THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-04-81-A

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Andrésia Vaz
Judge Khalida Rachid Khan

Registrar: **Mr. John Hocking**

Date Filed: **10 April 2012**

THE PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

MOMČILO PERIŠIĆ'S NOTICE OF RE-CLASSIFICATION AND RE-FILING OF THE PUBLIC REDACTED VERSION OF APPEAL BRIEF

The Office of the Prosecutor:
Ms. Helen Brady

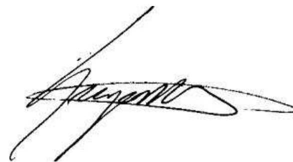
Counsel for Momčilo Perišić:
Mr. Novak Lukić
Mr. Gregor Guy-Smith

1. On 15 February 2012, Mr. Perišić filed the Public Redacted Version of the Appeal Brief. On 5 April 2012, errors were discovered in the Public Redacted Version of the Appeal Brief which could inadvertently reveal confidential information.

2. Mr. Perišić requests that the Public Redacted Version of the Appeal Brief filed on 15 February 2012 be re-classified as confidential.

3. Mr. Perišić hereby files a new and corrected Public Redacted Version of the Appeal Brief.

Respectfully submitted this 10th day of April 2012,



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Annex A

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ABBREVIATIONS USED THROUGHOUT THE BRIEF

ABiH	Army of Bosnia and Herzegovina
AJ	Appeal Judgement
BiH	Bosnia and Herzegovina
CIL	Customary International Law
FRY	Federal Republic of Yugoslavia
GS	General Staff
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
JCE	Joint Criminal Enterprise
MOD	Ministry of Defence
MP	Protected Witness (Pseudonym)
MS	Main Staff
MUP	Ministry of the Interior
NATO	North Atlantic Treaty Organization
NTC	National Transitional Council (Libya)
OTP	Office of the Prosecutor
PC	Personnel Centre
Res	Resolution
RS	Republika Srpska
RSK	Republic of Serbian Krajina
SAJ	Sentencing Appeal Judgement
SDC	Supreme Defence Council
SJ	Sentencing Judgement
SRK	Sarajevo Romanija Corps
SVK	Army of the Serbian Krajina
TJ	Trial Judgement
TO	Territorial Defence
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UK	United Kingdom
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States of America
VJ	Yugoslav Army
VJ CGS or CGS	VJ Chief of General Staff
VRS	Army of the Republika Srpska

Introduction

I. Procedural Background

1. On 6 September 2011, Trial Chamber I rendered its Judgement in the case of *Prosecutor v. Perišić*, Case No. IT-04-81-T.[1]

2. The Trial Chamber, by majority, found Mr. Perišić guilty of counts 1-4 and 9-12 as an aider and abettor and counts 5-8 as a superior for failing to punish his subordinates.[2]

3. For counts 1-4 and 9-12, the Trial Chamber unanimously found that evidence did not support findings of command responsibility.[3]

4. The Trial Chamber unanimously found Mr. Perišić not guilty of count 13 (extermination).[4]

5. Judge Moloto dissented from all findings of guilt and would have acquitted Perišić on all counts.[5]

6. The Trial Chamber sentenced Perišić to a single sentence of 27 years, with credit for time served.[6]

7. On 8 November 2011, Perišić filed his Notice of Appeal.[7] The Notice of Appeal contained 17 grounds appealing all findings of guilt and the sentence imposed.

8. The legal and factual arguments in support of the Notice of Appeal follow. Perišić notes that Grounds 5 and 6 have been consolidated to avoid repetition of arguments. Each ground stands alone in the relief requested.

[1] *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgement, 6 September, [hereinafter "Judgement"].
[2] Judgement, paras.1838, 1839.
[3] Judgement, para.1837.
[4] Judgement, para.1836.
[5] Judgement, Dissenting Opinion of Judge Moloto on Counts 1 to 4 and 9 to 12 and Dissenting Opinion of Judge Moloto on Counts 5 to 8 [hereinafter "Dissent"].
[6] Judgement, para.1840.
[7] *Prosecutor v. Perišić*, Case No. IT-04-81-A, Notice of Appeal of Momčilo Perišić, 8 November 2011.

II. General overview

9. Momčilo Perišić's case is the only case before this Tribunal of a senior officer of one army being found guilty for crimes committed by members of a distinct army in a foreign country.

10. It highlights the importance of a fundamental principle of national and international criminal law – that individual criminal liability is based on personal guilt, not state responsibility.

11. This judgement ignores the reality that relations between states are often reinforced by the provision of significant military aid, in finding Perišić's provision of assistance renders him individually criminally responsible for aiding and abetting the crimes committed during the war. Many foreign armies are dependent, to various degrees, upon such assistance to function.

12. The Majority found Perišić guilty for providing assistance that did not have a substantial effect on the crimes committed by the VRS, on the basis of knowledge that he did not have and without even addressing whether he knew that his acts assisted the commission of crimes.

13. The Majority found Perišić responsible for failure to punish soldiers of a distinct army for the shelling of Zagreb. The evidence was clear that this crime was committed by the commander of the distinct army receiving orders from the head of a separate state.

14. The Judgement rendered by the Majority rests in many ways on speculation. It comprises a number of errors, which must be corrected.

15. If Perišić's convictions are sustained, it will have a chilling effect on international relations as under the Majority's reasoning a commander of any army can be found responsible for crimes committed by any troops of any nation simply by giving logistical or technical assistance to prosecute a war. The outcome of this appeal is not only of great importance to Perišić but also to political and military leaders throughout the world.

1st Ground of Appeal

16. The Majority erred in law when it concluded that providing assistance to the VRS in its war effort amounted to aiding and abetting the crimes committed during the war. The Majority's error invalidates the Judgment in respect of Counts 1-4 and Counts 9-12.

17. The Majority's interpretation and application of the objective and subjective elements of aiding and abetting, as enshrined in Article 7(1) of the Statute has significant implications not only for the continued, progressive development of international criminal law, but also for the practical realisation of the recently crystallised doctrine of the 'Responsibility to Protect'.[8]

18. The standard adopted by the Majority, entirely disregarding the centrality of the "specifically directed" component of "substantial effect",[9] coupled with a *mens rea* standard of basic knowledge or foreseeability,[10] places unrealistic and arbitrary constraints on the waging of war and on the potentiality of states to intervene militarily in circumstances where the 'Responsibility to Protect' doctrine comes into play.[11]

19. The impact of the Majority's determination is specific to individuals in positions of high command in national armed forces frequently in the position of supplying logistic and personnel assistance to the armed forces of a second state or non-state armed group. Such transactions are an unavoidable reality of contemporary international relations.[12]

20. Taken to its logical conclusion in this context, the standard adopted by the Majority, whereby assistance given to a party of a conflict in the knowledge that crimes are likely

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[8] *See,* UNGA Res. 60/1, '2005 World Summit Outcome' at para.138 et seq.; UNSC Res. 1970 (26 February 2011), para.26; UNSC Res. 1973 (17 March 2011), para.4. *See also,* UNSC Res. 1674 (28 April 2006), para.4; UNSC Res. 1894 (11 November 2009).
[9] *See*, Ground 2.
[10] The Majority's reasoning is unclear as to whether the "knowledge" standard encompasses a forseeability aspect. *See e.g.* Judgement, para.1646.
[11] Dissent, paras.8-10.
[12] See also, Dissent, para.33. "If we are to accept the Majority's conclusion based solely on the finding of dependence, as it is *in casu*, without requiring that such assistance be specifically directed to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting. I respectfully hold that such an approach is manifestly inconsistent with the law". *See also*, para.32.

to be committed by that party will result in a finding of guilt irrespective of the humanitarian intent or impact of that assistance.[13]

21. The absence of an element requiring specific direction, or even a lesser 'purpose of facilitating'[14] standard, creates a threshold approaching that of strict liability.

22. Judge Moloto reasons that a distinction must be drawn "between aiding and abetting in the present case and cases which have previously been decided by the Appeals Chamber, where the aider and abettor was either at, or proximate to, the crime scene…[I]n cases of remoteness, the notion of specific direction must form an integral and *explicit* component of the objective element of aiding and abetting".[15] The position is supported by customary international law concerning accomplice liability.[16]

23. It is clear that the Majority did not rely on specific evidence of assistance which had a substantial effect on the commission of crimes, but rather determined guilt on the basis of circumstantial evidence and inferences drawn from the dependence of the VRS on the VJ for its war effort and Perišić's alleged knowledge of the criminal objectives of the VRS.

24. In short, to in any way assist the VRS in their conduct of hostilities was to aid and abet their criminal acts.[17] This standard essentially amounts to a form of strict liability, but is contrary to the established jurisprudence of this Tribunal and ignores the practical reality of contemporary armed conflict.

25. The doctrine of the 'Responsibility to Protect' has become a key pillar of the international community's commitment to the enforcement and protection of universal human rights and the preservation of international peace and security.[18] A recent example of its application arose from the UN Security Council's response to the recent conflict in Libya. The facts surrounding this conflict may be summarised as involving a popular rights-

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[13] This characterization does not concede that Perišić had the requisite "knowledge" in this case. *See* Grounds 9-12.

[14] As required by Article 25(3)(c) of the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court 2187 UNTS 90 (entered into force 1 July 2002) [hereinafter "Rome Statute"].

[15] Dissent, para.10 [emphasis added].

[16] *See* Grounds 2 and 7. *See also*, Ground 5, para.108.

[17] The Majority's approach designates the VRS as a manifestly illegal organisation. This argument is explored further in Ground 4 below.

[18] *See*, fn.8, *supra*.

based uprising against the regime of Muammar Gaddafi, which descended into a non-international armed conflict between the state armed forces, loyal to Gaddafi, and the paramilitary forces of the popular movement. In response to widespread reports of serious violations of international humanitarian and human rights law committed by Gaddafi's forces against the civilian population of northern Libya, the UN Security Council passed Resolution 1973 which authorized states "to take all necessary measures" to protect civilians under the Responsibility to Protect doctrine[19] while excluding a foreign occupation force of any form on any part of Libyan territory.[20]

26. A coalition of states emerged (including *inter alia*, the UK, France, USA and Canada) who were prepared to participate in an air campaign – in consultation and with the support of anti-Gaddafi armed forces. In addition to air support, at least two states, France and the UK, offered additional assistance to rebel forces in the form of equipment, ammunition and training.[21]

27. This determination was made knowing that the National Transitional Council (NTC) constituted an irregular non-state armed group, lacking a formalized chain of command and training. Assistance offered to an armed group of this nature could contribute to, or have an effect on, the potential future commission of war crimes and crimes against humanity.

28. Applying the standard adopted by the Majority, if states provided assistance to the NTC with knowledge of the potential for that assistance to aid in some way in the commission of crimes, and such crimes were subsequently committed, then the military and political

[19] Significantly, para. 9 imposed an arms embargo on Libyan state forces. *See* UNSC Res. 1970 (26 February 2011).
[20] UNSC Res. 1973 (17 March 2011), para. 4 [emphasis added] "*Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, *to take all necessary measures*, notwithstanding paragraph 9 of resolution 1970 (2011)."
[21] See, M. Birnbaum, "France Sent Arms of Libyan Rebels", *Washington Post* (30 June 2011) (available at: http://www.washingtonpost.com/world/france-sent-arms-to-libyan-rebels/2011/06/29/AGcBxkqH_story.html); L. Charbonneau and H. Hassan, "France Defends Arms Airlift to Libyan Rebels", *Reuters* (29 June 2011) (available at: http://www.reuters.com/article/2011/06/29/us-libya-idUSTRE7270JP20110629); "Libya Conflict: France Air-Dropped Arms to Rebels", *BBC News* (29 June 2011) (available at: http://www.bbc.co.uk/news/world-africa-13955751); M. Urban, "Inside Story of the UK's Secret Mission to Beat Gaddafi", *BBC News*, *Newsnight,* (19 January 2012) (available at: http://www.bbc.co.uk/news/magazine-16573516 and video report here: http://www.bbc.co.uk/news/world-africa-16624401); T. Harding et al., "Libya: SAS Leads Hunt for Gaddafi", The Daily Telegraph, (24 August 2011) (available at: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8721291/Libya-SAS-leads-hunt-for-Gaddafi.html).

high command involved would be subject to criminal sanction for aiding and abetting in the commission of crimes. This, regrettably, is not merely a hypothetical scenario. It is now widely acknowledged that rebel forces of NTC frequently committed violations of international humanitarian and human rights law.[22]

29. If the legal standard adopted by the Majority were to be relied upon in subsequent international prosecutions of NTC crimes,[23] then there would be reasonable grounds for instituting proceedings against the military and civilian high command of assisting states such as the UK and France. This potentiality serves to illustrate the uncertain and logically incoherent nature of the Majority's reasoning.

30. The facts surrounding the Libyan conflict are far from unique. It is foreseeable that the international community will be called upon to make similar decisions in the future in non-international armed conflicts such as Syria.[24]

[22] These incidents are of such gravity as to warrant investigation by the Office of the Prosecutor of the International Criminal Court, who became seized of the situation pursuant to UN Security Council Resolution 1970. *See e.g.*, Human Rights Watch (HRW), "Libya: Protect Civilians in Sirte Fighting" (12 October,2011) (http://www.hrw.org/news/2011/10/12/libya-protect-civilians-sirte-fighting); HRW, "Libya: Militias Terrorizing Residents of 'Loyalist' Town" (30 October 2011) (available at: http://www.hrw.org/news/2011/10/30/libya-militias-terrorizing-residents-loyalist-town);HRW,"The Murder Brigades of Mistrata" (28 October 2011), "More than 100 militia brigades from Misrata have been operating outside of any official military and civilian command since Tripoli fell in August. Members of these militias have engaged in torture, pursued suspected enemies far and wide, detained them and shot them in detention, Human Rights Watch has found. Members of these brigades have stated that the entire displaces population of one town, Tawergha, which they believe largely supported Gadhafi avidly, cannot return home", (http://www.hrw.org/news/2011/10/28/murder-brigades-misrata); HRW, "Libya: Apparent Execution of 53 Gaddafi Supporters", (23 October 2011), "We found 53 decomposing bodies, apparently Gaddafi supporters, at an abandoned hotel in Sirte, and some had their hands bound behind their backs when they were shot," said Peter Bouckaert, emergencies director at Human Rights Watch, who investigated the killings",(http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters); HRW, "Libya: Investigate Deaths of Gaddafi and Son", (22 October 2011) (http://www.hrw.org/news/2011/10/22/libya-investigate-deaths-gaddafi-and-son); HRW, "Libya: Cease Arbitrary Arrests, Abuse of Detainees", (30 September 2011) http://www.hrw.org/news/2011/09/30/libya-cease-arbitrary-arrests-abuse-detainees); Amnesty International (AI), "Libya Urged to Investigate Whether Al-Gaddafi Death was a War Crime",(21 October 2011), (http://www.amnesty.org/en/for-media/press-releases/libya-urged-investigate-whether-al-gaddafi-death-was-war-crime-2011-10-21); AI,"Libya Detention Abuses Staining the New Libya", (13 October 2011), (http://www.amnesty.org/en/library/info/MDE19/036/2011/en); AI, "The Battle for Libya: Killings, Disappearances and Torture", (13 September 2011), see chapter 5 "Abuses by Opposition Forces" (http://www.amnesty.org/en/library/asset/MDE19/025/2011/en/8f2e1c49-8f43-46d3-917d-383c17d36377/mde190252011en.pdf).

[23] Bearing in mind paragraph 6 of Resolution 1973.

[24] See e.g.: N. Cohen, "The West has a Duty to Intervene in Syria", *The Observer* (1 January 2012) (http://www.guardian.co.uk/commentisfree/2012/jan/01/nick-cohen-intervene-in-syria?newsfeed=true). *See also*, UN News Centre, "Responsibility to Protect: Ban Urges Action to Make UN-Backed Tool a 'Living Reality'", (18 January 2012) http://www.un.org/apps/news/story.asp?NewsID=40972&Cr=responsibility+to+protect&Cr1=). "Mr.

31. The practical reality is that states will increasingly have to decide when intervention is deemed absolutely necessary for the protection of civilians: either support a party to a conflict fighting oppression and risk criminal sanction for aiding and abetting, or ignore the moral and humanitarian imperative to intervene.

32. This of course assumes that the Majority's standard is to be applied irrespective of any notions of the "just" or "unjust" nature of the intervention, an assumption which is arguably at odds with the political reality of international criminal justice. An obvious criticism of the above argument, in the context of the present case, is that Perišić did not provide assistance to the VRS in pursuit of the Responsibility to Protect. It is submitted that such a criticism deliberately ignores the import of the Majority's reasoning regarding the future development of international criminal law.

33. The jurisprudence of the ICTY is rich with instances of judicial creativity which have been directly responsible for the progressive development of core elements of substantive international criminal and humanitarian law.[25] In so doing, there has been an implicit acknowledgement from this Chamber that the law cannot remain static and must respond to the challenges of contemporary armed conflict.[26] With the establishment of this Tribunal, Secretary-General Boutros Boutros-Ghali mandated a "Golden Rule" to be followed in the judicial interpretation and application of the Statute, namely, fidelity to the principle of legality and customary international law.[27]

34. In this instance, the Majority has broken this rule on both counts. If the principle of legality is to be taken seriously with respect to aiding and abetting crimes, then foreseeability and interpretative certainty must attach to the understanding to be given to "substantial effect" which takes into account the centrality of a "specific direction" criterion. The Majority, unlike previous Chambers, failed to square its interpretation of

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Ban noted that the 'next test of our common humanity" is Syria, where more than 5,000 people have lost their lives since a popular uprising began in March last year'.

[25] *See generally*, S. Darcy and J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011). See Chapter 8, M Shahabuddeen "Judicial Creativity and Joint Criminal Enterprise".

[26] *See generally*, *Tadić*-Decision.

[27] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc S/25704 (3 May 1993), para 34.

the requisite objective and subjective standards for aiding and abetting war crimes, crimes against humanity with any observable customary standard.[28] In this regard, the Majority took no heed of the guidance to be derived from Article 25(3)(c) of the Rome Statute of the International Criminal Court which includes a "[f]or the purpose of facilitating the commission of such crime" element.[29] The result is not only uncertainty as to the customary standard, but another instance of inconsistent and divergent standards in international criminal law.

35. In its interpretation of aiding and abetting the Majority has exchanged judicial creativity for judicial activism, the *lex lata* for the *lex ferenda* and the objective and subjective elements for essentially a *de facto* strict liability standard. Not only does this interpretation deviate from the existing jurisprudence of this Tribunal, but it sets a precedent which, if adopted before other international courts and tribunals, has the potential to significantly expand the use of aiding and abetting in legitimate theaters of war.

36. The arbitrary and erroneous standard adopted by the Majority, coupled with its reliance on circumstantial inferences, is such as to find Mr. Perišić guilty not for aiding and abetting specific crimes, but rather for assisting the VRS in its war effort. The Dissent properly reminds us that "assisting the VRS wage war per se is not a crime under the Statute".[30]

Relief sought

37. As a result of the Majority's error, Perišić respectfully requests the Appeals Chamber to overturn the guilty findings entered by the Majority and return a finding of NOT GUILTY for Counts 1-4 and Counts 9-12.

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[28] See e.g. *Tadić*-TJ, paras.661-692.
[29] Rome Statute, Art. 25(3)(c).
[30] Dissent, para.30. *See also*, Judgement, para.1588, where the Majority recognised the same before making findings contrary to its recognition.

2nd Ground of Appeal

I. Introduction

38. The Majority erred in finding Perišić guilty of aiding and abetting, holding that Perišić's *actus reus* for aiding and abetting consisted of providing logistical and personnel assistance to the VRS in Sarajevo and Srebrenica.[31]

39. In finding Perišić guilty of aiding and abetting, the Majority held that "the acts of the aider and abettor need not have been '*specifically directed*' to assist the crimes."[32] The Majority defined the objective element of aiding and abetting as follows: "acts or omissions *directed* at providing practical assistance, encouragement or moral support to the perpetration of the crime, which have a substantial effect on the perpetration of the crime."[33]

40. By failing to require that Perišić's acts be "specifically directed" to assist the commission of the crimes in the Indictment, the Majority committed an error of law. It is submitted that none of Perišić's acts were specifically directed toward the commission of such crimes. This error was manifestly prejudicial to Perišić and invalidates the Judgement for Counts 1-4 and 9-12.

II. The principle of "specific direction" is a component of the *actus reus* of aiding and abetting

41. The Appeals Chamber has repeatedly and consisently defined the *actus reus* for aiding and abetting as acts "specifically directed" to assist, encourage, or lend moral support to the perpetration of a crime, which have a substantial effect on the commission of the crime.[34] The Appeals Chamber first articulated this standard in the seminal *Tadić*-AJ, and

[31] Judgement, para.1627.
[32] Judgement, paras.126, 1264 [emphasis added].
[33] Judgement, para.126 [emphasis added].
[34] *Tadić*-AJ, para.229(iii); *Vasiljević*-AJ, para.102(i); *Blagojević*-AJ, para.127; *Kvočka*-AJ, para.89; *Blaškić*-AJ, para.45. *See also, Rukundo*-AJ, para.52; *Kalimanzira*-AJ, paras.74, 86; *Muvunyi*-AJ, para.79; *Seromba*-AJ, para.44; *Nahimana*-AJ, para.482; *Ntagerura*-AJ, para.370; *Ntakirutimana*-AJ, para.530.

continues to include the notion of "specific direction" in its recitation of the requisite *actus reus* for aiding and abetting.[35]

42. The Majority's reliance on the Appeals Chambers' judgments in *Mrkšić* and *Blagojević* in finding that specific direction is not a required element of the *actus reus* of aiding and abetting is misplaced.[36] *Blagojević*-AJ accepted that specific direction forms a part of the *actus reus*, stating:

> such a finding [of specific direction] will *often be implicit* in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime.[37]

Moreover, *Blagojević*-AJ expressly noted, "the *Tadič* definition [of the *actus reus* for aiding and abetting] has not been explicitly departed from."[38]

43. It is imperative to note that *Mrkšić*-AJ relied solely on *Blagojević*-AJ for the proposition that the Appeals Chamber has "confirmed that 'specific direction' is not *an essential* ingredient of the *actus reus* of aiding and abetting."[39] This is not the case. Contrary to *Mrkšić*-AJ's assertion, *Blagojevic*-AJ actually accepted the continued applicability of specific direction, finding the notion to be "often […] implicit."[40]

44. Therefore, *Mrkšić*-AJ, standing alone, is misguided in this instance and cannot overshadow the Appeals Chamber's repeated adoption of the concept of "specific direction" in defining the *actus reus* for aiding and abetting.[41] Had *Blagojević*-AJ wished to reject this notion, it would have expressly done so.

45. Importantly, "specific direction" has been explicitly included as an element of the *actus reus* for aiding and abetting in two recent ICTR appeal judgements rendered after *Mrkšić*-AJ. *Kalimanzira*-AJ referred to acts "specifically directed" to assist the perpetration of a crime.[42] Likewise, *Rukundo*-AJ applied a variation of the "specific direction" notion,

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[35] *Ibid*.
[36] Judgement, para.126 & fn.258.
[37] *Blagojević*-AJ, para.189 [emphasis added].
[38] *Blagojević*-AJ, para.189.
[39] *Mrkšić*-AJ, para.159.
[40] *Blagojević*-AJ, para.189.
[41] *See*, *supra*, fn.34.
[42] *Kalimanzira*-AJ, para.74.

namely that the acts must be "specifically aimed" at assisting the perpetration of a crime.[43]

46. The jurisprudence of the Tribunal and the ICTR, therefore, demonstrates that "specific direction", albeit as either an *explicit* or an *implicit* element, continues to form an integral part of the *actus reus* for aiding and abetting. The *Mrkšić*-AJ is thus strikingly inconsistent with the Tribunal's jurisprudence and should be rejected. In light of the above, to satisfy the *actus reus* for aiding and abetting, Perišić's conduct must have been specifically directed to assisting the commission of the crimes in the Indictment.

47. Similarly, the Special Court for Sierra Leone, in two trial judgements, has held that specific direction is a requisite element of the *actus reus* for aiding and abetting.[44]

48. While specific direction may be an implicit element,[45] the majority of the Tribunal's jurisprudence has *expressly* included the notion of "specific direction" as part of the *actus reus* standard for aiding and abetting.[46] With this in mind, Perišić submits that in cases where the conduct of the accused is remote in relation to the commission of the crimes, the requirement of specific direction as an explicit element of aiding and abetting is manifest. This is especially important in this case, as Perišić is not accused of providing assistance to the commission of crimes committed by the VJ. Rather, he is accused of facilitating the commission of crimes committed by the VRS.

49. In the alternative, even assuming that this Appeals Chamber adopts the unique position articulated by *Mrkšić*-AJ, Perišić submits that in cases involving such remote conduct as is evident in this case, the notion of "specific direction" must form an integral part of the *actus reus* for aiding and abetting. To hold otherwise, in a case such as this, could lead to

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[43] *Rukundo*-AJ, para.52.
[44] *Sesay (RUF)*-TJ, para.277; *Fofana (CDF)*-TJ, para.229.
[45] See *Blagojević*-AJ, para.189.
[46] While some appeal judgements, such as *Orić* and *Simić*, use the term "directed" rather than "specifically directed" when defining the *actus reus* for aiding and abetting, subsequent appeal judgements have gone back to applying the "specifically directed" standard (*see Orić*-AJ, para.43; *Simić*-AJ, para.85; *cf. Blagojević*-AJ, para.127; *Rukundo*-AJ, para.52; *Kalimanzira*-AJ, paras.74, 86; *Muvunyi*-AJ, para.79; *Seromba*-AJ, para.44; *Nahimana*-AJ, para.482). Therefore, the *Orić* and *Simić* Appeal Judgements should be read as consistent with the "specifically directed" standard that the Appeals Chamber has continued to apply.

a conflation of State responsibility with individual criminal responsibility, which must be based on *personal* guilt.[47] As Judge Moloto properly noted,

> If we are to accept the Majority's conclusion based solely on the finding of dependence, as it is *in casu*, without requiring that such assistance be *specifically directed* to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting. I respectfully hold that such an approach is manifestly inconsistent with the law.[48]

50. In this case, FRY provided assistance to the VRS independent of the VJ.[49] Such assistance cannot not be considered in determining Perišić's individual criminal responsibility. Additionally, Perišić has acknowledged that the VJ provided assistance to the VRS,[50] but such assistance should not be considered tantamount to Perišić's individual criminal responsibility simply because he was the Chief of the General Staff in the VJ. If Perišić is to be convicted on the basis of individual criminal responsibility, it must be on the basis that it is proved beyond a reasonable doubt that *his* acts were specifically directed to assisting the commission of the crimes perpetrated by the VRS as a separate army. The Majority failed to do so. Perišić's convictions under 7(1) of the Statute therefore must be overturned and judgements of not guilty entered instead.

III. None of Perišić's acts were "specifically directed" to assisting the commission of the crimes perpetrated by the VRS

51. In light of the above, the proper analysis involves a factual determination of whether the Prosecution's evidence, either direct or circumstantial, proves beyond a reasonable doubt that Perišić's acts were specifically directed toward assisting the commission of the crimes. Given the lack of direct evidence, the Prosecution's case relies on circumstantial evidence. It is, therefore, necessary to bear in mind that where an inference is drawn from

[47] *See* Dissent, para.31.
[48] Dissent, para.33 [emphasis added].
[49] *See e.g.* paras.1599, 1601, 1006, 1050, 1086-1089, 1133, 1167, 1171, 1185, 1199, 1220, 1291-1294, 1295-1302.
[50] Judgement, para.1593, citing Defence Final Brief, paras.607, 780.

circumstantial evidence to establish a fact on which a conviction relies, it must be the *only* reasonable inference that could be drawn from the evidence presented.[51]

52. At the outset, it is crucial to note that when the Appeals Chamber first articulated the standard for the *actus reus* of aiding and abetting in *Tadić*-AJ, it was done in the context of distinguishing liability for aiding and abetting from participation in a JCE. The *Tadić*-AJ established that "the aider and abettor carries out acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime" and which have a substantial effect on the perpetration of the crime.[52] In contrast, the *Tadić*-AJ explained that "acts that *in some way* are directed to the furthering of the common plan or purpose" are sufficient for the requisite participation in a JCE.[53] This important distinction between these two modes of liability provides the foundation for the Appeals Chamber's continued inclusion of the concept of "specific direction" as a required element of the *actus reus* of aiding and abetting. If the *Tadić*-AJ had not intended for specific direction to constitute a requisite element for aiding and abetting liability, there would have been no need to make such a distinction.

53. Had the Prosecution intended to hold Perišić accountable for his alleged assistance in furthering a common plan or purpose based on the "strategic objectives" of the Bosnian Serbs, it should have done so by charging him under the theory of JCE.[54] If the Prosecution had done so, there would be no requirement that Perišić's acts be specifically directed towards assisting the commission of the underlying crimes. However, the Prosecution chose to charge Perišić with aiding and abetting and therefore was required to satisfy the "specific direction" element.

54. In this context, it must be emphasized that in reaching its conclusion on Perišić's liability for aiding and abetting, the Majority incorrectly took into account the strategic objectives of the Bosnian Serbs.[55] As Judge Moloto correctly stated in his dissenting opinion, such

[51] Judgement, para.28, citing *Stakić*-AJ, para.219; *Čelebići*-AJ, para.458; *Hadžihasanović*-AJ, para.286.
[52] *Tadić*-AJ, para.229 [emphasis added]. *See also Vasiljević*-AJ, para.102(i).
[53] *Ibid*.
[54] Dissent, para.6 & fn.1.
[55] See *e.g.* Judgement, paras.1588-1591, 1600.

objectives "have no place in an analysis under aiding and abetting."[56] Therefore, by focusing on these objectives, rather than on whether Perišić's conduct itself was specifically directed toward the commission of the crimes, the Majority erroneously conflated aiding and abetting with JCE.[57]

55. The Appeals Chamber has not expressly defined "specific direction". However, in *Kupreškić*-AJ, the Appeals Chamber provided an informative analysis when determining whether the conduct at issue amounted to acts specifically directed to the commission of the underlying crime. *Kupreškić*-AJ found that evidence that Vlatko Kupreškić was seen unloading weapons from his car in October 1992 was not sufficient for finding that his acts were specifically directed towards assisting the crime of persecution.[58] *Kupreškić*-AJ importantly noted that the six-month length of time between when Vlatko Kupreškić was observed unloading the weapons and when the attack on Ahmici actually occurred "diminishes the likelihood that the weapons were *intended* to be used for attacking the Muslim population."[59] *Kupreškić*-AJ further found that Vlatko Kupreškić's mere presence outside the building where the plan for the attack on Ahmici was discussed, one day before the attack occurred, could not amount to an act specifically directed towards the commission of the underlying crime.[60]

56. *Kupreškic*-AJ clearly demonstrates that not any act of assistance provided to the commission of a crime constitutes aiding and abetting. Only acts that are specifically directed towards assisting a crime are sufficient.

57. Perišić acknowledges that, as the Chief of the General Staff in the VJ, he provided assistance to the VRS pursuant to the SDC's orders.[61] However, such assistance was not *directed,* let alone *specifically directed*, to assisting the commission of the crimes perpetrated by the VRS. Rather, the evidence demonstrates that the assistance given was made in the context of supporting the war effort. The Majority itself found that "the VRS

[56] Dissent, para.11.
[57] Dissent, para.5.
[58] *Kupreškić*-AJ, para.277.
[59] *Ibid.* [emphasis added].
[60] *Kupreškić*-AJ, paras.283.
[61] Judgement, para.1593, *citing* Defence Final Brief, paras.607, 780.

depended heavily on FRY and VJ assistance in order to function as an army and to wage war."[62] There is no evidence supporting a finding that Perišić's acts were *specifically directed* to assisting the perpetration of the VRS's crimes.

58. There is a reason why the Majority avoided the requirement that the acts of an aider and abettor be specifically directed. That is that it:

> recognize[d] that the evidence does not establish that the specific weapons used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić.[63]

59. Moreover as discussed in Ground 5, *infra*, where direct evidence of the instrumentalities used to commit crimes were provided to the Trial Chamber, it found that the evidence was insufficient to establish that the weaponry used to commit the crimes was supplied to the VRS pursuant to the logistical assistance process managed by Perišić.[64]

60. Similarly, as all but three individuals holding key positions within the VRS held such positions prior to Perišić's appointment as Chief of the General Staff in the VJ, the VJ's overall personnel assistance, rendered through Perišić, cannot be said to have been *specifically directed* to the commission of the crimes of the VRS.[65]

61. Perišić provided the assistance at issue on behalf of the VJ to support the war effort alone,[66] not the VRS's commission of crimes. As the Majority correctly noted, "Perišić is

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[62] Judgement para.1602.
[63] Judgement, para.1624.
[64] Judgement, paras.1294, 1296, 1302.
[65] Judgement, paras.1605, 1609; Dissent, para.22.
[66] *See* P709, Stenographic Transcript of the 14th Session of the SDC, 11 October 1993, pp.5-6.("...we are helping the armies of the republics of Serbian Krajina".); P791, Stenographic Transcript of the 17th Session of the SDC, 10 January 1994, p.4 (If the war there were to continue"[. . .] "we know that they need to be given certain assistance, beginning with weapons and ordnance and all other materiel"; pp.59-60.(medical supplies for the wounded). *See also* P776, Stenographic Transcript of the 21st Session of the SDC, 7 June 1994, p.38 (Perišić stated that "*if we stop helping them* in the area of education, financing of educated personnel and material assistance for certain combat operations*, they'll start losing territories*") [Emphasis Added] p.39 (Perišić recommends that the SDC approve the grant of ammunition and spare parts to the VRS and SVK); P769, Minutes from the 58th Session of the SDC held on 21 November 1996, p.3; P800, Stenographic Transcript of the 58th Session of the SDC, 21 November 1996, pp.5-6; P708, Minutes from the 43rd Session of SDC held on 29 August 1995, 30 August 1995, pp.1-2; P765, Minutes from the 44th Session of the SDC held on 6 September 1995, pp.1-2 (decision to stop assisting the SVK since the army no longer existed); P782, Stenographic Transcript of the 18th Session of the SDC, 7 February 1994, p.53. ("if the two Krajinas [sic] are not defended, we will be significantly jeopardised. And they certainly can't be defended without our assistance in weapons and military equipment"); P763, Minutes from the 39th Session of the SDC, 29 July 1995, pp.4-5; P754, Minutes from the 23rd Session of the SDC held on 21 July 1994, p.2; P749, Minutes from

not charged with helping the VRS to wage war *per se*, which is not a crime under the Statute."[67]

IV. None of Perišić's acts were directed to assisting the commission of the crimes perpetrated by the VRS

62. Even if the Appeals Chamber accepts the Majority's definition of the *actus reus* of aiding and abetting, Perišić's conduct still falls short of this standard as his acts were not *directed* to assisting the commission of the specific crimes. As explained above, the assistance provided by Perišić, on behalf of the VJ and as authorized by the SDC, to the VRS was *directed* to assisting the war effort, not the commission of crimes by the VRS. Irrespective of whether the majority defined the proper standard in its definition of the *actus reus* of aiding and abetting, it failed to apply it.[68] Had the Majority applied the proper standard, then the impact of its findings regarding Scheduled Incidents A7 and A9, as well as evidence recovered from the Srebrenica killing sites,[69] would have necessarily forced a consistent legal approach that would have resulted in applying a proper legal standard and entering a judgement of not guilty for those crimes charged pursuant to Article 7(1) of the statute.

V. Relief sought

63. The assistance at issue provided by the VJ, as approved by the SDC and through Perišić, was provided to a separate army acting in accordance with its own operational command which distributed and utilized the logistical and personnel assistance as it saw fit. The remote nature of this assistance cannot be ignored. Many States seek and provide military assistance for various reasons.[70] The inclusion of specific direction in the standard for

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the 36th Session of the SDC held on 12 May 1995, p.5; P720, Minutes from the 38th Session of the SDC held on 27 June 1995, p.3.

[67] Judgement, para.1588.

[68] *See*, Grounds 5 and 6, *infra*.

[69] *Ibid*.

[70] *See*, Dissent, para.32.

aiding and abetting allows for the necessary distinction to be made between conduct which is lawful and conduct which is not.

64. Perišić respectfully requests that the Appeals Chamber: (i) hold that the *actus reus* of aiding and abetting in international law requires specific direction; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.

3rd Ground of Appeal

I. Introduction

65. The Majority erred in law by erroneously applying the applicable legal standard when it determined that the actions of Perišić fulfilled the required *actus reus* for aiding and abetting.

66. The Trial Chamber held that the acts of the accused must amount to "practical assistance. […] which have a *substantial effect on the perpetration of the crime.*"[71] The Majority failed to correctly assess the *effect* of Perišić's acts on the perpetration of the crimes.[72]

67. The Majority's findings that Perišić's acts 'contributed', 'facilitated', and 'assisted' the commission of crimes do not support its conclusion that: "Perišić's logistical assistance and personnel assistance, individually and cumulatively, had a *substantial effect* on the crimes perpetrated by the VRS".[73]

68. Having correctly applied the 'substantial effect' standard, no reasonable trier of fact could have concluded that Perišić's acts fulfilled the *actus reus* for aiding and abetting.

II. Argument

69. Defining the *actus reus* of aiding and abetting, the Appeals Chamber has consistently held that: "the aider and abettor carries out 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*."[74]

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[71] Judgement, para.126 [emphasis added].
[72] This error is distinct from the Majority's error briefed in Ground 2 regarding the requirement for the acts of the aider and abettor to be *specifically directed*.
[73] Judgement, para.1627.
[74] *Tadić*-AJ, para.229(iii); *Vasiljević*-AJ, para.102(i); *Blagojević*-AJ, para.127; *Kvočka*-AJ, para.89; *Blaškić*-AJ, para.45. *See also, Rukundo*-AJ, para.52; *Kalimanzira*-AJ, paras.74, 86; *Muvunyi*-AJ, para.79; *Seromba*-AJ, para.44; *Nahimana*-AJ, para.482; *Ntagerura*-AJ, para.370; *Ntakirutimana*-AJ, para.530. [emphasis added].

70. The question whether a given act has a substantial effect on the perpetration of the crime requires a fact-based inquiry.[75]

71. While it is established that there is no requirement for the acts of assistance to serve as a condition precedent for the commission of the crime, it is manifest that the contribution of the aider and abettor *must have a substantial effect upon the perpetration of the crime*.[76]

72. Both the practical assistance provided by the aider and abettor and whether this practical assistance directly and *substantially affects the commission of the offence* must be assessed.[77]

73. The practical assistance provided need not necessarily be substantial in itself. For example, while guarding detainees and helping to control access to them is not substantial in itself, such practical assistance might have a substantial effect on the crimes committed if it ensures the further detention of the detainees and allowed their murders to take place.[78]

74. As for the effect on the crime of the practical assistance provided, it must be substantial, which implies: "assistance which *facilitates* the commission of a crime in *some significant way*" [79] or acts which "make a *significant difference to the commission of the criminal act* by the principal."[80]

75. Consequently, acts which *facilitate the commission of a crime* fall short of the 'substantial effect' requirement.

76. The Majority's findings when considering the practical assistance provided by Perišić referred to terms such as 'facilitate', 'contribute' and 'assist', all of which do not support

[75] *Blagojević*-AJ, para.134; Judgement, para.128.
[76] *Blaskić*-AJ, para.48.
[77] *Furundžija*-TJ, para.226.
[78] *Blagojević*-AJ, para.132.
[79] *Tadić*-TJ, para.688 [emphasis added].
[80] *Furundžija*-TJ, para 233 [emphasis added].

its conclusion that: "Perišić's logistical assistance and personal assistance, individually and cumulatively, had a *substantial effect on the crimes* perpetrated by the VRS."[81]

77. For example, the Majority's finding that: "by providing vital logistical and technical assistance to the VRS during the war, including to the specific units that perpetrated the crimes, Perišić *facilitated the commission of those crimes*"[82] fails to meet the substantial effect threshold.

78. The Majority also found that Perišić *facilitated the commission of crimes* in Sarajevo and Srebrenica on the basis that he provided the VRS with personnel and sustained the officers already serving in the VRS before the establishment of the 30th PC, thereby creating the conditions for senior officers of the VRS to wage a war that encompassed systematic criminals actions without impediment.[83] This finding also falls short of the *substantial effect* standard.

79. Then, addressing Perišić's role in the verification of promotions, direct participation in the determination of the funds within the federal budget for the payment of the salaries of VJ military personnel, including 30th PC members, as well as his involvement in the provision of other benefits, the Majority found that this type of assistance *contributed to the commission of the crimes.*[84]

80. While the Majority held that Perišić's assistance was *at the very least significant,*[85] this finding describes Perišić's contribution in itself. It fails to address whether Perišić's contribution had a *substantial effect on the commission of the crimes*.

81. Notwithstanding the above findings, the Majority went on to hold that "Perišić's actions *substantially facilitated the commission of these crimes* because the VRS heavily depended on the VJ's support to function as an army and conduct its operations."[86]

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[81] Judgement, para.1627 [emphasis added].
[82] Judgement, para.1602 [emphasis added].
[83] Judgement, para.1613.
[84] Judgement, para.1619.
[85] *Ibid.*
[86] Judgement, para.1621 [emphasis added].

82. The Majority's holding rests solely on its findings that: (i) "the VRS heavily depended on the VJ's support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica";[87] and that (ii) "Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objectives."[88]

83. The Majority's finding of dependence[89] neither provides sufficient information for determining whether the support provided by the VJ had a *substantial effect on the commission of the crimes* nor makes it possible to establish the necessary link between the assistance given and the commission of the crimes.[90]

84. Moreover, the Bosnian Serb leadership's strategic objectives have no place in an analysis under aiding and abetting.[91]

85. The Majority's holding plainly rests on an analysis which is inconsistent, as well as insufficient, in comparison to findings made by other Trial Chambers having correctly applied the standard and found that the acts of the accused had a *substantial effect on the perpetration of the crimes*. For example, in *Milutinović*-TJ, the Trial Chamber found that, "through his acts and omissions, Ojdanic provided practical assistance, […] to the VJ forces engaging in the forcible displacement of Kosovo Albanians in coordinated action with the MUP";[92] and that "these contributions had a *substantial effect on the commission of the crimes*, because they provided assistance in terms of soldiers on the ground to carry out the acts, the VJ weaponry to assist these acts, and encouragement and moral support by granting authorization within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes."[93]

86. Consequently, the Majority's analysis cannot be saved by any type of broad interpretation of its findings of facilitation, contribution and practical assistance.

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[87] Judgement, para.1621.
[88] *Ibid*. Perišić disputes this finding; *see* Ground 8.
[89] Judgement, paras.1193, 1233, 1263, 1286, 1597, 1602, 1621, 1750, 1751, 1753, 1777.
[90] Dissent, para.11.
[91] Dissent, paras.8-14; *See, supra*, para.54.
[92] *Milutinović*-TJ, Vol.3, para.626.
[93] *Ibid.* [emphasis added]. *See also*, para.628.

87. In conclusion, the Majority incorrectly applied the ‘substantial effect’ standard and its finding that “Perišić’s logistical assistance and personnel assistance individually and cumulatively had a substantial effect on the crimes perpetrated by the VRS in Sarajevo and Srebrenica, as charged in the indictment”[94] cannot stand and must be quashed.

[94] Judgement, para.1627.

4th Ground of Appeal

I. Introduction

88. The Majority erred when it found that "under the VRS's strategy, there was no clear distinction between military warfare against BiH forces and crimes against civilians and/or persons not taking active part in the hostilities"[95] and when it found that "the VRS [waged] a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective."[96]

89. Having assessed the totality of the evidence, no reasonable trier of fact could have drawn these two inferences, which are plainly not the only reasonable conclusions that could be drawn in the circumstances. Neither the Prosecution's case nor the Indictment required the Majority to draw the specific inferences referred to above.

90. The Majority's errors occasioned a miscarriage of justice in respect of Counts 1-4 and 9-12.

II. Argument

91. As of April 1995, the VRS comprised a total of approximately 204,119 men and 93 units defending a front 1515 kilometres wide.[97] In the absence of evidence regarding all VRS activities conducted by these units, including that of forces not involved in Sarajevo or Srebrenica, it was unreasonable for the Majority to draw the above inferences, which define the VRS as a whole. They do not take into consideration the activities simultaneously conducted by the VRS in other parts of the BiH.

92. The VRS was composed of a Main Staff, six Corps and a number of independent units.[98] The activities conducted by no less than four Corps – more than half of the total strength of the VRS – were not considered by the Majority. Bearing in mind the Majority's

[95] Judgement, para.1588.
[96] Judgement, para.1621.
[97] P312, pp.18-20; *see also* D291.
[98] Judgement, paras.278-279.

finding that the VRS depended on the VJ to conduct its operations,[99] the inferences drawn by the Majority lead to the incorrect conclusion that any assistance provided by the FRY was necessarily used for the commission of crimes. The evidence does not support those inferences.

93. The crime base evidence in this case concerns Sarajevo and Srebrenica. Based on that limited crime base, the Majority went on to erroneously impose the premise of collective guilt on the entirety of the VRS by finding that 1) the military strategy encompassed crimes and/or 2) failed to make a distinction between legitimate warfare and the commission of crimes.

94. The imposition of collective guilt has no place in a criminal trial which must determine whether an individual (here, Perišić) has committed specific criminal acts in a particular place at a particular time, with the requisite criminal intent. Collective criminality has repeatedly been rejected as a form of liability. Tribunal jurisprudence on JCE, for example, clearly states that membership in a group, without more, is an insufficient basis to prove individual guilt. Membership in an organisation which has as its objective one or more specific crimes may be evidence towards proving that the accused participated in acts sponsored by the organisation, but membership alone is not sufficient to prove individual guilt.[100] Therefore, this finding suffers in the context of this case from a fundamental prohibition recognised in CIL.

95. Perišić was never a member of the VRS. In the context of the aiding and abetting charges against him, however, the import of "criminalizing" the VRS is clear. It allows the Majority to draw the inference that Perišić's assistance *a fortiori* imposes criminal responsibility upon him. Indeed, once knowledge of the VRS's "intent" as an organisation is established, Perišić would be forced into the improper, legally unsustainable position of having to rebut the presumption of guilt. He was entitled, however, to the presumption of innocence.

[99] Judgement, para.1621.
[100] Amnesty International, *Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia*, AI Index: Eur 48/02/93, April 1993, p.19.

96. The holding as presently constituted must also be reversed as it reduces the burden of proof.[101] This finding is pervasive throughout the Majority analysis.[102]

A. The Majority's inferences are not the only reasonable conclusions based on the evidence

97. Another reasonable conclusion is that VRS warfare against BiH forces, on the one hand, and the commission of criminal acts against Bosnian Muslim civilians, on the other hand *were not one and the same*.

98. Likewise, another reasonable inference from the evidence was that the assistance provided by Perišić was directed at helping the VRS wage war and was used by VRS forces involved in other areas than Sarajevo or Srebrenica and/or in other activities of the VRS.

99. Considering the absence of evidence on the activities conducted simultaneously by all other VRS units - more than half of the VRS strength was not involved in either Sarajevo or in Srebrenica - these inferences cannot stand.

B. The implementation of the RS strategic objectives did not entail the systematic commission of crimes

100. A reading of the Minutes of the 16th Session of the Assembly of the Serbian People in BiH,[103] held on 12 May 1992 supports the conclusion that the RS strategic objectives did not encompass the commission of systematic criminal actions as a strategy.

101. Karadzić explained the 6 Strategic Objectives and highlighted their political and strategic importance for RS. The successful implementation of the 6 Strategic Objectives did not include the commission of crimes.

102. More importantly, as highlighted by Mladić at the 50th session of the National Assembly on 16 April 1995, the tasks assigned to the VRS did not encompass the systematic commission of crimes.[104]

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[101] Rome Statute, Art.67, para.1(i). An accused shall not "have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."
[102] *See*, Grounds 1, 2, 5-6, 7, 9-12.
[103] P188.

III. Relief sought

103. The inferences drawn by the Majority are not the only reasonable conclusion available on the evidence.

104. Perišić respectfully requests that the Appeals Chamber reverse both inferences and overturn the convictions entered by the Majority for Counts 1-4 and 9-12 or in the alternative, order a re-trial in relation to these Counts.

[104] P312, pp.20-24.

5th and 6th Grounds of Appeal

I. Introduction

105. The Majority erred in law and fact finding Perišić guilty of aiding and abetting for Sarajevo (Ground 5, Counts 1-4) and Srebrenica (Ground 6, Counts 9-12). The Majority held that Perišić fulfilled the *actus reus* for aiding and abetting because he provided logistical and personnel assistance to the VRS in Sarajevo and Srebrenica.[105]

106. The Majority held that "Perišić's actions substantially facilitated the commission of these crimes because the VRS heavily depended on the VJ's support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica."[106] The Majority conceded that "the evidence does not establish that the specific weapons used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić."[107] However, the Majority, relying on the proposition that the acts of the aider and abettor need not be "specifically directed" to assist the crimes,[108] found that Perišić's support of the VRS served as a basis for his liability under Article 7(1).[109]

107. In the absence of proved acts and proved logistic assistance which resulted in assisting the commission of the crimes in the Indictment, the Majority committed an error of law and fact in finding the *actus reus* for aiding and abetting was proved beyond a reasonable doubt.

108. The Majority improperly rejected the need for applying the "specific direction" standard in analyzing this case.[110] The assistance given was neutral on its face in terms of whether it contributed to criminal or non-criminal military action. The Majority further failed to articulate how any assistance by Perišić contributed to the charged crimes, except in the

[105] Judgement, paras.1621-1627.
[106] Judgement, para.1621.
[107] Judgement, para.1624.
[108] *Ibid*. *See also*, Ground 2.
[109] Judgement, paras.1621-1627.
[110] *See*, Ground 2 regarding the Majority's error in failing to apply the "specific direction" standard.

most generalised of senses, and incorrectly relied on instances of logistic assistance which should not have been attributed to Perišić.[111]

109. In doing so, the Majority lowered the threshold for aiding and abetting to such an extent that criminal liability was imposed on Perišić not because his involvement with the crimes committed by the VRS was proved but because he provided, as a general matter logistical and personnel assistance to the war waged by the VRS, a war which was not criminal of itself.[112]

II. The Nature of the Assistance and the Need for a "Substantial Effect"

110. The *actus reus* for aiding and abetting includes "all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present",[113] provided that the assistance "*directly and substantially affected* the commission of that offence through supporting the actual commission before, during or after the incident."[114]

111. The Appeals Chamber has further clarified this standard, holding that "[t]he aider and abettor carries out 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."[115] No causal relationship (at least in terms of a "but-for" causal relationship) is required between the assistance and the commission of the crime.[116]

112. In this case, given the lack of direct evidence establishing a relationship between the crimes committed and the assistance given, the Prosecution's case relies on circumstantial evidence.[117] In doing so, it must adhere to the applicable standard, namely that where an inference is drawn from circumstantial evidence to establish a fact on

[111] *Supra*, fn.49.
[112] Judgement, paras.1621-1622. *See also*, Ground 1 and Ground 8.
[113] *Tadić*-TJ, para.689.
[114] *Tadić*-AJ, para.692 [emphasis added].
[115] *Tadić*-AJ, para.229(iii) [emphasis added].
[116] *Blaškić*-AJ, para.48; *Simić*-AJ, para.85; *Blagojević*-AJ, para.127; *Mrkšić*-AJ, para.81.

which a conviction relies, it must be the *only* reasonable inference that could be drawn from the evidence presented.[118]

III. The Majority Erred as a Matter of Law in its Generalised Approach to "Substantial Effect" and its Reliance on the VRS's Dependence on the VJ as Proof of Perišić Aiding and Abetting

113. In his dissent, Presiding Judge Moloto emphasized that Perišić was not charged with waging a war or participating in a JCE and accordingly stated:

> He is charged with aiding and abetting the crimes that were committed during the war and not for the war itself; therefore his conduct must be judged in relation to the commission of those crimes *and not in relation to the waging of war or the dependence of the VRS as an army on the VJ*.[119]

114. The point is crucial. Perišić's conduct must be judged in relation to the commission of the charged crimes, which requires proof that Perišić's individual acts had a substantial effect on such crimes, not on the VRS's war effort in general.

115. The Majority agreed that "Perišić is not charged with helping the VRS wage war *per se*, which is not a crime under the Statute."[120] However, it subsequently relied on its erroneous view that Perišić's liability stemmed from the "dependence of the VRS as an army on the VJ" as the primary basis to find Perišić individually guilty of aiding and abetting.

116. The Majority repeatedly and erroneously cited Perišić's role in responding to the dependence of and fulfilling the military needs of the VRS as proof of guilt, stating:

> The foregoing evidence conclusively demonstrates that Momčilo Perišić, as Chief of the VJ General Staff, oversaw the administration of logistical assistance *for the military needs of the VRS and SVK.* […] That being noted, the Trial Chamber considers that the

[117] In fact, when the Trial Chamber was supplied with direct evidence concerning the weaponry used for at least two incidents in Sarajevo and bullets found at Srebrenica, the Trial Chamber found those charges were not proven beyond a reasonable doubt. *See,* paras.124-130*, infra*.
[118] Judgement, para.28, *citing Stakić*-AJ, para.219; *Čelebići*-AJ, para.458; *Hadžihasanović*-AJ, para.286.
[119] Dissent, para.6 [emphasis added].
[120] Judgement, para.1588.

> question of greater relevance is [...] the *actual* role that Perišić played in the logistical assistance process.[121]

117. Providing support to the VRS as a matter of policy does not give rise to individual liability under 7(1). Whether the VRS as an army received substantial assistance from the VJ cannot be the focus of the inquiry. If such were the case then the inquiry could end with the mere proof of the waging of war, dependence of the VRS on the VJ, and the commission of crimes during the war. Nonetheless, the Majority focused on this precise issue, reasoning for example:

> In assessing whether the VRS received substantial assistance from the VJ, it is necessary to consider the extent to which the VRS relied on logistics from separate sources.[122]

118. Continuing in the same vein, the Majority, stated:

> Furthermore, numerous exhibits indicate that the *VRS heavily depended on supplies from the VJ,* thereby demonstrating that the VRS's reserves were insufficient.[123]

"Dependence", as pointed out by the Dissent, is the incorrect inquiry as it entirely fails to relate Perišić's conduct to the commission of the crimes for which he is charged. The Majority improperly places emphasis on conduct which is neutral on its face in terms of whether it contributed to criminal conduct or to non-criminal military action to establish that Perišić aided and abetted crimes in Sarajevo and Srebrenica.

119. In its conclusion regarding Logistical and Technical Assistance to the VRS,[124] the Majority, rejecting the Defence assertion that the evidence produced was insufficient to determine the extent of assistance received by the VRS from the VJ, stated:

> The trial record, however, demonstrates that the logistical assistance that the VRS received from the VJ with Perišić's approval was very important in comparison to other sources. In fact, the record clearly shows that the VRS *depended* on the VJ's assistance regardless of its other sources of supply.[125]

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[121] Judgement, para.1007 [first emphasis added].
[122] Judgement, para.1155.
[123] Judgement, para.1193 [emphasis added].
[124] Judgement, paras.1010-1237.
[125] Judgement, para.1233 [emphasis added].

The Majority similarly found that:

> Momčilo Perišić, as Chief of VJ General Staff, *oversaw a system providing comprehensive military assistance to the VRS,* and participated in the SDC's decision to license this aid. The VJ General Staff directly supplied considerable quantities of weaponry comprising a very large part of the VRS's munition requirements.[126]

The Majority concluded that:

> The VRS's *general state of dependence* on VJ support was acknowledged by Perišić himself, as well as Slobodan Milošević, Radovan Karadžić and Ratko Mladić.[127]

120. In sum, it is clear that the Majority impermissibly relied upon "the dependence of the VRS on the VJ", as the cornerstone for finding Perišić individually liable under Article 7(1) of the Statute.

IV. The Effect of the Majority's Reliance on an Improper Standard – the VRS's Dependence on the VJ – in Determining Perišić's Responsibility for Aiding and Abetting under Article 7(1)

121. In analyzing the effect the assistance had on the crimes committed by the VRS, the Majority found that the VRS's material reserves were significantly depleted as the war progressed.[128] The Majority further found that:

> The highest authorities in the VRS were clearly aware that *their war depended on the assistance from the VJ.* Karadžić admitted that "nothing would happen without Serbia. We do not have those resources and we would not be able to fight". Mladić too reckoned that "we would not be able to live" if the FRY suspended its assistance.[129]

122. Again, the consistent thread in the Majority's analysis centers on the issue of *dependence;* indeed its findings are replete with references to the *dependence of the VRS*, *e.g.*:

> In conclusion, the Majority finds that the *VRS depended heavily on FRY and VJ assistance in order to function as an army and to wage war.* As shown below, *this dependence was not limited to logistical assistance* but also encompassed all other forms of assistance provided by the VJ including personnel. The Majority recalls that the crimes

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[126] Judgement, para.1234 [emphasis added].
[127] Judgement, para.1236 [citations omitted] [emphasis added].
[128] Judgement, para.1597 [emphasis added].
[129] Judgement, para.1598 [citations omitted] [emphasis added].

> charged in the Indictment were an integral part of the VRS's war strategy.[130] Hence, the evidence leads the Majority to the only reasonable conclusion that *by providing vital logistical and technical assistance to the VRS during the war*, including to the specific units that perpetrated the crimes, Perišić facilitated the commission of those crimes.[131]
>
> The Majority finds that Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective. *Perišić's actions substantially facilitated the commission of these crimes because the VRS heavily depended on the VJ's support to function as an army and conduct its operations*, including besieging Sarajevo and taking over Srebrenica.[132]

123. Whether the VRS was dependent on the VJ for its war effort in whole or in part, such dependence does not prove that the assistance provided by Perišić had a substantial effect on the commission of crimes. This is particularly true where the Majority found that the Prosecution had failed to prove that certain instrumentalities used in the commission of crimes were provided to the VRS by the VJ pursuant to the logistical assistance process managed by Perišić, as discussed below.

V. The Majority's dependence analysis is undermined by its findings concerning Scheduled Incidents A7 and A9 and the Srebrenica area[133]

124. In the only two instances where evidence was recovered from alleged crime scenes in Sarajevo (for both shelling and sniping), the Trial Chamber determined that the shell remnants were manufactured by the *Krušik* factory in Valjevo, Serbia.[134]

125. In assessing whether these crimes could be attributed to Perišić because his acts of assistance had a "substantial effect" on these incidents, the Trial Chamber reasoned that there were three distinct equally plausible explanations for where the VRS obtained these shells which were used in the incidents that occurred on 18 June and 28 August. They were: 1) "it is possible that the aforesaid *Krušik* shells fired on Sarajevo civilians were obtained by VRS units from VJ reserves with Perišić's approval";[135] 2) it "would also be possible to conclude that the VRS purchased these particular shells directly from

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[130] Perišić refutes this finding. *See*, Ground 4.
[131] Judgement, para.1602 [emphasis added]. *See also*, Ground 3.
[132] Judgement, para.1621 [emphasis added].
[133] Judgement, paras.1291-1294, 1302.
[134] Judgement, para.1291.
[135] Judgement, para.1292.

Krušik"[136] (that transaction would not necessarily have implicated Perišić); and 3) "one cannot reasonably discount the possibility that the VRS obtained these particular shells through smuggling or donations of VJ personnel outside the official logistical assistance process."[137]

126. Based on the foregoing, the Trial Chamber rejected the Prosecution contention that the weaponry recovered from these crimes scenes stemmed from the logistical assistance overseen by Perišić, finding that the "trial record does not establish that the particular shells used in Scheduled Incidents A7 and A9 were provided to the VRS pursuant to the logistical assistance process managed by Perišić."[138] Given the varied possible explanations for how this weaponry came into the possession of the VRS, this finding was correct under the principle of *in dubio pro reo.*

127. However, alternative possibilities are improperly ignored in the Majority's remaining analysis of Perišić's responsibility for aiding and abetting crimes when similar evidence was not produced. The Trial Chamber properly found it could not draw an inference of guilt when presented with specific evidence of the instrumentalities or weaponry used. Drawing an inference of guilt in the absence of evidence of the specific instrumentalities or weaponry *a fortiori* had to have been based on speculation.

128. The Trial Chamber came to the same conclusion, for the same reasons, regarding evidence that was recovered from the Srebrenica area[139] that was manufactured by the Prvi Partizan factory in Uzice, Serbia in 1993 and 1994.

129. It held:

> The Trial Chamber finds that it is impossible to conclude beyond a reasonable doubt that these specific bullets were provided to the VRS pursuant to the logistical assistance process that Perišić oversaw. Overall, this evidence presents the same problems as the aforementioned shells recovered from Sarajevo. The trial record does not establish whether these specific bullets were delivered to the VRS pursuant to Perišić's orders,

[136] Judgement, para.1293.
[137] *Ibid*.
[138] Judgement, para.1294.
[139] Judgement, para.1295.

> purchased directly from *Prvi Partizan* or otherwise procured through unauthorised channels.[140]

130. Similarly, the Trial Chamber found that 378 bullet casings out of the 3,644 recovered from the Srebrenica killing sites were manufactured by Prvi Partizan in 1993 and that these bullets raise the same problems as previously discussed:

> Again, it is not possible to reasonably conclude that Perišić was involved in the provision of these specific bullets.[141]

131. The Majority found significant depletion of the reserves of the VRS had taken place well before the dates of these incidents in 1995.[142] Nevertheless, this depletion was not a factor in its determination that there was a failure of proof for these Counts. On the contrary, the Chamber found that there were a number of possible objective scenarios explaining the provision of the weaponry in A7, A9 and the Srebrenica bullets, holding that the evidence was insufficient to prove that Perišić aided and abetted those crimes.[143] It was unreasonable for the Majority to conclude, particularly in light of its reasoning concerning A7, A9 and the Srebrenica bullets, that Perišić's logistical assistance had a substantial effect on other crimes perpetrated by the VRS in Sarajevo and Srebrenica, as charged in the Indictment.[144]

132. The ultimate conclusion that Perišić's logistical assistance had a substantial effect on the commission of crimes was made in the absence of any evidence as to the origin of the ammunition actually used. It was based on the improper, generalised conclusion that providing logistical assistance to the VRS war effort automatically constituted aiding and abetting select crimes committed by the VRS during the war. That conclusion was contrary to law.

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[140] Judgement, para.1296.
[141] Judgement, para.1301.
[142] Judgement, para.1597.
[143] Judgement, para.1292.
[144] Judgement, para.1627.

133. The Majority acknowledged that there was *no* evidence and therefore *no* proof that specific weaponry or logistics used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić.[145]

134. The Majority excused this absence of proof by relying on its finding that the acts of an aider and abettor need not have been "specifically directed" to assist crimes.[146]

135. This finding is erroneous and highlights the underlying legal error on which evaluation of the evidence was based: to wit, that "general dependence" somehow imputes personal liability to Perišić for crimes committed by the VRS. The VRS dependence on the VJ in waging its war cannot, standing alone, lead to a reasonable conclusion that Perišić's acts had substantial effect on the commission of the crimes much less constitute the only reasonable conclusion.

136. That Perišić's acts had a substantial effect on the commission of the crimes charged is not the *only* reasonable conclusion.[147] A number of objectively alternative reasonable explanations exist:

> 1) the assistance provided by Perišić to the VRS was directed at supporting the war effort and not to the commission of the crimes and that such assistance did not contribute substantially to the commission of crimes;[148] or
>
> 2) the logistics used by the VRS for the crimes charged fell within the same analysis as those used for incidents A7 and A9 in Sarajevo and the bullets retrieved from the killing sites in Srebrenica;[149] or
>
> 3) FRY provided assistance to the VRS independent of the VJ;[150] or
>
> 4) the logistics came from the RS special purpose logistic production.

Such assistance cannot be considered to be determinative of Perišić's individual criminal responsibility.

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[145] Judgement, para.1624.
[146] *See*, Ground 2, *supra*.
[147] *Stakić*-AJ, para.219; *Čelebići*-AJ, para.458; *Hadžihasanović*-AJ, para.286.
[148] *See*, *e.g.* Dissent, paras.19-20 (concerning successful technical model of air bombs directed at waging a war).
[149] *See,* paras.124-130, *supra.*
[150] Judgement, paras.989, 999.

VI. The Majority erred in law and fact finding Perišić's practical assistance providing personnel to the VRS facilitated or contributed[151] to the commission of crimes in Sarajevo and Srebrenica

137. The Majority erred in concluding that the creation of the 30th PC, payment of salaries, and verification of promotions had a substantial effect on the crimes committed in Sarajevo and Srebrenica. The following submissions demonstrate the errors made by the Majority in finding that Perišić's acts had a substantial effect on the crimes committed by the VRS in Sarajevo and Srebrenica.[152] These errors invalidate the Judgement with respect to Perišić's responsibility for aiding and abetting through the provision of personnel assistance to the VRS.

138. The Majority found that Perišić provided *practical assistance* to the VRS by creating the conditions that enabled members of the 30th PC to continue serving in the VRS without impediments while enjoying the rights conferred to VJ members.[153] According to the Majority, Perišić created such conditions by forming the Personnel Centres, composed of key VRS officers, through which they legally acquired their status as VJ members with all the corresponding benefits.[154] The Majority further found that Perišić sent other VJ military personnel to the VRS on an ongoing basis, which enabled the flow and rotation of personnel to continue without interruption.[155]

139. With respect to the *effect* of the practical assistance which the Majority attributed to Perišić, it found that such assistance "was vital to help the VRS function"[156] and that it created conditions for the VRS to wage a war which encompassed systematic criminal activities, through which "he *facilitated* the commission of the crimes in Sarajevo and Srebrenica."[157]

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[151] *See*, Ground 3*, supra*.
[152] Judgement, paras.1603-1619, 1627.
[153] Judgement, para.1608, 1609, 1623.
[154] Judgement, para.1609.
[155] Judgement, para.1610.
[156] Judgement, para.1612 [emphasis added].
[157] Judgement, para.1613 [emphasis added].

140. The Majority also found that Perišić contributed to the commission of the crimes by the VRS promoting and paying the salaries of members of the 30th PC,[158] as such salaries and other benefits were "*vital to the functioning of the very core* of the VRS."[159]

A. Creation of Personnel Centres as contribution for the commission of crimes

141. The conclusion reached by the Majority that Perišić *facilitated*, through his activities, the conditions for VRS officers to remain in their posts within the VRS is misplaced. Further, the Majority's finding that VRS officers were allowed to carry out their operations with limited concerns for their own basic material needs and those of their families[160] does not address how Perišić facilitated the commission of crimes. It does address the VRS dependency on the VJ to wage war, which as previously discussed is not a crime and should not be part of the analysis.

142. There is no evidence that any of the officers who represented core officers of the VRS[161] requested, or expressed their desire to leave the VRS due to their unregulated status. The finding conceded that the majority of these men started serving in the VRS before Perišić's appointment and before the creation of the PCs.[162] In fact, *all* of the members of the 30th PC identified in paragraph 1608 fit into this category.[163] There is no evidence that their posts or further service in VRS were endangered prior to establishment of the PCs. Likewise, there is no evidence that the change in their status pursuant to the creation of the PCs impacted their decision to remain in the VRS.

143. The Majority found that by creating the conditions that enabled such personnel to continue serving in the VRS and wage a war without impediments while enjoying all the rights conferred to VJ members through the establishment of the PCs,[164] Perišić *contributed* to the commission of the crimes by the VRS. However, in order for Perišić to be found criminally responsible for such assistance it must have had a *substantial effect* on the commission of the crimes. The evidence does not establish such a conclusion.

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[158] Judgement, para.1614.
[159] Judgement, para.1619 [emphasis added].
[160] Judgement, para.1623.
[161] The Majority identified those persons in Judgement, paras.550-555, 562,727, 759.
[162] Judgement, para.1609.
[163] *See*, Judgement, paras.799, 1608; Malčić, T.11207- 11210; P2047; D294; D296; D330.
[164] Judgement, para.1609.

B. Salaries did not have a substantial effect on the commission of crimes by the VRS

144. The Majority also found that the salaries enjoyed by members of the 30th PC were instrumental in assisting the VRS in pursuing its military operations.[165]

145. Pursuant to the *actus reus* required for aiding and abetting, the Majority had to establish, based on the evidence, that this assistan*ce* had a substantial effect on the perpetration of the crimes.

146. The evidence established that during the sanctions imposed by FRY on the RS from August 1994 until February 1995, the payment of salaries provided to members of the 30th PC was completely suspended.[166] The Majority recognised that during this period of suspension none of the 30th PC members left their positions in the VRS.[167] Clearly, the suspension of their salaries did not cause high ranking VRS officials and other perpetrators of the crimes committed in Sarajevo and Srebrenica to leave their positions. "It cannot be said that the *only* reasonable inference is that the payment of salaries had a substantial effect on the commission of such crimes."[168]

147. The Majority concluded that members of the 30th PC did not leave their posts in the VRS due to the VRS denial of requests for transfer back to the VJ.[169] It must have had this conclusion in mind when addressing periods other than when sanctions were not being imposed.[170]

148. This fact demonstrates that the *VRS itself* had a mechanism for sustaining its personnel independent from Perišić. The operative requirement of authorisation for leaving the VRS was consent by the VRS Commander. Salaries had nothing to do with it.

149. The Trial Chamber held that it was not proved beyond a reasonable doubt that personnel serving in the VRS and SVK through the 30th and 40th PCs could be redeployed to VJ

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[165] Judgement, para.1623.
[166] Judgement, para.867.
[167] Judgement, para.1618. It should also be noted that 30th PC members were invited by the FRY leadership to cancel their obedience to the RS leadership and to return to FRY and VJ (P756, 25th SDC Session).
[168] Dissent, para.23. *See also*, P312, pp.191-192.
[169] Judgement, para.1618, referring to P2817.
[170] Judgement, paras.810-830.

without approval from the VRS or SVK.[171] Furthermore, General Milovanović, Chief of Staff of VRS, said:

> This is what happened, for six months we lived without salaries. We did not desert, as many people were hoping we would, we stayed behind and we would have stayed even if they never paid back what they did, and even that was short of the fighting allowance, short of all those things which go with a salary, but we are satisfied with how much we get, and we must be satisfied. I now can tell you that we must and should be satisfied because with a clear eye and a high forehead I stand before my soldiers. At the Bihać front, one says to me, general, I don't have a salary; son, I don't have one either; so he asks how do your wife and children live? Same as yours; but do not take this to mean that the officers should have their salaries abolished.[172]

150. MP-005 testified that salaries were not important to them in staying with the VRS,

> Q. Despite which, you remain with the Army Republika Srpska throughout this period, during which you were receiving no salaries at all; right?
>
> A. Your Honours, I stayed put. There was a war on. It's not like one had a choice, like one could pick where to go, nor did anyone suggest that I should be headed elsewhere, nor was I ever ordered to go anywhere else, or anything like that.[173]

151. The Majority, therefore, erred in finding that the only reasonable conclusion is that Perišić provided personnel assistance to the VRS and that such assistance had a substantial effect on the commission of the crimes perpetrated by the VRS in Sarajevo and Srebrenica.

C. Verifications of promotions did not have a substantial effect on the commission of crimes by the VRS

152. The Majority found the verification of promotions was essential for members of the PCs, as well as their families, because higher ranks would result in higher salaries and that verifications were reflected in the calculation of pensions and certain benefits.[174]

153. Nowhere in the paragraphs relied upon by the Majority for its finding that verifications of promotions were essential for members of the 30th PC was there a discussion about what the effect of the verifications would be on pensions and other benefits.[175]

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[171] Judgement, para.830.
[172] P312, pp.191-192. *See also*, P228, p.6.
[173] MP-005, T.2466:4-10.
[174] Judgement, para.1616.
[175] Judgement, paras.881-889, 905-910. Not a single word is said about the consequences of verifications of higher ranks to these status rights, in these paragraphs relied on by the Majority in fn.4540 of para.1616.

154. The Defence did not dispute the fact that the verification of higher ranks was reflected in higher salaries of members of PCs. However, the evidence could not have led any reasonable trier of fact to conclude that the verifications of higher ranks, as well as salaries, had a substantial effect on the commission of the charged crimes.[176]

155. The evidence at trial established a number of verification scenarios. None of these scenarios established a nexus between the verification process and the commission of the crimes charged.

156. Concrete examples were proved in which the promotions of personnel identified as direct perpetrators of crime, were not verified while they were posted in the VRS.[177]

157. Some personnel identified as perpetrators were given verifications upon the end of the armed conflict.[178]

158. Some personnel identified as perpetrators were never promoted in the VRS.[179]

159. [REDACTED][180]

160. Other witnesses also gave evidence about the importance of promotions in the VRS.[181]

161. Conversely, like the salaries, the verification of ranks during the sanctions which the SRJ imposed on the RS was not carried out, and this did not reflect on the quality and quantity of the members of the 30th PC.

[176] *See*, *supra*, Grounds 5 and 6, Section VI.B.
[177] Judgement, para.849 (mentions General Zivanović, the commander of the Drina Corps, whose rank was never verified and Galić, commander of the SRK, who's rank of Lieutenant General was never verified).
[178] Judgement, para.862 (noting the verifications of the rank of Major General D.Milošević was verified on 27.12.1995, a year and a half after his promotion in the VRS).
[179] P1920 (personnel file for Ljubiša Beara).
[180] [REDACTED]
[181] Škrbić, T.11716-11717.

D. The Majority's conclusion regarding the importance of the Personnel Centres is erroneous

162. The Majority's conclusion that the creation of the 30th PC Perišić sustained the very life line of the VRS by creating the PCs[182] is a conclusion no reasonable Trial Chamber could have reached beyond a reasonable doubt based on the totality of evidence presented.

163. The Majority's conclusion that Perišić's assistance in creating the 30th Personnel Centre and subsequently in regulating the status of its members, role in the payment of salaries for 30th PC members, and role in the verification of promotions process facilitated the commission of crimes is erroneous, let alone have a substantial effect on the commission of crimes

VII. Relief Sought

164. No reasonable Trial Chamber, having properly considered the above evidence, could have concluded beyond reasonable doubt that Perišić provided practical assistance and support to members of the VRS who were involved in the commission of crime and that his conduct had a substantial effect on the commission of those crimes. Perišić respectfully requests that the Appeals Chamber consider his arguments and reverse his convictions.

[182] Judgement, para.1623.

7th Ground of Appeal

I. Introduction

165. The Majority erred in law by failing to apply the purpose standard for the *mens rea* of aiding and abetting, as established by customary international law. In finding Perišić guilty of Counts 1-4 and 9-12 the Majority found that mere knowledge is sufficient to establish the *mens rea* for aiding and abetting.[183]

166. As a result, Perišić was convicted based on the Majority's finding that he could be guilty as an aider and abettor based merely on his knowledge that crimes might occur regardless of his purpose or intent.[184] This error invalidates the Judgment.

II. The mens rea standard for aiding and abetting under international law requires proof of purpose and not just knowledge

167. The Statute of the Tribunal does not provide for a *mens rea* standard for aiding and abetting; therefore, the applicable standard must derive from CIL.[185] The International Court of Justice has held "[i]t is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[186]

A. The Rome Statute

168. The Rome Statute of the International Criminal Court ("Rome Statute") clearly articulates the requisite *mens rea* for aiding and abetting. It requires that for a person to be held criminally liable for aiding and abetting, he or she must have acted "[f]or the purpose of facilitating the commission of [. . .] a crime."[187] Importantly, the knowledge

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[183] Judgement, paras.1632-1650. The Trial Chamber set forth its interpretation of the law in Judgement, paras.129-130, *quoting Simić*-AJ, para.86; *Mrkšić*-AJ, para.49.
[184] Perišić disputes the Majority's findings on *mens rea*. *See*, Grounds 9-12.
[185] ICTY Statute. The Statute of the ICTR similarly does not define the applicable *mens rea* for aiding and abetting.
[186] *Continental Shelf (Libya v. Malta)*, Judgement, I.C.J. Reports 1985, p.29, para.27.
[187] Rome Statute, Art.25(3)(c).

standard of the ICTY was considered when adopting the Rome Statute. This standard was expressly rejected in favor of the more appropriate purpose standard.[188]

169. The Rome Statute reflects the international community's consensus on the applicable *mens rea* standard for aiding and abetting. It has been signed and ratified by 139 and 120 States, respectively.[189] Article 25(3)(c) establishes that the international community has promulgated a standard that requires purpose as part of the *mens rea* and rejected a standard of mere knowledge alone for imposing aiding and abetting liability. The Tribunal has failed to do so in its jurisprudence. The Pre-Trial Chamber of the ICC recently clarified this point by explaining that "unlike the jurisprudence of the *ad hoc* tribunals, article 25(3)(c) of the [Rome] Statute requires that the person act with the *purpose* to facilitate the crime; knowledge is not enough for responsibility under this article."[190]

170. Since the seminal case of *Tadić*, the Appeals Chamber has expressly noted, "[the Rome Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly."[191] The ICTY Appeals Chamber also recognized that the "[Rome Statute] is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States"[192] and emphasised the "significant legal

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[188] Flavia Zorzi Giustiniani, *The Responsibility of Accomplices in the Case-law of the Ad Hoc Tribunals*, Criminal Law Forum 417, 20(3/4) (2009), pp.442-443. As one member of the German delegation to the Rome Conference and former *ad litem* judge of the Tribunal has observed, "the aider and abettor must act with *'purpose'*. . . [which] means more than mere knowledge" (Albin Eser, *Individual Criminal Responsibility in the Rome Statute of the International Criminal Court: A Commentary* 767, Vol. I (Antonio Cassese *et al.*, eds.)(2002), p. 801).

[189] International Criminal Court, http://www.icc-cpi.int/Menus/ASP/states+parties/; Coalition for the International Criminal Court, http://www.iccnow.org.

[190] Situation in the Democratic Republic of the Congo *in the Case of the Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para.274 (internal citations omitted). Furthermore, the knowledge standard provided under Article 30 does not alter the purpose standard in Article 25(3)(c), as this standard falls within the "[u]nless otherwise provided" clause of Article 30.

[191] *Tadić*-AJ, para.223. *See also Furundžija*-TJ, para.227.

[192] *Tadić*-AJ, para.223. *See also Furundžija*-TJ, para.227 (stating that the Rome Statute "by and large may be taken as constituting an authoritative expression of the legal views of a great number of States").

value" of the Rome Statute.[193] The Tribunal has accordingly looked to the Rome Statute for guidance when considering the substance of CIL.[194]

171. Article 25(3)(c) of the Rome Statute embodies the development of CIL. Since its adoption in 1998 there has been a growing trend of general acceptance that mere knowledge that crimes may be committed is insufficient to establish liability as an aider and abettor.[195]

B. U.S. Courts of Appeals

172. The applicable *mens rea* standard for aiding and abetting under international law has recently been addressed by a number of U.S. Courts of Appeals. A majority of them have held that the applicable *mens rea* for aiding and abetting liability under international law is the "purpose" standard provided in Article 25(3)(c) of the Rome Statute.[196] The U.S. Courts of Appeals for the Second and Fourth Circuits, applying CIL, also rejected a mere knowledge standard.[197] While the claims in these cases involved civil liability of corporations under the Alien Tort Statute ("ATS"),[198] the courts applied international law as required by the ATS. These decisions are particularly important given that the U.S. is not a party to the Rome Statute, and the Second and Fourth Circuits nonetheless found that the Rome Statute represents an authoritative international expression on the proper *mens rea* standard for aiding and abetting.[199]

173. Pursuant to its mandate, the Tribunal has historically applied CIL and found it to be a cornerstone for its decisions.[200] In light of evolving CIL on the elements of aiding and

[193] *Tadić*-AJ, para.223.
[194] *See e.g. Krnojelac*-AJ, paras.221-222; *Kunarac*-AJ, para.118 & fn.147; *Tadić*-AJ, paras.222-223. *See also Boškoski*-TJ, para.186; *Krstić*-TJ, para.541; *Furundžija*,-TJ, paras.227-235; *Čelebići*-TJ, paras.342-343 & fn.331; *Hadžihasanović*-Decision, para.46.
[195] In 2000, for example, the United Nations Transitional Administration in East Timor adopted the same purpose *mens rea* standard provided in Article 25(3)(c) of the Rome Statute (United Nations Transitional Administration in East Timor, Regulation Number 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, Section 14.3(c), 6 June 2000).
[196] *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, p. 259 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, p.401 (4th Cir. 2011).
[197] *Talisman*, 582 F.3d at p. 259; *Aziz*, 658 F.3d at p.401.
[198] 28 U.S.C. § 1350.
[199] *Talisman*, 582 F.3d at p.259; *Aziz*, 658 F.3d at p.400 & fn.12.
[200] *See e.g. Tadić*-AJ, paras.194, 220, 226-227, 251, 255-270, 275, 287-292; *Furundžija*-AJ, paras.272-273, 275, 281, 283-284 (Declaration of Judge Robinson); *Krstić*-AJ, paras.223-224; *Kunarac*-AJ, paras.98, 101, 116-124, 145-

abetting, the Appeals Chamber should find that an accused cannot be convicted as an aider and abettor unless there is proof beyond a reasonable doubt he acted with the purpose of facilitating the crimes charged. Mere knowledge is an insufficient basis upon which to impose accomplice liability.

III. The Tribunal's jurisprudence concerning the requisite mens rea standard under CIL is flawed

174. While the Appeals Chamber has held that knowledge is sufficient for aiding and abetting liability, it has not thoroughly addressed whether this standard is supported by CIL. The Tribunal's application of the *mens rea* standard for aiding and abetting has in fact been inconsistent, with various definitions cited for this standard throughout the relevant jurisprudence.[201] For example, in several cases before the ICTY and the ICTR the Chambers have referred to a requisite *intention* to facilitate or assist the crime, which implies purpose, while at the same time finding that mere knowledge is sufficient.[202] Additionally, *Furundžija*-TJ, one of the ICTY's first judgements to adopt a mere knowledge standard, is flawed.[203] In view of the international community's endorsement of a purpose standard for the *mens rea* for aiding and abetting which requires proof the aider acted with the purpose of facilitating the charged crimes, the soundness of the standard articulated in the *Furundžija*-TJ is increasingly doubtful.

175. *Furundžija*-TJ incorrectly relied on Article 30 of the Rome Statute in holding that the applicable *mens rea* standard for aiding and abetting is mere knowledge.[204] The *mens rea*

148; *Krnojelac*-AJ, paras.102, 220-223; *Galić*-AJ, paras.81-85; 3-5 (Separate Opinion of Judge Shahabuddeen); *Stakić*-AJ, paras.62, 300-303; 35 (Partially Dissenting Opinion of Judge Shahabuddeen); *Milutinović*-Decision, paras.9-10; *Hadžihasanović*-Decision, paras.11-31, 35, 44-51, 55.

[201] *Orić*-TJ, para.269.

[202] *See e.g. Kamuhanda*-TJ, paras.597, 599; *Kajelijeli*-TJ, paras.766, 768; *Kvočka*-TJ, paras.255, 262; *Bagilishema*-TJ, para.32; *Blaskić*-TJ, para.286; *Čelebići*-TJ, para.326.

[203] *Furundžija*-TJ, para.249. It has been approved of by subsequent Appeal Chamber judgements. *See e.g. Aleksovski*-AJ, para.162; *Blaškić*-AJ, paras.46, 50.

[204] *Furundžija*-TJ, para.244.

for aiding and abetting is in fact clearly stated in Article 25(3)(c) of the Rome Statute, *lex specialis* to Article 30.[205]

176. *Furundžija*-TJ further erred by holding that post-World War II ("post-WWII") jurisprudence, such as the *Einsatzgruppen*,[206] *Zyklon B*,[207] and *Schonfeld*[208] cases, established that mere knowledge is sufficient to find the requisite *mens rea* for aiding and abetting.[209]

177. The *Einsatzgruppen* case was conducted under Control Council Law No. 10 ("CCL-10"), which did not define the *mens rea* for aiding and abetting. Hence, the tribunals created by this law relied heavily on their own national legal standards in defining aiding and abetting, not international standards. This is precisely why the High Court of Australia has noted concern over accepting the opinions of these tribunals as reflecting authoritative statements of CIL.[210]

178. The *Zyklon B* and *Schonfeld* cases were tried before British military courts. The jurisdiction of these courts was based on the Royal Warrant of 14 June 1945 and these courts applied only domestic law, unless otherwise provided.[211] In fact, *Furundžija*-TJ conceded that the judgements from these courts are "less helpful in establishing rules of international law."[212] Neither of the military courts in these cases specified that they applied anything other than domestic British law.[213]

179. In sum, *Furundžija*-TJ's findings on the elements sufficient to establish the *mens rea* for aiding and abetting are based on a misreading and/or incorrect interpretation of CIL standards.

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[205] *Furundžija*-TJ, para.231.
[206] *Trial of Otto Ohlendorf and Others*, in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. IV ("*Einsatzgruppen*").
[207] *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, vol. I, Law Reports, p.93 ("*Zyklon B*").
[208] *Trial of Franz Schonfeld and Nine Others*, Essen, 11-26 June 1946, vol. XI, Law Reports, p. 64 ("*Schonfeld*").
[209] *Furundžija*-TJ, para.236-240.
[210] *Polyukhovich v. The Commonwealth of Australia and Another*, 172 CLR 501 (Austl, 1991), at p.586-587. See also Flavia Zorzi Giustiniani, *The Responsibility of Accomplices in the Case-law of the Ad Hoc Tribunals*, Criminal Law Forum 417, 20(3/4) (2009), pp.444-445.
[211] *Furundžija*-TJ, para.196.
[212] *Ibid*.
[213] *Schonfeld*, p. 68; *Zyklon B*, pp.101-102.

A. Post-WWII jurisprudence does not demonstrate a consensus that mere knowledge is the standard

180. There was no consensus in CIL that mere knowledge was the correct standard when *Furundžija* was decided.

181. Contrary to the passages in the *Einsatzgruppen* case cited by *Furundžija*-TJ,[214] the Judge Advocate in *Einsatzgruppen* stated that, "*more* than mere knowledge of illegality or crime is required."[215] Similarly, *Furundžija*-TJ's reliance on the *Schonfeld* case as cause to adopt a mere knowledge standard is wholly misplaced.[216] The *Schonfeld* court described the *mens rea* for aiding and abetting as "the *intention* of giving assistance",[217] and requiring that the accused's assistance must have been "*calculated* to give additional confidence to his companions."[218]

182. Additionally, other CCL-10 cases, such as the *Hechingen Deportation* case involving complicity liability, adopted a "purpose" test requiring that the accomplice must have acted with the same *mens rea* as the principal perpetrator.[219]

183. The *Ministries* case declined to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to finance the commission of crimes.[220]

184. *Tadić*-TJ, which also discussed post-WWII cases with respect to the *mens rea* for aiding and abetting, noted, "the [post-WWII] judgements generally failed to discuss in detail the criteria upon which guilt was determined."[221] The only "clear pattern" that the *Tadić*-TJ found within this jurisprudence concerning the *mens rea* standard was "a requirement *of intent*, which involves awareness of the act of participation coupled with a conscious

[214] *See Furundžija*-TJ, para.237 & fn.260.
[215] *Einsatzgruppen*, p.585 [emphasis added].
[216] *Furundžija*-TJ, para.240.
[217] *Schonfeld*, p.70 [emphasis added].
[218] *Ibid.* [emphasis added]. This language is noted in *Furundžija*-TJ at paragraph 201, but only with respect to the *actus reus* of aiding and abetting. This passage addresses the mental element and cannot be relied on for an *actus reus* analysis.
[219] *Furundžija*-TJ, paras.240, 248, (*citing* LG Hechingen, 28.6.1947, Kls 23/47 and OLG Tübingen, 20.1.1948, Ss 54/47 (decision on appeal), in *Justiz and NS-Verbrechen*, case 022, vol. I, pp.469 ff).
[220] *U.S. v. von Weizaecker (The Ministries Case)*, in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. XIV, pp.621-622.
[221] *Tadić*-TJ, para.674.

decision to participate by [. . .] aiding and abetting in the commission of a crime."[222] This standard provides for a higher *mens rea* than mere knowledge. *Tadić*-AJ states that the requisite *mens rea* is knowledge without providing any authority or analysis supporting this standard.[223]

185. To the extent that *Tadić*-TJ and *Furundžija*-TJ also rely on the ILC Draft Code on Crimes and Offences Against the Peace and Security of Mankind,[224] the Draft Code does not accurately reflect the extant CIL.[225]

B. Conclusion

186. While the *Krstič*-AJ did attempt to explain its reasoning for adopting the mere knowledge standard for aiding and abetting, its analysis is lacking. The *Krstič*-AJ relied on seven domestic jurisdictions in support of the knowledge standard;[226] however, several of these jurisdictions either do not follow this standard or have not done so consistently.[227] If the Appeals Chamber continues to apply the mere knowledge standard without clearly determining whether this standard is supported by CIL, it will simply perpetuate the initial underlying errors in *Furundžija*-TJ.

187. The Rome Statute articulates a *mens rea* standard which requires more than mere knowledge. Cases discussed herein also require proof the aider and abettor acted "for the purpose of facilitating" the crimes charged. Perišić submits that this standard accurately reflects CIL and, therefore, should be applied here. As the Appeal Chamber has recognized, the Appeals Chamber "should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[228]

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[222] *Tadić*-TJ, para.674 [emphasis added].
[223] *Tadić*-AJ, para.229. *See e.g.* (*citing Tadić*-AJ) *Blagojević*-AJ, para.221 & fn.581; *Kvočka*-AJ, para.89 & fn.202; *Krstič*-AJ, para.140 & fn.235; *Aleksovski*-AJ, para.163.
[224] *Tadić*-TJ, para.688; *Furundžija*-TJ, para.242.
[225] See Flavia Zorzi Giustiniani, *The Responsibility of Accomplices in the Case-law of the Ad Hoc Tribunals*, Criminal Law Forum 417, 20(3/4) (2009), pp.444-445.
[226] *Krstić*-AJ, para.141 (referring to: Germany, France, Switzerland, England, Canada, Australia, and the U.S.).
[227] Namely the U.S. (see Model Penal Code (American Law Institute, 1985), § 2.06, adopting a purpose standard), Canada (Canadian Criminal Code, R.S.C. 1985, c. C-46, Art. 21, adopting a purpose standard), and England (see *Gillick v. West Norfolk and Wisbesch Health Authority* [1986] 1 AC 112, requiring a "guilty mind" for aiding and abetting).
[228] *Aleksovski*-AJ, para.107.

IV. Perišić did not purposefully assist in the commission of crimes

188. In this case, *no* evidence was presented that Perišić's purpose in overseeing the administration of logistical assistance for the military needs of the VRS and SVK was to assist in the commission of crimes.

189. To the contrary, the record is filled with statements and indications of what his purpose was, namely to keep the territory of FRY secure, pursuant to the political and policy decisions of the SDC.[229]

190. The Majority based its determination that he was guilty on the inference that the lower standard of knowledge of the commission of crimes had been met.[230]

191. The Majority's error was highly prejudicial to Perišić since none of his acts were for the purpose of assisting in the commission of crimes.

V. Relief sought

192. Due to the nature and gravity of the crimes over which the Tribunal has jurisdiction, a thorough analysis by the Appeals Chamber of the requisite *mens rea* standard for aiding and abetting under CIL is necessary. Such an analysis will lead the Appeals Chamber to the ineluctable conclusion that the proper *mens rea* standard to be imposed for aiding and abetting is the purpose standard.

193. Perišić respectfully requests that the Appeals Chamber: (i) hold that the *mens rea* of aiding and abetting in international law requires proof of *purpose* rather than *mere knowledge*; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.

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[229] *See*, fn.66, *supra*.
[230] Perišić refutes this assertion. *See*, Grounds 9-12, *infra*.

8th Ground of Appeal

I. Introduction

194. The Majority committed an error of law when it failed to apply the correct legal standard for the *mens rea* of aiding and abetting.

195. The Majority stated the correct legal standard for the *mens rea* for aiding and abetting.[231] However, the Majority's conclusion that Perišić possessed the applicable *mens rea* rests solely on its finding that Perišić was aware of the VRS's propensity to commit crimes, that crimes were committed, and that other similar crimes would probably be committed. The Majority did not consider whether Perišić *knew that his acts assisted the commission of crimes*.

196. The Majority's error invalidates the Judgement with respect to Counts 1-4 and 9-12. Having correctly applied the legal standard, no reasonable trier of fact could have concluded beyond a reasonable doubt that Perišić knew that *his acts* would assist the commission of the crimes committed by the VRS in Sarajevo and Srebrenica.[232]

II. The Majority failed to properly determine whether Perišić knew that his acts assisted the commission of the crimes perpetrated by the VRS

197. The applicable *mens rea* 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 [perpetrator]".[233]

198. The Majority stated that "to establish the required mental element for aiding and abetting, it must be proved beyond a reasonable doubt that Perišić knew that *his actions* provided

[231] Judgement paras.129-130, 1629.
[232] These factual submissions are addressed in Ground 11, in relation to Sarajevo, and Ground 12, in relation to Srebrenica.
[233] *Vasiljević*-AJ, para.102.

practical assistance to the crimes and that he was aware of the essential elements of the crimes, including the mental state of the perpetrators."[234]

199. The *mens rea* for aiding and abetting comprises two components:

a. the aider and abettor knew that one of a number of crimes would probably be committed;[235] and

b. the aider and abettor knows that his acts or conduct assists the commission of these present or future crimes.[236]

200. The *Mrkšić* case provides an important example of the correct application of the requisite *mens rea* standard for aiding and abetting. Mrksić was found guilty of aiding and abetting the murder of prisoners of war because he issued an order to withdraw the members of the Military Police who were protecting prisoners from members of the Territorial Defence ("TO") and paramilitaries likely to commit one of a series of crimes against these prisoners.[237] *Mrkšić*-AJ held that the Trial Chamber did not commit an error of law concerning the *mens rea* for aiding and abetting when it concluded that "when Mrkšić ordered the withdrawal of the military police, he knew that this left the TOs and paramilitaries with unrestrained access to the prisoners of war and that by enabling this access, he was assisting in the commission of their murder."[238] In doing so, *Mrkšić*-TJ correctly applied the second element of the *mens rea* standard (see above) with respect to determination that Mrkšić knew that *his acts* (*i.e.* issuing the order) assisted the commission of the crimes.

201. Similarly, *Nahimana*-AJ upheld Ngeze's conviction for aiding and abetting genocide on the basis that he "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*."[239] In light of this evidence, *Nahimana*-AJ concluded that "there is no doubt that the appellant *was aware that his acts were contributing to the commission of*

234 Judgement, para.1629. *See also*, paras.129-130.
235 *Haradinaj*-AJ, para.58
236 *Blagojević*-AJ, para.127.
237 *Mrkšić*-TJ, paras.621-622.
238 *Mrkšić*-AJ, para.333.
239 *Nahimana*-AJ, para.670, *citing Nahimana*-TJ, para.956.

genocide by others.*"*[240] Hence, the requisite *mens rea* was proved, in that Ngeze had knowledge that crimes were being committed and would continue to be committed at the *Commune Rouge, and* he knew that *by his acts* – identifying Tutsi civilians who were then killed at the *Commune Rouge – he assisted the commission of genocide* by others.

202. The *Ntagerura* case further underscores the necessity of establishing that an alleged aider and abettor knew that *his acts* assisted the commission of the crime in finding that he possessed the requisite *mens rea*. In upholding Bagambiki's acquittal for aiding and abetting the killing of 16 refugees, *Ntagerura*-AJ correctly considered whether the evidence supported "the conclusion that Bagambiki *knew that his participation* in the selection of the refugees would lead to their death"[241] and held that a reasonable trier of fact could conclude that this had not been proved beyond a reasonable doubt.[242]

203. The required determination of whether an accused knew that his acts assisted the commission of a crime is especially important in a case such as this one, where the alleged aider and abettor is physically removed from the location of the crimes, let alone occupying the post of Chief of Staff in a different army, in another State. Whereas a military officer present at the crime scene and/or directly involved in the actions which lead to the commission of a crime is likely to know that his conduct assists the commission of that crime, a military officer who is located far from the crime scene and is not involved in, nor exercising any control over the events which led to the crime – is much less likely to know his conduct assists the commission of that crime. Hence, in the latter situation – that of Perišić in this case – it is particularly important that the trier of fact fully analyse and explain its reasoning in finding that the alleged aider and abettor possessed the requisite *mens rea,* which includes determining whether he knew that *his acts* assisted the commission of the crime.

204. This is precisely what the Majority failed to do in this case. The Majority found that Perišić had the required *mens rea* for aiding and abetting the crimes committed by the

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[240] *Nahimana*-AJ, para.672 [emphasis added].
[241] *Ntagerura*-AJ, para.327 [emphasis added].
[242] *Ntagerura*-AJ, para.327.

VRS in Sarajevo[243] and Srebrenica,[244] but it neither analysed nor explained whether Perišić knew that *his acts* assisted the perpetration of these crimes. The Majority failed to provide any reasoning in support of its conclusion that Perišić knew that his actions or conduct assisted the commission of these crimes.[245] Rather, the Majority found that Perišić possessed the requisite *mens rea* based solely on its determination that he knew of the VRS's propensity to commit crimes, that the VRS had committed crimes in Sarajevo and Srebrenica and that these crimes would probably be followed by the commission of more crimes.[246]

III. Relief sought

205. The Majority plainly failed to apply the correct legal standard for the *mens rea* of aiding and abetting.

206. In light of the above, Perišić respectfully requests the Appeals Chamber to quash the finding that he had the necessary *mens rea* for aiding and abetting and accordingly enter a finding of NOT GUILTY for Counts 1-4 and Counts 9-12.

[243] Judgement, para.1632.
[244] Judgement, para.1637.
[245] Judgement, paras.1636, 1638.
[246] Judgement, paras.1628-1650, 1438-1579.

9th Ground of Appeal

I. Introduction

207. The Majority erred in law and in fact, finding that Perišić "knew not only that the VRS was committing crimes in Sarajevo, but that individual crimes committed by the VRS would probably be followed by more crimes committed by the VRS throughout the city's siege."[247]

208. No reasonable trier of fact, having assessed the totality of the evidence could have made this finding. The Majority's error occasioned a miscarriage of justice.

II. The Majority erred in law in two specific ways

A. The Majority erred in law by failing to make any findings regarding Perišić's knowledge that any predicate acts would occur

209. The Majority's analysis and findings regarding Perišić's *mens rea* for aiding and abetting Sarajevo (Counts 1-4) are premised on the proposition that because Perišić knew that crimes had (allegedly) been perpetrated by VRS members against the civilian population in Sarajevo, he knew that future crimes would also occur.

210. The Majority incorrectly applied the law by not requiring proof of knowledge of any specific crimes, but only knowledge of "crimes" generally. The jurisprudence of the Tribunal requires more.

211. At first glance, an apparent split exists in Tribunal jurisprudence defining the *mens rea* of aiding and abetting. One line of cases defines the *mens rea* as knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[248] The other line holds that "it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact

[247] Judgement, paras.1436-1437, 1488-1522. *See also*, Dissent, paras.47-69.
[248] Judgement, para.129; *citing Seromba*-AJ, para.56; *Blagojević*-AJ, para.127; *Ntagerura*-AJ, para.370; *Simić*-AJ, para.86; *Blaškić*-AJ, paras.45-46; *Vasiljević*-AJ, para.102.

committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[249] *Tadic*-AJ explained parenthetically that a "specific crime" meant "murder", "extermination", "rape", "torture", "wanton destruction of civilian property", etc.[250] This is consistent with the second line of cases, that the aider or abettor need not know which of the specific crimes will be committed, but knows one of several will in fact be committed.

212. Recently, the Appeals Chamber, as well as the Trial Chamber in this case, has cited to both lines without identifying a divergence in them, leading to the conclusion that there is, in fact, no split.[251] Thus, the jurisprudence requires, at a minimum, a certain level of specificity for the *mens rea* for aiding and abetting to be satisfied.

213. Perišić's charges stem from a unique factual situation tried before this Tribunal. He was the CGS of a separate army of a separate state in a geographically remote location in the context of a series of alleged crimes with no proof of when the assistance given was used or the purpose for its use other than to support the war effort. In this context, "specific crime" cannot mean generically "murder" or "extermination". While the law does not require the "precise crime" to be known, the aider and abettor must know one of several will be committed.

214. A reasonable interpretation of the law implies that the knowledge standard to be applied includes knowledge of the pending attack or incident and that one of the "types" of crimes (murder, extermination, etc.) would occur as a result of that attack. It is legally insufficient to find Perišić guilty of aiding and abetting solely on the basis that assistance was provided with the knowledge that some generic class of crime (eg. murder), would take place in a large city (Sarajevo), committed by unknown persons, at some unknown time in the future. A finding of knowledge must be based on something more concrete. Perišić submits that it must be shown that the aider and abettor knew of a specific attack that would be criminal in nature, of the possible "types" of crimes that may result from

[249] Judgement, para.130; *citing Simić*-AJ, para.86; *Mrkšić*-AJ, para.49. *See also Blaškić*-AJ, para.49.
[250] *Tadic*-AJ, para.229(iii).
[251] *Haradinaj*-AJ, para.58; *Perišić* Trial Judgement, paras.129-130.

that specific attack, and that his assistance would facilitate the commission of one of those crimes.[252]

215. The Majority's reasoning incorrectly endorses the Prosecution assertion that "it is not necessary to establish that Perišić had knowledge of specific incidents alleged in the Indictment."[253]

216. By doing so, the Majority erred shifting the analysis from one of specific crimes (the Scheduled Incidents) to a finding that "the only reasonable inference is that Perišić knew of these *general allegations* on crimes against civilians in Sarajevo."[254] In fact, the Majority broadens its language to unspecified and generic "crimes" allegedly committed by the VRS[255] without indicating what those crimes were, how they relate to the Indictment, or how any assistance purportedly provided by Perišić could have affected those crimes.[256]

217. The Prosecution failed to prove Perišić knew that his acts would assist the crimes listed in Schedules A and B to the Indictment.[257] The Majority erred in applying a "general knowledge" of crimes standard. In addition to weakening the standard, followed to its logical conclusion there would be no requirement that the Indictment in the instant case adequately inform the accused of the charges, as suggested in paragraph 1438.

B. The Majority erred by failing to apply the standard of *in dubio pro reo* to information available in the public domain

218. The Majority erred by relying on information available in the public domain as evidence of Perišić's knowledge, without any proof that Perišić was aware of any of the documents or information contained therein. The Majority failed to properly apply *in dubio pro reo* in its analysis of the "circumstantial evidence" that the information contained in documents available in the public domain were in fact known by Perišić.

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[252] The last of these, "that his assistance would facilitate the commission of one of those crimes" will be discussed below in Ground 11.
[253] Judgement, para.1438, referring to Closing Arguments, T.14676; *See also* paras.1517-1522.
[254] Judgement, para.1521.
[255] *See also*, para.247, *infra*.
[256] Judgement, para.1522.
[257] *See*, Ground 8, *supra*.

219. Any ambiguity or doubt arising from the evidence must be resolved in favour of the accused in accordance with the principle of *in dubio pro reo.*[258] If there is a conclusion other than guilt which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[259] When the Prosecution relies on proof of the state of mind of an Accused by inference, the Trial Chamber must consider whether that inference was the *only* reasonable inference that could be made based on the evidence.[260]

220. A finding from circumstantial evidence must be established beyond a reasonable doubt.[261] An inference drawn from circumstantial evidence must be more than just reasonable; it must be the *only* reasonable inference that could be drawn from the evidence presented.[262] Where two or more reasonable inference can be drawn from circumstantial evidence, some consistent with guilt and some with innocence, the Chamber must adopt the inference consistent with innocence under the principle of *in dubio pro reo*.[263]

221. The mere availability of information in the public domain cannot support the presumption of knowledge, actual or inferred.[264] *Čelebići*-TJ rejected the Prosecution assertion that knowledge should be presumed where the crimes are a matter of "public notoriety, are numerous, occur over a prolonged period, or over a wide geographical area."[265] It must also be noted that the *Čelebići* analysis took place in a discussion of 7(3) liability. Judge Moloto emphasised that the standard for 7(1) liability must not be confused with, or lowered to, the applicable *mens rea* standard for 7(3) liability.[266] The distinction drawn is that, for 7(1) liability to arise, the accused must have *actual* knowledge of the probability

[258] *Limaj*-AJ, para.21; *Tadić*-Decision, para.73; *Naletilić*-AJ, para.120; *Čelebići*-TJ, para.601; *Akayesu*-TJ, para.319.
[259] *Čelebići*-AJ, para.458.
[260] *Popović*-TJ,para.9; *citing Vasiljević*-AJ, para.120.
[261] *Čelebići*-AJ, para.458.
[262] *Krajašnik*-TJ, para.1196; *Popović*-TJ, para.12; *citing Stakić*-AJ, para.219.
[263] *Čelebići*-AJ, para.458.
[264] *Čelebići*-TJ, paras.385-386; *Čelebići*-AJ, para.241; *Delic*-TJ, para.530; *see also*, *Perišić* Dissent, paras.40, 45, 55-56.
[265] *Čelebići*-TJ, paras.384-385.
[266] Dissent, para.38.

that one of a number of crimes will be committed, whereas the standard for 7(3) liability is knew or *had reason to know*.[267]

222. On several occasions, the Majority concedes the lack of "direct evidence" that Perišić was aware of documents in the public domain.[268] For example, the Majority "notes that no direct evidence shows that Perišić had knowledge of the UNSC Resolutions and the Mazowiecki reports issued prior to his appointment."[269]

223. The Majority notes that it was presented with "significant circumstantial evidence which includes documentation by the international community of crimes committed in Sarajevo and widespread media coverage of the siege of Sarajevo."[270] Without any evidence that Perišić ever reviewed or was personally informed of any of them, the Majority relies on these documents to prove knowledge of their contents.[271] The Majority's conclusion that because the documents were available Perišić knew of the information contained within them is unreasonable;[272] availibilty does not establish knowledge of contents.

224. No evidence was received establishing what Perišić reviewed in the "daily bulletins", Security Administration reports and Information Administration "press clippings".[273] The Majority then makes the unsupported finding that he was "generally informed of what was being reported in the international and Serbian press",[274] and thus, that he "was consequently aware of media reports that the VRS was committing crimes against the civilian population of Sarajevo."[275]

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[267] Dissent, paras.37-40; c*iting Čelebići*-TJ, paras.383, 385, 386; *Čelebići*-AJ, para.421.
[268] Judgement, paras.1456, 1479, 1641.
[269] Judgement, para.1456.
[270] Judgement, para.1495.
[271] Judgement, paras.1496-1514.
[272] Dissent, para. 45.
[273] Borović testified that the Information Administration provided "what one may call a press clipping, although [the VJ] didn't refer to it as such [in 1993-1995]". T.13918. None of these transmissions were tendered into evidence. The Majority also relies on the testimony of Škrbić, a member of the Information Administration prior to Perišić's tenure as Chief of the VJ General Staff. T.11878.
[274] Judgement, para.1521.
[275] Judgement, para.1521.

225. This falls well short of the standard required by *in dubio pro reo*. The Majority simply presumes knowledge without a basis proving Perišić had knowledge of any specific documents. Any findings based on this error should be reversed.

III. The Majority erred in fact in finding (1) that Perišić had knowledge of crimes in Sarajevo and (2) that Perišić knew that future crimes would be committed in Sarajevo, as the evidence does not support the Majority conclusions

A. The Majority unreasonably concluded that Perišić knew that crimes were being committed by the VRS in Sarajevo

1. The Majority's conclusion in the "Access to Information" section that Perišić was well informed of all aspects of the functioning and activities of the VRS and SVK is misplaced

226. The abstract proposition that access to information is the departure point for determining knowledge is proper. However, in setting forth the underlying basis upon which this issue would be considered, the Majority erred. These errors affect the foundation upon which the Majority bases its conclusions of Perišić's knowledge.

227. The Trial Chamber improperly infers that information concerning the conflict would necessarily include knowledge of crimes committed. The Trial Chamber makes the sweeping conclusion that "[t]hrough the system of regular reports, monthly meetings in Belgrade, various other *ad hoc* instances of reporting and exchanges of information during his tenure as Chief of the VJ General Staff, Perišić was well informed of *all important aspects* on the functioning of the SVK and the VRS *as well as their activities*."[276] The Majority uses this reporting system in part to improperly infer that Perišić was informed of the "criminal conduct" of the VRS.[277] There is *no* evidence that any of the intelligence apparatuses exchanged any information about crimes.[278]

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[276] Judgement, para.1436 [emphasis added].
[277] Judgement, para.1485.
[278] Dissent, paras.58-61. *See also*, P1622 (there is no discussion of crimes in this document or evidence of a discussion of crimes arising out of this document).

228. Thus, the Majority's conclusion that Perišić was "well informed of all important aspects on the functioning of the SVK and VRS as well as their activities"[279] is not supported by the evidence. It is an illogical generalisation and cannot serve as the basis for conclusions concerning Perišić's culpability.

2. The evidence does not support the conclusion that Perišić knew of crimes committed by the VRS in Sarajevo

229. The Majority concludes that Perišić was aware that the VRS was accused of committing crimes in Sarajevo, based on direct and circumstantial evidence.[280]

Direct Evidence

230. As direct evidence of Perišić's knowledge of "incidents" in Sarajevo, the Trial Chamber considered four diplomatic cables, one telegram, one SDC session, one meeting of FRY and RS political and military leadership, and one VJ General Staff Intelligence Administration report. As a result of this evidence, the Majority found Perišić was aware of four specific incidents.

231. The first incident is Scheduled Incident A2, in Dobrinja on 4 February 1994. The "direct" evidence regarding Perišić's knowledge of this incident is a diplomatic cable dated 7 February 1994 stating that "UNPROFOR has found that Serbian side [sic] was responsible for the previous attack on Dobrinja (4th February)."[281] No additional information was provided, such as the specific details of the attack, the number of casualties, or more specificity than the "Serbian side".[282]

232. The second incident is Scheduled Incident A3, known as Markale I, dated 5 February 1994. P852 mentions only "Saturday's incident in Sarajevo", likely referring to Markale I, without additional information. Another cable mentions that the mass media in New York and the "West" was "widely manipulating" the incident and pushing governments

[279] Judgement, para.1436.
[280] Judgement, para.1517.
[281] P852.
[282] This latter point is important because of the fact that the majority of the UNSC Resolutions and Mazowiecki reports referred generally to the "Serbian side" or unidentified "paramilitaries" without linking the alleged perpetrators to the VRS. *See*, Dissent, paras.67-68.

to adopt a decision on air strikes against Serbian positions in Sarajevo.[283] The Majority acknowledges that Perišić received "conflicting information on the alleged perpetrators".[284] At the 18th SDC Session Perišić underscored the RS position that the Serbian side was not responsible and that VJ military experts likewise concluded that Markale I could not have happened in the way it was being reported in the press.[285]

233. The third incident is an unscheduled incident. A diplomatic cable dated 10 April 1995 referred to an incident in which three projectiles were fired on Sarajevo from the positions of Bosnian Serbs.[286] Nothing is known about the targets of the projectiles, the consequences of their firing, or any further information about the incident. This document cannot form part of the analysis of Perišić's knowledge of crimes committed by the SRK in Sarajevo due to the paucity of details about this incident.

234. The fourth incident is Scheduled Incident A-9, Markale II, dated 28 August 1995. In a meeting between FRY and RS political and military leadership the day after the shelling[287] two separate UN sources, one blaming the Serbs for the shelling and one providing information that was interpreted by Mladić as disputing Serb responsibility were discussed.[288] A month later, the Intelligence Administration of the VJ General Staff sent a report to the FRY MOD skeptical of the conclusion that the Serbian side was responsible, based upon deficiencies in the forensic investigation carried out.[289]

235. The remainder of the "direct evidence" relied on by the Majority refers generically to the situation in Sarajevo, some of which questions the partiality of the reporting on the matter.[290]

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[283] P2852, p.1.
[284] Judgement, para.1633.
[285] P782, pp.60-61. As noted by the Majority, Perišić had to have additional information than just the cable. Judgement, para.1518, fn.4305. Based on whatever information Perišić received, however, he still endorsed the conclusion that the "Serb side" was not responsible for the incident.
[286] P853.
[287] Judgement, para.1493.
[288] P232, pp.5, 12.
[289] D542, p.3.
[290] Judgement, paras.1490-1491.

236. The most that can be said about the "direct evidence" is that Perišić knew of *allegations* of four incidents in Sarajevo, two of which Perišić knew of the sparsest of information about and two of which were the subject of open dispute at the time.

Circumstantial evidence

237. The Majority refers to "circumstantial evidence" regarding crimes in Sarajevo stemming from the international community and "widespread media coverage".[291]

238. Perišić recalls the legal principles on documents "available in the public domain" and the presumption of knowledge.[292] All of the documents discussed in the "circumstantial evidence" section of the Judgement fall into this category.[293] There is no evidence that Perišić read, reviewed, or was made aware of any of the documents discussed in paragraphs 1496 to 1514, nor can it be inferred from the evidence before the Trial Chamber.[294]

239. The Majority erred in finding that the information contained in documents from the international community was ever presented to Perišić.[295] Similarly, there is no information that Perišić ever read or was put on notice of the documents and information referred to in paragraphs 1498, 1499, or 1500.

240. Paragraphs 1502 to 1514 refer to the media coverage of Sarajevo. The Majority entirely fails to address the fact that no evidence was presented that Perišić read, or reviewed, any of the video or print reports referred to.

241. Knowledge cannot be imputed to an accused without proof that the accused in fact received the information that forms the basis of the knowledge. The Majority's conclusion that "[m]embers of the FRY political leadership and military leadership were aware of media reports related to BiH" cannot serve as a basis to impute liability to

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[291] Judgement, paras.1495 *et seq*.
[292] *See,* paras.218-225, *supra*.
[293] Judgement, paras.1496-1514; *see also*, Judgement, paras.1450-1456, 1461-1482.
[294] Dissent, paras.66-69. *See also*, para.1479, in which the Trial Chamber notes that there is no direct evidence that Perišić knew about the Mazowiecki Reports. Similarly, the finding in paragraph 1481 that the *Borba* publication was "available" to Perišić has no bearing on a determination of his guilt.
[295] Judgement, paras.1496-1501.

Perišić without evidence connecting the reports to Perišić's knowledge. Further, no evidence was produced establishing what "media reports" the FRY political and military leadership was aware of, nor can it be assumed that those reports contained information on crimes in Sarajevo.

242. The Majority uses comments by Perišić for the proposition that Perišić followed media reports. The first is from an SDC session in which Zoran Lilić referred to a media report of people applauding Karadžić in Bileca and Bijeljina. Milošević a member of the leadership of FRY was ignorant of the event. Perišić said that "[i]t was all reported in the press."[296] There is no indication that Perišić watched or read newsreports about this incident. Based on the evidence, there are a number of objectively reasonable interpretations as to how Perišić received the information. For example, it is objectively reasonable that Perišić was told this information by someone else.

243. The second comment is from a Croatian intercept of a conversation between Perišić and Slobodan Milošević, in which Perišić indicates that he had watched a news report on the shelling in Zagreb.[297] This statement cannot be extrapolated to the only reasonable inference being that Perišić followed all media reporting.

244. Thus, it cannot be inferred, based on this evidence, that Perišić read the media reporting referred to by the Majority simply because it was "available" in the public domain.

245. As noted above, when the Prosecution relies upon proof of the state of mind of an Accused by inference, the Trial Chamber must consider whether that inference was the *only* reasonable inference that could be made based on the evidence.[298] The Majority failed to determine whether its conclusions were the *only* reasonable inference available based on the evidence.

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[296] P784, p.48. Judgement, para.1516.
[297] P1366.
[298] *Popović*-TJ, para.9;*citing Vasiljević*-AJ, para.120.

The Majority's conclusions on Perišić's knowledge are unreasonable and must be overturned

246. The evidence, taken as a whole and with the appropriate legal standard applied, does not prove beyond a reasonable doubt that Perišić knew that crimes were being committed in Sarajevo. Knowledge cannot be presumed, as the Majority did in this case.

247. The Majority, in paragraph 1517, holds that it is satisfied that Perišić was aware that the VRS was *accused* of committing crimes in Sarajevo. After discussing several "considerations", the Majority states that the evidence shows that Perišić was "generally informed of what was being reported in the international Serbian press" and that "the only reasonable inference is that Perišić knew of these *general allegations* on crimes against civilians in Sarajevo."[299] Even if Perišić knew of some of the reports or about several of the incidents, such knowledge does not prove that he knew any more than that there were allegations that crimes had been committed.

248. The Majority erred in holding without a basis in fact that "accusations", "general information", and "allegations" proved that Perišić knew that the VRS was *committing crimes* in Sarajevo.[300] Allegations, by definition, are assertions without proof. The fact that an allegation is subsequently determined to be true is not a proper basis to find "knowledge" at the time the allegation was made. Similarly, knowledge of allegations or accusations cannot equate to knowledge at the time the allegations or accusations were made that crimes were actually committed. It certainly cannot form the basis of a conviction. A finding of guilt predicated on this analysis is unreasonable and must be overturned.

249. The Majority mischaracterises its previous conclusions and the exhibits it relied upon for the propositions that Perišić was "generally informed of the UNSC's agenda and specifically about some UNSC proceedings, and was in regular contact with the FRY leadership."[301]

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[299] Judgement, para.1521.
[300] Judgement, para.1522.
[301] Judgement, para.1519.

250. Paragraph 1478 concludes that "both the VJ Intelligence Administration and Perišić personally were aware of the UNSC's agenda".[302] P778 does not support the Majority's conclusion. The 25th SDC Session concerned FRY's acceptance of the Contact Group peace plan, the placement of observers along FRY's border, and the potential lifting of sanctions.[303] While these issues were being discussed Branko Krga opined that the issue of observers on the FRY border should never be "put on the agenda of the Security Council."[304] Nothing more of any agenda of the UNSC is mentioned in P778.

251. The documents relied upon by the Majority to support the conclusion that Perišić was "put on notice of at least certain proceedings before the UNSC"[305] are 1) a diplomatic cable which summarises the positions of a number of entities, **not** including the UNSC, and refers to "Muslim countries" within the UNSC supporting a proposal for an urgent Security Council meeting as a result of the February 1994 incidents and 2) an excerpt from P778 discussed above. This evidence does not allow for the extrapoloation from these specific facts that Perišić had a general awareness of UNSC proceedings.[306]

252. Based on the above, the Majority finds that Perišić was aware of "findings regarding the VRS's crimes in Sarajevo contained in the BiH documents provided to the FRY, the report of the UN Commission of Experts, the Mazowiecki reports and the filings and orders in the ICJ case between BiH and Serbia and Montenegro."[307] This analytical leap is factually unsupported. There is no evidence to support Perišić's awareness of any of these reports, nor can his knowledge be inferred based on the evidence before the Trial Chamber.

253. The Majority recalls that Perišić received "daily bulletins from his Intelligence Administration, reports from his Security Administration and press clippings, containing media information from his Information Administration."[308] An examination of the Majority analysis of Perišić's purported knowledge of crimes in Sarajevo shows that none

[302] Judgement, para.1478, relying on P778.
[303] P778, pp.6-18.
[304] P778, p.10.
[305] Judgement, para.1480, fn.4184.
[306] Judgement, para.1519.
[307] Judgement, paras.1519, 1480.
[308] Judgement, para.1520.

of the mentioned sources of information or their contents are in fact analysed by the Majority.[309] The conclusions arising from this section, then, are based on an unreasoned analysis and should be overturned.[310]

254. If the Majority had engaged in a reasoned discussion of the reports actually in evidence in this trial, they would have had to conclude that the documents discussing Sarajevo contain no information about crimes occurring in Sarajevo. For example the three 1st Administration Daily Reports received by the Chamber[311] contain information about combat activities and the movement of troops for both the VRS and ABiH. No mention is made of any criminal behaviour. The reports are identical in nature and structure, leading to the reasonable inference that the 1st Administration Daily Reports relied upon by the Majority as a basis for attributing knowledge of crimes in Sarajevo is unsupportable. The objective and logical conclusion to be drawn, quite contrary to the Majority's inference,[312] is that the daily reports did **not** contain information about crimes in Sarajevo.

255. The Majority places undue reliance on the "press clippings" as a potential basis of knowledge for Perišić.[313] No "press clippings" are in evidence.[314] The "press clippings" cannot be relied upon at all.

256. Furthermore, the Majority relies on discussions of press coverage in VJ Collegium meetings in October 1995, well after any Scheduled Incidents took place.[315] Reliance on after the fact information cannot be used in an analysis of whether Perišić knew crimes had been committed in Sarajevo such that he would know that future crimes would be committed.

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[309] Judgement, paras.1488-1516. In paragraph 1437, the Trial Chamber asserts the reports and information provided will be discussed later. The Majority fails to do so. Judge Moloto in his Dissent addresses the contents of the reports *See*, paras.58-61.
[310] *Haradinaj*-AJ, para.10; *Brđanin*-AJ, para.9; *Kvočka*-AJ, para.24-25; *Kupreškić*-AJ, para.39, 41.
[311] P860; P861; P862.
[312] Judgement, para.1520.
[313] Judgement, paras.1520-1521.
[314] The Majority is wholly ignorant of what information was actually contained in the "press clippings", what information was verified (see Judgement, para.1404-1405), or what information or documents were actually presented to Perišić.
[315] Judgement, para.1520.

257. Based on the foregoing, and the evidence in this case, no reasonable Trial Chamber would have reached the conclusion reached by the Majority in this case that Perišić knew that crimes had been committed by the VRS in Sarajevo.

B. The evidence does not prove that Perišić had knowledge that future crimes would be committed in Sarajevo by the SRK

1. The Majority's reliance on an alleged propensity to commit crimes by the VRS is erroneous

258. The Majority also bases the foreseeability of crimes in Sarajevo on its findings that Perišić was aware of the "VRS's discriminatory intent and propensity to commit crimes."[316] This conclusion is unreasonable and should be overturned.

Evidence prior to Perišić's appointment

259. The Majority lists three facts as "direct" evidence of Perišić's knowledge of the VRS's discriminatory intent and propensity to commit crimes.

260. The first is a statement made by Perišić in his interview with the OTP that he refused Karadzic's offer to become VRS commander, in part, because "they wanted [an] ethnically clean army, and [Perišić] was against that."[317] As noted by Judge Moloto in his dissent, this statement predates the creation of the VRS and does not establish as the only reasonable conclusion that Perišić was aware that the VRS would be likely to engage in the commission of war crimes.[318]

261. The second is a statement by Perišić in the same interview with the OTP that no Muslims were killed by soldiers during his tenure in Bosnia, but that after he left in June, 1992, "the exodus in this territory started."[319] Once again, the dissenting opinion of Judge Moloto is instructive in noting that the statement was made in hindsight, without reference to when the knowledge was obtained.[320] Further, the Trial Chamber had no

[316] Judgement, paras.1440. *See also,* Judgement, para.1522. The Majority variously refers to the VRS criminal conduct and the VRS propensity to commit crimes. Although the two terms are not synonymous, the Majority appears to use them interchangeably.
[317] Judgement, para.1444, quoting P803, p.4.
[318] Dissent, para.47.
[319] Judgement, para.1445, quoting P803, p.6.
[320] Dissent, para.48.

factual evidence before it regarding the reasons for the exodus, nor any evidence attributing the exodus to the actions of the VRS.

262. Finally, the Majority relies on a letter from the VRS 1st Krajina Corps Command to Perišić on the day of his appointment as CGS.[321] The letter in no way evinces a discriminatory intent or propensity to commit crimes on behalf of the 1st Krajina Corps or the VRS.[322]

263. The Majority's finding that prior to Perišić's appointment of CGS, "the FRY leadership" was aware of allegations of ethnic cleansing in BiH[323] and monitored what other countries were saying about FRY's involvement in the war[324] cannot serve as a basis for finding personal knowledge on Perišić's part. Knowledge of others cannot be imputed to Perišić. This is particularly true for matters that occurred before his appointment as CGS.

264. The Majority accepts that there is no direct evidence that Perišić had knowledge of the UNSC Resolutions and the Mazowiecki reports issued prior to his appointment as CGS.[325] In fact, there is no evidence whatsoever that Perišić had any knowledge of any of the documents. The Majority's reliance on this evidence, particularly in light of the concession of a failure of direct proof, constitutes error.

265. The Majority relies on the fact that Perišić was stationed in Bosnia between January and May 1992 and "directly exposed to these events" without explaining what events it is referring to. This proves nothing. Assuming that the Majority is referring to the UNSC Resolutions and Mazowiecki reports as "these events", apart from the failure of proof discussed above, the Mazowiecki reports were not published until August 1992,[326] some three months after Perišić had left BiH.[327]

266. The Majority relies on Perišić's attendance while Commander of the VJ 3rd Army at "*meetings*" of the Supreme Command Staff where the FRY leadership discussed events

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[321] Judgement, para.1447.
[322] Dissent, para.51.
[323] Judgement, paras.1449, 1454.
[324] Judgement, para.1454.
[325] Judgement, para.1456.
[326] P2439
[327] Judgement, para.1456.

related to the conflict.[328] The evidence the majority relies upon concerns one meeting only.[329] Therefore the conclusion that he attended "meetings" is not supported by the evidence and cannot be relied upon. Additionally, the minutes of this *meeting* contain no references to either the UNSC Resolutions or the Mazowiecki reports.[330] Thus, the meeting does not prove Perišić's knowledge of the documents or the basic allegations of war crimes contained in them.

267. Finally, the Majority returns to extensive media coverage and the establishment of the ICTY to investigate and prosecute the criminal allegations contained within the UNSC Resolutions and Mazowiecki reports[331] as a basis for finding knowledge. The establishment of the ICTY has no bearing on Perišić's knowledge of the documents or the allegations contained therein.

268. Thus, the conclusion reached by the Majority that "the evidence leads to the only reasonable inference that Perišić generally knew of basic allegations of war crimes reported in the UNSC Resolutions and Mazowiecki reports prior to his appointment as Chief of the VJ General Staff"[332] is unreasonable and not supported by the evidence.[333] This conclusion must be overturned.

Evidence after Perišić's appointment

269. The Majority's discussion of the evidence after Perišić's appointment as Chief of the VJ General Staff suffers from the same deficiencies as the discussion of the evidence prior to his appointment as Chief of the VJ General Staff.

270. The information received by the "FRY government",[334] absent additional evidence, does not constitute proof, and any knowledge on behalf of any members of the FRY government or FRY representatives to the UN cannot be imputed to Perišić.[335] As above,

[328] Judgement, para.1456. citing to para.1446.
[329] There is no evidence that Perišić actually attended the meeting referred to.
[330] P2888.
[331] Judgement, para.1456.
[332] Judgement, para.1456.
[333] *See also*, Dissent, paras.42-46.
[334] Judgement, para.1461.
[335] Judgement, paras.1461-1464, 1472-1473.

knowledge cannot be inferred from documents available in the public domain, such as the UNSC Resolutions or Mazowiecki reports promulgated during Perišić's tenure as Chief of the VJ General Staff.[336]

271. Perišić has already discussed the Majority's mischaracterisation of the evidence in paragraphs 1478 and 1480, and the inability to draw inferences from the public availability of documents in paragraph 1481.

272. As a result, the Majority finding that the evidence leads to the only reasonable conclusion that Perišić had knowledge of the information contained the Mazowiecki reports is unreasonable.[337]

273. Thus, the final conclusions reached in paragraphs 1484-1486 are based on unreasonable conclusions and are not supported by the evidence.

274. Contrary to the Majority holding,[338] and as noted by Judge Moloto's Dissent, the limited evidence of intelligence reports sent to Perišić regarding criminal conduct in Sarajevo disputes the accuracy of the accusations against the VRS.[339]

275. The Majority's conclusions that Perišić knew of the VRS's discriminatory intent and propensity to commit crimes cannot stand, as no reasonable Trial Chamber would have come to those conclusions.[340]

2. The conclusion by the Majority that Perišić knew that additional crimes would be committed in Sarajevo is not supported by the evidence

276. The Majority comes to the cursory and unsupported conclusion that Perišić knew that "individual crimes committed by the VRS would probably be followed by more crimes committed by the VRS throughout the city's siege."[341] The Majority entirely fails to explain how Perišić should know that future crimes would be committed. The Majority

[336] Judgement, paras.1465-1471. *See also*, *Čelebići*-TJ, paras.385-386; *Čelebići*-AJ, para.241; *Delic*-TJ, para.530; *see also*, *Perišić* Dissenting, paras.40, 45, 55-56.
[337] *See also*, Dissent, paras.52-56.
[338] Judgement, para.1485.
[339] Dissent, para.58.
[340] Judgement, para.1486.
[341] Judgement, para.1522 [emphasis added].

also fails to specify which particular crimes Perišić knew would be committed, holding only that he knew that "crimes" generally would be committed. This is a misapplication of the law. It lowers the standard for *mens rea* for aiding and abetting.[342]

IV. Relief sought

277. Based on the foregoing, Perišić submits that the Majority erred in both law and fact when it found that Perišić "knew not only that the VRS was committing crimes in Sarajevo, but that individual crimes committed by the VRS would probably be followed by more crimes committed by the VRS throughout the city's siege."[343] The Majority conclusion is based on an erroneous application of the law and an unreasoned analysis of the facts. The errors by the Majority necessitate the Appeals Chamber to intervene and overturn the convictions upon which the Majority findings are based.

278. No reasonable Trial Chamber, having properly considered the above evidence, could have concluded beyond reasonable doubt that Perišić knew that the VRS was committing crimes in Sarajevo and that these crimes would probably be followed by more crimes committed by the VRS in Sarajevo. Perišić respectfully requests that the Appeals Chamber consider the above evidence and arguments as to weight and reverse his convictions for Counts 1-4.

[342] *See*, *supra*, paras.209-217.
[343] Judgement, paras.1436-1437 and 1488-1522. *See also*, Dissent, paras.47-69.

10th Ground of Appeal

I. Introduction

279. The Majority erred in law and in fact when it found that Perišić "knew that individual crimes committed by the VRS before the attack on Srebrenica would probably be followed by more crimes committed by the VRS after the take over of the enclave in July 1995."[344]

280. No reasonable trier of fact, having assessed the totality of the evidence on the record could have made this finding. The Majority's error occasioned a miscarriage of justice and invalided the judgement in respect of Counts 9-12.

II. Argument

A. The Majority erred in finding that Perišić's knowledge of the "sensitivity" of the area of Srebrenica was a basis for him knowing it was probable that "more crimes" would be committed by the VRS after the takeover of the enclave in 1995.[345]

281. The evidence established that the following "sensitivity" concerning the Srebrenica enclave existed prior to the fall of Srebrenica. Perišić was concerned that there potential security issues with FRY's borders.[346] Perišić candidly admitted that he and Milosevic discussed the region "very often".[347] Additionally, there was a generalised sensitivity that existed throughout the region that this area would re-emerge as a theatre of war with the resulting consequences that are found in any conflict.[348] These "sensitivities" cannot equate to Perišić's personal knowledge that there was a "grave existing threat to the safety of Srebrenica and its inhabitants".[349]

282. Whatever descriptive term is used by the Majority in discussing its analysis of the "sensitivity" that was extant to the situation in Srebrenica, be it "grave existing threat",

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[344] Judgement, paras.1436-1437 and 1523-1579; Dissent, paras.70-81.
[345] Judgement, paras.1523-1531.
[346] M. Simić, T.9983-9985; D204; D205; D206; D207.
[347] P807, p.17. Perišić does not provide a source for his knowledge of events in the Srebrenica area.
[348] *See eg.,* P777, 20th SDC Session, 15 Apr. 1994, pp.5-8
[349] Judgement, para.1531.

"constant source of tension", or "growing attacks", the fact remains that Srebrenica was an area of central concern to all parties. It had strategic geographic importance. It was a training and staging ground for the ABiH.[350] It was a source of misinformation used politically and militarily.[351] It was contiguous to FRY and represented security concerns.[352] Therefore, "sensitivity" to the potential of it being part of a theatre of conflict and the resultant chaos that ensues from such conflict was inevitable in the absence of peace. All of this had to be taken into account by Perišić. His acknowledgement of the "sensitivity" does not mean that Perišić was referring to his knowledge that crimes would be committed.

B. Military intelligence received by the VJ General Staff before and during the operation in Srebrenica did not contain information on crimes committed by the VRS

283. Perišić does not dispute that he or the VJ General Staff periodically received reports from the VRS and VRS intelligence organs.[353]

284. The excerpts relied on by the Majority do not refer to any criminal behavior or an intention to commit crimes by the VRS or any subordinate forces in the Srebrenica area. The Majority concedes that "[t]he majority of the reports set out specific ABiH movements in and around the enclave", while "VRS movements were not similarly reported with such precision."[354] The reporting from May and July 1995 would lead to the objectively reasonable conclusions that both sides were building up their military forces in preparation for an engagement and there was a sizeable ABiH presence around Srebrenica.[355]

285. As noted above, the Majority's conclusion regarding the VRS's discriminatory intent and criminal conduct is unreasonable and not supported by the evidence.[356]

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[350] D158, para.30; D159, para.17; D706, para.37.
[351] Tucker, T.9271, 9276; D654, p.4.
[352] Gajić, T.10962.
[353] Judgement, para.1534.
[354] Judgement, para.1536.
[355] *See*, P1831, P2178, P2180, P2184, P2185.
[356] *See*, paras.258-275*, supra*.

286. Examining the entirety of the Majority analysis, the evidence does not support the Majority's ultimate conclusion that Perišić knew of the "high probability" that crimes would be committed in Srebrenica.[357] Objectively, Perišić's knowledge was that both sides had built up their military forces in the area and that a military engagement between VRS and ABiH was taking place in early July 1995. The conclusion that it was foreseeable to Perišić that crimes against the civilian population would occur as a consequence of the attack is not supported by the evidence.

C. Allegations of criminal conduct cannot serve as the basis of knowledge

287. The Majority concludes that Perišić was aware of allegations of crimes in Srebrenica as early as 13 July 1995.[358] As noted above, allegations, by definition, are assertions without proof. A finding of guilt predicated on assertions or accusations as proof of knowledge of contemporaneous events is unreasonable and must be overturned.

288. Furthermore, the Majority includes no analysis for how Perišić's purported knowledge by 13 July 1995 would give him knowledge that additional crimes would be committed by the VRS in Srebrenica after that date.

III. Relief sought

289. The Majority's conclusion that Perišić knew that crimes would be committed in Srebrenica as a result of the military operation in the area is unreasonable based on the evidence for the reasons stated above. The evidence does not prove beyond a reasonable doubt that Perišić knew of the "discriminatory intent" or "propensity to commit crimes" on behalf of the VRS. The evidence does not prove beyond a reasonable doubt that it was foreseeable to Perišić that following the military engagements in Srebrenica that the VRS would commit crimes against the civilian population.

290. No reasonable Trial Chamber, having properly considered the above evidence, could have concluded beyond reasonable doubt that Perišić knew that the VRS was committing

[357] Judgement, para.1541.
[358] Judgement, para.1578.

crimes in Srebrenica and that more crimes committed by the VRS in Srebrenica. Perišić respectfully requests that the Appeals Chamber consider the above evidence and arguments as to weight and reverse his convictions for Counts 9-12.

11th Ground of Appeal

I. Introduction

291. The Majority erred in fact when it found that Perišić knew that his conduct assisted the crimes committed in Sarajevo, invalidating the judgement for Counts 1-4.[359]

II. The Majority erred by presuming knowledge in the absence of proof

292. Perišić has previously demonstrated that the Majority erred in fact and in law regarding Perišić's purported knowledge of crimes in Sarajevo, Perišić's foreseeability of crimes in Sarajevo, and Perišić's knowledge of the VRS's "discriminatory intent and propensity to commit crimes."[360]

293. The Majority also erred in its section entitled "Findings on the Mental Elements of Aiding and Abetting".[361]

294. The Majority again presumes that Perišić was aware of documents available in the public domain reporting allegations of crimes without any evidence that Perišić read the documents or even was aware of them or their contents.[362]

295. The Majority failed to properly apply the law by failing to find Perišić had knowledge of any specific attacks, finding only that Perišić knew of a "campaign".[363] Reliance on information that was never proved to have been reviewed or known by Perišić, as discussed above, is not appropriate. The Majority holds that the information alerted Perišić to the high likelihood that the VRS was committing "crimes"[364] and that Perišić knew his conduct assisted in the commission of "crimes" in Sarajevo.[365] The Prosecution failed to meet its burden of proving that Perišić knew that any assistance provided would facilitate the commission of specific attacks, namely the Scheduled Incidents.

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[359] Judgement, para.1636; *see also* paras.1632-1635.
[360] *See*, Ground 9*, supra*.
[361] Judgement, paras.1628-1636.
[362] Judgement, paras.1633-1635. *See*, paras.218-225, *supra*.
[363] Judgement, para.1633.
[364] Judgement, para.1635.
[365] Judgement, para.1636.

296. The evidence did not prove beyond a reasonable doubt Perišić's knowledge of the perpetrators' state of mind. The Majority's use of the six strategic objectives of the RS political leadership as a basis to find criminal intent on the part of the perpetrators is error.[366] There is no evidence of the strategic objectives being adopted by VRS, or by any specific military officers responsible for the geographical area including Sarajevo. The Majority engages in no other discussion of the perpetrators' state of mind. The Majority shifts its analysis to Perišić's purported knowledge of the campaign and fails to return to Perišić's knowledge of the state of mind of the perpetrators.

297. The Majority finding that Perišić could not have "reasonably discounted" information in the public domain because he considered it biased against Serbs is misplaced.[367] First, as conceded by the Majority, the VJ placed little weight on news reports and similar information available in the public domain when compared to military intelligence.[368] Second, the information in the public domain was often no more than allegations.[369] Here, the differences between 7(1) and 7(3) liability must be emphasised. Unlike 7(3) responsibility, Perišić had no obligation under 7(1) to investigate any allegations.[370] Thus, it was objectively reasonable for Perišić to discount any allegations in the public domain (that he was in fact aware of) if that information was not verified by his own intelligence sources.

298. The premise upon which the Majority predicates Perišić's purported knowledge of past and future crimes is an error and must be overturned.

III. The Majority erred in finding Perišić had knowledge that any assistance provided would facilitate the commission of crimes in Sarajevo

299. The Majority holds that notwithstanding Perišić's knowledge, he continued to "provide significant assistance" to the VRS until the end of the siege.[371] Perišić notes that the

[366] Dissent, para.8; Judgement, para.1633.
[367] Judgement, para.1635.
[368] Judgement, para.1398.
[369] Judgement, paras.1449, 1456, 1485, 1521, 1635.
[370] Dissent, paras.37-40, 83.
[371] Judgement, para.1632.

amount of assistance, significant or otherwise, is not the appropriate standard for *mens rea*. Instead, the appropriate standard is whether Perišić knew that any assistance provided would assist the commission of the specific crime of the principal perpetrator.[372]

300. There is no evidence demonstrating how the logistical assistance provided was distributed from the VRS depots to corps or from corps to individual units. The VRS was a large army with six corps,[373] spread out over the entirety of Bosnia and Herzegovina, and with logistical depots serving the entire army.[374] How and when any logistical assistance would be used was unknown. It cannot be presumed that Perišić knew the logistical assistance provided would be used in the commission of crimes.

301. Perišić recognises that the law *does not* require specific perpetrators of crimes to be identified for liability to arise under aiding and abetting.[375] Greater specificity is required, however, than the "VRS" as a whole, to which the Majority refers.[376] While the specific individuals do not have to be named, more specificity is required than simply naming an entire army, especially in this unique circumstance where Perišić is physically removed from the location of the crimes.

302. Collectively, the errors demonstrate that the Majority failed to make findings on even the most basic details about the alleged crimes and Perišić's *mens rea*. In fact, the Majority failed to make *any* findings that would objectively demonstrate that Perišić knew the assistance he provided assisted the commission of the Scheduled Incidents, or any other crimes in Sarajevo. Especially in the context of "allegations", no reasonable Trial Chamber would have reached the conclusions reached by the Majority on the basis of so little information.

303. The law *does require* contemporaneous *actus reus* and *mens rea* for aiding and abetting.[377] The Majority failed to make any findings that Perišić *knew at the time* he

[372] Judgement, para.129; *citing Seromba*-AJ, para.56; *Blagojević*-AJ, para.127; *Ntagerura*-AJ, para.370; *Simić*-AJ, para.86; *Blaškić*-AJ, paras.45-46; *Vasiljević*-AJ, para.102.
[373] Defence Adjudicated Fact 74; Defence Proposed Agreed Fact 100.
[374] P75, p.3.
[375] *Milutinović*-TJ, Vol. 1, para.92; *citing Brđanin*-TJ, para.273; *Stakić*-TJ, para.533.
[376] Judgement, para.1632.
[377] *Blagojević*-TJ, para.728; *Blagojević*-AJ, para.295.

provided assistance that it would facilitate the commission of crimes. The Majority failed to make any correlation in this regard at all.

304. In the absence of any evidence regarding what assistance Perišić actually provided, there cannot be a finding that Perišić knew such assistance would facilitate the commission of crimes. As conceded by the Majority, there is no evidence that any of the bullets, shells, or mortars recovered from the Scheduled Incident crime scenes or specific weapons used to commit the crimes in Sarajevo originated from the "logistical assistance process" overseen by Perišić.[378]

305. Thus, the Majority erred by finding that Perišić had the requisite *mens rea* for Sarajevo. The Judgment is devoid of any finding that Perišić knew that any assistance provided—at the time he provided it—would facilitate the commission of any of the Scheduled Incidents—or any crimes, for that matter.

IV. Relief sought

306. Perišić respectfully requests the Appeals Chamber to consider the above evidence and arguments as to weight and reverse his convictions for Counts 1-4.

[378] Judgement, para.1624. *See*, Ground 5, paras.126-127.

12th Ground of Appeal

I. Introduction

307. The Majority erred in fact when it found that Perišić knew that his conduct assisted the crimes committed in Srebrenica, invalidating the judgement for Counts 9-12.[379]

II. The Majority erred by making no specific findings regarding Perišić's mens rea for Srebrenica

308. The law requires the *actus reus* and *mens rea* of aiding and abetting to be contemporaneous.[380] Even if Perišić knew of crimes in Srebrenica by the 13th of July, there is no contemporaneousness of *actus reus* and *mens rea*. No evidence was presented that Perišić provided any assistance after that date with the awareness that it would facilitate the commission of crimes in Srebrenica.

309. The Majority fails to specify what "substantial assistance" it finds that Perišić provided "prior to and during the period crimes were committed in Srebrenica."[381] Like the Sarajevo analysis, the Majority's Srebrenica analysis is devoid of a discussion of any details regarding Perišić's assistance, the recipients of any assistance, when the assistance was provided or received, how the assistance was distributed, or how Perišić was supposed to know that any assistance would be used for crimes in Srebrenica. Certain findings are made in the section "Findings on Objective Elements of Aiding and Abetting", but the findings are generic to the VRS and not specific to Srebrenica.[382]

310. This is particularly important as the Majority has noted that there is no evidence that any of the bullets recovered from the Srebrenica crime scenes came from Perišić[383] or that any of the specific weapons used to commit the crimes in Srebrenica originated from the "logistical assistance process" overseen by Perišić.[384] In the absence of any evidence

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379 Judgement, para.1648; *see also* paras.1637-1638.
380 *Blagojević*-TJ, para.728; *Blagojević*-AJ, para.295.
381 Judgement, para.1637; *see also,* paras.1638, 1648.
382 *See eg*., paras.1595, 1602.
383 *See*, Grounds 5 and 6, paras.128-130.
384 Judgement, para.1624.

regarding what assistance Perišić actually provided, there cannot be a finding that Perišić was aware that such assistance would facilitate the commission of crimes.

311. Instead, the Majority makes the generalized finding that Perišić provided assistance to the "VRS" prior to and during the time crimes were committed in Srebrenica,[385] without any specificity. It is inconceivable that a finding of this magnitude be devoid of any analysis or detail.

312. The Majority's finding that Perišić continued to provide substantial assistance "*during* the period crimes were committed in Srebrenica" was also error.[386] There is no evidence to support this finding. The Majority does not specify what assistance was provided "during" the period crimes were committed. Nothing in the Majority's discussion of assistance provided was done so in that time period.[387]

313. Thus, the Majority erred in finding that Perišić had the requisite *mens rea* for aiding and abetting crimes in Srebrenica. The Majority error should be overturned.

III. Relief sought

314. Perišić respectfully requests the Appeals Chamber to to consider the above evidence and arguments as to weight and reverse his convictions for Counts 9-12.

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[385] Judgement, para.1637.
[386] *Ibid*. [emphasis added].
[387] *See*, Grounds 5 and 6, *supra*.

13th Ground of Appeal

I. Introduction

315. The Majority erred in fact and in law when finding that "a superior-subordinate relationship between Perišić and the perpetrators of the crimes related to the shelling of Zagreb existed at the time of their commission".[388]

316. No reasonable trier of fact, having assessed the totality of the evidence on the record could have made this finding. The Majority's error occasioned a miscarriage of justice in respect of Counts 5-8.

317. Significantly, Judge Moloto dissented, finding that "the Prosecution failed to adduce sufficient evidence to prove that Perišić had effective control over members of the 40th PC who perpetrated the crimes charged in Counts 5-8 of the Indictment."[389]

II. Overview

318. The Majority failed to consider the most important indicator of effective control in the circumstances of this case – whether Perišić and the perpetrators of the crimes related to the shelling of Zagreb acted pursuant to a mutual acceptance that they were in a superior-subordinate relationship. More importantly, in assessing the indicators it considered to be relevant,[390] the Majority failed to consider whether, and in what manner, the presence of these indicators did or did not provide Perišić with the ability to control the acts of the perpetrators of this crime.

319. Perišić did not exercise command over members of the 40th PC and the Majority erred when finding that "Perišić was *de jure* superior of the 40th PC members who held all the key commanding positions in the SVK.[391] The *de jure powers* Perišić could exercise over the 40th PC members were restricted to administrative matters and subject to limitations.

[388] Judgement, paras.1784, 1769.
[389] Dissent, paras.116, 86.
[390] Judgement, para.1672.
[391] Judgement, para.1757.

These powers did not allow Perišić to control the acts of 40th PC members and he had no effective control over them.

320. Perišić did not have the material ability to punish the perpetrators of the crimes related to the shelling of Zagreb at the time of their commission. Moreover, the actions taken by Perišić to "initiate disciplinary proceedings against key military officers serving in the SVK through the 40th PC"[392] *carry no weight* in determining whether Perišić exercised effective control over 40th PC members at the time of the shelling of Zagreb.

321. At the time of the Zagreb shelling, Perišić neither had the power *nor* the ability to issue command orders which would be obeyed by the 40th PC members serving in the SVK. He thus did not possess the *ability to control their acts*. Furthermore, on the basis of the evidence presented at trial, no reasonable trier of fact could have come to the conclusion that parallel chains of command existed, let alone that "the system of command and control of the SVK *was bifurcated in two chains of command*: one controlled by Milan Martić as Supreme Commander of the SVK and the other by Perišić and other members of the FRY leadership, including Milošević".[393]

322. The Prosecution conceded that Perišić did not have the material ability to prevent the 40th PC members from committing crimes. The Majority failed to address this significant argument raised by the Defence at trial.[394]

III. Argument

A. Perišić did not act as though he was the superior of 40th PC members serving in the SVK who in turn did not act as if they were his subordinates

323. In determining that Perišić exercised effective control over the perpetrators of the crimes related to the shelling of Zagreb in May 1995, the Majority neither considered whether Perišić acted as though he was the superior of 40th PC members serving in the SVK – having the authority to control their acts – *nor* whether those members in turn acted as

[392] Judgement, para.1758.
[393] Judgement, para.1763 [emphasis added].
[394] Closing Arguments, T.14864.

though they were Perišić's subordinates by *inter alia*, executing his orders. As expressed by Judge Moloto,[395] this is a most important indicator, which the Majority should have considered.

324. In the unique circumstances of this case involving distinct States, Governments, legal structures and armies – each having its own laws, regulations and chain of command – whether Perišić *acted as if he had the authority to control the actions* of the 40th PC members serving in the SVK and whether the latter executed his orders and *acted as if they were his subordinates* is a most relevant indicator as to whether a superior-subordinate relationship existed between them.[396]

325. President Martić, in his capacity as Supreme Commander of the SVK, ordered the shelling of Zagreb.[397] Perišić was opposed to this shelling.[398] Had Perišić possessed the authority to control the actions of Čeleketić and to order him to put an end to the shelling of Zagreb, he would have done so at the first opportunity; he did not order Čeleketić to put an end to this shelling.

326. [REDACTED][399] This is certainly not the type of relationship which triggers a superior's responsibility for the conduct of a subordinate.

327. Had the Majority considered this most important indicator, it could not have determined beyond a reasonable doubt[400] that Perišić exercised effective control over the 40th PC members serving in the SVK.

B. The Majority failed to consider the result of effective control indicators on Perišić's ability to control the acts of 40th PC members serving in the SVK

328. The doctrine of command responsibility is "ultimately predicated on the power of the superior to control the acts of his subordinates". [401] This is what triggers the superior's

[395] Dissent, paras.87, 107.
[396] Bourgon, Stéphane, La doctrine de la responsabilité du commandement et la notion de subordination devant le tribunal pénal international pour l'ex-Yougoslavie', *Revue québécoise de droit international* (Montréal), Hors-série: Hommage à Katia Boustany (2007), pp.95-117.
[397] MP-080, T.8442-8443 [closed session]; Zagreb Adjudicated Facts, 60.
[398] Judgement, para.1763. *See also,* P1297, P1286.
[399] [REDACTED]
[400] Dissent, para.87.

duty to act to prevent his subordinates from committing crimes or to punish them if they do.[402]

329. A superior-subordinate relationship can only exist if a superior possesses the ability to control the acts of his subordinates. This ability is referred to as the superior's exercise of effective control over his subordinates.[403]

330. Whether a superior exercises effective control over alleged subordinates, which has been defined as the material ability to prevent or punish,[404] must be analyzed through a prism of control over the acts of his alleged subordinates.[405]

331. As further explored below, the Majority erred when weighing the different indicators it considered relevant to determine whether Perišić exercised effective control over the perpetrators of the shelling of Zagreb.[406] The Majority failed to assess the relationship between the indicators and their effect on the ability of Perišić to control the acts of the 40th PC members serving in the SVK.[407]

332. Having properly assessed the indicators on the ability of Perišić to control the acts of 40th PC members, no reasonable trier of fact could have determined that Perišić exercised effective control over the perpetrators of the crimes at the time of the shelling of Zagreb.

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[401] *Čelebići*-AJ, para.197 [emphasis added].
[402] ICRC Commentary on Additional Protocol I ("AP I"); "the qualification of superior is not a purely theoretical concept covering any superior in the line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control." (para.3544). *See also,* para.3560.
[403] *Halilović*-AJ, para.59.
[404] *Čelebići*-AJ, para.196; *see also,* ICRC Commentary on AP I, para.3543(a).
[405] See *Orić*-AJ, para.20; *Čelebići*-AJ, para.197
[406] Judgement, para.1762.
[407] For example, having found that he had the "general ability to issue orders" (Judgement, para.1763), "the ability to initiate discipline" (para.1760), ability to "make independent recommendations in relation to the verification of promotions" (Judgement, para.1768), had the ability to "terminate the professional contracts of the VJ soldiers" (Judgement, para.1768) and that he was "directly involved in determining the funds needed for the payment of salaries" (Judgement, para.1739), the Majority did not examine the effect of these indicators as to whether Perišić possessed the ability to control the acts of the 40th PC members serving in the SVK.

1. Perišić was not the de jure superior of the 40th PC members serving in the SVK

333. The Majority erred when finding that "Perišić was the *de jure* superior of the 40th PC members who held all the key commanding positions in the SVK".[408]

334. The Law on VJ defines the term *superior* as an individual who "pursuant to this law and other regulations of the competent organ, *commands a military unit or military institution, or individuals* serving in a military unit or military institution".[409]

335. Perišić did not exercise command over the former JNA members who were already serving with the SVK in Croatia before their status as members of the 40th PC was formalised. Perišić was thus never their *de jure* superior.

336. As for the members the VJ who were transferred to the 40th PC, Perišić exercised command over them before their transfer[410] but did not retain his *de jure* power to exercise command over after their transfer to serve in a distinct chain of command, within a different army, belonging to another State.[411]

337. From the moment officers became 40th PC members, they were integrated in the SVK, they were under the command and control of the Commander of the SVK[412] and Perišić was not the *de jure* superior. While Perišić remained a 'senior' vis-à-vis 40th PC members,[413] the sole *de jure* powers he could exercise over them were limited to administrative matters.[414] Perišić and/or the VJ personnel administration neither had the power *nor* the ability to punish 40th PC members serving in the SVK,[415] at least until such time as they had rejoined the VJ.[416]

338. Moreover, even Perišić's administrative authority was circumscribed. For example, during the discussions concerning the creation of the 40th PC, the SDC forbid Perišić to

[408] Judgement, para.1757.
[409] P197, art.10 [emphasis added].
[410] P197, art.6.
[411] P734, para.7.
[412] Dissent, para.87; *see also*, Judgement, para.1720; Orlić, T.5740, T.5762-5762; Rašeta, T.5969.
[413] P197, art.10.
[414] P 734, P197.
[415] P1082.
[416] Rašeta, T.5924.

impose disciplinary measures against VJ members who refused to be transferred to the 40th PC.[417] Perišić could not order 40th PC members serving in the SVK to transfer back to the VJ without approval from the SVK command.[418] Perišić could not assign officers to specific posts in the SVK.[419]

339. Perišić could not promote 40th PC members unless they were first promoted in the SVK[420] and his power of verification over promotions awarded within the SVK[421] did not provide him with the ability to control their acts while serving in the SVK. Bearing in mind the salary implications, Perišić might have been able to exert some influence over 40th PC members waiting for verification of their promotions but certainly not to control their acts. [REDACTED][422]

340. Obviously, the *de jure* powers which Perišić and/or VJ personnel administration could exercise in relation to 40th PC members did not allow Perišić to control their acts while serving in the SVK.

2. Perišić did not have the ability to initiate disciplinary and/or criminal proceedings against the perpetrators of the crimes related to the shelling of Zagreb at the time of their commission

341. The Majority erred when finding that "the evidence demonstrating that Perišić had the ability to initiate disciplinary and/or criminal proceedings against members of the 40th PC *strongly militates in favour of effective control*".[423]

342. At the time the shelling of Zagreb, Perišić *did not* have the material ability to punish officers serving in the SVK through the 40th PC.

343. The Majority confirmed that Perišić did not initiate any disciplinary measures against 40th PC members until after the fall of the RSK.[424] Nonetheless, the Majority went on to infer, on the basis of three findings, that Perišić did have the ability to initiate disciplinary

[417] Judgement, para.767.
[418] Judgement, para.830.
[419] Dissent, paras.114-115.
[420] Judgement, para.841.
[421] Judgement, paras.843, 847.
[422] [REDACTED]
[423] Judgement para.1760 [emphasis added].
[424] Judgement, para.1759.

and/or criminal proceedings against members of the 40th PC at the time of the shelling of Zagreb.

344. Firstly, the Majority found "that the fact that Perišić used his ability to punish members of the 40th PC only after the fall of the RSK in November 1995 does not raise a reasonable doubt as to his ability to punish members of the 40th PC before that".[425]

345. This finding is faulty and fails to take into account that when Perišić took those measures, the SVK had ceased to exist and the members of the 40th PC were no longer under the command and control of Čeleketić (until 18 May 1995)[426] or Mrkšić (who was appointed by the RSK Assembly on 18 May 1995),[427] in their capacity as SVK Commanders.

346. The measures initiated by Perišić at that time were thus the direct result of the fall of the RSK and of the new command and control relationships which existed at that time. They carry no weight in determining whether Perišić could initiate disciplinary measures against 40th PC members at the time of the shelling of Zagreb.

347. Secondly, the Majority's finding[428] that the absence of measures taken by Perišić at the time of the shelling of Zagreb is due to the existing relationship between the VJ and the SVK and VRS – which was characterized by overlapping goals – and the fact that Perišić only needed to make use of his authority when the VJ's military objectives diverged with those of the other two armies, is not supported by the evidence. As illustrated *inter alia* by the intercepted telephone conversations between Milošević and Perišić,[429] there is another compelling conclusion, which is that during the shelling of Zagreb, the VJ's objectives and strategy plainly diverged with those of the SVK and Perišić did not initiate any measures because he did not have the authority to do so.

[425] *Ibid*.
[426] Čeleketić's resignation of 17 May 1995 (P1975) was approved by the Assembly on 18 May 1995 (Judgement, para.297).
[427] P1916.
[428] Judgement, para.1759.
[429] P1276, p.1-2; P1297, p.1; P1389; P1321, pp.2-3; P1286, p.3.

348. Thirdly, the Majority held that disciplinary and/or criminal proceedings were not pursued by Perišić due to the SDC policy of keeping the VJ's involvement in the war in Croatia secret, which did not call into question his ability to do so.[430]

349. Contrary to the Majority's finding, even if Perišić had the ability to initiate disciplinary or criminal measures against 40th PC members at the time of the shelling of Zagreb, the SDC's policy of secrecy[431] was a national imperative – as publicizing the VJ's involvement in the SVK would have had catastrophic consequences for the FRY[432] – that would have been a limitation on Perišić's ability to take measures.

350. Moreover, the Majority's finding addresses the situation after the fall of the RSK. As such, for the reasons given above,[433] it carries no weight in determining whether Perišić had the ability to punish 40th PC members at the time of the shelling of Zagreb.

351. Lastly, an equally compelling conclusion is that Perišić did not take measures against 40th PC members at the time of the shelling of Zagreb because he did not have the material ability to do so.[434]

352. Furthermore, no reasonable trier of fact could have found, beyond reasonable doubt, that Perišić had the material ability to initiate measures to punish members of the 40th PC at the time of the shelling of Zagreb,[435] considering:

a. the absence of evidence that Perišić used his ability to initiate measures to punish 40th PC members before the fall of the RSK;[436]

b. that the General Working Principles of Special Personnel Centres, confirm that the *de jure* powers which could be exercised by Perišić and/or the VJ Personnel

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[430] Judgement, para.1758.
[431] Judgement, para.1758.
[432] Dissent, para.109.
[433] *See*, paras.344-346, *supra*.
[434] Dissent, para.109.
[435] Starčević agreed with the proposition that Perišić's note to investigate and file criminal reports against the three officers reported by Lončar as being absent without authority "was generally within the competence of the Chief of the VJ General Staff" (Starčević, T.6825-6827; P2416) does not affect this conclusion as this event took place after the fall of the RSK (Judgement, para.1676).
[436] Judgement, para.1759.

Administration was limited to administrative matters[437] and did not include disciplinary powers;

c. that upon being transferred to the 40th PC, members of the VJ were fully integrated in the SVK, acting solely within its chain of command, and under the operational command and control of Čeleketić;[438]

d. the testimony of Rade Rašeta, who confirmed that while Perišić had the authority to initiate disciplinary proceedings against 40th PC members serving in the SVK, he could only do so upon their return to the army of the Federal Republic of Yugoslavia;[439] and

e. that Exhibit P1082 confirms that the 40th PC was not authorized to institute any criminal or disciplinary proceedings against their personnel.

353. It follows that Perišić did not have the material ability to punish 40th PC members at the time of the shelling of Zagreb, which further illustrates that Perišić did not exercise effective control over the perpetrators of the crimes related to the shelling of Zagreb.

3. At the time of the shelling of Zagreb, Perišić neither had the power nor the ability to issue binding orders to 40th PC members serving in the SVK

354. The Majority found that: (i) Perišić occasionally provided instructions and other military directives to 40th PC – including orders typical of a vertical military relationship as well as requests and pleadings typical of a horizontal relationship;[440]and that (ii) Perišić issued certain command orders, albeit rarely, which were complied with by the SVK.[441] On this basis, the Majority concluded that Perišić had a "*general ability to issue orders*".[442]

355. Having properly assessed the totality of the evidence on the record, no trier of fact could have reached this finding.

356. Firstly, contrary to the Majority's reasoning, the paucity of orders allegedly issued by Perišić to 40th PC members serving in the SVK *does* cast doubt on his general ability to exercise command and control over the SVK as well as on his general ability to issue

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[437] P734.
[438] Judgement para.1720; Rašeta, T.5969; Orlić, T.5762; MP-080, T.8454 [closed session].
[439] Rašeta T.5924. *See also*, Judgement, para.830.
[440] Judgement, para.1761.
[441] Judgement, para.1763.
[442] *Ibid*.

orders. The Majority's inferences that Perišić was usually not expected to interfere in the command at the operational level – because he held the highest military position in the VJ – and that there was no need for him to issue orders – where the objectives of the VJ coincided with those of the SVK[443] – are not the only reasons which would justify the fact that he rarely issued orders. Another possible conclusion based on the evidence is that Perišić did not issue binding orders to 40th PC members serving in the SVK because he did not have the authority to do so.

357. Moreover, the fact that the very few orders and instructions allegedly issued by Perišić were not always complied with, clearly undermines the Majority's findings concerning Perišić's general ability to issue orders and ability to exercise command and control over the SVK. The only two orders – put forward by the Prosecution and considered by the Majority – which would have been issued by Perišić before 2 May 1995 also undermine these findings.

358. P1800, dated 7 December 1994, is plainly "an order sent directly from Milošević and [...] Perišić was only instrumental in passing it along."[444] It does not have the characteristics of an order given within a chain of command.

359. Moreover considering that: (i) Martić was not a 40th PC member and Perišić could neither issue an order to someone not in his chain of command nor to the President of the RSK; (ii) the alleged order was written on the authority of Milošević; (iii) Čeleketić addressed his response to Milošević; and (iv) the context of the document is a promise made by Martić in relation to co-operation with UNPROFOR, it is of no assistance in showing that Perišić had a general ability to issue orders at the time of the shelling of Zagreb.

360. P1925, dated 24 March, is clearly not a command order.[445] Significantly only one officer mentioned in the document served in the SVK Main Staff through the 40th PC at that time. Moreover there is no addressee on the document. The purpose of the document was to co-ordinate the assistance provided by the VJ to the 40th PC and SVK Main Staff.

[443] Judgement, para.1762.
[444] Dissent, para.90.
[445] Dissent, para.94.

Lastly, the record does not demonstrate that P1925 was complied with. Accordingly, it is of no assistance in showing that Perišić had the general ability to issue orders before the shelling of Zagreb.

361. While the Majority examined additional documents sent by the VJ General Staff to the SVK Main Staff before 2 May 1995, these documents do not show that Perišić had the "general ability" to issue orders before that time. In P2177 (11 May 1994) and P1138 (19 January 1995), the word '*please*' is used which according to Starčević, allows for the inference that there is no superior-subordinate relationship between the sender and the receiver.[446] As for P1621(11 August 1994), in which the more ambiguous expression 'is required' is used, it merely constitutes an exchange of information concerning cooperation between the SVK 11th Corps and the VJ Novi Sad Corps related to a possible sabotage infiltration via the Danube river. No order is issued to the SVK by virtue of this document.

362. Orlić,[447] Rašeta,[448] and [REDACTED][449] confirmed that no orders were given by Perišić and/or the VJ to the SVK. Their testimony militates in favour of the inference that Perišić did not have the ability to issue command orders. As for the co-ordination meetings, which were considered by the Majority, [REDACTED][450] during these meetings Perišić did not assign tasks, take decisions or issue orders along classical military lines, as there were no relations of authority between the VJ and the SVK.[451]

363. When this evidence is considered in the context of Čeleketić's refusal to put an end to the shelling of Zagreb when contacted by Perišić about this matter[452] – the only reasonable conclusion is that at the time of the shelling of Zagreb, Perišić did not have the ability to issue orders to 40th PC members serving in the SVK. This implies that he could not control their acts.

[446] Starčević, T.7027.
[447] Orlić, T.5740, 5762-5763.
[448] Rašeta, T.5969.
[449] [REDACTED]
[450] [REDACTED]
[451] Judgement, Confidential Annex C, para.11.
[452] *Supra*, para.325.

364. Regarding the period after the shelling of Zagreb, the Majority erred by relying on orders allegedly issued by Perišić to Mrkšić – after the latter's appointment as SVK commander – to infer that Perišić could also issue orders to Čeleketić at the time of the shelling of Zagreb. [453] Whether there was a systemic change between the two periods might be relevant for assessing a *de jure* command relationship but certainly not for assessing a *de facto* command relationship such as that advanced by the Majority. This is where the additional indicator of effective control considered by Judge Moloto is particularly important.[454]

365. There are no examples on the record of command orders issued by Perišić to Mrkšić that were obeyed. While MP-080 testified that Perišić issued orders to Mrkšić, he also confirmed that Perišić did not issue orders to Čeleketić.[455] His testimony highlights the important change in circumstances between their respective tenures as commanders, which in turn shows that the Majority's inference above *is not* the only reasonable conclusion which can be drawn from the evidence.

366. [REDACTED][456] the complaint is not supported by the evidence, which makes it clear that until the fall of the RSK in August 1995, Martić exercised command and control over the SVK, through the SVK Commander.

367. As for the Majority's reliance on an intercepted conversation between Perišić and Milošević[457] – during which Milošević said: "Request contact with Mrkšić only and he should not take any orders from Martić" to which Perišić replied: "He hasn't been taking any for a long time" – is misplaced. This intercept illustrates Milošević's and Perišić's efforts to influence various key persons from the SVK and the VRS, including *inter alia*, Mladić, Lončar, Karadzić and Mrkšić during the period following the shelling of Zagreb. While the focus of their interventions appears to have been their concern about the actions and the position taken by Martić at the time – who they describe as having "lost

[453] Judgement, para.1764, *see also*, para.1730.
[454] Dissent, para.107.
[455] MP-080, T.8454 [closed session].
[456] [REDACTED]; P1340.
[457] P1340.

his mind"[458] – it does not show that Perišić could or did issue orders to Mrkšić. The ability to exercise influence, even significant influence, is not sufficient to establish effective control.[459]

368. The Majority examined a number of documents related to this period – P1456 (10 July 1995), P2146 (11 July 1995), P1777 (16 September 1995) and P2707 (1 November 1995) – but failed to observe that (i) none were command orders; (ii) all were related to personnel and/or administrative matters; and (iii) none illustrate an attempt by Perišić to control the acts of 40th PC members serving in the SVK.

369. P1461 (6 August 1995) is an intercepted conversation in which Perišić appears to be issuing a command order to an officer within the SVK 11th Corps for onward transmission to its Commander, Lončar. While the Majority did not draw any conclusion on the basis of this document, it erred by failing to consider: (i) the context in which this conversation took place, *i.e.* the Croatian offensive against the RSK; (ii) the fact that it noticeably stands out from any other intercepted conversation involving Perišić; (iii) the absence of evidence as to whether Lončar ever received the message; and more importantly (iv) the absence of evidence as to whether it was actually obeyed.[460] For these reasons this intercept between Perišić and Lončar is of no assistance in showing that Perišić had the general ability to issue orders.

370. Finally, the evidence regarding Čeleketić's refusal to put an end to the shelling of Zagreb when contacted by Perišić, who attempted to influence his decision to cease the shelling, establishes that at the time, Perišić did not have the ability to issue orders to the perpetrators of the shelling of Zagreb, which would be obeyed.[461] If Perišić had the authority to issue a binding order to Čeleketić at the time, it is evident based on the intercept evidence on the record that he would have ordered Čeleketić to stop.[462]

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[458] P1340, p.2.
[459] *Čelebići*-AJ, para.266.
[460] Dissent, para.104.
[461] P1314.
[462] *Ibid*.

371. In light of the above, no reasonable trier of fact could have found that Perišić had the ability to issue binding orders to the perpetrators of the crimes related to the shelling of Zagreb at the time of their commission. Perišić could certainly not issue orders to members of the Orkan crew who reported directly to Martić and Celeketić, who were the only ones to know about the location of the Orkan MBRL and "the only ones who could decide about the use of the Orkan".[463] If Perišić could not issue binding orders to the 40th PC members, he certainly could not control their acts, and therefore could not exercise effective control over them.

4. The system of command and control of the SVK was not bifurcated in two chains of command

372. The Majority erred when finding that "the system of command and control of the SVK was bifurcated in two chains of command: one controlled by Milan Martić as Supreme Commander of the SVK and the other by Perišić and other members of the FRY leadership, including Milošević". Having properly assessed the totality of the evidence presented at trial, no reasonable trier of fact could have reached this conclusion.

373. The VJ and SVK were distinct armies belonging to different States, each having its own laws and regulations. The SVK operated "under the principle of unity or singleness of command".[464] The SVK had its own chain of command and Perišić was not part of it despite the presence in the SVK of a number of 40th PC members. Perišić was not the *de jure* superior of the 40th PC members serving in the SVK.[465]

374. As demonstrated, Perišić did not have the ability to issue orders to members of the 40th PC serving in the SVK that would be obeyed.[466] This of itself eliminates the possibility that parallel chains of command existed at the time.

375. As noted by Judge Moloto in his Dissent,[467] the existence of parallel chains of command indicates a lack of effective control. Indeed, pursuant to the situation described by the

[463] Rašeta, T.6006.
[464] Judgement, para.296.
[465] *Supra*, para.335.
[466] *Supra*, paras.333-340.
[467] Dissent, para.92.

Majority – which allows for the possibility that Čeleketić could be presented with two conflicting orders and has the ability to *choose* which order he complies with – neither Martić nor Perišić could be said to exercise effective control over Čeleketić.

376. [REDACTED][468] More importantly, MP-080 testified that Čeleketić's superior was Martić, and that Čeleketić was bound to obey and did obey the orders issued by Martić. On this basis, no parallel chains of command could have existed.[469]

5. By withdrawing the charge that Perišić failed to prevent 40th PC members from shelling Zagreb, the Prosecution conceded that Perišić did not exercise effective control over them

377. Perišić was initially charged pursuant to Article 7(3) for, *inter alia*, for failure to prevent and/or failure to punish the perpetrators of the crimes related to the shelling of Zagreb.

378. At the very end of trial, during oral arguments, the Prosecution withdrew the 'failure to prevent' charge for the shelling of Zagreb.[470]

379. Perišić respectfully submits that by withdrawing the failure to prevent charge, the Prosecution conceded that Perišić did not exercise effective control over the perpetrators of the shelling of Zagreb in the sense of having the material ability to prevent.

380. The only conclusion that can be drawn from the Prosecution's withdrawal of the failure to prevent charge is that Perišić did not have the material ability to prevent 40th PC members from committing the crimes related to the shelling of Zagreb at the time of their commission.

381. Consequently, based on the circumstances of this case, Perišić could not control the acts of the 40th PC members serving in the SVK and thus did not exercise effective control over them.

382. Having noted the withdrawal of the failure to prevent charge, the Majority erred by failing to consider this argument as raised by the Defence at trial.

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[468] [REDACTED].
[469] [REDACTED].
[470] Closing Arguments, T.14637.

IV. Relief sought

383. In light of the above arguments, Perišić respectfully submits that no reasonable trier of fact, having assessed the totality of the evidence on the record, could have concluded that a superior-subordinate relationship existed between him and the perpetrators of the shelling of Zagreb at the time it took place.

384. Thus, Perišić respectfully requests the Appeals Chamber to overturn the conviction entered by the Majority and to return a finding of NOT GUILTY for Counts 5-8 of the Indictment.

14th Ground of Appeal

I. Introduction

385. The Majority committed a discernible error by abusing its sentencing discretion and imposing a manifestly unreasonable and excessive sentence of 27 years' imprisonment on Perišić.

386. On the basis of the findings in the Judgement and the underlying record, the Majority ventured outside of its discretionary framework. This ground of appeal need not be considered in light of the other grounds of appeal raised by Perišić. As such, it stands alone regardless of the outcome of Perišić's 1st to 13th and 15th to 17th Grounds of Appeal, briefed herein. As a result of the Majority's abuse of its sentencing discretion, Perišić respectfully requests the Appeals Chamber to quash the sentence imposed by the Majority and to impose a new and much lower sentence.

387. In addition to the Majority's discernible errors addressed in Grounds 15, 16 and 17, the Majority erroneously assessed the gravity of Perišić's conduct. This discernible error had a significant effect on the determination of the sentence imposed.

388. More specifically, the Majority failed to adequately consider the particular circumstances of the case as well as the form and degree of Perišić's participation in the crimes committed in Sarajevo and in Srebrenica.

389. The Majority also committed a discernible error in relation to its assessment of Perišić's own conduct in failing to punish the perpetrators of the shelling of Zagreb on 2 and 3 May 1995.

390. Having properly assessed Perišić's conduct as a whole, no reasonable trier of fact could have imposed a sentence of 27 years' imprisonment, which is plainly excessive and unreasonable in the circumstances of this case.

II. The Majority Erred in Its Assessment of the Gravity of the Crimes Committed in Sarajevo and Srebrenica

391. The gravity of the crimes committed is the prime consideration in determining the appropriate sentence to be imposed on a convicted person. However, this assessment does not refer to the 'objective' gravity of the crimes but rather to the "particular circumstances surrounding the case and the form and degree of the accused's participation in the crime".[471]

392. Whereas the crimes committed in Sarajevo and Srebrenica are of a very grave nature, the form and degree of Perišić's participation in these crimes was both remote and curtailed by the circumstances.

393. When addressing the "Gravity of the Crimes and the Role of the Accused",[472] the Majority focused on the description and consequences of the crimes committed in Sarajevo and Srebrenica, leaving entirely aside the form and degree of Perišić's participation in these crimes.[473]

394. While the Majority held that Perišić had been found guilty of aiding and abetting the crimes committed in Sarajevo and Srebrenica,[474] it failed to consider Perišić's role in these events and the particular circumstances of this case. In fact, other than mentioning that these crimes happened during his tenure as Chief of the VJ General Staff,[475] the Majority made no findings – in relation to the gravity of the crimes – concerning Perišić's actual contribution and/or connection to these crimes.

395. Although Perišić was involved in the provision of 'practical assistance' to the VRS,[476] the logistical and personnel assistance was actually given by the FRY and not by an individual.[477] The decision to provide the assistance to the VRS was taken by the SDC

[471] *Mrkšić*-AJ, para.375
[472] Judgement, Section X.B.2.(a).
[473] Judgement, paras.1815-1822.
[474] Judgement, para.1815, 1820.
[475] Judgement, para.1816.
[476] Judgement, para.1595.
[477] Dissent, para.16.

and not by Perišić.[478] The SDC's decision to provide assistance to the VRS and the SDC's order to Perišić to organize the provision of such assistance were lawful.[479] Although Perišić participated in the meetings of the SDC,[480] he was not a member thereof.[481] Perišić did not have a vote and was only an advisor to the SDC.[482]

396. The SDC's objective in providing assistance to the VRS was to support the RS war effort, as well as to enable the VRS to wage war.[483] The SDC's assistance was not linked to or directed at the commission of any crimes in RS.[484] "Not even once was there a discussion among the participants [at SDC meetings] linking the provisions of logistical assistance to the VRS to the commission of crimes"[485] Moreover, when Perišić provided logistical assistance to the VRS pursuant to the authority he was given by the SDC.[486]

397. Although the "VRS depended heavily on the VJ's support to function as an army and conduct its operations",[487] it cannot be inferred on this basis that the logistical and personnel assistance provided to the VRS by the VJ was necessarily used by the VRS to commit crimes. In fact, the Majority found that it was not possible to determine if the weapons and ammunition used by the VRS to commit certain crimes could be traced back to the assistance provided by Perišić.[488]

398. Even if the VRS waged a "war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective",[489] it cannot be inferred on this basis that the VRS did nothing but commit crimes. There must have been legitimate warfare and other legitimate activities conducted by the VRS,[490] which depended on the same support provided by the VJ, as well as from other sources having no connection to Perišić. In these circumstances, it was not possible for Perišić to know with any degree of

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[478] Dissent, para.16.
[479] Judgement, paras.788, 1744, 1749, 1768, 1776.
[480] Judgement, para.220.
[481] Dissent, para.16.
[482] *Ibid.*
[483] *Supra*, para.61, fn.66.
[484] Dissent, para.17.
[485] *Ibid.*
[486] P1009.
[487] Judgement, para.1621.
[488] Judgement, para.1624; *See also*, Judgement, paras.1294, 1298, 1301 and 1302.
[489] Judgement, para.1621.
[490] Judgement, paras.1588, 1602.

precision what the assistance he provided to the VRS would be, or was in fact, used for on any particular day. The fact that Perišić was in a remote location from where the crimes were committed is also highly relevant.[491] The Majority's finding that Perišić did not exercise effective control over members of the 30th PC serving in the VRS[492] is very important in this regard. This confirms that Perišić was not involved in any way in the VRS decision-making as to what activities were conducted, how, where and when.

399. While the Majority found that Perišić knew that his conduct assisted in the commission of crimes in Sarajevo[493] and in Srebrenica,[494] these findings rest solely on the Majority's inferences that he knew that crimes were being committed and that other similar crimes would likely be committed in these locations.[495] The Majority made no findings on Perišić's knowledge[496] concerning the link between his assistance and the crimes committed.

400. The creation of the 30th PC by Perišić was unrelated to the commission of crimes by the VRS. To begin with, the creation of the 30th PC established the legal framework governing the presence of previous JNA members who were already present and fighting in RS before Perišić became Chief of Staff.[497] This was a necessity in response to the adoption of the new law in the VJ.[498] Moreover, the creation of the 30th PC was not aimed at concealing the commission of crimes.[499] The aim of the 30th and 40th PCs was twofold: to legalize the provision of personnel assistance to the VRS and SVK[500] by the FRY authorities and to conceal the VJ's involvement in RS and/or Croatia.[501] As noted by Judge Moloto, this was a national imperative "as publicising the VJ's involvement would have had catastrophic consequences for the FRY by way of international sanctions

[491] Dissent, para.3.
[492] Judgement, para.1778.
[493] Judgement, para.1636.
[494] Judgement, para.1648.
[495] Judgement, paras.1632, 1637.
[496] *See* Ground 8.
[497] Judgement, Section J.
[498] P709, 14th SDC Session, 11 Oct. 1993, p.32; P780, 15th SDC Session, 10 Nov. 1993, p.19.
[499] Judgement, para.762.
[500] *Ibid.*
[501] Judgement, para.778.

or even attack".[502] The involvement of Perišić in the creation of the two PCs was therefore not related to the commission of crimes and must not be considered as augmenting the gravity of the crimes. The fact that all but three individuals holding key positions in the VRS already held those positions before Perišić's appointment as Chief of the VJ General Staff also minimizes his involvement.[503] None of the three individuals who were transferred to the 30th PC later were found to have participated in crimes.[504]

401. The above circumstances were not considered by the Majority when assessing the gravity of the crimes. The Majority also failed to take into account the particular context in which Perišić found himself. As the Chief of Staff of the VJ, Perišić was ordered by the SDC to provide assistance to the army of a different State, the RS. Pursuant to the FRY policy of supporting the RS war effort and allowing the VRS to wage war, Perišić made available the assistance he was ordered to provide while being far away from the location where it was received and used. He had no say, involvement or control over the activities of the VRS.

402. Perišić's situation is truly unique. This is the only case before the Tribunal of a senior VJ officer found guilty for crimes committed by members of the VRS, a distinct army in a foreign country. Not only was Perišić located far away from where the crimes were committed, he did not exercise effective control over the VRS and had no say whatsoever in the manner in which the VRS conducted its military operations. Perišić did not participate in any way in the perpetration of crimes in Sarajevo or Srebrenica. Accordingly, Perišić was found guilty of aiding and abetting these crimes - a less severe mode of criminal responsibility - thus relieving the Prosecution from having to prove that Perišić intended the commission of these crimes. It was imperative for the Majority to fully consider the exceptional situation in which Perišić found himself.

403. In conclusion, the Majority's failure to give due consideration and to accord weight to its own findings concerning the particular circumstances surrounding the case and the form

[502] Dissent, para.109.
[503] Judgement, para.1605.
[504] *Supra*, para.142.

and degree of Perišić's participation in the crimes, vitiates its analysis of the gravity of the crime and constitutes an abuse of its discretion.

III. The Majority Erred in Its Assessment of the Gravity of the Crimes Committed in Zagreb

404. The Majority also committed a discernible error by abusing its discretion when assessing the gravity of Perišić's conviction pursuant to Article 7(3) of the Statute for the shelling of Zagreb.

405. The Appeals Chamber has held that "when assessing the gravity of a crime in the context of a conviction under Article 7(3) of the Statute, two matters must be taken into account: (1) the gravity of the underlying crime committed by the convicted person's subordinate; and (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crime".[505]

406. Whereas the crimes committed in Zagreb are of a grave nature, the gravity of Perišić's own conduct in failing to punish the perpetrators of the shelling of Zagreb is limited.

407. When addressing the "*Gravity of the Crimes and the Role of the Accused*", the Majority focused on the description and consequences of the crimes committed in Zagreb, leaving entirely aside Perišić's own conduct.[506]

408. The Majority stated that Perišić bears individual criminal responsibility for failing to punish his subordinates for the shelling of Zagreb[507] but failed to consider Perišić's role in these events and the particular circumstances of this case. In fact, the Majority made no findings – in relation to the gravity of the crimes – concerning Perišić's own conduct in failing to punish.[508]

[505] *Hadžihasanović*-AJ, para.303.
[506] Judgement, paras.1818-1819.
[507] Judgement, para.1818.
[508] Judgement, paras.1818-1819.

409. Firstly, the Majority ignored the fact that Perišić tried to prevent these crimes from being committed. Perišić was opposed to the shelling of Zagreb.[509] On more than one occasion, he tried to convince Čeleketić to put an immediate end to the shelling.[510] Even though Perišić was unsuccessful in doing so on 2 May 1995, the Prosecution withdrew the 'failure to prevent' charge.

410. Secondly, Perišić's ability to punish the perpetrators of the shelling of Zagreb was constrained by the SDC's policy of keeping the VJ's involvement in the war in Croatia secret.[511] This was a serious limitation.[512]

411. Thirdly, while the Majority found that Perišić did not take any meaningful attempts to punish the perpetrators of the shelling of Zagreb, Perišić did bring the matter to the attention of the SDC.[513]

412. Lastly, it was ultimately the decision of the SDC to terminate the professional contract of Čeleketić as a result of his conduct in connection with Operation Storm rather than to initiate disciplinary proceeding in relation to his participation in the shelling of Zagreb.[514]

413. The Majority failed to appropriately assess the gravity of the crime pursuant to the applicable criteria established by the Appeals Chamber. Having considered the above, no reasonable trier of fact could have attributed much weight to Perišić's failure to punish when determining his sentence.

IV. Relief sought

414. The Appeals Chamber has held that Chambers exercise a considerable amount of discretion in determining an appropriate sentence because of the over-riding obligation to

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[509] Judgement, para.1763; *See also,* P1297, P1286.
[510] *See inter alia*, P1297, P1314, P1284, MP-080, T.8444-8446 [closed session].
[511] Judgement, para.1758.
[512] Dissent, para.109.
[513] P2203.
[514] Judgement, paras.1680 and 1683; *see also*, Dissent, paras.110, 111.

individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. The Chamber's discretion is, however, not absolute.[515]

415. By failing to properly assess the gravity of the crimes for which Perišić was found guilty, the Majority failed to meet this over-riding obligation. It thus abused its sentencing discretion.

416. Consequently the Majority imposed a sentence which is manifestly unreasonable and excessive in the particular circumstances of this case.

417. The sentence imposed by the Majority must be quashed and replaced by a new and much lower sentence.

[515] *Čelebići*-AJ, para.717.

15th Ground of Appeal

I. Introduction

418. The Majority committed a discernible error by considering as aggravating circumstances, factors which were also considered in assessing the gravity of the crimes.

419. The Majority's discernible error must be corrected, the sentence imposed by the Majority quashed and a new and significantly lower sentence must be imposed.

II. Argument

420. The Appeals Chamber has held that "factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa".[516]

421. The Majority was aware of this jurisprudence, holding that "factors considered as aggravating the gravity of the crime cannot double as separate aggravating circumstances".[517] In the 'Aggravating Circumstances' section,[518] the Majority did not consider the vulnerability of the victims, noting that this factor was taken into consideration in evaluating the gravity of the offences.[519]

422. Nonetheless, in determining the sentence to be imposed on Perišić, no less than four factors were considered, *both* as factors going to the gravity of the crime *and* as aggravating circumstances.

423. Firstly, addressing the gravity of the crimes committed in Sarajevo, the Majority found that "the siege lasted for nearly four years…*a lengthy time span*."[520]

424. In the 'Aggravating Circumstances' section, the Majority then found that "*the lengthy time span* over which the crimes were committed are aggravating overall"[521], thereby

[516] *Deronjić*-SAJ, para.106.
[517] Judgement, para.1798.
[518] Judgement, Section X.B.2.(a)(iv).
[519] Judgement, para.1824.
[520] *Ibid.* [emphasis added].

plainly considering the lengthy time span over which the crimes were committed, *both* as a factor going to gravity *and* as an aggravating circumstance.

425. Secondly, looking at the gravity of the crimes committed in Sarajevo, the Majority held that "*thousands of men, women and children were killed*, and tens of thousands injured".[522] Then, examining the aggravating circumstances, the Majority "emphasized the *death of numerous victims*".[523] It follows that the Majority double counted the number of deaths as going to gravity of the crimes as well as an aggravating circumstance.

426. Thirdly, addressing the gravity of the crimes committed in Srebrenica, the Majority found that "the Srebrenica atrocities *shattered families and left behind countless broken homes*".[524] Then, examining the aggravating circumstances, the Majority "emphasized […] the *long-term physical, psychological and emotional suffering* inflicted on survivors, as well as victims' relatives and loved ones".[525] Once again, the Majority committed a discernible error by considering this factor both as going to the gravity of the crimes and as an aggravating circumstance.

427. Fourthly, at paragraph 1816, the Majority referred to the fact that "Sarajevo civilians were regularly shelled and sniped in the course of Perišić's *tenure as Chief of the VJ General Staff*" [emphasis added], thereby giving weight to the high level responsibilities of Perišić and the importance of his position as Chief of the VJ General Staff, as factors going to the gravity of the crimes. *Perišić's military rank* and experience,[526] *his high rank in the VJ* and the fact that he was *in charge of the highest professional and staff organ* for the preparation and use of the VJ in time of war and peace,[527] were used aggravating circumstances.

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[521] Judgement, para.1823 [emphasis added].
[522] Judgement, para.1816 [emphasis added]. The Majority also considered the numerous number of VRS's victims as going to the gravity of the crimes committed in Srebrenica.
[523] Judgement, para.1824 [emphasis added].
[524] Judgement, para.1821 [emphasis added].
[525] Judgement, para.1824 [emphasis added].
[526] Judgement, para.1825.
[527] Judgement, para.1823.

III. Relief sought

428. Perišić respectfully submits that the Majority's discernible errors above – having considered no less than four factors as going both to the gravity of the crimes and as aggravating circumstances - had a significant effect on the determination of the sentence imposed on him, which was much too high as a result.

429. Perišić thereby respectfully requests the Appeals Chamber to correct the Majority's discernible errors, quash the sentence imposed by the Majority and impose a new and significantly lower sentence.

<u>16th Ground of Appeal</u>

I. Introduction

430. Perišić submits that the Majority committed discernible errors in concluding that the following aggravating factors were present. Thus, the Appeals Chamber must intervene to correct these errors.

431. The Majority correctly stated the legal principle that "[o]nly circumstances both directly related to the commission of the offence and to the convicted person at the time he committed the offence may be considered as aggravating factors".[528]

II. Perišić did not wrongfully exercise his authority

432. The Majority took note of "Perišić's military rank and experience and of the fact that Perišić *wrongfully exercised his authority* to aid and abet grave crimes perpetrated by the VRS" as an aggravating circumstance.[529]

433. The Majority neither supported this finding with evidence nor explained how Perišić would have wrongfully exercised his authority.

434. It is settled jurisprudence that "superior position itself does not constitute an aggravating factor."[530] What matters is not the position of authority taken alone "but that position coupled with *the manner in which the authority is exercised*."[531] Thus, it must be proved beyond a reasonable doubt that the accused abused his authority or wrongfully exercised his power in order to commit a crime.[532]

435. Perišić's exercise of authority is entirely different from that of others who were found to have abused their authority or wrongfully exercised their powers.[533] For example, a

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[528] Judgement, para.1798; citing *Simba*-AJ, para.82.
[529] Judgement, para.1825 (emphasis added).
[530] *Stakić*-AJ, para. 411.
[531] *Kayishema*-AJ, paras.358-359 (emphasis added).
[532] *Čelebići*-AJ, para.763.
[533] *See eg. Galić*-AJ, para.451-452; *Strugar*-AJ, n.878, *citing Strugar*-TJ, para. 464; *D. Milosević*-AJ, para.302; *Kamuhanda*-AJ, para.347; *Kayishema*-AJ, paras.356-359.

prison warden who had a duty to protect prisoners was found to have abused his authority by committing violent acts against the prisoners he was responsible for.[534] Similarly, a medical doctor who took lives instead of saving them, was found to have abused the trust placed in him by committing such crimes.[535]

436. Perišić used neither his authority nor power to *commit* a crime. At all times, Perišić acted within the confines of his authority and power as Chief of the VJ General Staff. He was issued a lawful order by the SDC to provide support to the VRS, which he obeyed. He, in turn, issued lawful orders to his subordinates in the VJ to provide the VRS with various forms of assistance.

437. Perišić did not commit, plan, order or instigate *the c*ommission of a crime. He was found guilty as an accomplice, for providing support to the VRS, waging war in a foreign *c*ountry. No superior-subordinate relationship existed between Perišić and the members of the VRS who committed the crimes in Sarajevo and Srebrenica.[536]

438. The Majority thus erred in finding Perišić wrongfully exercised his authority to aid and abet the crimes committed by the VRS.

III. Perišić did not show callous disregard for the crimes committed by the VRS

439. The Majority's conclusion that Perišić showed callous disregard for VRS atrocities to be an aggravating circumstance was a discernible error.[537]

440. This conclusion was based, *inter alia*, on factual findings concerning Perišić's visit to the VRS Command post in Han Pijesak on 18 July 1995 and his close relationship with Mladić during 1997 and 1998.[538]

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[534] *Aleksovski*-AJ, para.183.
[535] *Ntakirutimana*-TJ, para.910.
[536] Judgement, para.1778.
[537] Judgement, para.1826.
[538] Judgement, para.1826. *See* Section IV, Ground 16, *infra*, which addresses the post Srebrenica relationship.

441. The Majority relied on the evidence of Krayshnik, who described meeting with Perišić on 18 July 1995 in Crna Rijeka.[539] The Majority found that Krayishnik and his delegation met with Mladić, Gvero and Perišić for several hours, that Mladić and Gvero discussed the liberation of Srebrenica in the presence of Perišić, that "there was a lot of joking around at lunch", and that there were "no signs of disagreement among the generals".[540]

442. These conclusions are based solely on a *written statement* that Krayishnik gave to the OTP and not his in-court testimony. Krayishnik testified that he did not recall any discussion whatsoever of Srebrenica in presence of Perišić,[541] that the mood during the meeting was normal,[542] that he could not recall whether it was lunch.[543] He thought Perišić left before he and his group did.[544]

443. The Majority failed to give any reasons for its *exclusive* acceptance of the witness statement given to the OTP, or for ignoring or rejecting his *viva voce* testimony. The Majority further failed to analyze Krayishnik's testimony in correlation with the testimony of Rodić.

444. Rodić testified that Perišić came to Crna Rijeka on 18 July 1995 after Mladić, Gvero, and the Krayishnik delegation had arrived,[545] that there was no lunch, and that Perišić had left after approximately an hour to an hour-and-a-half.[546] This testimony was not challenged by the Prosecution.

445. The Trial Chamber also heard additional relevant evidence which could reasonably have led to different conclusions, such as those discussed below.

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[539] Judgement, paras.1377, 1555. Perišić notes that these sections were agreed upon by the Trial Chamber as a whole, but it is the Majority that relies upon the meeting as an aggravating circumstance. Thus, Perišić refers only to the Majority in this section.
[540] Judgement, para.1377.
[541] Krayshnik, T.9631.
[542] Krayshnik, T.9578.
[543] Krayshnik, T.9643-9644; T. 9653.
[544] Krazshnik, T.9580; 9664; *see also*, T.9625-9626.
[545] Rodić, T.14231.
[546] Rodić, T.14230.

446. Both Gajić[547] and Borovic[548] testified that Perišić visited Crna Rijeka at the behest of the Ukraine Government to FRY seeking assistance for its UNPROFOR unit in Žepa. This evidence casts a completely different light upon the meeting in Crna Rijeka, and reveals factors which show the Majority failed to properly analyze the entire context of Perišić's visit. This improper exercise of the Majority's discretion by failing to give any consideration to the evidence concerning the serious problems of the Ukraine UNPROFOR battalion while considering "Perišić's callous disregard" as an aggravating circumstance constitutes error.

447. As the *Stakić*-AJ emphasized, while Trial Chambers clearly have discretionary power with respect to aggravating factors, "the Trial Chamber must provide convincing reasons for its choice of factors."[549] The Majority relied on evidence that was repudiated under oath and failed to explain its reasoning and provide convincing reasons for its finding that he demonstrated "callous disregard for the VRS's atrocities.

IV. Perišić's relationship with Mladić after the crimes committed by the VRS cannot be considered as an aggravating circumstance

448. The Majority found that Perišić's relationship with Mladić "long after the atrocities of Srebrenica were uncovered", constituted circumstance in aggravation.[550]

449. The Majority's reliance in any respect on the relationship between Perišić and Mladić *after* Srebrenica as a factor in aggravation is improper. It does not comport with the law controlling sentencing and aggravation and is directly contradictory to the law recognized by the Majority as controlling.[551] The relationship between Mladić and Perišić "long after the atrocities were uncovered" is, by definition, not *directly related to the commission of the offence.*

[547] Gajić, T.10882.
[548] Borović, T.14193.
[549] *Stakić*-AJ, para.416.
[550] Judgement, para.1826.
[551] Judgement, para.1798.

450. Further, the Appeals Chamber has found that the use, in aggravation, of findings concerning events that are temporally outside the scope of the Indictment without providing a reasoned opinion as to why doing so would be appropriate in the circumstances of the case is unfair.[552]

451. Perišić submits that these errors individually and collectively impacted on the determination of the sentence imposed by the Majority and requests the Appeals Chamber to take them into account in revising Perišić's sentence.

V. Relief sought

452. The Majority erred in its assessment of aggravating circumstances for the reasons stated above. Consequently, the sentence imposed by the Majority must be quashed and new and appropriate sentence imposed.

[552] *Stakic*-AJ para.423.

17th Ground of Appeal

I. Introduction

453. The Majority committed discernible errors in exercising its discretion when it failed to consider and/or to give appropriate weight to the following mitigating factors when determining the sentence to be imposed on Perišić.

454. Pursuant to Rule 101(B)(ii) of the Rules, a Trial Chamber must take into account any mitigating circumstances in determining a sentence. When challenging the weight given to a mitigating factor, the Appellant must demonstrate that the Trial Chamber committed a discernable error in exercising its discretion.[553]

II. The Majority erred in its assessment of a number of mitigating factors

A. The Majority erred by failing to properly consider and give appropriate weight to Perišić's genuine advocacy for peace as a mitigating circumstance

455. The Majority committed a discernible error by concluding that Perišić was not genuinely advocating for peace during the war in Bosnia, as it failed to properly evaluate his efforts to achieve peace as a mitigating circumstance.[554]

456. Perišić's activities and efforts directed towards peace and cessation of war operations during the conflict constitute a mitigating circumstance. *Babić*-AJ held "in light of the mandate of the International Tribunal under Chapter VII of the UN Charter, an attempt to further peace in the former Yugoslavia is in general relevant as a mitigating circumstance."[555]

457. The Majority relied on evidence demonstrating Perišić's personal engagement in the achievement of peace during the conflict, acknowledging his efforts to exert influence on

553 *Babić*-SAJ, para.44.
554 Judgement, para.1829.
555 *Babić*-SAJ, para.61. See also *Plavšić*-SJ, paras.85-94.

the VRS military leadership to accept the Contact Group peace plan, as well as his activities pertaining to the preparation of the Dayton Agreement.[556]

458. However, the Majority failed to provide a reasoned evaluation of the evidence concerning Perišić's efforts to achieve peace, concluding that Perišić was not genuine in such efforts. Further, it failed to define the meaning of "genuinely work towards peace" when holding that Perišić's peace efforts could not be considered as a mitigating circumstance.[557]

459. Additionally, the Majority's position that Perišić's involvement in the pursuit of peace was not genuine is in stark contradiction to its own findings.[558] The Majority fully recognized that there were repeated attempts to convince Mladić to come to the peace table which were rebuffed. In fact, it was Perišić's failure in this regard that contributed to the Majority's determination that Perišić lacked effective control of Mladić and other VRS officers.[559] In all areas of the Judgement, except for the Majority's consideration of whether Perišić's efforts in pursuing peace were a mitigating circumstance, the Majority found that Perišić did in fact work towards peace.

460. The FRY political leadership (especially intensive during negotiations regarding the Contact Group Plan in the summer of 1994), the FRY military leadership and Perišić actively and continuously supported the acceptance of the peace plan to cease the conflict. These acts were directed at achieving peace.

461. A policy under which military assistance was to be provided, while at the same time advocating for peace, cannot be considered non-genuine on the basis of those two co-existing activities. Decisions to provide, limit or deny military assistance during 1994 and 1995 were the result of specific political and military circumstances and the danger posed to the security of the FRY.[560] The scope of such decisions, at any point, cannot discount

[556] Judgement, paras.1365-1369. The evidence cited by the Majority are meetings: D344, 12 August 1994 at Command Post of VRS; D764, meeting in Belgrade from 20 September 1994; P779, 28th SDC session, 2 November 1994; P2783, meeting in Belgrade on 24 January 1995; P713, 42nd SDC session, 23 August 1995.
[557] Judgement, para.1829
[558] Judgement, paras.1365-1368.
[559] Judgement, paras.1365-1369, 1772.
[560] P778, 25th SDC session, p.68, Perišić stated,

the significance of the efforts made to achieve permanent peace in BiH. As the *Blagojević*-AJ aptly stated,

> conduct of an accused that promotes reconciliation in the former Yugoslavia may be considered as a mitigating circumstance *whether or not* it is directly connected to the harm the accused caused.[561]

462. In evaluating Perišić's activities to promote peace during the period of conflict, the Majority completely ignored his acts relating to the conflict in Croatia. The Majority failed to give appropriate attention to Perišić's efforts to stop rocket attacks on Zagreb.[562] Perišić's actions were aimed at the prevention of further loss of life and material damage and the continuation of peace negotiations between the RSK and the Croatian leadership.[563] The significance of such acts as a mitigating circumstance is self-evident. These peace activities were directly related to the crime base as set forth in the Indictment. The Majority, therefore, committed a discernable error by improperly exercising its discretion in failing to attach any weight to the evidence concerning Perišić's peace efforts relating to Croatia as a mitigating circumstance.

463. The Majority similarly erred by failing to take into account, as mitigating evidence, Perišić's position that the VJ should not be involved in the conflict in Croatia during the course of Operation Storm in August 1995.[564] Perišić was well aware of the possibility of a dramatic escalation in the military conflict were the VJ to get involved and clash with the Croatian Army.[565]

> If Banja Luka alone were to be bombed, we can expect at least 100,000 refugees who will imperil the security of the FR Yugoslavia. Secondly, mixed with refugees will be armed groups. If we do not take any action and decide what to do about it, the security of the FRY will be at stake.

P779, 28th SDC session, p.34, Perišić stated,

> I suggest that we try to persuade them if we still can do anything. Otherwise, they will face a complete disaster. And it is not only that they will face it, but such a situation will have dramatic consequences for Serbian and Montenegrin peoples.

[561] *Blagojević*-AJ, para.330 [emphasis added].
[562] Judgement, paras.1721-1722, 1725.
[563] Rašeta, T.5993-5994; P1314.
[564] Borović, T.14007.
[565] P797 (see Krga and Dimitrijevic).

B. The Majority erred by failing to properly consider and give appropriate weight to Perišić's involvement in the release of the French pilots

464. On December 14, 1995 the formal signing of the Dayton agreement was signed in Paris. On 30 August 1995, Frederic Chiffot and Jose Souvignet ("the French pilots") were captured by the VRS after their aircraft was shot down.[566]

465. The President of France, Jacques Chirac, had made it clear the signing of Dayton was conditioned on the release of the French Pilots.[567] The failure to sign the agreement would have had devastating consequences on the peace process and continuation of the war.

466. Perišić's endeavors in obtaining the release of the French pilots held hostage by Mladić assisted in bringing peace to the region. To put his endeavors in a proper context, a review of what was at stake is appropriate.

467. Perišić organised a series of meetings between international representatives and Mladić to obtain the release of the French pilots.[568] During November, Perišić "did everything in his power to get the pilots released."[569]

468. When Douin arrived at the airfield to pick up his men and return them to France, they were not present. For 30 hours, intense negotiations took place. Perišić was an integral part of these negotiations.[570] Thereafter, the French pilots returned to France.[571] Without Perišić's intervention, the substantial likelihood is that MP-901 would have returned home empty-handed to a displeased President. The Dayton Agreement would not have been signed and like previous peace negotiations, such as the Contact Group Plan endorsed by Perišić and Milošević, would have fallen through.

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[566] Vukšić, T.12192; Bildt, T.14314; MP-005, T.2438-2439 [private session].
[567] Bildt, T.14314
[568] Vukšić, T.12185.
[569] Vukšić, T.12193.
[570] Judgement, para.1382-1383; MP-901, T.14538-14540 [closed session], MP-902, T.14554-14555, 14557 [closed session].
[571] Judgement, para.1384.

469. The Majority found that Perišić's involvement was a mitigating circumstance, though of limited weight,[572] holding that "[i]t would be unreasonable to conclude that Perišić's involvement was simply motivated by altruism for the pilots' fates as opposed to the FRY's military and political interest in easing its conflict with NATO."[573]

470. Whether Perišić was "simply motivated by altruism" or motivated by a combination of factors, his involvement in the pilots' release had a salutary effect on the peace process. The Majority insertion of "altruism" as a mitigating factor, is unreasonable, given the critical stage and issues at stake. It also discounts the testimony and opinions of the participants that were involved in this delicate matter.[574] Promoting reconciliation in the former Yugoslavia is a mitigating circumstance.[575]

C. The Majority erred by failing to properly consider and give sufficient weight to Perišić's involvement in ensuring that the ABiH soldiers were accommodated after they swam across the Drina River in July 1995

471. Perišić took significant steps to ensure the safety of the Muslim soldiers that crossed the Drina River in July 1995, which ultimately saved the lives of at least 799 individuals. The Majority did not dispute this.[576] However, the Majority found Perišić's steps to lack weight as a mitigating factor due to Perišić's contribution to the situation through his provision of assistance to the VRS[577] and "the absence of additional details and corroboration."[578]

472. The Majority ignored significant evidence concerning this event, which exists, and importantly corroborates testimony Perišić's conduct in relation to these ABiH soldiers.

473. In addition to Borović, Gajić testified[579] that the Security Administration of GS VJ was informed on 31 July 1995 of the following: a) Muslim Army members swam over the Drina River; and b) the VJ command set up a three-member reception comission which

[572] Judgement, para.1830.
[573] Judgement, para.1830.
[574] Vukšić, T.12208-12210; MP-902, T.14545 [closed session]; D371, Letter from Embassy of France in Belgrade, 13 December 1995, p.1. *See also*, D510 [under seal]; MP-901, T.14559, 14561, 14565-14566.
[575] *Babić*-SAJ, para.61. See also *Plavšić*-SJ, paras.85-94.
[576] Judgement, para.1831, citing Borović, T.14003.
[577] This was an improper basis upon which to draw a conclusion. *See*, Grounds 5-6.
[578] Judgement, para.1831.
[579] Gajić, T.10883-T.10884.

received, registered, and handed 799 soldiers over to the Ministry of Interior of the Republic of Serbia,[580] along with the lists of their names, personal data and data on the units to which they belonged. From the end of July to the end of October 1995 while in reception centers in Serbia, the soldiers were registered by UNHCR and ICRC and visited by foreign diplomatic representatives in FRY and foreign media representatives. After their departure from the reception centers most of them headed west through Hungary.[581] None of this evidence, oral and documentary was analyzed.

474. Importantly, the Majority contradicted its previous findings in paragraph 1545 of the Judgement in concluding that there was an "absence of additional details and corroboration" for a mitigation analysis.[582]

475. In assessing Perišić's "knowledge", the Majority relied on Perišić's interview with the OTP regarding the escape of these Muslim soldiers from Žepa across the Drina river to FRY; the complaint that the MUP wanted to kill the refugees; and that Perišić then intervened through Milošević to prevent such a massacre.[583] This evidence was used to establish Perišić's knowledge of crimes committed by the VRS in Srebrenica.[584] Therefore, the Majority accepted the evidence as credible. However, this same evidence was ignored by the Majority when evaluating mitigating circumstances. This was improper.

476. Additionally, ICTY jurisprudence concerning mitigating factors, specifically addresses circumstances relating to the provision of assistance to members of other ethnicities. *Blagojević*-TJ held that Jokić's assistance to young Muslims to ensure their safe passage through a minefield was a mitigating circumstance.[585] *Blagojević*-AJ confirmed this position and recalled the jurisprudence in *Kupreškić*-AJ.[586]

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[580] Gajić, T.10883-T.10884.
[581] D273; Gajić, T.10890-T10891.
[582] Judgement, para.1831.
[583] Judgement, para.1545. *See also*, P706, pp.6-7 (Perišić's written reply to the questions of Principal Attorney of the ICTY in which he further describes these events).
[584] Judgement, para.1545.
[585] *Blagojević*-TJ, para.854.
[586] *Blagojević*-AJ, para.342. *See also, Kupreškić*-AJ, para.430 (allowing the Trial Chamber's consideration of Drago Josipović's prevention of the killing of a Muslim civilian woman as a mitigating circumstance).

477. Perišić's assistance to the ABiH members that crossed the Drina River is analogous to the act of Vinko Pandurević in opening a corridor in the course of the Srebrenica operation in July 1995. *Popović*-TJ found this act to be striking and considered it a mitigating circumstance.[587] It analyzed the significance of Pandurević's act primarily with respect to the consequence for the potential victims and independently of Pandurević's acts linked to the crimes.[588]

478. The Majority improperly exercised its discretion in attributing limited, if any, weight to the mitigating circumstance concerning Perišić's actions in relation to those individuals.

D. The Majority erred by failing to give appropriate weight to Perišić's involvement in the demilitarization process that took place in the former Yugoslavia after the conflict ended in 1995

479. The Majority committed a discernible error of fact in exercising its discretion by failing to give appropriate weight to the mitigating circumstance of the Perišić's involvement in the process of demilitarization of the former Yugoslavia after the cessation of conflict in 1995.

480. The Majority simply stated in general terms that it found "Perišić's post-conflict behavior in promoting peace and democratic reforms in the former Yugoslavia" to be a mitigating circumstance.[589] The Majority failed to reference any findings or cite any evidence upon which this conclusion could be based. Therefore, both Perišić and the Appeals Chamber are forced to guess whether the totality of the evidence was indeed analyzed.

481. If the Majority had properly assessed the totality of the evidence concerning Perišić's activities in the process of demilitarization after cessation of the conflict in the former Yugoslavia, and given it appropriate weight considering the importance of such acts in establishing permanent peace and preventing new conflicts, this mitigating circumstance would have been more significantly reflected in the sentence imposed.

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[587] *Popović*-TJ, paras.2219-2220.
[588] *Popović*-TJ, para.2220 (The Trial Chamber stated, "objectively he saved thousands of lives [...] and his action was a clear and compelling instance of assistance to potential victims").
[589] Judgement, para.1832.

482. Two groups of evidence demonstrate the abovementioned. The first group relates to Perišić's involvement in the implementation of the Dayton Agreement in BiH, and the second group relates to his actions taken in pursuit of the peaceful reintegration of Eastern Slavonia in the State of Croatia. In both circumstances, Perišić significantly contributed to the maintenance of peace and prevention of new conflicts by virtue of his position and conduct.

483. First, the Trial Chamber heard evidence that reflects the RS's reaction to the Dayton Agreement upon its official signing. In particular, evidence was brought before the Trial Chamber that the RS military leadership, headed by General Mladić, was critical towards the Agreement and opposed its implementation.[590] Such opposition could have jeopardized the peace, which had just been implemented.[591] Škrbić confirmed that General Mladić and the VRS military leadership were very dissatisfied with the Dayton Agreement.[592]

484. Perišić's unconditional support for peace on behalf of the VJ was published in the media. Perišić expressed the VJ's readiness to actively implement the Dayton Agreement.[593]

485. Second, Perišić played a considerable role in the peaceful reintegration of Eastern Slavonia into the Republic of Croatia. After the Dayton Agreement, demilitarization was achieved expeditiously and without incident. According to Borović:

> I don't think there were any incidents and we, on our part, in our territory, undertook all necessary measures to receive and disarm the conscripts and to place people in the reception centers, although not many of them arrived. This was approached in an organized fashion which luckily ended up well without any serious consequences […]. Everyone involved in it, including Mr. Klein, came to see Mr. Perišić. He issued orders and organized the process of storing weapons and receiving people. His role was key.[594]

486. Perišić's role in the demilitarization process in furtherance of solutions helped lead to permanent peace in these territories. Perišić submits that his key involvement in this

[590] D345.
[591] Borović, T.14031-14032.
[592] Škrbić,T.11786-11787.
[593] D495; Borović, T.14032.
[594] *Ibid.*

process represents a significant mitigating circumstance, which should have been accorded considerable weight.[595]

E. The Majority erred by failing to consider and give appropriate weight to Perišić's involvement in the release of the French humanitarian workers

487. The VRS detained four French humanitarian workers on 4 March 1995.[596] A [REDACTED] representative sought Perišić's assistance in obtaining the release of the hostages.[597] The Majority recognized that, according to Vukšić, Perišić played a "particularly significant and delicate role" in discussions with Mladić to get the VRS to release the hostages.[598] It further noted that Vukšić confirmed that "Perišić took steps" to ensure that the French hostages were released.[599] [REDACTED][600]

488. However, the Majority failed to attribute any weight to, or even consider, this relevant mitigating factor in determining Perišić's sentence, thereby failing to properly exercise its discretion.

F. The Majority erred by failing to consider and give appropriate weight to Perišić's involvement in the release of UNPROFOR hostages

489. The Majority recognized that Perišić contributed to the release of the UNPROFOR hostages.[601]

490. The Majority, however, erred by failing to consider and give appropriate weight to this important mitigating circumstance in determining Perišić's sentence.

III. Relief sought

491. The Majority's errors in exercising its discretion had a significant effect on the determination of the sentence imposed on Perišić.

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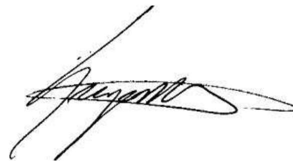
[595] See *Blagojević*-AJ, para.330.
[596] MP-902, T.14545-14546 (closed session); D510 (under seal); Vukšić, T.12130-12131, 12135, 12137.
[597] D510 [under seal]. *See also* Judgement, para.1370 ; MP-902, 14539,14543-45; D371.
[598] Judgement, para.1371.
[599] Judgement, para.1371.
[600] [REDACTED]
[601] Judgement, paras.1372-1374.

492. Perišić respectfully requests the Appeals Chamber to quash the sentence imposed by the Majority and impose a new and appropriate sentence.

Relief Requested

493. For the foregoing reasons, Mr.Perišić respectfully requests a full acquittal of all of the charges contained in Counts 1-12 of the Indictment.

Respectfully submitted this 10th day of April 2012,



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