution's submission, the attack on Srebrenica and the connected preparatory phases were thus closely related to the alleged crimes of forcible transfer and deportation committed through a JCE.

1055. The available documentary evidence and witness testimony, however, negate the possibility of Drago Nikolić being involved in the attack on Srebrenica. Bearing in mind the Prosecution's position concerning the correlation between the attack on Srebrenica and the JCE, Drago Nikolić's non-involvement in the attack constitutes strong evidence as to the absence of individual criminal responsibility for the alleged forcible transfer.

(A) Drago Nikolić Was Unaware of Operational Directive 7

1056. As 2Lt and the Zvornik Brigade Security Organ, Drago Nikolić could not have been aware of Operational Directive 7, developed at the highest political and military levels. Butler testified that it would have been unlikely for Drago Nikolić, as 2Lt, to have known of this document in its entirety.[1499] In addition, Pandurević, who was much higher-ranked than Drago Nikolić at the relevant time, testified that he had not seen this document until he arrived in The Hague, well after the events of July 1995 of course.[1500] REDACTED [1501]

1057. The Prosecution contends that through Exhibits P29, P110, P322, P330, P817, P837, P838, P2667; P3029 and P3177, Drago Nikolić learned of the Operational Directive 7 and the alleged criminal purpose to remove the populations from the enclaves.[1502]

1058. However, considering that Exhibits P29, P2667, P3029 and P3177 predate[1503] Operational Directive 7, issued on 8 March 1995, no knowledge of Operational Directive 7 can be attributed to Drago Nikolić on this basis. In addition, these Exhibits predate the commencement of the alleged JCE and are thus irrelevant for these purposes.

[1498] Indictment,paras.50 and 53.
[1499] T.20362-20363.
[1500] T.30821.
[1501] REDACTED
[1502] T.21339-21442.
[1503] Dated: 19 November 1992; 24 July 1994; 24 November 1992; and 4 July 1994, respectively.

1059. Drago Nikolić's non-involvement in Exhibits P110 and P322 has been discussed above. Furthermore, these documents do not refer directly to Operational Directive 7 and could not have allowed Drago Nikolić to learn of its contents.

1060. As regards Exhibits P330, P817, P837 and P838,[1504] referring directly or indirectly to Operational Directive 7, the Prosecution merely states that it is unlikely to assume that the Zvornik Brigade Command would have no knowledge of Operational Directive 7 if this document is cited in the above-mentioned Exhibits.[1505]

1061. However, the Prosecution's assumption does not constitute conclusive evidence concerning the knowledge of Drago Nikolić of Operational Directive 7. In fact, it is impossible to infer that Drago Nikolić learned of Operational Directive 7 based on a likelihood of learning of a certain document indirectly referred to. The Prosecution simply failed to discharge its burden of proof in this respect.

(B) Drago Nikolić Was Not a Member of the Tactical Group

1062. Exhibit P318, establishing a Tactical Group from the Zvornik Brigade based on an order of the Drina Corps,[1506] placed the Tactical Group under the command and control of the Drina Corps for the purposes of combat activities in Srebrenica. Drago Nikolić, however, was not a member of this Tactical Group and Exhibit P318 does not reserve any role for Drago Nikolić in any manner whatsoever. As confirmed by the Defence Expert Witness on Security, Vuga, Drago Nikolić remained in Zvornik discharging his duties as the Zvornik Brigade Security Organ when the Tactical Group of the Zvornik Brigade departed to participate in the military operations in and around Srebrenica.[1507]

1063. Even though Exhibit P318 appears to have been forwarded to Drago Nikolić, providing him with knowledge of the departure of the Tactical Group, it does not constitute evidence of Drago Nikolić's involvement *nor* of his knowledge of the alleged crimes. Exhibit P318 is unrelated to the commission of any crimes and is limited to instructions pertaining to legitimate combat operations.

[1504] Some of these documents have been assigned different numbers that the ones used by the Prosecution during its Rule *98bis* submissions. The Defence will use the numbers relied upon by the Prosecution during its Rule 98*bis* submissions for the sake of clarity.
[1505] T.21441.
[1506] 5DP00106.
[1507] T.23300-23301.

1064. In addition, there is no evidence indicating that, during the time relevant to the Indictment, Drago Nikolić was informed of the activities of the Tactical Group or of the wider operation it formed part of. REDACTED [1508] It logically and necessarily follows that, REDACTED, the Security Organ could not have had any more specific information in this regard, especially considering his low rank.

1065. Furthermore, evidence establishing that Drago Nikolić was in contact with alleged members of the JCE to forcibly displace the Muslim population from Srebrenica and Žepa is non-existent. The only testimonial evidence in this regard points towards an absence of information provided in respect of Krivaja 95. REDACTED.[1509] Pandurević confirmed that, from 4 to 14 July 1995, he did not contact the Zvornik Brigade, except for two matters unrelated to the allegations in the Indictment, and that he himself was not contacted by anyone from the Zvornik Brigade.[1510]

1066. Also, witness testimony establishes that Drago Nikolić never set foot in Srebrenica or in the surrounding area during the time relevant to the Indictment. Two Dutchbat witnesses said that they never saw Drago Nikolić in Srebrenica.[1511] REDACTED.[1512] Both REDACTED and Momir Nikolić said that they did not see Drago Nikolić in Bratunac in July 1995.[1513] Momir Nikolić added that, during this time, he did not have any telephone or other type of communication with Drago Nikolić or anyone else from the Zvornik Brigade for that matter.[1514]

1067. The vehicle log for 13 July 1995[1515] does not constitute evidence of the presence of Drago Nikolić in Bratunac on this day. Exhibit P136 establishes that a UN convoy travelled from Karakaj to Bratunac on 13 July 1995, as confirmed by Butler.[1516] Birčaković testified that, on 13 July 1995, he escorted this convoy together with Trbić in the vehicle to which the vehicle log of 13 July 1995 relates.[1517] Butler validated Birčaković in this respect saying that the trip to Bratunac would indeed have been

[1508] REDACTED
[1509] REDACTED
[1510] T.30919-30923.
[1511] T.2329; T.2598-2599.
[1512] REDACTED
[1513] T.33210.
[1514] T.33210.
[1515] P00904(296).
[1516] T.20400.
[1517] T.11147.

undertaken for the purpose of escorting the convoy.[1518] It follows that the vehicle log for 13 July 1995 does not establish that Drago Nikolić travelled to Bratunac in this vehicle on 13 July 1995.

II. DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE TRANSPORTATION OF WOMEN, CHILDREN AND ELDERLY MEN FROM SREBRENICA

1068. The evidentiary record does not support a conclusion beyond a reasonable doubt that Drago Nikolić was involved in the alleged transport of the women, children and elderly men from Srebrenica.

1069. Firstly, none of the intercepts allegedly related to forcible transfer involve or mention Drago Nikolić in any manner whatsoever.[1519]

1070. Secondly, even though there is evidence on the record establishing that the Zvornik Brigade provided buses and a Military Traffic Police patrol on 12 July 1995, the Defence posits, as developed above, that: (a) the orders were not illegal, in and of themselves; (b) the Zvornik Brigade was unaware of a possible illegal purpose related to the orders; (c) Drago Nikolić was not on duty on 12 July 1995; and (d) the Prosecution's allegation against Drago Nikolić do not commence until the late evening hours of 13 July 1995, subsequent to the completion of the alleged forcible transfer of the women, children and elderly men from Srebrenica.[1520]

1071. Thirdly, even if the Trial Chamber would not accept these arguments, Butler said that the drivers of the buses were under the command and control of the Drina Corps once they departed from the Zvornik Brigade.[1521] REDACTED.[1522]

1072. Finally, REDACTED [1523] Indeed, Butler confirmed that Drago Nikolić was neither involved in the sending of vehicles to the Drina Corps *nor* was he involved in the sending of the Military Traffic Police patrol to Konjević Polje.[1524]

III. NO INDIVIDUAL CRIMINAL RESPONSIBILTY ARISES OUT OF THE TRANSPORTATION OF ABLE-BODIED MEN

[1518] T.20400-20401.
[1519] REDACTED
[1520] Part FIVE, B,I,(B): **"**Drago Nikolić Did Not Know *nor* Was he Informed of the Common Plan".
[1521] T.20398.
[1522] REDACTED
[1523] REDACTED
[1524] T.20398-20399.

1073. The Defence posits that, even if the Trial Chamber would find that the able-bodied men from the crowd in Potočari and the able-bodied men from the column were victims of forcible transfer, contrary to the arguments advanced by the Defence above,[1525] the conclusion would remain unaltered: Drago Nikolić is not guilty of the alleged forcible transfer of these two groups.

1074. Firstly, should the Trial Chamber find that column was forced out of Srebrenica as a result of the pressure exercised by the advancing Drina Corps forces, the Defence reiterates that Drago Nikolić was not involved in the attack on Srebrenica, as developed above.[1526]

1075. Secondly, neither the Zvornik Brigade *nor* Drago Nikolić in particular, had any knowledge of anything else than legitimate combat engagements, let alone that the crime of forcible transfer was being committed during Krivaja 95.[1527] In any event, the evidence establishes that the fighting which took place before the fall of Srebrenica – as a minimum in respect of the advancing Tactical Group – consisted of legitimate military combat.

1076. Thirdly, were the Trial Chamber to accept that Drago Nikolić was, in some manner, involved in the transportation of able-bodied men from Srebrenica, it is the Defence's submission that his conduct was only related to the transportation of detainees, which is a legitimate measure under IHL.[1528] This has nothing to do with forcible transfer.

1077. Many in the Zvornik Brigade, including REDACTED, Babić, Perić, Ostoja Stanišić and Mitar Lazarević, were under the impression that the detainees were going to be transferred to Batković camp in Bijeljina for exchange.[1529] Some detainees were indeed exchanged.[1530] More specifically, Lazar Ristić asked Drago Nikolić why the detainees were being brought to Zvornik as they presented a security risk to which Drago Nikolić responded that *"he had been told just to place them in the schoolhouse pending an exchange in Batkovici"*.[1531]

[1525] Part Two,A,VII,(A):´The Group from Srebrenica".
[1526] Part FIVE, C,I: "DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE ATTACK ON SREBRENICA".
[1527] Part FIVE, B,I,(B): "Drago Nikolić Did Not Know *nor* Was he Informed of the Common Plan".
[1528] Part Two, A,VII,(A): ´The Group from Srebrenica".
[1529] REDACTED;T.10216;T.11375-T.11376;T.11601;T.13372-T.13373.
[1530] REDACTED;T1214-T.1215.
[1531] T.10088-T.10089.

1078. Drago Nikolić thus only had knowledge of the movement of prisoners for the purpose of an exchange. Clearly, such movement of detainees can not be considered forcible transfer.

1079. Fourthly, the conduct of Drago Nikolić necessarily negates the requisite *mens rea* and *actus reus* required for forcible transfer. As argued above,[1532] the Prosecution alleges that Drago Nikolić intended and acted to forcibly transfer the able-bodied men from the area in which they were lawfully present to an area outside the control of the RS. If the Trial Chamber were to hold that the transportation of detainees can be considered a form of forcible transfer, the alleged involvement of Drago Nikolić in this transport would still fall short of the forcible transfer alleged in the Indictment.

1080. By being involved in detaining the men in detention facilities in the Zvornik area, Drago Nikolić did not fulfil the requisite *actus reus* of forcible transfer. Instead of removing the able-bodied men from the area under the control of the RS, they were kept there by placing them in detention.

1081. The detention of the able-bodied men contradicts the possibility of Drago Nikolić intending to transfer them to an area outside the control of the RS. If the intention was to detain these men in the Zvornik area, it would be contradictory to claim that an intention existed to transfer them to an area outside the control of the RS.

D. THE ALLEGED ROLE AND ACTIONS OF DRAGO NIKOLIĆ IN FURTHERANCE OF THE JCE TO FORCIBLY TRANSFER AND DEPORT THE SREBRENICA AND ŽEPA MUSLIM POPULATION

I. DRAGO NIKOLIĆ'S ALLEGED SPECIFIC CONTRIBUTION

1082. The Indictment alleges that Drago Nikolić committed acts in furtherance of the JCE through specific acts described in paragraphs 30.6-30.12, 30.14, 30.15, 31.4, 32 and 34-37.[1533]

(A) The Correlation Between the Two JCE's

1083. The Defence notes that Drago Nikolić's alleged specific contribution to the JCE to forcibly remove the Muslim population from Srebrenica and Žepa is actually alleged to

[1532] Part Five,A: " THE COMMON PURPOSE OF THE FIRST ALLEGED JCE AND THE PROSECUTION'S BURDEN OF PROOF".
[1533] Indictment,para.80.

be his contribution to the JCE to murder all the able-bodied Muslim men from Srebrenica. Once again, the Prosecution is reusing facts pertaining to the alleged JCE to kill all the able-bodied Muslim men from Srebrenica in order to prove its case concerning another allegation, i.e. the purported JCE to force out the Muslim population of Srebrenica and Žepa.

1084. The Prosecution explained its position concerning the correlation between the two JCE's as follows:

> *"there was always the JCE to cleanse, remove the population from the enclaves in their entirety. Along the way, there was a JCE to kill* ***and murder the able-bodied men****. That never negated, changed, or in any way altered the purpose that* ***these men, all of them, be forcibly transferred*** *out of the enclaves. It's that forcing of the men, that transfer of the men forcibly, along with the rest of the population out of the enclaves, that constitutes the criminal purpose and element of this JCE."*[1534]

1085. In the Defence's submission, the Prosecution's position is unfounded. The two alleged JCE's can not co-exist in relation to the same victims. If the able-bodied men were allegedly forcibly transferred through a JCE, they could not have been simultaneously killed through another JCE. *Vice versa,* if the able-bodied men were allegedly killed through a JCE, they could not have been forcibly transferred through a distinct JCE at the same time. At some point, one JCE must necessarily put an end to the other JCE

(B) The Alleged Specific Contribution of Drago Nikolić

1086. The Defence notes that paragraphs 30.6-30.12, 30.14, 30.15, 31.4, 32 and 34-37, allegedly constituting the contribution of Drago Nikolić to the alleged forcible transfer of the Muslim population, relate to the transport of able-bodied men, either: (a) separated from the women and children and transported to Bratunac[1535]; or (b) detained in various places along the Bratunac - Konjević Polje – Milići road and transported to Bratunac.[1536]

1087. As argued above,[1537] these men are not included in the victim group that was allegedly forcibly transferred. Nonetheless, even if the Trial Chamber would deem that these men

[1534] T.21433-21434 (emphasis added).
[1535] Indictment,para.62.
[1536] Indictment,para.63.
[1537] Part Two, A,VII: "THE VICTIM GROUPS OF FORCIBLE TRANSFER AND DEPORTATION".

were forcibly transferred, the result would remain the same: Drago Nikolić does not incur individual criminal responsibility for the transportation of detainees.

1088. The Defence submits that Drago Nikolić's alleged specific contribution to the JCE is unrelated to the alleged forcible transfer as: (a) Drago Nikolić was unaware of the transportation of these men from the places where they were captured to the Bratunac area; (b) the allegations concerning the transportation of Muslim detainees in paragraphs 30.6 through 30.12 and 31.4 are unconnected to forcible transfer; and (c) the allegations in paragraphs 30.14, 30.15, 32 and 34-37 are inconsistent with the legal requirements of forcible transfer.

(I) Drago Nikolić Was Not Involved in the Transportation of the Able-bodied Men to Bratunac

1089. Considering that the charge in respect of forcible transfer and deportation relies on the relevant factual allegations concerning the JCE to murder the able-bodied men from Srebrenica, it is striking that Drago Nikolić is not alleged to have taken part in the events described in paragraphs 30.1 through 30.5 of the Indictment.

1090. The Prosecution, in fact, acknowledges that Drago Nikolić was not aware of or involved in the transportation of these men from the places where they were captured to the Bratunac area, allegedly constituting the first leg of the forcible transfer.

(II) The Prosecution Erroneously Relies on the Transportation of Muslim Prisoners

1091. Paragraphs 30.6, 30.7-30.12 and 31.4 directly or indirectly allege that detainees were transported.

1092. During the Prosecution's Rule 98*bis* submission, the evidence relied upon by the Prosecution in relation to Drago Nikolić's alleged contribution to the forcible transfer concerned: (a) REDACTED; (b) Exhibit P647, allegedly establishing that Drago Nikolić was relieved from duty on 13 July 1995 and his alleged subsequent presence in Orahovac; (c) his alleged responsibilities towards the Military Police as the Zvornik Brigade Chief of Security; (d) Exhibit P905, allegedly demonstrating that Drago Nikolić travelled to places where prisoners from Bratunac were taken to on 13 and 14 July 1995; (e) Drago Nikolić allegedly meeting buses from Bratunac and sending them

to Orahovac on 14 July 1995; and (f) Drago Nikolić's alleged encounter with Beara in Petkovci on 14 July 1995.[1538]

1093. The Defence posits that the act of "transporting", in and of itself, does not constitute the *actus reus* of forcible transfer. "Transportation" is not aimed at unlawful removal but concerns pre-arranged movement between pre-determined locations. The crime of forcible transfer, on the other hand, relates to the expulsion of individuals from an area in which they are lawfully present. Those seeking to forcibly transfer individuals do not seek to move them between pre-determined destinations; they merely seek their physical removal. "Transportation" can thus not be equated with forcible transfer.

1094. Furthermore, the Prosecution failed to establish that these men were taken to an area outside the control of the RS, as required by the common plan, design or purpose of the alleged JCE. It namely alleges that these men were taken from the Bratunac area to the Zvornik area, both of which were within the control of the RS.

(III) Paragraphs 30.14, 30.15, 32 and 34-37 are Unrelated to Forcible Transfer

1095. Finally, the allegations in paragraphs 30.14, 30.15, 32 and 34-37 are entirely devoid of references related to forcible displacement of individuals to an area outside the control of the RS. They can thus not amount to an alleged contribution to the JCE to forcibly transfer and deport the Muslim population from Srebrenica and Žepa.

1096. Paragraphs 30.14 and 30.15 are placed within the JCE to murder the able-bodied men from Srebrenica but, unlike paragraphs 30.6 through 30.12, they no do not contain a mention of transportation, or similar, of Bosnian Muslim victims.

1097. Paragraph 32 relates to the alleged reburial operation. Considering that forcible transfer relates to the absence of a genuine choice to remain, it is untenable to maintain that the bodies allegedly reburied could have been victims of forcible transfer. The Prosecution's novel approach to the crime of forcible transfer – claiming that corpses may be victims of forcible transfer - simply stands uncorroborated.

1098. Finally, paragraphs 34 through 37 relate to the alleged conspiracy to commit genocide. Besides a reference to the alleged removal of the Muslim population from Srebrenica and Žepa in paragraph 34, there is no mention of forcible transfer whatsoever. There is

[1538] T.21430-21438.

certainly no description of Drago Nikolić's alleged contribution to the JCE to forcibly transfer and deport.

II. DRAGO NIKOLIĆ'S ALLEGED GENERAL CONTRIBUTION

1099. In addition, it is alleged that, in general, Drago Nikolić controlled the movement of the Muslim population out of the enclaves through: (a) assisting in the planning, organising and supervising of the transportation of Muslim men from Bratunac from 13 through about 16 July 1995; (b) supervising, facilitating and overseeing the transportation of Muslim men from Bratunac to detention areas in the Zvornik area from 13 through 16 July 1995; and (c) failing to discharge his responsibility as Chief of Security, and by virtue of the authority vested in him by Pandurević, to ensure the safety and welfare of these Bosnian Muslim prisoners.[1539]

1100. Firstly, as regards the allegations contained in paragraphs 80(a)(i) and (ii) the Defence submits, as argued above,[1540] that the transportation of detainees does not constitute forcible transfer. Drago Nikolić can thus not incur individual criminal responsibility for the forcible transfer.

1101. Indeed, the Defence's proposition is strengthened by paragraph 80(a)(iii), which speaks of Drago Nikolić's alleged responsibility for *"these Bosnian Muslim **prisoners**"*. Therefore, even though paragraph 80(a) speaks of *"the Muslim population"*, it is clear that the Prosecution is, in actual fact, alleging that detainees were transported.

1102. Finally, in respect of paragraph 80(a)(iii), Drago Nikolić did not have responsibility for the *"handling of all these Bosnian Muslim prisoners and to ensure their safety and welfare"*. The Prosecution failed to buttress its allegation with relevant legal provisions and facts. As argued above, neither his position as Security Organ *nor* the authority vested in him by Pandurević bestowed such responsibility upon Drago Nikolić.[1541]

1103. In light of the argument and submissions provided above, Drago Nikolić must be acquitted of Count 7 - forcible transfer.

E. DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE *ACTUS REUS* OF THE ALLEGED FORCIBLE TRANSFER / DEPORTATION OF THE MUSLIM POPULATION FROM ŽEPA

[1539] Indictment,para.80(a)(i)-(iii).
[1540] Part Two, ,VII: "THE VICTIM GROUPS OF FORCIBLE TRANSFER AND DEPORTATION".
[1541] Part Three,A,IV, "Towards Prisoner of War".

1104. As has been indicated above, the alleged JCE pertains to Srebrenica as well as Žepa and the alleged common plan, design or purpose, developed on the evening of 11 July 1995, must thus be considered to relate to both places. The Defence reiterates that there is no evidence establishing Drago Nikolić's membership in this JCE and that he thus incurs no responsibility for the alleged forcible displacement and deportation in Srebrenica or Žepa.

1105. However, should the Trial Chamber consider that the common plan, design or purpose concerning the forcible transfer of the women and children and the deportation of the able-bodied men from Žepa must be distinguished from the common plan, design or purpose relating to Srebrenica, the Defence posits that there is absolutely no evidence supporting a conclusion that Drago Nikolić was a member of the JCE to forcibly transfer and deport the Muslim population from Žepa.

I. DRAGO NIKOLIĆ DID NOT SHARE THE *MENS REA* OF THE JCE RELATED TO ŽEPA

1106. The Prosecution failed to prove beyond a reasonable doubt that Drago Nikolić: (a) knew or was informed of the common plan, design or purpose; (b) intended to further the common plan, design or purpose; or (c) intended to forcibly transfer the women and children of Žepa to an area outside the control of the RS or to deport the able-bodied men of Žepa across the border to the then FRY.

(A) Drago Nikolić Did Not Know of the Common Plan, Design or Purpose

1107. Unlike the allegation concerning the development of the alleged common plan, design or purpose in respect of Srebrenica, there is no specific allegation as to the development of the alleged common plan, design or purpose concerning Žepa. The Indictment merely alleges that VRS representatives sought to force the population to leave the enclave under threat of military attack during three separate rounds of negotiations on 13, 19 and 24 July 1995 with Bosnian Muslim representatives.[1542]

[1542] Indictment,para.66.

1108. Drago Nikolić is not alleged to have been a participant in any of these meetings and he could thus not have had any direct knowledge in respect of the alleged common plan, design or purpose in respect of the alleged JCE relative to Žepa.

1109. Furthermore, there is no circumstantial evidence demonstrating Drago Nikolić's knowledge in this respect. In fact, the main parts of the Tactical Group, extracted from the Zvornik Brigade for combat activities in Srebrenica and Žepa, returned to the Zvornik Brigade on 15 July 1995,[1543] prior to the commencement of combat activities in Žepa and the alleged forcible transfer of the women and children on 25 July 1995 and the deportation of the able-bodied men on or about the same day. Therefore, the information available in the Zvornik Brigade in relation to the subsequent events in Žepa, if any, was extremely limited.

(B) Drago Nikolić Did Not Intend to Further the Common Plan, Design or Purpose

1110. The fact that Drago Nikolić did not know of or was not informed of the common plan, design or purpose necessarily negates intention on his part to further the common plan, design or purpose.

1111. Even if Drago Nikolić knew or was informed thereof, no evidence has been adduced by the Prosecution establishing Drago Nikolić's intent to further the alleged common plan, design or purpose.

(C) Drago Nikolić Did Not Have the Required Intent for Forcible Transfer or Deportation

1112. Finally, there is no evidence establishing that Drago Nikolić intended to forcibly transfer the women and children of Žepa to an area outside the control of the RS.

1113. The same conclusion may be reached on the basis of the available evidence for the *mens rea* of Drago Nikolić in respect of the deportation of able-bodied men of Žepa. The Prosecution failed to adduce a single piece of evidence indicating that Drago Nikolić intended to displace the able-bodied men across the border to the then FRY.

[1543] 7D686; T.30947-30948. In addition, there is evidence that certain parts of the Tactical Group already returned on 13 July 1995.

1114. Drago Nikolić was thus not a member of the JCE in respect of Žepa and he can not be held responsible for the acts of the alleged members of the JCE or for the reasonably foreseeable consequences of the implementation of the JCE.

1115. Any individual criminal responsibility that Drago Nikolić might incur on the basis of his acts must thus be assessed in isolation of the JCE. However, there is no evidence supporting a conclusion that Drago Nikolić's acts attract individual criminal responsibility on the basis of any of the other modes of liability mentioned in Article 7(1) considering the complete failure of the Prosecution to prove beyond a reasonable doubt any of the *mens rea* standards identified above.

II. DRAGO NIKOLIĆ DID NOT FURTHER THE JCE RELATED TO ŽEPA

1116. The Prosecution did not provide any evidence proving beyond a reasonable doubt that Drago Nikolić furthered either the forcible transfer of the women and children out of Žepa or the deportation of the able-bodied men to the then FRY.

(A) Drago Nikolić Was Not a Member of the Tactical Group

1117. As argued above,[1544] Drago Nikolić was neither a member of the Tactical Group that departed to Srebrenica and Žepa to participate in combat activities *nor* was he involved in the planning or preparations for the deployment of the Tactical Group.

1118. In any event, the Tactical Group, under the command and control of the Drina Corps, returned to the Zvornik area prior to the commencement of the alleged forcible transfer and deportation on or about 25 July 1995.

1119. There is no other evidence on the record establishing that Drago Nikolić was involved in any manner whatsoever in the combat activities in and around Žepa, much less that he was involved in the forcible transfer of the women and children and the deportation of the able-bodied men

(B) Drago Nikolić Did not Contribute to the Alleged Terror in Žepa

1120. The Prosecution argued that *"in addition to all the direct contribution to the men being transferred under his control* [in Zvornik]*, he's* [Drago Nikolić] *contributing to the*

[1544] Part FIVE, D,I,(B): "The Alleged Specific Contribution of Drago Nikolić"

coercive environment, to the terror in Zepa [sic].*"*[1545] The Prosecution corroborates its position with Exhibit P2941, notes of the meeting between Smith and Silajdžić on 13 July 1995, referring to *"the as-yet unconfirmed reports of atrocities in the Srebrenica area" and worries expressed regarding "reports of refugees being segregated into groups and men between the ages of 60 and 16 being sent to different locations"*.[1546]

1121. However, Exhibit P2941 is completely unrelated to Drago Nikolić: it does not mention him *nor* is it in any other manner relevant to him.

1122. Furthermore, Drago Nikolić's alleged contribution to the creation of an atmosphere of terror in Žepa is completely unsubstantiated. There is no causation between the alleged acts of Drago Nikolić in the Zvornik area and the alleged departure of individuals from Žepa. This is all the more so considering Drago Nikolić's non-involvement in Krivaja 95 and the absence of knowledge concerning this operation on his behalf.

1123. As argued above,[1547] the Prosecution did not adduce any evidence indicating that Drago Nikolić possessed the *mens rea* for forcible transfer and deportation of the Muslim population out of Žepa. Clearly, the absence of any link whatsoever between Drago Nikolić's alleged acts in the Zvornik area and Žepa reinforces the Defence's proposition that Drago Nikolić did not intend to forcibly transfer the women and children of Žepa within national borders *nor* did he intend to deport the able-bodied men from Žepa to the then FRY.

1124. Consequently, Drago Nikolić did not further the alleged common plan, design or purpose. Considering that there not a single piece of evidence linking Drago Nikolić to the alleged crimes in Žepa, he is also not individually criminally responsible under any other mode of liability identified in Article 7(1).

1125. In conclusion, in view of the complete lack of evidence concerning Drago Nikolić's individual criminal responsibility in respect of the alleged crimes committed in Žepa in July 1995, Drago Nikolić must be acquitted of Count 8 – deportation.

F. CONCLUSION

1126. It evidently follows from the above submissions that Drago Nikolić did not entertain the *mens rea* related to the JCE to *"force the Muslim population out of the Srebrenica and*

[1545] T.21439.
[1546] T.21439.
[1547] Part FIVE, E,I,(C):"Drago Nikolić Did Not Have the Required Intent for Forcible Transfer or Deportation"

Žepa enclaves to areas outside the control of the RS from about 8 March 1995 through the end of August 1995" nor did he commit acts in furtherance thereof.

1127. It is the respectful submission of the Defence that this conclusion, besides warranting an acquittal for the counts pertaining to forcible transfer and deportation, is also highly significant in respect of the remaining charges contained in the Indictment, most notably the charges relative to genocide and conspiracy to commit genocide.

1128. It is the Prosecution's submission that the two JCE's were intimately intertwined. The Indictment alleges in this respect that *"[i]n the evening hours of 11 July and of the morning of 12 July 1995, at the same time the plan to forcibly transport the Muslim population from Potočari was developed, Ratko Mladić and others developed a plan to murder the hundreds of able-bodied men identified from the crowd of Muslims in Potočari"*[1548] and that, on 13 July 1995, *"the plan to murder the able-bodied Muslim men from Srebrenica encompassed the murder of this group of over 6,000 men."*[1549]

1129. In addition, as argued extensively above,[1550] the Prosecution bases its allegation concerning conspiracy to commit genocide on the second alleged JCE as well considering that it maintains that *"[t]he underlying facts and agreement of the Conspiracy to commit genocide are identical to the facts and agreement identified in the Joint Criminal Enterprise."*[1551]

1130. If it is the Prosecution's case that the two JCE's and the conspiracy to commit genocide overlap and are interrelated, it logically follows that Drago Nikolić's non-involvement in the JCE to forcibly transfer and deport the Muslim population from Srebrenica and Žepa, significantly impacts the extent of his alleged involvement in the JCE to murder all the able-bodied men from Srebrenica and, even more so, in the alleged conspiracy to commit genocide.

1131. What is more, Drago Nikolić's non-involvement in the alleged JCE to forcibly transfer and deport the Muslim population from Srebrenica and Žepa, establishes a strong differentiation between Drago Nikolić and anyone involved in both JCE's.

PART SIX - ARGUMENTS RELATED TO THE SECOND ALLEGED JCE AND COUNTS 3, 4 AND 5

[1548] Indictment,para.27.
[1549] Indictment,para.29.
[1550] Part Two,B,IV.
[1551] Indictment,para.34.

1132. It is the Prosecution's case that a JCE of the first category to kill all the able-bodied men from Srebrenica was put in place in July 1995.[1552] In addition the Prosecution contends that two JCE's of the third category existed. Firstly, it is said that opportunistic killings were the natural and foreseeable consequence of both the purported JCE to forcibly displace the population of Srebrenica as well as the JCE to murder all the able-bodied Muslim men from Srebrenica.[1553] Secondly, it is alleged that the reburial operation was a natural and foreseeable consequence of the latter JCE.[1554]

1133. However, as will be demonstrated below, Drago Nikolić was not a member of the JCE to murder all the able-bodied Muslim men from Srebrenica as the Prosecution failed to prove, beyond a reasonable doubt, the requisite *mens rea* standards required for a conviction.

1134. Consequently, Drago Nikolić can not be held responsible for: (a) the acts of those who would have been members of the alleged JCE; and (b) the purported opportunistic killings and the reburial operation, as natural and foreseeable consequences thereof.

1135. Therefore, the limited responsibility of Drago Nikolić, if any, can not be described by JCE, a mode of liability employed by the Prosecution to ascribe individual criminal responsibility to him for all the crimes alleged in the Indictment. Drago Nikolić's limited responsibility, if any, must thus be evaluated on the basis of the remaining modes of liability for each of the allegations separately.

A. THE COMMON PURPOSE OF THE SECOND ALLEGED JCE

1136. In the submission of the Defence, the Prosecution alleges that the common plan, design or purpose was to kill **all** the able-bodied Muslim men from Srebrenica.

1137. Firstly, throughout the Indictment, the Prosecution maintains that the common plan, design or purpose was to kill **the** able-bodied Muslim men from Srebrenica.[1555] The Defence submits that "the able-bodied Muslim men" can only be interpreted to mean "all able-bodied Muslim men". If it were otherwise, the Prosecution would have charged that the common plan, design or purpose was to kill able-bodied Muslim men from Srebrenica, as opposed to **the** able-bodied Muslim men from Srebrenica.

[1552] Indictment,paras.27-30.
[1553] Indictment,paras.31.
[1554] Indictment,paras.32.
[1555] Indictment,paras.27-29.

1138. Secondly, the Prosecution specifically indicates on two occasions that the JCE would have targeted all able-bodied men from Srebrenica. The heading in Count 2 specifically states: *"the Conspiracy and Joint Criminal Enterprise to Murder **all** the Able-bodied Muslim men from Srebrenica"*.[1556] Also, it is alleged that the alleged opportunistic killings were the natural and foreseeable consequence of the JCE to *"murder **all** the able-bodied Muslim men from Srebrenica"*.[1557]

1139. Finally, the Prosecution contends that the plan allegedly developed in the evening hours of 11 July and on the morning of 12 July 1995 concerned the murder of *"hundreds of able-bodied men identified from the crowd of Muslims in Potočari"*.[1558] Supposedly, after the capture or surrender of 6,000 able-bodied Muslim men on 13 July 1995, *"[t]he plan to murder the able-bodied Muslim men from Srebrenica encompassed the murder of this group of over 6,000 men"*.[1559]

1140. The Blagojević Trial Chamber found that *"[i]f the objective of the joint criminal enterprise changes, such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed, then a new and distinct joint criminal enterprise has been established."*[1560] In addition, the Blagojević Trial Chamber specifically disagreed with the Prosecution *"that the objective of a joint criminal enterprise can change over time with the effect that a person entails liability for criminal acts far beyond the scope of the enterprise that he agreed to, except those acts which are 'natural and foreseeble [sic] consequences' and thus fall within the third category of joint criminal enterprise."*[1561]

1141. In the submission of the Defence, the allegations in the Indictment, in fact, seem to imply the existence of two separate JCE's, *i.e.* (a) a JCE to murder the hundreds of able-bodied men identified from the crowd of Muslims in Potočari allegedly developed in the evening hours of 11 July 1995 and on the morning of 12 July 1995; and (b) a JCE to murder over 6,000 surrendered and captured able-bodied Muslim men, which purportedly came into being on 13 July 1995.

1142. Nonetheless, the fact that the Prosecution maintains that the groups were targeted by one and the same JCE confirms the proposition of the Defence that the alleged common

[1556] Indictment,p.18(emphasis added).
[1557] Indictment,paras.31(emphasis added).
[1558] Indictment,para.27.
[1559] Indictment,para.29.
[1560] Blagojević,TJ,para.700.
[1561] Blagojević,TJ,footnote2155.

plan, design or purpose is alleged to relate to **all** the able-bodied Muslim men from Srebrenica.

1143. Moreover, In the Defence's submission, the appellation "Srebrenica" refers to the "Srebrenica enclave" and not merely to the "town of Srebrenica". In the Indictment, the Prosecution specifically refers to the status of Srebrenica and the surrounding areas as a "safe area" as well as the VRS's alleged acts directed against the "Srebrenica enclave".[1562]

1144. What is more, the alleged JCE to murder all the able-bodied men from Srebrenica, according to the Prosecution, would have involved or amounted to the Statutory crimes of: (a) extermination as a crime against humanity; (b) murder as a crime against humanity; and/or (c) murder as a violation of the laws or customs of war.[1563]

1145. Therefore, in order to secure a conviction against Drago Nikolić for any of these crimes through membership in a JCE of the first category, the Prosecution must prove several elements.

1146. Firstly, the existence of the alleged JCE of the first category requires proof of: (a) the involvement of a plurality of persons; (b) in a common plan, design or purpose to murder all the able-bodied Muslim men from Srebrenica; (c) which involved or amounted to: (i) extermination as a crime against humanity; (ii) murder as a crime against humanity, and/or (iii) murder as a violation of the laws or customs of war.

1147. Secondly, the Prosecution must prove that Drago Nikolić: (a) was one of the persons involved in the alleged common plan, design or purpose; (b) furthered the common plan, design or purpose; (c) voluntarily participated in the common plan, design or purpose, with knowledge thereof; (d) intended to further the common plan, design or purpose; (e) acted with the intent, shared by all co-perpetrators, to: (i) unlawfully kill individuals, whether on a massive scale or not; and/or (ii) cause grievous bodily harm or serious injury, in the reasonable knowledge that his act was likely to cause death; (f) knew of the alleged widespread or systematic attack directed against a civilian population; and (g) knew that his conduct was part of the alleged widespread or

[1562] Indictment,paras.22-24.
[1563] Indictment,paras.45-47.

systematic attack directed against a civilian population or took the risk that his conduct was part thereof.[1564]

B. THE PROSECUTION DID NOT PROVE THE *MENS REA* STANDARDS REQUIRED

1148. The Defence posits that the Prosecution utterly and completely failed to prove, beyond a reasonable doubt, that Drago Nikolić possessed the required *mens rea:* (a) to consider him a member of the alleged JCE; and (b) for crimes against humanity.

I. DRAGO NIKOLIĆ DID NOT SHARE THE MENS REA OF THE SECOND ALLEGED JCE

1149. The Prosecution alleges that Drago Nikolić committed acts and omitted to act with full knowledge of the plan to summarily execute the able-bodied men from Srebrenica.[1565]

1150. In the Defence's submission, Drago Nikolić never knew of *nor* was he ever informed of the common plan, design or purpose to murder all the able-bodied men from Srebrenica.

(A) The Information Available to Drago Nikolić About the Prisoners According to REDACTED and Momir Nikolić on 13 July 1995

1151. It is the Defence's case that REDACTED as well as Momir Nikolić lied flat-out in respect of the role of Drago Nikolić on 13 July 1995 in relation to the arrival and execution of detainees.[1566]

1152. Nonetheless, even if the Trial Chamber would accept one of these testimonies despite the multitude of contradictions and impossibilities identified by the Defence, neither of them constitutes evidence of Drago Nikolić's knowledge of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica.

1153. REDACTED [1567] [1568]

1154. In his Statement of Facts, Momir Nikolić claims that Colonel Beara ordered him *"to travel to the Zvornik Brigade and inform Drago Nikolić … that* ***thousands of Muslim***

[1564] The last two elements would become irrelevant if the crimes were to be classified as violations of the laws or customs of war.
[1565] Indictment,para.42(a).
[1566] Part FOUR, B, REDACTED and "MOMIR NIKOLIĆ".
[1567] REDACTED
[1568] REDACTED

prisoners *were being held in* ***Bratunac*** *and would be sent to Zvornik"* and that *"the Muslim prisoners should be detained in the Zvornik area and* ***executed****"*.[1569]

1155. During his *viva voce* testimony, Momir Nikolić contended that he told Drago Nikolić at the IKM that he *"had been sent by Mr. Beara to convey his order, that members who had been separated, i.e.,* ***the men from Bratunac*** *who had been separated and housed in the facilities in Bratunac, would, during the day, be transferred to Zvornik"* and that he *"had information that these men who were being brought or taken to Zvornik* ***would be executed****."*[1570] Drago Nikolić would have said that *"he was going to report and inform him [sic] command and then see what happens next"*.[1571]

1156. Over and above the mutual exclusiveness and other ambiguities contained in these testimonies,[1572] in the submission of the Defence, neither of these testimonies demonstrates that Drago Nikolić learned of the alleged common plan, design or purpose to murder all the able-bodied Muslim men from Srebrenica.

1157. Firstly, REDACTED whereas Momir Nikolić asserted that he informed Drago Nikolić of the arrival and execution of "*thousands of Muslim prisoners*".

1158. Even if this were true, the number of Muslim detainees arriving does not amount to knowledge of the purported alleged common plan, design or purpose. The execution of thousands of detainees is certainly a grave and significant event but it does not convey the information of the purported common plan, design or purpose to murder **all** the able-bodied Muslim men from Srebrenica.

1159. Secondly, both REDACTED and Momir Nikolić claimed that the detainees that were to be executed would have come from Bratunac. While Drago Nikolić could probably have assumed of a possible link between these detainees and the fall of Srebrenica, this is insufficient to ascribe knowledge of the purported common plan, design or purpose to Drago Nikolić. He was not informed as to who the detainees were, where they were captured or how they had become detainees.

1160. Therefore, even if the assertions of either REDACTED or Momir Nikolić were to be accepted, Drago Nikolić would have learned, at most, of a crime against a large number of certain Muslim detainees. This information does not correspond to the alleged common plan, design or purpose to murder **all** the able-bodied men from **Srebrenica**.

[1569] C00001,para.10(emphasis added).
[1570] T.32937-T.32938(emphasis added).
[1571] T.32938-T.32939.
[1572] Part FOUR, B, REDACTED and "MOMIR NIKOLIĆ".

1161. The only common denominator between, on the one hand, the information available to Drago Nikolić according to REDACTED and Momir Nikolić and, on the other hand, the information Drago Nikolić would have needed to have possessed to consider him a member of the alleged JCE, is that a crime would be committed against Muslims. The other elements are simply lacking.

(B) Drago Nikolić Did not Leave the IKM on 13 July 1995

1162. The evidence on the record reflects that, from 13 July 1995 to 14 July 1995, Drago Nikolić was IKM Duty Operations Officer. During this stint, Drago Nikolić remained continuously at the IKM.[1573]

1163. The Defence respectfully reiterates that, for the reasons set out above, Galić's claim that he replaced Drago Nikolić on this evening at the IKM as Duty Operations Officer is fabricated.[1574] Moreover, the vehicle log for 13 July 1995[1575] can not be treated as supportive of the allegation that Drago Nikolić would have left the IKM on this evening. As underscored by many witnesses, the accuracy of vehicle logs – because of the manner in which they were completed – is very low and doubtful.[1576] Indeed, Milorad Birčaković confirmed that *"these travel orders do not reflect the reality of where the vehicle went and how it went"*.[1577] Milorad Birčaković added that they were not filled in correctly and, if kilometres were lacking, destinations would be made up.[1578] Moreover, according to Milorad Birčaković, even though a particular column might have been signed by Drago Nikolić, it does not necessarily mean that he was the one who used that vehicle on that day.[1579]

1164. Even if the Trial Chamber were to accept, contrary to the Defence's submissions, that Drago Nikolić left the IKM on the evening of 13 July 1995, there is no evidence as to what Drago Nikolić did or did not do while he would have been absent from the IKM. Evidence as to what he did or did not learn concerning the purported common plan, design or purpose to murder all the able-bodied Muslim men from Srebrenica is thus equally absent.

[1573] Part FOUR Four,C:"MIHAJLO GALIĆ.
[1574] Part FOUR Four,C:"MIHAJLO GALIĆ.
[1575] P00296.
[1576] Sakotić, T.25759,L.20;T.2560,L.1-7 .
[1577] T.11052-T.11053.
[1578] T.11052-T.11053.
[1579] T.11141.

1165. In addition, although he could not remember the exact date, PW-143 claims to have been ordered by either Drago Nikolić or REDACTED to go to the Orahovac School on an evening in the summer of 1995.[1580] In addition, upon his arrival at the Orahovac School, PW-143 believes to have seen Drago Nikolić there on the same evening.[1581] However, PW-143's testimony can not be accepted and it certainly does not establish that Drago Nikolić ordered him to go to the Orahovac School *nor* that Drago Nikolić was at the Orahovac School on the evening of 13 July 1995.

1166. Firstly, as admitted by PW-143 himself, he would have liked to forget the day that he was in Orahovac, which is why he did not even try to remember anything about that event at that time.[1582] As a result, PW-143 could not remember many significant details about the events in Orahovac, such as: (a) how long he slept during his guard duty; (b) the kind of vehicle that drove him to Orahovac; (c) whether the prisoners were blindfolded or not; (d) whether the trucks were military or civilian; (e) what colour the trucks were; (f) the names of the people who were with him that night etc.[1583] His lack of memory renders his testimony completely unreliable.

1167. Secondly, PW-143's uncertainty about the events in Orahovac culminated into a frank admission that he could not be sure whether he truly was ordered by Drago Nikolić to go to the Orahovac School that evening and whether he saw Drago Nikolić at the Orahovac School upon his arrival. PW-143 admitted that if it could be demonstrated that Drago Nikolić was on duty at the IKM on 13 July 1995, it would be natural that he was not ordered by Drago Nikolić to go to the Orahovac School.[1584] In addition, he specifically said that he was not 100 percent sure whether he was ordered to go to the Orahovac School by Drago Nikolić or by REDACTED.[1585] Moreover, PW-143 acknowledged that perhaps Drago Nikolić was not at Orahovac School when the order to go back to the Zvornik Brigade command was issued and that he perhaps received the order from REDACTED.[1586]

1168. Thirdly, three Witnesses testified that they were ordered by other persons to go to Orahovac. Stanoje Birčaković and Stevo Kostić said that they were ordered by

[1580] REDACTED
[1581] T.6532-T.6533.
[1582] T.6590.
[1583] T.6590-T.6593.
[1584] T.6600.
[1585] REDACTED
[1586] REDACTED

Jasikovac.[1587] Dragoje Ivanović testified that he was ordered to go to Orahovac by Stevo Kostić.[1588]

1169. Fourthly, two other Witnesses did not see Drago Nikolić at Orahovac on the evening of 13 July 1995. Dragoje Ivanović did not describe Drago Nikolić as being present on 13 July 1995 and testified that Drago Nikolić arrived on the morning of 14 July 1995.[1589] Stanoje Birčaković said that Drago Nikolić was not in the mini-bus that went to Orahovac from the Zvornik Brigade on the evening of 13 July 1995[1590] and that he only saw Drago Nikolić once in Orahovac, which was on the morning of 14 July 1995.[1591]

1170. Lastly, it has been established above that the allegations concerning Drago Nikolić's supposedly departure from the IKM are not true.[1592] In addition, testimonial evidence indicates that Drago Nikolić remained at the IKM on 13 July 1995. Lazar Ristić said that, around 2100 or 2130 hours on 13 July 1995, Drago Nikolić called him from the IKM concerning a fire in Nezuk.[1593] In addition, Stojkić was with Drago Nikolić at the IKM as of 1200 hours on 13 July 1995 until the morning of 14 July 19995 and confirmed that Drago Nikolić did not leave the IKM, except for a period of 15-20 minutes to tour the light anti-aircraft artillery.[1594] Finally, Birčaković testified that he drove to the IKM on the morning of 14 July 1995 to take Drago Nikolić back to the Zvornik Brigade Command.[1595]

1171. The Defence respectfully submits that it certainly was not proved beyond a reasonable doubt that Drago Nikolić was present at the School in Orahovac on the evening/night of 13 to 14 July 1995.

(C) Meeting at Standard Barracks on 14 July 1995

1172. According to the evidence on the record, on the morning of 14 July 1995, Birčaković picked Drago Nikolić up at the IKM and drove him to Standard Barracks for a meeting with Beara and Popović, which lasted perhaps about 15 to 30 minutes.[1596]

[1587] T.10743.
[1588] T.14539.
[1589] T.14544.
[1590] T.10766.
[1591] T.10747-T.10748;T.10767.
[1592] Part FOUR, C: REDACTED and "MIHAJLO GALIĆ".
[1593] T.10111;T.10171-T.10172.
[1594] T.21973-T.21976;T.21986-T.21992.
[1595] T.11013-T.11015.
[1596] T.11013-T.11015.

1173. However, the evidence on the record concerning the contents of this meeting does not establish that Drago Nikolić was acquainted with the alleged common plan, design or purpose. Drago Nikolić merely learned of an imminent exchange of detainees. Moreover, on the basis of the evidence on the record, it is not open to the Trial Chamber to infer that Drago Nikolić indeed learned thereof.

1174. Firstly, Birčaković unambiguously testified that Drago Nikolić told him, after meeting with Beara and Popović, that he had been tasked with accommodating some people coming in for exchange purposes.[1597] Birčaković added that Drago Nikolić was upset as he had not been told of the arrival of these people beforehand.[1598] In addition, Birčaković stated that Drago Nikolić never mentioned killings to him at that time.[1599]

1175. After this meeting, Drago Nikolić waited for the buses with detainees at hotel Vidikovac.[1600] Birčaković boarded one of these buses while Drago Nikolić left in the car to run some errands.[1601] Birčaković indicates clearly that the destination of the buses was already known and that he himself did not know where they were heading.[1602] Drago Nikolić did thus not direct the buses to Orahovac. In any event, there is no indication that Drago Nikolić's subsequent actions were related towards anything else than the reception of the arriving detainees, which does not provide indications that he was informed of the alleged common plan, design or purpose to kill all the able-bodied men from Srebrenica.

1176. Secondly, the testimony of Perić also indicates that Drago Nikolić believed that a limited number of prisoners were coming for the purpose of being exchanged. Perić said that Drago Nikolić provided him with information similar to the contents of a telegram received, which indicated that about 200 Muslim prisoners would be put up in the School in Kula for one night in order to be exchanged the following day.[1603] Perić added that Drago Nikolić told him that it would be a good idea for him to be present as well in order to avoid problems with the local citizenry.[1604]

[1597] T.11120.
[1598] T.11120.
[1599] T.11120.
[1600] T.11018.
[1601] T.11018.
[1602] T.11019.
[1603] T.11375-T.11376.
[1604] T.11376.

1177. It must be emphasized that Drago Nikolić did not order Perić to go to the Kula School. Perić clearly testified that Drago Nikolić, as assistant commander for security, could not issue orders to him.[1605] When asked whether he could have refused to go, Perić said there was nothing to refuse because *"he didn't receive any orders"*.[1606] In addition, Perić stated that Drago Nikolić told him that *"it would be a good idea"* for him to be at the Kula School,[1607] which can not be considered an order but a suggestion.

1178. Finally, Lazar Ristić said that, on one occasion in the aftermath of the events in Orahovac on 14 July 1995, he asked Drago Nikolić why the detainees had been brought there considering the dangers, to which Drago Nikolić responded that he had just been told to place the detainees in a schoolhouse pending an exchange.[1608]

1179. What is more, even if the Trial Chamber would find that Beara and Popović knew of the purported common plan, design or purpose, it can not be inferred that Drago Nikolić also learned thereof during the meeting. It is certainly not the only reasonable inference available on the basis of the evidence on the record.

1180. An equally reasonable inference is, as established above, that Drago Nikolić was merely informed of the arrival of detainees for exchange purposes. In his capacity as Zvornik Brigade Security Organ, it fell within his prerogatives to deal with such a situation bearing in mind: (a) the security threat presented by the arrival of the detainees;[1609] (b) the hostility of the local populace towards the detainees;[1610] and (c) his familiarity with the region.

(D) Presence at the School in Orahovac on 14 July 1995

1181. It has been established that Drago Nikolić was present at the Orahovac School until 1400 or 1500 hours on 14 July 1995.[1611] However, the evidence on the record does not prove beyond a reasonable doubt that Drago Nikolić was present during the time the detainees were loaded onto buses. The evidence namely reveals that this occurred in the late afternoon hours,[1612] after Drago Nikolić had already left the Orahovac School.

[1605] T.11378;T.180.
[1606] T.11378.
[1607] T.11377- T.11378.
[1608] T.10088-T.10089.
[1609] T.10140;T.10088-T.10089;T23307.
[1610] T.6451.
[1611] T.6451-T.6452;T.6603;T.10334;T.10337;T.10750;T.11022-T.11023.
[1612] Part SIX, C,I,B,(I): "Orahovac Near Lažete"

1182. In addition, as will be addressed below, PW-143 can not be believed in respect of his claim that Drago Nikolić would have escorted the trucks to the execution site.[1613] Moreover, it has been demonstrated above that PW-101 and PW-168 lack any credibility whatsoever in relation to their assertions concerning Drago Nikolić's supposed involvement in the executions.[1614]

1183. In any event, even if the Trial Chamber would find that Drago Nikolić was present at the Orahovac School during the time the detainees were loaded onto buses and driven off to be executed, it can not be inferred that he learned of the alleged common plan, design or purpose to murder **all the able-bodied men from Srebrenica**.

1184. Firstly, even if the Trial Chamber would find that Drago Nikolić learned of the execution of these detainees, all that would be established is that he learned of a specific crime committed in Orahovac. His knowledge thereof can not be extended to cover the alleged common plan, design or purpose to murder **all** the able-bodied men from Srebrenica.

1185. Secondly, even though Birčaković testified that he believed the men driven to Orahovac to be Muslims,[1615] there is no mention of the geographical origin of these detainees. There is thus no indication that, through execution of the detainees at Orahovac, Drago Nikolić would have learned of the purported common plan, design or purpose to murder all the able-bodied men **from the Srebrenica enclave**.

(E) Presence Close to Petkovci on 14 July 1995

1186. The evidence indicates, furthermore, that Drago Nikolić was in Petkovci around 1600 or 1700 hours on 14 July 1995, at the crossroads leading to the Petkovci School.[1616]

1187. Drago Nikolić's presence at the cross-roads in Petkovci can not prove, in and of itself, that Drago Nikolić learned of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica. There is no evidence on the record indicating what Drago Nikolić did or did not do, whom he did or did not communicate with or what he did or did not learn at the crossroads in Petkovci on 14 July 1995.

[1613] Part SIX, C,I,B,(I): "Orahovac Near Lažete"
[1614] Part FOUR, E: REDACTED and "PW-101".
[1615] T.11018-T.11019.
[1616] T.11604-T.11605;T.13303.

1188. Moreover, even if the Trial Chamber would find that Ljubiša Beara had learned of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica at this point in time, it can not be inferred that Drago Nikolić also learned thereof. It is unquestionably not the only reasonable inference based on the evidence on the record.

1189. As indicated above, an equally reasonable inference is that Drago Nikolić was merely informed of the arrival of detainees and that his involvement was limited to the security aspects of their accommodation.[1617]

(F) Seeing Approximately 40 to 50 Bodies on 14 July 1995

1190. Moreover, the evidence establishes that Drago Nikolić would have seen approximately 40 to 50 bodies at a small section of the road about 50 metres from the water point in Orahovac on the evening of 14 July 1995,[1618] at which time he could likely have become aware of the commission of a significant crime.

1191. Nevertheless, such knowledge is absolutely insufficient to establish Drago Nikolić's knowledge of the existence of a common plan, design or purpose to murder all the able-bodied men from Srebrenica.

1192. Firstly, from the number of bodies Drago Nikolić saw on 14 July 1995, it can not be concluded that he learned of a common plan, design or purpose of the scale alleged by the Prosecution. The execution of 40 to 50 detainees is a grave crime but it could not have provided Drago Nikolić with the knowledge that it formed part of an operation purportedly targeting **all** able-bodied men from Srebrenica.

1193. Secondly, due to the lack of information available to Drago Nikolić at the relevant time, he could not have learned of the alleged JCE to kill all able-bodied men **from the Srebrenica enclave**.

(G) Intercept 15 July 1995

1194. REDACTED [1619] [1620]

[1617] Part SIX,B,I,"DRAGO NIKOLIĆ DID NOT SHARE THE MENS REA OF THE SECOND ALLEGED JCE"
[1618] T.11042-T.11043.
[1619] REDACTED
[1620] REDACTED

1195. However, in the submission of the Defence this intercept can not, in any manner whatsoever establish Drago Nikolić's knowledge of the alleged common plan, design or purpose.

1196. Firstly, considering the limited weight that is likely to be attached to intercept evidence, which is not corroborated, bears discrepancies and is challenged as to its accuracy, it can not be accepted that the intercept refers to Drago Nikolić.[1621] REDACTED

1197. REDACTED

1198. REDACTED

1199. The Prosecution must not be allowed to construct events on the basis of an intercept in the absence of any corroborating proof.

1200. In the Defence's submission, there is a complete lack of evidence concerning the knowledge Drago Nikolić would have had or obtained of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica.

1201. Therefore, Drago Nikolić can not be held responsible for the acts of those considered to be members of the JCE to murder all able-bodied Muslim men from Srebrenica.

1202. Except perhaps to a limited degree for the crime in Orahovac, as will be explained below, Drago Nikolić is thus not responsible for the crimes purportedly committed at (or against): (a) Bratunac Brigade Headquarters; (b) Jadar River; (c) Cerska Valley; (d) Nova Kasaba; (e) Kravica Warehouse; (f) Sandići Meadow; (g) Luke School near Tišća; (h) Petkovci School; (i) the Damn near Petkovci; (j) Ročević School; (k) Kula School; (l) Kozluk; (m) Branjevo Military Farm; (n) Pilica Cultural Centre; (o) Nezuk; (p) four survivors from Branjevo Military Farm; (q) injured Muslims from the Milići Hospital; (r) Snagovo; and (s) Trnovo.

1203. In this respect, bearing in mind the absence of knowledge on the part of Drago Nikolić of the alleged common plan, design or purpose to murder all the able-bodied Muslim men from Srebrenica, he is also not liable for the opportunistic killings and the reburial operation as natural and foreseeable consequences thereof.

1204. However, as will be elaborated upon below, the Defence recognizes the possibility that Drago Nikolić could perhaps incur a limited degree of individual criminal responsibility for his acts and conduct pertaining to the crime committed in Orahovac on 14 July 1995. It would remain within the Trial Chamber's discretion to determine which of the

[1621] REDACTED

remaining modes of liability enumerated in Article 7(1) of the Statute is suitable to express Drago Nikolić's restricted responsibility. To be sure, considering his lack of knowledge of the alleged common plan, design or purpose, Drago Nikolić does not incur individual criminal responsibility as a member of the alleged JCE.

II. DRAGO NIKOLIĆ DID NOT HARBOUR THE *MENS REA* FOR CRIMES AGAINST HUMANITY

1205. Even if would be established that Drago Nikolić knew of the alleged common plan, design or purpose, the Prosecution utterly and completely failed to prove the required *mens rea* on the part of Drago Nikolić in respect of the crimes the alleged common plan, design or purpose would involve or amount to.

1206. The Prosecution charges Drago Nikolić with extermination, murder and persecutions as crimes against humanity.[1622] Besides the intent related to the underlying offence, a conviction for crimes against humanity requires proof establishing beyond a reasonable doubt that Drago Nikolić knew of the alleged widespread or systematic attack directed against a civilian population and that he knew that his conduct was part of the alleged widespread or systematic attack directed against a civilian population.[1623] However, Drago Nikolić had no such knowledge.

1207. Firstly, Drago Nikolić did not know of the alleged *"widespread or systematic attack directed against the Bosnian Muslim civilian population of Srebrenica and Žepa and their surroundings"*.[1624]

1208. As established above, Drago Nikolić did not participate in the combat activities in and around Srebrenica and he had no knowledge of *nor* did he participate in the alleged forcible transfer operation.[1625] Drago Nikolić could only have known, although there is no such proof, of legitimate combat activities in and around Srebrenica and Žepa but not of an alleged attack against the civilian populations of these towns.[1626]

[1622] Indictment,counts3,4,6.
[1623] Kunarac,AJ,para.102.
[1624] Indictment,para.87.
[1625] Part FIVE, "ARGUMENTS RELATED TO THE FIRST ALLEGED JOINT CRIMINAL ENTERPRISE AND COUNTS 7 AND 8 OF THE INDICTMENT"
[1626] Part FIVE, B-C: DRAGO NIKOLIĆ DID NOT SHARE THE *MENS REA* OF THE FIRST ALLEGED JCE" and "DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE FORCIBLE TRANSFER OF THE WOMEN, CHILDREN AND ELDERLY MEN FROM SREBRENICA".

1209. Moreover, Drago Nikolić was under the impression that the persons arriving from Bratunac were detainees who were to be exchanged.[1627] As argued above, the transportation of detainees is, in and of itself, fully justified in non-international armed conflicts. More importantly, on the basis of the information available to Drago Nikolić, there was no indication whatsoever informing him whether there were civilians amongst the detainees.

1210. Secondly, even if it would be established that Drago Nikolić knew of the common plan, design or purpose, he did not know that his acts formed part of the alleged widespread or systematic attack.

1211. The Defence respectfully reiterates that, if the Trial Chamber were to find that Drago Nikolić knew of the common plan, design or purpose, the evidence establishes that Drago Nikolić believed that crimes would be committed against detainees who were ABiH members and not against civilians.

1212. In this regard, in Mrkšić et al., the Appeals Chamber found that:

> *"the perpetrators of the crimes in Ovčara acted in the understanding that their acts were directed against members of the Croatian armed forces. The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population of Vukovar."*[1628]

1213. Similarly, if it would be proved beyond a reasonable doubt that Drago Nikolić knew of the common plan, design or purpose, Drago Nikolić understood that his acts and those of others were directed against ABiH members, which precludes a finding that the would have intended that his acts form part of the attack against the civilian population.

C. THE ALLEGED ACTS AND CONDUCT OF DRAGO NIKOLIĆ MUST BE ASSESSED FOR EACH PURPORTED CRIME SEPARATELY

1214. The Indictment alleges that Drago Nikolić committed acts or omitted to act in furtherance of the alleged JCE in three manners: (a) as described in paragraphs 30.6-30.12, 30.14, 30.15, 31.4, 32 and 34-37 of the Indictment; (b) by supervising, facilitating and overseeing the transportation of Muslim men from Bratunac to detention areas in the Zvornik area and overseeing and supervising their execution;

[1627] Part SIX, B,I,"DRAGO NIKOLIĆ DID NOT SHARE THE MENS REA OF THE SECOND ALLEGED JCE".
[1628] Mrkšić,AJ,para.42.

and/or (c) failing to handle all the Bosnian Muslim prisoners in the Zvornik Brigade zone of responsibility and to ensure their safety and welfare.[1629]

1215. However, it is the Defence's submission that Drago Nikolić can not be considered a member of the alleged JCE to murder all able-bodied Muslim men from Srebrenica. His individual criminal responsibility must thus be assessed on the basis of the evidence for each alleged crime-site separately.

1216. As indicated above,[1630] the Defence posits that, with the exception of the limited individual criminal responsibility Drago Nikolić could possible incur in respect of the crime committed in Orahovac, the Prosecution has failed to prove his involvement in all remaining crimes alleged in the Indictment.

I. THE ALLEGED SPECIFIC INVOLVEMENT OF DRAGO NIKOLIĆ

1217. The alleged specific involvement of Drago Nikolić pertains to four separate categories: (a) ten instances of alleged large-scale and systematic murder of Muslim men from Srebrenica;[1631] (b) one instance of purported opportunistic killing;[1632] (c) the supposed reburial of victims;[1633] and (d) the alleged conspiracy to commit genocide.[1634]

1218. As a preliminary matter, the Defence notes that the Prosecution alleges that *"[t]he underlying **facts** and agreement of the Conspiracy to commit genocide are identical to the facts and agreement identified in the Joint Criminal Enterprise"*[1635] It is thus the Prosecution's case that Drago Nikolić's alleged furtherance of the JCE simultaneously constitutes his involvement in the purported conspiracy to commit genocide. The relevant paragraphs pertaining to the charge of conspiracy to commit genocide namely fail to mention any acts Drago Nikolić would or would not have undertaken outside his alleged contribution to the JCE. Then again, Drago Nikolić's alleged involvement in the conspiracy to commit genocide can not, at the same time, constitute a separate furtherance of the alleged JCE, as maintained by the Prosecution. This is circular reasoning *par excellence.*

[1629] Indictment,para.42.
[1630] Part One," PRELIMINARY SUBMISSIONS".
[1631] Indictment,paras.30.6-30.12;30.14;30.15.
[1632] Indictment,para.31.4.
[1633] Indictment,para.32.
[1634] Indictment,para.34-37.
[1635] Indictment,para.34 (emphasis added).

1219. Therefore, the Defence will exclusively address the first three categories below, bearing in mind that, on the basis of the evidence, the individual criminal responsibility of Drago Nikolić must be assessed in isolation of the alleged JCE. Drago Nikolić's supposed involvement in the purported conspiracy to commit genocide will be addressed separately.[1636]

(A) Paragraphs 30.1 to 30.5 of the Indictment – From Bratunac to Luke School Near Tišća

1220. According to the Indictment, Drago Nikolić was not involved in the first seven alleged crime-sites of the JCE to murder all able-bodied Muslim men in Srebrenica: (a) Bratunac Brigade HQ; (b) Jadar River; (c) Cerska Valley; (d) Nova Kasaba; (e) Kravica Warehouse; (f) Sandići Meadow; (g) Luke School Near Tišća.

1221. Indeed, the limited evidence on the record concerning Drago Nikolić for the period of 11 July 1995 until the evening of 13 July 1995, indicates that: (a) on 11 July 1995, Drago Nikolić was not involved in the combat activities or the ensuing events in and around Srebrenica;[1637] (b) on 12 July 1995, Drago Nikolić was off duty;[1638] and (c) at least from noon on 13 July 1995, Drago Nikolić was IKM Duty Operations Officer when Stojkić arrived.[1639]

(B) Paragraphs 30.6 to 30.12 of the Indictment – From Orahovac to the Pilica Cultural Centre

1222. Paragraphs 30.6 to 30.12 of the Indictment allege Drago Nikolić's involvement in eight crime-sites: (a) Orahovac near Lažete; (b) the Petkovci School; (c) the Dam near Petkovci; (d) the Ročević School; (e) the Kula School near Pilica; (f) Kozluk; (g) Branjevo Military Farm; and (h) Pilica Cultural Centre.

1223. The Defence respectfully posits that, except for his possible limited responsibility for the events in Orahovac, Drago Nikolić does not incur individual criminal responsibility for any of the remaining sites.

(I) Orahovac Near Lažete

[1636] Part EIGHT, "ARGUMENTS RELATED TO COUNT 2:CONSPIRACY TO COMMIT GENOCIDE".
[1637] Part FIVE,C,I,"DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE ATTACK ON SREBRENICA"
[1638] Part FIVE,b,I,(B),(II)," Drago Nikolić Was Unaware of the Alleged Forcible Transfer".
[1639] T.21973.

1224. The Indictment alleges that: (a) *"[i]n the late evening hours of 13 July and during the day of 14 July 1995, DRAGO NIKOLIĆ ... organised and facilitated the transportation of hundreds of Bosnian Muslim males from in and around Bratunac to the Grbavci School in Orahovac, with knowledge that those prisoners were to be collected and summarily executed;* (b) *"[o]n 14 July 1995, ... DRAGO NIKOLIĆ ... [was] present at the Grbavci School in Orahovac;* and (c) *"[i]In the early afternoon of 14 July 1995, Zvornik Brigade personnel under the supervision of DRAGO NIKOLIĆ and Milorad Trbić transported the Bosnian Muslim males from the Grbavci School in Orahovac to a nearby field, where personnel, including members of the 4th Battalion of the Zvornik Brigade, ordered the prisoners off the trucks and summarily executed them with automatic weapons. DRAGO NIKOLIĆ accompanied the trucks to and from the execution field on several occasions".*[1640]

1225. In the submission of the Defence, as established above,[1641] the evidence on the record is not capable of establishing that Drago Nikolić was involved in any manner whatsoever in the events at the Orahovac School in the evening of 13 July 1995.

1226. In addition, the Defence posits that, although the evidence reflects that Drago Nikolić was present at the Orahovac School on 14 July 1995 up until 1400 hours, he departed before the prisoners were loaded onto trucks in order to be executed in the late afternoon hours.

1227. Milorad Birčaković testified that Drago Nikolić was at the Orahovac School at 1100 hours and after approximately an hour Drago Nikolić left.[1642] Thereafter, Stanoje Birčaković saw Drago Nikolić again at the Orahovac School between 1200 hours and 1400 hours.[1643] PW-143 said that he saw Drago Nikolić at the Orahovac School in the afternoon hours conversing to a higher-ranking officer although he did not hear the conversation.[1644] According to Tanić, he saw Drago Nikolić at the Orahovac School

[1640] Indictment,para.30.6.
[1641] Part SIX,B,II:" DRAGO NIKOLIĆ DID NOT HARBOUR THE *MENS REA* FOR CRIMES AGAINST HUMANITY".
[1642] T.11022-T.11023.
[1643] T.10750.
[1644] T.6603.

around 1200 hours although he is not sure about the time.[1645] PW-142 indicated that he saw Drago Nikolić at the Orahovac School between 1200 and 1400 or 1500 hours.[1646]

1228. The evidence indicates that the detainees were loaded onto trucks in the late afternoon hours. PW-110 said that he arrived in Orahovac sometime in the afternoon and that he left before sunset.[1647] PW-142 testified that the detainees were taken out of the School in the late afternoon.[1648] According to 3DPW-10, he left for Orahovac around 1600 or 1700 hours on 14 July 1995 and, upon his arrival, detainees were loaded onto his truck.[1649] However, Orić believed that the executions, lasting one hour or shorter, took place between 1300 and 1400 hours.[1650] Considering that Orić fainted during these events and that he expressed doubts during this testimony,[1651] his estimation about the time-frame of the executions can not be attributed probative value.

1229. In addition, Dragoje Ivanović clearly said that he saw Drago Nikolić at the Orahovac School before the detainees were loaded onto the trucks.[1652]

1230. Consequently, the evidence on the record does not support a conclusion beyond a reasonable doubt that Drago Nikolić was present in Orahovac when the detainees were loaded onto the trucks.

1231. In addition to the fact that Drago Nikolić was not present at the Orahovac School during the execution of the detainees, no weight whatsoever can be attached to the testimonies of PW-143, PW-101 and PW-168 in respect of Drago Nikolić's purported involvement in the executions.

1232. REDACTED [1653]

1233. REDACTED

1234. REDACTED [1654]

1235. REDACTED [1655] [1656]

1236. REDACTED [1657] [1658] [1659]

[1645] T.10334;T.10337.
[1646] T.6451-T.6452.
[1647] T.759-T.760.
[1648] T.6486-T.6487.
[1649] T.25662-T.25664.
[1650] T.958.
[1651] T.958-T.959.
[1652] T.14562.
[1653] REDACTED
[1654] REDACTED
[1655] REDACTED
[1656] REDACTED

1237. In addition, as has been discussed extensively above, absolutely no weight can be attached to the testimony of PW-101 and PW-168 in respect of Drago Nikolić's alleged involvement in the executions in Orahovac.[1660]

1238. The evidence on the record reflects that Drago Nikolić returned to Orahovac, sometime in the evening of 14 July 1995 before 2100 hours, at which time he saw approximately 40 to 50 bodies on the road about 50 metres from the waterpoint.[1661]

1239. At this time, Drago Nikolić could have realized that a crime had been committed although, as developed above,[1662] he did not learn of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica.

1240. In the respectful submission of the Defence, the determination as to the responsibility Drago Nikolić incurs for his role in Orahovac remains within the discretion of the Trial Chamber.

(II) Petkovci School

1241. It is alleged in the Indictment that *"[o]n 14 July, DRAGO NIKOLIĆ was present at the Petkovci School, where he was involved in arranging security for the site and directing and overseeing the VRS and/or MUP personnel guarding the prisoners"*.[1663]

1242. The evidence reflects that Drago Nikolić was present at the crossroads leading up to the Petkovci School between 1600 and 1700 hours on 14 July 1995.

1243. Marko Milošević testified that, around 1600 or 1700 hours on 14 July 1995, he was sent to the Petkovci School in order to convey a message to Beara.[1664] Upon his arrival, he saw Drago Nikolić at the cross-roads leading up to the School and, since Marko Milošević did not know who Beara was, Drago Nikolić pointed Beara out for him.[1665] Upon conveying the message to Beara, Marko Milošević returned to his Battalion Command.[1666] Ostoja Stanišić confirmed that, around 1800 or 1900 hours on 14 July

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[1657] REDACTED
[1658] REDACTED
[1659] REDACTED
[1660] Part FOUR, A and E: "WITNESS PW-168" and "PW-101".
[1661] T.11042-T.11043.
[1662] Part SIX,C,V,II.
[1663] Indictment,para.30.7.
[1664] T.13302-T.13303.
[1665] T.13303.
[1666] T.13303.

1995, Marko Milošević was sent to the Petkovci School to convey a message to Beara and that Marko Milošević also saw Drago Nikolić there.[1667]

1244. In light of the remaining evidence on the record, the estimate provided by Marko Milošević seems more realistic. After his possible presence in Petkovci, Drago Nikolić would have travelled to Orahovac and on to the IKM before arriving at the Zvornik Brigade around 2100 hours. He could not have managed to do all of this if he had left at 1900 hours, as asserted by Ostoja Stanišić.

1245. However, the evidence does not reveal that Drago Nikolić was present during the ill-treatment of the detainees at Petkovci School. The evidence namely appears to reveal the possibility that Drago Nikolić was at the Petkovci School until 1600 or 1700 hours on 14 July 1995, whereas the ill-treatment is alleged to have occurred in the late evening hours or early morning hours of 15 July 1995. The Indictment reveals that the alleged ill-treatment of the detainees would have occurred *"just prior to the surviving prisoners being transported to the Dam near Petkovci"*[1668] which would have happened in the evening of 14 July 1995 and or the early morning hours of 15 July 1995.[1669] In addition, Ostoja Stanišić reported to have heard the first isolated shots on 14 July 1995 after the return of Marko Milošević from the crossroads towards the Petkovci School.[1670] There is no evidence on the record indicating that Drago Nikolić was still present at the crossroads towards the Petkovci School by this point in time.

1246. In addition, there is no evidence whatsoever that Drago Nikolić was involved in any other way in the alleged ill-treatment.

1247. Drago Nikolić, therefore, does not incur individual criminal responsibility on the basis of any of the modes of liability indentified in Article 7(1) of the Statute for the events at Petkovci School on 14/15 July 1995.

(III) Dam Near Petkovci

1248. Paragraph 30.8 of the Indictment alleges that, on or about the evening of 14 July 1995 and the early morning hours of 15 July 1995, *"DRAGO NIKOLIĆ supervised, facilitated and oversaw the executions at the Dam near Petkovci"*.

[1667] T.11604-T.11605.
[1668] Indictment,para.31.4.
[1669] Indictment,para.30.7.
[1670] T.11607.

1249. As developed above, all that the evidence reveals is that Drago Nikolić was at Petkovci School until 1600 or 1700 hours on 14 July 1995.[1671]

1250. Thereafter, Drago Nikolić is seen in Orahovac, upon which he travels to the IKM and then back to Standard Barracks where he arrives around 2100 hours, according to Milorad Birčaković.[1672] REDACTED [1673]

1251. According to Mićo Gavrić, he talked with Drago Nikolić and Duško Nikolić around 0830 hours on 15 July 1995 in the reception room of the Zvornik Brigade command.[1674] Todor Gavrić confirmed that he saw Mićo Gavrić conversing with Drago Nikolić and Duško Nikolić between 0800 and 0900 hours on 15 July 1995 at the Zvornik Brigade command.[1675] After Mićo Gavrić left, Todor Gavrić approached Drago Nikolić and Duško Nikolić asking them for a cigarette and conversed with them.[1676] Moreover, Dušica Sikimić testified that she telephoned Drago Nikolić at Standard Barracks around 1000 hours on 15 July 1995 asking for information about her husband, Dušan Nikolić.[1677] There is no other evidence indicating where Drago Nikolić could or could not have been before commencing his shift as Brigade Duty Operations Officer at 1145 hours at the latest on 15 July 1995.

1252. The evidence therefore clearly establishes that Drago Nikolić returned to Standard Barracks around 2100 hours on 14 July 1995 and that he remained there until at least 1000 hours on 15 July 1995. There is thus no evidence indicating that Drago Nikolić was present at the Dam near Petkovci on the evening of 14 July 1995 and the early morning hours of 15 July 1995.

1253. In addition, there is no other evidence indicating that Drago Nikolić was involved in any other manner in supervising, facilitating and overseeing the executions at the Dam near Petkovci.

1254. The evidence therefore does not support a finding that Drago Nikolić incurs any individual criminal responsibility for the events at the Dam near Petkovci on 14 and 15 July 1995.

[1671] Part SIX, C,I,(B),(III): "Dam Near Petkovci".
[1672] T.11039-T.11044.
[1673] REDACTED
[1674] T.26482-T.26483.
[1675] T.26452-T.26453.
[1676] T.26453.
[1677] T.25963-T.25964;T.25969.

(IV) Ročević School

1255. In respect of the events on 14/15 July 1995 in Ročević and Kozluk, it is alleged that Drago Nikolić: (a) was *"active in efforts to assemble an execution squad to murder the prisoners"*; and (b) *"travelled to the Ročević School to supervise the VRS personnel guarding the prisoners."*[1678]

1256. However, these allegations are not supported by the evidence on the record and must be discarded.

1257. Firstly, it has been demonstrated above that no weight whatsoever can be attached to the testimony of Srećo Aćimović.[1679] There is absolutely no truth in his assertions concerning the alleged acts and conduct of Drago Nikolić in respect of the detainees held at Ročević School on 14-15 July 1995.

1258. Secondly, it has already been established that, as of approximately 2100 hours on 14 July 1995, Drago Nikolić returned to the Zvornik Brigade command where he remained at least until about 1000 hours on 15 July 1995.[1680] Furthermore, the evidence establishes that, as of 1145 hours at the latest on 15 July 1995, Drago Nikolić assumed his shift as Brigade Duty Operations Officer for the remainder of the day on 15 July 1995 until the morning of 16 July 1995.[1681]

1259. Thirdly, there are no entries made by Drago Nikolić during his shift as Zvornik Brigade Duty Operations Officer that indicate any kind of involvement in the events at the Ročević School and/or Kozluk, where the detainees would have been executed.[1682]

1260. Fourthly, several witnesses testified that they did not see Drago Nikolić during the events at the Ročević School on 14/15 July 1995. REDACTED [1683] Moreover, Milorad Birčaković testified that he drove Jasikovac to the Ročević School on 15 July 1995 and he does not believe that he saw anyone else there,[1684] implying that Drago Nikolić was not present. Even Srećo Aćimović admitted straightforwardly that he did not meet Drago Nikolić at the Ročević School on 15 July 1995.[1685]

[1678] Indictment,para.30.8.1.
[1679] Part FOUR, F: "SRETEN AĆIMOVIĆ".
[1680] Part SIX, C,I,(B),(III): "Dam Near Petkovci".
[1681] P00377,p.140.
[1682] P00377,p.140-p.144.
[1683] REDACTED
[1684] T.11136-T.11137.
[1685] T.12957-T.12958.

1261. There is thus no evidence on the record to which any weight can be attached concerning Drago Nikolić's alleged involvement in the crimes committed in Ročević and/or Kozluk.

(V) Kula School Near Pilica

1262. It is the Prosecution's case that Drago Nikolić would have been present at Kula School on or about 14 and 15 July 1995 where he was purportedly involved in arranging security for the site and directing and overseeing the Zvornik Brigade military police personnel guarding the prisoners.[1686]

1263. However, on the basis of the evidence on the record, it is not open to the Trial Chamber to conclude beyond a reasonable doubt that Drago Nikolić was present at the Kula School at all *nor* that he was involved in the activities alleged by the Prosecution.

1264. Firstly, as indicated above, all the evidence establishes concerning Drago Nikolić's whereabouts on 14 July 1995, is that he would have been: (a) in Orahovac before the executions commenced; (b) at the cross-roads leading to Petkovci school from 1600 to 1700 hours; (c) again in Orahovac before driving up to the IKM; and (d) in the Zvornik Brigade Command as of approximately 2100 hours where he remained that night until at least 1000 hours on 15 July 1995.[1687] There is thus no evidence on the record establishing Drago Nikolić's presence at the Kula School on 14 July 1995.

1265. Secondly, as argued above, the telephone conversation between Slavko Perić and Drago Nikolić on 14 July 1995 merely concerned a suggestion on the part of Drago Nikolić for Slavko Perić to go to the Kula School to avoid problems with the local citizenry; it was not an order.[1688]

1266. Thirdly, the evidence establishes that Drago Nikolić did not issue any orders for crimes to be committed at the Kula School *nor* that he could have even influenced the situation at the Kula School. Slavko Perić testified that, during his visit to the Zvornik Brigade Command on 15 July 1995, he did not even go and speak to Drago Nikolić because he knew that Drago Nikolić could not do anything about the detainees held there.[1689]

[1686] Indictment,para.30.9.
[1687] Part SIX, C,I,(B),(I)-(IV): "Orahovac Near Lažete", "Petkovci School", "Dam Near Petkovci", "Ročević School".
[1688] Part SIX, B: "THE PROSECUTION DID NOT PROVE THE *MENS REA* STANDARDS REQUIRED"
[1689] T.11442.

Moreover, Slavko Perić explicitly said that neither he *nor* his battalion received information or an order from Drago Nikolić for detainees to be killed.[1690]

1267. Fourthly, testimonial evidence indicates that, on 15 July 1995, Drago Nikolić did not travel to the Kula School. Milorad Birčaković unmistakably said that Drago Nikolić was not with him in Pilica on 15 July 1995.[1691] Slavko Perić testified that, when he was in and around Pilica from 14 to 16 July 1995, he did not see Drago Nikolić in or around Pilica *nor* did he talk to Drago Nikolić except for a telephone conversation on 14 July 1995. Rajko Babić, who spent all his time in the Kula School on 14 and 15 July 1995,[1692] did not see Drago Nikolić there on those days, even though he knew who Drago Nikolić was at the relevant time.[1693]

1268. Fifthly, the evidence establishes, as argued above, that Drago Nikolić was at the Zvornik Brigade until at least 1000 hours on 15 July 1995.[1694]

1269. Finally, as demonstrated above, as of 1145 at the latest on 15 July 1995 until the morning of 16 July 1995, Drago Nikolić was Brigade Duty Operations Officer.[1695] There is a complete lack of evidence that Drago Nikolić would have, in violation of the rules, interrupted his shift as Duty Operations Officer to travel to the Kula School on this day. In addition, none of the entries made by Drago Nikolić during his shift point towards any type of involvement in or knowledge of the events in Kula School on 15 July 1995.[1696]

(VI) Kozluk

1270. As a preliminary matter, the Indictment alleges that the detainees from Ročević School would have been executed in Kozluk.[1697] The relevant paragraphs in the Indictment thus refer to one and the same alleged crime.

1271. According to the Indictment, on 15 and 16 July 1995, Drago Nikolić would have: (a) assisted in organising, coordinating and facilitating the detention, transportation,

[1690] T.11469.
[1691] T.11136-T.11137.
[1692] T.10248.
[1693] T.10250.
[1694] Part SIX, C,I,(B),(III): "Dam Near Petkovci.
[1695] Part SIX, C,I,(B),(I)-(IV): "Orahovac Near Lažete", "Petkovci School", "Dam Near Petkovci", "Ročević School"
[1696] P00377,p.140-p.144.
[1697] Indictment,paras.30.8.1. and 30.10.

summary execution and burial of the Muslim victims near Kozluk; and (b) supervised, facilitated and overseen the Kozluk executions.[1698]

1272. The evidence on the record, however, is incapable of supporting a conclusion beyond a reasonable doubt that Drago Nikolić was involved in any manner whatsoever in the events in Kozluk.

1273. Firstly, at the outset, it must be noted that it is the Prosecution's case that the victims murdered in Kozluk were held at Ročević School on 14/15 July 1995.[1699] It has been demonstrated above that, on these dates, Drago Nikolić was neither involved in efforts to assemble an execution squad to murder the detainees held there *nor* that he travelled to the Ročević School.[1700]

1274. Secondly, the evidence reveals that, at the time the detainees were driven off from the Ročević School to Kozluk, Drago Nikolić could not have been in those places. According to Jović, the transportation of the detainees from the Ročević School to Kozluk commenced approximately around 1400 or 1500 hours and it was still ongoing when he left around 1800 or 1900 hours.[1701] Ivanović testified that the transportation of the detainees from the Ročević School to Kozluk had been completed by 1500.[1702] However, Ivanović added that he returned to Malešić immediately after the transportation had been completed, where he arrived when it was getting dark.[1703] Considering that darkness sets in approximately between 2200 and 2300 hours at this time of year in this part of the world,[1704] the timing of the transportation must be considered to have been more accurately described by Jović.

1275. However, as has been shown above, Drago Nikolić: (a) returned to the Zvornik Brigade Command around 2100 hours on 14 July 1995; (b) was present at the Zvornik Brigade Command until at least 1000 hours on 15 July 1995; and (c) commenced his duty as Zvornik Brigade Duty Operations Officer at 1145 hours on 15 July 1995 at the latest, which lasted until the morning of 16 July 1995.[1705] There is absolutely no evidence on

[1698] Indictment,para.30.10.
[1699] Indictment,para.30.8.1.
[1700] Part SIX, C,I,(B),(IV): "Ročević School".
[1701] T.18063.
[1702] T.18179.
[1703] T.18179-T.18180.
[1704] T.33984.
[1705] Part SIX, ,I,(B),(I)-(IV): "Orahovac Near Lažete", "Petkovci School", "Dam Near Petkovci", "Ročević School".

the record whatsoever that Drago Nikolić would have left, in this period, to the Ročević School and/or Kozluk.

1276. Thirdly, Damnjan Lazarević, who knows who Drago Nikolić is, unequivocally stated that he did not see Drago Nikolić in Kozluk from 15 to 17 July 1995.[1706]

1277. Finally, the entries made by Drago Nikolić in the Duty Operations Officer Notebook during his shift,[1707] do not indicate any type of involvement in or knowledge of the events in Ročević School and/or Kozluk on 15 July 1995.

(VII) Branjevo Military Farm

1278. It is alleged that Drago Nikolić would have: (a) supervised, facilitated and overseen the Branjevo Military Farm executions on 16 July 1995; and (b) assisted in the organising, coordinating and facilitating the detention, transportation, summary execution and burial of Muslim victims murdered at the Branjevo military Farm on 16 and 17 July 1995.[1708]

1279. However, the evidence on the record does not allow for a conclusion beyond a reasonable doubt that Drago Nikolić incurs individual criminal responsibility on the basis of these allegations.

1280. Firstly, it is noteworthy that the Prosecution alleges that the victims who would have been executed at Branjevo Military Farm on 16 July 1995 were transported from the Kula School near Pilica where they would have been held on 14 and 15 July 1995. However, as argued above, it has not been established beyond a reasonable doubt that Drago Nikolić was involved in any manner whatsoever in the events in Kula School on 14 and 15 July 1995.[1709]

1281. Secondly, at the time the executions would have been carried out, Drago Nikolić could not have been present at Branjevo Military Farm as he was: (a) Brigade Duty Operations Officer until the early morning of 16 July 1995; (b) he attended a family lunch until the afternoon of 16 July 1995; and (c) he was involved in the confirmation of the death of his cousin killed on 16 July 1995 and the organization of the funeral until the evening of 17 July 1995.

[1706] T.14507.
[1707] P00377,p.140-p.144.
[1708] Indictment,para.30.11.
[1709] Part SIX, C,I,(B),(VI), "Kozluk".

1282. Erdemović estimated that the executions at the Branjevo Military Farm lasted from approximately 1000 hours until 1500 or 1600 hours, although he could not tell exactly.[1710]

1283. However, the evidence establishes that, on 16 July 1995, Drago Nikolić was Brigade Duty Operations Officer until at least 0635 hours.[1711]

1284. The evidence reveals furthermore that, at some point in time on 16 July 1995, Drago Nikolić came home for lunch on the occasion of his wife's birthday where he stayed until mid-afternoon, as testified to by Vida Vasić.[1712] Mara Milošević said that she telephoned Drago Nikolić's home around 1300 or 1400 hours on 16 July 1995 and that his wife told her that Drago Nikolić had just left to go to the Zvornik Brigade Command.[1713]

1285. Mara Milošević said that she went to the hospital in the early afternoon of 16 July 1995, where she found out that Drago Nikolić was seen at the hospital because a relative had been killed.[1714] Dušica Sikimić confirmed that Drago Nikolić told her that he had been to the hospital on 16 July 1995.[1715] Milisav Nikolić telephoned Drago Nikolić at the Zvornik Brigade Command later in the afternoon of 16 July 1995, when Drago Nikolić informed him that Duško Nikolić, their cousin, had been killed.[1716]

1286. Dragan Milošević said that he went to the Zvornik Brigade Command between 1500 and 1600 hours on 16 July 1995, where he found Drago Nikolić with Mića Petković and the three of them went to Mara Milošević to tell her about that death of Duško Nikolić, her brother.[1717] Milisav Nikolić testified that, when he went to Mara Milošević's place on 16 July 1995, Drago Nikolić was already there and that Drago Nikolić took the complete organization of the funeral upon him.[1718]

1287. Indeed, Dragan Milošević confirmed that Drago Nikolić organized the funeral and that he was with him from the afternoon of 16 July 1995 until the late evening hours of 17 July 1995.[1719] This was confirmed by Mara Milošević and Dušica Sikimić.[1720]

[1710] T.10972.
[1711] P00377,p.144.
[1712] T.25933;T.25959.
[1713] T.25953;T.25934.
[1714] T.25953-T.25954.
[1715] T.25967.
[1716] T.25915;3D00462.
[1717] T.25940-T.25941;T.25945;T.25954;T.25965-T.25966.
[1718] T.25916.
[1719] T.25940-T.25941.

1288. Thirdly, Damnjan Lazarević, who knows who Drago Nikolić from the Zvornik Brigade, testified that he did not see Drago Nikolić in Branjevo from 15 to 17 July 1995.[1721]

1289. Finally, the entries made by Drago Nikolić during his shift as Brigade Duty Operations Officer from 15 to 16 July 1995 do not mention the events at Branjevo Military Farm at all, let alone the executions.[1722] In addition, the entries made by the officers that took up the Brigade Duty Operations Officer shift after Drago Nikolić do not mention Drago Nikolić in any manner whatsoever on 16 and 17 July 1995.[1723]

(VIII) Pilica Cultural Centre

1290. The Prosecution claims, furthermore, that Drago Nikolić would have: (a) supervised, facilitated and overseen the Pilica Cultural Centre executions on 16 July 1995; and (b) assisted in the organising, coordinating and facilitating the detention, transportation, summary execution and burial of Muslim victims murdered at the Pilica Cultural Centre on 16 and 17 July 1995.[1724]

1291. The events in the Pilica Cultural Centre would have occurred on the same days as the events at Branjevo Military Farm, *i.e.* 16 and 17 July 1995. Erdemović testified that he returned from the Branjevo Military Farm to Pilica maybe around 1500 or 1600 hours on 16 July 1995.[1725] He added that, from the coffee bar across the Pilica Cultural Centre, firing and explosions could be heard coming from the Pilica Cultural Centre.[1726]

1292. For the same reasons set out above in relation to the events at Branjevo Military Farm,[1727] it follows that Drago Nikolić was not involved in any manner whatsoever in the events in the Pilica Cultural Centre on 16 and 17 July 1995.

1293. In summary, Drago Nikolić: (a) was not involved in the events in Kula School on 14 and 15 July 1995;[1728] (b) was at home until the afternoon of 16 July 1995;[1729] (c) was tied up in the identification of his cousin and the organization of his funeral from the

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[1720] T.25954;T.25966.
[1721] T.14507.
[1722] P00377,p.140-p.144.
[1723] P00377,p.144-p.159.
[1724] Indictment,para.30.12.
[1725] T.10983.
[1726] T.10983-T.10984.
[1727] Part SIX, C,I,(B),(VII):" Branjevo Farm"
[1728] Part SIX, C,I,(B),(V): "Kula School Near Pilica").
[1729] Part SIX, C,I,(B),(VII):" Branjevo Farm".

afternoon of 16 July 1995 until the evening of 17 July 1995;[1730] and (d) there are no entries in the Brigade Duty Operations Officer's Notebook concerning his involvement in the events at the Pilica Cultural Centre.[1731]

(C) Paragraph 30.13 of the Indictment – Nezuk

1294. The Indictment does not allege Drago Nikolić's involvement in the purported execution of 8 Bosnian Muslim males from Srebrenica near Nezuk on 19 July 1995.[1732]

(D) Paragraph 30.14 of the Indictment – Branjevo Farm Survivors

1295. The Prosecution maintains that the alleged summary execution of four survivors from Branjevo Military Farm by Zvornik Brigade personnel, after interrogation on 22 July 1995 and detention for several days, was carried out *"with the knowledge and assistance of Drago Nikolić"*.[1733]

1296. However, the evidence adduced on the record does not establish beyond a reasonable doubt the involvement of Drago Nikolić in the alleged execution of these four men.

1297. Firstly, Drago Nikolić was not involved in the interrogation of the four Muslim men at all. Three of the four Muslim men, were interviewed by Nebojša Jeremić and one of them was interviewed by Čedo Jović[1734]

1298. Drago Nikolić was only minimally involved in the interrogation of father and son Đokić, both of whom were VRS soldiers, who would have helped the four Muslim men escape. Drago Nikolić would have slapped Đokić jr.[1735] However, Nebojša Jeremić testified that he had never seen Drago Nikolić slap anyone before and that Drago Nikolić could have been stressed out because of the high workload and the loss of a close relative, Dušan Nikolić.[1736] In addition, Nebojša Jeremić stated that Drago Nikolić only stayed shortly when Đokić sr. was brought in and that he left soon thereafter.[1737] In

[1730] Part SIX, C,I,(B),(VII):" Branjevo Farm".
[1731] P00377,p.144-p.159.
[1732] Indictment,para.30.13.
[1733] Indictment,para.30.14.
[1734] T.10430-T.10433;P00389;P00390;P00391;P00392.
[1735] T.10427-T.10428.
[1736] T.10454-T.10455.
[1737] T.10428.

any event, the statements from father and son Đokić were in any event taken by Goran Bogdanović[1738] and not by Drago Nikolić.

1299. The rationale for Drago Nikolić's limited involvement in the interrogation of father and son Đokić is clear. Three out of the four Muslim men were ABiH soldiers[1739] and the assistance provided to them by father and son Đokić to pass through VRS lines presented grave security threats. Drago Nikolić, as Security Organ, was responsible for the prevention of enemy activity against the Zvornik Brigade.[1740] It corroborates furthermore the Defence's position that Drago Nikolić was only involved in security matters and that crime prevention, including the collection of information, remained within the competencies of the Military Police, as explained by Defence Security Expert Vuga.[1741]

1300. Secondly, there is absolutely no evidence as to the alleged involvement of Drago Nikolić in alleged execution of the four Muslim men. REDACTED[1742] [1743]

1301. The Prosecution thus failed to prove beyond a reasonable doubt that Drago Nikolić would have known of or assisted in the purported execution of the four Muslim men.

(E) Paragraph 30.15 of the Indictment - Injured Muslims from Milići Hospital

1302. In respect of the alleged removal and execution of 11 wounded Muslim detainees from Milići Hospital on or about 20 July 1995, the Prosecution asserts that Drago Nikolić would have: (a) known of and assisted in their removal and execution; (b) received an order from Vujadin Popović to remove and execute them and then they would have been removed and executed by VRS members; and (c) supervised, facilitated and overseen their removal and execution.[1744]

1303. The evidence on the record, however, does not support the Prosecution's contentions in respect of Drago Nikolić's alleged role in the removal and execution of these men.

1304. REDACTED [1745] [1746]

[1738] T.10429-T.10430;P00393;P00394.
[1739] T.10452-T.10453;P00389;P00390;P00391.
[1740] 3D00396,para.4.3.1.
[1741] 3D00396,para.2.138.
[1742] REDACTED
[1743] REDACTED
[1744] Indictment,para.30.15.
[1745] REDACTED
[1746] REDACTED

1305. REDACTED

1306. Secondly, Pandurević, who would have been under the impression that these men were to be exchanged and who claims not to have ordered their execution,[1747] never mentioned Drago Nikolić in any manner whatsoever in relation to the events concerning these men.[1748]

1307. REDACTED [1749]

(F) Paragraphs 30.15.1 to 30.16 of the Indictment – Snagovo and Trnovo

1308. Astoundingly, the Indictment fails to allege the involvement of any of the Co-Accused, including Drago Nikolić, in the purported executions of: (a) approximately six Bosnian Muslim men separated from the column of men retreating from Srebrenica by MUP forces near Snagovo on or about 22 July 1995;[1750] and (b) six Muslims from Srebrenica by the Scorpions working with the VRS and/or RS MUP near Trnovo sometime in July or August 1995.[1751]

(G) Paragraphs 31.1 to 31.3 of the Indictment – Potočari, Bratunac Town and Kravica Supermarket

1309. The Prosecution does not allege that Drago Nikolić was involved in the purported opportunistic killings of: (a) 25 to 26 Bosnian Muslim men in Potočari on 12 and 13 July 1995;[1752] (b) numerous Bosnian Muslim men in Bratunac town on 12 and 13 July 1995;[1753] and (c) several Bosnian Muslim men near Kravica Supermarket during the night between 13 and 14 July 1995.[1754]

(H) Paragraph 31.4 of the Indictment – Petkovci School

1310. The Indictment alleges that Drago Nikolić would have supervised and coordinated the detention of the Bosnian Muslim men at the Petkovci School on 14 and 15 July 1995 as well as that many Bosnian Muslim men would have been beat, abused and killed by

[1747] T.31169-T.31170.
[1748] T.31169-T.31170;T.32260-T.32268.
[1749] REDACTED
[1750] Indictment,para.30.15.1.
[1751] Indictment,para.30.16.
[1752] Indictment,para.31.1.
[1753] Indictment,para.31.2.
[1754] Indictment,para.31.3.

VRS and/or MUP personnel, just prior to the surviving detainees being transported to the Dam near Petkovci for summary execution.[1755]

1311. However, as established above, the evidence merely reflects that Drago Nikolić would have been present at the crossroads leading towards the Petkovci School between 1600 and 1700 hours on 14 July 1995 and that, thereafter, he is not in Petkovci anymore *nor* is he involved in any manner whatsoever in the events in Petkovci School on 14 July 1995.[1756]

1312. There is thus absolutely no evidence establishing beyond a reasonable doubt that Drago Nikolić would have been involved supervising and coordinating the detention of the Bosnian Muslim men at the Petkovci School *nor* that he would have been present during, or involved in, the beating and abusing and killing of Bosnian Muslim men at the Petkovci School on 14 and 15 July 1995.

(I) Paragraph 32 of the Indictment – Reburial of Victims

1313. The Prosecution alleges that the reburial operation in the Zvornik and Bratunac Brigade zones of responsibility was conducted by the VRS and MUP personnel from about 1 August 1995 through about 1 November 1995 and that Drago Nikolić would have supervised, facilitated and overseen all aspects of the reburial operation.[1757]

1314. However, the Defence has argued above that the purpose for including the alleged reburial operation is unclear as it: (a) is not a component of the alleged genocide; (b) is not a JCE of the third category; (c) is not charged as a crime in and of itself; and (d) is not charged as aiding and abetting.[1758]

1315. Nonetheless, if the Trial Chamber would not find these errors to be fatal to the Prosecution's case, the evidence clearly establishes that Drago Nikolić was not involved in any manner whatsoever in the alleged reburial operation.

1316. Firstly, Drago Nikolić was not present in the Zvornik Brigade area or in the Bratunac Brigade area during the time the reburial operation would have been carried out.

[1755] Indictment,para.31.4.
[1756] Part SIX, C,I,(B),(II)-(III): "Petkovci School", "Dam Near Petkovci"
[1757] Indictment,para.32.
[1758] Part Two,B,IX.

1317. REDACTED[1759] Damjan Lazarević, a soldier directly involved in the reburial alleged reburial operation, stated that the reburial was conducted mostly by night and that it lasted no longer than six days in the area of the Zvornik Brigade.[1760] The alleged reburial operation thus lasted from about 14 September 1995 until about 20 September 1995.

1318. However, at this time, Drago Nikolić was either off duty or had left to the Krajina with another unit. The attendance roster for officers of the Zvornik Brigade Command for the month of September 1995 indicates that Drago Nikolić was off duty on 13, 20 and 27 September 1995.[1761] It established, in addition, that Drago Nikolić was on the field from 14 to 19 September 1995.[1762]

1319. This is evidenced in the order from the Drina Corps dated 9 September 1995, ordering the establishment of a new Drina Brigade in the zone of responsibility of the 2nd Krajina Corps.[1763] In this respect, the order specifically reads *"the intelligence will be in the hands of second-lieutenant Drago Nikolić from the 1st Zvornik Brigade"*.[1764] The order provides for the change-over of units and the take-over of the position to be carried out on the night between the 14 and 15 September 1995.[1765]

1320. Indeed, Miodrag Dragutinović testified that the unit arrived in the village of Ramići and took up the positions in the morning hours of 15 September 1995.[1766] Dragutinović further confirmed seeing Drago Nikolić on the ground in the Krajina.[1767] In addition, Pandurević confirmed that, if Drago Nikolić's name was on the list of people that were to depart, he would have been in the Krajina.[1768]

1321. In addition, the fact that the order was fully implemented is further demonstrated in the Duty Operations Officer notebook, in which the entry for 14 September 1995 reads *"[r]eplacement units, 2nd Krajina Corps, departed at 11.20 from the perimeter"*.[1769]

[1759] REDACTED
[1760] T.14510.
[1761] 7DP02925,p.3;T.31357-T.31358.
[1762] 7DP02925,p.3;T.31357-T.31358.
[1763] 3D00165.
[1764] 3D00165,p.1.
[1765] 3D00165,p.4.
[1766] T.12870.
[1767] T.12870.
[1768] T.31355-T.31360.
[1769] 3D00217.

The Barracks Duty Officer Logbook indicates that around 0200 hours in the night of 18-19 September 1995, the unit returned.[1770]

1322. Secondly, the evidence on the record confirms that Drago Nikolić was not present during the purported reburial operation. Lazarević stated that, in the period of the reburial operation would have been carried out, he never saw Drago Nikolić at reburial or coordination meetings or any other activity related to reburial.[1771] In fact, Lazarević never even saw Drago Nikolić in the Zvornik Brigade at the time,[1772] indicating that the alleged reburial operation was most likely carried out during Drago Nikolić's absence.

1323. Thirdly, the evidence reflects that Milorad Trbić would have been responsible for the reburial operation. Lazarević unequivocally testified that Milorad Trbić coordinated the reburial operation and was responsible for all activities related to reburial.[1773] In addition, Lazarević stated that Trbić was his superior with regard to the reburial operation and that Trbić would call him to inform about the progress of the operation.[1774]

1324. Finally, the two telegrams received by the Zvornik Brigade regarding the transport of fuel were not addressed to Drago Nikolić *nor* was he involved in these matters in any manner whatsoever. These two telegrams mention the transport of 5,000 litres of D2 to Milorad Trbić but omit any reference whatsoever to Drago Nikolić.[1775] It is highly significant that Milorad Trbić, as a low-ranking officer, is specifically mentioned in a telegram coming from Ratko Mladić, the VRS Commander. This is, in and of itself, sufficient to delink Drago Nikolić from what Milorad Trbić was doing as he is not mentioned in any way.

1325. From the reference to these two telegrams in the entry in the Duty Operations Officer Notebook on 14 September 1995, it follows that they were in fact sent to Pantić, the chief of transport.[1776] Be that as it may, there is again no mention of Drago Nikolić's involvement.

[1770] P00377,p.74;T.31357-T.31358.
[1771] T.14508.
[1772] T.14508.
[1773] T.14508.
[1774] T.14508.
[1775] P00041;P00042.
[1776] 3D00217.

II. ACTS ALLEGEDLY COMMITTED BY DRAGO NIKOLIĆ IN FURTHERANCE OF AND WITH FULL KNOWLEDGE OF THE PLAN TO SUMMARILY EXECUTE THE ABLE- BODIED MEN FROM SREBRENICA

1326. Besides the specific acts and conduct of Drago Nikolić described above, the Prosecution alleges that, in general, Drago Nikolić: (a) supervised, facilitated and oversaw the transportation of Muslim men from Bratunac to detention areas in the Zvornik area … and oversaw and supervised their summary execution; and (b) failed to ensure the safety and welfare of the Bosnian Muslim detainees in the Zvornik Brigade zone of responsibility.[1777]

1327. However, on the basis of the arguments proffered above, it can not be concluded that Drago Nikolić's acts and conduct indeed amounted to the general role ascribed to him by the Prosecution.

1328. Firstly, in respect of Drago Nikolić's purported role in the transportation and the execution of the Bosnian Muslim men, the discussion above demonstrates that, except for his possible limited involvement in the events in Orahovac, it can not be concluded beyond a reasonable doubt that Drago Nikolić was involved in any manner whatsoever.

1329. Indeed, as demonstrated above, Drago Nikolić can not incur individual criminal responsibility for the alleged forcible transfer operation.[1778] Moreover, the evidence reflects that, in respect of the moving of the detainees from one detention facility to another, Drago Nikolić was merely involved to a limited extent, operating under the belief that the detainees would be exchanged.[1779]

1330. Similarly, the evidence establishes that, besides possibly incurring limited responsibility for the events in Orahovac on 14 July 1995, Drago Nikolić was either not present or not involved in the remaining events underlying the charges in the Indictment.[1780]

1331. Therefore, the arguments proffered above clearly demonstrate that Drago Nikolić's acts and conduct certainly may not be qualified as supervising, facilitating and overseeing their transportation and/or execution of the Muslim men. It appears that the Prosecution is seeking to trump up Drago Nikolić's role by assigning wide-ranging powers and responsibilities to him, in contravention of the evidence of the record.

[1777] Indictment,para.42.
[1778] Part FIVE"ARGUMENTS RELATED TO THE FIRST ALLEGED JOINT CRIMINAL ENTERPRISE AND COUNTS 7 AND 8 OF THE INDICTMENT"
[1779] Part SIX,C-D,I.
[1780] Part SIX,C-D,I.

1332. Secondly, concerning Drago Nikolić's purported failure to discharge his legal duty to handle all the Bosnian Muslim detainees in the Zvornik Brigade zone of responsibility and to ensure their safety and welfare, it has been established above that Drago Nikolić, as Security Organ, did not have any responsibilities whatsoever towards "POW's"[1781] – even though this term can not find application in a non-international armed conflicts.

D. CONSIDERATIONS SHOULD THE TRIAL CHAMBER FIND DRAGO NIKOLIĆ TO BE A JCE MEMBER

1333. In the alternative, despite the arguments proffered above, should the Trial Chamber deem that Drago Nikolić was a member of the JCE to murder all the able-bodied Muslim men from Srebrenica, the Defence respectfully submits that the following considerations must be borne in mind.

1334. Firstly, the limited contribution of Drago Nikolić would have made to the JCE is extremely important for sentencing purposes. The Appeals Chamber ruled that disparity between the extent of contributions made by different JCE members must be repaired at the sentencing stage.[1782]

1335. As indicated several times above, Drago Nikolić's alleged contribution to the JCE only started on the evening of 13 July 1995 or 14 July 1995 although the JCE would have been developed and set in motion on 11 and 12 July 1995. This entails that Drago Nikolić was not one of those alleged to have developed the common plan, design or purpose and that he only bought on the JCE at a later stage.

1336. Moreover, Drago Nikolić's junior rank, as 2Lt and Security Organ, at the time of the events would have necessarily prevented him from playing a significant role in the advancement of the JCE in comparison with the alleged JCE members of a higher rank. Drago Nikolić contribution to the JCE would have consisted of following orders, which significantly diminishes his responsibility. In addition, Drago Nikolić, as a junior officer, would have become caught up in the JCE during dramatic events in July 1995, which completely engulfed him.

1337. Also, the evidence indicates that, except for the events in Orahovac on 14 July 1995, Drago Nikolić does not incur individual criminal responsibility for the remaining

[1781] Part THREE, Part Three,B,IV: "TOWARDS PRISONERS OF WAR".
[1782] Brđanin,AJ,para.431.

instances of mass killings alleged to be part of the JCE.[1783] The Prosecution's thesis concerning Drago Nikolić's supposed across-the-board supportive role in the JCE must certainly be rejected.[1784]

1338. Furthermore, besides the fact that Drago Nikolić would have subsequently entered the JCE, the evidence establishes that he would have left the JCE before the completion of the mass executions. It has been demonstrated above that Drago Nikolić was tied up in the organisation of his cousin's funeral from the afternoon of 16 July 1995 until the evening of 17 July 1995.[1785] Thus, while the mass-executions were allegedly still ongoing, Drago Nikolić could not have committed any acts that could have been qualified as a furtherance of the JCE.

1339. In conclusion, for sentencing purposes, the alleged contribution of Drago Nikolić must be considered significantly lower than the contributions of those who would have been JCE members throughout the alleged mass-killings and who whose contributions would have been more far-reaching and influential.

1340. Secondly, the alleged opportunistic killings committed in Potočari, Bratunac and Kravica Supermarket on 12 and 13 July 1995 could not have been foreseeable to him as they were committed prior to the time Drago Nikolić would have purportedly became a JCE member on 13 or 14 July 1995. Thus, even if the Trial Chamber would consider Drago Nikolić a member of the JCE, he does not incur responsibility for these three instances of opportunistic killings.

1341. Finally, the purported reburial operation was not a foreseeable at the time the executions would have been carried out, according to the Blagojević Trial Chamber.[1786] Therefore, even if Drago Nikolić would have been a member of the JCE, he does not incur responsibility for the alleged reburial operation pursuant to a JCE of a third category.

E. CONCLUSIONS REGARDING THE ALLEGED ROLE AND ACTIONS OF DRAGO NIKOLIĆ IN FURTHERANCE OF THE JOINT CRIMINAL ENTERPRISE TO MURDER THE ABLE-BODIED MUSLIM MEN FROM SREBRENICA – PARAGRAPH 42 OF THE INDICTMENT

[1783] Part SIX, C,I:" THE ALLEGED SPECIFIC INVOLVEMENT OF DRAGO NIKOLIĆ".
[1784] Part SIX, C,II:"ACTS ALLEGEDLY COMMITTED BY DRAGO NIKOLIĆ IN FURTHERANCE OF AND WITH FULL KNOWLEDGE OF THE PLAN TO SUMMARILY EXECUTE THE ABLE- BODIED MEN FROM SREBRENICA".
[1785] Part SIX, C, ,(B),(VIII):" Pilica Cultural Centre".
[1786] Blagojević,TJ,para.730.

1342. In the respectful submission of the Defence, it can not be concluded beyond a reasonable doubt, on the basis of the evidence on the record, that Drago Nikolić was a member of the purported JCE to kill all the able-bodied men from Srebrenica.

1343. Nonetheless, the evidence seems to indicate that Drago Nikolić possibly incurs limited responsibility for the events in Orahovac on 14 July 1995. The Defence respectfully posits that it remains within the discretion of the Trial Chamber to determine which mode of liability corresponds to Drago Nikolić limited individual criminal responsibility.

PART SEVEN - ARGUMENTS RELATED TO COUNT 1: GENOCIDE

1344. Although it can not be denied that many inhabitants of Srebrenica died and/or were displaced in 1995, this does not amount to genocide because the Prosecution failed to prove either that: (a) there existed a State policy to commit genocide in Srebrenica; and/or (b) any one involved in these events possessed the required intent to destroy, in whole or in part, the Bosnian Muslims group, as such.

1345. The fact that three out of the four components of the alleged genocide – the alleged opportunistic killings, the alleged reburial operation and the alleged destruction of women and children through forcible transfer and deportation – necessarily lack one or more of the essential elements of the crime of genocide, constitutes further confirmation of the proposition that no genocide was committed in Srebrenica in 1995.

1346. Furthermore, the fact that two of the Accused - allegedly involved in two of the four components the genocide is supposedly comprised of - are not charged with genocide, further reinforces the Defence's submission that there was no genocide in Srebrenica in 1995.

1347. In any event, even if the Trial Chamber were to conclude that the crime of genocide was committed in Srebrenica in 1995, the evidence establishes that Drago Nikolić did not commit genocide *nor* that he aided and abetted genocide as he: (a) did not entertain the required intent to commit genocide; (b) was not aware of the alleged genocidal intent on the part of other who would have been involved in the events in Srebrenica in 1995; and (c) did not know that his actions contributed to the commission of genocide.

1348. Consequently, Drago Nikolić can not incur individual criminal responsibility for Count 1 of the Indictment – genocide.

A. THE PROSECUTION'S CASE OR THE ALLEGED GENOCIDE

1349. As argued above, it is the Defence's case that the Prosecutions' four-pronged charge of genocide can not stand.

1350. Firstly, the alleged *"opportunistic killings"* and the *"reburial operation"*, two of the components of the alleged genocide, do not correspond to either the *actus reus* or *mens rea* of genocide or both.

1351. Secondly, and most importantly, the irreconcilable contradictions in the Prosecution's case are demonstrated by the fact that Accused Miletić and Gvero would have been involved in the alleged opportunistic killings as well as in the alleged forcible transfer and deportation – two of the four components of the purported genocide – although they have not been charged with genocide.

1352. Indeed, if it is the Prosecution's case that Miletić and Gvero would have played a central role in the alleged forcible transfer and deportation of the Muslim population from Srebrenica and Žepa,[1787] while they would have worked alongside persons alleged to be leading members of the JCE to kill the able-bodied men from Srebrenica at the same time,[1788] the fact that they are not charged with genocide is revealing in terms of the intrinsically ambiguous charge of genocide. It establishes that there is no basis to charge two of the Co-Accused allegedly involved in the forcible transfer with genocide, casting significant doubt upon the Prosecution's case that the genocide would have encompassed the forcible transfer.

1353. On a note of caution, the Defence is not maintaining that the evidence supports any of the allegations against Miletić and Gvero *nor* is it the Defence's position that they should have been charged with genocide. The Defence considers that the allegations, as formulated in the Indictment, are inherently contradictory and expose the weaknesses of the Prosecution's case.

1354. The Prosecution decided to join the seven Accused into one mega-case, with diverging charges based on the same factual basis. The result is a concoction of factual and legal

[1787] Indictment,paras.75-76.
[1788] Indictment,paras.50,51,54.

contradictions, which the Trial Chamber, in all fairness to the Co-Accused, must not validate.

B. THE PROSECUTION FAILED TO PROVE THE EXISTENCE OF A STATE POLICY TO COMMIT GENOCIDE

1355. As set out above, the Defence submits that State policy to commit genocide constitutes an element of the definition of the crime of genocide.

1356. The Prosecution completely and utterly failed to establish the existence of a State policy to commit genocide beyond a reasonable doubt, which necessarily renders the qualification of the events of July 1995 in Srebrenica as genocide impossible.

1357. The Prosecution has led absolutely no direct evidence with a view to proving the existence of a State policy in the RS to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

1358. In addition, the evidence on the record does not support a finding that a State policy to commit genocide existed in 1995 in the RS.

I. THE DOCUMENTS RELIED UPON BY THE PROSECUTION

1359. Even though the Prosecution does not expressly allege that a State policy to commit genocide existed, it relies on certain documents, developed in the highest political and military echelons in the RS, to substantiate its case in respect of genocide. However, none of these documents amount to a State policy to commit genocide.

1360. Firstly, the Prosecution relies on the objectives formulated in the Decision on Strategic Objectives of the Serbian People in Bosnia and Herzegovina (the "Strategic Objectives"), issued on 12 May 1992 and published on 26 November 1993, as background information to the case.[1789]

1361. The Strategic Objectives refer to: (a) the demarcation of the State and the establishment of borders; (b) the establishment of two corridors and the eradication of the border between the RS and Serbia proper, (c) the division of Sarajevo; and (d) the securing of access to the sea.[1790]

[1789] Indictment,para.19.
[1790] P02755.

1362. It is noteworthy that the Strategic Objectives were developed more than three years prior to the alleged genocide and the conspiracy to commit genocide. They can thus not relate to the Prosecution's assertions in respect of genocide.

1363. More significantly, however, the Strategic Objectives do not refer, in any manner whatsoever, to genocide *nor* may they be interpreted to amount to genocide. First and foremost, no acts constituting the *actus reus* of genocide are included in the Strategic Objectives *nor* do the Strategic Objectives correspond to the components of the genocide as alleged by the Prosecution: (a) killing all able-bodied men from Srebrenica; (b) opportunistic killings; (c) reburying victims; and (d) forcible transfer of women and children.

1364. In addition, the Strategic Objectives do not display intent to destroy, in whole or in part, the Bosnian Muslim group, as such. They are merely concerned with the creation of an entity bearing the hallmarks of statehood.

1365. Secondly, the Prosecution invokes Directive 7, in which Karadžić allegedly set out the order to remove the Muslim population from the Srebrenica and Žepa enclaves.[1791] More specifically, it is said that this Directive orders as follows: *"[b]y planned and well-thought out combat operations, create an unbearable situation of total insecurity, with no hope of further survival for the inhabitants of Srebrenica and Žepa."*[1792]

1366. It is, however, significant to note that Operational Directive 7 is exclusively cited by the Prosecution in support of its charges regarding forcible transfer and deportation. Even though the section in the Indictment entitled *"background"* contains a general reference to Directive 7, the count regarding genocide, as well as related counts, ignore this Directive completely. The Prosecution, therefore, does not allege Directive 7 to relate to genocide.

1367. Finally, the Prosecution relies on Operational Directive 4, issued on 19 November 1992 by Mladić, ordering the Drina Corps to *"inflict the heaviest possible losses on the enemy, and force him to leave the Eastern Bosnia areas of Birač, Žepa and Goražde areas together with the Bosnian Muslim population."*[1793]

[1791] Indictment,para.24;P00005.
[1792] Indictment,para.49;P00005.
[1793] Indictment,para.21;P00029.

1368. Alike the Strategic Objectives, this Directive falls outside the time-frame during which the alleged genocide and the agreement to commit genocide were allegedly developed. It is consequently unrelated to the purported genocide.

1369. Moreover, a Directive issued by the VRS may not be equated with State policy to commit genocide. The VRS, the military wing of the RS, was unauthorized to create State policy. In the expert opinion of Professor Schabas, *"[a]ssuming,* arguendo*, that Mladić and his inner circle … had developed a genocidal intent on 13 July 1995, an intent that persisted for a few days,* ***surely this was not the result of the policy of a State or of a State-like body.****"*[1794]

1370. More importantly, this Directive does not correspond to the *actus reus* or *mens rea* required for genocide. It does not involve the commission of any of the acts underlying genocide nor does it evince intent to destroy, in whole or in part, a group protected by the Genocide Convention, as such.

II. TESTIMONIAL EVIDENCE

1371. The testimonial evidence in this respect unambiguously repudiates the existence of a State policy to commit genocide.

1372. Krajišnik, the President of the RS National Assembly in 1992 and 1993, testified that a policy to get rid of the Muslim or Croat population living in Bosnia and Herzegovina did not exist within the RS government and/or Assembly.[1795]

1373. It is significant to note that, in the trial of Krajišnik himself, the genocide charges against him were thrown out.[1796]

1374. Kosovac also testified that, throughout the war, he had not come across any indication of the existence of a plan or policy, whether at the state level or the VRS level, to destroy, in whole or in part, the Muslim population of Srebrenica and Žepa.[1797]

1375. Therefore, considering that there is absolutely no evidence of a State policy to commit genocide, the Trial Chamber must dismiss the count relative to genocide.

1376. In the alternative, as will be demonstrated below, the Prosecution failed to discharge its burden to prove that: (a) a specific intent to commit genocide is discernible from the

[1794] Schabas,p.38(emphasis added).
[1795] T.21603.
[1796] Krajišnik,TJ,para.847 (left undisturbed on appeal).
[1797] T.30214-T.30215.

events in Srebrenica in 1995; and/or (b) that Drago Nikolić personally harboured genocidal intent.

C. THE EVENTS ALLEGED IN THE INDICTMENT DO NOT AMOUNT TO GENOCIDE

1377. Even though the Krstić Appeals Chamber ruled that genocide was committed in Srebrenica in July 1995,[1798] this Trial Chamber must determine whether this indeed is the case, based on the evidence admitted in this case.

1378. However, in the submission of the Defence, the evidence on the record in this case sheds a completely different light on the events in Srebrenica in the time-frame material to the Indictment, on the basis of which the Defence respectfully submits that no genocide was committed.

I. THE PROTECTED GROUP

1379. Upholding the Trial Chamber's finding, the Krstić Appeals Chamber defined the group protected by the Genocide Convention as the national group of Bosnian Muslims.[1799] In addition, the Appeals Chamber validated the Trial Chamber's finding that the targeted part of the protected group was the Bosnian Muslims of Srebrenica.[1800]

1380. In addition, the Appeals Chamber found that the Trial's Chamber determination of the substantial part of the protected group was correct.[1801] The Appeals Chamber held that the Bosnian Muslims of Srebrenica, including the Muslim inhabitants of the municipality of Srebrenica and the Muslim refugees from the region,[1802] formed merely about 2,9% of the overall population of Bosnian Muslims.[1803]

1381. However, according to the Appeals Chamber, the importance of the Muslim community of Srebrenica was not captured solely by its size. The Appeals Chamber advanced three reasons buttressing its finding in respect of the importance of this group: (a) the strategic importance of Srebrenica to the Bosnian Serb leadership in seeking to unify an

[1798] Krstić,AJ,para.37.
[1799] Krstić,AJ,para.15.
[1800] Krstić,AJ,paras.15-22.
[1801] Krstić,AJ,para.23.
[1802] Krstić,AJ,para.15.
[1803] Krstić,AJ,footnote27.

ethnically Serbian state and to ensure access to Serbia proper;[1804] (b) the elimination of the Muslim population of Srebrenica would serve as a potent example to all Bosnian Muslims of their vulnerability and defencelessness in the face of Serb military forces;[1805] and (c) the genocidal enterprise of the Bosnian Serb forces charged with the take-over of Srebrenica was limited to Srebrenica.[1806]

1382. In this case, the Indictment is highly inconsistent in defining the protected group and the "part" of the group allegedly targeted. Count 1 mentions: (a) *"a part of the Bosnian Muslim people as a national, ethnical, or religious group"*;[1807] (b) *"members of the group"*;[1808] (c) *"female and male members of the Bosnian Muslim populations of Srebrenica and Žepa"*;[1809] and (d) the *"entire Muslim population of Eastern Bosnia"*.[1810] Count 2 introduces additional appellations, i.e.: (a) *"those Muslims"* referring to *"the able-bodied Muslim men from Srebrenica that were captured or surrendered after the fall of Srebrenica on 11 July 1995"* and the *"remaining Muslim population of Srebrenica and Žepa"*;[1811] (b) the *"Muslim men from Srebrenica"*;[1812] and (c) *"the Muslims of Srebrenica"*.[1813]

1383. The Prosecution adds to the confusion by employing a further sub-division of the "part" of the group through multiple references to the able-bodied men from Srebrenica, on the one hand,[1814] and to the women and children from Srebrenica and Žepa, on the other hand.[1815]

1384. However, the Defence notes that, from this hodgepodge of terms, it emerges that the burden of proof imposed on the Prosecution requires it to prove that the national group of Bosnian Muslims is the group protected by the Genocide Convention and that the Bosnian Muslim population of Eastern Bosnia and Herzegovina form the part allegedly singled out for destruction.

[1804] Krstić,AJ,para.15.
[1805] Krstić,AJ,para.16.
[1806] Krstić,AJ,para.17.
[1807] Indictment,para.26.
[1808] Indictment,para.26(a).
[1809] Indictment,para.26(b).
[1810] Indictment,para.33.
[1811] Indictment,para.34.
[1812] Indictment,para.35.
[1813] Indictment,para.35.
[1814] Indictment,paras.27-30 and 34-36.
[1815] Indictment,paras.33.

1385. The Prosecution specifically states that the Bosnian Muslims of Eastern Bosnia were targeted.[1816] In addition, in general, the Prosecution asserts that the Bosnian Muslims of Srebrenica and Žepa were targeted[1817] and not only the Bosnian Muslims of Srebrenica.

1386. It is significant to note that the Prosecution departs from the holding of the Krstić Appeals Chamber by alleging that the part of the Bosnian Muslim group targeted is the Bosnian Muslim population of Eastern Bosnia as opposed to the Bosnian Muslims of Srebrenica.

II. THE PROSECUTION FAILED TO PROVE A SPECIFIC INTENT TO DESTROY, IN WHOLE OR IN PART, THE BOSNIAN MUSLIM GROUP AS SUCH

1387. As set out above, apart from its obligation to prove beyond a reasonable doubt the individual intent of the Accused, the Prosecution bears the burden of proving that the intent to destroy the Bosnian Muslim group, in whole or in part, as such, is discernible from the acts in Srebrenica in 199.

1388. The Defence respectfully submits that the Prosecution utterly and completely failed to discharge this burden.

1389. In respect of the requisite intent required for genocide, the Krstić Appeals Chamber, in the absence of direct evidence, relied on inferences. It held that *"[t]he main evidence underlying the Trial Chamber's conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community."*[1818]

1390. The Defence posits - without prejudice to the argument espoused above in respect of the requirement of a State policy to commit genocide – that the evidentiary record in this case significantly amends the factual conclusions on the basis of which genocidal intent was inferred in the Krstić Judgments. It necessarily follows that the evidence in this case does not support a conclusion that the events in Srebrenica in 1995 evince an intent to destroy, in whole or in part, the Bosnian Muslims, as such.

1391. As will be discussed in detail below, there are three principal issues, extensively litigated in this case, affecting the main evidence relied upon by the Krstić Chambers: (a) demographic evidence indicates that the basis upon which the Prosecution

[1816] Indictment,para.33.
[1817] Indictment,paras.26(b),34.
[1818] Krstić,AJ,para.26.

calculated the number of victims can not be accepted; (b) forensic evidence demonstrates that the number of deaths resulting directly from the executions in Srebrenica in July 1995 is substantially lower than assumed hitherto; and (c) "column"-related evidence reveals that the fighting with the column was of a defensive nature and that the column was allowed to pass through the Zvornik Brigade defence lines.

1392. These issues strongly rebuff the inference that specific intent to destroy, in whole or in part, the Bosnian Muslim group is discernible from the acts in Srebrenica in 1995.

1393. In addition, in the Defence's submission, the evidence on the record in this case shines a completely different light on the alleged forcible transfer, which the Appeals Chamber treated as supportive of the inference that genocidal intent existed, and the ambit of the alleged genocide, relied upon by the Appeals Chamber in its assessment on the substantial part of the group.

1394. These matters also rebut the inference that specific intent to destroy, in whole or in part, the Bosnian Muslim group is discernible from the acts in Srebrenica in 1995.

1395. In conclusion, the new evidence adduced in this case firmly establishes the proposition that no genocide was committed in Srebrenica in 1995.

(A) Demographic Evidence

1396. The Defence respectfully submits that Dr. Brunborg's report is deficient in multiple respects and must be discarded as: (a) "Srebrenica" has not been defined for demographic purposes; (b) its sources are inadequate; and (c) numerous methodological errors were committed.

1397. Consequently, the main conclusion of Dr. Brunborg's report that *"a minimum of 7,661 persons from the Srebrenica enclave are missing and presumed dead"*[1819] is exaggerated and unsubstantiated.

(I) Failure to Define "Srebrenica"

1398. In his report, Dr. Brunborg assumes that *"about 40,000 people were in the town of Srebrenica before it fell"* while admitting that *"the exact size of this population is unknown."*[1820]

[1819] P02413,p.2.
[1820] P02413,p.28.

1399. However, "Srebrenica", the area subject to statistical and demographic analysis, has not been defined in administrative and territorial terms by Dr. Brunborg.[1821] The appellation "Srebrenica" is used interchangeably, irrespective of the fact whether it represents either: (a) the town of Srebrenica; (b) an area comprised of five municipalities;[1822] or (c) an area comprised of 13 municipalities.[1823]

1400. However, Dr. Brunborg's assumption is entirely unfounded. Indeed, Defence Demographic Expert Professor Radovanović[1824] concluded that there is not a single statistical indicator present in relation to this population count.[1825]

1401. Firstly, according to a letter sent by the President of the Presidency of Srebrenica Municipality to the BiH Department for Statistics on 11 January 1994, Srebrenica had 37,255 inhabitants, including: (a) 9,791 local people; (b) 10,756 local dislocated people; and (c) 16,708 expelled people from other municipalities.[1826]

1402. Professor Radovanović concluded that *"the point of this example lies not in the reliability of the data given, but in the registration of the high incidence of migration, which affected the composition of the population in quantitative and - in particular – qualitative terms compared to 1991."*[1827]

1403. Secondly, REDACTED [1828] [1829] Moreover, at the time, approximately 4,000 to 5,000 ABiH soldiers arrived in Tuzla from Srebrenica.[1830]

1404. It follows that approximately 40,000 people arrived in Tuzla from Srebrenica in August 1995. These figures clearly demonstrate the high incidence of migration, affecting the composition of the population of Srebrenica in quantitative and qualitative terms compared to the 1991 Census.[1831]

1405. This data raises serious doubts about the conclusion of the Prosecution experts that *"there is no evidence that any significant number of the Srebrenica-related missing persons have survived."*[1832]

[1821] T.11303.
[1822] P02413,p.29.
[1823] P02413,p.5.
[1824] 3D00398,p.2.
[1825] 3D00398,p.7.
[1826] 1D00312;T.11294-T.11294.
[1827] 3D00398,p.7.
[1828] REDACTED
[1829] REDACTED
[1830] 3D00374,pp.1-10.
[1831] 3D00398,p.8;T.11278-T.11279.
[1832] 3D00398,pp.7-8.

(II) The Sources of Dr. Brunborg's Report

1406. Dr. Brunborg's report relies on 6 sources[1833] while Professor Radovanović used 22 sources in her findings on missing and dead persons in Srebrenica.[1834] Indeed, Professor Radovanović concluded that the sources used in Dr. Brunborg's report do not meet a single statistical standard.[1835]

1407. Dr. Brunborg used the ICRC List and the Physicians for Human Rights List (the "PHR List") as primary sources for his report.

1408. Professor Radovanović testified that the methodology applied by the ICRC does not conform to the manner in which statistical data should be gathered. The ICRC List is namely based on questionnaires filled in by relatives who reported missing family members, which the ICRC incorporated into tables.[1836] However, it falls outside the ICRC's competence to incorporate the data into tables employing a statistical method.[1837]

1409. Furthermore, the ICRC raw material has never been made available to the Defence experts, which significantly affects its reliability.[1838]

1410. In addition, the quality of both the ICRC and PHR data is far from adequate. The questionnaires contain, *inter alia,* numerous empty fields, non-existent data and abundant errors.[1839]

1411. Besides the incomplete data, the two sources do not corroborate each other as they serve different purposes. Whereas the ICRC collected data about missing persons, the PHR gathered data about the dead for the purpose of an *ante mortem* database.[1840]

1412. An incorrect methodological procedure was also used in the identification of persons from the OSCE Voters' Lists for 1997/98 and 2000 (the "OSCE Voters' Lists") because these lists did not contain the name of the father - one of the key attributes necessary for a reliable decision on a possible match.[1841]

1413. The OSCE Voters' Lists enumerate people from various municipalities in Bosnia and

[1833] 3D00398,pp.7-8.
[1834] T.24327.
[1835] 3D00398,p.5.
[1836] T.24329.
[1837] T.24329.
[1838] T.24332.
[1839] T.24331.
[1840] T.24332.
[1841] 3D00398,p.9;T.24435.

Herzegovina, who were over 18 years old and voluntarily registered to participate in elections.

1414. As pointed out by Professor Radovanović, Dr. Brunborg reduced his comparison of the OSCE Voters' Lists to Srebrenica municipality, with the result that the voters who were in Srebrenica in 1991, but who registered to vote in other places in 1997-1998, were not taken into account by Dr. Brunborg when comparing the OSCE Voters' Lists to his own list.[1842]

1415. Other relevant sources were omitted from Dr. Brunborg's report. These include: the Database of Deceased Persons 1992-1995 (the "DEM 2T Database"); the Muslims against Genocide Database; the Bosnian Book of Dead, the ABiH Database etc.[1843]

1416. It appears that Prosecution experts purposely used selective sources and adjusted their research in order to increase the number of death ratios.[1844]

1417. For instance, the Prosecution refrained from employing the official ABiH Database.[1845] This database shows that: (a) 73% of the Srebrenica related missing persons were soldiers;[1846] and (b) 220 ABiH records of the ones matched with the 2005 Prosecution List have an inconsistent Date of Death.[1847]

1418. This is, in fact, the conclusion drawn by the internal memorandum of the Prosecution's Demographic Department dated 24 July 2008.[1848]

(III) Methodological errors in Dr. Brunborg's report

1419. Furthermore, the Prosecution's experts made unacceptable methodological errors by not correctly applying the standard statistical method of matching. According to Professor Radovanović, Dr. Brunborg's report contains a large number of errors.[1849]

1420. Dr. Brunborg and his associates did not use a standardized and fixed identification key. They used 71 different keys for matching the 2005 Prosecution List with the 1991 Census. When trying to identify missing persons, Dr. Brunborg and his associates used

[1842] T.24435-T.24437.
[1843] T.24345-T.24346.
[1844] 3DP02420.
[1845] T.11211.
[1846] 3D00457,p.2.
[1847] 3D00457,p.2;T.24352-T.24357.
[1848] 3D00457.
[1849] 3D00398,p.5.

a combination of criteria for establishing the identification key and consequently obtained incorrect results.

1421. Professor Radovanović demonstrated that, by changing the identification key when matching the 2005 Prosecution List with the 1991 Census, 129% of the persons can be identified.[1850]

1422. Conversely, the use of a correct methodological procedure - a match based on first name, father's name, last name, full date and place of birth - leads to the identification of merely 16% of the missing persons.[1851] Certainly, this raises a reasonable suspicion about 87% of the identified persons from the 2005 Prosecution List.[1852]

1423. Similarly, death ratios were calculated in an inadmissible manner as not the whole population of Muslim men was taken into account, which automatically increased the death ratios and resulted in a higher number of missing persons.[1853]

1424. The Prosecution's experts excluded the age group of 0-9 (30,4% of the male Muslim population).[1854] This omission had a direct impact on the number of missing Muslim men relative to the total population of Muslims in 1991.[1855]

1425. According to the correct method of calculation, the percentage of dead Muslim men in relation to the total Muslim population is in fact 2 to 4% for the men.[1856] While the Prosecution's experts calculated that, in relation to the five municipalities (Srebrenica; Bratunac; Vlasenica; Zvornik; and Han Pijesak), 14,1% of the Muslim men died, a correct methodology would have resulted in a percentage of 6,2%.[1857]

1426. A comparison between the Prosecution's 2005 List of Srebrenica-Related Missing and Dead (the "2005 Prosecution List")[1858] with one of the main sources, *i.e.* the 1991 Census, was used to determine whether a person from the 2005 Prosecution List actually existed.[1859]

1427. This comparison revealed that the 2005 Prosecution List contains 1,030 non-existent persons, of which 999 are unknown men.

[1850] 3D00398,p.25.
[1851] 3D00398,p.25.
[1852] 3D00398,p.6.
[1853] 3D00398,p.6.
[1854] 3D00398,p.6;p.33.
[1855] 3D00398,p.31.
[1856] 3D00398,p.31,table 6.
[1857] 3D00398,p.31-32,table 7.
[1858] P02414.
[1859] T.6792.

1428. The fact that 1,030 persons could not be found in the 1991 Census proves that they are, in fact, non-existent. In the absence of proof that those people ever existed on the territory of Bosnia and Herzegovina, let alone Srebrenica, these persons should have been excluded from the 2005 Prosecution List.[1860]

1429. In addition, some persons matched with the 1991 Census indeed existed, but were not connected to the events in Srebrenica.

1430. Many died before the events and others can not territorially be identified as Srebrenica victims.[1861]

1431. Moreover, the 1991 Census was treated as if all the people figuring on it still existed in 1995, although some emigrated or died before 1995. Nothing was done to revise the 1991 Census and the entire population of 1991 was regarded as if nothing had changed in the meantime.[1862]

1432. Dr. Brunborg did not take into account any demographic changes for the purpose of his report. And yet in his co-authored paper, *"[a]ccounting for genocide: [h]ow many people were killed in Srebrenica"*, it was stated that the proportion of missing people from Srebrenica should be considered as low estimates because of demographic changes between 1991 and July 1995.[1863]

1433. Based on the foregoing, 26,5% of persons from the OTP missing list can not meet even the minimum standards of reliability as to whether they existed in 1991 or were participants in the events of Srebrenica in the period relevant to the Indictment.[1864]

1434. A comparison between the ABiH Database and the 2005 Prosecution List demonstrated that more than 100 men killed before the events of July 1995 are included into the 2005 Prosecution List and identified as Srebrenica victims.[1865]

1435. Furthermore, while a comparison of the ABiH Database, the 1991 Census and the 2005 Prosecution List reveals that in excess of 70% of the dead and missing persons on the 2005 Prosecution List are soldiers, Dr. Brunborg nevertheless claimed that those people were exclusively civilians.[1866]

[1860] T.24403-T.24404.
[1861] T.24363.
[1862] T.24431-T.24432.
[1863] 3DP02420,p.10.
[1864] 3D00398,p.8.
[1865] 3D00398,p.9.
[1866] T.24395; T.11210-T.11211.

1436. In order to identify survivors, the Prosecution's experts matched the 2005 Prosecution List and the OSCE Voters' Lists by relying merely on the initials of a person and a date of birth, plus/minus a few years.[1867]

1437. Dr. Brunborg did not use all available criteria and he narrowed down the area within which he was conducting the matches.[1868] In case Dr. Brunborg did not find a match in the OSCE Voters' Lists when comparing to the 2005 Prosecution List, he concluded that the people on the 2005 Prosecution List are dead.[1869] Although Dr. Brunborg had the data for the persons who were certified dead, he still included the missing persons in the same category as dead persons.[1870]

(IV) Conclusion Regarding Demographic Evidence

1438. The Defence respectfully submits that the exact size of the Srebrenica population at the relevant time is unknown.

1439. The Srebrenica population count of 40,000, as presented by Dr. Brunborg, is a mere assumption, not supported by a single statistical source. The entirely unreliable figure of 40,000 inhabitants, forming the basis for Dr. Brunborg's analysis, is thus inadequate in establishing the number of deaths and renders any reliable determination of death ratio's impossible.

(B) Forensic Evidence

1440. As will be demonstrated below, the numbers of Srebrenica victims remain highly ambiguous even today, 14 years after the events. The Defence posits that the available forensic evidence does not support the unsubstantiated estimates proffered by the Prosecution.

1441. In any event, all of the Prosecution's estimates are irreconcilable with the Tracking Chart for the Srebrenica Case,[1871] dated 20 February 2009, which indicates a number of **3,876** closed cases.

[1867] T.11203.
[1868] T.24337.
[1869] T.24362.
[1870] 3D00398,pp.29-30.
[1871] 1D01376.

(I) Previous Estimates

1442. Many estimates of Srebrenica-related victims have been proffered by the Prosecution. However, all these estimates suffer from grave deficiencies.

1443. Firstly, the 2005 Prosecution List contains a total of **7,661** records of individuals reported as missing after the fall of Srebrenica in July 1995.[1872] However, as indicated in Ewa Tabeau's progress report, only **2,054** persons from the OTP list have actually been identified by the ICRC until 17 August 2005.[1873] REDACTED [1874]

1444. Secondly, Manning concluded, based on ICMP records, that **5,021** Srebrenica victims have been identified via DNA analysis in graves.[1875] Out of this number, **4,017** are said to be Srebrenica victims identified via DNA analysis in graves.[1876]

1445. REDACTED [1877] [1878]

1446. REDACTED [1879]

1447. REDACTED [1880] [1881] [1882] [1883]

1448. It follows from Parson's contradictory statement and the aforementioned counts, that it is clear that the 8000+ figure is unsubstantiated and, in fact, a mere speculation on the side of the ICMP.

(II) The Janc Update

1449. Janc's update of the Manning report (the "Janc Update"),[1884] purportedly contains the most updated numbers of (un)identified individuals exhumed from the graves as well as surface remains allegedly related to the fall of Srebrenica.[1885]

1450. The report counts a total number of **5,358** Srebrenica victims identified via DNA analysis in graves, including **294** unique Srebrenica related DNA profiles which have

[1872] P02414,p.2.
[1873] P03159,p.8.
[1874] REDACTED
[1875] P02993,p.2.
[1876] P02993,p.3.
[1877] REDACTED
[1878] REDACTED
[1879] REDACTED
[1880] REDACTED
[1881] REDACTED
[1882] REDACTED
[1883] REDACTED
[1884] P04490.
[1885] T.33378.

not yet been matched to a missing person.[1886] The total number is further enlarged by **648** Srebrenica victims identified via DNA analysis on the surface.[1887]

1451. As confirmed by Janc himself, the figure of 5,358 is incorrect in several aspects: (a) an exact number of individuals connected to the Kravica execution site can not be provided[1888] as over 100 individuals were brought from other locations to the Glogova mass graves;[1889] (b) the Bljeceva grave also contains the remains of approximately 50 individuals who died in 1992 related events;[1890] and (c) Janc concluded, in respect of the Cerska mass grave, that at least 10 individuals may have been captured after 13 July 1995, in some cases as late as 17 July 1995,[1891] and another two individuals were identified by Haglund as being seen alive as late as 16 and 17 July 1995[1892] - casting doubt on the Prosecution's allegation concerning the execution at Cerska.[1893]

1452. In addition, out of the 648 individuals identified via DNA analysis on the surface, 35 persons do not figure in the March 2009 ICMP Update and 3 of them appear to have gone missing already in 1993.[1894]

1453. REDACTED [1895] [1896]

1454. REDACTED [1897]

1455. As demonstrated above, the figures of other competent BiH institutions are significantly lower than those provided by the Prosecution. This is further confirmed by the RS government which indicated that: (a) **3,214** identified victims are buried in the memorial complex in Potočari; (b) **168** identified victims are buried in several local Muslim graveyards; and (c) the Tuzla Laboratory has completed preliminary identifications of approximately 2.000 victims who have not yet been identified by their families.[1898].

[1886] P04490,p.2.
[1887] P04490,p.3;Annex B.
[1888] P04492,para.3.
[1889] P4492,para.4.
[1890] T.33525-T.33526.
[1891] 1D01391,para.4.
[1892] P00611,p.viii.
[1893] Indictment,para.30.3.
[1894] P04490,Annex B,footnote 3.
[1895] REDACTED
[1896] REDACTED
[1897] REDACTED
[1898] 1D01347.

1456. Furthermore, the Janc Update did not differentiate between civilians and ABiH soldiers nor did it take into account the individuals that died as a result of suicide or regular combat engagements.

1457. In the submission of the Defence, deaths resulting from legitimate combat engagements and suicide may not be taken into account in assessing the number of victims of the alleged genocide. They do not correspond to the *actus reus* of genocide, which is concerned exclusively with acts committed with the intent to bring about the physical or biological destruction of the protected group.

1458. Deaths resulting from legitimate combat engagements and suicide do not display such intent. The former have a legal basis under IHL, provided all remaining conditions have been complied with, while the latter can not be considered the result of the acts and conduct of those accused of genocide.

1459. The high number of ABiH soldiers included in the Prosecution's estimates raises the question whether these individuals were killed during lawful combat or were murdered *hors de combat.* Obviously, lawful deaths must be excluded from the crimes allegedly committed.

1460. The most striking example may be found in a letter sent by Tabeau, pointing out that the number of matches of ABiH records with the 2005 Prosecution List is 5,371, *i.e.* a whopping 70 to 73%.[1899]

1461. REDACTED [1900] [1901]

1462. REDACTED [1902]

1463. Janc was unable to provide a valid justification for these matters.[1903] It appeared, furthermore, that Janc never even consulted the BiH Ministry of Defence records of missing and dead or the relevant Defence exhibits.[1904]

1464. Even though the aforementioned records of competent BiH institutions as well as accounts of Prosecution witnesses demonstrate that the number of combat-related deaths in Srebrenica is around **2.000**, the Janc Update fails to consider this number.

1465. Butler testified that it could reasonably be concluded that there were between 1,000 to 2,000 combat casualties in the column in the period from 12 July to 18 July 1995.[1905]

[1899] 3D00457.
[1900] REDACTED
[1901] REDACTED
[1902] REDACTED
[1903] T.33562-T.33564.
[1904] T.33569-T.335670.

One eyewitness stated seeing as much as 2,000 to 3,000 dead in combat engagement in the Pobuđe region.[1906] An United Nations report dated 17 July 1995 confirms that *"up to 3.000 were killed on the way, mostly by mines and BSA engagement."*[1907]

1466. In the preparation of the Janc Update, Janc never attempted to investigate the manner of death.[1908] Janc admitted that he did not take the combat engagements in the Pobuđe region into account, and thus did not rule out the possibility that victims of legitimate combat casualties were buried in those graves.[1909] The inadequate justification for this omission provided by Janc is that *"[i]t's not easy to establish how many"* and *"I don't know that because I don't have their names."*[1910]

1467. Janc acknowledged being aware of indications in witness statements relating to various methods of suicide by members of the column, including falling on grenades, hanging and self-inflicted gun shots.[1911] As to the latter method, Janc confirmed that pathology reports can not exclude the possibility that wounds were self-inflicted.[1912]

1468. Janc testified that the main source used in preparation of the Janc Update is the March 2009 ICMP Update.[1913] The reliability of the Janc Update thus depends greatly on the reliability, comprehensiveness and appropriateness of the 2009 ICMP Update.

1469. Parsons indicated that the 2009 ICMP Update is based on information provided by the family of the missing persons to the ICRC.[1914] He further clarified that, in order to safeguard the objectivity of the DNA matching, the ICMP has no knowledge of the origins of bone samples.[1915] It needs to be underlined that the ICMP does neither issue death certificates nor does it establish the manner and time of death.[1916]

1470. However, the reliability of the March 2009 ICMP Update is low.

1471. REDACTED [1917] [1918]

[1905] T.20251.
[1906] 2D00669.
[1907] 1D00374,p.2.
[1908] T.33610.
[1909] T.33606.
[1910] T.33607.
[1911] T.33603.
[1912] T.33603.
[1913] T.33378-T.33379;REDACTED
[1914] T.20873.
[1915] T. 20885.
[1916] T.20918-T.20919.
[1917] REDACTED.
[1918] REDACTED

1472. In addition, the shortcomings of the method of identification used by the ICMP have been confirmed by several scientific articles.[1919] One article states that a DNA match does not entail that a positive identification automatically follows.[1920] It goes on to state that *"[i]t is imperative that traditional forensic scientists review the tentatively identified remains and related evidence to ensure that the match is valid."*[1921] Even the ICMP reckoned that there is need for other methods, as it argued for the need of anthropological examination as a part of DNA identification.[1922]

1473. Also, the close relationship between the Prosecution and the ICMP strongly affects the independence of this organisation. An agreement to cooperate with the ICTY exists[1923] REDACTED [1924]

1474. This proposition is further reinforced by the ICMP website, stating that the ICMP provides support to courts on *"matters related to war crimes, crimes against humanity, genocide"*.[1925] However, the ICMP does not have a legal mandate and assistance in determining legal issues falls outside its expertise. This statement, in fact, reinforces the doubts relating to the objectivity of this organisation.

1475. Professor Dušan Dunjić, specialized in forensic medicine,[1926] reviewed autopsy reports from Nova Kasaba, Pilica, Zeleni Jadar and Ravnice[1927] in order to analyze the validity of the collective report.[1928] Due to time constraints and the voluminous material, Professor Dunjić was not able to analyse the remaining material.

1476. Professor Dunjić identified significant deficiencies contained in the individual autopsy reports which led to erroneous conclusions in the collective reports.

1477. As Professor Dunjić pointed out, the standard for post-mortems prescribes that everything the pathologist observes must be described in great detail.[1929] However, findings related to the bodies, such as articulation of the joints and putrefaction, which provide important information as to the decomposition of the body and thus the time of

[1919] 2D00174;2D00175;2D00176;2D00177.
[1920] 2D00177.
[1921] 2D00177,p.2.
[1922] T.20905.
[1923] 3D00293,art.4.
[1924] REDACTED
[1925] 3D00295A,p.2.
[1926] T.22770-T.22771.
[1927] 1D01070.
[1928] T.22777.
[1929] T.22785.

death and the conditions under which the body was found, are absolutely inadequately described in the autopsy reports.[1930]

1478. Another inconsistency found by Professor Dunjić relates to the number of ligatures found in the Nova Kasaba grave. According to Haglund's report, 27 individuals had their hands tied behind their backs.[1931] However, an analysis of the individual autopsy reports reveals that, in fact, only six individuals had their hands tied up.[1932]

1479. Professor Dunjić indicated cases where wrong conclusions on the cause of death were reached, which were either incorrect in comparison to the trauma findings[1933] or suffered from an inadequate description leaving the question open whether the individual was alive when the wound was inflicted.[1934] The latter determination is of great importance for ascertaining the cause of death: a trauma finding on the body, such as a gunshot wound, can only be interpreted as the cause of death if it can be determined that the wound was inflicted while the individual was still alive and the wound resulted in death of the individual.[1935] If there is no such evidence, then the Court must assess this question based on other evidence.[1936]

1480. In regard of putrefied bodies, an analysis of the report prepared by Clark[1937] clearly demonstrates its unreliability. Clark acknowledges the problem of determining the cause of death indicating that it is impossible to state whether an injury occurred before death or after death.[1938] He goes on to state, based on *"common sense"*, that it is not credible to assume that those individuals were shot post-mortem and concludes that "*in all of these cases, with certain exceptions, we are of the opinion that any injury that caused damage or indicated damage caused by a bullet, any such injury was caused while the individual was alive, and therefore it was necessarily or potentially fatal"*.[1939]

[1930] T.22786-T.22787.
[1931] P00621,p.58.
[1932] T.22800-T.22801.
[1933] T.22796.
[1934] T.22796-T.22797.
[1935] T.22796-T.22797.
[1936] T.22797.
[1937] P00575.
[1938] P00575,p.3.
[1939] P00575,p.3.

1481. This statement is clearly a groundless assumption. In the expert opinion of Professor Dunjić, a forensic expert can not make such assumptions.[1940] In order to answer this question, the Court must resort to other evidence.

1482. Haglund's report suffers from identical deficiencies. Professor Dunjić reviewed the treatment of a post-mortem report of a body found in Nova Kasaba by Haglund.[1941] Haglund concluded that an executive wound was inflicted by a bayonet although the description does not point to this effect and even stated that the wound was post-mortem.[1942]

1483. Another conclusion reached by Haglund is that most individuals from the group died as a result of gunshot wounds inflicted from a short distance and that there also were contact-wounds.

1484. However, this conclusion is again entirely unsupported by the autopsy reports, because no traces of gunpowder pointing to short distance wounds were found.[1943] Furthermore, Professor Dunjić testified that nothing in the autopsy report points to the conclusion that the injuries were caused by a projectile of any sort.[1944] Based on the fact that a projectile was left in the body, Professor Dunjić concluded that several wounds had been inflicted from a shot afar, i.e. as part of combat.[1945]

1485. The same conclusion is reached with regard to the Zeleni Jadar graves, where shell fragments and shrapnel were found on some bodies and some bones and clothes showed burning marks, indicating that they were the result of explosive devices employed during combat.[1946]

1486. Professor Dunjić's concerns have been confirmed in the San Antonio report.[1947] This report contains serious complaints made by participants in the exhumations, including: (a) instructions by Kirschner on listing the cause of death;[1948] (b) changes made by Kirschner to autopsy reports;[1949] (c) instructions to anthropologists by Kirschner on

[1940] T.22813.
[1941] T.22820.
[1942] T.22820.
[1943] T.22820-T.22821;T.22865-T.22866.
[1944] T.22821;T.22826.
[1945] 1D01070,pp.57-59;p.61;T.22837-T.22855.
[1946] 1D01070,pp.94-104;T.228870-T.22872.
[1947] 2D00070;T.22876.
[1948] 2D00070,item12.
[1949] 2D00070,item13.

what to do while processing autopsy reports;[1950] (d) instructions issued by Haglund to speed up exhumations with consequent shortcomings;[1951] and (e) clothing being discarded upon Haglund's command, while some contained identification.[1952]

1487. Furthermore, in his report on Cerska, Haglund stated that *"[f]inalisation of cause and manner of death, as well as editing of final autopsy reports, was facilitated by ICTY legal advisor, Peter McCloskey."*[1953]

1488. These issues are impermissible and absolutely unacceptable from a professional standpoint.[1954] They led to the San Antonio report conclusion that *"[t]here was too much subjectivity and not enough objectivity in the performance of the examination and post-mortem examinations"*[1955].

1489. Given the inconsistencies between the actual findings and the conclusions on the cause of death and in view of the serious complaints by people in the field, the Defence submits that strong indications of misrepresentations exist in the manner and causes of death of individuals found in the graves relevant to the Indictment.[1956]

(III) Conclusion Regarding Forensic Evidence

1490. The grave inconsistencies and shortcomings in the various figures provided by the Prosecution, which are purported to represent Srebrenica victims, render them unreliable for the purpose of determining the number of deaths in Srebrenica in the time relevant to the Indictment.

1491. The Defence respectfully submits that the most reliable number of Srebrenica victims may be found in the two most updated documents, *i.e.* the Tracking Chart for the Srebrenica case dated 20 February 2009 (3,876 closed cases) and the REDACTED

1492. REDACTED. Considering that the relevant evidentiary standard in a criminal case is "beyond a reasonable doubt", victims for whom the cause has not yet been established may not be ascribed to the crimes committed in Srebrenica in the time material to the Indictment.

[1950] 2D00070,item13.
[1951] 2D00070,item13.
[1952] 2D00070,item14.
[1953] P00611,p.ix;ECp.10.
[1954] T.22877-T.22880;1D01070,p.123.
[1955] 2D00070,para. 9.
[1956] T.22884-T.22885.

1493. In addition, the Tracking Chart and REDACTED include approximately 2,000 combat-related deaths. These deaths must also be excluded from the number of victims who died as a result of the crimes forming the basis of the Indictment in this case, insofar they are the result of legitimate combat engagements, conducted in full respect of IHL. Such deaths must be considered lawful under the law of non-international armed conflict and they can not amount to a crime under the jurisdiction of the International Tribunal. Moreover, the evidentiary standard of "beyond a reasonable doubt" precludes combat-related deaths to be labeled as any of the crimes contained in the Indictment, in the absence of evidence to the contrary.

1494. Consequently, in the light of the evidence proffered above, the Defence respectfully concludes that not in excess of 2,000 to 3,000 victims were killed in the crimes in Srebrenica forming the basis of the Indictment in the relevant time-period.

(C) The Column

1495. The Indictment alleges that

> *"[o]n the morning of 13 July and continuing all that day, over 6,000 able-bodied men surrendered to or were captured by Bosnian Serb forces stationed along the road between Bratunac, Konjević Polje and Milići. … The plan to murder the able-bodied Muslim men from Srebrenica encompassed the murder of this group of over 6,000 men".*[1957]

1496. Even though it is unclear what the Prosecution's case exactly is in respect of the groups allegedly encompassed by the plan to murder the able-bodied men, it appears from this quote that the Prosecution alleges that a certain correlation existed between the combat with the column and the alleged plan to murder the able-bodied men encompassing 6000 men.

1497. It is the Defence's submission, that, in fact, the correlation between the combat with the column and the plan alleged by the Prosecution negates the *mens rea* required for genocide. The legal justification for engaging the column, the defensive nature of the combat and the decision allowing the column to pass through Zvornik Brigade defence lines militate strongly against an inference that genocidal intent is discernible from the events in Srebrenica in 1995.

(I) The combat

[1957] Indictment,para.29.

1498. It has been demonstrated above that the combat with the column was justified under IHL. Considering that the column constituted a major threat to Zvornik and that the 28th Division aimed to break out of encirclement to join up with the 2nd Corps of the ABiH, the combat with the column formed a defensive operation from the perspective of the VRS.

1499. The column posed an enormous peril to Zvornik, as confirmed by the evidence on the record.[1958] It is clear that, in these circumstances, the combat with the column was of a defensive nature.

1500. Pandurević testified that the column was heavily armed[1959] and that the advance of the column placed the Zvornik Brigade in the unprecedented position of facing conflict both from the front and from the rear.[1960]

1501. Janković, a traffic policeman captured by the column, said that the 5,000 to 6,000 persons strong column was colossal and that the majority of its members were middle-aged men.[1961] According to his estimation, 80% of the men in the column were armed.[1962] He added that the column was well-organised[1963] and that he was astonished by the weaponry available to it.[1964]

1502. In addition, numerous orders have been advanced indicating that the aim of the VRS was to halt the advance of the column. There is no proof for the contention proffered by the Prosecution that the column was engaged as part of the alleged genocide.

1503. Three examples may be mentioned in this respect. On 13 July 1995, Drina Corps commander, Živanović, ordered all subordinate units to *"discover, block, disarm and capture any Muslim groups observed and prevent their crossing into Muslim territory"*.[1965] The Zvornik Brigade regular combat report of 14 July 1995 speaks of actions undertaken to *"cut off Muslim forces retreating from Srebrenica towards*

[1958] T.10196;T.20137-T.20138;T.20710;T.21736-T.21737;T.22533;T.23303;T.33968.
[1959] T.31453-T.31455.
[1960] T.31455-T.31456.
[1961] T.27370.
[1962] T.27371.
[1963] T.27373.
[1964] T.27373.
[1965] P00117.

Tuzla".[1966] On 15 July 1995, Krstić orders, *inter alia,* the Zvornik Brigade to *"take all measures to block and, if possible, break up and capture Muslim forces"*.[1967]

1504. It is important to note that the use of the term *"destroy"* in documents relating to the column does not denote a sinister aim. Based on the evidence on the record, the term "destroy" is to be interpreted as referring to the military defeat of the enemy.

1505. Pandurević testified, in this regard, that *"'[t]o destroy' means to carry out military activities which will destroy most of the enemy unit so that they no longer represent a military threat"*.[1968] He added that this might also be achieved by "neutralising", which means *"to render harmless in another way by disarming, imprisoning, capturing or putting the unit in a passive situation where it can no longer act."*[1969]

1506. Obradović said that the reference to *"crush and destroy"* in Directive 6[1970] denotes military defeat.[1971] Similarly, according to Prosecution expert Butler,[1972] in a military context, there is nothing wrong with the phrase *"[f]irst offer the able-bodied and armed men to surrender; and if they refuse, destroy them"* contained in Operational Directive 4.[1973]

1507. Thus, mutually corroborative explanations as to the meaning of the term *"destroy"* have been provided in relation to different documents: *"destroy"* pertains to the military defeat of the enemy.

1508. Therefore, the Defence submits that the VRS aimed to halt the advance of the column in order to defend Zvornik and to prevent the 28th Division from uniting with the ABiH 2nd Corps.

1509. Certainly, a defensive operation does not evince a specific intent to destroy, in whole or in part, the Bosnian Muslims as a national group, as such. It is, in fact, indicative of the absence of genocial intent.

(II) The passage of the column

[1966] 7DP00326.
[1967] 4D5D01346.
[1968] T.30961;T.30917.
[1969] T.30961.
[1970] P03919.
[1971] T.28342.
[1972] T.19679.
[1973] P00029.

1510. In addition to the defensive nature of the combat with the column, the evidence on the record clearly establishes that a conscious decision was made to allow the column to pass through the Zvornik Brigade's defence lines on 15 and 16 July 1995, at the alleged apex of the killings.

1511. Pandurević's testimony is clear in this respect. He describes the agreement reached between himself and Muminović, his ABiH counterpart, concerning the opening of a corridor by moving soldiers from the 4th Battalion from three trenches and inviting the column of the 28th Division to pass through.[1974] The agreement involved a complete cessation of hostilities with the possibility of retaliations should the agreement be violated one-sidedly.[1975]

1512. Dragutinović testified that he learned of the agreement reached on 16 July 1995 through the Commander of the 7th Battalion, who was in touch with Pandurević.[1976] Jovanović also found out subsequently about this agreement.[1977] Ristić heard Pandurević informing the soldiers that an agreement had been reached on the radio.[1978]

1513. The Zvornik Brigade interim combat report to the Drina Corps command of 16 July 1995 confirms the agreement reached between the VRS and the ABiH in respect of the column.[1979]

1514. In addition, the evidence establishes that the agreement was abided by, despite the animosity between the two sides and the possibility of betrayal.

1515. Ristić specifically testified that the agreement was respected and that the column passed through the Zvornik Brigade defence lines without hindrance.[1980]

1516. The agreement could have been violated easily by either side. Indeed, Pandurević confirmed that he could have betrayed the agreement by firing on the 28th Division once they had concentrated in one place.[1981]

1517. In addition, in Ristić's opinion, together with the forces that arrived on that day, the column could have been prevented from passing through.[1982] Trkulja also considered

[1974] T.31034.
[1975] T.31034-T.31035.
[1976] T.12708.
[1977] T.22440.
[1978] T.10157.
[1979] 7DP00330.
[1980] T.10158.
[1981] T.31027;T.31041.
[1982] T.10160.

that, considering the column was located in a depression, the Zvornik Brigade could have attacked it.[1983]

1518. Upon learning of the passage of the column through the Zvornik Brigade defence lines, the Main Staff sent an inspection team to determine whether anyone should have been held accountable.[1984]

1519. However, upon acquainting themselves with the situation, Sladojević and Trkulja decided that no measures should be taken as they deemed that allowing the column to pass through was the right decision in the circumstances ruling at the time.[1985] They conveyed their conclusion to the Main Staff.[1986]

1520. It is the Defence's submission that the undisturbed passage of the column constitutes a strong factor against the inference that genocidal intent existed. If it were otherwise, the VRS would have exerted every possible effort to kill as many people from the column as possible.

1521. The Krstić Trial Chamber held that *"this decision* [to allow the column to pass through] *was apparently made out of desperation and in light of the Zvornik Brigade's inability to contain the column"*[1987] and that *"[t]he most logical reason for this was that most of the VRS troops had been relocated to Žepa by this time and, due to lack of manpower to stop the column, the Zvornik brigade was forced to let them go"*.[1988] However, the Krstić Trial Chamber did not corroborate its position with evidence and, in light of the evidence in this case, its conclusion must be rejected.

1522. Irrespective of the truthfulness of Pandurević's alleged personal motive for allowing the column to pass,[1989] heavy losses could certainly have been inflicted on the column. The fact that the column was allowed to pass, despite the possibility of attacking it, strongly weighs in favour of rejecting the inference that genocidal intent existed.

1523. The Krstić Appeals Chamber found that *"[e]ven where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness <u>alone</u> does not preclude a finding of genocidal intent."*[1990]

[1983] T.15116-T.15117.
[1984] T.14373.
[1985] T.14380.
[1986] T.14408-T.1409.
[1987] Krstić,TJ,para.85.
[1988] Krstić,TJ,para.546.
[1989] T.31041.
[1990] Krstić,TJ,para.32(emphasis added).

1524. If ineffectiveness alone does not preclude a finding of genocidal intent, it follows, *a contrario,* that ineffectiveness can constitute a factor negating genocidal intent, in conjunction with other circumstances.

1525. The Appeals Chamber's finding was made in respect of the fact that the women and children of Srebrenica were not killed. Without corroborating its position, the Appeals Chamber concluded that this *"may be explained by the Bosnian Serbs' sensitivity to public opinion"*.[1991]

1526. If this is true, the complete absence of international scrutiny during the passage of the column must weigh heavily in favour of the absence of genocidal intent. Once the agreement had been concluded, the Bosnian Serbs, allegedly entertaining genocidal intent, could have effortlessly decided to deceive the 28th Division and to attack them in the woods, far removed from international scrutiny. The fact that they did not, constitutes a factor displaying a lack of genocidal intent.

(III) Conclusion Regarding the Column

1527. In conclusion, the situation concerning the column demonstrates that the events in Srebrenica in July 1995, in and of themselves, do not reflect an intent to destroy, in whole or in part, the Bosnian Muslim group, as such. Such a conclusion is negated by: (a) the legal justification for engaging the column; (b) the defensive nature of the combat with the column; (c) the undisturbed passage of the column; and (d) the endorsement of the course of action adopted in respect of the passage of the column by the Main Staff delegation.

(D) The Krstić Decision

1528. The Defence submits that two arguments advanced by the Krstić Appeals Chamber buttress the proposition that an inference that genocidal intent existed in Srebrenica in July 1995 is not open to the Trial Chamber on the basis of the allegations contained in the Indictment and the evidence on the record.

(I) The Alleged Forcible Transfer

[1991] Krstić,TJ,para.31.

1529. The Krstić Appeals Chamber ruled that *"[t]he Trial Chamber - as the best assessor of the evidence presented at trial - was entitled to conclude that the evidence of the transfer* [of the women, children and elderly] *supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica".*[1992]

1530. However, in this case, the Prosecution maintains wholly inconsistently that the forcible transfer forms one of the four components of the alleged genocide, whilst the Accused Gvero and Miletić are not charged with genocide.

1531. The Prosecution can not have it both ways. Considering that the bulk of the charges against Accused Gvero and Miletić relate to the alleged forcible transfer, it is untenable to maintain that the forcible transfer supports an inference of genocidal intent if two VRS Main Staff Officers are not charged with genocide.

1532. Thus, unlike in Krstić, the evidence on the record is not capable of treating the alleged forcible transfer operation as supportive of an inference of genocidal intent.

(II) The Ambit of the Alleged Genocidal Enterprise

1533. In addition, the Krstić Appeals Chamber considered that:

> *"the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control."*[1993]

1534. However, the Indictment in this case alleges that the ambit of the alleged genocide is broader than in Krstić.

1535. Firstly, it is alleged that individual criminal responsibility arises for all seven Co-Accused in respect of the events in Srebrenica as well as Žepa. Five of the Co-Accused are charged with genocide, conspiracy to commit genocide and the remaining charges in respect of Srebrenica and with the alleged forcible transfer and/or deportation from Srebrenica and Žepa. Conversely, two of the Co-Accused supposedly incur individual criminal responsibility for the alleged *"opportunistic killings"* in Srebrenica, classified

[1992] Krstić,AJ,para.31.
[1993] Krstić,AJ,para.17.

as three different Statutory crimes, and for the alleged forcible transfer and/or deportation from Srebrenica and Žepa.

1536. Secondly, it has been the Prosecution's position throughout the case that the military operations, and the purported resulting crimes, in respect of Srebrenica and Žepa are intimately intertwined. The Indictment advances, for instance, as background to the case, that:

> *"[o]n 8 March 1995, President Radovan Karadžić set out in Directive 7 the order to remove the Muslim population from* ***the Srebrenica and Žepa enclaves****. … By 1 November 1995, the entire Muslim population had been either removed or fled from* ***Srebrenica and Žepa*** *and over 7,000 Muslim men and boys from Srebrenica had been murdered by VRS and MUP forces.*[1994]

1537. Therefore, the Appeals Chamber's conclusion that *"[f]rom the perspective of the Bosnian Serb forces alleged to have had genocidal intent …, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control"*[1995] can not find application in this case. The Muslims of Žepa were also clearly within the control of the VRS forces allegedly acting with genocidal intent. If it this were not true, the Accused could not have been charged with the crimes allegedly perpetrated in Žepa.

1538. This is significant considering that the Indictment omits to allege the occurrence of acts constituting the *actus reus* of genocide in Žepa. It is the Prosecution's case that the events in Žepa amount exclusively to forcible transfer and/or deportation constituting crimes against humanity.[1996]

1539. The fact that the VRS forces, allegedly entertaining genocidal intent, are not charged with the commission of genocidal acts against the Bosnian Muslims of Žepa, also a part of the Bosnian Muslim group within their area of control, counts heavily against the inference that genocidal intent existed in Srebrenica in July 1995.

(E) Conclusion Regarding the Prosecution's Failure to Prove Specific Intent

1540. The Defence respectfully submits that there is no direct evidence concerning the alleged genocidal intent discernible from the acts in Srebrenica in 1995. In addition, the evidence does not support an inference that genocidal intent is discernible from these acts.

[1994] Indictment,paras.24-25(emphasis added).
[1995] Krstić,AJ,para.17.
[1996] Indictment,paras.49-84.

1541. Firstly, on the basis of the available demographic and forensic evidence, the Defence firmly rejects the biased and unsubstantiated number of victims proffered by the Prosecution. Considering that the magnitude of the alleged killing operation constituted the main evidence for inferring genocidal intent,[1997] the evidence adduced in this case necessitates an adjustment. The forensic and demographic evidence establishes that the number of victims of the crimes forming the basis of the Indictment in the material time-period can not be considered to exceed 2,000 victims, which is of a significantly lesser scale than assumed by the Krstić Chambers. In the respectful submission of the Defence, the inference of genocidal intent can thus not stand.

1542. In this regard, it is important to consider the 2005 Darfur Report, in which it was concluded that no genocide was committed in Darfur. The Commission considered that *"[t]he fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element."*[1998] The Commission referred to a specific instance of the killing of about 800 young men in a village and concluded that:

> *"[t]his case clearly shows that the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population."*[1999]

1543. In the Defence's submission, even though there is no doubt that the killings in the Zvornik area in 1995 constitute a serious crime, they do not display the intent to destroy, in whole or in part, the Bosnian Muslim group as such as only a selective groups of men were targeted.

1544. Secondly, this conclusion is reinforced by the fact that the column was allowed to pass through Zvornik Brigade defence lines. As the evidence establishes in this case, the Zvornik Brigade was in a position, regardless of the motive underlying the decision allowing the column to pass, to attack the column and to inflict substantive losses. The decision not to do so, in the absence of international scrutiny, corroborates the proposition that an inference of genocidal intent is not permitted on the basis of the evidence on the record.

[1997] Krstić,AJ,para.26.
[1998] Darfur Report,para.513.
[1999] Darfur Report,para.513-514..

1545. Finally, unlike the Krstić Chambers, the evidence does not sustain the treatment of the alleged forcible transfer operation and the ambit of the alleged genocide as supportive of the inference that the events in Srebrenica of July 1995 display genocidal intent.

1546. As a matter of fact, these two issues strongly militate against such an interference considering that the Prosecution: (a) did not charge two of those allegedly involved in the alleged forcible transfer operation with genocide; and (b) the VRS forces, allegedly acting with genocidal intent, had control over the Bosnian Muslims of Žepa as well, even though the occurrence of acts constituting the *actus reus* of genocide is not charged in Žepa.

D. DRAGO NIKOLIĆ DID NOT HAVE THE REQUIRED *MENS REA* FOR GENOCIDE

1547. Even if the Trial Chamber were to conclude that it may be inferred that an intent to destroy the Bosnian Muslim group, in whole or in part, as such is discernible from the acts in Srebrenica in 1995, the Prosecution bears, in addition, the burden of proving that the Accused entertained the intent to destroy, in whole or in part, the Bosnian Muslim group, as such.

1548. There is, however, not a shred of evidence to this effect. The Prosecution utterly and completely failed to prove that Drago Nikolić entertained genocidal intent in 1995 *nor* that he knew of the alleged genocidal intent on the part of others.

I. DRAGO NIKOLIĆ DID NOT HAVE THE SPECIFIC INTENT TO DESTROY, IN WHOLE OR IN PART, THE BOSNIAN MUSLIM GROUP AS SUCH

1549. The Prosecution alleges that Drago Nikolić, *"with intent to destroy a part of the Bosnian Muslim people as a national, ethnical or religious group: a. killed members of the group by summary execution …; and, b. caused serious bodily or mental harm to both female and male members of the Bosnian Muslim populations of Srebrenica and Žepa, including but not limited to the separation of able bodied men from their families and the forced movement of the population from their homes to areas outside the control of the RS."*[2000] The Prosecution also claims that the alleged forcible transfer of women and children from Srebrenica and Žepa *"created conditions known to the*

[2000] Indictment,para.26.

Accused that would contribute to the destruction of the entire Muslim population of Eastern Bosnia".[2001]

1550. The Prosecution thus clearly employs a subdivision within the Bosnian Muslims of Eastern Bosnia, the part of the Bosnian Muslim group allegedly targeted for destruction. It distinguishes between: (a) those allegedly killed by summary execution, i.e. the able-bodied men from Srebrenica; and (b) the women and children from Srebrenica and Žepa.

1551. However, there is a complete absence of direct evidence establishing that Drago Nikolić entertained the specific intent to destroy, in whole or in part, the Bosnian Muslim population of Eastern Bosnia, as such. In addition, the circumstantial evidence on the record does not allow the Trial Chamber to infer that Drago Nikolić possessed genocidal intent *nor* that he knew of genocidal intent purportedly harboured by others.

(A) Drago Nikolić Was Not Aware of a State Policy to Commit Genocide

1552. It is the submission of the Defence that a State policy to destroy, in whole or in part, the Bosnian Muslim group as such, did not exist within the RS, on any level, at any time.[2002]

1553. In any event, even if the Trial Chamber would reject the Defence's submission, Drago Nikolić was unaware of such a State policy.

1554. As argued above, Drago Nikolić, in his position as the Security Organ and holding the rank of 2Lt, was unaware of Operational Directive 7.[2003] It follows that, because of his low rank and low position, Drago Nikolić could not have been involved or have knowledge of such a State policy, in any manner whatsoever.

1555. Therefore, Drago Nikolić did not entertain the *mens rea* required for genocide and can not incur individual criminal responsibility.

1556. Should the Trial Chamber deem Drago Nikolić's unawareness of a State policy to commit genocide not to be pertinent in the circumstances of this case, it will be demonstrated below that Drago Nikolić did not personally harbour the specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such *nor* was he aware of such intent allegedly possessed by others.

[2001] Indictment,para.26.
[2002] Part SEVEN,C.
[2003] Part FIVE,D,I,(A).

(B) The Forcible Transfer of Women and Children From Srebrenica and Žepa

1557. As demonstrated above,[2004] Drago Nikolić is not individually criminally responsible for the alleged forcible transfer of the women and children from Srebrenica and Žepa in any manner whatsoever.

1558. This finding is highly significant in respect of the alleged *mens rea* for genocide possessed by Drago Nikolić and of his knowledge of such intent supposedly entertained by others.

1559. In accordance with the Krstić Appeals Chamber decision, the alleged forcible transfer must be treated as a factor supportive of the inference of genocidal intent.[2005] It must, *a contrario,* be concluded that the absence of criminal responsibility on the part of Drago Nikolić for these events weighs heavily in favour of rejecting the Prosecution's allegation concerning Drago Nikolić *mens rea* for genocide.

(C) The Murder of Able-Bodied Men

1560. The Defence submits that neither Drago Nikolić's purported intent to destroy, in whole or in part, the Bosnian Muslim group as such *nor* his knowledge of such intent purportedly harboured by others may not be inferred from Drago Nikolić's alleged contribution to the murder of the able-bodied men from Srebrenica.

(I) Drago Nikolić was not a member of the alleged JCE

1561. As argued above, Drago Nikolić was not a member of the alleged JCE, the common plan, design or purpose of which was to kill all the able-bodied men from Srebrenica as: (a) he did not know of *nor* was he informed about the alleged common plan, design or purpose; and (b) he did not know of the alleged widespread or systematic attack against the Muslim population of Srebrenica and Žepa.[2006]

1562. Considering that the alleged JCE constitutes the main evidence underlying the genocide charge, Drago Nikolić's non-membership strongly suggests that he did not harbour the

[2004] Part FIVE.
[2005] Krstić,AJ,para.31.
[2006] Part Six,B :"THE PROSECUTION DID NOT PROVE THE *MENS REA* STANDARDS REQUIRED".

specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such *nor* that he know of such intent held by others.

(II) Drago Nikolić's presence in Orahovac on 14 July 1995

1563. As has been established above, it is the Defence's submission that, when Drago Nikolić saw a number of bodies in Orahovac on 14 July 1995, he could have surmised that a crime had been committed.[2007]

1564. Even though this is significant, the Defence posits that this fact does not establish Drago Nikolić's genocidal intent *nor* his knowledge of such intent on the part of others.

1565. Seeing a number of bodies, does not, in and of itself, display any genocidal intent. The bodies need not have been the victims of genocide but, depending on the circumstances, they could have been, for instance, victims of a crime against humanity or a war crime.

1566. In addition, when Drago Nikolić saw the bodies in the evening of 14 July 1995, the alleged criminal activity operation had already been set in motion. Drago Nikolić could thus not have known, based on the information available to him, that the bodies were the victims of genocide.

(III) REDACTED and Momir Nikolić

1567. Should the Trial Chamber find that Drago Nikolić was informed at an earlier point in time of the alleged plan to murder all the able-bodied men from Srebrenica, the evidence establishes that Drago Nikolić was merely informed about the arrival of detainees.

1568. As discussed extensively above, the Defence robustly rejects the veracity of the assertions of REDACTED and Momir Nikolić considering their complete lack of credibility and mutually contradictory assertions.[2008] There is absolutely no truth in the contentions that Drago Nikolić either: (a) REDACTED; or (b) was informed by Momir Nikolić about the arrival of detainees that were to be killed on 13 July 1995 at the IKM.

[2007] Part SIX, B-C: "THE PROSECUTION DID NOT PROVE THE *MENS REA* STANDARDS REQUIRED" and "THE ALLEGED ACTS AND CONDUCT OF DRAGO NIKOLIĆ MUST BE ASSESSED FOR EACH PURPORTED CRIME SEPARATELY".
[2008] Part FOUR, B,I-II: "PRELIMINARY CONSIDERATION" and "THE LACK OF CREDIBILITY OF MOMIR NIKOLIĆ".

1569. However, if the Trial Chamber were nevertheless to hold that Drago Nikolić learned of the arrival of detainees that were to be killed on 13 July 1995, despite the arguments proffered by the Defence above, it is revealing to look closely at the exact testimony of REDACTED and Momir Nikolić. The Defence respectfully posits that, even if the Trial Chamber were to accept one of these testimonies, the evidence does not support a conclusion that Drago Nikolić harboured specific genocidal intent *nor* that he learned of the fact that others would have entertained such intent.

1570. REDACTED [2009] [2010]

1571. In his Statement of Facts, Momir Nikolić claims that Colonel Beara ordered him *"to travel to the Zvornik Brigade and inform Drago Nikolić ... that* ***thousands of Muslim prisoners*** *were being held in* ***Bratunac*** *and would be sent to Zvornik"* and that *"the Muslim prisoners should be detained in the Zvornik area and* ***executed****"*.[2011] During his *viva voce* testimony, Momir Nikolić contended that he told Drago Nikolić that he *"had been sent by Mr. Beara to convey his order, that members who had been separated, i.e.,* ***the men from Bratunac*** *who had been separated and housed in the facilities in Bratunac, would, during the day, be transferred to Zvornik"* and that he *"had information that these men who were being brought or taken to Zvornik* ***would be executed***."[2012]

1572. Therefore, even if the Trial Chamber were to accept one of these testimonies, the bottom line is that Drago Nikolić's information, if any, was limited to the arrival of an unknown number of detainees – and certainly not of all the able-bodied men from Srebrenica. Moreover, as Drago Nikolić was not involved in the forcible transfer[2013] and considering that he has not been charged with involvement in the transport of the detainees from Srebrenica to Bratunac,[2014] he merely know that the detainees were from coming from Bratunac - and not from Srebrenica. Finally, as confirmed by Momir Nikolić, the detainees were to be executed by unknown persons and not by the Zvornik Brigade.[2015]

[2009] REDACTED
[2010] REDACTED
[2011] C00001,para.10(emphasis added).
[2012];T.32937-T.32938(emphasis added).
[2013] Part FIVE,"ARGUMENTS RELATED TO THE FIRST ALLEGED JOINT CRIMINAL ENTERPRISE AND COUNTS 7 AND 8 OF THE INDICTMENT".
[2014] Indictment,paras.30.1-30.5.
[2015] T.33214.

1573. The partial information available to Drago Nikolić does not square with the Prosecution's allegation that he harboured genocidal intent *nor* that he knew of others' genocidal intent. Information as to the arrival of an unknown number of detainees from Bratunac that were to be shot by unknown persons does not equal intent to destroy, in whole or in part, the Bosnian Muslim group, as such or knowledge thereof

1574. Therefore, if all the Defence's arguments in respect of REDACTED or Momir Nikolić were to be denied, Drago Nikolić knew, at the most, of a revenge operation against certain detainees. Drago Nikolić still did not know of the alleged killing of **all** able-bodied men from Srebrenica, as part of the purported destruction of the Bosnian Muslim group. Therefore, it is not open to the Trial Chamber to infer, on the basis of the evidence on the record, that Drago Nikolić harboured genocidal intent or that he knew of the alleged genocidal intent of others.

(IV) The meeting with Beara and Popović

1575. As established above, on 14 July 1995, Drago Nikolić would have been informed of the arrival of detainees at a meeting with Beara and Popović.[2016]

1576. Except for the information concerning the arrival of detainees, there is no other concerning the information Drago Nikolić may or may not have obtained during this meeting. The meeting, as such, does not constitute evidence of Drago Nikolić's alleged intent to destroy, in whole or in part, the Bosnian Muslim group, as such or that he learned of others' purported genocidal intent.

1577. Furthermore, it is not open to the Trial Chamber to conclude that the only reasonable inference is that, at this meeting, Drago Nikolić learned of the alleged plan to kill all the able-bodied men from Srebrenica, which would demonstrate his alleged genocidal intent or his knowledge of others' purported genocidal intent. Other reasonable explanations may be provided on the basis of the evidence on the record.

1578. For instance, Drago Nikolić, in his capacity of Security Organ, was responsible for security issues in the zone of responsibility of the Zvornik Brigade. Considering that the arrival of a large number of detainees presented significant security risks,[2017] it is reasonable to conclude that Beara and Popović exclusively imparted information to

[2016] Part SIX, B,I,(B): "Drago Nikolić Did Not Leave the IKM on 13 July 1995".
[2017] T.10140;T.10088-T.10089;T23307.

Drago Nikolić concerning the arrival of detainees and not of any alleged plan to murder them.

(V) Exhibit P2352 Does Not establish Genocidal intent

1579. In an intercept of 20 April 1995, Drago Nikolić allegedly said: *"[w]hat the hell aim I going to do with Catholic peasants? ... I'll be forced here to decide to slit their throats and dump them in the Drina"*.[2018] REDACTED[2019]

1580. It is obvious, however, that this intercept could not be farther removed from establishing genocidal intent.

1581. Firstly, over and above the fact that the intercept was allegedly recorded at a time falling outside the scope of the Indictment, it does not relate to the group allegedly singled out for destruction, i.e. the Bosnian Muslims. The fact that the Prosecution claims that Drago Nikolić's alleged derogatory comments towards Catholics establishes his intent to destroy, in whole or in part, the Bosnian Muslim group as such is preposterous.

1582. Secondly, even if the Trial Chamber would decide to accord any weight to this intercept, it is completely annulled by the evidence concerning Drago Nikolić's character. Drago Nikolić was on very good terms with his sister-in-law, a Catholic Croat, and others of Croat or Muslim ethnicity.[2020]

1583. Thirdly, Drago Nikolić's agitation because of the arrival of volunteers may be explained by his responsibilities as Zvornik Brigade Security Organ. In this capacity, he was responsible for the screening of volunteers presenting potential security threats. According to Pandurević, Drago Nikolić acquitted himself affably of this task.[2021] Moreover, Pandurević confirmed that the screening of volunteers was important as they presented potential security threats.[2022] Therefore, Drago Nikolić's anxiety is thus related to possible dangers for the Zvornik Brigade in times of war and has absolutely nothing to do with ethnic bias, let alone genocidal intent.

[2018] P02352.
[2019] REDACTED
[2020] Part THREE, C,II: "PERSONAL CHARACTER OF DRAGO NIKOLIĆ".
[2021] T.31351-T.31352.
[2022] T.31350-T.31351.

1584. Finally, such language was uttered during war and, if only for this reasons, no genocidal intent may be ascribed to Drago Nikolić because of it. Indeed, the Krstić Appeals Chamber held that:

> *"the Prosecution emphasised - as evidence of Krstić's genocidal intent - the Trial Chamber's findings of incidents in which he was heard to use derogatory language in relation to the Bosnian Muslims. The Trial Chamber accepted that 'this type of charged language is commonplace amongst military personnel during war.' The Appeals Chamber agrees with this assessment and finds that no weight can be placed upon Radislav Krstić's use of derogatory language in establishing his genocidal intent."*[2023]

1585. Therefore, Exhibit P2352 does not even resemble evidence establishing genocidal intent on the part of Drago Nikolić. This intercept is, in fact, emblematic of the weakness of the Prosecution's case concerning Drago Nikolić's alleged genocidal intent.

1586. Consequently, Drago Nikolić did not, at any time, possess the specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such *nor* did he learn of the fact that others might or might not have harboured such intent.

II. DRAGO NIKOLIĆ DID NOT AID AND ABET GENOCIDE

1587. In addition, Drago Nikolić does incur individual criminal responsibility for aiding and abetting genocide.

1588. As indicated above, in respect of aiding and abetting genocide, the Prosecution bears the burden of proving that Drago Nikolić: (a) committed acts specifically directed to assist, encourage or lend moral support to the perpetration of a Statutory crime which had a substantial effect upon the perpetration thereof; (b) knew that his acts assisted the commission of a Statutory crime perpetrated; and (c) knew of the genocidal intent behind the underlying offences.

1589. As may be concluded from the arguments espoused in relation to the absence of genocidal intent on the part of Drago Nikolić,[2024] he also did not know of the alleged genocidal intent entertained by others.

1590. Should the Trial Chamber accept the contested testimonies of REDACTED or Momir Nikolić, contrary to the arguments and submissions of the Defence, the evidence would

[2023] Krstić,AJ,para.130.
[2024] Part SEVEN,E.

still not support a conclusion that Drago Nikolić acquired knowledge of the alleged genocidal intent on the part of others.

1591. Drago Nikolić would have been partially informed of an unknown number of detainees arriving from Bratunac who were to be executed by unknown persons. Considering that such information, in and of itself, does not evince intent to destroy, in whole or in part, the Bosnian Muslim group, as such, it is impermissible to maintain that Drago Nikolić obtained knowledge of others' genocidal intent on 13 July 1995.

1592. In addition, it also can not be inferred that Drago Nikolić learned of the alleged genocidal intent behind the events in Srebrenica in 1995 during the meeting with Beara and Popović on 14 July 1995. All that the evidence reflects is that Drago Nikolić would have been informed of the arrival of certain detainees. There is a complete lack of evidence in relation to the contents of this meeting and it can thus not support the inference that Drago Nikolić would have learned of genocidal intent allegedly harboured by other individuals.

1593. Consequently, considering the complete absence of knowledge possessed by Drago Nikolić concerning an alleged intent to destroy, in whole or in part, the Bosnian Muslim group, as such in 1995, he can not incur individual criminal responsibility for aiding and abetting genocide.

III. DRAGO NIKOLIĆ DID NOT PLAN, INSTIGATE, ORDER OR COMMIT GENOCIDE

1594. Considering that the Prosecution failed to adduce any evidence whatsoever in respect of the allegation that Drago Nikolić planned, instigated, ordered or committed genocide, he does not incur individual criminal responsibility genocide on the basis of these modes of liability either.

E. CONCLUSION ON COUNT ONE

1595. In view of the submissions presented above, the Defence respectfully submits that Drago Nikolić must be acquitted of genocide.

PART EIGHT - ARGUMENTS RELATED TO COUNT 2: CONSPIRACY TO COMMIT GENOCIDE

1596. As developed above, it is the Defence's submission that the Prosecution unwarrantedly equates conspiracy to commit genocide - an inchoate crime - with JCE – a mode of liability.[2025] It is, therefore, completely untenable, in law and in fact, to maintain that the agreement underlying the conspiracy to commit genocide is identical to the agreement indentified in the JCE.[2026] It necessarily follows that the Prosecution fails to allege the chief constitutive element of conspiracy to commit genocide, *i.e.* a concerted agreement to commit genocide, which must be considered fatal to its case.[2027]

1597. Nonetheless, should the Trial Chamber hold that the crime of conspiracy to commit genocide has been properly charged in the Indictment, the Defence respectfully submits that the Prosecution failed to prove, beyond a reasonable doubt, that: (a) a concerted agreement to commit genocide was concluded between the alleged conspirators mentioned in the Indictment on 11 and 12 July 1995 in Bratunac; and/or (b) Drago Nikolić incurs individual criminal responsibility for Count 2 of the Indictment.

1598. The Defence respectfully emphasizes that the assessment pertaining to Drago Nikolić's individual criminal responsibility for the crime of conspiracy to commit genocide is entirely distinct from the assessment pertaining to Drago Nikolić's individual criminal responsibility for the crime of genocide.

1599. As set out above,[2028] conspiracy to commit genocide is a crime in and of itself, requiring: (a) a concerted agreement to commit genocide[2029] – the *actus reus;* and (b) the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such[2030] – the *mens rea.*

1600. The chief criterion of the crime of conspiracy to commit genocide is the concerted agreement to commit genocide. The conclusion of such an agreement puts an end to the crime and renders it complete in legal terms. In other words, once a concerted agreement to commit genocide has been concluded, the crime of conspiracy to commit genocide has been committed.[2031] Whether the agreement is implemented – *i.e.* whether genocide is committed – is irrelevant for the crime of conspiracy to commit

[2025] Part Two,B,IV.
[2026] Indictment,para.34.
[2027] Ntagurera,TJ,paras.66-70.
[2028] Part Two,D,II.
[2029] Ntagurera,AJ,para.92.
[2030] Nahimana,AJ,para.896.
[2031] Zigiranyirazo,TJ,para.389;Musema,TJ,para.194.

genocide.[2032] As is well known, and as detailed above,[2033] the crime of genocide is concerned with the perpetration of genocide.

1601. Thus, in legal terms, the crimes of genocide and conspiracy to commit genocide are delinked. Individual criminal responsibility for the crime of conspiracy to commit genocide does not require the perpetration of genocide. *Vice versa*, individual criminal responsibility for the crime of genocide does not require a preceding concerted agreement to commit genocide to be concluded.

1602. Bearing this distinction in mind, it is evident that the evidence on the record does not support a conclusion beyond a reasonable doubt that Drago Nikolić incurs individual criminal responsibility for the crime of conspiracy to commit genocide, pursuant to any of the modes of liability enumerated in Article 7(1) of the Statute.

1603. The evidence establishes, *inter alia,* that Drago Nikolić: (a) was not physically present at the conclusion of the alleged concerted agreement to commit genocide; (b) was not involved, in any manner whatsoever, in the alleged concerted agreement to commit genocide; (c) did not commit acts specifically directed to assist, encourage or lend moral support to the concerted agreement to commit genocide, which had a substantial effect upon the perpetration of this Statutory crime; (d) did not harbour the specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such;[2034] and (e) was not aware of the specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such, on the part of those who would have concluded the concerted agreement to commit genocide.[2035]

1604. Therefore, an acquittal in respect of count 2 – conspiracy to commit genocide – is warranted.

A. THE ALLEGED CONSPIRACY TO COMMIT GENOCIDE

1605. Without prejudice to its argument in respect of the Prosecution's conflation between conspiracy to commit genocide and JCE, the Defence posits that the evidence on the record does not support a finding beyond a reasonable doubt that the conspiracy to commit genocide, as alleged in the Indictment, existed.

[2032] Bikindi,TJ,para.405;Niyitegeka,TJ,para.423.
[2033] Part Two,D,I.
[2034] Part SEVEN,E.
[2035] Part SEVEN,E.

1606. Over an above the complete lack of direct evidence establishing the existence of the alleged conspiracy to commit genocide, three factors militate strongly against an inference that such a conspiracy indeed took place: (a) several alleged conspirators lack the required genocidal intent; (b) the decision-making in respect of the prisoners was highly inconsistent; and (c) indications as to the existence of a secret plan in respect of the transfer of detainees to Zvornik and Bratunac are absent.

I. WHAT IS THE ALLEGED CONCERTED AGREEMENT TO COMMIT GENOCIDE?

1607. It is significant to note that the Prosecution alleges that there was a specific concerted agreement to commit genocide, concluded between identified conspirators at a specific place and time.

1608. If it is accepted that the agreement underlying the JCE is identical to the agreement underlying the conspiracy to commit genocide, the latter must be considered to be concluded *"[i]n the evening hours of 11 July 1995 and on the morning of 12 July 1995, at the same time the plan to forcible transport the Muslim population from Potočari was developed"*.[2036]

1609. It logically ensues that the agreement was developed in Bratunac, as the purported plan to forcibly transport the Muslim population from Potočari would have been concocted in this town.[2037]

1610. In addition, besides five of the Co-Accused, Mladić, Živanović, Krstić and those mentioned in Attachment A to the Indictment would have been involved in the alleged concerted agreement to commit genocide.[2038]

1611. In conclusion, in order to enter a conviction for conspiracy to commit genocide, the Trial Chamber must be convinced, beyond a reasonable doubt, that the agreement to commit genocide was concluded: (a) in the evening hours of 11 July 1995 and on the morning of 12 July 1995; (b) in Bratunac; (c) involving one or more of the Co-Accused.

1612. In the respectful submission of the Defence, the evidence on the record must sustain a conclusion beyond a reasonable doubt that **this** specific conspiracy to commit genocide was put in place. Indeed, in *Bagosora,* the Trial Chamber emphasized that:

[2036] Indictment,para.27.
[2037] Indictment,paras.57-59.
[2038] Indictment,paras.34;97.

"the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather, it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy."[2039]

II. THE EVIDENCE DOES NOT ALLOW FOR AN INFERENCE THAT THE ALLEGED CONSPIRACY TO COMMIT GENOCIDE EXISTED

1613. It is significant that there is absolutely no direct evidence establishing the existence of a concerted agreement to commit genocide.

1614. Moreover, it may not be inferred on the basis of the circumstantial evidence on the record that the conspiracy to commit genocide, as alleged in the Indictment, existed. Indeed, the ICTR Jurisprudence demonstrates the exacting standards required for an inference that a conspiracy to commit genocide existed.[2040]

1615. In this case, several circumstances militate against an inference that the alleged conspiracy to commit genocide indeed took place.

1616. Firstly, it is extremely significant that several alleged conspirators did not harbour genocidal intent.

1617. The Appeals Chamber considered that Krstić, who would have been physically present during the critical period of 11-12 July 1995 in Srebrenica, Potočari and the Hotel Fontana meetings,[2041] did not himself possess genocidal intent.[2042] In addition, the Appeals Chamber acquitted Blagojević[2043] of conspiracy to commit genocide because it had not been proved beyond a reasonable doubt that he harboured genocidal intent.[2044] In respect of Momir Nikolić and REDACTED,[2045] the Prosecution's decision to drop charges of genocide must be considered an admission that these two individuals did not entertain genocidal intent.[2046]

1618. The absence of genocidal intent on the part of several alleged conspirators casts significant doubt upon the Prosecution's allegation that the alleged agreement was concluded with the required genocidal intent.

[2039] Bagosora,TJ,para.2092.
[2040] Nahimana,AJ,para.906;910.
[2041] Indictment,para.34,58,59.
[2042] Krstić,AJ,para.134.
[2043] Indictment,para.97.
[2044] Blagojević,AJ,para.142.
[2045] Indictment,para.97.
[2046] Momir Nikolić, Amended Plea Agreement, Annex A, para.4(b); REDACTED

1619. Secondly, the evidence reveals that, from 11 to 13 July 1995, decisions adopted in respect of the detainees were highly incoherent and changed continuously. Momir Nikolić explained that

> *"as for the status of these prisoners, they made different decisions every half an hour, let's say. Decisions were made as to what to do with them, who was going to secure them, et cetera."*[2047]

1620. However, if a conspiracy to commit genocide would have been concluded on 11 and 12 July 1995, the decision-making would have been unambiguously geared towards the physical or biological destruction of the detainees.

1621. Finally, Defence Security Expert Vuga confirmed that the incarceration of detainees in Zvornik and Bratunac did not proceed according to a secret plan.[2048] It is important to note in this regard that he was not expecting to find documents detailing a secret plan although he did expect that in the procedures and steps taken he *"would have recognised something that would have belonged and been commensurate with a secret plan"*.[2049]

1622. Certainly, the procedures and steps analysed by Vuga would have revealed indications of the existence of the required agreement to commit genocide if the crime of conspiracy to commit genocide had been committed.

1623. It is the respectful submission of the Defence that the Prosecution failed to supply evidence, direct and circumstantial, of the purported agreement to commit genocide, which would have been concluded: (a) in the evening hours of 11 July 1995 and on the morning of 12 July 1995; (b) in Bratunac; (c) involving one or more of the Co-Accused.

B. DRAGO NIKOLIĆ DID NOT CONSPIRE TO COMMIT GENOCIDE

1624. Even if the Trial Chamber would consider that the arguments developed above are not fatal to the Prosecution's case, the Defence respectfully posits that Drago Nikolić can not be held accountable for committing conspiracy to commit genocide as he: (a) was not involved, in any manner whatsoever, in the conclusion of the alleged concerted agreement to commit genocide; and (b) neither harboured the specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such, *nor* was he aware of such intent allegedly entertained by others.

[2047] T.33183;T.33233-T.33234.
[2048] T.23480.
[2049] T.23481.

I. DRAGO NIKOLIĆ WAS NOT INVOLVED IN THE *ACTUS REUS* OF CONSPIRACY TO COMMIT GENOCIDE

1625. The Defence's case rests on the premise that the alleged conspiracy to commit genocide was completed on 11 and 12 July 1995, when the concerted agreement to commit genocide would have been concluded. The crime of conspiracy to commit genocide does not imply an ongoing criminal activity[2050] and any purported subsequent involvement of Drago Nikolić is thus irrelevant for the purpose of Count 2 of the Indictment.

1626. The evidence, or lack thereof, unambiguously establishes that Drago Nikolić was not involved in the agreement to commit genocide.

(A) The Rule 98*bis* Decision

1627. As a preliminary matter, the Defence notes that, at the Rule 98*bis* stage, the Trial Chamber found that the following evidence could allow a reasonable trier of fact to conclude that Drago Nikolić was involved in the alleged conspiracy to commit genocide:

> *"[w]itness PW-143, PW-168, Milorad Bircakovic, Ostoja Stanisic, PW-165 and Srecko Acimovic, as well as Exhibit P5, Republika Srpska Supreme Command Directive number 7, dated 8 March, […] P107, the Drina Corps order 04/156-2, Operations order number 1, Krivaja-95, dated 2nd July 1995, […] Exhibit 5DP106, the Drina Corps order 01/04-156-1, preparatory order operations number 1, dated 2nd July 1995, […] and P-318, an order from the Zvornik Brigade to the chief of security, signed by Vinko Pandurevic, dated 2nd July 1995."*[2051]

1628. Nonetheless, it is the respectful submission of the Defence that much of the evidence relied on by the Trial Chamber for the purpose of Rule 98*bis* can not be attributed probative value in respect of Drago Nikolić.[2052]

1629. More importantly, however, much of this evidence either predates or postdates the conclusion of the alleged agreement to commit genocide. The testimonies of Witnesses PW-143, PW-168, Milorad Birčaković, Ostoja Stanišić, PW-165 and Srećko Aćimović concern the alleged acts and conduct of Drago Nikolić as of the late afternoon or evening of 13 July 1995, subsequent to the alleged conclusion of the concerted

[2050] Part Two,D,II,C.
[2051] T.21465.
[2052] Part FOUR.

agreement to commit genocide on 11 and 12 July 1995. In addition, Exhibits P5, P107, 5DP106 and P318 were issued on either 8 March 1995 or 2 July 1995, which is prior to the purported conclusion of the concerted agreement to commit genocide.

1630. The Defence, therefore, respectfully posits that, even if this evidence was accorded probative value in respect of Drago Nikolić, it does not support a conclusion beyond a reasonable doubt that Drago Nikolić was involved in any manner whatsoever in the alleged agreement to commit genocide, supposedly established on 11 and 12 July 1995.

(B) The Allegations Against Drago Nikolić Commence after the Completion of the Crime

1631. Furthermore, it is astounding to note that, according to the Indictment, the alleged role of Drago Nikolić in the JCE to murder the able-bodied men from Srebrenica does not commence until the evening of 13 July 1995.[2053]

1632. At this point in time, the crime of conspiracy to commit genocide would already have been completed as the concerted agreement to commit genocide was allegedly concluded on 11-12 July 1995.

1633. It can thus not be maintained, on the basis of the allegations in the Indictment, that Drago Nikolić was involved in the alleged conclusion of the concerted agreement to commit genocide.

(C) Drago Nikolić Was Not Involved in Krivaja 95

1634. More importantly, the evidence on the record establishes that, during Krivaja 95, Drago Nikolić: (a) was not a member of Tactical Group I that took part in the combat activities in and around Srebrenica; and (b) never set foot in Srebrenica or the surrounding area.[2054]

1635. It logically ensues that Drago Nikolić was not involved in the conclusion of the purported concerted agreement to commit genocide. He was not physically present in Srebrenica or the surrounding area, which is where the alleged concerted agreement would have been concluded on 11-12 July 1995.

[2053] Indictment,para.30.6.
[2054] Part FIVE,D,I.

(D) Drago Nikolić Was Not Otherwise Involved in the Alleged Concerted Agreement to Commit Genocide

1636. In any event, even if the Trial Chamber would deem that Drago Nikolić's physical absence would not, in and of itself, preclude individual criminal responsibility for conspiracy to commit genocide, the record is completely devoid of any evidence establishing any form of communication with the alleged conspirators during 11 and 12 July 1995 or any other type of involvement in the alleged concerted agreement to commit genocide.

1637. There is simply no evidence concerning the activities, whereabouts, communication or similar of Drago Nikolić on 11 July 1995, except that he was not a member of Tactical Group I and that he was not physically present in Srebrenica or the surrounding area.[2055] In addition, as established above, on 12 July 1995, Drago Nikolić was off duty and there is no evidence on the record concerning his whereabouts and activities on that day.[2056]

1638. Moreover, the evidence indicates that, in general, the Zvornik Brigade had limited, if any, information concerning Tactical Group I and Krivaja 95, which could have potentially provided Drago Nikolić with a linkage with the alleged conspiracy to commit genocide as Tactical Group I was present in the area in which the crime would have been committed.[2057] However, even if Drago Nikolić would have had information concerning Tactical Group I and Krivaja 95, it does not establish, in and of itself, any type of involvement or knowledge on the part of Drago Nikolić in relation to the alleged conspiracy to commit genocide.

II. DRAGO NIKOLIĆ DID NOT HAVE THE SPECIFIC INTENT TO DESTROY, IN WHOLE OR IN PART, THE BOSNIAN MUSLIM GROUP AS SUCH

1639. The Defence respectfully posits that, taking into account that conspiracy to commit genocide is an inchoate crime, which does not imply ongoing criminal activity, the Prosecution is required to prove that the alleged conspirators harboured specific genocidal intent at the time of the conclusion of the concerted agreement to commit genocide.

[2055] Part FIVE,C,I,(B),(II) and Part FIVE,D,I,(B).
[2056] Part FIVE,C,I,(B),(II).
[2057] Part FIVE,D,I,(B).

1640. However, the Defence, respectfully posits that, in view of the complete lack of direct evidence proffered by the Prosecution in respect of Drago Nikolić's mental state on 11 and 12 July 1995, it is not open to the Trial Chamber to conclude beyond a reasonable doubt that Drago Nikolić harboured specific genocidal intent or that he knew of others' genocidal intent. In addition, the lack of evidence on the record does not support a conclusion beyond a reasonable doubt that the only reasonable inference is that Drago Nikolić possessed genocidal intent or that he had knowledge of others' genocidal intent.

1641. Moreover, as established above, the evidence clearly establishes that Drago Nikolić did not possess genocidal intent as of the evening of 13 July 1995.[2058]

1642. In conclusion, the Defence respectfully posits that Drago Nikolić is not guilty of Count 2 – conspiracy to commit genocide – as the Prosecution utterly and completely failed to prove beyond a reasonable doubt: (a) Drago Nikolić's involvement in the conclusion of the concerted agreement to commit genocide; and/or (b) that Drago Nikolić possessed the required specific genocidal intent for this crime.

C. DRAGO NIKOLIĆ DID NOT AID AND ABET THE ALLEGED CONSPIRACY TO COMMIT GENOCIDE

1643. In addition, it is the Defence's submission that Drago Nikolić did not aid and abet the alleged conspiracy to commit genocide.

1644. Drago Nikolić did not commit acts specifically directed to assist, encourage or lend moral support to conspiracy to commit genocide, which had a substantial effect on the perpetration of this crime *nor* did he know of the alleged specific genocidal intent harboured by the alleged conspirators.

I. DRAGO NIKOLIĆ DID NOT PERFORM ACTS SPECIFICALLY DIRECTED TO ASSIST, ENCOURAGE OR LEND MORAL SUPPORT

1645. As a preliminary matter, the Defence notes that aiding and abetting conspiracy to commit genocide must relate to the defining element of this crime, *i.e.* the agreement to commit genocide. Only if an individual assisted, encouraged or morally supported the conclusion of the agreement to commit genocide may he or she may be held

[2058] Part SEVEN,E,I.

accountable for aiding and abetting conspiracy to commit genocide, provided that, in addition, the remaining elements are also established.

1646. However, as established above,[2059] the evidence on the record is completely silent in respect of the alleged role played by Drago Nikolić in the establishment of the purported agreement to commit genocide on 11 and 12 July 1995 as he: (a) was not physically present in Srebrenica or the surrounding area; (b) did not communicate with the alleged conspirators in any manner whatsoever; and (c) was not involved in the alleged concerted agreement to commit genocide in any other way.

1647. Therefore, there is a complete absence of proof that Drago Nikolić performed acts specifically directed to assist, encourage or lend moral support to conspiracy to commit genocide.

II. DRAGO NIKOLIĆ'S ACTS DID NOT HAVE A SUBSTANTIAL EFFECT ON THE PERPETRATION OF CONSPIRACY TO COMMIT GENOCIDE

1648. Even if the Trial Chamber would find that Drago Nikolić performed acts that were specifically directed to assist, encourage or lend moral support to the conspiracy to commit genocide, his acts could not have had a substantial effect on the perpetration of this crime.

1649. The mere fact that Drago Nikolić's acts would necessarily have been committed *ex post facto* negates the possibility of his acts having had a substantial effect on the conspiracy to commit genocide. The conclusion of the agreement to commit genocide had already put an end to the crime of conspiracy to genocide on 11 and 12 July 1995.

1650. In addition, besides Drago Nikolić, the Indictment specifically mentions Mladić, Živanović, Krstić, Popović, Beara, Borovčanin and Pandurević as the alleged conspirators. All these officers, employed in the highest echelons of the VRS and MUP, were much higher-ranked than Drago Nikolić in July 1995, who was 2Lt and Zvornik Brigade Security Organ

1651. Drago Nikolić could not have exerted substantial effect on the conclusion of the alleged concerted agreement to commit genocide. Considering the far-reaching implications and degree of organization required for such an endeavour, such an agreement can only be concluded by those wielding significant power. Bearing in mind Drago Nikolić's

[2059] Part EIGHT,C,I.

junior rank at the relevant time and the hierarchical relations in the VRS, he could not have been in a position to significantly affect an agreement allegedly concluded by officers ranked much higher than he was.

III. DRAGO NIKOLIĆ DID NOT KNOW OF THE ALLEGED SPECIFIC GENOCIDAL INTENT ON THE PART OF THE ALLEGED CONSPIRATORS

1652. In any event, even if the Trial Chamber would disregard the arguments proffered above, it is evident that Drago Nikolić did not know of the purported specific genocidal intent harboured by the alleged conspirators.

1653. The Defence respectfully recalls that the mental element of conspiracy to commit genocide must be proved to have existed beyond a reasonable doubt at the time the crime was executed, *i.e.* at the time the alleged concerted agreement to commit genocide would have been concluded.

1654. As set out above, there is no evidence in respect of Drago Nikolić's activities, whereabouts, knowledge or similar on 11 and 12 July 1995, on the basis of which it could be concluded that he learned of others' genocidal intent.[2060] Indeed, the lack of evidence in this respect is confirmed by the fact that the allegations in the Indictment against him do not commence before the evening of 13 July 1995.

1655. Moreover, there is no circumstantial evidence supporting an inference that Drago Nikolić learned of the purported genocidal knowledge on the part of the alleged conspirators on 11 and 12 July 1995. For instance, there is no evidence on the record concerning any type of communication, contacts, meetings or similar between Drago Nikolić and those alleged to have conspired to commit genocide on 11 and 12 July 1995, during which he could possibly have learned of such specific, genocidal intent on their part.

1656. Accordingly, the Prosecution failed to adduce any evidence whatsoever establishing that Drago Nikolić aided and abetted conspiracy to commit genocide.

D. DRAGO NIKOLIĆ DID NOT SUBSEQUENTLY JOIN THE CONSPIRACY TO COMMIT GENOCIDE

[2060] Part FIVE,C,I,(B),(II) and Part FIVE,D,I,(B).

1657. Lastly, in the alternative, should the Trial Chamber consider that the crime of conspiracy to commit genocide does imply ongoing criminal activity, it is the Defence's submission that Drago Nikolić still does not incur individual criminal responsibility for the crime of conspiracy to commit genocide.

1658. As has been argued above, there is a complete lack of evidence establishing either Drago Nikolić's specific intent to destroy, in whole or in part, the Bosnian Muslim group, as such, or his knowledge of such intent purportedly harboured by others.[2061]

PART NINE - ARGUMENTS RELATED TO COUNT 6: PERSECUTIONS

1659. The Prosecution charges Drago Nikolić with *"[p]ersecutions on political, racial and religious grounds, a CRIME AGAINST HUMANITY."*[2062]

1660. In the submission of the Defence, the Prosecution failed to prove beyond a reasonable doubt that Drago Nikolić: (a) entertained the requisite *mens rea* for persecutions as a crime against humanity; and/or (b) participated in the *actus reus* of persecutions.

A. DRAGO NIKOLIĆ DID NOT POSSESS THE REQUIRED *MENS REA* FOR PERSECUTIONS

1661. The burden of proof imposed on the Prosecution requires it to prove beyond a reasonable doubt that Drago Nikolić would have carried out the underlying persecutory acts with the intent to discriminate on political, racial and/or religious grounds.[2063]

1662. However, the evidence on the record does not support a conclusion beyond a reasonable doubt that Drago Nikolić indeed intended to discriminate against the Bosnian Muslims.

1663. Firstly, according to the Prosecution, Exhibit P2352 would be *"directly relevant to the charges of genocide and persecution."*[2064] Nevertheless, for the same reasons set forth above, this exhibit certainly does not establish Drago Nikolić's discriminatory intent.[2065]

[2061] Part SEVEN,E,I.
[2062] Indictment,Count 6.
[2063] Kvočka,AJ,para.320.
[2064] REDACTED
[2065] Part SEVEN,E,I,(C),(V).

1664. Secondly, even though there are examples on the record that could be interpreted as constituting derogatory language towards Bosnian Muslims, they do not suffice in establishing Drago Nikolić's alleged discriminatory intent for the crime of persecutions. The Krstić Appeals Chamber found that derogatory language is commonplace in wartime and that it does not establish genocidal intent.[2066] Similarly, no weight can be placed on the utterance of such language in respect of discriminatory intent for the crime of persecutions. Drago Nikolić's comments display an animosity towards the enemy during the war but they do not amount to discrimination on any ground towards the Bosnian Muslims as a people.

1665. Finally, the fact that the crimes alleged in the Indictment would have been committed exclusively against Bosnian Muslims also does not establish Drago Nikolić's alleged discriminatory intent for the crime of persecutions. As has been established above, Drago Nikolić did not know of the alleged common plan, design or purpose to murder all the able-bodied men from Srebrenica.[2067] He acted under the impression that the detainees that were transferred to the Zvornik area were to be exchanged. Considering that the conflict in this part of Bosnia-Herzegovina was mainly waged between Bosnian Serbs and Bosnian Muslims, Drago Nikolić believed that the arrival of the detainees was related to the conflict. Therefore, it does not establish intent on his behalf to discriminate against the Bosnian Muslims as a people.

1666. In the alternative, even if the Trial Chamber would find that Drago Nikolić intended to discriminate against the Bosnian Muslims, the Defence posits that the Prosecution failed to prove beyond a reasonable doubt that Drago Nikolić harboured the required *mens rea* for crimes against humanity.

1667. As has been established above, Drago Nikolić did not know of: (a) the alleged widespread or systematic attack directed against the Bosnian Muslim civilian population of Srebrenica and Žepa; and/or (b) that his acts formed part of the alleged widespread or systematic attack.[2068]

B. DRAGO NIKOLIĆ DID NOT TAKE PART IN THE ALLEGED PERSECUTORY ACTS

[2066] Krstić,AJ,para.130.
[2067] Part SIX,C.
[2068] Part SIX,C,II.

1668. The Prosecution failed to prove beyond a reasonable doubt that Drago Nikolić was involved in any of the alleged persecutory acts.

I. MURDER OF THOUSANDS OF BOSNIAN MUSLIM "CIVILIANS"

1669. The first persecutory act alleged is *"the murder of thousands of Bosnian Muslim **civilians**, including men, women, children and elderly persons"*.[2069]

1670. However, the evidence on the record does not establish beyond a reasonable doubt that Drago Nikolić would have been involved in these murders as he: (a) can not be considered a member of the purported JCE to murder all able-bodied Muslim men from Srebrenica;[2070] (b) is not responsible for what happened at any of the crime-sites alleged in the Indictment, apart perhaps, to a limited degree, for the events in Orahovac on 14 July 1995; (c) acted under the impression that the people brought to Zvornik for exchange purposes were ABiH soldiers and not "civilians";[2071] and (d) there is a complete lack of evidence on the record establishing beyond a reasonable doubt that Drago Nikolić would have been involved in any manner whatsoever in the murder of women, children and/or elderly persons.

II. CRUEL AND INHUMANE TREATMENT OF BOSNIAN MUSLIM "CIVILIANS"

1671. The Prosecution alleges secondly that the crime of persecutions would have been carried out by and through *"the cruel and inhumane treatment of Bosnian Muslim **civilians**, including murder and severe beatings at Potočari and in detention facilities in Bratunac and Zvornik"*.[2072]

1672. Nonetheless, the evidence on the record does not allow for a conclusion beyond a reasonable doubt that Drago Nikolić would incur responsibility for these acts as he: (a) can not be considered a member of the two JCE's alleged in the Indictment;[2073] (b) is not charged with responsibility for the events at Potočari and in detention facilities in

[2069] Indictment,para.48(a) (emphasis added).
[2070] Part SIX,C.
[2071] Part SIX,C,I,(C).
[2072] Indictment,para.48(b) (emphasis added).
[2073] Parts FIVE and SIX.

Bratunac *nor* does the evidence reflect that he could have been involved therein;[2074] (c) did not consider the detainees to be civilians as he believed that they were ABiH soldiers who were to be exchanged;[2075] and (d) does not incur individual criminal responsibility for any of the alleged crime sites, except perhaps to a limited degree for the events at Orahovac on 14 July 1995.[2076]

III. TERRORIZING BOSNIAN MUSLIM "CIVILIANS"

1673. According to the allegations in the Indictment, the third persecutory act would have concerned *"the terrorising of Bosnian Muslim **civilians** in Srebrenica and at Potočari"*.[2077]

1674. In the Defence's submission, the same reasons proffered above preclude the attachment of individual criminal responsibility to Drago Nikolić for these acts.[2078]

IV. DESTRUCTION OF PERSONAL PROPERTY AND EFFECTS

1675. The Prosecution alleges that the fourth manner in which the crime of persecutions would have been carried out is *"the destruction of personal property and effects belonging to the Bosnian Muslims"*.[2079]

1676. However, the Prosecution has led absolutely no evidence in respect of Drago Nikolić's alleged involvement in this persecutory act.

V. FORCIBLE TRANSFER OF BOSNIAN MUSLIMS FROM SREBRENICA AND ŽEPA

1677. Finally, it is the Prosecution's case that the crime of persecutions was allegedly carried out through *"the forcible transfer of Bosnian Muslims from Srebrenica and Žepa by means of the forced bussing of the women and children to Bosnian Muslim controlled territory and the forced bussing of the men, separated at Potočari or captured or having surrendered from the column, up to the Zvornik area, where they were*

[2074] Part FIVE, D: "THE ALLEGED ROLE AND ACTIONS OF DRAGO NIKOLIĆ IN FURTHERANCE OF THE JCE TO FORCIBLY TRANSFER AND DEPORT THE SREBRENICA AND ŽEPA MUSLIM POPULATION.
[2075] Part SIX, B,I,(C): "Meeting at Standard Barracks on 14 July 1995".
[2076] Part SIX,C.
[2077] Indictment,para.48(c) (emphasis added).
[2078] Part NINE, B,I-II: "MURDER OF THOUSANDS OF BOSNIAN MUSLIM 'CIVILIANS' " and "CRUEL AND INHUMANE TREATMENT OF BOSNIAN MUSLIM 'CIVILIANS'".
[2079] Indictment,para.4(d).

ultimately executed, and the deportation of the Bosnian Muslim men from Žepa who were forced to flee from their homes in Žepa to Serbia".[2080]

1678. However, as has been established above, the bussing of the men separated at Potočari or captured or having surrendered from the column does not amount to forcible transfer as: (a) the departure of the men in the column from Srebrenica was voluntary; (b) the transportation of the detainees held for reasons related to the conflict must be considered a legitimate measure; and (c) the detainees were not moved to an area outside the control of the RS.[2081]

1679. In addition, it has been demonstrated above that Drago Nikolić: (a) did not know of the alleged common plan, design or purpose to force the Muslim population out of Srebrenica and Žepa; (b) did not harbour the requisite *mens rea* for the alleged crimes of forcible transfer and deportation; (c) was neither involved in the forcible transfer of women and children from Srebrenica and Žepa *nor* in the deportation of the men from Žepa ; (d) was neither charged with *nor* involved in the transportation of the able-bodied men from Srebrenica to Bratunac; and (e) does not incur individual criminal responsibility for the transportation of the able-bodied men from Bratunac to Zvornik.[2082]

PART TEN - FINAL SUBMISSIONS

1680. As a preliminary matter, the Defence acknowledges that this has been a very long trial and that the last three years have been very demanding not only on the Prosecution and Defence but also the Judges and the Registry Staff. The Defence takes this opportunity to express its gratitude to all persons invoved.

1681. In light of the arguments and submissions comprised in this Nikolić Brief and as will be expanded upon during closing arguments, the Defence respectfully submits that the charges laid against Drago Nikolić and the multiple allegations advanced by the Prosecution in respect of the Accused, simply do not reflect what happened in the area of Zvornik in July 1995.

[2080] Indictment,para.4(e).
[2081] Part Two, A,VII: "THE VICTIM GROUPS OF FORCIBLE TRANSFER AND DEPORTATION".
[2082] Part FIVE," ARGUMENTS RELATED TO THE FIRST ALLEGED JOINT CRIMINAL ENTERPRISE AND COUNTS 7 AND 8 OF THE INDICTMENT"

1682. While it is acknowledged that Drago Nikolić was present at the school in Orahovac on two occasions on 14 July 1995 and that for this reason, he may incur criminal responsibility, albeit to a limited extent, the Defence submits that the acts and conduct of Drago Nikolić and his involvement in the atrocious events which happenend in Eastern Bosnia in July 1995, do not even come close to a fragment of the Prosecution's case against him.

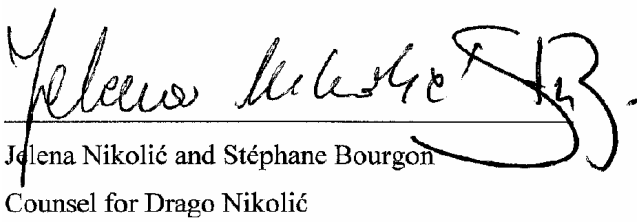
1683. Consequently, in application of the beyond reasonable doubt standard, the Defence respectfully request the Trial Chamber to return a verdict of NOT GUILTY for Counts 1, 2, 3, 5, 6, 7 and 8.

1684. As for Count 4, Murder as a violation of the laws of custom of war, the Defence respectfully requests the Trial Chamber to recognize the very limited involvment of the Accused in what happened at the school in Orahovac on 14 July 1995 and to determine his responsibility accordingly.

Page Count: 280 pages

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF JULY 2010

COUNSEL FOR THE ACCUSED DRAGO NIKOLIĆ



Jelena Nikolić and Stéphane Bourgon
Counsel for Drago Nikolić

ANNEX A LIST OF CASES REFERRED TO
ANNEX B ABBREVIATIONS
ANNEX C DRAGO NIKOLIĆ BEHAVIOUR REPORT WHILST IN CUSTODY
ANNEX D SCHABAS REPORT

ANNEX A

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ANNEX B

LIST OF ABBREVIATIONS

- DEM 2T Database	-	Database of Deceased Persons 1992-1995
- ICMP		International Commission for Missing Persons
- ICRC Guidance		ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities
- Janc Update	-	Janc's update of the Manning report
- OSCE Voters' Lists	-	OSCE Voters' Lists for 1997/98 and 2000
- PHR List	-	Physicians for Human Rights List
- Rules of Service		Rules of Service of Security Organs in the Armed Forces of the SFRY
- Statute		Statute of the International Criminal Tribunal for the Former Yugoslavia
- Strategic Objectives		Decision on Strategic Objectives of the Serbian People in Bosnia and Herzegovina
-UNDU	-	United Nations Detention Unit
-2005 Prosecution List	-	Prosecution's 2005 List of Srebrenica-Related Missing and Dead

ANNEX C

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia
Detention Unit

Tribunal Pénal International pour l'ex-Yougoslavie
Quartier Pénitentiaire

27 July 2009

To whom it may concern.

Further to a request of Ms Jelena Nikolić, defence counsel for Mr Drago Nikolić, for a report on the behaviour of her client whilst in the custody of the UN Detention Unit, please note the following.

Mr Drago Nikolić has been in the custody of the UN Detention Unit from 17 March 2005 to 01 August 2008 and from 04 August 2008 to the present day, a total of 1592 days in custody (4 years. 132 days).

During this time Mr Nikolić has shown good respect for the management and staff of the unit and has complied with both the Rules of Detention and the instructions of the guards.

He has consistently had cordial relations with his fellow detainees and has had a positive input to the dynamic on his residential wing. He has actively participated in the programme of remand taking particular advantage of sport and fitness activities to occupy himself during his time on remand.

Mr Nikolić has maintained a good and stable relationship with his family: wife, daughters and grandchildren who visit and speak with him on a regular basis.

Mr Nikolić is in good health for a man of his age, aided in this regard by regular use of the sports facilities and other recreational options available through the programme of remand.

Regards,

Fraser Gilmour
Deputy Commanding Officer
UN Detention Unit

ANNEX D

State Policy as an Element of the Crime of Genocide

A report on the role of State policy in the interpretation of the crime of genocide, with special reference to the case law of the International Criminal Tribunal for the former Yugoslavia

Submitted to Counsel for Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Vinko Pandurević in the case of *Prosecutor* v. *Popović* et al. (Case No IT-05-88-T)

by Prof. William A. Schabas OC MRIA

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Executive summary

- This is a report on the evolving law of genocide, with a particular emphasis on the issue of State policy as an element of the crime.
- Case law of the International Criminal Tribunal for the former Yugoslavia has focussed on the intent of individual perpetrators, even entertaining the hypothesis that genocide could be committed by a single person, acting alone. This is described as the 'specific intent' of genocide, reflecting a mechanistic transposition of terms from national criminal law dealing with ordinary crimes to the context of prosecution of international atrocity crimes.
- The better approach to *mens rea* of genocide focuses on knowledge rather than intent. In practice, this is what the Appeals Chamber did in the only conviction to date based upon article 4 of the Statute of the Tribunal, holding that General Krstić was guilty as an accomplice because he *knew* of the genocidal intent of 'some members of the VRS Main Staff'.
- The shortcoming of the Appeals Chamber decision is that it returns to an individual intent model, in its conclusion that the accomplice is guilty if he or she knows of the 'intent' of the principal perpetrator. The opinion argues that this question is much better addressed by asking if the accomplice (and for that matter the participant) knew of the State policy behind genocide.
- This raises the difficult issue of State policy as a component of the crime of genocide. Whether or not State policy is seen as an 'element' of the crime of genocide, this opinion contends that State policy should be central to the inquiry as to whether or not genocide was perpetrated. One advantage of this approach is that it efficiently links issues of State responsibility for genocide with those of individual responsibility, so that in both types of analysis the same basic questions are asked. Once the issue of State policy is resolved – a matter germane to both State responsibility and individual criminal responsibility – then criminal tribunals should ask whether the accused *knew* of the policy, rather than whether the individual had a 'specific intent' to physically destroy a group.

- The caselaw of the International Criminal Tribunal for the former Yugoslavia in genocide cases brings out all of the shortcomings of the intent-based approach. Once the analysis is shifted, as proposed in this opinion, judicial decisions in both the State responsibility and the individual criminal responsibility context have the potential to be coherent and consistent, something lacking at present.

Expert qualifications of Prof. William A. Schabas with respect to the crime of genocide

- author of *Genocide in International Law*, Cambridge: Cambridge University Press, 2000, as well as numerous books and articles dealing in whole or in part with legal aspects of the crime of genocide and international criminal law generally
- writings on genocide and international criminal law have been cited in rulings of the International Court of Justice, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone
- distinguished academic, holder of the chair in human rights law at the National University of Ireland, Galway, and Director of the Irish Centre for Human Rights
- Officer of the Order of Canada, Member of the Royal Irish Academy

Introduction

International criminal law is a discipline that continues to evolve, with previous decisions and 'convention wisdom' constantly being reassessed. Major issues need to be rethought from time to time. This is a phenomenon of which there are many examples in the case law of the international tribunals. It is something normal and desirable, and testifies to the dynamism of law as it is applied to concrete conditions.

The legal interpretation of the elements of genocide is in a period of some turmoil. The decisions of the International Criminal Tribunal for Rwanda may have clarified some elements, but the specific features of the Rwandan genocide have meant that certain important matters have simply not been explored in any depth. At the International Criminal Tribunal for the former Yugoslavia, there are contradictory strands, as can be seen in Trial Chamber rulings subsequent to the *Krstic* Appeals Chamber decision. Moreover, other important contributions to the evolving law of genocide have recently been made by the International Commission of Inquiry on Darfur and the International Court of Justice. In particular, the Darfur Commission and the International Court of Justice have addressed genocide from the standpoint of State responsibility, something that has not really been considered in the jurisprudence of the *ad hoc* tribunals. This opinion considers the relationship between individual responsibility and State responsibility with respect to genocide, and urges the adoption of a coherent and unifying approach, rather than one that views the two regimes as autonomous, distinct and, indeed, understood in different ways. It proposes that the unifying theme should be the element of State policy. An analysis based upon State policy provides a sound basis for establishing both State responsibility and individual criminal liability. It has significant advantages over the current trend in the case law of the international criminal tribunals, which focuses on individual intent in isolation from the overarching policy behind the genocidal attack.

The first judicial interpretations of the crime of genocide did not consider whether a State policy to commit genocide was an element of the crime. The prosecution of Adolf Eichmann was based upon legislation derived from the 1948 *Genocide Convention.* The District Court of Jerusalem noted that '[w]ith the rise of Hitler to power, the persecution

of the Jews became official policy and took on quasi-legal form through laws and regulations published by the government of the Reich'.[2083] The judgment demonstrated how the extermination of the Jews resulted from State policy, with the infamous Wannsee conference taking on decisive significance in this respect.[2084] In other words, although the State policy dimension was the *leitmotif* of the judgment, its existence as a requirement of the crime was never directly examined.

Similarly, it has never been at issue whether a State policy was a feature of the Rwandan genocide. In its first trial verdict, the International Criminal Tribunal for Rwanda wrote:

> On April 12 1994, after public authorities announced over Radio Rwanda that "we need to unite against the enemy , the only enemy and this is the enemy that we have always known...it's the enemy who wants to reinstate the former feudal monarchy", it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of the interim government, the Prime Minister and some key ministers travelled to Butare and Gikongoro, and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people.[2085]

At one point in the judgment, the Trial Chamber referred to the 'massive and/or systematic nature' of the crime of genocide.[2086] Convicting Akayesu of crimes against humanity as well as genocide, the Tribunal said that the crimes had been widespread and systematic,[2087] defining 'systematic' as involving 'some kind of preconceived plan or policy'.[2088] The clear presence of a State policy to commit the crime in Rwanda has meant that the judgments of the Tribunal never address whether this is an element of the definition or a requirement for the existence of genocide.

The Guatemalan truth commission, which examined charges of genocide with respect to atrocities committed during that country's civil war in the early 1980s, and which was chaired by the distinguished international lawyer Christian Tomuschat, considered it necessary to demonstrate the existence of a plan to exterminate Mayan

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2083 *A.-G. Israel* v. *Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 56.
2084 *Ibid.*, paras. 86 ff.
2085 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 109.
2086 *Ibid*., para. 477.
2087 *Ibid*., para. 651.
2088 *Ibid*., para. 579. The Tribunal cited the 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', UN Doc. A/51/10, p. 94.

communities that obeyed a higher, strategically planned policy, manifested in actions which had a logical and coherent sequence.[2089]

It is only with the first verdict of the International Criminal Tribunal for the former Yugoslavia concerning charges based on article 4 of the *Statute* that the question has presented itself in the judicial application of the definition of genocide. Unlike Rwanda, Nazi Germany and perhaps Guatemala, where State policy was self-evident and required no serious demonstration or proof, trial judges of the International Criminal Tribunal for the former Yugoslavia have found no compelling evidence of State policy to perpetrate genocide. However, instead of simply dismissing charges of genocide on the grounds that proof of State policy had not been made out, and directing judicial energy on war crimes, where there is no requirement of a State policy, Trial Chambers of the Yugoslavia Tribunal have developed an approach to genocide that is focussed on the intent of individuals rather than the policy of States or State-like entities. This has led to a contorted and inconsistent jurisprudence, whose difficulties have only recently become apparent as the definition has been applied within the context of establishing State responsibility for genocide.

A better approach, as some writers have argued, is for a 'knowledge-based' approach to the crime of genocide.[2090] The value of a focus on knowledge rather than intent features in recent decisions of the International Tribunal dealing with joint criminal enterprise where the test, at least when a large-scale joint criminal enterprise is concerned, appears to be knowledge of State policy rather than some insight into the intent of an individual.[2091]

This opinion adopts the view that the State policy element of genocide has been neglected or dismissed. The result of a misplaced emphasis on individual intent has led to

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[2089] *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, 'Conclusions', para. 120.

[2090] Claus Kress, 'The Darfur Report and Genocidal Intent', (2005) 3 *Journal of International Criminal Justice*, p. 578, pp. 565-573; Claus Kress, 'The Crime of Genocide Under International Law', (2006) 6 *International Criminal Law Review*, p. 461, pp. 492-497; Claus Kress, 'The International Court of Justice and the Elements of the Crimes of Genocide', (2007) 18 *European Journal of International Law*, p. 619, pp. 625-627. See also: Alexander Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation', (1999) 99 *Columbia Law Review*, p. 2288; Hans Vest, 'A Structure-Based Concept of Genocidal Intent', (2007) 5 *Journal of International Criminal Justice*, p. 781.

[2091] *Prosecutor* v. *Milutinović* et al. (Case No. IT-05-87-PT), Separate Opinion of Judge Iain Bonomy, 22 March 2006; *Prosecutor* v. *Brđanin* (Case No. IT-99-36-A), Judgment, 3 April 2007.

distortions in subsequent case law. The better approach to the mental element of the crime is to look for knowledge rather than intent. Where there is a State policy to commit genocide, and where the accused has knowledge of the policy and commits punishable acts in furtherance of the policy, then the crime of genocide is committed. Where there is no State policy, it is irrelevant whether an individual harbours some 'specific intent' to physically destroy a protected group. This is especially apparent in the State responsibility cases, including the recent judgment of the International Court of Justice, where the central question is whether the State had a policy to commit genocide rather than whether one or more individuals whose acts might be attributed to the State were animated by a genocidal intent. In practice, courts do not considere the second of these two hypotheses.

But first, let us retrace our steps.

Jelisić and the lone *génocidaire*

The first significant judicial determination concerning genocide by Chambers of the International Criminal Tribunal for the former Yugoslavia was in the *Jelisić* case.[2092] The Trial Chamber in that matter should be forgiven for not appreciating all of the subtleties, given that it was dealing with an issue about which little or nothing had been written and with a paucity of case law to guide it. Some of the carelessness in the decision can be seen, for example, in its discussion of the 1951 *Advisory Opinion* of the International Court of Justice, where it says the Court affirmed the *jus cogens* nature of genocide.[2093] In fact, the International Court of Justice refrained from describing anything as *jus cogens* until 2006.[2094]

Dismissing the charge of aiding and abetting genocide against Jelisić, the Trial Chamber said that 'the Prosecutor has not provided sufficient evidence allowing it to be

[2092] There had been isolated consideration of the definition of genocide by Trial Chambers in a few of the Rule 61 decisions: *Prosecutor* v. *Karadžić* et al. (Case No. IT-95-5-R61 & IT-95-18-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996; *Prosecutor* v. *Nikolić* (Case No. IT-95-2-R61), Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 34,

[2093] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 60.

[2094] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 64.

established beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Brcko or elsewhere within which the murders committed by the accused would allegedly fit'.[2095] This statement is curious, given the findings in the rest of the judgment that no plan is required in order to make out the crime of genocide. If the Trial Chamber were really consistent with the views it set out subsequently, it ought to have said the Prosecutor failed to prove that another individual perpetrated genocide, and that *Jelisić* knew of his genocidal intent. This seems to be the approach endorsed by the Appeals Chamber in *Krstić*.[2096]

Lacking evidence of a 'plan', the Trial Chamber might simply have concluded its observations and dismissed genocide-related charges. Instead, it said that it was 'therefore only as a perpetrator that Goran Jelisić could be declared guilty of genocide',[2097] something the Trial Chamber contended was 'theoretically possible'. The relevant portions are reproduced here, because it is important to consider the detail and depth of the Trial Chamber's reasoning on this important issue which, as has already been noted, was a novel one at the time:

> 100. Such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated.[147] In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the *ad hoc* committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text,[148] and that such precision would only make the burden of proof even greater.[149] It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.
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> 101. The Trial Chamber observes, however, that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system.[150]
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> 147. Witness I.
> 148. Pieter N. Drost, *The Crime of State, Genocide,* A.W. Sythoff, Leyden, 1959, p. 85: 'both as a question of theory and as a matter of principle nothing in the present Convention prohibits its provisions to be interpreted and applied to individual cases of murder by reason of the national, racial, ethnical or religious qualities of the single victim if the murderous attack was done with the intent to commit similar acts in the future and in connection with the first crime'.
> 149. The French word "délibéré" was dropped further to a proposal of Belgium (UN Off. Doc. A/C.6/217, UN Doc. A/C.6/SR.72 p. 8).

2095 *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 98.
2096 *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 19 April 2004, para. 140.
2097 *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100.

150. On this point, see *inter alia* the commentary of J. Graven, *op. cit.*, p. 495. [*sic.* There is no previous reference to J. Graven in the judgment. Presumably, the Trial Chamber was referring to: Jean Graven, 'Les crimes contre l'Humanité', (1950) 76 RCADI, p. 427.]

This conclusion was reached rather hastily, and the discussion is much too superficial for such a crucial issue. It relies upon two commentators whose publications date back forty and fifty years. Pieter Drost's observation, which is cited in footnote 148 of the *Jelisić* Trial Chamber decision, is quite speculative and no authority is provided. The Trial Chamber didn't seem to notice anything of significance in the title of the Drost book, *The Crime of State, Genocide*, but I find it to be exceedingly important to the discussion. Drost's obscure comment is not aligned with his basic approach to the crime of genocide, which is clearly expressed in the title of his study. As for the reference to Jean Graven, the latter's paper consists of a simplistic synopsis of the debate in the Sixth Committee of the General Assembly, noting that the desire was to avoid narrowing the definition of genocide by requiring proof of premeditation as this might have unfortunate consequences and lead to acquittals, as had been the case in certain lynching cases in the United States. Graven misread the *travaux*, because it is quite clear that there was never any serious intention that acts of lynching in the United States be encompassed within the definition of genocide. The problem with his analysis is in attempting to understand an aspect of the *Genocide Convention* with reference to a single debate, rather than situating this in the overall context of the drafting of that instrument. His statement is not reliable authority for the view that an individual, acting alone and not in pursuance of a State policy, can commit genocide.

I am not aware that the drafters of the *Convention* ever directly addressed the issue of State policy as an element of the crime of genocide. This may be because they did not think it germane, but I think it more likely that they believed the matter to be self-evident. For example, in the *Ad Hoc* Committee, at which the basic approach to the Genocide Convention was hammered out, the Soviet Union issued a document entitled 'Basic Principles' which said like '[t]he concept of physical destruction must embrace not only cases of direct murder of particular groups of the population for the above-mentioned reasons, but also the premeditated infliction on such groups of conditions of life aimed at the destruction of the group in question'.[2098] There was a debate in the Sixth

2098 UN Doc. E/AC.25/7, Principle II.

Committee of the General Assembly about whether reference to premeditation should figure in the definition of genocide, and it was agreed to exclude the concept, as the Trial Chamber explains in *Jelisić*. The debate was confusing and sometimes contradictory, and it is particularly dangerous to rely on isolated remarks from certain delegations in attempting to establish the intent of the drafters. Thus, while Belgium said premeditation should not figure in the definition because the notion of intent was sufficient,[2099] Haiti said premeditation was implicit because preparatory acts would always be involved in the commission of genocide.[2100] The final wording of the *Convention* represents a compromise aimed at generating consensus between States with somewhat different conceptions of the purposes of the convention.

The Trial Chamber's analysis leads to the following conclusion: 'It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.' In my opinion, this is an extravagant interpretation of the *Convention*, a misunderstanding of its context and to a large extent a misreading of the intent of its drafters. The reasoning is not persuasive, and it smacks of a judicial determination where judges have made up their minds about a result and then look for arguments to support it. In the case of the International Criminal Tribunal for the former Yugoslavia, once it became apparent, as it did to the Trial Chamber in *Jelisić*, that it was going to be difficult to identify a State policy to perpetrate genocide, there was an unfortunate incentive to develop a theory by which no such policy was required.

The Trial Chamber's cursory analysis of the drafting of the *Convention* is not accompanied by resort to any other techniques of interpretation. It is worth recalling the general rule of interpretation set out in the *Vienna Convention on the Law of Treaties*: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The *travaux préparatoires* are only a supplementary means of interpretation to be used when the general approach has left the meaning ambiguous or obscure, or leads to a result

[2099] UN Doc. A/C.6/SR.72 (Kaeckenbeeck, Belgium). See also UN Doc. A/C.6/SR.71 (Paredes, Philippines); and UN Doc. A/C.6/SR.72 (Fawcett, United Kingdom).
[2100] UN Doc. A/C.6/SR.72 (Demesmin, Haiti).

which is manifestly absurd or unreasonable. But the Trial Chmaber did not even consider whether interpretation 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' supported the view that genocide could be committed by an individual, acting alone, or whether the crime required, as part of its context, and in fulfillment of the object and purpose of the repression of genocide, that punishable acts be perpetrated as part of a State policy.

The Trial Chamber's conclusion on the State policy issue was confirmed on appeal, without any further reflection on sources of law or context. The Appeals Chamber did not provide any more substantial analysis or insight into the question. Its discussion on the issue is confined to a single paragraph:

> The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[83] [2101]
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> 83. This was also held in the oral decision by the Appeals Chamber for the ICTR in *Obed Ruzindana and Clément Kayishema v. Prosecutor*, Case No.: ICTR-95-1-A, 1 June 2001.

The reference in the footnote is to the oral decision of the Appeals Chamber, but the ruling has since been reported. The Appeals Chamber discussed the finding of the Trial Chamber that there was in fact a plan or policy behind the Rwandan genocide. According to the Appeals Chamber: 'It further opined (and the Appeals Chamber agrees) that even though a genocidal plan is not a constituent element of the crime of genocide, the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.'[2102] Indeed, the Appeals Chamber went on to say:

> It follows from the Trial Judgment that the Prosecution's case during trial was that a genocide of the Tutsi population was planned and executed by public officials, both on a national and regional level, in Rwanda during 1994. The Prosecution, being unable to tender into evidence some official document outlining a genocidal plan, put forward a theory that such a plan could be inferred from the existence of such sufficient *indicia* as (i) the existence of lists of persons to be executed (targeting, *inter alia*, the Tutsi élite); (ii) the dissemination of extremist ideology through the Rwandan media; (iii) the use of the civil defence programme and the distribution of weapons to the civilian population; and (iv) the "screening" carried out

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2101 *Prosecutor* v. *Jelisić* (Case No. IT-95-10-A), Judgment, 5 July 2001, para. 48.

2102 *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-A) Judgment (Reasons), 1 June 2001, para. 138.

at many roadblocks. The Trial Chamber considered that the relevant indicia had been proven by the Prosecutor. Consequently, it held that "the massacres of the Tutsi population indeed were 'meticulously planned and systematically co-ordinated' by top level Hutu extremists in the former Rwandan government at the time in question".[2103]

I would be inclined to treat *Kayishema* as supportive of the importance of a State policy in a judicial inquiry into genocide, rather than authority that it is not an 'element'.

Jelisić had an interesting effect on those who were negotiating the *Elements of Crimes* of the *Rome Statute of the International Criminal Court*. The *Elements* of genocide include the following: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[2104] In its draft 'definitional elements' on the crime of genocide for the *Rome Statute*, the United States had proposed that the mental element of genocide include the requirement of a 'plan to destroy such group in whole or in part'.[2105] During subsequent debate in the Preparatory Commission for the International Criminal Court, the United States modified the 'plan' requirement, this time borrowing from crimes against humanity the concept of 'a widespread or systematic policy or practice'.[2106] The wording was criticised as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the *Convention.*[2107] Israel however made the quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a 'widespread and systematic policy or practice'. As the debate evolved, a consensus appeared to develop recognising the 'plan' element, although in a more cautious formulation.[2108]

2103 *Ibid.*, para. 139.

2104 'Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalised draft text of the Elements of Crimes,' PCNICC/2000/INF/3/Add.2.

2105 'Annex on Definitional Elements for Part Two Crimes', UN Doc. A/CONF.183/C.1/L.10, p. 1. The elements also specify that 'when the accused committed such act, there existed a plan to destroy such group in whole or in part'.

2106 The draft proposal specified that genocide was carried out 'in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group': 'Draft elements of crimes', UN Doc. PCNICC/1999/DP.4, p. 7.

2107 Comments by Canada, Norway, New Zealand and Italy, 17 February 1999 (my personal notes).

2108 'Discussion paper proposed by the Co-ordinator, Article 6: The crime of genocide', UN Doc. PCNICC/1999/WGEC/RT.1: 'The accused knew … that the conduct was part of a similar conduct directed against that group'.

The 'manifest pattern of similar conduct' is what the *Elements* deem to be a 'contextual circumstance',[2109] to distinguish such facts from the classic criminal law concept of material element or *actus reus*. The term 'circumstance' appears in article 30 of the *Rome Statute of the International Criminal Court*, requiring that an accused have 'awareness that a circumstance exists'.[2110] Three additional provisions complete but also complicate the construction of this text about genocidal conduct in the *Elements of Crimes*. The term 'in the context of' is to include the initial acts in an emerging pattern, the term 'manifest' is deemed an objective qualification, and '[n]otwithstanding the normal requirement for a mental element provided for in article 30 [of the *Rome Statute*], and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis'.[2111]

Even if the *Elements* do not explicitly provide support for a State policy element, they clearly reject the 'lone *génocidaire*' approach adopted by the Trial Chamber and confirmed by the Appeals Chamber. The Appeals Chamber observed in *Krstić* that the definition of genocide adopted in the *Elements of Crimes* 'did not reflect customary law as it existed at the time *Krstić* committed his crimes'.[2112] The only authority offered by the Appeals Chamber for this statement is 'Prosecution Appeal Brief'. With respect, there is great confusion between customary international law and a literal reading of article II of the *Genocide Convention.* It is clear enough that State policy, or even the 'widespread or systematic' language, does not appear in article II of the *Convention* (and article 4 of the *Statute of the International Criminal Tribunal for the former Yugoslavia*). But the additional element spelled out in the Elements is strong evidence that it is implicit in customary international law. That the Preparatory Commission, representing the vast majority of States parties to the *Genocide Convention*, agreed to the text of the Elements should be taken as both a useful guide to the interpretation of the *Convention* as well as an indication of the substance of customary international law. Indeed, outside the treaty law environment of the *Genocide Convention*, it is difficult to identify the content of

2109 *Ibid*.
2110 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 30(3).
2111 *Elements of Crimes*, ICC-ASP/1/3, pp. 113-115.
2112 *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 224.

customary international law anyway. In this respect, note the text of article 31(3) of the *Vienna Convention on the Law of Treaties*:

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

It is submitted that article 31(3) enhances the relevance of the Elements of Crimes in the interpretation of article II of thw *Genocide Convention*. To say the opposite is simply to allow the personal opinions of judges to triumph over genuine manifestations of State opinion and practice.

The *Jelisić* reasoning is extended to crimes against humanity

A year after the Appeals Chamber decision in *Jelisić*, the issue of State policy presented itself in the context of charges of crimes against humanity. Not unlike the situation in *Jelisić*, despicable acts had been perpetrated by vile individuals, but the link to a State policy was not at all evident. *Kunarac* concerned a brothel operated within a detention camp where acts of extreme brutality were committed against women who were treated as sexual slaves. The defendants argued that because there was no evidence of State policy they could not be convicted of crimes against humanity. Noting that it had 'reached the same conclusion in relation to the crime of genocide (*Jelisic* Appeal Judgement, para 48)', the Appeals Chamber wrote:

> Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.[114] [2113]

114 - There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501;

[2113] *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98.

Case FC 91/026; *Attorney-General v Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al. v Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 298, 14 September 1993; *Sivakumar v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (*Jelisic* Appeal Judgement, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor v Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 ILR 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR 14/1947, 278 and 284 and comment thereupon in *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, pp 586-587).

As can be seen, the discussion of this important matter is confined to a footnote. Unfortunately, there is no detailed explanation of the reasoning of the Appeals Chamber, and on closer scrutiny it is often not very clear how and why these references buttress the court's position. It is important to consider this in more detail here, because it is clear that there is a symbiosis between the requirement of State policy for crimes against humanity and for genocide, as the Appeals Chamber acknowledged.

The first codification of crimes against humanity, in article VI(c) of the *Charter of the International Military Tribunal*, does not explicitly establish a State plan or policy as an element of crimes against humanity. Presumably for this reason, the Appeals Chamber cited article VI(c) as its first authority for the proposition that there is no State plan or policy element in customary international law. However, a State plan or policy is undoubtedly implicit in the entire concept of crimes against humanity, at least as it was developed first by the United Nations War Crimes Commission and subsequently at the London Conference. The *chapeau* of article VI of the *Charter* specifies that accused persons must have been 'acting in the interests of the European Axis countries, whether as individuals or as members of organizations'. Moreover, the so-called *nexus* which requires that crimes against humanity be committed 'in connection with any crime within the jurisdiction of the Tribunal' has the effect of linking them to crimes which are themselves associated with a State policy, and most specifically crimes against peace. Probably the possibility that crimes against humanity might apply to what are today called 'non-State actors' never even crossed the minds of those who drafted the *Nuremberg Charter*. Precisely because they understood the necessary link between

crimes against humanity and State policy, the four powers that drafted the *Charter* were actually concerned that the new category of offence might eventually apply to themselves, and to the policies of their own governments directed towards national minorities, and that is why they insisted on the *nexus* with armed conflict.[2114]

It is of course true that Streicher was convicted of crimes against humanity by the International Military Tribunal despite the conclusion that 'the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment'.[2115] That does not mean, however, that he would have been convicted of crimes against humanity *absent evidence of a State plan or policy*. One conclusion does not lead to the other. Moreover, Streicher was a *gauleiter*, a position of considerable importance in the Nazi regime. His crimes consisted essentially of being a propagandist for Nazi policy. It seems to be reading a lot into the Nuremberg judgment to assert, as does the Appeals Chamber, that his conviction is authority for the view that there is no State policy element with respect to crimes against humanity. The other example given by the Appeals Chamber is von Schirach. Since the 1920s, von Schirach had been leader of the Hitler Youth. During the war, he was *gauleiter* of Vienna, and it was for atrocities committed during the Nazi occupation of Austria that he was convicted of crimes against humanity by the Nuremberg Tribunal.[2116] This is hardly authority for the position of the Appeals Chamber. Both Streicher and von Schirach carried out their crimes with knowledge of Nazi policy and in order to ensure its success. That they may have, at some times, stood outside the Nazi establishment does not in any way mean that their guilt for crimes against humanity did not depend upon the policy.

[2114] See, *e.g.*, the remarks of the Justice Jackson, the United States delegate, at the London Conference, 'Minutes of Conference Session of July 23, 1945', in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Washington: US Government Printing Office, 1949, p. 333: [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.'

[2115] *France* et al. v. *Göring* et al., (1946) 22 IMT 203, 13 ILR 203, 41 *American Journal of International Law* 172, at p. 294.

[2116] *Ibid.*, pp. 309-311.

The International Military Tribunal never addressed the issue of plan or policy directly, and the reason is obvious: the Nazi plan and policy to wage aggressive war and to exterminate the Jews of Europe underpinned the entire case. Why would the Tribunal ever have even spoken to such a non-issue, under the circumstances? For the same reasons, the *Eichmann* trial – another source upon which the Appeals Chamber relies - seems flimsy authority indeed for the suggestion that there is no State policy element to crimes against humanity. The entire judgment of the Jerusalem District Court is constructed around evidence of Nazi policy. The Appeals Chamber's position would have been more convincing if it could point to a single example of a successful prosecution for crimes against humanity directed against a 'non-state actor' lacking any association with a State plan or policy. But there are none, except of course for its own judgments.

The Appeals Chamber's methodology, by which it argues that plan or policy is not an element of crimes against humanity, because it does not find this stated explicitly in the early instruments or judgments, seems flawed. This is because the same can be said of the 'widespread or systematic' language that the Appeals Chamber contends is the defining contextual element of crimes against humanity. The Nuremberg judgment used the words 'widespread' and 'systematic' on many occasions, but in a general sense, applicable to all of the Nazi atrocities, and not as in any way a definitional element of crimes against humanity. In *Eichmann*, the word 'widespread/ appears once ('The Accused also headed a widespread establishment of officials', at para. 231) but 'systematic' is not used at all. In other words, if the failure of the Appeals Chamber to find the State policy element in *Nuremberg* and *Eichmann* is an argument for dismissing its relevance at customary international law, can't one say the exact same thing about 'widespread or systematic'?

The summary and obscure comment of the Appeals Chamber in *Kunarac* on this most important issue is especially striking because it fails to even mention article 7(2)(a) of the *Rome Statute*, which reads: '"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.' The Appeals Chamber has not hesitated to invoke the *Rome Statute* as authority for customary international law when this

corresponds to its own views on a particular point. In *Tadić*, for example, when it was first enunciating the theory of 'joint criminal enterprise', the Appeals Chamber pointed to article 25(3)(d) of the *Rome Statute* as important evidence of the *opinio juris* of States and, therefore, of customary law.[2117] Of course, article 7(2)(a) of the *Rome Statute* leaves room for interpretation, but there can be no doubt that it imposes some kind of contextual element involving a plan or policy. The failure of the Appeals Chamber to even mention the rather obvious difficulty that article 7(2)(a) poses for its theory about the customary law of crimes against humanity certainly doesn't enhance the strength and credibility of its position.

Professor Cherif Bassiouni has written on the interpretation of article 7 of the *Rome Statute*. In his recent three-volume work, *The Legislative History of the International Criminal Court*, he argues:

> Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable f inflicting significant harm in more than one state, falls within this category. In this author's opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that mater, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses… The text [of article 7(2)] clearly refers to state policy, and the words 'organisational policy' do not refer to the policy of an organisation, but the policy of a state. It does not refer to non-state actors…[2118]

Another noteworthy oversight in the Appeals Chamber's discussion of the question of State policy is some of the significant national decisions dealing with crimes against humanity. It cites three Canadian cases from lower courts, but does not mention what was at the time the leading case on crimes against humanity of the Supreme Court of Canada. The *Finta* ruling of the Supreme Court of Canada has already been referred to by the Appeals Chamber, in a case where its own views coincided with those expressed by the Supreme Court,[2119] so the omission of any reference to it stands out all the more. On the State policy issue, *Finta* is not helpful to the Appeals Chamber. In *Finta*, the

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[2117] *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 223.

[2118] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, NY: Transnational PUblishers, 2005, pp. 151-152. See also: M. Cherif Bassiouni, *Crimes Against Humanity*, 2nd ed., The Hague: Kluwer, 1999, pp. 243-281.

[2119] *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, paras. 266-267.

majority of the Supreme Court of Canada said that 'state action or policy' was a pre-requisite legal element of crimes against humanity',[2120] a view that seemed to be common ground even for the dissenters.[2121] Similarly, in applying the French *Code pénal*, which requires evidence that crimes against humanity were 'organised in the execution of a prearranged plan against a group in the civilian population',[2122] French cases have taken this as requiring a State plan or policy.[2123]

Among the authorities listed by the Appeals Chamber to support its position that there is no plan or policy element is the Report of the Secretary-General to the Security Council on the draft Statute of the International Criminal Tribunal for the former Yugoslavia. The famous footnote in *Kunarac* cites paragraphs 47 and 48 of that Report as proof of the 'overwhelming support' of the contention that there is no State plan or policy requirement under customary international law. Here is the text of the two paragraphs that purportedly support the view that crimes against humanity do not have a State policy element:

> 47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.
>
> 48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[2124]

[2120] *R*. v. *Finta*, [1994] 1 SCR 701, 88 CCC (3d) 417, 112 DLR (4th) 513, p. 823 (SCR). More recently, the Supreme Court of Canada has said. 'It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement': *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, para. 158. This was not really a live issue in the case, and the comment can be taken as *obiter*. At the very least, an openness of the Supreme Court of Canada to a State policy element can be detected here. I think that the Supreme Court of Canada was obviously influenced by the case law of the Appeals Chamber, but that with full argument it might well reach a different conclusion.

[2121] *Ibid.*, p. 773.

[2122] *Code pénal*, art. 212-1.

[2123] *Barbie*, 6 October 1983, Cass. Crim., 1984 DS Jur. 113, JCP 1983, 11, G. No. 20, 107 (1983); *Touvier*, 100 ILR 341, 350 (1992) (Cour de cassation, chambre pénale, 1992).

[2124] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), paras. 47-48. The footnotes, which merely provide the bibliographic references, have been omitted.

Do these paragraphs really reinforce the Appeals Chamber's position? Can the silence of the Secretary-General, in the context of the two laconic paragraphs explaining the inclusion of crimes against humanity within the subject matter jurisdiction of the Tribunal, be taken as providing even a hint of support that would justify invoking them as part of the 'overwhelming' evidence of customary international law?

Similarly, the footnote in *Kunarac* refers to the 1954 draft *Code of Crimes* of the International Law Commission as another authority supporting its view that there is no State plan or policy element. But here is the text of the 1954 International Law Commission draft definition of crimes against humanity: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*.'[2125] The record of the 1954 session shows that the Commission was trying to define the contextual element of crimes against humanity. It had agreed to eliminate the nexus with armed conflict but then, after voting on this point, realised that it had made crimes against humanity virtually indistinguishable with ordinary crimes. So its members quickly added the text which, in my view, suggests that there was a broad understanding at the time of the relationship between crimes against humanity and State policy. Why the Appeals Chamber cited the 1954 code as authority for its view is a mystery, because it seems to bolster the opposite view.

Finally, the footnote in *Kunarac* notes that another decision that has been cited in support of the State policy element, *United States* v. *Alstötter* ('Justice case'), has been shown 'not to constitute an authoritative statement of customary international law'. On this it would seem that the views of the Appeals Chamber have now evolved. In fact, the *Alstötter* case is the principal decision upon which the recent individual opinion of Judge Bonomy concerning large-scale joint criminal enterprise has been built.[2126] In *Brđanin*, the Appeals Chamber cites *Alstötter* with approval, and no longer seems to dismiss it as not constituting an authoritative statement of customary international law.[2127] Indeed, if

[2125] 'Draft Code of Offences Against the Peace and Security of Mankind', UN Doc. A/2693 (1954).
[2126] *Prosecutor* v. *Milutinović* et al. (Case No. Case No. IT-05-87-PT), Separate Opinion of Judge Iain Bonomy, 22 March 2006.
[2127] *Prosecutor* v. *Brđanin* (Case No. IT-99-36-A), Judgment, 3 April 2007, paras. 396-404

only indirectly, the Bonomy opinion and the Appeals Chamber decision in *Brđanin* strengthen the importance of a role for State policy in the identification of international crimes more generally.

State policy in the State responsibility debate

Within the past few years, there have been two important judicial or quasi-judicial pronouncements on the issue of genocide that have involved, at least indirectly, consideration of the State policy element: the 2005 Report of the International Commission of Inquiry into Darfur and the 2007 judgment of the International Court of Justice in the application filed by Bosnia and Herzegovina against Serbia and Montenegro. In both cases, when asked whether genocide had been committed the response has involved an inquiry into the existence of State policy, rather than a search for the lone individual with genocidal intent.

Good evidence as to why a State policy is so important to any determination of the crime of genocide appears in the report of the Commission of Inquiry on Darfur, set up in late 2004 at the behest of the Security Council and chaired by the distinguished international legal scholar Antonio Cassese. Answering the Security Council's question 'whether or not acts of genocide have occurred'?,[2128] the Commission said 'that the Government of Sudan has not pursued a policy of genocide'. Explaining its position, the Commission said:

> However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[2129]

The Commission did not challenge the case law of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, and did not exclude the

[2128] UN Doc. S/RES/1564 (2004).

[2129] 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, annex, para. 518.

possibility that an individual acting alone might have committed genocidal acts.[2130] But in practice, it attempted to answer the question posed by the Security Council, that is, whether acts of genocide were committed in Darfur, by looking for evidence of a policy devised by the Sudanese state.

A similar phenomenon appears in the February 2007 judgment of the International Court of Justice on the claim filed by Bosnia and Herzegovina against Serbia and Montenegro pursuant to article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide.* The Court discussed whether or not the policy of Serbia and its Bosnian allies was one of ethnic cleansing or of genocide.[2131]

The focus on policy underpins the entire approach of both institutions. If the Darfur Commission and the International Court of Justice had actually accepted the theory by which genocide does not require a State policy, and by which it can be committed by a lone perpetrator, they would have looked for evidence that a single individual whose acts were attributable to Sudan or to Serbia had killed a member of a targeted group with the intent to destroy it in whole or in part. But the Darfur Commission interpreted the request of the Security Council that it 'determine also whether or not acts of genocide have occurred' to mean whether or not Sudan had a policy to commit such acts. The International Court of Justice reasoned along the same lines.

Both institutions attempted to apply the definition found in article II of the 1948 *Genocide Convention*. Judgments of the international criminal tribunals are replete with declarations that the defining element of genocide is 'specific intent', or 'special intent' or, for continental jurists, *dolus specialis.* For this reason, the Darfur Commission spoke of 'an aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part,

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2130 *Ibid.*, para. 520. See the criticism of this by George Fletcher and Jens David Ohlin, 'The Commission of Inquiry on Darfur and its Follow-up: A Critical View, Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *Journal of International Criminal Justice* 539, at pp. 545-548.

2131 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

the group as such'.[2132] The Commission actually associated the notion of policy with that of specific intent: 'Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.'[2133]

For the International Court of Justice, the acts must be committed 'with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region'.[2134] The Court concluded 'that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such'.[2135] Note that the Court referred to 'the perpetrators' in a collective sense. In paragraph 292 of the judgment, there is a particularly interesting discussion of specific intent in the context of the Srebrenica massacre:

> The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading 'A Plan to Execute the Bosnian Muslim Men of Srebrenica', the Chamber 'finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave' (IT-98-33-T, Judgment, 2 August 2001, para. 87).

As can be seen, in effect the Court analysed the issue of 'specific intent' in terms of the existence of a plan. But in criminal law, this is not such a straightforward matter. Several individuals may participate in a common plan, but this does not necessarily mean that they all share the same specific intent.

In the *Bosnia* case, the applicant was responsible for some of the blurring of the distinction between specific intent and policy. The Court noted:

2132 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, annex, para. 491.

2133 *Ibid.*, p. 4.

2134 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

2135 *Ibid.*, para. 277.

that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed 'within an organized institutional framework.'[2136]

In effect, Bosnia was arguing that the specific intent to commit genocide would be shown by a pattern of acts perpetrated 'within an organized institutional framework'. The Court considered evidence of official statements by Bosnian Serb officials, but observed that '[t]he Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership - to create a larger Serb State, by a war of conquest if necessary - did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion'.[2137] Here the Court added yet another ingredient to the discussion, the question of 'motive'. But again, in reality 'policy' is the better term to describe what was being considered. Merging specific intent and policy once again, the Court concluded: 'The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist.'[2138] Moreover, 'the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent.'[2139]

In reality, neither of the institutions, the Darfur Commission and the International Court of Justice, was looking for the specific intent of individual offenders. Rather, they were looking for the 'specific intent' of a State, like Sudan, or a State-like entity, like the 'Bosnian Serbs'. But States don't have 'specific intent'. Individuals have 'specific intent'. States have policy. The term 'specific intent' is used to describe the inquiry, but its real subject is State policy. It seems plausible, indeed likely, that in a campaign of ethnic cleansing carried out at the instigation of a State on a large scale there will be individual perpetrators who are so driven by racist hatred that they will seek the physical

2136 *Ibid.*, para. 371.
2137 *Ibid.*, para. 372.
2138 *Ibid.*, para. 373.
2139 *Ibid.*, para. 376.

extermination of the victimized group. In other words, acts resulting from a policy that is not genocidal may be perpetrated by groups of individuals some of whom have genocidal intent. But obviously when asked whether 'acts of genocide been committed', bodies like the Darfur Commission and the International Court justice do not pursue their search for these marginal individuals and their 'specific intent'. Rather, they look to the policy of the State or State-like entity that lies behind them.

An important legal difficulty here concerns the relationship between State responsibility and individual criminal liability. The Darfur Commission and the International Court of Justice appear to address this through the fiction that a State can have a specific intent. It might be more productive to reverse this logic. Instead of a mechanistic and unsatisfying attempt to impose concepts that belong from individual liability on the behaviour of a State, it would be better to take the State policy as the starting point and attempt to relate this to individual guilt. Following this approach, the first issue to be resolved in a determination as to whether genocide is being committed is whether there exists a State policy. If the answer is affirmative, then the inquiry shifts to the individual, with the central question being not the individual's intent but rather the individual's knowledge of the policy. Individual intent arises in any event, because the specific acts of genocide, such as killing, have their own mental element. But as far as the policy is concerned, knowledge is the key to criminality.

One important difficulty that this approach helps to resolve is the potential for different results in terms of State responsibility and individual criminal liability. But it also assists in addressing another problem that has perplexed judges at the international tribunals, that of complicity in genocide. They have addressed complicity by convicting those who assist in perpetrating the crime to the extent that the accused knows the intent of the perpetrator.[2140] Again, it is not really very realistic to expect an individual to know the intent of another, especially when it is specific intent that is being considered. Even courts will only deduce the intent from the behaviour of the perpetrator. The inquiry seems so much more logical and efficient when the question to be posed is whether the accomplice had knowledge of the policy. General Krstić was convicted of complicity because the Appeals Chamber believed that he knew of the plan being pursued by

[2140] *Prosecutor* v. *Blagojević* et al. (IT-02-60-A), Judgment, 9 May 2007, paras. 119-124.

General Mladić, not because it believed he had read Mladić's mind and knew of his 'specific intent'.

Whither 'specific intent'?

It has become fairly standard to describe genocide as a crime of 'specific intent', although the term does not appear in article II of the 1948 *Convention.* Nor was the concept of 'specific intent' of any importance during the drafting of the *Convention.* Where, then, did it come from? Why is it assumed in so much of the case law that the words 'intent to destroy' refer to 'specific intent' or *dolus specialis* than to State policy?

In the first judicial consideration of the crime of genocide, the District Court of Jerusalem used the term on two occasions:

> It has been proved that the specific intent to destroy the Jewish People, within the terms of Section 1(b), lay at the basis of the plan called "the Final Solution of the Jewish Question," from the time in mid-1941, when Hitler gave the order for general extermination. The acts of murder and violence against the Jews, committed by the Nazi regime and under its influence from that time onwards, were committed without a shadow of a doubt with specific intent to destroy the Jewish People as such, and not only Jews as individuals. Hence, also, the ruthlessness shown even towards little children, because those who sought to strike at the roots did not wish the survival of the new generation, which would ensure the future and continuity of the Jewish People.[2141]

Note here that the Court is using the term 'specific intent' to describe 'the plan called "the Final Solution of the Jewish Question"', which was based upon an order from Hitler. In other words, this is not 'specific intent' in the sense of individual criminal responsibility but rather a reference to State policy.

The next significant discussion of genocidal intent appears in the seminal report by Benjamin Whitaker for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1985. Whitaker did not use the term 'specific intent' at all:

> 38. If it is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide. An essential condition is provided by the words "as such" in Article II, which stipulates that , in order to be characterized as

[2141] *A.-G. Israel* v. *Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 182.

genocide, crimes against a number of individuals must be directed at the collectivity or at them in their collective character or capacity. Motive, one the other hand, is not mentioned as being relevant.

39. Evidence of this element of subjective intent is far harder to adduce than an objective test. Not all genocidal regimes are likely to be as thoroughly documented as the Nazi one was. It is suggested that a court should be able to infer necessary intent from sufficient evidence, and that in certain cases this would include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of is conduct. The plea of superior orders is dealt with later *infra*, in paragraph 51 onwards.[2142]

Note the reference, in paragraph 39, to 'genocidal regimes' in the context of a discussion about intent. I am not citing this as strong authority for the State policy argument. Indeed, as shown above, no such debate really took place until the first judgments of the International Criminal Tribunal for the former Yugoslavia. But I think the presence of the term attests to a rather widely held view that the policy of 'genocidal regimes' was what the crime of genocide was all about.

There is an isolated reference to 'specific intention' in the *travaux préparatoires* of the *Rome Statute.* A footnote inserted by the Working Group at the February 1997 session of the Preparatory Committee to what would become article 6 of the *Statute* said: 'The reference to "intent to destroy, in whole or in part . . . a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.'[2143] Also, the United States's implementing legislation of the *Genocide Convention* says that the intent component requires 'specific intent to destroy'.[2144] But the 'definitional elements' presented to the Diplomatic Conference on the Establishment of an International Criminal Court by the United States did not use the term 'specific intent' to describe the mental element of genocide.[2145] The term also appears in the 1996 commentary of the International Law Commission,[2146] but given the scattered and often contradictory references of the Commission to general principles and concepts of criminal law, about which it has never had any particular expertise, such observations do not have much authority.

And then we have the *Akayesu* judgment. It firmly established the term 'specific

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2142 Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6.

2143 UN Doc. A/AC.249/1998/CRP.8, p. 2

2144 Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1091(a).

2145 UN Doc. A/CONF.183/C.1/L.10, p. 1.

2146 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', UN Doc. A/51/10, p. 87

intent' in genocide law:

> 496. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.
>
> 497. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

The footnotes have not been omitted here. There are no footnotes. There is no authority to support the statement. But this marks the beginning of a focus on individual intent rather than State policy, using technical terms drawn from national criminal law that have previously been confined to the context of ordinary crimes. Since *Akayesu*, 'specific intent' has become part of the language, an international criminal law boilerplate that gets added to any discussion of the definition of genocide. Even in the International Court of Justice, itself with no expertise in criminal law, endorsed the concept,[2147] although it was of course doing nothing more than echoing judgments of the International Criminal Tribunal for the former Yugoslavia.

It seems that *dolus specialis* is a familiar term to lawyers trained in systems derived from continental law traditions. As for 'specific intent', the term has been used only occasionally in common law, essentially in order to distinguish offences for which voluntary intoxication might be a full defence. The expression appears in a famous passage by Lord Birkenhead in *Beard.*[2148] Here is what Glanville Williams writes on the subject:

> The law is sometimes stated in a restrictive form, it being said that drunkenness may help to negative a 'specific intent'. Lawyers tend to breathe this phrase with particular reverence, but it has already been suggested that the word 'specific' is otiose.[2149]

I could not find any reference to the term `specific intent` in the latest issue of *Smith &*

[2147] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187

[2148] *DPP* v. *Beard*, [1920] AC 504.

[2149] Glanville Williams, *Criminal Law, The General Part*, London: Stevens & Sons, 1961, p. 569.

Hogan.[2150]

Of course, in practice, the concept of 'specific intent' has not proven to be particularly helpful in international criminal law. The only conviction by the International Criminal Tribunal for the former Yugoslavia based upon article 4 of the *Statute* explicitly concluded that General Krstić did *not* have the specific intent of genocide: 'all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent.'[2151] Krstić was convicted of aiding and abetting, and the Appeals Chamber said that it was not necessary that he have the specific intent to commit genocide. The Appeals Chamber said 'it was reasonable for the Trial Chamber to conclude that, at least from 15 July 1995, Radislav Krstić had knowledge of the genocidal intent of some of the Members of the VRS Main Staff'.[2152] Perhaps this finding reflected some uncertainty within the Appeals Chamber about declaring a man to have genocidal intent when he was actually engaged in evacuating women and children from Srebrenica, in effect ensuring their survival. Be that as it may, the Appeals Chamber said that a person could be convicted of aiding and abetting genocide provided he or she *knew* of the specific intent of the actual perpetrator: 'an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime'.[2153]

But how exactly could General Krstić know of the 'specific intent' of General Mladić and other 'members of the VRS Main Staff'? The Trial Chamber said that 'by the evening of 13 July 1995 at the latest, General Krstić knew that the Muslim men were being executed at a number of separate sites and that none had been allowed to enter government held territory along with the women, children and elderly. General Krstić could only surmise that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all.'[2154]

2150 David Ormerod, *Smith & Hogan, Criminal Law*, Oxford: Oxford University Press, 2005.
2151 *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 134.
2152 *Ibid.*, para. 137.
2153 *Ibid.*, para. 140.
2154 *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 622.

I have never found the discussion of the *mens rea* of aiding and abetting genocide by the Appeals Chamber to be particularly edifying, or to lend itself to practical application. Academic writers on criminal law agree that the focus, in determining the *mens rea* of the accomplice, is on knowledge rather than intent. Glanville Williams wrote: 'To make a person responsible as a principal in the secondary degree or accessory it must be shown that he knew all the material facts constituting the principal crime (*i.e.*, the crime committed by the principal in the first degree), This is so even though no *mens rea* is required for the responsibility of the principal in the first degree…'[2155] This makes perfect sense, because the principal perpetrator may have a full defence in the form of an excuse, such as drunkenness or insanity, and therefore his or her *mens rea* is not determinative of the guilt of the accomplice. In my view, an individual who assists another to commit genocide with full knowledge that the acts constitute genocide bears a genocidal intent, even though the motive may not be genocidal. The Appeals Chamber's approach confuses motive and intent.

In reality, however, in the case of secondary liability such as that ascribed to Krstić what we are looking for is not knowledge of the 'specific intent' of particular individuals but rather of the genocidal plan or policy. And this leads us to the wisdom of a knowledge-based rather than an intent-based approach to the mental element of the crime of genocide.

A Knowledge-based approach to genocidal intent

The drafters of the *Rome Statute of the International Criminal Court* were the first to attempt a codification of the mental element of serious international crimes, including genocide. Article 30 of the *Statute* declares that the mens rea or mental element of genocide has two components, knowledge and intent. According to article 30, 'a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' Knowledge is defined as 'awareness

[2155] Glanville Williams, *Criminal Law, The General Part*, London: Stevens & Sons, 1961, pp. 394-395.

that a circumstance exists or a consequence will occur in the ordinary course of events'. Both knowledge and intent are relevant to the *mens rea* of genocide, although most of the recent case law has tended to emphasise intent rather than knowledge, probably because the word 'intent' actually appears in the definition of the crime. Professor Claus Kress and others have contrasted a 'purpose-based' approach, which focuses on intent, with a 'knowledge-based' approach.[2156] Adoption of a 'purpose-based' approach, which dwells on intent, results in a focus on individual offenders and their own personal motives. A 'knowledge-based' approach, on the other hand, directs the inquiry towards the policy of a State or similar group, and highlights the collective dimension of the crime of genocide.

Knowledge figures directly in the definitions of war crimes and crimes against humanity. For example, a perpetrator must be aware of 'the factual circumstances that established the existence of an armed conflict' for a conviction to lie for war crimes.[2157] Similarly, the definition of crimes against humanity in the *Rome Statute* imposes a knowledge requirement: '"crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, *with knowledge of the attack*…'[2158] However, with respect to genocide there has been a certain reluctance to impose a requirement of knowledge of the context in which the crime was committed. Rather, the case law has dwelled on the notion of intent, unconvincing citing the literal text of the introductory paragraph of article II of the Convention in support. Indeed, there is nothing in article II that refers explicitly to a context of genocide and therefore, it is argued, no knowledge of such a context can be part of the mental element of the crime. Such an approach may seem counterintuitive, given that genocide presents itself as the archetypical crime of State, requiring organisation and planning. There is, of course, strong pressure on the interpreters of international crimes to inexorably broaden definitions of crimes, based on the philosophy that to do otherwise enables nasty people to slip through the net. But this cannot be good criminal justice policy.

2156 Claus Kress, 'The Darfur Report and Genocidal Intent', (2005) 3 *Journal of International Criminal Justice*, p. 578, pp. 565-573.
2157 Elements of Crimes, ICC-ASP/1/3, p. 125.
2158 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 7(1) (emphasis added).

A knowledge-based approach to genocidal intent has crept in to the case law, but indirectly, in decisions dealing with aiding and abetting or complicy. In *Ntakirutimana*, the Appeals Chamber of the International Criminal Tribunal for Rwanda recalled that 'an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime'.[2159] General Krstić was found guilty of aiding and abetting in genocide at Srebrenica because he 'had knowledge of the genocidal intent of some of the Members of the VRS Main Staff'[2160] whilst Colonel Blagojević was acquitted of complicity in genocide because the evidence did not show 'he had knowledge of the principal perpetrators' genocidal intent'.[2161] Of course, neither Krstić nor Blagojević could read the minds of the 'principal perpetrators'. In reality, the Appeals Chamber was asking what a reasonable person under the circumstances would deduce from the acts of the principal perpetrators, taken collectively. In other words, the real question was whether Krstić and Blagojević knew of the policy that was underway. To the extent that they did, and they intentionally contributed to the furtherance of the policy, they were guilty of genocide (or, perhaps, aiding and abetting or complicity in genocide).

Knowledge was considered in the commentary of the International Law Commission on its draft Code of Crimes Against the Peace and Security of Mankind:

> The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.[2162]

But individual offenders need not participate in devising the plan. If they commit acts of genocide with knowledge of the plan, then the requirements of the Convention are met.[24]

[2159] *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 500. The Appeals Chamber supported its remarks with reference to: *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-A), Judgment, 17 September 2003; *Prosecutor* v. *Vasiljević* (IT-98-32-A), Judgment, 25 February 2004, para. 142.

[2160] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 137.

[2161] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A) Judgment, 9 May 2007, para. 123.

[2162] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', UN Doc. A/51/10, p. 90.

Proving a leader's knowledge of a genocidal plan may be relatively easy, although Nazi war criminal Albert Speer and some other intimates of Hitler argued successfully that even they were not privy to the 'final solution'.[2163] To this day, debates continue about how widespread the knowledge was within the German Government, army and population as a whole about the plan to destroy the Jews of Europe.[2164] In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia dealt with the accused's knowledge of policies of ethnic cleansing, an element necessary for conviction of crimes against humanity. The court accepted evidence that Tadić was an 'earnest SDS [Serb Democratic Party] member and an enthusiastic supporter of the idea of creating Republika Srpska', both of which embraced the notion of an ethnically pure Serbian territory. Evidence showed that he knew of and supported the goals of the SDS, including the fact that as president of an SDS branch 'he must have had knowledge of the SDS programme, which included the vision of a Greater Serbia'.[2165]

Knowledge of the genocidal plan or policy, or of 'the wider context in which the act occurs', should not be confused with knowledge that these amount to genocide as a question of law. An accused cannot answer that although fully cognoscent of a plan to destroy an ethnic group in whole or in part, he or she was not aware that this met the definition of the crime of genocide.[28] Addressing this point, the International Criminal Tribunal, referring to the analogous situation of crimes against humanity, has said that 'it would not be necessary to establish that the accused knew that his actions were inhumane'.[2166]

The accused must also have knowledge of the consequences of his or her act in the ordinary course of events. If the genocidal act is killing, then the consequence will be death, and the accused must be aware that this will indeed result or at least be reckless as to the act's occurrence. Knowledge of the consequences will vary, of course, depending on the act with which the accused is charged. In some cases, the genocidal act does not require proof of consequences. An example is direct and public incitement to genocide. In such cases, no proof of knowledge of the consequences is required.

2163 Gita Serenyi, *Albert Speer: His Battle with Truth*, New York: Knopf, 1995.
2164 Daniel Jonah Goldhagen, *Hitler's Willing Executioners*, New York: Alfred A. Knopf, 1996.
2165 *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 459.
2166 *Ibid.*, citing *R.* v. *Finta*, [1994] 1 SCR 701

Critique of the ICTY caselaw on genocide

As things currently stand, the International Criminal Tribunal for the former Yugoslavia has yet to convict anyone for the crime of genocide in a final judgment. However, the Appeals Chamber has made a finding that 'genocide occurred' in the Srebrenica enclave in mid-July 1995, and that it was 'devised' by by 'some members of the VRS Main Staff'.[2167] The Appeals Chamber held that '[t]he Trial Chamber - as the best assessor of the evidence presented at trial - was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica'.[2168] According to the Appeals Chamber, '[t]he fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here'.[2169]

There are, and have been from the beginning of the Tribunal, a number of indications of ambiguity and uncertainty about genocide prosecutions. In addition to the acquittals on genocide charges, there are other manifestations of difficulty applying the concept to the conflict, such as the Prosecutor's application to withdraw genocide charges against Biljana Plavšić, and her decision not to appeal the genocide acquittal in *Brđanin*. Many of these aspects of practice before the International Tribunal were cited by the International Court of Justice as further evidence that genocide did not take place during the war in Bosnia and Herzegovina, with of course the exception of Srebrenica.[2170] The recent book by Florence Hartmann chronicles vigorous debates within the Office of the Prosecution about whether or not to proceed with genocide charges in the *Milošević* case.[2171]

2167 *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 29.
2168 *Ibid*, para. 33; also para. 38.
2169 *Ibid*, para. 35 (reference omitted).
2170 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 374-375.
2171 Florence Hartmann, *Paix et châtiment*, Paris: Flammarion, 2007.

What emerges is a puzzling and contradictory narrative, of a conflict that was not fundamentally 'genocidal', but with one exceptional moment that took place over a few days in July 1995, and that was apparently the result of an improvised plan developed by an inner circle close to General Mladić that even other generals could only surmise (Krstić) and about which other high-ranking officers were not even aware (Blagojević). The indictment in this case speaks of 'a plan to murder the hundreds of able-bodies men identified form the crowd of Muslims in Potočari' that developed 'at the same time the plan to forcibly transport the Muslim population from Potočari was developed'.[2172] The allegation that there was a conspiracy `to kill the able-bodied Muslim men from Srebrenica that were captured or surrendered after the fall of Srebrenica on 11 July 1995 and remove the remaining Muslim population of Srebrenica and Žepa from the Republika Srpska with the intent to destroy those Muslims'[2173] seems internally contradictory. The implication that both killing one part of a group and removing another together demonstrate an 'intent to destroy' suggests a confusion about whether genocide is a matter of physical destruction only, as has been held by many authorities.[2174]

There is also an incoherence in the conclusion that a single massacre perpetrated over a period of a few days was genocidal, when it is situated in the context of a three-year-long war that is, overall, better described by the labels 'crimes against humanity' and 'war crimes'. It cannot even be argued that the mass killings at Srebrenica represented a more general change in policy by the Bosnian Serb leaders, because there is no suggestion of similar massacres taking place elsewhere in Bosnia and Herzegovina during or after the Srebrenica events. Genocide at Srebrenica appears to be both improvised and ideosyncratic, an abberation rather than as an overarching feature of the wartime strategy. The International Court of Justice may have reflected its own lack of enthusiasm on the subject when it wrote: 'The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.'[2175] Perhaps a more affirmative statement might have been expected under the circumstances, if the Court

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2172 *Prosecutor* v. *Tolimir* et al. (Case No. IT-05-88-PT), Indictment, 14 June 2005, para. 27.
2173 *Ibid.*, para. 34.
2174 *e.g.*, *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 19 April 2004, para. 25.
2175 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 296.

was really convinced that this was the first and only genocide on the European continent since the Second World War. Assuming, *arguendo*, that Mladić and his inner circle, referred to by the Appeals Chamber as 'some members of the VRS Main Staff', had developed a genocidal intent on 13 July 1995, an intent that persisted for a few days, surely this was not the result of the policy of a State or of a State-like body.

The term 'genocide' has a legal reality, but courts cannot be indifferent to the symbolism that the word has taken on. This operates in both directions: it presents itself almost as a badge of honour for those who can attach the description to their own victimisation, and it constitutes the most terrible stigma for those to whom the label is attached. It is abundantly clear since the ruling of the International Court of Justice, which effectively confirms the intricacies of the case law of the International Criminal Tribunal, that Serbia will not be branded as genocidal. Nor is the conflict, with the exception of those few days in June 1995, to bear the term genocide either. As for the charge that genocide took place in Srebrenica, it rests upon a tenuous interpretation that stretches the term genocide to its limits. The *Krstić* decision explains,

> Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again…[2176]

In other words, those victims who were targeted for execution, the 7,000 'military-aged Bosnian Muslim men of Srebrenica', represented about 20% of the population of the community. This is truly a crime of an entirely different magnitude and nature from the Nazi Holocaust, or the Rwandan genocide. Jurists should be wary of definitions and interpretations that make it difficult to distinguish genocide from any other mass execution of prisoners taken within a community. Even the four Srebrenica decisions of the International Tribunal communicate an impression of confusion and ambiguity, suggesting compromises by judges with fundamental disagreements rather than clarity and translucence about what happened, why it happened and how to describe it. The finding of genocide in Srebrenica also involves dubious interpretations of other aspects of

[2176] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 1.

the definition, such as the geographic scope of genocide, but these issues are not addressed in this opinion. I mention them only because it is useful to note that the definition of genocide is stretched in more than one way in order to make it fit the quite particular circumstances of the mass killings in Srebrenica.

How does the theoretical approach to the crime of genocide apply to the Srebrenica massacre, in light of the case law of the International Criminal Tribunal and the judgment of the International Court of Justice? In both *Krstić* and *Blagojević*, the Appeals Chamber adopted a fundamentally knowledge-based approach, asking whether the two were aware of the extermination plan. To this extent, the approach of the Appeals Chamber confirms what is advocated in this opinion. However, it is suggested that the question must go beyond simply whether there was a 'plan' but whether this was a 'plan' associated with a policy of a State or State-like body. Otherwise, the analysis descends back into the shortcomings of the intent-based approach, whereby the question becomes whether the accomplice knew of the primary perpetrator's specific intent. The better approach is to examine whether the accused knew of the State policy and acted to further it. Obviously those who ordered the murders at Srebrenica were acting pursuant to a 'plan', to the extent than any organised group with a command structure operates in such a way. General Mladić was a general and a commanding officer, and it is unlikely that he ordered acts that were unplanned and that were not discussed with his close associates. But that does not really get at the heart of the issue, which is whether he was operating under a 'genocidal plan'. It is implausible that a 'genocidal plan' was improvised by a military commander in the field. This is something that requires organisation and approval in a manner that reflects and is consistent with State policy.

Conclusions

'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced', reads the judgment of the International Military

Tribunal.[2177] This oft-cited phrase expresses a vital idea, but it may also have contributed to some misconception about the nature of international crimes. The Nuremberg court made the statement in a specific context, answering the argument that the Nazi leaders were not responsible because they were acting in the interests of the State. It was addressing the prohibition on a defence of official capacity, a norm reprised in article 7(2) of the *Statute of the International Criminal Tribunal for the former Yugoslavia.* Where the famous pronouncement about 'abstract entities' may mislead is in suggesting that the State's role is irrelevant or even secondary to the discussion about crimes against international law.[2178]

Admittedly, the views expressed in this opinion amount to a significant rethinking of the definition of genocide. It involves reading in to the definition adopted in the 1948 *Convention* an element that can only be there by implication. There is nothing inadmissible about this, from the standpoint of treaty interpretation. The Preparatory Commission and the Assembly of States Parties of the International Criminal Court did this when they codified the contextual element for genocide in the Elements of Crimes. Imposing a requirement of State policy may not be justified with reference to the *travaux préparatoires* but, as Judge Shahabuddeen of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted in his dissenting opinion in *Krstić*, excessive reliance should not be placed on drafting history.[2179]

Confirming the importance of State plan or policy as an element of the crime of genocide has many advantages in terms of coherence and judicial policy. It offers a unified vision of genocide from the standpoints of both States responsibility and individual criminal liability. The framework is focused on the knowledge of the offender rather than one based upon a search for individual intent, with its serious shortcomings and inconsistencies when mass crime such as genocide is concerned. It is entirely consistent with the context both of the adoption of the *Convention* and subsequent

[2177] *France* et al. v. *Goering* et al., (1946) 22 IMT 203; 13 ILR 203; 41 *American Journal of International Law* 172, p. 221 (*AJIL*).
[2178] See, *e.g.*, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 172.
[2179] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004, para. 52.

practice by States. Recent developments such as the judgment of the International Court of Justice and the report of the Darfur Commission compel such a reassessment.

The whole, respectfully submitted. I remain at your service for any further assistance you may require.

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Other courses, etc.: Bar admission school, Québec Bar, 1984; Course in International Humanitarian Law given by the Canadian Red Cross Society, Ottawa, August, 1991; Course in International Humanitarian Law given by the Graduate Institute for International Studies, Geneva, July, 1993; Internship at the European Commission of Human Rights, Strasbourg, June-July, 1994; Workshop on International Organization Studies, given by the Academic Council on the United Nations System and the American Society of International Law, Providence, Rhode Island, July, 1994.

Employment:

Current: Professor of Human Rights Law, Faculty of Law, and Director, Irish Centre for Human Rights, National University of Ireland, Galway (appointed 2000); Professor ('Global Legal Scholar'), University of Warwick, School of Law (appointed 2007); Professor, Queen's University Belfast, School of Law (appointed 2007); Département des sciences juridiques, Université du Québec à Montréal (assistant professor 1991-1995, associate professor 1995-1997, full professor 1997-2001, associate professor (*professeur associé*) appointed 2001); Visiting Fellow, Kellogg College, University of Oxford (appointed 2007); 'door tenant', 9 Bedford Row, London (appointed 2007)

2008 Visiting fellow, All Souls College, University of Oxford; Visiting professor, LUISS Guido Carli University, Rome

2007 Visiting professor, Cardozo School of Law, Yeshiva University, New York City

1984-2005 Lawyer; member of Quebec Bar, counsel in litigation before: Supreme Court of the United States, Supreme Court of Canada, United Nations Human Rights Committee, Inter-American Commission of Human Rights; various Canadian courts: Federal Court of Appeal, Quebec Court of Appeal, Federal Court (Trial Division), Quebec Superior Court, Quebec Court (all divisions), National Parole Board, Social Affairs Commission, Access to Information Commission, Labour Court, Rental Board

2002-2004 Member, Truth and Reconciliation Commission of Sierra Leone

1998-1999 Senior fellow, Jennings Randolph Programme for International Peace, United States Institute of Peace, Washington

1996-2000 Assessor, Quebec Human Rights Tribunal

1995-1996 Senior policy advisor, International Centre for Human Rights and Democratic Development, Montreal

1994-1998 Chair, Département des sciences juridiques, Université du Québec à Montréal (1994-1998)

1993-1996 Investigator, Quebec Human Rights Commission

1992-1993 Associate chair, Module des sciences juridiques, Université du Québec à Montréal

1984 Articling student, Guy & Gilbert, avocats, Montréal

1983-1984 Teaching assistant, Faculty of Law, University of Montréal

1973-1991 Freelance journalist, translator, speechwriter; Quebec correspondent for McGraw Hill World News Service (1981-1989); editor in chief, *Pulp and Paper Canada*, (1978-1980); associate editor, *Canadian Mining Journal* (1975-1978); editor, *Orchestra Canada/Orchestres Canada* (1973-1975); contributions to *Saturday Night*, *New Scientist*, *Harrowsmith*, *Globe and Mail*, etc.

1978 Lecturer, Vanier College, Montreal (history)

1973-1974 Teaching assistant, Department of History, University of Toronto

Visiting or adjunct professor, lecturer University of Montreal, Montreal, Canada (1991, 1998); Instructor, Canadian Foreign Service Institute, Department of Foreign Affairs and International Trade, Ottawa (1991-••••); Professor of law, University of Montpellier I, Montpellier, France (1994, 1998); McGill University, Montreal, Canada (1995-1998), University of Paris X (Nanterre) (1996), International Institute of Human Rights, Strasbourg, France (1996, 1997, 1999, 2002, 2003); National University of Rwanda, Butare, Rwanda (1996-1999); University of Paris XI (2000); University of Paris II (Pantheon-Assas) (2001, 2003); University of Westminster, London (2002-••••); Dalhousie University, Halifax (2002, 'Bertha Wilson Lectureship in Human Rights'); University of Geneva, University Centre in International Humanitarian Law (2003-2005); EMA European Masters in Human Rights, Venice (2003-04); University of Amsterdam (2003-2005); EU Mediterranean Masters in Human Rights and Democratization (2004-••••); Honorary Professor, Institute of Law, Chinese Academy of Social Sciences, Beijing, China (2004-••••); Faculty of Law, Harbin Institute of Technology, Harbin, China (2005-••••); Washington College of Law, American University, Washington, DC (2007); College of Criminal Law Science, Beijing Normal University (2007-••••).

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'Bosnia, Kosovo, Timor, Cambodia: Was it Genocide?', Lauterpacht Centre for International Law, University of Cambridge, 28 April 2000.

'Genocide and the International Criminal Tribunal for the Former Yugoslavia', International Symposium on the International Criminal Tribunal for the Former Yugoslavia, Croatian Law Centre, Opatija, Croatia, 9 May 2000.

'Ratification of the Statute of the International Criminal Court', Symposium on International Humanitarian Law, Irish Centre for Human Rights, Galway, 12 May 2000.

'Partnerships in Humanitarian Intervention: The NGO Perspective', Canadian Bar Association Conference on Private and Public International Law, Ottawa, 19 May 2000.

'Armenians and the 'G'-word', Hellenic-Canadian Association Conference on Human Rights in the Eastern Mediterranean and Asia Minor, Toronto, 20 May 2000.

'The Rwanda Experience', Canadian Bar Association seminar, Peace Building in the Justice Sector, Halifax, 20 August 2000.

'Developments in Abolition of Capital Punishment', University of the Philippines, Conference on Reconciling Human Rights and Criminal Justice', Cebu City, Philippines, 16 September 2000.

'Developments in the Jurisprudence of the Crime of Genocide', Raphael Lemkin Centenary Conference, Leo Kuper Institute, London, 18 October 2000.

'Common Law Approaches to Implementation of the Rome Statute', Rome Statute – What's Next? A Conference on Domestic and Foreign Implementation of International of International Criminal Law in National Law, International Criminal Law Society, Berlin, 20 October 2000.

'Abolishing the Death Penalty: New International Developments', University of Nebraska – Lincoln, 1 November 2000.

'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?', New England School of Law, Boston, 3 November 2000.

'International Legal Developments in Capital Punishment', National Coalition to Abolish the Death Penalty, San Francisco, 18 November 2000.

'Human Rights and Criminal Justice: From Fair Trial to Fit Punishment', Annual Meeting of the Society for the Reform of Criminal Law, Johannesburg, 2 December 2000.

'Defences Before the International Criminal Court', Annual Meeting of the Society for the Reform of Criminal Law, Johannesburg, 7 December 2000.

''Discrimination based on criminal record', Republican Prisoners Association, Belfast, 30 January 2001.

'Canadian human rights commissions', Symposium of the Irish Council for Civil Liberties, Dublin, 3 February 2001.

'Développements jurisprudentiels sur le crime de genocide', International Law Association, Paris, 14 March 2001.

'Droit pénal international et droit international des droits de la personne : faux frères?', Colloque sur l'internationalisation du droit pénal, Université de Genève, Geneva, 16 March 2001.

'Canada's intercultural model', Human Rights Art Festival, Athens, 23 March 2001.

'The 'Like Minded', the NGOs and the International Criminal Court', Conference on 'The New Diplomacy', Amman, Jordan, 6 April 2001.

'Burns and Rafay: International Law Nourishes the Charter', Canadian Bar Association Conference on the Twentieth Anniversary of the Canadian Charter, Ottawa, 20 April 2001.

'Human Rights Law in Canada', Wales Public Law and Human Rights Association, Llandrindod Wells, Wales, 28 April 2001.

'Public Opinion and the Death Penalty', EU-China Seminar on Human Rights, Beijing, 10 May 2001.

'Prosecuting the Crime of Aggression: Historical Aspects', University of Trento, Italy, 30 May 2001.

'L'influence de la Convention européenne des droits de l'homme sur la jurisprudence des cours suprêmes du Commonwealth', International Institute of Human Rights, Strasbourg, 8 June 2001.

'The *ad hoc* tribunals: developments in the law of genocide', Association of Genocide Scholars Fourth International Biennial Conference, Minneapolis, 12 June 2001.

'Approaches to Reconciliation and the International Criminal Court', Conference on Transitional Justice and International Perspectives, University of Ulster, Belfast, 14 June 2001.

'Crimes Against Humanity', International Seminar on Crimes Against Humanity, Indonesian Human Rights Commission, Jakarta, 20 June 2001.

'Prosecuting Atrocities: Contributing to Democratic Transitions', Seminar on Nationbuilding in East Timor, Centro Portugues de Estudos do Sudeste Asiatico (CEPESA), Lisbon, 21 June 2001.

'International Law and Capital Punishment', Fujen University International Conference on Abolition of the Death Penalty, Taipei, 24 June 2001.

'Democratisation, Conflict Resolution and Human Rights: The Role of Justice and Accountability', Fourth ASEM Informal Seminar on Human Rights, Denpasar – Bali, 12 July 2001.

'Incorporation of the European Convention on Human Rights', NGO Forum on Human Rights, Department of Foreign Affairs (Ireland), Dublin, 21 July 2001.

'Human Rights and Terrorism', INCORE, Derry, Northern Ireland, 5 October 2001.

'Human Rights and International Humanitarian Law', Humanitarian Law Seminar, International Committee of the Red Cross, Sarajevo, 9 October 2001.

'International Human Rights Law and Administrative Tribunals', Canadian Institute for the Administration of Justice, Halifax, 13 October 2001.

'International Criminal Courts and Prosecution for Money Laundering', International Convention on Money Laundering, Montreal, 15 October 2001.

'General Principles and Penalties', Expert Meeting on the International Criminal Court, Manila, 18 October 2001.

'La répression des crimes – la justice nationale et internationale', Séminaire sur la justice transitionnelle au Burundi, Human Rights Law Group, Bujumbura, 6 November 2001.

'The domestic impact of international law', National Judicial Institute, Canadian Chapter of the International Association of Women Judges and Faculty of Law, McGill University, Montreal, 10 November 2001.

'Rights of the Accused versus Rights of Victims and Witnesses', International Conference, Utrecht University, 29 November 2001.

'General Report on Torture', EU-China Dialogue Seminar, Brussels, 7 December 2001.

'Canadian Implementing Legislation of the ICC Statute', International Conference on the International Criminal Court, The Hague, 20 December 2001.

'Afghanistan, the UN and the Fight against Terrorism', United Nations Association of Ireland, Dublin, 7 January 2002.

'Impunity and Human Rights Defenders', Front Line Conference, Dublin, 18 January 2002.

'Internationalised Courts and National Justice Systems', Conference on Internationalised Courts and Tribunals, University of Amsterdam, 26 January 2002.

'Genocide and the *ad hoc* Tribunals', Generations of Genocide Conference, Institute of Contemporary History and Wiener Library, London, 26 January 2002.

'The *Ad Hoc* Tribunals and the Future of International Justice', Memorial and International Federation of Human Rights Conference, Moscow, 15 February 2002.

'The International Criminal Court: In Force by May 2002', International Law Association, Dublin, 27 February 2002.

'Creation of the International Criminal Court', Social Legal Studies Association, Aberystwyth, Wales, 3 April 2002.

'The Sierra Leone Truth and Reconciliation Commission', Conference on Reconciliation, Christian Michaelson Institute, Bergen, Norway, 11 April 2002.

'The Entry into Force of the Rome Statute', Department of Justice, Ottawa, 18 April 2002.

'International Law and the Canadian Charter', Association for Canadian Studies, Ottawa, 19 April 2002.

'Abolition of Capital Punishment: International Developments', Amnesty International USA Annual General Meeting, Seattle, 20 April 2002.

'Punishment of Non-State Actors', Transitional Justice Seminar, Belfast, 26 April 2002.

'Constitutions nationals et droit international', Société québécoise de droit international, Montréal, 10 May 2002.

'The International Criminal Court', Irish International Law Students Association, Dublin, 16 May 2002.

'Do We Need a Truth Commission in Northern Ireland?', The University of Ulster at Magee, Derry, 20 May 2002.

'Was 9/11 a Crime Against Humanity?', Abo Akademi University Institute for Human Rights, Turku, Finland, 23 May 2002.

'Transit, Surrender, Cooperation and Mutual Assistance', International Criminal Law Training Course, The Hague, 18 June 2002.

'Moratorium on the Death Penalty', Duke University School of Law Conference on International law, Human Rights and the Death Penalty, Geneva, 20 July 2002.

'The Interrelationship between Truth Commissions and Courts: The Case of Sierra Leone', Galway, Ireland, 4 October 2002.

'The Sierra Leone Truth Commission', Department of National Defence Symposium on International Humanitarian Law, Ottawa, 25 October 2002.

'The Interrelationship between Truth Commissions and Courts: The Case of Sierra Leone', Canadian Council of International Law, Ottawa, 26 October 2002.

'Drafting of the ICC Rules of Procedure and Evidence', British Institute of International and Comparative Law, London, 6 November 2002.

'*Mens rea* and Defences at the International Criminal Tribunal for the Former Yugoslavia', New England School of Law, Boston, 9 November 2002.

'The Protection of Human Rights: Ireland and Canada Compared', University College Dublin, 13 November 2002.

'Genocide and the International Criminal Court', Training Course on the International Criminal Court, TNT Solicitors, London, 16 November 2002.

'Quo Vadis: International Criminal Law', 30th Anniversary Conference, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, 29 November 2002.

'The Place of Victims in International Criminal Law', 30th Anniversary Conference, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, 3 December 2002.

'Alternative Forms of Access to Justice', EU-China Network Seminar on Access to Justice, Beijing, 11 March 2003.

'United Nations Systems for the Protection of Human Rights', Southwest China University of Political Science and Law, Chongqing, 12 March 2003.

'Où en est la justice internationale?', Centre d'études et de Recherches Internationales (Sciences Po), Paris, 17 March 2003.

'The Crime of Aggression and the International Criminal Court', British Institute of International and Comparative Law, London, 26 March 2003.

'Combating Impunity in Developing Countries', University of Montreal Conference on the International Criminal Court, Montreal, 1 May 2003.

'The Truth Commission and the Special Court of Sierra Leone', Conference on The International Criminal Court: Implementation in Central and Eastern Europe, Bucharest, 11 May 2003.

'An International Perspective on Abolition of the Death Penalty', Conference on 'The Death Penalty from an International Perspective, A Transatlantic Dialogue', Catholic University of Leuven, Brussels, 23 May 2003.

'Implications for International Law of the ICTR and ICTY', International Association of Genocide Scholars Fifth Biennial Conference, Galway, Ireland, 8 June 2003.

'How Can Existing IHL Mechanisms and Bodies be Used in Non-International Armed Conflict', Regional Expert Meeting on Improving Compliance with International Humanitarian Law, Ministry of Foreign Affairs, Mexico and International Committee of the Red Cross, Mexico City, 16 July 2003.

'Recent Developments Concerning Abolition of the Death Penalty', Seventeenth International Conference, International Society for the Reform of Criminal Law, The Hague, 27 August 2003.

'Human Security and the International Criminal Court', International Summer School on Human Rights and Human Security, Graz, Austria, 4 September 2003.

'Economic Aspects of the Conflict in Sierra Leone', Conference on Global Trade and the Implications for Human Rights, Irish Centre for Human Rights, Galway, Ireland, 4 October 2003.

'Gender Crimes In Sierra Leone and the Work of the Truth and Reconciliation Commission', War Crimes Research Symposium, Case Western Reserve University School of Law, Cleveland, 10 October 2003.

'The Case of Leon Mugesera (Rwanda) and the Minister of Citizenship and Immigration (Canada) Before the Federal Court of Canada', Concordia University, Montreal, 15 October 2003.

'The Sierra Leone Truth and Reconciliation Commission: A Personal Experience', Bernie Vigod Memorial Lecture, St. Thomas University, Fredericton, Canada, 15 October 2003.

'The Charles Taylor Indictment', Canadian Council for International Law, Ottawa, 18 October 2003.

'Prosecuting the Head of State: The Milosevic and Taylor Cases', Wayne State University Law School, Detroit, 27 October 2003.

'Criminal Accountability for Economic Actors in Civil Wars', International Peace Academy, New York City, 21 November 2003.

'Concluding Remarks', Conference on Searching for Justice, Comprehensive Action in the Face of Atrocities, York University, Toronto, 6 December 2003.

'The Relationship Between Genocide and Crimes Against Humanity', Conference on the International Criminal Court and Enlarging the Scope of International Humanitarian Law, International Committee of the Red Cross, Damascus, 14 December 2003.

'The International Criminal Court and the Secret to its Success', Conference on the International Criminal Court and the Advent of International Criminal Justice, Minerva Centre for Human Rights, Jerusalem, 15 December 2003.

'The Movement toward world-wide abolition of the death penalty', Launch Seminar for Strengthening the Defence of Death Penalty Cases in the People's Republic of China, Great Britain-China Centre, Chinese Academy of Social Sciences, Beijing, 8 January 2004.

'Comparative Law and the Death Penalty', Conference for Universal Abolition of the Death Penalty, Irish Cultural Centre, Paris, 23 January 2004.

'Genocide and Law: The Mysteries Remain', Oxford University Public International Law/International Law Association (UK) Discussion Group, New College, Oxford, 12 February 2004.

'Lessons from Abroad (and from history): Bills of Rights Deliver Results', Conference on Protecting Human Rights through Bills of Rights, Northern Ireland Human Rights Commission, Belfast, 20 February 2004.

'International Law and the Rwandan Genocide', Evangelische Akademie Loccum, Loccum, Germany, 5 March 2004.

'Transitional Justice: Rwanda, Sierra Leone, Iraq', San Francisco Bar Association, San Francisco, 11 March 2004.

'The Sierra Leone Truth Commission and Lessons for Transitional Justice', University of California at Davis, 12 March 2004.

'The Sierra Leone Truth and Reconciliation Commission', Thomas Jefferson School of Law, San Diego, California, 15 March 2004.

'Hommage à Damas Mutezintare Gisimba', Fondation Paul Grüninger, St. Gallen, Switzerland, 19 March 2004.

'Eichmann à Jerusalem, Karamira à Kigali, Mugesera à Québec', IBUKA-Belgique, Brussels, 20 March 2004.

'La Commission de la Vérité et de la Réconciliation de Sierra Leone', Université de Genéve, Geneva, 23 March 2004.

'Developments in the Law of Genocide', Holocaust Memorial Museum, Washington, 30 March 2004.

'Genocide and International Law', Mary Washington College, Fredericksburg, Virginia, 30 March 2004.

'Le TPIY à 10 ans', Société québécoise pour le droit international, Montréal, 31 March 2004.

'Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?', American Society of International Law Annual Meeting, Washington, 2 April 2004.

'Extradition, Diplomacy and Capital Punishment', William & Mary College, Williamsburg, Virginia, 5 April 2004.

'The International Criminal Court: The Secret of its Success', Raoul Wallenberg Institute for Human Rights, Lund, Sweden, 29 April 2004.

'Developments in the Law of Genocide', Marangopoulos Foundation for Human Rights, Athens, 14 May 2004.

'The Evolving Role of Non-State Actors in International Criminal Law', Conference on Justice in Transition, Northern Ireland and Beyond, Onati, Spain, 21 May 2004.

'Ulysses and Censorship', Centenary Conference on Joyce's Ulysses and Human Rights, Galway, 28 May 2004.

'Introductory Report on Corporate Social Responsibility', EU-China Dialogue on Human Rights, Beijing, 28 June 2004.

'Prosecutorial Discretion and International Criminal Law', International Conference on Accountability for Atrocity, Galway, 15 July 2004.

'Report on the International Criminal Court', International Law Association, Berlin, 17 August 2004.

'The Office of the High Commissioner for Human Rights and International Humanitarian Law', 28th Round Table on Current Problems of International Humanitarian Law, International Institute of Humanitarian Law, Sanremo, Italy, 3 September 2004.

'International Courts and Truth Commissions: The Case of Sierra Leone', 5th Annual Conference, Association of Human Rights Institutes, Oslo, 18 September 2004.

'Reservations to the ICCPR and Customary International Law', EU-China Dialogue Seminar, The Hague, 8 November 2004.

'Court Procedure in the International Criminal Tribunals (Yugoslavia, Rome Statute): A Convergence of Two Systems', St. Louis University and Washington University, St. Louis, 13 November 2004.

'The International Criminal Court', University of Birmingham, Birmingham, 10 December 2004.

'Philosophical and Cultural Perspectives on the Death Penalty', European Union and Department of Philosophy, University of Indonesia, Jakarta, 14 December 2004.

'Truth and Reconciliation in Sierra Leone', Conference on Genocide and the Holocaust, Thomas Jefferson School of Law, San Diego, 16 January 2005.

'Why Have We Failed? Thoughts on Human Rights in 2005', Osgoode Hall Law School Raoul Wallenberg Day International Human Rights Symposium, Toronto, 18 January 2005.

'Defining Transitional Justice', Conference on The Rule of Law and Transitional Justice: the Way Forward?', UN University Office at the United Nations, New York, 27 January 2005.

'First Cases at the International Criminal Court', University of Manchester School of Law, Manchester, 16 February 2005.

'Genocide and International Law: Darfur, Srebenica and Cambodia', Jonathan I. Charney Distinguished Lecture in International Law, Vanderbilt University Law School, Nashville, 28 February 2005.

'Clash of Civilizations: The Growing Rift Between the US & Europe in Human Rights Policy & Practice', Elizabethtown College, Elizabethtown, Pennsylvania, 1 March 2005

'The Globalization of Law', Indianapolis Peace House, Indianapolis, Indiana, 2 March 2005.

'International Criminal Tribunals and Rights of the Accused', European Law Institute, Trier, Germany, 7 March 2005.

'The Right to Enjoy the Benefits of Scientific Progress', UNESCO Meeting on Priorities for Research to Advance Economic, Social and Cultural Rights in Africa', Addis Ababa, 11 March 2005.

'Transitional Codes for Post-Conflict Justice', International Peace Academy Conference on Securing the Rule of Law, New York City, 14 March 2005.

'Children, Accountability and Armed Conflict', International Criminal Accountability and the Rights of Children, Institute of Social Studies and UN University, The Hague, 17 March 2005.

'The "Odious Scourge": Evolving Interpretations of the Crime of Genocide', Conference on 'Ultimate Crime, Ultimate Challenge, Human Rights and Genocide', Yerevan, Armenia, 20 April 2005.

'The Right to Life', Catholic University of Korea, Seoul, 18 May 2005.

'Reform of the United Nations', Aspen Atlantic Group, Vancouver, 20 May 2005.

'International Law and the Abolition of the Death Penalty', Caribbean Workshop on Capital Punishment, Barbados, 4 June 2005.

'Public Opinion and the Death Penalty', Caribbean Workshop on Capital Punishment, Barbados, 4 June 2005.

'The Death Penalty in China and in Europe From a Philosophical, Cultural and Political Perspective', EU-China Dialogue Seminar on Human Rights, Beijing, 20 June 2005.

'The International Criminal Court', Law Institute, Chinese Academy of Social Sciences, Beijing, 21 June 2005.

'Victims and Witnesses at International Criminal Tribunals', International Society for the Reform of Criminal Law Annual Conference, Edinburgh, 29 June 2005.

'The Sierra Leone Truth Commission and the Special Court for Sierra Leone', Hague Joint Conference on Contemporary Issues in International Law, The Hague, 1 July 2005.

'Violence against Women', International Institute of Human Rights, Strasbourg, 18-19 July 2005.

'Genocide and the Darfur Commission', The Criminal Law of Genocide International Conference, Nottingham Law School, Nottingham, 1 September 2005.

'Islam and the Death Penalty', Reframing Islam: Politics into Law, Conference, Galway, 10 September 2005.

'Developments in the Law of Genocide', Max-Planck-Institut für ausländisches und internationals Strafrecht, Freiburg, Germany, 22 September 2005.

'Pour de meilleures garanties (Projet de protocole facultative au Pacte, Projet de Convention sur la diversité culturelle', First Congress of the Association francophone des Commissions nationales des droits de l'Homme, Montréal, 30 September 2005.

'The Crime of Torture and the International Criminal Tribunals', Case Western University Law School, Cleveland, 7 October 2005.

'International Developments on the Abolition of the Death Penalty', University of Westminster, London, 13 October 2005.

'International Tribunals and Truth Commissions', Bar Council of England and Wales, London, 15 October 2005.

'International Criminal Justice: From Dachau to Darfur', Law Library Distinguished Lectureship, University of Minnesota, Minneapolis, 1 November 2005.

'Human Rights and the War in Iraq', University of Tulsa, Tulsa, Oklahoma, 2 November 2005.

'International Law and Genocide', European Network of Genocide Scholars, Heinrich Böll Stiftung, Berlin, 4 November 2005.

'Israeli Civil and Criminal Law Violations', El Haq Conference on International Humanitarian Law, Ramallah, Occupied Palestinian Territory, 23 November 2005.

'The Human Rights Commissioners', Academic Colloquium of the European Inter-University Centre for Human Rights and Democratisation, Venice, 26 November 2005.

'First Cases at the International Criminal Court', Indian Society of International Law, New Delhi, 11 December 2005.

'Developments in the Law of Genocide', Ankara Bar Association, Ankara, 5 January 2006.

'Taking Stock of Developments in the Use of the Death Penalty Worldwide', International Seminar on Strengthening the Defence In Death Penalty Cases, Beijing, 15 January 2006.

'First Cases at the International Criminal Court', New College, University of Oxford, 19 January 2006.

'First Cases at the International Criminal Court', School of Law, Queen's University, Belfast, 8 February 2006.

'A Historical Perspective on War Crimes Prosecutions', Trinity College Dublin, 24 February 2006.

'Relationship between National Law and the ICC Statute, and the Impact Thereof on the Implementation of Provisions relevant to Complementarity', Regional Meeting on International Humanitarian Law, International Committee of the Red Cross, Cairo, 26 February 2006.

'International Criminal Tribunals and Truth-Seeking', Catholic University of Leuven, Belgium, 17 March 2006.

'New Interpretations of the Law of Genocide', Hamburger Institut for Sozialforschung, Hamburg, Germany, 23 March 2006.

'Truth and Reconciliation', The Advocate's Society, Dublin, 25 April 2006.

'Canada, Ireland and Human Rights', Association of Canadian Studies in Ireland, Galway, 27 April 2006.

'Le dialogue des juges: le droit penal international', Centre Perelman de philosophie du droit de l'Université Libre de Bruxelles, Brussels, 28 April 2006.

'Perspectives on International Criminal Justice', Université du Québec à Montréal, 9 May 2006.

'La Répression internationale des crimes internationaux', Journée d'études, Collège d'Etudes Interdisciplinaires – Université de Paris-Sud 11, 13 May 2006.

'Sean Mac Bride and the Development of International Human Rights', St. Angela's College, Sligo, Ireland, 15 May 2006.

'*Lex specialis*? Belt and suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *ius ad bellum*', Hebrew University, Jerusalem, 23 May 2006.

'Enforcement Mechanisms of International Humanitarian Law', El Haq, Ramallah, Occupied Palestinian Territory, 23 May 2006.

'Truth and Reconciliation Commissions', Hebrew University, Jerusalem, 23 May 2006.

'The International Criminal Court', Bir Zeit University, Occupied Palestinian Territory, 24 May 2006.

'Developments at the International Criminal Court', International Law Association Conference, Toronto, 7 June 2006.

'A Rights-Based Approach to the Israel-Palestine Conflict', University of Exeter, United Kingdom, 9 June 2006.

'Language, the *Covenant* and the Human Rights Committee', International Academy of Language and Law Conference, Galway, 16 June 2006.

'A Rights-Based Approach to Peace Building', Fourth Annual Conference of the Centre for Peace Buildin (An Teach Ban), Downings, County Donegal, Ireland, 22 June 2006.

'Transitional Justice: Lessons and Challenges', Conference on Building Justice in Fragile States, Department of Foreign Affairs, Ottawa, 27 June 2006.

'Towards International Abolition of the Death Penalty', National Human Rights Commission of Thailand, Bangkok, 3 July 2006.

'Alternatives to the Death Penalty', National Human Rights Commission of Thailand, Bangkok, 4 July 2006.

'Regions and International Criminal Law', University of Canterbury, Christchurch, New Zealand, 19 August 2006.

'Complementarity and the First Prosecutions at the ICC', Association of Human Rights Institutes Annual Conference, Vienna, 9 September 2006.

'Terrorism and Human Rights', Universidad Iberamericano, Mexico City, 13 September 2006.

'Human Rights Research in the Knowledge Society', Irish Universities Association, Humanities and Social Sciences in 21st Century Ireland, Dublin, 23 October 2006.

'First Prosecutions at the International Criminal Court', Josephine Onoh Memorial Lecture, University of Hull, Hull, United Kingdom, 25 October 2006.

'Non-*Refoulement*', Follow-up Workshop on Human Rights and International Cooperation while Countering Terrorism, Vaduz, Liechtenstein, 15 November 2006.

'The Right to Benefit From Scientific Progress', International Bioethics Committee, UNESCO, Paris, 20 November 2006.

'The International Criminal Court', Marangopoulos Foundation for Human Rights, Athens, 21 November 2006.

'The Relationship Between International Human Rights Law and International Humanitarian Law', London School of Economics, London, 30 November 2006.

'Genocide in the Modern World', University of Tübingen, Faculty of Law, Tübingen, Germany, 6 December 2006.

'Genocide in the Modern World', Württembergische Landesbibliothek, Bibliothek für Zeitgeschichte, Stuttgart, Germany, 7 December 2006.

'First Cases at the International Criminal Court', London School of Economics, 18 January 2007.

'First Cases at the International Criminal Court', University of Warwick, Coventry, United Kingdom, 23 January 2007.

'First Cases at the International Criminal Court', University of Oxford, Oxford, United Kingdom, 31 January 2007.

'Islam and Capital Punishment', Third World Congress on the Abolition of the Death Penalty, Paris, 1 February 2007.

'La pénalisation du droit des affaires', Centre de recherche sur les droits de l'homme et le droit humanitaire, Univesité de Paris II, 9 February 2007.

'Abolition of the Death Penalty', Conference on Human Rights and Social Justice, University of Winnipeg, 23 February 2007.

'Le droit international humanitaire, reflet des valeurs fondamentales', International Committee of the Red Cross, Paris, 12 March 2007.

'The Role of the International Criminal Court', Baker Peace Conference, Ohio University, Athens, Ohio, 30 March 2007.

'Globalisation and the Canadian Charter', Canadian Studies Association, Ottawa, 17 April 2007.

'The International Criminal Court, Sixty Years After Nuremberg', MacDermott Lecture, Queen's University, Belfast, 30 April 2007.

'Complementarity in Practice: Some Uncomplimentary Thoughts', International Colloquium, University of Trento, Trento, Italy, 4 May 2007.

`The Right to Benefit from Scientific Progress', University of Amsterdam, 8 June 2007.

`International Law and Capital Punishment', Launch Seminar on Sino-EU project on Moving the Debate Forward of Death Penalty in China, Beijing, 21 June 2007.

'Developments at the International Criminal Court', International Society for the Reform of Criminal Law, 20th Annual Conference, Vancouver, 23 June 2007.

'Truth Commissions, Accountability and the International Criminal Court', The Hague Joint Conference on Contemporary Issues of International Law: 'Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference', The Hague, 29 June 2007.

'The EU Guidelines on Capital Punishment', EIUC Diplomatic Conference, Venice, 14 July 2007.

'The ICC After Five Years: The Office of the Prosecutor', Hemispheric Conference on the International Criminal Court, Mexico City, 21 August 2007.

'The Genocide Convention: Where Are We Now', Programme in Holocaust and Human Rights Studies, Benjamin N. Cardozo School of Law, New York City, 20 September 2007.

'New Mechanisms, Institutions and Processes to Better Protect Security and Human Rights', Institute for Research on Public Policy, Ottawa, 21 September 2007.

'Is There an African Model of Transitional Justice?', University of Michigan, Ann Arbor, 27 September 2007.

'The Origins of the Genocide Convention: From Nuremberg to Lake Success', Case Western Reserve University, Cleveland, 28 September 2007.

'Core Crimes of International Criminal Law: Evolving Conceptions from the time of Vespasien V. Pella', Conference: *In memoriam* Vespasien V. Pella (1897-1952). From the 1937 Convention on the Creation of an International Criminal Court to the Rome Statute – Developing an International Criminal Justice System, International Criminal Court, The Hague, 4 October 2007.

'Prosecutorial Discretion at the International Criminal Court', Royal Netherlands Academy of Arts and Sciences, Amsterdam, 5 October 2007.

'The International Criminal Court: Growing Pains or Eating Disorder?', International Law Weekend, New York City, 26 October 2007.

'The Genocide Convention: Where are we Now?', Rutgers University School of Law, Newark, 30 October 2007.

'The International Criminal Court: An Idea Whose Time Has Come', Reid Memorial Lecture, Dalhousie University, 27 November 2007.

'The *Ireland* v. *United Kingdom* case at the European Court of Human Rights', Conference on Diplomacy and Human Rights, Irish Cultural Centre, Paris, 7 December 2007.

'The International Criminal Court: An Idea Whose Time Has Come', University of Istanbul, 17 December 2007.

'The International Criminal Court: An Idea Whose Time Has Come', Ankara University, 18 December 2007.

'*In absentia* Proceedings before International Criminal Tribunals', Expert Meeting on International Criminal Procedure, University of Amsterdam, 18 January 2008.

'The First Trial at the International Criminal Court', Danish Institute of Human Rights, Copenhagen, 26 February 2008.

'The Human Rights Council, A Progress Report on the First Two Years', University of Tehran, 1 March 2008.

'Capital Punishment and the International Criminal Court', Shahid Beheshti University, Tehran, 2 March 2008.

'Non-*refoulement*', School of International Relations, Tehran, 3 March 2008.

'Capital Punishment and the International Criminal Court', School of International Relations, Tehran, 3 March 2008.

'The Mental Element of the Crime of Genocide', Marie Curie Network Conference, Grotius Centre for International Legal Studies, The Hague, 15 March 2008.

'Black Lists of the Security Council and the European Union', Conference on "Anti-terrorist measures and human rights", Parliamentary Assembly, Council of Europe, Athens, 28 March 2008.

'The European Union and the Abolition of Capital Punishment', National University of Ireland, Galway, 21 March 2008.

Supervision of research students:

Geert-Jan Alexander Knoops, PhD, *The Prosecution and Defense of Peacekeepers under International Criminal Law*, National University of Ireland Galway, 2005. Thesis published: *The Prosecution and Defense of Peacekeepers under International Criminal Law*. Ardsley, New York: Transnational Publishers, 2004.

Shane Darcy, PhD, Collective *Responsibility in International Law*, National University of Ireland Galway, 2005. Thesis published: *Collective Responsibility in International Law*. The Hague: Transnational Publishers, 2006.

Mohamed El-Zeidy, PhD, *The Principle of Complementarity in International Criminal Law*, National University of Ireland Galway, 2007.

Kamran Hashemi, PhD, *Religious Legal Traditions, International Human Rights Law and Muslim States*, National University of Ireland Galway, 2007.

Vivienne O'Connor, PhD, *Model Codes for Post-Conflict Criminal Justice': A Tool to Enhance the Substance and Process of Post-Conflict Criminal Law Reform*, National University of Ireland Galway, 2007.

Mohamed Elewa, PhD, *The Concept of* Mens Rea *in International Criminal Law*, National University of Ireland Galway, 2007.

Daniel Aguirre, PhD, *Economic Globalisation and the Tripartite Realisation of the Right to Development*, Galway, 2007.

Anthony Cullen, PhD, *The Concept of International Armed Conflict in International Humanitarian Law*, National University of Ireland, Galway, 2007.

Hitomi Takemura, PhD, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, National University of Ireland, Galway, 2007.

Carlo Tiribelli, PhD, *Surrender, Not Extradition: Transferring Offenders in a New International Context*, National University of Ireland, Galway, 2008.

Other professional activities:

Representative of the Republic of Cyprus at the Conference on youth and the law for the International Youth Year, Montreal, August 1985.

Commission of Inquiry into Human Rights Violations in Rwanda (mission to Rwanda, 5-25 January 1993), representative of the International Centre for Human Rights and Democratic Development.

Commission of Inquiry on the Humanitarian Situation in the South Sudan (mission to Sudan, Kenya, Uganda, 22 August-3 September 1993), mission sponsored by South Sudan Council of Churches.

Delegation of the Government of Canada to the Implementation Meeting on the Human Dimension, Conference on Security and Cooperation in Europe, Warsaw, 4-15 October 1993.

Commission of Inquiry into Human Rights Violations in Burundi (mission to Burundi, 25 January - 10 February 1994), mission sponsored International Federation of Human Rights, Africa Watch and other NGOs.

Mission of Inquiry into the Judicial System in Rwanda (mission to Rwanda, 27 November - 6 December 1994), mission sponsored by International Centre for Human Rights and Democratic Development.

Trial observer, Amnesty International, hearing before the Constitutional Court of South Africa in the matter of *Makwanyane and Mchunu* v. *The State*, Johannesburg, South Africa, 15-17 February 1995.

Rapporteur, Expert meeting on humanitarian intervention organized by the International Centre for Human Rights and Democratic Development, Ste-Adèle, Québec, 28 February - 2 March 1995.

Participant, Expert meeting on cultural rights organized by UNESCO and the Council of Europe, Fribourg, Switzerland, 23-25 March 1995.

Course on prosecution for crimes of genocide, given by the International Centre for Human Rights and Democratic Development and the Interafrican Union for Human Rights, Professor and organiser, Kigali, Rwanda, 14-15 June 1995.

Lecturer, Canadian Foundation of Human Rights, Montreal, 1995-1997.

Panelist, High Level Symposium on Peace and Development, Problems of Conflict in Africa, United Nations University, Tokyo, 11-12 October 1995.

Mission to Rwanda to Assist in Developing a Specialized Genocide Tribunal, Rwandan Department of Justice, Kigali, 2-9 March 1996.

Panel Moderator, The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond, Athens, 17 November 1996.

Preparation of course on 'L'intégrité physique', including video, given as part of doctoral-level diploma programme offered by AUPELF-UREF, the Université de Nantes and the Université de Paris-X Nanterre, August 1996.

Human Rights Trial Observation Mission to Rwanda (mission to Rwanda, 20 January – 8 February 1997), mission sponsored by Amnesty International.

Member, Mission to analyse the Rwandan judicial system, United States Agency for International Development, Kigali, Rwanda, 7-14 February 1998.

Chair, Coalition for the 50th anniversary of the Universal Declaration of Human Rights, Montreal, 1997-1998.

Member, Delegation of the Government of Canada to the United Nations Commission on Human Rights, Geneva, March-April 1998.

Delegate, International Centre for Criminal Law Reform to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Lyon, 1998.

Conception, organization, presentation etc. of a two-week course in human rights (in French), Pearson Peacekeeping Centre, Cornwallis Park, Nova Scotia, 15-30 October 1998.

Lecturer, International Committee of the Red Cross, Fourth Advanced Seminar in International Humanitarian Law, Moscow, February 1999.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Warsaw, July 1999.

Lecturer, Salzburg Law School on International Criminal Law, First Summer Session, 16-27 August 1999.

Mission to Cambodia to study justice system and prospects for prosecution of Khmer Rouge, International Federation of Human Rights, 30 August - 10 September 1999.

Lecturer, United Nations Regional Fellowship Programme in International Law for Countries from Central Asia and the Middle East, United Nations Institute for Training and Research (UNITAR), Tehran, 22-23 November 1999.

Lecturer, International Committee of the Red Cross, Fifth Advanced Seminar in International Humanitarian Law, Moscow, February 2000.

Expert, OSCE Mission to Kosovo, United Nations Mission in Kosovo, April 2000.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Warsaw, July 2000.

Lecturer, United Nations Fellowship Programme in International Law, United Nations Institute for Training and Research (UNITAR), The Hague, 10-13 July 2000.

Lecturer, Salzburg Law School on International Criminal Law, Second Summer Session, 14-25 August 2000.

Lecturer, Salzburg Law School on International Criminal Law, Third Summer Session, 8-17 August 2001.

Lecturer, Institute of International Public Law and International Relations of Thessaloniki, Twenty-ninth session, The New International Criminal Law, 10-14 September 2001.

Delegate of Ireland, Open Meeting of the Contracting Parties to the European Convention on the Recognition of Legal Personality to International Non-Governmental Organisations (ETS 124), Strasbourg, 19-20 November 2001, 20-22 March 2002.

Mission of Inquiry to Chechnya and Ingushetia, International Federation of Human Rights, 17-21 February 2002.

Lecturer, Continuing Legal Education, International Criminal Tribunal for Rwanda, Arusha, July 2002.

Lecturer, Erik Castren Institute of Human Rights, University of Helsinki, August 2002.

Lecturer, United Nations University, Tokyo, May 2003.

Lecturer, University of Nottingham, Course on the International Criminal Court, June 2003.

Lecturer, Specialisation Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, September 2003.

Rapporteur, International Law Association Committee on the International Criminal Court, 2002-****.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Warsaw, July 2004.

Lecturer, Seminar for Iraqi Law Professors, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, July 2004.

Lecturer, Salzburg Law School on International Criminal Law, Sixth Summer Session, 8-17 August 2004.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Modane, France, September 2004.

Lecturer, Specialisation Course in International Criminal Law, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, May 2005.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Warsaw, July 2005.

Lecturer, Fifth Advanced Workshop on International Human Rights Law for Chinese University Teachers, Law School, Shanghai Jiaotong University, 11-12 August 2005.

Lecturer, Salzburg Law School on International Criminal Law, Seventh Summer Session, 8-17 August 2005.

Academic Director, Cinema and Human Rights Summer School, European Inter-University Centre for Human Rights and Democratisation, Venice, 25 August-12 September 2005.

Lecturer, International Human Rights Academy, University of Western Cape, Cape Town, 23-24 October 2005.

Judge, Central Asian Competition in International Humanitarian Law, Kyrgyzstan, 2-7 May 2006.

Lecturer, Marie Curie Top Summer School, University of Leiden, The Hague, 5-6 July 2006.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law, Warsaw, July 2006.

Lecturer, Zoryan Institute, Course on Genocide, Toronto, August 2006.

Lecturer, International Committee of the Red Cross, Course on International Humanitarian Law for University Lecturers, Geneva, August 2006.

Academic Director, Cinema and Human Rights Summer School, European Inter-University Centre for Human Rights and Democratisation, Venice, 24 August-11 September 2006.

Lecturer, International Criminal Tribunal for Rwanda Chambers Continuing Education Seminar, Colloquium on Genocide and War Crimes, Arusha, Tanzania, 16-17 September 2006.

Lecturer, Judicial College, War Crimes Chamber, Courts of Bosnia and Herzegovina, Sarajevo, 18-20 September 2006.

Consultant, 'Black Death in Dixie', KMF Productions, Peadar King, Producer, 2006.

Lecturer, Master on International Organisations, International Criminal Law and Crime Prevention, United Nations Interregional Crime and Justice Research Institute, Turin, Italy, March 2007.

Lecturer, Specialisation Course in International Criminal Law for Young Penalists, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, May 2007.

Editor, Oxford Reports in International Criminal Law.

Tutor, Master of Studies in International Human Rights Law, University of Oxford, July 2007.

Lecturer, Zoryan Institute, Course on Genocide, Toronto, August 2007.

Lecturer, Salzburg Law School on International Criminal Law, 15-16 August 2007.

Academic Director, Cinema and Human Rights Summer School, European Inter-University Centre for Human Rights and Democratisation, Venice, 23 August-10 September 2007.

Lecturer, Seminar on International Criminal Law for Rwandan Judges, Kigali, 10 March 2008.

Associations, etc.:

Member, Québec Bar (1984-2005); Comité sur les droits de la personne (1989-1996); Editorial Board, *Revue du Barreau* (1992-1999).

Société québécoise de droit international Law (1990-••••); General secretary (1992-1997); Vice-president (1990-1992); Rapporteur spécial on the U.N. Decade of International Law (1990-1998).

Member, American Society of International Law (1990-•••••).

Member, Canadian Association of Law Professors (1991-1999).

Member, Association des professeurs de droit du Québec (1991-1999).

Canadian Council of International Law (1991-••••); Member, Board of Directors and Executive Committee (1994-••••).

Member, International Society for Penal Law (1991-••••).

President, Steering Committee, International League for the Abolition of the Death Penalty By the Year 2000 'Hands Off Cain' (1993-2003).

Member, International Society for the Reform of Criminal Law (1993-••••).

Member, Société française pour le droit international (1993-••••).

Member, International Commission of Jurists (1995-••••).

Member, International Law Association (1999-••••).

Member, Advisory Board, Centre for Studies in Capital Punishment, London, (1993-••••).

Member, International Advisory Board, Fondation Marangopoulos pour les droits de l'homme, Athens (1995-••••).

Member, Board of Directors, Canadian Human Rights Foundation (1995-1997); Honorary President (1997-1999); Member, Honorary Board (1999-2006).

Member, Sous-commission des études avancées et de la recherche, Université du Québec à Montréal (1995-1997).

Member, Board of Directors, Canadian Lawyers Association for International Human Rights (1995-1998).

Chair, Quebec Council of Law Deans (1996-1998).

Member, Editorial Board, *Canadian Criminal Law Review/Revue canadienne de droit pénal* (1996-••••).

Editor-in-chief, *Criminal Law Forum* (1998-••••).

Member, Advisory Board, Leo Kuper Foundation, London (1998-••••).

Member, Editorial Board, *Revue universelle des droits de l'homme* (1999-••••).

Member, Editorial Board, *Human Rights Law Journal* (1999-••••).

Member, Advisory Committee, Centre for International Human Rights, Northwestern University School of Law (1999--••••).

Member, Advisory Committee on Human Rights, Irish Department of Foreign Affairs (2000-••••).

Member, Advisory Board, Interamicus, Montreal (2000-••••).

Member, Board of Editors, *International Criminal Law Review* (2000-•••••).

Member, Board of Advisors, New England Centre for International Law & Policy, New England School of Law, Boston (2000-••••).

Member, Advisory Board, Institute for Human Rights, Abo Akademi University, Turku/Abo, Finland (2002-••••).

Board of Directors, International Institute of Human Rights, Strasbourg (member, 2000-••••; treasurer, 2002-2004).

Member, Advisory Board, Death Penalty Project (2002-••••).

Bertha Wilson Distinguished Professor in Human Rights, Dalhousie Law School, Halifax (2002).

Member, Advisory Board, Europäisches Trainings- und Forschungszentrum für Menschenrechte und Demokratie, University of Graz (2004-••••).

Vice Chair, Association of Human Rights Institutes (2004-••••).

Member, Advisory Board, International Association of Genocide Scholars (2005-••••).

Academic Advisor, *Hibernian Law Journal* (2004-••••).

Member, Editorial Board, *Human Rights and International Legal Discourse* (2005-••••).

Member, Board of Trustees of the Voluntary Fund for Technical Cooperation in the Field of Human Rights, Secretary-General of the United Nations (2006-2008).

Member, Honorary Board, Equitas, International Centre for Human Rights Education (2006-2009s).

Member, Editorial Board, *Revista Iberoamericana de Derechos Humanos* (2005-••••).

Member, Advisory Board, *International Studies Journal* (2005-••••).

Member, Board of Advisors, *International, Transnational & Comparative Criminal Law Journal* (2006-••••).

Member, Advisory Group, Transnational and Non-State Armed Groups Project, Programme on Humanitarian Policy and Conflict Research, Harvard University (2006-••••).

Member, Board of Advisors, CCJO René Cassin (2007-••••).

Member, Advisory Board, Center for the Study of Genocide and Human Rights, Rutgers University, Newark (2007-••••).

Research grants, etc.:

Association des universités partiellement ou entièrement de langue française (AUPELF-UREF), 'Droit international électoral', 1993-1996 – $Cdn 35,000.

United States Agency for International Development, Law teaching at the Rwandan National University, 1996-1998 – $Cdn 1,000,000.

United States Agency for International Development, Introductory book on Rwandan law, 1996-1997 – $Cdn 54,000.

Social Sciences and Humanities Research Council, 'The Law of Genocide', 1997-1999 – $Cdn 33,000.

Association des universités partiellement ou entièrement de langue française (AUPELF-UREF), 'Droit international électoral', 1997-2000 – $Cdn 35,000.

Department of Foreign Affairs and International Trade of Canada, 'Library for International Criminal Tribunal for Rwanda', 1998, $Cdn 60,000.

United States Agency for International Development, Law teaching at the Rwandan National University, 1999-2000 – $Cdn 400,000

European Commission, EU-China network on international human rights covenants, 2001-2003 – €1.4 million.

United States Institute of Peace, Applicable law, 2001-2002 – $US 45,000.

United States Institute of Peace, Applicable law, 2002-2003 – $US 100,000.

United States Institute of Peace, Applicable law, 2003-2004 – $US 25,000.

European Commission, EU-China network on international human rights covenants, 2004, €0.8 million.

Equality Authority, Ireland, Reasonable accommodation research project, 2004, €35,000.

Irish Research Council for the Humanities and Social Sciences, History of international human rights in Ireland, 2005-2008 - €60,000.

Irish Development Corporation, Bilateral network with Chinese universities, 2005-2006, €80,000.

External examinerships:

University of London, LLM programme (2003-•2005).

Trinity College Dublin, LLM programme (2003-2006).

Oxford University, MSt. in international human rights law (2004-•2007).

Prizes, awards, scholarships, honours:

Reuben Wells Leonard University Admission Scholarship, University of Toronto, 1968

Ontario University Admission Scholarship, University of Toronto, 1968

Ontario Graduate Fellowship, University of Toronto, 1972

Kenneth R. Wilson award for best editorial, 1978, 1979 (Canadian Business Press Editors Association)

Fondation du Barreau du Québec, Prize for best monograph, 1995.

Bora Laskin National Fellowship in Human Rights Research, Social Sciences and Humanities Research Council of Canada, 1998.

Service medal, International Society for the Reform of Criminal Law, 2000.

Officer of the Order of Canada (appointed 29 June 2005, inducted 17 February 2006).

Member of the Royal Irish Academy (elected 16 March 2007).

Certificate of Merit for a book in a specialised area of international law, American Society of International Law, 2007.

Doctor of laws (LLD) *honoris causa*, Dalhousie University, Halifax, Canada, 25 May 2007.

Community and public service activities:

Association culturelle helléno-québécoise, Montréal (Chair of board of directors, 1981-1982).

Vanier College, Montréal (Chair of board of directors, 1987-1990; Member of board of directors, 1984-1991).

CLSC Côte des Neiges, Montréal (Chair of board of directors, 1985-1998; Member of board of directors, 1983-1999).

Foundation of CLSC Côte des Neiges, Montréal (Chair of board of directors, 1992-1999).

Jewish General Hospital, Montréal (Member of board of directors, 1987-1992).

Town of Outremont (Quebec), Intercultural Relations Committee (Member, 1989-1991).

Montreal Holocaust Memorial Centre (member of board of governors, 1997-1999).

Other activities, hobbies:

Hiking, Gardening, Stamp Collecting, Cellio

Long distance running (Marathon of Montréal, 1980-1986)

Swimming (First place, Stony Lake Memorial 1-Mile Swim, grandfather category, 5 August 2007)

Citation accompanying Order of Canada (17 February 2006): A law professor and committed activist, William Schabas is one of the foremost international authorities on genocide and on the death penalty. A member of several human rights organizations around the world, including the International Institute for Criminal Investigation, he played a pivotal role in the creation of the International Criminal Court in 1998. Now director of the Irish Centre for Human Rights, he serves as an example of Canada's contributions to international affairs and enhances our nation's reputation as a peacemaker.